1947 *Present : Dias J.*

ARON SINGHO, Appellant *and* BUULTJENS (S. I. Police), Respondent.

394—M. C. Colombo, 24,432.

Criminal Procedure—Inspection by Court—Of place where offence committed—Proper procedure to be followed—Courts Ordinance, s. 53.

A Court is entitled to inspect the scene of an alleged offence in order to arrive at a better understanding of the offence. The inspection must, however, be carried out with great care, and should not be made the occasion for the taking of fresh evidence. If anything is said or done which amounts to the taking of fresh evidence and the correction of any doubts in the mind of the Court, that evidence should be repeated from the witness-box, so that no prejudice may be caused to the accused.

A Magistrate is empowered by section 53 of the Courts Ordinance to hold his Court "at any convenient spot" within the limits of his judicial division, but it must be a judicial proceeding.

APPEAL against a conviction from the Magistrate's Court, Colombo.

H. V. Perera, K.C. (with him *Stanley de Zoysa* and *Lucien Jayewileke*), for the accused, appellant.

J. G. T. Weeraratne, C.C., for the Attorney-General.

Cur. adv. vult.

June 20, 1947. DIAS J.—

The appellant, who is a fitter in the Ceylon Government Railway, was convicted under section 369 of the Penal Code with having on January 19, 1947, at the Railway Washing Shed, Maligawatta, Colombo, committed theft of a measure of rice from a goods wagon. He was sentenced to undergo six months' rigorous imprisonment.

The direct evidence was to the effect that the appellant was seen to insert an implement like a spear into the space between the door and the door frame of a sealed and locked steel goods wagon, and thereby pierced a bag of rice inside it causing the rice to flow down a groove of the spear like water down a chute. This rice the appellant was alleged to have collected in a bag.

It appears to have struck the Magistrate, particularly after the witness Corteling, the immediate superior of the appellant, had given evidence, that it would be a very difficult feat to steal rice from a sealed and locked goods wagon. After Corteling gave evidence the Magistrate recorded :

"I propose to stop the case to carry out a test with regard to the possibility or otherwise of P1 (being ?) inserted through a part of the door or frame. The number of the wagon is agreed to be 3682."

The Magistrate then proceeded to record the evidence of certain witnesses who had come from a distance, and on the same day made the further record :

"I shall carry out the test I have stated above before I call on the defence."

At that stage the prosecution evidence had concluded. This being a summary trial, it was the duty of the Magistrate to make up his mind whether to call upon the accused for his defence or not. In order to make that decision, he had to be satisfied (*a*) that the prosecution had established the *corpus delicti*, and (*b*) if so, whether there was evidence which, if believed, would justify the finding that it was this accused who committed the offence in question. It is plain from the above minute, that before the Magistrate made up his mind he wanted to carry out a test as to whether the *corpus delicti* had been established, *i.e.*, whether it was possible for anybody to abstract rice from a bag contained in a sealed and locked steel goods wagon.

Seven days later there appears the following minute on the record :

"Accused present. Inspected wagon. Further inquiry 5.3."

This proves that on some day between February 21, 1947, and February 28, the Magistrate had visited the scene and carried out his test. Then on March 5, he had made up his mind for he called upon the appellant for his defence. At that point Mr. Stanley de Zoysa for the appellant took the objection that the Magistrate's procedure was incorrect and cited the case of *R. v. Seneviratne*[1]. The Magistrate then recorded :

"I do not think the conditions which are stated to have prevailed at the inspection by the Court in that case and that held by the Court in this case are analogus. I shall enlarge on this in my judgment when I come to write it ; but I may say now that at the inspection held by me, even though there was a demonstration by a railway official as to whether a piece of iron similar to the so-called dagger alleged to be used in this case could be inserted between the door and the frame of the wagon as contended by the prosecution, I carried out that experiment myself with the dagger produced in Court, *and found that it was quite an easy matter to insert it in the manner related by the prosecution witnesses.* I, therefore, hold against the defence on this point of law."

In his judgment, the Magistrate reverted to this subject in the following terms :

"I should refer to the matter of the inspection by Court. This was carried out because the defence contended that it was impossible to insert the dagger between the door and the frame of the wagon as contended by the police. It is true, as the defence pointed out in its objection to the actual inspection and demonstration held, that an officer of the railway produced a similar weapon and introduced it as stated by the prosecution ; but the Court did not rely on that demonstration, *but carried out the experiment itself and found there was ample room between the door and the frame for the weapon to be inserted.*"

Mr. Stanley de Zoysa from his place at the bar during the argument of this appeal stated that the Magistrate expressed his intention to go to the scene and intimated that he would do so on a date suitable to

[1] *(1936) 38 N. L. R. at p. 223.*

counsel. He further stated that he was instructed that thereafter on a day when he was not appearing in the Court, the Magistrate informed his proctor that he would be visiting the scene on that day. Mr. de Zoysa further stated that he was instructed that, although the appellant and his proctor were present at the scene out of respect to the Court, they took no part in the proceedings at the scene.

