Privy Council Appeal No. 25 of 1992

Wayne Watt *Appellant*

v.

The Queen *Respondent*

FROM

THE COURT OF APPEAL OF JAMAICA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 25TH MARCH 1993

Present at the hearing:-

LORD KEITH OF KINKEL
LORD GRIFFITHS
LORD LOWRY
LORD BROWNE-WILKINSON
LORD WOOLF

*[Delivered by **Lord Lowry**]*

This is an appeal, by special leave granted on 19th November 1991, from a judgment of the Court of Appeal of Jamaica (Kerr, Campbell and Downer JJ.A.) given on 29th July 1987 and dismissing the application of Wayne Watt ("the appellant") for leave to appeal against his conviction by a jury for the murder of Ainsworth Case ("the deceased") before Ellis J. in the Home Circuit Court, Kingston on 29th January 1987. Their Lordships have been informed that since the hearing of the appeal before the Board the appellant has died from stab wounds inflicted by two other prisoners on 18th November 1992. It is, however, appropriate that judgment be given disposing of the appeal.

The stated grounds in support of the application for leave to appeal were as follows:-

"(1) Unfair trial.
(2) Conflicting evidence.

Other grounds of appeal will be filed by my attorney."

On the hearing of the application, as appears from the judgment of the court delivered by Campbell J.A., Mr. Delroy Chuck, for the applicant (who had not appeared at
[12] the trial), informed the court that "having carefully

perused the transcript of evidence and summing up to the jury, he could find nothing of merit to submit in support of the application". Expressing agreement with counsel's statement, the judgment of the court, understandably brief in the circumstances, observed that the issues raised on the facts were identification and common design and concluded that there were no meritorious grounds to sustain the application.

Before the Board the appellant relied on the following criticisms of the trial judge's directions to the jury:-

A. Failure to give adequate directions on the issue of identification;

B. Misdirection concerning the appellant's defence of alibi;

C. Misdirection on the appellant's decision not to give evidence but to make an unsworn statement from the dock;

D. Inviting the jury to speculate as to why the police suspected the appellant in the first instance and to take account of inadmissible hearsay while doing so;

E. Failing to remind the jury of weaknesses in the prosecution evidence, and in particular the lack of corroboration of the identification evidence and the specific weaknesses in the identification evidence;

F. In connection with the doctrine of joint enterprise and common design, telling the jury that they must be satisfied that robbery was the motive behind the incident before they could consider the elements required to constitute the offence of murder.

Before addressing these points, their Lordships will briefly narrate the facts.

The deceased and Miss Carmeta Campbell ran a restaurant. Maurice Jones played music there. At about 11.45 p.m. on 6th December 1985 the deceased, followed by Miss Campbell, went to let Jones out of the back door, where they encountered two men. At least one of them (the appellant, according to the prosecution case) was holding a gun. Jones said in evidence for the Crown that he struggled with the gunman and tried unsuccessfully to get the gun. At the same time the deceased was struggling with the other man. Then Jones ran away and, just as he did so, he said, he heard two shots. By then Miss Campbell had run back into the restaurant. She said in evidence that she heard one shot and saw the deceased coming back towards her. He had been shot in the chest, as it turned out, fatally. Ten or fifteen minutes later Jones returned and saw that the police had arrived and that the deceased, who was bleeding from a chest wound, had been put in a van to be taken to hospital.

The next day Jones made a statement to the police and on 6th February 1986 at an identification parade he identified the appellant as the man with the gun. He said that he had known the appellant before, by sight but not by name, having seen him on a number of occasions during a period of about five months some time before the murder, when the appellant was working as a conductor at a bus stand in Kingston. Miss Campbell attended the identification parade but failed to identify anyone.

