JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO.147 OF 2007

BEFORE: THE HON. MR. JUSTICE SMITH, J.A
THE HON. MR. JUSTICE HARRISON, J.A
THE HON. MISS JUSTICE GLORIA SMTH, J.A (Ag.)

FITZROY SALMON

V

REGINA

Miss Velma Hylton, Q.C. for the Appellant.

Miss Paula Llewellyn, Q.C., Director of Public Prosecutions and Mrs. Karen Seymour- Johnson, Crown Counsel for the Crown.

June 23 and July 25, 2008

HARRISON J.A

1. On December 7, 2007 the appellant was convicted before Judge and jury of murdering Nordan Reeves on 9th July, 2006 in the parish of St. Elizabeth. He was sentenced to fifteen (15) years imprisonment at hard labour on the 17th December 2007.

2. The appellant, known as "Peng", was identified by Edmarie Clarke, the sole eyewitness, as the person who chopped the deceased (her common-law husband) to death. At the time of the murder the couple had one child and Miss Clarke was pregnant with their second child. She had known the appellant for almost her entire life.

At the time of the incident she was twenty-two years of age. The appellant lived close to her and she saw him not infrequently even though there were periods when she had moved away from the area.

3. On the day of the murder the deceased and Edmarie were at their house and at about 9:30 a.m, he left to go to the stand pipe in order to bathe. Edmarie said she heard a "bawling out". She left the house and ran to the common which was about 5-6 chains away from their house. She came upon the deceased, the appellant and his brother, Desmond Salmon also called Clinton Salmon. She was about 35-40 ft. from where they were and the deceased was lying on his back on the ground. She saw the appellant stab the deceased with a ratchet knife while Desmond was holding deceased's leg. She picked up stones, quickly moved forward and threw them at the appellant. She was about 8 ft. away from the appellant when she threw the stones at him. The appellant was not hit and he and his brother ran off.

4. The deceased got up off the ground and ran past her towards the house. Edmarie also returned to the house and she saw the deceased lying on the floor inside the house. He was bleeding from a stab wound in the region of his chest. She armed herself with a machete, took up her baby and went on the verandah. She then locked the front door for the house. She stood on the verandah, holding her baby in one arm and holding the machete with the other hand.

5. Shortly after she went on the verandah, she saw the appellant and his uncle "Bunny" coming towards the house. She first saw them when they were about 60 ft.

away. The appellant was armed with a machete. Both men stepped up on to the verandah. Bunny drew a knife from his waist and he held on to her. They struggled with each other as he attempted to disarm her.

6. During the struggle between Edmarie and Bunny on the verandah, she saw the appellant kick in the door that was locked and enter the room where the deceased was lying on the floor. The appellant then chopped the deceased on his neck with the machete. She was approximately 12 ft. away from where the chopping occurred and her view of the appellant and the deceased at that time was unobstructed. The appellant and his uncle left the house shortly after the chopping was done.

7. The police went to the house and the body of Nordan Reeves was removed by personnel from Brown's Funeral Home and taken to the Black River Public Hospital morgue.

8. A post-mortem examination was done on the body of Reeves by Dr. Ledford. He observed eight injuries to the front of the deceased's body, five to the back and one to the leg. The injuries to the front of the body were located at the neck, tip of the shoulder and at the front, and right side of the chest. In his opinion, death was due to shock which was caused from the chop to the left side of the neck which had severed major blood vessels causing massive bleeding. It was also his opinion that death would have occurred within 2-3 minutes after the wound was inflicted to the neck.

9. Dr. Ledford opined that the injury to the neck could have been caused by a sharp cutting instrument such as a machete. In his opinion the injuries to the front, back and leg could have been caused by a knife.

10. Edmarie attended an identification parade on the 21st June 2006 where she pointed out the appellant as the person who had stabbed and chopped the deceased man. It was suggested to her in cross-examination that it was citizens who came to her house and inflicted the injuries on the deceased but she strongly denied this. Crown Counsel had taken the decision at the trial, not to call Sgt. Watson who had conducted the identification parade.

