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CJN

# Diritto Penale Contemporaneo

RIVISTA TRIMESTRALE

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REVISTA TRIMESTRAL DE DERECHO PENAL  
A QUARTERLY REVIEW FOR CRIMINAL JUSTICE

*La riforma della legittima difesa*

ISSN 2240-7618

3/2019

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<p>LA RIFORMA DELLA LEGITTIMA DIFESA</p> <p><i>LA RIFORMA A LA LEGITIMA DEFENSA</i></p> <p><i>SELF-DEFENCE REFORM</i></p>	<p><b>La riforma della legittima difesa: prove tecniche di diritto senza giustizia</b> 1</p> <p><i>La reforma a la legitima defensa</i></p> <p><i>Self-defence Reform</i></p> <p>Federico Consulich</p> <hr/> <p><b>Uno studio comparatistico dell'eccesso di difesa domiciliare nel nuovo art. 55 co. 2 c.p.</b> 26</p> <p><i>Un estudio comparado del exceso de legítima defensa domiciliaria en Italia (art. 55 co. 2 c.p.)</i></p> <p><i>A Comparative Study of the Excess of Domestic Self-defence in the New Italian art. 55 co. 2 C.P.</i></p> <p>Francesco Macri</p>
<p>L'OGGETTIVO SU...</p> <p><i>OBJETIVO SOBRE...</i></p> <p><i>FOCUS ON...</i></p>	<p><b>Iura et leges. Perché la legge non esiste senza il diritto</b> 62</p> <p><i>Iura et leges ¿Por qué la ley no existe sin el derecho?</i></p> <p><i>Iura et leges. Because Law Doesn't Exist Without Right</i></p> <p>Massimo Donini</p> <hr/> <p><b>La confisca di prevenzione nella tutela costituzionale multilivello (Corte Cost. n. 24/2019)</b> 90</p> <p><i>El comiso de prevención en la tutela constitucional multinivel (Corte Constitucional n. 24/2019)</i></p> <p><i>The preventive Confiscation in the Multilevel Constitutional Protection (Constitutional Court n. 24/2019)</i></p> <p>Anna Maria Maugeri, Paulo Pinto de Albuquerque</p> <hr/> <p><b>Corte edu e Corte costituzionale tra operazioni di bilanciamento e precedente vincolante. Spunti teorico-generalisti e ricadute penalistiche</b> 158</p> <p><i>Corte Europea de Derechos Humanos y Corte Constitucional entre operaciones de ponderación y precedente vinculante. Observaciones teórico-generales y consecuencias penales</i></p> <p><i>European Court of Human Rights and Constitutional Court Between Balancing and Binding Precedent. Theoretical Starting Points and Criminal Consequences</i></p> <p>Alessandro Tesaro</p> <hr/> <p><b>Il superamento delle preclusioni alla risocializzazione: un'occasione mancata della riforma penitenziaria</b> 194</p> <p><i>Una oportunidad perdida para la reforma penitenciaria</i></p> <p><i>Overcoming Foreclosure to Resocialisation: A Missed Opportunity for Prison Reform</i></p> <p>Francesca Delvecchio</p>

	<b>Il comportamento gravemente colposo del lavoratore e la responsabilità del datore di lavoro</b>	241
	<i>Conducta gravemente culposa del trabajador y responsabilidad del empleador</i>	
	<i>The severely negligent behaviour of the worker and the responsibility of the employer</i>	
	Luca Carraro	
	<b>Challenging Common Sense. The Confession Dilemma</b>	256
	<b>An Analysis of the “Canaro della Magliana” Case</b>	
	<i>Oltre il Buon Senso. Il Dilemma Confessorio</i>	
	<i>Un Analisi del Caso del “Canaro della Magliana”</i>	
	<i>Desafiando el sentido común. El dilema de la confesión.</i>	
	<i>Un análisis del caso del “Canaro della Magliana”</i>	
	Giulio Soana	
<b>DIRITTO STRANIERO E COMPARATO</b>	<b>Corruption, Freedom of Speech within Campaign Finance Law in the United States</b>	274
<i>DERECHO EXTRANJERO Y COMPARADO</i>	<i>Corruzione e libertà di parola nella regolamentazione del finanziamento delle campagne elettorali negli Stati Uniti</i>	
<i>FOREIGN AND COMPARATIVE LAW</i>	<i>Corrupción y libertad de expresión en la regulación del financiamiento de las campañas electorales en los Estados Unidos</i>	
	Sira Grosso	
	<b>Riflessioni sugli istituti di clemenza collettiva alla luce dell’esperienza tedesca e austriaca</b>	285
	<i>Reflexiones sobre las instituciones de clemencia colectiva a la luz de la experiencia alemana y austriaca</i>	
	<i>Reflections on Collective Pardon Measures in Light of the German and Austrian Experience</i>	
	Kolis Summerer	
	<b>True and False in the “Bifurcation” of the Italian Criminal Proceedings</b>	317
	<i>Vero e falso nella transizione del processo penale italiano verso il sistema bifasico</i>	
	<i>Verdadero y falso en la transición del proceso penal italiano al sistema bifásico</i>	
	Federica Centorame	

L'OBBIETTIVO SU...

*OBJETIVO SOBRE...*

*FOCUS ON...*



# Challenging Common Sense. The Confession Dilemma\* An Analysis of the “Canaro della Magliana” Case

*Oltre il Buon Senso. Il Dilemma Confessorio  
Un'Analisi del Caso del “Canaro della Magliana”*

*Desafiando el sentido común. El dilema de la confesión.  
Un análisis del caso del “Canaro della Magliana”*

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## ABSTRACTS

Common sense plays a pervasive role when we judge other's behaviours and purposes. As argued by psychological literature, our understanding of the surrounding environment is deeply influenced by several postulates on "how the world works". Jurisprudence has embraced this point of view and frequently uses these postulates in its reasonings. But what if Common Sense was fallacious?

This paper analyses the downfall fallacious Common Sense statement have on the genesis and perpetuation of false confessions through the analysis of three of them: people do not lie against their interest; humans are good lie detector and this ability can be trained; healthy individuals do not generate false memories. By debunking these myths the aim is to expose the frailty of judicial reasoning when it comes to confessions.

The last part of the paper analyses the case of "il Canaro della Magliana" exposing the fallacies in the genesis and evaluation of the alleged perpetrator's confession.

Il Buon Senso ha un ruolo pervasivo nel giudicare il comportamento e le intenzioni altrui. Come affermato da accreditata dottrina, la nostra comprensione dell'altro è fortemente influenzata da postulati su "come gira il mondo". La giurisprudenza ha condiviso questo punto di vista utilizzando questi postulati, attraverso lo strumento delle massime di esperienza, nella motivazione. E se in realtà il Buon Senso fosse tutt'altro che buono? Questo articolo analizza le ricadute in termini di false confessioni di tre errate affermazioni di Buon Senso: nessuno mente contro il proprio interesse; gli esseri umani riescono a riconoscere la menzogna e questa capacità può essere allenata; individui sani non generano ricordi falsi. Sfatando questi miti lo scopo è denunciare la fragilità del ragionamento giudiziale in ambito di confessione. L'ultima parte del testo analizza il caso del "Canaro della Magliana" allo scopo di evidenziare le fallacie che hanno caratterizzato la genesi e la valutazione della confessione del condannato.

