JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 246 OF 2002

BEFORE: **THE HON MR JUSTICE BINGHAM, J.A.**
THE HON MR JUSTICE WALKER, J.A.
THE HON MR JUSTICE HARRISON, J.A. (Ag.)

REGINA
v
ONIEL GRAHAM

Jack Hines for Appellant

Miss Grace Henry, Crown Counsel for Crown

June 1, 2, and December 20, 2004

HARRISON, J.A. (Ag.):

This appeal came before us by leave of the single judge.

On the 3rd day of December 2002, the appellant was convicted in the High Court Division of the Gun Court, St Ann's Bay, on an indictment charging him with two counts. On Count 1, he was charged for illegal possession of a firearm and he was sentenced to imprisonment of ten years at hard labour. On Count 2 that charged him with robbery with aggravation, he was sentenced to imprisonment of ten years at hard labour. The sentences were ordered to run concurrently.

The facts presented by the prosecution

The facts are that during the night of July 27, 2002 Mr Ezekiel Sterling left his home and went to a nearby shop to make a purchase. On his return and on reaching his gate he heard his dogs barking. He got suspicious, opened his knife and according to him, he "screechy down" by some flowers. On reaching close to his doorway, he saw two men sitting on a piece of board. They sprung up immediately on his approach. One man pointed a gun at him and said:

"don't move p... a yuh me come fah."

The man then grabbed him by his shirt collar and drew him into an open area of the premises where the witness said it was "brighter." He asked the men why they were going to kill him and a third man said:

"give me the money whey you have."

He immediately recognized the voice of that man as someone who he knew as "Fidious" and who was the appellant. He observed that all three men were wearing masks. Sterling said he took out his wallet that contained $4,500.00 and gave it to the appellant who thereafter searched his other pants pockets. After he completed the search he said:

"shot the p... hole."

Sterling begged for his life and the man with the gun placed it on his forehead. Sterling said he held on to it and gently moved it away from his forehead.

Sterling said further, that the appellant who was armed with a piece of iron pipe used it to "jook him in his belly." He held on to the pipe and discovered that a sharp weapon was inside of it. The appellant then knocked the top of the pipe and a knife blade about four inches in length was dislodged. Sterling said he held on to the pipe with "tension" and a piece of merino that was tied around the appellant's face dropped off at one end. He said that he "sighted" and recognized the person as "Fidious", a man who he spoke to everyday. He said:

> "I see almost the whole of him face. Then me identify the somebody weh me know and me let go the iron. I was frighten to know say is that man weh me call Fidious, man weh me talk to everyday fe behave himself."

He further said that the appellant moved towards him in order to stab him and the man with the gun blocked the appellant and pushed him behind him. The gunman then put the gun on Sterling's forehead and told him that he would not kill him but if he talked about the incident he would return for him. They then left his premises. Sterling went to the police however that very night, and reported the incident.

Sterling said he was able to see his assailants although it was 10:00 o'clock at night. He described the lighting which came from his neighbour's house that was to the left of his house. There was also an electric light in a tree on his right. The men were about eight to ten feet away from the light that was shining from the left. He said the men had

tied up their faces like "Talaban". Two of them had used a mesh merino material that he said had "dropped down over their faces." He said that the appellant had a handkerchief tied over his head and a merino was tied below the handkerchief across his face.

The next morning, Sterling returned to the police station at St. Ann's Bay and saw the appellant in a room. On seeing him he said to the police:

> "Si the boy Fidious weh rob mi last night, him and two other with gun."

Detective Constable Rudyard Baker testified that on July 27, 2002 he saw Ezekiel Sterling at St Ann's Bay Police Station and he made a report to him. He went to Steer Town where Sterling lived and made observations at the scene of the robbery. On Sunday, July 28, 2002 he returned to Steer Town. He saw Sterling who made a further report to him. Sterling took Constable Baker to a house but the appellant was not found. The complainant and Constable Baker returned to the station and whilst there, Baker said he received a further report that caused him to return to Steer Town. The appellant was seen at the house that he had visited earlier. He had a bag in his hand and when Constable Baker asked him about the bag and what he was doing he said:

> "Me a pack some clothes fi split because mi hear se unuh a look fi mi."

Constable Baker said he told the appellant of the report he had received concerning the robbery. He was taken thereafter to the station. Whilst they were at the station, Constable Baker said that Sterling entered the C.I.B. room, and pointed at the appellant saying:

> "Si the bwoy Fidious de weh rob mi last night, him and two other man wid gun."

