REVISIONAL CRIMINAL.

Before Mr. Justice Ashworth and Mr. Justice King.

1928

December, 18.

EMPEROR *v.* KUMERA AND OTHERS.*

Criminal Procedure Code, sections 110 *and* 117(4)—*Security for good behaviour—Evidence—Admissibility—General repute—"Bad character"—Hearsay evidence—Evidence that accused was suspected of certain thefts—Evidence that accused was previously bound over to be of good behaviour.*

In a case under section 110 of the Code of Criminal Procedure a witness should not be allowed to state *merely* that an accused person is a "bad character", as that expression is too vague; but where he immediately follows this up by saying that the person habitually commits theft, there is no ambiguity about his meaning and his deposition is relevant and admissible as evidence of general repute.

Evidence of general repute must necessarily consist largely of "hearsay" evidence. The reputation of a person means what is generally said or believed about his character. A witness may depose "I believe the accused to be a habitual thief, and that is what persons of the neighbourhood generally say about him". Such evidence is admissible as evidence of general repute.

The evidence of a witness who says that *he himself suspected* the accused person of having committed a certain offence is admissible; evidence that the accused person has been so *suspected by persons other than the witness*, although it may be inadmissible for proving general repute, would nevertheless be admissible as showing one of the grounds for the witness's opinion.

The fact that a person has on a previous occasion been bound over under Section 110 may be stated and proved as one of the grounds on which the witnesses to general repute believe the accused to be a habitual offender.

*Criminal Revision No. 765 of 1928, by the Local Government, from an order of Mohammad Ali Ausat, Additional Sessions Judge of Aligarh, dated the 16th of July, 1928.

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Emperor v. *Kurwa* (1), explained. *Raham Ali* v. *King-Emperor* (2) and *Raj Narain Pandey* v. *Emperor* (3), referred to.

THE facts of the case are fully set forth in the judgement of KING, J.

The Government Advocate (Pandit *Uma Shankar Bajpai*), for the Crown.

Maulvi *Muhammad Abdul Aziz*, for the opposite parties.

KING, J. :—This is an application by the Local Government against an order made by the learned Additional Sessions Judge of Aligarh, setting aside an order made by a Magistrate of the first class requiring four persons to give security for good behaviour in consequence of proceedings under section 110, Code of Criminal Procedure.

Twenty witnesses were produced for the prosecution, including both Hindus and Muhammadans, who are respectable zamindars and mahajans. The evidence for the prosecution was to the effect that the accused are habitual thieves and burglars and that they belong to one gang and commit thefts together and that the people of Jalali, where they reside, are constantly complaining about their committing thefts. The Magistrate came to the following conclusion :—"I have considered and weighed the evidence on both sides carefully and I am perfectly satisfied with the prosecution evidence that all the accused belong to one and the same gang and habitually commit theft and burglary and that the whole town of Jalali and the people in the neighbourhood are tired of them and live in terror of them." He accordingly ordered them to furnish security for good behaviour and they appealed.

(1) (1928) 26 A. L. J., 519. (2) (1913) 11 A. L. J., 461.
(3) (1927) 25 A. L. J., 393.

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The Additional Sessions Judge, in his appellate order, referred to a decision of a Division Bench of this Court in the case of *Emperor* v. *Kurwa* (1) and found that, in accordance with that ruling, nearly all the evidence produced for the prosecution was inadmissible.

It will be convenient to consider the evidence of one witness in detail and to note how that evidence has been dealt with by the court below. I take the evidence of the first witness, Musahib Khan of Jalali, as set forth in the Magistrate's memorandum of evidence:—"I pay about Rs. 1,000 as rent. I know the accused present in court. They live in my village. Their character is bad. They habitually commit theft. They belong to one and the same gang and commit theft together. Their general repute is bad. People say that they are thieves. Kishori, Parma, Thakuri Ram, Musi Raza, Aziz-ul-Hasan, Mehdi Hasan and others had told me so. Ten months ago a theft was committed from my house and property worth Rs. 1,400 was stolen away. I had suspected the accused." (According to the Judge, who probably referred to the vernacular record, the last sentence should be read "I had suspected all the *badmashes* in the village and also the accused persons"). There was no cross-examination of this witness, although other witnesses were cross-examined.

