[IN THE COURT OF CRIMINAL APPEAL]

1958 *Present:* **Basnayake, C.J. (President), Gunasekara, J., and Sinnetamby, J.**

THE QUEEN *v.* A. NIMALASENA DE ZOYSA

Appeal No. 51, with Application No. 68, of 1958

S. C. 61—M. C. Balapitiya, 19,561

Court of Criminal Appeal—Grounds of appeal—Particulars must be given—Multiplicity of questions put by trial Judge—Is it a ground to quash conviction?—Non-direction on facts—Effect thereof—Improper admission of evidence—Effect thereof—Point of time at which Judge should deal with questions as to relevancy of evidence—Evidence Ordinance, ss. 136 (1), 165, 167—Criminal Procedure Code, s. 244 (1) (a)—Court of Criminal Appeal Ordinance, s. 5.

Held, (i) that when an appeal is preferred to the Court of Criminal Appeal the grounds of appeal should not be vague and general but should contain sufficient particulars of the matter to which objection is taken. If misdirection is alleged, the misdirection must be specified, and if a wrong decision of any question of law is alleged the wrong decision should be specifically stated.

(ii) that the mere fact that the trial Judge has, by availing himself of the power vested in him by section 165 of the Evidence Ordinance, put a large number of questions to a witness is not a ground for quashing a conviction, even if the number of questions is greater than that put by the prosecution or the defence. To quash the conviction the Court of Criminal Appeal must be satisfied that the multiplicity of the questions asked by the trial Judge resulted in a miscarriage of justice.

(iii) that where an appellant complains of non-direction on facts, he must establish that the omission resulted in a miscarriage of justice.

(iv) that although section 136 of the Evidence Ordinance imposes on the trial Judge the duty of asking the party proposing to give evidence of any fact in what manner any particular fact if proved would be relevant or not, the Court of Criminal Appeal will, when considering a complaint that the appellant has been prejudiced by the admission of irrelevant evidence, take into account the fact that such evidence was not objected to by the appellant at the time at which it was given or that it was elicited by the appellant or his Counsel. What importance it would attach to such omission to object or to the fact that the defence itself is responsible for eliciting the irrelevant evidence would depend on the circumstances of each case.

(v) that where irrelevant evidence has been admitted, the Court of Criminal Appeal may hold under the provisions of section 167 of the Evidence Ordinance that, casting aside the irrelevant evidence which should not have been admitted, there is sufficient evidence to justify the decision of the jury. Section 167 of the Evidence Ordinance applies to trials by jury as well as to trials by Judge alone.

(by GUNASEKARA, J.), that evidence can be sufficient to justify a decision only if it is true and not if it is false, and therefore before the Court can say that "there was sufficient evidence to justify the decision" the credibility of that evidence or the fact that its acceptance by the jury was not influenced by the inadmissible matter must be demonstrable from the record.

2—J. N. B 9149-1,593 (11/58)

(vi) that under section 136 (1) of the Evidence Ordinance, read with section 244 (1) (*a*) of the Criminal Procedure Code, questions as to relevancy of evidence may properly be dealt with only at the point of time at which the evidence is tendered. " Where defending counsel has informed counsel for the prosecution that he intends to object to the admissibility of certain evidence, it is, as a general rule, undesirable that the argument on admissibility should be heard and the issue decided before the case is opened. The proper course is for counsel for the prosecution to refrain from referring to the evidence in his opening, and that the issue should be decided at the appropriate moment in the case when the evidence is tendered."

APPEAL, with application for leave to appeal, against a conviction in a trial before the Supreme Court.

Colvin R. de Silva, with *W. E. M. Abeysekera* and *V. G. B. Perera* (assigned) for Accused-Appellant.

E. R. de Fonseka, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

August 25, 1958. BASNAYAKE, C.J.—

The appellant Nimalasena de Zoysa, a lad of 16 years and 3 months, attending Revata Vidyalaya in Balapitiya, was convicted of the offence of murder of D. Dayananda *alias* Linter de Zoysa another lad of 19 years attending the same school. This appeal is from that conviction.

