[2010] JMCA Crim 66

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 62/2009

BEFORE: **THE HON. MRS JUSTICE HARRIS, J.A.**
THE HON. MISS JUSTICE PHILLIPS, J.A.
THE HON. MRS JUSTICE McINTOSH, J.A. (Ag)

DWAYNE DOUGLAS v R

Norman Godfrey instructed by Brown Godfrey & Morgan for the appellant

Mrs Karen Seymour-Johnson for the Crown

3, 4, 5 May, 30 July and 8 October 2010.

PHILLIPS, J.A:

[1] This appeal concerns the conviction and sentence of the appellant, Mr Dwayne Douglas, who was tried in the Circuit Court in Mandeville in the parish of Manchester, before the Hon Miss Justice Straw and a jury, on an indictment for the murder of Mr Trevor Anthony Morgan. He, having been convicted, was sentenced on 3 June 2009 to life imprisonment and the court ordered that he should not be eligible for parole until after 28 years. The appeal was heard in May of this year and on 30 July 2010 we allowed the appeal, quashed the conviction and set

aside the sentence imposed. A judgment and verdict of acquittal was entered. We promised to give our reasons in writing and do so now.

The case for the prosecution

[2] The case for the prosecution was that Mr Richard Turner was in his one bedroom home asleep with his cousin, Mr Trevor Morgan, when the appellant came into the room, shot him three times, shot Mr Morgan three times, then shot Mr Turner two more times outside of the room before he left the premises. Mr Morgan died, in the opinion of the doctor, as a result of multiple gunshot wounds.

[3] The prosecution called four witnesses, but there was only the evidence of Mr Turner with regard to what took place in the room that night. The case for the prosecution therefore relied heavily on the testimony of Mr Turner.

[4] Mr Turner gave evidence that on 9 September 2007 at about 11.00pm he was at his home in his bed asleep when he awoke and found his cousin Mr Trevor Morgan (otherwise called "Matthew") asleep beside him. He recalled turning on the 'inside light' and looking at his cousin as he was not there when he went to bed at 9:00 pm. He described this light as coming from a bulb located in the ceiling, which he said he turned off immediately thereafter and went back to sleep. He said that he also had an outside light which was on at the time that he went to bed. This light

hung outside in a grapefruit tree, which was 5 feet from the door of his bedroom, which leads outside.

[5] He further testified that while sleeping, with his head covered by a sheet, he heard the door that led into his room, being kicked off, and he saw a man enter his room with a 'flashlight phone' and a small gun. He said after the door was kicked off he lay in his bed, looking at the person at the door to his house. The bed was three feet from the door. The intruder came into the room, took the sheet off his head, and started shooting him in his chest. He was shot three times. Then his cousin woke up and called his name, and the "gun went around to Trevor Morgan head" and he heard three shots. He said that he did not want the "gun come around to me in bed" so he used his heel and kicked the man outside. The man dropped 5 feet from him, under the light, where he was able to see his face. He said that this was the first time that he had seen this man. However, he also said that he knew him before, that in fact he had known him for a very long time, about "nine, ten years or more". This was someone he used to speak to, and he had seen him two or three days before that night. The assailant, he said, was someone he knew as "Dwayne Douglas", otherwise called "Drop Short", and he pointed to the appellant in the dock. Mr Turner said that he tried to find his machete, after he had kicked the appellant out of the room, but without success, and when he went outside, within 3 feet of the appellant, he got up and

started to fire at him again. He also said that the parts of the intruder's body that he was able to see when he got up were his foot and his shoulder "turn back way to mi a go out".

[6] Mr Turner stated that when he was looking for his machete, he looked outside at his assailant and he was able to see all of him, "him face and him foot and him hand too". He said that he called out to the intruder, and said, "…Dwayne Douglas, a you come in a mi yard come shot mi and mi and you nuh have nothing." The assailant did not respond, but he found and picked up his gun, opened fire on Mr Turner again, and this time he received shots to his right and left hand. The assailant then left the yard running toward the neighbour's house. Mr Turner attempted to follow him and did so for about three chains, but had to turn back as he was bleeding all over and felt weak. He then went to his mother's home, told her what had happened and thereafter, the police took him to the Mandeville Hospital where he remained for four days.

[7] It was Mr Turner's evidence, initially, that he could see the assailant's face when he just entered the room because of the outside light and he could see the whole of his assailant, from his head to his feet, when he was in the room, as he was coming towards his bed and because he was only 3 feet away. He said that he was lying down on the right side of the

bed, with his head turned to the left, and the door away from his feet. He said the incident took place at about 2:00 am and he reiterated that he was able to see with the assistance of the outside light. He said that there were about three minutes between when the assailant entered into the room and when he kicked him outside, and he was able to see his face for about two minutes of that time. He said while he was looking for the machete and was looking at the assailant, he saw his face for about two minutes. He was also able to see his face for about two minutes when the assailant was outside by the grapefruit tree root and when he left in the direction of the neighbour's yard. He said that the assailant did not have anything on his face at any time.

[8] Mr Turner said that he gave a report to the police and the only name that he gave to the police was "Drop Short".

[9] In cross-examination Mr Turner was seriously challenged with regard to the length of time that he had to observe his assailant and the conditions of the lighting at all material times. A very different picture emerged. He maintained that the light outside was a bulb that was hanging down from the grapefruit tree and that he was certain that he was able to identify the assailant, but then he agreed with counsel right away that it was in a split second that he was able to identify the said assailant, in the house; that he would describe his opportunity to identify

the assailant in the house as a split second; and that he was able to make him out in a split second, or, he said, in a flash.

