# ORIGINAL CRIMINAL.

*Before Mr. Justice Strachey.*

## QUEEN-EMPRESS *v.* VISRAM BABAJI.

1896. *April* 4.

*Evidence—Confession—Statement of prisoner made before inquiry—Statement of prisoner made in the course of or after inquiry—Criminal Procedure Code (Act X of 1882), Secs. 164, 364, 533.*

The sections comprised in Chapter XIV of the Criminal Procedure Code (Act X of 1882) (except section 155) do not apply to the Police in the Presidency towns, and consequently a statement or confession made to a Presidency Magistrate does not come within section 164 and the procedure prescribed in regard to the recording of statements or confessions by that section, and (by reference) section 364 does not apply to statements and confessions recorded by a Presidency Magistrate before the commencement of the trial. But such statement or confession though not taken under section 164 is admissible in evidence against the prisoner.

*Queen-Empress* v. *Nilmadhub* (1) followed on this point.

During an inquiry before a Presidency Magistrate after the evidence for the prosecution was taken, the Magistrate examined the accused under sections 209 and 342 of the Criminal Procedure Code (Act X of 1882). The accused was examined in Maráthi, but the questions and answers were recorded in English. The Magistrate deposed at the trial that it was the invariable practice in his Court to take down depositions in English and that he could not himself have accurately recorded the prisoner's statement in Maráthi. He also deposed that the statement was correctly recorded in English, and that each question and answer when recorded was interpreted to the accused in Maráthi, and that the accused then made his mark at the end of the recorded statement. He further stated that there were at hand native subordinate officials of his Court who could have recorded the statement in Maráthi, but that he himself had not sufficient knowledge of Maráthi as to be able to read what was written by such a subordinate, or to satisfactorily check or test the correctness with which it represented the statement made by the accused.

*Held* that, assuming that it was practicable to record the statement in Maráthi, 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.

*Jai Narayan Rai* v. *Queen-Empress* (2) dissented from.

THE accused was tried on a charge of murder. In the course of the trial, counsel for the prosecution tendered in evidence two statements alleged to have been made by the accused in the presence of Mr. Hamilton, Second Presidency Magistrate. The first of these was made on the 28th February, 1896, before the commencement of the inquiry which resulted in the commitment

(1) I. L. R., 15 Cal., 595. (2) I. L. R., 17 Cal. 812.

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of the accused. The second was made on the 29th February during that inquiry, after the evidence for the prosecution had been taken, and when the accused was questioned by the Magistrate under sections 209 and 342 of the Criminal Procedure Code (Act X of 1882). The statements were recorded in the English language, but the accused spoke and was examined in Maráthi.

*Lang* (Advocate General) and *Sayani* for the prosecution.

*Robertson* for the accused.

The following evidence was given by Mr. Hamilton with reference to the taking of these statements :—

"I am Second Presidency Magistrate. The prisoner made a statement to me on the 28th February, 1896. I recorded it in question and answer. It has been correctly recorded in English. He spoke in Maráthi. It was interpreted to him correctly. Questions were put to him in Maráthi. The answers were in Maráthi and correctly taken down in English. I don't think I could myself have correctly taken it down in Maráthi. In my Court the invariable practice is to take the deposition down in English.

"At the conclusion of the evidence for the prosecution, I questioned the accused. I recorded his answers in the same way. That is, at the end of the inquiry before me. I don't think that with any pretence to accuracy I could have myself recorded the statements in Maráthi. I can read Maráthi. I can write very imperfectly. I don't think I have written it for twenty years at least.

"As regards the statement of the 28th February, each question and answer was interpreted to him from English into Maráthi. The same thing was done in regard to the latter statement. When this had been done, he made his mark. The interpreter could have taken down the first statement in Maráthi. The second statement could have been taken down in Maráthi by a subordinate of the Court. I can read Maráthi. If a subordinate had written down the prisoner's statement in Maráthi, I could not have read what he wrote, so well, or checked it independently so as to satisfy myself that he had correctly recorded what the prisoner had said."

