1951 *Present:* **Basnayake J.**

SAMARANAYAKE, Appellant, *and* WIJESINGHE (Inspector of Police), Respondent

S. C. 1,315—M. C. Galle, 18,832

Inspection of scene of offence—Judge trying a case without jury—Scope of visit—Principles applicable—Stage at which inspection may be made—Criminal Procedure Code, ss. 238 and 422 (1) (c)—Evidence Ordinance, Proviso to section 60—Prosecuting officer—Should not have played leading role in detection of offence.

It is not open to a Magistrate, in the course of an inspection of the scene of an offence, to carry out experiments for the purpose of verifying the veracity of witnesses or testing their evidence.

A Judge sitting alone as a judge of both fact and law has the power to view the scene of the offence at any stage of the trial. He must, however, exercise that power within the limits allowed to a jury, for as a judge of fact his role is the same. The purpose of the view is to obtain a better understanding of the evidence but not to find out the truth or falsity of the oral evidence, although incidentally a view may have the effect of exposing the false witnesses. Before a view is decided upon, the Judge must satisfy himself that no material change has taken place in the surroundings since the date of the offence.

A public officer who has played the leading role in the detection of an offence should not, in the interests of justice, act as a prosecutor in that case.

APPEAL from a judgment of the Magistrate's Court, Galle.

G. E. Chitty, with *A. W. W. Gunawardena*, for the accused appellant.

H. A. Wijemanne, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

May 15, 1951. BASNAYAKE J.—

The appellant Peter Samaranayake has been convicted of the offence of selling fermented toddy without a licence and ordered to pay a fine of Rs. 150. The conviction is challenged on grounds of law and fact. The case for the prosecution is that in consequence of certain information received by him Inspector Wijesinghe arranged a trap for the appellant and obtained a search warrant to enter and search the premises known as Danwela Group, Baddegama, owned by one Henry Abeywickrema who manufactures vinegar therein. The appellant is an employee in the vinegar manufactory, his duty being to supervise the collection of toddy and its disposal into the appropriate vats.

The technique adopted was the usual one of sending a decoy with a currency note the features of which were previously noted. In this instance Police Constable Banda acted as the decoy and he was accompanied by Police Constable Suraweera. It was a ten-rupee note that he tendered for the two bottles of toddy purchased by him, the total cost of which was Re. 1.40. The evidence relating to the sale of toddy, if true, is sufficient to warrant a conviction on the charge.

The case for the defence is that this is a trumped-up charge. The allegations of the prosecution are denied and counter allegations of

using violence on the appellant and others and of destruction of property and the breaking open of doors and windows and the fabrication of false evidence, are made against the police.

After hearing the case for the prosecution and the defence the learned Magistrate without recording his verdict made the following order:—

> " In view of the sketch I propose to visit the scene tomorrow after the day's work. It is not possible to visit the scene today (4.30 p.m. now). As it is late and the road is said to be muddy and the distance is over 13 miles, I propose to visit the scene tomorrow after 4 p.m. Accused to be present in Court tomorrow morning. On same bail."

On the following day the learned Magistrate visited Danwela Group. The appellant and the prosecution witnesses were present. The following is the Magistrate's note of his visit:—

> " I first inspected the spot where the alleged sale is said to have taken place. I was shown the spot by P.CC. Banda and Suraweera. I got the wire netting measured and found it to be 4 feet 10 inches in height. I stood at the gate marked D in the sketch marked D 1 and I left the two P. CC. in charge of the Court Interpreter and on a signal given by me I got the two P. CC. to run from the spot where they alleged they bought the toddy as they gave chase to witness Dissanayake and the accused. I could see the two constables run though their view was at times obstructed by the intervening trees.
>
> " Inspector Dole also pointed out the spot to where he saw the alleged chase. I got the two canstables to repeat the run and I stood watching at the spot pointed by Inspector Dole which spot is close to the pond. I could see the two constables run."

