Privy Council Appeal No. 23 of 1992

(1) Michael Beckford
(2) Junior Birch and
(3) Joel Shaw — *Appellants*

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 2ND MARCH 1993, DELIVERED THE 1ST APRIL 1993

Present at the hearing:-

LORD GRIFFITHS
LORD BRIDGE OF HARWICH
LORD LOWRY
LORD SLYNN OF HADLEY
LORD WOOLF

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

This is an appeal by special leave by Michael Beckford and Joel Shaw ("the appellants") from a decision of the Court of Appeal of Jamaica (Rowe P., Campbell and Wright JJ.A.) given on 15th February 1988 and explained in a written judgment delivered on 7th March 1988, dismissing the application of the appellants and a co-accused, Junior Birch, against their conviction by a jury for the murder on 23rd July 1985 of Leonard Reid ("the deceased") before Walker J. in the Elizabeth Circuit Court on 1st July 1986. The co-accused was also given special leave to appeal, but he was killed in prison by another inmate on 23rd March 1992. The appellants have also appealed, on grounds stated in their printed case, against the lawfulness of the death sentence passed upon them.

At the conclusion of the hearing on 2nd March 1993, their Lordships agreed humbly to advise Her Majesty that the appeal ought to be allowed for reasons to be given later and ordered the respondent to pay the appellants' costs. Their Lordships' reasons for their report to Her Majesty now follow.

The important question in the appeal is whether, in a case where the substantial issue raised is the credibility of an identifying witness, a general warning by the trial judge concerning the danger of relying on identification evidence is required.

The deceased was shot and killed on 23rd July 1985 on the Cheltenham-Brighton main road which passes through the district of Clifton. He had gone there, as he was accustomed, to buy pimento and had taken with him J$30,000. The shooting occurred at about 8.30 a.m. and the only eye-witness produced by the Crown was Alvin Bell, who lived in Brighton and had gone to attend to his escallion farm which was on a hill overlooking the scene of the shooting on the main road. His evidence was that he reached his farm about 8.00 a.m. About half-an-hour later he heard two gunshot explosions coming from the direction of the Cheltenham-Brighton main road. He ran down the hill to a position in some bushes about eight chains from, but still overlooking, the main road. From this position he observed Beckford, Shaw and Birch. Beckford was holding the deceased by his waist at the back of a van, which proved to be the deceased's and which was parked in the banking abutting the road. Beckford released his hold and the deceased fell on his back and did not get up. Birch and Shaw were standing at the back of the van. Each was armed with a short gun which was being held with the mouth pointing to the ground. After Beckford had released his hold of the deceased, all three searched the van, both the front and the rear; the van had an open back with a tarpaulin cover which was raised in the course of the search. After the search, Birch ran from the van onto a track in standing wood leading to a gully and disappeared. He was followed by Beckford and Shaw who, having travelled about two chains, returned to the van and searched the back of it again. They then went back onto the track and disappeared from sight.

With regard to his opportunity of observing the three men, the witness said that from his position in the bushes he could see the main road plainly and that the van was in front of him on the banking of the road about eight chains away. He could see the men's faces while they were by the van and also when they ran onto the track, because they came to within two chains of where he was and crossed his line of vision. He said that from the time when he first saw them until they finally disappeared was about half-an-hour. According to Bell, he had known Beckford, whose nickname was "Don", for about a year. He was accustomed to seeing him in Brighton, sometimes night and day for a week, sometimes not at all. He had known Birch, who was nicknamed "Scoopy", from birth. He and Birch were born in Clifton district and grew up there. He knew where Birch lived and was used to seeing him night and day. He knew Shaw from the time when Shaw was a little boy. Shaw had come to live beside him, and did so for over five years; his nickname was "Weedy".

Bell said that, after the three men had disappeared, he returned to his farm and from there went to the home of his Aunt Muriel nearby, where he told her something which he admitted was an untruth, namely, that the police had shot Scoopy (that is, Birch) down on the main road. He explained, as the reason for this falsehood, that, as the men had disappeared and were at large, he was afraid to say what he had really seen. From his aunt's house he went home. After that he joined a crowd which he saw out on the road at Brighton and from there he returned to the scene of the shooting. He saw a crowd and many policemen, including Detective Sergeant Ashman. This officer died before the trial and therefore was not a witness. Bell observed the body of the deceased at the place where he had seen him fall. He was about to return home when he heard people calling him to come back. He did so and was then taken by Detective Sergeant Ashman to New Market police station, where he was invited by Ashman to tell what he had seen. That very day he gave a statement in which he mentioned the names of Birch, Shaw and Beckford as the persons involved. He attended identification parades in November and December 1985. On the first parade he pointed out Shaw and on the second Beckford and Birch.

