JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS. 84, 85 & 86/99

BEFORE: **THE HON. MR. JUSTICE FORTE, P.**
THE HON. MR. JUSTICE WALKER, J.A.
THE HON. MR. JUSTICE SMITH J.A. (Ag.)

R. vs. Gavaska Brown

Kevin Brown

Troy Matthews

Dennis Daly Q.C., for Troy Matthews

Miss Nancy Anderson for Kevin Brown

Miss Janet Nosworthy for Gavaska Brown

Bryan Sykes Senior Deputy Director of Public Prosecutions and Miss Tanya Lobban for the Crown

January 29, 30, 31, February 1, 2 and April 6, 2001

SMITH, J.A. (Actg.)

On the 6th May 1999, in the Circuit Court Division of the Gun Court the appellants were convicted of the murder of Ms. Carol Adams, and each sentenced to life imprisonment.

In the early morning of the 21st day of April, 1997 gunmen invaded the home of Mr. Roger Brown and his girlfriend, the deceased Carol Adams, at 3 Charles Street in the parish of Kingston. Mr. Roger Brown and the deceased occupied the front room of the house. At about 1:10 a.m. he and the deceased were in bed when he heard a bang on the door. The witness Brown stood on the bed and looked through a side window. He saw a man whom he recognised as the appellants, Gavaska Brown, otherwise Gavin, coming from the back of the premises. He said the appellant Brown went

to the front of the premises and stood by the front wall looking into the street. The witness Roger Brown said he saw the appellant Gavaska Brown with a gun in his hand. The latter then "turned from looking at the street and looked up at the window as if he was looking at me" the witness said in his evidence.

He saw another man "coming down, screeching down" (bending down low). This man took the deceased's washstand and placed it under the window through which the witness Brown was looking. Mr. Brown recognised this man as "Ninja" – the appellant Kevin Brown.

Roger Brown then took up his machette and went to the front window where the deceased was. He looked through a hole in the window and saw a third person standing on a step at the gate. This third man he recognised as the appellant Troy Matthews otherwise called "Dicey". A stone was thrown through the side window followed by shots through the side window. The deceased went under a bed. The front door was kicked open. The witness Roger Brown started chopping with his machette. By this time shots were being fired through both the window and the door. Mr. Roger Brown was shot in the leg. Adams was fatally shot.

At the trial, the main issue was whether the appellants were correctly identified by Mr. Roger Brown, the only eyewitness. Mr. Brown's evidence was uncorroborated. His evidence was that by reason of his being injured in the same incident he was hospitalised for about seven weeks. He testified that he knew all three appellants for many years before the incident. They were all friends and he had been drinking with Gavaska Brown and Troy Matthews either the Friday or the Saturday before. It is his evidence also that he did not give the names of the appellants to the police until some time after he had been discharged from the hospital.

The appellants, Gavaska Brown and Kevin Brown were arrested on warrants issued on the 30th June 1997. The warrant for Troy Matthews was issued earlier on the

24th April 1997. The arresting officer Sgt. Masters testified that the witness Roger Brown gave him the names of the appellants while in the hospital.

After the incident the witness next saw Gavaska Brown and Troy Matthews at the Gun Court in Kingston. He pointed out Kevin Brown at the Central Police Station. The trial judge rejected no-case submissions by counsel for the appellants.

The appellants gave unsworn statements from the dock saying they knew nothing about the case and were innocent. The appellant Troy Matthews called one Sandra Ranger as an alibi witness.

Several grounds were filed and argued by counsel on behalf of the appellants.

Troy Matthews

Mr. Daly, Q.C. for the appellant Troy Matthews, advances three main grounds in support of the appeal. His first argument is that the quality of the identification evidence was so poor that the judge ought to have stopped the case at the no case submission stage there being no further evidence to implicate the appellant. Having left the case to the jury the trial judge failed to direct them adequately, or at all, on the effect that certain discrepancies might have on the identification evidence.

His second argument is that the judge failed to direct the jury correctly in relation to the defence of alibi. Mr. Daly's third point is that the judge in directing the jury on common design failed to relate his directions to the facts of the case.

The identification issue

As regards the quality of the identification evidence Mr. Daly made a number of submissions:

> (1) That the uncorroborated evidence of the only eye-witness is that he only had a "speck of time" to observe the person he claims to be the appellant whilst peeping through a hole in the window. This is a classic case of "fleeting glance" and the judge should have upheld the no case submission.

(2) That the lighting was unsatisfactory. (This factor is common to the submissions made on behalf of all three appellants and will be dealt with later.)

(3) That as regards the discrepancy between the eyewitness and Sgt. Masters as to when the latter was informed of the names, the learned trial judge failed to direct the jury that the witness' credibility would be in question if what the police, Sgt. Masters said is true and that the witness' reliability and/or credibility would be in question if what the witness said is true. Even when the jury intimated that they were concerned as to "the time that the warrants were issued" the judge failed to assist.

(4) That the learned trial judge failed to direct the jury in respect of the possible effect on the issue of identification of the discrepancy between the evidence and written statement of Det. Masters as to whether or not he had issued a warrant for the arrest of a man called 'Spiderman'.

Mr Sykes, for the Crown in a concise manner, submits that when the evidence of the eyewitness is examined closely it is clear that the witness was alert and was on the look-out after he heard the "bang". He urges the court to take the view that in the context of the narrative of the witness "speck of time" or "nick of time" means "at that time". Thus he contends that the witness was saying that "at that time" when he saw the appellant a stone was thrown through the window.

