CRIMINAL REVISION.

Before Mr. Justice Ameer Ali and Mr. Justice Pratt.

KAMALA PRASAD (PETITIONER) *v.* SITAL PRASAD (OPPOSITE PARTY).* 1901 *Jany.* 31.

Accomplice—Evidence—Corroboration of evidence given by—Accomplice by implication or in a secondary sense—Evidence Act (I of 1872), ss. 114 and 133—Penal Code (Act XLV of 1860), s. 381.

Ordinarily speaking the evidence of an accomplice should be corroborated in material particulars. At the same time the amount of criminality is a matter for consideration; when a person is only an accomplice by implication or in a secondary sense, his evidence does not require the same amount of corroboration as that of the person who is an actual participator with the principal offender.

In dealing with the question what amount of corroboration is required in the case of testimony given by an accomplice, the Courts must exercise careful discrimination and look at the surrounding circumstances, in order to arrive at a conclusion whether the facts deposed to by the person alleged to be an accomplice are borne out by these circumstances or whether the circumstances are of such a nature that the evidence purporting to be given by the alleged accomplice should be supported in essential and material particulars by evidence *aliunde* as to the facts deposed to by that accomplice.

IN this case, on the night of the 26th March 1900, there was a burglary in the house of one Brindabun. A trunk was taken out of the house, it was broken open afterwards, and a considerable amount of money in cash, gold and silver ornaments and clothes were abstracted therefrom. Information was given to the *thana* on the 27th with a list of the articles missing. The trunk was found broken in a corner of the garden towards the north of the house. Suspicion fell upon the servants of the house, but the accused Kamala Prasad, who was a sort of *musahib* to the complainant, and used to take his meals with him, was not suspected. On the 29th March the house of Dusain a servant of the complainant was searched, and two silver bangles were found and identified as part of the articles stolen. The case was sent up on the 18th April, and on the 19th Dusain was convicted under s. 411 of the Penal Code, and sentenced to imprisonment

* Criminal Revision No. 1012 of 1900, made against the order passed by H. Holmwood, Esq., Sessions Judge of Gya, dated the 11th of October 1900.

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and fine. Dusain's statements were taken on several occasions; and on the 20th April a warrant was issued against the accused in this case. The accused was convicted by the Deputy Magistrate of Gya under s. 381 of the Penal Code, and sentenced to undergo two years' rigorous imprisonment and to pay a fine of Rs. 100, or in default of payment to undergo six months' further imprisonment. He preferred an appeal to the Sessions Judge of Gya, who, on the 11th October 1900, confirmed the conviction and upheld the sentence. Dusain, who was examined at the trial, deposed that, on the night in question, he went out of the house of Brindabun where he used to sleep and hearing some trampling on dry leaves, went towards the spot and found the accused engaged either in opening a box or standing near the box which had been apparently broken open. The accused in order to obtain his silence gave him the two bangles which he produced, or which were found in his house on the 29th March. The accused applied for and obtained a rule from the High Court calling upon the District Magistrate to show cause why the conviction and sentence should not be set aside on the ground that the evidence of the accomplice Dusain had not been sufficiently corroborated in law and also on the ground that there was no sufficient evidence to support the conviction.

Mr. *P. L. Roy* (with him Babu *Dasarathi Sanyal*) for the petitioner.

The *Deputy Legal Remembrancer* (*Mr. Leith*) for the Crown.

1901, JANY. 31.—The judgment of the Court (AMEER ALI and PRATT, JJ.) was delivered by

AMEER ALI, J.—In this case, the petitioner Kamala Prasad was convicted by the Deputy Magistrate of Gya under s. 381 of the Indian Penal Code, and sentenced to undergo two years' rigorous imprisonment and to pay a fine of Rs. 100, or in default of payment, to undergo six months' further imprisonment. He preferred an appeal to the Sessions Judge, who has confirmed the conviction and upheld the sentence. A Rule was applied for and obtained from this Court calling upon the District Magistrate to show cause why the conviction and sentence should not be set aside on the ground that the evidence of the

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accomplice upon which the judgment is based has not been sufficiently corroborated in law, and also on the ground that there is no sufficient evidence to support the conviction. Mr. Roy for the accused has placed the entire evidence before us, and has contended that the witness Dusain was an accomplice, and that his statements regarding the identity of the accused and the latter's participation in the offence of theft, which, there can be no doubt, took place on the night in question in the house of Brindabun Prasad, have not been corroborated regarding material particulars by outside evidence, and that, if the statements of Dusain be eliminated, there is no other evidence to connect the accused with the offence. It appears, that on the night of Monday, the 26th March last, there was a burglary of a serious character in the house of Brindabun. A box or trunk seems to have been taken out of the house. It was broken open afterwards, and a considerable amount of money in cash and gold and silver ornaments, and clothes were abstracted therefrom. Information was given at the *thana* on the 27th with a list of the articles missing. The steel trunk was found broken in a corner of the garden towards the north of the house. Naturally suspicion fell upon the servants, but, as the learned counsel for the accused points out, Kamala Prasad was not suspected. His position in the house was one of some trust. It is said he was a sort of *musahib* to the complainant and used to take his meals with him. On the 29th of March Dusain's house was searched, and two silver bangles were found and identified as part of the articles stolen. Mr. Roy says that Dusain himself produced those articles, but it makes no difference whether he himself produced them or they were found in the search. The inquiry into the case proceeded for some time apparently with the object of discovering more articles, and connecting the different people whose names Dusain gave as having been perpetrators of the burglary. The case was sent up on the 18th of April, and on the 19th Dusain was convicted under s. 411 of the Indian Penal Code, and sentenced to imprisonment and a small fine of Rs. 5. On the 20th April a warrant was issued against the present accused. Dusain's statements were taken on two previous occasions, and, after he had served out his period of

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imprisonment, his evidence was taken afresh regarding the facts to which he deposes and upon which stress has been laid by the Courts below.

