

(2018) 03 SIK CK 0004
In the Sikkim High Court
Case No : Crl. A. No. 17 of 2016

State Of Sikkim

APPELLANT

Vs

Suren Rai

RESPONDENT

Date of Decision : 10-03-2018

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 37, 161, 164, 164(b), 164(1), 164(2), 164(3), 164(4), 164(5), 193, 281, 281(4), 313, 313(2), 313(3), 315, 342, 362(2A), 364(1), 364(3), 364, 463, 533, 533(1)
Oaths Act, 1969 — Section 3, 4, 4(2), 5, 6, 7, 8
Indian Evidence Act, 1872 — Section 3, 17, 24, 25, 26, 27, 32, 80, 91, 132, 145, 161, 162, 162(2), 163, 164
Indian Penal Code 1860 — Section 120B, 193, 199, 302, 409, 467, 477A
Prevention of Corruption Act, 1988 — Section 5(2)
Terrorist and Disruptive Activities (Prevention) Act, 1987 — Section 5, 19
Arms Act, 1959 — Section 25(1)(c), 27
Ranbir Penal Code 1989 — Section 302, 451
TADA Rules — Rule 15(3)(b)
Constitution of India, 1950 — Article 20, 20(3), 21

Citation : (2018) 03 SIK CK 0004

Hon'ble Judges : BHASKAR RAJ PRADHAN, MEENAKSHI M. RAI, SATISH KUMAR AGNIHOTRI

Bench : Full Bench

Advocate : J. B. Pradhan, Karma??Thinlay, S.K Chettri, Pollin Rai, B. Sharma, B. N. Sharma, Sajal Sharma, A. Moulik, N. Rai, K. D. Bhutia, Ranjit Prasad, Tamanna Chettri, Malati Sharma

Final Decision : Disposed

Judgement

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Bhaskar Raj Pradhan, J.",

1. A Division Bench of this Court vide order dated 03.07.2017 had referred three questions for consideration before the Full Bench. The said three,

questions were :,

â??(i). Whether the confessional statement recorded under the provisions of Section 164 Cr.P.C on oath, is fatal or could it be still protected by the",

provisions of Section 463 Cr.P.C and if so protected, then whether the judgment of the Division Bench of this Court reported in re: Arjun Rai v State",

of Sikkim 2004 SCC OnLine Sikk 24 is good law?,

(ii). Whether the mere administering of oath to an accused while recording his confessional statement keeping in mind sub section 5 of section 164,

Cr.P.C, without anything more, lead to an inference that the confessional statement is not voluntary and thus in violation to the fundamental",

requirement of Section 164 Cr.P.C and thus fatal ?,

(iii). Whether administering oath to an accused while recording the confessional statement of an accused under Section 164 Cr.P.C violates Article 20,

(3) of the Constitution of India?â??â?? Rival Contentions:,

2. Mr. B. Sharma, learned Senior Advocate appearing for the appellant would submit that administering oath to an accused person before recording a",

confessional statement is fatal and cannot be cured under section 463 Cr.P.C. He would submit that the prohibition is found in Article 20 (3) of the,

Constitution of India as well as section 164 (5) Cr.P.C. and section 4 (2) of the Oaths Act, 1969. He would rely upon the judgment of the Supreme",

Court in re: Rabindra Kumar Pal alias Dara Singh v. Republic of India(2011) 2 SCC 490, and submit that non-compliance of Section 164 Cr.P.C. goes",

to the root of the Magistrate's jurisdiction to record the confession and renders the confession unworthy of credence. He would further rely upon the,

judgment of the Supreme Court in re: State of Uttar Pradesh v. Singhara Singh & Ors. AIR 1964 SC 358 and submit that the rule adopted in Taylor v.,

Taylor[(1875) 1 Ch D 426, 431] is that if a statute has conferred a power to do an act and has laid down the method in which that power has to be",

exercised, it necessarily prohibits the doing of the act in any other manner than that which has been prescribed is squarely applicable. The principle",

behind the rule is that if this were not so, the statutory provision might as well not have been enacted. A Magistrate, therefore, cannot in the course of",

investigation record a confession except in the manner laid down in Section 164.,

3. Mr. J. B. Pradhan, learned Public Prosecutor, appearing for the Appellant would commence his arguments stating that section 164 Cr.P.C. was in",

three parts. The first part i.e. sub section (1) thereof dealt with empowering

certain Magistrates to record any confession or statement. The second, part i.e. sub section (2), (3) and (4) thereof are safeguards for recording confessions and therefore mandatory. The provisions of sub section (2), (3)", and (4) of section 164 Cr.P.C. would make it amply clear that the guidelines prescribed therein are for the purpose of safeguarding the accused and to, ensure that the confession is voluntary and not made on account of any extraneous influence. He would submit that once the Magistrate complies with, the 4. above provisions and comes to the satisfaction that the accused is making the confession voluntarily without any inducement, threat or promise", the Magistrate proceeds to record the confession. The third part comprising of sub section (5) of section 164 Cr.P.C. which deals with the manner in, which a statement (other than a confession) was to be recorded. Mr. J. B. Pradhan, would submit that the provision of sub section (5) of section 164", Cr.P.C. makes it evident that a Magistrate cannot administer oath upon an accused and therefore the recording of a confession on oath is prohibited., However, if there was full compliance of sub section (2), (3) and (4) of section 164 Cr.P.C. by the Magistrate and the Court is assured of the", voluntariness of the said statement, the administration of oath to an accused person while recording a confessional statement would be a curable", defect under section 463 Cr.P.C. He would rely upon the judgment of 3 the Supreme Court in Mohd. Ajmal, Amir Kasab v. State of 4", Maharashtra(2012) 9 SCC 1 and draw the attention of this Court to paragraph 457 thereof:- 5 â??457. The object of the criminal law process is to, find out the truth and not to shield the accused from the consequences of his wrongdoing. A defence lawyer has to conduct the trial on the basis of the, materials lawfully collected in the course of investigation. The test to judge the constitutional and legal acceptability of a confession recorded under, Section 164 CrPC is not whether the accused would have made the statement had he been sufficiently scared by the lawyer regarding the, consequences of the confession. The true test is whether or not the confession is voluntary. If a doubt is created regarding the voluntariness of the, confession, notwithstanding the safeguards stipulated in Section 4 5(2012) 9 SCC 15 164 it has to be trashed; but if a confession is established as", voluntary it must be taken into account, not only constitutionally and legally but also morally.â??â?? He would submit that the Supreme Court has",

held that right against self-incrimination under article 20 (3) does not exclude any voluntarily statement made in exercise of free will and volition.,

4. Mr. J.B. Pradhan would further submit that the bare reading of section 463 Cr.P.C. would reveal that the violation of section 164 Cr.P.C. is curable,

under section 463 Cr.P.C. and the Court can admit such an evidence if it has not injured the accused in his defence on the merit. He would draw,

reference of the judgment of the Supreme Court in re: Singhara Singh & Ors. (supra) and in re: Ram Singh v. Sonia & Ors. (2007) 3 SCC 1 and,

submit that section 463 permits oral evidence to be given to prove that the procedure laid down in section 164 Cr.P.C. had in fact been followed and if,

the confession is not recorded in proper form as prescribed by section 164 Cr.P.C. read with section 281 it is a mere irregularity and curable under,

section 463 Cr.P.C.,

5. Mr. J.B. Pradhan would refer to the judgment of the Supreme Court in re: Babubhai Udesinh Parmar v. State of Gujarat(2006) 12 SCC 268 and,

submit that it was held that a judgment of conviction can also be based on confession if it is found to be truthful, deliberate and voluntary and if clearly",

proved. He would submit that the Supreme Court also held that the voluntarily nature of the confession depends upon whether there was any,

inducement, threat or promise and its truth is judged on the basis of the entire prosecution case. Mr. J.B. Pradhan would also draw the attention of this",

Court to the judgment of the Supreme Court in re: Brijbasi Lal Shrivastava v. State of Madhya PradeshAIR 1979 SC 1080 and submit that in the said,

case the Supreme Court had observed that administration of oath while recording statements of the accused under section 164 Cr.P.C. would amount,

to a concealed threat but would go further to point out that the Supreme Court did not, even then, hold it to be illegal or inadmissible but only went to",

the extent of holding that its probative value would be precise little. He would submit that the Division Bench of the Madhya Pradesh High Court in re:,

Madhu v. State of M.P. 2008 SCC OnLine MP 177 having relied upon both in re: Babubhai Udesinh Parmar (supra) and Brijbasi Lal Shrivastava,

(supra) has held that administration of oath while recording statements of an accused may not be fatal in view of section 463 Cr.P.C.,

6. Mr. J.B. Pradhan would submit that during the trial it is for the learned Trial Judge to determine as to whether the administration of oath had,

prejudiced and injured the defence of the accused which can be done during the proceedings under 7. section 313 Cr.P.C. and if the learned Trial,

Judge comes to the conclusion that the said confession of the accused was voluntarily without any inducement, threat or promise the learned Trial",

Judge can always accept and admit the confession in evidence. However, during the trial if the accused retracts or in his examination under Section",

313 Cr.P.C submits otherwise then the probative value of such evidence would be little.,

7. Mr. J.B. Pradhan would rely upon the Supreme Court judgment in re: State (NCT of Delhi) v. Navjot Sandhu Alias Afsan Guru0(2005) 11 SCC,

600 would submit that the confessions are considered highly reliable because no rational person would make admission against his interest prompted,

by his conscience to tell the truth. He would hasten to add though that a confession of an accused recorded under section 164 Cr.P.C. is not a,

substantive piece of evidence. He would submit that in spite of oath having been administered if the Court would find substantive material establishing,

the guilt of the accused then even such a confession could have corroborative value although its probative value would be diminished by the,

administration of oath.,

8. Mr. A. Moulik, learned Senior Advocate assisting this Court as Amicus Curiae would straight away rely upon the judgment of the Supreme Court in",

re: Brijbasi Lal Shrivastava (supra) and Haridasan Palayil v. Speaker of AIR 2003 Kerala 328t h would submit that the Supreme Court had clearly,

held that there is always a concealed threat to the accused when oath is administered to him even if it is his voluntarily statement under section 164,

Cr.P.C. and that section 164 (5) Cr.P.C. prohibits administration of oath in cases of confession. Drawing the attention of this Court to the judgment of,

the Division Bench of the Kerala High Court in re: Kerala Legislative Assembly11, he would submit that taking confession on oath involves the idea of",

calling God to witness what is averred as truth which itself amounts to invoking fear in the mind of the confessor taking the oath. He would further,

submit that Article 20 (3) of the Constitution of India prohibits self-incrimination and therefore recording of confession would violate the said,

constitutional safeguard. He would submit that section 164 (5) of Cr.P.C., Section 281 Cr.P.C. and section 4 (2) of the Oaths Act, 1969 specifically",

prohibits administration of oath to an accused person in a criminal proceeding.,

9. Mr. A. Moulik would submit that confessional statement taken on oath is not at all curable under section 463 Cr.P.C., Section 463 Cr.P.C. falls",

under chapter XXXV of Cr.P.C. relating to irregular proceedings and non compliance of the mandatory provision of 164 (5) Cr.P.C. would not,

just be irregular proceeding but illegal proceedings as being specifically prohibited by law and therefore not curable as irregular proceedings under,

section 463 Cr.P.C. Once it is clear that administering oath to an accused while recording confessional statement under section 164 Cr.P.C. is illegal,

the question of prejudice or injury to the accused in his defence has no relevance. He would draw the attention of this Court to the judgment of the,

Supreme Court in re: Kehar Singh & Ors. v. The State (Delhi Admn.) (1988) 3 SCC 609 and submit that non compliance of the provisions of section,

164 (2) is a substantial defect and is not curable under section 463 Cr.P.C. He would therefore submit that similarly non compliance of the mandatory,

provision of section 164 (5) Cr.P.C. is also not curable under section 463 Cr.P.C. Relying upon a full Bench decision of the Orissa High Court in re:,

Shanti v. The State AIR 1978 Orissa 19 (FB) Mr. A. Moulik would submit substantial non compliance of the provision of section 164 Cr.P.C. is not,

curable. He would further argue that Article 20 (3) of the Constitution of India is a fundamental right and therefore could not be violated by,

administering oath even if no prejudice is caused to the accused person. He would rely upon the judgment of the Supreme Court in re: A.R. Antulay v.,

R.S. Nayak (1988) 2 SCC 602 in which it was held: "No prejudice need be proved for enforcing the fundamental rights. Violation of a fundamental,

right itself renders the impugned action void."

10. Mr. A. Moulik would submit that the Supreme Court in re: Babubhai Udensing Parmar (supra) had clearly held that section 164 Cr.P.C. prohibits,

administration of oath and that there should be strict compliance of the provisions of section 164 Cr.P.C. He would respectfully submit that the,

Supreme Court was not called upon to consider the provision of section 463 Cr.P.C. He would therefore submit that the law laid down by this Court in,

re: Arjun Rai (supra); by the High Court of Gauhati in re: The State of Assam v. Akanman Bora 1988 SCC OnLine Gau 154; by the High Court of,

Karnataka in re: Philips v. State of Karnataka (1980 Cr.L.J. 171; by the High Court

of Jammu & Kashmir in re: State v. Suram Singh 1976 Cri LJ 96;,
 by the High Court of Bombay in re: Atmaram Namdeo v. State of Maharashtra AIR 1969 Bom 189 is good law and the moment oath is administered,
 to an accused before recording his confession under section 164 Cr.P.C. it shakes the very purpose of recording such a confession of an accused.,
 Such confession being under compulsion is not admissible in evidence and therefore not curable under section 463 Cr.P.C. Mr. A Moulik would,
 further submit that in view of the judgment of the Supreme Court in re: Mohd. Ajmal Amir Kasab (supra) the right against self-incrimination under,
 Article 20(3) of the Constitution of India does not proscribe voluntary statements made in exercise of free will and volition and further the right against,
 self-incrimination under Article 20(3) has been statutorily incorporated in the provisions of Cr.P.C. (i.e. Sections 161, 162, 163 and 164) and the",
 Evidence Act, 1872, as manifestations of enforceable due process, and thus compliance with statutory provisions is also compliance with the",
 constitutional requirements.,

11. Mr. N. Rai, learned Senior Advocate and also assisting this Court as Amicus Curiae would rely upon the judgment of the Supreme Court in re:",
 Selvi v. State of Karnataka (2010) 7 SCC 263, and submit that confession having a "testimonial character" cannot be categorized as material",
 evidence. He would further buttress his argument by referring to the meaning assigned to the word "testimony" in Black's Law Dictionary",
 7th Edition as "Evidence that a competent witness under oath or affirmation gives at trial or in an affidavit or deposition- also termed personal,
 evidence-testimonial." Mr. N. Rai would submit that a confession of an accused recorded by the Magistrate on oath is not admissible in evidence.,
 Once oath is administered, it is a concealed threat to the accused and same takes the character of a "testimony" and loses its character of a",
 statement of an accused. The testimonial compulsion therefore amounts to self-incrimination and such a defect of substantial nature cannot be cured,
 by section 463 Cr.P.C.,

12. Mr. N. Rai would submit that section 4 (2) of the Oaths Act, 1969 has to be read conjunctively with section 8 thereof. Read together, Mr. N. Rai",
 would submit that the Oaths Act, 1969 specifically makes the administration of oath to an accused, unlawful. Appreciation of the Judgments in re:",

Administration of oath on an accused person:-,

13. In the judgment rendered by a Division Bench of the Oudh Judicial Commissioners Court in re: Mahadeo & Anr. v. King Emperor AIR 1924 Oudh,

65: 1923 SCC OnLine Oudh 124; Wazir Hasan, A.J.C. held as under:-",

â??Having regard to the circumstances in which Mangu Lal gave evidence and in the absence of any reliable and independent corroborative evidence,

as to the material particulars of the story for the prosecution, it would not be safe to accept his statement as to the complicity of the appellants in the",

act of murdering Ram Lal.,

15. There is one matter to which I wish to make a particular reference. Mangu Lal stated in the witness box â??When I was in dock and before I,

had made my plea of guilty my pleader and also the Court had carefully explained to me that I should speak the truth and that I wanted to.â? There is,

no note by the Court that the above is untrue. This to my mind is a serious thing. Now Mangu Lal was an accused person standing his trial for the,

offence of murder when he was told by the Court to speak the truth. It was practically equivalent to administering an oath to an accused person. This,

is contrary to all civilized systems of jurisprudence. In this particular case, it might well have aroused hopes in the mind of Mangu Lal that he would",

escape punishment if he spoke the truth, which according to his judgment, affected by the surroundings in which he stood, was to be a narrative of the",

complicity of the appellants.,

16. I agree with my learned colleague that the appeal of Mahadeo and Gokaran be allowed and that the appeal of Mangu Lal be dismissed.â?,

(Emphasis supplied) Way back in 1920 the Oudh Judicial Commissionerâ??s Court would hold that administering an oath to an accused person is,

contrary to all civilized systems of jurisprudence and having taken oath it might well have aroused hopes in the mind of the accused that he would,

escape punishment if he spoke the truth, which according to his judgment, affected by the surroundings in which he stood, was to be a narration of the",

complicity of the Appellants.,

15. A Division Bench of the Calcutta High Court speaking through Lodge, J. in re: Nandalal Ghose v. King-Emperor 1943 SCC OnLine Cal 103: AIR",

1944 Cal 283 would in the year 1943, while setting aside a conviction and sentence passed under section 193 and 199 of the Indian Penal Code and",

examining the provisions of section 5 of the Oaths Act, would hold thus:- "In our opinion, this Rule must be made absolute. In the first place, the affidavit was sworn before a first class Magistrate who had no jurisdiction to take evidence in this particular matter. The first class Magistrate had, therefore, no authority under sec. 4 of the Oaths Act to administer an oath in the matter. Further, the Petitioner was the accused in criminal proceedings which were the subject-matter of the proceedings before the Sub-Divisional Officer. Under sec. 5 of the Oaths Act there is no authority to administer an oath to an accused in a criminal proceeding. For this reason also no oath ought to have been administered to this accused. Such being the case, the Petitioner ought not to have been prosecuted for making a false statement on oath and ought not to have been convicted", therefor... (Emphasis supplied) A Division Bench of the Bombay High Court in re: Atmaram Namdeo (supra) while examining a conviction under section 302 of the Indian Penal Code would examine the amendments made to the Cr.P.C. by the State to various provisions, including section 164 of the old Cr.P.C. whereby the Magistracy in the State had been divided into two distinct categories. The contention of the State, on the construction of section 37 of the old Cr.P.C. as amended was that the State Government could authorize a District Magistrate to invest any Magistrate subordinate to him with the powers under section 164 of the old Cr.P.C. amongst others and on the issuance of the notification the said Executive Magistrate subordinate would ipso facto get authority to record the statement under the said section. Repelling the said construction the Division Bench would hold:-

"14. in this division of function with regard to the powers enumerated in Part II of the fourth Schedule, we see a clear legislative intent and",

scheme. The powers under Section 164 are ordinarily required to be exercised by a Magistrate of experience. Even in the original Code, it will be seen",

that the only Magistrate other than the Magistrate of the first class, who is eligible to be invested with the powers under Section 164, is a Magistrate of",

the second class and that investment has to be at the instance of the State Government and not the District Magistrate. We are unable to hold that the State Legislature, in effecting amendment of the scheme of the Code, would have intended such a violent departure in the matter of investing any",

Magistrate, be he a Magistrate of the third class, or even an Executive Magistrate, with powers of recording statements and confessions under",

Section 164. The reason for restricting the investment of powers under Section 164 to experienced Magistrate is obviously that the Magistrate must,

have enough experience to judge whether a statement is being made voluntarily or otherwise. The Magistrate must be competent to understand why a,

person is making a confession and more or less convicting himself out of his own mouth. The detailed and elaborate provision made to ensure that the,

confession is made in a free and fair manner and without any duress of restraint or under pressure or for any reward, requires that such powers",

should be exercised by experienced and competent Magistrates. Before investing a Magistrate with such important functions, the authority concerned,"

which, in our opinion, is the State Government alone, will apply its mind to find out whether the person recommended for being invested with such",

powers deserves to be entrusted with such functions. The very instance in this case shows the danger of investing all and sundry with powers under,

Section 164. The learned Taluka Magistrate in this case administered oath to the accused and thus violated the most elementary principle that,

statements have to be voluntarily made. The argument that in spite of the oath, the voluntary nature of the confession may not be affected is difficult",

to understand. The reason why oath is not to be administered to a person coming forward to make a statement in the nature of confession is that there,

should be no kind of pressure either of oath or of affirmation or of any other kind operating on the mind compelling him to disclose something which,

ordinarily that person would not disclose or state. The manner in which the confession is to be recorded, the preferable form being questions and",

answers, and the whole record being in the language of the deponent, are all salutary safeguards which have to be observed and non-observance of",

which imperils the acceptance of the statements as good evidence or reliable evidence in criminal prosecutions.â??â??,

17. The Division Bench of the Bombay High Court would also hold in 1969 that administration of oath to an accused would violate the most,

elementary principle that statements have to be voluntarily made. The Division Bench of the Calcutta High Court would hold that under Section 5 of,

the Oaths Act there is no authority to administer oath to an accused and that no oath ought to have been administered on such an accused. The Oudh,

Judicial Commission and the Calcutta High Court would hold so much before the people of India gave themselves the Constitution of India in the year, 1951.,

18. The Bombay High Court in the year 1969 would hold that the reason why oath is not to be administered to a person coming forward to make a, statement in the nature of confession is that there should be no kind of pressure either of oath or of affirmation or of any other kind operating on the, mind compelling him to disclose something which ordinarily that person would not disclose or state. The manner in which the confession is to be, recorded, the preferable form being questions and answers, and the whole record being in the language of the deponent, are all salutary safeguards", which have to be observed and non-observance of which imperils the acceptance of the statements as good evidence or reliable evidence in criminal, prosecutions.,

19. In the year 1975 the same question arose before the Jammu and Kashmir High Court. In re: State v. Suram Singh (supra) while deciding an appeal, against acquittal of the accused of the offence under sections 302 and 451 R.P.C. a Division Bench of the Jammu & Kashmir High Court would, examine the confessional statement vis-a-vis section 164 Cr.P.C., section 24 of the Indian Evidence Act and Article 20 (3) of the Constitution of", India. Mufti, J. would hold:-",

â??8. Assuming that the confessional statement was voluntary, it would still be inadmissible because it was made under compulsion, of oath. Here it", may not be violative of Section 24 of the Evidence Act in its not having been proceeded from threat promise or inducement. But it does violate Article, 20 (3) of the Constitution according to which no person accused of an offence shall be compelled to be a witness against himself. That the accused, made a confessional statement before a Magistrate which could be read against him at the trial cannot be disputed. That he did so when he stood in, the character of an accused person cannot also be disputed. The confession is therefore a statement made by an accused who was driven to make it, under compulsion of an oath. That being so, the use of confession against the accused at the trial would constitute a violation of clause 3 of Article 20.", That is what renders it inadmissible. Viewed from any angle, therefore, the confession cannot be treated as a circumstance adverse to the",

accused.â??â?? Jaswant Singh, C.J.: - would, however, hold:â?"â??I have had the advantage of going through the judgment which my learned",

brother, Mufti, J., has taken great pains to prepare. While I agree with the conclusion arrived at by him as also the observations made by him that the",

confessional statement purporting to have been made by the accused under Section 164 of the Criminal P.C. is inadmissible in evidence as it was,

made on oath and as a result of the pressure exercised by the police, I regret I find myself unable to subscribe to the view expressed by him in the last",

paragraph of the judgment that even assuming that the confessional statement was voluntary, it was still violative of cl. (3) of Article 20 of the",

Constitution as it was made under compulsion of oath. Cl. (3) of Art. 20 of the Constitution provides that no person would be compelled to be a,

witness against himself. As held in *State of Bombay v. Kathi Kalu*. AIR 1961 SC 1808 : (1961 (2) Cri LJ 856) the compulsion contemplated by this,

clause means duress which in the context means physical objective act and not the state of mind of the person making the statement, and unless",

duress is exercised against an accused, he cannot be held to have been compelled to be a witness against himself If that be so, I doubt if the mere",

administration of oath to an accused by a Magistrate while recording his statement under Section 164 of the Criminal P.C. can fall within the purview,

of compulsion as contemplated by clause (3) of Article 20 of the Constitution, and amount to a compelled testimony.â??â??",

20. In re: Suram Singh (supra) while Mufti, J. would hold that even if the confessional statement is voluntary, it would still be inadmissible because it",

was made under compulsion of oath and violated Article 20(3) of the Constitution of India, Jaswant Singh, C.J. would express doubt whether mere",

administration of oath to an accused by a Magistrate while recording his statement under Section 164 Cr.P.C. can fall within the purview of,

compulsion as contemplated by clause (3) of Article 20 of the Constitution and amount to compelled testimony.,

21. In re: Brijbasi Lal Shrivastava (supra) the Supreme Court would deal with an appeal against conviction and sentence under section 409, 467 and",

477-A, Indian Penal Code and section 5(2) of the Prevention of Corruption Act. The appellant was a Principal of a School. A case was started",

against the appellant on a basis of a complaint made by a clerk who had actually drawn the amount on the orders of the appellant and who was later,

on dismissed from service by the appellant for some irregularities. The central evidence against the appellant consisted of a "sort of a confession", made by the appellant to the Assistant Divisional Superintendent, Education who further took the abundant caution of taking a written statement signed", by him from the appellant. In this statement the appellant admitted to have falsely drawn up ₹ 500/-towards the salary of a chowkidar which was re-, deposited into the treasury subsequently. The High Court and the Special Judge relied heavily on this document which formed the sheet-anchor of the, prosecution case. The Supreme Court would examine the effect of the confession made by the appellant to the Assistant Divisional Superintendent,", Education on his guilt. The Supreme Court would note that the said confession contained an admission not only of the misappropriation of ₹ 500/- but, also of the two items of ₹ 20/- and ₹ 43/- which was the subject-matter of withdrawal by the same contingent bill and which formed the basis of, Special Criminal Case No.2 of 1966 tried by the same Special Judge. The Special Judge had disbelieved the prosecution case and acquitted the, appellant regarding these two items. The Supreme Court would observe that the purported confession had been found to be un-reliable with respect to, two out of the three items which fact appears to have been completely overlooked by the Special Judge as well as the High Court. The Supreme, Court would observe that it was not in dispute that the confession was made by the appellant to the Assistant Divisional Superintendent, Education", who was his superior officer and was, therefore, a person in authority. The Supreme Court would also note that the appellant in his statement under", section 342 of the old Cr.P.C. (now section 313 Cr.P.C.) while answering the question put to him regarding the said document has stated that the, Assistant Divisional Superintendent, Education and his party had forced him to write the said confession. In such factual circumstances the Supreme", Court would observe:-,

10. The evidence of PW 10 the officer who had taken the statement of the appellants shows that he had administered an oath to the appellant, before taking his statement although he was not empowered to administer any oath. This circumstance by itself would amount to a concealed threat,", because if the statement was found to be false the appellant may have entertained a genuine belief that he might be prosecuted.â??,

22. The Supreme Court in the year 1979 would hold that the circumstance of administration of oath to an accused person by itself would amount to a,

concealed threat, because if the statement was found to be false the accused may have entertained a genuine belief that he might be prosecuted.",

23. In re: Philips (supra) the Karnataka High Court would examine the judicial confession said to have been made by the accused vis-à-vis section,

164, 281 and 463 Cr.P.C. The First Additional Session Judge had chosen not to act on this confession on three grounds. The two questions put to the",

accused had not been put on record, the accused had been administered oath while recording the confessional statement and the Magistrate had",

recorded the confession knowing he himself was the committal Magistrate and therefore ordinarily ought not to have proceeded to record the,

confessional statement of the accused. The Division Bench would observe that the First Additional Session Judge had not taken trouble of advertng to,

section 463 Cr.P.C. The Division Bench, thereafter, would examine the said provision of section 463 Cr.P.C. in detail and would hold:-",

â??8.The First Additional Sessions Judge has not weighed the evidence of P.W.1 to find out whether he had stated the truth about putting,

those two questions to the accused but had not recorded those questions in the proceedings he held on 17-12-1977. It was his duty to apply his mind to,

the evidence of P.W. 1 in regard to this aspect and come to a conclusion one way or the other. If his conclusion was that P.W.1 had stated the truth",

then in view of Section 463, Cr.P.C., it would have been incumbent on him to hold that the recording of confession by P.W.1 had been done by him",

â?" except in regard to administering of oath to the accused â?" in a manner as required by the provisions in Section 164, Cr.P.C..",

.....â??â??,

â??9. We do not consider it necessary to go into the evidence of P.W.1 to find out whether P.W.1 had recorded Ex. P.4 in accordance with the,

provisions in Section 164 of the Code of Criminal Procedure in the light of Section 463 of the Code as in our opinion the fact that P.W. 1 had,

administered oath on the accused while recording the confessional statement, deprives the statement Ex. P. 4 of any evidentiary value. In this",

connection the First Additional Sessions Judge has in para VII (gg) of his judgment, adverted to the provision in Section 5 of the Indian Oaths Act",

1873. Here again, the First Additional Sessions Judge has exhibited his ignorance of the law holding the field because Indian Oaths Act, 1873, has",

been repealed by the Indian Oaths Act, 1969. Section 5 of the Indian Oaths Act, 1969 is not in parimateria with Section 5 of the Indian Oaths Act,"

1873. Section 5 of the Indian Oaths Act 1969, has no application in regard to this question.",

10. Section 164 (4) Cr. P. C, lays down that such confession shall be recorded in the manner provided in Section 281 of the Code for recording the",

examination of an accused person and shall be signed by the person making the confession and so on. In view of this provision, it was incumbent on P.",

W. 1 to record the confessional statement of the accused by following the manner and method laid down in Section 281 Cr. P. C. Section 281 reads,

as follows:,

â??281. Record of examination of Accused.- (1) Whenever the accused is examined by a Metropolitan Magistrate, the Magistrate shall make a",

memorandum of the substance of the examination of the accused in the language of the Court and such memorandum shall be signed by the,

Magistrate and shall form part of the record.,

(2) Whenever the accused is examined by any Magistrate other than a Metropolitan Magistrate, or by a Court of Session, the whole of such",

examination, including every question put to him and every answer given by him, shall be recorded in full by the presiding Judge or Magistrate himself",

or where he is unable to do so owing to a physical or other incapacity, under his direction and superintendence by an officer of the Court appointed by",

him in that behalf,

(3) The record shall, if practicable, be in the language in which the accused is examined or, if that is not practicable, in the language of the Court.",

(4) The record shall be shown or read to the accused, or, if he does not understand the language in which it is written, shall be interpreted to him in a",

language which he understands, and he shall be at liberty to explain or add to his answers.",

(5) It shall thereafter be signed by the accused and by the Magistrate or presiding Judge, who shall certify under his own hand that the examination",

was taken in his presence and hearing and that the record contains a full and true account of the statement made by the accused.,

(6) Nothing in this section shall be deemed to apply to the examination of an accused person in the course of a summary trial.,

11. It is clear from the above that there is no provision for administering oath to an accused who is making a confessional statement before a,

Magistrate, When this specific provision is made, the other provisions of the Indian Evidence Act etc., regarding recording of statements, will not",

operate. Therefore, no question of administering oath arises, and in fact if oath is administered, it will be contrary to the provisions of Section 281, Cr.",

P.C.. It is well settled by a series of Judgments of the Privy Council as well as the Supreme Court that when the mandate of the law is that a,

particular act has to be done in a particular manner, it has got to be done in that manner or it should not be done at all. Therefore, recording of Ex. P. 4",

by P. W. 1 confessional statement by the Magistrate after administering oath to the accused, is not as provided by Section 281 Cr. P. C. and as such",

Ex, P. 4 loses its evidentiary value. Moreover, the object behind this provision viz. Section 164 (4) Cr . P. C. is clear on the face of it. The concerned",

accused should not be made to feel that he is bound down to a particular statement, and if he later stated something contrary to that he would be",

incurring the wrath of law. In fact similar is the object in regard to the manner and method of recording the statements of witnesses during the,

investigation by the police, under Section 161 Cr. P. C. There, it is provided that the signatures of the persons are not expected to be taken below their",

statements so recorded. If this aspect viz., recording of examination of the accused is gone deeper into by looking into the provisions of the Code of",

Criminal Procedure, it will be clear that there are three stages at which examination of the accused is provided. First stage is Section 232 Cr. P. C.",

That would be during a sessions trial when the prosecution closes its case. The next is Section 239 of the Code. That is the stage at which in a trial of,

warrant case on police report a Magistrate has to decide whether he should frame charge or pass an order of discharge. The third is Section 313 of,

the Code which is a general provision because it states that an accused may be examined at any stage in any enquiry or trial, to enable him to explain",

personally any circumstances appearing in evidence against him, Section 313 (2) Cr. P. C. specifically lays down that no oath shall be administered to",

the accused when he is examined under Sub-section (1) of that Section. It is easy to see that it has no application to the recording of a confession of,

an accused under Section 164 (4) Cr. P. C. and in that behalf only the provisions in Section 281 of the Code are specifically made applicable.,

12. In view of the foregoing, we hold that administering oath to the accused by P. W. 1 before recording Ex. P. 4 the confessional statement, is an",

illegality and hence, Ex. P. 4 loses its evidentiary value. It is of course true that the learned First Additional Sessions Judge had reached the same",

conclusion, but what we have observed is in regard to the reasoning put forth by him and the manner in which he has exhibited his ignorance of the",

provisions of law and the rules, which he is expected to know;â??",

24. The Karnataka High Court in the year 1980 would hold that administration of oath to an accused person while recording the confessional,

statement deprives the statement of any evidentiary value and is an illegality and therefore it is not necessary to go into the evidence of the Magistrate,

to find out whether he had recorded the confession as per Section 164Cr.P.C in the light of Section 463 Cr.P.C.,

25. In re: Akanman Bora v. State of Assam1987 SCC OnLine Gau 33 a Division Bench of the Gauhati High Court would examine a confessional,

statement taken on administration of oath by the Magistrate vis-Ã -vis section 164 and 281 Cr.P.C. and Article 20 (3) of the Constitution of India. S.,

Haque J. would hold:-,

â??5. An accused is at liberty to make any statement or complain verbally or in writing to the arresting authority or to the Magistrate before whom he,

is produced for the purpose of remand. His statement in writing or verbal, as to his complicity in a crime, made to police is inadmissible in evidence;",

whereas such statement before a Magistrate is admissible in evidence. If such verbal statement as to his complicity in a crime makes before a,

Magistrate or expresses to make it, then it is mandatory to the Magistrate to record the same after duly observing all formalities prescribed under the",

provision of Section 164 of the Criminal Procedure Code and by following the instructions given in the Schedule Form referred to above. Section 4(2),

of the Oath Act prescribes administering of oath to a witness. This Act nowhere prescribes administration of oath to an accused at any stage of,

investigation, inquiry or trial. Exception to this general rule is to be made applicable under the provision of Section 315 of the Code of Criminal",

Procedure when the accused offers himself as a defence witness. At such stage

he is characterized not as an accused but as a competent witness.,

Administering oath is barred in the recording of confessional statement by the clear provision of Sub-Section (5) of Section 164 of the Criminal,

Procedure Code which runs as:â?"