[10] Mr Turner also accepted that when the person entered the room he pulled the sheet from over his (Turner's) head, while he was lying on his side, with his face turned to the wall to the left and then immediately the person started to shoot him in his chest. He said when the person first entered the room, he would have shone the cellular phone flashlight on him (Turner) through the sheet, and after he pulled the sheet from his head, he would still have shone the light in his face. Then after shooting him, he turned the gun on Matthew. He subsequently said that although he did not know whether the gun was touching Matthew's body, he did say that the gunman was standing right over him and also over Matthew. Mr Turner said that all of that happened "not so quickly". Yet, he seemed to accept the suggestion of counsel that the incident lasted less than sixty seconds. However, he maintained that in that short time he would have been able to see the face of the appellant, although the sheet was over his head, as he said that it was not covering his face. He said that his face was on the right side of the bed and turned to the left wall as one entered the room. Then he said it was to the right as one entered the room. He then he said that his face was turned to the right, and the deceased's face was turned to the left. He finally said, "My head was set face the doorway". Mr Turner was asked about the light that was at the grapefruit

tree, and whether he had ever said that there was a light at the front of his doorway, which has a bulb in a socket that he would just reach up in the night and turn and the light would come on, and he agreed that this was the case. He also agreed that there was no difference between the light at the door and the one at the grapefruit tree. He said that this light at the doorway would not have been shining on his face when he was lying in the bed, it would have been shining on his feet, up to his waist. However, he agreed that it could not be shining on the face of the person entering the house, as he said, "after him come up in the house, too much can't shine on him anymore".

[11] When pressed further in cross-examination, Mr Turner accepted that he could see the face of his assailant when he was entering the room and not while he was in the room. He was questioned about whether he had given sworn testimony at the preliminary inquiry that he had recognized the appellant when he dropped under the light. He agreed that he had, but when challenged that that was the first time that he had recognized the face of the intruder, he denied that. Subsequently however, he not only agreed that he had said so, he told the jury that that was the truth. He said that when he was coming out of the room the light was shining in his face, yet he was able to recognize the assailant lying under the grapefruit tree, at the root of the tree. It was put to him that the branches of the grapefruit tree cast a shadow, which at first he denied,

then he was challenged that he had said in the preliminary inquiry that the grapefruit tree had cast a shadow, which he also denied stoutly, more than once, then he agreed that he had admitted to the previous court that the grapefruit tree cast a shadow and that that admission was the truth. He said also that he had kicked the appellant at the root of the grapefruit tree and he fell thereafter. He said that when he was exiting the house, the light was shining in his face and that was when he was able to recognize his assailant, who was then lying at the grapefruit tree root. That was when he had called out his name. When the assailant started to shoot at him the second time, he took refuge behind a barrel in the house and he stayed there. He finally admitted that as the assailant, while lying at the grapefruit root, picked up his gun and started to fire at him immediately after he called his name, he would have seen his face for only a split second. He maintained though that the light shining in his face did not prevent him from seeing anyone in the yard and that he did know who had shot and killed Matthew.

[12] Mr Turner testified that in the report that he gave to the police, he did not give the name Dwayne Douglas, even though at the date of the incident he said that he had called out the name Dwayne Douglas. The name he gave to the police was "Drop Short". It was suggested generally to him that he was not speaking the truth, which he denied, and then it was put to him that his assailant, on his case, was lying down by the

grapefruit tree for three minutes, without the gun in his hand, and yet he did not do anything to him, and the witness then said, "Is more than one man out there, a never one man outside". When asked where these men were, he said that he could not say. When challenged that that was the first time that he was saying that there were other persons outside, he denied that and said that he had told the police. He said that none of these men attempted to enter the house, he was not able to see any of them, and he could not say where they were when he was chasing his assailant after he had been shot for the second time. Finally at the end of the cross-examination he said that he was still lying on his bed, on his side, when he kicked the assailant, and he tumbled all the way out to the grill and fell outside.

[13] Detective Corporal Donovan Bell gave evidence that in September 2007 he was working in the Mandeville Police Station and he was the investigating officer in the case. On 3 September 2007, on information received, he went to a house in Comfort District in the parish of Manchester, where he saw many persons gathered. Having identified himself as a police officer, he entered the house, and saw the body of a male lying on a bed, with what appeared to be gunshot wounds to the left side of the head, and whom, on his observation, appeared to be dead. He subsequently went to the emergency section of the Mandeville Regional Hospital in the parish of Manchester, and after

making inquiries, was shown a man lying on a stretcher with doctors and nurses attending to him. He identified that person as the witness Mr Richard Turner. He told the court that he interviewed several persons and recorded statements and based on those investigations, and particularly shortly after he received the statement from Mr Turner, he prepared a warrant of arrest, in September 2007 in the names of "Murderous", "Drop Short" and "Lawful". He said that on 10 October 2007 at about 3:00 pm, based on information received, he went to the police station on the compound of the Norman Manley International Airport, where he saw and spoke to the appellant. He identified himself and told the appellant that he was investigating the case of the murder of Mr Trevor Morgan, among other offences, and he cautioned him. He asked him if he was known by the names of Drop Short, Lawful and Murderous, and he responded in the affirmative and, in response to further questioning, said that he had been called by those names for a long time. He showed him the warrants, executed them on him, cautioned him and he kept silent. The warrant in relation to the case at bar had been endorsed three times as the police endeavoured to locate the appellant in Comfort District and the adjoining community. It was tendered into evidence as exhibit 2. Corporal Bell said that he attended a post mortem examination in respect of Mr Morgan at the funeral home and the body was identified by Mr Stanley Turner, the grand uncle of the deceased. He later told the court

that the body he saw at the post mortem was the same body that he had seen on the night that he went to the house at Comfort District.

[14] In cross examination Corporal Bell indicated that he had not known the persons in respect of those names that appeared on the warrant. He told the court that he went looking for Dwayne Douglas, otherwise called, "Murderous", in spite of the fact that the name "Dwayne Douglas" did not appear on the warrant. He said that Mr Turner had given him the names, "Lord Flow" and "Murderous" but he did not recall him giving the name "Dwayne Douglas". He was questioned about the areas he had gone in search of the persons named on the warrant. He confirmed that when he spoke to the appellant at the airport, the appellant had said that he was going to a Caribbean island, he was unsure if it was Antigua or St. Martin, but the appellant did say that he was going to participate in a sound system clash and he produced an airline ticket, although he could not recall if it had a return date on it.

