

over his land to Amir Chand, as he promised to do, disabled himself from performing his promise that the plaintiff should recover his money from Amir Chand. The judgment which in our opinion applies exactly to the present case is *Raja Ram v. Mehar Khan* (1) which is an authority based on similar facts that the plaintiff is entitled to rescind his sale-contract and revert to his previous consideration. We consider that the defendants cannot oppose the plaintiff's claim either in law or in equity and we dismiss their appeal with costs.

Appeal dismissed.

APPELLATE CRIMINAL.

Before Sir Shadi Lal, Chief Justice, and Mr. Justice Martineau.

FARID—*Appellant,*

versus

THE CROWN—*Respondent.*

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Criminal Appeal No. 598 of 1921.

Criminal Procedure Code, Act V of 1898, sections 164 (3) and 533—Confession recorded by a Magistrate without inquiry as to whether it was made voluntarily—whether admissible in evidence—Indian Evidence Act, I of 1872, sections 21, 24—Difference in oral confessions pointed out.

The accused-appellant was convicted mainly on his confession, recorded by a Magistrate in the course of a police investigation, which was retracted in the Committing Magistrate's Court. In the memorandum written by the Magistrate before recording the confession he noted that the accused was made to understand that he should make his statement voluntarily without any inducement or influence, and that he was given time to satisfy himself and make his statement voluntarily. In his evidence the Magistrate stated that it was explained to the accused that whatever statement he was going to make he should make voluntarily and without influence of any sort, and that he was told that the confession could be used against him. The Magistrate also said that the accused made the statement of his own accord, but he did not say, nor was it mentioned in the memorandum, that he asked the accused whether he was making it voluntarily.

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Held, that section 164 of the Code of Criminal Procedure makes it imperative for the Magistrate, before recording a confession made to him in the course of a police investigation, to question the person making it as to whether it was made voluntarily, and as this was not done in the present case, and as the defect, being one of substance which prejudiced the appellant in his defence, was not cured by section 533 of the Code, the confession was not admissible in evidence.

Thein Maung v. Emperor (1); *Nga Shwe Sin v. Emperor* (2); *Queen-Empress v. Viran* (3); *Jai Narayan Rai v. Queen-Empress* (4) and *Queen-Empress v. Bhairab Chunder* (5), followed.

Buta v. Empress (6), distinguished.

Feroz v. The Crown (7), referred to.

Appeal from the order of Lala Murari Lal, Khosla, Sessions Judge, Hoshiarpur, dated the 30th June 1921, convicting the appellant.

FIR TAJ-UD-DIN and ABDUL AZIZ, for Appellant.

KHILANDA RAM, Public Prosecutor, for Respondent.

The judgment of the Court was delivered by—

MARTINEAU, J.—The appellant Farid, who lives at Sham Chaurasi in the Hoshiarpur District, has been sentenced to death for the murder of a boy named Gurbachan Singh. One Fazal was tried jointly with Farid for the murder, but has been acquitted. Gurbachan Singh, whose home was at Bhagowal, went on the 27th March last to his sister's house at Laroi. He was a student of the Government School at Hoshiarpur, and on the 31st March he left Laroi for Sham Churasi in order to take the train for Hoshiarpur, as he wanted to be present at the School on the 1st April, when the result of the first middle school examination in which he had lately appeared was expected to be announced. On the 2nd April his dead body was found near the field of one Chiragh Din at Sham Churasi. There was a wound on his neck, and his hands were tied with his turban, which had been wound round his neck and body. The body was naked from the waist downwards, and the *pyjamas*, a book, a

(1) (1905) 4 Cr. L. J. 194.

(2) (1908) 4 Cr. L. J. 335.

(3) (1886) 1 L. R. 9 Mad. 224.

(4) (1890) 1 L. R. 17 Cal. 862.

(5) (1898) 2 Cal. W. N. 702.

(6) 52 P. R. (Cr.) 1857.

(7) 11 P. R. (Cr.) 1918.

bundle, and some other articles were lying close by. There was also blood on the ground. The prosecution theory is that Fazal and Farid committed an unnatural offence on the boy and then murdered him.

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No clue was obtained by the police till the 11th April, when they received a letter from one Miran Bakhsh in which it was mentioned that two men named Buland Khan and Ata Muhammad had met the boy in Saam Churasi, and that Ata Muhammad had left him with Farid. Farid's house was searched and a blood-stained *khes* was found in it, while the shirt that Farid was wearing was also found to have a number of small stains of blood on it. He was arrested on the 13th April, and on the 14th a *gāndasa* (not blood-stained) was found in a well which he pointed out in Chiragh Di's field near which the body had been found. On the 15th his confession was recorded by *Sheikh* Abdul Aziz, Magistrate of the 1st class, and it is mainly on this confession that the conviction rests. The important question is whether the confession, which was retracted in the Committing Magistrate's Court, is admissible in evidence, the contention of Counsel for the appellant being that the Magistrate, who recorded it, made no inquiry as to whether it was made voluntarily, and that it is for that reason inadmissible. In the memorandum written by *Sheikh* Abdul Aziz before recording the confession he noted that the accused was made to understand that he should make his statement voluntarily without any inducement or influence, and that he was given time to satisfy himself and make his statement voluntarily. In his evidence also he says that it was explained to Farid that whatever statement he was going to make he should make voluntarily and without influence of any sort, and that he was told that the confession could be used against him. He says that the appellant made the statement of his own accord, but he does not say, nor is it mentioned in the memorandum, that he asked the appellant whether he was making it voluntarily. Telling an accused person that he should make his statement voluntarily and questioning him as to whether he is making it voluntarily are two very different things. Section 164 of the Criminal Procedure Code makes it imperative for the Magistrate,

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before recording a confession made to him in the course of a police investigation, to question the person making it as to whether it is made voluntarily. In the present case it appears that this was not done, and the question to be determined is whether the failure to comply with the provisions of section 164 in this respect renders the confession inadmissible.

