

any interest on the sum of Rs.135, the trial Judge was wrong in awarding interest on that amount to the defendants and that this error was apparent on the face of the record; but unlike rule 1 of order XLVII, the words in rule 2 are "apparent on the face of the decree". This means that an application for review based on an error apparent on the face of the decrees can be presented to the successor of the Judge who passed the decree, but one based on an error apparent on the face of the record, but not on the face of the decree, can only be made to the Judge who passed the decree. In the present case it might be said that it was an error on the part of the Judge to allow interest on Rs.135 without its being claimed by the defendants and that this error would appear from a perusal of the written statement of the defendants but this is not an error which can be said to be apparent on the face of the decree.

We uphold the objection of the opposite parties and reject this application with costs.

*Application dismissed.*

## APPELLATE CRIMINAL

*Before Mr. Justice Bisheshwar Nath Srivastava, Chief Judge  
and Mr. Justice Ziaul Hasan*

KING-EMPEROR (COMPLAINANT-APPELLANT) v. KALLOO  
(ACCUSED-RESPONDENT)\*

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December, 8

*Evidence of accessory after the event without corroboration in material particulars, value of—Murderer committing murder in presence of his wife—Wife not divulging crime, if accessory after the fact—Conviction on her solitary evidence in absence of independent corroboration, whether justified.*

The evidence of an accessory after the event suffers more or less from the same taint as the evidence given by an accomplice. It would be very unsafe to accept the solitary evidence of such a person as proving the guilt of an accused without independent corroboration in material particulars.

\*Criminal Appeal No. 300 of 1936, against the order of K. N. Wanchoo, Esq., I.C.S., Sessions Judge of Rae Bareilly, dated the 5th of June, 1936.

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Where a murder is committed in the presence and within the sight of the wife of the murderer, she is under section 44 of the Code of Criminal Procedure under a legal obligation of forthwith giving information to the nearest magistrate or police officer of the commission of the murder and if she does not do so even when her husband is away to another place about ten days after the murder, her conduct in not divulging the crime is clearly intended to assist the accused and she must be regarded as an accessory after the fact and the court is right in refusing to convict the accused on her solitary statement in the absence of independent corroboration of her evidence. *Turab v. King-Emperor* (1), and *Brijpal Singh v. King-Emperor* (2), relied on. *Ramaswami Gounden v. Emperor* (3), not followed.

The Government Advocate (Mr. H. S. Gupta), for the Crown.

Mr. N. U. Hyder, for the accused.

SRIVASTAVA, C.J. and ZIAUL HASAN, J.:—This is a Government appeal under section 417 of the Code of Criminal Procedure against an order of the learned Sessions Judge of Rae Bareli acquitting the accused Kallu who with three others was charged of an offence under section 302 of the Indian Penal Code.

The case for the prosecution was that the deceased Birua who used to live in Baba-ka-Purwa left his village on the 23rd of January, 1936, for a bath in the Ganges at Allahabad. On the 15th of February, 1936, a sack was noticed floating in a well about a mile from the *abadi* of Baba-ka-Purwa known as the well of Babu Murai. It was discovered that the sack contained the body of Birua. The *chaukidar* reported these facts at the police station Mustafabad on the 15th of February, 1936. It was mentioned in this report that there was an illicit connection between the deceased and the wife of Kallu accused and that the village people suspected that Kallu was responsible for the murder of Birua. Kallu was not in the village as he had gone away to Cawnpore five days before the making

(1) (1934) I.L.R., 10 Luck., 281. (2) (1936) O.W.N., 892.  
 (3) (1903) I.L.R., 27 Mad., 271.

of the report. The house of Kallu was searched on the 15th of February, and a *gandasa*, a gunny bag and a *dhoti* which appeared to be blood-stained were taken possession of. Some bloodstains were also noticed on the wall of the house, on a charpoy and on the *tattar* of the door. Musammat Duiji, wife of Kallu, on being examined by the police made a statement which led to the arrest of three persons Bhola, Ganga and Sardar besides Kallu. Musammat Duiji was also produced before a magistrate and her statement was recorded under section 164 of the Code of Criminal Procedure. After completing the investigation the police prosecuted all the four persons named above who were committed to the Court of Session. The case was tried with the aid of four assessors. All the assessors were of opinion that all the accused were not guilty. The learned Sessions Judge agreed with the opinion of the assessors and acquitted all the accused. This appeal on behalf of the Government is directed against the acquittal of Kallu alone.

