1964 *Present :* **G. P. A. Silva, J.**

G. W. PERERA and another, Appellants, *and* E. M. V. NAGANATHAN, Respondent

S. C. 226-227/1963—M. C. Jaffna, 24240

***Evidence**—Cognizable offence—Statement made by a person to a police officer during investigation—Use of it by Court as evidence—Illegality—Reception of evidence of bad character of accused—Effect—Finding of fact in a criminal case—Circumstances when appellate Court will reverse it—Burden of proof in a criminal case—Criminal Procedure Code, ss. 122 (3), 190—Evidence Ordinance, ss. 145, 155, 165, 167.*

At the trial of a cognizable offence, the accused led evidence in terms of section 122 (3) of the Criminal Procedure Code, read with sections 145 and 155 of the Evidence Ordinance, to show that the prosecution witnesses had, in their statements to the Police in the course of the investigation of the offence, made certain statements which were contradictory of their evidence at the trial. After the evidence in the case was concluded, the Magistrate caused to be produced the full statements made to the Police by the prosecution witnesses, in order to satisfy himself " that nothing has been taken out of their context " and also " to go through the record of the statements in the light of statements of counsel for the defence ". On the next morning he pronounced his verdict finding the accused guilty and, two weeks later, delivered his reasons. In his reasons, however, he made no reference to the statements made to the Police.

Held, (*a*) that the use made by the Magistrate of the statements to the Police was contrary to the provisions of section 122 (3) of the Criminal Procedure Code. The failure of the Magistrate to advert, in his judgment, to the statements and to say in what way he used them was a fatal irregularity. Silence on the matter left the appellate court without any material to adjudicate on the question as to the use made of the statements or as to the extent to which the Magistrate was influenced by them in arriving at his decision. Further, the note by the Magistrate that he would also like to go through the record of the statements in the light of the statements of the Counsel for the defence suggested that he might quite unwittingly have put these statements to a use other than that which was authorised by the Code.

(*b*) that, if the statements to the Police were produced in terms of section 165 of the Evidence Ordinance in order to discover or obtain proper proof of relevant facts, and the Magistrate made use of such statements which he caused to be produced of his own motion in arriving at his verdict under section 190 of the Criminal Procedure Code, acting on such evidence was a flagrant violation of the provisions of section 122 (3) of the Criminal Procedure Code.

Held further : Where irrelevant evidence as to the character of the accused has been admitted and the other evidence against the accused is by no means overwhelming and is unsupported by any independent circumstance and there is no indication by the Judge that he has not been in any way influenced by the inadmissible evidence, the conviction of the accused would be set aside. In such a case, the provisions of section 167 of the Evidence Ordinance are not applicable.

The court of appeal will not lightly interfere with a finding of fact by the trial court in a criminal case, but where there is good ground to do so in the circumstances of the case or where the judgment is unsound, not merely has the appellate court the right but it is under a duty to reverse such finding.

In a criminal trial the trial Judge must not convict the accused by merely expressing a preference of the prosecution version to that of the defence. It is incumbent on him not merely to have a preference for the prosecution version but to be satisfied beyond reasonable doubt. Implicit in an expression of preference is a reasonable doubt.

APPEAL from a judgment of the Magistrate's Court, Jaffna.

H. W. Jayewardene, Q.C., with *N. R. M. Daluwatte, L. C. Seneviratne* and *I. S. de Silva*, for the Accused-Appellants.

M. Tiruchelvam, Q.C., with *A. Mahendrarajah, M. Amerasingham* and *Henry Jayakody*, for the Complainant-Respondent.

Cur. adv. vult.

September 23, 1964. SILVA, J.—

The two accused-appellants in this case, G. W. Perera and S. B. Pilapitiya, both Sub Inspectors attached to the Jaffna Police, were charged on two counts of voluntarily causing hurt to Dr. E. M. V. Naganathan at the Jaffna Police Station on 5. 6. 1962, offences punishable under Section 314 of the Penal Code. There was a separate charge in respect of each of them of having committed this offence in the course of the same transaction. The learned District Judge, who was also an additional Magistrate, found both the accused guilty at the conclusion of the trial and sentenced Sub-Inspector Perera to one month's simple imprisonment and Sub-Inspector Pilapitiya to a fine of Rs. 100, in default four weeks simple imprisonment. Both the accused have appealed. In view of this sentence passed against Sub-Inspector Perera, which is not appealable, he has also filed papers in revision before this Court. The appeal has been strenuously argued on both sides, the argument lasting four days, and I am indebted to both counsel for their exhaustive analysis. As the cases of both accused are inextricably interwoven with each other, being part of the same incident, it will be convenient to deal with both the appeal and the application in revision together. Counsel for the respondent has very properly conceded that the same considerations will apply to the appeal and the application in these circumstances.

