JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 25/84

BEFORE: THE HON. MR. JUSTICE CARBERRY, J.A.
THE HON. MR. JUSTICE ROSS, J.A.
THE HON. MR. JUSTICE WRIGHT, J.A. (AG.)

R. V. ROY DENNIS

Mr. Dennis Daly for the appellant.

Mr. Courtney Daye for the Crown.

December 4, 5, 1985 and May 5, 1986

CARBERRY, J.A. (DISSENTING):

On the 21st and 22nd February, 1984, in the Home Circuit Court, before Gordon J. and a jury, this appellant was tried and convicted of the murder of Barrington McPherson on the 22nd of December, 1980.

The hearing of his application for leave to appeal was treated as the hearing of the appeal, with the result indicated below.

Barrington McPherson, aged 21, lived in a house in an area called Hannah Town; the house was apparently a corner lot, and is described as having entrances on Union Street, and on Clarence Road, though the entrance commonly used was on Union Street. He lived there with his mother Ruth Peart, and a young lady (his mistress or common law wife, popularly described as his "baby mother") Patricia Elvin. She described the premises as "there I sleep in the night", and she termed Barrington as her "baby father".

On Monday the 22nd December, 1980, at about 10:15 p.m. the young couple were standing up at the gateway on Union Street: Patricia Elvin in the actual gateway and McPherson, within touching distance, on Union Street: they were listening to the music coming from a nearby bar. There was a street lamp nearby and overhead, described by her as being on, and bright light. Suddenly, and without warning, McPherson was shot dead. Three shots were fired. Two found their mark: one entered over the left cheek and exited in front of the (right) ear; the other entered over the left side of the back of the head, and on dissection by Dr. Ramu who performed a post-mortem examination on the deceased on the 30th December, 1980, it was found lodged in the left parietal region.

McPherson collapsed in the gateway to the premises. There were many persons on the street. A crowd gathered. He was put into a car and taken to the Kingston Public Hospital nearby. There he was pronounced dead, and the body was then taken to the Hannah Town Police Station.

Investigations were commenced that night by Det. Cpl. Laing, of the Admiral Town Police Station. He visited the fatal scene, which he describes as 1 Union Street, Jones Town: (Jones Town and Hannah Town are adjacent to each other) and went from thence to the Hannah Town Police Station. There he saw the deceased Barrington McPherson's body. He interviewed Patricia Elvin, and as a result he obtained a warrant for the arrest of a man known by the name of "Youth".

Det. Cpl. Laing said in his evidence that he knew the appellant as "Youth

The warrant remained unexecuted for over six months. Laing went on leave, and handed it to Det. Sgt. Hamlin Dennis, who executed it on the appellant on the 2nd July, 1981. The

appellant was then in custody at the Admiral Town Police Station.

The warrant was made out in the name of "Youth". Dennis in his evidence said he did not know the appellant before, but that he admitted being called "Youth"; in chief and in cross-examination he stated that the appellant made no statement on being arrested and cautioned. The witness, asked to resolve this apparent contradiction, said that the appellant did not admit the crime, but admitted the name. To anticipate, in his evidence the appellant admitted to being called "Big Youth", but not "Youth". Both are common nick-names.

The case against the appellant turned entirely on the evidence of identification by a single witness, Patricia Elvin, though, as she said in her evidence, there were many people on the street, not only at the corner but also on Union Street, moving up and down, and in front of the nearby bar. They may or may not have seen what happened. She says that she spoke to them and "Everybody come and give them sympathies and ask what happen."

At no stage was any motive ever suggested for this killing and no identification parade was ever held. What took place was a dock identification.

The evidence of Patricia Elvin was to the effect that herself and the deceased were on Union Street on the fatal evening, standing outside of their premises, she at the gate-way and deceased a little further from the gate and both listening to the music from a nearby bar. The time was about 10:30 p.m. There was a light post at the corner, and the deceased was leaning against it, within arms length of where she was standing. The light was on - bright light. They had been there for twenty to twenty five minutes. She was not looking at

the deceased at the time. Suddenly she heard a gun shot, she looked towards the deceased, and beyond him she saw the accused whom she knew as "Youth".

The geography is a little confusing, but she says that there was a wall on Clarence Road, the road intersects with Union Street, and that the accused was leaning on this wall quite close to the deceased, and to his left, that is further down from her, and that he had a gun in his hand.

Instinctively she ducked back into the yard of the premises and took cover behind the gate column. Evidently she stooped down. She says however that she could still see through the gate, and that the deceased had fallen at the gate.

She heard two more shots. It is not clear whether these two shots were heard before she saw the deceased had fallen at the gate or after. These two shots were louder, and inferrentially, closer.

On hearing them and presumably on seeing the deceased fall at the gate, she ran out back to the corner, and saw the accused running down Clarence Road, that is away from the scene.

She saw that the deceased had been shot, he was bleeding from the ear, a crowd gathered, they got a car and took him to the Kingston Public Hospital where the doctor pronounced him dead. The body was then taken to the Hannah Town Police Station.

She had known "Youth" by sight for some two to three years before: seen him on Regent Street (a street in this area).

Latterly she had seen him in the Jones Town area, and that on the last occasion that she had seen him he was riding a bicycle, about a week before the shooting.

Under cross-examination Patricia Elvin said that she had never spoken to the accused, and that she had seen him with the deceased, and that she did not know where he lived. She was firm in her identification and denied that she could have made

any mistake in identifying him. She maintained that she had seen him in the area "all the while".

In re-examination she added, for the first time, that while she was behind the gate column she had seen the accused come up and bend over the body of the fallen man.

The shorthand note indicates that she demonstrated this action, but we have of course no way of knowing what she demonstrated. No request was made to further cross-examine the witness on this, and speaking generally there was insufficient cross-examination of the extent to which she had seen the accused before.

To anticipate, the accused in his evidence said that he had never known or seen the deceased or the witness before. He denied knowing where Clarence Road or Union Street were, or that he could have been riding a bicycle in the area, as he had been disabled by being shot in the foot in 1980. The first time he had ever seen the witness was when she gave evidence at the Preliminary Examination.

Patricia Elvin then, does not say that she saw the accused shoot the deceased, or even that she saw anything indicating that the gun which he had had been fired: but it is a clear inference from her evidence that the man she saw with the gun was the man who fired the fatal shots that killed her "baby father", and she identified that man as being the accused.

Unlike some accused, the appellant gave sworn evidence from the witness box. In effect he set up an alibi.

He stated that he worked at the Botanical Gardens at Hope, and lived at 22 Crook Street, in nearby Jones Town. His route to work did not take him anywhere near the fatal scene and he did not know that area at all.