Shortly the relevant facts are as follows: The deceased was a son of Simeon Zoysa, a carpenter, who at the relevant time lived in the village of Galwehera. The appellant is a son of Aladin Zoysa of the same village, who at the material time lived about quarter of a mile away from Simeon Zoysa's house. The appellant and the deceased lived with their respective parents. The other neighbours who were witnesses at the trial are Mendis Senanayake the headman of Galwehera and Pitahandi Rucial Nona. The evidence discloses that on 9th May 1957, the date of this offence, about 3.15 p.m. the appellant came to the garden adjoining the deceased's and called him by name. The deceased answered the appellant's call and left with him informing Gickson Mendis, a relation (he was married to the deceased's father's cousin) and a carpenter by occupation, who happened to be working in his house at the time, that he was going to cut reeds. Round about 3.30 p.m. the two lads were seen by Rucial Nona going in the direction of a village called Vilegoda, the appellant carrying a katty like P1. As the deceased had not returned by 6 p.m. his father Simeon Zoysa inquired from Rucial Nona, his nearest neighbour, whether she had seen the deceased that afternoon. He learnt from her that she had seen the two lads going together in the direction of Vilegoda, the appellant carrying a katty like P1. Search parties went in different directions to look for the missing lads. The search went on till about 9.30 p.m. but it proved fruitless. Then two

members of one of the search parties Wilman Zoysa and Gickson Mendis decided to inform the Police about the disappearance of the two lads. They went to the Kosgoda Police Station and Wilman Zoysa made a statement regarding the missing lads. At about 10.30 p.m. before his statement was concluded the appellant was brought to the Police Station by the headmen of Galwehera and Hegalla. His father accompanied them.

It would appear that in consequence of certain information received by the headman of Galwehera from the appellant's father that night he decided to go to the house of Rosalin Zoysa to search for the appellant. But he first went to the headman of Hegalla as Rosalin Zoysa lived in his division, and with him proceeded to her house at about 10.30 p.m. There they found the appellant. He was dressed in a white sarong and white shirt. Both shirt and sarong were stained with human blood. The headman of Hegalla arrested the appellant and took him to the Kosgoda Police Station where he was detained. In consequence of certain information disclosed by the appellant in his statement to the Police, the headman of Hegalla, Sergeant Silva, and Police Constable Dharmaratne left for a place called Miniranwalawatta in a jeep taking with them the appellant who had offered to point out the place to which he threw the katty P1. The place was not accessible by road and the party had to halt the jeep some distance away and walk through a cinnamon plantation to get there. There the appellant pointed out the place to which he had thrown the katty, which was recovered. It was among a mass of " pamba " creepers. He also pointed out the place where the body of the deceased was. It was in a Crown land adjoining Miniranwalawatta and six feet from the place from which the katty was recovered.

In his petition of appeal the appellant has set forth three grounds of appeal and submitted 33 further grounds subsequently but within the prescribed time. Learned counsel for the appellant at the outset intimated to us that he would confine his argument to grounds 7, 8, 9, 13, 14, 17 and 32 of the further grounds of appeal. Those grounds are as follows :—

" 7. The learned trial Judge has permitted much indirect and direct evidence of an inadmissible character relating to a confession alleged to have been made by me to the Police and this prejudiced my defence.

" 8. It is respectfully submitted that the general conduct of the case by the trial Judge in the course of the examination of witnesses prejudiced my defence. In this connection it is respectfully submitted that several leading questions at material points in the case were put by the learned trial Judge which prejudiced my defence.

" 9. The learned trial Judge has erred it is respectfully submitted in his directions on the law of circumstantial evidence.

" 13. It is respectfully urged that the learned trial Judge's remanding my father to Fiscal's custody in the presence of the Jury and in its hearing prejudiced my defence and caused a miscarriage of justice.

"14. It is respectfully urged that the learned Judge permitted evidence to be led that I pointed out the place where the katty was. The learned Judge has failed to direct the Jury carefully in regard to the evidence of the Police Officer on this point and has permitted much inadmissible evidence to be led on this point.

"17. It is also submitted respectfully that the conduct of the case by the trial Judge prevented me from placing my defence properly before the Jury.

"32. The learned trial Judge permitted much inadmissible evidence to be led in the case and directed the Jury on the subject matter of admissible evidence. It is respectfully mentioned that the admission of evidence regarding a mango tree and the creepers thereon was a circumstance regarding which the Jury should at least have been correctly directed."

The grounds which relate to the admission of irrelevant evidence and misdirection do not set out the items of irrelevant evidence or the specific misdirections. We have repeatedly stated from this Bench that grounds of appeal should contain sufficient particulars of the matter to which objection is taken, otherwise there would be cast upon this Court the burden of scanning the evidence and the summing-up in order to ascertain what are the matters to which objection is taken. The petition of appeal in the instant case is a good example of how grounds of appeal should not be stated. Below are some of the obvious examples of improperly set out grounds :—

"7. The learned trial Judge has permitted much indirect and direct evidence of an inadmissible character relating to a confession alleged to have been made by me to the Police and this prejudiced my defence.

