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lower appellate Court, while dealing with this point, thought that as the order of the 30th November 1908 related only to the recovery of costs, that deduction of time ought not to be made. We think that it is perfectly immaterial for the purposes of the present point as to whether the order of the 30th of November 1908 related only to a part of the decree. If the period during which the execution of the decree had been stayed is excluded, the present application is clearly within time.

We hold, therefore, that the application is in time. The order of the lower appellate Court is reversed and the case remanded for disposal according to law.

All costs to be costs in the application.

Order reversed; case remanded.

R. R.

CRIMINAL APPELLATE.

Before Mr. Justice Macleod: on reference from Mr. Justice Heaton and Mr. Justice Shah.

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September 13.

EMPEROR *v.* GANGAPPA KARDEPPA.*

Indian Evidence Act (I of 1872), section 30—Co-accused—Confession—Independent corroboration—Evidence—Practice.

Eleven accused persons were tried for the offence of dacoity. There was no direct evidence against any of them. Seven of these confessed, each one implicating himself and the rest. They were convicted on their own confessions. A question arose whether the remaining four accused, who had not confessed, could be convicted solely on the confessions of their co-accused when they were not corroborated by any independent evidence. Heaton, J. was of opinion that section 30 of the Evidence Act made the confessions, which were already evidence in the case, evidence against the person implicated as well as the other accused. Shah, J. held that section

* Criminal Appeal No. 282 of 1912.

30 permitted the confession of a co-accused to be taken into consideration along with other evidence in the case ; but if there was no evidence in the case outside those statements, no conviction based only upon the confessions of co-accused was good in law. Owing to this difference in opinion, the case was referred to Macleod, J. :—

Held, that there was nothing in section 30 of the Indian Evidence Act, 1872, which prevented the Court from convicting after taking the confession of a co-accused into consideration ; but that the High Courts in India had laid down a rule of practice which had all the reverence of law, that a conviction founded solely on the confession of a co-accused could not be sustained.

Held, further, that the confession of one co-accused could not be said to be corroborated by the confession of other co-accused.

Per Macleod, J. :—I do not think that "confession" in section 30 can be restricted to an unretracted confession, as once a confession is proved it may be taken into consideration.

THIS was an appeal from convictions and sentences passed by F. K. Boyd, Sessions Judge of Bijapur.

There was a dacoity on the 18th and 19th January 1913, at the house of one Aminappa at Islampur. Considerable property consisting of cash and ornaments was looted ; and a number of documents and books of account were taken away. The dacoits were not recognised and the property was not traced.

Eleven persons were later on placed for trial for the dacoity. There was no direct evidence against any of them. Seven of the accused made confessions of their guilt, each one implicating himself and all the rest. Accused No. 1 confessed before the Committing Magistrate. Accused Nos. 2 and 3 confessed before a Third Class Magistrate and again before the Committing Magistrate. Accused Nos. 3, 6, 7 and 9 made confessions before a Third Class Magistrate, but retracted them before the Committing Magistrate. All of them retracted their confessions in the Sessions Court.

The seven confessing accused were convicted on their own confessions and were sentenced.

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The remaining four who had not confessed were convicted solely on the confessions of their co-accused, on the following grounds:—

I find myself here faced by a most serious difficulty. On the one hand, from the fullest consideration I can give to the case, I have not the slightest doubt that these accused are guilty. The cases of the other accused present no difficulty. But, after all, they have confessed and made some restitution a fact for which they are entitled to credit. From the confessions it seems accused 10 was the ringleader: and from a comparison of the value of the property stolen and of that recovered I am led to the conclusion that leading parts were played by these four accused. If the others go to jail for this dacoity while these four accused go free it will amount, in my opinion, to a travesty of justice. On the other hand, I am faced with the ruling in *Queen-Empress v. Khandia bin Pandu* [(1890) I. L. R. 15 Bom. 66] that no conviction can alone be based on confession of co-accused—a ruling of this High Court, with which, with the greatest deference, I find I cannot agree. (I regret that the provisions of section 432 of the Criminal Procedure Code do not apply to Sessions Judges: if they did, the difficulty would be easy to solve.) The ruling is of 23 years ago and has not, so far as I can discover, been referred to in any subsequent reported case of *this* High Court. I think it possible, even probable, that their Lordships would now dissent from it. In this belief, I venture, with the greatest deference, to state the grounds of my disagreement.

