Privy Council Appeal No. 64 of 1998

(1) Irvin Goldson and (2) Devon McGlashan *Appellants*

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 23rd March 2000

Present at the hearing:-

Lord Nicholls of Birkenhead
Lord Mackay of Clashfern
Lord Hoffmann
Lord Clyde
Sir Patrick Russell

*[Delivered by **Lord Hoffmann**]*

In the early hours of 10th April 1993, Miss Claudette Bernard woke up to find three gunmen standing by her bed. She lived in a two-room apartment in a tenement yard on Banana Street, Franklyn Town, Kingston 16. Her boyfriend Donovan Guthrie, who lived near Walham Park Road, was staying the night and slept next to her. One of the men, holding a short gun, said "Who is you?". She replied "I am Claudette and my boyfriend from off the Waltham Park Area". The man then shot her in the face. The bullet shattered her jaw but she remained conscious. She lay pretending to be dead and while her eyes were shut she heard several more shots. When the gunmen had left she opened her eyes and saw that Donovan was dead.

Claudette was taken to hospital and given emergency treatment to her jaw. The doctors wired her teeth together so that she could not open her mouth to speak to the police
[9] when they came to see her. But she wrote down some

names on a piece of paper. There is no direct evidence of which names she wrote, because a misguided concern for the hearsay rule seems to have inhibited the prosecution from leading evidence on the point or producing the paper. But the names can be inferred from a statement she made on 17th April 1993 after her discharge from hospital. She identified the gunmen as people known to her by the names Sector, Yoogie and Marlon. The police set about looking for people known by these names.

On 27th May 1993 Detective Inspector Rowe, the police officer in charge of the investigation, went to the University Hospital, where Devon McGlashan was recovering from injuries received in a recent shooting incident. According to the Inspector's evidence, another officer had told him that McGlashan was Sector but when he put this to him at the hospital, McGlashan replied that his name was Peter Phillips. Mr. Rowe nevertheless had him placed under police guard and subsequently taken to the police station, where he was arrested and charged with the murder of Donovan Guthrie and the shooting of Claudette Bernard. Under caution, McGlashan said "you and mi lawyer will talk". Irvin Goldson, who was alleged to be Yoogie, was arrested in August 1993 and similarly charged. There was no evidence that he said anything at the time.

On 24th November 1993 a preliminary examination was opened in the Resident Magistrate's Division of the Gun Court against McGlashan and Goldson on a charge of murdering Donovan Guthrie. Claudette Bernard gave evidence. She said that she had known Sector for about three years and Yoogie for fifteen years. There had been no identification parade and she identified the men she said were Sector and Yoogie by pointing at McGlashan and Goldson in the dock. There was no objection to this evidence. She was cross-examined by counsel for the accused, who put it to her that she was called "Cock up" (which she accepted) and that she was a prostitute (which she denied).

After the preliminary examination, the police arrested three other men who were alleged to have been accomplices to the murder although not participants in the shooting. The man whom Claudette Bernard identified as Marlon was thought to have died during the investigation.

So eventually on 20th February 1996 McGlashan, Goldson and the three other men stood trial for the murder of Donovan Guthrie in the Gun Court before Clarke J. and a jury.

Claudette Barnard was the only witness to connect McGlashan and Goldson with the murder. So everything turned on the correctness of her identification. Again she identified McGlashan and Goldson as Sector and Yoogie by pointing to them in the dock. She said, as at the preliminary examination, that she had known them for 3 and 15 years respectively. But she went into more detail about the nature of her acquaintance with them. She had seen Sector two or three times a week on the streets, outside her house or from her mother's house in nearby McIntyre Villas. She knew that his girlfriend's name was Ginger. But she had spoken to him only once. The last time she had seen him before the murder was the afternoon of the previous day. Yoogie was not around as often as Sector but she had known him much longer. They grew up in the same Franklyn Town community. She knew that he lived on Somerset Street and his mother was a Miss Tulloch.

In cross-examination, McGlashan's counsel put to her that she did not know him at all. He was not called Sector and if she knew someone called Sector, he must be someone else. Claudette insisted that she knew Sector well and that he was the man in the dock. In cross-examination of Detective Inspector Rowe, counsel asked whether he had not told McGlashan that he would put him on an identification parade. The Inspector denied it. Goldson's counsel did not challenge Claudette's evidence that she knew him well.

