[2024] JMCA Crim 25

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MISS JUSTICE STRAW JA
THE HON MRS JUSTICE FOSTER-PUSEY JA
THE HON MRS JUSTICE V HARRIS JA

SUPREME COURT CRIMINAL APPEAL 69/2014

ANDRE NELSON v R

Mrs Emily Shields for the appellant

Malike Kellier and Dwayne Green for the Crown

31 January, 1 February, 9 April and 14 June 2024

Criminal Law – Summation – Lies - Lucas direction - Comments by trial judge on lies - Comments by the trial judge on evidence - Whether usurpation of the role of the jury - Whether section 14(1) Judicature (Appellate Jurisdiction) Act proviso to apply - Whether retrial to be ordered

FOSTER-PUSEY JA

[1] The appellant, Andre Nelson, was charged on an indictment with one count of murder. The charge alleged that on 2 December 2007, in the parish of Saint Andrew, he murdered Michael Samuels ('the deceased'). After a trial in the Home Circuit Court, before a judge ('the learned trial judge') sitting with a jury, on 9 June 2014, the appellant was found guilty of murder by a majority verdict. On 4 July 2014, the learned trial judge sentenced the appellant to life imprisonment at hard labour with the stipulation that he would not be eligible for parole before serving 20 years.

[2] The appellant applied for leave to appeal his conviction and sentence. The transcript of the proceedings was received by this court on 21 August 2020, and by 15 October 2020, a single judge of this court granted the appellant leave to appeal his conviction and sentence. In her ruling, the single judge indicated that although the learned trial judge gave adequate directions in most instances, he made some comments that were "unfortunate". One of these instances concerned the approach

to be taken to a lie that the appellant admitted that he told, and the other concerned a view that could be taken of the evidence of one of the witnesses. The learned single judge opined that these matters could be viewed as "a usurpation of the role of the jury to make such findings as they believed arose from the evidence" and, therefore, provided grounds for appeal. The single judge also expressed concern as to whether, in arriving at the sentence imposed on the appellant, the learned trial judge gave sufficient consideration to the appellant's personal mitigation.

[3] We granted the appellant leave to rely on the following supplemental grounds of appeal:

> "1. The learned trial judge materially misdirected the jury in law over the evidential effect of lies admittedly told by the [appellant] in a police interview resulting in a substantial miscarriage of justice;
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> 2. The material misdirection of the jury on the evidential effect of the lies admittedly told by the [appellant] has rendered the conviction unsafe and the conviction should be set aside without the issue of sentence being considered.
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> 3. The learned trial judge made comments which fell short of usurping the role of the jurors but which were so weighted against the Appellant so as to leave the jury with little real choice other than to comply with the learned trial judge's views-specifically:
>
> (i) 'The motive for this lie, Mr Foreman and your members, must have been a realization of guilt and fear of the truth; that must be the motive for the lie. So that is that'; and
>
> (ii) 'If anything-if there is any weakness in the evidence, it may possibly be in the evidence of [CS] when she gave two conflicting arguments'."

[4] We heard this matter on 31 January and 1 February 2024 and reserved our decision after requesting the attorneys for the Crown and the appellant to provide us with written submissions on the issue as to whether, depending on the outcome of the court's assessment of the grounds of appeal, it would be appropriate to order a

retrial. The Crown provided written submissions dated 4 April 2024, and the appellant, written submissions dated 9 April 2024.

The case for the prosecution

[5] The wife of the deceased, "BS", testified that on Sunday, 2 December 2007, the entire family, including the deceased and their children, went to the main road at Nine Miles to buy ice cream. Before heading to the shop where they would purchase the ice cream, they sat on a wall in front of Corn Shop, listening to music and planning what flavour of ice cream they would buy. The deceased was sitting beside her. She then saw two young men emerge from the lane beside the wall on which she was sitting. One of the men came before the deceased. She recognized him as "Ants". She did not know his real name but had known him for about seven years before the incident. Ants had a gun and used it to shoot the deceased in his chest. BS testified that from the time Ants came before her husband and when he shot him, he stood looking at him, and then ran off, she was looking at Ants' face for one minute. The deceased died on the scene. In cross-examination, it was suggested, among other things, that BS was either not at the scene of the killing or was telling a lie about the appellant.

