1948 *Present :* **Basnayake J.**

ARON, Appellant, and AMARAWARDENE (Excise Inspector), Respondent.

S. C. 1,320—M. C. Horana, 3,652.

Evidence—Irrelevant evidence of character—Does it vitiate conviction ?—Functions of Appellate Court—Evidence Ordinance, section 167.

The admission of irrelevant evidence as to the character of an accused does not necessarily vitiate his conviction. It is open to the Appellate Court to apply the provisions of section 167 of the Evidence Ordinance and uphold the verdict if there is sufficient admissible evidence to justify it.

APPEAL from a judgment of the Magistrate, Horana.

M. M. Kumarakulasingham, with *S. Walpita*, for accused, appellant.

A. C. Alles, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

February 5, 1948. BASNAYAKE J.—

The accused-appellant was charged with the sale and possession of fermented toddy at Horana on September 3, 1947, in breach of sections 16 and 17 of the Excise Ordinance and was after a trial in which he was represented by Counsel convicted and sentenced to pay a fine of one hundred rupees in respect of each charge.

It is urged by Counsel for the appellant that the conviction should be set aside on the ground of the admission of irrelevant evidence of character of the appellant. The statements to which exception is taken were made by the witness Surabiel, the Excise decoy, and are italicised in his evidence in cross-examination and re-examination set out hereunder.

"XXd—I do not live near the Excise Station. Deonis' house is behind the accused's house. I did not see any one in that house. *I have bought toddy from this accused about a week earlier.* I did not ask for the change when I tendered the rupee. A glass costs 25 cents. Accused did not run through the fields. I have not acted as a decoy for about ten years prior to this. I was wearing a banian and sarong. The accused was wearing a red sarong. I deny that I was taken into the accused's garden this morning.

Rxd—*I have bought toddy from this accused on two occasions before this. I did so on instructions from the Excise Inspector.*"

Appellant's Counsel relies on the case of *Coomarasamy v. Meera Saibo* [1] and *The King v. Kotelawala* [2]. The former case contains no indication of the circumstances in which the statements reflecting on the character of the accused were made nor am I able to reconcile that decision with the provisions of section 167 of the Evidence Ordinance. In the latter case following the decision of the House of Lords in *Maxwell v. Director of Public Prosecutions* [3] the conviction of the accused was set

[1] *(1940) 5 C. L. J. 68.*
[2] *(1941) 42 N. L. R. 265.*
[3] *(1935) A. C. 309.*

aside and a re-trial ordered by the Court of Criminal Appeal on the ground that it was impossible to say that the evidence improperly admitted was not the deciding factor which made the Jury give their verdict. In a later case *Stirland v. Director of Public Prosecutions*[1] the House of Lords did not interfere with a conviction where apart altogether from the impeached evidence there was an overwhelming case proved against the accused.

The powers of the appellate Court in the event of misreception of evidence is stated in section 167 of the Evidence Ordinance which declares that the improper admission or rejection of evidence shall not be a 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 is sufficient evidence to justify the decision.

There is no doubt that this section applies to cases in which irrelevant evidence of character has been admitted in evidence. In the case of *King v. Pila*[2] where several witnesses stated in evidence that they were deterred from coming forward to give evidence by the fact that the accused were reputed rowdies, gamblers and thieves, Lascelles C.J. while declaring the evidence of character as irrelevant observed :—

> " 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. " (at 458)

It is not out of place to repeat the words I quoted from the Privy Council case of *Abdul Rahim v. Emperor*[3] in my recent judgement in case *No. 35,300 from the Magistrate's Court of Puttalam*[4] wherein the function of the appellate Court in applying section 167 of the Evidence Ordinance is elaborated :—

> " 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 present case the finding of the learned Magistrate does not rest on the evidence to which exception is taken, and I am satisfied that there is sufficient evidence to justify the verdict. There is nothing here to indicate that the statements objected to were either the deciding factor for the prosecution or occasioned a failure of justice. The appeal is dismissed.

Appeal dismissed.

[1] *(1942) 2 All E. R. 13.*
[2] *(1912) 15 N. L. R. 453 (F. B.)*
[3] *(1946) A. I. R. Privy Council 82 at 85.*
[4] *S. C. Minutes of January 5, 1948.*