1959 [IN THE COURT OF CRIMINAL APPEAL]

Present : **Basnayake, C.J. (President), Pulle, J., and H. N. G. Fernando, J.**

THE QUEEN *v.* H. H. ALADIN and another

Appeals 125 and 126, with Applications 161 and 162

S. C. 1—M. C. Balapitiya, 16,686

Criminal procedure—Tender of entire record of a case in evidence—Irregularity—Civil Procedure Code, s. 154—Inspection by jury of place where offence was committed —Presence of Judge necessary—Criminal Procedure Code, s. 238—Previous statement made by a witness in writing or reduced to writing—Procedure for contradicting the witness by such written statement—Evidence Ordinance, s. 145 (1).

It is highly irregular to tender the entire record of another case in evidence without reference to specific portions of it which ought to be distinctly specified and marked.

Under section 238 of the Criminal Procedure Code a view of the scene of the crime can take place only when the Judge thinks that it is desirable and makes an order to that effect. Moreover, the inspection must be had in the presence of the Judge.

Where it is sought to contradict a witness by proving a portion of his statement made to a police officer and reduced by the latter to writing, section 145 (1) of the Evidence Ordinance requires that the witness's attention must first be called to those parts of the statement which are to be used for the purpose of contradicting him.

The Evidence Ordinance does not permit proof of the contents of a document without the production of the document itself. *The King v. Jinadasa* (1950) 51 N. L. R. 529 distinguished.

APPEALS, with applications, against two convictions in a trial before the Supreme Court.

Colvin R. de Silva, with *M. L. de Silva*, for Accused-Appellants.

A. C. Alles, Deputy Solicitor-General, with *P. Colin Thome*, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

February 9, 1959. BASNAYAKE, C.J.—

The appellants Hewa Hakuru Aladin and Hettiyahandi Peiris Singho were arraigned on an indictment containing two counts, one charging them both with the attempted murder of Yakupiti Hendrick Appu and the other with the attempted murder of Yakupiti John Singho. They were

acquitted of the charges of attempted murder ; but were found guilty of attempted culpable homicide not amounting to murder. They have now appealed against their convictions.

Of the twelve grounds stated in the notice of appeal learned counsel for the appellants urged the following :—

(*a*) that the verdict of the jury is unreasonable,

(*b*) that the admission in evidence of the record in C. R. Balapitiya Case No. 25,851 was improper,

(*c*) that the taking of evidence on the visit of the jury to the scene in the absence of the Judge was illegal,

(*d*) that it was sought to contradict the defence witness Thomme Hakuru Martin by proving a portion of his statement made to Police Sergeant Munsoor and reduced to writing by him without the witness's attention being called to those parts of it which were to be used for the purpose of contradicting him as required by section 145 (1) of the Evidence Ordinance.

It will be convenient at this stage to state briefly the material facts and then proceed to examine the above grounds one by one. The injured persons live in a portion of a hamlet in extent one and half acres and containing six houses. It has a river on two sides, on the third a marshy field and on the fourth Thanahengoda Estate, a cinnamon plantation several acres in extent. The land on which the injured persons lived adjoins Thanahengoda Estate. A fence separated the estate from their land. A stile in the fence gave access to a footpath over the estate leading to Galwehera Village Committee road.

The prosecution case is that Aron Singho a son of Hendrick Appu one of the injured persons was on the day in question (27th August 1956) waylaid and severely assaulted near the estate bungalow as he was returning home from his place of work in Araniel Silva's field. Aron managed to get home though he was badly injured. He appears to have been pursued by the two appellants and several others. The appellants were armed with guns and the others with katties and clubs. They came up to the stile but did not proceed further. When Hendrick asked them why they had assaulted Aron Singho the 2nd appellant shot him and the 1st appellant shot his son John Singho.

The defence version is that Hendrick, John Singho, Aron Singho, Raththa, and several others were cutting cinnamon by stealth on Thanahengoda Estate when Thomme Hakuru Martin the watcher who was on his rounds with his gun at about 5 in the afternoon suddenly came across them when Aron Singho seized his gun and stabbed him on his back. Martin struggled with him, freed his gun and struck Aron Singho with it. Hendrick, John Singho, and Raththa, rushed to his aid when Martin shot them pointing his gun at their feet and they fled.

