JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS. 15 and 23/2006

BEFORE: THE HON. MR. JUSTICE SMITH, J.A.
THE HON. MR. JUSTICE COOKE, J.A.
THE HON. MR. JUSTICE DUKHARAN, J.A. (Ag.)

KEVIN TYNDALE V. REGINA
AND
BRENTON FLETCHER

Mr. Patrick Atkinson, for the applicant Kevin Tyndale.

Mr. Ravil Golding, for the applicant Brenton Fletcher.

Mr. John Tyme for the Crown.

22nd, 23rd 24th July and 24th October 2008

COOKE, J.A.

1. On the 30th January 2006 both applicants were convicted of the murder of Jervis Lobban which took place on the 14th July 2003. Each on the 3rd February 2006 was sentenced to a term of life imprisonment. Tyndale was not to be eligible for parole before thirty-five years had elapsed and the corresponding period for Fletcher was twenty years.

2. The case for the prosecution rested entirely on the evidence of Barrington Phinn. He was a motor car mechanic. On the 14th July 2003 at about 12:30 p.m. he was in an area known as Highlight View in Mud Town in the parish of St.

Andrew. He had just completed work on the deceased's car and had earlier picked up the latter and driven to the scene of the murder. This place was variously called "the level", "the square" and "the battlefield". The deceased's car was parked in this area. Phinn's car was also parked in the immediate vicinity. Phinn had been living in that community for some eight years. The deceased became engaged in washing off his car and Phinn seated himself on the bonnet of his car awaiting payment from the deceased for the work which he had done. While Phinn was thus seated the applicant Fletcher drove up and parked his car behind Phinn's car. (There is no dispute that Phinn and Fletcher were well known to each other.) Fletcher called Phinn who proceeded to Fletcher's car. There was some conversation between them pertaining to mangoes which were in Fletcher's car. Fletcher then left and entered a lane which led to his (Fletcher's) home. Fletcher returned shortly thereafter and called Phinn who replied that he was waiting on payment. While Phinn and Fletcher were talking, another gentleman whom Phinn first referred to as "the brown man" came up from the lane on which Fletcher lived. This person came close to where Phinn was, passed him and "hail me". Then he (the gentleman who had come up) circled the deceased's car. Immediately after that, to quote Phinn, he saw:

> "... a gentleman, the same brown man come around with something tie around his forehead here. A black thing tie around his forehead."

According to Phinn the black thing tied around the forehead did not in any way obscure his view of the facial features of that individual. Further, during the incident he was concentrating on the "brown man". Phinn soon realized that something was wrong and "all persons in the area disappeared". Phinn and the deceased "look on each other". The deceased who was still wiping off the car stopped that activity and then in Phinn's words:

> "Mervis (Jervis) walk right cross mi. As him walk cross, mi hear blop."

The "blop" was an explosion which came from a firearm in the hand of "the brown man" who had come up. Phinn received an injury to his right hand. Phinn said he then heard "puck, puck" and saw the deceased "drop a ground same time". While the deceased was on the ground more shots were fired at him. Phinn said the person firing the gun was a "Mr. Poo" and he pointed out the applicant Tyndale in the dock as the murderer. Phinn managed to enter his car and drive off pursued by a barrage of gunshots. However, his car hit a sleeping policeman and overturned. He kicked out the windscreen and ran to the University Hospital which was not a great distance away. He was hospitalised.

3. Phinn's evidence was that after "the brown man" came on the scene, Fletcher went to the back of his car and took out a short gun and exchanged that gun with one which "the brown man" handed to him. Fletcher then left the scene. It is not clear if Fletcher drove or left on foot. However, when Phinn's

car overturned he saw Fletcher who asked him if he had been shot. This was at "a little jump" away from the scene. Phinn told Fletcher to "f off" and started his run to the hospital. On the day following the murder Fletcher visited Phinn in the hospital. The transcript at p 39 records the conversation which took place.

"His Lordship: He visit you in hospital?

Witness: yes, sir.

