

the subject of a fixed charge. Accordingly therefore in our opinion the decree of the court below should be modified on this point. We therefore allow the appeal to this extent that instead of a declaration that the amount decreed would have priority over the debentures in favour of defendants 2 to 7 we grant a declaration that the amount decreed shall have priority over the assets of the company in regard to which the debenture holders had a floating charge under clause 5 of the trust deed of 8th August, 1923, between the Agra United Mills and Anthony Ulysses John and George Anthony John. As the parties have partly succeeded and partly failed in this appeal we direct that the parties pay their own costs of this appeal. We uphold the order of the court below that the suit is decreed for Rs.37,246 with costs and pending and future interest at 8 annas per cent.

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### APPELLATE CRIMINAL

*Before Mr. Justice Bennet, Acting Chief Justice, and  
Mr. Justice Verma*

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#### EMPEROR v. LAL SINGH\*

*Evidence Act (I of 1872), sections 29, 80—Confession recorded by a Magistrate in Gwalior State—Mode of recording confession—Non-compliance with Criminal Procedure Code, section 164—Admissibility in evidence—Criminal Procedure Code, section 533(1)—Evidence of Magistrate who recorded the confession, as to whether it was duly taken—Manual of Government Orders, paragraph 853A, clause (d)—Power of Government to make rules supplementary to the Criminal Procedure Code—Indian Penal Code, section 396—Dacoity with murder—Sentence.*

A confession was recorded by a Magistrate in Gwalior State, the mode of recording and certifying being in accordance with the Criminal Procedure Code of that State and being the same as prescribed by section 164 of the Criminal Procedure Code of British India as it stood before its amendment by Act XVIII of 1923. The person making the confession was subsequently tried in British India for an offence included in

\*Criminal Appeal No. 846 of 1937, from an order of F. N. Crofts, Sessions Judge of Agra, dated the 11th of November, 1937.

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that confession. At the trial the confession was produced in evidence, and the Magistrate who had recorded it was examined as a witness and he stated *inter alia* that he had, before recording the confession, explained to the accused that he was not bound to make it and that any confession made by him would be used against him: *Held*, that the confession was admissible in evidence and could be used against the accused, under the provisions of section 80 of the Evidence Act.

Section 29 of the Evidence Act makes a confession admissible in evidence notwithstanding that the certificate by the Magistrate at the foot of the confession does not contain the additional words introduced by Act XVIII of 1923 into section 164(3) of the Criminal Procedure Code. The question of admissibility is determined by the Special Act, namely the Evidence Act; and section 164(3) of the Criminal Procedure Code, which gives certain directions to Magistrates recording confessions, does not provide that if these directions are not complied with then the confession would be inadmissible.

Paragraph 853A, clause (d), of the Manual of Government Orders also provides that the Magistrate recording a confession should add certain things to the certificate under section 164 of the Criminal Procedure Code; but there is no section of the Code which gives the executive Government power to make rules to supplement the Code, and whatever value may be attached to the paragraph it can not have any legal effect as regards the admissibility or inadmissibility of the confession.

Further, any such defect in recording the confession could be and was cured under section 533(1) of the Criminal Procedure Code by taking the evidence of the Magistrate who recorded the confession, and from whose statement it appeared that he had explained to the accused that he was not bound to make a confession and that any confession made by him would be used against him.

Upon a conviction under section 396 of the Indian Penal Code, it is not a general rule that a sentence of death should necessarily follow. Section 396 differs from section 302 in this respect that whereas under section 302 the rule is that a sentence of death should follow unless reasons are shown for giving a lesser sentence, no such rule applies to section 396. So, where in the course of a dacoity one man was shot dead, and the accused person who was tried had a gun and others of the dacoits also had guns, and there was no evidence that the accused was the man who fired the fatal shot, the sentence was altered from one of death to one of transportation for life.

Messrs. *Saila Nath Mukerji, B. B. Chandra, Shah Habeeb and Kamlanandan Prasad Srivastava*, for the appellant.

The Government Advocate (Dr. *M. Wali-ullah*), for the Crown.