â??Any statement (other than a confession) made under sob-section (1) shall be recorded in such manner hereinafter provided for the recording of,

evidence as is, in the opinion of the Magistrate, best fitted to the circumstances of the case; and the Magistrate shall have power to administer oath to",

the person whose statement is so recorded.,

6. Confession should be recorded in the manner provided for recording statement of an accused/suspect and not in the manner provided for recording,

evidence. If it is recorded in the manner provided for recording evidence by administering oath, then it loses its character in so far the maker is",

concerned. The fact of administering oath at the recording of confession virtually means that the maker is compelled to give evidence against him,"

placing him in the status of a witness at the stage of investigation in violation of Article 20(3) of the Constitution of India read with sub-section (5) of,

Section 164 of the Code of Criminal Procedure. Administering oath for recording confession will only mean that recording of evidence of the maker,

for use in subsequent stage against the maker and which is prohibited in law. Such confession is bad in law, and is inadmissible in the evidence."

7. This subject was dealt by a Division Bench of Karnataka High Court in Philips v. State of Karnataka reported in 1980 Cri. L.J. 171. It was held,

that the manner of recording confession has provided under section 281 for the purpose of memorandum as laid down by Section 164(4), there is no",

provision for administering oath to an accused making a confessional statement before a Magistrate. When such specific provision is made, the other",

provision of the Evidence Act etc, regarding recording of statement, will not operate. Therefore, no question of administering oath arises and in fact if",

oath is administered; it will be contrary to the provision of Section 281. It is an illegality and as a such the confessional statement loses its evidentiary,

value. The object behind Section 164(4) is clear on the face of it. The concerned accused should not be made to feel that he is bound down to a,

particular statement, and if he later stated something contrary to that, he would be incurring the wrath of law."

9. The confession of the accused-appellant Akanman Bora was recorded on 25.5.1981 by the Magistrate Shri Birupaksha Sarma after administering, oath. The recording of the confession in that manner was illegal and inadmissible in evidence. Learned Sessions Judge ought to have been cautious in, considering the confession as substantive piece of evidence for application against the appellant in murder charge. It appears that the learned Sessions, Judge failed to read and scrutinise through the entries recorded in the Confessional Statement Form, Ext. 1 in a trial of serious charge. This only", exposes non-application of mind by the Sessions Judge at the proceeding of the trial. Either the learned Sessions Judge was ignorant of the law on the, subject or superficially disposed of the trial of a serious charge. It reflects lack of legal equipment and merit of the trial Judge. Learned Sessions Judge, committed illegality in convicting the accused appellant on the basis of an illegal and inadmissible confession.,

11. In a criminal trial, an accused can be examined by court at different stages under the provisions of Cr. P.C. and his statement can be recorded," , such as, under section 329 before the charge, section 240(2) and 251 at the framing of charge and stating particulars of the offence respectively, and", sections 227/228 at the hearing and framing of charges and finally section 313 after close of the evidence. The accused is also examined and his, statement can be recorded under section 248(2) and section 235(2) at the trial on the question of sentence. The manner of examination and recording, statement of an accused by courts have also been prescribed under section 282 Cr. P.C. At no stage, administering oath is required to be made to an", accused. The accused is at liberty to make statement or complain before the Court at any stage of the trial and recording such statement need not, require administering oath.â??,

26. J. Sangma J. while concurring with S. Haque J. in re: Akanman Bora (supra) would hold:-,

â??15.â?|â?|â?|... A Magistrate has to record the confession of accused in accordance with the provisions made in Sections 164 and 281 of the Code, of Criminal Procedure. Those Sections, among other things, require a Magistrate to record the confession only after removing all fears from the mind", of the accused and by explaining to him that he was not bound to confess and that, if he did so, it would be used as evidence against him. He must",

fully satisfy himself that the confession was made voluntarily. Sub-section (5) of Section 164 of the Code provides as follows:â?,"

â??Any statement (other than a confession) made under sub-section (1) shall be recorded in such manner herein after provided for the recording of,

evidence as is, in the opinion of the Magistrate, best fitted to the circumstances of the case: and the Magistrate shall have power to administer oath to",

the person whose statement is so recorded.â?,"

16. It is clear from the words of this sub-section that a Magistrate should not administer oath/solemn affirmation for recording the confession.,

Apparently this was considered necessary because the accused has the liberty to retract the confession either at that time itself or at the trial and the,

prosecution has to prove the confession by giving evidence that the accused had made it voluntarily. Oath is meant to bind down the maker of,

statement. Therefore if a Magistrate administered the oath before recording confession, it would not be open to the accused to retract at that time or",

even subsequently before the trial court, because in that case he would be subject to the consequences of his oath/solemn affirmation. So I share the",

opinion of my learned Senior brother Haque J., in holding that giving an oath/solemn affirmation before recording confession of the appellant in this",

case has vitiated the confession and that has made it inadmissible in evidenceâ?!

27. The Gauhati High Court would follow the dictum of Karnataka High Court in re: Philips (supra) and in the year 1987 hold that administration of,

oath at the recording of confession virtually means that the maker is compelled to give evidence against him, placing him in the status of a witness at",

the stage of investigation in violation of Article 20 (3) of the Constitution of India read with sub-section (5) of Section 164 Cr.P.C. and further,

administration of oath for recording confession will only mean that recording of evidence of the maker for use in subsequent stage against the maker,

which is prohibited in law and inadmissible in evidence.,

28. In re: Arjun Rai (supra) a Division Bench of this Court would examine a confession statement recorded on oath vis-Ã-vis section 164 (5) and 281,

Cr.P.C., Article 20(3) of the Constitution of India as well as section 4(2) of the Oaths Act, 1969 and hold:-",

â??12. It is evident from the confessional statement (Exhibit P8) that the learned

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confession, he shall not administer oath to such person (accused). At that stage, we may have a look at sub-section (2) of S. 4 of the Oaths Act. 1969",

which states inter alia that nothing in the said section shall render it lawful to administer, in a criminal proceeding oath or affirmation to the accused",

person unless he is examined as a witness for the defence. Therefore recording of confession of the accused by administering oath or affirmation to,

him is illegal and, therefore, is inadmissible.",

16. In the case at hand, the learned Magistrate did administer oath to the appellant before she recorded his confessional statement. For the reasons",

foregoing, we have no hesitation to hold that the confessional statement (Exhibit P8) is inadmissible and the same is not available to be",

considered.â??â??,

29. In re: Arjun Rai (supra) the Division Bench of this Court would accept the dictum of the Karnataka High Court in re: Philips (supra) and in re:,

Akanman Bora (supra) and in the year 1987 hold that confessional statement is inadmissible and the same is not available to be considered.,

30. In re: Babubhai Udesinh (supra) the Supreme Court would examine a case in which the accused therein was found guilty of the commission of,

rape and murder of a minor girl principally relying on or on the basis of a judicial confession. The learned Sessions Judge having taken into,

consideration the fact that the accused had been found guilty of commission of similar offences as also other offences imposed death penalty on him,

and the High Court affirmed the said judgment of conviction and sentence. The High Court while recording that the confession was found not only to,

be true but having been voluntarily being made, opined that the same could be relied upon. At the same time, the High Court proceeded on the basis",

that the accused was free to make retraction of his confession when his statement under section 313 Cr.P.C. was recorded. The High Court further,

noticed that oath should not have been administered to the accused but opined that the same is not of much significance but proceeded on the basis,

that the decisions of the Supreme Court have often said that the Court cannot solely rely on the retracted confession and make it a foundation for,

convicting the accused. But, while purporting to keep the confessional statement of the appellant aside, examined the purported circumstances used",

against him. The Supreme Court would observe that nothing had been brought on record to show the existence of any circumstance which would lead,

to the conclusion that the appellant alone is guilty of commission of the offence.

The Supreme Court would also note that it was not disputed that apart, from the purported judicial confession there is no other material which can be said to be sufficient to establish the guilt of the appellant. The Supreme, Court would note the various discrepancies in the recording of the confessional statement including the administration of oath on the accused which is, prohibited and ultimately disagreeing with the ultimate findings of the learned Sessions judge as also the High Court and considering the merit of the, appeal set-aside the judgment of conviction and sentence. In such fact situation the Supreme Court would go on to examine in detail the confessional, statement recorded. The Supreme Court would find inconsistencies appearing in the prosecution case vis-à-vis the confessional statement. The, Supreme Court would also hold in paragraph 10 thereof:,

¶10. We do not appreciate as to why oath had to be administered to the accused while recording confession. Taking of a statement of an accused, on oath is prohibited. It may or may not be of much significance. But, it may assume significance when we examine that a purported deposition of the", accused was taken on 10-3-2003 wherein also his evidence on oath is recorded in the following terms:,

¶I hereby state on oath that:,

My name: Babubhai,

My father's name: Udesing Parmar,

My age about: 27 years,

My occupation: Labour work,

Village of residence: Native Umrav Tadia Pura, at present Karamsad",

Question: Have you received copy of documents of police investigation?,

Answer: Yes.,

Question: Is the charge-sheet, Ext. 4 read over to you? Do you admit the offence? Or you want to proceed further the judicial proceedings?",

Answer: I do not admit the offence.,

Question: Have you engaged private advocate for your self-, defence or you want to engage advocate at the cost of the Government?,

Answer: I have engaged free advocate.¶,

(Emphasis supplied),

31. It must be noted that in the afore-quoted evidence on oath of the accused in reply to a specific question as to whether in the charge-sheet, exhibit-",

4 was read over to him and whether he admitted the offence, the accused had specifically answered that he did not admit the offence. The Supreme",

Court would then go on to examine the various judicial pronouncements of the Supreme Court and ultimately hold thus:,

â??15. Section 164 provides for safeguards for an accused. The provisions contained therein are required to be strictly complied with. But, it does not",

envisage compliance with the statutory provisions in a routine or mechanical manner.,

16. The court must give sufficient time to an accused to ponder over as to whether he would make confession or not. The appellant was produced,

from judicial custody but he had been in police custody for a period of 16 days. The learned Magistrate should have taken note of the said fact. It,

would not be substantial compliance of law. What would serve the purpose of the provisions contained in Section 164 of the Code of Criminal,

Procedure are compliance with spirit of the provisions and not merely the letters of it. What is necessary to be complied with, is strict compliance with",

the provisions of Section 164 of the Code of Criminal Procedure which would mean compliance with the statutory provisions in letter and spirit. We do,

not appreciate the manner in which the confession was recorded. He was produced at 11.15 a.m. The first confession was recorded in 15 minutes',

time which included the questions which were required to be put to the appellant by the learned Magistrate for arriving at its satisfaction that the,

confession was voluntary in nature, truthful and free from threat, coercion or undue influence. It is a matter of some concern that he started recording",

the confession of the appellant in the second case soon thereafter. Both the cases involved serious offences. They resulted in the extreme penalty.,

The learned Magistrate, therefore, should have allowed some more time to the appellant to make his statement. He should have satisfied himself as",

regards the voluntariness and truthfulness of the confession of the appellant.â??
â??,

20. There is another aspect of the matter which must be taken into consideration. The same being the manner in which the case has been dealt with, by the courts below.,

21. The judgment of the learned trial Judge gives an impression that he had proceeded on the basis that the appellant is guilty of commission of crime, in large number of crimes. The High Court although taken note of the propositions of law, while pointing out the corroborative pieces of evidence," repeated only the evidences brought on record which proved the commission of offence. The purported corroborative evidence brought on record by, the prosecution and as noticed by the High Court did not indicate that the appellant was guilty of commission of the offence. The circumstances were, not such which formed links in the chain and point out only to the guilt of the accused and the accused alone.,

22. We, therefore, with respect, are constrained to record disagreement with the ultimate findings of the learned Sessions Judge as also the High", Court. We, however, may observe that we have only considered the merit of the present appeal. Each case against the appellant must be judged on", the basis of the legal evidence brought on record. Our observations, we are sure, would not influence the learned Judges dealing with other cases", involving the appellant and pending before them.,

23. The judgment of conviction and sentence is set aside and the appeal is allowed.â??â??,

32. The observation of the Supreme Court in paragraph 10 and especially the sentence â??It may or may not be of much significanceâ? seems to us, to be in reference to the observation of the High Court that even though oath should not have been administered to the accused the same was not of, much significance. The Supreme Court thus has clearly pronounced that taking of a statement of an accused on oath is prohibited. It is also clear that, one of the reasons why the Supreme Court set-aside the judgment of conviction was the act of the Magistrate administering oath on the accused, which was held to be prohibited.,

33. In contra, the Division Bench of the Madhya Pradesh High Court in re: Madhu (supra) has respectfully disagreed with the view expressed by the", Karnataka High Court in re: Philips (supra) and by the Jammu and Kashmir High Court in re: State v. Suram Singh (supra) and held:-,

â??20. It is apparent from the aforesaid exposition of law in the aforesaid decisions that administering of oath to an accused is prohibited. However," at the same time the Apex Court has not laid down in Babubhai Udesinh Parmar

vs. State of Gujarat (supra) and Brijbasi Lal Shrivastava vs. State of, M.P. (supra) that if oath is administered, statement will be rendered wholly inadmissible. Considering the provisions of section 463 of Criminal", Procedure Code, it is apparent that if any Court before which a confession or other statement is made evidence against an accused person is", recorded, or purporting to be recorded under section 164 or section 281, finds that any of the provisions of either of such sections have not been", complied with by the Magistrate recording the statement, take evidence in regard to such non-compliance, and may, if satisfied that "such non-", compliance has not injured the accused in his defence on the merits and that he duly made the statement recorded, admit such statement.â? The", provisions of section 463(1) makes it clear that non-compliance of the provision is fatal in case it has caused injury to the accused in his defence on, merit. Though there was non-compliance in the instant case inasmuch as oath was administered, it was violative of section 164(5) of Criminal", Procedure Code, it may not be fatal. The evidenciary value of such confessional statement is required to be considered and Court is required to find", that such non-compliance has injured the accused in his defence on merits and whether he duly made statement recorded. In our opinion, such", statement may be admitted in case it has not caused prejudice on merit in the facts of the case to the accused. In the instant case accused Shamim, had retracted the confession (PW-59) by way of filing application (D-4), after 6 days it was recorded. He never felt boundan (sic bounden) by oath", which was administered wrongly to him and oath has to be simply ignored. The administering the (sic of) oath simpliciter cannot be said to have, injured the accused in his defence on merit in the instant case. We disagree with the finding recorded by the Court below that due to administering of, the oath the confessional statement (P-59) was rendered inadmissible. We respectfully disagree with the view expressed in Philips vs. State of, Karnataka (supra) by Karnataka High Court and State vs. Suram Singh (supra) by Jammu & Kashmir High Court. In our opinion it has to be seen, whether administering of the oath has injured the accused in his defence on merit of a case.â??â??,

34. In re: Baldeo and Anr. v. State of U.P. MANU/UP/2965/2012 was a case based on circumstantial evidence. One of the circumstances taken,

against the accused persons was the judicial confessions recorded. The learned Sessions Judge would rely upon the said judicial confessions as vital,

evidence against the accused persons. One of the accused had retracted the confession while giving a statement under section 313 Cr.P.C. The,

Allahabad High Court would examine the said confession vis-à-vis section 164 (5) and 281 Cr.P.C. as well as Article 20 (3) of the Constitution of,

India and hold:-,

15. The Magistrate has given a certificate below the statement of the accused as required under Section 164 Cr.P.C. Learned Amicus Curiae,

has, however, contended that the record does not indicate the basis on which the learned Magistrate had reason to believe that the statement was",

given voluntarily and there was no pressure on the accused from any side. Before recording confession of an accused under Section 164 Cr.P.C. it is,

the duty of the Magistrate to satisfy himself that the accused was giving statement voluntarily and for this he has to put certain questions to the,

accused and from the answers given to the questions, the Magistrate would come to the conclusion as to whether the confession which the accused is",

going to make would be voluntary or under some duress or inducement. The questioning of the accused before recording confession as to whether it,

was voluntary is a matter of substance and not a mere formality. A Magistrate should ascertain at the beginning of the statement and not at the end,

whether the confession made is voluntary. In the instant case before us, from the statement of the learned Magistrate, it is clear that he had not put",

any question to the accused before making confession, but he had given only warning as has been given in the certificate. It is, therefore, clear that",

before recording the confession, the learned Magistrate had not at all made any enquiry by putting question to the accused for satisfying himself that",

the confession made by the accused was voluntary and not under duress and inducement. Further, the learned Magistrate has committed gross",

illegality in administering oath to each accused before recording their confessional statement. Section 164(5) Cr.P.C. specifically provides that no oath,

shall be administered to an accused while recording his confession. Administration of oath to the accused in his confessional statement is violative of,

mandatory provisions of Article 20(3) of the Constitution and Section 281 Cr.P.C. Thus, the Magistrate cannot administer oath to the accused before",

recording his confessional statement and if he does so, the statement is illegal and should be excluded from consideration.â??â??",

35. The Allahabad High Court in the year 2012 would hold that administration of oath to an accused in his confessional statement is violative of the,

mandatory provisions of Article 20 (3) of the Constitution of India as well as Section 281 Cr.P.C and such statement being illegal should be excluded,

from consideration.,

36. The Division Bench of the Madras High Court in re: N. Senthil @ Senthilkumar v. State Rep. by the Inspector of Police, South Gate Police",

Station, Madurai City 2016 SCC OnLine Mad 28793 would hold",

â??13. The Trial Court has relied on the judicial confession made by the second accused to PW-15, the then learned Judicial Magistrate, No. VI,"

Madurai. We have got very serious reservation about the manner in which the said judicial confession had been recorded by the learned Judicial,

Magistrate. At the outset, we should say that it was illegal on the part of the learned Judicial Magistrate to administer oath on the second accused.",

Administering oath on the accused would amount to compulsion, which is unconstitutional, as the same would amount to testimonial compulsion. On",

this score alone, the judicial confession made by the second accused could be rejected.â??",

37. The Madras High Court in the year 2016 would have serious reservations about the manner in which the confession was recorded. The High,

Court would hold that administering oath to an accused was illegal and amount to compulsion which is unconstitutional as it would amount to testimonial,

compulsion. Answers to the three questions referred by the Division Bench vide order 03.07.2017,

38. For clarity and to avoid prolixity we would address the third question referred by the Division Bench of this Court on 03.07.2017 first i.e.:-,

(iii). Whether administering oath to an accused while recording the confessional statement of an accused under Section 164 Cr.P.C. violates Article,

20 (3) of the Constitution of India. 39. Section 17 of the Indian Evidence Act, 1872 defines â??admissionâ?? as:",

â??17. Admission defined.- An admission is a statement, oral or documentary or contained in electronic form, which suggests any inference as to any",

fact in issue or relevant fact, and which is made by any of the persons, and

under the circumstances, hereinafter mentioned."

40. Section 24 of Indian Evidence Act, 1872 reads thus:",

24. Confession caused by inducement, threat or promise, when irrelevant in criminal proceeding.-A confession made by an accused person is",

irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat or promise,"

having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the Court, to give the",

accused person grounds, which would appear to him reasonable, for supposing that by making it he would gain any advantage or avoid any evil of a",

temporal nature in reference to the proceedings against him."

41. In re: Thimma and Thimma Raju v. State of Mysore(1970) 2 SCC 105, the Supreme Court would hold:-",

9. An unambiguous confession, if admissible in evidence, and free from suspicion suggesting its falsity, is a valuable piece of evidence",

which possesses a high probative force because it emanates directly from the person committing the offence. But in the process of proof of an alleged,

confession the court has to be satisfied that, it is voluntary, it does not appear to be the result of inducement, threat or promise as contemplated by",

Section 24 of the Indian Evidence Act and the surrounding circumstances do not indicate that it is inspired by some improper or collateral,

consideration suggesting that it may not be true. For this purpose, the court must scrutinise all the relevant factors, such as, the person to whom the",

confession is made, the time and place of making it, the circumstances in which it is made and finally the actual words used."

42. In re: Kanda Padayachi alias Kandaswamy v. State of Tamilnadu(1971) 2 SCC 641, the Supreme Court would hold:-",

9. Sections 24 to 26 form a trio containing safeguards against accused persons being coerced or induced to confess guilt. Towards that end,

Section 24 makes a confession irrelevant in a criminal proceeding if it is made as a result of inducement, threat or promise from a person in authority,"

and is sufficient to give an accused person grounds to suppose that by making it he would gain any advantage or avoid any evil in reference to the,

proceedings against him. Under Section 25, a confession made to a police officer under any circumstances is not admissible in the evidence against",

him. Section 26 provides next that no confession made by a prisoner in custody even to a person other than a police officer is admissible unless made, in the immediate presence of a Magistrate.,

43. In re: Bharat v. State of U.P. (1971) 3 SCC 950 the Supreme Court would hold:-,

“7. The law as to confessions is perhaps too widely stated. Confessions can be acted upon if the court is satisfied that they are voluntary and that, they are true. The voluntary nature of the confession depends upon whether there was any threat, inducement or promise and its truth is judged in the", context of the entire prosecution case. The confession must fit into the proved facts and not run counter to them. When the voluntary character of the, confession and its truth are accepted it is safe to rely on it. Indeed a confession, if it is voluntary and true and not made under any inducement or", threat or promise, is the most patent piece of evidence against the makerâ?|â? |..â??",

44. In re: Veera Ibrahim v. State of Maharashtra(1976) 2 SCC 302, the Supreme Court would hold:-",

“14. To attract the prohibition enacted in Section 24 of the Evidence Act, these facts must be established:",

“(i) that the statement in question is a confession;,,

(ii) that such confession has been made by an accused person;,,

(iii) that it has been made to a person in authority;,,

(iv) that the confession has been obtained by reason of any inducement, threat or promise proceeding from a person in authority;",

(v) such inducement, threat or promise, must have reference to the charge against the accused person;,,

(vi) the inducement, threat or promise must in the opinion of the court be sufficient to give the accused person grounds, which would appear to him",

reasonable, for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against",

himâ??.â??,

45. In re: Satbir Singh v. State of Punjab(1977) 2 SCC 263, the Supreme Court would hold:-",

“28. In deciding whether a particular confession attracts the frown of Section 24 of the Evidence Act, the question has to be considered from the",

point of view of the confessing accused as to how the inducement, threat or promise proceeding from a person in authority would operate in his mind.",

46. In re: State (NCT of Delhi) v. Navjot Sandhu (Supra) the Supreme Court would summarize the law regarding confession and hold thus:

26. We shall, now, deal with certain legal issues, which have been debated before us in extenso. These issues have a bearing on the",

admissibility/relevancy of evidence and the evidentiary value or weight to be attached to the permissible evidence. Law regarding confessions,

27. We start with the confessions. Under the general law of the land as reflected in the Evidence Act, no confession made to a police officer can be",

proved against an accused. Confessions which is a terminology used in criminal law is a species of admissions as defined in Section 17 of,

the Evidence Act. An admission is a statement, oral or documentary which enables the court to draw an inference as to any fact in issue or relevant",

fact. It is trite to say that every confession must necessarily be an admission, but, every admission does not necessarily amount to a confession. While",

Sections 17 to 23 deal with admissions, the law as to confessions is embodied in Sections 24 to 30 of the Evidence Act. Section 25 bars proof of a",

confession made to a police officer. Section 26 goes a step further and prohibits proof of confession made by any person while he is in the custody of,

a police officer, unless it be made in the immediate presence of a Magistrate. Section 24 lays down the obvious rule that a confession made under any",

inducement, threat or promise becomes irrelevant in a criminal proceeding. Such inducement, threat or promise need not be proved to the hilt. If it",

appears to the court that the making of the confession was caused by any inducement, threat or promise proceeding from a person in authority, the",

confession is liable to be excluded from evidence. The expression appears connotes that the court need not go to the extent of holding that the,

threat, etc. has in fact been proved. If the facts and circumstances emerging from the evidence adduced make it reasonably probable that the",

confession could be the result of threat, inducement or pressure, the court will refrain from acting on such confession, even if it be a confession made",

to a Magistrate or a person other than a police officer. Confessions leading to discovery of a fact which is dealt with under Section 27 is an exception,

to the rule of exclusion of confession made by an accused in the custody of a police officer. Consideration of a proved confession affecting the person,

making it as well as the co-accused is provided for by Section 30. Briefly and broadly, this is the scheme of the law of evidence vis-à-vis",

confessions. The allied provision which needs to be noticed at this juncture is Section 162 CrPC. It prohibits the use of any statement made by any,

person to a police officer in the course of investigation for any purpose at any enquiry or trial in respect of any offence under investigation. However,"

it can be used to a limited extent to contradict a witness as provided for by Section 145 of the Evidence Act. Sub-section (2) of Section 162 makes it,

explicit that the embargo laid down in the section shall not be deemed to apply to any statement falling within clause (1) of Section 32 or to affect the,

provisions of Section 27 of the Evidence Act,

28. In the Privy Council decision of *Pakala Narayana Swami v. Emperor* [AIR 1939 PC 47 : 40 Cri LJ 364] Lord Atkin elucidated the meaning and,

purport of the expression "confession" in the following words: (AIR p. 52),

"[A] confession must either admit in terms the offence, or at any rate substantially all the facts which constitute the offence. An admission of a",

gravely incriminating fact, even a conclusively incriminating fact is not of itself a confession".

29. Confessions are considered highly reliable because no rational person would make admission against his interest unless prompted by his,

conscience to tell the truth. "Deliberate and voluntary confessions of guilt, if clearly proved are among the most effectual proofs in law." (Vide",

Taylor's Treatise on the Law of Evidence, Vol. I.) However, before acting upon a confession the court must be satisfied that it was freely and",

voluntarily made. A confession by hope or promise of advantage, reward or immunity or by force or by fear induced by violence or threats of violence",

cannot constitute evidence against the maker of the confession. The confession should have been made with full knowledge of the nature and,

consequences of the confession. If any reasonable doubt is entertained by the court that these ingredients are not satisfied, the court should eschew",

the confession from consideration. So also the authority recording the confession, be it a Magistrate or some other statutory functionary at the pre-trial",

stage, must address himself to the issue whether the accused has come forward to make the confession in an atmosphere free from fear, duress or",

hope of some advantage or reward induced by the persons in authority. Recognising the stark reality of the accused being enveloped in a state of fear, and panic, anxiety and despair while in police custody, the Evidence Act has excluded the admissibility of a confession made to the police officer.",

30. Section 164 CrPC is a salutary provision which lays down certain precautionary rules to be followed by the Magistrate recording a confession so, as to ensure the voluntariness of the confession and the accused being placed in a situation free from threat or influence of the police.â??,

47. â??Confessionsâ?? are one species of the genus â??admissionâ??, consisting of a direct acknowledgement of guilt by an accused in a criminal case. â??Confessionsâ? are thus â??admissionsâ? but all admissions are,

not confessions. A confession can be acted upon if the Court is satisfied that it is voluntary and true. Judgment of conviction can also be based on,

confession if it is found to be truthful, deliberate and voluntary and if clearly proved. An unambiguous confession, as held by the Supreme Court, if",

admissible in evidence, and free from suspicion suggesting its falsity, is a valuable piece of evidence which possess a high probative force because it",

emanates directly from the person committing the offence. To act on such confessions the Court must be extremely vigilant and scrutinize every,

relevant factor to ensure that the confession is truthful and voluntary. Although the word confession has not been defined in the Evidence Act, 1872",

the Privy Council in re: Pakala Narayanaswami v. King Emperor⁶⁶ IA 66 has clearly laid down that a confession must either admit in terms the,

offence, or at any rate substantially all the facts which constitute the offence. As abundant caution the Courts have sought for corroboration of the",

confession though. As per Taylorâ??s Treatise on the law of Evidence, Vol. I a confession is considered highly reliable because no rational person",

would make admission against his own interest prompted by his conscience to tell the truth. If the Court finds that the confession was voluntary,",

truthful and not caused by any inducement, threat or promise it gains a high degree of probability. To insulate such confession from any extraneous",

pressure affecting the voluntariness and truthfulness the laws have provided various safeguards and protections. A confession is made acceptable,

against the accused fundamental right of silence. A confession by hope or promise of gain or advantage is equally unacceptable as a confession by,

reward or immunity, by force or fear or by violence or threat. As held by the Supreme Court in re: Navjot Sandhu (supra) the authority recording the",
 confession at the pre-trial stage must address himself to the issue whether the accused has come forward to make the confession in an atmosphere,
 free from fear, duress or hope of some advantage or reward induced by the person in authority. It is therefore, the solemn duty of the authorities both",
 investigating agencies as well as Courts to ensure, before acting on such confession, that the same is safe to be acted upon and that there is no",
 element of doubt that the confession is voluntary and truthful and not actuated by any inducement, threat or promise from any quarter. To do so the",
 Magistrate must create an atmosphere and an environment which would allow voluntary confession induced by nothing else but his conscience to,
 speak the truth and confess the crime. In deciding whether a particular confession attracts the frown of Section 24 of the Evidence Act, the question",
 has to be considered from the point of view of the confessing accused as to how the inducement, threat or promise proceeding from a person in",
 authority would operate in his mind.,

48. A confession is a direct admission or acknowledgment of guilt by the person committing the crime. A possible inducement, threat or promise in",
 reference to an alleged confession leads to a presumption that the confession may become irrelevant. A confession made by accused person become,
 irrelevant in criminal proceedings, if the making the confession appears to the Court to have been caused by any inducement, threat or promise. The",
 inducement, threat or promise is directly relatable to a person in authority. If the Court would come to an opinion that the confession is a result of",
 inducement, threat or promise which in the opinion of the Court would give the accused reasonable ground for supposing that by making it he would",
 gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him then such confession would become irrelevant.,

49. Article 20 (3) of the Constitution of India reads thus:,

â??20. (3) No person accused of any offence shall be compelled to be a witness against himself.â??,

Wigmore on Evidence, (Tillers revision, 1983) Volume VIII (S.2250) gives a detailed historical perspective of the history of privilege against self-",

incrimination. It states that:-,

2250. History of the privilege. The history of the privilege against self-incrimination has something more than the ordinary interest of a rule of evidence not only because the privilege has been given a constitutional sanction in nearly every one of our jurisdiction, nor merely because the tracing of its origin takes us so far afield, in our survey, as the administrative policy of William the Conqueror and the criminal procedure of Louis XIV, and the French Revolution, but particularly because the woof of its long story is woven across a tangled warp composed in part of the inventions of the early canonists, of the momentous contest between the courts of the common law and of the church, and of the political and religious issues of that convulsive period in English history, the days of the dictatorial stuart. To disentangle these various elements, while keeping each in sight and unbroken, is a complicated task. To begin with, two distinct and parallel lines of development must be kept in mind the one an outgrowth of the other, succeeding it, and yet beginning just before the other comes to an end. The first is the history of the opposition to the ex officio oath of the ecclesiastical courts; the second is the history of the opposition to the incriminating question in the common law courts i.e., of the present privilege, in its modern shape. Let us remember that there is, in the first part of this history, no question whatever of the subject of the second part, and that the second part has not yet begun to exist. The first part begins in the 1200s, and lasts well into the 1600s; the second part begins in the early 1600s, and runs on for another century.

