

Original

Privy Council Appeal No. 13 of 1996

Richard Hall

Appellant

v.

The Queen

Respondent

FROM

THE COURT OF APPEAL OF JAMAICA

REASONS FOR REPORT OF THE LORDS OF THE
JUDICIAL COMMITTEE OF THE PRIVY COUNCIL,
OF THE 29th October 1997, Delivered the
Monday, 15th December 1997

Present at the hearing:-

Lord Browne-Wilkinson
Lord Hoffmann
Lord Hutton
Sir Andrew Leggatt
Mr. Justice Gault

[Delivered by Lord Hutton]

In the early hours of the morning of 8th February 1991 about 2.00 a.m. Charles Woolery was shot in the chest in the presence of his wife, Mrs. Ruby Woolery, in the bedroom of their home in St. Catherine, Spanish Town, Jamaica by a robber armed with a gun. Mr. Woolery was taken to the Spanish Town hospital where he died on 12th February 1991. On 9th March 1992 after a trial in the Circuit Court Division of the Gun Court at Kingston before Cooke J. and a jury the appellant was convicted of the murder of Mr. Woolery and was sentenced to death. On 12th May 1993 the Court of Appeal of Jamaica dismissed the appellant's application for leave to appeal against his conviction. The present appeal by special leave to their Lordships' Board is against the decision of the Court of Appeal. At the conclusion of the hearing their Lordships agreed humbly to advise Her Majesty that the appeal ought to be dismissed for reasons to be given later. Their Lordships' reasons now follow.

The evidence of Mrs. Woolery.

At the trial the only evidence linking the appellant with the shooting was the identification evidence of Mrs. Woolery and there was no other evidence corroborating or supporting it. Her evidence may be summarised as follows. At the time of the trial she was aged 64. On the morning of 8th February 1991 about 2.00 a.m. she was in bed with her husband, Charles Woolery, in their house in St. Catherine when she heard a stone flung onto the roof of the house. The door into the bedroom was being kicked down and her husband went and braced the door. A gun went off and her husband dropped to the ground. A man burst in through the door, he was the defendant in the court. He had a gun and a yellow and black flashlight in his hand. The man called to his friends to come, there was "just one little old man and one little old woman". Three men came into the house. The man told her to lie down but she lay down on her back on the bed. The man searched everywhere in her bedroom. Her room and her grand-daughter's room opened into one another and her grand-daughter's room faced her room. The man who first came through the door into her room, after he had searched it, went into her grand-daughter's room and searched everything in the wardrobe. She could see him in her grand-daughter's room because the light was on. The men spent about half an hour between her room and her grand-daughter's room. After the first man had searched her grand-daughter's room he went into her son's room. After he went into her son's room she got up and her husband was there crying for help. After the men went into her son's room she did not see them go anywhere else until they left the house. After the men had left she called for help and her husband was taken to Spanish Town hospital. At the hospital she made a report to the police and gave a description of the men who came in but in cross-examination she said that at the hospital the police did not take down what she told them. She was able to see the first man who came into her bedroom through the door as her husband had turned the light on when they heard the stone flung on the house top. The light was a plain bulb in the flat roof.

Mrs. Woolery was asked by Crown counsel what was the closest the first man came to her during the quarter of an hour he searched her room, and she replied:-

"Him come close to me and bounce me and tell me must get up off the bed so he must look under the mattress."

Crown counsel then asked her:-

"Mrs. Woolery, what part of the accused man did you see which enabled you to identify him subsequently?"

Mrs. Woolery's answer was:-

"Just take a good look at his face with that big wide open cut on his jaw, is like a scar there, but you see how it big, open wide, look at his nose if he could miss you a second time; couldn't miss you; just take a good look and see if he could miss you a second time."

Mrs. Woolery said that when the first man went into her grand-daughter's room she could see him from top to bottom, she could see the whole of him, because where he was in the wardrobe in her grand-daughter's room, you could stay in her room and see every earthly thing, his clothes, everything that he had on, she could describe it. When he was in her grand-daughter's room he was about seven feet away from her.

When the first man went into her son's room she got up and went to the door between her room and her son's room. When the man was in her son's room she saw his face, the whole of him. When he was in her son's room he was about fifteen feet away from her. She was looking into her son's room, she was peeping, to see if they had gone so that she could go and help her husband. She had not known any of these men. Her husband died after four days on the 12th.