[15] He was asked whether he had arrested one "Pete" and taken him into custody for the same murder, which the Corporal denied and in re-examination explained that the person by the name of Pete had been arrested in relation to another offence which had been committed in the same yard but in another house some thirty feet away. He indicated that he could not recall if he had taken anybody else into custody in respect

of the same murder. He was challenged with the transcript of another trial, and asked if he had said that he had arrested another person in relation to the said murder, but that he did not recall his name, though he was in custody. He denied all of this and said it was not in relation to the murder but "the shooting". However, when confronted with the particular passage, the Corporal recanted and said that it could have been a mistake and he continued:

> "The record will speak for itself, I will agree with the record."

But in answer to the question posed by the court:

> "… Just answer the question. What is written on the record is it the truth?
>
> You're saying you arrested another person in connection for the murder is that the truth?",

he responded:

> "No, ma'am, that is not the truth."

He then stated that he had not told any untruth to the court.

[16] He was then asked if he had taken anyone into custody pending an identification parade in this matter and he indicated that one person had been held, to wit Mr Dwayne Douglas. He indicated that all arrangements had been put in place for the holding of the parade, in that the appellant and his counsel were present and the police had made arrangements for the witness to be taken to the parade, which was

scheduled to be conducted at the May Pen Police Station. However the identification parade was not held as the Corporal said, "It was prevented".

[17] Counsel for the appellant then asked a specific question namely:

> "Q. Was the parade for Dwayne Douglas, arranged to establish whether he was one and the same person as, Murderous, Drop Short or Lawful?"

and the dialogue which followed is best set out in its entirety:

> "A. I am not sure how I should answer that.
>
> HER LADYSHIP: You took out a warrant for Murderous? You said you didn't get the name Dwayne Douglas. What he is saying an I.D. parade was arranged. Was it arranged?
>
> THE WITNESS: An informal parade to see…Can I answer your question, sir?... to see if the same person I am thinking of was Dwayne Douglas, otherwise called, Murderous, is the same person that the witness is talking about, sir.
>
> Q. And this parade was never held?
>
> A. It was never held, sir.
>
> Q. Did you say earlier that you arrested and charged him at the airport with murder
>
> A. Yes, sir.
>
> Q. So, you would have arrested and charged him before you made an arrangement for an I.D. parade?

A. Yes, sir, I did.

Q. So, at no time did the witness point out Dwayne Douglas to ….

A. No, sir."

[18] Dr Garfield Blake gave evidence that he is a pathologist. On 15 September 2007 he performed an autopsy on Mr Trevor Morgan whose body was identified by Mr Stanley Turner. His examination revealed the presence of three gunshot wounds as follows:

(a) There was an entrance wound to the left temporal scalp, which penetrated the soft tissue of the scalp where subdural haemorrhage was noted. The left temporal bone was fractured, the left temporal lobe was lacerated, and the exit wound was in the right temporal scalp. The wound path was left to right, back to front and downwards.

(b) There was an entrance wound in the left jaw, which perforated the subcutaneous tissue of the neck . The wound path was also left to right, back to front and downwards.

(c) There was an entrance wound in the left forearm which perforated the subcutaneous tissue. In this case the wound path was left to right, back to front and upwards.

In all three wounds, there was no evidence of close range firing or stippling. The doctor explained that there can be hard contact when the

gun is pressed against the skin and fired, and one would expect to see signs of burning or the imprint of the muzzle of the gun on the skin. There is loose contact, in which case one would not see the imprint of the muzzle but one would expect to see edges being burnt. There is near contact, when the gun is held close to the skin but not actually touching the skin, then one would expect to see soot around the entrance wound. In the intermediate range, the bullet as well as unburnt gunpowder would reach the skin. In this case one would expect to see powder stippling or powder tattooing. This is actually unburnt powder hitting the skin and causing abrasions to the skin. In the distant range, it is only the bullet that would get to the skin. It was the doctor's evidence that generally one could get powder stippling when the gun is fired at a distance of one centimeter from the skin up to as much as 120 cm away. He was unable to say whether this would change depending on the type of weapon used. It was his opinion that the cause of death was a result of multiple gunshot wounds.

No case submission

[19] At the end of the Crown's case, counsel for the appellant made a submission that the appellant should not be called on to answer. He argued that this was a fleeting glance case and should therefore not be left to the jury. Crown counsel opposed the same. The judge responded right away with her ruling that there was a case to answer.

The Case for the Defence

[20] The appellant gave an unsworn statement from the dock which was very brief and is therefore set out in its entirety:

> "My name is Dwayne Douglas, sound system operator, live in May Day, Manchester, for over a year. Me and Mr. Turner did not have any argument, no fight, never went to his house, never shoot him, didn't murder anyone. Mr. Turner is telling nothing but lies on me. That is the end of my story, m'lady."

The Appeal

[21] The appellant filed three original grounds of appeal which counsel indicated that he intended to rely on and argue, and he also sought and was granted permission to argue three additional grounds of appeal. The grounds of appeal are set out below.

> "1. The Learned trial Judge erred in law when she failed to uphold the no case submission made on behalf of the appellant in relation to the inadequacy of the identification evidence and thereby depriving the appellant of a fair trial.
>
> 2. The circumstances under which the witness Richard Turner purported to identify his assailant as the appellant are such that at best he could only have had a fleeting glance at his assailant and would not have seen his face consequent upon the poor lighting condition.
>
> 3. The verdict is unreasonable and cannot be supported by the evidence.

4. The Learned judge misdirected the Jury by failing to direct them how to treat the variance between the evidence of the Doctor as regards the absence of evidence of close range firing or stippling on the body of the deceased as against the testimony of Richard Turner that the Appellant was standing over the deceased when the firearm was discharged.

5. The learned Trial Judge erred when she allowed the dock identification of the accused.

6. The learned Trial Judge misdirected the jury when she failed to direct them on the advantage of which the appellant was deprived by the failure to hold an identification parade, thereby resulting in a miscarriage of justice."

Counsel also requested and was granted permission to argue grounds of appeal 1 and 2 together.