The first submission made by counsel for the appellant, based on certain provisions of the Criminal Procedure Code, is that the statements made to the Police by the complainant and his witness were *used* as evidence by the learned Magistrate. His contention was that such use of Police statements was clearly contrary to the provisions of Section 122 (3) of the Criminal Procedure Code, which says :—" No statement made by any person to a Police officer or an inquirer in the course of any investigation under this Chapter shall be used otherwise than to prove that a witness made a different statement at a different time, or to refresh the memory of the person recording it. But any Criminal Court may send for the statements recorded in a case under inquiry or trial in such Court and may use such statements or information, not as evidence in the case, but to aid it in such inquiry or trial. " Counsel argued that the only course authorised by this Section for a Court is to send for the statements recorded in a case under inquiry or trial, so that they may be used to aid the Court in such inquiry or trial but that it would be irregular for a Court under any circumstances to have entire statements made to the Police by prosecution witnesses to be produced in the case and that the moment such statements are produced they become part of the evidence. It seems to me that there is force in this contention. In the conduct of criminal cases, it is imperative that the provisions of the Criminal Procedure Code must be strictly adhered to. In a country where there is a statute or code governing criminal procedure, the rule is that a court can only do what it is authorised to do and no other discretionary powers can be exercised, unless the Code itself permits such discretionary powers over and above what is specifically laid down. That being so, *a fortiori*, where the Code makes a definite prohibition regarding any matter such as the use of Police statements during the proceedings, a violation of such a prohibition must be considered to be a fatal irregularity, whatever may be the use to which such statements have been put. The objection is rendered stronger when the Judge has failed, in the course of his judgment, to advert to the statements produced in the teeth of a prohibition in the Code and to say in what way he has used the statements. Silence on such a matter would leave this court without any material to adjudicate on the question as to the use made thereof or as to the extent to which the learned Magistrate may have been influenced by such statements in arriving at his decision against the accused.

In the case of *Bartholomeusz v. Velu* [1], it was held by Macdonell, C.J., that where a Magistrate at the conclusion of the evidence in a case sent for and perused the Police Information Book for the purpose of arriving at a decision, the use of the Information Book was irregular and that a Magistrate who wished to use the Information Book should call the Police officer who recorded the information. In that case after the prosecution and the defence had closed, having called witnesses on both sides, the Magistrate made an order, " Let I. B. Extracts be produced tomorrow ". They were accordingly produced and filed in the record of the case the

[1] *(1931) 33 N. L. R. 161.*

next day and, on the day after that, the Magistrate found the accused guilty. Macdonell, C.J., in setting aside the conviction observed, " These entries in the record can, I think, only mean this, that after hearing the evidence on both sides, the learned Police Magistrate was not quite satisfied which side he should believe, and that he sent for the Information Book to assist him. This is a purpose for which the Information Book must not be used and to my thinking it vitiates the conviction ". While saying that there was abundant authority for this proposition he cited one case, namely, that of *Paulis Appu v. Don David* [1], in which case too the Magistrate had done almost identically the same thing. In the instant case what happened was that when the prosecution witnesses gave evidence, they were confronted with certain alleged statements made to the Police which contradicted their evidence. Later, when the Assistant Superintendent of Police gave evidence for the defence, these contradictory statements were proved with a view, of course, to showing that the prosecution evidence should not be accepted owing to their inconsistency with previous statements. This course is sanctioned by section 122 (3) of the Criminal Procedure Code read with sections 145 and 155 of the Evidence Ordinance. At some stage of the evidence of the Assistant Superintendent of Police the Magistrate made the following order :—" I order the witness to produce the full statement of Pathmanathan and the full statement of Dr. Naganathan as recorded by him, as I want to ensure that nothing has been taken out of its context and for no other reason. " The Assistant Superintendent of Police being the last witness to be called for the defence, counsel made their addresses after which the learned Magistrate made the following order :—" Order tomorrow morning, as I have had no opportunity to read through the record of statements of Dr. Naganathan and witness Pathmanathan, which I want to be produced to see that nothing is taken out of their context. I would also like to go through the record of statements in the light of statements of the counsel for the defence. " These two statements appear at the end of the record marked ' X ' and ' Y ' and on the next morning (1. 2. 1963) the Magistrate pronounced his verdict finding both accused guilty and ordered the accused to be present on 14.2.1963 for reasons to be delivered and sentence to be imposed. These were accordingly done. There appears to have been some misunderstanding about this date owing to a Press report that the reasons were to be dolivered on 15.2.1963 and the learned Magistrate delivered his reasons on the 15th. In his reasons, however, he has made no reference to the statements which he ordered to be produced and which, in fact, have been produced as ' X ' and ' Y '. It would appear that the contradictions that were put form a very small proportion of the fairly long statements made by the prosecution witnesses. It is not possible for one to say that the contradictions which were put have been taken out of their context. In the absence of any observations by the learned Magistrate regarding this aspect of the contradictions, it must be assumed that, at the time they were proved, he considered the contradictions to

[1] *8 Times of Ceylon Law Reports 59.*

have been material, for, if they were immaterial contradictions, no useful purpose would have been served by the Magistrate going through the entirety of the statements in order to discover for himself whether such immaterial contradictions were in or out of context. If then he ordered the statements to be produced because he considered the contradictions to be material, unless they were taken out of their context, and if, after perusal of the statements, he found that the contradictions were not out of context, what importance did he attach to the contradictions. Unfortunately, the judgment does not furnish an answer to this question. In these circumstances, it is not possible for this court to say to what use the learned Judge put these Police statements nor to assess to what extent, however imperceptibly, he would have been influenced by the Police statements in coming to his decision. Further, the note by the Magistrate that he would also like to go through the record of the statements in the light of the statements of the counsel for the defence suggests that he may quite unwittingly have put these statements to a use other than that which is authorised by the code.

