JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS: 50, 51, 52 & 53/91

COR: THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE GORDON, J.A.

R. v. ROHAN TAYLOR
JUNIOR BARRETT
GILBERT HYDE
ALVIN PETERKIN

Delroy Chuck & Miss Winsome McGlashan for Taylor

Lord Gifford, Q.C. for Barrett and Hyde

Paul Ashley for Peterkin

Miss Diana Harrison for Crown

30th November - 1st December 1992

& 1st March, 1993

GORDON, J.A.

In the Circuit Court Division of the Gun Court, Kingston on 18th April, 1991 the appellants were convicted before Patterson J, sitting with a jury for the murder of Donald Stewart, a member of the Jamaica Constabulary Force, who died on 29th November 1989 from four gunshot wounds, two to the head and two to the thigh.

The prosecution's case against Barrett, depended mainly on the evidence of Miss Dorothy Johnson and on a cautioned statement given by him. The case against Hyde and Peterkin depended solely on the evidence of Miss Johnson. The case against Taylor depended entirely on a cautioned statement given by him to Det. Sgt. Dennis Young at Morant Bay in St. Thomas on 18th December 1989.

Miss Dorothy Johnson said she was in her home on Berwick Road St. Andrew at about 2 o'clock on the morning of the 29th November 1989, when she heard two gunshot explosions which

appeared to have been on the road behind her home. She heard a voice crying, coming along Latore Avenue which was behind her home. She then heard footsteps of persons running down Latore Avenue towards her house. The voice continued crying and was now in the backyard of her premises. The cry was for "Murder and help." She heard a voice that she recognized to be that of the applicant Barrett, as if speaking to the person crying saying "shut up you mouth boy! you nuh hear me say fi stop the noise." She heard the voice of the applicant Hyde say "Pull the boy over deh so, Star! Pull the boy over deh so, Star." She heard Peterkin say "Draw him out a deh so, Star. Draw him out a deh so." She then heard two more explosions and the crying voice became silent. All these sounds and voices came from the back of her home. She heard water running from a pipe in her backyard and sounds as if sweeping was being done. She heard the sound of the intruders going towards Latore Avenue and then there was silence. She remained in her home sleepless and kept as quiet as possible. The sounds she heard had disturbed the stillness of the night.

Later, at about 5.30 a.m., on hearing her neighbour's voice she went in the backyard where she observed blood on the side of the house by the passage, on an old stove in the passageway and on the ground. With her neighbour, she searched the premises but found nothing. About 7.30 a.m. on going to the cemetery some 3-4 chains from her home, she saw the body of a man bespattered with blood, lying face down. The feet of the deceased were tied together "with material, something that I recognized that belong to me" she said. There were also a pair of blue pants (trousers) around the waist of the victim and a white T-shirt thrown on him. These aricles she recognized as belonging to other tenants in the premises where she lived.

According to the applicant Barrett in his cautioned statement admitted in evidence by the learned trial judge, he was at

his home at 37½ Berwick Road when he heard gunshot explosions. About 30 minutes later, two men armed with guns came to him and invited him to assist them to dispose of a body. He said three persons were there with him and they all left to premises between 52 and 54 Berwick Road. There he saw the bloodied body of a man tied by his feet. As ordered, he acted as the look-out man while the others carried the body and threw it over the wall into the cemetery.

The applicant Taylor in his cautioned statement, said he was on his way from a dance when he was stopped by men who told him they had held a man who was a policeman and they were going to kill him. He advised them to rob him and release him. T said that could not be done. He again advised robbery and release of the victim, but the victim was ordered to lie on the ground. The victim tried to escape and one Masco shot him in his foot. Cartridges taken from the victim were loaded in a gun and the victim again tried to escape and was shot in the side. The victim ran in a yard and cried out. He was told to stop the noise. He continued making noise and was shot in the head. The applicant said he was asked to assist in disposing of the body and he saw garments taken from the premises used to tie the victim's feet. He assisted in throwing the body over the wall into the cemetery. On arrest he told Inspector Longshaw after caution "a nuh mi kill him sir, but me help throw him over the cemetery."

In defence, Gilbert Hyde said nothing and he called no witnesses. Alvin Peterkin said in an unsworn statement that he knew nothing of the charge. He also called no witnesses.

Rohan Taylor gave an unsworn statement in which he denied dictating a statement to the police. He lived with his grand-mother at 100 Penwood Road. His mother lived at 35 Berwick Road. He said he was beaten and forced to sign "a paper." He said he never volunteered. Junior Barrett stood mute and called no witnesses.

