

APPELLATE CRIMINAL.

Before Mr. Justice Maung Ba and Mr. Justice Brown.

BA YIN AND ANOTHER

v.

KING EMPEROR.*

1929

July 22.

Confession of an accused recorded by Magistrate—Omission to take confessor's signature—Confession otherwise properly made and duly recorded—Admissibility of confession in evidence—Criminal Procedure Code (Act V of 1898), ss. 164, 364, 533.

A magistrate recorded the confession of an accused person in accordance with the provisions of s. 164 of the Criminal Procedure Code; but through an oversight he did not take the signature of the accused. He tried to obtain the signature of the accused in jail the next day but the accused refused to sign. The magistrate and his clerk were examined as to the confession by the Sessions Judge at the trial.

Held, that the confession was admissible in evidence and the failure to secure the signature was cured under the provisions of s. 533 of the Criminal Procedure Code, the irregularity not having injured the accused as to his defence on the merits.

Lalchand v. Queen-Empress, 18 Cal. 549; *Queen-Empress v. Visram*, 21 Bom. 495; *Sadananda Pal v. Emperor*, 32 Cal. 550—*referred to*.

Queen-Empress v. Viran, 9 Mad. 224—*distinguished*.

Jai Narayan v. Queen-Empress, 17 Cal. 862—*dissented from*.

MAUNG BA, J.—Ba Kin, aged 18/19, and Ba Yin, aged 25, have been convicted of the murder of Thein Maung, a boy of 15, at Shwebo, and sentenced to death.

Ba Kin made a confession, but the Magistrate, who recorded the confession, forgot to take his signature. He noticed the omission on the following day and sent his Second Clerk to the jail to obtain Ba Kin's signature. Ba Kin refused to append his signature. At the trial the learned Sessions Judge examined the Magistrate. The Magistrate stated that before he recorded the confession he satisfied himself

* Criminal Appeals Nos. 607 and 622 of 1929, from the order of the Sessions Judge of Shwebo in Sessions Trial No. 11 of 1929.

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that Ba Kin wanted to confess voluntarily. Then the Magistrate deposed to what had been stated to him by Ba Kin. The Magistrate finally stated "I wrote out all that Ba Kin said and then my clerk Ba Din read it out to him in my presence. I asked him whether what had been read out to him was correct. Ba Kin said that it was correct. * * * I took down the statement of the accused in my Criminal Miscellaneous No. 32 of 1928. This record contains a full and true statement of what the accused Ba Kin told me." The Magistrate's Bench Clerk, Ba Din, was also examined in the Sessions Court. He states that he was present when Ba Kin made his confession and that he read his statement over to him and Ba Kin acknowledged it to be correct. He further states that the statement recorded in Criminal Miscellaneous No. 32 is the confession made by Ba Kin on that occasion.

On behalf of the two appellants it has been urged that the confession is not admissible in evidence. The learned counsel in support of that contention quoted three cases. The first case is *Queen-Empress v. Viran and others* (1). In that case a Deputy Magistrate recorded a statement in the nature of a confession made by V. The statement, which was made in Malayalam, was recorded in English and signed by the Magistrate only. Shortly afterwards the Magistrate examined V as to this statement and V admitted that he had made it voluntarily. V retracted that statement later. Mr. Justice Parker held that the provisions of section 164 of the Code of Criminal Procedure are imperative, and section 533 will not render a confession admissible where no attempt has been made to conform to the provisions of the former section. He further held that inasmuch as the record of the

(1) (1886) 9 Mad. 224.

