EVIDENCE OF SYSTEM

PART I

Section 15 of the Evidence Act provides that "where there is a question whether an act was accidental or intentional or done with a particular knowledge or intention, the fact that such act formed part of a series of similar occurrences, in each of which the person doing the act was concerned, is relevant".[1]

The general principle has been stated by Lord Herschell in *Makin* v. *Attorney-General of N.S.W.*[2], "it is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts, other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible, if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental or to rebut a defence which would otherwise be open to the accused. The statement of these general principles is easy but it is obvious that it may often be very difficult to draw the line and to decide whether a particular piece

[1] This should be read with section 14 which reads –

"Facts showing the existence of any state of mind, such as intention, knowledge, good faith, negligence, rashness, ill-will or good will towards any particular person, or showing the existence of any state of body or bodily feeling, are relevant when the existence of any such state of mind or body or bodily feeling is in issue or relevant". In the Indian case of *Empress* v. *Vyapoori Moodaliar* (1881) 8 Cal. L.R. 197 a question of law was referred to the High Court "whether in trying the three specific charges of receiving illegal gratification from the firm of Cohen Brothers at Tonghoo in 1876, evidence of similar but unconnected illegal gratifications from the same firm at Thayetmyo in the years 1877 and 1878 is admissible". It was held that the evidence was not admissible. Reference was made to S.14 of the Evidence Act and Garth C.J. said, "We must be very careful not to extend the operation of the section to other cases, where the question of guilt or innocence depends upon *actual facts* and *not upon the state of a person's mind or feeling*. We have no right to prove that a man committed theft or any other crime on one occasion by showing that he committed similar offences on other occasions."

[2] [1894] A.C. 57. See D.B.W. Good, *The Quest for Forensic Truth*, 1974 J.M.C.L. 161 at p. 167.

of evidence is on the one side or the other".[3]

In *Makin's case*, a husband and wife were charged with murdering a baby. Its body was found buried in the garden and they were proved to have agreed to adopt it in consideration of the payment of a small premium by its parents. The prosecution was allowed to lead evidence that the bodies of other babies taken in for small premiums were found buried in the grounds of houses occupied by the accused. The accused were convicted and the Privy Council held that the evidence had been rightly admitted to rebut that the child's death was accidental in the sense that it was not caused by the conduct of the accused.

In *Noor Mohamed* v. *R.*[4], the appellant had been convicted of the murder by poisoning of a woman, Ayesha, with whom he had gone through a ceremony of marriage after the death of his first wife, Gooriah. There was no direct evidence that he had administered the poison. At the trial evidence was admitted tending to show that the appellant had murdered Gooriah, in the same manner on the ground that it tended to rebut the possible defences that the woman Ayesha had committed suicide or had taken poison accidentlly. He had never been charged with the murder of Gooriah. It was held by the Privy Council that the evidence should not have been admitted. Lord Du Parcq said,

"The first comment to be made on the evidence under review is that it plainly tended to show that the appellant had been guilty of a criminal act which was not the act with which he was charged. In *Makin* v. *A.G.for New South Wales*, Lord Herschell L.C. delivering the judgment of the Board, laid down two principles which must be observed in a case of this character. Of these the first was, "it is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused had been guilty of criminal acts other than that covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried". In *Maxwell* v. *D.P.P.*[5] the principle was said by Lord Sankey L.C. with the concurrence of all the noble and learned lords who sat with him to be "one of the most deeply rooted and jealously guarded principles of our criminal law" and to be "fundamental in the law of evidence as conceived in this country".[6] The second principle stated in *Makin's case* was

[3] See Cross on Evidence 4th Edition, 1974, p. 317–318.

[4] [1949] A.C. 182; [1949] 1 All E.R. 365.

[5] [1935] A.C. 309 at p. 317. In this case the accused who was charged with manslaughter of a woman by performing an illegal operation on her had given evidence of his good character. It was held that questions to show that the accused had been acquitted on a previous charge of manslaughter were not relevant to the issue before the jury and should not have been allowed.

[6] See *Director of Public Prosecutions* v. *Kilbourne* [1973] A.C. 729 at p. 757.

"the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental or to rebut a defence which would otherwise be open to the accused". The statement of this latter principle has given rise to some discussion. A plea of "not guilty" puts everything is issue which is a necessary ingredient of the offence charged and if the Crown were permitted, ostensibly in order to strengthen the evidence of a fact which was not denied, and perhaps could not be the subject of rational dispute, to adduce evidence of a previous crime it is manifest that the protection afforded by the "jealously guarded" principle first enunciated would be gravely impaired. This aspect of the matter was considered by the House of Lords in *Thompson* v. *R.*[7] Their Lordships need not allude to the facts of that case. It is enough to say that the evidence there admitted was held to be relevant as one of the indicia by which the accused man's identity with the person who had committed the crime could be established; see Per Lord Parker of Waddington. In the words of Lord Atkinson it rebutted the defence of an alibi which would otherwise have been open. Nothing of the kind can be suggested in the present case. The value of the case for the present purpose is that Lord Sumner dealt particularly with the difficulty to which their Lordships have referred and stated his conclusion thus:

"Before an issue can be said to be raised, which would permit the introduction of such evidence so obviously prejudicial to the accused it must have been raised in substance if not in so many words, and the issue so raised must be one to which the prejudicial evidence is relevant. The mere theory that a plea of not guilty puts everything material in issue is not enough for this purpose. The prosecution must not credit the accused with fancy defences in order to rebut them at the outset with some damning piece of prejudice".

Their Lordships respectfully agree with what they conceive to be the spirit of Lord Sumner's words and wish to say nothing to detract from their value. On principle, however, and with due regard to subsequent authority, their Lordships think that one qualification of the rule laid down by Lord Sumner must be admitted. An

[7] [1918] A.C. 221. In this case the appellant who was charged with acts of gross indecency with boys set up the defence that he was not the man and adduced evidence to prove an alibi. It was proved that the man who committed the offence made an appointment to meet the boys three days later at the time and place where the offence was committed and that the appellant met the boys at the appointed time and place and gave them money. The prosecution tendered evidence that on the occasion when he was arrested, the appellant was carrying powder puffs and that he had indecent photographs of boys in his possession. It was held that in the special circumstances of the case the evidence was admissible on the issue of identity.

accused person need set up no defence other than a general denial of the crime alleged. The plea of "not guilty" may be equivalent to saying "Let the prosecution prove its case, if it can", and having said so much the accused may take refuge in silence. In such a case it may appear (for instance) that the facts and circumstances of the particular offence charged are consistent with innocent intention, whereas further evidence, which incidentally shows that the accused has committed one or more offences, may tend to prove that they are consistent with a guilty intent. The prosecution could not be said, in their Lordships' opinion to be 'crediting the accused with a fancy defence" if they sought to adduce such evidence. It is right to add however that in all such cases the judge ought to consider whether the evidence which it is proposed to adduce is sufficiently substantial having regard to the purpose to which it is professedly directed to make it desirable in the interest of justice that it should be admitted. If, so far as that purpose is concerned, it can in the circumstance of the case have only trifling weight, the judge will be right to exclude it. To say this is not to confuse weight with admissibility. The distinction is plain but cases must occur in which it would be unjust to admit evidence of a character gravely prejudicial to the accused even though there may be some tenuous ground for holding it technically admissible. The decision must then be left to the discretion and sense of fairness of the judge".

In *R. v. Sims*[8] the appellant was charged on an indictment containing ten counts three of which alleged buggery with three men, three as alternate gross indecency with the same man, one gross indecency with a fourth man and the remaining three indecent assaults on three boys. An application for separate trials in respect of each separate man or boy involved was refused. An appeal to the Court of Criminal Appeal was dismissed. Lord Goddard LCJ said:—

> "We start with the general principle that evidence is admissible if it is logically probative, that is, if it is logically relevant to the issue whether the prisoner has committed the act charged. To this principle there are exceptions. One of the most important exceptions in this: evidence that the accused has a bad reputation or has a bad disposition is not admissible unless he himself opens the door to it by giving evidence of good character or otherwise under the Criminal Evidence Act, 1898. The reason for excluding evidence of bad character was said by Willes, J., to be policy and humanity. He thought that evidence of bad character was just as relevant as evidence of good character, but the unfair prejudice created by it was so great that more injustice would be done by admitting it than

[8] [1946] 1 All E.R. 697.

by excluding it: see *R. v. Rowton*.[9] Lord Sumner, however, thought it was irrelevant: see *Thompson* v. *R.*[10] We do not stay to consider which view is correct. The exception is well settled. The question is what are its limits. In our opinion it does not extend further than the interests of justice demand. Evidence is not to be excluded merely because it tends to show the accused to be of a bad disposition but only if it shows nothing more. There are many cases where evidence of specific acts or circumstances connecting the accused with specific features of the crime has been held admissible, even though it also tends to show him to be of bad disposition. The most familiar example is when there is an issue whether the act of the accused was designed or accidental or done with guilty knowledge, in which case evidence is admissible of a series of similar acts by the accused on other occasions, because a series of acts with the self-same characteristics is unlikely to be produced by accident or inadvertence: see *Makin* v. *Attorney General for N.S. Wales*. Another example is where there is an issue as to the nature of an act done by the accused with, or to another person, in which case evidence is admissible of a series of similar acts between them, because human nature has a propensity to repetition and a series of acts are likely to bear the same characteristics: see *R.* v. *Ball*.[11] So also where there is an issue as to the identity of the accused, we think that evidence is admissible of a series of similar acts done by him to other persons, because, while one witness to one act might be mistaken in identifying him, it is unlikely that a number of witnesses identifying

[9] [1865] Le. & Ca. 520. In that case a schoolmaster was charged with indecent assault on a boy and called witnesses to his character. The Crown called a witness to give evidence in rebuttal. This witness said he did not know of the neighbourhood's opinion but gave his own opinion. It was held that the evidence was not admissible, as the witness ought only to speak of the accused's reputation.

[10] See note 7.

