JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS: 60 & 117/90

COR: THE HON. MR. JUSTICE CAREY - PRESIDENT (AG.)
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE GORDON, J.A. (AG.)

R. v. ANTHONY FINN
JUNIOR LESLIE

Eme Usim for Finn

Enoch L. Blake for Leslie

Lancelot Clarke for Crown

July 1, 2, 3 & 15, 1991

CAREY, P. (AG.)

In the Circuit Court Division of the Gun Court held in Kingston before Patterson J, and a jury, the applicants were convicted of the murder of a mother Mercelin Morris and her son, Dalton Brown, who were both shot to death. Both applicants were sentenced to death.

With respect to Anthony Finn, Mr. Usim informed the Court that he had read the record and consulted a colleague, Mr. Chester Stamp who agreed with him, that there was no arguable point of substance which he could put forward. He had so advised the applicant who had signed a notice of abandonment. We do not propose to regard the application as abandoned and will deal with it as if it were still extant.

We now summarize the facts.

The victims live on a housing estate called Delacree Park in St. Andrew. On the night of 8th November 1987 at 8.00 p.m. both were at home. One of the two eye-witnesses, Carol Brown, a daughter of the slain woman was standing in the doorway of the house. Her

brother Dalton Brown, (the other victim) was sitting on a tyre in the middle of the premises engaged in conversation with his friend Courtney who was by the gate. Miss Morris occupied herself ironing school uniforms for her grandchildren. The gateway was to the left of the doorway at which the witness stood. Suddenly the gate shook, there was an explosion, whereupon both these applicants rushed in. Both were armed with hand guns. As they rushed in, she ran by them at the gate to a spot which was about two houses away.

Inside the house itself was, of course, the slain woman ironing and also the second witness, Orlando Campbell, her 15 year old grandson. He was lying on a bed about 6 feet away from her. Dalton Brown then dashed into the room and grabbed his mother. He was followed there by Anthony Finn whom the witness knew as "Mouth". His grandmother employed the ironing board to block this applicant who then wrestled with her, pushed her off and shot her. He then turned his attention to Dalton Brown whom he also shot a number of times. The witness did not actually witness this shooting but heard the explosions and his uncle's entreaty to the applicant not to shoot him further. Then he heard the applicant say "come let we go now." Subsequently he saw from his doorway, three men making their escape through the gate, one of these being Finn.

When Carol Brown fled in terror from her home, she stood in the pathway in the vicinity of her home where she saw, first, her brother's friend Courtney rush by and then the two applicants still carrying their weapons. Her mother limped up but her clothing was blood-stained and she herself was bleeding.

So far as the applicant Anthony Finn was concerned, he was well known to Carol Brown. They had grown up together in the same neighbourhood. She said his correct name was Winston Phillips.

She had last seen him some 3 to 4 weeks before the shooting. With respect to Junior Leslie, she had seen him one week before when he was pointed out to her as the person who had been involved in the stabbing of her slain brother.

The distance between the gateway and the doorway at which the witness stood when she heard the gate being shaken was a matter of 3 yards. There was a light (100 watt bulb) affixed to the wall facing that gateway. The intruders and the witness passed each other at or in the gateway. The applicants also passed in close proximity to her as she stood in the pathway after the shooting. Some non-verbal evidence indicating distances was then given which would have been observed by the trial judge and understood by the jury. See page 48 of the Record as an example. At all events, the pathway was only 4 feet wide. She was able to see them as they rushed by on the pathway because lights from two houses nearby shone onto it.

Young Orlando Campbell said that he knew Anthony Finn as "Mouth" as he had seen him visit his uncle the slain man twice before the incident, between March and August of the same year. On one of these occasions, this applicant had requested him to purchase cigarettes. After the shooting of his grandmother and uncle, the witness went to the doorway in time to watch three men "lining up" to make their way through the gateway. He recognized the applicant Finn and another man whom he referred to as "Honey Boy". The third man, he was unable to identify.

The medical evidence confirmed the eye-witness account that both victims had been shot and died as a result of injuries caused thereby.

Both applicants gave sworn evidence and put forward alibis as their defence.