"9. The learned trial Judge has erred it is respectfully submitted in his directions on the law of circumstantial evidence.

"10. The learned trial Judge has, it is respectfully submitted, erred in his directions on the burden of proof.

"11. It is respectfully urged that the summing-up of the learned Judge was lopsided and failed to bring out the features of my case favourable to my defence.

"32. The learned trial Judge permitted much inadmissible evidence to be led in the case, and directed the Jury on the subject matter of admissible evidence."

It does not seem to be sufficiently realised that the appellate powers of this Court are circumscribed by the statute constituting it and that the right of appeal granted by the Court of Criminal Appeal Ordinance is a limited right, and is not so wide as that conferred by the Criminal Procedure Code on those convicted in Magistrates' Courts and District Courts. The scheme of our Court of Criminal Appeal Ordinance is in the main the same as that of the corresponding English Act and section 5 of our Ordinance which prescribes the powers of this Court is, except for the power to order a retrial, substantially the same as the corresponding

provision of the English Act. It has been said time and again both here and by the Courts of Criminal Appeal in England and elsewhere that the grounds of appeal should not be vague and general but specific, that if misdirection is alleged the misdirection must be specified, and that if a wrong decision of any question of law is alleged the wrong decision should be specifically stated. It would be sufficient to refer to two of the better known expressions of opinion on this point by the English Court. They are the observations of Darling J. and Du Parcq J. which have been cited with approval in subsequent cases.

> " The Court wishes it to be understood that in future substantial particulars of misdirection or of other objections to the summing-up must always be set out in the notice of appeal or sent to the Registrar of the Court of Criminal Appeal with the notice of appeal, even if the transcript of the shorthand note of the trial has not then been obtained. Such particulars must not be kept back until within a few days of the hearing of the appeal. If counsel has a genuine grievance regarding a summing-up he knows substantially what it is as soon as the summing-up is finished, and can certainly specify his general objection when he settles the notice of appeal." (Darling J. in *Wyman* [1])

> " It has been said many times in this Court that particulars must be given in the grounds of appeal. If misdirection is complained of, it must be stated whether the alleged misdirection is one of law or fact, and its nature must also be stated. If omission is complained of, it must be stated what is alleged to have been omitted. It is not only placing an unnecessary burden on the Court to ask it to search through the summing-up and the transcript of the evidence to find out what there may be to be complained of, but it is also unfair to the prosecution, who are entitled to know what case they have to meet. " (Du Parcq J. in *Jack Fielding* [2])

The grounds argued by learned counsel may be classified under the following heads :—

(*a*) admission of inadmissible evidence (7, 13, 32),

(*b*) conduct of the case by the trial Judge to the prejudice of the appellant (8, 17),

(*c*) misdirection (9, 32), and

(*d*) non-direction (14).

It would be convenient to dispose of heads (*b*), (*c*) and (*d*) before dealing with head (*a*). In the grounds which fall under head (*b*) it is urged that the learned trial Judge put questions to the witnesses which prejudiced the defence. Section 165 of the Evidence Ordinance empowers a Judge to ask any question he pleases. The material portion reads—

> " The Judge may, in order to discover or to obtain proper proof of relevant facts, ask any question he pleases, in any form, at any

[1] *13 Cr. App. R. 163 at 165.* [2] *22 Cr. App. R. 211.*

time, of any witness, or of the parties, about any fact relevant or irrelevant; and may order the production of any document or thing; and neither the parties nor their agents shall be entitled to make any objection to any such question or order, nor, without the leave of the court, to cross-examine any witness upon any answer given in reply to any such question:

"Provided that the judgment must be based upon facts declared by this Ordinance to be relevant and duly proved; . . . . ."

It would appear from the transcript of the proceedings that the learned trial Judge has asked a very large number of questions. Learned counsel for the appellant stated from the bar that the trial Judge had asked as many as 282 questions while counsel for the prosecution and the defence had asked 218 and 286 questions respectively.

The section quoted above gives the Judge a wide power. In order to discover or to obtain proper proof of relevant facts he may ask any question he pleases in any form, at any time, about any fact whether relevant or irrelevant. This power extensive though it be has limits, but those limits cannot be precisely defined. The trial Judge himself is the best arbiter of how and when he may exercise it. In its exercise a Judge should be careful not to usurp the functions of the prosecution or the defence. He should also so regulate his interpositions as not to hamper the conduct of the case by counsel for the prosecution or the defence. The fact that neither the parties nor their agents are entitled to make any objection to any question by the Judge or to cross-examine any witness upon any answer given in reply to his questions is a matter which calls for caution in the exercise of this power.

