JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 105/04

BEFORE: THE HON. MR. JUSTICE PANTON, J.A.
THE HON. MR. JUSTICE SMITH, J.A.
THE HON. MRS. JUSTICE McCALLA, J.A.

R V PETER MORRIS

Carlton Williams for applicant
Miss Tara Reid, for the Crown

3rd 4th 31st July, 2006 and 20th April, 2007

McCALLA, J.A.:

The applicant Peter Morris was on May 6, 2004 convicted in the Home Circuit Court of the non-capital murder of Paul Chin.

He was sentenced to a term of life imprisonment with a stipulation that he should serve a period of 25 years before becoming eligible for parole.

His application for leave to appeal was refused by the single judge on September 2, 2005 and he renewed his application before us. Having heard arguments in the matter, on 31st July, 2006, we dismissed the application and promised to put our reasons in writing. This we now do.

The original grounds of appeal were abandoned and leave was granted to argue four supplementary grounds which were as follows:

1. In the absence of an identification parade, the evidence of identification adduced by the prosecution was too weak to support a conviction.

2. The issue of the credibility of the witness was not left for the jury's consideration, or in the alternative, appropriate directions on the issue of the credibility of the witness were not given to the jury by the learned trial judge.

3. That the learned trial judge misdirected the jury on five *(5)* aspects of the evidence which significantly impacted on the crucial issue of identification, to the prejudice of the Applicant:
(a) That the learned trial judge's approach to the evidence as it relates to the opportunity of the witness to have seen the assailant was simplistic, and failed to reflect the tedious, disjointed and confused nature of the witnesses' testimony on this aspect of the case, and that his flippant dismissal of the Jurors' observation 'that where he was standing he could not see' amounted to a gross misdirection,

(b) That the learned trial judge's failure to have directed the jury on the implications of not holding an identification parade in the circumstances of this case was a misdirection.

(c) There being no direct evidence that the alleged eye witness knew the accused as Peter before the incident it was a misdirection when on page 260 the learned trial judge said "Mr. Green knew who the person was although he knew him only as Peter.

> (d) This misdirection was compounded by the further misdirection that Sergeant Sterling said "that he had other information that the Peter in custody was the Peter referred to by Mr. Green.
>
> (e) The learned trial judge's directions on the gun powder residue allegedly found on the accused's hand were tantamount to a gross misdirection when he said on "a bad identification, but that he fired a firearm and you are being asked to infer that because gun powder residue was found on his hand, that he was there that night and he shot Mr. Chin that night.
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> 4. That on the state of the evidence at the end of the prosecution's case and in particular as it relates to identification the learned trial judge erred by failing to take the matter away from the jury and to direct them to enter a formal verdict of not guilty."

At the trial of the applicant the prosecution led evidence that on September 26, 2002 the applicant shot and killed the deceased after he had made a purchase from a shop in the vicinity of 55 Grants Pen Road in St. Andrew.

Delroy Green, the sole witness as to fact testified that he was at a shop in the vicinity of 55 Grants Pen Road on September 26, 2002 at about 10:00 p.m. when the deceased Paul Chin, also called Ernie, was present. Having made a purchase, the deceased turned and started to walk away. Mr. Green then heard the sound of a gunshot and saw the deceased fall to the ground. He then saw the applicant use a short gun

to fire at the deceased two more times and then the applicant ran away.

He was able to see the applicant with the aid of about four street lights that were in the area. He had seen the applicant before, on more than one occasion, at a bridge on Fagan Avenue. The witness reported the matter at the Constant Spring Police Station the following day and subsequently gave a written statement. He identified the applicant for the first time at the preliminary enquiry. No identification parade had been held.

Sergeant Wilbert Sterling, the investigating officer, went to the scene of the crime on September 26, 2002 and saw the body of the deceased lying on the ground. He collected casings of bullets which were later handed in for forensic analysis.

On September 27, 2002 Sgt. Sterling saw and spoke to the applicant at the Constant Spring Police Station. He told the applicant that he had information that he had shot and killed the deceased. The applicant denied it. On his instructions the hands of the applicant were swabbed by Detective Corporal Mayne. Sgt. Sterling subsequently arrested and charged the applicant for the offence of murder. Mrs. Marcia Dunbar, the Government Analyst attached to the Forensic Science Laboratory, carried out an analysis of swabs that had been taken from the right and

left hands of the applicant and found elevated levels of gunshot residue on them.

