JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 23/99

BEFORE: THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MR. JUSTICE LANGRIN, J.A.

REGINA
V
SHELDON MORGAN

Cecil J. Mitchell for Appellant
Anthony Armstrong for the Crown

23rd Februaryand 20th July, 2000

LANGRIN, J.A.:

On the 10th February, 1999 the appellant was convicted in the Home Circuit Court before Beckford J, and jury of the offence of murder and sentenced to life imprisonment with a recommendation to serve thirty (30) years imprisonment at hard labour before becoming eligible for parole. On the 23rd September, 1999 a single judge of this Court granted him leave to appeal on the issue of identification.

The evidence presented against the accused came from a sole eyewitness who testified that he saw the accused chase and shoot the deceased and that he had known the accused for a long period of time before the commission of the offence.

The sole witness also testified that he saw the entire event from start to finish and that only one person was involved in the commission of the crime. The eye witness stated that he knew the person who committed the crime by the name "Dutchman".

However, two persons were arrested and charged for the offence and were brought before the court. Both men faced the Court during the preliminary enquiry and the first man arrested and charged was dismissed at the end of the preliminary enquiry. The Crown's position on the matter based on the evidence of the investigating officer was simply that the arresting and placing before the court of the "other" man was based on a second statement. That statement was not given by the said sole eyewitness they relied on at the trial nor was any such witness in the second statement called. In the light of that the reasons for the arrest were not matters before the trial judge and did not need to be ventilated.

The trial judge at page 139 stated that:

> "... this is a trial where the case against the accused rests on two limbs, one , the question of the identification of the accused man which the Defence is saying is mistaken or is a downright lie and, two, the truthfulness of the sole eyewitness".

When coupled with a previous statement at page 133 she went on to say:

> " ... this case is going to be based or is based on the credibility of the witness, because you have one eyewitness".

As a whole, these aspects of the trial judge's general charge given the prosecution's position, and in the light of the evidence for both sides, it could

not be concluded that on these facts the jury came to an unreasonable unsupportable position. This court would only "... set aside a verdict where a question of fact alone is involved, only where the verdict was obviously and palpably wrong".

Directions on Identification

Three grounds were filed on this area but being all connected they will be dealt with as one. Grounds 2, 3, and 4 read as follows:

> **Ground 2:**
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> "The learned trial judge failed to give the jury the proper direction as to how the jury should treat the evidence adduced that two men had been charged and brought before the court although the sole eye witness spoke of one man only being present and involved in the commission of the offence.
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> **Ground 3:**
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> That the learned trial Judge failed to give the jury any proper direction as to how to deal with the question of identification bearing in mind that although the sole eyewitness testified that only one person committed the crime and the fact that two persons were arrested and brought before the Court and that the first man was arrested on the 12th January, 1998 while the accused was arrested on 20th January, 1998.
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> **Ground 4:**
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> That the learned trial judge failed to direct the jury regarding the reason why the jury should exercise caution in accepting the testimony of the witness in so far as the question of identification was concerned".

In light of the above an examination of the case law and an assessment of the trial judge's summing-up will now be conducted.

The starting point is what has basically become the **locus classicus** in the modern approach of this area of law, ***R v Turnbull and Others*** [1977] Q.B. 224 where at page 228 the role of the court is enunciated:

> "First, whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification(s). In addition he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken.
>
> Secondly the judge should direct the jury to examine closely the circumstances... Recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made".

Counsel relied on ***R v Horace Cameron*** (unreported) SCCA 238/88 delivered 23rd October, 1989 in support of his grounds. In that case the Crown conceded that it could not support the conviction and in the interests of justice the court ordered a new trial. The court in that case recognised that the judge had not given the double warning in that he had not alerted the attention of the jury to the need for caution. An examination of that case will not be embarked upon for the simple reason that it is not relevant to the instant case.

The binding decision of ***Thomas Palmer v The Queen*** [1992] 29 JLR 17 addresses the point in light of the defence of alibi and the position being one of

a case of recognition. Lord Ackner at page 19 gave credence to the principles laid down in ***R v Turnbull*** (supra) and established that in the case before the Board the trial judge failed to regard the requirement cited before that there is a reason behind the necessity for the warning, nor did the judge state the reasons. The Board in referring to the judgments in ***Reid and Others*** [1990] A.C.363 alluded to the words of their Lordships in the case, ***R v Dickson*** [1983] 1 V.R. 227 at pg. 231, which stated [see page 20 of the ***Palmer*** case]:

> "It is difficult to convey to the jury the reality of particular dangers which exist in the evidence without drawing to the attention of the jury two things which they are unlikely to know. The first is that experience in the courts over the years has shown that in a not insignificant number of cases erroneous identification evidence by apparently honest witnesses had led to wrong convictions. For this knowledge the judge draws largely on accumulated judicial experience. One sees instances of erroneous identification from time to time... The second thing which the jury are unlikely to know is the substantial degree of risk that honest witnesses may be wrong in their evidence of identification. Jurors, who, unlike trial lawyers, have not given thought to the way in which evidence of visual identification depends on the witness receiving, recording and recalling accurately a fairly subjective impression on the mind, are unlikely to be aware of the extent of the risk that honest and convincing witnesses may be mistaken..."