We have looked long and hard at this issue and have been persuaded that the unsupported identifying evidence is weak. In relation to the appellant Matthews the witness was asked:

"Q. Did you see whether he had anything at all?

A. Well in that speck of a time then they throw a stone through the window

Q. Which window, sir?

A. That was the side window the one which I was at first, then shots started firing"

Earlier in his testimony the witness had testified that he looked through the front window and saw "another person" standing on a step at the gate. He recognised this person as the appellant Troy Matthews. The other important parts of his evidence are as follows:

Q. Would you say for how long you saw his face?

A. Well, as I have said before, Ninja and Dicey, these two faces just happen in the nick of time because after that things started happening you know.

Q. O.K. you saw his face in the nick of time, how have you been able to say that it is Dicey you saw that night at the gate? How are you able to say that?

A. We were face to face actually

Q. Anything else?

A. That is when the shots start to fire.

Q. So, O.K. I am asking you, you say it happened in the nick of time, so how were you able to say it is Dicey, and you have said you were face to face?

A. I have known Dicey all the time."

One gets the distinct impression that the prosecutor was not satisfied with the state of the identifying evidence.

Under cross-examination his evidence continues:

Q. When you first saw the man you say is Troy, (Dicey) that morning you had been peeping through your keyhole?

A. Keyhole?

Q. The little hole that you called a peep-hole. When you first saw him that morning was that early morning. Is that correct?

A. Yes.

Q. That was after you had seen shadows?

A. Yes after I had seen the other two

Q. And after you heard the stoning through the window. Was it after you had heard the stoning through the window?

A. Just as I saw him was when the stone came through the window."

The above colloquy suggests that the witness' opportunity to properly observe the person at the gate was frustrated by the stoning of the house.

Another important part of his evidence is the following:

Q. So when you are looking through the peephole you are looking through one eye at the accused, the one inch peephole you are using one eye?

A. It is just a small hole. I said it is one inch in circumference.

Q. One eye you used. If it is just a small hole. You had used your two eyes? Did you use one eye or two eyes?

A. With my eyes.

Q. The hole is still there today?

A. I am not sure ...

It may be appropriate at this point to state that on the day of the incident photographs were taken of the house and in particular of the window through which the witness said he looked and saw the appellant Matthews. We were not able to discern any hole in the window. During cross-examination the witness was shown the photographs and the following dialogue ensues:

Q. Are you able to show us the hole? The peep hole?

A. Actually in this photograph I cannot see it.

Thus the witness was not able to show the jury the hole through which he said he saw the appellant. The following excerpt from his re-examination indicates that the

witness was not sure whether he looked through a hole in the window or through a partly closed window.

> Q. In respect of the hole, counsel in cross-examination asked you about the window that you were looking through you had said that there is a hole in the window which is one inch and you had said something about it not being fully closed?
>
> A. Yes. My window as you can see in the photograph I don't know if you were noticing that my window wasn't fully closed.
>
> His Lordship. Just answer the question in relation to that.
>
> Q. You say your window was not fully closed?
>
> A. Yes.

The evidence referred to above discloses:

> (1) that the time of observation by the witness of the person whom he identifies as the appellant Matthews was at the best very brief.
>
> (2) that the witness' brief view of that person was gained through a small aperture in the window which he was unable to point out when shown the photograph and which indeed was not discernible.
>
> (3) that just as the witness saw the person a stone was thrown through the window and gunshots were fired in the house.

It is our view, that the base of the prosecution's case, which depends wholly on the identification of the appellant Matthews by the witness is very slender. This being so the trial judge should have withdrawn the case from the jury. In such circumstances a case is withdrawn from the jury not because the judge considers that the witness is lying but because the evidence has a base which is so slender that it is unreliable and therefore not sufficient to found a conviction: See **Wilbert Daley v. The Queen** 30 JLR 429 at 436 **which** applied **R v.Turnbull** 1977 QB 224. The **Turnbull** doctrine

protects a jury from acting upon the type of evidence which experience has shown to be a possible source of injustice **Daley v R** (supra).

This conclusion is sufficient to dispose of the appeal of Troy Matthews. However, we will say something about the judge's direction on the appellant's defence of alibi at this point. The issues of common design and discrepancies which also affect the others will be considered later.

The alibi case

The appellant Matthews made an unswom statement to the effect that he was at home on the night of the 21st April 1997 and did not leave. His sister Sandra Ranger testified that the appellant was at home throughout the night of the incident.

The judge directed the jury as follows:

> "In this case, members of the jury, you heard in the unsworn statement which I told you, you can give such weight as you think it deserves. You heard questions as to alibi. I was not there, and you heard the evidence from one of the accused's witnesses purporting to support that alibi. You give it the weight which you think it deserves, unless (sic) you think that it is good, then the identification would not be proper. Because two persons or one person can't be at more than one place at the same time. That is all I will tell you on that."

Notwithstanding the last sentence the learned judge later in his summation after reminding the jury of the evidence of Sandra Ranger, told them:

> "But you will have to look at the evidence in relation to the statement that Troy Matthews gave. When you are running alibi, members of the jury, it is not the big things that cause the discrepancies you know, but since she gave evidence you have to treat her discrepancy just as the other discrepancies which have arisen on the witness' testimony."

The judge then proceeded to remind the jury of the discrepancies between the appellant's statement and his witness' evidence and then continued:

> "That was the case for Troy Matthews and you have to look at that evidence from his sister and see if you accept it as truth."

