Privy Council

Nazir Ahmad v King-Emperor

Present :—LORD ROCHE, SIR JOHN WALLIS, SIR LANCELOT SANDERSON, SIR SHADI LAL AND SIR GEORGE RANKIN.

P. C. A. No. 11 of 1936, from the High Court of Judicature at Lahore.

June 16, 1936.

NAZIR AHMAD *Appellant.*

versus

KING-EMPEROR *Respondent.*

A.—*Criminal Procedure Code, Act 5 of 1908, Ss. 164, 364—Magistrate not acting under S. 164 or 364 Cr. P. C. but giving oral evidence of alleged confession by accused—Evidence is inadmissible and should be rejected.*

An accused cannot be convicted mainly, if not entirely, on the strength of a confession said to have been made by him to a Magistrate, of which oral evidence is given by the Magistrate but which is not recorded under S. 164 Cr. P. C., such evidence of confession being inadmissible and liable to be rejected, where the Magistrate neither acts nor purports to act under S 164 or S. 364 Cr. P. C. and nothing is tendered in evidence as recorded or purporting to be recorded under either of those sections. Whether a Magistrate records any confession is a matter of duty and discretion and not of obligation, the rule applicable being the well-recognized rule that where power is given to do a certain thing in a certain way the thing must be done in that way or not at all. The effect of the statute of the Code of Criminal Procedure 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 any other method (pp. 506, 511, 512, 513).

2 Lah. 325 ; 137 Ind. Cas. 57 ; 55 All. 426 ; 2 Cal. W. N. 702; 17 Cal. 862 ; 45 Cal. 557 ; 49 Cal. 167 ; 9 Mad. 224 and 3 L. B. R. 173, appr.

14 Lah. 290 ; I6 Lah. 912, 21 P. R. 1881 (Cr.) 36; 11 P. R. 1918 (Cr.) 22 ; 56 All. 302 and 45 Mad. 230 ref. and impliedly not appr.

B.—*Criminal Procedure Code, Act 5 of 1908, Ss. 164, 364—Construction —S. 164 confers powers on Magistrates and delimits them—Ss. 164 and 364 must be looked and construed together.*

Sections 164 and 364 Cr. P. C. must be looked at and construed together. 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. S. 164 is a section conferring powers on Magistrates and delimiting them, its scope and extent being far other than this that 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 Evidence Act, whereby all the precautions and safeguards laid down by Ss. 164 and 364 would be of such trifling value as to be almost idle and the range of Magisterial confessions would be so enlarged that the provisions of S. 164 would almost inevitably be widely disregarded (pp. 512, 513).

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Judgment

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C. Sidney Smith for Appellant.

A. M. Dunne K. C. and *W. Wallach* for Respondent.

Lord Roche.—This is an appeal *informa pauperis* by special leave from a judgment of the High Court of Lahore, dated 10th October, 1935, which affirmed a judgment of the Additional Sessions Judge of Lyallpur, dated the 16th April, 1935, convicting the appellant of dacoity with murder under S. 396 of the Indian Penal Code and sentencing him to death.

The appellant was convicted mainly, if not entirely, on the strength of a confession said to have been made by him to a magistrate of which evidence was given by the magistrate but which was not recorded under S. 164 of the Criminal Procedure Code. It was not contended before their Lordships that the conviction could be supported if the evidence of the confession was inadmissible. Nor was it disputed that if the evidence was inadmissible, then, in the circumstances of this case, by well recognised principles laid down by this Board, it would be proper humbly to advise His Majesty to interfere—see *Pillai* v. *The King-Emperor* (1), following *in re Dillet* (2). Therefore the sole question for decision is whether such evidence was or was not admissible. The answer ultimately depends upon the meaning and effect of certain sections of the Criminal Procedure Code, 1898. The most material sections are in the following terms :—

In Part V.—Information to the Police and their powers to investigate :—

157.—(1) If, from information received or otherwise, an officer in charge of a police station has reason to suspect the commission of an offence which he is empowered under S. 156 to investigate, he shall forthwith send a report of the same to a Magistrate empowered to take cognizance of such offence upon a police report.

159.—Such Magistrate, on receiving such report, may direct an investigation or, if he thinks fit, at once proceed, or depute any Magistrate subordinate to him to proceed, to hold a preliminary inqniry into, or otherwise to dispose of, the case in manner provided in this Code.

162.—(1) No statement made by any person to a police officer in the course of an investigation under this Chapter shall, if reduced into writing be signed by the person making it ; nor shall any such statement or any record thereof, whether in a police diary or otherwise, or any part of such statement or record, be used for any purpose (save as hereinafter provided) at any inquiry or trial in respect of any offence under investigation at the time when such statement was made.

(1) (1913) 40 I. A. 193. (2) L. R. 12 App. Cas. 459.

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164.—(1) Any Presidency Magistrate, any Magistrate of the first class and any Magistrate of the second class specially empowered in this behalf by the Local Government may, if he is not a police officer, record any statement or confession made to him in the course of an investigation under this Chapter or at any time afterwards before the commencement of the inquiry or trial.