The Additional Sessions Judge, after setting forth the substance of the above evidence, proceeds as follows:—"I have given the evidence of this witness in full in order to show that *it is all hearsay* and the only tenable point in his evidence is that a burglary took place in his house ten months ago and he suspected all the *badmashes* of the village. The learned Judges pointed out in the above ruling that a witness should not

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be allowed to state that the accused is a bad character or has the reputation of being a bad character, but in this deposition it will be seen that the witness is allowed to say that the accused's character is not good. I do not think that his evidence comes within the definition of general repute."

It appears, therefore, that the court below has swept away the whole of this witness's evidence, in so far as it implicates the accused, on the ground that it is inadmissible.

I think that the Additional Sessions Judge has misunderstood and misinterpreted the ruling cited. He takes exception to the witness's statement that the character of the persons concerned is bad. It is true that in the ruling the learned Judges remarked:—"A witness should be allowed to depose, if he can in fact give that evidence, that the accused has a general reputation as a habitual thief (or robber, etc., as the case may be) but he should not be allowed to state that the accused is a bad character or has the reputation of being a bad character." I understand this to mean that a witness should not be allowed to state *merely* that the accused is a "bad character", simply because that expression is too vague. The expression "bad character" (*badmash*) is undoubtedly vague and susceptible of many different meanings. It may mean that the person concerned is a drunkard or a gambler or an adulterer. When the prosecution sets out to prove that the accused is a habitual thief and burglar, as in the present case, it is obviously insufficient to prove merely that he is a "bad character", as that expression may not mean that he is a thief or burglar. I quite agree that a witness should not be allowed to state *merely* that an accused person is a "bad character" if he does not explain more

precisely what he means by that expression. But when a witness starts by saying that a person is a "bad character" and immediately follows this up by saying that the person habitually commits theft (as in the present case), then there is no ambiguity about his meaning, and in my opinion his deposition is relevant and admissible as evidence of general repute. The court below seems to treat the statement in the ruling, that a witness should not be allowed to state that the accused is a bad character or has the reputation of being a bad character, as meaning that a witness should not be allowed to state anything tending to show that the accused is a bad character, for example that the accused is a habitual thief, which is the fact in issue. I do not for a moment believe that the learned Judges of this Court meant anything of this kind. Such a view would obviously reduce proceedings under section 110 to a mere absurdity. I hold that the court below was wrong in rejecting the statement "they habitually commit theft" as inadmissible.

The witness also deposed that he suspected the accused of having committed the burglary in his own house. The court below has also treated this evidence as inadmissible. Here, again, I think the Additional Sessions Judge has misunderstood the ruling. Part of the head-note runs as follows:—"In a case under section 112 of the Code of Criminal Procedure evidence cannot be led under section 110 that an accused person *has been suspected* of committing such and such offences." This does not mean, in my opinion, that a witness cannot be permitted to say that *he himself suspected* an accused person of having committed a certain offence. Such evidence would in no sense of the word be hearsay evidence and would clearly be admissible as forming one of the grounds for his belief that the accused is a habitual offender. The ruling, as I understand it,

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goes no further than to lay down that evidence cannot be given that an accused person *has been suspected by persons other than the witness* of having committed a certain offence. The ruling is no authority for the proposition that a witness cannot be allowed to state that he personally suspected the accused of having committed a certain offence, and I hold that the learned Additional Sessions Judge was wrong in rejecting such evidence as inadmissible.

