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Judicial DEPARTMENT.

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*Proceedings of the Madras Government, Judicial Department,
2nd March 1867.*

No. 27. Proceedings of Government, dated 2nd March 1867, No. 338.

The attention of Government having been drawn to a paper containing the opinion of Sir B. Peacock on the "Evidence (of accomplices)—Corroboration—Power of High Court to set aside conviction and order new trial, for error or defect in summing up," which was published in the *Police Weekly Circular*, dated the 28th July 1866, the Governor in Council resolves that copies of the same be struck off, and furnished to all Magistrates, as well as to their Assistants and Sub-Magistrates.

(True Extract).

A. J. ARBUTHNOT,
Chief Secretary.

To the Magistrate of

FROM THE CALCUTTA WEEKLY REPORTER.

Evidence (of accomplices)—Corroboration—Power of High Court (to set aside conviction and order new trial, for error or defect in summing up).

A conviction founded upon the uncorroborated evidence of one or more accomplices alone is valid in law.

The evidence of accomplices should not be left to a Jury, without such directions and observations from the Judge as the circumstances of the cases may require.

Improper advice given by the Judge to the Jury upon a question of fact, or the omission of the Judge to give that advice which a Judge, in the exercise of a sound Judicial discretion, ought to give the Jury upon questions of fact, amounts to such an error in law in summing up as to justify the High Court, on appeal or revision, in setting aside a verdict of guilty.

The power of setting aside convictions and ordering new trials, for any error or defect in the summing up, will be exercised by the High Court only when the Court is satisfied that the accused person has been prejudiced by the error or defect, or that a failure of justice has been occasioned thereby.

Peacock C. J. (Kemp and Phear, J. J., concurring).—I am of opinion that a conviction upon the uncorroborated testimony of an accomplice is legal. This is not new law, nor founded upon a new principle.

The point was decided in England as far back as the 10th December 1862, after conference with all the Judges.

Several cases to that effect are cited by Sir Matthew Hale in his "Pleas of the Crown," Vol. I. pp. 303-304. He, however, remarks :—"Yet, though such a party is admissible as a witness in law, the credibility of his testimony is to be left to the Jury; and truly it would be hard to take away the life of any person upon such a witness that swears to save his own, and yet confesseth himself guilty of so great a crime, unless there be very considerable circumstances which may give the greater credit to what he swears."

In the *King vs. Attwood*, 1 Leach's Crown Cases, page 464, which is a leading case upon the subject, two prisoners were convicted of highway robbery upon the uncorroborated evidence of an accomplice as to their identity. The question was referred for the opinion of the twelve Judges, who were unanimously of opinion that an accomplice alone is a competent witness; and if the Jury, weighing the probability of his testimony, think him worthy of belief, a conviction supported by such testimony alone is perfectly legal.

In sentencing the prisoners, Mr. Justice Buller made the following remarks :—

"Prisoners, you were convicted of a highway robbery at the last summer Assizes at Bridgewater. The material circumstances of the trial were these:—The prosecutor gave in evidence that he was robbed by three men on the day laid in the indictment, mentioning the

"conversation that passed during the robbery, and proving all the facts that are necessary in law to constitute that offence; but as it was dark he could not swear to the persons by whom it was committed. The accomplice was then called, who swore that he and you had, in company of each other, committed this robbery, and he mentioned all the circumstances that passed which exactly corresponded with those which the prosecutor had before related. On the testimony of these two witnesses, the Jury found you guilty. But, on a doubt arising in my mind respecting the propriety of this conviction, I thought it proper to refer your case to the consideration of the twelve Judges. My doubt was whether the evidence of an accomplice, unconfirmed by any other evidence that could materially affect the case, was sufficient to warrant conviction; and the Judges are unanimously of opinion that an accomplice alone is a competent witness, and that, if a Jury, weighing the probability of his testimony, think him worthy of belief, a conviction supported by such testimony alone is perfectly legal. The distinction between the competency and the credit of a witness has been long settled. If a question be made respecting his competency, the decision of that question is the exclusive province of the Judge; but if the ground of the objection go to his credit only, his testimony must be received and left with the Jury, under such directions and observations from the Court as the circumstances of the case may require, to say whether they think it sufficiently credible to guide their decision on the case. An accomplice, therefore, being a competent witness, and the Jury in the present case having thought him worthy of credit, the verdict of guilty which has been found is strictly legal, though found on the testimony of the accomplice only."

His Lordship then passed sentence of death upon the prisoners, but intimated that it was his intention to recommend them to mercy.

In the case of the King vs. Jones, 2 Campbell's Reports, 131, Lord Ellenborough says:—"No one can seriously doubt that a conviction is legal though it proceed upon the evidence of an accomplice only. Judges, in their discretion, will advise a Jury not to believe an accomplice, unless he is confirmed, or only in so far as he is confirmed; but if he is believed, his testimony is unquestionably sufficient to establish the facts which he deposes: it is allowed that he is a competent witness, and the consequence is inevitable that, if credit is given to his evidence, it requires no confirmation from another witness. Within a few years, a case was referred to the twelve Judges where four men were convicted of a burglary upon the evidence of an accomplice, who received no confirmation concerning any of the facts which proved the criminality of one of the prisoners; but the Judges were unanimously of opinion that the conviction as to all the four was legal, and upon that opinion they all suffered the penalty of the law. Strange notions upon this subject have lately got abroad, and I have thought it necessary to say so much for the purpose of correcting them."

See the King versus Durham and another, Leach's Crown Cases, 478.

At the Old Bailey Sessions, 1784, Smith and Davies were tried for robbing Hunter. During the night, the prosecutor was attacked by four ruffians, whose persons he was unable to identify; but, during the scuffle, he had torn a piece of the coat which one of them had on, who, on being discovered by these means, turned King's evidence, and implicated the two prisoners. But the Court, although it was admitted as an established rule of law that the uncorroborated testimony of an accomplice is legal evidence, thought it too dangerous to suffer a conviction to take place under such unsupported testimony, and the prisoners were acquitted.