Counsel for the appellants further argued that the only provisions which permitted a Judge to order the production of a statement are contained in section 165 of the Evidence Ordinance and that it must, therefore, be presumed that he ordered the production of the statements made to the Police by the prosecution witnesses in terms of this section. He submitted that in criminal proceedings that section must be read with sections 190 and 301 (1) of the Criminal Procedure Code, the last section dealing only with the requirement for the Magistrate to initial and date any document produced as evidence, which requirement has been complied with in this instance by the Magistrate. Section 165 of the Evidence Ordinance provides as follows :—" The Judge may, in order to discover or to obtain proper proof of relevant facts, ask any question he pleases . . . . . and may order the production of any document or thing . . . . ." Section 190 of the Criminal Procedure Code says :—" If the Magistrate after taking the evidence for the prosecution and defence and such further evidence (if any) as he may of his own motion cause to be produced finds the accused not guilty . . . . . &c." On an interpretation of these two sections read together it would appear that a Judge is entitled to order the production of any document of his own motion only to discover or to obtain proper proof of relevant facts which can be used in arriving at a verdict. Conversely, unless a Judge wishes to discover or to obtain proper proof of relevant facts he has no power to order the production of any document *mero motu*. It seems to me, therefore, that a Judge is not empowered under this section to order any documentary evidence to be produced in order to check whether an alleged contradiction has been taken out of its context. This principle would apply with greater force when the documentary evidence ordered to be produced consists of a complete statement to the Police which itself is prohibited from being used as evidence under section 122 (3) of the Criminal Procedure Code, even though the Magistrate has stated that he was ordering their production

for some other purpose. It was, therefore, either irregular for the court to have ordered the productions of documents ' X ' and ' Y ' as there was no enabling provision to do so or, if they were produced in terms of section 165 of the Evidence Ordinance in order to discover or obtain proper proof of relevant facts, and the Magistrate made use of such statements which he caused to be produced of his own motion in arriving at his verdict under section 190 of the Criminal Procedure Code, acting on such evidence would be a flagrant violation of the provisions of section 122 (3) of the Criminal Procedure Code.

The answer of the counsel for the respondent to this submission is that section 122 (3) of the Criminal Procedure Code empowers a criminal court in the course of a trial or inquiry to send for Police statements and that the Judge in this case did no more than that. He also submitted that there was not one word in the judgment to show that the court was influenced in its decision by these Police statements. Counsel cited to me several cases in support of his argument. In the first of them, *King v. Soysa*[1], while Jayawardena, A.J., expressed the view that the improper use of the entries in the Information Book will not necessarily vitiate a conviction of the accused if there is other reliable independent evidence to support the conviction, he held that a Judge was not entitled to use statements in the Information Book for the purpose of corroborating the prosecution evidence. It is important here to note the qualifications in the expression of this opinion. The other evidence referred to must be both independent and reliable. The complainant's oral evidence alone unsupported by any other witness—Pathmanathan's evidence being admittedly unreliable—or any circumstance such as the presence of injuries on the complainant based on a medical report, can hardly be called other reliable independent evidence which Jayawardena, A.J., had in mind. His pronouncement about the improper use of the Information Book, however, is categorical and he set aside the conviction although I must say that the trial Judge in that case appears to have gone much further in the use of the Information Book statements than in the instant case. In the next case cited, *Paulis Appu v. Davit*[2], after the case was closed the Magistrate deferred judgment noting down that he wished to peruse the Information Book and gave his decision convicting the accused some time thereafter. Akbar, J., citing two previous cases in support acquitted the accused holding that it was wrong for the Magistrate to have looked at the Information Book to enable him to come to a decision.

Of the two cases cited by Akbar, J., one was the 26 New Law Reports case already referred to and the other one was that of *Wickremasinghe v. Fernando*[3], where too the accused was acquitted in appeal when the Magistrate referred to the Information Book for the purpose of testing the credibility of a witness by comparing his evidence with a statement by him to the Police. In this respect this case bears some similarity to the instant case. In this case Jayawardena, A.J., went on to illustrate

