JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 93/97

BEFORE: THE HON. MR. JUSTICE RATTRAY, P.
THE HON. MR. JUSTICE PATTERSON, J.A.
THE HON. MR. JUSTICE BINGHAM, J.A.

REGINA vs. BARRINGTON OSBOURNE

Delroy Chuck and Tom Tavares-Finson for appellant

Hugh Wildman and Donna Marie Parkinson for Crown

February 16 and March 16, 1998

PATTERSON, J.A.:

Barrington Osbourne was convicted on June 25, 1997, of capital murder and sentenced to suffer death in the manner authorised by law. On February 16, 1998, we granted his application for leave to appeal against conviction, and we treated the hearing of the application as the hearing of the appeal. We allowed the appeal, quashed the conviction, set aside the sentence and directed a judgment and verdict of acquittal to be entered. Our reasons for so doing follow.

The case for the prosecution can be briefly stated. On the morning of August 27, 1996, Yanique Cha, a ten year old school girl, was left alone in a second floor apartment at Washington Towers, Central Avenue in St. Andrew, to await the arrival of the household helper Sharon Clare. Miss Clare arrived at the apartment at about 11:00 a.m. She had a key to let herself in, but she could not enter because

the door was bolted from the inside. She called Yanique and banged on the door several times, but got no response. After waiting outside the door for about fifteen minutes, Miss Clare said she heard the sound of the bolt being drawn. She turned around and saw "a young man" leaving the apartment. She was then about 8 feet from the door. The young man was wearing a hat and he had a rag in his hand. She asked him, "Who are you?", but he did not answer. She then remarked, "I can't believe that there was someone inside and I out here knocking so long and there wasn't any answer." The young man then said that he had been cleaning the floor and that the lady was asleep, she should awake her. Thereafter, the young man descended the stairs and she entered the apartment. She noticed the furniture in the living room was out of position. She did not see Yanique or anyone in the house. She spoke with Yanique's mother on the telephone, and then continued her search in the apartment. It was only then that she discovered the dead body of Yanique lying on the floor behind a sofa in the living room. Yanique was wearing her underwear, her T-shirt tied around her neck and her hands tied behind her with a piece of string. The police were called in and they removed the body to the morgue. A post mortem examination revealed that death was due to strangulation.

The crucial aspect of the case presented by the prosecution turned upon the visual identification of the appellant by the single witness Sharon Clare, as being the young man she saw leaving the apartment where Yanique's body was found. There was no other evidence whatsoever to support her visual identification evidence, and the appellant's complaint centered on the quality of that evidence. It was contended on behalf of the appellant that the visual identification evidence was

not only weak, but that it was also unreliable. It was contended further that the verdict was unreasonable and cannot be supported having regard to the evidence.

An evaluation of the quality of the identification evidence must include the question of whether Sharon Clare had a sufficient sighting of the young man she said she saw leaving the apartment to enable her to identify and point him out on an identification parade on October 8, 1996. It is important to identify the weaknesses in her identification evidence. She said she did not know the man before. She looked at his face from a distance of "about three to four feet" for about "twenty, twenty-five seconds or more"; he was sweating.

That was all the evidence elicited, by the prosecution, from the witness of the opportunity she had to establish the identity of the man she saw leaving the apartment wearing the hat and having a rag in his hand. On October 8, 1996, the witness went on an identification parade at the Central Police Station, and her evidence as to what transpired follows:

"**Q:** Now, on this parade, were you told to do anything?

A: Yes, I was told to look to see if I could identify the person.

Q: Did you identify anyone?

A: Yes, sir.

Q: Who you identified?

A: I looked at No. 9 first and after I identified No. 7.

Q: Who was at No. 7?

A: The accused, sir.

Q: And you identified him as who? You identified him as?

A: As the murderer.

Q: Now, when you spoke to this man at the apartment, you see, did anything attract your attention when you spoke with him?

A: Yes, sir.

Q: What attracted your attention?

A: His speaking.

Q: What about his speaking?

A: He have a - he didn't have a patois.

Q: I see. Now, on the day when you went on the parade, do you recall if this man spoke?

