[IN THE COURT OF CRIMINAL APPEAL]

1963 *Present:* **Basnayake, C.J. (President), Weerasooriya, S.P.J., and H. N. G. Fernando, J.**

THE QUEEN *v.* V. P. JULIS and two others

Appeals Nos. 253 to 255, with Applications Nos. 264 to 266 of 1961

S. C. 123—M. C. Gampaha, 51787/A

1. *Evidence—Identification parade—Witness's former statement relating to identification of accused—Admissibility at trial—"Authority legally competent to investigate the fact"—Evidence Ordinance, ss. 9, 155, 157.*

Under section 157 of the Evidence Ordinance a former statement made by a witness identifying an accused at an identification parade is relevant as corroboration of any evidence to the like effect given by the witness at the trial of the accused, provided that the statement was made before "an authority legally competent to investigate the fact" other than an officer investigating under Chapter XII of the Criminal Procedure Code.

A person who is delegated by a Magistrate to hold an identification parade is not "an authority legally competent to investigate the fact" within the meaning of section 157 of the Evidence Ordinance.

2. *Evidence—False evidence given by witness on a material point—Can the rest of his evidence be accepted as true?—Applicability of maxim* falsus in uno, falsus in omnibus.

In a prosecution for robbery and certain other offences, the only evidence against the 1st, 4th and 5th accused was that of two alleged eye-witnesses who stated that the three accused took part in the robbery. At the conclusion of the evidence of the first eye-witness, and before the second eye-witness was called, Crown Counsel applied under section 217 (3) of the Criminal Procedure Code to withdraw the indictment against the 1st accused on the ground that the evidence of these two witnesses (father and son) as to what the 1st accused did could not be accepted as true because they failed to mention his name to any of the neighbours who turned up after the robbery as one of those who took part in the robbery, and also because the first witness had a motive for falsely implicating the 1st accused. The application of Crown Counsel was allowed by the trial Judge and the 1st accused was discharged.

Held, that, by falsely implicating the 1st accused, the two witnesses gave false evidence on a material point. Applying the maxim *falsus in uno, falsus in omnibus* (He who speaks falsely on one point will speak falsely upon all), their evidence implicating the 4th and 5th accused should also be rejected. When such evidence is given by witnesses, the question whether other portions of their evidence can be accepted as true should not be resolved in their favour unless there is some compelling reason for doing so.

3. *Inspection of scene of offence by Judge and Jury—Procedure—Criminal Procedure Code, ss. 231 to 233, 235 to 238—Courts Ordinance, ss. 53, 85.*

After all the evidence led for the prosecution and the defence was concluded there was an inspection of the scene of offence and other material places by the Jury in the presence of the Judge and Counsel. During the inspection, the witnesses pointed out various objects and places and demonstrated how certain incidents, including the identification parade, took place.

1—R 16536—1,855 (2/64)

Held, by WEERASOORIYA, S.P.J., and H. N. G. FERNANDO, J. (BASNAYAKE, C.J. dissenting), that there was no legal objection to the Jury having been shown the various places, objects and matters. The only irregularity of which any notice could be taken was that the questions put to the witnesses and the replies they gave took the form of evidence recorded at the inspection, instead of the witnesses being re-called in Court after the inspection was concluded and their evidence recorded as to what took place at the inspection, which is the procedure normally adopted. Section 238 of the Criminal Procedure Code does not authorise the recording of evidence at the scene of the offence or other places viewed by the Jury. The irregularity, however, did not cause material prejudice to the accused so as to vitiate the trial. Most of the evidence recorded at the scene was in respect of matters which had already been deposed to by the witnesses when they gave evidence earlier in Court.

APPEALS against three convictions in a trial before the Supreme Court.

K. Shanmugalingam, for 2nd Accused-Appellant.

Neville Wijeratne (assigned) for 2nd, 4th and 5th Accused-Appellants.

Colvin R. de Silva, with *Prins Rajasooriya* and *H. E. P. Cooray*, for 5th Accused-Appellant.

S. S. Wijesinha, Crown Counsel, for Attorney-General.

Cur. adv. vult.

November 18, 1963. BASNAYAKE, C.J.—

Five persons named Senarat Don Saineris Vidana Ralalage Don Saineris Gunasekara, Vithana Pathirennehelage Julis, Hapu Arachchige Haramanis *alias* Weeraratne, Hetti Arachchige Cyril Tissera *alias* Sira *alias* Sirisena and Kalu Arachchige Wilson Perera were indicted on charges of being members of an unlawful assembly whose common objects were house-breaking and robbery, and of using violence in prosecution of the common object of committing house-breaking and robbery. They were also charged with jointly committing house-breaking and robbery independently of the charges involving membership of an unlawful assembly. On the following motion of prosecuting counsel made in the course of the prosecution case while the first eye-witness was under cross-examination the 1st accused was discharged :—

> " Will Your Lordship permit me under section 217 (3) of the Criminal Procedure Code to withdraw the indictment against the first accused. "

At the end of the evidence of the witness Sedara learned Crown Counsel stated—

> " These are the only witnesses whom I am calling to prove the facts other than the Police witnesses ; I am placing no further evidence other than the Police Evidence. "

and on the following direction of the learned Commissioner—

> " So far there is no evidence against the 3rd accused. You are the sole judges of fact and if there is no evidence against the 3rd accused I do not know whether you would like to hear the case against the

3rd accused any further. If you unanimously decide not to hear the case against the 3rd accused please tell me, then we can acquit him. It has to be a unanimous decision. You can consider the matter here or retire."

the jury after retiring for two minutes brought a unanimous verdict of not guilty against the 3rd accused.

The trial of the other accused then proceeded. They neither gave evidence nor called witnesses to give evidence on their behalf, and the only witness called for by the defence was the Clerk of Assize to prove certain statements made by the witness Windsor Gunasekara to the Magistrate. The 2nd, 4th and 5th accused were found guilty on counts 1, 2, 3 and 4 of the indictment and on the direction of the Commissioner they did not return a verdict on counts 5 and 6. The accused were sentenced to separate terms of imprisonment in respect of each of the charges of which they were found guilty. Some of them were to run concurrently, others consecutively. In the result each of them became liable to undergo fifteen years' rigorous imprisonment.

