

**Babbu Vs. State**

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**SooperKanoon Citation :** [sooperkanoon.com/469609](http://sooperkanoon.com/469609)

**Court :** Allahabad

**Decided On :** Mar-26-1954

**Reported in :** AIR1954All633

**Judge :** Agarwala and ;Roy, JJ.

**Acts :** [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 162, 164 and 533;  
[Evidence Act, 1872](#) - Sections 32

**Appeal No. :** Cr. Appeal No. 60 of 1951

**Appellant :** Babbu

**Respondent :** State

**Advocate for Def. :** The Govt. Adv.

**Advocate for Pet/Ap. :** R.C. Ghatak, Adv.

**Judgement :**

**Roy, J.**

1. The appellant Babbu alias Babu Ram has been convicted by the learned Additional Sessions Judge of Farrukhabad under Sections 307 and 309, I.P.C. He preferred an appeal to this Court. The appeal was heard by a learned single Judge on 26-10-1953. The learned single Judge has referred the following question for

decision by this Bench:

'Whether the statement Ex. P. 8 could be admitted in evidence as a confession in view of the decision of their Lordships of the Privy Council in -- 'Nazir Ahmad v. King Emperor , after such a statement has been ruled out as inadmissible under Section 32, Evidence Act?'

2. The appellant was charged with having assaulted his wife with a gandasa and having caused her serious injuries. He was further charged of having inflicted injuries on himself in order to end his own life after he had assaulted his wife. Both the appellant and his wife were found lying injured and almost in an unconscious state by some people and then report of the incident was made and investigation commenced. The prosecution were unable to produce any eye-witnesses of the actual assault. Reliance was placed by the prosecution on the extra-judicial confession of the appellant. The confession was attempted to be proved by the evidence of three witnesses, namely, Shanker Sen, Bharat and Kunwar Sen.

The appellant and his wife were removed to the hospital for treatment after the investigation had begun. The doctor found their condition very low, He, therefore, sent a note to a Magistrate to make arrangements for the recording of the dying declaration of both. In pursuance of that request from the Medical Officer, the Tehsildar Magistrate, one Mr. Farid Uddin, went to the hospital to record the dying declaration of the appellant and his wife. The dying-declaration of the appellant is to be found at page 10 of the paper-book and has been marked Ex. P. 8 in the case. That statement was recorded after oath having been administered to him. In this dying declaration the appellant, in effect, confessed to not only having caused injuries on himself but also to having caused injuries on his wife with a gandasa.

3. It was contended on behalf of the appellant before the trial Court that the recording of the appellant's statement by the Magistrate amounted really to the recording of a confession of the accused and since the Magistrate did not follow the procedure prescribed for the recording of confession, it was inadmissible in evidence. The learned trial Judge did not appear to have given effect to that contention on behalf of the appellant and he held that though the statement of the accused recorded as a dying declaration was not admissible in evidence under

Section 32, Evidence Act, yet it was admissible as a confession.

4. Mr. Ghatak, appearing on behalf of the appellant, has contended that in view of the decision of their Lordships of the Privy Council in the case of ', the statement Ex. P. 8 was inadmissible, even though the statement was ostensibly recorded as a dying declaration. When the case was before the learned single Judge reliance was placed by the other side upon a reported decision of this Court in -- 'Rex v. Moti : AIR1953 All792 , and it was contended that the statement of the appellant which was ostensibly recorded as a dying declaration would be admissible and could not be hit by the rule laid down by their Lordships of the Privy Council in -- Nazir Ahmad's case (A)'. The learned Government Advocate has reiterated the same contention before us when this matter has been heard.

5. After hearing arguments from both sides we are of opinion that the view laid down by their Lordships of the Privy Council in -- 'Nazir Ahmad v. King Emperor (A)', (ante), would be completely applicable to the present case.

6. The answer to the question which has been referred to us would depend upon the meaning and effect of certain sections of the Code of Criminal Procedure. Section 164 of the Code is as follows :

'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 Provincial 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 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 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.'

Section 364 of the Code then lays down :

'364 (1) Whenever the accused is examined by any Magistrate, or by any Court other than a High Court established by Royal Charter or the Chief Court of Oudh, 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 account 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 memorandum 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.'

Then Section 533 of the Code is in the following terms:

'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.'