[6] A daughter of the deceased ('CS') also testified that she was at the scene. She stated that she knew Ants, and he was the only person that she knew by that name in the community. She testified that she saw three men come out of the lane near where the family was sitting. The only person that she recognized in the group of men was Ants. Ants came right up to the deceased, pulled a gun, and fired one shot, hitting him in the chest. In cross-examination, CS was challenged as having stated on a previous occasion that Ants was wearing a bandana on his head with strings at his jaws. This was in contrast with her testimony in the course of her examination in chief when she stated that the person she had seen did not have anything on his head.

[7] Detective Sergeant David Campbell photographed the scene on 2 December 2007. The photographs were shown to BS and CS and entered into evidence during the trial. In cross-examination, he stated that he observed an injury "to the left and below the breast" of the deceased (see page 181 of the transcript).

[8] The post-mortem report indicated that the deceased died from multiple gunshot wounds.

[9] Detective Sergeant ('Det Sgt') Maurice Puddie went to the scene on 2 December 2007. He commenced investigations into the murder of the deceased and was looking, in particular, for the appellant, otherwise called Ants, whom he knew before for approximately two years, having seen him in the areas of Beach Road, Nine Miles, Bull Bay and Taylor Land.

[10] On 11 December 2007, he saw the appellant at the Port Royal Lock Up and informed him that he was investigating the murder of the deceased that took place on 2 December 2007.

[11] On 19 December 2008, Det Sgt Puddie conducted a question-and-answer interview with the appellant at the Elleston Road Criminal Investigation Bureau in the presence of his attorney-at-law. Having cautioned the appellant, he asked him 69 questions. At the beginning of the interview, Det Sgt Puddie asked the appellant to state his name. The appellant gave his name as "Mario Bennett". At the end of the interview, Det Sgt Puddie read over the questions and answers to the appellant and told him he could add, alter, or make changes to any of the answers. The appellant did not make any changes and, in the presence of his attorney, signed each page of the question and answer as "Mario Bennett". His attorney then left.

[12] After the attorney left, Det Sgt Puddie spoke to the appellant, who then told him that his name was Andre Nelson and confirmed that he was called Ants. Det Sgt Puddie cautioned the appellant and asked him his name. He responded that his name was Andre Nelson. Det Sgt Puddie invited the appellant to sign a prescribed form titled CR 12 that outlines the description of the accused and is placed on the case file. The appellant signed as Andre Nelson. Det Sgt Puddie charged the appellant for the offence of murder of the deceased and cautioned the appellant, who stated, "Mr. Puddie mi nuh know nutten 'bout dat".

[13] In cross-examination, Det Sgt Puddie acknowledged that no identification parade was held. He also acknowledged that during the question and answer

interview, the appellant accepted the name Ants. He denied that there were several persons living in the community who were called Ants.

[14] In re-examination, Det Sgt Puddie indicated that no identification parade was held because the appellant was a prominent, well-known person living in the same community as the complainants.

[15] At the end of the prosecution's case, defence counsel for the appellant made a no-case submission. However, the learned trial judge ruled that the appellant had a case to answer.

The case for the defence

[16] The appellant gave an unsworn statement from the dock. He stated that he lived in the Bull Bay community and played football as a profession. The appellant insisted that on the day in question, he was with his family. He denied knowing the deceased, as well as the deceased's wife or daughter, who testified at the trial. The appellant stated that he answered questions in the absence of his attorney at law as "time been passing by and he did not turn up". He stated that he was in a room with Det Sgt Puddie and two police officers, one who asked questions and one who wrote the answers. Det Sgt Puddie cautioned him and left the room. The appellant stated that during Det Sgt Puddie's absence, he was instructed by other officers who assisted him inside the room. These officers told him that he was going to be charged with murder, but the people who gave statements only knew him as Ants as a pet name, and that they also gave one statement with the 'right name' but they were not sure. At page 414 of the transcript, the unsworn statement continued:

