

FULL BENCH.

Before Addison, Coldstream and Jai Lal JJ.

ABDULLA—Appellant

versus

THE CROWN—Respondent.

Criminal Appeal No. 1159 of 1932.

Criminal Procedure Code, Act V of 1898, Section 164: Confession—Admission made by accused in the presence of a Magistrate—during police investigation—of which Magistrate made a written memorandum—whether Magistrate can give evidence to prove the admission—Indian Evidence Act, I of 1872, Sections 26, 159, 160, 161: Production of the memorandum to refresh witness's memory.

The questions referred to the Full Bench for decision were:—

(1) Where during the investigation of a criminal case a Magistrate is associated with the investigating officer, and in the presence of such Magistrate the accused points out places alleged to be connected with the crime, and makes admissions which do not lead to the discovery of any fact, and the Magistrate does not record the admissions in accordance with the provisions of sections 164 of the Code of Criminal Procedure, but makes a memorandum of the conduct and admissions of the accused, is (a) the oral evidence of the Magistrate and (b) his memorandum admissible to prove the admissions of the accused?

(2) Whether the fact that the Magistrate is empowered to record the confession of the accused under section 164 of the Code of Criminal Procedure would affect the question of the admissibility of such evidence?

Held by the Full Bench (in answer to the first question) that the oral evidence of the Magistrate is admissible to prove the admissions of the accused. The written memorandum of the Magistrate is ordinarily not admissible, though the Magistrate under section 159 of the Indian Evidence Act can refresh his memory when under examination by referring to the memorandum, and after having refreshed his memory he can give

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evidence in the witness-box as to what the admissions of the accused were.

Held (in answer to the second question) that the fact that the Magistrate is empowered to record the confession of the accused under section 164 of the Code of Criminal Procedure would not affect the question of the admissibility of such evidence.

Shera Singh v. The Empress (1), *Buta v. The Empress* (2), *Feroze and Gulab v. The Crown* (3), *Bhagel Singh v. Emperor* (4), *Jog Raj v. Emperor* (5), and *Tangedupalle Pedda Obigadu v. King-Emperor* (6), followed.

Emperor v. Gulabu (7), and *Queen-Empress v. Bhairab Chander Chuckerbutty* (8), not followed.

Emperor v. Maruti Santu More (9), *Baker, In re Nichols v. Baker* (10), and *Barindra Kumar Ghose v. Emperor* (11), referred to.

B. R. Puri, for the appellant, referred to section 164 of the Criminal Procedure Code and sections 21 and 26 of the Indian Evidence Act as relevant to the case and argued that a confession by an accused, while in custody of the police is inadmissible unless made in presence of a Magistrate.

[JAI LAL J.—All that is necessary is the presence of the Magistrate and not that the Magistrate should record the confession of the accused.]

The Legislature has imposed certain conditions if a confession is recorded, which should have been observed when the Magistrate made a record of the accused's admission and in their absence the record is inadmissible in evidence.

[ADDISON J.—What happened in this case was that the Magistrate looked into his notes to refresh his memory. The document was not placed on the record.]

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| (1) 21 P. R. (Cr.) 1881. | (6) 1922) I. L. R. 45 (Mad) 230. |
| (2) 52 P. R. (Cr.) 1887. | (7) (1913) I. L. R. 35 All. 260. |
| (3) 11 P. R. (Cr.) 1918. | (8) (1898) 2 Cal. W. N. 702. |
| (4) 1929 A. I. R. (Lah.) 794 | (9) (1920) 54 I. C. 465. |
| (5) 1930 A. I. R. (Lah) 534. | (10) (1890) 44 Ch. D. 262, 270. |
| (11) (1910) I. L. R. 37 Cal. 467. | |

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Where the Magistrate does not remember and goes to the document, the document is inadmissible in evidence unless the necessary legal formalities required by section 164, Criminal Procedure Code, have been observed.

[ADDISON J.—The substantive law contained in section 26 of the Evidence Act is not controlled by section 164 of the Criminal Procedure Code.]

[JAI LAL J.—Is it obligatory on a Magistrate to record a confession made in his presence?]

I do not think there is anything in the provisions of the law which makes it obligatory on a Magistrate to record a confession, but if the Magistrate was competent to record a confession and he made up his mind to do so, he must record it in accordance with the provisions of law. In the present case the Magistrate did not merely elect to hear the oral confession of the accused but he made a written memorandum thereof, that memorandum would be inadmissible in evidence in the absence of necessary formalities.

