JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 115/83

BEFORE: THE HON. MR. JUSTICE RATTRAY, PRESIDENT
THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE GORDON, J.A.

REGINA vs. LENFORD HAMILTON

Frank Phipps, Q.C., Delroy Chuck and Wentworth Charles for the appellant

Dr. Diana Harrison for the Crown

September 29, 30; October 1, 1993 and February 24, 1994

WRIGHT, J.A.:

This appeal came before the court for re-hearing on a reference from the Governor General under section 29(1)(a) of the Judicature (Appellate Jurisdiction) Act which states:

> "29.(1) The Governor-General on the consideration of any petition for the exercise of Her Majesty's mercy or of any representation made by any other person having reference to the conviction of a person on indictment or as otherwise referred to in sub-section (2) of section 13 or by a Resident Magistrate in virtue of his special statutory summary jurisdiction or to the sentence (other than sentence of death) passed on a person so convicted may, if he thinks fit at any time, either-
>
> **(a) refer the whole case to the** Court and the case shall then be heard and determined by the Court as in the case of an appeal by a person convicted;"

The Governor General was induced to adopt that course pursuant to a petition on behalf of the appellant praying that his conviction be set aside on one or all of the following grounds:

1. Failure to uphold a submission of no case to answer.

2. Failure to hear the submission in the absence of the jury.

3. Error of the trial judge in his direction to the jury on the actus reus.

4. Failure of the trial judge to withdraw the case from the jury at the close of the prosecution case on the ground that the evidence against the appellant consisted entirely of identification evidence which was of poor quality and was wholly unsupported by any other evidence.

5. That there were two important pieces of evidence not brought out at the trial, viz:

"(a) The fact that, whilst the evidence was that the man the Crown's witnesses identified as your Petitioner drew a pistol from behind his back with his left hand and fired a pistol with his left hand, your Petitioner is right handed.

(b) The fact that prior to the 27th February 1981, your Petitioner's photograph was published in the Jamaican newspapers as a person on the police's most wanted list and that it was his case that those Crown witnesses who claimed to have known your Petitioner before 27th February 1981 had claimed to identify him not because they had seen him on 27th February 1981 but rather because they had seen his photograph in the newspapers."

The contention in the petition is that for the above-stated reasons the Petitioner (appellant) has suffered grave and substantial injustice.

In addition to the fresh evidence mentioned in the petition to be given by the appellant himself and his mother, notice of motion was served for leave to adduce further evidence of two witnesses who claimed that they had witnessed the incident which gave rise to the murder charge in question and that they did not see the appellant, whom they knew, there. Be it noted that their willingness to testify is being announced twelve years after the

event. In the end, however, counsel for the appellant did not call any of the suggested witnesses and proceeded to re-argue the appeal without the benefit of any evidence which had not been considered by the jury. It is obvious that the real intention was to challenge the identification of the appellant in the light of the more recent cases on identification. In those circumstances, since it must have been abundantly clear that the proposed fresh evidence was not worthy of credit, it would seem to us that the more advisable course would have been for the Court's opinion on the question to have been sought under section 29(1) of the Judicature (Appellate Jurisdiction) Act (supra) which states at paragraph (b):

> "...if he desires the assistance of the Court on any point arising in the case with a view to the determination of the petition, refer that point to the Court for their opinion thereon, and the Court shall consider the point so referred and furnish the Privy Council with their opinion thereon."

That procedure would have avoided the peculiar situation in which the re-hearing which resulted was not what was sought on the face of the petition and the appellant was enabled to present his appeal a second time on the same evidence.

The appellant had been indicted for the murder of Caswell Christian on the 27th February, 1981, in the parish of St. Catherine. He was tried in the Home Circuit Court before Chief Justice Smith on November 15 to 17, 1983 convicted and sentenced to death. At the hearing of his application for leave to appeal on the 14th January, 1986, leading counsel who represented the appellant addressed the court as follows:

> "I have looked carefully at the summing-up of the Chief Justice and at the transcript. I cannot find any arguable grounds for challenging the conviction. I cannot support the application for leave to appeal as I can find no arguable grounds."

In the opinion of the Court, having read the record, there was no arguable point of law or fact. Accordingly, the President briefly reviewed the facts and dismissed the application for

leave to appeal and in keeping with the practice then obtaining in such cases no written judgment was delivered. Those facts were related to the Attorney General by letter dated June 21, 1989. The records do not disclose any appeal to the Privy Council. The next step was the petition dated 19th January, 1993, to the Governor General drafted by lawyers in London.

Before this Court, submissions on behalf of the appellant did not proceed along the lines adumbrated in the petition. The issue before us centered on visual identification. To deal with this the facts must be told and the directions to the jury examined.

