account, moreover, the mortgagee is liable to a reasonable occupation rent, and it would be unfair to make him pay rent for the whole period, and not give him the interest for the same period.

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We, therefore, reverse the decree of the Joint Judge so far as it does not allow interest on the mortgage money for the whole period and restore the decree of the Subordinate Judge. Respondents to pay the costs of both appeals.

Decree reversed.

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CRIMINAL REVISION.

Before Mr. Justice Bayley, Mr. Justice Scott, and Mr. Justice Jardine.

QUEEN-EMPRESS *v.* MAGANLAL AND MOTILAL.*

[24th September, 1889.]

Accomplice—Evidence of an accomplice—Necessity of corroboration—Compulsion an excuse for crime—Presence as evidence of common intention—Fear of instant death—Indian Penal Code (Act XLV of 1860), ss. 34 and 94.

The accused, who were classers employed in the Revenue Survey Department, were charged, under s. 161 of the Indian Penal Code, with taking bribes from the rayats of certain villages. The only evidence against the accused was that of persons who had either subscribed to the bribes or collected subscription or paid the money to the accused. They stated that they had offered the bribes, because the classers had threatened to raise the assessment, cut down the hedges, and erect new boundary-marks. As regards this evidence, the trying Magistrate remarked that, even if all the witnesses for the prosecution were treated as accomplices, it was open to him to convict on their uncorroborated testimony, as "there was inherent truth in their statements, and circumstances existed which negatived the presumption of a conspiracy, and evidenced signs of truthfulness." The Magistrate was also of opinion that there was a distinction between accomplices who volunteered to assist in the receipt of illegal gratifications and those who assisted under compulsion. In **[116]** the opinion of the Magistrate, the witnesses in the present case belonged to the latter class, and there was no reason to disbelieve their evidence. He, therefore, convicted the accused under s. 161 of the Indian Penal Code, and sentenced them to rigorous imprisonment and fine.

Held, (Scott, J., *dissenting*), that the convictions were illegal, there being no evidence to corroborate the witnesses for the prosecution, all of whom were accomplices.

Held, also (Scott, J., *dissenting*), that there was such error in the consideration by the Magistrate of the evidence as to prejudice the accused, and such a failure of justice as to justify the Court in revision in setting aside the convictions.

Per Curiam:—The limits of the application of the doctrine of necessity as an excuse for an act otherwise criminal are those prescribed in s. 94 of the Indian Penal Code. Therefore witnesses who in order to avoid pecuniary injury or personal molestation had offered or given bribes to a public servant were abettors of the offence of taking an illegal gratification, and their evidence should be treated as that of accomplices.

By the law both of India and England the evidence of an accomplice is admissible, and a conviction is not illegal because it proceeds upon the uncorroborated testimony of an accomplice (s. 133 of the Evidence Act I of 1872). But the presumption that an accomplice is unworthy of credit, unless corroborated in material particulars, has become a rule of practice of almost universal application.

Per SCOTT, J.—There may be, however, cases of an exceptional character in which the accomplice evidence alone convinces a Judge, and if he acts on that

* Criminal Review No. 263 and No. 265 of 1889.

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conviction, with the character of the witnesses clearly present in his mind, a revisional Court ought not to interfere in the absence of other circumstances showing a want of Judicial discreation.

Per JARDINE, J.—The mere circumstances of a person being present on a lawful occasion does not raise a presumption of that person's complicity in an offence then comitted so as to make s. 34 of the Indian Penal Code applicable—*Reg* v. *Farler* (1). Where the Magistrate on that ground did make that presumption against an accused person, and applied the provisions of s. 34, he committed an error in law, and the High Court, as a Court of Revision, might acquit the accused.

[F., 26 B. 193 (197)=3 Bom. L.R. 694; Rel., 12 Cr. L.J. 170=9 Ind. Cas. 978=9 M. L.T. 503; R., 14 B. 331 (346, 347); 16 B. 580 (583)=Rat. Unr. Cr. Cas. 577 (579), 19 B. 51 (65); 19 B. 363 (369); 20 B. 215 (223); 20 B. 394 (399); 21 B. 588 (602); 26 B. 193 (197)=3 Bom. L.R. 694; 33 C. 649 (654)=10 C.W. N. 669; 26 M. 1 (6)=2 Weir 531; 27 M. 271=14 M.L.J. 226 (238)=2 Weir 803 (814); 35 M. 247=14 Ind. Cas. 849=22 M.L.J. 490=11 M.L.T. 1=(1912) M. W. N. 207; 35 M. 397=13 Cr. L.J. 352=14 Ind. Cas. 896=12 M.L.T. 1=(1912) M.W.N. 549; 12 Cr. L.J. 150=9 Ind. Cas. 897=21 M.L.J. 283=(1911) 1 M.W. N. 327; Rat. Unr. Cr. Cas. 564(569); Rat. Unr. Cr. Cas. 720 (721); Rat. Un. Cr. Cas. 740 (743); Rat. Unr. Cr. Cas. 746 (748); Rat. Unr. Cr. Cas. 750 (752); Rat. Unr. Cas. 844 (846); D., 27 C. 144 (153).]

THIS was an application to the High Court in the exercise of its revisional criminal jurisdiction under s. 435 of the Code of Criminal Procedure (Act X of 1882).

A number of persons employed as classers in the Revenue Survey Department were accused and convicted of taking bribes. The following report deals with the cases of two of the convicted persons, *viz.*, Maganlal and Motilal. The judgment of Scott, J., however, refers to the other cases also.

Maganlal and Motilal were charged with taking bribes—Rs. 96 from the villagers of Sanasthal and Rs. 75 from those of [117] Jivanpur. They were convicted by Mr. P. H. Dastur, Magistrate, First Class, under s. 161 of the Indian Penal Code, and sentenced to two months' rigorous imprisonment and a fine of Rs. 200.

The conviction rested on the evidence of persons who had either subscribed to the bribes, or collected the subscriptions, or paid the money over to the accused. The witnesses stated that the accused demanded the money, and that it was paid under the influence of threats held out by the accused, of raising the assessment, cutting down the hedges, and erecting new boundary-marks.

With respect to this evidence the Magistrate who tried the case made the following remarks:—

"It will be said that the witnesses in this case are all accomplices, and that they, therefore, require corroboration, and of course one accomplice cannot corroborate another. I admit the force of this argument, but s. 133 of the Evidence Act is clear; and in such cases what the Court has to determine is *whether there is inherent truth in the statement of the accomplices which verifies their statements*. In both cases I have shown that circumstances exist which negative the presumption of conspiracy, and evidence signs of truthfulness.

"Again, in the learned observations of Sir Raymond West in the Crawford case a distinction is observed between accomplices who volunteer to assist in the receipt of illegal gratification and those who assist

(1) 8 C. & P. 106.

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under compulsion. The witnesses in this case belong to the latter class, and I see no reason to disbelieve their evidence."

On appeal the Sessions Judge upheld the convictions and sentences.

The accused thereupon applied to the High Court under s. 439 of the Code of Criminal Procedure (Act X of 1882).

The case was argued in the first instance before a Divisional Court consisting of SCOTT and JARDINE, JJ.

Gokuldas Kahandas Parakh, for the accused Maganlal.

Branson (with him *G. M. Tripati*), for the accused Motilal.

[118] *Shantaram Naryan*, Government Pleader, for the Crown.

Branson contended that the evidence against the accused was the tainted evidence of accomplices, which was not corroborated by any independent evidence. The distinction drawn by the Magistrate between persons who voluntarily offer bribes and those who pay under compulsion is unknown to the law. Nothing short of a fear of instant death can be pleaded as an excuse for a crime. Section 94 of the Penal Code contains the law on the subject. Referred to *Reg.* v. *Tyler* (1); *Queen* v. *Dudley* (2); *Mc Growther's Case* (3); *Queen* v. *Sonoo* (4); *Reg.* v. *Parashram* (5).