I. [History of the opposition to the ex officio oath of the ecclesiastical courts.] Under the Anglo-Saxon rule, the bishops had sat as judges and entertained suits in the popular courts. But William the Conqueror, before 1100, had put an end to this. His enactment required the bishops to decide the [ecclesiastical] causes according to the ecclesiastical law [, not according to the law of the hundred, and not in the hundred courts]; whence, sprang up a separate system and a double judicature. By a century later, the papal power and the regal power were in hot conflict over the delimitation of their jurisdictions; in the great Constitution of Clarendon, in 1164, Henry II temporarily gained the advantage. By another century, Stephen and John had lost ground; and under Henry III the influence of the leaders of the church, foreign born and foreign educated, was in the

ascendant. When Henry married his French wife, in 1236, there came over four uncles with her, one of whom, by name Boniface, was placed in the",

see of Canterbury as archbishop (or perhaps archdeacon). In the same year, 1236 (Matthew Paris said 1237), there came over also a Cardinal Otho.",

These two men were active in developing the local church law of England. First to be noted is a constitution of Otho, promulgated at a Pan-Anglican",

council in London, 1236: "Jusjurandum calumniae in causis ecclesiasticis et civilibus de veritate dicenda in spiritualibus, quo ut veritas facilius",

aperiatur, et causae celeriter terminentur, statuimus praestari de caetero in regno Angliae secundum canonicas et legitimas sanctiones, obtenta",

consuetudine in contrarium non obstante." Next, in 1272, came a similar constitution from Boniface: "Statuimus quod laici, ubi de subditorum",

peccatis et excessibus corrigendis per praelatos et iudices ecclesiasticos inquiritur, ad praestandum de veritate dicenda juramentum per",

excommunicationis sententias, si opus fuerit, compellantur." Meanwhile, the general struggle between papal and royal claims of jurisdiction had gone",

on. Under Edward I, the statute of "Circumspecte Agatis" (1285) favored the former's rights. But by the early 1300s the statute "De",

Articulis Cleri" set fairly definite limits; it was enacted that the royal officers should not permit "quod aliqui laici in ballione sua in aliquibus locis,

convenient ad aliquas recognitiones per sacramenta sua facienda, nisi in causis matrimonialibus et testamentariis."

Such are the preliminary data at the opening of this first part of the history. What was their significance for the relation of the parties to the contest?

First of all, we may note that the opposition therein reflected has nothing to do with any objection to the general process of putting a man on his oath to",

declare his guilt or innocence; they concerned only the questions (a) who should have the right to do this, and (b) how it should be done. Moreover, the",

former of these things is alone at first concerned: later, the second comes to dominate in importance. Three stages are fairly well marked, namely, (I)",

to Elizabeth I's time, (2) to Charles I's, (3) and afterwards."

(I) [To Elizabeth I's time.] (a) Who should have the rights of jurisdiction? This was in the 1200s and 1300s the great question. The statute "De,

Articulis Cleri" settled the line of ecclesiastical jurisdiction over laymen by confining it to causes matrimonial and testamentary; and this in substance,

prevailed till the end of church courts in England. The forms of writs of prohibition were thereafter based on this statute. A century later, in 1402,"

under Henry IV, the papal or clerical power obtained some sort of enlargement of its "liberties and privileges", and under Henry VIII this foreign",

and papal domination was repudiated, and in 1533 all canons "repugnant to the customs, laws, or statutes of this realm" were forbidden to be",

enforced. Under Mary, for a moment, in 1554, the statute of Henry was repealed; but Elizabeth I, in 1558, took care promptly to restore it."

Thenceforward the struggle of jurisdiction is against Elizabeth's own High Commission Court, and not against a foreign and papal power."

(b) In the other important respect, namely, how the church courts should proceed, there is, as yet in the 1200s and 1300s, apparently no interference or",

hostile feeling at all in relation to the methods that here concern us. It does not appear that the decrees of Otho and Boniface above quoted,"

authorizing certain oaths to be employed, met with any more opposition than other acts done in assertion of the church's jurisdiction. The oath was",

plainly permitted, by the statute "De Articulis Cleri," in causes matrimonial and testamentary; there was no objection to it as such. How could",

there be, in a community where the compurgation system was still in full force in the popular and the royal courts, and men might be forced to clear",

themselves by their oaths with oath helpers "where they even struggled for the privilege of it, for centuries afterward, against the innovation of jury",

trial? The writs of prohibition, set forth by Britton and Fitzherbert, mentioned an oath, to be sure; but, in the first place, this might equally be the",

compurgation oath (not the "jusjurandum calumniare" or "de veritate"); and, in the next place, and chiefly, it was mentioned simply as a",

descriptive feature of the forbidden jurisdiction as if one should forbid writs of habeas corpus to be issued by a probate judge, not meaning in the least",

to strike at that sort of writ, but at the particular judge's power and jurisdiction. There is no valid reason to believe that the statute "De Articulis",

Cleri" had among its motives any animus against the church's imposition of an oath as such.,

(i) Nevertheless (though the king's lawyers cared nothing about it) this procedure of Otho's and Boniface's, the "jusjurandum de",

veritate dicenda" (which we may call the inquisitorial oath, as distinguished from the compurgation oath) was then, for the church, an innovation."

Hitherto, the trial by compurgation, or formal swearing of the party with oath helpers, and the trial by ordeal, had been the common methods of",

ecclesiastical trial and decision. But in the early 1200s, under the organizing influence of Innocent III, one of the first great canonists in the papal chair",

(1198-1216), new ideas were rapidly germinating in church law. The trial by ordeal was formally abolished by the church in 1215. The trial by",

compurgation oaths "was already becoming little better than a force." There was a decided need of improvement in method. One of the marked,

expedients in this improvement was the inquisitional or interrogatory oath, introduced and developed in the early 1200s, chiefly by the decretals of",

Innocent III. The time-worn compurgation oath had operated as a formal appeal to a divine and magical test or "Gottesurtheil"; there was no,

interrogation by the tribunal; the process consisted merely in daring and succeeding to pronounce a formula of innocence, usually in company with oath",

helpers. But the new oath pledged the accused to answer truly, and this was followed by a rational process of judicial probing by questions to the",

specific details of the affair, after the essentially modern manner. The former oath operated of itself as a decision, through the party's own act;",

the latter merely furnished material for the judge with which to reach a personal conviction and decision. This was an epochal difference of method.,

Indeed, the radical part played, for the progress of English procedure, by the new jury trial in the 1200s and 1300s, was paralleled, in a near degree",

not only for ecclesiastical procedure but also for the secular criminal procedure of the Continent, by this inquisitional oath of the 1200s. There were, to",

be sure, as time went on, several varieties of form to the oath. The chief forms were the simple "juramentum de veritate dicenda," used in",

Boniface's English Constitution of 1272 (quoted supra [at note 7]), and the broader "jusjurandum calumniare de veritate dicenda", used in",

Otho's English constitution of 1236 (quoted supra [at note 6]; but their unity consisted in the subjection of the accused to a rational specific,

interrogation for the purpose of informing the judge.,

(ii) Yet there was a distinction of real consequence (upon which everything came later to turn), regarding the different preliminary conditions upon",

which a party could be put to this or any other oath. There must be some sort of a presentment, to put any person to answer. But must that come from",

accusing witnesses or private prosecutors or the like (corresponding to our notion of a *qui tam* or a grand jury)? Or might it be begun by an, official complaint (somewhat like our information *ex relatione* by the attorney general)? Or might the judge *ex officio mero* summon the, accused and put him to answer in hopes of extracting a confession which would suffice? And in the last method, must the charge at least be brought", first to the judge's notice *per famam*, or *per clamor* *insinuationem*, or *common report* or *notorious suspicion*?",

Such were the questions of procedure which later formed the essential subject of dispute. The last question became in the subsequent history the most, important one; and it was apparently to be answered, in the strictness of the law, in the affirmative. Nevertheless, the matter was complicated by the, varieties of detail in procedure, and there were differences of phrasing in the various decretals that served as authority. It is enough here to note that", the third method of trial "the *inquisitor*, or proceeding *ex officio mero* " became a favorite one for heresy trials; and that is canonical", lawfulness in some shape was supported by clear authority. About the year 1600, there came to be in England much pamphleteering anent this; and a", formal opinion of nine canonists declared the lawfulness of putting the accused to answer on these conditions: *Licet nemo tenetur seipsum prodere*, [i.e., accuse], *tamen proditus per famam tenetur seipsum ostendere utrum posit suam innocentiam ostendere et seipsum purgare*.",

Thus, on the one hand, it was easily arguable that, in ecclesiastical law, the accused could not be put to answer *ex officio mero* without some", sort of witnesses or presentment or bad repute; and in this sense on oath *ex officio* (as it came to be called) might be claimed (as it was, claimed) to be a distinct thing from the same oath when exacted on proper conditions, and to be therefore canonically unlawful. But, on the other hand", it is plain to see, also, how, in the headlong pursuit of heretics and schismatics under Elizabeth and James, the *ex officio* proceeding, lawful", enough on Innocent III's conditions about *clamor* *insinuation* and *fama publica*, would degenerate into a merely unlawful process of", poking about in the speculation of finding something chargeable. In short, the common abuse, in later days, of the *ex officio* proceeding led to", the matter being argued, in English courts and in popular discussion, as if this oath were either wholly lawful or wholly unlawful, though, in truth, by the",

theory of the canon law, it might be either, according to the circumstances of presentment.",

(c) But (to take up again the story of Otho's and Boniface's decrees) all these distinctions, it must be clearly understood, did not trouble the",

lay powers in their controversy of earlier days with the church on English soil. At the time of Edward's statute "De Articulis Cleri," in the",

early 1300s, the royal powers is not at all concerned, in this respect, with the method of ecclesiastical procedure, but only with the limits of that",

jurisdiction.,

Otho's and Boniface's constitutions of the 1200s were issued under a new and improved procedure in the church; if the king's lawyers,

had thought about it at all, they would probably have welcomed the better methods, for they certainly were dissatisfied with the church's old-",

fashioned compurgation methods. But the jurisdictional controversy was the vital one, as the "Articuli Cleri," show in every paragraph. Wherever",

the king and his counselors concede this jurisdiction, there they are found ready enough to concede to the fullest the usual ecclesiastical procedure. In",

this very statute, indeed, "De Articulis Cleri," they concede the church's oath procedure where jurisdiction is conceded, i.e., in matrimonial",

and testamentary causes. As time goes on and the church becomes occupied with heresy trials, the same complaisance is equally plain. Toward the",

end of Richard II's time, during the Lollard agitation, the church began, in 1382, to receive temporal sanction for its claims in the field of heresy;",

finally, in 1401, Henry IV's statute gave to the church the punishment of heretics; these were to be arrested and detained by the diocesan when",

"defamed or evidently suspected," until they "do canonically purge him or themselves," the diocesan to "determine that same business",

according to the canonical decrees." Here is no objection to the oath or to the "ex officio" procedure, but a sanction of the church's usual",

rule. Under this statute Archbishop Arundel, with renewed vigor, conducted his campaigns against heretics; and under it were all subsequent",

prosecutions conducted for more than a century..,

After a long period, however, there finally appears the little rift within the lute. In 1533, under Henry VIII, the old statute of Henry IV, of 1401 was",

repealed by a statute which did not take away the church's jurisdiction over

heresy, nor yet oppose its power to put the accused on inquisitional",
oath, but did not insist on something more than "ex officio" proceedings; it
provided that "every person presented or indicted of any heresy, or",
duly accused by two lawful witnesses, may be . . . committed to the ordinary [of
the church] to answer in open court.",
Here was the first portent of the new phase of the contest. Under the brief
liberality of Edward VI, in 1547, this whole jurisdiction over heresy was",
taken away; but under Mary, in 1554, the extreme statute of Henry IV was
revived. Then, Mary's statute was in turn repealed, in 1558, by",
Elizabeth I, who at the same time took into her own hands the church's
powers, and, with the Court of High Commission, introduced new features",
into the controversy.,

(2) [To Charles I's time] (a) Under Elizabeth and James, and to the end of the
story, there appears no further doubt (material to us now) as to the",
jurisdiction of the ordinary church courts; it was confined, in its control of
laymen, to causes "matrimonial and testamentary"; and it was",
constantly prohibited from holding them to answer in other classes of cases. So
also the Court of High Commission in Causes Ecclesiastical, which",
Elizabeth, as head of the church, now constituted, in 1558, as an extraordinary
instrument for carrying out her church policy, worked under similar",
limitations, though it constantly strove to exceed them, and though it perhaps
had jurisdiction over heresy. So, too, that offshoot of the Privy Council",
known as the Court of the Star Chamber (first sanctioned by statute in 1487, but
not beginning until Elizabeth's time to exercise actively its great",
and for some time useful powers), had by its charter so broad jurisdiction that
little dispute could be made on that score.",

(b) Thus, the emphasis of controversy now shifted. It had in the 1300s
concerned jurisdiction; it now concerned methods. The objection portended in",
1533, in the statute of 25 Hen. VIII, c. 14 (quoted supra), was now to be the
vital one. The Court of High Commission of course followed",
ecclesiastical rules; the Court of Star Chamber did likewise, in what concerned
the procedure of trial. No one is going yet to object to their general",
process of putting the accused to answer upon oath; but there is to be much
opposition to the preliminary methods, to the lack of a presentment, to",
charging a person "ex officio mero." There was here some room (as we have

seen) for uncertainty as to the proper canonical methods; and these, courts were to strain all the possibilities, and even to exceed them. The Court of Star Chamber seems to have raised no special antagonism during the", 1500s, nor until James's time, in the next century. Nor did the Court of High Commission, under the first five commissions. But in 1583, the sixth", was issued, with Archbishop Whitgift at the head " a man of stern Christian zeal, determined to crush heresy wherever its head was raised. He", proceeded immediately to examine clergymen and other suspected persons, upon oath, after the extremest "ex officio" style. From this time", onwards there is much concerning this oath. That it was canonically and statutably lawful was at least arguable. The repealed statute of 25 Hen. VIII, c. 14, in 1533 (quoted supra), which might otherwise have been urged against its methods, was now of doubtful validity."

Furthermore, the royal courts of common law, early in the agitation, had plainly declared these things lawful on certain conditions. In 1589, the question", had been first raised in the Common Pleas, in *Collier v. Collier*. In 1591, in *Dr. Hunt's Case*, the King's Bench refused to sustain an", indictment for administering the oath on a charge of incontinency since "the oath cannot be ministered to the party but where the offence is, presented first by two men, "quoted *fruit concessum*"; and it was said, it was so in this case." So also, in the same year, when the case of the", preacher Cartwright and his followers, for refusing to take Whitgift's oath and make answer, was brought up for a final settlement, all the chief", judges and law officers gave it as their opinion that the refusal was unlawful. Up to this time, then, it would seem that the stricter ecclesiastical rule", was conceded by the highest authorities to be unimpeachable by common law courts. When James I came to the throne, in 1603, the church's", claim was, if anything, strengthened; for James, in his own conceit, was as good a canonist as theologian, and would be prone to favor so useful an", engine against heretics as the proceeding "ex officio". In the first scenes of his career, he appears plainly vouching for it. So, too when Bancroft", succeeds Whitgift as Archbishop, bringing a like zealotry to the office, the common law judges seem to have been still complaisant. But in 1606 Sir", Edward Coke comes to be Chief Justice of the Common Pleas, and a change begins gradually. Coke had been counsel for *Collier* in 1589, and had",

perhaps thus acquired his convictions. It is well known that he set himself, as judge, against the ecclesiastical courts' pretensions in general. At",

first, however, he avoided a direct issue on the "ex officio" oath. His first case in 1609, he decided on other points. His next, in 1615, was allowed",

to drag on for a year or more, with repeated adjournments and other expedients intended to induce either the accused or the Court of High",

Commission to yield a point and avoid the direct issue. The plain opinion of Coke, and apparently, the final decision of the court, was that the oath was",

improperly put by the ecclesiastical court; yet the objectionable thing seemed to be not that the accused should be compelled to answer but that he,

should be charged ex officio, in a cause not testamentary or matrimonial but penal. In the meantime (in 1610, 1611 and 1615), three other cases had",

come before the common law courts, presumably the King's Bench, and from their imperfect reports it may be inferred that a similar view was",

now prevailing there. The change had thus substantially been effected. Archbishop Abbott, a man of less rabid views, had in 1610 succeeded",

Bancroft; Coke had carried his views to the King's Bench, as Chief Justice, in 1613; and the matter seems to have been so far settled (in respect",

to the ecclesiastical claims) that no more cases occurred, until in 1640, statute (quoted later [in note 69]) put an end, for the time, to further doubt.",

But the Star Chamber claims remained still to be faced. What had been settled was (in effect) merely that the ecclesiastical courts (including that of,

High Commission) could not, as a matter of jurisdiction and procedure, put laymen to answer, "ex officio", to penal charges. But this did not touch",

the Court of Star Chamber. Its conceded jurisdiction was ample enough to fine and imprison for almost any offense that it chose to pursue. The very,

statute that sanctioned it, in 1487, expressly vested in it the authority to examine the accused on oath in criminal cases, without naming even such",

restrictions as the ecclesiastical law conceded; and its right to examine in this fashion, wherever the case was within its jurisdiction, seems to have",

been conceded under Henry VIII and Elizabeth, all through the 1500s. But as James's reign went on, and its practices became arrogant and",

obnoxious, so its use of the "ex officio" oath came to share the burden of criticism and discontent which that procedure in the ecclesiastical courts",

excited. The common law courts seem to have found no handle against its oath procedure, even after Coke's accession to the bench. But though",

there was no explicit judicial condemnation, there was, after a time more than one formal questioning of it. The analogy of the doctrine already settled",

by Coke in 1607-16, for the ecclesiastical courts, was naturally invoked. Toward the end of its career, it would seem that some impression was being",

made on the court's own theory of orthodoxy.,

(3) [After Charles I's time.] But its time in the kingdom was now drawing to an end; and the trial which seems to have precipitated the crisis,

came in 1637,- a case full of instruction for our present history. John Lilburn, an obstreperous and forward opponent of the Stuarts (popularly known",

as "Freeborn John"), constituted somewhere between a patriot and a demagogue, had the obstinacy to force the issue. A decade later, he came",

into a similar collision with the Parliament's government, but he makes his entrance as a victim of the King's Star Chamber:",

"Lilburn's Trial, 3 How. St. Tr. 1315 (1637-45) [the following is a summary prepared by Dean Wigmore of the report]: John Lilburn was",

committed to prison by the Council of the Star Chamber, including the Chief Justice of the King's Bench, on a charge of printing or importing",

certain heretical and seditious books; on examination, while under arrest, by the Attorney General, having denied these charges, he was further asked",

as to other like charges, but refused, saying: "I am not willing to answer you to any more of these questions, because I see you to about by this",

examination to ensnare me; for seeing the things for which I am imprisoned cannot be proved against me, you will get other matter out of my",

examination; and therefore, if you will not ask me about the thing laid to my charge, I shall answer no more ; . . . and of any other matter that you",

have to accuse me of, I know it is warrantable by the law of God, and I think by the law of the land, that I may stand upon my just defence and not",

answer to your interrogatories". Afterwards, "some of the clerks began to reason with me, and told me every one took that oath, and would I be",

wiser than all other men? I told them, it made no matter to me what other men do". Then, when examined before the Chamber itself, he again",

refused, saying, "I had fully answered all things that belonged to me to answer unto," but as to things "concerning other men, to insnare me",

and get further matter against me," he was not bound "to answer such things as do not belong unto me; and withal I perceived the oath to be an",

oath of inquiry,â? i.e., ex officio, â??and of the same nature as the High Commission oath,â? which was against the law of the land, the Petition of",

Right, and the law of God as shown in Christâ??s and Paulâ??s trials; yet, â??if I had been proceeded against by a bill, I would have answeredâ?.",

Then the Council condemned him to be whipped and pilloried, for his â??boldness in refusing to take a legal oath, â??without which many offenses",

might go â??undiscovered and unpunishedâ?; and in April 1638, 13 Car. I, the sentence was executed. On Nov. 3. 1640, he preferred a complaint to",

Parliament; and on May 4, 1641, the Commons (having not yet abolished the Star Chamber Court) voted that the sentence was â??illegal and against",

the liberty of the subject,â? and ordered reparation. But, the petition going for a while no further, he applied once more, and on Feb. 13., 1645 (1646),",

the House of Lords heard his petition by counsel, Mr. Bradshaw urging for him the sentenceâ??s illegality. â??The ground whereof being that Mr.",

Lilburn refused to taken an oath to answer all such questions as should be demanded of him, it being contrary to the laws of God, nature, and the",

kingdom, for any man to be his own accuserâ?; and Mr. Cook arguing that, without an information, â??to administer an oath was all one with the",

High Commission,â? where on the Lords ordered that the said sentence â??be totally vacated . . . as illegal, and more unjust, against the liberty of the",

subject and law of the land and Magna Chartaâ?; and on Dec, 21, 1648, he was finally granted Â£3000 in reparation.",

Lilburnâ??s case, together with those of Prynne and Leighton (whose grievances were of another sort), were sufficiently notorious to focus the",

attention of London and the whole country. The Long Parliament (after eleven years of no Parliament) met on Nov. 3, 1640. Lilburn was on the spot",

that day with his petition for redress. In March 1641, a bill was introduced to abolish the Court of Star Chamber, as well as (then or shortly after) a bill",

to abolish the Court of High Commission for Ecclesiastical Causes. These were both passed July 2-5 of the same year, and in the latter statute was",

inserted a clause which forever forbade, for any ecclesiastical court, the administration ex officio of any oath requiring answer as to matters penal.",

This clause was in substance reenacted as soon as the Restoration of the Stuarts was effected.,

But was the oath hereby totally abolished in ecclesiastical courts â?" that is, was it the â??ex officioâ? proceeding only that was abolished, and could",

a man still be put to answer in a penal matter, in a cause lying within the court's jurisdiction and begun by proper canonical presentment ?This",

question fairly remained open under the first statute, though less plausibly under the second one. During the next twenty years after the enactment of",

the second statute, the matter came often before the courts, in applications for prohibitions. The various rulings are hardly to be reconciled. But, by the",

end of the 1600s, professional opinion apparently settled against the exaction of an answer under any form of procedure, in matters of criminality or",

forfeiture. Such, at any rate, beginning with the 1700s, was the application of the law ever after, without question. The statutes had abolished, in those",

courts, all obligation to answer on oath to such matters, without regard to the form of presentment or accusation.",

II. [History of the principle in common law courts in jury trials.] But what, in the meantime, of the common law, and of jury trial? Thus far the",

controversy here examined had been purely one of ecclesiastical jurisdiction and ecclesiastical methods of presentment. The common law courts had,

concerned themselves with it simply by virtue of their superior authority to keep the church courts and other courts to their proper boundaries. In their,

enforcement of these restrictions, one thing seems plain: There is no feature of objection to the compulsion, in itself, on answering on oath; the",

objection is as to who shall require it, and how it shall be required. On the very eve of the statute of 16 Car. I, and of the disappearance of the Star",

Chamber forever, John Lilburn, the stoutest of recusants, is willing to answer all matters properly charged against him, and objects only to â??such",

things as do not belong unto me.â?He seems to have known no broader defensive principle to fall back upon, more substantial or inclusive than a",

conceded rule of ecclesiastical procedure. Was there in fact, at the time, any available principle known in the common law courts in jury trials?",

(I) [Before the seventeenth century.] Down to the early 1600s, at any rate, it was certainly lacking. If we look at what the common law had to build",

upon, before then, there is nothing of the sort. The generations which forced an accused to the ordeal and the compurgation oath had plainly no",

scruples against such compulsion. Compurgation, under its later name of â??wager of law,â? was enforced in the 1500s without objection. Jury trial",

came to be approved as a trial so much more effective that the defendant's oath in wager of law became, indeed, rather a privilege than a burden.",

In jury trial, to be sure, the oath was not administered to the defendant, because it would, in those days, still be regarded as a decisive thing, and as a",

method of summary self-exoneration which would be entirely too facile; it was the jurors's oaths that were to try him, not his own; and so, in",

jury trial proper, either in civil or in criminal cases, the oath of the party does not appear. But wherever, in other proceedings, it was thought",

appropriate to have the defendant's oath, there was no hesitation in requiring it. All through the 1500s the statute book records the sanction of",

oaths to accused persons. The Star Chamber statute of 1487 (3 Hen.VII, c. I) had expressly sanctioned the examination of the accused on oath at the",

trial, because "little or nothing may be found by inquiry of the ordinary sort. The statute of Hen. VIII, in 1533, authorized the common law",

officers to turn over indicted heretics for examination by the ordinaries upon oath. Wherever a party is committed to jail by the judges for fraud or,

other misconduct done in the course of trial, by forging writs or the like, he appears to have been put to his examination on oath to disclose it. Persons",

charged as bankrupts, as Jesuits, as abusers of warrants were to be examined on oath by common law officers. Most notably, every accused felon",

was required to be examined by the justices of the peace, and his examination to be preserved for the judges at the trial, and, so far as appears, not a",

murmur was ever heard against this process till the middle of the 1700s and no statutory measure was taken to caution the accused that his answer,

was not compellable until well on in the 1800s. The everyday procedure in the trials of the 1500s and the 1600s, and almost the first step in the trial,",

was to read to the jury this compulsory examination of the accused; in 1638, the year after Lilburn's imprisonment, in the very next recorded trial,",

the accused's previous examination before the Chief Justice was offered and read at the outset, without a shadow of objection. Furthermore, as",

the trial goes on, the accused, in all this period of 1500-1620, is questioned freely and judged by the judges to answer; he is not allowed to swear, for",

the reasons already noted, but he is pressed and bullied to answer. A striking example is found in the jury trial of Udall, in 1590, for seditious libel; and",

the significant circumstance is that Udall, who before the ecclesiastical High Commission Court, a few months previously, had plainly based his refusal",

on the illegality of making a man accuse himself by inquisition, has here, before a common law jury with witnesses charging him, no such claim to",

make: Udall's Trial, 1. How. St. Tr. 1271, 1275, 1289 (1590): Udall pleaded not guilty; and after argument made and witnesses testifying, Judge",

Clarke: "What say you? Did you make the book, Udall, yes or no? What say you to it, will you be sworn? Will you take your oath that you made it",

not declaring this to be a favor; Udall refused, and the judge finally asked: "Will you but say upon your honesty that you made it not? Udall",

again refused; Judge Clarke: "You of the jury consider this. This argueth that, if he were not guilty, he would clear himself"; then, to Udall:",

"Do not stand in it; but confess it. The same features appear still in 1606, in the Jesuit Garnet's trial for the Gunpowder Plot; called before",

the Council inquisitorially, he denies his liability to answer; but, tried on indictment before a common law jury and the chief common law judges, he is",

questioned and urged, he answers or refuses to answer, as it suits him, but says never a word of the illegality of such questions or an immunity from",

answer. And such indeed, beyond a reasonable doubt, was the common law, as well as the common practice, of the time.",

It is true that precedents apparently to the contrary have been alleged to exist " by Coke, for example, who invokes two common law cases to",

support his ambiguous and shifting arguments. But neither these, nor any others hinted at, indicate in any way the existence of any common law rule.",

Even Coke himself, whose writings have since served as the chief source of information on this subject, does not actually go so far as to apply his",

arguments to any effect but the limitation of the ecclesiastical courts' proceedings. He is willing to stop them from requiring answers "which,

may be an evidence against him at the common law upon the penal statute; but he says nothing about a common law illegality; indeed, this argument",

of his seems rather to assume the contrary. He freely quotes, in mutilated form, the canon law phrase (whose origin has been examined above)",

"nemo tenetur seipsum prodere"; but there is nothing to show, down to the end of his life, that he believed in or knew of any privilege of refusal in",

the king's common law proceedings.,

The only source of doubt that can be found arises from certain scantily reported chancery rulings of the late 1500s. Some of these, at first sight, might",

be supposed to indicate the existence, as early as Elizabeth's reign, of a general privilege against self-incriminating. Other explanations, however",

lie open with fair plainness. In the first place, it is a long-established maxim of jurisdiction that equity will not lend its aid, even by relief, apart from",
discovery, to enforce a forfeiture; on this ground (and remembering that an answer in chancery is a pleading as well as testimony) are",
explainable the cases refusing to compel an answer as to a forfeiture. In the next place, the Chancellor had almost no jurisdiction over criminal",
charges, hence, in cases of this nature, cognizance might be declined by refusing to compel an answer. But, where this jurisdiction was not disputable",
there seems to have been no objection to compelling the answer. Finally, the chancery practice is to be interpreted by the rules of the ecclesiastical",
courts, already examined. The Chancellor was forming his procedure (hardly organized until Bacon's time, in the early 1600s) almost precisely",
after that of the ecclesiastical courts. So far as he could take cognizance at all of a case involving a criminal fact, he would of course employ this",
ecclesiastical rule, as he did others, and not require the defendant to answer without due accusation by two witnesses or by presentment; that is to",
say, a plaintiff, upon his unsworn bill alone, could not put the defendant to answer to a criminal fact. The close affinity between the Chancellor's",
and the church's courts makes it plain that we need not look to the former for light upon the common law notions of the time-especially when that,
practice stands out plainly in the full and abundant reports throughout this whole period.,

(2) [The early 1600s.] For nearly a generation onwards, in the 1600s. there is no acknowledgment of any privilege in common law trials. Under",
Coke's leadership, from 1607 to 1616, the ecclesiastical courts had been kept within bounds; but here were as yet no bounds in common law",
proceedings. With 1620 begin indications ;that some impression was being transferred into that department. Nevertheless, in the parliamentary",
remonstrances to Charles I, and the discussion over ship money and forced loans and the Petition of Right, in the Parliament which ended in 1629",
there is nothing about such a privilege.,

(3) [The recognition of the privilege in the middle 1600s.] Finally, however, in 1637-41, comes Lilburn's notorious agitation; and in 1641, with a",
rush, the Courts of Star Chamber and of High Commission are abolished, and the ex officio oath to answer criminal charges is swept away with",

them. With all this stir and emotion, a decided effect is produced and is immediately communicated, naturally enough, to the common law courts. Up to",
 the last moment, Lilburn had never claimed the right to refuse absolutely to answer an incriminating question; he had merely claimed a proper",
 proceeding of presentment or accusation. But now this once vital distinction comes to be ignored. It begins to be claimed, flatly, that no man is bound",
 to incriminate himself on any charge (no matter how properly instituted) or in any court (not merely in the ecclesiastical or Star Chamber tribunals).
 Then this claim comes to be conceded by the judges â?" first in criminal trials, and even on occasions of great partisan excitement; and afterwards, in",
 the Protectorâ??s time, in civil cases, though not without ambiguity and hesitation. By the end of Charles IIâ??s reign, under the Restoration, there",
 is no longer any doubt, in any court; and by this period, the extension of the privilege to include an ordinary witness, and not merely the party charged,"
 is for the first time made. It is interesting to note, in passing, that the privilege, thus established, comes into full recognition under the judges of the",
 restored Stuarts, and not under the parliamentary reformers. Moreover, the privilege as yet, until well on into the time of the English Revolution,"
 remained not much more than a bare rule of law, which the judges would recognize on demand. The spirit of it was wanting in them. The old habit of",
 questioning and urging the accused died hard â?" did not disappear, indeed until the 1700s had begun. So the interesting question is, How did this result",
 come about? How did a movement which was directed, originally and throughout, against a method of procedure in ecclesiastical courts, produce in its",
 ultimate effect a rule against a certain kind of testimony in common law courts? The process of thought, popular and professional, is to be accounted",
 for. Now, for our history of legal ideas we do not ordinarily expect to go to Bentham. But he was the first to search into this history, and to maintain",
 that this common law privilege did not antedate the Restoration; and, in this instance, his explanation of the process of thought by which the",
 transmutation took place seems fairly to represent the probabilities. That explanation (as indeed the foregoing details exhibit) lies in the principle of the,
 association of ideas â?" an association which began to operate immediately in the reactionary period of the Restoration and the Revolution, when the",
 growth and ascendancy of Whig principles involved all the Stuart practices in one

indiscriminate and radical condemnation. Read in the light of the, foregoing details, the great reformer's words serve as a correct analysis of motives: "The privilege, thus creeping in by", indirection, appears by no means to have been regarded in England as the constitutional landmark that the later American legislation has made it. In all, the parliamentary remonstrances and petitions and declaration that preceded the expulsion of the Stuarts, it does not anywhere appear. Even by 1689, when the courts had for a decade ceased to question it, and at the English Revolution the fundamental victories of the past two generations, struggle were ratified by William in the Bill of Rights, this doctrine is totally lacking. Whatever it was worth to the American constitution-makers of 1789, it was not worth mentioning to the English constitution-menders of 1689."