On 31st July 1991 she attended an identification parade at the Hunts Bay Police Station. She there identified Number 7 and Number 7 was the person in court.

In cross-examination Mrs. Woolery said that she was very shocked and frightened by what happened on that morning. The stone was flung onto her roof by her neighbour to let her know that a thief was about. The other people in her house that night were her son aged 22, her grand-daughter aged 10 and Miss Evette Johnson who could be aged about 20 to 30.

When her husband fell in front of the door she could see the blood spewing. She was concerned for her husband. When asked if she was frightened she replied: "Frightened a little, but not so much". She was worried about her husband.

The first man called in other men. Two more men came in, making three men in all.

She was crying and frightened and upset at everything that had taken place. She was crying whilst she was on the bed. All three men had guns.

Her grand-daughter was crying. She took her into her room and onto the bed and was trying to comfort her. They were both crying. Miss Johnson and her grand-daughter slept together in her grand-daughter's room and one of the men took Miss Johnson outside to rape her through a door leading to the outside from her grand-daughter's room.

The men took her son out of his room and made him lie down in her grand-daughter's room, and then when they were going to search his room they took him back to his room when they were going to search it.

Mrs. Woolery was then cross-examined about her wearing glasses as follows:-

"Q. I notice you didn't read the oath this morning, you wear glasses?

A. Yes please, but ...

Q. The reason you couldn't read the oath this morning was because you didn't have on your glasses, is that correct?

A. Can be.

Q. Is that true or not.

A. Yes, because I did, I cannot see without the glasses, on the night the glasses break when they were in the house.

Q. Your glasses broke the night when they were in the house?

A. Yes.

HIS LORDSHIP: So you had your glasses with you at that time?

WITNESS: I don't have any glass.

HIS LORDSHIP: What is that?

WITNESS: My wallet.

Q. But you normally wear the glasses?

A. Yes, sir.

Q. And you couldn't take the oath, you couldn't read it because you didn't have the glasses with you?

A. Yes."

Mrs. Woolery agreed to a suggestion put to her by defence counsel that at the identification parade she walked up and down the line at least seven times. When defence counsel asked her whether in her statement to the police she mentioned the man's big flat nose, she replied: "Of course". The relevant section of a written statement which she had made to the police on 26th April 1991 was then read to her and the trial judge put the question to her:-

"In the written statement, you didn't tell the police about the big, flat nose?"

Mrs. Woolery answered: "No, but ...", and it appears that Mrs. Woolery was not permitted to complete her answer because defence counsel intervened with a question on a different point. At the conclusion of the cross-examination defence counsel put it to Mrs. Woolery that she was making a mistake when she said that she saw the defendant at her house that night in February and she replied:-

"No, not making any mistake, certain, certain I saw him and anyone of them who come in a the house."

In re-examination Mrs. Woolery was asked if there was any reason in particular why she walked up and down the line seven times and she replied:-

"Just to make certain, because I didn't want to make any mistake, I saw him from the first time I go there, but to be certain, I go up the line just to know that a hit the right person."

Mrs. Woolery's report to the police at Spanish Town Hospital on 8th February 1991

Detective Corporal Evarad O'Neil gave evidence that on 8th February 1991 he spoke to Mrs. Ruby Woolery at Spanish Town Hospital. She made a report to him and in the report she gave descriptions of the men who came into her house, but he did not collect a statement from her at that time.

The Identification Parade.

Sergeant Beverly Regent gave evidence of the organisation of the identification parade which took place on 31st July 1991 and of the identification of the accused made at that parade by Mrs. Woolery. Sergeant Regent said that prior to the identification parade she noticed that the accused had a scar on his right cheek and that his nose was very noticeable and distinctive. Therefore amongst the other men she selected for the parade she included four men with scars and four men with pronounced noses, three of whom had scars.

The identification parade took place in the presence of a Justice of the Peace. There were numberings on the wall from one to nine and the suspect elected to stand at Number 7. She asked him if he was satisfied with the formation of the parade and he said he was. When Mrs. Woolery was brought into the identification parade, she went up the line and then she went down the line and then she went up the line again, and she then asked all the men to look to the left, which the men did, and Mrs. Woolery then said loudly: "A number seven kill me husband". After Mrs. Woolery had left Sergeant Regent spoke to the accused and asked him if he was satisfied as to how the parade was held and he said: "Me have nothing fe say".

