evidence in this respect is unrebutted and unchallenged.

The appeal, therefore, fails and I would dismiss it with costs.

AGARWALA, J.—I agree.

Appeal dismissed.

APPELLATE CRIMINAL.

Before Macpherson and Khaja Mohamad Noor, JJ.

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v.

KING-EMPEROR.*

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February, 9, 14, 15, 27.

Trial by Jury—Judge, duty and function of, in summing up to the Jury—evidence of accomplice, probative value of—conviction based on uncorroborated testimony of accomplice, legality of—presumption—Evidence Act, 1872 (*Act* 1 *of* 1872), *sections* 114 *and* 133.

Under section 133 of the Evidence Act, 1872, an accomplice is a competent witness against an accused person and a conviction is not illegal because it proceeds upon the uncorroborated testimony of the accomplice; under section 114 of the Act it is *open* to the court to presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case, and in particular it is open to the court to presume that "an accomplice is unworthy of credit unless he is corroborated in material particulars". If, however, this presumption is raised, the court shall, in considering whether this maxim (which is but a rule of prudence after all) does or does not apply to the case before it, also have regard to considerations which would go to show that the evidence of the accomplice is *not* unworthy of credit and which vary in different cases.

* Criminal Appeals nos. 312 and 320 of 1933, from a decision of T. G. N. Ayyar, Esq., I.C.S., Additional Sessions Judge of Patna, dated the 15th September, 1933.

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Ratan Dhanuk v. *Emperor* (1), followed.

In his summing up to the jury, however, the judge must make a clear distinction between the pure law and the expression of his own opinion upon any question of fact or upon any question of mixed law and fact relevant to the proceeding, which he is specially empowered to state to them if he thinks proper.

In dealing with the evidence of an accomplice, it is the duty of the judge to explain the provisions of sections 133 and 114 with the relevant parts of section 4—that is necessary and so far as law is concerned, it is sufficient. It is not his duty to tell the jury, and it would be quite wrong to tell them as a matter of law, that they must not convict unless they find that the evidence of the accomplice is corroborated in material particulars. In any particular case he may, under section 298(2) of the Code of Criminal Procedure if he thinks proper in the course of his summing up, express to the jury his own opinion that, in the circumstances of the particular case, they would do well to presume that the accomplice before them was unworthy of credit unless corroborated in material particulars. But he should give the jury clearly to understand that this is his opinion on a question of fact which the jury is at liberty to accept or reject and that it is not as his direction as to the law is, an absolute and binding direction upon them. And if he does express such an opinion, it is proper further to explain for the assistance of the jury what would in his judgment be material particulars and that, as is generally agreed that if the jury do in their discretion apply the maxim, corroboration in material particulars would certainly include corroboration as to the identity of the individual accused against whom the accomplice testifies.

If a jury on a proper direction think fit to act on the evidence of an approver, they commit no illegality and the High Court has no right to interfere with the verdict.

The facts of the case material to this report are stated in the judgment of Macpherson, J.

K. B. Dutt, *I. B. Biswas* and *N. K. Biswas*, for the appellants.

Assistant Government Advocate, for the Crown.

(1) (1928) I. L. R. 8 Pat. 235, 240.

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MACPHERSON, J.—These two appeals are preferred from the same judgment of the Additional Sessions Judge of Patna, who, accepting the verdict of the jury, passed sentence of ten years' rigorous imprisonment on twelve of the appellants under section 395 of the Indian Penal Code, the same sentence on Paran Dom of Rampur under section 395 read with section 109, and transportation for life on Ramsawarath Singh, Chuli Dom and Batoran Dom under section 395 read with section 75 of the Indian Penal Code.

Of the thirteen appellants in the first appeal, the first two, Nanhak and Mukha, residents of Naghar, are represented by Mr. K. B. Dutt and the others by Mr. Biswas who has also placed the case of the three appellants in the second appeal which has been preferred from jail. Of the latter Hardwar Singh has also been convicted under section 412 but a separate sentence has not been passed on him for that offence.

