JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS. 18 AND 19 OF 2001

BEFORE: THE HON. MR. JUSTICE FORTE, P.
THE HON. MR. JUSTICE WALKER, J.A.
THE HON. MR. JUSTICE SMITH, J.A.

R.V. OMAR POWELL
DONOVAN CLARKE

Marvalyn Taylor-Wright and Michael Lorne for Powell
Ian G. Wilkinson and Shawn Steadman for Clarke

Paula Llewellyn, Senior Deputy Director of Public Prosecutions
Jermaine Spence, Crown Counsel for the Crown

March 25, 26, 27, 28, and November 11, 2003

SMITH, J.A.

On the 15th January, 2001, the applicants were indicted in the St. Catherine Circuit Court for capital murder. The particulars of the offence were that on the 23rd of February, 1998, in the parish of Kingston, the applicants Omar Powell and Donovan Clarke, murdered Newton Burdo in the course of furtherance of burglary. On the 18th January, 2001, they were convicted as charged, and sentenced to suffer death in the manner prescribed by law.

On the 24th January, 2001, Notices of Applications for Leave to Appeal were filed. The grounds of appeal/application as stated on the prescribed forms were:

1. Unfair trial
2. Not enough evidence to warrant my conviction and sentence.

When the matter came before the Court on the 25th March, 2003, counsel for the applicants sought and obtained leave to argue supplementary grounds. We will return to these grounds after stating in outline the evidence at trial.

The Prosecution's case

The principal witness for the prosecution was Miss Sandra Bent, the common-law wife of the deceased Newton Burdo. She gave the following narrative.

Miss Bent lived in a two-bedroom house at 12 Graham Street, Kingston 16, with her boyfriend (the deceased) and her three children. In the early hours of 23rd February, 1998, Miss Bent woke up at the sound of her door being kicked open. She sat up and turned on the light. The door was kicked and flew open. Two masked men entered. She was shot in the face – the bullet entered her mouth, shattered her teeth and exited through the cheek. She lay on the bed pretending to be dead. The men approached her boyfriend who had been sleeping on a mattress in the room. They fired several shots at him. They were leaving but when they reached the door they stopped, turned around, removed the masks from their faces and the one she identified as the applicant Powell said. "The pussy hole informer dem dead" – page 22 of the record. The other man

said "come now, come now nuh." She saw their faces and recognised them. She knew the applicant Powell as "Scarry", and the applicant Clarke as "Clarkie". As the intruders left they again fired shots at her hitting her on the left upper arm. After they had gone she tried to get off the bed but it was difficult because her left arm was numb. Her 13 year old son who was in an adjoining room opened the door and entered her room. He assisted her to sit up on the bed. She saw the deceased on the mattress on the floor with wounds to the head and neck. He appeared to be dead. With the assistance of her young son she was able to leave the room and called her neighbour who took her to the Kingston Public Hospital. While at the hospital she could barely speak. However later that same day she was able to give the names of the intruders to Corporal Beckford (as she then was).

Detective Sergeant Herfa Beckford testified that on 23rd February, 1998, about 3:15 a.m. she went to the Kingston Public Hospital. There she saw and spoke with Miss Sandra Bent who had wounds to her mouth and left arm. From the hospital she went to 12 Graham Street, Kingston 16. There, she saw the body of Newton Burdo lying in a pool of blood on a mattress on the floor. She observed gunshot wounds to the back of the head and neck. On the bed she saw fragments of teeth and blood. She also found three 9 mm spent shells and two expended bullets in the bedroom. About 8:00 a.m., same morning she returned to

the Kingston Public Hospital. She spoke with Miss Bent and subsequently obtained warrants for the arrest of four persons including the applicants.

Dr. Prasad Kadiyala gave evidence to the effect that there were two gunshot wounds on the body of the deceased. One to the left side of the neck and the other at the back of the neck. The cause of death was multiple gunshot wounds.

The case for the Defence

At the end of the Crown's case both attorneys for the applicants submitted that the learned trial judge should withdraw the case from the jury on the ground that the quality of the identifying evidence of the sole eye-witness was extremely poor. The learned trial judge overruled the no-case submissions.

The applicant Powell gave evidence and called two witnesses in support of his alibi defence. The applicant Clarke made an unsworn statement in which he denied knowing anything about the crime. He also said the was 19 years old.

