8/1957

In the Privy Council.

No. 25 of 1956.

ON APPEAL FROM THE COURT OF CRIMINAL APPEAL IN THE SUPREME COURT OF BRITISH GUIANA

BETWEEN

(1) TAMESHWAR
(2) SEOKUMAR ... ... APPELLANTS

AND

THE QUEEN ... ... RESPONDENT.

CASE FOR THE APPELLANTS.

1.—This is an Appeal by Special Leave *in forma pauperis* from the Judgment of the Court of Criminal Appeal in the Supreme Court of British Guiana (Holder C.J., Stoby and Phillips JJ.) dated the 4th day of April 1956, Stoby J. dissenting, dismissing the Appellants' appeals from their convictions before the Honourable Mr. Justice Miller sitting with a Jury in the Supreme Court of British Guiana of the offence of robbery with aggravation contrary to Section 222 (c) of the Criminal Law (Offences) Ordnance Chap. 11. Their convictions were upon a retrial after a jury on a former trial in November 1954 had been unable to agree upon its verdict. Upon conviction each of Your Appellants was sentenced to ten years' penal servitude and ordered to receive six strokes.

RECORD
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2.—The principal questions involved in the Appeal are as to the effect of the Statutory Provisions in respect of a view of the *locus in quo* by the Jury and as to whether there had been a disregard of the forms of legal process or a subversion of the very foundations of justice in the manner in which the Jury made their view of the *locus in quo* in the presence of prosecution witnesses who gave evidence there in the absence of the Trial Judge.

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3.—The following Sections of the Criminal Law (Procedure) Ordinance (Laws of British Guiana 1953) are relevant to this Appeal . . . :—

(2) In this Ordinance, unless the context otherwise requires—

. . . " the Court " . . . means the Supreme Court acting in the exercise of its Criminal Jurisdiction ;

(16) Subject to the provisions of this Ordinance and of any other Statute for the time being in force, the practice and procedure of the Court shall be, as nearly as possible, the same as the practice and procedure for the time being in force in criminal causes and matters in the High Court of Justice and the Courts of Assize created by the Commission of Oyer and Terminer and of Gaol Delivery in England.

(45) (i) Where in any case it is made to appear to the Court or a Judge that it would 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.

(ii) 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.

(48) Subject to the provisions of this Ordinance and of any other Statute for the time being in force, the practice and procedure relating to juries on the trial of indictable offences shall be as nearly as possible in accordance with the practice and procedure in the like case of the Courts in England mentioned in section 16 of this Ordinance.

(90) (i) Every person committed for trial shall be tried on an indictment in the Court.

(ii) Subject to the provisions of the next succeeding section, the trial shall be had by and before a Judge of the Court and a Jury constituted under this Ordinance.

(91) On motion made by the Attorney General, a Judge shall Order that the trial of any Indictment shall be had at Bar, that is to say by and before two or three Judges of the Court and a Jury constituted under this Ordinance ; and that trial shall be had accordingly.

4.—The evidence against the Appellants was to the following effect :—

pp. 6, 7 The Post Office moneys from Nigg Post Office were lodged with the Police at the Albion Police Station for safe keeping each

afternoon and brought back in the morning by one of the Post Office staff. At about 7.15 a.m. on the 25th February 1954, a postal apprentice named Sherry Brown was cycling towards the Post Office with a bag containing $13,129.68, which he had just collected from the Albion Police Station, when the Appellants stopped him at a bridge and pulled him off his cycle. The first Appellant Tameshwar was armed with a gun and the second Appellant Seokumar had a cutlas. The Appellants took the bag from Sherry Brown and ran away with it. At an identification parade on the 26th February 1954 Sherry Brown identified the Appellants as his assailants. Other witnesses confirmed the loss of the money and that two men were present at the scene of the alleged offence and were running away afterwards and that one of the men carried a bag like a Post Office delivery bag over his shoulder and had a gun in the other hand. There was evidence of people some distance away from the scene of the alleged offence that they saw two men running and these they recognised as the Appellants. A statement made by the second Appellant after an earlier statement was also given in evidence by the Crown. His counsel objected to its admissibility, alleging that it had been obtained by force, but after hearing evidence the learned Judge directed that the statement should be admitted in evidence.

