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[Crown case reserved.]

Present: The Hon. Sir Joseph T. Hutchinson, Chief Justice, Mr. Justice Middleton, and Mr. Justice Wood Renton.

KING *v.* BABUNDINA.

P. C., Matara, 21,090.

(1st Matara Criminal Sessions, 1907, No. 6.)

Criminal Procedure Code, ss. 302 and 424—Statement in Sinhalese taken down in English by Sinhalese Magistrate—Irregularity—Admissibility of evidence to prove that the statement was actually made—Burden of proving impracticability.

Under section 302 of the Criminal Procedure Code the statement of an accused made in the course of an inquiry under chapter XVI. of the Criminal Procedure Code must be recorded in the language in which it is made, unless it is impracticable to do so.

MIDDLETON J.—The burden of proving that it was impracticable to record the statement in the language in which it was made is on the Crown.

Where the accused made a statement in Sinhalese and it was recorded in English by the committing Magistrate, who was a Sinhalese, and on objection being taken at the trial by the accused's pleader to the said statement being put in, the presiding judge admitted evidence under section 424 of the Criminal Procedure Code to prove that the accused duly made the statement recorded, and after such evidence allowed the statement to be put in—

Held, that such evidence was properly admitted, and that the statement was rightly put in.

CROWN case reserved. The case reserved for the consideration of the Court by the Chief Justice was as follows:—

"1. The accused Babundina was charged with the murder of a man called Nanda by shooting him. His statement to the Magistrate, as recorded by the Magistrate in English (see page 49 of the record), was in substance that the shooting was an accident; that he fired at Nanda thinking that he was firing at a wild animal.

"2. Section 302 of the Criminal Procedure Code requires that the statement of the accused to the Magistrate 'shall be recorded in full in the language in which he is examined, or, if that is not practicable, in English.' This accused is a Sinhalese, and made his statement in Sinhalese. The Magistrate was Mr. Godamune, who is a Sinhalese; he understood what the accused said, and could have recorded it in Sinhalese but he recorded it in English only.

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"3. When the Crown Counsel was proceeding to open his case, the accused's counsel objected to his telling the jury what was the substance of the accused's statement to the Magistrate, on the ground that it was not recorded in the language in which the accused had been examined. And at the close of the evidence for the prosecution, when the Crown Counsel proposed to put in the statement, he again objected.

"4. I thought that when a statement has been recorded in English, the Court should presume that it was properly so recorded; but that if the presumption is shown to be wrong by proof that it was practicable for the Magistrate to record the statement in the language of the accused, the Court had power under section 424 of the Criminal Procedure Code to take evidence that the accused duly made the statement recorded.

"5. I accordingly took the evidence of the Magistrate; and being satisfied by it that the statement as recorded by him was a correct representation in English of what the accused said, I admitted the statement.

"6. The jury acquitted the accused of the charge of murder, but found him guilty of causing the death of Nanda by a rash and negligent act under section 298 of the Penal Code.

"7. No defence was suggested other than that contained in the accused's statement to the Magistrate. If the statement had been excluded and no other defence had been set up, the result of the trial would probably have been the same.

"8. The questions for the Court are—

"(1) Whether the statement of the accused as recorded by the Magistrate was rightly admitted, although not recorded in the language in which the accused was examined?

"(2) If the Court is of opinion that the statement ought not to have been admitted, whether the conviction ought to stand?"

The Hon. Mr. Walter Pereira, *K.C.*, (Acting) *A.-G.* (with him *W. S. de Saram*, *C.C.*), for the Crown.

Garvin, for the accused.

Cur. adv. vult.

27th August, 1907. HUTCHINSON C.J.—

This is a case reserved under section 355 of the Criminal Procedure Code.

The Magistrate at the preliminary inquiry recorded the statement of the accused in English. The accused was examined in Sinhalese and made the statement in that language, and the Magistrate understood what he said, and could have recorded it in Sinhalese.

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HUTCHINSON C.J.

