JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS:196 & 197/2002

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

R. v. RONALD MASTERS
DAVID PARKER

Leroy Equiano for the Applicants
Tricia Hutchinson for the Crown

June 28 ,29 and December 20, 2004

SMITH, J.A:

On the 14th October, 2002, the applicants were convicted in the Home Circuit Court in Kingston before Mrs. M. McIntosh J, and a jury of the murder of Patrick Lewis. Their applications for leave to appeal were refused by a judge in Chambers. They have now renewed their applications before the Court. The case for the prosecution depended on the evidence of the sole eyewitness Ainsley Terrelonge, a mechanic.

Terrelonge otherwise called "Jolly Good Man" gave evidence that on the 31st July, 2001 about 9:30 p.m. he was sitting on a wall by the Public Works building on the Bull Bay main road. He was waiting for his friend the deceased, Patrick Lewis also known as "Pops" and "Rapper". While sitting on the wall he heard someone say "Wha me and yuh and

de dread have?" He recognized the voice to be that of Patrick. He jumped off the wall and crept like a quadruped alongside the wall in the direction of the voice. When he got to the end of the wall he lay on his belly. He testified that in that position he saw both applicants confronting the deceased. The applicant Masters whom he knew before as "Musky" had a gun in hand. The applicant Parker whom he knew before as "Bungles" had a cutlass-like knife. He said Bungles took hold of Pops (the deceased) and told him "long time yu and di dread fi dead yu know sey a should a kill uno long time". Shortly thereafter he heard two explosions. He ran in the direction from which he came. According to Mr. Terrelonge this incident took place on premises situated off the St. Thomas main road belonging to the National Water Commission ("NWC"). These premises are bordered on one side by a Gypsum Factory and on the other by property owned by the Public Works Department ("PWD") . There is a roadway to the NWC premises. The shooting took place along this roadway at the entrance to the pumphouse. The area he said was well lit by electric lights which were in the vicinity. One was on the PWD compound, one a street light on the main road and one on the NWC premises. He testified that the light that was on the PWD compound was about 25ft from where "Pops" was shot. Those on the Gypsum Factory and on the main road were about 25ft and 30 ft away respectively. He was at the end of the PWD wall which was about 25ft from where Pops

was shot and killed. He testified that he knew Musty (the applicant Masters) for about 20 years before the killing. He knew where he lived and used to see him every day. He told the court that on the fateful night he saw the applicant Master's face for about 10 minutes. He gave the Court a description of the clothes that Masters wore that night.

He knew the applicant Parker for about eight years before. He also knew where he lived and worked and used to see him every day. He described the clothes Parker had on that night. In particular he said Parker had on a shirt with a hood which was drawn over his head. However, his face was not covered and he saw his face for about ten minutes.

Mr. Terrelonge testified that he saw both applicants after the incident but before he made a report to the police. He made the report about two days after he saw them. When asked why he did not report the matter immediately he replied "I just have to go home and meditate what is the best solution, what problem I have to get into. I just have to think about it. I was just thinking about." On the 21st August 2001, he attended identification parades and identified both applicants. He identified photographs of the scene and of the body of the deceased at the locus in quo.

On the 16th August 2001, Dr. Prasad Kadiyana, a consultant, pathologist, conducted a post mortem examination of the body of the

deceased. The body was identified by Sarah Lewis the mother of the deceased. The doctor testified that he saw three gunshot wounds on the body. The first was an entrance wound on the left side of the face below the eye. The bullet exited on the right side of the face over the right ear. There was no gun powder deposition. The second was on the left lower occipital region of the head without gun powder deposition. The bullet exited at the right temporo occipital region of the head. Wound number three was an entrance gunshot wound on the top of the left shoulder also without powder deposition. On dissection a slightly deformed half copper jacketed bullet was removed from the muscle section of the shoulder joint. In the doctor's opinion the cause of death was the gunshot wound to the head.

On the 11th of August, 2001, Constable McKoy saw the applicant Masters at a place called Jamaica Gates at the round about in Harbour View. He informed Masters that he was wanted for questioning in respect of a murder committed in the Harbour View area. He took Masters into custody. Two days later Constable McKoy also took the applicant Parker into custody in respect of the said murder.

