[COURT OF CRIMINAL APPEAL.]

1941 *Present :* **Howard C.J., Soertsz and de Kretser JJ.**

THE KING *v.* WEGODAPOLA.

63—M. C. Kurunegala, 67,585.

Abduction with intent to force or to seduce to illicit intercourse—Statutory statement—Wrong inference from statutory statement—Misdirection—Document prejudicial to accused—Statement by Counsel with reference to document in presence of Jury—Complaint in answer to question admitted in corroboration—Court of Criminal Appeal Ordinance, s. 6.

The accused was charged under two counts:—

(1) With abducting N in order that she may be forced to illicit intercourse under section 357 of the Penal Code.

(2) With abducting N in order that she may be seduced to illicit intercourse under the same section.

He was acquitted on the second count and convicted on the first count.

In his statutory statement the accused stated, *inter alia*, "We enjoyed as husband and wife".

The statement as regards the girl leaving her home refuted any suggestion of force or beguilement on the part of the accused.

The learned Judge in the course of the charge to the Jury on the question whether the accused intended to use force for the purpose of illicit intercourse stated as follows:—

> "He goes further in his statement and says that he had intercourse. So you would not have much difficulty once you find that he abducted her to say that he did so in order that she may be forced to illicit intercourse."

Held, that the invitation of the Judge to the Jury to draw such an inference amounted to a misdirection.

A document showing that the accused had given notice of marriage with another person at a time when it was suggested by the defence that he was in terms of affection with N is admissible and no inference as to the bad character of the accused could be drawn from it.

A complaint made by N which was admitted in corroboration of her evidence under section 157 of the Evidence Ordinance is not inadmissible merely because it was made in answer to a question provided the question was a natural one under the circumstances and was not of a leading or suggestive character.

A communication made by Crown Counsel in the presence of the Jury of the existence of a document which was prejudicial to the accused but which the Crown was not in a position to produce in due course of law is sufficient to invalidate a conviction.

Semble.—It is not competent to the Court of Criminal Appeal to substitute a verdict of guilty on count (2), on which the accused was acquitted, to that returned by the Jury on count (1).

THIS was an appeal from a conviction by a Judge and Jury before the Western Circuit. The facts are stated in the headnote.

H. V. Perera, K.C. (with him *G. G. Ponnambalam* and *S. N. Rajaratnam*), for the accused, appellant.—There are 12 grounds of law set out in the petition of appeal. Grounds (3), (4), (9), and (10) are now abandoned. As to ground (1), the trial Judge allowed the prosecution to lead in evidence document X, a notice of marriage alleged to have been given by the accused in July, 1939. This document was not marked on the back of the indictment. It was also indirect evidence of bad character of the accused.

Ground (2) : The Crown applied for the first time at the trial to lead in evidence certain love letters written by Miss Madahapola, the prosecutrix, to her fiancé, Mr. Palipane, at the time of the alleged abduction. The application was made and discussed in the presence of the Jury. It was refused, but the discussion that took place must have prejudiced the case of the accused in the minds of the jurors in view of the fact that the defence was one of elopement. The proper course when a point on admissibility of evidence involving discussion of facts, which may be prejudicial to the accused, is to be argued, is for the Jury to be asked to retire—*R. v. Thomson* [1]. The fact that Counsel for the defence did not raise any objection is not material. The letting in of inadmissible evidence vitiates a conviction, for the prime consideration is a fair trial—*R. v. Gibson* [2] ; *Maxwell v. Director of Public Prosecutions* [3].

Ground (5) : The Judge misdirected the Jury when he told them that no inference of any kind either way could be drawn from the circumstances that the Crown did not call the Resthouse Keeper of Habarana, whose name was at the back of the indictment and who was the only independent witness available to support the story of Miss Madahapola regarding the incidents at the Resthouse. This misdirection is not covered by the ruling in *The King v. Chalo Singho* [4]. Under section 114 (*f*) of the Evidence Ordinance the Court may presume that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it.