The following judgments were delivered by the Judges of the Divisional Court (SCOTT and JARDINE, JJ.) on the 9th September 1889:—

JUDGMENTS.

SCOTT, J.—I propose to deal first with the points of law common to all these cases, and then to apply the law to the varying facts of each case. To justify the interference of the Court in Revision, it must be shown, first, that the Judge below has committed some error of law; and, secondly, that the accused has been materially prejudiced by that error—*Reg.* v. *Fattechand Vastahand* (6). This Court may also exercise its revisional power, even as regards finding of fact, in cases where the lower Court has totally misconceived the evidence and come to an obviously wrong conclusion (7). But it is only very extreme cases which justify such an interference with the appreciation of fact by the lower Court which heard the evidence and the appellate Court which reconsidered its value. The words "material error" cannot be held to include error in the appreciation of evidence (8). There must be a material error in law (9). "The uniform practice of the Court," says Mr. Justice Melvill, "is not to exercise its power of upsetting a finding on fact except for some very extraordinary reason, and the circumstance that the Court itself might have come to a different conclusion is not such a reason." I do not think any of the present cases call for revision on that ground.

[119] The main error relied upon in all these six cases is, that the Judge did not apparently, in weighing the evidence, bear in mind the fact that all the evidence came from accomplice witnesses. I think it clear the witnesses were accomplices on their own statement. They had subscribed together in order to bribe the Government classer either to return their lands as liable to a lower assessment, or to leave them undisturbed in their own work at a time when they were liable to be called out to assist at the Government survey. In offering money for such a purpose, they were, in the eyes of the law, abettors of the offence of bribery; and I do not doubt they were themselves aware they were liable to the

(1) 8 C. & P. 620. (2) 14 Q.B.D. 273. (3) 9 St. T. 566.
(4) 10 W.R. Cr. R. 48. (5) 7 B. H. C. R. 61, C. C.
(6) 5 B. H. C. R. Cr. 85. (7) 8 B. 197; 11 B.H. C.R. 125; 4 B. H.C. R. Cr. 25.
(8) 2 M. 38. (9) 1 A. 139.

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criminal law in offering money to a Government servant for a corrupt purpose. By the law both of India and England the evidence of an accomplice is admissible, and a conviction is not illegal, because it proceeds upon the uncorroborated testimony of an accomplice (s. 133, Indian Evidence Act). But the presumption allowed by illus. (*d*) of s. 114 of the Evidence Act, that an accomplice is unworthy of credit unless he is corroborated in material particulars, has become a rule of practice of almost universal application. Judges now, in their charge, usually tell a jury that under ordinary circumstances it is unsafe to convict on such evidence without the substantial corroboration of independent evidence. A Judge who combines the functions of Judge and jury is equally bound to scrutinise accomplice evidence with great care and to consider whether there is any corroborating evidence when the main evidence is of an accomplice character. There may be, however, cases of an exceptional character in which the accomplice evidence alone convinces a Judge of the facts required to be proved, and s. 133 would support him if he acted on that conviction without the corroboration usually insisted on. But it must clearly appear to the Court sitting in revision that the character of the witnesses was present in his mind when the Judge or Magistrate came to such a conclusion, but, if that is so, there is no ground for interference of a revisional character.

Then comes the question—Are these cases of that exceptional character? Accomplice evidence is held untrustworthy for three reasons:—(1), because an accomplice is likely to swear falsely in [120] order to shift the guilt from himself; (2), because an accomplice, as a participator in crime, and consequently an immoral person, is likely to disregard the sanction of an oath; and (3) because he gives his evidence under promise of a pardon, or in the expectation of an implied pardon, if he discloses all he knows against those with whom he acted criminally: and this hope would lead him to favour the prosecution.

Now to apply these principles to the present cases, corroboration was very difficult, if not impossible, to find. If a whole village combines to bribe a public officer, there can be no independent evidence of the offence. In the present cases the temptation to swear falsely against the accused did not exist in the sense that it was necessary to save the witnesses themselves from liability to the criminal law. By their evidence they acknowledged themselves to be abettors. If they had said nothing, no guilt would have been brought home to them. As to the second ground of doubt, the criminality of their act was probably slight to them. To give a present to a public officer is a usual thing to do, and what they did hardly diminishes the limited amount of credibility ordinarily assigned to witnesses of their class. But the third ground of doubt does exist. They told their story, not voluntarily, but in consequence of a Government inquiry, and they may have spoken in favour of the prosecution to ensure their own impunity. Although no promise of pardon was made, still it is hard to believe they did not know they had tampered with a public officer, and did not expect to be freed from possible punishment if they told all they knew. They are, therefore, accomplice witnesses, whose evidence ought to be scrutinised very carefully, because there was a special reason why they should lean to the side of Government and to prosecution. Still it is, in my opinion, that kind of accomplice evidence which a Magistrate, after very careful scrutiny with the law present in his mind, might fairly be sustained in holding trustworthy under s. 133 in spite of the usual restrictive rule. It would, in my opinion, be

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contrary to the law, as it is laid down in our Evidence Code, to say that under no circumstances a Magistrate can hold an accused guilty on the uncorroborated evidence of accomplices. If it is clear both Judge and [121] Magistrate have weighed the evidence with a full knowledge and recognition of its accomplice character, and the necessity for corroboration in ordinary circumstances, I do not think this Court should interfere in revision. If it is clear that they have wholly overlooked the accomplice character, then I think this Court should interfere, unless it is itself satisfied that there is corroboration, or that the evidence is satisfactory in itself under s. 133, in spite of illus. (*b*) of s. 114. In all the cases where I hold this Court ought to interfere, I wish it to be distinctly understood that I should order a new trial rather than a reversal if the accused had not already suffered the greater part of their sentences.

I will now deal with each case in detail. As regards the first, the Matoda case, (Labshanker's case), there is no sign in the judgments that the fact of all the evidence being of an accomplice character was in the mind of either Judge or Magistrate when they considered the case. There is no independent evidence even. The shopkeeper Popal Rupchand knew of the subscription when he undertook to give the money. There is no evidence the accused had been oppressive, or that he had demanded money, and the evidence that he had received the money is totally untrustworthy. I think the conviction and sentence should be reversed, and the accused set at liberty.

In the Navapura case (Chotalal's case) the Judge and Magistrate again overlooked the fact that the evidence was of the accomplice character, and consequently did not give it that special scrutiny which such evidence requires. There was, however, in this case the evidence of a money-lender who says he advanced the money to the village, which, it was stated, was handed over to the classer; and he supports this by an entry in his book. But he is himself, in a sense, an abettor, as he knew the object of the loan, and there are grave discrepancies in the evidence connected with this loan, nor is there any but accomplice evidence of the actual payment to the classer. As regards the alleged offence, it was committed two years ago, and the witnesses did not, at first, identify the accused. Had the Judge and Magistrate borne in mind the fact that almost all, if not all, the evidence was that [122] of accomplices, they might not have convicted. I think the conviction and sentence should be reversed, and the accused set at liberty.

In the Mahurba case the evidence is stronger, although there was the same judicial error as regards accomplice evidence. There is an independent witness, who refused to join in the bribery, confirming the story as regards the collection of money for the classer, and two shopkeepers show that they actually supplied food to the classer, at the instance of the patels and on their guarantee. Still the main fact of the payment to the accused is proved on the uncorroborated testimony of accomplices, and the Magistrate did not consider that testimony from that point of view. I do not think the conviction should stand. If so much of the sentence had not been suffered, I should certainly on this and the other cases order a new trial. But in the actual circumstances of the case, I think the conviction and sentence must be reversed.

