<u>THE KALISHER LECTURE 2022</u>

Presumed Guilty? Judge Jeffreys, fair trial and the Bloody Assizes

Delivered by Sir Stephen Silber on 17 January 2022

I feel greatly honoured to be asked to give this lecture to commemorate the life of Michael Kalisher who was a distinguished advocate. He qualified as a solicitor before getting called to the Bar. He took Silk 14 years after being called to the Bar but sadly he died at the tragically young age of 55. He believed passionately in the strengths of the independent criminal bar and the rights of defendants to have their cases heard fairly by an independent judiciary.

The Importance of the Presumption of innocence or Guilt in Criminal Trials

I like to think that he would have approved of the subject matter because Michael Kalisher would have appreciated that one of the most basic issues to be considered in any criminal justice system is to determine what verdicts factfinders should reach when they were uncertain as to whether or not a defendant had committed the offence with which he or she was charged.

Let me explain what determines the answer to that question:

The answer to that question depends on whether the starting point for the criminal justice system is that there should be a presumption of innocence or that the starting point is that there should be a presumption of guilt.
Why does that matter?

If the legal system adopts a presumption of innocence this would lead to the defendant in the example that I have just given being regarded as not guilty of the offence charged. That would be because the presumption of innocence would not have been rebutted.

Very importantly the verdict in that case would have been totally different if the legal system's starting point was that there was a presumption of the guilt of the defendant and not a presumption of innocence. In that case, the defendant would have to been found guilty as the presumption of guilt would not have been rebutted.

The reasons for that was because the factfinders were uncertain as to whether the defendant had committed the offence in question.

Let me now explain how our legal system has treated these presumptions
We originally had a presumption of guilt and we now have a presumption of innocence.
I will consider how this change has come about and this entails looking at how criminal trials were conducted in the 17th, 18th and 19th centuries.

The Applicable Presumption in the 17th Century

It is important that we remember that during this period the main evidence, if not the sole evidence, in criminal trials came from those who witnessed the crime being committed and those who can say from what they had seen that they did not believe that the offence had not been committed by the accused person such as by providing an alibi for the person accused of the crime.

We must not forget that in the 17th 18th and 19th centuries there was little, if any, other evidence of the kind which is common in criminal trials today. There was, for example, no fingerprint evidence, no photographic evidence, no recordings of interviews or any kind of other evidence which we all now take for granted. In addition, as I will explain, it is very unlikely that either the defendant or the prosecution would have been represented. So the jury were likely to be short of evidence on what might have been crucial matters and at the end of the trial there are likely to have been a number of issues which had not been resolved,

Without any of these modern forms of evidence, you will not be surprised to hear that Criminal trials in the 17th 18th and 19th centuries were much shorter than those taking place today. Indeed, there were on average fifteen to twenty trials taking place on an average day at the Old Bailey at this time. It seems that the average felony trial could rarely have taken more than half-an-hour.

So at this time the likelihood is that there would have been many issues the jury would have had great difficulty in resolving on account of the limited evidence and the absence of representation. In consequence, the issue of whether there was a presumption of guilt or innocence would very frequently have been of crucial importance in determining the guilt or innocence of a defendant

Let me explain how the attitude of the English legal system as to which of those presumptions applies has changed and why it is so interesting. It is accepted by all legal historians that as late as the late seventeenth century there was a definite presumption of guilt in this country. This presumption meant that as Stephen said of the defendant in a criminal trial "the jury expected from him a clear explanation of the case against him, and if he could not give it, they convicted him". Similarly, Beattie another legal historian explained that at this time "if any assumption was made in court about the prisoner himself, it was not that he was innocent until the case against him was proved beyond reasonable doubt, but that if he were innocent he ought to be able to demonstrate it to the jury by the quality and character of his reply to the prosecutor's evidence*"*. In other words, unless the defendant could prove his innocence, he would be presumed guilty.