(4) [The appearance of the privilege in the American Bill of Rights.] How then did it come to make its appearance in the constitutional discussions and, the Bill of Rights to 1787-89?

The novelty and recentness of it all in common law tradition is apparent not only in the very gradual progress of the recognition in criminal trials after, 1641 but also in the fact that it remained an unknown doctrine for that whole generation in the colony of Massachusetts "a colony not only familiar, enough with common legal proceedings, but knowing enough to send over for Sir Edward Coke's reports and other lawbooks to inform its court", and keep abreast of the times. In this colony the privilege (which had begun its career in England after the departure of its founders from England), was unrecognized till at least as late as 1685: more, they formally sanctioned the ecclesiastical rule by which the inquisitional oath was allowed."

It might be supposed that the explanation of the Colonial conventions' insistence on it in the 1780s was to be found in the agitation then going on in, France against the inquisitional feature of the Ordonnance of 1670. There appears no allusion, in Elliot's Debates on the Constitution, to the, contemporary French movement: but the delegates who had been over there must have known of it. The proposals of reforms laid before the French, Constitutional Assembly from the Provinces, in 1787, show how strong was the popular agitation. The Third Estate in every district, in their, cahiers sent up to Paris, had voted to abolish compulsory sworn interrogation of the accused, and the clergy in ninety-one districts had done the,

same. The decree of 1789 (though keeping the interrogation) abolished the oath
â??de veritateâ?; art. 12: â??For this interrogatory, and for all others,"

the oath shall not be required from the accusedâ?; and the Instructions of 1791
added: â??Mere good sense suffices to convince of the uselessness,

and immorality of such an oathâ??.

But an examination of the contemporary French literature shows that this was
not the correct explanation, and that the process of inspiration was in",

fact just the reverse, i.e., from the American example to the French legislation.
The Colonies had had their own experiences with highhanded",

prerogative courts. In the course of time they had developed the privilege in
their own history, fortified no doubt by the legal learning brought back by",

the Colonial lawyers who had gone over to the Inns of Court for their education.
So the proposals agitated in France in the 1780s were based explicitly,

on an acquaintance with the constitution of the prior decade in the new American
states:,

PITMAN, *The Colonial and Constitutional History of the Privilege Against Self-
crimination in America*, 21 Va. L. Rev 763, 764-66, 783 (1935): [T]",

his privilege had been inserted in the constitutions or bills of right of seven [765]
American States before 1789; namely, Virginia (June 1776),"

Pennsylvania (Sep. 1776), Maryland (Nov, 1776), North Carolina (Dec. 1776)
Vermont (July 1777), Massachusetts (Mar. 1780), and New Hampshire",

(1784).,

French editions of these American constitutions were published in Paris as fast as
they came from the separate State conventions. [Franklin writes,

(May 1777) â??They (the French) read the translations of our separate colony
constitutions with rapture,â?] The demand for them became so great",

that Franklin was induced to get out an official edition of all the American
constitutions in 1783. Sir Samuel Romilly, upon visiting the American Envoy",

in Paris, while these constitutions were being distributed by the thousands,
expressed surprise that they were not suppressed by the government, and",

observed that they â??certainly produced a very great sensation at Paris, the
effects of which were probably felt many years afterwards.â? In fact,"

the greater part of those who were demanding a Declaration of Rights in 1789
had â??imbibed their principles in America.â? [La Fayette heard Gen.,

Greene extend the privilege to Major Andre in 1780.] Nowhere was this American

influence testified to more strongly than upon the floor of the, National Convention. For example, in August 1789, Rabaut de Saint Etienne, speaking from the floor said: "You have resolved upon a Declaration", of Rights because your Cashiers impose it as your duty, and your Cahiers mentioned it because France has had America as its model. The records", of those Assembly debates reveal conclusive evidence of the fact that the stream of influence was running towards France and not towards America, at this time.,

If we attempt to ascribe the influence upon America to the writings of the French political philosophers, we are faced with [766] the fact that those", who cried loudest against the inquisitional feature of the Ordinance of 1670, such as Voltaire and Montesquieu, had all made their studies on this", question in England. So the facts drive us to seek other grounds of explanation. . . . [783] The real reason for the American insistence that the, privilege against self-incrimination be made a constitutional privilege may possibly be traced to the proceedings of the prerogative courts of Governor, and Council, which constituted the Supreme colonial courts, and the proceedings instituted to enforce the laws of trade in the colonies."

51. The Supreme Court in *re: Selvi* (supra) would examine the historical origins of the "right against self-incrimination" which perhaps is required, to be reiterated and thus the following paragraphs from the rendition of the Supreme Court is quoted herein below:-,

"92. The right of refusal to answer questions that may incriminate a person is a procedural safeguard which has gradually evolved in common law, and bears a close relation to the "right to fair trial". There are competing versions about the historical origins of this concept. Some scholars have, identified the origins of this right in the medieval period. In that account, it was a response to the procedure followed by English judicial bodies such as", the Star Chamber and the High Commissions which required the defendants and suspects to take ex officio oaths. These bodies mainly decided cases, involving religious non-conformism in a Protestant dominated society, as well as offences like treason and sedition. Under an ex officio oath the", defendant was required to answer all questions posed by the Judges and prosecutors during the trial and the failure to do so would attract punishments, that often involved physical torture. It was the resistance to this practice of

compelling the accused to speak which led to demands for a "right to, silence",

93. In an academic commentary, Leonard Levy (1969) had pointed out that the doctrinal origins of the right against self-incrimination could be traced", back to the Latin maxim *nemo tenetur seipsum prodere* (i.e. no one is bound to accuse himself) and the evolution of the concept of "due process of, law" enumerated in the Magna Carta. [Refer Leonard Levy, "The Right against Self-Incrimination: History and Judicial History" [84(1) Political", Science Quarterly 1-29 (March 1969)] .],

94. The use of the ex officio oath by the ecclesiastical courts in medieval England had come under criticism from time to time, and the most prominent", cause for discontentment came with its use in the Star Chamber and the High Commissions. Most scholarship has focussed on the sedition trial of, John Lilburne (a vocal critic of Charles I, the then monarch) in 1637, when he refused to answer questions put to him on the ground that he had not", been informed of the contents of the written complaint against him. John Lilburne went on to vehemently oppose the use of ex officio oaths, and the", Parliament of the time relented by abolishing the Star Chamber and the High Commission in 1641. This event is regarded as an important landmark in, the evolution of the "right to silence",

95. However, in 1648 a Special Committee of Parliament conducted an investigation into the loyalty of Members whose opinions were offensive to the", army leaders. The Committee's inquisitorial conduct and its requirement that witnesses take an oath to tell the truth provoked opponents to condemn, what they regarded as a revival of the Star Chamber tactics. John Lilburne was once again tried for treason before this Committee, this time for his", outspoken criticism of the leaders who had prevailed in the struggle between the supporters of the monarch and those of Parliament in the English, Civil War. John Lilburne invoked the spirit of the Magna Carta as well as the 1628 Petition of Right to argue that even after common law indictment, and without oath, he did not have to answer questions against or concerning himself. He drew a connection between the right against self-", incrimination and the guarantee of a fair trial by invoking the idea of "due process of law" which had been stated in the Magna Carta.,

96. John H. Langbein (1994) has offered more historical insights into the

emergence of the "right to silence". [John H. Langbein, "The", Historical Origins of the Privilege against Self-Incrimination at Common Law? [92(5) Michigan Law Review 1047-1085 (March 1994)] .] He draws, attention to the fact that even though ex officio oaths were abolished in 1641, the practice of requiring the defendants to present their own defence in, criminal proceedings continued for a long time thereafter.,

97. The Star Chamber and the High Commissions had mostly tried cases involving religious non-conformists and political dissenters, thereby attracting, considerable criticism. Even after their abolition, the defendants in criminal courts did not have the right to be represented by a lawyer ("right to", counsel?) or the right to request the presence of the defence witnesses ("right of compulsory process"). Hence, the defendants were more or", less compelled to testify on their own behalf. Even though the threat of physical torture on account of remaining silent had been removed, the", defendant would face a high risk of conviction if he/she did not respond to the charges by answering the material questions posed by the Judge and the, prosecutor. In presenting his/her own defence during the trial, there was a strong likelihood that the contents of such testimony could strengthen the", case of the prosecution and lead to conviction.,

98. With the passage of time, the right of a criminal defendant to be represented by a lawyer eventually emerged in the common law tradition. A", watershed in this regard was the Treason Act of 1695 (c. 3) which provided for a "right to counsel" as well as "compulsory process" in, cases involving offences such as treason. Gradually, the right to be defended by a counsel was extended to more offences, but the role of the counsel", was limited in the early years. For instance the defence lawyers could only help their clients with questions of law and could not make submissions, related to the facts.,

99. The practice of requiring the accused persons to narrate or contest the facts on their own corresponds to a prominent feature of an inquisitorial, system i.e. the testimony of the accused is viewed as the "best evidence" that can be gathered. The premise behind this is that innocent persons, should not be reluctant to testify on their own behalf. This approach was followed in the inquisitional procedure of the ecclesiastical courts and had, thus been followed in other courts as well. The obvious problem with compelling

the accused to testify on his own behalf is that an ordinary person, lacks the legal training to effectively respond to suggestive and misleading questioning, which could come from the prosecutor or the Judge.", Furthermore, even an innocent person is at an inherent disadvantage in an environment where there may be unintentional irregularities in the testimony. Most importantly the burden of proving innocence by refuting the charges was placed on the defendant himself. In the present day, the inquisitorial conception of the defendant being the best source of evidence has long been displaced with the evolution of adversarial procedure in the common law tradition.,

100. Criminal defendants have been given protections such as the presumption of innocence, right to counsel, the right to be informed of charges, the right of compulsory process and the standard of proving guilt beyond reasonable doubt among others. It can hence be stated that it was only with the subsequent emergence of the "right to counsel" that the accused's "right to silence" became meaningful. With the consolidation of the role of the defence lawyers in criminal trials, a clear segregation emerged between the testimonial function performed by the accused and the defensive function performed by the lawyer. This segregation between the testimonial and defensive functions is now accepted as an essential feature of a fair trial so as to ensure a level playing field between the prosecution and the defence. In addition to a defendant's "right to silence" during the trial stage, the protections were extended to the stage of pre-trial inquiry as well. With the enactment of the Sir John Jervis Act of 1848, provisions were made to advise the accused that he might decline to answer questions put to him in the pre-trial inquiry and to caution him that his answers to pre-trial interrogation might be used as evidence against him during the trial stage.â??,

52. In England the principle of protection against self-incrimination seem to be the result of an systematic development of law through a long period of progressive revulsion against the inquisitorial methods adopted and the barbarous sentences imposed by the Ecclesiastical Court and ultimately, resulting in the abolition of the Court of Star Chamber after the final revolt by John Lilburn (3 State Trials 1315) resulting in the firm recognition of the principle that the accused should not be put on oath and that no evidence should be taken from him. The Lilburn trial dates back to the year 1637 and,

the abolition of the Court of the Star Chamber in the year 1641.,

53. Wigmore on Evidence, (Tillers revision, 1983) Volume VIII (S.2263 at page 362-363 states:-",

2263. General Principle. In the interpretation of the principle, nothing turns upon the variations of wording in the constitutional clauses; this much is",

now conceded (2252 supra). It is therefore immaterial that the witness is protected by one constitution from "testifying," or by another from",

"furnishing evidence," or by another from "giving evidence," or by still another from "being a witness." These various phrasings have a",

common conception, in respect to the form of the protected disclosure. What is that conception?",

Does it apply only (1) to self-incriminating disclosures which are testimonial (i.e. communicative, or assertive) in nature? Or (2) to self-incriminating",

disclosures which, whether or not testimonial, involve cooperative participation by the witness? Or (3) to all evidence obtained from a witness which",

incriminates him, whether or not his cooperation is involved?",

It should be agreed, at least, that evidence satisfying only the third description "evidence obtained from a witness without compelling his",

cooperation, testimonial or otherwise, is not within the privilege, E.g, viewing, measuring, placing a hat on and even moving a limb of the relaxed body",

of the individual do not offend the policies of the privilege (2251 supra) and are not the sort of things which historically gave rise to the privilege (2250,

supra). There is an understandable difference of opinion, however, as to whether it is the first or the more inclusive second description which correctly",

circumscribes the form of disclosure protected. Compare, e.g. (1) requiring the witness to make a verbal communication of an incriminating fact",

(testimonial cooperation), with (2) requiring him to write a sample of his handwriting for comparison purposes (nontestimonial cooperation).",

The history of the privilege (2250 supra) "especially the spirit of the struggle by which its establishment came about " suggests that the privilege,

is limited to testimonial disclosures. It was directed at the employment of legal process to extract from the person's own lips an admission of guilt",

which would thus take the place of other evidence. That is, it was intended to prevent the use of legal compulsion to extract from the person a sworn",

communication of his knowledge of facts which would incriminate him. Such was

the process of the ecclesiastical court, as opposed through two",
centuries â?" the inquisitorial method of putting the accused upon his oath in
order to supply the lack of required two witnesses. Such was the,
complaint of Lilburn and his fellow objectors, that he ought to be convicted by
other evidence and not by his own forced confession upon oath.",
Such, too, is the main thrust of the policies of the privilege (2251 supra). While
the policies admittedly apply to some extent to nontestimonial",
cooperation, it is in testimonial disclosures only that the oath and private
thoughts and beliefs of the individual â?" and therefore the fundamental",
sentiments supporting the privilege â?" are involved. In other words, it is not
merely any and every compulsion that is the kernel of the privilege, in",
history and in the constitutional definitions, but testimonial compulsion. The
latter idea is as essential as the former.â??",

54. The doctrinal origins of the right against self-incrimination is traced back to
the latin maxim â??nemo tenetur seipsum prodereâ??,

(i.e. no one is bound to accused himself) and the evolution of the concept of â??
due process of lawâ?? enumerated in the Magna Carta.,

55. The Supreme Court in re: Selvi (supra) would underline the rationale of the
right against self-incrimination and hold:-,

â??Underlying rationale of the right against self-incrimination,

102. As mentioned earlier â??the right against self-incriminationâ? is now viewed
as an essential safeguard in criminal procedure. Its underlying,

rationale broadly corresponds with two objectivesâ?"firstly, that of ensuring
reliability of the statements made by an accused, and secondly, ensuring",

that such statements are made voluntarily. It is quite possible that a person
suspected or accused of a crime may have been compelled to testify,

through methods involving coercion, threats or inducements during the
investigative stage. When a person is compelled to testify on his/her own behalf,"

there is a higher likelihood of such testimony being false. False testimony is
undesirable since it impedes the integrity of the trial and the subsequent,

verdict. Therefore, the purpose of the â??rule against involuntary confessionsâ?
is to ensure that the testimony considered during trial is reliable. The",

premise is that involuntary statements are more likely to mislead the Judge and
the prosecutor, thereby resulting in a miscarriage of justice. Even",

during the investigative stage, false statements are likely to cause delays and

obstructions in the investigation efforts.",

103. The concerns about the "voluntariness" of statements allow a more comprehensive account of this right. If involuntary statements were, readily given weightage during trial, the investigators would have a strong incentive to compel such statements "often through methods involving", coercion, threats, inducement or deception. Even if such involuntary statements are proved to be true, the law should not incentivise the use of", interrogation tactics that violate the dignity and bodily integrity of the person being examined. In this sense, "the right against self-incrimination" is", a vital safeguard against torture and other "third-degree methods" that could be used to elicit information. It serves as a check on police behaviour, during the course of investigation. The exclusion of compelled testimony is important otherwise the investigators will be more inclined to extract, information through such compulsion as a matter of course. The frequent reliance on such "short cuts" will compromise the diligence required for, conducting meaningful investigations. During the trial stage, the onus is on the prosecution to prove the charges levelled against the defendant and the", "right against self-incrimination" is a vital protection to ensure that the prosecution discharges the said onus."

56. In re: State of Bombay v. Kathi Kalu Oghad AIR 1961 SC 1808 the Supreme Court would hold:-,

"11. The matter may be looked at from another point of view. The giving of finger impression or of specimen signature or of handwriting, strictly", speaking, is not "to be a witness". "To be a witness" means imparting knowledge in respect of relevant facts, by means of oral statements or", statements in writing, by a person who has personal knowledge of the facts to be communicated to a court or to a person holding an enquiry or", investigation. A person is said "to be a witness" to a certain state of facts which has to be determined by a court or authority authorised to come, to a decision, by testifying to what he has seen, or something he has heard which is capable of being heard and is not hit by the rule excluding hearsay", or giving his opinion, as an expert, in respect of matters in controversy. Evidence has been classified by text writers into three categories, namely, (1)", oral testimony; (2) evidence furnished by documents; and (3) material evidence. We have already indicated that we are in agreement with the Full,

Court decision in Sharma case [(1954) SCR 1077] that the prohibition in clause (3) of Article 20 covers not only oral testimony given by a person, accused of an offence but also his written statements which may have a bearing on the controversy with reference to the charge against him. The, accused may have documentary evidence in his possession which may throw some light on the controversy. If it is a document which is not his, statement conveying his personal knowledge relating to the charge against him, he may be called upon by the court to produce that document in", accordance with the provisions of Section 139 of the Evidence Act, which, in terms, provides that a person may be summoned to produce a document", in his possession or power and that he does not become a witness by the mere fact that he has produced it; and therefore, he cannot be cross-", examined. Of course, he can be cross-examined if he is called as a witness who has made statements conveying his personal knowledge by reference", to the contents of the document or if he has given his statements in court otherwise than by reference to the contents of the documents. In our opinion,", therefore, the observations of this court in Sharma case [(1954) SCR 1077] that Section 139 of the Evidence Act has no bearing on the connotation of", the word "witness" is not entirely well-founded in law. It is well established that clause (3) of Article 20 is directed against self-incrimination by, an accused person. Self-incrimination must mean conveying information based upon the personal knowledge of the person giving the information and, cannot include merely the mechanical process of producing documents in court which may throw a light on any of the points in controversy, but which", do not contain any statement of the accused based on his personal knowledge. For example, the accused person may be in possession of a document", which is in his writing or which contains his signature or his thumb impression. The production of such a document, with a view to comparison of the", writing or the signature or the impression, is not the statement of an accused person, which can be said to be of the nature of a personal testimony.", When an accused person is called upon by the court or any other authority holding an investigation to give his finger impression or signature or a, specimen of his handwriting, he is not giving any testimony of the nature of a "personal testimony". The giving of a "personal testimony" must", depend upon his volition. He can make any kind of statement or may refuse to make any statement. But his finger impressions or his handwriting, in",

spite of efforts at concealing the true nature of it by dissimulation cannot change their intrinsic character. Thus, the giving of finger impressions or of",
specimen writing or of signatures by an accused person, though it may amount to furnishing evidence in the larger sense, is not included within the",
expression "to be a witness".,

12. In order that a testimony by an accused person may be said to have been self-incriminatory, the compulsion of which comes within the prohibition",
of the constitutional provision, it must be of such a character that by itself it should have the tendency of incriminating the accused, if not also of",
actually doing so. In other words, it should be a statement which makes the case against the accused person at least probable, considered by itself. A",
specimen handwriting or signature or finger impressions by themselves are no testimony at all, being wholly innocuous because they are unchangeable",
except in rare cases where the ridges of the fingers or the style of writing have been tampered with. They are only materials for comparison in order,
to lend assurance to the Court that its inference based on other pieces of evidence is reliable. They are neither oral nor documentary evidence but,
belong to the third category of material evidence which is outside the limit of "testimony".,

15. In order to bring the evidence within the inhibitions of clause (3) of Article 20 it must be shown not only that the person making the statement was,
an accused at the time he made it and that it had a material bearing on the criminality of the maker of the statement, but also that he was compelled to",
make that statement. "Compulsion" in the context, must mean what in law is called "duress". In the Dictionary of English Law by Earl Jowitt",
"duress" is explained as follows:,

"Duress is where a man is compelled to do an act by injury, beating or unlawful imprisonment (sometimes called duress in strict sense) or by the",
threat of being killed, suffering some grievous bodily harm, or being unlawfully imprisoned (sometimes called menace, or duress per mines). Duress",
also includes threatening, beating or imprisonment of the wife, parent or child of a person. The compulsion in this sense is a physical objective act",
and not the state of mind of the person making the statement, except where the mind has been so conditioned by some extraneous process as to",
render the making of the statement involuntary and, therefore extorted. Hence,

the mere asking by a police officer investigating a crime against a",
certain individual to do a certain thing is not compulsion within the meaning of
Article 20(3). Hence, the mere fact that the accused person, when he",
made the statement in question was in police custody would not, by itself, be the
foundation for an inference of law that the accused was compelled to",
make the statement. Of course, it is open to an accused person to show that
while he was in police custody at the relevant time, he was subjected to",
treatment which, in the circumstances of the case, would lend itself to the
inference that compulsion was in fact exercised. In other words, it will be a",
question of fact in each case to be determined by the court on weighing the facts
and circumstances disclosed in the evidence before it.,

16. In view of these considerations, we have come to the following conclusions:",

(1) An accused person cannot be said to have been compelled to be a witness
against himself simply because he made a statement while in police,

custody, without anything more. In other words, the mere fact of being in police
custody at the time when the statement in question was made would",

not, by itself, as a proposition of law, lend itself to the inference that the accused
was compelled to make the statement, though that fact, in conjunction",

with other circumstances disclosed in evidence in a particular case, would be a
relevant consideration in an enquiry whether or not the accused person",

had been compelled to make the impugned statement.,

(2) The mere questioning of an accused person by a police officer, resulting in a
voluntary statement, which may ultimately turn out to be",

incriminatory, is not "compulsion".,

(3) "To be a witness" is not equivalent to "furnishing evidence" in its
widest significance; that is to say, as including not merely making of oral",

or written statements but also production of documents or giving materials which
may be relevant at a trial to determine the guilt or innocence of the,

accused.,

(4) Giving thumb impressions or impressions of foot or palm or fingers or
specimen writings or showing parts of the body by way of identification are,

not included in the expression "to be a witness".,

(5) "To be a witness" means imparting knowledge in respect of relevant facts
by an oral statement or a statement in writing, made or given in",

court or otherwise.,

(6) "To be a witness" in its ordinary grammatical sense means giving oral testimony in court. Case law has gone beyond this strict literal,

interpretation of the expression which may now bear a wider meaning, namely, bearing testimony in court or out of court by a person accused of an",

offence, orally or in writing.",

(7) To bring the statement in question within the prohibition of Article 20(3), the person accused must have stood in the character of an accused",

person at the time he made the statement. It is not enough that he should become an accused, any time after the statement has been made.",

(Emphasis supplied),

57. In re: Nandini Satpathy v. P.L. Dani(1978) 2 SCC 424, the Supreme Court speaking through Krishna Iyer J. would hold:-",

"57. We hold that Section 161 enables the police to examine the accused during investigation. The prohibitive sweep of Article 20(3) goes back to,

the stage of police interrogation " not, as contended, commencing in court only. In our judgment, the provisions of Article 20(3) and Section 161(1)",

substantially cover the same area, so far as police investigations are concerned. The ban on self-accusation and the right to silence, while one",

investigation or trial is under way, goes beyond that case and protects the accused in regard to other offences pending or imminent, which may deter",

him from voluntary disclosure of criminatory matter. We are disposed to read " compelled testimony" as evidence procured not merely by physical,

threats or violence but by psychic torture, atmospheric pressure, environmental coercion, tiring interrogative prolixity, overbearing and intimidatory",

methods and the like " not legal penalty for violation. So, the legal perils following upon refusal to answer, or answer truthfully, cannot be regarded",

as compulsion within the meaning of Article 20(3). The prospect of prosecution may lead to legal tension in the exercise of a constitutional right, but",

then, a stance of silence is running a calculated risk. On the other hand, if there is any mode of pressure, subtle or crude, mental or physical, direct or",

indirect, but sufficiently substantial, applied by the policeman for obtaining information from an accused strongly suggestive of guilt, it becomes",

"compelled testimony", violative of Article 20(3).",

58. A police officer is clearly a person in authority. Insistence on answering is a

form of pressure especially in the atmosphere of the police station, unless certain safeguards erasing duress are adhered to. Frequent threats of prosecution if there is failure to answer may take on the complexion of, undue pressure violating Article 20(3). Legal penalty may by itself not amount to duress but the manner of mentioning it to the victim of interrogation, may introduce an element of tension and tone of command perilously hovering near compulsion.â??,

58. In re: Selvi (supra) the Supreme Court would have occasion to examine the question whether the involuntary administration of Narcoanalysis", polygraph test (lie-detector test) and BEAP (Brain Electrical Activation Profile) test violates the â??right against self- incriminationâ? enumerated in,

Article 20 (3) of the Constitution. While doing so the Supreme Court would hold:-, â??88. In the Indian context, Article 20(3) should be construed with due regard for the interrelationship between rights, since this approach was",

recognised in Maneka Gandhi case [Maneka Gandhi v. Union of India, (1978) 1 SCC 248 : AIR 1978 SC 597] . Hence, we must examine the",

â??right against self-incriminationâ?? in respect of its relationship with the multiple dimensions of â??personal libertyâ?? under Article 21, which include", guarantees such as the â??right to fair trialâ?? and â??substantive due processâ??.,

89. It must also be emphasised that Articles 20 and 21 have a non-derogable status within Part III of our Constitution because the Constitution,

(Fourty-fourth Amendment) Act, 1978 mandated that the right to move any court for the enforcement of these rights cannot be suspended even during",

the operation of a Proclamation of Emergency. In this regard, Article 359(1) of the Constitution of India reads as follows:",

â??359. Suspension of the enforcement of the rights conferred by Part III during Emergencies.â?"(1) Where a Proclamation of Emergency is in,

operation, the President may by order declare that the right to move any court for the enforcement of such of the rights conferred by Part III (except",

Articles 20 and 21) as may be mentioned in the order and all proceedings pending in any court for the enforcement of the rights so mentioned shall,

remain suspended for the period during which the Proclamation is in force or for such shorter period as may be specified in the order.â??,

59. While examining the question what constitutes incrimination for the purpose

of Article 20 (3) of the Constitution of India the Supreme Court in re:
would hold :-,

¶133. We have already referred to the language of Section 161 CrPC which protects the accused as well as suspects and witnesses who are, examined during the course of investigation in a criminal case. It would also be useful to refer to Sections 162, 163 and 164 CrPC which lay down", procedural safeguards in respect of statements made by persons during the course of investigation.¶

60. In conclusion and in answer to the pivotal question posed the Supreme Court in re: Selvi (supra) would hold:-,

¶262. In our considered opinion, the compulsory administration of the impugned techniques violates the right against self-incrimination. This is", because the underlying rationale of the said right is to ensure the reliability as well as voluntariness of statements that are admitted as evidence. This, Court has recognised that the protective scope of Article 20(3) extends to the investigative stage in criminal cases and when read with Section 161(2), of the Code of Criminal Procedure, 1973 it protects accused persons, suspects as well as witnesses who are examined during an investigation. The", test results cannot be admitted in evidence if they have been obtained through the use of compulsion. Article 20(3) protects an individual's choice, between speaking and remaining silent, irrespective of whether the subsequent testimony proves to be inculpatory or exculpatory. Article 20(3) aims to", prevent the forcible conveyance of personal knowledge that is relevant to the facts in issue. The results obtained from each of the impugned, tests bear a testimonial character and they cannot be categorised as material evidence.¶

61. In re: Selvi (supra) the Supreme Court would hold that the compulsory administration of certain scientific techniques, namely narco-analysis", polygraph examination and the Brain Electrical Activation Profile (BEAP) bare a testimonial character and thereby triggers the protection of, Article 20(3) of the Constitution.,