That evening when Police Sergeant Munsoor came to investigate the crime at about seven he found Martin in the verandah of the house of a neighbour N. S. D. S. Wickramasinghe. He had two stab injuries on his back and was still bleeding and appeared to be in pain. He made a

statement to Munsoor which he reduced to writing. That very night Munsoor was shown the place where the cinnamon was cut (about 50 sticks had been freshly cut), the pellet marks on a cinnamon bush, and the place where the alleged attack took place. Though search was made neither the Sergeant nor the other officers found any pellets or wadding near about the spot at which Martin shot Hendrick, John Singho and others. Sergeant Munsoor went to the bungalow and examined the gun. It had a spent cartridge in the breach and bore signs of having been recently used. It was 10 p.m. when Munsoor reached the houses of the injured men. They had by then been removed to hospital and he could not record their statements nor was he able to find any wadding or pellets near or about their houses that night. It had rained and the detection of such things as wadding and pellets and any marks of struggle on the ground was rendered difficult. On his second visit to Hendrick's compound the next day he found two pieces of wadding—one thick and the other thin—and two pellets. On his third visit to the land on the second day after the offence the witness Meliashamy handed him 14 pellets which she said she had found at different places in the garden. The evidence of the injured persons that they were shot while they were in their compound by the appellants who fired from the stile is not supported by any unequivocal circumstances. The injuries on both Hendrick and John Singho indicate that the person or persons who shot them had aimed the gun low. The former had 17 punctured wounds on his left leg and thigh and 18 punctured wounds on his right leg and thigh while the latter had one punctured wound on his spine, three on his left buttock, two on his left leg and two on his right leg.

Learned counsel drew our attention to the infirmities in the case for the prosecution. It is not necessary to enumerate them for the purpose of deciding the grounds of appeal urged on behalf of the appellants. Though the defence version was promptly given to the Police even before the prosecution version was recorded it is not without its shortcomings. Martin's account of what happened does not fully explain the injuries on Aron, Hendrick and John. The jury appear to have believed the evidence of Hendrick, John Singho, Aron Singho and Meliashamy, and rejected the evidence of Martin as they were entitled to do. Having regard to the evidence we cannot say that the verdict is one which no reasonable tribunal could have found, for, that is what is meant by the ground that the verdict is unreasonable. The first ground of appeal must therefore fail.

The second ground of appeal urged by counsel is that the prosecution improperly tendered in evidence the record in Case No. 25,851 of the Court of Requests of Balapitiya. That record contains the plaint and answer. The plaintiff is one Hewessagamage Babynona of Thanahengoda. The defendants Daniel de S. Edirisinghe of Wellaboda, Balapitiya, Liyanagamage Brampy, Liyanagamage Thomis Singho, and Liyanagamage Davith Singho, all of Thanahengoda. Both the plaintiff and the defendants are strangers to these proceedings and are not even formal witnesses. The prosecution not only produced the whole record which it should not have done ; but it also elicited from the record-keeper who produced it irrelevant evidence, though without objection by the defence. Learned

Crown Counsel elicited the fact that the action was instituted on 20th February 1956 and that the plaintiff claimed a share of Thanahengoda Mahawatte and that on 4th July the action was withdrawn for the purpose of filing other proceedings in the District Court. The learned Judge elicited the fact that it was alleged in the plaint that the four defendants had obstructed the footpath claimed by the plaintiff by putting up a fence. The contents of paragraph 3 of the answer were elicited both by the learned Judge and counsel for the defence. Learned Crown Counsel did not explain how the averments in the plaint and answer and the journal entries in the Court of Requests case between strangers were relevant to these proceedings. The obstruction of the footpath was not a fact in issue nor are the statements in the pleadings which are hearsay relevant under any provision of the Evidence Ordinance. Irrelevancy apart, it is highly irregular to tender records in evidence without reference to specific portions of them which ought to be distinctly specified and marked. The Civil Procedure Code (s. 154) enjoins that in civil proceedings it shall not be competent to the Court to admit in evidence the entire body of proceedings and papers of another action indiscriminately. It requires that each constituent document should be separately and formally tendered at the time when its contents or purport are first immediately spoken to by a witness. If what was done here would have been obnoxious if done in civil proceedings how much more so should it be in criminal proceedings ?

The third ground is that evidence was taken at the scene in the absence of the Judge. Section 238 of the Criminal Procedure Code provides that 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. When the Judge makes such an order the law requires that 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. The officer under whose care the jury are conducted is forbidden by the statute to suffer any other person to speak to or hold any communication with any member of the jury except with the permission of the Judge. The statute also requires that the jury shall when the view is finished be immediately conducted back into Court unless the Court otherwise directs.