[11] [1911] A.C. 47. In this case the accused who were brother and sister were indicted for incest. Evidence was given on behalf of the prosecution to show that at the times specified in the indictment the accused were seen together at night in the same house which contained only one furnished bedroom; and that there was in the bedroom a double bed which bore signs of two persons having occupied it. The witnesses for the prosecution were not cross-examined. The prosecution then tendered evidence of previous acts of the accused with a view of showing what were the relations between them. The evidence was to the effect that the male accused took a house to which he brought the female accused as his wife; that they lived as husband and wife for about sixteen months; and that the female accused gave birth to a child and that she registered the birth giving herself as the mother and the male accused as the father. It was held that the evidence was admissible to establish that the accused had a guilty passion towards each other and to rebut the defence of innocent association as brother and sister.

the same person in relation to a series of acts with the self-same characteristics would all be mistaken. In all these cases the evidence of other acts may tend to show the accused to be of bad disposition, but it also shows something more. The other acts have specific features connecting him with the crime charged and are on that account admissible. A similar distinction exists in respect of articles found in possession of the accused. If they have no connection with the crime except to show that the accused has a bad disposition, the evidence is not admissible; but if there are any circumstances in the crime tending to show a specific connection between it and the articles, the evidence is admissible: see *Thompson v. R.* per Lord Sumner at p. 236. Thus, in the case of burglary, evidence is admissible that house-breaking implements such as might have been used in the crime were found in the possession of the accused. In the case of abortion, evidence is admissible that the apparatus of an abortionist such as might have been used in the crime were found in the possession of the accused. The admissibility does not, however, depend on the circumstance that the articles might have been used in the crime. If there is any other specific feature connecting the articles with the crime, it will suffice. Thus, in the case of Thompson there was no suggestion that the photographs were used in the crime charged, but the House of Lords found a connection between the crime and the photographs in that the criminal on the 16th showed a propensity to unnatural practices by making án appointment for the 19th and the accused showed a like propensity by the photographs found in his possession. In the case of *Twiss*[12] and *Gillingham*[13] there was also no suggestion that the photographs were used in the crime charged, but the court found a connection between the two in that the crime itself showed a propensity to unnatural practices and the photographs showed a like propensity. The specific feature in such cases lies in the abnormal and perverted propensity which stamps the individual as clearly as if marked by a physical deformity. We think that in all the cases where evidence has been admitted there have been specific features connecting the evidence with the crime charged as distinct from evidence that he is of a bad disposition. This is illustrated by the cases on false pretences where

[12] [1918] 2 K.B. 853. In this case the accused was convicted of gross indecency with a boy whose evidence was that he went to the accused's lodgings where he was shown a number of indecent photographs after which the act of which complaint was made took place. It was held that the indecent photographs found in the possession of the accused were admissible against him even though they were not alleged to have been used in the course of the crime charged.

[13] [1939] 4 All E.R. 122.

evidence can be given of other transactions when similar false pretences were used, because they have that specific feature in common; but not of different transactions which only show that the accused was of a generally fraudulent disposition.

It has often been said that the admissibility of evidence of this kind depends on the nature of the defence raised by the accused: see, for instance, the observations of Lord Sumner in *Thompson* v. *R.* at p. 232, and of this court in *R.* v. *Lewis Cole.*[14] We think that that view is the result of a different approach to the subject. If one starts with the assumption that all evidence tending to show a disposition towards a particular crime must be excluded unless justified, then the justification of evidence of this kind is that it tends to rebut a defence otherwise open to the accused; but if one starts with the general proposition that all evidence that is logically probative is admissible unless excluded, then evidence of this kind does not have to seek a justification but is admissible irrespective of the issues raised by the defence, and this we think is the correct view. It is plainly the sensible view. It is only fair to the prosecution, because the depositions have often to be taken and the evidence called before the nature of the defence is known. It is also only fair to the accused, so that he should have notice beforehand of the case he has to meet. In any event, whenever there is a plea of not guilty, everything is in issue and the prosecution have to prove the whole of their case, including the identity of the accused, the nature of the act and the existence of any necessary knowledge or intent. The accused should not be able, by confining himself at the trial to one issue, to exclude evidence that would be admissible and fatal if he ran two defences; for that would make the astuteness of the accused or his advisers prevail over the interests of justice. An attempt was made by the defence in *R. v. Armstrong*[14a] to exclude evidence in that way but it did not succeed.

Applying these principles, we are of opinion that on the trial of one of the counts in this case, the evidence on the others would be admissible. The evidence of each man was that the accused invited him into the house and there committed the acts charged. The acts they describe bear a striking similarity. That is a special feature sufficient in itself to justify the admissibility of the evidence; but we think it should be put on a broader basis. Sodomy is a crime in a special category because, as Lord Sumner said in *Thompson* v. *R.* at p. 235: Persons . . . who commit the offences now under consider-

[14] [1941] 28 Cr. App. R. 43.

[14a] [1922] 2 K.B. 555

ation seek the habitual gratification of a particular perverted lust, which not only takes them out of the class of ordinary men gone wrong, but stamps them with the hallmark of a specialised and extraordinary class as much as if they carried on their bodies some physical peculiarity.

On this account, in regard to this crime we think that the repetition of the acts is itself a specific feature connecting the accused with the crime and that evidence of this kind is admissible to show the nature of the act done by the accused. The probative force of all the acts together is much greater than one alone; for, whereas the jury might think one man might be telling an untruth, three or four are hardly likely to tell the same untruth unless they were conspiring together. If there is nothing to suggest a conspiracy their evidence would seem to be overwhelming. Whilst it would no doubt be in the interests of the prisoner that each case should be considered separately without the evidence on the others, we think that the interests of justice require that on each case the evidence on the others should be considered, and that even apart from the defence raised by him, the evidence would be admissible.

In this case the matter can be put in another and very simple way; the visits of the men to the prisoner's house were either for a guilty or innocent purpose; that they all speak to the commission of the same class of acts upon them tends to show that in each case the visits were for the former and not the latter purpose. The same considerations would apply to a case where a man is charged with a series of indecent offences against children, whether boys or girls; that they all complain of the same sort of conduct shows that the interest the prisoner was taking in them was not of a paternal or friendly nature but for the purpose of satisfying lust. If we are right in thinking that the evidence was admissible, it is plain that the accused would not be prejudiced or embarrassed by reason of all the counts being tried together, and there was no reason for the judge to direct the jury that, in considering whether a particular charge was proved, they were to shut out other charges from their minds".

In *Harris* v. *Director of Prosecutions*[15] the appellant a policeman was charged on an indictment containing eight counts with office breaking and larceny between May and July 1951. He was acquitted by the jury on the first seven counts and convicted on the eighth. Before the appellant pleaded, an application was made by counsel for the defence for a separate trial on the eighth count and that that count should be tried first, counsel submitting that the depositions disclosed no case in respect of the first

[15] [1952] 1 All E.R. 1044.

seven counts and that it would be prejudicial to the appellant to open these counts against him when there was only one count on which there was evidence which would be left to the jury. The learned Judge refused the application on the grounds that the charges could all properly be included in one indictment and that in his opinion, the appellant would not be embarrassed or prejudiced by the trial of all eight counts together. So far as the eighth count was concerned the evidence was that a burglar alarm had been placed on the premises without the knowledge of the appellant who was on duty in the market at the time. Immediately after it sounded, detectives who had been lying in wait ran to the market and saw the accused standing near the premises. He did not approach them immediately although they were persons with whom he was acquainted, but he did so after disappearing from sight for a short period during which he could have placed marked money that had been left on the premises in the bin where it was found. The only evidence on the other seven counts was that thefts which were in some respects similar occurred at times when Harris might have been on duty in the vicinity of the market although this was not shown to be the case. It was held by the House of Lords (Lord Oaksey dissenting) that the evidence with regard to the seven occasions was irrelevant to the charge on the eighth count and as the jury were not warned that the evidence called in support of the earlier counts did not in itself provide confirmation of the eighth charge, the conviction must be quashed. Viscount Simon L.C. said, "in my opinion the principle laid down by Lord Herschell L.C. in *Makin's case* remains the proper principle to apply and I see no reason for modifying it. *Makin's case* is a decision of the Judicial Committee of the Privy Council but it was unanimously approved by the House of Lords in *R.* v. *Ball*[16] and has been constantly relied on ever since. It is, I think, an error to attempt to draw up a closed list of the sort of cases in which the principle operates. Such a list only provides instances of its general application to the particular circumstances of the charge that is being tried. It is the application that may sometimes be difficult and the particular case now before the House illustrates that difficulty. The principle as laid down by Lord Herschell L.C. is as follows: "It is undoubtedly not competent for the prosecution to produce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury and it may be so relevant if it bears upon the

[16] See note 11.

question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental or to rebut a defence which would otherwise be open to the accused". When Lord Herschell speaks of evidence of other occasions in which the accused was concerned as being admissible to "rebut" a defence which would otherwise be open to the accused, he is not using the vocabulary of civil pleadings and requiring a specific line of defence to be set up before evidence is tendered which would overthrow it. If it were so, instances would arise where magistrates might be urged not to commit for trial or it might be ruled at the trial, at the end of the prosecution's case, that enough had not been established to displace a presumption of innocence, when all the time evidence properly available to support the prosecution was being withheld. Avory J. in giving the judgment of the Divisional Court in *Perkins* v. *Jaffery*[17] said "in criminal cases and especially in those where the justices have summary jurisdiction, the admissibility of evidence has to be determined in reference to all the issues which have to be established by the prosecution and frequently without any indication of the particular defence that is going to be set up". Lord Du Parcq pointed out in *Noor Mohamed* v. *R.* commenting on what Lord Summer has said in *Thompson* v. *R.* "an accused person need set up no defence other than a general denial of the crime alleged. The plea of Not Guilty may be equivalent to saying "let the prosecution prove its case, if it can," and having said so much the accused may take refuge in silence. In such a case it may appear (for instance) that the facts and circumstances of the particular offence charged are consistent with innocent intention, whereas further evidence which incidentally shows that the accused has committed one or more other offences may tend to prove that they are consistent only with a guilty intent. The

[17] [1915] 2 K.B. 702. In this case the respondent was charged under the Vagrancy Act 1824 for having exposed his person in a park with intent to insult a certain female Mrs. T. The solicitor for the prosecution intimated that to rebut the respondent's denial he desired to recall Mrs. T. to show that the respondent had been guilty of the same conduct to her at the same time and place on a previous day; he also desired to call other witnesses to show that the respondent had been guilty of a systematic course of conduct by indecently exposing himself with intent to insult females on other occasions at the same place and about the same hour. The justices refused to allow such evidence to be brought. On appeal it was held that the evidence tendered by Mrs. T. to show that the respondent had been guilty of the same conduct to her on a previous occasion was admissible and relevant for the purpose of showing that Mrs. T was not mistaken in her identification and that what was done by the respondent was done wilfully and not accidentlly and that it was done to insult her. As regards the evidence of the other witnesses it was held that unless it appeared clearly that the defence that the act was not done wilfully or with intent to insult a female was going to be relied on and that the other occasions were sufficiently proximate to the alleged offence to show a systematic course of conduct, the evidence should not be admitted.

prosecution would not be said in their Lordship's opinion to be "crediting the accused with a fancy defence" if they sought to adduce such evidence". Lord Herschell's statement in *Makin's case* that evidence of similar facts may sometimes be admissible as bearing on the question whether "the acts alleged to constitute the crime charged in the indictment were designed or accidental" deserves close analysis. Sometimes the purpose properly served by such evidence is to help to show that what happened was not an accident. If it was, the accused had nothing to do with it. Sometimes the purpose is to held to show what was the intention with which the accused did the act which he is proved to have done. In a proper case and subject to the safeguards which Lord Herschell indicates, either purpose is legitimate. Scrutton J. points out the distinction very clearly in *Ball's case.* Sometimes the two purposes are served by the same evidence. The substance of the matter appears to me that the prosecution may adduce all proper evidence which tends to prove the charge. I do not understand Lord Herschell's words to mean that the prosecution must withhold such evidence until after the accused has set up a specific defence which calls for rebuttal. Where for instance *mens rea* is an essential element in guilt, and the facts of the occurrence which is the subject of the charge, standing by themselves, would be consistent with mere accident, there would be nothing wrong in the prosecution seeking to establish the true situation by offering as part of its case in the first instance, evidence of similar action by the accused at another time which would go to show that he intended to do what he did on the occasion charged and was thus acting criminally. *R.* v. *Mortimer*[18] is a good example of this. What Lord Sumner meant in *Thompson* v. *R.* when he denied the right of the prosecution to "credit the accused with fancy defences" was that evidence of similar facts involving the accused ought not to be dragged in to his prejudice without reasonable cause.