[1] *(1924) 26 N. L. R. 324.* [2] *(1930) 32 N. L. R. 336.*
[3] *(1928) 29 N. L. R. 403.*

some of the uses to which statements in the Information Book can be put, namely, " to discover out of them any matter of importance bearing upon the case and then to call for the necessary evidence to have the matter legally proved ". It would thus appear that it requires careful discrimination and wise judgment to make a proper use of the Police records and while they may be resorted to in the course of an inquiry or trial for the history of the several stages through which the Police investigation into a crime has passed they are unsafe to be relied on for any purpose relating to the finding of guilt. The other case cited by counsel for the respondent was that of *Kitnapulle v. Christoffelz* [1], in which Basnayake, J., held that the use of the Information Book was a matter entirely within the discretion of the Judge. He qualified his decision by saying that a Judge should, however, take care not to make use of statements or facts contained in the Information Book as evidence for any purpose whatsoever or to draw any conclusion of guilt from such statements. On a perusal of this judgment it would appear that the Magistrate had in his judgment stated the specific purpose for which he read the Police statement : " There were some discrepancies between the statement to the Police and evidence but these do not go to the root of the incident. On the evidence it is clear beyond doubt that the accused are the persons who committed the offence ". In this particular case, therefore, the Appeal Court had some material in the judgment from which it could definitely be satisfied as to what use the Magistrate had made of the Information Book, and secondly, there seems to have been other weighty evidence to prove clearly the guilt of the accused. In the instant case while the Judge stated in the course of the proceedings why he was calling for the two statements he has not stated, for the benefit of this court, what opinion he formed after a perusal of the statement in regard to the contradictions. It is to be noted that in all these cases cited by both counsel, bar one, the use of the Information Book was held to vitiate the conviction when such use was for a purpose other than those specified in section 122 (3) of the Criminal Procedure Code. In my view, when the Information Book has been used by the court even if it is doubtful whether such use was proper or not, or even if it is doubtful whether the Judge was influenced by it or not, the accused must receive the benefit of the doubt, more particularly where the evidence for the prosecution is neither overwhelming nor compelling. In this connection the principle laid down by de Kretser, J., in the case cited by counsel for the appellant, *Coomarasamy v. Meera Saibo* [2], is of interest even though it was cited by counsel for a different purpose. It was held in that case that even if a Judge is not in fact influenced, if the *accused gained the impression* that he had been influenced by some inadmissible evidence that consideration was sufficient to vitiate a conviction having regard to the principle that the administration of justice should not only be pure but should seem to be pure. (The italicizing is mine.)

[1] *(1948) 49 N. L. R. 401.* [2] *5 Ceylon Law Journal 68.*

The next point taken up by counsel for the appellant was that the learned Magistrate has not given reasons for his decision in the manner that he is required to do in terms of the provisions of section 306 (1) of the Criminal Procedure Code. Two cases have been cited to me in support of his submission, namely, *Ibrahim v. Inspector of Police, Ratnapura* [1], and *Thuraiya v. Pathaimany* [2]. In the latter case, which was followed in the former, it was held that a mere outline of the case for the prosecution and defence, embellished by such phrases as, " I accept the evidence " for the prosecution, " I disbelieve the defence " is by itself an insufficient discharge of the duty cast upon a Magistrate by section 306 (1) of the Criminal Procedure Code. In his submission there was a narration of facts for the prosecution and defence by the Judge which ran into about 3½ pages, at the end of which he merely said, " I have no hesitation at all in preferring the doctor's version to that of Sub-Inspector Perera. While the doctor made an excellent impression in the box, Sub-Inspector Perera cut a very sorry figure under cross-examination ". I do not think that there is substance in this contention for the Judge has, in fact, given reasons for his finding. There is, however, a grave fallacy in his reasoning. For, having disbelieved the Sub-Inspector the Judge thereafter went on to give some reasons for his disbelief almost all of which were based on his being contradicted by Sergeant Dharmalingam. I could even have appreciated this line of reasoning if the learned Magistrate had formed a very favourable impression of the witness Dharmalingam. But I find that the learned Magistrate had condemned Dharmalingam as a perjurer for more reasons than one. At various times in the course of the judgment he has made the following observations in regard to Sergeant Dharmalingam. " Police Sergeant Dharmalingam has obviously been prevailed on to fall into line with the Sub-Inspector's version of what the Sub-Inspector claimed that the doctor did in regard to the taking of the seat . . . . The Sergeant's story of how the doctor pulled him off the seat was obviously untrue . . . . The statements of Police officers were not commenced until 12.25 a.m. when Dharmalingam's statement was recorded. This obviously gave the Police officers ample opportunity not only to concoct a defence to the known facts of the case but also to prevail on Dharmalingam to fall into line, if indeed he had ever intended to tell the truth. Dharmalingam did not appear to me to be made of the stuff that heroes are made of and it is obvious that he would have to be a very brave man to go counter to his superior officers and continue to work with them at the Jaffna Police Station." This being his view of Dharmalingam as a witness, his disbelief of Sub-Inspector Perera, because he was contradicted by Dharmalingam, appears to me illogical. Further, the serious point of contradiction which the learned Magistrate has referred to is the one in regard to the table at which complaints were recorded and as to the conflicting reason given by each of them for getting the complainant away from the reserve table. While the 1st accused stated that complaints were recorded by the Reserve Sergeant at a table