On October 19, 1950, Inspectors Wijesinghe and Dole and Police Constables Banda and Suraweera were examined by the Magistrate on the respective part each of them played on his visit to the scene. On the following day the learned Magistrate made his order convicting the appellant.

It is submitted for the appellant that the procedure adopted by the learned Magistrate is irregular and has prejudiced the appellant. The question raised by learned counsel is of some importance.

The reported decisions of this Court are to the effect that though there is no express provision in that behalf it is not illegal for a judge trying a ease without a jury to visit the scene of crime. But no definite rule as to the scope of such a visit has been laid down. It will be useful therefore first to review those decisions.

In the case of *Perumal v. Fonseka and another* [1], Moseley J. characterised an inspection of the house of the accused after the close of the case for the prosecution and defence as " irregular procedure ". He went on to say:—

> " If an inspection was considered desirable, it should have been made during the course of the trial, where the further evidence of the Inspector could have been taken as to the re-arrangement of the furniture."

[1] *(1937) 9 C. L. W. 131*

In the next case of *Barnes v. Pinto* [1], the Magistrate visited the scene after notice to both parties at the close of the case for the prosecution before he called on the defence. At the scene a witness was made to act the part the accused is alleged to have played. The visit to the scene appears to have convinced the Magistrate of the truth of the prosecution case. Abrahams C.J. in setting aside the conviction states:—

"Now in order to arrive at a better understanding of the evidence the Court is entitled to view the *locus in quo*. But experience of Courts going beyond the purpose of a view has shown that this inspection should be carried out with great care and ought not to be made the occasion for the taking of fresh evidence. In my opinion if anything is said or done which amounts to the taking of fresh evidence and the correction of any doubts which may be in the mind of the Court prior to the view it is essential that that evidence should be repeated in the witness-box in order that no prejudice should be occasioned to the accused. In this instance the inspection does appear to have imported a certain amount of fresh evidence, but what to my mind is rather serious is that the demeanour of the witness Vincent de Alwis outside the Court was employed by the Magistrate to correct an unfavourable impression which was created when he was in the witness-box. This is tantamount to the Magistrate using his own personal knowledge to correct an unfavourable opinion that he has formed as a Magistrate of a witness."

In the third case of *Jayawickrema v. Siriwardena and others* [2], the Magistrate inspected the scene of the offence and appears to have been influenced by what he saw. The conviction was set aside and a re-trial ordered on the ground that the procedure adopted by the Magistrate was not fair to the accused. Soertsz A.C.J. observes in that case:—

"The Criminal Procedure Code makes no provision for inspection of scenes of offences by District Judges and Magistrates. Section 238 provides for a view by the jury of the place where the offence was committed, but, perhaps, there can be no objection to an inspection by a District Judge or a Magistrate provided it is held with due care and caution."

In the fourth case of *Aron Singho v. Buultjens* [3], the Magistrate after notice to the accused inspected the goods waggon from which it was alleged rice was stolen by the adoption of a special device and carried out an experiment himself with the very implement with which the alleged crime was committed. The experiment convinced him that the offence could have been committed in the way described by the prosecution witnesses. My brother Dias set aside the conviction on the main ground that by performing the experiment himself the Magistrate had made himself a witness on a question of fact.

Lastly in the case of *The King v. Gnanapiragasam* [4], the Magistrate in the course of the prosecution case inspected the scene at 7.30 p.m., the time of the alleged offence, after notice to and in the presence of the accused. His object was to test the evidence of indentification of the accused. In appeal objection was taken to the conviction on the ground

[1] *(1938) 40 N. L. R. 125.*
[2] *(1939) 14 C. L. W. 83 ; 18 Law Recorder 182*
[3] *(1947) 48 N. L. R. 285.*
[4] *(1948) 50 N. L. R. 77.*

that there was no provision in the Criminal Procedure Code which enabled a Magistrate to view the scene of an offence. Canekeratne J. over-ruled the objection and enunciated the principle on which he held that the Magistrate was entitled to do what he did, thus:—

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

The above decisions show that there are several aspects to the present question. They are—

(*a*) May the scene of the crime be viewed for the purpose of obtaining a better understanding of the evidence ?