In the instant case there is no complaint that the learned Judge usurped the functions of the prosecution or of the defence or that his interpositions hampered the examination and cross-examination of witnesses. The mere fact that the trial Judge has put a large number of questions to a witness, even if the number is greater than that put by the prosecution or the defence, is not a ground for quashing a conviction. The appellant must satisfy us that the fact that the Judge put so many questions resulted in a miscarriage of justice. In the instant case the Court is not satisfied that the multiplicity of the questions asked by the trial Judge resulted in a miscarriage of justice.

Learned counsel did not press the ground under head (*c*). He was constrained to admit that the direction on circumstantial evidence was both adequate and correct. In regard to head (*d*) the non-direction complained of is not made clear in ground 14.

Where an appellant complains of non-direction on facts he must satisfy the Court that the omission resulted in a miscarriage of justice. In this connexion it would not be out of place to refer to the observations of Brett, Master of the Rolls, in the case of *Abrath v. Northern-Eastern Railway* [1] though those observations were made in a civil case.

[1] *(1883) 11 Q. B. D. 440 at 453.*

"It is no misdirection not to tell the Jury everything which might have been told them : there is no misdirection unless the Judge has told them something wrong, or unless what he has told them would make wrong that which he has left them to understand. Non-direction merely is not misdirection, and those who allege misdirection must shew that something wrong was said or that something was said which would make wrong that which was left to be understood."

The Court is not satisfied that in the instant case there is non-direction amounting to misdirection and that the omissions from the summing-up referred to by learned counsel in the course of his address have resulted in a miscarriage of justice.

Under head (*a*) learned counsel invited our attention to those parts of the evidence of Gickson Mendis, Wilman Zoysa, Mendis Senanayake the headman of Galwehera, and Simeon Zoysa, which he submitted were irrelevant and prejudicial to the case of the appellant. He also took objection to the evidence of Police Sergeant Edwin Silva as to the identity of the katty P1.

To quote all the passages in the evidence to which learned counsel has taken exception would make this judgment unduly long. Only the more important of them are therefore set out below :—

"*Gickson Mendis*

Cross-Examination :

293. Q : After you met the village headman at the Police Station did you meet Simeon the same night ?

A : I met Simeon the same night after meeting the headman.

To Court :

294. Q : Where ?

A : In his house.

295. Q : By that time they had come to know that the body had been found ?

A : I brought him the information which I got from the Police Station and conveyed it to the deceased's father.

Cross-examination contd. :

296. Q : Thereafter did you see Simeon leaving the house ?

A : He fainted off on receiving the information.

Wilman Zoysa

Examination-in-chief :

566. Q : While you were still there the two headmen brought the accused to the Police Station ?

A : Yes, they came along with the accused's father.

567. Q : When did you first learn that the deceased had been killed ?

A : At the Police Station.

568. Q : Did you come and give that information to anybody after that ?

A : I came home and gave the information.

Court :

569. Q : The deceased's family ?

A : Yes.

Exam. contd. :

570. Q : You gave the information to Simeon's wife ?

A : I told not only to Simeon's wife but to all the others also.

571. Q : What time did you go to Simeon's home after you left the Police Station ?

A : About 10.30 or 11 p.m.

572. Q : When you went to the house was Simeon there ?

A : No.

573. Q : You gave the information to Simeon's wife ?

A : Yes.

574. Q : She started crying and wailing ?

A : Yes.

579. Q : Did you receive information that the deceased had been killed by somebody when you were there at the Kosgoda Police Station ?

A : Yes.

580. Q : At what time did you get information as to the place of death ?

A : About 10 p.m.

581. Q : Thereupon did you make any statement to the Police at the time ?

A : I had not concluded my statement to the Police when I got the information.

Court :

582. Q : It was when your statement was being recorded that the other party came to the Police ?

A : Yes.

583. Q : And it transpired that the deceased had been killed ?

A : Yes.

Cross-examination contd. :

609. Q : At the Police Station did you learn where the dead body was ?
A : Yes.

To Court :

610. Q : Before you left the Police Station you knew the name of the land on which the deceased's body was found ?
A : Yes.