Mr. Blake, on behalf of Leslie, obtained leave to argue three grounds of appeal, the first of which complained of "confusing, misleading and highly prejudicial comments of the trial judge, the second challenged his ruling that there was a case to answer and the third, criticised him for his failure to warn the jury of the dangers of convicting on the uncorroborated visual identification by a sole eye-witness." We propose to deal with them in the order in which they were argued.

The final ground was argued first, doubtless that in which Mr. Blake had the greatest confidence. He submitted that no clear warning was given, but admitted that the reason therefor, was given and further complained that the trial judge did not advise the jury to heed the warning. We understood from these apparently contradictory submissions that a warning had been given but it was not clear.

Where the Crown's case is based wholly or substantially on visual identification, then it is the law, that a trial judge is obliged to give a warning to the jury of the dangers inherent in such evidence, and must explain the reason for that warning, pointing out that an honest witness may be mistaken and they should not confuse honesty with accuracy. Visual identification evidence is a special genre of evidence and calls for special treatment. We do not doubt that definitive statements of this court in several cases since the Privy Council decision of **Junior Reid v. R** [1989] 3 W.L.R. 771 have brought these principles home to all the judges of the Supreme Court.

In the instant case the learned trial judge admonished the jury in these terms at pages 212-215:

"... The question of identity is paramount. The case against each defendant depends wholly on the correctness of one or more identification of each accused. And each accused is saying that the witnesses were mistaken. I must therefore warn you of the special need for caution before convicting in reliance on the correctness of the identification.

The reason for this, is that it is quite possible for an honest witness to make a mistaken identification, and notorious miscarriage of justice have occurred as a result. A mistaken witness can be as convincing as anyone else, and even a number of apparently convincing witnesses can all be mistaken. Mr. Foreman and members of the jury, you will have to draw on your experiences, and I am sure that each of you at some time or the other, must have been mistaken as to the identity of a person. Time and time again, I have been mistaken for someone else. People come up to me, call me by some other name. It may well be that it is because they don't know me, or it may well be that they didn't see me properly before they called me the name of this other person. You, in your experience, I am sure you have used the term, 'I could swear it was you,' telling someone that you saw them somewhere and when that person tell you, 'No, I wasn't there, as a matter of fact I was off the island then,' 'Boy, I could swear I saw you at such and such a place.' Maybe that you didn't get a good look at the person or may be it is someone that you didn't know very well. I tell you all this because it is very important that you bear in mind the special need for caution, before convicting in reliance on the correctness of the identification.

You will have to examine carefully the circumstances in which the identification by each witness was made. There are a number of things that you will have to take into consideration. You will have to consider how long did the witness have the accused under observation, at what distance, in what light, was this observation impeded in any way, had the witness ever seen the accused before, if so, how long before, how often, if only occasionally had he any special reason for remembering the accused. All those are things that you will have to take into consideration, Mr. Foreman and members of the jury, when you are considering the quality of the identification evidence.

> "And, of course, you will have to look at the evidence that is presented against each accused man separately and see whether you are satisfied so that you can feel sure that the witnesses are not mistaken when they say that they saw these two accused men that night. Mr. Foreman and members of the jury, remember I told you that they are saying that they were not there, and implicit in the cross-examination of the crown's witnesses there was this further allegation that you will have to consider, that quite apart from the witness making an honest mistake, the witness could also be telling a deliberate lie because of something that had happened to the deceased Dalton Brown some weeks before and in revenge they could be telling a deliberate lie on these two men. Those are things that you have to consider, Mr. Foreman and members of the jury."

The trial judge then examined and discussed the evidence in the case with the jury as was his clear duty. These directions occupied another 8 pages of the transcript.

Then at page 223 he returned to emphasize some of the dangers which could arise where visual identification was the basis of the Crown's case.