Dr. Prasad Kadiyala performed a post mortem examination on the body of the deceased and opined that the cause of death was due to multiple gunshot injuries. He found gunshot injuries on the upper chest, left mid-posterior forearm, right lower posterior thigh and left lower posterior knee of the deceased. In his opinion the deceased could have been lying on the ground when the shots were fired.

The applicant's defence was alibi. He gave sworn evidence in which he denied shooting the deceased. He testified that he had been at home on the night of the murder along with his girlfriend Keneisha Gentles whom he called as a witness in support of his alibi. He agreed that on September 27, 2002 his hands had been swabbed by the police but denied that gunshot residue was found and with regard to the prosecution's evidence of that finding he asserted that "it look like a cook up thing."

Grounds 1 and 3(b)

The misdirections referred to in these grounds relate to the issue of identification. The witness Green identified the applicant for the first time, whilst he was in the dock at the preliminary enquiry as no identification parade had been held. In cross-examination it

was suggested to the witness that he never saw the applicant before and "never hail him at all".

The complaint is that the question as to whether the witness knew the applicant before was in dispute and there was no evidence that before the date of the incident, he knew the applicant as Peter.

Further, the applicant was not held as a result of the witness' report as the applicant was held on the 27th September, but the witness made his report on the 28th September. Counsel argued that in these circumstances an identification parade ought to have been held and the failure to hold an identification parade had deprived the applicant of the advantage of testing the validity of the purported recognition.

Before examining the fundamental principles in relation to the issues raised in these grounds it is necessary to refer to the transcript of evidence adduced at the trial.

The witness testified that having heard the 'shot bus" beside him he saw the applicant going to Constant Spring Road. At page 9 of the transcript, the examination-in-chief of the witness regarding his knowledge of the applicant was along these lines:

"**Q.** What is his name?

A. We always buck up but me an him never reason yet 'bout anything at all.

Q. Let us take it step by step. You pointing to the gentleman. What hairstyle?

A. Plait up.

Q. Eh, eh? You pointing to the gentleman, what hairstyle he has?

A. Him hairstyle always plait up. Him name Peter".

The above excerpt shows that the name Peter was elicited from the witness without prompting by Crown Counsel.

Mr. Green gave evidence in which he demonstrated that the applicant was about 20ft away from him when he first saw him and he was able to see his face with the aid of about four street lights. At the time he saw the applicant standing near the deceased firing two to three shots into his body, he was about 10 feet away and was able to see his face. He had known the applicant for four weeks during which time on an almost daily basis he would see the applicant on the bridge as he (the witness) crossed the bridge on Fagan Avenue. However, he had never spoken to him.

At page 196 lines 1-3 of the transcript examination-in-chief of the applicant as to whether or not he knew the witness before was as follows:

"**Q** All right let me ask you then, before seeing him in court, did you know him before?

A. See him a whole heap a time pass"

With regard to lighting the following evidence emerged at page 213 of the transcript, in cross-examination of the applicant:

"**Q.** Tell me something, on Grant's Pen Road along Grants Pen Road where you have those shops in 5A Grants Pen Road?

A. Yes.

Q. You have a lot of street lights there on in the night?

A. Yes, but they went off and went lock off and tun on.

His Lordship: You have plenty of street lights they go on and off?

A: Dim off more time and come on.

Q. They are usually lock?

A. They dim off and dim on".

and at page 214:

"**Q.** Light on the shop then?

A. Yes.

Q. Electric light?

A. Yes.

Q. That is on in the night?

A. Yes."

In cases where an accused is well known to an identifying witness there is no need for an identification parade to be held. However, the authorities make it clear that in cases of disputed identification, an identification parade ought to be held where it would serve a useful purpose. A dock identification is unsatisfactory and ought not to be allowed if a witness has

not previously identified an accused save in circumstances where a description of such a nature was given to the police so as to enable them to apprehend the accused.

In ***Goldson and McGlashan v R*** [2000]56 WIR 444 at page 448 Lord Hoffmann delivering the Opinion of the Board said:

> "The normal function of the identification parade is to test the accuracy of the witness' recollection of the person whom he says he saw commit the offence. Although, as experience has shown, it is not by any means a complete safeguard against error it is at least less likely to be mistaken than a dock identification."

In ***McGlashan*** (supra) the fact that the witness knew the appellants before was in dispute and in those circumstances the learned judge stated that:

> "The truth of this issue could have been tested by an identification parade. If Claudette had failed to pick out the accused on the parade, her assertions that the accused were known to her would have been shown to be false. By not holding identification parades, the police had denied the accused an opportunity to demonstrate conclusively that she was not telling the truth. On the other hand if she had picked them out the prosecution case would have been strengthened, although the judge would have had to direct the jury that the evidence went only to support her claim that she knew them and did not in any way confirm her identification of the gunmen."