The Seeling case is supported by a large body of witnesses, but they are almost all of the cultivator class and accomplices. The corroborative

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evidence is of shopkeepers who advanced money to the cultivators, who supplied food to the classer; but there is no distinct corroboration of the main incriminating fact that the money reached the classer. Neither the Magistrate nor the Judge considered the evidence from the point of view of its being given by accomplices. I would reverse the conviction and sentence.

In the Sanasthal and Jivanpur cases the Magistrate shows clearly by his judgment that the fact of the witnesses in the case being accomplices was present in his mind. He says that, under s. 133 of the Evidence Act, "the Court has to determine whether there is inherent truth in the statements of the accomplices, which verify the statements in both cases." The Magistrate then finds in the accomplice evidence the inherent signs of truthfulness, which he properly describes as necessary for a conviction. It must be remembered that in all these cases no presumption arises of a conspiracy to ruin the classer. The cultivators only made their statements of what happened when [123] interrogated by the Government officials, and if they had a grudge against the classer, they would have made those statements long before. It must also be remembered that the degree of criminality in their offering money to the classer must, in their eyes, be slight, and their fear of punishment equally slight. This is not one of those cases of accomplice evidence where the accomplice would save his own neck or his own liberty by falsely accusing some third person. He might have saved himself all further trouble by denying all knowledge. However, he did admit that he paid money to the classer. The sole ground why that statement should be received with caution is that he made it at the instance of the police. But the ordinary ground for doubting the evidence of accomplices—to wit, that they will try to throw the guilt upon others—does not apply in this case, as they were not subject to any accusation whatever. I do not, therefore, think there is any ground for our interference in revision, because the Magistrate acted on accomplice evidence.

There is the further question whether these two classers are guilty, under s. 34 of the Indian Penal Code, on the ground that one received the bribe in furtherance of a common intention of both. It appears that both were present when the money was demanded by Motilal, and arrangements made for its payment. And Maganlal was also present when the money was actually paid to Motilal. The Magistrate inferred from these facts, and the other circumstances of the case before him, that there was a common intention. I do not think in revision that we should interfere with this conclusion.

In the Bhavanpur case the Magistrate considers the question whether the witnesses are accomplices, but he comes to the conclusion they are not. His reason is that they paid in consequence of pressure and threats from the classer. The alleged pressure is not, in my opinion, the kind of compulsion which the law allows to be an excuse for the offence of abetting the acceptance by a public servant of an illegal gratification. The Magistrate, therefore, committed an error of law in not scrutinising the evidence as coming from accomplice witnesses. There is no independent evidence in the case of the main incriminating [124] fact—the actual payment of the bribe. So much of the sentence has been suffered that no time is left for a new trial. I think the conviction and sentence must be reversed.

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JARDINE, J.—The accused Maganlal and Motilal (1) have each been sentenced to imprisonment and fine by Mr. Dastur, under s. 161 of the Indian Penal Code, for an illegal receipt of Rs. 96 from the rayats of Sanasthal, and another of Rs. 75, in two instalments, from those of Jivanpur. They were employed as classers in the Revenue Survey in those villages at the time of the alleged offences. It is contended for them that the evidence was wholly misappreciated by the Magistrate, in that he failed to consider whether the evidence of the witnesses,—accomplices,—was corroborated; and that the Sessions Judge, who, after hearing the pleaders for accused and perusing the record, rejected their appeals without admitting them, had failed to apply this test to the evidence. We are asked to use our powers as a Court of Revision both on the facts and on the law, and I will, therefore, consider the facts first.

First as regards the Sanasthal case, it appears that all the witnesses for the prosecution were cognizant on their own confession of the bribery. Except two Banias, they all, including the patel, subscribed to the bribe, or collected the subscriptions, or handed the bribe to Motilal. The Banias came to prove that two of these witnesses had borrowed money from them to be paid as their subscription to the bribe. They produced their account-books in corroboration. But the Magistrate is of opinion that these entries have been falsified in an endeavour to create evidence against the accused: and I am, therefore, of opinion that the Banias' evidence cannot safely be relied upon. There is thus no corroboration of the witnesses who conspired to bribe. The inducement to bribe is said to have been a fear that the classers would influence a raising of the assesment, a matter with which they have something to do, also a fear that they would induce some expense in requiring boundary-marks to be erected, a matter with which they appear to have no concern. [125] There is no evidence of any illegal act or omission in matters of the survey on the part of either accused. No complaint was made till a police inspector came to the village to inquire about these offences.

Excluding very vague, isolated, and uncorroborated statements about oral threats, the facts which incriminate the accused are chiefly two: a demand made by Motilal for money in presence of Maganlal after Motilal had summoned the villagers to Motilal's lodging; a payment of Rs. 96 to Motilal in Maganlal's presence. Five of the witnesses have been examined about Maganlal's presence at these two incidents. One of them denies that Maganlal was there at either. The other four say he was sitting somewhere near. But there is no evidence that he said or did anything or received any of the money; and it appears from the same witnesses, and is a fact found by the Magistrate, that Maganlal often went to Motilal's lodging and was in the habit of dining there. He appears to have been there on a lawful occasion, and the ruling of Lord Abinger in *Regina* v. *Farler*(2) is in his favour. Under these circumstances, I am of opinion that the Magistrate committed an error in law in holding that s. 34 of the Indian Penal Code about common design had an application; and I think that he has assumed a guilty intention on Maganlal's part in the absence of evidence, and that Maganlal is, therefore, entitled to acquittal of this charge on this ground alone.

(1) In the other cases referred to in the above judgment of Scott, J., separate judgments were delivered by Jardine, J.
(2) 8 C. & P. 106.

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There is a complete absence of evidence as to the persons from whom each of the bribe collectors raised the subscriptions, except as to those who borrowed from the Banias who produced falsified entries. The mendicant gentleman Shankar, who is said to have acted as treasurer, is not such a person as can be believed on his *ipse dixit*. As regards both prisoners, therefore, I am of opinion that we are bound to pay great attention to the argument that the conviction is bad. The bribers are accomplices, as I will presently show, and, as such, require corroboration. There are also other discrepancies as to the coins kept by Shankar, and as to what the witnesses told the Banias.

[126] As regards the Jivanpur case, the only direct fact against Motilal is that he went there with Maganlal and threatened the villagers. But it is admitted that Motilal did no work at Jivanpur, so there was no reason why the people should heed him. One witness also is ignorant of these threats. The other evidence shows that he was a silent spectator when the two payments were made to Maganlal at Sanasthal. His presence does not, I think, justify an assumption that he was joining in the receipt. So the only evidence incriminating him is that of the bribers, who say he came to Jivanpur. The defence was made difficult, because the prosecution were not at all exact as to date. Some witnesses say the second payment was made three days after the first; another says it was one day after. It seems to me highly improbable that mere tenants of the landowner should so readily agree to pay bribes in hopes of preventing the landlord's assessment being possibly raised. If, as the Magistrate assumes, they were so ready to bribe on the mere chance that if this were done the landlord might raise their rent, it is also possible that some other contingency may have made them ready to give false evidence. Again, it is notable that they did not consult their landlord. Also that no inhabitant of Sanasthal, where the two bribes were paid, knows about the visit for that purpose: and one landowner of Sanasthal and the talati are ignorant of these subscriptions altogether. As regards Motilal, I am of opinion, as a mixed question of law under s. 34 of the Indian Penal Code, and as a special case on the facts justifying our interference, that he ought not to have been convicted: and as to Maganlal, I have carefully considered whether he has been prejudiced by the view the Magistrate has taken of the bribers. For reasons I will give below, I consider them to be criminal persons and accomplices: and that as error has been committed and the test of corroboration was not applied by the Sessions Judge, or, at least, not shown in his judgment, we ought, as in many other cases, to examine the evidence and determine whether the convictions can safely be upheld.