Q. During the first week or the second time?

A. The first. I get shot the Monday, he visit me the Tuesday.

Q. When Mr. Fletcher visited in the hospital what did he say to you?

A. I ask him weh really gwan. Mi seh weh really gwan. Him seh to mi seh, boy him nuh know but is a misunderstanding why mi get shot and "ray ray."

Q. It was a misunderstanding why you got shot?

A. Yeh.

Q. It was a misunderstanding that you got shot and what?

A. We talking, talking and him seh, "yuh lucky yuh nuh. Yuh lucky yuh nuh, because if a mi come pon the scene yuh dead."

Q. All right. So when Mr. Fletcher told you that you were lucky what did you say to him?

A. Mi seh, how yuh mean lucky. Him seh, anyhow a him did get the order fi come shoot him kill mi in front a witness."

Phinn further recounted how Fletcher took him to obtain medication for the injury suffered to his right hand. He also took him to get pins which were to be inserted in the injured hand.

4. It was Phinn's evidence that after July 2003 "Mr. Poo" told him that "is just a mistake and he is sorry, a misunderstanding". This aspect of the evidence will be addressed subsequently. Phinn was visited by the police while he was in the hospital. At that time he never gave any statement because he said he feared for the safety of his family. He gave his first statement on the 24th November 2004 and a second on the 2nd March 2005. By this time he and his family had moved from the Mud Town Community.

5. The deceased succumbed to four gunshot wounds which were to:

(i) right parietal area
(ii) right occipital area
(iii) right posterior chest
(iv) left genital area.

6. Both applicants made unsworn statements. Tyndale said he lived at Mount Friendship District. He had a farm and ran a taxi. He knew nothing about the crime for which he was charged. Further, he went to an identification parade at which Phinn did not point him out. Fletcher said he lived in Willowdene, St. Catherine. He did spear fishing, construction work and was also a soup vendor. He considered Phinn a friend of his like a brother. He would not

have gotten involved in a situation against Phinn. On the date of the murder his car was nowhere in the Mud Town community.

THE APPLICATION OF KEVIN TYNDALE

7. A number of grounds were filed on behalf of this applicant. However, it is agreed that the resolution of this application will be determined by consideration of issues pertaining to the fact that on the case presented by the prosecution the applicant was identified for the first time in the dock. Two questions arise. The first is whether or not in the circumstances of this case an identification parade would have served a useful purpose. If the answer to this question is in the affirmative then the second question would be whether or not the learned trial judge gave appropriate directions pertaining to dock identification. A perusal of the transcript would seem to indicate that the issues did not attract the attention of the court below.

8. In respect of the first question, guidance has been provided in **Irvin Goldson and Devon McGlashan v The Queen** (Privy Council Appeal No. 64 of 1998 delivered the 23rd March 2000). At p 7 of that advice their Lordships' Board said:

> "Their Lordships consider that the principle stated by Hobhouse L.J. in *Reg. v. Popat* [1998] 2 Cr. App. R. 208, 215, that in cases of disputed identification "there ought to be an identification parade where it would serve a useful purpose", is one which ought to be followed. It follows that, at any rate in a capital case such as this, it would have been good practice for the police to have held an identification parade

> unless it was clear that there was no point in doing so. This would have been the case if it was accepted, or incapable of serious dispute, that the accused were known to the identification witness."

9. (a) It will be recalled that the murder took place on the 14th July 2003. The sole identifying witness for the prosecution Phinn gave statements to the police on the 24th November 2004 and 2nd March 2005. It is obvious that these statements were taken some considerable time after the date of the murder.

(b) In answer to the leading question "from you first know him (the applicant) up to July 2003 how long was that?", Phinn answered "bout three months". The witness further said he would see him "twice daily, sometimes a just saw him on Sunday". He would see him in "the square" of Mud Town. He knew where the applicant lived which was between Mud Town and Land Lease which was an adjoining area to the former. He did not know any of the applicant's family members. He did not know the name of the applicant at the time of the murder but apparently the name "Ritchie Poo" was given to him before he was interviewed by the police leading to the giving of his statements. As to when, and how Phinn became aware of the name of the applicant is disturbingly unclear. Further the leading question which introduced this aspect of the evidence was impermissible especially as the critical and in fact sole issue in this case was that of identification. The question as framed presupposes that the applicant was previously "known" to Phinn. The defence roundly challenged the

evidence of Phinn as to his ever seeing the applicant in the square of Mud Town or previously anywhere in those environs.

