CHAPTER-VII

RULE OF CREDIBILITY & PRESUMPTION

Credibility is not a notion that is only relevant in the context of proceedings before a Court or a tribunal. We make judgments every day, usually tacitly and subconsciously. About the credibility of persons who wish us to rely on the veracity of their statements or predictions. Politicians, Newscasters, Weathermen, children, the list is infinite. It is as long as there are types of individuals and situations in which we are asked to believe something, decide something, or act in a certain way based on statements that are make. In every instance, we have to ascertain whether the statements are worthy of credit, whether they are Acredible.

It will be your duty to decide any disputed questions of fact. You will have to determine which witnesses to believe, and how much weight to give their testimony. You should give the testimony of each witness whatever degree of belief and importance that you judge it is fairly entitled to receive. You are the sole judges of the credibility of the witnesses, and of there are any conflicts in the testimony, it is your function to resolve those conflicts and to determine where the truth lies.

You may believe everything a witness says , or only part of it or none of it. If you do not believe a witness's testimony that something happened, of course your disbelief is not evidence that it did not happen. When you disbelieve a witness, it just meant that you to look elsewhere for credible evidence about that issue.

In deciding whether to believe a witness and how much importance to give a witness's testimony, you must look at all the evidence, drawing on your own common sense and experience of life. Often it may not be what a witness says, but how he says it that might give you a clue whether or not to accept his version of an event as believable. You may consider a witness's, appearance and demeanor on the witness stand, his frankness or lack of frankness or testifying, whether his testimony is reasonable or unreasonable, probable or improbable. You may take into account how good an opportunity he had to observe the facts about which he testifies, the degree of intelligence he shows, whether his memory seems accurate. You may also consider his motive for testifying, whether he displays any bias in testifying, and whether or not he has any interest in the outcome of the case.

As judges of the facts, you alone determine the truthfulness and accuracy of the testimony of each witness, You must decide whether a witness told the truth and was accurate, or instead, testified falsely or was mistaken, You must also decide what importance to give to the testimony you accept s truthful and accurate, It is the quality of the testimony that is controlling, not the number of witnesses who testify[1].

If you find that witness has intentionally testified falsely as to any material fact, you may disregard that witness's entire testimony. Or, you may disregard so much of it as you find was untruthful, and accept so much of it as you find to have been truthful and accurate[2].

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[1] People vs ward, 282 A.D. 2d 819 (3d dept. 2001).

[2] This portion of the charge was revised in January, 2008 to make it clear that the jury may accept so much of testimony as they find to have been truthful "and accurate".
See People v Perry, 277 N.Y. 460, 467-468 (1938), People v Laudiero, 192 N.Y. 304, 309 (1908).

There is no particular formula for evaluating the truthfulness and accuracy of another person's statements or testimony, You bring to this process all of your varied experiences. In life, you frequently decide the truthfulness and accuracy of statements made to you by other people. The same factors used to make those decisions, should be used in this case when evaluating the testimony.

In General some of the factors that you may wish to consider in evaluating the testimony of a witness are as follows[3]:

(i) Did the witness have an opportunity to see or hear the events about which he or she testified?

(ii) Did the witness have the ability to recall those events accurately?

(iii) Was the testimony of the witness plausible and likely to be true, or was it implausible and not likely to be true?

(iv) Was the testimony of the witness consistent or inconsistent with other testimony or evidence in the case?

(v) Did the manner in which the witness testified reflect upon the truthfulness of that witness's testimony?

(vi) To what extent, if any, did the witness's background, training, education, or experience affects the believability of that witness's testimony?

(vii) Did the witness have a bias, hostility or some other attitude that affected the truthfulness of the witness's testimony?

[3] See People v Jackson, 74 N.Y. 2d 787, 789-790 (1989), People v. Hudy, 73 N.Y. 2d 40, 56 (1988).

Human testimony can seldom acquire the certainty of demonstration. Witnesses not infrequently are mistaken or wish to deceive, the most that can be expected is that moral certainty which arises from analogy. The credibility which is attached to such testimony arises from the double presumption that the witnesses have good sense and intelligence, and that they are not mistaken nor deceived, they are further presumed to have probity, and that they do not wish to deceive.

To gain credibility, we must be assured, first, that the witness has not been mistaken nor deceived . To be assured as far as possible on this subjects it is proper to consider the nature and quality of the facts proved, the quality and person of the witness, the testimony in itself, and to compare it with the depositions of other witnesses on the subject, and with known facts, Secondly, we must be satisfied that he does not wish to deceive, There are strong assurances to this when the witness under oath is a man of integrity and disinterested.

Witnesses are truthful and trustworthy, fair and unbiased, or they are not, they are reasonable and consistent in there statements or the contrary, their opportunities for seeing and knowing the matters and things they testify to are favorable or unfavorable, they may be interested in the result of the trial or they may not be, and they may be impeached or sustained. All these matters relating to the witnesses are collateral issues to be determined by the jury.

Credibility and reliability are two best qualities of the personality of a person which provides him or her high quality of reputation, regard,

respect, honour and the likes in the society and provides a passport to go anywhere, anytime in the family, society, state and even in the world. An attempt has been made in this chapter to discuss the credibility and reliability of an accomplice. It can be rightly be said that in considering the weight and value of the testimony of any witness, the appearance, attitude, and behaviour of the witness, the interest of the witness in the outcome of the suit, the relation the witness to the parties, the inclination of the witness to speak truthfully or not, the probability or improbability of the witness's statements, and all other facts and circumstances in evidence may be taken into consideration. Thus, the testimony of any witness may be given such weight and value as the testimony of such witness is entitled to receive.

1. Historical background of Credibility and Presumption of Accomplice testimony :-

While tracing the history of credibility and presumption of accomplice testimony, it can be said that in the background there were political trials since the time of Henry VIII where king's Evidence was the main dependence of the crown in its prosecutions, the question of the very admissibility of the evidence of the accomplice loomed large. In the 17th and the 18th centuries, it was ruled repeatedly by the English courts that an accomplice was a competent witness. His "credit' or the sufficiency of his evidence as a quantitative conception, however, remained in the backgrounds. Those were days when 'form' predominated over the

substance' and the oath had a dead weight of its own. It was for this reason that struggle was make to keep out this evidence even at threshold[4].

Further development in the law relating to accomplice is highlighted by *Wigmore* in the following words, "As time went on and the modern conception of testimony developed the possibility of admitting a witness and yet discrimination as to the qualitative sufficiency of his testimony became more apparent, and the way was open for the consideration of these question. In a few instances, as the 1700s wore on and even before then judicial suggestions are found as to feasibility of such a discrimination. But not until the end of that century does any court seem to have acted upon such a suggestion in its direction to the jury. About that time there comes into acceptance a general practice to discourage conviction founded solely upon the testimony of an accomplice uncorroborated..... But was this practice founded on a rule of law. Never, in England until modern times, it was recognized constantly that the judge's instruction upon this point was a mere exercise of his common law function of advising the jury upon the weight of the evidence and was not a statement of a rule of law binding upon the jury[5].

