*Privy Council Appeal No. 4 of 1995*

**Larry Raymond Jones** *Appellant*

*v.*

**The Queen** *Respondent*

FROM

THE COURT OF APPEAL OF THE BAHAMAS

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, Delivered the 27th November 1995

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*Present at the hearing:-*

Lord Jauncey of Tullichettle
Lord Browne-Wilkinson
Lord Mustill
Lord Slynn of Hadley
Mr. Justice Hardie Boys

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

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On 17th March 1988 the appellant was convicted of the murder of Harold Taylor on 29th April 1987 at Freeport, Grand Bahama and sentenced to death. His appeal against conviction was dismissed on 11th November 1988 and the sentence confirmed although the latter now falls to be considered in accordance with the judgment of their Lordships' Board in *Pratt & Another v. Attorney-General for Jamaica* [1994] 2 A.C. 1 and *Bradshaw v. Attorney-General of Barbados* [1995] 1 W.L.R. 936.

He now appeals against his conviction on the grounds that the trial judge should have withdrawn the case from the jury at the end of the prosecution case, alternatively that in summing up the judge failed to direct the jury adequately in accordance with *R.v. Turnbull* [1977] Q.B. 224. It is further said that the summing up was unfair and in particular that it failed to put the defence case fairly.

At the trial the deceased's widow, Mrs. Angela Taylor, gave evidence that she and her husband had driven to the Stone Crab restaurant at about 8.05 pm in order to collect some food which they had ordered earlier. When they returned to their parked car with the food, Mrs. Taylor got into the passenger seat. Her husband walked round the back of the car and got into the driver's seat. When he turned the ignition key, a man came to the driver's door and fired several shots through the glass. Four bullets were found to have entered his body and he died shortly thereafter due to haemorrhage from his liver.

These matters were not disputed. The issue was whether the appellant was proved to be the gunman. That depended on his identification by Mrs. Taylor and whether the prosecution evidence disproved the alibi which he alleged.

Mrs. Taylor's evidence at the trial was that as her husband was sitting in the car she looked back and saw a man. At the time he fired the gun, she could not see his face as he was much taller than the car. When he stopped firing she got out of the car and looked to the back of the car from which the man was walking. He looked back twice, once when he was about four feet from her, and a second time when he was eight to ten feet from her as she made her way along the side of the car to go round the back to her husband's side. The man went to a white car parked not far away, walking slowly as if nothing had happened. She went to her husband who fell to the ground and she looked at the man although she did not suggest at that stage that she again saw his face. She said that the whole incident took about two minutes and that she saw his face for some fifteen seconds. Her evidence was that it was still daylight though getting dusk; darkness fell some twenty minutes after the incident. The clocks had just been changed to daylight saving time. She had to wait about twenty five minutes before the ambulance came.

Her husband as he lay on the ground said, "I love you; I am going to die. It was one of the guys I was trying to show you all day", the latter being a reference to a white car they had seen earlier in the day though she had not seen the gunman's face in that car during the day. Moreover, she said in evidence that she had not seen the man before the incident.

Mrs. Taylor's description of the man at the trial was "Tall. My height. Maybe a little taller. Slim face, long turned-up mouth. Wore a shirt straight cut. Could not remember his pants. Shirt was outside of his pants. Buttoned down. I am about 5 ft 8 ins. He should be 5 ft 10 ins. - 5 ft 11 ins." The prosecution tendered without objection a police statement which she had signed. This read:-

> "6'2", heavy build with a little stomach. Light brown complexion. Low hair cut. Oval features and wore a light coloured buttoned up shirt with a straight bottom worn out of his trousers. I don't remember colour of his trousers or whether it was of a dark or light colour but it was long pants. I can positively identify him if I see him again because I have seen him on several occasions along with Neil Stuart. I also observed that his top lip is turned up a lot'?"

There was no answer to that question. She denied later having told the police "6'2", heavy build with a little stomach" and "I saw him on several occasions along with Nick Stuart".

Mrs. Taylor identified the accused at an identification parade, though saying that the man who had shot her husband had a little more hair than the man she picked out.

There was police evidence that the car was parked under a big tree and the ambulance driver gave evidence that he left the hospital at 8.13, arriving at between 8.20 and 8.24. It was turning dark and he had to use his headlights. The lighting at the scene was pretty good, partly from a lamp pole and partly from the ambulance roof light. It was on this evidence that a submission of no case was made on the basis of *Turnbull*. It was said that the light was not good, that Mrs. Taylor did not have a good chance to see the man, that the description in the police statement of the man was inconsistent with the evidence and did not fit the accused in the dock.