It is clear from the section that a view of the scene of the crime can take place only whenever the Judge thinks that it is desirable and makes an order to that effect. In the instant case the extract from the transcript of the proceedings which is reproduced below does not show that that requirement was satisfied. The transcript at the end of John Singho's evidence reads—

> " *Crown Counsel* : At this stage, before the other witnesses are called, I make an application, if the jury wishes to, that a visit to the scene may be very useful in this case in view of the fact that a sketch drawn and produced does not sufficiently show the points and the geography of the land.
>
> " *Court to Mr. Foreman* : Do you wish to inspect the scene ?

" *Mr. Foreman :* Actually I was feeling like asking that some sort of objects be given to this man so that he could place it in such a way that we could find out the place where the well was and so on.

" *Defence Counsel :* If the members of the jury wish to see the scene I shall have no objection.

" *Crown Counsel :* I make the application that it is at this stage that we should visit the scene.

" *Court :* We shall leave tomorrow morning at 8.30 a.m. "

The next day's record reads as follows :—

" *8·30 a.m.* Jury assembles in Court.

Court directs that the jury do proceed to the scene of offence in charge of the Clerk of Assize, and *that Police Sergeant 3210 Munsoor do point out the scene and the various spots shown in the sketch as having been pointed out to him by the witnesses.* The Clerk of Assize is directed not to permit any person other than Sergeant Munsoor to have any communication with the jury. After inspection the Clerk of Assize is directed to conduct the jury back to Court.

" *8.45 a.m.* Crown Counsel, Counsel for the Defence, the Sinhalese Mudaliyar, the Stenographers, the accused in the custody of the Fiscal, and the members of the jury in charge of the Clerk of Assize, all leave the Court premises for the scene of offence. The Jurors, Counsel and accused arrive at the scene of offence at 10.45 a.m. The Clerk of Assize directs Sergeant Munsoor to point out various spots marked in the sketch. The Sergeant then points out to the jury the following spots :— "

It would appear that the Sergeant first pointed out the places referred to in Martin's evidence, and next pointed out the places marked A, B, C, D, F, G, H, J, K, M, N, P, Q, and some other places such as a new house and a well spoken to by the witnesses in their evidence. The record further reads—

" At Crown Counsel's request the Sergeant points out the point ' R' without mentioning what ' R ' is. At the request of Mr. Dahanayake, Defence Counsel, the Sergeant points out Podinona's house which, the Sergeant states is the same as Aron's house marked ' P ' on the sketch. At Mr. Dahanayake's request the Jurors take a view of the stile from the well. "

The inspection of the scene was over by 11.25 a.m. and then the jurors and counsel were taken to the Ambalangoda Resthouse and given some light refreshments. Thereafter the jurors were conducted back to the Court by the Clerk of Assize. The transcript reads—

" Having arrived at the Court-house at 1.45 p.m. the Clerk of Assize administers the oath of separation to them and they are discharged till 9 a.m. tomorrow."

That the learned Judge did not take part in the view is not disputed. His direction to Sergeant Munsoor amounts to an order that he should give evidence in his absence. 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.

A view is part of the evidence in a case and what Sergeant Munsoor did and said in the instant case is evidence (*Karamat v. Reginam*)[1]. In whatever form, in a trial in the Supreme Court evidence can be admitted only before the Judge and jury. It is improper to communicate to the jury any facts relating to the charge except in the presence of the Judge. In the instant case the view was designed to help the jury to understand a sketch that puzzled them and proved on their visit to the scene to be wrong in several material particulars. At the view Sergeant Munsoor appears to have not only pointed out the various spots depicted on the sketch and given particulars regarding those spots but also made a number of statements to the jury which he later admitted in his evidence to be incorrect. He also admitted that the most important of those spots, viz. where the injured men Hendrick and John Singho were said to have been when they were shot were never pointed out to him by them and that certain particulars of the sketch were not to scale and that the houses were incorrectly shown. It would also appear from the proceedings quoted above and the following record that the view lacked that orderliness which is associated with a view in which the Judge takes part.

"*Crown Counsel:* By the time we came to the spot we found the Jury already examining it, and in my submission that is inadmissible.

"*Court*: (to Crown Counsel) Then why did you refer to it in the evidence?

"*Crown Counsel:* I referred to it for this purpose, at the scene the jury were pointed out that spot and it was described as given in the key. That description in my submission was inadmissible at that stage. So to get it clear on the record I put the question to the Clerk of Assize when he was in the box in order to find out exactly what happened at the spot when the jury were there.

"*Court:* That was a point pointed out to the jury by a witness for the prosecution.

"*Crown Counsel:* That is so, but is strictly against Your Lordship's instructions."

