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the person who performed the *Sradha* and set the animal at liberty, and he regards it as a moral duty to feed it after it has been set at liberty.

Even if it be true that the villagers do not use the bull for breeding purposes without asking permission of the Rajbari people, I think this is only a matter of courtesy on their part, and ought not to be construed as evidence of any property in the animal remaining in those who set him at large.

In support of the 5th conclusion at which I have arrived, I rely upon Mr. Kilby's argument which I have summarised above, and to which I have nothing to add. I am therefore of opinion that the rule should be discharged.

MACPHERSON, J.—I agree and would discharge the rule.

H. T. H. *Rule discharged.*

CRIMINAL APPEAL.

Before Mr. Justice Macpherson and Mr. Justice Hill.

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JAI NARAYAN RAI *v.* THE QUEEN-EMPRESS.*

Confession—Criminal Procedure Code (Act X of 1882), sections 164, 364, and 533—Evidence Act (I of 1872), section 91—Examination of accused—Defect in confession—Confession not recorded in language in which it is given, admissibility of in evidence.

An accused, when in custody, made a confession to a Deputy Magistrate, in the presence of a Sub-Inspector, and during an investigation being held into a case of murder, under the provisions of chapter XIV of the Criminal Procedure Code. The confession was recorded by the Deputy Magistrate in English, though made in Hindi, which the Deputy Magistrate perfectly well understood and could write. It purported to have been recorded under the provisions of section 164, and was in reply to one question which was set out. The record bore the signatures of the accused and of the Deputy Magistrate, as well as the certificate as required by the section. It occupied about five pages of foolscap. At the trial the Sessions Judge excluded this confession on the ground that, not having been recorded in the language in which it was made, and there being no reason why it should not have been so recorded, the document was inadmissible in evidence. He, however, called the Deputy Magistrate as a witness and admitted in evidence his statement as to what the accused told him. This evidence, which occupied only a few

* Criminal appeal No. 223 of 1890 against the order passed by A. C. Brett, Esq., Sessions Judge of Tirhoot, dated the 30th of January 1890.

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lines, was to the effect that the accused told him he had committed the murder, and on this evidence alone the accused was convicted. On appeal—

Held that the provisions of section 164 read with section 364 are imperative as to the language in which a confession is to be recorded, and that section 533 does not contemplate or provide for any *non*-compliance with the law in this respect, and that, therefore, as it was not impracticable to record the confession in Hindi, the Sessions Judge was right in refusing to admit the document in evidence.

Held further that the Sessions Judge erred in admitting the oral evidence of the Deputy Magistrate as to what the accused told him, as, seeing that he was acting under the provisions of section 164 of the Criminal Procedure Code, the confession was matter which was required by law to be reduced to the form of a document, and therefore, under section 91 of the Evidence Act, no evidence could be given in proof of such matter except the document, where, as in this case, it was in existence and forthcoming.

Held also, that as the defects in the record could not be cured under section 533 of the Criminal Procedure Code, and no secondary evidence could be given, no proof of the confession could be given, and the accused must be acquitted.

THE prisoner, Jai Narayan Rai, was charged with the murder of one Mahabir under the following circumstances. It appeared that in the month of September 1889 there had been some rioting going on in the village of Patuha, and during one of these riots a man named Soorji, who was the father of Jai Narayan Rai, was killed. A charge was preferred against several persons, including Mahabir, in respect of this riot, and they were committed for trial on that charge. During the investigation of that case, it appeared that Mahabir had stated that he had dealt Soorji a blow on the head which had killed him. After the committal, Mahabir was released on bail by the Sessions Judge, and the night following his release he was killed when he was asleep in the verandah of his house, a deep gash being found in his throat, which, in the opinion of the Civil Surgeon, must have caused death very rapidly and prevented him ever speaking after it had been inflicted. It was alleged that the occurrence took place on the night of the 21st October. On the morning of the 22nd information was sent to the thana, and a Sub-Inspector proceeded to investigate the case. It seemed that the prisoner was suspected of the crime, and in the afternoon a Sub-Deputy Magistrate, who had been sent out by the Subdivisional Officer, arrived at the village and recorded a confession made by