[1] *(1917) 2 K. B. 630 ; 12 C. A. R. 261 at 269.*
[2] *L. R. 18 Q. B. D. 537.*
[3] *(1935) A. C. 309 at 323.*
[4] *(1941) 42 N. L. R. 269.*

Ground (6): The appellant has been convicted on count (1) of the indictment of having abducted Miss Madahapolā (aged 18) in order that she may be forced to illicit intercourse. The evidence led for the prosecution does not establish the necessary ingredient namely, that the purpose of the alleged abduction was that the prosecutrix might be *forced* to illicit intercourse. There was nothing beyond mere overtures on the part of the appellant. Some act of overcoming resistence is necessary to prove intention of using force.

[HOWARD C.J.—Cannot the conviction be altered now to one of abduction in order to seduce ?]

No, the Jury have already acquitted the accused on that count, viz., count (2) of the indictment.

Ground (7): The statement alleged to have been made by Miss Madahapola to Mr. Melder is inadmissible in law. It was admitted as corroboration under section 157 of the Evidence Ordinance. It was made on the following day about ten hours after the alleged abduction and cannot be said to have been made "at or about the time when the fact took place". See *Mohideen v. Johanis* [1]. Our law is similar to the English law in regard to such complaints (*Dona Carlina v. Jayakody* [2]) although a different view was taken in *Ponnammah v. Seenitamby* [3]. For the English law see *R. v. Christie* [4]. The statement was made by the girl to Mr. Melder not voluntarily but in answer to certain questions put by the latter. This circumstance too renders it inadmissible (*R. v. Osborne* [5], *R. v. W. A. Fernando* [6]). Even if the statement was admissible, the Judge was wrong in not directing that it was not evidence *per se* of the truth of the facts complained of.

Ground (8): The Judge, in his summing-up, referred to the accused as "contemptible" and as "a man of low mentality" and by using such expressions gave the impression to the Jury that the accused was a man of bad character. This was improper (*R. v. Counter* [7]).

Grounds (11) and (12): There was serious misdirection when the Judge referred to the statutory statement of the accused as containing proof of the intention of the accused to use force. That statement, when read as a whole, does not warrant any such inference. It has already been submitted under ground (6) that the intention is an essential ingredient of the offence. Further, the intention should be present at the very commencement of the abduction (*Upendra Nath Ghase v. Emperor* [8]).

On the evidence, the verdict of the Jury is unreasonable.

[SOERTSZ J.—In *R. v. Andris Silva et al.* [9], cases were considered in which this Court would interfere on the ground that a verdict is unreasonable, but the present one does not seem to be such a case.]

Section 5 (1) of the Court of Criminal Appeal Ordinance expressly provides that an appeal may be allowed when the verdict is unreasonable. Moreover, in this case the summing-up of the trial Judge was in favour of an acquittal.

[1] *(1915) 1 C. W. R. 70.*
[2] *(1931) 33 N. L. R. 165.*
[3] *(1921) 22 N. L. R. 395.*
[4] *(1914) A. C. 545.*
[5] *(1905) 1 K. B. 551.*
[6] *(1940) 19 C. L. W. 21.*
[7] *7 23 C. A. R. 22.*
[8] *A. I. R. 1940 Cal. 561.*
[9] *(1940) 41 N. L. R. 433.*

[HOWARD C.J.—Why then was no application made for a certificate?]

It would appear that a certificate is granted *ex mero motu.*

[HOWARD C.J.—There is nothing to prevent the defending Counsel from making an application.]

The observations of the presiding Judge may be taken into consideration in appeal—*R. v. Willie Hart* [1].

E. H. T. Gunasekera, C.C. (with him *G. E. Chitty, C.C.*), for the Crown.—To deal with the points in the order already adopted, firstly, the notice of marriage was produced in answer to a suggestion made by the defence.

[The Court did not wish to hear Counsel further on this point.]

