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Khan's representative has not been sustained, namely, that of showing that this was a proper transaction considering the relationship of the parties.

Then it is said that although Rani Sadha Bibi revoked this deed in 1872 by a registered petition, it was a deed *in præsenti* which could not be revoked, at all events in so far as the endowment was in the nature of a dedication of her property to the expenses of her husband's and her own tomb, and that the petition itself recognised at that time the continuing existence and validity of the endowment. But if the instrument was bad in the beginning, at all events as regards the benefit which Dalmir Khan took under it, it is difficult to see how his representative is prejudiced by its revocation in 1872, which if valid puts an end to the instrument, and if invalid could not set up an instrument that was bad in itself. Their Lordships are clearly of opinion that the instrument was bad *ab initio;* that it was improperly obtained by a person in a fiduciary character; and that even if there were no onus on Dalmir Khan's representative to prove the honesty of the transaction, all the facts of the case go to show that there was active undue influence.

Upon these grounds their Lordships will humbly advise Her Majesty that this appeal should be dismissed, and that the judgment of the Court below should be affirmed. The appellant must pay the costs of this appeal.

Appeal dismissed.

Solicitors for the appellant: Messrs. *T. L. Wilson & Co.*

Solicitors for the respondent: Messrs. *Barrow and Rogers.*

C. B.

CRIMINAL APPELLATE.

Before Mr. Justice Prinsep and Mr. Justice Beverley.

1891 *March* 17.

LALCHAND (APPELLANT) *v.* QUEEN-EMPRESS (RESPONDENT).*

Confession—Criminal Procedure Code (Act X of 1882), *ss.* 164, 364 *and* 533—*Examination of accused—Defect in confession—Confession not recorded in language in which it is given, admissibility of.*

Where a confession given in Hindustani was taken before a Subdivisional Magistrate, and was recorded by the Court Officer in Bengali, that being the

* Criminal appeal No. 165 of 1891, against the order of Syed Ameer Hossein, Presidency Magistrate of Calcutta, Northern Division, dated the 16th of February 1891.

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language of the Court, and where it appeared that the Magistrate himself was a Mahomedan and it was contended that he must be taken to have been able to record the confession in the language in which it was given, there being no evidence to the contrary, *held*, in the absence of such evidence the Court should presume that the proceedings of the Subdivisional Magistrate were conducted in accordance with law, and that in the absence of anything to show that it was practicable for the officers of his Court to record the statement in Urdu, it could fairly be held that the Subdivisional Magistrate found that was impracticable, and adopted the alternative allowed by law of having the confession recorded in the Court language.

Jai Narain Rai v. *The Queen-Empress* (1) doubted.

THE appellant in this case, Lalchand, was convicted by the Presidency Magistrate of the Northern Division of offences under sections 380 and 411 of the Penal Code and sentenced to one year's rigorous imprisonment. The facts of the case were as follows:—

The complainant, Sookhraj Roy, a minor under the Court of Wards, who resided in Bhagulpur, came down to Calcutta in January 1890 and put up at the house of his father-in-law, Roy Dhunput Sing Bahadur. He was possessed of, amongst other property, a *surpech* set with diamonds, emeralds, rubies and pearls; a necklace of pearls and emeralds, and another of diamonds and emeralds. These were kept in a box in his room, and on one occasion he went out sight-seeing, leaving the key of the box in the room; Lalchand also being there. On his return he found the box open and the above-mentioned ornaments and others gone. Nothing was discovered till November 1890, when some of the jewels and of the ornament, said to be a portion of the stolen property, were seen by a witness in the case, who gave information. Thereupon a Sub-Inspector of the Calcutta Police, Preonath Mookerjee, was deputed to Azimgunge and Murshidabad, and he recovered some jewels, said to be portion of the stolen property. Thereafter Superintendent Robertson was sent up, and the appellant and a man named Meher Chand were arrested and taken before the Subdivisional Magistrate, Moulvie Mahomed Nubbee, on the 20th November. On that occasion the appellant appeared to have made a statement to the Magistrate, which was recorded in English, but this did not amount to a confession. On the 22nd November both the accused were taken before the Subdivisional Magistrate, and on that occasion