BENNET, A.C.J., and VERMA, J.:—This is a reference by the learned Sessions Judge of Agra of a sentence of death passed on Lal Singh Thakur, a resident of Gwalior State, under section 396 of the Indian Penal Code for taking part in a dacoity in which murder was committed. It is not held by the lower court that the murder was committed by the present appellant. The first report was made on the 15th of March, 1935, at 5 a.m. in thana Bah in Agra district stating that on the previous night at midnight there had been an armed dacoity at the house of Gopi Bania in mauza Khilla. The actual person who made the report was one Kanhai Singh Thakur, and his brother had been with the villagers outside the house who attempted to intervene and had been shot by some dacoit unknown. The first report was very brief. The witness P. W. 43, sub-inspector Daniells states that he went to the place and inspected the house and found property lying about and the usual signs of a dacoity and Bachan Singh had wounds in his leg and was sent to the Thomason Hospital in Agra where he died. Gopi, the owner of the house, gave him a list of property Ex. B. which had been stolen. None of the dacoits had been recognized. Some time later on the 28th of June, 1935, the present accused Lal Singh was arrested in Gwalior State which lies to the south of tahsil Bah separated from it by the river Chambal and a great area of ravine country. Now the proceedings of identification of this accused were taken and six witnesses were sent down to Gwalior and in Gwalior State identification proceedings were taken before Mr. R. Ganesh Bapuji. Of these witnesses three persons identified Lal Singh, namely Mathura Singh, Gopi and Chhotey. Mathura Singh made no mistake; Gopi picked out one wrong person also, and Chhotey made no mistake. . . .

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There is no doubt that the evidence of identification is of considerable weight.

The next piece of evidence is a confession recorded in Gwalior State on the 20th of August, 1935, that is, shortly after the identification by the witnesses from this dacoity. The same Magistrate at Amba recorded the confession whose name is given as G. B. Dhekne, that is, Mr. Ganesh Bapuji, Judicial Officer, who gave his evidence on commission, and he has proved that he made this record of the confession of Lal Singh. The confession of Lal Singh sets out a number of offences, mostly kidnapping for ransom in Gwalior State, and there is a translation of a confession of the present dacoity as follows: "(Having seen the 14 *lachhas* of silver, said) these are of the dacoity committed at Khilla. Maharaj Singh, Barnam Singh, Ochhe Singh of Rawatki, Firangi Singh of Nagra, Shambhu Singh of Nagra, Raghubar Singh of Nagra, Beni Singh of Nagra, Madan Singh of Nagra, Heera Thakur of Nagra, Kanhai Singh of Kichol, Bharat Singh of Lakhankapura, and myself took part in it. We committed the dacoity at the house of a Baniya. I got this property recovered from my house." There is the statement of sub-inspector Murari Lal, formerly of Porsa thana, Gwalior, to the effect that the accused handed him Exs. 1 and 2 in connection with a dacoity at Khilla and he made the recovery Ex. H and had it signed by witnesses. These articles Exs. 1 and 2 were what are mentioned by the accused as 14 *lachhas* of silver which he said he had taken at this dacoity. Now the Magistrate was asked various questions in regard to this dacoity and he stated as follows:

Q.—Did you take all necessary precautions?

A.—Yes.

Q.—Did you satisfy yourself that the confession made by Lal Singh was true and voluntary?

A.—Yes.

In cross-interrogatories on behalf of some accused he was asked:

Q.—Was Lal Singh put up before you for confession by the police?

A.—Yes.

Q.—Was he put up before you from police custody?

A.—I do not remember correctly.

Q.—Was any police officer present when the confession was recorded?

A.—No.

Q.—The confession of Lal Singh was not recorded by you in your own handwriting?

A.—It was recorded by me personally in my own handwriting.

Q.—Did you explain to Lal Singh before recording his confession that he was not bound to make it and that any confession made by him would be used against him?

A.—Yes. I did explain to Lal Singh these things.

Q.—You did not make a note of having told Lal Singh so in your foot-note at the end of the confession?

A.—As it was not necessary I did not make such a note.

A further question was asked in regard to Ex. K, this confession of Lal Singh, and the Magistrate said it was recorded by him.

Now there is also the evidence of the finding and identification of these ornaments. For the finding of the ornaments given up by the accused there is the evidence of Murari Lal and Raghunandan. . . . It appears to us, however, that the evidence of Mst. Mahadevi is sufficient for the identification of these articles, taken with the fact that the accused Lal Singh himself admitted that the articles were taken in this dacoity when he handed them up and he has not claimed later that the articles were his. . . .