El sentido común juega un papel persuasivo cuando juzgamos el comportamiento y los propósitos ajenos. Tal y como sostiene la doctrina psicológica, nuestro entendimiento del ambiente que nos rodea está profundamente influenciado por múltiples postulados sobre el funcionamiento del mundo. La jurisprudencia ha adoptado también esta postura y habitualmente utiliza estos postulados en sus razonamientos. Pero, ¿y si el sentido común fuera falaz? El presente trabajo analiza el impacto que las falacias del sentido común tienen en el génesis y la

\*The author likes to thank prof. Luca Lupària for the precious support provided during the draft of the article.

perpetuación de las confesiones falsas. Para ello, tres de estas falacias son analizadas: las personas no mienten en contra de sus intereses; los seres humanos tienen la habilidad de detectar mentiras, habilidad que puede ser entrenada; los individuos sanos no generan recuerdos falsos. Al desmentir estos mitos, se pone de manifiesto la fragilidad del razonamiento judicial en relación a confesiones. La última parte de este trabajo analiza el caso de "il Canaro della Magliana" y expone el génesis y la evaluación de la confesión del presunto autor.

## SOMMARIO

1. Introduction. – 2. The Fallacies of Common Sense. Genesis of a False Confession. – 3. Common Sense Challenged. – 3.1. People Do Not Lie Against Their Interest. – 3.2. Humans Are Good Lie Detector and This Ability Can Be Trained. – 3.3. Healthy Individuals Do Not Generate False Memories. – 4. A Case Study: “Il Canaro della Magliana”. – 4.1. The Facts. – 4.2. Evaluation. – 4.3. The Confessor. – 4.4. The Safeguards at Trial. – 5. Conclusions.

# 1. Introduction.

To understand the dilemma that is posed by false confessions in the judiciary system one has to understand the roots and stereotypes that accompany the idea itself of self-incriminating statements. As a matter of fact, the strength of this evidence primarily relies on common sense ideas regarding human functioning<sup>1</sup>.

Each one of us in daily life bases social functioning on the so-called Theory of Mind. This cognitive function allows us to evaluate others, assess their intentions and feelings, hint non-verbal nuances and catalyses most of our opinions regarding other people's behaviour<sup>2</sup>. This evaluation process is defined by a series of postulates, regarding human functioning, which are used as premises of our reasoning<sup>3</sup>.

In juridical reasoning, both of the Courts and of the doctrine, common sense is considered as a valid and essential argument in order to reach a conclusion in different matters. In particular, common sense or common experience is considered fundamental to reach conclusion regarding normal, intended as non-pathological, human behaviour. In Italy, the use of the “*massime di esperienza*” (common sense) as a valid mean for the judge to evaluate the evidence is well established. Frequently these common-sense inferences are included, as supporting arguments, in the motivation of a decision as legal practitioners regard these rules as highly reliable canons especially when assessing the “human factor” of criminal law. Apart from the strict legal reasoning, as these postulates influence the social functioning of all of us, they are involved in the decision-making and evaluating process of police officials, prosecutors, lawyers and judges. When the veracity of a statement, the behaviour of a suspect or the right interrogation techniques are being assessed all these common-sense rules play, consciously or unconsciously, a fundamental role.

Notwithstanding the common-sense appearance of these rules and their widespread use, modern psychology has increasingly demonstrated their inaccuracy posing relevant doubts regarding the ability of human beings to evaluate their surroundings using their common sense. These scientific findings raise relevant doubts regarding the use by legal players of common sense inferences in their reasoning.

These fallacies play a vital role in the false confession process starting from the interrogation to the judicial evaluation. As a matter of fact, conscious and unconscious bias regarding human behaviour and his regularities catalyse counterproductive conducts and fallacious evaluations that accompany an innocent from the interrogation room to prison.

In this article, using the relevant scientific literature, I falsify three of these common-sense postulates that are particularly pertinent to confession: humans are good lie detectors, and this ability can be trained; nobody lies against his interest; healthy individuals do not generate false memories.

As a matter of fact, the fallaciousness of these common-sense criteria exposes the inadequacy and danger of our gut evaluations regarding humans, especially in criminal investigation. The reduction of miscarriages of justice related to false confession can start from educating legal actors about the inadequacy of their “folk psychology”. In order to do so, Science and Law have to collaborate to adjourn legal reasoning to recognized science<sup>5</sup>.

<sup>1</sup> KASSIN, (2008), p. 1315.

<sup>2</sup> SAXE *et al* (2004), p. 88.

<sup>3</sup> SHERWIN (1988), p. 373 “the pre-reflective attitude of common sense, the meanings I share with others in the routines of everyday life inform my world, my sense of self, and the way I interact with others. What I know is “self-evident”; it is “what everybody knows.” We thus share a common language that supplies the terms that construct reality”.

<sup>4</sup> CORDOPATRI (1999), pag. 632 see also BORELLI (2007), pag. 1074.

<sup>5</sup> As urged by many authors see GARRETT (2015), p. 420.

## 2.

**The Fallacies of Common Sense. Genesis of a False Confession.**

Despite the ample reliance of humans and, therefore, legal actors on common sense, science has increasingly demonstrated its inadequacy when it comes to evaluating our environment<sup>6</sup>.

One of the most thrilling area where these fallacies have been exposed concerns the ability of individuals to understand and predict others emotions, intentions and beliefs<sup>7</sup>. This field of study is particularly interesting as it is common-sense that, when it comes to judging humans, science has no place as these evaluations are regulated exclusively by “gut”, innate, feelings<sup>8</sup>. As a matter of fact, we tend to distinguish between an inanimate world that follows the rules of mathematics and science and an animate, human world. To understand and read the latter one has to rely on a mix of human intuition and experience. There is, therefore, an ample reliance on common-sense evaluation in this field as, in an increasingly scientific society, this is seen as the last exclusive ambit left to layman evaluations.

Notwithstanding the aforementioned presumed exclusivity, psychology has increasingly proven that many of the postulates our gut evaluations are based on are incorrect. The latter implies that, although our extensive reliance on our evaluations regarding others humans, these tend to be fallacious.

This false belief regarding the existing relation between common-sense and human behaviour deeply affects the validity of juridical reasoning<sup>9</sup> from two, main, point of view.

Firstly, from a formal external point of view it affects the reasoning of judgments. As a matter of fact, the above-mentioned fallacy undermines the validity of the use, by legal actors, of common sense statements when building inferences at Court<sup>10</sup>. Lawyers, prosecutors and judges, in order to legitimately draw their conclusions, use in their reasoning a series of supporting arguments, both legal and factual. Between these, common sense is considered by case law to be a valid premise to a judicial conclusion<sup>11</sup>. In particular, the scope of human behaviour evaluations, especially regarding “normal” individuals, is commonly intended as the natural framework for the use of common sense intuitions when reaching conclusions<sup>12</sup>; in this ambit, therefore, there is a widespread use of these inferences when it comes to justify a decision<sup>13</sup>. Consequently, the effective use of these fallacious common-sense statements as supporting arguments in legal reasoning could hamper the validity of the conclusions drawn at Court in the same way as a false evidence would.

These reflections are particularly relevant when it comes to confessions. As a matter of fact, the assessment of the validity and reliability of a self-incriminating statement is generally seen as falling within the scope of “human evaluations” and, therefore, within the ambit where common sense statements are widely used<sup>14</sup>. Frequently to challenge or support the value and reliability of a confession, legal players tend to rely on intuitive convictions regarding the way intention and memory arise and develop<sup>15</sup>. It's in the latter convictions that the fallacy is nested and spreads to the decision, causing miscarriages of justice. Meaning that, when it comes to evaluate confessions many judicial decisions rely on fallacious assumption regarding human

<sup>6</sup> As recognized by *U.S. v. Hall*, 7th Cir., 1996, 93 F.3d 1337, 1345, “Even though the jury may have had beliefs about the subject, the question is whether those beliefs were correct. Properly conducted social science research often shows that commonly held beliefs are in error”. For a list of fallacies involving our reasoning see PERLIN (1990), pp. 15-17.

