APPELLATE CRIMINAL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

QUEEN-EMPRESS *v.* RAGHU.*

1893.
March 14.

Criminal Procedure Code (Act X of 1882), Sec. 533—Confession—Confession not signed by the accused—Admissibility of such confession—Parol evidence admissible to prove the terms of the confession.

Section 533 of the Code of Criminal Procedure (Act X of 1882) is intended to apply to all cases in which the directions of the law have not been fully complied with. It applies to omissions to comply with the law as well as to infractions of the law.

Queen-Empress v. *Visram Babaji*(1) followed.

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

The accused was charged with murder. At the trial a confession made by him before the committing Magistrate was tendered in evidence against him. The Sessions Judge rejected the confession as inadmissible, as it did not bear the mark or signature of the accused, and, as there was no other reliable evidence to bring home the charge to the accused, he was acquitted.

Held, reversing the order of acquittal, that though the record of the confession was inadmissible, parol evidence could be given of the terms of the confession, and those terms, when proved, might be admitted and used as evidence against the accused under section 533 of the Code of Criminal Procedure (Act X of 1882). The accused was, therefore, ordered to be retried.

APPEAL by the Local Government from an order of acquittal passed by C. H. Jopp, Sessions Judge of Ahmednagar.

The accused was charged with the murder of his wife and child.

He was alleged to have made a confession before the committing Magistrate.

The confession was taken down in the Maráthi language, in the form of question and answer, by a clerk in the presence of the Magistrate who made a memorandum in English.

The confession did not bear the mark or signature of the accused.

At the trial in the Court of Session the confession was retracted by the accused. Thereupon the prosecution examined the

* Criminal Appeal, No. 24 of 1893.

(1) (1893) 21 Bom., 405. (2) (1890) 17 Cal., 862.

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clerk who had written the confession. He stated that he wrote down what the accused said, that the statement was read over to the accused, and admitted by him to be correct, and that he told a kulkarni to get the accused to make his mark, but he did not do it.

The Sessions Judge held that the confession was inadmissible in evidence, and there being no other evidence sufficient to connect the accused with the offence, the Sessions Judge, concurring with the assessors, acquitted the accused. The following extract from the judgment gives the reasons for the acquittal :—

"The error of the Magistrate in omitting to ask the accused to sign the statement was, having regard to the probable intention of the Legislature, of such a nature as may have seriously prejudiced the accused in his defence on the merits. It may have deprived the accused of the opportunity given him by the law of denying the accuracy of the confession, and the statement is inadmissible in evidence under section 91 of the Evidence Act and under section 533 of the Code of Criminal Procedure, which so far from affording a remedy for a defect of this kind expressly excludes from the operation of this section errors which have injured the accused as to his defence on the merits. It may be noted that as the kulkarni, who was told to take the accused's signature, has not been examined, it cannot be pronounced for certain that the accused did not at the last moment refuse to make his mark and deny that the statement was correct.

"As the confession cannot be considered against the accused, and as the evidence in the case is insufficient by itself to establish the accused's guilt, it is plain that it is not proved that the accused caused the death of Ambi or of his infant daughter.

"The Court, agreeing with the assessors, directs that the said Raghu Mahadu be acquitted and discharged."

Against this order of acquittal the Local Government appealed to the High Court.

Ráo Bahádur *Vasudev J. Kirtikar*, Government Pleader, for the Crown :—The Sessions Judge was wrong in holding that the confession of the accused was inadmissible in evidence merely because it was not signed by the accused. *Reg.* v. *Bai Ratan*[1] is not applicable to the present case. That ruling is, no doubt, followed in *Reg.* v. *Shivya*[2], *Reg.* v. *Apa*[3] and *Imp.* v. *Sirsapa*[4]. But all these cases were decided under the old Code of Criminal

(1) (1873) 10 Bom. H. C. Rep., 163.
(2) (1876) 1 Bom., 219.
(3) (1873) 10 Bom. H. C. Rep., 181, foot note.
(4) (1877) 4 Bom., 15.

Procedure (Act X of 1872). But the law is now altered by section 533 of the present Code. Such an omission can now be cured by taking evidence that the accused duly made the statement recorded, and when the statement is so proved, it is admissible notwithstanding the provisions of section 91 of the Evidence Act. In accordance with this section the statement of the accused has been proved in this case by the clerk who wrote down what he said. The clerk deposes that the whole statement was read over to the accused, who admitted it to be correct. The Sessions Judge holds that the omission to ask the accused to sign the confession may have prejudiced him in his defence. But of this there is no proof. The statement is, therefore, admissible in evidence, and should be taken into consideration against the accused.

