C.A. Criminal Law — Murder — Evidence — Identification — Visual Identification — Summing up — whether judge should have warned jury that probability of mistaken identification must have been enhanced by witness's ordeal — whether directions adequate — whether judge dealt fairly with inconsistencies and discrepancies — whether judge failed to direct jury on probative value of a statement admitted in evidence. Application for leave to appeal refused. Conviction affirmed as Capital murder.

[Cases referred to p 6 (end)]

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 97/92

BEFORE: THE HON. MR. JUSTICE RATTRAY, P.
THE HON. MR. JUSTICE GORDON, J.A.
THE HON. MR. JUSTICE WOLFE, J.A.

REGINA vs. GLADSTONE HALL

Walter Scott for the applicant

Miss Carol Malcolm, Assistant Director of Public Prosecutions, for the Crown

July 4, 5 and 29, 1994

WOLFE, J.A.:

The applicant was convicted in the Home Circuit Court before Malcolm, J., sitting with a jury, on the 28th day of September, 1992, for the offence of murder and sentenced to suffer death in the manner authorised by law.

The incident giving rise to the charge was reminiscent of the days of the crusaders when persons espousing the Christian faith were rounded up and executed. On the 20th November, 1991, the otherwise peaceful fishing village along the Causeway leading from the corporate area to Portmore was subjected to a night of terror. Sometime about 11:30 p.m. the sole eyewitness for the prosecution, Mr. Gosford Mitchell, a fisherman, was resting in his tent along the beach when the applicant, accompanied by three other men, all armed with guns, invaded his humble abode. This was the beginning of the ordeal which ensued that night. At gun point one of the intruders addressed him in gangland style: "Old boy, either the drugs wey you have or the money wey you win at the dice." His reply that he had neither was met with a savage attack from one of the men known as "Lancey", who used the butt of an M16

rifle to deal him "some hard blow to my stomach." The applicant joined in the fray and used the gun with which he was armed to strike the witness causing a wound which bled profusely. A third man delivered a blow to his head also resulting in a wound. He was then thrown to the ground and one of the terrorists ordered that he be tied so that he could be taken away for execution. Having been tied up he was robbed of eighteen hundred dollars and thrown into his boat which was moored on the nearby beach. The men then set out to sea. They stopped at a nearby gambling shed along the beach. Some of the men disembarked, kidnapped five men from the gambling shed, forced them into the boat and again set sail. The deceased, Errol Williams, otherwise called Errie, was one of the men forced into the boat. As they sailed along, the deceased spoke to the applicant saying, "Shakey, how you a deal with Cappy so." The applicant is called "Shakey" and the witness Gosford Mitchell is referred to as "Cappy", being the abbreviation for his seafaring nomenclature "Captain Blood". "Shakey" replied, "How you a tek up fi Cappy so." The deceased in a passionate plea said, "You nuh fi go on so man for the whole a wi a brethren." No doubt to disprove the claim that they were brethren, the applicant hugged the deceased and at point blank range shot him and then threw him overboard into the sea. They were then about one mile from the shoreline. "Lancey" then used the M16 rifle to blow off the left hand of the witness. He was also shot in the chest and then dumped overboard into the sea. He subsequently found himself in the Kingston Public Hospital.

The defence at the trial was a complete denial of the prosecution's case. His alibi was that he was at home with his baby's mother.

Four grounds of appeal were argued before us. Relying upon the dictum of Lord Lowry in Anthony Bernard v. The Queen P.C. Appeal No. 24/93 judgment delivered on 26th April, 1994 (unreported), ground 1 was couched thus:

> "Identification being the central issue the learned trial judge failed to direct the jury that the possibility of mistaken identification must have been enhanced by the terrifying traumatic and distressing circumstances of the ordeal of the witness Gosford Mitchell."

At page 9 of the judgment, Lord Lowry, delivering the opinion of the Board, said:

> "To begin with, they consider that identification being the real issue the judge ought to have reminded the jury that, in an area where mistakes are so easy to make, the possibility of error must have been enhanced by the terrifying and distressing circumstances already depicted."

It is useful to summarise the facts in **Bernard's** case. On December 6, 1991, Nelson Webster and his wife Esmie returned home at about 11:30 p.m. and whilst in the process of locking up the house three gunmen invaded their home, shot and killed Mr. Webster and wounded Mrs. Webster. The house as well as the verandah was well lit. The incident lasted some thirty minutes. The applicant was identified by Mrs. Webster at an identification parade. She had not known the applicant before the incident. The firearm which was used to kill Mr. Webster and injure his wife was recovered from the bodies of two men killed in a shoot-out with the police and that same gun had been used to commit a murder at a time when the applicant was already in custody. Also Mrs. Webster had testified that whilst her husband was shot and killed by the applicant she was wounded by another man. There were a number of other weaknesses in the Crown's case to which their Lordships alluded. It is against this background that Lord Lowry said:

> "Turning to the alleged specific weaknesses which ought, according to the appellant, to have been the subject of special directions, their Lordships see considerable merit in the submission that the terrifying circumstances of Mrs. Webster's ordeal and the appalling consequences at close quarters which ensued made it most desirable, if not imperative to caution the jury specifically about the possibility of a mistaken identification which those circumstances and consequences were likely to provoke."

