1935 *Present:* **Dalton S.P.J., Maartensz and Koch JJ.**

THE KING *v.* GRANIEL APPUHAMY

101—P. C. Chilaw, 44,534.

Misdirection to jury—Defence of alibi—Statement to police—Accused cross-examined on statement—Denial of statement—Failure of Crown to prove statement—Charge to jury—Failure of Judge to ask the jury to exclude the statement.

Where a statement alleged to have been made by an accused person to the police was put by the Crown to the accused in order to discredit him when giving evidence on his behalf in support of his plea of an *alibi*, and where the statement, on being denied by the accused, was not legally proved by the Crown,—

***Held*, that the failure of the presiding Judge to direct the jury in his charge to disregard the unproved statement, in considering the evidence for the defence, amounted to a misdirection.**

THIS was a case stated by the Commissioner of Assize, Western Circuit, under the provisions of section 355 (1) of the Criminal Procedure Code.

The facts are stated in the reference as follows:—

"When the accused was giving evidence on his own behalf in support of his plea of an *alibi*, Crown Counsel, with the intention of discrediting the evidence of the accused, put to him a statement, alleged to have been made by him to the prosecuting Sub-Inspector of Police, E. G. Arendtsz, to the effect that he had heard that a drunken man was lying fallen on the road, and had gone to the spot and seen the man there, and later saw him being removed to the Police Headman's house. Counsel for the defence objected, under section 25 of the Evidence Ordinance to the alleged statement being admitted, but I overruled the objection, on the authority of *King v. Cooray* [1], as the statement was not in the nature of an admission or confession, but an exculpatory one, and I concluded the prosecution intended to prove it. In my charge to the jury I made reference to this alleged statement in the following terms:—

'The accused is alleged to have made a statement to the Inspector that he heard a drunken man was lying fallen on the road, and he went there and saw him, and later saw him being removed to the Police Headman's house. I allowed the questions to be put to the accused as the statement was not in the nature of an admission, or confession, and the questions were put with the object of discrediting the witness. The accused has denied making this statement. You have to make up your minds whether the accused was present and assaulted the injured man, as alleged, or was at the local option polling station at the time.'

"As the statement had not been proved, my purpose in referring to it was to indicate to the jury that it was only a statement, alleged to have been made, by the accused, which he had denied; that it had not been proved, and there was no evidence therefore that it had been made

[1] *28 N. L. R. 74.*

"Learned Counsel for the defence, however, informed me that he, at the time, made a note of my reference to this statement, and that I had omitted to mention to the jury that there was no evidence of its having been made, and I, therefore, allowed the application.

"5. It was contended by Counsel for the defence that I should, in express terms, have told the jury that there was no proof that the statement had been made, and that they should exclude it from their purview when considering the evidence for the defence.

"The following case would therefore arise for consideration:—

'Where a statement, alleged to have been made to the police by the accused, when put to the accused by the Crown in order to discredit him when giving evidence on his own behalf in support of his plea of an *alibi*, is denied by the accused and the said statement although it discredits the evidence of the accused in respect of his plea, is not legally proved by the Crown, does the failure of the presiding Judge expressly to direct the jury, in his charge to them, to exclude the said unproved statement from their purview when considering the evidence for the defence, amount in law to a misdirection?'"

Sri Nissanka (with him *Colvin R. de Silva* and *Senaratne*), for accused—The Inspector, who was a witness for the Crown, should have been called to prove the making of the statement by the accused. The presiding Judge drew the jury's attention to the contradiction between the evidence of the accused before the jury and his statement to the Inspector. It is difficult to gauge how far the mind of the Jury was affected by the statement alleged to have been made by the accused.

The verdict of the jury should not be given on any evidence except that which the law allows—see *R. v. Gibson* [1]. The conviction is bad, if the jury has been directed on legally inadmissible evidence; and this notwithstanding that there was other evidence properly admitted and sufficient to warrant a conviction.

The evidence is inadmissible unless the accused's statement was proved. We have only the bare denial of the accused.

Counsel cited *R. v. Dyson* [2] and *R. v. Norton* [3], cases based on section 4, sub-section (1) of the English Criminal Appeal Act of 1907.

There should be a full direction by the Judge to the jury—see *R. v. Wann* [4]. The direction by the Judge here amounts to a misdirection.

J. E. M. Obeyesekere, Acting Deputy S.-G. (with him *Kariapper, Acting C.C.*), for the Crown.—There is no misdirection, but an omission to direct. Even if there is a misdirection, it is not such a misdirection as has occasioned a failure of justice. One has to look at the whole case and see what verdict was possible without this particular evidence.

The Judge on a certain point omitted to direct the jury. Where there is merely an omission to direct, we have to see whether such omission was on a material point.

As to what is a misdirection see *King Emperor v. Minhwasayo* [5]; matters of prime importance should not be omitted from the Judge's charge to

[1] *(1887) 18 Q. B. D. 537.*
[2] *(1908) 2 K. B. 454.*
[3] *(1910) 2 K. B. 496.*
[4] *107 L. T. 462.*
[5] *11 Crim. Law Journal of India. p. 13.*

the jury. Non-direction is not a misdirection, unless it is on a point of prime importance. See also *R. v. Fattechand* [1].

"Improper advice given by a Judge to a jury amounts to a misdirection"—see *R. v. Buksh* [2].

It may be conceded that Crown Counsel's intention in cross-examining the accused on this statement was to disprove the *alibi*. But the Judge's omission to direct was not on a material point. On the jury's verdict it shows that they accepted the case for the Crown, and that they rejected the accused's version.

Even where a misdirection exists, the High Court need not order further inquiry, but may consider the evidence on the whole case and enter a verdict—see *King Emperor v. William Smither* [3].