In relation to Taylor Mr. Chuck's first ground of appeal runs thus:

> "The following statements of the Learned Trial Judge appear to be inconsistent.
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> 'In considering what weight and what value to be given to the statement. You are entitled to take into account the manner in which you think the statement was obtained and if you should find that it was not voluntary, then probably you would not attach any weight to the statement at all.'
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> AND
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> 'If on the other hand, you are sure the confession was made and that **it is true, then you may rely** on it even if it was or may have been made as a result of oppression or other improper circumstances.'
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> If the statement was obtained by oppression then it was not voluntarily given and, quite rightly, no weight should be attached to it. It seems strange therefore that the jury could find the content of the statement to be true." [Emphasis supplied]

He **relied on a statement at page 135 D - F (infra)** in R. v. Seymour Grant 23 W.I.R. 132. The use of the term "even if", by the trial judge as emphasized in the ground set out above, he submitted, would tend to mislead and give the jury the impression that it did not matter if a statement was obtained by oppression or other improper means.

We cannot agree. The summing-up of the learned trial judge was in our view absolutely correct and unobjectionable for it followed settled principles and was a correct statement of the law. His directions were taken from Specimen Directions prepared at the request of the Judicial Studies Board of the U.K. and approved by the Lord Chief Justice in May 1987. See Archbold 42nd Edn. 15-29.

In R. v. Seymour Grant (supra) Robinson P. said this:

"The fact of the matter is that a jury is entitled to differ from the judge on the question of whether a statement was obtained voluntarily or not, but for different reasons. Voluntariness, as a test of admissibility, is a question for the judge and for the judge alone. But after a statement has been admitted in evidence, voluntariness may become a question for the jury if they should consider it to be a relevant factor in deciding the truth or otherwise of the matters contained in that statement, in which event the question of voluntariness would then become one for the jury and for the jury alone. The effective difference is this. Once the judge is of opinion that the statement was not obtained voluntarily it is his duty to reject it and, therefore, not to admit it in evidence whereas a jury may well, in the course of deciding what weight and value should be given to that statement, conclude that it was not a voluntary statement, but that nevertheless its contents were true and many confidently be acted upon.

What should be borne in mind is that the judge's function in this regard is solely as to the admissibility of the evidence and for that purpose, and for that purpose only, voluntariness is a test. If the judge applies that test and concludes that the statement was not voluntary, then that is an end of that matter. The statement is not admitted in evidence, the jury are not made aware of its contents and, therefore, are not concerned with its truthfulness or otherwise. On the other hand if the judge applies the test of voluntariness and, concluding that the statement was voluntary admits it in evidence, then the jury are obliged to consider the statement, its contents and what weight and value should be given to it. In so doing, they are entitled to consider, inter alia, the circumstances under which it came to be obtained and to form their own opinion as to those circumstances. That opinion may well be that it was not a voluntary statement. But even if they so concluded that is not an end of the matter because voluntariness is not an absolute test of the truth of a statement. It may or may not be, depending on the circumstances, and they may well feel that although in their opinion it was not a voluntary statement that, nevertheless, its contents were true and may safely be acted upon." [Emphasis added]

The passage which Mr. Chuck prayed in aid of his submission appe in the second paragraph and, taken out of context, does appear to support Mr. Chuck's contention, but the entire passage, especiall the portion emphasized, effectively dissipates Mr. Chuck's arguments and supports the correctness of the learned trial judge's directions to the jury. In our view once a statement is admitted in evidence, the jury is obliged to consider it. The truthfulness of the statement has to be determined by them even if it is admitted without challenge. If the voluntariness of the statement is challenged, the jury have to consider the fact of voluntariness and also the fact of truthfulness. Should they conclude that it was not voluntarily given, that does not lead to an automatic rejection of it. They must reject it if they find that it was obtained involuntarily and it is not true or they entertain doubts as to its truthfulness. It is always their function to decide what weight or value should be given to a statement. If therefore they find that the statement was involuntarily obtained, but they accept the contents as true and may safely be acted upon, then it is within their competence to so act. This ground fails.

Ground II is framed thus:

> "The Learned Trial Judge misdirected the jury when he said:
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> 'And if you accepted what he has said on his own story, then, Mr. Foreman and members of the jury, it would be up to you to find him guilty as charged.' The accused's confession statement was exculpatory in respect to the offence of murder and he could not be guilty if the jury accepted it as true."