As to the fatal night, the 22nd December, 1980, he was able to say where he was because that very evening he had been

on his street and had seen a man running on it who said he had just been shot. He and a friend who lived at his premises who owned a taxi had taken this man to the Kingston Public Hospital at about 10:00 p.m. and had waited there all night with the injured man, hoping to get him medical attention. To use his own words:

> "Q. How long did you stay at the hospital?
>
> A: Well, I stay for the whole night, 'till in the morning about 6 o'clock.
>
> Q: You stay the whole night at the hospital?
>
> A: Yes, through I have to go to work in the morning, I stay until 6 o'clock in the morning, take a van and go to work.
>
> Q. What happen to the man?
>
> A: We leave him. Through him never get through in the night, through no doctor never see him, we leave him. Through I have to go to work I leave him."

Under cross-examination it turned out that the taxi driver friend who took the injured man and the appellant to the hospital had migrated, and so was not available to give evidence in support of the alibi. The account given above seems ambiguous: it does not state whether the injured man lived or died. It seems to have been assumed that "through him never get through" meant that he died. He was never called as a witness, and all that is known is that he was named "Booso Wing". The record indicated that the appellant had proposed to call a witness, but that when the witness failed to turn up, his counsel closed the case. No attempt seems to have been made to support the alibi by reference to the records of the Kingston Public Hospital; though possibly there were no records as the injured man was not seen by any doctor?

The appellant denied that he had ever shot the deceased, and as we have noted, denied that he knew him or Patricia Elvin, or that he had ever frequented or been in the area of Union

Street, Crook Street, or Regent Street. He had only recently gone to live in the Jones Town area after being shot in his foot and did not know the area nor could he ride a bicycle in his injured condition. His left knee could not bend.

Two points were argued before us in this appeal. The first was that the evidence given by Patricia Elvin amounted at most to evidence of suspicion only, and that essentially it was "circumstantial evidence" and that the trial judge had failed to direct the jury that such evidence could only be accepted as pointing to the guilt of the accused if it was not only consistent with his guilt but inconsistent with any other rational explanation other than guilt.

This rule or approach to "circumstantial evidence" was derived from Hodge's case (1838) 2 Lee C.C. 227; 168 E.R. 1136 from the summing-up of Alderson B. to the jury. It is perhaps worth remembering what the evidence there was: it was to the effect that the accused knew the deceased, a woman, who was robbed and murdered returning home from selling in the market. That he had been seen near the spot or lane in which she was murdered (but others had been there also). That he was seen some hours after on the same day burying something, which on being dug up next day turned out to be a sum of money which was supposed to be about the sum she was supposed to have had on her when leaving the market.

The jury returned a not guilty verdict.

In R. v. Gardener (1859) 1 F. & F. 669; 175 E.R. 899, a case of manslaughter by setting a ship on fire: the accused had struck a match and lighted a candle in a part of the ship in which it was forbidden, and had thrown down the match on the floor before it was extinguished. The fire occurred some six hours later. In his summing-up Bramwell B., while saying that

he could not say that there was no evidence to go to the jury, observed that it could not be proved exhaustively that the fire might not have been due to some other cause and that it would seem like guessing at the prisoner's guilt, which should be brought home to him beyond a reasonable doubt. The Crown consented to an acquittal.

This represents a rather different approach to the same problem, the sufficiency of the evidence on which to found an inference of guilt.

The problem is a recurrent one: see for example R. v. Wallace (1931) 23 Cr. App. R. 32 (husband accused of murdering wife: evidence against him amounted to grave suspicion only: conviction quashed by Court of Criminal Appeal. "The case against the appellant ..... was not proved with that certainty which is necessary in order to justify a verdict of guilty").

The problem has on occasion arisen when the body of the deceased has not been found, and proof of death has rested on circumstantial evidence. Circumstantial evidence is admissible and can be acted on, but here too there is authority to the effect that the jury should be warned that the evidence must lead to one conclusion only: see Goddard L.C.J. in R. v. Onufrejczyk (1955) 1 Q.B. 388 at 394; (1955) 1 All E.R. 247.

This case and Hodge's case were reviewed by the House of Lords in McGreevy v. D.P.P. (1973) 1 All E.R. 503; (1973) 1 W.L.R. 276; 57 Cr. App. R. 424.

Their Lordships in effect declined to regard Hodge's case as laying down a rule of law, and preferred to rest these cases on the basic rule that before guilt of a criminal charge can be pronounced, the jury must be satisfied of guilt beyond all reasonable doubt. It would be a question on the facts of each case whether the summing-up had adequately explored the circumstances of the case.

Their Lordships however cited with approval Lord Goddard's observations in Onufrejczyk's case, and that of Lord Normand in the Privy Council decision Teper v. R. A.C. 480 at 489.

The last sentence of Lord Normand's dictum reads:

> "It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference."

Though the House of Lords in McGreevy's case declined to treat Hodge's case as laying down a rule of law, they did observe that it had been so treated in a number of Commonwealth jurisdictions, notably in Canada and Australia.

This is also the position in Jamaica: see R. v. Clarice Elliott (1952) 6 J.L.R. 173 a decision of the pre-independence Court of Appeal, and R. v. Cecil Baily (1975) 23 W.I.R. 363; 13 J.L.R. 46, a decision of this Court in which, in delivering the judgment, Edun J.A. said at p. 366:

> "We are also of the view that the rule in Hodge's case has, in Jamaica, become a settled rule of practice and it is incumbent upon a trial judge to assist the jury in their proper line of approach having regard to the facts and circumstances of the particular case. But a judge's failure to do so may not necessarily in every case result in the quashing of a conviction."

In the event, the Court carefully examined the evidence offered, including the statement of the accused and found that it was in fact sufficient to justify the conviction of the accused by the jury, and that though the trial judge had failed to direct the jury in accordance with the rule in Hodge's case, there had been no misdirection as to the burden of proof generally and that there had been no miscarriage of justice.

It is of interest to note that despite McGreevy's case the Australian High Court has continued to follow the rule in Hodge's case: see Barca v. R. (1975) 133 C.L.R. 82. In that case the majority judgment at page 104 put the matter thus:

> "When the case against an accused person rests substantially upon circumstantial evidence the jury cannot return a verdict of guilty unless the circumstances are 'such as to be inconsistent with any other reasonable hypothesis other than guilt of the accused.'.....
>
> To enable a jury to be satisfied beyond reasonable doubt of the guilt of the accused it is necessary not only that his guilt should be a rational inference but that it should be 'the only rational inference that the circumstances would enable them to draw.'...
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> However, 'an inference to be reasonable must' rest on something more than mere conjecture. The bare possibility of innocence should not prevent a jury from finding the prisoner guilty, if the inference of guilt is the only inference open to reasonable men upon a consideration of the facts in evidence."

