

The concession which is allowed to judgment-debtors is only allowed under certain conditions. Those conditions do not exist in the present case. We must, therefore, discharge the rule with costs. One set of costs.

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Rule discharged.

J. G. B.

CRIMINAL APPELLATE.

Before Sir Basil Scott, Kt., Chief Justice; on difference between Mr. Justice Heaton and Mr. Justice Shah.

EMPEROR v. SABITKHAN BAHADURKHAN^o.

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March 8.

Indian Evidence Act (I of 1872), sections 30, 114, 133—Confession by co-accused—Evidence against the accused—Amount of corroboration.

The accused was charged with the murder of his brother in concert with two associates with whom he was jointly tried for the offence. The principal evidence against the accused was the confessions of the two co-accused. Other facts established in the case were these. The accused had a wife and children, but no means to support them; he had to work as a coolie in the Forest Department. He was continually importuning the deceased who was rich but had no wife or children, for assistance which was continually refused, and although the two brothers lived in the same building they did not associate. About a fortnight after the disappearance of the deceased the accused made free with the grain which was collected in his brother's bin; and on several occasions gave rice from it to his two associates. Three months after the event, the accused told a shop-keeper that his brother had gone to Miraj for medical treatment. After the crops had been got in he began to ask the tenants of his brother to pay their rents to him. Shortly afterwards, the accused, when questioned by the Ranger of the forest, replied that his brother had gone to Miraj and that no letter had come. Later, the accused received a letter through post, purporting to come from his brother, which directed the accused to collect the rents and pay the assessment. The muster-roll kept by the Forest Officer showed that the accused was absent from his work on the day of the offence and for some days after. The trial

^o Criminal Appeal No. 425 of 1918.

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Judge acquitted the accused. On appeal by Government to the High Court of Bombay, Heaton J. was of opinion that there was in the case, apart from the confessions, a body of evidence and circumstances enough to support a conviction; and that taking the confessions together with the circumstances the accused's guilt was made out. Shah J. was of opinion that though the proved circumstances in the case were consistent with the guilt of the accused and though they might create a certain amount of suspicion against him, they did not prove anything as to his participation in the crime. Owing to this difference in opinion the case was heard by Scott, C. J.

Held, by Scott, C. J. (agreeing with Heaton, J. and differing from Shah, J.) that there was, on the facts established, corroboration of the story of the confessing co-accused so far as it affected the accused.

Dictum of Garth, C. J., in *Empress v Ashootosh Chuckerbutty*⁽¹⁾, followed.

Dictum of Macleod, J., in *Emperor v. Gangappa Kardeppa*⁽²⁾, commented on.

THIS was an appeal from an order of acquittal passed by V. M. Ferrers, acting Sessions Judge of Kanara.

The facts were as follows :—

The accused Sabitkhan had a brother named Mahomedkhan. The two brothers lived in the same house though separately. They lived in the hamlet of Alkeri. Mahomedkhan had no wife or children, but had considerable property. The accused was in straitened circumstances; and had besides a wife and children to support. He was working as a coolie in the Forest Department. He was continually importuning his rich brother for assistance, who always turned a deaf ear to his entreaties and bade him work for his living. This led to frequent quarrels between them; and the relations between the two brothers became very strained.

In the year 1917, at the celebration of the Ganesh Chaturthi festival, Mahomedkhan was last seen alive in the village. He had pains in the stomach, for which he proposed to go to the neighbouring village of Kalgutgi. He persuaded one Bussia to accompany

(1) (1878) 4 Cal. 483.

(2) (1913) 38 Bom. 156 at p. 176

him, but Bussia changed his mind, and Mahomedkhan started alone on the morning of the 25th September 1917. Mahomedkhan never returned to his village.

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Before Mahomedkhan left, he had asked one Day Munna to keep watch over his bin of rice.

Shortly after Mahomedkhan's disappearance the accused Sabitkhan opened his brother's bin of rice, and took from it rice for himself. He was accosted by Day Munna, but he asked Day Munna to mind his own business. The accused was also seen taking rice from the bin two or three times and giving it away to two persons Honya and Umya.

Three months after the Ganesh Chaturthi festival, the accused informed one Bhoojang, a shop-keeper in the neighbouring village of Kirvatti, that Mahomedkhan had gone to Miraj for treatment.

The accused demanded payment of rents from Mahomedkhan's tenants when it was time for them to pay rents.

About that time, the Ranger under whom the accused was working as a coolie heard a rumour that Mahomedkhan had disappeared. He went to Alkeri to inquire about the disappearance. He sent for the accused who informed him that Mahomedkhan had gone to Miraj for treatment. He also inquired if the accused had received any letter from his brother; but was told that no letter had come.

After this, the accused received a letter through post purporting to come from Mahomedkhan. The letter asked the accused to collect rents from Mahomedkhan's tenants and to pay Government assessment. It also added that if the writer wanted money he would write to the accused about it.

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The muster-roll kept by the Forest Department showed that the accused was absent from his work on the 25th September 1917 and for some days thereafter.

Bussia, who was asked by Mahomedkhan to accompany him to Kalgutgi, stated that at first he was ready to accompany Mahomedkhan, but he was dissuaded by the accused from undertaking the trip. He stated further that on the morning of the 25th September 1917, he saw the accused, accompanied by Honya and Umya, starting half-an-hour earlier by the same road which Mahomedkhan took later.

The Ranger, who made enquiries of the accused, had his suspicions aroused about Mahomedkhan's fate. He set the Police in motion, with the result that the accused, Honya and Umya were arrested.

Honya and Umya made detailed confessions of their guilt. They stated that they and the accused waited for Mahomedkhan in a forest near Alkeri. When they saw him coming near them, the accused first went up to him and gave him a blow across his shoulders. Mahomedkhan fell down, when the accused took the help of Honya and Umya and finished him. At first, Mahomedkhan's body was buried in a pit dug close by the road; but afterwards fearing that the stench might reveal the murder the three persons exhumed the body and buried it in a pit at a considerable distance from the road. In the second pit, the remains of human bones were found. The confessions were first made before the Sub-Divisional Magistrate, and were later repeated before the Committing Magistrate. Before the Sessions Court, however, they were retracted. Sabitkhan made no confession and maintained that he was innocent.