Supplementary Grounds of Appeal

Mrs. Marvalyn Taylor-Wright argued the following supplementary grounds on behalf of the applicant Omar Powell:

> "1.That the learned trial judge erred in refusing to accept the submission of no-case to answer ... the evidence showed clearly that the purported recognition was being made under difficult and traumatic

circumstances by way of a fleeting glance.

2. That the learned trial judge misdirected the jury by suggesting to them that there was an obligation on the accused to supply evidence of a reason on the part of the eye-witness to lie against him.

3. That the verdict is unreasonable having regard to the paucity of credible identification evidence in relation to the accused Omar Powell ...

4. The learned trial judge misdirected the jury by failing to advert them to the legal position that even if they disbelieved the accused's evidence it was their responsibility to examine the Crown's case again to see if the Crown had proved the case against him so that they felt sure of his guilt."

Mr. Wilkinson and Ms. Steadman argued the following supplementary grounds on behalf of the applicant Donovan Clarke.

1. The learned trial judge erred in law in failing to find that this was a "fleeting glance" case and consequently erred in law in failing to uphold the submission of "no case to answer" ... especially having regard to the numerous contradictions and inconsistencies and weaknesses in the evidence given by the sole eye-witness, Sandra Bent.

2. The verdict against the second applicant is unreasonable and cannot be supported having regard to the evidence.

3. The learned trial judge erred in law in failing to direct the jury, adequately or at all in relation to the weaknesses and/or inconsistencies on the prosecution's case and consequently

deprived the second applicant of a fair trial resulting in a substantial miscarriage of justice.

4. The learned trial judge erred in law and/or failed to direct the jury adequately, properly or at all regarding the issue of common design as it related to capital murder under the Offences against the Person Act.

5. The learned trial judge erred in law in sentencing the second applicant to 'suffer death in the manner authorised by law' in light of the fact that the second applicant was under 18 years old at the date of the commission of the offence."

Counsel for the Crown had to concede in respect of ground 5. Apart from the statement of the applicant (in January 2001) that he was then 19 years old - a certified copy of his birth certificate was exhibited to an affidavit sworn to on the 19th March, 2003 by his mother and filed in this Court. According to the certificate he was born on the 20th April, 1981; that would make him just under 17 years old in February 1998 (the date of the offence).

There is no dispute that the murder was committed in the course of a burglary. The only issue at trial concerned the identification of the applicants.

As in most cases where the issue is identification, counsel before this court directed their submissions mainly on the quality of the identification evidence and the adequacy of the judge's directions to the jury.

The Identification evidence

Counsel for both applicants submitted forcefully that the quality of the identification evidence was so poor that the judge should have withdrawn the case from the jury at the end of the prosecution's case and directed them to acquit.

In **R.v. Turnbull** (1976) 3 All ER 549; (1977) Q.B. 224 at pages 229, 230, Lord Widgery C.J. stated the following principle:

> "When in the judgment of the trial judge, the quality of the identifying evidence is poor, as for example when it depends solely on a fleeting glance or on a longer observation made in difficult conditions the situation is very different. The judge should then withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification."

As was stated by this Court in **R.v. Carlton Taylor,** SCCA No. 57 of 1999 (unreported) December 20, 2001, the above stated principle requires the trial judge himself to make an assessment of the quality of the evidence, as a preliminary issue. It is only if the judge is satisfied that the visual identifying evidence is not poor or if poor that its correctness is supported by other evidence that it may be left to the jury for their consideration.

The question now for this Court is whether the unsupported evidence of sole eye-witness, Miss Bent, was so poor that the judge should have withdrawn the case and directed an acquittal.

Miss Bent was suddenly awakened by the sound of someone kicking down the door to her 12 x 8 bedroom. The head of the bed, she said, was by the door as one entered the bedroom. Her head was at the foot of the bed which was touching the wall. She sat up and turned on the light – the light switch, she said, was on the wall beside the bed. Two masked men entered the room and immediately fired shots at her hitting her in the face. She fell back in the bed. Her head was turned to the door. She heard the firing of other shots. She lay on the bed pretending to be dead. She was on her left side. She said that just before the intruders left the room they stood at the door, removed the masks and spoke. She saw their faces for 5 to 6 seconds and recognised them as "Scarry" and "Clarkie". She had known them for sometime before. She knew "Scarry" for about 10 to 11 years. She said he used to live on Benloss Lane in Central Kingston. She knew some of his relatives. She had seen him running through her "yard" on several occasions. She last saw him on the Saturday night before the day of the incident (Monday) on a street in the same area. She had spoken to "Scarry" before the fateful morning. He last spoke to her on the Saturday night before as he "hailed" her. On the night of the incident it was "Scarry" who first spoke. Counsel for the prosecution sought to elicit from her evidence of voice identification by asking (page 31):

> "Q. Is there anything peculiar about his voice, does he speak in any particular way?

