THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

ANTIGUA AND BARBUDA

ANUHCRAP2020/0001

BETWEEN:

DORIAN MARSHALL

Appellant

and

THE KING

Respondent

Before:

The Hon. Mde. Margaret Price Findlay	Justice of Appeal
The Hon. Mde. Esco Henry	Justice of Appeal
The Hon. Mr. Gerard St. C Farara	Justice of Appeal [Ag.]

Appearances:

Mr. Wendel Alexander and Mr. Wayne Marsh for the Appellant
Mrs. Shannon Jones-Gittens DPP [Ag.] for the Respondent

2024: October 2;
2025: July 10.

Whether the identification evidence was such that the Learned trial judge ought to have left the issue for the jury- Whether the Learned trial judge carried out the evaluative exercise required before leaving the issue to be decided by the jury- Whether in the circumstances of the case the identification was a fleeting glance or an identification made under difficult circumstances so as to have an effect on the quality and accuracy of the identification- Whether the Learned trial judge gave appropriate directions with respect to the identification in relation to the circumstances surrounding the making of the identification-Whether conviction was unsafe and unsatisfactory –Whether the evidence adduced at trial was unreliable and weak so that prosecution's case should have been withdrawn from jury

On the evening of 18th August 2017, the appellant was among several persons gathered outside of "Kathy's Shop" in Cedar Grove. At around 9 p.m., a silver/grey Allion vehicle was observed travelling from east to west on the road in front of the shop. The vehicle was dark and had its bright lights on. There was light in the area of the shop from a lamp post as well as light from the shop itself. The vehicle was travelling slowly and as it approached the shop, it turned off its lights. An eyewitness

testified that as the vehicle approached the shop, the front and back passenger windows, which were tinted, were brought down, and he saw the appellant, who had his mouth covered with a cloth at the front of the passenger window, raise a gun and fired several shots in his direction. The eyewitness identified all three occupants of the vehicle and indicated that the passenger in the back seat also fired shots in his direction; he was the only witness to the incident who identified any of the assailants. The defendants, who were all arrested and taken into custody, denied involvement in the incident and all proffered alibis. At the trial, the jury convicted the appellant of the murder of Xavier Thomas but failed to arrive at verdicts for the other two defendants. He was subsequently sentenced to forty years' imprisonment by the learned trial judge.

Being aggrieved with the conviction of the jury and the sentence imposed by the learned trial judge, the appellant filed this appeal on six grounds that: (1) the sentence imposed by the learned trial judge was manifestly excessive; (2) the sentence imposed was wrong in principle and not justified in law nor in accordance with the sentencing guidelines; (3) the conviction is unsafe and unsatisfactory; (4) the verdict of guilty in respect of the appellant as opposed to the other accused is so illogical, inconsistent and perverse that it is unsafe and unsatisfactory; (5) the evidence adduced at trial was so unreliable and weak that the prosecution's case should have been withdrawn from the jury; and (6) the learned trial judge failed to give appropriate directions to the jury on the issue of identification, rendering the verdict unsafe and unsatisfactory.

Held: quashing the appellant's conviction and setting aside the sentence, and not ordering the appellant to be retried, that:

1. The quality of the identification evidence is of paramount importance. Where the quality of the identification evidence is good and adequate, the case can be left to the jury to decide guilt or innocence, however, where the quality is poor the learned trial judge must, having carried out the relevant assessment, withdraw the case from the jury and direct an acquittal. This is an assessment to be conducted by the learned trial judge and not the jury. In carrying out that assessment, the question which the learned trial judge must ask himself is whether the evidence is so weak that it is unreliable. The learned trial judge in this case appeared to place the burden of determining the quality of the evidence on the jury, not making the assessment himself as to whether the evidence was of such quality that it ought to have been left to the jury.

   R v Omar Nelson JM 2001 CA 81 applied.

2. The quality of the identification evidence was poor, and since there was no other evidence which supported its correctness, the learned trial judge in keeping with the Turnbull guidelines ought to have withdrawn the case from the jury at the end of the case for the prosecution and direct an acquittal. The discrepancies in the evidence as to the amount of time the incident took, whether the windows came down entirely or only partially along with the fact that the gunman in the

front passenger seat having his face partially covered, as well as the difficult circumstances under which the identification was made, were things which needed to be juxtaposed against the Turnbull guidelines and the possible effect these inconsistences and the surrounding circumstances had on the reliability of the evidence of the lone eyewitness who identified the assailant.