The only direct evidence against Kallu consists of the statement of his wife Musammat Duiji. She deposed that for the last two years she had an intrigue with the deceased which resulted in her and her husband being outcasted by the panchayet. They were taken back in August six months afterwards but the intrigue continued all along. On the 23rd of January, Birua met her in the afternoon and it was agreed that he would visit her that night. Sardar saw them talking that day. She saw Ganga and Bhola accused sitting with Kallu outside the house that evening. Then she went to sleep but woke up on hearing some sound. She went to make water. When she came back she saw Birua in the *dahliz*. He caught her and put her down on the charpoy. Immediately after this Ganga and Bhola came in from the door and caught Birua and threw him down. Kallu also came in from the kitchen and all these three persons cut Birua's neck with the

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*gandasa* and killed him. She wanted to run out but Sardar accused, who was standing at the door, prevented her and threatened to kill her if she went out. She then sat down in a corner and was a helpless spectator of the murder. After the murder had been committed Birua's body was put in a sack and was taken away by Kallu, Ganga and Bhola while Sardar remained watching her. When the three persons returned about two hours before sunrise they scraped the blood on the ground and she was asked by Sardar to wash the ground with cow-dung and it was so washed.

*Srivastava,*  
*C. J.*  
*and*  
*Ziaul Hasan,*  
*J.*

The case for the prosecution against Kallu rests mainly on the evidence of Duiji who is the solitary witness of the commission of the murder. The learned Sessions Judge relying on the decision of a Bench of this Court of which one of us was a member in *Turab v. King-Emperor* (1), held that the position of Duiji was virtually that of an accomplice and therefore her statement could not be accepted or made the basis of a conviction unless it was corroborated in material particulars. As the learned Sessions Judge was of opinion that there was no reliable or sufficient evidence affording material corroboration of her evidence he held that the case against Kallu was not proved. He was further of opinion that the statement of Musammat Duiji was not true and he was not prepared to rely on it for the conviction of the accused on a capital charge.

The learned Government Advocate contended strongly that the position of Musammat Duiji was not that of an accomplice or even that of an accessory after the fact. He has further argued that there was no good reason for the learned Sessions Judge rejecting the evidence of Musammat Duiji and has claimed that Kallu ought to be convicted of the offence of murder on the statement of Musammat Duiji even in the absence of corroboration of her statement in material particulars. He has relied on a decision of the Madras High

(1) (1934) I.L.R., 10 Luck., 281.

Court in *Ramaswami Gounden v. Emperor* (1), in support of his arguments. In this case one of the witnesses had deposed that on the evening of the murder the accused obtained a crow-bar from him, and, later on, went to where the deceased was sleeping, when the witness heard a cry, and, on secretly approaching the spot, saw the accused strike the deceased on the head with the crow-bar; that the witness then ran away; that accused called him; that he went to the spot, and accused asked him to put the body in an empty pit some distance off; that witness refused to help, whereupon accused dragged the body to the pit and threw it in; that next morning accused threatened to murder the witness if he mentioned what had happened; that some fifteen days later, after a quarrel with the accused, the witness ran away and gave information to the brother of the deceased women and then to the police, who, with some villagers, were taken by the witness to the pit, where the body was found and, subsequently, identified. The witness also stated that he had not given information earlier because he was afraid. There being a difference of opinion between the two Judges who heard the appeal the matter was referred to a third Judge who held that the witness aforesaid could not rightly be held to be either a guilty associate with the accused in the crime of murder or liable to be indicted with him jointly. The witness was therefore not an accomplice and the rule of practice as to corroboration had no application to the case.

In *Brijpal Singh v. King-Emperor* (2), which is a later decision of the same Bench which decided *Turab v. King-Emperor* (3), it was held again that the evidence of accessories after the commission of the crime cannot be accepted as proving the guilt of the accused without corroboration in material particulars by independent witnesses. The case of *Ramaswami Gounden v. Emperor* (1), was relied upon by the learned Government

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(1) (1903) LL.R., 27 Mad., 271. (2) (1936) O.W.N., 892.

(3) (1934) I.L.R., 10 Luck., 281.

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Advocate in this case also, but it was not followed and the opinion was expressed that the view taken by the dissentient Judge Mr. Justice BODDAM was a sounder view.