The ruling is based on two reasons. The first is that, while confessions by co-accused can be taken into consideration under section 30, "they are not technically evidence within the definition given in section 3 of the Act.....and they could not, therefore, *alone* form the basis of a conviction." I know of no authority for the position that convictions can *only* be based on "evidence," as defined. I can at once instance two cases in which perfectly good convictions are not so based—on plea of guilty and on confession. In the first of these cases there is no "evidence," and in the second there need not be any. A conviction might, too, be based on matters of physical fact: yet these are not "evidence" at all. "Proved," as defined, depends on consideration of "the *matters*" before the Court—not the "evidence" only. The second reason is that such confessions cannot be allowed such weight as can legally be given to the sworn testimony of an accomplice who gives evidence subject to cross-examination. That a confessing co-accused ranks below an accomplice is a *dictum* to be found in many cases. With the greatest deference, I find myself unable to understand it. An accomplice has actual inducement to implicate. It is the means whereby he earns his pardon. The value of an oath, in such circumstances, I should take to be

absolutely nothing. He can be prosecuted for perjury, but that is an extremely remote possibility. On the other hand, a confessing co-accused gives the guarantee that he is tarring himself with the same brush (*Empress of India* v. *Ganraj* (1879) I. L. R. 2 All. 444). What this guarantee is worth is a question in each case, but at any rate it is worth something; while an accomplice not only has no guarantee but, so to speak, exactly the contrary. This guarantee may very easily out-weigh that given by the fact that accomplices can be cross-examined. Cross-examination, in very many cases, is a weapon of very doubtful utility. In this case, for instance, I have no doubt that any degree of cross-examination would only have confirmed the truth of the confessions.

I venture to submit an objection more fundamental. The ruling in *Khandia's case* appears to me an actual alteration and limitation of the law. Section 30 lays down that "the Court *may* take into consideration such confession." The ruling lays down that the Court *cannot* take it into consideration except "along with evidence." If this had been the intention of the Legislature it would, or should, have been expressed. It has not been expressed and even if it were the intention, it is never legitimate interpretation to supply a *casus omissus* or to fill a *lacuna*. I venture to think that it would have been perfectly right to lay down that such confessions in such circumstances should be considered with extreme jealousy and suspicion, and I do not consider them. But not that in any circumstances they cannot be considered at all. As Knox, J., said in *Emperor* v. *Kehri* ((1907) I. L. R. 29 All. 434) "Does the law anywhere forbid a Court.....from considering at all against persons tried jointly.....a confession made by one of such persons affecting himself and the persons who were being tried jointly, when such confession has been subsequently withdrawn? It appears to me that this is a limitation *which does not exist* in, and *would have to be introduced* into the words used in section 30 of the Indian Evidence Act, 1872, and that to do so *would be not to follow the law as it stands but to legislate*" at p. 439.

This case is on a slightly different point (I quote it again on that point later); but the reasoning seems to apply.

The matter appears to me roughly parallel to the question of the value to be attached to accomplice evidence on which hundreds of rulings—heretofore—have turned. The true meaning of section 30 appears to me as clear as that of the much debated sections 133 and 114 (*b*) of the Evidence Act. There are many and strong reasons why an accomplice, or a confession by a co-accused, should not be believed. But one must, and the other may, be considered. And if, after full consideration of these reasons, a Court *believes* either, then it must act on the belief. I venture to think that the expression "Such weight *as can legally be given*....." (p. 67) is not correct. I know of no law which prescribes the *weig* to be given to any kind of evidence. The law merely

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lays down what evidence is admissible : as to the weight to be attached to it after admission, to the best of my belief, it is entirely silent. (It may be said that the second part of section 133 of the Evidence Act is against this remark. But, in my opinion, that part of the section, entirely unnecessary, is inserted merely *pro majore cautela*, to bar a probable misinterpretation of the section.) It could not, I submit, be otherwise, since the weight to be attached to any evidence or consideration cannot be the same in any two cases.

The case of *Yasin* v. *King-Emperor* ((1901) I. L. R. 28 Cal. 689) was quoted for the position that a retracted confession should carry no weight as against an accused other than the maker, and that far more corroboration would be *necessary* than in the case of accomplice evidence. This case was not quoted in *Emperor* v. *Kehri* ((1907) I. L. R. 29 All. 434), a case of six years later than *Yasin's*, in which a contrary view is taken. I have quoted this case above.

In my humble opinion, the law governing these cases is this. Confessions by co-accused may, in any circumstances whatever, be considered. The weight, if any, to be attached to them is a matter wholly dependent on the individual case. Any Court would, at the best, regard them with jealousy and caution : when retracted the degree of jealousy and caution would be higher : when also uncorroborated the degree of jealousy and caution would be at its highest. But if, after consideration on this basis, a Court *believes* such a confession, it can, and must, act on that belief. (Why the words "may take into consideration" are used, instead of "shall be relevant," I do not know. Nor why in sections 25-27 the words "shall be proved" are used instead of "shall be relevant.")