11. The appellant made an unsworn statement from the dock. He said that on the 9th June 2006, he was at work when he received a telephone call about his brother Desmond. Upon receiving the message he said he rushed to the scene of an alleged stabbing and he saw a man called "Stewey" holding Desmond who was suffering from wounds. Desmond was taken to his home by the appellant and "Stewey". He was eventually placed in a motor car and taken to Black River Hospital. The appellant said that whilst he was at the hospital, he was taken into custody by the police on suspicion of having murdered Nordan Reeves.

12. Desmond Salmon gave evidence on behalf of the Defence. He testified that on the 9th July 2006, he was attacked by Reeves in a common and that he was stabbed four times by the deceased. He also said that the deceased had bitten him. He said that it was the appellant and "Stewey" who had taken him to the hospital for his injuries. He

denied that he had attacked the deceased and he did not see the appellant stabbing the deceased.

13. The first ground of appeal argued by Miss Hylton, Q.C, on behalf of the appellant is that the learned trial judge failed to deal adequately or at all with the Defence.

14. Miss Hylton submitted that there were admitted inconsistencies in the evidence of Edmarie Clarke and that the learned judge had rehabilitated her in her charge to the jury and even though the judge told the jury that inconsistencies were for them to resolve, on several occasions the judge had explained away the inconsistencies to the disadvantage of the appellant.

15. Counsel also submitted that the learned judge did comment on the number of times that the witness Clarke had to be directed to speak aloud and had commented at page 231 as follows:

> "I recall and this is a comment I make that we had to be begging her to talk louder and at certain points when certain suggestions were made to her nobody had to ask her to talk loud. She found the strength to respond strongly. It is a matter for you what you make of Miss Clarke..."

16. Miss Hylton submitted that merely to tell the jury that this was a matter for them was insufficient. Counsel then referred the Court to several passages in the record of the transcript to point out where several requests were made to the Court for the witness to speak louder.

17. In dealing with the question of inconsistencies, the learned judge said at page 213 of the record:

> "Now in most trials, it may be possible to find what is called inconsistencies, and/or discrepancies, in the evidence of witnesses, especially when the facts about which they speak are not of recent occurrence. An inconsistency occurs, when a witness gives different evidence, concerning the same facts or circumstances.....
>
> Now, where these arise, you will have to consider whether they are slight or serious, whether they are material or immaterial and you will have to consider how they affect the credibility of the witness concerned. If they are slight, you may probably think they do not really affect the witness' credibility at all. If on the other hand, you think they are serious, you may say it would not be safe to believe that witness, on that point or at all. It is a matter for you to say, in examining the evidence, whether there are any such inconsistencies or discrepancies and if so, whether they are slight or serious, and you bear in mind the principles I just outlined..."

18. There is no doubt that there were inconsistencies in the evidence of Edmarie Clarke. The following instances, which are not exhaustive of the inconsistencies pointed out, are clearly seen in the transcript:

(i) whether the standpipe was on the common or not;

(ii) the fact that she could not remember how many times she saw the appellant stabbing the deceased in the common (page 20);

(iii) whether it was the deceased or her mother who took her baby to the common (page 57); and

(iv) the discrepancy between her statement to the police and her evidence in court as to whether she saw both Desmond and the appellant, or only the appellant stabbing the deceased".

19. We do not consider that the inconsistencies were of such a character as to amount to a substantial miscarriage of justice and to make the appellant's conviction

unreasonable. It was for the jury to consider and to try to resolve them as best they could, bearing in mind that it was for the prosecution to prove its case. The jury in our view were given ample guidance on the burden of proof and how they should approach Edmarie's evidence. Parts of her evidence were confused, and there were instances of inconsistencies but we are of the view that the effect of her evidence overall was very clear. The learned judge did specifically direct the jury, several times and sufficiently, as to their taking into consideration the inconsistencies when assessing Edmarie's evidence. We are not persuaded that there were any defects in the summing-up which could be regarded as material. Neither are we persuaded that there is any merit in the submissions regarding the request for the witness Edmarie Clarke to speak louder at times.