<sup>7</sup> Vedi *supra* § 1.

<sup>8</sup> As exemplified by a statement reported in, *United States Court of Appeal*, 4th Cir, *United States v. Belyea* 2005 159 F. App'x 525, 529-30 “juries decide all the time, and I don't need an expert to help them in that respect” see also SHERWIN (1988), p. 738, “in criminal procedure, the dialect of ordinary common sense pre-supposes two “self-evident” truths. First, everyone knows how to assess an individual's behavior. Second, everyone knows when to blame some- one for doing wrong”.

<sup>9</sup> SCHWIKKARD (2003), pp. 97-98

<sup>10</sup> For several example of fallacious uses of common sense statements by South African courts see SCHWIKKARD (2003), p. 99.

<sup>11</sup> See *Inter alia*, ECHR, *Murray v. United Kingdom*, 08-02-1996, No. 18731/91; ECHR, *Averill v. the United Kingdom*, 06-06-2000, No. 36408/97; *House of Lords*, *R. v. Peregrine Boyesen*, 1981, 72 Cr. App. R. 43; Cass. Pen., sez. V, 11/05/2018, n. 44107; Cass. Pen., sez. I, 17-05-2017, n.58023.

<sup>12</sup> See as an example the statement of Cass. Pen., sez. IV, 19-11-2015, n.12478 “Vi sono alcuni ambiti nei quali il richiamo all'esperienza compare con particolare insistenza e in modo sempre più affinato (...) o perchè infine essi sfuggono per definizione all'osservazione diretta, come accade, proprio in relazione all'oggetto dell'odierno giudizio, con riguardo ai processi psichici”.

<sup>13</sup> See as an example, PIRAS (2017), pag. 1 or Cass. Pen., sez. VII, 13-04-2016, n. 18669 regarding the distinction between the expected behaviours of a subject addicted to alcohol compared with one addicted to drugs or Cass. Pen., sez. II, 13/04/2016, n. 18132.

<sup>14</sup> As affirmed by Supreme Court of Pennsylvania, *Com. v. Alicia*, 2014, 625 Pa. 429, 447, 92 A.3d 753, 764, “we believe that the matter of whether Appellee's confession is false is best left to the jury's common sense and life experience”

<sup>15</sup> KASSIN, (2008), p. 1315.

functioning, considered common sense, that inevitably affect the outcome of the reasoning<sup>16</sup>.

Common-sense undermines the validity of legal reasoning in a second, subtler way. This concerns the internal decision-making process of legal players. As a matter of fact, psychology has extensively proved that when humans evaluate others avail themselves of a toolkit of unconscious, common-sense, assumptions regarding the way people think, behave and decide. The latter can be considered as the lens through which we see, and therefore judge, the world when it comes to animate beings<sup>17</sup>. It's apparent that also legal players, as humans, are affected by this fallacious index<sup>18</sup>. This fallacy is particularly relevant given the coercive power that characterizes the decisions and the consequent actions of many legal players (e.g. police, judges, prosecutors...).

The disruptive effect of biased evaluations is clear when we consider confessions. As a matter of fact, common-sense postulates regarding human behaviour tend to deeply influence the assessments of the suspect/defendant and, therefore the actions of the actors involved; e.g., a "presumption of guilt" regarding a suspect during an interrogation due to the interpretation of certain behaviours by a police officer can lead to an inquisitorial, confession seeking interrogation. As we will see hereinafter, false confessions are frequently the product of an incorrect gut evaluation of a legal actor equipped with coercive powers on the suspect.

To better understand how the abovementioned fallacies are relevant when it comes to false confession we can analyse what the doctrine has defined as the "false confession process". According to this doctrine a miscarriage of justice catalysed by a false confession entails a series of biased steps that police, prosecutors and judges take and that lead first to the self-incriminating statement and, finally, to a conviction<sup>19</sup>.

In this process, the first fallacy that comes into play is the one that affects the internal decision making of the legal players. In fact, the first step of the false confession process is the misclassification, by the investigative authorities, of an innocent person as guilty<sup>20</sup>. This is frequently based rather than on material evidences on assumption regarding the suspects content or on "gut feelings" of the investigative authorities. So, in this first step, the investigative authorities, because of an intuitive misevaluation of the suspect's demeanour, assume its guilt.

Given the strong reliance held on this gut evaluation, following the misclassification, the suspect undergoes a guilt-presumptive accusatory interrogation. During the latter, the interrogator seeks to confirm the intuitions and opinions he has developed regarding the suspect with factual basis<sup>21</sup>. This confession-seeking questioning style leads to the collapse of the interrogated<sup>22</sup>. Finally, the innocent is led into shaping its self-incriminating statement into a coherent storyline using the details fed by the interrogator<sup>23</sup>.

After the confession comes to light the second, formal, fallacy comes to play. In fact, once obtained the false confession's reliability and validity is frequently justified by common-sense statements as "no one lies against its interest" rather than by factual feedbacks. This explains the perpetuation of the confession throughout the whole investigation and trial period and the inability of the judge to spot its fallaciousness. The erroneous usage of this argumentative premises by the legal players finally leads to the conviction of the innocent<sup>24</sup>.

A last factor has to be taken into account when the relation between false confessions and common-sense is considered: the high common-sense value that self-incriminating statements bears.<sup>25</sup> Meaning that the validity of a confession is sustained by some of the core postulates that enable the functioning of our social intelligence.

This predominance is apparent when it comes to criminal procedure. As a matter of fact,

<sup>16</sup> KASSIN *et al.* (2010), p. 51.

<sup>17</sup> GREENE e COHEN, (2004), p.1781-1782.

<sup>18</sup> PERLIN (1990), p.70, see also TANFORD e TANFORD (1988), p. 749, "in a complex task such as deciding on a verdict in a trial, cognitive biases are a natural consequence of the decision process. They serve as a means of simplifying and organizing information, and they reflect the way all persons think".

<sup>19</sup> KASSIN (2017), p. 3.

<sup>20</sup> OFSHE e LEO (1997), p. 986

<sup>21</sup> See on this "confirmation theory" VRIJ (2008), p. 130.

<sup>22</sup> LEO e DRIZIN (2010), p. 23.

<sup>23</sup> For a thorough analysis of the confession path see LEO e DRIZIN (2010), p. 13; for an analysis regarding the importance of "detail feeding" during interrogations for miscarriages of justice see GARRETT (2010), p. 1066.

<sup>24</sup> Regarding the role of false confession in wrongful convictions see GARRETT (2008), p. 88.

<sup>25</sup> KASSIN (2017), p. 5-6, see also GARLATI (2015), p. 87 according to whom for inquisitorial trial confession was "regina probationum o probatio superlativa" as "confession facit rem manifestam, inducit notorium, habet vim rei iudicatae et iis similia".

confession has been generally described as the Queen of evidences<sup>26</sup> and its seek has characterized criminal investigation since early ages<sup>27</sup>.

At the time of the “*processo romano-canonico*”, the idea of confession of crime was intimately connected with the confession of sin<sup>28</sup>; obtaining a self-incriminating statement was the central role of the judge-inquisitor<sup>29</sup> as it pursued the theological aim of the trial: to purify the soul of the criminal<sup>30</sup>. This is clearly reflected in the infamous interrogation techniques of the Saint Inquisition during Middle Age. Along with the secularization of the criminal trial the expiating aim of it has been gradually abandoned; however, the preponderant weight of confession between the evidences has remained intact<sup>31</sup>. As aforementioned the reasons of this immutability are both related to policy implications and to human nature.

