

**Garnett Edwards**

*Appellant*

v.

**The Queen**

*Respondent*

**FROM**

**THE COURT OF APPEAL OF  
JAMAICA**

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JUDGMENT OF THE LORDS OF THE JUDICIAL  
COMMITTEE OF THE PRIVY COUNCIL

Delivered the 25th April 2006

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*Present at the hearing:-*

Lord Bingham of Cornhill  
Lord Steyn  
Lord Hope of Craighead  
Lord Hutton  
Lord Carswell

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*[Delivered by Lord Carswell]*

1. The decision of the English Court of Appeal in *R v Turnbull* [1977] QB 224 contained a timely direction of the attention of courts in cases turning on the identification of a suspect by a witness to the importance of careful assessment by trial judges of the reliability of the evidence of identification and equally careful direction of juries in their approach to that evidence. Experience prior to that decision had shown the risks attaching to acceptance of identification evidence, as evidenced by a number of cases in

which miscarriages of justice had occurred. The *Turnbull* judgment has led to the adoption of a substantially more critical evaluation of the testimony of witnesses who purport to identify suspects as the perpetrators of offences and the acceptance by trial judges and appellate courts of the need for abundant care in dealing with that testimony, most particularly where it is not corroborated by independent evidence. The present appeal provides yet another example of the difficulties which may be encountered in the course of a trial turning on identification.

2. The appellant Garnett Edwards was on 15 March 2002 convicted of the capital murder of Dougal Wright after a trial in the Home Circuit Court sitting at Kingston, Jamaica before Marsh J and a jury, and sentenced to death. His appeal against conviction was dismissed at the conclusion of the hearing on 25 June 2003 and the sentence was affirmed. The Court of Appeal set out its reasons in a written judgment given on 19 December 2003. Special leave to appeal as a poor person to the Privy Council was granted on 27 July 2004.

3. The fatal shooting took place on 13 February 1999 in a bar known as the Mango Tree Bar. Dougal Wright and Donovan Gilroy Bailey, the latter being then a police sergeant and at the time of trial an inspector, met on that date about 10.30 am in a store known as the Prepack Wholesale and Retail Establishment. Bailey was in plain clothes at the time and unarmed. The two men were friends of some years' standing and when they had made their purchases they adjourned to the Mango Tree Bar, which was across the road from the store. They entered the bar together and went up to the bar counter, where Wright ordered drinks. They were standing facing the counter, with Wright about two feet to Bailey's left, when Bailey heard a voice behind him say "Big man, give me what you have". He turned round suddenly and saw a man pointing a gun, which he described as a 9 mm pistol, at his chest. He held his hand in the air and replied "Me nuh have nutten". Bailey stated in evidence that he kept staring at the person, concentrating his focus on his face and chest region, down to the firearm. He said that he kept staring for a while at the man, who then said "Pussyhole, lif' up yuh shut." Bailey hesitated awhile, then instead of going towards his shirt made a slight movement to his left. He made a grab at the firearm, but missed, then heard an explosion and felt a burning sensation to the right side of his stomach. He held his side and ran outside and into the Prepack store, with blood running down his side. He was taken to hospital, where he underwent an emergency operation and was detained for a total of 31 days. Bailey said in

evidence that the time span of the whole incident was about two minutes and in cross-examination said that it had happened “within two minutes”. He stated that the time he focused on the man’s face was about one and a half minutes. These estimates were challenged in cross-examination and do appear to be unsustainably long.

4. The injury sustained by Bailey was a gunshot wound. The bullet entered the right upper quadrant of the abdomen at the midline, travelled through his body and exited through the back just over the right lateral aspect in the area of T10 to T12. It then entered Wright’s body in the right anterior chest, directed downwards, backward and to the left. It travelled through underlying tissues, the thoracic cavity, both lungs and the heart and lodged in the soft tissues over the left flank of the chest. The spent bullet was recovered at the post mortem examination, but could not be produced at trial and there was no evidence of its having been the subject of forensic examination. Death was as a result of this gunshot wound.

5. In the course of his examination in chief Bailey was asked about a statement which he gave to the police on 18 February 1999 while in hospital, and retailed to the court the description which he had then given of the man who shot him. He said:

“He is of a dark-brown complexion, low cut hair, clean face, oval shape face, average built, wearing a blue shirt, m’lord.  
The voice ordinary, not rough, not soft, but moderate, m’lord”.

He described him as about five feet six inches tall and about 23 years of age. He had never seen him before the time of the shooting. Bailey was unable to say, when asked in cross-examination, whether the man was wearing trousers or shorts or whether he wore shoes, but claimed that that was because he had been focusing on his face and upper body and not because the incident happened so quickly.

