1948 *Present :* **Canekeratne and Nagalingam JJ.**

THE KING *v.* GNANAPIRAGASAM

S. C. 44—D. C. Crim. Jaffna, 4,341

Criminal procedure—Inspection of scene of offence—Parties noticed—Right of judge to inspect.

It is not improper for a judge trying a criminal case to inspect the scene of the offence provided he notifies the parties and allows them to attend him at the view.

APPEAL from a judgment of the District Judge, Jaffna.

M. M. Kumarakulasingham, with *J. Pathirana*, for accused, appellant.

A. C. Alles, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

September 24, 1948. CANEKERATNE J.—

The 2nd accused appeals from a judgment convicting him of causing grievous hurt to Police Constable Kumarasamy and simple hurt to Police Constable Kanagalingam, while they were in the discharge of their duty on August 14, 1946. The two Constables had stopped a rickshawman plying his vehicle, for hire, unlighted along a public street about 7.30 p.m. when the appellant went up to them and

requested them to release the man. On being asked "to mind his own business" he slapped Kanagalingam and when seized he shouted that he was being assaulted by the police; three or four men then turned up and the Constables were assaulted.

The trial commenced on January 7, 1948, three witnesses, one was Kanagalingam, gave evidence on this day. It was continued on January 9 and on that day Kumarasamy and five others gave evidence. At the close of that day's proceedings there is a note to this effect "Further trial January 12, 1948. Inspection today at 7.30 p.m." The inspection was held by the learned Judge in the presence of Counsel for both sides. On January 12, Counsel for the 1st and 2nd accused called the latter and some other witnesses and after Counsel had finished their addresses the learned Judge delivered judgment. He said that the opportunities for seeing the 1st, 3rd and 4th accused clearly and identifying them were little and that he had grave doubts of their correct identity and acquitted them. He gave cogent reasons for convicting the appellant. His Counsel contends that the conviction is bad inasmuch as the Judge inspected the place, which according to him he was not entitled to do; and secondly that the Judge was not impressed with the evidence given by the prosecution witnesses at the time he fixed the inspection and should have given the benefit of the doubt to the appellant. He referred in this connection to the absence of any provision in the Criminal Procedure Code (Cap. 16 of the Ceylon Legislative Enactments) similar to that relating to a trial by Judge and Jury (section 238). Thus if no statute had told the Judge how to perform his duty in some novel or unusual situation he should feel helpless.

Evidence includes all modes, other than argument, by which a party may lay before the tribunal that which will produce persuasion. There are three sources of belief, one is the testimony of a witness who had seen a thing, *e.g.*, a two-edged knife being used by the accused on the person injured: the second is the testimony of circumstance that a flesh wound at edges had narrow incisions—the witness who deposes to this must first appear to be so qualified that his assertion is worth receiving; the third is the production of the knife and the inspection of it by the tribunal. This source differs from the other two in omitting any step of self conscious inference or reasoning, and in proceeding by direct self perception. It is usually called real evidence. In the first case demonstration is founded upon the sight of others, in the last upon the sight of the tribunal The tribunal in the first case is confined to hearing what other men. think they have seen, in the last case it sees for itself the thing. Where the existence of the external quality or condition of a material object is in issue or is relevant to the issue, the inspection of the thing itself, produced before the tribunal is always proper, provided no specific reason of policy or privilege bears decidedly to the contrary. It does not appear that there is any distinction to be taken as regards the kind of fact to be presented for inspection. Anything cognizable by the senses of the tribunal may thus be offered, *e.g.*, the inspection of a maimed person on a trial for mayhem, tools, weapons, and other objects connected with a crime may be proved by production, as well as the clothing of the injured person. In the present case some things were produced, *e.g.*, P