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the prisoner. The circumstances under and manner in which the confession was recorded are fully stated in the judgment of the High Court. The day following the prisoner was taken before a Magistrate of the first class and a further statement made by him was recorded, which purported to have been taken under section 164 of the Criminal Procedure Code. This statement was in reply to questions put by the Magistrate, and was as follows:—*Q.* "Did you make the statement you made yesterday before the Sub-Deputy Magistrate of your own free will"? *A.* "Yes, of my own free will, and it is correct." *Q.* "Did any one teach you anything"? *A.* "No; no one taught me anything." Both the confession and the statement before the Magistrate were recorded in the English language, and contained the memorandum signed by the respective Magistrates, who recorded them in the form required by section 164. The prisoner was committed for trial on the charge of murder, and at the trial the prosecution called several witnesses and tendered these statements made by the prisoner. The evidence given by witnesses who sought to connect the prisoner with the crime was disbelieved by the Judge, and the above statements were held by him to be inadmissible in evidence. He, however, called the Sub-Deputy Magistrate and recorded his evidence, which will be found in full in the judgment of the High Court. He also called the Joint-Magistrate and recorded his evidence as to the circumstances under which he recorded the statement set out above. The Joint-Magistrate deposed that when he recorded the statement he had the confession said to have been made to the Sub-Deputy Magistrate before him, but that he probably did not read it over to the prisoner. One of the Assessors found the prisoner guilty and the other considered he ought to be acquitted. The Sessions Judge agreed with the verdict of the former, and convicted the prisoner and sentenced him to transportation for life.

The material portion of his judgment was as follows:—

"The Government Pleader has put into the box a number of witnesses sent up by the committing officer (Narghoon being the principal witness), who say that the prisoner was seen just after he had struck the blow (with a chopper called 'gharasa'), that he was pursued and seized, but got away by struggling and escaped by threats. In putting his case, however, he did not rely on this evidence. And he was quite right not to do so.

Narghoon's story will not fit in with Ghina's, and I have no manner of doubt that the whole of this direct evidence is manufactured. I believe that the murderer, whoever he was, got clear off without any sort of detection, and that the denunciation of the prisoner was grounded on mere suspicion. The determination of the case turns entirely on the prisoner's confession, and unfortunately the Sub-Deputy Magistrate has not followed the procedure laid down by law. He has recorded the confession in English (though he himself can write Hindi), and I have therefore been obliged to rule that the record is inadmissible. The prisoner was taken to the Sub-divisional Officer himself next day (23rd), and was still in a confessing mood, but curiously enough the opportunity of rectifying the Sub-Deputy Magistrate's error was not seized, and all that was asked of the prisoner was whether he had made the 'yesterday's' statement of his own free will and without dictation. The Joint-Magistrate did not apparently even read over the confession to him (see his evidence). On the 11th November the prisoner told the Joint-Magistrate that he had been 'compelled by blows' by the police, who threatened to dishonour him. To this Court he does not allege that he was beaten (an accusation that he could hardly support), but he says that the police threatened to tie him and his wife and mother together. This procedure, I take it, would be considered very dishonouring.

"As I put it to the assessors, the problem before us is to consider whether the prisoner, in telling the Sub-Deputy Magistrate that he killed Mahabir, was speaking the truth or was lying. One assessor is satisfied that he was telling the truth and the other is doubtful. I entirely agree with the former assessor. The prisoner's contention that he was bullied into confessing is manifestly a conventional plea. That he told the Deputy Magistrate that he killed Mahabir is proved to demonstration both by the evidence of that officer and the evidence of the Joint-Magistrate, as well as by the prisoner's own statements and pleas. That he was telling the truth when he said so, I have no doubt whatever.

"Then how does the matter stand? It is quite true that we cannot accept the record which purports to have been made under section 164, Criminal Code Procedure, by the Deputy Magistrate, and the record made by the Joint-Magistrate does not carry us further, but the position is only thereby reduced to this, that it is the same as if no record had been made, and that the Deputy Magistrate had come into the box and said 'the prisoner told me he killed Mahabir, but I did not write down what he had said.' Is this 'evidence' that the prisoner killed Mahabir? I have no hesitation in saying that it is. The definition of 'evidence' in Act I of 1872 is as follows:—'Evidence means and includes all statements which the Court permits or requires to be made before it by witnesses in relation to matters of fact under enquiry, &c.' To put it in another way, 'evidence' means (*inter alia*) words spoken in order to convince the Court

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of the existence of facts. I do not think any reasonable man will deny that if A tells a court that B told him he had killed C, A does so in order to convince the Court of the existence of the fact that B did kill C. This is the case here.