Detective Corporal Patrick Muir, then of the Elletson Road Police Station testified that on August 1, 2001 about 6:00 a.m. he went to a location along the St. Thomas main road which is the same as the Harbour View main road or the Bull Bay main road. There he saw the

dead body of a man. The body was on the driveway leading to the NWC sewage plant. On his instructions Constable Marnar took photographs of the body and the surrounding area. Onlookers identified the body as that of Patrick Lewis. Following investigation warrants were issued for the arrest of the applicants in the names of "Musty Masters" and "Bungles" or "Maya". On the 11th August 2001, Masters was taken to the Elletson Road Police Station. Detective Muir said he told Masters that he was a suspect in the murder of Patrick Lewis. Masters replied: " Mi hear bout it, mi nuh kill no man".

On the 13th August "Bungles" was taken to the police station. He was also told that he was a suspect in the murder. His reply was: "Dis a frame ting officer". They were placed in custody to face identification parade because Mr. Terrelonge had referred to them by their aliases.

On the 17th August about 2:30 p.m. Detective Muir visited the crime scene with Mr. Terrelonge. There Mr. Terrelonge he said pointed out certain things to him. On the 20th August at about 9:30 p.m. Detective Muir returned to the scene. He testified that the spot where he had seen the body of the deceased was illuminated by fluorescent lights in three locations – PWD compound, the NWC sewage plant and the main road. He subsequently arrested the applicants for the murder of Patrick Lewis. When cautioned Masters said "mi nuh kill nuh man" and Parker said "mi nuh know nothing".

The Defence of Ronald Masters

Masters gave an unsworn statement from the dock and called two witnesses – one in support of his alibi defence. The gist of the applicant's statement is that at the material time of the murder for which he was charged, he was living with his mother, because his house in Harbour View was destroyed by fire. He said he did not know anything about the murder. Mrs. Veronica Masters the mother of the applicant Masters, gave her address as 2B Cunningham Avenue, Kingston 6. She told the jury that in June 2001 her son came to live with her because his house in Harbour View was burnt down. She testified that on the 31st of July 2001 after her son had performed certain chores they watched cable television. She said that they were so engaged from about 6:00 p.m. to minutes after 10:00 p.m. when her son retired to his room. Her son did not leave her house that night: "because I was alone at home and my legs were giving me problem so he was there to help me". The following day her son, a cousin and herself went to Bath, St. Thomas.

The second witness was Mr. Frank Hines, a supervisor at Crimex Security Company and an ex-corporal of the Jamaica Constabulary Force. On the 10th October 2002, he told the judge and jury that on the 9th October, 2002 (that is the day before) he went to the entrance to the NWC's property on St. Thomas Road. He made two visits on the same day -at about 12:30 p.m. and 9:35 p.m. Mr. Williams, Counsel for the

applicant, Masters, showed the witness photographs of the scene (exhibits 1 and 2) and sought to elicit from the witness details as to where the deceased body was in relation to the lighting in the area. The objection of counsel for the crown to these questions was upheld by the learned judge. Attempts by Mr. Equiano, counsel for the applicant Parker, to have the witness describe the locus as he saw it on the 9th October, 2002 were also successfully challenged by the Crown.

The Defence of David Parker

The applicant Parker gave sworn evidence and called one witness. His defence was also an alibi. Parker testified that he knew the NWC compound on the St. Thomas main road. He had walked past it on occasions but had never been there. The Public Works Department (PWD) premises are beside the NWC compound. There is a bus stop in front of the PWD premises. He said that there were no street lights in the area. There were lights on the Gypsum Factory and PWD premises. The NWC compound he said was very dark at nights.

He told the trial court that around the 15th July, 2001 he was "chopped up" and had to seek medical treatment at the Kingston Public Hospital. On the 31st July, 2001 he returned to the hospital to have the stitches removed. He testified that "on that day I could not even bathe myself". From about 4:00 p.m. on the 31st July he said that he was

at home and he remained there for the rest of the day. It was his sister's daughter's second birthday. He spoke of the birthday party and the limited role he played because of his injuries. The party went on until 11:30 p.m. He denied knowing Mr. Terrelonge but he used to see him in the Harbour View area. They have never spoken. He did not know "Pops" the deceased. He knew Musky Masters but insisted that they were not friends only co-workers.

Mr. Kimani Breakenridge gave evidence on behalf of the applicant Parker. His evidence is to the effect that he has been living in Harbour View near the St. Thomas main road for over 20 years and he knows the locus and surrounding areas very well. He said that there were lights on the PWD compound, the gypsum factory but none on the NWC premises. Hence the NWC premises are very dark at nights.