(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 S. 364, and such statements or confessions shall then be forwarded to the Magistrate by whom the case is to be inquired into or tried.

(3) A 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 when he records any confession, he 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."

Explanation.—It is not necessary that the Magistrate receiving and recording a confession or statement should be a Magistrate having jurisdiction in the case.

S. 364 occurs in Part VI Proceedings in Prosecutions. Chapter XXV. Of the Mode of taking and recording Evidence in Inquiries and Trials. It reads as follows :—

364.—(1) Whenever the accused is examined by any Magistrate, or by any Court other than a High Court established by Royal Charter..the whole of such examination, including every question put to him and every answer given by him, shall be recorded in full, in the language in which he is examined; or, if that is not practicable, in the languge of the Court or in English : and such record shall be shown or read to him, 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.

(2) When the whole is made conformable to what he declares is the

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truth, the record shall be signed by the accused and the Magistrate or Judge of such Court, and such Magistrate or Judge 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.

(3) 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 shall be annexed to the record. If the Magistrate or Judge is unable to make a memorandum as above required, he shall record the reason of such inability.

(4) Nothing in this section shall be deemed to apply to the examination of an accused person under S. 263 or in the course of a trial held by a Presidency Magistrate.

The remaining section to be quoted is S. 533 which is in the following terms :—

533.—(1) If any Court, before which a confession or other statement of an accused person recorded or purporting to be recorded under S. 164 or S. 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, S. 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.

The facts of the case so far as they are necessary for the decision of the point may be very shortly stated. The house of one Guran Das was broken into on the night of 11th October, 1934, and a theft was perpetrated. A hue and cry was raised and villagers attempted to intercept the dacoits, and there was some shooting by the dacoits, or by one of them, with the result that a villager was wounded and died. The appellant and a number of other men who were tried with him were later apprehended and were kept in custody. No one had identified the dacoits at the stage of the robbery or at the stage of the shooting but they were said to have been met by a camel driver rather later in the night. This man gave evidence and identified the appellant as one of the dacoits, but the High Court was of opinion that no reliance could be placed on this evidence. There was some circumstantial

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evidence as to the stolen goods and as to a revolver which was found in the possession of another of the accused (Haji) and not of the appellant. This evidence, though raising a strong suspicion with regard to the appellant's position either as a participant in the dacoity or as a receiver of goods stolen in the course of it, was, as has been already stated, insufficient to warrant a conviction. The evidence of one Mr. L. D. Vasisht, a First Class Magistrate, and therefore a magistrate entitled to proceed under S. 164 was the determining evidence. This witness deposed that on 14th November, 1934, on the application of the police and under the orders of the District Magistrate, he proceeded by car to the scene of the dacoity and to the places material to the events connected with it. The accused in handcuffs accompanied him in another car. The object was said to be that the accused, including the appellant, might be given the opportunity of voluntarily and after a caution leading the way and showing to the magistrate the places where incidents in the crime occurred. On arrival, the magistrate said that he excluded the police, or sent them to stand apart at a distance, and then was led round by each man and the places were pointed out. As to the appellant the magistrate deposed that the result was a full confession to participation in the robbery and to firing a revolver in the course of the pursuit. The deponent said he made rough notes of what he was told and, after dictating to a typist a memorandum from the rough notes, then destroyed them. 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 S. 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 V of the Code either purported to follow or in fact followed the procedure of Ss. 164 and 364. 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 S. 164. The statement of the appellant when questioned by the Sessions Judge was a direct and simple denial that he had ever made the admissions the magistrate said he had made or done any of things he was said to have confessed to doing. The statements of the other accused men were to the same effect.

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The Additional Sessions Judge, acting on the admissions, found the appellant guilty, and on the strength of the same admissions held that he was the ringleader and the man who used a firearm and therefore sentenced him to death. The other accused were convicted and received sentences either of transportation or rigorous imprisonment. The High Court held the evidence of confessions admissible in the form in which it was given, saying that "it has long been held in this Court that evidence of this nature is admissible" and was "satisfied that all the accused have been properly convicted on their own confessions". It therefore confirmed the conviction and sentence.

Upon the argument of the appeal the attention of the Board was rightly directed to a considerable number of decisions in the Courts of India dealing with the same or similar points arising upon the same statute or upon earlier statutes of much the same tenour. In the course of the judgments in these cases the various considerations on both sides have been presented and dealt with, so that their Lordships are not without information as to the views of Judges in India on the subject. But any lengthy review of the decisions is neither necessary nor helpful, the more as there emerges from the decisions great divergence of judicial opinion.