Shortly the facts are as follows:—Senarath Gunasekara Vidane Ralalage Don Thomis Gunasekara (hereinafter referred to as Thomis) who lived in the village of Godigama was a wealthy land owner. In his house lived his mistress Missie Nona and his son Windsor, a lad fifteen years of age. On 24th September 1959 his house was broken into and he was robbed. It would appear that Thomis, his mistress and his son were asleep in the room in which they usually slept. Two bottle lamps were alight in the house, one in the hall and the other in the dining room. Thomis was disturbed by the barking of dogs and in order to investigate the cause he went towards the front door followed by his mistress and son. As he approached the door some one outside said "Who is that?" and almost immediately after that those outside banged the door and a gun was fired. Thomis went to his room and armed himself with a manna knife and as he came out the rear door was forced open by the robbers who rushed in. They snatched the manna knife from his hands and one of them pressed him against the wall and demanded money. When he said "The money is in the room" he was taken into the room. He gave the robbers a box containing Rs. 2,500. Then one of the robbers brought the lamp which was in the dining room. Thereafter they robbed him of the jewellery in the wooden chest in that room. Then two of the robbers brought his son and his mistress into that room and his son was made to stand by some bags of paddy in the room and his mistress was made to sit down. Next they demanded money from his mistress. She gave them the money that was in her hand-bag. They demanded more money from Thomis and when he said that he had already handed them all his money Saineris the 1st accused, who was not one of those who had originally rushed in, came up with a gun and placed it against his chest and was preparing to shoot him when his mistress cried out "Saineris Aiya, what is this crime you are going to perpetrate?" Saineris then withdrew and one of the robbers remarked "These fellows have more than

fifty thousand rupees and they will not give the money till the son is murdered. Stab him with a knife." One of the robbers went up to his son with upraised knife. The son in fear cried "O father! Give the money you have". Thereupon Thomis offered to hand over the money and one of the robbers brought his bunch of keys from under his pillow. He opened one of the drawers to get at the secret drawer and as he reached it one of the robbers pulled it out and took three tins from it containing Rs. 13,000. Thereafter the robbers put out the lamp and locked the door and went away. After about fifteen minutes Thomis unlocked the door and along with his mistress went to the house of their neighbour Aron, his mistress's elder brother. It was raining heavily at the time.

Only two of the robbers were identified at the time of the robbery. They were the 1st accused Saineris and the 2nd accused Julis. They were persons known to the occupants of the house. The former was identified by Thomis and Windsor and the latter by the witness Sedera who was sleeping in the verandah of the house. It is not clear why the prosecution did not call Missie Nona, a witness whose name was on the back of the indictment, and one of the persons who was robbed that night and who had an equal opportunity of identifying the robbers as Thomis and Windsor. The 4th and 5th accused were arrested by the Police on suspicion on 14th and 15th October respectively and were identified by Thomis and Windsor as two of the robbers that entered their house, both at the trial and earlier at an identification parade held by Police Sergeant Edirisinghe on 19th October 1959 on the orders of the Magistrate. The case against these two accused rests entirely on the identification of them by Thomis and Windsor. The evidence of Thomis as to the identity of the 5th accused is as follows :—

"279. Q : Did you see him after this incident ?
A : I pointed out that man at the identification parade.
280. Q : So you first saw that man when he went towards your son with a knife in his upraised hands ?
A : Yes.
281. Q : And the next occasion on which you saw him was at the identification parade when you pointed him out ?
A : Yes.
282. Q : Can you point out that person ?
A : He is the fifth accused.
283. Q : Are you going by the numbers ?
A : Yes. He is the person standing at that corner (points out).
285. *Court :* Q : You do not know his name ?
A : No. It was only after his name was mentioned in court that I came to know it."

Windsor's evidence as to the identity of the 4th and 5th accused is as follows :—

"816. Q : Did you see the person who struck you ?
A : I can identify him if seen.

817. Q : In fact at an identification parade subsequently held did you identify him ?
A : Yes.

818. *Court :* Q : That is the man who hit you on the left shoulder ?
A : Yes.

Court : Let the accused stand up when they are referred to.

819. Q : You can see the numbers placed against the accused—2, 3, 4 and 5 ?
A : Yes.

Court : No. 1 is vacant.

820. Q : By reference to the numbers behind which they are standing, can you point out the person who struck you ?
A : Yes.

821. Q : What is the number in front of him ?
A : No. 4.

822. Q : Is he the person who struck you, the fourth accused ?
A : Yes.

823. Q : Was that the first occasion on which you had seen him, the occasion on which he hit you ?
A : Yes.

824. Q : In between those two occasions, in between the occasion when you saw him that night and the occasion on which you identified him at the identification parade, did you see the fourth accused ?
A : No.

841. Q : At any stage were you threatened ? Did anybody threaten you at any stage ?
A : Yes.

842. Q : In what manner were you threatened ?
A : A robber came to stab me.

843. Q : Who ?
A : An unknown person.

844. *Court :* Q : Is he here ?
A : Yes.

845. Q : Can you point him out ?
A : That is the fifth accused.

846. Q : You said that the fifth accused was a person unknown to you that night ?
A : Yes.

847. Q : Did you subsequently identify the fifth accused at an identification parade ?
A : Yes. "

The evidence of the Police Sergeant as to the identification of the 4th and th accused by Thomis and Windsor respectively is as follows :—

Thomis

" 1366. Q : What did you ask this witness to do ?
A : I informed the witness to point out the persons or person who entered his house on the night of 24.9.59 and committed robbery and used force on them if any one of them was in the line.

1367. Q : Then what happened ?
A : Then he carefully examined the line of men and pointed out the 4th and 5th accused. "

Windsor

" 1374. A : Thereafter I sent the Court Aratchie to bring witness Windsor Gunasekera.

1375. Q : After the Court Aratchie was sent did you ask the suspects to change their attire or their places if they wish ?
A : Yes, and they elected to remain in their same place and in the same attire.

1376. Q : Then was Windsor Gunasekera brought to court ?
A : Yes. Then I informed Windsor Gunasekara to point out the persons or person who entered their house on the night of 24.9.59 and committed robbery and used force on them if anyone of them were in the parade.

1377. Q : Then ?
A : Then the witness went along the line of men, examined the men carefully in the line and pointed out the 4th and 5th accused. "

It is unfortunate that in the instant case the Magistrate instead of olding the identification parade himself delegated this important function o Police Sergeant Edirisinghe. It has resulted in the parade being of ttle use as the meaning of what Thomis and Windsor did is left in doubt. hey said nothing at the parade and we are left in uncertainty as to what as in their minds at the time they pointed out the two accused. As was bserved by Lord Moulton in *Christie's* case [1], " Identification is an act f the mind and the primary evidence of what was passing in the mind f a man is his own testimony, where it can be obtained ". But in nswer to the complex direction of the Sergeant each of them pointed out ie 4th and 5th accused. In that state of evidence of identification at ie parade leading questions put to the witnesses further impaired their vidence at the trial. Both Judge and counsel appear to have lost sight f the fact that the identification of accused at a parade held before the ial is not substantive evidence at the trial. The fact that the witness as been able to identify the accused at an identification parade is only a rcumstance corroborative of the identification at the trial. The jury ay act only on the evidence given before them. There is no section of ie Evidence Ordinance which declares proceedings at an identification

[1] *10 Cr. App. R. 141 at 159 H. L.*

parade to be evidence of the fact of identity. The principal evidence of identification is the evidence of a witness given in Court as to how and under what circumstances he came to pick out a particular accused person and the details of the part which the accused took in the crime in question. The evidence of Thomis at the trial does not go beyond identifying the 5th accused as the man who went towards his son with upraised knife. He ascribes no specific act to the 4th accused. Windsor's evidence at the trial was to the same effect, except that he added that the 4th accused was the man who struck him. The learned Commissioner has omitted to point out to the jury that the evidence of identification at the parade is not substantive evidence but a circumstance corroborative of the evidence of identification in Court. When statements are made at an identification parade, they may be used under section 157 to corroborate the identifying witness or under section 155 to contradict him. In the instant case no statement was made by the witnesses at the parade and therefore no question of corroboration under section 157 arises. Even if the witnesses had made statements indicating what they had in mind when they pointed out the two accused those statements would not have been admissible for corroborating them as section 157 only permits the use of statements made before an authority legally competent to investigate the fact. Now Sergeant Edirisinghe was not such an authority. The authority contemplated in section 157 is an authority other than an officer inquiring into an offence under Chapter XII, for, statements made to a Police Officer in the course of an inquiry under that Chapter cannot be used to corroborate. There is a long line of Indian decisions on the subject of the evidentiary value of identifications at extra-judicial parades. Some of better known decisions are referred to in the footnote at the end of this judgment. [His Lordship referred to the following decisions in the footnote:—*Bindeshri v. King Emperor* [1]; *Lal Singh v. Emperor* [2]; *Regina v. Emperor* [3]; *In re Sangiah* [4]".]

