VIEWS OF THE LOCUS IN QUO

TAMESHWAR v. THE QUEEN [1957] A.C. 476 P.C.

The recent decision of the Judicial Committee in Tameshwar v. The Queen [1957] A.C. 476 P.C. raises two interesting issues: firstly, whether the presence of the judge, both parties and their counsel is necessary at a view at which demonstrations are given, and secondly, whether it is permissible for the judge or for the jury to disregard evidence given in court and act upon what they have seen at the view or whether the view must be used solely to explain the evidence given in court.

1. Is the presence of the Judge, both parties and their counsel necessary at a view where demonstrations are given?

Tameshwar's case was an appeal from the Court of Criminal Appeal of British Guiana, where, during the trial of the two accused for aggravated robbery, the jury requested a view of the place where the robbery was alleged to have been committed. They also asked that several witnesses of the robbery should attend. The view was held in the presence of the accused, a superintendent of police, counsel for the prosecution, and counsel for one of the accused. Before leaving for the view the jury were warned by the judge not to have any communication or to engage in any discussion or argument during the view. The judge did not go with them. At the view the witnesses pointed out various places. On the following day the trial was resumed. Evidence was given of what happened at the view and the witnesses were available for cross-examination. The jury then found the prisoners guilty. No complaint was made at the trial about the absence of the judge, because in that country for many years it had not been the practice for the judge to attend a view. The question for consideration before the Judicial Committee was whether the absence of the judge at the view was a fatal defect in the trial. In deciding this question in the affirmative the Privy Council held that a view with witnesses demonstrating

was part of the evidence in the trial and the absence of the judge was a defect which vitiated the trial. In delivering the judgment of the Judicial Committee Lord Denning said (at 487):

> . . . 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 . . . [which] 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. . . .

Their Lordships were assisted in reaching this decision by drawing a distinction between "simple" views (at which there are no witnesses present and there is no demonstration) and views where "live" evidence is given. The basis of the distinction is explained thus (at 484):

> 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 on 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. . . . 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.

The Privy Council here recognizes as sound a proposition first expounded by Denning L.J. (as he then was) in the civil case of Goold v. Evans and Co. Ltd. [1951] 2 T.L.R. 1189, 1191, C.A., from which it follows that a view by either judge or jury plus a demonstration at that view becomes a part of the evidence in the case and must be held in the presence of the judge and both parties. He there said:

> It is a fundamental principle of our law that a judge must act on the evidence before him and not on outside information; and, further, the evidence on which he acts must be given in the presence of both parties, or, at any rate, each party must be given an opportunity of being present. Speaking for myself, I think that a view is part of the evidence, just as much as an exhibit. It is real evidence. The tribunal sees the real thing instead of having a drawing or photograph of it. . . .

In that case, which was tried before a judge without a jury, the plaintiff alleged that he had suffered injury through the negligence of his employers. The judge had a view of the premises where the employee had suffered the injury and saw an

operation which purported to be the same as that in which the workman had been engaged at the time of the accident. The plaintiff was not present at the view as he had not been notified of the date of inspection. On the appeal the remaining members of the Court of Appeal agreed in substance with Denning L.J.'s opinion and an order for a new trial was made.

In Tameshwar's case Lord Denning also refers to Buckingham v. Daily News Ltd. [1956] 2 Q.B. 534, C.A. This was a case in which the plaintiff was injured whilst cleaning a rotary press at the defendant's printing works. At the invitation of the parties, the trial judge inspected the press and saw a demonstration by the plaintiff showing how it was cleaned. In his judgment in the Court of Appeal Birkett L.J. (at 543) expressly adopted the language of Denning L.J. in Goold v. Evans and Co. Ltd. (supra) and said:

> . . . when a judge goes to see machinery, and sees it in operation when the parties are present and everything is done regularly and in order, it is just the same as though the machine were brought into court and the demonstration made in the well of the court, so that the judge . . . may see it.

Parker L.J. also decided that such a view would be part of the evidence.

