1937 *Present :* **Hearne J.**

THE KING *v.* THOLIS SILVA *et al.*

68—71—D. C. Galle, 15,717.

Criminal procedure—Duty of Court to scrutinize defence—Reasons for rejecting defence—Method of identification.

It is the duty of a Court to scrutinize the defence put forward in a case and if it is rejected, to give reasons therefor.

It is improper to allow witnesses the opportunity of seeing before hand persons whom they will later be ordered to identify in an identification parade.

APPEAL from a conviction by the District Judge of Galle.

H. V. Perera, K.C. (with him *C. R. de Silva*), for accused, appellants.

M. F. S. Pulle, C.C., for Crown, respondent.

Cur. adv. vult.

September 1, 1937. HEARNE J.—

The case for the prosecution stands or falls by the question of identification.

Apart from the question of whether the witnesses for the prosecution had the opportunity of identifying the first appellant it is very doubtful whether in giving evidence they were honest in saying that they did identify him. The witness Charles who stated that he had seen the first appellant on the night of the attack upon him and his companions and had heard him speak did not mention his name to the Police when he made a complaint. In his evidence he stated that he knew the first

[1] *31 N. L. R. 314.*

appellant well and had mentioned his name to the Police, but this is inconsistent with the evidence of P. S. 1253 Velappen who is emphatic that the complainants "could give no names but said they could identify" their assailants. The witness Upasakappu stated that he knew "Tholis (the first appellant) as did the lorry driver Charles" but that he mentioned "no names at the Police Station as I was not asked". The fact that these witnesses "knew" the name of one of their assailants and did not mention his name makes their evidence suspect at least in regard to the first appellant.

But there is another reason why the conviction of the first appellant is unsatisfactory and cannot be affirmed. His defence of an *alibi* in regard to which he gave evidence himself and called a witness in support was apparently not considered at all. The evidence for the defence must be scrutinized and failure to do so is an injustice to the accused "unless it is overwhelmingly obvious" as the Chief Justice remarked in a recent case "that the witnesses are so contradictory of each other so as not to be worthy of credit . . . ." That would not be a fair criticism of the witnesses in the present case. They were not contradictory and if their evidence was believed the first appellant would have been entitled to be acquitted. "A defence, and that applies as much to an *alibi* or to any other defence, unless it is on the face of it fantastic or contradictory, must be properly examined, and if it is rejected reasons must be given".

In regard to the remaining appellants their "identification" was far from being satisfactory. It does not appear in the evidence in what circumstances Charles and Upasakappu identified the fourth appellant (accused No. 5), if before the Police Court proceedings they identified him at all, but the evidence of Velappen is to the effect that the second and third appellants (accused Nos. 3 and 4) were brought to the Police Station and were thereupon identified by Charles and Upasakappu. In the case of *Williams* (*8 Crim. App. Rep. 84*), the court quashed a conviction which depended on the identification of a man who was seen by the identifying witnesses in the Police Station, not having been placed among others. The Court said that the mode adopted was not a proper one and the identification could not be said to have been satisfactory. The method of identification adopted in this case is to be strongly deprecated. The Police on hearing that the associates of Wijeratne were concerned with the attack on the complainants may have arrested two of them on suspicion, and the witnesses, as appears to have happened, merely said "Yes, these are two of the men who were in the gang". The danger of such a procedure is too obvious to be stressed.

The witness Alim had not known the accused previously. His evidence is to the effect that "he picked out the accused subsequently from other men". What precisely he means it is difficult to say. There is no evidence of an identification parade having been held. Certainly neither of the two police witnesses speaks of one. The convictions must be regarded as unsatisfactory.

I allow the appeals and acquit the appellants.

Set aside.