[COURT OF CRIMINAL APPEAL]

1968 *Present:* **T. S. Fernando, J. (President), Tambiah, J., and Sirimane, J.**

PAULINE RUTH DE CROOS, Appellant, *and* THE QUEEN, Respondent

C. C. A. APPEAL No. 18 OF 1968, WITH APPLICATION No. 22 OF 1968

S. C. 73/67—M. C. Colombo South, 68959/A

Trial before Supreme Court—Admission of bad moral character of the accused—Misreception of inadmissible evidence—Circumstances when the Court of Criminal Appeal will nevertheless dismiss the appeal of the accused—Court of Criminal Appeal Ordinance, ss. 2 (6), 5 (1), 5 (2)—Evidence Ordinance, ss. 54, 167—Criminal Procedure Code, ss. 6, 234.

The proviso to section 5 (1) of the Court of Criminal Appeal Ordinance which states that the Court of Criminal Appeal may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss an appeal if they consider that no substantial miscarriage of justice has actually occurred, would be applicable in case of misreception of inadmissible evidence if it is evident that no reasonable jury, after being properly directed, could have failed to convict the appellant on the rest of the evidence to which no objection could be taken.

In an indictment against the accused-appellant as the 1st accused and another as the 2nd accused, both accused were charged jointly (1) with conspiracy to commit or abet the offence of murder of a boy who was a son of the 2nd accused, and (2) with murder of the said boy. On the sixth day of the trial the 2nd accused was discharged, in terms of section 234 (1) of the Criminal Procedure Code, on the ground that there was no evidence upon which he could be convicted. The trial proceeded thereafter against the 1st accused only and she was found guilty by the jury, by a divided verdict of 6 to 1, of the offence of murder. The main ground of the present appeal was that, before the 2nd accused was discharged, certain evidence was led or elicited about an improper association between the appellant and the 2nd accused and her "affairs" with other men. It was urged that the appellant was at least entitled to a fresh trial on the ground that this evidence of bad moral character would have been rendered inadmissible by section 54 of the Evidence Ordinance if the Crown had not recklessly joined in the indictment the 2nd accused who was discharged. It was submitted that the fact that the trial Judge had cautioned the jurors to disregard the evidence was incapable of erasing from their minds the prejudiced impression caused by it.

Held by T. S. FERNANDO, J., and TAMBIAH, J., (SIRIMANE, J., dissenting), that, in the present case, notwithstanding the fact that the jury was in possession of evidence tending to show that the appellant was a girl of loose morals, which evidence could not have been led in a case against her if she had stood her trial alone, there was no substantial miscarriage of justice. The proviso to section 5 (1) of the Court of Criminal Appeal Ordinance was therefore applicable.

Held further, that the discharge of the 2nd accused before the prosecution had technically closed its case did not cause any prejudice to the 1st accused.

APPEAL against a conviction at a trial before the Supreme Court.

G. E. Chitty, Q.C., with *E. R. S. R. Coomaraswamy, A. M. Coomaraswamy, Anil Obeyesekere, Kumar Ameresekere, P. Chakradaran* and *Tyrone Fernando*, for the accused-appellant.

V. S. A. Pullenayegum, Senior Crown Counsel, with *Kenneth Seneviratne* and *L. D. Guruswamy*, Crown Counsel, for the Crown.

Cur. adv. vult.

March 24, 1968. T. S. FERNANDO, J.—

The Attorney-General presented to this Court an indictment containing two charges against the appellant as the 1st accused and another as the 2nd accused alleging (1) conspiracy to commit or abet the offence of murder of one Ramdas Gotabhaya Kirambakanda in consequence of which conspiracy the murder was alleged to have been committed (S. 113B read with SS. 296 and 102 of the Penal Code) and (2) murder of the said person (S. 296). The deceased Gotabhaya was a school-boy of the age of 11 years and a son of the 2nd accused. The appellant is an unmarried girl living with her parents at Dehiwala in which town the 2nd accused also resides with his family. The two accused were tried on this indictment before a judge and jury. After five days of evidence had been recorded, counsel for the 2nd accused objected to the admissibility of a certain piece of evidence sought to be led by the Crown and legal argument on its admissibility was permitted in the absence of the jury. At the time of adjournment on the fifth day, the trial judge, again in the absence of the jury, addressed Crown Counsel as follows :—

> " I certainly will have to direct the jury that this cannot in any way add very much unless on the rest of the evidence you have made out a case. "

On the morning of the sixth day, Crown Counsel addressed the Court and said :—

> " Your Lordship indicated that, even if you were disposed to permit that item of evidence that I was seeking to lead, Your Lordship will direct the jury that that evidence has very little weight or value as such against the 2nd accused. In those circumstances, it is not my intention to pursue the application. "

A little later, the learned judge said to Crown Counsel :—

> " So that this alleged statement just hangs in the air without any impact. I understand from your opening that apart from this little item of evidence you are relying solely upon subsequent conduct. "

The record of the proceedings thereafter reads as follows :—

Crown Counsel : " Yes, my Lord. The various items relate to this subsequent conduct that I was seeking to urge as

being circumstances against him. If Your Lordship is of the view that the conduct after the event will be of no avail, I do not wish to pursue my application."

Court: "It is certainly of no value whatsoever unless the other evidence is trusted. Now that I am aware of the important evidence I think I should state at this stage that there is no case against the 2nd accused. In this situation there may have been subsequent misconduct despite the innocence before, but your case is based on subsequent conduct."

Crown Counsel: "If that be Your Lordship's view, I will not pursue my application."

The jury was then recalled, and the Court addressed them as follows :—

"If you remember, at the commencement of this case I said to you that you are the judges in this case and you will ultimately have to decide the guilt of the accused; but there is a power which I have, namely, to decide whether there is evidence upon which you can convict. I have now become aware of the sort of evidence which the prosecution proposes to lead as against the 2nd accused. I think you will realise that thus far, if the evidence implicates anyone at all, the evidence you have so far heard is directed against the 1st accused, and counsel has informed me of the nature of the evidence which he can lead, if he wishes, against the 2nd accused. I am satisfied that there will be no evidence upon which a jury can reasonably convict the 2nd accused. Therefore, I direct you now to enter a verdict of not guilty against the 2nd accused. You are bound to follow that direction."

The verdict was accordingly signed by the foreman, and it was communicated to the 2nd accused and he was thereupon acquitted and he left the dock.

If we may say so with respect, this Court shares the opinion of the learned trial judge that there was no evidence upon which a jury could reasonably have convicted the 2nd accused. We indicated as much to Crown Counsel who argued at this appeal. He tabulated for us all the items of evidence the Crown had relied on against the 2nd accused and contended that the most important item of evidence was that over which the legal objection noted above had been raised, and in respect of which the trial judge said "this cannot in any way add very much unless on the rest of the evidence you have made out a case." Indeed, I think the 2nd accused should not have been put on trial at all. An accused person should not be put to the expense and harassment of a trial on a charge of murder unless it can fairly be said that the evidence is such that, if believed, a reasonable jury could convict him of the offence charged or of a lesser offence. The Legislature has placed the Attorney-General between the committing Magistrate and the court of trial in the interests of justice, and those interests can be secured not only by safeguarding

the interests of the State but also, if I may say so, by looking at the other side of the medal as well, namely, the interests of the accused person.