The appellant did not give evidence but made an unsworn statement. He was permitted to come out of the dock in order to be more easily heard by the jury. His statement, which was punctuated and repeated, not unhelpfully, by the judge in the further interests of audibility, was to the effect that he worked on a mini-van plying between Kingston and St. Thomas. Maurice Jones, whom he knew as "Jackie", travelled more than once on the appellant's bus between Yallahs and Albion and always got off without paying his fare; the appellant said, "I mark him face". One Sunday night the appellant was coming down and stopped the bus at Yallahs in the square. People were getting off and getting on. Jones ran for the bus and got on as it was about to drive off. The appellant stopped the bus and told Jones that he was not carrying him. Jones would not get off the bus. The appellant told the driver not to move and the driver stopped the bus. The appellant told Jones that he must get off and Jones then got off, saying "is all right, you hear, conductor boy, is all right". Some time in March 1985, the appellant continued, he lost the job on the mini-bus and in May he heard that a mini-bus owner called Downie wanted a conductor. He went to see this man about the job but he was not there. Waiting at a bus stop on the way back to town, the appellant had a conversation with a schoolgirl called Dawn. Jackie passed along the road and greeted Dawn who said, "Hello, Jackie". When Dawn had gone into her own yard, Jones came back along the road:-

> "He passed like he would want to pass me like he would look and see me and turn back towards me and he said to me, 'Nah you work on a mini-van', and I said to him, 'Yes, mi work on a mini-van'. Him say, 'So, you put me off at Yallahs square one night' and I said, 'If all the while you tek the bus and you don't want to pay, ah nuh my bus, is work I work pon it.' Him say, 'What you ah do here on my base?' and I say, 'I have to walk', and him box me, My Lord."

The appellant went on to say that a few weeks after that he was downtown at the mini-van stand. Jackie was standing beside a sky-juice cart and was watching him. The appellant went for a stone and ran towards Jackie, who ran away, and the appellant hit Jackie in the back with the stone. He had not seen Jones again until the identification parade. No other evidence was given for the defence.

Jones had already been cross-examined about these alleged incidents but had denied them all. Another aspect of the defence was counsel's suggestion, when cross-examining Detective Burnett, that he and the police generally had known the appellant for some time, that they had beaten up the appellant in 1984 when investigating the killing of a detective and that they had falsely accused him in connection with the robbery of a Mr. Bambino. Counsel then put it to Detective Burnett that he had deliberately threatened the appellant with hanging or a long term of imprisonment by saying, "and, if him neck don't get bruk, him going old and gray when him come out of gaol". These allegations were denied, and were not repeated in the appellant's statement.

The sole evidence against the appellant was that of Jones, who said that the appellant was "right at the door", with one foot on the step, when he first saw him. He was about "a hand reach" away. Jones said that he grabbed the barrel of the gun and the struggle lasted between thirty seconds and a minute before the gunman got control of the gun and Jones ran away. He said he could see the man's face for about a minute, thirty seconds of which was while whey were struggling; the gunman was not masked and was "in the light", which he described as an electric light at the back of the building which shone onto the yard. It was fitted to the roof at the corner about four feet above and to the right of the back door. Miss Campbell referred in her evidence to "a big floodlight" above the door and a separate light at the corner of the roof.

A. <u>The identification issue.</u>

This was undoubtedly a recognition case, since the appellant and Jones both acknowledged their previous acquaintance, but neither this fact nor the appellant's attribution of malice to Jones and to the police dispensed with the need to warn the jury of the possibility that Jones was <u>mistaken</u> in his identification. As to recognition cases generally, their Lordships refer to *Reg. v. Turnbull* [1977] Q.B. 224, 228H. The judge in this case, when summing up, warned the jury as follows about identification evidence:-

> "Mr. Foreman and members of the jury, another aspect of this case which I am going to tell you about is identification. An important area in this case is the identification and at the outset of the Crown's case Crown witness Mr. Jones told you that he saw this accused man before. On more than three occasions he said at a bus stand at the - in Kingston where the St. Thomas bus go and he saw him again at Albion on the night of the 6th December 1985.
>
> Identification is very important, Mr. Foreman and members of the jury, but in this case it is not merely a case of identification because the defence has admitted the circumstances which not only presupposes knowledge but establishes that the person is known to

the witness. You remember the circumstances of the taking off minibus, boxing, throwing stones and all sorts of things. The defence is not denying that the accused man is known to the witness Jones, so it is no longer a question of identification it's a question of recognition. Recognition and the question that you will ask yourselves when you go to deliberate, was the witness Jones mistaken when he recognised the accused because mistakes can be made in recognition.