There is a second proposition which ought to be added under this head. It is not a rule of law governing the admissibility of evidence, but of judicial practice followed by a judge who is trying a charge of crime when he thinks that the application of the practice is called for. Lord Du Parcq referred to it in *Noor Mohamed's* case immediately after the passage above

[18] [1936] 25 Cr. App. R.1. In this case the appellant was charged with murder, the allegation of the prosecution being that he had knocked down a woman cyclist by deliberately driving a motorcar at her. Evidence was admitted to the effect that shortly before the occurrence which was the subject of the charge he had knocked down two other women cyclists in a similar way and he had stopped his car and assaulted them and that shortly afterwards he had knocked down another woman cyclist and stolen her bag. It was held that the evidence was rightly admitted as being relevant to establish the guilty intent of the appellant either to kill or to cause grievous bodily harm to the woman who was killed by the motorcar.

quoted when he said, "in all such cases the judge ought to consider whether the evidence which it is proposed to adduce is sufficiently substantial, having regard to the purpose to which it is professedly directed, to make it desirable in the interest of justice that it should be admitted. If, so far as that purpose is concerned, it can in the circumstances of the case have only trifling weight the judge will be right to exclude it. To say this is not to confuse weight with admissibility. The distinction is plain, but cases must occur in which it would be unjust to admit evidence of a character gravely prejudicial to the accused even though there may be some tenuous ground for holding it technically admissible. The decision must then be left to the discretion and sense of fairness of the judge". This second proposition flows from the duty of the judge when trying a charge of crime to set the essentials of justice above the technical rule if the strict application of the latter would operate unfairly against the accused. If such a case arose the judge may intimate to the prosecution that evidence of "similar facts" affecting the accused, though admissible, should not be proved because its probably effect "would be out of proportion to its true evidential value" per Lord Moulton in *R.* v. *Christie.*[19] Such an intimation rests entirely within the discretion of the judge. It is of course clear that evidence of "similar facts" cannot in any case be admissible to support an accusation against the accused unless they are connected in some relevant way with the accused and with his participation in the crime; see Lord Summer in *Thompson* v. *R.* It is the fact that he was involved in the other occurences which may negative the inference of accident or establish his *mens rea* by showing "system" or again, the other occurrences may sometimes assist to prove his identity as for instance in *Perkins* v. *Jeffrey.* But evidence of other occurrences which merely tend to deepen suspicion does not go to prove guilt. This is the ground, as it seems to me, on which the Privy Council allowed the appeal in *Noor Mohamed's* case. The Board there took view that the evidence as to the previous death of the accused's wife was not relevant to prove the charge against him in murdering another woman and if it was not relevant it was at the same time highly prejudicial."

In *R.* v. *Ellis*[20] the appellant was convicted of obtaining cheques for large sums of money from one Dickins to whom from time to time he sold pieces of china under an agreement by which he charged D the cost price of the articles plus ten per cent commission. The false practices alleged were that the appellant represented the cost prices of various pieces of china at a much higher figure than was actually the case, thereby obtaining from D larger sums than those to which he was entitled. During the

[19] [1914] A.C. 545.

[20] [1908–1910] All E.R. Rep. 488.

hearing of the case the appellant was cross-examined as to alleged fraudulent practices in cases other than those included in the indictment and this evidence was admitted. It was held by the Court of Criminal Appeal that the evidence only amounted to a suggestion that the appellant was of a generally fraudulent disposition and therefore it was not relevant to prove the false practices charged against the appellant and was inadmissible. Bray J. said "Was the proof that he had committed the Countess Crozier or Peter the Great frauds admissible evidence to prove the frauds with which he was then charged. In other words, could evidence of the frauds have been given by the prosecution? It was argued by Counsel for the Crown that the judgments in *R.* v. *Bond*[21] supported this proposition. We think they show the contrary. Lord Alverstone C.J. says, "The general rule of law applicable in such cases can be clearly stated. It is that apart from express statutory enactments, evidence tending to show that the accused had been guilty of criminal acts other than those covered by the indictment cannot be given unless the acts sought to be proved are so connected with the offence charged as to form part of the evidence on which it is proved". Ridley J. agreed with this judgment and Kennedy L.J. and Bray J. agrees with the principle so enunciated by Lord Alverstone C.J. so that four of the seven judges (a majority) laid down this principle; but when the other judgments are referred to it will be seen that they differ not so much as to principle but as to the application of the principle to the facts of that case. The law on this subject is laid down with perfect accuracy by Channell J. in *R. v. Fisher*[22]. He says giving the judgment of the Court of Criminal Appeal (Lord Alverstone C.J., Channell J. and Lord Coleridge J.J.) "In other words wherever it can be shown that the case involves a

[21] [1906] 2 K.B. 389. In this case the accused a medical man was indicted for feloniously using certain instruments on a woman with intent to procure her miscarriage. At the trial evidence was tendered on behalf of the prosecution to show that some nine months previously the prisoner had used similar instruments upon another woman with the intention of bringing about her miscarriage and that he had then used expressions that he was in the habit of performing similar operations for the same illegal purpose. The evidence was admitted and the accused was convicted. It was held by a majority in the Court of Crown Cases Reserved that the evidence was rightly admitted and the conviction must be upheld. See Williams, Evidence to show Intent (1907) 23 L.Q.R. 28.

[22] [1910] 1 K.B. 149. In this case the accused was tried on an indictment charging him with obtaining a pony and cart by false pretences on June 14, 1909. Evidence was admitted that on May 14, 1909 and on July 3, 1909 the accused had obtained provender from other persons by false pretences different from those alleged in the indictment. It was held that the evidence was wrongly admitted as it did not show a systematic course of fraud but merely that the accused was of a general fraudulent disposition and therefore it did not tend to prove the falsity of the representations alleged in the indictment.

question as to there having been some mistake or as to the existence of a system of fraud, it is open to the prosecution to give evidence of other instances of the same kind of transaction, notwithstanding that the evidence goes to prove the commission of other offences in order to negative the suggestion of mistake or in order to show the existence of a systematic course of fraud". Then applying these principles to the case he was dealing with where the prisoner was charged with obtaining a pony and cart by making certain statements he proceeded "The falsity of those statements is not proved by giving evidence that in other cases the prisoner made other false statements, though it does tend to show that the prisoner was a swindler. But there is no rule of law that swindling is, as regards proof, different from any other offence, and if a man is charged with swindling in a particular manner, his guilt cannot be proved by showing that he has also swindled in some other manner. We are of opinion that the evidence as to the other cases was inadmissible in this case, because it was not relevant to prove that he had committed the particular fraud for which he is being charged, in that it only amounted to a suggestion that he was of a generally fraudulent disposition. On the other hand, if all the cases had been frauds of a similar character, showing a systematic course of swindling by the same methods, then the evidence could be admissible". Applying these principles to the present case, we are of opinion that proof that the appellant had committed the Countess Crozier or the Peter the Great frauds is not admissible evidence that he was guilty of the fraud with which he was charged. As we have already pointed out, the frauds with which the appellant is charged was making false representations as to the cost price of the articles and so obtaining from Mr. Dickins more than the cost plus 10%. In the Countess Crozier and Peter the Great cases there had been no agreement by the defendant to charge only cost plus 10%. The frauds were in representing the articles to be genuine old Dresden china when they were not so. The transactions were entirely distinct. The frauds were not of a similar character. There was no systematic course of swindling by the same methods."

In *R.* v. *Straffen*[23] the appellant who was a patient at Broadmoor Institution was charged with murder by strangulation of a girl of five years of age which was committed during the period when he was at large, having escaped from the institution. After his recapture the appellant was interviewed at the institution by police officers who, without administering a caution, questioned him as to his movements while he was at large. At the trial evidence was admitted of these questions and the appellant's answers thereto and also of the previous murders by strangulation of two other young girls to which the appellant had confessed, the circumstances

[23] [1952] 2 All E.R. 657.

of those murders being similar to those of the murder charged. The appellant appealed against his conviction. It was held that the prosecution was entitled to adduce evidence of the previous murders as tending to identify the person who had committed the murder charged as being the same person as he who had confessed to having murdered the other two girls in precisely the same way, namely the appellant, and therefore the evidence was rightly admitted. Slade J. said that abnormal propensity is a means of identification. "In the present case it was an abnormal propensity to strangle young girls without any apparent motive, without any attempt at sexual interference and to leave their dead bodies where they can be seen and where presumably their deaths would be rapidly detected". In that case there was evidence that the appellant had the opportunity of committing the murder as he had been seen to pass near the place where the victim's body was found near the time at which she must have been strangled, but this was also true of others. The evidence of the other murders committed by the appellant served to identify him, rather than any of the others as the perpetrator of the offence charged.

In *R.* v. *Reading*[24] the accused was charged with robbery. Evidence was given of articles found in the house of the accused and in the car when the police conducted a search. The materials found might be used in the particular type of robber and included articles which might have been stolen in the course of the robbery charged. It was argued that the evidence should not have been admitted as there was no evidence that any of them was used in relation to the robbery of which they were charged. It was held that the evidence was admissible. Edmund Davies L.J. said, "The issue on which what was found on December 8, 1964 was admissible evidence was that of identification. The applicants were all denying that they were present either on Nov. 11 or Nov. 30, 1964. It was in our judgment admissible evidence to show what the scene was as the police found it on December 8, 1964. There are a number of reported decisions where despite the fact that material found on an accused was not used in the perpetration of the crime charged, the fact of its possession was nevertheless held admissible in evidence on the issue of identification." Reliance was placed on *Thompson* v. *Director of Public Prosecutions (Supra)*.

In *R.* v. *Brown and others*[25] the four appellants were jointly tried for an offence of shopbreaking and larceny. One of the appellants pleaded guilty to another count in the same indictment charging a similar offence committed at a different place five days before. Both offences were committed during the absence of the shopkeeper for his luncheon break and in both entry to the premises was effected by use of a skeleton key. The

[24] [1966] 1 All E.R. 521.

[25] (1963) 47 Cr. App. R. 205.

Judge refused applications for separate trials and admitted on the trial of the four appellants, evidence of the earlier offence to which S had pleaded guilty but gave the jury a clear warning that such evidence was admissible only in the case of S. and should not be considered by the jury in the case of any of the other defendants. It was held by the Court of Criminal Appeal that the evidence of the earlier offence by S. should not have been admitted at all, as there was no nexus between it and the latter offence; that the clear warning by the Judge could not eradicate the mischief which had been done by the admission of the inadmissible evidence and the prejudice which it may have caused to the cases of the other defendants; and that accordingly the convictions of all four appellants must be quashed. The Court was unanimous in holding that there were no peculiar features linking the offence with the earlier offence which would justify the admission of the earlier offence as evidence to support the implication of S. in relation to the latter.