In cross-examination Sergeant Regent said that another parade had been held on that day in which the accused had taken part. Mrs. Woolery's son had come to view that parade but he had not made any identification.

In the course of the hearing of the appeal counsel for the respondent, with the consent of counsel for the appellant, furnished to their Lordships a photograph of the appellant, and it is apparent from that photograph that the appellant has a very noticeable large, flat, nose.

The defence case.

The appellant did not give evidence from the witness box in his own defence and called no witnesses. He made a statement from the dock which consisted of two short sentences: "My Lord, I am innocent of this crime. I am innocent, my Lord".

The police statements of Mrs. Woolery and her son, Noel Woolery.

(A considerable part of the submissions of the appellant to their Lordships related to the failure of the prosecution to disclose or to disclose fully to the defence the statements of Mrs. Woolery and her son, Noel Woolery, before or during the trial.) Therefore it is convenient at this point in the judgment to set out those statements. They were not disclosed or fully disclosed until proceedings had been commenced in the Privy Council.

The written statement of Mrs. Woolery made to the police on 26th April 1991 was as follows:-

"I am a housewife 62 years old and living at Irish Pen District in the Parish of Saint Catherine.

The deceased Charles Woolery was my husband. He was a 82 years old pensioner. We lived at the above address with my son, Noel Woolery, my Granddaughter Stacey-Ann Woolery who is ten (10) years old and a lady by the name Yvette Johnson.

We occupied a four apartment house. This house is constructed of concrete with glass louvre windows and wooden doors.

On Friday the 8th February 1991 at about 2 am I was awoken from my sleep by the sound of stones hitting on the roof of my house. On hearing the noise my husband got up and went and turned off the lights. I heard footsteps outside and told my husband that someone was outside.

Shortly after I heard kicking on the front door that lead to my bedroom. My husband went and braced against the door which was half open as a result of the kicking. While he was bracing the door I heard an explosion like a gunshot and my husband fell to the ground. I shouted for thief and help.

I saw a man came into the room with a shotgun and a flash-light in his hand. The electric light was still on in the room. The man said, 'unoo come man a wha old man and woman in a the room'. Two other men came into the room one of them had a shotgun in his

hand. They told me to lie down on the bed, but I refused and remained sitting on the bed. I continued shouting for thief and help.

The men asked me for money. I told them that we are pensioners and we have no money. They started to search the room.

While they were searching the room I forced open Miss Johnson's room and ran into it. The man came into Miss Johnson's room with the flashlight and searched the room. They took off Miss Johnson's ring off her finger and took some money out of my husband jacket pocket.

The man without gun took Miss Johnson outside. The other two men went into my son room. After about an hour at the house the men left and went away.

I noticed that my husband was bleeding from a wound to the left side of his chest. We took him to Spanish Town Hospital where he was admitted.

The men took the following items from the house Cash \$350.00 and one pants for my son.

The first man who came into my room is of light black complexion medium built about 5ft 7-8" tall. He had a open scar on one side of his face. He was wearing a brown pant and red and blue wind-breaker.

The other man is of black complexion slim built about 5ft 10-11" tall. He was wearing brown pant. He has only three fingers on one of his hands.

The other man is of black complexion medium built about 5ft 7" tall. He had hair style. He was wearing black pant and shirt.

If I should see any of these men again I will be able to identify them.

On the 12th February 1991 my husband died in the Hospital.

On Friday the 26.04.91 about 10.30 am I gave this statement to the Police at the Spanish Town Police Station. It was read over to me and I signed same as been true and correct."

The written statement which Noel Woolery made to the police is undated but appears to have been made on the morning of 8th February 1991, and was as follows:-

"I am a woodworker aged 25, and I am residing at 116 Brunswick Ave, Spanish Town in the Parish St. Catherine.

I live at this address with my father, mother and niece, my father name is Charles.

On Friday the 8th day of February 1991 at about 2 am I was at home sleeping when I was awakened by stones been thrown on the house top. My room is at the back of the house, and my parents room is at the front.

Suddenly I heard when the front door kicked open, and I heard strange voices in my parents room, I also heard my parents crying out for thief. Same time I got up and ran around to my parents room. I heard a gunshot in the room.

