

APPELLATE CRIMINAL.

*Before Mr. Justice Spencer and Mr. Justice
Kumaraswami Sastri.*

1921,
September
19.

TANGEDUPALLE PEDDA OBIGADU (SECOND ACCUSED),

v.

KING-EMPEROR.*

Criminal Procedure Code (V of 1898), ss. 159, 164, 288, 364, 533—Magistrate—Inquiry under section 159—Confession by accused—Not recorded in writing—Oral evidence of Magistrate, whether admissible.

Under section 164, Criminal Procedure Code, it is not obligatory on a Magistrate holding an investigation or preliminary inquiry under section 159 of the Code to record in writing a confession made to him by an accused person and such confession may be proved by the oral testimony of the Magistrate.

TRIAL referred by A. FOTHERINGHAM, Sessions Judge of Cuddapah, for confirmation of the sentence of death passed upon the Second Accused in Case No. 10 of the Calendar for 1921, and Appeal filed by the said accused in the same case and Appeal filed by the Public Prosecutor against the acquittal of accused Nos. 1, 3, 4 and 5.

Second accused and four others were charged with the murder of one Kuppaswami Ayyangar, a Sub-Inspector of Police. This prisoner had been put up by the Sub-Inspector under one of the security sections and bound over and the Sub-Inspector had given evidence against him. The other four were accused in a theft case, and were all under remand. They were on their way to be tried at Pulivendla by the Deputy Magistrate when they had to pass his camp. They were detained there and examined by the Investigating Inspector and then by the Deputy Magistrate. The examination by the Magistrate was, as

* Referred Trial No. 50 of 1921 and Criminal Appeals Nos. 307 and 377 of 1921.

the Sessions Judge put it, "informal and nothing was recorded : indeed the information about it is such that it appears he did not realize the essential difference between his conducting the examination himself and having it conducted by the Police Inspector in his presence." The other material facts are set out in the judgment of SPENCER, J. The Sessions Judge convicted second accused of the murder and sentenced him to be hanged by the neck subject to confirmation by the High Court but acquitted the other four accused. Against this acquittal the Public Prosecutor filed an Appeal.

S. Ranganatha Ayyar for the prisoner.

The Public Prosecutor for the Crown.

SPENCER, J.—In the Sessions Court five men of Yarla caste were tried for the murder of Kuppaswami Ayyangar, late Police Sub-Inspector of Chekrayapet, but the second accused alone was found guilty and convicted under section 302, Indian Penal Code. There is before us an Appeal preferred by Government against the acquittal of accused Nos. 1, 3 and 4, and the sentence of death passed on the second accused has come up for confirmation under section 374 of the Criminal Procedure Code. The case of the fifth accused is not before us.

It was proved by the deceased police officer's wife, prosecution witness 20, that she last saw her husband at 3 p.m. on February 20th, 1920, when he left his house at Kumarakalva for the police station at Chekrayapet saying he would return at night. It was proved by prosecution witnesses 12 and 13, constables of that station, that he worked in the station that day till 6 p.m., when he left for home. He was last seen alive by two Muhammadans, prosecution witnesses 17 and 18, near Gandikovur, a village which lies midway between Chekrayapet and Kumarakalva. About the same time a

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blacksmith, prosecution witness 24, says he saw the fifth accused crossing the Papagbni river in the direction of Gandikovur and a man in white, who may have been the deceased (except for the fact that prosecution witness 18 says he was wearing a dark coat), descend into the river-bed from the Gandikovur side just as prosecution witness 24 was about to ascend by the separate path to Bojjireddivarapalli.