The trial having been by jury, appeal is limited to questions of law and the appellate Court is also limited by the provisions of section 423(*2*) and section 537 of the Code of Criminal Procedure.

Broadly the only points which arise in the appeal are whether the verdict is erroneous owing to a misdirection by the Judge in respect of the evidence of an approver examined as a prosecution witness and if so whether the misdirection has in fact occasioned a failure of justice in which case only the conviction can be reversed or altered.

The appellants other than Paran Dom belong to five villages, Naghar, Barah, Patut, Mahendarnagar, Nayatola and Babhanlai lying six to eight miles west of Rampur, and are at pains to bring out that they are badmashes, suspects or surveillees.

The prosecution case, so far as material, was briefly as follows.

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On the night of the 21st March last a dacoity took place in the cloth-shop of Ramnarain Sahu in village Rampur five miles south of the Naubatpur police-station, in the course of which a brother of Ramnarain, Wali Mia, Muhammad Ali and other villagers who helped were injured and Manji his servant threw tiles at the intruders from the roof. The village chaukidar (who with his son was subsequently arrested as being implicated) gave information at the police-station at 6-15 A.M. stating that the dacoits were not recognized. On arrival at the village about two and a half hours later the Sub-Inspector had the badmashes of the village collected including the appellant Paran Dom. Information was given at the Bikram police-station, about eight miles from Rampur, which led to enquiry being made as to the absence of badmashes from their homes. Gaya Dusadh and Gulabchand Chamar of Patut brought information that on the previous evening thieves had collected near the house of the appellant Chuli Dom including the appellant Ugrahi and the approver Sheo Singh and that Gaya Dusadh had at dawn that morning seen Sheo Singh and the appellants Agnu Kandu, Nathuni Dusadh, Anu and Doma with others passing together westward (Rampur is to the east) towards Chuli Dom's house. Further evidence of the movement of a gang of men on the road west of Rampur that night became available. On the night of the 22nd March seven or eight persons with spears and lathis were seen by a picketing party going south of whom two Sheo Singh and Ugrahi were arrested. On the following morning it was ascertained that Anu, Doma, Ugrahi, Sheo Singh, Agnu Kandu and Nathuni Dusadh had been absent from their houses. On the 29th Sheo Singh made a statement at the thana and on information thus received the house of Hardwar Singh was searched on the 31st and a bundle of cloths was found concealed there which contained property stolen at the dacoity. On the 4th April the Sub-Deputy Magistrate recorded the confession of Sheo Singh as to this and other

dacoities; but the names of the appellants Ramsawarath, Nathuni and Agnu do not occur in his statement until the 18th April as participants in the Rampur dacoity. There were identification parades on the 9th and 13th May. The charge-sheet was submitted on the 29th May and pardon was tendered to Sheo Singh on the 21st June and he was remanded to police custody apparently in connection with inquiries in other cases.

The prosecution relied for identification primarily upon the testimony of the approver and the evidence of Ramnarain and Wali Mia who, in the course of the dacoity, had received injuries by a bhala on the palm of the left hand, the thigh and on the back, and in respect of the appellant Kanthia Dom on the evidence of Mauji, the servant of Ramnarain, who stated that Kanthia was one of the dacoits and had a bhala. These witnesses of Rampur did not know the names of any of the dacoits and their recognition was by face. In most cases they and the approver pointed out the appellant at the test identification before the Magistrate and in the Sessions Court. The cases in which that did not occur call for individual consideration.