R v Turnbull [1977] QB 224 applied, **Daley v R** JM 1993 PC 10 applied.

3. The learned trial judge gave directions that the inconsistencies went to the credibility of the witness and mentioned those inconsistencies to the jury but failed to relate them clearly to the directions on identification and did not bring home to the jurors the impact of these inconsistences on the reliability of the identification evidence of the lone eyewitness.

Bedminster v The Queen Antigua and Barbuda HCRAP2008/002 & HCRAP2008/003 (delivered 15th December 2015, unreported) applied.

JUDGMENT

[1] **PRICE FINDLAY JA:** This appeal arises out of the conviction of the appellant who was sentenced to 40 years' imprisonment for murder after a jury trial.

[2] The appellant was indicted with two others on a charge of a murder which took place on 18th August 2017. The victim was Xavier Thomas ("the deceased").

Brief Facts

[3] On the evening of 18th August 2017, several persons including the deceased were gathered at a shop in Cedar Grove called "Kathy's Shop". Apart from the deceased, present were, Clinton Williams, Lorne Nicholas ("Nicholas"), aka T.I. and Shane Matthew.

[4] The persons present were all outside of the shop. At around 9 p.m. a silver/grey Allion vehicle was observed travelling from east to west on the road in front of the shop. The vehicle was dark and had its bright lights on. There was light in the area of the shop from a lamp post as well as light from the shop itself.

[5] The vehicle was travelling slowly and as it approached the shop, it turned off its lights. The witness Nicholas testified that he continuously observed the approach of the vehicle. He testified that as the vehicle approached the shop, the front and back passenger windows which were tinted were brought all the way down.

[6] Nicholas said that he saw the appellant, who had his mouth covered with a cloth, at the front passenger window from which he raised a gun and fired several shots in his (Nicholas') direction.

[7] He identified all three occupants of the vehicle and indicated that the passenger in the back seat also fired shots in his direction. Nicholas was the only witness to the incident who was able to identify any of the assailants.

[8] Nicholas was shot several times about his body as was Mr. Matthew. Ms. Thomas was struck by a bullet in her lower chest and succumbed to her injuries.

[9] The defendants were all arrested and taken into custody. Each denied involvement in the incident and all proffered alibis.

[10] At trial, the jury convicted the appellant of murder but failed to arrive at verdicts for the other two defendants. He was subsequently sentenced by the learned trial judge. It is from this conviction and sentence that he now appeals.

[11] The appeal proffered six (6) grounds of appeal, to wit:

(1) The sentence imposed by the learned trial judge was manifestly excessive.

(2) The sentence imposed was wrong in principle and not justified in law nor in accordance with the sentencing guidelines.

(3) The conviction is unsafe and unsatisfactory.

(4) The verdict of guilty in respect of the appellant as opposed to the other accused is so illogical, inconsistent and perverse that it is unsafe and unsatisfactory.

(5) The evidence adduced at trial is so unreliable and weak that the prosecution's case should have been withdrawn from the jury.

(6) The learned trial judge failed to give appropriate directions to the jury on the issue of identification, rendering the verdict unsafe and unsatisfactory.

[12] I will deal with grounds five and six together, that is, that the evidence was so unreliable that the case ought to have been withdrawn from the jury at the close of the prosecution's case and, that the learned trial judge failed to properly direct the jury on the issue of identification thereby rendering the jury's verdict unsafe and unsatisfactory. I do this as these grounds, if decided in favour of the appellant, will dispose of the appeal.

Appellant's submissions on grounds 5 and 6

[13] On ground 5, the appellant submitted that even without any prompting from the defence counsel at trial, the learned trial judge had inherent powers to stop the case at any stage of the trial if the quality of the case or, as in this present case, the quality of the identification is so weak, tenuous or discredited that it would be pointless to continue the case.