A: No, sir, I asked him to speak.

Q: You asked him to?

A: To let him speak?

Q: Did he speak?

A: Yes, sir.

Q: Did you notice anything about him when he spoke?

A: Yes, sir.

Q: What?

A: His voice.

Q: What about his voice now when he spoke?

A: It was the same accent that he spoke to me at the apartment."

The cross-examination of the witness brought out further evidence on the issue of identification. She said that she described the man in a statement to the police as having "a rough face", and that "he had on a hat; he had on a beige - he had on a plaid shirt and a yellow looking pants to match the shirt." She admitted that at the preliminary hearing she had told the examining magistrate that the man had "a scar on his face under his left eye", but she did not include that in her statement to the police which was given shortly after the discovery of the deceased's body. Apparently the appellant has a scar under his right eye. She was asked further questions about the shape of the appellant's face. She said "his face is not round, he has an oval shape face." The relevant part of her statement to the police which contradicted that bit of evidence was admitted in evidence and it reads: "He is of dark complexion, 5 ft 6" tall, round face." That was all the description that was recorded in her police statement, but she insisted that she did tell the police that the man had a rough face and that he did not have a round face.

Counsel for the appellant tested the witness' power of observation and the time frame within which the sighting took place. The witness said the man came through the door facing her in the corridor where she stood; she spoke to him, he replied, turned left and went down the stairs. She estimated that twenty to twenty-five seconds elapsed between his leaving the door and departing down the stairs. He was using the rag to wipe the sweat from his face. It would appear, therefore, that her view of the man's face was somewhat obstructed and her estimate of time seemed to be exaggerated. The time that she had to observe the man was quite limited. It is not likely that a person who had just committed a crime would stand idly by so that he could be easily identified subsequently.

We turn now to the further details of what transpired at the identification parade. The witness admitted that she walked up and down the line-up about three times looking at the men. She then asked the No. 9 man to step forward and look to the right and to the left. After he did so she admitted saying, "No. 7, I have a strong feeling about him", but denied that she added, "I am not sure." She requested No. 7 in line to speak, and after he did she said, "I still have a strong feeling about him; I have the same feeling that I had when I saw him at the apartment." She later admitted that she did not say at the parade or at the preliminary enquiry that she had the same feeling that she had when she saw him at the apartment. She explained that by those words she meant that, "My spirit over-grow against him."

The Inspector of Police, Lorna Wilson, who conducted the identification parade, said that the witness "walked along the line-up of men on the parade; she went down the line and she returned." She then asked number 9 in line to turn to the left and to the right, and he did so. The witness walked along the line again and returned. She then said "No. 7", which was the position occupied by the suspect. She was asked to sign the identification form but she hesitated and asked that No. 7 should be made to speak. After the suspect spoke, the witness said, "I am not changing anything'." The Inspector was asked, "Could she have said, 'I have a strong feeling. I am not changing anything," and her reply was, "Yes, she could have said that."

The Inspector also testified that three other persons failed to identity the suspect on parades that she conducted.

That was the state of the identification evidence at the close of the prosecution case. The description of the "young man" that the witness gave to the police was so vague that it could not have played any part in the apprehension of the appellant. It seemed quite clear that the young man was of unremarkable appearance. The opportunity she had of observing the young man leaving the apartment was limited in time and was obstructed. Her utterances and behaviour on the identification parade evinced a high degree of uncertainty, and rendered the identification of the appellant poor and unreliable. Her dock identification evidence was of no value.

It was quite clear that on the identification parade, the witness was not purporting to identify the appellant by his facial features or his voice; she said she had a strong feeling about him. The views of the trial judge about that particular aspect of the evidence were reflected in his summing-up to the jury. This was what he said:

> "Well, I think I have a duty to tell you, Mr. Foreman and members of the jury, that this strong feeling cannot be used as evidence of identification. The fact that when you see one person your body reacts a certain way on occasion A, does not mean that it's the same person when you see - does not form proper identification if you have the same feeling on a subsequent occasion. The feeling of the body does not form part of evidence of identification.
>
> The identification has to be visual and in this case there is added part by the prosecution that there was this accent, but in that regard you bear in mind also that this is not an accent that the witness is saying she had heard before that day in August. She told you just before she left the witness box that she never identified the accused man by the scar, she identified him by the look on his face. So you will have to ask yourself what looks? That is a matter you have to consider. It is a matter solely for you to consider. She identifies him

> by the looks on his face, but the looks do not include the scar. So what looks? And why is the scar not a feature? If the person she saw had a scar, why is it not a feature of her means of identification? It is a question that you the jury have to ask yourself and resolve."