The Emergence of the Presumption of Innocence

As we all know, we now have a presumption of innocence and the issue to which I now turn is when it emerged and also why it emerged. The standard long established view is that the first reference to the presumption of innocence is to be found in Phillips' Evidence published in 1820 in which it was stated that "that innocence is to be presumed, till the contrary is proved, may be called a presumption of law founded on the universal principles of justice".

I will try to show that contrary to this long established view the presumption of guilt was replaced by a presumption of innocence much earlier than the start of the 19th century and indeed more than a century earlier.

How the Monarchs treated Judges in the Stuart Era

The issue on what presumption is applicable depends on how a legal system sees the role of judges and the status of defendants at different times. This entails considering the importance attached by Government to the rights of individuals and the freedom of judges. When I refer to the Governments in the period with which this talk is concerned, I mean the Monarchs. So this requires consideration of the power of the Monarch and how he or she purported to exercise this power in influencing decisions in the criminal courts.

You will remember what we were all taught at school about political life in 1670s and the 1680s. It was a time of great instability in English political life. Indeed, it was only in 1660 that the Monarchy had been restored after the Interregnum which followed the execution of Charles I.

Even at that time there there was a widespread fear in the political community about the prospect that the new Monarch King Charles II, who had no lawful heirs would be succeeded by his Catholic brother, James, who was to be the future James II. The fear was that James would use his role as the Monarch to undermine the Anglican Church and to replace it as the Established Church with the Catholic Church. Indeed, when James II came to the throne on the death of his brother in 1685, there followed a period of great unrest in this country at the general authoritarian conduct of James II. This conduct included his determined attempts to criminalize and to punish those who did not share his views

In order to convict those who did not share his views, James II considered it essential to have judges in office who would obtain the convictions of those people who did not share his views and this could be done by unfair means if necessary. *The* way in which James II expected his judges to perform their duties was explained by Lord Chancellor Jeffreys to a newly appointed judge in words which many of you will find shocking

"be sure to execute the law to the utmost of its vengeance upon those that are now known and we have reason to remember them, by the name of Whigs; and you are likewise to remember the sniveling trimmers; for you know what our Savior Jesus Christ says in the Gospel that 'they who are not for us are against us"".

In the light of that comment, you will not be surprised that the sanction imposed on judges for not complying with the wishes of King James II was dismissal. Indeed, James II told Sir Thomas Jones when he dismissed him from the post of Chief Justice of Common Pleas that he was determined to have judges in office who shared his opinions. A more accurate way of describing James II's views was that he was determined to ensure that all judges in post would first follow his instructions to obtain convictions and second would then impose nothing less than the severe sentences which were considered appropriate by the Monarch.

There was an obvious and well-known sanction that if any judge failed to comply with the wishes of the Monarch, such failure would lead to the judge's dismissal. It is a striking fact that in the four years of James II's reign, 13 judges were removed and four were removed on one day in 1686. The grounds for dismissal of the judiciary included a failure to impose a sentence which James regarded as appropriate. Indeed, both Herbert and Wythens were dismissed because they refused to order that a convicted soldier should be executed. Holt lost his post as Recorder of London for refusing to sentence to death a soldier who had been found guilty of desertion.

I suggest that the threat of dismissal must have inhibited, if not prevented the later seventeenth century judiciary from taking steps which they feared would or might upset the Monarch, such as assisting defendants or not assisting the prosecution

In addition, some judges were removed from their posts to make room for judges who were enthusiastic and open supporters of James.

This leads on to the question of how judges were required to behave to meet the demands of James II. The answer is clear as they were expected to obtain convictions and to use all means to achieve that end. Indeed, the typical "evil judge" of that pre-1680 era was described by Holdsworth as "the political lawyer without principles with a fluent tongue and with a little knowledge of law" and he then wrote that "very perfect samples were found in Jefferys and Scroggs". Let me tell you a little about Jefferys and Scroggs.

Jefferys became Recorder of London in 1678 when he was only 33 years old. Two years later, he became Chief Justice of Chester. In 1683, he became Chief Justice of the King's Bench Division and Lord Chief Justice at the age of 38. When James II acceded to the throne, he appointed Jeffreys as Lord Chancellor at the age of 40. We should not be too surprised about the young age at which he was appointed to these important posts as the life expectancy in the 17th century was very much lower than it is at the present time.

