STATE OF UTTAR PRADESH

v.

SINGHARA SINGH AND OTHERS

1963

August 16

(A. K. SARKAR, M. HIDAYATULLAH AND J. C. SHAH, JJ.)

Criminal Procedure—Evidence—Respondents accused of murder—Magistrate not empowered to record a confession records a confession—Records of confession not held to be admissible by the trial Court—The Magistrate gives oral evidence of confession—The records used to refresh his memory—Whether the oral evidence is admissible—Code of Criminal Procedure, 1898 (*Act 5 of* 1898), *ss.* 164, 364, 533—*Indian Evidence Act,* 1872 (1 *of* 1872), *ss.* 74 80 *and* 159.

By sub-sec. (1) of s. 164 of the Code of Criminal Procedure it was provided, "Any Presidency Magistrate, any Magistrate of the first class and any Magistrate of the second class specially empowered in this behalf by State Government may, if he is not a police -officer record any statement or confession made to him in the course of an investigation under this Chapter or under any other law for the time being in force or at any time afterwards before the commencement of the inquiry or trial." In a case where a confession had been recorded under s. 164(1) by a Magistrate of the second class not specially empowered,

Held, the confession had not been recorded under s. 164 of the Code and the record could not be put in evidence under ss. 74 and 80 of the Evidence Act to prove confession.

Oral evidence of the Magistrate to prove the confession was not admissible. If a statute has conferred a power to do an act and had laid down the method in which that power has to be exercised, it necessarily prohibits the doing of the act in any other manner than that which has been prescribed.

Taylor v. *Taylor,* (1875) 1 Ch. D. 426 and *Nazir Ahmed* v. *King Emperor,* L.R. 63 I.A. 372.

A Magistrate recording a confession under s. 164 of the Code is bound to follow the procedure laid down in it. Section 533 of the Code does not show that the procedure prescribed by s. 164 of the Code was not mandatory. The object of s. 164 of the Code was not to give the prosecution the advantage of ss. 74 and 80 of the Evidence Act so that the only result of the disregard of these provisions was to deprive the prosecution of that advantage. *Nazir Ahmed's* case was rightly decided.

Nazir Ahmed v. *King Emperor,* L.R. 63 I.A. 372 *Rao Shiv Bahadur Singh* v. *State of Vindhya Pradesh,* [1954] S.C.R. 1908 and *Deep Chand* v. *State of Rajasthan,* [1962] 1 S.C.R. 662.

The principle of *Nazir Ahmed's* case which dealt with the recording of a confession by a Magistrate of the first class without complying with the procedure laid down in s. 164 of the Code also covers the present case. When a statute confers a power on

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certain judicial officers, that power can obviously be exercised only by those officers and no other officer can exercise it.

Case Law reviewed.

Ashraf v. *State,* I.L.R. [1960] 2 All. 488, distinguished.

Ram Sanchi v. *State* A.I.R. 1963 All. 308 and *Ghulam Hussain* v. *The King,* L.R. 77 I.A. 65, distinguised.

Brij Bushan Singh v. *King Emperor,* L.R. 73 I.A. 1 *Bhabori Sahu* v. *The King,* L. R. 76 I.A. 147 *Emperor* v. *Ram Naresh,* I.L.R. [1939] All 377. *Re* : *Natesan,* A.I.R. 1960 Mad. 433.

Willie Slaney v. *State of Madhya Pradesh,* [1955] 2 S.C.R. 1140.

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 31 of 1962.

Appeal by special leave from the judgment and order dated May, 31, 1961, of the Allahabad High Court in Criminal Appeals Nos. 2017 and 2109 of 1960 and Reference No. 142 of 1960.

C. B. Agarwala, G. C. Mathur and *C. P. Lal,* for the appellant.

Nuruddin Ahmed and *V. D. Misra,* for the respondents.

August 16, 1963. The Judgment of the Court was delivered by

Sarkar J.