The law, as above laid down, that a conviction is legal though supported by the uncorroborated evidence of an accomplice, has been admitted by Lord Denman in *Rex versus Hastings* and another, Carrington and Paynes's Reports, 152; by Baron Alderson in *Rex versus Wilkes*, 7 Carrington and Payne's Reports, 272; and by many other learned and eminent Judges; and it was so ruled by the Court of Criminal Appeal in *Rex versus Stubbs*, 25 Law Journal Reports, Magistrates' Cases, page 16. The Law of England, therefore, upon this subject, is beyond doubt.

The Law of America is the same, and in that country, where, in most of the States, new trials are granted in Criminal cases, new trials have been refused even when the verdicts were obtained upon the uncorroborated evidence of an accomplice. The cases upon the subject are collected in

Wharton's Criminal Law of the United States of America, page 366. It does not appear that, in the cases in which new trials were refused, the Judge who tried the case had omitted to make such observations to the Jury, with reference to the evidence of the accomplices, as the circumstances required. But in Civil cases, it is clear that, both in that country and in England, a new trial will be granted where, from the absence of proper instructions from the Judge, the Jury fall into an error. Formerly, the rule was that the mere commission of a crime did not render a witness incompetent; but persons convicted of treason, felony, or certain other crimes, were rendered incompetent by conviction. The incompetency created by conviction was removed in England by Act of Parliament, and was subsequently removed here by Act XIX of 1837, by which it was enacted that no person shall, by reason of a conviction for any offence whatever, be incompetent to be a witness in any stage of a cause, Civil or Criminal, or before any Court in the Territories of the East India Company.

It was contended, in the course of argument in the present case, that, in India, the rule of evidence in the Mofussil is different from the law of England with respect to the legality of convicting upon the uncorroborated evidence of an accomplice.

If there had been a long uniform course of decisions in the late Sudder Court that the uncorroborated evidence of an accomplice was insufficient in law for the conviction of prisoners, we should have been disposed to bow to those decisions, and to act upon the rule "*stare decisis*."

One case only was cited in which a Judge of the Sudder Court stated that he did not think it legal to convict upon such evidence. There may be other cases to the same effect; but there is no uniform current of decisions which would

7. Nizamut Reports, page 57.

justify us in holding that the law in this respect in the Mofussil was different from the established law of England, and from that which was administered in the late Supreme Court, and is now administered by this Court in the exercise of Original Criminal Jurisdiction. It would require a uniform train of decisions to justify us in holding that the Law of Evidence to be administered by the Court upon such a point as this, is different in the exercise of the Appellate Criminal Jurisdiction from that which is acted upon in the exercise of Original Jurisdiction.

When called upon to give effect to particular expressions which have been made use of by the Judges of the late Sudder Court, with regard to the rules of evidence, we must bear in mind that, up to a very recent period, when trial by Jury was established in certain districts, it was the province of the Sessions Judges, and of the Judges of the late Sudder Court, to determine questions of fact as well as questions of law in Criminal cases; and that, in dealing with such cases, it was not very frequently necessary to determine whether the evidence of a particular witness was insufficient in law to justify a conviction, or merely insufficient to induce them, as judges of fact, to declare that a prisoner was guilty. There is a wide distinction, however, between disbelieving evidence and determining that it is not legally sufficient if believed; but this distinction is not always sufficiently adverted to by Courts which are Judges of fact as well as of law.

Act II of 1855, Section 28, was referred to by the appellant's pleader, by whom the cause was very well argued, and it was contended that that Act rendered corroboration necessary. Upon that point, it is sufficient to say that it was not the intention of the Act to render inadmissible any evidence, which, but for the Act, would have been admissible (see Section 58); nor was it intended to lessen the legal effect of any such evidence.

We have, therefore, no hesitation in answering the first question in the affirmative, and declaring that a conviction may be legally had on the uncorroborated evidence of one or more accomplices.

It is unnecessary, as regards this part of the case, to answer the second question.

Holding that the Judge was not bound to direct the Jury that the evidence was not legally sufficient for a conviction, we shall probably mislead if we do not go on to consider whether there was any error or defect in the summing up which constitutes a valid ground of appeal. The

[* No—the English Act was subsequent to the Indian Act; the English Act is the 6 and 7 Vict. c. 85.]

question of misdirection is raised by the Judges who referred the case, and is, I think, substantially before us, and ought to be considered, although there is no specific question as to whether there was a misdirection or not. I proceed, therefore, to consider whether there is any ground for setting aside the conviction, upon the ground of error in the summing up.

In the case of *Regina versus Farler*, 8 Carrington and Payne's Reports, page 103, a very learned and eminent Judge, than whom no one was better able to deal with evidence, and to determine the degree of credibility to which particular witnesses were entitled—I mean the late Lord Abinger—in summing up the case to the Jury, made the following remarks:—"I am strongly inclined to think that you will not consider the corroboration in this case sufficient. No one can hear the case without entertaining a suspicion of the prisoner's guilt; but the rules of law must be applied to all men alike. It is a practice, which deserves all the reverence of law, for Judges uniformly to tell Juries that they ought not to pay any respect to the testimony of an accomplice unless he is corroborated in some material circumstance. In my opinion, that corroboration ought to consist of some circumstance that affects the identity of the party accused."

