JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 151/97

BEFORE: **THE HON. MR. JUSTICE RATTRAY, P**
THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MR. JUSTICE PANTON, J.A. (AG.)

R. v. ELVIS MARTIN

Ian Wilkinson for Applicant

David Fraser & Dawn Eaton for Crown

22nd February & 6th July 1999

RATTRAY, P.

The applicant Elvis Martin was convicted of the offence of murder in relation to the death of one Terrence Runte.

The main witness for the prosecution was one Ladrick Scott, whom the trial judge in summing-up to the jury categorized as an accomplice and gave the required warning that it was dangerous to convict on his uncorroborated evidence, but if the jury believed he was speaking the truth they could nevertheless convict having warned themselves as directed.

The facts briefly stated are as follows: The deceased Terrence Runte o/c Terry, was an American visitor to Jamaica. The witness Ladrick Scott, a labourer resided at Hector's River, Portland and was on intimate terms with one Karen Harris, a United States Peace Corp worker who was working as a teacher at the Happy Grove High School in Hector's River.

On October 16, 1994 between 6.00 p.m. & 6.30 p.m. the witness Scott met Karen on the roadway at Hector's River and walked with her and one Maxine Danaloo, a Peace Corp worker from England to Hector's River. They met two other persons who had a motor car. All five went in the car to Rolls Royce Villa where they met the deceased Terrence Runte o/c Terry. Maxine, Terry and the witness travelled in Terry's red Suzuki Swift motor car to Winnifred's Guest House, but the place not being found lively enough they went on to the Roof Club in Port Antonio, where they danced. They eventually went back to Happy Grove High School where they dropped off Maxine and Karen. Terry was driving the car which stalled and shut off near to the school gate. A motor cycle coming from the St. Thomas direction collided with the car. The applicant was on the pillion seat of the motor cycle. The witness had known him for more than twenty (20) years. He had last seen him about three months before. The witness spoke to the applicant saying: "Who that, Cutty?" The applicant replied: "Yes, I am Elvis Martin." The other man on the bike, a tall man of about 6'2" came to the side of the car and boxed the witness. The applicant told the man to leave the witness alone because he knew him.

Terry said - "What's up, Lets go!" The applicant pointed a gun in Terry's direction and said "White boy shut up you mouth". The tall man held the witness in his back and said, "This car can finish the job for the rest of the night."

The two men commandeered Terry's car at gun point (the applicant being the person with the gun). The tall man drove the car with the witness, Terry and the applicant also travelling in the car. They drove to the Happy Grove playfield. The applicant left the witness with the tall man and walked away to a distance of about one chain. The applicant picked up a piece of bamboo and hit Terry in the back of his head three times. Terry fell on his face. With the tall man pointing a gun at him, the witness was ordered to

pull off a piece of rope about 10 - 15 feet long to which a goat was tethered nearby. Terry was lying on his face. They took a stone about 80-90 pounds in weight and under the orders of the tall man and the threat of the gun, the witness tied Terry's body to the stone. The back of Terry's head was smashed where the applicant had hit him with the bamboo. The applicant said they were going to throw Terry's body into the sea. All three of them including the applicant lifted the body and threw it into the sea. The witness did not let go and so he fell into the sea as well. The area of the sea in which the body was thrown is shark infested. The witness had previously dived for conch and deep below there is an under-water cave. The witness swam into the cave. He did not come out of the cave until about 45 minutes later. When he came out and went to the surface, the car was not there. The witness walked to Karen's house and slept there until about 7.00 o'clock the next morning when he left.

The trial judge told the jury that Scott was an accomplice and warned of the danger of convicting on his uncorroborated evidence. There is no complaint about his direction in this regard.

Mr. Wilkinson for the applicant has submitted that the trial judge failed to direct the jury adequately and fairly in respect of identification evidence with regard to: (a) the factors existing which would affect the quality or strength of the evidence on the issue of identification (b) the failure to direct that the true principle in assessing the identification evidence was not necessarily the credibility or honesty of the witness, but the accuracy or quality of the identification evidence (c) the failure to direct that an honest witness could nevertheless be a mistaken one. Further, he maintained that the learned trial judge erred in allowing the case to go to the jury as in addition to the weaknesses in the identification evidence the witness Scott had been irreparably discredited and was completely unreliable.

How did the learned trial judge deal with the issue of identification? He told the jury as follows: "In this case also the issue of identification arises and more particularly identification by recognition. I must warn you "that mistakes in recognition even of close friends and relatives are sometimes made." He continued -

> "Now Ladrick Scott testified that the incident happened between 1.00 a.m. and 2.00 a.m. in the morning of the 17th of October, 1994 on the playfield. Now the interior light of the car was on when the car door was opened; it was also bright because the moon was shining and there was floodlight at the gate, so you must be satisfied that the light there was sufficient for the witness to have seen what transpired on that night.
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> Now, if you know someone for a long time even though you can make mistake when it comes to recognizing the person, you are more likely to recognize the person whom you have known for a long time rather than someone you are seeing for the first time. In this case as I said, it is a matter of recognition because Ladrick Scott said he knows the accused man for many years, they grew up together in the same area."

He reminded the jury that the accused man Martin had told the tall man to leave the witness alone because he knew him. The trial judge stated:

> "Here is evidence Madam Foreman and your members if you accept it you may use it in the question of identification as to whether or not he recognized the accused man because the evidence here is that the accused man said he knew him."

Counsel for the applicant relies strongly on the evidence that when the motor bike came up with the applicant on the back of the bike the witness said "Who that, Cutty?" to which the applicant replied: "Yes, I am Elvis Martin." Counsel submits that the question asked shows some uncertainty in the recognition by the witness.

