the adoption of an only son in the *Dwyamushyayana* form, and refers to cases where such adoptions have taken place. In the southern districts of this Presidency such adoptions have not been rare—*Basava* v. *Lingangauda*.[1] On the whole, therefore, it appears to us that no objection can be taken to the validity of the adoption in this case, (1) because the ruling in *Lakshmappa* v. *Ramava* does not apply to *Dwyamushyayana* adoption; (2) because the recent rulings, which make the gift of an only son valid in the case of father, naturally justify a similar presumption of validity where the gift was made by the widow; (3) because the power of making *Dwyamushyayana* adoption is not confined to brothers only, but their widows may give and receive in adoption an only son.

We would therefore reverse the decision of the lower appellate Court and remand the case back to that Court for its decision on the remaining issues. Costs to abide the result.

Decree reversed and case remanded.

(1) (1894) 19 Bom. 428.

APPELLATE CRIMINAL.

Before Mr. Justice Candy and Mr. Justice Whitworth.

QUEEN-EMPRESS *v.* NARAYAN.*

1901. *January* 14.

Evidence—Confession—Confession of an accused while in custody of the police—Duty of Magistrate when such confession is made—Sessions Judge—Duty of—Criminal Procedure Code (Act V of 1898), section 164 (3)—Evidence Act (I of 1872), section 24.

When an accused person has been in custody of the Police and has made a confession, it is important that the Magistrate before recording such confession under section 164 of the Criminal Procedure Code (V of 1898) should ascertain how long the accused has been in custody. If there is no record of that fact, it is the duty of the Sessions Judge, before holding the confession relevant under section 24 of the Evidence Act (I of 1872), to send for the Magistrate and satisfy himself on the point.

* Criminal Appeals, Nos. 526 and 527 of 1900.

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APPEALS from the convictions and sentences recorded by H. L. Hervey, Sessions Judge of Kánara.

The two accused were charged with murder under section 302 of the Indian Penal Code (Act XLV of 1860).

Accused No. 1 was arrested by the Police on 11th June, 1900. On the 23rd of June he made a confession before a First Class Magistrate, which he subsequently retracted during the preliminary inquiry before the Committing Magistrate.

The Sessions Judge relying on this confession and on the evidence of Timaka, convicted both the accused of murder and sentenced them to transportation for life.

Against these convictions and sentences the accused appealed to the High Court.

Branson (with *Shamrao Vithal*) for accused No. 1:—The confession of accused No. 1 appears on the face of it to have been obtained by pressure and undue influence by the police. The accused was in police custody for ten or eleven days, and though there is no direct evidence on the point, it is impossible to believe that the accused made the confession voluntarily. The surrounding circumstances of the case clearly show that the confession was anything but voluntary. There is nothing to show that the Magistrate who took down the confession satisfied himself that the confession was voluntary, before formally recording it. Nor was the Magistrate examined on this point in the Sessions Court. The confession therefore is inadmissible. The rest of the evidence is wholly unreliable and cannot sustain the conviction.

Robertson (with *N. G. Chandavarkar*) for accused No. 2:—The confession of accused No. 1 is self-exculpatory. It cannot therefore be taken into consideration as against accused No. 2.

Ráo Bahádur *V. J. Kirtikar*, Government Pleader, for the Crown:—The confession recorded in this case satisfies the requirements of section 164 of the Criminal Procedure Code (Act V of 1898). It bears the requisite memorandum of the Magistrate at the foot, and it must be presumed, until the contrary is established by clear evidence, that it was duly recorded in the manner required by law. It has been held that the omission of

the Magistrate to record the circumstance that the accused was not in the custody of the police does not invalidate a confession —*Imperatrix* v. *Barku*[1]; *Queen-Empress* v. *Anga*.[2] Under section 24 of the Evidence Act (I of 1872), it lies on the accused to prove that the confession was the result of inducement, threat or promise &c. There is ample evidence in the case corroborating the confession in material respects. It can therefore be taken into consideration against accused No. 2 also.

CANDY, J.:—We concur with the Sessions Judge that the evidence against the two accused consists solely of Timakha's deposition and the confession of the first accused, and that it has to be seen whether these statements can be accepted as true and voluntary.