The three accused were tried together at one trial by the Sessions Judge of Kanara. The learned Judge

convicted Honya and Umya on their own confessions and sentenced them to transportation for life.

As regards Sabitkhan, the learned Judge was of opinion that the confessions of the co-accused were not so far corroborated as to the identity of Sabitkhan as to support his conviction. He, therefore, acquitted the accused on the following grounds:—

Against accused No. 1 the evidence is exactly the same as the evidence against his hirelings. But the use which can be made of it is not the same. A man may be convicted upon his own retracted confession. But a man must not be convicted upon the retracted confession of an accomplice. Before acting upon such a confession (I am quoting the words of Mr. Justice Shah, which will be found in 15 Bom. L. R. 933) "a Court should insist upon independent corroboration from other evidence particularly as to identity".

This requirement is not made by the Statute law. It is a rule of practice laid down by the High Court and the High Court claims that it is clearly entitled to lay down rules which deserve all the reverence of law.

This case manifestly comes within the rule laid down in *Queen-Empress v. Khandia bin Pandu*⁽¹⁾ and recently re-affirmed in *Emperor v. Gangappa Kardeppa*⁽²⁾.

I am to see, therefore, whether the confessions of the two other accused are in this case corroborated by independent evidence from other sources, particularly as to identity.

That the confessions are well confirmed from another source than the speakers is, I think, beyond dispute. The corpse was found where the confession-makers said it would be found. But this confirmation is not confirmation as to identity. The discovery shows that in other respects the speakers were speaking the truth. But it does not show that they were speaking the truth when they say "Besides ourselves, Sabit was much engaged in this murder."

Is there anything which does confirm this part of what they say? Sabit was known to have a grudge against his elder brother. On the morning when the brother was last seen alive, he so arranged that the murdered man might go into the ambush alone. He was absent from his employment on the 25th September. He was seen to go with the two confessing prisoners into the forest just before the murder. Not long after the murder he was seen to give to his hirelings grain from the murdered man's granary. He endeavoured to possess himself of the murdered man's property.

(1) (1890) 15 Bom. 66.

(2) (1913) 38 Bom. 156.

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Can it be said that any of these facts, or all of them, afford such confirmation as the High Court's Rule requires? If I answered "yes" I should, I think, be frittering away the rule in a case which manifestly comes under it. But I accept the rule broadly and honestly; and, in so doing, I think myself bound to answer "no".

The true effect of the rule in question is laid down by Jenkins, Chief Justice, in these words. I am quoting from *Emperor v. Lalit Mohan Chuckerbutty* (1). "The Court can only treat a confession as lending assurance to other evidence against a co-accused". That is to say, the other evidence must afford a basis broad enough and firm enough to sustain a conviction, if the superstructure be steadied by some adventitious and subsidiary prop.

What is, in this case, the other evidence?

First, Bussia says he saw accused No. 1 going in company with accused No. 2 and accused No. 3 on the morning after the Waunsha festival. Now, I have no reason to disbelieve Bussia. His word may be as trustworthy as my own memory. But if my own memory suggested to me that I had casually seen three acquaintances together one day six months ago; and that that day was the 25th September, I would not trust my own memory very far, unless there happened to be some impressive concomitant circumstance. In this case there was no such circumstance. It was not till long afterwards that it began to be believed that those three men were then upon the way to murder Mahomed. I cannot build much upon Bussia's testimony.

Then there is the muster-roll which shows that on 25th September Sabit was absent from his usual employment. But such absence has frequently been held to be a fact incapable of sustaining any important inference. It is like a mathematical symbol, the effect of which depends entirely upon the "sign". Had the sign been positive; had it been proved that Sabit was at his work that day, the fact would be important. But the sign is negative. Sabit was not there. From a negative premiss no positive conclusion can be drawn.

Next comes the fact that, after Mahomedkhan had disappeared for some time, his brother sought by insidious means to be accepted as the heir. But this is a thing which Sabit might very well have done, even if he had no notion what had become of his brother. For a long time he had put forward a pretension to some part in his brother's property. The brother disappeared. Sabit asserted his pretensions more boldly than before. What inference can be drawn? That Sabit must have murdered his brother? Surely not.

On the facts that Sabit had long had a grudge against Mahomed and that he dissuaded Bussia from bearing Mahomed company, the same sort of comment can be made. These things are all consistent with the truth of the confessions. In some sort and to some extent they support the confession. So do Cuba and Hayti support the United States of America, when they also declare war against a common enemy. But it is not enough that the other evidence should support the confessions. It is the confession which must support the other evidence. The words of Chief Justice Jenkins will not allow the confessions to bear the bulk of the burden. The other evidence must preponderate over the confessions.

That in the present case the confessions are true, I must of course believe, or I could not convict the two accomplices.

But since the confessions are not confirmed in the manner which the High Court requires, I must differ from both my assessors and acquit the first accused.

The Government of Bombay appealed to the High Court against the order of acquittal.

The appeal was at first heard by a Division Bench composed of Heaton and Shah, JJ., but their Lordships having differed in opinion delivered the following judgments:—

HEATON, J.:—Three men were tried for murder by the Sessions Judge of Kanara with assessors. He convicted two of them, accused Nos. 2 and 3, and acquitted Sabitkhan *valad* Bahadurkhan who is accused No. 1 in the case. The convicted accused appealed and their appeals were dismissed by this Court some time ago. The Government of Bombay have appealed against the acquittal of Sabitkhan and that is the appeal now before us.