[14] In usual circumstances, the judge would invite submissions from counsel on both sides and then make a ruling. However, there is nothing to prevent a judge on his or her own initiative to invite submissions from both sides and make such a ruling. Counsel for the appellant relied on **Daley v R**[1] to demonstrate that the trial judge

[1] [1993] 4 All ER 86.

has the power and the duty to withdraw the issue of guilt from the jury if he considers that the evidence is insufficient to sustain a conviction. The judge retains the power to intervene of his own motion.

[15] The appellant therefore submitted that in light of the circumstances of the case, including the weaknesses pertaining to whether the incident was one of a fleeting glance or how the main witness identified the only defendant with his face partially covered, the learned trial judge ought to have exercised his discretion and stopped the case even in the absence of a No Case Submission by defence counsel.

[16] On ground 6, the appellant submitted that the trial judge failed to give the appropriate directions to the jury on the issue of identification, rendering the verdict unsafe and unsatisfactory. Counsel for the appellant averred that the learned trial judge only considered those factors which make a positive identification and did not bring the jury's attention to the weaknesses as stated above in a case where identification is in issue per **Henry v The State**[2]. The appellant's submission was therefore that the learned trial judge's failure to ask the jury to consider the several weaknesses (including evidence concerning the firearm and the car) in the identification or regard on the judge's part to the terrifying circumstances[3] of the case as well as other inconsistent parts of the prosecution's case, render the conviction unsafe.

Respondent's submissions on grounds 5 and 6

[17] In response, the respondent was of the view that the learned trial judge gave full and comprehensive directions to the jury on the identification evidence and its treatment in accordance with **R v Turnbull**[4].

[18] The respondent submitted that the learned trial judge instructed the jury that they must examine the circumstances. He further explained that after their assessment,

[2] [1986] 40 WIR 312.
[3] See Bernard (Anthony) v R (1994) 45 WIR 296.
[4] [1977] QB 224.

the better the quality of the identification evidence, the more they can rely on it but the poorer the quality the greater the danger of acting on it. The respondent also submitted that the learned trial judge fulfilled his obligations in reminding the jury of the weaknesses in the identification evidence in the timing of the matter and that the appellant's face was partially covered.

[19] The respondent submitted that the omission of the judge to specifically direct the jury that the frightening circumstances of the case may have led to mistaken identification should not be treated as a grave error. He submitted that even if such a direction may have been desirable, it was not a fatal flaw in the circumstances of the case.

[20] On the issue of whether the learned judge ought to have withdrawn the case, the respondent submitted that there was sufficient evidence upon which a conviction could properly be based. The evidence need not be particularly strong, and the identification evidence may be largely unsupported yet be sufficient to be left for the jury's consideration: **R v Holmes**[5]. On the same point, the respondent submitted that it cannot properly be argued that certain 'weaknesses' in the case in any way strengthened or weakened the identification evidence or the prosecution's case. Certainly, the uncertainties regarding the car and the firearm were of no moment as there was no evidence connecting the two items to him or the other co-defendants.

Discussion

[21] It is the contention of the appellant that the quality of the identification evidence was so poor that the learned trial judge ought to have withdrawn the case from the jury at the close of the prosecution's case, even though defence counsel made no such submission to the court. The learned trial judge ought to have directed the jury to return a verdict of acquittal as a result. They argue in the alternative that the directions given to the jury by the learned trial judge were not totally in accordance

[5] [2014] EWCA 420.

with the guidelines set down in **R v Turnbull** and as a result this failure led to a verdict which was unsafe and unsatisfactory.

[22] The guidelines with respect to the directions which a trial judge ought to give to a jury in a case where identification is a substantial issue can be found in the case of **R v Turnbull,** where Lord Widgery stated:

> "When in the judgment of the trial judge the quality of the identification evidence is poor as for example when it depends solely on a fleeting glance or on a longer observation made under difficult conditions, the situation is very different. 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."

[23] As stated in **Turnbull,** a trial judge is required to withdraw the case from the jury and direct a verdict of acquittal if the quality of the identification evidence is poor and unless there is some other evidence which supports the correctness of the identification.

[24] Identification evidence can be considered poor even where multiple persons identify an individual as the perpetrator of a crime. They may have all had only a fleeting glance of the individual or a longer observation under what can be described as difficult circumstances.