Whilst dealing with the statement of another appellant the judge obviously realised that the above directions were insufficient and interposed the following:

> "When you look at the unsworn statement from Troy Matthews you look at the evidence of his sister. If it affects you to be the truth you have to acquit him because the prosecution would not have discharged the burden of proof. If it leaves you in doubt, equally you have to acquit him. And in this case also if you disbelieve him you still would have to go back to the evidence that was led by the prosecution to see if it satisfies you of the requisite standard of proof."

Mr. Daly Q.C. complains that the learned trial judge's direction was inadequate in that:

> "(1) he failed to advise the jury that the burden of negating the alibi was on the prosecution;
>
> (2) he failed to direct the jury that they must weigh the evidence of the alibi witness in the same scale as the prosecution witnesses;
>
> (3) he failed to direct the jury that if they did not believe the alibi evidence that by itself does not mean that the appellant is guilty."

For this submission counsel relies on **R. v.Turnbull** (supra), **R. v. Pemberton** (1994) 99 Cr. App. R.228 and **Bernard v The Queen** (1994) 31 JLR 149.

Mr. Sykes, for the Crown,submitted that the directions of the learned trial judge to the jury in respect of the alibi evidence could not have left them in any doubt that the burden was on the prosecution to make them sure that the appellant was guilty. In respect of the second point, he argued that the learned trial judge's direction to the jury to "treat her (the alibi witness') discrepancy just as the other discrepancies which have arisen or other witness' testimony" was sufficient in the circumstances.

As regards the third point, Mr. Sykes contended that where an accused person made an unsworn statement a judge was not required to direct the jury on the significance of the rejection of an alibi.

The judge gave the jury a clear and correct direction on the burden of proof. Indeed no criticism is made of that.

We accept the submission of Mr. Sykes. It is not obligatory for the trial judge to use any special words. He must in clear and unequivocal terms direct them that an accused does not have to prove that he was elsewhere at the material time. See **R v. Baillie** (1995) 2 Cr. App. R. 31.

In view of the simple and clear language in which the judge directed the jury in the instant case the jury could not have entertained any doubt that the burden of proving the alibi was on the prosecution. We hold therefore, that the submission of Mr. Daly, Q.C. that the learned trial judge failed in his duty in this regard, is untenable.

As regards the second point, it is sufficient to say that we do not think it has any merit.

We now come to the third point. Lord Widgery CJ. In **Turnbull** said:

> "Care should be taken by the judge when directing the jury about the support for an identification which may be derived from the fact that they have rejected an alibi. False alibis may be put forward for many reasons: an accused for example, who has his own truthful evidence to rely on may stupidly fabricate an alibi and get lying witnesses to support it out of fear that his own evidence will not be enough. Further, alibi witnesses can make genuine mistakes about dates and occasion like any other witnesses can. It is only when the jury is satisfied that the sole reason for the fabrication was to deceive them and there is no other explanation for its being put forward can fabrication provide any support for identification evidence. The jury should be reminded that proving the accused has told lies about where he was at the material time does not by itself prove that he was where the identifying witness says he was."

In the instant case the judge did not give such a direction. Instead the judge gave the **Leary Walker** direction **(D.P.P. v. Leary Walker** 21 W.I.R. 406 at 411).

In **Mills et al v R** (1995) 46 W.I.R. 240 the Privy Council held that the observations of Lord Widgery in **Turnbull** have no application to an alibi put forward only in an **unsworn** statement. However, in the instant case the appellant called an alibi witness. The learned trial judge pointed out the discrepancies between the appellant's unsworn statement and the witness' evidence.

In these circumstances a rejection of the alibi evidence by the jury might have led them to think that that supported the identification evidence. In our judgment, because of this danger, the learned trial judge ought to have directed the jury in terms of Lord Widgery's CJ. observation in **Turnbull** (supra): see **R. v. Pemberton** (1994) 99 Cr. App. R.228.

This omission further justifies our conclusion that the appeal of Troy Matthews must be allowed.

Kevin Brown

Miss Nancy Anderson argued four grounds of appeal on behalf of the appellant, Kevin Brown alias "Ninja". In respect of the first she submitted that the quality of the identification evidence was so poor that the learned trial judge ought to have upheld the no-case submission and to have withdrawn the case from the jury. As was stated earlier, the prosecution's case depended wholly on the correctness of the identification of the appellant, Kevin Brown by the only eyewitness, Mr. Roger Brown.

According to the witness, he was standing on his bed looking through the window when he saw a man "screeching crouching low from the back of the yard." He said that the person was "Ninja" the appellant Kevin Brown. The front of the yard was well lit by street lights, he said.

The witness testified that he saw Ninja's face as the latter placed a "washstand" under the window where the witness was and "then he looked up as if he was about to come up to the window and he held up his face." The witness said he turned to his girlfriend and said "Carol this look like it is for us" The following is an important part of the witness' evidence:

"Q. So about how long did you see his face for?

A. Ninja?

Q. Yes

A. Well, not really a long time, he just look up at me; that is when I look down and saw him that is when I call to Carol...

Q. Hold on. You said you had seen Gavaska Brown for about two to three minutes?

A. Yes

Q. Would you estimate?

A. Ninja, is as if you just – you look up at me, you look up, for example he is looking at me, he looked at me then I saw him, then I turn around, just telling the lady that look like us. So that is just a nick of time.