Scroggs was appointed Chief Justice of the King's Bench Division in 1678 twenty-five years after his Call to the Bar but after holding his position for 3 years his unpopularity became so great that he was removed from office. His unpopularity was caused by his misconduct when conducting trials

For example, Chief Justice Scroggs presided over the the trial of Ireland, Pickering and Groves in 1678 during the reign of Charles II who were being tried for high treason. Scroggs was noted for his violent hatred of Catholic priests. I hope that I will not cause offence if I explain that In his outrageous summing up to the jury he said of the Catholic defendants that "they *indulge all sorts of sins, and no human bonds can hold them".*

After the jury returned verdicts of guilty, Scroggs told them in relation to their verdicts "you have done gentlemen, like very good subjects and very good Christians, that is to say like very good Protestants and how much good may their Thousand Masses do them".

That statement exemplifies the pro-prosecution and anti-Catholic attitude of the judges in the reign of Charles II which was to obtain convictions irrespective of the weakness of the prosecution case, and that High Court judges should be good "King's men".

One aspect of the absence of due process in criminal trials and the activities of the "evil judges" in the pre-Bill of Rights period was the bullying attitude of the judiciary who put pressure on juries to convict in this period. So, when the jury hearing the prosecution of Lady Alice Lisle told Judge Jeffreys that "we have some doubt" on a particular issue, he said of the issue "there is as full as proof can be. Come, come gentlemen it is plain proof". Within 15 minutes, the jury convicted the defendant.

Let me tell you about another case which has been the subject of much controversy and that is Rye House Plot Trial in 1683 in which two leading Whig figures, Lord William Russell and Algernon Sidney, as well as some others were convicted of treason and executed. There was much criticism of the conduct of the trial of Russell and the unfairness of the behaviour of Judge Jeffreys. The judge was criticised for allowing evidence to be adduced that it had been insinuated that Russell was responsible for the death of "my lord of Essex" even though there was no basis for that accusation and that in any event it had no relevance to the charge faced by Russell. Jeffreys' summing up was described by an eminent contemporary as "barbarous being invectives and no consequences."

Another example of oppressive judicial conduct arose when loyal forces put down a Protestant uprising in the West of England attempting to prevent James' accession at the Battle of Sedgemoor. Captured rebels numbering nearly 1400 were charged with treason. Chief Justice Jeffreys presided over a Special Assize Commission at what has come to be known as" the Bloody Assizes" on account of the large number of the Protestant rebels who were hanged. The best estimate is that over 200 rebels were executed in six towns. One commentator explained that:

"The full punishment for high treason was carried out. Rebels were hanged until unconscious, disembowelled, beheaded and quartered. Their remains were then boiled in brine, covered in black tar and set up on poles and trees and lampposts" for a year until James II ordered that the display should end".

Returning to Jeffreys' misconduct, he is alleged to have sold pardons or rather recommendations that pardons should be granted which the Crown accepted. One such pardon was sold to the wealthy Prideaux family for the large sum of £14,500 which Jeffreys retained.

The best known victim of the Bloody Assizes in 1685 was Lady Alice Lisle to whose trial I have just referred. At the time of her trial she was in her seventies and she was the deaf widow of one of the people who were responsible for the execution of Charles I in 1649. She was charged with treason in that she was alleged to have harboured Hicks one of the defeated rebels. Her evidence at the trial was that she had known him for a long time as a dissenting minister and her defence was that she did not know that he was one of the rebels nor had she observed anything in his conduct or in his dress to show that he had been involved in any activities on the battlefield.