Once these confessions are considered against these accused there is, in my opinion, an end of the matter. I entirely believe the confessions and can see no reason, neither is any suggested, why any one of accused should falsely implicate any other. It was argued in defence that all would naturally implicate accused 1 because he had "split". But none of them knew this ; the fact was mentioned for the first time in this Court.

The accused appealed to the High Court.

The appeal was argued before Heaton and Shah, JJ. on the 18th August 1913.

The Court delivered the following judgments on the 28th August 1913.

HEATON, J. :—In this case eleven persons were tried for dacoity, seven out of the eleven either before a Third Class Magistrate or before the Committing Magistrate

or both confessed to their guilt and implicated the other four. As regards these seven there was other evidence besides their confessions. All eleven were convicted and all have appealed.

As regards the seven who made confessions, I think, the evidence is conclusive.

The only matter which requires serious considerations as regards them is whether to their confessions the provisions of section 24 of the Indian Evidence Act apply, so as to render them irrelevant. The matter was considered by the trying Judge and he came to the conclusion that the confessions were relevant. Accused 1 confessed only to the Committing Magistrate and accused 2 and 5 before the Committing Magistrate confirmed the confessions they had previously made. Before the Committing Magistrate accused 3, 6, 7 and 8 repudiated their confessions and two of them Nos. 6 and 7 produced written statements. These two, therefore, had evidently carefully considered the matter. I infer that the others had done the same. Hence the fact that accused 1, 2 and 5 confessed to the Committing Magistrate is in the circumstances a peculiarly strong reason for holding that the confessions of all were given in a way that did not offend against the provisions of section 24 of the Evidence Act. This inference is confirmed by the manner in which the confessions were recorded and by the assurance of the Magistrate who recorded them that they were voluntarily made.

Against this is the circumstance that the confessing accused were in each instance for three or four days in the custody of the Police before they confessed and that whilst in such custody they produced property alleged to be stolen. How it came about that they were so long in police custody does not appear. Accused 3, 6, 7 and 8 were all defended by three pleaders but no cross-examination of witnesses was directed to this matter.

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The Magistrate who recorded the confessions was aware of it: yet he was satisfied that the confessions were voluntary.

I do not find any good reason for rejecting these confessions. They appear to me to be relevant.

I would, therefore, confirm the convictions of accused Nos. 1, 2, 3, 5, 6, 7 and 8.

As regards the other four, questions on which my learned colleague and myself are not agreed have arisen.

Against the other four, there is nothing substantial to show that they took part in the dacoity except the confessions of the other seven. It has been contended first of all that, as was decided in the case of *Queen-Empress* v. *Khandia bin Pandu*[1], the confession of a co-accused is not technically evidence, and that, therefore, a conviction based on the confession of co-accused, whether one or more than one, is illegal. As to this point, so far as my own knowledge goes, the ruling where it asserts that the confession of a co-accused is not evidence, has not in practice been followed. The confession of a co-accused has always within my experience been treated as evidence. The Special Tribunal of three Judges, of which I was a member, which tried the *Nasik Conspiracy case*[2], certainly did treat the confessions of co-accused person as evidence. These confessions were tested as far as possible, and were weighed by such knowledge and experience as we possessed, and we determined whether they had or had not probative force: that is to say, we dealt with them precisely as if they were evidence. Undoubtedly, in my opinion, they fall within the definition of evidence in the Evidence Act; for, these confessions are documents submitted to the inspection of the Court. Then section 30 by its own

(1) (1890) 15 Bom. 66. (2) (1910) Cases Nos. 2, 3 and 4 (Unrep.).

terms applies only where the confession is proved; that is, it applies only to a confession which has become evidence in the case, and the section provides that it may then be taken into consideration against the person implicated as well as against the person making it. These words, in my judgment, are exactly appropriate to making the confession, which is already evidence in the case, evidence against the person implicated as well as the other accused. There are authorities on the point but the only one I will refer to is *Empress* v. *Ashootosh Chuckerbutty*[1]. In this case the Judges did regard the confession of a co-accused as evidence for reasons which to me are convincing. Therefore it is that I feel bound to decline to follow the ruling in *Khandia's case* and feel that I must treat the confessions of the co-accused as evidence for the purpose of all the accused.