6. On 14 April 1999, some four weeks after his discharge from hospital, Bailey was driving his private car about 2 pm past the Mango Tree Bar. He saw a man standing in the vicinity of the bar and identified him as the man who had shot him on 13 February. He was about 22 yards away from Bailey when the latter first saw him. Bailey drove slowly past him, at a speed under 10 miles per hour, which he described as “barely crawling”, and stared straight at his face, coming within about ten feet as he passed him. He said that he had him in his view for a time in the region of two minutes. He was

bareheaded and was not wearing anything on his face. Bailey said in evidence that the only difference in the man's appearance since February was that his hair was a little taller.

7. Bailey kept driving along the road and saw a police vehicle at an intersection about 100 yards from the man. He signalled the driver to stop, told him what he had observed and pointed out the man, who was still standing in the same place. He then left and went on with his business, leaving the officers to deal with the situation. After completing his business he went home. About 4 pm that afternoon he received a telephone call asking him to go to Cross Roads police station. On arrival there he saw the same man, whom he identified in court as the appellant, sitting handcuffed on a bench in the guard room. He identified him to a police officer there, as the man whom he had seen earlier that afternoon outside the Mango Tree Bar. He said in the appellant's presence "This is the man that shot me in February", but did not recall the appellant making any response. He did not make an entry in the station diary, stating in evidence that that was only done by investigators and was not required of him.

8. Detective Sergeant Ebanks was called by the prosecution to deal with the investigation of the killing. He was called to the scene, where he found the deceased lying face down in a pool of blood. He did not find any spent shells at the scene. He recorded statements during that day, including one from the barmaid Miss Jennifer Smith, who subsequently died before trial on 14 October 2001.

9. DS Ebanks stated that on 15 February 1999 he received certain information in respect of the appellant Garnett Edwards, otherwise known as "Manbug". Based on this information he obtained and prepared a warrant for his arrest. The appellant's counsel cross-examined the witness in some detail on the warrant, apparently in order to establish a minor discrepancy between the evidence which he gave at trial and a statement made previously by him in which he referred to his source of knowledge being information and a statement. Counsel then asked for the warrant to be put in evidence and the judge accepted it. In re-examination Crown counsel asked the witness whether he had sought a statement from the person who gave him the information, to which he said that the person was not willing to come forward. No objection was taken to the admission of this evidence and the judge did not intervene to prevent its reception.

10. DS Ebanks arrested the appellant on 14 April 1999, cautioned him and told him that he had a warrant for his arrest for the murder of Mr Dougal Wright. The appellant replied "God know, mi nuh kill nobody", but made no other statement. The witness was asked in examination in chief whether he thought that it was necessary to have held an identification parade, to which he replied it was not, stating as his reason "the fact that the accused man was pointed out by Sergeant Bailey shortly after the incident was so fresh in his mind." He added in response to a further question that the main reason for holding a parade would be that the question of identity was not clear.

11. An application was made to the Board to admit the statement made by Jennifer Smith as fresh evidence. It was originally based on an averment that it had not been disclosed by the prosecution before trial, but correspondence was produced to the Board which referred to the sending of a copy on 28 March 2001 to the appellant's attorney who conducted his case at trial. Their Lordships nevertheless decided in the interests of justice to admit the statement in evidence. A photograph of the appellant taken on 15 March 2002 and an accompanying affidavit were also put before the Board without objection. The photograph showed what was described as a birthmark at the lower corner of his right eye, which was measured at between one and a half and two centimetres in length. It was stated in the affidavit to be a plain and obvious feature, clearly visible from a distance of ten feet.

12. In the statement Miss Smith stated that there were four other men, all of whom were known to her, in the bar at the time. It appeared from her account that the incident happened fairly quickly. She stated that she took an order for beer from Wright, when both he and Bailey were sitting on stools at the bar. She turned her back on the bar while she opened the cooler and took out the beer. She heard an explosion as she was taking out the second bottle and looked round. She did not see Wright or his companion on the stools, but saw a man standing at the entrance to the bar. The only description she was able to give of him was that he had a black complexion, and was about five feet five inches in height and of medium build. She could not describe his clothing and would not recognise him again. There was a discrepancy between Miss Smith's statement and Bailey's evidence, in that she described Wright and Bailey as sitting on bar stools, whereas in Bailey's account they were standing up. Moreover, she said that she saw a

police officer pick up a spent shell, whereas DS Ebanks had said that he did not pick up any shells.