At about 1:30 p.m. on February 27, 1981, a party of policemen numbering about twenty-two under the command of Detective Inspector Owen Johnson travelling in several vehicles went to Tawes Pen, an area on the Old Harbour side of Spanish Town. The purpose of the mission was to apprehend the appellant. Included in the party were Detective Acting Corporals Percival Williams and Leslie Ashman and the deceased Caswell Christian. On arrival at Tawes Pen the party split into two groups. At Tawes Pen there is a housing scheme consisting of high-rise buildings behind which there is a ghetto area. It is the evidence of Percival Williams that after the party had split he saw the appellant whom he had known by name from 1978 about one chain away in company with two other men. A member of the party shouted to him in a loud voice, "Aye, boy, come here." The appellant crouched and ran off and in the process pulled a gun from beneath his shirt at the centre of his back with his left hand and fired shots in the direction of Detective Williams' party which was then about 1½ chain from the appellant. The police returned the fire but the appellant escaped out of sight behind the high-rise buildings and into the ghetto area which is about one-half chain from the high-rise buildings. The police then began a house-to-house search during which the witness received information which he passed on to his senior

officer Detective Inspector Johnson. Thereafter the police surrounded a house. This was a three-apartment L-shaped board house with glass windows.

Detective Inspector Johnson threw two tear-gas canisters through a window in the front of the house. They exploded then fire and smoke appeared inside the building. A woman came running and crying and after she had spoken with the Inspector he took a rifle from a member of the party and entered a room which opened onto the verandah. He made two trips into the room rescuing two babies who were handed to the woman. A burning mattress and some linen were afterwards removed from the room and water used to put out the fire. After this both Williams and Ashman took up positions behind the house. Williams positioned himself near a window in the back of the house; Ashman stood on adjoining premises.

In the meantime, Detective Inspector Johnson, Detective Onis and Constable Caswell Christian entered the living room and approached the doorway of the other bedroom in the house at which there was a curtain. Affected by the tear-gas fumes Detective Onis stepped back leaving Constable Christian in front. Christian, while in a crouching position, used his left hand to pull away the curtain slightly when a shot rang out from inside that room. Inspector Johnson fired two shots through the curtain into the room and retreated then he heard the breaking of glass to the rear of the building.

Detective Williams attributes the breaking of the glass to the fact that the appellant somersaulted backways through the window landing on his feet. He then spun around facing Detective Williams then ran off firing shots at Williams with a gun held in his left hand. The first shot grazed Williams' left jaw causing him to throw himself to the ground with face down. He then spun over on his back and traded shots with the appellant who had by then spun around facing him. The appellant spun around when he ran and bounced into a gate. He now ran back in

the direction of the witness Williams crouching as he did so and with his right arm held across his forehead. Williams was surprised to see the appellant still coming at him despite his shooting at the appellant. The appellant ran past him about five feet away and escaped by climbing over a gate into adjoining premises. The witness was unable to estimate the time which had elapsed between the somersault through the window and the appellant's escape over the gate. He said it happened so quickly. The witness had fired about five or six shots at the appellant who in turn fired several shots before escaping. While trading shots with the appellant the witness in his supine position was looking at the right side of the appellant's face. Apart from the graze to his left jaw this witness sustained injuries to his right shoulder which caused him to change his gun to his left hand but still firing at the appellant.

In cross-examination he said he could not tell what Detective Acting Corporal Ashman was doing while he was engaged with the appellant. He could not say how many windows were in the house but there were other windows. He was positive that the man who somersaulted through the window was the appellant whom he had known since 1978 and whom he had seen on many occasions.

Detective Acting Corporal Ashman does not appear to have travelled in the same vehicle with Detective Williams because the first thing that attracted Ashman's attention was the sound of gunshots from the direction of the high-rise building which, on Williams' evidence, began with the appellant shooting at the police. Having alighted from his car he went in the direction from which the sounds came and there he saw the appellant, known to him as "Batta John", about one chain away running towards the ghetto area. He had a right side view of the appellant's face who he said was firing a pistol held in his left hand. He had first seen the appellant in 1976 while stationed at the Caymanas Park Police Station about five miles from Spanish Town. He joined

in the search for the appellant and witnessed the tear-gas being thrown into the house and the subsequent rescue. Thereafter he positioned himself behind the house but on adjoining premises not far from Williams. About one minute later he heard gunshots inside the house followed by the appellant somersaulting backways through the glass window landing on his feet and turning around towards them. The appellant then ran towards the witness in a crouch, his right arm across his forehead while firing at the witness who returned fire. The appellant ran past him about twelve feet away and during the encounter he saw the appellant's face. After the appellant had passed him he heard Williams cry out and when he looked he saw Williams holding the right arm with his left hand. In the meantime, the appellant escaped over a fence.

On the question of time, he said his viewing of the appellant in the vicinity of the high-rise building lasted for a couple of seconds and the incident behind the house lasted split seconds. He, too, was surprised that despite the shots fired at the appellant he kept coming at them and felt the appellant must have been wearing a bullet-proof vest.

It was in cross-examination that it was elicited that the apprehension of the appellant was the purpose of the trip to Tawes Pen. His credit was challenged on the question of the time they left the police station - his deposition differed from his testimony in court on this point. He was also challenged as to the number of shots he had fired. His deposition recorded three as opposed to six in his testimony. But the most serious contradiction demonstrated related to when he first saw the appellant that day. He did not remember telling the Resident Magistrate, "I saw the accused for the first time that day when he jumped through the window", even though such a statement appeared in his deposition.