62. In re: Mohd. Ajmal, Amir Kasab (supra) the Supreme Court would hold:-", ¶458. In light of the above discussion, we are in agreement with the submissions of Mr Subramaniam as formulated in paras 438.2. and 438.3.", (supra) of his summing up. We accept that the right against self-incrimination

under Article 20(3) does not exclude any voluntary statements made in, exercise of free will and volition. We also accept that the right against self-incrimination under Article 20(3) is fully incorporated in the provisions of, CrPC (Sections 161, 162, 163 and 164) and the Evidence Act, 1872, as manifestations of enforceable due process, and thus compliance with these", statutory provisions is also equal compliance with the constitutional guarantees.â??â??,

63. In re: R. Dineshkumar v. State(2015) 7 SCC 497, the Supreme Court while examining the provision of Section 132 of the Indian Evidence Act," 1872, would hold that the Supreme Court has held in re: Nandini Satpathy (supra) that the protection afforded by Section 161 (2) is wider than the", protection afforded by Article 20(3) of the Constitution in some respects and that terminological expansion apart, Section 161(2) Cr.P.C. is a", parliamentary gloss on the constitutional clause. The Supreme Court would hold that the rule against self-incrimination found expression in Indian law, much before the advent of the Constitution of India under Article 20(3) and a facet of such rule is seen in Section 161 Cr.P.C., 1898 which", corresponds to Section 161 Cr.P.C., 1973. It was held another facet of the rule against self-incrimination finds expression in Sections 25 and 26 and", the proviso to Section 132 of the Evidence Act, 1872 which existed on the statute book from 1872 i.e. for 78 years prior to the advent of the guarantee", under Article 20 of the Constitution of India.,

64. It is settled that in the Indian context, Article 20(3) should be construed with due regard for the interrelationship between rights. Hence, we are", required to examine the â??right against self-incriminationâ? in respect of its relationship with the multiple dimensions of â??personal libertyâ? under, Article 21, which include guarantees such as the â??right to fair trialâ? and â??substantive due processâ?. It has been made amply clear that", Articles 20 and 21 have a non-derogable status within Part III of the Constitution of India.,

65. Article 20(3) of the Constitution of India embodies the right against self-incrimination. It is a fundamental right. The privilege against self-, incrimination is said to be a fundamental canon of common-law jurisprudence and this principle characteristics features are:- (i) that the accused is, presumed to be innocent; (ii) that it is for the prosecution to establish his guilt,

and (iii) that the accused need not make any statement against his will.",

Article 20(3) of the Constitution of India mandates a fundamental guarantee that no person accused of any offence shall be compelled to be a witness, against himself. The prohibitive umbrella of Article 20(3) protects the accused back to the stage of police interrogation. A testimony by an accused, person may be said to have been self-incriminatory when the compulsion comes within the prohibition of the constitutional provision and it must be of, such a character that by itself it should have the tendency of incriminating the accused, if not also of actually doing so. As held by the Supreme Court",

the right against self-incrimination is now viewed as an essential safeguard in criminal procedure and its underlying rationale broadly corresponds with, two objectivesâ?" firstly, that of ensuring reliability of the statements made by an accused, and secondly, ensuring that such statements are made",

voluntarily. As has been well settled when a person is compelled to testify on his/her own behalf, there is a higher likelihood of such testimony being",

false which is undesirable since it impedes the integrity of the trial and the subsequent verdict. The purpose of the â??rule against involuntary, confessionsâ? is therefore to ensure that the testimony considered during trial is reliable and worthy of credence. It has been conclusively held that,

Article 20(3) of the Constitution of India protects an individual's choice between speaking and remaining silent, irrespective of whether the subsequent",

testimony proves to be inculpatory or exculpatory. Article 20(3) of the Constitution of India aims to prevent the forcible conveyance of personal, knowledge that is relevant to the facts in issue.,

66. The question, therefore, is would administration of oath to an accused, in the circumstances, make the confession testimonial?",

67. Three things are absolutely necessary to invoke Article 20(3) of the Constitution of India viz (i) An accused person; (ii) his being compelled to be a, witness and (iii) such compulsion being against himself.,

68. As held by the Supreme Court to be a â??witnessâ? means imparting knowledge in respect of relevant facts by an oral statement or a statement, in writing, made or given in court or otherwise. The phrase used in Article 20 (3) is â??to be a witnessâ? and not to â??appear as witnessâ?. It",

follows that the protection afforded to an accused in so far as it is related, to the phrase â??to be a witnessâ? is not merely in respect of testimonial",

compulsion in the Court room but may well extend to compelled testimony previously obtained from him. "To be a witness" in its ordinary, grammatical sense means giving oral testimony in court. It has been held and accepted that the case law has gone beyond this strict literal, interpretation of the expression which may now bear a wider meaning, namely, bearing testimony in court or out of court by a person accused of an offence, orally or in writing.",

69. A bare perusal of Article 20(3) of the Constitution of India makes it abundantly clear that compulsion to be a witness against himself is the sine-qua-non of the fundamental guarantee.,

"Compulsion" is an essential ingredient of Article 20 (3) of the Constitution of India and covers a confession not made voluntarily. To compel is to,

cause or bring about by force, threats or overwhelming pressure. As held by the Supreme Court in re: Kathi Kalu Oghad (supra) compulsion in the",

context of Article 20(3) of the Constitution of India means what in law is called "duress". As held by the Supreme Court in re: Nandini Satpathi,

(supra) "We are disposed to read "compelled testimony" as evidence procured not merely by physical threats or violence but by psychic,

torture, atmospheric pressure, environmental coercion, tiring interrogative prolixity, overbearing and intimidatory methods and the like "not legal",

penalty for violation. So, the legal perils following upon refusal to answer, or answer truthfully, cannot be regarded as compulsion within the meaning",

of Article 20(3)". As held by the Supreme Court in re: Selvi (supra) "When a person is compelled to testify on his/her own behalf, there is a",

higher likelihood of such testimony being false. False testimony is undesirable since it impedes the integrity of the trial and the subsequent verdict.,

Therefore, the purpose of the "rule against involuntary confessions" is to ensure that the testimony considered during trial is reliable. The premise",

is that involuntary statements are more likely to mislead the Judge and the prosecutor, thereby resulting in a miscarriage of justice. Even during the",

investigative stage, false statements are likely to cause delays and obstructions in the investigation efforts. In view of the aforesaid not administering",

oath on an accused person while recording his confession is a Constitutional mandate to be zealously protected under Article 20(3) of the Constitution,

of India. An accused person when brought before a Magistrate or appears before

a Magistrate to record a confession is required to explain to the, accused that he is not bound to make a confession and that, if he does so, any confession he may make may be used as evidence against him under", Section 164 Cr.P.C. It is, therefore, evident that the confession may be taken as evidence against the accused once made in compliance with Section", 164 Cr.P.C. We are of the view that whether the accused was compelled to be a witness against himself can only be a question of fact requiring, proof thereof. Compulsion, if proved would lead to a definite conclusion of violation of Article 20(3) of the Constitution of India. As held in re: Brijbasi", Lal Shrivastava (supra) administration of an oath to the accused by a person in authority before taking a statement is by itself a concealed threat. We, are of the view that threat in any form be it concealed or otherwise directly affect voluntariness of the confession and render the same inadmissible in, evidence.,

As pointed out by Mr. J. B. Pradhan, it is true that the object of criminal law process is to find out the truth and not to shield the accused from the", consequences of his wrong doings. However, it is equally true that the process of finding out the truth must be undertaken keeping paramount Article", 21 of the Constitution of India and the fundamental guarantee that no person shall be deprived of his life or personal liberty except in accordance to, procedure established by law. In no circumstances can it be said that administration of oath to an accused before recording a confession which is, prohibited by law and therefore illegal and unlawful (as we shall explain later) pursuant to which the confession is recorded was done by a procedure, established by law. We are, thus, of the view that administering oath to an accused violates Article 20(3) of the Constitution of India and accordingly", answer the first question in the affirmative.,

70. We shall now attempt to answer the first two questions referred by the Division bench of this Court vide order dated 03.07.2017. As the first two, questions referred are inter-related we shall seek to answer both together. The first two question seeking judicial determination are:-,

(i). Whether the confessional statement recorded under the provisions of Section 164 Cr.P.C on oath, is fatal or could it be still protected by the", provisions of Section 463 Cr.P.C and if so protected, then whether the judgment of the Division Bench of this Court reported in re: Arjun Rai (supra)",

is good law?,

(ii) Whether the mere administering of oath to an accused while recording his confessional statement keeping in mind sub-section (5) of section 164,

Cr.P.C, without anything more, lead to an inference that the confessional statement is not voluntary and thus in violation to the fundamental",

requirement of Section 164 Cr.P.C and thus fatal ?,

71. Section 164 Cr.P.C. reads thus: 164. Recording of confessions and statements.(1) Any Metropolitan Magistrate or Judicial Magistrate may,"

whether or not he has jurisdiction in the case, record any confession or statement made to him in the course of an investigation under this Chapter or",

under any other law for the time being in force, or at any time afterwards before the commencement of the inquiry or trial: Provided that any",

confession or statement made under this sub-section may also be recorded by audio-video electronic means in the presence of the advocate of the,

person accused of an offence: Provided further that no confession shall be recorded by a police officer on whom any power of a Magistrate has been,

conferred under any law for the time being in force.,

(2) The Magistrate shall, before recording any such confession, explain to the person making it that he is not bound to make a confession and that, if",

he does so, it may be used as evidence against him; and the Magistrate shall not record any such confession unless, upon questioning the person",

making it, he has reason to believe that it is being made voluntarily.",

(3) If at any time before the confession is recorded, the person appearing before the Magistrate states that he is not willing to make the confession,"

the Magistrate shall not authorise the detention of such person in police custody.,

(4) Any such confession shall be recorded in the manner provided in section 281 for recording the examination of an accused person and shall be,

signed by the person making the confession; and the Magistrate shall make a memorandum at the foot of such record to the following effect:-,

"I have explained to (name) that he is not bound to make a confession and that, if he does so, any confession he may make may be used as",

evidence against him and I believe that this confession was voluntarily made. It was taken in my presence and hearing, and was read over to the",

person making it and admitted by him to be correct, and it contains a full and true account of the statement made by him. (Signed) A. B. Magistrate"".",

(5) Any statement (other than a confession) made under sub-section (1) shall be recorded in such manner hereinafter provided for the recording of,

evidence as is, in the opinion of the Magistrate, best fitted to the circumstances of the case; and the Magistrate shall have power to administer oath to",

the person whose statement is so recorded.,

[5A)(a) In cases punishable under section 354, section 354A, section 354B, section 354C, Section 354D, sub-section (1) or sub-section (2) of section",

376, section 376B, section 376C, section 376D, section 376E, or section 509 of the Indian Penal Code (45 of 1860), the Judicial Magistrate shall record",

the statement of the person against whom such offence has been committed in the manner prescribed in sub-section (5), as soon as the commission of",

the offence is brought to the notice of the police: Provided that if the person making the statement is temporarily or permanently mentally or physically,

disabled, the Magistrate shall take the assistance of an interpreter or a special educator in recording the statement: Provided further that if the person",

making the statement is temporarily or permanently mentally or physically disabled, the statement made by the person, with the assistance of an",

interpreter or a special educator, shall be videographed;"

(b) A statement recorded under clause (a) of a person, who is temporarily or permanently mentally or physically disabled, shall be considered a",

statement in lieu of examination-in-chief, as specified in section 137 of the Indian Evidence Act, 1872 (1 of 1872) such that the maker of the statement",

can be cross-examined on such statement, without the need for recording the same at the time of trial.]",

(6) The Magistrate recording a confession or statement under this section shall forward it to the Magistrate by whom the case is to be inquired into or,

tried.â??â??,

72. In the oft cited and followed judgment of the Privy Council in re: Nazir Ahmad v. King EmperorAIR 1936 Privy Council 253 (2), it was held at",

page 588:-,

â??The matter to be considered and decided is one of plain principle and first importanceâ?"namely, is such oral evidence as that of the magistrate,"

Mr Vasisht, admissible? It was said for the respondent that it was admissible just because it had nothing to do with s. 164 or with any record. It was",

argued that it was admissible by virtue of ss. 17, 21, 24 and 26 of the Evidence

Act, 1872, just as much as it would be if deposed by a person other",

than a magistrate. It was also said, and with this argument their Lordships agree, that if the oral evidence was admissible then s. 91 of the Evidence",

Act requiring evidence in writing did not apply, because the matter would in such a case not be one which had to be reduced to writing. For the",

appellant, it was said that the magistrate was in a case very different from that of a private person, and that his case and his powers were dealt with",

and delimited by the Criminal Procedure Code, and that if this special Act dealing with the special subject-matter now in question set a limit to the",

powers of the magistrate the general Act could not be called in aid so to allow him to do something which he was unable to do, or was expressly or",

impliedly forbidden to do, by the special Act. The argument was that there was to be found by necessary implication in the Criminal Procedure Code a",

prohibition of that which was here attempted to be done: in other words that the magistrate must proceed under s. 164 or not at all. To this contention,

it was answered that there was no ground for reading the word "may" in s. 164 as meaning "must" on the principle described in *Julius v.*,

Lord Bishop of Oxford. There is no need to call in aid this rule of construction"well recognized in principle but much debated as to its application. It,

can hardly be doubted that a magistrate would not be obliged to record any confession made to him if, for example, it were that of a self-accusing",

madman, or for any other reason the magistrate thought it to be incredible or useless for the purposes of justice. Whether a magistrate records any",

confession is a matter of duty and discretion and not of obligation. The rule which applies is a different and not less well recognized rule"namely",

that where a power is given to do a certain thing in a certain way the thing must be done in that way or not at all. Other methods of performance are,

necessarily forbidden. This doctrine has often been applied to Courts"Taylor v. Taylor "and although the magistrate acting under this group of,

sections is not acting as a Court yet he is a judicial officer, and both as a matter of construction and of good sense there are strong reasons for",

applying the rule in question to s. 164.,

On the matter of construction ss. 164 and 364 must be looked at and construed together, and it would be an unnatural construction to hold that any",

other procedure was permitted than that which is laid down with such minute particularity in the sections themselves. Upon the construction adopted, by the Crown, the only effect of s. 164 is to allow evidence to be put in a form in which it can prove itself under ss. 74 and 80 of the Evidence Act.",

Their Lordships are satisfied that the scope and extent of the section is far other than this, and that it is a section conferring powers on magistrates", and delimiting them. It is also to be observed that, if the construction contended for by the Crown be correct, all the precautions and safeguards laid", down by ss. 164 and 364 would be of such trifling value as to be almost idle. Any magistrate of any rank could depose to a confession made by an, accused so long as it was not induced by a threat or promise, without affirmatively satisfying himself that it was made voluntarily and without showing", or reading to the accused any version of what he was supposed to have said or asking for the confession to be vouched by any signature. The range, of magisterial confessions would be so enlarged by this process that the provisions of s. 164 would almost inevitably be widely disregarded in the same, manner as they were disregarded in the present case.,

As a matter of good sense, the position of accused persons and the position of magistracy are both to be considered. An examination of the Code", shows how carefully and precisely defined is the procedure regulating what may be asked of, or done in the matter of examination of, accused", persons, and as to how the results are to be recorded and what use is to be made of such records. Nor is this surprising in a jurisdiction where it is not", permissible for an accused person to give evidence on oath. So with regard to the magistracy: it is for obvious reasons most undesirable that, magistrates and judges should be in the position of witnesses in so far as it can be avoided. Sometimes it cannot be avoided, as under s. 533; but", where matter can be made of record and therefore admissible as such there are the strongest reasons of policy for supposing that the Legislature, designed that it should be made available in that form and no other. In their Lordships' view, it would be particularly unfortunate if magistrates were", asked at all generally to act rather as police-officers than as judicial persons; to be by reason of their position freed from the disability that attaches to, police-officers under s. 162 of the Code; and to be at the same time freed, notwithstanding their position as magistrates, from any obligation to make",

records under s. 164. In the result they would indeed be relegated to the position of ordinary citizens as witnesses, and then would be required to",
 depose to matters transacted by them in their official capacity unregulated by any statutory rules of procedure or conduct whatever. Their Lordships,
 are, however, clearly of opinion that this unfortunate position cannot in future arise because, in their opinion, the effect of the statute is clearly to",
 prescribe the mode in which confessions are to be dealt with by magistrates when made during an investigation, and to render inadmissible any",
 attempt to deal with them in the method proposed in the present case. The evidence of Mr. Vasisht should therefore, in the opinion of their Lordships",
 have been rejected by the Court. The admission in evidence of Mr. Vasisht's memorandum, such as it was, is a minor point. It does not appear to have",
 been used by him merely to refresh his memory, but to have been put in as a document. This is of no great importance, because if the oral evidence",
 was allowed perhaps no more mischief was done by the admission of the memorandum; but it has always to be remembered that weight, or apparent",
 weight, is lent to oral testimony by a written version of it closely related in time to the events described, and it is an additional objection to the",
 proceedings under review that such a record as this should have been admitted in evidence.â??,

73. In re: Nazir Ahmed (supra) the Privy Council would lay down a fundamental rule of criminal jurisprudence following the dictum of in re: Taylor,
 (supra) that where a power is given to do a certain thing in a certain way the thing must be done in that way or not at all. Other methods of,
 performance are necessarily forbidden. The proposition of law stated first in re: Taylor (supra) and adopted later by the Judicial Committee in re: Nazir Ahmad (supra) has been followed by the Supreme Court in a series of judgments including Rao Shiv Bahadur Singh v. State of Vindhya,
 PradeshAIR 1954 SC 322, Singhara Singh (supra), Chandra Kishore Jha v. Mahavir Prasad(1999) 8 SCC 266, Dhananjaya Reddy v. State of",
 Karnataka(2001) 4 SCC 9, Gujarat Urja Vikas Nigam Ltd. V. Essar Power Ltd. (2008) 4 SCC 755 and State of Rajasthan v. Mohinuddin Jamal Alvi",
 & Anr. (2016) 12 SCC 608,

74. In re: Nazir Ahmed (supra) the Privy Council would also hold on examination of Section 164 of the old Cr.P.C. that it carefully and precisely,

defined a procedure regulating what may be asked for, or done in the matter of examination of, accused persons, and as to how the results are to be",

recorded and what use is to be made of such records. The Privy Council would also observe: "Nor is this surprising in a jurisdiction where it is not,

permissible for an accused person to give evidence on oath."

75. In re: Nazir Ahmed (supra) the Privy Council would also hold that it is for obvious reasons most undesirable that Magistrates and Judges should be,

in the position of witnesses in so far as it can be avoided but it cannot be avoided in cases falling under Section 533 (now section 463 Cr.P.C.),

76. In re: Sarwan Singh Rattan Singh v. State of Punjab AIR 1957 SC 637 the Supreme Court while examining the provisions of Section 164 of the old,

Cr.P.C. would hold:-,

"10. It is hardly necessary to emphasize that the act of recording confessions under Section 164 of the Code of Criminal Procedure is a very,

solemn act and, in discharging his duties under the said section, the Magistrate must take care to see that the requirements of sub-section (3) of",

Section 164 are fully satisfied. It would of course be necessary in every case to put the questions prescribed by the High Court circulars but the,

questions intended to be put under sub-section (3) of Section 164 should not be allowed to become a matter of a mere mechanical enquiry. No element,

of casualness should be allowed to creep in and the Magistrate should be fully satisfied that the confessional statement which the accused wants to,

make is in fact and in substance voluntary.,

Incidentally, we may invite the attention of the High Court of Punjab to the fact that the circulars issued by the High Court of Punjab in the matter of",

the procedure to be followed, and questions to be put to the accused, by Magistrates recording confessions under Section 164 may be revised and",

suitable amendments and additions made in the said circulars in the light of similar circulars issued by the High Courts of Uttar Pradesh, Bombay and",

Madras. The whole object of putting questions to an accused person who offers to confess is to obtain an assurance of the fact that the confession is,

not caused by any inducement, threat or promise having reference to the charge against the accused person as mentioned in Section 24 of the Indian",

Evidence Act. "..."

77. In re: Dara Singh (supra) the Supreme Court would have occasion to

examine the confessions recorded of various accused persons under section, 164 Cr.P.C. which was contested by the defence as being not voluntary. It was contested that the accused persons were produced before the, Magistrate from Police custody and remanded back to police custody. In so far as one accused was concerned it was contested that he was produced, from police custody and the other accused made a confession when he was on bail and in no case the Magistrate had assured the accused persons, that if they decline they would not be sent to police custody. In such fact situation the Supreme Court would hold thus:-,

â??64. The following principles emerge with regard to Section 164 Cr.P.C.:

- (i) The provisions of Section 164 CrPC must be complied with not only in form, but in essence.",
- (ii) Before proceeding to record the confessional statement, a searching enquiry must be made from the accused as to the custody from which he was", produced and the treatment he had been receiving in such custody in order to ensure that there is no scope for doubt of any sort of extraneous, influence proceeding from a source interested in the prosecution.,
- (iii) A Magistrate should ask the accused as to why he wants to make a statement which surely shall go against his interest in the trial.,
- (iv) The maker should be granted sufficient time for reflection.,
- (v) He should be assured of protection from any sort of apprehended torture or pressure from the police in case he declines to make a confessional, statement.,
- (vi) A judicial confession not given voluntarily is unreliable, more so, when such a confession is retracted, the conviction cannot be based on such", retracted judicial confession.,
- (vii) Non-compliance with Section 164 CrPC goes to the root of the Magistrate's jurisdiction to record the confession and renders the confession, unworthy of credence.,
- (viii) During the time of reflection, the accused should be completely out of police influence. The judicial officer, who is entrusted with the duty of", recording confession, must apply his judicial mind to ascertain and satisfy his conscience that the statement of the accused is not on account of any", extraneous influence on him.,

(ix) At the time of recording the statement of the accused, no police or police official shall be present in the open court.",

(x) Confession of a co-accused is a weak type of evidence.,

(xi) Usually the court requires some corroboration from the confessional statement before convicting the accused person on such a,

statement.â??â??,

78. In re: Shivappa v. State of Karnataka(1995) 2 SCC 76 the Supreme Court would observe:-,

â??6. â?|â?|â?|â?|.it is manifest that the said provisions emphasise an inquiry by the Magistrate to ascertain the voluntary nature of the confession.,

This inquiry appears to be the most significant and an important part of the duty of the Magistrate recording the confessional statement of an accused,

under Section 164 CrPC. The failure of the Magistrate to put such questions from which he could ascertain the voluntary nature of the confession,

detracts so materially from the evidentiary value of the confession of an accused that it would not be safe to act upon the sameâ?|â?|â?|.â??,

â??7. â?|â?|â?|. Moreover, the Magistrate must not only be satisfied as to the voluntary character of the statement, he should also make and leave",

such material on the record in proof of the compliance with the imperative requirements of the statutory provisions, as would satisfy the court that sits",

in judgment in the case, that the confessional statement was made by the accused voluntarily and the statutory provisions were strictly complied",

with.â??,

79. In re: Alope Nath Dutta v. State of West Bengal(2007) 12 SCC 230 the Supreme Court would hold:-,

â??Confession generally 87. Confession ordinarily is admissible in evidence. It is a relevant fact. It can be acted upon. Confession may under certain,

circumstances and subject to law laid down by the superior judiciary from time to time form the basis for conviction. It is, however, trite that for the",

said purpose the court has to satisfy itself in regard to: (i) voluntariness of the confession; (ii) truthfulness of the confession; (iii) corroboration. 104.,

Section 164, however, makes the confession before a Magistrate admissible in evidence. The manner in which such confession is to be recorded by",

the Magistrate is provided under Section 164 of the Code of Criminal Procedure. The said provision, inter alia, seeks to protect an accused from",

making a confession, which may include a confession before a Magistrate, still as may be under influence, threat or promise from a person in",

authority. It takes into its embrace the right of an accused flowing from Article 20(3) of the Constitution of India as also Article 21 thereof. Although,"

Section 164 provides for safeguards, the same cannot be said to be exhaustive in nature. The Magistrate putting the questions to an accused brought",

before him from police custody, should sometime, in our opinion, be more intrusive than what is required in law. (See Babubhai Udesinh Parmar v.",

State of Gujarat [(2006) 12 SCC 268 : (2007) 1 SCC (Cri) 702 : (2006) 12 Scale 385].)â??,

80. In re: Mohd. Jamiludin Nasir v. State of W.B. (2014) 7 SCC 443 the Supreme Court would hold:-,

â??21. Going by the prescriptions contained in Section 164 CrPC, what is to be ensured is that the confession is made voluntarily by the offender, that",

there was no external pressure particularly by the police, that the person concerned's mindset while making the confession was uninfluenced by any",

external factors, that he was fully conscious of what he was saying, that he was also fully aware that based on his statement there is every scope for",

suffering the conviction which may result in the imposition of extreme punishment of life imprisonment and even capital punishment of death, that prior",

to the time of the making of the confession he was in a free state of mind and was not in the midst of any persons who would have influenced his,

mind in any manner for making the confession, that the statement was made in the presence of the Judicial Magistrate and none else, that while",

making the confession there was no other person present other than the accused and the Magistrate concerned and that if he expressed his desire not,

to make the confession after appearing before the Magistrate, the Magistrate should ensure that he is not entrusted to police custody. All the above",

minute factors were required to be kept in mind while recording a confession made under Section 164 CrPC in order to ensure that the confession,

was recorded at the free will of the accused and was not influenced by any other factor. Therefore, while considering a confession so recorded and",

relied upon by the prosecution, the duty of the Sessions Judge is, therefore, to carefully analyse the confession keeping in mind the above factors and if",

while making such analysis the learned Sessions Judge develops any iota of

doubt about the confession so recorded, the same will have to be rejected",

at the very outset. It is, therefore, for the Sessions Judge to apply his mind before placing reliance upon the confessional statement made under",

Section 164 CrPC and convince itself that none of the above factors were either violated or given a go-by to reject the confession outright. Therefore,"

if the Sessions Judge has chosen to rely upon such a confession recorded under Section 164 CrPC, the appellate court as well as this Court while",

examining such a reliance placed upon for the purpose of conviction should see whether the perception of the courts below in having accepted the,

confession as having been made in its true spirit provides no scope for any doubt as to its veracity in making the statement by the accused concerned,

and only thereafter the contents of the confession can be examined.â??,

In India the privilege against self-incrimination appears in various relevant statutory provisions as stated above. The rule against self-incrimination,

seem to have found expression in Indian law much before the advent of the Constitution of India under Article 20(3) and as held by the Supreme,

Court, facets of such rule are seen in Section 161 Cr.P.C., 1898 which corresponds to Section 161 Cr.P.C., 1973, Sections 25 and 26 and the proviso",

to Section 132 of the Evidence Act, 1872 which existed on the statute book from 1872 i.e. for 78 years prior to the advent of the guarantee under",

Article 20 of the Constitution of India. As held by the Supreme Court in re: Mohd. Azmal Amir Kasab (supra) the right against self-incrimination,

under Article 20(3) is fully incorporated in the provisions of Cr.P.C. (Section 161, 162, 163 and 164) and the Evidence Act, 1872 as manifestations of",

enforceable due process, and thus compliance with these statutory provisions is also equal compliance with the constitutional guarantees."

