1969 *Present :* **Samerawickrame, J.**

J. A. D. E. K. JAYAKODY and another, Petitioners, *and*
THE SUB-INSPECTOR OF POLICE, HETTIPOLA,
Respondent

S.C. 404-405/67—Application in Revision in M. C. Kuliyapitiya, 31421

Evidence Ordinance—Section 15—Scope—Charge of criminal offence (abduction)—Evidence of similar facts—Admissibility at stage of non-summary inquiry.

Section 15 of the Evidence Ordinance reads as follows :—

"When there is a question whether an act was accidental or intentional, or done with a particular knowledge or intention, the fact that such act formed part of a series of similar occurrences, in each of which the person doing the act was concerned, is relevant."

Held, that where a person is charged with the offence of having abducted a girl in order that she might be forced or seduced to illicit intercourse, evidence of similar acts of abduction of other girls by the accused can be led by the prosecution at the stage of the non-summary inquiry if it is elicited in cross-examination of the girl that she was taken away by the accused by reason of a mistake.

"It appears to be the position that a specific line of defence need not be set up before evidence of similar occurrences may be led. It is sufficient if that defence is open on the facts."

APPLICATION to revise an order made by the Magistrate's Court, Kuliyapitiya, at a non-summary inquiry.

A. H. C. de Silva, Q.C., with *Stanley Alles* and *Kumar Amarasekara*, for the accused-petitioners.

Kenneth Seneviratne, Crown Counsel, for the complainant-respondent.

Cur. adv. vult.

September 28, 1969. SAMERAWICKRAME, J.—

This is an application made by way of revision for the review of an order made by the learned magistrate in respect of the admission of evidence in non-summary proceedings. Learned Crown Counsel, while he did not question the jurisdiction of this Court to review such an order, pointed out that it was open to the magistrate at the end of the non-summary inquiry to decide whether a case had been made out to place the accused on trial ; that the Attorney-General had to consider whether proceedings should be had in a higher court and that the objection to the admissibility of the evidence which is the subject matter of the order of the learned magistrate could be raised at the trial and, if necessary, canvassed before three judges in the Court of Criminal Appeal. He submitted therefore that this Court should be slow to

exercise its jurisdiction in this matter. Learned Queen's Counsel appearing for the petitioner submitted that grave prejudice would be caused to his client if this evidence was admitted and that therefore this Court should exercise its powers of revision to preclude a miscarriage of justice. I am not disposed to come to any decision in respect of matters which have to be determined by the learned magistrate at the end of the non-summary inquiry or by the Attorney-General at the time of considering the question of preferring an indictment against the petitioner. In view however of the submission made by learned Counsel for the petitioner that grave prejudice would be caused to him if this evidence is permitted to be led I have gone into this matter only to decide whether the petitioner can show that this order involves either illegality or some grave irregularity which would result in a miscarriage of justice of such a nature that this Court should at this stage intervene by the exercise of its powers of revision.

The charge against the petitioner is that of abducting one Nandawathie in order that she may be forced or seduced to illicit intercourse. The prosecution sought to lead the evidence of eight other young girls to the effect that they were abducted in order that they may be forced or seduced to illicit intercourse by the petitioner. Learned Queen's Counsel appearing for the petitioner submitted that the evidence sought to be led was, in the circumstances of this case, not admissible and that, even if it was admissible, the prejudice that would be caused to the petitioner was very grave and the probative value of the evidence so slight that the evidence should not be admitted even though it was technically admissible. He further submitted that there was no proof of the ingredients of the offence.

The evidence of the girl Nandawathie is to the effect that on the 19th of March, 1966, she was at a bus halting place at Hettipola along with another girl in order to take bus to Galkande. The accused who came in a car with another offered them a lift saying they were going towards Bowatte. They got into the rear seat of the car and it proceeded towards Galkande. At Galkande junction her companion got down but when she was about to get down the door was shut and the car proceeded. She says, she raised cries and on seeing a car coming in the opposite direction, appealed to the occupant of that car one Chandra Nilame who was known to her. The car driven by the accused reversed into a by-road and the other car blocked it. She says that thereafter there was a fight between Chandra Nilame and the accused.

It appears that sometime after Nandawathie had made her statement to the police she had written a letter to them resiling somewhat from her original position and had made a second statement. Under cross-examination she gave evidence in regard to that matter as follows :—

> "I told the 1st accused that I was going to Galkande. My 2nd statement was recorded by S.I. Silva. If S.I. Silva has recorded that I have told the 1st accused that I was going to Maunawa I accept that

as correct. Maunawa is about 6 miles away from the place where my sister got down from the car. I think that the 1st accused had driven off the car after dropping my sister in order to drop me at Maunawa. I say that I shouted when I was taken because I have suspected that I have been taken away and that is why I made my 2nd statement to the police. I can't say that the door of the car was closed in order to take me away. At the time I got into the car I told the 1st accused that I was going to Galkande. But on the way the 1st accused asked me from where I was and I told him that I am from Maunawa. I think that 1st accused may have thought that I was going to Maunawa."

