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Privy Council Appeal No. 50 of 1993

Carl Brissett *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 29TH NOVEMBER 1994

Present at the hearing:-

LORD JAUNCEY OF TULLICHETTLE
LORD GRIFFITHS
LORD MUSTILL
LORD WOOLF
LORD NICHOLLS OF BIRKENHEAD

*[Delivered by **Lord Griffiths**]*

On 2nd February 1984 the appellant was convicted of the murder of Richard Williams committed on 9th March 1981. On 3rd May 1986 the Court of Appeal dismissed the appellant's application for leave to appeal against his conviction: he now appeals by special leave granted on 10th June 1993. Their Lordships do not have the advantage of seeing the reasons given by the Court of Appeal for refusing the application for leave to appeal: no doubt they were given orally and have not survived the years that have elapsed before this appeal was brought before the Board.

The facts.

On the night of 8th/9th March 1981 Richard Williams was the front seat passenger in a car driven by Alford Francis in the course of their duty as security guards. Patricia Garrison, the fiancée of Alford Francis, was a passenger in the back seat. Shortly after midnight Francis drove the car to 5 Montclair Drive, Beverley Hills to make a spot check on the premises. Francis drove into the car port of the house and as he stopped a man armed with a gun approached the driver's door from the house and said "Don't move, if you move you dead" or words to that effect. Williams drew a gun and fired at the man who leapt

back, ran to the front of the car and fired shots through the windscreen that killed Williams. The assassin, together with another man who had broken into the house, then made their escape. Francis and Garrison were uninjured due to the fact that Francis flung himself out of the driver's door and Garrison lay flat on the rear seat after the first shot was fired through the windscreen.

Six months later, on 8th September 1981, the appellant was put upon an identification parade. Francis said he could not identify any of the men but Garrison identified the appellant as the man who shot Williams.

At the trial the prosecution case rested solely on the uncorroborated identification evidence given by Patricia Garrison. Francis was called as a witness but said he was unable to identify the appellant as he was looking at the gun in the man's hand rather than his face. Garrison's evidence was that she saw the man as he approached the car in the light shed by a light in the car port, a light outside the house and the lights of the car. She saw the man was holding a gun and heard him threaten them, saying when close to the driver's door "Don't move, or you gonna dead now" or something like that. As the man approached she saw Williams draw a gun, lean across and fire at the man immediately after he uttered the threat. The man ran from the side of the car to the front still pointing the gun, she heard another explosion and threw herself flat on the rear car seat where she had been sitting, there she lay hearing another explosion and the windscreen smashing. She then heard the car reversing and saw Williams slumped and bleeding. She estimated that she had the appellant under observation for about ten minutes but agreed she did not see him again after she had thrown herself flat on the rear seat of the car. She identified the appellant in the dock as the man she had identified on the identification parade, and as the man she saw that night. The judge asked her "Did you observe anything particular about his appearance or anything at all about him" to which she answered "When he was talking, a see like he wears a denture but is something of gold in his mouth" asked to repeat her answer she said "When he was talking I observe he wearing like a gold teeth in his mouth". Asked by the judge "Anything else, anything else you observed about him" she shook her head. She said, however, that she had not seen the gold tooth on the identification parade and had not relied upon it to identify the appellant.

On the morning of the shooting she described the man to the police as about her height (5'4½"), of dark complexion with a stout build. The police agreed the appellant's height was 5'10½".

The defence called no evidence but the defendant made a statement from the dock, which commenced with the words "My Lord, I know nothing about this case that I charge with, sir" and ended "I don't know nothing about this case,

sir". The rest of the statement consisted of a complaint about the behaviour of the police towards him and his girlfriend when they were taken into custody on 11th August 1981.

Counsel on behalf of the appellant has made a number of substantial criticisms of the summing up. In the first place it is submitted that the judge failed to give an adequate direction on the dangers of relying upon one uncorroborated witness of identification, and in particular failed to warn the jury that an honest witness may appear very convincing yet be mistaken. Their Lordships consider that there is considerable force in this criticism. This was not a recognition case and whereas it could not fairly be described as a "fleeting glance" case the opportunity to see the man was limited to what must have been a very short period of time in terrifying circumstances; it clearly could not have been anything approaching the time of ten minutes estimated by the witness. Nor can one lose sight of the fact that Francis, the driver, was unable to identify the man although he would have had a better line of vision than the back seat passenger; furthermore six months had passed before the identification parade was held.