M. B. Chaubal, for accused :—No doubt the Full Bench ruling in *Bai Ratan's* case[1] and the cases in which it is followed are all decisions under the Code of 1872, but the principle laid down in those cases still holds good under the present Code. The reason why the accused is required to sign a confession, is that the law gives him a *locus penitentiæ*, a final opportunity, before the completion of the record, of showing that the confession was not voluntary, or made under improper influences, or that it is not accurately recorded. The accused is deprived of this opportunity when he is not asked to sign the incriminating statement. If it is not signed, the record is incomplete. Section 533 of Act X of 1882 was not intended to cure such a defect. When a confession is complete, the law requires the Magistrate to make certain endorsements at the foot of the confession. If any of these endorsements are omitted, section 533 would allow evidence to be taken to show that the provisions of the law were substantially complied with ; but it cannot apply where the statement is not complete on the part of the person making it. The conviction would be based, not on what the accused himself had actually stated, but upon evidence of what he intended to state. Such a confession is no confession and cannot be used against the accused. Even if evidence be taken under section 533, it must show that the confession was *duly* made by the accused. The word "duly"

(1) (1873) 10 Bom. H. C. Rep. 136.

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means in accordance with the provisions of the law in that respect, and where the accused is not asked to sign what he has stated, or being asked, has refused to do so, no evidence can prove that the confession was duly made.

PARSONS, J.:—This is an appeal by the Local Government against the order passed by the Sessions Court of Ahmednagar, acquitting Raghu Mahadu of the offence of murder with which he was charged. The chief ground of the appeal is that the Sessions Judge improperly rejected, as inadmissible in evidence, the confession made by the accused to the committing Magistrate.

It is somewhat difficult to ascertain what were the precise reasons which led the Sessions Judge to hold that the confession was inadmissible, and could not be treated as evidence, as he did after he had examined the kárkún who took it down in writing, and after he had allowed it to be read and recorded in the case. It is true that the Magistrate had not fully complied with the requirements of the law in recording the confession, for he had not obtained the mark of the accused upon it, but the Sessions Judge evidently thought that this omission was not fatal in itself, for he says that the argument of the pleader to that effect does not commend itself to him. It seems that the omission plus the prejudice that the Sessions Judge thinks was caused to the accused in his defence by the omission was the reason which led to the rejection of the confession, for the Sessions Judge says: "The error, therefore, of the Magistrate in omitting to ask the acused to sign the statement was, having regard to the probable intention of the Legislature, of such a nature as may have seriously prejudiced the accused in his defence on the merits. It may have deprived the accused of the opportunity given him by the law, of denying the accuracy of the confession, and the statement is inadmissible in evidence under section 91 of the Evidence Act I of 1872 and under section 533 of the Code of Criminal Procedure (Act X of 1882), which so far from affording a remedy for a defect of this kind expressly excludes from the operation of the section errors which have injured the accused as to his defence on the merits."

It becomes, therefore, necessary to ascertain exactly what section 533 of the Code of Criminal Procedure means. In the present

case we have a confession recorded under section 364 tendered in evidence, but it is found that one of the requirements of the section has not been observed, *viz.*, the record is not signed by the accused. On this account the record is inadmissible in evidence. Under the provisions of section 91 of the Indian Evidence Act, oral evidence would be inadmissible to prove the terms of the confession, and this was the law under the Code of 1872 as regarded confessions taken otherwise than in the course of a preliminary inquiry. (See the case of *Bai Ratan*[1] and *Reg.* v. *Daya Anand and Ranchod Khalpo*[2].) The Code of 1882, however, has in section 533 introduced an important alteration. It expressly allows oral evidence to be given that the accused duly made the statement recorded, and it provides that notwithstanding any thing contained in the Indian Evidence Act, section 91, such statement shall be admitted if the error has not injured the accused as to his defence on the merits. This seems to me to be capable of but one meaning. I can see no ground for the nice distinction drawn in *Jai Narayan Rai* v. *The Queen-Empress*[3] between omissions to comply with the law and infractions of it. That ruling was doubted in *Lalchand* v. *Queen-Empress*[4], dissented from in *Queen-Empress* v. *Visram Babaji*[5], and I agree with Strachey, J., entirely on this point, and I think that section 533 is intended to apply to all cases in which the directions of the law have not been fully complied with.