> "And mi tell him tell mi the name as Andre Williams. Then he also tried to tell me a next name which I turned to him and sey, no, yuh tricking me, which is one Mario Bennet [sic]. An' him sey no man, mi naaw trick yuh man, jus' hold one of dem name yah and…when yuh see your lawyer…You get legal document to prove that these people don't know yuh. Soh I go ahead and say all right…Mi a goh hold the name and I did…Mr Puddy [sic], return now, and said I gonna continue the Question and Answer, and asked me my name and I tell him that my name was Mario Bennett. After that, he said he have sixty nine questions to

> ask me…Yes, so I go ahead and tell him my name, date of birth… and my age…But the reason for doing that is because I was coached to do it….I was coached to tell him that my name was Mario Bennett. After telling him my name was Mario Bennett, I go through the procedure and answer the questions them….In answering those questions, mi lawyer wasn't there…But I admit answering the question them…I finish the interview and I sign to the paper. I said to Mr. Puddy [sic], I was tricked. And him sey, 'I was waiting to see how long you were playing a fool'. I know nothing what yuh talking about. My name is Andre Nelson, my girlfriend is outside with my legal document, age paper, passport, and National I.D…He say give me a minute to confirm it, and he went outside. And he said to me that he confirm it…And he won't bring me before the court in Mario Bennett…that is the reason why I have been charged in the name of Andre Nelson what is my correct name…He said to me that any more adjustment…and I said no. [T]hat is the only mistake…So, what I would like to say is that making that mistake doesn't prove that I killed Mr. Samuels…Because I was instructed, I never did that from my heart, I was instructed to do it. I never did that by telling the police my name was Mario Bennett from my heart, I was instructed….and I also admit that my name, my alias name was 'Ants'…The name 'Ants' is a very popular name…For people to say that I am 'Ants', I think that they should know the details about my background, and I don't have a grandmother by the name of Beverley. And I did not live in front of a church or beside a church. Finally, I have no motive, to just get up and go and kill…. Mr Samuels. I am just indicating that I am innocent. Thank you."

The submissions

Submissions for the appellant

[17] Mrs Shields, attorney for the appellant, submitted that, upon an examination of the transcript of the trial, the prosecution was clearly relying on lies told by the appellant during the police interview regarding his correct name to buttress other evidence of his guilt of the offence of murder. Mrs Shields highlighted that the learned trial judge told the jury that the appellant's motive for his lie must have been a realization of guilt and fear of the truth. Counsel submitted that the learned trial judge did not put to the jury the appellant's reason for the lie he told about his name and, at points, appeared to pour scorn on the appellant's statements. Counsel submitted

that the learned trial judge used a "forbidden reasoning which cuts to the core of the integrity of the conviction, rendering it unsafe as having come from a substantial miscarriage of justice".

[18] Counsel also complained that the comments made by the learned trial judge concerning the appellant's lie were "so weighted against the Appellant" that they left the jury with little choice but to adopt the views of the learned trial judge concerning the motive for the lie.

[19] Mrs Shields submitted that the learned trial judge gave the impression that the evidence for the prosecution was strong, with only a "possible" weakness in the evidence of "CS" due to her conflicting statements. This went beyond the proper bounds of judicial comment, as the determination of issues of fact was for the jury. Counsel relied on **R v Gary Michael Goodway** (1994) 98 Cr App Rep 11, **Byfield Mears v Regina** (1993) 97 Cr App R 239, **R v Lucas** [1981] 3 WLR 120, **R v Dalton Reynolds** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 127/1995, judgment delivered 24 June 1996, and **Adrian Forrester v R** [2020] JMCA Crim 39.

[20] Mrs Shields submitted that the issues that arose in the case at bar deprived the appellant of the substance of a fair trial and the protection of law. Counsel highlighted the context of the instant case in which the material issues were identification and recognition, and rested on the credibility of the witnesses. Referring to section 14(1) of the Judicature (Appellate Jurisdiction) Act, counsel submitted that the verdict of the jury should be set aside on the ground that the learned trial judge made a material misdirection in law which has caused a substantial miscarriage of justice, rendering the conviction unsafe. Counsel posited that, as a consequence, this was not an appropriate case for the application of the proviso. She relied on **R v Cyril Barton and Winston Barton** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeals Nos 97 and 98/1995, judgment delivered 20 December 1996.