Grounds of Appeal

The following grounds of appeal were argued before this Court:

1. The learned trial judge erred in law in the exercise of her discretion in refusing the application of the defence counsel, for a visit to the locus in quo.
2. The learned trial judge erred in law when she ruled that the evidence of a defence witness, called on behalf of the applicant Masters to give evidence in relation to the locus in quo was irrelevant and inadmissible.

3. The learned trial judge erred in law when she ruled that counsel for the applicant Parker, could not cross-examine on matters relating to the locus in quo as he had only recently visited the locus.
4. The applicants were denied the opportunity to place before the jury evidence that would have been vital to their case.
5. The learned trial judge in her summation to the jury failed to point out the weaknesses in the identification evidence.
6. The learned trial judge failed to give the appropriate warning to the jury on voice identification.

Ground 1 – application to visit locus in quo

During the testimony of Mr. Frank Hines, a witness called on behalf of the applicant Masters, Counsel for the defence, Mr. Equiano made an application to the Court for a visit to the locus in quo. The learned trial judge in refusing the application said:

> "It is my ruling that a visit to the locus at this time will not in anyway, assist the court and jury in determining any of the issues in this matter."

At the end of the evidence adduced on behalf of the applicants Mr. Equiano renewed the application to the judge for a visit to the locus in quo. The evidence was that the physical features of the locus had not changed. The eyewitness' description of the distances between the point where the shooting took place and the various locations of the lights differed somewhat from that of the police. Further, the applicants challenged the prosecution evidence as to the said distances.

Mr. Equiano contended that a view would have greatly assisted the jury in evaluating the evidence before them.

In refusing the application the learned trial judge said:

> "Mr. Equiano, I cannot accede to your request . I do not think any useful purpose would be served unless we visit the locus at the time or near the time when the incident is alleged to have occurred, going there in the day would serve no useful purpose and I do not propose to break any arm here to make the shorthand writer, the police, the jury and myself go to the main road of St. Thomas at nine-thirty in the night, so its not going to happen... If we visit the location in the day when this thing happened at night. I don't see how it would possible assist them, they will have to judge the case from the witnesses from the witness box."

It is not disputed that the object of a visit to the locus in quo is to enable the jury to understand the questions being raised, to follow the evidence and to judge the evidence. Such a visit is not a substitution for the evidence.

In ***R v Warwar*** 11 JLR 370 at p.383G Waddington P (Ag) in delivering the judgment of the Court said:

> "An application of this nature is essentially one which is within the discretion of the trial judge, to be exercised according to the facts of each case, and we do not think that it would be desirable for rules to be laid down which might in any way fetter this discretion."

In ***R v Herman Williams*** 12 JLR 541 at p. 544 B Fox JA re-echoed the principle in this way:

> "A decision as to whether or not the locus in quo should be visited is entirely a matter within the discretion of the trial judge. So long as the discretion has been judicially exercised, this court cannot interfere. The considerations which guide the discretion in making this decision are not circumscribed by the rules which regulate the reception of the evidence as was contended."

We cannot agree with counsel for the applicants that the learned trial judge improperly exercised her discretion by refusing the application to visit the locus. The important issue in so far as the distances referred to are concerned was whether the entrance to the pumping station where the shooting took place was sufficiently illuminated for the witness to recognize the assailants of the deceased. The investigating officer went with Mr. Terrelonge at night to the locus. Despite their differences as to the estimated distances they agreed that the lighting was sufficient to aid the witness to see. The applicant Parker was allowed to call as witness Mr. Breakenridge who disagreed with the Crown witnesses as to the number of lights and the relevant distances. Mr. Breakenridge claimed that the area where the witness said the alleged shooting occurred is very dark at nights. The trial judge was of the view that a visit to the locus during daylight would not assist the jury to determine the adequacy or otherwise of the lighting. She was also of the view and for good reason that a visit during the night was fraught with danger and would probably involve some arm-twisting. The learned judge held that the jury would have "to judge the case" from evidence given in court.

The jury was also provided with photographs of the locus and a description of the photographed scenes. In our judgment there was sufficient material before the jury for them to properly determine the issues raised. We are clearly of the view that the learned trial judge acted judicially in refusing the application. We cannot therefore interfere with the exercise of her discretion.

This ground fails.