The trial judge directed himself that the power to withdraw a case from the jury should be exercised "with great care when the exercise of the power is dependent on the assessment of facts, as the function of the jury is to determine facts". Accepting that the circumstances in which she first saw the accused were not ideal, he thought that this was a proper case for the consideration of the jury. The Court of Appeal, after carefully analysing the evidence, took the view that the evidence was "eminently fit for the jury's consideration".

The appellant argues that the judge directed himself in accordance with *Regina v. Galbraith* [1981] 1 W.L.R. 1039 when he should have directed himself in accordance with *Regina v. Turnbull* [1977] Q.B. 224. In *Daley v. The Queen* [1994] 1 A.C. 117, their Lordships' Board in a judgment delivered by Lord Mustill considered the relationship between these two cases where the judge is asked to stop the case. Lord Mustill said at page 129:

"A reading of the judgment in *Regina v. Galbraith* [1981] 1 W.L.R. 1039 as a whole shows that the practice which the court was primarily concerned to proscribe was one whereby a judge who considered the prosecution evidence as unworthy of credit would make sure that the jury did not have an opportunity to give effect to a different opinion. By following this practice the judge was doing something which, as Lord Widgery C.J. had put it, was not his job. By contrast, in the kind of identification case dealt with by *Regina v. Turnbull* [1977] Q.B. 224 the case is withdrawn from the jury not because the judge considers that the witness is lying, but because the evidence even if taken to be honest has a base which is so slender that it is unreliable and therefore not sufficient to found a conviction: and indeed, as *Regina v. Turnbull* itself emphasised, the fact that an honest witness may be mistaken on identification is a particular source of risk. When assessing the "quality" of the evidence, under the *Turnbull* doctrine, the jury is protected from acting upon the type of evidence which, even if believed, experience has shown to be a possible source of injustice. Reading the two cases in this way, their Lordships see no conflict between them."

The real attack on Mrs. Taylor's evidence in this case was principally that it was not sufficiently reliable to found a conviction and therefore should not have been left to the jury.

Their Lordships consider that the trial judge, in ruling that even if the circumstances were not ideal the case should be left to the jury on the question of identification, was entitled to take the course he took. Whether Mrs. Taylor did recognise the accused man in all the circumstances was essentially a question for the jury rather than for the judge to decide. The jury would be very familiar with the degree of light available at that time and they had had the opportunity of seeing Mrs. Taylor and would have the opportunity of seeing and perhaps hearing the defendant. Even if there were some discrepancies in the evidence and even if the quality of identification was not of the best, it cannot be said that no reasonable jury could convict. Their Lordships accordingly reject the argument that the judge erred in not ruling that there was no case to answer. It was, however, important that, leaving it to the jury, the judge should then give sufficient directions to the jury in accordance with *Turnbull*.

The accused made a statement from the dock to the effect that he had been at work from 4.45 pm until 11.45 pm. He gave a detailed account of his movements and he called three witnesses to support his case that he had been at work at the relevant time though the evidence of these witnesses was not entirely consistent.

The learned judge told the jury in his summing up:-

> "[Mrs. Taylor]..is a vital witness, as without her evidence as to the identity of the gunman, there is no evidence to link the accused to the offence. If you were not sure of her evidence as to identity, you might conclude that Harold Taylor was murdered, but you could not also conclude that the accused murdered him."

He stressed that:-

> "When dealing with evidence of identification there is a special need for you, the jury, to exercise caution before convicting in reliance on the correctness of the identification. The reason being that mistakes occur. A witness who is a liar is sometimes more easily spotted than a witness who believes he or she to be speaking the truth, but is, in fact, mistaken. Mr. Evans went into this at very great length, but it is nonetheless my duty to repeat very much what he said, even though as I saw it, he expressed the law with great correctness. It is the mistaken witness who is the real problem in identification evidence and that is why there is a special need for caution on your part. It is, therefore, incumbent upon you to examine closely the circumstances in which the identification was allegedly made."

He further indicated the factors which were to be taken into account - the length and distance of the observation, previous knowledge, any description given to the police subsequent to the killing and before the trial. He warned them that the identification parade, "whilst important, should not be treated by you [as] of such importance as automatically for you to feel that Mrs. Taylor has spotted the right man". He specifically told the jury that they should consider whether she had picked this man out on the identification parade "because for some reason she wants to pick out somebody who is associated with Nick Stuart". He told the jury that the statement which she had made previously was to be used to test her credibility as a witness. He then went through the evidence in detail. He drew the jury's attention to the discrepancies between the statements and her denial that certain things had been said, to the important issue as to whether there was enough light for her to identify the gunman and as to the submissions made by the appellant's counsel on his behalf.

In the Court of Appeal no criticism, it is said, was made of the judge's summing up, but it was said that the case should not have been left to the jury and that the conviction was unreasonable

and could not be supported by the evidence. After a full and careful analysis of the arguments addressed to them, the Court of Appeal concluded that even if there were discrepancies in the evidence there was no justification for holding that the verdict of the jury could not be supported by the evidence.