Bell's cross-examination proceeded on the basis that he knew the applicants but was telling deliberate untruths either through being a compulsive and inveterate liar or because of his susceptibility to mental aberrations since being a patient (as he had been) at Bellevue Mental Hospital ten years previously.

The only other evidence which might have had relevance against the appellants was that of two policemen. Detective Corporal Howell on 14th October 1985 arrested Shaw (who had previously been detained by Detective Sergeant Ashman on 24th July and released on 5th August) and said that on being then cautioned Shaw had said, "Officer, dem did hold me already, and a company me follow". Detective Acting Corporal Maxam gave evidence that on 15th October 1985 he heard Detective Sergeant Ashman inform Shaw, in the presence of Beckford and Birch, of Shaw's alleged complicity in the murder and that Shaw after caution replied, "A just company me follow". Detective Maxam also said that on 10th October 1985 he heard Detective Sergeant Ashman inform Beckford of his alleged complicity in the murder with Shaw and Birch and that Beckford after caution replied, "Me one nay take the rap, sir". No evidence was adduced of any statement having been made by Birch.

Neither the appellants nor Birch tendered evidence, but each made an unsworn statement from the dock. Beckford said that he lived at Fraser District and was a farmer and did not know anything about what Mr. Bell was saying; he was at his farm in October and was taken into custody. He concluded:-

"I only know that I owe Mr. Bell two hundred dollars, my Lord, and that is why him must be telling a lie on me my Lord. I don't know anything about it and that is all, my Lord. I know nothing about it."

Birch said:-

"Junior Birch, live at Clifton District. Dah a yard, my Lord, and when me come out on the road me buck up ocean a people on the road. [Judge A what? A crowd a people.] And dem say, 'Lord God, nuh you Mass Alvin say police shoot down the road?' And me deh deh, my Lord, and me about to fi a me baby mother yard. And me catch pon the road, me see a next ocean a people a Mass Alvin yard, and the people say, 'But Scoopie, nuh you Mass Alvin say police shoot?' And me turn to Mass Alvin and ask him say whey him get dat from, my Lord, and him say him over him herb bush, my Lord ... And him hear shot a fire, my Lord, whole heap a shot, and me left, my Lord. [Judge: You left?] Yes, through me see the argument nuh mek sense. Through I see a foolishness him a talk, my Lord. I left and go a me baby mother yard, my Lord. And October me deh a me yard, my Lord, and me see police detain me, my Lord, tek me in a custody, my Lord. I don't know anything about that, My Lord."

Shaw said that he had been at home on 23rd July and saw Bell running "with an alarm that police shoot Scoopy down the road". He thereafter told of his visit to the scene of the shooting and his hearing that it was the "pimento man" who had been shot. He then described his arrest and release and his rearrest on 14th October and concluded by saying:-

"That is all that I have to say, and I don't know anything about this, my Lord, and Mr. Bell is telling an untruth on me. And the first time I see Mr. Maxam is at the preliminary enquiry, my Lord. Me and him in no argument, my Lord. I see him at the preliminary enquiry here, that is the first time I see him, My Lord."

The last part of Shaw's unsworn statement contradicted by necessary implication Maxam's evidence that on 15th October 1985 he heard Shaw say, "A just company me follow".

In the Court of Appeal only one point was argued in support of the application for leave to appeal, namely, that the learned trial judge failed to direct the jury on the law of identification, and in particular that he omitted to warn the jury of the dangers of mistaken identification, especially in the peculiar circumstances of the case. Delivering the court's written judgment, which set forth the reasons for refusing the applications, Campbell J.A. said:-

"The learned trial judge admittedly did not give any general or specific warning, nor did he state in abstract general terms the principle of law relative to the issue of visual identification stated in *R. v. Oliver Whylie*; (1977) 25 W.I.R. 430 15 J.L.R. 163. This is

> however a far cry from saying he did not alert the jury to the fact that the issue of identification was critical, albeit being challenged on the aspect of credibility. It is equally a far cry from saying that he did not highlight in concrete terms, based on the evidence, the factors which were critical in determining whether Alvin Bell the sole eye witness ought to be believed."

Having adverted to matters relevant to credibility, he continued:-

> "The failure by the learned trial judge to give any general warning on the dangers of visual identification is not in the circumstance of this case fatal because it did not in any way render the summing up unfair or inadequate. The case was not one of visual identification in the strict sense. It was one of identification by recognition of persons well known to the eye witness. *R. v. Bradley Graham & Randy Lewis* SCCA 158, 159/81 (26th June 1986) expressly provided that 'in the recognition cases where the accused is said to be well known to the witness for an extended period the true test might be that of credibility rather than of an honest witness making a positive yet mistaken identity'. The aspect of the identification evidence which was under challenge was not based on the possibility of mistake based on objective factors such as lighting, proximity, obstruction of view, time within which observation is made, or that the persons observed were strangers to the witness. The challenge was that whoever he may have seen that morning, he is telling a deliberate lie either from unknown motive, or through uncured mental illness, when he said it was the applicants or any of them whom he saw that morning. The learned trial judge in his summation highlighted and repeatedly directed the attention of the jury to these matters."

