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that being so, the case is an authority for the proposition put forward by Fletcher J. Lord Brougham's judgment seems to me quite inconsistent with any other view. I agree with Fletcher J. in the view he takes of the decision of this Court in *Mungle Chand v. Gopal Ram* (1).

The petition therefore fails on a point of law and I need not determine the question whether the defendant has any property within the jurisdiction, as the question does not arise. But I may say that the term property would have to be extended to very wide limits to embrace the Rs. 600 that the plaintiff has received and has applied to his own purposes.

The rule is therefore discharged with costs.

Rule discharged.

Attorney for the plaintiffs: *C. C. Bose.*

Attorneys for the defendant: *Manuel & Agarwalla.*

J. C.

(1) (1906) I. L. R. 34 Calc. 101.

APPELLATE CRIMINAL.

Before Mr. Justice Holmwood and Mr. Justice Sharfuddin.

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 Feb. 7.

BHONA

v.

EMPEROR.*

Previous Convictions, evidence of—Belonging to a Gang of Thieves—Habit—Evidence of habit—Admissibility of evidence of previous convictions of offences against property and of bad livelihood—Penal Code (Act XLV of 1860) s. 401.

Where the other evidence in a case under s. 401 of the Penal Code establishes association for the purpose of habitually committing theft, evidence of previous convictions of offences against property and of bad livelihood is admissible to prove habit; and for this purpose convictions of bad livelihood are more cogent than those of isolated thefts.

* Application for admission of Appeal, No. 5 of 1911, against the order of W. S. Coutts, Additional Sessions Judge of Dacca, dated Dec. 9, 1910.

Empress v. Naba Kumar Patnaik (1), *Meher Ali Sarkar v. Emperor* (Cr. App. 742 of 1900 decided 20th March, 1901, by Prinsep and Hill JJ.) (2), *Madhu Dhari v. Emperor* (Cr. App. 582 of 1905, decided 26th July, 1905, by Rampini and Mookerjee JJ.) (3), *Khanta Karwal v. Emperor* (Cr. App. 78 of 1909, decided 28th January, 1909, by Holmwood and Ryves JJ.) (4), *Gobardhan v. Emperor* (Cr. App. 958 of 1910, decided, 21st November, 1910, by Holmwood and Fletcher JJ.) (5) referred to.

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Mankura Pasi v. Queen-Empress (6) doubted and explained.

THE appellants were tried before the Additional Sessions Judge of Dacca and a jury on a charge under s. 401 of the Penal Code, and convicted and sentenced thereunder, on the 10th December, 1910, to various terms of imprisonment. They filed an appeal from jail which was referred by the Judges hearing the undefended cases in Chambers to the Criminal Bench composed of Holmwood and Sharfuddin JJ.

It appeared from the first information filed in the case, on 1st March, 1910, that in 1890 the existence of a gang was, from the frequent occurrence of thefts in several villages, suspected and some ineffectual steps taken in the matter. In 1904 a gang case was contemplated but dropped. In September, 1909, the investigation was taken up again and one Fazul Sheik and two others were arrested. The former confessed to a Magistrate that in company with several of the present appellants and others he had been for the last 19 or 20 years concerned in 25 thefts and burglaries. Further police inquiries followed and in the course of them additional information was obtained, and the present appellants were sent up for trial, Fazul being made an approver. The evidence for the prosecution consisted (i) of the testimony of the approver, who deposed to the existence of a gang formed for the purpose of committing thefts, the actual participation of several of the accused in specific instances, and meetings convened to arrange about the commission of thefts at which some of the accused were present; (ii) evidence of association generally or at specific times and in particular circumstances, in the houses

(1) (1897) 1 C. W. N. 146.

(2) Unreported.

(3) Unreported.

(4) Unreported.

(5) Unreported.

(6) (1899) I. L. R. 27 Calc. 189.

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of some of the accused, at *hâts*, on the road, and in boats, from batches of two to ten or twelve, the same persons not being found together on each occasion; and (iii) evidence of previous convictions of theft and receiving stolen property, or of being bound down under ss. 109 and 110 of the Criminal Procedure Code during the period of the existence of the gang.

The Deputy Legal Remembrancer (Mr. Orr), for the Crown.
 No one for the appellants.