In *R. v. Doughty*[26] it was held that although it is clear that on a charge of indecent assault on young children evidence of similar acts of indecency is admissible to enable the jury to decide whether visits of the children to the a sed person were in pursuance of a guilty or innocent association (*R. v. Sim*[27] applied), yet where the evidence of indecency is tenuous to a degree and where even if the conduct is held to be indecent, it is a different form of indecency, then the trial judge can only exercise his discretion by excluding that evidence for its prejudicial effect would be overwhelming.

In *R. v. Flack*[28] the appellant was charged on three counts with committing incest with three of his sisters. All three counts alleged a series of offences of the same or a similar character. The judge found on a provisional view that evidence of the alleged offence against any one girl would be evidence of the alleged offences against the other two. He therefore exercised his discretion and rejected an application for separate trials and ordered the three counts to be trialed together. It was held by the Court of Criminal Appeal (1) the appellate court would not overrule the judge's decision since it was of opinion that in all the circumstances the charges might well have been tried together although the reason given by the judge was wrong; (2) that since the defence consisted of a complete denial of the incident the evidence of an alleged offence against one sister could not be evidence of an alleged offence against the others; (3) although it would as a rule be better in circumstances such as these that the counts should be tried separately the court would not interfere with the

[26] [1965] 1 All E.R. 560.

[27] See note 8.

[28] [1969] 2 All E.R. 784.

judge's decision since the judge came to the conclusion that even if his provisional view was wrong, the three alleged offences could properly be tried together and summed up so that the jury would not be influenced or prejudiced in considering any one count by evidence in respect of the others. Salmon J. giving the judgment of the Court of Criminal Appeal said:—

> "Before the trial commenced, it was submitted on behalf of the appellant that each count should be tried separately. The learned judge ruled that they should be tried together. The first point taken is that ruling was wrong, and that on this ground the convictions should be quashed. Clearly, the three counts alleged a series of offences of the same or similar character; accordingly, it is plain that there was power to order these counts to be tried together (see S. 4 of the Indictments Act 1915, and Sch. 1, r. 3 to that Act). That being so, it became a matter for discretion of the learned judge whether he should allow the counts to be tried together or order them to be tried separately. That is a discretion which this court has said, on more than an occasion, it will not overrule unless it can see that justice has not been done or unless compelled to do so by some over-whelming fact. Of course, if the learned judge gives a reason which obviously was a bad reason, the court may review his decision. It will not do so however if it is of the opinion that in all the circumstances the charges might well have been tried together, although the reason given by the judge was wrong (*R.* v. *Hall*).[29] In the present case, counsel on behalf of the appellant argues very persuasively that the reasons given by the learned judge for allowing the counts to be tried together were wrong. In giving his ruling, the learned judge certainly indicated that at that stage at any rate he had formed the provisional view that evidence of the alleged offence against any one girl would be evidence of the alleged offences against

[29] [1952] 1 All E.R. 66. In this case the appellant was convicted on an indictment containing eight counts charging him with committing acts of gross indecency with three men. An application for the separate trial of each group of counts relating to one of the men was refused on the ground that all the witnesses to be called on all the counts could have been called on any one count. In his defence the appellant stated in respect of two of the men that when he did the acts complained of he was giving them medical treatment and in the case of the third man that there had been a mistake in identity. It was held that as soon as it became clear that the defence of the appellant was that the acts alleged against him had an innocent and not a guilty complexion or that he relied on mistake or accident as a defence, the prosecution could call evidence of similar acts and such evidence was not inadmissible because it tended to show that the appellant had committed other offences and therefore the evidence of each of the first two men was admissible on the counts relating to the other of those two men. In the case of the third man the evidence was admissible on the issue of identity. The application for separate trials was therefore rightly refused.

the other two. He added, however, that he could not forecast definitely whether he would remain of the same view at the conclusion of the evidence.

Counsel for the Crown has sought to support the learned judge's provisional view with passages from the judgments of Lord Goddard C.J. in *R. v. Sims*[30] and *R. v. Campbell.*[31] Counsel has very frankly conceded that these passages – at any rate at first sight, if unqualified – appear to be rather startling, a view with which this court is certainly disposed to agree. In *R. v. Sims* the accused was convicted on three counts, each alleging buggery with a different man. In *R. v. Campbell,* the accused was convicted on seven counts, each alleging indecent assault on a different boy. The passage in *R. v. Sims* relied on by the Crown was as follows:–

> "The probative force of all the acts together is much greater than one alone; for, whereas the jury might think one may might be telling an untruth, three or four are hardly likely to tell the same untruth unless they were conspiring together. If there is nothing to suggest a conspiracy their evidence would seem to be overwhelming. Whilst it would no doubt be in the interests of the prisoner that each case should be considered separately without the evidence on the others, we think that the interests of justice require that on each case the evidence of the others should be considered, and that even apart from the defence raised by him, the evidence would be admissible."

The passage in *R. v. Campbell* relied on by the Crown is shorter, but to much the same effect, and reads as follows:–

> "At the same time we think a jury may be told that a succession of these cases may help them to determine the truth of the matter provided they are satisfied that there is no collaboration between the children to put up a false story."

These passages seem to suggest that, whenever a man is charged with a sexual offence against A, evidence may always be adduced by the Crown in support of that charge of similar alleged offences by the accused against B, C and D. This court does not think that those passages were ever intended to be so understood. If, however, this is their true meaning, they

[30] See note 8.

[31] [1956] 2 All E.R. 272. In this case the appellant a schoolmaster was charged on an indictment containing seven counts of indecent assaults on boys under the age of sixteen years each boy being in fact about ten years old. The boys were called by the prosecution and allowed to give sworn evidence. The prosecution relied for corroboration of the boy's evidence on, in the case of some counts, the evidence of other boys named as assaulted persons in other counts and in other counts on the evidence of other boys and girls who were not involved in any of the charges and who gave evidence on oath that they had seen the appellant act in a manner which was alleged to constitute an indecent assault. An appeal to the Court of Criminal Appeal was dismissed.

go much further than was necessary for the purpose of the decisions, and cannot, in the view of this court, be accepted as correctly stating the law.

In *R. v. Sims*, the accused had admitted that he invited each of the men to his house. He said he had done so solely for the purpose of conversation and playing cards. Each man said he had been invited to the house for the purpose of buggery. The question was whether this was a guilty or an innocent association. As Lord Goddard C.J. said:

> ". . . the visits of the men to the prisoner's house were either for a guilty or innocent purpose; that they all speak to the commission of the same class of acts upon them tends to show that in each case the visits were for the former and not the latter purpose."

This was plainly right, and the correctness of the decision in *R. v. Sims* has never been doubted. The evidence of B, C and D was clearly admissible against A to negative the defence of innocent association. In *R. v. Campbell*, the passage to which reference has been made was unnecessary for the decision which turned on the extent to which the evidence of one child could amount to corroboration of another. The correctness of the decision itself in *R. v. Campbell* has never been questioned. It is only the passage to which reference has already been made about which any criticism is possible. In *R. v. Chandor*[32] Lord Parker C.J. referring to the passage from *R. v. Campbell* which has been read, said:

> "Unqualified it would appear to cover a case where the accused was saying that the incident in question never took place at all. To take an incident in the present case, the accused said that in respect of an alleged offence with a boy – at View Point – he . . . had never met the boy at View Point at all. Yet, if this passage in *R. v. Campbell* is unqualified it would apply to just such a case. We do not think that

[32] [1959] 1 All E.R. 702. In this case the respondent a schoolmaster was tried on five charges of indecent assault on boys, involving three different boys, alleged to have been committed at different times and at different places. There was no corroboration. The respondent's defence was that none of the alleged incidents had taken place. In his summing up the Recorder directed the jury that "where there is a series of these incidents deposed to by witnesses of this kind, where you are told that a succession of these incidents happened, it may help you to determine the truth of the matter, provided you are satisfied that there is no collaboration between the children to put up a false story". It was held that the direction to the jury was a misdirection. Where in cases of alleged sexual assaults on children the evidence of a child deals only with the alleged assault on him or her and the defence is that the alleged meeting between the accused and the child never took place, evidence of other incidents between the accused and other children is not relevant to determine whether the alleged meeting took place; although evidence of a succession of incidents may properly be admissible to help to determine the truth of one incident on questions of identity, intent or guilty knowledge or to rebut a defence of innocent association.

> the passage in *R.* v. *Campbell* was ever intended to cover that. Indeed, so far as we know the authorities have never gone so far as that, nor do we see how they could . . . . There are, of course, many cases in which evidence of a succession of incidents may properly be admissible to help to determine the truth of any one incident, for instance, to provide identity, intent, guilty knowledge or to rebut the defence of innocent association. On such issues evidence of a succession of incidents may be very relevant, but we cannot say that they have any relevance to determine whether a particular incident ever occurred at all."

This court respectfully agrees with every word of Lord Parker, C.J.'s judgement in *R.* v. *Chandor.*

In the present case, the defence consisted of a complete denial that any such incident as that to which the appellant's sisters spoke had ever occurred. No question of identity, intent, system, guilty knowledge, or of rebutting a defence of innocent association ever arose. That was plain at any rate at the conclusion of the evidence, whatever may have been the position when the application for separate trials was originally made. Accordingly, the evidence of an alleged offence against one sister could not be evidence of the alleged offences against the others. Although the learned judge had provisionally formed a contrary view before hearing the evidence, his ruling that the counts could properly be tried together did not necessarily turn exclusively on his view as to the admissibility of the evidence on each count. It seems to this court that he came to the conclusion that even if his provisional view was wrong, these three alleged offences – each falling into watertight compartments – could properly be tried together, and summed up so that the jury would not be influenced or prejudiced in considering any one count by evidence in respect of the others. This, no doubt, in a matter about which different judges might take different views. Certainly it would as a rule be better, in circumstances such as these, that the counts should be tried separately. This court will not, however, interfere with the decision of the judge in such a matter unless satisfied that there was no reasonable grounds on which his decision could be supported, or that it may have caused a miscarriage of justice.".

