CRIMINAL REVISION.

Before Mr. Justice Fulton and Mr. Justice Crowe.

KING-EMPEROR *v.* MALHAR MARTAND KULKARNI.* 1901. *September* 30.

Accomplice—Evidence—Corroboration—Bribery—Evidence Act (I of 1872), sections 114, *ill.* (*b*), *and* 133—*Indian Penal Code* (*Act XLV of 1860*), *section 161.*

It is generally unsafe to convict a person on the evidence of accomplices unless corroborated in material particulars. But, in considering whether this general maxim does or does not apply to a particular case, it must be remembered that all persons coming technically within the category of accomplices cannot be treated as on precisely the same footing: the nature of the offence and the circumstances in which the accomplices make their statements must always be considered. No general rule on the subject can be laid down.

A person who gives bribes is an accomplice of the person who receives them; and, while it is usually unsafe to convict a public servant of receiving bribes on the uncorroborated evidence of persons who say they have given them, the question as to the amount of corroboration depends on the circumstances of each case.

THIS was an application for revision under section 435 of the Code of Criminal Procedure (Act V of 1898).

The applicant, Malhar Martand Kulkarni, was charged with an offence under section 161 of the Indian Penal Code (Act XLV of 1860). It was alleged that he being a Kulkarni, a public servant, obtained from three persons, *viz.*, Gangaram, Mohan and Sakharam, the sums of Rs. 3, Rs. 4 and Rs. 2, respectively, other than legal remuneration for doing an official act.

Gangaram, Mohan and Sakharam were witnesses for the prosecution and deposed that they had received *tagai* † from Government in the Kutchery at Chopda, and that when they left the Kutchery the accused followed them and obtained the above sums from them by threatening that he would have them deprived of their *tagai*.

G. D. French, the First Class Magistrate of Sindkheda, convicted the accused.

* Criminal Application for Revision, No. 136 of 1901.

† Advances made out of the public treasury to agriculturists in time of famine.

1901.

KING-EMPEROR v. MALHAR.

On appeal, Thakurdas Mathuradas, Acting Sessions Judge of Khándesh, confirmed the convictions, but reduced the sentence on each charge to one month's simple imprisonment and fine Rs. 25; the three sentences to run concurrently. The learned Sessions Judge in the course of his judgment stated:

It is stated on behalf of the appellant that the Magistrate having taken cognizance of the offences upon information under section 190 (1) (c), he (the appellant) should have been informed under section 191, Criminal Procedure Code, that he was entitled to have his case tried by another Court, and that as the Magistrate did not do so his proceedings are irregular. It is not asked that his proceedings should on this account be set aside, but it is represented that this irregularity should be weighed in considering the evidence. The original complaint was made not to him as a Magistrate, but to him as Assistant Collector. He made some sort of preliminary investigation and got a sanction for the prosecution of the appellant, who being a Kulkarni could not be prosecuted without the sanction of the Commissioner.

It is argued that the Magistrate having held an investigation for the purpose of obtaining a sanction, should not have himself tried the case, but should have caused it to be transferred to some other Magistrate. I find, however, that the Magistrate took cognizance of the case, not upon information, but upon complaint made to him in writing. It is true that the complaint was addressed to him as Assistant Collector, but that circumstance would not turn it into information. . . . I hold for the purpose of this case that the Magistrate took cognizance of this case on a complaint and not upon information, and that it was not necessary for him to inform the accused under section 191 that he was entitled to have his case tried by another Magistrate. The Magistrate has done nothing wrong in making a preliminary inquiry, in obtaining the Commissioner's sanction and in then trying the case. He never initiated the proceedings on his personal knowledge and information.

* * * * *

I would only say that the evidence of the persons who gave the bribes is sufficiently corroborated by other witnesses, namely, 6, 12 and 13, also by Nos. 8, 14 and 17. The evidence is overwhelming, and it is clear therefrom that the appellant, being a Kulkarni, received the items referred to in the charges from the village men for the purpose of keeping favour upon them in the performance of his official duty, viz., in examining boundary marks and in allowing them to enjoy their *tagai*.

Against this conviction and sentence the accused moved the High Court under its criminal revisional jurisdiction, contending that the evidence against him was that of accomplices which could not be accepted, and that the Magistrate was incompetent to try the applicant as he had started the departmental inquiry against him.

Hamilton (with him *Daji A. Khare*) for the applicant:—The Magistrate, who had received information from certain persons and held an inquiry into these charges as Assistant Collector, should have informed the accused under section 191, Criminal Procedure Code, that he might claim to be tried by another Magistrate. His failure to do so avoids the trial as made without jurisdiction.

The evidence shows money was obtained by threats: this would be 'extortion' and not 'bribery'; but it is impossible to suppose the threat caused fear, and therefore it is not extortion. If the offence is bribery, the evidence in support of it is that of accomplices, namely, of other bribers on the same day and on other days. A strong feeling of hostility exists against the accused among the villagers. The Court should not uphold the conviction based on the uncorroborated testimony of accomplices and of tainted witnesses: *Queen-Empress* v. *Maganlal* (1) and *Queen-Empress* v. *Chagan Dayaram*.(2)

Ráo Bahádur *Vasudeo J. Kirtikar*, Government Pleader, for the Crown:—The objection on the ground of sections 190 and 191 of the Criminal Procedure Code cannot now be taken. It was waived in the Court below by the defence; and if it were entertained now, the result would be that the whole of the proceedings would be *ultra vires* and would have to be annulled and a new trial directed. The defence entirely declined, in the Court below, to have such effect given to that objection. The objection, however, is not tenable; the Court of first instance took the initiative upon complaint made to it, within the meaning of clause (*a*) of section 190 of the Criminal Procedure Code, and not under circumstances referred to in clause (*c*) of that section. Section 191 has accordingly no application.