The appellant in response said:

> "Look how long you know mi, you know mi, you know mi from me a little boy."

He was then arrested and charged with the offences of robbery with aggravation and illegal possession of a firearm. Upon arrest, the appellant said:

> "Him nuh tell you a who a the other man them to?"

The defence

The defence was one of an alibi. The appellant said that he had been staying at Marvin Williams' house for more than a week before July 27. He said that Marvin's house was about two houses away from Mr Sterling's house and that on the night of the robbery he had reached home at about 9:00 p.m. Both Marvin and himself watched a movie and then retired to bed. He did not leave there until the following morning between 7: 30 and 8: 00 a.m. when he went to the river. He denied that he and two other men had robbed Sterling. Under cross-examination he

further denied that the complainant had seen him at the station and said to the police:

> "Si the boy Fidious we rob mi last night, him and two other with gun."

He said however, that he told Sterling:

> "Look how long you know me, you know me from be a baby. You really telling such a wicked lie on mi."

Marvin Williams was called as a witness for the appellant. He had known the appellant for several years. He recalled a Sunday morning in July when he was at home. He saw a man called "Ghetto" and a police officer come through his gate. Ghetto was living a house away from where he lived. He also recalled that the appellant had slept at his house during the Saturday night. He said that both of them left his house and went around to the appellant's brother's house. They returned to his house, cooked and watched a movie. He said he was also present when the police took the appellant away. Williams said he had last seen the appellant at about 7:00 a.m. the morning when the police came to his house.

Grounds of Appeal

Before us, Mr Hines was granted leave to argue five supplemental grounds of appeal. The original grounds of appeal were abandoned.

Grounds 1 and 2

Grounds 1 and 2 were argued together. The complaint in respect of ground 1 is that the learned trial judge fell into error since she failed to take into account the fact that the complainant did not inform the police both orally and in writing that he had recognized the voice of the appellant on the night of the incident. The second ground complained that the failure to state that the complainant recognized the appellant's voice at the first opportunity would cast doubt on the veracity and/or quality of the identification. It was contended that the learned trial judge should have taken this into account since she had stated that "it was the visual identification that had buttressed the voice identification."

It was not disputed that the complainant had failed to inform the police in his oral interview and, more significantly, when he gave his written statement that he had recognized the voice of the appellant on the night of the incident. Mr Hines referred us to ***R v Weir and Michael Kinton*** SCCA 46 and 47 of 1989 (unreported) delivered on September 24 1990, and placed great reliance on this case. He submitted that the facts with regard to the identification evidence are akin to the facts in the instant case.

In ***Weir's*** case, the evidence showed that the victim of a robbery had known the appellant *Weir* as well as his parents, but he did not bring these facts to the attention of the police either when they visited him on

the same day of the robbery and took his first report at the hospital or a week later when he gave them the written report. The Court held, inter alia, that this was a weakness that should have been considered by the trial judge.

We are of the view that even if the withholding of information regarding the voice of the appellant in the instant case could be said to amount to a weakness in the identification evidence, the failure of the learned trial judge to state specifically that this was so, did not, per se, invalidate the verdict to which she eventually came.

Grounds 3, 4, 5 and 6

These grounds can conveniently be dealt with together. Ground 3 complained that the learned trial judge had either misinterpreted or been confused by the evidence as to the length of time that the witness said he had viewed the face of the appellant. The witness actually stated that it was for half of a second to a second that he got to look at the appellant. The fourth ground complained that the words "kill him" as stated by the learned trial judge to be the words used by the appellant on the occasion of the recognition of the appellant's voice were not a sufficient number of words to make recognition of the voice safe on which to act. Mr Hines referred us to ***R v Taylor, Barrett, Hyde and Peterkin*** (1993) 30 JLR, 107. Ground 5 stated that the identification evidence was weak and the identification itself was difficult in that the visual identification evidence

was a mere fleeting glance of a second or half a second and oral evidence of a mere two words. Ground 6 contended that the modern view is that there is the need for a ***Turnbulll*** type warning in voice identification cases which warning was not given in this case.