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5.—Each of Your Appellants elected to make a statement from the Dock. In these each denied the charge and said that he was not in the vicinity of Nigg Post Office at the time that the robbery took place. One of the Prosecution witnesses Ahamad Baksh, sometimes called Sonny Juman, had stated in evidence that at about 5.40 a.m. on the 25th February 1954 the first Appellant asked for a lift in the boat to his rice field about 7 miles away. He could not say if the first Appellant travelled in the boat but at about 4.45 p.m. the same day he saw the first Appellant coming from the Dam about 7 miles out of town and gave him a lift back to town. Another Crown witness, a Police Constable named Joel Haynes, had said in evidence that when he arrested the first Appellant at about 5.50 p.m. on the 25th February 1954, the first Appellant said that he knew nothing about the matter as he was away from 6 a.m. with Sonny Juman working at St. John. In his statement from the Dock the first Appellant said that this statement to P.C. Haynes was the truth. The first Appellant called two witnesses in his defence. One of them was the Clerk of the Court at the first Trial at which the Jury had been unable to agree on their verdict. The Clerk gave in evidence his recollection that one of the vital prosecution witnesses, Mohamed Islam Khan, had said at the previous trial that one or both of the Accused had a kerchief tied below his eyes, whilst in the present trial he had denied this and said that neither had any covering over any part of his face. The other witness Armogn Naiken said that on a Thursday in February 1954 a few days before he heard of a Post Office robbery he saw the first Appellant in the boat with Juman

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and many others between 6.30 and 7 a.m. The 25th February 1954 was a Thursday.

pp. 34–36 The Second Appellant had stated from the Dock that his first statement in which he said that he was sleeping in his hammock when the offence took place was true. He called one witness, Hector Apedoo, who stated in evidence that he saw the second Appellant in his hammock at 6 a.m. and again at 7.45 a.m. on the Thursday the day before he heard of the robbery.

p. 18 A Crown witness, a Police Corporal named James Robertson, had said in evidence that when he saw the second Appellant at about 10 p.m. on the 25th February 1954, the second Appellant said that he knew nothing of the robbery and that at about 7.20 a.m. the following morning this Appellant

p. 66 made a written statement to this effect and stating that he was in his hammock at the time when it was alleged to have taken place.

p. 37 6.—The Trial commenced on the 8th February 1955 and on the 14th February 1955 at the conclusion of the evidence for the Defendants the Jury asked to visit the *locus in quo* and requested that the five principal prosecution witnesses should be present and that they, the jurors, should be allowed to see the living quarters of the defendants. The Judge directed that a view should take place the following day and it did so take place. At this stage in the proceedings all the prosecution witnesses had given their evidence and been examined, cross-examined and re-examined. After giving their evidence each of the prosecution witnesses had remained in Court and so been able to hear the evidence given by later witnesses called on behalf of the Prosecution and on behalf of each of the Appellants.

p. 37 The view took place in the presence of an Assistant sworn Clerk the Appellants, Counsel for the Crown and for the Appellants, the Marshal, Police Officers, including those who had given evidence for the prosecution, and the five prosecution witnesses, whose presence had been requested by the jury. The Judge was not present. The Jury travelled a considerable distance to see the various places at which prosecution witnesses had stated that they had seen the Appellants. These places were difficult of access and had to be reached by parties walking and wading to them. It is probable that the jurors mingled with the prosecution witnesses in moving from place to place and no precautions were taken to prevent this. On each occasion when the jurors halted for a view one or more of the prosecution witnesses would point out particular places which had been mentioned in his or their evidence and would demonstrate what had happened and would repeat material parts of the prosecution case and say what had happened and been said at that place. Counsel for the prosecution conducted the proceedings and asked questions of the witnesses for the prosecution either at the request of the jury or on his own initiative. The statements and demonstrations of the prosecution witnesses were in the presence and hearing of the other prosecution witnesses on most occasions. It is a matter of uncertainty as to whether all the jurors saw each of the places which were pointed out or all the demonstrations or heard all that was said. No record was kept of what was said by the prosecution witnesses

at any of the places that were viewed and no oath was taken by any witness at the time. The learned Judge was not there to control the proceedings and no cross-examination by counsel for your Appellants was possible. On the following day, the 16th February 1955, counsel for the Crown recalled to the witness box the Police Sergeant named David Adams, who had given evidence for the prosecution and had attended at the view without any request from the Jury. He was recalled to give evidence of what happened at the view and for cross examination. All the five prosecution witnesses who attended the view at the request of the jury were also tendered by counsel for the Crown for cross-examination by counsel for Your Appellants, but such cross-examination was declined. Neither prior nor subsequent to the view was any objection taken by counsel for the Appellants to a view conducted in this manner because it was a practice which had long been followed in the Colony as appears from the judgments in the Court of Criminal Appeal.

