

Barrington Farquharson

Appellant

v.

The Queen

Respondent

FROM

THE COURT OF APPEAL OF JAMAICA

REASONS FOR REPORT OF THE LORDS OF
THE JUDICIAL COMMITTEE OF THE PRIVY
COUNCIL OF THE 14TH JUNE 1993,
DELIVERED THE 26TH JULY 1993

Present at the hearing:-

LORD KEITH OF KINKEL
LORD JAUNCEY OF TULLICHETTLE
LORD LOWRY
LORD SLYNN OF HADLEY
LORD WOOLF

[Delivered by Lord Lowry]

This is an appeal by special leave granted on 16th October 1991 from a decision of the Court of Appeal of Jamaica (Rowe P., Carberry and White JJ.A.) on 13th July 1987 dismissing the application of Barrington Farquharson ("the appellant") for leave to appeal against his conviction on 17th May 1985 by a jury in the Westmoreland Circuit Court before Gordon J. for the murder on 19th April 1984 of Randal Hamilton ("the deceased"). The death sentence passed on the appellant was subsequently commuted to one of life imprisonment. At the conclusion of the hearing their Lordships agreed humbly to advise Her Majesty that the appeal ought to be allowed and the conviction quashed for reasons to be given later. Their Lordships' reasons now follow.

The main point in the appeal is concerned with identification evidence and the adequacy of the trial judge's directions to the jury in relation to that evidence.

The Crown's case depended entirely on the evidence of Junior Walters who was the driver of a 15-seater minibus plying between Montego Bay and Sav-la-Mar via Petersfield. The deceased was the conductor. Junior Walters said that the appellant and another man boarded

the minibus at Montego Bay about 6.00 p.m. After reaching Petersfield about 7.00 p.m. somebody, later identified by Junior Walters as the appellant, said, "Stop the bus, boy". He stopped and the man whom Junior Walters identified as the appellant and the other man got off. There was an argument, which had started in the bus and continued outside it, between the two men, who were refusing to pay the fare, and the deceased. The men, despite the intervention of Junior Walters, who suggested as a compromise that only one of the men need pay the fare, persisted in their refusal to pay and the man identified as the appellant took a gun from his friend's bag and threatened Junior Walters, who made haste to go away to the driver's door of the bus. In the meantime the deceased had armed himself with a machete. Junior Walters shouted to him to "leave them and come" and the deceased "mek a shift like him coming". Junior Walters then heard an explosion, observed flame coming from the gun and saw the deceased fall to the ground. The two men ran off, the appellant still holding the gun, and the police arrived to find Randal Hamilton dead, shot through the chest.

At the trial, which commenced on 16th May 1985, the evidence of Junior Walters included the information that one week before the shooting, at about 4.00 p.m. in daylight, he picked up the appellant and three companions; there were not many passengers and, when the bus reached Anchovy, a dispute arose between the appellant and the deceased (who had then also been the conductor). The appellant would not pay the fare and proposed to give the conductor a gold chain in exchange for a price less the cost of the fare. The conductor did not agree to this and, according to Junior Walters, drew a knife, but that was all; the appellant then said to him, "You boy, you a go dead".

When asked by the prosecuting counsel how, on the night of the shooting, he was able to make out that the passenger in question was the appellant, Junior Walters replied, "You see, from the first time dem was trying to build up the strife" (this was clearly a reference to the incident a week earlier) "I know him from that time".

The witness deposed to seeing the assailant (whom he identified as the appellant) on two occasions subsequent to the shooting. The first time was at Miss Amy Piazza at the corner of St. James Street and Barnett Street in Montego Bay, when he was driving the bus and saw the appellant standing with three others in the street. He then got in touch with the police and described the appellant. The date of this sighting can be fixed, but only roughly, by reference to the next time: "I don't see him for a good little while, couple months or couple weeks I don't see him, I don't remember". The date of the second sighting (or, to be strictly accurate, the sighting of a man who was undoubtedly the appellant) can, however, be definitely established as 1st February 1985 when the police, alerted by Junior Walters, arrested the appellant. Junior Walters, having sold his bus and taken up another job, was standing

at his workplace in Fustic Road, Montego Bay when he saw the appellant pass "selling some rods, towels in a bag". The appellant went up Barnett Street. Junior Walters followed and pointed him out to a policeman, who arrested the appellant. When asked in cross-examination why he did not go with the police when they arrested the appellant, Junior Walters replied, "I never want to show up myself". And when it was suggested that the appellant had never been on his bus and that "the police held this man because you feel that he look like that man that night", he replied, "Don't feel like him look like him, I know is him".

