

ordinate Court refusing to make a complaint. We therefore answer the question referred to us in the negative. The appeals will be laid before the referring Judge for disposal.

A. N. C.

APPELLATE CRIMINAL.

Before Justice Sir Henry Scott-Smith and Mr. Justice Fforde.

KHEMAN—Appellant,

versus

THE CROWN—Respondent.

Criminal Appeal No. 702 of 1924.

Criminal Procedure Code, Act V of 1898 (as amended by Act XVIII of 1923), sections 164 and 533—Confession recorded by Magistrate—when admissible in evidence, and what proof of its having been duly made is required—Indian Evidence Act, I of 1872, section 80.

Held, per curiam, that if a confession of an accused person to a Magistrate is tendered in evidence and the Court finds that any of the provisions of section 164 of the Code of Criminal Procedure have not been complied with, then under section 533 the Court shall take evidence that such person duly made the statement tendered and upon such evidence it shall be admitted, if the error has not injured the accused as to his defence on the merits.

Per Fforde J.—Section 164 of the Code of Criminal Procedure, as amended by Act XVIII of 1923, contains two new provisions which must be observed by the Magistrate in recording a confession, *viz.*, that the person making it must be warned that he need not make any confession at all and that, if he does so, such confession may be used as evidence against him. If the memorandum contains the proper note at the foot of it, it shall be presumed that all necessary formalities purporting in the foot-note to have been performed have in fact been performed—*vide* section 80 of the Indian Evidence Act.

The words in section 533 of the Code “duly made the statement recorded” must mean that the statement was made

1924

Nov. 18.

in accordance with and subject to the provisions of section 164 otherwise it could not be held to be "duly made".

Appeal from the order of Lala Jaswant Rai, Taneja, Sessions Judge, Amritsar, dated the 1st August 1924, convicting the appellant.

NANWAN MAL, for Appellant.

GOVERNMENT ADVOCATE, for Respondent.

JUDGMENT.

SIR HENRY SCOTT-SMITH J.—Kheman has been convicted by the Sessions Judge of Amritsar of the murder of Ram Sarup, a resident of the Reformatory Settlement, Amritsar, by cutting his throat with a razor on the 20th April 1924, and has been sentenced to death. He has appealed to this Court and has been represented at the hearing by a Vakil, and the case is also before us for confirmation of the sentence of death under section 374 of the Criminal Procedure Code.

On the 19th April 1924, that is, one day before the murder, Ram Sarup was admitted into the hospital attached to the Reformatory suffering from fever. On the afternoon of the 20th April Bhole (P. W. 22) and Natha (P. W. 23) visited him there, and his wife *Mussammatt* Bhagwati (P. W. 3) and the appellant Kheman were also there. After the departure of Bhole and Natha the appellant sent *Mussammatt* Bhagwati away to return a dish (*parat*) which had been borrowed from the house of one Rup Ram. The appellant remained alone with the deceased and, according to the theory for the prosecution, murdered him by cutting his throat with a razor, after which he threw the razor over the outer wall in front of the hospital and washed his hands at a tap where he was seen by Jalal (P. W. 4). After this, according to the state-

1924

KHEMAN
v.
THE CROWN.

1924

KHEMAN

v.

THE CROWN.

SCOTT-SMITH J.

ment of *Mussammat* Bhagwati, he met the latter returning to the hospital and told her that her husband had a pain in his chest and that she should fetch him some turmeric as a remedy. *Mussammat* Bhagwati says she returned to her quarters, got some turmeric and pounded it. She then heard Misri (P. W. 6) shouting to her that her husband had been murdered.