My learned brother and myself are unable to agree as to the disposal of this appeal and therefore the matter will, as required by section 429 of the Criminal Procedure Code, have to be laid before another Judge of this Court,

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In dealing with the appeal against the acquittal we have to consider the evidence in the case, and there are also confessions made by accused Nos. 2 and 3. On the strength of that evidence and those confessions and also the decision of this Court in the appeals of accused Nos. 2 and 3, there is no doubt that those accused did take part in the murder of Mahomedkhan. If we assume that Mahomedkhan was murdered shortly after leaving his village of Alkeri on or about 25th September last by accused Nos. 2 and 3 and possibly one or more others, and if we then believe all the circumstances deposed to by the witnesses, it follows as a natural though not perhaps as an inevitable inference that Sabitkhan also took part in the murder. But for this we must believe all the incidents deposed to.

These incidents are set out by the Sessions Judge as follows :—

“Now this Mahammad was a bachelor; but he had a younger brother, named Sabitkhan, who had a wife and family and was penniless. This Sabitkhan conceived himself to have a claim upon the generosity and good offices of his elder brother; and this claim he urged with importunity, both in season and out of season.

“Mahomedkhan did not take the same view of an elder brother's obligations. It was his opinion that Sabitkhan should earn his own living and he asked the Ranger to give the same advice.

“Many of the villagers have heard the brothers quarrel.

“Last year the feast of *Ganesh Chaturthi* came to an end upon the 24th of September. It was at this feast that Mahomedkhan was last seen alive. The man

was then in poor health. He intended to go to Kalgutgi for a cure ; and he invited one Bussia (Exhibit 8) who was thought to be suffering from the same malady, to bear him company.

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“ Bussia was willing and he agreed to go. But that same evening Sabitkhan sought out this Bussia and dissuaded him from the undertaking. ‘I myself will fetch you physic’ said Sabitkhan : and Bussia, willing to be spared the labour of a long journey, renounced his project, and allowed Mahomedkhan to take the road alone. This Bussia saw Sabitkhan who is the first accused going next morning along the road which Mahomedkhan was to take and with him went the other two prisoners. Half an hour later he saw Mahomedkhan go the same way. Mahomedkhan was never seen alive again. It is a lonely road.

“Time went on: and Mahomedkhan did not return. He had been expected in a few days ; but neither he came nor any word of him. But Sabitkhan opened his granary ; and he was seen two, three or four times giving grain to his two fellows, accused Nos. 2 and 3. Juncu saw him do this (Exhibit 9) ; and so did Day Munna. Now Day Munna had been asked by Mahomedkhan to keep an eye upon that grain ; and accordingly he asked of Sabitkhan what he was doing with that rice. But Sabit bade him mind his own business (Exhibit 10).

“ When the time came for the tenants to pay their rents, Sabitkhan began to demand that these payments should be made to him. But the tenants had never been used to pay Mahomedkhan’s rents to Sabit ; and they had no mind to begin. They asked of Sabit by what authority he made these demands ; and bye-and-bye there came for Sabit a letter, which was read for him by Anant Paund Pie. This letter purported

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to be an authority to Sabit to collect rents ; but it was neither dated nor signed ; and it was not in the handwriting of Mahomedkhan.

“ Anant Paund Pie knows the writing of Mahomedkhan, and he had very grave doubts of that letter. He asked the Postmaster to examine the post-mark, but the mark was indecipherable.”

To accept all this is to put something of a strain on one's powers of belief ; for though there is no reason to suspect concoction of evidence in this case or to suppose that the witnesses are consciously untruthful, one must be reasonably cautious. No doubt the villagers of Alkeri came to suspect Sabitkhan and that suspicion would colour what they recollected of his doings. For this reason, for example, the witness Bussia might in his recollections confuse the day Mahomedkhan was last seen alive, with some other day on which he had seen the three accused, or three men he came to believe were the three accused, go together into the forest. Similarly he might attribute too much importance to some innocent opposition by Sabitkhan to a suggestion that Bussia should accompany Mahomedkhan. Then recollection of the contents of a letter is a notoriously uncertain thing ; so far too much may be made by the Postmaster and Anant of the letter that came for Sabitkhan.

Nevertheless the hypothetical jury we are so fond of appealing to, might convict Sabitkhan on this testimony. The Sessions Judge, however, would not ; nor, so far as I can judge, would I myself. But accused Nos. 2 and 3 in their confessions both implicated Sabitkhan in the murder. Does that make any difference ? As a matter of appreciation of evidence it certainly may do. When I myself read these confessions, two of which were made before the Committing Magistrate and two at an earlier stage, and compare and consider

them and take them together with the evidence, I arrive at a positive conviction that Sabitkhan did join in the murder. The two assessors in the case and also the Sessions Judge arrived at the same conclusion.

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But the latter felt himself to be bound as a matter of law to acquit Sabitkhan because the conclusion that he was really guilty was based to too great an extent on the confessions of the co-accused. For my own part I think he was wrong ; though I quite see the force of the Sessions Judge's reasoning. To me it seems that the matter stands thus. The rule is that a man is not to be convicted solely on the confessions of co-accused persons ; and it follows that he must not be convicted on such confessions together with evidence of the ordinary kind which is trivial or unimportant. For so to convict him would be in reality to disregard the rule. But in this case we have, apart from the confessions, a body of evidence and circumstances enough to support a conviction, if the evidence is accepted as free from untruth or exaggeration or serious mistake or distortion. Therefore we are entitled to take the confessions into consideration and in doing so we must consider together the evidence, the circumstances and the confessions. We should not, it seems to me, divide the material into compartments and say the confessions of themselves are insufficient, the evidence is not altogether convincing and therefore we must acquit. It is not as I look at it a case of the weakest link in a chain.

Dealing with all the material before us the position to my mind is this ; the hypothesis that Sabitkhan designed and joined in the murder explains everything. There is not a single circumstance apparent which it fails to explain. This hypothesis also is not confronted with any serious difficulties. It is not against the probabilities. The evidence and confessions do not bear

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the impress of falseness. Then there is no alternative hypothesis which so completely and convincingly explains matters. This cannot be a case of mistaken identity. It is not in my judgment, a case in which malice has been at work and has fabricated or distorted the evidence. The only possible alternative hypothesis, so far as I can see, is that suspicion has caused the witnesses unconsciously to distort or exaggerate circumstances innocent in themselves, and that it is possible that the confessing co-accused have introduced the name of Sabitkhan in order to lighten their own responsibility. This hypothesis I find myself unable to regard as one for which any fair basis can be found in the known circumstances of the case.