(c) The prosecution relied on a conversation which Phinn said took place between himself and the applicant. This is what the transcript records (pps 41 – 43):

> "Q. Now, tell mi, did you ever see Mr. Poo again after the 14 of July, or after you came out of hospital?
>
> A. Yes, ma'am.
>
> Q. Where?
>
> A. Highlight View, same place in Mud Town, ma'am.
>
> Q. What month, same July or a different month?
>
> A. "bout the end of July, because...
>
> Q. Answer the questions that I ask you. Now, when you saw Mr. Poo in the same Highlight Drive or the Mud Town, what did he say to you? Did he speak to you. Mr. Poo, did he speak to you?
>
> A. At the appointed time when I come from the hospital or long after?
>
> His Lordship: You say you saw him in Mud Town at about the end of July. When you saw him at that time did he speak to you?
>
> Witness: No, sir.
>
> Q. Did he speak to you at any time after you came from the hospital?

A. Yes ma'am.

Q. When?

A. I don't remember. He tell me that is a mistake.

His Lordship: Just answer what you are asked.

Q. You remember if is the same July or after July?

A. After July.

Q. At the time that Mr. Poo spoke to you after July, had you told the police anything about what had happened?

A. No, ma'am.

Q. And where were you still living at that time?

A. Highlight View, ma'am.

Q. In Mud Town?

A. Yes, ma'am..

Q. What about your family?

A. Still live there, ma'am.

Q. So when Mr. Poo spoke to you after July, what did he say? This is the first time he is speaking to you after the incident, what did he say to you?

A. He say is just a mistake an he is sorry, a misunderstanding.

Q. And that he is sorry?

A. Yeh.

Q. When he said that to you did you say anything to him?

A. Yes, ma'am.

Q. What you said to him?

A. I accept the sorry because I still scared, ma'am.

Q. You did what?

A. I accept the word what he is saying that he is sorry because I still scared."

The defence contended that no such conversation took place. It is striking that this alleged conversation took place at an unspecified time; at an unspecified place and in unspecified circumstances. It is somewhat curious as to why there was avoidance of seeking precision in respect of this aspect of the evidence.

(d) It is very surprising that there was no evidence as to when the applicant was charged for the offence of murder. There is no evidence as to whether there was any nexus between the statements obtained from Phinn and the charging of the applicant. This hiatus is perplexing.

(e) In the circumstances of this case, based on the foregoing it cannot be said that it was "incapable of serious dispute" that the applicant was so well known to Phinn that an identification parade would not have served a useful purpose. To put it starkly – was it the accused in the dock at the trial who Phinn said proffered his sorrow to him? Was the person in the dock the murderer?

10. Since there should have been an identification parade, the second question must now be addressed. The learned trial judge emphasized to the jury that in arriving at their verdict a critical assessment of the credibility of the evidence of Phinn was paramount. He also gave full **Turnbull** directions as to the assessment of the quality of the identification evidence at the time of the murder. (**R v Turnbull** [1977] QB 224). However, he gave no directions as to the treatment of dock identification. As previously observed this issue was not raised in the court below. In **Pop v Queen** [2003] UKPC 40 their Lordships' Board stated at para 9:

> "The facts 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 did mean, 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. He should have gone on to warn the jury of the dangers of identification without a parade and should have explained to them the potential advantage of an inconclusive parade to a defendant such as the appellant. For these reasons, he should have explained, this kind of evidence was undesirable in principle and the jury would require to approach it with great care: R v Graham [1994] Crim LR 212 and Williams (Noel) v The Queen [1997] 1 WLR 548."

The correctness of the approach stated in **Pop** was underlined in **Leslie Pipersburgh and Patrick Robateau v Queen** (Privy Council Appeal No. 96 of 2006 delivered the 21st February 2008). This advice dealt with the distinction between **Turnbull** directions and directions pertinent to dock identification.

