**JAMAICA**

**IN THE COURT OF APPEAL**

**SUPREME COURT CRIMINAL APPEAL NO. 19/96**

**BEFORE:** THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE GORDON, J.A.
THE HON. MR. JUSTICE BINGHAM, J.A.

**REGINA v. CLIFFORD BROWN**

**Terrence Williams for the appellant**

**Miss Paula Llewellyn and Miss Janice Gaynor for the Crown**

**October 23 and December 2, 1996**

**BINGHAM, J.A.:**

The appellant was tried and convicted in the Clarendon Circuit Court before Ellis, J. and a jury on 24th January, 1996, for burglary with intent (count 1) and wounding with intent (counts 2-4). On a charge of rape (count 5) he was found not guilty and discharged.

He was sentenced to concurrent terms of imprisonment of twenty years at hard labour on each count.

At the conclusion of the arguments before us we treated the application for leave to appeal as the hearing of the appeal, dismissed the appeal and affirmed the convictions and

sentences. The sentences were ordered to commence as from 24th April, 1996. We promised then to put our reasons into writing and this we now do.

The facts were as follows: the virtual complainants Carl Osbourne, his common-law wife Iris Henry and their teenaged daughter lived in a one-room dwelling house at Farm District in the town of May Pen in Clarendon. The appellant hailed from the same district.

On the night of 25th September, 1994, the appellant broke into their house and there subjected them to a severe battering which left them with very serious injuries which necessitated the complainants being hospitalized for varying periods. At the trial some fifteen months later they still bore the visible scars of the encounter with their assailant.

The sole issue in the case was one of visual identification based on recognition as the appellant was known to his victims. Moreso, Miss Iris Henry testified to knowing him from childhood.

This was no fleeting glance case. The incident in which all three complainants were set upon, beaten and injured in their home lasted for a period long enough to afford them ample opportunity to recognise and make out their attacker in the lighting from a shade lamp that was alight in the one-room dwelling house.

There were discrepancies and inconsistencies in the evidence of the witnesses Osbourne and the young girl, a situation to be expected given the atmosphere existing at the

time of the incident. However, despite her ordeal, the testimony of Miss Henry remained unshaken throughout. She recognised the appellant while the incident was taking place. She exclaimed that she had recognised him by shouting out the name "Bigga Boy" by which he was known, a fact which could have placed her own life in jeopardy, given the appellant's conduct. Her screams for help caught the attention of her neighbours who rendered assistance to the victims after the appellant fled the scene.

Following the incident, a report was made to the May Pen Police which resulted in the appellant being taken into custody later in the day around 1:00 p.m. On being told of the report and on caution he said, "Mi nuh know nothing 'bout that."

At the trial his defence was an alibi. The jury were properly directed on all issues and the defence received fair treatment. After retiring for a very short period the jury returned a verdict adverse to the appellant on four counts of the indictment.

The sole issue in the case was one of visual identification which, given the alibi defence raised, was inextricably bound up with that defence. The acceptance by the jury of the Crown's case would indicate as a matter of course that the alibi defence raised by the appellant was thereby rejected.

It was against this background that learned counsel for the appellant sought to file some seven grounds of appeal in challenging the convictions. Two of these (grounds 4 & 5) were

subsumed in ground 1 whereas grounds 2, 3, and 5-7 were found to be without merit. We were of the view that ground 1(a) and (b) was the only one which merited any treatment and which was of any substance. This ground was as follows:

> "1. The learned trial Judge erred in law, in failing to properly direct the jury on how they ought to treat the evidence of witnesses of purported visual identification. In that:
>
> > (a) The learned trial Judge did not distinguish between an honest witness and a reliable witness. [pg. 12, 16, 17 & 18].
> >
> > (b) The learned trial Judge failed to indicate that many honest witnesses could all be yet mistaken on the question of identification."

Given this complaint, it is now necessary to examine the summing-up, in so far as it sought to deal with the important question of identification. This direction commenced at page 12 of the record. There the learned trial judge, having summarised the prosecution's case, said:

> "But you have to look at the prosecution's evidence in the context of what the accused said, and in the context now of this important area called identification.
>
> Mr. Foreman and members of the jury, this case turns to a great extent on identification, visual identification, and when you are dealing with visual identification members of the jury, you have to be extremely careful because mistakes have been made as to identification and several instances of miscarriages of justice have occurred, so you have to be very careful when you are dealing with visual identification. And although this case is not merely one of visual identification like you just see somebody flip pass you who you never know for a long time, it is recognition, you

> "recognise somebody. Even in recognition cases caution is demanded because people can still make mistakes when you recognising somebody who you know for some time. But you have to be very careful when you deal with it and so you have to be careful and look at what the evidence is as to the conditions for the recognition or the identification."