The relevant principles in relation to the way in which the Court should approach cases depending wholly or mainly on disputed visual identification are to be found in ***R v Turnbull and others*** [1967] 63 Cr. App. R. 132. The principles have been applied and considered in many subsequent cases. We do not feel it necessary however, to cite the whole of the well-known passage from the judgment of *Lord Chief Justice Widgery,* which embodies those principles, of which we have of course reminded ourselves and to which passing reference has been made by Mr Hines in the course of his submissions. Particularly relevant to the grounds of appeal, however, is the following passage from page 138 of the judgment. The Lord Chief Justice, having dealt, in terms, now very familiar, with the need for caution and the dangers and so on and the way in which juries should be directed and the matters to which they should be directed to have regard, said this:

> "In our judgment when the quality" (that is to say the quality of their identification evidence) "is good as for example when the identification is made after a long period of observation, or in satisfactory conditions by a relative, a neighbour, a close friend, a workmate and the like, the jury can safely be left to assess the value of the identifying evidence even though there is no

> other evidence to support it: provided always, however, that an adequate warning has been given about the special need for caution. ... 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 a longer observation made in difficult conditions, the situation was 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"."

In ***R v Junior Reid et al*** Privy Council Appeals Nos: 14, 15 and 16 of 1988, and 7 of 1989, delivered July 27 1989, at page 8, their Lordships referred to the judgment of Lord Widgery, C.J., in ***R v Turnbull*** (1977) 1 Q.B. 224 and said:

> "Their Lordships have no doubt that the direction of Lord Widgery, C.J. that '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 judge should withdraw the case from the jury and direct an acquittal, unless there is other evidence which goes to support the correctness of the identification', applies with full force and effect in criminal proceedings in Jamaica."

The crucial question in the instant case is whether the evidence was of such a quality that the learned trial judge could safely assess its value bearing in mind special need for caution. We therefore turn to consider the relevant evidence with respect to the quality of the identification. What did it amount to?

Mr Hines submitted that the quality of the evidence on visual identification in the instant case was poor and that it amounted to a fleeting glance situation.

At page 147 of the transcript, the learned trial judge in directing the jury on visual identification said this:

> "... I hold the view not only did he recognized (sic) the voice having known him from he was a youngster and having spoken to him that he also then saw the face and this would have assisted him in recognizing the accused. If it were just a half a second, a fleeting glance, one would have to say it was not good enough but I find that this evidence is good enough where he saw him from the moment it fell off because he is right and he showed the length of the piece of pipe iron and they were in near distance, the close proximity to each other and they are struggling for this piece of pipe iron when this thing fell and when he let go off the pipe iron. He was so frightened he let go of the pipe iron and then held up his hand to stab him and it was when the man with the gun stopped him."

And at page 148, the learned trial judge continued:

> "... He said that since June, the accused had moved to some house close to him. He saw him there in the morning, he saw him there in the evening, so him check that him live there. Him say him don't work, him never si him work and he had seen him the Wednesday before. So there is no doubt that the complainant and the accused are well known to each other. I accept the evidence that there were bright lights and complainant saw the accused face and recognized him. I said that nothing blocked the complainant's view, at least one and a half second (sic) and that it was sufficient for the complainant to recognize the accused. I

> accept the evidence to be cogent and the complainant to be an honest and credible witness. I find that he is making no mistake when he say the accused man is the man he saw on the 27th of June 2002. ..."

To summarize, Mr Sterling said the appellant was somebody well known to him both by appearance and by his voice. He had known him from 1982, and he knew that he was called "Fidious." He said that the appellant came from Dunn's River, Bull Point and had lived a few chains away from where he lived at the time. He also knew that the appellant lived with his parents. His mother was called "Mother Faithy" and his stepfather whose name is Long is his cousin. The last time that he had seen the appellant was between April and May 2001. He had seen him whilst he was doing work for the Urban Development Corporation (U.D.C.) in Steer Town. He called to the appellant and spoke to him. Mr Sterling then moved from Bull Point and the appellant had also moved into a house next door to where he lived. A man called Ned had occupied this house.

The evidence further revealed that all of the men who were involved in the robbery were wearing masks. The appellant had on what appeared to be two pieces of merino tied around his face. There was a struggle between the appellant and complainant and it was not until one end of the cloth dropped that he was able to see who it was. He said, that he had seen "almost the whole of him face" and by this he meant

that it was only one side of his jaw that he had not seen. The witness also said that he had seen "all the way cross way of his face". The record reveals the following dialogue at page 33:

> "Her Ladyship: You are pointing to the side next to your eye.
>
> Answer: Yes m'lady.
>
> Question: And can you say for how long you were seeing that part of his face, the cross way of his face?
>
> Answer: By time I could identify him, him grab the thing and come back half a second, it was half a second me get fi look pon him, call it a second me get fi look pon him, call it a second and me see the gunman step in front."