"A man who has been guilty of a crime himself will always be able to relate the facts of the case, and if the confirmation be only on the truth of that history, without identifying the persons, that is really no corroboration at all. If a man were to break open a house, and put a knife to your throat, and steal your property, it would be no corroboration of an accomplice that he had stated all the facts correctly—that he had described how the person did put a knife to your throat, and did steal the property. It would not at all tend to show that the party accused participated in it. Here you find that the prisoner and his accomplice are seen together at the house of the landlord. Now, look at his evidence. If they were seen together under circumstances that were extraordinary, and where the prisoner was not likely to be unless there were concert, it might be something. But he lives within one hundred and fifty yards, and there is nothing extraordinary in his being there; and he left when they were shutting up the house. Therefore, it is perfectly natural that he should have been there, and left when he did. The single circumstance is, that the prisoner was seen in a house which he frequents, where he may be seen once or twice a week; and there the case ends against him. All the rest depends upon the evidence of the accomplice. The danger is that, when a man is fixed and knows that his own guilt is detected, he may purchase impunity by falsely accusing others. I would suggest to you that the circumstances are too slight to justify you in acting on this evidence." The prisoner was accordingly acquitted.

In *Rex versus Wilkes and Edwards*, 7 Carrington and Payne's Reports, page 272, a similar rule was laid down by Baron Alderson in a case of sheep-stealing. He said:—"There is a great difference between confirmations to the circumstances of the felony and those which apply to the individuals charged: the former only prove that the accomplice was present at the commission of the offence; the latter show that the prisoner was connected with it. This distinction ought always to be attended to." In summing up, the learned Judge said:—"The confirmation of the accomplice as to the commission of the felony is really no confirmation at all, because it would be confirmation as much if the accusation were against you and me, as it would be as to those prisoners who are now upon their trial. The confirmation which I always advise Juries to require is the confirmation of the accomplice in some fact which goes to fix the guilt on the particular person charged. You may legally convict on the evidence of an accomplice only if you can safely rely on his testimony; but I advise Juries never to act on the evidence of an accomplice, unless he is confirmed as to the particular person who is charged with the offence. With respect to the prisoner Edwards, it is proved that meat of a similar kind was found in his house. The meat cannot be identified, but it is similar; that is, therefore, some confirmation of the accomplice as to Edwards more than any one else. It is also proved that the skin was found in a whirley hole: that is no confirmation, because it does not affect the prisoners more than it affects any other person. With respect to the prisoner Wilkes, it is proved by the witness Meek that the prisoner Wilkes told him nearly the same story as the accomplice has told you to-day. If you believe that witness, there is confirmation of the accomplice as to the prisoner Wilkes: you will say whether,

"with these confirmations, you believe the accomplice or not. If you think that his evidence is not sufficiently confirmed as to one of the prisoners, you will acquit that one; if you think he is confirmed as to neither, you will acquit both; if you think he is confirmed as to both, you will find both guilty." The Jury found both prisoners guilty.

In the case of *Rex versus Stubbs*, in the Court of Criminal Appeal above referred to, Mr. Baron Parke said:—"My practice has always been to tell the Jury not to convict the prisoner unless the evidence of the accomplice is confirmed, not only as to the circumstances of the crime, but also as to the person of the prisoner." And, Creswell, J., added:—"You may take it for granted that the accomplice was at the committal of the offence, and may be corroborated as to the facts; but that has no tendency to show that the parties accused were there." Chief Justice Jervis, in the same case, remarked:—"There is another point to be noticed. When an accomplice speaks as to the guilt of three prisoners, and his testimony is confirmed as to two of them only, it is proper, I think, for the Judge to advise the Jury that it is not safe to act on his testimony as to the third person in respect of whom he is not confirmed; for the accomplice may speak truly as to all the facts of the case, and at the same time in his evidence substitute the third person for himself in his narrative of the case." In *Rex versus Merries and another*, 7 Carrington and Payne's Reports, 270, on an indictment against A as principal and B as receiver, where the evidence of an accomplice was corroborated as to A, but not as to B, Baron Alderson thought it was not sufficient as to B.

Conflicting opinions have been expressed as to whether, in a case in which an accomplice accuses two persons, and is corroborated as to one, but not as to the other, a Jury ought to be advised to acquit the one as to whom there is no corroboration. The opinion expressed by Chief Justice Jervis in *Rex versus Stubbs*, as above mentioned, appears to be the correct one; for nothing is more easy than for an accomplice to accuse an innocent person in order to get off his real companion in guilt, and to attribute to the person falsely accused acts which were really committed by the guilty companion.

In the present case, two accomplices gave evidence against Elahée Buksh; but that does not seem to carry the case much further.

In *Rex vs. Noakes*, in which two accomplices spoke distinctly as to the prisoner, Littledale, J., told the Jury that if their statements were the only evidence, he could not advise them to convict the prisoner; that it was not usual to convict on the evidence of one accomplice without confirmation; and that, in his opinion, it made no difference whether the evidence was that of one accomplice only, or of more than one. This, as a general rule, is correct, for otherwise two companions in guilt might get off by confessing and falsely accusing two innocent persons. But if two or three persons should be apprehended at different places, at long distances from each other, and should each confess and give a similar account as to the persons associated with them in a particular dacoity, the statement of each, if made under such circumstances as not to raise a presumption of collusion, might be proved in corroboration of his evidence; such statement being admissible as corroborative evidence under Act II of 1835, Section 31. The evidence of the several accomplices so corroborated might be sufficient to satisfy a Jury, although the evidence of one of them alone could not have been safely acted upon. These are matters to which the attention of a Jury ought, under all circumstances, to be specially directed, with proper remarks from the presiding Judge, according to the rule laid down by Mr. Justice Buller, in the case already cited.

The danger of acting upon the evidence of an accomplice who is admitted to give evidence for the Crown, arises, not merely from the fact of his having committed a crime—for that would go to the credit of every witness who had recently committed, or been convicted of, a crime—but from the fact of his giving his evidence under the hope or expectation of pardon, and of his obtaining immunity from punishment if his evidence be believed.