The second point is that even so regarding the confessions, they are evidence of so peculiar a character that to found a conviction on that class of evidence alone is illegal, and for this proposition there is the authority of the Calcutta case already referred to. But to this proposition also I must respectfully demur. There is, I believe, no law whatever prescribing the credibility of evidence. Matters relating to the admission of evidence are matters of law, but the credibility of evidence is a matter left to the knowledge, experience and logic of the Court that has to decide on the evidence. I think that much of the confusion which has arisen, more particularly in the case of accomplice evidence, has arisen out of the fact, that questions of credence and questions of law have not been rigorously kept apart but have been confused together. Moreover I think that if a Court lays down a rule touching the credibility of evidence, it does that which it has no

[1] (1878) 4 Cal. 483.

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authority to do and which it ought to be against the conscience of the Court to do. How can a Court, however eminent, lawfully say that a Jury in some future case shall not be convinced by some particular class of evidence?

Dealing with cases of the four appellants against whom there is nothing but the confessions of co-accused, the matter in my judgment stands thus. The confessions are admissible in evidence. They are not found by the Sessions Judge to offend against any of the provisions of the Indian Evidence Act, and I do not think they do so offend. I think also that they are substantially true statements and are not the result of police or other tutoring. A careful perusal of the statements themselves convinces me of this. It is perfectly true that you cannot from the statements collectively gather with absolute precision either what the maker of each statement himself did or what each one of the others did. But this, it seems to me, is due to the fact that each of these accused persons told his own story in his own way. I have, therefore, come to the conclusion that we have here the implication of four accused persons from seven different and independent sources. To my mind, as a matter of human knowledge and experience, it is almost inconceivable that seven men should independently falsely accuse the same four persons. If, as I believe to be the case, the seven accused have independently implicated the other four, then I regard the evidence in this case as coming nearer to scientific proof than is to be found in the majority of cases in which persons are convicted.

It has, I am aware, been held, and it is often argued that one accomplice or one co-accused cannot corroborate another. Why this argument is advanced is difficult to understand, when one refers to the comment on ill. (*b*) to section 114 of the Evidence Act. That

comment gives precisely this kind of corroboration as in certain circumstances a sound foundation for belief.

I should, therefore, confirm the convictions of all the eleven accused, but as my learned colleague is of a different opinion as regards accused Nos. 4, 9, 10 and 11, this case will, as regards them, have to be referred to a third Judge.

SHAH, J. :—In this case eleven persons were jointly tried on a charge of dacoity under section 395 of the Indian Penal Code. All of them have been found guilty by the lower Court.

The present appeal is preferred by accused Nos. 4, 9, 10 and 11.

There can be no doubt in this case that a dacoity was committed at the house of one Aminapa. The main question in the appeal is whether the accused Nos. 4, 9, 10 and 11 are proved to have taken part in the dacoity. The case against them rests chiefly upon the confessional statements of co-accused Nos. 1 to 3 and 5 to 8.

In addition to these statements the learned Government Pleader has relied upon two circumstances: *viz.*, (1) the production of certain cash by accused No. 4; and (2) the conduct of accused Nos. 9 to 11 in remaining away from the usual quarters for some time. The learned Sessions Judge does not attach much importance to these circumstances. I think that the production of cash, which is not indentified as being part of the loot, does not afford any corroboration of the guilt of accused No. 4. As regards the conduct of accused Nos. 9 to 11, I am unable to attach much weight to it, as by itself it is quite insufficient to afford any material corroboration to the confessional statements of the co-accused. The two accused Nos. 9 and 10 in fact surrendered not long after the warrants were issued. The case against the appellants must rest ultimately on

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the confessions of the co-accused. I agree with the Sessions Judge that "If these four accused persons are to be convicted, the convictions can be based only on the confessions of co-accused considered against them under section 30 of the Evidence Act."

Coming now to these confessions the learned Sessions Judge has declined to follow the ruling of this Court in *Queen-Empress* v. *Khandia bin Pandu*[1] and has given his reasons for adopting the view that if a Judge feels convinced of the truth of the story as contained in the confessions of the co-accused, not only may he consider the statements but he is bound to act upon them even though there may be no evidence outside those statements to corroborate the story in material particulars. I am unable to agree with the Sessions Judge in his view that the decisions of this Court and of all the other High Courts in India, at least Madras and Calcutta High Courts, have put an erroneous interpretation upon section 30 of the Evidence Act. I feel clear that the confessions of co-accused may be taken into consideration under section 30 of the Indian Evidence Act along with other *evidence* in the case: but if there is no evidence in the case outside these statements, a conviction based only upon the confessions of the co-accused is not good in law. The confessions of the co-accused could not be considered at all against the other accused but for the provisions of section 30 of the Indian Evidence Act. These confessional statements are not made on oath and have not been tested by cross-examination. Their evidentiary value is very low. They stand on a much lower footing than the evidence of an accomplice. It is clear, therefore, that obvious considerations of justice require that a Court, before acting upon such statements, should insist upon independent corroboration from

[1] (1890) 15 Bom. 66.

other evidence in the case in material particulars, particularly as to identity.

