JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS: 200 & 201/99

BEFORE: **THE HON. MR JUSTICE FORTE, PRESIDENT**
THE HON MR. JUSTICE HARRISON, J.A.
THE HON MR. JUSTICE PANTON, J.A.

REGINA V CLIFTON WILLIAMS
ONEIL BUCKLE

Dwight Reece for appellant Clifton Williams

Earl Witter for appellant Oneil Buckle

Kenneth Ferguson from the Office of the Director of Public Prosecutions for the Crown

HARRISON, J.A:

October 08 2001 and December 20, 2002

The appellants were convicted in the Circuit Court Division of the Gun Court on 3rd December 1999, of the murder of George Isaacs on 3rd July 1997, and each was sentenced to imprisonment for life at hard labour and ordered to be ineligible for parole before serving a period of thirty years. We heard the applications for leave to appeal, treated them as appeals and allowed each appeal. We quashed the convictions, set aside the sentences and entered verdicts of acquittal. These are our reasons in writing.

The facts are that on 3rd July 1997, at about 8:30 p.m. the prosecution witness Clavarie Christie then 14 years old, was watching friends including the deceased, on the sidewalk on Heslop Avenue three quarter chain from its intersection with Windward Road, performing as "deejays", that is, singing. He saw the two appellants and a third man Markie one and one half chains away across the road on Windward Road near the stop light in the area where the Kentucky Fried Chicken establishment was. The area was well lit with street lights and lights from a gas station. He saw their faces for three seconds looking through an open bus stop. He averted his gaze from them and then he saw one Screachie run off and he heard gunshots and he saw that the deceased George Isaacs otherwise called Troy was shot and spun around. The witness himself received a shot to his head which caused him to spin around and fall to the ground. He then received a gunshot to his chest, got up and ran and received a third gunshot to his neck. He fell to the ground on his belly,face downwards. The appellants and the third man came across the road. He saw their faces then for about two seconds from a half chain away. All three men had guns in their hands pointing at him. The street lights were on. He closed his eyes. He received three more gunshots. He became unconscious, then revived and got up. He saw the deceased lying on the ground "blood up". He spoke to someone then

went to the Rockfort police station where he made a report and then went to the hospital.

Detective Sergeant Williams received information on 3rd July 1997, at about 9:30 p.m. and went to Heslop Avenue, Rockfort, where he saw the body of the deceased lying in a pool of blood on the right hand side of the roadway as one goes down the said avenue. He found on the scene thirteen 9 mm cartridges and three bullets. He spoke to persons in the area. He went to the Kingston Public Hospital and there saw the prosecution witness Clavarie Christie with bandages to his neck, side and right arm. The following day he gave the said cartridge cases and bullets to Det. Sgt. Dunkley. Subsequently, they were examined by Asst. Commissioner Daniel Wray, (retired) Government Ballistics expert attached to the Forensic Laboratory and he concluded that they were fired from three different 9 mm semi-automatic pistols.

On 4th July 1997, having received from Det. Sgt. Sutherland, a report and the said cartridge cases and bullets, Det. Sgt Dunkley went to the Kingston Public Hospital and spoke to the witness Christie. He then visited Madden's Funeral Home where he saw the body of George Isaacs. He then obtained warrants for the arrest of three persons including the appellants. On 5th March 1998, he arrested the appellant

Williams, and on the 1st October 1998, he arrested the appellant Buckle, on the said warrants, each for the murder of George Isaacs.

A postmortem examination was performed on the body of the deceased George Isaacs, otherwise called Troy, by Dr Seshiah, consultant forensic pathologist, who found six gunshot wounds to the body, in the area of the head, neck, side, right leg and back. The cause of death was due to multiple gunshot wounds. Neither appellant had been placed on an identification parade.

The witness Christie knew the appellant Williams for five years and the appellants would "pass my gate twice per day" and he worked "at Public Service". He knew the other appellant Buckle as Horace for four years. This appellant lived at Rusden Road, as did the appellant Williams, and worked at the power barge. He had fallen off a building and injured his head. The witness used to see him daily on the road as the appellant Buckle passed his yard. He knew the appellant's mother whose name was Miss Sinclair and who taught him at the Elder basic school.

Each appellant made a statement from the dock and each denied any involvement in the said murder.

Mr. Witter for the appellant Buckle argued the following grounds:

> "1. The learned trial judge erred in law in rejecting the submission of no case to answer made at the close of the case for the prosecution in that the evidence concerning

> the essential issue of visual identification adduced, was tenuous and therefore an insufficient and/or unreliable basis upon which to found a conviction.
> 2. In the particular circumstances of the case, the learned trial judge's directions to the jury on the issue of visual identification were inadequate and/or misleading in law and otherwise inaccurate in relation to the viva voce testimony, whereby the applicant was deprived of a fair chance of acquittal and justice has miscarried.
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> 3. In any event the sentence imposed was manifestly excessive."

Mr. Reece for the appellant Williams argued the following grounds:

> "1. The learned trial judge erred in law in not upholding the submission made on behalf of the appellant that the identification evidence of the witness Clavarie Christie, which was the sole evidence against the appellant, was of such poor quality that the learned judge was required by law to withdraw the case from the jury and direct a verdict of not guilty. In particular:
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> (a) The witness had seen his friend shot, and had himself been shot in the chest and neck and had dropped to the ground, before he saw the assailants. (transcript, page 31). He was then lying on his belly (p.56). His whole body felt funny. (p.55-6). In that situation he saw the assailants for two seconds. (p.35). He then closed his eyes and was shot three more times and passed out. His identification was a fleeting glance made in impossibly difficult circumstances.