Detective Inspector Owen Johnson testified that when he arrived at the southern section of Tawes Pen he heard gunshots

to the northern section and after he alighted from his vehicle he encountered a man, whom he does not purport to identify, who traded shots with him and then ran away out of sight along the canal. After the incident at the house he saw a different person running from behind the house, but again he did not identify that person.

The medical evidence disclosed that Constable Christian had been shot below the right eye the bullet passing through the brain and exiting on the right side of the skull, fracturing the skull and producing massive haemorrhage.

It was not until July 23, 1982, that Inspector Johnson saw the appellant in custody at the Central Police Station where he arrested him on a warrant charging him with the murder of Caswell Christian. On being cautioned, the appellant made no statement.

A submission of no-case to answer having been overruled the appellant made an unsworn statement:

> "My right name is Glenford Campbell. The police them call me by the name Lenford Hamilton. I live at Spanish Town, Construction Worker. Well, my Lord, I know nothing at all about this case. I hear people tell me that I wanted for police murder and I then gave up myself to the security forces. I have nothing more to say."

The defence closed at that point.

The very detailed summing-up lasted from 11:20 a.m. to 2:29 p.m. and after retiring for eleven minutes the jury returned a unanimous verdict of guilty.

The single ground of appeal reads:

> "The identification of the appellant as the person who had run from the house in which Cons. Christian had been shot, and by inference the person who had murdered Christian, was assisted by inadmissible hearsay evidence. This identification by Cons. Williams and Ashman was poor and by itself would have been insufficient to be left to the jury. The identification, however, was strengthened by evidence of what was told to Cons. Williams and related to Inspector Johnson resulting

> "in the house in which Christian was shot being surrounded by the Police.
>
> The appellant had first been identified by both Cons. Williams and Ashman as the man who had shot at the Police party and ran out of sight into a ghetto area. Sometime later while the Police were conducting a house-to-house search in the area Williams received information which he told Inspector Johnson (pp 14 & 89) which resulted in the particular house being surrounded by the Police. The jury must have been left with the impression that (was to) the effect that the appellant had entered the particular house; and the man who later ran from the house was the same man who entered. There was no admissible evidence to show that the appellant had ever entered the house where Christian was murdered but there was evidence of the presence of other men in the area, at least one with a gun shooting at the Police at the relevant time (pp 11, 87 & 95)."

It will readily be observed that no complaint has been made about the summing-up of the learned Chief Justice. However, the submissions ranged much wider than the ground of appeal suggests thus rendering it necessary to examine the summing-up.

Submissions in support of this ground ran thus:

> "The circumstances of the identification of the appellant were insufficient for acceptance by the jury so they could be sure the appellant was the person at the scene and the one who murdered Christian.

That is how the direct thrust of the appeal was made. Thereafter separate forays were launched at the critical areas of the prosecution's case, viz:

1. The viewing of the appellant at the first and second incidents by Williams.

2. The viewing of the appellant at the first and second incidents by Ashman.

3. Inspector Johnson's reason for searching the house in which Christian was shot.

Concerning Williams, it was contended that no linkage should be made between the two viewings of the appellant because it did not follow logically that the person whom he saw at the first

incident was the person who shot Christian. Accordingly, the two viewings should be regarded independently.

The logic of this submission is difficult to accept because the evidence of Williams is that the person whom he had known since 1978 is the person whom he saw firstly by face in company with two others and who ran off while firing shots at the police, and, secondly, he was the same person whom he saw by face after he had somersaulted through the window and thereafter engaged him in a gun battle. The case was not presented that the man who somersaulted through the window must have been the same man who was seen at the first incident half an hour earlier. Rather, the case was that the man who somersaulted through the window after Christian had been shot was recognised by Williams to be the very person who had been seen and recognised at the first incident. Williams had testified to having spoken with the appellant in 1978. In an affidavit by the appellant dated 22nd June, 1993, it emerges that they are not strangers. Paragraph 6 states:

> "That although I might have seen Acting Corporal Williams before the trial, we had never spoken, and I can say for certain that I had never seen Acting Corporal Ashman or Inspector Johnson before that day."

So on that issue the question must be whether the jury had adequate directions on the assessment of visual identification evidence.

One aspect of the prosecution's case was criticized as being admission of hearsay evidence. It had to do with how the police came to search the house in which Christian was killed. The evidence appears at pages 14 to 15 of the transcript as follows:

> "A: The accused man ran through a gate into the ghetto area when I lost sight of him.
>
> Q: After you lost sight of the accused man did the members of the police party do anything in relation to the area that he ran into?

"A: Yes, ma'am.

Q: What did you do?

A: We carried out a search in the area in which the accused ran.

Q: Can you tell the court what kind of a search was it? Search of persons or search of what?

A: House to house.

Q: During the course of that house to house search did you, yourself, personally receive any information?

A: Yes, ma'am.

Q: Having received that information did you communicate that information to any other member of your party?

A: Yes, ma'am.

Q: To whom did you communicate?

