[COURT OF CRIMINAL APPEAL]

1968 *Present :* **H. N. G. Fernando (President), T. S. Fernando, J., and Abeyesundere, J.**

S. RATHINAM, Appellant, *and* THE QUEEN, Respondent

C. C. A. No. 121 OF 1967, WITH APPLICATION 161

S. C. 25 of 1966—M. C. Jaffna, 31328

Summing-up—Reference to a verdict which is " not acceptable in law "—Inadequacy of direction—View by jury of scene of offence—Demonstration by a witness—Duty of Court to recall the witness on resumption of trial—Demonstration held at scene of offence—Procedure—Criminal Procedure Code s. 238.

(i) At the conclusion of his summing-up, the trial judge addressed the jury as follows :—

" Try to be unanimous in your decision ; but if you cannot be unanimous, at least bring in a 5 to 2 verdict. Any other verdict is not acceptable in law. You may now retire and consider your verdict."

Held, that the direction, such as it was, was inadequate. The jury should have been further informed as to what would be the position if they were finally divided 4 to 3.

(ii) Where, at an inspection by judge and jury of the scene of the alleged offence, certain places are pointed out by a witness, the witness must be recalled and examined on oath and cross-examined on that matter when the trial is resumed in Court on the return of the jurors.

(iii) In a prosecution for murder by shooting, a material question at the trial was whether two witnesses who claimed to have seen the shooting could have identified the accused from their respective positions if the accused, who was seated in a moving car, had fired at the deceased from the car. A demonstration was held at the scene of the shooting in order to test the opportunity offered for identification.

Held, that the demonstration should not have been permitted and was capable of misleading the jury on the question of the credibility of the alleged eye-witnesses unless it was held in conditions comparable to those which existed at the time when the alleged offence was committed.

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

G. E. Chitty, Q.C., with *E. R. S. R. Coomaraswamy, Eardley Perera, M. Devasagayam* and *A. M. Coomaraswamy* (assigned), for the accused-appellant.

E. R. de Fonseka, Senior Crown Counsel, for the Crown.

Cur. adv. vult.

February 14, 1968. T. S. FERNANDO, J.—

The appellant (as the 1st accused) and two others (as the 2nd and 3rd accused) stood their trial at the Jaffna Assizes on a charge of murder of one Subramaniam Devendram. The jury by a unanimous verdict found the 2nd and 3rd accused not guilty, but by a divided verdict of five to two found the appellant guilty. The trial judge accordingly sentenced him to death.

Two main questions were raised before us on appeal, one of law and the other of fact. The question of fact was that the verdict was unreasonable ; but, having regard to the view we have formed on the question of law and the order we decided to make on this appeal, that a new trial be held, it becomes unnecessary to examine the evidence in this judgment as our order implies that we are of opinion that there was evidence upon which the appellant might reasonably have been convicted. The question of law was that, at a view of the scene ordered at the instance of the presiding judge, a demonstration took place before the judge and jury other than the kind of demonstration that was permissible resulting in grave prejudice to the appellant on the issue of the credibility of the alleged eye-witnesses.

Two other points raised, both of law, may also be mentioned. The first of these related to a direction given by the learned trial judge as to what is an acceptable verdict. At the very end of his charge to the jury, he addressed them thus :—

> "Try to be unanimous in your decision ; but if you cannot be unanimous, at least bring in a 5 to 2 verdict. Any other verdict is not acceptable in law. You may now retire and consider your verdict."

It was contended on behalf of the appellant that there was misdirection here capable of leading the jury to conclude that if they cannot be unanimous they had to return at least a 5 to 2 verdict. In respect of the appellant that was indeed the kind of verdict returned. We are free to say that the direction, such as it was, above reproduced was inadequate. What is an acceptable verdict cannot be said to be a matter of common knowledge on the part of jurors. It is a question on which jurors may well be instructed by a trial judge, and where such instruction is attempted it should be fuller than in the instant direction. They should be informed that the returning of a legal verdict is not obligatory, and that, if they are finally divided 4 to 3, their duty is to say to the judge on their return that they are unable to reach a verdict by reason of the nature of their division.