Under cross-examination at pages 38 and 39 he was asked the following:

> "Question: so, when the side drop off, right, what part of his face you saw?
>
> Answer: I saw the three-quarter of his face, is only just like how you see me put me hands like so (witness indicates).
>
> Question: You cover of (sic) your eye?
>
> Answer: Piece of cloth tie.
>
> Question: I am asking if you could see one of the two eyes?
>
> Answer: I see two of it. It drop off and heng down round yah soh like this (witness demonstrates). If him never insist fi kill mi, me wouldn't see him face, a through him insist fi kill me."

The learned trial judge in referring to Mr Sterling, described him as an honest and credible witness. She found that he was making no mistake when he said the accused man is the man he saw on June 27, 2002. This witness seemed to have made a good impression on the learned judge. The learned trial judge referred to the time the witness said he had seen a part of the appellant's face and said that if it were just a half a second, it would amount to a fleeting glance, and that one would have to say it was not good enough. She accepted the evidence that there were bright lights and that the complainant saw the appellant's face and recognized him. She also accepted the evidence that nothing blocked the complainant's view, for at least one and a half seconds and it was sufficient time for the complainant to recognize the accused.

The issue to be determined here is whether the learned trial judge having correctly stated the principles failed to apply them. The witness' evidence as to how long he had the appellant under observation is a matter of grave concern. What is tolerably clear on the witness' evidence is that he did not have the appellant under observation for any length of time. He had only seen a part of the appellant's face. Although he said he could see his two eyes when the piece of cloth covering his face fell to one side, we are of the view that a one-half of a second or even a second was too brief a period of time for the complainant to have made a proper recognition. We are further of the view that the alleged

recognition was made under difficult and stressful conditions and this would have affected the quality of the identification evidence. It is therefore difficult to avoid the conclusion that the witness had no more than a fleeting glance of the person. Accordingly, we conclude that the quality of the visual identification evidence was not such that the learned trial judge could safely be left to assess its value. We therefore think that there is merit in these grounds of appeal.

We now turn our attention to the issue of voice identification. There is no legislation in Jamaica governing the admissibility of voice identification evidence hence the common law principles apply. In the English Court of Appeal case of ***R v Gummerson and Steadman*** [1998] Crim. L.R. 680, Lord Justice Clarke said:

> "As we see it, unless and until it is thought appropriate to draft a code for identification of this kind, the matter can properly be dealt with by the careful application of suitably adapted ***Turnbull*** guidelines."

In ***R v Devlin*** [1997] EWCA Crim. 739 delivered on March 14, 1997, the English Court of Appeal also approached the matter of voice identification by reference to the ***Turnbull*** guidelines. In that case the victim of a robbery said that he recognized one of two masked robbers when he heard him shout, "money, money." He also said that he had the same build and body shape as the appellant and he subsequently identified him on a visual identification parade. The Court approached

the initial evidence of recognition or identification as it would in a ***Turnbull*** case. It concluded that the hearing of the two words, "money, money" was the equivalent of a fleeting glance, that the identification was poor and that in all the circumstances the judge should have withdrawn the case from the jury.

In Jamaica there are a few cases that have dealt with voice identification: See ***R v Taylor, Barrett, Hyde and Peterkin*** (supra); ***R v Johnathan Smith*** SCCA 106/88 (unreported) delivered June 92, 1989; ***R v Clarence Osbourne*** SCCA 67/91 (unreported) delivered November 23, 1992; ***R v Derrick Beckford*** SCCA 88/01 (unreported) delivered March 20, 2003 and ***R v Christopher Doyley*** SCCA 79/01 (unreported) delivered February 18, 2004. In ***Taylor*** et al the prosecution case against two of the appellants depended mainly on the evidence of one D.J. She heard a voice which she recognized to be that of Barrett saying:

> "Shut up you mouth! Boy! You nuh hear me say fi stop the noise."

She heard the voice of Hyde say:

> "Pull the boy over deh so, Star! Draw him out a deh so."

Counsel for the appellants challenged the voice identification evidence given by the witness and argued that the identification was made in the most unsatisfactory circumstances and accordingly, was wholly unreliable. He further submitted that:

> "The quality of the identification evidence was so poor that the learned trial judge, following the guidelines in ***R v Turnbull*** 63 Cr. App. Rep. 132 and ***Reid v R*** [1989] 3 W.L.R. 771 (P.C.), ought to have withdrawn the case from the jury. It was akin to a 'fleeting glance' identification."

