[2010] JMCA Crim 37

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 130/2008

BEFORE: **THE HON. MRS JUSTICE HARRIS, J.A.**
THE HON. MR JUSTICE DUKHARAN, J.A.
THE HON. MRS JUSTICE MCINTOSH, J.A. (Ag)

GARFIELD STEWART v REGINA

Lord Anthony Gifford, Q.C., for the applicant

Miss Paula Llewellyn, Q.C., Director of Public Prosecutions and Loxley Ricketts for the Crown

15 February and 2 July 2010

HARRIS, J.A.

[1] The applicant Garfield Stewart was on 31 October 2008 convicted of the murder of Kemar Sergeant and sentenced to life imprisonment. It was ordered that he would not become eligible for parole before twenty-five years had elapsed. His application for leave to appeal against conviction and sentence was refused by a single judge and was renewed before this court.

The Prosecution's Case

[2] The main witness for the prosecution was Jason Stewart, the only eyewitness to the murder. He gave evidence that on Tuesday 12 September, 2006, at about 11:00 am, the deceased and himself went to an area called McDonald's Lane to collect some money from his cousin, Keneek. Keneek was not there when they arrived and so they went to a 'weed house' about three houses away in search of Keneek, he apparently having been told that this was where he would find Keneek. When they arrived at the 'weed house', he went into the yard while the deceased stood in the middle of the road. In the yard, he saw Keneek who was in the company of four other men, one of whom was the applicant. All of the men were smoking. The applicant, he said, had a gun in his right pocket. He said that the applicant who was wearing a white shirt and blue pants was seven to eight feet away. He stated that he was able to see the applicant's entire body, that is, his face and foot. It was also his evidence that having spent about 20-25 minutes at the weed house, he was able to observe the applicant's face for 20 minutes. Shortly after he arrived, another man whom he referred to as 'Black star' joined the group of men.

[3] He went on to state that the men held him and the deceased by their shirts and took them to the back of an abandoned house. Both he and the deceased were made to lie face down and one of the men started to beat the deceased. Keneek then tied him up while the other men tied up the deceased.

He said the applicant gave the gun to Keneek and as he did so, he came closer to him, Stewart. One of the other men then took the gun and said, "A kill wi fi kill dem over here so". There was an objection to that being done and so he and the deceased were both left under an iron drum. The witness said he could not remember how long the events at the abandoned house lasted but said that he was able to see the applicant for about 15 minutes and was able to see from his face to his feet from a distance of eight feet.

[4] The witness said he fell asleep. Some time later when he awoke, the deceased, using a piece of broken bottle which the deceased had found, managed to cut both of them loose. Both of them jumped over a wall and made their escape from the premises by running across several communities until they eventually got to Little Kew Road where they saw the applicant and another man who had a 'hoody' over his head, in a yard. The applicant came out of the yard and said, "Whey unnoo a go"? The witness said that at that point the applicant was about eight feet away and he was able to see his face for about ten seconds. The applicant pointed the gun at the deceased's head and then fired killing the deceased who fell in front of him, Stewart. He stepped over the deceased and began running. He was chased and fired at by the man in the 'hoody' who by that time had taken the applicant's gun. He was shot in his right hand and left leg and was hospitalised as a result of these injuries. Later on that day he gave a statement to the police.

[5] During cross-examination, the witness admitted that he had been smoking marijuana on the morning of the murder and had been smoking it for four years. He stated however, that this did not affect his ability to see the applicant.

[6] On 26 September 2006, he was discharged from the hospital. On that day, he was in the front passenger seat of a taxi and his uncle was at the back and they were traveling from the hospital when he saw the applicant at the intersection of Montgomery Road and Trueman Avenue, which was about three houses away from his (Stewart's) house. The applicant was on the other side of the road. He said that the taxi was moving slowly but it did not come to a complete stop. He pointed out the applicant to his uncle and after they arrived home his uncle called the police. On 4 October 2006, he identified the applicant at an identification parade.