Their Lordships consider that the trial judge gave a sufficient direction to the jury as to the issues raised in the case and particularly as to the questions of identification and alibi. Moreover he drew the jury's attention carefully to the discrepancies in the evidence and to the arguments advanced by the appellant's counsel.

The question remains as to whether the verdict here on the evidence can be said to be unsafe or unsatisfactory.

An important issue for the jury was whether it was light enough for Mrs. Taylor to see the man. She clearly said there was enough light even though dusk was falling; darkness only fell about twenty minutes after the incident and she had to wait some twenty five minutes for the ambulance. There is no real discrepancy between her evidence and that of the ambulance driver. After the shooting she had to telephone for an ambulance; the driver had to receive the message to set off and drive to the scene. If the shooting was at 8.05 pm, he says he arrived between 8.10 and 8.24 although Mrs. Taylor would put it nearer to 8.30 pm. Even if he arrived twenty minutes after the shooting there could be a substantial difference in the amount of light as Mrs. Taylor herself recognised. The jury would, moreover, have been very familiar with the degree of visibility at that time of the evening allowing for the change to daylight saving time.

Mrs. Taylor said that she saw the man's face three times. The first was clearly no more than a fleeting glance at the back of the car, and if that had stood alone it might well not have been sufficient even to justify leaving the case to the jury. But it did not stand alone. She saw his face twice subsequently at a short distance (four feet and eight to ten feet) when she was out of the car. She was no doubt distressed but she was equally concerned to see who it was who had shot her husband. Even if her estimate of fifteen seconds was an overstatement it seems to their Lordships that the jury were entitled to conclude that she had seen him sufficiently to identify him in the light of the judge's warning about the factors to be considered and as to the possibility of mistake.

If the jury accepted that her statement was made to the police in the terms in which she signed it on the day of the killing, there

were two express discrepancies. The first was that the gunman was 6'2", whereas in court she estimated that he was 5'10" or 5'11". Estimates of height by different people can obviously vary, and the jury could see the man and could consider whether she could have thought that he was over 6' on the day of the killing (even if she did say it). She denied saying that the man was of heavy build with a little stomach, but in any event it does not seem that she said anything inconsistent with this at the trial. Of more importance is her description of a "long turned-up mouth". She obviously attached some importance to this since at the identification parade she asked that the accused should stop biting his lip so that she could see his mouth. Her evidence at the trial was not in any way inconsistent with what she had said in the statement about his mouth. Moreover the jury could see the accused and decide whether her description was accurate. They were obviously interested to check her description of the man since they asked what "oval" (the word used in her statement) meant, and they asked her to indicate how tall she thought the foreman of the jury was. Their Lordships do not consider that such discrepancies as there were between her two descriptions were sufficient to cast significant doubt on her identification so as to make it unreasonable for the jury to convict. It was for them to decide.

If, as the statement indicates, she did say first that she had seen the accused with Nick Stuart on several occasions but in evidence she said that she had not seen the accused before the day of the shooting, there was an obvious conflict. The matter was, however, specifically referred to by the trial judge and the jury had to decide whether or not to believe her evidence at the trial on this point. The judge emphasised that the jury must consider whether at the identification parade she was simply picking out someone who was associated with Nick Stuart, her husband having been involved with Nick Stuart, with whom he had had differences, in "another shooting incident". The jury had to consider whether she was mistaken on the first occasion or the second occasion or whether she was or was not telling the truth. They were very aware of the discrepancy and no doubt considered its effect on the rest of Mrs. Taylor's evidence.

The prosecution sought to rely on the fact that the accused got into a white car after the shooting (Mrs. Taylor and her husband having seen a white car several times during the day even though her evidence varies as to the times at which she had seen the car) as being, if not corroboration, at least support for the identification. In their Lordships' view the link is here too tenuous for this to be any support for Mrs. Taylor's identification.

The evidence of the witnesses who had been at the hotel where the appellant claimed he had spent the whole afternoon and evening was referred to by the judge, together with the differences between the appellant and Babbs on the one hand, and Morley and Fynes on the other. The jury were told clearly of the burden of proof in regard to the alibi defence. They would know how long it would have taken to get from the hotel to the scene and back, and they had to decide whether the identification was such as to lead them to reject the alibi. It seems clear that both from their questions and the time they took to deliberate (some two hours) that they gave this case very careful consideration and they obviously accepted Mrs. Taylor's evidence.

Even though, as the trial judge said, the circumstances of the identification may not have been ideal, their Lordships are satisfied that there was sufficient evidence in this case upon which, if it was accepted, the jury could reasonably convict. Their Lordships find no errors of law in the judgment of the Court of Appeal.

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