Privy Council Appeal No. 1 of 1993

Michael Freemantle *Appellant*

v.

The Queen *Respondent*

FROM

THE COURT OF APPEAL OF JAMAICA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 27TH JUNE 1994

Present at the hearing:-

LORD TEMPLEMAN
LORD JAUNCEY OF TULLICHETTLE
LORD LLOYD OF BERWICK
LORD NOLAN
SIR VINCENT FLOISSAC

*[Delivered by **Sir Vincent Floissac**]*

On 19th January 1987, after a trial by jury presided over by Walker J. in the Clarendon Circuit Division of the Gun Court of Jamaica, the appellant (Michael Freemantle) was convicted of the murder of Virginia (Tiny) Ramdas (the deceased) and was sentenced to death. Whereupon the appellant applied to the Court of Appeal of Jamaica for leave to appeal against his conviction and sentence. On 4th December 1987, the Court of Appeal (Wright J.A., Downer and Bingham J.J.A. Ag.) treated "the hearing of the application as the appeal", dismissed the appeal and affirmed the conviction and sentence. The appellant now appeals against the judgment of the Court of Appeal and does so by special leave granted on 13th October 1992.

The deceased's death arose out of an incident which occurred in the evening of 29th August 1985 in an enclosed area known as Bongo's Lawn situate in the district of Raymonds in the parish of Clarendon in the island of Jamaica. Then and there, while a crowd (including the deceased) was watching a film, the crowd was attacked by allegedly politically motivated gunmen, one of whom shot the deceased who died on the following day as a result of wounds to her chest and abdomen.

The appellant was indicted for the murder to which he pleaded an alibi. The prosecution relied on the evidence of Anthony King, Wade Campbell and Courtney Cardoza. The learned judge however directed the jury to disregard King's evidence. It may therefore be assumed that the appellant's conviction was based on the evidence of Campbell and Cardoza. Campbell gave evidence that he recognised the appellant firing a long gun at the scene of the crime. Cardoza gave evidence that he recognised the appellant firing a long gun at the windows of a house some quarter of a mile from the scene of the crime about a quarter of an hour after the commission of the crime. Only one gun was observed at the scene of the crime and only one gun was observed at the subsequent incident.

The learned judge was therefore under the judicial duty prescribed by the Court of Appeal in *R. v. Turnbull* [1977] 1 Q.B. 224 as explained in the recent decisions of their Lordships' Board in *Scott v. The Queen* [1989] 1 A.C. 1242, *Reid (Junior) v. The Queen* [1990] 1 A.C. 363, *Palmer v. R.* (1990) 40 W.I.R. 282 and *Beckford and Others v. Regina* [1993] 97 Cr.App.R. 409. According to these decisions, whenever the case against an accused person depends wholly or substantially on the disputed correctness of one or more visual identifications of the accused person, the judge should warn the jury of the danger of convicting and of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. The judge should also explain to the jury the reason for the danger and the special need for caution. The reason required to be explained is that experience has shown that visual identification (even by way of recognition) is a category of evidence which is particularly vulnerable to error and that no matter how honest or convinced the eye witnesses may be as to the correctness of their visual identifications and no matter how impressive and convincing they may be as witnesses, there is always the possibility that they all might nevertheless be mistaken in their identifications.

Unfortunately, in the year 1987, the learned judge could not have had the benefit of these recent decisions. The result is that the trial judge failed to give to the jury the requisite general warning and explanation. The Court of Appeal found and counsel for the respondent concedes that failure which was in effect a non-direction amounting to a misdirection of the jury. The Court of Appeal however applied the proviso to section 14(1) of the Judicature (Appellate Jurisdiction) Act of Jamaica which reads as follows:-

> "The Court on any such appeal against conviction shall allow the appeal if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or that the judgment of the court before which the appellant was convicted should be set aside on the ground of a wrong decision of any question of

law, or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal;

Provided that the Court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred."

Counsel for the appellant and the respondent agree that the issues in the appeal are whether the application of the proviso is ever appropriate to a case where the requisite general warning and explanation were not given and if so whether the Court of Appeal was justified in applying the proviso to the circumstances of this case.

Appropriateness of the proviso.

In *Scott v. The Queen (supra)* at page 1261, Lord Griffiths said:-

"Their Lordships have nevertheless concluded that if convictions are to be allowed upon uncorroborated identification evidence there must be a strict insistence upon a judge giving a clear warning of the danger of a mistaken identification which the jury must consider before arriving at their verdict and that it would only be in the most exceptional circumstances that a conviction based on uncorroborated identification evidence should be sustained in the absence of such a warning. In this capital offence their Lordships cannot be satisfied that the jury would inevitably have convicted if they had received the appropriate warning in the summing up and they will accordingly advise Her Majesty to allow the appeal of Scott and Walters."

