RUKMANI v. SUBBAMANIA.

the decree. This has a bearing upon the desirability of selling the property in small parcels, a subject we have already dealt with.

N.S.

APPELLATE CRIMINAL.

Before Mr. Justice Burn and Mr. Justice Stodart.

1939, October 17.

IN RE NAINAMUTHU, SON of KANNAPPAN (ACCUSED), APPELLANT.*

Code of Criminal Procedure (Act V of 1898), sec. 164—Statement by accused, after committing the offence, to Magistrate that he killed the deceased and describing the circumstances of the crime—Admissibility—Killing with consent of the deceased—Offence, if murder—Indian Penal Code (Act XLV of 1860) sec. 300, exception 5.

The appellant, after killing his concubine, appeared before a Joint Magistrate and made a statement to him that he (appellant) had killed the deceased and describing the circumstances of the crime. The Magistrate took down the statement in writing and that statement was admitted in evidence at the trial of the appellant for the murder of his concubine. On objection taken to the admission of the statement in evidence on the ground that it was a statement made under section 164, Criminal Procedure Code, and that it had not been recorded after observing the formalities prescribed by that section,

held that the objection was unsustainable.

The Magistrate was not investigating the case or any of the facts connected with the case. On the contrary the information given by the appellant was itself the first information of the crime.

Held further that as the appellant had killed the deceased at her request and with her own consent, the offence committed by him was not murder but was only culpable homicide not amounting to murder.

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*Referred Trial No. 107 of 1939 and Criminal Appeal No. 439 of 1939.

NAINAMUTHU *In re.*

TRIAL referred by the Court of Session of the Coimbatore Division for confirmation of the sentence of death passed upon the said prisoner in Case No. 81 of the Calendar for 1939 on 11th August 1939 and appeal by the said prisoner against the said sentence passed upon him.

M. C. Sridharan for accused.

Public Prosecutor (*V. L. Ethiraj*) for the Crown.

STODART J.

The JUDGMENT of the Court was delivered by STODART J.—The appellant has been convicted of murdering Palaniammal, his concubine, a woman of thirty years and sentenced to death subject to the confirmation of this Court. There can be no doubt about the facts of this case. The parties are Adi-Dravidas. The accused was a married man and he had been keeping the deceased as his concubine for a considerable time. P.W. 2, his wife, lived with her parents in a house adjoining that in which the accused and the deceased lived. Some four or five months before the crime, the accused and his wife removed to another residence, namely, a shed in a garden belonging to P.W. 3. This removal was in order to put a stop to the scandal of the accused living with his concubine while the accused's wife lived in a separate house. But even after this change of residence, the deceased used to visit the accused and even to spend the night with him in the new house. The accused's parents tried to put a stop to this conduct and complained to the owner of the garden with a view to pressure being brought to bear upon the accused, and that was the state of affairs at the time the deceased was killed.

On the night of 13th February this year, the deceased was in the accused's house and had her food there. Appellant and deceased then went to a

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tope which is close by and lay down to sleep in front of the shed occupied by P.W. 4 and her son P.W. 5. P.W. 5 waking in the morning and going out to work saw the accused and the deceased lying asleep. That was in the early morning. A little later, according to P.W. 2, the wife of the accused, the accused returned to his own hut and asked for a drink of water which P.W. 2 gave to him. He then left after telling P.W. 2 that he was going to the Pollachi Court "to tell everything there in person." P.W. 9, the Joint Magistrate of Pollachi, proves that the accused appeared before him at 11-30 in the morning of 14th February and made a statement to him that he had killed the deceased and describing the circumstances of the crime. P.W. 9 took down the statement in writing and that is Exhibit C. The accused then went back to the village accompanied by the Circle Inspector of Police and took him to a place in the tope fifty yards from the hut of P.Ws. 4 and 5. The body was there in a hollow of the ground covered over with coconut leaves. The accused had already told the Joint Magistrate that he had covered the body with a thatti. The cause of death was a cut on the neck which cut through the spinal cord and also involved the trachea and the large blood vessels on either side of the neck. There is also evidence about the weapon with which the throat of the deceased woman was cut. P.W. 5 had purchased an aruval from the accused five or six months before this crime and he kept this aruval in his hut in the coconut tope. On the morning of the crime it was missing from the hut and the accused produced it from his own hut.

It is urged upon us by the learned Counsel for the appellant that the statement made by the appellant to the Joint Magistrate, P.W. 9, was improperly

admitted in evidence. Learned Counsel argues that this was a statement made under section 164 of the Criminal Procedure Code and since it was not recorded after observing the formalities prescribed by that section, it should not have been put in evidence. We think that that objection would be very just if the Magistrate had been investigating the case but he was not investigating the case or any of the facts connected with the case. On the contrary this information given by the accused was itself the first information of the crime. The ruling cited to us in *Nazir Ahmad* v. *The King-Emperor*(1) does not apply to the facts here. When he was examined in the committing Magistrate's Court, the statement he had made, Exhibit C, to the Joint Magistrate was brought to the notice of the accused and he admitted that he had made it. At the Sessions, however, he denied that he had made it, and said that when he came into the Joint Magistrate's Court, his intention was merely to tell the Magistrate that his concubine had been killed, that thereupon a Head Constable and the Inspector of Police pushed him into the dock and after that he did not remember what he had said to the Joint Magistrate. There is no doubt in our minds that the appellant did make this confessional statement, Exhibit C, and the facts of the crime correspond in all material details with that statement. The facts proved against the appellant, therefore, establish that he killed Palaniammal.

The question however remains whether in the circumstances of the case, the offence was one of murder or whether it comes within the fifth exception to section 300. The learned Public Prosecutor does

(1) (1936) I.L.R. 17 Lah. 629 (P.C.).

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not support the finding of the learned Sessions Judge that the offence proved against the appellant was murder. The evidence in the case is that the accused and the deceased were on affectionate terms and there was no motive whatever for the accused to encompass the death of the deceased. In his confession to the Joint Magistrate, the appellant stated that he killed the deceased at her own request and with her glad consent. He stated that on the night in question, after some talk, she declared that she would sever her connexion with him and go away and then, in the alternative, she suggested that both of them might commit suicide, and that in the morning he killed her at the place where her body was found. This version of the crime apparently has been accepted from the beginning by the prosecution and it clearly amounts to this, that Palaniammal suffered death at the hands of the appellant with her own consent. There were two contusions on the body besides the fatal wound on the neck which look as if they were caused by blows with a stick. But the accused was not asked about these marks. It was not suggested to him that the said marks were inconsistent with the statement which he had made to the Magistrate that the deceased had consented to be killed. There may be an explanation of these marks consistent with the story given by the appellant. In these circumstances, we set aside the conviction for murder and convict the appellant of culpable homicide not amounting to murder. We sentence him to transportation for life.

V.V.C.