It may be technically correct to say that a trial judge cannot direct the jury to return a verdict of not guilty in respect of any person indicted until the prosecution has closed its case—vide section 234 of the Criminal Procedure Code. Certainly, according to English Criminal Procedure it is not permissible for a court to quash an indictment on the ground that, if the depositions are examined, it would be found that the evidence for the prosecution would be insufficient to support a conviction—see *Regina v. Chairman, County of London Quarter Sessions, ex parte Downes* [1]. Here there was no quashing before trial; had it been otherwise, section 6 of our Criminal Procedure Code may have rendered the English law applicable. The procedure actually adopted by the learned judge in this case is, to our knowledge, not infrequently resorted to by judges in this Country when it becomes apparent to the Court and counsel that to continue is to waste precious time and that there is no purpose in "flogging a dead horse". We ourselves have no desire, at this stage of the development of the practice of stopping trials at their virtual though not their technical end, to insist on technicality to the point almost of sanctifying it. Nor do we think that the course the learned judge took of stopping the case as against the 2nd accused caused any prejudice to the appellant. I am not unmindful of the point raised on behalf of the appellant that on the day following that on which the 2nd accused was acquitted, counsel for the Crown, in the presence of the jury, presumably for the purpose of correcting an incorrect newspaper report of the previous day's proceedings in court, submitted that he had not stated to court that there was no evidence against the 2nd accused and that it was not correct that the gentlemen of the jury agreed that there was no evidence. I do not find it possible to appreciate why this statement was made, particularly in the presence of the jury. The Court had ruled that there was no evidence upon which a reasonable jury can convict the 2nd accused, and that should have been an end of the matter. Neither the agreement of Crown Counsel nor that of the jury was necessary. The trial judge could have so ruled even if both Crown Counsel and the jury were in disagreement with him on the point. The Court was not concerned with newspaper reports, particularly after the 2nd accused had been acquitted. I do not, however, agree with the contention of counsel for the appellant that this episode in court could or might have caused prejudice to the appellant's case.

The case of the Crown thereafter proceeded as against the appellant alone for another three days without any effort made on the part of anyone to have the indictment amended. After the acquittal of the 2nd accused, the first charge of conspiracy to commit or abet murder should have been struck out, and the second charge had to undergo minor consequential amendment. The necessity for doing this was

[1] *(1954) 1 Q. B. 1.*

inadvertently overlooked, and the required amendments of the indictment were made only at the time the Crown's case was being closed with the statutory statement of the appellant being read to the jury. The evidence of certain witnesses was thereafter called for the defence and the trial judge permitted the Crown to lead the evidence of a fresh witness in rebuttal of certain evidence called for the defence. Counsel then addressed the jury and the trial judge summed up the case. The jury, after a retirement for consideration lasting about two hours, returned a divided verdict of 6 to 1 finding the appellant guilty of murder, and sentence of death was accordingly pronounced on her.

The main ground of appeal centred round the admission of certain evidence relating to an improper association between the appellant and the 2nd accused and her "affairs" with other men. This evidence, it was urged, amounted to evidence of bad character of the appellant, and therefore rendered irrelevant by section 54 of the Evidence Ordinance. All the evidence to which exception was taken before us had been led or elicited before the acquittal of the 2nd accused. So long as the 2nd accused stood charged along with the appellant with conspiracy to murder and with murder itself, it was not possible to say that the evidence could have been excluded. Moreover, no objection was raised at the trial itself to the leading of the evidence now questioned. The complaint on appeal is that, even conceding that that evidence was admissible while the 2nd accused also remained an accused person, in a trial against the appellant alone the evidence was wholly irrelevant. It amounts to evidence of bad moral character and would have led the jury to form a prejudice against the appellant generally, and thereafter all caution administered to the jurors to disregard that evidence would in practice be incapable of erasing from their minds the prejudiced impression which it would have left behind. In Mr. Chitty's picturesque phrase, it would have sunk into the minds of the jury even as ink is indelibly absorbed by blotting paper.

In regard to this complaint, I have to observe that in the case of one of the witnesses called, indeed the first witness called by the Crown at the trial, Mrs. Kanagaratnam, a lady living next door to the appellant, the evidence that may be termed evidence of bad character was elicited in answer to counsel for the appellant herself and for the 2nd accused. Counsel appear to have thought at that stage that the questions which were designed to elicit those answers were necessary for their respective cases. But while the evidence given by Mrs. Kanagaratnam may be said to have been elicited by the defence itself, Crown Counsel before us has conceded that the evidence of certain other witnesses, to wit, Speldewinde, Warnakulasuriya, and Edmund de Silva, which also affect the appellant's moral character and was led by the Crown would not have been admissible in the case had the appellant stood her trial alone on a charge of murder of this boy. The argument of the Crown in respect of this evidence loses strength by reason of the fact—apparent from the learned judge's summing-up and from the statement made to us by one of the Crown Counsel who appeared also at the trial—that no motive on

the part of the appellant for desiring to kill this boy was being advanced or suggested. For instance, it was not the suggestion of the Crown that the deceased was aware of the relationship between his father and the appellant, and therefore one or both of the accused may have desired to do away with the boy so that their illicit association may not be disclosed to others like the mother of the boy.

In the circumstances in which the trial court found itself at the stage when the learned judge directed the jury to enter a verdict of not guilty in respect of the 2nd accused, we think that, having regard to the receipt of evidence of the unsatisfactory moral character of the appellant, the court might well have considered favourably the question of ordering a fresh trial of the appellant on an altered indictment. I must, however, observe that no application with the object of securing such a fresh trial was made on behalf of the appellant, and, in any event, the matter was one which lay in the discretion of the trial judge. Five days of trial had already been expended; the learned trial judge was probably acutely conscious of the state of congestion of the trial rolls in our Assize Courts; and he appears to have thought that the interests of the appellant could be sufficiently safeguarded by an adequate direction by him to the jury to disregard the evidence the receipt of which is now the subject of complaint.

That direction was contained in certain passages of the charge to the jury which I have collected below :—

(*a*) "There was a fairly obvious suggestion that this accused and her family led rather a disorderly kind of life. We have, as I said, the evidence of this love affair with a married man with three children. That sort of thing, even in this Beatle age, is still disapproved of in some circles, but I want to tell you with all the influence at my command that in considering the guilt of this accused, in considering the ultimate problem whether she indeed pushed that boy into the well, you must not let in all that evidence about her character and her doings. You must not let any of it influence your minds one whit against her; she is not being tried for that conduct; she is being tried for something which has nothing whatever to do with her conduct. So, it is your duty not to be influenced by anything that happens at this trial in this Court in regard to that proved conduct, or anything that you may have read outside; you must not be influenced one whit by such matters when it comes to considering whether this accused has committed the grave offence with which she is charged."

(*b*) "Again, gentlemen, much of that evidence may perhaps not have been led but for the fact that this trial started with there being in the dock this married man with whom this affair was going on. In some vague way, gentlemen, if you feel strongly inclined on the evidence to hold that this accused had pushed

that boy into that well, you might be tempted to say to yourselves "Well, we are not very positive about it but she must have done so because of this affair; we do not know quite how, but because this affair was going on she must have pushed the boy into the well." In that way, gentlemen, you might make a mistake all along that the evidence about Kirambakanda and this girl form a kind of evidence of motive. That also, gentlemen, you must not do."

(c) "I have told you thus far that you cannot regard that as showing a motive and that you cannot regard that kind of conduct or misconduct in any way unfavourable to this accused when you consider whether she is guilty of this offence. So that thus far you cannot use that except to forget it."

(d) "But there is one respect, and one respect only, in which the prosecution itself really and properly relies on that evidence, namely, for the purpose of showing that this accused knew Gota, and of showing, through Mrs. Kanagaratnam's evidence, that Gota knew this accused."

I think the direction actually given was in all the circumstances adequate and, notwithstanding the fact that the jury was in possession of evidence tending to show that the appellant was a girl of loose morals which evidence could not have been led in a case against her if she had stood her trial alone, I am satisfied that no substantial miscarriage of justice has actually occurred. I shall set out later a brief summary of the evidence the Crown relied on to establish the charge against her.