A. To tell you the truth through this incident long time I never talk to him after or before that.

Q. You don't talk to him after?

A. No sir."

Then the tea break was taken. Sometime after the resumption Counsel for the Crown revisited the "voice issue" (page 39):

"Q. Lets go back to Scarry, you said you heard before the morning of the incident?

A. Yes sir.

Q. All right. Now you said you used to see Scarry everyday, how often you used to hear him talk?

A. Often sir, nuff sir. I remember one time him a plant up some plant at the roadside and him com borrow mi knife.

Q. He spoke to you on that occasion?

A. Yes, sir."

The length and extent of this conversation was not explored. Instead prosecuting counsel asked:

"Q. Have you ever heard him in any lengthy conversation or prolonged conversation with anybody at all?

A. Yes sir, with Newton Bodoe (the deceased)."

According to the witness this "lengthy or prolonged conversation" took place about a month before the incident and lasted for about two hours. Then she was asked what the judge described as the critical question:

"Q. Now you said that on the morning Scarry was the one who said, "The pussy hole informer dem dead." How did you know that it was he who had said that?

A. Because him tek off the mask and say it, sar, and mi si seh a him.

Q. Yuh si seh is him?

A. Yes sir.

Q. Is there anything about the voice?

HIS LORDSHIP: Not allowed.

Q. So is only because you saw that he spoke that you said that he was the one who said that?

A. And the windbreaker him have on, sir, clear evidence that is him a saw him."

Counsel was minded to persist on this path but relented on the intervention of the judge. Up to this point there was no reference to any speech impediment. It was certainly not the evidence of Miss Bent that she recognised the voice of one of the intruders as that of Scarry. Her

recognition of him was purely visual aided, she said, by the windbreaker. However after a while prosecuting counsel, with unflagging resolve returned to the voice issue. He asked (page 48):

"Q.	Just to go back to Scarry, on that morning, did you know Scarry's voice before that morning?
A.	(No answer)
Q.	You know him voice before?
A.	Yes sir."

Counsel then sought the judge's leave to ask the following question. Defence counsel objected. However the judge allowed it:

"Q.	Were you able to identify his voice or are you able to identify his voice?
HIS LORDSHIP:	Scarry 's voice. In other words, it all you heard, you didn't see him, all you heard was his voice would you be able to say that that is Scarry's voice?
A.	Yes sir.
HIS LORDSHIP:	Why would you be able to identify his voice?
WITNESS:	He had a way how he talks, sir.
Q.	When you heard the person speak that morning whose voice you heard the one who

said "P hole informer them dead, which voice you heard?

A. Scarry – sorry Omar Powell."

Eventually the prosecuting counsel got from the witness what he wanted. Mrs. Taylor-Wright was very critical of the manner in which this evidence was elicited. She complained that leading questions were asked and observed that before the break the witness testified that she had not spoken to the applicant before or after the incident and after the break the witness changed her testimony. She contended that the voice identification was manifestly unreliable and seriously undermined the credibility of the witness. We are inclined to agree with counsel for the applicant Powell (Scarry). Further the applicant gave evidence and was cross-examined. There was, apparently no trace of any speech impediment apart from what prosecuting counsel described as "significant pauses". Mrs. Taylor-Wright complained that the learned trial judge's direction to the jury on this aspect of the evidence was inadequate and incorrect and must have affected the minds of the jury in returning a verdict adverse to the applicant. If necessary we will return to this criticism.

Another area of concern in relation to the applicant Powell is the evidence of a scar. The witness when asked if she noticed anything at all

about his face said he had a scar. She said she had seen a scar on his face before the incident. It is clear that the scar was not conspicuous. Even when the applicant was, on the direction of the judge, brought within close proximity of the Bench the judge was unable to see the scar. The witness at one stage indicated that she could not recall on which side of his face the scar was. When the applicant was brought up to her she indicated that it was under the left eye (page 34), but soon thereafter indicated the right side of the face (page 35). Further there is no evidence as to how the witness was able to see the scar that night of the incident. We agree with Mrs. Taylor-Wright that evidence of the scar cannot be a reliable aspect of the identification.