First as to the confession. From the very first the relatives of Timakha's husband were suspected of having caused the death of Biranna, who had been Timakha's lover. The criminal intimacy was notorious, and the fact of the corpse having been apparently with set purpose placed on the verandah of Timakha's mother's house, pointed to the motive which the murderers were not anxious to conceal. Directly the police came upon the scene on the 11th June, a few hours after the murder, the houses of the relatives of Timakha's husband, including the present accused, were searched to see if anything suspicious could be found, but without success. Of course the difficulty with which the police were confronted was to discover which of the relations of the accused were implicated in the murder. According to the police records, the police arrested accused No. 1 on the 21st June at 10 A.M. at Bargi, a village three miles from Hiregutti (the scene of the murder) and nine miles from Kumta. The story told by the Head Constable Vithalrao as to how by chance he happened to meet the accused on the road going from Hiregutti to Bargi, and how the accused voluntarily made a full disclosure of the facts regarding the murder, is, on the face of it, absurd, and is moreover proved by evidence in the case to be absolutely false. It was rightly disbelieved by the Sessions Judge. It is obvious that accused No. 1, having from the first,

(1) (1891) Bom. Cr. Rulings, No. 3 of 1891. (2) (1898) 22 Mad. 15.

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i. e. the 11th June, been practically under arrest, was purposely sent from Hiregutti, where the sympathy of the villagers was with the accused persons, to Bargi, where it was thought that the accused would be more ready to confess. The police papers purport to show that accused No. 1 was arrested at Bargi on the 21st June at 10 A.M., that is ten days after he had really been arrested. It is difficult to understand why he was detained at Bargi on the 21st; possibly it was in order that the Chief Constable might see him. (The Chief Constable deposed that he left Hiregutti for Gokarn on the 21st, returned to Hiregutti that evening; saw accused No. 1 at Bargi that night, and arrested accused No. 2 and Mahadu the next day.) But then there is no explanation why accused No. 1 was not examined by the Magistrate at Kumta till the 23rd. If sent off from Bargi on the morning of the 22nd, he must have reached Kumta by 10 A.M. on that day, and that is the time of the arrival before the Magistrate as given in the criminal return.

It is much to be regretted that there is nothing on the record showing in what way the Magistrate at Kumta carried out the provisions of section 164 (3) of the Criminal Procedure Code, which forbid a Magistrate to record a confession *unless*, upon questioning the person making it, he has reason to believe that it was made voluntarily. No doubt there is the usual formal certificate at the foot of the record; but in a case like this, in which the confessing accused had been for ten days in detention by the police, obviously the first question which a Magistrate should put in order to satisfy himself that the confession will be a voluntary one, is, how long has the accused been in the custody of the police? Possibly in this case the Magistrate did so question the accused before recording the confession, though he did not write down such questions and answers. But considering that there was no record of the questioning, it was the duty of the Sessions Judge, before holding the confession to be relevant under section 24 of the Evidence Act, to have sent for the Magistrate and satisfied himself on the point. We entirely agree with the directions of Government (Government Resolution, Judicial Department, No. 1333, 27th February, 1886, a copy of which is on the files of the Sessions Judge) that in a case of this

nature "it is the duty of the Court to inquire very carefully into all the circumstances under which the confession was taken, *and particularly as to the length of time during which the accused person was in custody.*"

In the present case the Committing Magistrate in the committal proceedings did not formally examine accused No. 1, or ask him to explain the circumstance of the confession. But it is clear from the proceedings that the accused did retract his confession, and (as usual) pleaded ill-treatment at the hands of the police. Many Judges and Magistrates, as well as accused persons, think that a confession cannot be irrelevant under section 24 of the Evidence Act, unless it can be alleged that there was torture, leaving marks of personal violence. This is a mistake. The confession is irrelevant if the making of it appears to have been caused by any inducement, threat, or promise, &c. Now what are the facts here, and what is the natural inference from those facts? The most important fact (as shown in the directions of Government above quoted, with which we concur) is the length of time during which the accused person was in custody. As shown above, accused No. 1 was virtually in custody from the 11th June. He made his "confession" to the Magistrate on the 23rd June. Is it reasonable to suppose that during all that time no pressure was put upon the accused by the police to induce him to "confess"? The Sessions Judge says: "My belief is that accused No. 1, finding himself under close and continuous observation—if not detention—by the police, and knowing that the whole village was aware of his guilt, felt impelled to make a clear breast of the matter." But if the whole village was aware of his guilt, that must have been from the first, or at least from the 13th June, when Timakha is said to have made her statement to the police and mentioned the name of accused No. 1. But accused No. 1 did not make his confession to the Magistrate till ten days after Timakha is said to have implicated him. As the Sessions Judge says, it is impossible to believe that the police were not attempting to get a confession from the accused, and we are unable to resist the conclusion that it was improperly induced and therefore was irrelevant, and must be excluded from consideration.