Suddenly I was confronted by a strange man who pointed a gun at me and told me to lie down on the ground.

I lie down on the ground, and three other men joined the first man and they all started to beat me with their guns. All of them were armed with hand guns.

The men then took me into my parents room, I then realised that my father was shot and he was bleeding from a gunshot wound on his right shoulder.

The men ordered me to lie down on the floor, while they ransacked the room. They put all of us on the floor, to lie down. At one stage my mother tried to get up and one of the men pointed the gun at her but it did not go off. They asked my parents for money. They then took a double deck tape recorder, our electric fan, and some money. They then took me

over into my room and they searched up my room, and took a sheet, one jeans pants, four bath soaps, and two family size Colgate tooth paste. I value these things for about \$350.00.

After the men took the things they came out of the room and went away.

I went back in my parents room, and my father and mother told me that one of the men shot him. We took our father to the Spanish Town Hospital where he was admitted.

The description of the men are as follows.

The first man is of a dark complexion, medium built, about five feet five inches tall about twenty four years old, he was wearing blue sweat suit top with red stripe on sleeve he tied his head with a red handkerchief. The second man is of brown complexion slim built, about five feet eleven inches he seems to be about twenty seven years old, he was wearing a black shirt and white British Knight shoes. The third man is of dark complexion, medium built, about twenty five years old, he was wearing black clothes and British Knight shoes. He like the others had a red kerchief tied around his head. The fourth man is of dark complexion slim built about twenty one years old he is about twenty four years old. If I see them again I will be able to identify them.

That same morning a report was made to the Police at Spanish Town Station, and I gave this statement which was read over to me and I sign my name to it as true and correct."

The grounds of appeal advanced to the Court of Appeal.

Two grounds of appeal were advanced to the Court of Appeal. The principal point in the first ground was stated as follows in the notice of appeal:-

"That the learned trial judge erred in that he failed to direct the jury fairly and or adequately on the crucial matter of visual identification and in particular on (a) the singularly, most important and fundamental factor of such identification namely the physical capacity of

the eye-witness to see at all or to see sufficiently acutely so that they could be sure that she was not making an honest mistake; this factor of her capacity to see being raised as a live and crucial issue by the absence of her glasses at the very time of the identification. He also in addition failed to explain the significance of this mutual weakness to the jury."

This ground was rejected by the Court of Appeal and the court stated:-

"It is plain that the only significance of this evidence is that it proved that the witness was not able to read without her glasses. It is not capable of showing anything else. It is true that the witness was over 60 years of age at the time, but counsel at the trial did not probe further to ascertain whether her vision was so impaired that she needed glasses to be able to see at all times, and certainly the jury should not be invited to speculate on the matter. In light of the evidence which clearly showed she was not wearing glasses when she pointed out the applicant on the identification parade, counsel may well have thought it wise not to pursue the matter any further than he did."

The Court of Appeal then referred to the portion of the trial judge's summing up in which he dealt with this matter at some length. The Court of Appeal then stated:-

"In our view, the directions of the learned judge on this issue were fair and adequate, and the jury could have no doubt as to the significance of the evidence. Accordingly, we find that the complaint is not well-founded."

Their Lordships are of opinion that there was no error in the ruling of the Court of Appeal on this point.

The second ground of appeal was based on the point that although the trial judge reminded the jury that in her written police statement on 26th April 1991 Mrs. Woolery made no mention of the distinctive nose of the appellant, a facial feature upon which she placed considerable emphasis in her evidence, he did not place sufficient emphasis on this discrepancy and bring it sufficiently to the attention of the jury. Their Lordships would observe that before the Court of Appeal the appellant also claimed that in her written

statement Mrs. Woolery failed to refer to the scar on the face of the first man, but this claim is incorrect because in her statement Mrs. Woolery said in relation to the first man: "He had a open scar on one side of his face". The Court of Appeal rejected this ground on the basis that Mrs. Woolery may have referred to the distinctive nose in the oral report which she made to the police at the hospital a few hours after the shooting of her husband, and the Court of Appeal stated:-

"However, the evidence of the oral description was never probed by counsel who appeared at the trial, as it was open for him to do, and consequently, learned counsel candidly admitted that its significance had grown pale and was of little value."

Their Lordships are also of opinion that there was no error in the decision of the Court of Appeal on this ground of appeal.

