Privy Council Appeal No. 43 of 1990

Kenneth Evans *Appellant*

v.

The Queen *Respondent*

FROM

THE COURT OF APPEAL OF JAMAICA

REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL OF THE 23RD JULY 1991. DELIVERED THE 8TH AUGUST 1991

Present at the hearing:-

LORD BRIDGE OF HARWICH
LORD BRANDON OF OAKBROOK
LORD ACKNER
LORD JAUNCEY OF TULLICHETTLE
LORD LOWRY

*[Delivered by **Lord Ackner**]*

This is an appeal by special leave granted on 14th March 1990, against the order of the Court of Appeal of Jamaica made on 2nd December 1982, which in an unrecorded oral judgment dismissed the appellant's application for leave to appeal against his conviction of murder in the Home Circuit Court on 5th May 1981, when he was sentenced to death. At the conclusion of the hearing of the appeal on 23rd July their Lordships announced that they would humbly advise Her Majesty that the appeal should be allowed, and the conviction quashed. The reasons for this advice now follow.

The murder with which the appellant was charged occurred on 18th February 1980 in the Parish of Kingston. On the previous evening the victim Horace McKenzie had been at a dance. At about 2.00 a.m. on 18th February on his way home he met up with his girlfriend Nadia Facey and the two of them returned to his house at 24 Foster Lane to spend the rest of the night together. The deceased partially undressed intending to go to the bathroom, lay down across the head of the double bed and fell asleep, leaving the light on. Miss Facey lay across the bottom end of the bed.

About an hour later Miss Facey was suddenly woken up by a gunshot in the room. She looked up and saw five men, of whom three were standing at the foot of the bed while two were standing behind them against the door to the room. The man in the middle of the three held a gun and wore a handkerchief around his face whilst another wore khaki. Miss Facey, who was to be the main witness for the Crown at the trial, and the only witness identifying the appellant, said in evidence that she recognised only one of the five intruders, a man standing by the door wearing red, whom she identified by the name of "Scabby-Diver". She only looked at the group of men for a matter of seconds and then turned round and saw that the deceased was bleeding from his side. She then ducked her head, heard two more shots, followed by some clicks from the gun.

After the men had left, Miss Facey called two friends and they set out to report the incident to the police. On her way she said she saw "Scabby-Diver" and his friends coming up Foster Lane towards them, so she returned to the house, waited until dawn and then made a report to the police. She gave no further details of this encounter. According to Detective Corporal Henry she named four of the five men as "Hosang", "Spidoo", "Haishen Toe" and "Scabby-Diver". She did not inform the police that "Scabby-Diver" was the appellant Kenneth Evans nor did she give the police any visual description of any of the intruders.

Unlike so many of the cases from Jamaica which come before their Lordships, the appellant elected to give evidence. He denied not only that he was ever at the scene of the crime, but that he knew either the deceased or Miss Facey, Spidoo or Haishen Toe, although he did know someone called Hosang. He further denied that he had ever been called "Scabby-Diver". More important still he denied that he had ever been to the shop in Maiden Lane, where Miss Facey alleged that she had regularly seen him. As to the night of the 17th/18th February, he said that he had gone to a film show at the Gaiety Theatre, that as soon as it had finished, about 11.00 p.m., he went to the house of his girlfriend's mother at 51 Rosemary Lane and from there he fetched his baby and went to his home at 7 Hanover Street and there he spent the night.

It is the appellant's contention that the quality of the identification evidence was so poor that the judge should have withdrawn the case from the jury at the end of the prosecution's case and directed them to acquit, or alternatively that he should have directed the jury with regard to visual evidence of identification in accordance with established guidelines. This, it is contended, he failed to do.

Although the trial took place over eleven years ago, guidelines in cases depending on identification evidence had been laid down by the Court of Appeal in *R. v. Turnbull* [1977] Q.B. 224 and were by then well-known and applied to criminal proceedings in Jamaica. In that case Lord Widgery C.J. gave the following direction at page 229-230:-

> "When, in the judgment of the trial judge, the quality of the identifying evidence is poor, as for example when it depends solely on a fleeting glance or on a longer observation made in difficult conditions ... [the] judge should then withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification."