2. Accomplice : Unworthy of Credit:-

On the other hand, accomplices are not like ordinary witnesses in respect of credibility, but their evidence is tainted and should be carefully scrutinized before being accepted[6], and there fore, the presumption, that an

[4] Balwant Kaur vs Union Territory of Chandigarh AIR 1988 Sc 139 at. P. 141.
[5] Ravinder vs State. AIR 1975 SC 856.
[6] (1895) 2 C.W.N. 672.

accomplice is unworthy of credit unless corroborated in material particulars, has become a rule of practice of almost universal application[7]. "Neither Sec. 114 Illust. (b), nor this is to be ignored in the exercise of judicial discretion. The Illust. (b) is, however, the rule, and, when it is departed from, the Court should show, or it should appear that the circumstances justify, the exceptional treatment of the case. It is not enough for a Court to state the rule proforma and merely as a reason to evade it, the Courts must act up to it. So long established a rule of practice as that which makes it prudent, as a general rule, to require corroboration of accomplices, cannot without great danger to society be ignored, simply because Sec. 133 declares that a conviction is no illegal merely because it proceeds upon the uncorroborated testimony of an accomplice[8]. It is no doubt the law, that a conviction is not illegal because it proceeds upon the uncorroborated testimony of as accomplice. But the Court has not merely to record a conviction that is not illegal. It has to be satisfied that the conviction is properly based[9]. The general result, therefore, is that in almost all cases the presumption mentioned in Sec. 114 Illust. (b) Should be raised and corroboration in material particulars required. The bare existence of a principle is acknowledged in order to meet the requirements of very except tonal cases, but from the very fact of the exceptional character of these cases, this principle is in practice constantly disapproved of and frequently violated[10]. Later cases leave the law where it was, viz., that the evidence of an accomplice, if believed, is in law sufficient, but that

[7] R.V. Magam Lal, 14 Bom. 115, R. vs Amir Khan (1871) 9 B.L.R. 36.
[8] RV. Chagan (1890) 14 B 331, 344.
[9] Ambica Charan vs Emperor, 1931 Cal. 697.
[10] Remarks in Roscoe, Cr. Er. 16th Ed. 138-145.

in practice the Courts will generally insist on corroboration of it in material particulars. As observed in *Emperor v. Sriniwas Krishna*[11], the right to raise a presumption was sanctioned by the Act, and it would accordingly be an error of law to disregard it. The presumption of untrustworthiness may be rebutted by special circumstances[12]. But though, under Sec. 133 of the Evidence Act, a conviction is not illegal merely because it proceeds on the uncorroborated testimony of witnesses. Illust. (b) to Sec. 114 lays down that a Court may presume that an accomplice is unworthy of credit unless he is corroborated in material particulars. In the case of such a person, on his own showing, he is a depraved and debased individual who having taken part in the crime tries to exculpate himself and wants to fasten the liability on another. Such circumstances, it is absolutely necessary that what he has deposed must be corroborated in material particulars[13]. Whilst, it is not illegal to act upon the uncorroborated evidence of an accomplice, it is a rule of prudence so universally followed as to amount almost to a rule of law that it is unsafe to act upon the evidence of an accomplice unless it is corroborated in material respects so as to implicate the accused, and further that the evidence fan accomplice cannot be used to corroborate the evidence of another accomplice[14].

According to the provisions of Sec. 133, indeed the evidence of an accomplice carries much weight and even if it is uncorroborated, a conviction based thereon is not illegal. But this rule of law must always be

[11] (1905) 7 Bom. L.R. 969.
[12] I.L.R. 35 mad. 397.
[13] 1958 S.C. 66.
[14] Bhuboni Sahu vs. The King 1949 P.C. 257.

read with IIIust. (b) to Sec. 114 of the Evidence Act, which is a rule of prudence[15]. Courts should seek corroboration of the testimony of accomplice as a rule of prudence. The corroborating evidence must connect the accused with the offence charged[16]. This rule has hardened into a rule of law[17]. There is no rule of law or practice that the self-incriminating portion of the evidence of an accomplice is unworthy of belief unless corroborated. The credibility of a witness who says that he and another joined in committing an offence stands *per se,* so far as his self-accusation is concern ed, on the same footing as that a witness who says that he alone committed an offence, though in the latter instance there would be a narrow basis for cross- examination to test his own self-accusation. If a witness is an accomplice, he is an accomplice and must own to be an accomplice, if he tells the truth. It is, therefore, merely arguing in a circle to say that the self-incriminating statement of an accomplice requires corroboration because he is an accomplice. What must first be decided is whether the witness in question is in truth an accomplice or is merely posing as an accomplice. When it is once established that he is an accomplice, then the next practical question arises who are the other accomplices, and it is at that stage, when his evidence implicating others has to be weighed, that there comes into application the maxim, that it is unsafe to convict upon the evidence of an accomplice, unless he is corroborated in material particulars, both as to the circumstances of the offence and the identity of the person whom he implicates[18]. It has been

[15] In Re. K. Muttiga, 1958 A.P. 255-257.
[16] Ram Narayan vs state of Rajashtan, 1973 W.L.N. 98.
[17] In Re Basi Reddy AIR 1972 Mad. 118.
[18] R vs. Hanmant, (1904) 6 Bom. L.R. 443, 450.

held that the testimony of a person who may not be an accomplice in a strict sense of the term but a person who in any way helped in the commission of the offence for which the accused are tried, or was cognisant of it and omitted to disclose it for a time, it not a person whose testimony could justify a conviction, except where there is corroboration[19]. But "so far as the statutory provisions are concerned, there is nothing in law to justify the proposition that evidence of a witness, who happens to be cognisant of a crime, or who made no attempt to prevent it, or who did not disclose its commission, should only be relied on to the same extent as that of an accomplice. The real question, in such a case, is the degree of credit to be attached to the testimony of such a witness, and that depends on all the facts and circumstances of the particular case. It may not be possible to place much reliance on the evidence coming from persons falling within the description given above, but they are not accomplices, and it leads to confusion of thought to treat them as practically accomplices and then apply the rule as to their credibility, instead of judging their credibility by a careful consideration of all the particular fact of the case affecting the evidence[20].

The English rule is that the evidence of a husband or wife that there has been no access by the husband to the wife is inadmissible because it is evidence which tends to bastardize the issue. But there is nothing in the Indian Evidence Act which renders such evidence inadmissible in India[21]. But, if the evidence of an approver is discarded , it must be discarded as a

[19] I.L.R. 21 Cal. 328.
[20] Hafijuddi vs Emperor. 1934 Cal. 678.
[21] I.L.R. 1939 All. 573.

whole, and the defence cannot base arguments on it any more than the prosecution[22].

3. Mode of weight and Credibility of accomplice Evidence :-

Although, generally speaking, it would be most unsafe to convict an accused person on the uncorroborated evidence of an accomplice, such evidence must, like that of any other witness, be considered and weighed by the Judge, who, in doing so, should not overlook the position in which the accomplice at the time of giving his evidence may stand, and the motives which he may have for stating what is false[23]. If the Judge, after making due allowance for these considerations and the probabilities of the story, comes to the conclusion that the evidence of the accomplice, although uncorroborated, is true, and the evidence, if believed, establishes the guilt of the prisoner, it is his duty to commit[24]. Every case as it arises must be decided on its own facts, and not on supposed analogies to other cases[25]. There may be cases of an exceptional character in which the accomplice evidence alone convinces a Judge, and if he acts on that conviction, with the character of the witness clearly present in his mind, a revisional Court ought not to interfere, in the absence of other circumstances showing a want of judicial discretion[26].

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[22] Sheo Barhi vs. Emperor 1930 Pat. 164.
[23] Queen-Emperess vs. Gobardhan, a All. 528.
[24] Reg. vs. Ramasami Padayaehi, 1 Mad. 394.
[25] Queen-Empress vs Gobardhan 9 All 528.
[26] Queen-Empress vs Maganlal and Motilal 14 Bom.115.

Where, upon an indictment against principals and accessories, the case against the principal was proved by an accomplice who was confirmed as to the accessories but not as to the principal, the jury were directed to acquit the prisoners[27].