There is one passage in the ruling cited,—"but evidence of general repute is evidence of a definite fact and is in no sense hearsay evidence"—which suggests that hearsay evidence is inadmissible for proving general repute. I doubt whether this is what the learned Judges really meant, but the court below seems to have interpreted their ruling in this sense, as it rejected the evidence, that people say that the accused are thieves and certain specified persons have told the witness so, as being "all hearsay". I think the learned Additional Judge was wrong, and, if he has correctly interpreted the ruling, then I must respectfully express my dissent. Section 117 (4) expressly lays down that the fact that a person is a habitual offender may be proved by evidence of general repute or otherwise. I venture to think that evidence of general repute must necessarily consist largely of "hearsay" evidence. The reputation of a person means what is generally said or believed about his character. A witness may depose "I believe the accused to be a habitual thief, and that is what persons of the neighbourhood generally say about him." Such evidence is admissible as evidence of general repute. So far as the witness gives his personal opinion, the evidence is not hearsay. So far as the witness gives the opinion or the statements of other persons, his evidence must, in a sense, be "hearsay". A witness can only know the opinion of other persons by hearing them say

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what they think. For this reason I think evidence of general repute necessarily consists largely of "hearsay" evidence, i.e. of statements of what persons other than the witness say or believe about the character of the accused. When a witness deposes that an accused person is generally reputed to be a habitual thief, he may be examined and cross-examined as to his means of knowledge. He may be asked who told him that the accused was a thief. In the present case the witness mentioned the names of six persons who gave him this information and I would hold that this evidence is admissible as evidence of general repute, although it is undoubtedly "hearsay" evidence of the alleged fact that the accused are habitual thieves.

In my opinion there is nothing in the deposition of this witness which could be ruled out as inadmissible in evidence and the Judge was wrong in rejecting it. The value to be attached to the evidence is, of course, a matter for the court to determine, but the court below has rejected the evidence not because he discredits the witnesses but because he holds that the statements made by them are not admissible in evidence.

It is unnecessary to consider the evidence of all the other witnesses in detail. Their evidence is much to the same effect and the Additional Sessions Judge has accordingly rejected it on the ground of its inadmissibility.

There is one further point worth considering. Evidence was led to show that the accused persons were suspected of certain specified thefts or burglaries. In some cases the persons who suspected the accused have themselves given evidence to this effect and I think the court below was clearly wrong in rejecting such evidence as inadmissible. It is open to question, however, whether evidence that the accused has been suspected

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by persons other than the witness is inadmissible for all purposes in an inquiry under section 117. It has no doubt been held in several cases, as for instance, *Raham Ali* v. *King-Emperor* (1) and *Raj Narain Pandey* v. *Emperor* (2), that evidence of cases in which the accused is suspected is not evidence of general repute within the meaning of section 117 of the Code of Criminal Procedure. I am not prepared to challenge this proposition, but it does not necessarily follow that such evidence is not admissible for other purposes. When a witness gives evidence of general repute he is undoubtedly entitled to give his personal opinion of the person concerned. As his opinion is undoubtedly relevant, then the grounds of his opinion must also be relevant, under section 51 of the Evidence Act. A witness may say: "I believe the accused to be a habitual thief. The grounds for my opinion are, *firstly*, that he has no honest means of livelihood; *secondly*, that he associates with persons convicted of theft or burglary; *thirdly*, that he is frequently absent from his house at night for reasons which he refuses to disclose; and *fourthly*, because *A*, *B*, *C* and *D* have severally and on different occasions told me that they suspected him of having stolen their property." The last statement is inadmissible for proving that the accused committed the alleged thefts, and it may be inadmissible for proving general repute, but I think it would nevertheless be admissible as showing one of the grounds for the witness's opinion. The value to be attached to such evidence is another matter.

Another question arises, whether the fact that a man has been previously bound over to be of good behaviour as a habitual offender can be proved against him in proceedings under section 110. In the present case one of the persons with whom we are concerned in this application was convicted of burglary. Such conviction

(1) (1913) 11 A. L. J., 461. (2) (1927) 25 A. L. J., 393.

