Privy Council Appeal No. 8 of 1994

Karl Shand *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 November 1995

Present at the hearing:-

Lord Keith of Kinkel
Lord Browne-Wilkinson
Lord Slynn of Hadley
Lord Hoffmann
Mr. Justice Hardie Boys

*[Delivered by **Lord Slynn of Hadley**]*

On 28th April 1987 the appellant was convicted of murdering Dudley Campbell on 26th October 1984 in the parish of St. Andrew in Jamaica and he was sentenced to death. His application for leave to appeal was refused by the Court of Appeal on 15th February 1988. He now appeals against that decision by special leave of Her Majesty's Privy Council.

The appellant, known as Duppy, was identified as the murderer by two witnesses. The first was Sonia Simmonds, who had known the appellant for over four years, seeing him sometimes twice a week at a shop in Mountain View where the appellant lived. On the day of the murder she was standing at a bus stop which was next door to a shop. Four young men including the deceased and one Phillip Daley went into the shop. She followed them into the shop. Subsequently she came out onto a piazza where she saw a man jump over a wall onto the piazza and come towards her. He had a short gun in his hand and she called out

to the men in the shop: "Duppy ah come", at a time when he was about eighteen feet from her. Phillip Daley ran out of the shop and she then heard an explosion. Phillip Daley held his side, spinning in the road. At the time of the explosion the appellant was about four feet from her. Dudley Campbell then ran out of the shop. When he was facing the appellant the latter had the gun in his hand and she heard three explosions. Campbell ran into the street and she saw him lying in front of the piazza. She did not see Duppy again. She did not see anyone else with a gun. Her evidence was challenged solely on the basis that she was not at the shop at all when Campbell was killed and that her whole story was a lie.

The second witness to identify the appellant was Phillip Daley, who had been shot. He said that he had known the appellant for five years, though the latter said that as they had been brought up in the same area they had known each other longer, for around twelve years. When he was at the shop door the appellant came through the lane beside the shop with a gun. He was about ten yards away when Daley first saw him. He ran down the road when he heard an explosion like a gun shot and felt something hit him in the back and pass through his body. He staggered into the lane, hearing three more shots. When he stopped he looked over his shoulder to see Duppy on the piazza. He was then taken to hospital. Again his evidence was challenged on the basis that he did not see the appellant that morning. He denied this: "Five years I know him if him tun back way a know him, sideways a know him, him face a know him, is him".

Sonia Simmonds gave evidence that later on she saw the appellant in the General Penitentiary when she visited him and her boyfriend, who was detained there. The appellant said to her that "he know that he is wrong". Asked by the judge what she understood him to be saying - Q. Wrong about what? she replied: "What he have done...murdering Dudley". It was put to her that she was lying and that she had told the appellant that she knew "that he was not the man who did it" but that she was under pressure from the deceased's mother and a police officer. This she denied.

The appellant gave evidence on oath that he left home at 8.15 a.m. or 8.20 a.m., visited a sister, the Reverend Monica Swaby, and after fifteen minutes went to visit a Miss Soul, at whose house he stayed until after 12 noon. He said that he had had political differences with Phillip Daley and that Campbell had belonged to the same party as Phillip Daley. His case was that someone was trying to pin this murder on him.

Another sister, Monica Scafe, confirmed that he had left home in the morning to visit the Reverend M. Swaby but at a few minutes before 8.00. She went to another shop not far from the shop where the incident happened and about 9.00 a.m. she heard a shot. She saw Peter Daley (Phillip Daley's brother) throw a gun to another boy as the former ran away. She heard the name Duppy called. She told her brother that it had been said that it was he who had shot Campbell and that the police had been to enquire after him. The Reverend Monica Swaby said that the appellant came to her house at about 9.00 a.m. for fifteen minutes. One other witness failed to appear at the trial.

The appellant gave a very different account of the prison conversation. He said that he had not asked to see Sonia Simmonds and that she said to him that she had never wanted to come to court because she did not know anything about it, but that she was under pressure from the deceased's mother and Detective Sergeant Harvey, who had charged the appellant on 19th February 1985. He denied that he had asked her not to give evidence against him and he denied that he had admitted that he was wrong.