In the Indian case of *Amritalal Hazra* v. *Emperor* (33) where the accused had been charged with possession of explosive substances and conspiracy to make and keep explosive substances evidence was adduced to show that the accused had associated with one Pulin Behry Das who had been convicted under S.121A of the Penal Code and had been seen engaged in lathi play on the premises of a society. No evidence was given as to the nature of the activities of the society. It was held that the evidence should not have been admitted. Mookerjee J. after referring to the English cases said –

[33] AIR 1916 Cal. 188

"No useful purpose would be served by an analysis of the special facts of each of these cases but the principles deducible therefrom as to the law administered in England may be briefly formulated. Facts similar to but not part of the same transaction as the main fact are not in general admissible to prove either the occurrence of the main fact or the identity of its author. But the evidence of similar facts although in general inadmissible to prove the main fact or the of the parties therewith, is receivable, after evidence aliunde on these points has been given to show the state of mind of the parties with regard to such fact; in other words evidence of similar facts may be received to prove a party's knowledge of the nature of the main fact or transaction or his intent with respect thereto. In general whenever it is necessary to rebut, even by anticipation the defence of accident, mistake or other innocent condition of mind, evidence that the defendants has been concerned in a systematic course of conduct of the same specific kind as that in question may be given. To admit evidence under this head however the other acts tendered must be of the same specific kind as that in question and not of a different character and the acts tendered must also have been proximate in point of time to that in question."

It might be instructive to consider the illustrations to section 15. Illustration (a) to section 15 is founded on the English case of *Reg.* v. *David Gray.*[34] In that case the accused was indicted for setting fire to his house with intent to defraud an insurance company. The prosecution sought to prove that the accused had occupied two other houses in London, in succession, both of which had been insured and that fires had broken out in both and that the accused had made claims upon and been paid by the insuranee companies in respect of the loss caused by each fire. This was for the purpose of showing that the fire was not the result of accident. It was held that the evidence was admissible.

Illustration (b) to section 15 is founded on the English case of *R.* v. *Richardson.*[35] In that case the accused was charged with three charges of embezzlement. It was alleged that it was the accused's business to pay the labourer's wages and to make certain other payments and to make weekly accounts of such payments, by entering them in a book and adding them up at the end of a week. On March 25, 1860 the accused's book showed a number of payments as having been made in the preceding week. All these payments had in fact been made and correctly entered but the addition instead of making a total of £20 12s 8d, the real amount, showed a total of £22 12s 8d for which sum the accused in accounting with his master took the credit.

[34] (1866) 4 F. & F. 1102.

[35] (1860) 2 F. & F. 343.

In another week there was a precisely similar error of the same amount for which the accused also took credit; and the same in a third week. It was argued that anticipating that a defence would be set up that these errors were the result of accident, evidence could be given of a series of similar errors both before and after those which formed the subject of the charges.

Williams J. held the evidence was admissible. "To hold that this evidence is admissible is in accordance with the principle laid down in numerous cases that to explain motives or intention, evidence is admissible although it does not bear upon the issue to be tried."

Illustration (c) to section 15 also follows the law in England where it is well settled that evidence of uttering counterfeit coins on other occasions than that charged is admissible to show guilty knowledge. (*R.* v. *Forster*[36]; *R.* v. *Tattershall*[37]; *R.* v. *Phillips.*[38]).

In *James* v. *Rex*[39] it was held that in a trial on a charge of extortion, evidence may be given of similar payments to the accused on dates not specified in the charge in order to show the dishonest intention irrespective of any question of anticipating the defence. Such evidence may not however be used to corroborate the fact of payment. Burton Ag. C.J. said,

> "It is clear that the prosecution cannot produce evidence of parallel extortions to prove the fact; it can produce the evidence to prove the mind — It seems to me the District Judge has clearly found the fact proved — The whole question is did he properly admit the other evidence. The D.P.P. did argue on a passage in the judgment of Bray J. in *R.* v. *Bond*[40] that the evidence could be admitted to corroborate the fact of payment. Even if this is good law in England, it is doubtful if it is good law here because section 14 of the Evidence Ordinance refers to a state of mind. The question then is, was the evidence properly led to anticipate the defence. I think it was because, even if the defence were not put up, the prosecution must prove dishonesty as part of the substantive offence. Therefore as the duty of the prosecution is to prove the charge substantively irrespective of the defence. I think the evidence was admissible for that purpose, irrespective of the question of anticipating the defence".

This ruling was not accepted in the case of *Teo Koon Seng* v. *Rex*[41] Referring to the case of *Rex* v. *James*, Terrell J. said, "The learned Judge held in that case that evidence of other acts of extortion was admissible to

[36] (1855) 24 L.J.M.C. 134.

[37] (1801) 2 Leach 184.

[38] (1829) 1 Lew C.C. 105.

[39] [1936] M.L.J. 9.

[40] See note 21.

[41] [1936] M.L.J. 10.

anticipate a possible defence, and that even if the defence was not put up the prosecution were entitled to prove dishonesty as part of their substantive case. I regret that I am unable to accept this ruling as being of general application. In the present case I am satisfied that it is not open to the prosecution to call evidence to anticipate a supposed defence which was never put up and which was never likely to be put up. When it is remembered that a dishonest intention is an essential element of every crime of this class it will be realised how dangerous it would be to admit evidence of other offences to prove dishonesty where such other evidence had no other connection with the issues before the court. It would only be a short step to admit evidence tending to show that the accused has a bad character on the specious plea that the prosecution must be allowed to prove that the accused had a dishonest intention when he committed the particular crime with which he was charged". That was a case of extortion and Terrell J. said, "Can it be said in the present case that the issue before the court was whether the accused received the money accidentally or innocently? It appears to me to be abundantly clear that if the story of the complainant is accepted the accused's intention was necessarily dishonest. If he was a person who made his living as an informer and through an intermediary induced a woman he did not know to come to his house and obtained money from her, what innocent explanation is possible? It is also clear that no such defence was even indicated in the cross-examination of prosecution witnesses and in the circumstances of the case it is to my mind quite inconceivable that such a defence could be put forward. Take the case of theft. Is it permissible for the prosecution to bring forward evidence of other thefts upon which the accused has never been prosecuted in order to prove that when he entered the house of a complete stranger he removed articles not belonging to him with a dishonest intention? As Bray J. says in *R. v. Bond*, "a number of acts of theft do not constitute a system. They are isolated acts having no connection with one another".

In *Samy v. Rex*[42] the accused was charged with falsification of accounts and criminal breach of trust. Terrell Ag. C.J. giving the judgment of the Court of Criminal Appeal said, "In the present case the court finds that evidence of previous transactions can be admitted under sections 14 and 15 of the Evidence Ordinance – the illustrations to Section 14 make that quite clear. It is not only to rebut the defence of accident that such evidence can be admitted; it can also in a proper case be called to prove a state of mind, to prove criminal intention. In the case before this court this evidence was particularly relevant because the accused did not deny that he had made the false entries under the direction of Mr. Vowler and that Mr. Vowler had had the money. So surely it must be relevant to

[42] [1937] M.L.J. 172.

look to the previous transactions to see what the previous method of business had been so as to arrive at a conclusion whether or not that defence would hold water. Is it likely that Mr. Vowler would have asked the accused to falsify various items in the accounts to the extent of one or two dollars? Still more is it likely that the accused would have continued to falsify the accounts on Mr. Vowler's instructions when Mr. Vowler was not in the country. That is what the accused alleged. It appears that that was substantially the defence and in order to rebut it this other evidence was absolutely relevant". The learned Judge then went on to explain his decision in *Teo Koon Seng* v. *Rex* (supra). That he said "is quite a different case and evidence of an entirely different transaction had been brought in to prove guilty intention. There was no connection between the two sets of circumstances in that case. The whole issue was whether the accused had attempted to extort money or not. If the court was satisfied that he had extorted the money, no explanation was possible and it was not possible to prove that the accused extorted money from A because on an entirely different occasion he had extorted money from B. In this case on the other hand the question whether the money had been taken and the accounts falsified were not in dispute. The only matter in dispute which the court had to satisfy the jury was the knowledge or intention with which the acts had been done. The Crown was not trying to prove that the accused had committed the particular offences charged, by proving that he had committed similar offences on other occasions. They were anticipating the defence that he was not an abettor and that the criminal intention which was the essence of the charges alleged, was absent".

In *Rauf bin Haji Ahmad* v. *Public Prosecutor*[43] the accused was charged with the offences of taking gratifications as a public servant in contravention of section 161 of the Penal Code. It was alleged that the accused had obtained the sums of money ($100/- from one person and $200/- from another person) who had been appointed under provision contracts to supply goods on credit to special constables, and it was alleged that the moneys were paid as illegal gratifications. At the trial evidence was given of the supply of goods and payments of other sums of money to the appellant by the persons concerned at the time when they were enjoying the benefit of the provision contract. The appellant in his defence admitted the receipt of the money and the goods but said that as to the sums of money they were loans which he intended to repay and as to the goods that he had always intended to pay for them. One of the grounds of appeal was that the evidence of the supply of provisions to the appellant by the two shopkeepers and of payments to him by them other

[43] [1950] M.L.J. 190.

than the payments alleged in the charges themselves which was evidence of the commission of offences not charged against him was inadmissible and was a source of great prejudice to him. Thomson J. said "The general principle as to this type of evidence is contained in the following much quoted passage from the judgment of Lord Herschell L.C. in the case of *Makin* v. *A.G. of New South Wales* -

> "It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried".

The reason for the exclusion of such evidence is to be found in the following passage from the judgment of Kennedy J. in the case of *Rex* v.*Bond*:—

> "It may be laid down as a general rule in criminal as in civil cases that the evidence must be confined to the point in issue — when a prisoner is charged with an offence it is of the utmost importance to him that the facts laid before the jury should consist exclusively of the transaction which forms the subject of the indictment which alone he can be expected to come prepared to answer. It is therefore a general rule that the facts proved must be strictly relevant to the particular charge and have no reference to any conduct of the prisoner unconnected with the charge".

Such evidence cannot be admitted unless it be relevant to the issue actually in contest and as to when it is so relevant, I quote the judgment of Lord Alverstone C.J. in *Bond's case* —

> "Evidence tending to show that the accused had been guilty of criminal acts other than those covered by the indictment cannot be given unless the acts sought to be proved are so connected with the offence charged as to form part of the evidence upon which it is proved — see *Reg.* v. *Rearden*[44] or are material to the question whether the acts alleged to constitute the crime were designed or accidental; see *Reg.* v. *Gray*[45] or to rebut a defence which would otherwise be open to the accused; see *Makin* v. *Attorney-General of New South Wales*".

To that statement of the law I would only add that when evidence tending

[44](1864) 4 F. & F. 76. In this case it was held that when a man was charged with the rape of a child, once it is proved that he threatened to injure her if she complained of his conduct, evidence of subsequent penetrations might be given, on the ground that the threat gave them such a continuity with the first as to render them part of the same transaction.

[45]See note 34.

to show that the accused has been found guilty of other criminal acts is otherwise admissible, it is immaterial whether these acts precede or follow the particular act with which he stands charged. Having so stated the law I proceed to remind myself of the existence of a class of cases where in the words of Sir Rufus Isaacs L. C.J. in *Shellaker's case*[46]:

> "Although the evidence is strictly admissible, it is of little value to the prosecution but would indirectly so prejudice the fair and dispassionate trial of the prisoner that the judge would say that it ought not to be given",

and on the following observations by Lord Du Parcq in the case of *Noor Mohamed* v. *Rex* which have been accepted by the local Court of Appeal,

> "The Judge ought to consider whether the evidence which it is proposed to adduce is sufficiently substantial having regard to the purpose to which it is professedly directed, to make it desirable in the interest of justice that it should be admitted. If, so far as that purpose is concerned, it can in the circumstances of the case have only trifling weight, the Judge will be right to exclude it. To say this is not to confuse weight with admissibility. The distinction is plain, but cases must occur in which it would be unjust to admit evidence of a character grossly prejudicial to the accused even though there may be some tenuous ground for holding it technically admissible. The decision must then be left to the discretion and the sense of fairness of the Judge".