The procedure adopted by the learned Commissioner in the visit to the place of the alleged crime next calls for consideration. On 1st November 1961, the third day of trial, the learned Commissioner stated in Court—

> "I think it is desirable to visit the scene of the incident in this case, and I think it would be more convenient to do that after all the evidence has been led. Shall we fix it for tomorrow morning 10 o'clock? Will that suit you gentlemen.?"

To this question the Foreman said "Yes". On 3rd November, (the transcript does not show what happened on 2nd November), after the case for the prosecution and the defence had been closed, the Commissioner, the jury, counsel, the witnesses, the accused and the Court staff

[1] *(1927) A. I. R. Allahabad 163.*
[2] *(1925) A. I. R. Lahore 19.*
[3] *(1921) A. I. R. Allahabad 215.*
[4] *(1948) A. I. R. Madras 113.*

visited the house of Thomis. There the Commissioner first examined on oath the witnesses Sedara, Police Inspector Dhanapala Weerasooriya, Thomis, and the photographer Jinapala Jayasuriya. The Commissioner recalled and questioned the witnesses Dhanapala Weerasooriya twice, Sedara twice, and Thomis nine times. The transcript contains the following minutes regarding the movements of the Commissioner :—

(*a*) " *11.25 a.m.* Court leaves the house of Thomis Gunasekera and proceeds along the road in front of the house said to be leading to Aron's house up to a distance of 75 yards and stops at a bend."

At the bend Thomis was examined at length.

(*b*) " *11.35 a.m.* Court leaves the scene and arrives at the Gampaha Police Station at 11.55 a.m. (At the Gampaha Police Station premises in the front verandah facing the road). "

There it was that the Commissioner examined Arlis Perera.

(*c*) " *12.03 p.m.* Court leaves the Gampaha Police Station and arrives at Magistrate's Court, Gampaha, at 12.05 p.m. "

There the Commissioner examined Arlis Perera once more.

(*d*) " Court arrives at the verandah of the Remand Cell. "

At this place Arlis Perera was examined by the Commissioner for the third time.

(*e*) " *12.10 p.m.* Court leaves the Remand Cell and arrives at the Magistrate's Court at 12.12 p.m. "

There Thomis was examined for the eighth time.

(*f*) " Court leaves the Court-house and goes up to the Record Room of the Magistrate's Court. "

There Thomis was examined for the ninth time.

(*g*) " Court leaves Magistrate's Court, Gampaha, at 12.15 p.m. and returns to Supreme Court, Negombo, at 1.00 p.m. "

(*h*) " *1.05 p.m.* Court re-assembles and adjourns for lunch. "

The minutes in the transcript do not show where the jury were while the Commissioner was moving from place to place, and whether they were in a body under the care of an officer of the Court while the witnesses were being examined by the Commissioner at the different places he visited. There is also nothing to indicate that what was said by the witnesses examined by the Commissioner was heard by each and everyone of the jurors.

The proceedings at the view occupy seventeen pages of the transcript and 104 questions were asked from the witnesses who were examined by the Commissioner. The vast majority of the questions were asked by the Commissioner himself. The procedure adopted by the Commissioner in this case is without precedent and is certainly not authorised by section 238 of the Criminal Procedure Code which reads—

" (1) Whenever the Judge thinks that the jury should view the place in which the offence charged is alleged to have been committed or any other place in which any other transaction material to the trial is alleged to have occurred the Judge shall make an order to that effect ; and the jury shall be conducted in a body under the care of an officer of the court to such place which shall be shown to them by a person appointed by the Judge.

(2) Such Officer shall not except with the permission of the Judge suffer any other person to speak to or hold any communication with any member of the jury ; and unless the court otherwise directs they shall when the view is finished be immediately conducted back into court. "

The above section provides for the jury being conducted in a body under the care of an officer of the Court to the place in which the offence charged is alleged to have been committed *or* any other place in which any other transaction material to the trial is alleged to have occurred which shall be shown to them by a person appointed by the Judge. As the enactment expressly provides that the person under whose care the jury are to be conducted to the scene shall be an officer of Court and does not enact a similar requirement in regard to the person whom the Judge should appoint to show the jury the place, any person acquainted with the place may be so appointed. The section does not provide for the attendance of the Judge, counsel, witnesses, stenographers or any other officers of the court. Subsection (2) provides that the officer conducting the jury to the place should not permit any person other than the one appointed by the Judge to show them the place, to speak to or hold any communication with the jury except when the Judge has granted such permission. The section does not empower the Judge to hold an inquiry or investigation in the presence of the jury or record any evidence. Except when the statute so authorises, proceedings such as the taking of evidence are not meant to be taken in any place other than the Court-house. There is no section of the Criminal Procedure Code or of any other enactment which provides for the examining of witnesses, the carrying out of experiments, or the making of tests at the place viewed by the jury as has been done in the instant case.

Apart from the fact that the Commissioner has by examining witnesses and taking evidence and as it were holding a sitting of the Court acted illegally, he has also failed to take the imperative precautions prescribed in the section. An order that the jury should view the scene of the crime as required by subsection (1) of section 238 has not been made. The order contemplated therein is a formal order giving the reasons for it and not a bare minute or record as in the instant case. He has also omitted to appoint an officer of the Court under whose care the jury had to be conducted to the view, nor did he appoint a person to show the jury the place. All these are imperative requirements of the statute which the Judge is bound to observe and are conditions precedent to a view by the jury. The presence of the presiding Judge at the view does

not cure the breach of the statute. The previous decisions of this Court in the case of *Regina v. D. M. Arthur Perera*[1] and *The Queen v. H. H. Aladin*[2] also emphasise that the jury may view the scene of an offence only within the limits of section 238. The *dicta* of the Privy Council in *Karamat v. The Queen*[3] and *Tameshwar and another v. Regina*m[4] should be read subject to the provisions of our Courts Ordinance, the Criminal Procedure Code and the Evidence Ordinance. In delivering the decision of the Board in the latter case Lord Denning said—

> "In England it is a rare thing for a jury in a criminal trial to view the place where the crime is said to have taken place. At one time it was never done at the assizes except with the consent of the prosecution. But in a case in 1847 on a trial for rape, the defence wished the jury to have a view, in order to support the contention that it was so public a place that it was unlikely for the offence to have taken place there. The prosecution did not consent, but nevertheless the Judge allowed a view. It was regarded as a thing of such moment that the jury were accompanied by the under sheriff, the chief constable, 20 policemen and 12 javelinmen; but the Judge apparently did not go with them. Nor did the prisoner. It is to be noticed that there were no witnesses [See *Reg. v. Whalley* (*1847*) *2 Car. & K. 376*]. Such a view is on a par with the common case where a thing is too large or cumbrous to bring into court but is left in the yard outside. It is everyday practice for the jury in such a case to be taken to see the thing. The Judge sometimes goes with them. Sometimes he goes by himself. But there are no witnesses and no demonstration. Their Lordships see nothing wrong in a simple view of that kind, even though a Judge is not present."