Therefore I think the accused Sabitkhan should be convicted of murder. The appropriate sentence would be death, but when one Judge of this Court is not satisfied, though two Judges are satisfied of a man's guilt, the lesser sentence of transportation for life may, in my opinion, be properly imposed.

SHAH, J. :—This is an appeal by the Government of Bombay against the acquittal of Sabitkhan *valad* Bahadurkhan, who was accused No. 1 in the trial Court. He was tried along with two others by the Sessions Judge of Kanara with the aid of assessors on a charge of murder. The charge was that all the three accused murdered the deceased Mahomedkhan on or about the 25th September 1917 at about 8 or 9 a.m. at Alkeri in the jungle.

The assessors were of opinion that all the accused were guilty. The learned Sessions Judge agreed with them as to accused Nos. 2 and 3 and accordingly convicted them and sentenced them to transportation for life. He, however, felt himself constrained to differ from them as to accused No. 1, whom he acquitted.

The appeal by accused Nos. 2 and 3 to this Court against their convictions was summarily dismissed in August last.

The question in this appeal from acquittal is whether accused No. 1 is proved to be one of the murderers.

The case for the prosecution is that the relations between the two brothers, accused No. 1 and the deceased Mahomedkhan, were considerably strained, and that with a view to secure the property of Mahomedkhan accused No. 1 arranged to obtain the assistance of accused Nos. 2 and 3 and that all the three murdered him on the morning of the 25th September 1917, while he was going alone on the way from Alkeri to Kirvatti. Mahomedkhan had no wife and no children. He owned lands in Alkeri and was a man of means. His brother accused No. 1 had a wife and children. He used to work as a coolie in the Forest Department not with regularity; and he had no other means of livelihood. He used to ask Mahomedkhan to help him; but the latter expected him to work and earn his livelihood and would not help him. On this account their relations were strained. They lived separately at Alkeri. Mahomedkhan did not return to the village; and some days after the 25th September accused No. 1 commenced to meddle with the property of his brother, apparently made no inquiry about him, and gave unsatisfactory and evasive answers as to his whereabouts. He received a letter sometime in February in 1918, which was supposed to have been written to him by his brother. Ultimately, on the 31st March the Range Forest Officer informed the Police Sub Inspector, who arrived on the scene on the 1st April when he found accused Nos. 2 and 3 ready to point out the place where the dead body of Mahomedkhan was buried and to confess. The Sub-Inspector wrote to the Magistrate

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and Mamlatdar of Yellapur, who arrived on the 2nd April. The accused Nos. 2 and 3 pointed out the place where the dead body of Mahomedkhan was buried, and confessed that they and accused No. 1 had murdered him. All the accused were arrested on the 2nd April. The confessions of accused Nos. 2 and 3 were recorded on the 3rd April; and they adhered to the confessions in their statements before the committing Magistrate on the 26th April. They retracted their confessions and previous statements at the trial before the Sessions Court. The result of the trial is already stated:

It is not disputed now, and it is indisputable that Mahomedkhan was murdered; and it must be taken for the purpose of this appeal that accused Nos. 2 and 3 were concerned in the murder.

The learned Sessions Judge reluctantly acquitted the accused No. 1 as the evidence outside the confessions of the co-accused was weak as regards him, and as his conviction could not be based principally on the confessions of the co-accused.

On a consideration of the evidence in the case and the confessions of the co-accused, I am of opinion that the conviction of accused No. 1, if at all, must rest principally upon the confessions of the co-accused. I think such a conviction would be neither legal nor proper. I do not consider it necessary to discuss in this appeal the value of the confessions of the accused as matter which may be taken into consideration against the co-accused under section 30 of the Indian Evidence Act. I have stated my opinion with reasons in *Emperor v. Gangappa Kardeppa*⁽¹⁾ on that point. It will serve no useful purpose to repeat the same here. I only desire to state that the limitation laid down as to the use to be made of the confessions of the accused against a

(1) (1913) 38 Bom. 156.

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co-accused is not created by the High Courts, but is based upon what they hold to be the true meaning of the provisions of the Indian Evidence Act, and, if I may respectfully add, upon sound sense. The rule, as I understand it, requires that before acting upon such confessions the Court should insist upon independent corroboration from other evidence in the case in material particulars, particularly as to the identity of the accused. If this rule be applied properly, personally I do not think that there would be any practical difference in the result whether the rule be accepted in the form in which I have stated it, or whether it is taken to be, as stated by Jenkins, C. J., in *Emperor v. Lalit Mohan Chuckerbutty*⁽¹⁾ that "the Court can only treat a confession as lending assurance to other evidence against a co-accused." But whether that is so or not, I am willing to take the rule in the form more favourable to the prosecution under the circumstances of this case, and to consider whether the other evidence in the case affords such independent corroboration.

I also take it that there is no rule as to what would constitute sufficient independent corroboration in a particular case. That must depend upon the circumstances of that case. I desire to refer, however, to two considerations at the start: first the evidence, which is supposed to afford independent corroboration, must be in itself reliable and not doubtful evidence, which is treated as reliable in consequence of the confessions; otherwise it will not be independent corroboration. Secondly, the value of the confessions of the accused against a co-accused, when those confessions are retracted at the trial, is very low as pointed out in *Yasin v. King Emperor*⁽²⁾ and in *Lalit Mohan's case*⁽¹⁾ at p. 588 of the report.

(1) (1911) 38 Cal. 559 at p. 588

(2) (1901) 28 Cal. 689 at pp. 690-691.

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I shall now deal with the evidence. It is urged for the Crown that the following circumstances afford independent and sufficient corroboration to the confessions of the co-accused in this case :—

(1) that the accused No. 1 dissuaded the witness Bussia from accompanying the deceased on the morning of the 25th September, though the witness had agreed in the first instance to go with the deceased to Devikop for treatment ;

(2) that accused No. 1 was seen going with accused Nos. 2 and 3 that morning on the same path followed by the deceased a short time after ;

(3) that the accused was on terms of enmity with his brother and in need of money and had a motive in getting rid of his brother ; and

(4) that his subsequent conduct in dealing with the property of the deceased, in failing to make any inquiry about him, in giving evasive and unsatisfactory replies and in receiving a letter, which must have been a forged letter purporting to have been written by his brother, indicates a guilty knowledge of his brother's murder.