The first ground of appeal is that the trial judge failed to give a warning to the jury about the identification evidence in accordance with the guidelines set out in *Regina v. Turnbull* [1977] Q.B. 224. In that case, Lord Widgery, Chief Justice, said at page 228:-

> "First, whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Provided this is done in clear terms the judge need not use any particular form of words."

See also *Scott v. The Queen* [1989] 1 A.C. 1242, *Reid (Junior) v. The Queen* [1990] 1 A.C. 363, *Beckford v. The Queen* (1993) 97 Cr. App. R. 409. It is said in this case in particular that the judge did not warn the jury that witnesses can be mistaken and that even an honest and a convincing witness can be mistaken. The jury should have been told that neither witness gave a description of the appellant and that the identification was during a very brief period and in very traumatic circumstances

which cast doubt on their evidence. Moreover the judge did not draw the attention of the jury to the circumstances in which they claimed to identify the appellant and he did not tell them to consider how well the two witnesses really knew the appellant.

There was no suggestion in this case that the witnesses were mistaken. The trial judge made it clear to the jury that the defence case was that the witnesses were lying. Then he said:-

> "So the question of identification is most important in this case. Defence Counsel has suggested to you that this is not a case of mistaken identity it is not a case in which the witnesses Sonia Simmonds and Phillip Daley have mistaken somebody else for the accused or mistaken the accused for somebody else. There is no question of mistake. What the Defence is saying is that this is a case of deliberate lies. The accused is saying they are giving me a political fight. The accused is saying Phillip Daley has come and told you it is me because he is against me politically and political warfare has been going on since 1976 between us. What the accused is saying is that Sonia Simmonds has come and said it is me because she has been pressured to do so by the mother of Dudley Campbell who is now dead and by Detective Sergeant Harvey who is very much alive."

He added that if they thought that one was telling the truth and the other lying, they could still be satisfied that the appellant had been identified as the murderer.

It is clear and conceded by the Crown that no *Turnbull* warning was given although the Board's attention was drawn to the fact that the trial took place before their Lordships made it clear that the *Turnbull* guidelines applied in Jamaica (see *Scott* [1989] and *Reid* [1990] *supra*) and at a time when in Jamaica it was considered that if credibility rather than accuracy of identification was an issue, a *Turnbull* warning need not be given (see *Regina v. Bradley Graham and Randy Lewis* S.C.C.A. 158/9 of 1981 and *Regina v. Whylie* (1977) 25 W.I.R. 430). The Court of Appeal in the present case referred to their judgment in *Graham and Lewis*. Rowe P. said:-

> "I said in the *Bradley Graham and Randy Lewis* case:
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> 'In the recognition cases where the accused is said to be well-known to the witness for an extended period the true test might be that of credibility rather than of an honest witness making a positive yet mistaken identity. Therefore the language of the general warning to be given in the recognition cases might differ in detail from that which is to be given where the accused was not known to the witness previously.'

> As a general statement of the law, I can find no fault in what I said then, but I did give the example this morning of a brother and a sister giving evidence against another brother who is the defendant. If all three had lived in the same house and the incident giving rise to the case had allegedly taken place in broad day-light in the presence of all three, then if the defendant brother says 'I was not present, they are telling lies on me', obviously it would be ludicrous for the Judge in those circumstances to give the jury a direction as to identification, then to give a general warning as to the untrustworthiness of visual identification evidence, when in truth and in fact the only live issue was as to the credibility of that brother and that sister. We are of the view that the way in which this particular case was conducted the trial Judge took the correct view that no live issue as to mistaken identity arose and so he focused quite strongly upon the credibility of these witnesses and about that focus there has been no complaint. We therefore do not find that there is any substance in ground 1."