Our section seeks to provide for just that kind of view referred to in the words of Lord Denning. In *Regina v. Arthur Perera* (*supra*) this Court, while affirming that the kind of view contemplated by our section was a view pure and simple with no demonstrations, refused to set aside a conviction on the ground that there had been a demonstration by the Inspector standing at a window of the house viewed and inserting his hand through the grille. In the later case of *The Queen v. Aladin* (*supra*) this Court, while disapproving of the course adopted by counsel in seeking to place evidence before the jury at the view in the absence of the Judge, made certain observations *obiter* which indicate that what may not be done in the absence of the Judge may be done if the Judge is present. Those observations must be treated as made *per incuriam* in the light of what has emerged from a reconsideration of the whole question. A view ordered under section 238 is not a part of the trial for the reason that persons whose presence is essential to a trial such as the Judge, the accused and the respective counsel are not required to be present. Nor is there power conferred thereunder to compel the accused and witnesses to attend. That being the case, the opinion expressed by the Privy Council in the British Guiana cases of *Tameshwar* (*supra*) and *Karamat*

[1] *(1956) 57 N. L. R. 313.*
[2] *(1959) 61 N. L. R. 7.*
[3] *(1956) A. C. 256.*
[4] *(1957) A. C. 476.*

(*supra*) that a view is a part of the trial does not apply to a view under section 238. If it is not a part of the trial, proceedings such as demonstrations and the examination of witnesses cannot be properly taken at a view even if the Judge chooses to attend the view himself. For his presence cannot convert what under the Code is not a part of the trial to a sitting of the Court. In *The King v. Seneviratne* [1] the Privy Council, while not seeking to interpret the express words of section 238, said—

> ". . . . Section 238 of the Criminal Procedure Code (No. 15 of 1898) provides for a view by the jury and lays down definite and strict conditions for its conduct. Section 165 of the Evidence Ordinance provides for the Judge asking questions at any time of any witness. The proceedings on June 8, 1934, seem to have been a combination of a view and a further hearing with the introduction of some features permitted by neither procedure, such as the performance of an experiment with chloroform by a Dr. Pieris, who does not appear to have been sworn as a witness, the Judge and the foreman of the jury being somewhere else. The jurors seem also to have been divided for the purpose of other experiments in sight and sound and to have been asked questions as to the impressions produced on their senses. Their Lordships have no desire to limit the proper exercise of discretion or to say that no view by a jury can include an inspection or demonstration of relevant sounds or smells; but they feel bound to record their view that there were features in the proceedings of June 8 which were irregular in themselves and unnecessary for the administration of justice."

Some of the above observations which are *obiter* appear to go beyond the ambit of section 238.

Under our legal system where both the adjective and substantive criminal law are codified the Judge in a trial by jury is not entitled to travel outside the statute and devise a procedure unwarranted by it. The Evidence Ordinance provides certain methods of testing the credibility of a witness. Testing the truth of evidence given at a trial by directing demonstrations, experiments and tests is not authorised by any statute. Besides, it is no part of the presiding Judge's function to direct the carrying out of experiments or tests for the purpose of ascertaining whether the witnesses have spoken the truth or not. A Judge should guard himself against appearing to assume the role of investigator. Chapter XX which lays down the procedure to be followed at trials before the Supreme Court prescribes the respective functions and duties of the Judge, the jury, the prosecution and the defence. There is a further objection to demonstrations, tests and experiments at a view by the jury. In terms of section 231 of the Criminal Procedure Code, upon being sworn, the jury are in every case admonished by the Registrar that it is their duty to listen to the evidence and upon that evidence to find by their verdict whether or not the accused is guilty of the charge or any of the charges, if more than one, laid against him in the indictment.

[1] (*1936*) *38 N. L. R. 203.*

The evidence is the evidence which is referred to in the succeeding sections 232, 233, 235, 236 and 237. Evidence is defined in the Evidence Ordinance thus—

" ' Evidence ' means and includes—

(*a*) all statements which the court permits or requires to be made before it by witnesses in relation to matters of fact under inquiry; such statments are called oral evidence.

(*b*) all documents produced for the inspection of the court; such documents are called documentary evidence. "

In view of section 5 of the Evidence Ordinance, evidence may be given of the existence or non-existence of every fact in issue and of such other facts as are declared to be relevant and of no others. Evidence of experiments may not be given except by experts when they are conducted by them for the purpose of supporting or explaining their opinions which are declared to be relevant by section 45 of the Evidence Ordinance. Nothing should therefore be done or said at the view by anyone which the jury are to take into account in deciding the case. The fact that the Commissioner has questioned the witnesses many times and asked them many questions calls for notice. Even in proceedings in Court the power conferred by section 165 to ask questions is not unrestricted and in view of the proviso thereto it is even doubtful whether it is meant to be used in trials by jury. But assuming that its use is not confined to trials by Judge alone the power conferred by the section is " in order to discover or to obtain proper proof of relevant facts ". Testing the veracity of witnesses is not obtaining proper proof of relevant facts or discovering relevant facts. Apart from that where in a jury trial the presiding Judge asks questions about facts which are irrelevant, he is, in view of the proviso to that section bound to warn the jury against basing their verdict on any facts which are not declared by the Ordinance to be relevant. The proviso which reads, " Provided that the judgment must be based upon facts declared by this Ordinance to be relevant and duly proved ", makes it necessary that the power conferred by section 165 should be exercised in trials by jury with great care ; because in certain circumstances no amount of caution can wipe out the harm done by irrelevant matter being placed before the jury.

It is not clear whether the learned Commissioner had in mind section 429 of the Criminal Procedure Code when he recalled and re-examined witnesses who had given evidence and even examined a witness who had not given evidence previously. If he did, he appears to have lost sight of its terms. That section reads—

" Any court may at any stage of an inquiry, trial, or other proceeding under this Code summon any person as a witness or examine any person in attendance though not summoned as a witness or recall and re-examine any person already examined; and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case. "

The expression " proceeding " particularly in view of the preceding word " other " must be construed *ejusdem generis* with inquiry and trial.

As has been pointed out above, a view by the jury under section 238 is not a stage of " an inquiry , trial or other proceeding under this Code ". It is the " Court " that is given the right to summon, examine and re-examine witnesses. The Judge who chooses to attend the view by the jury cannot be properly described as the Court. The expression " Court " in that section does not mean the Judge wherever he may happen to be. It can only mean the Judge sitting in the Court-house exercising the judicial duties of his office. That expression is not defined in the Criminal Procedure Code, but it is defined in the Courts Ordinance and reads as follows :—

> " ' Court ' shall denote a Judge empowered by law to act judicially alone, or a body of Judges empowered by law to act judicially as a body, when such Judge or body of Judges is acting judicially ; "

When the Commissioner decided to attend the view by jury, though under no legal obligation to do so, he had no power to exercise his functions and duties as presiding Judge at that place. His presence at the scene can only be warranted on the ground that he is there for the purpose of seeing for himself what the jury were to be shown. For, otherwise, he would be under the disadvantage of not having seen what the jury had viewed.