*Robertson* :—The statements are not admissible in evidence not being recorded in Maráthi—*Jai Narayan Rai* v. *Queen-Empress*(1). Section 164 of the Criminal Procedure Code (Act X of 1882) does not apply in the Presidency towns—*Queen-Empress* v. *Nilmadhul*(2) ; *Queen-Empress* v. *Viran* (3) ; *Reg.* v. *Sivya* (4).

(1) I. L. R., 17 Cal., 862.
(2) I. L. R., 15 Cal., 595.
(3) I. L. R., 9 Mad., 224.
(4) I. L. R., 1 Bom., 219.

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*Lang* (Advocate General) *contra*. He cited *Empress* v. *Vaimbilee* (1); *Lalchand* v. *Queen-Empress* (2); section 533 of the Criminal Procedure Code (Act X of 1882).

STRACHEY, J.:—The Advocate General, on behalf of the Crown, has tendered in evidence two statements purporting to have been made by the prisoner Visram Babaji in the presence of Mr. Hamilton, Second Presidency Magistrate. The first of these was made on the 28th February, 1896, before the commencement of the inquiry in which the prisoner was committed for trial. The second was made on the 29th February during that inquiry, after the evidence for the prosecution had been taken, and appears to have been made in an examination of the accused by the Magistrate under section 209 and section 342 of the Code of Criminal Procedure (Act X of 1882). Each of the two statements is in the form prescribed by section 364, except that the questions and answers are recorded in English, and not in Maráthi, which is the language in which the accused was examined. Mr. Hamilton has been called and examined as a witness. He states that he does not think that he could have himself recorded the statements in Maráthi "with any pretence to accuracy." He says that he understands Maráthi, and that he took down the statement of the prisoner correctly in English, according to the invariable practice of his Court. On each occasion an interpreter was present, and as each question and answer was recorded in English, it was retranslated back to the prisoner in Maráthi, and he acknowledged that what was so put to him correctly expressed his meaning, and made his mark on the document at the end with his own hand. Mr. Hamilton further says that on both occasions there were at hand native subordinate officials of his Court who could have recorded the statements in Maráthi. But he adds that, although he is able, to some extent, to read Maráthi, he could not do so well enough to read what such a subordinate might have written, and satisfactorily check or test the correctness with which it represented the statement made by the accused.

Mr. Robertson, on behalf of the prisoner, objects to both the statements tendered by the Advocate General, on the ground that they are not admissible in evidence. As regards the statement

(1) I. L. R., 5 Cal., 826, at p. 829. (2) I. L. R., 18 Cal., 519.

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made on the 28th February, he contends that, if it is regarded as having been taken under section 164 of the Code, the second paragraph of that section requires that it should be recorded in the manner provided in section 364, and that as it was not proved that it was "not practicable" within the meaning of the latter section to record the examination in Maráthi, the Magistrate was not authorised to record it in English. Mr. Robertson further contends, upon the authority of certain cases which he has cited, that the irregularity in the method of recording the examination could not be cured by applying the provisions of section 533. Mr. Robertson further argues, on the authority of the decision of the Full Bench of the Calcutta High Court in *Queen-Empress* v. *Nilmadhub Mitter* (1), that section 164 of the Code of Criminal Procedure does not apply to the statements recorded by Magistrates in the Presidency towns. I should mention that the statement does not purport, on the face of it, to have been recorded under section 164, and that the memorandum made by the Magistrate at the foot of the record of the statement is not in accordance with the last paragraph of that section, as it omits to state that the statement "was read over to the person making it and admitted by him to be correct."