(*b*) May it be visited for the purpose of testing the oral evidence already given ?

(*c*) May it be visited for the purpose of carrying out experiments which will either confirm or destroy the impression created by the oral testimony ?

(*d*) May it be visited for the purpose of obtaining evidence ?

As the considerations that apply to a view of the scene by a jury will equally apply to a view by a Judge sitting alone, for both view the scene in their capacity as triers of fact, it will be helpful in the first instance to examine the provisions of law that provide for a view by a jury and the judicial decisions thereon.

Section 238 of our Criminal Procedure Code provides:—

"(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 of the jury; and unless the court otherwise directs they shall when the view is finished be immediately conducted back into court."

The enactment provides for what may be called a bare view of the scene by the jury. It does not require that the Judge or counsel should accompany them. They are to be conducted in a body under the care of an officer of the Court to the place in which the offence was committed and the place shown to them by a person appointed by the Judge. No other person is permitted to communicate with the jury. No power is granted for the conducting of experiments at the scene or the carrying out of any tests. The sole object of the visit appears to be to enable the jury to better understand the evidence. There is no doubt that after a view the jurors will appreciate the evidence better. At the same

time it cannot be denied that they will be impressed by what they see at the place and will not hesitate to reject the testimony of a witness if it is in conflict with what they have seen. To that extent the matters they see will be taken into account in deciding the case although there may be no oral testimony on the point. I am not aware of any decision of this Court on the subject of this section. The dearth of decisions may be due to the fact that a view is rarely ordered. Before a view is granted the Judge must satisfy himself that no material change has taken place in the surroundings since the date of the offence. For if a change has taken place the object of the view would be defeated. In the case of *King v. Seneviratne* [1] wherein the propriety of certain experiments carried out on a visit to the scene by Judge, jury, counsel and witnesses came up for consideration, the Privy Council while discouraging the procedure adopted in that case refrained from saying anything as to the scope of the section. Nevertheless as its observations are pertinent to this discussion I shall quote them:—

> " 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 of 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. Peiris, who does not appear to have been sworn as a witness, the Judge and the foreman of the jury being present with Dr. Peiris in a room and the rest 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."

The American and Canadian cases which are cited *in extenso* in Wigmore on Evidence discuss the scope of a view of the scene by a jury in greater detail than has been attempted in the English Courts. A survey of the legislation both in England and elsewhere on this point will doubtless be of assistance in understanding the decisions of the foreign courts.

A statute of 1705 (4 Anne, c. 16, s. 8) provided that in any action at Westminster where it shall appear to the Court that it will be " proper and necessary " that the jurors who are to try the issues should have the view of the lands or place in question " in order to their better understanding the evidence " to be given at the trial the Court may by special writ order a view. It was later provided by section 23 of 6 Geo. IV, c. 50, (1825), as follows:—

> " Where in any case, either civil or criminal, or on any penal statute, depending in any of the said courts of record at Westminster, it shall

[1] *(1936) 38 N. L. R. 208*

appear to any of the respective courts, or to any judge thereof in vacation, that it will be proper and necessary that some of the jurors who are to try the issues in such case should have the view of the place in question, in order to their better understanding the evidence that may be given upon the trial of such issues, in every such case such court, or any judge thereof in vacation, may order a rule to be drawn up containing the usual terms, and also requiring, if such court or judge shall so think fit, the party applying for the view to deposit in the hands of the under Sheriff a sum of money to be named in the rule for payment of the expenses of the view."

In 1854, 17 and 18 Vict., c. 125, s. 58, provided that either party shall be at liberty to apply to the Court for an order for inspection by the jury of any real or personal property in inspection of which may be material to the proper determination of the question in dispute.