The majority judgment commenting on McGreevy's case observed at page 105:

> "That decision goes only to the form of direction necessary to be given to the jury, and although its effect may be that the practice in this respect is less rigid in England than in Australia, it does not reflect upon the correctness of the principles stated, which are really principles of logic and common sense."

It may be of interest to take a very quick look at the evidence offered in Barca's case: those involved were immigrants from Calabria - the background lay in the customs of Calabria which required a father to avenge any dishonour to a daughter by killing the man responsible, leaving on his body a "sign of honour" in the form of a cross. The victim here had been so killed; the person charged was not the father of the victim's wife, but his son. There was evidence that the family regarded the victim as having dishonoured their daughter (sister). It was suggested by the Crown that the son had undertaken the murder

of the victim on behalf of his father. Both had uttered threats, and there was evidence as to who was last seen with the victim, where the body was found, and the weapon used. There was no direct evidence as to the killing. The defence of the son seemed to suggest that it was the father who had "executed" the victim. However only the son was charged, and he gave no evidence but only a short statement from the dock in which he was content to say that he personally did not believe in the Calabrian custom. The trial judge had directed the jury to ignore the suggestion that it might have been the father - not the son - who was responsible. Hence the anxious exploration by the Court of the rules relating to circumstantial evidence.

Whether the true approach to Hodge's case is to regard it as a matter of common-sense turning on the requirement to prove guilt beyond reasonable doubt, and leaving it to the discretion of the judge as to how to deal with the facts of the case before him, or whether it be treated as a rule of law, or as Edun J.A. put it "a settled rule of practice" which it is incumbent on a trial judge to follow in Jamaica, it will still be necessary to decide whether the particular case can be said to be one of "circumstantial evidence", or to put it in another way, whether the evidence was of such a nature as to bring the rule into play.

A reading of most of the cases suggests, as do some text book writers, that the rule is aimed at evidence other than direct evidence; it is aimed at evidence which points to opportunity, motive, threats, preparations, previous attempts, false statements offered by an accused to explain the absence of someone that was last seen in his company, possession of recently stolen property and the like. In short the rule is aimed at evidence that suggests or points to guilt, but not

conclusively so. In these circumstances, to quote Lord Normand in Teper's case it is necessary to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.

The evidence offered in the case before us was not such as to bring the rule into play. Obviously a great deal depends on the circumstances. There are no doubt some countries or situations in which the mere seeing of a gun in the hands of a bystander does not lead to the inference that he was the person who fired the fatal shot. No evidence was given here to suggest that this was one of those situations. Nor was it incumbent on the Crown to prove that there was no one else on the street at that time who had a gun, and it is not easy to see how that could have been established.

Here the circumstances were that this person was seen with a gun, and that after the deceased had fallen he was observed to go up and inspect his body, and then to take to flight from the scene.

It was not "direct" evidence in the sense that the witness did not see him aim, or pull the trigger, or see the bullet emerge, or see smoke from the gun. But it was not "circumstantial" in the sense in which this adjective has been applied in the many cases on this topic. There were no other co-existing circumstances which exist to weaken or destroy the inference that this gunman, whoever he was, was the person who fired the fatal shots.

The real issue in this case was whether the accused was that person or not: in short the real issue was that of identification.

The problem of identification is a perennial one, and occurs in a very large percentage of criminal cases. It is particularly difficult in capital cases, such as murder. The Courts have realized the peculiar dangers of identification evidence, particularly in cases where it is the sole evidence and there are no supporting items, e.g. evidence of motive, or of being found with the murder weapon, or articles stolen from the victim or the like.

To meet some of these difficulties we have evoked the use of the identification parade, which in essence in a pre-trial test of the ability of the witness to identify the person charged as the person whom the witness saw commit the act in question.

This Court has on many occasions stressed the necessity of conducting such a pre-trial test of the eye witness's ability to identify the person charged: the police sometimes dispense with the holding of such a parade on the ground that the witness "knows" the accused; this so-called "knowledge" will vary enormously and there may be cases in which the evidence discloses that the witness has such a familiarity with the accused as to make a parade unnecessary. Where, however, the evidence shows that the witness knows the accused only in a casual way, by sight on a limited number of occasions, none of which have any particular significance, then an identification parade ought to be held, especially in cases in which there is no other evidence supporting the identification.

In the case of R. v. Errol Thomas, Errol Hanson and Michael Bailey (1978) 15 J.L.R. 264; 25 W.I.R. 495; Henry J.A. delivering the judgment of this Court said (p. 265 I):

> "Before parting with this aspect of the appeal we wish to say that we view with alarm a growing tendency not to hold identification parades in circumstances which clearly demand that such a parade

> "be held. The purpose of the parade is to minimize the ever present risk of mistaken identification with consequences which may be calamitous for a person wrongly identified but unable to refute with certainty the allegations made against him. It is therefore of the first importance that an identification parade be held in every case in which the circumstances require it and also that the rules in relation to the holding of the parade be strictly observed."

In the case above, the victim, and the eye-witness (the victim's brother) were set upon by a large group of men and beaten: the victim being burnt in some sort of explosion. The eye-witness knew some of his attackers, for some months and was able to give the police their "nicknames" (Cleveland and Satan), names which were sufficiently well-known for the police to effect arrests.

The accused Hanson he did not know before, though at the scene Hanson was particularly active in attacking him.

Henry J.A.'s remarks are not however limited merely to cases in which the witness did not know the accused before: they apply to circumstances in which, as in the present case, such knowledge as there is is scant and casual, with no particular reason for any significant contact which would or might cause the witness to recollect the accused with some particularity. This is not a rural setting in which a stranger might be conspicuous, but a crowded urban area in which in the course of a day or longer a witness might see hundreds of persons with no particular reason to significantly recognize one of them.

Apart from the identification parade, the holding of which lies in the discretion of the police, the Courts have developed an approach to such evidence, exemplified in the English case of Turnbull v. R. (1976) 3 All E.R. 549; (1976) 63 Cr. App. R. 132, and the Jamaican case of R. v. Oliver Whylie, a decision of this Court (1978) 15 J.L.R. 163; 25 W.I.R. 430.

In Oliver Whylie's case: A betting shop had been held up by two gunmen at about noon, and one of the two clerks working there was shot dead in the hold up, and the surviving clerk was the sole eye-witness to the incident. He did not know the accused before, but identified him at an identification parade held some three weeks after the incident. The fairness of the parade was attacked.