[ADDISON J.—The memorandum is a record of what the Magistrate saw and heard and it is not the record of the statement of the accused and the Magistrate was not bound to record it.]

There may be no obligation on the part of a Magistrate to record a statement of the accused, but if he chooses to record it, he must observe certain formalities which have not been observed in the present case.

Des Raj Sawhney, for the Crown, was not called upon to reply but cited—*Baghel Singh v. Emperor* (1), and *Jog Raj v. Emperor* (2).

Appeal from the order of Khan Zaka-ud-Din Khan, Sessions Judge, Jullundur, dated the 20th of August, 1932, convicting the appellant.

B. R. PURI, for Appellant.

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DES RAJ SAWHNEY, Public Prosecutor, for Respondent.

The order of reference, dated 15th December, 1932, made by Coldstream and Jai Lal JJ., was as follows:—

JAI LAL J.—Abdulla appellant has been convicted of the murder of Imam Bakhsh on the night between the 12th and 13th May 1932, and has been sentenced to transportation for life.

The conviction rests mainly on circumstantial evidence. The prosecution also relied upon a confession said to have been made by the appellant before Dr. Farzand Ali, an Honorary Magistrate of Jullundur. It does not appear from the record whether this Magistrate is competent to record the confession of an accused person under section 164 of the Code of Criminal Procedure. Presumably he is not. The learned Sessions Judge has held the confession made before this Magistrate to be inadmissible on the ground that it had not been recorded as provided by section 164 of the Code. It must, however, be stated that the Magistrate did not profess to record the confession under that section, but, as contended by the learned Public Prosecutor, he merely took down notes of what had happened in his presence and such notes have been used for the purpose of refreshing the memory of the Magistrate when he gave evidence on behalf of the prosecution and not as a record of the confession made before the Magistrate by the accused.

What appears to have happened is this. The accused after having surrendered himself to the police volunteered to show the various places connected, directly or indirectly, with the crime. Most of these places were already known to the police and it must be assumed that section 27 of the Indian Evidence Act did not apply to the information proposed to be given by the appellant. An Honorary Magis-

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trate, therefore, was associated with the investigating police officer to accompany the accused when he pointed out the various places. When pointing out the various places the accused also stated the manner in which they were connected with the crime. The Magistrate made notes of the fact of pointing out the places by the accused and also of the statement made by him in his presence.

The learned Public Prosecutor contends that the Sessions Judge wrongly held the statement made by the accused to be inadmissible. He says that the accused was not produced before the Magistrate with a view to record his statement under section 164 of the Code, and, therefore, it is open to the prosecution to prove the statement made by him before the Magistrate by the oral testimony of the latter. He relies upon a judgment of a learned Judge in Chambers of this Court in *Baghel Singh and another v. Emperor, Criminal Appeal No. 57 of 1929* (1). The Sessions Judge has relied in support of his view on a judgment of a Division Bench of this Court, to which I was a party, in *Jog Raj v. Emperor, Criminal Appeal No. 31 of 1930* (2). That judgment, however, appears to have been misunderstood by the learned Judge and the facts of that case were different from those of this case. After stating the views held by the other Courts and by this Court, I refrained from expressing any opinion on the question now involved, but most of the relevant case-law on the subject is mentioned in my judgment. The question involved is of considerable importance from the point of view of administration of criminal justice in this province and I am of opinion that it should be referred for decision to a Full Bench.

(1) 1929 A. I. R. (Lah.) 794.

(2) 1930 A. I. R. (Lah.) 534.

I would, therefore, refer the following question to a Full Bench:—

(1) Where during the investigation of a criminal case a Magistrate is associated with the investigating officer, and in the presence of such Magistrate the accused points out places alleged to be connected with the crime and makes admissions which do not lead to the discovery of any fact and the Magistrate does not record the admissions in accordance with the provisions of section 164 of the Code of Criminal Procedure, but makes a memorandum of the conduct and admissions of the accused, are (a) the oral evidence of the Magistrate, and (b) his memorandum, admissible to prove the admissions of the accused?

(2) Whether the fact that the Magistrate is empowered to record the confession of the accused under section 164 of the Code of Criminal Procedure would affect the question of the admissibility of such evidence?

The case will be placed before the Hon'ble the Chief Justice for the constitution of a Full Bench, if he approves of this course, and for the hearing of the reference at a very early date.

COLDSTREAM J.—I agree.

