Privy Council Appeal No. 5 of 1993

Desmond Amore *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 15TH MARCH 1994

Present at the hearing:-

LORD KEITH OF KINKEL
LORD JAUNCEY OF TULLICHETTLE
LORD BROWNE-WILKINSON
LORD WOOLF
LORD NOLAN

*[Delivered by **Lord Nolan**]*

On 23rd July 1987, after a trial in the Home Circuit Court, Jamaica, before Morgan J. and a jury, the appellant, Desmond Amore, was convicted of the murder of Christopher Jones and was sentenced to death. On 23rd March 1988 his application for leave to appeal to the Court of Appeal of Jamaica was refused. He now appeals by special leave to Her Majesty in Council.

At his trial, the principal witness for the prosecution was Mrs. Jones, the widow of Christopher Jones. She described how, at about 2.30 a.m. on 3rd October 1985, she and her husband were asleep in bed when she was awakened by a crashing sound downstairs. She woke her husband and got out of bed. While crossing the room she was confronted by a man who told her that he had a gun and ordered her to get back to bed. When she had done so the man ordered her and her husband to cover their faces. He asked them "where is the $U.S.?". He turned on the bedside light, which was on Mrs. Jones' side of the bed, and which she described as "fluorescent". At this point her face was still covered with a sheet. The man carried out a search of the room, with Mr. and Mrs. Jones trying to tell him where to look. After looking in Mrs. Jones' wallet and in the bedside table drawer he found US$10.00. According to Mrs. Jones, he then "got really mad" and asked them whether this was all that they had got. They

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replied that it was, because they been robbed previously. The man then said that he was going to kill them. He had been threatening to do so from the time when he entered the room.

Mrs. Jones said that during the course of these exchanges she and her husband removed the cover "maybe three times" in order to speak to the man. The lighting from the bedside light was very bright, and he was standing at the foot of the bed. She could see him from his face to his knee. She and her husband begged him not to kill them. He then said words to the effect of "give me the pussy then", hit Mr. Jones on the head with the gun and dragged Mrs. Jones by her feet down the bed. He pulled off her pyjama bottoms and began to rape her. Mrs. Jones said that this stage lasted for about five minutes, during which she could see the man clearly. She was then able to kick him away, and Mr. Jones also started to struggle with him. It was in the course of this struggle that Mr. Jones was shot. The man left the room, and tried to re-enter but Mrs. Jones was able to prevent him from doing so. She found that her husband was bleeding from his mouth and nose. She raised the alarm.

In cross-examination, Mrs. Jones agreed that she had been very frightened. When she was asked how long it was between the time the bedside light was turned on and the time that the man ran out of the room she said:-

> "It seemed like a very, very long time. I could approximately say maybe about forty-five minutes."

She agreed that she had never seen the man before. When the possibility of a mistake was put to her in cross-examination she said, referring to the appellant:-

> "There is no question in my mind whatsoever that that man up there is the man that shot my husband."

Mrs. Jones made a statement to the police after the incident, and on 18th April 1986 she attended an identification parade at which she picked out the appellant.

The other witnesses called by the prosecution included Sergeant Dumont, who had conducted the identification parade (which was attended by the appellant's attorney) and Assistant Superintendent Dudley Reynolds, who arrested and charged the appellant after the parade. Having been cautioned the appellant simply said words to the effect that he was not going to stand trial for this. When the trial took place, he did not give evidence or call any witnesses but made a short unsworn statement from the dock in the course of which he said:-

> "I got to understand that I been pointed out by a lady of Miss Angela Jones. I did not know her. I don't rape she and I did not kill his husband. I know nothing about the murder of Miss Jones [sic]."

Thus the prosecution case against the appellant was based entirely upon the uncorroborated identification evidence given by Mrs. Jones. The main thrust of the clear and helpful submissions put before their Lordships by Mr. Kuldip Singh Q.C. on behalf of the appellant was to the effect that the learned judge in her summing-up had failed to deal accurately or adequately with the approach which the jury should adopt to a case of this kind.

