J A M A I C A

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 108/88

BEFORE: THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MR. JUSTICE CAMPBELL, J.A.
THE HON. MR. JUSTICE FORTE, J.A.

REGINA v. CARL PEART

Delroy Chuck and Miss Helen Birch for Appellant

Mr. Brian Sykes for Crown

15th January and 7th February, 1990

CAREY, J.A:

On 9th May, 1989 in the St. Ann Circuit Court before McKain, J. and a jury, the appellant was convicted of the murder of his one-time girlfriend Donna McDonald and sentenced to death.

The solitary ground argued was that the learned trial judge failed to direct the jury properly on the law of identification, in particular she omitted to warn the jury that an honest witness can be a mistaken one. Counsel cited in support an unreported decision of the Privy Council against judgments of this court viz Reece and Others v. R. - Privy Council Appeals Nos. 14, 15 and 16 of 1988 and 7 of 1989. He said the evidence against the appellant however was overwhelming but since there had been no warning, this Court should allow the appeal and in the interest of justice, order a new trial.

Before we deal however, with these submissions and the response of counsel for the Crown, we think it is opportune to give a summary of the facts in this case.

On 9th May, 1987 while the victim was returning home with her cousin Donna Powell, the appellant came up, grabbed her in her bosom and tried to stab her with an ice pick. Donna Powell remonstrated with the appellant, who remarked that he was giving Donna McDonald until the end of the month before he killed her. Both women then left him for Donna McDonald's home where they advised McDonald's father of what had occurred. Shortly after, accompanied by the father and her cousin, she set off for the police station. On the way, there, the appellant was seen by the two relatives of the victim to emerge from some bushes along the road and attack Mr. McDonald by felling him with a stone which injured him in his face and rendered him unconscious. When he regained consciousness, he saw the appellant a chain away stabbing his daughter. He managed to approach within one ¼ chain of the appellant who then bolted. He was chased by the girl's father who, overcome by a feeling of faintness, was forced to end his pursuit. He nevertheless called out after the retreating appellant "Tambo, Tambo you kill my daughter but it allright." The appellant's pet name is "Tambo". A witness wholly unrelated to the McDonald family, Vashtina Park told the jury that from a distance of ½ chain away, she observed the appellant chasing Donna McDonald, hurl a stone at her which caused her to fall. He then used a knife to stab her "in her belly". When Donna Powell who had run off when the attack was launched returned to the scene, it was to find her cousin lying in the roadway. She was dead.

The suggestion put to the slain-woman's cousin Donna Powell by defence counsel was that she was lying when she said she saw the appellant on the scene because:-

(a) the appellant and the witness were not on speaking terms

(b) the slain-woman and the witness were friends

(c) the slain woman and the witness were cousins

Plainly this was not a case of any mistake on the part of the witness but a witness deliberately fabricating evidence to implicate the appellant. So far as Mr. McDonald's cross-examination went, it was suggested to him that he could not see anyone a chain away because he was giddy, and his face was covered with blood. The witness emphatically rejected the suggestions. Finally it was put to him that he had not seen the appellant at the material time. It had also been put that there was bad blood between both men presumably because the appellant had taken away Mr. McDonald's 15 year old daughter to live with him. Here again, the reasonable inference to be drawn was that this was a case of a witness deliberately telling lies on the appellant. No consideration of honest but mistaken witness arose. With respect to Vashtina Park who also placed the appellant on the scene at the material time, the defence suggestion here, was that she was mistaken. No reason for her mistake was advanced nor was any reason advanced why she would deliberately tell lies on the appellant. It was plain in her evidence that she was an independent witness, who knew the appellant and was able to identify him in conditions that were entirely satisfactory as regards lighting, distance and time for observation. He was perfectly well known to her.

The appellant gave a long rambling statement but the significant portion was to the effect that at the material time he was at Cedar Valley in a shop. All the witnesses he said, were carrying "a long time feeling" for him. This defence in this jurisdiction is characterized as the defence of "alibi."

The law is well settled however that where a case depends wholly or substantially on the correctness of one or more identifications of an accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting in reliance on the correctness of that identification. The judge is also required to direct the jury as to the reason for the need of such a warning. In the present case the defence was saying that the witnesses were mistaken because they were all lying. Whether the witness is making an honest mistake or a "deliberate mistake," the requirement for the warning is mandatory. Obviously where, as in the present case, the unreliability of the evidence is suggested to be due to deliberate falsehood, the reason for the warning will be altogether different from the case of the honest but mistaken witness. In that sort of case, the jury should be told that the credibility of the witness or witnesses is being challenged and accordingly the reasons being put forward as the motive for lying, must be scrutinized with some care.