You can make a mistake, you know, even if you say you recognise your near relative in certain circumstances. If you see a person at a far distance even though it is your relative you can make a mistake.

If you see a person in adverse lighting conditions even though the person is your near relative, the possibility is that you can make a mistake as to recognising the person. If you see a person in a vast and milling crowd, even if the person is your relative, you can still make a mistake in recognition; and if you yourself who is doing the observing is in a confused state you can make a mistake also. So, even if although it is a case of recognition, you still have to be careful when you consider the circumstances under which the witness said he recognised this man. You have still got to be careful because, Mr. Foreman and Members of the Jury, and let me leave you with this, what you are finding or you are to find in this case is the, (sic) what has got to be established to you, is the identity of the perpetrators or perpetrator of the crime, not the confidence with which the witness tells you that he recognised the man.

So, you have to examine all the circumstances and see if in all the circumstances the witness is saying or giving you proper reasons or making a proper recognition."

Later, having dealt with the appellant's accusation of malice against Jones, the judge returned to the issue of identification:-

"And you remember what Jones told you, that when, after the identification in Morant Bay the accused man said, 'Jackie, mi know you, you know' or something to that effect; you remember that. So, you look at all that. Anyhow, Jones is positive and confident in his recognition. You have to examine that, the circumstances of the recognition, in the light of the directions I gave you, that persons can be mistaken. But you have to look, that there is this talk about light; he says the light was there, an outside light, and he saw him, the light shone over the entire yard and he saw him. He is not mistaken

as to whom he recognised. You have to consider Jones' evidence carefully; his demeanour, and does he strike you, which is solely a matter for you, because you have to find the fact, whether he is a witness who is going to be motivated by malice."

The appellant took the judge to task for "failing to give an adequate *Turnbull* direction, for not indicating specific weaknesses in Jones's evidence and for not stressing the brevity of the incident and the possible effect of confusion and fright on the witness". He further submitted that the judge ought to have emphasised the futility of an identification parade in a recognition case and the absence of corroboration. As against these considerations, the judge did warn the jury that mistakes of identification could be made by a witness, even in recognition cases. He also referred to the risk where the witness was in a confused state and told the jury to examine all the circumstances. He also referred to the crucial importance of Jones as a witness. There were in fact no specific weaknesses or inconsistencies in Jones' evidence to which the judge ought to have pointed, and he could properly have stressed, although he refrained from doing so, that this was not a fleeting glance case, if Jones's description of the incident was correct, and that the lighting conditions were good and favourable to recognition at close quarters. It is true that an identification parade in a recognition case is of strictly limited value; on the other hand, unlike a confrontation or a dock identification, a parade can confirm the witness's ability to pick out the person identified. Although the judge did not tell the jury that even a convincing witness could be mistaken, he did say that what had to be established was the identity of the perpetrator, "not the confidence with which the witness tells you that he recognised the man".

Both *Reg. v. Turnbull* [1977] Q.B. 224 and *Reg. v. Keane* (1977) 65 Cr.App.R. 247, per Scarman L.J. at page 248, while emphasising the principle, dismiss the need for a particular form of words. Their Lordships could in this connection refer also to *Reg. v. Bentley* (1991) Crim.L.R. 620. It will, too, be recalled, as Lord Widgery C.J. stated in *Reg. v. Oakwell* [1978] 1 W.L.R. 32, 36, that the *Turnbull* rules were primarily designed to deal with "the ghastly risk run in cases of fleeting encounters".

Their Lordships detect in the present case nothing in the nature of "a significant failure to follow the guidelines laid down in *Reg. Turnbull*", such as Lord Ackner mentioned in *Reg. v. Junior Reid* [1990] 1 A.C. 363 at page 384C. Considering that in this recognition case the identification evidence was strong, they are of the clear opinion that the *Turnbull* principles were sufficiently well applied by the judge and that there was no significant failure to follow them.