How, then, did the judge deal with the matter? The evidence and closing submissions of counsel were completed on 22nd July 1987, and the judge began her summing-up before the close of proceedings on that day. After setting out in simple and conventional terms the functions of the judge and jury respectively, the burden and standard of proof, and the elements of the crime of murder, the judge said this:-

> "Now before I go on to look at the evidence which you heard this morning, you will recall, and I just said to you that the issue in the case, the main issue in the case, is identification, and I think defence counsel has stressed on it. Now, caution has to be exercised when you rely on the correctness of any identification because indeed it is always possible, two things, for a mistaken witness to be a very convincing witness, and it is always possible that one person can be mistaken for another. Because of that you must examine very closely, the circumstances in which the identification came to be made, and in trying to determine identification, the frankness of the witness is very important. You have seen the witness, you heard the witness and you will have to determine that.
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> There are things that you will have to look at; first of all to see whether or not there was a sufficient opportunity for the witness to have seen the person, and if you are satisfied that there was a sufficient opportunity, then you go on to look at how the person came to be identified, in this case an identification parade; you look at it and see if the identification parade was fair; to see if there was enough opportunity; you look at things like the amount of time that the witness - sorry, that the person was within the view of the witness; how long did she have him under observation. You look at the distance that they were from each other because, of course, if the person - the nearer the person is, the better able you are to see the person. You look at the light, what sort of light was the person seeing; was there anything that prevented her from seeing him. You will consider too the fact that the witness was not known before."

The judge returned to the subject a little later saying:-

"Now, she tells you that on the 18th of April she went to the Half-way-tree Police Station to an identification parade and on the parade she saw the man who killed her husband and she recognised him almost immediately, she says, as the man who killed him, and pointed him out. He was not alone, he was in a line with nine of the men. She accepts that during the time she was frightened but it is for you, Mr. Foreman and members of the jury, you have seen her and you have heard her. People get frightened yes, and as we say, turn fool and some people are frightened and still retain all their senses. She says that between the time the light was turned on and the man ran out, that was about forty-five minutes, and she says it seemed like a long time.

When it was suggested to her that she was mistaken about the identification she said, there was no question in her mind whatsoever, 'that that man up there is the man who shot my husband'. Now, she had never seen this man before and this was the opportunity in which she said she had to see him. You will have to look at the opportunity which she relates, look at the opportunity that she had to identify him. It is a matter for you; how did she impress you, did she impress you as a witness of truth, do you think she is lying, do you think she is making it up, do you think she is mistaken; because you see, you have to be satisfied that there is no mistaken identity. You will have to see whether or not you accept it and whether you feel sure that she had the opportunity, the opportunity to see him and whether or not she has had this recollection in her mind, because if you do you will no doubt be able to say whether or not she would be able to pick out the person from a group of nine other persons, persons who you are told were similar in height and otherwise, to the accused.

You will have to say what you find of this witness because in all things some persons are more intelligent than some; some are more accurate than some, some recall more than others; it is for you to say but you must feel sure."

The judge returned to the subject when she completed her summing-up on the following morning. She said:-

"Now, that is the case for the crown and what the crown has put before you is a witness who said she saw the man and she identified him at the parade. Sergeant Dumont tells you about the parade. As I told you before the major issue in the case is one of identification and I would ask you to look at that evidence. Look at the evidence carefully because what you are concerned with is the nature and quality of the evidence. You will first have to decide about the witness Mrs. Jones. Is she a person on whom you can

> place reliance? Is she a person who you think is speaking the truth? If you make that finding that she is a person on whom you can rely then you look at what she has said and see if that evidence is of such a nature and character that if you yourself were to so decide that as reasonable persons those circumstances could show and make you feel sure that she could identify the accused man in those conditions."

The first ground upon which Mr. Kuldip Singh criticised these passages in the summing-up was that they unduly emphasised the importance of Mrs. Jones' truthfulness as a witness. This, submitted Mr. Kuldip Singh, was incorrect and potentially misleading: the veracity of Mrs. Jones was not an issue in the case.