At the close of the Crown case the trial judge rejected a defence submission that there was no case to answer.

The appellant gave evidence on oath. His defence was a complete denial of the Crown case: he had not been on the bus on the night of the shooting or the previous week or, indeed, on any occasion. He stated that he made and sold brass rings but that he did not make or sell chains.

In the course of a summing up which was in every other respect a model of thoroughness, clarity and fairness, the judge, when dealing with the identification evidence of Junior Walters, described the shooting incident and continued:-

"Those are the circumstances in which he said he saw and was able to identify the accused, because you may think that in a case of this nature, Mr. Foreman and members of the jury, that the accused has not been properly identified. It is for the Crown to lead evidence which satisfies you on the issue of identity. I would like to emphasise for your consideration that the proper identification of the accused has been raised in this case. I must ask you to bear in mind that where the proper identification of the accused is important, you may find that the accused has not been properly identified, in which case you must find him not guilty of any offence. Any doubt that the accused was properly identified or that there is a mistake must be resolved in his favour and he must be acquitted.

Persons that commit offences are wont to pounce on their victims, strike and disappear without leaving any trace of their presence. It is known that in this country we have over two million people and in any given area you may find more than one person, two or more persons who bear a marked resemblance. You therefore have to examine the evidence with care because there is always the possibility that a single witness may be mistaken. A mistake is no less a mistake if it is made honestly and although it is the experience of human beings that many honest people were quick to admit their mistakes as soon as they became aware of them, it is also possible that a

perfectly honest witness who makes a positive identification may be mistaken and be not aware of his mistake.

It is therefore for you to examine the opportunity that the witness had of viewing the criminal. First of all, was he known to him before. In other words, had he ever seen him before. He said, yes, I saw him in Sav-la-mar when I took him up in the bus, I saw him in the bus having a problem with the conductor at Anchovy; I saw him in Montego Bay on the evening when I stopped and picked him up; I saw him on the bus when he asked to stop, 'Stop the bus, boy', let him off. I went outside when there was a conversation between him and my conductor and I spoke with him for some five minutes, face to face, pleading with him to pay, and he produced a gun on me, and then I backed away. So those are the opportunities he had of seeing the person that he identifies as the accused.

Now, you look at other opportunities that he had. Sometime later, one evening before 7.00 o'clock he saw him on Miss Amy's piazza. He was driving the bus. He had stopped but he did not come out. He eventually got in touch with the police. Nothing came of that police contact. On the 1st of February he was in his brother's shop and he saw the accused pass and he went to the market. He went outside and was with friends and the accused came back; he was with Fat Jaw, Errol and Clive. The accused came back and passed close by him, and he indicated within the confines of the witness box about how close the accused passed, and the accused went into a dressmaker's shop; then the accused came out and went up Fustic Road, and he parted from his friends and he followed on foot. This time he was on foot, wasn't driving, and he followed behind him.

The accused went up Fustic Road, across Barnett Street to the other side opposite the entrance of Fustic Road. He remained on the side of Barnett Street from which he came out on Fustic Road, and as the accused walked up towards the clock he walked behind him towards the gas station which is in the same direction of the clock. He kept him in view, said he never lost sight of him. The accused was selling something, towels, he said.

He saw this policeman and he spoke to the policeman, pointed to the accused. The policeman went across the road and held the accused, and when he saw that the accused was held by the police, he went away. It was at that stage that he turned away.

The man he had seen, the man he had identified, the man he followed, was now in police custody. He did not go across. Why? Because he did not want to show up himself. You understand what he means by that. He

had fingered the man. He was asked why didn't he and his friends hold him when he came near. The question is, why should he get his friends involved? Who says his friend would have been involved if he had even told him. This is a man who when last they were in close contact pulled a gun on him.

So he, of course, having seen him, left the matter of holding this man to the police who may be able to meet fire with fire if fire is produced, and he left it with the police having fingered him.

So you have that continuity of identification, that is what you look at to see if you are satisfied that you feel sure that this man is the man that committed the offence on the night.

You think of all the circumstances that existed at the time when the identification was made: First time he saw him, daylight, in Sav-la-mar; the quarrel developed at the back of the bus between here and Montego Bay. You know how long it takes to go to Montego Bay on a minibus. He said they were in the bus; the quarrel developed; he saw him, he saw the accused on the occasions that he took up the accused in Montego Bay to come to Sav-la-mar. On this fatal evening it was daylight.