The general tendency and state of authority in the Courts of India as appears from these decisions is as follows:—

In Lahore the High Court has held both ways. The most recent authority for admissibility is in *Abdulla* v. *The Crown* (3), and in *Bakhshan* v. *The Crown* (4), and there are earlier cases to the same effect, *viz.*, *Shere Singh* v. *The Crown* (5), and *Feroz and Gulab* v. *Emperor* (6). But against admissibility are *Farid* v. *The Crown* (7), *Allah Dad* v. *Emperor* (8). In Allahabad the decision in *Emperor* v. *Ram Baran Shukla* (9) is in favour of the appellant; but the practical result of this decision is much diminished by the very wide view taken by the Full Court of the scope of S. 533 in *Emperor* v. *Muhammad Ali* (10). In Calcutta the decisions have been almost, if not quite uniformly, in favour of the inadmissibility of such evidence. See *Queen-Empress* v. *Bhairab Chunder Chuckerbutty* (11), in which the leading judgment was given by Bannerjee J. and concurred in by Maclean C. J. The reasoning of this judgment is lucid and cogent: In the same sense are the

(3) (1933) 14 Lah 290.
(4) (1935) 16 Lah 912.
(5) (1881) 21 P. R (Cr.) 36.
(6) (1918) 11 P. R. (Cr.) 22.
(7) (1921) 2 Lah. 325
(8) (1931) 137 Ind. Cas. 57.
(9) (1933) 55 All. 426.
(10) (1933) 56 All. 302 F B.
(11) (1898) 2 Cal. W. N. 702.

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following decisions :—*Jai Narayan Rai* v. *Queen-Empress* (12), *Amiruddin* v. *Emperor* (13), *Legal Remembrancer* v. *Lalit Mohan Singh Roy* (14). In Madras there is a closely reasoned decision of Parker J. against admissiblity *Queen-Empress* v. *Virna* (15), but in the contrary sense is the decision of *Tangedupalle Pedda Obigadu* v, *King-Emperor* (16). A decision in Burmah favourable to the appellant, *Thein Maung* v. *King-Emperor* (17), was also called to the attention of the Board as were a number of other cases which, however, mainly turned upon the scope and effect of S. 533 and upon the extent in which that section operated to cure defects and to enable statements or records not complying with the requirements of the material sections of the Code to be made admissible in evidence. In this case no question of the operation or scope of S. 533 arises and their Lordships desire to express no opinion on that matter. It is here conceded that the magistrate neither acted nor purported to act under S. 164 or S. 364 and nothing was tendered in evidence as recorded or purporting to be recorded under either of those sections.

The matter to be considered and decided is one of plain principle and first importance, namely, is such oral evidence as that of the magistrate, Mr. Vasisht, admissible ? It was said for the respondent that it was admfssible 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

(12) (1890) 17 Cal. 802.
(13) (1917) 45 Cal. 557.
(14) (1921) 49 Cal. 167.
(15) (1886) 9 Mad. 224.
(16) (1921) 45 Mad. 230.
(17) (1905) 3 L. B. R. 173.

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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. *Bishop of Oxford* (18). There is no need to call in aid this rule of construction—well recognised 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 recognised 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* (19)—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

(18) L. R. 5 App. Cas. 214. (19) L. R. 1 Ch. D. 426 (at p. 431).

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 the 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

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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.

For these reasons their Lordships have humbly advised His Majesty that this appeal should be allowed and the conviction of the appellant should be set aside.

Appeal allowed.

Solicitors for Appellant:—*Hy. S. L. Polak & Co.*

Solicitors for Respondent:—*Solicitor India Office.*

Oudh Chief Court

Ramji Lal v The Secretary of State for India in Council.

Present :—SIR CARLETON MOSS KING KT., C J. AND MR. JUSTICE ZIA-UL-HASAN.

S. 25, Revn. Appln. No. 41 of 1935, of the order, dated December 20, 1934, of S. Khurshed Husain, Judge, Small Cause Court, Lucknow.

April 16, 1936.

RAMJI LAL, *Lala* *Plaintiff-Applicant.*

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL *Defendant-Opposite Party.*

A.—*Transfer of Property Act, 1882, S. 106—House taken on rent—Rent to be paid monthly—Tenancy is from month to month.*

Where a house is taken on rent and there is a proposal to pay monthly rent which is accepted by the owner of the house, the tenancy is really intended to be from month to month (p. 515).

B.—*Transfer of Property Act, 1882, S. 106—House taken on rent—First payment of rent for broken period of a month—Tenancy runs according to calendar month and begins on the first of each month.*

Where the first amount of rent in respect of a house taken on hire is paid for the period from a certain date of a month to the end of that month, the inference is that the parties intend that the tenancy should run according to the calendar month. The general practice also is that when a house is occupied in the middle of a month and it is intended that the tenancy should be by the calendar month, rent is paid separately for the days during which the house is occupied prior to the first of the following calendar month and tenancy is deemed to begin on the first of each calendar month (pp. 515, 516).

30 Mad 109, rel

C.—*Transfer of Property Act, 1882, S. 53A.—Scope and applicability—Tenancy from month to month—Section is not retrospective nor applies to such tenancy.*

S. 53A, Transfer of Property Act, is not intended te be given retrospective effect and is inapplicable to the case of a tenancy which is from month to month (p. 516).

Mr. R. K. Bose for Appellant.

Mr. H. S. Gupta, Government Advocate for Opposite-Party.