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JAYANTI LAL PATEL

v.

REGINAM

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[SUPREME COURT, 1972 (Grant J.), 21st July, 24th August]

Appellate Jurisdiction

Criminal law—trial—view of scene by magistrate—accused not present nor given opportunity to be present—magistrate making use of information so obtained in deciding essential ingredient of offence—trial vitiated—Minor Offences Act 1971, ss.2, 4—Criminal Prcedure Code (Cap. 14) s.183.

C

Criminal law—practice and procedure—view by magistrate in absence of accused—use made in judgment of information so obtained—whether irregularity vitiating trial—Criminal Procedure Code (Cap. 14) s.183.

The question whether the offence with which the appellant was charged was committed in a public place being in issue, the trial magistrate personally viewed the scene in the absence of the appellant and his counsel. In his judgment the magistrate noted what he had observed and found that the place in question was one to which "the public have or are permitted to have access."

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HELD: 1. The holding of a view is part of the evidence and the evidence in any trial is required by section 183 of the Criminal Procedure Code to be taken in the presence of the accused; though, if the accused has been given the opportunity to be present and has declined, he cannot afterwards raise the objection that his absence of itself rendered the view illlegal.

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Semble: there is an exception to this principle whereby a judge may, by a view, simply obtain a general picture of a particular locale to assist him in understanding or following the evidence given.

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2. Where, as in the present case, the view took place in the absence of the accused and without his being afforded an opportunity to be present the question whether the irregularity vitiates the trial is a matter of degree depending on all the circumstances.

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3. The trial magistrate having relied upon his inspection of the scene for the purpose of a finding as to an essential ingredient of the offence, including matters which could have been the subject of cross-examination, it was not a case in which the appellate court could find that no substantial miscarriage of justice had occurred.

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Cases referred to:

Goold v. Evans & Co. [1951] 2 T.L.R. 1189.

Buckingham v. Daily News Ltd. [1956] 2 Q.B. 534; [1956] 3 W.L.R. 375.

Karamat v. R. [1956] A.C. 256: [1956] 2 W.L.R. 412.

A *Hunter v. Gray* [1970] N.I.1.

Sadhu v. Reg. (1961) 7 F.L.R. 125.

Poole v. Reg. [1961] A.C. 223; [1960] 3 All E.R. 398.

R. v. Lawrence [1968] 1 All E.R. 579; (1968) 52 Cr. App. R.163.

B *R. v. Nixon* [1968] 2 All E.R. 33: (1968) 52 Cr. App. R.218.

Phelan v. Back [1972] 1 All E.R. 901; 56 Cr. App. R.257.

Mwanga v. R. (1949) 16 E.A.C.A. 142.

Jan Barkat Ali v. Reg. (1972) 18 F.L.R. 129.

C Appeal to the Supreme Court from a conviction in the Magistrate's Court of behaving in a disorderly manner.

K. C. Ramrakha for for the appellant.

C. Trafford-Walker for the respondent.

D The facts sufficiently appear from the judgment.

24th August 1972

GRANT J.:

E This is an appeal against the conviction of the appellant on the 6th day of June 1972 for behaving in a disorderly manner in Waimanu Road contrary to Section 4 of the Minor Offences Act 1971 and against the sentence imposed, the grounds of appeal being :—

(1) The sentence is harsh, and excessive.

F (2) The learned trial Magistrate erred in law, and in fact, in concluding that the offence took place on "Waimanu Road".

(3) The learned trial Magistrate erred in law, and in fact, in viewing the scene without the accused and/or his counsel and in drawing conclusions from his own view of the locale without reference to the accused or his counsel.

G (4) The verdict is unreasonable and cannot be supported having regard to all the evidence.

(5) The place where the incident is alleged to have occurred is private property.

H Dealing with the appeal against conviction, it is extremely difficult, if not impossible, to ascertain from the evidence of the first witness for the prosecution (the only one in a position to testify on the point) exactly where the disorderly conduct took place. In examination-in-chief he stated that he arrested the appellant on the footpath close to the junction of Toorak Road and Waimanu Road, under cross-examination he stated

that the appellant's car was parked in a public place in the centre of the footpath and in reply to a further question he stated that he did not know that the driveway on which the car was standing was wholly maintained by a private individual. In re-examination he stated that the public had access to the footpath which was a public place. Referring to his evidence on this aspect of the matter the trial Magistrate in his judgment said "As a result of further cross-examination P.W.1 said that the accused's car was in a public place and I shall make a finding of the fact as to this later on in the judgment. P.W.1 was re-examined but I do not propose to go into that re-examination."

The appellant in his evidence claimed that his car was in a private driveway, the third defence witness testified that the public did not use the driveway and the fourth defence witness testified that he had control of the driveway which was a private one, and that it was not a footway or passage, although he then went on to say that he had a display window which people came to see in the "passage" and that he would let people stand in the "passageway". He also testified that the appellant's car was parked four to five feet from the edge of the pavement and that the appellant was arrested beside the back door of the car, and the trial Magistrate referred to this portion of the witness's evidence in his judgment. In his closing address at the trial defence counsel submitted that there was no evidence that the incident occurred in a "public place", which for the purpose of this offence is statutorily defined by Section 2 of the Minor Offences Act 1971 as meaning, inter alia, any highway, public street, public road, lane, footway or passage whether a thoroughfare or not to which for the time being the public have or are permitted to have access.