Suppose two gentlemen of previously undoubted honor and good character should, in a moment of irritation, not amounting in law to provocation, get out of a dak carriage, and thrash the coachman or syce for not giving them a good horse,—suppose the man should die, and that both should be convicted of culpable homicide. Would any one say that either of them would be so wholly

unworthy of credit as witnesses in any other case, that a Jury ought to be advised not to act upon his testimony, except so far as it was corroborated?

If he would not, after conviction, be unworthy of credit if called upon to give evidence against a stranger for another offence, why should he be unworthy of credit before conviction against his own companion and friend, if compelled to give evidence against his will? Suppose that immediately after the commission of the offence, one should be apprehended and the other should escape without being identified with sufficient certainty for conviction,—suppose that the one who escaped should be apprehended and brought to trial, and that the one who had been apprehended in the first instance should be called as a witness against his will, and, being compelled to give evidence (as he might be under Act II of 1855, Section 32), should identify his companion. Would any Judge, in the exercise of a sound judicial discretion, feel himself bound to tell a Jury that, because the witness was an accomplice, it would be dangerous to act upon his evidence alone uncorroborated?

When the Judges speak of the danger of acting upon the uncorroborated evidence of accomplices, they refer to the evidence of accomplices who are admitted as evidence for the Crown, in the hope or expectation of a pardon.

If, in such a case, the accomplices admitted to give evidence act fairly and openly, and discover the whole truth, though according to the law of England they are not, except in certain cases for which special provision is made by Statute, entitled as of right to pardon, yet the usage, the lenity, and the practice of the Court is to stop the prosecution against them, and they have an equitable title to a recommendation to the mercy of the Crown (Cowper's Reports, 334).

The origin of the practice of admitting accomplices to give evidence for the Crown without approvement, is explained by Lord Mansfield in *Rex vs. Rudd* (Cowper's Reports, 334, 335). He there says:—

“A person desiring to be an approver must be one indicted for the offence, and in custody on that indictment. He must confess himself guilty of the offence, and desire to accuse his accomplices. He must likewise, upon oath, discover, not only the particular offence for which he is indicted, but all *treasons* and *felonies* which he knows of; and after all this, it is in the discretion of the Court whether they will assign him a Coroner and admit him to be an approver or not; for, if on his confession, it appears that he is a *principal*, and tempted the others, the Court may refuse and reject him as an approver. When he is admitted as such, it must appear that what he has discovered is true, and that he has discovered the *whole truth*. For this purpose, the Coroner puts his appeal into form; and when the prisoner returns into Court, he must repeat his appeal without any help from the Court or from any bystander. And the law is so nice, that, if he vary in a *single circumstance*, the whole falls to the ground, and he is condemned to be hanged. If he fail in the color of a horse, or in circumstances of time, so rigorous is the law that he is condemned to be hanged; much more if he fails in essentials. The same consequences follow if he does not discover the *whole truth*; and in all these cases the approver is convicted on his own confession. (See this doctrine more at large in Hale's Pleas of the Crown, Vol. II, pages 226 to 236; Staun's Pleas of the Crown, lib. 2, C. 52 to C. 58, 3 Insti. 129). A further rigorous circumstance is that it is necessary to the approver's own safety that the Jury should believe him, for if the partners in his crime are not convicted, the approver himself is executed.

Great inconvenience arose out of this practice of approvement. No doubt, if it was not absolutely necessary for the execution of the law against notorious offenders that accomplices would be received as witnesses, the practice is liable to many objections. And though, under this practice, they are clearly competent witnesses, their single testimony alone is seldom of sufficient weight with a Jury to convict the offender, it being so strong a temptation to a man to commit perjury, if, by accusing another, he can escape himself.

Let us see what has come in the room of this practice of approvement, a kind of hope that accomplices who behave fairly, and disclose the whole truth, and bring others to justice, should themselves escape punishment and be pardoned. This is in the nature of a recommendation to

“mercy. But no authority is given to a Justice of the Peace to pardon an offender, and to tell him he shall be a witness against others. The accomplice is not assured of his pardon, but he gives his evidence *in vinculis*, in custody; and it depends on the title he has from his behaviour whether he shall be pardoned or executed.”

Sir Mathew Hale, speaking of approvement, says:—“This course of admitting approvers has long been disused, and the truth is that more mischief hath come to good men by this kind of approvements by false accusations of desperate villains, than benefit to the public by the discovery and convicting of the real offenders; jailers, for their own profits, often constraining prisoners to affect honest men, and therefore provision has been made against it.” (See 2 Hale's Pleas of the Crown, 226).

The modern practice of admitting accomplices to give evidence under a hope of pardon, though not so dangerous as to the old practice of approvement, would still be attended with the greatest danger, but for the safeguard which has to some extent been provided by the practice of the Judges in recommending Juries not to act upon such evidence without requiring corroboration as to the identity of the person accused.

The danger of acting upon the uncorroborated evidence of accomplices is at least as great here as it would be in England, for here, as in England, the accomplices are not actually pardoned before they give evidence.

In England, by confessing and giving evidence, they acquire an equitable right to a recommendation for the mercy of the Crown. Here, the Magistrate is merely authorized to tender a pardon, and if it appear to the Court of Session, at the time of trial, or to the High Court as a Court of Reference, that the person who has accepted the offer of pardon has not conformed to the conditions under which the pardon was tendered,

Code of Criminal Procedure, Sections 209, 211. either by concealing anything essential, or by giving false evidence or information, it is competent to the Court to direct the commitment of such person for trial for the offence in respect of which the pardon was tendered.

The witness, therefore, does not give his evidence under an absolute certainty of immunity.