The appellant's submissions

Grounds of Appeal 1 and 2: no case submission/ identification

[22] Counsel for the appellant submitted that the case for the prosecution against the appellant rested solely on the evidence of Mr Richard Turner. It is he, he argued, who sought to identify the appellant, and there is no other evidence linking the appellant to the offence charged. Counsel further submitted that the witness gave evidence initially of three occasions on which he had the opportunity to view the appellant, but even on his own account reduced those opportunities to only two occasions. Counsel then proceeded to attack the quality of the identification evidence adduced by the Crown, with particular reference

to at least seven instances in which the conditions for viewing the appellant by the sole eyewitness were poor, and on which the witness contradicted himself with regard thereto. This he argued would therefore make the evidence unreliable and a verdict of guilty unsafe.

[23] It was submitted on behalf of counsel for the appellant that :

(i) Mr. Turner had initially said in evidence that he had first seen the face of his assailant, "when him drop under the light" and this was referring to the grapefruit tree. However later in evidence he had said that he was able to see the appellant's face when he just came through the door, with the assistance of the outside light.

(ii) The witness said that when the appellant was under the tree he saw his face for about two minutes, which suggested that he was facing him. Yet the witness said that when the appellant got up he saw his foot and his shoulder,"turn back way to him going out.

(iii) The sighting of the appellant in the house, counsel argued, on the evidence, gave the witness only a split second opportunity to identify him.

(iv) The appellant when he entered the room shone the flashlight in the witness' face whilst his face was still under the sheet thus preventing him from identifying who was inside the room. When the appellant lifted the sheet he immediately started firing at the witness.

(v) The narrative and sequence of events could not have lasted three minutes and the witness eventually agreed that the incident in the house only lasted for less than a minute, and there was no evidence as to how long the witness saw the face of the appellant during that period, as the witness said he saw the face of the appellant when he was entering the house and at that time he had a sheet covering his head. Even the witness said he understood the difference between a light shining directly in his face, and a light shining through the sheet in his face, which must have impeded his view.

(vi) The witness' evidence was that when he was coming out of house the light was shining in his face when he reached the doorway. He also admitted that in evidence in a prior trial, he had admitted truthfully, he

said that the branches of the grapefruit tree had cast a shadow. He had also stated that as soon as he had called out the appellant's name, and he had started shooting at him, he had hidden behind a barrel in his house .which would also have posed a difficulty in respect of sighting the appellant.

(vii) The witness claimed that he called out the appellant's name Dwayne Douglas when the appellant was lying at the root of the grapefruit tree. However when making the report to the police he did not give that name to the police. If he was certain about the identity of the appellant, then when the first opportunity arose to do so, one would have expected him to have given that name to the police. It was further submitted that if he had known the correct name of the appellant the investigating officer would have tried to obtain that information from him.

[24] Counsel argued that the identification of the appellant by the witness was done under extremely difficult circumstances. In the first case when the appellant entered the room, the witness had a sheet covering his face. He at first had indicated that he could see the appellant while

he was in his room, and then under cross-examination he accepted that it was only when the appellant was entering the room that he was able to see his face. Then he would have seen his face when he fell under the grapefruit tree but that was only for a split second. So those were the two occasions when the witness would have been able to view the appellant's face, and, it was submitted, both were fleeting glances. Further, when the appellant was entering the house the light was shining behind him and the witness' face was covered by a sheet, and on the second occasion, the appellant was lying at the root of the grapefruit tree and the limbs and branches of the tree would have cast a shadow, and the light was in the witness' face. On both occasions, the witness' view of the appellant would have been seriously impaired.

[25] It was submitted that in evidence the witness had said three different things:

(1) that he had been able to recognize the appellant for the first time when he was in his home;

(2) that he had been able to recognize the appellant for the first time when he was entering his home and

(3) that he had been able to recognize the appellant for the first time under the light under the grapefruit tree.

Counsel argued that the fact that he was unclear about where the first sighting occurred, confirmed the unreliability of his evidence on identification, particularly since he accepted that they were all split

second opportunities which, counsel submitted, are all a prelude to a fleeting glance and on this occasion do not, taken together, even amount to a fleeting glance.

[26] In these circumstances, counsel's serious complaint related to the fact that an identification parade was not held. He submitted that the investigating officer had told the court that Mr Turner had not given him the name of Dwayne Douglas. So, although on the prosecution's case, the identification was on the basis of recognition, since the identification of the appellant was being challenged, counsel argued that a parade, although not mandatory, ought to have been held. This, counsel submitted, was due to the fact that the identification took place under exceptionally difficult circumstances, and the evidence disclosed that it is unclear whether one could have seen anyone in the house. This was buttressed by the fact that the person who entered the room needed the aid of a telephone flashlight to see who was in the room, notwithstanding the witness' testimony that there was light outside, whether hanging at the door itself or outside by the grapefruit tree. In fact, counsel said, the witness later conceded that the outside light did not cover all of the room, indeed it covered only up to his waist and so the time spent in the room by the assailant was of no moment in terms of recognition of the appellant. It was only on entering the room that there was any chance of recognition and as had already been submitted, those conditions,

counsel said, were extremely poor. Counsel also referred to the witness' evidence of the position of his head, which he said was turned to the left, and so would have been away from the door, and not facing the assailant. The fact that the witness' evidence was that he had known the appellant for many years ought not to be the determinative factor, as the witness himself had confirmed to the court that he understood the meaning of time and what a minute and a second were and he had admitted to sightings of a split second, which, argued counsel, would not therefore even amount to a fleeting glance.

[27] Counsel therefore submitted that this was a proper case for the learned trial judge to have withdrawn from the jury and directed a verdict of acquittal, on the basis of the principles laid down in ***R v Turnbull*** [1977] QB 224.

