

**APPELLATE CRIMINAL.**

*Before Young C. J. and Rangī Lal J.*  
**BAKHSAN (CONVICT) Appellant**

*versus*

**THE CROWN—Respondent.**

**Criminal Appeal No. 1341 of 1934.**

*Criminal Procedure Code, Act V of 1898, sections 164, 364, 533: Confession — Compliance with the provisions of section 164 — Defect — whether can be cured under section 533 — Indian Evidence Act, I of 1872, sections 21, 80: Inadmissible confession—whether can be proved as an “admission”—Classes of confessions and their evidential value, described.*

The Magistrate recording the confession of the accused did not comply with one of the requirements of section 164, Criminal Procedure Code, namely, that a confession shall not be recorded *unless, upon questioning* the person making it, the Magistrate has reason to believe that it was made voluntarily.

*Held*, that this defect could not be cured under section 533 of the Code, but that the confession could be proved as an admission under section 21 of the Evidence Act—sections 164 and 364 of the Code merely prescribing the mode of recording a confession and not in any way affecting the provisions of the Evidence Act.

The confession, however, must be proved by the testimony of the Magistrate who heard it and he can still use the written record to refresh his memory, and the adverse party can then call upon him to produce the document and cross-examine him thereupon.

Various classes of confessions and their evidential value, described.

*Appeal from the order of Mr. M. A. Soofi, Sessions Judge, Dera Ghazi Khan, dated 28th August, 1934, convicting the appellant.*

MOHAMMAD ASLAM KHAN, for Appellant.

Diwan RAM LAL, Government Advocate, for Respondent.

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Jan. 8.

The judgment of the Court was delivered by—

YOUNG C. J.—On the 30th April, 1934, at mid-day, Bakhshan, accused, appeared at the Jampur Police Station, in the Dera Ghazi Khan district, with a superficial cut wound,  $2\frac{1}{4}'' \times \frac{1}{2}'' \times \frac{1}{3}''$ , on his throat and reported that towards the small hours of the morning he was going in the company of *Mussammât Ghulaman*, whom he had abducted six or seven months before, when they were waylaid by her husband, Jumma, and his friends, Ghulam Hussain, Kalu and Qadra, who carried her away after wounding him with a knife. He was sent to the hospital and Allah Ditta, Head Constable, accompanied by *Mir Hazar Khan*, tracker constable, and Khan Chand, *Sarbarah Zaildar*, went to the spot indicated in the above report as the scene of the occurrence. No marks of any struggle were found there, but the dead body of *Mussammât Ghulaman* was found under a *jal* tree closeby. Hazar Khan noticed the track of a man and a woman coming from the *Bakainwala* well to that place and the track of the man alone leaving the place and proceeding to *Shahanwala* well, then to *Bakainwala* well and thence to the Jampur road where it was lost. The foot-prints on these tracks were clearly identifiable in spite of a slight drizzle which had taken place in the interval and some of these were properly covered. The place where the dead body was found was in the jurisdiction of the Kot Chhutta Police Station and the investigation was, therefore, taken up by the Sub-Inspector in charge of that Police Station. On the 1st of May, 1934, a track identification parade was held and Ghulam Hussain, Kalu and Qadra were made to walk with several other men, but the track of none of those men was found to tally with the track of the man who had accompanied the woman to the

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*jal* tree and had left her there. On the following day another parade was held when the accused was made to walk with a few other men. His foot-prints were picked out by the tracker as corresponding to the man's foot-prints which had been preserved. The woman's foot-prints were found to be those of the shoes on the feet of the corpse. The accused was then questioned about the matter and expressed his willingness to make a statement. He was promptly produced before a second class Magistrate who was specially empowered to record confessions, and made a confession to the effect that he had abducted *Mussammat* Ghulaman six or seven months before, had kept her concealed at various places, but found it impossible to do so any longer, that he was taking her on the night in question to restore her to her people, that she strongly objected to this and threatened to have him prosecuted, if he did so, that he thereupon killed her with a razor and then tried to commit suicide, but succeeded only in inflicting a superficial cut on his throat and that he then went and made a false report as stated above. After making this confession, the accused dug out a razor which was buried near the *jal* tree. It was on examination by the Chemical Examiner and the Imperial Serologist found to be stained with human blood.