I shall deal first with the last point, which applies only to the statement recorded by the Magistrate on the 28th February. It appears to me that the decision of the Full Bench of the Calcutta High Court is, so far as this point is concerned, exactly applicable to the present case. I agree with Mr. Justice Prinsep in his note to the heading of Chapter XIV of the Code and again to section 155 that the grounds of the decision of the Full Bench equally apply to Bombay. The first paragraph of section 164 shows that the section does not apply generally to all statements or confessions made to a Magistrate, but only to statements or confessions made to him, either during or after "an investigation under this chapter;" that is to say, either during or after an investigation by the police under Chapter XIV. But section 1 (*a*) of the Code provides that, in the absence of any specific provision to the contrary, nothing in the Code (and, therefore,

(1) I. L. R., 15 Cal., 595.

nothing in Chapter XIV) shall apply to the police in the towns of Calcutta and Bombay. As there appears to be no specific provision to the contrary, it follows that Chapter XIV (except section 155, as to which see *Queen-Empress* v. *Nilmadhub*[1]) does not apply to the police in the Presidency towns; and consequently a statement or confession made to a Presidency Magistrate does not come within the words of section 164: "a statement or confession made to him in the course of an investigation under this chapter or at any time afterwards." If that is so, then the procedure prescribed in regard to the recording of statements or confessions by section 164 and (by reference) section 364 does not apply to statements or confessions recorded by a Presidency Magistrate before the commencement of the trial.

The question then arises, whether the statement or confession, though not taken under section 164, is admissible in evidence. The decision of the Calcutta Full Bench is a direct authority in the affirmative. The Court there held that "it being proved that the whole of the statements contained in the documents were either the actual words spoken by the prisoner, or were accepted by him as representing the true meaning of what he had said, and as the whole document is signed by him with his own hand, the whole of the admissions contained in the document were strictly proved to have been made by him, and were admissible against him under the Indian Evidence Act." The judgment specially refers to section 26 of that Act. In the present case the statements contained in the document were not "the actual words spoken by the prisoner," but the evidence of Mr. Hamilton satisfies me that they were "accepted by him as representing the true meaning of what he had said," and "the whole document is signed by him with his own hand." I think that I ought to follow the decision of the Full Bench, with which I agree, and I, therefore, over-rule the objection as to the statement made on the 28th February, and I admit the document tendered by the Advocate General.

I now come to the statement recorded by the Magistrate in the course of the inquiry, on the 29th February. There can be no doubt, in regard to that statement, that the provisions of section

(1) I L. R., 15 Cal., at p. 606.

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364 of the Code were applicable. The first question is whether it was "not practicable" to record the statement in Maráthi. Having regard to Mr. Hamilton's statement that he could not write Maráthi with any pretence to accuracy, I am satisfied that it was not practicable for the Magistrate to personally record the examination in that language. Mr. Robertson, however, contends that there is nothing to show that it was not practicable for the examination to be recorded in Maráthi by a native subordinate. On the other hand, the Advocate General contends that the record, under section 364, must be made by the Magistrate personally, unless he is physically disabled from doing so. I think that would be going too far. The second paragraph of section 364 requires the Magistrate to certify that "the examination was taken in his presence and hearing:" it does not require a certificate that it was recorded by his own hand. The third paragraph speaks of "cases in which the examination of the accused is not recorded by the Magistrate or Judge himself," and not of cases in which the Magistrate or Judge is physically disabled from recording the examination himself. The recent decision of the Calcutta High Court in *Queen-Empress* v. *Razai Mia*[1] distinctly implies that a *mohurrir* may record a confession or statement, under section 364, in a case where the only disability of the Magistrate is that he cannot write the language well. In *Fekoo Mahto* v. *The Empress* [2] a confession was recorded before a Deputy Magistrate by one of his clerks under section 164, but the Court does not say in its judgment that this was irregular. In *Queen-Empress* v. *Buchanna*[3] it was held that the Magistrate was justified in recording the statement in Hindustáni, as the statement was made on a close holiday, "and there was no native official at hand to record the statements of the appellants in their own tongue." Mr. Justice Tyrrell says that "the exception is when the statement is made to an officer who cannot record it in Hindustáni, and has not at hand the means of getting it so recorded. It is a question of fact in each case whether an amanuensis could or could not readily be had to record the statement in Hindustáni." That implies that if a

(1) I. L. R., 22 Cal., 817. (2) I. L. R., 14 Cal., 539.
(3) Allahabad Weekly Notes, 1891, p. 55.