[1] *(1957) 59 N. L. R. 235.* [2] *(1939) 15 C. L. W. 119.*

other than the table at which he sat, Dharmalingam denied this and although the 1st accused stated that the ammunition at the Reserve Sergeant's table was not under lock and key Dharmalingam said that the drawers were locked and the key was with him. The question at issue to which this evidence related was whether there was a table other than the Reserve Sergeant's table at which complaints were recorded. It has to be borne in mind that even if this was a material contradiction it was on an incidental matter which, though it has a bearing on the circumstances that led to the alleged assault, does not affect the main question whether the accused assaulted the complainant. Secondly, counsel for the appellant submitted that the 1st accused was speaking to a practice that obtained for years having himself been attached to the Jaffna Police for some time while Dharmalingam had been there only for five days and could not have been at the Reserve table for more than one or two days at the most. Thirdly, he has brought to my notice that on this crucial matter when the complainant was questioned in cross-examination whether it was not the fact that the 1st accused asked him to go and sit at the table in question and make the statement, he refused to do so, he gave no answer, the suggestion of the counsel, of course, being that this conduct of the complainant supported the evidence of the 1st accused. It would thus appear that while counsel's submission that the Magistrate has given no reasons whatsoever for his finding is incorrect, because the Magistrate has, in fact, given some reasons the reasons for the conclusion and the inferences drawn do not bear scrutiny and the conclusions appear from one point of view to be based on misdirections on questions of fact. For, on the evidence there is no justification for holding either that Dharmalingam shaped his testimony to fall in line with the accused nor that there was an unexplained *mala fide* delay on the part of the Assistant Superintendent of Police to record the statments of the accused and Dharmalingam which " obviously gave the Police officers ample opportunity not only to concoct a defence . . . . but also to prevail on Dharmalingam to fall into line " when such a suggestion was not made even by the prosecuting counsel.

This brings me to the other submission very strongly urged by counsel for the appellants that the adverse conclusion of the learned Magistrate against the Assistant Superintendent of Police who recorded the statements is most unjustified having regard to the evidence in the case. He has argued with considerable force, that, in fairness to the Police officer he should have been given an opportunity, when he was giving evidence, to meet the adverse inferences that were made against him in the course of the judgment by at least a question being asked either by the counsel for the prosecution or by the court as to his conduct. On an examination of the evidence of Assistant Superintendent of Police Senarath, it would appear that having come to the Station at some stage he took over the inquiry himself and continued to record the statements of the complainant which Inspector Marso had started recording. Immediately after he finished the complainant's statement, at about 8.30 p.m. he recorded the statement of the witness Pathmanathan.

As there was reference in these statements to persons who were not mentioned by name and who were not known to the deponents, he held an identification parade at 10.25, presumably, in order to make sure who the assailants were. It should be appreciated that the parade was an essential prerequisite to the questioning of the alleged assailants, as Pathmanathan, the only witness for the complainant, referred to them by description, such as ' the dark Inspector ' and ' the person with a banian '. Pathmanathan's statement was concluded about 9.30 p.m. and after that the statement of Mr. Navaratnam, Member of Parliament. The Assistant Superintendent of Police then held an identification parade. He next went to the Hospital and after returning from there he recorded the statements of Inspector Marso, Sergeant Dharmalingam and thereafter, the statements of the two accused around 1 a.m. It is very important to remember, in regard to the complaint made by counsel for the appellant, firstly, that the Assistant Superintendent of Police must have the basis of the complaint from the complainant's statement and the supporting evidence and secondly, that the alleged assailants must be either known to the complainant and the witness and if not known, should be identified before they can be questioned in regard to the charges. It would, therefore, not be practicable to record the statements of the alleged assailants before these steps are taken nor would it be useful for some other officer to record simultaneously the statements of those who may possibly be the assailants. Considering the length of the statements of the complainant and witness Pathmanathan, it would certainly have taken some time to record them. Seeing that the steps taken by the Assistant Superintendent of Police were not only correct but necessary and also considering that Sergeant Dharmalingam's statement was recorded *before* those of the two accused, can it be said that the Assistant Superintendent of Police was acting with improper motives to enable the accused to concoct their defence, particularly, when not one question was asked by counsel for the prosecution or by the Judge, directly suggesting such improper conduct, in which case, the Assistant Superintendent of Police would have had an opportunity of further explaining the course he took. It also seems to me that the learned Judge's finding both against the Assistant Superintendent of Police, that he gave this opportunity and against Dharmalingam, that he made use of the opportunity of the delay to fall in line with accused's version, considerably loses force when it is found that Dharmalingam made his statement before the accused. For, how could Dharmalingam who made his statement at 12.25 a.m. fall in line with the statements of the accused that were to be made later, unless, of course, one concludes that this too was a part of the conspiracy to meet a possible attack of concoction of an agreed defence which may be directed against the accused at the subsequent trial. If one always imputes bad faith there would, of course, be no end to such inferences. It must be appreciated that recording of each statement, depending on its length, making arrangements for an identification parade, conducting such parade and such other matters necessarily take some time. The only question to consider

is whether having regard to all this and the requirements of the case there was delay on the part of the Assistant Superintendent of Police which could not be explained. I am not able to say that the learned Magistrate has given his mind to all these aspects nor that he has given an opportunity to the Assistant Superintendent of Police to meet the grave charge of dishonesty and partiality implied in his finding before such finding was arrived at. In the circumstances, I am compelled to hold that the facts of the case do not warrant the finding of the learned Magistrate either against Dharmalingam or against the Assistant Superintendent of Police.