Regarding the weight and credibility of accomplices, it can be said that although the testimony of an accomplice properly corroborated is not merely cumulative, complicity does affect the credibility of accomplices as witnesses. An accomplices testimony is subject to grave suspicion and should be acted on with the utmost caution[28]. An accomplice's testimony should be subjected to close scrutiny and minute examination, and weighed with great caution, 'caution' meaning to warn, exhort to take heed, or give notice of danger.[29] Even in jurisdiction where no corroboration is necessary as a rule of law, the uncorroborated testimony must be clear and convincing , must show guilt beyond a reasonable doubt,[30] and must not be improbable on its face,[31] In a jurisdiction where ordinarily conviction might be had on the uncorroborated testimony of an accomplice, where he was the sole witness as to the facts to which he testified, and his veracity was bad and defendant's reputation for honesty, integrity and veracity was good, and where the alibi was proved by a disinterested witness, conviction on such unsupported testimony of the accomplice was not upheld.[32] However the rule that evidence of accomplices should be

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[27] R vs Wells, I M & M. 326. sited in 27 Mad, 271 (283).
[28] Craig v. United States, 81 Fed. (2d) 816, certiorari dismissed 298 U.S. 637, 80L. ed. 1371, 56. sup. cit. 670.
[29] Arnold vs united states 94 Fed. (2d) 499.
[30] Out law vs united state 81 Fe. (2d) 805.
[31] Gate vs state 160 miss. 479, 135.
[32] Abeb vs state 138 miss 772, 103 SO. 770.

received with caution applies only when the witness joined in committing the particular crime for which the defendant is being tried.[33]

Where conviction may be had on uncorroborated testimony, it has been held that conviction will not be sustained unless the record is substantially free from prejudicial error,[34] especially from palpable efforts by the state to prejudice defendants with the jury by dragging in matters wholly foreign and irrelevant.[35]

In both the states requiring corroborations[36] and those in which corroboration is unnecessary,[37] it has been held that an accomplice's testimony is subject to the same rules as to weight and sufficiency as any other witness, except that, in the former states, it must be corroborated, Where corroboration is required, it has been held that only when the accomplice exhibits moral turpitude of a nature ordinarily inconsistent with veracity, or has such an interest in giving his testimony as to render the temptation to perjury peculiarly powerful has the court the right in its discretion to caution the jury to scrutinize such testimony carefully, unless it is confirmed by independent evidence , but before so charging the jury, it must be admitted that the witness is an accomplice or the caution must be made upon the hypothesis of such of finding by the Jury; and the contention of moral turpitude or interest must be either admitted or the caution must be contingent upon such finding by the jury[38]. The testimony

[33] Commonwealth vs. Minker, 81 Pa. Super 42.
[34] People vs Lawson, 345 III 428, 178 N.E. 62.
[35] People v. Lavis 313 III 312, 145 H.E. 149.
[36] Rice V. State 50 Tax. Cr. 648, 100. S.W. 771.
[37] State V. Mc Adams, 167 S. Cas, 405, 166, SE 405.
[38] State v.Cianflone. 98Com 454.120Ad 347

of an accomplice is to be weighed by considering his connection with the crime and with the accused, his interest in the case, his appearance on the stand, the reasonableness of his testimony and its consistency with other facts proved in the case[39].

Promise or expectation of immunity or benefit affects the credibility of an accomplice as a witness[40], and may render his testimony of little weight[41]. It would be illogical to place accomplice in every character of crime upon the same footing. Evidently the nature of the crime in which the accomplice is involved must vary, the weight that a jury will accord to his testimony, while the reasonableness of his story and his manner of testifying are considerations affecting his credibility and tending to shape the advice of the judge. If the crime be free from moral turpitude the story which he tells reasonable, and the manner of its relation evincive of truthfulness, the jury might, even under the influence of the strongest caution, feel bound to believe and convict. To deny a conviction legal support under such circumstances would be to take form the jury their right of judgment upon the weight of the testimony. And to compel them to find against their conviction of truth[42]. The credibility of witnesses, and the weight of their testimony, whether they are accomplices or not, is for the jury exclusively[43], and the jury should carefully consider accomplices' testimony in the light of all other evidence and the influence under which it is given[44]. But the jury may believe an accomplice's testimony

[39] Butt v. State, 81Ark. 173,98S W. 723. 118m. St.42.
[40] United States v Rainone. 192 Fed. (2d) 80
[41] People v. Gaskill, 322 III. 259. 153 N. E 393.
[42] People v. Pattin, 290 III. 125. N.E 248
[43] Valdez v. United States. 244. U S 432. 61.L. ed. 1242. 37. Sup. Ct. 725.
[44] People v. Gordon 344 III. 422 . 176. N. E. 722 (murder)

notwithstanding the introduction of evidence tending to impeach the accomplice[45]. In States which require no corroboration. the rule is stated to be that if the testimony of the accomplice, his manner of testifying and his appearance upon the witness stand, impress the jury with the truth of his statement, there is no inflexible rule of law which prevents a conviction[46]. The rule in such jurisdictions is sometimes stated to be that the jury must believe the accomplice's testimony in order for conviction to rest on his testimony alone[47]. The jury has been held entitled to believe the testimony of a codefendant. Jointly indicted, which implicates the defendant[48]. an accomplice's testimony may be attacked before the jury as incredible and prompted by unworthy motives. The jury is usually warned by the court against hasty credence of the testimony of an accomplice, and instructed that great caution must be employed in the reception and consideration of accomplice evidence and that it should be submitted to the strictest scrutiny,[49] and advised against conviction on uncorroborated testimony. But it is not error of law for the court to neglect or refuse to express an opinion to the jury as to what facts they should or should not find upon the proof, in those jurisdictions not requiring corroboration as matter of law.

4.**Value of Evidence accomplice:-**

A person who is convicted on his confession remains an accomplice with all the attaching to an accomplice and his evidence must be viewed

[45] Reuben v. United States. 86 Fed. (2d) 464.
[46] United States vs. Ybanez. Woldeck 53. Fed. 536.
[47] Waldeck v United States. 2. Fed (2d)243.
[48] Simmons v. States, 184 Ark. 373, 42 S. W. (2d) 549.
[49] United states vs. Sacia. 2 Fed . 754.

with all the suspicion, which ordinarily attaches to the evidence of an accomplice.[50]

The utmost caution is necessary in admitting or using the evidence of an approver. It not only requires corroboration in material particulars for its use, but its evidentiary value depends considerably upon the circumstances under which his evidence is tendered. In *Windsor v. Queen*[51]. Cocksure, CJ, observed.' "In all cases where two persons are joined in the same indictment, and it is desirable to try them separately, in order that the evidence of the one may be received against the other, I think it necessary, for the purpose of ensuring the greatest possible amount of truthfulness in the person coming to give evidence , to take a verdict of not guilty as to him, or if the plea of not guilty be withdrawn by him, and a plea of guilty taken, to pass sentence, so that the witness may give his evidence with a mind free of all the corrupt influence which the fear of impending punishment and the desire to obtain immunity to himself at the expense of the prisoner might otherwise produce." Blackburn, Mellor and Lush, JJ, were of opinion that the evidence of an accomplice not tried under the same indictment was admissible, but that the evidence though admissible was tainted and subject to strong observations as to its weight. Lord Blackburn said that before an accomplice was called, " the temptation to strain the truth should be as slight as possible". In *Queen. v Payne*[52] .Lord Cockburn stated, in the course of argument of counsel, that though

[50] Emperor vs. Komoruddin sheikh 1928 /cal, 233.
[51] (1866) L. R. 1 Q. B. 289.
[52] (1872)1. C.C. R. 349.

the evidence of an accomplice under such circumstances was admissible, it was inconvenient to admit such evidence[53].

The statement of the accomplice is, of course, subject to suspicion, but in certain cases it is of great value in evidence. But the Courts have held that such a statement unless supported by reliable evidence of another kind to corroborate it is no sufficient in itself to form the basis of a conviction.[54]

The evidence of an approver does not differ from the evidence of any other witness save in one particular respect, namely, that the evidence of an accomplice is regarded *ab initio* as open to grave suspicion. Accordingly, if the suspicion which attaches to the evidence of an accomplice be not removed that evidence should not be acted upon unless corroborated in some material particular, and. if the suspicion attaching to the accomplice's evidence be removed then that evidence may be acted upon even though uncorroborated and the guilt of the accused may be established upon that evidence alone[55].