can unquestionably be proved as tending to show that he is a burglar. The other three persons have not been convicted of any specific offence, but they have all been previously bound over under section 110. There are certain remarks in the ruling in *Emperor* v. *Kurwa* (1) which suggest that an order passed under section 118 cannot be proved against a person proceeded against under section 110 as evidence of his being a habitual offender, on the ground that such an order is not a "conviction". Explanation 2 of section 54 of the Evidence Act only speaks of a previous conviction as being relevant as evidence of bad character. The previous order under section 118 is not admissible under the Explanation mentioned, because it undoubtedly is not technically a "conviction", but I am clearly of opinion that it can be proved and is admissible on other grounds. The mere fact that a person has been bound over as a habitual offender certainly tends to injure his reputation. It makes people inclined to believe that he is a habitual offender, whether he is so or not. Hence the fact that a person has been bound over previously under section 110 may be stated and proved as one of the grounds on which the witnesses to general repute believe the accused to be a habitual offender. Then again, if a court has once held that a person is a habitual thief there is some presumption that he was a habitual thief at the time that the order was passed. This renders it more probable that the accused remains a habitual thief even after an interval of some years, since habits are not easily discarded. The value to be attached to the proof of a previous order under section 110 is, of course, a question for the court to consider, but I cannot see that evidence of the previous order could be held inadmissible.

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(1) (1928) 26 A. L. J., 519.

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The court below has remarked that if the accused are such notorious thieves then the police must be quite incompetent because they did not succeed in catching them red-handed. The failure of the police to catch the accused red-handed may reflect upon their competence, but I cannot see that it is any reason for refusing to bind over the accused to be of good behaviour, if it is proved that they are habitual thieves and burglars. Security for good behaviour is required in the interests of the public, who are not the less entitled to protection if the police are incompetent.

In the present case I think the evidence upon the record is ample to prove that the accused are habitual thieves and burglars and the Magistrate was justified in passing his order. Even the court below has not set aside the order upon its merits, but owing to an error of law in holding that practically all the evidence for the prosecution was inadmissible.

I would accordingly accept the application, set aside the order of the Additional Sessions Judge and restore the order of the Magistrate.

ASHWORTH, J. :—I concur. The provision of section 117 (4) of the Code of Criminal Procedure that the fact that a person is an habitual offender (i.e. an habitual doer of certain criminal acts) may be proved by evidence of "general repute or otherwise" appears to me to render the Evidence Act inapplicable to the proceedings under section 110 of the Criminal Procedure Code. Any evidence which supports or explains the fact that a person has acquired a certain reputation appears to me to be admissible. A court is not bound to bind over a person because he has a certain reputation but is bound further to consider whether he deserves such a reputation. I deprecate reference to general observations as to the evidence admissible in cases under sec-

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tion 110, because such observations should only be construed with reference to the particular facts of each case. The Evidence Act offers little or no assistance for the hearing of such cases, which depend on a common-sense view of the evidence. It may generally be stated that any evidence which enables a court to come to a decision that a person is or is not an habitual offender is admissible.

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BY THE COURT:—We accept the application, set aside the order of the Additional Sessions Judge and restore the order of the Magistrate.

APPELLATE CIVIL.

Before Mr. Justice Kendall and Mr. Justice Niamat-ullah.

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July, 10.

BASDEO NARAIN (PLAINTIFF) *v.* MUHAMMAD YUSUF AND OTHERS (DEFENDANTS).*

Joint Hindu family—Alienation by manager—Permanent lease of agricultural lands—Suit by minor brother for avoidance and possession—Benefit to the estate—Extent of relief against agricultural lessees—Act (Local) No. III of 1926 (Agra Tenancy Act), section 45.

The manager (elder brother) of a joint Hindu family granted a permanent lease of agricultural lands, being joint family property, to tenants at a favourable rate of rent, having taken from them a certain sum as *nazrana*. A minor brother sued for avoidance of the lease and for possession.

Held (1) that a permanent lease was an "alienation" of the property;

(2) that the validity of the alienation was to be judged not from whether it was a good business transaction but from whether the permanent lease or the cash *nazrana* was for the benefit of the family;

*Second Appeal No. 2223 of 1925, from a decree of D. C. Hunter, District Judge of Allahabad, dated the 14th of September, 1925, reversing a decree of Vishun Ram Mehta, Subordinate Judge of Allahabad, dated the 26th of May, 1924.