[COURT OF CRIMINAL APPEAL.]

1940 *Present :* **Howard C.J. and Keuneman and Nihill JJ.**

THE KING *v.* L. SEEDER DE SILVA.

No. 1 of 1940/S. C. No. 5/M. C. Kalutara, 44,026.

Misdirection of law—Misdirection of fact no ground of appeal—Circumstantial evidence—Duty of Judge to direct the Jury on law applicable—Where there is no case to go to the jury—Duty of Judge to direct a verdict of not guilty—Grounds of appeal—Failure to state grounds in notice—Court of Criminal Appeal Ordinance, No. 23 of 1938, s. 4 (b).

A wrong direction as to the law, which obtains generally in the class of cases to which the particular case belongs, or as to the law applicable to the special facts of the case is a misdirection of law.

A mistake of fact or an omission to refer to some point in favour of the accused is not a misdirection of law but falls under "any other ground" within the meaning of section 4 (*b*) of the Court of Criminal Appeal Ordinance.

In a case resting upon circumstantial evidence the Judge should explain to the jury the main principles that should be followed in appreciating such evidence. But where the charge contains passages on which it is open to the jury to find an innocent as well as a guilty explanation in the circumstances proved, the charge cannot be said to be unfair or prejudicial to the accused.

Section 234 (*1*) of the Criminal Procedure Code imposes a duty on the Judge, if he considers there is no evidence to go to the jury that the accused committed the offence, to direct a verdict of "not guilty".

The Court of Criminal Appeal will as a general rule refuse to entertain grounds not stated in the notice of appeal.

But where the appellant is without legal aid and has drawn his own notice the Court will not confine him to the grounds stated in the notice.

APPEAL from a conviction for murder at a trial held at Kalutara in the Western Circuit. The grounds of appeal are as follows :—

(1) As a matter of law there was no case to go to the jury.

(2) In dealing with a possible theory involving the guilt of the accused the learned Judge addressed these words to the jury, "I cannot refer to anything that he may have said to the Police because the law prevents any reference being made to that". It is submitted that this is a misdirection in that the words used by the Judge, having regard to the context in which they were used, suggest or tend to suggest to the jury that the accused had made a confession to the Police.

(3) In the course of his charge the learned Judge said, "the murderer, whoever he may be, or others acting with the murderer had stabbed the woman, laid out her body, placed it on a mat and pillow in a decent manner, covered it with a cloth, arranged her hands, placed flowers, placed a candle, locked the door and gone . . . . was it the accused or, was it anyone else who did all this ?" It is submitted that this was a misdirection in that it identifies the person who locked the door with the person who stabbed the woman. Having regard to the fact that it was

the accused who unlocked the door for the Police to enter, it is submitted that this misdirection was calculated to cause grave prejudice to the accused.

(4) In dealing with the admittely abnormal behaviour of the accused in general, the Judge directed the jury to consider whether such behaviour would be sufficient to bring the accused within the exception created by section 77 of the Ceylon Penal Code, but failed to direct the attention of the jury to the bearing of such abnormality on the question of the inferences to be drawn, with reference to the alleged guilt of the accused, from the conduct of the accused in relation to the incidents of the day in question. Referring to the possibility of the accused having dressed and laid out the body of the deceased, the learned Judge directed the jury to consider whether the master of a house finding his servant stabbed, would act in that way, without immediately informing the Police, implying thereby that the jury had to consider whether a man would normally act in that way, if the deceased had been killed by someone else. It is submitted that the failure to draw the attention of the jury to the fact that the accused was abnormal in his general behaviour is a non-direction amounting in the circumstances to a misdirection.

(5) In the absence of proof that the blood found on exhibits P 2 and P 3 was human blood, or a tittle of evidence indicating it to be such, the Judge was wrong in directing the jury to regard it as an item of real evidence, which may be taken into account-by them.

H. V. Perera, K.C. (with him *M. T. de S. Amerasekere, K.C., S. Alles* and *N. M. de Silva*), for the accused, appellant.—The furthest the evidence goes, is to indicate opportunity. This is insufficient. It does not exclude the possibility of a person other than the accused committing the act. If this is the case, the fact is not inconsistent with the hypothesis of innocence.