SARKAR J.—On March 20, 1959 Raja Ram, a shopkeeper, of Afzalgarh in the State of Uttar Pradesh was murdered by gunshot in his shop. Seven persons including the three respondents, Singhara Singh, Bir Singh and Tega Singh were prosecuted for this murder. The learned Additional Sessions Judge of Bijnor before whom the trial was held, convicted the respondent Singhara Singh of the murder under s. 302 of the Indian Penal Code and sentenced him to death. He convicted the respondents Bir Singh and Tega Singh of abetment of the murder under s. 302 read with ss. 120B, 109 and 114 of the said Code and sentenced Bir Singh to death and Tega Singh to imprisonment for life. He acquitted the other accused persons.

The respondents appealed from the conviction to the High Court at Allahabad and the State from the acquittal. The High Court had also before it the usual reference for confirmation of the sentences of death. The High Court allowed the appeals of the respondents, dismissed the appeal of the State and rejected the reference. The State has now filed this appeal against the judgment of the High Court by special leave. This Court however granted the leave

only so far as the judgment of the High Court concerned the three respondents. We are not, therefore, concerned with the other accussed persons and the order acquitting them is no more in question.

The only point argued in this appeal was as to the admissiblity of certain oral evidence. It is conceded that if that evidence was not admissible, then there is no other evidence on which the respondents can be convicted. In other words, it is not in dispute that if that evidence was not admissible the High Court's decision acquitting the respondents cannot be questioned. It is therefore not necessary to state the facts in detail.

Now, the evidence with which this case is concerned was given by a learned magistrate, Mr. Dixit, of confessions of guilt made to him by the respondents and purported to have been recorded by him under s. 164 of the Code of Criminal Procedure. The terms of that section and certain other sections of the Code on the interpretation of which this case depends, are as follows:

> *S.* 164 (1) Any Presidency Magistrate, any Magistrate of the first class and any Magistrate of the second class specially empowered in this behalf by the State Government may, if he is not a police-officer record any statement or confession made to him in the course of an investigation under this Chapter or under any other law for the time being in force or at any time afterwards before the commencement of the inquiry or trial.
>
> (2) Such statements shall be recorded in such of the manners hereinafter prescribed for recording evidence as is, in his opinion, best fitted for the circumstances of the case. Such confessions shall be recorded and signed in the manner provided in section 364, and such statements or confessions shall then be forwarded to the Magistrate by whom the case is to be inquired into or tried.
>
> (3) A Magistrate shall, before recording any such confession, explain to the person making it that he is not bound to make a confession and that if he does so it may be used as evidence against him and no Magistrate shall record any such confession unless, upon questioning the person making it, he has reason

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to believe that it was made voluntarily; and, when he records any confession, he shall make a memorandum at the foot of such record to the following effect:—

I have explained to (name) that he is not bound to make a confession and that, if he does so, any confession he may make may be used as evidence against him and I believe that this confession was voluntarily made. It was taken in my presence and hearing, and was read over to the person making it and admitted by him to be correct, and it contains a full and true account of the statement made by him.

(Signed) A.B.
Magistrate.

S. 364 (1) Whenever the accused is examined by any Magistrate, or by any Court other than a High Court for a Part A State or a Part B State the whole of such examination, including every question put to him and every answer given by him, shall be recorded in full, in the language in which he is examined, or, if that is not practicable, in the language of the Court or in English; and such record shall be shown or read to him, or, if he does not understand the language in which it is written, shall be interpreted to him in a language which he understands, and he shall be at liberty to explain or add to his answers.

(2) When the whole is made conformable to what he declares is the truth, the record shall be signed by the accused and the Magistrate or Judge of such Court, and such Magistrate or Judge shall certify under his own hand that the examination was taken in his presence and hearing and that the record contains a full and true acount of the statement made by the accused.

(3) In cases in which the examination of the accused is not recorded by the Magistrate or Judge himself, he shall be bound, as the examination proceeds, to make a memorandum thereof in the language of the Court, or in English, if he is sufficiently acquainted with the latter language; and such memorandum shall be written and signed by the Magistrate or Judge with his own hand, and shall be annexed to the record. If the Magistrate or Judge is unable to make a memo-

randum as above required, he shall record the reason of such inability.

(4) Nothing in this section shall be deemed to apply to the examination of an accused person under section 263 or in the course of a trial held by a Presidency Magistrate.