Mr. Chuck contended that the identification of the appellant was clearly weak and unreliable. He submitted that in the circumstances, the learned trial judge should have upheld the "no case" submission at the end of the Crown's case.

The principles by which a judge is guided when a submission of "no case" is made were clearly laid down by the Court of Appeal in England in ***R. v. Galbraith*** [1981] 2 All E.R. 1060, [1981] 1 W.L.R. 1039, and approved by their Lordships' Board in ***Daley (Wilbert) v. R.*** [1993] 43 W.I.R. 325. Lord Lane, C.J. in delivering the judgment of the court in ***Galbraith*** (supra) said:

> "(1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case. (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence. (a) Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case. (b) Where, however, the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness' reliability or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty then the judge should allow the matter to be tried by the jury... There will of course, as always in this branch of the law, be borderline cases. They can safely be left to the discretion of the judge."

It seemed to us that in the instant case, the learned judge applied the principle in ***Galbraith*** (supra) expressed in (2)(b) above, and accordingly, left the case to the jury. We would not have interfered with the discretion of the learned trial judge had we not come to the decision that in the circumstances of this case he erred in principle by failing to take into consideration the principles laid down in ***R. v. Turnbull*** [1976] 3 All E.R. 549, and explained fully in ***Daley v. R.*** (supra). Perhaps the learned trial judge fell in error as a result of the "no case" submission which counsel for the defendant urged at the close of the prosecution case. We were satisfied that had the learned trial judge considered the ***Turnbull*** principles, he could have come to no other conclusion than that the quality of the identifying evidence was so poor that he was duty bound to withdraw the case from the jury and direct an acquittal. As Lord Mustill pointed out in ***Daley v. R.*** (supra) (at page 334):

> "...in the kind of identification case dealt with by ***R. v. Turnbull*** the case is withdrawn from the jury not because the judge considers that the witness is lying, but because the evidence even if taken to be honest has a base which is so slender that it is unreliable and therefore not sufficient to found a conviction: and indeed, as ***R. v. Turnbull*** itself emphasised, the fact that an honest witness may be mistaken on identification is a particular source of risk. When assessing the 'quality' of the evidence, under the ***Turnbull*** doctrine, the jury is protected from acting upon the type of evidence which, even if believed, experience has shown to be a possible source of injustice."

It is important for trial judges to bear in mind, in all cases where the question of identity of the defendant is of paramount importance, not only the guidelines laid down in ***R. v. Galbraith*** (supra) but also those laid down in ***R. v.***

Turnbull (supra) as to the way in which the quality of evidence of identification is assessed.

The ***Turnbull*** principles should not only be considered at the close of the prosecution case, but also at the close of the defence. Steyn, L.J., in delivering the judgment of the Court of Appeal in ***R. v. Ivan Fergus*** [1994] 98 Cr. App. R. 313 made this quite clear when he said: (at p. 318)

> "...it is important to note that the trial judge's duty to withdraw the case from the jury in an identification case is wider than the general duty of a trial judge in respect of a submission of no case to answer as enunciated in ***Galbraith*** (1981) 73 Cr.App.R. 124, [1981] 1 W.L.R. 1039. Moreover, ***Turnbull*** plainly contemplates that the position must be assessed not only at the end of the prosecution case but also at the close of the accused's case."

Visual identification of any person is susceptible to error, and more so when such a person is not known previously to an eyewitness.

The instant case falls within the ***Turnbull*** principles and we, therefore, concluded that there was a substantial miscarriage of justice, and accordingly allowed the appeal.