As regards the first two circumstances, they depend entirely upon the evidence of Bussia. His evidence is important. The learned Sessions Judge did not consider it safe to rely upon this evidence. I consider it unsafe to rely upon his testimony for the following reasons :—In the first place, he is speaking of incidents which took place nearly six months before he first mentioned these matters to any one ; and the incidents in themselves are so ordinary that he would not be expected to remember them. Secondly, he does not appear to me to be a witness who can be credited with anything like clear and reliable memory ; he mentions his age as 8 or 9 when he is probably 25 years old.

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Thirdly, it does not appear from the record as to when and how this evidence came to be known to the investigating officer for the first time, which is a matter of importance under the circumstances. Lastly, he does not appear to have asked the accused No. 1 for the cure which he is said to have promised to procure for him at the time of dissuading him, nor does he appear to have shown any concern for a long time after the disappearance of Mahomedkhan even though, if his evidence were true, he would be clearly interested in knowing whether the treatment, which he at one time wanted to have, had done Mahomedkhan any good. I must, therefore, hold that the first two circumstances relied upon as affording an independent corroboration to the confessions are not proved.

The other circumstances relating to motive and conduct, generally speaking, are proved. There is reliable evidence that the relations of the two brothers were strained, and that the accused No. 1 was in needy circumstances. As regards the subsequent conduct, though I regard the details with some suspicion, broadly speaking, the conduct attributed to him is proved. But it is easy to overrate its importance. It is the conduct of a callous and indifferent brother but not necessarily the conduct of a murderous brother. As to the letter, his conduct would be much the same if any enemy had sent him a letter of that kind or if any person interested in tracing the whereabouts of Mahomedkhan had written to him with a view to see what use he would make of the letter. Apparently he did not use the letter in any way. I am not satisfied that the circumstances justify our treating the accused to be a man of such intelligence as to be able to resort to a plan which requires so much forethought and cleverness. I have not thought it necessary to discuss the evidence on this point in detail, as taking it at its best

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I am satisfied that the evidence as to motive and conduct affords neither independent nor sufficient corroboration to the confessions. It is independent in the sense that it is proved by evidence outside the confessions; but the facts connected with the motive and conduct generally would be known in the village and to the people at Kirvatti who knew the two brothers; and if any one was interested in getting accused Nos. 2 and 3 to mention the name of accused No. 1 falsely or if for any reason accused Nos. 2 and 3 were inclined to mention his name falsely, this knowledge is just the thing which would render the inculcation of accused No. 1 easy. It would be plausible and apparently credible to state that accused No. 1 was concerned in the murder. Accused Nos. 2 and 3 knew Mahomedkhan well and as they were the murderers they would know the whole story generally; and under the circumstances the inculcation of accused No. 1, even if incorrect, would be easy. It is because a false inculcation is easy, that the need for closely examining the nature of circumstances affording independent corroboration is great. It is obvious that it would not be insisting upon independent corroboration to treat matters of such common knowledge among the persons concerned as affording that kind of corroboration. In the present case the evidence as to the investigation is rather meagre or at any rate not full. We do not know as to how and when accused Nos. 2 and 3 were found ready to confess. Apparently Nos. 2 and 3 were found by the Sub-Inspector ready to give out the whole story. The Range Forest Officer says that he first heard the rumour that accused Nos. 1 and 2 and another had murdered Mahomedkhan on the 30th March. Thus we do not know when and to whom accused Nos. 2 and 3 first mentioned the name of accused No. 1, and who gave the information to the Range Forest Officer that accused Nos. 1 and 2 and another were the murderers.

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Thus the circumstances under which the name of accused No. 1 came to be mentioned by accused Nos. 2 and 3 are left in obscurity. It would be very unsafe to treat the facts proved as to motive and conduct as an independent corroboration. Even treating it as affording some corroboration I do not think it is sufficient under the circumstances.

It is true that the proved circumstances in the case are consistent with the guilt of accused No. 1; they may create a certain amount of suspicion against accused No. 1; but they do not prove anything as to his participation in the crime. It may be that the accused No. 1 was concerned in the murder; but that is obviously insufficient. I have to consider whether it is proved that he was so concerned. I am of opinion that the confessions of the co-accused are not sufficiently corroborated by independent evidence; and the conviction of accused No. 1 must, therefore, rest, if at all, principally upon the confessions of the co-accused. I am clear that such a conviction would not be legal, and that in any event it would not be proper.

I doubt whether the assessors could realize the limitation, subject to which the confessions could be used against a co-accused; and it does not appear whether the learned Sessions Judge had explained the point to them. I am, therefore, unable to attach that weight to their opinion which I would do in an ordinary case.

The learned Sessions Judge has rightly apprehended the rule as to the value of the confessions of the accused against a co-accused and has fairly applied it in appreciating the evidence.

I am not concerned with his other observations which do not touch the conclusion in any way, but which may have a bearing upon the question whether the rule, which he felt himself bound to follow, ought to exist or not.

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There is only one point to which I may properly refer. While speaking of an appeal against acquittal, the learned Sessions Judge has referred to the possibility of this Court ordering a retrial in order that accused Nos. 2 and 3 may be examined as witnesses now. The learned Government Pleader has not asked for a retrial. In my opinion, there is no reason whatever to order a retrial. The trial was valid and proper. It was open to the Crown, if so minded, to have secured the examination of accused Nos. 2 and 3 as witnesses by asking for the separate trial of accused No. 1 at the proper time. The joint trial was not objected to; and the trial Court apparently did not think that in the interests of justice a separate trial was necessary.

I would, therefore, dismiss the appeal.

OWING to this difference of opinion, the case was heard by Scott, C. J., on the 24th and 25th February 1919.