The prosecution also relied on the windbreaker to buttress the identification evidence. Miss Bent said the applicant Scarry was wearing a windbreaker at the time of the incident. When asked if she remembered the colour she said "I think its orange and blue, I don't quite recall." She said she had seen him in that windbreaker on the Saturday night before the incident. In our view the evidence relating to the windbreaker is of little weight and cannot support the visual identification if it is otherwise poor.

In respect of the applicant Clarke (Clarkie) the witness said she knew him for about two years prior to the murder of the deceased but had never spoken to him. She said that at the time when they took off

their masks the other man (Scarry) was closer to her than Clarkie. She said she used to see Clarkie almost every day before the murder. She used to see him on the street and in her yard. She had last seen him on the Wednesday or Thursday before the incident. She had heard him speak before but not often. When asked for how long she had seen his face her reply was: "I did not look upon Clarkie much like how mi did a look upon Scarry."

Mr. Wilkinson submitted that the quality of the identification of Clarke is extremely poor. He relied on **R.v. Galbraith** (1981) 1 WLR 1639; **R.v. Turnbull** (supra) and **Daley v.R.** (1993) 4 All ER 86. It cannot be seriously disputed that the identification of the applicants was made in difficult circumstances. The sole eye-witness had been shot and seriously injured. She was lying on her side in the bed. She was pretending to be dead. It was in these circumstances that she said she was able to see the faces of the intruders when they removed their masks. She said she saw them for about 5 to 6 seconds.

The following pieces of evidence in our view illustrate how unreliable Miss Bent's evidence is.

(1) Near the end of the examination in chief she was asked (page 53):

> "Q. That morning when you said you saw their faces, Scarry you said five to six seconds and Clarkie how much time you saw them?

A. I just lie down and look pon the two a dem face, I don't know.

HIS LORDSHIP: About the same time?

A. Yes, sir."

in cross-examination she was asked (page 95):

"Q What were you doing?

A. Just lay there

Q. You did anything with your eyes?

A. Look.

Q. You never roll up your eye in your head?

A. <u>If I roll back my eyes in head how mi a go si dem now?</u>
... (emphasis supplied)

Q. Is it correct to say you lay there pretending to be dead?

A. Yes.

Q. And in so pretending what did you do?

A. Just lay down

Q. You did not roll over your eye?

A. No mi don't remember rolling over mi eyes."

During cross-examination she was asked questions about her evidence in the first trial. She denied that she had in the first trial said she "rolled over" her

eyes and she also denied demonstrated it. The relevant part of the transcript of the previous trial was adduced before this Court. The evidence of Miss Bent then was as follows:

"Q. You were – I think you said before you were pretending to be dead.

A. Yes sir.

Q. I understand your difficulty believe me, I understand it. You were pretending to be dead. When you say pretending to be dead – because you see I am moving on from that. When you were pretending to be dead what did you do?

A. Lie down there with my eyes (demonstrates).

Q. Roll up in your head.

A. Yes sir.

HIS LORDSHIP: Lying down with your eyes what?

WITNESS: Roll over sir." (demonstrates).

The evidence of the witness at the second trial diverges significantly from that at the first trial on this crucial aspect of the case. This inconsistency is without doubt very material. It is, we think, a matter of common sense that a person who is pretending to be dead would not be staring at her

assailants. As the witness herself said if she had in fact "rolled back" her eyes she would not be able to see them.

2. It was the evidence of Ms. Bent that she spoke to a man called "Uncle" when she was outside of her house. During cross-examination she was questioned about her conversation with the man (page 84).

> "Q. So immediately after the incident when you spoke to "Uncle" you did not tell him that you could not recognise any of the members (sic) because they had on mask, didn't you say that to him?
>
> A. Yes, ma'am, I say that and the reason is -
>
> HIS LORDSHIP: Wait you told Uncle you could not recognise the men because they had on mask?
>
> WITNESS: Sir, I just got shot and I am outside my children were inside how could I tell a neighbour that so and so shot me. Sir, my children were inside one seven, one eight and one thirteen years did not wake up, I could not say to Uncle say a A or a B."