(b) The witness had said that he saw the appellant and two others crossing a road for about three seconds, shortly before the shooting. This identification was also in the nature of a fleeting glance around three seconds (p. 27-28). The witness then took his eyes off the three men, thus creating a further weakness in his identification of them as the assailants (p.30).

(c) The identification took place at night and at a distance of over half a chain (p. 33).

(d) The witness was a boy of 14 years old who must have been traumatized and confused by the events.

2. The learned trial judge erred in law in his directions to the jury on the issue of identification. In particular he erred in directing them that "you will have to look and see if you find any weaknesses in it and also whether these weaknesses, if any, were induced by deceit" (p. 254). He should have directed the jury that there were indeed weaknesses in the identification, in particular the matters set out under paragraph 1(a) and (b) above. See **R v Turnbull** [1977] Q.B. 224 He should remind the jury of any specific weaknesses which had appeared in the identification evidence.

3. The learned judge erred in commenting that the decision of the appellant to give unsworn statement was that he was reluctant to put his evidence to the test of cross-examination, and to ask the jury: "if they were reluctant to put their evidence to this test, why?" (p. 300-1). The learned judge was thereby suggesting to the jury that the failure of the appellant to give evidence was indicative of guilt and supported the crown's case.

> 4. The learned judge erred in suggesting to the jury that the appellant was evading the police because the police went to an address and spoke to his relatives but did not find him (p. 284-5).
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> Again the learned judge was inviting the jury to draw an inference of guilt, on an insufficient basis of evidence. It is submitted that in a case depending on weak identification evidence this increased the danger of a wrongful conviction."

Ground 1 - appellant Williams

Mr. Reece submitted that the identification evidence of the witness Christie, a boy 14 years old, amounted to a fleeting glance of the appellants for three seconds before the shooting and a subsequent fleeting glance for two seconds in difficult circumstances after he had been shot twice. He must have been traumatized and confused. The learned trial judge in those circumstances should have withdrawn the case from the jury.

Ground 1 - appellant Buckle

Mr. Witter submitted that the evidence of the prosecution witness Christie was of such a nature that the identification in relation to the appellant was tenuous and weak and a mere fleeting glance and made in difficult circumstances. The learned trial judge had a duty to withdraw the case from the jury by accepting the submission of no case to answer.

It is our view that visual identification, because of its inherent danger demands that it be accorded the special treatment laid down in the cases in keeping with the principles formulated in **R v Turnbull** [1976] 3 All E.R. 549 and **R v Oliver Whylie** ((1978) 25 W.I.R. 430; 15 J.L.R. 163). In the former case, Lord Widgery, C.J. at page 553 said:

> "When, in the judgment of the trial judge, the quality of the identifying evidence is poor, as for example when it depends solely on a fleeting glance or on a longer observation made in 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. This may be corroboration in the sense lawyers use the word; but it need not be so if its effect is to make the jury sure that there has been no mistaken identification."

Trial judges are obliged to adhere to this test in order to ensure fairness to the accused and avoid a possible miscarriage of justice.

In the instant case, the evidence of the prosecution witness Christie reveals he saw the appellants, as he looked through a bus stop constructed with "a skeletal frame" of uprights with a roof. This was a viewing of three seconds from a distance of approximately one and one half chains away, albeit in bright electric lights, from the street light and flood lights from a business establishment. This viewing for three seconds was clearly unremarkable, in that, there was

no evidence of any action on the part of the said appellants that particularly drew the witness' attention to them. He was otherwise engaged in observing the "deejaying" activities of his friends, viewed the appellants for three seconds and thereafter averted his gaze from them. This was an observation in the nature of a fleeting glance.

After the witness Christie had been shot in the chest and neck, this caused him to fall face downwards to the ground. From this position he viewed the appellants at a distance of about half a chain for a period of about two seconds and promptly thereafter voluntarily closed his eyes. The witness' range of vision and the angle from which he observed the appellants for the said two seconds, sideways, lying down, could only be classified as abnormal, in our view. This could not even be described as "a longer observation made in difficult conditions" which would itself attract the strictness of the **Turnbull** test. It was an observation by the said witness for a "shorter period" under vastly difficult circumstances. He was at that time suffering from gunshot injuries, enduring the agony of an imminent further assault and viewing his attackers from an unusually awkward almost inverted posture, for two seconds. In our view, this was undoubtedly a fleeting glance made in difficult circumstances. There was no other evidence led that could support this weak identification evidence.

In addition, the warrant on which the appellant Buckle was arrested on 1st October 1988, read "Horace o/c Oneil Buckle". The words "Oneil Buckle" was admittedly written in a different ink than that in which "Horace" was written. The witness Christie only gave to the police officer the name "Horace". No identification parade was held. No evidence was led linking the name "Horace" to the appellant Buckle. The evidence of the witness Christie initially, was merely naming "Horace". However, the further statement given by the witness Christie dated 5th November 1988, describes the appellant as "Horace o/c Oneil Buckle". The suggestion put to the witness Christie was, that the appellant was not known as Horace. One possible view of the evidence is, that the name "Oneil Buckle" may well have been given to the police officer, Det. Sgt. Dunkley by a source other than the witness Christie, rendering such information hearsay and inadmissible. In those circumstances an identification parade should properly have been held.

In all the circumstances, we were of the view that at the close of the case for the prosecution there was such a deficiency of material evidence that the learned trial judge should have acceded to the submission of counsel for the appellants and withdrawn the case from the jury, applying the **Turnbull** test. For the above reasons, we find it unnecessary to reveal our thoughts on the remaining grounds and came to our decision stated earlier.