S. S. Patkar, Government Pleader, for the Crown :—
For the purpose of conviction against accused No. 1, I would rely not only on the confessions of co-accused Nos. 2 and 3, but also on other independent evidence in the case which would sufficiently go to show that accused No. 1 is also guilty of murder. The independent evidence is : (a) that of ill-feeling between accused No. 1 and his deceased brother Mahomedkhan, Exhibits 9, 11, 13; (b) that ten or fifteen days after the murder, accused No. 1 began to meddle with the property of the accused; (c) that accused No. 1 admitted having received a letter which purported to have been written by his deceased brother and which authorised the accused to collect rents from the tenants of the deceased. When asked about this letter he says it was torn; (d) that the evidence of one Bussia (Exhibit 8) shows that accused No. 1 dissuaded Bussia

from accompanying the deceased to Kalgutgi where the deceased intended to go for a cure and that on 25th September 1917 he saw co-accused Nos. 2 and 3 going in company with accused No. 1 to Kirvatti and deceased following them on the same road shortly afterwards. Co-accused Nos. 2 and 3 are now held to have murdered the deceased on that day while going by that road; (e) the accused was absent from his duty on the 25th September and thereafter.

Apart from the evidence, there are also the confessions of co-accused Nos. 2 and 3 to prove the complicity of the accused No. 1 in the murder. All the three accused were jointly tried and the confessions made by accused Nos. 2 and 3 which implicate also accused No. 1, can be taken into consideration not only against accused Nos. 2 and 3, but also against accused No. 1: see section 30 of the Indian Evidence Act.

Shah, J., is of opinion that unless materially corroborated a confession of a co-accused cannot be taken into consideration. I submit that the wording of section 30 is "may take into consideration" and though it may not be materially corroborated there is nothing in law to prevent the Court from taking into consideration a confession of a co-accused.

[SCOTT, C. J.:—Why should not the Court presume that the statement of an accomplice is unworthy of credit unless corroborated in material particulars. See section 114, ill. (b) of the Indian Evidence Act.]

The case of an accomplice stands on a different footing from that of an accused person. An accused person would not inculpate himself unless the confession was true. If any guarantee of its being true is necessary, it is in the inculpation of the maker himself along with the inculpation of co-accused. In the case of an accomplice even that guarantee would be wanting.

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Shah, J., further makes a distinction between a retracted confession and a confession which is not retracted. According to him the value of a retracted confession is very low and for this opinion he relies on *Yasin v. King Emperor*⁽¹⁾ and *Emperor v. Lalit Mohan Chuckerbutty*⁽²⁾. I submit there is no difference between a retracted and an unretracted confession. When a confession is once proved, it is good for all purposes and may be taken into consideration: see section 30 of the Indian Evidence Act. It does not matter whether it is subsequently retracted or not. In *Emperor v. Gangappa Kardappa*⁽³⁾, Macleod, J., has pointed out that confessions referred to in section 30 cannot be restricted to unretracted confessions. Retracted confession is treated on the same footing as unretracted confession: *Queen-Empress v. Tanya*⁽⁴⁾.

The learned Sessions Judge is of opinion that the other evidence must afford a basis broad enough and firm enough to sustain a conviction. If the other evidence is sufficient to sustain a conviction, then the confessions of co-accused would be superfluous.

The confessions of the co-accused supply just such corroboration of the circumstantial evidence and probabilities and other evidence in the case as is necessary to sustain a conviction.

S. V. Palekar, for the accused:—I submit that the evidence outside the confessions of the co-accused is weak as regards accused No. 1. Both the Sessions Judge and Shah, J., do not accept it. Under the circumstances the conviction of accused No. 1 would depend principally upon the confessions of the co-accused Nos. 2 and 3. It would be dangerous to convict this accused on the confessions of the co-accused, first, because these confessions were retracted

(1) (1901) 28 Cal. 689.

(2) (1913) 38 Bom. 156 at p. 175.

(3) (1911) 38 Cal. 559 at p. 588.

(4) (1890) Ratanlal's Cri. Cas. 510.

at the trial and therefore their value as evidence is very low: *Yasin v. King Emperor*⁽¹⁾ and *Emperor v. Lalit Mohan Chuckerbutty*⁽²⁾.

Secondly, before acting upon the confessions of the co-accused the Court must be satisfied that the confessions were corroborated in material particulars by other evidence in the case, particularly as to the identity of the accused. This is the test laid down by the Bombay High Court in *Emperor v. Gangappa Kardeppa*⁽³⁾. According to the test laid down by the Calcutta High Court "the Court can only treat a confession as lending assurance to other evidence against a co-accused;" these words evidently show that the burden of proof must be principally borne by the other evidence in the case and the confessions can only be made use of for the purpose of raising its probative value in such a way that both together may sustain a conviction; *Emperor v. Lalit Mohan Chuckerbutty*⁽²⁾. Here the probative value of the other evidence is not worth much and therefore the conviction must stand only on the confessions of the co-accused Nos. 2 and 3. As to the nature of corroboration needed: see *The Queen v. Mohesh Biswas*.⁽⁴⁾

C. A. V.

SCOTT, C. J.:—The case against the accused is that in concert with Honya and Umya he murdered his brother Mahomedkhan on or about the 25th September 1917 about 8 or 9 in the morning in the forest near Alkeri in Kanara. Honya and Umya were tried jointly with the accused by the Sessions Judge of Kanara and two assessors. Honya and Umya were found guilty upon their own confessions, but the accused

(1) (1901) 28 Cal. 689.

(3) (1913) 38 Bom. 156.

(2) (1911) 38 Cal. 559 at p. 588.

(4) (1873) 19 W. R. (Cr.) 16.

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Sabitkhan was acquitted, and the Government of Bombay have appealed against his acquittal.