It is not a matter of much moment to my mind whether these statements are treated as evidence in the case or are treated as matter which may be taken into consideration under section 30 of the Indian Evidence Act. The substantial distinction which the Courts have insisted upon is that the matter (or evidence) which may be taken into consideration under section 30 of the Evidence Act stands on a different footing from the other *evidence* in the case. No matter which can be taken into consideration only under section 30, if there is no evidence other than such matter, can form the basis of a legal conviction. I understand this to be the effect of the rulings to which I shall presently refer.

The Madras High Court has consistently adopted this view almost ever since the passing of the Evidence Act: See *Proceedings, 24th January 1873*[1]; *Reg.* v. *Ambigara Hulagu*[2]; *Giddigadu* v. *Emperor*[3].

A Full Bench of the Calcutta High Court so far back as 1878 accepted this view in the case of *Empress* v. *Ashootosh Chuckerbutty*[4]. The same conclusion has been expressed in the recent case of *Emperor* v. *Lalit Mohan Chuckerbutty*[5] by Jenkins, C. J., as follows:—

"The language of the section is guarded, and the history of this Act leaves me in no doubt that this section was designedly framed in these terms. While admissions, a word which embraces confessions, are by section 21 *relevant*, and may be proved as against the person making them, all that section 30 provides is, that the Court *may* take into consideration, as against other persons. This distinction of language is significant, and it appears to me that its true effect is, that the Court can only treat a confession as lending assurance to other evidence against a co-accused. Thus to illustrate my meaning, in the view I take, a conviction on the confession of a co-accused

(1) (1873) 7 Mad. H. C. R. App. xv.
(2) (1876) 1 Mad. 163.
(3) (1909) 33 Mad. 46.
(4) (1878) 4 Cal. 483.
(5) (1911) 38 Cal. 559 at p. 588.

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alone would be bad in law. This reading of the section appears to me to gain confirmation from the language of section 5."

The Allahabad High Court also accepted this view in *Empress of India* v. *Bhawani*[1] and *Queen Empress* v. *Nirmal Das*[2]. It was suggested in the course of the argument that the Allahabad High Court has dissented from the view in the case of *Emperor* v. *Kehri*[3]. In this case no reference is made to *Nirmal Das' case*, and, as I read the judgments, I think that the observation of the learned Judges expressing their dissent from the view of law taken in the Calcutta Full Bench case were not necessary for the decision of the case. At any rate, the fact remains that the Allahabad High Court has not definitely dissented from the views accepted by it in *Nirmal Das' case*.

So far as this Court is concerned, it has consistently taken the view which has found favour with the Calcutta and Madras High Courts : See *Reg.* v. *Timava*[4] and *Queen-Empress* v. *Khandia bin Pandu*[5]. So far as I know this Court has never allowed a conviction based entirely upon the confession of co-accused to stand. It is argued by the Government Pleader that the judgment in the *Nasik Conspiracy case* is not consistent with this view. I do not find anything in that judgment which can be said to be in conflict with the rulings of this Court. It shows that the confessions of co-accused were considered against other accused under section 30 either as evidence or matter which may be taken into consideration under the said section. The question whether the confessions of co-accused when taken into consideration under section 30 could form the basis of a conviction in the absence of other evidence in the case apparently did not arise and was not considered in that case.

(1) (1878) 1 All. 664.
(2) (1900) 22 All. 445.
(3) (1907) 29 All. 434.
(4) (1876) Ratanlal's Cri. Cas. 108.
(5) (1890) 15 Bom. 66.

By the decisions of this Court I am bound. I may add, however, that I entirely agree with the decisions, which, broadly speaking, accept the view adopted by this Court. In my opinion they lay down a safe and sound rule that no conviction based only upon matter which can be taken into consideration under section 30 is good in law.

