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SHAH WAJIH-UD-DIN ASHRAF v. SHAH AHMAD ASHRAF.

Misra, J.

Munsif, must be deemed in the capacity of a trustee and on payment of half the money he must deliver half the property mortgaged to the plaintiff.

No other point was urged before me.

I am, therefore, of opinion that the plaintiff's suit for possession of half share in the property mortgaged was rightly decreed by the learned Munsif. I, therefore, accept the appeal, set aside the decree of the learned Subordinate Judge and restore the decree of the Munsif with costs in this and all the courts.

Appeal allowed.

APPELLATE CRIMINAL

Before Sir Louis Stuart, Knight, Chief Judge, and Mr. Justice Muhammad Raza.

RAM PRASAD AND OTHERS *v.* KING-EMPEROR.*

1927 *August*, 22.

Evidence of accomplices, admissibility of—Accomplices' uncorroborated evidence, how far to be acted upon—Identification evidence, admissibility of—Weight to be attached to a man's identification in jail if he fails to repeat that identification in court.

Held, that the evidence of accomplices is always admissible and is always relevant but under a very old practice of the courts in England such evidence is accepted only with great caution and after the closest scrutiny, and is not usually accepted against any individual person unless it is corroborated. Although it is not illegal to convict on the uncorroborated evidence of an accomplice, there is a consensus of opinion that a conviction on the uncorroborated evidence of an accomplice is rarely justifiable. The practice in India is the same as the practice in England. [*The King* v. *Baskerville* (1), *Rex* v. *Atwood* (2), *Reg* v. *Stubbs* (3), *In re*: *Meunier* (4), *Reg* v. *Mullins* (5), *Rex* v. *Noakes* (6), and *Rex* v. *Wilkes* (7), referred to.]

* Criminal Appeals Nos. 189, 186, 187, 231, 261, 272, 273, 288, 289, 290, 291, 292, 315, 316 and 317 of 1927 against the order of A. Hamilton, Special Sessions Judge of Lucknow, dated the 6th of April, 1927.

(1) (1916) 2 K.B., 658.
(2) (1787) 1 Leach, 464.
(3) Dears 555.
(4) (1894) 2 Q.B., 415.
(5) 3 Cox. C.C., 526.
(6) (1832) 5 C. and P., 326.
(7) 7 C. and P., 272.

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Held, that when a man has made identification in jail proceedings and has been unable to repeat that identification in court his evidence of identification will be weakened but the evidence is admissible.

If it is proved that the victim of a certain dacoity was present at jail identification proceedings, and there stated in the presence of a third party that he identified a certain person as having taken part in the dacoity, it is permissible to produce evidence in a subsequent case that he made such an identification even if he has failed to identify that person in court. [*Emperor* v. *Abdul Wahab* (1), relied upon, and *Nagina* v. *Emperor* (2), dissented from.]

The facts of the case are as follows :—

A number of armed dacoities accompanied with murder were committed in the various districts of the United Provinces from December, 1924 to August, 1925. The last of them is known as the Kakori Train dacoity in which a passenger train was stopped by pulling the communication cord of the alarm signal and a safe containing railway earnings was broken open and its contents extracted and the dacoits then decamped with the plunder. During this period a printed pamphlet headed " The Revolutionary—An organ of the Revolutionary Party of India " was also circulated by post and by hand. The police by their investigation discovered that these dacoities were the work of persons engaged in a conspiracy against British rule. A number of persons were then charged for conspiracy and dacoity and convicted by the Sessions Court under sections 121A, 120B and 396 of the Indian Penal Code. They then appealed to the Chief Court.

Mr. *L. S. Misra*, for Ram Prasad, appellant in Appeal No. 189.

Mr. *B. C. Chatterji* and Dr. *J. N. Misra*, for Raushan Singh, appellant in Appeal No. 186.

(1) (1925) I.L.R., 47 All., 39. (2) (1921) 19 A.L.J., 947.

Messrs. *B. C. Chatterji*, *H. C. Dutt* and *C. B. Gupta*, for Rajendra Nath Lahiri, appellant in Appeal No. 187.

Messrs. *John Jackson* and *B. P. Pain*, for Prem Kishen, appellant in Appeal No. 231.

Mr. *H. N. Misra*, for Ram Nath Pande, appellant in Appeal No. 261.

Mr. *N. C. Dutt*, for Manmotha Nath Gupta, appellant in Appeal No. 272.

Messrs. *K. D. Malaviya* and *C. B. Gupta*, for Vishnu Saran Dublis, appellant in Appeal No. 273.

Mr. *N. C. Dutt*, for Ram Kishan, appellant in Appeal No. 288.

Mr. *H. N. Misra*, for Suresh Chandra Bhattacharji, appellant in Appeal No. 289.

Mr. *N. C. Dutt* and Mr. *Mohan Lal*, for Jagesh Chandra Chatterjee, appellant in Appeal No. 290.

Mr. *N. C. Dutt*, for Gobinda Charan Kar, appellant in Appeal No. 291.

Mr. *H. N. Misra*, for Ram Dularey, appellant in Appeal No. 292.

