[APPELLATE CRIMINAL JURISDICTION.]

REG. v. GOVIND BÁBLI RÁUL and BÁBÁJI GOVIND KUBAL.

1874.
December 2.

Confession—Prisoners jointly tried—Indian Evidence Act, Section 30—Amendment of Charge—Criminal Procedure Code, Sections 447 to 449.

While A and B were being jointly tried before a Court of Session, the first for murder and the second for abetment of murder, a confession made by A that he himself had committed the murder at the instigation of B, was put in as evidence against A. Subsequently the charge against A was altered to one of abetment of murder, and the Session Judge, under the authority of Section 30 of the Indian Evidence Act, used the confession against both, and convicted them,

The High Court held that the original and amended charges were so nearly related that the trial might, without any unfairness, be deemed to have been a trial on the amended charge from the commencement; and that no objection having been taken by B, who was represented by a Vakil, to the admissibility of A's confession against him when the charge against A was altered, the Session Judge was justified in using the confession against B also,

THE accused Govind and Bábáji were convicted by R. W. Hunter, Session Judge of Ratnágiri, of the abetment of murder, and the former was sentenced to transportation for life, and the latter to death.

The material facts of the case are briefly as follows :—

Prisoner Govind confessed to a Magistrate that he, at the instigation of prisioner Bábáji, by laying poison before an idol, caused it to be taken by members of the complainant Rám Kubal's family, thus causing the death of two of his children. Govind was committed on a charge of murder, and Bábáji on that of abetment of murder and a joint trial upon these charges was commenced in the Court of Session. In this state of affairs, the confession of Govind was tendered in evidedce, and was received as against Govind. Subsequently the Judge was fit to alter the charge against him to one of abetment of murder, so as to make the charge against both the prisoners identical, and he then took into consider-

ation under Section 30 of the Indian Evidence Act Govind's confession against Bábáji, and relying upon it, coupled with the other evidence in the case, convicted both the prisoners of abetment of murder.

The appeal was heard by West and Náná Bhái Haridas, JJ.

Branson (with him *Shivshankar Govindram* and *Maniksha Jehangirsha*) for the appellants :—When the confession of Govind was received, he and Bábáji were charged with different offences, and his confession should not, therefore, have been considered against Bábáji: *Reg* v *Jaffir Ali* (*a*). Even though on objection was raised by Bábáji or his pleader, the Judge was bound, under Section 256 of the Code of Criminal Procedure, to have thrown it out of his consideration.

Dhirajlal Mathuradas, Government Pleader, for the Crown.

WEST, J.:—As to the point of the admissibility of prisoner Govind's confession as evidence against the second prisoner, Bábáji, we think that the Session Judge was justified in admitting that confession only against Govind, but against his fellow-prisoner. No doubt, when it was received, the two accused were before the court on different charges, and it was received under the notion that it was evidence against Govind alone. But the Code of Criminal Procedure, by Section 447 and the following sections, provides for an amendment of the charge at any stage of the trial, and enables the Court, at its discretion, after making such amendment, to proceed with the trial as if the amended charge had been the original charge. The amendment of the charge in this case made the charge identical against both the accused. If both had been charged originally with abetment, the confession of one would have been received without question against the other. Some difficulty might indeed conceivably arise out of dealing with a case of a confession of prisoner *B* as evidence against prisoner *A* (then under trial jointly on a different charge), but at the time when this confession was recorded, might

(*a*) 19 Cal. W. R. Cr. R. 57.

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possibly have rasied an objection against its legal admissibility, or might have started questions which would have served his purpose, but for their apparent irrelevancy at that time. But looking to the principle laid down in Sections 447, to 449, it is clear that the intention of the Legislature is, that whenever an amendment of the charge in any way tends to prejudice the prisoner, steps should be taken to prevent that consequence arising by ordering a new trial, or suspending the trial going on, to enable him to make his defence or to examine any material witness, or to, recall any witnesses already examined. The same principle extends to all instances of material prejudice arising to any one under trial from an amendment made in the course of the proceedings. If we found that the Session Court had overlooked this principle, that the prisoner Bábáji had objected, on valid grounds, to the reception of the confession, or that this prisoner had really been prejudiced by the refusal of an adjournment, or in any other manner, we should, in a confirmation case, give the accused the full benefit of the objection. We find, however, that the prisoner Bábáji in whose favour the objection is raised here, was defended by a competent pleader, who, when the charge against Govind was amended, neither asked for a new trial, nor sought to raise any objection to the admissibility of the confession as evidence against his client. It is only in the case of charges closely related that a trial goes on forthwith after an amendment; and in this instance the original and amended charges are so nearly related, that in the absence of technical objection urged on behalf of the prisoner Bábáji, the trial might, without any unfairness, be deemed for the reception of evidence and all other purposes, to have been a trial on the amended charge from its commencement. It was only when he came to draw up his judgment that the Judge took Govind's confession into consideration against Bábáji, and at that moment they were both jointly under trial for the same offence. Therefore, the objection must be disallowed, although at first sight, it might seem to possess some force.

[His Lordship then went on the consideration of the evidence against both prisoners, and Babaji was acquitted and discharged, while the conviction and sentence against Govind were confirmed.)

Order accordingly.

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[APPELLATE CRIMINAL JURISDICTION.]

August 26.

REG *v.* ARJUN MEGHA AND MÁNÁ JEESÁ.

The Code of Criminal Procedure, Section 249—Appeal against exercise of discretion.

The purpose of section 249 of the Code of Criminal Procedure, as amended by section 20 of Act XI. of 1874, is to make depositions given before Magistrates in the preliminary inquiry evidence in the trial before the court of Session, only when the Session Judge determines, in the exercise of his discretion, that they are to be used in this way. But the exercise of this discretion considering it as a matter of fact or law, is open to review by the Appellate Court.

THE appellants, with two other accused, were tried and convicted of murder by W. H. Newnham, Session Judge of Ahmedabad, and sentenced to death.

The appeal by two of the prisoners and the reference for confirmation of the sentences of death were heard by WEST and NÁNÁBHÁI HARIDÁS, JJ.

Shantaram Narayan for the appellants :-There are discrepancies in the depositions made by some of the witnesses for the prosecution before the committing Magistrate and the Session Judge. Section 249 of the Code, as modified by the amending Act of 1874, implies that the Session Judge must, in proper cases, exercise a discretion, and make the depositions given in the preliminary inquiry evidence in the trial. Where he fails to do this, we have a right to appeal to this Court to review his proceeding, and ask it to exercise the discretion itself, or order the Session Court to do so in a proper manner. It should appear on the Session Judge's proceedings how he exercises any discretion which the law vests in him.