Q. O.K. You were able to see Gavaska Brown two to three minutes?

A. Aha.

Q. Maybe you could assist us by telling us what you mean by 'nick of time'. Give us an idea of the time.

A. About a minute

Q. Now about what distance was Ninja from you?

A. Oh just below

Q. About what distance would that be?

A. I am on my bed here and he is down there, just the same distance

Q. Could you have touched him?

A. If I opened my window I could have."

The witness went on to say that he had known the appellant, Ninja, for five to six (5-6) years and that Ninja used to be his barber. He knew where Ninja lived. He and Ninja and the others were friends and Ninja used to "hang out at his shop."

When he was asked by Crown Counsel how long he saw Troy Matthews' face, his answer was "Well as I have said before, Ninja and Dicey, those two faces just happen in a nick of time because after that things started happening, you know... ."

In answer to Mr. Reece during cross-examination the witness agreed that it was "just a couple of seconds." Miss Pyke (Crown counsel) in re-examination tried to clarify this aspect by asking:

"Q. Mr. Brown, in answer to me yesterday, in regards to the amount of time that you saw Kevin Brown, Ninja, you said it is about a minute, and counsel suggested to you that it was about a couple of seconds. Exactly what was the amount of time that you saw his face?

A. As I said yesterday, I can say, I would say a nick of time. You can term three minutes and I say minute as I have said yesterday. We are not using a clock at the time to say it is one, two, three or four minutes. In the nick of time. We had to reach couple of seconds to come to minutes. Anything after seconds is minutes.

Q. So is it about a minute or seconds

A. Miss, listen

Q. And there are sixty seconds in a minute and you are saying it was a couple of seconds and you have said to me that it was a minute. So when you say it was a couple of seconds, I would like you to explain whether it is a minute or a couple of seconds. About a minute or couple of seconds or is there a difference?

A. That is what I am saying, I don't see the difference. That is what I am saying. I don't see the difference."

The witness' evidence as to how long he had the appellant Kevin Brown (Ninja) under observation is demonstrably unsatisfactory. What is tolerably clear on the witness' evidence is that he did not have the appellant under observation for any length of time. He was looking through the top part of a "push up" window. The witness saw the face of the person he identified as the appellant only once. This was when the person looked up at the window. The witness said just as the person looked up at him that was when he looked down and saw him and then he spoke to Carol and picked up his machette. It is in this context that the witness used the term "nick of time."

It is difficult to avoid the conclusion that the witness had no more than a fleeting glance of the person.

Accordingly, we are driven to the conclusion that the quality of the identification evidence was not such that the jury could safely be left to assess its value. For this reason the appeal should be allowed.

Confrontation where suspect is known

Miss Anderson also submitted that the learned trial judge gave the jury no direction or no adequate direction on how to deal with the confrontation of the appellant, Kevin Brown by the witness.

The evidence is that just over a year after the incident the police told the witness, Roger Brown, that they had the man in custody at the Central Police Station. The witness was invited to the station. At the station the appellant was taken from the lock-up and the witness was asked if he was the man. In his direction to the jury the judge said:

"He said he attended no identification parade. 'I pointed out Ninja at Central Station.' Those questions were asked of him to say that this was not a proper identification. You

> haven't (sic) got to take it from me in the circumstances, no violence is done to anybody with that type of ..."

When a suspect disputes the claim of a witness that they know each other an identification parade should be held where it would serve a useful purpose: **R.v. Popat** (1998) 2 Cr. App. R. 208 and **R.v. Conway** (1990) 91 Cr. App. R. 143. Even where there is no such dispute, if the suspect asks for an identification parade then one should be held if it is practicable to hold one: **R.v. Conway** (supra).

In England, Codes of Practice have been issued under the Police and Criminal Evidence Act 1984 (PACE) to ensure that pre-trial identification procedures are conducted as fairly as possible.

Where the identity of the subject is known, Code D provides for four possible methods of identification by witnesses namely, identification parades, group identification, video film identification and confrontation. This is in order of preference. Confrontation is the last resort and in keeping with the Code must be carried out strictly in accordance with prescribed rules. See for example **R.v. Samms, Elliot and Bartley** (1991) Crim. L.R. 197.

In Jamaica we do not have any procedure similar to Code D. In **R.. v. Hassock** 15 JLR 135, no identification parade was held and three witnesses to whom the applicant was previously known were allowed to see him at the police station with a view to identifying him. Melville JA. (Ag.) (as he then was) had this to say at p.138(d-e):

> "Confrontation should be confined to rare and exceptional circumstances, such as those in **R. v. Trevor Dennis,** [(1970) 12 J.L.R. 249] where the court would perhaps not be inclined to frown too unkindly on the procedure adopted there. Although it is always difficult to formulate universal rules in those circumstances where the facts may vary so infinitely, a prudent rule of thumb would seem to be: where the suspect was well known to the witness before, there may be confrontation. That is, the witness may be asked to confirm that the suspect is the proper person to be held. If the witness did not know the suspect before, then the safe course to adopt would be to

> hold an identification parade, with the proper safeguards unless of course there are exceptional circumstances."

In **R. v. Errol Haughton and Henry Ricketts** 19 JLR 116 the above passage was referred to by Carey J.A.

In **Watt v. R.** (1993) 42 W.I.R. 273 at 278 (h) the Privy Council per Lord Lowry said:

> "It is true that an identification parade in a recognition case is of strictly limited value; on the other hand, unlike a confrontation or a dock identification a parade can confirm the witness' ability to pick out the person identified."

Finally in **Goldson and McGlashan v. R.**(2000) 56 W.I.R. 444 the Privy Council accepted the submission that:

> "If the accused is accepted to be a person well known to the identifying witness, no parade need be held. The witness will naturally pick out the person whom he knows and whom he believes that he saw commit the crime. In fact the evidence of the parade might mislead the jury into thinking that it somehow confirmed the identification, whereas all that it would confirm was the undisputed fact that the witness knew the accused. It would not in any way lessen the danger that the witness might have been mistaken in thinking that the accused was the person who committed the crime."