"As I am satisfied that the prisoner told the truth when he told the Deputy Magistrate that he killed Mahabir, I am satisfied that the prisoner did kill Mahabir; and what I have said above will show that I am so satisfied on 'evidence.'

The prisoner appealed to the High Court against the conviction and sentence, the main ground being that the Sessions Judge should not have admitted the evidence given by the Sub-Deputy Magistrate after holding that the confession itself was inadmissible.

Baboo *Durga Mohun Dass* (for Baboo *Umbica Churn Bose*) for the appellant.

The *Deputy Legal Remembrancer* (Offg., *Mr. Leith*) for the Crown.

The nature of the arguments appears sufficiently from the judgment of the High Court (MACPHERSON and HILL, JJ.), which was as follows:—

The prisoner has been convicted of the murder of Mahabir Rai on the evidence of a Sub-Deputy Magistrate who deposes to a confession which the prisoner made. His evidence is this—"He (the prisoner) told me that he had killed a man named Mahabir, because Mahabir had admitted to the Magistrate that he had killed his (the prisoner's) father Suroop. He said he had cut the throat of Mahabir in the night with a *gharasa* as he slept on a bed. He pointed out the *gharasa*, which lay on the ground in front of him."

There is no other proof against the prisoner, as the direct evidence which implicated him was disbelieved by the Judge, who says it was not relied on by the prosecution, that he has no manner of doubt it is manufactured, and that the murderer, whoever he was, got clear off without any sort of detection, the prisoner being afterwards denounced on mere suspicion. There is, however, evidence that the prisoner's father had been killed in a riot which took place some time previously, and that Mahabir, who with others had been committed to the Sessions on a charge of being concerned in it, had stated that he had inflicted the wound which caused his death. That case was still pending in the Sessions Court, and Mahabir and the other accused had been released on bail. The confession to which the Sub-Deputy Magistrate speaks was recorded

by him under the provisions of section 164 of the Criminal Procedure Code, but the recorded confession was rejected by the Judge on the ground that the provisions of that section read with section 364 as to the manner of recording it had not been complied with, and that it was therefore inadmissible. The Judge in rejecting the recorded confession treats it as if it had never been made and was not in existence. "The position (he says) is only thereby reduced to this, that it is the same as if no record had been made and that the Deputy Magistrate had come into the box and said 'the prisoner told me that he had killed Mahabir, but I did not write down what he had said.'" He then comes to the conclusion that the confession deposed to by the Deputy Magistrate is true and sufficiently proved.

It is contended for the prisoner that if the recorded confession is rejected and put aside, oral evidence is inadmissible to prove that he did confess. We think the contention is correct, and that the only confession (if any) which can be proved against the prisoner is the confession which was recorded under section 164 of the Procedure Code.

There can be no doubt that the Deputy Magistrate was acting under section 164. At the time when the confession was made, the police had commenced an investigation under chapter XIV of the Procedure Code, the prisoner was in their custody, the confession was recorded in the presence of the Sub-Inspector, and the Deputy Magistrate purported to act under section 164. That section, which is part of chapter XIV, provides that when a confession is made to a Magistrate under such circumstances, the confession shall be recorded and signed in a specified manner. It is therefore a matter which is required by law to be reduced to the form of a document; and under section 91 of the Evidence Act, the only evidence which could be given in proof of such matter is the document itself, for, as this is forthcoming, there is of course no question of secondary evidence.

Section 533 of the Criminal Procedure Code modifies, however, as regards confessions, section 91 of the Evidence Act. It provides that when, on the tender of a confession recorded under section 164, it is found that the provisions of that section and of section 364 have not been fully complied with, the Court shall take

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evidence that the accused person duly made the statement recorded. That section does not authorise the Court to proceed as if there had been no recorded confession, or to treat such confession as non-existent: it clearly means that the evidence which is to be taken shall be evidence that the accused person duly made the particular confession which was recorded and tendered. If, therefore, a document framed under section 164 of the Procedure Code is inadmissible owing to a non-compliance with the provisions of the law, the Court must proceed under section 533, if the defects are cured by the provisions of that section. If they are not cured, no proof of the confession can be given.