611. Q : That night ?
A : Yes.

612. Q : What is the name ?
A : Miniranwalawatta.

Mendis Senanayake

629. Q : On the 9th of May last year you went with accused's father to the house of the V. H. of Hegalla ?
A : Yes.

630. Q : Having taken the V. H. of Hegalla you went to the house of one Rosalin Zoysa ?
A : Yes.

633. Q : At the house of Rosalin Zoysa you found the accused there ?
A : Yes.

To Court :

653. Q : Can you tell us whether at any time that night Simeon fainted off in your house ?
A : Yes.

654. Q : That was about what time ?
A : About 10.30 p.m.

655. Q : That was before you left for the house of the village headman of Hegalla in search of him ?
A : Yes.

Cross-examination :

656. Q : Can you say that at the time Simeon fainted that you and Simeon were the only people in your house ?
A : No.

657. Q : Who were the other people who were in your house at the time Simeon fainted ?

A : Darlin Vedamahattaya, Aladin Zoysa the father of the accused, and Charlin Gunaratne the brother of Darlin Vedamahattaya.

658. Q : That is all ?

A : Yes. and my children also.

659. Q : Did you take any action when Simeon fainted in your house ?

A : As he fell Charlin Gunaratne held him, and I asked Charlin to have Simeon removed immediately.

Sergeant Edwin Silva

To Foreman :

1001. Q : On that day did the deceased's father identify the katty ?

A : Yes.

To Court :

1002. Q : You had to find out from whose house this katty was taken ?

A : Yes.

1003. Q : In the course of your investigation, you learnt that this katty was one belonging to the house of the accused ?

A : Yes.

1004. Q : On what date did you come to learn of that ?

A : That same day before the Magistrate came. I recorded the statement in regard to the identity of the katty from Aladin, father of the accused.

1006. Q : The only step you took in regard to the identity of the katty was to show it to the father of the accused and to record his statement ?

A : And the accused."

In the opinion of the Court the evidence of Gickson Mendis and Wilman Zoysa that they learnt at the Police Station that the deceased had been killed and that Simeon fainted on being given the news is irrelevant. The evidence of the headman of Galwehera that the father of the deceased fainted in his house is also irrelevant. The Court is also of opinion that Edwin Silva's answer to questions 1004 and 1006 have the effect of introducing hearsay as the appellant's father was not called to give evidence at the trial. At the same time it must be pointed out that the evidence to which learned counsel took exception in this Court was either elicited by defending counsel in cross-examination or, when not elicited by the defence, allowed to pass without objection. Although section

136 of the Evidence Ordinance imposes on the Judge the duty of asking the party proposing to give evidence of any fact in what manner any particular fact if proved would be relevant or not, this Court will when considering a complaint that the appellant has been prejudiced by the admission of irrelevant evidence take into account the fact that such evidence has not been objected to by the appellant at the time at which it was given or has been elicited by the appellant or his counsel. What importance it would attach to such omission to object or the fact that the defence itself is responsible for eliciting the irrelevant evidence would depend on the circumstances of each case. The progress of a trial would be considerably hindered if the Judge had to inquire from counsel whenever a question is asked how the fact that is sought to be elicited is relevant. It is therefore necessary that counsel on either side should make every effort to keep their examination and cross-examination strictly within the limits prescribed by the Evidence Ordinance and ask no questions that will bring out irrelevant facts. At the same time they should be vigilant and actively assist the Judge in the task of keeping evidence within the limits of relevancy as laid down in the Evidence Ordinance by bringing to his notice any question of his opponent that is likely to introduce irrelevant facts. The Legislature recognising the difficulty of altogether excluding the introduction of irrelevant evidence in the course of a trial has enacted a useful provision in section 167 of the Evidence Ordinance. It reads—

> "The improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decisions in any case, if it shall appear to the court before which such objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision."

This section applies equally to civil as well as criminal trials. It has never been doubted in this country that in the case of criminal trials it applies to trials by jury as well as to trials by Judge alone (*Rex v. Thegis* [1]; *The King v. Pila* [2]; *The King v. Appu Sinno* [3]). In the case of *The King v. Pila* (*supra*) Lascelles C.J. observed at p. 458—

> "There can be no question but that this Court, under section 167 of the Evidence Ordinance, has power to uphold the conviction, if we are of opinion that the evidence improperly admitted did not affect the result of the trial."

In the case of *Rex v. Thegis* (*supra*) Shaw J. said—

> "In my opinion, therefore, section 167 of the Evidence Ordinance applies to the present case, and we have the power to uphold the verdict on the admissible evidence should we think the circumstances warrant it."