Mr. *H. N. Misra*, for Raj Kumar Sinha, appellant in Appeal No. 315.

Mr. *H. N. Misra*, for Mukandi Lal, appellant in Appeal No. 316.

Mr. *H. N. Misra*, for Parnwesh Kumar Chatterji, appellant in Appeal No. 317.

Pandit *Jagat Narain* and the Government Advocate (Mr. *G. H. Thomas*) for the Crown.

STUART, C. J., and RAZA, J. :—After giving the facts and circumstances of the case at length the judgment of their Lordships thus continued :—

We have next to state the manner in which we have approached the evidence of accomplices. The evidence of accomplices is always admissible and is always relevant but under a very old practice of the

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courts in England such evidence is accepted only with great caution and after the closest scrutiny, and is not usually accepted against any individual person unless it is corroborated. Although it is not illegal to convict on the uncorroborated evidence of an accomplice there is a consensus of opinion that a conviction on the uncorroborated evidence of an accomplice is rarely justifiable. The practice in India is the same as the practice in England. We have followed that practice in this case, but while following the practice we have considered very carefully a comparatively recent pronouncement of the Court of Criminal Appeal in England consisting of the CHIEF JUSTICE and four other learned Judges which is reported in *The King* v. *Baskerville* (1). The facts in appeal were these. A male person was convicted of an offence punishable under section 11 of the Criminal Law Amendment Act, 1885, with two boys. The only direct evidence of the commission of the acts charged was that of the boys themselves who on their own statement were accomplices. The only corroboration of the boys' statements was contained in the contents of a letter sent by the prisoner to one of the boys enclosing a treasury note for ten shillings. The words of the letter were capable of an innocent construction. This letter was, however, considered sufficient corroboration, and the conviction was up-held. In the judgment in this appeal their Lordships have stated the law in the following words :—

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> "There is no doubt that the uncorroborated evidence of an accomplice is admissible in law [see *Rex* v. *Atwood* (2)]. But it has long been a rule of practice at common law for the Judge to warn the jury of the danger of convicting a prisoner on the uncorroborated testimony of an accomplice or

(1) 2 King's Bench, 1916, page 658. (2) (1787) 1 Leach, 464.

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accomplices, and, in the discretion of the Judge to advise them not to convict upon such evidence; but the Judge should point out to the jury that it is within their legal province to convict upon such unconfirmed evidence [see *Reg* v. *Stubbs* (1) and *In re*: *Meunier* (2)] . . . . . .

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As the rule of practice at common law was founded originally upon the exercise of the discretion of the Judge at the trial, and, moreover, as it is anomalous in its nature, inasmuch as it requires confirmation of the testimony of a competent witness, it is not surprising that this rule should have led to differences of opinion as to the nature and extent of the corroboration required, although there are propositions of law applicable to corroboration which are beyond controversy. For example, 'confirmation does not mean that there should be independent evidence of that which the accomplice relates, or his testimony would be unnecessary' [see *Reg* v. *Mullins* (3), per MAULE, J.] Indeed, if it were required that the accomplice should be confirmed in every detail of the crime, his evidence would not be essential to the case, it would be merely confirmatory of other and independent testimony. Again, the corroboration must be by some evidence other than that of an accomplice, and, therefore, one accomplice's evidence is not corroboration of the testimony of another accomplice [see *Rex* v. *Noakes* (4)].

(1) Dears 555
(2) (1894) 2 Q.B., 415.
(3) 3 Cox, C.C., 526 (531).
(4) (1832) 5 C. and P., page 326.

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After examining these and other authorities to the present date, we have come to the conclusion that the better opinion of the law upon this point is that stated in *Reg* v. *Stubbs* (1) by PARKE, B., namely, that the evidence of an accomplice must be confirmed not only as to the circumstances of the crime but also as to the identity of the prisoner. The learned Baron does not mean that there must be confirmation of all the circumstances of the crime; as we have already stated, that is unnecessary. It is sufficient if there is confirmation as to a material circumstance of the crime and of the identity of the accused in relation to the crime. PARKE, B., gave this opinion as a result of twenty-five years' practice; it was accepted by the other Judges, and has been much relied upon in later cases. In *Rex* v. *Wilkes* (2) ALDERSON, B., said: 'The confirmation which I always advise juries to require, is a confirmation of the accomplice in some fact which goes to fix the guilt on the particular person charged. You may legally convict on the evidence of an accomplice only, if you can safely rely on his testimony; but I advise juries never to act on the evidence of an accomplice, unless he is confirmed as to the particular person who is charged with the offence. . . . . .'

We hold that evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime.

(1) Dears, 555. (2) 7 C. and P. 272.

> In other words, it must be evidence which implicates him, that is, which confirms in some material particulars not only the evidence that the crime has been committed, but also that the prisoner committed it. . . . . *Stuart, C. J. and Raza, J.*
>
> The corroboration need not be direct evidence that the accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connection with the crime."