It should not be forgotten at any stage of this appeal that there was no misdirection of the jury on the part of the learned trial judge. A wrong decision on a question of law within the meaning of section 5 (1) of the Court of Criminal Appeal Ordinance may come about, of course, not only where there has been misdirection of the jury. Even misreception of evidence can constitute a wrong decision on a question of law. The tests for applying the proviso are, however, not identical in the two cases, namely, misdirection and misreception of evidence. In a case where misdirection of law is established, a court would ordinarily be more unwilling to apply the proviso than in the case of a mere misreception of evidence. Even here it is pertinent to point out, as Goddard L.C.J. did in *Whybrow* [1] that in the well-known judgment of Channell J. in *Cohen v. Bateman* [2] that learned judge in no way suggested that the proviso should not be applied in a case where the misdirection was on a point of law. There are other cases of the application of the proviso where there had been a clear misdirection in the summing-up: see e.g. *Oster-Ritter* [3]. It is interesting to note that in *Jones and others* [4], the English Court of Criminal Appeal, referring to the case of *Britton* (reported in the Solicitors' Journal of May 5, 1961) where the Court

[1] *(1951) 35 Cr. A. R. 141.*
[2] *(1909) 2 Cr. A. R. at 207.*
[3] *(1948) 32 Cr. A. R. 191.*
[4] *(1961) 46 Cr. A. R. at 70.*

had declined to apply the proviso when there had been two separate misdirections on important matters, taking the view that to maintain the conviction would involve applying the proviso twice over, observed :— "In our view, however, that decision is not to be regarded as laying down a hard and fast rule that, if an appellant can establish more than one instance of misdirection, the proviso cannot be applied. No doubt the fact that there has been more than one instance of misdirection in a summing-up affords a strong reason why the provi o should not be applied but, in our view, it is not conclusive. Each case falls to be decided on its own facts, and much will depend upon the nature of the misdirection complained of."

Except for drawing attention to one kind of case where ordinarily the Court will hesitate to apply the proviso to section 5 (1), we need not concern ourselves with cases of misdirection on law for, I have already emphasised, there is no such thing here. This is at best a case of misreception of evidence, and there is no doubt as to the test we are called upon to apply in such a case. I am indebted to Mr. Pullenayegum for drawing my attention to a case familiar to us in another context, viz., *Stirland v. Director of Public Prosecutions* [1]. In that case, Viscount Simon, L.C. indicated the following as the proper test to determine whether the proviso should be applied. "When the transcript is examined it is evident that no reasonable jury, after a proper summing-up could have failed to convict the appellant on the rest of the evidence to which no objection could be taken."..... "A perverse jury might conceivably announce a verdict of acquittal in the teeth o all the evidence ; but the provision that the Court of Criminal Appeal may dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred in convicting the accused assumes a situation where a reasonable jury, after being properly directed, would, on the evidence properly admissible, without doubt convict."

Twenty-two yea s later, in 1966, in the House of Lords again, in the case of *Commissioners of Customs and Excise v. Harz* [2], Lord Morris, after stating that there should be no replacement or abandonment of the principle of the approach to the proviso indicated in *Stirland* (*supra*), enunciated the test in even clearer language. Said he :—"It is to be observed that the test to be followed is not that of seeking to assess what the particular jury that heard the case would or must have done if it had only heard a revised version of the evidence. For the purpose of the test the appellate court must assume a reasonable jury, and must then ask whether such a reasonable jury, hearing only the admissible evidence, could if properly directed have failed to convict."

These are two cases of the highest possible authority, but we were urged that they were not binding on us in spite of the fact that the terms of section 4 (1) and the proviso thereto of the (English) Criminal Appeal Act, 1907 are absolutely identical with the terms of section 5 (1) and the proviso thereto of our Court of Criminal Appeal Ordinance of

[1] *(1944) A. C. 315.* [2] *(1967) A. C. at 824.*

1938. We were relieved from the task of considering this argument at any length by reason of the fact that counsel for the Crown drew our attention to a Privy Council decision on appeal from our Court of Criminal Appeal itself. In the case of *The King v. Dharmasena* [1], the Privy Council, referring to *Stirland's case* (*supra*), guided themselves by the test there indicated by Viscount Simon and reproduced in large part by me earlier in this judgment.

After judgment on this appeal had been reserved by us, counsel for the appellant brought to our notice a recent decision of the Privy Council on appeal from the Federal Court of Malaysia, the case of *Chung Kum Moey v. Public Prosecutor for Singapore* [2]. The Privy Council was there concerned with the proviso to section 60 (1) of the Court of Judicature Act in terms almost similar to the proviso to section 5 (1) of our Ordinance. The decision is not applicable to the present appeal before us as the Malaysian case was not one involving misreception of evidence but misdirection. I have already adverted to the difference between these two grounds, and it is unnecessary to say more.

Mr. Chitty, for the appellant, contended that the tests applied under the English statute should not be applied here where, unlike in England, the legislature has made provision for quashing a conviction and ordering a new trial. He contended that the appellant was at least entitled to a fresh trial on the ground of misreception of evidence. Our attention was invited to the local case of *The Queen v. Nimalasena de Zoysa* [3], where the majority of the Court dismissed an appeal observing that the duty of the Court in a case of improper admission of evidence 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. In doing so, the majority of the Court seems to have applied the rule embodied in section 167 of the Evidence Ordinance rather than apply the test in *Stirland's* case. After stating that it has never been doubted in this Country that, in the case of criminal trials, section 167 applies to trials by jury as well as to trials by Judge alone, the Court went on to make the following observation :—

> " 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 of ordering a new trial; but it would appear from the following observation of Viscount Simon in the case of *Stirland* that even in England the Court does not quash a conviction merely on the ground of misreception of evidence."

[1] *(1950) 52 N. L. R. at 487.*
[2] *(1967) 2 W. L. R. 657.*
[3] *(1958) 60 N. L. R. 97.*

With respect, I do not myself see that the application of the proviso to section 5 (1) of the Court of Criminal Appeal Ordinance leads to a result substantially different to that which would follow from applying the rule contained in section 167 of the Evidence Ordinance.

I am not unmindful of the dissenting view in *Nimalasena de Zoysa's case* (*supra*) of Gunasekara J. Indeed any opinion of that learned judge on a question affecting our criminal law and procedure is entitled to weight. Said he :—" 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." While pointing out that the case now before us is distinguishable from that of *Nimalasena de Zoysa* as we have not here inadmissible evidence which could have induced the acceptance of the admissible evidence, I must, with all respect to Gunasekara J., add that the test he has suggested in considering the application of section 167 appears to cast an undue burden on the prosecution.

I wish to guard myself against an impression that any kind of admissible evidence would suffice. A mechanical *reading* of the transcript of the evidence will not do. There must be an *examination* of the transcript, and that examination involves a consideration of the weight to be attached to the evidence. It is not merely a matter of ink and paper or of mere bulk. It is not merely a case of finding the skeleton or the frame-work, the bare-bones, so to say. The Court must be satisfied that within the frame-work there is also flesh and blood of quality and extent which would suffice to pass the test. For myself, I would adopt in practice the test indicated in the words of Winn L.J. in the case of *Richards*[1] as follows :—

> " This Court must make up its own mind whether, if the inadmissible evidence had not been before the jury, and if a proper direction had been given to the jury whose mind had not been affected by any such inadmissible evidence, such a jury would without doubt have convicted. It is not for this court to speculate what would have happened in the trial itself, what the jury which was charged with the decision in that case would or would not have done."

In the case before us, where there has been no misdirection of the jury, I am satisfied that a reasonable jury whose mind had not been affected by the inadmissible evidence would without doubt have convicted the appellant of the charge laid against her.