[28] Counsel submitted that the case should also have been withdrawn from the jury based on the principles outlined in ***R v Galbraith*** [1981] 2 All ER 1060 as the medical evidence was completely at variance with the evidence of Mr Turner. It was Mr Turner's evidence that the appellant was standing over the deceased, and at the preliminary inquiry he had said that the gun was almost touching the head of the deceased and that the gunman was standing right by the side of the bed, with the bullets entering his body in that way. Dr Blake's evidence, counsel argued,

completely discredited this evidence, in examination in chief, as the doctor stated that none of the injuries to the body of the deceased disclosed any evidence of close range firing, as described by the witness, or stippling which was the forensic description of the same. (In fact, Dr. Blake said that close range firing would have been from a distance of 1cm to 120cm). Counsel relied on two cases in support of this aspect of his submissions, namely ***Andre Manning v R*** (SCCA No. 199/2006 judgment delivered 16 October 2009) out of this court and ***Byfield Mears v R*** (1993) 30 JLR 156 Privy Council appeal from Jamaica.

In Reply- Grounds of Appeal 1 and 2

[29] Crown Counsel submitted that there was no merit in the appeal argued on behalf of the appellant. Counsel contended that although there were inconsistencies and discrepancies in the evidence of the main witness for the prosecution, his testimony was not so impugned as to be fatally flawed, so that the case ought to have been taken from the jury. In respect of the positioning of his face, whether to the right or to the left, it was submitted that the witness eventually said that, "my head was set face, the doorway", which would have assisted in his ability to see who was entering the room. With regard to the sheet covering him, he eventually said that the sheet was covering his head, but not his face. He also stated that the light at the doorway and the light at the grapefruit

tree were one and the same, so effectively there was no difference. As counsel at the trial used the words "to see" and "to recognise" interchangeably, then the witness' evidence of doing either of these things for the first time at different places and times ought not to be taken as meaning that he was not able to identify his assailant. Counsel relied on ***R v Galbraith*** and on ***Herbert Brown and Mario McCallum v R*** (SCCA Nos. 92 & 93/2006 judgment delivered 21 November 2008) submitting that the quality of the evidence in this particular case was such that it had passed that threshold which avoided the ghastly risk of a mistaken identification. Counsel argued that there will always be inconsistencies and discrepancies in the evidence of any particular witness, but that does not mean that the witness has been totally discredited, and she relied on the Guyanese Court of Appeal case of ***Anand Mohan Kissoon and Rohan Singh v The State*** (1994) 50 WIR 264.

Analysis of Grounds 1 and 2

[30] In the celebrated and oft cited judgment of Lord Widgery, in ***R v Turnbull,*** the guidelines included this statement:

> "…When in the judgment of the trial judge, the quality of the identification evidence is poor, as for example when it depends solely on a fleeting glance or on a longer observation made in difficult circumstances, the situation was very different. The judge should then withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification…".

[31] In the instant case the real issue is whether the sole eye-witness for the Crown was able to correctly identify that assailant whom he said he saw in the house in Comfort District on that night in September, 2009.

The identification evidence

[32] There are many aspects of the identification evidence in this case which are a cause for great concern.

(a) The lighting

The evidence of Mr Turner is that there were two relevant lights, namely a bulb in the ceiling of the room which he turned on at approximately 10:00-11:00 pm when he looked and saw his cousin in the bed beside him, and which he promptly turned off and never turned on again that night, and a second light hanging from a grapefruit tree which was about 5 feet from the door to the house. The limbs and the branches of that tree were said to cast a shadow. The witness said that the room was not a big room; it was a board house of about 10 feet by 14 feet. Mr Turner made it clear after searching cross-examination that after the person came into the house, "not too much light would be shining on him anymore". It is clear that very little, if anything, would have been seen by the witness inside the room based on the lighting in the room. With regard to the light outside the room, Mr Turner said that light shone onto his feet and up to his waist but not into his face. So that light does not seem to have been helpful with regard to visibility in the room either, which may explain why the

medical evidence and that of Mr Turner are at variance as he could not see what was happening in the room.

[33] When the assailant entered the room that night he had a "flashlight phone" which was pointed at Mr Turner and which he shone on his face through the sheet which covered his head, and then on his face after the sheet was pulled from his head, which was done right away, and immediately thereafter he was shot three times. He claimed to be able to identify the assailant by saying that the sheet was over his head but was not covering his face. His evidence seems so implausible, entirely unreliable and not in keeping with his own observation in cross-examination that he could not see the face of his assailant while he was in the room. Mr Turner nonetheless endeavoured to say that he could identify and did recognize the assailant, on his entry into the room, with the aid of the outside light which shone in the room and the light from this "flashlight phone". However, the light from the grapefruit tree was 5 feet away, outside the room and there was a shadow, and he said that that light only shone on his feet up to his waist. With a sheet over his head in these circumstances it seems entirely unlikely that he would have seen his assailant's face.

[34] With regard to the other light, this appears to have been hanging from the grapefruit tree, outside the house, although Mr Turner also said it was at the door to the house. There is a conflict in his evidence with regard to its positioning, yet it was supposed to have assisted him seeing and recognizing the assailant, for the first time, as the assailant fell at the root of the tree, where there was a shadow cast by the limbs and branches of the tree, which at 2.00 am would have affected his visibility.

(b) The opportunity

[35] Initially Mr Turner was claiming that he could see the face of the person who entered the room, while he was in the room, for about two minutes, then, when he kicked him outside, for about another two minutes, and when he was outside by the grapefruit tree, for a further two minutes. However, the assailant kicked off the door, came into the room, took the sheet off Mr Turner, shot him three times, and then shot his cousin three times. These were very difficult circumstances. It is not surprising that he eventually said that he would describe the opportunity to identify the assailant in the house as "a split second" or in "a flash." It is also not surprising that after he called out to the assailant, (he said by his name, Dwayne Douglas) and the assailant fired two more shots at him, that he said that he would only have seen his face for a split second. This too was under very difficult circumstances. In fact, Mr Turner said that he had been looking for his machete, which could mean that his attention had

been diverted, and he would not have been looking at the face of the assailant. Additionally, after this second firing, he hid behind a barrel.

[36] Mr Turner had also said that his face was turned to the right to the door when the assailant entered the room, then to the left away from the door, and then his head was "set face the doorway", and this was when the flashlight phone was shining on his head and face through the covers.

[37] In our view, the opportunity to observe this assailant was not good. The lighting was poor. The timing was short. These were definitely fleeting glances in difficult conditions and, in our view, the case ought to have been withdrawn from the jury.