native official or amanuensis had been obtainable, it would have been "practicable" within the meaning of the section 364 to record the statement in Hindustáni. In the present case, the Magistrate has deposed that the statement could have been taken down in Maráthi by a subordinate of his Court. Assuming, however, that it was practicable to record the examination in Maráthi, and that consequently it was irregular to record it in English, the further question arises, what is the effect of the irregularity, having regard to the concluding words of section 533? Upon this point Mr. Robertson referred to *Jai Narayan Rai* v. *Queen-Empress*(1), the passage at pp. 607-608 of the report of *Queen-Empress* v. *Nilmadhub*(2), *Queen-Empress* v. *Viran* (3) and *Reg.* v. *Shivya* (4). The first of these decisions has been doubted in *Lalchand* v. *Queen-Empress*(5). With all respect for the learned Judges who decided the case of *Jai Narayan Rai* v. *Queen-Empress*, I cannot agree with them that the scope of section 533 is limited to any particular kinds of non-compliance with section 364, that a neglect to sign the confession or the certificate or to certify the facts requiring to be certified would be an "omission" curable by section 533, but that a neglect to record the examination in the prisoner's own language would be an "infraction" or "direct violation," not curable by the plainest evidence that the prisoner had not been injured as to his defence on the merits. Neither the language nor the object of section 533 appears to me to justify that distinction. The passage cited from the Full Bench decision is an *obiter dictum* not necessary to the decision, and not going beyond the expression of "very grave doubts." The Madras case is, in my opinion, inapplicable. It merely lays down that section 533 does not apply where there has been a total and not merely a partial non-compliance with the provisions of sections 164 and 364. The case of *Reg.* v. *Shivya* is also inapplicable. It was decided with reference to a different question arising under the Criminal Procedure Code of 1872. I agree with the opinion expressed by Sir John Edge, C. J., and Mr. Justice Blair in *Queen-Empress* v. *Anta*(6) that "the

(1) I. L. R., 17 Cal., 862.
(2) I. L. R., 15 Cal., 595.
(3) I. L. R., 9 Mad., 224.
(4) I. L. R., 1 Bom., 219.
(5) I. L. R., 18 Cal., 549.
(6) All. Weekly Notes (1892), p. 60.

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object of section 533 was to prevent justice being frustrated by reason of the Magistrate not having fully complied with the provisions of section 164 or of section 364." In that case the Magistrate took down the confession in English, though he could have taken it down in the vernacular. He deposed that he had re-translated it, word by word, to the accused, who had acknowledged it to be correct, and had made his mark at the end. The confession was attested by the Magistrate in the usual way. It was held to be admissible in evidence, the error not having injured the accused as to his defence on the merits. The case of *Queen-Empress* v. *Bachanna*, to which I have already referred in connection with another point, is an authority to the same effect. In the present case, even assuming that the examination of the accused was irregularly recorded in English instead of Maráthi, I am satisfied by Mr. Hamilton's evidence that the accused was not injured as to his defence on the merits.

For these reasons I overrule the objection as to the statement made on the 29th February, and I admit the document. It will be obvious that the same reasons would equally justify the admission under section 164 of the statement made on the 28th February if section 164 were held applicable to that statement.

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## ORIGINAL CIVIL.

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*Before Sir C. Farran, Kt., Chief Justice, and Mr. Justice Candy.*

1896. *December* 18.

LUXUMON NANA PATIL (ORIGINAL DEFENDANT), APPELLANT, *v.* MOROBA RAMCRISHNA AND ANOTHER (ORIGINAL PLAINTIFFS), RESPONDENTS.*

*Civil Procedure Code (Act XIV of 1882), Sec. 379—Suit for injunction or damages—Payment into Court by defendant to satisfy plaintiffs' claim—Costs in such case—Costs—Practice—Procedure.*

The plaintiffs sued alleging certain windows in their house to be ancient windows and complaining that a building in course of erection by the defendant would, when completed according to the building plan, obstruct the light through the said windows. In his written statement the defendant denied that the plaintiffs' windows were ancient and that the plaintiffs were entitled to the light and air as an easement. At the time of filing his written statement the defendant paid into Court the sum of Rs. 200, which

* Suit No. 517 of 1895; Appeal No. 924.