P.C. Criminal – Murder – Summing up – Evidence – Visual identification with the judge's warning to jury inadequate – whether warning required by R v Rybie given – whether judge pointed out strengths and weaknesses of Crown case. APPEAL DISMISSED. Cases referred to (See p 11)

comp ✓

Privy Council Appeal No. 31 of 1991

(1) Anthony Ashwood
(2) Anthony Gruber and
(3) Fitzroy Williams *Appellants*

v.

The Queen *Respondent*

EVIDENCE

CRIMINAL PRACTICE

FROM

THE COURT OF APPEAL OF JAMAICA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 29TH APRIL 1993

Present at the hearing:-

LORD GOFF OF CHIEVELEY
LORD BRIDGE OF HARWICH
LORD ACKNER
LORD LOWRY
LORD WOOLF

*[Delivered by **Lord Lowry**]*

This is an appeal by special leave by Anthony Ashwood, Anthony Gruber and Fitzroy Williams ("the appellants") from a decision of the Court of Appeal of Jamaica (Casey, Ross and Campbell JJ.A.) on 6th November 1985 dismissing the applications of the appellants and a man called Calvin Mattie for leave to appeal against their convictions by a jury on 21st October 1983 in the Home Circuit Court at Kingston before Vanderpump J. for the murder of Leopold Smith ("the deceased") on 6th June 1982.

The deceased was an elderly man and he lived at 23 York Street in Franklyn Town. He occupied a bedroom at the North end of the house with his wife Laurel Smith ("Mrs. Smith"), who was aged 74, and his baby grandson. Next to the deceased's room was another bedroom, occupied by his own son Harold Smith ("Harold") and the mother of Harold's baby, Maxine Dias ("Maxine"), and beyond that was the living room. Each bedroom had a window looking out onto York Street and the deceased's bedroom also had two windows facing North. The windows were glass louvre windows which could be opened outwards and upwards by means of a hand-operated lever. The front of the house was parallel with York Street, which ran in a North-South

direction, and between the house and York Street was a yard. There were two lights on the exterior of the house and a street light in York Street, directly opposite to the house and about one chain (22 yards) from it. A group of men, some or all of whom were armed, attacked the house about 2.30 a.m. or 3.00 a.m. on 6th June 1982 and one of them, firing through a window, shot the deceased in the chest and killed him.

Harold said in evidence that he was wakened by Maxine and went to the window of their bedroom and looked out. The yard was well lighted and he saw five men there. Three had long guns like M16s (rifles) and two had short guns (pistols). The men were about 15 yards away. He watched them for about a minute and a half while they got past the dogs, which were barking, and "the men with the tall guns were flashing off the dogs from biting them". He said that he was able to recognise all the men, each of whom he had known before and whom he knew by nicknames. They were "Kung Fu" (Calvin Mattie), whom Harold said he had known for four or five years, "Fines" (Ashwood), whom he had known for five years, Gruber (his real name), whom Harold said he had known for five or six years, "Gungo Green" (Williams), whom Harold said he had known for the same time and whom he said he had seen the previous day in York Street, and "Crashie". This man was not before the court and was, it seems, at large at the time of the trial. Harold, referring to all the men, said "We live in the same community, Franklyn Town, Brown's Town", and that they all played football together. He added that all the men bought shoes and clothing in his shop.

Harold then described how the men came up to the door of the house and tried to kick it in. Maxine tried then to telephone the police and Harold got a machete from the deceased's room. Then Kung Fu broke into Harold's room through the window. Things became confused and it is difficult to say exactly what happened thereafter and in what order. At all events, Harold got hold of Mattie and took his gun; Mattie called to the men outside for help; some of the men attacked the other window; Mrs. Smith hit Mattie on the head with a hammer and Maxine hit him with a bottle; shots were fired into the house; Mattie at one stage called out, "Iyah, a me you shot and not the boy"; the deceased was shot in the chest and killed; Harold was shot in the shoulder and the left thigh; Mrs. Smith was shot in the chest, and Mattie was also shot, actually in the head (but, according to Harold, in the mouth by Harold).

After the shooting, Maxine escaped with the baby and went to get the police, and Harold gave Mattie's gun to a neighbour, Mr. Walker, who had come on the scene. This gun, it seems, disappeared and could not be found.

