APPELLATE CRIMINAL.

Before Mr. Justice Ghose and Mr. Justice Hill.

ALIMUDDIN (APPELLANT) *v.* QUEEN-EMPRESS (RESPONDENT).* 1895 *October* 11.

Evidence—Depositions—Criminal Procedure Code (Act X of 1882), section 288—Previous statements of witnesses, Admissibility of—Accomplices, Evidence of.

Although previous statements made by witnesses may be used, under section 145 of the Evidence Act, for the purpose of contradicting statements made by them subsequently at the trial of an accused person, they cannot, if they have been made in the absence of the accused, be treated as independent evidence of his guilt or innocence; section 288 of the Criminal Procedure Code will not avail anything for this purpose.

Where witnesses appeared to have taken an active part in carrying away a person after he had been grievously assaulted and was in a helpless condition, and then leaving him in a field where he was subsequently found dead, *Held*, that their evidence was no better than that of accomplices; at any rate, it would be most unsafe for the Court to rely upon their evidence, unless corroborated in material respects, in convicting the accused.

AT the Noakhally Sessions one Habibulla was put on his trial and convicted under section 304 of the Penal Code of causing the death of one Hosseinuddin. Alimuddin, the appellant, was suspected of being implicated in the offence, but was not put on his trial as he was not then forthcoming. He was subsequently apprehended and put on his trial. The same witnesses were examined on behalf of the prosecution in both cases.

Two witnesses, Ayesha and Latifa, when examined before the Committing Magistrate in Habibulla's case, made statements incriminating Alimuddin who was then absent. When Alimuddin was apprehended these women were again examined before the Committing Magistrate, but on this occasion they denied all knowledge of the occurrence. They were then cross-examined by permission of the Court, and on their former statements being read to them they admitted having made them, but alleged

* Criminal Appeal No. 614 of 1895, against the order passed by H. E. Ranson, Esq., Officiating Sessions Judge of Noakhally, dated the 20th June 1895.

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that they were made under threats of violence from the police. These depositions, containing the former statements put to the witnesses in cross-examination, were at the Sessions trial admitted as evidence under the provisions of section 288 of the Criminal Procedure Code. The Sessions Judge and both assessors believed these former statements so admitted in evidence, but now retracted in preference to the evidence which the witnesses gave at the trial exculpating the accused, and mainly upon those statements and upon the evidence of two persons, Yasin and Bunde Ali, alleged to be accomplices, convicted him. Yasin and Bunde Ali, who were the servants of Alimuddin, upon their own statements did not witness the attack on the deceased, but only assisted, though involuntarily, in carrying the injured man to a field where he was left, and where he was found dead the next morning.

Mr. *Khundkar* and Moulvi *Abdul Tawak* appeared on behalf of the appellant.

Mr. *Donogh* appeared on behalf of the Crown.

Mr. *Khundkar*.—The Sessions Judge improperly admitted these statements under section 288 of the Criminal Procedure Code, because the accused was not present when the statements were made. Such evidence was not "duly taken in the presence of the accused" within the meaning of that section. The statements should therefore be excluded, and if they are excluded there is no other direct evidence against the appellant, for the evidence given by Ayesha and Latifa in this case is in his favour. There is the evidence of Yasin and Bunde Ali, but they were undoubtedly accomplices. They both helped to carry the wounded man to a field where he was left, and where he was found dead the next morning.

Mr. *Donogh* in support of the conviction.—The former statements of the two women could be put to them in cross-examination for the purpose of contradiction under section 145 of the Evidence Act. That section provides for such statements being proved in this manner, and when once proved they are admitted in evidence and form part of the depositions. The case of *Queen-Empress* v. *Ishri Singh* (1) is an authority for the admission of such statements,

(1) I. L. R., 8 All., 672.

though made in the absence of an absconding accused person, at the trial, for the purpose of corroborating the evidence given by the witness who made them under section 157 of the Evidence Act. But the same principle will also apply where the object is to contradict and not to corroborate. The statements are equally admissible whichever purpose be in view. Under section 288 of the Criminal Procedure Code the depositions thus recorded by the Committing Magistrate can be put in and treated as evidence in the case at the Sessions. And it is competent for the Sessions Judge to rely upon any portion of them, and to believe the former statements, if he sees good reason to do so, in preference to the statements made at the trial before himself. See the observations of Phear, J., in the case of *Queen* v. *Amanullah* (1) and also *Queen-Empress* v. *Dan Sahai* (2), where the rule to be adopted by Judges in such cases is pointed out. As regards the second question neither Yasin nor Bunde Ali can be held to be accomplices in the sense intended by the Evidence Act, section 114, clause (*b*). There is no legal definition of the word "accomplice," but the observations of the Full Bench in *Queen-Emprees* v. *O'Hara* (3) would seem to indicate that he must be either *particeps criminis*, or at least a person who could be put on his trial as an abettor, within the meaning of section 107 of the Indian Penal Code. He must fall within the scope of one of the three clauses of section 107. These show that abetment can only be prior to, or contemporaneous with, the crime, not subsequent to it. There is no such thing as an accessory after the fact recognised by the Penal Code, so that a person in that position could not be regarded as an accomplice. See Mayne's Commentaries on the Penal Code under "Abetment." These witnesses, Yasin and Bunde Ali, did not witness the crime, nor were they cognisant of it, and they only assisted to carry the man under compulsion. To be accomplices they must have been in the conspiracy, or at least cognisant of the plot. See *Queen* v. *Chando Chandalinee* (4) and *Queen* v. *Mohesh Biswas* (5). Assuming, however,

(1) 21 W. R., Cr. 40 (51); 12 B. L. R., Ap., 15 (17).
(2) I. L. R., 7 All., 862.
(3) I. L. R., 17 Calc., 642 (665). (4) 24 W. R., Cr., 55.
(5) 19 W. R., Cr., 16 (20); 10 B. L. R., 455 note.