[25] The issue for the trial judge is the quality of the identification, if the quality is good and remains so at the close of the case for the prosecution the danger of a mistaken identification is decreased but if the quality is poor, the greater the danger that a mistake can be made.

[26] The trial judge must first determine whether the evidence of the identification of the defendant is of such quality that it can be left to the jury to determine guilt or innocence. Once that threshold is crossed, the judge, when summing up the evidence to the jury, must give the appropriate **Turnbull** directions in conjunction with the factual matrix of the case.

[27] When assessing the quality of the evidence the question which the learned trial judge must consider is whether the evidence is so weak that it can be considered unreliable. In **Daley v R**[6], Lord Muskill said:

> "… in the kind of identification case dealt with by **R v Turnbull** the case is withdrawn from the jury not because the judge considers that the witness is lying, but because the evidence even if taken to be honest has a base which is so slender that it is unreliable and therefore not sufficient to found a conviction: and indeed as **R v Turnbull** emphasised, the fact that an honest witness may be mistaken on identification is a particular source of risk. When assessing the "quality" of the evidence, under the *Turnbull* doctrine, the jury is protected from acting upon the type of evidence which, even if believed, experience has shown to be a possible source of injustice…"

[28] The learned trial judge in this matter did not treat this as a case where the identification was what could be described as a fleeting glance. The witness, Nicholas, stated that he was able to see part of the face of the appellant for three to five minutes during what was accepted was a drive by shooting. This evidence was in marked contrast to the evidence of other witnesses who put the duration of the incident as a matter of seconds.

[29] Nicholas indicated that he had known the appellant for about ten years and had spent time in prison with him. It was a case of recognition, not the identity of a stranger.

[30] The appellant gave an alibi strongly disputing that he was present at the scene of the incident, but did not dispute that he knew the witness (Nicholas). It is also correct that the witness informed the police officers at the hospital on the night of the incident that it was the appellant who was one of the persons who fired shots at the time of the incident.

---

[6] JM 1993 PC 10.

[31] The learned trial judge gave proper directions with respect to the failure to hold an identification procedure in the circumstances of the case and no more needs to be said on that issue.

[32] But even if this Court is satisfied that this case did not depend solely on a fleeting glance but was a case of the witness recognising the appellant as someone known to the witness and with whom the witness was familiar over a period of time, the observation of the appellant was made in very difficult conditions. He saw the vehicle approaching, bright lights on, windows tinted. The vehicle slowed down and kept moving, the windows came down, the face of the person in the front passenger seat was partially covered, there was a streetlight but no evidence of light in the vehicle, gunshots were fired, and the witness was struck about the body twice. It must have been a distressful if not terrifying situation. He retreated into the shop and got behind the counter to escape further injuries. There was also no evidence that the person in the front passenger seat put his face outside the window.

[33] The quality of the evidence is of paramount importance, where the quality is good and adequate, the case can be left to the jury to decide guilt or innocence, however, where the quality is poor the learned trial judge must, having carried out the relevant assessment, withdraw the case from the jury and direct an acquittal. This is an assessment to be conducted by the learned trial judge not the jury. In carrying out that assessment, the question which the learned trial judge must ask himself is, whether the evidence is so weak that it is unreliable.

[34] The learned trial judge in this case appeared to place the burden of determining the quality of the evidence on the jury, not making the assessment himself as to whether the evidence was of such quality that it ought to have been left to the jury.

[35] The learned trial judge in his summation to the jury stated:

> "But if the quality of the identification is good and it continues in your view to be good at the end of the case, then the danger of a mistaken identification is less and you can properly act on it. The better the quality of

> identification, the better for you. The poorer the quality, the greater the danger. So that is why I cannot overemphasize the quality of the identification."[7]

[36] It is for the trial judge to carry out the appropriate assessment and then decide what evidence goes before the jury as the jurors are the triers of the facts.

[37] In **R v Omar Nelson**[8], Harrison JA stated:

> "A trial judge is therefore required himself to make an assessment of the quality of the evidence, exclusive of the jury, as a preliminary issue, and then make a further determination whether or not to leave it to the jury for them to decide the ultimate issue of guilt or otherwise of the accused. Consequently, he has to consider certain factors in order to make that determination, namely, inter alia, the lighting at the relevant time, the length of time the victim had to observe (the) assailant, the circumstances existing when the observation was made and whether or not the assailant was recognized as known before to the victim. A mature consideration of those factors will usually assist the trial judge in coming to a proper conclusion as to whether or not he should withdraw the case from the jury."