I now come to the questions of law which are of considerable importance. In determining what test should be applied to the stories of the witnesses whom he admits to be accomplices [127] Mr. Dastur, the trying Magistrate, states reasons for holding that there is *inherent truth* in their statements, and that they have not conspired to bring false charges. He treats s. 133 of the Indian Evidence Act as applicable. As regards the rule which requires corroboration of accomplices he writes: "In the learned observations of Sir Raymond West on the Crawford case, a distinction is observed between accomplices who volunteer to assist in the receipt of illegal gratification and those who assist under compulsion. The witnesses in this case belong to the latter class, and I see no season to disbelieve their evidence. I, therefore,

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convict both the accused of the second offence also." This is some indication that the Magistrate put to himself the question whether the accomplices required corroboration, although he does not consider whether the people who collected the money on pretext of using it as a bribe may not have kept it themselves. He held apparently that there was no corroboration, and that none was needed. The Sessions Judge took a similar view, and held that whether the payers of the bribes paid for private reasons, or to avoid the trouble of complaining, or whether they paid under such fears as are found in cases where the offence of extortion is committed when they might be "practically" helpless, they were persons to be believed as witnesses. After much anxious consideration, I think it may be presumed that the Sessions Judge had in his mind the rule about accomplices, and that he thought s. 133 did apply. In another case, in which Mr. Dracup convicted the accused Maganlal of a similar offence, (Criminal Revision, 262.) where we acquitted after argument, (1) that Magistrate [128] met the objection of accused's pleader as to the need of corroboration of accomplices with the following remark :—"But it is clear that accused demanded some money from the witnesses under a threat of increasing their boundary-marks, and it was in consequence of these threats that the money was collected and paid; and in this transaction the authors of the Indian Penal Code have remarked: 'The person who, without any demand, express or implied, on the part of a public servant, volunteers an offer of a bribe and induces that public servant to accept it, will be punishable under the general rule contained in cl. 88 as an instigator. But the person who complies with a demand, however signified

(1) In the case referred to, the following judgment was deliverd by—

JARDINE J.—My judgment in Criminal Revision 263 contains my reasons for holding that in this case Mr. Dracup committed an error in treating the witnesses who say they paid the subscribed bribe to accused, and the witnesses who say they conspired to bribe at the suggestion of friends and neighbours, as if these two sorts of witnesses were neither criminally punishable, nor accomplices in the alleged crime. The Sessions Judge who heard the appeal does not advert at all to the rule that requires that accomplices should be corroborated by independent evidence. There is some very vague evidence of threats used by the accused. Most of the bribers say they paid to avoid being made to erect boundary-marks. But it is admitted that over such matter the accused had no control: so the story is improbable. The witness Hira confesses to starting a subscription and making a collection of Rs. 24 for bribing the accused. He says he paid this sum the same day to accused at the *chora*; and Ambaram, one of the organisers of the subscription, says he happened to be present at the payment. Hira declares that accused had never asked him for money. Hira deposed to receiving money from two subscribers named Daji and Sankla, and the case is that they borrowed the money from a groser named Atmaram, who was examined, and produced his books. Here, as in others of these cases, the evidence breaks down. For it is proved to the Magistrate's satisfaction, and there can be no doubt about it, that Atmaram's dates showed the payment to Daji one day after accused had left the village and that to Sankla two days after. The Magistrate thinks these two entries, which are false if the theory of the prosecution is true, are the result of mistake, and, therefore, he falls back on the mere oral evidence of the two accomplices. But he has overlooked the fact that Daji swears that Atmaram made the entry at the time. If Atmaram had no reason to falsify his accounts, the entries are evidence in favour of the accused and indicate an attempt to give a false complexion to ordinary village dealings in order to implicate the accused. It appears to me that in such a state of evidence, the accused has a peculiar right to the application of the rule about accomplice testimony, for this testimony is the very danger to which people are exposed, unless what Sir Barnes Peacock in *Elahi Buksh's case* calls the great safe-guard of the rule, is extended to them. The rule must be extended to all alike. The accused is not shown to have done any oppression in his official duty, irksome as that duty always is to the village people. I am of opinion that there has been a failure of justice, and that the prisoner is entitled to an acquittal for the reasons given above, which coincide with the principal arguments of Mr. Gokuldas, who appeared for him at the hearing.

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on the part of a public servant, cannot be considered as guilty of instigating the public servant to receive a bribe.'" It is clear that Mr. Dracup considered these remarks of the first report of the Commissioners on the Indian Penal Code as a correct statement of the present law enacted many years later. The Sessions Judge, who heard the appeal, does not allude [129] to the rule about accomplices, although he considers it possible that the account given of their motives by the bribers may not be true, and that it may not have been to save themselves from illegal annoyances that they paid the bribes. While Mr. Dastur treated the bribers as accomplices of fairly good character, whom he might after all believe, Mr. Dracup treated them as innocent persons. So although the result is the same in both cases, and the accused have been convicted, their cases are to be distinguished in the exercise of our powers of revision.

The minute referred to by Mr. Dastur, though not of any judicial authority, is a State document expressing the views of the Government of Bombay in a matter of importance. Inasmuch as it is used by the Magistrate as a guide in weighing the testimony of the accomplices, and the chief contention of Mr. Branson, as counsel for Motilal, was that his method was wrong in law, and had caused a failure of justice, and as Mr. Gokuldas in this case on behalf of Maganlal and Mr. Vasudev on behalf of the accused in other cases heard by us the same day adopted Mr. Branson's argument, we permitted the minute to be referred to as explaining Mr. Dastur's meaning in the passage above quoted. It was the hinge round which the arguments of the learned counsel turned on the questions of necessity, and whether the bribers were accomplices or only victims, a point which has been considered by the Sessions Judge as bearing on the offence of extortion defined in s. 383 of the Indian Penal Code. Moreover, as the work of a learned jurist, who was for years an eminent Judge of this Court, I do not think it ought to be passed over by this Bench in silence when we proceed to judgment; and as it has been the occasion of the citation of the cases, I have examined it with all kindly respect so far as the arguments and cases touch it. They, too, are not to be passed over in silence.

What I have to say on the questions of law cannot be understood without reference to the arguments of the counsel and the great authorities on which he has relied. The passage in the minute referred to by Mr. Dastur was said to be the following, where Sir Raymond West argues the value of the testimony of [130] certain witnesses, Mamlatdars and Magistrates, who deposed that they had paid money to procure their offices:—"Macaulay and his colleagues in framing the Indian Penal Code took occasion in one of their notes to point out that in India the criminality of one who under pressure bribed an official was but nominal. Looking to the habits of thought and traditions of the people, a payment of money under such circumstances to procure an office or transfer no more implies a general moral insensibility than in England the purchase of a church living or a commission or an exchange between officers in the army. Neither, therefore, does it materially detract from the credibility of a witness. What has next to be observed is, that if the testimony of the witnesses of the class just referred to is believed, the evidence of victims of extortion rather than willing parties to corruption, then a general sense of oppression and helplessness must have been so diffused amongst the official community that those who without direct compulsion or pressure assisted in corrupt

bargains or paid or helped to pay money in pursuance of them can hardly be deemed men who acted of their own free will. The traveller who hands his purse to a brigand is no more free in reality than he from whom it is wrested by force" (Parliamentary Blue Book, C.—5701, 1889; Correspondence relating to the case of Mr. Crawford, C.M.G., of the Bombay Civil Service, p. 127). These observations were actually made with respect to the corrupt dealings of certain Magistrates and Judges, to whom the provisions of 5 and 6 Edward VI, c. 16, and 49 George III, c. 126, apply.