The system of reconstructing a crime is foreign to our system of criminal procedure, and this was criticised in the case of *R. v. Seneviratne*[1]. In the case of *R. v. Weeraswamy (the Pope Murder Case)* [2] which was tried at Colombo and the jury expressed a desire to inspect the *locus* at Pussellawa, Soertsz J. ruled that the only inspection that would occur would be a view by the jury of the scene of the offence. They were to make their own observations. Witnesses were not to be available at the spot for their evidence to be taken on oath or affirmation, and if any witnesses happened to be at the spot, no questions were to be put to them. Both these cases were decided under section 238 of the Criminal Procedure Code in regard to trials before the Supreme Court.

As was pointed out in *Jayawickreme v. Siriwardene*[3] there is no provision in the Criminal Procedure Code, except perhaps section 153 which refers solely to non-summary inquiries in cases of culpable homicide, for the inspection of the scene of an alleged offence by a Magistrate or District Judge.

Nevertheless, section 53 of the Courts Ordinance (Chap. 6) empowers *a Magistrate* to hold *his Court* " at any convenient spot " within the limits of his judicial division. Thus, a Magistrate can hold his Court at a Rest-house which has not been proclaimed to be a Court-house—*Wickremaratne v. Bastian* [4] or even in his own bungalow—*Rasiah v. Sittamparapillai*[5]. In fact, under section 53 of the Courts Ordinance a Magistrate, provided it is within the territorial limits of his judicial divsion, can hold his Court at *any* convenient spot ; but it must be a judicial proceeding. The parties and their legal advisers have the right to attend. The Court staff must be present, and any evidence led must be on oath or affirmation and subject to cross-examination, &c. Obviously, the Magistrate in this case did not adjourn his Court to the railway washing shed.

In Barnes v. Pinto[6] it was laid down that a Court is entitled *to view* the *locus in quo* in order to arrive at a better understanding of the evidence. But it was pointed out that such an inspection must be carried out *with great care,* and should not be made the occasion for the *taking of fresh evidence.* If anything is said or done which amounts to the taking of fresh evidence and the correction of any doubts in the mind of the Court, *that evidence should be repeated from the witness-box, so that no prejudice may be caused to the accused.* In the unreported case 543 M. C. Chilaw, 27,230 (S. C. M. October 21, 1946) I followed this case, and came to the conclusion that the procedure was correct, because the inspection was held at the request of the defence, and in the presence of the accused and his lawyers, and what transpired at the inspection was duly recorded

[1] *(1936) 38 N. L. R. at p. 223.*
[2] *(1941) Notable Ceylon Trials p. 108.*
[3] *(1939) 18 C. L. Rec. 132.*
[4] *(1918) 5 C. W. R. 119.*
[5] *(1920) 8 C. W. R. 116.*
[6] *(1938) 40 N. L. R. 125.*

as evidence by subsequently calling the requisite witnesses. In *Jayawickreme v. Siriwardene* [1] it was held that there can be no objection to an *inspection* by a District Judge or a Magistrate provided it is held with due care and caution.

It is obvious that the Magistrate acted quite *bona fide*, but, nevertheless, his procedure is open to criticism. Under section 53 of the Courts Ordinance he might have adjourned the trial from his Court to the scene of the offence. He did not do that. Although the appellant and his proctor were present, things were said and done at the scene which are irregular. The railway official who made the demonstration has not been called, nor has the implement which that official used been produced as an exhibit. The defence was given no opportunity of cross-examining the railway official. Most important of all, the Magistrate, by personally making the experiment, made himself a witness on a question of fact, which enabled him to decide whether to call upon the appellant for his defence or not. The defence had no right or opportunity of cross-examining the Magistrate on this question of fact. Judicial officers should be careful not to leave their lofty and detached position as Judges and descend to the forensic arena by becoming witnesses to facts, and thereby become enveloped in the dust of conflict created by the contending parties.

The conviction, therefore, cannot stand. I cannot, however, accede to Mr. H. V. Perera's submission that the appellant should be acquitted and not placed in peril twice. I quash all the proceedings and send the case back for a new trial before another Magistrate.

Proceedings quashed.

[1] *(1929) 18 C. L. Rec. 182.*