COLDSTREAM J.

JUDGMENT OF THE FULL BENCH.

ADDISON J.—The following two questions have been referred to a Full Bench:—

ADDISON J.

(1) Where during the investigation of a criminal case a Magistrate is associated with the investigating officer, and in the presence of such Magistrate the accused points out places alleged to be connected with the crime and makes admissions which do not lead to the discovery of any fact and the Magistrate does not record the admissions in accordance with the provisions of section 164 of the Code of Criminal

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Procedure, but makes a memorandum of the conduct and admissions of the accused, is (a) the oral evidence of the Magistrate and (b) his memorandum, admissible to prove the admissions of the accused?

(2) Whether the fact that the Magistrate is empowered to record the confession of the accused under section 164 of the Code of Criminal Procedure would affect the question of the admissibility of such evidence?

The questions raised have all along been decided in one way by this Court. The first case of importance is *Shere Singh v. The Empress* (1). It was held in it that an oral confession by an accused person, not being open to exception under sections 24, 25 or 26 of the Evidence Act, is, as an admission by an accused person, a relevant fact and may be proved at his trial under section 21 of the Evidence Act, and therefore such a confession made to a magistrate is relevant, and may be proved by the evidence of the magistrate. If the confession is reduced into writing by the magistrate in accordance with the provisions of sections 164 and 364 of the Criminal Procedure Code, the document is admissible in evidence without further proof under the provisions of section 80 of the Evidence Act. If it is reduced into writing by the Magistrate, but not with the formalities prescribed by sections 164 and 364 of the Criminal Procedure Code, the document can still be admitted upon proof by the evidence of the magistrate under section 533 of the Criminal Procedure Code. If the defects cannot be remedied under the provisions of section 533 of the Criminal Procedure Code the document cannot be admitted in evidence against the accused person but the magistrate may still give evidence as to the confession made before him and the document

(1) 21 P. R. (Cr.) 1881.

in that case may still be used under section 159 of the Evidence Act to refresh the magistrate's memory as to the accused's statement or under section 160 of the Evidence Act. In those cases the document must be produced and shown to the adverse party, if he requires it, and the adverse party may cross-examine the witness thereupon under the provisions of section 161 of the Evidence Act. The same view was taken in *Buta v. The Empress* (1). These authorities were followed in *Feroze and Gulab v. The Crown* (2), where it was held that an oral confession by an accused person, not being open to exception under sections 24, 25 or 26 of the Evidence Act, is, as an admission by an accused person, a relevant fact and may be proved at his trial under section 21 and therefore such a confession made to a magistrate is relevant and may be proved by the evidence of the magistrate. A Single Judge of this Court in the case *Baghel Singh v. Emperor* (3), followed these authorities. There is a long discussion of this subject by Jai Lal J. in *Jog Raj v. Emperor* (4). The Division Bench in that case took the view previously held by this Court.

The Allahabad High Court, however, has taken the opposite view. A Division Bench of that Court in *Emperor v. Gulabi* (5), held that a confession of an accused person made to a magistrate holding an enquiry is a matter required by law to be reduced to the form of a document within the meaning of section 91 of the Indian Evidence Act, and that no evidence can be given of the terms of such a confession except the record, if any, made under section 164 of the

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(1) 52 P. R. (Cr.) 1887.

(3) 1929 A. I. R. (Lah.) 794.

(2) 11 P. R. (Cr.) 1918.

(4) 1930 A. I. R. (Lah.) 534.

(5) (1913) I. L. R. 35 All. 260.

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Code of Criminal Procedure. There are also decisions of the Calcutta High Court to the same effect. One of these may be referred to, namely, *Queen-Empress v. Bhairab Chunder Chuckerbutty* (1); as typical of the others. Further, in *Emperor v. Maruti Santu More* (2), a case decided by a Division Bench of the Bombay High Court, one Judge held that a confession made to a magistrate during the course of an investigation, which was not reduced into writing, was inadmissible in evidence and could not be proved by oral evidence. The view he took of the word "may" in section 164 was that it should be read as "must." The other Judge, however, took the same view as this Court has always done. In his view the word "may" under section 164 of the Criminal Procedure Code could never mean "shall" so long as the English language should retain its meaning, as declared in *Baker, In re Nichols v. Baker* (3), by Cotton L. J. The Allahabad case was not followed by him. It may also be noted here that Jenkins C. J. in *Barindra Kumar Ghose v. Emperor* (4), took the view that sections 164, 342 and 364 of the Code were not exhaustive, and did not limit the generality of section 21 of the Evidence Act as to the relevancy of admissions.