The additional grounds of appeal relied on before the Privy Council.

1. At the conclusion of the Crown case in the trial Mr. Manley, counsel for the appellant, made an application to the trial judge that because of the poor quality of the evidence relied on by the Crown he should withdraw the case from the jury and direct an acquittal. The judge rejected this application without calling on Crown counsel and made the succinct ruling: "There is a case to answer". The application and the ruling were made in the presence of the jury.

The trial of the appellant took place before this Board had given judgment in *Crosdale v. The Queen* [1995] 1 W.L.R. 864 in which it held that in Jamaica, as in England, the trial judge, save in exceptional circumstances, should request the jury to withdraw to the jury room before hearing and ruling on a defence submission of no case to answer. The fact that the jury in the trial of the appellant remained in court to hear the application and the ruling was in accordance with what was the common practice in Jamaica at that time.

Mr. Thornton Q.C., on behalf of the appellant, submitted to the Board that the presence of the jury constituted a material irregularity which carried a real risk of prejudice to the appellant and that accordingly the conviction should be quashed. It is clear in the light of the judgment in *Crosdale v. The Queen* that the presence of the jury did constitute an

irregularity, but their Lordships are of opinion that the irregularity was not one which, in the circumstances of this case, gave rise to a real risk of prejudice so that a miscarriage of justice took place. The trial judge gave a direction to the jury in his summing up that his ruling on the no case submission did not affect the issue of the appellant's guilt and stated:-

"Now, before I move on, during this case Mr. Manley for the accused at the end of the crown's case made a no case submission. This was a submission in law, it found no favour with this court. I wish to make it clear to you that the non-success of that submission that Mr. Hall had no case to answer, that non-success in no way indicates that I was saying that he was guilty because that is a matter for you, it has nothing at all to do with any indication from (me) as to whether or not he is guilty. It was a submission now which as I said, found no favour and that is that."

In addition, for reasons which they will develop at a later stage, their Lordships consider that the identification evidence of Mrs. Woolery was of good quality and was of very considerable strength, so that the presence of the jury to hear the rejection of the submission of no case did not give rise to a real risk of prejudice to the appellant.

2. Mr. Thornton also submitted that in this case the quality of the identification evidence was poor so that, in accordance with the principle stated in *R. v. Turnbull* [1977] 1 Q.B. 224 and *Reid (Junior) v. The Queen* [1990] 1 A.C. 363, the trial judge should have withdrawn the case from the jury with the consequence that the conviction should be quashed. Their Lordships do not accept that submission. In *R. v. Turnbull*, in delivering the judgment of the Court of Appeal, Lord Widgery C.J. stated at pages 228E and 229A:-

"... the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the

subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? ...

In our judgment when the quality is good, as for example when the identification is made after a long period of observation, ... the jury can safely be left to assess the value of the identifying evidence even though there is no other evidence to support it: provided always, however, that an adequate warning has been given about the special need for caution."

In the present case a number of the circumstances specified by Lord Widgery as operating to constitute evidence of good quality were present. Mrs. Woolery had the first man who entered her bedroom under observation at close range in that bedroom and in the adjoining bedroom of her grand-daughter for a period of about 30 minutes. The electric bulb in the ceiling was on so the light was good. Her observation was in no way impeded. Therefore their Lordships are of opinion that the trial judge was right to let the case go to the jury notwithstanding that Mrs. Woolery had not seen the first man before and the period which lapsed between the shooting and the identity parade.

3. Mr. Thornton further submitted that the trial judge had failed adequately to direct the jury on the weaknesses in the evidence relating to identification relied on by the Crown, such as the delay in holding the identification parade, which was due to the illness of a police officer and his subsequent attendance at a management course, and the frightened condition of Mrs. Woolery during the robbery. Counsel also criticised the failure of the judge to direct the jury of the potential effect of the evidence that Noel Woolery was unable to identify the appellant at the identification parade, and his directing the jury not to take this into consideration. Their Lordships have given consideration to all of these points but consider that, whether viewed separately or cumulatively, they do not constitute grounds for concluding that a miscarriage of justice occurred. In the opinion of their Lordships the summing of the trial judge to the jury was full, fair and careful and included the following warning:-

"... it is clear that the case against the accused rests entirely on the correctness of the identification of Mrs. Woolery. As I have said earlier, her evidence must be

subjected to close scrutiny, because the evidence rests entirely on Mrs. Woolery. I must therefore warn you of the special need for caution before convicting on the reliance, on the correctness of the identification of Mrs. Woolery. The reason for this is that it is quite possible for an honest witness to be mistaken and a convincing witness and an honest witness can also be mistaken.