Ground (2): There is a risk of prejudice involved alike in a suggestion that the Jury should retire and in an argument in the presence of the Jury. It is for the defence to choose which risk they will take, and the making of any suggestion by the Judge or the prosecution may well be open to objection. What was held in *R. v. Thomson* (*supra*) was that, when it is decided that an argument should be heard in the absence of the Jury, the argument should be heard in open Court and not in chambers. A case more in point is *R. v. Anderson* [2]. The order on the application, delivered is the hearing of the Jury, contained a sufficient warning to the Jury to ignore the reference to the letters.

Ground (5): The comments of the Judge regarding the failure to call the Resthouse Keeper can be justified by the ruling in *R. v. Chalo Singho* (*supra*).

Ground (6): If the Jury were satisfied that the girl was abducted, there was sufficient evidence that the accused's intention was to force her to illicit intercourse. The intention suggested by the fact of abduction and the circumstances that the accused was a young man, that the girl was of marriageable age, and that he kept her for a night in a distant resthouse where he occupied the same room with her, is an intention to force or seduce her to illicit intercourse. See *Mohamed Sadiq v. Emperor* [3]. The girl's evidence that he threatened to shoot Palipana if she did not yield herself to him is evidence that his intention was to force her to intercourse. If the accused had any different intention the burden was on him to prove it: *Evid. Ord. s. 106* and *illustration* (*a*). He did not give evidence.

Ground (7): The statement of the girl to Melder was admissible as corroborative evidence under section 157 of the Evidence Ordinance and also to prove the consistency of the story of the girl. It was made "at or about the time" because the abduction can be said to have terminated only when the girl left the accused's car and spoke to Mr. Melder.

With reference to the objection that the statement was made in reply to questions, *R. v. Osborne* [4] was considered later in *R. v. Richard Norcott* [5]. The questions were not of a leading, inducing or intimidating character. Even if they were leading questions, section 157 of our Evidence Ordinance is wide enough to make the answers admissible.

Ground (8): The expressions "contemptible", &c., were used by the Judge in relation only to the conduct of the accused in this particular case and were not allusions to general bad character.

[1] *10 C. A. R. 176 at 178.*
[2] *21 C. A. R. 178.*
[3] *(1938) A.I.R. Lahore 474.*
[4] *(1905) 1 K. B. 551.*
[5] *12 C. A. R. 166.*

Grounds (11) and (12): It is possible to justify the direction of the Judge that intention to force to illicit intercourse can be inferred from the statutory statement of the accused alleging actual intercourse, when that statement is considered in conjunction with the evidence of the girl. Even if it was a misdirection, it was innocuous, because once the Jury found abduction they could not reasonably acquit the accused of both abduction with intent to force to illicit intercourse and of abduction with intent to seduce to illicit intercourse. The question then would be not whether the accused had a criminal intention but which of two equally criminal intentions, and our law permits a conviction in the alternative: Criminal Procedure Code, section 307, Penal Code, section 67A. The Judge directed the Jury on the footing that counts (1) and (2) were in the alternative. If the alleged misdirection has resulted in a wrong conviction under count (1), the right verdict was not an acquittal on both counts but a conviction on count (2) or a conviction in the alternative. In any event, upon a proper direction there would have been a conviction of an offence punishable under section 357 of the Penal Code. There is therefore no miscarriage of justice.

[HOWARD C.J.—Is it open to this Court to alter the conviction to one of abduction in order to seduce, notwithstanding the acquittal on that count ?]

Yes, section 6 of the Court of Criminal Appeal Ordinance would permit it.

The verdict of the jury is not unreasonable.

H. V. Perera, K.C., in reply.—Section 106 of the Evidence Ordinance does not alter the burden of proof as regards intention. From the fact of abduction alone the necessary intention cannot be inferred.

The conviction cannot be altered now to one of abduction with intent to seduce. The words "some other offence" in section 6 of the Court of Criminal Appeal Ordinance cannot include an offence regarding which there is already a verdict of acquittal.

Cur. adv. vult.