The evidence is to the effect that it was the accused who unlocked the door for the Police to enter. The effect of the learned Judge's charge to the jury is to identify the person who unlocked the door with the murderer. (Counsel cites the relevant passages.) This is a misdirection, and moreover prejudicial to the accused.

Statements in the nature of confessions made by accused persons to the Police officers are inadmissible in evidence (*vide* section 25, Evidence Ordinance). This is a well-known rule of evidence and it is inconceivable that the jury are unacquainted with this proposition, so that the learned Judge's statement, " I cannot refer to anything that he may have said to the Police because the law prevents any reference being made to that ", in effect, suggests to the jury that the accused made a confession to the Police. Statements of accused to the Police other than confessions are admissible. This is all the more reason why the jury might have inferred, that the statement of the accused to the Police was to the effect that he committed the offence.

The evidence indicates that the behaviour of the accused is abnormal. Assuming that the body was arranged by the accused, this circumstance does not identify him as the murderer. Considering the feelings of the accused for the deceased it is not unnatural that he should have acted in this way, seeing the woman murdered.

There is no case to go to the jury. Section 234, Criminal Procedure Code, provides that the Judge should direct the jury to return a verdict of not guilty when after the prosecution is closed the Judge considers that there is no evidence, that the accused committed the offence. Taking the case for the prosecution as a whole, one cannot say that a primâ facie case is made out against the accused. This is a matter for the Judge to consider even though there is no submission from Counsel for the defence.

J. W. R. Ilangakoon, K.C., Attorney-General (with him *E. H. T. Gunasekera, C.C.*), for the Crown.—Points 2 to 5 are not questions of law. They are questions of fact. According to section 4, sub-section (*b*), of the Court of Criminal Appeal Ordinance, No. 23 of 1938, there is no right of appeal on facts without leave of Court. Leave has not been obtained here.

Taking the evidence adduced in the case as a whole there is stringent proof of circumstances to support the charge against the appellant. In such cases the absence of an explanation from the accused militates against him. (The Attorney-General here referred to various items of events and circumstances and cited *Wills' Circumstantial Evidence, pages 314–316, 7th ed.*) The principles laid down in *Wills* have been adopted here. See *Inspector Arendsly v. Wilfred Pieris* [1] and cases referred to in *Dias' Criminal Procedure Code, Vol. I., p. 640.*

Whether there is evidence to go to the jury is a question of law (see *Benjamen Pearson* [2]). Although this point was not raised by Counsel at the trial there was sufficient circumstantial evidence from which the jury may legitimately draw an inference adverse to the accused. (The Attorney-General here referred to the evidence.) Under such circumstances it is submitted that the learned Judge could not have withdrawn the case from the jury.

The mere presence of some expressions used by the Judge in his charge which are open to criticism will not avail the appellant. The summing up must be considered as a whole. The burden is on the appellant to show that notwithstanding the presence of some expression open to objection there has been some substantial miscarriage of justice. Unless the appellant establishes this, the Court will not interfere. See the judgment of the Lord Chief Justice in the case of *Dodds* [3].

Even when the point of law is a good one, which the Court will give effect to, the Court may dismiss the appeal if no substantial miscarriage has resulted. See the case of *Allen* [4]. On the question of miscarriage of justice it is open to the Court to consider the whole of the evidence and even to admit fresh evidence. See *Rex v. Abraham George* [5]. The Attorney-General referred to the contents of a diary the entries in which had been ruled out by the Judge. No doubt it was open to the prosecution to prove the handwriting of the accused. There is ample proof that the document was in his possession. Having regard to the circumstances and the contents of the dairy it is submitted that the material is ample to create the presumption that the appellant was acquainted with its contents. See *Phipson on Evidence, 5th ed., p. 241.*

[1] *10 Ceylon Law Weekly 121.*
[2] *1 Crim. App. Rep. 77.*
[3] *1 Crim. App. Rep. 68.*
[4] *1 Crim. App. Rep. 19.*
[5] *1 Crim. App. Rep. 168.*

The Judge is not bound to put forward probable theories not advanced at the trial. See the case *George Joseph Smith* [1].

Where circumstantial evidence has been less stringent convictions for the offence of murder have been upheld. See *Robertson* [2] and *Pakala Narayana Swami v. King Emperor* [3].