The other point of law related also to something that took place at the view of the scene. Certain places were pointed out at the scene by the witnesses, but the witnesses were not recalled and examined on oath as to what they did nor, of course, were they permitted to be cross-examined on that matter. On the return of the jurors to the court and

on the resumption of the recording of evidence, the Clerk of Assize alone was examined as a witness to ascertain what took place at the trial. We think that the two witnesses who showed certain spots material to the issue of their credibility should themselves have been recalled and, of course, permitted to be cross-examined. The observations made by Lord Denning in giving the reasons of the Privy Council in the case of *Tameshwar v. The Queen*[1] are in point and are reproduced below :—

> " By giving a demonstration (a witness) 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 advantages what things he did that day. But however much or however little the witness repeats his evidence or improves upon it, the fact remains that every demonstration by a witness is itself evidence in the case. A simple pointing out of a spot is a demonstration and part of the evidence.... "

Had there been no other and more material question of law urged on behalf of the appellant, in spite of the technical merit in this point of law, we would have had no hesitation in dismissing this appeal because we were in no doubt that no substantial miscarriage of justice had actually occurred by reason of the failure to examine in court the witnesses who showed the material spots.

We can now turn to the main question of law relied on by the appellant. The case for the Crown was that the deceased Devendram was shot by the appellant who was seated in a car that moved along the road abutting which the deceased was seated on the step of a boutique. Two witnesses, Kulasingham and Sharma, claimed to have identified the appellant as the person who fired the shot. Kulasingham was himself seated on a step of the boutique very close to the deceased. Sharma was seated on a chair behind a table placed towards the rear of the boutique. One of the material questions at the trial naturally was whether each of these two witnesses could have identified the appellant from their respective positions.

It was not disputed that at the view of the scene, which could only have been ordered by the learned trial judge under section 238 of the Criminal Procedure Code, the judge either ordered or permitted a car to be driven along the road while the judge and jury remained inside the boutique in the belief, one must assume, that the jurors would thereby be assisted in their task of determining the credibility of the witnesses Kulasingham and Sharma when they said that they did identify the

[1] *(1957) 3 W. L. R. at 162.*

appellant as the person who actually fired. (It should be mentioned that the Crown case was that the 2nd accused drove the car, and that the appellant and the 3rd accused were in the rear seat.) There is no record in the evidence as to the nature of this demonstration nor indeed even of the fact that any demonstration did take place. Apart from what counsel has been able to tell us of the nature of the demonstration, the only reference to a demonstration of this kind is to be found in the learned trial judge's summing-up to the jury. In that summing-up much stress was laid on what could have been gathered by the visit to the scene and all that the jury saw there, including the demonstration with the aid of a car being driven along the road, and at various stages thereof, he observed :—

(*a*) " You have in your mind a picture of that " ;

(*b*) " Ask yourselves whether you could have seen what he purports to have seen from that position " ;

(*c*) " You had the useful assistance of an inspection of the scene and I think you ought to have no difficulty in reaching a conclusion in regard to this matter ".

It is unnecessary, in our opinion, to examine on this appeal the nature of and the extent to which demonstrations are permissible at views of a place where the offence is alleged to have been committed. That all demonstrations are not ruled out is apparent from decisions on corresponding provisions of law ; see *Karamat v. The Queen*[1] and *Tameshwar v. The Queen* (*supra*). We do, however, think that the actual demonstration which was accepted before us as having taken place was impermissible and, far from assisting the jury to decide upon the credibility of the two witnesses concerned, was liable to mislead them on that important issue. While the shooting was alleged to have taken place about 6 o'clock in the evening, the demonstration took place about noon. The boutique had changed hands between the date of the offence and the date of the visit by the jury to the scene. While this circumstance may not have affected the question whether Kulasingham who said he was sitting on the step of the boutique could have identified the man who shot, it could have affected the question whether the other witness Sharma who sat in the rear of the boutique could also have identified because the contents of the show-cases in the boutique had undergone changes by reason of the conversion of what was a motor-spares boutique to a lending library. While the car used on the date of the offence is said to have been an Austin Ten, there is no evidence as to whether the car used at the demonstration was similar ; any difference between the two could affect the question as to what part or how much of the body of the person who shot was visible to persons in the boutique. We do not know who drove the car on the occasion of the demonstration. He was not called as a witness even on the return of the jury to court after the view of the scene. We have no evidence as to how fast or how slow the car was driven at the demonstration. It was suggested that

[1] (*1956*) *A. C. 256.*

it was driven slowly. Whatever its speed at the demonstration may have been, there is all the difference one can imagine between the question of what a person or persons might have seen of another who somewhat unexpectedly passes in a car and shoots and what persons who (like the jurors) waited expectantly in the boutique for the car to appear on the road could have seen of its occupant or occupants. To say the least, a demonstration which was not held in comparable conditions should not, in our opinion, have been permitted and was capable of misleading the jury on the question of the credibility of the alleged eye-witnesses.

We have set out above the reason why we quashed the conviction of and the sentence passed on the appellant and ordered his retrial on the charge contained in the indictment.

Sent back for retrial.