The case before us cannot be said to have the weaknesses with which **Bernard's** case was plagued. This case was a recognition

case. Mitchell had known the applicant for twelve years prior to the incident and was accustomed to seeing him "every week, sometime twice, sometime everyday for the week." He used to see him on the beach and he even knew where he lived along the train line. He had last seen the applicant earlier the day of the incident. All this was admitted by the applicant on oath.

Further, there was no complaint with regard to the circumstances under which the recognition took place. Indeed, the circumstances were considered ideal; the light of the bright "tilly lamp" in the tent and the light of the bright full moon at sea. Throughout the ordeal the applicant and the witness were always in close proximity to each other.

Their Lordships were of the view that the judge in **Bernard's** case had failed to apply the **Turnbull and Whylie** doctrine and that the failure was significant. In this case the learned judge did apply the **Turnbull and Whylie** principle as is evidenced at pages 226 to 227 of the transcript. Worthy of note is the passage at page 10 of the judgment in **Bernard's** case:

> "This direction was therefore inadequate although in a strong, unflawed prosecution case it would no doubt have been accepted as adequate."

We are of the view that although the learned trial judge did not tell the jury that the possibility of error must have been enhanced by the terrifying and distressing circumstances of the incident, the warning which he gave concerning the approach to evidence of visual identification was adequate in the circumstances of the case. This was, indeed, a strong unflawed prosecution case based on the recognition of the applicant by a witness who had known him for over twelve years and who was observing him under ideal circumstances. The tenacious manner in which Mr. Mitchell fought for survival is a clear indication that he was not overwhelmed by the situation. One may very well say he kept his composure under extremely trying circumstances.

Ground 2 complained that the learned trial judge failed to deal adequately with the several inconsistencies, discrepancies

and contradictions arising on the prosecution's case. We find no merit in this complaint. The learned judge, in our view, dealt with the matter adequately. He gave clear directions to the jury as to how they ought to address such matters.

Grounds 3 and 4 were concerned with the testimony of a witness called by the defence, one Samuel Rutty. Rutty had given a statement to the police. His name did not appear on the back of the indictment. The prosecution did not seek to call him as a witness. The defence adopted him, so to speak, and the prosecution made available to the defence his statement. During cross-examination of the witness by counsel for the Crown, it was suggested to him that he was not speaking the truth and that he was either deliberately lying or mistaken. Whereupon counsel for the defence sought and was granted permission to tender in evidence the statement of the witness on the basis that it would go to prove that he was being consistent.

We entertain no doubt that the learned judge was in error when he admitted the statement into evidence. As counsel for the Crown pointed out to him there was no allegation of a recent concoction.

In **Nominal Defendant v. Clements** [1961] 104 C.L.R. 476, which was approved by the English Court of Appeal in **R. v. Charles Oyesiku** 56 Cr. App. R. 240, Dixon, C.J. said:

> "If the credit of a witness is impugned as to some material fact to which he deposes upon the ground that his account is a late invention or has been lately devised or reconstructed, even though not with conscious dishonesty, that makes admissible a statement to the same effect as the account he gave as a witness, if it was made by the witness contemporaneously with the event or at a time sufficiently early to be inconsistent with the suggestion that his account is a late invention or reconstruction."

The bald suggestion that a witness is not speaking the truth does not invoke the principle established in **Oyesiku's** case. The suggestion must be one of recent concoction. There was no such suggestion made neither can it be said that counsel for the Crown had laid the foundation for such an attack.

Against this background, the complaint that the learned trial judge failed to direct the jury as to the probative value of the statement is without any legal basis. The statement had absolutely no probative value. It ought not to have been received into evidence.

Finally, the applicant complains that the learned trial judge failed to give adequate directions to the jury as to the evidential value and weight of Samuel Rutty's testimony. The judge clearly pointed out the evidence of Rutty to the jury. They could not have failed to appreciate the significance of his evidence and that if they believed him or was in doubt about his testimony they would have had to acquit the applicant.

There is no basis on which we can interfere with the verdict of the jury. The application for leave to appeal is refused.

The evidence disclosed that these men robbed Mr. Mitchell of eighteen hundred dollars. From the words used to him whilst in his tent it is obvious that they were on a robbery spree. These men were engaged in terrorist activities. Mr. Scott has conceded that the circumstances of the offence make it capital murder. We too are of that view. The offence is, therefore, classified as capital murder contrary to sections 2(1)(d)(i) and 2(1)(f) of the Offences against the Person Act, as amended. The sentence of death imposed by the court below is affirmed.

Cases referred to

(1) Anthony Bernard v The Queen P.C. Appeal 24/93 - delivered [illegible]

(2) Nominal Defendant v Clements (1961) 104 CLR 476

(3) R v Charles Oyesiku 56 Cr. App. R 240.