The accused was then sent up for trial. He pleaded not guilty and denied having made any confession. He said that he had been beaten by the Police and that his thumb-mark was obtained on a statement recorded at the dictation of the Sub-Inspector.

The prosecution case rests on—

- (a) the confession;
- (b) the track evidence; and

(c) the recovery of the razor at the instance of the accused.

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The track evidence is particularly reliable in this case, as it furnished the first clue against the accused and showed the falsity of the first information report. It receives support from independent evidence which goes to show that the accused went first to the *Shahanwala* well and then to the *Bakainwala* well after the occurrence.

The evidence on point (c) consists of the statements of Din Mohammad Khan, *Zaildar*, P.W.6, and Ghulam Mohammad Khan, Sub-Inspector, P.W.16, which we have no reasons to disbelieve. A defence witness stated that a razor was picked up from the spot on the 30th of April, 1934, but he is a relation of the accused and his testimony is not entitled to any serious consideration.

As for the confession, it has been contended that it is not admissible in evidence, because the Magistrate, who recorded it, did not question the accused in order to ascertain whether it was being made voluntarily. The Magistrate appeared as a witness and stated that before recording the confession he had warned the accused that he need not make a confession and that, if he made one, it might be used as evidence against him. At the foot of the statement the following certificate was appended:—

“ I had clearly explained to Bakhshan that he need not make the confession, and that, if he did, his confession would be used against him as a piece of evidence. I am sure it has been obtained without resort being had to force or compulsion. The confession was made in my presence and within my hearing. It was read out to him and he admitted it to be correct.

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And this is the statement, entire and correct, made by Bakhshan."

It is clear that the Magistrate did not comply with one of the requirements of section 164, Criminal Procedure Code, namely, that a confession shall not be recorded *unless upon questioning* the person making it the Magistrate has reason to believe that it was made voluntarily. This defect could not be cured under section 533, Criminal Procedure Code, because the confession cannot be said to have been "duly made," *viz.*, in accordance with law. The record of the confession cannot, therefore, be admitted in evidence under section 80 of the Evidence Act. This being so, the question arises whether the confession can be proved as an admission under section 21 of the Evidence Act. There has been some conflict of judicial opinion on this point, but the view of this Court, with which we entirely agree, has consistently been that sections 164 and 364, of the Code of Criminal Procedure, merely prescribe the mode of recording a confession and do not in any way affect the provisions of the Evidence Act regarding the admissibility of a confession heard by a Magistrate. Section 164, Criminal Procedure Code, authorises a Magistrate to record a confession, but does not make it incumbent upon him to do so, nor does it enact that, if a confession is not recorded in accordance with the provisions of that section, the evidence given by the Magistrate to prove the confession shall be inadmissible. The consequence of non-compliance with those provisions is that the record of the confession cannot be admitted in evidence under section 80 of the Evidence Act without further proof. The admissibility of evidence is governed by the Evidence Act and under section 21 of that Act an oral confession by an accused person is

relevant, subject to the provisions of sections 24 to 29. The confession must, however, be proved by the testimony of the Magistrate who heard it. If he did not record it at all, he would obviously have to rely on his memory alone. If he did record it, but not in accordance with law and consequently the record is rendered inadmissible under section 80, he can still use it to refresh his memory when in the witness-box. The adverse party can then call upon him to produce the document and cross-examine him thereupon. If the confession was read out to the accused and was admitted by him to be correct and was also signed by him it can perhaps be regarded as a confession in writing and can be proved by the prosecution under section 21 of the Evidence Act. In the present case, the confession was thumb-marked by the accused after it was read out to him and was admitted to be correct. In any case, the Magistrate stated that Exhibit P. D. was a correct record of the statement made by the accused and the document was read out in Court. The Magistrate gave evidence three months and 25 days after he recorded the confession and could not be expected to remember what the accused had stated. He could only testify to the effect that the statement made by the accused was contained in the record prepared by him. We are, therefore, of opinion that the confession has been properly proved. It is clear that this confession cannot be excluded under sections 25 to 29 of the Evidence Act. Section 24 is the only section which need be considered. That section makes a confession irrelevant if it appears to the Court that it was caused by any inducement, threat or promise, having reference to the charge against the accused person, proceeding from a person in authority, and sufficient, in the opinion of the Court, to give the