His evidence in substance amounts to this that, on the night in question, he went out of Brindabun's house where he used to sleep and, hearing some trampling on dry leaves, went towards the spot and found the present accused engaged either in opening a box or standing near the box, which had been broken open. He states further that on hearing his footsteps two of Kamla Pershad's companions had gone a little distance. He then inquired from them what they were there for, and the accused thereupon, in order to obtain his silence, gave him the two bangles which he produced or which were found in his house on the 29th of March. If Dusain's evidence is believed, there can be no doubt that the present accused was concerned in the burglary and has been rightly convicted by the Courts below. The question of law which has been raised before us is, as we pointed out before, that he is an accomplice and that his evidence requires corroboration, and that the necessary corroboration has not been furnished. It is contended that the matters which have been used for the purpose of holding that his evidence has been corroborated do not in law afford that corroboration. Before considering the position of Dusain it is desirable to state the law bearing upon the admissibility of an accomplice's evidence and the legality of a conviction founded thereon. Illustration (*b*) to s. 114 of the Evidence Act says that the Court may presume that an accomplice is unworthy of credit, unless he is corroborated in material particulars. S. 133 declares that an accomplice shall be a competent witness against an accused person, and that a conviction is not illegal, merely because it proceeds upon the uncorroborated testimony of an accomplice. The principle underlying the rule against the acceptance of an accomplice's evidence without corroboration proceeds upon certain reasons. Those reasons have been set forth in a number of cases, to which it is not necessary for us to refer here. Primarily an accomplice's evidence requires to be accepted with a great deal of caution and scrutiny, because it is naturally supposed that, when a person is concerned in a crime and has been discovered as

being so concerned, he is likely to swear falsely in order to shift the guilt from himself. It is also supposed that an accomplice, in other words a participator in the crime, is a person of bad character, and that his evidence, although given under the sanction of an oath, is open to suspicion, and, thirdly, evidence given in expectation of any hope of pardon is sure to be biased in favour of the prosecution. It is for these reasons, although the law declares that a conviction is not illegal, merely because it proceeds upon the uncorroborated testimony of an accomplice, that the Courts have held, that ordinarily speaking the evidence of an accomplice should be corroborated in material particulars, and the practice which has been laid down has become, one may say, a part of the law itself. At the same time it is quite clear from the cases that the amount of criminality is a matter for consideration. When a person is only an accomplice by implication, or in a secondary sense, his evidence does not require the same amount of corroboration as that of the person who is actually concerned in the crime or participating in it with the principal offender. In dealing with the question what amount of corroboration is required in the case of testimony given by an accomplice, the Courts must exercise careful discrimination and look at all the surrounding circumstances in order to arrive at a conclusion whether the facts deposed to by the person alleged to be an accomplice are borne out by those circumstances, or whether the circumstances are of such a nature that the evidence purporting to be given by the alleged accomplice should be supported in essential and material particulars by evidence *aliunde* as to the facts deposed to by that accomplice. That seems to be the general principle, and keeping that in view, it appears to us that in this case Dusain Goala is only an accomplice in a secondary sense. He does not say, nor has it been shown, that he was actually concerned in the burglary, that he took any part in the abstraction of the steel trunk, in breaking it open or taking out any of the articles or money. His statement amounts to this that he saw that night certain persons whom he names, and one of whom is the accused, committing the robbery. He knew that there was a burglary, and knowing of the theft, he accepted certain articles which were the proceeds of that theft, and for that he has suffered

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imprisonment and has now no hope of reward or expectation of punishment. It is difficult for us to see how the principles to which we have referred apply to him. No doubt, having been a receiver of stolen property with a guilty knowledge, and having suffered imprisonment, his character is such that his evidence requires to be scrutinized and carefully considered in connection with the other circumstances of the case. The Courts below seem to have examined the facts with a great deal of care, and they have come to the conclusion that there was no reason to disbelieve the direct testimony of Dusain. They do not ignore the fact that he was a receiver of stolen property, or that he had been in jail, yet the First Court which had the witness before it and the Appellate Court which dealt with the evidence, have both come to the conclusion that his evidence may be accepted. It is difficult for us to say that they are wrong in accepting his testimony, nor are we in a position to say, giving every consideration to Mr. Roy's argument, that circumstances are wanting to support the positive testimony. On the whole, therefore, after a careful consideration of the case we are of opinion that the conviction ought not to be interfered with, and we accordingly discharge the Rule. The accused being on bail must surrender to undergo the remaining portion of his sentence.

D. S. *Rule discharged.*

Before Mr. Justice Prinsep and Mr. Justice Handley.

NAZAMUDDIN (PETITIONER) *v.* QUEEN-EMPRESS (OPPOSITE PARTY).*

1900 *July* 9.

Public servant—Peon attached to office of Superintendent of the Salt Department—Manager of Estate under Court of Wards—Penal Code (Act XLV of 1860), s. 21, cl. 9.

An officer in the service or pay of Government within the terms of s. 21, cl. (9) of the Penal Code, is one who is appointed to some office for the performance of some public duty.

* Criminal Revision No. 404 of 1900, made against the order passed by A. E. Staley, Esq., Sessions Judge of Tirhoot, dated the 12th May 1900, affirming the order of F. P. Dixon, Esq., Joint Magistrate of Muzafferpur, dated the 11th of April 1900.