On one hand, from policy point of view, the confession of the defendant appears as an implicit form of legitimation of the punitive power of the judge. As a matter of fact, through the confession the defendant voluntarily exposes himself to the punishment implicitly recognizing its accuracy. Furthermore, in a criminal trial that, with the transition from inquisitorial to accusatorial system, has lost its core beliefs regarding the idea of truth a self-incriminating statement appears as an extremely reassuring evidence<sup>32</sup>.

On the other hand, if we consider the “human factor”, a confession thrills deeply rooted mechanism of our psyche that create a sense of certainty unknown when a judgment is merely based on material evidences<sup>33</sup>. This reliability effect<sup>34</sup> is based on a series of postulates regarding human functioning that come into play when we are confronted with a confession<sup>35</sup>. The most important one being: No one lies against their interest, Humans are good lie detectors and this ability can be trained, memory of normal individuals doesn't create false memories.

### 3. Common Sense Challenged.

Notwithstanding the widespread acceptance of common-sense principles and their general perception as obvious, science has increasingly demonstrated their fallaciousness<sup>36</sup>. It results that, humans have little, if no idea, of the reasons and the phenomenology of their actions; however, they seem to hold strong beliefs regarding them. This overlap between projection and reality is the cause of many biases and logic errors throughout the whole spectrum of human activities. When it comes to law, and in particular to the evaluation of a confession, these “everyday” biases suddenly increase in importance, as they can deeply affect the life of an individual<sup>37</sup>. For this reason, they must be urgently addressed by all the operators of the sector.

In order to reframe the reasoning of the legal players it is necessary to shake the grounds of common-sense reasoning in this field by exposing the fallaciousness of the postulates on which it is based. As a matter of fact, in order for officers, prosecutors and judges to feel the need of new instruments to evaluate the validity and the content of confessions it's necessary

<sup>26</sup> GAROFALO (2017), p. 49.

<sup>27</sup> SHERWIN (1988), p. 749-750.

<sup>28</sup> On the function of the confession as “thrill of the therapeutic process of internal revision” of the perpetrator see CENTORAME (2015), p. 101-102.

<sup>29</sup> LUPÀRIA (2006), p. 6-8.

<sup>30</sup> ILLUMINATI (2012), p. 1258, “secondo la concezione per cui la pena è un bene per chi la subisce, bisogna convincere l'imputato ad ammettere le proprie colpe”.

<sup>31</sup> LUPÀRIA (2006), p. 197 on the use of confession by Italian Courts; CONTI (1999), p. 14, see also *R. v. Pearce*, Manitoba Court of Appeal, July 17 2014, MBCA 70 “confession is like no other evidence. Our system of justice accepts that an accused can be convicted solely on the basis of their own confession without any confirmatory evidence of its truth”.

<sup>32</sup> MARCHETTI (2015), p. 9.

<sup>33</sup> As reported FOLETTE *et al.* (2018), p. 3 “No other evidence is as persuasive to juries as a confession. No other is harder to explain or discount. Studies have shown that when a false confession is presented to juries, they convict the false confessor from 73-88% of the time”; see also GAROFALO (2017), p. 45 “La confessione (...) costituisce una sorta di contratto di verità che permette al giudice di conoscere in virtù di un sapere indubitabile”.

<sup>34</sup> On the pervasivity of this reliability effect between legal actors see LEO e DAVIS (2010), p. 22.

<sup>35</sup> KASSIN, (2008), p. 1310.

<sup>36</sup> As stated in *United States Court of Appeal*, 4th Cir, United States v. Belyea, 04-4415, 2005, “Jurors may not know, however, that people lie on occasion to their own detriment by falsely confessing to crimes that they did not commit. The phenomenon of false confessions is counter-intuitive and is not necessarily explained by the general proposition that jurors know people lie”; see also KASSIN (2012), p. 433, “False confession is not a phenomenon that is known to the average layperson as a matter of common sense”

<sup>37</sup> For examples of the disruptive power of confessions see the stories of Angel Gonzalez, Jonathan Barr, Huwe Burton and many others on <https://www.innocenceproject.org/cases/>.

to show the inadequacy of the present ones. In order to do so I'll falsify three common-sense postulates that are inherent to confessions evaluations.

### 3.1. *People Do Not Lie Against Their Interest.*

The idea of somebody confessing a crime he didn't commit sounds completely abstruse to the majority of people<sup>38</sup>. False confessions are generally seen as a rare exception to the common-sense principle "people don't lie against their interest"<sup>39</sup>. Consequently, as underlined by several studies, decision-makers tend to attach a great value to confessions despite their content or the process through which they have been obtained<sup>40</sup>.

An obvious example of this tendency has been furnished by a recent study<sup>41</sup>. The aim of the latter was to compare the reliability evaluations of witness statements and of confessions. Given the similarities between the two statements, as content and as procedure adopted, the study underlined an enormous gap in their assessment. Cases based on confessions, even in presence of inconsistencies retractions and exculpatory evidences, were brought forward by police and prosecutors whereas the latter were reluctant to pursue a case based on a witness or victim statement with the above-mentioned characteristics. The study explains the different treatment received with the tendency of "fact-finders and investigators to believe confessions, even retracted ones, on the grounds that defendants are unlikely to make statements contrary to their own interests, especially when those statements are false"<sup>42</sup>.

Moreover, the relevance of this common-sense principle exceeds the subjective, internal, decision-making of the legal players in their daily activities as it is generally considered a valid inference rule in judgment's reasoning<sup>43</sup>. As a matter of fact, various Courts have embraced the principle "nobody lies against its own interest" as a valid common-sense parameter when it comes to evaluating the reliability of confession evidence<sup>44</sup>. It can be reported as an example, the Italian Supreme Court's opinion in the infamous case of the "*Strage di Erba*". In the latter judgment, the Corte di Cassazione explicitly affirmed that the common-sense principle stating that is highly unlikely that an innocent individual accuses oneself of a grave offence is a valid rule of judgment when evaluating a confession<sup>45</sup>. Therefore, explicitly authorising judges to use the latter parameter as a factual premise of their judgment.

The ample use of this parameter in judicial setting, both implicitly and explicitly, causes a serious *vulnus* to the validity of the reliability assessment of self-incriminating statements. As a matter of fact, the phenomenon of false confession has been increasingly demonstrated as a pressing reality of criminal procedure<sup>46</sup>. Despite what is commonly believed innocents do falsely confess, and do so even if no physical coercion is used<sup>47</sup>. Clamorous post-conviction exoneration cases have demonstrated how innocent people can be induced in confessing even

<sup>38</sup> KASSIN, (2008), p. 1316, "Common sense further compels the belief that people present themselves in self-serving fashion and that self-destructive behaviors, such as false confessions, must be particularly diagnostic. Reasonably, most people believe that they would never confess to a crime they did not commit, and they cannot imagine the circumstances under which others would do so".

<sup>39</sup> See *mutatis mutandis* SHERWIN (1988), p. 755, "According to OCS, "everyone knows" that when an innocent person is confronted with accusations against her, she will spontaneously refute them if they are false"; see also GAROFALO (2017), p. 39, "La riconosciuta affidabilità della prova confessoria era soprattutto legata alla sua provenienza da un soggetto che, autoincolpandosi di un reato, decideva di forzare il proprio istinto di conservazione".

<sup>40</sup> KASSIN *et al.* (2010), p. 51.

<sup>41</sup> MALLOY e LAMB (2010), p. 46.