In 1883, Rules 3 and 4, Order 50, of the Rules of Court, made very wide and sweeping provision for inspection by both judge sitting alone and by jury in civil trials. They went on to empower the taking of samples, the making of observations and the carrying out of experiments that may be necessary or expedient for the purpose of obtaining full information or evidence.

In Canada provision for a view in criminal cases is made by section 958 of the Criminal Code which reads—

" On the trial of any person for an offence against this Act, the court, may, if it appears expedient for the ends of justice, at any time after the jurors have been sworn to try the case and before they give their verdict, direct that the jury shall have a view of any place, thing or person, and shall give directions as to the manner in which, and the persons by whom, the place, thing or person shall be shown to such jurors, and may for that purpose adjourn the trial, and the cost occasioned thereby shall be in the discretion of the Court.

" 2. When such view is ordered, the Court shall give such directions as seem requisite for the purpose of preventing undue communication with such jurors: Provided that no breach of any such directions shall affect the validity of the proceedings."

The South African Criminal Procedure and Evidence Act, 1917, enacts:—

" 212 (1) The judge may, in any case, if he thinks fit, direct that the jury shall view any place or thing which the judge thinks it desirable that they should see and may give any necessary directions for that purpose.

(2) The validity of the proceedings is not affected by disobedience to any such directions, but, if the fact is discovered before the verdict is given, the judge, if he is of opinion that such disobedience is likely to prejudice the fair trial of the accused, may discharge the jury and may direct that a fresh jury be sworn during the same session of the court or may adjourn the trial."

The American statutes are too numerous to bear citation. I shall therefore content myself with the law as enunciated in the Law Institute, Code of Criminal Procedure, section 317:

> "*View by Jury.* When, in the opinion of the Court, it is proper that the jury should view the place where the offence appears to have been committed, or where any other material fact appears to have occurred, it may order the jury, in the custody of the proper officer, to be conducted in a body to such place; and the officer shall be admonished to permit no person to speak to or otherwise communicate with the jury, nor to do so himself, on any subject connected with the trial, and to return them into the court-room without unnecessary delay, or at a specified time. The trial judge shall be present and the prosecuting attorney and counsel for the defendant may be present at the view by the jury."

The Indian Criminal Procedure Code which has many features in common with our Criminal Procedure Code provides as follows:—

> "293 (1) Whenever the Court thinks that the jury or assessors should view the place in which the offence charged is to have been committed, or any other place in which any other transaction material to the trial is alleged to have occurred, the Court shall make an order to that effect, and the jury or assessors 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 Court.
> (2) Such officer shall not, except with the permission of the Court, suffer any other person to speak to, or hold any communication with, any of the jury or assessors, and, unless the Court otherwise directs, they shall, when the view is finished, be immediately conducted back into Court."

The enactments I have cited make it abundantly clear that a view of the scene of the crime is limited in its scope. It is intended only for the purpose of enabling the jury to better understand the evidence. But it cannot be denied that a view does incidentally provide matter which the jury cannot help taking into account in considering their verdict. Certain Judges have held that a jury's "view" does not involve the obtaining of evidence, but in America at least that opinion has not been accepted by the majority of the Courts. The majority opinion has been very effectively put by Bissel J.[1] thus:—

> "We are very frank to say we do not appreciate the refined distinction which is drawn by some of the authorities, wherein it is held that the jury are not at liberty to regard what they have seen as evidence in the case, but must utterly reject it otherwise than as an aid to the understanding of the testimony offered. The folly of it is apparent from the constitution of the human mind, and the well-understood processes by which juries arrive at conclusions. Many illustrations which forcibly express these ideas may be found in the cases. If a dozen witnesses should testify that there was no window on the north side of the house from which one man had sworn that he viewed the affray, and the jurors on view should see the window,

[1] *Denver T. & F. W. R. Co., v. Ditch & Co., 11 Colo. App. 41, 52 Pac. 224.*

all lawyers would know that it would be futile, on the argument, to insist to the jury that their verdict must be based on the non-existence of the window since the point had been sustained by a vast preponderance in the number of witnesses ".