Grounds 2,3, and 4

In these grounds the applicants complained that the learned trial judge erred in not allowing them to elicit from a defence witness evidence in relation to the locus in quo. The issue was the location of the lights. During cross-examination of Mr. Terrelonge, the prosecution's sole eyewitness, counsel for the applicants challenged the accuracy of the estimated distances given and his ability to see what took place. The following suggestions were put to the witness:

(i) That the distance between the nearest light and the point where it was alleged that the deceased was shot was over three chains;

(ii) That the distance from the point where the alleged shooting took place to the wall where Terrelonge said he hid himself was in excess of 70 feet;

(iii) That the area where the shooting took place was very dark.

Mr. Terrelonge of course, did not agree with these suggestions. The applicant Masters in his defence called as a witness Mr. Frank Hines, a former member of the Jamaica Constabulary Force. The witness testified that he had visited the locus in quo twice on the 9th October 2002 (the day before he gave evidence). These visits were made during the day and at night at about 12:30 p.m. and 9:30 p.m. Mr. Hines did not say that he was accompanied on the visits. During his evidence in chief, Mr. M. Williams, counsel for the applicant showed the witness a photograph and began asking questions of the witness about the photograph. Counsel for the Crown objected to this exercise. The learned trial judge allowed him to proceed, saying:

> "I will allow him a little leeway."

During cross-examination of the witness, Mr. Equiano, counsel for the applicant Parker sought to ask questions about the locus in quo. The learned trial judge ruled that such questions were irrelevant. The following exchange between counsel and the judge ensued:

> "Mr. Equiano: Are you saying M'Lady that I cannot ask the witness anything about the locus, because the witness saw it yesterday?
>
> Her Ladyship: You ask the witness about a locus but you must ask the witness relevant questions. You must ask the witness about the locus as it was when the incident occurred."

The learned judge later said:

> "Mr. Equiano... I am not going to allow you to ask this witness any questions about the locus he visited yesterday. If he had visited it a year ago and you asked him about it that year it would be perfectly in order. But, I am not going to allow you to ask him questions about a place where trees have grown up, ditches dug, anything could have happened."

Before this Court Mr. Equiano submitted that the learned judge erred in holding that because the witness had recently visited the locus his evidence was irrelevant and thus inadmissible. He argued that in the light of the evidence that the locus had not changed, the witness' evidence which was intended to challenge that of Mr. Terrelonge was admissible.

Miss Hutchinson for the Crown contended that the learned judge was right in not allowing Mr. Hines to describe the locus in quo and to give evidence as to the distances between the lights and the area where the shooting took place. She based her submission on the following facts:

(i) Mr. Hines was not an eyewitness;

(ii) he was not accompanied by the eyewitness;

(iii) he was not accustomed to the area; and

(iv) his visit to the locus was made over 1 ½ years after the crime was committed.

The fact that Mr. Hines had exhibits 1 and 2 (the photographs) when he viewed the locus would not put him in a position to speak to the locations

of all the lights mentioned or the vantage point of the witness Terrelonge, she urged. Counsel for the Crown observed that another witness, Mr. Breakenbridge was allowed to give evidence describing the locus and the lighting. We agree entirely with Counsel for the Crown that the learned trial judge did not err when she disallowed the questions put to Mr. Hines. We have quoted the ruling of the trial judge in part to underscore the concern of the judge that the evidence sought to be adduced by Mr. Equiano was not only inadmissible but might mislead or confuse the jury. How could Mr. Hines speak of the distance between the area where the deceased was shot and any of the locations of the lights not having been accompanied by the eyewitness? I would venture to say that such evidence would be based on hearsay. This witness could not speak to the condition of the lighting on the night of the killing. Any evidence from him as to the lighting he observed on the night he visited the locus would clearly be irrelevant. These grounds, in our judgment are devoid of merit.

Ground 5

Counsel for the applicants complained that the learned judge failed to highlight the weaknesses in the identification evidence. Counsel referred to the following as such weaknesses;

(i) The only eyewitness was lying on his stomach in a ditch surrounded by vegetation when according to him he saw and recognized the applicants.

(ii) The deceased was between the witness and the men he identified as the applicants.

(iii) There was at the scene a large lignum vitae tree.

(iv) The distance of the lights from the area where the deceased and his assailants were.