July 31, 1941. HOWARD C.J.—

In this case the appellant was convicted of abductiing one Nandawathie Madahapola in order that she may be forced to illicit intercourse in contravention of the provisions of section 357 of the Penal Code and sentenced to rigorous imprisonment for a term of three years. Mr. Perera on his behalf has submitted that on various grounds of law the conviction should be set aside and has also contended that on the facts the verdict is unreasonable and cannot be supported by the evidence.

In the notice of appeal the appellant has based his appeal on twelve grounds of law. Of these grounds (3), (4), (9) and (10) were abandoned in this Court by Mr. Perera. We are of opinion that there is no substance in grounds (1), (5) and (8). With regard to ground (1) Mr. Perera contended that the notice of marriage, the document marked "X", should not have been admitted in evidence as it was not on the back of the indictment. Moreover, inasmuch as it was indirect evidence of the bad character of the appellant, the latter was prejudiced by its admission. The document showed that the appellant had given notice of marriage in

July, 1939, at a time when it was suggested by the defence that he was on terms of affection with Nanda. It was, therefore, admissible in evidence to rebut the suggestion that at this time their relations were of an affectionate character. Nor do we think that an inference as to the appellant's character can be deduced from this document. Ground (5) complains that the learned Judge misdirected the Jury when he told them that no inference of any kind either way could be drawn from the circumstance that the Crown did not call the Resthouse Keeper of Habarana whose name was on the back of the indictment as a witness. In the recent case of *R. v. Chalo Singho*[1], this Court in a judgment delivered by Soertsz J., in which all the authorities were reviewed, held that there is no non-direction by the Judge when he omits to refer to the presumption under section 114 (f) of the Evidence Ordinance in cases in which the Crown does not call or tender for cross-examination, on the request of the prisoner's pleader, a witness whom the prisoner's pleader had himself an opportunity of calling. Mr. Perera accepts the authority of this case, but maintains that the learned Judge's direction would not have been open to question if he had merely refrained from commenting on the failure of the prosecution to call the Resthouse Keeper. The matter of drawing an inference one way or the other should have been left to the Jury. We do not consider there was any misdirection. It was open to either side to call the Resthouse Keeper and in these circumstances the Judge's comment was justified. With regard to ground (8), we are of opinion that the expressions used by the learned Judge in his charge to the Jury had reference to the appellant's behaviour in this particular affair and could not be regarded by the Jury as stigmatising him as a man of bad character.

The remaining grounds of appeal have required and received our most careful consideration. Grounds (6), (11) and (12) may be considered together. Mr. Perera makes two points. He first of all contends that there was no evidence that the appellant had any intention to use force, an ingredient of the offence of which he was found guilty. In this connection it has been maintained that it must be established that force was intended at the time of the abduction. Abduction, however, is a continuing offence, and an intention to use force to accomplish his purpose could be inferred by the Jury if they believed the story of the girl that the appellant said he would shoot Ivor Palipane if she did not allow him to have her and that he only desisted in his attempts when she threatened to shout and scream if he did not leave her alone. In the case of *Mohamed Sadiq v. Emperor*[2], it was held that the natural presumption when a young man abducts a girl of marriageable age is that he abducted her with intention of having sexual intercourse with her either forcibly or with her consent after seduction or after marrying her. If any other intention is alleged to exist, the burden is on accused to prove it. We think, therefore that there was evidence on which a Jury could find an intention to use force.

Mr. Perera also contends that there was a misdirection by the learned Judge in the reference in the charge to the statutory statement made by