Jeffreys considered that he had to rebut the defence. According to the law report, he told the jury in words that we would all consider appalling that all "those lying, snivelling, canting Presbyterian rascals ...one way or another had a hand in the late horrid conspiracy and

rebellion". Although the jury initially resisted convicting Alice Lisle, they later yielded to Jeffreys and convicted her. He then sentenced her to be burned at the stake. James II commuted the sentence to beheading

Because of popular unrest James II fled to France in 1688 and was regarded as having abdicated. After the departure of James II, the convictions of Russell and Sidney were later reversed by both Houses of Parliament in 1689 as was the conviction of Lady Alice Lisle. All these convictions were considered even at the time as miscarriages of justice. Indeed, the reversal of these convictions shows the radical changes after James 11's departure in the approach to the trials in his reign

JP Kenyon, the distinguished historian wrote of the Chief Justices who presided over the Stuart treason trials that "they behaved deplorably, but their manner in court and particularly in cross-examination, arose not from natural ignorance but deliberate policy. It was their duty to obtain certain verdicts despite the unreliability of a great deal of the Crown's evidence and the untrustworthiness of most of their juries".

Holdsworth observed of Jeffreys that "throughout his life he cared for his own advancement and was wholly unscrupulous as to the means by which it was procured". He appreciated that his advancement depended on complying with the wishes of the Sovereign as otherwise he would be dismissed

You might wonder what the Bar was doing to prevent this judicial misconduct or to protest against it. These disreputable judges were able to behave badly as defendants were rarely represented and that was because defendants were denied counsel while the prosecution invariably employed lawyers

Indeed, there was much evidence that defence counsel was not involved in dealing with issues of fact in the period before 1730. Langbein found that the earliest clear case of defence counsel cross-examining prosecution witnesses occurred in 1732, but this was long after the conclusion of the cases to which I have referred. Beattie offers evidence that "defence counsel appeared in a handful of cases at the Old Bailey in the 1730s". His research showed that in 1740, the percentage of cases with defence counsel was 0.5% and the percentage of cases with prosecution counsel was 3.1%. It is arguable that these percentages do not give a full picture and that is because law reporters at the time did not have any particular reason to record the presence of counsel. Unless Beattie's statistics are totally inaccurate, it would seem that defendants rarely had the services of counsel in the period up to 1750. Sir John Baker has explained why that occurred when he pointed out that the defendant in a criminal trial was not permitted to be represented by a lawyer unless one was assigned by the court to argue points of law but significantly that the point of law had to be identified before counsel was allowed. So as Sir John Baker concluded that "the unlearned defendant had little chance of professional help". In consequence, the defendant was deprived of the assistance of a person with the experience, training and expertise required to cross-examine the prosecutor and his witnesses.

There were two further difficulties for most criminal defendants who wished to instruct counsel. First, the defendants were likely to be paupers who were unable to afford lawyers and there were no public funds available.

A second difficulty for prisoners awaiting felony trials is that they would not have found it easy to actually instruct counsel even if they wished to do so and were financially able to do so. That was because they were likely to have been in custody and to have been ignorant of the case against them. Indeed, in one major criminal case, the defendant, Stephen College who was charged with high treason explained in 1681 the plight of defendants when he observed that

“I have been kept a close prisoner in the Tower ever since I was taken; I was all along unacquainted with what was charged upon me. I knew not what was sworn against me; not the persons that did swear it against me. and therefore I am wholly ignorant of the matter”.

These comments also show why defendants would have had very great, if not insuperable, difficulties in acting for themselves. Furthermore, the defendant and any counsel instructed by him would have been at a great disadvantage in criminal trials because of the rules of evidence favouring prosecution counsel over defence counsel.

Prosecution witnesses were privileged over defence witnesses in two significant ways. First, prosecution witnesses testified on oath and in consequence they benefitted from having the enhanced credibility of having been sworn. Second, defence witnesses were forbidden to be sworn until the Treason Trials Act of 1696 conferred the right on the defendant’s witnesses to testify on oath but only in treason trials. An Act of 1702 extended the right to all felonies

So the position in the late 1680s was that the defendant was at a great disadvantage in criminal proceedings and the judge had excessive power to behave in the way he or the prosecutor wished. Indeed, at this time, there is much evidence that where a jury returned a verdict that the judge thought was against the evidence or otherwise mistaken, the judge could refuse to accept the verdict. He could also probe its basis with the jurors. He could give them further instruction and he could also require them to redeliberate.