Mr. Chitty, stressing the additional feature in our law which permits this Court to order a retrial, invited us, in seeking to achieve a just end,

[1] *(1967) 51 Cr. A. R. at 271.*

to adopt as a working rule a course of action which, he claimed, would not cause injustice to anybody. As he put it, as every tribunal has to consider the risk of injustice, this Court should not risk that injustice if there is any other course available. That submission is not without appeal to me, but justice has, in my opinion, to be administered in our courts according to law. The Courts have judicially laid down (*Stirland, Harz, Dharmasena*) the test to be applied in considering the application of the proviso to section 5 (1) of the Court of Criminal Appeal Ordinance. The Legislature has itself formulated the test to be applied in considering the proviso to section 5 (2), viz., where the Court of Criminal Appeal is of opinion that there was evidence before the jury upon which the accused might reasonably have been convicted. The two tests are obviously different, the test in the latter case being less stringent than in the former. I am satisfied that I have here to consider the application of the proviso to section 5 (1), and the test I am called upon by law to apply is satisfied. No substantial injustice has, in my opinion, actually occurred. When that is the situation, the question of ordering a retrial does not ordinarily arise. It remains for me now to set out the brief summary I referred to earlier of the evidence the Crown marshalled against the appellant.

The deceased boy was known to the appellant as a son of the man with whom she had struck up an undue familiarity or association. The medical evidence established that he died on the 7th February 1966, and on that day witness Charlotte Gunawardene who lives on the same road as the appellant came up to her gate at about 6 a.m. to see her husband off to work. At that time she saw the appellant also leave her home and it was unusual for her to see the latter leave home so early. At about 7.10 a.m. witness Rohan, a school friend of the deceased travelled, as was not unusual, with the latter in the school bus that left at that time from the Dehiwala junction. They both got off at Hena Road, and as they set off to walk towards school a lady smiled at the deceased. When they had gone a few yards, the lady called out to the deceased by his short name, Gota, and the deceased, leaving Rohan where they were, went up and spoke to the lady. After speaking to her, the deceased shouted to Rohan to go along to school. Rohan saw the deceased and the lady go in the direction of Mount Lavinia. Rohan claimed to identify the appellant as that lady.

Witness Gunasekere, at about 8.30 a.m. that day, dropped in to pray at St. Rita's Church at Mount Lavinia. He saw a lady on a pew along with a boy. The boy appeared to be in some distress. He therefore went up and asked the lady whether there was anything the matter with the child, whereupon the lady replied the child was suffering from giddiness. Gunasekere paid his respects at certain statues and then went along to what is called St. Rita's Wing in this church and then he noticed the same lady, this time alone in the main body of the church. She then looked at him in what he described as a startled fashion. Gunasekere

identified the appellant as the lady who was in the church and, after seeing a picture of the deceased boy in a newspaper, recalled this was the boy he had seen with the appellant in the church.

The deceased boy was seen in the school premises in what has been referred to as the interval that ends at 11 a.m. He had however not attended school classes at all that day.

The son of witness Gunasekere, a school boy named Earle, af er school hours had ended that day, was sitting with a friend about 2 p.m. on a parapet wall watching other boys at play. He then noticed a lady and a boy near the well in St. Rita's Church premises. The lady inquired from him how deep the well was. Earle, thinking that she wanted water, offered to get her a bucket to draw some and also pointed to a water tap. He even offered to get her some water himself, but the lady did not respond to that offer. He and his friend left the spot after some time. He identified the appellant as that lady.

Witness Chandrasiri saw a lady throw an attache case at about 3 p.m. into a shrub by the roadside. He thought this was unusual and, feeling a little curious and even suspicious, watched what was happening and asked the lady what it was all about. The lady asked him to pick up the case. He refused to do so thinking that there may be kittens inside which the lady was trying to dispose of. She then picked up the case herself and opened it, and Chandrasiri then saw some school-books inside that case. Chandrasiri identified the appellant as the lady who threw that case. The Crown's claim was that this was an abortive attempt to dispose of the deceased's case. Another witness Marshal Perera also saw the appellant with an attache case in her hand near about the same place about the same time.

Charlotte Gunawardene referred to earlier saw the appellant pass her house in the direction of the appellant's own at about 3.30 p.m.

Witness Mary Alwis found an attache case inside her garden sometime between 4 and 5.30 p.m. that day. This case was identified as the school attache case of the deceased. Inside it Mary Alwis saw school books and a pair of sandals. The books and the sandals were also identified as those of the deceased.

On the afternoon of the 8th of February witness Asoka Siriwardene saw the appellant and her sister peeping into the fence close to the spot where the previous afternoon Mary Alwis had picked up the deceased's attache case. When Asoka questioned the girls what they were doing there the appellant replied they had come to pick berries.

Except for the fact that some of the witnesses were belated in coming forward, there was no apparent reason urged for any false testimony on their part. Many of them had not even known the appellant before these incidents occurred. The circumstantial evidence summarised above constituted a fairly strong case against the appellant, further strengthened as it was by an absence of any effort on the part of the appellant to suggest

any innocent reason for desiring to throw away the books and sandals and the attache case of the deceased. The evidence against the appellant being entirely circumstantial, I would remind myself of what the Privy Council stated in *Ebert Silva v. The King* [1] was the right question the Court of Criminal Appeal has to pose for itself : " Was there any evidence upon which the jury could find their verdict ? ". If there is any evidence upon which a reasonable jury could have found a verdict of guilty, it is not the function of the Court of Criminal Appeal, in the absence of any misdirection by the trial judge, to enquire whether, in its own opinion, the offence is established beyond reasonable doubt. While that may be a sufficient test to be applied at this stage, it could be said that in this particular case the cumulative effect of the circumstantial evidence was so compelling that a verdict of not guilty would have been almost a perverse one.

There were certain other matters raised on behalf of the appellant to which it is my duty to advert before concluding this judgment. First, it was urged that by reason of the leading of evidence of bad moral character of the appellant she was deterred from giving evidence herself to explain her conduct consistently with innocence, inasmuch as she feared that she would thereby expose herself to further vilification of her character. I do not see any real substance in this ground. It would not have been open to counsel for the Crown to cross-examine her to establish her bad character. It was her own counsel who first elicited answers indicative of her loose morals. The fear of entering the witness box so put forward is, in my opinion, unwarranted.

Next, it was suggested that Police Sergeant Dissanayake, who was called as a Crown witness, was in a position to testify that the witness Rohan, at the first opportunity he had of seeing the appellant, failed to identify her and that Dissanayake's evidence on the point would have gone towards discrediting Rohan's claim that the appellant it was who went along with the deceased towards Mount Lavinia on the morning of the 7th February. Reference was made to a ruling of the trial judge while Dissanayake was being examined in chief expressed in the record as follows :—

> *Court to witness.*—" In answer to the Crown Counsel you are not to say what Rohan told you when you went to his house in Quarry Road."

It would appear that the learned judge had in mind section 122 (3) of the Criminal Procedure Code. I think it was in the circumstances a proper caution to the witness. There was no fetter on the defence asking any question designed to elicit through Dissanayake a contradiction of Rohan's evidence at the trial on the point of identification. For some unaccountable reason, counsel for the appellant at the trial made no effort to pursue the matter when he had the opportunity to cross-examine Dissanayake. We cannot see validity in the complaint that the court gave the defence

[1] *(1951) 52 N. L. R. at 509.*

no opportunity to contradict Rohan. The third and last matter related to certain questions put by Crown Counsel to an Inspector of Police, Perimpanayagam, called as a witness for the appellant, suggesting that there was a conspiracy on the part of the original investigating police officers to shield the appellant. Complaint was made that such a conspiracy was not proved, and, even if proved, the appellant must not be made to suffer prejudice by reason of something to which she has not herself been shown to be party. I am free to say that counsel appearing in a case, particularly counsel for the Crown, should avoid making suggestions not intended to be proved as there is always a danger of a jury composed of laymen falling into the error that the suggestion is indeed being made for the Crown only because it is true. In this case, however, I am unable to agree with counsel for the appellant that much of the cross-examination of Perimpanayagam was unjustified. Perimpanayagam, on his own evidence, was assigned a very limited task of recording afresh Rohan's statement in order to verify certain particulars. Although he stated he was in Rohan's house some two hours putting questions to Rohan, he was unable to show satisfactorily that he had carried out his task of recording a statement. He had in the end put down in his own words certain answers given by Rohan to questions he put to him.