The final submission of law made by counsel for the appellants was in regard to the leading of the inadmissible evidence of character. This was based on the fact that in re-examination of the complainant by his counsel, it was elicited that from the reports he heard, the 1st accused Perera was one of the Police officers who had conducted himself in a very unpleasant manner and that he had referred to him in speeches in Parliament. It is submitted that this evidence constituted bad character of the 1st accused and that it should not have been led. Counsel who conducted the prosecution presumably led this evidence to show motive on the part of the 1st accused Perera towards the complainant. However, it must be said that this evidence came out in re-examination and did not arise out of any cross-examination on behalf of the 1st accused. While the fact of the complainant having referred to the accused Perera in Parliament could even remotely have been justified on this basis, there is considerable substance in the contention of counsel for tho appellant that the rest of the evidence was objectionable as evidence of bad character. I think that the objection is rendered even stronger when the bad character deposed to was derived not from personal knowledge but from hearsay, which itself should not find its way into proceedings in court.

Counsel for the respondent has sought to meet this objection by the argument that the mere reception of inadmissible evidence will not vitiate a conviction if there is other evidence to support it and secondly if it cannot be shown that the Judge was influenced by such inadmissible evidence. He cited section 167 of the Evidence Ordinance and also certain decisions of this court in his favour. In the first case cited by him, *Aron v. Amarawardene*[1], Basnayake, J. held that in a case where irrelevant evidence as to character has been admitted 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. Basnayake, J. referred in his judgment to various cases in which different views were taken on this matter and the two decisions on which he appears to have relied for his own view were *Stirland v. Director of Public Prosecutions*[2] and *King v. Pila*[3]. In the former, the House of Lords did not interfere with a conviction in a case where apart altogether from the impeached evidence there was an overwhelming case proved against the accused. In the latter, Lascelles, C.J., observed that there

[1] *(1948) 49 N. L. R. 167.* [2] *(1944) 2 All England Law Reports, page 13.*
[3] *(1912) 15 N. L. R. 453.*

was no question but that the Appellate Court, under section 167 of the Evidence Ordinance, has power to uphold a conviction if it was of opinion that the evidence improperly admitted did not affect the result. The other case cited by counsel was that of *King v. Perera*[1], in which a Bench of two Judges decided that evidence of bad character of the accused given in a trial before a District Court is not fatal to a conviction if there is other evidence to convict the accused and if there is nothing to indicate that the District Judge was influenced by the irrelevant evidence. It would, therefore, appear that in *Stirland v. Director of Public Prosecutions* there was an overwhelming case proved against the accused on the inadmissible evidence and in the case of *King v. Perera* the concluding sentence shows that the District Judge convicted the accused on ample admissible evidence and there was nothing to show that the Judge was influenced by the inadmissible evidence. Where, however, the other evidence is by no means overwhelming nor abundant and is unsupported by any independent circumstance and where there is no indication by the Judge that he has not been in any way influenced by the inadmissible evidence and the matter is left in a state of doubt and where there is also a larger volume of evidence for the defence which is worthy of note, different considerations would apply.

In this case the facts are admitted by both sides up to a point and the question of the probability or improbability of the 1st accused assaulting the complainant is the vital issue. The admission of this item of inadmissible evidence, therefore, which is irrelevant in two ways—hearsay and bad character—has to be given considerable weight, particularly in view of the observations in the judgment regarding the discourteous treatment of the complainant by the 1st accused and the necessity for the Police officers to show the utmost courtesy to a Member of Parliament. One cannot, in these circumstances, say with certainty, in the absence of an indication to the contrary by the Magistrate, that his knowledge that the 1st accused was a man who had been accused in Parliament for conducting himself in a very unpleasant manner—which accusation is aggravated as it is based on hearsay and may well have been without foundation—did not even unconsciously colour his approach to the vital point that had to be decided in the case. The 1st accused should, in my view, have the benefit of this possible and even likely prejudice. It is in this connection that the pronouncement of de Kretser, J., in the case cited earlier will directly apply.

In regard to all these three matters raised by the appellants, namely, improper use of the Police statements, reception of evidence of bad character of the 1st accused and the inadequacy of the reasons of the Magistrate for his conclusions, counsel for the respondent has strongly urged me to consider that the decision is by a Judge of great experience who must be presumed to have been able to steer clear of these difficulties even if the irregularities may be technically present. While I appreciate the force of this argument and will attach great weight to the findings of the trial Judge, it is also necessary for this court to look at the question

[1] *(1941) 42 N. L. R. 526.*

objectively from the point of view of the accused and to be cautious before drawing such presumptions in the absence of material as would have the effect of tilting the case against the accused.

For the above reasons, two out of the three points of law raised by counsel have to be resolved, in my judgment, in favour of the appellants and, in regard to the third point, although I do not accept counsel's contention, I hold that the reasons given by the Magistrate do not bear examination. The finding of the learned Magistrate has, therefore, perforce to be set aside on these grounds of law.