The motive for the murder is said to have been (1) that the appellant wanted to start an intrigue with *Mussammat* Bhagwati and in order to achieve his object committed the crime; and (2) that the deceased owed some money to the appellant which the latter had repeatedly demanded but the deceased had not paid. It is clearly proved by evidence on the record, and the appellant also admits this, that he used to live in the same house as Ram Sarup, but some months before the murder he left his house and resided in another, also in the Reformatory Settlement. *Mussammat* Bhagwati has given evidence that the appellant gave her a powder by way of a love charm which she was to eat, that she told her husband of this and that the latter then turned the appellant out of his house. She has also stated, and there does not appear to be any reason to disbelieve her, that on the night of 19th April, when her husband was in the hospital, the appellant came and knocked at the door of her quarters, but she would not let him in. Her story about the powder is corroborated by Bhole (P. W. 22) who states that two months before the death of Ram Sarup his wife showed him a powder saying that it had been given to her by Kheman in order that she might eat it, and that she told this story to her husband and the members of the brotherhood and on this account Ram Sarup turned Kheman out of his house. The appellant has admitted even in the Sessions Court that when he and *Mussammat* Bhagwati were sitting with

Kheman on the evening of the day of the murder he sent her away to return the *parat* to Rup Ram, but he states that he followed her at a few paces distance. The statement of *Mussammat* Bhagwati that after returning the *parat* she powdered up turmeric for her husband is borne out by the statement of Umrao (P. W. 20) recorded by the Committing Magistrate. He stated that *Mussammat* Bhagwati came and asked him to give her some turmeric, that he gave her some which she began to grind and that she was still grinding it when Misri came running, saying that Ram Sarup was lying senseless and bleeding. He and others then ran to the dispensary and discovered that Ram Sarup was dead.

On the 22nd April *Sardar* Hari Singh, Deputy Commissioner, Criminal Tribes, came to the Reformatory and ordered that a search should be made for the lethal weapon. A search was accordingly made and a razor (Exh. P. 4) was found on the other side of the outer wall, which is near the hospital, and some 60 feet from it. This razor was subsequently found by the Imperial Serologist to be stained with human blood and was identified as the property of the appellant. The evidence of P. W. 18, Sub-Inspector Zulfiqar Khan, shows that the appellant gave information which led to the discovery of the person from whom he had purchased this razor for Re. 0-5-0. The appellant told the investigating police that he had purchased the razor from a barber outside the Ram Bagh Gate of Amritsar city. He took the party there where four or five barbers were sitting, and the appellant said that the barber from whom he had purchased the razor was not one of them. Inquiry showed that there was another barber who used to sit there and whose name was Muhammad Sharif, and when the latter came up the appellant at once identified him as the person from

1924

KHEMAN

v.

THE CROWN.

SCOTT-SMITH J.

1924

KHEMAN

v.

THE CROWN.

SCOTT, SMITH J.

whom he had purchased the razor. Muhammad Sharif has given evidence in support of this, and there is other evidence also, detailed by the learned Sessions Judge, of persons who identified the razor as belonging to the appellant. It has a red handle and some moon-shaped marks on the blade, which the Judge says could be easily identified. I do not see any reason at all to disbelieve this evidence, and I consider it to be clearly proved that the razor found within some 70 feet of the scene of the murder belongs to the appellant. The murderer could easily have thrown it over the wall to the place where it was found two days after the murder.

Finally, we have the accused's confession which was recorded by *Bawa Sampuran Singh*, Magistrate, First Class, and Superintendent of the Reformatory, on the 23rd April. He states that *Chaudhri Devi Dial*, Assistant Superintendent, told him that the appellant was confessing, and he therefore recorded his statement. *Chaudhri Devi Dial* has also in his evidence stated that the appellant confessed the murder before him, but he was not asked as to the actual words used by the appellant, and his evidence on the point is therefore not of much use. Objection has been taken to the confession both in the Court below and before us on the ground that it has not been recorded in accordance with the provisions of section 164 of the Criminal Procedure Code. The learned Sessions Judge has pointed out certain irregularities which were committed by the Magistrate, but he examined *Bawa Sampuran Singh* as a witness, and has held that any defects in the recorded confession have been cured under the provisions of section 533 of the Code. Section 164 (3) of the Code lays down that a Magistrate shall, before recording any such confession, (1) explain to the person making it that he is not bound to

make a confession; (2) that, if he does so, it may be used as evidence against him; and (3) that no Magistrate shall record any such confession unless, upon questioning the person making it, he has reason to believe that it was made voluntarily. It is also laid down that after he has recorded any confession he shall make a memorandum at the foot of such record to the following effect:—