Doubtless because of the serious problems experienced in Jamaica due to the escalating violence, coupled with the intimidation, indeed the suspected murder of potential witnesses, some reservations had been expressed in the past by the Court of Appeal of Jamaica about the desirability of fully applying the *Turnbull* guidelines. In the relatively recent appeals in the cases of *Junior Reid, Roy Dennis, Oliver Whylie, Errol Reece and Others* [1990] 1 A.C. 363 their Lordships at pages 381/2 referred to those reservations, as expressed in *R. v. Graham and Lewis* (unreported) 26th June 1986 (Supreme Court Criminal Appeal Nos. 158 and 159/81), and confirmed that the guidelines as laid down in *R. v. Turnbull* apply with full force and effect to criminal proceedings in Jamaica, including in particular the direction of Lord Widgery C.J. set out above.

It is clear that the learned judge was not prepared to treat this as a case where the identifying evidence depended "solely on a fleeting glance". True enough, as established by the judge's own questions of Miss Facey, her opportunity to observe the five intruders was "fleeting". It lasted for only about five or six seconds. However, in her evidence Miss Facey said that she had known the appellant for about a year but had never spoken to him. She would see him in a particular shop where she went every other day and had also seen him once at a dance. But this was strongly disputed by the appellant and, significantly, she never informed the police officer, to whom she made her report, how she had identified the accused.

At the trial counsel for the defence strongly criticised the prosecution for not holding an identification parade. The only identification made by Miss Facey of the appellant was some fourteen months after the murder viz., at the trial in May 1981. The judge belittled this criticism in his summing up saying:-

> "... it would have been a mockery to have gone and held a parade to pick out a man who you know

already. But I suppose Counsel was just pressing every little thing that he could put on his scale for his client."

There was however a serious issue as to whether Miss Facey had seen the appellant at any time before the murder and, if so, whether she was able to recognise him. Accordingly the judge was not entitled to direct the jury on the basis that he was known to her.

But even treating this as a case which did not depend solely on a fleeting glance but upon a witness recognising someone whom she had frequently seen before, her observation of the appellant was made in very difficult conditions. She was suddenly woken up by an explosion. She was lying in an unusual position, across the bed and on her stomach. She merely raised her head to see what could be seen. She did not sit up, let alone stand up, although the judge on two occasions during his summing up wrongly stated that she got up or stood up and then saw the accused. She was understandably very frightened at the time. Having turned towards the deceased and seeing that he was bleeding and hearing two more explosions, she kept her head down until the men left.

In their Lordships' opinion the quality of this identifying evidence was indeed poor. Since there was no other evidence which supported its correctness, the judge, in accordance with the *Turnbull* direction set out above, should have withdrawn the case from the jury at the conclusion of the prosecution's case and directed an acquittal. His failure so to do is in itself a sufficient reason for the quashing of this conviction.

But even if the judge was justified in not withdrawing the case from the jury, his summing up, as Mr. Guthrie frankly conceded, failed in a number of important respects to comply with the *Turnbull* guidelines. The jury were never directed that visual evidence of identification is a class of evidence that is particularly vulnerable to mistake or the reasons for that vulnerability. The jury were never told that honest witnesses can well give inaccurate but convincing evidence and that mistakes in the recognition of even close relatives and friends are sometimes made. The jury were never instructed that visual evidence of identification has therefore to be treated with special care. Indeed, in his summing up the judge presented Miss Facey to the jury as either an honest witness who was therefore telling the truth and upon whose evidence of identification they could safely rely, or a dishonest witness who had invented the evidence she gave. That she might be an honest witness but mistaken in identifying the appellant as one of the intruders, was never an alternative suggested for the jury's consideration.

As there were no exceptional circumstances to justify this failure to give a clear warning of the dangers of mistaken identification, their Lordships would have quashed the conviction, had they thought that the case, contrary to their opinion expressed above, should have been left to the jury.