Well, how did matters change? As I have explained, the unrest in this country led to James fleeing to France. He was regarded as having abdicated in 1688 which is also when William and Mary arrived in England.

Jeffries who was renowned for his hostility to defendants in criminal proceedings tried to flee. He intended to follow James to France, but he was captured in a public house in Wapping. Reputedly, he was disguised as a sailor, but he was recognized by somebody who he had tried and who claimed he could never forget Jeffreys' countenance even though by this time Jeffries’ ferocious eyebrows had been shaven. Jeffreys begged his captors for protection from the mob, who according to a contemporary source intended “to show him the same mercy he had ever shown to others”. Not surprisingly, Jeffreys was terrified of what the public would do to him but he was sent to prison, namely the Tower of London “for his own safety”. He died of kidney disease while in custody in the Tower in April 1689. You will

be surprised to hear when he was then only 43 years old. Later in 1689, Parliament attainted him stripping him of "estate and honor". Scroggs had died earlier in 1681.

The throne was offered to William and Mary after their arrival in this country, but the offer was conditional on their assent to the Bill of Rights which had been drawn up by a committee of the House of Commons

They duly assented and the Bill of Rights received the Royal Assent on 16 December 1689. The Declaration and the Bill of Rights contained many provisions giving rights to citizens, including ensuring due process in criminal trials. Indeed, the opening sentence of the Declaration blamed the unrest in the country on James II and his "Evil Counsellors, Judges and Ministers..."

The puzzling issue is why these experienced judges like Jeffreys and Scroggs behaved in this way and were so keen to obtain convictions by any means. I believe that there is strong evidence that these judges behaved in this way because they did not have any form of security of tenure and that they concluded with good reason that they would be dismissed without any form of redress if they did not comply with the wishes of the Monarch to obtain convictions especially in treason and public order cases. Indeed, there was much evidence to justify those fears because, as I have explained, between 1675 and 1683 eleven judges had been summarily dismissed and thirteen judges were removed in four years of James II's reign.

Not surprisingly, there was also criticism of the way in which judges were selected and Holdsworth in the History of English law noted that many judges were appointed in the Stuart era who were in Holdsworth's words "wholly unfit for the post". He records that in spite of opposition the King was able to get Robert Wright made a judge although he was not only a notoriously incompetent lawyer but also a man of immoral life who had been found guilty of perjury. Havighurst concluded that "the judges of James II were men of little talent and they were servient to the King. "

The Granting of Security of Tenure to the Judiciary

There was one crucial matter which surprisingly was missing from the Bill of Rights and that was a provision giving judges some form of security of tenure so that they could perform their duties without fear of intimidation or of victimisation or of dismissal. Such a provision was necessary to ensure that the autocratic rule of the Stuart monarchs would not be repeated and there would be no pressure to obtain convictions especially in treason cases. Indeed, as Lord Bingham explained "if the judges are to enforce the law against the highest authority in the state they must be protected against intimidation and victimisation."

It is noteworthy that the first draft of the Bill of Rights contained a provision safeguarding the job security of judges but this was subsequently deleted. Lord Bingham has explained that this provision was dropped from the Bill because William of Orange insisted that the Bill should confirm old rights and that it should not create new ones.

Matters changed after William III came to the throne in 1689 as he made judicial appointments conditional only on good behaviour. That was only an interim measure because

under the Act of Settlement of 1701, which took effect after the accession of George I in 1714, judicial service ceased as a matter of statute law to be at the pleasure of the Crown but it provided in relation to judges that "upon the address of both Houses of Parliament it may be lawful to remove them".

This was a major change as it prevented Monarchs dismissing judges at will at any time *during their reigns*. The independence of the judges from the Crown's influence was, however, even then still not fully established because the law provided that the commissions of the judges should continue for 6 months after the death of the reigning sovereign unless the new Sovereign removed the judge before the expiration of that period. In other words, a new Sovereign was able to remove judges of whom he or she did not approve in the 6 month-period after his or her accession.