The evidence before me is that which was recorded by the Sessions Judge at the joint trial. It establishes that Mahomedkhan was the owner of the most of the land and houses, only 8 or 9 in number, in the village Alkeri which is situated less than a mile and a half from Kirvatti, Kirvatti being on the main road from Yellapur to Kalgutgi, and about 12 miles from the latter place. The relations between Sabitkhan and Mahomedkhan, the deceased, were very strained. Mahomedkhan had neither wife nor children, and was not disposed to support his brother Sabit and his family. Sabit consequently was obliged to work as a cooly in the Forest Department, and was continually importuning the deceased for assistance which was continually refused, and although the two brothers lived in the same building they did not associate and all their intercourse was unfriendly. On or about the 24th of September 1917 the deceased who was suffering from pains in his stomach decided to go to Kalgutgi for treatment and requested a neighbour named Bussia in the presence of another inhabitant of Alkeri named Day Munna to accompany him as Bussia was also suffering from pains in the stomach. On the 25th of September the deceased left Alkeri in the morning alone. At all events, he was never seen after that time at Alkeri. He had left a bin of rice in front of his house upon which he had asked a neighbour Day Munna to keep an eye saying he would be back in a few days. About a fortnight after his departure the accused began to make free with the grain. When Day Munna asked him what he was doing with the rice Sabit asked what business it was of his. According to witness Juncu, Sabit said when asked that Mahomedkhan would not be back soon and on several occasions gave rice from

the bin to Honya and Umya, the convicts at the first trial. Three months after the Ganesh Chaturthi, the accused told Boojang, a shop-keeper of Kirvatti, that Mahomedkhan had gone for medical treatment to Miraj. He began after the crops had been got in to ask the tenants of Mahomedkhan to pay their rents to him. Four months after the departure of Mahomedkhan, namely, on the 4th of February 1918, the Ranger of the Forest having heard that Sabit was trying to collect the rents of Mahomedkhan sent for him and asked him if he had heard from Mahomedkhan and what had become of him. He replied that Mahomedkhan had gone to Miraj and that no letter had come. Later in February at Kirvatti when postmaster Wycunt delivered him a letter in the presence of Anant, a shop-keeper, Sabit tore it open and asked Anant to read it to him. Both Anant and Wycunt depose to the contents of the letter. Their versions are not verbally identical, but are to the same effect. The letter which was unsigned and undated purported to come from Mahomedkhan from Belgaum, and stated that he was getting better and proposed to go to Miraj. It directed Sabit to collect the rents and pay the assessment and said that if Mahomedkhan wanted money he would let Sabit know. The letter was returned to Sabit. Three of the witnesses who lived at Alkeri deposed to Sabit demanding rent from them and stating that he had a letter from Mahomedkhan. At the end of March the convicts Honya and Umya disclosed a spot in the forest between Alkeri and Kirvatti in which the remains of Mahomedkhan were buried. It was found that his ribs had been broken. Bussia of Alkeri, who has already been mentioned in connection with Mahomedkhan's proposed journey to Kalgutgi, stated that he had been persuaded by Sabit not to go with Mahomedkhan, and that on the day following, i.e., the 25th September,

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he had, while driving cattle towards Kirvatti near the village tank, seen Sabit together with the two other accused taking the path from Alkeri to Kirvatti, and half an hour later had seen Mahomedkhan take the same path. The muster-roll kept by the Forest Officer shows that Sabit was absent from his work on the 25th and following days of September. The learned Judge says he has no reason to disbelieve Bussia, but he doubts if Bussia could remember exactly the day on which he saw Sabit and the two convicts go along that path, because there was no impressive concomitant circumstance. There is no doubt that Mahomedkhan never went to Belgaum and never reached Kalgutgi and that the letter opened by Sabit in Kirvatti is a false document which might explain the absence of Mahomedkhan and justify Sabit's attempts to collect his rents. If there were no other evidence in the case, and if the evidence of Bussia were discarded, it seems to me there would still be a strong case of suspicion against Sabit as being concerned in the murder of Mahomedkhan.

The Sessions Judge, however, had before him not merely this evidence, but also the detailed confessions of Honya and Umya (who had reasons for disliking Mahomedkhan) who state that Sabit participated with them in the murder of Mahomedkhan and engaged their services on a promise of payment in grain, and that the body was buried with a spade provided by Sabit, the spade which was found in Sabit's house after the confession. These confessions must be taken into consideration against Sabit according to the provisions of section 30 of the Indian Evidence Act. But the learned Judge seems to have been afflicted by a certain paralysis of his judicial faculty owing to a perusal of reported cases which lay down that a man should not be convicted upon the uncorroborated confession of his

co-accused, and reading these cases in conjunction with an observation occurring in the judgment of the Calcutta Court in the case of *Emperor v. Lalit Mohan Chuckerbutty*⁽¹⁾, to the effect that "the Court can only treat a confession as lending assurance to other evidence against a co-accused", he considers himself unable to make use of the confessions at all, because there is not a perfect enough case against the accused without them, although as he states he has no doubt whatever that the accused committed the murder. He puts it thus: "It is not enough that the other evidence should support the confessions. It is the confessions which must support the other evidence which 'must afford a basis broad enough and firm enough to sustain a conviction, if the superstructure be steadied by some adventitious and subsidiary prop', such as the confessions." The learned Judge in the above quotation from *Lalit's Case*⁽¹⁾ has omitted the concluding words: "Thus to illustrate my meaning, in the view I take, a conviction on the confession of a co-accused alone would be bad in law." The rule which the learned Judge conceives to be binding on him is affirmed by Jackson, J., in *The Queen v. Chunder Bhattacharjee*⁽²⁾ in this form "that when as against any such person there is evidence tending to his conviction, the truth or completeness of this evidence being the matter in question, the circumstance of such person being implicated by the confession of one of those who are being jointly tried with him, should be taken into consideration as bearing upon the truth or sufficiency of such evidence." It is also affirmed in the judgments of Jackson and McDonell, JJ., only out of the Full Bench of five Judges in *Empress v. Ashootosh Chuckerbutty*⁽³⁾ where the third question referred was "whether such a confession made

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(1) (1911) 38 Cal. 559 at p. 588. (2) (1875) 24 W. R. (Cr.) 42 at p. 43.