Sections 165 of the Evidence Ordinance and 429 of the Criminal Procedure Code therefore afford no authority for summoning and examining or re-examining witnesses at a view of the scene and the Commissioner's action was illegal. This aspect of sections 165 and 429 was not examined in the judgment in *Aladin's* case (*supra*), and the following observations in that case must be regarded as made *per incuriam* :—

> " We wish to guard ourselves against what we have said above being understood to mean that at a view of the scene witnesses cannot be asked to demonstrate or explain something which needs explanation or take up certain positions which they say they occupied at the time the crime was committed. Witnesses can be asked to give demonstrations or explanations but such demonstration and explanation must be given in the presence of the Judge and jury. How essential it is that the Judge should be present at a view is emphasised not only in *Tameshwar's* case but also in the case of *Karamat* (*supra*) where Lord Goddard in dismissing the appeal to the Privy Council said—
>
> > ' Here everything was done in the presence of the Judge, who throughout was in control of the proceedings. It was eminently desirable that he should be present, and it is possible that, had he not been, a different result would have followed. '
>
> At a view directions to witnesses and other questions if any to them should come from Judge and not from the jury or counsel ; but it is open to counsel or the jury to suggest them to the Judge so that he may decide whether a particular direction should be given or question asked. "

Both *Karamat's* case and *Tameshwar's* case (*supra*) proceed on the assumption that in British Guiana the Court can be held at any place viewed by the jury and that if witnesses give demonstrations or answer questions the view becomes a part of the trial and that if the Judge is present demonstrations may be given or questions asked. But our law is different. A Judge of the Supreme Court holding criminal sessions of the Supreme Court may hold such sessions only in a public building appointed for the purpose which all persons have a right to enter in order freely to attend the sessions. There are two further reasons for holding that a view by the jury cannot be regarded as a part of the trial or a proceeding of the Court. The first is that the holding of criminal sessions of the Supreme Court outside the precincts of the building appointed for the purpose is not warranted by the Courts Ordinance or any other enactment. Magistrates alone are under our law authorised to sit at any convenient spot (s. 53 Courts Ordinance). It is well-established that what is not warranted by law is illegal (*Smurthwaite v. Hannay* [1]). This principle applies with greater force in a system where the law is codified. The second is that section 85 of the Courts Ordinance requires that the sittings of every Court within Ceylon shall be public, and all persons may freely attend the same. The place at which an offence has been committed is generally not a place to which all persons can be freely admitted. To hold a sitting of the Court at such a place would be obnoxious to section 85.

In the instant case the visit to the scene was after the prosecution and defence had closed their respective cases. By itself there seems to be no objection to a view at the end of the case. The section imposes no restriction on the stage of a trial at which the view may take place. No hard and fast rule can be observed but a view should not be ordered at a stage when it would not be in the interests of justice so to do. But when evidence is recorded after the defence is closed the accused are at a disadvantage when the further evidence taken touches aspects of the case which they were not called upon to meet at the time when they entered on their defence. The evidence taken by the Commissioner brought out new matter which the prosecution had not brought out. What happened in the instant case can aptly be described in the words of *The King v. Seneviratne* as "a combination of a view and a further hearing with the introduction of some features permitted by neither procedure."

One more question remains for consideration, and that is whether the learned Commissioner's direction that although Thomis and Windsor were admittedly implicating Saineris falsely, it was still open to the jury to act on their evidence against the 4th and 5th accused. His charge on this point reads :—

> "On the other hand you will also take into consideration the evidence of Thomis and his son Windsor, that they saw the first accused, Saineris, who is a relation of theirs, with a gun inside the house. Is it likely

[1] *(1894) A. C. 494 at 501.*

that Saineris, who was well-known to them, even if he organised such a robbery, is it likely that he would have gone about showing his face ? If Saineris and his son gave false evidence on that point

Crown Counsel : Thomis.

Court : I am sorry. Did I say Saineris ?

Crown Counsel : Yes.

Charge to the Jury continued : I am very sorry. You will have to take that into consideration. The defence suggestion is that a man who is capable of implicating somebody else, a man who is capable of implicating the first accused falsely, may be implicating the other accused also falsely. That is a matter to which you will give the due consideration. On the other hand, it would be still open to you to say that Thomis and his son, Windsor, had a motive to implicate falsely the first accused but they do not have a motive to implicate the other accused falsely. They may have suspected Thomis—they may have suspected Saineris as having been a party to this burglary because of the ill-feeling that existed between them and they may have implicated Saineris for that reason, but have they any reason to implicate any one of these other accused falsely ? Therefore, you may be disposed to reject their evidence implicating the first accused on that account but to accept the rest of the evidence, or you may as I told you earlier consider that that taints the whole of the evidence, you may consider this of such vital importance, and reject the rest of the evidence. It is open to you to do either. ''

Falsus in uno, falsus in omnibus or *Falsum in uno falsum in omnibus*, both forms are in use, (he who speaks falsely on one point will speak falsely upon all) is a well-known maxim. In applying this maxim it must be remembered that all falsehood is not deliberate. Errors of memory, faulty observation or lack of skill in observation upon any point or points, exaggeration, or mere embroidery or embellishment, must be distinguished from deliberate falsehood. Nor does it apply to cases of conflict of testimony on the same point between different witnesses. In *Baksh v. The Queen* [1] the Privy Council in applying this maxim to a case of co-accused in a case from British Guiana said, " Their credibility cannot be treated as divisible and accepted against one and rejected against the other.'' In the instant case there are no circumstances which exclude the application of the maxim and as the sole testimony against the accused is that of these two witnesses, the learned Commissioner's direction that it was open to them to act on the evidence of Thomis and Windsor against the 4th and 5th accused is contrary to the maxim. There is nothing that distinguishes their testimony against the 4th and 5th accused from their perjured testimony against the 1st accused. When the only evidence on which the jury are told they may act is the evidence of admitted perjurers whose testimony even the prosecution does not hold out as true against one accused, it would be wrong for them

[1] *(P. C.) (1958) A. C. 167 at 172.*

to convict the other accused on the testimony of the perjurers unless there is something positive which distinguishes the case of the others. In a case such as the one before us the proper direction is that it is not open to them to convict on the testimony of the witnesses whom the prosecution itself had admitted were witnesses who had falsely implicated the 1st accused. The illegalities above referred to are, in my opinion, fatal to the conviction of all the appellants.

In view of the importance of the questions of law that arise for decision in this case I have thought it fit that separate judgments should be pronounced.

WEERASOORIYA, S.P.J.—

The three appellants were convicted on charges of (*a*) being members of an unlawful assembly the common objects of which were to commit housebreaking and robbery, (*b*) using violence in prosecution of the said common objects, and (*c*) committing housebreaking and robbery in prosecution of the said common objects, offences punishable under sections 140, 144 and 443 and 380, read with Section 146, of the Penal Code. They were sentenced to various terms of imprisonment and have filed these appeals and applications against their convictions and sentences.