He saw him stop the bus; he took him up; when they stopped in Petersfield in the square he had turned on the light of the bus inside, the light over his head and that light was on when the man said, 'Stop the bus, boy'. He saw him when he came out of the bus; confronted him. He said there was a street light but it was not overhead. The one overhead was off. The one that was there was up in the square, some distance away but he was face to face with the man.

It was suggested to him that he was mistaken, that it was not the accused. He said, 'No, I am not mistaken'. What the defence is saying, that it is a mistake in identification. They are not saying that the witness, Walters, lied when he spoke of the incident that occurred. They are only saying he is mistaken and by extension they are saying he is also mistaken when he said he took him up in Sav-la-mar a week before. He is also mistaken when he said he was involved in a quarrel on the bus that same day at Anchovy when the accused tried to pass off some rings on the conductor. He is also mistaken when he said he picked him up at the clock in Montego Bay when he was coming out on the fatal evening and he is also mistaken when he says he is the same man that pull the gun on him and he is the same man that fire the shot that killed Hamilton.

He is mistaken when he said he saw him at Miss Amy's piazza and the biggest mistake he has made is to say this is the same man who committed the offence when he pointed him out to the police and he has come to court to perpetrate or to continue that mistake by his insistence that this man is the man. That's what the Defence is saying: all along he is mistaken.

There are other factors that you take in mind in considering the question of identification. You consider the manner in which the identification was made. This was not a case where the accused was placed in a line of men on an identification parade and pointed out. This is a case where the sole witness said he saw him on the street; first, he passed in the market, then he came back and when he came back it was a continuous process of trailing him. He said he is the man - it is not a case of confrontation when you look along a line of men and you are asked to select - 'It was in my movement around I eventually came upon him. I saw him and I pointed him out to the police'. Those are factors you will take into consideration when considering whether the witness has satisfied you that his identification is positive, that he is not mistaken; and, of course, you take into consideration any special things about the accused which could have assisted the witness in remembering him.

Now, you see the accused there, the witness said at the time when the incident happened the accused wore a tam with a peak and he also had a beard. When he saw him and pointed him out to the police he was still wearing a tam with a peak and he had a beard. You see the accused, he doesn't have on a tam. Is there anything significant in what the witness said when he said at that time he had a beard having regard to the appearance of the accused now? 'Had a beard' and there is some hair still on his face. Why did the witness refer to a beard - it is a matter for you - at the time when he saw him?

Of course, the accused (sic) has in evidence admitted that his hair was higher when he had the tam, not locks but higher. So, take all the factors into consideration, the lapse of time which is the date when the offence was committed - the offence was committed on the 19th of April, he identified this man to the police on the 1st of February the following year, 19th of April last year, the 1st of February this year; take into consideration the light, take into consideration any special feature in the accused which could have assisted in the witness, Walters remembering him. You take into consideration, too, the fact that where the confrontation with the gun was, was not under the light of the street light but bear in mind that he said the light in the bus was on and he also mentioned that the door of the van when it is open the light comes on and this incident happened right beside the van near the front door and he saw.

These factors you take into consideration in deciding whether you are satisfied that the accused has been properly identified."

Their Lordships have for the purpose of later comment emphasised certain passages in the foregoing extract from the judge's charge.

The jury brought in a unanimous verdict of guilty after an absence of 8 minutes and the appellant by a notice in general terms sought leave to appeal against his conviction. His counsel informed the Court of Appeal that the summing up significantly covered the main issue of identification and that he was unable to argue any grounds in support of the appeal. The official note of the Court of Appeal's oral judgment shows that the court was "in agreement with (counsel) that the issue of identification was left to the jury in an appropriate manner" and refused the application for leave to appeal.

The appellant's first submission to their Lordships was that the trial judge ought to have withdrawn the case from the jury. Lord Williams of Mostyn Q.C. relied on the observation of Lord Widgery C.J. in *R. v. Turnbull* [1977] Q.B. 224 at page 229H:-

"When, in the judgment of the trial judge, the quality of the identifying evidence is poor, as for example when it depends solely on a fleeting glance or on a longer observation made in difficult conditions, the situation is very different. The judge should then withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification."

He also referred their Lordships to the judgment delivered by Lord Ackner in *Junior Reid v. The Queen* [1990] A.C. 363 at page 382C-G and contended that in rejecting the submission of no case the judge had misdirected himself by holding that, if there was any evidence which would support a conviction, the case should go to the jury unless the prosecution witnesses had been completely discredited, and had thereby applied the wrong test.

