CRIMINAL REFERENCE.

Before Rankin C. J., Graham and Mallik JJ.

EMPEROR

v.

TAZEM ALI.*

1930

Dec. 22.

Jury—Charge on evidence—Presumption against accused person—Witness deposing on oath, whether presumed to be speaking the truth.

A jury cannot be *required* to make the presumption *against an accused person* that the *particular* statements of a *particular* witness are true ; still less can it be required to make such a presumption as regards the prosecution witnesses as a body or the prosecution evidence as a whole. The jury should be told that it is their duty to consider carefully and to say whether they are convinced by the prosecution evidence and that if they are not convinced there is no law which obliges them to convict.

Ambar Ali v. *Emperor* (1) explained and dissented from.

The facts of the case were as follows. Nasaruddin and his son, Tazem Ali, held some lands under Ahad Ali for a number of years. For the last three years they did not pay any rent and Ahad Ali took the land out of their possession, refusing to settle it with them again, although they approached him for settlement. Some time after, one night, Tazem Ali and his cousin, Hatem Ali, came to Ahad Ali's house and represented to him that Tazem Ali's father, Nasaruddin, was seriously ill and wished to see Ahad Ali to come to some arrangement about the land. Ahad Ali agreed and went to Nasaruddin's house in their company, from which he never returned. Next morning, Ahad Ali's son went to Nasaruddin's house and peeping through a chink in the mat wall of the *verândâ* saw a dead body covered with a cloth, which he suspected to be his father's body, but which the inmates of the house did not let him approach. He then informed the villagers who came and discovered that it was the

*Death Reference, No. 15, and Criminal Appeals, Nos. 892 and 893 of 1930, against the order of T. H. Ellis, Sessions Judge of Bakarganj, dated Nov. 19, 1930.

(1) (1928) 33 C. W. N. 55.

1930

Emperor v. *Tazem Ali.*

corpse of Ahad Ali. Formal information was then lodged at the *thânâ* and the usual investigation followed. The *post-mortem* examination disclosed that there was a symmetrical fracture of the ribs on both sides of the body, death being due to the application of mechanical pressure to the body. Tazem Ali and Hatem Ali were then sent up for trial on charges under sections 364 and 302/120B of the Indian Penal Code, for having, by deceitful means, abducted Ahad Ali in order that he might be murdered and for entering into a conspiracy to murder him. After commitment, they were tried before the Sessions Judge, with the aid of a jury, consisting of 9 persons. The defence of the accused Tazem Ali was that Ahad Ali had an intrigue with his wife and, while attempting to outrage her, was beaten by her and his mother and death was due to the beating; while Hatem Ali's defence was that he was falsely implicated as he was a relation of Tazem Ali. The jury brought in a unanimous verdict of guilty on both the charges against the first accused, Tazem Ali, and a majority verdict of guilty against accused Hatem Ali. The Sessions Judge, accepting the verdict, sentenced Tazem Ali to death and Hatem Ali to transportation for life, and referred the case to the High Court for confirmation of the capital sentence. Both the accused at the same time appealed to the High Court.

G. Sircar for the accused.

Debendranarayan Bhattacharya for the Crown.

[The judgment of Rankin C. J., after dealing with the facts and the case of the second accused, proceeded as follows:—]

RANKIN C. J. It remains then to deal with the case of the first accused. Now, the learned Judge, in dealing with the law and the evidence, directed the jury as follows: "It is, of course, a presumption "in law that a witness should be believed while "deposing on oath. In other words, you should accept "what these witnesses say as being true, until the "defence give you some reason to reject their evidence

"as being tainted." In my opinion, that is a direction, which cannot be supported. The matter is made worse, when it is put by saying "until the "defence give you some reason to reject their evidence "as being tainted." In my judgment, that will not do at all. The usual way of directing the jury is to tell them that they must start with a presumption of the innocence of the accused, that the prosecution must prove their case beyond a reasonable doubt; according to the language of section 3 of the Evidence Act "a fact is said to be proved when the court either "believes it to exist, or considers its existence so "probable that a prudent man ought, under the "circumstances of the particular case, to act upon the "supposition that it exists." Now, the learned Judge has done all this and done it very well at the beginning of his charge, but, when he comes to deal concretely with the evidence, I think the passage to which I have referred, spoils the effect and value to the prisoner of these directions. The one thing which a jury must be made to understand is that, before they find the prisoner guilty, they must be convinced, and anything which seems to mean that they ought, by reason of a presumption of law, to accept statements, of which they are not convinced beyond a reasonable doubt, is objectionable. We have been referred by Mr. Bhattacharya to *Ambar Ali's* case (1) and to the unreported case mentioned therein [*Gani* v. *Emperor* (2)] where reference is made to section 352 of Best on Evidence. That section opens with the statement which can hardly *for the present purpose* be correct "all testimony given in a court of justice is presumed "to be true *until the contrary appears*," and very old authority is cited in support of it, *viz.*, Cro. Jac. 601. pl. 26 and M 20, 20 Hvii 11 B. pl. 21. In modern times witnesses who are interested are not regarded by the law as incompetent and the jury is called upon to listen to all kinds of witnesses on the footing that their credibility can be left entirely to the jury.

(1) (1928) 33 C. W. N. 55.

(2) (1927) Crim. App. No. 607 of 1926, decided by Cuming and Graham JJ. on 21st Feb.

1930

Emperor
v.
Tazem Ali.

Rankin C. J.