Mr. Chuck submitted that on these facts a verdict of manslaughter should have been left to the jury that is to say if they accepted the appellant's cautioned statement, manslaughter would be a proper verdict.

However, the passage extracted by Mr. Chuck is but part of a larger passage in which the learned trial judge was setting out the Crown's case. The entire passage appears at page 270 of the transcript and it runs:

> "Now, Mr. Foreman and members of the jury, the prosecution is asking you to look at this and to see, firstly, if you accept that this statement was made by this accused man, what it really means. What is he really saying? The prosecution is saying that he shows that he participated fully in the entire proceedings, from the time when Miss Johnson said she heard the crying on the road and the running coming into her yard, right up to the disposal of the body. This is a man that was present at all time, aiding and abetting. And if you accept what he has said on his own story, then, Mr. Foreman and members of the jury, it would be up to you to find him guilty as charged."

In our view, Taylor's cautioned statement can lend support to Miss Johnson's evidence. Plainly, the two shots to the thigh (non-fatal) must have been those discharged away from Miss Johnson's premises when the victim attempted to escape. Just as plainly the two to the head must have been those discharged at the back of Miss Johnson's premises which silenced the pleas. It was open to the jury to find that the appellant was associated with the others and went along with them as they pursued the victim to the back of Miss Johnson's home and killed him. The jury were entitled to find that the applicant was therefore a party to the use of violence of the kind meted out to the victim. However, the question arises whether on the statement of Taylor, it was appropriate for the learned trial judge to have given directions on a verdict of manslaughter. In his cautioned statement, the appellant said he advised the other men to rob the victim not to kill him, this advice he gave twice. Cartridges, he said, were taken from the victim and loaded in a gun and the victim was shot twice as he attempted to escape. His statement makes it clear that he was with the aggressors in pursuit of the victim into the backyard of Miss Johnson's premises was also with them when the victim was shot and he assisted in disposing of the body. In his statement the applicant declared he was party to the robbery of the victim, which involved a degree of violence, but he was not ad idem with

the attackers in murder although he went with them in pursuit of the victim as he sought to escape. Clearly, "he was a party to a plan to rob the deceased, a plan which would contemplate use of sufficient violence to make the appellant guilty of manslaughter if the death of the deceased was the result of the execution of that plan." See per Lord Woolf in **Leroy Burke vs. The Queen** (unreported) Privy Council Appeal 33 of 1991 delivered 1st December 1992. Manslaughter as an alternate verdict should therefore have been left for the jury's consideration. The learned trial judge fell into error when he failed to direct the jury on a possible verdict of manslaughter. In the circumstances, we find that Mr. Chuck's submissions were well founded. We are unable to say that the jury properly directed, would not have returned a verdict of manslaughter.

For these reasons, we treat the hearing of Taylor's application for leave as the hearing of the appeal, which we allow, we set aside the verdict of murder against Taylor and substitute a verdict of manslaughter and will hear counsel as to sentence.

On behalf of the applicants Barrett and Hyde, Lord Gifford Q.C., argued four grounds of appeal. It is convenient to address his grounds 1 to 3 in conjunction with the submissions made by Mr. Ashley on behalf of the applicant Peterkin.

On ground 4, he submitted that the learned trial judge misdirected the jury as to the effect of the statement under caution given by Barrett. The misdirection was due to the fact that the learned trial judge having said the statement was exculpatory suggested that it supported the evidence of Dorothy Johnson. The cautioned statement, he submitted, could not support the voice identification. The statement was wholly inconsistent with the evidence. The principal error lay in the failure of the trial judge to withdraw the case from the jury and he asked this court to find that the evidence lacked the required quality of reliability.

Barrett's cautioned statement was mixed. In that statement he placed himself at the scene of the crime ½ hour after it was committed and he admitted assisting in the criminal activity of disposing of the body. This statement was tendered by the prosecution and the jury were in duty bound to consider it in its entirety. If they accepted as true his assertion that he got there after the murder then they would be obliged to acquit him. The jury also had the evidence of Miss Johnson asserting that the applicant was actively involved in the commission of the crime. The issues for resolution were issues of fact which fell within the purview of the jury and the learned trial judge correctly directed himself and refrained from usurping their functions.

In our view there was no misdirection.