[7] Mr Dennis Bleachington, the witness' uncle also gave evidence. It was consistent with the witness' account of seeing the applicant on the street on 26 September. He stated that after he had escorted the witness inside the house, he observed the applicant for about fifteen minutes as the applicant walked back and forth while talking on his cell phone. While he was watching the applicant, he called the police who arrived five minutes later and took the applicant into custody.

[8] Evidence was also given by two police officers. There was Detective Hemford Wade who was the investigating officer. He testified that on 26

September 2006, he visited the Half Way Tree Police Station where he saw the applicant. He arranged to have a question and answer session on 29 September 2006, and an identification parade was held on 4 October 2006. Detective Wade said that on the day of the identification parade, he told the applicant that he, the applicant, had been identified at the parade to which he responded, "Mi nuh know sah". When cautioned, the applicant said, "Mi neva kill nobody, sah".

[9] Sergeant Bent, who had conducted the identification parade, also gave evidence. He stated that when the witness Stewart was asked about his purpose for attending the parade, he responded that he was there to point out the man who had killed his friend.

The Defence

[10] The applicant gave an unsworn statement in which he denied knowing anything about the murder. He said that on the day on which he had been seen on the street by the witness, he had been doing some tiling work in Portmore and that after leaving Portmore he had gone to his lawyer's office to make some payment in respect of another matter unrelated to this case. He said that while he was in the lawyer's office, the police arrived and took him into custody.

[11] His employer gave evidence on his behalf. This evidence was essentially with respect to the applicant's good character. He said he had known the applicant for over twenty years, had found him to be quiet and "well

mannersable" and that he had not been in trouble with the law. He said that he considered the applicant to be a coward.

[12] The following grounds of appeal were filed:

> "1. The learned judge failed to give adequate directions to the jury on the particular dangers of mistaken identification in the instant case, where the identifying witness had claimed to have identified the (sic) appellant as the assailant (who was not previously known to him) by chance on the street.
>
> 2. The learned judge erred in directing the jury on the importance of fairness in the conduct of the identification parade, when in the circumstances of the case the identification parade was of little probative value as the witness had previously seen the appellant in the street.
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> 3. The learned judge erred in directing the jury that there had been two actions of identification, in terms which suggested that the identification at the parade would strengthen the identification in the street.
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> 4. In all the circumstances of the case, there is a real danger that an innocent man has been wrongly identified, and that a miscarriage of justice has thereby occurred."

[13] All four grounds touch and concern the central issue of identification. Not surprisingly therefore, they were argued simultaneously. Lord Gifford Q.C. conceded that there was no issue that while the applicant was on Montgomery Avenue, the witness Stewart had pointed at him as the man who had shot and

killed Kemar. The witness, he submitted, had not known the applicant before the date of the murder and the Crown's case had depended on the coincidental identification of the applicant on Montgomery Avenue. There was, he submitted, a real danger that the witness simply got it wrong and no warning or guidance was given by the learned trial judge that the identification parade was of limited probative value since the witness would merely have been identifying the man he saw in the street. Therefore, he argued, if the witness had made a mistake in the street identification, he was bound to make the same mistake on seeing the applicant again on the parade. It was his further submission that the witness had admitted that he had been smoking marijuana on the morning of the murder and, in these circumstances, including the unusual feature of the street identification made, as a safeguard against mistaken identification, it would have been necessary for the judge to have given the most careful directions.

[14] He also contended that the learned trial judge gave a lengthy direction on the question of the identification parade which would have left the jury with the impression that the fairness of the identification parade enhanced the accuracy of the witness' recollection. The clear thrust of the summing up, he argued, was that a fairly held identification parade would enhance the reliability and accuracy of the identification and reduce the risk of an erroneous identification. However, the learned trial judge failed to have adverted her mind to the fact that a street identification is likely to be less reliable than an identification through a parade,

in that, on a parade with eight other persons of similar height and build, an innocent accused is protected because he will most likely not be pointed out, he argued.