S. 533 (1) If any Court, before which a confession or other statement of an accused person recorded or purporting to be recorded under section 164 or section 364 is tendered or has been received in evidence, finds that any of the provisions of either of such sections have not been 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 the Indian Evidence Act, 1872, section 91 such statement shall be admitted if the error has not injured the accused as to his defence on the merits.

(2) The provisions of this section apply to Courts of Appeal, Reference and Revision.

A confession duly recorded under s. 164 would no doubt be a public document under s. 74 of the Evidence Act which would prove itself under s. 80 of that Act. Mr. Dixit, who recorded the confession in this case was a second class magistrate and the prosecution was unable to prove that he had been specially empowered by the State Government to record a statement or confession under s. 164 of the Code. The trial, therefore, proceeded on the basis that he had not been so empowered. That being so, it was rightly held that the confessions had not been recorded under s. 164 and the record could not be put in evidence under ss. 74 and 80 of the Evidence Act to prove them. The prosecution, thereupon called Mr. Dixit to prove these confessions, the record being used only to refresh his memory under s. 159 of the Evidence Act. It is the admissibility of this oral evidence that is in question.

The Judicial Committee in *Nazir Ahmed* v. *The King-Emperor*(1) held that when a magistrate of the first class records a confession under s. 164 but does not follow the procedure laid down in that section, oral evidence of the confession is inadmissible. *Nazir Ahmed's*(1) case natu-

(1) L.R. 63 I.A. 372.

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rally figured largely in the arguments presented to this Court and the Courts below. The learned trial Judge following *Ashrafi* v. *The State*(1) to which we will have to refer latter, held that *Nazir Ahmed's case*(2) had no application where, as in the present case, a magistrate not authorised to do so purports to record a confession under s. 164, and on that basis admitted the oral evidence. The learned Judges of the High Court observed that the present case was governed by *Nazir Ahmed's case*(2) and that *Asharfi's case*(1) had no application because it dealt "with the question of identification parades held by Magistrates. There was no occasion to discuss the question of confessions recorded before Magistrates." In this view of the matter the learned Judges of the High Court held the oral evidence inadmissible and acquitted the respondents. It would help to clear the ground to state that it had not been argued in *Nazir Ahmed's case*(2) that s. 533 of the Code had any operation in making any oral evidence admissible and the position is the same in the present case. It would not, therefore, be necessary for us to consider whether that section had any effect in this case in making any evidence admissible.

In *Nazir Ahmed's case*(2) the Judicial Committee observed that the principle applied in *Taylor* v. *Taylor*(3) to a Court, namely, that where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all and that other methods of performance are necessarily forbidden, applied to judicial officers making a record under s. 164 and, therefore, held that magistrate could not give oral evidence of the confession made to him which he had purported to record under s. 164 of the Code. It was said that otherwise all the precautions and safeguards laid down in ss. 164 and 364, both of which had to be read together, would become of such trifling value as to be almost idle and that "it would be an unnatural construction to hold that any other procedure was permitted than that which is laid down with such minute particularity in the sections themselves."

The rule adopted in *Taylor* v. *Taylor*(3) is well recognised and is founded on sound principle. Its result is

(1) I.L.R. [1960] 2All. 488.
(2) L.R. 63 I.A. 372.
(3) [1875] 1 Ch. D. 426, 431.

that if a statute has conferred a power to do an act and has laid down the method in which that power has to be exercised, it necessarily prohibits the doing of the act in any other manner than that which has been prescribed. The principle behind the rule is that if this were not so, the statutory provision might as well not have been enacted. A magistrate, therefore, cannot in the course of investigation record a confession except in the manner laid down in s. 164. The power to record the confession had obviously been given so that the confession might be proved by the record of it made in the manner laid down. If proof of the confession by other means was permissible, the whole provision of s. 164 including the safeguards contained in it for the protection of accused persons would be rendered nugatory. The section, therefore, by conferring on magistrates the power to record statements or confessions, by necessary implication, prohibited a magistrate from giving oral evidence of the statements or confessions made to him.

