Privy Council Appeal No. 44 of 1990

Thomas Palmer *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 20TH JANUARY 1992, DELIVERED THE 3RD FEBRUARY 1992

Present at the hearing:-

LORD BRIDGE OF HARWICH
LORD ACKNER
LORD OLIVER OF AYLMERTON
LORD LOWRY
LORD BROWNE-WILKINSON

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

This is an appeal by special leave granted on 19th December 1989 against the judgment of the Court of Appeal of Jamaica (Rowe P., Carey J.A. and Ross J.A.) dated 5th May 1986 dismissing the appellant's application for leave to appeal against his conviction for murder in the Home Circuit Court on 2nd December 1983, when he was sentenced to death. At the conclusion of the hearing of the appeal on 20th January 1992 their Lordships announced 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 the night of 9th July 1982 in a remote village called Bowden in St. Andrew. The victim, Burchell Craddock, and some nine other men were playing dominoes by the light of a torch in a beer-joint, when they were attacked. District Constable Lyndon Bogle was shot and required treatment in hospital for eight days. The deceased who was hit in the chest, ran to a mango tree where, the next morning, he was found dead.

The sole issue at the trial was identification. In an unsworn statement made by the appellant from the dock he informed the court that at the time when the

incident occurred he was not in the area. He was "at Price Lane, Kingston at Oliver house". District Constable Bogle was the sole witness who identified the appellant as having entered the domino room and having fired two shots, one of which injured him. His evidence was that at about 12.15 a.m. he heard footsteps approaching the rear of the building. He turned to face the door and saw the appellant standing in the centre of the doorway pointing a gun straight at the left side of his face. He ducked and turned towards the front door still in that bent position, when he heard two firearm explosions coming from the direction of the appellant. Outside Bogle felt a burning sensation in his shoulder, chest and back and discovered that he was bleeding from all three places.

Electric light was not available at Bowden. Illumination in the beer-joint was from a gas lamp, while in the domino room the only light was from a quart bottle torch. Bogle said that he observed his assailant for one and a half minutes. However, in cross-examination, he agreed that he only saw his face for a few seconds. His only thoughts, understandably enough, were to escape. He could not describe the man's clothes. Part of the brief time in which he observed his assailant was spent looking down the barrel of the gun.

Bogle had known the appellant for some fourteen years, the pair of them having grown up in Bowden. He said that at times he was accustomed to see the appellant four times a day. However, he had not seen the appellant since 1975 or 1976, except for two brief occasions in April and in June of 1982.

A security guard, Trevor Dixon, gave evidence that, when on his way home in the village of Bowden at about 9.00 p.m. to 10.00 p.m. on the night of 9th July 1982, he met three men and was able with the assistance of the bottle lamp which he was carrying to identify the appellant who was walking away from the beer-joint. Later, at about 2.30 a.m., he heard two explosions which he thought to be gunshots. His evidence was of course relevant to the appellant's alibi, but not directly to the identity of the person who fired the gun in the domino room.

Although the trial took place over eight 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 very well-known and applied to criminal proceedings in Jamaica. The learned trial judge, Harrison J., in a very careful and painstaking judgment, in directing the jury, followed those guidelines. He warned the jury of the special need for caution before convicting an accused in reliance on the correctness of identification evidence. He directed the jury to examine closely the

circumstances in which the identification came to be made and in particular how long the witness had the accused under observation, at what distance and in what light. He drew the jury's attention to the extent to which Bogle had previously known the appellant and cautioned them that mistakes can be made even though the person may be well known to the witness. It is, however, common ground that the judge failed to have regard to the requirement stated by Lord Widgery C.J. when giving the judgment of the Court of Appeal in *R. v. Turnbull* at page 228 that:-

> "... he [the judge] 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."

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 emphasised how serious was the risk in "fleeting glance" cases, of which this appeal is yet another example, of wrongful convictions. They drew attention to cases subsequent to that of *Turnbull* which had emphasised that a mere statement that a jury must treat visual identification evidence with extreme caution, accompanied by detailed references to the witness's opportunity to identify the accused, was not sufficient. Reference was made in particular to the decision of the Full Court of the Supreme Court of Victoria in *Reg. v. Dickson* [1983] 1 V.R. 227. In that case the court was of the opinion that the trial judge had not sufficiently emphasised the reasons for the danger of identification evidence being of a greater order than the risk, inherent in any evidence depending on human recollection, that the witness may be honestly mistaken. He had not stressed that honesty as such is no guarantee against a false impression being so indelibly imprinted on the mind as to convince an honest witness that it was wholly reliable. Their Lordships quoted in the *Junior Reid* decision at pages 380-1 the following observations of the court in *R. v. Dickson* at page 231:-

> "It is difficult to convey to the jury the reality of particular dangers which exist in the evidence without drawing to the attention of the jury two things which they are unlikely to know. The first is that experience in the courts over the years has shown that in a not insignificant number of cases erroneous identification evidence by apparently honest witnesses has led to wrong convictions. For this knowledge the judge draws largely on accumulated judicial experience. One sees instances of erroneous identification from time to time ... The second thing which the jury are unlikely to know is the substantial degree of risk that honest witnesses may be wrong in their

> evidence of identification. Jurors, who, unlike trial lawyers, have not given thought to the way in which evidence of visual identification depends on the witness receiving, recording and recalling accurately a fairly subjective impression on the mind, are unlikely to be aware of the extent of the risk that honest and convincing witnesses may be mistaken ... The best way of explaining and bringing home to the jury the extent of this risk is by explaining the reasons for there being the risk and that it is essential to distinguish between honesty and accuracy and not assume the latter because of belief in the former."

The trial judge never told the jury that visual evidence of identification is a class of evidence that is particularly vulnerable to mistake, and the reasons for that vulnerability, nor that honest witnesses can well give inaccurate but convincing evidence. Their Lordships have previously stated in *Scott v. The Queen* [1989] A.C. 1242 at page 1261, and repeated the observation in the *Junior Reid* decision, that unless there are exceptional circumstances to justify such a failure the conviction will be quashed, because it will have resulted in a substantial miscarriage of justice.

So far from there being exceptional circumstances to justify the failure in this case, the contrary is in fact the position. The jury retired at 1.05 p.m. and returned at 1.47 p.m. and asked the learned judge for additional assistance. The foreman said "At the time when they say they saw the accused, the witnesses said they saw him, to me or to some of us, to some of us, right, I don't think it is time enough to really ...". He was then interrupted by the learned judge who said he wanted to know whether or not there was any area of the law in which the jury wished further assistance. In the interchange which then followed, it was made reasonably clear that the jury were concerned, not with matters of law, but with matters of fact.

The learned judge, concluding that the jury were having difficulty in reaching a verdict, then gave them further directions as to the desirability of reaching a unanimous verdict, and that, before reaching a final decision, each juror should have regard to the views of his fellow jurors. Despite the fact that some members of the jury were apparently worried as to whether Bogle had sufficient time to identify the appellant, the learned judge gave the jury no further assistance in evaluating the identification evidence. Had the learned judge explained earlier in his summing-up the reasons for the need for special caution and that errors, in particular errors by honest and impressive witnesses, had been known to result in wrong convictions, the jury might well not have been in the state of indecision which they apparently were, some forty five minutes after they had retired. Alternatively, if in response to the

foreman's enquiry the learned judge had given the directions which he had omitted in his summing-up, the jury might well have acquitted the appellant.

The prosecution must pay the appellant's costs before their Lordships' Board.