[15] The lengthy directions about the fairness of the parade, he submitted, added a false strength to the prosecution's case and failed to emphasize that the witness could be mistaken in his sighting of the witness on the street. In support of these submissions, he relied on **Scott and Walters v R** (1989) 37 WIR 330, **Keane v R** (1977) Crim App Rep. 247 and **Fuller v The State** (1995) 52 WIR 424.

[16] Mr Ricketts for the Crown submitted that the circumstances under which the applicant was sighted presented no additional difficulty which required any direction over and above the standard specified in the **Turnbull** directions. He argued that the identification of the applicant on the street was a spontaneous recognition in that it was a completely unaided identification. This would have represented a far greater depth/breadth of circumstances for recognition to take place than would an identification parade, he argued. In support of this submission, he cited the case of **Haughton and Ricketts v R** (1982) 19 JLR 116. In the present circumstances, an identification parade, he argued, was useful because the identification evidence of the witness Jason Stewart, who was present during the murder was important, and not that of his uncle. To support this submission, he relied on **David Ebanks v R** [2006] UKPC 6 delivered 16

February 2006. He further submitted that there was no special formula to be employed in giving the T**urnbull** directions and that the learned trial judge had given adequate **Turnbull** directions and had analysed the evidence, including the inconsistencies. He argued that the jury would have been left in no doubt as to how they were to treat the evidence of the identification parade as the learned judge had pointed out that the first instance of identification would have been when the witness had identified the applicant to his uncle and that the identification parade was the official identification to the police.

[17] The prosecution's case was wholly dependent on the correctness of the identification of the applicant by the witness Stewart. It is not in dispute that adequate **Turnbull** directions were given. Indeed, it was conceded by Lord Gifford that the learned trial judge had given the standard **Turnbull** direction and had examined the evidence of Jason Stewart highlighting the circumstances surrounding the opportunities which he had to see the man who had committed the murder. The burden of the applicant's complaint, however, is concerned with the directions given by the learned trial judge, in respect of the identification parade, in light of the fact that there had been a prior street identification.

[18] In **Garnet Edwards v The Queen** Privy Council Appeal No. 29/2005 delivered 25 April 2006, the sole eyewitness to a murder had identified the appellant in an area in close proximity to the scene of the murder. He drove

around until he saw a police vehicle, told the police what he had observed and pointed out the man who was still standing in the same place. He then left and some time later at the request of the police, he went to the police station and identified the same man who was sitting on a bench handcuffed in the guard room. No identification parade was held. Lord Carswell who delivered the opinion of the Board had this to say on the issue of the absence of the identification parade:

> "If one were held in these circumstances, the defence would criticize an identification made at it on the ground that the identity of the suspect seen recently would be imprinted on the mind of the identifier, who would not truly be identifying by recollection the person whom he saw at (sic) time when the crime was committed. There is substance in this view, which the judge adopted and retailed in fairly robust terms to the jury."

[19] His Lordship's dicta would seem to support the view that there may be instances where the holding of an identification parade is of minimal value because there has been a sighting of the accused subsequent to the commission of the offence, this being so because of the possibility that the witness would be identifying the person he saw on the subsequent sighting and not the person who committed the offence. It is significant however, that his Lordship went on to state that since no identification parade had been held, in accordance with Lord Bingham of Cornhill's direction in **R v Forbes** [2001] 1 AC 473, the jury can and normally should be told that:

> "An identification parade enables a suspect to put the reliability of an eye-witness's identification to the test, that the suspect has lost the benefit of that safe-guard and that the jury should take account of that fact in its assessment of the whole case, giving it such weight as it thinks fit."

Lord Bingham's direction indicates that an identification parade always serves the purpose of testing the reliability of an eyewitness. It provides a safeguard for the suspect because it puts the witness to the test of identifying the person he said he saw committing the offence from among a group of persons with similar physical features. As an added advantage, it carries with it the possibility that the witness may not point out the suspect.