We are not now concerned with the criminality of men who procure judicial office or public offices of trust by the payment of bribes. That case was recently dealt with by this Court in Criminal Revision—*In re Ganesh Narayan Sathe* (1)—and the law laid down, following the decisions of Imperial Parliament, the House of Lords, the Judicial Committee of the Privy Council, and the Queen's Bench, which all treat corrupt behaviour of a Judge as most criminal in its origin and dangerous in its consequences. Many of the remarks in that case apply to this, [131] and those in *Queen-Empress* v. *Ganesh* (2) made by Mr. Justice Candy and myself have some bearing on the question of the credibility of men who use corrupt means to procure favours. The present case is one where the witnesses confess to collecting and paying a subscription of money said to have been received by the accused classers of the Revenue Survey Department. The witnesses make out that they paid on solictation or threat proceeding from the classers, or under the advice of others who advised them to subscribe. They profess that they were afraid that otherwise the classers would unfairly get their assessment raised, or put them to expense in erecting boundary-marks. Two questions arise at law, and both have been argued—(1) whether the witnesses, solicited or threatened by the classers, or cajoled into subscribing by other people, their friends and neighbours, are punishable for conspiring to bribe and for bribing; (2) if so, whether they are accomplices.

In dealing with the first of these points, it was argued by Mr. Branson that no one can plead the excuse of necessity or compulsion as a defence of an act otherwise penal, except as provided in s. 94 of the Penal Code, which in express terms confines such a defence to "an offence which is done by a person who is compelled to do it by threats which at the time of doing it reasonably cause the apprehension that instant death to that person will otherwise be the consequence." From this excuse the section excludes "murder and offences against the State punishable with death." The Government Pleader, Mr. Shantaram, admitted this argument to be sound, and that s. 94 is the only law which allows the doer of a crime to plead necessity as a defence. I am of opinion that this is the law; there must be a reasonable fear, at the very time, of instant death. Then with reference to the remarks about extortion and the definition in s. 383 of the Penal Code, Mr. Branson distinguished the case of people who hand their purses to brigands, who are certainly not accomplices, on the ground that in so doing they commit no injury to the public. They do not break the Queen's peace, nor distrub the public order, which is based on the due performance [132] of their duty by all the public officers. People may not band together to resist the public authorities by force, neither may they assail the public authorities by conspiracies and bribes (*Queen* v. *Ganesh*). Mr. Branson adopted the language of Lord Chief Justice Denman in *Regina* v. *Tyler* (3),

(1) 13 B. 600. (2) 13 B. 506. (3) 8 C. & P. 616 (620).

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where he points out that prisoners often say they did the crime from fear of each other: yet he says: "That circumstance has never been received by the law as an excuse for his crime, and the law is, that no man, from a fear of consequences to himself, has a right to make himself a party to committing mischief on mankind." So it was held in *Reg.* v. *Parshram Keshav* (1), that receipts of bribes by public servants differ from extortions by private persons, and ought to be tried under s. 161 rather than under s. 383 of the Penal Code. Where certain witnesses gave false evidence, and then pleaded that they were coerced to do so by a police inspector, it was held that they were guilty, as there was no proof of fear of instant death (*Queen* v. *Sonoo* (2)). Of course, these principles apply with greater force to public functionaries. In *Rex* v. *Kennett* (3), Lord Mansfield said: "In law, to say, 'I was afraid' is not an excuse for a magistrate," But even private persons who do criminal acts from fear of anything but instant death do them at their peril (4).

What, then, was the duty of the *mukhi* or headman, the other collector and subscribers, to the bribes and the people who say, [133] they paid them to the classers? Certainly not to do acts like these. Suppose they were afraid of having to put up boundary-marks, with which it appears the classers have nothing to do, or of having too high an assessment placed on their fields by the Governor in Council after the higher survey officers had made proposals. How can they, the parties interested, presume to judge what the assessment ought to be, or even whether the classer has rightly classified the soils? The act of bribery *prima facie* suggests that the bribers wish to get illegal advantages to themselves; and a briber is not readily to be believed, who says he paid the public officer in order to prevent him doing something illegal and corrupt. Section 161 of the Penal Code punishes a public servant who takes a reward or a bribe for merely doing his duty. If, then, people join in a conspiracy to bribe him and make a subscription for that purpose and offer the bribe in pursuance of the conspiracy, they commit the offence of abetment of the receipt of the bribe all are accessories who conspire, or directly, or indirectly counsel, procure, command or offer (see Stephen's Digest, art. 39.) The general rule taken from the English law and enacted as s. 94, that no fear, except of instant death, justifies a criminal act, was proposed after full consideration by Lord Macaulay and his colleagues, as appears from their long and interesting argument in their Note B. The clauses about bribery as originally drafted were altered when the Legislature enacted the Penal Code, and it is pertinent to notice that an illustration to s. 116 is a legislative declaration, that an offer of a bribe to a public servant, who refuses it, is an offence under the Penal Code.

(1) 7 B H.C.R. 61, C. C. (2) 10 W.R. Cr. R. 48. (3) 5 C. & P. 295.

(4) NOTE.—The reasoning in Macaulay's Note B to the First Draft of the Penal Code may usefully be cited. He says: "We cannot count on the fear which a man may entertain of being brought to the gallows at some distant time as sufficient to overcome the fear of instant death. But the fear of remote punishment may often overcome the motives which induce a man to league himself with lawless companions in whose society no person who shrinks from any atrocity that they may command can be certain of his life. Nothing is more usual than for pirates, gang-robbers and rioters to excuse their crimes by declaring that they were in dread of their associates, and durst not act otherwise. Nor is it by any means improbable that this may often be true. Nay, it is not improbable that crews of pirates and gangs of robbers may have committed crimes which every-one among them was unwilling to commit, under the influence of mutual fear. But we think it clear that this circumstance ought not to exempt them from the full severity of the law."

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The Indian law about compulsion and necessity as a justification of an act otherwise criminal is, as I have noticed, based on the law of England, which, as stated by Mr. Mayne under s. 94 and by Mr. Justice Stephen in arts. 31 and 32 of his Digest, is substantially the same. It is very ancient law—see Stephen, J.'s comments in *Queen* v. *Tolson*(1). Lord Hale argues that our law is better than that laid down by the Jesuitical Casuists of France, in this respect, as it prevents aggrieved persons pretending to judge their own cause, and then proceeding to illegal means [134] of redress, as when servants, judging themselves in want of clothes or victuals get them by robbing their masters(2) Mr. Branson cited *Mc Growther's case* (3) as showing how any other rule would make crime triumphant. Where some prisoners pleaded that in 1746 they joined the Duke of Perth in arms against the king because they feared that their houses would be burned and their goods spoiled, all the Judges concurred that the prisoners were rightly convicted; and Sir M. Foster points out that if threats of this kind were an excuse; it would be in the power of any leader of a rebellion to indemnify all his followers. The same consideration applies to people who bribe public officers: a crime more common here than high treason. If the law allowed the bribers to escape criminal liability when they bribed a Judge to procure a decision, or some high executive officer to procure an office, by pleading and proving that they were put in fear of some pecuniary injury or some stoppage of promotion, that would be tantamount to encouraging the corruption, as the corrupt Judge or Officer would then be able by a politic use of threats to give an indemnity to all who paid him money. The argument becomes more extensive, if the indemnity could by any doctrine of law be extended to persons, not in contract with him, but, like many witnesses in these cases, cajoled by others to pay to *them* through fear of *him*. The next case to be noted is that of Stratton and other members of Council, who were tried for deposing Lord Pigot, the Governor of Madras. They pleaded necessity, and that this violent act was needed in order to carry on the Government. But Lord Mansfield (4) pointed out the different meanings of the word, when it relates to fear of instant death and to mere questions of opinion and calculation of advantage. The latter or civil necessity, which is no excuse in law, cannot exist where there is a regular government and all its officers to which the aggrieved person can apply. The latest case cited by the learned counsel is the *Queen* v. *Dudley* (5) where it was held that a person, who in order to escape death from hunger kills another for the purpose of eating his flesh, is guilty of murder. In that case Lord Coleridge sums up the authorities [135] which showed that there was no such necessity as could justify the other shipwrecked sailors in killing the boy whom they ate to save their own lives. It follows from all these authorities that in dealing with the question of guilty or not, the law does not, where there is no fear of instant death, require the Courts to discuss the philosophy of free will, or determine whether the person who bribes to secure some advantage to himself is a victim of extortion, or feels helpless or not. Except in mitigation of penalty, this sort of language is rather rhetoric than relevant argument. This was pointed out at the trial of Lord Ferrors for murder; when his counsel argued that *Ira brevis furor est* and that he should be acquitted because he was angry: the Solicitor General replied that, however excellent

(1) 23 Q.B.D. 186. (2) 1 Hale P.C. 51. (3) 9 St. T. 566; Foster's C.L. 13.
(4) 21 St.T. 1223. (5) 14 Q.B.D. 273.