[38] In light of the summation to the jury, it is not clear whether the learned trial judge in this case conducted such an exercise before leaving the case to the jury.

[39] Even though the evidence of Nicholas was, as stated before, this would have been a difficult situation under which to observe the appellant's features.

[40] In the circumstances, even though Nicholas testified that he knew the assailant before, and therefore this was a case of recognition, a viewing period which was very brief with the assailant in a moving vehicle with tinted windows, which came down either some way or all the way coupled with the assailant wearing something over a portion of his face and gunfire, it was in this Court's view, a fleeting glance made in what was undoubtedly difficult circumstances. The observation was for a limited time and of only a portion of the face of the assailant and while the lighting may have been adequate, there was no supporting evidence by any other

[7] Transcript of proceedings Vol 3 pages 157-158.
[8] JM 2001 CA 81.

eyewitness or any circumstantial evidence. The evidence of the identification was poor.

[41] In the opinion of this Court, the quality of the identification evidence was poor, and since there was no other evidence which supported its correctness, the learned trial judge in keeping with the **Turnbull** guidelines ought to have withdrawn the case from the jury at the end of the case for the prosecution and direct an acquittal.

[42] The appellant succeeds on ground five of the appeal.

[43] Even if the learned trial judge had good reason and was justified in his decision not to withdraw the case from the jury, it would then fall to the learned trial judge to give appropriate directions and assistance to the jury on how to treat with the evidence.

[44] Although the learned trial judge made reference to the surrounding circumstances of the recognition, he failed to point out to the jurors the potential weaknesses in the evidence.

[45] The learned trial judge should have reminded the jury of the evidence of Nicholas that he saw the vehicle coming, the windows tinted, the face covering worn by the assailant, the gunfire, the fact of trying to get away from being shot, again having been shot twice with injuries about his body. The learned trial judge ought to have asked the jurors to consider whether the manner in which the incident unfolded that might as well as the nature of the incident had any impact on the reliability of the evidence of Nicholas. This is especially so as this was the only evidence proffered by the prosecution as to the identity of the assailant.

[46] The discrepancies in the evidence as to the amount of time the incident took, whether the windows came down entirely or only partially were things which needed to be juxtaposed against the **Turnbull** guidelines as well as the possible effect these

inconsistencies had on the reliability of the evidence of the lone eyewitness who identified the assailant.

[47] In this instance the learned trial judge gave directions that the inconsistencies went to the credibility of the witness and mentioned those inconsistencies to the jury, but he failed to relate them clearly to the directions on identification and did not bring home to the jurors the impact of these inconsistencies on the reliability of the identification evidence of Nicholas.

[48] As stated by Baptiste JA in **Bedminster v The Queen**[9]:

> "It was incumbent upon the learned judge to tailor his summing up so that the jury could clearly appreciate and weigh the strengths and weaknesses of the identification evidence in reaching their verdict. This became even greater as Norde was the only person to recognize or identify the appellants."

[49] It is a similar situation in this case. Apart from Nicholas, no one identified the appellant as being one of the shooters that night.

[50] I further agree with the conclusion arrived at by Baptiste JA in **Bedminster**, when he said:

> "The question now becomes, what is the effect of these failures on the safety of the conviction? In the context of this case, I am of the view that their cumulative effect would render the conviction unsafe".[10]

[51] The Appellant also succeeds on Ground 6 of the appeal.

---

[9] Antigua and Barbuda HCRAP2008/002 & HCRAP2008/003 (delivered 15th December 2015, unreported).
[10] Antigua and Barbuda HCRAP2008/002 & HCRAP2008/003 (delivered 15th December 2015, unreported) at paragraph 30.

[52] In the circumstances I would accordingly quash the conviction of the appellant and set aside the sentence. In the circumstances, I would not order that the appellant be retried.

I concur.
Esco Henry
Justice of Appeal

I concur.
Gerard St.C Farara
Justice of Appeal [Ag.]

By the Court

Chief Registrar