The Judge does not profess to have acted under section 533: he makes no allusion to it, but apparently considers that the defects in the record of the confession are not cured by it. He has in effect, however, admitted oral evidence of a matter which is required by law to be reduced to the form of a document, although he rejected that document when it was tendered. The Deputy Magistrate does not, it is true, profess to speak to the contents of the document, but there is no pretence for saying that he spoke to any other confession than that which was made to him on the 22nd October, and which he recorded under section 164. The course which the Judge has followed seems to us not only without authority of law, but opposed to the law as it is in this country. We might also point out the great danger attending it. The recorded confession, which the Legislature has attempted to safeguard in every possible way so as to make it a perfect record of all that the prisoner did say, covers five pages of foolscap. The confession as spoken to by the Deputy Magistrate covers four or five lines. The former may or may not amount to a confession: no one can say without reading the whole of it. Yet it is not to be looked at, and the Deputy Magistrate's condensed version of it, possibly for all that is known an erroneous version, is to be accepted.

On this part of the case we have no doubt. But we have assumed so far that the Judge was right in holding that the defects which made the document inadmissible were not cured by the provisions of section 533 of the Procedure Code. He can hardly have overlooked that section, and we must take it that this was what he intended to find, although he does not expressly

say so. The question whether he was right in this conclusion is a much more difficult one. It does not arise on the appeal of the prisoner, who, if he can get rid of the admitted evidence, is of course content to accept the Judge's decision as to the excluded portion; but the case is before us as a whole, and we think we must deal with it.

The confession which was recorded under section 164 and tendered in evidence is written entirely in English. There is only one question "Did you kill Mahabir Rai?" Then follows a long statement covering five pages of foolscap paper. The record bears the signature of the prisoner and of the Deputy Magistrate, and has attached to it the certificate prescribed by section 164, which is also signed by the Deputy Magistrate. The statement purports, however, on its face to be made on solemn affirmation. The first page is written on the form furnished for the depositions of witnesses, but it may be there was an omission to strike out the words inappropriate to the examination of an accused person or to a confession, although it is singular that while the word "statement" has been substituted for "deposition" and the words "oath or" have been struck out, the words "solemn affirmation" have been allowed to remain. This, however, is a matter which might be cleared up by evidence. Probably no questions were asked, as the recorded confession was rejected as inadmissible. The ground of the rejection was that it was written in English, which was not the language used or understood by the prisoner, although the Deputy Magistrate understood and could write such language.

Section 364 read with section 164 enacts that the confession shall be recorded in full in the language in which the accused person is examined, or, if that is not practicable, in the language of the Court, or English. It is clear that this provision of the law was not complied with. The question is whether the defect is cured by the provisions of section 533, which is as follows:—

"If any Court before which a confession or other statment of an accused person recorded under section 164 or section 364 is tendered in evidence finds that the provisions of such section have not been fully complied with by the Magistrate recording the statement, it shall take evidence that such person duly made the statement recorded; and notwithstanding anything contained in

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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."

The point, so far as we know, has not been definitely decided. In the *Queen-Empress* v. *Virun* (1) the confessions were taken down in English, and not in the language in which they were made, but there was in other respects hardly any attempt to conform to the provisions of sections 164 and 364. Parker, J., held that the provisions of section 164 are imperative, and that section 533 will not render the confession admissible when no attempt at all has been made to conform to its provisions. In the *Queen-Empress* v. *Nilmadhub Mitter* (2), which came before a Full Bench of this Court, the question arose but it was unnecessary to determine it. The Chief Justice in delivering the judgment of the Court said with reference to a confession:—"We wish to guard ourselves from being supposed to hold that when answers are made by an accused person in one language and written down in another, unless it was shown that it was impracticable to write them in the language in which they were spoken, section 164 would be complied with; on the contrary, we think that when such a proceeding is adopted, the statement of the accused would not be recorded under that section read with section 364, and we have very grave doubts whether the defect could be cured under the provisions of section 533."

The question, which is not free from difficulty, is therefore still an open one. In our opinion the provisions of section 164 read with section 364 are imperative as to the language in which a confession is to be recorded, and section 533 does not contemplate or provide for any non-compliance with the law in this respect. It is clear from the two sections first mentioned that the confession is to be recorded in the language in which it was made, or, if that is not practicable, in the language of the Court or English. It would be for the prosecution to establish the impracticability, if any existed. Here there was obviously none.