[1] *(1901) 2 N. L. R. 10.* [2] *(1912) 15 N. L. R. 453.*
[3] *(1920) 22 N. L. R. 353.*

The doubt which at one time existed in India whether the corresponding provision of the Indian Evidence Act which is word for word the same as our section applies to trials by jury has been set at rest by the Privy Council. It is sufficient for the purpose of this appeal to refer to the case of *Abdul Rahim v. Emperor* [1] and *Kottaya v. Emperor* [2]. In the former case Lord Macmillan who delivered the opinion of the Board stated at p. 85—

> "The first question submitted relates to the effect of the misreception of evidence. It has been found by the High Court that in the present case material evidence was improperly admitted. What are the powers and what is the duty of the High Court in such circumstances? It was contended for the appellant that the evidence improperly admitted might have so seriously prejudiced the minds of the jury as to have brought about a failure of justice and that he was entitled on a new trial to have the verdict of a jury on proper evidence. To this submission S. 167, Evidence Act, in their Lordships' opinion affords a complete and conclusive answer. The improper admission of evidence is thereby expressly declared not to be a ground of itself for a new trial. The appellate Court must apply its own mind to the evidence and after discarding what has been improperly admitted decide whether what is left is sufficient to justify the verdict. If the appellate Court does not think that the admissible evidence in the case is sufficient to justify the verdict then it will not affirm the verdict and may adopt the course of ordering a new trial or take whatever other course is open to it. But the appellate Court if satisfied that there is sufficient admissible evidence to justify the verdict is plainly entitled to uphold it."

In the latter case at which the former decision does not appear to have been cited Sir John Beaumont who delivered the opinion of the Board (p. 71) observed—

> "The position therefore is that in this case evidence has been admitted which ought not to have been admitted, and the duty of the Court in such circumstances is stated in S. 167, Evidence Act, which provides:
>
> 'The improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decision in any case, if it shall appear to the Court before which such objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision.'
>
> "It was therefore the duty of the High Court in appeal to apply its mind to the question whether, after discarding the evidence improperly admitted, there was left sufficient to justify the convictions. The Judges of the High Court did not apply their minds to this question because they considered that the evidence was properly admitted, and their Lordships propose therefore to remit the case to the High Court

[1] (1946) *A. I. R. (P. C.) 82.*

[2] (1947) *A. I. R. (P. C.) 67.*

of Madras, with directions to consider this question. If the Court is satisfied that there is sufficient admissible evidence to justify the convictions they will uphold them. If, on the other hand, they consider that the admissible evidence is not sufficient to justify the convictions, they will take such course, whether by discharging the accused or by ordering a new trial, as may be open to them."

It would appear from the cases cited above that the duty of the Court is to cast aside the evidence which ought not to have been admitted and then consider whether there still remains sufficient evidence to support the conviction. Applying this rule to the facts of the instant case, and casting aside the irrelevant evidence which should not have been admitted, there is sufficient evidence to justify the decision of the jury. Learned counsel for the appellant to whom we afforded the opportunity of addressing us on the question whether this Court was empowered to act under section 167 did not argue that it had no power to do so ; but he contended that this Court should in a case where evidence had been improperly admitted act in the same way as the Court of Criminal Appeal in England. To accede to that contention would amount to ignoring section 167. It would be wrong to do so. The Court of Criminal Appeal in England has not the power which this Court has of ordering a new trial ; but it would appear from the following observation of Viscount Simon in the case of *Stirland* [1] that even in England the Court does not quash a conviction merely on the ground of misreception of evidence.

"It has been said more than once that a Judge when trying a case should not wait for objection to be taken to the admissibility of the evidence, but should stop such questions himself (see *Ellis* 5 Cr. App. R. 41 at p. 62 ; (1910) 2 K. B. 746 at 764). If that be the Judge's duty, it can hardly be fatal to an appeal founded on admission of an improper question that counsel failed at the time to raise the matter. No doubt, as Bray, J., said at pp. 61 and 763 of the respective reports in the same case, the Court must be careful in allowing an appeal on the ground of reception of inadmissible evidence when no objection has been made at the trial by the prisoner's counsel. The failure of counsel to object may have a bearing on the question whether the accused was really prejudiced. It is not a proper use of counsel's discretion to raise no objection at the time in order to preserve a ground of objection for a possible appeal. But where, as here, the reception or rejection of a question involves a principle of exceptional public importance, it would be unfortunate if the failure of counsel to object at the trial should lead to a possible miscarriage of justice."