After the prosecution evidence, counsel for both McGlashan and Goldson submitted that there was no case to answer. The identification evidence was too weak. McGlashan's counsel drew attention to the gunman's inquiry about who Claudette was. Why should he have asked such a question if they were already known to each other? Counsel also said that the prosecution should have held an identification parade. Goldson's counsel, on the other hand, accepted that Claudette knew him and that the question was whether she had recognised him in the room. The judge overruled both submissions. McGlashan then

gave evidence under oath. He said that he did not know Claudette Bernard or anything whatever about the area in which she lived. He had no girlfriend called Ginger. He knew none of the other accused. He spent the night of the murder with his girlfriend Novelette and her aunt, watching television. He did not call either of them to give evidence in support of the alibi. Goldson elected not to give or call evidence but made a statement from the dock. He said that his pet name was Big Head. He had never seen Claudette until the day of the preliminary examination and had spent the night of the murder at home with his little nephew.

In summing up, the judge gave the jury a careful warning about the dangers of identification evidence. He reminded the jury that Claudette's honesty had been put in issue. The accused had made a general attack on her credibility and said that she was not telling the truth when she said she knew them well. He mentioned the matters which might assist the jury to determine her credibility. He then gave the standard warning that even if they found her to be an honest witness, she might still be mistaken in her recognition. But he gave the jury no specific instruction on the significance of the absence of identification parades.

The jury convicted both McGlashan and Goldson of capital murder and they were sentenced to death. Both appealed to the Court of Appeal, both against conviction and the classification of the offence as capital. The grounds of appeal against conviction included complaints that the judge should have upheld the submission of no case to answer and that his directions on visual identification evidence were insufficient. But nothing was said of the absence of identification parades. Their Lordships will return later to the question of classification. On 27th October 1997 the Court of Appeal dismissed both appeals and confirmed the classification and sentences.

On appeal to their Lordships' Board, Mr. Thornton Q.C., dealing first with the appeals against conviction, placed in the forefront of his argument the fact that there had been no identification parade. He accepted that if the accused is accepted to be a person well known to the identifying witness, no parade need be held. The witness will naturally pick out the person whom he knows and whom he believes that he saw commit the crime. In fact,

the evidence of the parade might mislead the jury into thinking that it somehow confirmed the identification, whereas all that it would confirm was the undisputed fact that the witness knew the accused. It would not in any way lessen the danger that the witness might have been mistaken in thinking that the accused was the person who committed the crime.

But Mr. Thornton said that in the present case, the fact that Claudette knew McGlashan and Goldson was in dispute. McGlashan made it clear from the outset, through his counsel's cross-examination of Claudette, that he denied that he was the person she knew as Sector. And although Goldson does not appear to have instructed his counsel to put forward a similar denial, he did so in his statement from the dock. The truth of this issue could have been tested by an identification parade. If Claudette had failed to pick out the accused on the parade, her assertion that the accused were known to her would have been shown to be false. By not holding identification parades, the police had denied the accused an opportunity to demonstrate conclusively that she was not telling the truth. On the other hand, if she had picked them out, the prosecution case would have been strengthened, although the judge would have had to direct the jury that the evidence went only to support her claim that she knew them and did not in any way confirm her identification of the gunmen.

There is no dispute that if an identifying witness has not made a previous identification of the accused, a dock identification is unsatisfactory and ought not to be allowed. Unless the witness had provided the police with a complete identification by name or description, so as to enable the police to take the accused into custody, the previous identification should take the form of an identification parade. On the other hand, Mr. Thornton accepts that if the accused is well known to the witness, an identification parade is unnecessary and could, for the reasons already given, be positively misleading. In the present case, however, the question of whether the identification fell into the one class or the other was itself a question in dispute. Mr. Thornton says, rightly, that an identification parade would have helped to resolve this dispute. It does not however follow that the absence of a parade has resulted in

a serious failure of justice so as to require the intervention of the Privy Council.

The normal function of an identification parade is to test the accuracy of the witness's recollection of the person whom he says he saw commit the offence. Although, as experience has shown, it is not by any means a complete safeguard against error, it is at least less likely to be mistaken than a dock identification. But an identification parade in the present case would have been for an altogether different purpose. It would have been to test the honesty of Claudette Bernard's assertion that she knew the accused. It is of course true that even if her evidence about knowing them had been truthful, she might still have been mistaken in identifying them as the gunmen. But, as Lord Devlin remarked in his *Report to the Secretary of State for the Home Department of the Departmental Committee on Evidence of Identification in Criminal Cases* (26th April 1976) (at page 99 para. 4.96), that is "not a claim that could be tested by a parade".

