

## APPELLATE CRIMINAL.

—

*Before Mr. Justice White and Mr. Justice Maclean.*

1880  
May 13.

NOSHAI MISTRI AND RAM CHUNDER HALDAR v. THE EMPRESS.\*

*Confession—Criminal Procedure Code (Act X. of 1872), ss. 122 and 346—  
Evidence Act (I of 1872), s. 33.*

When a confession is made to a Magistrate, by an accused person during an enquiry held previously to the case being taken up by the committing officer, and by an officer acting merely as a recording officer, it must be recorded in strict accordance with the provisions of ss. 122 and 346 of the Code of Criminal Procedure. If the provisions of these sections have not been fully complied with by the recording officer, the Court of Session may take evidence that the accused person duly made the statement recorded; but a Court of Session is not at liberty to treat a deposition sent up with the record and made by the recording officer before the committing officer to the effect that the accused person did in fact duly make before him the statement recorded as evidence of that fact. In such a case the recording officer must himself be called and examined by the Court of Session, except in cases in which the presence of the recording officer cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court of Session considers unreasonable.

THE two appellants in this case had, with several others, been arrested on a charge of dacoity. The Magistrate of the district had, apparently under s. 115 of the Criminal Procedure Code, directed a preliminary enquiry to be held before a Deputy Magistrate. The Deputy Magistrate, besides examining the witnesses brought before him on behalf of the prosecution, also examined the appellants, and took down and recorded their statements, which amounted in each instance to confessions of guilt. He omitted, however, to certify, as required by ss. 122 and 346 of the Criminal Procedure Code, that the examination had been taken in his presence and in his hearing, and that the record of it contained accurately the whole of the statement made by the accused, and that he believed the confessions to have been

\* Criminal Appeal, No. 718 of 1879, against the order of A. C. Brett, Esq., Sessions Judge of Jessore, dated the 1st October 1879.

made voluntarily. The case was afterwards transferred to the Joint Magistrate, by whom the prisoners were eventually committed for trial to the Sessions. The Joint Magistrate noticing that the provisions of ss. 122 and 346 had not been duly complied with, to remedy this defect, himself called and examined the Deputy Magistrate, and after taking his deposition attached it to the record and sent it up with the other depositions to the Sessions Court. The Sessions Court treated the deposition of the Deputy Magistrate as sufficient evidence that the confessions of the appellants had been duly taken and recorded, and accordingly convicted both the appellants upon their own confessions.

From this order the appellants appealed to the High Court, on the grounds—

1st.—That the deposition of the Deputy Magistrate ought not, under s. 33 of Act I of 1872, to have been received in evidence, it not appearing that his presence might not have been obtainable without unreasonable delay or expense ; and

2nd.—That without the deposition properly admitted, or the evidence of the Deputy Magistrate, the confessions of the appellants ought not to have been received in evidence.

Both the appellants and the Crown were unrepresented.

The judgment of the Court (WHITE and MACLEAN, JJ.) was delivered by

WHITE, J.—We have now considered the cases of the prisoners Noshai Mistri and Ramchunder Haldar with reference to the ruling of the Full Bench in the case of *Anuntram Singh* (1), and are of opinion that the ruling in question has no application in the present case, but that the confessions are inadmissible for the following reasons :—

They were in our opinion confessions recorded under s. 122 of the Code, and are defective from the omission of the Deputy Magistrate to record the certificate required by s. 346, Criminal Procedure Code, and the defect cannot be cured by taking evidence under the last clause of s. 346.

Independently of this objection, we think that, even if the defect could have been cured by taking evidence under that

(1) *Ante*, p. 954.

1880

NOSHAI  
MISTRIB AND  
RAM CHUNDER  
HALDAR  
v.  
EMPERESS.

1880

NOSHAI  
MISTRHI AND  
RAM CHUNDER  
HALDAR  
v.  
EMPEROR.

section, the Sessions Judge had no evidence on the point before him on which he could act, for the last clause of s. 346 directs that the Court of Session shall take the evidence. In this case, the committing Magistrate took the deposition of the recording Magistrate, which he appears to have had no authority to do. Furthermore, we think that if the committing Magistrate had power to take the recording Magistrate's evidence, the Sessions Judge has not shown that that Magistrate's deposition was properly admitted under the provisions of the 33rd section of the Evidence Act, 1872. There is nothing on the record to show that the presence of the recording Magistrate could not have been obtained without an amount of delay or expense which in the opinion of the Court was unreasonable.

We accordingly set aside the conviction and sentence, and direct the discharge of the appellants Noshai Mistri and Ram chunder Halidar.

*Conviction set aside.*

---