In *Palmer v. R. (supra)* at page 285, Lord Ackner said:-

"The trial judge never told the jury that visual evidence of identification is a class of evidence that is particularly vulnerable to mistake, and the reasons for that vulnerability, nor that honest witnesses can well give inaccurate but convincing evidence. Their Lordships have previously stated in *Barnes, Desquottes and Johnson v. R*; *Scott and Walters v. R.* (1989) 37 W.I.R. 330 at page 343, and repeated the observation in *Reid, Dennis and Whylie v. R.* that unless there are exceptional circumstances to justify such a failure the conviction will be quashed, because it will have resulted in a substantial miscarriage of justice."

In *Beckford and Others v. Reginam (supra)* at page 415, Lord Lowry said:-

> "Their Lordships, however, having regard to their conclusion upon the judge's failure to give a general warning, and also because they wish to emphasise that such a failure will nearly always by itself be enough to invalidate a conviction which is substantially based on identification evidence, deem it unnecessary to devote to counsel's second point the care which it would otherwise deserve."

Their Lordships are satisfied that none of these dicta was intended to close the door to the application of the proviso whenever the trial judge has failed to give to the jury the requisite general warning and explanation in regard to visual identifications. On the contrary, the door was deliberately left ajar for cases encompassed by exceptional circumstances and has not been closed by the observations of the Board in *Reid (Junior) v. The Queen* [1990] 1 A.C. 363 at 384C. Their Lordships consider that exceptional circumstances include the fact that the evidence of the visual identification is of exceptionally good quality. Accordingly, the ultimate issue in this appeal is whether the evidence of the visual identifications of the appellant was qualitatively good to a degree which justified the application of the proviso.

Quality of the evidence.

An examination of the circumstances which determine the quality of the evidence of the visual identifications of the appellant reveals that the quality of the evidence was exceptionally good.

Firstly, the identifications were by way of recognitions by eye witnesses who knew and had previously seen the appellant. Campbell had known the appellant for about 15 years and Cardoza had known the appellant for at least 8 years. Campbell regularly saw the appellant and had seen him only a couple of days before the shooting incident. Cardoza saw the appellant occasionally at Lionel Town and in his vehicle.

Secondly, the distance between the eye witnesses and the appellant was not great. Campbell was in the same enclosure as the appellant when he watched the appellant and his movements. Cardoza was at the window of his house where he observed the appellant from a distance of about 44 feet.

Thirdly, the eye witnesses' observations of the appellant were not fleeting glances. Campbell observed the appellant for about one minute. He saw the appellant appear on the wall of the enclosure. He saw the appellant enter the enclosure where he fired the shotgun and where he remained for about 30 seconds. He saw the appellant retreat over the wall. By comparison, Cardoza attested that he observed the appellant for about 2 minutes. In either case, the observation was not a fleeting glance as in the case (for example) of *Evans v. R.* (1991) 39 W.I.R. 290 where the duration of the observation was only 5 or 6 seconds.

Fourthly, the eye witnesses testified that they recognised the appellant with the aid of bright moonlight. They so testified before a jury who had experience of bright moonlight and knew the extent of the visibility afforded by such moonlight.

Fifthly, the eye witnesses had unobstructed views of the appellant. Campbell deposed that he sheltered "behind a little bamboo column" and from that position watched the appellant. He insisted that people ran to the side of him and towards a gate in the wall, but did not run in front of him so as to obstruct his vision. In the case of Cardoza, there was no evidence or suggestion that his view was obstructed in any way.

Sixthly, there were no material discrepancies, contradictions or other weaknesses in the evidence of identifications of the appellant.

Finally, there was an exceptional (if not unprecedented) dialogue between Campbell and the appellant. When the appellant was retreating over the wall, Campbell shouted "Freemantle me see you". Whereupon the appellant retorted "go suck your mumma". The retort could reasonably be interpreted as an implied acknowledgement by the appellant that he had been correctly identified by way of recognition and as an expression of the appellant's resentment of Campbell's public disclosure of the identification. Their Lordships consider this brief exchange of words to be a most significant feature of the recognition of the appellant and to be a factor which considerably enhanced the quality of the evidence of visual identifications of the appellant.

Having regard to the cumulative potency of these facts, their Lordships are of the opinion that the quality of the evidence of the visual identifications of the appellant by Campbell and Cardoza was exceptionally good and was therefore an exceptional circumstance which justified the application of the proviso by the Court of Appeal. The quality of the evidence was good enough to eliminate the danger of mistaken identification which necessitates the requisite general warning and explanation. Their Lordships are satisfied that there was no miscarriage of justice because the jury (acting reasonably and properly) would inevitably have returned the same verdict of guilty of murder if they had received the requisite general warning and explanation from the trial judge.

Accordingly, their Lordships will humbly advise Her Majesty that the appeal should be dismissed.