

[COURT OF CRIMINAL APPEAL]

1972 Present : H. N. G. Fernando, C.J. (President), Deheragoda, J.,
and Walgampaya, J.

W. F. FERNANDO, Appellant, *and* THE QUEEN, Respondent

C. C. A. 162 OF 1971

S. C. 128/70—M. C. Kurūnegala, 57502

Trial before Supreme Court—View by jury of scene of offence—Absence of Trial Judge—Illegality—Criminal Procedure Code, s. 238.

During a trial before the Supreme Court the jury viewed the scene of offence in the absence of the Trial Judge, and a demonstration was given then by prosecution witnesses concerning incidents relating to the commission of the alleged offence.

Held, that the absence of the Judge rendered the proceedings illegal and obnoxious to the provisions of section 238 of the Criminal Procedure Code.

APPEAL against a conviction at a trial before the Supreme Court.

C. Motilal Nehru (assigned), for the accused-appellant.

Shiva Pasupati, Senior Crown Counsel, for the Attorney-General.

Cur. adv. vult.

April 26, 1972. WALGAMPAYA, J.—

At the conclusion of the arguments in this case we set aside the conviction of the appellant and acquitted him. We now set down the reasons for our order.

The indictment against the accused was that on or about the 18th of May 1969 at Gettuwana in the division of Kurunegala he committed attempted murder by shooting at Police Constable 7594 Benedict Appuhamy with a gun. The Police Constable did not sustain any injuries.

At the close of the defence case and before the Assize Judge commenced his summing up the Foreman indicated to the Judge that the members of the Jury were anxious to visit the scene. The record then reads as follows :

“ His Lordship directs the Clerk of Assize to conduct the Jurors in a body to the scene.

. . . At 2.10 p.m. the Jurors in the care of the Clerk of Assize, the Crown Counsel, Assigned Counsel, Inspector of Police with Police Sergeant Benedict Appuhamy, Court staff and the accused in the custody of prison officials proceed to the scene in vehicles along the Kandy road and turn left at the Gettuwana junction.

At 2.20 p.m. Jurors arrive and get down from vehicles and the Inspector of Police conducts the party to Alexander's house which is on a high elevation.

Foreman : Q. Could you show the house of Alexander in which the accused was ? (Inspector Maheswaram shows a house which is cadjan thatched.)

Foreman : Q. Kindly show us the place where the Police party was challenged by the accused. (Inspector Maheswaram stands at a spot about 15 feet away in front of Alexander's house.)

Inspector : When we were coming up we saw the accused seated. When we spotted him seated the accused was inside and we were further down. (At this stage the distance is measured—the place where the Inspector now stands to the spot where the accused was seated—30 feet.) The spot from where the accused challenged us is from here to the doorway. (measured distance is 15 feet.) The door on the parapet wall was open at that time.

Foreman : Show us the back door through which the accused ran. (At this stage the Inspector enters Alexander's house and shows the rear door. The Jurors are led out of the house and they are taken around Alexander's house to the back compound and from here they get on to a climb and stop under a Jak tree which is in the adjoining garden.)

Foreman : Show us the spot where the Police Sergeant stood when the accused fired the first shot. (At this stage Sergeant Benedict Appuhamy stands at a spot and says, this is the spot where I stood when the accused fired at me. The Sergeant then walks down the slope and says, this is the spot where the accused stood and fired. The measured distance is 37 feet.)

Foreman : Show us the place where the Sergeant was when he fired the second shot. At this stage Sergeant Appuhamy moves about 6 feet. (measured distance is 6 feet from the earlier spot.)

Foreman : Show us the spot where the accused is supposed to have fallen. (At this stage the Inspector and Sergeant Appuhamy walk down and stand near some plantain trees. The Inspector turns round and says pointing to a place where a house is supposed to have been, now only a mound of red earth can be seen, this is the spot where Abdul Cader's house was.)

Foreman : Show us the spot where P. C. Sakkaf was standing at the time he flashed the torch. (At this stage Sergeant Appuhamy walks up and having crossed the barbed wire fence stands at a spot on Alexander's land.) The Inspector at this stage walks down to the road and a little to the right of Alexander's house shows the direction in which the Sergeant's party left to cover the rear of Alexander's house. The Jurors walk uphill and view the spot. At this stage the Jurors get into their respective vehicles and proceed. The Inspector having got down from his Jeep points out the spot where they are supposed to have alighted from their cars before they came to Alexander's house which is about $\frac{1}{4}$ mile (2.50 p.m.)