Mr. Aggarwala does not question the validity of the principle but says that *Nazir Ahmed's case*(1) was wrongly decided as the principle was not applicable to its facts. He put his challenge to the correctness of the decision on two grounds, the first of which was that the principle applied in *Taylor* v. *Taylor*(2) had no application where the statutory provision conferring the power was not mandatory and that the provisions of s. 164 were not mandatory as would appear from the terms of s. 533.

This contention seems to us to be without foundation. Quite clearly, the power conferred by s. 164 to record a statement or confession is not one which must be exercised. The Judicial Committee expressly said so in *Nazir Ahmed's case*(1) and we did not understand Mr. Aggarwala to question this part of the judgment. What he meant was that s. 533 of the Code showed that in recording a statement or confession under s. 164, it was not obligatory for the magistrate to follow the procedure mentioned in it. Section 533 says that if the court before which a statement or confession of an accused person purporting to be recorded under s. 164 or s. 364 is tendered, in evidence, "finds that any of the provisions of either of such sections have

(1) L.R. 63 I.A. 372. (2) [1875] 1 Ch. 426.

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not been complied with by the magistrate recording the statement, it shall take evidence that such person duly made the statement recorded." Now a statement would not have been "duly made" unless the procedure for making it laid down in s. 164 had been followed. What s. 533, therefore, does is to permit oral evidence to be given to prove that the procedure laid down in s. 164 had in fact been followed when the court finds that the record produced before it does not show that that was so. If the oral evidence establishes that the procedure had been followed, then only can the record be admitted. Therefore, far from showing that the procedure laid down in s. 164 is not intended to be obligatory, s. 533 really emphasises that that procedure has to be followed. The section only permits oral evidence to prove that the procedure had actually been followed in certain cases where the record which ought to show that does not on the face of it do so.

The second ground on which Mr. Aggarwala challenged the decision in *Nazir Ahmed's case*(1) was that the object of s. 164 of the Code is to permit a record being kept so as to take advantage of ss. 74 and 80 of the Evidence Act and avoid the inconvenience of having to call the magistrate to whom the statement or confession had been made, to prove it. The contention apparently is that the section was only intended to confer a benefit on the prosecution and, therefore, the sole effect of the disregard of its provisions would be to deprive the prosecution of that benefit, for it cannot then rely on ss. 74 and 80 of the Evidence Act and has to prove the confession by other evidence including the oral evidence of the magistrate recording it. It was, therefore, said that the principle adopted in *Nazir Ahmed's case*(1) had no application in interpreting s. 164.

A similar argument was advanced in *Nazir Ahmed's case*(1) and rejected by the Judicial Committee. We respectfully agree with that view. The section gives power to make a record of the confession made by an accused which may be used in evidence against him and at the same time it provides certain safeguards for his protection by laying down the procedure subject to which alone the record may be made and used in evidence. The

(1) L.R. 63 I.A. 372.

record, if duly made, may no doubt be admitted in evidence without further proof but if it had not been so made and other evidence was admissible to prove that the statements recorded had been made, then the creation of the safeguards would have been futile. The safeguards were obviously not created for nothing and it could not have been intended that the safeguards might at the will of the prosecution, be bypassed. That is what would happen if oral evidence was admissible to prove a confession purported to have been recorded under s. 164. Therefore it seems to us that the object of s. 164 was not to give the prosecution the advantage of ss. 74 and 80 of the Evidence Act but to provide for evidence being made available to the prosecution subject to due protection of the interest of the accused.

We have to point out that the correctness of the decision of *Nazir Ahmed's case*(1) has been accepted by this Court in at least two cases, namely, *Rao Shiv Bahadur Singh* v. *The State of Vindhya Pradesh*(2) and *Deep Chand* v. *State of Rajasthan*(3). We have found no reason to take a different view.

Mr. Aggarwala then contended that *Nazir Ahmed's case*(1) was distinguishable. He said that all that the Judicial Committee decided in *Nazir Ahmed's* case was that if a Presidency Magistrate, a Magistrate of the first class or a Magistrate of the second class specially empowered in that behalf records a statement or confession under s. 164 but the procedure laid down in it is not complied with, he cannot give oral evidence to prove the statement or confession. According to Mr. Aggarwala, it does not follow from that decision that a Magistrate of a class not mentioned in the section, for example, a magistrate of the second class not specially empowered by the State Government cannot give oral evidence of a confession made to him which he had purported to record under s. 164 of the Code.

