

Privy Council Appeal No. 25 of 1956

Tameshwar and another - - - - - *Appellants*

v.

The Queen - - - - - *Respondent*

FROM

THE SUPREME COURT OF BRITISH GUIANA

REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL
COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE
1ST MAY, 1957

Present at the Hearing:

EARL JOWITT
LORD TUCKER
LORD DENNING

[*Delivered by* LORD DENNING]

This was an appeal by special leave from a judgment of the Court of Criminal Appeal in British Guiana dismissing the appeal of the two appellants against their conviction for robbery with aggravation after a trial before Miller, J. and a jury. At the close of the argument their Lordships announced that they would humbly advise Her Majesty to allow the appeal and quash the convictions; and they now give their reasons for the advice which they tendered.

The point on which special leave to appeal was granted was the fact that the jury had a view with witnesses *in the absence of the Judge*. The question is whether that vitiates the trial. The Judges in the Court of Criminal Appeal were divided in opinion. Holder, C.J. and Phillips, J. thought that it would not warrant their holding that the trial was irregular. Stoby, J. held that the Judge's absence was fatal.

The material facts are these: At about 7.15 in the morning of 25th February, 1954, a postal apprentice named Sherry Browne, aged 19, was entrusted with a bag containing \$13,129.68 to carry to the Nigg Post Office. He was cycling towards the Post Office when two men stopped him at a bridge and pulled him off his cycle. One had a gun and the other a cutlass. They took the bag of dollars and ran away with it. It has never been recovered.

Two men named Tameshwar and Seokumar were arrested and charged with the offence. At the trial Tameshwar was called accused "No. 1" and Seokumar accused "No. 2", and it is convenient here to do the same. Sherry Browne gave evidence of the robbery and identified accused Nos. 1 and 2 as his assailants. A boy scout, aged 12, gave evidence that he saw two men running away and identified them as accused Nos. 1 and 2. A barber said he saw two men running away and identified accused No. 2 as one of them. A young married woman said that she saw accused No. 1 running with a bag over his shoulder. So did a carpenter. A police serjeant named Adams gave evidence of statements made by the two accused after they were arrested. Both, in their first statements, said they were not at the place at all; but accused No. 2 afterwards made a second statement in which he said they were

both there but he himself took no part in the actual robbery. He said: "Me get frighten and me run pon Nigg dam behind Tameshwar . . . Ah run behind Tameshwar and meself and them been ah shouting 'Hold he, hold he'". Later accused No. 2 withdrew this second statement and said it was obtained from him by threats. The defence of each of them was an alibi. Accused No. 1 said he was in a boat going to the rice field. Accused No. 2 said he was in his hammock in his living quarters.

At the end of the evidence taken in Court, the jury made a request to visit the scene of the robbery and asked that the postal apprentice, the boy scout, the barber, the young married woman and the carpenter should attend. They also wished to see the living quarters of the accused.

On Tuesday, 15th February, 1955, the view took place. Before the jury left for the view, they were checked in the presence of the Judge to see all were there. The two accused men were there. So were the Superintendent of Police and Counsel for the Prosecution. The Judge warned the jury not to have any communication or engage in any discussion or argument. The jury then left with the Registrar, the Marshal, Counsel for the Prosecution and Counsel for No. 2 accused, and the police officers. The two accused were present throughout. They went to the scene of the robbery. The postal apprentice indicated the spot where he said he was robbed, then the bridge where he said he saw the two accused standing. Police Serjeant Adams pointed out the Nigg Post Office and two dams which had been mentioned in evidence. The boy scout pointed out the spot where he said he was standing when he saw two men running south. The barber pointed out the spot where he saw accused No. 2. The young married woman pointed out the house in which she lived at the time and the place where she was standing when she saw accused No. 1 going south. The carpenter showed the bridge on which he was standing when he saw accused No. 1.

It appears that three other witnesses were present at the view. A witness for the defence, Hector Apadoo (who had given evidence in support of No. 2's alibi that he was in his hammock), showed where Nos. 1 and 2 accused were living, and where he himself was living, and the communal latrine. A witness for the prosecution (who was an engine driver who lived on the same estate as the two accused), showed where he was living. A witness for the defence (who had given evidence in support of No. 1's alibi that he was in the boat) indicated the koker south of the estate. Serjeant Adams indicated the house where a witness for the prosecution, named Bacchus, lived.