Delivering the (majority) judgment of the Court Rowe J.A. said at pages 165-166 (432-433):

> "It has been observed in recent years that in a very large number of serious criminal cases tried in the Circuit Court the critical issue has been the identification of the accused person. When this issue of identification is a live issue in the case, it is the clear and paramount duty of the trial judge to address his mind with the utmost care to that issue and to give the jury full assistance on how to approach that important question.....
>
> It is common knowledge that more than two million people inhabit Jamaica and that there is a rich mixture of all the races in this population. There is therefore always the possibility that one person may bear a marked similarity or resemblance to another in any given geographical area. The further possibility exists that an honest and prudent person may make a mistake in visually identifying another.
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> Where, therefore, in a criminal case the evidence for the prosecution connecting the accused to the crime rests wholly or substantially on the visual identification of one or more witnesses and the defence challenges the correctness of that identification, the trial judge should alert the jury to approach the evidence of identification with the utmost caution as there is always the possibility that a single witness or several witnesses might be mistaken. A mistake is no less a mistake if it is made honestly. Although it is the experience of human beings that many honest people are quick to admit their mistakes as soon as they become aware of them, it is also possible that a perfectly honest witness who makes a positive identification might be mistaken and not be aware of his mistake.
>
> In every such case what matters is the quality of the identification evidence.

"The judge should direct the jury that in order for them to determine the quality and cogency of the identification they should have full regard to all the circumstances surrounding the identification. These may include:

(a) the opportunity which the witness had of viewing the criminal;

(b) was the person known to him before the date of the commission of the crime and if so for what period and in what circumstances;

(c) if the person was unknown to the witness what description, if any, did he give to the police;

(d) the physical conditions existing at the time of the viewing of the criminal as to place, light, distances, obstructions, etc.;

(e) any special peculiarities of the criminal or any special reason for remembering him;

(f) the lapse of time between the date of the crime and the time of identification;

(g) the conditions under which the identification was made;

(h) any special weaknessss in the identification evidence;

(i) any other evidence which can support the identification evidence.

It is of importance that the trial judge should not consider his duty fulfilled, merely by a faithful narration of the evidence on these matters. He should explain to the jury the significance of these matters, enlightening with his wisdom and experience what might otherwise be dark and impenetrable.

We have considered the decisions in the cases of: Arthurs v. A.G. for Northern Ireland (1970) 55 Crim. App. Rep. 161; R. v. Turnbull (1976) 3 All E.R. 549; (1976) 3 W.L.R. 445; 63 Crim. App. Rep. 132; R. v. Peggy Gregory (1973) 12 J.L.R. 1061; R. v. Desmond Bailey (1973) S.C.C.A. 176/73 (unreported); R. v. Dennis Gayle (1973) 12 J.L.R. 1077, and from these cases we extract the principle that a summing-up which does not deal specifically, having regard to the facts of the particular case, with all matters relating to the strength and the weaknesses of the identification evidence is unlikely to be fair and adequate.

> "Whether or not a specific warning was given to the jury on the dangers of visual identification is one of the factors to be taken into consideration in determining the fairness and adequacy of a summing-up.
>
> In the instant case the learned trial judge did not warn the jury in general terms that there was the danger of a mistake in visual identification, he did not tell the jury any of the reasons why such danger can arise and most important of all he did not tell the jury how to approach the identification evidence of the witness Rose if they believed or were in doubt about the incident of June 2, 1974, in the C.I.D. office at Hunts Bay, in respect of which the accused gave evidence. Due to this non-direction we do not consider the summing-up to be fair and adequate."
>
> [Emphasis supplied]

It will be noticed that Turnbull's case was specifically referred to, and in some respects the judgment follows it very closely. So closely that their Lordships in the Privy Council case of Dennis Reid v. The Queen (an appeal from this Court) reported at (1978) 27 W.I.R. 254; (1979) 2 W.L.R. 221; (1980) A.C. 343 were led to observe that Turnbull's case was followed in Jamaica (see at p. 347 A.C.) and that on the evidence the judge should have directed the jury to acquit the accused. This was based on Turnbull's case.

In Turnbull's case, Lord Widgery at p. 138 said:

> "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."

This observation is significantly absent from the judgment in Oliver Whylie's case. (And it is in this respect that the minority judgment of Watkin's dissented: that learned judge wished this Court to go 'the full length' of the Turnbull decision. The majority judgment however stops short of making this recommendation).

In a situation in which there had been an escallation of gun crimes and in which eye-witnesses were often reluctant to come forward for fear of reprisals, and the police lacked the expertise or resources to properly investigate the cases that arose and provide the necessary supporting evidence, both the police and the courts tended to rely heavily on the eye-witness who did come forward and testify, and there was a consequential reluctance to recommend the complete withdrawal of such cases. However the potential dangers of such evidence was realized and attention drawn to the need for warning the jury of its dangers and for the trial judge to carefully review its weaknesses and strength when presented.

As to the role of the Court of Appeal in dealing with such cases, there was again a significant difference between the judgment in Oliver Whylie's case and that of Turnbull.

In Turnbull's case Lord Widgery C.J. said, at p. 139:

> "A failure to follow these guidelines is likely to result in a conviction being quashed and will do so if in the judgment of this Court on all the evidence the verdict is unsatisfactory or unsafe."

Here too Oliver Whylie's case puts the matter differently; it states only that the summing-up must deal "with all matters relating to the strength and weaknesses of the identification evidence" and that one that does not do so is unlikely to be fair and adequate, and as to the need for a warning as to the dangers of identification evidence it points out that this is one of the factors to be taken into consideration in determining the fairness and adequacy of the summing-up.

In the United Kingdom Turnbull's case continues to be followed, but has been somewhat modified.

An article in The Criminal Law Review for 1977, at page 510 "Identifying Turnbull" by Mr. E. Grayson indicates that the courts have treated Turnbull's case as applying to what may

be termed "fleeting glance cases"; the courts have distinguished cases in which the witness had a prolonged period of observation, or in which there had been evidence supporting the identification.

Lord Widgery C.J. himself said in R. v. Oakwell (1978) 1 W.L.R. 32; (1978) 1 All E.R. 1223 at p. 35:

> "Turnbull is intended primarily to deal with the ghastly risk run in cases of fleeting encounters. This certainly was not that kind of case."

(It was a case in which a policeman had been trying to break up a fight, and had himself been attacked by one of the combatants: this struggle had lasted for an appreciable length of time, and the witness would have had every reason to remember the face of his attacker).