A: I spoke with Detective Inspector Johnson, ma'am.

Q: After you spoke to Mr. Johnson did you see anything being done?

A: Yes, ma'am.

Q: What was it?

A: A house which the accused...

Q: No, did you see anything being done? What did you see after you spoke to Mr. Johnson?

A: We surround a house, ma'am.

Q: About how many police officers so far as you could see, so far as you could see with your eyes surround the house?

A: I can remember five.

Q: After the house was surrounded did you see any member of that police party do anything?

A: Yes, ma'am.

Q: What?

A: Detective Inspector Johnson threw tear-gas in the house, madam."

The contention here is that the evidence fell victim to what Lord Devlin called the customary devices in **Glinski v. McInver**

[1962] A.C. 726 at page 780 to 781 whereby hearsay evidence of a conversation is admitted not by eliciting the contents of the conversation or a written document but by adducing evidence of what the conversation or document was about. He condemned such evidence as clearly objectionable. Did such a situation arise in the instant case? The fact is that there were some twenty-two policemen engaged in the exercise of searching the area from house to house. There is no evidence that any of those policemen apart from Williams and Ashman knew the appellant and there is no evidence of any civilian participation in the house-to-house search. The nature of the search was such that in all probability every house in the area would be searched and it is impracticable to contemplate such a search being executed without any communication between those so engaged. Issue is taken that the incomplete answer, "A house which the accused..." went to supporting the identification of the appellant. But even with the utmost care we are quite unable to see how such a claim can be sustained on the basis of those four words. Such a claim can only rest on speculation and that is not permissible.

Ashman's first reference to the appellant on that fateful day was elicited at pages 52 to 53 thus:

"Q: The vehicle that you travelled in, do you recall where was the driver?

A: I was the driver.

Q: When you ran in that direction, did you see anybody?

A: Yes, ma'am.

Q: Who was it that you saw?

A: I saw 'Satta John' running.

Q: Who was that? What you call him?

A: That man there, ma'am. The accused man.

Q: The accused man? You saw him do what?

A: I saw him running towards the ghetto area.

"Q: Now, when you saw him, the moment you set eyes on him, about what distance from you was he?

A: About a chain.

Q: Can you point out a chain for the Court?

A: It is a little more than the length of the court-room.

Q: A little more than the length of the court-room, you say, and you are pointing from behind the judge to the end of this room?

A: Yes, ma'am.

Q: At that time what part of this person whom you say was the accused could you see?

A: Sideways.

Q: Can you recall what side?

A: Right side.

Q: Could you see whether he had anything in any of his hands?

A: Yes, ma'am.

Q: What?

A: He had a pistol.

Q: Where?

A: In his left hand."

That viewing, he said, lasted for a couple of seconds. The second viewing after the somersault through the window he judged as lasting for a split second. It was submitted that Ashman's evidence should not have been left to the jury the moreso because, it was contended, his credit had been impeached by his deposition on the question as to whether he had known the appellant long before the day in question.

For the Crown Dr. Harrison submitted that on the question of the length of time regard must be had to what took place in the period mentioned. In the first instance the witness saw the appellant running for about one chain until he disappeared into the ghetto area. Then on the second instance he saw him somersault backways through the window, spin around to face the witness,

run off while firing at the police, bounce into the gate which made him run back passing the witness at a distance of some twelve feet albeit with his right hand across his forehead, before disappearing over the fence. We agree with Dr. Harrison that those events could not be done in what is normally accepted as a "split second." The jury would thus be able to make their own judgment of his assessment of time.

It will be necessary to set out the summing-up in extenso in order to put in perspective the complaints made by the appellant. The reputation of the learned Chief Justice for being scrupulously fair and meticulous is apparent from his approach to and treatment of the issues. Beginning at page 120 and continuing to page 124 he set out the principles which should guide the jury in resolving the vital issue of visual identification:

> "Has evidence been put before you upon which you can feel sure that this accused and no other was behind that curtain and fired that gun killing the Constable? On the evidence presented before you can you feel sure that that is so? And if for some reason you are not sure then you must acquit him.
>
> Now, as learned counsel for the defence has done, quite rightly, he has broken down in two the first question. Was the accused on the scene at all? Has he been identified by the evidence so that you can feel sure that he was there, that a mistake as to identity has not been made, and you can feel sure that he was on the scene doing what the witnesses described him as doing? That is the first issue. And the second issue is, if he was indeed there and indeed in the house as has been testified to by the witnesses, were the circumstances such that you can feel sure that it was he and no other who fired the gun that killed Christian? So let us deal with those issues now.
>
> First, as to the question of identity. The accused made a statement from the dock, which he was entitled to do, and you must take it into account in deciding whether the prosecution has proven its case so that you feel sure of his guilt. You take it into account, bearing in mind that what he said wasn't tested under cross-examination, and give it what weight you think it deserves. And what he told you, members of the jury, is that he knows nothing about the case. You will have to say what he means by that.