H. V. Perera, K.C., in reply.—The cases cited by the Attorney-General are distinguishable. In those cases, without an exception, certain incriminating circumstances pointing to the guilt of the accused were definitely proved. In this case all that one can say is that there was evidence of opportunity. The distinction between suspicion and proof has been forcibly brought out in Justice Darling's charge to the jury in *Stein Morrison's Trial at p. 275* of the report in the *Notable British Trial Series.*

The burden of proof does not shift on to the accused unless and until some incriminating circumstances have been proved by the prosecution. In this case there is no case to go to the jury. See *William Wallace* [4]. The grounds on which the Court will hold that there has been a miscarriage of justice are considered in *Cohen v. Bateman* [5].

Cur. adv. vult.

June 12, 1940. HOWARD C.J.—

Several points have arisen for consideration in the hearing of this appeal which is the first to be heard under the Court of Criminal Appeal Ordinance, No. 23 of 1938. In his notice of appeal the appellant relies on five grounds of appeal. The Attorney-General has taken the preliminary objection that the last four grounds three of which complain of misdirection and one of non-direction by the Judge do not involve questions of law and hence cannot be considered by this Court without the prior leave of the Court or upon the certificate of the Judge who tried the appellant granted under section 4 (*b*) of the Ordinance. The line of demarcation between questions of law and fact is a somewhat narrow one and it is advisable that the principles on which this Court is to be guided in matters such as this should be clearly stated at the earliest opportunity after its establishment. Ordinance No. 23 of 1938 follows almost word for word the Imperial Criminal Appeal Act, 1907, and hence it is expedient that our procedure in Ceylon should model itself on the decisions and practice of the English Court of Criminal Appeal. In England leave to appeal is considered to be necessary unless the misdirection alleged is clearly misdirection as to the law. Where the misdirection consists of a wrong direction as to the law in general which obtains in the class of cases to which the particular case belongs, or as to the law which is applicable to the special facts of the case, the complaint clearly involves a question of law. A mistake of the Judge as to fact, or an omission to refer to some point in favour of the accused, is not, however, a wrong decision of a point of law, but merely comes within the very wide words " any other ground " in section 4 (*b*). In this connection I would refer to the judgment of Channell J. in *R. v. Cohen and Bateman* [6]. Applying the principles I have

[1] *11 Crim. App. Rep. at p. 238.*
[2] *9 Crim. App. Rep. 189.*
[3] *(1939) 1 All. Ey. Rep. 396.*
[4] *23 Crim. App. Rep. 32.*
[5] *2 Crim. App. Rep. 197.*
[6] *2 Crim. App. Rep. 207.*

formulated, we are of opinion that grounds 3, 4 and 5 cannot be regarded as involving questions of law. The suggestion in ground 5 that the learned Judge was wrong in directing the jury to regard the finding of the blood as real evidence is a complaint with regard to a misdirection as to a fact. Ground 4 is an alleged omission to refer to some point in favour of the appellant. Ground 3 is an alleged misstatement of the evidence. We are of opinion that ground 2 must be regarded as involving a question of law inasmuch as the phraseology employed by the Judge if construed as contended for in the grounds of appeal had the effect of bringing to the notice of the jury the fact that the appellant had made a confession. Applying therefore the strict letter of the law, grounds 3, 4 and 5 were not properly before the Court. In view, however, of the uncertainty with regard to what is a question involving a point of law we have decided in making our decision on the appeal to take these grounds into consideration.

We do not consider that ground 3 bears the construction placed upon it by Counsel for the appellant. Read with the rest of the context it cannot be said that the learned Judge told the jury that one person must have done all of these acts. He is putting before the jury various hypotheses. The words that follow the passage of which complaint is made indicate that the person who locked the door, that is to say the appellant, may not have been the murderer.

Ground 4 raises a matter of small importance. It is true that with regard to the laying out of the body the learned Judge did not particularly refer to the abnormality of the appellant. On the other hand a large part of the summing-up is devoted to a consideration as to whether he was of sound mind. It cannot be contended, therefore, that such abnormality would not be present in the minds of the jury when they were considering this and every aspect of the case.

With regard to ground 5 it might have been better if the learned Judge had informed the jury that there was no evidence that the blood was human blood. On the other hand they were warned that it might be any other kind of blood and the matter was left for them to decide. We do not consider the appellant was prejudiced by this passage.

