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March 8.

*Before Mr. Justice West and Mr. Justice Pinhey.*

EMPRESS against DAJI NARSU AND GOVINDA NATHA.

*Evidence—Confession certificate—The Code of Criminal Procedure (X of 1872),  
Section 122—The Indian Evidence Act I of 1872, Section 30.*

If the certificate required by section 122 of the Code of Criminal Procedure (Act X of 1872) that a confession is voluntarily made is not recorded by the Magistrate at the time the confession is made, or, at any rate, on the day it is reduced to writing, the confession is bad and inadmissible in evidence.

To render the statement of one person jointly tried with another for the same offence liable to consideration against that other, it is necessary that it should amount to a distinct confession of the offence charged.

This was a case submitted by R. F. Mactier for confirmation of the sentence of death passed on Daji bin Narsu. This was also an appeal made by the said Daji bin Narsu and his fellow prisoner Govinda bin Natha, sentenced, on conviction of murder, to transportation for life.

The circumstances of the case are as follows:—

The accused Daji and Govinda were charged before R. F. Mactier with having, on the 2nd day of January, 1882, caused, at Borjai Vadi, Taluka Koregaon of the Satara District, the death of one Narsu bin Hari, under circumstances which amounted to the offence of murder.

The prosecution alleged and the evidence showed that the death of the deceased was not due to suicide, and that it was due to a blow inflicted on the left temple of the deceased by means of a heavy weapon. The Session Judge held it proved that the deceased had been carrying on an intrigue with Daji's wife, and that, in consequence, there was ill-feeling between them. As regards the state of feeling between the deceased and the other prisoner Govinda, the Judge, upon the admission of Govinda himself and other evidence, came to the conclusion that Govinda had some sort of a grudge against the deceased, arising out of an alleged mischief done to his crops, and that Govinda wished to do the deceased some personal injury.

One Manu Mali, a fellow worker with the deceased in a field, deposed to having been an eye-witness of the murder. He said, he and the deceased were present at an entertainment given at the village temple by a company of performers; that they stayed there till 11 p. m., and then went to their field and slept at the distance of 25 cubits from one another, the deceased having near him, as was his wont, his iron-bound stick. Some time afterwards, he says, two men came near the deceased; that one of them took up the stick which lay near and hit him on the left temple which caused him to give a cry. The two men, whom he knew and whom he recognized to be the two accused, then went up to the witness and cautioned him not to make an outcry, or to disclose the transaction, or their names. The witness further said, he sat still till day-break from fear, and not till then did he perceive that Narsu had been dead. He then went to the village and reported the fact of his death to the patel without disclosing to him or to any one the names of the murderers. He mentioned those to the chief constable who came a few days afterwards to the village to conduct the investigation.

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The prisoner Govinda, on the 3rd of February, 1882,—that is, a day after the murder,—made a statement before the 3rd Class Magistrate of Koregaon. This statement was in the form of question and answer, and bore the mark of the prisoner and the signature of the Magistrate. It was also certified in due form that the statement had been taken down in the presence and the hearing of the Magistrate; that it was accurate; and that the confession was voluntarily made. This latter fact, however, was not recorded at the time or on the same day, but some few days afterwards.

Govinda also made a statement before the committing Magistrate. In this he tried to throw the principal blame on the shoulders of Daji, and admitted no more than that he had intended to give the deceased Narsu a sound beating.

A statement of the prisoner Daji's was also deposed to by two members of the inquest who examined Narsu's body soon after the murder. The Panch depose "that Daji admitted before them he had gone to where Narsu was asleep in a field and had struck him on the head with an iron-bound stick and killed him."

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The Session Judge relying upon the above statements and the evidence of two more witnesses, which he said corroborated those statements, came to the conclusion that "the actual killing of the deceased Narsu was the act of Daji, and that the prisoner Govinda was there present, and abetting, by previous agreement, personal injury to Narsu, though he may not have imagined the killing of Narsu." And being of opinion that the act of each amounted, in law, to murder, convicted each of that offence, sentencing Daji to death, and Govinda to transportation for life.

Both the convicts appealed to the High Court.

*Branson* for Govinda and *Ganesh Ramchandra Kirloskar* for Daji.—The findings of the Judge are based on illegal evidence. The statement of Govinda before the 3rd Class Magistrate did not bear, at the time it was made, the certificate that it was voluntarily made, but was added on three or four days afterwards. This is contrary to the procedure laid down in sections 122 and 346 of the Code of Criminal Procedure (X of 1872) and the ruling of the Court in the case of *Bai Ratan*(1). The statement is objectionable on another ground also. It bears the mark of Govinda's attestation; and Govinda is a person who can write. The Legislature could not have intended to allow persons who can write to put their mark only. His statement before the committing Magistrate does not amount to a confession of his guilt, and cannot be considered against Daji. The alleged confession of Daji is also inadmissible before he was in police custody. The other evidence is incredible, and insufficient for conviction of any accused.