[38] Additionally, no identification parade was held. Detective Corporal Donovan Bell did not receive the name Dwayne Douglas from Mr Turner. He only had the alias Drop Short or other aliases, and so the warrant was prepared accordingly. Yet, the appellant was apprehended. Detective Corporal Bell arrested and charged another person for the same murder, and he also arrested and charged the appellant before arranging any identification parade. The witness had therefore never pointed out the appellant, save and except in the dock.

[39] In our view, this was entirely unacceptable and this approach has been frowned upon for many years by their Lordships in the Privy Council

and also by this Court. We do not agree with counsel for the prosecution that the evidence with regard to the visual identification showed some inconsistencies and discrepancies but fell outside of the cases which have been described as providing a ghastly risk of mistaken identification. The facts of this case, in our view, fall squarely into that category.

[40] Counsel for the appellant had also argued that the facts which underpinned ground 4 of the appeal also fell within the ambit of grounds 1 & 2, as they supported the submission that as the medical evidence so contradicted the eye-witness' account, the evidential base of the prosecution's case was sufficiently slender that the case should have been withdrawn from the jury. The doctor's evidence, as stated, is that short range firing did not occur. There was no evidence of any stippling. The gun was therefore not within 120 cm of the body. The evidence of Mr Turner was that the gunman was standing right over him and Mr Morgan. He had also said previously that the gun was almost touching the head of Mr. Morgan, and that the gunman was standing right by the side of the bed. These are completely different positions.

[41] Whilst it is true that the eye-witness in the instant case was not as emphatic in the evidence given as in the ***Manning*** case (for though agreeing that he had made those statements in another court, he tried

to say in this court that he did not know the position of the gun), the principles set out in the ***Manning*** case are still applicable. In the ***Manning*** case, having set out the contradictory facts between the pathologist's evidence and the eye-witness' account, Cooke, J.A. in delivering the judgment of the court said this:

> "10. The pathologist's evidence and his opinion as to the absence of gunpowder is to be regarded as expert evidence, It was evidence adduced by the prosecution. There was no other evidentiary material to cast the slightest doubt on his findings or the authenticity of his opinion. It is therefore clear that the evidence of Dr. Sheshiah undermines Powell's account of the shooting. In his evidence Powell was adamant that the appellant placed the gun very close to the deceased head. If this was so there would have been gun powder markings. Of course, the entry wound being to the left side of the face is not in harmony with the original stance of Powell that the appellant was to the right of the deceased when the wound to the head was inflicted. The entry wound was to the left of the face.
>
> 11. In ***Daley (Wilbert) v R*** (1993) 43 W. I.R. 325 at p 334 letters g-h, Lord Mustill in delivering the advice of Their Lordships' Board said that a case should be withdrawn from the jury:
>
> > 'because the evidence … has a base which is so slender that it is unreliable and therefore not sufficient to found a conviction.'
>
> In the circumstances of this case the pathologist's evidence flatly contradicts the narrative of the sole eye-witness, Powell. Further, the inconsistencies raised by defence

> counsel at the trial were quite material. Accordingly, the evidential base fashioned by the prosecution would appear to be less than 'slender'. We held that the learned trial judge should have acceded to the no case submission. We were of the view that the evidence of visual identification given by Powell was decidedly unreliable."

[42] This was in keeping with the first part of the second limb of ***R v Galbraith***, relied on by counsel for the appellant, where Lord Lane, CJ in treating with how the learned trial judge should approach a submission of "no case", and having indicated that if there is no evidence that the crime has been committed by the defendant there is clearly no difficulty, then stated that:

> " The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence.(a) Where the judge comes to the conclusion that the Crown's evidence, taken at its highest, is such that a jury properly directed could not properly convict on it, it is his duty, on a submission being made, to stop the case… ."

[43] In our view, this passage is applicable to the facts of the instant case as the medical evidence and the eye-witness' account are at variance, and would also be applicable to the particularly tenuous state of the visual identification evidence, where as can be seen herein, the statements of the eye-witness' ability to identify the assailant crumbled under searching cross–examination, to admissions of split-second sightings,

leaving the evidence on a base so slender as to be unreliable and not sufficient to found a conviction. We adopt also the dicta in ***Daley v R,*** (1993) 43 WIR 325 where Lord Mustill explained the manner in which the principles of ***R v Turnbull*** and ***R v Galbraith*** are, as he put it , "able to live together,"(pages 333-334):

> "How then are the principles able to co-exist? There appear to be two possibilities The first is simply that the Turnbull rule is an exception superimposed on the general principles of Galbraith, taking identification cases (or, more accurately, the kind of identification case which was the subject of ***Turnbull***, for ***R v Galbraith*** was itself concerned with identification) outside the general principle, while otherwise leaving it completely intact. This is certainly a possible view…
>
> Their Lordships doubt, however, whether it is necessary to explain the two lines of authority in this way. A reading of the judgment in ***R v Galbraith*** 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, CJ had put it was not his job. By contrast in the kind of identification case dealt with by ***R v Turnbull*** 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 ***R v Turnbull*** itself emphasized, 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."

[44] In ***Herbert Brown, and Mario McCallum v R***, in delivering the judgment of the court, Morrison, J.A. (paras. 32 - 40, page 20 - 24) in adopted the principles laid down in ***Daley v R*** and the dictum of Lord Mustill, set out above, and in a masterly canvassing of the most recent cases dealing with the proper approach to be taken with regard to the no case submission in an identification case, distilled the arguments and in paragraph 35 clarified it thus:

> "35. So that the critical factor on the no case submission in an identification case, where the real issue is whether in the circumstances the eye-witness had a proper opportunity to make a reliable identification of the accused, is whether the material upon which the purported identification was based was sufficiently substantial to obviate the 'ghastly risk' (as Lord Widgery CJ put it in ***R v Oakwell*** [1978] 1 WLR 32, 36-37) of mistaken identification. If the quality of that evidence is poor (or the base too slender), then the case should be withdrawn from the jury (irrespective of whether the witness appears to be honest or not), but if the quality is good, it will ordinarily be within the usual function of the jury, in keeping with Galbraith, to sift and to deal with the range of issues which ordinarily go to the credibility of witnesses, including inconsistencies, discrepancies, any explanations proffered, and the like."