The main issue at the trial, as presented by the defence, concerned the credibility of Alvin Bell from two points of view, that he was deliberately lying about the appellants and Birch or that, by reason of his mental instability, he might have been indulging in fantasy. Mr. Robertson Q.C., who appeared for the appellants before the Board, advanced two general propositions which were strongly supported by authority: that a general warning on *Turnbull* lines was required in recognition cases, as well as those involving the identification of a stranger, and that the warning was none the less required even if the sole or main thrust of the defence was directed to the issue of the identifying witness's credibility, that is, whether his evidence was true or false, as distinct from accurate or mistaken: since the trial judge gave no warning whatever concerning the possibility of mistake and the danger of acting on identification evidence, his charge to the jury was "fatally flawed", to quote the

observation of Lord Griffiths when delivering the judgment of this Board in *Scott v. R.* [1989] A.C. 1242 at page 1262AB, and, there being no other significant evidence against the appellants, their convictions must be quashed. Their Lordships are, with all respect to Mr. Guthrie's submissions on behalf of the Crown (which were, as always, relevant and well marshalled), satisfied that the argument for the appellants is based on irrefutable logic and unimpeachable authority and is, having regard to the facts, unanswerable.

Campbell J.A. rightly pointed out that the judge, although not giving any general or specific warning about evidence of identification, did alert the jury to the fact that the issue of identification was critical and did highlight the factors "which were critical in determining whether Alvin Bell, the sole eye witness, ought to be believed". In fact, all the extracts from the judge's charge which were quoted in the Court of Appeal judgment concentrated on demeanour and the issue of true or false.

Expressing the view that the judge's failure to give any general warning did not in any way render the summing up unfair or inadequate, Campbell J.A. pointed out that the present case was one of identification by recognition of persons well known to the eye witness. He then referred to *R. v. Graham and Lewis supra* in which *R. v. Turnbull* [1977] Q.B. 224 and *R. v. Oliver Whylie* (1978) W.I.R. 430 had been considered.

Having observed that *Turnbull* seemed to require both a general warning and an explanation of the reason for the need to give such a warning, Rowe P., delivering the judgment of the Court of Appeal in *R. v. Graham and Lewis* and referring to *R. v. Whylie supra*, said:-

> "Our Court of Appeal was not prepared to establish such an absolute rule and formulated the applicable principle thus:
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> > 'We have considered the decision in the cases of *Arthurs v. A.G. for Northern Ireland*; *R. v. Turnbull*; *R. v. Peggy Gregory*; *R. v. Desmond Bailey*; *R. v. Dennis Gayle* and from these cases we extract the principle that a summing-up which does not deal specifically, having regard to the facts of the particular case, with all matters relating to the strength and weaknesses of the identification evidence is unlikely to be fair and adequate. Whether or not a specific warning was given to the jury on the danger of visual identification is one of the factors to be taken into consideration in determining the fairness and the adequacy of the summing-up.' (Emphasis added)

The passage quoted above was deliberately formulated in that manner to allow for the gradual development of the law as it relates to the value and importance of

visual identification evidence. An earlier passage in the judgment in *Whylie's* case had laid it down that:

> 'The trial judge should alert the jury to approach the evidence of identification with the utmost caution as there is always the possibility that a single witness or several witnesses might be mistaken.'

Somehow, with the passage of the very few years since 1977, this judicial duty seems to have become blurred in the minds of some trial judges.

> It is not within the discretion of the trial judge to determine whether or not he will give a general warning on the dangers of visual identification, and to elaborate and illustrate the reasons for such a warning. That is the starting point from which he ought not to swerve. Judges, however, are human and due to an oversight in a particular case a judge might omit to give the general warning although he alerts the jury to the possibility of mistaken identity. Such a lapse might not be fatal if there are elements in the identification evidence which renders the acceptance of the identification evidence inevitable. In the recognition cases where the accused is said to be well-known to the witness for an extended period the true test might be that of credibility rather than of an honest witness making a positive yet mistaken identity."