HOLMWOOD AND SHARFUDDIN JJ. This is a jail appeal in a gang case, under section 401 of the Indian Penal Code, which before admission was sent to us by one of the Benches constituted to try undefended appeals in Chambers for argument on the point whether, having regard to the decision in the case of *Mankura Pasi v. Queen Empress* (1), evidence of previous convictions for offences against property and for bad livelihood are admissible in gang cases. We have heard the learned Deputy Legal Remembrancer for the Crown and have considered the reported and unreported cases. It was held by Prinsep and Hill JJ., in the case above cited that the character of the accused was not a fact in issue in the offence of belonging to a gang of persons associated for the purpose of habitually committing theft, and that, therefore, evidence of bad character or reputation of the accused is inadmissible for the purpose of proving the commission of that offence. The judgment is a doubtful one inasmuch as the case of *Empress v. Naba Kumar Patnaik* (2), where it was held that previous convictions for dacoity are relevant on a charge under section 400 of the Indian Penal Code, provided they are prior to the inception of the charge of belonging to a gang, is cited with approval.

Further, the decision went on the ultimate ground that even if convictions for theft and bad livelihood were admissible they were not sufficient in themselves for a conviction. "Such evidence," the Judges observe, rather curiously we venture

(1) (1899) I. L. R. 27 Calc. 139. (2) (1897) 1 C. W. N. 146.

to suggest, considering the statement set out in the judgment of what the evidence showed, "had in the case before them, formed the main, if not the only, ground on which the appellants had been convicted."

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But in cases where the other evidence has established association for purposes of habitually committing theft, evidence of previous convictions, whether for offences against property or for bad livelihood, has, we find, always been admitted, not as evidence of character, but as evidence of habit: and it would seem that of such evidence convictions for bad livelihood would be more cogent than those for isolated thefts.

Such evidence must of course be weighed. A single instance of theft, for instance, would count for little or nothing. There must be at least two or more cases against the same individual to show habit, but that the evidence of such convictions is inadmissible is clearly against the weight of authority in this court. We have already cited the case of *Empress v. Naba Kumar Patnaik* (1). We may proceed to cite four unreported cases that have been laid before us affirming the admissibility of such evidence. The first is a judgment of the same two learned Judges, Prinsep and Hill JJ., in *Meher Ali Sarkar v. Emperor* (2) (Cr. App. 742 of 1900, decided 20th Mar. 1901). There the Judges say: "It is also shown that several of the prisoners have been convicted of dacoity or other offences against property, and that some have been required to give security for good behaviour. These convictions and orders are of course evidence only against the particular persons concerned."

Clearly then the decision in *Mankura Pasi v. Queen-Empress* (3), cannot have been intended by the learned Judges to exclude such evidence in gang cases, but only in the case then before them, where they appear to have been under the impression that there was no other evidence. Then we have the case of *Madhu Dhari v. Emperor* (4) (Cr. App. 582 of 1905

(1) (1897) 1 C. W. N. 146.

(2) Unreported.

(3) (1899) I. L. R. 27 Calc. 139.

(4) Unreported.

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dated 26th July 1905, under section 401 decided by Rampini and Mookerjee JJ.) where it is said "the accused are clearly all habitual thieves. They have been repeatedly convicted of theft or have been called on to give security for their good behaviour, and many of them have been tried jointly in these cases."

In two appeals from the same District, *Khanta Karwal v. Emperor* (1) (Cr. App. 78 of 1909 decided on 28 Jan. 1909, by Holmwood and Ryves JJ.) and *Gobardhan v. Emperor* (2) (Cr. App. 958 of 1910 decided on 21st Nov. 1910, by Holmwood and Fletcher JJ.), the learned Sessions Judge, in charging the jury, cited these two cases at length and told the jury that on this authority the previous convictions were admissible. One of us was a party to each of the orders passed on these appeals, which were summarily dismissed after consideration of the point of law raised, the first by Holmwood and Ryves JJ., the second by Holmwood and Fletcher JJ.

We do not, therefore, think it necessary to admit these appeals on the point of law referred to us, as the admissibility of these convictions seems to be well established and the rules as to their weight and value have been clearly laid down. On the merits the findings of the Jury appear to be based on overwhelming evidence apart from the previous convictions. The appeals are, therefore, summarily dismissed.

E. H. M.

(1) Unreported.

(2) Unreported.