"That he wasn't there at all? If he were on the scene and didn't do it I would expect him to tell you that he was there and it 'was not me'. He said, 'I know nothing at all about it', and we have to assume that what he meant by that is that he wasn't there. He need not say anything, because as I told you the burden is on the prosecution, the prosecution has to make you feel sure by evidence that he was there and was in that house in which the police Constable was killed.

Now this brings into focus the question of visual identification, and a Judge is under a duty where that arises for consideration in a case, on the question of identity the Judge is under a duty to caution a jury on the way in which you assess visual identification, and it is necessary for this to be done because in human experience it is a common occurrence for mistaken identity --- for other people --- for mistaken identity to occur. You heard Mr. McKoy, learned counsel for the defence, tell you of instances where he has been mistaken for somebody else. No doubt you have had that experience yourselves. I have been many times mistaken for other people, and I usually tell the jury that the most outstanding person I have been mistaken for is Mr. Shearer in the days when I was much younger, and he was much younger. Indeed a police Inspector who should know me once stood up and had a conversation with me all the time believing I was Mr. Shearer. I was so embarrassed for him that I did not let him know that it was not Mr. Shearer he was talking to, and so he walked off believing he was talking to Mr. Shearer.

So the reason it is necessary to give this warning or this caution to the jury is that a person will go to the witness box and swear that they saw a particular person doing something and yet they are mistaken, but as far as they are concerned they are right. For instance if that Inspector who spoke to me thinking I was Mr. Shearer, if anything turned on the question of where Mr. Shearer was on a particular day or a particular time - suppose it was said that Mr. Shearer had knocked down somebody where he had spoken to me, that Inspector would go and swear on oath that on that day or at that time Mr. Shearer was in that area because he saw and spoke to him but it is a mistake as he was then speaking to me. It is for that reason why a jury has to be careful in dealing with questions of visual identification, that a person who comes and says I saw a person do so and so is not in fact making a mistake as to identity. And you might say now, well how could anybody at any stage ever believe anybody about visual identification, because if what you

"are saying, what you the judge, what you are saying, well we can never be sure about that...but of course you can be sure depending on the circumstances. So there are a number of matters which a jury must look at and consider carefully in deciding whether to accept evidence of visual identification.

The first thing a jury looks at is the question of whether or not the person who is doing the identification, that is the witness, knows the person being identified. In other words, was the accused known to the witness before - whatever case? That's the first essential, because the simple reason is this: It makes quite a difference as to whether a person identifies another or not, whether he was known to the other before ... and that is commonsense. In other words, if the person was not known to the person doing the identification before the incident occurred then the chances of mistaken identity are greater than if the person was well known. In other words, you see a person and it's somebody that you know well, you are less likely to make a mistake about that person's identity than if it was a person who you never saw before in your life. It's commonsense. So that is one matter about which a jury has to look. Look at that to say: Was the person known beforehand? But, of course, even where the person is known beforehand you can make mistakes, and that is why I have said, you know, you might have spoken to somebody who you thought was somebody else, somebody who you knew well. That's the first matter you look at.

The second matter to look at is: Was it day, or was it night when the person was seen? If it was at night there is a greater risk of your making a mistake than if it was day. Again, that is commonsense. If it was day...whether it be day or night...but what distance were they apart when the person was seen? Was the person seen near or far? The nearer the person is seen the less chance of a mistake than if the person was far. For what length of time was the person seen? What part of his body? Naturally, people are identified by their features. Was the face seen? For how long was it seen? If it was just a fleeting glance there is a greater risk of mistake than if the person was seen for a reasonable length of time. Bear in mind when you are considering time: How long? For ten seconds? Ten seconds is a long time. Twenty seconds? So those are the matters which you take into account and consider, and see what opportunity there was for the person being identified, in this case the accused, and you look at those circumstances and make up

> "your own mind as to whether or not the evidence convinces you that a positive identification has been made and that a mistake is not being made as to the identity of the accused."

Before moving on to consider how the learned Chief Justice applied these principles to the evidence, we wish to make certain observations. First of all, it is noticeable that the language used by the Privy Council in **Reid v. R.** [1989] 3 W.L.R. 771; [1990] A.C. 363; [1990] 90 Cr. App. R. 121 in dealing with the question of visual identification was not the language employed by the learned Chief Justice but since what is required is not adherence to a formula (See **Wayne Wyatt v. R.** Privy Council Appeal No. 25 of 1992 and **Ashwood and others v. R.** Privy Council Appeal No. 31 of 1992) but the adequacy of the directions in alerting the jury to the dangers of visual identification these directions will fall to be considered in the light of this requirement.

Having stated the principles, the learned Chief Justice proceeded to examine the evidence in the light of those principles. Dealing with the question of knowledge of the appellant by Williams and Ashman, he reviewed their evidence taking into account the criticisms of the defence. Referring to the fact that Ashman had testified that they had gone in search of the appellant he cautioned at page 124 to 125:

> "What Counsel for the Defence has said is that, having gone to search for him they were influenced by that fact, that they went to search for him and so that made them saw him when in fact they might have been making a mistake. I don't know whether that appeals to you or not, but what you have to decide is not the question of why they went to search for him; the question is: Did they see him really? Having gone to search for him did they find him or did they see him? Has evidence been put before you upon which you can say you feel sure that they did see him and not making a mistake that they did?