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There remains the evidence of Timakha. She was the only person in the village who would be likely to know anything about the murder, and, no doubt, she was questioned by the police on the 12th, though they falsely deny that fact. On the 13th she is said to have made a statement implicating the two accused and Mahadu, and on the 14th she showed the place near the haystack where she said she was sitting with the deceased when he was attacked. It is to be remarked that she was not then sent to the Magistrate for her statement to be recorded by the Magistrate under section 164 of the Criminal Procedure Code. The Chief Constable deposed in the Sessions Court: "I sent Timakha up before the First Class Magistrate, Kumta, who recorded her statement. I did this to prevent her being tampered with." But the record of the case shows that she was not sent to the Magistrate till the 2nd July. Accused No. 1 having, it is said, made his confessional statement to the police on the 21st June, the Chief Constable arrested accused No. 2 and Mahadu on the 22nd June, apparently at Hiregutti, where he was on that date conducting the inquiry and where were those accused persons. Why the police papers and the Magistrate's criminal return should show the arrest of accused No. 2 and Mahadu at 6 P.M. on the 22nd at Kumta is extraordinary. They could not have reached Kumta unless they were taken there in custody by the police.

The next point to be noticed is that on the 23rd June these two accused persons were put before the First Class Magistrate at Kumta, and ten days' time was asked for by the Chief Constable to complete the police enquiry. The Magistrate granted five days' time, and sent those two accused persons back into the custody of the police. Accused No. 1 having made a confession before the Magistrate on the 23rd June, was kept by the Magistrate in his own lock-up and was not sent back to the police. But it is difficult to see what further legitimate police inquiry was possible for which the presence of accused No. 2 and Mahadu was necessary. There was no property to be produced. It is noteworthy that the Chief Constable apparently made no attempt to produce Timakha before the Magistrate on 23rd June. Having obtained five days' time, he on 29th June (*i. e.*

after six days, one day possibly being counted for the journey) sent the case to the Magistrate. In the criminal return the entry is that accused No. 2 and Mahadu arrived before the Magistrate at 3 P.M. on the 29th. But in the reasons of delay recorded by the Magistrate, and attached to his return, it is stated that the accused were brought before the Magistrate on the 2nd July, and that the case was "postponed for the 9th as the Magistrate had to go to Honávar on some urgent duty under the orders of the District Magistrate." However, on the 2nd July the Chief Constable sent Timakha under the charge of a Constable to Honávar (apparently this was done after the Magistrate had formally postponed the case at Kumta and himself had gone to Honávar) with a memorandum saying that he had secret information that attempts were being made to tamper with the prosecution witnesses, and he requested that Timakha, a principal witness, might be examined under section 164 of the Criminal Procedure Code. This was accordingly done at Honávar, and the statement is recorded as Exhibit 9 in the Sessions Court. Her further deposition before the Magistrate on the 23rd July is No. 10, and her deposition before the Sessions Judge is No. 8. The question is whether her statements in those depositions are sufficient on which to base the convictions of the two accused.

We regret that after careful consideration we can come to no other conclusion than that it would be unsafe to base a conviction solely on Timakha's testimony. We must put aside her "realistic account of the appearance of the body" of the deceased when she went to her mother's door in the early morning of the 11th June. That may be quite true; but it has no connection with the alleged facts of the murder. Nor need we take into consideration any inconsistencies or slight discrepancies which may have arisen from the fact that she, a woman of bold demeanour, plainly resented close cross-examination by the pleader for the defence. The question is, can we accept her statement that she witnessed the murder? The Sessions Judge had no doubt that her desire was to avenge the murder of her lover, and that she was only kept from speaking at the first by her reluctance to proclaim her own shame and to bring

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ruin upon her husband's family. But she must have well known that her criminal intimacy with Biranna was notorious, and she certainly had no affection for her husband's family, who, according to her account, treated her badly. It is remarkable that in her statement before the Magistrate, recorded on the 2nd July, she stated that the accused who first assaulted Biranna and held him fast was Mahadu; and that agrees with the statement of the first accused. In her deposition recorded on the 11th July she said the first one who came was Narayan (accused No. 2). This was also the statement she made in the Sessions Court. This is not a slight discrepancy. Then is it likely that she would have been sitting for an hour or so with Biranna beside the stack, and that she would have been surprised there? Possibly she has invented this part of her statement and the story of the state of her health at the time, in order to avoid the admission that she was caught actually in bed with Biranna, the truth being that Biranna bolted when discovered sleeping with Timakha, and that he was overtaken near the haystack and strangled there. But this is more or less a surmise; and the difficulty is to reject part of Timakha's deposition and accept the rest. It is impossible to resist the suspicion that she did not witness the murder at all. If from the first, in natural indignation at the cruel death which her lover had met with, she had frankly told in a consistent story what she had seen, her testimony alone might have sufficed for conviction. As it is, we feel that the only safe verdict is that arrived at by the assessors. The Government Pleader contended that there was no ground for the suggestion that some other lover of Timakha might have killed Biranna, but he omitted to notice that besides the assertion of witness No. 1 (brother of Biranna), the Chief Constable himself, who conducted the investigation, deposed that he suspected Mahadu Deobhari.

Having regard to the above facts, we must reverse the convictions and sentences, and direct the accused to be acquitted and discharged.

Convictions and sentences reversed.