The submissions for the Crown

[21] Counsel for the Crown, Mr Green, in making submissions on grounds of appeal one and two, agreed that the learned trial judge needed to have given a **Lucas**

direction in the circumstances of the case at bar. Counsel submitted that the learned trial judge gave detailed and adequate directions to the jury on how they should treat lies, after which he commented on the issue of whether the appellant had lied to the police in the question and answer interview. Counsel urged that the comment made by the learned trial judge "cannot be read in isolation of the full **Lucas** direction provided…and…from the totality of his summation". Counsel submitted that taken as a whole, the comment would not affect the integrity of the direction, as the learned trial judge directed the jury that they were to determine if the appellant had lied, if yes, whether any satisfactory explanation had been given, that a lie alone is not evidence of guilt and the potentially probative effect of lies. Thus, no miscarriage of justice had occurred.

[22] Mr Kellier addressed ground of appeal three on behalf of the Crown. Counsel drew the court's attention to the fact that the learned trial judge alerted the jury that if, in the course of reviewing the evidence, he expressed any views, the jury should not adopt those views unless they agreed with them and that it was their judgment alone that mattered when it came to the facts of the case. Counsel submitted that in those circumstances, the members of the jury would have clearly understood that they were the judges of the facts in the case. Counsel submitted that the learned trial judge did not exhibit blatant unfairness or pro-prosecution bias.

[23] On the issue of the learned trial judge's comments on the evidence of CS, Mr Kellier submitted that the comment could not be read in isolation. He drew attention to the fact that the learned trial judge's comments fell within the context of his compliance with the guidelines outlined in **Turnbull v R** [1977] 1 QB 224 on identification. Counsel noted that the learned trial judge drew the attention of the jury to certain inconsistencies and discrepancies but reminded the jury that it had the responsibility to determine what evidence was reliable or unreliable.

[24] Upon an inquiry from the Bench, and after some thought, counsel Mr Kellier stated that the learned trial judge's statements after he gave the Lucas directions were comments and not directions to the jury, and these comments would not force the hands of the jury. Counsel stated that **Byfield Mears v R** was distinguishable.

[25] Counsel relied on several cases, including **R v Lucas**, **Byfield Mears v R**, **R v Gary Michael Goodway**, **R v Burge and Pegg** (1996) 1 Cr App R 163, **Rohan Ebanks v R** [2020] JMCA Crim 37, **Adrian Forrester v R**, **Mohinder Singh v R** [2022] JMCA Crim 63, and an excerpt from **Blackstone's Criminal Practice 2024**, see paras. D26.1-D26.37.

Discussion

[26] In **Lucas v R**, the court outlined the classical principles concerning when statements that an appellant has made out of court that are proved to be false may amount to corroboration. At page 162, the Lord Chief Justice stated:

> "To be capable of amounting to corroboration the lie told out of court must first of all be deliberate. Secondly it must relate to a material issue. Thirdly the motive for the lie must be a realisation of guilt and a fear of the truth. The jury should in appropriate cases be reminded that people sometimes lie, for example, in an attempt to bolster up a just cause, or out of shame or out of a wish to conceal disgraceful behaviour from their family. Fourthly the statement must be clearly shown to be a lie by evidence other than that of the accomplice who is to be corroborated, that is to say by admission or by evidence from an independent witness."

[27] The principle was applied in **Goodway v R** (see page 15). Also as Edwards JA highlighted in para. [72] in **Adrian Forrester v R**:

> "In **R v Middleton** [2001] Crim LR 251, the court stressed that the point of a **Lucas** direction was to warn against the forbidden reasoning that lies demonstrate guilt, so that where there is no such risk, the direction is unnecessary. A **Lucas** direction is only required if there is a danger that the jury may conclude the defendant lied, and that the lie was probative of his guilt…"

[28] Importantly, it is the jury that must consider and determine what was the motive for the lie.

[29] In the case at bar, there is no dispute as to whether the prosecution was relying on the lie that the appellant told concerning his correct name. The appellant himself admitted that he told a lie and gave an explanation as to why he wrote the name

Mario Bennett repeatedly on the question and answer document and adopted that name. The appellant's correct name was an issue as the witnesses only knew him as "Ants", and he was suggesting that there were some other persons in the community who went by that alias. Counsel both agree that the learned trial judge was required in law to give the **Lucas** direction. We agree.