Chandra Nilame too gave evidence and stated that when he was going by car he heard cries of distress from the car in which Nandawathie was travelling and that he blocked that car.

The learned magistrate states, in regard to Nandawathie, " Whatever she may have said in cross-examination about being mistaken about the intentions of the accused and having second thoughts about their conduct and writing P1, I do not think I can be influenced by the impression created in the mind of Nandawathie on second thoughts. The letter P1, which is signed by Nandawathie has been clearly written by someone else. There is nothing to indicate that it was anything but an after-thought. " The learned magistrate was of course correct in saying that the opinion of Nandawathie is irrelevant. A witness has to depose to the facts to which he can speak but the inference deducible from the facts and the decision in regard to what the facts prove is a matter for the Court. The learned magistrate further states :—" Assuming that the eight girls whom the prosecution proposes to call as witnesses will give the evidence that they were forcibly taken by the accused and subjected to sexual intercourse, I hold that this evidence is admissible under section 15 of the Evidence Ordinance to show the state of mind of the accused when they took away the complainant Nandawathie ".

The evidence at a trial should be prima facie limited to matters relating to the subject matter of the charge. In *Maxwell v. Director of Public Prosecutions*,[1] Lord Sankey stated—

> " It is of the utmost importance for a fair trial that the evidence should be prima facie limited to matters related to the transaction which forms the subject matter of the indictment, and any departure from those matters should be strictly confined ".

It is therefore necessary to consider whether the admission of the evidence is warranted by law. Evidence tending to show that the accused had been guilty of criminal offences other than that on which there is a charge against him is inadmissible except in special cirsumstances where that evidence is relevant to some issue before the Court. The rule

[1] *1935 A. C. 309 at 320.*

relating to admissibility of evidence of similar facts has been laid down by Lord Herschell L.C. in *Makin v. Attorney-General for New South Wales,* [1] as follows :—

> "It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused."

In *George Joseph Smith,* [2] where the appellant had been charged with the murder of Bessie Munday, it was held that evidence had properly been admitted of the death of Alice Burnham and Margaret Lofty in similar circumstances for the purpose of showing the design of the appellant. In *Harris v. Director of Public Prosecutions,* [3] the rule laid down in *Makin's case* was approved though it was held that the evidence which was led in that case was not warranted. In the case of *D. D. W. Waidyasekera,* [4] where the appellant had been charged with causing the death of a woman by an act done with intent to cause miscarriage, the evidence of a nurse employed by him who stated that during the 10 months of her service under the appellant there were 150 to 175 cases in which the accused had caused miscarriage and that in each of those cases the accused used the same instruments and resorted to the same procedure, was held to have been properly admitted. The evidence of other occurrences must negative the inference of accident or establish *mens rea* by showing system. Evidence of other occurrences which merely tend to deepen suspicion does not go to prove guilt—*vide Noor Mohamed v. The King.* [5]

Under our law there is statutory provision in s. 15 of the Evidence Ordinance which is as follows :—

> "When there is a question whether an act was accidental or intentional, or done with a particular knowledge or intention, the fact that such act formed part of a series of similar occurrences, in each of which the person doing the act was concerned, is relevant."

The evidence of the other eight girls which the prosecution proposes to lead would not be relevant to show that the accused was a person whose disposition was such that he was likely to have abducted Nandawathie on this day. It would be relevant only in order to rebut

[1] *1894 A. C.57.*
[2] *11 Criminal Appeal Reports 236.*
[3] *1952 A. C. 695.*
[4] *(1955) 57 N.L.R. 202.*
[5] *1949 A. C. 182 at 192.*

the inference of mistake or accident. In cross-examination it has been elicited from Nandawathie that in her view the accused may have taken her in the car onwards from Galkande in the belief that she desired to proceed towards Maunawa. In other words, that the accused took Nandawathie from Galkande onwards by reason of a mistake. It appears to me that the evidence proposed to be led will be available to rebut the possibility of mistake.