If these were the only criticisms of the judgment I would have been inclined to consider seriously whether there should not be a fresh trial in this case. Counsel for the appellants has argued that, apart from questions of law, the finding of the learned Magistrate cannot be sustained even on the facts and that there is abundant reason for this court to interfere with the decision. He cited in support the case of *Martin Fernando v. Inspector of Police, Minuwangoda*[1], in which it was held that an Appellate Court is not absolved from the duty of testing the evidence in a case both extrinsically and intrinsically although the decision of a Magistrate on questions fact based on the demeanour and credibility of witnesses carries great weight and that where a close examination of the evidence raises a strong doubt as to the guilt of the accused, he should be given the benefit of the doubt. That was a case in which evidence had been led both for the prosecution and the defence and the Magistrate gave reasons for the acceptance of the prosecution evidence as well as for his rejection of the defence. Wijeyewardene, J. proceeded to examine the reasons and went on to say in the judgment :—" I do not see any reason for disbelieving the evidence of accused or (his witness) Charles. Nor am I impressed by the reasons given by the Magistrate for rejecting the defence." For the view in regard to the duty of the Appellate Court to test the evidence he also relied on the case of *King v. Fernando*[2]. In the course of his judgment in this case, Akbar, J. cited the case of *Milan Khan v. Sagai Bepari*[3], which he followed. The dictum in that case clearly set out the difference in the approach that should be made by an Appellate Court in a civil and criminal case. While in a civil case the court must be satisfied before setting aside the order of the lower court that the order was wrong, in a criminal case, if the Judge of the Appellate Court has any doubt that the conviction is a right one the accused should be discharged. Counsel for the respondent, however, cited several cases in support of his submission to the contrary, namely, that this court should not disturb a finding of fact arrived at by the trial Judge who has had the advantage of hearing the witnesses and watching their demeanour. He relied strongly on the case of *Watt v. Thomas*[4], in which it was held that when a question of fact has been tried by a Judge without a Jury and there is no question of misdirection of himself by the Judge, an Appellate Court which is disposed to come to a different

[1] *(1945) 46 N. L. R. 210.*
[2] *(1930) 32 N. L. R. 251.*
[3] *23 A. I. R. Calcutta 347.*
[4] *(1947) 1 A. E. R. 582.*

conclusion in the evidence should not do so unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses could not be sufficient to explain or justify the Judge's conclusion. Counsel drew my attention to the observation of the Lord President, Viscount Simon, in this case, in the course of which he said that if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at at the trial and especially if that conclusion has been arrived at on conflcting testimony by a tribunal which saw and heard the witnesses, the Appellate Court will bear in mind that it has not enjoyed this opportunity and that the view of the trial Judge as to where credibility lies is entitled to great weight. The Lord President, however, went on to qualify this statement when he observed, " This is not to say that the Judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals he may go wrong on a question of fact but it is a cogent circumstance that a Judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which the evidence is given . . . . I would only add that the decision of an Appellate Court whether or not to reverse conclusions of fact reached by the Judge at the trial must naturally be affected by the nature and circumstances of the case under consideration." These are observations with which I respectfully agree and even though the observations were made in respect of a civil case I think that they are no less applicable even in a criminal case and would be most useful to a Judge of appeal who should, however, never overlook the essential difference in the burden of proof in a civil and a criminal case. While in a civil case a Judge of appeal is making use of this principle to decide whether the trial Judge's *preference* for one version was justified, in a criminal case the Judge of appeal has to decide whether the trial Judge's assessment of the evidence was sufficient to establish the prosecution case beyond reasonable doubt. Counsel for the respondent also referred me to an unreported case, S. C. 918/M. C. Kuliyapitiya, 18416 (S.C. Minutes of 21.2.1964), in which Sri Skanda Rajah, J., quoting in support a dictum of Lord Justice Denning in the case of *Griffiths v. Harrison* [1], refused to interfere with the trial Judge's decision on a question of fact. The important words of Lord Justice Denning which Sri Skanda Rajah, J. quoted were " But there comes a point when a Judge can say that no reasonable man could reasonably come to that conclusion. Then, but not till then, is he entitled to interfere." On a reading of Lord Justice Denning's judgment, however, it would appear that this pronouncement was made not on the question whether a finding of fact should be interfered with but on a question of law whether on the proved facts the inference *could* reasonably be drawn, the case under consideration being one in which there was a right of appeal only on a question of law. In other words, the court of appeal was called upon to decide whether a certain finding of fact was " erroneous in point of law ". The dictum in this case, therefore, would not apply to the question under consideration in the instant case.

[1] *(1962) 1 A. E. R. 916.*

The substance of all these decisions is that the court of appeal will not lightly interfere with a finding of fact by a Magistrate but where there is good ground to do so in the circumstances of the case or where the judgment of the lower court is unsound not merely has this court the right but it is under a duty to reverse such finding. The last case cited by counsel for the appellant in further support of this view is that of *King v. Eliatamby*[1], where Abrahams, C.J., disturbed a finding of fact by a District Judge observing that where there is a mixture of truth and falsehood on both sides, it has to be remembered that the burden of proof is on the prosecution and that the defence has to prove nothing beyond what is necessary to instil a reasonable doubt in the view of the court.