It has been the experience, Mr. Foreman and Members of the Jury, in jurisdictions like ours, that is, where the administration of justice is like ours, this adversary system, that there have been notorious miscarriages of justice based upon mistaken identification. I myself am not aware of any case in Jamaica where there has been this notorious miscarriage of justice, but the fact is that there has been, hence the need for caution. And as I have already said, a mistaken witness can be quite a convincing witness."

4. The submission upon which Mr. Thornton placed most weight in the appellant's appeal to their Lordships' Board was one which the appellant was not in a position to advance to the Court of Appeal, and related to failure by the prosecution to make disclosure or full disclosure of the police statements of Mrs. Woolery and her son, and their Lordships now turn to consider this submission.

There is a dispute between the parties as to the time and nature of a partial disclosure to the defence of Mrs. Woolery's written statement dated 26th April 1991. It appears from the transcript of the trial that at some time before Mrs. Woolery began to give evidence counsel for the defence, Mr. Manley, was told by Crown counsel of the description of the first man contained in Mrs. Woolery's statement. Crown counsel contended at the trial that Mr. Manley had seen this description, but Mr. Manley denied this. Having regard to this regrettable disagreement between counsel, their Lordships think it right to proceed on the basis that Mr. Manley was told of the contents of that part of Mrs. Woolery's written statement which contained her description of the first man, but that he was not given a copy of that part, nor was he told, nor given a copy, of the contents of the remainder of the statement. This limited disclosure appears to correspond with the practice described in the judgment of the Board in *Berry v. The Queen* [1992] 2 A.C. 364 at page 373D:-

"When investigating offences in Jamaica the police take from potential witnesses written statements which are not, however, used for the purpose of committing accused persons for trial. The witness gives oral evidence at the preliminary inquiry in the magistrate's court which is recorded in the form of a deposition. The accused, if committed, is given copies of the depositions, but is not provided with copies of the statements taken by the police except when the Crown intends to call a witness who did not give evidence at the preliminary inquiry, in which case the Crown will serve the defence with a notice of intention and a copy of the witness's statement.

There is also a rule of practice under which Crown counsel owes a duty to inform the defence of any material discrepancy between the contents of a witness's statement and the evidence given by that witness at the trial. The duty may in addition require Crown counsel to show the statement to the defence."

It is clear that the defence was not given a copy of Noel Woolery's written statement to the police or told of its contents at any time until after the Court of Appeal had given judgment.

In *R. v. Ward* (1993) 1 W.L.R. 619, 645F Glidewell L.J., delivering the judgment of the Court of Appeal, stated:-

"We would adopt the words of Lawton L.J. in *R. v. Hennessey* (1978) 68 Cr.App.R. 419 at 426 where he said that the courts must -

'keep in mind that those who prepare and conduct prosecutions owe a duty to the Courts to ensure that all relevant evidence of help to an accused is either led by them or made available to the defence. We have no reason to think that this duty is neglected; and if ever it should be, the appropriate disciplinary bodies can be expected to take action. The judges for their part will ensure that the Crown gets no advantage from neglect of duty on the part of the prosecution.'

That statement reflects the position in 1974 no less than today. We would emphasise that 'all relevant evidence of help to an accused' is not limited to

evidence which will obviously advance the accused's case. It is of help to the accused to have the opportunity of considering all the material evidence which the prosecution have gathered, and from which the prosecution have made their own selection of evidence to be led."

Applying this test Mr. Thornton submitted that the entire statement of Mrs. Woolery and also the entire statement of Noel Woolery should have been furnished to the defence before the trial. He submitted that there were a number of inconsistencies between the written statement of Mrs. Woolery and her evidence at the trial, and that if the entirety of her written statement had been furnished before the trial, defence counsel could have made use of the inconsistencies in cross-examination of Mrs. Woolery to assist the defence and to weaken her reliability as a witness in the eyes of the jury. The inconsistencies were detailed by Mr. Thornton as follows:-

(a) In her statement Mrs. Woolery said that on hearing the sound of the stones hitting the roof her husband got up and went and turned off the lights, whereas in her evidence Mrs. Woolery said that when they heard the sound of the stones hitting the roof her husband turned on the light (although their Lordships would observe that later in the statement Mrs. Woolery said that when she saw the man come into the room with a gun and flashlight in his hand the electric light was still on in the room and it may be, as suggested by the Crown, that the reference to turning off the lights was related to lights outside the house).