20. The second ground of appeal is that the learned trial judge failed to give a warning to the jury about the identification evidence, in accordance with the guidelines set out in **R v Turnbull** [1977] QB 224. In that case, Lord Widgery CJ said (at page 228):

> '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 or identifications. 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. Provided this is done in clear terms the judge need not use any particular form of words.'

21. See also **Scott and Walters v R** (1989) 37 WIR 330, **Reid, Dennis and Whylie v R** (1989) 37 WIR 346, and **Beckford and Shaw v R** (1993) 42 WIR 291.

22. It is submitted by Miss Hylton Q.C that the issue of identification ought to have been properly dealt with by the trial judge notwithstanding the fact, that the appellant was known to the witness Clarke and she to him. Miss Hylton submitted that the person Edmarie Clarke identified on the Common stabbing Reeves was seen sideways from a distance of 35-40 feet and in an area where there were shrubs, bushes and trees. Furthermore, she submitted that the witness would have had great difficulty seeing the appellant delivering the fatal blows to Reeves, because she held her child with one hand and was struggling with Bunny who was trying to disarm her of the machete.

23. Counsel relied also on the authority of **Palmer v R** reported in [1992] L.R.C (Crim.) 264. This case was decided by the Privy Council. Lord Ackner who delivered the judgment of the Board emphasized that in cases which turn on the correctness of identification evidence, a full Turnbull warning is required and that it must include a specific warning that a witness may be honest and convincing yet mistaken.

24. Miss Llewellyn Q.C, Director of Public Prosecutions, submitted that the learned trial judge ought to have directed the jury on the issue of identification and to give a Turnbull warning, but notwithstanding this, the quality of the evidence was good enough to eliminate the danger of a wrongful identification. She submitted that no miscarriage of justice would have occurred and referred to and relied on the case of

Freemantle v Regina (1994) 31 JLR 335. She submitted that the **Freemantle** case is authority for the proposition that in identification cases, where the quality is good enough to eliminate the danger of "misidentification", there is no necessity for the trial judge to give a **Turnbull** warning. She further submitted that even in these circumstances where the trial judge failed to warn the jury, the proviso to section 14 of the Judicature (Appellate Jurisdiction) Act could be applied.

25. In **Shand v Regina** (1995) 47 WIR 346 Lord Slynn of Hadley who delivered the advice of the Board said:

> "In cases where the defence challenges the credibility of the identifying witnesses as the principal or sole means of defence, there may be exceptional cases where a Turnbull direction is unnecessary or where it is sufficient to give it more briefly than in a case where the accuracy of identification is challenged.

And at page 351 he said:

> "The importance in identification cases of giving the Turnbull warning has been frequently stated and it clearly now applies to recognition as well as to pure identification cases. It is, however, accepted that no precise form of words need be used as long as the essential elements of the warning are pointed out to the jury. The cases in which the warning can be entirely dispensed with must be wholly exceptional, even where credibility is the sole line of defence. In the latter type of case the judge should normally, and even in the exceptional case would be wise to, tell the jury in an appropriate form to consider whether they are satisfied that the witness was not mistaken in view of the danger of mistake referred to in Turnbull".

Shand (supra) held inter alia:

> "The importance in identification cases of giving the Turnbull warning has been frequently stated and it now applies to recognition as well as to pure identification cases. The cases in which the warning can be entirely dispensed with must be wholly exceptional, even where credibility is the sole line of defence. In the latter type of case the judge should normally, and even in the exceptional case would be wise to, tell the jury in an appropriate form to consider whether they are satisfied that the witness was not mistaken in view of the danger of mistake referred to in Turnbull. However, the door to the application of the proviso whenever a trial judge has failed to give to the jury the requisite general warning and explanation as to visual identification is open in exceptional circumstances, such as where the evidence of identification is exceptionally good (in this case where the accused had known both witnesses for a long time, the identification took place in daylight, and both witnesses saw the accused at close quarters but at different times and independently of each other)".