In *King v. Henry Beecham* [4], inadmissible evidence of accused's bad character was put in; but the Court, having regard to the other evidence in the case, held that no substantial miscarriage of justice had occurred.

Looking at the case as a whole, what is a proper verdict? *Vide* judgment of Lord Reading in *R. v. Williams and Woodley* [5].

Counsel also cited *R. v. Arnolis Perera* [6], where on a reference under section 355 of the Criminal Procedure Code, a new trial was ordered.

Sri Nissanka (called upon to reply on the question whether there was a substantial failure of justice).—When once it is established that a direction is improper, it becomes very difficult to decide whether the verdict is right or wrong.

December 12, 1935. DALTON S.P.J.—

This matter came before the Court in the form of a case stated by the Commissioner of Assize, Western Circuit, Colombo, under the provisions of section 355 of the Criminal Procedure Code.

At the close of the argument on the 12th instant we held that there was such an omission to direct the jury as amounted, in the circumstances, to a misdirection, and we quashed the conviction stating that the reason for our conclusion would be put in writing later.

The facts are set out in the case stated. The accused was indicted on a charge of attempted murder, and was convicted of the offence of voluntarily causing grievous hurt, being sentenced to undergo five years' rigorous imprisonment.

At the close of the case for the prosecution the accused himself went into a witness-box and called other witnesses on his behalf. The defence set up was an *alibi*, for the purpose of proving he was not in the village at the time the injured man received his injuries, but some 4½ miles away attending a local option poll.

In the course of the cross-examination of the accused by Crown Counsel, the latter put to him a statement which Crown Counsel suggested he had made to a Sub-Inspector of Police who was inquiring into the offence. This statement, it was suggested, was inconsistent with his defence that he was elsewhere, but was to the effect that he was at home in the village and saw the injured man lying on the road.

[1] *5 Bom. H. C. Rep. 85.*
[2] *(1806) 5 Southerland's W. R. (Crim.) 80, at p. 90.*
[3] *(1903) 26 I. L. R. (Mad.) 1, at pp. 8 and 16.*
[4] *(1921) 3 K. B. 464.*
[5] *(1920) L. J. 89 K. B. D. 557.*
[6] *28 N. L. R. 481.*

The shorthand note of the proceedings contains the following record, "Crown Counsel desires to put to the witness his statement to the police —proceeds to read out that statement". Defending Counsel, Mr. Sri Nissanka, thereupon got up and objected, his reason being that a statement alleged to have been made by accused to the Sub-Inspector of Police was inadmissible. Counsel states he was not aware of the contents of the statement at the time, but was under the impression that Crown Counsel might be seeking to prove a confession, which would be inadmissible, under section 25 of the Evidence Ordinance. His objection was overruled and the cross-examination continued. This argument took place in the presence of the jury. Crown Counsel thereupon put the whole of the alleged statement to the accused, reading it from the Police Inspector's notebook. The accused stated he had made a statement to the police but denied it was the statement read out to him.

There is no question now as to the inadmissibility of the evidence that Crown Counsel sought to extract from the accused. His Counsel concedes that the learned Commissioner was correct in overruling his objection. It is clear, however, that the learned Commissioner concluded that, in the event of the accused denying the truth of the statement, the prosecution intended to prove it. In our opinion, the questions based upon this statement should not have been put to the accused at all, unless the prosecution was prepared to go further in the event of the accused denying he had made the statement.

At the close of the defence no request was made by the prosecution to call any evidence in rebuttal, although the Sub-Inspector in question was one of the Crown witnesses and had given evidence earlier.

In the course of his summing up to the jury, the learned Commissioner referred to this alleged statement by the accused to the police. He told them why he allowed the questions to be put to the accused, as the statement was not in the nature of a confession or admission, but they were put with the object of discrediting him. He pointed out that the accused denied making the statement, but he failed to direct them that there was no evidence at all that he had ever made such a statement. The learned Commissioner states his intention in referring to the statement was to indicate to the jury that there was no evidence that it had been made, but he omitted to do so. He then pointed out that they had to make up their minds whether the accused was present and assaulted the injured man, as the Crown alleged, or was at the local option polling station at the time.

The failure to direct the jury that there was no evidence at all that the accused had stated he was on the scene, as suggested in the question put to him in cross-examination, was a serious omission. The method in which Crown Counsel had put the questions, making use of the police notebook, for instance, and reading out a statement, could not, we think, have failed to prejudice accused in the minds of the jury. The impression left upon my mind by the notes on the record and in the case stated is that at the close of the case it was assumed that the accused had made a statement to the police as regards his whereabouts that evening, the

truth of which, however, he denied. The jury were not directed that there was no evidence at all on this point, except his denial. This omission, on a most material point, was a misdirection.

The answer to the question, "Does the failure of the presiding Judge expressly to direct the jury in his charge to them to exclude the said unproved statement from their purview when considering the evidence for the defence amount in law to a misdirection?" must be answered in the affirmative.

In the event of our coming to that conclusion, Mr. Obeyesekere for the Crown further argued that in effect no injustice has been done to the accused. It is impossible, in our opinion, to say here that, had the jury been directed fully, they would have convicted the accused. We are not satisfied that they would necessarily have done so. There was some evidence in support of his *alibi*, given by one of the Crown witnesses. It is true the jury in a rider censured the evidence of that witness, but it is possible that rider was influenced by the prejudice that had been caused to the accused by the prosecution, in the attempts to show that his evidence on the subject of an *alibi* was not in accordance with a previous statement he had made to the police.

We were satisfied this conviction could not stand and we made order accordingly.

MAARTENSZ J.—I agree.

KOCH J.—I agree.

Conviction quashed.