Their Lordships were of the view that where there is a dispute over whether the accused was in fact known or sufficiently known to the witness there ought to be an identification parade where it would serve a useful purpose. In such circumstances, the function of the identification parade is not only to test the accuracy of the witness' recollection of the person whom he says he saw commit the crime but to test the honesty of the witness' assertion that he knew the accused. Their Lordships approved the dictum of Hobhouse L.J. in **R.v. Popat** (1998) 2 Cr. App. R. 208 at 215 that "there ought to be an identification parade where it would serve a purpose."

The upshot is that where the suspect is well known to the witness unless the suspect asks for an identification parade, confrontation is permissible in this country.

But how should such confrontation be conducted? It is suggested that we should adopt some aspects of Annex C of the current Code D issued pursuant to PACE. The following, in our view, will help to ensure fairness:

(i) Before confrontation takes place, the identification officer must tell the witness that the person he saw may or may not be the person he is to confront and that if he cannot make a positive identification he should say so.

(ii) Before confrontation takes place the suspect or his attorney-at-law shall be provided with details of the first description of the suspect given by any witness who is to attend the confrontation.

(iii) Confrontation should take place in the presence of the suspect's attorney-at-law unless this would cause unreasonable delay.

(iv) The suspect should be confronted independently by each witness who should be asked "Is this the person?"

In this case had the procedure suggested in (i) above been applied it would have ensured fairness to the appellant. However, the uncontroverted evidence of the witness is that he knew the appellant, Kevin Brown for some six (6) years. The appellant was his barber, they were friends and used to cook, eat and drink together. The trial judge gave the jury the **Turnbull** directions and reminded them, of the ever present danger of an incorrect or wrong identification and of the possibility of an honest witness being mistaken. The jury was also told that mistakes in recognition, even of close friends and relatives are sometimes made. We conclude therefore that in the circumstances of this case what transpired at the police station was not unfairly prejudicial to the appellant.

Gavaska Brown o/c Gavin

Ms. Janet Nosworthy on behalf of the appellant Gavaska Brown, filed and argued 7 grounds. Grounds 1, 2, 3 and 6 which overlap each other are directed mainly at the question of identification.

In grounds 4 and 5 counsel complained of the judge's treatment of the Defence and the failure of the appellant to give sworn evidence.

In Ground 7 the complaint is that the verdict is unreasonable and cannot be supported having regard to the evidence. Whilst arguing this Ground counsel adopted the submissions of her colleagues on the issue of common design.

The quality of the identification evidence

Counsel submitted that the identification of the appellant Gavaska Brown, by Roger Brown, was made during a fleeting glance and/or under difficult circumstances. She contended that the light was poor; that the witness did not have the person he identified as the appellant under observation for long; that the evidence as to the distance between them was not specific; and that the purported identification was made under difficult circumstances or under stress.

The eyewitness testified that he saw the appellant "coming from the back of the yard to the front. He came right up to the front, stood by the wall looking outside the street. I realised he had a gun in his hand". At page 14 of the transcript his evidence is:

> "Q. You said that Mr. Gavaska Brown came to the front, stood by the wall looking, did he do anything else?
>
> A. He had the gun in his hand looking as if he was looking to see- I was on the window looking down, then he looked up at the window as if he was looking at me."

At page 23 his evidence continues:

"Q. ...Now, at the time when you were at the window you said you saw Gavaska Brown coming from the back ...(he) came right up to the front and stood by the wall. Did you see any part of him at that point? Did you recognise and know that it was Gavaska Brown?

A. Yes, I saw the whole of Gavin, everything about Gavin; everything about him I saw. He was the first one, I saw everything about him.

Q. But any place in particular to recognise him?

A. From the top of his head.

Q. What is at the head? What part of him you see to recognise him?

A. His face his whole body. I know him."

At page 27 the witness insisted:

"I saw him. We actually were face to face. We were looking in each others eyes then."

It is the witness' evidence that he knew Gavaska Brown (Gavin) for some twenty (20) years and that they were born and raised in the same area. They were friends and Gavin and the others watched T.V. in his house. They cooked, ate and drank together. He used to see Gavin every day. He had seen him the evening before the incident took place.

He was looking at Gavin, he said, for about 2 to 3 minutes. From the window where he was to the wall where the appellant stood is about four (4) feet. The witness described the place and pointed out distances to assist the jury.

The witness testified that the place was well lit by street lights. He spoke of two street lights. One of these was at the corner of Text Lane and Charles Street. The other was on Charles Street "just a little chain below my gate. As you know these street lights are pretty bright, bright, bright."

When asked to describe how the street light at the corner of Text Lane and Charles Street assisted him, he said,(see p. 30 of transcript):

> "The street light just bright up my yard right through. Way from the back of the yard, the front is pretty bright you can see everything at the front."

He had earlier testified that the back of the yard was in darkness. No evidence was led to challenge his evidence that the front of his yard was 'bright'.

In our view, this is not a fleeting glance case. It is a classic case of recognition. The witness had ample opportunity to positively identify by recognition the appellant who he said was about four (4) ft. from him in the front of his yard which was brightly lit and who looked at him and he saw his face for at least a minute. Even though the single eyewitness' evidence is uncorroborated we are satisfied that the evidence is of sufficient quality to justify the case against Gavaska Brown being left to the jury.