In impugning the charge to the jury Mr. Biswas roundly contends that a failure of justice has been caused by misdirection of the judge consisting in failure to direct the jury that they could not convict accused on the uncorroborated testimony of the approver but *must* require corroboration of his testimony in respect of the accused in material particulars and claims that the appellants Ramsawarath, Benga, Anu, Paran Dom and Nathuni had been convicted on the sole testimony of the approver. To begin with, this list of five is not accurate and in fact only Paran Dom has been so convicted. He further urges that it is a fatal misdirection that the Judge failed to tell the jury that the evidence of the approver himself that he was an accomplice must in law be corroborated, apparently relying upon the decision in *Golam Asphia*

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v. *Emperor*(1). He also contends in reliance upon certain Calcutta decisions that it is the Judge and not the jury who has to determine whether certain facts amount to corroboration in material particulars of the testimony of the accomplice. With much respect, all these contentions are ill-founded.

Mr. Dutt contends that section 423 of the Criminal Procedure Code is not controlled by section 537 and that " may presume " in *Illustration* (*b*) to section 114 of the Indian Evidence Act must be taken as equivalent to " shall presume ". These contentions are manifestly unsound.

As to the legalities of a conviction in India on the uncorroborated evidence of an accomplice, I would refer to what I said in *Ratan Dhanuk* v. *Emperor*(2). There is indeed this distinction between that decision and the present appeal that the appeal in that case was from a conviction on the uncorroborated testimony of an accomplice in a trial held without a jury. But the distinction is, as will appear, against the appellants.

The law in India is simple if extraneous considerations derived from reminiscences of English law are not introduced to mislead. Under section 133 of the Evidence Act an accomplice is a competent witness against an accused person and a conviction is not illegal because it proceeds upon the uncorroborated testimony of the accomplice; under section 114 of that Act it is *open* to the Court to presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case and in particular it is open to the Court to presume that ' an accomplice is unworthy of credit unless he is corroborated in material particulars '; if, however, this presumption is raised, the Court shall, in

(1) (1932) 137 Ind. Cas. 497.
(2) (1928) I. L. R. 8 Pat. 235.

considering whether this maxim (which is but a rule of prudence after all) does or does not apply to the case before it, also have regard to considerations which would go to show that the evidence of the accomplice is *not* unworthy of credit and which vary in different cases.

In cases where there is no jury, the judge is apt to fail to distinguish between the pure law and considerations of caution or experience which, strictly speaking, are facts and indeed the distinction is perhaps not important in many cases. In his summing up to the jury, however, the judge must make a clear distinction between the pure law and the expression of his own opinion upon any question of fact or upon any question of mixed law and fact relevant to the proceeding, which he is specially empowered to state to them if he thinks proper. While the former will always be the same the latter will vary in each case. It is of the first importance that the judge should direct the jury as to what exactly the law is. In dealing with the evidence of an accomplice, it is the duty of the judge to explain the provisions of sections 133 and 114 with the relevant parts of section 4—that is necessary and so far as law is concerned, it is sufficient. It is not his duty to tell them, and it would be quite wrong to tell them as a matter of law, that they must not convict unless they find that the evidence of the accomplice is corroborated in material particulars. In any particular case he may, under section 298(*2*) of the Code of Criminal Procedure if he thinks proper, in the course of his summing up, express to the jury his own opinion that, in the circumstances of the particular case, they would do well to presume that the accomplice before them was unworthy of credit unless corroborated in material particulars. But he should give the jury clearly to understand that this is his opinion on a question of fact which the jury is at liberty to accept or reject and that it is not, as his direction as to the law is, an absolute and binding direction upon them. And if he

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does express such an opinion, it is proper further to explain for the assistance of the jury what would in his judgment be material particulars and that, as is generally agreed, that if the jury do in their discretion apply the maxim, corroboration in material particulars would certainly include corroboration as to the identity of the individual accused against whom the accomplice testifies.