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the Latin maxim might be as a moral caution, it never was and never could be a rule of law, laws being meant to restrain angry men from murder. Our law is based on common sense and the general welfare: it recognizes the rogue for the purpose of punishing him. It is not, says Macaulay, "to our virtue that the penal law addresses itself: nor would the world stand in need of penal laws, if men were virtuous." How can a suitor tell what judgment ought to be passed, or a rayat what assessment should be levied, or a civil servant whether his conduct justifies promotion, or a military officer whether he should receive a command or be selected for a service of distinction? These lie in the discretion of superiors, and are often matter of the Royal prerogative. It would overturn the Government if every person discontented imputed his fate to the corruption of the authorities, and in defiance of all legal presumptions sought to attain his aims by offering bribes. As well might a clergyman procure a bishopric by simony, or a commoner seek a peerage by corruption. There would be ample opportunity for all such doings if once the terror of the criminal law were removed. The favours of the Crown like the gifts of God, are not to be purchased with money: there is no room for Simon Magus in our civil polity. Every subject of the Crown can get his rights in the constitutional way; no person whatever may try to get them by corrupting the servants of the Crown. This is against the public policy of the law, [136] like the buying of public offices even when there is no offence against the Statute—*Law* v. *Law* (1); *Hanington* v. *Duchatel* (2).

All this bribery being thus immoral, dangerous to the State, and prohibited and punished by the Penal Code and by the Stat. 33, Geo. III, c. 52,c. 62, which shows what Parliament thinks of it, I am of opinion that the bribing witnesses are accomplices in the alleged receipt of bribes. For the reasons given, it follows that they are not to be treated as men of good character, but as corrupt men. I have not noticed any circumstance in the evidence which can justify our treating them as anything better than criminals, not of an atrocious sort; nor does their evidence get any weight otherwise, as they had ample opportunity to conspire. One cannot help suspecting that men so pliable, so eager to bribe, may be induced to tell lies under some other motive or pressure. These considerations are important, because it is not contended that the accused practised any oppression in their actual duty. As it is not shown that the accused did any single illegal or unnecessary act in their work of classing the soils, the statement of the bribers, that they paid to *avoid* oppression, must be scrutinized—and the evidence about threats also.

I see no reason why the ordinary test of the evidence of accomplices should not be applied to those witnesses. Lord Abinger lays down that such rules must be applied to all alike: and the reasons given by Sir Barnes Peacock in the case of *Elahi Buksh*(3) apply in all their fulness, and more especially as the Magistrate finds that the only peace of documentary evidence in the case has been falsified by the Banias in order to make the testimony of some of the subscribers to the bribe appear corroborated. Why, then, should it be assumed that the evidence is to be believed? It is also to be noticed that the bribers are not corroborated by any details in writing of the amounts collected at Sanasthal, although the collection and payment to the man who acted as treasurer extended over ten

(1) 3 Peere Willams, 391. (2) 1 Brown Ch. R, 124.
(3) B. L. R. F. B. Sup. Vol., 459=5 W. R. 80 Cr. R.

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or twelve days. Neither are the bribers corroborated by any previous statements of their own made at the time. They kept silence till a police inspector [137] came. The accomplices are dangerous for two reasons. They have committed a crime; as they conspired to bribe, so they may have conspired to give false evidence: the two offences often go together. They hope to escape punishment if their evidence is believed; and it would seem that some of the bribing officials are retained in office. They have been treated by the Magistrate as witnesses; and, to quote Sir Barnes Peacock, they give their evidence under the hope of obtaining immunity from punishment if it is believed. The Magistrate has not, I gather from his judgment, understood the law as laid down by Sir Barnes Peacock as to their acquiring an equitable title to pardon under 'Lord Mansfield's decision in *Rudd's Case* (1) which was followed by this Court in *Reg.* v. *Hanmant* (2). All that Sir Barnes Peacock says about the great danger that lies in believing such persons without the safeguard of the rule requiring corroboration is to be carefully studied by the Magistrates. His views have often been enforced since, and have been distinctly adopted in ss. 114 and 133 of the Indian Evidence Act. As noticed by Tindal, C.J. at the trial of Frost, there is often a danger that, for the purpose of saving themselves rather than stating the truth, the accomplices will make out a stronger case against the prisoner and more favourable to themselves than the real truth will warrant. They do not give their evidence under an absolute certainty of impunity; and probably some of them hope, not only to avoid prosecution, but to retain their appointments in the Government service. These reasons for requiring independent corroboration, so strongly insisted upon by Sir Barnes Peacock, are not expressly mentioned by the Magistrate. Under these circumstances and as we have the power and are asked to use it, it becomes our duty as a Court of Revision to examine the evidence under the light of the rule requiring corroboration. It may be conceded that there are many crimes more atrocious than bribery: without going the length of treating the bribers as if they were honest men, like two country gentlemen indicted for not repairing a road like the two gentlemen of honour and good character of whom Sir Barnes Peacock makes an illustration, who get angry at their coachman, and in a moment of irritation [138] not amounting in law to provocation, get out and thrash him. These bribers again are not to be compared, though Sir Raymond West makes the comparison, (in the passage quoted), to military officers who, when the system of purchase existed in the army as a recognized practice, openly purchased their steps. That case has been distinguished by the Judges of England, on the ground that they were not corrupt, although they might have broken a law, because what they did was sanctioned by their military superiors, and was, therefore, not dishonourable. But in *Blackford* v. *Preston*(3), a different view was taken of a transaction where a person bought the command of an East Indiaman belonging to the East India Company, went to sea, and lost the ship (See, too, *Graeme* v. *Wroughton* (4) and *Hoppins* v. *Prescott* (5).) It may also be admitted that in conspiracies the accomplices are often the only witnesses that can be got.

But it has been held by two eminent Judges, now members of the Judicial Committee of the Privy Council that it would certainly be

(1) Cowper, 334.
(2) 1 B. 610, (619).
(3) 8 Term. R. 89.
(4) 11 Ex. 146.
(5) 16 L. J. N. S., C. P. 259.

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unsafe to depart in India from the established practice of England in the application of the rule requiring corroboration. These are the words of Couch, C. J., in *Reg.* v. *Imam*(1), and they pervade Sir Barnes Peacock's decision in *Elahi Buksh's Case*(2). I do not think an exception can be made in favour of bribers, because they are not, in my opinion, people of good character, and because, if such exception were allowed, men of previously good character would be exposed to charges of receiving bribes, without sufficient protection, as happened in the half dozen cases where we reversed the convictions to-day. We have lately had several cases before us in which the learned Judge of Ahmedabad has passed severe strictures on the patels and rayats of that district in regard to the fabrication and suppression of evidence in criminal cases.