[30] The learned trial judge stated at pages 496-500 of the transcript:

> "This is the critical part when he asked him his name. He gave his name as Mario Bennett.
>
> Question: Did you ask him at the end of the 69 question [sic] or the beginning? Answer: At the beginning of the questions. Now, what about the end of the questions. Did you give him...did you say anything to him at the end of the question [sic]? Answer, yes, sir. The questions and answers were read over to him and told him that he could add, alter, or make changes in any of the answers made in the exchanges. After that what next did you do? Answer: I invited him to sign and he signed Mario Bennett. And he did. He signed Mario Bennett on each page; yes, sir. Now, after he signed each page of the question and answer, what, if anything did you do? Thereafter I was talking to him; this is his answer, then he told me that his correct name is Andre Nelson. And where is his attorney at this time? His attorney had already left at that time. So what Mr. Puddy did was full [sic] out a CR12 form which is a prescribed form which outline [sic] the description information of the accused and his [sic] place on the file. And after this is placed on the file...it was placed on the file, he invited Andre Nelson to sign and he signed his name as Andre Nelson. In other words, Mr. Foreman and your members, Andre Nelson told the police officer a lie in the presence of his attorney and [sic] am going to tell you how to deal with it. Lies have some significance in this case, Mr. Foreman and members. It is the prosecution's contention that the accused lied on that occasion. I have just pointed out to you and you are entitled to consider if the lies support the case against the accused. When it comes to lie [sic] you should consider 2 questions. First: You must decide whether the accused did in fact tell those lies. You must ask yourselves if there is an explanation for the lies. If you believe that he spoke the truth you don't have to go any further, just ignore the matter. If you are satisfied so that you feel sure that he told lies then you go

> on to consider why did he tell the lies. The mere fact that the accused told a lie or lies is not in itself evidence of guilt. An accused may lie for many reasons and the reasons may possibly be innocent ones. I use the word innocent in the sense that it does not denote guilt. And an accused may lie to bolster a…try [sic] defence or he may lie to protect someone else or he may lie to conceal some disgraceful conduct or the commission of the offence. Or he may lie out of panic or confusion. If you find that this accused lied and if you think that there may be an innocent explanation which you consider to be a satisfactory one, then you should take no notice of it. It is only if you are satisfied so that you feel sure that he did not lie for an innocent reason; that the lies can be regarded by you as evidence of supporting the prosecution's case. Very important.
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> In other words, before you can treat lies as tending towards the proof of the guilt of the offence charged, you, Mr. Foreman and your members, must be satisfied so that you feel sure that there is not some possible explanation for the lies which destroys their potentially probative effect. So that lies must be deliberate and must relate to material issues."

[31] The above directions were correct. Counsel for the appellant took no issue with them. On the other hand, counsel took serious issue with aspects of the learned trial judge's statements that followed on page 500:

> "Here the material issue is whether or not his name is Andre Nelson otherwise called Ants. And after answering sixty-nine questions which were put to him, he signed on each page, Mario Bennett. **The motive for this lie, Mr. Foreman and your members, must have been a realization of guilt and fear of the truth; that must be the motive for the lie. So that is that."** (Emphasis supplied).

[32] Counsel for the Crown orally raised the issue as to whether the learned trial judge, having given a faultless **Lucas** direction earlier, really spoke the words highlighted. It does appear strange that the learned trial judge could make that statement after his correct directions, in which he highlighted the fact that it was the jury that was to have assessed the evidence and determine the motive for the admitted lie. There was, however, no evidence to suggest that the transcript was

erroneous. The court, therefore, proceeded on the basis that the transcript was correct.

[33] In the course of the hearing, the question arose as to whether the highlighted words by the learned trial judge were partial directions or comments. It is possible to view the statements of the learned trial judge as his attempt to repeat the tail end of his directions on what the jury had to be sure about as the reason for the lie. If seen as a direction, it would have been prejudicial, as it would have reduced the impact of the correct directions given previously, with the effect of causing the jury to assess the lie in a manner that was unfair to the appellant. Such a direction would have been a material error that rendered the trial unfair and would be fatal to the appellant's conviction.