The Criminal Procedure Code enacts in section 302 that the statement of the accused "shall be recorded in full in the language in which he is examined, or, if that is not practicable, in English."

At the trial, which took place before me, the accused's counsel objected to the statement being put in evidence. I was of opinion that when a statement is recorded by the Magistrate in English, the Court should presume that it was properly recorded, until the contrary is shown; that it is not essential, although it is desirable, that the Magistrate who records in English a statement made in some other language should certify on the record that it was not practicable to record it in the language in which the accused was examined; and that, when it appears, as the present case, that it was so practicable, the Court has power under section 424 of the Code to take evidence that the accused duly made the statement recorded. I accordingly took the evidence of the Magistrate, and being satisfied by it that the statement as recorded was a correct reproduction in English of what the accused had said, I admitted the statement.

The jury convicted the accused, and I then reserved this case.

The first question for the Court is whether the statement of the accused as recorded by the Magistrate was rightly admitted, although not recorded in the language in which the accused was examined.

The answer depends on whether section 424 applies to a case of this kind. That section enacts that "if any Court before which a deposition of a witness or a statement of an accused recorded under the provisions of this Code is tendered in evidence finds that the provisions of this Code have not been fully complied with by the Police Magistrate recording the evidence or statement, it may take evidence that such accused duly gave the evidence or made the statement recorded, and, notwithstanding section 91 of the Ceylon Evidence Ordinance, such evidence or statement shall be admitted, if the error has not injured the accused as to his defence on the merits."

It was contended for the appellant that this defect could not be cured under section 424, because this statement was not "recorded under the provisions of this Code," but was recorded in a manner which was a violation of those provisions. That contention involves the reading of the word "under" as meaning "in strict conformity with." But to give it that meaning would be to defeat the whole object of section 424, which is to allow the admission, in a proper case, of a deposition or statement which has been recorded under the Code, although not in strict compliance with all the provisions of the Code. Some Indian cases were referred to in which provisions in the old Indian Code in the same terms as section 424 were construed in the way in which the appellant contends that ours ought to be construed; and it was pointed out that the corresponding provision in the Indian Code now in force uses the words

" recorded or purporting to be recorded under the provisions of this Code ". But that construction was not generally accepted by the Indian Courts; and it seems probable that it was in consequence of the conflicting opinions on the point that the Legislature in the later Code set the matter at rest by adding the words " or purporting to be recorded. "

In my opinion the Court had power under section 424 to admit the evidence of the Magistrate, and, as the error certainly did not injure the accused as to his defence on the merits, to admit the statement.

The first question should therefore be answered in the affirmative and the conviction should be affirmed.

MIDDLETON J.—

This was a case of murder in which counsel for the defence objected to the admission of the statement made by the accused before the Magistrate on the ground that, though it was practicable to do so under section 302 of the Criminal Procedure Code, the Magistrate had not recorded the accused's statement in Sinhalese —his own language—but in English.

The learned Chief Justice, acting under the provisions of section 424, allowed the Magistrate to be called to prove that the accused had in fact made the statement which was objected to, and that the English translation was a correct representation of what the accused said.

There was no doubt that the Magistrate, a Sinhalese gentleman, could have found it practicable to record the statement in his own language.

The Chief Justice stated a case for the opinion of two or more Judges of this Court under section 355.

The first question in the case was whether the statement of the accused which had been recorded in English by the Magistrate was rightly admitted under section 424 of the Criminal Procedure Code. Secondly, if the statement should not have been admitted, whether the conviction ought to stand.

It was argued by counsel for the defendant that before applying section 424 it must be shown that section 302 had not been fully complied with, and that this section was intended only to obviate errors of accidental non-compliance but not deliberate infraction.

It was further argued that a confession recorded in direct violation of the provisions of the Code of procedure cannot be said to be recorded under the provisions of the Code.

It was also contended that the onus of proving that it was impracticable to record the statement in the language of the accused was on the Crown, who desired to put it in evidence.