The point made with regard to ground 2 is that the reference to the statement made by the appellant to the Police would inevitably lead the jury to think that the appellant had made a confession. The policeman to whom the statement had been made by his omission to relate in his evidence what the appellant said to him might with equal force be said to have brought to the notice of the jury that the appellant had made a confession. Moreover, jurymen are not so well versed in legal procedure as to infer from the words used by the learned Judge that a confession had been made. Jurymen know that the law formulates various rules with regard to the admission of evidence. They are not, however, fully acquainted with such rules and in these circumstances it does not follow that the phraseology of the Judge suggested to their minds a confession.

To sum up we are of opinion for the reasons I have stated that there is no real substance in grounds 2, 3, 4 and 5.

The main case for the appellant was based on the ground that as a matter of law there was no case to go to the jury. In connection with this ground Mr. Perera asked us to give consideration to an alternative

ground not mentioned in the notice of appeal, namely, that the learned Judge omitted to explain to the jury the main principles to be followed in appreciating circumstantial evidence and, in particular, to point out to them that before they could convict, they must be satisfied that the incriminating facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt. This alternative ground of appeal is intimately connected with ground 1 and, in these circumstances, we have given it consideration although it is not raised in the notice of appeal. Generally speaking this Court will refuse to give effect to grounds not stated in the notice, but when the appellants is without means to procure legal aid and has drawn his own notice, the Court will not as a rule confine him to the grounds stated in his notice.

Counsel for the appellant contends that although no submission was made by Counsel for the accused at the close of the case for the prosecution the Judge should at this stage have directed the jury to return a verdict of "not guilty". It was argued that section 234 (1) of the Criminal Procedure Code imposes this duty on the Judge if he considers that there is no evidence to go to the jury that the accused committed the offence. The English law is somewhat different. In *Rex v. Abraham George* [1], it was held that at the close of the case for the prosecution a judge is not, in law, bound to withdraw the case from the jury if the point is not submitted to him. If prisoner elects to go on, the Court will look at the case as a whole. It is, therefore, material at this stage to consider whether there was any evidence that the appellant committed the offence. In this connection the following facts have been established. The deceased was a young girl introduced into his house by the appellant ostensibly as a cook. There was at that time another girl called Pody Nona who also lived in the house and assisted in the cooking. About three weeks before the death of the deceased the girl Pody Nona left the appellant's house. There was evidence that the appellant regarded the deceasd from another aspect than that of a servant. The witness Bastian Senanayake has testified that the appellant informed him that the deceased had bolted because he held her breasts. There is evidence that the appellant was jealous of the attentions that he thought the deceased was receiving from other men. It was established that at the time when the deceased met with her death she was living alone with the appellant in the latter's house. She was last seen alive by Charles, the carter, at the appellant's house at 7 A.M. on the morning of June 23, the day before the murder. On this occasion the appellant told Charles apparently in the presence of the deceased that the latter was a woman of bad character and asked her to leave the house. He also asked Charles to advise the deceased and Charles told her to live well according to the instructions of her master. Charles on that day took the accused to Alutgama in his cart and brought him back to his home about 5.30 P.M. He did not see the deceased on his return. On the following day about 6.30 P.M. Charles was driving the cart about quarter mile from the appelant's house when he met the appellant. The latter got into the cart and was driven to Alutgama Police Station. During the drive the appellant made no mention to Charles of

[1] *1 Cr. App. Rep. 168.*

the death of the deceased. At the Police Station the appellant made a statement in consequence of which Sub-Inspector Ratnarajah went with the appellant to his house. The appellant opened the door with a key which he had in his pocket. All the doors and windows were closed. In a room the Inspector saw the body of the deceased covered with a cloth laid on a mat with the head resting on a pillow. She was dressed in a white jacket and a white cloth which were soaked with blood. Her hands were placed on her chest clasped together with a bunch of orchids placed in her hand. A candle fixed in a bottle was burning at the time. A knife covered with blood stains and identified as having previously been in the possession of the appellant was on the pillow. The deceased's hair was cropped short. The appellant told the Inspector that the hair cut from the woman's head would be in the shed. The Inspector went to the shed and found the hair there. The appellant also took from the bed some clothes—exhibits P 2 and P 3—which were identified by the dhoby as belonging to the appellant. These clothes had blood stains on them. It was not, however, established that it was human blood. The Inspector then took the appellant to the Police Station, searched him and found a diary in one of his pockets. Inside the diary was a Galle Gymkhana Club sweep ticket the *nom de plume* being "Lily", one of the names of the deceased. The dairy also contained certain entries. The handwriting that made these entries was not proved to be that of the appellant. In these circumstances we are of opinion that such entries cannot be taken into consideration.