A passage that has given considerable assistance is to be found in the judgment of Scarman L.J. (as he was then) in Peter Paul Keane (1977) 65 Cr. App. R. 247, at 248. It reads thus:

> "As the recorder commented at the very beginning of his summing-up, 'essentially this is a case of identification.' Leroy Noel was himself the only identifying witness. It is, therefore, a case which calls for examination in the light of the judgment in Turnbull (supra).
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> In that case the Lord Chief Justice emphasised first the requirement that the judge should warn the jury of the special need for caution, secondly the need for the judge to direct the jury to examine closely the circumstances of the identification, and thirdly the need for him to remind the jury of any specific weaknesses in the identification evidence. If the quality of that evidence be poor, it is the duty of the judge to withdraw the case from the jury and direct an acquittal, unless, there is other evidence, which goes to support the correctness of the identification. Such supporting evidence does not have to be what lawyers call 'corroboration,' so long as its effect is to support the identification. Its weight is a matter for the jury.
>
> It would be wrong to interpret or apply Turnbull (supra) inflexibly. It imposes no rigid pattern,

> "establishes no catechism, which a judge in his summing-up must answer if a verdict of guilty is to stand. But it does formulate a basic principle and sound practice. The principle is the special need for caution when the issue turns on evidence of visual identification: the practice has to be a careful summing-up, which not only contains a warning but also exposes to the jury the weaknesses and dangers of identification evidence both in general and in the circumstances of the particular case.
>
> Unfortunately the summing-up in this case falls short of the requirements of sound practice. The warning is muffled and confused: the weaknesses in the evidence are not fully exposed: and some comments are definitely misleading. ..."

It may be that the position indicated by Scarman L.J. is closer to that indicated in Oliver Whylie's case than was the original position indicated in Turnbull.

In the judgments that have followed in this Court since Oliver Whylie there has been a similar tendency.

In R. v. Daniel McLean S.C. Criminal Appeal 52/77, in giving the judgment of this Court, (on 31st January, 1978) Henry J.A. observed:

> "In so far as the first ground is concerned, we consider it desirable to state that in our view no fixed formula of words of warning or caution is contemplated by the dicta in R. v. Turnbull and R. v. Oliver Whylie which state that in appropriate cases a jury ought to be warned of the dangers of relying solely on identification evidence and of the need for caution in convicting on such evidence. If a jury is alerted to these dangers the method adopted is immaterial. In this case the only witness as to identification was Miss Jourey. She did not know the intruder before the night in question. She saw him for a very short time by the light of a small glass lamp and at the subsequent identification parade she took some 8 - 10 minutes to identify the applicant.
>
> All these matters were put before the jury in terms which made it clear that the learned trial judge himself considered that the evidence of identification required the most cautious consideration....."

(Several long passages were cited from the summing-up to illustrate this, and the judgment concludes, on this point):

> "We do not consider that the jury could have been in any doubt either as to the crucial nature of Miss Jourey's evidence or the care with which they had to approach it. They must have accepted her evidence that the light was turned up bright, that the intruder came within a yard of her and that she looked in his face. They must therefore have concluded that she was in a position to identify him at the identification parade."

In that judgment the Court found that the jury had been advised of the special need for caution in considering evidence of visual identification, and that the weaknesses and dangers of identification evidence in general and in this case had been explored. The warning had been implicit in the approach taken.

In R. v. Errol Thomas, Errol Hanson and Michael Bailey (supra) (the facts have already been referred to, in giving the judgment of this Court on 9th March, 1978), Henry J.A. said (J.L.R. 265 I; W.I.R. 491 D):

> "The circumstances called for the most careful and positive directions from the learned trial judge as to the dangers inherent in this dock identification. No such directions were given although general directions as to the danger of relying on identification evidence were given. We were of the view, therefore, that the conviction of Hanson ought not to stand and counsel for the Crown very properly conceded this."

This case illustrates that the warning by itself is not enough, in the absence of exposing to the jury the weaknesses and dangers of visual identification in general and in the particular case. There had been no identification parade. As to the other accused the witness was shown to have had such a familiarity with them as to make his identification safe to rely on.

In R. v. Lloyd Aitkens S.C. Criminal Appeal 273/77, the eye-witness saw a gangland "execution" take place, in the early morning (dawn) on a city street, the executioner being a person well-known to him as "Goat Kid", and pointed out by him to the police later on in the same day. Giving the judgment of the Court Zacca P. observed:

> "The judge, as I pointed out, referred to the weaknesses of the identification but the directions were adequate, proper warnings were given, in particular, as to mistaken identity even where the person knows the person being identified."

In R. v. Junior Reid S.C. Criminal Appeal 8/181, 29th July, 1982, a case in which the victim was ambushed and shot in broad day-light on her way to work while driving on a side street, the eye-witness, who summoned the police, was an ex-waitress who had known the accused for some eight years, and had served him food at the small restaurant at which she worked nearly every day for some four years of the period, and more recently had observed him frequenting an abandoned house directly opposite the scene of the ambush. Her own house was at the apex of the corner where the ambush took place and commanded the scene enacted about a chain away.

An identification parade was held at which she picked out the accused, and confirmed her identification by pointing to a gold tooth which the accused had.

In this case the trial judge had inadvertently forgotten to give the general directions as to the dangers of visual identification but had adequately explored all the factors involved, distance, lighting, the speed with which the murder had been executed, the witness' opportunity for seeing, and the familiarity of the witness with the appearance and person of the accused. There was no doubt that she knew him and knew him well.

The Court, after the most anxious review of the case, upheld the conviction, the strength and weaknesses of the

evidence having been carefully explored.

On September 30, 1983, in R. v. Beverly Champagnie, Ransford Taylor and Trevor Bailey, S.C. Criminal Appeals 22, 23, and 24/80 this Court again reviewed the situation.

It was a case in which the Crown alleged that a business woman had engaged the services of the other two accused to murder her employer who had discarded her favours for a new lover. There was the most ample evidence given by the person who, before the murder, had been asked to make the necessary contacts with the hired killers and by those who had been asked after it to make arrangements for her secret departure from the jurisdiction. There had however been only one eye-witness to the actual murder which took place late at night outside a popular night club. On the question of the adequacy of the identification evidence relating to the hired gunmen, Kerr J.A. giving the judgment of this Court had this to say.

Having cited the passages set out above from Oliver Whylie, he continued:

> "From the careful language used, we do not interpret this judgment as laying down as an inflexible rule of law, that in every case where there is evidence of visual identification, a trial judge is obliged to warn the jury of the dangers of mistaken identification. As Rowe J.A. (actg.) puts it, 'what matters is the quality of the identification evidence'. Indeed, the issue may be one, not of mistake, but of deliberate falsehood. Nor was it intended that the list of factors and circumstances affecting identification, as set out in the judgment, should be considered exhaustive or of general applicability. Much will depend upon the circumstances of the particular case.
>
> In the instant case, the trial judge in a painstaking review of the evidence of Simmonds (the eye-witness), adverted the jury's attention to the evidence of opportunity for making an identification of the appellant, the physical conditions existing at the time, namely the light, distance and unobstructed view, her subsequent identification at the parade, and the fact that no parade identification was made

> "in respect of the appellant Taylor. There was other cogent evidence implicating this appellant.
>
> Accordingly, we are of the view that the omission to give a specific warning in the circumstances did not render the summing-up on this aspect, unfair and inadequate."