Pop (Aurelio) v R 62 W.I.R. 18 was a case in which the appellant had been identified by a single witness at night where the scene of the

murder was lit by electric lighting and the claim by the witness to have known and recognized the accused was in dispute.

In delivering the opinion of the Board Lord Rodger referring to the strictures laid down in ***R v Turnbull and Others*** [1976] *3 ALL ER 549* had this to say:

> " The fact that no identification parade had been held and that Adolphus identified the appellant when he was in the dock did not make his evidence on the point inadmissible. It meant however, that in his directions to the jury the judge should have made it plain that the normal and proper practice was to hold an identification parade."

In the case of ***Mark Anthony Capron v R*** Privy Council Appeal No. 32 of 2005 delivered on the 25th June, 2006 the witnesses were allowed to make a dock identification of the appellant when they had not previously identified him at an identification parade. There, the absence of a **Turnbull** direction was held not to have made the conviction unsafe as the witness had made the identification in suitable conditions. It had been made clear to the jury that even if they rejected the defence's position and came to the view that the witnesses were telling the truth they still had to be sure that the witnesses were not mistaken as to the identify of the killer.

In the case at bar the learned trial judge did not suggest to the jury that the holding of an identification parade would have served no useful purpose.

The question to be determined is whether or not the learned trial judge complied with the essential requirements having regard to the evidence adduced. Having given, in our view, an appropriate warning in accordance with the **Turnbull** requirements, at pages 250-251, he continued as follows:

> "Now, in this case you may recall that the accused man was being identified first time at the preliminary examination at Half Way Tree, while no identification parade was held there, so you have to be very, very careful in circumstances where this identification was done, if it was done in a fair way, you have to be satisfied that Mr. Green had ample opportunity.
>
> I must tell you there are maybe one or two witnesses in this case in terms of identification, he doesn't state how long he saw this accused man but he said he saw him, he said for about fifteen minutes, but certainly fifteen minutes, could be about five, six, don't know the extent, but it couldn't be fifteen minutes, so you take all that into consideration. You have to examine all of this identification issue carefully to see that he was correct when he said that that man he saw who shot his friend Ernie, is the accused man."

We have given careful consideration to the complaint that the learned trial judge failed to direct the jury as to the implications of not holding an identification parade. We are of the view that in the above circumstances having regard to the evidence of the lighting conditions referred to, the evidence of the witness that he had seen the applicant before on several occasions and the evidence of the applicant that he

had seen the witness " a whole heap a time", the directions given by the learned judge were adequate and these grounds of appeal are without merit.

Grounds 2 and 3(a)

These grounds relate to the complaints regarding the credibility of the witness Green and the directions of the learned judge regarding the opportunity of the witness to have seen and identified the applicant as the killer.

Mr. Williams made detailed references to the evidence elicited from the witness Green at pages 8-25 of the transcript in relation to the circumstances in which the witness was able to see and recognize the applicant. He referred specifically to the witness' evidence that " as me hear the shot bus, run I a run in the shop" and in relation to the shooting "not even 15 minutes because me move so fast, I just see him and run so said time I don't want – me move same time". In answer to the question as to his ability to see the applicant's face the witness said: "I tell you say I just turn and run." Counsel criticized the learned trial judge's directions as failing to reflect the "tedious, disjointed and confused nature of the witness' testimony." He submitted that the failure of the trial judge to have discussed the opportunity of the witness to identify the assailant in

circumstances of running to which the witness testified "was to have misdirected the jury."

At pages 252- 253 the learned judge said:

> "He then says everything happened fast. He said he heard the shot. He buck up in the gunman, he was a little confused and he buck up in the gunman. He saw his face, his forehead and he turned and he ran. So it is a matter for you. You have to be satisfied that during that period of time he was able to identify this accused man correctly and that he is not making any mistakes."

Counsel complained further that the learned judge's directions on Mr. Green's evidence was not as clear- cut as the learned judge interpreted it to be, and alluded to directions at pages 247-8:

> "He said when he heard the shot bus, Ernie drop on the sidewalk. He was in a short pants. He said the person go down and shot him two more times and he said the person was Peter. He calls the accused man Peter. Said he had a short gun in his hand and he has seen guns before and he said he see the whole of Peter's body, saw his forehead and he saw the front of his face. He said he moved same time. Three persons came out of the car, but Peter had the gun. He said he had seen Peter before, he had known him before, very important."

