[COURT OF CRIMINAL APPEAL.]

1941 *Present :* **Moseley S.P.J., Keuneman and de Kretser JJ.**

THE KING *v.* KOTALAWALA

18—M. C. Kurunegala, 69,650.

Evidence—Questions as to bad character of accused—Duty of Judge—Warning to jury—Statements prejudicial to accused—Order for a new trial—Evidence Ordinance, s. 54 (Cap. 11).

Where questions as to the bad character of an accused person are put to a witness, it is the duty of the Judge to stop such questions himself without waiting for any objection from the prisoner's Counsel.

Where such a question is put by mischance it is equally the clear duty of the Judge to direct the jury to disregard if and not to let it influence their minds.

Where, as the result of such a question, a statement prejudicial to the accused is made by a witness, an application for a fresh trial should be allowed, even where the Judge had warned the jury that the objectionable evidence should be disregarded.

THIS was an application for leave to appeal on the facts from a conviction by a Judge and jury before the third Midland Circuit. The Court however allowed the appellant to raise a point of law, which had not been made a ground of appeal.

S. Mahadeva, for the accused, appellant.—The evidence indicating that the accused was of violent disposition was improperly admitted. Under section 54 of the Evidence Ordinance (Cap. 11) the fact that an accused person has a bad character becomes relevant only if evidence has been given that he has a good character. It cannot be said in this case that the accused led evidence of good character.

Further, even if the bad character of the accused became relevant, it could not, according to the provisions of section 55 of the Evidence Ordinance, be proved by evidence of isolated acts.

The reception of the inadmissible evidence caused material prejudice to the accused. See *Maxwell v. Director of Public Prosecutions* [1]; *Arthur Thomas Ellis* [2]; *Ramesh Chandra Das v. Emperor* [3]; *Sumeshwar Jha et al. v. Emperor* [4].

E. H. T. Gunasekera, C.C., for the Crown.—Some questions put by the defending Counsel in cross-examination of the deceased's father were clearly intended to establish the good character of the accused. The questions, therefore, put by the Crown Counsel did not offend against the provisions of section 54 of the Evidence Ordinance. They were, moreover, directed to elucidate matters referred to in cross-examination.

If, with the view of raising a presumption of innocence, witnesses to character are called for the defence, the Counsel for the Crown may then rebut this presumption by cross-examining the witnesses as to particular facts—*R. v. Hodgkins* [5], *R. v. Wood* [6], *Taylor on Evidence (12th ed.), paras. 351—2, Wills on Circumstantial Evidence (5th ed.), p. 228.*

Cur. adv. vult.

[1] *(1934) L. J. K. B. 501.*
[2] *5 Cr. App. R. 41.*
[3] *I. L. R. (1919) 46 Cal. 895.*
[4] *A. I. R. 1923 Patna 103.*
[5] *(1836) 7 C. & P. 298.*
[6] *(1860) 5 Jur. 225.*

April 2, 1941. MOSELEY J.—

This matter came before the Court by way of an application for leave to appeal on the facts. In our opinion it cannot be said that the verdict of the jury on the evidence before it was unreasonable. Nor is there any substance in the submission that there has been misdirection on a matter of fact. The appellant was, however, allowed to raise a point of law which had not been made a ground of appeal.

The appellant was convicted at the Kurunegala Assizes on February 24, of the murder of the son of his employer. The latter was the manager of a boutique and both the deceased and the appellant were employed in the boutique, the deceased as a salesman, accused as a clerk. In the absence of the manager the accused was accustomed to take charge. There is evidence that accused and deceased were jealous of each other. Otherwise they appear to have been on friendly terms. In a box on the premises there was a shot-gun. On the day of the incident, according to the evidence of the accused, he took the gun out of the box and asked the cook to load it. Shortly afterwards a report was head and the deceased who was sitting at a table in the next room, separated from the accused by a screen of gunny bag, was shot. It is common ground that the gun was in the hands of the accused. The defence was that the gun went off by accident.

The prosecution led evidence of several incidents tending to show that there was ill-feeling between deceased and appellant such as might provide the latter with a motive for intentionally harming the deceased. The latter's father, in cross-examination, said that, apart from the feeling of jealousy between the two, he had nothing to say against the accused. This statement, which appears to us to be limited to the question of motive, apparently encouraged Counsel for the defence to put a question as follows :—

"Q.—Accused was a very well behaved man, doing his work well in the boutique ?"

The answer was : "He is a quarrelsome man who loses his temper in no time for very trivial things." The examination of the witness continued as follows :

"If anybody finds fault with him in any work he does, he gets angry. I have seen it very often and I have warned him. There are two very important incidents which I know apart from the deceased. (Re-examined.) This accused went to get some medicine from the dispenser at Dodangaslanda and when the dispenser asked him to wait for some time to give him the medicine the accused quarrelled with the dispenser and came away without taking the medicine.

Counsel for the accused : I object to this as it is hearsay.

Crown Counsel : How did you come to know about it ?

Witness : The accused told me about it. The accused came away merely because the dispenser asked him to wait till he got the medicine ready. The second incident happened in my presence. When a man from an estate came to buy some dry fish he found

> fault with the accused for overcharging. Accused abused the customer and after he left the boutique the accused said that if that man came to the boutique again he would hit him with a ruler."