It is true that the Judicial Committee did not have to deal with a case like the present one where a magistrate of the second class not specially empowered had purported to record a confession under s. 164. The principle applied

(1) L.R. 63 I.A. 372. (2) [1954] S.C.R. 1098.
(3) [1962] 1 S.C.R. 662.

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in that decision would however equally prevent such a magistrate from giving oral evidence of the confession. When a statute confers a power on certain judicial officers, that power can obviously be exercised only by those officers. No other officer can exercise that power, for it has not been given to him. Now the power has been conferred by s. 164 on certain magistrates of higher classes. Obviously, it was not intended to confer the power on magistrates of lower classes. If, therefore, a proper construction of s. 164, as we have held, is that a magistrate of a higher class is prevented from giving oral evidence of a confession made to him because thereby the safeguards created for the benefit of an accused person by s. 164 would be rendered nugatory, it would be an unnatural construction of the section to hold that these safeguards were not thought necessary and could be ignored, where the confession had been made to a magistrate of a lower class and that such a magistrate was, therefore, free to give oral evidence of the confession made to him. We cannot put an interpretation on s. 164 which produces the anomaly that while it is not possible for higher class magistrates to practically abrogate the safeguards created in s. 164 for the benefit of an accused person, it is open to a lower class magistrate to do so. We, therefore, think that the decision in *Nazir Ahmed's case*(1) also covers the case in hand and that on the principles there applied, here too oral evidence given by Mr. Dixit of the confession made to him must be held inadmissible.

It remains now to notice some of the decisions on which Mr. Aggarwala relied in support of his contention. First of all we have to refer to *Asharfi's case*(2). That was a case which was concerned with the memorandum of an identification parade prepared by a magistrate of the first class. It was observed in that case that *Nazir Ahmed's case*(1) was authority for the proposition that where a magistrate belongs to a class mentioned in s. 164, he must act in terms of it or not at all, but where the proceedings are held before any other magistrate the statement is one under the unwritten general law and *Nazir Ahmed's* case had no application. It was also observed that an identification memorandum was a statement recorded under s. 164 when the record was

(1) L.R. 63 I.A. 372. (2) I.L.R. [1960] 2 All. 488.

made by a magistrate of a class mentioned in it but where the memorandum was prepared by a magistrate of another class it was not a record made under that section and the magistrate making the record can give oral evidence in proof of the statements in the memorandum. We are not very clear as to what exactly was intended to be laid down in this case about s. 164. Furthermore it does not appear to us from the report how the observations referred to above were necessary for the decision of the case, for, as earlier stated, the identification memorandum considered there had been prepared by a magistrate of the first class. It is not necessary for us in this judgment to decide whether or how far a memorandum of identification proceeding is a statement recorded under s. 164 and we do not wish to be understood as lending our support to the view expressed on that question in *Asharfi's case*(1). We think it enough to state that for the reasons earlier mentioned, we are unable to share the view—if that was the view expressed in *Asharfi's case*—that where a statement or confession is made in the course of investigation to a magistrate not belonging to one of the classes mentioned in s. 164, he can prove the statement or confession by oral evidence. We may state here that a later judgment of the same High Court has expressed some doubt about the correctness of that case: see *Ram Sanehi* v. *State*(2).

The next case to which reference was made by Mr. Aggarwala was *Ghulam Hussain* v. *The King*(3). That case dealt with the question whether a statement recorded under s. 164 which did not amount to a confession could be used against the maker as an admission by him within ss. 18 to 21 of the Evidence Act and it was held, that it could. The Judicial Committee observed that "the fact that an admission is made to a Magistrate while he is functioning under s. 164 of the Code of Criminal Procedure cannot take it outside the scope of the Evidence Act." That case only held that the relevancy of a statement recorded under s. 164 had to be decided by the provisions of the Evidence Act. We have nothing to do with any question as to relevancy of evidence. The question before

(1) I.L.R. [1960] 2 All. 488.
(2) A.I.R. [1963] All. 308. (3) L.R. 77 I.A. 65.