By way of a final appeal, Mr. Chitty referred us to the decision of the majority of this Court in *Gunawardene v. The King*[1] that the proviso to section 5 (1) of the Ordinance cannot properly be applied in a case of a divided verdict unless the evidence against the accused is of such a character as to justify the reproach that the judgment of the dissenting jurors was manifestly perverse. As I have already said above that a verdict of not guilty would here have been almost a perverse one, there is no bar to the application of the proviso here even if one were to follow this majority decision. I feel it right to add, however, that the test Gratiaen J. has formulated in *Gunawardene's case* (*supra*) is one which, with all respect to that learned Judge, I fear I would hesitate to adopt in practice. I find myself in alignment with the dissenting judge in that case.

I note with interest certain observations of the House of Lords in *Hardz's case* (*supra*) made by Lord Morris in a somewhat analogous situation, and agreed to by the other learned judges, in relation to observations of the Court of Criminal Appeal in two earlier cases, *R. v. Manning* and *R. v. Johnson*, to the effect that there can be no question of applying the proviso after a convict on at a second trial where the jury had disagreed at the first trial. Said Lord Morris, "I cannot think that the mere circumstance that there has been a first trial in which the jury disagreed should automatically preclude the application of the proviso, if there is an appeal following on conviction in a second trial. The reasons why a jury fail to agree either to convict or to acquit are in normal circumstances not known. No firm conclusion can ordinarily be drawn merely from

[1] *(1950) 52 N. L. R. at 144.*

the fact of a disagreement. There could be cases where nearly everyone on a jury considered that guilt was proved, and where the contrary view was held irrationally or perversely or possibly for discreditable reasons. Why, it may be asked, should an application of the proviso be ruled out automatically or almost automatically in such a case."

I must add that, in terms of section 2 (6) of the Court of Criminal Appeal Ordinance, the Court found it convenient to pronounce separate judgments in this case.

For reasons which I have attempted above to set out in full, I dismiss this appeal.

TAMBIAH, J.—

Mr. Chitty, who appeared for the appellant, submitted that the Crown recklessly joined the second accused who was discharged, which necessitated the eliciting of evidence which otherwise would have been inadmissible had the case been only against the appellant. He submitted that in the process, evidence of bad character had been led which necessitates a re-trial.

Although the evidence against the discharged second accused (who shall hereinafter be referred to as Kirambakanda), is of a tenuous nature, I am not prepared to take the view that the joinder was reckless or made with a view to lead inadmissible evidence. There was some circumstantial evidence against Kirambakanda. There is the evidence of Neville Amaraweera who stated that on the day the boy was drowned, during the interval the deceased boy, who was playing in the playground of the school, ran along a gravel road leading away from the school saying that he was going to meet his father. There is also evidence of close intimacy between the appellant and Kirimbakanda. Even after the death of the son, Kirambakanda was seen in the house of the appellant, conversing with her for a long time. There were also some letters of a suspicious nature between them. The learned Crown Counsel, who drafted the indictment, perhaps thought that there was sufficient evidence against K rambakanda. With respect I agree with the ruling of the learned Trial Judge that the evidence against Kirambakanda is not of such a cogent character as to enable a jury to convict him.

Crown Counsel led evidence to show the relationship between the appellant and the deceased boy. For this purpose it became n cessary for the Crown to prove that the deceased was the son of Kirambakanda whom the first accused was passionately fond of and wanted to marry. This evidence, in my view, is admissible under sections 9 and 11 of the Evidence Ordinance. If this evidence was not led the jury might have wondered why the accused should kill a stranger whom she did not know. No doubt the Crown Counsel admitted that there was no evidence of motive. But the complete absence of motive must be distinguished from no motive being proved. In order to show the relationship the

Crown Counsel, who conducted this case, led evidence to show that the first accused and Kirambakanda were on intimate terms but refrained from asking any questions which tended to show that the accused was a woman of loose morals. The evidence of bad character complained of was obtained by the accused's Counsel who put a number of questions from witnesses from which answers were elicited to show that she had affairs with several men. Mr. Chitty, who appeared for the second accused at that stage, also questioned the witnesses on these lines to establish the same fact. Presumably, these questions were asked in order to show to the jury that the first accused was not so desparately in love with Kirambakanda as to desire matrimony. Kirambakanda was only one of the boy friends of the first accused. The learned Trial Judge could not have shut out this evidence because it was relevant for the defence. It seems to me that the accused's Counsel, presumably on instructions, led the evidence complained of and it is not open for Mr. Chitty now to take up the position in this Court that evidence of loose character had been led and that the trial was prejudiced.

Assuming that the Crown Counsel, who conducted this case, also made his contribution towards eliciting evidence of lax morals of the accused, the question arises whether this evidence is of such a prejudicial nature so as to influence the minds of the jury to convict her of the offence of murder. The evidence showed that the accused is an unmarried girl who entertained a number of young men. But such a disposition does not tend to show that she is capable of committing a murder. Tendency to commit acts of violence and lax morals belong to different categories of bad character. The case might have been different if the evidence tended to show that she had committed crimes of violence earlier. There are women with lax morals who have a gentle disposition. On the other hand there are women with strict codes of morals who are prone to commit acts of violence.

When inadmissible evidence of bad character is led, I am of the view that this Court should apply the test laid down in *Stirland's Case* [1] in dismissing the appeal.

The proviso to section 5 (1) of the Court of Criminal Appeal Ordinance states : " Provided that the court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal, if they consider that *no substantial miscarriage of justice has actually occurred.* "

In interpreting the identical provisions in the corresponding English statute a working rule had been set out in *Stirland's Case* where Viscount Simon enunciated this rule as follows : (vide 30 Criminal Appeal Reports, at 46, 47).

> " When the transcript is examined, it is evident that no reasonable jury, after a proper summing up, could have failed to convict the appellant on the rest of the evidence to which no objection could be

[1] *30 Criminal Appeal Reports p. 40 at 46.*

taken. There was, therefore, no miscarriage of justice and this is the proper test to determine whether the proviso to section 4 (1) of the Criminal Appeal Act, 1907, should be applied..... A perverse jury might conceivably announce a verdict of acquittal in the teeth of all the evidence; but the provision that the Court of Criminal Appeal may dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred in convicting the accused, assumes a situation where a reasonable jury, after being properly directed, would, on the evidence properly admissible, without doubt convict."

This test was adopted in the case of *Regina v. Harz* and *Regina v. Power*[1] by Lord Morris who said :

"It is to be observed that the test to be followed is not that of seeking to assess what the particular jury that heard the case would or must have done if it had only heard a revised version of the evidence. For the purpose of the test the appellate court must assume a reasonable jury and must then ask whether such a reasonable jury *hearing only the admissible evidence could if properly directed have failed to convict.*"

In *Leslie Charles Richard's Case*[2] this test was again adopted by Winn, L. J. who after referring to the dictum in *Stirland's case, (supra)* said : (vide at p. 271).