The right of the new Sovereign to remove a judge in the first six-month period of his or her reign was removed in an Act of 1760 and this established the principle that judges were entitled to tenure for life. Indeed, since that time, no High Court Judge has been removed.

This change meant that since that time judges no longer had to fear being dismissed at the whim of the Monarch. Trevelyan explained that in consequence of these changes, judges were "no longer jackals of Government but independent umpires between the crown and subjects".

The Consequences of Granting Security of Tenure to the Judiciary

This leads me on to the next question which was how the judges exercised their powers as the "independent umpires between crown and subjects" and this has to be considered in the light of three important developments.

First, the judges who were responsible for the miscarriages of justice to which I have referred were no longer in Office by the 1690s. Jeffreys and Scroggs had died by then.

Second, and perhaps most importantly, there was at that time a universal feeling that the behaviour of judges like Jeffreys and Scroggs was totally unacceptable. As I have explained, this was shown by the decision of both Houses of Parliament in 1689 to reverse the convictions of Russell and Sidney as well as that of Lady Alice lIsle. It is clear that in 1689, all these convictions were already regarded as miscarriages of justice. The reversals of these convictions show the radical change in 1689 to the approach to the trials a few years earlier in James II's reign. Indeed, as I have explained, the opening sentence of the Declaration blamed the unrest in the country on James II and among other groups, his "Evil Counsellors, Judges and Ministers..."

The third new development was a wish to increasingly respect the rights of individuals. This was achieved in relation to the rights of the judiciary at the expense of the rights of the Monarch. That was evident, as I have explained, from the Act of Settlement and the 1760 Act which conferred on judges the benefit of having job security. indeed, this led to changes in the attitude to defendants in criminal trials in the light of what Wigmore described as "the liberal reaction

This liberal reaction was part of a new growing movement in the country focusing on and respecting the rights of individuals. Arlidge and Lord Judge in their book "Magna Carta Revisited "explained that after 1688 there was a movement towards ensuring that citizens enjoyed rights. They pointed to legislation providing for regular elections in the Triennial Act of 1694 and parliamentary control of the armed forces in the Mutiny Acts of 1689 and 1703.

The policy of respecting the rights of individuals was not consistent with a presumption of guilt or indeed of dismissing judges who did not follow the wishes of the Sovereign. That liberal reaction led to the introduction of the presumption of innocence in numerous criminal trials.

It is noteworthy that there had been much controversy about various proposals to reform the way in which treason trials were conducted in the aftermath of the Stuart treason trials and the Revolution of 1688-89. Some proposals had been the subject of deadlock between the Houses of Lords and Commons. This all changed with the enactment of the Treason Trials Act of 1696 which was described as "a by-product of the Revolution of 1688 and belongs with the Bill of Rights and the Toleration Act in the class of post-revolutionary remedial measures".

The preamble of the 1696 Act is suggestive of the emergence of the presumption of innocence when it states that "[N]othing is more just and reasonable that Persons prosecuted for High Treason…. should not be debarred of all just and equal means for the defence of their Innocence in such Cases". The Act also has a provision which prevented the admission of evidence of some forms of previous misconduct in treason trials

So to conclude on this issue, the Act of Settlement in 1701 and the 1760 Act enabled judges to ignore the wishes of the Monarch when deciding cases without having to be fearful of being dismissed. Judges were then no longer regarded as part of the royal administration and that meant that they could decide cases independently of the views of the Monarch or the Government. Judges could and did use this independence to respect the rights of individuals by introducing the presumption of innocence after 1689 even though there was not a developed regime of binding precedents then as we now know it.

There are many decisions which show the emergence of the presumption of Innocence after 1689. Thus in 1691, Sir John Holt, who was Chief Justice of England from 1689 until 1710 told the Defendant Sir Richard Grahame (Lord Preston) who was charged with Treason "we are supposing you not guilty until you are proved guilty". In that case, the jury were told that:

"if you are satisfied upon the evidence that he is guilty. and will find him so; and if you have no such evidence or any to prove the contrary that he is not guilty, then you ought to find him so too."

