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of this kind, i.e., when their mistakes have led to injustice, that their inherent powers are preserved intact by section 151 of the Code of Civil Procedure. I am therefore of opinion that the District Judge had inherent power to allow the application made to him by the respondents and was right in exercising it.

The revision petition must therefore fail, and it is dismissed with costs.

K.W.R.

APPELLATE CRIMINAL.

Before Mr. Justice Pakenham Walsh.

1934, August 20.

IN RE MAVUTHALAYAN AND OTHERS (ACCUSED), APPELLANTS.*

Indian Penal Code (Act XLV of 1860), sec. 107 (3)—Receiver of stolen property—Accomplice—Accessory after the fact—Criminal trial—Charge to the jury—Omission to direct jury that evidence of receiver should be received with caution—Accused prejudiced.

Although under the law prior to the Indian Penal Code (Act XLV of 1860) an accessory after the fact stood on a different footing from an accomplice, now a person who knowingly aids in the disposal of stolen property is an accomplice within the meaning of section 107, clause 3 of the Code; and an omission to tell the jury that the evidence of a receiver of stolen property, being that of an accomplice, should be received with caution, is a failure to direct the jury on a material point, thereby prejudicing the accused.

APPEALS against the Order of the Court of Session of the North Arcot Division at Vellore in Case No. 21 of the Calendar for 1934.

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* Criminal Appeals Nos. 265 and 266 of 1934 and Criminal Revision Case No. 659 of 1934.

Accused were not represented by Counsel. *Public Prosecutor* (*L. H. Bewes*) for the Crown.

Cur. adv. vult.

JUDGMENT.

In this case the accused have been convicted of house-breaking and theft, offences under sections 457 and 380, Indian Penal Code. There is no direct evidence that any of them were seen at the place of house-breaking and the conviction rests on the subsequent recovery of certain of the stolen articles. The learned Sessions Judge says in his charge to the jury :

"There is hardly little or no evidence on record that these accused were arrested with these articles in their possession."

So the evidence against them is that of third persons to whom they handed over the property. One of these is Prosecution Witness 6 to whom six brass vessels, material objects 2 to 7, and a silk saree, material object 10, were sold.

As regards this witness the learned Judge instructed the jury as follows :—

"What Prosecution Witness 6, Abdul Rahim Sahib, says is that accused 1, 2 and 4, who are all brothers, brought to him these brass vessels and one silk saree, material objects 2 to 7 and 10, and wanted him to give them two rupees. As he had no money then he gave them six annas. You have seen this witness in the box. These three accused were living in his land. He knew them very well. He was compelled to say that these brass articles could not have been owned by these accused. He was also forced to answer that the silk saree, material object 10, is one which the womenfolk of accused 1, 2 and 4 could not have owned. This may show that he might have known at the time when he received these articles that they were stolen. But he is not at present in the dock. If it is an offence, it is for the authorities to proceed against him. What you are now concerned with is whether his testimony is

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true or not. That these articles were recovered from his possession is proved by Prosecution Witness 5 as well as by the Village Munsif of Desur. A mahazar too was prepared at the time, which has been filed as Exhibit C. Desur is not far away from the place of occurrence, Solai Arugavur: it is only three miles from it. So then, it comes to this that, if you believe the testimony of Prosecution Witness 6, it follows that very soon after the theft, most of the articles that had been stolen were sold or pledged with him by accused 1, 2 and 4."

CURGENVEN J. admitted this appeal with the note that the Sessions Judge omitted to point out the need for caution in accepting the evidence of a receiver of stolen property as that of an accomplice.

Mr. Bewes, for the Crown, raised the point whether a person who receives stolen property knowing it to be stolen is an accomplice.

Woodroffe in his Evidence Act says: "The term 'accomplices' may include all '*participes criminis*'"; and there is a note below that in English law it includes both principals of the first and second degree and accessories before and after the fact, but that in India it was held that an accessory after the fact (under the law prior to the Penal Code) stood on a very different footing from an accomplice. (Page 916, eighth edition.)

Mayne in his "Criminal Law of India" says (paragraph 756, second edition):

> "Abettors of a crime are accomplices, and must be looked upon as such, if they are produced as witnesses against the principal offenders."

Section 107, Indian Penal Code, says:

> "A person abets the doing of a thing, who—
>
> *First*—Instigates any person to do that thing; or,
>
> *Secondly*—Engages with one or more other person or persons in any conspiracy for the doing of that thing; if an

act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing ; or,

Thirdly.—Intentionally aids, by any act or illegal omission, the doing of that thing."

It appears to me that a person who knowingly aids in the disposal of stolen property falls under the third definition and is an "accomplice", and that whatever may have been the case in India before the Penal Code he is an accomplice under that Code. If so, the Judge was, I think, bound to tell the jury this, that Prosecution Witness 6 being on the evidence a receiver of property, which he must have known to be stolen, was a tainted witness whose evidence must be received with great caution. I therefore hold that there has been a failure to direct the jury on a material point and that the accused have been thereby prejudiced. On looking through the records I found another matter which in my opinion also vitiates the charge and which I pointed out to Mr. Bowes. As stated above there was no direct evidence that the accused committed the house-breaking and theft. Yet the charge against them was framed solely under sections 457 and 380, Indian Penal Code, with no alternative charge under section 411, Indian Penal Code.

In his charge to the jury the learned Judge did not mention section 411, Indian Penal Code, nor inform the jury that it was open to them either to find on the facts, that the accused committed the house-breaking and theft or that they were guilty under section 411, Indian Penal Code, or tell them that they might convict them in the alternative.

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He left them no choice between a conviction under sections 457 and 380, Indian Penal Code, and an acquittal. The offence under section 411 being punishable with a lesser sentence than the offences under the two former sections this was an omission which prejudiced the accused.

For both these reasons the conviction and sentence must be set aside and a retrial ordered.

The case will be transferred to the Sessions Judge, Chittoor, for disposal according to law.

The convictions and sentences passed on the accused 2 and 4, who have not appealed and whose cases are indistinguishable, are also set aside under sections 423 (*d*) and 439 (1), Criminal Procedure Code, for the reasons given in the judgment above and their retrial is ordered.

K.W.R.