The evidence to connect the accused with the crime consists, first, of confessional statements which they each made in turn on April 12th, 1920, to the Deputy Magistrate of Royachoti, prosecution witness 2; secondly, of evidence of conduct in pointing out on April 13th certain human remains which one K. Pedda Chennugadu, who is not an accused or a witness in this trial, had shown on April 10th on the top of a hill called Erramatti Kanama, and some charred bones concealed in a cleft in the rock a furlong away which Chennugadu had not previously shown; thirdly, of evidence of conduct in showing a place in second accused's field from which the village munsif extracted a bundle containing the fragments of a watch which is proved conclusively to have belonged to the deceased Kuppaswami Ayyangar; and lastly, of the statement of prosecution witness 24 that the accused were seen in the neighbourhood of the place where the deceased was last seen alive and were shouting as if drunk, and the statement of prosecution witness 15, toddy shopkeeper at Kumarakalva, that he sold them toddy that evening.

The first question for decision is whether the oral evidence of the Deputy Magistrate is admissible to prove that the accused confessed to the crime of having drowned the Sub-Inspector in the river.

In his further examination this Magistrate has explained that he did not record these confessions under section 164, Criminal Procedure Code, as the section does

not make it obligatory that he should do so and he thought that if he wasted time on formalities the material objects might disappear in the meantime. He has not explained why he did not record these confessions either at Erramatti Kanama or after he and the accused returned to his camp. He says he was acting as a Magistrate but was not holding any trial or preliminary inquiry but was inquiring into the crime under section 159 under the directions of the District Magistrate. That is a section which authorizes Magistrates, who are empowered to take cognizance of offences upon a police report, to direct an investigation or to themselves proceed to hold a preliminary inquiry upon receiving a report of the commission of a cognizable offence or to depute a Subordinate Magistrate to do so. From the definitions in section 4 (l) and (k) it appears that "investigation" is a word confined to proceedings of the police or persons other than Magistrates and that "inquiry" is the word appropriate to the proceedings of Magistrates prior to trial.

The expression "preliminary inquiry" in section 159 appears to be used in a different sense from its use in section 288, where it refers to inquiries under Chapter XVIII, prior to commitment to the Sessions, which are held after the police investigation is complete, after a charge sheet is drawn up, and after the accused is forwarded under custody under section 170 to the Magistrate empowered to take cognizance of the case.

After a person is taken as an accused, it is made obligatory upon the Magistrate who examines him to record the whole of the questions put to him and the answers given by him, under section 364, Criminal Procedure Code. But statements, whether in the nature of information given by witnesses about a crime or admissions by persons who have taken part in a crime, if made during the course of an investigation before the

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commencement of a trial or inquiry are governed by section 164 and this section permits Magistrates to record the same without compelling them to do so.

In this case it does not appear that the Deputy Magistrate made any inquiry independently of the police or recorded any statements from the available witnesses. The police were conducting an investigation and collecting evidence of the crime. The Magistrate was watching the progress of their work of detection. Under such circumstances he was not bound by law to record in writing what was said to him.

The law is stated by BRANDT, J., in *Queen-Empress v. Vira*(1) thus :

“Evidence may be given of a confession provided that it be not excluded by an express provision of law, whether made to a private person, or to a Magistrate otherwise than in the course of an inquiry or other judicial proceeding; it may then be proved, and must be proved if at all, like any other fact.”

In *Emperor v. Maruti Santu More*(2) SHAN, J., gave his reasons for thinking that in spite of the use of the expression “may record” in section 164 (1) it was the intention of the Legislature to make all confessions matters required by law to be reduced to the form of a document. He relied on the implied purpose of the section and on the terms and the existence of section 533; but HAYWARD, J., who sat with him, dissented from this view and observed, that

“if it was intended to make oral statements which would be relevant when made to private persons irrelevant when made to Magistrates, then there would surely have been express provision that such statements should not be proved except by writings duly recorded by Magistrates,”
and

“it would not have been left to mere implication from the provisions relating to the manner of proof of such writings

(1) (1886) I.L.R., 8 Mad., 224, 240.

(2) (1920) 54 I.C., 465.

when recorded by Magistrates under section 533 of the Criminal Procedure Code."