> "Mr. Foreman and Members of the Jury, again I am going to remind you that mistakes are sometimes made in recognition even of close friends, sometimes even of relatives. You will have to say whether in this case the witness, Carol Brown, is mistaken when she said she recognized the accused man, Anthony Finn, whom she knew for a long time, that is common ground, or whether she is mistaken when she said she recognized Junior Leslie whom she had seen one time before and whom she was seeing that night again. She said she had the opportunity of seeing them in the home and she saw them when they were running past her again on the street.
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> Learned attorneys for the defence, they have asked you to say that Carol Brown would not have stood in the pathway after what she saw, if she saw gun men enter her house and she ran outside. She wouldn't have stood in the pathway, and it was, I think Mr. Blake, who told you that there was this nine night going on and she didn't run to the nine night and people were out

> "there. She said yes, there was a nine night but it was not in the direction that she ran. She ran away from where the nine night was and where she ran to she was alone. There was nobody there and in her fright she doesn't know why she just stood up but she ran and she stood up there and even when those men went by she was standing there."

He went on to deal with Orlando Campbell's evidence in so far as Anthony Finn was concerned at pages 224-226:

> "Now Campbell told you that he had seen Finn two times before. He is not telling you that Finn is a man that he has been seeing every day. He said he saw him twice before. On the first occasion he saw him for about an hour. On the second occasion it was also for about an hour. He said both occasions it was when Finn came to his house and it was between March 1987 and August 1987. Finn himself told you, Mr. Foreman and Members of the Jury, that in August 1987 he went to Brown's house. He is a friend of Brown -- not a special friend but a friend of Brown. He knows him. But Brown has an uncle who had come from abroad who is his, Finn's special friend. And he went there and he spent some time with that uncle. That is in August.
>
> Campbell told you that on one occasion Finn sent him to buy cigarettes and he said that on this night, the night of the incident, he was on his bed and when he saw his uncle run into the room it was Finn who he saw following behind the uncle. Finn had a gun and his grandmother tried to block Finn. He was seeing all this. He was lying on his bed and he saw that and his grandmother used the iron board and Finn was wrestling with her to take away the iron board. He had the gun in one hand and then he shot her and when she dropped he looked off.
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> Well you will have to say whether he had sufficient time, an opportunity to see who was that man that come in the house, to see that it was Finn ...
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> Mr. Foreman and Members of the Jury, the light, he said, was still shining in the yard. Inside the house there was electric light shining. The mother was ironing."

At pages 226-227 he concluded his directions in this way:

> "Mr. Foreman and Members of the Jury, you will have to say whether or not he had sufficient opportunity. This question of identification, as I told you, is very important. They are saying that they weren't there and even if you should reject their alibi you should not use that to say that because you reject their alibi they were there. You must look at the quality of the prosecution's evidence and see whether or not you are satisfied so that you feel sure that the witnesses were not mistaken when both of them said that they saw Finn there and that Carol Brown was not mistaken when she said she saw Junior Leslie there.
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> I will just remind you when you are considering the question, take into consideration how long the witness had the accused under observation, the distance between them, lighting conditions, was the observation impeded in any way, whether or not the witness had seen the accused before and how often.
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> You were told by learned counsel for the defence that at the most, all that Carol could have said, if she did see anybody, was she had a fleeting glance of the persons because as they came in she ran out and when she was on the street the light was poor and the men ran by her.
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> Mr. Foreman and Members of the Jury, those are things that you have to take into consideration and see what you make of it."

We consider that the learned trial judge gave the warning necessary in cases of this nature. No particular words are prescribed. No catechism need be recited. It is not a matter of any formula being required. The jury must be, and in this case, were alerted in clear terms as to the caution that was expected of them in their approach to the facts and circumstances which bore on the matter. He pointed out the weaknesses in the prosecution case, e.g. the short time available to Carol Brown for viewing the applicants. In our view his direction in this regard were clear, fair and more than adequate.

We are quite unable to appreciate why it was thought necessary for the trial judge to direct the jury that they must heed the warning. The learned trial judge had directed the jury that they were obliged to accept his directions on the law as he was the judge of the law. The proper directions as to the respective functions of judge and jury were given to the jury. In our view, Mr. Blake was descending into the arid realms of semantics. Plainly there was no substance in this ground which accordingly fails.

With respect to ground 1, we were adverted to the following passage at pages 221-222:

> "You heard the police officer saying that that very night he received a report from Carol Brown and from young Campbell, and he also received a report from and took a statement from Mercelin Morris at the hospital. Now, Mr. Foreman and members of the jury, that statement couldn't be put before you, that is not evidence. If certain conditions had existed it could be, but those conditions were not fulfilled, so you couldn't hear what is in that statement. Again, I am not asking you to speculate, but the officer told you that he was the person investigating this case, and he got information and he went to the Hunts Bay Police Station on the 11th of November, three days after the incident, and he went back there in December and there he saw these two accused men and he arrested them."

