

[APPELLATE CRIMINAL JURISDICTION.]

REG. v. SHIVYA', SON OF BHAGOWA, AND THREE OTHERS.

1876.
April 5.

*Confession—The Code of Criminal Procedure (Act X. of 1872), Sections 122 and 346—
Memorandum—Certificate.*

A confession recorded under Section 122 of the Code of Criminal Procedure to be admissible in evidence must not only bear a memorandum that the Magistrate believed it to have been voluntarily made, but also a certificate, under Section 346 of the Code, that it was taken in the Magistrate's presence and hearing, and contains accurately the whole of the statement made by the accused person.

No oral evidence can be received to prove the fact of the confession, if the confession itself be inadmissible. *Reg. v. Bai Ratan* (10 Bom. H. C. Rep. 166) followed.

THE four accused persons were tried for the offence of murder before W. H. Crowe, Joint Session Judge of the District of Belgaum at Kaládgi, and sentenced to death.

When arrested, some of the accused were taken before a Magistrate of the 3rd Class, and statements, in the nature of confessions, signed by the accused who made them, were recorded. The Magistrate attached to their confessions a memorandum stating that he believed them to have been voluntarily made, but not the certificate required by Section 346 of the Criminal Procedure Code. The accused were afterwards placed before the same Magistrate for the preliminary inquiry, when two of them retracted their former confessions. The Magistrate examined all the accused in the manner provided by Section 346 of the Criminal Procedure Code, and to such examination annexed the certificate required by that section, and committed all the accused, who were subsequently found guilty, and sentenced as stated above.

The case was heard by MELVILL and WEST, JJ.

Purcell, with him *Ghanasham Nilkanth*, for the appellants:—The confessions are inadmissible in evidence for want of the certificates, required by Section 346 of the Code of Criminal Procedure, that they were made in the Magistrate's presence and hearing, and contain accurately the whole of their statement. Section 122 of the Criminal Procedure Code enacts that "such confessions shall be taken in the manner provided in Sections 345 and 346";

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and para. 2 of the latter section provides that the Magistrate shall certify these particulars under his own hand. These provisions should be liberally construed in favour of the accused, as they embody important safeguards. The confessions of Nos. 2 and 3 were, moreover, retracted before their committal: *Reg. v. Garbad Becha*⁽¹⁾. [WEST, J.—The prisoner in that case retracted his confession before he made his signature. Can you show any case where a confession retracted after it had been assented to by the prisoner, and duly signed both by him and the Magistrate, was held inadmissible?] I cannot. [MELVILL, J.:—We think the case you cite, applies only to a single statement made by the accused, and a retraction of it before his signature.]

Shántárám Náráyan, for *Dhirajlál Mathurádás*, for the Crown:—Section 122 contemplates confessions being taken, and recorded by one Magistrate and forwarded to another by whom the case is inquired into or tried. Here the confessions were taken by the same Magistrate who committed the accused, and the whole of the proceedings before him should be regarded as one continuous proceeding. The use of the word “taken” in Section 122 is important as showing, that though a confession is to be in the form of question and answer, as provided for in para. 1 of Section 346, yet that the certificate is not necessary. The case of *Bai Ratan*⁽²⁾ now makes it necessary that the confession shall be signed or attested by the accused. And, lastly, the confessions in this case do bear the necessary certificates; for when the accused were again examined by the Magistrate before committal, he appended these certificates, which must be taken to relate also to their previous statements.

[WEST, J.:—The certificates are appended to the examination of the accused, which contains their retraction of their confessions; and it would be unreasonable to take them to apply to anything else.]

The judgment of the Court was delivered by

MELVILL, J.:—In this case it is admitted that if the so-called confessions of three of the prisoners be excluded from consideration,

(1) 9 Bom. H. C. Rep. 344.

(2) Bom. H. C. Rep. 166; see also *Reg. v. Dnyá Anand*, 11 Bom. H. C. Rep. 44.