Now the questions which have been argued most in the present case are in regard to the admissibility or otherwise of the confession. It has not been explained on behalf of the accused or by the accused what proceedings took place in Gwalior in regard to the crimes of which he made a confession on this occasion. A great deal of time has elapsed between the date of confession on the 20th of August, 1935, and the production of the

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accused in Agra district for his trial in regard to this case and presumably this time was occupied in some criminal proceedings in Gwalior in connection with the offences in Gwalior mentioned in the confession. Learned counsel for the accused laid stress on a statement of a Gwalior witness, head constable Abdul Shakur, that "He had been promised a pardon." It is not clear to what the witness alludes other than that the word "pardon" is used in the ordinary sense and that he means some Magistrate or Sessions Judge in Gwalior offered a pardon to Lal Singh on condition of his giving evidence in regard to the offences in Gwalior. If that is so, the offering of a pardon has no bearing on the admissibility of the confession in the present case, because it is not open to the Gwalior authorities to make any offer of pardon for an offence committed in British India. Learned counsel, however, desired to place the construction on these words that the police had offered some inducement to Lal Singh to make a confession. The words cannot bear that meaning and no such suggestion appears to be intended by the witnesses, nor has the accused ever said that he was offered any inducement, except that to the sessions court he stated: "Murari Lal, the station officer and Pancham Singh of Garh got me arrested at the District Magistrate's house and told me to make a confession. They said that if I confessed I should be released." Now it is obvious that the head constable cannot be alluding to this matter when he speaks of a pardon. The accused did not accept the suggestion, if any such were made, as he states "I said I had taken no part in any dacoity." Obviously therefore there was no influence of this sort at work on the mind of the accused and if the accused had received such a suggestion he would naturally have said to Murari Lal "Place me in front of the District Magistrate and let him make me the offer", as it is said the suggestion was made at the house of the District Magistrate. That nothing of this sort was done indicates that there is no truth in the allegation of the ac-

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cused. Later in the same statement the accused says that Murari Lal shut him in the lock-up and fettered him and made him stand throughout the night and therefore he made the confession. Now there is no evidence to confirm this statement of the accused which was put forward after great delay. We have also no information from the accused as to what he was doing in regard to the other parts of the confession and the cases which may have been founded on them. In the meantime before he made this allegation in 1937 the accused has not told us whether he appeared as a witness for the prosecution and confirmed what he said in his confession or whether he was treated as an accused and sentenced in Gwalior for the offences indicated. We therefore fail to find any evidence which would indicate that the confession was induced by any suggestion of favour or by any ill treatment of the accused. The fact that the confession had been made after the accused had been identified by three witnesses for this dacoity supplies a reason as to why the accused might have made a confession, because the accused was one of a number who were arrested and tried for this dacoity.

Now the main arguments against the admissibility of this confession are legal. In the first place we were told that the confession had not been properly recorded under the Gwalior Criminal Procedure Code. The certificate at the foot of the confession is as follows: "I believe that this confession of the commission of crimes was made without any compulsion or coercion. It was taken in my presence and hearing, and on being read over to the person making it, it was admitted by him to be correct. It contains a full and true account of the statement made by him." This is in the form that was required by the Criminal Procedure Code in British India in section 164, sub-section (3), up till the year 1923 when there was an amendment by Act XVIII of 1923 and the following words were added to the beginning of the certificate: "I have explained to (name) that he

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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." We were told by learned counsel for accused that the Gwalior Code had also been amended to the same effect and that when this confession was recorded on the 20th of August, 1935, the Magistrate should have followed the amended form. We therefore sent to the Gwalior State for a copy of the Criminal Procedure Code of Gwalior in force on the 20th of August, 1935, and we find that that Code has a form of certificate which is exactly the one which the Magistrate has used. This is laid down in section 79 of that Code. The Magistrate has also given evidence as already noted to the effect that the further additions to the certificate suggested were not necessary. It is then argued that the Magistrate should have asked questions from the accused and recorded the answers to show that the confession was made without any compulsion or coercion. Now even in British India in section 164 there is no provision that the questions and answers should be recorded. Now the Magistrate has, as we have noted, been questioned on the point and he has stated that he did ascertain from the accused that the confession was voluntarily made. This is what he has certified in his certificate. We think that the certificate fully complies with the provisions of the law of Gwalior laid down in section 79 of the Criminal Procedure Code. Now a further argument was made by learned counsel to the effect that although this might be so, still for use in British India these certificates should be in the form for British India. This seems to be a peculiar doctrine. There are a number of rulings of this Court to the effect that a confession recorded in Gwalior can be used in British India under the provisions of section 80 of the Evidence Act. These rulings are *Queen-Empress v. Sundar Singh* (1), *Emperor v. Hulasi* (2); and of other High Courts we have *King-Emperor v. Shafi Ahmad* (3), *Queen-Empress v. Nagla*

(1) (1890) I. L. R. 12 All. 595.

(2) A. I. R. 1933 All. 286.

(3) (1925) I. L. R. 49 Bom. 542.