The last sentence above was the one cited by Campbell J.A., but the judgment in *R. v. Graham and Lewis* continued:-

> "Therefore the language of the general warning to be given in the recognition cases might differ in detail from that which is to be given where the accused was not known to the witness previously.
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> Henry J.A. underlined the necessity to give a general warning and to adumbrate the reasons therefor in his judgment in *R. v. Daniel McLean* S.C. Criminal Appeal 52/77 when he acknowledged that both *Turnbull* and *Whylie* -
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> > 'Stated that in appropriate cases a jury ought to be warned of the dangers of relying solely on identification evidence and of the need for caution in convicting on such evidence.'
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> That learned judge did not go on to specify what he meant by 'appropriate cases' but the context in which the phrase was used clearly refers to <u>all</u> not just <u>some</u> of the cases in which the prosecution's case rests wholly or substantially upon visual identification evidence."

The portion of the *R. v. Graham and Lewis* judgment which dealt with identification evidence concluded as follows:-

> "All the decisions of this Court since the decision in *R. v. Whylie*, supra, of which those referred to herein are but a small sample, have reiterated the principle that there is a duty on trial judges to issue the warning referred to in *Whylie's* case where there is dependency upon visual identification by the prosecution in proof of the charges preferred. This Court cannot over-emphasize that trial judges should not only pay lip service to the existence of the decision in *R. v. Oliver Whylie* supra, but that they should faithfully endeavour to sum up in accordance with those guidelines. These views accord with the opinion of the learned authors of Archbold Criminal Pleading, Evidence and Practice, 41st Ed. at para. 14-7 where it is said that the *Turnbull* guidelines 'should invariably be followed'."

The Court of Appeal's judgment in the present case concluded with the observation that the summing up of the trial judge was "correctly tailored to the circumstances of the case before him" and "did not transgress the principle of *R. v. Oliver Whylie* as further developed in *R. v. Graham and Lewis*". With respect, their Lordships cannot agree, in view of the extracts from the judgments in those cases which they have cited. The need to give the general warning even in recognition cases where the main challenge is to the truthfulness of the witness should be obvious. The first question for the jury is whether the witness is honest. If the answer to that question is yes, the next question is the same as that which must be asked concerning every honest witness who purports to make an identification, namely, is he right or could he be mistaken?

Of course no rule is absolutely universal. If, for example, the witness's identification evidence is that the accused was his workmate whom he has known for twenty years and that he was conversing with him for half-an-hour face to face in the same room and the witness is sane and sober, then, if credibility is the issue, it will be the only issue. But cases like that will constitute a very rare exception to a strong general rule.

With a view to challenging the convictions, Mr. Robertson also strongly relied on the judge's duty to point out to the jury any specific weaknesses in the identification evidence: see *R. v. Turnbull supra* at page 228G and *R. v. Keane* (1977) 65 Cr.App.R. 247 per Scarman L.J. at page 248. He made on this aspect of the case a number of forceful and cogent submissions which were well calculated to persuade their Lordships to hold that the judge's failure to expose the weaknesses of the identification evidence constituted a fatal defect. Their Lordships, however, having regard to their conclusion upon the judge's failure to give a general warning, and also because they wish to emphasise that such a failure will nearly always by itself be enough to invalidate

a conviction which is substantially based on identification evidence, deem it unnecessary to devote to counsel's second point the care which it would otherwise deserve. They have therefore decided not to embark on an analysis of the arguments advanced.

One of the authorities on which Mr. Robertson relied was the very important Australian case, *Domican v. The Queen* (1992) 66 ALJR 285, which re-emphasises the need for a general warning and the importance of highlighting weaknesses in the identifying witness's evidence. The case is also an authority for the proposition that:-

> "The trial judge is not absolved from his or her duty to give general and specific warnings concerning the danger of convicting on identification evidence because there is other evidence, which, if accepted, is sufficient to convict the accused ... unless the Court of Criminal Appeal concludes that the jury must inevitably have convicted the accused independently of the identification evidence, the inadequacy or lack of a warning concerning that evidence constitutes a miscarriage of justice even though the other evidence made a strong case against the accused." (p. 289B-E).

Of immediate relevance to the present appeal are the statements at pages 287G and 289G to the effect that the general warning about identification evidence is still needed where the thrust of the defence is to challenge the veracity of the witness. And their Lordships agree with the statement, by analogy with *R. v. Porritt* (1961) 45 Cr.App.R. 348, that it is the judge's duty to give a *Turnbull* warning, even if the defence does not rely on the possibility of mistake.

Subsequently to the Court of Appeal's judgment in the case under appeal the principles enunciated in *Turnbull* have been endorsed in two decisions of this Board, given in appeals from Jamaica, *Scott v. R. supra* and *Junior Reid v. R.* [1990] 1 A.C. 363, the judgments in which must now command the careful attention of trial judges and appellate courts.

In view of their recommendation on the appeals against conviction, their Lordships have found it unnecessary to consider the appeals against sentence.