81. Section 281 Cr.P.C. reads thus: â??281. Record of examination of accused.-

(1) Whenever the accused is examined by a Metropolitan,

Magistrate, the Magistrate shall make a memorandum of the substance of the examination of the accused in the language of the Court and such",

memorandum shall be signed by the Magistrate and shall form part of the record.,

(2) Whenever the accused is examined by any Magistrate other than a Metropolitan Magistrate, or by a Court of Session, the whole of such",

examination, including every question put to him and every answer given by him, shall be recorded in full by the presiding Judge or Magistrate himself",

or where he is unable to do so owing to a physical or other incapacity, under his direction and superintendence by an officer of the Court appointed by",
him in this behalf.,

(3) The record shall, if practicable, be in the language in which the accused is examined or, if that is not practicable, in the language of the Court.",

(4) The record shall be shown or read to the accused, or, if he does not understand the language in which it is written, shall be interpreted to him in a",
language which he understands, and he shall be at liberty to explain or add to his answers.",

(5) It shall thereafter be signed by the accused and by the Magistrate or presiding Judge, who shall certify under his own hand that the examination",
was taken in his presence and hearing and that the record contains a full and true account of the statement made by the accused.,

(6) Nothing in this section shall be deemed to apply to the examination of an accused person in the course of a summary trial.â??â??,

83. A perusal of Section 281 Cr.P.C. requires a Magistrate under sub-section (2), while recording the confession to record the whole of the",

examination of the accused, including every question put to him and every answer given by him in full and if the Magistrate is unable to do so owing to",

a physical or other capacity, and officer of the Court appointed by the Magistrate in this behalf must do so. The record is required, if practicable, to be",

in the language of the Court. This record is then required to be shown or read to the accused, or, if he does not understand the language in which it is",

written, to be interpreted to him in a language which he understands, and the accused shall be at liberty to explain or add to his answers. Thereafter",

the said record is required to be signed by the accused and by the Magistrate or presiding Judge, who shall certify under his own hand that the",

examination was taken in his presence and hearing and that the record contains a full and true account of the statement made by the accused.,

84. Section 463 Cr.P.C. reads thus:- â??463. Non-compliance with provisions of section 164 or section 281.-(1) If any Court before which a,

confession or other statement of an accused person recorded, or purporting to be recorded under section 164 or section 281, is tendered, or has been",

received, in evidence finds that any of the provisions of either of such sections have not been complied with by the Magistrate recording the statement,",

it may, notwithstanding anything contained in section 91 of the Indian Evidence Act, 1872 (1 of 1872), take evidence in regard to such non-",

compliance, and may, if satisfied that such non-compliance has not injured the accused in his defence on the merits and that he duly made the",

statement recorded, admit such statement.",

(2) The provisions of this section apply to Courts of appeal, reference and revision.â??",

85. The Supreme Court in re: Babu Singh v. State of Punjab^{1964 (1) Cri.LJ. 566} would find that the confessions had not been recorded by the,

Magistrate in his own hands for the reason that he was not familiar with the writing in Urdu which meant that the requirement of Section 364 (3) of,

the old Cr.P.C. (now Section 281 Cr.P.C.) had not been complied with. In such factual narrative the Supreme Court would seek to answer: â??12. If,

the Magistrate under whose supervision the confessions were recorded has not complied with the provisions of S. 364 (3) of the Code of Criminal,

Procedure, can it be said that the said confessions are not proved or that the making of the confessions and their recording is vitiated so as to make",

them inadmissible. â?|â?|.â?. To answer the said question the Supreme Court would examine Section 164, Section 364 and Section 533 (now Section",

463) of the Code of Criminal Procedure and hold:-,

â??12. If the Magistrate under whose supervision the confessions were recorded has not complied with the provisions of Section 364(3) of the Code,

of Criminal Procedure, can it be said that the said confessions are not proved or that the making of the confessions and their recording is vitiated so as",

to make them inadmissible. The decision of this question would naturally take us to three sections of the Code of Criminal Procedure. Section 164 of,

the Code confers power on the Magistrates specified in Section 164(1) to record statement and confessions. Section 164(2) provides a safeguard to,

protect the interest of innocent persons. It lays down that such statements, meaning the statements authorised to be recorded by Section 164(1) shall",

be recorded in such of the manners hereinafter prescribed for recording evidence as is, in the opinion of the Magistrate, best fitted for the",

circumstances of the case. Then the section adds that such confessions shall be recorded, and signed in the manner provided in Section 364 and they",

shall then be forwarded to the Magistrate by whom the case is to be inquired into

or tried. It would thus be seen that sub-section (2) requires that the, confessions should be recorded in the manner prescribed by Section 364; that is one safeguard provided by this section. Sub-section (3) then proceeds, to provide further safeguards, it lays down that the Magistrate shall before recording, any such confession, explain to the person making it that he is", not bound to make a confession and that if he does so it may be used as evidence against him and no Magistrate shall record any such confession, unless, upon questioning the person making it, he has reason to believe that it was made voluntarily; and it provides that when the confession is", recorded after following the procedure prescribed by it the Magistrate shall make a memorandum at the foot of such record to the following effect.,

13. When we turn to Section 364 we find that sub-section (1) provides for the recording of the confession in full in the manner prescribed therein and, for explaining the contents of the same to the accused in a language which he understands, and the accused shall be at liberty to explain or add to his", answers. Sub-section (2) lays down that when the whole of the confession is made conformable to what he declares is the truth, the record shall be", signed by the accused and the Magistrate, and the Magistrate shall certify under his own hand that the examination was taken in his presence and", hearing and that the record contains a full and true account of the statement made by the accused. Sub-section (3) is important for our purpose. It, provides that in cases in which the examination of the accused is not recorded by the Magistrate or judge himself, he shall be bound as the", examination proceeds to make a memorandum thereof in the language of the court or in English, if he is sufficiently acquainted with the latter", language; and such memorandum shall be written and signed by the Magistrate or judge with his own hand and annexed to the record. It also says that, if the Magistrate is unable to make a memorandum as required, he shall record the reason of such inability. It would thus be clear that if a confession", is recorded not by the Magistrate himself as required by Section 364(1) it is necessary that the Magistrate should make a memorandum as the, examination proceeds and the memorandum should be signed by him. It is conceded that in the present case, the confessions were not recorded as", required by Section 364(1) and yet the safeguard prescribed by Section 364 (3) has not been complied with. Mr Rana contends that the failure to,

comply with the requirements of Section 364(3) makes the confessions inadmissible.,

14. In dealing with this question we must consider the provisions of Section 533 of the Code. It is on the provisions of this section that Mr Khanna, for",

the respondent, relies. Section 533(1) lays down that if any court before which a confession recorded or purporting to be recorded under Section 164",

or Section 364 is tendered or has been received in evidence finds that any of the provisions of either of such sections have not been complied with by,

the Magistrate recording the statement, it shall take evidence that such person duly made the statement recorded; and it adds that notwithstanding",

anything contained in Section 91 of the Indian Evidence Act, 1872 such statement shall be admitted if the error has not injured the accused as to his",

defence on the merits. Mr Khanna contends that the Magistrate has in fact given evidence in the trial court and the evidence of the Magistrate shows,

that the statement has been duly recorded; and he argues that unless it is shown that prejudice has been caused to the accused the irregularity,

committed by the Magistrate in not complying with Section 364(3) will not vitiate the confessions nor will it make them inadmissible. There is some,

force in this contention.,

19. We have also been disturbed to notice that in recording the confessions the Magistrate has adopted a somewhat casual attitude. It is unnecessary,

to emphasise that the safeguards provided by Section 164(3) and Section 364(3) are valuable safeguards intended to protect the interest of innocent,

persons. The recording of a confession is a solemn and serious act, and so any Magistrate who records confessions must see to it that a tone of",

casualness does not enter in the transaction. Having regard to the evidence given by the Magistrate in the present case we are constrained to observe,

that when he got the confessions recorded in the present case he was not fully conscious of the solemnity and the seriousness of what he was doing.,

That is another factor which has weighed in our minds. Having regard to these features of the case we are not prepared to uphold the finding of the,

High Court that the confessions made by the appellants can be safely treated to be voluntary in the present case. If the confessions are, therefore",

excluded from consideration it is impossible to sustain the charge of murder against either of the two appellants. In a case where the charge of murder,

was founded almost exclusively on the confessions it was necessary that the High Court should have considered these relevant factors more carefully, before it confirmed the conviction of the appellants for the offence under Section 302 and confirmed the sentence of death imposed on Babu Singh. In, our opinion, if the confessions are left out of consideration the charge of murder cannot be sustained. The result is the conviction of both the appellants", for the offence under Section 302 read with Section 34 is set aside and consequently the sentence imposed on them for that offence is also set, aside.â?? (Emphasis supplied),

86. In re: Babu Singh (supra) the Supreme Court would find some force in the contention of the learned Counsel for the State of Punjab that in view, of Section 533 of the old Cr.P.C. unless it is shown that prejudice had been caused to the accused the irregularity committed by the Magistrate in not, complying with Section 364 (3) of the old Cr.P.C. will not vitiate the confessions nor will it make them inadmissible based on the premise that the, Magistrate had in fact given evidence in the Trial Court and the evidence of the Magistrate showed that statement had been duly recorded. Section, 364 (3) of the old Cr.P.C. provided that in cases in which the examination of the accused is not recorded by the Magistrate or Judge himself, he shall", be bound as the examination proceeds to make a memorandum thereof in the language of the Court or in English, if he is sufficiently acquainted with", the latter language; and such memorandum shall be written and signed by the Magistrate or Judge with his own hand and annexed to the record. It, also provided that if the Magistrate is unable to make a memorandum as required he shall record the reason of such inability. It was conceded in the, said case that the confessions were not recorded as required by Section 364 (1) and yet the safeguard prescribed by Section 364 (3) had not been, complied with. The defence had contended that the failure to comply with the requirements of Section 364(3) makes the confession inadmissible. It, would also reiterated that the safeguards provided by Section 164 (3) and Section 364 (3) are valuable safeguards intended to protect the interest of, innocent persons.,

87. The Supreme Court in re: Singhara Singh (supra) would examine a case in which a Second Class Magistrate not specially empowered by the State, Government to record a statement or confession under section 164 of the Code

of Criminal Procedure had purported to record the confession of the, accused under section 164. The only point argued before the Supreme Court in appeal was as to the admissibility of certain oral evidence, which", evidence if held not admissible, there would be no other evidence to convict the respondents. This oral evidence was given by the Magistrate of the", confessions of guilt made to him by the respondents and purported to have been recorded by him under section 164 of the Code of Criminal, Procedure. The Supreme Court would examine the provisions of section 164, 364 and 533 of the Code of Criminal Procedure and hold that:-",

â??5. A confession duly recorded under Section 164 would no doubt be a public document under Section 74 of the Evidence Act which would prove, itself under Section 80 of that Act. Mr Dixit, who recorded the confession in this case was a Second Class Magistrate and the prosecution was unable", to prove that he had been specially empowered by the State Government to record a statement or confession under Section 164 of the Code. The trial", therefore, proceeded on the basis that he had not been so empowered. That being so, it was rightly held that the confessions had not been recorded", under Section 164 and the record could not be put in evidence under Sections 74 and 80 of the Evidence Act to prove them. The prosecution", thereupon called Mr Dixit to prove these confessions, the record being used only to refresh his memory under Section 159 of the Evidence Act. It is", the admissibility of this oral evidence that is in question.,

6. The Judicial Committee in Nazir Ahmed v. King-Emperor [LR 63 IA 372] held that when a Magistrate of the First Class records a confession, under Section 164 but does not follow the procedure laid down in that section, oral evidence of the confession is inadmissible. Nazir Ahmed case [LR", 63 IA 372] naturally figured largely in the arguments presented to this court and the courts below. The learned trial Judge following Ashrafi v. State, [(1960) 2 ILR 488] to which we will have to refer later, held that Nazir Ahmed case [LR 63 IA 372] had no application where, as in the present case", a Magistrate not authorised to do so purports to record a confession under Section 164, and on that basis admitted the oral evidence. The learned", Judges of the High Court observed that the present case was governed by Nazir Ahmed case [LR 63 IA 372] and that Ashrafi case [(1960) 2 ILR, 488] had no application because it dealt â??with the question of identification

parades held by Magistrates. There was no occasion to discuss the, question of confessions recorded before Magistrates. In this view of the matter the learned Judges of the High Court held the oral evidence, inadmissible and acquitted the respondents. It would help to clear the ground to state that it had not been argued in Nazir Ahmed case [LR 63 IA 372], that Section 533 of the Code had any operation in making any oral evidence admissible and the position is the same in the present case. It would not, therefore, be necessary for us to consider whether that section had any effect in this, case in making any evidence admissible.",

7. In Nazir Ahmed case [LR 63 IA 372] the Judicial Committee observed that the principle applied in Taylor v. Taylor [(1875) 1 Ch D 426, 431] to a",

court, namely, that where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all and that other",

methods of performance are necessarily forbidden, applied to judicial officers making a record under Section 164 and, therefore, held that the",

Magistrate could not give oral evidence of the confession made to him which he had purported to record under Section 164 of the Code. It was said,

that otherwise all the precautions and safeguards laid down in Sections 164 and 364, both of which had to be read together, would become of such",

trifling value as to be almost idle and that it would be an unnatural construction to hold that any other procedure was permitted than that which is,

laid down with such minute particularity in the sections themselves.",

8. The rule adopted in Taylor v. Taylor [(1875) 1 Ch D 426, 431] is well recognised and is founded on sound principle. Its result is that if a statute has",

conferred a power to do an act and has laid down the method in which that power has to be exercised, it necessarily prohibits the doing of the act in",

any other manner than that which has been prescribed. The principle behind the rule is that if this were not so, the statutory provision might as well not",

have been enacted. A Magistrate, therefore, cannot in the course of investigation record a confession except in the manner laid down in Section 164.",

The power to record the confession had obviously been given so that the confession might be proved by the record of it made in the manner laid,

down. If proof of the confession by other means was permissible, the whole provision of Section 164 including the safeguards contained in it for the",

protection of accused persons would be rendered nugatory. The section,

therefore, by conferring on Magistrates the power to record statements or",
 confessions, by necessary implication, prohibited a Magistrate from giving oral evidence of the statements or confessions made to him.",

9. Mr Aggarwala does not question the validity of the principle but says that Nazir Ahmed case [LR 63 IA 372] was wrongly decided as the principle,
 was not applicable to its facts. He put his challenge to the correctness of the decision on two grounds, the first of which was that the principle applied",
 in Taylor v. Taylor [(1875) 1 Ch D 426, 431] had no application where the statutory provision conferring the power was not mandatory and that the",
 provisions of Section 164 were not mandatory as would appear from the terms of Section 533.,

10. This contention seems to us to be without foundation. Quite clearly, the power conferred by Section 164 to record a statement or confession is not",
 one which must be exercised. The Judicial Committee expressly said so in Nazir Ahmed case [LR 63 IA 372] and we did not understand,
 MrAggarwala to question this part of the judgment. What he meant was that Section 533 of the Code showed that in recording a statement or,
 confession under Section 164, it was not obligatory for the Magistrate to follow the procedure mentioned in it. Section 533 says that if the court before",
 which a statement or confession of an accused person purporting to be recorded under Section 164 or Section 364 is tendered in evidence, â??finds",
 that any of the provisions of either of such sections have not been complied with by the Magistrate recording the statement, it shall take evidence that",
 such person duly made the statement recordedâ??. Now a statement would not have been â??duly madeâ? unless the procedure for making it laid,
 down in Section 164 had been followed. What Section 533, therefore, does is to permit oral evidence to be given to prove that the procedure laid down",
 in Section 164 had in fact been followed when the court finds that the record produced before it does not show that that was so. If the oral evidence,
 establishes that the procedure had been followed, then only can the record be admitted. Therefore, far from showing that the procedure laid down in",
 Section 164 is not intended to be obligatory, Section 533 really emphasises that that procedure has to be followed. The section only permits oral",
 evidence to prove that the procedure had actually had been followed in certain cases where the record which ought to show that does not on the face,

of it do so.,

11. The second ground on which Mr Aggarwala challenged the decision in Nazir Ahmed case [LR 63 IA 372] was that the object of Section 164 of, the Code is to permit a record being kept so as to take advantage of Sections 74 and 80 of the Evidence Act and avoid the inconvenience of having to, call the Magistrate to whom the statement or confession had been made, to prove it. The contention apparently is that the section was only intended to", confer a benefit on the prosecution and, therefore, the sole effect of the disregard of its provisions would be to deprive the prosecution of that benefit", for it cannot then rely on Sections 74 and 80 of the Evidence Act and has to prove the confession by other evidence including the oral evidence of the, Magistrate recording it. It was, therefore, said that the principle adopted in Nazir Ahmed case [LR 63 IA 372] had no application in interpreting", Section 164.,

12. A similar argument was advanced in Nazir Ahmed case [LR 63 IA 372] and rejected by the Judicial Committee. We respectfully agree with that, view. The section gives power to make a record of the confession made by an accused which may be used in evidence against him and at the same, time it provides certain safeguards for his protection by laying down the procedure subject to which alone the record may be made and used in, evidence. The record, if duly made may no doubt be admitted in evidence without further proof but if it had not been so made and other evidence was", admissible to prove that the statements recorded had been made, then the creation of the safeguards would have been futile. The safeguards were", obviously not created for nothing and it could not have been intended that the safeguards might at the will of the prosecution be bypassed. That is what, would happen if oral evidence was admissible to prove a confession purported to have been recorded under Section 164. Therefore it seems to us that, the object of Section 164 was not to give the prosecution the advantage of Sections 74 and 80 of the Evidence Act but to provide for evidence being, made available to the prosecution subject to due protection of the interest of the accused.â??,

13. Mr Aggarwala then contended that Nazir Ahmed case [LR 63 IA 372] was distinguishable. He said that all that the Judicial Committee decided in, Nazir Ahmed case [LR 63 IA 372] was that if a Presidency Magistrate, a

Magistrate of the First Class or a Magistrate of the Second Class specially",
empowered in that behalf records a statement or confession under Section 164
but the procedure laid down in it is not complied with, he cannot give",
oral evidence to prove the statement or confession. According to Mr Aggarwala, it
does not follow from that decision that a Magistrate of a First",
Class not mentioned in the section, for example, a Magistrate of the Second
Class not specially empowered by the State Government cannot give oral",
evidence of a confession made to him which he had purported to record under
Section 164 of the Code.,

14. It is true that the Judicial Committee did not have to deal with a case like the
present one where a Magistrate of the Second Class not specially,

empowered had purported to record a confession under Section 164. The
principle applied in that decision would however equally prevent such a,

Magistrate from giving oral evidence of the confession. When a statute confers a
power on certain judicial officers, that power can obviously be",

exercised only by those officers. No other officer can exercise that power, for it
has not been given to him. Now the power has been conferred by",

Section 164 on certain Magistrates of higher classes. Obviously, it was not
intended to confer the power on Magistrates of lower classes. If, therefore",

a proper construction of Section 164, as we have held, is that a Magistrate of a
higher class is prevented from giving oral evidence of a confession",

made to him because thereby the safeguards created for the benefit of an
accused person by Section 164 would be rendered nugatory, it would be an",

unnatural construction of the section to hold that these safeguards were not
thought necessary and could be ignored, where the confession had been",

made to a Magistrate of a lower class and that such a Magistrate was, therefore,
free to give oral evidence of the confession made to him. We cannot",

put an interpretation on Section 164 which produces the anomaly that while it is
not possible for higher class Magistrates to practically abrogate the,

safeguards created in Section 164 for the benefit of an accused person, it is open
to a lower class Magistrate to do so. We, therefore, think that the",

Section 533 old Cr.P.C, Section 463 Cr.P.C

â??533. Non compliance with provisions of Section

164 or 364: (1) If any Court, before which a

confession or other statement of an accused person

recorded or purporting to be recorded under Section 164 or Section 364 is tendered or has been received in evidence, finds that any of the provisions of either of such sections have not been complied with by the Magistrate recording the statement, it shall take evidence that such person duly made the statement recorded and, notwithstanding anything contained in the Indian Evidence Act, 1872, Section 91, such statement shall be admitted if the error has not injured the accused as to his defence on the merits.

(2) The provisions of this section apply to Courts of Appeal, Reference and Revision.â??", "â??463. Non-compliance with provisions of section

164 or section 281.-(1) If any Court before which a confession or other statement of an accused person recorded, or purporting to be recorded under section 164 or section 281, is tendered, or has been received, in evidence finds that any of the provisions of either of such sections have not been complied with by the Magistrate recording the statement, it may, notwithstanding anything contained in section 91 of the Indian Evidence Act, 1872 (1 of 1872), take evidence in regard to such non-compliance, and may, if satisfied that such non-compliance has not injured the accused in his defence on the merits and that he duly made the statement recorded, admit such statement.

(2) The provisions of this section apply to Courts of appeal, reference and revision.â??

45.7. We would, therefore, recommend that sub-section (1) of section 533 be

amended as follows to clarify that the evidence given should relate to",

the apparent non-compliance with the statutory provisions:-,

“(1) If any Court before which a confession or other statement of an accused person recorded or purporting to be recorded under section 164 or,

section 364 is rendered or has been received in evidence finds that any of the provisions of either of such sections has not been complied with by the,

Magistrate recording the statement, it may notwithstanding anything contained in section 91 of the Indian Evidence Act, 1872, take evidence in regard",

to such non-compliance, and may, if satisfied that such non-compliance has not injured the accused in his defence on the merits and that he duly made",

the statement recorded, admit such statement.”,

91. The Forty First Report of the Law Commission of India was for the revision of the old Cr.P.C. A Bill on the Code was introduced in the,

Parliament which became law on 25.01.1974.,

92. In re: Kehar Singh (supra) the Supreme Court would examine the death sentence imposed by the Trial Judge on the two appellants for the charge,

of murder of Smt. Indira Gandhi. While examining the appeal from the High Court which confirmed the order of conviction and sentence passed by,

the Trial Court, the Supreme Court would have occasion to examine the case where the Magistrate was found to have not complied with the mandate",

of sub-section (2) of Section 164 of Cr.P.C. and the curability of non-compliance of such a mandate under Section 463 Cr.P.C. and hold:-,

119. On a consideration of the above decisions it is manifest that if the provisions of Section 164(2) which require that the Magistrate before recording,

confession shall explain to the person making confession that he is not bound to make a confession and if he does so it may be used as evidence,

against him and upon questioning the person if the Magistrate has reasons to believe that it is being made voluntarily then the confession will be,

recorded by the Magistrate. The compliance of the sub-section (2) of Section 164 is therefore, mandatory and imperative and non-compliance of it",

renders the confession inadmissible in evidence. Section 463 (old Section 533) of the Code of Criminal Procedure provides that where the questions,

and answers regarding the confession have not been recorded evidence can be adduced to prove that in fact the requirements of sub-section (2) of,

Section 164 read with Section 281 have in fact been complied with. If the court

comes to a finding that such a compliance had in fact been made the, mere omission to record the same in the proper form will not render it inadmissible evidence and the defect is cured under Section 463 (Section 533 of, the old Criminal Procedure Code) but when there is non-compliance of the mandatory requirement of Section 164(2) of the Criminal Procedure Code, and it comes out in evidence that no such explanation as envisaged in the aforesaid sub-section has been given to the accused by the Magistrate, this", substantial defect cannot be cured under Section 463, Criminal Procedure Code. In the instant case the accused Satwant Singh who was in police", custody was produced before the Magistrate Shri S.L. Khanna on 29-11-1984. On that day the accused made an application (Ex. PW 11-A) stating, that he wanted to make a statement about the facts concerning Indira Gandhi Assassination Case. The Magistrate directed the remand of the accused, in judicial custody till 1-12-1984 giving the accused time to reconsider and reflect. The Magistrate also told him that he was not bound to make any, statement and if any statement is made the same might be used against him. The Magistrate also directed to send a letter to the Secretary, Legal Aid", Committee to provide legal assistance to the accused at the expense of the State. On 1-12-1984, the Magistrate enquired of the accused whether he", wanted to make a statement whereon the accused stated that he wanted to make a statement. He was allowed to consult his counsel, Shri I.U. Khan,", advocate who conferred with him for about 15 minutes privately. As the accused insisted that his statement be recorded, the application was sent by", the Magistrate, Shri S.K. Khanna to the Link Magistrate, Shri Bharat Bhushan for recording his statement. Before recording his statement Dr Vijay", Kumar was called to examine the accused. Dr Vijay Kumar stated in his report (Ex. PW 11-B) that in his opinion the accused is fit to make his, statement. It appears from Ex. PW 11-B-2 as well as from the questions and answers which were put to the accused (Ex. PW 11-B-3) that the Link, Magistrate, Shri Bharat Bhushan warned the accused that he was not bound to make any confessional statement and in case he does so it may be", used against him during trial. The accused in spite of this warning wanted to make a statement and thereafter the confessional statement Ex. PW 11-, C was recorded by the Link Magistrate. In the certificate appended to the said confessional statement it had been stated that there was no pressure,

upon the accused and there was neither any police officer nor anybody else within the hearing or sight when the statement was recorded. Therefore,"

it appears that the accused was put the necessary questions and was given the warning that he was not bound to make any statement and in case any,

statement is made, the same might be used against him by the prosecution for his conviction. Of course, no question was put by the Magistrate to the",

accused as to why he wanted to make a confessional statement. It also appears from the evidence of the Magistrate, Shri Bharat Bhushan (Ex. PW",

11) that the confessional statement was made voluntarily by the accused. So the defect in recording the statement in the form prescribed is cured by,

Section 463 of the Code of Criminal Procedure. It is indeed appropriate to mention in this connection that the defect in recording the statement in,

appropriate form prescribed can be cured under Section 463 of the Code of Criminal Procedure provided the mandatory provisions of Section 164(2),

namely explaining to the accused that he was not bound to make a statement and if a statement is made the same might be used against him, have",

been complied with and the same is established on an examination of the Magistrate that the mandatory provisions have been complied with..â??,

93. In re: Kehar Singh (supra) the Supreme Court would specifically examine the provision of Section 463 Cr.P.C. After a detailed and thorough,

analysis of the judgments of the Supreme Court and various High Courts it would categorically hold that on a consideration of the decisions it is,

manifest that if the provisions of Section 164(2) Cr.P.C. which requires the Magistrate before recording confession to explain to the person making,

confession that he is not bound to make a confession and if he does so it may be used as evidence against him and upon questioning the person if the,

Magistrate has reason to believe that it is being made voluntarily then the confession will be recorded by the Magistrate. It was held by the Supreme,

Court that the compliance of sub-section (2) of Section 164 is therefore, mandatory and imperative and non compliance of it renders the confession",

inadmissible in evidence. Section 463 (old Section 533) of the Code of Criminal Procedure provides that where the questions and answers regarding,

the confession have not been recorded evidence can be adduced to prove that in fact the requirements of sub-section (2) of Section 164 read with,

Section 281 have in fact been complied with. If the Court comes to a finding that such a compliance had in fact been made, the mere omission to",

record the same in the proper form will not render it inadmissible evidence and the defect is cured under section 463 but when there is non-compliance, of the mandatory requirement of Section 164(2) of Cr.P.C. and it comes out in evidence that no such explanation as envisaged in the aforesaid sub-, section has been given to the accused by the Magistrate, the substantial defect cannot be cured under Section 463 Cr.P.C. While holding so the", Supreme Court would examine the evidence of the Magistrate in detail to appreciate whether the confession was voluntary or not and being satisfied, come to the conclusion that the defect in recording the statement in the form prescribed is cured by Section 463 of the Cr.P.C. It would also hold that, the defect in recording the confession in appropriate form prescribed can be cured under Section 463 if the mandatory provision of Section 164 (2) had, been complied with.,

94. A similar question arose before the Supreme Court in State v. Nalini(1999) 5 SCC 253 while examining the case relating to the assassination of, former Prime Minister of India, Rajiv Gandhi by a human bomb while dealing with the death reference of accused Nalini the Supreme Court would", examine the confession of Nalini who had denied in her statement under section 313 Cr.P.C. that a confession was voluntary. The Supreme Court, would observe:-,

400. Coming to the confession of Nalini (A-1), it was submitted by Mr Natarajan that she, in her confession, referred to Murugan (A-3), Arivu", (A-18), Bhagyanathan (A-20) and Padma (A-21) among the accused now arraigned before the Court. She also referred to Jayakumar (A-10) though", he comes in the picture after the act of assassination had been completed. Nalini (A-1) who was present at the scene of the crime is the sole surviving, accused of the group that had gone to Sriperumbudur in furtherance of the conspiracy to assassinate Rajiv Gandhi. Nalini (A-1) has denied in her, statement under Section 313 of the Code that her confession was voluntary. She said blank papers were got signed from her. This confession does not, satisfy the requirement of law under Section 15 of TADA and Rule 15(3) of the TADA Rules though it is not disputed that all the confessions are, recorded by V. Thiagarajan (PW 52), Superintendent of Police. 401. It was submitted that the certificate required to be recorded under Rule 15(3) of", the Rules of TADA is on the same lines as given in Section 164(4) of the Code.

Section 164(4) of the Code is as under:

164. (4) Any such confession shall be recorded in the manner provided in Section 281 for recording the examination of an accused person and,

shall be signed by the person making the confession; and the Magistrate shall make a memorandum at the foot of such record to the following,

effect",

"I have explained to (name) that he is not bound to make a confession and that, if he does so, any confession he may make may be used as",

evidence against him and I believe that this confession was voluntarily made. It was taken in my presence and hearing, and was read over to the",

person making it and admitted by him to be correct, and it contains a full and true account of the statement made by him."

(Signed) A.B. Magistrate. "

402. It is unnecessary to refer to the provisions of Section 281 of the Code as it is not disputed that otherwise the confessions of the accused have,

been properly recorded. Contention in the case of Nalini (A-1) is that the mandatory provisions of Rule 15(3) have been violated as it is not signed by,

Nalini (A-1) whose signatures are required at the end of the confession. It was thus submitted that since the confession does not bear the signatures,

of Nalini (A-1) it could not be said to be a valid confession. It is important that the accused signs the confession at the end. In that way he,

comprehends that he has made confession. Confession of Nalini (A-1), it was submitted, has to be rejected in its entirety. Confession is said to be in",

18 pages out of which only pp. 1 to 16 bear her signatures while pp. 17 and 18, which are crucial to the confession, do not bear her signatures. It may",

be said that the police officer has appended his certificate at the end of the confession but his recording of the certificate is immaterial if the accused,

did not append his signatures at the end of the confession. Omission of signatures of Nalini (A-1) cannot cure the defect. V. Thiagarajan (PW 52)",

who recorded the confession, merely stated in the examination-in-chief that his not getting the signatures of Nalini (A-1) was an omission. No",

explanation has been given as to why the omission occurred and it was not for the accused to bring out in cross-examination as to the circumstances,

under which signatures of Nalini (A-1) could not be obtained at the end of the confession. It is also not relevant if each page of the confession is,

signed, signature has to be put on the last page at the end of the confession and only then endorsement by the police officer recording the confession",

has a meaning. Both the signatures at the end of the confession and the certificates of the police officer must go together. Rule 15 provided an,

assurance that confession recorded is as per prescribed provisions. In support of the submission Mr Natarajan referred to a Constitution Bench,

decision of this Court in Kartar Singh v. State of Punjab [(1994) 3 SCC 569 : 1994 SCC (Cri) 899] where this Court considered constitutional validity,

of the provisions of Section 15 of TADA and Rule 15 of the TADA Rules. It was submitted that the constitutional validity of TADA was upheld,

because of the safeguards provided by Rule 15 for recording confession by police officer which under ordinary law is impermissible. In Kartar Singh,

case [(1994) 3 SCC 569 : 1994 SCC (Cri) 899] the Court said: (SCC p. 680, para 254)",

â??254. In view of the legal position vesting authority on higher police officer to record the confession hitherto enjoyed by the judicial officer in the,

normal procedure, we state that there should be no breach of procedure and the accepted norms of recording the confession which should reflect only",

the true and voluntary statement and there should be no room for hypercriticism that the authority has obtained an invented confession as a source of,

proof irrespective of the truth and creditability as it could be ironically put that when a Judge remarked, â??Am I not to hear the truthâ??, the",

prosecution giving a startling answer, â??No, Your Lordship is to hear only the evidenceâ??.â??",

This is how this Court analysed Section 15 and Rule 15: (SCC pp. 681-82, paras 257-62) â??257. As per Section 15(1), a confession can either be",

reduced into writing or recorded on any mechanical device like cassettes, tapes or soundtracks from which sounds or images can be reproduced. As",

rightly pointed out by the learned counsel since the recording of evidence on mechanical device can be tampered, tailored, tinkered, edited and erased,",

etc., we strongly feel that there must be some severe safeguards which should be scrupulously observed while recording a confession under Section",

15(1) so that the possibility of extorting any false confession can be prevented to some appreciable extent. 258. Sub-section (2) of Section 15 enjoins a,

statutory obligation on the part of the police officer recording the confession to explain to the person making it that he is not bound to make a,

confession and to give a statutory warning that if he does so it may be used as evidence against him.,

259. Rule 15 of the TADA Rules imposes certain conditions on the police officer with regard to the mode of recording the confession and requires the,

police officer to make a memorandum at the end of the confession to the effect that he has explained to the maker that he was not bound to make the,

confession and that the confession, if made by him, would be used as against him and that he recorded the confession only on being satisfied that it",

was voluntarily made. Rule 15(5) requires that every confession recorded under Section 15 should be sent forthwith either to the Chief Metropolitan,

Magistrate or the Chief Judicial Magistrate having jurisdiction over the area in which such confession has been recorded and the Magistrate should,

forthwith forward the recorded confession received by him to the Designated Court taking cognizance of the offence.,

260. For the foregoing discussion, we hold that Section 15 is not liable to be struck down since that section does not offend either Article 14 or Article",

21 of the Constitution.,

261. Notwithstanding our final conclusion made in relation to the intendment of Section 15, we would hasten to add that the recording of a confession",

by a Magistrate under Section 164 of the Code is not excluded by any exclusionary provision in the TADA Act, contrary to the Code but on the other",

hand the police officer investigating the case under the TADA Act can get the confession or statement of a person indicted with any offence under,

any of the provisions of the TADA Act recorded by any Metropolitan Magistrate, Judicial Magistrate, Executive Magistrate or Special Executive",

Magistrate of whom the two latter Magistrates are included in Section 164(1) by sub-section (3) of Section 20 of the TADA Act and empowered to,

record confession.,

262. The net result is that any confession or statement of a person under the TADA Act can be recorded either by a police officer not lower in rank,

than a Superintendent of Police, in exercise of the powers conferred under Section 15 or by a Metropolitan Magistrate or Judicial Magistrate or",

Executive Magistrate or Special Executive Magistrate who are empowered to record any confession under Section 164(1) in view of sub-section (3),

of Section 20 of the TADA Act.â? Reference was also made to a Division Bench

decision of the Bombay High Court in Abdul Razak Shaikh v. State, of Maharashtra [1988 Cri LJ 382 : 1987 Mah LJ 863 (Bom)] which relying on a decision of the Privy Council in Nazir Ahmad v. King-Emperor [AIR, 1936 PC 253 (2) : 63 IA 372] held that the provision that the Magistrate after recording confession should obtain the signature of the accused, thereon is a salutary provision and has been specially provided for, for safeguarding the interest of the accused and, therefore, it is mandatory.",

The High Court said that this omission cannot be cured by examining the Magistrate under Section 463 of the Code. Section 463 of the Code is as, under:

463. Non-compliance with provisions of Section 164 or Section 281. (1) If any court before which a confession or other statement of an, accused person recorded, or purporting to be recorded under Section 164 or Section 281, is tendered, or has been received, in evidence finds that any, of the provisions of either or such sections have not been complied with by the Magistrate recording the statement, it may, notwithstanding anything, contained in Section 91 of the Indian Evidence Act, 1872 (1 of 1872), take evidence in regard to such non-compliance, and may, if satisfied that such, non-compliance has not injured the accused in his defence on the merits and that he duly made the statement recorded, admit such statement.",

(2) The provisions of this section apply to Courts of Appeal, reference and revision. In Nazir Ahmad v. King-Emperor [AIR 1936 PC 253 (2) : 63, IA 372] the Magistrate, who purportedly recorded the confession, was called as a witness. He said that the accused made a full confession of his, participation in the crime. The Magistrate said that he made rough notes of what he was told and, after dictating to a typist memorandum from the, rough notes, destroyed them. The Board then noticed:",

He produced, and there was put in evidence, a memorandum, called a note, signed by him, containing the substance but not all of the matter to, which he spoke orally. The note was signed by him and at the end, above the signature, there was appended a certificate somewhat to the same, effect as that prescribed in Section 164, and in particular stating that the Magistrate believed that the pointing out and the statements were, voluntarily made. But it was not suggested that the Magistrate, though he was manifestly acting under Part 5 of the Code, either purported to,

follow or in fact followed the procedure of Sections 164 and 364 (old Code). Indeed, as there was no record in existence at the material time, there",

was nothing to be shown or to be read to the accused, and nothing he could sign or refuse to sign. The Magistrate offered no explanation of why he",

acted as he did instead of following the procedure required by Section 164.â??,

403. The Board did not express any opinion in this case on the question of the operation or scope of Section 533 (old) corresponding to Section 463 of, the present Code. It was conceded that the Magistrate neither acted nor purported to act under Section 164 or Section 364 (old) and nothing was, tendered in evidence as recorded or purporting to be recorded under either of the sections. The Board then went on to hold as under:,

â??On the matter of construction Sections 164 and 364 must be looked at and construed together, and it would be an unnatural construction to hold", that any other procedure was permitted than that which is laid down with such minute particularity in the sections themselves. Upon the construction, adopted by the Crown, the only effect of Section 164 is to allow evidence to be put in a form in which it can prove itself under Sections 74 and 80," Evidence Act. Their Lordships are satisfied that the scope and extent of the section is far other than this, and that it is a section conferring powers on", Magistrates and delimiting them. It is also to be observed that, if the construction contended for by the Crown be correct, all the precautions and", safeguards laid down by Sections 164 and 364 would be of such trifling value as to be almost idle. Any Magistrate of any rank could depose to a, confession made by an accused so long as it was not induced by a threat or promise, without affirmatively satisfying himself that it was made", voluntarily and without showing or reading to the accused any version of what he was supposed to have said or asking for the confession to be, vouched by any signature. The range of magisterial confessions would be so enlarged by this process that the provisions of Section 164 would almost, inevitably be widely disregarded in the same manner as they were disregarded in the present case.â??,

In Abdul Razak Shaikh case [1988 Cri LJ 382 : 1987 Mah LJ 863 (Bom)] the Bombay High Court also relied on a decision of the Nagpur High Court, in Neharoo Mangtu Satnami v. Emperor [AIR 1937 Nag 220 : 38 Cri LJ 642] where also the Nagpur High Court relying on the aforesaid decision of,

the Privy Council in *Nazir Ahmad v. King-Emperor* [AIR 1936 PC 253 (2) : 63 IA 372] held that the evidence of the Magistrate, who recorded the",

confession of the accused and did not obtain his signatures thereon, was inadmissible. The Magistrate also while recording the confession of the",

accused did not follow the provisions of Sections 164 and 364 of the Code (old) and did not record the confession of the accused with required care,

and formality. He also did not record the certificate as required by Section 164 and also failed to obtain the signature of the accused. The Magistrate,

subsequently went into the witness box for the prosecution and deposed that the confession was made by the accused voluntarily. In these,

circumstances the High Court held that the evidence of the Magistrate was inadmissible and the confession recorded by him was ineffective.,

404. In the case before the Bombay High Court contention was that "as per the provisions of sub-section (4) of Section 164 CrPC it is mandatory,

for the Magistrate, after recording the confession, to obtain the signature of the accused thereon and as in the present case the learned Judicial",

Magistrate failed to obtain the signature of the accused on the confession recorded by him, that confession could not be admitted in evidence and the",

defect could not be cured by invoking the provisions of Section 463 CrPC",.