In order to decide whether the evidence in question in this case is admissible by virtue of the law as stated by Lord Alverstone, it is necessary to consider what, if it were believed, it tended to prove. The answer to that question is to be found in the following passage from the grounds of judgment of the learned President —

> "It is noteworthy that these goods and sums of money taken from these two shopkeepers were in fact taken from each of them only during the time that that particular shopkeeper was supplying the Special Constables and having the amounts due from them deducted from their pay at the pay parades".

[46] [1914] 1 K.B. 414; 9 Cr. App. R. 240. In this case the accused was charged with having unlawful carnal knowledge of a girl under the age of 16 years. Evidence was admitted to corroborate the girl's story of what had taken place between the appellant and Denton — that is that the appellant had paid money to Denton who was in his employment with the object of getting him to assume the guilt in previous offences and leave the country. Objection had been raised that such evidence might disclose the fact that previous offences had taken place between the appellant and the girl before the six months limited by statute as the period within which a prosecution may be commenced. The Court of Criminal Appeal held that the evidence was rightly admitted. Isaacs L.C.J. said — "If the evidence only showed that the appellant was of evil disposition it would not be relevant. But if it showed that he had a guilty passion and that the act charged was the result of such passion it would be relevant, even though it incidentally showed that the appellant was a man of bad character".

The sting of the evidence lay in this, that it went to show a connection between the appellant's relations with the shopkeepers and the provision contract. The fact that the appellant received goods and money from the shopkeepers, which he himself freely admitted, was in itself perfectly neutral. It was as consistent with his innocence as with his guilt. But the fact, if it were proved, that he only received goods and money from each individual shopkeeper during the period in which that particular shopkeeper enjoyed the benefit of the contract was very relevant to the question of whether the relationship between him and the shopkeepers was an innocent one or a guilty one and therefore relevant to the nature of the two transactions embodied in the charges which formed part of it. Whether it be regarded as evidence of one transaction of which the two payments involved in the charges formed part and so is evidence which helped to prove that these two payments were corrupt or whether it be regarded as evidence that rebutted the defence which was open to the appellant, and which is in fact his main defence, that the payments were innocent loans and not corrupt gifts is immaterial for in either event it was clearly admissble. And even if it did have the incidental effect of grossly prejudicing the appellant it could not be described as of little value or of trifling weight in proving the case against him."

In *Mohamed Kassim bin Hassan* v. *Public Prosecutor*[47] the facts were that the accused was originally charged with three charges of criminal misappropriation of petrol "between 15th May 1949 and 23rd July 1950" but at the close of the prosecution case the charges were amended by the learned President of the Sessions Court so as to relate to three particular dates in May 1949. It was held that some of the evidence which had been brought against the appellant on the original charges were inadmissible on the amended charges and that in the circumstances of the case the improper admission of evidence had caused a failure of justice. Whitton Ag. J. said, "When the accused was called upon to answer the three charges on which he was eventually convicted he was entitled to have to meet only relevant and admissible evidence adduced by the prosecution — Actually the accused was faced with a considerable body of evidence which in the circumstances had become irrelevant and inadmissible — There could be no objection to those portions of the prosecution evidence which deal with alleged instructions by the accused to the pump operators and other witnesses in preparation for or in furtherance of the commission of the offences but since, if the physical acts of the accused directed towards the diversion of the petrol from the tank to his own car was established, there could be no doubt that he did these acts with dishonest intention, it was not a case where evidence of system was admissible and accordingly those

[47] [1950] M.L.J. 295.

portions of the evidence – were rendered irrelevant by the amendment of the charges at the close of the prosecution case. I feel that the effect of this evidence must be to tend to produce on the mind of anyone who heard it the impression that the accused had for a period of eight or nine months been systematically misappropriating petrol and cheating the Department of Public Relations. The accused may have done both of these things, but the existence of this evidence must have been prejudicial to him when the trial reached the stage when he was called upon to answer the three specific charges relating only to the month of May 1949".

In *R. v. Raju*[48] the first and second appellants appealed against their conviction in the lower court on two charges of corruption and the 3rd appellant against his conviction of abetting those offences. There was no evidence that the first two appellants received the sums of moneys as charged. There was some evidence that the 3rd appellant received the moneys but no evidence that he passed them to the first two appellants. However evidence was admitted that on different occasions certain persons had paid money to the second appellant. The learned President considered these similar facts as relevant and admissible because they show system. Spenser-Wilkinson J. said, "The law on the subject of the admissibility or otherwise of similar acts committed by an accused person is perhaps one of the most difficult branches of the law of evidence. One thing however appears to me to emerge very clearly from all the decided cases on this subject and that is that what is often referred to as evidence of "system" (a phrase which I deprecate as being somewhat misleading) when it is admissible at all is admissible for specific purposes and for these purposes only and not as suggested in this case by the learned President because it shows system. In this country such evidence of similar acts is often admissible under section 15 of the Evidence Ordinance, although certain types of evidence of similar offences may be admissible under sections 14 and 11. Generally speaking the evidence of similar facts may be relevant for the following purposes, though this list may not be exhaustive –

1. To negative accident;
2. To prove identity;
3. Where mens rea is the gist of the offence, to prove intention; and ..
4. To rebut a defence which would otherwise be open to the accused.

In my opinion it is of the greatest importance when evidence of this kind is tendered that the prosecution should tender it for a specific purpose and that if, it is admitted, it should be made quite clear for what purpose it is admitted. In his opinion in the case of *Harris* v. *Director of Public Prosecutions* Lord Simon says: "What Lord Sumner meant in *Thompson* v. *D.P.P.* when he denied the right of the prosecution to "credit the accused with fancy defences" was that evidence of similar facts involving the

[48] [1953] M.L.J. 21.

accused ought not to be dragged in to his prejudice without reasonable cause". He then goes on to say as follows: "There is a second proposition which ought to be added under this head. It is not a rule of law governing the admissibility of evidence but a rule of judicial practice followed by a judge who is trying a charge of crime when he thinks that the application of the practice is called for. Lord Du Parcq referred to it in *Noor Mohamed's* case immediately after the passage above quoted when he said, "in all such cases the judge ought to consider whether the evidence which it is proposed to adduce is sufficiently substantial having regard to the purpose to which it is professedly directed to make it desirable in the interest of justice that it should be admitted. If so far as that purpose is concerned, it can in the circumstances of the case have only trifling weight, the judge will be right to exclude it. To say this is not to confuse weight with admissibility. The distinction is plain, but cases must occur in which it would be unjust to admit evidence of a character gravely prejudicial to the accused even though there may be some tenuous ground for holding it technically admissible. The decision must be left to the discretion and the sense of fairness of the judge".

"Although these passages no doubt refer primarily to a trial by Judge and Jury the principle that evidence of similar facts involving the accused ought not to be dragged in to his prejudice without reasonable cause remains one which should be borne in mind in all courts. As in the High Court so in the subordinate courts cases may occur (though perhaps not as frequently as with a jury) in which it would be unjust to admit highly prejudicial evidence simply because it is tentatively admissible. And it is only when the purpose to which such evidence is professedly directed is known that the question can be decided whether or not it would be unjust in all the circumstances to admit such evidence. Moreover in a latter part of his opinion in the case Lord Simon states quite categorically and generally that evidence of similar facts should be excluded unless such evidence has a really material bearing on the issues to be decided.

In the present case it looks as though the evidence had been admitted and used to help to prove that the second appellant had actually received the sums of $18/- from Athiaya and Salleh respectively as charged. It must be pointed out, however, that even if it had been conclusively proved that the 2nd appellant had received sums of money in respect of ration cards from a large number of other persons on different dates and in different places this would not prove that he had in fact received the sums referred to in the charges from the particular persons and at the particular times alleged. As regards actual receipt of moneys it might prove that the 2nd appellant was in the habit of receiving such sums and was therefore the sort of person who was likely to receive the sums in

question. It has been held time and time again that evidence of this kind is not admissible for this purpose. If the second appellant had been charged with abetment by conspiracy it might have been material evidence in support of the conspiracy, but he was not so charged. If admissible at all upon the matters actually charged in this trial this evidence would have been admissible after proof *aliunde* of the facts charged, either to show that the sums received as alleged in the charge were received with a corrupt motive or to rebut the defence that the sums were received for an innocent purpose. As however there was no evidence *aliunde* that the sums charged were ever received the evidence about other sums received on other occasions should have been ignored".

There have been a number of cases relating to charges under the Road Traffic Ordinance for using a motor vehicle licensed as a private vehicle as a public service vehicle. In *Gan Kim Lan* v. *Public Prosecutor*[49] the police had kept watch on the vehicle for a period of time and had gathered evidence which was held by Ong J. to be admissible. In *Abdul Hamid* v. *Public Prosecutor*[50] Adams J. held that such evidence was admissible under section 15 of the Evidence Ordinance and that it proved conclusively that the defendant had plied for hire. In that case there was evidence that the police had observed the vehicle for two months. Adams J. said that it was desirable that evidence of such nature should be produced in cases of this nature.

In *Darus* v. *Public Prosecutor*[51] the appellant was charged under the Road Traffic Ordinance for using his motor car as a public service vehicle without a licence for that purpose. At the trial evidence as to the user of the car was given by a police constable who stated that he observed the motor car for 14 days during which period the car was seen carrying 140 passenger on 47 occasions. The three passengers travelling in the car on the occasion for which the appellant was charged were also called as witnesses but they said contrary to their previous statements that they had not paid or intended to pay the appellant for being carried in his car. It was held by Ong J. that the evidence of what took place during the previous 14 days was admissible, for the purpose of section 15 of the Evidence Ordinance, to prove that the meetings were not accidental and that it was the appellant's regular practice to pick up passengers.

This practice was queried by Ali J. in *Ali bin Hassan* v. *Public Prosecutor*[52]. After referring to the principle as laid down in *Makin's case*

[49] [1961] M.L.J. 35.

[50] [1962] M.L.J. 44.

[51] [1964] M.L.J. 146.