It is plain that here he was emphasising the reliability of the evidence of the witness in this regard.

Further, referring to the criticism of the witnesses, he said at page 125:

> "Defence Counsel is saying that it wasn't the accused, it was some other person who they mistook for the accused; and what Counsel gallantly say is: They are not saying that these policemen are liars. Counsel don't always refer to police in those gallant terms. Others say they are obvious liars. As a matter of fact they call them all sorts of names, but Counsel doesn't do that. They are not saying they have come and tell deliberate lies on the accused; they are saying they are mistaken. You have to say whether they are liars or not, and if they are liars you can't convict a person on the evidence that they are not speaking the truth."

In the previously cited portions the issue was whether the witnesses were mistaken. Here it is whether they were lying and the clear admonition was given to acquit if they so found.

On the question of whether the witnesses had spoken to the appellant as they had testified, the direction to the jury (at page 127) was:

> "So, there you are, members of the jury, both these policemen upon whom the prosecution are relying for identification have said that they knew the accused before. You will have to say whether you believe them or not."

Turning to the opportunity for the witness to see the appellant, the learned Chief Justice reviewed first the evidence of Williams as to his seeing the appellant when they arrived at the scene and then directed (at pages 128 to 129):

> "You will have to say whether, if he saw the accused, it is true that he saw the accused, that he had sufficient opportunity to see him and could identify him and make you feel sure that he has not made a mistake when later on he said he saw the accused when he was behind the house, whether the fact of having seen him before would strengthen his evidence of identification later on when he saw him come through the window. So, you will have to say whether you believe this policeman saw the accused out by the high-rise building. ... You remember I told you distance is important, knowledge of the person, distance. The distance he indicated was about the length of this court room. He said: 'I could see all of his body;

> "when I first saw him I saw his face.' And he said there was nothing to prevent him seeing his face properly."

Next, he reminded the jury of the witness' evidence of the time he had for viewing the appellant and then ended:

> "You will have to say whether that was sufficient time for him to be able to positively identify the accused, in other words, where you can feel sure that he was not making a mistake."

Turning to the opportunity of Ashman, he referred to the time and distance stated by Ashman and then said at pages 131 to 132:

> "Did he have as good an opportunity as Williams, or did he have such an opportunity - that is Ashman - that you can say you feel sure in fact that he did see him at the high-rise building? When you are considering whether it is true when he said he saw the accused at the high-rise building, a very important piece of evidence was brought out by the defence."

He then proceeded to deal with contradictions between Ashman's deposition and his evidence before the jury and in emphasising the significance of the contradictions he said at pages 134 to 135:

> "But what is vital as far as the case is concerned is the identification at the preliminary enquiry, members of the jury, because you know the question of identity is extremely important in this case. It is vital. It is the whole issue in the case. And here you have this police officer saying, he is recorded as having said ... he said he doesn't remember saying it; he doesn't say he said it there and he made a mistake; he said he doesn't remember saying it; and even when his deposition was shown to him he said he still doesn't remember saying that - and what does he say here?... he is recorded as having said at the preliminary enquiry that he saw the accused for the first time that day when he jumped from the window behind the house - which means that he didn't see him at the high-rise building. This is what it means, that when he was giving evidence at the other court he didn't say he saw him at the high-rise building.
>
> Now since this accused is the person who is being identified as having been on the scene and as having committed the murder, if it is true that he saw him at the high-rise building, as he said here, would you

"expect him when he gave evidence at the preliminary enquiry to say that he saw him? And if he didn't say then that he saw him and said that he saw him for the first time, in other words, he was being asked, when first did you see him that day? He said, behind the building through the window, how then if he said it there does he come here and said he saw him at the high-rise building? In other words, Counsel said that that might be a mistake. It's more than that, members of the jury. He would be telling a lie. You can't make a mistake about that. Why does he say he saw him there when at the other place he said he saw him for the first time? So he has added to what he has said, and you would have to say whether you believe him in view of what he said. It's more vital on the question of identification, whether you can believe Corporal Ashman when he said he saw the accused twice that day, when at the preliminary he said he saw him once; and that is the way in which what he said at the preliminary enquiry is used in the case, for the purpose of the credit which the jury is prepared to give to the evidence of the witness here. So that is the evidence about the question of identity at the high-rise building.

Corporal Ashman said the accused man ran into the ghetto area out of sight and he and others followed and began searching down there in the ghetto area. It was suggested to him that it is not true that he saw the accused running from the high-rise building, and he said it is true that he saw him. Well, of course, you would have to say whether you believe him in view of what I have just told you.'

was submitted that the learned Chief Justice rawn Ashman's evidence from the jury. No au such a proposition which is pregnant with da rial judge begins to usurp the function of t hat portion of the evidence which has been a consideration by the jury there arises the the jury getting a wrong message that despi by the judge they are to accept the eviden em to consider. Alternatively it could pro e minds of the jury to be told, as they must are the sole judges of the facts only to fi the judge has not abided by his own advice.

being contended for is an altogether different situation from what obtains where a judge, in the exercise of his discretion, disallows admissible evidence because its prejudicial effect outweighs its probative value. See **Selvey v. D.P.P.** [1970] A.C. 304; [1968] 2 W.L.R. 1494; **R. v. Sang** [1980] A.C. 402; 69 Cr. App. R. 282; **Richard Scott et al v. R.** P.C. 2/87 & 32/86. Whereas the treatment of Ashman's evidence in the manner submitted by Mr. Phipps was not permissible it is obvious that the learned Chief Justice regarded that portion of the evidence as representing a significant weakness in the prosecution's case and we can find no fault in his treatment thereof.