Counsel for the appellant complained that the learned trial judge failed to adequately point out the weaknesses in the identification evidence. It is the contention of counsel that instead of treating the limitations as weaknesses the learned judge dealt with them as 'strengths'. Further the judge gave the jury the impression that honesty is the same as accuracy. The learned judge in his direction to the jury said:

> "Members of the jury, you will recall that this was when Mr. Brown (the witness) was taken to task by defence lawyers in cross-examination that the back of the place was dark. He didn't dispute that, but you have to examine that in the light of circumstances and the evidence because the allegation from all that was that the identification was mistaken. Members of the jury, you will notice from that, it is a matter for you to consider. If Mr. Roger Brown is mistaken why did he not see or say that he saw the two persons when they came out from the dark and who they were? Why did he not say so?
>
> He waited until according to him, they were out in the light, where he discerned them and recognised them. If he is mistaken or lying, ask yourselves the question, why did he not say he saw who they were from they were in the dark or in the inadequate light? It is a matter for you."

It is true that in this passage the judge seemed to have been confusing credibility with reliability. However, the judge had given the jury strong and clear directions that an honest witness can be mistaken in identification in the following terms:

> "It is required of me ... to warn you of the extreme need for caution before convicting in reliance upon visual identification. The reason for this members of the jury is that it is quite possible for an honest witness to be mistaken in identification and notorious incidents of miscarriages of justice have occurred..."

After he had given the jury the full **Turnbull** direction, he said:

> " If you conclude that the identification was not proper, so be it. If having considered all the circumstances you conclude that the identification is good, you move on, but remember it is the correctness of the identification which you seek and not the conviction with which the witness tells you... ."

We do not think that the directions taken as a whole would have left the jury in any doubt that they should not equate accuracy with honesty when considering the vital issue of mistaken identity.

Another complaint by counsel is that the learned trial judge failed to warn the jury that the witness might have been confusing seconds with minutes. In re-examination the witness was asked by counsel for the prosecution if, according to his evidence, there was a difference between a minute and a couple of seconds. His answer was that he did not see any difference.

On this aspect of the case the judge reminded the jury of the evidence and said:

> "... I am telling you now, members of the jury, that in Jamaican parlance when one speaks of couple, couple mangoes, couple coconuts, couple fingers of bananas, you think they mean two? That is a matter for you. You are the judges of the facts, and your common sense speaks."

The judge's observations were in part in the nature of a comment on the evidence. He was scrupulously careful to remind the jury that it was for them as judges of the facts to interpret the witness' evidence. He did not in our view, exceed the permissible bounds of judicial comment.

Counsel for the appellant Gavaska Brown further took the judge to task for failing to point out specifically the weaknesses in the evidence of Mr. Roger Brown that is, the limitations of the lighting; the discrepancies; and the possible effect of stress and fright on the witness.

She further submitted that the learned trial judge failed to deal with the evidence in a thorough, balanced and impartial manner and that the judge's comments on the failure of the appellant to give sworn testimony exceeded the limits of "fair and proper comments".

The learned trial judge after properly directing the jury as to how they should approach identification evidence said:

> "You may also members of the jury consider any apprehended weaknesses in the identification ... was it under difficult circumstances or under stress. You may say that operate here, but remember that is the witness, Roger Brown, identification evidence that you are considering. You will have to consider whether he did his identification under stress or under such stress as would impair his ability to properly identify. When you are considering the identification evidence, members of the jury, you are to bear in mind those circumstances which I have told you, physical condition, the possible weaknesses consider them."

The complaint that the judge failed to deal with the effect of stress and fright on the witness is certainly without merit.

The trial judge went on to remind the jury of the evidence relating to the condition of the light at the time of the viewing of the appellant. He told them:

> "This is how he says he identified or what aided him to recognise these persons. I saw them from street lights at the corner of Text Lane and Charles Street."

Later on, the learned judge dealt with the arguments of counsel for the appellant and invited the jury to look at the photographs which were put in evidence. He specifically reminded them of counsel's argument that the shadows cast by the trees would obscure the vision of the witness and would render the lighting inadequate.

It is true that the judge made certain strong comments such as "Picture don't lie" and "no amount of sophistry can alter the conditions which existed when the camera captured the condition and locked them in a film". However, these and other such comments by the learned judge do not detract from the adequacy of the directions given on the important issue of the 'lighting'. He left it to the jury to decide whether the description of the lighting conditions given by the witness was correct and whether the conditions were good and favourable to recognition.

The complaints dealing with other so called "weaknesses" in the prosecution evidence are subsumed in the submissions made on the issue of identification. For the reasons already given we reject the submissions on the judge's treatment in his summing up of the identification evidence.

Discrepancies

The witness, Roger Brown, testified that he did not give the police the names of his assailants whilst he was in the hospital. He left the hospital in mid June 1997. Sgt. Masters' evidence contradicts the witness in this regard, in that he said he got names on the 24th April, 1997 from the witness. The Warrants for the arrest of the appellants Gavaska Brown and Kevin Brown were issued on the 30th June 1997 whilst the warrant for Troy Matthews was issued on the 24th April, 1997. If in fact the witness did not give the police the names until late June 1997, this would, it is argued, affect the

issue of identity. If in fact the names were given to the police on the 24th April, 1997, then it is argued, the credibility of the witness would be affected.

Counsel submitted that the trial judge did not adequately direct the jury as to the likely effect of this discrepancy. Counsel pointed out that the jury returned to Court and asked for assistance on this issue and the judge did not oblige.