13. No application appears to have been made to the judge at the close of the Crown case for a ruling that the appellant had no case to answer, and the trial proceeded. The appellant did not give sworn evidence or call any witnesses, but gave an unsworn statement from the dock, in which he denied any connection with the crime. He averred that he had been beaten by the police after his arrest and that although he had been informed that he would be going on an identity parade none was held.

14. In his summing-up to the jury the judge defined the crime of murder and stated (Record p 162):

“Now, in order to amount to murder, the killing must be the result of a deliberate and voluntary act, that is to say, it was not done by accident. Now, Mr Foreman and your members, where death results by an accident, it is no offence.”

He again said at page 169:

“The prosecution must also prove to you that the accused killed Mr Wright by a deliberate act, in other words, it was not accidental, it was intended ... So the prosecution must prove to you that the act was not involuntary, in other words that it was deliberately done.”

No application was made to the judge to leave to the jury the possibility that they might bring in a verdict of manslaughter, on the basis of causing death by an unlawful and dangerous act, nor did the judge advert to that possibility at any stage in his summing-up.

15. The judge gave the jury a direction on identification based on the *Turnbull* requirements, which it is necessary to quote in full (Record, pp 174-8):

“Now, Mr Foreman and your members, this is a case, or this is a trial where the case of the accused rests wholly on the correctness of the identification of him which the defence questions and alleges to be mistaken. Remember the suggestion that was made to Inspector Bailey, the only eyewitness in the case that he was honestly mistaken. I must

warn you of the special need for caution before you can convict the accused on reliance of the evidence of identification and that is because an honest witness can make a mistaken identification.

Mr Foreman and your members, it might be your experience that you may know somebody very well and you saw somebody and you called to them thinking it's the person who you know very well and it turns out to be somebody else. So, you must remember Mr Foreman and your members, that a most convincing witness can be honestly mistaken so you therefore look at the circumstances in which the witness purports to identify the accused. How long did he have to observe the person whom he say was the accused? How far away was he from the accused when he purports to identify him? What was the nature of the lighting? Was there anything that would interfere with that observation? Was there anything on the accused man's head? Anything on the accused man's face which would have made identification difficult or not possible? How long was it between the original observation and the identification to the police? Was there any marked difference between the description given by the witness to the police and the appearance of the defendant? And, you should also look at any specific weakness which may exist in the evidence which the prosecution seeks to bring before you as evidence of identification. And are those – and I will go straight, Mr Foreman and your members, to Inspector Donovan Bailey. Inspector Bailey tells us that this incident took place a little after – 10.30 in the morning, in February, and he says that the light in the morning, and I would like to use his words 'was clear.'

Remember he tells us that when he heard the voice behind him, saying, "Big man, give me what you have," he spun around and he saw the accused man pointing a firearm at him. He says, the accused man was about two arm's length from him and he said he kept staring at the person.

Now, Mr Foreman and your members, this is the witness who up the thirteenth of February, 1999, had in excess of 28 years service as a policeman or so he said. He said that he kept staring at the accused man for a while and it was, and that the

accused man said, "Pussy hole, lift up your shirt." He said he hesitated and instead of going towards his shirt he said he made a slight movement to the left.

Now, Mr Foreman and your members, you remember in cross-examination yesterday that the Inspector was asked to use the clock and to indicate by the clock exactly what took place in relation to time, but Mr Foreman and your members, that is essentially a matter for you, but you will think that the witness could repeat exactly what is alleged to have taken place that morning in regards to time but when it comes to time, what did he say? He said the incident took place and lasted for about two minutes and he was asked a direct question as to how long of that two minutes did he see the accused man's face? He said for about one and a half minutes. He was asked questions in cross-examination about what clothes the man was wearing, he said the whether the man was wearing trousers or shorts and his reply was that his attention was directed to the man from the gun up, not below that. So, Mr Foreman and your members that is a matter for you. What you will make of the evidence. Is he a witness who is honest mistaken? Because, it is going to be your responsibility to ask yourselves the question, 'Am I satisfied beyond a reasonable doubt that the identification of the accused man is a correct identification?'

Because very candidly Inspector Bailey agree that he was frightened and it would and extremely unusual if somebody goes shopping on a particular day is about to have a drink with a friend, hears a voice, turns around only to find that he is facing a firearm; not to be frightened, but he said he was frightened because the fact that he was frightened did not hamper his ability to honestly and accurately identify the accused? That is a matter for you."

Their Lordships will return later to consideration of the terms of this direction, but the burden of the complaint made on behalf of the appellant was that while it correctly set out the proper approach to the consideration of identification evidence, it fell short of giving the jury sufficient assistance in analysing the evidence and relating it to the principles expressed.