"15. In *Holland v HM Advocate* [2005] UKPC D1; 2005 1 SC (PC) 3 the Board was concerned with the contention that dock identifications of the accused, where the witnesses had failed to pick him out at an identification parade, had contributed to making his trial unfair in terms of article 6 of the European Convention on Human Rights and Fundamental Freedoms. In Scotland, recommendations on the way that judges should approach identification evidence, in general, are to be found in a Practice Note issued by the then Lord Justice-General in 1977. In the course of his judgment in *Holland*, at p 20, para 58, Lord Rodger of Earlsferry said:

> "It is necessary, however, to distinguish between directions which a judge gives on the approach to be adopted in relation to eye-witness identification evidence in general and directions on the dangers of dock identification evidence, in particular. The Lord Justice-Clerk referred to the Lord Justice-General's 1977 Practice Note and to a series of decisions in which the appeal court have given guidance on eyewitness identification in general. Important as these are in relation to that matter, they do not deal with the peculiar dangers of a dock identification where a witness previously failed to identify at an identification parade."

In other words, a judge does not discharge his duty, to give proper directions on the special dangers of a dock identification without a prior identification at an identification parade by giving appropriate directions on the approach to be adopted to eyewitness identification evidence in general. Though related, the issues are different and, where they both arise, the judge must address both of them. So, in the present case, even assuming that the judge gave adequate *Turnbull* directions on the difficulties inherent in all identification evidence, this does not mean that, taken as a whole, his directions were adequate where the identifications were dock identifications without a previous identification parade. (Emphasis supplied)

16. The problems posed by dock identifications as opposed to identifications carried out at an identification parade are well known and were summarised in *Holland* 2005 SC (PC) 1, 17 at para 47:

> "In the hearing before the Board the Advocate-depute, Mr. Armstrong QC, who dealt with this aspect of the appeal, accepted that identification parades offer safeguards which are not available when the witness is asked to identify the accused in the dock at his trial. An identification parade is usually held much nearer the time of the offence when the witness's recollection is fresher. Moreover, placing the accused among a number of stand-ins of generally similar appearance provides a check on the accuracy of the witness's identification by reducing the risk that the witness is simply picking out someone who resembles the perpetrator. Similarly, the Advocate-depute did not gainsay the positive disadvantages of an identification carried out when the accused is sitting in the dock between security guards:. the implication that the prosecution is asserting that he is the perpetrator is plain for all to see. When a witness is invited to identify the perpetrator in court, there must be a considerable risk that his evidence will be influenced by seeing the accused sitting in the dock in this way. So a dock identification can be criticised in two complementary respects: not only does it lack the safeguards that are offered by an identification parade, but the accused's position in the dock positively increases the risk of a wrong identification."

Allowing for any differences in practice, their Lordships consider that these observations apply equally to the position in Belize."

11. The learned trial judge was in error in failing to give appropriate directions in respect of the dock identification of the applicant. Consequently he did not receive a fair trial. Accordingly his conviction must be quashed. On the state of the evidence adduced by the prosecution it would not be in the interest of justice to order a retrial.

THE APPLICATION OF BRENTON FLETCHER

12. The grounds advanced on behalf of this applicant can be summarised as follows:

> "(a) There was no urgent or credible evidence linking or making the applicant part of any joint enterprise to murder the deceased.
>
> (b) The learned trial judge failed to give adequate directions on the issue of common design and in particular whether the applicant might be said to have withdrawn from the common design."

13. The evidential aspects of the evidence pertinent to the involvement of the applicant in a common design were:

> (i) The murderer appeared on the scene immediately after Fletcher returned from the lane he had entered. In the totality of the circumstance the jury would no doubt have considered whether the arrival of the person who killed the deceased was merely coincidental.

(ii) There was the exchange of guns which immediately preceded the shooting.

(iii) Just prior to the shooting persons in the vicinity who apparently saw what was happening disappeared. Fletcher left the scene but remained nearby.

(iv) On two occasions prior to the shooting Fletcher called Phinn to come to him. The jury must have considered whether this was a ploy to remove him (Phinn) from the line of fire.