[34] In our view, however, these statements of the learned trial judge ought properly to be viewed as comments as he had completed his directions on the question of lies. The question now arises as to what was the effect of the comments.

[35] In **Mears v R,** Lord Lane, in delivering the judgment of the Board, stated on page 243:

> "The Court of Appeal took the view that the trial judge was not putting forward an unfair or unbalanced picture of the facts as he saw them. In rejecting the appellant's submission that the comments of the judge were unfairly weighted against him, the court asked themselves whether the comments amounted to a usurpation of the jury's function. **In the view of their Lordships it is difficult to see how a judge can usurp the jury's function short of withdrawing in terms an issue from the jury's consideration. In other words this was to use a test which by present day standards is too favourable to the prosecution. Comments which fall short of such a usurpation may nevertheless be so weighted against the defendant at trial as to leave the jury little real choice other than to comply with what are obviously the judge's views or wishes…However, if the system is trial by jury then the decision must be that of the jury and not of the judge using the jury as something akin to a vehicle for his own views**." (Emphasis supplied)

Later on in the judgment, in assessing the facts of that case, Lord Lane stated at page 244:

> "Their Lordships consider that the judge's comments already cited went beyond the proper bounds of judicial comment and made it very difficult, if not practically impossible, for the jury to do other than that which he was plainly suggesting."

[36] In our respectful view, the comments of the learned trial judge went beyond the proper bounds of judicial comment and amounted to a usurpation of the role of the jury. It was the jury that was to determine whether the motive for the appellant's lie was a realization of guilt and fear of the truth. It was the jury that was to assess the appellant's reasons that he put forward for the admitted lie concerning his identity. The learned trial judge's comment made it very difficult for the jury to arrive at a decision differing from his statement that the motive for the appellant's lie was a realization of guilt and a fear of the truth. Those comments, unfortunately, negated the correct **Lucas** directions that the learned trial judge had given earlier. We agree with the submissions of counsel for the appellant that this was a serious error that, in the circumstances of the case at bar, deprived him of a fair trial.

[37] Counsel for the appellant also took issue with comments that the learned trial judge made concerning the evidence of CS when he stated on page 472 of the transcript:

> "If anything--if there is any weakness in the evidence, it may possibly be in the evidence of [CS] when she gave two conflicting answers…"

[38] Counsel relied on **R v Dalton Reynolds**, a judgment of this court. Bingham JA (Ag), as he then was, delivered the judgment of the court, and highlighted aspects of the summation of the judge at first instance. On page 3, he wrote:

> "In his summation having given what amounted to clear directions on the law applicable to the facts of the case and gone on to set out the case advanced by both sides, the learned trial judge said:

> 'Now Madam Foreman and members of the jury, you might wish to consider Mr Richards as a very impressive witness. Indeed this has been conceded even by the defence. The defence may have used a word other than 'impressive', but certainly the defence regarded him as a very good witness.'

Having summarized the witness' account of the chopping incident the learned trial judge went on to say in relation to this witness that:

> 'I formed the impression, it's for you to say whether you agree, Madam Foreman and Members of the Jury, that Mr. Owen Richards was a completely reliable witness in relation to the important aspects of this case'. (Emphasis added)

In the light of the above directions we understood the learned judge to be telling the jury that he was putting forward this witness as one whose testimony was credible and upon whom they could place reliance in coming to their verdict."

Later on in the judgment, after noting the submissions made by the appellant in that case and authorities on which he relied, Bingham JA (Ag) wrote at page 5:

> "The principle to be extracted from these cases is the need for the approach of a trial judge in a summing up to be impartial and fair, leaving the determination of the issues of fact for the jury to arrive at. We find that there is merit in this ground of complaint and the submissions advanced in support. **When the summing up is examined as a whole we find that the comments of the learned trial judge in relation to the witness Richards went much too far. The learned judge was doing nothing less than putting his stamp of approval upon this witness as credible and reliable and someone whose testimony the jury should accept. In this regard he fell into error as his comments amounted to an usurpation of the role and function of the jury**."

The court ordered a retrial.