"As Lord Morris of Borth-y-Gest said in his speech (at pp. 162 and 309 of the respective reports), the test of whether or not the court should apply the proviso is the test laid down in *Stirland v. D. P. P.* (1944) 30 Criminal Appeal Reports 40; (1944) A. C. 315 that this court must make up its own mind whether, if the inadmissible evidence had not been before the jury, and if a proper direction had been given to a jury whose mind had not been affected by any such inadmissible evidence, such a jury would without doubt have convicted. It is not for this court to speculate what would have happened in the trial itself, what the jury which was charged with the decision in that case would or would not have done. It is not sufficient that this court itself should be clear that the appellant is guilty; it has to apply the test which I have just enunciated and ask itself whether on the two hypotheses stated, and assuming an intelligent and reasonable jury, this court can itself be sure that the man would have been convicted. The fact that the chances are very greatly in favour of that having happened in the present trial is in law beside the point."

The test laid down in *Stirland's case (supra)* was adopted by the Privy Council in a Ceylon case—*The King v. Dharmasena*[3].

After judgment was reserved in this case Mr. Chitty, after notice to the Crown, has sent me a written argument relying on the case of *Chung Kum*

[1] *(1967) 1 Appeal Cases 760, at 824.* [2] *(1967) 51 Criminal Appeal Reports 266.*
[3] *(1950) 51 N. L. R. 481, at 487 et seq.*

Moey v. Public Prosecutor for Singapore[1]. In a written statement (which I have underlined), he submits that the rule laid down in *Stirland's case* was further narrowed down in *Chung Kum Moey's Case* and *unless the Court of Appeal can say that on the issues of fact, it can 'exclude the possibility' of a reasonable jury finding in favour of the appellant, or in other words, that an acquittal on the rejection of the prosecution evidence would be perverse and unreasonable,* the appeal should not be dismissed. He submitted that *this involves an assessment of the credibility of witnesses and is therefore virtually identical with the test applied by Gunasekara J. in Nimalasena de Zoysa*[2].

I have perused the judgment in *Chung Kum Moey's case*. In that case there were vital misdirections by the trial judge on questions of law. The trial judge in that case, after taking the view that the appellant shot at the arm of the deceased who was trying to grab a telephone when the appellant and his party had raided the deceased's shop, took away the possibility of a verdict of culpable homicide not amounting to murder as a result of vital misdirections. In such a case no doubt the test laid down in *Stirland's case* cannot be applied. Viscount Dilhorne, after citing the dictum of Lord Simon in *Stirland's case*, said :

> " On the simple facts of this case it might well be said that a reasonable jury properly directed would inevitably and without doubt have reached the conclusion that the person who fired the shots was guilty of murder. Their Lordships cannot, however, disregard the fact that the learned judge who heard the evidence formed the view that the accused's intention was only to shoot the deceased in the forearm. They are unable, therefore, to exclude the possibility that a reasonable jury properly directed would have reached the same conclusion, and, if it had, the possibility that it would not have concluded that the accused knew that shots at the deceased's forearm were so imminently dangerous that they must in all probability cause death or such bodily injury as was likely to cause death or that the injury intended was sufficient in the ordinary course of nature to cause death. Their Lordships are therefore unable to apply the proviso. "

Accordingly, their Lordships of the Privy Council substituted a verdict of culpable homicide not amounting to murder.

Chung Kum Moey's case is clearly distinguishable from the present case. In this case there is no misdirection. As was stated earlier, there was clear and unequivocal direction by the Trial Judge that the jury should not take into account the immoral character of the prisoner in coming to the conclusion as to whether she committed this murder. The learned Judge has further directed that the jury should not be influenced by any such evidence of immoral character on the part of the accused or any questions by the learned Crown Counsel suggesting that there had been partiality on the part of the police. The principle laid down in this case has in no way whittled down the dictum of Lord Simon in *Stirland's*

[1] *(1967) 2 W. L. R. 657.*

[2] *(1958) 60 N. L. R. 97 at 113.*

case. No doubt the effect of the inadmissible evidence on the jury has to be considered. But this will depend on the nature of the inadmissible evidence. I wish to add that even if the test suggested by Gunasekara J. in *Nimalasena de Zoysa's case* was applied, yet any reasonable jury, properly directed without doubt would have convicted the accused on the rest of the evidence, since the rest of the evidence is severable and has not been " woven into the fabric of this case ".

Mr. Chitty urged that in England there is no provision for a re-trial but there is such provision in the Court of Criminal Appeal Ordinance of Ceylon and therefore we should not apply this test in dismissing an appeal when inadmissible evidence has crept in. Although the House of Lords is not one of the Courts of Ceylon, yet, its opinion regarding the construction of the words in an English statute which are identical with those in a Ceylon statute, has great weight in this country. This rule was laid down in *Trimble v. Hill* [1], and has been followed in a number of cases in Ceylon. The Court of Criminal Appeal Ordinance of Ceylon is based on the English Act and the words found in the proviso to section 5 (1) of the Court of Criminal Appeal Ordinance are identical with section 4 (1) of the English Criminal Appeal Act of 1907. I see no reason why we should not follow the test laid down by the House of Lords in interpreting the identical provision.

Under section 5 (2) of the Court of Criminal Appeal Ordinance of Ceylon provision is made for a re-trial but the circumstances under which a re-trial can be ordered are set out in the same section. The proviso to section 5 (2) of the Ordinance enacts: " Provided that the Court of Criminal Appeal may order a new trial if they are of opinion that there was evidence before the jury or the judges, as the case may be, upon which the accused might reasonably have been convicted but for the irregularity upon which the appeal was allowed." This provision has only to be considered where the appeal is not dismissed on the ground that no substantial miscarriage of justice has actually occurred and yet the Court is of opinion that there is evidence on which the jury may reasonably convict. Prisoners who would be acquitted in England if substantial miscarriage of justice had actually occurred as a result of inadmissible evidence being led, will not be acquitted in Ceylon, if this Court is of opinion that there is evidence before the jury or the Judge, as the case may be, upon which the accused would have been reasonably convicted but for the irregularity upon which this appeal was allowed. Our Legislature while considering some of the defects in the English statute and considering local conditions, has thought it fit to introduce this provision for re-trial. By the introduction of this provision the words which occur in the proviso to section 5 (1) of the Court of Criminal Appeal Ordinance are in no way affected.

[1] *(1879) 5 App. Cases 342.*

Mr. Chitty also referred us to the dictum of Gunasekara J. which he expressed in his dissentient judgment in *The Queen v. Nimalasena de Soysa*[1]. In that case Gunasekara J. said :

> " 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. "

In my view this is an overstatement of the law. The ruling in *Stirland's case* appears not to have been cited or considered in that case. Had it been cited the learned Judge might not have expressed such a wide view. If this test is adopted there will hardly be a case where the provision can be applied if inadmissible evidence has crept into the record.

As stated earlier, when inadmissible evidence is led, one will have to consider its nature and effect on the jury. In *Stirland's case*, a suggestion that the accused was charged with forgery which was denied was held not to be sufficient to have influenced the minds of the jury, whereas in *Rex v. Harz* (*supra*) confessions made by the accused to customs officers who were not authorised to receive them, were held to have influenced the minds of the jury. In the instant case, the fact the defence for some purpose or other elicited evidence which shows that the accused was a woman of loose morals would not have affected the minds of the jury in coming to the conclusion as to whether she committed this crime. There was clear and emphatic direction by the learned trial judge to disregard the evidence complained of in this appeal, in coming to the conclusion as to whether the accused is guilty or not of the offence of which she was charged. I am of the view that a reasonable jury with such clear direction, without doubt would have convicted this accused on the overwhelming evidence against the accused.

The accused did not choose to give evidence or make a statement from the dock. Mr. Chitty submitted that in view of the evidence of bad moral character led she was not in a position to face the witness box. But as stated earlier, her own Counsel had asked questions to prove that she had been friendly with a number of men. Even if she gave evidence she could not have denied this fact which she herself, through her Counsel, placed before the Jury. Therefore in my view, this was not a reason as to why the accused had not given evidence in this case. She could have even made a statement from the dock explaining her conduct. Further her Counsel did not ask for a re-trial on the grounds urged in appeal.