(3) (1878) 4 Cal. 483 at pp. 487, 491.

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by one such person may be used as the basis of proof of the offence charged as against the other, and, if corroborated, may sustain a conviction; or whether it is necessary, in order to sustain a conviction, to use such confession only as itself corroborative of other independent evidence?" The answer of the Chief Justice to this question was: "If the confession is corroborated by other evidence, I do not think it matters whether, in proving the case at the trial, the confession precedes the other evidence, or the other evidence precedes the confession. The course of proof in each case is a question of convenience for the prosecution; and they have a right to bring forward the evidence in any order they may think fit."

This question has not, so far as I am aware, been considered in any Bombay case. The passage from the judgment in *Lalit's Case*⁽¹⁾ is only quoted by Shah, J., in *Emperor v. Gangappa Kardeppa*⁽²⁾ in support of the conclusion that 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 propose to take the judgment of Garth, C. J., in *Empress v. Ashootosh Chuckerbutty*⁽³⁾ as a correct statement of the law; it gives effect without qualification to the words of section 30 that "the Court may take into consideration such confession as against such other person as well as against the person who makes such confession."

The question here is not as in *Emperor v. Gangappa Kardeppa* whether the Court may convict solely on the confession of a co-accused. The Sessions Judge has not done so, nor have either of the High Court Judges whose difference has led to this reference.

⁽¹⁾ (1911) 38 Cal. 559 at p. 588. ⁽²⁾ (1913) 38 Bom. 156 at p. 167.

⁽³⁾ (1878) 4 Cal. 483.

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The question is rather one of appreciation of evidence. I have to consider whether on the facts established there is corroboration of the story of the confessing co-accused so far as it affects Sabit. I will only make this further remark with regard to *Emperor v. Gangappa Kardeppa*,⁽¹⁾ that I think Macleod, J., went too far when he said in that case (p.176) "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." I think it will be apparent to any one who peruses the judgment of Lord Reading, L. C. J., in *Rex v. Baskerville*⁽²⁾ that except in regard to corroboration of accomplice by accomplice evidence, there is no difference between the law in England and the law in India.

As regards the confessions of co-accused the Indian Law has no counterpart in England, but it seems to me that for the purpose of admissibility such confessions stand on the same footing as accomplice evidence and that their weight must depend on the circumstances of each case. I propose, therefore, to apply to the question of corroboration of the confessions the same rules as are applicable to the corroboration of accomplice evidence. In *Rex v. Baskerville*⁽²⁾, a criminal appeal heard by a Court of five Judges specially constituted to lay down rules for future guidance, it was said (page 33) "there are propositions of law applicable to corroboration which are beyond controversy. For example, 'confirmation does not mean that there should be independent evidence of that which the accomplice relates or his testimony would be unnecessary' — *Reg. v. Mullins*⁽³⁾. Indeed, if it were required that the accomplice should be confirmed in every detail of the crime, his evidence would not

(1) (1913) 38 Bom. 156.

(2) (1917) 86 L. J. K.B. 28.

(3) (1848) 3 Cox. C.C. 526 at p. 531.

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be essential to the case; it would be merely confirmatory of other and independent testimony". In the same case it was held that (page 34) "evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence...which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it." "The corroboration need not be direct evidence that the accused committed the crime: it is sufficient if it is merely circumstantial evidence of his connection with the crime; a good instance of this indirect evidence is to be found in *Regina v. Birkett*⁽¹⁾." A good Indian illustration of circumstantial evidence corroborative of the confessions of co-accused is to be found in the judgment of Phear, J., in *The Queen v. Naga*⁽²⁾.

Does then the testimony independent of the confessions affect the accused by connecting or tending to connect him with the crime? I start with the fact that Mahomedkhan was murdered and buried in the forest within a mile of his house. Evidence that when that man has been murdered and buried within a mile of his house, his brother and his enemy seeking to profit by his disappearance tells a false story as to his whereabouts, affirming him to have gone to Miraj, a town distant 100 miles or more, for medical treatment, tends to connect the brother with the crime. So does evidence that the brother has been seen on several occasions giving grain to the confessed murderers to whom he had no ostensible reason to be charitable. So does evidence that when trying to collect rents due to the murdered man he calls the tenants and tells them a false story that he has received a letter of authority from his brother.

(1) (1839) 8 Car. & P. 752.

(2) (1875) 23 W. R. (Cr.) 24.

No Judge who has considered the evidence has expressed a doubt as to credibility of the witnesses who depose to these events. But the trial Judge and Shah, J., are not satisfied that Bussia can remember the day when he saw Mahomedkhan leave preceded by Sabit, Honya and Umya. Shah, J., also appears to have doubted the story of the letter received in Kirvatti. I do not share these doubts, for the date of Mahomedkhan's departure from his village on the day after the Vansha would be known to all the residents, and I see no reason to doubt the truth of the story told by Wycunt and Anant about the letter; it is entirely consistent with the other evidence of the false story spread by Sabit that his brother had gone to Miraj for treatment, although we do not know by what agency Sabit got the letter written and sent to Kirvatti.

I concur in the conclusion arrived at by Heaton, J. I find the accused guilty of the murder of Mahomedkhan and sentence him to transportation for life.

Appeal allowed.

R. R.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Hayward.

THE BOMBAY BARODA & CENTRAL INDIA RAILWAY COMPANY,
(ORIGINAL DEFENDANTS), APPLICANTS *v.* RANCHHODLAL CHHOTALAL
AND COMPANY, AGENTS TO THE AHMEDABAD SPINNING & WEAVING
MILLS COMPANY, LIMITED (ORIGINAL PLAINTIFFS), OPPONENTS.*

Contract—Goods consigned by rail—Risk note—Liability of Company for goods consigned on a risk note—Burden of proof—Indian Evidence Act (I of 1872), section 103.

The plaintiff consigned certain bales of piecegoods by the defendants' Railway under a risk note. By the terms of the risk note in consideration of a special reduced rate being charged the consignor agreed to hold the Railway

*Civil Application No. 257 of 1918 under Extraordinary Jurisdiction.

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April 8.