In the course of his summing up, the learned judge indicated that a charge can be sustained even on the evidence of a single reliable witness but that it was always advisable to insist upon some corroborative testimony either direct or circumstantial. Later, in dealing with the evidence of the approver Sheo Singh, he pointed out that he was an accused who had turned a prosecution witness against his erstwhile co-accused, that the jury would have realised that in such a case his statements in Court are likely to invite suspicion, that the law permitted a conviction to be based even on his uncorroborated testimony, but that it has become a rule of practice to insist on corroboration of an approver's evidence as a matter of precaution and this rule of practice has almost become a rule of law by successive judicial decisions. He pointed out further that corroboration would be either by direct evidence of other witnesses or by circumstantial evidence and it was important that there should be no serious improbability or vital inconsistency between his evidence and the rest of the prosecution case on any fundamental point of the prosecution. He dealt with the evidence as to every individual accused and, in particular with the evidence as to identification, set out inter alia the direct and circumstantial evidence as to the dacoity, circumstantial evidence in respect of the recovery of the property and bhalas and all the movements of individual accused on the morning of the 22nd, the arrest of the approver and Ugrahi with bhalas that night and the absence of accused from their houses, the test identification and in particular the evidence of the approver and the extent to which

his confession and the rest of the prosecution evidence corroborated one another. He specially put it to the jury whether Sheo Singh and the rest of the prosecution case corroborated each other in essential details. Towards the end of a lengthy summing up he particularly put it to the jury that before relying upon Sheo Singh's evidence they should find that his confession was voluntary and there was corroboration in material particulars to his statement from the evidence afforded by the other prosecution witnesses. As to identification, he counselled them to assess the veracity of witnesses as to what they thought reasonable and probable in the circumstances.

In my judgment, taking his elaborate summing up as a whole, it is impossible to hold that there was any misdirection at all or at least such as could prejudice the accused, on the point of the evidence of the accomplice, either generally or in respect of individuals. But apart from that it is not possible to find here that even if there has been a misdirection, there has either been a failure of justice or such failure has in fact been occasioned by the misdirection in the judge's charge to the jury.

It is indeed difficult to see how the appellate Court is to ascertain that an error in the charge to the jury as to the evidence of the accomplice has in fact occasioned a failure of justice. The jury is not bound to make any presumption that the evidence of the accomplice is unworthy of credit unless corroborated in material particulars. If there is a conviction, it is impossible to say whether the jury found that there was corroboration in material particulars or declined altogether to apply the maxim which it was entitled to apply or not to apply.

In the course of the hearing, we have actually examined all the individual cases and are of opinion that the law has been adequately explained and that the case of each appellant has been fairly placed before the jury. It is irrelevant that a judge sitting

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alone, and so exercising the functions of judge and jury, might have demanded proof of a better quality or of greater extent in respect of an accused. The local Government has directed that the trial of these charges before the Court of Sessions shall be by jury and until it revokes or alters its order, an erroneous decision by the jury on the facts is its concern and is not the concern of the appellate court whose scrutiny is limited by the statute as already mentioned In point of fact, however, assuming that the jury accepted the identification of Wali Mian and/or Ramnarain Sahu, they had testimony in court other than that of the accomplice implicating thirteen of the appellants—namely, Chuli, Batoran, Kanthia (also identified by Mauji), Nanku Singh, Ugrahi, Doma, Benga, Anu, Ramdin, Hardwar Singh, Agnu Kandu, Nathuni Dusadh and Ramsawarath Singh. The jury may have acted on the testimony of these three witnesses by itself or may have used it as corroboration of the accomplice or may have used the evidence of the accomplice as corroboration of the other identifying witnesses. There is also other evidence against some of them and especially against Hardwar Singh who was convicted also under section 412.