The third case to which Lord Denning refers is the decision of the Judicial Committee in Karamat v. The Queen [1956] A.C. 256, P.C. This case, like Tameshwar's case, was an appeal from the Court of Criminal Appeal of British Guiana. During the course of the trial of the accused and five others for murder all counsel applied to the judge to direct a view of the locus in quo. Under s.44 of the Criminal Law (Procedure) Ordinance of British Guiana the judge was entitled to order a view if he considered it to be in the interests of justice to do so. Section 47 governed the conditions under which the view was to be held. Counsel for Karamat objected to the procedure adopted. He declined to take any part in the view and informed the court

that his client would not attend. The question before the Privy Council was whether the absence of the accused from the view invalidated the trial. In delivering the judgment of their Lordships Lord Goddard C.J. said (at 264):

> . . . That a view is part of the evidence is, in their Lordships' opinion, clear. It is in substitution for or supplemental to plans, photographs and the like. In such a view as took place . . . there can, in their Lordships' opinion, be no objection to the judge asking a witness to place himself at a particular spot which he has mentioned in his evidence or to show to the jury the place where someone else stood or the direction from which someone came. . . .

The Lord Chief Justice continued (at 265):

> It was, however, strenuously argued before this Board that as the accused was not present this is a fatal objection. A short answer to this point was made by Mr. Le Quesne, for the Crown, who pointed out that under the Criminal Procedure Ordinance it is competent for the court to allow the accused to be absent during a part of the trial. The holding of a view is an incident in and therefore part of the trial, and as the court, on being informed that the accused did not desire to attend, did not insist on his presence, this is equivalent to allowing him to be absent. . . .

The rule that can be formulated from these cases, in which the proposition enunciated by Denning L.J. in Goold's case (supra) has been followed or re-affirmed, is that all views at which witnesses demonstrate are now part of the evidence in the case and must be attended by the judge and all the parties to the action. If one of the parties intentionally absents himself from the view he cannot afterwards be heard to complain if the Court had power to allow him to be absent during a part of the trial.

In New Zealand the question whether a judge and the parties must be present at a view has never been the subject

of a reported decision. In Frank Harris and Co. Ltd. v. Hakaraia (1914) 33 N.Z.L.R. 1074, (discussed more fully below) the Court of Appeal held that a view is to serve merely as elucidation, and not as producing evidence in chief. This might imply that the judge need not be present. In Pinner v. Martin's Boot and Shoe Stores Ltd. [1941] N.Z.L.R. 55, the jury had a view which was not attended by the judge, and the judge later had a view by himself to enable him to dispose of a motion for a nonsuit. However, none of the judgments in the Court of Appeal contains dicta relating to the way in which the first view was held.

It is likely in the event of the question arising in New Zealand that Tameshwar's case (supra) would be followed and New Zealand practice thus brought into line with that followed in England and other parts of the Commonwealth.

It is convenient to mention here that reported decisions disclose inconsistent rulings on the propriety of a juror having a view of the locus in quo, on his own accord, during the course of a trial.

In the decisions of the Full Court of New South Wales in Perdriau v. Moore (1888) 9 N.S.W.L.R. (L) 143, and Way v. Way (1928) 28 S.R.N.S.W. 345, this was held a sufficient irregularity to upset the proceedings. In the latter case (a divorce action on the grounds of adultery) the jury had been asked whether they wished to view the scene of the alleged adultery but they deemed it unnecessary as some of their number had already been for a view on their own account. With regard to this point Street C.J. observed (at 346):

> . . . It is plain that it was an irregular and improper proceeding for any member of the jury to go on his own account to visit the locality. If there was to be an inspection of it, it should have been an inspection by all, under the direction of the Court and with proper safeguards to provide against improper interference or communications and to ensure that their attention

> would be properly directed to the things which it was material that they should see and observe for themselves. It is necessary, I think, that this should be emphasised. Juries are sworn to give their verdict upon legal evidence brought properly before them and upon that only, and a juryman who attempts to inform his mind from outside sources commits a grave irregularity. . . .

Against this finding is the dictum (which is admittedly obiter) of the Board, in Tameshwar's case (at 483):

> . . . 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.

2. Are the judge or the jury permitted to reject the sworn evidence and act upon what they have seen at the view or must the purpose of the view be limited to explaining the sworn evidence?

Prior to Goold v. Evans and Co. Ltd. (supra) the second alternative was the rule which prevailed in England. This rule had been expounded by Lord Alverstone C.J. in London General Omnibus Co. Ltd. v. Lavell [1901] 1 Ch. 135, C.A. (at 138):

> . . . It is quite true that by rule 4 of Order L.[1] it is provided that the judge may "inspect any property or thing concerning which any question may arise" in the action; but I have never heard

1. The New Zealand provisions are: Code of Civil Procedure, R.498; Juries Act 1908, ss. 127-139.

> it said, and, speaking for myself, I should be very sorry to endorse the idea, that the judge is entitled to put a view in the place of evidence. A view, as I have always understood, is for the purpose of enabling the tribunal to understand the questions that are being raised, to follow the evidence, and to apply the evidence.