In Scotland the law is different. There, as remarked by Mr. Alison, it is established that,

Alison's Practice of the Criminal Law of Scotland, 453, “by the mere fact of calling the Socius as a witness, the prosecutor debars himself from all right to molest him for the future with

relation to the same offence. This is always explained by the presiding Judge to the witness as soon as he appears, and consequently he gives his testimony under a feeling of absolute security as to the effect which it may have upon himself. This privilege is absolutely and altogether independent of the prevarication or unwillingness with which the witness may give his testimony. Justice may indeed be often defeated by a witness retracting his previous disclosures, or refusing to make any confession after he is put into the witness box; but it would be much more put in hazard if the witness were sensible that his future safety depended on the extent to which he spoke against his associate at the bar.”

It is quite as necessary here, as it is in England, if not more so, that the evidence of accomplices should not be left to a Jury without such directions and observations from the Judge as the circumstances of the case may require.

The question is, whether the omission of the presiding Judge, on a trial in the Mofussil, to make such observations, is not such an error in his summing up as to justify the Court, on appeal or revision, in setting aside a verdict of guilty.

It has been said by a learned author, speaking of the administration of Civil Justice in England, that “it is the practice for the Judge at

Starkie on Evidence, page 472.

“Nisi Prius, not only to state to the Jury all the evidence that has been given, but to comment on its bearing and weight, and to state the legal rules upon the subject and their application to the particular case, and even to advise them as to the verdict they should give, so that it may accord with his view of the law and with justice.”

He proceeds:—"Indeed, without this assistance from the Judge, few Juries would, in a contested case, be able to come to an unanimous opinion, being frequently left in a state of great perplexity by the influence of the speeches of the contending leaders."

"The accuracy of the summing up of the Judge is, therefore, of the very utmost importance, because, if the Jury, after hearing the evidence and the powerful arguments which probably have been urged in favor of quite opposite views of the question, were entirely left to decide for themselves, without an impartial direction as to what just and legal weight ought to be attached to this or to that view of the case, it would be difficult, if not impracticable, for them to come to a just conclusion; and hence, in the administration of Civil Justice, it is incumbent on the Judge correctly to state the law upon the case, as well as the evidence and the bearings of the latter."

If the above remarks as to the impracticability of Juries coming to a just conclusion are correct as regards the administration of Civil Justice in England, they are still more so as regards the administration of Criminal Justice in the Mofussil, where trial by Jury is in its infancy, and where the persons of whom Juries are generally composed are necessarily more dependent upon the Judge than they are in England for sound and proper advice and assistance; as regards the degree of weight which may be fairly and safely attached to the testimony of particular witnesses. The Jury, it is true, are not legally bound to act upon the advice or recommendation of the Judge, as there is no appeal from a verdict of acquittal or from a verdict of guilty upon a mere matter of fact.

By Section 379 of the Code of Criminal Procedure, it is enacted that, in a trial by Jury, the Judge will sum up the evidence on both sides, and the Jury shall then deliver their finding upon the charge, and "a statement of the Judge's direction to the Jury shall form part of the record." There can be no doubt that that Section requires the Judge to sum up properly, and there would be very great danger in holding that there is no remedy by appeal against a verdict of guilty, if it appears clearly to the High Court that a failure of justice has been caused by improper advice upon a question of fact, or by an omission to give that advice which a Judge, in the exercise of a sound judicial discretion, ought to give upon questions of fact, or as to the degree of credit to be given to particular witnesses.

It appears to me that it amounts to an error in law in the summing up, which, on appeal, is a ground for setting aside the verdict, subject, however, to the limitation provided by the Code of Criminal Procedure in Sections 439 and 426, viz., that the Appellate Court is satisfied that the accused person has been prejudiced by the error or defect, and that a failure of justice has been occasioned thereby.

It was said by Chief Justice Tindal, in *Davidson vs. Stanley*, 2 Manning and Granger's Reports, p. 728, that "it is no objection that a Judge lets the Jury know the impression which the evidence has made upon his own mind, and that, at all events, the party objecting to such a course should show that the impression entertained by the Judge was not justified by the evidence;" and it has been already shown that it is the practice of Judges in England to advise Juries not to convict merely upon the uncorroborated evidence of an accomplice.

If a Judge in a Criminal trial in the Mofussil were to tell the Jury that, in his opinion, the evidence was sufficient to justify them in finding the prisoner guilty, in a case in which, if the Judge had been trying the case with the aid of Assessors, the High Court would, on appeal, have reversed his judgment if upon the same evidence he had convicted the prisoner, I have no doubt that the Court ought, on appeal, to set aside a verdict of guilty found by the Jury, notwithstanding the advice was merely as to the weight of evidence.

So, if a Judge, instead of advising a Jury not to convict upon the mere uncorroborated evidence of an accomplice, were to advise them to convict upon such evidence, or were to tell them that the uncorroborated evidence of an accomplice given under a tender of pardon was admissible, and that it was for them alone to form their opinion upon it, that a conviction founded upon such evidence would be legal, and that such evidence without corroboration might be acted upon with

as much safety as that of any other witness, I think the error in the direction would form a good ground of appeal.

Now, there are errors of omission as well as errors of commission, and I have no doubt that it would form a good ground of appeal against a verdict of guilty if a Judge were to call the attention of a Jury to all the evidence against the prisoner, and to omit altogether to allude or call attention to the evidence in his favor. By such a summing up, the Judge would not comply with the requirement of the Code of Procedure, and a verdict found upon such a summing up ought, I think, to be set aside, if the Court should be of opinion that the evidence was not sufficient to justify a conviction. I put the case merely to try the principle. It appears to me that such an omission, or an omission to follow a practice which is universally adopted by the Judges in England, and is described by Lord Abinger to be "a practice which deserves all the reverence of law," would be a ground of appeal against a conviction upon a verdict of guilty based upon such evidence alone, and found by a Jury upon such a summing up. So, also, I think it would be error in a summing up, if a Judge, after pointing out the danger of acting upon the uncorroborated evidence of an accomplice, were to tell the Jury that the evidence of the accomplice was corroborated by evidence of a fact which did not amount to any corroboration at all. When Lord Ellenborough said "Judges in their discretion will advise a Jury not to believe the evidence of an accomplice, unless he is confirmed, or only so far as he is confirmed," he must have intended that it was their duty to do so. "Discretion," says Lord Mansfield, "when applied to a Court of Justice, means sound discretion, guided by law. It must be governed by rule, not by humour. It must not be arbitrary, vague, and fanciful, but legal and regular."