Their Lordships do not accept this criticism. It is true that the only suggestions put to Mrs. Jones in cross-examination were, first, that she was very frightened during the incident in the bedroom (which she accepted) and secondly that she was mistaken in her identification of the appellant (which she did not accept). It was nonetheless essential for the jury to determine whether the accounts Mrs. Jones gave of her opportunity of seeing the appellant during the incident in the bedroom represented the unvarnished truth. The jury had to bear in mind the danger that Mrs. Jones, convinced of the guilt of the man whom she again identified in court, might wittingly or unwittingly attempt to exaggerate the accuracy of her recollection. As Mr. Kuldip Singh himself pointed out, without in any way seeking to impugn the veracity of Mrs. Jones, it is possible to doubt whether the incident in fact lasted for as long as forty-five minutes. Bearing in mind that the evidence of Mrs. Jones was wholly uncorroborated, their Lordships think that the learned judge was quite right to stress that the jury must be satisfied of its substantial truthfulness and reliability.

Secondly, and more generally, Mr. Kuldip Singh submitted that the judge, in the passages quoted from her summing-up, had failed to place adequate emphasis on the caution with which the evidence of identification should be approached, and had failed also to give a sufficient explanation of the reasons why caution was required. In considering this submission their Lordships must refer to the well known passage from the judgment of the court in *Reg. v. Turnbull* [1977] Q.B. 224, a judgment which is now established as forming part of the law of Jamaica, and which the judge will, no doubt, have had well in mind. The passage, which is at page 228 of the report, reads as follows:-

> "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."

In *Reg. v. Whylie* (1978) 25 W.I.R. 430, 432, the Court of Appeal of Jamaica, following *Turnbull*, said:-

"Where, therefore, in a criminal case the evidence for the prosecution connecting the accused to the crime rests wholly or substantially on the visual identification of one or more witnesses and the defence challenges the correctness of that identification, the trial judge should alert the jury to approach the evidence of identification with the utmost caution as there is always the possibility that a single witness or several witnesses might be mistaken."

Having considered the judge's directions to the jury in the light of these observations their Lordships are satisfied that she dealt adequately both with the need for caution and with the reasons why caution was required. The judge did not speak in terms of a requirement for the "utmost" caution, but the precise form of words is immaterial: what matters is the general tenor of the language used. As will be seen from the passages quoted above, the judge dealt fully with the considerations which the jury should bear in mind, and in the first of the passages she gave the reasons for her warning, namely that "it is always possible ... for a mistaken witness to be a very convincing witness, and it is always possible that one person can be mistaken for another".

Mr. Kuldip Singh relied upon two recent decisions of their Lordships' Board, namely *Scott v. The Queen* [1989] A.C. 1242 and *Reid (Junior) v. The Queen* [1990] 1 A.C. 363. These decisions were given after the trial of the appellant, and after the rejection of his application for leave to appeal by the Court of Appeal. In both cases, their Lordships' Board stressed yet again the need for the juries to be warned about the dangers of convicting on uncorroborated identification evidence. It will be sufficient to refer to the latter decision.

The judgment of the Board was delivered by Lord Ackner. At pages 380-381 of the report he quoted from the judgment of the Full Court of the Supreme Court of Victoria in *Reg. v. Dickson* [1983] 1 V.R. 227. The passage quoted concludes with the observation that jurors:-

"... are unlikely to be aware of the extent of the risk that honest and convincing witnesses may be mistaken, especially where their opportunities for observing a previously unknown offender were limited. The best

> way of explaining and bringing home to the jury the extent of this risk is by explaining the reasons for there being the risk and that it is essential to distinguish between honesty and accuracy and not assume the latter because of belief in the former."

Lord Ackner continued:-

> "The court was of the opinion ... that the trial judge had not sufficiently emphasised *the reasons* for the danger of identification evidence being of a greater order than the risk, inherent in any evidence depending on human recollection, that the witness may be honestly mistaken. He had not stressed that honesty as such is no guarantee against a false impression being so indelibly imprinted on the mind as to convince an honest witness that it was wholly reliable."