Also medieval religious notions, as to the sanction of an oath, have not been incorporated without modification into the Indian Evidence Act. It would hardly be worth while to enquire, at any length, into the principles and practice of English Criminal law at the time of the *dicta* cited by Best. Indeed, the matter is both too important and too simple to be left to ancient dicta. Unless there were some probability that, by the evidence of witnesses, the truth could be arrived at, no doubt some other system of trial would have to be devised. If all you know is that A gave evidence on oath in a court of law and everything else is left for presumption, the presumption will be that he gave his evidence truthfully. But the moment you know something of the circumstances, something of his statement, of his demeanour, of his interest in the case, of the other evidence, this presumption has been overlaid with other much more strong presumptions and with other elements of probability. Now, a jury is never in the position of merely knowing that a certain man gave evidence. It sees him as he enters the box; the moment he opens his mouth he may show the class of man he is, whether he tends to exaggeration, or evasiveness, whether he is prompt and frank in answering questions without regard to consequences. It finds out whether he has any interest, whether his story was told at the first opportunity, whether the circumstances give antecedent probability to what he has stated, whether other evidence contradicts it. Whatever force or strength attaches to the mere abstract presumption that because he gives evidence at all his evidence will be true, it is not by itself sufficient to convict any man of a crime. A man might be very safely and properly hanged upon the evidence of one witness, but that is a proposition *toto coelo* different. In such a case, the jury is convinced, they are satisfied by the circumstances, by the probabilities, by his frankness and lack of bias, by his opportunities of knowledge, by his accuracy of observation, by his intelligence, by his previous conduct and, it may be, by many other

considerations that *this* witness is in *this* case speaking truthfully and without mistake. But I take the liberty to say it is a serious error to tell a jury, in any form of words, that the law in a criminal case requires them *prima facie* to accept the particular statements of a witness and that it is only when the defence have shown good reason to reject his statements that the jury have any option in the matter. This is in effect to tell the jury that the general presumption of innocence and of accuracy in the witness is stronger than the presumption of innocence in the accused. "It is impossible to enumerate, *â priori*, the causes "which may distort or bias the minds of men, to "mis-state or pervert the truth, or to estimate the "weight of each of these causes in each individual "case or with each particular person." To this passage from "Best on Evidence," 11th ed., p. 53, I will add for myself that it will, in general, be found equally impossible to enumerate these causes *â posteriori*. Why should one presumption, and that one of the weakest, be singled out as the central pivot of a criminal case? At the highest, it is one of a number of competing presumptions. When the learned Judge, in this case, told the jury that "you "should accept what these witnesses say as being true "until the defence give you some reason to reject their "evidence as being tainted," he applied the presumption to the prosecution witnesses as a body. He was proceeding to refer to suggestions that they were interested as relations of the deceased, biased on account of enmity with the accused, that they were "chance witnesses" and so forth. The accused called three witnesses, but I cannot find, in this charge, that the presumption of innocence was pressed upon the jury with regard to these or any of them. Nor, can I find, in this charge, any reference to the fact that, apart from general criticisms as to relationship, likelihood of bias, *etc.*, the jury have to assess the reliability of every witness and it may be of individual statements of each witness for themselves by carefully observing his demeanour, degree of

1930

Emperor
v.
Tazem Ali.

Rankin C. J.

intelligence, reluctance or overzeal, *etc.*, *etc.* The things which cannot be enumerated or exhausted, which no jury can be expected to analyse too far, are often the all-important things. This is well understood and it is not generally necessary that they should be expressly mentioned in the judge's charge. But it becomes very necessary to refer to them and to enlarge upon them if the learned Judge is to lay down "a presumption in law that a witness should "be believed when deposing on oath." The Evidence Act makes no reference to any such presumption, probably because the legislature considered that it was a misleading refinement or at least a doctrine of no great practical utility, but, if the matter be carefully analysed, it will be found that in section 114 of the Evidence Act reference is made to somewhat similar matters, *e.g.*, the presumption in favour of the common course of business and the regularity of judicial and official acts. Why then are we to hold that the presumption that a particular witness has discharged his duty properly is a presumption which the jury *must* make and not merely one of the things which a jury "may presume" as distinct from "must presume" (section 4)? I am the last person to regard a charge as unsatisfactory merely because general explanations of the law of evidence are not stated with complete accuracy, but, in the charge before us, the passage which I have quoted appears to me to be a governing principle. There seems to be a danger lest learned judges should get into the habit of employing this kind of direction, which seems to me to be confused and unfair. The present is, at least, the third case in which similar language has been employed, though in *Ambar Ali's* case (1), the direction as a whole was not approved upon this point, and it was very pertinently observed that the presumption of veracity of a witness and the presumption of innocence of an accused were in their nature different and should not be classed together. I desire to see this kind of direction abandoned

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1930

Emperor
v.
Tazem Ali.

Rankin C. J.

altogether. In my opinion, a jury cannot be *required* to make the presumption *against an accused person* that the *particular* statements of a *particular* witness are true; still less can it be required to make such a presumption as regards the prosecution witnesses as a body or the prosecution evidence as a whole. The jury should be told that it is their duty to consider carefully and to say whether they are convinced by the prosecution evidence and that, if they are not convinced, there is no law which obliges them to convict. If they do in such a case convict they stand without excuse before the law.

The direction given in the present case makes it exceedingly difficult for me to consent to uphold the verdict against the first accused.

[The rest of the judgment discussed the charge in relation to conspiracy.]

MALLIK J. I agree.

A. A.