The appellants, who were the 2nd, 4th and 5th accused at the trial, were jointly tried with the 1st and the 3rd accused. The case for the prosecution, shortly, is that they, along with others unknown, broke into the house of one Don Thomis Gunasekera on the night of the 24th September, 1959, and committed robbery of cash and articles valued at Rs. 17,530. At the time of the entry Don Thomis Gunasekera, his mistress Missi Nona and their son Don Windsor were sleeping in a bedroom in the house while Sedera, a servant, was sleeping in the front verandah. The prosecution called as witnesses at the trial all these persons except Missi Nona.

The 1st accused is an illegitimate son of a brother of Don Thomis Gunasekera, and according to the latter, when the robbers were demanding money and jewellery from him and Missi Nona, the 1st accused entered the room armed with a gun which he placed against the chest of Don Thomis, but when Missi Nona remonstrated at this the 1st accused desisted from further participation in the robbery and left the scene. Don Thomis stated that after the 1st accused went away one of the robbers remarked "These fellows have more than fifty thousand rupees and they will not give the money till the son is murdered. Stab him with a knife", and then the 5th accused (the 3rd appellant) who at the time was a stranger but whom he subsequently identified at an identification parade held in the Magistrate's Court of Gampaha, went up with knife upraised towards Don Windsor, who appealed to his father to give the robbers the money they wanted. Don Thomis stated, further, that at the identification parade he also indentified the 4th accused (the 2nd appellant) as one of the robbers, but in examination-in-chief he did not assign to the 4th accused the doing of any specific act. It was elicited

from Don Thomis in cross-examination that at the time of the house-breaking and robbery he was not well-disposed towards the 1st accused as a result of a dispute over the possession of a field called Delgahakumbure and that a case which he had filed against the 1st accused charging him with criminal trespass in having entered that field was pending.

At the conclusion of the evidence of Don Thomis Gunasekera, who was called before Don Windsor and Sedera, Crown Counsel applied under Section 217 (3) of the Criminal Procedure Code to withdraw the indictment against the 1st accused. Crown Counsel stated that although there was other evidence against the 1st accused—he was referring to the evidence of Don Windsor whom he had not yet called—he did not think that such evidence would take the case against the 1st accused any further. The application of Crown Counsel was allowed by the trial Judge and the 1st accused was discharged. Notwithstanding the evidence of Don Thomis Gunasekera implicating the 1st accused, and that evidence of a similar nature was expected from Don Windsor, the main consideration which moved Crown Counsel to make, and the trial Judge to allow, this application appears to have been that the evidence of these two witnesses as to what the 1st accused did could not be accepted as true seeing that they failed to mention his name to any of the neighbours who turned up soon after the robbery as one of those who took part in it, and also that Don Thomis Gunasekera had a motive for falsely implicating the 1st accused.

Don Windsor on being called stated in examination-in-chief that among the robbers who entered the house were the 4th accused, who gave him a blow on the back of the left shoulder, and the 5th accused, who tried to stab him, that he had not seen either of them before and that he subsequently identified them at the identification parade. This witness was not questioned by Crown Counsel about the 1st accused, but in cross-examination he gave evidence on the same lines as Don Thomis Gunasekera against the 1st accused.

Sedera said that when he was sleeping in the verandah a crowd of persons rushed in, he asked " who is that ? " and then he was given a blow and held against the wall by the 2nd accused (the 1st appellant) and kept there, while the others went away from the verandah. The 2nd accused continued to hold him against the wall for about quarter of an hour and he was then ordered to sit down and the mat on which he was sleeping was placed over his head and he was told to remain there and that he would be murdered if he raised cries. Sedera says that after a few minutes, realising that he was alone, he removed the mat from his head and ran away and hid himself in a ditch. After some time he went into the kitchen of Don Thomis' house and there he saw Don Thomis seated on a bench and bewailing his loss. He also saw Aron Singho, a brother of Missi Nona, and several others who had come there after the robbers went away. He told Aron that Julis (the 2nd accused) assaulted him and that as a result he had a split lip. Sedera said that

he knew the 2nd accused for about four to five years, and that the 2nd accused lived on a land adjoining the residing land of Don Thomis Gunasekera.

Aron confirmed that Sedera told him that he had been held down and assaulted by Julis and that he noticed a bleeding injury on Sedera's lip. Aron also stated that he went to the Police Station and gave information of what happened, including what Sedera told him, and that the only person among the robbers whom he mentioned as having been identified was Julis. A certified copy of the statement made by Aron was produced marked P10 by the Police officer who recorded it.

After Aron had given evidence, Crown Counsel informed the Court that the only other evidence he proposed to call was the evidence of certain police officers. So far no evidence had been led against the 3rd accused, and on the direction of the trial Judge, the Jury brought in a verdict of not guilty in his favour and he was acquitted. The trial then proceeded against the 2nd, 4th and 5th accused (the appellants), with the result already stated.

The Police arrested the 4th and 5th accused on the 14th and 15th October, 1959, respectively. The nature of the information leading to their arrest has not been disclosed in evidence, but it was not in consequence of any description of the robbers given by Don Thomis Gunasekera or other inmates of his house. Thereafter an identification parade was held in the Magistrate's Court on the 19th October, 1959, by Police Sergeant Edirisinghe, acting on the orders of the Magistrate. The 4th and 5th accused were lined up in this parade along with 12 others. Sergeant Edirisinghe requested Don Thomis and Don Windsor, as each of them was brought into Court, to point out the person or persons who came on the night of the 24th September, 1959, and committed the robbery and used force on them, and each of them pointed out to the 4th and 5th accused. The case against the 4th and 5th accused rests entirely on the fact that they were identified at this parade by Don Thomis and Don Windsor and on the evidence testifying to that fact given at the trial by these witnesses and Sergeant Edirisinghe.

One of the grounds formulated in the applications for leave to appeal filed by the appellants is that the verdict of the Jury is unreasonable and cannot be supported by the evidence. This ground involves the question whether the Jury should have acted on the evidence of Don Thomas Gunasekera and Don Windsor that the 4th and 5th accused were two of the persons who took part in the robbery, when, in moving to withdraw the indictment against the 1st accused, the Crown had virtually conceded that the same two witnesses were not worthy of credit in regard to their evidence implicating the 1st accused. In *Gardiris Appu v. The King*[1] this Court had occasion to make the following observations as to the courses open to a Jury where false evidence had been introduced into a case by the prosecution witnesses: "In such a case the jury can do one of two things. It is open to them to say that the

[1] *(1951) 52 N. L. R. 344.*

falsehoods are of such magnitude as to taint the whole case for the prosecution and that they feel it would be unsafe to convict at all. On the other hand, it is equally open to them, if they think fit to do so, to separate the falsehoods from the truth and to found their verdict on the evidence which they accept to be the truth ". In the present case these observations were repeated almost verbatim by the learned trial Judge in the course of his charge to the Jury, but no directions were given to them regarding the test to be applied in deciding what portion, if any, of the evidence of Don Thomis Gunasekera and Don Windsor against the 4th and 5th accused could be accepted as representing the truth, once their evidence against the 1st accused has been rejected as false.

In *The Queen v. Vellasamy & Others*[1] it was held that the evidence of a witness which is unacceptable in respect of one offence cannot reasonably afford good ground for convicting the accused of another offence. The charge in that case was one of murder. The Jury found the accused not guilty of that offence but guilty of the offence of causing disappearance of evidence of the commission of homicide. For proof of either offence the prosecution relied on the evidence of one and the same witness. The verdict of the Jury finding the accused guilty of the offence of causing disappearance of evidence of the commission of homicide had necessarily to be based on an acceptance of a part, if not the entirety, of the evidence of this witness, whom the Jury had, presumably, disbelieved when they found the accused not guilty of the offence of murder. The conviction of the accused was, accordingly, quashed and judgment of acquittal entered.