There is one more consideration to which I may advert. It is a significant fact that though by Act III of 1891 a proviso was added to section 30 with a view to get rid of the effect of certain rulings, such as *Reg.* v. *Amrita Govinda*[1] and *Badi* v. *Queen Empress*[2], nothing was done then nor has anything been done thereafter by the Legislature to get rid of the effect of the rulings on this point by adding any proviso to that section or by adding appropriate words to section 133 of the Evidence Act.

I do not consider it necessary to refer to the law relating to the evidence of an accomplice in connection with this point. I may, however, add that ill. (*b*) to section 114 in my opinion refers to the testimony of an accomplice. The other illustrations qualifying ill. (*b*) also have reference to such testimony and have no bearing whatever on the present question relating to the confessions of co-accused to be taken into consideration under section 30.

In this case there being no other evidence tending to the convictions of these appellants and the confessions of the co-accused being insufficient by themselves to justify these convictions, I would allow this appeal.

Assuming for the sake of argument, however, that the confessions of the co-accused may form the basis of a legal conviction, I have to consider whether the confessions of the co-accused in this case corroborate one an-

(1) (1873) 10 Bom. H. C. R. 497. (2) (1884) 7 Mad. 579.

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other in material particulars and prove beyond reasonable doubt that the appellants took part in the dacoity. The confessions to be considered are made by accused No. 1 before the Committing Magistrate, by accused Nos. 2 and 5 before a Third Class Magistrate and adhered to before the Committing Magistrate, and by accused Nos. 3, 6, 7 and 8 before a Third Class Magistrate. The accused Nos. 3, 6, 7 and 8 retracted their confessions before the Committing Magistrate and adhered to their retractations in the Sessions Court. The other accused Nos. 1, 2 and 5 have retracted their confessions in the Sessions Court.

In the first place, as all the confessions are retracted, it is most unsafe to place any reliance on them against the co-accused. Secondly, it is clear in this case that these several accused were not arrested on the spot, and the account, which they give in their respective confessions, is not an account given soon after the occurrence. If the dates on which these several accused were arrested, when they were brought to Islampur, and when all of them except No. 1 were taken to the Third Class Magistrate for having their confessions recorded, be carefully examined, it is clear that there is no guarantee in the present case that all the accused were kept separate and that they gave their accounts independently of one another. From the accounts which they give of the occurrence, and particularly of the persons who took part in the dacoity, I am unable to say that previous concert is highly improbable. None of these confessing co-accused is entitled to any particular consideration on the score of good character. In fact, none of the conditions contemplated in the illustrations qualifying ill. (*b*) to sections 114 is found to exist in the present case.

Further, these statements have not been and cannot be tested by cross-examination and are not made on

oath. I am unable to agree with the learned Sessions Judge when he says that in this case he has no doubt that any degree of cross-examination would only have confirmed the truth of the confessions. This is an assumption which it is easy to make but difficult to substantiate. I, for my part, am unable to say that cross-examination would have only confirmed the truth of the statements in this particular case.

Having regard to all these considerations, I am unable to place any reliance upon the confessions of the co-accused so far as they implicate persons other than those making the confessions. I do not consider it necessary to enter into a detailed consideration of these statements. After considering them carefully I feel clear that they fail to establish beyond reasonable doubt that the present appellants took part in the dacoity.

I am of opinion, therefore, that the convictions and sentences should be set aside and the appellants (*i.e.*, accused Nos. 4, 9, 10 and 11) acquitted.

Owing to this difference of opinion, the appeal was heard by Macleod, J., on the 13th September 1913.

Desai, with *G. S. Rao* and *H. B. Gumaste*, for the appellants :—It is undisputed that the only evidence against the appellants is the confessions made by seven co-accused at the trial. These confessions are no evidence and cannot by themselves support the conviction of the appellants.

I submit, first, that the Sessions Judge was bound by the decision of *Queen-Empress* v. *Khandia bin Pandu*[1] ; and he ought accordingly to have acquitted the appellants. Secondly, the confession of a co-accused is no evidence ; the Court may take it into consideration ; but no conviction can be based on it so long

[1] (1890) 15 Bom. 66.

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as it is uncorroborated. Thirdly, even if the Court treat it as evidence, then regard must be had to the rule of construction laid down in an unbroken series of decisions in this Court that the uncorroborated confession of a co-accused is not enough to warrant the conviction of the accused.

The decision in *Queen-Empress* v. *Khandia bin Pandu*[1] was binding on the Sessions Judge. The appeal should therefore be allowed on this short point, and the appellants should be acquitted.