If the evidence of the approver is discarded no notice can be taken of the statements made by the approver in his evidence before the Court. If the evidence is discarded it must be discarded as a whole and the defence cannot base arguments on it any more that the prosecution[56]. The questions as to whether or not the statement of the approver should be taken into

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[53] Mohan Lal vs. Emperor . AIR 1935. All , 477.
[54] Ibid.
[55] Rattan Dhanuk vs Emperor . AIR 1928, /Pat. 630. 631.
[56] Shoe Barhi v. Emperor, A. I. R . 1930 Pat . 164 at p. 167.

consideration or should be totally rejected is one which will depend on the circumstances of the case[57].

If a witness is admittedly an accessory after the fact, his evidence cannot be put on a higher level than that of an approver[58], If the withdrawal of prosecution against the accomplice has any effect, the least consequence it brings about is to relegate him from the position of a co-accused to his original position of an accomplice who has for all practical purposes earned complete immunity for his participation in the crime. His evidence under such circumstances cannot be a piece of independent evidence. To regard the testimony of one accomplice as corroborated by the testimony of another accomplice is to hold that there is corroboration where under law or fact there is none at all[59].

5. Appreciation of approvers Evidence:-

Approver is an accomplice who has been tendered pardon on condition of his True disclosure of the facts & circumstances of the crime by becoming a witness on behalf of the prosecution.

The rules relating to appreciation of an approver's evidence have been laid down by the Supreme Court in the case of *Sarwan Singh v. State of Punjab*[60]. Their Lordships have held that the appreciation of an approver's evidence has to satisfy a double test. His evidence must show that he is a reliable witness and that is a test common to all witnesses. If this test is satisfied, the second test which still remains to be applied, is that

[57] Bhola Nath v. Emperor, I. L . R. (1939) All 736.
[58] Shyam Kumar Singh v. Emperor , A. I. R . 1941 Oudh 130 at p, 143.
[59] Mohammad Usuf Khan Emperppor. A I R . 593.
[60] A I R 1957 S.C 637.

the approver's evidence must receive sufficient corroboration[61]. Edge. C.J. observed:

"As a general rule, it would I think, be most unsafe to convict an accused person on the uncorroborated evidence of an accomplice . The evidence of an accomplice whether it is corroborated or not, must, like the evidence of any other witness, be considered and weighed by the judge, who, in doing so, should not overlook the position in which the accomplice at the time of giving his evidence may stand, and the motive which he may have for stating what is false. If the judge, after making due allowances for these considerations and the probabilities of the story comes, to the conclusion the evidence of the accomplice, although uncorroborated is true, it is his duty to act upon strength of his convictions".

The Chief Justice next observed that criminal and other cases, so far as where questions of fact are concerned would not be decided on their supposed analogy to a previous case to do so would not be to exercise that independent judgment of the court on the facts before them in the particular case and it would be to apply the finding in a previous case to the facts before the Court on the speculative assumption that the other Judges would have decided the case in hand in a similar way. Each case must, therefore, be decided on its own facts.

This case lays down that as a general rule, it unsafe to convict on the uncorroborated testimony of an accomplice but rule in Sec. 133 should should also be considered. Which rule would be given effect to is a

[61] state of Bihar vs Srilal KeJriwal A I R 1960 pat, 459.

questions to be decided on the facts of each case without reference to other precedents.

It is well settled that the Court has to satisfy itself that the statement of the approver is credible in itself and that there is evidence other than the statement of the approver that the approver himself has taken part in the crime. Secondly after the court is satisfied that the approver's statement is credible and his part of the crime is corroborated by other evidence, the court seeks corroboration of the approver's evidence with respect to the part of the other accused persons in the crime and this evidence has to be of such a nature as to connect the accused with the crime. Thus it is to be remembered that, before the Court reaches the stage of considering the questions of corroboration and its adequacy or otherwise the first initial and essential questions to consider is whether even as an accomplice the approver is reliable witness. If the answer to this question is against the approver, then there is an end of the matter. In other words, approver's evidence has to satisfy a double test. His evidence must show that he is a reliable witness. If this test is satisfied the second test is that his evidence receives sufficient corroboration. This test is special to the case of weak or tainted evidence like that of an approver[62]. *Hfijuddi v Emperor*[63], it was observed, "So far as the statutory provisions are concerned, there is nothing in law to justify the preposition that evidence of a witness, who happens to be cognizant of a crime, or who made no attempt to prevent it or who did not disclose its commission should only be relied upon to the

[62] State of Rajasthan v Chhuttanlal. 1970 Cr LJ1206
[63] 38 CWN 777

same extent as that of an accomplice. The real question in such a case is the degree of credit to be attached to the testimony of such a wines, and that depends on all the facts and circumstance of the particular case.

In such cases, the principle of caution and the requirement of corroboration on material particulars should be applied if the circumstantial evidence calls for it[64]. Thus, it is no doubt true that an accomplice is a competent witness under Sec.133 of the Evidence Act. But if his testimony introduces a serious taint in his evidence, the courts are naturally reluctant to act on such tainted evidence unless it is corroborated in material particulars by other independent evidence. It would not, however, be right to expect that such independent corroboration should cover the whole of the prosecution case or even all the material particulars of the prosecution case. If such a view is adopted, it will render the evidence of the accomplice wholly superfluous. On the other hand, it will not be safe to act upon such evidence merely because, it is corroborated in minor particulars or incidental details because in such a case, corroboration does not afford the necessary assurance that the main story disclosed by the approver can by reasonably and safely accepted as true[65]. It is a rule of prudence that the testimony of an accomplice should not be accepted unless it is corroborated by some independent evidence[66]. A conviction can, however be based on the testimony of a person with a shady character, provided the evidence is cogent and believable[67].

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[64] In Re. Mohali, 1970 Cr. L.J.
[65] Piara Singh vs State of Punjab 1969 Cr L. J. 1435 at p. 1439.
[66] B. B. Gupta vs state 1968Cr L. J. 1630 at 1634.
[67] Ram Sarup Charan Singh vs state , A I R 1967 Delhim 26.

In an Assam case, the evidence of the approver was fairly long and full of details of a large number of activities in which the approver took part. It was held that on a careful consideration of the evidence of the approver, it could not be said that he deposed from his imagination as to be tutored by police. Unless he had personal knowledge it would not be possible for the approver to give details of so many dacoities at so many places in different houses of different persons residing in different districts. In the circumstances there was no inherent improbability in the evidence of the approver for which it might be brushed aside his evidence might be relied upon, provided there was corroboration as required under the law[68]. In Tribhuvan Nath[69], case, it was held by the Supreme Court that In appraising the evidence of an accomplice, the court has to see-

(a) Firstly, whether the evidence of an accomplice is reliable, and

(b) Secondly, even if it is so, whether it is corroborated in material particulars by other independent evidence, direct or circustantial.

(c) The test of reliability is the same as the one applied to all witnesses. Therefore, it does not mean that an accomplice, evidence cannot be relied upon unless it is totally and absolutely blemish less. In majority of cases, such is not the case, and, in spite of some discrepancies and such other infirmities, the courts have often found it safe to act upon the evidence of such witness.

(d) Regarding the second test, that is, of the necessity of corroboration, such corroboration need not-on the one hand, be of

[68] State v. Hatep Bore, 1972 Cr LJ 1074(Assam)
[69] Tribhuvan Nath v. State of Maharashtra 1972 SCD 571

every particular given by an accomplice, and on the other hand, be of only minor particulars,

(e) The corroboration must be adequate enough to afford the necessary assurance that the main story testified by the accomplice can be reasonably and safely accepted as true.

Similarly, the High Court of Kerala, laid down that: When it is stated that there should be confirmation of the evidence of accomplice by collateral evidence, it is not meant that everything that the accomplice says, should be spoken to by some other witness because, of that were so, there would be no need of an accomplice in any case.