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*J.*

In our opinion no sufficient ground has been made out for us to depart from the view taken in the two Bench cases of this Court to which reference has been made above. The rule requiring independent corroboration in material particulars of the evidence of an accomplice is only a rule of caution which for a long time has been adopted as a rule of practice by the courts in England as well as in this country, and is now virtually a rule of law. The reason underlying the rule is that the testimony of an accomplice is regarded as tainted evidence and it is therefore considered unsafe to base a conviction on it unless there is independent corroboration forthcoming. On the same principle corroboration is insisted upon in the case of the evidence of informers. We think that the evidence of an accessory after the event suffers more or less from the same taint as the evidence given by an accomplice. It would be very unsafe to accept the solitary evidence of such a person as proving the guilt of the accused without independent corroboration in material particulars and we are therefore of opinion that the learned Sessions Judge was right in refusing to convict Kallu on the solitary statement of Musammat Duiji in the absence of independent corroboration of her evidence.

Next as regards the question whether Musammat Duiji was an accessory after the fact or not. Ratan Lal in his Law of Crimes, 13th edition, page 243, describes "an accessory after the fact as one who, knowing a felony to have been committed by another, receives, relieves, comforts, assists, harbours, or maintains the felon." It is admitted that the murder in the present case was committed in the presence and within the sight of Musammat Duiji. In the circumstances

she was under section 44 of the Code of Criminal Procedure under a legal obligation of forthwith giving information to the nearest magistrate or police officer of the commission of the murder. She did not do so even when her husband Kallu had gone away to Cawnpore about ten days after the murder. Her conduct in not divulging the crime was clearly intended to assist the accused. In the circumstances we think she must be regarded as an accessory after the fact.

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We are also in agreement with the learned Sessions Judge that the statement of Musammat Duiji does not ring true. Bhola, Ganga and Sardar the other three accused had no motive to join Kallu in the commission of the heinous crime. She made no mention of Sardar having threatened her in her statement to the police or in her statement under section 164 of the Code of Criminal Procedure. Even in her statement in the Sessions Court she admitted that Sardar had threatened her only once. So there was no reason for her not divulging the crime, more specially after her husband had gone away to Cawnpore. Having carefully examined the statement of Musammat Duiji we are of opinion that the learned Sessions Judge was right in discarding it.

Lastly as regards corroboration there is hardly any corroboration in material particulars affecting the accused. The only thing which creates suspicion is that human blood was discovered on the *gandasa* and *dhoti* recovered from Kallu's house and on the scraping from the wall of the house and on the string of the charpoy. The discovery of blood on these articles can suggest an inference that Birua might have been killed in the house but it does not necessarily incriminate Kallu. In any case mere suspicion cannot be substituted for evidence and made the basis of a conviction.

We are accordingly of opinion that no case has been made out to justify our setting aside the order of the

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learned Sessions Judge acquitting Kallu. We accordingly dismiss the appeal. If Kallu is in custody he should be released at once.

*Appeal dismissed.*

## APPELLATE CIVIL

*Before Mr. Justice Bisheshwar Nath Srivastava, Chief Judge*

1937  
 January, 6

MUSAMMAT SIDDIQ-UN-NISA AND ANOTHER (DEFENDANTS-APPELLANTS) v. BHAGWAN DIN (PLAINTIFF-RESPONDENT)\*

*Mortgage—Decree for sale obtained—Transferee of portion of mortgaged property not impleaded—Property purchased by mortgagee decree-holder himself—Mutation refused for property in possession of transferee—Second suit by mortgagee for proportionate amount of mortgage money against transferee, if maintainable—Transferee's right to redeem—Amount for which mortgagee required to give credit for portion of property purchased by him and not in possession of transferee.*

Where a mortgagee brings a suit to enforce his mortgage by sale without impleading a subsequent transferee of a portion of the mortgaged property, and obtains a final decree for sale, in execution whereof he himself purchases the mortgaged property, and obtains formal possession, but his application for mutation of names in his favour is opposed by the transferee and ultimately he obtains mutation only in respect of untransferred portion, the mortgagee can bring a second suit against the transferee claiming a decree for the proportionate amount of the mortgage money by sale of the transferred portion. On the other hand, the vendee not being impleaded in the previous suit is not affected by the decree passed in that suit and is entitled to redeem the property in spite of that decree. *Lakshmanan Chetty v. Muthaya Chetty* (1), *Venkat Reddy v. Kunjapa Goundan* (2), and *Rampia v. Hazari Lal* (3), referred to.

\*Second Civil Appeal No. 61 of 1935, against the decree of Syed Yaqub Ali Rizvi, Second Additional Judge, Small Cause Court, as Additional Civil Judge Lucknow, dated the 2nd of November, 1934, confirming the decree of Babu Girish Chandra, Munsif, Haveli, Lucknow, dated the 20th of August, 1934.

(1) (1919) 62 I.C., 833.

(2) (1923) I.L.R., 47 Mad., 551.

(3) (1922) 65 I.C., 654.