On the next day after the view the trial was resumed before the Judge in Court. Serjeant Adams gave evidence of what happened at the view. Sherry Browne, the postal apprentice, was re-called so as to be offered for cross-examination by the accused. They declined the offer. The other witnesses were available also for cross-examination but Counsel for the accused did not take advantage of it. Counsel made their speeches. The Judge summed up. The jury found the prisoners guilty by a majority of 11 to 1. Each was sentenced to 10 years penal servitude and 6 strokes by flogging.

It is important to notice that there is no suggestion of impropriety on the part of the jury or witnesses or anybody else at the view or any irregularity apart from the absence of the Judge. No complaint was made at the trial about the absence of the Judge, for the simple reason that in British Guiana for many years it has not been regarded as necessary for the Judge to attend a view. It appears that in British Guiana many Judges in the past have not accompanied the jury, and in a case decided in 1954 (*Hassan Mahamed v. The Queen*) the Court of Criminal Appeal in British Guiana had held that the absence of a judge on a visit to the place was not an irregularity.

The question for our consideration is whether the absence of the Judge at the view is a fatal defect in the trial.

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 javelin men; but the Judge apparently did not go with them. Nor did the prisoner. It is to be noticed that there were no witnesses. (See *R. v. Whalley* (1847) 2 Car. and K. 376.) Such a view is on a par with the common case where a thing is too large or cumbersome 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. In a case of motor manslaughter, any member of the jury could go in the evening and look at the place by himself if he wished, without being guilty of any irregularity.

It is very different when a witness demonstrates to the jury at the scene of a crime. By giving a demonstration he gives evidence just as much as when in the witness box he describes the place in words or refers to it on a plan. Such a demonstration on the spot is more effective than words can ever be, because it is more readily understood. It is more vivid as the witness points to the very place where he stood. It is more dramatic as he re-enacts the scene. He will not, as a rule, go stolidly to the spot without saying a word. To make it intelligible he will say at least "I stood here" or "I did this", and, unless held in check, he will start to give his evidence all over again as he remembers with advantages what things he did that day. But however much or however little the witness repeats his evidence or improves upon it, the fact remains that every demonstration by a witness is itself evidence in the case. A simple pointing out of a spot is a demonstration and part of the evidence. Whilst giving it the witness would still be bound by the oath which he had already taken to tell the truth. If he wilfully made a demonstration, material to the proceedings, which he knew to be false, he would be guilty of perjury.

In England the Court of Appeal has clearly held in civil cases that a view, coupled with a demonstration, is part of the evidence. So much so that if it takes place in the absence of one party without his consent, the trial is bad—See *Goold v. Evans & Co.* [1951] 2 T.L.R. 1189. Or again, it may of itself outweigh all the other evidence in the case, so that the Judge can found his decision upon it without more—See *Buckingham v. Daily News Ltd.* [1956] 3 W.L.R. 375. Their Lordships have held likewise, in a criminal case in an appeal from British Guiana, that a view, at which witnesses give demonstrations, is part of the evidence—See *Karamet v. The Queen* [1956] A.C. 256.

Now if a view of this kind is part of the evidence—as their Lordships are clear that it is—it would seem to follow that it must be held in the presence of the Judge. It is the very essence of a criminal trial that it must be decided on the evidence before the Court and not on any outside information; and that the Judge and jury must be present throughout the giving of the evidence and every part of it, so as to be able to appreciate it and assess its worth: and throughout the speeches of counsel too. The summing-up of the evidence by an impartial judge with a trained mind is an essential part of every criminal trial: but it can only properly be done by a judge who has heard all the evidence and seen all the demonstrations by witnesses. The Judge, for instance, may notice something at a demonstration which may be of vital import but passes unnoticed

by everyone else until he draws attention to it. His presence ensures not only that the proceedings are properly conducted but also that no relevant point on either side is overlooked.

Thus much has been said because there was a case in England many years ago which at first sight suggests the contrary. It is *Reg. v. Martin and Webb* (1872) L.R.1.C.Cas.R. 378 where two men were charged with indecency in a urinal. Two policemen gave evidence of what they had seen through the bars in a wall. After the Judge had summed up, the jury asked to view the place so as to see whether the policemen could have seen what they asserted. No objection was made on behalf of the prisoners. The jury had a view. The Judge did not attend. Nor did the prisoners. On the return of the jury to the Court, without any further direction from the Judge, they found the prisoners guilty. Afterwards the Court was informed that the two police witnesses had gone to the view and pointed out where they had stood at the time of the alleged offence and the position in which the prisoners were standing: and that the jury had then placed themselves in the same spot and looked through the bars. A case was thereupon stated for the opinion of the Court on the ground that there had been a mistrial in that (*inter alia*) the jury had at the view put questions to the witnesses and thus received evidence in the absence of the Judge and the prisoners. The Court for Crown Cases Reserved refused to determine this point because there had been no examination in the Court below into the facts of what took place at the view. The alleged reception of evidence out of Court might be a mere rumour without any foundation. The conviction was therefore affirmed. Their Lordships cannot regard that case as any warrant for a view to take place with witnesses in the absence of the Judge. A reference to the report in 26 L.T. 778 shows that, during the argument, all the Judges thought it was undesirable and some thought it was wrong: but they did not determine the point because the facts were not properly before them. Now that the point has arisen for decision, their Lordships have no hesitation in saying that it is not only undesirable but that it is wrong for a view to be had with witnesses in the absence of the Judge.