Gordon, J.A., at page 108 of the judgment said:

> "In order for the evidence of a witness that he recognized an accused person by his voice to be accepted as cogent there must, we think, be evidence of the degree of familiarity the witness has had with the accused and his voice and including the prior opportunities the witness have had to hear the voice of the accused. The occasion when recognition of the voice occurs, must be such that there were sufficient words used so as to make recognition of that voice safe on which to act. The correlation between knowledge of the accused's voice by the witness and the words spoken on the challenged occasion, affects cogency. The greater the knowledge of the accused the fewer the words needed for recognition. The less familiarity with the voice, the greater necessity there is for mere spoken words to render recognition possible and therefore safe on which to act."

The Court held that sufficient words were used by two of the applicants for the witness to have recognized their voices and in the circumstances refused to set aside the verdict of the jury.

In ***R v Clarence Osbourne*** SCCA 67/91 delivered November 23, 1992 evidence of voice identification was challenged in a manner somewhat similar to the challenge in ***Taylor's*** case. The court per Carey, P. (Ag.), said:

> "... Commonsense suggests that the possibility of mistakes and errors exists in the adduction of any direct evidence, in the sense of evidence of what a witness can perceive with one of his five senses. But that can hardly be a warrant for laying down that a ***Turnbull*** type warning is mandatory in every sort of situation where identification of some object capable of linking an accused to the crime or perhaps some attribute or feature of his speech capable of identifying him as a participant, forms part of the prosecution case."

In both ***Taylor*** and ***Osbourne***, the Court concluded that there is no need for the learned trial judge to give a ***Turnbull*** type warning where there is voice identification or recognition. We are of the view however, that where the prosecution case is based solely on voice identification or recognition of the accused, judges should be alert to the dangers of mistaken identification and withdraw cases from the jury where the identification is poor.

The issue to be determined therefore in the instant case is whether there were sufficient words spoken by the appellant, in order for the complainant to have recognized his voice. Mr Hines submitted that the words "kill him" (a mere two words) could be categorized as the equivalent of a fleeting glance. We have observed from the record however, that the actual words used by the appellant were, "shot the pussy hole." The question nevertheless, is, whether or not the words to which the learned trial judge directed her mind were sufficient words spoken for the witness to have recognized the voice. Mr Hines submitted

that the words in ***Taylor's*** case comprised more than one sentence and they were sufficient words on which it was safe to act. He submitted however, that the words used in the present case were insufficient for safety, however well known the appellant was to the complainant.

The learned trial judge in summing-up the case on voice identification said at page 147 lines 6-7:

> "... I hold the view not only did he recognized (sic) the voice, having known him from he was a youngster and having spoken to him that he also then saw the face and this would have assisted him in recognizing the accused."

At lines 18-22 of page 147, she continued:

> "... The complainant is saying in response to you, he heard the voice of the accused saying, "kill him". So that the sighting of the accused (sic) face would buttress the voice recognition."

The witness said that the appellant was a man that he spoke to everyday to "behave himself." He had seen him between April and May 2001 in Steer Town. The witness also said that he was doing work for UDC, when he spoke to the appellant. He had called the appellant and had spoken to him. This was the evidence adduced with respect to the voice recognition. The record reveals at page 144 that the learned trial judge had warned herself of the special need for caution with regard to visual identification. She had also recognized that this type of evidence was particularly vulnerable to error. Then at page 146 she said:

> "... I hold the view not only did he recognized (sic) the voice."

Again at page 147 lines 1-6, the learned trial judge said:

> "... I hold the view not only did he recognize the voice having known him from he was a youngster and having spoken to him that he also then saw the face and this would have assisted him in recognizing the accused."

At lines 18-22 of page 147 the learned trial judge continued:

> "... The complainant is saying in response to you, he heard the voice of the accused saying, "kill him". So that the sighting of the accused face would buttress the voice recognition."

We have carefully considered the submissions and have concluded that the voice recognition in the instant case really depended upon the two words "kill him" that were spoken whilst the person was wearing a mask. Such evidence is, in our judgment, incapable of being described as being other than unsafe to act upon and cannot be a basis for grounding a conviction. The scope for mistake, genuine mistake, is very obvious. We consider that the quality of the evidence both visually and by voice was poor and as such the learned trial judge ought to have discharged the appellant on these charges.

It therefore follows from these conclusions that this appeal must succeed. The conviction is quashed, the sentence set aside and a judgment and verdict of acquittal entered.