

That such a suit is cognizable by a civil court has been repeatedly recognized by the decisions of this Court (it is only necessary to refer to Special Appeal 57 of 1871, decided 15th March 1872, and Regular Appeal 73 of 1871, decided 24th June 1872, and Regular Appeal 74 of 1873, decided 21st September 1874): and that such a suit will lie, even when the object of it is only to enable the plaintiff to influence the revenue authorities by showing that he has been declared by the civil court eligible for office as *Patil*, is further supported by the remarks made by their Lordships of the Privy Council in *Sadat Alikhan v. Khajeh Abdul Gani*.

1874
Ningangavda
Patil
v.
Satyangavda
Patil.

We, therefore, reverse the decree of the District Court, and remand the case to the District Court for retrial on its merits. Costs to follow the final decision.

Decree reversed and case remanded.

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[APPELLATE CRIMINAL JURISDICTION.]

REG. v. DEVÁ DAYAL.

November 23.

The Code of Criminal Procedure, Section 346—Prejudice.

An accused person whose signature to a statement made by him to the committing Magistrate is not taken, as provided in Section 346 of the Code of Criminal Procedure, is not prejudiced thereby within the meaning of that section, unless he is unfairly affected as to his defence on the merits.

Where a prisoner in the Court of Session was represented by a pleader who had opportunity to object to the admissibility of his statement, and did not, the High Court held that he was not prejudiced.

THE accused Devá Dayál was tried by J. W. Walker, Act. ing Session Judge of Ahmedabad, for the murder of his wife, Jamná, and sentenced to death.

The accused made a confession of his guilt to the Third Class Magistrate at D'holká on the day that Jamná was found dead, and he admitted the confession of the offence before

1874.
Reg.
v.
Deva Dayal. the committing Magistrate, but withdrew it before the Session Judge. The Judge was of opinion that the facts of the case bore out the confessions made by the accused, and established the charge of murder.

The appeal and the reference for confirmation of the sentence of death were heard by WEST and PINHEY, JJ.

Shantaram Narayan for the appellant:—The confession of the accused is not made as directed in Section 346 of the Code of Criminal Procedure. A *karbun* of the committing Magistrate appears to have written the prisoner's name but the accused himself has neither signed his name nor made his mark. In the absence of these pieces of pre-appointed evidence, the prisoner must necessarily be considered as prejudiced, for a doubt remains as to the genuineness of the statements.

Mr. Shántáráam then commented on the evidence.

Dhirajlal Mathuradas, Government Pleader, for the Crown:—The prisoner is not prejudiced. The meaning of what is prejudice within the meaning of Section 346 of the Code of Criminal Procedure may be gleaned from a comparison of it with Section 447.

WEST, J. (in delivering judgment said):—It has been urged upon us by the accused's Pleader, Mr. Shántáráam Náráyan, that the statement of the accused, taken before the committing Magistrate, is inadmissible in evidence, inasmuch as it does not bear the signature of Devá Dayál, as directed by Section 346 of the Code of Criminal Procedure. "The signature of A. B., the accused, in the hand writing of C. D.," which is what appears in this case, has been held not to meet the requirements of that section. The question, therefore, is whether this defect has "prejudiced" the prisoner, for if it has not, then, as provided in the last paragraph of that section, it cannot be deemed to affect the admissibility of the statement recorded.

We are of opinion that the meaning of the word "prejudiced" in this section is 'unfairly affected as to his defence on the merits.' The intention of the whole para-

graph in which this word occurs is to remedy defects of a formal character, which may have arisen through inadvertence or neglect on the part of the Magistrate and which defects the law, and the Legislature, think ought not to be made the means of culprits escaping the just penalties of their crimes. As the examination of the accused person, taken in the preliminary inquiry, may be proved to have been duly made, though not regularly and formally recorded, a defect in such record is not sufficient to exclude it, and the inquiry may be forgone, if no objection is made, and it appears that the defect has been of a kind which does not really affect the merits, and is one which would be remedied by the examination of the Magistrate, or some one who was present.

1874.

Reg.

v
Deva Jayal.

In the present case prisoner was represented by a professional gentleman, who, we must suppose, was reasonably well acquainted with the law. As an objection existed on the ground of the want of the proper signature of the prisoner to the document, it is right to suppose that he would have taken it, if he had thought leaving the error uncorrected would have operated unfairly against his client. His not taking this objection shows that to his consciousness, the defect was purely formal, or that he considered that it would be at once remedied by the examination of a person present when the statement was made.

We must lastly refer to Section 167 of the Indian Evidence Act and Section 283 of the Code of Criminal Procedure. No decision is to be upset for a defect which has not prejudiced the prisoner in his defence. In order that an Appellate Court may be asked to act upon an objection of this kind, it is necessary that it should have been taken before the lower court. It was not taken in this case, and it cannot, in strictness be claimed that it be entertained by us now. Had the prisoner been unrepresented in the Court of Session, we might possibly have felt it within our competence to make a relaxation in his favour; but the fact that he was represented, and that his pleader did not take the objection, leads us to the inference that the latter did not

1873.
Reg.
v.
Deva Dayal.

consider that it would benefit his client. Upon the whole, therefore, we think the prisoner was not prejudiced.

The Court declining to confirm the sentence of death, passed upon Devá Dayál a sentence of transportation for life.

Order accordingly.

NOTE.—See *supra* p. 44, the case of *Reg. v. Daya Anand and another*, in which the Court (West and Nanabhai Haridás, J.J.) held that a similar confession should not have been admitted. In that case, however, it does not appear that the prisoners were professionally represented in the Session Court.—Ed.

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November 23.

[APPELLATE CRIMINAL JURISDICTION.]

REG. v. CHÁND NUR AND PIRBHÁI ÁDAMJI.

The Code of Criminal Procedure, Section 457—Conviction of an offence without a specific charge.

When a person is charged with an offence consisting of parts, a combination of some only of which constitutes a complete minor offence, he may, under Section 457 of the Code of Criminal Procedure, be convicted of the latter without being specifically charged, but only when the graver charge gives notice of all the circumstances going to constitute the minor offence.

Hence, where a man charged with murder was convicted of abetment of it, the High Court annulled the conviction and sentence, and ordered him to be retried on the latter charge.

THE accused Chánd and Pirbhái were both tried by W. H. Newnham, Session Judge of Ahmedabad, on a charge of murder; but while the former was convicted of the offence charged, the latter was found guilty of abetment of murder. Both, however, were sentenced to death.

The material facts of the case are as follows:—

Chánd, at the instigation, it is said, of Pirbhái, put some poison into a mill belonging to one Rájebháí (an enemy of the latter), in consequence of which Rájebháí narrowly escaped death, while his two sons actually died. Mr. G. B. Reid, Magistrate, First Class, committed both those persons on a charge of murder, on which they were tried by Mr. Newnham, who, finding on the evidence that Pirbhái was not present at the commission of the offence, found him guilty to abetment of murder only, without making any amendment