[1] (*1958*) *60 N. L. R. 97.*

Eliminating the evidence of lax morals of the appellant, there is sufficient circumstantial evidence on which the jury would have convicted the appellant.

Charlotte Gunawardena had seen the appellant setting out from her house at about 6.30 a.m. on 7th February 1966. She stated that this was an unusual conduct on the part of the appellant who does not normally get out of the house at that time. Rohan Wickremasinghe who was travelling with the deceased boy had seen the appellant at about 7 a.m. near the Dehiwela junction. According to his evidence he saw the first accused talking to the deceased boy. Thereafter both the deceased and the appellant went in the direction of Mount Lavinia. F. R. S. Gunasekera saw the deceased boy in distress at the Church, when he went to St. Rita's Church at 8.30 a.m. The accused was seen with her arms around the deceased boy. Gunasekera had asked the accused whether she needed any help. He said that she appeared to be scared at his sight.

Earle Gunasekera who was a school-boy had seen the deceased boy and the first accused near the well where the body of the deceased was found, at about 2 p.m. on 7th February 1966. The first accused asked Earle Gunasekera as to whether the well was deep. He said that the well was deep and wanted to give her a bucket to draw water. Then he pointed out a water tap on the road.

The most crucial evidence against her consists of the throwing of the suit case where the books of the deceased and his sandals were found. At about 3 p.m. on 7th February 1966, Chandrasiri had seen her throwing this suit case. He suspected that she had thrown some kitten and he asked her as to what she threw. She then opened the bag and showed some school books. Chandrasiri's evidence is corroborated by Marshall Perera's evidence who stated that he saw the lady carrying this suit case, at or about the time. She had changed her hair style perhaps to avoid detection.

Mrs. Alwis, who was the owner of the land where the suit case was found, testified to the finding of the suit case which is a production in this case. The books of the deceased were identified by G. T. G. N. Rosalin, a school teacher.

The subsequent conduct of the first accused also inculpates her. The witnesses Vanderziel and Asoka Siriwardena had seen the first accused on the 8th of February 1966 near the place where the suit case was found. She was seen looking over the compound of Mrs. Alwis. This evidence was led to show that the first accused had come to see whether the suit case was still there perhaps with the idea of removing it and throwing it away in some other place.

This mass of evidence from impartial witnesses has been accepted by the jury. The appellant did not give any explanation regarding her conduct in throwing the suit case either by choosing to give evidence or

making a statement from the dock. In these circumstances there is a strong body of independent evidence which a reasonable jury with a proper direction could have accepted. The deceased boy died between 2 p.m. and 3 or 3.30 p.m. on 7th February 1966.

Mr. Chitty suggested that the deceased might have committed suicide or might have accidentally fallen into the well. If that was so the conduct of the accused in throwing the suit case containing the books and sandals of the deceased cannot be reasonably explained. Further the appellant was seen in the company of the deceased at about 2 p.m. near the well on the same day. Later at about 3 or 3.30 p.m. she had been seen by two witnesses throwing the suit case into the garden of Mrs. Alwis.

Mr. Chitty also contended that the evidence at the most only showed that the appellant was trying to hide evidence of a crime committed by another. But the evidence shows that the accused was seen with the deceased by the well at about 2 p.m. on 7th February 1966. Further there was no necessity for the accused to have thrown the suit case of the boy if she was trying to hide evidence of a crime committed by another or if the boy had died accidentally. In either event the suit case would have been found near the well in which he was drowned, which may furnish evidence of either suicide or accidental death. The suggestion of Mr. Chitty is pure speculation.

All the evidence led is consistent only with the guilt of the appellant and is inconsistent with any reasonable hypothesis of her innocence. For these reasons, applying the test laid down by the House of Lords in *Stirland's case* (*supra*), I dismiss the appeal.

SIRIMANE, J.—

The appellant was found guilty of the murder of an 11-year old school boy by the divided verdict (6 to 1) of a jury and sentenced to death.

When the trial commenced, the appellant had to face two charges, one, of having conspired with Kirambakanda, the 2nd accused in the case, who was the father of the deceased, and the other, of having committed murder in the course of that alleged conspiracy.

In support of the charges of conspiracy evidence was led to establish an association between the appellant and the 2nd accused which undoubtedly would have had the effect of blackening her character, and bringing her into contempt in the eyes of the jury. The jury listened to such evidence for the greater part of three days and learned Crown Counsel conceded at the hearing of this appeal that the evidence of at least three of these witnesses, and a large part of the evidence of a fourth was quite irrelevant, and inadmissible against the appellant on the amended charge of murder of which she was ultimately convicted.

In the course of the trial the learned Trial Judge found that there was no evidence on which a verdict against the 2nd accused could reasonably have been brought. He, therefore, directed the jury to bring in a verdict

of not guilty on the charges laid against the 2nd accused, who was accordingly acquitted. The conspiracy charges then disappeared; though they remained on the record until an amendment was made at the close of the case for the prosecution.

Crown Counsel conceded that they had no evidence of a motive against the appellant.

In the course of the argument we questioned Crown Counsel and acquainted ourselves with all the evidence that was available against the 2nd accused, and it is sufficient to say that, in my opinion, no one could have hoped for a conviction against him on that evidence. So that the charge of conspiracy which, in my view, was unfair and unjust to both the appellant and the 2nd accused should never have been laid. A prosecutor should not, as a general rule, include the charge of conspiracy in an indictment, except in those exceptional cases where the evidence is such that he is left with no alternative; for, the inclusion of this charge always places the defence at a disadvantage in many ways. The Courts have (though in somewhat different circumstances) looked upon the inclusion of this charge with disapproval. (See *Regina v. Lawson* [1] and *Rodrigo v. The Queen* [2].) The evidence prejudicial to the appellant had, in my view, been laid without justification.

It is true that the learned trial Judge, in the course of his charge, told the jury in very strong language that they should disregard that evidence. But, it is too much to think that the minds of a lay jury could have completely forgotten the large volume of evidence regarding the appellant's character—and then functioned as perfect reasoning machines. I have no doubt that prejudice must have intermingled with reasoning to an extent on which it is unnecessary to speculate. But the fact that prejudice was caused is undeniable.

The prosecution, however, submitted that the appeal should be dismissed on the application of the rule as formulated in *Stirland v. Director of Public Prosecutions* [3], viz., whether on the admissible evidence a reasonable jury properly directed would, without doubt, have convicted the appellant.

In *Stirland's case* the appellant, who was charged with forgery, put his character in issue. In cross-examination the prosecutor suggested that he had left a certain employment on being questioned about a suggested forgery. The appellant not only denied this but added that he had, in fact, a reference from that employer. As the facts in that case bear no resemblance to the facts here, learned Counsel for the appellant contended that the House of Lords had merely laid down a "working rule" (as he called it), to be followed in considering the provisions of the English Statute which differs from ours in that there is no provision for a re-trial. He submitted that this test should not always be applied.

[1] *(1960) 1 Weekly Law Reports, 163.* [2] *(1952) 55 N. L. R. 49.*
[3] *(1944) 2 A. E. R. 13.*

I am unable to accept this argument, and would apply the test in *Stirland* which has been followed in *Regina v. Harz* [1], in considering the case against the appellant here.

The test as I understand it means this : " Is the evidence of so credible a nature that the tainting had no effect on the decision ?" Before an Appeal Court can say that a reasonable jury properly directed would *without doubt* have convicted, the credibility of the evidence " must be demonstrable from the record ", as Gunasekara J. said in his dissentient judgment in *The Queen v. Nimalasena de Zoysa* [2]. I need hardly add that the fact that the jury which heard the prejudicial evidence had accepted the prosecution version is quite irrelevant, and is a factor which should not be taken into consideration at all, in finding an answer to the test.