Lyon J. puts the matters thus [1]:

" The object of a view is to acquaint the jury with the physical situation, conditions, and surroundings of the thing seen. What they see they know absolutely. For example, if a witness testify that a farm is hilly and rugged, when the view has disclosed to the jury, and to every juror alike, that it is level and smooth, or if a witness testify that a given building was burned before the view, and the view discloses that it had not been burned; no contrary testimony of witnesses on the stand is needed to authorize the jury to find the fact as it is, in disregard of testimony given in court. "

In the case of *State v. McCausland* [2] Ritz J. put the matter thus:

" As to whether or not a view by the jury of some place connected with the matter before it is a taking of evidence is a question upon which there is a very decided conflict of authorities. Many of the courts hold that it is not, but is a part of the deliberations of the jury in arriving at a verdict; others say it is not the taking of evidence, but is simply allowing the jury to see the physical conditions in order that it may better understand the oral testimony; while still others assert that it is the presentation of physical conditions to the jury from which it may be informed as to some pertinent matter of inquiry. The purpose of introducing evidence is to inform the jury of the transaction in regard to which the trial is had, and anything pertinent to that end is proper for the purpose. Frequently in the trial of such cases material objects are introduced before the jury. In homicide cases the garments worn by the deceased are often introduced for the purpose of showing the place at which the wounds were inflicted. Can it be said that this is not evidence? It is stronger and more convincing to the jury than the oral testimony of any witness could possibly be. There can be no difference in the proffer of objects to the jury in the courtroom and such exhibition by taking the jury to view such objects, when they are not susceptible of being brought into court. The reason the jury is taken to view the ground is simply because it is physically impossible to bring it into the courtroom, and it is therefore necessary, in order that the jury may have all of the light obtainable upon the subject to which the inquiry is directed, that it be taken and shown these objects which form a part of the subject of inquiry. "

The renowned Cardozo J. in discussing this matter in the case of *Snyder v. Massachusetts* [3] expressed the view that the inevitable effect of the view is that of evidence, no matter what label the judge may choose to give it.

[1] *Washburn v. R. Co., 59 Wis. 364, 368, 18 N. W. 328.*

[2] *82 W. Va. 525, 96 S. E. 938.*

[3] *(1934) 291 U. S. 97.*

In a Canadian case [1] the view was expressed that the only purpose to be served by an inspection was to enable the Judge by a view to better understand the evidence. One of the Judges who took part in the decision, Roach J.A., said (p. 20.):

> " I have never understood that a Judge, by taking a view, can place what his senses there perceive into one or the other of the pans of the scales of justice. All that goes into those pans is the evidence, nothing else. "

I have devoted so much attention to the consideration of the law relating to a view by the jury as the principles that apply to a view by a Judge, if he has power to inspect, must necessarily be the same. Where a Judge alone is trying the action, he is Judge of both the law and the facts. There cannot be one rule for a jury as the judge of the facts and another rule for a Judge as judge of the facts.

It is convenient at this point to deal with the questions I have posed hereinbefore. The statutes cited clearly point to the fact that the jury may view the scene of the crime in order to obtain a better understanding of the evidence. The purpose of a view is not to find out the truth or falsity of the oral evidence although incidentally a view may have the effect of exposing the false witnesses. Nor is it intended to be a means of obtaining evidence. The carrying out of experiments also seem to fall outside the scope of a view.

There remains the question as to the stage of the trial at which a view may be granted. No hard and fast rule can be laid down. In certain cases a view at the very outset would help, in others a view after the important features of the case are known to the jury may be profitable, in still others the end of the case may be the most desirable stage for a view. In the case of R. v. *Martin* [2] *it* was held that an order for a view may be made even after the summing up by the Judge.