With due respect I am unable to adopt the view taken by SHAH, J., which is founded partly on theories as to implications to be drawn from certain sections, whereas the law is always precise in stating what "may" and what "shall" be done, and partly on four decisions of the Bombay High Court which became obsolete by the enactment of section 533 in the Code of 1882. In *Emperor v. Gulabu*(1) it was held that no evidence could be given of the terms of a confession of an accused person made to a Magistrate except the record, if any, made under section 364. That was a case in which it was found that the Tahsildar was actually conducting an inquiry as a Magistrate when the statement was made to him and therefore section 364 strictly applied. When no record at all had been made of Gulabu's statement in spite of the provision in section 364, that the whole of the examination of an accused including the questions put to him and every answer given by him shall be recorded in full, section 533 was inapplicable and no oral evidence could be admitted to prove what Gulabu said. It is quite plain that section 533 can only be invoked when there is some written record but that record is defective through some error in not strictly following the provisions of section 164 or section 364. The object, apparent from the words of the section, is to take such records out of the excluding provisions of section 91, Indian Evidence Act. *Queen-Empress v. Bhairab Chunder Chuckerbutty*(2), which has been cited for the defence, is not really helpful in considering the value of unrecorded confessions. It dealt with a case where statements were recorded by a

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(1) (1913) I.L.R., 35 All., 260.

(2) (1898) 2 C.W.N., 702.

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Magistrate in the course of an investigation under section 159 in the form provided by section 364 but without the certificate required by section 164, to the effect that they were made voluntarily.

I hold then that the oral statements of the Deputy Magistrate as to what the accused admitted in his presence are not inadmissible on account of his failure to record them in writing.

The next question is whether the confessions spoken to by the Deputy Magistrate were made voluntarily. Section 164 provides that a Magistrate should not record such a confession unless upon questioning the accused he has reason to believe that it was made voluntarily.

The Deputy Magistrate now deposes that these confessions were made voluntarily and that the accused said they were voluntary.

But the conditions under which they were given make it very doubtful whether he was right in his supposition. The accused did not come forward spontaneously. They were in police custody at the time, accused Nos. 1, 2, 3 and 5 being charged with theft of sheep and the fourth accused being put up for giving security for good behaviour. They were brought over from the police thana to the chattram where prosecution witness 2 was halting. The Police Inspector first put questions and then the Deputy Magistrate put questions to each accused in turn. K. Pedda Chennugadu had three days previously shown the Inspector the cave where the human remains were hidden. The accused repeated the process. First accused said that they drowned the Sub-Inspector at the instigation of Boya Reddi and Pedda Roshan who were looking on. It is possible that he may have had an idea that if he gave information against Boya Reddi and Pedda Roshan he would be taken as an approver like K. Pedda Chennugadu and would be let

off on the charge of theft of sheep. So also with the other accused. It is difficult to conceive that they all confessed to the murder without any threat or promise or other inducement.

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In this case the guarantee that would be afforded by the Magistrate's certificate under section 164 (3), written at the time the confessions were made, is wanting owing to the course adopted of not recording what they said. There is moreover, some uncertainty as to what each accused said, as it is too much to suppose that the Deputy Magistrate carried in his head the actual words used by each accused during the year that elapsed between the date of the confessions and the date of his deposing in the Sessions Court. Without knowing the words in which the confessions of guilt were made it is impossible to judge of their genuineness from the language.

I hold, therefore, that the evidence as to the confessions must be excluded as I am not satisfied that they were voluntary.

Without them there is no proof that Kuppuswami Ayyangar was murdered or that the bones shown at Erramatti Kanama were his. The Public Prosecutor concedes that, if the confessions are left out, the rest of the evidence is not sufficient to sustain convictions of the accused.

The second accused is therefore acquitted, his conviction and sentence being set aside.

Criminal Appeal No. 377 of 1921 is dismissed.

KUMARASWAMI SASTRI, J.—I agree.

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M.H.H.