Lord Gifford Q.C., challenged the voice identification evidence given by the witness Dorothy Johnson. He said that the convictions of Hyde and Barrett depended on identification of persons by their voices and that identification was made in the most unsatisfactory circumstances and accordingly was wholly unreliable. He further submitted that:

> "The quality of the identification evidence was so poor that the learned trial judge, following the guidelines in **R. v. Turnbull** 63 Cr. App. Rep. 132 and **Reid v. R** [1989] 3 W.L.R. 771 (P.C.), ought to have withdrawn the case from the jury. It was akin to a 'fleeting glance' identification."

Hyde and Barrett, he submitted, were entitled to have their convictions quashed.

On ground 3, he submitted that the learned trial judge did not grapple with the peculiar problems presented by voice identification. He admitted, in reference to page 243 et seq of the summing-up, that although there were many fair features therein the trial judge made a fatal omission when he did not draw the jury's attention to specific weaknesses in the identification evidence.

Mr. Ashley on Peterkin's behalf, adopted the submissions of Lord Gifford Q.C., and urged that there was no evidence that the witness Johnson was sufficiently familiar with the voice of this applicant to warrant his case being left to the jury. He prayed in aid the case of **R. v. John Keating** [1909] 2 Cr. App. R 40.

Miss Harrison responded by submitting that the evidence of voice identification was not weak nor unsatisfactory within the principles enunciated in **Turnbull's** case. There ought to be evidence that the witness was sufficiently familiar with the voices of the applicants and that she had an opportunity to hear the voices and identify them. This evidence she said was amply supplied by Miss Johnson. She said the men were not whispering when they spoke and the voices were heard above the cries of the victim which grew weak.

Miss Harrison sought support in **Bowlin v. Commonwealth** 242 S.W. 604, 195 Ky 600. She referred to 23 Corpus Juris Secundum paragraph 920 page 648 which, she advised is the U.S.A. equivalent of Archbold Criminal Pleading. She directed our attention to this statement of the Law:

> "Identification need not be based on recognition of accused's facial features, but may be based on other peculiarities, general appearance, size features, clothing, or voice. Accordingly it has been held that when, and only when, such means of identification, taken in connection with other circumstances in evidence, point to accused as the guilty person, to the exclusion of every other reasonable hypothesis, identity of accused may be established by voice, by fingerprints, ...". [Emphasis added]

Support for this statement is derived from Ky - **Bowlin vs. Commonwealth** 242 S.W. 604 195 Ky 600 which is one of several cases referred to by the authors. In that case it was held that:

> "The law regards the sense of hearing as reliable as any other of the five senses, so that testimony witness recognized accused by his voice is equivalent to testimony he was recognized by sight."

These statements correctly represent the law in this jurisdiction.

It is trite that man has always used his senses singly or in combinations to identify persons, places and things because these attributes are natural and use of them is made instinctively as circumstances dictate. A well known example is the biblical record of Isaac's deception by Jacob's guile. Isaac, being blind, depended on his sense of touch and although he felt the hand of Esau and heard the person with that hand speak in the voice of Jacob, he nevertheless accepted the person as Esau. A person may disguise his appearance to make identification difficult. He may attempt to disguise his voice to this end, but when detection is not within the contemplation of that person, no attempt at disguise is likely. Voice identification falls to be considered under the general law. There is no legislation that governs its admissibility. In this respect the Law in the United States of America and that in our jurisdiction are the same. The common law principles apply. Two recent decisions of the English Court of Appeal are helpful:

In R. vs. Robb [1991] Crim. L.R. 539 -

> "The Court was predominantly concerned with the question whether the voice identification of an (admittedly non-expert) police officer was admissible, and, if it was, whether any weight could properly be attached to it. It was held that the evidence was admissible ... and that the judge had acted correctly in directing the jury that it was for them to consider whether the evidence was of any worth."

R. vs. Robb was applied in R. v. Deenik [1992] Crim. L.R. 578:

> "D was charged with being knowingly concerned in importing a large quantity of cannabis resin. A co-accused, H, was arrested and in his possession was found a radio pager which received messages from a telephone box in London. A Customs officer masqueraded as H's wife and spoke to a man later identified as D. After various messages had been given D was arrested at the telephone Kiosk bearing the number on H's pager. During H's interview with Customs officers an officer who had masqueraded as H's wife overheard H's interview

> "with other officers and recognized H's voice as that of the person to whom she had spoken on the telephone. During the trial the issue arose as to the admissibility of the voice recognition. The judge admitted the evidence. D was convicted and applied for leave to appeal against conviction, submitting that the judge should have refused to admit the evidence under section 78 of PACE. Held, refusing the application. Three objections to admitting the evidence had been advanced:
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> (1) its lack of weight and the limited opportunity the officer had to overhear the interview; (2) there was no consideration given to how to reduce the chance of mistaken recognition; (3) D was not given the opportunity to refuse to provide the opportunity for the officer to hear his voice. (1) went purely to weight, not admissibility. As for (2) and (3) Code D to PACE did not deal with voice identification and the general law therefore applied: the details as to parades etc. in the code were of little help in the context of voice identification."

