and the 5th defendant, who are the son and daughter of a deceased brother and deceased sister, respectively, are also heirs is a proposition that cannot be sustained under the Muslim Law. The principle of succession *per stirpes* is unknown to that system of jurisprudence. Besides, it is a well known doctrine that as among residuaries the nearer in degree to the intestate excludes the more remote. The 5th defendant, the niece of Amina Umma, is neither a sharer nor a residuary but she is in fact one who falls under the category of "distant kindred" who can take only on the failure of sharers and residuaries. She would therefore be excluded by the residuary, the 4th defendant.

As regards the plaintiff, he being a son of the full brother of the deceased is a residuary, but his rights must be postponed to those of the full brother who is a residuary but nearer in degree to the deceased than the plaintiff.

The judgment of the learned District Judge is set aside and a fresh decree will be entered, the shares being worked out on the basis of the devolution indicated above and, of course, having regard to what I have said in regard to the interests of Sarah Umma's husband.

The costs of partition will be *pro rata*, not exceeding $\frac{1}{3}$ the value of the land. As the 4th defendant has not only failed with regard to a substantial part of the claim he made but has also been found guilty of perjury, I think the proper order to make is that he should be allowed no costs of contest in the lower Court to which otherwise he might have been entitled. As the 4th defendant has succeeded only partially in this Court, I would allow $\frac{1}{2}$ costs of appeal as against the 1st and 2nd defendants. The 3rd defendant will bear his own costs.

WINDHAM J.—I agree.

Set aside.

[COURT OF CRIMINAL APPEAL]

1949 *Present:* **Canekeratne, Gratiaen and Gunasekara JJ.**

THE KING v. GUNATILLEKE

APPEAL NO. 17 OF 1949

S. C. 68—M. C., Gampaha, 46,118

Court of Criminal Appeal—Evidence of good character led by accused—Direction by Judge that evidence should not be taken into account—Misdirection—Relevancy of such evidence—Evidence Ordinance, section 53.

Where the accused led evidence of good character and the Judge in his charge directed the Jury as a matter of law that they "must not pay the slightest attention" to the evidence of good character—

Held, that there was a misdirection. In criminal proceedings the fact that a person is of good character is relevant under section 53 of the Evidence Ordinance and it is therefore a matter which the Jury should take into consideration before arriving at a verdict.

APPEAL from a conviction in a trial before a Judge and Jury.

H. V. Perera, K.C., with *T. Goonetilleke* and *A. B. Perera*, for accused appellant.

R. A. Kannangara, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

April 5, 1949. GRATIAEN J.—

The appellant in this case was charged with the murder of P. K. Karunaratne Silva (to whom I shall hereafter refer as " the deceased "). It is common ground that prior to July 17, 1948, on which date the deceased was stabbed once by the appellant in the upper arm and died in consequence, there had been no ill-feeling between them. The appellant and the deceased were at the time students of Ananda Vidyalaya School in Gampaha. On July 17 there was an earlier incident in the course of which the deceased struck the appellant. This incident was relied on by the prosecution as providing the motive for what occurred later in the day when the parties met again, on which latter occasion the appellant at some stage, as he himself admitted at the trial, stabbed the deceased. The only eye-witness called by the Crown to speak to the events of the second incident was the deceased's father. According to him, he and the deceased were returning from the Police Station after making a complaint regarding the earlier incident, when the accused's father, unaccompanied in the first instance, came up and struck the deceased ; thereupon the accused arrived on a bicycle, dismounted, and, having first attacked the witness, rushed up and stabbed the deceased.

In his dying declaration, however, which was recorded on the same day by a Justice of the Peace, this witness said that his son had been stabbed not by the appellant but by the appellant's father, and in his account to the Police of what had happened he merely stated, with regard to the injuries sustained by the deceased, that he " saw him bleeding ". Mr. Perera submits that these inconsistent statements, and particularly the dying declaration implicating the appellant's father (who admittedly did not stab the deceased at all) create serious doubts as to whether the witness did in fact observe how the deceased came by the fatal injury. In other words, the inconsistency becomes material when the circumstances in which the stabbing occurred came to be considered by the Jury.

A witness Arnolis was also called for the prosecution. He claimed no personal knowledge of what had taken place, but stated that the deceased had told him that it was the appellant who had stabbed him. His evidence was attacked by the defence as untrue.

The appellant gave evidence in his own defence. He admitted having stabbed the deceased, but his version is that he did so in entirely different circumstances to those spoken to by the deceased's father. According to him he arrived on the scene after the altercation had commenced, and saw the deceased on the point of stabbing the appellant's father.