Secondly, the confession of a co-accused is not evidence as defined in section 3 of the Indian Evidence Act, since the co-accused is not a witness, nor is his confession a documentary evidence. Section 30 also does not make it evidence. It can at most be supplementary evidence, but not evidence by itself. In other words, it is *quasi* evidence, its effect being limited: see *Queen-Empress* v. *Khandia bin Pandu*[1]; *Emperor* v. *Lalit Mohan Chuckerbutty*[2].

Thirdly, the point is concluded by a long series of decisions in every High Court: see *Queen* v. *Chunder Bhuttacharjee*[3]; *Barindra Kumar Ghose* v. *Emperor*[4]; *Reg.* v. *Ambigara Hulagu*[5]; *Giddigadu* v. *Emperor*[6]; *Queen-Empress* v. *Dosa Jiva*[7]; *Queen-Empress* v. *Khandia bin Pandu*[1]; *Reg.* v. *Wasapa*[8]; *Queen-Empress* v. *Bayaji*[9]; *Queen-Empress* v. *Ganapabhat*[10]. The case of *Emperor* v. *Kehri*[11] is against the current; but it appears that the confession there was corroborated.

(1) (1890) 15 Bom. 66.
(2) (1911) 38 Cal. 557 at pp. 587, 588.
(3) (1875) 24 W. R. 42 (Cri. Rul.).
(4) (1909) 37 Cal. 467 at p. 505
(5) (1876) 1 Mad 163.
(6) (1909) 33 Mad. 46.
(7) (1885) 10 Bom. 231.
(8) (1876) Ratanlal's Cri. Cas. 108.
(9) (1886) Ratanlal's Cri. Cas. 311.
(10) (1889) Ratanlal's Cri. Cas 456.
(11) (1907) 29 All. 434 at p. 441.

Further, the confessions in the present case are all retracted. The retractation may not have any effect against the confessing accused; but as against the co-accused, a retracted confession has no weight at all: see *Yasin* v. *King-Emperor*[1].

Strangman (Advocate General), with *S. S. Patkar*, Government Pleader, for the Crown:—Section 30 of the Indian Evidence Act says that the Court may take the confession of a co-accused into consideration. It can only do so by treating it as evidence. The Evidence Act states first of all, what is evidence. It then proceeds to consider, what is relevant evidence; and it finally addresses itself to the question, what evidence amounts to proof. It provides nowhere for the *quantum* of evidence to be given in any particular case. The confession of co-accused is evidence; and a conviction may be founded on that evidence: see *Emperor* v. *Kehri*[2].

In the present case, seven accused persons have confessed, several of them on more than one occasion. Each of them is corroborated in material particulars by the remaining confessions. They are cumulative. They are believed by the Sessions Judge to be true. They can, therefore, support by themselves the conviction of the appellants.

Desai, in reply.

Cur. adv. vult.

MACLEOD, J.:—In this case eleven persons were tried jointly before the Sessions Judge of Bijapur sitting with Assessors on a charge of dacoity. All were found guilty and sentenced to various terms of imprisonment.

Accused Nos. 4, 9, 10 and 11 preferred an appeal to the High Court which was heard by Heaton and Shah, JJ.

(1) (1901) 28 Cal. 689 at p. 691. (2) (1907) 29 All. 434.

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The learned Judges having differed, the appeal has been referred to me for final decision.

It is admitted that there is nothing on the record which can be said to implicate the appellants in the dacoity, which undoubtedly was committed on the 18th-19th January 1913, except the confessions of the other seven persons who were tried jointly with the appellants. No. 1 confessed before the Committing Magistrate; Nos. 2 and 5 confessed before the Third Class Magistrate and the Committing Magistrate; Nos. 3, 6, 7 and 8 confessed before the Third Class Magistrate but retracted their confessions before the Committing Magistrate. Before the Sessions Judge all the confessions were retracted.

Section 30 of the Evidence Act is as follows :—

"When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such confession as against such other person as well as against the person who makes such confession."

It seems surprising that this section which has given rise to so much discussion, so much conflict of judicial opinion, as to its real meaning, should have continued to exist without amendment.

The confessions made by the co-accused affecting themselves and the appellants having been proved the Court was entitled to take them into consideration as against the appellants.

It seems to me immaterial whether such a confession is called 'evidence' or 'matter'. If anything that a Court may take into consideration to enable it to come to a conclusion whether the guilt of an accused person is proved, can be called evidence, then the confession is evidence, but that part of it which affects another accused is not evidence as defined by the Act, and the fact that it is included in the Magistrate's record of what

the confessing accused admitted against himself, which is relevant, in my opinion makes no difference.