"The other cogent evidence" implicating the appellant Taylor (for whom no identification parade had been held) was the evidence given with regard to his engagement for the task, the procurement of a getaway car, and his subsequent payment off and relationship with the business woman who procured his services.

The argument on appeal largely centred on the adequacy of this evidence and as to whether the witnesses involved were themselves implicated in the plot and as to how adequately the jury had been warned with respect to the acceptance of their evidence.

Here then this Court held that the absence of the general warning as to evidence of visual identification was not fatal, regard being had to the judge's careful analysis of this evidence, the fact that one of the hired killers had been identified at an identification parade, and the volume of other evidence connecting the other with the murder.

The problem arose again in R. v. Glanville Henry, Gibson Bunting, and Michael Mclean S.C. Criminal Appeals 8, 10 and 11/82.

In that case the three appellants were charged with having murdered a house-owner, broken into the house and having there raped his wife and stolen various articles therein.

The evidence against the three men came from the ravaged wife; they had been apprehended, on suspicion, on the morning of the crime, and while being taken to the police station the police had driven past the home of the deceased, where having had to stop because of the crowd of curious sight-seers blocking the road, the wife had recognized the three in the back of the

vehicle, and purported to identify them. One accused she had known very well prior to the attack, and he and the second man had raped her on the evening in question. The third man had been posted as the look-out man, had never entered the house, and she had had but two short glimpses of him: once when he was handed some of the loot, and the second when the other two were raiding her kitchen and she had attempted to run away and had seen him posted on the verandah outside when she peeped to see if she could escape.

As to the look-out man, much turned on the availability of moon-light at the time that the witness had seen him outside, and the fact that the accidental confrontation that took place may have prejudiced her identification, She did not know him before, and her identification took place out of hearing of the accused. No identification parade was held in respect of any of these accused, and the evidence against the "look-out man" was materially different from that against the two who had entered the house and raped the witness.

Delivering the judgment of this Court on the 21st June, 1985, Kerr J.A. observed:

> "Because of the obvious lack of cogency in the evidence of the alleged confrontation and because the evidence against the third appellant was so materially distinguishable from the evidence in relation to the others and especially in respect of the comparatively limited opportunity for making a positive identification, the case in relation to him called for special and careful directions. ....."
>
> (The learned judge then referred to the passage in Oliver Whylie cited earlier, and to that in Champagnie's case also cited earlier ..... and continued):
>
> "Because of the identification evidence in relation to the third appellant and the circumstances under which the purported identification was made, we are of the view that the case of the third appellant fell within the type of cases in which helpful directions in the manner advocated in Whylie's case were necessary to render the summing-up fair and adequate...."

The judgment then reviewed the directions that the trial judge had given with regard to the evidence of the eye-witness, observed that it had failed to alert them to the important differences between the evidence against the first two appellants and that against the "look-out man", and that the trial judge had so misconstrued and attacked the evidence given by a meteorologist called to give evidence as to the availability of moon-light on the night in question that "the jury were precluded from giving a fair consideration to (his) evidence":

> "Accordingly, not only did the trial judge fail to give directions appropriate to the special circumstances of the case in relation to the third appellant, but his mistreatment of the evidence of (the meteorologist) denied the appellant a fair consideration of his defence."
>
> "With respect to the other two appellants, the evidence of identification was cogent and the directions given were adequate."

The conviction of the "look-out man" was quashed, and in the particular circumstances (unlike Oliver Whylie's case) a new trial was not ordered. This was in accordance with the observations made in the Privy Council judgment in the case of Dennis Reid v. R., an appeal from Jamaica, reported at (1980) A.C. 343 and (1978) 27 W.I.R. 254, and referred to earlier.

Thus far it appears that this Court in its approach to the problem of visual evidence of identification and the guidance offered by Oliver Whylie's case has not departed from the approach outlined by Scarman L.J. in Peter Paul Keane. The principle is the special need for caution when the issue turns on visual identification, and the practice requires a careful summing-up which contains not only a warning but exposes the jury to the weaknesses and dangers of identification evidence in general and particularly in the circumstances of the case before them.

The warning has sometimes been implicit rather than explicit, its absence a factor that causes great concern, but has not necessarily resulted in the quashing of the conviction where the summing-up has adequately canvassed the strengths and weaknessss of the evidence in the particular case and the quality of the evidence has been good.

The second ground of the supplementary grounds of appeal canvasses these issues. It reads:

> "2 (a) That the Learned Trial Judge's direction in relation to the issue of identification was inadequate in that he failed to direct the jury, inter alia,
>
> (i) of the dangers of identification evidence and the need for 'utmost caution' in assessing such evidence,
>
> (ii) of the possibility that a witness, though honest may be mistaken as to identity, and,
>
> (iii) of the fact that mistakes may be made, notwithstanding that the identification evidence is based upon the recognition of someone known previously to the witness.
>
> (b) Further, that the Learned Trial Judge failed to give the jury adequate directions in relation to the circumstances of the identification including, inter alia, the fact that there was no evidence that the witness had seen the face of the man identified as the accused, and if so, for how long."

The complaint at 2(b) may be semantic, but there was throughout the summing-up no word of warning along the lines suggested in Oliver Whylie's case. No suggestion was ever made to the jury of the special need for caution when the issue turned on evidence of visual identification as it did here.

To what extent can it be said that despite the absence of a warning the summing-up was fair and adequate, and or that

the evidence of identification was cogent and strong?

The case was a short one, and the summing-up was even shorter, it occupies some twelve pages of the transcript. In that short space the learned trial judge put the Crown's case, the evidence of the witness Patricia Elvin, no less than four times, and on each occasion in practically identical terms. The defence received two mentions of two lines each, and was put fully on one occasion only.