He thereupon stabbed the deceased in the arm in order to save his father's life. On this version, if accepted by the Jury, his action was justified and he would have been entitled to an acquittal.

At the conclusion of the learned Judge's charge the Jury retired and in due course returned a verdict against the appellant that he was guilty of the offence of culpable homicide not amounting to murder. The Foreman explained, in answer to the Judge, that in their view the appellant " had no murderous intention ". The appellant was sentenced to a term of 10 years' rigorous imprisonment.

The main ground of appeal was that at the trial the defence had called as a witness the appellant's Headmaster who gave evidence of the appellant's good character, but that the learned Judge in his summing up had gravely misdirected the Jury by telling them *inter alia* " as a matter of law " that they must not pay " the slightest attention to this circumstance ".

The presiding Judge's charge to the Jury on this matter was as follows :—

> " Then, gentlemen, you are also told that the character of an accused person is a fact to be taken into consideration, a circumstance that some judges do direct juries in cases on, that the good character of an accused person is a factor to be taken into consideration, but speaking for myself as a matter of law I direct you that you will not pay the slightest attention to that circumstance, because if you have a man of the most exemplary character you are not going to act upon that if a case is proved beyond reasonable doubt. On the other hand, a man may be a villain. If the evidence does not prove the case beyond reasonable doubt against him the fact that he is a villain, his character has nothing to do with it. If after hearing the whole of the case you have doubts in your minds, it is immaterial even if there is evidence of bad character. You must give the benefit of the doubt to the accused. Similarly if the case is proved beyond reasonable doubt against an accused person the fact that he has got a good character has no bearing on the question. It is sometimes put in this way by judges. If you find doubts in your minds on hearing the case for the prosecution and the defence and if the man's character is a good character, then give the benefit of the doubt to him. I go further and say, if you have any doubts in your minds after considering the prosecution and the defence, after viewing the whole case together, then you must give the benefit of the doubt to the accused."

The majority of us are of the opinion that the effect of this direction, taken as a whole, was to withdraw entirely from the Jury's consideration the evidence relating to the appellant's good character, and that the Jury must have understood that, whatever view they might be disposed to take of the other evidence in the case, they were precluded in law from attaching any weight whatsoever to the evidence of the appellant's good character. Upon that interpretation of the summing up, the learned Judge has misdirected the Jury in law.

In this country, section 53 of the Evidence Ordinance expressly declares that in criminal proceedings the fact that the person accused is of good character is relevant, and his good character is therefore one of the

matters which, in view of the definition of the word " proved " in section 3, the Jury should take into consideration before arriving at a verdict. It was therefore a misdirection to tell the Jury " as a matter of law " that they " must not pay the slightest attention " to evidence of the accused's good character. Such evidence may of course in the facts of a particular case carry little or no weight but cannot properly be declared to be totally irrelevant. In *Rex v. Noble*[1] the accused put his character in issue, but the Chairman " categorically told the Jury that this consideration was immaterial and not for them ". The Court of Criminal Appeal in England quashed the conviction on the ground that there was misdirection. The majority of us think that this decision should be applied in the present case.

The only question which remains for consideration is whether the conviction of the appellant can be upheld notwithstanding the ruling that there has been misdirection in law. There was a conflict of evidence with regard to the circumstances in which the deceased was stabbed, and the majority of us find ourselves unable to arrive at the conclusion that the Jury, if properly directed, would not have taken a view favourable to the defence. We cannot therefore say that no substantial miscarriage of justice has actually occurred. The conviction is accordingly quashed and the appellant is acquitted.

Accused acquitted.

1949 *Present :* **Gratiaen J.**

HEEN BANDA, Appellant, *and* HERATH, Respondent

S. C. 614—M. C. Kandy, 2,849

Companies Ordinance, No. 51 of 1938—Keeping of proper books of account by company—Director's liability for failure—Meaning of " proper books "—Difference between section 120 and section 262.

There is a sufficient compliance with the provisions of section 120 of the Companies Ordinance, No. 51 of 1938, if the books of a Company contain an accurate record of each and every transaction which the section requires to be recorded. It cannot be said that the books are not " proper books " so long as they correctly embody at all relevant times such information as is necessary to enable an auditor periodically to prepare the Company's profit and loss account and balance sheet as required by the Ordinance.

APPEAL from a judgment of the Magistrate, Kandy.

H. V. Perera, K.C., with *C. S. Barr Kumarakulasinghe, A. I. Rajasingham* and *B. S. C. Ratwatte,* for defendant appellant.

N. E. Weerasooria, K.C., with *C. E. S. Perera* and *D. S. Jayawickrama,* for complainant respondent.

Cur. adv. vult.

[1] *20 Cr. App. Rep. 191.*