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us is whether a confession which is relevant can be proved by oral evidence in view of the provision of s. 164 of the Code. The question dealt with in *Ghulam Hussain's case*(1) was quite different and that case has no bearing on the question before us.

It is clear that the observation quoted earlier from *Ghulam Hussain's case*(1) does not, as argued by Mr. Aggarwala, support the contention that where a confession has been purported to be recorded under s. 164 but by a magistrate who is not one of those mentioned in it, the Evidence Act can still be called in aid to admit oral evidence to prove the confession. All that the Judicial Committee did in that case was to hold that an admission in a statement duly recorded under s. 164 was substantive evidence of the facts stated in it under ss. 18 to 21 of the Evidence Act. The Judicial Committee made that observation for this purpose only and to reject an argument that the cases of *Brij Bhushan Singh* v. *King Emperor*(2), and *Bhuboni Sahu* v. *The King*(3) showed that the admission made in the statement recorded under s. 164 could not be used against an accused person as substantive evidence of the fact stated. The Judicial Committee pointed out that "In these cases the Board was considering whether a statement made by a witness under s. 164 of the Code of Criminal Procedure could be used against the accused as substantive evidence of the facts stated, and it was held that such a statement could not be used in that way."

Another case cited was *Emperor* v. *Ram Naresh*(4). What had happened there was that two accused persons walked into the court of a magistrate and wanted to make a confession. The magistrate called a petition-writer and the accused persons dictated an application to him and that was taken down by the petition-writer and signed by them. That petition was admitted in evidence under s. 21 of the Evidence Act. It was held, and we think rightly, that *Nazir Ahmed's case*(5) did not prevent the petition being admitted in evidence because it only forbade certain oral

(1) L.R. 77 I.A. 65.
(2) L.R. 73 I.A. 1.
(3) L.R. 76 I.A. 147.
(4) I.L.R. [1939] All. 377.
(5) L.R. 63 I.A. 372.

evidence being given. This case turned on wholly different facts and is of no assistance.

We may also refer to, *In re Natesan*(1) where it was observed that the decision in *Nazir Ahmed's case*(2) might require reconsideration in view of the observations of this Court in *Willie Slaney* v. *The State of Madhya Pradesh*(3). The actual decision in *In re Natesan*(4) does not affect the question before us and with regard to the aforesaid observation made in it we think it enough on the present occasion to say that we are unable to accept it as correct.

We think that the High Court in the present case rightly rejected the oral evidence of Mr. Dixit.

The result is that the appeal fails and is dismissed.

Appeal dismissed.

GURAMMA BHRATAR CHANBASAPPA DESHMUKH AND ANOTHER

v.

MALAPPA

(K. SUBBA RAO, RAGHUBAR DAYAL AND J. R. MUDHOLKAR, JJ.)

Hindu Law—Joint family—Manager, powers of—Gifts of property to stranger and to daughter after marriage, validity of—Adoption—Whether existence of son in embryo invalidates adoption—partition—Sudras of Bombay Presidency—Share of adopted son vis-a-vis natural born son.

'A' died on January 8, 1944. He left behind him three wives and two widowed daughters, children of his pre-deceased wife. The senior most widow filed a civil suit for partition and possession of 1/6th share after setting aside the alienations made by her husband on January 4 and 5, 1944. It was alleged that at the time of the death of 'A' his youngest wife was pregnant and that she gave birth to a male child on October 4, 1944. On January 30, 1944, the senior most widow took her sister's son in adoption. A few days before his death 'A' executed two deeds of maintenance in favour of his two wives (defendant Nos. 1 and 2) and also executed deeds of gift in favour of widowed daughter, a son of an illegitimate son and a relative. Long before his death he also executed two deeds viz one a deed of maintenance and a deed of gift in favour of the senior most widow (the plaintiff). To this suit the two widows were made defendants 1 and 2; the alleged adopted son, defendant 3,

(1) A.I.R. 1960 Mad. 443.
(2) L. R. 63 I. A. 372.
(3) [1955] 2 S.C.R. 1140.