APPELLATE CRIMINAL.

Before Mr. Justice Waller and Mr. Justice Krishnan Pandalai.

IN RE VELLAMOONJI GOUNDAN (FIRST ACCUSED), PRISONER.* 1931, December 17.

Code of Criminal Procedure (Act V of 1898), sec. 164 (3)—Caution prescribed by—Omission to administer—Admissibility in evidence of confession in case of—Indian Evidence Act (I of 1872), sec. 29—Effect of—Code of Criminal Procedure (Act V of 1898), ss. 164 (3) and 163 (2)—Inconsistency between provisions of.

A confession, otherwise admissible in evidence, is, by virtue of section 29 of the Indian Evidence Act, admissible even though the caution prescribed by section 164 (3) of the Code of Criminal Procedure has not been administered. Section 164 of the Code of Criminal Procedure does not override section 29 of the Evidence Act, and it is the latter Act that must, as a rule, be looked to when there is a question of the admissibility of a particular piece of evidence.

Inconsistency between the provisions of section 164 (3) and section 163 (2) of the Code of Criminal Procedure as regards the necessity or propriety of administering a caution pointed out.

TRIAL referred by the Court of Session of the North Arcot Division at Vellore for confirmation of the sentence of death passed upon the said prisoner in Case No. 14 of the Calendar for 1931.

K. S. Jayarama Ayyar for first accused.

Public Prosecutor (*L. H. Bewes*) for the Crown.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by

WALLER J.—The appellant has been convicted of the murder of a woman called Chinnathayee. Three WALLER J.

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other men, who were tried with him, were acquitted. The case against him was based on the evidence of an approver, corroborated by that of a number of witnesses, on a confession and on the discovery of some of the murdered woman's jewellery in his possession. The Sessions Judge disbelieved the evidence of the approver and of the corroborating witnesses and convicted on the confession, supported by the production of the jewels.

Chinnathayee disappeared on 28th April. On 21st May the approver and the appellant led the magistrate and the police to a place, where, they said, her body had been buried. The earth was removed and the disintegrated skeleton of a human being, with some flesh adhering to parts of it, was discovered, which the medical officer certified to be that of a woman. The shoulder-blades and collar-bones and eight ribs were missing—a very strange circumstance, as there is no suggestion that the body had not been buried immediately after death or that it had been dug up and attacked by jackals. Apart from that, the various parts of the skeleton had become detached from each other, a circumstance which is not reconcilable with the theory that it was that of a woman who had been killed and buried only twenty-three days before the exhumation. That being so, we find it impossible to say that we are satisfied that the body was that of Chinnathayee. It follows that the confession, on which the conviction mainly rests, cannot be accepted as true on a very material point. That leaves only the alleged discovery of Chinnathayee's jewels, the identification of which is not entirely satisfactory. The conviction must accordingly be set aside. Mr. Jayarama Ayyar raised, in the course of his argument, an interesting point. The confession, on which the Sessions Judge relied, did not bear the certificate required by section 164 (3) of the Code of

Criminal Procedure. The magistrate was called, therefore, to prove that he not only administered the required caution to the appellant, but also satisfied himself that the confession had been made voluntarily. Exhibit M, the confessional statement, itself shews that the appellant assured the magistrate that he was not acting under any compulsion. The only question, then, that remained was as to the caution prescribed by the section. The magistrate swore that he administered it and, if he was speaking the truth, Mr. Jayarama Ayyar's objection disappears. Let us, however, assume that he was not and that no caution was given, does it follow necessarily that Exhibit M could not be admitted in evidence? The general effect of the decisions on section 164 is that it could not. We venture to express a doubt whether they are correct. The Legislature, when it amended the section so as to prescribe that an accused person must be warned that he is not bound to confess and that his confession may be used against him, apparently overlooked section 29 of the Evidence Act. That section provides, *inter alia*, that a confession otherwise admissible—as Exhibit M is—does not become inadmissible, because the accused person "was not warned that he was not bound to make such confession and that evidence of it might be given against him". The Code of Criminal Procedure does not, save in Chapter XLI, and in certain sections, such as 287, 288, 512, 507 and 533 itself, lay down any rules as to the admissibility of evidence. And all that section 533 seems to do is to allow oral evidence to be given in a case where the Evidence Act would not allow it to be given and the overriding of the Evidence Act is specifically provided for in the section itself. Section 164 of the Code of Criminal Procedure, however, does not pretend to override section 29 of the Evidence Act,

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The position would therefore seem to be this that, though section 164 of the one Act makes it imperative that the accused person should be cautioned, section 29 of the other says that his statement is not inadmissible in evidence, merely because the prescribed caution has not been administered. And it is to the latter Act that, as a rule, we have to look, when there is a question of the admissibility of a particular piece of evidence ; see *Emperor* v. *Misri*(1).

There is another provision of law that the Legislature appears to have overlooked, that is, sub-section (2) of section 163 of the Code of Criminal Procedure. It says that "no police-officer or other person", which presumably includes a magistrate, "shall prevent by any caution or otherwise any person from making, in the course of any investigation under this Chapter, any statement which he may be disposed to make of his own free will." That was entirely consistent with section 164 in its unamended form, when all that a magistrate had to consider was whether the confession was voluntary. Now that he is directed to administer a caution as well, the position has become anomalous. One section deprecates the administering of a caution, the other makes it imperative. If the caution is successful and the accused person, as a result of it, is prevented from making a statement he wishes to make of his own free will, has not the magistrate done something illegal ? That is a question we need not answer at present. It is sufficient for us to point out that the position is far from being as clear as the decisions that have been placed before us indicate. We allow the appeal and direct that the appellant be set at liberty.

K.N.G.

(1) (1909) I.L.R. 31 All. 592 (F.B.).