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jury unless it is of opinion that such verdict is erroneous owing to misdirection by the Judge or to a misunderstanding on the part of the jury of the law as laid down by him, and it is clear that the original verdict of the jury acquitting the accused under sections 333 and 225 was not so erroneous. We have, therefore, come to the conclusion that the learned Assistant Sessions Judge was not justified in convicting the applicants before us under sections 333 and 225.

It was then argued on behalf of the Crown that under our revisional jurisdiction we should convict the accused under sections 323 and 325 and pass an appropriate sentence. Without deciding whether we have such a power under section 439 of the Criminal Procedure Code we are of the opinion that, regard being had to the particular facts of the present case, this is not a fit case in which we should so act, in view of the protracted trial which the applicants had to undergo. The result is that we allow this application, upholding the last contention of the applicants, set aside the conviction and the sentence passed on them and direct that they be forthwith released, unless wanted in some other case.

APPELLATE CRIMINAL

Before Mr. Justice Young and Mr. Justice Collister

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August, 29

EMPEROR *v.* HAPPU*

Criminal Procedure Code, section 510—Chemical Examiner's report—Weight of such report where Chemical Examiner himself not examined—Evidence not tested by oath and cross-examination—Indian Penal Code, section 300—Murder by arsenic poisoning—Chemical Examiner should be examined as a witness.

Per YOUNG, J.—In a trial for murder by arsenic poisoning the prosecution must prove that the deceased died of arsenic poisoning, and that the accused administered arsenic to the deceased with intent to murder. If the prosecution wishes to establish the first proposition by means of the Chemical Ex-

*Criminal Appeal No. 265 of 1933, from an order of G. O Allen, Sessions Judge of Bareilly, dated the 14th of March, 1933.

aminer, and weight is to be attached to his evidence, he must be called, sworn, and offered for cross-examination. By his evidence he must prove that a lethal dose, i.e. at least two grains of arsenic were administered to the deceased. He can do this by proving the discovery of this amount in the body of the deceased, or by accounting for its absence in part due to processes of natural elimination of the poison from the body before death.

Section 510 of the Criminal Procedure Code is contrary to the accumulated legal experience of what is necessary for the protection of accused persons. It, however, says nothing as to the weight to be attached to the Chemical Examiner's report where he himself is not examined on oath, there is no reason, therefore, why the ordinary rule of law, which requires evidence to be tested by the administration of oath and by cross-examination, should not be strictly enforced if any weight is sought to be attached to the report. No weight, as evidence, e.g. as proof of death by arsenic poisoning, can be attached to the written report by itself, and no person ought to be put in peril of capital, or any, punishment on a written report not given on oath and untested by cross-examination.

Per COLLISTER, J.—Section 510 of the Criminal Procedure Code is anomalous. Where, however, in a trial for murder the whole case depends on the decision of the question whether a fatal dose of poison was or was not administered to the deceased, the trial Judge should, whenever he is of opinion that such action is necessary for the ends of justice, exercise his right to call the Chemical Examiner so that he may be examined on oath and be subjected to cross-examination. The section uses the word "may", not "shall"; so it is clear that the court has a discretion in the matter.

Mr. *K. O. Carleton,* for the accused.

The Government Advocate (Mr. *Muhammad Ismail*), for the Crown.

YOUNG, J.:—Happu, caste Nat, was charged under section 302 of the Indian Penal Code in the court of the Sessions Judge of Bareilly with murdering one Babu Singh by administering arsenic to him. The learned Sessions Judge found Happu guilty and sentenced him to death. Happu appeals to this Court and we have before us an application for confirmation of the death sentence.

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On the 21st of November, 1932, Babu Singh ate his evening meal and thereafter at the invitation of Happu went to his house. Happu gave Babu Singh a *chhatak* of broken *pera* to eat telling him it was the *parshad* of Ganga and that he had kept it for him. Babu Singh ate the *pera* and returned home. He felt ill, and when he reached his own house he was attacked by vomiting and purging. He was taken to the hospital and died two days later. These facts are proved.

In a charge of murder by arsenic poisoning it is essential for the prosecution to prove: (*a*) That the person alleged to have been murdered died of arsenic poisoning; (*b*) that the accused person administered arsenic to the deceased with intent to murder.