Lord Ackner went on to reiterate the position of the Board as enunciated in ***Reid*** (supra) that:

> "Unless there are exceptional circumstances to justify such a failure, the conviction will be quashed, because it will have resulted in a substantial miscarriage of justice".

The Privy Council in ***Michael Beckford et al v The Queen*** [1993] 30 JLR 160 took the matter no further except to recognize where and why the judicial duty seems to have become blurred in the minds of judges. At page 165 Lord Lowry had this to say:

> "It is not within the discretion of the trial judge to determine whether or not he will give a general warning on the dangers of visual identification, and to elaborate and illustrate the reasons for such a warning. That is the starting point from which he ought not to swerve... Such a lapse might not be fatal if there are elements in the identification evidence which renders inevitable..."

Further, at page 165 to 166:

> "The need to give the general warning even in recognition cases where the main challenge is to the truthfulness of the witness should be obvious. The first question for the jury is whether the witness is honest. If the answer to that question is yes, the next question is the same as that which must be asked concerning every honest witness who purports to make an identification, namely is he right or could he be mistaken? Of course no rule is absolutely universal".

However, in-spite of the last sentence the court was quite cognizant of the fact that in this area of the law, the occasion upon which the rule would not be applied would be a rare exceptional case.

Having alerted the jury to the two issues in the case at bar; that is identification where (a) the defence alleges mistake or lie and (b) the truthfulness (the credibility) of the witness, the learned trial judge in the instant case went on to deal with the identification warnings at page 139. She stated:

> "... let me deal with the question of identification because that is very important. I must warn you of the special need for caution before you can convict the accused man in reliance on the evidence of identification, that is, because it is possible for an honest witness to make a mistaken identification. As well... an apparently convincing witness can be mistaken... So you must examine carefully the circumstances in which the witness said the identification was made". (emphasis supplied).

She then went on to address generally the issue of recognition and raised in her charge that the jury must assess the possibility of "knowing". In this case this meant addressing issues such as seeing "someone up and down" for some time and not knowing his real name or even speaking with him; (at page 140):

> "Yes, I know that face, I see that face all the time... but you would not know the name, you do not know the name and you have never spoken to the person".

The sighting was dealt with at page 141 giving the time frame and the conditions:

> "You have to look at how long... never said anything obstructed his view nor did he at any point lose sight of the accused".

At page 145 the judge dealt with the specific evidence of the description that the witness gave the police and the issue of the name and balanced such with the defence saying the accused is not known by that name.

She then reminded them of the "special need for caution" in reliance on the evidence of identification.

The trial judge then went on to deal with the issue of the lack of an identification parade at page 146:

> "Now, you remember the accused man telling you that they said he was to face an identification parade and he did not. Now, where a suspect is well known to a witness because if you accept what Dixon is telling you, the witness Dixon... he said... 'look, I know this man'... So where a suspect is well known to a witness before, there is no need for an identification parade. There maybe some sort of confrontation... bearing in mind all what I told you about the dangers and then you'll have to ask yourselves, are you certain that the witness Dixon is making no mistake?..."

At page 153 to 154 the judge alludes to the evidence of the Police Officer regarding the arresting and charging of another man and directs the jury that:

> "... there are many reasons why this other man may have been discharged. None of that evidence is before you. You remember what I told you about evidence from outside... you are not to speculate... you are only to act on the evidence you have heard in this court coming from that box..."

This warning direction was immediately followed by a reminder to the jury of the burden that rests with the prosecution and the role they should adopt if on the facts they find that, that duty has not been discharged.

Given the legal position as cited not only did the trial judge deal with the circumstances but she also started her charge on the issue with a direction that was in a similar vein to that postulated in ***Turnbull.*** Additionally, in addressing the recognition issue and her highlighting the issue of the lack of the parade she again reminded the jury of the need for caution.

It cannot be gainsaid that the judge could not when addressing the reason for the two men being initially charged, specifically raise that reason as an element of risk in the identification. It would certainly have been otherwise if the same eye witness who gave evidence at the trial was responsible for the presence of the other accused at the preliminary enquiry.

It is not necessary to give a special direction in every case where a person who was before the Court had been discharged. Such a direction was required only when on the evidence in the case there was room for the possibility of a genuine mistake in the identification of the accused by the eye witness in so far as the presence of the two accused men before the Court was concerned. That conclusion accorded with the basic conclusion that the jury should not be subjected to unnecessary and irrelevant directions, or invited to speculate.

The question we have to ask ourselves is whether, on the evidence in this case, it was open to the jury to reach a verdict that the absence of the reason for the discharge of the "other man" could be due to mistaken identification.

In the instant case it had not been open to the jury on the evidence to reach a verdict that there was a mistaken identification of the defendant because the reason for the discharge had not been given.

Accordingly, the judge's failure to give a special warning in respect of the presence of two men at the preliminary examination did not render the verdict unreasonable nor was there a miscarriage of justice.

Accordingly, the appeal against conviction and sentence is dismissed. Sentence is to commence on the 9th May, 1999.