The evidence has to be assessed as a whole and the fact that the question was asked "Who that Cutty?" in the context of the whole evidence does not suggest the uncertainty for which learned Counsel for the applicant contends. Indeed, that question

was asked when the car had stalled and shut off, and immediately prior to the motorbike almost colliding with the car when the witness heard someone say "b.... c.... Cutty, the bike punctured."

On the 10th of November, 1994 Superintendent Miller of the police force went to Buff Bay with other policemen. The witness Scott was there and the applicant was brought in. On seeing Scott, he spoke in a loud voice saying "a what that you a do Ladrick?" Superintendent Miller's evidence is that Scott then said "A you lick the American tourist and him drop, an you lick him three more times." The trial judge told the jury: "Now you must examine what is said by the accused man Martin because that was a spontaneous comment coming from the accused man 'a wha that you a do Ladrick?' Since Scott had not said anything, how did he know that Ladrick was doing something to him? Now that is a matter for you". This piece of evidence could also establish that the applicant was a person known to the witness Ladrick Scott. Superintendent Miller's account is supported by Det. Sergeant Barrington Forrest, who was in charge of the investigation of the case. Learned Counsel for the applicant has relied on the well-known authorities of ***R. v. Turnbull*** [1977] 1 Q.B. 224 ***R. v. Palmer*** [1992] 40 W.I.R. 283 and ***R. v. Whylie*** [1977] 15 J.L.R. page 163. These cases establish the utmost care which a trial judge must take in directing on the issue of identification thus giving the jury full assistance as to how to approach that question. It does not appear to me that any of the principles established by those cases in relation to the identification evidence was breached by the trial judge in his summing-up. The conditions and the opportunity to make a proper identification were such that the jury on the directions given by the trial judge, would have been able to conclude that the witness' identification of the applicant who had been known to him for a very long time and who on the occasion was in his presence and under full view for a protracted period,

was an accurate one. This was no "fleeting glance" situation. It was a case of recognition.

As Lord Slynn of Hadley stated in delivering the judgment of their Lordships of the Judicial Committee of the Privy Council on the 27th of November, 1995 in Privy Council Appeal No. 8 of 1994 ***Karl Shand v. The Queen:***

> "The importance in identification cases of giving the ***Turnbull*** warning has been frequently stated and it clearly now applies to recognition as well as to pure identification cases. It is, however accepted that no precise form of words need be used as long as the essential elements of the warning are pointed out to the jury. The cases in which the warning can be entirely dispensed with must be wholly exceptional, even where credibility is the sole line of defence. In the latter type of case the judge should normally, and even in the exceptional case would be wise to, tell the jury in an appropriate form to consider whether they are satisfied that the witness was not mistaken in view of the danger of mistake referred to in ***Turnbull.***"

It cannot be said that the trial judge in this case failed to follow these principles. Lord Slynn of Hadley had earlier stated:

> "In cases where the defence challenges the credibility of the identifying witnesses as the principal or sole means of defence, there may be exceptional cases where a ***Turnbull*** direction is unnecessary or where it is sufficient to give it more briefly than in a case where the accuracy of identification is challenged. In ***Regina v. Bentley,*** reported in [1991] Crim. L.R. 620 Lord Lane C.J., having said that although in a fleeting glance identification a full ***Turnbull*** direction would be required, in a case where there was purported recognition of a familiar face which had taken place over a considerable period of time in perfectly good conditions of lighting and so on, continued:
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> > 'If the judge were to give that full ***Turnbull*** direction in the latter type case, the jury would rightly wonder whether he, the judge, has taken leave of his senses because most of the ***Turnbull*** direction would in those circumstances be quite unnecessary,'."

Having regard to the foregoing this ground of appeal cannot succeed.

On the ground of appeal that the no case submission should have been allowed, there was ample evidence before the jury of the commission of the offence and the implication of the applicant in its commission. ***(R. v. Galbraith*** [1981] 2 All E.R. 1060).

The defence given in an unsworn statement by the applicant was that he was not at the scene of the crime when it was committed. At the time alleged by the Crown that Terry Runte was killed he was then in Kingston. He saw his picture on T.V. and heard that he was wanted by the police and so he went to the Hunts Bay Police who took him into custody. The jury clearly rejected his defence.

Although Runte's body was not recovered there was ample evidence from which the jury could have properly concluded that he had been murdered by the applicant. On the instructions of the police divers searched the area at "Shark's Rock" where the body had been thrown. The area is 50 feet deep. They recovered a merino shirt and a jeans pants to the loop of which there was a watch attached. The clothes were attached to a rock by rope. They saw sharks in the sea in the vicinity of where the clothes were found.

Evidence was given by his girlfriend Jane Pessin with whom he lived in Kentucky, U.S.A. that he had left for Jamaica on October 15, 1994 to write a romantic comedy. He was a screen writer. He spoke to her from Jamaica on the 17th October and he was scheduled to return on the 22nd October. She went to the airport to meet him but he did not arrive.

After telephoning Jamaica and receiving certain information she spoke to the Jamaican police. Consequently, she came to Jamaica and attended at the Port Antonio Police Station on the 29th October when she was shown the rock with the T-shirt and the pair of jeans tied to it, his belt and his watch. She identified them as belonging to Terry Runte.

In view of the strength of the evidence presented by the prosecution, and the careful summation of the issues by the learned trial judge in our view there is no reason to disturb the conviction.

The application is therefore refused.