The witness had stated, earlier, that her 13 year old son opened the door and that she spoke to him and he assisted her to get someone to take her to the hospital (page 45). We may observe that she did not even tell the lady who took her to the hospital the names of the intruders.

3. The witness said that when she first spoke to Sergeant Beckford at the hospital she did not give her the names of her assailants because she was scared. Her evidence is as follows (page 49):

"Q. Is there any reason why you did not give any names to the police when you saw them at K.P.H? Remember you said you saw them first at K.P.H. and you said you gave them names when you gave the written statement, is there any reason why you did not give them any names?

A. I was scared.

HIS LORDSHIP: When?

WITNESS: At the hospital.

HIS LORDSHIP: Did they ask you any questions if you knew the identification of the person?

WITNESS: Yes sir.

HIS LORDSHIP: At the hospital?

WITNESS: Yes, sir.

HIS LORDSHIP: And at that time you were scared?

WITNESS: Yes sir, all I said to the police 'Dem have on mask'."

Subsequently, the witness gave a different reason for not giving the assailants' names (page 51).

"HIS LORDSHIP: What I want to know why when the police first asked you who kill your baby father you did not give them any names yet later on you gave them names?

WITNESS: The reason why, sir, mi teeth whey get shot out all of the

> splinter down in mi tongue so mi wasn't able to say 'well them name so and so and so'."

Strangely, however, she was able to speak to "Uncle" and to the female neighbour who took her to the hospital.

4. We need only mention one other aspect of the evidence which indicates, in our view, the weakness of the identification of the applicants by the sole eye-witness. Now the evidence of the witness is that she saw two men enter her room the morning when the deceased was murdered. She further said she came out of the house after she had heard the men going through the fence and when she thought it was safe to do so. Yet the evidence of Sergeant Herfa Beckford is that she was given the names of four persons and prepared warrants for the arrest of those four persons (page 105). It is true that she did say that she "got two from Miss Bent". But the Sergeant said "she named two, there was also another statement which was given and it gave all four names including two of the accused. She saw some outside." On the intervention of the judge Sergeant Beckford seemed to be changing her evidence. She said, I am saying a statement was recorded in respect to four men from an eye-witness not Miss Bent, my Lord. The Sergeant's conflicting statements only serve to highlight the unsatisfactory state of the identification evidence and consequently the real danger of a miscarriage of justice. But the matter

does not stop there because the transcript of the previous trial shows the following cross-examination of Miss Bent:

> "Q. I would never say that you are lying, but you have made a mistake. Let me put it that way, you have made a mistake. You understand?
>
> A. Yes, sir.
>
> Q. I am going to suggest to you that –
>
> HIS LORDSHIP: Let us get this straight. The suggestion to you is that you made a mistake. What is your answer to that?
>
> WITNESS: I don't know if I made a mistake sir but –
>
> HIS LORDSHIP: What?
>
> WITNESS: I don't know if I made a mistake sir, I was just lying down there, sir, pretending to be dead."

The above seems to us to import some doubt on the part of the witness. The above excerpt was not put to the witness during the course of the second trial. But in any event it is difficult to see how it could be explained. We have little doubt that if the witness' expression of uncertainty as to whether or not she was mistaken had come to the attention of the judge the learned trial judge in the light of the decision of this Court in **R. v. Carlton Taylor** (supra) would have acceded to the submissions that each of the applicants had no case to answer.

But even without such expression of uncertainty by the witness there can be little doubt that her observation of the applicants was made in very difficult conditions. As already stated she was suddenly awakened. The door to her bedroom was kicked off. Two masked men entered and immediately shot her in her face fragmenting her teeth. She was in severe pain as she lay on the bed pretending to be dead. Her boyfriend was shot several times. It was in those circumstances she purportedly recognised the intruders as they pulled the masks from their faces before exiting the room.

We are clearly of the view that the quality of the identifying evidence was indeed poor. Further there were many material discrepancies and inconsistencies in the evidence of the sole eye-witness some of which we have already referred to. The learned trial judge should have withdrawn the case from the jury pursuant to **R. v. Galbraith** and **R.v. Turnbull** as explained in **Daley v. R.** (supra). Having so concluded we do not find it necessary to consider the other grounds.

We have treated the hearing of the applications for leave to appeal as the hearing of the appeals. The appeals are allowed. The convictions are quashed and the sentences set aside and verdicts of acquittal are entered.