Although the established doctrine of the law about what sort of necessity amounts to a defence on a criminal charge has never been doubted since the time of Hale, it has been, I think, misappreciated in the cases which we decide to-day: **[139]** and on the other point of law I have to remark that there appears to be no reported decision whether or not the person who under a mild threat or solicitation of a public functionary or an ordinary person proceeds to bribe a public functionary is guilty of a crime or not. I have, therefore, given my reasons at length with the arguments of the learned counsel without which these judgments would be incomplete; and as it is desirable that every great question of penal law should be determined with certainty by the Bench, I have given my brother Scott an opportunity of perusing this decision before delivering it. On these questions of law, I think we are in substantial accord. I have mentioned the authorities cited before us, bacause we have been asked, and rightly asked, to declare what the law is: and it is a peculiar glory of our law that its doctrines are based on ancient experience, on the wisdom of a long succession of learned Judges, and on great precedents which have left their mark on the history of the country. With doubt and hesitation after careful examination of the evidence, more especially as the Magistrate finds that the Banias manipulated the entries and so fabricated evidence against the accused, who the Magistrate says, are old servants of Government, I come to the opinion that sitting as a Court of Revision, we ought to refrain from interfering with the sentences passed on Motilal on the Sanasthal charge, and on Maganlal on the Jivanpur charge. I think it must be held that the Magistrate did in a way consider the bribers to be accomplices, and then as he mentions s. 133 of the Evidence Act, did proceed to consider whether under all the circumstances they could be believed. If he came to a wrong conclusion on the facts, the proper Court to review the facts was the Court of Appeal—the Sessions Court of Ahmedabad. I cannot be sure whether the learned Judge looked upon the bribers as criminals, or whether he thought they were exonerated by the doctrine of necessity. Anyhow, the accused, who were both represented by pleaders, might have argued that the bribers were accomplices, and on referring to the Gujarati record to-day, I find that this is alleged in Motilal's petition of appeal to the Sessions Court. The Courts below are the appointed Judges of the facts, and without special **[140]** reasons we ought not to interfere on facts, lest we should weaken the responsibility of those Courts.

(1) 3 B. H. C. R. C. C. 57. (2) B.L.R. F. B. Sub. Vol. 459.

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As regards, however, the guilt of Maganlal on the Sanasthal charge, and that of Motilal on the Jivanpur charge, and after considering s. 34 of the Indian Penal Code, *Regt* v. *Farler* (1), *Reg.* v. *Clewes* (2), the very slight evidence, the infirmities of that evidence (already discussed in detail), and the insufficient manner in which I think it has been examined below, I have the misfortune, after several consultations, to differ from my learned brother, and would acquit the accused. I fear that if the safeguarding rule is not in such a case applied with all care and strictness, the result to men of good character and long years of good service may be as evil as if no such rule existed. We have had this day to reverse one conviction after another, because they have been based on evidence of people who say they bribed at the slightest hint and at the earliest opportunity, and whom the Magistrates, misapplying the legal doctrine of necessity, treated as if they were honest and innocent people. But when we differ in opinion, we must refer the matter of difference for the opinion of another Judge, before whom the case and our opinions will be laid under ss. 429 and 439 of the Code of Criminal Procedure.

There being thus a difference of opinion between the learned Judges, the case was referred to Mr. Justice Bayley.

JUDGMENT.

The following was the judgment delivered by

BAYLEY, J.:—On the 9th September instant, Scott and Jardine, JJ., passed the following order:—"Having this day confirmed the convictions and sentences passed on Motilal on the first or Sanasthal charge and on Maganlal on the second or Jivanpur charge, we have differed as to whether Maganlal is guilty on the first or the Sanasthal charge, and whether Motilal is guilty on the second or Jivanpur charge; and, therefore, under ss. 429 and 439 of the Criminal Procedure Code, lay the case and our opinions before Mr. Justice Bayley."

The matters so referred were fully argued before me on the 24th September instant by Mr. Shantaram Narayan, the Government [141] Pleader for the Crown, by Mr. Gokuldas for Maganlal and by Mr. Goverdhanram for Motilal. Having carefully considered the evidence given before the Magistrate, I agree with Scott and Jardine, JJ., in holding that all the witnesses called on behalf of the prosecution were accomplices, and I concur with the Magistrate in thinking that the only documentary evidence produced for the Crown, (*viz.*, the entries in the Banias' books), was quite untrustworthy, as such entries had undoubtedly been altered and fabricated by some one with the object of assisting in securing the conviction of the accused.

I collect, from the judgment of the Magistrate, that the important point, that the witnesses for the Crown were all accomplices and that, as such, their evidence required corroboration, was not taken by the pleaders who defended the two accused before him. Towards the conclusion of his judgment he says: "The defence has simply sought to prove, in respect to this as well as the Sanasthal case, that the accused are old servants and have borne good character." He then proceeds to consider the question of corroboration in the following words:—"Only one more remark and I have done. It will be said that the witnesses in this case are all accomplices, and that, therefore, they require corroboration, and, of course, one

(1) 8 C. & P. 106. (2) 4 C. & P. 225.

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accomplice cannot corroborate another. I admit the force of this argument, but s. 133 of the Evidence Act is clear, and in such case what the Court has to determine is whether there is inherent truth in the statement of the accomplices which verify their statements. In both cases I have shown that circumstances exist which negative the presumption of conspiracy, and evidence signs of truthfulness. Again, in the learned observations of Sir Raymond West on the Crawford case a distinction is observed between accomplices who volunteer to assist in the receipt of illegal gratifications and those who assist under compulsion. The witnesses in this case belong to the latter class, and I see no reason to to disbelieve their evidence. I, therefore, convict both the accused of the second offence also."

Such being the manner in which the Magistrate treated the evidence of the witnesses for the prosecution, every one of whom was an accomplice, I entertain no doubt that there has been such an error in the consideration of the evidence by which the [142] persons convicted have been prejudiced, and such a failure of justice as to justify this Court on revision in setting aside the conviction. The mode in which the Magistrate regarded the evidence is, in my opinion, erroneous on more than one ground.

First, they did not refer to, and certainly did not give proper effect to, the provisions of s. 114, Illus. (*b*) of the Evidence Act, which says that "the Court may presume that an accomplice is unworthy of credit, unless he is corroborated in material particulars;" coupled with the definition of "may presume" in s. 4 of that Act "whenever it is provided by this Act that the Court may presume a fact, it may either regard such fact as proved unless and until it is disproved, or may call for proof of it." The Magistrate appears to have thought that what a tainted witness—which an accomplice is—says may be treated as corroborating the evidence of that witness, which is, in my opinion, an error of a serious character.

In Taylor on Evidence, Vol. I, s. 171 (edition of 1868), it is said "some few general propositions in regard to matters of fact and the weight of testimony are now universally taken for granted in the administration of justice, and are sanctioned by the usage of the Bench. Such, for instance, is the caution given to juries to regard with distrust the testimony of an accomplice, unless it be materially confirmed by other evidence. There is no rigid presumption of the common law against such testimony, yet experience has shown that it is little worthy of credit, and on this experience the usage is founded." Such usage or practice was distinctly recognised by the Indian Legislature in the Evidence Act passed in 1855 (Act II of 1855, s. 28), enacting that, except in cases of treason, the direct evidence of one witness who is entitled to full credit shall be sufficient for proof of any fact in any such Court or before any such person; but this provision shall not affect any rule or practice of any Court that requires corroborated evidence in support of the testimony of an accomplice."

In the leading case of the *Queen* v. *Elahi Buksh* (1) decided by a Full Bench of the Calcutta High Court in 1866, it was held by [143] the majority of the Court, in the elaborate judgment delivered by Sir Barnes Peacock, C.J., that the uncorroborated testimony of one or more accomplice or accomplices was sufficient in law to support a conviction; but that the evidence of accomplices should not be left to the jury without such directions and observations from the Judge as the circumstances of the case

(1) B. L. R. Sup. Vol., 459, and 5 W. R. Cr. R. 80.