In cases where the defence challenges the credibility of the identifying witnesses as the principal or sole means of defence, there may be exceptional cases where a *Turnbull* direction is unnecessary or where it is sufficient to give it more briefly than in a case where the accuracy of identification is challenged. In *Regina v. Bentley*, reported in [1991] Crim. L.R. 620 (case no. 742/z4/90 of 14th January 1991), Lord Lane C.J., having said that although in a fleeting glance identification a full *Turnbull* direction would be required, in a case where there was purported recognition of a familiar face which had taken place over a considerable period of time in perfectly good conditions of lighting and so on, continued:-

> "If the judge were to give that full *Turnbull* direction in the latter type case, the jury would rightly wonder whether he, the judge, has taken leave of his senses because most of the *Turnbull* direction would in those circumstances be quite unnecessary."

In *Beckford v. Regina* (1993) 97 Cr. App. R. 409, their Lordships, in a judgment delivered by Lord Lowry, after discussing *Turnbull* and *Graham and Lewis*, added at page 415:-

> "Of course no rule is absolutely universal. If, for example, the witness's identification evidence is that the accused was his workmate whom he has known for 20 years and that he was conversing with him for half an hour face to face in the same room and the witness is sane and sober, then, if credibility is the issue, it will be the only issue.

> But cases like that will constitute a very rare exception to a strong general rule."

The importance in identification cases of giving the *Turnbull* warning has been frequently stated and it clearly now applies to recognition as well as to pure identification cases. It is, however, accepted that no precise form of words need be used as long as the essential elements of the warning are pointed out to the jury. The cases in which the warning can be entirely dispensed with must be wholly exceptional, even where credibility is the sole line of defence. In the latter type of case the judge should normally, and even in the exceptional case would be wise to, tell the jury in an appropriate form to consider whether they are satisfied that the witness was not mistaken in view of the danger of mistake referred to in *Turnbull*.

Their Lordships consider that in the present case the *Turnbull* warning should have been and was not given. The circumstances in which the identification took place did not constitute and are not similar to the example given by Lord Lane.

In dealing with the conversation between Sonia Simmonds and the appellant, the trial judge said:-

> "It is very important that you should decide whether Miss Simmonds has spoken the truth about that conversation which she said she had at the General Penitentiary with this accused if she has spoken the truth about that, what he said to her ... 'I know I was wrong for murdering Dudley Campbell'. It would be open to you to find that that is a confession of guilt and it seems to me, if you find that Miss Simmonds has spoken the truth on that aspect of the matter, and you find that what he said amounts to a confession, you will have very little difficulty in coming to a verdict of guilty of murder in this case. But you have to decide whether that conversation really took place as Miss Simmonds said because this accused man has denied it, denied saying what she said he said."

This is not an accurate account of her evidence. According to her the appellant did not say: "I know I was wrong for murdering Dudley Campbell" but her evidence was: "He said he know that he is wrong". The judge reverted to what she had said earlier towards the end of her evidence when he asked two questions amongst others. Question: "He said that he knew he was wrong, what did you understand him to be saying, wrong about what? Answer: "What he have done." Question: "What do you understand it to be?" Answer: "Murdering Dudley."

Counsel did not pursue this and merely put it to her that she was lying.

In the Court of Appeal the notice of appeal complained as ground 2 that the judge misdirected the jury when he told them that the alleged admission by the appellant to Sonia Simmonds "amounts to a confession". Counsel for the appellant, however, told the Court of Appeal: "there could be no other interpretation to what the applicant is alleged to have said to Simmonds other than that the applicant was admitting that he had shot Dudley Campbell for which he was sorry".

On this appeal Mr. Kuldip Singh Q.C. has strenuously contended that this evidence was not admissible and that what the appellant said could not be a confession of murdering Campbell.

At the trial the witness was merely challenged on the lines that the appellant did not say these words. Her understanding of them, if they were said, was not pursued. Even though it is clear that the judge ran together his words (as alleged by her) and her understanding of those words in the context of their discussion in prison, their Lordships are satisfied that if the jury accepted that he did say the words she alleged, then her understanding of them was the only possible one in the circumstances. It follows that the concession was rightly made in the Court of Appeal.