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The cases reported in Indian Law Reports, *Queen Empress v. Viran*[1] and *Queen Empress v. Nilmadhub Mitter*,[2] *Jai Narayan Rai v. Queen Empress*[3], were cited.

In *Jai Narayan Rai v. Queen Empress* and *Queen Empress v. Viran* the point before us was decided in favour of the accused while in *Queen Empress v. Nilmadhub Mitter* the document containing the statement was held properly admitted upon the evidence of the Magistrate who recorded it.

Section 364 and section 533 of the Indian Criminal Procedure Code of 1898 are substantially similar respectively to sections 302 and 424 of the Ceylon Criminal Procedure Code, and both sections 533 and 424 specifically provide for the obviation of any effect that section 91 of the Ceylon Evidence Ordinance or Indian Evidence Act might be held to have on the admissibility of secondary evidence of matter which is required by law to be reduced to the form of a document.

The decision in the case relied on for the accused was anterior in date to the Indian Criminal Procedure Code of 1898.

The Attorney-General referred us to *Queen Empress v. Visram Babaji*,[4] in which the ruling in *Jai Narayan Rai v. Queen Empress* was dissented from and that in *Queen Empress v. Nilmadhub Mitter* followed.

It was also further contended for the Crown that the Police Magistrate who recorded it might have given evidence of it as a confession made before him under section 26 of the Evidence Ordinance, using the statement to refresh his memory.

In my opinion the language and context indicate that the meaning of the word "recorded" in section 424 must be taken to be "purporting to be recorded," and the object of the section is to prevent justice being frustrated by rendering admissible such evidence as has been received in the present case as to the contents of the accused's statement, provided that the error of the Magistrate in improperly recording it is not shown to have injured the accused in his defence on the merits. That is not shown here.

I would therefore, answer the first question in the affirmative, and hold that the evidence has been rightly admitted. It is not necessary under these circumstances to deal with the second question.

I think also that section 302 means that if the statement of the accused is recorded in English, the burden of showing it was impracticable to record it in the language of the accused is on the Crown, with whom that knowledge must be assumed to be.

WOOD RENTON J.—

I think that my Lord, the Chief Justice, was right on the first point reserved. The second point, therefore, does not arise. It

[1] (1886) *I. L. R.* 9 *Mad.* 224.
[2] (1888) *I. L. R.* 15 *Cal.* 595.
[3] (1890) *I. L. R.* 17 *Cal.* 862.
[4] (1896) *I. L. R.* 21 *Bom.* 495.

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appears to me that the effect of section 424 of the Criminal Procedure Code is to enable any irregularity in the recording of the statement of an accused person under section 302 to be corrected by evidence, provided that the accused is not prejudiced thereby as to his defence on the merits. The construction derives support (i.) from the language of section 424 itself; (ii.) from the balance of Indian judicial authority under the corresponding sections of the Indian Code (*Lalchand v. Queen Empress*,[1] *Queen Empress v. Visram Babaji*,[2] as against *Queen Empress v. Viran*,[3] *Queen Empress v. Nilmadhub Mitter*, [4] *and Jai Narayan Rai v. Queen Empress*, [5] and (iii.) from the general scope of chapter XLII. (sections 423—426) of our own Code of Criminal Procedure, the object of which is to prevent criminal proceedings from being frustrated by any kind of technical irregularity which has not prejudiced the person accused.

I need only touch more specifically on the first point above noted, and that in a single sentence, I think that a statement is " recorded under the provisions " of section 302, within the meaning of section 424, when the person recording it purports to act under the former section, and I see no ground for introducing any limitation on the class of irregularities that may be cured under the latter.

Conviction upheld.

[1] (1891) *I. L. R.* 18 *Cal.* 595.
[2] (1896) *I. L. R.* 21 *Bom.* 495.
[3] (1886) *I. L. R.* 9 *Mad.* 224.
[4] (1888) *I. L. R.* 15 *Cal.* 595.
[5] (1890) *I. L. R.* 17 *Cal.* 862.