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the convictions cannot be sustained. In fact, there is no other evidence of the smallest value in the case. These confessions were recorded by a Magistrate of the 3rd Class under Section 122 of the Code of Criminal Procedure. They are signed by the prisoners, and the Magistrate has made on them the memorandum required by Section 122, certifying his belief that the confessions were voluntarily made. Several objections have been taken to the admission of these confessions, but the only one which requires serious consideration is the following. Section 122 requires that confessions recorded under that section shall be taken in the manner prescribed in Sections 345 and 346. One of the provisions of Section 346 is that the Magistrate shall certify under his own hand that the examination was taken in his presence and in his hearing, and contains accurately the whole of the statement made by the accused person. It is contended that the words above quoted from Section 122 render it necessary that the certificate mentioned in Section 346 should be attached to confessions recorded under the former section. On the other hand, it is argued that the memorandum as to the voluntary nature of the confession is all which the law requires, and that if the certificate mentioned in Section 346 be necessary, it does, in fact, appear upon the documents. The latter of these two arguments may be at once dismissed. It happened that the Magistrate, who took the confessions, became afterwards the committing Magistrate, and nearly a month after he took the confessions he examined the prisoners previously to committal. To their examination he attached the certificate required by Section 346; but it is quite clear to us that this certificate was not intended by him to apply to the previous confessions. The only question, then, is, whether the words of Section 122, "such confessions shall be taken in the manner provided in Sections 345 and 346", include the provision of Section 346, which requires the Magistrate's certificate. The loose and inaccurate phraseology of the two sections has already given us much trouble in *Bai Ratan's* case⁽¹⁾. One of the points decided in that case was that the words quoted from Section 122 incorporate into that section the provision of Section 346, which requires that the accused person shall sign the record of his examination. We are now

(1) 10 Bom. H. C. Rep. 166.

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of opinion that the same words must be so liberally construed as to embrace that provision of Section 346 which relates to the Magistrate's certificate. We believe that it was the intention of the Legislature to provide the same safeguards against the admission of confessions improperly taken under Section 122 as are provided for examination under Section 346. We cannot conceive that a less degree of protection to the accused should have been thought necessary; on the contrary, all the precautions required to guarantee the accuracy of an examination made in open Court, at a late period of the proceedings, when the accused has heard the evidence against him, and has had time to consider his defence, must be far more necessary when the statement to be guaranteed is a confession made in the first bewilderment of an arrest, and while the accused is still in the exclusive custody of the police. The question may be looked at from another point of view. The law allows certain presumptions as to certain documents, and on the strength of these presumptions dispenses with the necessity of proving by direct evidence what it would otherwise be necessary to prove. One of these presumptions relates to confessions. Section 80 of the Evidence Act provides that, whenever any document is produced before any Court, purporting to be a statement or confession by any prisoner or accused person, taken in accordance with law, it shall be presumed that such statement or confession was duly taken. Now it is evident that, as a necessary basis for this presumption, the document must purport to show all the facts of which it would otherwise be necessary for the Court to be satisfied by direct evidence, before the confession could be used against the accused. What are those facts? First, as a matter of course, the Court would have to be satisfied that the confession was accurately taken down or repeated. Next, it would be necessary to prove that the confession had been taken in the immediate presence of a Magistrate; because, otherwise, the accused person having been in the custody of the police, the confession would be legally inadmissible. For the same reason it would be necessary to show that no inducement had been held out to the accused by threat or promise or otherwise. If, then, these three facts—viz., the accuracy of the record, the presence of a Magistrate, and the voluntary nature of the confession—would otherwise have

to be proved by direct evidence, they must all be stated on the face of the document, before the Court can draw a presumption of their having occurred : and these are the very three facts which are stated in the memorandum and certificate mentioned in Sections 122 and 346 respectively. This consideration leads us irresistibly to the conclusion that the Legislature must have intended that both the memorandum and the certificate should be attached to such confessions. The necessity of both these guarantees could not be better illustrated than by the confessions in the present case. All that is certified upon them, is that the Magistrate upon enquiry had reason to believe that they were made voluntarily. But there is nothing to show where, or by whom, or under what circumstances, they were recorded. For all that appears to the contrary, they may have been drawn up by the police, and then taken to the Magistrate for his certificate. We do not mean to suggest that this was the procedure, but the Magistrate's certificate that he believed the confessions to be voluntary is quite consistent with it. We have held in *Bai Ratan's* case⁽¹⁾ that when a confession taken under Section 122 is inadmissible in evidence, oral evidence to prove that such a confession was made, or what were the terms of the confession, is inadmissible also. We must, therefore, absolutely reject the confessions in this case, and as there is no other evidence, we must reverse the convictions. We do so with the less regret, because, even had the confessions been admissible, they are so full of reservations, contradictions, and inconsistencies, that we think we should have agreed with the assessors in acquitting the prisoners.

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[APPELLATE CRIMINAL JURISDICTION.]

REG. v. RA'MA' BHIVGOWDA'.

April 12.

The Code of Criminal Procedure (Act X. of 1872), Sections 314 and 13—Combined sentence for several offences—Confirmation—Appeal.

The aggregate of the sentences passed under Section 314 of the Code of Criminal Procedure in a case of simultaneous convictions for several offences, must be considered a single sentence for the purposes of confirmation or appeal.

(1) 10 Bom. H. C. Rep. 166.