If it were not for the provisions of that section of the Criminal Procedure Code, the confession would be admissible under section 21 of the Evidence Act. In the absence of proof that it was caused by any inducement, threat or promise such as would render it irrelevant under section 24, and it may appear anomalous that the confession should be inadmissible on account of the Magistrate's omission to question the person making it as to its voluntary nature, notwithstanding that it would have been admissible if made orally, *Feroze v. The Crown* (1), the Magistrate not being required by law to make such an inquiry in the case of an oral confession. The authorities, however, are in favour of the view that such an omission is a fatal one.

It was held in *Thein Maung v. Emperor* (2) that unless the Magistrate has made a real and substantial inquiry as to the voluntary nature of a confession, the confession recorded by him under section 164 of the Criminal Procedure Code is inadmissible in evidence, and the same view was taken in *Nga Shwe Sin v. Emperor* (3).

In *Queen-Empress v. Viran* (4) it was held that section 533 of the Criminal Procedure Code would not render a confession recorded under section 164 admissible where no attempt has been made to conform to the provisions of the latter section.

In *Jai Narayan Rai v. Queen-Empress* (5), the learned Judges said on page 871 that a confession recorded in direct violation of sections 164 and 364 would not be a confession recorded under them, and that the recorded statement to be proved must mean a statement recorded in accordance with the provisions of the Act and not in violation of them.

(1) 11 P. R. (Cr.) 1918.

(2) (1905) 4 Cr. L. J. 192.

(3) (1906) 4 Cr. L. J. 345.

(4) (1885) 1 L. R. 9 Mad. 224.

(5) (1890) 1 L. R. 17 Cal. 862.

In *Queen-Empress v. Bhairab Chunder* (1) it was held that the rule laid down in section 21 of the Evidence Act must be taken subject to the special provisions relating to confessions and statements of accused persons enacted in sections 164 and 364 of the Criminal Procedure Code, since, were it otherwise, confessions and statements of accused persons not recorded in accordance with the requirements of those sections of the Code might be proved as admissions by the accused, and the wholesome provisions elaborately laid down in those two sections practically reduced to a nullity. With regard to section 533 it was held that the defect which that section is intended to cure is one not of substance but of form only.

In *Buta v. Empress* (2) it was held that section 533 was presumably not intended to override the law of evidence, and that when it was enacted that "such statement" (that is the statement recorded under section 164 or 364) "shall be admitted," the meaning is that the document shall not be excluded merely by reason of the error of the recording Magistrate, but shall be admitted as a matter of Criminal Procedure, subject to any just exceptions under the Evidence Act, other than an objection under section 91 of that Act. But in that case the error committed by the Magistrate who recorded the confession was one which had not prejudiced the accused, and as the confession was also not shown to have been improperly induced it was held to be admissible.

Section 533, after providing that when any of the provisions of section 164 or section 364 have not been complied with, the Court shall take evidence that the statement recorded was duly made, lays down that such statement shall be admitted if the error has not injured the accused as to his defence on the merits. The necessary implication appears to be that if the error is one that has injured the accused as to his defence on the merits the statement is not admissible. The omission to question the appellant before recording his confession as to whether he was making it voluntarily was a material omission which prejudiced him, and we are of opinion that the defect is a fatal one, not

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(1) (1838) 2 Cal. W. N. 702.

(2) 52 P. R. (Cr.) 1837.

curable by section 533, and that the confession must therefore, be excluded.

The rest of the evidence is insufficient to support the conviction. Ata Muhammad's statement that he left the boy with Farid is no proof of the latter's guilt in the absence of evidence to show what happened to the boy afterwards. The presence of blood-stains on the appellant's shirt and *khes*, and his pointing out a well in which a *gandasa*, said to belong to Fazal, was found are also facts from which alone no inference of guilt can be drawn. The appellant is said to have pointed out other places also, but his doing so does not advance the case for the prosecution as it did not lead to the discovery of any material facts not already known.

We must accordingly hold that Farid's guilt has not been proved, and accepting his appeal we set aside the conviction and sentence and acquit him.

Appeal accepted.

APPELLATE C VII.

Before Mr. Justice Chevis and Mr. Justice Harrison.

CHANDA SINGH (DEFENDANT)—*Appellant,*

versus

THE AMRITSAR BANKING COM-
PANY (PLAINTIFF)
AND
THE AMRITSAR NATIONAL IN-
SURANCE COMPANY
(DEFENDANT)

—*Respondents.*

Civil Appeal No. 1156 of 1917.

Indian Evidence Act, I of 1872, section 91—suit for recovery of money advanced on a hundi which was signed shortly after the money was actually paid—Hundi insufficiently stamped and inadmissible in evidence—whether plaintiff has a cause of action independent of the hundi.

The defendant C. S. applied to the Amritsar National Insurance and Banking Company for a loan and in his application stated the security as "personal security on a *hundi* payable after 3-

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