We must express our disapproval of the course adopted by counsel for the prosecution and the defence in seeking to place evidence before the jury in the absence of the Judge. The former asked Sergeant Munsoor to point out spot "R" without mentioning what "R" is and the latter asked the jury to take a look at the well from the stile. The irregularities that occurred at the view are grave and sufficient to vitiate the trial. It was in similar circumstances that in the case of *Tameshwar v. Reginam*[2]

[1] *(1956) 1 All E.R.415 at 417, (1956) A.C. 256.*

[2] *(1957) 2 All E.R.683, (1957) A.C. 476.*

the Privy Council quashed a conviction in a case from British Guiana. The principle on which that decision was founded is equally applicable in Ceylon. This is how Lord Denning states it—

> "Section 45 enables the Court or a Judge to determine the terms and conditions on which a view may be held ; but this power must be exercised in accordance with the fundamental principles of a fair trial ; and one of these principles is that every piece of evidence given by a witness must be given in the presence of the tribunal which tries the case ; and the tribunal is not the Jury alone, but the Judge and Jury . . . . If witnesses give demonstrations or answer questions at a view, that is undoubtedly part of the trial, and must be had before the Judge and Jury."

We wish to guard ourselves against what we have said above being understood to mean that at a view of the scene witnesses cannot be asked to demonstrate or explain something which needs explanation or take up certain positions which they say they occupied at the time the crime was committed. Witnesses can be asked to give demonstrations or explanations but such demonstration and explanation must be given in the presence of the Judge and jury. How essential it is that the Judge should be present at a view is emphasised not only in *Tameshwar's* case but also in the case of *Karamat* (*supra*) where Lord Goddard in dismissing the appeal to the Privy Council said—

> "Here everything was done in the presence of the Judge, who throughout was in control of the proceedings. It was eminently desirable that he should be present, and it is possible that, had he not been, a different result would have followed."

At a view directions to witnesses and other questions if any to them should come from Judge and not from the jury or counsel ; but it is open to counsel or the jury to suggest them to the Judge so that he may decide whether a particular direction should be given or question asked.

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 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. The disadvantage is greater where as in this case the sketch happens to be unreliable in many important respects.

The last of the above grounds of appeal is that portions of the statement made by the defence witness Martin were elicited by Crown Counsel in rebuttal from Police Sergeant Munsoor without complying with the condition precedent prescribed in section 145 (1) of the Evidence Ordinance. Martin admitted in examination-in-chief that he made a statement to a Police Sergeant and the learned Judge put to him the following questions at the end of his re-examination :—

> "2057. *Court :* Q. What time did Sergeant Munsoor record your statement ?
>
> A. At about 6 p.m. It was just getting dark.

2058. Q. I take it you told him what exactly happened ?
A. Yes.
2059. Q. Did you tell him that when Aron stabbed you from behind you struck him with the gun ?
A. Yes.
2060. Q. You are quite sure ?
A. Yes. "

After Martin's evidence was over the Crown Counsel stated : " I move to call P. S. Munsoor in rebuttal on the evidence led by the defence. "

Crown Counsel then proceeded to read to Sergeant Munsoor specific portions of Martin's statement from a copy of the written record of it and Sergeant Munsoor who also appears to have had a copy answered " Yes " to the questions asked. Below are the questions put to Munsoor and the answers given by him.

" 2072. Q. You told us that on the 27th August 1956 when you were going towards this Thenahengoda Estate you recorded the statement of T. H. Martin at 7.45 p.m.?
A. Yes.
2073. Court : Q. In the estate bungalow of N. S. D. S. Wickramasinghe ?
A. Yes.

Examination contd.

2074. Q. In the course of that statement did he tell you that at about 3.30 or 4 p.m. that evening when he was going round the cinnamon land of Daniel Edirisinghe he noticed Hendrick Appu and John Singho cutting cinnamon ?
A. Yes.
2075. Q. That he went up to them without being seen by them and that he approached them and questioned them and while he was questioning them, Aron Singho came from behind and stabbed him twice on his back ?
A. Yes.
2076. Q. And as he was stabbed he fired a shot with his gun that he had in his hand ?
A. Yes.
2077. Q. And that he did not know whether that shot struck anyone and that when he fired the shot all of them started to run ?
A. Yes.
" 2078. Q. He also mentioned the fact that one Rathu Appu was collecting cinnamon sticks ?
A. Yes.
2079. Q. Then he raised cries ?
A. Yes.
2080. Q. And for his cries Aladin, William and some others came there and he said ' brought me here , or there ' ?
A. Brought me there.
2081. Court : Q. To the estate bungalow ?
A. Yes.