The learned trial judge's general directions on discrepancies are not being challenged. The complaint here is that the trial judge did not assist the jury with the specific discrepancy.

In his direction to the jury the judge said:

> "He said he was seven weeks in hospital suffering from two gunshot wounds. He gave no statement while he was in the hospital. I gave no names while I was in the hospital. I saw Masters the night I was shot. Members of the jury that is another area which suggestion was made to you about. 'He said nothing' although Masters said that he got the names from him at the hospital. He said, 'No, I did not give any until after.' That is a matter for you. You have to deal with it how I directed you in dealing with discrepancy and inconsistency. He said, 'No police came to me while I was in hospital.' When I left hospital I left then Sgt. Masters visit me while I was out of the area and took a written statement from me. That is the first time I gave the police the names of all three accused. I had given the names to my mother."

The judge then went on to suggest "caution" on the part of the witness as a possible explanation for his not giving the police the names but instead giving the names to his mother.

About an hour after the jury retired they returned. They had not arrived at a unanimous decision. The following exchange took place:

> His Lordship: "Mr. Foreman and members of the jury, I tell you that you have to strive to be unanimous, you see. Is there any area in which I can assist you? Any directions which you require?

Foreman: There is a matter of photographs there where one of the light posts is not shown in the picture.

His Lordship: Which one, picture 1?

Foreman: Picture 3, I think

His Lordship: Picture 2?

Foreman: Yes sir. About the light post at the corner but it is not shown in the photograph there.

Hjs Lordship: Yes, but nobody said it was shown there, but you heard the evidence that, it was from the policeman, that it was down the corner, four feet down the corner, and the witness Roger Brown said it is there.

Foreman: And one other situation is that the warrant, the time that the warrants were issued. On that issue also there was some controversy on that also.

His Lordship: Yes, but that's a matter for you, that is a factual situation."

We think that merely telling the jury that "it is a matter for you", was certainly not helpful. The learned trial judge should have explained to the jury the possible effect the evidence surrounding the issue of the warrants might have had on the identification evidence and/or the credibility of the witness, depending on the view they took of the discrepant evidence. Our anxious concern is whether such a failure amounts to a material misdirection. To determine this question, regard should be had to all the summing up on this aspect of the matter.

In his directions when dealing with discrepancies the trial judge said:

> "Members of the jury, in a trial or in circumstances where you are relating incidents which have happened before gone by, you are bound to have what we call discrepancies or inconsistencies. You have to deal with it, because those inconsistencies in statements or evidence arise on the facts and you are the sole judges of the facts. An incident which I will tell a bit later about, but these arise on the facts. You are to deal with it and this is how you

> deal with them, that is the discrepancies or the inconsistencies. If you find there is a discrepancy between what a witness said on a previous occasion and what the witness says here, or a discrepancy between two witnesses, if you find this discrepancy, and having examined it in light of the explanation given, if you think it is serious material to the extent that it erodes the credibility of a witness, then you are entitled as jurors, judges of the facts to say you can't believe the witness, and you will be entitled to reject the witness' testimony in its entirety if it affects it in its "entirety" or this portion which you think is discrepant.
>
> On the other hand, if you say, yes there is a discrepancy, but it is not material, it does not go to the pith and substance of the issues, equally you are within your competence and your right to ignore it and you may put it down to human frailty and propensity or the possibility of human frailty, that is how you deal with discrepancy"

Later on in his summing up the judge specifically referred to what he called the "controversy" between the eyewitness and the police and told the jury:

> "You will have to deal with it how I told you to deal with discrepancies, whether that discrepancy affects the issue. What weight you are to give to the discrepancy. You will remember he said he had told the police who the men were, but the controversy arises at what time did he tell the police about this, who they were? When we go further into it, the cross-examination you will relate it to the directions that I have given you as to the discrepancy."

When dealing with the crucial issue of identification the learned judge had told the jury that one of the circumstances they should take into account in their careful examination of the identification evidence is the time which elapsed between the identification and the report made to the police. He was at pains to emphasise that if after considering all the circumstances they conclude that the identification was not 'proper' they must acquit. As to the credibility of the witness the judge said nothing that was not justified.

Having closely examined the summing-up as a whole we are inclined to think that the failure of the judge, to which we had earlier adverted, did not amount to a material misdirection.

The Defence

The complaint by the appellant, Gavaska Brown is that the learned judge misdirected the jury when he failed to put the Defence to the jury adequately or at all and undermined the Defence by advising the jury that the unsworn statement of the appellant was no more than a long rambling statement which said nothing more than "I am innocent."

In his summing up he said:

> "The case put forward by Gavaska Brown is in his unsworn statement. An unsworn statement which you will remember rambled, but at the last sentence to his case "I am innocent." That is the case for Gavaska Brown."

Later on the judge expressed himself thus:

> "Members of the jury, the accused Gavaska Brown elected to make an unsworn statement. You heard it. I am not obliged to go into it because it is not to be elevated as evidence, it is a statement. You give it the weight you think it deserves. He said in that statement that he is innocent. That is the case put forward by Gavaska Brown."

The judge had earlier correctly directed the jury as to the burden and standard of proof. Indeed there is no complaint about the adequacy of such directions. Near the end of his summing –up the judge returned to the point:

> "When you consider the unsworn statement of Gavaska Brown, give it the weight which you think it deserves, no more no less. If it affects you to be the truth, that is the end of the matter. You can't convict him. You have to acquit him. Equally if it leaves you in reasonable doubt you have to acquit him also. But if you don't believe him that does not give you the competence to say he is guilty because he owes no obligation to discharge any burden of proof. The burden of proof rests on the prosecution and as I told you it does not shift. So you will have to go back and

> look at the totality of the prosecution case to see if that case satisfies you so that you feel sure about what the prosecution says about Gavaska Brown."