<sup>42</sup> This statement is confirmed by Cass. pen. Sez. V, 20-10-2008, n. 39205, "non vi è dubbio che colui il quale si autoaccusi di gravi colpe appare maggiormente credibile".

<sup>43</sup> See an example the exception provided by the Federal Rules of Evidence to the prohibition of hearsay statement. Hearsay is generally inadmissible as considered unreliable however, "FRE 804-b-3 states that "declarations against interest" (i.e., statements that would expose a declarant to criminal or civil liability) are admissible as an exception to the hearsay rule on the assumption that such statements in particular can be trusted" KASSIN (2012), p. 435. See also the statement quoted in LEO e DAVIS (2010), p. 23.

<sup>44</sup> Manitoba Court of Appeal, *R. v. Pearce*, July 17 2014, MBCA 70, "A confession is seen as such a powerful piece of evidence because of the logic that an innocent person is unlikely to incriminate themselves" and *R. v. Rojas*, 2008 SCC 56 (S.C.C.) § 35.

<sup>45</sup> Cass. pen., Sez. I, 05-09-2011, n. 33070; furthermore, this judgment explicitly confirmed a first prior judgment that affirmed "It's against any common-sense principle even to hypothesize that two people could autonomously choose to self-incriminate of heinous crimes when innocent" on the point see also *R. v. Hodgson*, 1998, 2 S.C.R. 449, S.C.C., what people freely say which is contrary to their interest is probably true".

<sup>46</sup> CONTI (1999), p. 20.

<sup>47</sup> MEISSNER *et al.* (2010), p.111-112 see also OFSHOE e LEO (1997), p. 989.

hideous crimes that entail serious consequences<sup>48</sup>.

The question that arises if we observe this discrepancy is: if false confession is such a widespread phenomenon, why do people hold such a strong belief on the validity of self-incriminating statements. The answer seems to primarily involve what in social psychology is known as the “fundamental attribution error”<sup>49</sup>. This phenomenon depicts the tendency of individuals, when assessing others behaviour, to overestimate dispositional causes while underestimating environmental factors<sup>50</sup>. In other terms, people tend to underestimate the effect of situational elements when it comes to decision-making<sup>51</sup>.

In particular, environmental pressures, combined with individual characteristics, can modify the motivation of a subject, influencing what in that moment he perceives as the most rational or convenient choice<sup>52</sup>. Meaning that what can be perceived as irrational from a neutral, common-sense, point of view may be perceived as the best option in specific, extreme, conditions<sup>53</sup>.

Scientific literature has identified a series of factors that can trigger the above-mentioned modification. These can be divided between inherent vulnerabilities of the suspect, the dispositional risk factors, and situational pressures, the situational risk factors.<sup>54</sup> Situational risk factors for false confessions include physical custody and isolation, presentation of false evidence<sup>55</sup>, minimization techniques<sup>56</sup> and length of the interrogation<sup>57</sup>, whereas dispositional risk factors include adolescence and immaturity, cognitive and intellectual disabilities, personality and psychopathology<sup>58</sup>.

Interestingly enough, from our common-sense point of view, several studies have identified innocence as a risk factor for false confessions<sup>59</sup>. Research shows that many innocent suspects waive their rights and allow themselves to be questioned without a lawyer because they are afraid of appearing guilty. Furthermore, their knowledge of being innocent, leads them to openly answer questions, with the risk of ending up in a situation where they confess to a crime they did not commit because of their naive belief that truth and justice will prevail<sup>60</sup>.

To conclude, the belief that people don't lie against their interests is completely fallacious. Its widespread acceptance constitutes a relevant risk when it comes to false confessions as it deeply hampers the reliability evaluation operated by the legal players at different stages of the enquiries and of the trial<sup>61</sup>. As above-mentioned the influence of this common-sense statement is particularly pervasive. In fact, it affects both the internal forum of the judicial players and the validity of the reasoning. It's therefore of the outmost importance to recognise and internalize its fallaciousness for all legal players.

## 3.2.

### *Humans Are Good Lie Detectors and This Ability Can Be Trained.*

The second statement I take into account directly entails our ability to understand others. In fact, when assessing others statements and intentions we tend to formulate judgments in terms of credibility or unreliability; this distinguishing function is fundamental in order to orient the individual in his social environment by consenting conclusions in terms of trust,

<sup>48</sup> For several examples of post-conviction exonerations see GARRETT (2011), p. 1-18.

<sup>49</sup> KASSIN e SUKEL (2012), p. 435.

<sup>50</sup> CONTI (1999), p. 15.

<sup>51</sup> WRIGHTSMAN (1991), p. 170, “It seems that what you say is more influential than why you say it”.

<sup>52</sup> MEISSNER *et al.* (2010), p. 116 “a suspect may accept the immediate instrumental gain of ending the interrogation and mistakenly determine that the truth of his or her innocence will be revealed or that no jury would ultimately convict them (...) various social and environmental factors associated with interrogations can impair a suspect's ability to make an informed decision, particularly as interrogators manipulate a suspect's perceptions regarding the likely outcome about a certain course of action or their level of fear, anxiety, or ability to rationalize a decision through sleep deprivation and fatigue”.

<sup>53</sup> LEO e DAVIS (2010), p. 40, “Studies of decision making under stress have shown, for example, that stress can promote a form of tunnel vision, in which attention narrows and the person relies on less and less relevant information when making the decision”.

<sup>54</sup> PERILLO e KASSIN (2010), p 327.

<sup>55</sup> KASSIN (2015), p 30.

<sup>56</sup> MEISSNER e RUSSANO (2003), p 58.

<sup>57</sup> GARRETT (2015), p. 427.

<sup>58</sup> See GARRETT (2010), p. 1064, “In twenty-six of the forty cases (examined) -or sixty-five percent- the defendant was either mentally disabled, under eighteen at the time of the offense, or both”.

<sup>59</sup> KASSIN (2012), p. 433.

<sup>60</sup> KASSIN (2005), p 218.

<sup>61</sup> LEO e DAVIS (2010), p. 25.



suspicion, etc. Being such a vital feature of everyday life<sup>62</sup>, humans tend to hold strong beliefs regarding their ability to spot liars and on the characteristic features of them<sup>63</sup>.

The centrality and primacy of this function is confirmed by a recent research. The latter has demonstrated how certain stereotypes regarding lying related behaviours, as eyes diversion or shifting of posture, are global and seem to know no cultural or physical border<sup>64</sup>. It has been hypothesized that the strength and pan-cultural scale of these beliefs is due to our innate association of specific behaviours with certain emotions we link with lie, as shame or anxiety<sup>65</sup>.

Notwithstanding the, aforementioned, widespread acceptance regarding lie indicators and the strong belief held regarding our lie detection ability, humans have been proved to be extremely poor at detecting lies<sup>66</sup>. As a matter of fact, several studies have established that the latter ability is barely above chance level<sup>67</sup>. Even more unexpected is the result that this ability is not affected by experience or profession<sup>68</sup>; the laymen seem to have the same ability to detect lie as policemen or judges<sup>69</sup>. On top of that, experience may even have a negative impact on lie detection ability, as some studies have remarked that trained interrogator seems to commit the same number of mistake as untrained subjects but tend to be more confident about them<sup>70</sup>.