On one of the occasions on which the Crown's case was put the learned trial judge did discuss some of the factors involved in the identification and it is set out below. (It occurs after the learned trial judge had already twice summarised the evidence of Patricia Elvin, once by way of "introduction", pages 54-55, and again at page 56). The passage cited appears at page 58 thus:

> "The evidence in proof of the Prosecution's case I have summed-up to you already, but I will go over it so far as it is necessary to assist you in your deliberation. The evidence indicated that there was Patricia Elvin by the gate, her boyfriend to her left, she heard the sound of a shot - well, she heard an explosion like it was a shot and she looked - she demonstrated - and she saw the accused with a gun in his hands to the left of her boyfriend coming up on Clarence Road which adjoins Union Street at that point. At this stage she ducked behind the column; and she was asked why did she do that and she said the column was not big enough to offer her total protection, it was concrete, it would offer her some protection, and she looked out into Union Street, she heard two more explosions and then she see her boyfriend fall, she saw the accused over him, she eventually left where she was, went outside and she saw the accused running away; she saw his back at this time. After she saw her boyfriend fall down she got a car, placed him in it, took him to the Kingston Public Hospital and then she was sent to Hannah Town Police Station; and she went with the body to Hannah Town Police Station. She later made a report to the police from Admiral Town Police Station."

At pages 59-61 the learned trial judge continued:

> "The chief witness for the Prosecution, Patricia Elvin, was cross-examined as to the knowledge of the accused with a view to establishing that she was mistaken, but she said she has known the accused for some two to three years, she has seen him on Regent Street, she has seen him in the Kingston 12 area and she has seen him on Union Street, she has seen him on Clarence Street. Just the week before the incident occurred she had seen him riding a bicycle. She had known him over this period. She had actually seen him together with the deceased, her boyfriend.
>
> Where a crime of this nature is before you for consideration the Crown need not produce any evidence of motive. The motive that a person may have for killing another is not material, but if there is evidence of motive it may assist you to determine why the act was committed. It didn't appear on the evidence, no indication of any motive.
>
> On Elvin's evidence the two men were known to each other; she had seen them but she herself had never had anything to do with the accused, but she had seen him with her boyfriend, now deceased. On the night in question she said there was a bright street light, it was very bright overhead, right at the corner where they were standing, and it's by the light of the street light that she saw the accused. You have to take these factors into consideration to determine whether she had an opportunity to see and an opportunity to recognise the person that she said committed the act. The fact that she had known him some two to three years before or so, you must take that into consideration, if you accept it. The lighting that obtained at that time, all surrounding circumstances, granted she must have been there, so she looked, she heard the explosion.
>
> She said she looked; she heard the explosion, she looked, she saw him. She ducked behind the column, looked, and she saw him again. So she had two opportunities to view the accused. That is her evidence. When she looked and saw him with the gun first, and when she saw him over the fallen Barrington McPherson. Think of that with care, in examining the evidence as to the opportunity she had to view and the opportunity to recognise the assailant of her boyfriend in these circumstances that existed at the time."

With great respect this seems an inadequate analysis of the weaknesses of the identification evidence. It was an identification made at night in a situation that must have been as terrifying as it was sudden. The opportunity to see and

further to recognize seem to fall well within the "fleeting glance" time frame. No suggestion is made that the absence of motive might on the otherhand cast some doubt as to the identification.

Further no identification parade was ever held, despite the obvious fact that the witness' acquaintance with the accused was extremely casual. The summing-up is completely silent on this fact. All that we had here was a dock identification, taking place first at the Preliminary Examination and later at the trial, and in the latter case taking place more than three years after the incident, and as to the former taking place presumably at least a year after. The accused was arrested some six months after the incident, and the only identification given of him by this witness was that she knew him as "Youth", a nickname that must be shared by scores of others in the corporate area. She stated that she did not even know his approximate address, and denied that she told the police he lived on Pryce Street.

As to the defence put forward by the accused this was dealt with substantially at pages 62-64 as follows:

> "Now the accused in his defence entered the witness box and gave evidence. All witnesses in this case gave their testimony from the witness-box, so you assess them by the same method. You weigh them in the same scale, you measure them by the same measure, because they were all tested by cross-examination. You saw them, you saw how they responded to cross-examination, it is for you to say what you make of the evidence, and how you find.
>
> His evidence is that he lived at Crook Street in Jones Town, he worked at Hope Gardens., Ministry of Agriculture. He does not know Union Street; he does not know Clarence Road. When he does travel he goes by Collie Smith Drive. He doesn't own a bicycle and he hasn't got friends with a bicycle. He said he never rode a bicycle. He said he did not know Barrington McPherson, he never knew Patricia Elvin, the first time he saw her was at the Gun Court at the preliminary enquiry. He is called Big Youth.

> "He has never lived at Pryce Street. On the night in question he said he was not anywhere near the scene of the crime. At that time he was - at about the time of the incident, he was on Crook Street talking with a friend, when he saw a man running who had received a gun-shot injury, and he says he assisted in taking the man to hospital and he was at the hospital until daylight when he went home as he had to go to work. So the defence is an alibi.
>
> As I said he is not obliged to prove anything, he takes on no burden; the burden in this case rests on the prosecution. That burden never shifts. When a prisoner puts forward an answer to a charge against him in the form of an alibi he does not in law assume any burden of proving that answer. There is no burden on him to show that at the time the offence was committed he was where he said he was. On this occasion at Crook Street talking to a friend, and later at the hospital. The burden remains on the prosecution, throughout the case, to establish to the extent that you feel sure, that he was not in fact on Crook Street, as he said, with some friend, and then later at the hospital assisting this injured man, but that he was at the scene of the crime - the intersection of Union Street and Clarence Road - committing the offence charged in this case. So you cannot convict him unless you definitely reject his story, because, obviously, he cannot be in two places at the same time.
>
> If you believe his story then you must acquit him. If it leaves you in doubt, then you must acquit him; if you are not sure whether or not to accept his story, then you must accept it and acquit him."

There is no complaint as to the directions on the onus of proof, nor was the alibi critically examined. On the otherhand nothing was said as to the difficulties that might have been experienced in trying to find supporting evidence; the fate of the victim the accused was helping was uncertain and the taxi-man who had assisted in taking the victim to hospital was alleged to have migrated to America.

The very last words of the summing-up reflect to some extent the imbalance in the summing-up viewed as a whole. They read at p. 65:

> "There you have it, Mr. Foreman and members of the jury, the Crown's case and the case as put forward by the defence. The Crown is saying he is the man through the mouth of Patricia Elvin: I have known you two to three years. On the night in question I saw you; I saw you twice. I saw you when I heard the explosion. When I looked around, there you were with the gun in your hand. When I ducked behind the column I heard two more explosions and my boyfriend fell. I saw you again over him. I am not mistaken. The defence says: 'You are mistaken, I was not there, I was somewhere else.' Those are the issues you have to resolve. The Crown must satisfy you so that you feel sure that the accused is the person who committed the crime charged, the crime of killing Barrington McPherson."

It cannot be said that the defence was not put to the jury, or that they were not correctly advised as to the burden of proof.