In these circumstances it was of the first importance to require the jury to consider most carefully the possibility that although Patricia Garrison might have been an honest and convincing witness she might yet have been mistaken in her identification of the accused, before they convicted on her evidence alone. Although the judge did refer to the possibility of a mistake in his summing up, it was not with the emphasis that is now to be expected in the case of a single identifying witness in circumstances like those in this case.

The passages dealing with mistake appear at different places in the summing up and are as follows:-

> "In a serious charge like this, where one witness is the person put forward by the Crown, and the case is going to stand or fall on the credibility of the witness, there is nothing wrong in putting forward the argument that the jury should be careful in examining the evidence of that witness to see whether you can safely rely on that witness."
>
> "Well it's possible for people to make mistakes and may look at a person and believe that it's somebody else. That's possible. There is no doubt about that."
>
> "Now, our Court of Appeal in a decision in 1977 said that the Judge should alert the jury that there is a possibility that a witness may be mistaken when it comes to visual identification. Well, I have already told you that it's possible you have mistake."

Save so far as it may be implicit in these passages there is no clear warning of the danger of convicting on mistaken identity as required by *R. v. Turnbull* [1977] Q.B. 224 and emphasised in the subsequent cases.

Furthermore the impact of the foregoing passages is likely to have been weakened by the emphasis placed by the judge on the credibility of Patricia Garrison. The trial was unfortunately bedeviled by a series of clashes between the judge and defence counsel. Many arose out of the questions in cross-examination and may have led the judge to the mistaken view that counsel was actually challenging the presence of Patricia Garrison in the car at the time of the shooting. There was also a most ill-judged submission by defence counsel in the closing speech that there was no proof that the accused had a gold tooth. Counsel had not suggested to Patricia Garrison that the accused had no gold tooth as it would manifestly have been her duty to do if such was the case, and furthermore, as the accused had made a long statement from the dock it would have been plain to see by all the jury.

It was against this background that the following passages appeared in the summing up, and it should be explained that by the time of trial Patricia Garrison had married her fiancée, the witness Alford Francis, the driver of the car:-

> "I want you to take a note of something, and it's an important point for you to consider: whether these witnesses are misleading you or trying their best in relating the truth: they are now wife and husband. She says that it is the accused. If it was a made-up story why the husband then wouldn't come and support the wife? One would have thought so. Because he would have had the same opportunity to see the man as she had, but he has come here to tell you everything save and except that 'I didn't make out the man', because he was looking or watching the hand and the gun. So that is an important piece of evidence there for you to examine. ..."
>
> " The question in this case is, was this accused man one of them? So the case boils down to that really. The other point is this, can we rely on the evidence of Patricia Garrison concerning the identification of the accused as the man who fired the shot, or fired several shots really, killing Williams? That is what the case boils down to. That is how the case turns out to be, because you will recall at one time while the trial was going on, while Mrs. Macaulay was cross-examining Miss Garrison, I heard certain questions being asked: Where did Mr. Francis pick you up? What time? Where you went after that?, and so forth. I thought all that was being done to suggest that she was not there at all. It was when Mr. Francis came now and gave evidence and supported what Miss Garrison said - he picked her up at a bus stop along Half-way Tree Road,

had her in the car - the chasing of that part stopped. I couldn't find out what all those questions were about. Mrs. Macaulay said they were for credit, and as I said and pointed out, what has happened is that it turned out - the Lord moves in a mysterious way - it turned out that it is the same lady who is now trying to assist you and who, if you believe her, says that the accused man was one of the two burglars implicated in the killing of the deceased man. ..."

" If you do not accept Miss Garrison as a witness of truth, find him not guilty. If you are not satisfied to the extent that you feel sure that you can rely on her as to the identity of the accused, you must find him not guilty. It is only if you are prepared to accept her evidence, having regard to what I have told you, and you are left in no reasonable doubt whatever, that it will be open to you to convict him."

These passages tend to lead the mind away from the question of mistake and focus upon the possibility of deliberate untruthfulness; whereas in reality the real issue in this case was whether Patricia Garrison had made an honest mistake in her identification of the accused.

Criticism is also made of the manner in which the judge summed up the circumstances and opportunity the witness had to see the accused. There is no force in this criticism, the judge dealt fairly and adequately with the lighting, the distance and the time, pointing out to the jury it could not have been as long as the witness estimated.