This contention was upheld by the High Court relying on the aforesaid two decisions, one of the Privy Council and the other of the Nagpur High",

Court. We do not think the view taken by the Bombay High Court and the Nagpur High Court is correct. It may be noted that the Privy Council did,

not consider the scope and applicability of Section 463 in the circumstances of the case before it. In that case it was conceded that the confessions,

were not recorded either under Section 164 or Section 281 of the Code. The view taken by the Bombay High Court appears to us to be rather too,

technical and if we accept this view it would be almost making Section 463 of the Code ineffective. Confession of Nalini (A-1) runs into 18 pages.,

The certificate as required by Rule 15(3) of the TADA Rules in the form prescribed has been appended by V. Thiagarajan (PW 52), SP, at the end of",

the confession. Signatures of Nalini (A-1) appear on pp. 1 to 16. In his testimony V. Thiagarajan (PW 52) has submitted that his not getting signatures,

of Nalini (A-1) at the end of the confession is an omission. There is no cross-examination of V. Thiagarajan (PW 52) as to why the omission,

occurred. It has not been suggested that the omission was deliberate. Statement of V. Thiagarajan (PW 52) is forthright. There could certainly be a,

human error but that would not mean that Section 463 of the Code becomes inapplicable. Mr Natarajan is correct in his submission that when the,

requirement of law is that confession should be signed by the person making it, it would mean his signatures at the end of the confession. What",

Section 463 requires is that evidence could be led of police officer recording the confession as to why provisions of Rule 15(3) could not be complied,

with while recording the confession. It has not been suggested or brought on record as to how not getting signatures of Nalini (A-1) on the last pages,

of the confession has injured her in her defence on the merits of the case. The confession has been corroborated in material particulars by means of,

an independent evidence even if the confessions of the co-accused are set apart. Confession of Nalini (A-1) was recorded on 7-8-1991 and was sent,

to the Court of the Chief Judicial Magistrate on the following day and on 9-8-1991 it was sent to the Designated Court. We find that the confession,

was duly made, which was recorded by V. Thiagarajan (PW 52). We are, therefore, inclined to admit the confession of Nalini (A-1) overruling the",

objection that Rule 15(3) of the TADA Rules has been violated.,

405. We think sufficient time was given to the accused in the circumstances of the case for them to reflect if they wanted to make confession. Merely,

because confession was recorded a day or so before the police remand was to expire would not make the confession involuntary. No complaint was,

made before the trial court that confession was the result of any coercion, threat or use of any third-degree methods or even playing upon the",

psychology of the accused.â??,

95. In re: Nalini (supra) the Supreme Court would hold that the view taken by the Bombay High Court in Abdul Razak Shaikh case (1988 Cri.LJ 382),

and the Nagpur High Court in Neharoo Mangtu Satnami v. Emperor (AIR 1937 Nag. 220) relying upon the decision of the Privy Council in re: Nazir,

Ahmed (supra) is not correct. The Bombay High Court had held that the provision that the Magistrate after recording confession should obtain the,

signature of the accused thereon is a salutary provision and has been specially provided for, for safeguarding the interest of the accused and,"

therefore, it is mandatory. The High Court also held that this omission cannot be

cured by examining the Magistrate under Section 463 of the Code.",

The Bombay High Court also relied on a decision of the Nagpur High Court relying upon the decision in re: Nazir Ahmed (supra) had held that the,

evidence of the Magistrate, who recorded the confession of the accused and did not obtain his signature thereon, was inadmissible. The Supreme",

Court once again held that the Privy Council had not considered the scope and applicability of Section 463 of Cr.P.C. in the circumstances of the case,

before it. The Supreme Court would hold that the view taken by the Bombay High Court was too technical and if that view was accepted it would be,

almost making Section 463 of the Code ineffective. While holding so the Supreme Court would examine the confession of Nalini intricately. It would,

examine as to why the Magistrate had failed to obtain the signature of the accused on the confession recorded by him. The Supreme Court would then,

hold:-,

404. In his testimony V. Thiagarajan (PW 52) has submitted that his not getting signatures of Nalini (A-1) at the end of the confession is,

an omission. There is no cross-examination of V. Thiagarajan (PW 52) as to why the omission occurred. It has not been suggested that the omission,

was deliberate. Statement of V. Thiagarajan (PW 52) is forthright. There could certainly be a human error but that would not mean that Section 463,

of the Code becomes inapplicable. Mr Natarajan is correct in his submission that when the requirement of law is that confession should be signed by,

the person making it, it would mean his signatures at the end of the confession. What Section 463 requires is that evidence could be led of police",

officer recording the confession as to why provisions of Rule 15(3) could not be complied with while recording the confession. ,

96. In re: Ram Singh (supra) the Supreme Court would have occasion to examine a situation where a confessional statement had been recorded by,

the Magistrate as per the provisions of section 164 Cr.P.C. but had failed to record the question that was put by him to the accused whether there,

was any pressure on her to give a statement. The said Magistrate had however, stated in his evidence before the Court that he had asked the accused",

orally whether she was under any pressure, threat or fear and he was satisfied that the accused was not under any pressure from any corner, that in",

the room in which the said confessional statement was recorded it was only he

and the Doctor who were present and none else and that no police, officer was available even within the precincts of the hospital. On such fact situation the Supreme Court would hold that the said defect is cured by, section 463 as the mandatory requirement provided under section 164 (2), namely, explaining to the accused that he was not bound to make a", statement and if a statement was made the same might be used against him had been complied with and the same is establish from the certificate, appended to the statement and from the evidence of the Magistrate. It was in this context that the Supreme Court distinguished the judgment of the, Judicial Committee in re: and observed:,

18. Turning now to the next submission of learned counsel appearing on behalf of the accused as to the judicial confession (Ext. 187) made by A-

1 before PW 62, it would be useful to refer to the relevant provisions in the Criminal Procedure Code that deal with the recording of a judicial",

confession by a Judicial Magistrate and see whether the judicial confession recorded by PW 62 of A-1 is according to the procedure prescribed by,

these provisions or whether any violation thereof has been made by the Magistrate while recording it. The relevant sections in CrPC are Sections 164,"

281 and 463.,

19. Sub-section (2) of Section 164 CrPC requires that the Magistrate before recording confession shall explain to its maker that he is not bound to,

make a confession and if he does so it may be used as evidence against him and upon questioning the person if the Magistrate has reasons to believe,

that it is being made voluntarily then the confession shall be recorded by the Magistrate. Sub-section (4) of Section 164 provides that the confession so,

recorded shall be in the manner provided in Section 281 and it shall be signed by its maker and the recording Magistrate shall make a memorandum at,

the foot of such record to the following effect:,

"I have explained to [name] that he is not bound to make a confession and that, if he does so, any confession he may make may be used as",

evidence against him and I believe that this confession was voluntarily made. It was taken in my presence and hearing, and was read over to the",

person making it and admitted by him to be correct, and it contains a full and true account of the statement made by him.",

(signed)Magistrate",

20. Sub-section (1) of Section 463 provides that in case the court before whom the confession so recorded is tendered in evidence finds that any of,

the provisions of either of such sections have not been complied with by the recording Magistrate, it may, notwithstanding anything contained in",

Section 91 of the Evidence Act, 1872, take evidence in regard to such non-compliance, and may, if satisfied that such non-compliance has not injured",

the accused in his defence on the merits and that he duly made the statement recorded, admit such statement.",

21. In the case on hand, the application that was made to PW 62 was for recording a dying declaration as A-1 was suspected to have consumed",

poison. Learned counsel appearing on behalf of the accused submits that as there was no danger to the life of A-1, there was no reason for the",

prosecution to call PW 62 for recording dying declaration of A-1. We have perused the indoor charts of Janta Hospital (Exts. 192 and 193), which",

clearly depict that hers was a case of suspected poison. We have also been taken through the evidence of Dr. Jagdish Sethi, PW 52, who, in his",

testimony, has also stated that A-1 was admitted to Janta Hospital in the morning of 24th August as a suspected case of poison and, therefore, she",

was declared to be unfit to make any statement. In our view, the prosecution rightly sent for PW 62 for recording dying declaration of A-1.",

22. Before advertent to the three decisions relied upon by the learned counsel for the accused, we shall first analyse the judicial confession (Ext. 187)",

recorded by PW 62 and see whether it has been recorded according to the procedure prescribed by Section 164.,

23. On 24-8-2001, upon receipt of an application moved by Superintendent of Police for recording dying declaration of A-1 by a Magistrate, DSP Man",

Singh, who partly investigated the case, approached the Chief Judicial Magistrate, Hissar, who, in turn, marked the said application to Pardeep Kumar,",

PW 62. On its presentation to PW 62 by DSP Man Singh at 10 p.m. the same day, both PW 62 and DSP Man Singh left for Janta Hospital, Barwala.",

After reaching the hospital and before recording the statement, PW 62 first sought opinion of Dr. Anant Ram (PW 32) as to the fitness of A-1 to",

make the statement. As in the opinion of PW 32, A-1 was fit to make the statement, PW 62 proceeded to record it, which is in question and answer",

form. It appears from Ext. 187 as well as from the questions and answers which were put to A-1 that PW 62 warned A-1 that she was not bound to,

make any confessional statement and in case she did so, it might be used against her as evidence. In spite of this warning, A-1 volunteered to make",

the statement and only thereafter the statement was recorded by PW 62. In the certificate that was appended to the said confessional statement PW,

62 has very categorically stated that he had explained to A-1 that she was not bound to make a confession and that if she did so, any confession she",

would make, might be used as evidence against her and that he believed that the confession was voluntarily made. He further stated that he read over",

the statement to the person making it and admitted by her to be correct and that it contained a full and true account of the statement made by her. It,

has been further stated by PW 62 in his evidence that at the time of recording of the confession it was he and PW 32, who were present in the room",

and there was neither any police officer nor anybody else within the hearing or sight when the statement was recorded. It also appears from the,

evidence of PW 62 that it took about 2½ hours for him to record the statement of A-1, which runs into 5 pages, which he started at 10.53 p.m. and",

ended at 1.28 a.m. which goes to show that A-1 took her time before replying to the questions put. PW 62 has also stated that she had given the,

statement after taking due time after understanding each aspect. It also appears that he was satisfied that she was not under any pressure from any,

corner. Therefore, it is evident from the certificate appended to the confessional statement by PW 62 that the confessional statement was made by",

the accused voluntarily. Of course, he failed to record the question that was put by him to the accused whether there was any pressure on her to give",

a statement, but PW 62 having stated in his evidence before the court that he had asked the accused orally whether she was under any pressure",

threat or fear and he was satisfied that A-1 was not under any pressure from any corner, that in the room in which the said confessional statement",

was recorded it was only he and PW 32 who were present and none else and that no police officer was available even within the precincts of the,

hospital. The said defect, in our view, is cured by Section 463 as the mandatory requirement provided under Section 164(2), namely, explaining to the",

accused that he was not bound to make a statement and if a statement is made the same might be used against him has been complied with and the,

same is established from the certificate appended to the statement and from the evidence of PW 62. Therefore, in the light of our discussion above,"

we have no hesitation in holding that the judicial confession (Ext. 187) having been recorded according to the procedure set out in Section 164 read,

with Section 281 and the defect made while recording the same being curable by Section 463, it is admissible in evidence.",

24. We now advert to the decisions relied upon by the learned counsel appearing on behalf of the accused. In Nazir Ahmad [(1935-36) 63 IA 372 :,

AIR 1936 PC 253 (2)] the accused, who was charged with dacoity and murder, was convicted on the strength of a confession said to have been made",

by him to a Magistrate of the class entitled to proceed under the provisions of Section 164 relating to the recording of confession. The confession was,

not recorded according to the procedure and the record of the confession was not available as evidence either. The Magistrate, however, appeared as",

a witness and gave oral evidence about the making of the confession. He stated that he made rough notes of what he was told, got a memorandum",

typed from the typist on the basis of the rough notes and thereafter destroyed the rough notes. The said memorandum, signed by him contained only",

the substance but not all of the matter to which he spoke orally. The recording Magistrate in the said memorandum just above his signature appended,

a certificate somewhat to the same effect as that prescribed in Section 164 and, in particular, stating that the Magistrate believed that the statements",

were voluntarily made. As there was no record in existence at the material time, there was nothing to be shown or to be read to the accused and",

nothing he could sign or refused to sign. The Judicial Committee held that the oral evidence of the Magistrate of the alleged confession was,

inadmissible. The Magistrate offered no explanation as to why he acted as he did instead of following the procedure required by Section 164. When,

questioned by the Sessions Judge, the response of the accused was a direct and simple denial that he had ever made any confession. The Judicial",

Committee, considering the abject disregard by the Magistrate of the provisions contained in Section 164 of the Code, observed that "where a",

power is given to do a certain thing in a certain way the thing must be done in that way or not at all". Nazir [(1935-36) 63 IA 372 : AIR 1936 PC 253,

(2)] is a case where recording Magistrate did not at all follow the procedure prescribed by Section 164 of the Code as a result of which, he violated",

the provisions thereof whereas in the case on hand the omission that has been made by the Magistrate is his failure to record the question that he,

asked to the accused whether she was under any pressure, threat or fear to make a confession in the confessional statement and the answer given by",

A-1. In his evidence before the court, PW 62 stated that he asked A-1 whether she was under any pressure, threat or fear and after he was satisfied",

that she was not under any pressure from any corner, he recorded in the memorandum that was appended to the confessional statement of A-1 that",

he believed that the confession was voluntarily made. In our view, Nazir [(1935-36) 63 IA 372 : AIR 1936 PC 253 (2)] has no application to the facts",

of the present case as the failure of PW 62 to record the question put and the answer given in the confessional statement has not caused prejudice to,

the accused in her defence and is a defect that is curable under Section 463.,

25. In Preetam [(1996) 10 SCC 432 : 1996 SCC (Cri) 1343] the accused was arrested on 17-6-1973 and when produced before the Magistrate on the,

following day he was sent to police custody, where he remained until 22-6-1973 and, thereafter he was sent to judicial custody. Upon being produced",

before a Magistrate on 25-6-1973 for recording his confession, he was given two hours' time to reflect. After cautioning the accused that he was not",

bound to make a confession and that if he did so, it might be used against him, the Magistrate went on to record his confession. Failure of the",

recording Magistrate to put questions to the accused to satisfy himself that the confession was voluntary so as to enable him to give the requisite,

certificate under sub-section (4) was termed by this Court as flagrant violation of the provisions of Section 164(2) and in utter disregard of the,

mandatory requirements of the said section. Preetam [(1996) 10 SCC 432 : 1996 SCC (Cri) 1343] is a case where the accused remained in police,

custody for six days immediately before the recording of his confession by the Magistrate and, therefore, could be said to have been pressurised,"

tortured and harassed by the police. In such a situation, omission on the part of the recording Magistrate to put a question to the accused to satisfy",

himself that the confession was being made voluntarily can be said to be flagrant violation of law. However, in the case on hand, A-1 was removed by",

the police from the place of occurrence to the hospital in the morning of 24-8-2001 where she remained until her arrest by the police in the evening of,

26-8-2001. It was at 10.58 p.m. on 24-8-2001 i.e. during her hospitalisation, that PW 62 recorded her confessional statement after cautioning her that",

she was not bound to make any confession and that if she did so, it might be used as evidence against her. PW 62 in his evidence has stated that it",

was only after administering the above caution and satisfying himself that A-1 was making the statement voluntarily that he proceeded on to record,

her confession. It also appears from his evidence that no police official was present either in the room in which he recorded the confessional,

statement of A-1, or in the hospital. Therefore, in the absence of any evidence to show that she was under direct or indirect vigil of the police",

authorities during her hospitalisation and she having already confessed the crime in her suicide note, the omission on the part of the recording",

Magistrate to record the question and the answer given in the confessional statement cannot be said to be flagrant violation of law, especially in view",

of the fact that the recording Magistrate has stated in his evidence that he orally asked A-1 if she was under any pressure, threat or fear and it was",

only after satisfying himself that she was not under any pressure from any corner that he recorded her confessional statement. In the certificate that,

was appended to the confessional statement as well, PW 62 has stated that he believed that confession that A-1 made was voluntary. In our view, the",

defect committed being curable under Section 463 has not injured the accused in her defence on the merits and that she duly made the statement.,

26. Similarly, in *Tulsi Singh* [(1996) 6 SCC 63 : 1996 SCC (Cri) 1118] , also relied upon by the learned counsel for the accused, the recording",

Magistrate did not explain to the accused that he was not bound to make a confession and that if he did so, it might be used against him, nor did he put",

any question to him to satisfy that the confession was being voluntarily made although, an endorsement to this effect was made by him in the",

certificate that was appended to the confessional statement. This Court, while setting aside the conviction and sentence recorded against the accused",

under Section 302 IPC, held that the Special Court was not at all justified in entertaining the confession as a voluntary one, observing that mere",

endorsement would not fulfil the requirements of sub-section (4) of Section 164. This case too has no application at all to the facts of the present case,

for two reasonsâ?"firstly, in this case too the appellant remained in police custody for a week and secondly, it is a case in which the recording",

Magistrate neither explained to the accused that he was not bound to make a confession and if he did so, it might be used against him nor satisfied",

himself upon questioning the accused that the confession was being voluntarily made. In the case on hand, PW 62 in his evidence has stated that he",

did ask the accused the question whether she was under any pressure, threat or fear and only after satisfying himself that she was not under any, that",

he proceeded on to record her confessional statement.,

27. Therefore, in view of our above discussion, the three decisions relied upon by the learned counsel for the accused in Nazir [(1935-36) 63 IA 372 :",

AIR 1936 PC 253 (2)] , Preetam [(1996) 10 SCC 432 : 1996 SCC (Cri) 1343] and Tulsi [(1996) 6 SCC 63 : 1996 SCC (Cri) 1118] are of no help to",

the accused.,

28. In Babu Singh [(1963) 3 SCR 749 : (1964) 1 Cri LJ 566] reliance on which has been placed by Mr Tulsi, appearing on behalf of the appellant in",

Crl. Appeal No. 895 of 2005, a three-Judge Bench of this Court, while dealing with the question whether non-compliance with the provisions of",

Section 164 or Section 364 (Section 281 of the new Code) is a defect which could be cured by Section 533 (Section 463 of the new Code) observed at,

SCR pp. 759-60 thus:.,

â??Section 533(1) lays down that if any court before which a confession recorded or purporting to be recorded under Section 164 or Section 364 is,

tendered or has been received in evidence finds that any of the provisions of either of such sections have not been complied by the Magistrate,

recording the statement, it shall take evidence that such person duly made the statement recorded; and it adds that notwithstanding anything contained",

in Section 91 of the Evidence Act, 1872 such statement shall be admitted if the error has not injured the accused as to his defence on the merits. Mr",

Khanna contends that the Magistrate has in fact given evidence in the trial court and the evidence of the Magistrate shows that the statement had,

been duly recorded; and he argues that unless it is shown that prejudice has been caused to the accused the irregularity committed by the Magistrate,

in not complying with Section 364(3) will not vitiate the confessions nor will it make them inadmissible. There is some force in this contention.â?;! But,

for the purpose of the present appeals we are prepared to assume in favour of the prosecution that the confessions have been proved and may",

therefore, be considered on the merits if they are shown to be voluntary and that is the alternative argument which has been urged before us by Mr",

Rana.â??,

29. After observing that the confessions were duly recorded, the Bench proceeded to discern from the factual matrix of the case whether the",
confessions were voluntary or not and taking note of three unusual features qua the confession recorded, namely, (1) that the accused was kept in the",
police custody even after the substantial part of the investigation was over; (2) that the confession so recorded did not indicate as to how much time,
the accused was given by the Magistrate before they made their confessions, and (3) that the Magistrate who recorded the confession had taken part",
in assisting the investigation by attesting recovery memos in two cases, the confessional statement of the accused was excluded from consideration. It",
was observed at SCR p. 764 thus: ,

â??Having regard to these features of the case we are not prepared to uphold the finding of the High Court that the confessions made by the,
appellants can be safely treated to be voluntary in the present case. If the confessions are, therefore, excluded from consideration it is impossible to",
sustain the charge of murder against either of the two appellants. In a case where the charge of murder was founded almost exclusively on the,
confessions it was necessary that the High Court should have considered these relevant factors more carefully before it confirmed the conviction of,
the appellants for the offence under Section 302 and confirmed the sentence of death imposed on Babu Singh. In our opinion, if the confessions are",
left out of consideration, the charge of murder cannot be sustained.â??",

30. The three unusual features noticed by the Bench in Babu Singh [(1963) 3 SCR 749 : (1964) 1 Cri LJ 566] impelled the learned Judges to exclude,
from consideration the confessional statement made before the Magistrate by the accused after having observed that the confession was inadmissible,
in evidence. As the charge of murder was founded exclusively on the confession, both the accused persons were acquitted of the charge under",
Sections 302/34 IPC.,

31. In our view, the factual matrix in Babu Singh [(1963) 3 SCR 749 : (1964) 1 Cri LJ 566] was distinct from the one with which we are dealing. In",
Babu Singh [(1963) 3 SCR 749 : (1964) 1 Cri LJ 566] both the accused remained in police custody for a long time and even after the substantial,
portion of the investigation was over. If one were or held to be in police custody,

question of pressure, threat or fear would arise. We have already",
held that in the facts and circumstances of the present case, A-1 cannot be said to be in police custody during her hospitalisation and, therefore,"
question of her being pressurised, threatened or put under any kind of fear does not arise."

32. In *State of U.P. v. Singhara Singh* [AIR 1964 SC 358 : (1964) 1 Cri LJ 263 (2)] a three-Judge Bench of this Court observed that if the confession,

is not recorded in proper form as prescribed by Section 164 read with Section 281, it is a mere irregularity which is curable by Section 463 on taking",

evidence that the statement was recorded duly and has not injured the accused in defence on merits. It was observed at AIR p. 362, para 10 thus:",

â??What Section 533 [Section 463 of the new Code] therefore, does is to permit oral evidence to be given to prove that the procedure laid down in",

Section 164 had in fact been followed when the court finds that the record produced before it does not show that that was so. If the oral evidence,

establishes that the procedure had been followed, then only can the record be admitted. Therefore, far from showing that the procedure laid down in",

Section 164 is not intended to be obligatory, Section 533 [Section 463 of the new Code] really emphasises that that procedure has to be followed. The",

section only permits oral evidence to prove that the procedure had actually been followed in certain cases where the record which ought to show that,

does not on the face of it do so.â??,

33. In the light of the above discussion, we are of the view that Ext. 187 is admissible, having been recorded according to the procedure prescribed",

under law and the same is voluntary and truthful.â??,

97. In *re: Ram Singh* (supra) the Supreme Court would find that the certificate appended to the confession would show that it was voluntary. The,

Supreme Court would further notice that the Magistrate had failed to record the question that was put by him to the accused whether there was any,

pressure on her to give a statement. The Supreme Court would also notice that the said Magistrate had stated in his evidence that he had asked the,

accused orally whether she was under any pressure, threat or fear and he was satisfied that he was not under any pressure from any corner; that in",

the room in which the confession was recorded it was only he and another witness who were present and no police officer was available even within,

the precincts of the hospital. In such factual narrative the Supreme Court would hold that the said effect is cured by Section 463 Cr.P.C. as the,

mandatory requirement provided under Section 164(2) Cr.P.C. of explaining to the accused that he was not bound to make a statement and if a,

statement is made the same might be used against him had been complied with established by the certificate from the Magistrate.,

98. In re: Ahmed Hussein Vali Mohammed Saiyed v. State of Gujarat(2009) 7 SCC 254 a three Judge Bench of the Supreme Court would examine,

statutory appeals under Section 19 of the Terrorist and Disruptive Activities (Prevention) Act, 1987 against the order passed by the Designated Court",

whereby the learned Designated Judge convicted the appellants under Section 302 read with Section 120-B IPC, Section 25 (1) (c) and 27 of the",

Arms Act and Section 5 of the TADA Act. The appellant's main contention was that the conviction based on confessional statements of the,

appellants without any corroborative evidence is not sustainable. It was also contended that even those alleged confessional statements of the accused,

are not admissible as not fulfilling the conditions prescribed under Rule 15 (3) (b) of the TADA Rules. It was further contended that without a,

certificate of the competent person in clear categorical terms about his satisfaction or belief as to the voluntary nature of the confession recorded by,

him would be fatal to the admissibility and the same cannot be cured by placing any other material. It was submitted that no contemporaneous record,

to support the confessions were produced. The Supreme Court would also pronounce its view on the omission to obtain signature of the accused at the,

end of confession thus:-,

53. It is also clear that while recording confessional statement, if there is omission to obtain signature of the accused at the end of the confession",

the same is admissible and the omission made by the competent officer is curable in view of the provision contained in Section 463 CrPC. In the same,

manner, the Court has held that even if there was any omission in respect of the certificate which the competent officer is required to append under",

sub-rule (3) at the foot of the confession, it can be cured as provided under Section 463 CrPC. Such approach is permissible in view of Section 463",

CrPC in regard to the omission in recording confession under Section 164 CrPC, the Court has clarified that the same approach can be adopted in",

respect of confession recorded under Section 15 of the TADA Act.â??,

99. Section 3 of the Oaths Act, 1969 reads thus: â??3. Power to administer oaths.â?"(1) The following courts and persons shall have power to",

administer, by themselves or, subject to the provisions of sub-section (2) of section 6, by an officer empowered by them in this behalf, oaths and",

affirmations in discharge of the duties imposed or in exercise of the powers conferred upon them by law, namely:â?""

(a) all courts and persons having by law or consent of parties authority to receive evidence;,,

(b) the commanding officer of any military, naval, or air force station or ship occupied by the Armed Forces of the Union, provided that the oath or",

affirmation is administered within the limits of the station.,

(2) Without prejudice to the powers conferred by sub-section (1) or by or under any other law for the time being in force, any court, Judge, Magistrate",

or person may administer oaths and affirmations for the purpose of affidavits, if empowered in this behalfâ?""

(a) by the High Court, in respect of affidavits for the purpose of judicial proceedings; or",

(b) by the State Government, in respect of other affidavits.â??â??",

100. Section 4 of the Oaths Act, 1969 reads thus:",

â??4. Oaths or affirmations to be made by witnesses, interpreters and jurors.â?"(1) Oaths or affirmations shall be made by the following persons,"

namely:â?",

(a) all witnesses, that is to say, all persons who may lawfully be examined, or give, or be required to give, evidence by or before any court or person",

having by law or consent of parties authority to examine such persons or to receive evidence;,,

(b) interpreters of questions put to, and evidence given by, witnesses; and (c) jurors: Provided that where the witness is a child under twelve years of",

age, and the court or person having authority to examine such witness is of opinion that, though the witness understands the duty of speaking the truth,"

he does not understand the nature of an oath or affirmation, the foregoing provisions of this section and the provisions of section 5 shall not apply to",

such witness; but in any such case the absence of an oath or affirmation shall not render inadmissible any evidence given by such witness nor affect,

the obligation of the witness to state the truth.,

(2) Nothing in this section shall render it lawful to administer, in a criminal proceeding, an oath or affirmation to the accused person, unless he is",

examined as a witness for the defence, or necessary to administer to the official interpreter of any court, after he has entered on the execution of the",

duties of his office, an oath or affirmation that he will faithfully discharge those duties.â??â??",

101. Section 6 the Oaths Act, 1969 reads thus: â??6. Forms of oaths and affirmations.â?"(1) All oaths and affirmations made under section 4 shall be",

administered according to such one of the forms given in the Schedule as may be appropriate to the circumstances of the case: Provided that if a,

witness in any judicial proceeding desires to give evidence on oath or solemn affirmation in any form common amongst, or held binding by, persons of",

the class to which he belongs, and not repugnant to justice or decency, and not purporting to affect any third person, the court may, if it thinks fit,",

notwithstanding anything hereinbefore contained, allow him to give evidence on such oath or affirmation.",

(2) All such oaths and affirmations shall, in the case of all courts other than the Supreme Court and the High Courts, be administered by the presiding",

officer of the court himself, or, in the case of a Bench of Judges or Magistrates, by any one of the Judges or Magistrates, as the case may",

be.â??â??,

102. Section 7 of the Oaths Act, 1969 reads thus: â??7. Proceedings and evidence not invalidated by omission of oath or irregularity.â?" No omission",

to take any oath or make any affirmation, no substitution of any one for any other of them, and no irregularity whatever in the administration of any",

oath or affirmation or in the form in which it is administered, shall invalidate any proceeding or render inadmissible any evidence whatever, in or in",

respect of which such omission, substitution or irregularity took place, or shall affect the obligation of a witness to state the truth.â??",

103. Section 8 of the Oaths Act, 1969 reads thus: â??8. Persons giving evidence bound to state the truth.â?"Every person giving evidence on any",

subject before any court or person hereby authorised to administer oaths and affirmations shall be bound to state the truth on such subject.â??â??,

104. The schedule to the Oaths Act, 1969 reads thus:",

THE SCHEDULE,

(See section 6),

FORMS OF OATHS OR AFFIRMATIONS,

Form No. 1 (Witnesses):

I do swear in the name of God/ solemnly affirm that what I shall state shall be the truth, the whole truth and nothing but the truth."