Counsel did not say in what way the presence of the tree constituted a weakness. The evidence does not indicate that the tree might have obstructed the witness' view. It is true that the judge did not use the word "weakness" when drawing the jury's attention to the dangers of mistaken identification. However, nothing in **Turnbull:**

> "requires the judge to make a "list" of the weaknesses in identification evidence or to use a particular form of words when referring to these weaknesses. The essential requirement is that all the weaknesses should be properly drawn to the attention of the jury and critically analyzed where this is appropriate" - see ***Michael Rose v R*** [1994] 46 W.I.R 213, 217D.

The learned trial judge gave the jury the full **Turnbull** direction. She reminded them of the evidence relating to identification and emphasized the need for a careful examination of the circumstances in which the identification by the witness was made. She told them of the special need for caution and then said:

> "So in order to determine the quality and cogency of the identification you must examine carefully the circumstances in which the identification was made. You have to look at the opportunity which the witness had of viewing each accused. Mr. Foreman Ainsley Terrelonge is the only witness who identifies these accused, and you will have to say from the evidence what opportunity he had of viewing these men. And what you do is to look carefully at the evidence which relates to identification."

Thereafter the learned judge proceeded to analyse the identification evidence of Mr. Terrelonge reminding them on at least two occasions that "he was lying on his belly". At p. 264 the learned judge reminded them:

> "...he said he went to the end of the wall and lie on his belly, and when he was being cross-examined... he said, 'because of the hours of the night, I could not see, so I went down further'. He got closer."

Later at p. 273 the learned judge told them:

> "He said he creep down that night again, this in cross-examination, he said he was lying on his belly in a ditch and behind the wall, and when he got to that position, he saw the men..."

As to whether or not the witness' view was obstructed the learned judge said:

> "The other thing you will have to consider is whether anything interfered with the witness' observation of these men. In other words could he see clearly what he said he saw. And his evidence is that there was nothing to prevent him from seeing the faces."

She reminded the jury of the positions of the deceased (Patrick) and his assailants:

> "... he (Terrlonge) said that the accused Masters was on the left-hand side of Patrick. His face, Patricks face turn down Water Commission road. His back was to the witness Terrelonge and Masters was facing Patrick. So you will have to visualize the scene... He has said that Patrick's back was to him and Masters was to the left facing him the witness and the deceased. He said Patrick would be between the two of them one to the left and one to his right."

The learned judge drew the attention of the jury to the serious challenges to the evidence of Mr. Terrelonge in respect of the lighting and the various distances given. At p. 258 she said:

> "Now, in what light were they. Looking at Mr. Terrelonge's evidence there were certain sources of light. There was a light from the Public Works Department premises. There was a light from the gypsum premises, a flood light he said, a fluorescent light. There was street light and he said cars were passing on the main road. You will have to say whether you accept that evidence. It was seriously challenged".

It was contended that Mr. Terrelonge could not have seen and recognized the deceased's assailants because it was very dark. Indeed it was suggested to him that he was either mistaken or deliberately lying to the court. At the end of the review of Mr. Terrelonge's evidence the learned judge reiterated:

> "You have to examine his evidence carefully and see if he is a witness of truth and whether you

> can safely rely on his identification and on his evidence that he has given in relation to this incident."

We are of the view that these directions were correct and adequate. The jury by the directions given would have understood that the reason for the challenges to Mr. Terrelonge's evidence was to cast doubt on the correctness of the identification of the applicants. They were certainly alerted as to the risk of mistaken identification and hence the special need for caution. Not only were they alerted to the factors that may affect reliability they were also directed as to the importance of the credibility of the main prosecution witness. This ground also fails.

Ground 6 - Voice identification

Counsel for the applicants complained that the learned trial judge failed to give the appropriate warning to the jury. There is a dearth of authority on how a judge should direct a jury on voice identification or recognition. It seems that this Court has taken a different path from that taken by the English. In ***R v Hersey*** [1998] Crim L. R. 281 and ***R v, Gummerson and Steadman*** [1999] Crim. L. R. 680 the English Court of Appeal held that in cases of identification by voice the judge should direct the jury by the careful application of a suitably adapted **Turnbull** direction. However, as was observed in the commentary on ***R v Gummerson and Steadman*** (supra) one of the difficulties with adapting

Turnbull is that the trial judge will not necessarily be familiar with all the factors that will affect the reliability of voice identification or recognition. Mr. Equiano relied on ***R v Roberts*** [2000] Crim. L. R. 183 in which the English Court of Appeal referred to academic research indicating that voice identification was more difficult than visual identification and concluding that the warning given to jurors should be even more stringent than that given in relation to visual identification. It should be noted that ***Roberts*** was a case of voice identification rather than voice recognition. It was the identification of a stranger by voice and this was the only evidence implicating the stranger. Further the complainant in ***Roberts*** did not have a good opportunity to listen to the voice of her assailant.