In this case the plaintiff bus company alleged that the defendant had painted his bus in such a manner that the general public would be deceived into thinking that it was one of the plaintiff's buses, and an injunction was sought. The judge at first instance, Farwell J., after a view of the two buses outside the court, stated that he was satisfied upon the evidence of his own eyesight alone, without any further evidence, that the defendant's omnibus was so painted and lettered on the side panels as to deceive the casual passenger. Relying on this statement counsel for the plaintiff offered no evidence of actual deception. An injunction was granted. The Court of Appeal held that Farwell J. had no authority to act in the manner he did and ordered a re-hearing.[2]

Lord Alverstone's proposition has been followed in New Zealand in Frank Harris and Co. Ltd. v. Hakaraia (supra); in Australia by the Full Court of New South Wales in Hodge v. Williams (1947) 47 S.R.N.S.W. 489, and Unsted v. Unsted (1947) 47 S.R.N.S.W. 495; and in Canada in Sederquest v. Ryan [1939] 4 D.L.R. 52 (N.B.).

The rule that can be formulated from these cases is that the only purpose for which a view can be used is to enable the judge or jury better to understand the evidence given in court, and that it is not a legitimate use of a view to allow the opinions and impressions there formulated to supersede the sworn evidence. Whether there was or was not a demonstration by witnesses does not affect the rule. Neither judge nor jury is entitled to disregard the sworn evidence in favour of the impressions gained at the view.

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2. Cf. Black and White Cabs, Ltd. v. Nicholson [1928] N.Z.L.R. 273.

However, since the case of Goold v. Evans and Co. Ltd. (supra) where Lord Denning first expounded the proposition that a view together with a demonstration is part of the evidence in the case, a different complexion is placed on the value which judge and jury are to place on the information and impressions gained and formulated from a view. This case decided that such views are part of the evidence and that this evidence can both reinforce and if need be replace the sworn evidence heard in court. The subsequent case of Buckingham v. Daily News Ltd. (supra) brings this point out clearly. The judge of first instance decided to reject sworn evidence in favour of the impressions gained by him from the demonstration of the cleaning of the rotary press given at the view. The Court of Appeal, following the decision in Goold's case (supra) held that the judge was entitled to act as he had done, provided that he gave full consideration to the sworn evidence before rejecting it in favour of his own impressions. Birkett L.J. said (at 546):

> . . . What the judge manifestly was doing in this judgment was to say: I have in mind the evidence given by the plaintiff; I have taken each witness in turn and stated the substance of what they have said; but I must also bear in mind that I was invited to see the particular operation going on and I did see it. I express my view with regard to it. My own view is contrary to the view of the witnesses which has been given before me, and to that extent, impliedly and implicitly, I reject that evidence.

To allow the judge or jury to reject, after due consideration, the sworn evidence in favour of the opinions formulated from the view, is a logical extension of the principle that a view together with a demonstration is part of the evidence. From the Privy Council's adoption of Goold's case and Buckingham's case in Tameshwar's case it would appear that this proposition has become established as part of the common law.

The question now to be considered is the extent to which the rule applies in New Zealand, having regard to the fact that the rule in the London General Omnibus case was adopted by the Court of Appeal in Frank Harris and Co. Ltd. v. Hakaraia (supra). This was a contract case involving a statue of Major Kemp. Major Kemp's sister, the defendant, had commissioned the statue from the plaintiff, an Auckland firm. She refused to pay the balance of the contract price because she maintained that the statue bore very little resemblance to her brother. The firm sued her for the balance. The evidence about the statue was wholly in favour of the defendant. After the judge's summing up the jury requested a view of the monument. Later, they returned a verdict which was contrary to the weight of the oral evidence. The Court of Appeal unanimously rejected counsel's argument that since the jury had viewed the monument they were entitled to disregard the evidence of the witnesses and to act upon their own conclusions drawn from their inspection of the statue. Edwards J., who delivered the judgment of the court, said (at 1088):

> In our opinion there is no reason to doubt that a view, whether by a jury or by a Judge, is, as was laid down by the Court of Appeal in England in The London General Omnibus Company v. Lavell . . . "for the purpose of enabling the tribunal to understand the questions that are being raised, to follow the evidence, and to apply the evidence." . . . If it were otherwise it would certainly never be safe to order a view by a jury.