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accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him. In the case of a confession recorded according to law, there is an initial presumption that it does not offend against section 24, but, if, on a consideration of the direct and circumstantial evidence in the case, it does appear to the Court that the confession was obtained by any inducement, threat or promise such as is referred to in the aforesaid section, it will be held to be inadmissible. In the case of a confession not recorded according to law, no such presumption arises and it is apparently the duty of the prosecution to satisfy the Court that the confession did not contravene the provisions of section 24 of the Evidence Act, before it can be admitted. The points that go to show that the confession in this case did not contravene those provisions are :—

(1) The accused was not suspected till the track evidence definitely seemed to connect him with the crime.

(2) The confession was made soon after the track evidence was obtained.

(3) There was no opportunity for any torture and the accused made no complaint of any kind before the Magistrate.

(4) There is no allegation that the confession was the result of any inducement, threat or promise, proceeding from a person in authority.

(5) When the accused was faced with the track evidence, he must have felt that a denial of guilt would be of no avail.

For these reasons, we are satisfied that section 24 of the Evidence Act is no bar to the admissibility of this confession.

The next question for consideration is, whether we believe the confession to be true. This question will arise even in the case of a recorded confession admitted under section 80 of the Evidence Act. In the present case, the circumstances under which the confession was obtained furnish the best guarantee of its truth. The wound found on the throat of the accused was superficial and the medical officer who examined it was inclined to think that it was self-inflicted and not caused by an adversary in the course of a struggle. This wound and the injuries found on the deceased could have been caused by the razor which was produced by the accused himself. These facts, coupled with the excellent motive mentioned in the confession and the track evidence, not only go to show the truth of the confession, but furnish the corroborative evidence which prudence requires in the case of a retracted confession.

It has been urged that an oral confession proved by the testimony of the Magistrate who recorded it, even if admissible in evidence, should not have the same value as a confession recorded under all the safeguards which were considered to be necessary by the Legislature. As an abstract proposition this is perhaps unexceptionable, but still the exact weight which is to be attached to a particular confession, whether recorded in accordance with law or not, would depend on the facts of each case. Confessions made to a Magistrate can be divided into five classes:—

(1) Those recorded with all the formalities prescribed by sections 164 and 364, Criminal Procedure Code.

(2) Those imperfectly recorded, but where the defect is cured by section 533, Criminal Procedure Code.



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(3) Where the defect is not cured and the confession is proved by the testimony of the Magistrate.

(4) Where the Magistrate refuses to record the confession of an accused person produced before him for that purpose, but hears it.

(5) Where the accused appears before a Magistrate of his own accord and makes an oral confession.

Confessions falling under classes 1 and 2 are recorded under great precautions and should, therefore, obviously carry more weight than those falling under the remaining classes. A confession under class 3 would be less weighty, because some of the precautions prescribed by law were not observed. A confession under class 4 should have very little weight unless the Magistrate can explain to the entire satisfaction of the Court why he refused to act under sections 164 and 364, Criminal Procedure Code. The weight to be attached to a confession under class 5 would depend entirely on the circumstances under which it is made. It is impossible to lay down any hard and fast rule as to the amount of weight to be attached to a particular confession. This is a matter for the Court to decide in each case on consideration of the cumulative effect of the entire evidence in the case.

In the present case, we agree with the learned Sessions Judge and the assessors that the confession corroborated, as it is, by the other evidence referred to above fully proves the guilt of the accused. The murder was committed in a brutal manner and there are no extenuating circumstances in the case. We, therefore, dismiss the appeal and confirm the sentence of death.

A. N. C.

*Appeal dismissed.*