Apart from these two points it seems to their Lordships that no other criticism of the summing up has been substantiated. The trial judge went carefully and at length through the evidence and gave a sufficient direction as to alibi and as to the contention that Phillip Daley was trying to pin the murder upon the appellant because they were political opponents.

Their Lordships were referred to *Domican v. The Queen* [1992] 66 A.L.J.R. 285 where in the judgment of the majority of the court it was said at page 289:-

> "If a trial judge has failed to give an adequate warning concerning identification, a new trial will ordinarily be ordered even when other evidence makes a very strong case against the accused (see *Regina. v. Gaunt* [1964] NSWR 864 at 867). Of course, the other evidence in the case may be so compelling that a court of criminal appeal will conclude that the jury must have convicted on that evidence independently of the identification evidence. In such a case, the inadequacy of or lack of a warning concerning the identification evidence, although amounting to legal error, will not constitute a miscarriage of justice.

> But unless the Court of Criminal Appeal concludes that the jury must inevitably have convicted the accused independently of the identification evidence, the inadequacy of or lack of a warning concerning that evidence constitutes a miscarriage of justice even though the other evidence made a strong case against the accused."

Brennan J., who held that an adequate warning had been given so that he would have dismissed the appeal, said at page 291, on the basis that the warning was inadequate:-

> "The general principle is this: where, on the evidence and consistently with the directions of the trial judge, it is open to a jury to convict on any of two or more independent bases, a misdirection or an inadequate direction which would vitiate a conviction on one of those bases necessarily results in the setting aside of a guilty verdict despite the availability of another sound basis for conviction. That is because it is not possible to conclude that a guilty verdict has been founded on a sound basis when it was open to the jury to convict on a basis affected by the misdirection or inadequate direction. A Court of Criminal Appeal cannot apply the proviso by speculating either that the jury acted on a body of evidence which was unaffected by the misdirection or inadequate direction; nor can the Court speculate that, if the jury had acted on such evidence, they would have convicted. If a misdirection or inadequate direction would vitiate a conviction based on identification evidence and that basis of conviction was open to the jury, it is impossible to be satisfied that, by reason of the misdirection or inadequate direction, the accused did not lose a chance of acquittal."

However, in *Turnbull* at page 231C, Lord Widgery C.J. said:-

> "A failure to follow these guidelines is likely to result in a conviction being quashed and will do so if in the judgment of the Court on all the evidence the verdict is either unsatisfactory or unsafe."

He thus recognised that there might be exceptional cases where despite the fact that the warning was not given the Court could still be satisfied that the verdict was neither unsafe nor unsatisfactory.

In *Freemantle v. The Queen* [1994] 1 W.L.R. 1437 their Lordships' Board in a judgment delivered by Sir Vincent Floissac, said at page 1440, after reviewing the cases:-

> "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 *Junior Reid v. The Queen* [1990] 1 A.C. 363, 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 defendant was qualitatively good to a degree which justified the application of the proviso."

In that case they found that the evidence was exceptionally good and therefore an exceptional circumstance which justified the application of the proviso. Their Lordships were satisfied, at page 1442, "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".

Their Lordships consider that in the present case the evidence of identification also was "exceptionally good". The appellant accepted that he had known both witnesses for a long time (indeed as already pointed out he said that he known Daley for much longer than Daley said that they had known each other). The identification took place in daylight and both witnesses saw the appellant at close quarters. Sonia Simmonds' reaction was immediate when she saw the gunman - "Duppy ah come". Daley left quickly no doubt because of past disputes fearing danger because it was the appellant with a gun. There is nothing to suggest that these witnesses who saw the appellant at different stages and independently and identified him without any doubt were mistaken or that they possibly could have been mistaken. The jury could only have understood the appellant's words at the prison as meaning what Sonia Simmonds understood them to mean.

In all the circumstances their Lordships are satisfied, as was the Board in *Freemantle,* that there was here no miscarriage of justice since the jury acting reasonably and properly would inevitably have returned the same verdict if they had received the appropriate warning and explanation from the trial judge.

Their Lordships will accordingly humbly advise Her Majesty that the appeal should be dismissed.