statement of V was not admissible, secondary evidence thereof could not be given. The next case cited is *Jai Narayan Rai v. The Queen-Empress* (1). There the accused, when in custody, made a confession to a Deputy Magistrate. The confession was recorded by the Deputy Magistrate in English, though made in Hindi, which the Deputy Magistrate perfectly well understood and could write. It purported to have been recorded under the provisions of section 164, and was in reply to one question which was set out. The record bore the signatures of the accused and of the Deputy Magistrate, as well as the certificate as required by the section. It was held that the provisions of section 164 read with section 364 are imperative as to the language in which a confession is to be recorded, and that section 533 does not contemplate or provide for any non-compliance with the law in this respect, and that, therefore, as it was not impracticable to record the confession in Hindi, the Sessions Judge was right in refusing to admit the document in evidence. It was further held that the Sessions Judge erred in admitting the oral evidence of the Deputy Magistrate as to what the accused told him, as, seeing that he was acting under the provisions of section 164 of the Criminal Procedure Code, the confession was matter which was required by law to be reduced to the form of a document, and therefore, under section 91 of the Evidence Act, no evidence could be given in proof of such matter except the document. The third case cited is *Sadananda Pal v. Emperor* (2). The accused made a certain statement before a Magistrate who recorded it and took his thumb mark. The accused retracted that statement later. The learned Judges held that a thumb mark is not a signature within the meaning

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(1) (1890) 17 Cal. 862.

(2) (1905) 32 Cal. 550.

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of section 3, clause 52, of the General Clauses Act, or section 164 of the Criminal Procedure Code. They, however, returned the record to the Sessions Judge with a direction to take evidence as to whether the accused duly made the statement recorded.

The last case will not support the argument. The learned Judges, who decided the case, were of the opinion that the defect could be remedied by taking evidence that the statement recorded was duly made by the accused. In the present case also the learned Sessions Judge of Shwebo has adopted that remedy. The view of the law taken in *Jai Narayan Rai's* case (2) was doubted in *Lalchand v. Queen-Empress* (1). In considering *Jai Narayan Rai's* case (2) the learned Judges observed: "It is unnecessary for us in the present case to do more than say that, as at present advised, we are unable to agree in the view of the law which formed the grounds of that judgment." *Jai Narayan Rai's* case (2) was dissented from in *Queen-Empress v. Visram Babaji* (2). The accused's statement was made in Marathi and recorded in English. The learned Judge held that, assuming that it was practicable to record the statement in Marathi, and that consequently it was irregular, with reference to section 364 of the Code, to record it in English, the statement was nevertheless admissible in evidence under section 533, the irregularity not having injured the accused as to his defence on the merits. *Viran's* case (1) was decided in 1886. The learned Judge, who decided the case, in holding that section 533 could not be invoked, was no doubt influenced by the fact that no attempt had been made to conform to the provisions of section 164. It appears from the judgment that prisoner No. 1 made three separate statements before the Deputy Magistrate on 9th May ;

(1) (1891) 18 Cal. 549.

(2) (1897) 21 Bom. 495.

a fourth on 19th May, and a fifth on 31st May; but none of these statements were recorded under section 164 or 364. The questions put and answers given were not written down; they were not taken down in the language in which they were made, but in English; they were not signed by the prisoner or certified by the Magistrate. In these circumstances section 533 could not be invoked. Since the decision of that case, some verbal alterations have been made in section 533. After the word "recorded", these words "or purporting to be recorded" have been inserted. After the words "tendered in evidence", the words "or has been received in evidence" have been inserted. The alterations imply that, even if a statement be not recorded strictly in conformity with section 164, but so long as the Magistrate purports to have recorded it under that section, and even after the statement has been received in evidence, section 533 can be resorted to and evidence taken that an accused person duly made the statement recorded. Section 533 plainly provides that notwithstanding anything contained in section 91 of the Indian Evidence Act such statement shall be admitted, if the error has not injured the accused as to his defence on the merits. In the present case the confession was recorded under section 164, and the Magistrate who recorded it complied with the provisions of that section, except that through an oversight he did not take the signature of the confessor. The learned Magistrate has been examined, and from his evidence it appears that Ba Kin did make that confession and that he did so voluntarily. I therefore have not the slightest doubt that the confession can be admitted in evidence.