On the other hand, a Division Bench of the Madras High Court in *Tangedupalle Pedda Obigadu v. King-Emperor* (5), held that it was not obligatory on a magistrate holding an investigation or preliminary inquiry under section 159 of the Code to record in writing a confession made to him by an accused

(1) (1898) 2 Cal. W. N. 702.

(3) (1890) 44 Ch. D. 262, 270.

(2) (1920) 54 I. C. 465.

(4) (1910) I. L. R. 37 Cal. 467.

(5) (1922) I. L. R. 45 Mad. 230.

person and such confession could be proved by the oral testimony of the magistrate. The Allahabad and Calcutta decisions and the opinion of one of the Judges in the Bombay case referred to above were not followed.

Before us it was admitted that confessions made by an accused person to an ordinary individual could be proved orally. It was, however, argued that it would be anomalous to allow a magistrate to prove a confession made to him or in his presence by word of mouth, seeing that elaborate precautions have been enacted in the Criminal Procedure Code to insure that the recording of confessions of an accused person by Magistrates should be done with great care; but it was not contended before us that section 164 of the Criminal Procedure Code controlled or repealed the substantive Law as regards confessions given in the Evidence Act. This means that it was not seriously contended before us that the view taken by this Court and by the Madras High Court was wrong. If a confession is formally recorded under the provisions of the Criminal Procedure Code by a magistrate the provisions of the Criminal Procedure Code must be followed. If a confession is not recorded, then the general law as enacted in the Evidence Act applies and an oral confession by an accused person, not being open to exception under sections 24, 25 or 26 of the Evidence Act is a relevant fact as an admission by him and can be proved under section 21 of the Evidence Act.

The answer to the first question referred to the Full Bench, therefore, is that the oral evidence of the magistrate is admissible to prove the admissions of the accused. Ordinarily speaking, however, the

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written memorandum of the magistrate is not admissible, though the Magistrate under the provisions of section 159 of the Evidence Act can refresh his memory when under examination by referring to the memorandum. After he has refreshed his memory he can give evidence in the witness box as to what the admissions of the accused were. In such a case the memorandum must be shown to the adverse party, if he requires it, under the provisions of section 161 of the Evidence Act and the witness may be cross-examined on it. Further, section 160 of the Evidence Act allows a magistrate to testify to facts mentioned in his memorandum, although he has no specific recollection of the facts themselves, if he is sure that the facts were correctly recorded in the document. The illustration to this section is as follows:—A book-keeper may testify to facts recorded by him in books regularly kept in the course of business, if he knows that the books were correctly kept, although he has forgotten the particular transactions entered. In this case also he may be cross-examined on the memorandum under the provisions of section 161 of the Evidence Act. The distinction between sections 159 and 160 of the Evidence Act is stated at page 1032 of Woodroffe and Amir Ali's ninth edition of the Law of Evidence. When the witness after reference to the memorandum finds his memory so refreshed that he can testify recollection independently of the memorandum, there is no reason or necessity for the introduction of the paper or writing itself; and it is not admissible. But another rule prevails when the witness cannot testify to the existing knowledge of the fact independently of the memorandum, but can testify that, at or about the time the writing was made, he knew of its contents and of their truth or

accuracy. This is the case contemplated by section 160 of the Evidence Act. In such a case both the testimony of the witness and the contents of the memorandum are admissible, the two being the equivalent of a present positive statement of the witness affirming the truth of the memorandum. Even, however, if the memorandum becomes admissible in this latter case it must never be looked upon as a record of the statement of the accused person; it is merely a memorandum recorded at the time of what the magistrate says the accused stated. This disposes of the first question. As regards the second question my reply would be that the fact that the magistrate is empowered to record the confession of an accused person under section 164 would not affect the question of the admissibility of such evidence. In the case before us the magistrate was not empowered but there would be no difference to the reply if he had been empowered. It would be anomalous, in my opinion, to hold that a confession made to an ordinary individual could be orally proved while a confession made either to a magistrate not empowered to record confessions under section 164 of the Criminal Procedure Code or to a magistrate empowered to record confessions under section 164 could not be so proved.

COLDSTREAM J.—I agree.

JAI LAL J.—I agree.

A. N. C.

*First question answered in the affirmative,
the second in the negative.*

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