The unsworn statement of the appellant did not exemplify an alibi defence. He did not attempt with or without the help of a witness to say where he was at the time of the murder. He was merely repeating his plea of not guilty. There was nothing the trial judge could have done save to direct the jury to consider very carefully the prosecution's evidence and that the prosecution was to satisfy them beyond reasonable doubt.

Accordingly, we find no merit in this complaint.

The appellant's unsworn statement

The appellant complains that the learned trial judge misdirected the jury as to how to treat the unsworn statement of the appellant and that the judge's comments on the failure of the appellant to give sworn evidence exceeds the limits of "fair and proper comments."

The burden of counsel's submission on this issue is that the **Leary Walker** direction was inappropriate. It is necessary to quote the judge's direction:

> "In this case, you will recall that each accused person made an unsworn statement, one of them called a witness. That unsworn statement members of the jury, obviously has not been tested by cross-examination. You have heard not one question asked of anybody of any of the accused on that statement. Can't happen. Couldn't happen, because it has been unsworn, but it is their statement and, members of the jury, from the highest court which governs our law, the Judicial Committee of the Privy Council, says all you can do with that statement is to give it the weight, if any, which you think it deserves! No more no less, but you have to consider it because it is their statement, but it is not evidence in the strict sense, and members of the jury in so doing you are entitled to ask yourselves, each of you, why did each man not subject his testimony to be cross-examined? Couldn't be that that he was unrepresented because you have seen three counsel representing each one and who represented them with vigour.

> It would not be because any advantage – disadvantage would be apprehended, because each of those vigorous counsel would be objecting. Even the Bench would have to accord and afford a measure of protection against any advantages. Could not be that anybody is afraid of taking an oath because there is provision in our law that if you are not minded to take the oath on the Bible, you can be affirmed. You are entitled to ask these questions, "Why did you not hear the testimony being subject to cross-examination? When you are so asking and whatever conclusion you come to, remember that in our system of law each man has the right to make an unsworn statement. All you are required to do is to give it the weight which you think it deserves."

The trial judge's directions were modelled on Lord Salmon's statement in **Director of Public Prosecutions v. Leary Walker** (1974) 21 W.I.R. 406 at 411 (C-E). These directions in our view were mild in comparison with those given in **Watt v R.** (at p. 279 (j), where the judge asked; "Has he got something to hide?" In that case, the Judicial Committee of the Privy Council observed that that question could have evoked misgivings on the part of the jury but that having regard to its context it was permissible.

Counsel argued before us that in the circumstances of the instant case where the appellant, in his unsworn statement, did not seek to impugn the credibility of any of the witnesses for the prosecution the directions of the judge were inappropriate.

In **Mills Mills, Mills and Mills v. R.** (1995) 46 W.I.R. 240 three of the accused persons in unsworn statements stated that they were not present. They were elsewhere. The fourth, also in an unsworn statement raised the issue of self-defence. Their Lordships' Board agreed with this Court that the guidance given by the Privy Council in **D.P.P. v Leary Walker** should be understood as comprehensively describing what a trial judge generally may say to a jury in directing them about the value of an unsworn statement:

> "Their Lordships regard the guidance given in **D.P.P. v. Walker** about unsworn statement as requiring no qualification. It governs the present case."

We accept this.

Lastly, on this issue, counsel argued that by telling the jury that the unsworn statement is not evidence and in the same breath telling them that they must give it what weight it deserves, the learned trial judge must have confused the jury.

It is true that this Court in **R. v. Alfred Hart** (1978) 12 J.L.R. 165 at 168 (h) did express the view that such a direction is often confusing. Because the unsworn statement is not to be equated with sworn evidence which is tested under cross-examination, there is no need to go beyond the general direction which states that the jury is at liberty to ascribe such weight to it as they think fit.

The appellant in his unsworn statement raised no special defence and raised no challenge to the Crown's case other than that which a plea of not guilty would raise. What the trial judge was required to do, and what he did, was to invite the jury to examine critically the evidence of the prosecution against the background of the burden and standard of proof. The judge's statement that such an unsworn statement of the appellant was not "evidence in the strict sense" is in our view unexceptionable based on **Leary Walker**.

Common Design

The appellant's argument on this point is that there was not sufficient evidence from which the jury could find that there was a joint enterprise to invade the house of the deceased and to kill the occupants.

This point must be considered on the basis that the jury had accepted the evidence of the witness Roger Brown. According to the witness' evidence it was 1:10 a.m. when he heard a 'bang'. He saw a man coming from the back of the premises with a firearm in hand. This man went to the front of the house and stood. Shortly after, another man came from the same direction and placed a 'washstand' under the

window. The witness moved to the front window and saw a third man at the front gate. These persons were in close proximity to each other; a stone was thrown through the window; shots were fired through the window; the door was kicked open and shots were fired into the house. The deceased, who had sought refuge under the bed, was mortally wounded.

The conclusion was inescapable that those persons, described by the witness, were acting in concert and that their motive was to murder. We see no merit in this complaint.

Conclusion

The appeals of Troy Matthews and Kevin Brown are allowed. Convictions and sentences set aside. Judgment and verdict of acquittal entered in each case.

The appeal of Gavaska Brown is dismissed. His conviction and sentence affirmed. Sentence is to commence on 6th August, 1999.