Another case which is relevant to the question under consideration is *Baksh v. The Queen*[2] decided by the Judicial Committee of the Privy Council and referred to in the judgment of this Court in *The Queen v. Vellasamy and Others* (*supra*). In that case two persons, Nabi Baksh and Fiaz Baksh, were convicted of murder. The case for the prosecution was that the deceased man was killed one night by shots from a gun fired by one or other of the accused acting together in furtherance of a common intention. The defence of each accused was an alibi. The case against the accused rested largely on their identification by three witnesses, two of whom, according to the statements made by them to the police, which the Court of Criminal Appeal permitted to be produced at the hearing of the appeals preferred by the accused against their convictions, had not spoken to having seen Nabi Baksh at all. These statements had not been produced at the trial. The Court of Criminal Appeal dismissed the appeal of Fiaz Baksh but allowed the appeal of Nabi Baksh and ordered a new trial in his case. Subsequently the Crown entered a *nolle prosequi* in respect of Nabi Baksh. Fiaz Baksh appealed by special leave to Her Majesty in Council. The Privy Council allowed the appeal and remitted the case to the Court of Criminal Appeal with a direction that the Court should quash the conviction and either enter a verdict of acquittal or order a new trial, whichever course

[1] *(1960) 63 N. L. R. 265.* [2] *(1958.) 3 C. 167.*

the Court may consider proper in the interests of justice. The Privy Council also made the following observations regarding the two witnesses who had failed to refer to the presence of Nabi Baksh in their statements to the Police: "Their credibility cannot be treated as divisible and accepted against one and rejected against the other. Their honesty having been shown to be open to question, it cannot be right to accept the verdict against one and re-open it in the case of the other. Their Lordships are accordingly of the opinion that a new trial should have been ordered in both cases".

Despite the above observations, the direction given by the Privy Council would imply that had the Court of Criminal Appeal considered it proper to order a new trial of the accused Fiaz Baksh, it was open to the Jury at the new trial to find him guilty of the offence of murder on the testimony of the same three witnesses who claimed to have identified him, notwithstanding that the veracity of at least two of them in regard to their evidence identifying Nabi Baksh was gravely suspect, and that even in the case of the remaining witness, the Crown, apparently, was not prepared to put him forward as worthy of credit when he purported to have identified Nabi Baksh.

The maxim *falsus in uno, falsus in omnibus*, is not an absolute rule which has to be applied without exception in every case where a witness is shown to have given false evidence on a material point. But when such evidence is given by a witness, the question whether other portions of his evidence can be accepted as true should not be resolved in his favour unless there is some compelling reason for doing so. In the present case the most that can be urged for accepting the evidence of Don Thomis Gunasekera and Don Windsor implicating the 4th and 5th accused is that each of them in turn picked out these two accused from among those lined up in the identification parade as two of the robbers. It is in evidence that the Gampaha Police Station is just by the road leading from the Remand Cell to the Railway Station and that the 4th and 5th accused, after being remanded to Fiscal's custody, had been taken on foot along this road to the Railway Station to be sent to Colombo. Don Windsor stated in the Magistrate's Court that he had been to the Police Station seven or eight times after the commission of the robbery, but at the trial he said that he had been there only twice and that he could not remember having stated in the Magistrate's Court that he had gone there seven or eight times. On the day on which the identification parade was held the 4th and 5th accused were brought from Colombo in a covered van, first to the Remand Cell and then to the Magistrate's Court. The parade was held only at about 4.15 p.m. but, for a reason which is unexplained, both Don Thomis Gunasekera and Don Windsor had been kept at the Police Station from 7 a.m. till 4 p.m. These items of evidence were elicited by the defence as supporting the suggestion that prior to the identification parade the two witnesses had either been shown the 4th and 5th accused, or been given such particulars relating to them as would have facilitated their identification at the parade.

Evidence relating to the identification of an accused at an identification parade by a witness who is subsequently called at the trial and gives evidence implicating that accused would be relevant under section 9 of the Evidence Ordinance as a fact establishing the identity of a person whose identity is relevant. The evidence of Sergeant Edirisinghe that Don Thomis Gunasekera and Don Windsor each identified the 4th and 5th accused at the parade was therefore admissible evidence. But such evidence does not go very far towards showing that the evidence given by Don Thomis Gunasekera and Don Windsor against the 4th and 5th accused at the trial is true even though the defence failed to establish that the identification was brought about in the manner suggested by it. Neither Don Thomis Gunasekera nor Don Windsor was able to give to the Police a description of the robbers which tallied in any way with the 4th or 5th accused. Even with regard to what these accused did at the time of the robbery the evidence of the two witnesses is contradictory. Don Thomis at first said that the 4th accused did not do anything in particular, while the 5th accused went up with a knife upraised towards Don Windsor. According to Don Windsor, the 4th accused struck him a blow with the hand on the back of his shoulder, and the 5th accused tried to stab him. Subsequently Don Thomis, when cross-examined as to whether he had not stated in the Magistrate's Court that the person who tried to stab Don Windsor was the 4th accused, admitted having said so and adopted that evidence as correct.

Apart from evidence relating to the identification of an accused by a witness at an identification parade being relevant under section 9 of the Evidence Ordinance, where the witness's identification amounts to a statement that the person identified is the person who committed the offence in question, and the statement is made before " an authority legally competent to investigate the fact ", such statement would also be relevant under section 157 of the Evidence Ordinance as corroboration of any evidence to the like effect given by the witness at the trial of the person identified. In the present case the identification parade having been held by Sergeant Edirisinghe, the question arises whether he was " an authority legally competent to investigate the fact ", viz., the identity of the persons concerned in the commission of the housebreaking and robbery. It is not claimed for Sergeant Edirisinghe that in holding the identification parade he was conducting an investigation under Chapter XII of the Criminal Procedure Code. If he was holding such an investigation, the special provisions of section 122 (3) in Chapter XII would preclude the use, as corroboration under Section 157 of the Evidence Ordinance, of any statement made to him by Don Thomis Gunasekera or Don Windsor relating to the identity of the 4th and 5th accused.

Was Sergeant Edirisinghe " an authority legally competent to investigate the fact " by virtue of the orders given to him by the Magistrate to hold the identification parade ? Assuming that the powers conferred on a Magistrate by the Criminal Procedure Code are wide enough to make him legally competent to investigate the identity of the person or persons concerned in the commission of an offence, by holding an identification

parade, such powers cannot be delegated by him to another. It would follow, therefore, that in holding the identification parade Sergeant Edirisinghe was not "an authority legally competent to investigate the fact" and any statements made to him by Don Thomis Gunasekera or Don Windsor at the identification parade that the 4th and 5th accused were two of the robbers who entered their house on the night of the 24th September, 1959, are not admissible under section 157 of the Evidence Ordinance. Hence, any corroboration of the evidence of Don Thomis and Don Windsor at the trial that would have been available had their statements been admissible under Section 157 is not forthcoming in this instance. In regard, however, to such statements, even if admissible under section 157, it may be observed that there is ample authority that they are not " corroboration " in the true sense of the term, for " corroboration must be extraneous to the witness who is to be corroborated "— per Lord Hewart, C.J., in *Rex v. Whitehead* [1]. See, also, the case of *The King v. Atukorale* [2], where it was held that at the trial of an accused charged with rape, the particulars of the complaint made to the police by the prosecutrix shortly after the alleged offence, though admissible under section 157 of the Evidence Ordinance, is not corroboration of her evidence.