(b) In her statement Mrs. Woolery said that when two other men came into the room one of them had a gun in his hand, whereas in her evidence she said that all the men in the room had guns in their hands.

(c) In her statement she said that the man told her to lie down on the bed, but she refused and remained sitting on the bed, whereas in her evidence she said that she lay down on the bed on her back.

(d) In her statement she said that while the men were searching her room she forced open Miss Johnson's room and ran into it, whereas her evidence suggested that she did not go into the room where Miss Johnson and her grand-daughter slept but that her grand-daughter came into her room.

(e) In her statement she said that the men asked her for money, but she made no reference to this in her evidence.

(f) In her statement she said that the two other men went into her son's room and made no further reference to her son, but in her evidence she said that when the men went into her son's room they took him out and made him lie down in her grand-daughter's room and then carried him back to his room.

Mr. Thornton further submitted that there were a number of inconsistencies between the written statement of Noel Woolery and the evidence of his mother, and that if his statement had been furnished to the defence before the trial, defence counsel could also have made use of those inconsistencies in the cross-examination of Mrs. Woolery to further weaken her reliability as a witness in the eyes of the jury. The inconsistencies which Mr. Thornton detailed were as follows:-

(g) Noel Woolery said in his statement that there were four robbers armed with guns, whereas in her evidence Mrs. Woolery said that there were three robbers armed with guns.

(h) Noel Woolery gave a description of each of the four men in some detail but made no reference to any of them either having an open scar on his face or having a distinctive nose as described by Mrs. Woolery in her evidence.

(i) In his statement Noel Woolery referred to the first man as having a red handkerchief on his head, but in her evidence Mrs. Woolery made no reference to the first man having a handkerchief on his head.

(j) In his statement Noel Woolery described that shortly after hearing the gun shot he was confronted by a strange man who pointed a gun at him and he was then assaulted on the ground by that man and three other men using their guns, whereas in her evidence Mrs. Woolery said that the three robbers remained in her room and in her grand-daughter's adjoining room for half an hour and made no mention of any of the robbers leaving the room shortly after they entered it to assault her son.

(k) In his statement Noel Woolery said that after being assaulted he was taken into his parents' room and was ordered to lie down on the floor while the men ransacked the

room, whereas in her evidence Mrs. Woolery said that her son was taken into her grand-daughter's room and from there back to his room.

(l) Noel Woolery said in his statement that when he was taken into his parents' room they were all put on the floor to lie down while the room was ransacked, and that at one stage his mother tried to get up and one of the men pointed a gun but it did not go off, whereas in her evidence Mrs. Woolery did not refer to this incident.

In *Berry v. The Queen* this Board, having described the practice in Jamaica of disclosing statements, stated at page 373H:-

"In relation to the disclosure to the defence of material in the possession of the prosecution, the key is fairness to the accused but the practice varies between different jurisdictions in the common law world."

The Board later stated at page 376G:-

"Having examined the practice in different common law jurisdictions, their Lordships consider that the principles endorsed by the Jamaican Court of Appeal, particularly with regard to inconsistent previous statements, represent what will normally be an acceptable way of achieving fairness to the accused and they take the opportunity of saying that in a civilised community the most suitable ways of achieving such fairness (which should not be immutable and require to be reconsidered from time to time) are best left to, and devised by, the legislature, the executive and the judiciary which serve that community and are familiar with its problems.

Bearing in mind the reference by Shelley J.A. in *Reg. v. Barrett*, 12 J.L.R. 179, 180, to the concept of counsel for the Crown as 'minister of justice whose prime concern is its fair and impartial administration,' their Lordships, while not feeling bound to accept in relation to Jamaica the comprehensive principles, almost amounting to criminal discovery, which the defendant has attempted to rely on, recognise that the '*Purvis-Barrett*' principles do not cover every situation in which fairness may demand that the prosecution make available material to the defence."