These cases illustrate that the circumstances under which the identification was made go to the weight to be given to the evidence, not to its admissibility. The jury's function was to determine the weight to be given to the evidence of voice identification.

In **R. v. John Keating** (supra) to which Mr. Ashley adverted the appellant was convicted of Burglary on the evidence of a woman who heard a voice and declared it to be that of the appellant's. That was the only evidence of identification. Leave to appeal was granted because the Deputy Chairman failed to direct the jury to consider the point raised as to identity, which was, in fact, the appellants' real defence. The appeal was dismissed. The court held that the facts were before the jury and they decided on them. [1909] 2 Cr. App. R. 61.

The evidence of voice identification was critical to the conviction in that case and the court was of the view that the conviction was correct.

In R. v. Clarence Osbourne S.C.C.A. 67/91 delivered 23rd November, 1992 evidence of voice identification was challenged in a manner somewhat similar to the challenge in this case. This court per Carey P. (Ag.) said:

> "... Commonsense suggests that the possibility of mistakes and errors exists in the adduction of any direct evidence, in the sense of evidence of what a witness can perceive with one of his five senses. But that can hardly be a warrant for laying down that a Turnbull type warning is mandatory in every sort of situation where identification of some object capable of linking an accused to the crime or perhaps some attribute or feature of his speech capable of identifying him as a participant, forms part of the prosecution case."

We would add that the directions given must depend on the, particular circumstances of the case.

In order for the evidence of a witness that he recognized an accused person by his voice to be accepted as cogent there must, we think, be evidence of the degree of familiarity the witness has had with the accused and his voice and including the prior opportunities the witness may have had to hear the voice of the accused. The occasion when recognition of the voice occurs, must be such that there were sufficient words used so as to make recognition of that voice safe on which to act. The correlation between knowledge of the accused's voice by the witness and the words spoken on the challenged occasion, affects cogency. The greater the knowledge of the accused the fewer the words needed for recognition. The less familiarity with the voice, the greater necessity there is for more spoken words to render recognition possible and therefore safe on which to act. The jurors who heard the evidence were persons from the common walks of life. They are familiar with the norms of behaviour of their peers and there must have been among them those who had knowledge of the behavioural pattern of individuals who patronize bars. Miss Johnson spoke of conversing with Barrett and Hyde in the bar where she helped as a server and the jurors certainly

were not precluded from utilizing their knowledge in this regard in the assessment of Miss Johnson's evidence of exposure to the applicants' voices. A bar in Jamaica, like its British counterpart, the pub, is a place that people frequent and conversation flows freely.

The learned trial judge was well aware of the requirements of caution and he emphasized this aspect of the case and in particular at page 248 he told them:

> "Of course, of paramount importance is the witness' familiarity with the voices of these accused. You will have to decide whether or not she was so familiar with the voices of each accused as to be able to recognize it whenever she heard that accused speaking. You will take into account the length of time she knew each accused but that is not the real issue and that is not the most important thing. What is most important in this regard is how many times and how often and over what period he had heard each person speaking. You will have to consider if there is any other evidence in the case that goes to support the correctness of the witness as to the identity of the persons she said she heard speaking that night. [Emphasis added]

The witness Johnson said she had known Barrett about 1 year and 4 months. She knew premises he frequented and he visited a bar where she assisted a friend working. He would on his visits on a couple of occasions talk with her. By couple she meant "not every day but now and again." They spoke and he would buy something.

In re-examination asked how she recognized voices above the voice of the victim who was crying she said she heard 'Brunch' (Barrett) "tell him to hush up him mouth." Of Barrett, she said: "he has a distinct voice that you cant miss." She said the men were in the passage between her house and the house next door. There was an old stove in this passage and from the sounds she heard, it appeared they were trying to pull the victim out. All the sounds from the passage were heard by her.