There is one other matter that should be adverted to. After the jury had been empanelled but before the opening address for the prosecution, counsel for the defence indicated to the learned trial Judge that he wished to take certain objections to the indictment in the absence of the jury. In the course of his submissions he stated that he would object to Crown Counsel referring in his opening address to the jury to a confession made

[1] *30 Cr. App. R. 40 at 55.*

by the appellant to his father Aladin Zoysa. After hearing the submissions of counsel for the defence and the prosecution the learned trial Judge informed counsel of the course he proposed to take. He said—

> " What I propose to do is this, to call the father into the witness box now and give my ruling on the admissibility of that evidence. If I rule that his evidence is admissible, I propose to allow Crown Counsel to open on that part of the case to the jury. If I hold against the Crown on the point, I will direct Crown Counsel not to open on that matter."

The appellant's father and the headman of Galwehera were then affirmed and examined-in-chief, cross-examined, and re-examined, and also questioned by the learned trial Judge. At the end of their examination the learned Judge ruled that the counsel for the Crown should not in his opening address refer to the appellant's confession to his father. The appellant's father was not eventually called as a witness by either the prosecution or the defence.

The course adopted in the instant case is unusual. When the defence proposes to object to evidence of any fact appearing in the depositions being tendered at the trial it has been the practice for quite a long time for defence counsel to indicate it to counsel for the Crown so that he may exercise his discretion as to whether he should omit any reference in his opening address to the item of evidence to which the defence proposes to object. It has been a good working rule and it is not clear why the usual course was not adopted in this instance. The proper time for the Judge to rule on the admissibility of evidence is when a party proposes to give evidence of any fact and not before. Section 136 (1) of the Evidence Ordinance reads—

> " When either party proposes to give evidence of any fact, the Judge may ask the party proposing to give the evidence in what manner the alleged fact, if proved, would be relevant, and the Judge shall admit the evidence if he thinks that the fact, if proved, would be relevant, and not otherwise."

Section 244 (1) (*a*) of the Criminal Procedure Code, which prescribes the duty of the Judge in a trial by Jury, lays it down that it is the duty of the Judge to decide all questions of law arising in the course of a trial and especially all questions as to the relevancy of the facts which it is proposed to prove and the admissibility of evidence. This provision lends support to section 136 (1) of the Evidence Ordinance and emphasises the rule that questions as to relevancy of evidence may properly be dealt with only at the point of time at which a party proposes to elicit the oral evidence or tender any documentary evidence.

The instant case illustrates the danger of ruling on the admissibility of evidence before the appropriate stage is reached. It resulted in the admission of hearsay evidence and the father of the appellant not being called as a witness though he had material evidence to give. The relevancy of a fact has to be determined against the background of other

relevant facts which the prosecution has led in evidence. It is both difficult and unsafe to rule on the relevancy of evidence *in vacuo* as it were.

The procedure that has been followed all this time has not only long-standing practice to commend it but is also what our law enjoins. Although in England Criminal Procedure is not governed entirely by statute as in our country, the procedure adopted is the same. Comparatively recent attempts in that country to depart from the established procedure have been disapproved by the Court of Criminal Appeal as in the case of *Framroze Patel* [1], where Byrne J. adopting with approval the headnote to *Zielinski* [2] said—

> "Where defending counsel has informed counsel for the prosecution that he intends to object to the admissibility of certain evidence, it is, as a general rule, undesirable that the argument on admissibility should be heard and the issue decided before the case is opened. The proper course is for counsel for the prosecution to refrain from referring to the evidence in his opening, and that the issue should be decided at the appropriate moment in the case when the evidence is tendered."

The appeal is accordingly dismissed and the application refused.

GUNASEKARA, J.—

I find myself unable to agree with the majority of the court on the principal questions of law that are discussed in the judgment that has been prepared by my lord the Chief Justice.

It is the unanimous view of the court that on several points inadmissible evidence has been admitted. The admission of every such item of evidence necessarily involved a wrong decision of a question of law and therefore, in terms of section 5 of the Court of Criminal Appeal Ordinance, the court must decide whether it considers "that no miscarriage of justice has actually occurred". The case for the prosecution rested mainly on the evidence given by Gickson Mendis, Rucial Nona and Police Constable Dharmaratne and the evidence of the presence of "a few small stains" of human blood on the shirt and sarong that the appellant was wearing at the time of his arrest. The credibility of each of these three witnesses was challenged by the defence and it cannot be demonstrated that the jury would have accepted their testimony even if the inadmissible evidence had not been placed before it. Although according to the case for the prosecution the appellant was arrested within a few hours after the commission of the alleged murder there is no evidence that the blood-stains were too fresh to have been caused long before the deceased's death. Nor does it appear that they were too large or too many to be such blood-stains as might be found on the clothing of any villager without his being able to explain them, by recalling for instance a particular occasion on which he was stung by a mosquito or was pricked by a thorn or bitten by a leech.

