CA. CRIMINAL LAW — APPLICATION FOR LEAVE TO APPEAL TO PRIVY COUNCIL — Motion — Sec. 35 Judicature (Appellate Jurisdiction) Act — whether point(s) of law of exceptional public importance: (1) whether incumbent on judge to withdraw case from jury where identifying evidence poor (2) whether Ct of Appeal correct in holding that where defence of alibi raised and accused mentions witnesses they should be called or their absence accounted for (3) whether when statement of prisoner tendered by prosecution the incriminating as well as the exculpatory should be left for the jury's consideration.

Application Dismissed (Per curiam Court of appeal laid down no principle re (2) above)

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 7/87

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BEFORE: THE HON. MR. JUSTICE CAREY, PRESIDENT (Ag.)
THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MISS JUSTICE MORGAN, J.A.

Cases referred to
R v Whylie (1978) 25 WIR 430; (1977) 15 JLR 163
R v Williams and Lewis SCCA 158 & 159/81 (unreported) dated 26/6/86

R. vs. ALLAN McGANN

Miss D. Satterswaite for Applicant

Kent Pantry & Brian Sykes for Crown

20th September, 1988

CAREY, P. (Ag.):

We have before us this morning a motion to appeal to Her Majesty in Council a decision of this Court, in the case of Regina against Allan McGann. This application is being made pursuant to Section 35 of the Judicature (Appellate Jurisdiction) Act. Under that section, this Court has power to grant leave where "the decision involves a point of law of exceptional public importance and it is desirable in the public interest that a further appeal should be brought."

Miss Satterswaite has argued with great charm, that some four points which are contained in her notice of motion come within the category of a point or points of law of "exceptional public importance." The points which we had to consider were stated in the following terms:

"1. (a) Is it incumbent on the Judge to withdraw the case from the jury when the quality of the identifying evidence is poor?

(b) In the instant case where the identifying witness, a child of twelve years, has stated categorically, "I do not know who it was", should this evidence have been left to the jury to identify the accused and supporting other evidence in the case?

2. Where a deceased person has made a statement as part of the res gestae identifying her assailant as being a person other than the prisoner, was it incumbent on the learned trial judge to withdraw the case from the jury and direct an acquittal?

3. Was the Court of Appeal correct in holding that where the defence of alibi is raised at a trial it would be reasonable to expect the prisoner to call witnesses to cover his presence at the particular time or tender some explanation for the absence of such witnesses in the circumstances where some witnesses had in fact been called in support of the alibi?

4. Where a mixed statement of the prisoner had been tendered at the case for the prosecution, should the statement as a whole including what is incriminating (sic) the exculpatory be left for the jury's consideration."

We have given very careful thought to these points upon which we were required to certify exceptional public importance, and we are firm in the conclusion that none of them is capable of coming within any such categorisation. In so far as the first point is concerned, namely, whether it is incumbent on the judge to withdraw a case from the jury when the quality of the identifying evidence is poor, this is a question which has already been determined by this Court in R. v. Whylie [1978] 25 W.I.R. 430; [1977] 15 J.L.R. 163, and settled beyond per-adventure. In that case and in the subsequent case of R. v. William and Lewis SCCA 158 & 159/81 (unreported) dated 26th June, 1986, the Court took time out to consider the English decision of Turnbull, and it is, in our view, no longer a point of public importance requiring any further appeal in the public interest.

In so far as (b) is concerned, that was a question of fact and nothing more need be said of it.

With respect to (2), it falls squarely within the first point which was raised by Miss Satterswaite, and there again, no further appeal is required.

As to the third point, we can see no fundamental principle involved. In its judgment, this Court was merely pointing out the self-evident. It was intended to demonstrate that it was a question for the jury in making up their minds as to the guilt or innocence of the applicant, whether the fact that the applicant had raised an alibi in which he had called the names of witnesses but did not call those witnesses nor give an explanation for their absence was not a matter that the jury could have taken into consideration. No principle was being laid down by this Court. We find it difficult to see how that commentary could be erected into a principle of law that ordains that there is a duty on the defence to prove it.

In so far as the final point is concerned, learned counsel conceded that the entire statement made by the applicant, namely, the incriminating as well as the exculpatory portions had been left to the jury, and in those circumstances, we do not see what is the ground of complaint or the nature of the prejudice against the applicant.

In all the circumstances, this application will be refused.