She heard Hyde's voice then. The voice of the victim, she said, was feeble, not as loud as when he was on Latore Avenue. Her evidence anent Hyde was that she knew him about 5 years. He lived on premises adjoining hers and behind. She saw him almost every day and they spoke regularly. She went on to say, "He is a guy that like to drink and him would come into the bar and order from me." She had been assisting in the bar for 6 - 7 months prior to the incident.

The learned trial judge from pages 243-255 of the transcript directed the jury on the need for caution in acting on the evidence of the witness Johnson. He advised them of the possibility of mistakes and cautioned care in dealing with the evidence of voice identification. He advised them to consider the words spoken, the context, whether there were competing noises, the evidence of her knowledge of the speakers and the length of time she had known them and how often she had spoken to them. He reminded them she had heard things other than voices and these were all factors to be considered in addressing the weight and value of her evidence. His directions followed implicity the guidelines given in Turnbull and followed in R. v. Oliver Whylie [1970] 25 W.I.R. 430 and R. v. Reid (supra) and other cases subsequently decided in the Privy Council. Although in R. v. Osbourne (supra) it was stated that such a direction would not be necessary yet what the trial judge did was scrupulously fair and adequate. We find that the learned trial judge discharged his function with propriety, the voice identification evidence was properly left for the jury's consideration and grounds 1, 2 and 3 fail. For these reasons the applications of Barrett and Hyde are refused.

Although this point was not raised by counsel, we thought it necessary to consider if the circumstances of this case gave rise to manslaughter being an issue that should have been decided by the jury. This we thought was desirable having due regard to the decision of the Privy Council in **Leroy Burke vs. The Queen (supra)**

On Barrett's cautioned statement he was not involved in the killing. On arrest he said "a no mi kill him." It is clear that the jury accepted Miss Johnson's evidence that Barrett was in her backyard immediately before the fatal shots were fired and was associated with the victim's assailants when he said "Shut up you mouth boy! you nuh hear me say fi stop the noise?" This is what Miss Johnson heard when she recognized his voice. The jury also accepted Miss Johnson's evidence that she heard the applicant Hyda say "Pull the boy over deh so, Star! Pull the boy over deh soh Star." These voices spoke in the passage where there were the sounds of a struggle taking place. There were thereafter two gunshot explosions and all talk ceased.

The words were spoken in the course of the violence on the victim and immediately preceding the fatal shots. The inference to be drawn is that the applicants actively participated in the acts of violence which culminated in the murder of the victim. There was therefore no basis on which the learned trial judge could have left manslaughter for the consideration of the jury.

We now turn to consider the application of Alvin Peterkin. Miss Johnson on whose evidence his conviction rested was an intelligent witness, above average of witnesses usually encountered in these cases. She had been reading in bed shortly before she was alerted by the sound of gunshots and she delivered her evidence with clarity and in almost perfect standard English. She must have impressed the jury with her honesty and intelligence, but close examination shows her evidence against Peterkin as tenuous. It amounted to this: she had known him for a short while before the incident: She had seen him on the road but she had never spoken to him then. She saw him come to her home twice and heard him enquire for ice and she thereupon summoned the ice vendor for

him. In the absence of evidence of any peculiar feature of his voice, we consider these fleeting instances of exposure to the sound of his voice insufficient to found a conviction based on voice identification. Her evidence lacked the cogency about which we have spoken. This was a weakness which rendered the prosecution case against him tenuous. The trial judge should have withdrawn the case from the jury.

We therefore treat the hearing of his application as the hearing of the appeal; the appeal is allowed, the conviction quashed and a verdict and judgment of acquittal entered.

The decisions at which we have arrived may be summarised thus. The applications of Barrett and Hyde are refused. The application of Taylor is treated as the hearing of the appeal. The appeal is allowed, the conviction quashed and the sentence set aside. A verdict of manslaughter is substituted and we will hear counsel on sentence.

We must now consider the classification of the category of the offence that flows from the conviction of Barrett and Hyde, pursuant to the Offences against the Person (Amendment) Act 1992. Although the victim was a policeman there is no evidence that he was killed in the execution of his duty and although there is evidence he was robbed there is no evidence indicating which of the applicants if any discharged the fatal shots. The case therefore falls to be classified by virtue of section 2 (3) as non-capital murder and each applicant is accordingly sentenced to be imprisoned for life. We will hear the submissions of counsel on the period each must serve before becoming eligible for parole.