The evidence of Inspector Johnson did not supply any aid to the identification of the appellant. That was pointed out to the jury.

In similar detailed manner the evidence of the events behind the house was examined and, in relation thereto, the jury were told at pages 142 to 143:

> "Members of the jury, please bear in mind that in any case put before you by the prosecution and several witnesses are called to give evidence, it is open to you to believe one witness as against another, and if one witness convinces you that he spoke the truth, and you don't believe the other, then you can accept the evidence of that witness who has convinced you and reject the evidence of the other. In other words if you have two witnesses, one is a hopeless witness who you disbelieve, and one you believe, the fact that you disbelieve one doesn't detract from the evidence of the other one. These are people speaking of an incident which took place some time ago, and it is open to you to believe both, or believe one and not believe the other. They are not tied together, so you have to decide whether both are speaking the truth, or one is speaking the truth, or none is speaking the truth."

Of course, this direction does not detract from the criticism which was earlier levelled at Ashmam's evidence which related to the first incident but it will be recalled that the jury was there put on caution as to whether they would accept Ashman's

evidence about the second incident which is now being dealt with.

The summing-up ends at page 155 and at pages 151 to 152 the jury were told:

> "Now, you can only find the accused guilty of murder as being the person who shot the deceased if you feel sure that he is the person who jumped through the window, and you feel sure that it is he who shot him, and you can only find him guilty by inference from what has been put before you if the inference that it is he who shot the deceased is quite inescapable, in other words, that it is the only reasonable inference that you can draw from the circumstances, that it was he who did it. And if the circumstances are capable of the inference that it is somebody else, it might have been somebody else apart from the accused, if you find that he is the person who jumped through the window, then you can't draw the inference and say, it is he, like the two cats, if the circumstances are such that there might have been somebody else in the house who actually did the shooting, and although the accused was in the house, if you feel sure it was he who jumped through, then that other person might have done it, and this is what counsel for the defence is asking you to say, that the circumstances are such that you cannot feel sure that he is the person who did it, because they are such that it is capable of the inference that somebody else was in the room there apart from the accused, if you believe he was in the house.
>
> So you have to look at the circumstances and say what you find. As I say, if the inference is quite inescapable that it was he who did it then of course it is open to you to convict him of murder, but you must feel sure that it is the only reasonable inference that can be drawn.
>
> Now you heard the address of Mr. McKoy in which he suggested that somebody else could have been in that house. You will have to say whether you agree with him or not, but let me remind you of the evidence from which you are asked to draw the inference that the prosecution is asking you to draw."

Thereafter the learned Chief Justice compacted the various bits and pieces of evidence of the events at the house the final aspect of that drama being centred on the 8ft x 10ft room where Christian was shot.

Then just before the jury retired here is what they are told at page 154:

> "So that is the evidence you have before you. Are the circumstances about which I have just reminded you capable of having any other reasonable interpretation than that the accused - if you believe it was he who jumped through the window - than that it was he who shot the deceased? If the circumstances are capable of the interpretation that there was somebody else there who did it, even though you believe the jumping through the window, if the circumstances are capable of some other interpretation other than that it was the accused then you can't convict him.
>
> If the circumstances are capable of no other interpretation, if it is quite inescapable that it was he alone in that house and that it was he who had come through the window armed with a gun and had shot the deceased, and nobody else who shot him, then you can convict him of murder."

At the end of this review it is clear that the central issue of visual identification, which depends for proof on Williams and Ashman, was very thoroughly examined. Undoubtedly there was evidence for the consideration of the jury. We are certainly not of the view that the evidence falls within that category to which Lord Widgery referred in **R. v. Turnbull** [1977] 1 Q.B. 224 at as being -

> "...poor as for example when it depends solely on fleeting glance or on a longer observation made in difficult conditions."

which he said should be withdrawn from the jury. Conditions for viewing may be difficult for different reasons, for example, distance, obstruction, hostile action etc. It is a fact of life that crimes do not as a rule take place in ideal conditions so as to exclude any form of difficulty in the nature of the evidence. To hold the contrary would be to issue a charter to crime which is certainly not what Lord Widgery, C.J. had in mind.