[1] *42 N. L. R. 269.* [2] *(1938) A. I. R. Lahore 474.*

the appellant. The passage to which objection is taken is worded as follows :—

"Now, if you hold that he did abduct, you will have to find whether he did that with this intention—in order that she may be forced to illicit intercourse. I do not think there will be much difficulty with regard to this. Then what is the position ? He abducted her, he took her, got her into the room and admittedly, according to his own statement, he not only made the attempt, but he succeeded in the attempt. The girl herself says that he did attempt to have intercourse. He came and disturbed her clothes. He goes further in this statement and says that he had intercourse. So, you would not have much difficulty once you find that he abducted her to say that he did so in order that she may be forced to illicit intercourse. It is for you to form an opinion. I am just telling you. Well, if you come to that conclusion then he is guilty on the first charge. It may be that he did not intend forcing her, but intended only to persuade her to illicit intercourse by quiet means. Having abducted her, he thought, if I place her in a room and create a situation which would be favourable to my having my own way with the girl she would be agreeable. If you think he did not intend to force sexual intercourse, but intended to force her to a situation where he would know her carnally, then, that is seduction. It is a case either of intending to force her to illicit intercourse or a way to seducing her to intercourse. If you find that he had abducted her, then consider the other circumstances with regard to the intercourse and see whether you will find him guilty of counts (1) or (2). Then coming to count (3) again if you find that he had abducted her then you got his own statement that he went and had intercourse with her."

Mr. Perera contends this passage suggests to the Jury that if they are satisfied that the appellant abducted the girl, they can infer from his statutory statement first of all that he intended to force her to illicit intercourse or in the alternative an intention to seduce her to illicit inercourse. Mr. Perera further maintains that such an intention cannot be inferred from the statutory statement of the appellant which refutes the suggestion of abduction and must be considered as a whole. Mr. Perera admits that the direction would be less objectionable if the learned Judge had invited the Jury to infer from the statement of the appellant an intention merely to seduce. As the Jury have found the appellant not guilty on the second count, he contends that this Court has no power to substitute a conviction on this count even if it considered that the evidence warranted such a conviction. The Jury was invited by the learned Judge to make the inference to which exception is taken by reason of the fact that the appellant in his statutory statement said: "We enjoyed as husband and wife". Twice in his charge the learned Judge states that if the appellant abducted the girl, the Jury would not have much difficulty in finding that he did so in order that she may be forced to illicit intercourse. In the first reference this absence of difficulty is because as stated by the learned Judge—

"according to his own statement, he not only made the attempt, but he succeeded in the attempt."

The Jury would from this passage infer that the portion of the statement of the appellant admitting having sexual intercourse that night indicated an intention on the part of the appellant to overcome any resistance of the girl to such intercourse. The second reference to the absence of difficulty is put by the learned Judge as follows :—

> "He goes further in this statement and says that he had intercourse. So you would not have much difficulty once you find that he abducted her to say that he did so in order that she may be forced to illicit intercourse."

Once again from the admission by the appellant that intercourse took place the Jury are invited to find that there was an intention to force to illicit intercourse. I do not consider that such an intention can be inferred. It is true that immediately after the passage to which objection is taken the learned Judge tells the Jury that it is for them to form an opinion and also that, if they think he did not intend to force sexual intercourse, but only to place her in a situation when he would know her carnally, it would only be seduction and therefore he would be guilty only under count (2.) The majority of the Court are of opinion that in spite of the matter being left to the Jury the invitation by the learned Judge to draw the inference I have mentioned amounted to misdirection. They are also of opinion that any inference to be invited from the statutory statement of the appellant should regard that statement in its entirety and not merely as an isolated passage. In this connection it has to be borne in mind that the statement as a whole in regard to the girl leaving her home refutes any suggestion of force or beguilement. For reasons given later in the judgment it is unnecessary to consider whether a verdict of guilty on count (2) could be substituted by this Court for that returned by the Jury on count (1). The case of *R. v. Florence Fisher*[1], seems to indicate that we cannot adopt such procedure.

Ground (2) alleged that during the course of the trial the Crown applied to produce in evidence certain love letters written by the girl Nanda to her fiancé, Palipane, on or about December, 1939, and January, 1940. The application to produce these letters which was refused by the learned Judge after argument on both sides took place in the presence and hearing of the Jury. It was submitted that the appellant could not have failed to have been prejudiced by this argument. Crown Counsel in making the application stated that the Crown wished to put in evidence certain letters written by the girl during her engagement to Mr. Palipane to show the nature of their relationship. The application followed on a statement by the girl in evidence that she was fond of Palipane. The letters, if admitted in evidence, would rebut the defence of the appellant that he and the girl were on terms of such affection that they were contemplating elopement. Crown Counsel also stated that the purpose of putting in the letters was to rebut the case for the defence that the girl was unhappy about her engagement to Palipane. The learned Judge in refusing the application of Crown Counsel said that the admission of the letters would work serious prejudice to the appellant if they were admitted at that stage. We regard it as most unfortunate that the Jury should have heard the argument on this matter and have become aware of the