I have considered the evidence led in the case, and applying the test as set out above, I find it quite impossible to say with confidence that another jury which had not heard the tainting evidence would without doubt have convicted the appellant.

I shall now set out, in very broad outline, the principal evidence on which the jury was called upon to come to a decision. It was the prosecution case that the deceased boy had been pushed into a well by the appellant on the afternoon of the 7th February, 1966. The case depended on circumstantial evidence, and the prosecution set out to prove that the boy was seen in the company of the appellant at different times on that day.

There was first the evidence of Rohan Wickramasinghe, a school mate of the deceased, who deposed to having seen a lady taking away the deceased when he was on his way to school. He identified the lady in Court as the appellant. The body of the deceased was found in a well in the premises of St. Rita's Church on the morning of 8th February, 1966, and Rohan made his statement to the police shortly after that, giving a description of the lady he had seen. He was then taken to the house of the appellant by Police Sergeant Dissanayake. One complaint made by the appellant's Counsel was that evidence of what Rohan said and did when the appellant was shown to him (which Counsel stated was favourable to the appellant) was wrongly shut out at the trial. The learned trial Judge was apparently of the view that anything Rohan said to Sergeant Dissanayake on that occasion was a statement made to a police officer in the course of an investigation under Chapter 12 of the Criminal Procedure Code and was inadmissible under section 122, except for purposes of contradiction. His order was (page 525 of the record) that Sergeant Dissanayake should not, in answer to Crown Counsel, state in evidence what Rohan had told him in the appellant's house. He, therefore, left it open to the defence to get out such evidence. Though, with all respect to the learned trial Judge, I am of a different view on the

[1] *(1967) Appeal Cases, p. 760 at p. 824.*
[2] *(1958) 60 N. L. R. 97 at p. 113.*

question whether the statement was made in the course of an inquiry under Chapter 12, it is unnecessary to enter into a discussion on the correctness of the order, because its result was favourable to the appellant. Sergeant Dissanayake did *not* say that Rohan on being shown the appellant identified her as the person whom he had seen on the previous day. On this point the defence called Police Inspector Perimpanayagam who recorded Rohan's statement at a later stage on the orders of his superior officer. He said, in evidence, that Rohan told him that he failed to identify the appellant as the person who led the deceased away, when she (the appellant) was shown to him at her house on the morning of 8th of February. In an effort to discredit Perimpanayagam, a vague suggestion of partiality was made which I have not been quite able to follow. There was also a passage from Rohan's evidence given before the Magistrate which was put in evidence by the defence (D7) where he had stated that he did not tell the police, (presumably Perimpanayagam) that the appellant was the lady he had seen on the morning of the 7th.

There was then the evidence of one Francis Gunasekera, who said that he had seen a lady at St. Rita's Church with a boy on the morning of the 7th February around 8.30 a.m. According to his evidence about three weeks later, on 26.2.66, on seeing the appellant at the police station he was convinced that she was the lady whom he had seen in Church about three weeks earlier. Yet he made no statement to the police till about the 20th of April, 1966, as far as one can gather from his evidence at page 260 of the record. Belated witnesses always offer excuses for their belatedness. Gunasekera's, when questioned by the learned trial Judge, was, that he was " more concerned with his children " and reluctant to come forward as a witness, as witnesses in murder cases (according to him) run the risk of getting murdered themselves. But as he appears to have thought nothing of exposing his child Earl to this danger,— for he took him to the police station as a witness in the case much earlier—I doubt whether an unprejudiced jury would have found this excuse convincing when testing his credibility.

The prosecution relied next on the evidence of this witness' son, Earl Gunasekera, a school boy attending a different school from that of the deceased, to establish that the appellant was seen with the deceased on the afternoon of the 7th February. Earl stated that he had seen a lady (whom he identified in Court as the appellant) with the deceased boy (whom he had later identified from a photograph in a newspaper) near the well at St. Rita's Church on the afternoon in question. He made his statement to the police sbout 3 weeks after that day. The prosecution also led (in rebuttal) the evidence of a Mrs. Pereira who stated that she was *not* with the deceased on that day. The defence challenged this evidence and led the evidence of a school mate who knew the deceased well—one Asoka Atapattu who said that he had seen the deceased on this day at about this time in a different place in the company of Mrs. Pereira who was his (Asoka's) private tutor. The boy said that as soon as the deceased's body was found he informed his class teacher of

what he had seen and she took him to the Principal, to whom, too, he related his story. The Principal, Mr. Wijepala, corroborated this evidence.

This was all the evidence relating to the alleged association of the appellant with the deceased on this day, and, from what appears on the record I am quite unable to say that an unprejudiced jury would, without doubt, have reached the conclusion on that evidence that the appellant was with the deceased at different times on that day.

The other important evidence relied on by the prosecution related to the finding of the school bag belonging to the deceased.

On the evening of the 7th February, 1966, Mrs. Alwis, found a bag by the fence in the backyard of her home in Dehiwala. It was subsequently identified as the deceased's school bag containing his school books and his pair of slippers. There is a "nelli" tree near the fence and Mrs. Alwis herself thought that some child who had come there to pluck these berries had left the bag behind by mistake. She, therefore, asked two of her neighbours, Asoka Siriwardana and Lawrence Vanderzeil, to let her know if any child came in search of a school bag. Asoka and Vanderzeil gave evidence that the appellant and her younger sister were seen on the next day near the fence, and that Asoka saw the appellant plucking some berries.

About a month later, on 6.3.66, a youth by the name of Chandrasiri, who works in a biscuit factory, made a statement to the police that he had seen a lady, identified in Court as the appellant, throw a bag similar to the one produced in the case, at some other place in Dehiwala. On his questioning the lady as to why she did so, it is alleged that she made some unconvincing excuse, and when he insisted on seeing what the bag contained, she opened it and he saw some books inside. She then got into a bus and went away taking the bag with her. One Marshal Perera also gave evidence on this point. He said that on the afternoon of 7.2.66, while passing along the road on a bicycle, he noticed a lady (whom he identified in Court as the appellant) with a bag and Chandrasiri looking at her. He also stated that Chandrasiri told him on the next day that the lady had made an attempt to throw the bag away. This witness also said in evidence that he made his statement about 1½ months later.

Unless the jury had been "conditioned", if I may use that term, to accept the evidence that the appellant was seen with the deceased on that day, it is doubtful whether, on the evidence set out above, a jury would have undoubtedly drawn the inference that it was the appellant and no other who had put the bag in the place in which it was found. Even assuming that a jury would have drawn that inference—on that fact alone—the other evidence being equivocal—would they have undoubtedly convicted the appellant on the charge of murder? I do not think so.

There are certain other bits of evidence, e.g., some entries in the appellant's diary, which carry little weight unless the evidence I have discussed was accepted.

As I stated earlier, viewing the evidence as a whole, this is not a case, in my view, where it can be said that an unprejudiced jury would, without doubt, have convicted the appellant. In the case of *Leslie Charles Richards* [1], following the test in *Stirland's case*, Winn, L.J. said at page 271, " It is not sufficient that this Court itself should be clear that the appellant is guilty ; it has to apply the test.....and ask itself whether.....assuming an intelligent and reasonable jury, this Court can itself be sure that the man would have been convicted. The fact that the chances are very greatly in favour of that havin happened.....is in law beside the point."

I think that justice demands that the appellant should be afforded an opportunity of facing the charge against her unsaddled by a heavy burden of prejudice, which may have occasioned a miscarriage of justice.

I would quash the conviction, but acting under the proviso to section 5 (2) of the Court of Criminal Appeal Ordinance, I would order a new trial.

Appeal dismissed.

[1] *(1967) Criminal Appeal Reports 266.*