Maxine said in her evidence that she was wakened by the dogs barking. She went to the window and opened it. At first she saw four men. Two were by the gate of the yard (which was reached from York Street by a footbridge over

a gully), one by the streetlight and one next to him. She was able to recognise them, since she had known them for a long time, "because I sell on King Street and they buy shoes from me and I live in the area". The men at the gate, according to Maxine, were Fines (Ashwood) and Gruber. The man by the lightpost was Kung Fu (Mattie) and Crashie was with him. She then saw Gungo Green (Williams) "coming down from off the lightpost", where the telephone wire ran. Maxine described how the dogs, four in number, were barking at the men, all of whom had guns. She said that Ashwood, Gruber and Crashie had long guns and Mattie and Williams had short guns. She woke Harold (whom she called "Stucky"). He came to the window. She went to the telephone to ring for the police, but the line was dead. Her account of events from then on did not materially differ from Harold's. While she agreed that the glass of the window in their bedroom was partly clear and partly frosted, she insisted that she had opened the louvres and looked through and she said that Harold had looked through the window in the same way as she had done. (The trial judge treated this evidence as indicating a discrepancy from what Harold had said.) Maxine also estimated the time during which she was able to observe the men as about a minute and a half. She also said that Harold had shot Mattie in the mouth.

Other evidence was also given. Dr. Ramu confirmed that the deceased was killed by a gunshot wound in the chest. Mr. Walker confirmed that Harold had given him a gun but said that he had hidden the gun and that it had been stolen. Detective Assistant Superintendent Linton gave evidence, which was consistent with that of Harold and Maxine, concerning the finding of bullets and spent casings found at the scene. The latter were outside the window of the deceased's room which faced York Street. Detective Acting Corporal Davis, describing what he found, said that the lever of Harold and Maxine's window was in the open position and that the glass of that window, which was lying broken on the floor, was all frosted.

In cross-examination on behalf of Mattie (about whose identification there was no doubt, since he was found in the house and arrested, while the other four men had escaped) it was suggested to Harold that they had never played football together. This suggestion was not made in respect of the appellants. On behalf of Gruber it was suggested to Harold that Gruber had not bought anything from him. This suggestion was not made on behalf of the other appellants. It was not, however, suggested to Harold or Maxine that the nicknames they had attributed to the defendants were wrong or that they had not previously known the defendants for the periods of time which they had deposed to.

All the defendants made unsworn statements from the dock. Mattie said that he had been made to take part in the incident by persons unknown. Ashwood, Gruber and

Williams all said that they had been at home and knew nothing about the incident.

Dr. Kakuturu gave evidence that Mattie had been shot in the left side of his head, which had partially paralysed him on the right side, and shot also in the left thigh. There was no sign that he had been shot in the mouth. There were no exit wounds and the bullets had not been recovered. There were no signs of any incised wounds caused by a knife or a machete. None of this evidence was challenged by the Crown.

Mrs. Smith, who had made a Crown deposition, was made available to, and called by, the defence. She was clearly unwell and did not give coherent evidence, nor did she identify anyone.

The defence did not try by cross-examination or otherwise to establish a reason why Harold or Maxine should have falsely accused any of the defendants. In their closing speeches, though not in cross-examination, defence counsel suggested that those witnesses had concocted their evidence.

On the application for leave to appeal (which counsel for Williams advisedly did not pursue) it was argued on behalf of Ashwood and Gruber that the trial judge's directions as to the evidence of identification were inadequate in that the trial judge had given no warning, as required by *R. v. Whylie* (1978) 25 W.I.R. 430; 15 J.L.R. 163, and had not pointed out the strengths and weaknesses of the Crown's case on identification. The Court of Appeal, in a written judgment delivered by Carey J.A., stated its reasons for refusing the applications. Having quoted an extract from the judge's charge, Carey J.A. said:-

> "The jury by these directions were being alerted to the dangers of mistaken identity and being cautioned to examine the evidence with care. We are not in the least doubt that counsel who appeared at the trial would have focused the attention of the jury wholly on this issue. These directions were clearly stated and adequate to bring home to the jury the onus on the prosecution to prove the identity of the persons who participated in that early morning raid beyond reasonable doubt. In our view, the trial judge was clearly aware of the factors which he was required to bring to the attention of the jury in accordance with a decision of this Court, viz., *R. v. Whylie* (1978) 25 W.I.R. 430; 15 J.L.R. 163.
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> It was further said that the trial judge did not itemize the weaknesses or strengths of the identification case. But he did advert to the discrepancies in the evidence of the two witnesses who gave visual identification."

This statement was followed by another passage from the judge's charge in which he had dealt with alleged discrepancies concerning the witnesses' view out of their window.