It has been argued for the appellants that as a matter of law the Court could not convict on these confessions standing by themselves, that the confessions referred to in section 30 must be unretracted confessions, and that in any event the section must be read as if it said that the confessions might only be taken into consideration along with other evidence against the accused.

I do not think that 'confession' in section 30 can be restricted to an unretracted confession, as once a confession is proved it may be taken into consideration. Nor do I think that words can be read into the section when there is nothing in the section to fetter the discretion of the Court, or that there is anything in the section itself which prevents a Court from convicting after taking the confession into consideration.

But I do think that the High Courts in India have, as they are clearly entitled to do, laid down rules of practice which deserve all the reverence of law, so that they ought to be observed by Judges when exercising their discretion under section 30.

It was decided in this Court in *Queen-Empress* v. *Khandia bin Pandu*[1] that a conviction founded solely on the confessions of co-accused could not be sustained. My brother Heaton has declined to follow that decision because the *ratio decidendi* was that the confessions of the co-accused were not technically evidence within the definition of section 3 of the Act, and this Court has since then repeatedly held that such confessions were evidence. But as I have already stated, if these confessions can be called evidence, it can only be by using the word 'evidence' in a wider sense as meaning 'any matter which the Court may take into consideration.'

[1] (1890) 15 Bom. 66.

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In my opinion this decision laid down a definite rule of practice and not having been reversed by any later decision it is binding on me.

The confession of a co-accused stands on quite a different footing to the testimony of an accomplice, which the Evidence Act treats as having a higher probative value than similar evidence has according to English law. In England it is a rule of practice that Judges should direct a Jury to acquit unless they consider that the testimony of an accomplice is corroborated in material particulars by independent evidence. In India a Judge is entitled to direct a Jury that they may convict on the testimony of an accomplice without corroboration if they believe it, provided they are duly cautioned. Again the testimony of an accomplice may be corroborated by the accounts given by other accomplices (section 114, ill. (*b*)) whereas in England the corroboration must be by independent evidence.

In my opinion a Judge sitting with Assessors ought never to convict an accused solely on the confession of a co-accused, since he has no materials before him to enable him to decide whether as against the accused it is true or false. If he is sitting with a Jury, he has a discretion, either to withdraw the confession from the Jury, or to put it before them with the direction that they ought to acquit unless it is corroborated in material particulars by independent evidence. It has been contended by the prosecution that seven co-accused in this case have made confessions before a Magistrate, affecting themselves and the appellants, and that therefore each confession has been corroborated by the others. I agree with my brother Shah that section 114, ill. (*b*), only applies to the testimony of an accomplice given on oath before the Court, and not to confessions before a Magistrate. Once it is laid down that a Court ought not to convict on the confession of the co-accused, it follows

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that it ought not to convict however many of the co-accused have confessed. I agree with my brother Shah that the conviction and sentence should be set aside and the appellants acquitted.

Rs. 240 taken from accused 4 to be returned to him.

Appeal allowed.

R. R.

APPELLATE CIVIL.

Before Mr. Justice Heaton and Mr. Justice Shah.

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DINKAR HARI KULKARNI (ORIGINAL DEFENDANT), APPELLANT, *v.* CHHAGANLAL NARSIDAS AND ANOTHER (ORIGINAL PLAINTIFFS), RESPONDENTS.*

Limitation Act (IX of 1908), Articles 116 and 66, section 19—Registered bond—Suit to recover money due on the bond—Period of limitation—Acknowledgment contained in promissory notes.

On the 17th June 1897, the defendant passed a registered mortgage bond in favour of the plaintiff. It was attested by one witness and made the mortgage amount repayable in three instalments, the last one becoming due on the 24th June 1900. On the 24th August 1903, the defendant passed a promissory note in favour of the plaintiffs, wherein he stated : " An account is taken to-day and the amount due under the mortgage deed is set apart." Again, on the 11th August 1906, he passed another promissory note which recited : " Besides this the mortgage debt is distinct." The plaintiff sued on the 6th August 1910 to recover the money due under the bond :

Held, that the words used in the two promissory notes amounted to acknowledgments within the meaning of section 19 of the Limitation Act.

Held, further, that the suit was governed by Article 116 and not by Article 66 of the Limitation Act, for though the suit was in form a suit for money due on a bond, it was in substance a suit for compensation for breach of a contract.

Ramdin v. *Kalka Pershad*[1] and *Bulakhi Ganu Shet* v. *Tukarambhat*[2], commented on.

* First Appeal No. 206 of 1912.

(1) (1884) L. R. 12 I. A. 12. (2) (1889) 14 Bom. 377.