B. The defence of alibi.

The appellant's case included the contention that the trial judge misdirected the jury on the issue of the appellant's alibi, "which was the main issue in the case of the defence", but Mr. Carlile Q.C., for the appellant, laid no stress on this head of complaint. Although the judge interposed the classic judicial safeguard by telling the jury that the mere rejection of an alibi did not prove guilt, this case did not truly exemplify an alibi defence, since the implication from cross-examination and from the appellant's unsworn statement was simply that he was not there: he did not purport, with or without the help of witnesses, to say where he was at the time of the murder. The judge's direction was most favourable since, if the jury rejected the "alibi", they must have found that the appellant was where Jones said he was.

C. The appellant's unsworn statement.

The judge went carefully into the implications of the appellant's election not to give evidence and correctly explained the significance and evidential value of an unsworn statement. His directions on both points were modelled on Lord Salmon's classic statement in *Walker v. The Queen* [1974] 1 W.L.R. 1090, 1096, an appeal in which the Court of Appeal of Jamaica were seeking the Board's authoritative guidance. In this case the judge said, *inter alia*:-

> "You may think, members of the jury, why did this accused man give an unsworn testimony, why didn't he come into the witness box. It is his right to stay away from the witness stand you know. Nothing can detract from that. He has the right; but you are nevertheless entitled to question why didn't he give sworn testimony. Has he got something to hide because he is represented by Counsel. Mr. Manning is a very experienced lawyer, Miss Alcott is there to back him up and even if anybody was going to take an unfair advantage, for example, suppose Mr. Douglas was going to ask him some unfair questions I as the Judge has the responsibility to hold the case evenly. So you are entitled to ask yourselves why did he not give sworn testimony. (Emphasis added)
>
> In all that question you must remember that it is his right so to do because he could sit down there and say nothing, but he gave you an unsworn testimony."

In *Walker* Lord Salmon said, *inter alia*:-

> "There are ... cases in which the accused makes an unsworn statement in which he seeks to contradict or explain away evidence which has been given against him or inferences as to his intent or state of mind which would be justified by that evidence. In such cases (and their Lordships stress that they are

> speaking only of such cases) the judge should in plain and simple language make it clear to the jury that the accused was not obliged to go into the witness box but that he had a completely free choice either to do so or to make an unsworn statement or to say nothing. The judge could quite properly go on to say to the jury that they may perhaps be wondering why the accused had elected to make an unsworn statement; that it could not be because he had any conscientious objection to taking the oath since, if he had, he could affirm. Could it be that the accused was reluctant to put his evidence to the test of cross-examination? If so, why? He had nothing to fear from unfair questions because he would be fully protected from those by his own counsel and by the court." (Emphasis added)

The drift of one statement seems to their Lordships to be indistinguishable from that of the other, but Mr. Carlile's specific objection was directed to the words, "Has he got something to hide?" It is true that this question could have evoked misgivings on the part of the jury, but their Lordships, having regard to the context, do not regard it as damaging to the defence.

D. The invitation to the jury to speculate.

Detective Burnett gave evidence that on 31st January 1986, having received certain information, he went to the Halfway Tree police lock-up and spoke with the appellant whom he later removed to the Morant Bay lock-up, where on 6th February an identification parade was held and the appellant was charged with murder. On this part of the case the judge directed the jury as follows, having first adverted to the accusation of malice which had been made against Jones:-

> "You will have to consider if there is any truth in this or any foundation to this that the witness Jones is saying all this out of sheer malice. You will be entitled to ask yourselves the question, is it not a strong coincidence that the very man against whom Jones has so much malice is the man who was held in relation to a serious charge as murder at Morant Bay for Jones to come and identify him.
>
> You are entitled to ask yourself the question, somebody must have told Burnett who it was that they saw at the restaurant the night. The only person or persons whom he could have got that information from was Jones or Campbell. Somebody must have. Because the accused man was taken into custody and was held at Half Way Tree; so, something must have been said. It couldn't be so much coincidence if nobody said anything that he is just at Half Way Tree, Burnett could go for him and then he is identified by Jones at Morant Bay. All that, members of the jury, is a matter for you.