Although this summing up fell short of the standard required by *Turnbull* and the subsequent cases, their Lordships would have hesitated before saying its deficiencies were sufficient to quash this conviction if that criticism had stood alone. Before turning to what their Lordships regard as a further serious criticism they will dispose of two grounds of criticisms to which they attach no weight. The appellant complains that the judge allowed Patricia Garrison to make a dock identification of the accused.

In her evidence-in-chief describing the incident she said:-

"The man was standing at the side of the car, after the explosion he run from the side of the car to the front of the car standing in front of the car still pointing the gun.

Question: Who was that man?

Answer: The man (pointing to the accused in the dock).

Later in her evidence-in-chief when asked about the identification parade Patricia Garrison said:-

> "I identified a man to the police as the man that shot and killed Richard Williams.
>
> Question: Where is that man.
>
> Answer: The man that - the man over there in the dock.
>
> Judge: Who shot and did what?
>
> Answer: Shot and killed the deceased Richard Williams."

It is well established that although a judge has a discretion as to whether or not to allow a dock identification he should as an almost invariable rule refuse to allow an accused to be identified by a witness for the first time when he is in the dock: see *R. v. Cartwright* (1914) 10 Cr.App.R. 219 and *R. v. Fergus* (1992) Crim.L.R. 363. The reason for this is that the very presence of the accused in the dock will suggest to the witness that it is the person who committed the crime. But in the present case the prosecution were not relying on a dock identification, they were relying on the identification at the identity parade; it added little if any weight to that identification that the witness again identified the man in the dock, and it lay within the discretion of the judge to permit the questions.

The second unsubstantial criticism is that the judge gave evidence to the jury that the accused had a gold tooth. The judge was dealing with defence counsel's submission to the jury that there was no evidence that the appellant had a gold tooth. He pointed out that counsel had never suggested to Patricia Garrison that she was mistaken when she said the accused had a gold tooth and the judge had seen it for himself when the appellant made his statement from the dock. There are two passages in the summing up that are relevant:-

> "Now I am a little far from him but when he was giving his statement yesterday - some of you are a little closer to him and my sight might not be so good - but I think I could have seen signs suggesting that there was something shining in that mouth which could be a gold tooth, while he was speaking to you yesterday. ...
>
> Now, when the accused man made a statement from the dock, as I told you, he was a tall chap, when he was talking there you observed him, and as I already indicated to you, from this distance, to me it did appear that he had something in his mouth that could be a gold tooth, but it would not have been right for me, since he elected to make a statement from there, to tell him to come down in the court and talk ... But you saw him, you heard him ..."

A judge is entitled to comment on the appearance and demeanour of an accused if it is material to the issues that the jury have to determine. The only possible purpose of defence counsel suggesting to the jury that there was no proof that the accused had a gold tooth was to undermine the identification evidence of Patricia Garrison. If the accused had a gold tooth it was a bad point, and the judge rightly pointed out that it appeared to him that the accused had a gold tooth when he made his statement from the dock, leaving it to the jury to decide the matter for themselves if they thought their eyesight was better than that of the judge. The judge was not giving evidence to the jury, he was commenting on the appearance of the accused because it was relevant and he was entitled to do so.

The final criticism is of the manner in which the judge dealt with the weight to be attached to the statement from the dock. In *DPP v. Walker* [1974] 1 W.L.R. 1090 the Privy Council gave the following guidance at page 1096:-

> "The Court of Appeal has indicated that it would be in the public interest if this Board were to give some guidance on the 'objective evidential value of an unsworn statement' by an accused, since it has for some time been the standard practice in Jamaica to keep the accused out of the witness box. Much depends on the particular circumstances of each case. In the present case, for example, even on the approach that everything the respondent said in his unsworn statement was true, no jury (unless perverse) could have acquitted him on the ground of self-defence. There are however cases in which the accused makes an unsworn statement in which he seeks to contradict or explain away evidence which has been given against him or inferences as to his intent or state of mind which would be justified by that evidence. In such cases (and their Lordships stress that they are speaking only of such cases) the judge should in plain and simple language make it clear to the jury that the accused was not obliged to go into the witness box but that he had a completely free choice either to do so or to make an unsworn statement or to say nothing. The judge could quite properly go on to say to the jury that they may perhaps be wondering why the accused had elected to make an unsworn statement; that it could not be because he had any conscientious objection to taking the oath since, if he had, he could affirm. Could it be that the accused was reluctant to put his evidence to the test of cross-examination? If so, why? He had nothing to fear from unfair questions because he would be fully protected from these by his own counsel and by the court. The jury should always be told that it is exclusively for them to make up their minds whether the unsworn statement has any value, and, if so, what weight should be attached to it; that is for them to decide whether the evidence

for the prosecution has satisfied them of the accused's guilt beyond reasonable doubt, and that in considering their verdict they should give the accused's unsworn statement only such weight as they may think it deserves."