At pages 244 -245 the learned judge directed the jury as follows:

> "Demeanour means you must watch the witness to see if the witness is shifty and whether or not you can believe this witness.

> You take into account also the intelligence level of the witness. Not all of us are capable of giving evidence, but though they may not have the intelligence, they have common sense. I make particular mention of Mr. Green and the accused man. Mr. Green is not the most intelligent of persons, likewise the accused, so you have to take that into consideration, sometimes they can't put it across to you as somebody intelligent would put it across to understand clearly, you take that into consideration.

At page 256 he continued thus:

> "You are to look clearly at Mr. Green's evidence and be convinced and be satisfied beyond a reasonable doubt that he is speaking the truth. You saw him, He is a man who seemed to have been traumatized since that day till now, that is not to say that you cannot believe him. You saw how he gave his evidence and he is quite certain that it is Peter who murdered his best friend."

Then at page 265 he directed them as follows:

> "...examine the evidence of the prosecution, particularly the evidence of Mr. Green, coupled with that of the scientific evidence of the swabbing, you have to be convinced that they are speaking the truth so you can convict him. So if you don't believe him, you still have to examine the prosecution's case."

Earlier, in his directions at page 249 of the transcript he had given these directions in accordance with the **Turnbull** guidelines:

> "Now I have to warn you that there is a special need for caution, where before convicting this accused man on the identification, you have to be careful because it is possible for an honest witness to make a mistaken identification and

> apparently convincing witness can be mistaken, so you have to bear that in mind."

In ***Michael Rose v R*** [1994] 46 W.I.R. 213 at 217, the Court opined that:

> "...nothing in **Turnbull,** or in the subsequent cases to which their Lordships were referred requires the judge to make a "list" of the weaknesses in the identification evidence, or to use a particular form of words, when referring to those weaknesses. The essential requirement is that all weaknesses should be properly drawn to the attention of the jury, and critically analysed where this is appropriate."

In his summation, the learned judge reminded the jury of the evidence relating to the circumstances in which the witness identified the applicant and having cautioned them to be very, very careful left the issue of identification for their consideration. The jury must have understood that they were to consider whether in light of the circumstances referred to, the witness had the opportunity to have seen and identified the applicant and whether or not he was a credible and reliable witness.

At pages 270 – 271 at the end of the summation the jurors posed a question through the foreman as follows:

> **"FOREMAN...** Can we assume that the road level is below , would it be safe to say that the front of the shop and the sidewalk is a few inches below?

HIS LORDSHIP: That is the evidence given as you step up you put your hand to the shop.

JUROR: Where he was standing, he could not see?

HIS LORDSHIP: He did indicate he looked under his legs, that is not what he used to identify the accused man. So that has nothing to do with the identification of this accused man, very well."

There was no evidence that at that point the witness was in a position to identify the applicant and the learned trial judge's response to the question asked was appropriate in the circumstances.

In our view having regard to the learned judge's summation as a whole on the question of identification, the submissions advanced by Counsel are lacking in merit.

Grounds 3(c) and 3(d):

In these grounds of appeal Counsel argued that it was a misdirection when the learned judge directed the jury at page 260 of the transcript that "Mr. Green knew who the person was although he knew him only as Peter" and this was compounded by his further directions at page 263 that Sgt. Sterling said that "he had other information that the Peter in custody was the Peter referred to by Mr. Green."

An examination of the transcript reveals that at page 260 in the course of reviewing the evidence of the investigating officer the learned judge said:

> "Mr. Green knew who the person was, although he knew him only as Peter, but I told you about the weakness of the identification because several people can be called Peter. In this case, he says that he had other information that the Peter in custody was the Peter referred to by Mr. Green, who Mr. Green has come and identified before you, so that is a matter for you. He said I think it was not necessary to hold an identification parade."

At page 268 he revisited the matter at the invitation of the Crown. The exchange between bench and bar was as follows:

> "**MISS LLEWELLYN:** Perhaps I am being - your Lordship did indicate to the jury that Sergeant Sterling had given the impression that when he went to the scene he received information in respect of the accused, out of an abundance of caution though it was a comment, one would not wish the jury to use it. That there was no such evidence and that the only evidence they must use to assess must be the evidence that they have heard.
>
> **HIS LORDSHIP**: So that there is no misunderstanding remember Sergeant Sterling went to the scene, he said he got information about this. The only evidence that links this accused man to the murder is that of Mr. Green as an eyewitness, not what people told Mr. Sterling. You can't speculate. You have to judge this case purely on what you have heard from the witness box."