It is precisely because the case of the prosecution cannot be proved wholly and fully by independent evidence, that the law permits the evidence of accomplice. Therefore, the corroboration that is required in law, is not corroboration of every particular in respect of which the accomplice gives his evidence, It need only be such as to lead the judge to believe that the evidence of the accomplice is truthful and can be acted upon . There may be cases where circumstances may exist justifying courts not insisting on corroboration of accomplice evidence. In the case of accomplice who are shown to be wholly reliable witnesses, no corroboration is necessary for acting on their evidence.

1. It is not correct to say that, in no case, can one accomplice corroborate a fellow accomplice. In the absence of collusion between accomplices, there is nothing wrong in using the evidence

of one accomplice for corroborating the evidence of a fellow accomplice because plurality of witnesses is an element of corroboration and that can be supplied by a fellow accomplice.

2. The corroboration that is required is only of a general king rendering it probable that it is true story of the accomplice. It need not be the confirmation of every material circumstance. It need not be direct evidence also.

3. It may even be circumstantial but, as usual, "working cumulatively in geometrical progression and eliminating other possibilities[70].

As to the nature of corroboration and the circumstances in which it should be sought ,when a person is accused of as crime and the evidence against him is partly or wholly that of an accomplice or accomplices, the following propositions have been laid own in *R v Nga Mayo*[71], namely :

1. Provided that it has been established by extraneous evidence or matters appearing on the record that the accomplice are not acting in collusion with one another, the cumulative effect of the evidence of two or more of them may be sufficient to remove the prime facie presumption of the individual unworthiness of their statements, and if this be the case, a conviction may legitimately be recorded upon their statements alone, if the court is convinced of their truth. The same observation applies to the cumulative effect of the evidence of an accomplice and the confession of a co-accused when presumption of their unreliability has, in the special circumstances, been rebutted.

[70] Kuruchiya Kunhaman vs state of kerala 1974 ker. LT. 328.
[71] A 1938, R 177 FB

2. That evidence from a source which is not prima facie unworthy of credit may prove a fact which displaces in a particular case the presumption that an accomplice is unworthy of credit.

3. That corroboration must proceed from source extraneous to the person whose testimony it is sought to corroborate. But it may consist of extraneous proof of a fact relating to that very person's prior conduct. What has been said of accomplice applies to approvers and vice versa[72]. In this way the commision of the offence is confirmed by some competent evidence other than the single or unconfirmed testimony of the accomplice and the inclusion by the accomplice of an innocent person is defeated. This rule of caution or prudence has become so ingrained in the consideration of accomplice evidence as to have almost the standing of a rule of law[73].

6. Judges charge to jury:-

The evidence of accomplices should not be left to the jury without such direction and observations from the Judge, as the circumstances of the case may require, pointing out to them the danger of trusting to such evidence when it is not corroborated by other evidence[74]. The omission to do so is an error in law in the summing up by the Judge, and is on appeal a ground for setting aside the conviction when the Appellate court thinks the prisoner has been prejudiced by such omission, and that there has been a failure of justice.

[72] Aung HIa v R, 9R 804 and Ngs Aung v R. 1937Rang 110 superseded is so far as they differ from the conclusion above.
[73] Harron Haji Abdulla v. State of Maharashtra, A I R 1968 SC 832 at pp . 835-36.
[74] R vs. Elahi Bux (1866)B. L R. Sup . vale P. 459.

The statutes giving to parties or to persons who are interested in the result the right to testify do not affect the degree of credit to be given to the testimony of accomplice[75]. Since the testimony of accomplices is competent and since the jury are to judge of the credibility of witnesses, it follows, in the absence of statute to the contrary that one who is accused of crime may be convicted upon the unsupported evidence of an accomplice. While it may be that the jury ought not to convict upon such testimony without corroboration their verdict will not be set aside.[76]

In spite of the fact that an accomplice has always been a competent witness, that a conviction on his evidence though uncorroborated is sustainable, and that a judge can properly direct a jury that they are entitled to convict upon such uncorroborated evidence. It has been the custom since a very long time for the judges to warn the jury that it is dangerous to act upon such evidence without corroboration. This warning was in some earlier cases regarded as discretionary ."Judge in their discretion , will advise a jury not to believe an accomplice unless he is confirmed "[77] . But in later decisions what was no more than a practice gradually assumed the hard lineaments of a rule of law and the warning became a solemn duty of the judge. The conviction would be quashed if there is failure to warn. In the last case it was pointed out that the observations (that in the absence of warning the conviction must be quashed) in *R v Burkeville* were obiter as what consequences would follow from the omission to warn was not the

[75] State Vs. Stebbins, 29 Comm. 463.
[76] United Staes V. Lancaster 44f 896.
[77] Per Lord Ellen Borough in R.v. Jones 2 Camp 130, 33. Rv Tata 1908.2 k B680, R v. Moore 28 Cr Appx 111. Rv. Farler 8 cs p. 907.

point in issue in that case. Nevertheless the rule enunciated in *Baskeville's* case being the correct law was affirmed in *Davies v. DPP Sup*. The law as to the warning is the same in India.

The English law relating to corroboration of accomplice evidence has been thus stated: "There is no doubt that uncorroborated evidence of an accomplice is admissible in law and that a jury can convict the prisoner on it, especially where there is in question the evidence of a person who is not so much an accomplice as a victim. If however, a person who is an accomplice gives evidence on behalf of the prosecution , it is the duty of the judge to warn the jury that, although they may convict on his evidence, it is dangerous to do so unless it is corroborated and this rule, although a rule of practice now has the force of a rule of law. It is never the duty of the judge to advise the jury to convict on uncorroborated evidence. Corroboration is not required where the evidence of an accomplice is not called by the prosecution[78]. The evidence of accomplice should not be left to the jury without such directions and observations from the judge as the circumstances of the case may require, pointing out to them the danger or impropriety of trusting to such uncorroborated evidence. The omission to do so is an error in law and is ion appeal a ground for setting aside the conviction when the appellate court thinks that the prisoner had been prejudiced by such omission and that there has been a failure of justice[79]. The judge must tell the jury that they may if they choose, convict on the uncorroborated evidence of an accomplice alone, if believed but that it is

[78] Davies v DPP sup, Hals 3rd ed. Vol 10 para 844
[79] R v Elahee Buksh, BLR Sup Vol 459

dangerous to act upon such evidence unless it is corroborated in material particulars by reliable evidence. If such warning be not given, the conviction will be quashed[80].

He must tell the jury clearly and emphatically that it is a rule which has practically the force of law and that they ought not to convict on accomplice evidence without corroboration. A verdict of jury in disregard of the rule is illegal[81] .The warning must be given in such terms as could leave no possible doubt in the minds of the jury as to its import[82].

Where a judge is sitting without a jury he must apply the same rule by treating himself as a jury[83]. Where on offence is tried without jury, it is necessary that the judge should give some indication in his judgment that he had this rule of caution in his mind and should proceed to give reasons why in the particular case he considered it unnecessary to require corroboration If in spite of the warning the jury convict, the court, on appeal, will quash it if the verdict is considered unreasonable or cannot be supported having regard to the evidence[84]. On a charge of receiving stolen goods the prosecution evidence rested largely on the evidence of accomplices though there was some independent evidence of corroboration implicating the prisoner in a material particular. The presiding judge omitted to give warning as to the danger of convicting on accomplice evidence without corroboration. It was held that although the Criminal

[80] Madhusudan v R 37 CWN 934, R v Wajod A 1933, P 500, Shibdas v R A 1934 C 114. Rameshwar v S A 1952 SC 54, S v Basawan A 1958 SC 500.
[81] Mata Pd v R A 1943 B 74.
[82] R v Cleal, 1942, 1 AII ER 203, 205.
[83] Motilal v R 39 CWN 754.
[84] R v Lewis 1937, 4 AII ER 360

Court of Appeal might affirm a conviction despite the absence of warning in a case where the corroborative evidence was of such a convincing, cogent and irresistible nature that the jury must have reached the same conclusion even if they had received the proper direction as to accomplices, yet the corroborative evidence in the particular case fell short of that standard, and the failure to warn the jury was, accordingly fatal to the conviction[85]. In this regard, in the famous case of *R v Baskerville*[86]. Lord Reading LCJ, observed:

"There is no doubt that the uncorroborated evidence of an accomplice is admissible in law. But it has long been a rule of practice at the common law for the judge to warn the jury of the danger of convicting a prisoner on the uncorroborated testimony of an accomplice or accomplices, and in the discretion of the judge to advise them not to convict upon such evidence- but the judge should point out to the jury that it is within their legal province to convict upon such unconfirmed evidence. The rule of practice has become virtually equivalent to a rule of law ..... And in the absence of such a warning by the judge, the conviction must be quashed."