At 2.50 p.m. the party leave the scene of alleged incident and return along the same road to Court-house. 3 p.m. at Court-house.

Clerk of Assize administers the oath of separation.

Certified correct.

(Sgd.) _____

Stenographer, S. C.”

When the Trial was resumed the following day the Clerk of Assize gave evidence. He spoke to the selfsame matters which I have earlier referred to as to what occurred at the inspection of the scene.

The record of what occurred at the scene appears to have been taken down at the scene by a stenographer, presumably under the direction of the Clerk of Assize.

Provisions for the view of a scene of offence by the Jury are contained in Sec. 238 of the Criminal Procedure Code. Sec. 238 (1) states “ Whenever the Judge thinks that the Jury should view the place in which the offence charged is alleged to have been committed or any other place in which any other transaction material to the trial is alleged to have occurred the Judge shall make an order to that effect and the Jury shall be conducted in a body under the care of an officer of the court to such place which shall be shown to them by a person appointed by the Judge.

Sec. 238 (2). Such officer shall not except with the permission of the Judge suffer any other person to speak to or hold any communication with any member of the Jury ; and unless the court otherwise directs they shall when the view is finished be immediately conducted back into court.”

In *The Queen v. H. H. Aladin and another*¹ 61 N. L. R. p. 7 Basnayake, C.J., said “ that the learned Judge did not take part in the view is not disputed. . . . The Clerk of Assize appears to have administered the oath of separation to the Jurors in the absence of the Judge. If this was done it was improper.”

In the instant case not only did the Clerk of Assize administer the oath of separation in the absence of the Trial Judge but the stenographer has taken down notes of what occurred at the scene and also of what Inspector Maheswaram and Police Constable Benedict Appuhamy said and did all of this in the absence of the Trial Judge. Those two witnesses were not recalled after the Inspection. The observations of Basnayake C.J. in 61 N. L. R. p. 7 at p. 13 will apply with great force to the instant case. “ It is unnecessary to add that a Judge who does not take part in an Inspection especially in a case of this nature is at a disadvantage when it comes to charging the Jury. They have a mind’s picture of the scene which he has not and he is confined to the bare sketch which

¹ (1959) 61 N. L. R. 7.

does not convey such a vivid picture as a view. He is thereby precluded from making the contribution he might have been able to make to the case had he taken part in the view."

In the case of *Tameshwar v. Reginam*¹ (1957) 2 A. E. R. p. 683 Lord Denning said "It is very different when a witness demonstrates to the Jury at the scene of the crime. By giving a demonstration he gives evidence just as much as when in the witness box he describes the place in words or refers to it on a plan. Such a demonstration on the spot is more effective than words can ever be, because it is more readily understood. It is more vivid as the witness points to the very place where he stood. It is more dramatic as he re-enacts the scene. He will not, as a rule, go stolidly to the spot without saying a word. To make it intelligible he will say at least "I stood here" or "I did this" and, unless held in check he will start to give his evidence all over again as he remembers with advantage what things he did that day. . . ."

"Now if a view of this kind is part of the evidence—as their Lordships are clear that it is—it would seem to follow that it must be held in the presence of the Judge . . . The summing-up of the evidence by an impartial Judge with a trained mind is an essential part of every criminal trial; but it can only properly be done by a Judge who has heard all the evidence and seen all the demonstrations by witnesses. The Judge, for instance may notice something at a demonstration which may be of vital import but passes unnoticed by everyone else until he draws attention to it. His presence ensures not only that the proceedings are properly conducted but also that no relevant point on either side is overlooked."

In the instant case, Police Constable Benedict was in fact not injured as a result of the gun shot fired by the accused. This was an important fact for the consideration of the Jury in determining whether or not the evidence established beyond doubt that the accused had fired with the intention of causing the death of the Constable. The incident took place at night in circumstances in which a possible explanation for the firing of the gun was that the accused only wished to scare a Police party which approached the house of Alexander in order to arrest the accused.

In these circumstances, and having regard to the full re-enactment at the inspection of the alleged incidents as spoken to in the evidence of the prosecution witnesses, it was highly probable that the ultimate verdict of the Jury was influenced by impressions formed in the course of the demonstration. Faith in the credibility of Constable Benedict's evidence could well have been created by his demeanour and conduct during the demonstration, in which he actively participated. Thus, in the words of Lord Denning, the demonstration became part of the evidence. It was clearly illegal that a demonstration of this nature took place in the absence of the trial Judge. On this ground, we quashed the verdict and sentence and acquitted the accused.

Accused acquitted.

¹ (1957) 2 A. E. R. 683. .