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that they were accomplices, they are corroborated by the statements of the two women admitted under section 288 of the Criminal Procedure Code, or at least, if these are inadmissible, by the fact of their having made such statements. It is well established that incriminating statements were made, and that is a corroborative circumstance. But in any case a conviction based on the uncorroborated testimony of an accomplice would not be illegal, section 133 of the Evidence Act. *Queen-Empress* v. *Maganlal* (1).

The following judgment was delivered by the High Court (GHOSE and HILL, JJ.) :—

The appellant in this case, Alimuddin, has been convicted by the Sessions Judge of Noakhally of the offence of culpable homicide not amounting to murder under section 304 of the Indian Penal Code. The case for the prosecution is that one Habibulla and the appellant, on the 29th of March last, severely assaulted the deceased Husseinuddin and carried him to a field, where they left him in a most helpless condition, the result being that he shortly afterwards died. It would appear that a prosecution was had against Habibulla alone, Alimuddin being then not forthcoming ; and in the course of the inquiry that was then held by the Committing Magistrate, two women, Ayesha and Latifa Banu, were examined as witnesses for the prosecution ; and they deposed before that officer that both Habibulla and Alimuddin were implicated in the grievous assault that was committed upon the deceased. In the Sessions Court, however (Habibulla having been committed to take his trial in that Court), these two women retracted the statements they had made before the Committing Officer ; but notwithstanding this Habibulla was convicted of the crime of culpable homicide not amounting to murder. The present prosecution was against Alimuddin, and before the Committing Officer the same two women, Ayesha and Latifa Banu, were examined as witnesses, and they denied having seen any assault being committed upon Husseinuddin by either Habibulla or Alimuddin. Their statements made in the course of the inquiry in the case against Habibulla were, however, put to

(1) I. L. R., 14 Bom., 115.

them, as we understand it, under the provisions of section 145 of the Evidence Act, in order to contradict the statements made by them upon the present occasion; and, though they admitted having made those statements, they said they had been compelled by the maltreatment which they received at the hands of the police to make them. Then we have two other witnesses examined in this case, Yasin and Bunde Ali, who support to some extent the case for the prosecution.

The success of the prosecution in this case rests mainly upon the statements of Ayesha and Latifa Banu made in the case of Habibulla before the Committing Officer, and upon the evidence of Yasin and Bunde Ali.

As regards the statements of Ayesha and Latifa Banu it seems to us that, though no doubt they could be used for the purpose of contradicting the statements made by them in the present trial, they could not be treated as independent evidence of the guilt or innocence of the accused, for the simple reason that they were not made in the presence of the accused. Mr. Donogh, however, on behalf of the prosecution has contended, referring to section 288 of the Code of Criminal Procedure, that, inasmuch as the statements of these two women made upon the former occasion were put to them and referred to in the course of the evidence that they gave before the Committing Officer in the present case, therefore those statements themselves could properly go in and be used as evidence establishing the guilt or innocence of the accused. We are unable to accept this contention as correct. Section 288 provides as follows: "The evidence of a witness, duly taken in the presence of the accused before the Committing Magistrate, may, in the discretion of the presiding Judge, if such witness is produced and examined, be treated as evidence in the case." Now, in the first place, the statements in question were not made in the presence of the accused; and, in the second place, it seems to us that the argument assumes that the said statements were evidence against the accused; for if they were not, they could not be made evidence against him, merely because they were put to the two women in the course of their evidence in this case.

Then, as regards the evidence of Yasin and Bunde Ali, it would appear on a perusal of it that they took an active part in carry-

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ing away the deceased while he was in a most helpless condition, knowing full well, as we take it, that a grievous assault had been committed on him, and then leaving him in a field in that helpless condition, which resulted, as we gather from the evidence in this case, in his death. We cannot but regard the evidence of these two witnesses as no better than that of accomplices; at any rate, they took such a part in this transaction as to make it most unsafe for the Court to rely upon their evidence, unless corroborated in some material respects, in convicting the accused. Mr. Donogh has called our attention to some of the incidents or facts in this case, which, according to his view of the matter, do corroborate the evidence of these two witnesses; but we are unable to accept his view. We do not think that there is any real corroboration of the statements made by them, nor do we consider it to be safe to proceed upon their evidence in holding that the accused took any part in the grievous assault upon Hosseinuddin.

Upon the whole, we are of opinion that the judgment of the lower Court, based as it is mainly upon the two classes of evidence to which we have referred, cannot stand.

We accordingly set aside the conviction and sentence and direct the release of the appellant.

S. C. B. *Conviction set aside.*

APPELLATE CIVIL.

Before Mr. Justice Banerjee and Mr. Justice Rampini.

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December 9.

SAMAR DASADH (PLAINTIFF) *v.* JUGGUL KISHORE SINGH (DEFENDANT No. 1.) *

Evidence Act (I of 1872), section 35—Public record—Admissibility of evidence —Teishkhana paper—Bengal Regulation XII of 1877, section 16.

The *teishkhana* paper kept by *patwaris* under section 16 of Bengal Regulation XII of 1817 is not a public register or record within the meaning of section 35 of the Evidence Act, and is not admissible as evidence under

* Appeal from Appellate Decree No. 420 of 1894, against the decree of Moulvi Khaja Syed Fukheruddin Hossein, Subordinate Judge of Patna, dated the 9th of February 1894, reversing the decree of Babu Jogendra Nata Mukerjee, Munsif of Behar, dated the 7th of March 1893.