In a later case, objection was taken to the direction of the judge on two ground: First that the judge in warning the jury had at the same time added that it was generally dangerous to act on such evidence alone, and secondly, that he had directed them to the effect that if in fact they were satisfied with the evidence and believed the same to be true they ought to

[85] R v Lewis (1938) 158 LT 454.
[86] 1916, 2 KB 658.

convict, notwithstanding the absence of corroboration. The Court of Criminal Appeal quashed the conviction and the Lord Chief Justice summarized thus the points of direction when the only evidence is the uncorroborated testimony of an accomplice:-

"There is a distinction drawn between the three different things which the jury is to be told-that it is within their legal province to convict, that in all cases it is dangerous to convict and they may be adviced not to convict. It is quite clear, when one looks at the enumeration of the various course that nowhere is there to be found, directly or indirectly, any reference to a case in which it may be the duty of the learned judge to advise the jury in such a case that they ought of convict."[87] The Position as defined by *R v Baskerville* and restarted in *R v Beebe,* has been summed up thus by HILBERY J. in *R v Cleal.*[88] " It is for the court" to tell the jury that it is within their legal province to convict upon such uncorroborated evidence to warn the jury of the danger of convicting a person on the uncorroborated testimony (and this is a rule to be observed and applied in all cases), and in the exercise of its discretion to advise the jury not to convict. This last is something which the court may do, but is not bound to do." A judge should warn the jury of the danger of convicting a prisoner on the uncorroborated testimony of an accomplice and in his discretion advise them not to convict upon such evidence, but he should at the same time point to the jury it is within their legal province to disregard the caution

[87] R v Beebe 1925 41 TLR 635
[88] 1942 I All ER 203,204-205 CCA

and to convict upon unconfirmed evidence if believed by them.[89] Similarly, Ruffin CJ. said:-

"The evidence of an accomplice is undoubtedly competent and may be acted on by the jury as a warrant to convict, though entirely unsupported. It is however, dangerous to act exclusively on such evidence, and therefore the Court may properly caution the jury and point out the grounds for requiring evidence confirmatory of some substantial part of it. But the court can do nothing more, and if the jury really yield faith to it, it is not only legal, but obligatory on their consciences, to found their verdict upon it."

A jury may convict on the uncorroborated testimony of an accomplice but the Judge ought not to leave the case without warning them that such evidence must be regarded always with grave suspicion and they ought not to convict unless it is corroborated. Further he ought to point out whether there is any corroborative evidence, and if there is none, he should tell the jury.[90] It would be an error in summing up, if a judge after pointing out the danger of acting upon the uncorroborative evidence of an accomplice, were to tell the jury that the evidence of accomplice, was corroborated by evidence of a fact which did not amount to any corroboration at all. The judge must not tell the jury that such or such witness does in fact corroborate. That is the province of the jury and depends upon whether they believe the witness or not. Where the judge has given an adequate warning on corroboration and explained what is meant

[89] R. vs. stubbs 1855, 25 LJMC 16,
[90] Zielinski v R 1950 34 Cr App R 193.

in law by corroboration it is unnecessary to point out to the jury the items of evidence, which can amount to the jury the items of evidence, which can amount to corroboration.[91] Even in a case where there is some evidence of an apparently corroborative character but inconclusive, the warning must be given and the judge should further explain to the jury the nature and real value of the corroborative evidence.[92] (a case of indecent assault, but the rule applies equally to corroboration of approver's evidence)].

Hence, the question as to what is or is not, what amounts or does not amount to corroborative evidence in law, is a question of law to be decided by the judge. It is the duty of the judge to direct the attention of the jury to those portions of the evidence confirming or corroborating the accomplice's story which do or do not fulfill the requirements of law viz, corroboration of the accomplice's story in material particulars connecting or identifying each of the accused.[93] The judge should tell the jury the kind of corroboration required viz corroboration in material particulars tending to connect each of the accused with the offence[94] and it is not enough that the corroboration shows the witness to have told the truth in matters unconnected with the guilt of the accused.[95] So, when there is a general charge of conspiracy to commit dacoity against several accused and also a charge against the accused for having committed dacoity, it is most necessary that in summing up the judge should distinguish what is

[91] BAYLEY J in R v Magan Lal 14 B 115.
[92] Sikandar v R 41 CWN 641.
[93] Rebati v R 23 CWN 949-50, Hachuni v R 34 CWN 390.
[94] Hachuni v R 34 CWN 390.
[95] R v Baskerville 1916, 2 KB 658.

evidence against each of the accused on the charge of conspiracy and what is evidence against each of the accused on the charge of having committed decoity- particularly in cases where the main evidence is that of an approver. A general warning as to sufficient,[96] the necessity of corroboration without classifying the evidence is not the discrepancies in the uncorroborated evidence should be explained to the jury, and this is even more important when there has been a considerable interval of time between the giving of that evidence and the summing up to the jury.[97] It is undesirable and indeed improper for the judge when charging a jury to invite their attention to the decisions of cases reported in Law Reports[98] or to read out passages from text books without reference to the fact of the case[99]. Owing to the fact that witnesses of this character are often subjected to strong temptation to shift the burden of guilt upon the defendant, it has long been a rule of practice in criminal trials for the court to charge the jury that they should not convict the prisoner upon the uncorroborated testimony of an accomplice.[100] But while some courts have taken the opposite view.[101] It is the general rule that the neglect or refusal of the judge so to instruct the jury is not reversible error, the decision as to giving such an instruction being one which is governed by the discretion of the Judge. The instruction relates to the value or weight of the testimony and

[96] Rezak v R 42 CWN 870.
[97] R v Cleal, sup
[98] Janak v R A 1942 P 444 , Govt of Bombay v Sakur, A 1947 B 28.
[99] Anilesh v S, A1951 As 122
[100] State. V. Williamson, 42 Conn 261
[101] Hoyt v People 140 III 588, 30 NF 315

does not withdraw the case from the jury.[102] Questions of fact are for their determination.[103]

In many of the states, the legislatures have passed statutes changing the rule of practice to a rule of law and forbidding a conviction upon the testimony of an accomplice without corroboration.[104] An ideal instruction to the jury is contained in the following passage of Darling, J, in *R v Feigenbatum.*[105]- "The boys were undoubtedly the accomplices of the appellant. It is a rule of law that a jury may convict on the uncorroborated evidence of an accomplice and therefore, a judge is not justified in directing the jury, at the close of the case for the prosecution that they must acquit the prisoner because, in his opinion the only evidence against him is the uncorroborated evidence of an accomplice. But it has been laid down in many cases, that the judge ought not to leave the case to the jury without warning them firmly that the evidence of an accomplice must always be regarded with grave suspicion and that they ought not to convict unless the evidence of accomplice is corroborated, further, he ought to point out to the jury what corroborative evidence there is, if any, or if, in his opinion, there is no corroborative evidence, he should tell the jury so". Practically this differs little from saying that a judge may direct an acquittal if there is indeed no corroboration of the accomplice's evidence but a difference does exist, though it may be very slight. Similar instruction is to be found in the following observations of Lord Williams, J. in *Rebati v. R.*[106] "..... Just as