Mr. Blake contended that the trial judge's comment contained in the extract was "confusing, misleading and highly prejudicial," because the jury could understand that the identity of her assailants had been disclosed to the investigating officer and on that basis the applicants were arrested.

We cannot agree. The trial judge was careful to say that her statement was not before them and they were not entitled to speculate as to its contents. Nothing contained in the remainder of the extract was remotely capable of enabling the jury to draw any

inference as to the identity of the slain woman's assailants. It was the eye-witnesses who gave statements to the officer which was the basis for his arresting them. The trial judge had got his facts right and his "comments thereon" which really were directions, were fair and proper.

The other illustration put forward by Mr. Blake in support of this ground is to be found at page 232 of the transcript:

> "... It was put to him that he gave the description of that man as being short and stout.
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> Now, Mr. Foreman and members of the jury, this incident took place on the 8th of November, 1987, almost three years ago, and learned counsel is asking you to look at the accused now, the accused man, Leslie, and to say whether or not you would describe him as being short and stout. He conceded that he can be called short, but what he is saying, that by no stretch of imagination you could describe Leslie now as being stout. The witness wasn't speaking of today, the witness spoke to two years and some months ago. You heard that the accused man had been incarcerated since then, since he was arrested."

The background to this criticism is this. Mr. Blake in the course of his cross-examination of Carol Brown asked if she would describe him as "short and stout". Her response was - "he could not be stout now."

The trial judge was entitled, as part of his duty to assist the jury to appreciate the significance of evidence, to point out that any description of this applicant (given to the police) by a witness shortly after the event "as short and stout," might not at the date of trial be accurate. The applicant had, in point of fact, been in prison on remand for a period of two years. The facts were true: the comment was fair. This complaint, we consider to be lacking in substance.

The final ground (ground 2) concerned the trial judge's refusal to accede to a no case submission. The basis of this ground was that the evidence was tenuous which is a phrase used in **R. v. Galbraith** [1981] 2 All E.R. 1060. Counsel argued that the sole eye-witness had only a "fleeting glance" of the gunmen and everything happened in a flash. The judge should have withdrawn the case as is sanctioned in **R. v. Turnbull** [1977] Q.B. 224.

We do not accept that this is a true "fleeting glance" case. At all events, it is not a fleeting glance of a perfect stranger. The sole witness with respect to the identification of the applicant Leslie, had the opportunity to observe him on two occasions at close range. Firstly, from her doorway she was able to see him. She covered the 12 feet from doorway to gateway and passed him there. As she approached the gateway, she would have been able to see him. She had especial reason to remember him, we would think as he had shortly before, been pointed out to her as someone who had assaulted and stabbed her brothers: he was no stranger.

The lighting was from a 100 watt bulb in the wall which was no more distant than the doorway to the gateway. She had a second opportunity to observe him when he passed her in the 4 feet wide pathway as he and his colleague made their escape. There was lighting from the houses adjacent to the pathway.

In our view, this was not a case to which either limb of Lord Parker's Practice Direction was applicable: the evidence was not tenuous: it was not a weak case. The trial judge was correct to call upon the applicants.

With respect to the other applicant, we are of the view that the case against him was quite strong. Two witnesses one of whom grew up with him identified him. Orlando Campbell had better conditions for recognizing him as he entered a room in the house in which Campbell was and was in close proximity to him at the material time. The house was well-lit.

Mr. Usim who appeared for this applicant, reminded us of the facts in the case, referred to the summing-up and he reviewed the evidence against the applicant, and conceded that the trial judge (pace Mr. Blake) had given the necessary warning and dealt with the issue of identification correctly. Our review of the facts and circumstances and our analysis of the summing-up compel us to agree entirely with the view expressed by counsel. We were assured by him that he had personally communicated his view to this applicant who signed notice of abandonment.

In the result, for the reasons we have set out above, both applications for leave to appeal are refused.