Is a Turnbull type direction required in this jurisdiction ?

In ***R v Clarence Osbourne*** [1992] 29 JLR 452, 455 this Court in answering this question held:

> "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 ***R v. Taylor et al*** [1993] 30 JLR 100 at 105 H et seq. the Court had to consider a complaint that the trial judge did not draw the jury's attention

to specific weaknesses in the identification evidence. Essentially the issue was whether the judge ought to have given a modified **Turnbull** direction in respect of the voice identification. In that case Gordon JA quoted the above passage in ***R v Gibburne*** and said:

> "We would add that the directions given must depend on the particular circumstances of the case.
>
> 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 may have had to hear the voice of the accused. The occasion where 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..."

Gordon JA recognized the need for caution but stopped short of holding that there must be a warning thereof and that an omission to draw the jury's attention to specific weaknesses in the voice identification evidence is necessarily fatal –pg. 13 ibid.

It would seem that the authorities emanating from this Court do indicate that a **Turnbull** type direction in cases of voice identification or recognition is not mandatory. However, we would venture to suggest that where the prosecution case is based solely on the voice identification or recognition of the accused, judges should be alert to the dangers of mistaken identity and be prepared to withdraw cases where the

evidence is of poor quality. Indeed in the ***R v Taylor et al*** case the Court in allowing the appeal of ***Peterkin*** said:

> "She (the witness) saw him come to her home twice and heard him enquire for ice and she thereupon summoned the ice vendor for him. In the absence of evidence of any peculiar feature of his voice we consider these fleeting instances of exposure to the sound of his voice insufficient to found a conviction based on voice identification. Her evidence lacked the cogency about which we have spoken. This was a weakness which rendered the prosecution case against him tenuous. The trial judge should have withdrawn the case from the jury."

We now turn to consider the evidence of the voice identification and the trial judge's direction to the jury in respect thereof. Mr. Terrelonge's evidence is that he heard and recognized the voice of the deceased saying. "Wha me and you and the dread have". This was what alerted him that "nothing good was going". Consequently he jumped off the wall and positioned himself so that he could see what was happening. The learned judge in his summing up referred to the above evidence and continued:

> "He said he saw the accused, Parker drape up the deceased and he heard him saying " long time you and the dread fe dead, yuh know'. This is a man who he knew before for eight years according to his evidence. If you accept this is all a question of fact for you. He said this is a man he knew for eight years, a man who had conversed with him, having regard to the words that were spoken and the length of the sentence, do you remember?..."

Mr. Terrelonge testified that he recognized Parker's voice as he lay on his belly listening to them. In fact his evidence under cross-examination is that he knew Parker for over twenty years and they were friends for years. They would sit down and talk. According to him they talked "plenty, plenty, plenty". The learned judge further told the jury:

> "He also said that he heard the accused Masters and this was elicited by Mr. Michael Williams, the attorney for the accused Masters . He said that Master said that "Pops should dead long time" and again you have to consider, having known this man, having heard this sentence would it be sufficiently long for him to have recognized the voice after just some minutes. He had known him for over eight years, it is a question of fact for you."

The learned judge observed that the evidence of voice identification was in addition to Mr. Terrelonge's evidence of visual identification and that it was for them to decide whether to accept his evidence or not. We are clearly of the view that in the circumstances of this case the learned judge dealt adequately and fairly with the issue of voice recognition. We may add that the correctness of Mr. Terrelonge's identification of the deceased by voice recognition is in our view relevant to show that the circumstances were not so difficult as to make unreliable the voice recognition of the applicants at the same time. Proof of the correctness of the identification of the deceased by voice may tend to rebut mistake in the voice identification of the applicants in the same circumstances: (For a parallel reasoning see ***R v Castle*** [1989] Crim. L.R.

567). Accordingly, we are of the view that the learned judge was correct in telling the jury that the evidence of visual identification was not the only evidence of identification. We are also of the view that in the circumstances of this case the judge's failure to give the jury a **Turnbull** type warning was not fatal. This ground also fails.

Conclusion

For the above reasons the applications are refused. The sentences are to commence as of the 14th January, 2003.