Earlier in his summation at page 252, the learned judge had said:

> "... he went on the scene and got information, obviously information about this accused."

From the passages quoted it is apparent that the learned judge made it quite clear to the jury that the only eye witness evidence linking the appellant to the murder was that of the witness Green and he cautioned them not to speculate and left Mr. Green's evidence for their consideration.

The Court must be astute to ensure that in the trial of the applicant no prejudice is occasioned to him by the admission of hearsay evidence which might be within the knowledge of the investigating officer. As Carey J.A. said in **McClymouth v R** (1955) 51 WIR 178 :

> "The court will be slow to interfere unless it feels that the applicant would be justified in saying that what occurred was devastating."

The Court must consider in the circumstances of each case whether any evidence was so prejudicial as not to be capable of curative action by the judge. We do not find that the hearsay evidence elicited was devastating having regard to the further directions given.

Ground 3 (e).

We set out hereunder the full context in which, at pages 262-263, the learned judge, in reviewing the evidence of the forensic analyst, gave directions the subject of the complaint in this ground of appeal:

> "What she is saying in effect, the accused man could have used a gun or he used a gun because gunpowder residue, she told you, when a shot is fired, certain gases are emitted, when the projectile leaves the barrel of a firearm some of the gases come back on to the hand of the person who fired that firearm. So what the prosecution is saying here, that this accused man fired a gun, that is what the prosecution is saying by way of evidence of Mrs. Dunbar. That would be a matter for you and that not only buttress Mr. Green's evidence about identification, but you have to look at it separately, because although he fired a firearm, maybe would have fired a firearm elsewhere, but Mr. Green is saying no, he fired that firearm there that night, so that supports Mr. Green's evidence. **A bad identification, but that he fired a firearm and you are being asked to infer that because gunpowder residue was found on his hand, that he was there that night and he shot Mr. Chin that night.** He said that he shot four rounds, and so the period of deposit would be longer, up to more than twelve hours, be elevated. After that, probably would be intermediate but she said she found on those swabs, a high level. Now, that was the case for the prosecution."(emphasis supplied)

Mr. Williams took issue with the learned trial judge's directions (as emphasized) regarding the gunpowder residue found on the swabs taken from the hands of the applicant. He said the directions

amounted to a gross misdirection which the Crown recognized and sought to have corrected by the learned judge. He argued that the correction by the learned judge fell short of the mark.

The jury, he said could have been left with the impression that they could not use the finding of the gunpowder residue to make the identification good but they could use it along with the bad identification as additional evidence to say that the applicant was the man who committed the crime.

Towards the end of his summation, at pages 269-270, the prosecutor drew the judge's attention to the above direction in the following manner:

> "**MISS LLEWELLYN:** Although your Lordship did explain the whole relationship in respect of the evidence of the gunpowder deposition on his hands to the identification, just to make it clear that the qunpowder deposition, if they find that it was his hand, is not corroborative of the identification of the accused man.
>
> **HIS LORDSHIP:** I did tell — what I was telling you about Mr. Foreman and members of the jury is that if you find that there was gunpowder residue on his hand, that he had fired a gun the night, **you cannot use that as corroboration that he killed Mr. Paul Chin, you still have to go and examine Mr. Green's evidence and you have to be satisfied that Mr. Green's evidence in regards to identification was the correct one. So you can't say that because he had gunpowder residue he -**

> **although it follows that the person who fired the firearm is the accused, it is not corroboration. Very well."**(emphasis supplied)

We are clearly of the view that in the context in which the words complained of were used and the additional directions given by the learned judge in the passage referred to, he dealt adequately with the relevance of the deposits of gunpowder residue on the hands of the applicant. In those circumstances it is in our view that there is no proper basis for the complaint in this ground of appeal.

Ground 4

The question that arises for our determination in this ground is whether or not on the state of the evidence relating to identification at the end of the prosecution's case, the learned trial judge erred, as counsel contends, by failing to take the matter away from the jury.

In our view this was not a case in which the evidence of identification was so poor or made in difficult circumstances which might have justified its removal from the jury's consideration (see ***Freemantle & Others v R*** (1994) 45 WIR312) . This ground also fails.

Having given careful consideration to all the matters raised in this appeal we found that there was no basis for interfering with the verdict of the jury. It was for these reasons that we dismissed the application.