In England, the obligations of the police to hold identification parades are contained in a Code of Practice issued by the Home Secretary pursuant to section 66 of the Criminal Evidence Act 1984. The language of the Code is not for present purposes material, because there is no similar code in Jamaica, but its effect was summed up by Hobhouse L.J. in *Reg. v. Popat* [1998] 2 Cr.App.R. 208, 215 by saying "There ought to be an identification parade where it would serve a useful purpose".

Their Lordships will give two English examples of this principle being applied in cases in which there was, as here, a dispute over whether the accused was in fact a person known, or sufficiently known, to the witness. The first is *Reg. v. Conway* (1990) 91 Cr.App.R. 143. The accused was charged with stabbing a man outside the flat where the victim lived with his woman friend and her 15 year old son. Seeing the accused from behind immediately before the incident, the woman had said to the victim that she did not know him. Afterwards, she said that she knew him, had seen him in a public house and had entertained him to dinner but had not wanted the victim to know about their acquaintance. Her son also said that he knew him in the same way. They did not know his name, where he lived or, as the Court of Appeal later said, anything of

importance about him. Before the preliminary hearing in the magistrates' court, the accused's solicitors wrote to the Crown Prosecution Service saying that their client denied that either witness knew him and requested an identification parade. They added "Obviously, if there is not an identification parade, we will be objecting to any form of dock ID". No parade was held despite a specific provision in the then Code of Practice for the Identification of Persons by Police Officers which said "In a case which involves disputed identification evidence a parade must be held if the suspect asks for one and it is practicable to hold one". The witnesses made dock identifications at the committal proceedings and at the trial. The Court of Appeal held that the judge should have stopped the case because the identification evidence was too tenuous and because there had been a breach of the Code. Even if he had allowed the case to go to the jury, he should have pointed out the provisions of the Code and the consequent prejudice to the accused.

The other case is *Reg. v. Fergus* [1992] Crim.L.R. 363 in which there had been no identification parade although the witness claimed only to have seen the accused once and heard his name from someone else. The Court said that "The case where the complainant had seen the assailant only once or on a few occasions before might well be treated as that of identification rather than recognition". An identification parade should have been held and the dock identification made the verdict of guilty unsafe and unsatisfactory.

Their Lordships consider that the principle stated by Hobhouse L.J. in *Reg. v. Popat* [1998] 2 Cr.App.R. 208, 215, that in cases of disputed identification "there ought to be an identification parade where it would serve a useful purpose", is one which ought to be followed. It follows that, at any rate in a capital case such as this, it would have been good practice for the police to have held an identification parade unless it was clear that there was no point in doing so. This would have been the case if it was accepted, or incapable of serious dispute, that the accused were known to the identification witness. At least in the case of McGlashan, that does not appear to have been the position here.

But the question is, as their Lordships have said, whether the failure to hold a parade has caused a serious miscarriage of justice. In *Reg. v. Conway (supra)* and *Reg. v. Fergus (supra)* the convictions were set aside as unsafe and unsatisfactory because, in the absence of a parade, the evidence of identification adduced by the prosecution was too weak to support a conviction. In *Conway* the previous acquaintanceship claimed by the witnesses was relatively slight and even its credibility was impaired by the woman's initial denial that she knew the man at all. In *Fergus* the claimed previous knowledge was very slight indeed. Furthermore, in *Conway* the accused had, with the backing of the Code, requested an identification parade and it had been refused.

By contrast, in the present case their Lordships are in no position to say that the evidence of identification was weak. If Claudette Bernard was a credible witness, it was sufficient to support a conviction. The issue of credibility, as between Claudette and the accused, was left to the jury with appropriate directions and they clearly believed Claudette. They may have had ample justification for doing so. Their Lordships are handicapped in forming a view on the matter because not only did they not see the witnesses but, this point not having been taken in the Court of Appeal, they do not have the assistance of a court with local knowledge. So, for example, McGlashan was cross-examined at some length, and, it may be, to considerable effect with the jury, in order to show that his denial of any knowledge of the Franklyn Town area was incredible. Similarly, Claudette Bernard's claim to previous knowledge of the accused as people she had seen on the streets must be assessed against a knowledge of street life in East Kingston which their Lordships lack.