The trial Magistrate, quite understandably, appears to have been in some doubt as to the exact position and in order to resolve the matter he personally viewed the scene, stating in his judgment

> "That is the summary of the evidence on behalf of the Prosecution and Defence and on that evidence I propose to make the following findings of fact :—
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> (i) I have visited the driveway and I have observed that it is a small passage commencing at the corner of the shop of Lala Totaram and further down there are the entrance to two offices including a Solicitor's office and beyond that premises of a General Merchant. I find that in accordance with Section 2 of the Minor Offences Act, 1971 this is a place to which 'the public have or are permitted to have access'."

It is common ground that the trial Magistrate viewed the scene in the absence of the appellant and his counsel. Indeed he seems to have viewed it on his own, and while Denning L.J. in *Goold v. Evans & Co.* [1951] 2 T.L.R. 1189 at 1191 says that a Judge may go by himself to some public place, such as the site of a road accident with neither party present, he describes this as the only exception to the rule that a Judge must make his view in the presence of both parties or at any rate each party must be given an opportunity of being present; and it is clear that the exception to which he refers is limited to a Judge simply obtainng a general picture

of a particular locale in which a specific incident occurred to assist him in understanding or following the evidence given but excludes his utilising same to supply evidence, or to supplement evidence necessary to establish an essential ingredient of a criminal offence.

In *Goold v. Evans & Co.* (supra) the Court of Appeal held that in a civil action a view by a Judge in the absence of the plaintiff on which, prima facie, the judgment was based was inadmissible. Denning L.J. also expressed the opinion that a view is part of the evidence (Hodson L.J. disagreeing), and so far as civil cases are concerned this was confirmed as being a correct statement of the law by the Court of Appeal in *Buckingham v. Daily News Ltd.* [1956] 3 W.L.R. 375. The same approach was adopted in criminal cases by the Privy Council in *Karamat v. Reg.* [1956] 2 W.L.R. 412 in which Lord Goddard stated at 417 and 418 "That a view is part of the evidence is in their Lordships' opinion clear . . . The holding of a view is an incident in and therefore part of the trial." There is a decision of the Northern Ireland Court of Appeal the other way *(Hunter v. Gray* [1970] N.I.1), but I consider this Court bound by the Privy Council decision, particularly as *Buckingham v. Daily News Ltd.* (supra) was followed by the Supreme Court of Fiji in its crimnal appellate jurisdiction in *Sadhu s/o Raya & Anor v. Reg.* (1961) 7 F.L.R. 125.

Section 183 of the Criminal Procedure Code provides that evidence taken in any trial shall be taken in the presence of the accused; and while an accused who has been given the opportunity to attend a view and has declined to do so cannot afterwards raise the objection that his absence of itself made the view illegal and a ground for quashing the conviction *(Karamat v. Reg.* (supra)) in this case the view took place in his absence and without his being given any opportunity to be present. The question thus arises as to whether this irregularity vitiates the trial, which is a matter of degree depending on all the circumstances. In *Poole v. Reg.* (1960) 3 All. E.R. 398 the Privy Council concluded that in the particular circumstances of that case the accused had not been prejudiced as a result of his inadvertent absence from a demonstration which was repeated in his presence, but added "On the other hand it is not difficult to envisage many instances in which his absence would be fatal."

It is not clear from the record at what stage the trial Magistrate carried out his view. If it was after he had retired to consider his verdict then I think it must be fatal (unless no substantial miscarriage of justice has occurred) by reason of the decision in *R. v. Lawrence* (1968) 52 Crim. App. R.163 that the strict rule of procedure that no further evidence shall be adduced in a trial after the jury have retired to consider their verdict extends to the inspection by the jury of a material object referred to in the evidence during the trial and that where there has been an inspection by the jury in such circumstances the conviction will be quashed (c.f. *R. v. Nixon* (1968) 52 Crim. App. R.218). While the rules of procedure governing a Supreme Court trial do not necessarily apply to a Magistrate's Court (vide *Phelan v. Back* [1972] 1 All. E.R. 901) I do not think, for this purpose, that a Magistrate is in a more favoured position than a jury. Even if the trial Magistrate carried out his view during the progress of the trial I have come to the conclusion that, in the circumstances of this particular case, the absence of the appellant was fatal. The trial Magistrate relied upon his inspection of the scene for the purpose of making a finding that one of the essential ingredients of the offence with which

the appellant stood charged existed, namely that it was in a public place that the disorderly behaviour of the appellant occurred, and he made certain observations regarding entrances to offices including a solicitor's office and to premises of a general merchant which, had these points been put to a witness, could have been subject to cross-examination (*Mwanja s/o Nkii* (1949) 16 E.A.C.A. 142). This is not a case in which this Court can find that no substantial miscarriage of justice has actually occurred as it cannot be said that the trial Magistrate must have convicted whether he viewed the locus in quo or not. Indeed, I fail to see how the trial Magistrate could have been satisfied beyond reasonable doubt that the spot where the incident apparently happened was a public place had he not carried out an inspection.

It is of course open to a Judge or Magistrate in arriving at his decision to use his general information and that knowledge of the common affairs of life which men of ordinary intelligence possess and he may in appropriate circumstances even make use of his general local knowledge, although he may not act on his own private knowledge or belief regarding the facts of the particular case. Had the location of this incident been, for instance, a well-known public road or what was, to common knowledge, a place of public resort to which the public are permitted to have access the Court may well have been entitled to take notice of the fact that it was a public place (*Jan Barkat Ali v. Reg.* (1972) 18 F.L.R. 129.) but the circumstances here clearly preclude the operation of this doctrine.

For these reasons the appeal must be allowed and the conviction is accordingly quashed and the sentence set aside.

Appeal allowed.