We have next to make some general observations on the manner in which the jail identifications were conducted. The practice adopted in this case was that when a person had been arrested, charged with complicity in the conspiracy, he was removed from the place of his arrest to a jail where he was in the custody of jail officials and not of police officials. After a certain period he was placed in a line which consisted partly of suspects but mainly of persons who were not suspected of complicity in a crime. All these persons were dressed in a manner which would prevent witnesses from recognizing a suspect by peculiarities of costume. Witnesses to the offences were then called in one by one. Saiyid Ain-ud-din was present at all identification proceedings. No two witnesses were allowed to communicate with one another. As each man completed his observation of the persons in the line he was put in a place where he could not communicate with any one else. As far as possible persons were selected of the same class and position in life as the suspects. The suspects were permitted to change their places in the line from time to time. They were permitted to alter their personal appearance by changing their clothes or by shaving, or having their hair cut or in other manners. After the identification proceedings were over Saiyid Ain-ud-din prepared a note

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embodying the results. These notes have been proved in the case. Saiyid Ain-ud-din has been examined as a witness and cross-examined at great length. In this Court no suggestion has been made by any learned Counsel that these identification proceedings were unfair in any respect, but before the learned Sessions Judge sweeping allegations were made against the honesty of the identification proceedings. Our conclusion as to the manner in which the identification proceedings were conducted is that they were conducted most carefully and absolutely honestly and that every precaution was taken to prevent dishonest or careless identification. In fact our criticism is that in a desire to protect the interests of the suspects the learned Magistrate was possibly inclined to place difficulties in the path of honest identifying witnesses.

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We have here to touch upon a point which arises out of the identifications. There have been occasions in this case in which witnesses who identified in jail a suspect in connection with a particular offence were unable subsequently to identify that suspect either in the Court of the Committing Magistrate or in the Court of the Sessions Judge, or in both. It was argued in the court below (although it was not argued here) that evidence of identification in the jail could not be treated as subsequent independent evidence in the trial as such identification amounts to statements either expressed or implied made by certain persons that the individuals whom they pointed out were persons whom they recognized as having been concerned in a particular crime. Such statements not having been made on oath and having been made in the course of extra judicial proceedings they were admissible not as substantive evidence in the case, but merely as evidence to corroborate or contradict their statements in court and as such were not admissible

in evidence. The authority for this proposition is a decision of a Bench of two learned Judges of the Allahabad High Court which is reported in *Nagina* v. *Emperor* (1). With great respect to the learned Judges who decided that appeal we are of opinion that although there is much that is correct in their observations the decision has omitted certain necessary qualifications. Reading the decision as it stands, it would almost appear that the learned Judges laid down that in no circumstances was the evidence of such identification admissible. We cannot accept that conclusion. In our opinion if it is proved that the victim of a certain dacoity was present at jail identification proceedings, and there stated in the presence of a third party that he identified a certain person as having taken part in the dacoity, it is permissible to produce evidence in a subsequent case that he made such an identification even if he failed to identify that person in court. In certain cases it might be impossible for a witness to identify again in court. After having made the jail identification the witness might lose his eye-sight and in such a case it would not be physically possible for him to repeat his identification. In a subsequent case in *Emperor* v. *Abdul Wahab and others* (2) another Bench of the Allahabad High Court supplemented the decision in *Nagina* v. *Emperor* (1) by pointing out how such an identification could be proved in evidence. We agree with the conclusion of the learned Judges in the latter case. It is noted in the present case that when a witness who made an identification in jail was unable to repeat it in court, outside evidence has been called to prove that the witness did make such identification and the circumstances in which he made it, and we find that evidence of this

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(1) (1921) 19 A.L.J., 947. (2) (1925) I.L.R., 47 All., 39.

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nature is admissible. The question as to what weight is to be given to this evidence will be decided in the individual cases of each particular appellant. Obviously, when a man has made an identification in jail proceedings and has been unable to repeat that identification in court, his evidence of identification will be weakened but, in the circumstances which we have detailed, the evidence is admissible. Its value will be considered separately. . . . . .

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PRIVY COUNCIL.

On Appeal from the Court of the Judicial Commissioner of Oudh.

P. C. 1927 October, 18.

SHIAM SUNDAR SINGH (DEFENDANT) *v.* JAGANNATH SINGH (PLAINTIFF).*

Will—Attesting witness—Validity of bequest—Persons signing as token of consent to provisions—Indian Succession Act (X of 1865) Section 54.

In the will of a deceased Oudh taluqdar there appeared below the signature of the testator seven signatures beneath one another; the first and the last three were of persons who admittedly signed as attesting witnesses, the other four signatures were of the four sons of the testator. The word "witness" appeared opposite each of the seven signatures. Evidence as to what occurred when the will was executed, in conjunction with its terms, showed that the four sons had signed at the request of the testator, not for the purpose of attesting his signature, but as a token of their consent to the provisions of the will.

Held, that the testator's sons were not persons "attesting" the will within the meaning of section 54 of the Indian Succession Act, 1865, so as to render void bequests to them made by the will.

Decree of the Court of the Judicial Commissioner affirmed.

CONSOLIDATED APPEALS (No. 6 of 1927) from two decrees of the Court of the Judicial Commissioner of

*Present :—Lord DARLING, Lord WARRINGTON of Clyffe, Mr. Justice DUFF, and Sir LANCELOT SANDERSON.