[45] As we have already stated that the quality of the identification evidence in this case was poor, then in keeping with the principles outlined above, the case should have been withdrawn from the jury.

[46] Notwithstanding the poor state of the evidence, Crown Counsel relied on several authorities attempting to show that this was a credibility case which should be left to the jury. We will deal with some of them summarily. We agree with the principles enunciated in ***Jones v R***, that where there are discrepancies in the evidence, and even if the quality of the identification is not of the best or ideal, that in certain circumstances it may still not be said that no reasonable jury could convict. However the ***Jones*** case is distinguishable from the instant case. In the ***Jones*** case the witness saw the man's face three times and only one was no more than a fleeting glance. Further, since her descriptions of the accused did not cast any significant doubt, and she identified the accused on the identification parade, it was a matter for the jury to decide. Their lordships were therefore satisfied that there was sufficient evidence in the case upon which, if accepted, the jury could reasonably convict.

[47] ***Anand Mohan Kissoon*** is also distinguishable from the case at bar. The headnote of that case indicates that although inconsistencies in the witness' evidence can weaken the prosecution's case, the case should only be withdrawn from the jury in extreme circumstances where the

witnesses have been totally discredited. In that case, there was concern about the fact that one of the appellants had been identified by one of the witnesses at the police station some 22 months after the fatal shooting, and by another witness at the preliminary inquiry, and the other appellant has been identified only in court, yet, the Court of Appeal found that the evidence in the case when examined as a whole, seemed to point to the fact that both appellants were involved in the killing of the deceased. It was a matter for the jury to decide as it concerned the credibility and reliability of the witnesses. This therefore fell within the second part of the second limb of ***R v Galbraith***:

> "Where the Crown's evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence on which a jury could properly come to the conclusion that the defendant is 'Guilty', then the judge should allow the matter to be tried by the jury."

[48] This was a question about reliability of the evidence led at the trial, and that is essentially a question for the jury, so the court found that the judge was correct in not withdrawing the case from the jury at the end of the case for the prosecution. The appeals, however, were ultimately allowed as the directions by the trial judge to the jury in respect of the dock identifications and identification evidence generally were fatally flawed.

[49] In light of the foregoing, in our view, there is merit in grounds of appeal 1and 2 and as a consequence ground 3 also. The conviction is clearly unsafe and cannot be permitted to stand. It follows that grounds 1, and 2 having succeeded, they would essentially dispose of the appeal. However, we will briefly address grounds of appeal 3, 4, 5, and 6.

Grounds of Appeal 3 & 4 -verdict unreasonable/discrepancies

The appellant's submissions

[50] Counsel challenged the learned trial judge's directions to the jury with regard to the variance between the evidence of the doctor and the eye-witness (which formed the basis of ground of appeal 4). The directions, counsel submitted, were deficient and unhelpful. The learned trial judge should have directed the jury that the medical evidence remained unchallenged even at the end of the appellant's case, and any resolution of that discrepancy ought not to have come from Crown Counsel in closing submissions, but from the witnesses in evidence. The jury was left with the impression that there was no real significance in respect of the alleged short range shooting and the forensic evidence. Counsel submitted that the witness could not say who discharged the bullet, but equally the bullet could not have been discharged in the manner that he said that it was. He further submitted that the evidence given by the witness and the doctor are irreconcilable, and this court should adopt the

course taken in the **Andre Manning** case, and conclude that the case ought to have been withdrawn from the jury, but if not, then the directions of the trial judge to the jury should have been very clear on such a very important issue. Indeed, the directions to the jury should have been that if, at the end of the case, the evidence had not been reconciled, they should not come to a decision adverse to the appellant. He submitted that the directions were not to that effect, which they were not, then the appellant would have suffered a miscarriage of justice.

In reply

[51] Counsel for the Crown distinguished the ***Andre Manning*** case from the instant case as she said that in that case the witness was emphatic about how the events had unfolded and how the injuries had been received, whilst in the instant case the witness had given two unresolved positions, indicating that he did not know exactly where the gun was positioned, and did not agree with what was said on a previous occasion in another court. Thus, the matter was left open, and not directly irreconcilable as was the case in **Andre Manning.** It was submitted therefore that the learned trial judge's directions were clear and comprehensive, and that in this regard the verdict was safe.

[52] Counsel submitted further that in any event, even if the circumstances relating to the identification were not ideal, the judge

could still have left the case to the jury, as she did, which in this case, was correct (***R v Larry Jones.*** (1995) 47 W.I.R). Additionally, counsel argued that there was no merit in ground of appeal 3 that the verdict is unreasonable and cannot be supported by the evidence, as one cannot go through the evidence minutely and attempt to show a balance in favour of the appellant. One must show that the verdict is against the weight of the evidence so much so, as to be unsustainable and insupportable. She relied on (***R v Joseph Lao,*** (1973)12 JLR). (which she submitted was not so in the instant case.)

Analysis

[53] The issue in these grounds of appeal is whether the directions of the learned trial judge were flawed in that she failed to direct the jury how to deal with the variance between the medical evidence and that of the eye-witness. What the learned trial judge did was to direct the jury generally on how to treat with discrepancies and inconsistencies, and recounted the evidence accurately. Then she left the decision to the jury in this way:

> "There is no dispute that Mr Turner was in the room and there is no dispute Mr. Turner also received gunshot injuries. The issue is who fired the shot that killed Mr Morgan. It is a matter for you, how you assess Mr Turner's reliability, and you bear in mind as I said the circumstances of the offence and when it

took place and when he is giving this evidence before."