The presumption of innocence was also apparent when Sir John Holt told the juries in a whole series of cases such as in the murder case of *Harrison* in 1692 that "if you are not satisfied on the evidence that the defendant is guilty, then you ought to acquit him".

In other cases, it was stated " the law will intend everybody innocent till the contrary appears" and that "everyone is presumed innocent till the contrary appears".
Chief Justice Raymond and Chief Justice Parker adopted similar approach in cases in 1713 and 1730.

Although there was material in the form of judicial directions to the jury which showed that there was a widely held view that there was a presumption of innocence, it must be stressed there was not at that time a widely accepted doctrine of precedent which required all trial judges to give their directions to the jury based on a presumption of innocence. In 1670, Chief Justice Vaughan explained in the case of *Bole v Horton* that if a judge believed a decision in a previous case to be erroneous, he was not bound to follow it unless it was a decision of the House of Lords.

It is significant that the doctrine of precedent only emerged in the late nineteenth century when it was described by Cornish as being "essentially a Victorian rationalisation" , while Ellis Lewis explained that the doctrine of precedent "did not emerge until late in the nineteenth century."

Therefore, it is not surprising that in the early nineteenth century there were still some judges who did not believe that there was a presumption of innocence. Beattie has given an example of a case at Surrey Assizes in 1739 at which after evidence had been given by the prosecution, the judge turned to the defendant and in effect said "you have heard all the evidence , what do you have to say for yourself?" Beattie said correctly in my opinion "the implications of the judge' s questions were perfectly clear. Indeed, when one defendant replied "I am no thief", the judge said "you must prove that"

Nevertheless, the comments in that case were exceptional, as the clear evidence is that by the mid- eighteenth century, the presumption of innocence was the correct approach in English criminal law. You might wonder why I have not referred to any appeal decisions.

The reason is there was at this time no formalised appeal procedure but judges could refer matters of importance to a group of judges who would consider the matters not as "a court of record but merely as an advisory body … and their opinion was always acted on, and –if reported- would serve as a precedent for the future". None of the statements on the presumption of innocence or of guilt have been subject to this procedure.

So standing back, it is fair to say that Judge Jeffreys hastened the advent of the presumption of innocence although that clearly was not his intention but his conduct set in train a series of developments which led to the emergence of the presumption of innocence

It is noteworthy that other jurisdictions nowadays attach great weight to judges having security of tenure. This is regarded as a safe and sure way of ensuring that the executive branch of government cannot and do not use the threat of dismissal to influence judicial decision making. It is a striking fact that there was no systematic criticism of judicial behaviour after judges were given security of tenure. Indeed, judicial security of tenure is now universally regarded as a way of ensuring judicial independence in many countries.

The Consequences of the Emergence of the Presumption of Innocence

I will now consider but only briefly because of the time constraints whether a further consequence of the emergence of the presumption of innocence was its effect on the right of the prosecution to adduce any evidence of the previous misconduct of the defendant. Michael Kallisher would have been very aware that this has always been a contentious subject and that this was a particularly acute issue in the 17th century because of the limited evidence that was adduced at criminal trials.

As I have explained there was in the 17th and 18th centuries no scientific evidence of the kind now widely used to provide cogent evidence for determining whether the accused and witnesses were giving reliable evidence. So the jury were not assisted in reaching their verdicts by fingerprint evidence, photographic evidence, DNA evidence, CCTV evidence or recordings of interviews which were not available.

The combination of all these factors meant that the jurors in the 17th century had to reach their verdicts on the basis of very much less evidence than is presented to the jurors of today. It was not surprising that in those circumstances jurors were anxious to discover more information about the defendant. In consequence, the character of the defendant was particularly important and often of crucial relevance to the outcome of the trial. This encouraged defendants to bring character witnesses to speak on their behalf. Matters which were considered important related to the life style of the witnesses, including such matters as whether they worked regularly, whether they supported their family, whether they were sober and honest as well as whether they were known to their respectable neighbours as being trustworthy.