In the instant case what are the items of evidence that the Magistrate had before him ? On the side of the prosecution there was the evidence of the complainant supported by one witness, Pathmanathan, who was materially contradicted by his own statement to the Police in regard to the 2nd accused. Having stated to the Police that he did not see anyone except the dark Inspector (the 1st accused) assaulting the complainant, he stated to court that the 2nd accused with his right hand gave a blow on the forehead of the complainant. This serious contradiction must necessarily diminish the value of this evidence even as against the 1st accused and would shake one's confidence in the prosecution case, more particularly as against the 2nd accused, seeing that he took no part at all even in the argument between the complainant and the 1st accused, which preceded the assault. The prosecution derives no support from any independent circumstance such as any injuries on the complainant despite four blows from two young Sub-Inspectors in the region of the forehead. As against this there is the defence case put forward by the 1st accused himself who denied any assault, supported strongly in material particulars by the evidence of Sergeant Dharmalingam with an unblemished record of 27 years service in the Police and having nothing in common with either of the accused, and also deriving indirect circumstantial support from the absence of injuries on the complainant to bear out an assault. As I stated earlier the main reason of the learned Magistrate for his disbelief of Dharmalingam is the deliberate delay on the part of the Assistant Superintendent of Police in recording the statements of the Police officers in order to give an opportunity to concoct a false defence. In view of my holding that the learned Judge has misdirected himself on this issue, I am constrained to say that the rejection of Dharmalingam's evidence is not based upon sound reasoning. But for this misdirection the learned Magistrate would have been faced with the oral testimony of the complainant unsupported by any other reliable oral evidence or any item of circumstantial evidence, against the testimony of the 1st accused and his witness Dharmalingam who had no interest in the 1st accused, belonged to a community different from the 1st accused, had an untarnished record of service in the Police, had been in the Jaffna Police Station only for five days, and gave his evidence in court long after the accused had been transferred out of the Jaffna Police Station, where

[1] *(1937) 39 N. L. R. 53.*

had they remained upto that time, some semblance of influence over Dharmalingam may even have remotely been suggested. This evidence of the defence together with any inference to be drawn from the absence of any circumstantial support for the prosecution story would surely have left the learned Magistrate in reasonable doubt in regard to the prosecution case, without necessarily going so far as to reject the testimony of the complainant, and the accused would then have been entitled to an acquittal. No wanton attack by the accused on the complainant being ever suggested, and there being no trace of any injury, is it not possible that, when the 1st accused forcibly removed the complainant from the stool at which the latter was not entitled to sit and the complainant resisted, the accused's hands struck the forehead of the complainant in the course of the ensuing struggle and the complainant honestly believed that he was assaulted and stated in evidence what he believed to be true.

There is one final aspect of the case, relating to the burden of proof, which, when considered from one angle, goes to the root of this case and affects the correctness of the conviction. Even though neither counsel has raised the question, I feel it is of fundamental importance. The judgment shows that what the learned Magistrate stated after setting out the facts was, " I have no hesitation at all in preferring the doctor's version to that of Sub-Inspector Perera ". In a criminal trial in which the case against the accused must be proved beyond reasonable doubt, it is not sufficient for a Judge to express a preference for the prosecution version. The concept of preference of one version to another based on a preponderence of evidence or a balance of probability essentially arises only in a civil case, or in a criminal case where the burden has been shifted on the accused to prove certain circumstances according to law. But where no such obligation is cast on the accused and a Judge is considering the question whether a case against the accused has been established by the prosecution it is incumbent on him to scrutinise the evidence for the prosecution and the defence carefully and not merely to have a preference for the prosecution version but to be satisfied beyond reasonable doubt. For, implicit in an expression of preference is a reasonable doubt. I am fortified in this view by the opinion expressed by Sir Sidney Abrahams, C.J., in the *39 New Law Reports case* which has already been referred to earlier in another connection. After enumerating the facts he went on to say, " The learned District Judge said that the first question is whether the fight took place in the circumstances alleged by the defendants. He says that the story of the genesis of the quarrel, as told by the prosecution, is very much more likely than that told by the defence. Then he says, 'On the evidence and the probabilities of the case, I am inclined to think that it was the accused party who were the aggressors and who went and created a disturbance in the complainant's house', and he says finally, 'The chief question is whether the accused were the aggressors or whether they were waylaid by the complainant's party and assaulted by them. As I said before, on the evidence and the probabilities of the case, I think

there can be no doubt that it was the accused who went to the complainant's house and created a disturbance '. It appears to me that the learned District Judge overlooked the burden which lay upon the Crown to prove its case beyond all reasonable doubt, and was rather inclined to consider a balance of probabilities between two conflicting stories.''

In view of all the reasons stated above the convictions of the accused cannot be allowed to stand. I, therefore, allow the appeal of the 2nd accused and set aside his conviction and sentence and acquit him, and, in the exercise of my powers of revision, I set aside the conviction and sentence of the 1st accused and acquit him.

Convictions of 1st and 2nd accused set aside.