[39] In the case at bar, the context in which the learned trial judge made his comments is crucial for a determination as to whether the complaint that the appellant's counsel has made has merit. The learned trial judge stated at pages 471-472 of the transcript:

> "Mr. Foreman and your members, the case against Andre Nelson depends wholly on the correctness of one or more identifications of him which he alleges to have [sic] mistaken. Or about which he says that the witnesses are lying. To avoid the risk of any injustice in the case such as has happened in some cases in the past, I must therefore warn you of the special need for caution before convicting the defendant in reliance on evidence of identification. A witness who is convinced in her own mind may as a result be a convincing witness, but may nevertheless be mistaken. The same may apply to a number of witnesses. Mistakes can also be made in a recognition of someone known to a witness, even of a close friend or relative. You should therefore examine carefully the circumstances in which the identification by each witness was made, for how long did she have the person, or rather, did the person she says was the defendant, under observation. At what distance? In which light? Did anything interfere with that observation? Had the witness ever seen the person he observed before? If so, how often? Remember, I have gone through the evidence of [BS]. Remember I have also gone through the evidence of [CS], but there [sic] are the two persons who say they made out this person. Having warned you of that, how you should approach that evidence, you may act on their evidence if you believe they are speaking the truth. **If anything--if there is any weakness in the evidence, it may possibly be in the evidence of [CS], when she gave two conflicting answers in relation to whether or not this person had something on his head, a bandanna**." (Emphasis added)

[40] We do not agree with the submissions of counsel for the appellant. On the other hand, we agree with the submissions of the Crown that when the comments are viewed in context, the learned trial judge was carrying out his function, in accordance with the **Turnbull** guidelines, to highlight possible weaknesses in the identification evidence that the members of the jury should take into account in their deliberations. The case at bar is distinguishable from **R v Dalton Reynolds.**

The proviso to section 14(1) of the Judicature (Appellate Jurisdiction) Act.

[41] The question now arises as to the way forward in the matter in light of the significant error that has been identified.

[42] The Crown submits that this is an appropriate case in which the court ought to apply the proviso to section 14(1) of the Judicature (Appellate Jurisdiction) Act, as the evidence against the appellant was very strong and the jury would have convicted him even if the errors had not been made. Counsel for the Crown referred to **Rupert Anderson v Regina** (1971) 43 WIR 286, in which reference was made to **Woolmington v Director of Public Prosecutions** [1935] AC 462, and **Paul Maitland v Regina** [2013] JMCA Crim 7.

[43] On the other hand, Mrs Shields, counsel for the appellant, repeating earlier submissions, has stated that a substantial miscarriage of justice has occurred in this case and, as a consequence, it would be inappropriate to apply the proviso. Counsel relied on **R v Cyril Barton and Winston Barton.**

Discussion

[44] Section 14(1) of the Judicature (Appellate Jurisdiction) Act provides:

> "The Court on any such appeal against conviction shall allow the appeal if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or that the judgment of the court before which the appellant was convicted should be set aside on the ground of a wrong decision of any question of law, or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal:
>
> **Provided that the Court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred**." (Emphasis supplied)

[45] In **Anderson v R**, their Lordships of the Privy Council agreed that the judge, at first instance, had given serious misdirections. In one instance, the trial judge

invited the jury to disregard the evidence of an expert that there was no blood on the accused's water boots and directed the jury to form their own opinion as to whether there was blood upon the boots.

[46] The trial judge also misdirected the jury on the issue of a piece of cardboard found in the right foot of the accused's water boots that he was wearing on 23 December. The expert found that there were human blood stains that, as their Lordships related it, "must have been about two weeks old but they could have been there before two weeks. In his opinion, it was not more recent than two weeks. It might have been older. It was definitely not a fresh stain" (page 106 paras. E-F). The trial judge, in his summing up, when dealing with the expert's evidence, told the jury that the expert's opinion was that the blood stains were about two weeks old. In their Lordships' views, this could have confused the jury as to whether the blood on the cardboard could have been 'of more recent origin than two weeks" (page 106 para. G).