The judgment of the Court of Appeal continued:-

> "The crucial question for the jury was visual identification in regard to all the applicants save Mattie. That issue was clearly and adequately put to the jury. This was a 'recognition' case where the jury plainly accepted Harold Smith and Maxine Dias as witnesses of truth despite some hyperbole on the part of Smith, viz., shooting Mattie in his mouth and no injury later found. They were entitled, on the evidence, to return the verdict in fact returned. As to Mattie, his defence was hardly likely to achieve success.
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> In our view, the jury came to a correct verdict and further we were not persuaded that the trial judge's directions either as to identification evidence or duress were otherwise than adequate."

The Court of Appeal recognised visual identification as the crucial question and, although the truthfulness of Harold and Maxine was in issue, also acknowledged the need to alert the jury to the dangers of mistaken identification. Thus the present appeal differs from the recent Privy Council appeal, *Beckford and Shaw v. The Queen* (judgment delivered 2nd March 1993), in which the Court of Appeal had erroneously accepted the fact that the identifying witness's credibility was the substantial issue as a justification for giving the jury no general warning about the dangers of acting on identification evidence.

Before this Board Mr. Chambers Q.C., for the appellants, observed that the appeal was not really concerned with the trial judge's failure to give an adequate *Turnbull* warning. He said, "We do not seek a *Turnbull* check-list approach", thereby accepting by implication that, when a general warning on identification evidence has to be given, 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. The essential need is to convey to the jury in clear terms how careful they must be when considering evidence of identification and how easy it is for an honest witness to make a mistake, even when purporting to recognise someone who is already known to him. And the requirement for an adequate direction is not to be relaxed, much less dispensed with, in recognition cases, including cases like the present one, in which the credibility of the identifying witness or witnesses is the sole or main contested issue. In *Beckford and Shaw v. The Queen (supra)*, their Lordships explained the reason:-

"The first question for the jury is whether the witness is honest. If the answer to that question is yes, the next question is the same as that which must be asked concerning every honest witness who purports to make an identification, namely, is he right or could he be mistaken?"

Mr. Guthrie, for the Crown, referred their Lordships to those parts of the judge's charge to the jury in which he stressed the importance of the identification evidence:-

"(i) ... the most crucial aspect of this case, and let me tell you from now, is that of identification.

(ii) ... the question of identification about which I will tell you a little later on is of paramount importance. That is the first hurdle that you must surmount in your deliberation - that of identification. If you are not satisfied about it, if you don't feel sure about it, then you must find all of them not guilty and you go no further.

(iii) Perhaps I better tell you about identification first because it is all-important in this case. Remember these witnesses, two of them, said they saw these accused men plus Crashie for at least a minute and a half. One of them says that the first time they were seeing them were some fifteen yards away from the window through which they were looking. I believe it is learned counsel, Mr. Green who was submitting before you yesterday that they did not have time, sufficient opportunity to properly identify these men. You will have to be satisfied where the question of identity arises that there was sufficient opportunity for the person being identified to be seen by the person doing the identifying, so that a sufficient impression of the features of the person being identified is made on the mind that the person would be able to recall with certainty afterwards that the person he saw and she saw was these accused persons. You have to be satisfied there was sufficient opportunity before you can say the witness' evidence is reliable where the question of identity is in issue. And, it doesn't matter, Madam Foreman and members of the jury, that these accused persons were known for some years, if you believe them; it doesn't matter because you can know a person for years and yet you can mix them up for somebody else. Just because you happen to know them beforehand for some years, that does not say that the identification is all right; you have to examine it. You might well think that if a person sees another person whom he knows before, it is easier for that person to be able to say that the person he saw was so and so than if he had not

seen him before in his life because he already knows him; he sees him and at just a fleeting glance was sufficient for him to say that he was so and so. But, even if the person was well known mistakes can be made. That is why a person has to be careful. How long was he seen? One and a half minutes, if you believe them, at least. What position were they seen? Was his face seen so that it could afterwards be recalled? How far would it be? Was he sufficiently close so that his features could be seen? Remember Mr. Green told you yesterday how when they were beating off dogs with long guns if they had to bend down to do that ... if they did bend down, would that affect the identification, bearing in mind that it was only the faces they were going by? One witness actually said that he didn't want to look at the clothes because clothes would change; face couldn't. So, that is what you must consider: whether there was a sufficient opportunity for the features to be impressed on the mind's eye, as it is called, sufficiently so that Smith and the lady have come now and said that it was so and so. You have to deliberate a lot on that, Madam Foreman and members of the jury.