It is noteworthy that there was evidence in the late 17th century and in the early eighteenth century that evidence of good character could and did on occasions lead to acquittals and was decisive

There is also evidence that "a man who could produce no witnesses was likely to have a difficult time in court". The Old Bailey Session papers often noted that the want of character evidence for the defendant was material to his conviction and they also record instances of acquittals based heavily on character evidence. Indeed, in the case of John *Theobalds* in 1692, character evidence on behalf of the defendant was not volunteered but the jury asked for it.

The traditional view in pre-Glorious Revolution period had been that a general allegation of a defendant's bad character. such as being a "bad person" was regarded as constituting cogent evidence of the guilt of that defendant. Anne Gardiner denied in her trial in 1684 an allegation of obtaining a quantity of silk by fraud "but being known to be a notorious cheat and shop lift, she was found guilty."

So *Hannah Westcott* who had been charged with stealing pewter plates in which the "Constable of the Parish appear[ed] against her, and gave evidence that he took the Plates in her custody, and that she was a person on bad life and conversation; and having little to say in her own defence, she was found guilty".

In other cases, evidence that the defendant had previously been in prison was adduced and considered by the jury without necessarily describing the offence of which the defendant had been convicted, when it was committed and how it might have any relevance whatsoever to the matter to be considered by the jury.

As I have explained at the end of the 17th century there was great disquiet about the perceived unfairness of trial procedures which had played a large part in bringing about the Glorious Revolution. Treason trials were a source of particular criticism because the pro-prosecution partiality of the Bench in treason trials, which I have mentioned, did not necessarily apply to ordinary felony trials. That was not surprising because the outcome of treason trials, unlike many ordinary felony trials, was of particular importance to the Crown not least because the prosecution case in such cases frequently alleged plots to kill the Monarch and to overthrow the Government.

So it was not surprising therefore that the first major piece of criminal law reform enacted after the Glorious Revolution was the Treason Trials Act 1696 which prevented the admission of evidence of previous misconduct in treason trials. It stated in section 7
"And it be further enacted, That no Evidence shall be admitted or given of an Overt Act that is not expressly laid in the Indictment against any Person or Persons"

Although the Treason Trials Act 1696 did not apply to trials for crimes other than treason, there is an indication in the treatises that evidence that was "foreign to the point in issue" was not being permitted to be adduced against a defendant in cases other than treason cases. The treatises were written by experienced practitioners who were describing what happened in court. Indeed, Foster and Phillips regarded the 1696 Act and in particular section 7 as being the triggers for the adoption of the "foreign to the point in issue "test. On account of the time limitations of this talk, it is not possible to go into any further detail on this matter.

A trigger for the adoption of that "foreign to the point in issue" approach was the introduction of the presumption of innocence test in place of the presumption of guilt test as this meant that the prosecution had to overcome that presumption of innocence by showing the probative value of that evidence before permission could be given for it to be adduced.

To sum up, the judiciary behaved deplorably during trials in the Stuart era and it is generally agreed, as Kenyon has explained, that *"their manner in court and particularly in cross-examination, arose not from their natural ignorance but instead from deliberate policy decisions."* The judiciary did not have security of tenure and judges in the Stuart era and were regularly dismissed by the Stuart Monarchs when they were dissatisfied with the result of criminal trials.

An analysis of the cases suggests that to avoid being dismissed by a dissatisfied Monarch, the judiciary apparently felt compelled to resort to deplorable behaviour to obtain the results sought by the Monarch. This all changed after the Glorious Revolution because judges were then given security of tenure and thereafter, they could not be dismissed at the whim of the Monarch.

In consequence, the judges were no longer hostile to defendants and they adopted the presumption of innocence and rejected the long accepted presumption of guilt. It is a striking fact that there was no systematic criticism of judicial behaviour after judges were given security of tenure.

ENDS

Sir Stephen Silber
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