*Kala* (1) and *In re Panchanatham Pillai* (2). Now these rulings lay down that the confession in an Indian State may be accepted as admissible for prosecution in British India. The person making the confession was a subject of Gwalior and if the confession was recorded in Gwalior and it was recorded according to the provisions of the Criminal Procedure Code in Gwalior, it seems to us incorrect to lay down that the form of certificate should have the additional words now added for such certificates in British India. But there is a further point to be noted. When the legislature made the amendment of the Criminal Procedure Code in 1923 the legislature no doubt laid a certain duty on a Magistrate recording a confession in British India under section 164 and a Magistrate is bound to act accordingly. But it was open to the legislature to repeal the provisions of section 29 of the Evidence Act in this matter and the legislature did not do so. This section is as follows: "If such a confession is otherwise relevant, it does not become irrelevant because it was made under a promise of secrecy, or in consequence of a deception practised on the accused person for the purpose of obtaining it, or when he was drunk, or because it was made in answer to questions which he need not have answered, whatever may have been the form of those questions, or because he was not warned that he was not bound to make such confession and that evidence of it might be given against him." The question before us now is the admissibility of a confession and the point is taken that the certificate does not contain these two points, that is, that he was not bound to make the confession and that if he did so any confession he might make could be used as evidence against him. When the legislature directed that these matters should be added to the certificate the legislature did not provide that if the matters were not added to the certificate then the confession would be inadmissible. On the contrary the provision of section 29 of the Evi-

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(1) (1896) I. L. R. 22 Bom. 235.

(2) (1929) I. L. R. 52 Mad. 529.

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dence Act still stands good that not merely if these points are not added to the certificate but if the questions are not even asked the confession does not become irrelevant. The question of relevancy or irrelevancy is determined by the special Act which is the Evidence Act. Therefore we must follow the provisions of section 29. We may also refer to the provisions of section 533, sub-section (1) of the Criminal Procedure Code where it is laid down as follows: "If the court, before which a confession or other statement of an accused person recorded or purporting to be recorded under section 164 or section 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, section 91, such statement shall be admitted if the error has not injured the accused as to his defence on the merits." This clearly authorises the evidence of the Magistrate as taken in the present case, because it cannot be said that any error in the form of recording or not recording questions or in the form of the certificate is a matter which had injured the accused as to his defence on the merits. Now learned counsel for the appellant relied on two rulings, one in *King-Emperor v. Patey Singh* (1). That was a case in which a Bench of this Court referred to the provisions of the Manual of Government Orders, paragraph 853A, clause (d), where it was stated that the Magistrate should add certain things to the certificate under section 164 of the Criminal Procedure Code. The Bench did not hold that the failure of the Magistrate to add these extra observations to the certificate prescribed by law would have any result to make the confession not admissible in evidence. Now we may point out that there is no section of the Criminal Procedure Code which gives

(1) [1931] A. L. J. 1000.

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the Executive Government power to make rules to supplement the Code, and whatever value may be attached to the paragraph in the Manual of Government Orders it cannot have any legal effect as regards the admissibility or inadmissibility of the confession. The next ruling is reported in *Emperor v. Shambhu* (1). In that case the Bench observed that there should be something in addition to the usual stereotyped questions and reference was made to the first ruling referring to the Manual of Government Orders. The same remarks apply. The Bench did not suggest that these matters would have any bearing on the question of admissibility but stated that there would be some effect on the opinion that the Bench would form about the voluntary nature of the confession. Now these two rulings have been considered and commented upon in a Full Bench ruling of this Court in *Emperor v. Muhammad Ali* (2). This Full Bench ruling dealt with the first case on page 307 and with the latter case on pages 309 and 310. It was laid down by the Full Bench that where a confession has not been duly recorded the error can be cured by calling evidence under section 533 of the Criminal Procedure Code to show that the confession was duly made, provided that the error has not injured the accused as to his defence on the merits. We are bound to follow this Full Bench ruling as it is dealing exactly with the point which has been raised before us, and we therefore consider that the court below was correct in admitting the evidence of the Magistrate on these points. Now reference has been made to a ruling of their Lordships of the Privy Council in *Nazir Ahmad v. King-Emperor* (3). That was a case in which their Lordships explained on page 639 as follows: "In this case no question of the operation or scope of section 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 section 164

(1) (1931) I. L. R. 54 All. 350.

(2) (1933) I. L. R. 56 All. 302.

(3) (1936) I. L. R. 17 Lah. 629.