Counsel for the Crown sought however to justify the practice in British Guiana by reference to the Criminal Law (Procedure) Ordinance of 1953 which re-enacts a provision to the like effect dating back to 1893. It says in section 45 (i) and (ii)—

“Where in any case it is made to appear to the Court or a Judge that it will be for the interests of justice that the jury who are to try or are trying the issue in the cause should have a view of any place person or thing connected with the cause, the Court or Judge may direct that view to be had in the manner and upon the terms and conditions to the Court or the Judge seeming proper.

When a view is directed to be had the Court or judge shall give any directions seeming requisite for the purpose of preventing undue communication with the jurors: Provided that no breach of any of these directions shall affect the validity of the proceedings unless the Court otherwise orders.”

Their Lordships think that the view primarily contemplated by that section is a simple view by a jury when no witnesses are present, such as a view of a van in the yard of the Court, or of the cross-roads where a motor accident took place. But the section undoubtedly extends to cover a view when witnesses are present and demonstrate where they stood. Their Lordships so held in the recent case of *Karamat v. The Queen* (*supra*). That case formed the basis for much of Mr. Le Quesne's argument. He said that the section applied alike to a view with witnesses as to a view without witnesses: and hence that if a Judge need not be present at the one, he need not be present at the other. Their Lordships do not accept this contention. Section 45 enables the Court or a Judge to determine the terms and conditions on which a view may be held: but this power must be exercised in accordance with the fundamental principles of a fair trial: and one of these principles is that every piece of

evidence given by a witness must be given in the presence of the tribunal which tries the case: and the tribunal is not the jury alone, but the Judge and jury. Section 90 of the Ordinance says that "the trial shall be had by and before a Judge of the Court and a jury". If witnesses give demonstrations or answer questions at a view, that is undoubtedly part of the trial and must be had before the Judge and jury.

These observations do not apply to a simple view without witnesses. It often happens that a jury have a simple view of a vehicle in the Court-yard by themselves without the Judge being present. It is rather like their examination of an exhibit or a plan in the jury room without the Judge being present. But the Judge usually sees it himself too.

There remains the question whether the absence of the Judge at this view vitiates the trial. Their Lordships are mindful of the principles on which they advise Her Majesty in criminal cases. Slow as their Lordships are to interfere, yet if it is shown that something has taken place which tends to divert the due and orderly administration of the law into a new course, which may be drawn into an evil precedent in the future, then their Lordships may well think it necessary to advise Her Majesty to allow an appeal—See *The Attorney-General of New South Wales v. Bertrand* (1867) L.R.1.P.C.520 at p. 530, *Ibrahim v. Rex* [1914] A.C. 599 at p. 615 per Lord Sumner. Their Lordships think it plain that if a Judge retired to his private room whilst a witness was giving evidence, saying that the trial was to continue in his absence, it would be a fatal flaw. In such a case, the flaw might not have affected the verdict of the jury. They might have come to the same decision in any case. But no one could be sure that they would. If the Judge had been present, he might have asked questions and elicited information on matters which counsel had left obscure; and this additional information might have affected the verdict. So here, if the Judge had attended the view and seen the demonstration by the witnesses, he might have noticed things which everyone else had overlooked: and his summing-up might be affected by it. Their Lordships feel that his absence during part of the trial was such a departure from the essential principles of justice, as they understand them, that the trial cannot be allowed to stand. Mr. Le Quesne argued that the conviction should not be set aside unless the absence of the Judge was shown to have affected the result of the trial: but their Lordships do not think it should stand in any case. It is too disturbing a precedent to be allowed to pass.

In the Privy Council

TAMESHWAR AND ANOTHER

v.

THE QUEEN

DELIVERED BY LORD DENNING

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1957