For the foregoing reasons we are of the opinion that the verdict of the Jury convicting the 4th and 5th accused (the 2nd and 3rd appellants respectively) on the evidence of Don Thomis Gunasekera and Don Windsor is unreasonable. The convictions of these appellants are accordingly quashed and they are acquitted.

There remains for consideration the case of the 2nd accused (the 1st appellant). His complicity in the offence of which he was convicted rests on the evidence of Sedera, and not on the evidence of Don Thomis Gunasekera or Don Windsor. Although Sedera was subjected to cross-examination at some length with a view to showing that he had reason to give false evidence against the 2nd accused, nothing tangible was elicited as a result of it. Sedera mentioned the name of the 2nd accused without delay to those, including Aron, who came soon after the robbers left the scene of the crime. Moreover, the 2nd accused was well known to Sedera, and the circumstances in which Sedera says he identified him leave no room to think that this may be a case of mistaken identity.

Submissions were addressed to us by counsel for the 2nd accused, and also by counsel for the 5th accused, that the trial was vitiated by certain irregularities and illegalities connected with the inspection of the scene and other places by the Jury in the presence of the Judge and counsel after all the evidence led for the prosecution and the defence was concluded. The first place inspected was the house of Don Thomis Gunasekera. There the witness Sedera was asked to point out where he was sleeping and also where he hid himself. Don Thomis Gunasekera demonstrated the composition of the walls of his house, and pointed out various objects and places in the house already referred to in his

[1] *(1922) 1 K. B. D. 99.* [2] *(1948) 50 N. L. R. 256.*

evidence. He was questioned about the gap between the two shutters of the rear door when they were closed, some additional locks which he had fitted to the door after the robbery and about the houses in the neighbourhood which had figured in the evidence. He indicated the direction in which each of them stood. The Assistant Superintendent of Police, Mr. Weerasooriya, pointed out the place in the frame of the front door where a shot alleged to have been fired by the robbers had struck, and was also questioned about the condition of the shutters of the rear door at the time when he first arrived at the scene. The photographer, Mr. Jayasuriya, was asked to locate some of the objects shown in the photographs taken by him and produced at the trial, and the various angles from which the photographs were taken.

The next place inspected was the road opposite the Gampaha Police Station. The witness Arlis Perera, who at the relevant time was the officer-in-charge of the Fiscal's Remand Cell at Gampaha, indicated in which direction along the road the Remand Cell and the Railway Station were situated. At the Remand Cell itself, Arlis Perera was questioned as to what parts of the Magistrate's Court, which is a little further away, could be seen by a person who was in the Remand Cell. At the Magistrate's Court, Don Thomis Gunasekera showed from which side of the Court house he was brought into the well of the Court where the identification parade was held, and the place upstairs where he and Don Windsor were taken after they had, in turn, identified the 4th and 5th accused at the parade. Each of the witnesses mentioned was questioned on affirmation by the Court, and in some instances by Crown Counsel and Counsel for the accused as well.

The scope of section 238 of the Criminal Procedure Code, which provides for a view by the Jury of the scene of the offence or other material place, was considered by the Privy Counsel in *The King v. Seneviratne*[1]. While certain aspects of the view of the scene which took place in the course of the trial in that case were criticised by their Lordships, they stated that they had "no desire to limit the proper exercise of discretion or to say that no view by a jury can include an inspection or demonstration of relevant sounds and smells". In the more recent case of *Regina v. Arthur Perera*[2], there was an inspection of the scene at which a police officer demonstrated how it was possible for a person of the height of the accused to have stood outside the window of a bedroom and, by introducing his hand through the grille, have shot the deceased with a pistol while the latter was in a particular part of the room. This Court held that the demonstration was not obnoxious to the provisions of section 238 of the Criminal Procedure Code.

The majority of us can see no legal objection to the Jury having in the present case been shown the various places, objects and matters to which their attention was specially directed in the course of the inspection, as already briefly set out in the preceding paragraphs. The only irregularity of which any notice need be taken is that the questions put to the witnesses and the replies they gave, took the form of evidence

[1] *(1936) 38 N. L. R. 208.* [2] *(1956) 57 N. L. R. 313.*

recorded at the inspection, instead of the witnesses being re-called in Court after the inspection was concluded and their evidence recorded as to what took place at the inspection, which is the procedure normally adopted. Section 238 of the Criminal Procedure Code does not authorise the recording of evidence at the scene of the offence or other places viewed by the Jury. The majority of us do not consider, however, that the irregularity is such as to vitiate the trial, or that it resulted in material prejudice to the 2nd accused. Most of the evidence recorded at the scene was in respect of matters which had already been deposed to by the witnesses concerned when they gave evidence earlier in Court.

The indictment on which the appellants were tried consisted of six counts. When the Jury returned their verdict finding the appellants guilty on Counts 1 to 4, which had been framed on the basis that there was an unlawful assembly, the Court directed the Jury not to return a verdict on the 5th and 6th counts, which contained charges of house-breaking (section 443) and robbery (section 380), respectively, read with section 32, of the Penal Code. The sentence imposed on Count 3 was five years rigorous imprisonment, to run concurrently with the sentences of six months rigorous imprisonment on Count 1 and two years rigorous imprisonment on Count 2, but consecutively with the sentence of ten years rigorous imprisonment on Count 4, i.e., 15 years in all. In view of our order acquitting the 2nd and 3rd appellants, it is doubtful whether on the evidence it has been established that the number of persons who took part in the house-breaking and robbery comprised the minimum number of five required to constitute an unlawful assembly.

The verdict finding the 1st appellant (the 2nd accused) guilty on Counts 1 to 4 of the indictment shows that the Jury were satisfied of the following facts—(*a*) that the 1st appellant was a member of an unlawful assembly the common objects of which were housebreaking and robbery, and (*b*) that in furtherance of those objects he was present at the scene of the crime, in which he took an active part by tying up the witness Sedera, while the other members of the assembly entered the house of Don Thomis and committed the offences of housebreaking and robbery. On these facts the 1st appellant would be guilty of the charges laid against him in Counts 5 and 6 of the indictment. Acting under Section 6 (2) of the Court of Criminal Appeal Ordinance (Cap. 7), we, therefore, substitute for the verdict of the Jury against the 1st appellant a verdict of guilty on Counts 5 and 6 and pass a sentence of five years rigorous imprisonment on Count 5 and a sentence of ten years rigorous imprisonment on Count 6, the sentences to run consecutively, that is fifteen years rigorous imprisonment in all. But under section 15 (3) of the same Ordinance we direct that the time during which the 1st appellant has been specially treated as an appellant in terms of that section shall count as part of the term of imprisonment under the sentence passed on him.

Verdict against 2nd accused-appellant altered.
4th and 5th accused-appellants acquitted.