But although I am of opinion that the Legislature intended that the Sudder Court should have the power of setting aside a verdict of guilty pronounced by a Jury upon an erroneous or defective summing up of the evidence by the presiding Judge, yet I think that it was not their intention that a verdict of guilty should be set aside in every case in which there is a defective or erroneous summing up. It was their intention to provide protection for the innocent, but not chances of escape for the guilty. The power, therefore, of reversing a finding or of setting aside a trial was carefully guarded by Sections 426 and 439 of the Code of Criminal Procedure, by which it was enacted that "no finding or sentence passed by a Court of competent jurisdiction shall be reversed or altered, on appeal or revision, on account of any error or defect either in the charge or in the proceedings on the trial, unless, in the judgment of the Appellate Court, the accused person shall have been prejudiced by such error or defect;" and that "no trial held in any Criminal Court shall be set aside, and no judgment passed by any Criminal Court shall be reversed, either on appeal or otherwise, for any irregularity in the proceedings of the trial, unless such irregularity have occasioned a failure of justice."

The Code of Criminal Procedure provides that, if a person be convicted on a trial by Jury, the appeal shall be admissible only upon a matter of law. But it certainly is not against the principle, or even the letter of the Code, that the Court should have power to set aside a verdict of guilty for an insufficient or defective summing up of the evidence in a case in which, in their judgment, the verdict is not warranted by the evidence.

If a verdict and conviction could not under such circumstances be set aside, trial by Jury in the Courts of Sessions in this country would be fraught with the most dangerous consequences. On the other hand, if every convict against whom a verdict of guilty is pronounced by a Jury, has a right to have that verdict set aside upon appeal, and to obtain his discharge whenever it can be shown that the presiding Judge has not properly directed the Jury as to the degree of weight which ought to be given to particular evidence, a wide door would be thrown open for the escape of guilty men, and the due administration of the Criminal Law of this country would be placed in the greatest jeopardy in those Districts to which trial by Jury has been extended. A verdict of acquittal by a Jury cannot be reversed, and ample protection is afforded to prisoners by allowing the High Court to reverse a verdict of guilty for any error or defect in the summing up, whenever the Court is of opinion that a failure of justice has been thereby occasioned.

It has been suggested that the word "reverse" means to change to the contrary, and that to reverse a verdict of guilty is to change it into a verdict of not guilty; and that although the Court as a Court of Revision, may grant a new trial as a Court of Appeal, it has not power to do so.

But I am of opinion that the word "reverse" is not used in so restricted a sense. The word "reverse" in Sections 419 and 426 is applicable, not merely to findings or verdicts, but also to sentences; and in Section 439 the same word is used with reference to judgments only. But if the word "reverse," when applied to a verdict means to "change or turn into the contrary," it must also mean the same when applied to judgments or sentence. Thus, a judgment of conviction must be turned into a judgment of acquittal. Section 420 shows that such was not the meaning of the word when applied to sentences, even if without that Section it would have been possible to put such a construction upon it.

Section 405.

The Court, upon revision, may grant a new trial. But the person convicted cannot obtain a revision as a matter of right.

I think that the Court has as great a power in this respect on appeal as it has on revision: that it may set aside a verdict of guilty and a conviction founded upon it for any error in law, such as a misdirection of the Judge in point of law, or an error or defect in the summing up of the evidence, or the improper rejection or admission of evidence; provided the Court is of opinion that the person convicted has been prejudiced by the error or defect, and that a failure of justice has been occasioned thereby. I am of opinion that the word "reverse" is used in its legal sense, and means to make void, to set aside, or annul.

The Legislature, when giving a power to a Court of Revision to order a new trial, may have thought it necessary to do so by express words, as a Court of Revision may act of its own motion and without any application or consent of the person convicted. But an appeal must be preferred by the person convicted, and it seems to follow that, if he asks to have a finding and conviction set aside for error in law, he cannot set up that conviction in bar of a second trial.

That was the principle acted upon by the Judges in America, who held that a new trial might be granted in cases of felony, notwithstanding the words in the constitution, "nor shall any person be subject, for the same offence, to be twice put in jeopardy of life or limb," which words were interpreted by Mr. Justice Story to mean that "no person shall be tried a second time for the same offence where a verdict has been given by a Jury." "I am aware," said Mr. Justice Kane, "that one of the most eminent of our Jurists, Mr. Justice Story, has found an inhibition in the constitution against the grant of new trials in cases involving jeopardy of life. But I cannot realize the correctness of the interpretation which, anxious to secure a citizen against the injustice of a second conviction, requires him to suffer under the injustice of the first. Certainly, I would not subject the prisoner to a second trial without his consent. If, being capitally convicted, he elects to undergo the sentence, it may be his right. When, however, he asks a second trial, it is to release himself from the jeopardy in which he is already, and it is no new jeopardy that he encounters when his prayer is granted, but the same divested of the imminent certainty of its fatal issue."

The same distinction was noticed by other Judges between jeopardy incurred with the consent of a prisoner, and jeopardy incurred without that consent.

If a new trial may be granted for error in law by a Court of Revision, even without the prisoner's consent, can it be doubted that the same Court, as a Court of Appeal, may grant a new trial when an appeal is preferred by a prisoner against a verdict and conviction?

It appears to me that, in all cases in which a finding of guilty is set aside upon appeal, the Court, if it considers it necessary, may order a new trial.