26. In **Freemantle v R** (1994) 45 WIR 312 their lordships' Board in a judgment delivered by Sir Vincent Floissac, said (at page 315) after reviewing the cases:

> 'Their lordships are satisfied that none of these dicta was intended to close the door to the application of the proviso whenever the trial judge has failed to give to the jury the requisite general warning and explanation in regard to visual identifications. On the contrary, the door was deliberately left ajar for cases encompassed by exceptional circumstances and has not been closed by the observations of the Board in **Reid, Dennis and Whylie v R** (1989) 37 WIR 330 at pages 335, 336. Their lordships consider that exceptional circumstances include the fact that the evidence of the visual identification is of exceptionally good quality. Accordingly, the ultimate issue in this appeal is whether the evidence of the visual identifications of the defendant was qualitatively good to a degree which justified the application of the proviso.'

27. In the **Freemantle** case, their Lordships found that the evidence was exceptionally good and therefore an exceptional circumstance which justified the application of the proviso. Their lordships were satisfied (at page 317) -

> 'that there was no miscarriage of justice because the jury (acting reasonably and properly) would inevitably have returned the same verdict of "Guilty of murder" if they had received the requisite general warning and explanation from the trial judge.'

28. The expression "exceptional circumstances" has been further explained in **Capron v Regina** (2006) 68 WIR 51. Their Lordships sitting in the Privy Council noted that in both **Beckford and Shaw v Regina** (1993) 42 WIR 291 and **Shand** (supra) there was a suggestion that only in 'wholly exceptional' or 'very rare' cases could a court dispense with giving a Turnbull warning even where the main issue is the credibility of the witness or witnesses. Lord Rodger of Earlsferry who delivered the advice of the Board said at paragraph 16 page 59:

> 'The Board notes that in both Beckford and Shaw and Shand there is a suggestion that only in "wholly exceptional" or "very rare" cases could a court dispense with giving a Turnbull warning even where the main issue is the credibility of the witness or witnesses. ... [And] experience tends to show the wisdom of Lord Widgery CJ's apprehension in Turnbull that using the phrase "exceptional circumstances" to describe situations in which the risk of mistaken identification is reduced would be liable to result in the build-up of case law as to which circumstances can properly be described as exceptional and which cannot. Such case law is liable to divert attention from what really matters, which is the nature of the identification evidence in each case. Perusal of the cases where the Board either has, or has not,

> allowed an appeal where the trial judge has omitted to give a Turnbull direction in a recognition case indicates that ... the result depends on such matters as whether the evidence is corroborated, whether the conditions for observation were good, whether it was a fleeting glance, etc. This suggests that, even in a recognition case, the trial judge should always give an appropriate Turnbull direction unless ... the nature of the eye-witness evidence is such that the direction would add nothing of substance to the judge's other directions to the jury on how they should approach that evidence.'

29. It is clear (and conceded by the Crown) that in the instant case the learned judge did not give the warning envisaged in **Turnbull**. The judge made it clear to the jury that the case turned essentially on the question of credibility. At page 217 of the transcript she said:

> "It is essentially a question of credibility whether or not you believe Edmarie Clarke".

And at page 243 she said:

> "...other matters may affect your assessment of the credibility of Miss Clarke, because ultimately that is what is important. What do you make of her? Do you believe she is speaking the truth? Do you believe that she's making up this story because she and Mr. Salmon's uncle doesn't (sic) get along? You have to consider all the evidence..."