Mr. Perera maintains that there was no case to go to the jury inasmuch as there was no evidence of previously expressed intention or preparation or motive and such evidence as there was only indicated opportunity and did not exclude opportunity by other persons. He also contended that there were no circumstances incriminating the appellant. The circumstances in which the appellant found himself were not incompatible with his innocence. Though there was suspicion, that suspicion did not amount to proof. We have given careful consideration to the submission of Mr. Perera and have come to the conclusion that the Judge was right in not withdrawing the case from the jury. It seems to us that the following facts incriminate the appellant and definitely associate him with the crime. The deceased was living alone in the house with the appellant and was last seen alive in his house at 7 A.M. on the previous day. The appellant left the house after locking the door and taking the key with him about 6.15 P.M. on June 24, 1939, which according to the medical evidence was about the time that the deceased might have met with her death. The appellant omitted to tell Charles, the driver of the cart, anything about the death of the deceased although on the day before he had made complaints to Charles about her conduct and asked the latter to give her advice as to her behaviour. The position in which the body of the deceased was found and its surroundings indicated the improbability of its having been so arranged by an intruder or stranger to the house. The hair of the deceased had been cropped and the appellant had pointed out to the Police where it would be found. The sweepstake ticket in the diary indicated that the appellant did not regard the deceased in the light of a servant only and in this respect reinforces the evidence of Charles and

Bastian. The interest thus evinced by the appellant in the deceased indicates that he was actuated by feelings of jealousy which supply a possible motive for the crime. We are of opinion that in view of the evidence to which I have referred the learned Judge would not have been justified in withdrawing the case from the jury. In considering whether the jury were entitled to convict on such evidence, it must also be borne in mind that the appellant gave no evidence and offered no explanation of the various parts of the evidence that incriminated him. On the assumption that he was innocent of this crime he alone was in a position to tell the jury the circumstances in which he found the body of the deceased. He could, moreover, have offered his explanation of the body being found lying in his house draped in white, with the hands clasped and holding orchids, a candle burning in a bottle and his blood-stained knife on the pillow. He could also have explained how he knew that the hair of the deceased was in the shed. In this connection I would refer to the following dictum of Lord Ellenborough in the case of *Rex. v. Lord Cochrane and others*[1] :—

> "No person accused of crime is bound to offer any explanation of his conduct or of circumstances of suspicion which attach to him; but, nevertheless if he refuses to do so where a strong primâ facie case has been made out, and when it is in his own power to offer evidence, if such exist, in explanation of such suspicious circumstances which would show them to be fallacious and explicable consistently with his innocence, it is a reasonable and justifiable conclusion that he refrains from doing so only from the conviction that the evidence so suppressed or not adduced would operate adversely to his interest."

This dictum applies in the present case. A strong primâ facie case was made against the appellant on evidence which was sufficient to exclude the reasonable possibility of someone else having committed the crime. Without an explanation from the appellant the jury were justified in coming to the conclusion that he was guilty.

I now come to the final point made by Mr. Perera, namely, that the learned Judge in his charge to the jury has omitted to explain the main principles to be followed in appreciating circumstantial evidence. It is true that, when the Judge deals with the evidence generally, he has not explained fully those principles. On the other hand the charge has to be considered as a whole. If it is found that the jury have been warned in judging each circumstance that incriminates the appellant to look for an innocent as well as a guilty explanation, the charge cannot be said to be unfair or prejudicial to the defence. Perusal of the charge indicates that the passages with regard to the arrangement of the body, the lighting of the candle, the closing of the door and the supplying of information to the Police without a word to anyone invite the jury to find an innocent as well as a guilty explanation of such circumstances. The charge, so it seems to us, recognized that there might be an innocent interpretation in regard to those circumstances that incriminated the appellant. Even

[1] *Gurney's Rep. 479.*

if the charge failed to explain as it should have done the principle to be followed by the jury in dealing with circumstantial evidence, we are of opinion that on a right direction the jury would have come to the same conclusion.

The appeal is therefore dismissed.

Appeal dismissed.