[102] Collins v People 98 III 584.
[103] Honselman v. People 168 III 172 48 NE 304.
[104] People v Coffey, 161 Cal 433, 119 P 901.
[105] 1919, 1 KB 431.
[106] 23 CWN 945, 949-50.

it is the duty of the judge to direct the jury as to what portions of the evidence amount to evidence in accordance with law, and to lay before them such evidence only and to direct them to reject any evidence which may have been given but which does not amount to evidence in accordance with law, similarly it is the duty of the judge to direct the attention of the jury to those portions of the evidence confirming or corroborating the accomplice's story which do or do not fulfill the requirements to which I have already referred. But the judge must not tell the jury that such witness does in fact corroborate the accused. That is the function of the jury and depends upon whether they believe the witness or not. And though an omission to direct the attention of the jury to those portions of the corroborative evidence which amount to corroborative evidence in law would only be non-direction- it is a misdirection if the judge points out to the jury certain portions of the evidence as fulfilling the requirements already stated, when in fact they do not do so."

The following observations of Prinsep and Stephens, JJ, in *Jamiruddi v. R.*[107] make the point more clear:-

"In laying the evidence before the jury the sessions judge told them: If you think that the approver's story is worthy of credit in itself, you have to consider whether it has been corroborated on material points. 'He then described what in his opinion were the points of corroboration', and he told the jury that the above are points on which the evidence has been corroborated and that corroboration is full and complete, if you believe it,

[107] 29, 786, 787

you have to consider these points and decide whether the approver has been corroborated in material points, and if you find that to be so then you have in his story sufficient evidence to connect all three with the crime....."

"This was not a proper way to place the case before the jury. The sessions judge should have told the jury that, although the law permits them to convict on the uncorroborated evidence of an accomplice, it is into the practice of our courts, which have consistently held that it is not safe or proper to convict on such evidence without corroboration sufficient to connect each of the accused with the offence committed. With this caution, the sessions judge should have laid before the jury the evidence corroborating the statements of the accomplice. In regard to the nature of the corroborative evidence, it must be confirmatory of some of the leading circumstances of the story of the approver as against the particular prisoner. Facts which do not show the connection of the prisoner with the commission of the offence with which he is charged are no corroboration in the sense in which the word is used in such cases, although they may tend to show that certain portion of what the accomplice says is true."

The following passage in the charge to the jury by Garrow B in *Tidd's Trial*[108], contains an ideal instruction: "It may not be unfit to observe to you here that the confirmation to be derived to an accomplice is not a repetition by others of the whole story of the accomplice and a confirmation of every part of it, that would be either impossible or

[108] 33 How St T 1483.

unnecessary and absurd.... and therefore you are to look to the circumstances to see whether there are such a number of important facts confirmed as to give you reason to be persuaded that the main body of the story is correct.....You are, each of you, to ask yourselves this question: Now that I have heard the accomplice and have other circumstances which are said to confirm the story he has told, does he appear to me to be so confirmed by unimpeachable evidence, as to some of the persons affected by his story or with respect to some of the facts stated by him, as to afford me good ground to believe that he also speaks the truth with regard to other prisoners or other facts, with regard to which there may be no confirmation? Do I, upon the whole, feel convinced in my conscience that his evidence is true and such as I may safely act upon?"

The juries are the sole judges of the weight to be given to the testimony of a party who testifies as a witness in either a civil action or a criminal prosecution. But the judge may properly remind the jury, in his instructions to them, of the fact that the temptation is strong to color, pervert or withhold facts. Some authorities hold that it is the duty of the judge so to instruct the jury.[109]

While the jury may consider interest in determining the weight to be given to the testimony of the party they must in arriving at their verdict, weigh the party's testimony as carefully as they do that of any other witness. Thus the jury may reject the testimony of a party in part or as a whole, if they consider it unworthy of belief. Or if they find that he has

[109] Johnson v. United States.

testified falsely as to any material fact[110] and they may find a verdict against his uncontradicted evidence. On the other hand, it is within the province of the jury to accept a party's testimony upon a question of fact although it is clearly in conflict with that of several witnesses.[111] In a case of murder, it was held that the Judge had not given a proper direction in the jury in telling them that it was for them to consider whether the evidence of the accomplice was strictly corroborated as to the prisoners, that it was not enough that the evidence should disclose a state of facts consistent with the possibility of the truth of the accomplices story, and that the judge ought to have gone through the history of the crime as detailed by the accomplice, to point out any independent evidence proving facts showing that the prisoners were or must have been present at, or cognizant of, the murder.[112]

7. Necessity of Independent evidence should be stated:-

The Judge ought, in his charge, to direct that the corroboration of an accomplice or accomplices ought to be that which is derived from unimpeachable or independent evidence, as distinguished from the earlier statements of the same accomplice or the statements of other accomplices, and to point out the danger of convicting any one of the several prisoners charged at the trial, about whose identity, as one of the persons committing the crime, the accomplice testimony is not corroborated.

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[110] Hirchmann v People 101 111 586.
[111] Lewis vs state 88 All. 11, 6 So. 755.
[112] Queen Vs Karoo, Rumee and Handoo Khattree 6 W.R. (Cr.) 44.

A co-accused's statement, taken with the pardoned accomplice's statement, is not sufficient by itself to warrant the conviction of those who never confessed. The value of such sworn testimony of the approver can hardly be appreciated unless it is shown that the circumstances under which the pardoned approvers had first made their statements were such as to render previous concert highly improbable. It would, therefore, be a misdirection to tell the jury that the statements of some of the prisoners when committed by the Magistrate were corroboration.[113]

When such statements are made in another trial in the absence of prisoners whom it is intended to implicate thereby, the Sessions Judge should caution the jury against attaching any weight to them at all except as against those who made them. [114]

Where the only evidence against the prisoner is the statement of the co-accused taken into consideration under Sec. 30 of the evidence Act, the Judge ought to direct the jury to acquit the prisoner.[115] If, however, the co-accused is convicted and sentenced on his own plea of guilt and then is examined as a witness in a subsequent trial of his co-prisoner, a judge is not wrong in law in directing the Jury in a trial of the other prisoner, that they can look to the evidence of he convicted prisoner for confirmation of the story told by the approver as the former is not an approver or unconvicted accomplice.[116]

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[113] Bhagya v. R., Rat. unreported cases 750, Narain Das v. R. I.L.R. 2 Lah. 144, 68 I.C. 113, A.I.R. 1922 Lah. 1.
[114] R. v. Bepin Biswas supra, Kalwa v. R. I.L.R. 48 All. 409, 95 I. G. 74: A.I.R. 1926 A. 377.
[115] R. v. Ashotosh, I.LR. (1878) 4 CAl. 483 (F.B.)
[116] In re Marudaimuther (1892) 2 Weir 520.

It is not a misdirection to tell the jury that if the approver was corroborated on some points they might believe him on other points in respect of which he was not corroborated, provided the jury think it reasonable to do so.[117]

Care must be taken that the suggested corroboration is in fact adequate.[118] It would not be enough that the evidence should disclose a state of facts consistent with the possibility of the truth of the accomplice's story. Such proof would be insufficient as corroborative evidence, though of course such evidence may be of great importance as a link in the chain of proof against a prisoner.[119]

In *R.v. Feigenbaum,*[120] a case where there was no corroborative evidence, Justice Darling observed as follows: "The boys were undoubtedly accomplices of the appellant. It is a rule of law that jury may convict on the uncorroborated testimony of an accomplice, and, therefore, a judge is not justified in directing a jury, at the close of the case for the prosecution, that they must acquit the prisoner because in his opinion the only evidence against him is the uncorroborated evidence of an accomplice. But it has been laid down in many cases, that the judge ought not to leave the case to the jury without warning them firmly that evidence of an accomplice must always be regarded with grave suspicion, and they ought not to convict unless the evidence of accomplice is corroborated, further, he ought to point out to the jury what corroborative evidence there

[117] Leda Molla v. R., (1925) 42 C.L.J. 501.
[118] R. v. Clive, (1930) 22 Cr. A.R. 19.
[119] R.v. Karoo, (1866) 6 W.R. Cr. 44.
[120] (1919) 1 K.B. 431.

is, if any, or if in his opinion, there is no corroborative evidence, he should tell the jury so. Practically this differs little from saving that the judge may direct an acquittal, if indeed there is no corroboration of the accomplice's evidence but a difference does exist, though it be very slight."