[1] *16 C.A.R. 53*

existence of such letters. Neither Counsel suggested that the Jury should retire while the argument took place. The question of the retirement of the Jury during an argument as to the admissibility of evidence was considered by the Court of Criminal Appeal in England in the case of *R. v. Thomson* [1]. In the course of his judgment Lord Reading C.J. laid down the following principle:—

> "No objection was taken on this appeal to the procedure adopted, but in order to prevent any misapprehension as to this Court's view of the proper course to pursue in such circumstances, we are of opinion that whenever the Judge in his discretion thinks it will unfairly prejudice the defence if the argument should be heard in the presence of the Jury, he should direct the Jury to retire to their room, and he should hear the argument in open Court so that it may appear on the shorthand note. This course should only be adopted when the Judge in the exercise of his discretion thinks that the defence would be unfairly prejudiced, and the question cannot be argued in the abstract, as it frequently may be, when the evidence objected to appears on the depositions."

The question of the retirement of the Jury was also considered in *R. v. Anderson.* [2] In that case it was held that the Judge is not entitled to order the Jury to withdraw in order to hear statements in their absence without the consent of the defence. It was also held that Counsel must not convey to the Jury by suggestion or otherwise that there is in existence a document prejudicial to the defence, unless he is in a position to produce that document in due course of law : such a communication is sufficient to invalidate a conviction. We are of opinion that in this case the existence of a document prejudicial to the defence and which the Crown was not in a position to produce was brought to the notice of the Jury. Such procedure could not have failed to prejudice the defence.

Ground (7) complained that the girl's statement to Mr. Melder was inadmissible in evidence, and if admissible, the learned Judge should have warned the Jury that it did not amount to corroboration of her evidence in Court. The statement was admitted as corroboration of the girl's evidence under section 157 of the Evidence Ordinance. Mr. Perera contended that it would not be evidence under the provision of the law as it was not made "at or about the time when the fact took place" and was moreover made in answer to questions. He also took the objection that parts of the statement made by the girl to Mr. Melder did not come within the ambit of the words "relating to the same fact". We are of opinion that the statement was made "at or about the time when the fact took place". The fact must be taken to be the act of abduction. Abduction being a continuing offence the girl made the statement at the earliest opportunity to a person to whom it would be natural to make a complaint. With regard to the objection that the statement was elicited in reply to questions, Mr. Perera referred us to the case of *R. v. Osborne* [3] where the following passage occurs in the judgment of the Court of Criminal Appeal delivered by Ridley J.:—

> "It appears to us that the mere fact that the statement is made in answer to a question in such cases is not of itself sufficient to make it

[1] *(1917) 2 K. B. 630.* [2] *21 C. A. R. 178.* [3] *(1905) 1 K. B. 551.*

inadmissible as a complaint. Questions of a suggestive or leading character will, indeed, have that effect, and will render it inadmissible, but a question such as this, put by the mother or other person, "What is the matter?" or "Why are you crying?" will not do so. These are natural questions which a person in charge will be likely to put; on the other hand, if she were asked, "Did so-and-so" (naming the prisoner) "assault you?" "Did he do this and that to you?" then the result would be different, and the statement ought to be rejected. In each case the decision on the character of the question put, as well as other circumstances, such as the relationship of the questioner to the complainant, must be left to the discretion of the presiding Judge. If the circumstances indicate that but for the questioning there probably would have been no voluntary complaint, the answer is inadmissible. If the question merely anticipates a statement which the complainant was about to make, it is not rendered inadmissible by the fact that the questioner happens to speak first. In this particular case, we think that the Chairman of Quarter Sessions acted rightly, and that the putting of this particular question did not render the statement inadmissible."