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a further statement amounting to a confession was made by the appellant. This statement was made in Urdu, but was recorded by the Magistrate in English, the document itself showing that it purported to have been recorded under the provisions of section 364 of the Code of Criminal Procedure. At the same time that the Magistrate put down the statement, the Court Officer also recorded it in Bengali. On being placed before the Presidency Magistrate both accused pleaded not guilty, and a number of witnesses were examined for the prosecution, and the jewels which had been found were produced and *spoken* to and identified. The Subdivisional Magistrate, Moulvie Mahomed Nubbee, was also called as a witness for the purpose of rendering the statement recorded by him in English admissible in evidence, as the certificate required by section 164 of the Code had not been attached to the document. From his evidence it appeared that he believed the statement to have been voluntarily made, and that he recorded it under sections 164 and 364 of the Code; but it also appeared that very much more had been stated by the appellant than had been recorded. No evidence was given to show that he could not have recorded the statement in Urdu. Upon the evidence the statement recorded in English was admitted in evidence by the Presidency Magistrate, and it also appeared from the record that the statement as recorded in Bengali was also put in, but throughout the trial before the lower Court and up to the reply by Counsel for the appellant before the High Court, the latter document was not referred to by any one as the confession of the accused, and the only document referred to or relied on by the prosecution or the Magistrate was the statement recorded in English by the Subdivisional Officer himself. Before the Presidency Magistrate, Counsel objected to the admissibility of this document, but the objection was overruled. The material portion of the judgment of the lower Court, so far as it affected the appellant, was as follows:—

"The defendants were arrested, and on the 20th November they were taken to the Subdivisional Magistrate of Lal-bag in the Murshidabad district. On the 22nd November the first defendant made a statement to the Deputy Magistrate which amounts to a confession of his crime.

The defendants plead not guilty. On the case for the prosecution being closed, they, through their counsel and pleader, informed the Court that they did not wish to examine any witness for the defence.

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The evidence adduced on behalf of the prosecution satisfactorily proves that the following articles recovered by the police belong to the complainant, and that they found portions of the stolen *surpech* and the two necklaces.

The evidence satisfactorily traces these articles to the first and second defendants. The Magistrate of Lal-bag (Moulvie Mahomed Nubbee) gives the following deposition as to what had happened in his Court on the 22nd November:—

'I next saw him (Lalchand) on the 22nd November. He was produced before me by Superintendent Robertson. He was accompanied by the second defendant, Meher Chand (identifies). 54 diamonds, 8 emeralds, a wire containing 4 pearls, one ruby, a gold catch, one gold pendant with emerald, one *peitch* set with 8 diamonds and one emerald were produced. I marked them (as Exhibit J). Defendant No. 1 said that they had been in his possession, and that he had made them over to defendant Meher Chand, his father-in-law, about 10 months ago. On my asking him where he had got them from, he said that he had got the things in a box from the Dhurrumsallah of Dhunput Baboo at Burtolla Gullee in Calcutta on the second storey of the house, and he said that the key of the box was lying a little way from the box. He further said that there were 7 pieces of diamonds, a pair of gold *tora*, and 300 small pearls. He said that he opened the box and took the articles from it, and that he had sold the 7 pieces of diamonds and 20 rutiees of diamonds to jewellers in Calcutta, whose names he did not know.'

While the Deputy Magistrate recorded the confession of the first defendant, he forgot to attach the certificate prescribed by section 164, Criminal Procedure Code, to the statement. It was therefore necessary to examine him as a witness to prove the statement and to say whether the statement made by the defendant was a voluntary one.

Mr. Henderson, his counsel, contends that under the ruling of the High Court in *Jai Narain Rai* v. *The Queen-Empress* (1), the confession should not be admitted. But I think that there can be no question as to the admissibility of this confession under section 26 of the Evidence Act under the Full Bench ruling in the case of *Empress* v. *Nilmadhub Mitter* (2).