The Civil Surgeon was called by the prosecution. He made the post mortem examination of the stomach and intestines of Babu Singh. He said: "From the history and the post mortem appearance of the stomach and intestines I am of opinion that death was due to an irritant poison of the nature of arsenic." This evidence is insufficient to prove death by arsenic poisoning. From an examination of the authorities on Medical Jurisprudence and the medical evidence in arsenic poisoning cases tried in England, two facts are apparent. Firstly that the symptoms of arsenic poisoning before death are indistinguishable from the symptoms of some natural diseases, such as cholera and acute dysentery. Both diseases are common in India and both can cause sudden death. Secondly it is not possible to be certain by a naked eye post mortem examination of the stomach and intestines that death was due to arsenic poisoning. Post mortem appearances similar to those observed in undoubted cases of arsenic poisoning are also similar to those produced by certain natural diseases, and other irritant poisons. It is just possible, too, that under certain conditions they might be produced by the action of the digestive gastric juices of the stomach upon the tissues after death.

There was also before the lower court a report by the Chemical Examiner, in which it was said that arsenic was "detected" in the viscera of the deceased. This again is not enough to prove death by arsenic poisoning. Traces of arsenic might legitimately be present in the viscera of a large number of dead bodies. Arsenic is present in some food substances such as glucose. This substance is largely used in the preparation of preserves, and also in the manufacture of beer. Arsenic may be obtained in any bazar in India and is used in both Indian and European medicines. It is also frequently used as an aphrodisiac. In the trial court there was no evidence that a lethal dose of arsenic, that is two grains or more, had been administered; there was therefore no evidence that death was due to arsenic poisoning. In this Court a quantitative analysis report was produced at the Court's request. The Chemical Examiner reported that he had found 0·182 of a grain of arsenic in those portions of the viscera of Babu Singh submitted to him.

The Chemical Examiner employed the well known Marsh-Berzelius process to estimate the quantity of arsenic in the material for examination. In this process mirrors are used on which minute quantities (about 1/50th of a milligramme) of arsenic are deposited. 1/50th of a milligramme is 1/3200 of a grain. Standard mirrors are prepared on which the different minute amounts of arsenic deposited are known. The mirror prepared from the material examined is then compared with the density and shade of the standard mirrors and a standard mirror is selected which gives the amount of arsenic. Only a small portion of the material to be examined is used. The result thus obtained has therefore to be multiplied by the figure representing the remainder of the material. When this has been done the figure arrived at is in milligrammes and has to be converted into grains. This final calculation, as is seen from the above, is reached by using a large multiplication figure. It is therefore clear that unless the skill, experience, and eyesight of the Chemical Examiner are

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beyond criticism there might easily be an error in his selection of the right standard mirror, which might make, in the final estimate, all the difference between a lethal and a harmless dose. On the correct estimation and calculation of these infinitesimal quantities life or death often depends.

A very important question of law arises in this case, namely what is the weight, as evidence, to be attached to the written report of the Chemical Examiner? In my opinion it has no weight.

It has long been held as a general rule, both in England and in India, that evidence which cannot be adequately tested must be rejected. There are two methods of testing evidence. The first is by the administration of an oath, the second by cross-examination. This is the reason why courts reject hearsay evidence; it is not on oath, and cannot be tested by cross-examination. Even evidence on oath is of little or no value unless sifted by cross-examination. LOPES, L. J., in *Allen* v. *Allen* (1), said: "It appears to us contrary to all rules of evidence, and opposed to natural justice, that the evidence of one party should be received as evidence against another party without the latter having an opportunity of testing its truthfulness by cross-examination. In the case of prisoners jointly charged with an offence, the jury are always most carefully warned that what one may say inculpating the other is not evidence against that other. The reason is because one prisoner cannot cross-examine another, and therefore their statements condemnatory of each other, unassailable by cross-examination, would be valueless." In another part of the judgment he says: "In our judgment, no evidence given by one party affecting another party in the same litigation can be made admissible against that other party, unless there is a right to cross-examine . . . We are clearly of opinion that if the Judge refused to allow a co-respondent to

(1) [1894] P., 248 (253 *et seq*).

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cross-examine the respondent, as he did in this case, the jury should be distinctly directed to disregard the respondent's evidence when considering the case of the co-respondent."

If this be the law, as it undoubtedly is, in civil actions of however trivial a nature, it applies much more forcibly to a criminal case where death may be the result.

It has undoubtedly been the practice in India to rely upon such a report, even where there is no quantitative analysis, to prove death by arsenic poison, and on this evidence many persons have been convicted. The origin of this dangerous practice is found in section 510 of the Criminal Procedure Code. This section reads as follows: "Any document *purporting* to be a report under the hand of any Chemical Examiner or Assistant Chemical Examiner to Government upon any matter or thing duly submitted to him for examination or analysis and report in the course of any proceeding under this Code, *may* be used as evidence in any inquiry, trial or other proceeding under this Code." It is to be noted that under this remarkable provision of law the document need only "purport" to be that of the Chemical Examiner. No proof that it is in truth his is apparently necessary, and in practice the signatures on reports are not proved. Courts have construed this section to mean that Chemical Examiners need not be called as witnesses—in practice they never are in this province—and, further, that whatever the report says must be taken at its face value and given all the weight of evidence on oath subject to the test of cross-examination.