7. In, the present case, the Magistrate concerned, who recorded the statement Ex. P. 8, was not available when evidence was heard. An effort was made on behalf of the prosecution to prove that statement by producing his Judicial Clerk. In the Privy Council case, referred to above, the Magistrate himself was produced to prove the record of the statement made by him. Their Lordships of the Privy Council in dealing with the matter observed as follows:

'The matter to be considered and decided is one of plain principle and first importance namely, is such oral evidence as that of the Magistrate, Mr. Vasisht, admissible? It was said for the respondent that it was admissible just because it had nothing to do with Section 164 or with any record. It was argued that it was admissible by virtue of Sections 17, 21, 24 and 26, [Evidence Act, 1872](#), just as much as it would be if deposed by a person other than a Magistrate.

'It was also said that if the oral evidence was admissible then Section 91, Evidence Act, requiring evidence in writing did not apply because the matter would in such a case not be one which had to be reduced to writing. For the appellant it was said that the Magistrate was in a case very different from that of a private person, and that his case and his powers were dealt with and delimited by the Criminal Procedure Code, and that if this special Act dealing with the special subject-matter now in question set a limit to the powers of the Magistrate, the general Act could not be called in aid so as to allow him to do something which he was unable to do, or was expressly or impliedly forbidden to do, by the special Act. The argument was that there was to be found by necessary implication in the Criminal Procedure Code a prohibition of that which was here attempted to be done: in other words that the Magistrate must proceed under Section 164, or not at all.

'To this contention it was answered that there was no ground for reading the word 'may' in Section 164 as meaning 'must' on the principle described in -- 'Julius v. Bishop of Oxford', (1880) 5 AC 214 (C). There is no need to call in aid this rule of construction -- well recognised in principle but much debated as to its application. It can hardly be doubted that a Magistrate would not be obliged to record any confession made to him if, for example, it were that of a self-accusing madman or for any other reason the Magistrate thought it to be incredible or useless for the purposes of justice. Whether a Magistrate records any confession is a matter of duty and discretion and not of obligation. The rule which applies is a different and not less well recognised rule, 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. Other methods of performance are necessarily forbidden.'

8. In the present case, the provisions of Section 164 of the Code were not complied with. If the statement EX. P 8 is to be taken as a confession, the Magistrate had failed to warn the person making the statement that he was a Magistrate, that the person making the statement was not bound to make a confession and that if he did so it could be used in evidence against him and he could be convicted on his own confession. The statement Ex. P 8 was essentially recorded and intended to be a dying declaration, but since the man who made it survived, it was inadmissible under Section 32 of the Indian Evidence Act. Since

the formalities laid down in Section 164 of the Code were not complied with and since in the present case there was not even any semblance of oral evidence to prove that the Magistrate had informed the person making the statement that he was a Magistrate, that he was not bound to make a statement, and that any statement made by him could be used against him and that he could be convicted on his own confession, the statement Ex. P. 8 cannot, in our opinion, be taken as a confession and it is, therefore, not admissible in evidence.

9. In 'Rex v. Moti (B)' (Supra) the decision of their Lordships of the Privy Council in ', had been noticed and a distinction drawn upon facts. We have considered the decision in 'Rex v. Moti (B)', and we are of the opinion that the present case is different on facts from what it was in 'Rex v. Moti (B)'. In : AIR1953 All792 ', the question which had to be considered was laid in the following terms:

'Whether the materials on the record go to show that the confession was being made voluntarily and the accused had been warned that he was not bound to make a confession and any confession made by him could be used in evidence against him,'

Their Lordships after noticing the evidence that was produced in the case held that before the statement was recorded the Magistrate had explained to the accused that he was not bound to make a statement, that any statement made by him would be used against him and that he could be convicted on his own confession. They further observed that though it would have been better if the Magistrate had written down in the form of questions and answers all that had transpired, there was no reason to discard the evidence of the Magistrate and the defect was cured by Section 533 of the Code of Criminal Procedure, though by reason of the defects already pointed out the confession must be said to have lost much of its evidentiary value.

10. In the present case, as we have already observed, the precautions which the Magistrate had taken as in the case of 'Rex v. Moti (B)', before recording the statement of the person, were not proved to have been taken.

11. In every view of the matter we have come to the conclusion that the statement Ex. P. 8 could not be admitted in evidence as a confession in view of the decision of their Lordships of the Privy Council in 'Nazir Ahmad v. King-Emperor (A)' cited above. The reference is accordingly answered and the answer may be laid before the learned single Judge.

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