[52] [1967] 2 M.L.J. 76.

and *Harris* v. *Director of Public Prosecutions* and to section 15 of the Evidence Ordinance he said, "It now becomes necessary to enquire whether in a prosecution for an offence under section 92(1) of the Road Traffic Ordinance there can possibly arise the question whether the act alleged to constitute the offence was accidental or intentional or done with a particular knowledge or intention. What is prohibited in this section is the act of conveying passengers in the car for hire or reward without a valid licence. The simple issues raised in the charge for such an offence are (1) whether or not on the material date the conveyance of passengers was for hire or reward and (2) if it was, whether such conveyance was authorised by a valid licence. The first of these issues turns solely on the question whether fees have or have not been paid to or received by the person charged. It is a straight forward question of fact to be determined by the evidence of the passenger or passengers conveyed in the car or of other witness or witnesses, if any. Where such evidence is not forthcoming the prosecution is of course entitled to invoke the appropriate presumptions in section 144 of the Road Traffic Ordinance. But the evidence of the occurrences of a series of similar transactions of the nature disclosed in this case could hardly lead to the conclusion that fees had been paid to or received by the person charged. The reported acts of conveying passengers on the various occasions prior to the date material to the charge are as colourless as the act which was alleged in the charge. That this is recognised by the legislature is reflected by the need of enacting the necessary presumptions in section 144". He held that on the facts in the case there was sufficient foundation for invoking the presumptions under the section.

In *Maidin Pitchay* v. *Public Prosecutor*[53] MacIntyre J. dissented from the view of Ali J. and agreed with the earlier views of Adams J. and Ong J. He said "in view of the presumption under section 144, the question of whether or not on the material date the conveyance of passengers was for hire or reward does not arise in a prosecution under section 92(1) of the Road Traffic Ordinance. It is to be presumed. It is for the defence to show that the passengers were not carried for hire or reward. The obvious way, besides a bare denial, of proving a negative proposition such as this, is for the accused to call evidence to show that the incident in respect of which he is charged was an isolated one and that all the passengers happened to be in the car through circumstances which are fortuitous and not intentional. It would appear that section 15 of the Evidence Ordinance was designed to enable the prosecution to offer evidence in advance to rebut a defence which would otherwise be open to the accused; and that such evidence is admissible even though it may tend to show the commission of

[53] [1968] 1 M.L.J. 82.

other crimes. The authority for this prosecution is to be found in the judgment of *Makin* v. *Attorney-General of New South Wales*".

In the case of *Public Prosecutor* v. *Ong Kok Tan*[54] the Federal Court considered all the relevant judgments on this question and held that such evidence is relevant by virtue of section 15 of the Evidence Ordinance and may be used by the prosecution in rebuttal of the anticipated defence. Azmi L.P. in giving the judgment of the court said, "As material and relevant evidence it could be used both in support of the presumption under S.144(a) (of the Road Traffic Ordinance) and to corroborate evidence of payment by a witness for the prosecution. Evidence of observation thus made in conjunction with the presumption of payment of fares, strengthens considerably the case for the prosecution by rebutting any possible defence." The learned Lord President then referred to the judgment of the Privy Council in *Makin* v. *Attorney-General of New South Wales* and said that the principles laid down in that case are embodied in section 15 of the Evidence Ordinance.

In *Tan Geok Kwang* v. *Public Prosecutor*[55] the appellant was charged with being in possession of a revolver. At the trial evidence was led (1) to show that a hand-grenade had been thrown from a blukar into which the appellant had run and in which no other person was found by the police (2) to show that the revolver found had been fired a few days previously at Sungei Bakap and (3) to show the contents of documents found in the possession of the appellant. It was held by the Court of Appeal (1) that the evidence relating to the throwing of the hand-grenade was admissible under section 6 of the Evidence Enactment as *res gestae* but that (2) the evidence as to the firing of the revolver a few days earlier should have been excluded as it tended to show that the appellant was guilty of another offence, namely the possession or the carrying and using of the same revolver three days earlier and (3) that the contents of the documents should not have been admitted in evidence as it tended to show that the appellant was a man of bad character and also showed that he had been guilty of other criminal offences not contained in the charge. Willan C.J. said, "It may be that evidence that this particular revolver was in that area shortly before the arrest of the appellant is admissible, but its evidential value was negligible as many persons in that area at that time may have had a similar opportunity to possess it. There can be no question that this evidence was highly prejudicial to the appellant as tending to show that he was guilty of another offence, namely the possession or the carrying or the using of this same revolver three days previously". After referring to the case of *Noor Mohamed* v. *Rex* he said "we are of opinion that the learned

[54] [1969] 1 M.L.J. 118. See *Martin* v. *Osborne* (1936) 55 C.L.R. 367.
[55] [1949] M.L.J. 203.

Judge in the exercise of his discretion should have rejected this evidence in view of its trifling weight and its gravely prejudicial nature". As regards the contents of the documents Willan C.J. said "We were of opinion that the contents of the documents should not have been before the jury. As stated by the learned Judge in his summing up, they obviously related to the intelligence system and finance of a body of bandits and therefore, in our opinion, tended to show not only that the appellant was a man of bad character but also that he had been guilty of other criminal offences not contained in the present charge. At the very least they tended to show that the accused was a person who consorted with persons whom he knew or had reasonable grounds for believing intended to act or had recently acted in a manner prejudicial to public safety". After referring to *Makin v. A.G. for New South Wales* he went on "the contents of these documents were not relevant to any issue which the jury had to try because no defence was thereby rebutted nor could the question of design or accident arise – It appears to us that the contents of the documents were put before the jury with the intention of leading them to believe that the accused was the kind of man who would be likely to have had possession of the revolver and therefore was wrongly admitted in evidence".

In *Ewin v. Public Prosecutor*[56] the appellant was originally charged with murder. The appellant in his defence stated that he entered the hut in the belief that there were six armed bandits in the hut and he had fired his gun at the hut in which he saw something move. There were in fact no terrorists in the hut and the appellant in fact fired at and killed a child. Evidence was admitted that while on patrol and on approaching a Chinese mine the appellant had fired several shots from his sten gun and wounded a Chinese headman who was supervising the mine labourers. It was held by the Court of Appeal that the evidence should not have been admitted on the principles laid down in *Makin's case*.

In *Abubakar bin Ismail v. Reg.*[57] the appellant was convicted on two charges of making a false statement for the purpose of facilitating a grant of a driving licence. In each case the application form was endorsed by the appellant to the effect that he had seen the applicant's Federation driving licence, which thus excepted the applicant from the necessity of passing a driving test in Singapore. Evidence to show similar endorsements by the appellant was produced. One of the grounds of appeal was whether such evidence of similar acts was admissible. Brown J. said, "The prosecution called evidence to prove that on eight occasions between the 29th September and 29th October 1952 the appellant had made similar endorsements to the effect that he had seen Federation driving licences in the case of eight applicants whose forms he had filled in and that in none

[56] [1949] M.L.J. 279.

[57] [1954] M.L.J. 67.

of the eight cases had the applicant produced a Federation driving licence for his inspection. "The general rule of law applicable in such cases can be clearly stated. It is that apart from express statutory enactments, evidence tending to show that the accused had been guilty of criminal acts other than those covered by the indictment cannot be given unless the acts sought to be proved are so connected with the offence charged as to form part of the evidence upon which it is proved: see *Reg.* v. *Rearden*[58]; or are material to the question whether the acts alleged to constitute the crime were designed or accidental: See *Reg.* v. *Gray*[59]; or to rebut a defence which would otherwise be open to the accused; see *Makin* v. *A.G. for New South Wales*. As is pointed out in the last mentioned case, the statement of these general principles is easy; in applying them it is often very difficult to draw the line and decide whether a particular piece of evidence is admissible or not". This quotation is from *Rex* v. *Bond*[60]. In the present case it is said that the evidence to which objection is taken was admissible to rebut the defence that what purported to be Federation driving licences were in fact produced to the appellant but were forgeries. It is said that the issue in these charges was whether the endorsements which the appellant made on the two application forms which were the subject of the charges were false to his knowledge and that the fact that he had within a month shortly before the two occasions in respect of which he was charged, made similar endorsements in eight cases without having the Federation licences produced to him was material to that issue. By section 11(2) of our Evidence Ordinance "facts not otherwise relevant are relevant if by themselves or in connection with other facts they make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable". The fact in issue was whether upon the dates referred to in the charges, Federation driving licences were produced to the appellant or not. Does the fact that on the eight previous occasions the appellant made similar endorsements without any Federation driving licences being produced make it "highly probable" that no Federation driving licences were produced upon the two dates which are material to these charges? Or does it merely tend to prove that the appellant, having done this before, is the sort of person who would probably do it on the two occasions charged? As Lord Sumner said in *Thompson* v. *The King*[61]. "No one doubts that it does not tend to prove a man guilty of a particular crime to show that he is the kind of man who would commit a crime, or that he is generally disposed to crime and even to a particular crime; but, sometimes for one reason, sometimes for another, evidence is admissible, notwithstanding its general character, to show that the accused had in him the

[58] See note 44.

[59] See note 34.

[60] See note 21.

[61] See note 7.

makings of a criminal, for example in proving guilty knowledge or intent or system or in rebutting an appearance of innocence, which unexplained the facts might wear". I have come to the conclusion that the evidence which is objected to went far beyond showing that the appellant, having committed similar acts previously, was a person who was likely to have committed the two acts with which he was charged and that the evidence of the previous eight cases was relevant to the issue before the court. The defence was that the prosecution witnesses were lying when they said that they had produced no Federation driving licences and that they had produced licences which he believed to be genuine but which were in fact forgeries. If they were forgeries, this evidence showed that on 10 occasions within the space of five weeks he was taken in by forged licences; and the appellant admitted to seeing an average of only 4 or 5 Federation driving licences in the course of a day. The issue was: did he make the two false statements with which he is charged knowing these were false? His defence was "I made them, but I was deceived by forgeries". It seems to me to be impossible to say that the fact that he had done the same thing eight times within a month immediately prior to the two occasions on which he was charged was irrelevant to the issue of whether he made the two false endorsements knowing they were false".

In *Wong Kok Wah* v. *Reg.*[62] the appellant was charged with being in possession of uncustomed goods. Evidence was given by a prosecution witness at the trial that he had been arrested for carrying certain goods of the appellant which were headache powders similar to those in respect of which the appellant was charged. The witness stated that the appellant gave him the goods when he was going off duty and that the appellant had asked him to take the goods to a rubber godown and wait for him. The witness said he was arrested before he could reach his rendezvous. On appeal it was held that the evidence of the witness was clearly evidence tending to suggest that the appellant had committed a similar offence on a different version. Such evidence was not admissible as it went to show merely that the appellant was likely to have committed the offence charged and therefore should not have been admitted. Spenser Wilkinson J. said that he was unable to see that the evidence of the witness came under any of the four categories laid down in the case of *Raju and Others* v. *Rex* (supra).

In *Abdul Hamid* v. *Public Prosecutor*[63] the accused was charged with an offence under section 3 of the Prevention of Corruption Ordinance, 1950. On appeal it was argued that evidence of similar facts prejudicial to the accused had been admitted without reasonable cause and that no specific reason had been given for leading evidence thereon contrary to the

[62] [1955] M.L.J. 46. [63] [1956] M.L.J. 231.

principles enunciated in *Raju's case* (supra). It was held that the offences were of the same kind and were all part of one and the same transaction and was properly admitted. Smith J. said, "I cannot agree that the evidence of the earlier instalments of the bribe was admitted without reasonable cause. As the learned President has noted in his Grounds of Judgment the three incidents really form one whole: the last incident, the subject of the charge, cannot be understood without reference to the earlier incidents. Where there are other offences of the same kind which are all of one and the same transaction evidence thereof is properly admissible (see *Reg. v. Rearden*)".