The result is this. The record of the confession is inadmissible owing to a failure to comply with the law, and nothing can make it admissible, but parol evidence may be given of the terms of the confession, and those terms, if and when proved, may be admitted and used as evidence in the case. As regards confessions made and recorded by a Magistrate in the course of a preliminary enquiry, there does not seem to have been any material alteration in the law. Section 246 of the Code of 1872 permitted evidence to be given of the statement made where the record was informal. In the case of *Reg.* v. *Deva Dayal*[6], the Judges deal with such a confession and use it in evidence although it is not signed,

(1) (1873) 10 Bom. H. C. Rep., 166.
(2) (1874) 11 Bom. H. C. Rep., 44.
(3) (1890) 17 Cal., 862.
(4) (1891) 18 Cal., 549.
(5) (1896) 21 Bom., 495.
(6) (1874) 11 Bom. H. C. Rep., 237.

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(*Reg.* v. *Shivya*[1]) or when the statement was not authenticated by the Magistrate's endorsement of its accuracy. When the certificate was not recorded at the time, but was appended after some days, it was similarly held that the irregularity was one which made the confession inadmissible (*Empress* v. *Daji Narsoo and Govinda Natha*[2]). The strictness of these rulings apparently suggested the change in the wording of the present section 533. The other High Courts have not interpreted the old section with the same strictness. In *Empress* v. *Ramanjyya*[3] the decision of this Court noted above (*Reg.* v. *Shivya*) was not followed, and that High Court held that oral evidence was admissible. In *Empress of India* v. *Bhairon*[4], failure to append the memorandum in due form was held not to render the confession inadmissible. In the *Queen* v. *Kala Chand Pal*[5] similarly, the High Court of Calcutta sent the case back for the examination of the Magistrate with a view to remove the defects caused by non-compliance with the provisions of the old section 346. In *Empress* v. *Munshi Sheikh*[6] the High Court of Calcutta held that the defect represented by the taking down of the statement in the form of narrative, and not in the form of question and answer, did not prejudice the defence of the accused. The strictness of the ruling in *Jai Narayan Rai* v. *The Queen-Empress*[7] was not approved by the same Court in *Lalchand* v. *Queen-Empress*[8] when the defect, in both cases, was represented by the answers being taken down in a language other than that in which the accused gave them to the Magistrate. In *Reg.* v. *Deva Dayal*[9], this Court held that failure to sign the statement did not affect the admissibility of it in evidence, if it did not prejudice the prisoner. The true principles which should govern such cases were clearly laid down in *Queen-Empress* against *Viran*[10]. As stated there, section 533 merely gives legal sanction to the maxim "*Omnia præsumuntur rite esse acta*". When no attempt has been made to comply with the provisions of the law, section 533 will

(1) (1876) 1 Bom., 219.
(2) (1882) 6 Bom., 283.
(3) (1878) 2 Mad., 5.
(4) (1880) 3 All., 338.
(5) (1875) 24 Cal. W. R., 29 (Cr. Rul.)
(6) (1882) 8 Cal., 616.
(7) (1890) 17 Cal., 862.
(8) (1891) 13 Cal., 519.
(9) (1874) 11 Bom. H. C. Rep., 237.
(10) (1886) 9 Mad., 224.

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not render a confession admissible. Judging by this test, it cannot be said in the present case that the Magistrate made no attempt to comply with the provisions of the law. He made a memorandum in English. He put the questions and answers which were taken down in his presence by the clerk, and these were read to the accused, and admitted by him to be correct. The memorandum and certificate are all in proper form. The failure of the kulkarni to make the mark of the accused was apparently not noticed through inadvertence. It does not appear that there is any room for presuming, as the Sessions Judge has apparently done, that the accused might have changed his mind, and that admitting the oral evidence of the Magistrate and of the kulkarni under section 533 would prejudice the defence on the merits. It must be admitted that the clerk's evidence by itself was insufficient for the purposes for which it was given. The prosecution should have given the evidence of the Magistrate himself who put the question, and recorded the answer. It is also not clear how the prosecution could not find out the whereabouts of the kulkarni, who was asked by the clerk to make the mark for accused. Such further evidence appears to me to be clearly admissible under section 533, and in such a case as this, where the confession is the only reliable evidence, it seems to be necessary, in the interests of justice, that this evidence should be received, and the case retried. I would accordingly reverse the order of acquittal and direct such retrial under section 423.

APPELLATE CIVIL

Before Mr. Justice Parsons and Mr. Justice Ranade.

1898. *March* 21.

TOTAWA AND ANOTHER (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* BASAWA AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

Hindu law—Inheritance—Daughters—Succession among daughters—The poorest daughter entitled to inherit the whole estate—Comparative poverty.

In the Presidency of Bombay, the principle of law which governs the succession of daughters *inter se* as heirs to their father's estate is, that though the Courts ought not to go minutely into the question of comparative poverty, yet where the difference in wealth is marked, the whole property passes to the poorest daughter.

* Second Appeal, No. 1177 of 1897.