(v) The conversation between Fletcher and Phinn in the hospital has earlier been set out. The jury in respect of this conversation must have considered whether or not if Fletcher was able to assert that it was a "misunderstanding" he would have known what was "the understanding".

(vi) The subsequent behaviour of Fletcher in providing aid to Phinn in assisting in the recuperative process. This aspect counsel for the applicant submitted was inconsistent with his involvement in a common design.

There was a sufficiency of evidence which entitled the learned trial judge to correctly reject the no case submission which was made on behalf of Fletcher at the trial. Further it cannot be said that there was no cogent or credible evidence

relevant to the involvement of the applicant in a common design to murder the deceased. It is to be recalled that in his unsworn statement the applicant said his car was not on the scene.

14. In his summing-up the learned trial judge said at pps 291 – 292 of the transcript.

> "And you may say to yourselves but Mr. Fletcher is not alleged to have used the gun to inflict wounds on anybody how can he be liable. Madam Foreman and your members, the prosecution case is that the accused men jointly committed this offence and where the offence is committed jointly by two or more persons each of them may play a different part but each is guilty of the offence."

At p 293 of the transcript he further directed the jury in these terms:

> "Therefore, before you can convict the accused, you must be sure that there was an unlawful joint plan and that the accused in this particular case, the Prosecution is saying is Mr. Fletcher agreed to — — I should put it the other way, that Mr. Tyndale agreed with Mr. Fletcher, acting as he did in carrying out the plan because what the Prosecution is saying, Madam Foreman and your members, is that there was an exchange of gun that Mr. Fletcher exchanged guns with Mr. Tyndale and that Mr. Tyndale used the gun to inflict wounds on Jervis Lobban, which resulted in Mr. Lobbans' death. So the Crown is relying on the legal doctrine of common design."

In the particular circumstances of this case these directions were adequate.

15. In respect of withdrawal from the common design the learned trial judge at p 307 of the transcript had this to say:

> "So, Madam Foreman and your members, the fact, if you so find, that Mr. Fletcher, after the exchange, that he removed himself from the immediate scene does not remove him from common design. He must have communicated this before the crime had been committed and that the mere fact that he removed himself from the exact place where the incident is happening is not an indication that he is no longer part of a common design. So, remember that when you are assessing the evidence in regards to whether or not Mr. Fletcher was part of the common design."

This direction is essentially in harmony with the established law on this issue which was subject to extensive treatment in **Shamar Lindo, Eraldo Lindo and Ivy Pryce v Regina** (SCCA Nos. 75, 83 & 92/1999) delivered on the 15th November, 2001.

16. There was a complaint that the learned trial judge did not deal adequately with the fact that there was no reference in Phinn's witness statement that there was an exchange of guns at the scene. Firstly this factor could not have escaped the attention of the jury as it was belaboured at the trial by counsel for Fletcher. Secondly the learned trial judge gave proper general directions to the jury as to their approach in dealing with inconsistencies and discrepancies. Thirdly there were directions to the effect that in assessing the evidence of each witness it was open to the jury to reject any part of that evidence which they the jury regarded as unacceptable. Fourthly the learned trial judge faithfully at p 319 of the transcript rehearsed the evidence touching this aspect of the case. He said:

> "Now, it was suggested to him an exchange of gun never took place. He said yes, sir that he never told Corporal Joseph anything about exchange of gun and

> he said yes, he did. He said that when the statement was read over to him he cannot recall if he heard any mention about any exchange of gun. But when his statement was read over to him he never stopped Sergeant Josephs to tell him that he left out anything or anything like that. It was suggested that the first time that he told the court or anybody about an exchange of gun was today. He said no, sir."

It is clear that the evidence pertaining to this issue was fairly left to the jury for their ultimate assessment. Therefore there is no merit in this complaint.

17. As in the case of the applicant Tyndale so it is with Fletcher, both applications are treated as the hearing of their respective appeals. The appeal of Fletcher is dismissed. His sentence is to commence on the 3rd of May 2006. As earlier indicated the conviction of Tyndale is quashed. His sentence is set aside and a judgment and verdict of acquittal is entered.