It is open to the jury to disregard the warning if they think fit.

Where a prisoner had been found guilty by the jury on the uncorroborated evidence of an approver, after the judge in his summing up had pointed out the desirability, under the circumstances of such corroboration, the High Court on appeal refused to set aside the conviction.[121]

In *R.v. Baskerville,*[122] Lord Reading, C.J., after pointing out the rule of practice in such cases, said: "If after the proper caution by the Judge the Jury nevertheless convict the prisoner this Court will not quash the conviction merely upon the ground that the accomplice's testimony was uncorroborated. It can but rarely happen that the jury would convict in such circumstances. In considering whether the conviction should stand or not, the Court will review all the facts of the case and will bear in mind that the jury had the opportunity of hearing and seeing the witnesses when giving their testimony."

8. Statement of a dead or absent Accomplice:-

We have already discussed the admissibility of the statement of a dead or absent accomplice, as a statement of a conspirator, and of an

[121] R.v. Mohima Chunder Das (1871) 6 Beng. L.R. App. 108, 15 W.R. Cr. 37.
[122] (1916) 2 K.B. 658.

accomplice's statement as a dying declaration under Sec. 32, Evidence Act. Sec in this connection the Privy Council case of *Pakala Narayanaswami v. R.*,[123] as the whether it is necessary under Sec. 32 that the statement should be made after the transaction had taken place, whether the person making it must be near death and what are meant by the words 'circumstances of the transaction which resulted in death'.

When after deposing before the inquiring Magistrate the approver dies or cannot be found or is incapable of giving evidence, or, is kept out of the way by the adverse party, or, if his presence cannot be obtained without an amount of delay or expenses which under the circumstances of the case the Court of Session or the High Court which tries the accused, considers unreasonable, then the deposition of the approver before the inquiring Magistrate is admissible for the purpose of proving the truth of the facts which it states, provided the accused had the right and opportunity to cross-examine him. (Sec. 33 of the Evidence Act).

If the case is that that witness cannot be found, it is necessary to prove that reasonable attempt had been made to find the witness.[124]

It must be shown that by ordinary care and use of ordinary means the witness could not have been produced.[125] It should be found by the Court that reasonable exertion has been made to find him. A mere report of the process-server that the witness cannot be traced in sufficient for such finding.[126]

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[123] (1939) 69 C.L.J. 273 (281): A.I. R. 1939 P.C. 47.
[124] R.v. Lucky Narain Nagory, (1875) 24 W.R. Cr. 18, 19
[125] R.V. Nowjan, (1873) 20 W.R. LE 429 Cr. 69
[126] Malia v. Sarkar, 1939 Marwar L.R. Cr. 12.

The identity of a person deposing in a previous judicial proceeding should also be proved.[127]

In the case of *Ibrahim v. R.*,[128] which was a case tried with assessors, the evidence of the deceased approver Rahmat was put in under Sec. 33 of the Evidence Act and laid before the assessors. The assessors with great force said that they could not give any opinion whatever as to the value of that evidence in as much as there has been no cross-examination of the witness and they had neither seen him nor heard him in the witness-box. Now, this is a position which can fairly be taken by a jury as judges of fact, and if the jury took such a position, it is difficult to see how it could be escaped from. The High Court added: "Although it may be admissible technically under the terms of Sec. 33 even this in our opinion seems doubtful-its evidentiary value is small indeed. The doubt which we express as to its admissibility is because Sec. 33 says that the adverse party in the first proceeding must have the right and opportunity to cross-examine. Now the practice in Sessions enquiries is not to cross-examine the prosecution witnesses unless, at the conclusion of the case when the charge is drawn up, the accused thinks it worthwhile to defend himself in the first Court, and under the new provisions of the amended Code of Criminal Procedure get the charge cancelled by cross-examining the witnesses and by entering into his defence. But if from the first he takes no such action, although it is clear he has the right to do so, it can hardly be said that he

[127] Barajaballoo v. Akhoy, (1925) 30 C.W.N. 254.
[128] (1912) 17 C.W.N. 230.

had the opportunity to cross-examine. We are borne out in this view by the fact that on the record it is stated that a lengthy examination in-chief of the approver was read over to him and admitted to be correct, and it does not appear that the accused persons were asked then and there to cross-examine if they wished to. We think in the case of approvers having regard to the difficulty which has arisen in this case, that it would be a sound principle for the committing Court to clearly bring to the notice of the defence that it is their duty to cross-examine the approver if they desire to do so directly his evidence is given. The fact that some of the witnesses were cross-examined would make the inference from the record itself and from the fact that the approver was not cross-examined even stronger. We can attach no importance to this evidence."

Having regard to the facts and circumstances of the case, the High Court in this case doubted whether the accused had opportunities of cross-examining the approver. The mere fact, however that in Sessions inquiries the practice is generally not to cross-examine the prosecution witnesses in the committal Court as observed by the High Court, is no ground for thinking that the accused had not the opportunity to cross-examine the witness. Whether the cross-examination is "declined" or is reserved by the accused, should distinctly appear in the record.

9. Value of evidence of Trap witnesses:-

Trap witnesses or decoy witnesses are employed generally in bribery cases. A decoy may not be an accomplice but he is an interested witness no

doubt. Though a trap witness is not an approver, he is certainly an interested witnesses in the sense that he is interested to see that the trap laid by him succeeded, he can atleast be equated with a partisan witness and it would not be permissible to rely upon his evidence without corroboration. His evidence is not tained one, it would only make a difference in the degree of corroboration required rather than the necessity for it- the corroboration must be by independent testimony confirming in some material particulars not only that the crime was committed but also that the accused committed it. It is, however, not necessary to have corroboration of all the circumstances of the case of every details of the crime, sufficient if there is corroboration as to material circumstances of the crime.[129] Though trap witness is an interested witness, as a matter of law his evidence cannot be rejected for want of corroboration.[130] Evidence of interested and partisan witnesses who are concerned in the success of a trap must be tested in the same way as that of any other interested witness. In a proper case court can look for independent corroboration before convicting the accused.[131]

It is not proper on the part of the judge to magnify every minor detail or omission of a trap witness to falsify him and to cast a shadow of doubt in the prosecution case.[132] When the witness falls under the category of accomplices by reason of their being bribe-givers independent

[129] E.G. Barsay Vs state of Bombay AIR 1961 SC 1762.
[130] Dalpat Singh Vs state of Rajasthan. AIR 1969 SC 17.
[131] State of Bihar Vs Basawan Singh. AIR 1958 SC 500.
[132] State of Maharashtra Vs N.G. Pimple AIR 1964 S.C. 63.

corroboration is necessary.[133] No conviction can be based on accomplice evidence unless it is corroborated in material particulars. But as to evidence of a partisan or interested witness, i.e. who had laid a trap or offered bribe it is open to the court to convict solely on the basis of such evidence, if reliable. In appropriate case the court may look for corroboration in a general way and not material corroboration as in the case of evidence of accomplice."[134]

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[133] R.R. Chari Vs State of UP. AIR 1959 All. 149.
[134] E.G. Barsay Vs State of Bombay, AIR 1961 SC, 1762.