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may require, pointing out to them the danger of trusting to such evidence when it is not corroborated by other evidence, and that the omission to do so amounts to such an error in law as to justify the High Court on appeal or revision in setting aside the conviction when the Court thinks that the prisoner has been prejudiced by such omission, and that there has been a failure of justice.

Sir Barnes Peacock, C. J., in the course of his judgment, says: "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 favour." . . 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(1). In *Reg.* v. *Budhu Nunko* (2), which was decided by Sir M.R.Westropp, C.J., and Nanabhai Haridas, J., in 1876, it was held that a conviction based on the testimony of approvers uncorroborated as to the identity of the accused person could not be sustained, and that confessions of co-prisoners implicatting him could not be accepted as sufficient corroboration of such testimony.

[144] In the present case the Magistrate said; "What the Court has to determine is whether there is inherent truth in the statement of the accomplices which verify their statements." He had nothing before him but the corrupt evidence of confessed accomplices. His omission to consider the necessity that such evidence should be corroborated by that of one or more other and untainted witnesses is, in my opinion, an error by which the accused have undoubtedly been prejudiced.

Had the case been tried before me at the Criminal Sessions of the High Court I should, at the close of the case for the prosecution, have told the jury that there was not a particle of evidence to corroborate that given by the accomplices, and I should have strongly advised the jury at once to acquit the accused. Such a recommendation from the Bench, as an experience of many years in criminal Courts has shown me, is never disregarded by a jury.

Next, I think that the accused were prejudiced, from the manner in which the Magistrate regarded persons who assist in the receipt of an illegal gratification under compulsion, stating, as he did, that the witnesses belonged to that class. The passage in the minute of Sir Raymond West referred to by the Magistrate has been given at length by Mr. Justice Jardine in his judgment in the present case, and I need not, therefore, quote it here.

I entirely agree with that learned Judge and with Mr. Justice Scott that the pressure, supposing it to have existed in the present case, is not the kind of compulsion which the law allows to be an excuse for the offence of abetting the acceptance by a public servant of an illegal gratification.

(1) 5 C.W.R. 80 (88).

(2) 1 B. 475.

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The Magistrate appears to have overlooked s. 94 of the Indian Penal Code, which states when a person is to be held excused who is compelled by threats to commit an offence. Section 94 enacts that, except murder and offences against the State, punishable with death, nothing is an offence which is done by a person who is compelled to do it by threats, which, at the time of doing it, reasonably cause the apprehension that instant death to that person will otherwise be the consequence." Then comes a proviso which does not apply to the present case. The explanations to s. 94 are as follows:—"Explanation 1.—A person who, of [145] his own accord, or by reason of a threat of being beaten, joins a gang of dacoits, knowing their character, is not entitled to the benefit of this exception, on the ground of his having been compelled by his associates to do anything that is an offence by law. Explanation 2.—A person seized by a gang of dacoits and forced, by threat of instant death, to do a thing which is an offence by law—for example, a smith compelled to take his tools and to force the door of a house for the dacoits to enter and plunder it—is entitled to the benefit of this exception." There is no evidence in the present case, and it would be manifestly absurd to suppose that the revenue survey-classers—the two accused—threatened the villagers in such a way as to reasonably cause any of them to apprehend that instant death would be the consequence of their refusal to raise a fund to bribe the two classers. And yet I fail to see that anything short of that would legally exonerate the witnesses for what they did.

In the *Queen* v. *Sonoo* (1), which came before the High Court at Calcutta in 1868, the prisoner admitted that they had made the false statements charged; but their defence was that they had been coerced into doing so by the police inspector. It was held that there was no proof of coercion, and that if there were, it would be necessary to show that the prisoners were compelled to act, as they did, from apprehension that instant death would be the consequence of a refusal, and that s. 94 of the Penal Code required nothing less than that.

The question as to temptation or the force of surrounding circumstances affording an excuse for a crime came before a Court in England of five Judges in 1884 in the case of the *Queen* v. *Dudley and Stephens* (2). There the prisoners, when in an open boat, and probably more than 1,000 miles away from land, in order to escape death from hunger, killed a boy for the purpose of eating his flesh, believing and having reasonable grounds for believing that such act afforded the only chance of preserving their lives. The Judges were unanimously of opinion that the prisoners were guilty of murder.

[146] Lord Coleridge, Lord Chief Justice of England, in delivering the judgment of the Court, said (p. 283): "Lord Hale deals with the position asserted by the Casuists, and sanctioned, as he says, by Grotius and Puffendorf, that in a case of extreme necessity either of hunger or clothing 'theft is no theft, or at least not punishable as theft, as some even of our lawyers have asserted the same.' 'But,' says Lord Hale, 'I take it that here in England that rule—at least by the laws of England—is false, and, therefore, if a person being under necessity for want of victuals or clothes shall upon that account clandestinely and *animo furandi* steal another man's goods, it is felony and a crime by the laws of England, punishable with death.' Hale Pleas of the Crown

(1) 10 W. R. Cr.R. 48.

(2) 14 Q. B. D. 273.

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1—54." And at the conclusion of the judgment (p. 288) Lord Coleridge says: "It must not be supposed that in refusing to admit temptation to be an excuse for crime it is forgotten how terrible the temptation was; how awful the suffering; how hard in such trials to keep the judgment straight and the conduct pure. We are often compelled to set up standards we cannot reach ourselves, and to lay down rules which we could not ourselves satisfy. But a man has no right to declare temptation to be an excuse, though he might himself have yielded to it, nor allow compassion for the criminal to change or weaken in any manner the legal definition of the crime."

During the terrible famine which occurred in the Madras Presidency and in portions of this one in 1877, numerous cases of murder came up for confirmation of the capital sentence, or on appeal before my colleagues and myself, where a woman had killed a child for the sake of its ornaments, which the prisoner had immediately pledged or sold to raise money to buy food to save herself from starvation. It was never suggested in any of such cases which came before me that the offence was less than that of murder. I think, therefore, that it cannot be too clearly pointed out that in the opinion of my two learned colleagues (Scott and Jardine, JJ.), and myself, the distinction referred to by the Magistrate, which, he says in his judgment, he finds taken in Sir Raymond West's minute in the Crawford case, "between accomplices who volunteer to assist in the receipt of illegal gratifications and those who assist under compulsion" is an unfounded distinction [147] and one which is directly contrary to the law in force in British India. I consequently agree with Mr. Justice Jardine in acquitting the two accused on the charges referred for my opinion, and I concur with Sir Barnes Peacock, C. J., when he says in his judgment in the case of *Elahi Buksh* (1), "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."

Conviction and sentence reversed.

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14 B. 147.

ORIGINAL CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Scott.

THE BOMBAY AND PERSIA STEAM NAVIGATION COMPANY, LIMITED (*Original Defendants*), *Appellants v.* THE RUBATTINO COMPANY, LIMITED (*Original Plaintiffs*), *Respondents.**
[22nd and 29th November, 1889.]

Contract—Contract to carry passengers in ship—Passengers infected with disease—Excuse for non-performance of contract—Implied term in Contract—Performance become illegal—Contract Act IX of 1872, *s.* 56—*Penal Code (XLV of* 1860), *s.* 269.

By a contract made with the plaintiffs the defendants agreed to carry from Bombay to Jeddah, in their steamer "Mobile," 500 pilgrims who were about to arrive in Bombay from Singapore in the plaintiffs' ship the "Stura." The defendants were to be paid at the rate of Rs. 26 *per* head, and the ship "Mobile"

* Suit No. 167 of 1888.
(1) 5 W. R. (Cr.) 80.