30. The case advanced by Counsel on behalf of the applicant during cross-examination of the witness Edmarie Clarke, is as follows:

> <u>Page 65; lines 1-5</u>
>
> "Q. – I am suggesting to you, further, that after you ran back to your house, a large crowd of people gathered at your house.

A – After Nordan was – after Nordan get the stab, that time.

Page 65; lines 11-15

Q – I am suggesting to you, that it is persons in the crowd that cut up Nordan, after he had cut up the brother of the accused man.

A – Mi si Peng when Peng stab him up over di common. Mi si him.

Page 72; lines 5 -7

Q. – I am suggesting to you, that it is the citizens who came to your house and injured Nordan.

A. – No ma'am, Peng.

Page 73; lines 23 – 25

Q. – And I am suggesting to you that you never saw anybody chop Nordan's neck.

A. – I saw Peng chop Nordan.

Page 74; lines 1-3

Q – Did you say at any time, "After they left, I noticed a chop on Nordan's neck"

A. – Yes, ma'am.

Page 75; lines 21 – 25

Q. – Yes ma'am, I am suggesting you never saw this man attacking or cutting Nordan in the common.

A. – Yes ma'am, I see him.

Q. – You never saw this man, the accused, bending over Nordan.

A. – Yes ma'am, I see him

Page 76; lines 2 – 22

Q. – And I am suggesting to you that it is the citizens who came to your house who gave Nordan his several injuries.

A. – No citizens came to the house never went into the house, was 'Peng'.

Q. – And I am suggesting further that this accused man never kicked off any door of your house.

A. – Yes ma'am, he did.

Q.- Were you wrestling with 'Bunny' that day?

A.- Yes ma'am.

Q. – And when you wrestled, you were remaining in one position?

A. – Yes ma'am, because I did have the baby in one hand and the machete in one hand and he was trying to get away the machete from me and I was insist him not get it.

Q. – But he got it?

A – Yes, ma'am.

Q. – I am suggesting that is not true, you know.

A- Yes, ma'am."

31. Counsel also relied on certain inconsistencies in Clarke's evidence. There was no suggestion however by Counsel in this case that the witness Edmarie Clarke was mistaken.

32. It would seem from the evidence presented to the jury that the judge deliberately chose not to give a Turnbull direction because of the nature of the case. The defence was one of an alibi, and it could be inferred from the cross-examination of

Clarke that Counsel was suggesting that the witness was lying. And, to support that position, Counsel relied on certain inconsistencies in her evidence. We are of the view that the learned judge had given adequate directions on the issue of alibi and had also directed the jury how they should treat inconsistencies where they found them. The jury would therefore be required, of course, to take these points into account, as the judge directed.

33. We consider nonetheless that in the present case, the Turnbull warning should have been given because the jury would be required to consider not only if Clarke's evidence was reliable but also whether she might have made a mistake.

34. This was a case based on the recognition of the appellant by Clarke and we consider that her evidence in relation to her recognition of him was 'exceptionally good'. The incident had occurred in suitable conditions - in the morning, in full daylight. Clarke had known the appellant for many years before the incident and who would therefore have been able to recognise him in suitable conditions. The evidence of Clarke also revealed that the appellant passed her on the verandah and then kicked open the front door. She said she saw the appellant chop the deceased whilst he was on the floor, and that she was at a distance of about twelve (12) feet from where she stood to the actual chopping (page 44 of the transcript). This was the overall position that the jury had before them.

35. We are therefore satisfied that the nature of Clarke's evidence was such that the absence of a Turnbull direction would not cause a miscarriage of justice so as to make the appellant's conviction unreasonable.

36. In all the circumstances we are satisfied that the evidence of Clarke's recognition of the appellant was exceptionally good and this would justify the application of the proviso. We believe that a jury acting reasonably and properly would inevitably have returned the same verdict if they had received the appropriate warning and explanation on identification from the trial judge. We therefore apply the proviso.

37. The appeal is dismissed and the sentence is to commence as of March 17, 2008.