The reason for this complete overlap between perception and reality is based on one main problem, there seems to be no direct cue of deception<sup>71</sup>. All the signs commonly associated with lying are, actually, the non-verbal cues of emotions, as nervousness or shame, commonly associated with deception<sup>72</sup>. The common-sense association between lying and the latter emotions is highly speculative. On one hand, especially in interrogation-like situations, it's common that feelings of fear and anxiety arise both between innocent and guilty individuals causing similar reactions<sup>73</sup>. On the other hand, subjective characteristics of the interrogated may mediate the emotional arousal, and it has even been hypothesized that guilty people may be more careful not to show the typical "guilt indicators" than innocents<sup>74</sup>.

The repercussion of this fallacy on confessions is apparent. As mentioned before<sup>75</sup>, the "original sin" of false confession lies in the misclassification of an innocent suspect as guilty by investigative authorities<sup>76</sup>. In particular, the insidiousness of the latter is heightened when the misclassification derives from sensations of the investigators rather than on material proofs as these convictions are difficult to challenge. Therefore, the perception of the detective that a certain suspect is lying based on his gut or his experience is most likely to thrill an extremely dangerous process.

The dangerousness of this fallacy during police interrogations is heightened by a further observation. Despite their inefficacy, the use of lying detection techniques to assess suspect's reliability, has been encouraged by many police manuals and are now part of the culture of different national police corps<sup>77</sup>. The most famous of them is the BAI protocol, widely used in the USA, which is based on asking behaviour provoking questions and on the subsequent observation of verbal and non-verbal cues, such as crossing the legs or grooming behaviour<sup>78</sup>, which are related to feeling of anxiety or nervousness<sup>79</sup>. As with general lie detection techniques the inefficacy of this test has been widely attested<sup>80</sup>. It's apparent how the institutionalization of the aforementioned fallacy, when it comes to police interrogations, has the effect of pampering

<sup>62</sup> VRIJ e GRANHAG (2005), p.43.

<sup>63</sup> LEO e DAVIS (2010), p. 45.

<sup>64</sup> THE GLOBAL DECEPTION RESEARCH TEAM (2006), p. 69; VRIJ (2008), p. 60.

<sup>65</sup> VRIJ *et al.* (2010), p. 100.

<sup>66</sup> THE GLOBAL DECEPTION RESEARCH TEAM (2006), p. 69.

<sup>67</sup> Chance level is the probability to opt for the right answer by randomized responses. In this case as the answer are two lying/not lying the chance level is 50%. See for example, VRIJ (2008), p. 147-148.

<sup>68</sup> VRIJ e GRANHAG (2005), p. 46.

<sup>69</sup> VRIJ *et al.* (2006), p. 301.

<sup>70</sup> KASSIN, (2008), p. 1311, see also MEISSNER *et al.* (2010), p.113.

<sup>71</sup> VRIJ e GRANHAG (2005), p. 65.

<sup>72</sup> VRIJ (2008), p. 127, "if lying is bad then people should feel ashamed when they lie".

<sup>73</sup> VRIJ (2008), p. 61.

<sup>74</sup> VRIJ *et al.* (2010), p. 98-99.

<sup>75</sup> *Supra* §2.

<sup>76</sup> LEO e DRIZIN (2010), p. 13.

<sup>77</sup> CONTI (1999), p. 19, VRIJ (2008), p. 133-134.

<sup>78</sup> VRIJ e GRANHAG (2005), p. 49.

<sup>79</sup> KASSIN *et al.* (2011), p. 40.

<sup>80</sup> KASSIN, (2008), p. 1311.

the detective's reliance on incorrect assumptions. This creates an enormous problem in term of validity of interrogation process as it encourages many of the biases that are connected with invalid self-incriminating statements<sup>81</sup>.

To conclude, the idea that human beings are good lie detectors or that they can be trained to do so is completely fallacious<sup>82</sup>. Nevertheless, this belief is widespread and hardly challenged as it is part of the innate toolkit that human beings use in everyday life to make their social choices. Furthermore, dubious scientific techniques and cinematographic representation have established the idea that lie detection, not only is a common-sense instrument, but that it can be trained. This not only reinforces the pre-existing belief, but also, causes "trained interrogators" to be over confident on their judgments.

It is compelling to debunk this myth, when dealing with the judicial setting, as its effects are devastating for the efficacy of the reliability of a suspect by police or of a defendant by a judge.

### 3.3.

#### *Healthy Individuals Do Not Generate False Memories.*

The last of the common-sense myths I will address regards the way we perceive ourselves and in particular our memory. The starting point to understand this fallacy is the phenomenology of false confessions. As a matter of fact, scientific literature has distinguished false confessions in three main categories<sup>83</sup>. Voluntary false confessions, coerced-compliant false confessions and coerced-internalized false confessions<sup>84</sup>. The latter is described as the false self-incriminating statement of a subject that, because of situational and dispositional factors, has come to believe his guilt<sup>85</sup>.

This internalized kind of confession is particularly problematic from our point of view as it clashes with common-sense idea of memory functioning. It is generally believed that memories are data stored in the mind which can be retrieved at will. This conviction is further supported by the innate notion and perception of truthfulness we hold of our own memories (exemplified by the statement: I know what I saw). The possibility that memory can be incepted in the mind of a person is perceived by most as abstruse and few would accept that they cannot trust their own memories.

However, research on eyewitness and suspect statements has extensively demonstrated that this perception is fallacious<sup>86</sup>. It results that memory is a malleable and dynamic entity that is extremely reactive to external, situational factors<sup>87</sup>. Considerable research has demonstrated that in specific situation it's possible to induce a "confabulation status" in certain subjects that can result in the creation of false memories<sup>88</sup>.

Interrogation has been identified as a high-risk situation for the creation of false memories. This is due both to objective and subjective factors.

On one hand, isolation paired with lengthy questionings and the repetition of a story by an authoritarian figure, especially if supported by false evidences and conducted in a suggestive manner, has been shown to push the boundaries of memories activating a compliant process in the interrogated<sup>89</sup>. On the other hand, the effect of these influences is even greater if these are applied to vulnerable individuals<sup>90</sup>. The vulnerability may be due to inherent characteristics of the suspect such as young age, low intelligence, anxiety problems or suggestibility, or to

<sup>81</sup> Vedi *supra* § 2.

<sup>82</sup> GIUSTI (2009), p. 561, "ci sentiamo di affermare che non vi sono comportamenti che ci consentano di dire con sicurezza se durante un colloquio clinico il soggetto sta mentendo".

<sup>83</sup> KASSIN e WRIGHTSMAN (1985), pp. 67-94.

<sup>84</sup> KASSIN (2017), p. 2.

<sup>85</sup> GIUSTI (2009), p. 558, "Non sempre una falsa confessione è definibile come un comportamento patologico. Esistono, infatti, realtà a grande impatto emotivo sul soggetto che possono generare shock emozionali tali da indurre la produzione di deformazioni mnesiche. È il caso, ad esempio di un interrogatorio emotivamente molto duro, di un colloquio psichiatrico effettuato con particolare asprezza durante una perizia, che fanno sì che colui che lo subisce possa trovarsi in condizioni psichiche particolarmente instabili tanto da mettere in atto false confessioni".

<sup>86</sup> *United States Court of Appeals*, 6th Circuit, *United States v. Smithers* 2000, 212 F.3d 306, 315-16 "many factors affecting memory are counter-intuitive, complex, and not fully known by jurors".

<sup>87</sup> KASSIN e KIECHEL (1996), p. 126-128.

<sup>88</sup> OFSHE e LEO (1997), p. 1000 and for some relevant cases see p. 994-995.

<sup>89</sup> PERILLO e KASSIN (2010), p. 329-330; GARRETT (2010), p. 1064.