the tunic of one Constable, P2 the tunic of the other, P3 the buttons and P5 the slouch hat of one of them. Nor is any distinction to be taken as regards the mode of presentation by the party : nor is any distinction to be taken as to the mode of inspection by the tribunal. It may employ its senses directly, or it may use some suitable mechanical aid, such as a microscope or a magnifying glass. It may merely look on, or it may take an active share in the process of experimentation. Nor is there any distinction as to the place of inspection : the thing may be brought into Court, or the tribunal may go to the place where the thing is,—thus where the object is immovable or inconvenient to remove, the natural proceeding is for the tribunal to go to the object in its place and there observe it. A Judge can see a picture of the place. Why should not the trier see the place itself ? Inspection may be forbidden in the same way as the reception of other evidence is barred, *e.g.*, it may be irrelevant ; sometimes a Judge in the exercise of a discretion may refuse it because unfair prejudice may be caused to an accused person, *e.g.*, the mutilated members of the victim of the crime[1]. A judge could act on the testimony of his own sense—Blackstone (1768) III, 331. The provision in the Code (section 238) is derived from English law. In the earliest English practice, the granting of a view seems to have become almost demandable as of course : (those who are curious may see 1 Burr. 252). It was thus necessary to make specific provision giving the trial Court its proper control. The theory of jury trials is that all information about the case must be furnished to the jury in open Court, where the Judge can separate the legal from the illegal evidence, and where the parties can explain or rebut. But if jurors were permitted to investigate out of Court, there would be great danger of their getting an erroneous or one sided view of the case, which the party prejudiced thereby would have no opportunity to correct or explain. A view not had under the discretion of the Court is therefore improper.

Whenever facts are tried by a Judge sitting alone, the Judge's use of real evidence becomes an equally appropriate mode of ascertaining facts, and is a corollary of his general power to obtain evidence. The Judge, therefore, may equally well proceed from the Court room to the place in issue, whenever such a proceeding would be a suitable one, to take a view, provided only that he observes the usual rule of fairness for a jury view, viz., that he notify the parties and allow them to attend him at the view.

The second contention may well be examined from a practical common sense point of view. An inspection is undertaken in order to enable the Judge to better understand the testimony of the witnesses respecting the same and thereby the more intelligently to apply the testimony to the issues on trial before him. What is the appropriate stage for doing this, at the beginning of the trial, at the end of it, at the end of the prosecution case or at any time ? There is very little advantage in the first method ; a Judge would not know whether such a change of conditions has occurred that a view of the object in its present

[1] *Wigmore on Evidence—from section 1150 to section 1154.*

I am indebted to Mr. Advocate V. A. Kandiah for getting me a copy of this volume.

state would be misleading. Stopping the trial and proceeding from the Court room to the place seems too theatrical and may not appeal to a Judge who is thought to be sober. In the present case it was not practical to fix the inspection for January 7, as one of the principal witnesses had not yet testified. There are obvious disadvantages in the second method and it should not ordinarily be adopted except on the application of the defence. The question, could he have felt a doubt may be tested in two ways. Firstly, in a case tried by a Judge and Jury the opportunity to decide finally upon the evidential material offered does not go to the jury as a matter of course ; the prosecution must first with its evidence pass the gauntlet of the Judge. The Judge requires that the mass of evidence put in be at least enough to be worth considering by the jury. A Judge trying a case without a jury would if he is properly doing his duty guide himself in the same way—if there is a sufficiency of evidence then there is a *prima facie* case to answer. Secondly, the two Constables were sent out from the Station on patrol duty and were to patrol the streets of beat No. 7. It is not denied that these Constables were assaulted by some person or persons at or near the place specified. Proper seeing is a skill which needs to be learned like playing the piano or playing good golf. It is unlikely that they would be sent on patrol duty in the night unless they were proficient to some extent. Constables who go on patrol duty are likely to be more observant of something that attracts their attention. In the first complaint one of the Constables had mentioned that the man " who interfered with their business with the rickshaw puller " was a slim tall man— a description which, according to the Judge, fits the appellant : he was also identified at the identification parade.

Opposing pieces of evidence may leave doubt. Doubt means a pulling of the mind in two directions, that is, a state of discord or conflict due to the action of two incompatible and antagonistic thought tendencies. As against the evidence given by these witnesses, the only circumstance at this time before the Judge was the suggestion that the light from the electric road lamp was not sufficiently strong for an identification. Can any one reasonably say that this was sufficient to create a rational doubt at this time in the mind of the Judge ? The more natural explanation for what the Judge did is that he had formed no view of the case at the time, the process of judging was in a suspended state : as the impulse to inquire was not satisfied he fixed the inspection. This is borne out by the note of the Judge " I wanted to see whether the light from the distant lamp lighted the spot sufficiently to enable the prosecution witnesses to see clearly to identify the accused ". The learned Judge has been hearing cases for a considerable number of years. It is hardly likely that on January 9, he lost sight momentarily of the cardinal rule relating to doubt.

The appeal is dismissed.

NAGALINGAM J.—I agree.

Appeal dismissed.