Another reported Court of Appeal case involving a view by judge or jury is Pinner v. Martin's Boot and Shoe Stores Ltd. (supra). In this case the plaintiff, a shop assistant in the employ of the defendant company, suffered injury when the ladder on which she was standing slipped. She alleged that the company was negligent in neither supplying a safe ladder nor adopting a safe system of work. During the course of the hearing the jury viewed the premises. After the jury's verdict, but before judgment, the judge went for a view in order that he might better dispose of a motion for nonsuit moved by the defendant company. The Court of Appeal

considered Hakaraia's case and criticised what was there said as being too wide. Myers C.J. said (at 70):

> . . . With the greatest respect, this does not seem to me to be an entirely satisfactory or sufficient statement, but I admit the difficulty of more precise expression and the still greater difficulty of the tribunal - particularly if it be a jury - being kept within the limits intended to be laid down. . . .

Blair J. thought the decision in the London General Omnibus Company case (supra) depended on its own special facts, and that the proposition there laid down by Lord Alverstone could have no general application. He said (at 75):

> . . . There is nothing in it to show what was the purpose for which the parties agreed that the Judge should take a view before hearing evidence. . . . The case is one where the learned trial Judge wrongly assumed he had been, by consent of the parties, clothed with the power to dispose of the case by what he learnt as the result of his inspection of the rival omnibuses. The Appeal Court in its judgment defined the purpose and object of that particular inspection. I cannot read the case as laying down what is the purpose and object of every inspection taken by agreement of the parties.

The Court of Appeal decided that the rule laid down by Lord Alverstone and followed in Hakaraia's case could not be taken as an authority that in no case could a judge or jury, after a view, act upon the evidence of his or their own eyes. The Court did not attempt to go beyond this and formulate a restatement of the rule.

In view of the doubts expressed in Pinner's case it is unlikely that the rule in the London General Omnibus case will again be followed in this country; and this is even more unlikely following the above-mentioned recent developments culminating with Tameshwar's case. As a result of the decision in Tameshwar's case it now seems that both the judge and the jury are permitted to act upon what they have seen at

the view, and that they are not bound to regard the view as something which is to be used solely to clarify and better explain the evidence given in court.

It now remains to consider whether these conclusions apply to all types of views. As to the first (i.e. where judge and counsel must be present) regard must be had to the question whether witnesses will be there. If no witnesses are present there cannot be a demonstration. This would be the case where the jury inspect a van or something of a similar nature which is too large to bring into court. This is what Lord Denning in Tameshwar's case (supra) refers to as a "simple" view. If no witnesses attend, the case remains under the old rule that the judge need not be present. But, as Lord Denning points out in Tameshwar's case (at 484): "A simple pointing out of a spot is a demonstration and part of the evidence." Logically, in cases where there are witnesses present but no demonstration is intended, the mere words "here is the spot" or "that is the place over there" or other similar phrases by any of the witnesses present would be sufficient to turn what was intended as a simple view into a view of the other category in Lord Denning's classification and into part of the evidence. It is suggested that this difficulty will be overcome if the category of views which must be attended by the judge, the parties and counsel is extended to include all views at which a witness is present.

As to the second point (the use that may be made of a view), even in the case of simple views it is difficult to see the jury being kept within the confines of Lord Alverstone's words, viz., that a view should only be used to help the jury understand the evidence put before them in court. It is submitted that consciously or unconsciously the impressions gained at a simple view are going to be weighed against the sworn evidence heard in court. This of course was long thought to be outside the purpose for which views were intended. Edwards J. in Hakaraia's case (supra), referring to sections now repealed, remarked (at 1088):

> . . . we are satisfied that the intention was not to give the jury power, as the result of a view

> by some of them, to disregard the sworn evidence of the witnesses at the trial. To effect such a startling revolution in the law of evidence express and unequivocal words would, in our opinion, be necessary.

But the authorities already cited show that this restriction has been swept away in cases where witnesses were present at the view. No valid reason exists why the judge or jury should still be bound by this restriction when witnesses were not present. The significance of what the judge or jury apprehend directly with their own senses cannot be distorted to conform with every statement made from the witness box. It is predicted that the principles which were laid down in Buckingham v. Daily News Ltd. (supra) and approved by the Privy Council in Tameshwar v. The Queen (supra) will be applied in all cases of a view, whether by judge or jury, and whether in the presence of witnesses or not. Rules of evidence and procedure must take account of the fact that the system is operated not by robots but by human beings.