[1] *35 Cr. App. R. 62 at 65.* [2] *34 Cr. App. R. 193.*

Before the court can say that no substantial miscarriage of justice has actually occurred it must consider the possible effect on the minds of the jury both of the inadmissible evidence and of the order, of which the appellant complains, committing his father Aladin Zoysa to the custody of the fiscal.

After the jury had been empanelled and before the case for the prosecution was opened the counsel for the defence requested that the jury should be asked to retire as he proposed " to take certain objections to the indictment ". In reply to a question from the presiding judge as to how the jurors would be affected by legal submissions he said that his legal submissions " would be covering certain factual matters ". The jury were then asked to retire. They did so at 11.45 a.m. and returned shortly after 12.50 p.m. It appears that the learned judge then said in their hearing " Let the accused's father be kept in fiscal's custody until this case is over."

It is not unlikely that the jury would have inferred that what led to this order were " factual matters " discussed in their absence. Nor could they have failed to notice that the man who was to be kept in custody was described not by name but by reference to his relationship to the appellant. Subsequently, although Aladin Zoysa was not examined as a witness, the prosecution adduced evidence indicating that, at a time when no prosecution witness had any information as to what had happened to the deceased, Aladin Zoysa gave the village headman of Galwehera information that led him to cause the village headman of Hegalla to arrest the appellant. No doubt the object of this evidence was merely to introduce and explain the relevant fact of the arrest ; but it was not necessary for that purpose and was therefore not admissible under section 9 of the Evidence Ordinance on that ground. On the other hand it could have had, and most probably did have, the unintended effect of suggesting to the jury that Aladin Zoysa, who was not being called as a witness and who had been committed to the custody of the fiscal after some proceedings held in their absence, was in a position to give incriminating evidence against his son if only he could be persuaded to place public duty before private interest and disclose what he knew.

In addition to this inadmissible evidence as to the part played by Aladin Zoysa in the events that led to the prisoner's arrest the jury had before them inadmissible hearsay to the effect that Aladin stated to Police Sergeant Edwin Silva that the katty P1 " was one belonging to the house of the accused ". It may well be that this inadmissible evidence induced the jury to accept Rucial Nona's evidence that she had seen a similar katty in the appellant's hands at about 3.30 p.m. and evidence of Police Constable Dharmaratne that he found the katty P1 at a place pointed out by the appellant as a place to which the appellant had thrown it.

Prejudice could also have been caused by the evidence elicited from Wilman Zoysa in his examination-in-chief as to the information that he claimed to have obtained at the police station. The passages from that evidence that are quoted in the judgment of my lord the Chief Justice

could not fail to suggest to the jury that the appellant or his father or both had stated at the police station that the deceased had been killed by the appellant.

For these reasons it is not possible, in my opinion, for the court to hold "that no miscarriage of justice has actually occurred", and the appeal must therefore be allowed.

Application of the provisions of section 167 of the Evidence Ordinance can lead to no different result.

I do not think that "sufficient evidence" means "evidence which if believed would be sufficient". It seems axiomatic that evidence can be sufficient to justify a decision only if it is true and not if it is false. Therefore, before the court can say that "there was sufficient evidence to justify the decision" the credibility of that evidence or the fact that its acceptance by the jury was not influenced by the inadmissible matter must be demonstrable from the record.

In a case in which inadmissible evidence induces a jury to accept evidence that has been properly admitted the sufficiency of the latter to justify the decision is dependent on the former. Therefore, in such a case as the present one, where the inadmissible evidence could have induced the acceptance of the admissible evidence, the court is not in a position to say that independently of the inadmissible evidence there was "sufficient evidence to justify the decision" of the jury. What this expression contemplates is not evidence which may or may not be true but evidence that is demonstrably true or evidence that can be demonstrated to have been accepted by the court of trial without being influenced by inadmissible evidence to arrive at that finding. I therefore see no inconsistency in the views expressed by the learned judges who decided the three Ceylon cases cited by my lord the Chief Justice and no conflict between those views and the two Privy Council decisions.

In my opinion the conviction of the appellant and the sentence passed on him must be set aside and the court must order a new trial.

Appeal dismissed.