R. v. Tyler [1992] Crim. L.R. 60 answers that fallacy:

> "The appellants were convicted of offences connected with poll tax demonstrations. On appeal the identification evidence was challenged. Two police officers had given

> "evidence identifying the appellant during the demonstrations. The contention was that such evidence ought to have been excluded under **Turnbull** (1977) 63 Cr. App. R. 132 as it had taken place in difficult circumstances since people would be moving about during the demonstrations making it difficult to maintain observation on a particular person. It was also objected that the evidence of one police officer in those circumstances, claimed to be poor, could not support the evidence of the other officer operating in the same circumstances. The direction to the jury was criticized as being inadequate because the judge had omitted to tell the jury that an honest witness can be mistaken nor had he warned them that miscarriages of justice had occurred in the past as a result of misidentification (see **Ramsden** (1991) Crim. L.R. 295; **Reid** (1990) 90 Cr. App. R. 121.
>
> The Court of Appeal Criminal Division dismissing the appeal held, inter alia, that there could be a good identification even when conditions were difficult. The fact that two witnesses observed the same event did not, so to speak, merge their evidence into one. There were still two separate and independent identifications provided they were honestly made. **Reid** was not authority for the proposition that it was necessary to warn the jury of the risk of miscarriage of justice. The judge had referred to the possibility of a mistaken witness being a convincing one. That plainly connoted an honest witness because a dishonest one would not be mistaken. Moreover, in one part of the summing up the judge did refer to the possibility of an honest witness being mistaken. The omission to refer to past miscarriages was not fatal. No particular form of words was needed provided the judge emphasised the need for caution, which this judge did on both occasions that he dealt with identification. The whole thrust of his directions underlined the dangers which the jury should have in mind."

In our view, this decision speaks eloquently to the instant situation. Almost from the outset the witnesses encountered difficulties. So soon as the appellant had been observed he ran off firing at the witnesses and it goes without saying that the circumstances at the back of the house presented difficulties. Insofar as the evidence of Ashman goes, the jury, having regard to the fact that he had only a profile view of the appellant at the

first incident and the challenge to his credit regarding that incident, could properly have rejected his identification evidence at the first incident and yet go on to accept his evidence regarding the second incident if they believed his evidence that he had come to know the appellant during the years of police duty in the area having made their own assessment of the time within which that viewing would have been made having regard to the events described. Williams would, therefore, stand alone on the identification at the first incident when he said he saw the face of the appellant whom he had known for years. Acceptance of that evidence, though not determining identification behind the house, would be an important factor in assessing that evidence. There would, therefore, be support by one officer of the other. But, even if, the Chief Justice's criticism of Ashman as being more of a liar rather than being mistaken led them to reject Ashman altogether there was still the evidence of Williams which would even alone be good evidence which, after heeding the caution, they could accept.

In this case the caution was administered thus:

> "Now, this brings into focus the question of visual identification, and a judge is under a duty where that arises for consideration in a case, on a question of identity the judge is under a duty to caution a jury on the way in which you assess visual identification and it is necessary for this to be done because in human experience it is a common occurence for mistaken identity to occur." (page 121)

Then after giving the example of being mistaken for the former Prime Minister the Rt. Hon. Hugh Shearer he continued (at page 122):

> "So the reason it is necessary to give this warning or this caution to the jury is that a person will go to the witness-box and swear that they saw a particular person doing something and yet they are mistaken, but as far as they are concerned they are right."

The jury could not fail to appreciate that he was showing them how a miscarriage of justice can be brought about by mistaken

identity. Further, this caution was strengthened when shortly after that he said:

> "It is for that reason why a jury has to be careful in dealing with questions of visual identification, that a person who comes and says I saw a person do so and so is not in fact making a mistake as to identity."

And very relevantly he said at page 123:

> "But, of course, even where the person is known beforehand you can make mistakes, and that is why I have said, you know, you might have spoken to somebody who you thought was somebody else, somebody who you know well."

It is our considered opinion that with that amount and quality of caution no jury worthy of the office could be held to be wanting in instruction. And yet that was not all. The summing-up lasted 3 hours and 9 minutes and during that time they heard the terms "feel sure" and "are not sure" no fewer than 35 times.

It is true that in dealing with the risk of mistaken identification the learned Chief Justice used the term human experience instead of judicial experience as was used in **R. v. Dickson** [1983] 1 V.R. 227 at page 231 and cited in **Reid v. R.** [1990] A.C. 363 at page 380. But in our opinion this departure does not represent any defect **because** human experience is much wider than judicial experience which it embraces. Moreover, it is patent that throughout the summing-up the learned Chief Justice, in communicating the principles of law to a Jamaican jury, carefully avoided any problem of comprehension by employing language which they would readily understand. Furthermore, his rather graphic example involving himself and the police officer who mistook him for the former Prime Minister ensured that they were fully alerted to the dangers of mistaken identification.

We can find no basis on which to interfere with this conviction. Accordingly, the appeal is dismissed and the conviction and sentence are affirmed.

Classification

Under section 2(1)(a)(i) of the Offences against the Person (Amendment) Act, this crime has properly been classified as capital murder carrying the sentence of death. However, heeding the advice of the Privy Council in **R. v. Pratt & Morgan** P.C. Appeal No. 10 of 1993 regarding sentences of death pending for five years, the Governor General will, no doubt, commute this sentence to imprisonment for life.