In some cases it may be necessary: for example, where evidence is improperly rejected, or, where, for other reasons, the Appellate Court is unable to form a correct opinion as to the guilt or innocence of the appellants. But when the finding and conviction is objected to upon the ground that the Judge did not properly direct the Jury as to the degree of weight which ought to be given to the evidence,

it appears to me that this Court, sitting as an Appellate Court, is not necessarily bound to send the case back for a new trial. If the Court are of opinion that the evidence could not, in any proper view of the case, support a conviction, it would be worse than useless to send the case back for a new trial, in order that a Jury might have the opportunity of convicting upon such evidence under a proper summing up.

Section 419 of the Code of Criminal Procedure allows the Appellate Court to alter or reverse the finding. It does not compel them to send the case back for a new trial, in cases in which they see that it is useless, and may be injurious, to do so. Regard for the prosecutor and witnesses forbids it; the prisoner is amply protected by the Section which prohibits an appeal from a judgment of acquittal, and a failure of justice is sufficiently guarded against by allowing the Court to order a new trial whenever, upon appeal, they are satisfied that there has been a failure of justice. It would tend to defeat, and not to promote, justice, if a verdict of guilty were set aside, and a new trial granted, for a defective summing up with reference to the weight of evidence in a case in which the High Court would, upon the evidence given on the trial, have affirmed a conviction, if, instead of a trial by Jury, the trial had been before a Judge and Assessors. In determining whether the verdict ought to be set aside, and a new trial granted, for a defective summing up of the evidence, it appears to me that the question to be considered is not whether, upon a proper summing up of the whole evidence, a Jury might possibly give a different verdict, but whether the legitimate effect of the evidence would require a different verdict. If the evidence is such that the High Court would have affirmed the conviction if the trial had been before a Judge and Assessors, I think that they ought not to set aside a verdict of guilty found by a Jury, merely because the Judge has not, in summing up, given proper caution or advice to the Jury as to the weight which they might properly give to the evidence. If the verdict is set aside for such a cause, upon the ground that the error of the Judge has caused a failure of justice, and that the prisoner has been prejudiced thereby, it may be necessary in some cases to grant a new trial. But if the Court is satisfied that a failure of justice has been caused, and that the evidence is wholly insufficient to support any conviction against the prisoner, and would upon the same evidence have reversed a conviction if the case had been tried without the intervention of a Jury, there is no necessity, and I think it would be improper, to grant a new trial. In such a case, the Court, having set aside the verdict, may order the prisoner to be discharged.

In the case under consideration, the appellant was convicted and sentenced for the crime of dacoity. The Judge told the Jury that the prisoners might be divided into four classes: 1st, Elahee Buksh (the appellant), Pauchewree, and Baratee, charged with abetment, and against the first and last of whom the tendency of the evidence is to show that the dacoity originated with them; 2nd, the Ghazeepore men, who came down to commit the dacoity. As to these, he says: "the second set, the Ghazeepore men, are charged with actually committing the dacoity, and the evidence goes to show that Chakowree Goindah, Bahadoor Goindah, and Elahee Buksh (the appellant) also went with the gang."

The statements "that the tendency of the evidence was to show that the dacoity originated with" Elahee Buksh the appellant and others, and that the evidence "went to show that" Elahee Buksh went with the gang who were charged with the actual commission of the dacoity, would fairly lead to the inference that the evidence was such, upon which Elahee Buksh might be safely convicted of dacoity and also of abetment of dacoity, and the Jury found him guilty of those offences. So far from cautioning the Jury against convicting the appellant upon the mere evidence of accomplices, unless they should find it corroborated as it related to him, he substantially told them that the evidence went to show that the appellant was guilty.

Having made the remarks to which I have before alluded, the Sessions Judge concluded by saying: "Elahee Buksh's statement has been already recapitulated; his defence is that the charge was made against him out of spite, because he was the person through whom the dacoity was traced out. This is undoubtedly true. It is for you to say whether the confessing Goindahs (i. e. the accomplices) are really speaking the truth in implicating Elahee Buksh, or whether this was done out of revenge."

The Judge did not even tell the Jury that the accomplices were giving their evidence under a tender of pardon, or explain to them the position in which the witnesses were placed, and the danger of acting upon their evidence unless they should find that it was corroborated. The witnesses were men whose evidence was of a dangerous character. They were not merely accomplices giving evidence under a tender of pardon; they were men who had been previously convicted of dacoity, and had been pardoned for the purpose of giving evidence against other dacoits, and were kept in the pay of Government, under the surveillance of the Police. Even then, according to their own evidence, they were planning and concocting fresh dacoities, and, having evaded the surveillance under which they were kept, abetted the dacoity in question; and then, again, for the sake of saving themselves, turned round and accused others of being their associates in the new crime. Yet, the attention of the Jury was not prominently directed to the fact, as it ought to have been, by the Judge, in his summing up; nor did he point out to them the danger of acting upon the uncorroborated evidence of accomplices in general, or of such desperate and abandoned characters as Shunker and Soondur in particular.

I have read the evidence in the present case, and I agree with the Judges of the Division Bench, by whom this case was referred, that the evidence of the accomplices was not corroborated by the Telce, who deposed that he sold 24 seers of oil to Pauchcowree, the servant of Elahee Buksh, the prisoner. The circumstance was not an unusual one, nor was it more unnatural than the fact commented upon by Lord Abinger in *Regina vs. Farler*, above cited, that the accomplice and the prisoner were drinking together at a public house commonly frequented by the prisoner, and that they left together on the night in question when the house was shut up.

But there was in this case, as it appears to me, a strong piece of corroborative circumstantial evidence against the prisoner Elahee Buksh. Isree Singh, Inspector of Police, Bankipore, stated that he got information on the 18th September at 11 p. m., from Elahee Buksh, the prisoner, that a dacoity at Alungunge had been committed by the approvers and some *Shahabad and Ghazee-pore dacoits*, and that some of the property was with the approvers, and some had been sold to Ramsahaye Sonar, who was about to melt it down, and he suggested the propriety of an instant search.