The criteria adopted with regard to prosecution evidence in general by Lord Lane C.J. in *R. v. Galbraith* (1981) 73 Cr.App.R. 124 and earlier by Lord Widgery C.J. in *R. v. Barker* (1975) 65 Cr.App.R. 287 are less favourable to the accused than the more subjective approach to identification evidence in *Turnbull*, and the difference is no doubt attributable to the well-known danger associated with identification evidence and the equally well-known risk that a jury may rely unduly on such evidence. Their Lordships, however, applying the *Turnbull* test, are clearly of the opinion that it was right to leave this case to the jury; it was a question for the jury, properly and adequately directed, to decide for

themselves, as the judges of fact, whether the evidence of Junior Walters satisfied them that the appellant was indeed the murderer.

It was Lord Williams's second submission that raised the real issue for their Lordships' consideration, that is, whether the judge's directions to the jury on the issue of identification were adequate in this case. It will be recalled that, while this was not a recognition case in the sense that a witness purports to identify someone who was already known to him by virtue of earlier familiarity or acquaintance, Junior Walters said that he had seen the same man on four occasions, namely, a week before the shooting, in daylight and in circumstances which could have left a fairly strong impression, then on 19th April 1984, the night of the shooting, thirdly at Miss Amy Piazza and finally at Barnett Street, Montego Bay, on 1st February 1985, when the appellant was arrested. The last sighting occurred nearly nine and a half months after the shooting and therefore the third occasion must have been from seven to nine months after the shooting if Junior Walters's evidence was approximately accurate in point of time.

Referring back to the extract quoted from the judge's charge and to the phrases therein which they have emphasised, their Lordships observe that he stressed the crucial importance of the identification evidence and dealt fully with the circumstances of the different identifications, including the lighting conditions on 19th April 1984, and with the witness's opportunities for making a reliable identification.

When considering the judge's directions to the jury on how they should approach identification evidence, their Lordships do not forget their own statement in *Ashwood and Others v. The Queen* (judgment delivered 29th April 1993) that:-

"... it is the principle which is paramount and not a precise verbal formula, as this Board has recently declared in *Wayne Watt v. The Queen* (judgment delivered 25th March 1993) by reference to *R. v. Turnbull* [1977] Q.B. 224 and *R. v. Keane* (1977) 65 Cr.App.R. 247."

That said, it must be acknowledged that, although the judge rightly emphasised the importance of the identification evidence, he did not say anything which would have conveyed to the jury a warning as to the special need for caution before convicting in reliance on the correctness of an identification, which was the first point stressed by Lord Widgery C.J. in *Turnbull* at page 228C. As the Court of Appeal of Jamaica put it in *R. v. Whyllie* (1977) W.I.R. 430, 432:-

"The trial judge should alert the jury to approach the evidence of identification with the utmost caution (emphasis supplied) as there is always the possibility that a single witness or several witnesses might be mistaken."

Even if one accepts, as a basis for argument, that the man refusing to pay his fare in daylight a week before the shooting was the man who shot the deceased and that the man whom Junior Walters spotted from the bus at Miss Amy Piazza and the appellant, who was arrested on 1st February 1985, were one and the same, there was a gap of from seven to nine months between the shooting and the sighting at Miss Amy Piazza. Now that sighting occurred "before 7 o'clock" (effectively in uncertain light) while Junior Walters was driving a bus and presumably paying attention to the traffic and to the road in front of him. He would have had no more than a fleeting glimpse on that occasion and, as to that, their Lordships are reminded of the words of Lord Widgery C.J. in *R. v. Oakwell* [1978] 1 W.L.R. 32, 36, when he said that the *Turnbull* rules were primarily designed to deal with "the ghastly risk run in cases of fleeting encounters". Accordingly, no matter how likely it may be - and even this was far from certain - that the man glimpsed at Miss Amy Piazza was again seen two weeks or two months later at Barnett Street, the link was not strong between the night of the shooting and the encounter at Miss Amy Piazza at least seven months later. Their Lordships are forced to say that, despite the great care taken generally by the trial judge, the failure to highlight this potential infirmity in the Crown case amounted to a weakness in complying with the *Turnbull-Whyllie* approach which, taken with the neglect of Lord Widgery's first principle already noted, amounted to a significant failure.

7 marks
better identified

It is by now accepted (see *Ashwood supra*) that:-

"in order to judge the adequacy of a warning in an identification case, its precise terms should properly be considered in the light of the strength of the identification evidence in the case."

Here the evidence was not particularly strong. The lighting conditions at the time of the shooting and at Miss Amy Piazza were not very favourable and there was nothing remarkable in the dress or personal characteristics of the man (or men) identified. Most important of all, the link between the first and the second group of sightings could be described as tenuous and therefore as something which made a careful *Turnbull* direction indispensable.