<sup>90</sup> As recognized by *Supreme Court of Canada*, *R. v. Oickle*, 2000, SCC 38.

characteristics of the memory the suspect is asked to retrieve<sup>91</sup>. In particular, if a suspect has a blurred memory of the event. (e.g. because he was intoxicated at the time of the acts) it could be easier to reconstruct the latter according to the suggestions of the interrogator.

To conclude, memory is far from being a static data as in reality it is environmentally receptive and dynamic<sup>92</sup>. Specific police interrogation methods when paired with a vulnerable individual have been shown to be a high-risk situation for the creation of false memories.

This conclusion regarding the actual functioning of our minds is even more compelling if we consider the second problem linked with internalized confessions. The latter constitute a subtler fallacy of the criminal system as they tend to be extremely hard to discover. This is because the main device by which false confessions, of sane individuals, are identified and expelled by the evidentiary body of a criminal case is throughout a claim of falsity by the confessor. Actually, only when the confessor claims the invalidity of his statement the judge will have to consider its reliability. However, if the confessor believes in what he is stating the possibilities of miscarriages of justice are enhanced as legal players have no legitimate reason not to believe his self-incriminating statement.

These peculiarities of internalized false confessions need to be addressed to preserve the validity of criminal trial. Firstly, it is necessary for legal players to better understand the reasons behind this phenomenon. Understanding the situational and dispositional factors that lead to the internalization of false memories can help to interrupt the above mentioned “false confession process”. As it would allow the investigative bodies, during the questioning phase, to prevent the phenomenon by identifying a subject at risk and by avoiding the situational risk factors.

Secondly, it can furnish a further instrument to evaluate the validity of a confession critically while compelling every legal player to have a certain degree of suspicion<sup>93</sup> when addressing self-incriminating behaviours.

## 4.

### A Case Study: “Il Canaro della Magliana”.

#### 4.1.

##### *The Facts.*

On Friday 19 of February 1988, in a glade near the roman suburbs Magliana a couple of shepherds find a body burned and horribly mutilated. Through the fingerprints the police identifies the body as Giancarlo Ricci, an ex-boxer, involved in Magliana’s criminal world.

Examining the corpse, the brutality of the murder is immediately clear: his skull is almost opened in half, his face is unrecognizable because of the mutilations suffered, he no longer has nose, ears or lips; two fingers of his hands are stuck in his eyes whereas the other fingers are inside his anus; the kneecap rolls have been broken; his genitals are stuck in his mouth.

Last time Mr Ricci was seen he was entering inside a dog grooming shop on via della Magliana. The shop is owned by a scrawny man with a few records for theft and cocaine dealing, Pietro de Negri. He is a quiet man, Sardinian immigrant, married, with a young daughter.

Questioned by the police Mr de Negri initially denies. Frustrated by the inconsistent version of the facts the suspect keeps repeating the investigator decides to tease him, “a coward like you can’t be responsible of such a brutal murder” says the policeman to de Negri, is at this moment that the Canaro (as will be called by the newspapers) begins to tell his story.

After having convinced Ricci to enter in a dog cage with the deceit, he has tortured him for seven hours only stopping to pick up his daughter from school; de Negri provides to the police a detailed description of the tortures inflicted, he also affirms having consumed relevant quantities of cocaine during the action. The motive for this hideous act is the rage accumulated by the suspect during the years because of the repeated bullying and beatings inflicted by Ricci.

<sup>91</sup> KASSIN (2017), p. 4.

<sup>92</sup> See for example the experiment in BEM (1966), p. 707-710 which explores the possibility that false statements can distort an individual’s recall of his past behaviour as a function of the credibility cues present at the time these statements are emitted; see also GAROFALO (2017), p. 42-43.

<sup>93</sup> GIUSTI (2009), p.560.

A few days after his confession the Canaro sends a thirteen pages' memorial to the judge of his case, a precious piece of evidence to understand his personality.

“De Negri Pietro. Until a few days ago he was one like many others, except of course for acquaintances. Now no longer.” with these words begins the memorial in which the suspect at first portrays himself, “a loyal, clean and respectful man”, and his upbringing and then describes the causes of his infamous act and the tortures inflicted to Mr Ricci into all their sordid details.

His strain after the recognition and admiration of the reader combined by the will of representing himself in a magnificent and idealized way is evident, up to the ridiculous. The victim is presented as an oppressor whose only goal in life was to bully and crush his neighbours, even if, between the lines, his admiration for Ricci is evident. The murder is displayed as the inevitable wrath of the upright against the oppressor.

The process of the tortures is described thoroughly; the humiliation of the victim is not only physical but moral as well: during the tortures de Negri makes fun of Ricci, and numerous dialogues are described. During the whole process the Canaro affirms he has consumed continuously cocaine to gain the necessary strength and courage. No regret or pity is present as Ricci appeared to him as nothing more than a beast.

But the surprises of this case are not finished; few days after the arrest of de Negri the report of the autopsy is delivered: Ricci dyed about one hour after the first hit and all the mutilation have been inflicted *post mortem*.

The whole story narrated in detail by the Canaro is nothing more than a fiction, a legend.

After the confession, the whole activities of the investigating authorities and of the trial judge focused on the assessment of de Negri's sanity at the time of the act. For this purpose, the defendant underwent two different psychiatric examination that had similar results regarding de Negri's personality profile but differed on the qualification of the cocaine assumption as mere substance abuse or as chronic addiction.

Notwithstanding the discrepancies that emerged at trial between de Negri's version and the evidences collected, the protests of the victim's family that explicitly defined the defendant as a “puppet” and the general climate of conspiracy between the witnesses nor the judge or the prosecutor delved in the reliability of the statement of the Canaro.

Finally, the Canaro was declared partially insane and sentenced to 20 years of prison.

## 4.2.

### *Evaluation.*

In order to evaluate the validity of the confession in the present case and to spot potential fallacies in the process that led from the confession to the sentence I will divide the present analysis in three main aspects: the confessor, the confession and the safeguards at trial. By doing so I will underline how the fallacies I have delved into in the article may be applicable to the present case.

My aim is not to prove beyond reasonable doubt the falsity of the confession, rather I want to underline how the presence of an un-recanted confession, especially when related to a heinous crime, may create in all the parties involved a tunnel vision<sup>94</sup> which doesn't allow to spot highly relevant factors. If, as stated by all the relevant doctrine, confession is only the starting point of a criminal case not its conclusion it's the duty of each judge to address the validity of a confession without assuming it. This principle has been ignored in the present case as all the legal players have presumed the reliability of the confession and built their arguments on this postulate. My aim is therefore to show how, notwithstanding the general acceptance of the Canaro's confession, there are several weaknesses in the whole confession process.

I believe it's not their presence that is worrying but the fact that they have been completely ignored by all the legal players; as it underlines how self-incriminating statements trigger in the parties involved a subconscious “reliance presumption” extremely difficult to break: who doesn't believe somebody confessing such monstrosities without pity or shame?

This latter observation confirms the above-mentioned intimate bond existing between common sense thinking and self-incriminating statements and the subsequent necessity of rational scientific thinking in order to avoid miscarriages of justice.

<sup>94</sup> For tunnel vision see FINDLEY e SCOTT, (2006), p. 291–397; and LEO e DAVIS (2010), p. 29.

## 4.3. *The Confessor.*

Examining the psychological profile of Mr de Negri, as marked out by the two expert witnesses involved in the trial, it is possible to define the defendant as a vulnerable individual<sup>95</sup>.

In particular, the Canaro was described as affected by a severe narcissistic/paranoid personality disorder with persecutory impulses and antisocial tendencies. Moreover, at the time of the facts de Negri was assuming relevant quantities of cocaine, which, even if didn't amount to a chronic dependence, for sure influenced the defendant's cognitive abilities.