When the Magistrate's second clerk, Po Yan, visited Ba Kin in the jail to obtain his signature, Ba Kin

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refused to sign, saying that he had confessed on the previous day because the police had asked him to do so; but when he was examined by the Committing Magistrate on 11th January 1929, Ba Kin denied that he ever made a confession. He added that when the Court Clerk came to him for signature he refused to sign, because he had not made any confession. Had it been true that the confession was made under inducement, he would certainly have said so to the Committing Magistrate. In my opinion the confession was quite genuine and it can be used against Ba Kin under the provisions of section 21 of the Indian Evidence Act, and it can be considered against the co-accused Nga Ba Yin under the provisions of section 30 of the said Act. But as against Ba Yin corroboration by independent testimony is essential.

[On the evidence, and after considering the confession, his Lordship upheld the conviction and sentences of both the accused.]

BROWN, J.—I have had the advantage of reading the judgment of my learned brother Maung Ba, and I agree with him that the confession in this case was admissible in evidence and that the failure of the Magistrate to secure the signature of the confessing accused has been cured under the provisions of section 533 of the Code of Criminal Procedure. The record made by the Magistrate who recorded the confession shows that before recording the confession, he asked Ba Kin a number of questions as to the reasons which led him to confess. He asked him whether he knew that the confession might be used as evidence against him, and to this Ba Kin replied in the affirmative. He also asked other questions to satisfy himself of the voluntary

nature of the confession. In none of these questions does the Magistrate definitely explain that Ba Kin was not bound to make a confession, but when examined in Court the Magistrate says that he warned the accused that he had nothing to gain by his confession and that it might be used against him, and the Magistrate appended to the foot of the confession the certificate required by section 164 of the Code of Criminal Procedure to the effect that he had explained to Maung Ba Kin that he was not bound to make a confession and that if he did so any confession he might make might be used as evidence against him. I am satisfied in the circumstances that there was a substantial compliance with the provisions of sections 164 and 364 of the Code of Criminal Procedure, and that any defect in this respect has been cured under the provisions of section 533.

I agree also that there is sufficient corroboration of the confession to leave no room for reasonable doubt as to the guilt of either of the accused. The confession of Ba Kin does not entirely agree with the evidence of the prosecution witness, Maung Ba Lay, as in the confession Ba Kin says that it was Ba Yin who originally called the deceased, saying that he would get compensation for damage to the bicycle, whereas Ba Lay mentioned Ba Kin only. Ba Kin in his confession does not deal with this point at length, and it is possible that he did not speak the truth here as he wished to minimise his part in the assault. I can see no reason, however, for supposing that the confession was not a voluntary one and so far as the case of Ba Yin is concerned, strong corroboration is afforded by the evidence of U Hmu, Maung Pan and Ma Suleman. I see no good reason for doubting the *bona fides* at any rate of U Hmu and Ma Suleman.

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It has been suggested that the confession cannot be used as against Ba Yin, because Ba Yin is assigned the leading part in the crime in the confession. It seems to me clear, however, that the confession does implicate Ba Kin himself in the murder and therefore can be considered as against Ba Yin also. The murder was of the most brutal kind and in spite of the youth of the appellant Ba Kin, I do not consider there is any reason for not passing the death sentence on both the appellants.

I agree that both appeals must be dismissed and the sentence of death confirmed in each case.

APPELLATE CIVIL.

Before Mr. Justice Baguley.

1929
 July 24.

MA E SE

v.

MA BOK SON.*

Agriculturist's house—Exemption from attachment—Situation of house immaterial so long as occupied by agriculturist and belonging to him—Civil Procedure Code (Act V of 1908), s. 60 (c).

A house belonging to an agriculturist and occupied by him is exempt from attachment and sale under the provisions of s. 60 (c) of the Civil Procedure Code. The fact that such a house is situate in a village and not in the field makes no difference.

Iwan Bhaga v. Hira Baiji, 12 Bom. 363—distinguished.

Day for the appellant.

Tambe for the respondent.

BAGULEY, J.—This is an application in revision of an order passed by the Township Judge, Pakòkku, in his execution case No. 9 of 1929.

* Civil Revision No. 52 of 1929 (at Mandalay) from the order of the Township Court of Pakòkku in Civil Execution No. 9 of 1929.