But it can be said, with respect, that the jury was left unenlightened by the wisdom and experience of the judge. There was no warning as to the dangers of visual identification, a factor to be taken into consideration in determining the fairness and adequacy of the summing-up, and the summing-up did not adequately expose to the jury the weaknesses in the identification evidence.

The major weakness was the failure to hold an identification parade, and the courts ought not to be put into the position of deferring to the investigating policeman the question of whether or not the familiarity of the witness was such as to make it safe to dispense with this test of a witness'ability to recognize a casual acquaintance seen on an occasion of sudden and overwhelming terror for a few brief moments.

There remains the question of whether in this situation the Court should apply the proviso or simply quash the conviction or should quash the conviction and order a new trial. The latter was the course recommended or adopted in Oliver Whylie's case.

Since then however this Court has received guidance from the Privy Council in the case of Dennis Reid v. R. (1980) A.C. 343; (1978) 27 W.I.R. 254; (1979) 2 W.L.R. 221 and reference should also be made to Ferguson v. R. (1978) 25 W.I.R. 559; (1979) 1 W.L.R. 94.

Ferguson's case was a Privy Council Appeal from Grenada: shortly put the facts were that the deceased, his wife, his sister-in-law, another lady and a small child were returning home by car at about 9:15 p.m. at night when they found a bridge they had to cross blocked by stones in three places. The deceased and two of the ladies got out the car to clear the road block. Suddenly a man leaped out went to the car and demanded money from the wife, who spoke to him. He took her handbag, and demanded more. One of the ladies outside the car seeing what was happening called out to the deceased, who came running to the car to protect his wife. The gunman shot him dead and escaped. The sole issue was identification, and the sole witness who recognized the accused was the wife. The judge did not direct the jury in the terms now approved by Turnbull, but he directed them fully on all the factors affecting her identification and such other evidence as seemed to affect it. Their Lordships noted also that the burden of proof had been correctly put. The Grenada Court of Appeal had dismissed the appeal, applying the proviso. The Privy Council found that they had erred in the test used to apply it, and found themselves therefore faced with applying it, and did so. They found that there was no doubt that the jury had reached a true verdict on the issue of identification, and that no miscarriage of justice had occurred.

Ferguson's case establishes that the proviso can be applied in a case where there has been a failure to use the Turnbull warning on visual identification, but where the judge

has carefully analysed all the weaknesses and strengths of that evidence. Lord Scarman, who delivered the Privy Council judgment in this case, and also the judgment in Peter Paul Keane (supra), observed:

> "Their Lordships have considered anxiously all the evidence as to identification. It was summed-up fully and fairly....
>
> The whole emphasis of the summing-up as to the facts was as favourable to the accused as it could be. Their Lordships are in no doubt that the jury reached a true verdict. No miscarriage of justice has occurred at the end of this protracted and unhappy case."

It is perhaps worth noting that Grenada had adopted the new version of the English Criminal Appeal Act, 1968, Section 2(1) introducing the new criterion: is the verdict unsafe or unsatisfactory? The application of the proviso under the new formula is therefore slightly different to its application under the old formula still in use in Jamaica. While making allowance for that difference, it is still necessary to ask whether there has been or may have been a miscarriage of justice.

In the case before us there was a failure to use the guidelines established by Oliver Whylie's case: there was no warning of the dangers of visual identification evidence, explicit or implicit, and it cannot be said that the summing-up fully and fairly analysed such evidence including the absence of an identification parade. As was said in Oliver Whylie's case:

> "It is of importance that the trial judge should not consider his duty fulfilled, merely by a faithful narration of the evidence on these matters. He should explain to the jury the significance of these matters, enlightening with his wisdom and experience what might otherwise be dark and impenetrable."

In the circumstances, though it is possible that on this evidence a jury properly directed might have brought in the same verdict it cannot be said that they must have done so and that no miscarriage of justice has occurred. This therefore is not

a case for the application of the proviso.

This still leaves to be considered the question of whether a new trial should be ordered.

Dennis Reid's case explored this situation.

In that case there was a sole eye-witness to the murder of the proprietor of a night club. She gave a description of the accused to the police, and subsequently picked out the accused at an identification parade. He had not been known to her before. In the period between the murder and the arrest the description of the accused had been published in press, on radio and television, and a photograph of him was published in at least one daily newspaper. The accused's appearance was distinctive by reason of a conspicuous scar across his forehead and two central upper teeth were missing. The witness' original description to the police did not mention either disfigurement. At trial she denied having seen the photograph but admitted having heard the description. In the event it was left uncertain whether she had identified the accused by her own unaided recollection of him at the scene of the murder, or by the description subsequently heard, or by a combination of both. There had also been a failure to follow the Oliver Whylie guidelines in dealing with such evidence. The Privy Council held that in the circumstances of this case there had been a failure by the prosecution to present sufficiently clear evidence to warrant a conviction, and a distinction was drawn between cases where the conviction was quashed by reason of the inadequacy of the evidence, and other cases. In the former it was said that a new trial ought not to be granted: its only effect would be to enable the prosecution to fill the gaps left in the evidence given at the first trial. On the general question of when should a new trial be ordered their Lordships, in their judgment delivered by Lord Diplock, pointed out that there were two

extremes: (a) cases in which a reason for setting aside the trial had been the inadequacy of the evidence offered to justify a conviction by a reasonable jury even if properly directed, (in which case a new trial should not be ordered) and on the other hand (b) cases in which the evidence offered against the accused was so strong that any reasonable jury if properly directed would have convicted the accused, in which case the proviso should be applied and the appeal dismissed instead of incurring the expense and inconvenience to witnesses and jurors which would be involved in another trial.

As Ferguson's case (supra) shows, it is possible to apply the proviso in cases involving visual identification and a failure to use the Turnbull and/or Oliver Whylie formula. But as already pointed out it is not possible to do so here. On the otherhand this case does not fall within category (a). The reason for setting aside the conviction is not the inadequacy of the evidence per se, but the failure to properly direct the jury upon it. This case therefore falls between the two extremes indicated by Lord Diplock, as one in which a number of factors have to be considered, including the seriousness of the offence, its prevalence, the probable length of time expense and complexity to be involved in any new trial, the length of time that has elapsed between the offence and the new trial, whether evidence tending to support the defence at the first trial will not be available at the new trial, and the hardship imposed on the accused in going through a second trial unless the interests of justice require that he should do so. I have considered these and other factors mentioned in Dennis Reid's case and I am of the view that all things considered the interest of the public requires that the question of guilt or otherwise be determined finally by the verdict of a jury, and not left as something which must remain undecided by reason of a defect in legal machinery.

I would therefore have ordered that the conviction be quashed and a new trial ordered.