[54] In our view, the judge would have fallen short in respect of this direction as if the case was not being withdrawn from the jury, (which it ought to have been). The judge in her summation, is under a duty to assist the jury in their deliberations and to guide them with regard to their specific responsibility, which, in this case would have been how to treat with the conflicting and contradictory evidence of Dr Blake and Mr Turner (both witnesses for the prosecution), with specific directions as to the significance thereof (see ***Regina v Barrington Clarke, Conrad Hendricks and Adrian Campbell***,(1991) 28,JLR 519). In ***R v Carletto Linton, Omar Neil, Roger Reynolds***. SCCA Nos. 3, 4 & 5/2002, delivered 20 December 2002, Harrison J.A, in dealing with the duty of a trial judge in directing the jury on discrepancies, said this:

> "Discrepancies occurring in the evidence of a witness at a trial ought to be dealt with by the jury after a proper direction by the trial judge as to the determination of their materiality.
>
> The duty on the trial judge is to remind the jury of the discrepancies which occurred in the evidence instructing them to determine in respect of each discrepancy, whether it is a major discrepancy, that which goes to the root of the case, or a minor discrepancy to which they need not pay any particular attention. They should be further instructed that if it is a major discrepancy, they the jury, should consider whether there is any explanation or any satisfactory explanation given for the said

> discrepancy. If no explanation is given or if the one given is one that they cannot accept they should consider whether they can accept the evidence of that witness on the point or at all***: (R Baker et al*** (1972) 12 J.L.R. 902)…"

No explanation was given for the material discrepancies between the conflicting evidence of the witnesses. The learned trial judge did not give any directions to the jury as to how they should deal with the glaring differences in the evidence, or its impact on the credibility of the sole eye-witness, whose evidence was critical to the case for the prosecution. This ground too has merit.

Grounds 5 and 6-dock identification/benefit to the accused of an identification parade

The appellant's submissions

[55] In respect of these grounds of appeal, counsel submitted that in all the circumstances of this case, with particular regard to the conditions under which the identification of the appellant was supposed to have taken place, the court ought not to have allowed the witness Turner to have made a dock identification, and the learned trial judge ought to have given the jury the requisite directions with regard to the benefit that the appellant had been deprived of due to the failure of the prosecution to conduct an identification parade. Counsel relied on the dicta in the following cases in respect of this submission: ***Aurelio Pop v R*** (2003)62 WIR 18, ***Leslie Pipersburgh, Patrick Robateau v R***, (Privy Council Appeal No. 96

of 2006, (judgment delivered 21 February 2008), ***Ebanks v R***, (Privy Council Appeal No. 4 of 2005 judgment delivered 16 February) and ***Garnet Edwards v R*** (Privy Council Appeal No. 29 of 2005 judgment delivered 25 April 2006). Counsel submitted that in all the circumstances, the verdict is unreasonable and cannot be supported by the evidence (grounds of appeal 3) and the appeal ought to be allowed , the conviction set aside, and a verdict of acquittal entered.

In reply

[56] Crown Counsel submitted that the learned judge was correct in allowing Mr Turner to identify the appellant from the dock as this was a case of recognition. Indeed, counsel argued that there was no dispute that the witness and the appellant knew each other as the appellant had said in his unsworn statement that he had never had any argument or any fight with the witness, from which she said one could draw the conclusion that they knew each other. The evidence of the witness, was that he had known the appellant in excess of 9 years and had seen him about two to three days before the incident took place. So, the decision of the learned trial judge, she submitted, could not be faulted. She relied on ***Jerome Tucker, Linton Thompson v R,*** (SCCA Nos. 77&78/1995 judgment delivered 25 February 1996). Counsel also submitted that the learned trial judge gave detailed directions with regard to the reasons for holding an identification parade and why it was permissible in the circumstances to

allow the dock identification, and that notwithstanding, she had set out the dangers of proceeding on a dock identification. Counsel concluded that the verdict of the jury is safe and ought to be upheld.

[57] In responding, counsel for the appellant, argued that even if the parties knew each other, the authorities supported the position taken in ***Ebanks v R*** (supra) namely that identification parades were nonetheless desirable, and failing to tell the jury that a benefit had been lost to the appellant which was an advantage given to him in law, so that the witness' reliability could be tested, resulted in a serious miscarriage of justice. Further, in her summing up the learned trial judge substituted reliability and honesty for accuracy. In any event, counsel stated, the crucial issue in the case was still whether the case ought to have been withdrawn from the jury and in this case the opportunities to see were only two, and, as already stated, they were merely fleeting glances.

Analysis

[58] The learned trial judge gave detailed directions with regard to the purpose of holding identification parades generally, which she said, in a case of disputed recognition, was to test the accuracy of the witness' recollection of the person who he said he saw commit the offence. In the case at bar, she indicated that the identification parade would be to test the honesty of Mr Turner's assertion that he knew the accused man as

"Drop Short" and that was not in dispute. But, she said, what was in issue were whether he was credible, whether he was lying, and if not, whether he was there sufficient opportunity for him to properly recognize the man who entered the house that night and shot Mr Morgan. We have already dealt with that, which is why, in this case, the only useful purpose which could have been served by holding an identification parade would have been to test whether the man the witness said he saw that night and the person apprehended by the police were one and the same person. But the ability to recognize the person in the exceptional circumstances of that night would remain.

[59] The learned trial judge also stated that the parade is not a complete safeguard but is at least better than a dock identification. She set out the dangers of the identification in the dock but stated that the danger is minimized if, as in this case, the witness and the accused are known to each other. In our view, this was a fair comment. The law is clear that a dock identification is admissible once the appropriate warnings are given, and so would be allowed in evidence. Also generally, the judge should direct the jury when a parade is not held , on the advantage that the appellant is deprived of with regard to the results of an inconclusive parade. In ***Aurelio Pop v the Queen*** (Privy Council Appeal No. 31 of 2002, delivered 22 May 2003) Lord Rodger of Earlsferry in delivering the decision of the Board made this very clear.

[60] Based on the view we have taken on grounds of appeal 1, 2 and 3, however, the holding of an identification parade in this case may not have been very helpful and the dock identification even less so.

Conclusion

[61] In light of all of the above, as indicated in paragraph 1 herein, the appeal was therefore allowed. The conviction was quashed, the sentence imposed set aside, and a judgment and verdict of acquittal entered.