*Nanabhai Haridas*, Government Pleader, *contra*.

WEST, J.—The first question which we have to consider in this case is how much of the evidence which has been recorded by the Session Judge at the trial of the prisoners is legally admissible? We are of opinion that the statement of Govinda before the Subordinate Magistrate is inadmissible for the reason that the certificate as to the Magistrate's belief, that the confession was voluntarily made, was not recorded by the Magistrate at the time the statement was made, but three or four days afterwards. Section 122 of the Code of Criminal Procedure (X of 1872) enacts

(1) 10 Bom. H. C. Rep. 166.

that the Magistrate shall make a memorandum to that effect at the foot of the confession. We think that the making of such a memorandum is a judicial, or, at least, a quasi-judicial act. A good many acts of a ministerial nature may properly be performed not precisely at the time contemplated when they are of a kind leading up to or following judicial functions; but when those latter are performed, the necessary formalities should be promptly and strictly gone through. It is not permissible for a Magistrate, after a statement of a person has once gone out of his hands, to attach to it, several days afterwards, the certificate that it was voluntarily made. To enable him to do so he must either depend solely upon his own memory or have his memory refreshed by the impression of some one, perhaps by a police officer who was present at the time the statement was taken down. This is unsatisfactory. If the statement in the present case did not amount to a confession, we might consider whether we should not allow it to be proved in some other way; but the contention for the prosecution is that it does amount to a confession, and, having regard to the case of *Bai Ratan*(<sup>1</sup>) and other cases in which the decision there arrived at was followed, we are of opinion that a confession upon which the necessary certificate is not recorded at the time, or, at any rate, on the day the confession was reduced to writing is bad, and cannot be admitted in evidence.

The next piece of evidence is the confession of Daji deposed to by two members of the Panch. The Government Pleader felt himself unable to deal with it as a confession. When it was made, Daji was in police custody. The Legislature, choosing the lesser of two evils, has excluded confessions taken under such circumstances.

The next point for consideration is the statement of prisoner Govinda before the committing Magistrate. In this it is obvious that Govinda does not intend to criminate himself. His intention is to exculpate himself and make Daji the murderer of Narsu. When a person admits guilt to the fullest extent, and exposes himself to the pains and penalties provided for his guilt, there is a guarantee for his truth, and the Legislature provides that his statement may be considered against his fellow prisoners charged

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with the same crime. By exculpating himself Govinda fails to provide this guarantee, and his statement must also be set aside in weighing the evidence against Daji.

This reduces the evidence to the deposition of Manu Mali, for the evidence of Babaji and Shiva—besides being conflicting—is not very material. Manu's evidence is not free from objections. He does not make his statement till after the arrival of the chief constable to his village for conducting the investigation. It is not quite unusual in this country for ignorant people to withhold information of the kind. They are afraid of being charged with complicity in the crime they have happened to witness. At the same time the evidence of timid people given after some delay must be received with considerable caution. It is not safe to give ready credence to such testimony. Shorn of Govinda's evidence, the case is quite barren. It bears, moreover, indications of police manipulation, and we are unable to uphold the convictions.

We accordingly reverse the sentences, but not without regret. The case has not been efficiently handled, and justice has possibly been defeated. We are unable to say to whom this result is due; but there has been mismanagement on the part of some one there is but little doubt. A strong suspicion remains in our mind as to the guilt of Daji. But under the circumstances we must acquit both him and Govinda.

*Conviction reversed.*

## APPELLATE CIVIL.

*Before Sir M. R. Westropp, Kt., Chief Justice, and Mr. Justice Melvill.*

February 14.

BHAVANISHANKAR SHEVAKRAM AND ANOTHER, PLAINTIFFS,  
v. PURSADRI KALIDAS, DEFENDANT.\*

*Jurisdiction—Judgment—Decree—Native Courts, suit on decree of—Suits in India on judgments of Courts in India—Suit on foreign judgment—Jurisdiction of Small Cause—Court Civil Procedure Code (Act X of 1877), Section 434.*

No suit is maintainable in any Court in British India founded upon the judgment of a Court situate in a Native State.

\* Small Cause Court Reference 5 of 1880.