[47] Their Lordships concluded that these were serious misdirections as "[t]here was no evidence of blood on the boots or on the cardboard that could have implicated the accused" (page 106 para. G). Nevertheless, their Lordships agreed with the Court of Appeal that the proviso was appropriately applied. Lord Guest, in delivering the judgment of the court, wrote at pages 107-108:

> "The question is therefore 'whether a jury being properly directed as to the presence of blood on the water boots or cardboard would inevitably have come to the same conclusion.' Their Lordships agreeing with the Court of Appeal consider that the prosecution presented a very strong case of circumstantial evidence…But apart from this consideration their Lordships' view is that the following facts would have inevitably led a jury properly directed to a conclusion of guilt. The accused was on his own admission in the vicinity of the crime at or about the time of its commission. The evidence of Constable Fairweather that he in fact recognised the accused's voice with which he was familiar. The evidence of the accused's uncle Magnus Watson that at 6 a.m. on the following day the accused spoke of a killing in Port Maria of a man he knew, one hour before the body of the deceased had been found. The totality of the evidence presents a very strong case

> and their Lordships have no doubt that apart altogether from the evidence as to the condition of the boots and the cardboard, no reasonable jury could have failed to convict."

Their Lordships indicated that they were satisfied that no miscarriage of justice occurred and that a jury properly directed would inevitably have convicted the accused.

[48] In **R v Cyril Barton and Winston Barton**, Gordon JA wrote at page 13:

> "**For there to be a contemplation of a new trial there must be fault in the conduct of the trial or the summing-up. Where by such fault the accused is denied the fair chance of an acquittal there has been a miscarriage of justice and the appeal must be allowed and a determination on whether there should be a new trial made on the guidelines given. Where, however, there has been no miscarriage of justice the strength of the prosecution case is the determinant.** When the prosecution case is overwhelming there should be no new trial but an application of the proviso dismissing the appeal.
>
> The injuries inflicted on the deceased in this case are "far greater than could conceivably have been necessary." Self-defence cannot avail the appellants. A misdirection on self-defence cannot affect the justice of the case.
>
> On the authorities to which we have made reference and on the facts of this case we hold that there has been no miscarriage of justice. Applying the proviso we would dismiss the appeal and order that sentence should commence on 29th September, 1995." (Emphasis supplied)

[49] Bearing in mind the principles outlined above, we agree with the submissions of counsel for the appellant. The comment in question was not merely on the meaning or impact of evidence. Neither was it a failure to leave for the jury a defence that was unlikely to succeed in the circumstances. Of course, the issues arising in cases such as these are many and so the above points are only illustrative. Importantly, the learned trial judge in the case at bar commented that the proven lies must have been a realization of guilt. The lie would have been a very important factor in the jury's assessment of the evidence, as the only evidence against the appellant rested on the

identification evidence of the eye witnesses. The lie touched and concerned the appellant's identity. The effect of the comments of the learned trial judge is that they took away from the jury an important assessment of the facts that would form part of their ultimate determination as to whether the appellant was guilty or not guilty. This was a substantial miscarriage of justice.

[50] While we agree with the position of the Crown that the evidence of identification was very strong, the appellant was deprived of a fair trial due to the nature and impact of the comments made by the learned trial judge concerning the lie. It would be inappropriate to uphold the conviction after such a serious error.

Should there be a retrial?

[51] Given the outcome of the preceding discussion on the application of the proviso, this is a matter in which the court would move on to consider whether to order a retrial. The Crown has, however, indicated that a retrial would not be appropriate in these circumstances as:

i. The depositions taken at the Kingston and Saint Andrew Resident Magistrate's Court and sent to the Criminal Registry of the Home Circuit Court cannot be located by the registrar of the latter court.

ii. The Crown has reviewed its file that was used in the trial, and the statements of the two eyewitnesses, BS and CS, cannot be found. Counsel who appeared at the trial for the appellant is also unable to locate the statements that were disclosed to him.

The Crown has taken the position that, having been left with only the transcript of the trial, this would not be enough to safeguard the appellant's right to a fair trial. We agree.

[52] In all the circumstances, since there can be no retrial, and there has been a substantial miscarriage of justice, the conviction must be quashed.

[53] The order of the court is as follows:

1. The appeal is allowed.

2. The conviction is quashed and sentence for murder is set aside.

3. A judgment and verdict of acquittal is substituted therefor.