[20] Of course, the purpose of an identification parade may differ according to the circumstances of a particular case, for instance, where the recognition is disputed as in **Goldson & McGlashan v R** (2000) 56 WIR 444. In that case there was a dispute as to whether the appellants were known to the sole witness and whether she had correctly identified them as the persons who committed the offence of murder for which they were charged. No identification parade was held. Their Lordships found that there would have been no necessity for the trial judge to have given directions on the absence of an identification parade and the dangers of dock identification.

[21] However, we do not think it is correct to say that in the circumstances of the present case, an identification parade would be of little or no probative value. In fact, the Board in **Goldson & McGlashan** said:

> "…if she [the witness] had picked them out, the prosecution case would have been strengthened, although the judge would have had to direct the jury that the evidence went only to support her claim that she knew them and did not in any way confirm her identification of the gunmen."

[22] It seems to us that in the particular circumstances of this case where the applicant was not known to the witness prior to the incident, the witness's street identification of the suspect was not to the police but to his uncle and the identification having been made in circumstances where the applicant was identified without comparison with persons of similar physical features, an identification parade was necessary and would have some probative value. Accordingly, the applicant's submission that the identification parade was of no probative value seems, to us, to be inconsistent with the contention that "on a parade with eight others of similar height and build, an innocent accused is protected because he will most likely not be pointed out". In **Pipersburgh and Robateau v R** PC Appeal No. 96 of 2006 delivered 21 February 2008, Lord Rodger, in delivering the judgment of the Board, said at paragraph 6:

> "…, where the identification of the perpetrators is plainly going to be a critical issue at any trial, the balance of advantage will almost always lie with holding an identification parade."

In that case, the appellants were convicted of murder but no identification parade had been held because the prosecution had been of the view that since the pictures of the appellants had been published, there was a risk that the witnesses would identify the appellants from the pictures. Although the facts are

somewhat different from this case, we think the principle stated by Lord Rodger is nonetheless applicable.

[23] We are of the view that where there is a sighting of a suspect subsequent to the commission of an offence but before an identification parade any parade held subsequently could serve some useful purpose. However, the value to be placed on the identification parade would depend on the circumstances of the identification. The circumstances in **Garnet Edwards** are somewhat peculiar, in that although there was a subsequent sighting on the street there was a confrontation a short while after the sighting. In view of the confrontation, it is obvious that an identification parade would not have had any probative value and would no doubt have been otiose. In the present case, the identification parade served the purpose of testing the reliability of the witness and to that extent would have strengthened the prosecution's case.

[24] The central issue in the instant case was the identification of the applicant. The learned trial judge was therefore correct in directing the jury on that issue. She reminded them that the witness had seen the applicant fourteen days after the incident. She described this as "Jason's first identification of him" to his uncle and then stated that the identification parade would have been the next time on which an identification had taken place. At page 333, she said:

> "Mr. Jason Stewart identified Mr. Garfield Stewart to his uncle that day and as a result of that the police came and took him away. So that would have been Jason's first identification of him and that was to his

> uncle and as a result of that the police took up Mr. Stewart, take him to the lock-up and on the 4th of October an identification parade was held.
>
> That would have been the next time now that Mr. Jason Stewart is identifying this man and he officially identified him to the police, but you must bear in mind that he had already identified him to the uncle on the 21st, but this is the official identification to the police on the 26th September. He first identified him to his uncle."

From the outset, her focus was on the issue of the identification of the applicant, first on the street and subsequently at the identification parade. She then recounted the evidence of the policeman who had conducted the parade, particularly what had happened on the day of the parade. Thereafter, she gave directions on the purpose of the parade and then on the fairness of the parade. At page 338, she said:

> "…in cases of disputed identification an ID parade ought to be held. The normal function of such a parade is to test the accuracy of the recollection of the person who the witness says he saw committed (sic) the offence. An ID parade is held to put the reliability of the eye witness,s recollection to the test."

She briefly told the jury about the importance of the identification parade being fair. She directed the jury on the conditions which should exist for an identification parade to be regarded as fair and then examined the issue of the question and answer being held prior to the identification parade, no doubt as this may have been relevant to the issue of fairness. She then continued by saying:

> "…so what is before you, is what you have been told about the parade and defence has said to you they are not challenging the fairness and as I said to you, at any rate, the ID parade was the second time the man was being pointed out. But it is a matter for you because I have to put the facts and leave it in your hands to assess the fairness and value of identification."