Of the other three appellants Nanku and Mukhu were identified at the trial by the approver only, though it is true that Ramnarain picked out the former at the test identification and mentioned the latter in the Magistrate's Court. The approver at the early stage mentioned three persons of their village but did not give their names. As to Paran Dom all the indication that the approver could give of him, was that a Dom of Rampur (whose name he could not give) gave the information upon which the dacoits acted, and led them to the outskirts of the village and he recognized Paran when produced before him as that Dom of Rampur. There is no corroboration of the testimony of the approver in respect of him. It is legally impossible for this Court acting within its statutory limitations to interfere with the verdict

in respect of these three appellants or indeed to suggest that the verdict is wrong on the merits. The approver has been found to be truthful in respect of many other accused and his inability to give the names of these persons may be regarded as not very significant in the circumstances. It is not for us to say whether the local Government may wish to make its own investigation in the matter. If it does, it may also for its own satisfaction be inclined to consider the cases of Nathuni, Ramsawarath and Anu Ahir in respect of whom there was some additional evidence for the consideration of the jury. Besides being mentioned by the approver as late as 18th April, Nathuni and Ramsawarath are only named in Court by the approver and Wali Mia. As against Anu, the evidence is the testimony of the approver before the Magistrate and at the trial, the testimony of Wali Mia before the Magistrate only and identification, for what it may be worth, by Ramnarain at the test identification. It is not for us to make any recommendation. We do not presume to say that the convictions are erroneous on the facts. All that it is for us to say is that there is no legal ground for our interference in appeal with the verdict of the jury. If a jury on a proper direction think fit to act on the evidence of an approver, they commit no illegality and the High Court has no right to interfere with the verdict.

The sentences are no doubt severe, but except in the case of the persons convicted under section 75 they can hardly be said to be excessive. These three persons Ramsawarath, Chuli and Batoran have had only one previous conviction each and in the case of the two Doms they must have been boys at the time, while that of Ramsawarath occurred in 1915. The proper sentence in their case is also ten years' rigorous imprisonment with an order under section 565 of the Code of Criminal Procedure that their residence and any change of or absence from such residence after release be notified by each of them for a period not exceeding three years from the date of the expiration

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of his sentence. With this modification of sentence I would dismiss the appeals.

KHAJA MOHAMAD NOOR, J.—I entirely agree.

Appeal dismissed.

MACPHERSON, J.

REVISIONAL CIVIL.

Before Courtney Terrell, C. J. and Varma, J.

1934.

March, 5, 6, 16.

MAKHU SAHU

v.

KAMTA PRASAD SAHU.*

Code of Civil Procedure, 1908 (*Act V of* 1908), *Order XLI, rule* 11—"*summary dismissal*" *of appeal, whether should be supported by judgment—rule* 31, *applicability of—appeals from original decrees or orders, whether liable to dismissal under rule* 11—*revision by High Court—test.*

A simple order of dismissal of an appeal under Order XLI, rule 11, Code of Civil Procedure, 1908, need not be supported by a "judgment" and it is not until after admission and after hearing that a judgment under rule 31 is required.

Samin Hasan v. *Piran*(1), and *Tanaji Dayde* v. *Shankar Sakharam*(2), followed.

Rami Deka v. *Brojo Nath Saikia*(3), *Surendra Nath Some* v. *Raghunath Dutt*(4), *Altap Ali* v. *Jamsur Ali*(5), *Hari Dasi Devi* v. *Gadadhar Roy*(6), *Durga Thathera* v. *Narain Thathera*(7) and *Ma Saw* v. *Ma. Bwin Byu*(8), dissented from.

* Civil Revision no. 622 of 1933, against a decision of Rai Bahadur Ram Chandra Chaudhuri, District Judge of Shahabad, dated the 30th August, 1933.

(1) (1908) I. L. R. 30 All. 319.
(2) (1911) I. L. R. 36 Bom. 116.
(3) (1897) I. L. R. 25 Cal. 97.
(4) (1923) 27 Cal. W. N. 501.
(5) (1926) 30 Cal. W. N. 334.
(6) (1926) 42 Cal. L. J. 499.
(7) (1931) A. I. R. (All.) 597, F. B.
(8) (1926) I. L. R. 4 Ran. 66.