As to the second objection, it is not correct to say that the persons who independently of each other gave bribes to the accused were accomplices of each other; the evidence shows there was no concert between them. Moreover, the conviction in the present case is based not on the evidence of such people alone, but on the independent testimony of persons who were

(1) (1889) 14 Bom. 115. (2) (1890) 14 Bom. 331.

1901.

KING-EMPEROR v. MALHAR.

not concerned in giving any bribe to him. This evidence is sufficient to support the conviction. The objections taken below to its credibility have been fairly discussed and carefully considered by both the Courts, and their concurrent finding as to the guilt of the accused ought not to be disturbed in revision.

FULTON, J.:—In this case the accused was found guilty by Mr. French, First Class Magistrate, of receiving bribes in three instances from cultivators to whom *tagai* advances had been made. On appeal the conviction was confirmed by the Sessions Judge.

The first objection made was that the Magistrate had taken cognizance of the case under section 190 (*c*) of the Criminal Procedure Code, and had omitted to inform the accused, as required by section 191, that he was entitled to have the case tried by another Magistrate. It was not seriously pressed. The Sessions Judge who dealt with it considered that the information on which Mr. French commenced his enquiry was, in fact, a complaint. We think this view was correct. The accused was defended by pleaders, who appear to have taken no objection to the procedure.

Secondly, it was contended that the evidence was insufficient, as the convictions were based entirely on the uncorroborated evidence of accomplices; and the cases of *Queen-Empress* v. *Maganlal and another*[1] and *Queen-Empress* v. *Chagan Dayaram and another*[2] were referred to. The leading case on this subject is that of *Elahee Buksh*,[3] decided in 1866 by a Full Bench of the Calcutta High Court, presided over by Sir Barnes Peacock, C.J. That case may well be studied by all Judges and Magistrates who have to deal with such evidence, for though it was decided before the enactment of the Evidence Act, the existing law embodied in section 133 and section 114 seems to be entirely in accordance with it.

Illustration (*b*) to section 114 directs attention to the general principle that it is unsafe to convict on the evidence of accomplices unless corroborated in material particulars. But along

(1) (1889) 14 Bom. 115. (2) (1890) 14 Bom. 331.
(3) (1866) 5 Cal. W. R. Cr. Rul. 80.

with this principle must be borne in mind the qualifications, taken apparently from Chief Justice Peacock's judgment, contained in the further illustrations which the Court is directed to consider when determining whether the general maxim does or does not apply to a particular case. They show that all persons coming technically within the category of accomplices cannot be treated as on precisely the same footing. The nature of the offence and the circumstances in which the accomplices make their statements must always be considered. No general rule on the subject can be laid down. The Legislature has not done so; and the Courts, whose function it is to interpret the law, cannot do so. The decisions, however, show the principles on which Judges have acted in particular cases, and it is the duty of their successors to consider those principles and determine to what extent they are applicable to the circumstances of other cases.

Now the cases of *Maganlal* (1) and *Chagan* (2) show beyond doubt that persons who give bribes are accomplices of persons who receive them. They also show that the learned Judges who dealt with those cases felt strongly how unsafe it usually would be to convict public servants of receiving bribes on the uncorroborated evidence of persons who said they had given them. We share that feeling. In this country false accusations are numerous, and public servants who fearlessly discharge their duties are likely to make many enemies. It is, therefore, most necessary for their protection that the Courts shall be vigilant in requiring strong and convincing evidence before hastily accepting charges brought against them. The humbler classes of public servants are especially in need of this protection.

But when the question arises what amount of corroboration will suffice, it is obvious that the answer in each case must depend on the circumstances. In *Maganlal's case*, the convictions on certain charges were maintained while on others they were reversed. In the case now before us the persons who say that they were persuaded to give bribes were, if their stories are true, acting quite independently of each other. There was no

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1901.

KING-EMPEROR v. MALHAR.

previous concert amongst them and there is nothing to show that they were in any sense abettors of each other. It was urged that their stories were highly improbable, but neither the Sessions Judge nor the Magistrate seems to have thought so. *A priori* there seems nothing very incredible in their statements, which, moreover, were supported by the evidence of persons other than those who say they were persuaded to pay money to the Kulkarni. Doubtless there may be a good deal of hostility to the accused; but the Sessions Judge and the Magistrate both considered the evidence overwhelming. With such a conclusion arrived at in both Courts after considering the inherent weakness of accomplice evidence it is impossible for us to interfere. We think that on the facts found, the provisions of section 161, Indian Penal Code, were rightly applied. We reject the application.

Application dismissed.

APPELLATE CIVIL.

Before Mr. Justice Fulton and Mr. Justice Crowe.

1901, *September* 30.

RAMRAO NARAYAN BELLARY (ORIGINAL DEFENDANT 4), APPELLANT, *v.* RUSTUMKHAN AND OTHERS (ORIGINAL PLAINTIFFS 1, 2 AND 5), RESPONDENTS.*

Mahomedan Law—Custom—Graveyard—Land formerly used as graveyard—Right of performing rites at the graves—Regulation IV of 1827, section 26.

Certain land at Dhárwár, which had formerly been used as a graveyard by the Mahomedan community there, but which had been disused as such for twenty or thirty years, was sold by the owner to defendant 4, who thereupon commenced to prepare the foundations of a house which he proposed to build upon it. The plaintiffs, who were Mahomedan residents at Dhárwár, brought this suit, alleging that the Mahomedans of Dhárwár were accustomed to perform religious rites and ceremonies at the graves in the said land, and praying for a declaration that they were entitled so to do and for an injunction restraining the defendants from obstructing them.

Held, that they were entitled to the declaration and injunction prayed for.

* Second Appeal No. 153 of 1901.