

Present : Sirimane J., Malcolm Perera J. and Weeraratne J.

W. M. PETER SINGHO and another, Appellants *and* Republic
of Sri Lanka

S. C. 106—107/74—H. C. Galle—73/74

Criminal Procedure—Inspection of the scene of the crime—failure to recall the chief prosecution witness who was present at the inspection to give evidence—prejudice to the accused.

Held : Where an inspection is held at the scene of the crime and witnesses are called to point out various spots, they should be recalled in Court and their evidence taken under oath or affirmation as to what they pointed out at the scene, so that it would form legally admissible evidence upon which a Jury can base its verdict.

A PPEAL against a conviction at a trial before the High Court, Galle.

E. R. S. R. Coomaraswamy with C. Chakradaran and E. R. S. R. Coomaraswamy (Jnr.) for the accused-appellants.

R. Gunatilleke Senior State Counsel for the Attorney-General.

June 9th, 1975. SIRIMANE, J.—

We have considered a preliminary matter argued by learned Counsel for the appellants namely, the question as regards whether there has been material prejudice caused to the

accused by sufficient evidence not being given in Court in respect of what transpired on a visit to the scene by the Judge and the Jury. From the notes of the inspection produced by the Registrar during the course of the trial it appears that the chief prosecution witness Upasena who had concluded his evidence at the time of the inspection was questioned and requested to point out various spots and distances at the scene. Some of these matters were of vital importance such as the place where the Petromax lamp was and the distance to which it shed its light; the place from which the accused fired the shot and very many other material matters. Some of the Jurors also put questions to this witness Upasena at the scene and he answered them and pointed out various spots. In view of the fact that Upasena was the main witness for the prosecution the matters that took place at the inspection appear to have been both an examination and demonstration by this witness on very material points. It was therefore essential that this witness should have been recalled and evidence elicited under oath or affirmation as to the points he showed at the scene of offence and thereby give an opportunity to the defence to cross-examine him on those matters. By not calling Upasena and taking his evidence on oath, material questions which transpired at the inspection were left to the Jury on unsworn statements and demonstrations given by Upasena.

It has been laid down in decisions of the Supreme Court that where an inspection is held and witnesses are called to point out various spots they should be recalled in Court and their evidence taken under oath or affirmation as to what they pointed out at the scene, so that it would form legally admissible evidence upon which a Jury can base its verdict. As stated earlier, in the present case a large number of matters which were very material have been spoken to and demonstrated by the main witness Upasena without his subsequently having spoken to them under oath or affirmation. These cannot be regarded as mere technicalities as they could well have influenced the Jury in arriving at their verdict in this case.

Learned Counsel for the State conceded that it was irregular for Upasena not to have been called in Court and examined on what he did at the inspection but he submitted that no material prejudice had been caused.

In view of what we have already stated we are of the view that such important matters like the means of identification and the place from which the assailant fired pointed out by Upasena, together with very many other matters which in our view are

quite material would have caused prejudice to the appellants. For these reasons we quash the conviction and sentence and send the case back for retrial on the same charge.

MALCOLM PERERA, J.—I agree.

WEERARATNE, J.—I agree.

Case sent back for retrial.