It appears to be the position that a specific line of defence need not be set up before evidence of similar occurrences may be led. It is sufficient if that defence is open on the facts. In *Thompson v. The King*,[1] Lord Sumner stated :—

"No one doubts that it does not tend to prove a man guilty of a particular crime to show that he is the kind of man who would commit a crime, or that he is generally disposed to crime and even to a particular crime ; but, sometimes for one reason sometimes for another, evidence is admissible, notwithstanding that its general character is to show that the accused had in him the makings of a criminal, for example, in proving guilty knowledge, or intent, or system, or in rebutting an appearance of innocence which, unexplained, the facts might wear. In cases of coining, uttering, procuring abortion, demanding by menaces, false pretences, and sundry species of frauds such evidence is constantly and properly admitted. Before an issue can be said to be raised, which would permit the introduction of such evidence so obviously prejudicial to the accused, it must have been raised in substance if not in so many words, and the issue so raised must be one to which the prejudicial evidence is relevant. The mere theory that a plea of not guilty puts everything material in issue is not enough for this purpose. The prosecution cannot credit the accused with fancy defences in order to rebut them at the outset with some damning piece of prejudice."

Commenting on this passage, Lord du Parcq, in *Noor Mohamed v. The King* (supra) at pages 191 and 192 said—

"An accused person need set up no defence other than a general denial of the crime alleged. The plea of not guilty may be equivalent to saying 'let the prosecution prove its case, if it can,' and having said so much the accused may take refuge in silence. In such a case it may appear (for instance) that the facts and circumstances of the particular offence charged are consistent with innocent intention, whereas further evidence, which incidentally shows that the accused has committed one or more other offences, may tend to prove that they are consistent only with a guilty intent. The prosecution could not be said, in their Lordships' opinion, to be 'crediting the accused with a fancy defence' if they sought to adduce such evidence."

[1] *1918 A.C. 221 at 232.*

In *Waidyasekera* (supra) Basnayake, A.C.J. at page 212 said—

> " It is sufficient to say that under our law too the prosecution may adduce all proper evidence tending to prove the charge against the accused, including evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment without waiting for the accused to set up a specific defence calling for rebuttal."

As I have indicated earlier, the position that the petitioner acted on a mistake has been indicated in the cross-examination of Nandawathie, so that the defence of mistake or accident has already been adumbrated.

I should refer to the fact that there is another rule, not of law but of judicial conduct which may be applicable. It is a rule of judicial practice, flowing from the duty of the judge when trying a charge of crime to set the essentials of justice above the technical rule if the strict application of the latter would operate unfairly against the accused, and to consider whether the evidence of similar facts which it is proposed to adduce is sufficiently substantial, having regard to the purpose to which it is professedly directed to make it desirable in the interests of justice that it should be admitted. If it can, in the circumstances of the case, have only trifling weight, the judge would be right to exclude it—vide *Harris v. Director of Public Prosecutions* (supra).

I am unable to say, on a consideration of matters as they are before me, that the essentials of justice require the exclusion of the evidence sought to be led by the prosecution. The evidence is relevant and may even be decisive on a matter which the prosecution has to prove. The trial judge will be in a far better position to decide whether this evidence should be excluded by reason of the operation of this rule of practice. He will have before him all the evidence. In fact it has been said that this is a matter which rests entirely within the discretion of the trial judge.

Learned Counsel for the petitioners submitted that there was no evidence to prove the ingredients of the offence. In particular, he submitted, that there was no evidence that any force or deceitful means had been used to induce Nandawathie to get into the car. He further submitted that there was no evidence to show that she was being taken for the purpose of being forced or seduced to illicit intercourse. Although Nandawathie may have got into the car voluntarily without the use of force, it cannot be said that upon the evidence it is not a possible view that the taking of her from Galkande junction onwards was compulsorily and without her volition. According to her, she desired to alight from the car at Galkande but she was prevented from doing so as the door of the car was shut and the car was driven off. Whether a girl who has been abducted was so abducted for the purpose of forcing or seducing her to illicit intercourse is a matter to be inferred from all the evidence in the case. The fact that a young girl is abducted, together with the fact that there was no other ostensible reason for her being taken may

be sufficient for the inference to be drawn that she had been abducted for the purpose of being compelled to sexual intercourse. I do not consider it necessary for the purpose of this application that I should decide, at this stage, whether there is prima facie evidence in regard to the proof of the ingredients of the offence. It is sufficient for me to state that there is evidence upon which the learned magistrate has taken that view and that it is not a view taken arbitrarily or without any foundation.

In the result I am of the view that the petitioner has failed to discharge the heavy burden that lay on him to show that, in the circumstance of this case this Court was called upon to intervene by way of revision at this stage. I wish to stress again that I have considered the matter solely from this point of view and that nothing I have said should be construed as precluding the learned magistrate from coming to a view either way at the end of the non-summary proceedings as to whether a case has been made out warranting the petitioner being put on trial or the Attorney-General in deciding whether an indictment should be preferred and further proceedings taken.

The applications are refused.

Applications refused.