(iv) First thing you think about is identification of these men - not the first one, because he said he was there, the other three. If you don't feel that they were there ... remember Mr. Green is submitting that they did not have a proper view of them. If you feel they weren't there or you are not sure about it then you must acquit everybody. Remember 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. The identification evidence in this case was strong. Although the incident took place during darkness, the yard was well illuminated and Mr. Chambers expressly took no point against the Crown on the score of lighting. The evidence of long and reasonably close acquaintance with those who were identified was uncontradicted, as was the allocation of nicknames to the individual defendants. The opportunity for identifying the raiders and the incentive to identify them correctly were both obvious. And, to judge by the expedition with which the police picked up three of the defendants (Mattie having been arrested at the scene), Harold and Maxine must have identified them to the police without any delay. Thus, provided the witnesses were honest, there were cogent arguments for finding that they were also accurate.

The criterion adopted by Lord Ackner, when delivering the Board's judgment in *Junior Reid v. R.* [1990] 1 A.C.

363 at page 384C, of "a significant failure to follow the guidelines laid down in *Reg. v. Turnbull*" is the appropriate lodestar for appellate courts, and their Lordships consider that there was no such failure in the present case.

Mr. Chambers submitted, however, that the real failure here consisted of not warning the jury adequately of the danger of accepting the evidence of witnesses, namely, Harold and Maxine, who had been shown to be unreliable and therefore unworthy of being believed to the required standard of proof. There was, he said, a strong element of confusion in their evidence, of which a glaring example was Harold's statement, and Maxine's confirmation, that Harold had shot Mattie in the mouth, which could not possibly be right. He pointed secondly to Maxine's suggestion, as to which she became emphatic, although Harold was not sure, that Harold had struck Mattie with a machete, which was in conflict with the uncontradicted medical evidence. Next there was the point raised by the judge: could Harold have looked through the window and thus have observed the intruders as they approached the house? And finally, though this was a somewhat speculative point, how accurate were Harold and Maxine in their account of what happened? Admittedly, said counsel, there was some coherence in their evidence, but it was disrupted by the evidence of Detective Davis. Counsel did not contend (nor could he credibly have done so) that there was not evidence upon which the jury could properly have convicted the appellants. He relied solely on the judge's alleged failure to warn the jury against the danger of accepting the evidence (which was crucial) of "two unreliable witnesses".

With regard to two of the examples of unreliability, as instanced by counsel, namely, the evidence of the shooting of Mattie in the mouth and Harold's alleged attack on him with a machete, the judge's charge to the jury included the following passage, in which the emphasis has been supplied and the paragraphs have been numbered for convenience:-

> "1. The doctor said he found another gunshot wound to his left thigh and no exit wound; so the doctor said this poor, unfortunate first-named accused, Kung Fu - Calvin Mattie - still has two bullets, one in his head and one in his thigh; he said only those two gunshot wounds did he see.
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> 2. Well, if you believe the doctor, the doctor is another expert, he has no axe to grind - as the Americans like to say - he is an independent witness. Harold Smith said he took the gun and pushed it past his teeth right on into his mouth and fired. Well, if that is so the doctor should have seen it because the 6th June, the doctor is examining him the same day in which this incident occurred. If that is so, how the doctor didn't see it? <u>So, you will, perhaps, consider that Harold Smith and Maxine Dias on that point they were not telling the truth</u>. It could be if that had happened maybe the poor chap would be dead.

3. So, if you find - and indeed you would almost be obliged to find - that Harold Smith and Maxine Dias are not speaking the truth on that aspect, well, you may think are they telling the truth on other aspects more material as, especially, such as looking through the window - one opening the window and one looking through the panes - and the police saying all the panes in that window were frosted, so that if that was so they could not be looking; you must view it on that point of view.

4. The doctor went on to say that he found the few lacerations on the left side of his face, irregular lacerations, could have been caused by broken glass, and he made no record of a machete injury; apparently he found none, because if he had he would have made it, so apparently there was no machete wound either.

5. You will remember that both witnesses were agreed that at some stage of the game the witness, Harold Smith, chopped the unfortunate person on the head. In his evidence I believe Mr. Spaulding who was trying to get it from one of them said, 'What part of the head was he chopped? Front, back, side?' She ended up by saying she didn't have the time. So, apparently, he got no wound in the head with a machete. So, perhaps, they are both not speaking the truth in that regard either. All these are questions of fact for you, Madam Foreman and members of the jury, it is for you to hammer all this out."