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7.—The Appellants appealed to the Court of Criminal Appeal. Their Notices of Appeal both dated the 26th of February 1955 and their Supplemental Ground of Appeal dated the 24th October 1955 set out many grounds of Appeal, of which only that contained in the Supplemental Ground of Appeal is now maintained. That is :—

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(1) " The visit of the jury to the *locus in quo*, as recorded at " pages 48, 49, and 50 of the notes of evidence, was conducted in " an improper and/or illegal manner because :—

" (a) the jurors were not all times kept apart and separate " from the witnesses,

" (b) the witnesses, in answer to the questions put to " them demonstrated and made statements not on oath in " the presence of the jury,

" (c) the learned trial judge was absent during the Jury's " visit to the *locus in quo*."

8.—The Appeals were argued on the 28th October 1955, 21st December 1955 and 11th February 1956 and judgments were given on the 4th April 1956. Holder C.J. and Phillips J. delivered a judgment dismissing the Appeal but Stoby J. with the consent of Holder C.J., the President of the Court, delivered a separate judgment dissenting from the judgment of the other two members of the Court and in favour of allowing the appeals of both Appellants.

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9.—The judgment of the majority of the Court in dealing with the ground of appeal relating to the conduct of the view set out their opinion of the purpose of a view. They said that this was to enable the jury to get a clear picture of points and spots and land-marks and the general topography of the area of which they may sometimes obtain a hazy and inaccurate picture merely through the medium of plans and photographs. They said that they had seen nothing on the record nor heard any submission leading to the inference that the Appellants did not have a fair

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p. 54 and proper trial. On the facts of the case there had been no suggestion of impropriety on the part of the jury or witnesses or any irregularity apart from the absence of the Judge at the view and the Assistant Sworn Clerk's conducting the view in the Judge's absence. The Assistant Sworn Clerk was an officer of the Court and he and the Marshall had charge of the jury by virtue of their office and under the direction of the Judge. It had not been suggested that they performed their duties improperly. After the view the prosecution witnesses present at the view had been tendered for cross-examination and had this not been done, the judgment might have
p. 55 been different. They concluded that there had been no irregularity because otherwise counsel would have brought it to the attention of the Judge. They held that the absence of the Judge was by itself, in the absence of irregularities, not necessarily fatal and this ground of Appeal therefore failed.

pp. 55, 56 10.—The dissenting judgment of Stoby J. was the first dissenting judgment to be given in the Court of Criminal Appeal of the Supreme
p. 60 Court of British Guiana since the Court was established by Ordinance No. 29 of 1950. Stoby J. held that in his view the law provides that the jury can be permitted to have a view in the absence of the Judge provided no questions are asked and they communicate with no-one but that if the jury asks questions and witnesses place themselves in positions they were in at the material time, then the Judge must be present. He said that the
p. 61 view was part of the trial and once that was conceded, a Clerk of Court cannot question the jury or if he does the answers must be recorded. He pointed out that no complaint of the Judge's absence could be expected because a previous decision of the Court, of which he was a member, had held that this was not an irregularity and indeed the practice had existed for many years. He said that evidence cannot be received in the Judge's absence and that he would quash the convictions.

11.—The Appellants submit that the judgment of the Court of Criminal Appeal should be reversed and their convictions quashed for the following among other

REASONS

1. BECAUSE Section 45 of the Criminal Law (Procedure) Ordinance does not enlarge the Judge's powers in directing a view of the *locus in quo* beyond the powers which he has by the Common Law of England.

2. BECAUSE the view allowed prosecution witnesses, who had already given evidence and heard the evidence of subsequent prosecution witnesses and the witnesses for the defence, to give further evidence both orally and by conduct before the jury at the request of the jury and of the prosecution.

3. BECAUSE at the view evidence was given by the prosecution witnesses in the absence of the Judge.

4. BECAUSE at the view one or more prosecution witnesses was present whose attendance had not been ordered or permitted by the Judge.

5. BECAUSE at the view the prosecution witnesses were all present whilst one or more of their number was giving a demonstration, answering questions and making statements, and so enabled to know the evidence of the other prosecution witnesses.

6. BECAUSE no record was kept of the proceedings at the view.

7. BECAUSE at the view Counsel for the Appellants were not permitted to cross-examine the prosecution witnesses who were giving evidence to the jury.

8. BECAUSE at the view there may have been casual and unauthorised communications by the prosecution witnesses there present to the jurors and a failure to ensure that all the jurors were present and able to see and hear the evidence there given by the prosecution witnesses.

J. LLOYD-ELEY.

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