The learned judge then went on to examine the evidence of each of the complainants in relation to the circumstances in which they purported to identify the appellant as the assailant.

The jury were then told to examine their evidence in this important area with care. Despite these directions learned counsel for the appellant contended that the directions on identification fell short of the standard required as they focussed on the need for the jury to be satisfied that the prosecution witnesses were honest in their recall when the jury, before convicting the appellant, needed to be satisfied that they were both honest as well as reliable in their testimony. He relied in support on ***R. v. Turnbull*** [1976] 63 Cr. App. R. 132; [1977] Q.B.D. 224, while accepting that on the facts, this matter before us was a recognition case. Counsel based his arguments on the following statement of Lord Chief Justice Widgery where he said:

> "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." (Q.B.D. 228 C-D; 63 Cr. App. R. 137).

Learned counsel for the Crown, Miss Llewellyn, submitted that the totality of the learned trial judge's summation on

identification, when examined, would cure any apparent deficiency in the summation on the question of a ***Turnbull*** direction as no particular set of words or verbal formulae were required to be adopted by the trial judge. All that was needed was for him to use words which conveyed the import of the jury's task in relation to identification. Counsel relied in support on the decision of the Board of the Privy Council in Privy Council Appeal 4/93 ***Arthur Mills, Garfield Mills, Julius Mills and Balvin Mills v. The Queen*** delivered on 21st June, 1995 (unreported). This case in which the facts were not dissimilar to the present case, turned on the issue of identification by recognition by several eyewitnesses. The main area of complaint by learned counsel for the appellants was directed at the learned judge's failure to follow the ***Turnbull*** guidelines. There the learned judge's directions were as follows:

> "The issue which I come to at this point is the issue of identification where the prosecution's case rests wholly or substantially on evidence of visual identification, then a jury must be careful in how it assesses that evidence because it is possible that a person who says I saw so and so, a perfectly honest witness can make a mistake and a mistake is no less a mistake because the person is an honest person. So a jury has to be warned that it is dangerous to convict persons on 'I see' evidence unless they are satisfied that the people who come along and claim that they have seen the accused have the kind of opportunity to make the identification and to recall the circumstances of the identification, and you the jury can be quite sure that the person is not making any mistakes at all. You can be satisfied that it is a true and correct identification."

In ***Mills et al*** (supra) the learned trial judge as in this case in directing the jury also did not resort to the verbal formula in terms that "a mistaken witness can be a convincing one and that a number of such witnesses can be mistaken."

Although acknowledging the fact that the learned trial judge had in the passage cited above given the warning in the correct terms counsel there, as before us, sought to contend that it was incumbent on a trial judge to direct a jury using the ***Turnbull*** formula in terms that "a mistaken witness can be a convincing witness and that a number of witnesses can be mistaken."

The Board's response to this argument was most incisive. They said: (p.6)

> "Their Lordships emphatically reject this mechanical approach to the judge's task of summing up. ***Turnbull*** is not a statute. It does not require an incantation of a formula. The judge need not cast his directions on identification in a set form of words. On the contrary, a judge must be accorded a broad discretion to express himself in his own way when he directs a jury on identification. All that is required of him is that he should comply with the sense and spirit of the guidance in ***Turnbull*** as restated by the Privy Council in ***Reid (Junior) v. The Queen*** [1990] 1 A.C. 363. In the present case the judge emphasised that a perfectly honest witness can be a mistaken witness. That was entirely apt to convey to the jury that the fact that they regard the witness as credible is not enough. It focused their attention on the separate issue of reliability." [Emphasis supplied]

The decision in ***Mills et al***, when examined in the light of ***Turnbull***, can also be seen as an attempt by the Board of the

Privy Council at restating the proper approach to be adopted by trial judges in cases based wholly or substantially on visual identification. One must not, however, overlook the fact that the Court of Appeal, in formulating the guidelines in ***Turnbull***, was careful to state that (per Lord Widgery):

> "Provided this was done in clear terms the judge need not use <u>any particular form of words.</u>" [Emphasis supplied]

In his own style, the learned trial judge, in this case, sought to assist the jury in directing them as to how to approach their task in weighing and assessing the testimony of the witnesses in determining the quality of the identification evidence. In so doing, after having directed them in the manner referred to earlier in this judgment, he was careful in highlighting the strengths and weaknesses in their testimony as it affected their identification of the appellant.

In the result, when the summing-up of the learned trial judge was examined and considered as a whole against the background of the authorities, in our judgment, it satisfied the criteria laid down and accordingly the ground of complaint advanced by learned counsel fails.

It was for these reasons that at the end of the arguments we dismissed the appeal in terms as set out at the commencement of this judgment.