Similarly, in the present case, submitted Mr. Kuldip Singh, the learned judge had failed to warn the jury that an honest and convincing witness might be mistaken; and by linking the possibility that Mrs. Jones might have been mistaken with the question of her truthfulness or reliability the judge blurred the essential distinction between honesty and accuracy.

Their Lordships would wish to endorse what was said in the case of *Reid*. Their Lordships trust that, following the decisions in *Scott* and *Reid*, judges when summing-up will be more than ever alert to the importance of warning juries, in cases where the point may arise, of the danger that an honest witness, who is convinced of the correctness of his identification and gives his evidence in an impressive manner, may yet be mistaken.

Their Lordships do not, however, consider that the judge in the present case can properly be criticised on this score. In warning the jury that a mistaken witness might be a convincing witness (in fact, the judge said a "very" convincing witness) the judge was following precisely the language of the *Turnbull* judgment which is quoted above. Read with the rest of her directions on the subject of identification, it cannot be regarded as an inadequate warning. Nor do their Lordships accept that the jury might have been confused by the fact that truthfulness and the possibility of mistake were referred to by the judge in the same context. There was indeed no question of the witness's honesty, that is to say of her desire to tell the truth. The judge's references to truthfulness, as their Lordships have indicated, were plainly concerned with the reliability of the witness's recollection of her opportunities of seeing the appellant during the course of the incident in question. If her account was reliable, then her opportunities of seeing him and memorising his appearance, albeit during a fairly short period of time, were all too good.

There is one further passage in the *Reid* judgment to which their Lordships must refer before leaving the case. It occurs on page 390 of the report where, in the course of explaining why the appeal of *Oliver Whylie* must be allowed, Lord Ackner said:-

> "What the judge failed to do was to explain that visual evidence of identification is a category of evidence, which experience has shown is particularly vulnerable to error, errors in particular by honest and impressive witnesses *and that this has been known to result in wrong convictions*." (emphasis added)

The closing words reflect the fact that in England and Ireland wrong convictions have indeed been known to occur as a result of mistaken identification evidence. But it was accepted by Mr. Kuldip Singh that there is no record of any similar occurrence in Jamaica. The point was touched upon in the later case of *Daley v. The Queen* [1994] A.C. 117 where Mr. James Guthrie Q.C., who represented the Crown both in that case and this, is quoted at page 121 of the report as stating in argument that:-

> "There is no history in Jamaica, as there is in England, of well publicised miscarriages of justice resulting from erroneous identification, and it would not assist a jury in Jamaica to tell them that that has happened elsewhere."

Mr. Guthrie told their Lordships that the statement thus attributed to him reflected what was said by Zacca C.J. (who was sitting as a member of their Lordships' Board) during the course of the hearing. In these circumstances their Lordships are satisfied that the judge cannot be criticised for making no reference to experience of injustice in other cases as a result of mistaken identification. Such a reference would have been unnecessary and unhelpful.

Mr. Kuldip Singh made a number of other complaints about particular aspects of the summing-up. Thus, he said that the judge should have warned the jury not to be influenced against the appellant by the fact that Mrs. Jones had identified the appellant in court, or by the fact that the appellant had not given evidence. He also complained of the judge's treatment of the failure by the appellant to pursue an allegation that, prior to his identification parade, the police had removed him from his cell on four occasions, the inference being that this might have given Mrs. Jones an opportunity to single him out in advance. Of this, the judge had remarked:-

> "You are entitled then, I would think, to conclude that he has abandoned that allegation and abandoned it because it is not true. For it is reasonable I would think, to think that if it were true he would have made it the focal point of his defence, he would have made it the focal point of his defence to you. For my part I would dismiss the complaint from my mind but of course it is a matter for you."

In their Lordships' judgment there is no substance in any of these final complaints of Mr. Kuldip Singh. Read as a whole, the summing-up gives a full and fair picture of the issues in the case. The jury can have been left in no doubt that they had to approach the evidence of Mrs. Jones with great care, and that they could only convict if they were sure that she had made no mistake in her identification of the appellant.

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