Examination contd.

2082. Q. He did not mention anywhere in that statement of his that he had used the gun to assault Aron Singho ?
A. No.
2083. Q. Nor has he stated that he ever assaulted Aron Singho that day ?
A. No.
2084. Q. He has not mentioned the fact that John Singho and Hendrick Appu assaulted him at any time ?
A. No. "

After the cross-examination and re-examination of the witness the learned Judge asked the following questions :—

" 2102. Q. After recording the statement did you read it over and explain it to Martin ?
A. Yes.
2103. Q. Did he admit it to be correct ?
A. Yes.
2104. Q. Did he sign the statement ?
A. Yes. "

By adopting this unusual procedure learned Crown Counsel presumably intended to show that some of Martin's statements to the Sergeant contradicted his evidence. But this he was not entitled to do without first drawing the attention of the witness to those parts of his statement which were to be used for the purpose of contradicting him (S. 145 (1) Evidence Ordinance).

The defence justifiably complains against the strange course adopted by learned counsel for the prosecution. The complaint is that, apart from the contravention of section 145 (1), the failure of the prosecution to draw the attention of Martin to those portions of his statement which were to be used for the purpose of contradicting him deprived the only witness for the defence of the opportunity of explaining or denying the statements imputed to him and that the absence of any explanation from him might have had the effect of showing him in an unfavourable light and influenced the jury to reject his evidence. Crown Counsel was either aware of the provisions of section 145 (1) or he was not. In either case his action is inexcusable.

We cannot allow to pass without comment the strange way in which Crown Counsel sought to prove portions of Martin's statement. It is clear from the transcript that Munsoor was not giving oral evidence of those statements for unless he had a prodigious memory, which the evidence shows he had not, he could not have remembered over two years after the event every word of those portions of Martin's statement which were put in evidence. It is also clear that Munsoor was not refreshing his memory by reference to the written statement. Crown Counsel was in effect proving the contents of a document without producing the document itself. The Evidence Ordinance does not permit it. If it was done on the assumption that the decision of this Court in *King v. Jinadasa* [1] authorises it, we wish to state that that assumption is wrong.

[1] *(1950) 51 N. L. R. 529.*

The last ground of appeal must also be upheld. In the result all except the first ground of appeal urged by learned counsel must be upheld and the convictions of the appellants quashed.

The only question that remains for consideration is whether a retrial should be ordered or not. We are of opinion that after such a long lapse of time—it is now 2 years and 6 months from the date of the commission of the offence—and in a case of this nature where there are several infirmities in the evidence for the prosecution, no useful purpose will be served by a retrial. We therefore quash the conviction and direct that an order of acquittal be entered in respect of both appellants.

Appellants acquitted.

1957 *Present :* **Basnayake, C.J., and Pulle, J.**

V. ARUMUGAM *et al.*, Appellants, *and* S. SOMASUNDERAM *et. al.* Respondents

S. C. 351—D. C. Jaffna, 6,056/M.

Thesavalamai—Action for pre-emption—Decree entered in plaintiff's favour—Subsequent execution of conveyance by District Court Secretary—Date of vesting of title in pre-emptor—Prescription Ordinance, s. 6—Civil Procedure Code, ss. 200, 333.

Where, in an action for pre-emption, the Secretary of the District Court is ordered by Court to execute a conveyance in favour of the pre-emptor on account of the wilful failure of the defendants to do so, title vests in the pre-emptor from the date of the Secretary's conveyance and not from the date of the decree.

In an action for pre-emption, the plaintiff obtained decree and District Court Secretary's conveyance in his favour but subsequently suffered damages by reason of an obligation to pay off a mortgage created by the 1st defendant (co-owner) in respect of the property in question during the pendency of the action and after the 1st defendant had obtained a re-transfer from the 2nd defendant (the vendee)—

Held, that the plaintiff was entitled to bring a second action to recover the damages suffered by him and that the period of prescription in respect of his claim for damages commenced from the date of the conveyance executed by the Secretary of the District Court.

APPEAL from a judgment of the District Court, Jaffna.

H. V. Perera, Q.C., with *A. Nagendra*, for Plaintiffs-Appellants.

S. Nadesan, Q.C., with *C. Chellappah*, for 1st Defendant-Respondent.

N. E. Weerasooria, Q.C., with *H. W. Tambiah* and *C. Renganathan*, for 2nd Defendant-Respondent.

Cur. adv. vult.