

1938

*Present: Abrahams C.J.*BARNES *v.* PINTO.

565—P. C. Colombo, 7,749.

*Inspection of scene of offence—Duty of Magistrate—No occasion for fresh evidence—Necessity for repeating evidence from witness-box—Criminal Procedure.*

A Court is entitled to view the *locus in quo* in order to arrive at a better understanding of the evidence. But the inspection should be carried out with great care and should not be made the occasion for the taking of fresh evidence. If anything is said or done which amounts to the taking of fresh evidence and the correction of any doubts in the mind of the Court, that evidence should be repeated from the witness-box so that no prejudice may be caused to the accused.

**A** PPEAL from a conviction by the Police Magistrate of Colombo.

No appearance for accused.

*E. H. T. Gunasekere, C.C.*, for respondent.

*Cur. adv. vult.*

November 7, 1938. ABRAHAMS C.J.

The appellant in this case is a boy of eighteen. He was charged with stealing a gun from the house of a man called Vincent de Alwis with whom the gun had been left by its owner, W. B. Fernando. Fernando stated that he had left the barrel of the gun wrapped up in paper and cloth. A little girl, Bridget, the daughter of Vincent de Alwis, stated that the accused came to the house, pushed her on one side, entered into the house and removed the gun from the loft where it had been placed. She cried out to her father who said that he saw the accused coming out of the house with the gun and pursued him and caught him at his house where his father and his brothers prevented Vincent from proceeding any further. Another witness, Romanis, said that he saw the accused running with a gun and going towards his house followed by Vincent. The Police Vidane to whom a complaint was made by Vincent some hours later, stated that he searched for the accused and could not find him nor could he get any information of his whereabouts. On a Police report eight days after the alleged offence a warrant was issued which was not executed. From the record it would appear that the accused surrendered twenty-nine days after the alleged offence.

The accused said that the charge was completely false and was inspired by spite as there was litigation between the complainant and the accused's father, but that there was some ill-feeling between the parties has been accepted by the Magistrate.

The evidence as it appears from the record had certain contradictory features about it, and the Magistrate says that at one time it seemed rather fantastic, particularly because of the peculiarities in the witness-box of the witness Vincent de Alwis, which made the Magistrate suspect his honesty. At the close of the case for the prosecution the Magistrate decided to inspect the scene before he called on the defence. The time

was fixed for the inspection and notice was served on the prosecuting officer and on the accused. At the scene of the inspection the Magistrate says that the witness Vincent de Alwis "took us through the whole incident following the line the accused is alleged to have taken to his house with the gun". The Magistrate was then convinced, after viewing the scene, that the man was speaking the truth in the witness-box, and he also thought that the peculiarity of his manner was due to nervousness which he seemed "to shed out of the witness-box". Now in order to arrive at a better understanding of the evidence the Court is entitled to view the *locus in quo*. But experience of Courts going beyond the purpose of a view has shown that this inspection should be carried out with great care and ought not to be made the occasion for the taking of fresh evidence. In my opinion if anything is said or done which amounts to the taking of fresh evidence and the correction of any doubts which may be in the mind of the Court prior to the view it is essential that that evidence should be repeated in the witness-box in order that no prejudice should be occasioned to the accused. In this instance the inspection does appear to have imported a certain amount of fresh evidence, but what to my mind is rather serious is that the demeanour of the witness Vincent de Alwis outside the Court was employed by the Magistrate to correct an unfavourable impression which was created when he was in the witness-box. This is tantamount to the Magistrate using his own personal knowledge to correct an unfavourable opinion that he has formed as a Magistrate of a witness. I am bound to say that the Magistrate has been very frank about what appears to me to have been an irregularity. So far as the evidence of this witness is concerned I am afraid it must be deemed to have been unsatisfactory, and I think the case must now be looked at from the point of view of the other evidence on the record and I must ask myself whether the accused ought to have been convicted in any event.

It appears to me that the case is a strong one even without the testimony of Vincent de Alwis, and though the Magistrate states that the little girl Bridget has drawn on her imagination in one respect, yet he says she was unshaken in cross-examination, and it was difficult to believe that she had been coached. If that is so, then there was no reason why the Magistrate ought to have rejected her evidence. There is also the witness Romanis who says that he saw the accused running with a gun towards his house followed by Vincent and that there was a big discussion on the accused's land about the gun between Vincent and the accused's father and brothers. The accused himself stated that Vincent came to his house on the day in question, seized him and told his father that he had stolen a gun from the complainant's house and that he had come after him; that his father told him to look for it and take it if it was there, and that Vincent searched the house and went away. This appears to me to be corroborative of the evidence of Romanis. However, the cloth and paper in which the owner of the gun says that the article was wrapped was found near the house. It was found on the path along which the accused is said to have run. Further the headman testified to the fact that on the morning of the alleged offence Vincent complained to him that a gun had been stolen by the accused who ran away with it to his

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house. Whether that complaint was true or whether it was false, it was made. The headman says that in consequence of that he went to the house of the accused and did not find him there. He could get no information about his whereabouts although his father was there. The headman searched for the accused in the neighbourhood and in the village during that day. The accused was not in the village after that. No explanation was given of what the accused was doing from that date until the day that he surrendered to the Court. It was obviously a strong case for the accused to answer. In my opinion it has not been answered merely by saying that there was ill-feeling between his family and that of the complainant. Despite then the substantial irregularity above mentioned that the Magistrate committed, in my opinion the conviction was right and I dismiss the appeal.

*Affirmed.*

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