Besides, in addition to the above confession, there is ample evidence on the record to bring the charges home to both the accused.

I therefore find the first defendant, Lalchand, guilty under sections 380 and 411, Indian Penal Code, and sentence him to one year's rigorous imprisonment."

Against that conviction and sentence Lalchand appealed to the High Court, the main ground being that the confession as recorded by the Subdivisional Magistrate had been improperly admitted in evidence; that it appeared from the evidence in the case that it

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had not even been made voluntarily; and that, apart from it, there was no sufficient evidence upon which to base the conviction.

Mr. *Henderson* and Baboo *Dwarka Nath Chuckerbutty* for the appellant.

Mr. *Phillips* (Standing Counsel) for the Crown.

Mr. *Henderson* (upon the question of the admissibility of the confession).—The case is precisely similar to that of *Jai Narain Rai* v. *The Queen-Empress* (1), and is distinguished from the case of *Queen-Empress* v. *Nilmadhub Mitter* (2), the decision in which was based on the ground that section 164 did not apply to Calcutta where confessions need not be reduced into writing. Here the statement was made in Urdu and recorded in English by a person who knew Hindustani perfectly well, and it is not shown that the statement could not have been recorded in the language in which it was made. Although there was a certificate under section 364, there was none under section 164, and under the circumstances, and having regard to the decision in *Jai Narain Rai's* case, the defect is one which cannot be cured. Apart from the confession, there is no evidence to support the conviction.

Mr. *Phillips*.—It is not necessary that every word of what is uttered by an accused should be recorded by the Magistrate, and here the substance was taken down, which is sufficient. If *Jai Narain Rai's* case be rightly decided, I cannot contend that this confession is admissible in evidence, but I would submit that the Judges in that case were wrong in laying down the principle they did. Section 533 was intended to prevent the exclusion of confessions such as this, owing to mere slips by Magistrates, and it shows that the Magistrate is called not to prove the form of the document or to give the certificate, but to depose to the fact that the confession was one really made by the prisoners.

Mr. *Henderson* in reply.

During the reply *Beverley, J.*, pointed out that it would appear that the statement as recorded in Bengali was the real statement, and that what was recorded by the Magistrate himself was only a memorandum; and in answer to that Mr. *Henderson* stated that throughout the case it had never been even suggested by the prosecution that this was so, and that the lower Court had

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gone entirely on the statement as recorded by the Magistrate. He further contended that the memorandum referred to in section 364 was only a note of the statement, and not the statement itself, as the Magistrate here appeared and purported to have recorded.

The judgment of the High Court (PRINSEP and BEVERLEY, JJ.) was as follows:—

The appellant has been convicted by the Presidency Magistrate of the Northern Division of theft in a house, and of dishonestly receiving stolen property knowing it to be such, under sections 308 and 411 of the Indian Penal Code. The property stolen consists of some ornaments and precious stones belonging to Sookhraj Roy, a boy, under the Court of Wards, of considerable means. These articles were deposited in a box in his house in Calcutta, and were left by him there when he went out sight-seeing. The appellant was at that time in his room, and some relation or dependent who was lying sick. This fact is mentioned because it shows that the appellant had an opportunity to commit the theft, if that offence is otherwise proved against him.

The evidence against the appellant consists in his having given information to the police, in consequence of which some of the precious stones, identified by two witnesses, were produced by a person who stated that he received them from the appellant. There is also evidence in a confession said to have been made by him to the Subdivisional Magistrate of Lal-bag, in the district of Murshidabad, where he was arrested.

The Magistrate no doubt has principally relied upon this confession, which was recorded under section 164 of the Criminal Procedure Code. That statement was recorded in Bengali, the language of the Court, and a memorandum as required by law was made by the Subdivisional Magistrate himself in English. Because, however, the certificate required by section 164, to the effect that the statement was voluntarily made, was not appended to that statement, the Subdivisional Magistrate was summoned to give evidence so as to make the statement admissible in accordance with the provisions of section 533 of the Code of Criminal Procedure. In the course of his examination the Subdivisional Magistrate deposed that the statement was made by the prisoner in Hindustani. No notice was apparently taken of this, nor was he called upon to

explain why the statement was not recorded in that language, or whether it was impracticable to do so.