It is in regard to the admission of this evidence that objection is now taken on the ground that, as provided by section 54 of the Evidence Ordinance (Cap. 11), the fact that the accused has a bad character is irrelevant, unless evidence has been given that he has a good character. The explanation to section 55 makes it clear that the word "character" includes both reputation and disposition, and that, except as provided in section 54, "evidence may be given only of general reputation and general disposition, and not of particular acts by which reputation or disposition were shown." The reason underlying this limitation is that whereas some inference may be drawn in favour of an accused person from a general reputation of good character, no presumption can be based on proof of isolated facts.

Counsel for the Crown submitted that evidence of good character had been led by the defence and relied upon the statement of the deceased's father that apart from the feeling of jealousy he had "nothing to say against the accused". As we have already observed it seems to us that the question which elicited that answer was directed to show the absence of motive in the appellant, and that the answer obtained is limited to that aspect of the case. It is not clear how the evidence of the witness which immediately followed, and which is quoted above, was elicited. The reference to "two very important incidents" would seem to be in reply to a query as to the ability of the witness to furnish instances reflecting the quarrelsome nature of the appellant. Assuming that to be so Counsel for the Crown argued that the re-examination which followed was proper since it was he said, directed to matters referred to in cross-examination. This argument does not appeal to us. The reference by the witness to "two very important incidents" did not require explanation from the point of view of the case for the prosecution. The result of the re-examination was to crystallize in the minds of the jury a matter which Counsel for the defence had wisely left in shadowy form.

The position then seems to be that, since evidence that the appellant had a good character had not been given, the evidence indicating that he had a bad character was not relevant. It matters not who was responsible for its introduction. In *Arthur Thomas Ellis*[1] the Court expressed the opinion that it is the duty of the Judge not to wait for any objection from the prisoner's Counsel, but to stop such questions himself, and if by mischance the question be put, it is equally the clear duty of the Judge to direct the jury to disregard it and not let it influnce their minds". The present case is in this respect not free from difficulty since in the first place, it could have been reasonably anticipated that the question put by Counsel for the defence would receive an answer favourable to the appellant, and secondly the answer reached the jury in the language of the witness before it was interpreted to the Judge. Even

[1] *5 Cr. App. R. 41*

then the purport of the evidence appears to have escaped attention. Indeed it is only in this Court and at the last minuute that the point has been raised. Objection was raised at the trial, but only on the ground that the evidence as to one of the incidents was hearsay, and the objection being ill-founded, was not pressed.

There can be little doubt but that this evidence, particularly that in regard to the second incident, might well have the effect of inclining the jury to the belief that the appellant was of a violent disposition and therefore not unlikely to have intentionally shot at the deceased. The presiding Judge might have told the jury to put the evidence out of their minds entirely. But as was observed in *Rex v. Norton*[1] and quoted in *Ramesh Chandra Das v. Emperor*[2] "whatever directions be given to the jury, it is almost impossible for them to dismiss such evidence entirely from their minds".

No doubt, if the position had been realized and if Counsel for the defence had applied for a fresh trial before another jury, it would have been the duty of the Court to begin the trial again. This was laid down in so many words in *Harry Firth*[3]. In that case a statement prejudicial to the accused had been inadvertently made by a witness. Application for a fresh trial was refused and the accused was convicted, notwithstanding a strong warning from the Judge that the objectionable evidence should be disregarded. It seemed to the Appeal Court "in a high decree dangerous to permit the trial to continue to its end where such an irregularity has occurred as that which here was inadvertently permitted. It is impossible to say at what conclusion the jury might have arrived if the irregularity had not occurred . . . . The question is not whether the risk involved in refusing another jury should have been accepted. The risk seems to us too great to have been taken . . ." In the case before us there was no application for, nor refusal to grant, a fresh trial. Nevertheless there is in our view a clear indication of the remedy which this Court should apply in such a case.

In *Maxwell v. Director of Public Prosecutions*[4] an accused person who had put his character in issue was asked whether he had been previously charged with a certain offence, a question which Counsel for the prosecution was entitled, under the Criminal Evidence Act, 1898, to put to him, "subject to the consideration that the question asked him must be one which was relevant and admissible to the case of an ordinary witness". As was observed in the judgment of the House of Lords which proceeds as follows:—

> "The effect of such a statement on the minds of a jury might be overwhelming, and it is impossible to say in this case that the reception of this evidence was not the deciding factor which made the jury give their verdict. It might well be that the fact . . . . might have been the last ounce which turned the scale against him."

In the present case the jury had before them on the one hand a case of shooting which the prosecution asked them to say was intentional. On

[1] *(1910) 2 K. B., p. 500.*
[2] *46 Cal., 895.*
[3] *26 Cr. App. R. 148.*
[4] *103 L.J. (K.B.) p. 501.*

the other hand the defence put forward a case of accident. Evidence that the accused had a tendency towards violence might be the deciding factor in favour of the case for the prosecution.

The appeal must be allowed and the conviction quashed. In exercise of the powers conferred upon us by the proviso to section 5 (2) of the Court of Criminal Appeal Ordinance, (No. 23 of 1938), we order a new trial.

New trial ordered.