[25] Her treatment of the issue of the fairness of the parade was extensive. However, this would not have detracted from the main issue of the correctness of the identification of the applicant. The fairness of the parade would go to show whether the parade had been tainted and as such could have operated prejudicially to the applicant. In our judgment, the fact that the learned trial judge did not give a warning to the jury about the identification parade is not a factor which would render the summation flawed. What is important is that having warned them of the dangers of convicting on the evidence of visual identification of the witness, she left for their consideration all the opportunities which the witness could have had to view the applicant, namely the distances between them, the length of time he had for viewing and reminded them that this was done during daylight. She did not fail to take into account the discrepancies and inconsistencies arising. It may be that the emphasis on the fairness of the parade, particularly when it was not in issue, could have led the jury into focusing on the identification parade but as we have already indicated, the identification parade was of some probative value in that it tested the reliability of the witness' identification. Where a witness, acting within the constraints, rules and

conditions of an identification parade, is able to point out an accused, this would bolster the prosecution's case that the person so identified was the person who had committed the offence. In so doing, it reduces the risk of an erroneous identification.

[26] It is true that if the street identification were a mistake, there was a possibility that this mistake could have been perpetuated at the identification parade, but it seems to us that this is a mere speculative possibility. In our view, it would not have been necessary for the learned trial judge to have specifically directed the jury to that possibility. It is to be noted that, at the identification parade, when the witness was asked if he knew the reason for his attendance there, he responded that he had come to point out the person who had killed his friend. The paramount consideration in identification cases, as demonstrated by the authorities, is the possibility of mistaken identification even where the witness seems honest in his assertion that the accused is the perpetrator of the crime. The trial judge's duty therefore would be to direct the jury's attention to consider whether the witness could have been mistaken. This is done with the object of ensuring that the jury is satisfied that the dictates of **R v Turnbull** (1977) QB 224 are observed and that the witness is not mistaken.

[27] We do not understand the authorities to have established a principle that where there is an issue concerning visual identification, a trial judge who has given the appropriate **Turnbull** warning and assisted the jury in analyzing the

identification evidence, is obliged to further warn the jury to pay special attention to any subsequent sighting for them to determine whether it was a mistaken identification. We can discern no such principle from the authorities to which Lord Gifford referred. On the contrary, those authorities cited by him reinforce the incontrovertible principle that in a case where a conviction solely or substantially depends on identification evidence, the jury ought to be told of the need to be cautious in their approach to the evidence and the reason therefor. Interestingly, Lord Gifford contended that if there had been no identification parade, the jury would have had to consider the conditions for observing the assailant and the warning on the dangers of mistake. Surely, if there was no identification parade, this would militate against the safeguards afforded by an identification parade and further it could expose the applicant to the danger of being wrongly identified.

[28] No objection has been taken against the learned trial judge's direction on the **Turnbull** principle. Additionally, there is also no criticism of her application of the evidence relating to the witness' opportunity to see the perpetrator and of her explanation of the inconsistencies and discrepancies which arose in the witness' evidence. The directions given to the jury were adequately put for them to consider the fundamental issue, that is, whether the witness was mistaken. Further, there was nothing on the evidence to indicate that there were any particular facts about the identification on the street that required that the judge give any further direction in respect thereof. It must be borne in mind that the

jury is presumed to employ common sense in their approach to the verdict. In all the circumstances, we do not think any harm was done by the learned trial judge telling the jury that the identification parade was a second identification in testing the reliability of the witness' evidence. In our view, the directions were sufficient to advert the jury's attention to the question as to whether the witness was mistaken in the identification.

[29] The learned trial judge gave ample directions to the jury and given the nature of the evidence, we can see no proper ground for successfully challenging the conviction.

[30] The application for leave to appeal is refused. The conviction and sentence are affirmed. The sentence should commence on 31 January 2009.