The witness was not cross-examined by Elahee Buksh, nor does the fact of his having stated to the witness that some *Shahabad and Ghazee-pore dacoits* were parties to the dacoity at a time when, if his story is correct, his knowledge of the fact is not accounted for or explained, seem to have been pressed or used as evidence against him. The evidence of the Inspector is, therefore, the more worthy of credit.

If Elahee Buksh's story is true, and he was not a party to, or an abettor of, the dacoity, how did he know that some *Ghazee-pore dacoits* were parties to it, or that some of the property remained with the *Goindahs*? The offence was committed on Saturday night, and Elahee Buksh's statement, if the evidence of the Inspector is accurate and to be believed, was made on Monday night at 11 p. m., before any search had been made, or the Police had had any communication with the *Goindahs*.

Elahee Buksh, in his defence, stated that he made secret inquiries which led to the belief that the property had been sold to Ramsahaye Sonar, but no evidence was given on his behalf to show from whom he made the inquiries, or how, at the time when he gave information to the Police, he knew that part of the property was with the *Goindahs*, or that some *Ghazee-pore dacoits* had been concerned in the robbery.

The witness Nuseebun, who was admitted to give evidence under a tender of pardon, was not an accomplice in the dacoity. She appears to have received a portion of the property, knowing it to have been obtained by dacoity. But she lived with Soondur Goindah as his wife, and was probably as untrustworthy as if she had actually been his wife, or as an actual accomplice in the dacoity. She says that Elahee Buksh came on the Sunday to divide the stolen property, and that he brought the scales. In this respect, if true, she corroborates Soondur and Sunker. It appears that the *Goindahs* were arrested and taken to the Quarterguard before any of the accomplices confessed, and that the women were taken to the *Thana*. If, after the arrest, and before the con-

fession, Nuseebun had no means of communicating with Sunker or Soondur, or of hearing their confession before she was examined and gave her evidence, the fact of her corroborating the evidence of the other accomplices without knowing what they stated, and without communication with them, is a strong fact to be taken into consideration. I do not think that there is much weight in the fact that the accomplices did not mention Elahee Buksh's name at first. They did not confess when they were first arrested; as soon as they confessed, they implicated Elahee Buksh.

The case should be returned to the Division Bench with an expression of the opinion of the Full Bench—

1. That a conviction found upon the uncorroborated evidence of one or more accomplices or accomplices alone is valid in law.

2. That, for the reasons above stated, there was error in law in the summing up of the evidence, which would warrant the Court in setting aside the verdict of guilty, if the Court is satisfied that the prisoner was prejudiced by the error, and that there has been a failure of justice.

3. That the verdict and conviction ought not to be set aside if the Court be of opinion that the verdict was warranted by the evidence, and that, upon that evidence, they would have upheld the conviction on appeal, if the trial had been by the Judge with the aid of Assessors, instead of by Jury.

I should observe that, in his evidence before the Magistrate, the Inspector of Police, Isree Singh, did not say that Elahee Buksh, the appellant, informed him that some *Ghazee-pore* men were concerned in the dacoity; nor did the woman Nuseebun mention the fact of Elahee Buksh's bringing the scales. It may be that the Judges who referred this case, if they set aside the conviction, may consider a new trial necessary, to test, by further examination, the accuracy of that portion of the evidence to which I have referred, and which, if accurate, tends to corroborate the evidence of the accomplices against the appellant.

Whatever may be the result of this case, it appears to me that a copy of the depositions ought to be sent to the Lieutenant-Governor of Bengal. The accomplices who gave evidence are convicted dacoits in the pay of Government. These men and the other *Goindahs* who were convicted, though supposed to be under proper surveillance, were, according to the evidence of the accomplices, engaged in abetting and planning fresh dacoities. To keep a number of such men together in the pay of Government, appears to me to be most dangerous, even when they are under the strictest surveillance; but to leave them under such a lax inspection, as that which appears to have been exercised in the present case, seems to be little short of keeping up, at the public expense, a nest of dacoits, a harbour for men of the most abandoned, depraved, and dangerous character, and a place for the reception of stolen property.

It appears to me that the attention of his Honor the Lieutenant-Governor should be called to the lax and insufficient manner in which the surveillance appears to have been performed by those who were entrusted with the duty.

Exd. J. H. Burns.

1 August -

My Dear Arthur Must-
please show your
eye on the remarks
& let Mr. Peacock in-
the enclosed Robinson
write - It occurs to
me that our maps may
wonder be all the better
for a printed copy of
them - They are complete
and clear and the point
disposed of has of late
been misunderstood. he



fact our Judicial mind,
too, (Hallway of course
suggested) would in all pro-
bability form a wrinkle
from reading & re-em-
bracing what has been said.
Sach. -

Robinson's paper does
not reach my remembrance
of the machinery, tho' I
believe it is circulated
to the extent of some
hundreds. But of your
kind I would write

to get a batch of copies
straight off & send round, and
attention will be paid to
be paid to them to
the "Long year as W.R.'s
papers" -

Very sincerely yours
W.R.

1 August.

Judicial Department.

PROCEEDINGS of the MADRAS GOVERNMENT,

Dated 2^d March 1867 N^o 332.

The attention of Govt.
having been drawn to a paper
containing the opinion of
Sir B. Peacock on the Evidence
(of accomplices) Corroboration - Power
of High Court to set aside
conviction and order new
trial, for error or defect in
summing up, which was
published in the "Police
Weekly Circular" dated
the 28th July 1866, the Governor
in Council resolves that
copies of the same be struck
off ~~all the copies of the~~
and furnished to all Ma-
gistrates, as well as
to their Assistants and
Sub Magistrates.

To Magistrate of Dist^o 14/3.