105. In re: State of Rajasthan v. Darshan Singh(2012) 5 SCC 789, the Supreme Court would hold:-",

24. This Court in Rameshwar v. State of Rajasthan [AIR 1952 SC 54 : 1952 Cri LJ 547] has categorically held that the main purpose of,

administering of oath is to render persons who give false evidence liable to prosecution and further to bring home to the witness the solemnity of the,

occasion and to impress upon him the duty of speaking the truth, further such matters only touch credibility and not admissibility. However, in view of",

the provisions of Section 7 of the Oaths Act, 1969, the omission of administration of oath or affirmation does not invalidate any evidence."

106. Although, the Kerala High Court in re: Haridasan Palayil (supra) was dealing with taking of oath by member of State legislature and whether",

variation of such prescribed form was permissible or not it would have occasion to examine the meaning of the expression oath and hold that an oath,

is a form of attestation by which a person signifies that he is bound in conscience to perform an act faithfully and truthfully. It involves the idea of,

calling in God to witness what is averred as truth, and it is supposed to be accompanied with an invocation of his vengeance, or a renunciation of his",

favour, in the event of falsehood."

107. Sub Section (2), (3) and (4) of Section 164 Cr.P.C. all relate to ensuring the voluntariness of the statement of the accused vis-à-vis the",

investigating agencies. The question raised here is somewhat different. It does not relate to allegation of any undue influence, threat or promise made",

to the accused by the investigating agencies, at least not at this stage. What is required to be answered is whether administering of oath per se by the",

Magistrate on the accused would amount to undue influence, threat or promise."

108. A perusal of Section 164 Cr.P.C. makes it unequivocally clear that whereas Section (2), (3) and (4) exclusively relates to confession, sub-section",

(5) thereof relates to manner of recording statement other than confession and therefore necessarily not the method for recording confessions which, ought to be done in the manner laid down in sub-section (4) under Section 281 of Cr.P.C. The legislative intent of using the words "other than a, confession" within brackets after the words "any statement" is to limit the mandate of sub-section (5) of Section 164 Cr.P.C. to recording of, statement only and not confessions. Therefore, it is also limiting the requirement of sub-section (5) of Section 164 Cr.P.C. to the recording of, statements of witnesses only other than confessions. In other words the requirement of administering oath is limited to witnesses only and not to an, accused making a confession.,

109. In the Criminal Procedure Code, 1893, as it stood before the amendment of 1973, the relevant provision was section 164(2); it read as follows:",

Section 164(2): "such statements shall be recorded in such of the manners hereinafter prescribed for recording evidence as is, in his opinion, best",

fitted for the circumstances of the case. Such confessions shall be recorded and signed in the manner provided in section 364, and such statements or",

confessions shall then be forwarded to the Magistrate by whom the case is to be inquired into or tried.",

110. The Forty First Report of the Law Commission, which preceded the introduction of Section 164(5) Cr.P.C. had stated:-",

"The earlier Report (37th) considered the question whether the statements recorded under section 164 should be on oath or not and recommended,

that they should be. The actual practice, we understand varies; but it would certainly be proper if such statements are always made on oath and this",

should be provided in the section itself" [as it has been done by the new sub-section (5).]"

111. The new Cr.P.C. came into force on the 1st of April 1974. The Objects and Reasons of Section 164 Cr.P.C. is as follows:-,

"The Law Commission in its 41st Report (page 75, para.14, 17) had remarked thus while recommending re-arrangement of the provisions of sub-",

sections (2) and (3): The earlier Report (37th), considered the question whether statements recorded under S. 164 should be on oath or not and",

recommended that they should be. The actual practice we understand, varies; but it would certainly be proper if such statements were always made",

on oath and this should be expressly provided in the section itself. (See sub-section (5). As a further safeguard to ensure that the confession in, voluntary, a new sub-clause has been added prohibiting a remand to police custody of a person who expresses his unwillingness to make the", confession when produced before the Magistrate. This does not of course mean or imply that remand has to be made if the accused wants to, confess- J.C.R (See sub-section (3) now).

112. The Legislature has advisedly used the word "statement" while referring to statement of witnesses and the word "confession" while, referring to confessions of the accused in Section 164 Cr.P.C. A comparison of Section 164 (2) of the old Cr.P.C. with section 164 (5) Cr.P.C. would, reflect that the former part of the old sub-section (2) of Section 164 of the old Cr.P.C. has become sub-section (5) of Section 164 Cr.P.C. Section 164, (5) Cr.P.C. now contains an express provision for administration of oath by the Magistrate to the person whose statement is recorded. Section 164, Cr.P.C. provides for recording of confession by accused persons and statements by any person including an accused.,

113. A confession by an accused person cannot be made the basis of a prosecution for perjury under Section 193 Cr.P.C. However, a statement is to", be recorded in the manner prescribed for recording evidence may be made the basis of a charge for perjury under Section 193 I.P.C. perjury., Substantive evidence is one which is given by witness in Court on oath in presence of accused whereas statement recorded under Section 164 is not, substantive evidence.,

114. Under the scheme of Section 164 Cr.P.C. confessions by an accused persons and statements of persons can be recorded. Whereas confessions, are required to be recorded in the manner provided by sub section (2), (3) and (4) of Section 164 and Section 281 Cr.P.C. statements other than", confession are required to be recorded in the manner provided under sub-section (5) of Section 164 Cr.P.C. A reading of Section 164 (2), (3) and (4)", with Section 281 Cr.P.C. makes it amply clear that there is no provision to administer oath on an accused person. The Magistrate while doing so must", before recording any such confession, explain to the accused that he is not bound to make a confession and that, if he does so it may be used "as", evidence against him. Under Section 281 Cr.P.C. the record of examination of

accused is to be made by the concerned Magistrate and signed by, the accused as well as the Magistrate who is required to certify under his own hand that the examination was taken in his presence and hearing and, that the record contains a full and true account of the statement made by the accused. A reading of Section 164 (5) Cr.P.C. makes it evident that a, statement other than confession is to be recorded by the Magistrate in the manner provided for recording of evidence and the said Magistrate shall, have power to administer oath to the person whose statement is so recorded. The word "evidence" used in Section 164 (5) Cr.P.C. is defined in, Section 3 of the Indian Evidence Act, 1872. The word "evidence" as defined means and includes "(1) all statements which the Court permits", or requires to be made before it by witnesses, in relation to matters of fact under enquiry, such statements are called oral evidence; (2) all documents", including electronic records produced for the inspection of the Court, such documents are called documentary evidence." The Legislature has, advisedly not desired that confessions be recorded in the manner provided for recording of evidence. Thus, it is evident that under the scheme of, Section 164 Cr.P.C. as well as Section 281 Cr.P.C. there is no provision for recording a confession on oath. It is quite evident that Section 164 Cr.P.C, has been designed and scripted to ensure that the privilege against self-incrimination is protected.,

115. The Supreme Court in re: Babubhai Udensinh Parmar (supra) has categorically held that administration of oath while recording statements of, accused is prohibited and there should be strict compliance of the provision of Section 164 Cr.P.C. The word prohibited in the context would mean, forbidden by law. It is seen that oath cannot be administered to an accused person while recording a confession under the provision of Section 164, Cr.P.C. Section 164(4) Cr.P.C. provides that the confession shall be recorded in the manner provided in Section 281 Cr.P.C. Section 281 Cr.P.C., provides for the manner of recording examination of an accused. Section 281 Cr.P.C. is a combination of Section 362 (2 A) and 364 of the Old, Cr.P.C. Section 281 Cr.P.C. does not prescribe administration of oath upon an accused while taking his confession. The provision of section 164, Cr.P.C., must be complied with not only in form, but in essence. It is a settled principle of law that where a power is given to do a certain thing in a",

certain manner, the thing must be done in that way or not at all. Other methods of performance are necessarily forbidden.",

116. While deciding this question it is vital to examine the effect of administration of oath. Under Section 3 of the Oaths Act, 1969 all Courts and",

persons having by law or consent of parties authority to receive evidence shall have power to administer oaths and affirmations in discharge of the,

duties imposed or in exercise of the powers conferred upon them by law. Thus, as a natural corollary a Magistrate while recording a confession would",

not be recording evidence and thus would not have the necessary power to administer oath on accused under Section 3 of the Oaths Act, 1969. Under",

Section 4 of the Oaths Act, 1969 oath or affirmation shall be made by witnesses, that is to say, all persons who may lawfully be examined or give, or",

be required to give, evidence by or before any Court or person having by law or consent of parties authority to examine such persons or to receive",

evidence. Section 4(2) of the Oaths Act, 1969 specifically provides that nothing in this section shall render it lawful to administer, in a criminal",

proceeding, an oath or affirmation to the accused person, unless he is examined as a witness for the defence, or necessary to administer to the official",

interpreter of any Court, after he has entered on the execution of the duties of his office, an oath or affirmation that he will faithfully discharge those",

duties. Section 4 of the Oaths Act, 1969 makes it clear that oath shall not be administered to an accused and it would be unlawful to do so in a criminal",

proceeding unless the accused is examined as a witness for the defence. In fact, Section 4(2) of the Oaths Act, 1969 not only prohibits the",

administration of oath to an accused person but also prohibits and renders it unlawful to administer oath even to the official interpreter of any Court,",

after he has entered on the execution of the duties of his office. Under Section 6 of the Oaths Act, 1969 all oaths and affirmations made under Section",

4 shall be administered according to such one of the forms given in the schedule as may be appropriate to the circumstances of the case. As per the,

schedule to the Oaths Act, 1969 a person required to administer oath or affirmation is required to swear in the name of god or solemnly affirm that",

what he states shall be the truth, the whole truth and nothing but the truth. Under Section 8 of the Oaths Act, 1969 every person giving evidence on",

any subject before a Court or person authorized to administer oaths and affirmations shall be bound to state the truth on such subjects. A Judicial oath,

is a pledge made by witness i.e. evidence is given in the name of God to speak the truth. The main purpose of administration of oath is to render, persons who give false evidence liable for prosecution. It is also to remind the witness of the solemnity of the occasion and to impress upon him the, duty of speaking the truth. After the administration of oath every person giving evidence on any subject before any Court shall be bound to state the, truth of such subject and the Court is the authority to either compel or excuse the witness from complying with the requirement. It is, however, seen", that under the scheme of the Oaths Act, 1969 administering oath to accused persons is not lawful and that the Magistrate while recording confession", does not have the power to administer oath to an accused person unless he is being examined as a witness for the defence. A perusal of the Oaths, Act, 1969 makes it clear that the said Act was enacted for the purpose of administration of oath to a witness or an interpreter to be examined in Court", and not upon an accused making a confession. The specific bar under Section 4 (2) of Oaths Act, 1969 against administration of oath to an accused", person in a criminal proceedings unless he himself is a defence witness is based on well founded criminal jurisprudence that accused cannot be forced, to make any incriminatory statement on oath which would prejudice his defence. Under the Indian system of criminal jurisprudence the burden of, proof is always on the prosecution except of course where the law creates a specific exception. Thus, even under the scheme of the Oaths Act, 1969", it is amply clear that administration of oath to an accused, unless he is being examined as a witness for the defence, is prohibited. The mandate of", Section 4 (2) of the Oaths Act, 1969 also reflects a clear desire of the Legislature to insulate the accused from self-incrimination.",

117. Let us now examine whether administration of oath on accused while recording a confession under Section 164 Cr.P.C. which is prohibited", unlawful and illegal can still be cured under Section 463 Cr.P.C.? Section 463 Cr.P.C. provides that the Court before which a confession or other, statement of an accused person is recorded, or purporting to be recorded under Section 164 or Section 281, is tendered, or has been received, in", evidence finds that any of the provisions of either of such sections have not been complied with by the Magistrate recording the statement, it may", notwithstanding anything contained in Section 91 of the Indian Evidence Act, 1872, take evidence in regard to such non- compliance, and may, if",

satisfied that such non-compliance has not injured the accused in his defence on the merits and that he duly made the statement recorded, admit such", statement.,

118. The judicial pronouncements of the Supreme Court quoted hereinabove makes it clear that:-,

(i) That the provision of Section 164 Cr.P.C. must be complied with not only in form but in essence.,

(ii) Non compliance with Section 164 Cr.P.C. goes to the root of the Magistrates Jurisdiction to record the confessions and renders the confession,

unworthy of credence.,

(iii) Section 164 Cr.P.C. provides a detailed procedure for recording confessions and statements of witnesses. Law requires that when the power is,

given to do a certain thing in a certain way it must be done in that way or not at all and that other methods of performance are necessarily forbidden.,

(iv) Section 463 Cr.P.C. permits taking of evidence in regard to non compliance of the provision of Sections 164 and 281 of Cr.P.C.,

(v) If any Court in which a confession recorded under Sections 164 and 281 Cr.P.C. by the Magistrate is tendered in evidence finds that any of the,

provisions of Section 164 and / or 281 Cr.P.C. have not been complied with by the Magistrate while recording the confession it shall take evidence,

that such person duly made the confession recorded. The recording of the confession is mandatory and failure to record the confession cannot be,

cured under Section 463 Cr.P.C. If it is proved that the confession was duly recorded then Section 463 Cr.P.C. further provides that notwithstanding,

anything contained in Section 91 of the Indian Evidence Act, 1872 such statement shall be admitted if the error has not injured the accused as to his",

defence on the merits.,

(vi) What Section 463 Cr.P.C., therefore, does is to permit oral evidence to be given to prove that the procedure laid down in Section 164 and 281",

Cr.P.C. had in fact been followed when the Court finds that the record produced before it does not show that that was so.,

(vii) Omission to record the confession in the proper form would not render the confession inadmissible and the defect is cured under Section 463,

Cr.P.C.,

(viii) Under Section 463 Cr.P.C. evidence could be led as to why the provision of

Sections 164 and 281 Cr.P.C. could not be complied with while,
recording the confession.,

(ix) When the voluntariness of the confession recorded by the Magistrate is established the failure or the defect or the irregularity or the error of the,
Magistrate in recording the said confession in the manner provided by Section 164 and 281 Cr.P.C. is curable under Section 463 Cr.P.C.,

119. It was argued before us that Section 463 Cr.P.C. falls under chapter XXXV under the head "irregular proceedings" and thus what Section,
463 Cr.P.C. permits is the curing of irregularities and not illegalities.,

120. The Supreme Court in *re: Sarah Mathew v. Institute of Cardio Vascular Diseases*⁸ (2014) 2 SCC 62 would hold:-,

"47. So far as the heading of the chapter is concerned, it is well settled that heading or title prefixed to sections or group of",

sections have a limited role to play in the construction of statutes. They may be taken as very broad and general indicators or the nature of the,

subject-matter dealt with thereunder but they do not control the meaning of the sections if the meaning is otherwise ascertainable by reading the,

section in proper perspective along with other provisions. In *Frick India Ltd. v. Union of India* [(1990) 1 SCC 400 : 1990 SCC (Tax) 185] , this Court",

has observed as under: (SCC p. 405, para 8)",

"8. It is well settled that the headings prefixed to sections or entries cannot control the plain words of the provision; they cannot also be referred to,

for the purpose of construing the provision when the words used in the provision are clear and unambiguous; nor can they be used for cutting down,

the plain meaning of the words in the provision. Only, in the case of ambiguity or doubt the heading or sub-heading may be referred to as an aid in",

construing the provision but even in such a case it could not be used for cutting down the wide application of the clear words used in the provision."

121. The Supreme Court in *SEBI v. Gaurav Varshney*(2016) 14 SCC 430 would hold:-,

"51. We have given our thoughtful consideration to the last submission advanced at the hands of the learned Senior Counsel for the Board. It is,",

however, not possible for us to accept the same. We are of the considered view, which clearly emerges from the observations rendered in *Bhooraji*",

case [*State of M.P. v. Bhooraji*, (2001) 7 SCC 679 : 2001 SCC (Cri) 1373] , that

Section 465 CrPC pertains to omissions or irregularities in matters of",
 procedure. It is, therefore, that both the sub-sections of Section 465, pointedly
 refer to proceedings under the CrPC. Added to the above, it is of some",
 significance that Chapter XXXV of CrPC includes Sections 460 to 466. The
 heading of the instant Chapter is "Irregular Proceedings". Not only,
 that, each one of the sections in Chapter XXXV of CrPC make pointed reference
 only to matters of procedure. There can be no doubt, therefore, that",
 omissions and/or irregularities in matters of procedure can be overlooked,
 subject to the condition that such an omission or irregularity does not",
 occasion "failure of justice". This is our understanding of Section 465
 CrPC."

122. It is thus clear that Section 463 Cr.P.C. also pertains to omission or
 irregularities in matters of procedure in recording statement or a confession,
 under Section 164 and 281 Cr.P.C. To understand the intent and scope of Section
 533 of old Cr.P.C. it was important to distinguish between (a),
 whether the confession or other statement was "duly made" after giving the
 necessary warning and after putting the required questions under,
 Section 164 and (b) whether the confession or other statement, duly made, was
 properly recorded. Section 533 of the old Cr.P.C would not apply in the",
 first case because to do so would be to defeat the very object of Section 164 and
 281 Cr.P.C. It is only the second kind of defect i.e. defects in,
 recording the confession or other statement, duly made, that was curable.
 Section 463 Cr.P.C. thus sought to clarify that the evidence given should",
 relate to apparent non-compliance with the statutory provisions. It is also clear
 that substantial illegality of not recording a confession as mandated by,
 Section 164 Cr.P.C. as opposed to mere irregularity in the procedure in recording
 the same cannot be cured under Section 463 Cr.P.C. The question,
 therefore is whether administration of oath on an accused person is a substantial
 illegality or a curable irregularity?,

123. We have already held that administration of oath on an accused while
 recording his confession is unconstitutional, prohibited, unlawful and illegal.",
 Section 164 Cr.P.C. has been meticulously designed in great detail to ensure
 voluntariness and truthfulness. The rationale as to why oath ought not to,
 be administered on an accused while recording confession seems to date back to
 the period in England when the accused were administered oath and,

confessions extracted in the ecclesiastical courts. The revulsion against this practice came to a head in the case of John Lilburn before the Court of, Star Chamber and was ultimately abolished in 1641. Thereafter, it was firmly recognized that accused should not be put on oath and that no evidence", should be taken from him. The privilege against self incrimination is now firmly embodied in various statutory provisions and other Constitutions of the, world including the 5th Amendment of the Constitution of the United States as part of the Bill of Rights and, inter-alia, protects individuals from being", compelled to be witness against themselves in criminal cases. The Constitution of India provides this safeguard under Article 20 (3) of the Constitution, of India. In re: Brijbasi Lal Shrivastava (supra) the Supreme Court would observe:-- "The evidence of PW 10 the officer who had taken the, statement of the appellants shows that he had administered an oath to the appellant before taking his statement although he was not empowered to, administer any oath. This circumstance by itself would amount to a concealed threat, because if the statement was found to be false the appellant may", have entertained a genuine belief that he might be prosecuted. To our mind, therefore, it seems quite clear that a positive act of the Magistrate to", administer oath on an accused while recording his confession may lead to an inference that the accused being compelled to state the facts which are, self-incriminatory by a method prohibited by law made the self-incriminating statement. This lingering doubt troubles the judicial mind to accept the, confession as voluntary. To hold that this illegality is curable under Section 463 Cr.P.C. would be to allow evidence of the Magistrate to come in to, explain whether the illegal administration of oath upon the accused by the said Magistrate resulted in injury to the accused. To our mind the prohibition, not to administer oath upon an accused is a protective umbrella to safeguard the accused from self-incrimination and therefore, it has been made", unlawful upon the Magistrate to administer oath on an accused while recording confession. To allow the said prohibition and illegality to be cured, under Section 463 Cr.P.C. would perhaps expose the accused to self-incrimination which may not always be voluntary if the accused were to believe, that having been administered oath he is now compelled to self-incriminate. We thus hold that not only administration of oath on an accused while, recording his confession is prohibited, unlawful and illegal but also that the said act cannot be cured under Section 463 Cr.P.C. Administration of Oath",

upon an accused while recording confession has a direct bearing on the voluntariness of the confession and voluntariness is sacrosanct. Let us look at, the problem from yet another perspective. Under the scheme of Cr.P.C. the accused has a right to remain silent. In fact it is a fundamental guarantee, under Article 20 (3) of the Constitution of India. Under the scheme of Cr.P.C. it is only at the stage of examination of an accused under Section 313, Cr.P.C. an accused is asked to explain any circumstance appearing in evidence against him by the Court. Even at this stage sub-section(2) of Section, 313 Cr.P.C. requires that no oath shall be administered to the accused when he is examined and under sub-section (3) thereof accused shall not, render himself liable to punishment by refusing to answer such questions, or by giving false answers to them. The recording of a statement of an", accused under Section 313 Cr.P.C. cannot equate to taking of evidence as envisaged in Section 463 Cr.P.C. for on the basis of such evidence taken, in regard to such non-compliance, the Court is required to come to a definite finding whether the accused was injured or not. At no stage of a criminal", trial can an accused be compelled to be a witness against himself. The narrow area within which an accused may be a competent witness is provided, in Section 315 Cr.P.C. which reads:-,

â??315. Accused person to be competent witness-(1) Any person accused of an offence before a Criminal Court shall be a competent witness for the, defence and may give evidence on oath in disproof of the charges made against him or any person charged together with him at the same trial:,

Provided that-,

(a) he shall not be called as a witness except on his own request in writing,;

(b) his failure to give evidence shall not be made the subject of any comment by any of the parties or the Court or give rise to any presumption against, himself or any person charged together with him at the same trial.,

(2) Any person against whom proceedings are instituted in any Criminal Court under section 98, section 107, or section 108, or section 109, or section", 110, or under Chapter IX or under Part B, Part C or Part D of Chapter X, may offer himself as a witness in such proceedings: Provided that in", proceedings under section 108, section 109, or section 110, the failure of such person to give evidence shall not be made the subject of any comment", by any of the parties or the Court or give rise to any presumption against him or

any other person proceeded against together with him at the same,
inquiry.â??,

124. As per Section 315 Cr.P.C. an accused before a Criminal Court shall be a competent witness for the defence and may give evidence on oath in,
disproof of the charges made against him or any person charged together with him at the same trial. Further, the accused shall not be called as a",

witness except on his own request in writing. In view of Section 315 Cr.P.C. an accused can waive his right under Article 20 (3) of the Constitution of,

India and tender himself as a witness if he so chooses as held by the Supreme Court in re: P. N. Krishna Lal v. Government of Kerala^{1995 Supp. (2)},

SCC 187. To cure the irregularity under 463 Cr.P.C. the Court is required to take evidence in regard to such non-compliance and be satisfied that,

such non-compliance has not injured the accused in his defence on the merits and that he duly made the statement recorded, admit such statement.",

Whether administration of oath on an accused person compelled the accused to incriminate himself is a question only the accused can answer. Under,

the scheme of Cr.P.C. we do not see any provision by which the evidence of the accused can be taken as required under Section 463 Cr.P.C. except,

under Section 315 Cr.P.C. and that too only if the accused so chooses. The illegal act of administering oath on an accused before recording his,

evidence would therefore take away the choice given to the accused under Section 315 Cr.P.C. and compel the accused to be a witness for the,

defence. We are thus of the view that this was not the eventuality contemplated under Section 463 Cr.P.C. Section 463 Cr.P.C. provides that the,

Court can notwithstanding anything contained in Section 91 of the Indian Evidence Act, 1872 take evidence in regard to such non-compliance as an",

exception to taking oral evidence to prove the contents of a document. Section 80 of the Indian Evidence Act, 1872 provides that:- â??Whenever any",

record is produced before the Court, purporting to be a record or memorandum of the evidence, or of any part of the evidence, given by a witness in a",

judicial proceeding or before any officer authorized by law to take such evidence, or to be a statement or confession by any prisoner or accused",

person, taken in accordance with law, and purporting to be signed by any Judge or Magistrate, or by any such officer as aforesaid, the Court shall",

presume- that the document is genuine; that any statements as to the

circumstances under which it was taken, purporting to be made by the person", signing it, is true, and that such evidence, statement or confession was duly taken.â The presumption under Section 80 of the Indian Evidence Act,"

1872 is available only when the record purporting to be a confession is taken in accordance with law. Administering illegal oath upon an accused,

would denude the presumption in favour of the genuineness of the said document and that the statement was duly taken under the said provision.,

125. A bare perusal of Section 164 Cr.P.C. ought to make it clear to the Magistrate that the entire exercise to be meticulously conducted by the,

Magistrate while recording the confession is to ensure its truthfulness and voluntariness. These are paramount safeguards provided in the law under,

Section 164 and 281 Cr.P.C., Section 4 (2) of the Oaths Act, 1969 as well as Article 20(3) of the Constitution of India. This is to ensure not only that",

the accused person is absolutely insulated from being compelled into self-incrimination but also to see that the accused not effected and not pressured,

by any external influences is willing to confess a crime committed by him which would be accepted as evidence against him. It would be strange that,

the Magistrate so empowered, to ensure its truthfulness and voluntariness himself commits an illegality which is prohibited giving reason to doubt not",

only of a failure of proper application of mind but also as to whether the confession itself was involuntary, under pressure of illegal oath administered.",

It has been held that administering oath to an accused before recording his confession is prohibited, unlawful and illegal. It has been held that",

administering oath on an accused infringes the fundamental guarantee against self-incrimination under Article 20 (3) of the Constitution of India. The,

Supreme Court has in no uncertain terms held that no prejudice may be proved for enforcing fundamental right. Violation of fundamental right itself,

renders the impugned action void. The Supreme Court has also held that compulsion must be understood to mean âduressâ and that compulsion in,

this sense is a physical objective act and not the state of mind of the person making the statement, except where the mind has been so conditioned by",

some extraneous process as to render the making of the statement involuntary and, therefore extorted. The Magistrate while administering oath on an",

accused before recording the confession commits an illegality and unlawful act prohibited by law. Any information received which may be self-

incriminatory in violation of the laws as well as the Constitutional guarantee, which may have compelled the accused to self-incriminate cannot but be",

termed "duress" or "undue influence". While it is true that the demand or requirement for speaking truth is absolute both by a witness after,

he is administered oath and by an accused while making a confession, administering oath upon an accused while recording his confession would lead",

to disastrous consequences. A perusal of Section 164 read with Section 281 Cr.P.C. makes it evident that the record of the examination of the,

accused is required to be done in a question and answer format. Section 281 Cr.P.C. mandates that whenever an accused is examined by any,

Magistrate the whole of such examination, including every question put to him and every answer given by him, shall be recorded in full by the",

Presiding Judge or Magistrate himself or where he is unable to do so owing to a physical or other incapacity, under his direction and superintendence",

by an officer of the Court appointed by him in his behalf. The administration of illegal oath upon the accused at the first instance and thereafter,

questioning the accused person and seeking information which is self-incriminatory cannot but fall squarely within the ambit and scope of,

"testimonial compulsion". When any mode of pressure, subtle or crude, mental or physical, direct or indirect, but sufficiently substantial, applied by",

the Policeman (a person in authority) for obtaining information from an accused strongly suggestive of guilt becomes "compulsion testimony" as,

held by the Supreme Court in re: Nandini Satpathy (supra) it can also be said that the same act by a Magistrate who also is a person in authority for,

obtaining self-incriminatory information from the accused is also "compelled testimony". We hold that in order to accept a confession as voluntary,

the Court must be absolutely certain that the confession is unblemished and there remains not an iota of doubt that the confession was actuated by,

undue influence, threat or promise. When a Magistrate takes the chair to record the confession, the mandate of the law prescribes the Magistrate to",

ensure that the mind of the accused is free from any external pressure. While doing so, if the Magistrate goes on to administer oath upon the accused",

it cannot be said that the said Magistrate complied with the statutory requirement of the law to ensure the voluntariness of the confession. We further,

hold that the confession so made must not give any reason for the Court to doubt whether the said confession was the result of a hope in the mind of,

the accused or fear of the Magistrate, a person in authority, administering oath upon him to extract truth. Section 463 Cr.P.C. permits evidence of non",

compliance of Section 164 and 281 Cr.P.C. to be taken to examine if it has injured the accused. It does not permit violation of a fundamental right,

guaranteed under Article 20(3) of the Constitution of India to be cured. It must always be remembered that under the doctrine of Constitutional,

supremacy the Constitution is the paramount law to which all other laws must conform. The Constitution of India must ever remain supreme and,

deemed written in every statute. We are, therefore, of the firm view that the substantial illegality of administering oath upon an accused before taking",

a confession which is prohibited cannot be termed as a curable irregularity under Section 463 Cr.P.C. Answering the first question referred by the,

Division Bench in the affirmative we hold that the confessional statement recorded under the provision of Section 164 Cr.P.C. on oath is fatal and,

cannot be protected by the provision of Section 463 Cr.P.C. In the circumstances and consequently we hold that the judgment of the Division Bench,

of this Court in re: Arjun Rai (supra) is good law. We reiterate, as already held by the Supreme Court in re: Brijbasi Lal Shrivastava (supra), that",

administration of oath while recording statements of the accused under section 164 Cr.P.C. would amount to a concealed threat. If this be so then to,

permit further evidence to disprove what has been held to be a concealed threat would be to dilute the fundamental protection given to an accused,

under Article 20 (3) of the Constitution of India which we are not inclined to in today's context where the accused due to social conditions, lack of",

knowledge or advise may not be in a position to understand the nuances and intricacies of the laws.,

126. It is also evident that on examination of Section 164(5) Cr.P.C. administering of oath to an accused while recording confession without anything,

more may lead to an inference that the confession was not voluntary. However, there could be stray cases in which the confessions had been",

recorded in full and complete compliance of the mandate of Section 164 and 281 Cr.P.C and that the confession was voluntary and truthful and no,

oath may have been actually administered but inspite of the same the confession was recorded in the prescribed form for recording deposition or,

statement of witness giving an impression that oath was administered upon the accused. If the Court before which such document is tendered finds,

that it was so, Section 463 Cr.P.C would be applicable and the Court shall take evidence of non-compliance of Section 164 and 281 Cr.P.C. to satisfy",

itself that in fact it was so and if satisfied about the said fact is also satisfied that the failure to record the otherwise voluntary confession was not in,

the proper form only and did not injure the accused the confession may be admitted in evidence. We answer the second question accordingly.,

127. Hearing of this matter was confined to the legal issues referred to the Full Bench of three Judges as per the order of reference dated 03-07-2017,

passed in Criminal Appeal No. 17 of 2016 in re: State of Sikkim v. Suren Rai 2017 SCC OnLine Sikk 07. Through the above judgment we have,

answered the reference. Let the said appeal be placed before the appropriate Bench for final disposal,