> You are entitled to look at these things and to say if it is coincidence, mere coincidence, and you are to consider and be reminded of what I told you that persons can be malicious and vicious to other people. ..." (Emphasis added)

It is never helpful, and can be most harmful to the administration of justice, for the trial judge to invite the jury to speculate concerning a matter which is not before them and of which there is no evidence. It was, however, fortunate that the judge expressly confined the possible source of the detective's information to Jones and Campbell, the only witnesses to the crime who had made statements, since that ruled out the possibility that the jury might think that some third person had given the police damaging evidence against the appellant. It must, in other words, have been obvious that the information which had led to the arrest of the appellant and the visit of Detective Burnett to Halfway Tree lock-up must have come from Jones (or from Jones and Campbell).

Their Lordships have to say that they were unfavourably impressed by the statement about coincidence which they have emphasised in the passage reproduced above. It implies quite illogically that the appellant's arrest may have been due to a cause which was independent of the information furnished by Jones, thereby inviting the jury to conclude that Jones's accusation was corroborated. On the other hand, when the passage is read as a whole, their Lordships come back to the fact that only Jones and Campbell could have been the informants and that that is what the judge told the jury.

E. Weaknesses in the prosecution evidence.

In the event this point was largely subsumed in the argument presented on the issue of identification and their Lordships do not require to give it any further attention.

F. Joint enterprise and common design.

The principles are familiar and have been expounded in *Chan Wing-siu v. R.* [1985] A.C. 168 and *Hui Chi-ming v. R.* [1992] 1 A.C. 34, two decisions of this Board which have been recently cited in *R. v. Roberts* [1993] 1 All E.R. 583, an appeal which was concerned with murder as incidental to an intended robbery. It is worth noting at the outset that the appellant's argument on this point falls to be considered on the basis that the jury had accepted Jones's evidence that the appellant, armed with a gun, and another man had come to the back door of the premises at 11.45 p.m. and had jointly struggled with Jones and the deceased, that a gun had been fired and that the deceased had been fatally wounded in the chest. The conclusion was inevitable that the appellant and his companion were acting in concert and that their motive

was murder or, more probably, robbery. If it was murder, the joint object was achieved and both men were guilty, no matter who fired the fatal shot. If robbery, it follows equally that, on the facts proved in evidence, the jury were fully entitled to find that both men contemplated that serious violence might be used as an incident of the joint enterprise. Such violence was used and the jury were again entitled to find in those circumstances that the appellant and his companion were guilty of murder.

When directing the jury on joint enterprise the judge told them that they must be satisfied that robbery was intended and that the appellant contemplated that force might be used as an incident of the enterprise either to facilitate the escape of the participants or to prevent them from being identified. The appellant argued that this was a misdirection on the ground that there was no evidence to show that the raiders' motive was robbery. Quite apart from the fact that robbery was the most probable answer, the appellant's argument led nowhere, since the only alternative plan that could reasonably have been contemplated by the jury was murder, of which the participants were bound to be guilty, if murder had been their purpose.

The appellant further contended that the appellant might have had a gun which was not loaded and might not have known that the other man had a gun or might not have known that the other man's gun was loaded, and he contended that the judge ought to have left this possibility to the jury. Their Lordships find it difficult to imagine a less likely hypothesis.

Finally, the appellant submitted, as a development of his second point, that the other man might have shot the deceased, not as an act incidental to the common design but "on a frolic of his own", quite independently of the common design, and that the judge ought to have left this possibility for the jury's consideration. Again, their Lordships find it impossible to imagine that, the raiders having set out on a joint criminal expedition with a gun displayed by the appellant, and a struggle having commenced, in which both men took part, the other man (who had not been displaying a gun to start with) suddenly brought out a gun (or took the appellant's gun) and shot the deceased as a quite independent crime. The judge correctly explained what facts were needed as the ingredients of a murder incident to the joint enterprise and repeatedly told the jury that they must be satisfied of those facts before they could convict the appellant of murder.

Their Lordships would only add that the result of the trial depended almost entirely on the jury's view of the credibility of Jones, and the judge said nothing about that witness which was not fully justified. His summing up was notable for a thorough and careful review of the facts and he explained in unmistakable terms the burden of proof and the standard to which the prosecution were bound to discharge it.

Accordingly, for the reasons given in this judgment, their Lordships will humbly advise Her Majesty that this appeal should be dismissed.