It appears to us that some of the replies given by the girl to questions put by Mr. Melder are objectionable having regard to the principles laid down in *R. v. Osborne* (*supra*), an authority accepted by this Court in *R. v. Waduge Arthur Fernando*[1]. Mr. Gunasekera on behalf of the Crown meets the objections taken to the admission of this evidence by a reference to the record of the trial which indicates that the fact of a statement being made by the girl to Mr. Melder was first elicited in reply to a question put by the defence. We do not consider that the putting of this question justified the admission of the questions and replies that offended against the rule laid down in *R. v. Osborne*. We do not consider that there is much point in Mr. Perera's complaint that the learned Judge failed to direct the Jury that the statement of the girl to Mr. Melder did not corroborate her evidence. In this connection it must be borne in mind that the statements were put in under section 157 of the Evidence Ordinance with a view to "corroborating" the testimony of the girl. It might perhaps have been of assistance to the Jury if the learned Judge had directed them that the statement to Mr. Melder was not fresh evidence of an independent character, but merely went to strengthen the girl's evidence in view of the fact that consistency is a ground for belief in a witness' veracity.

There now remains for consideration the further question as to whether the verdict of the Jury must have been the same if the irregularities to which I have referred had not taken place. The majority of the Court are not able to say that it would. In these circumstances the interests of justice require that the appeal should be allowed and the conviction of the appellant quashed.

The appellant had also applied for leave to appeal on the facts, on the ground that the verdict of the Jury is unreasonable and cannot be supported by the evidence. In view of the decision of the majority of the

[1] *19 C. L. W. 21.*

Court on the submission of Counsel for the appellant on grounds of law, it is unnecessary to arrive at a conclusion on this point. It has, however, been laid down on numerous occasions by this Court, following the practice of the Court of Criminal Appeal in England, that we do not sit as a Jury and will not interfere with the findings of a Jury on a question of fact unless the verdict is unreasonable or unsupportable on the evidence or a manifest injustice has occurred. We think it very doubtful whether this case is one that can be brought within the category of cases where the Court of Criminal Appeal in England has set aside the verdict of the Jury on a question of fact.

We have given careful consideration to the question as to whether in the circumstances of the case a new trial should be directed. In this connection we have attached considerable weight to the opinion of the Judge as reflected in his charge. The majority of the Court are of opinion that a new trial would not serve the interests of justice.

In conclusion there is one other matter on which the Court in the interests of the proper administration of justice is impelled to comment. The record of evidence in the case is out of all proportion to the facts in issue. This is due to the inordinate length of the cross-examination. Counsel for the accused have thought fit to cross-examine the Crown witnesses on matters not even remotely relevant to any point in issue. There is tedious iteration in some of the questions asked, and prolonged emphasis is laid on some matters, trivial in relation to the main issues. Such procedure can only have the effect of distracting the attention of the Jury from the real issues on which their minds should be focussed. The resultant confusion does not make for the due administration of justice. In fact a criminal trial in such circumstances becomes a travesty of justice. Moreover a protracted and irrelevant cross-examination not only adds to the cost of litigation, but is a waste of public time. No doubt advocates who cross-examine at such inordinate length do so under the impression that they are serving the best interests of their clients. This is a fallacy and only serves to bring home the fact that they are unfamiliar with the art of cross-examination as formulated by distinguished lawyers. Advocates often forget that cross-examination, though a powerful engine, is likewise an extremely dangerous one, very apt to recoil even on those who know how to use it. In this connection I cannot do better than suggest that Advocates interested in the due administration of justice, and who are at the same time anxious to put before the Jury the case of their client in the most favourable light should scrutinize and take to heart the rules for examination of witnesses in Part 2 of Book IV. of Best on Evidence. I would also invite attention to the judgment of Lord Sankey in Mechanical and General Inventions Co. and *Lehwess v. Austin and the Austin Motor Co.*[1]

Conviction set aside.

[1] *(1935) A. C. at p. 359.*