As recognised by scientific literature, mental illness is a relevant risk factor when it comes to false confessions<sup>96</sup>. As a matter of fact, this individual characteristic affect the ability of the subject to resist interrogation pressure and to correctly direct his behaviour<sup>97</sup>. Moreover, when the specific disorder Mr de Negri was affected is considered it is easy to understand how he constituted a particularly critical profile. In fact, the narcissistic personality disorder is defined as a mental condition that causes an inflated sense of self-importance, a deep need for excessive attention and admiration, troubled relationships, and a lack of empathy for others<sup>98</sup>.

If these characteristics are related to the first of the postulates that have been considered "nobody lies against their interest" it's easy to understand how in a subject as the one taken in account the above-mentioned "motivation shift" may occur<sup>99</sup>. As a matter of fact, in such an individual the obvious, rational motivation to stay out of jail may be substituted by factors as the possibility to achieve attention or to see recognized that grandiosity the subject feels he deserves.

In the present case, more than one factor points to the presence of this inner process in the defendant. First sign is the content of the confession. In its memorial, de Negri depicts himself as the saviour of the neighbourhood, his act represents, according to him, a sort of modern version of David tearing down Golia. It's apparent how the confessor uses the incriminating statement to convey an image of himself rather than to narrate a fact. This is confirmed by the later findings that underline the complete incongruence between the narration and the evidences. The whole account of the Canaro is a legend, a story artificially constructed to impress the public and create an aura of admiration and respect around him. This idea is supported by the structure of the Canaro's memorial. The latter more than a confession appears as an autobiography in which the defendant gives predominant space to the description of his life and of his multiple good deeds.

Second critical aspect is represented by the modality of the confession. The sentence that thrills the confession pronounced by the investigator after hours of interrogation is clearly critical: "A coward like you can't be responsible of such a brutal murder". When confronted with a narcissistic personality it is clear how the most efficient but also the most dangerous way, from an epistemological point of view, to make him talk is to offend his sense of grandiosity. The problem is that even if the confession is voluntary when confronted with such a personality the above-mentioned sentence may constitute an enormous pressure on an already fragile personality.

Coming now to the problems related to the cocaine intoxication, this status constitutes a relevant risk factor for the third of the postulates analysed in the article "Healthy individuals don't generate false memories". As a matter of fact, intoxication at the time of the act may generate in the individual blurred memories of the relevant time-span. This combined with suggestive questioning and lengthy interrogation may induce the interrogated to fill in the gaps with what is suggested by the interrogator.

Given the relevant weaknesses of the confessor and of the confession it is appropriate to verify the presence of counterbalancing factors during the trial that may have amended these fallacies.

<sup>95</sup> Vulnerable in the sense of the Confession Doctrine, see for example FOLLETTE *et al.* (2007), p. 43-45 or FOLLETTE *et al.* (2017), p. 4.

<sup>96</sup> REDLICH *et al.* (2011), p. 394.

<sup>97</sup> FOLLETTE *et al.* (2007), p. 43.

<sup>98</sup> For a complete overview see AKHTAR e THOMSON (1982), p. 12-20.

<sup>99</sup> *Supra* § 3.1.

## 4.4. *The Safeguards at Trial.*

Examining the trial of Mr de Negri several criticalities arise. As extensively affirmed by the relevant doctrine the confession should only be the starting point of a criminal case not its conclusion<sup>100</sup>. The meaning of this statement is that is crucial for the judge to verify with concurring evidence the reliability of the self-incriminating statement. This necessity cannot be ignored even when the confession is consistently affirmed by the defendant throughout the whole trial<sup>101</sup>. The necessity of latter control of reliability is confirmed also by the relevant jurisprudence of Italian Supreme Court<sup>102</sup>.

Notwithstanding this recognized necessity, the judges of the Corte di Assise don't seem to really take into account the possibility that de Negri's confession may be, at least partially, fictitious. As a matter of fact, in their reasoning the Judges, even if they acknowledge the inconsistencies between the confessor version and the evidences emerged at trial and the multiple protests of the victim's family regarding their allegation of the participation to the crime of the organized crime, seem not to consider relevant the latter. Moreover, even if the judgment itself acknowledges that the greater part of the case "can only be inferred by the defendant's narrative" no specific part of the reasoning is devoted to the evaluation of the reliability of the said statement.

Regarding the expert testimonies, the theory of the consultants is that the Canaro's story discrepancies are due to the state of cocaine intoxication which have led the defendant into a hallucinatory state. Therefore, de Negri's memorial had "exclusively a value of psychic truth" as it described the crime as perceived by the perpetrator not how it actually happened. Furthermore, when asked by the judge on the matter of the reliability of the confession the expert adds up, as supporting remark, that the validity of the statement could be inferred by the postulate that "nobody lies against its interest", especially when dealing with such a heinous crime.

From a holistic point of view, the trial seems to have overridden the issue related to the validity of de Negri's confession. All the legal players seem to have been affected by a confirmation bias<sup>103</sup> which has led them to concentrate to the evidences that pointed towards the defendant's culpability and to ignore the multiple inconsistencies present<sup>104</sup>. This case clearly underlines the capability of an un-recanted self-incriminating statement to trigger deeply rooted reliance mechanism that unconsciously lead to a reliance effect. As a matter of fact, when we are confronted with a voluntary confession of a heinous crime disregarding it or doubting of it seems counterintuitive; with this I don't mean to affirm the innocence of the Canaro rather my aim is to underline how many investigative leads were open and possible and how they have been disregarded.

## 5. *Conclusion.*

The aim of this article was to shed light on a specific aspect of human functioning as underlined by psychological research. In particular, the validity and reliability of common sense statement, especially when related to self-incriminating statements, was addressed.

As science increasingly demonstrate the fallaciousness of common sense, it's urgent for legal players to acknowledge this fallaciousness and to act in order to tackle the miscarriages that spread from it. This task is particularly hard as common sense thinking is deeply rooted in our functioning and culture and to act differently will frequently appear counterintuitive.

However, the fall of common sense represents a scientific truth at the moment and needs

<sup>100</sup> See on the need of corroborating elements regarding the validity of the confession LUPÀRIA (2006), p. 202 e ss.

<sup>101</sup> As is exemplified by the category of the internalized false confessions see *supra* § 3.3

<sup>102</sup> See Cass. Pen., Sez. I, 17-02-1992, n. 3209, "la confessione può essere posta a base del giudizio di colpevolezza dell'imputato nelle ipotesi nelle quali il giudice ne abbia apprezzato la veridicità, la genuinità e l'attendibilità, fornendo ragione dei motivi per i quali debba respingersi ogni sospetto auto calunnatorio o di intervenuta costrizione del soggetto" see also Cass. Pen., Sez. I, 15-01-1990, n. 2364.

<sup>103</sup> KLAIMAN (1995), p. 385.

<sup>104</sup> LEO e DRIZIN (2010), p. 25, "even when they are false, confessions appear to be such powerful evidence of guilt that they almost automatically trigger tunnel vision and confirmation bias among the criminal justice officials and jurors who must evaluate confessions, blinding them to the possibility of error".

to be acknowledged. These discoveries, if fully embraced and understood, will represent a revolution for our daily functioning as they will question the way we perceive our environment and even our self. In order to enact changes based on these new paradigms I believe it's necessary to first deconstruct our previous schemes. In order to do so is necessary to shake the grounds of our knowledges by exposing the fallaciousness of the subconscious postulates we base our decision and evaluation on. Only if we eliminate our previous line of reasoning we can fully embrace a new, scientifically based, cognitive construct.

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