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or section 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. Vasishth, admissible?" It is clear therefore that the ruling of their Lordships has no application to a case like the present which is one where the memorandum of a confession purporting to have been taken by a Magistrate under the provisions applicable has been tendered on behalf of the prosecution. Learned counsel for the accused argued that because their Lordships had referred to sections 164 and 364 of the Criminal Procedure Code therefore they would exclude a case like the present where the confession was recorded under section 79 of the Gwalior Criminal Procedure Code. We are quite convinced that learned counsel is mistaken in this argument and that their Lordships meant that their judgment did not refer to cases where a memorandum of the confession purporting to be recorded by a Magistrate in accordance with law was tendered on behalf of the prosecution. What was tendered before their Lordships was the evidence of the Magistrate orally, and instead of making a memorandum he had taken rough notes for his own benefit and had not read them over to accused but had been conducted by the accused to various places where things had been pointed out and on his return the Magistrate had had a memorandum made from his notes and had then torn up his notes. That was quite a different case from the case before this Court. On pages 640-41 of the ruling their Lordships lay down a distinction as regards the difference between a Magistrate and a private person and they point out that whereas a private person might prove a confession orally if made to him, a Magistrate was precluded from doing so and must record the confession under sections 164 and 364. We consider therefore that the ruling of their Lordships does not in any way refer to a case like the present. At most it may

be said that their Lordships made a reference on page 639 to the Full Bench ruling of this Court and said it was a very wide view. That may be so. But their Lordships did not purport in any way to dissent from it. Accordingly therefore we consider that the confession as recorded by the Magistrate in Gwalior is admissible in evidence.

We have therefore in the present case three matters on which the prosecution rests. Firstly we have the identification of the accused by three witnesses in Gwalior within five months of the dacoity. Those witnesses had ample opportunity to see the accused for long periods at night, both by moonlight and by the light of a lantern, and they were comparatively close to the accused, one of them the owner of the house being actually beaten by those dacoits including the accused who entered the house. We have secondly the evidence of the ornaments which were given up by the accused in Gwalior to the police officer and another witness as part of the property he had stolen in this dacoity. We have thirdly the evidence of the confession of the accused which was eventually retracted by the accused in the court of the Magistrate and in the sessions court. Having regard to this evidence, we consider that the conviction of the accused under section 396 of the Indian Penal Code was correct.

There remains the question of sentence. It is true that a man was wounded in this dacoity and eventually died. It is also true that the accused carried a gun in this dacoity. But it is stated that there were several guns carried in this dacoity and none of the witnesses say that the accused was the man who fired the shot which had fatal effects. We do not consider that as a general rule a sentence of death should necessarily follow a conviction under section 396 of the Indian Penal Code and this section differs from section 302 of the Indian Penal Code in that respect. The rule is under section 302 that a sentence of death should follow unless reasons are

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shown for giving a lesser sentence. No such rule applies to section 396 of the Indian Penal Code. Accordingly we find no reason in this case why the sentence of death should be imposed. We therefore maintain the conviction of Lal Singh under section 396 of the Indian Penal Code and we reduce the sentence from a sentence of death to a sentence of transportation for life.

### REVISIONAL CIVIL

Before Mr. Justice Mulla

1938  
 August, 8

KISHANLAL MATRUMAL (PLAINTIFF) v. B. B. AND C. I. RAILWAY AND OTHERS (DEFENDANTS)\*

*Railway—Risk-notes forms A and B—Deviation of route due to floods—Notice of deviation not given to consignor—Forfeiture of protection conferred by risk notes—Transshipment of goods to bigger wagons necessitated by the deviation—Knocking about in the bigger wagons—Negligence—Liability of railway—Contract Act (IX of 1872), section 161—Act of God—Bailee adopting different course attended with risk.*

Two consignments, each of 420 tins of oil, were booked with the B. B. and C. I. Railway at Hathras for despatch to stations in East Bengal. Each consignment was loaded into and occupied one whole wagon of that railway, the loading being done by the consignor. The consignments were accepted under risk-notes forms A and B. The ordinary route by which the consignments would travel would be over that railway as well as the R. K. Railway and the B. N.-W. Railway, and all the three railways being on the same gauge the original wagons would run through and there would be no transshipment of the goods. Owing, however, to breaches on the B. N.-W. Railway caused by floods, the consignments were diverted to a different route, *via* the E. I. Railway, at Benares, and the latter railway being of a wider gauge the contents of the original wagons had to be transferred to two wagons of that railway. As these wagons were bigger, the tins did not fill them compactly as before and consequently the tins were likely to knock against each other and the sides of the wagons and be injured thereby; the railway took no steps to pack the tins round with grass or straw to prevent such knocking. The court found that this actually happened and consequently there was a leakage of over 11 maunds. No notice was given

\*Civil Revision No. 393 of 1936.