In the present case, there is no question but that the quality of the evidence of identification was good and remained good at the end of the case of the appellant. We would think that the danger of a mistaken identification in this case was nil. We should also state unequivocally that in the present case not only did the trial judge fail to warn

the jury of the dangers inherent in identification evidence, there was no real discussion with the jury of the circumstances in which the identification came to be made.

The real question for this court is the disposition of this appeal in the light of this fundamental defect in the summation. In Junior Reid and Others v. The Queen and Errol Reece and Others v. The Queen (supra) Lord Ackner delivering the judgment of the Board said this -

> "Their Lordships have no hesitation in concluding that a significant failure to follow the guidelines laid down in Turnbull will cause the conviction to be quashed because it will have resulted in a substantial miscarriage of justice."

This view was based on the Board's approval of a dictum of Fullagar J. in Mraz v. the Queen (1955) 93 C.L.R. 493 at page 514 where the learned judge said this:

> "... in the light of the long tradition of the English criminal law that every accused person is entitled to a trial in which the relevant law is correctly explained to the jury and the rules of procedure and evidence are strictly followed, if there is any failure in any of these respects, and the appellant may thereby have lost a chance which was fairly open to him of being acquitted, there is, in the eye of the law a miscarriage of justice. Justice has miscarried in such cases, because the appellant has not had what the law says he shall have, and justice is justice according to the law."

It was argued by learned counsel for the Crown that the present case was distinguishable from the case in which the Privy Council had held that the failure to warn would result inevitably in a conviction being quashed. Lord Griffiths in Scott and Another v. R. [1989] 2 All E. R. 305 at pages 314 - 315:-

> "... if convictions are to be allowed on uncorroborated identification evidence there must be a strict insistence on a judge giving a clear warning of the danger of a mistaken

> identification which the jury must consider before arriving at their verdict, and that it would only be in the **most exceptional circumstances** that a conviction based on uncorroborated identification evidence should be sustained in the absence of such a warning." **(emphasis supplied).**

He contended that the present case contained "exceptional circumstances." There was support for the identification of the appellant: three witnesses testified to his presence and his conduct at the material time. It could not properly be said that this was a case dependent on uncorroborated identification evidence.

The argument is attractive but we are not impressed by it. We start with the fundamental rule that a warning is mandatory in cases where the defence is putting forward an alibi and thereby raises for the jury's consideration, the issue of mistaken identification. Whether that mistake is induced by faulty recollection, honest error or deliberate falsehood, the issue remains the same. We must now accept that identification evidence has emerged as a class of its own. (per Lord Ackner in Reid and Others v. R. (Unreported) Privy Council Appeals 14, 15 and 16/88 dated 27th July, 1989). In the Privy Council decision of Scott and another v. R. (supra), the law was laid down in emphatic terms -

> "... A failure to give a warning of the danger of identification evidence is generally to be regarded as a fatal flaw in a summing-up ..."

In R. v. Turnbull and Others (1977) 1 Q. B. 224 by which we are now firmly bound, Lord Widgery C. J. was not attracted by the phrase "exceptional circumstances" and said this -

> "... the use of such a phrase is likely to result in the build up of case law as to what circumstances can properly be

> described as exceptional and what cannot. Case law of this kind is likely to be a fetter on the administration of justice ..."

We would prefer that the phrase 'exceptional circumstances' which has now been reintroduced, be defined by the Privy Council itself. Although Lord Widgery C. J. said, as we did, in R. v. Whylie 25 W.I.R. 430 that what matters in the end is quality, we are very doubtful whether the fact that the evidence in the case was of the highest quality and cogency, a conviction would be sustained despite the absence of the mandatory warning. We would also point out that although Lord Lane in R. v. Weeder 71 Cr. App. R. 228 expressed the view that identification by one witness can provide support for the identification by another, he did go on to say, in effect, that the warning was nevertheless required.

We have come to the conclusion therefore that this appeal must be allowed, the conviction quashed and the sentence set aside but in the interests of justice we order that a new trial should be had at the next Session of the St. Ann Circuit Court. Before parting with this case, we wish to commend Mr. Chuck for the candour with which he made his submissions. He conceded from the outset that the identification evidence was more than adequate. We treated the application for leave to appeal as the hearing of the appeal because a point of law was involved.