This brings me to the question whether under our law a Judge sitting alone as judge of both fact and law has power to view the scene of the offence he is trying. The Criminal Procedure Code makes no express provision in that behalf but section 422 (1) (c) appears to recognise the existence of such a right. It provides that one of the grounds on which a case may be transferred from the Court having jurisdiction to try the offence to another is " that a view of the place in or near which any offence has been committed may be required for the satisfactory inquiry into or trial of the same. " The Code seems to proceed on the assumption that the right exists. The decisions of this Court recognise the necessity of such a right, which quite apart from statute may be regarded as inherent in a Court of Justice. In fact the opinion has been expressed that even the provisions which regulate a view by the jury are designed not so much to confer the power as to regulate it. For the power to view is inherent in a court. It may therefore be assumed that both our Code and the decisions of this Court recognise the power of a Judge sitting as a judge of fact and law to view the scene. He must however exercise that power within the limits allowed to a jury for as a judge of fact his role is the same. As I have pointed out

[1] *MacDonald v. Goderich, (1948) 1 D. L. R. 11.*

[2] *(1872) L. R. 1 C. C. R. 378 ; 12 Cox Cr. 204 ; 41 L. J. M. C. 113.*

above, it is not open, to a jury on a view to carry out tests for the purpose of verifying the veracity of witnesses or testing their evidence. Likewise a Judge sitting alone may not do so. Such a procedure is not sanctioned by law. A witness's evidence must be tested in one or more of the ways prescribed by the Evidence Ordinance.

In the instant case therefore the learned Magistrate was acting within his powers in viewing the scene of the offence. But the same cannot be said of the tests described by him in the journal entry which I have cited above. The course adopted by the learned Magistrate is one fraught with danger especially in a case such as this where all the witnesses are police officers who must be taken to know the points made at the trial by the defence in the course of their cross-examination. It cannot be asserted with certainty that when they rehearsed before the Magistrate they did exactly as they acted on the day of the offence, and that their actions were uninfluenced by their knowledge of the defence.

The trial of a case by the adoption of a procedure which has not the sanction of law cannot but result in prejudice to the accused. I think the conviction cannot be sustained and must be set aside.

Before I leave this topic I should not fail to prefer to the second proviso to section 60 of the Evidence Ordinance which prescribes that if oral evidence refers to the existence or condition of any material thing other than a document, the court may, if it thinks fit, require the production of such material thing for its inspection.

This procedure is followed every day in the Criminal Courts where bloodstained clothes, skulls, and bones with injuries, pieces of plaster, knives, clubs, and other weapons of offence and a whole host of other things too numerous to detail are produced for the inspection of the Court.

The question that arises is whether the Court's power of inspection under this section is confined to things that can be brought into the Court house. Can it not inspect things outside its walls? Take for example a motor vehicle which cannot be taken inside. Has the Court no power to go out into the place where it is left ? Let us now go a step further. Cannot the Court inspect under this section a thing that is immovable by proceeding to where it is? I am inclined to think that it may. To deny such a power would amount to an undue and unreasonable restriction of the power conferred by it. It seems to be a provision designed to provide a visual aid to the understanding of the oral testimony. At the same time it may operate as a means of checking the oral evidence.

The difference between a view of the scene and an inspection under the proviso to section 60 seems to me to be that until there is oral evidence which refers to the existence or condition of a material thing the Court cannot inspect it.

Before I conclude this judgment I must express my stern disapproval of the conduct of Sub-Inspector Wijesinghe who not only planned and led the raid but also prosecuted in the case despite objection by learned counsel for the defence. This Court has in a series of cases laid down the rule that an officer who has played the leading role in the detection

of a crime or offence should not in the interests of justice act as prosecutor in that case. That rule seems to be disregarded by public officers. It is a rule that must be strictly observed. The disregard of this rule in the instant case is an additional reason for setting aside the conviction of the appellant.

The appeal is allowed and the conviction is quashed.

Appeal allowed.