The words which have been emphasised in the foregoing passage show that the trial judge was inviting the jury to find that Harold and Maxine were not telling the truth on the two points mentioned and also to ask themselves whether the failure of those witnesses to tell the truth on those points detracted from their credibility on the material aspects of the case.

Now, with regard to the third alleged example of unreliability or confusion on which Mr. Chambers relied, that is, the view from the window of Harold and Maxine's room, the judge directed the jury as follows:-

"Learned Counsel appearing for the Defence, criticised quite rightly, the evidence of Maxine and the evidence of Harold. Harold said he looked through a window, looked through a pane, panes. Maxine said she opened the window and looked through. One looks through it and one opens it. Well, that is a discrepancy, Madam Foreman and Members of the Jury. You will have to hammer that out, because remember, you are the judges of the facts. Discrepancies are material differences in evidence between one witness and another witness.

> One witness says he looked through the closed window, closed glass louvre window; the other one says she opened it first. That is a discrepancy. You might well consider that discrepancy a serious one, would it be? Because remember it was on these two witnesses that the Crown is depending to prove the presence of the second, third and fourth accused men ..." (that is, the appellants.)

He then gave the jury some general advice:-

> "Now, these discrepancies, speaking generally, if they are so numerous and so significant where, say, these two witnesses are concerned that they could lead you to the conclusion that these witnesses are not speaking the truth you are advised to reject the evidence of the witness concerned, and you can do that either entirely - in its entirety, or some, so far as the particular discrepancy arises; and you will have to say whether one is speaking the truth and the other is not ... Any time you cannot make up your mind about anything, whatever it is about, you must resolve that in favour of the accused man."

Later in his charge the judge made another observation:-

> "I don't know ... the lady said she opened the window and she looked through it and she left it opened. But, the policeman said he found it in a closed position. Well, in the heat of the moment, a lot of things can happen. ..."

Their Lordships must now refer again to paragraph 3 of the passage first cited from the judge's charge, where he spoke of:-

> "other aspects more material as, especially, such as looking through the window - one opening the window and one looking through the panes - and the police saying all the panes in that window were frosted, so that if that was so they could not be looking; you must view it on that point of view."

The first thing to note about the passages newly cited is that they encouraged the jury to view with a healthy scepticism the evidence of the main prosecution witnesses so far as that evidence was marred by discrepancies. And the second thing to note, as Mr. Guthrie conclusively demonstrated by reference to the record of the evidence at the trial, is that the judge's references to discrepancies in the evidence between Harold and Maxine and Detective Davis were unduly favourable to the appellants and created a false issue to their advantage. It was, in the first place, wrong to suggest that Harold claimed to have seen the raiders through a closed window, and therefore the question of which panes of the window were frosted and which, if any, were plain was immaterial. And Detective Davis did not say that the window was in a closed position; he said that the lever was in the open position and that the

glass of the window was lying broken on the floor. He said that all the glass was frosted, but this did not matter in view of Maxine's evidence that she had opened the window and that Harold had looked out.

Harold's obviously wrong account, which was supported by Maxine, of having shot Mattie in the mouth is puzzling, since it is difficult to think either that he imagined the incident or that he deliberately made up the detailed story which he told. It would be pointless, and it is also unnecessary, to speculate, but a theory could be evolved, consistently with the evidence, that the firing pin of the revolver used may not have come in contact with a live round when Harold pressed the trigger. The important point is that it was for the jury, properly directed, to decide what to make of this evidence, as well as the evidence of the machete attack, as it affected their approach to the main issue in the case.

The parts of Harold's and Maxine's evidence which the appellants attacked as examples of unreliability were not supportive of or even connected with the main Crown case. Their relevance to the main issue lay in the extent to which the mistakes or untruths which they contained might undermine the witnesses' credit or throw doubt on their evidence of identification as being either concocted or inaccurate. That was peculiarly a matter for the jury. Their Lordships are satisfied that on this point the trial judge gave the jury adequate assistance and therefore they reject the appellants' submissions based on unreliability.

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

Cases referred to

1. R v Whyte (1978) 25 W.I.R 430
2. Wayne Watt v The Queen (PC Judgment 25/3/93)
3. R v Keane (1977) 65 Cr App R 247
4. Beckford and Shaw v The Queen (P.C. Judgment 2/3/93)
5. Junior Reid v R [1990] A.C 363