“ I have explained to (name) that he 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, and I believe that this confession was voluntarily made. It was taken in my presence and hearing, and was read over to the person making it and admitted by him to be correct, and it contains a full and true account of the statement made by him.

(Signed) A. B.,
Magistrate.”

Now in the present case the certificate at the foot of the confession is merely as follows:—

“ The statement was written in my presence and hearing. It was read over to the accused, and he admitted it to be correct. It contains a true and full account of the statement made by him.”

The rest of the certificate as provided for in section 164 does not appear on the record.

The first question is whether the appellant was given to understand by the Magistrate that he was not bound to make a confession. In regard to this, there is a note at the head of the confession that Khe-
man, accused, was fully made to understand that he was not subject to any compulsion or coercion, and that he was at liberty to make whatever statement he

1924
KHEMAN
v.
THE CROWN.
SCOTT-SMITH J.

1924

KHEMAN

v.

THE CROWN.

SCOTT-SMITH J.

liked. In his statement also at page 11 of the record the Magistrate states "I explained to the accused that he was not under any compulsion, and that he was at liberty to make whatever statement he liked." In my opinion this undoubtedly means that it was explained to the accused that he was not under any compulsion to make any particular statement and that he could make any statement which he liked. I have no doubt that Kheman fully understood that he was not bound to make any confession unless he liked. As to the second point whether he was told that if he made it, it might be used as evidence against him, the Magistrate in reply to a question put in cross-examination stated (see page 11, line 25 of the record): "I did warn the accused, however, that the statement recorded by me would be used as evidence against him." I consider that the second provision laid down in section 164 (3) and referred to above has been fully complied with. The next point is whether, prior to recording the confession, the Magistrate satisfied himself that Kheman was making it voluntarily. In this connection the Magistrate stated (see page 11, line 4): "I did put a definite question to the accused whether he was voluntarily making the confession before me and he did reply that he was making the confession of his own free will. It is an omission that I did not put the question and his answer in my note, or in his statement. I fully believe that the confession was quite voluntary, though my this belief also is not recorded in my note below the statement." In my opinion this is quite sufficient to show that the Magistrate did satisfy himself as is required by section 164 (3) that the confession was being made voluntarily. I therefore agree with the learned Sessions Judge that the defects in the recorded confession have been cured by the statement made

by the Magistrate in Court and would hold accordingly that it is admissible in evidence. I wish to point out here that, though this section lays down that no Magistrate shall record any such confession unless, upon questioning the person making it, he has reason to believe that it was made voluntarily, still it is nowhere laid down that the Magistrate shall record any note showing what questions he has put to the person and how he has satisfied himself that the confession is made voluntarily. At the same time I am of opinion that it is advisable that the Magistrate should always record a memorandum showing that he has, by questioning the person making it, satisfied himself that the confession is made voluntarily. As *Bawa Sampuran Singh* is himself the Superintendent of the Reformatory it was thought advisable that *Kheman's* confession should be recorded by an independent Magistrate, and he was therefore sent to *Bawa Jhanda Singh*, Magistrate, First Class, Amritsar, who recorded another statement of the appellant on the same day. In this the appellant retracted the confession which he had previously made. Under these circumstances I do not think that it would be safe to convict the appellant of the murder of *Ram Sarup* if the confession stood alone, but, as the evidence detailed above shows, it has been corroborated in material particulars. The corroborative evidence will be found well summarised under six heads in the judgment of the learned Sessions Judge on page 34 of the printed record. Even leaving the confession altogether out of consideration the circumstantial evidence seems to me to point very strongly to the fact that the appellant committed the murder, but reading it along with the confession I do not think that there can be any doubt whatever that the appellant did commit the murder. The assessors were unanimously of

1924

KHEMAN

v.