Whatever may be said of the wisdom of this enactment—contrary as it is to the accumulated legal experience of centuries of what is necessary for the protection of accused persons—nothing is more certain than that section 510, fortunately for accused persons, says nothing as to the *weight* to be attached to the report. There is no reason, therefore, why the ordinary rule of law should not be strictly enforced if any weight

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is sought to be attached to a report on the chemical examination of suspect material.

It is notorious in this country that any document may be forged or substituted by a forged document. Substitution has been known even after the document has come into the custody of a court. The Chemical Examiner and his Assistant, both being human, are liable to err, especially in such a delicate operation as the Marsh-Berzelius process. There is not in this case the slightest allegation against the Chemical Examiner but it is equally possible that these privileged persons might be half blind, incompetent, or even corrupt. I take judicial notice of the fact that an inquiry is now taking place in India as to whether a Chemical Examiner has made a false report. No person therefore ought to be put in peril of capital, or any, punishment on a written report not given on oath and untested by cross-examination. To accept such a report—whatever it may contain—as *proof* of death by arsenic poisoning, or of anything, appears to me to be an impossible proposition in law. I would certainly in this case have wished to see both the Chemical Examiner and his report subjected to a searching examination on oath before I could have agreed to confirm the sentence of death. In this case we would have called the Chemical Examiner to give evidence in this Court if it had been necessary. In view of our finding that there is no evidence that Happu administered arsenic to Babu Singh such a course was unnecessary.

To sum up therefore: In any trial for murder by arsenic poisoning the prosecution must prove (*a*) That the deceased died of arsenic poisoning; (*b*) that the accused administered arsenic to the deceased with intent to murder. If the prosecution wishes to establish the first proposition by means of the Chemical Examiner, and weight is to be attached to his evidence, he must be called, sworn, and offered for cross-examination. By his evidence he must prove that at least two grains of

arsenic were administered to the deceased before death. He can do this by proving the discovery of this amount in the body of the deceased, or by accounting for its absence in part. He may attribute the loss to vomiting, purging, or the natural elimination of the poison from the body before death,—taking into consideration the lapse of time between the hour the arsenic had been taken and the hour of death.

It is to be noted that under section 509 of the Code of Criminal Procedure a Civil Surgeon, or other medical witness, is to be examined on oath in the presence of the accused, and therefore subjected to cross-examination. This is a curious contrast to the privilege given to the Chemical Examiner or his Assistant under section 510. There is also no such privilege allowed to the Examiner of questioned documents. In arsenic trials in England, Chemists of the eminence of Sir William Willcox are called to prove that at least two grains of arsenic must have been administered, and they are subjected to the severest cross-examination before their evidence is accepted.

With regard to the second point, namely whether poison was in fact administered to the deceased by Happu, there is not sufficient evidence. Babu Singh had taken a heavy meal just before he went to Happu's house. The time when the symptoms of illness appeared is consistent both with poison having been administered either in his own house or in the house of Happu. There is no evidence that Happu was in possession of arsenic, and there is no adequate motive alleged by the prosecution for the murder of Babu Singh. The only motive alleged was that Babu Singh had refused to give Happu a small sum of money for the purposes of his expenses at a Ganges mela. Apparently Babu Singh had also been having sexual intercourse with the daughter of a woman who was kept by Happu, but this had been proceeding for some time and no one seems to have objected to it.

The appeal ought to be allowed.

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COLLISTER, J.:—I agree with the conclusions of my learned brother. The charge of murder has not been proved in this case and Happu's appeal must be allowed.

Collister, J.

As regards section 510 of the Criminal Procedure Code, the anomaly of its provisions has probably struck every Judge who has had a murder case to try. The reason for the special dispensation which is thus granted to the Chemical Examiner presumably is the expense, delay and inconvenience which would be entailed if he had to travel round the province giving evidence at every murder trial. But where a man's life is in the balance and where the whole case depends on the decision of the question whether a fatal dose of poison was or was not administered to the deceased, it is a matter for consideration whether the sessions court should not, whenever it is of opinion that such action is necessary for the ends of justice, exercise its right to call the Chemical Examiner so that he may be examined on oath and be subjected to cross-examination. Section 510 uses the word *may*, not *shall;* so it is clear that the court has a discretion in the matter.

I also think that when a report is received from the Chemical Examiner containing a quantitative analysis, it should be shown to the medical officer who conducted the post-mortem examination, so that he will be in a position to state before the committing Magistrate what are the medico-legal inferences to be drawn from the report.