It is contended in appeal before us that as the confession was not recorded in the language in which it was made, it is inadmissible in law; that section 533 cannot be applied so as to make it admissible; and that it does not appear to have been voluntarily made.

On this last point we may state that, so far as the evidence goes, the confession appears to have been voluntarily made, and there is nothing in our opinion in proof of the contrary. Hindustani, the language in which the appellant is said to have made that statement, is not the Court language of Murshidabad; and therefore ordinarily we take it that the ministerial officers of that Court would not be competent to record it in that language. We are, however, asked to conclude that because the Subdivisional Magistrate was a Mahomedan gentleman, he must have sufficient acquaintance with Urdu to enable him to record a statement in that language. We are not prepared to make any such presumption. It appears to us that in the absence of any evidence to the contrary, we should presume that the proceedings of the Subdivisional Magistrate were conducted in accordance with law; and that in the absence of anything to show that it was practicable for the officers of his Court to record the statement in Urdu, we can fairly hold that the Subdivisional Magistrate found that this was impracticable, and adopted the alternative allowed by law, namely, to have it recorded in the Court language, that is, Bengali. We have been referred to the case of *Jai Narain Rai* v. *The Queen-Empress* (1) in which it seems to have been held that if a statement by an accused person, purporting to have been recorded under section 164, is not recorded in the language in which it is made, and it is not shown that it was impracticable to record it in that language, the defect cannot be cured by section 533 of the Code, and that oral evidence of such confession is inadmissible.

It is unnecessary for us in the present case to do more than say that, as at present advised, we are unable to agree in the view of the law which formed the grounds of that judgment. We do not, however, think it necessary to refer the matter to a Full Bench, because, for the reasons already stated, we think that this objection cannot in this case be sustained. We also think that the appeal

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should be dismissed on other grounds. We think that the evidence proves that on information given by the prisoner to the police a portion of the stolen property, as proved by the complainant and another witness, was found. We have been asked to disbelieve this evidence, because from the nature of the articles they were not capable of easy identification. It is impossible for us sitting on appeal to give weight to such an objection. That evidence was believed by the Magistrate before whom it was given, and it was in no way shaken in cross-examination. We may further observe that the appellant has not attempted to prove that these articles belonged to him, or to explain how they came into his possession. No doubt the Magistrate in convicting the appellant relies principally on the confession made to the Subdivisional Magistrate of Murshidabad, but he states in his judgment that in addition to that confession there is ample evidence on the record to bring the charges home to the accused. From this we conclude that he relies also on the evidence to which we have adverted. We therefore dismiss the appeal.

Appeal dismissed.

H. T. H.

FULL BENCH REFERENCE.

Before Sir W. Comer Petheram, Knight, Chief Justice, Mr. Justice Pigot, Mr. Justice O'Kinealy, Mr. Justice Macpherson, and Mr. Justice Ghose.

1891
June 8.

BAIJ NATH TEWARI (DEFENDANT) *v.* SHEO SAHOY BHAGUT AND OTHERS (PLAINTIFFS).*

Registration—Act III of 1877, *ss.* 5, 6, 7, 21, 22, 28, 30, 31, 35, 49, *and* 60—*Description of property misleading—Registration of document referring to land not in the Subdistrict of Registering Officer a Sub-Registrar—Transfer of Property—Act IV of* 1882, *s.* 59.

Certain property was described in a mortgage bond as bearing towji No. 10, as paying a sudder jama of Rs. 719, and as lying within the

* Full Bench Reference on Special Appeal No. 596, of 1890, against the decree of Baboo Gopal Chunder Bose, Officiating Subordinate Judge of Zilla Bhagulpur, dated the 26th of February 1890, reversing the decree of Baboo Gobind Deb Mukerji, Munsiff of Banka, dated the 25th of May 1890.