Furthermore, the accused made no request for an identification parade. Both had been told that they had been arrested in connection with the murder of Donovan Guthrie and "the shooting of Claudette Bernard". It must have been obvious that she would be the principal witness for the prosecution. But there was no request and no objection to the dock identification at the preliminary examination. The position is therefore that although one may speculate about the possibility that a parade would have destroyed the prosecution's case (as one may about any other evidence which might have been available to

damage the credibility of a prosecution witness) it is not possible to say that the absence of a parade made the trial unfair. The judge was entitled to leave the question of credibility to the jury on the evidence before them. And once she was accepted as a credible witness, no criticism was or could be made of the judge's directions that the jury were to be careful about accepting her evidence that they were the gunmen.

Mr. Thornton submitted that the judge should have given the jury a specific direction about the absence of an identification parade and the dangers of a dock identification. But their Lordships consider that in the present case such directions were unnecessary. The judge told the jury that they should first consider whether Claudette Bernard was a credible witness. If they thought she was lying, the accused had to be acquitted. This appears to their Lordships to be sufficient, because if she was not lying, it would follow that there had been no need for an identification parade and the dock identification would have been the purely formal confirmation that the men she knew were the men in the dock. The appeal against the convictions must therefore fail.

Their Lordships turn next to the question of classification. The definition of capital murder in section 2(1) of the Offences Against the Person (Amendment) Act 1992 is, so far as relevant, as follows:-

> "(d) any murder committed by a person in the course or furtherance of ... (ii) burglary ...."

This is subject to the qualification in section 2(2) that:-

> "If ... two or more persons are guilty of [a murder falling within section 2(1)] it shall be capital murder in the case of any of them who by his own act caused the death of, or inflicted or attempted to inflict grievous bodily harm on, the person murdered, or who himself used violence on that person in the course or furtherance of an attack on that person; but the murder shall not be capital murder in the case of any other of the persons guilty of it."

There is now no dispute that the murder was committed in the course of a burglary, which is defined in section 39 of the Larceny Act as breaking and entering a dwelling

house by night with intent to commit a felony therein. But the judge gave the jury no direction on the application of section 2(2) to the facts before them. The Court of Appeal accepted that this was a misdirection but considered that there was sufficient evidence to enable them to apply the proviso. The first reason was that the three men had "used violence" on the deceased because, on any view, they had committed an assault upon him by making a hostile intrusion into the room in which he and Claudette were sleeping and putting them in apprehension of injury. The Court did not at the time have the advantage of the decision of the Board in *Daley v. The Queen* [1998] 1 W.L.R. 494, which interpreted the words "used violence" to mean that there must have been some physical contact with the victim. The first reason given by the Court of Appeal is therefore no longer sufficient. The second reason was that the medical evidence of the bullet wounds in the deceased and the spent cartridges on the floor, together with Claudette Bernard's evidence of the type of guns carried by the accused, made it clear that they must each have shot at the deceased and thereby caused his death or, at the lowest, used violence upon him.

Claudette Bernard spoke of the gunmen carrying long and short guns. The evidence of the cartridges and wounds showed that a gun of each kind had been discharged more than once and had caused wounds to the deceased. But the evidence as to who carried which guns was less clear. Claudette said that she was shot by a short gun carried by McGlashan. She said in her evidence in chief that Yoogie had a long gun and that Marlon had a short gun. If this was the case, it follows that the medical and cartridge evidence cannot establish that Sector fired any shot at the deceased. All the shots from a short gun may have come from Marlon. The fact that Sector fired at Claudette is irrelevant because section 2(2) requires that the death, harm or violence should have been inflicted on the person murdered. But the matter does not stop there, because Claudette had said at the preliminary examination that she saw two long guns and one short gun. Cross-examined on this statement by counsel for McGlashan, she said (Record, p. 92): "Yes, ... I saw two long guns and a short gun". The contradiction was not touched upon in re-examination. It is however of great importance, because if there were two long guns, presumably carried by Goldson and Marlon, it cannot be said with certainty that the shots

from a long gun were attributable to Goldson. In this state of the evidence, their Lordships do not think that it was possible to apply the proviso. It is impossible to say how the jury, if instructed on the point, would have resolved the question of who carried what kind of gun and in the absence of a determination on that point, it is impossible to say of any of the men in the room, with the necessary degree of certainty, that he must have fired a shot at the deceased.

Their Lordships will therefore humbly advise Her Majesty that the appeals should be allowed to the extent of substituting verdicts of non-capital murder for the verdicts of capital murder but should otherwise be dismissed and that the question of sentence should be remitted to the Court of Appeal.