In *Teng Kum Seng* v. *P.P.*[64] the appellant was convicted on three charges of putting persons in fear of injury in order to commit extortion. In each case it was alleged that the appellant's method of operation had been to write a letter to his intended victim demanding the money and also making telephone calls referring to the letter. Each of the intended victims made a report to the police but it was only as a result of the report in the third case that the police after having made arrangements at the telephone exchange, succeeded in arresting the appellant as he was leaving a public telephone call box after having been seen apparently speaking on the telephone and then putting down the receiver. As he was being removed to a police car he threw away a piece of paper which was recovered and on it was found written the telephone number of the complainant in the third case. It was held that the evidence as to the circumstances in which he was arrested was admissible not only as to the third charge but also as evidence of system relevant to the first and second charges.

In the case of *X* v. *Public Prosecutor*[65] the appellant had been convicted under Regulation 4C(1) of the Emergency Regulations, 1948. It was alleged that the appellant had demanded payment of money from workers in an estate for bandits. Evidence was led by the prosecution that earlier the appellant had consorted with bandits who had visited the estate. It was held on appeal that the evidence was admissible under Section 11 (as making the existence of a fact in issue highly probable) and Section 14 (as showing the existence of a state of mind). Foster-Sutton C.J. said, "While it is not competent for the prosecution to adduce evidence tending to show that the accused had been guilty of a criminal act other than that covered by the charge, for the purpose of leading to the conclusion that he is a person likely from his criminal conduct to have committed the offence for which he is standing trial, the mere fact that the evidence adduced tends to show the commission of another offence does not render it inadmissible if it is relevant to an issue before the Court and it may be relevant if it is indicative of a state of mind, such as intention".

[64] [1960] M.L.J. 225.

[65] [1951] M.L.J. 10.

In *Yong Sang* v. *Public Prosecutor*[66] however, it was held that the evidence of association with the terrorists tended to show that the appellant was the sort of person who was likely to commit the offence and was therefore wrongly admitted. In that case the accused was charged with having terrorist documents under his control. The documents were found under the driver's seat in a lorry driven by the appellant. One of the grounds of appeal was that evidence was wrongly led that the appellant had been seen on two occasions in association with terrorists. There was no proof that the appellant knew that the documents were in the lorry. The conviction of the appellant was set aside.

In *Cheng Siak How* v. *Public Prosecutor*[67] the appellant was charged with the importation into Malaya of opium worth $1 million. Evidence was given of the finding of a bundle of labels described as "Black Dog Rangoon Opium Labels" Hill J. held that the evidence of the finding of the labels was admissible and relevant both to show mens rea and to rebut the obvious defence of innocent and fortuitous participation. In a statement recorded by the Customs Officer, the appellant had explained that the labels had been brought from school some time before by his children. Hill J. said, "I consider that there are as good reasons for admitting this evidence as there were for admitting the photographs in *Thomson* v. *The King*".

In *Kan Sik Fong* v. *Public Prosecutor*[68] the appellant had been charged on two charges of failing to declare dutiable goods and denying possession of dutiable goods. At the trial evidence was given by a revenue officer that the appellant on the way to the customs office had asked the officer to help him and not to take him to the office. He further stated that he would give $3,000 as coffee money. On appeal it was contended that this evidence should not have been admitted.

Adams J. said – This piece of evidence, if it is admissible at all, would only be admissible under sections 11 and 14 of the Evidence Ordinance. It is not competent for the prosecution to adduce evidence which tends to show that the appellant has been guilty of a criminal act other than that covered in the charge for the purpose of showing that he is a person likely from his character to commit the offence charged). (See *X* v. *Public Prosecutor*). Thomson J. (as he then was) in *Rauf bin Haji Ahmad* v. *Public Prosecutor* dealt with this difficult matter at length and reviewed the authorities. It was again considered by Spenser-Wilkinson J. in *R.* v. *Raju & Ors.* v. *R.* In that case the learned Judge said:– "Generally speaking the evidence of similar facts may be relevant for the following purposes, though this list may not be exhaustive:–

1. To negative accident;

[66] [1955] M.L.J. 131.

[67] [1953] M.L.J. 178.

[68] [1961] M.L.J. 163.

2. To prove identity;
3. Where mens rea is the gist of the offence, to prove intention; and
4. To rebut a defence which would otherwise be open to the accused."

I do not think that the above unfortunate statement by PW2 falls under any of these heads. The evidence that a person offered a bribe is inconclusive in any event. It does not necessarily mean that a person is guilty of another offence with which he may be threatened. Mens rea is not the gist of these offences with which the appellant was charged. Once the appellant failed to comply with the provisions of section 99 (no doubt because he hoped to defraud the revenue) he committed an offence, and if he made a false declaration (no doubt with the same hope) he committed the second of the offences with which he was charged. This statement should therefore never have been admitted. Statements of this nature must be avoided, and it can be done quite easily by the careful examination-in-chief of a witness. I do not think that it was deliberately put in to prejudice the Court. The witness was merely relating in chronological order what happened.

Although this piece of evidence appears in the evidence of PW2 (revenue officer (P) 907), PW3 (revenue officer (P) 512), and PW4 (senior customs officer (P)), no objection was taken to its admission on any occasion. Apparently it was thought to be admissible because of the fact that it formed part of the history of events leading up to the present charges. The learned President does not mention the matter in his reasons for finding the appellant guilty. Reading his judgment I am quite satisfied that the admission of this piece of evidence has weighed in no way with the President when he came to consider the evidence against the appellant and there is ample evidence without it on which to convict the appellant.

The learned Deputy Public Prosecutor argued that since its admission had no effect whatsoever on the mind of the learned President, the provisions of section 422 of the Criminal Procedure Code should apply, since there has been no failure of justice. Mr. Rayner referred me to the last paragraph of the Lord Chancellor's judgment in *Maxwell* v. *Director of Public Prosecutions*. That case related to inadmissible evidence produced before a Jury. In this case there was no possibility of the learned President coming on the facts to any other decision than the one he has reached, and there has been therefore no failure of justice. There was also no Jury. The learned President is legally qualified and quite clearly put the matter out of his mind.

Statements of this nature should only be admitted after very careful consideration by both the prosecutor and the Court to ensur that they are admissible for one of the purposes outlined in *Raju's case*, supra, and even then the Court must consider whether it is in the interests of justice to admit the statements. The Court always has a discretion in this matter. As was said in the case of *Noor Mohamed* v. *R.*: "The Judge ought to consider whether the evidence which it is proposed to adduce is sufficiently

substantial, having regard to the purpose to which it is professedly directed, to make it desirable in the interest of justice that it should be admitted. If, so far as that purpose is concerned, it can in the circumstances of the case have only trifling weight, the Judge will be right to exclude it. To say this is not to confuse weight with admissibility. The distinction is plain, but cases must occur in which it would be unjust to admit evidence of a character gravely prejudicial to the accused even though there may be some tenuous ground for holding it technically admissible. The decision must then be left to the discretion and the sense of fairness of the Judge.

This statement was inadmissible and, even if it were admissible, it should have been excluded by reason of the direction above quoted, and I think this is a case to which section 422 of the Criminal Procedure Code applies.".

In the case of *Datuk Haji Harun bin Haji Idris* v. *Public Prosecutor*[70] the appellant had been convicted of corruption in that he solicited and accepted the sum of $250,000 for U.M.N.O. as illegal gratification. Evidence was given at the trial that the appellant had received donations from other companies and that in those cases there were receipts given and accounts kept. It was argued that the evidence was wrongly admitted to discredit the appellant as the appellant never denied receiving the donations and his case was that he had received them as donations for U.M.N.O. Suffian L.P. said – "In brief he (counsel for the appellant) says that the prosecution cannot adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the charges, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is charged, that the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it is relevant to an issue before the court, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged are designed or accidental, or to rebut a defence which would otherwise have been open to the accused; but, and this is the important part of Mr. Chelliah's submission, before an issue can be said to be raised, which would permit the introduction of such evidence so obviously prejudicial to the accused, it must have been raised in substance if not in so many words, and the issue so raised must be one to which the prejudicial evidence is relevant, and that the mere theory that a plea of not guilty puts everything material in issue is not enough for this purpose, and that the prosecution cannot credit the accused with fancy defences in order to rebut them at the outset with some damning piece of prejudice.

[69] [1977] 2 M.L.J. 1

In our judgment P50 was rightly admitted, since it was not evidence tending to show that the accused has been guilty of an offence other than the offences with which he was charged. This exhibit merely went to show that a voluntary and honest donation was usually followed by the issue of an official receipt, and so could legitimately be used to rebut a defence which was open to the accused and which had been raised by him in substance.

P51 also was not evidence admitted to show that the accused was guilty of an offence other than the offences with which he was charged, but was relied on by the judge as showing that in the case that accused did maintain some sort of accounts".

[To be continued]

Ahmad Ibrahim*

*Professor of Malaysian Law, University of Malaya.

THE THIRD WORLD AND INTERNATIONAL LAW

The Third World is attempting to extort – through economic blackmail, moral bullying, and outright theft – a portion of the West's legitimately acquired wealth.

– Patrick Moynihan
(Former U.S. Ambassador
to the United Nations)

The position of the Third World[1] in international affairs is a difficult one. Often misunderstood, this group of developing countries has participated in numerous bitter international confrontations in the recent past. Forced to defend their positions in what appears to them as unfriendly, if not hostile environments, many countries of the Third World have been branded "blatantly irresponsible."[2] In the aftermath of the 1974 Oil Crisis, some of them were chided as childish and vindictive for resorting to their superior numbers to pass "meaningless" resolutions during the 1975 United Nations General Assembly Sessions. They have also been accused of breaching or being unwilling to abide by the generally "accepted" rules of international law.

The reticence of the Third World to accept certain norms of international law has created a most difficult situation, if not a crisis, in the international legal order. This crisis must be resolved if the rule of law is to ultimately prevail in the international legal process, and if international law is to play its assigned role in the peaceful settlement of disputes.

What truths exist in the accusations meted against the Third World? How did the cleavage highlighted above come about?

In general, this paper answers these questions by presenting, *from the viewpoint of the Third World*, the origin of the international legal system, its historical development and growth in importance, and the reasons why the countries which now constitute the Third World view the subject differently from those which comprise the industrial or developed bloc.

No effort is made in this paper to argue, defend, or justify specific Third World positions nor to take into account differences between Third

[1]The term "Third World" is generally used to refer to those developing and have-not countries. Other expressions which are also used to refer to Third World countries include "the LDCs" (the less developed countries), "the South" (in contrast to the industrialized North) and "the Group of 77." See *Time Magazine*, 22nd December, 1975, at pp. 34–42.

[2]See e.g. Address to U.N. General Assembly by U.S. Ambassador John Scali on 6th December, 1974 as reported in the Dept. of State Digest of U.S. Practice in International Law (1974) pp. 14–17.