THE CROWN.

SCOTT-SMITH J.

1924

KHEMAN
v.
THE CROWN.

opinion that his guilt was fully proved, and I have no hesitation in agreeing with them.

I would therefore dismiss the appeal and confirm the sentence of death.

FFORDE J.

FFORDE J.—I agree. The question whether or not the document recording the confession may be admitted in evidence is one of supreme importance. The oral evidence is corroborative of the story as recorded in the written confession, but I agree that such evidence would hardly be sufficient in itself to establish a conviction in the present case.

Section 164 of the Criminal Procedure Code is one of the exceptions to the main principle of evidence that a document recording a confession may not be given in evidence when the witness to the statement can be produced and can prove it by oral testimony. Section 164 being an exception to the well established rule of law, and applying as it does to criminal proceedings, its provisions must always be complied with in the strictest possible manner. The essential requirements of the section are that the Magistrate who records the confession shall before doing so explain to the person making it—

- (1) that he is not bound to make any confession at all; and
- (2) that, if he does so, it may be used as evidence against him.

And no Magistrate shall record any such confession, unless upon questioning the person making it, he has reason to believe that he will make it voluntarily. The document when duly reduced to writing in compliance with these provisions must contain at the foot of it a memorandum to the effect that the Magistrate has explained to the person making the confession that, if he does so, it may be used as evidence

against him, that the Magistrate believes that the confession has been voluntarily made, that it was taken in his presence and hearing, was read over to the person making it and admitted by such person to be correct and that it contains a full and true account of the statement made by him. These provisions, which appear in the section as amended by Act XVIII of 1923, are somewhat fuller than the section as it originally stood. The original section only required that the Magistrate upon questioning the maker of a confession should be satisfied that it was made voluntarily. The memorandum, which was to be appended to the statement, merely required to be to the effect that the confession was voluntarily made, that it was taken in the presence and hearing of the Magistrate, was read over to the person making it and admitted by him to be correct and that it contained a full and true account of the statement made by him.

It will be observed therefore that there are two new provisions in the amended section, *viz.*, that the person making it must be warned that he need not make any confession at all, and that, if he does so, such confession may be used as evidence against him.

If the memorandum contains the proper note at the foot of it, it shall be presumed that all necessary formalities purporting in the foot-note to have been performed have in fact been performed. This presumption of correctness arises under section 80 of the Indian Evidence Act. Were there no other statutory provision qualifying section 164 it is clear that a confession recorded under its provisions could not be admissible in law without the foot-note which has been referred to. Section 533, however, provides that, where a confession or other statement under section 164 or 364 has been tendered or received in evidence,

1924

KHEMAN

v.

THE CROWN.

FRANCIS J.

1924

KHEMAN
v.
THE CROWN.
FORDE J.

and any of the provisions of either of these sections have not been complied with by the Magistrate recording the statement, the Court shall take evidence that the statement was duly recorded, and upon such evidence it shall be admitted if the error has not injured the accused as to his defence on the merits. The words in section 533 "duly made the statement recorded" must mean that the statement was made in accordance with and subject to the provisions of section 164, otherwise it could not be held to be "duly made."

In the present case the foot-note to the recorded confession complies with the provisions of section 164 before it was amended by the Act of 1923. The Magistrate apparently was not aware that this section had been amended and consequently acted in ignorance of the new provisions which had been added. The Magistrate, however, under the provisions of section 533 was duly called as a witness and examined, and his evidence shows that he did in fact comply with the provisions which are now enacted in the amended section. That being so I have no doubt that the document in which the confession is recorded was properly admitted in evidence.

I am satisfied that the offence for which the appellant has been convicted has been established beyond any possibility of doubt.

A. R.

Appeal dismissed.