The appellant by denying that he knew anything about the case, was clearly contradicting the evidence of Patricia Garrison that he was the man who shot Williams. The judge was therefore entitled to direct the jury in accordance with the advice in *Walker*. But the judge went much further than the language of *Walker*. He dealt with the matter twice and on both occasions he gave the direction in association with the issue of the gold tooth, pointing out to the jury that if the appellant had given evidence he could have been required to open his mouth and put the question of the gold tooth beyond doubt. The first passage is near the beginning of the summing up and it is necessary to set it out at length:-

"But, the accused made a statement from the dock, he didn't go in there (pointing to dock) and give evidence as the other witnesses. Staying from the dock and making a statement is a right he has. Going to the witness box and giving evidence and offering himself to be cross-examined, to be asked questions by the judge or you the jury through the foreman, is another right he has.

Few years ago a certain case of Jamaica - murder case - the judges here certified ... they asked guidance from the Privy Council about the value to be put on a dock statement, a statement made from the dock - that is where the man goes and gives evidence; how the jury should treat it and how the judge is to approach it in a proper case.

One of the directions given, sent back here to Jamaica - I thought the judges would have known that any rate - is that the jury can properly ask themselves: 'Why is it you didn't want to go there and tell us whatever you have to tell us from there? Is it something you have to hide? Are you afraid of cross-examination? Is it a case where you believe it is better for you to take shelter there than go there?'

Why I say that is this: You remember the witness Garrison told you that what she observed about the accused that night is that he had ... well she didn't use the singular; she didn't say 'gold tooth' - that he had a 'gold teeth'.

When she was being cross-examined, not one word, one suggestion was put to her: 'Miss Garrison, I suggest to you that you are making a mistake; this man doesn't have a gold tooth'. Did you hear any such suggestion? Not one!

> Now, if he had given evidence there, I could ask or Crown Counsel could ask, 'Open you mouth let the jury have a look and go there, go up there to the jury, open your mouth'; and yet we hear an argument being put up before you that there is no proof that this man in the dock has a gold tooth in his head. I thought that when counsel had come to the end of her address and had sat down, and was about to sit it would have been better if she had taken the move at that stage without bringing out that; otherwise perhaps I would not have mentioned this thing to you. But in view of her argument I had to use a term 'set you straight, put you on the right course'."

The second passage was a response to a protest by defence counsel that the judge had commented on her failure to cross-examine on the gold tooth, made at the end of the summing up, and reads as follows:-

> "So, that caused me to then tell you that we have an authority from the Privy Council flowing from a case named Walker, seven or eight years ago, in which the Privy Council gave some guidance to the Jamaican Judges, those who need it, as to the value of an unsworn statement and how it is to be examined; and that one thing that the Judge can do is to tell the jury where the accused stays in the dock and makes a statement instead of going to the witness box to tell his story, he is taking shelter there because he is afraid of something. And I was telling you further, that if he had gone there and given evidence from there I could have asked him, open up your mouth let us see and you could have put him done there and let him come near to you. That is the only point I was making: as simple as a,b,c."

The effect of these passages is to tell the jury that the accused is frightened to go into the witness box because it will prove he has a gold tooth. And as the jury almost certainly knew he had a gold tooth there is a grave danger that the jury may have regarded the presence of the gold tooth as the touchstone of the reliability of Patricia Garrison's identification of the accused. This would be a very dangerous approach to the evaluation of her evidence. She did not rely upon the presence of a gold tooth to identify the accused, and whereas the presence of a gold tooth obviously adds something to the value of her identification it must be weighed against the fact that it is common knowledge that many of the adult population have gold in their teeth.

The anxieties raised by this misdirection added to the failure to give any clear direction on the dangers of relying upon a single uncorroborated identifying witness and the undue prominence that was given to the gold tooth throughout the summing up lead their Lordships to

the conclusion that this summing up was so unsatisfactory that it would be unsafe to allow this conviction to stand. They will accordingly humbly advise Her Majesty that this appeal should be allowed and the conviction of the appellant should be quashed.

Cases referred to

(1) R v Cartwright (1914) 10 Cr App R 214

(2) R v Fergus (1992) Crim L R 363

(3) DPP v Walker [1974] 1 W.L.R. 1090