Applying the approach stated by the Board in *Berry v. The Queen* and recognising that the rules of disclosure developed in recent years by the courts in England may not be appropriate to apply in Jamaica because of the different circumstances there, including (as their Lordships have been informed) the serious and real danger of witnesses being killed or wounded or intimidated, their Lordships consider that in the particular circumstances of this case where the only evidence against the appellant was that of Mrs. Woolery, fairness required that the entirety of her statement should have been disclosed to the defence (preferably by a copy being given) before the commencement of the trial so that defence counsel would have had the opportunity to make use of the statement in his cross-examination of Mrs. Woolery.

Their Lordships also consider that as Noel Woolery was present at the scene of the robbery and witnessed a substantial part of it, his statement should also have been disclosed to the defence (preferably by a copy of it being given) before the commencement of the trial, so that defence counsel could also have made use of it in his cross-examination of Mrs. Woolery.

Their Lordships were informed by Mr. Andrade Q.C., Director of Public Prosecutions in Jamaica, appearing on behalf of the respondent, that in Jamaica the defence was normally given a copy of the statement of a witness present at the scene of a crime whom the Crown did not intend to call as a witness unless the Crown regarded that witness as "unreliable". In such circumstances where the witness was regarded as being "unreliable" the Crown considered that under the rule in *R. v. Bryant and Dickson* 31 Cr.App.R. 146 it was not obliged to give the defence a copy of the statement or to inform it of its contents. Mr. Andrade submitted that Noel Woolery was an "unreliable" witness within the rule stated in *R. v. Bryant and Dickson*, and their Lordships understood this submission to be based on the point that his evidence was "unreliable" because he was unable to make an identification at the identification parade which he attended. Their Lordships are unable to accept that submission. They are of opinion that Noel Woolery did not come within the ambit of the rule in *R. v. Bryant and Dickson* because under that rule a witness could be regarded as "unreliable" if the Crown considered that he would or might go into the witness box to give untruthful evidence, and their Lordships consider that Noel Woolery did not fall within that category.

Their Lordships further observe that in the recent decision of *R. v. Mills* [1997] 3 W.L.R. 458 the House of Lords disapproved the rule in *R. v. Bryant and Dickson* and held that the statement of a witness present at the commission of the crime, whom the Crown decided not to call as a witness, should be furnished to the defence even if the Crown regarded him as an unreliable and dishonest person who might, if called as a witness, give false evidence to assist the defence. However, having concluded that Noel Woolery could not be viewed as an unreliable witness, their Lordships express no opinion as to whether the new rule stated in *R. v. Mills*, in respect of a witness viewed as unreliable, should be applied in the circumstances prevailing in Jamaica where it appears that great pressure is on occasion improperly applied to subvert the evidence of possible witnesses.

Their Lordships being of opinion that the contents of the statements of Mrs. Woolery and Noel Woolery should have been disclosed to the defence, and further being of opinion that the failure to make the disclosure constituted a material irregularity (see *R. v. Mills* at page 477B), the final issue which arises is whether the irregularity gave rise to a miscarriage of justice. Their Lordships consider that it did not. The evidence of Mrs. Woolery was strong evidence of good quality and the identification parade was fairly and properly conducted. The trial judge's summing up was fair and full and contained a proper warning of the danger that an honest and convincing witness as to identification could be mistaken.

It appears from Noel Woolery's statement that as soon as he was confronted by the first robber he was forced to lie down and was beaten, and he was then taken into his parents' bedroom where he was again ordered to lie down, so he viewed what happened from a position on the floor, whereas his mother's evidence was that she viewed what happened from her bed. In these circumstances it is not surprising that there were discrepancies between his description of what he saw and his mother's description. In addition it is very frequently the case that there are some discrepancies as to details between the accounts of witnesses who have viewed a crime. It is also not uncommon that there are some variations between the police statement of a witness and the evidence which he or she gives at the trial, and their Lordships do not consider that the variations

between Mrs. Woolery's written statement and her evidence at the trial were of any real substance.

In this case, having regard to the strength and quality of Mrs. Woolery's evidence, their Lordships are satisfied that disclosure before trial of the statements giving rise to the inconsistencies to which Mr. Thornton referred would not have materially undermined or weakened the evidence of Mrs. Woolery or strengthened the defence case so as to lead to a different result at the trial, and accordingly no miscarriage of justice occurred.