The recorded confession speaks for itself, but the Magistrate is directed to do certain things in connection with it, and to render the

(1) I. L. R., 9 Mad., 224.
(2) I. L. R., 15 Calc., 595.

document admissible in evidence it must appear on its face that these things have been done. He is directed to sign it, to certify that he believes the confession to be voluntary (and he is prohibited from recording a confession until he has satisfied himself by questioning the person making it that it is voluntary); he is also to certify that it was taken in his presence and hearing, that it was read over to the person making it and admitted by him to be correct, and that it contains a full and true account of the statement made by him. The provisions of the Act would not be fully complied with by the Magistrate if he failed to sign the confession and the certificate, and to certify all the facts which he is required to certify; and it is against omissions of this kind by the Magistrate that we think section 533 was intended to provide a remedy by allowing evidence to be taken that the accused person duly made the statement recorded. The section would only come into operation when a confession or other statement of an accused person recorded under section 164 or section 364 was tendered, but a confession recorded in direct violation of those sections would not be a confession recorded under them; and the recorded statement, to be proved, must mean a statement recorded in accordance with the provisions of the Act, and not in violation of them. It may be argued that if the Magistrate recording the confession records it in a language other than that directed by law, there is on his part a non-compliance with the provisions of the law which is cured by section 533, as much as non-compliance with any other provision; but there is a difference between non-compliance, an omission to do something which a person is directed to do, and a direct violation of the law; and, as I have said, the section seems to assume that the confession has been recorded in accordance with the provisions of the law. It is a section which provides a remedy in cases in which certain provisions of the law have not been fully complied with by the Magistrate, and, operating as it does against the accused person and not in his favour, it must be strictly construed. It would, we think, be extremely dangerous so to construe it as to include not only omissions to comply with the law, but infractions of it.

We think, therefore, the Judge was right in holding that the recorded confession was inadmissible, and that it could not be proved; but as we have held that he was wrong in admitting evidence to

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prove a confession to the Deputy Magistrate, and, as apart from the confession, there is no proof against the prisoner, we must set aside the conviction and direct that the prisoner be acquitted.

H. T. H.

Appeal allowed and conviction quashed.

CRIMINAL MOTION.

Before Mr. Justice Norris and Mr. Justice Macpherson.

1890 *June* 2.

RAGHOOBUNS SAHOY (PETITIONER) *v.* KOKIL SINGH *alias* GOPAL SINGH AND ANOTHER (OPPOSITE PARTY).*

Sanction to prosecution—"Court"—Collector—Appraisement proceedings—Criminal Procedure Code (Act X of 1882), s. 195—Bengal Tenancy Act (Act VIII of 1885), ss. 69 and 70.

The word "Court," used in section 195 of the Criminal Procedure Code, without the previous sanction of which, offences therein referred to, committed before it, cannot be taken cognizance of, has a wider meaning than the words "Court of Justice" as defined in section 20 of the Penal Code. It includes a tribunal empowered to deal with a particular matter and authorised to receive evidence bearing on that matter, in order to enable it to arrive at a determination.

A Collector, acting in appraisment proceedings under sections 69 and 70 of the Bengal Tenancy Act, is a Court within the meaning of the term as there used.

Where therefore, in certain appraisement proceedings, some rent receipts, which were alleged to be forgeries, were filed by tenants before the Collector, and proceedings were subsequently taken against them before the Joint-Magistrate charging them with offences under sections 465 and 471 of the Penal Code,—

Held, that the Joint-Magistrate could not take cognizance of the offences charged without the previous sanction of the Collector having been granted.

THE facts which gave rise to this application were as follows:—

The petitioner, who was in the employment of the proprietor of mouzah Bhadones, in the district of Monghyr, applied to the Collector, under section 69 of the Bengal Tenancy Act, to appraise the crops on the lands of certain tenants, alleging that the rent was taken by appraisement. The tenants resisted the application on the ground that they paid a fixed money rent, and in support of their objection filed some rent receipts. The petitioner alleged

* Criminal motion No. 84 of 1890 against the order passed by G. E. Manisty, Esq., Joint-Magistrate of Monghyr, dated the 6th of February 1890.