[2011] JMCA Crim 60

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 160/2002

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MR JUSTICE MORRISON JA
THE HON MISS JUSTICE PHILLIPS JA

SHELDON PALMER v R

Robert Fletcher for the appellant

Mrs Ann-Marie Feutardo-Richards and Mrs Paula-Roseanne Archer-Hall for the Crown

8, 11 April and 2 December 2011

PHILLIPS JA

[1] The appellant was convicted on 25 July 2002 in the High Court Division of the Gun Court for the parish of Clarendon, before James J and a jury, for the murder of Levi Knight o/c Buck. He was sentenced to life imprisonment and the court directed that he should serve a sentence of 15 years before he would be eligible for parole.

[2] The appellant filed an application for leave to appeal against his sentence and conviction on 2 August 2002, and on 14 October 2003 he was granted leave to appeal by a single judge of appeal. The single judge queried whether a prima facie case had

been made out by the prosecution, and if so, whether adequate directions had been given by the learned trial judge on the issue of alibi.

Background facts

The case for the prosecution

[3] Miss Salomie Benjamin, with whom the deceased was living at the time of his death, testified that on 17 February 1999, at 6:00 p.m. she went to a club in Sheep Pen Hill in the parish of Clarendon to join the deceased. She remained there with him until 9:15 p.m. when they left the club together, walking on the main road, in the direction of her home. Just before leaving the club, she said, she saw "a car drove up and turn, right at the club", and when they reached "below the streetlight in the dark, we see two men coming up, in front of us. They were on foot when me saw them." Later she said that, "they come and hold up the two of us one time." "Hold we up in we stomach here." She said that her assailant wore a white T-shirt, and he had "a shine something like a gun." "A shine something when him hold me up in my chest point on me." She said that he held onto her with one hand while the other man held Buck. He told the other man who held Buck to "lick him in him bumbo claat face." After which he turned to Buck and started hustling him with the other hand. While her assailant was holding her and hitting Buck, she said, "mi scared out of mi blouse. I take off mi blouse over mi head and leave it inna him hand." She said that she ran away leaving Buck with the men, and while making her escape she heard explosions behind her, which sounded like gunshots. She said she ran back to the club and the owner took her to the Rock River Police Station, where she made a report. She did not see Buck until she saw him lying on his back in

the bushes, the following morning, and he appeared to be dead. She did not see him alive again. It was obvious that her evidence was of no assistance in identifying Buck's assailants. She was not able to see the men clearly. The area was dark. The value of her evidence, it appeared, was to pinpoint a possible date and time of the shooting. In fact the main witness for the prosecution was Miss Tanique Oxford, who had in the past been an intimate friend of the deceased and at the time of his murder, the intimate friend of Wayne Palmer, the other accused.

[4] Miss Oxford gave evidence that she had been friends with Buck in 1999, but had also ceased being his girlfriend in 1999. She said that she knew both accused, Wayne Palmer as "Samuda", from January 1999 and the appellant as "Bracey", from February 1999. Miss Oxford testified that on 23 January 1999, she met Samuda at the "Go - Go" club in Sheep Pen Hill and it appears that she started an almost immediate intimate relationship with him. She told the court that she left the club that night in a white "deportee" with Samuda, "Baldhead" a woman at whose home she lived at the time, "Bunny", "Priest" and "Butty" heading towards Baldhead's house. Samuda was driving. On the way she saw Buck on the road walking towards his house. As Miss Oxford tells it, Samuda, after having been told something by Baldhead reversed the car to where Buck was and said to him, Buck, "yuh see dis woman, mi don't want you box har again." "Dis woman" to whom reference was being made was Miss Oxford, and she said she turned to them and said, "Oonu stop oonu foolishness because him don't box mi." Miss Oxford said that when the car was being driven away, "Butty" who had a gun in his hand, placed his hand out through the window and fired a shot. She told the court

that she turned to Samuda and said "Let mi out because oonu ah go kill the man fi nutten." But Samuda's response was that he could not let her out because, if he did, "Buck" was going to beat her up. She testified further that she saw Samuda several times between that night in January and the night of 17 February 1999, as he used to visit her at "Baldhead's" house. She also said that she had not seen "Buck" since that night of 23 January 1999.

[5] On 17 February 1999, the night that "Buck" was killed, Miss Oxford saw the appellant, ("Bracey") for the first time. She said that while asleep at "Baldhead's" house, she was awakened by "Samuda", the appellant and "Twelve Finger." " Samuda" told her that she had to come with him. She resisted at first, but he insisted and eventually she went with him, taking her two year old child with her. She sat in the middle in the back of the car flanked by Tamika Kerr, a friend of hers, "Priest" and "Twelve Finger." They went to "Longsville", a housing estate where "Samuda" lived. Samuda drove, while the appellant was sitting in the front passenger seat.

[6] It was while in the car, Miss Oxford said, that the appellant known to her only as "Bracey" turned towards her and said "We kill a man." She said that "Samuda" turned to the appellant and said, "Stop you noise and nuh tell him nothing." She said that she turned to him and said, "unnu let me go for unnu going kill me too." She said that the appellant kept talking, saying that he wasn't sure if the man was dead, but he knew for sure they had shot him. "Samuda" again cautioned the appellant by saying, "yuh nuh hear say you nuh fih tell her anything? Is mi man."

[7] Upon reaching Longsville, Miss Oxford said that she saw the appellant place a black handled shine gun, that she had seen him with in the car on the way from "baldhead's" house to Longsville, under a mattress in "Samuda's" house. "Twelve Finger" also had a gun in the car. She did not know who was shot until she got to the house in Longsville. She said that the appellant said that the man who was shot "is a man name "Buck." She stayed at Longsville for a few days until she saw the appellant run from the premises leaving his baby, so she also left her child there. She returned the following day, collected her child, went to Old Harbour to visit her aunt and, then to Kitson Town to visit her grandmother. She eventually returned to May Pen with her sister and went to the police station where she gave a statement. She told the court that at that time on 17 February 1999, she was "Samuda's" girlfriend and that she had not seen "Buck" since that night.

[8] In cross-examination, counsel for the accused men focused firstly on the fact that Miss Oxford had indicated that she could not read, that she had been detained at the May Pen Police Station in the guard room, then taken in a police car, where she sat alone in the rear seat to the station at Four Paths. She returned to May Pen where, in the presence of approximately four police officers, she was asked several questions and her responses were taken down as her "statement", on 3 March 1999. She said that she did not attend on the police station to give a statement voluntarily. She was detained along with her friend Tamika, and at the time she was detained she knew that "Samuda" and the appellant had been apprehended by the police. She was questioned for over six hours, during which time the "statement" was obtained. She was crying and

worried about her child. She was thereafter taken to the Four Paths Police Station at midnight, locked in a cell and later released from custody at 6:00 a.m.

[9] Miss Oxford was challenged that in her statement to the police she had stated that "sometime in late April, I was one night sleeping at "Baldhead's" house……. and "Samuda" come and shake me and wake me up." At first she told the court that she did not remember saying that, then she said that she did and finally said that it was a mistake. She was also challenged that in her statement she said, "the night when they came to the house I saw "Priest" and "Twelve Finger" with guns." She agreed with counsel that she had said so, but she did not qualify this statement as a mistake or attempt to amend it to bring it in line with her evidence in chief.

[10] She was further forced to admit that in the statement to the police, she said that it was "Samuda" who said the words, "we shot a man." She explained to the court that she had in fact told the police that "Samuda" had said the words but she had made a mistake as the words were uttered by the appellant. She said the statement which was read back to her was true and no amendments were made to it despite the fact that the words "we shoot a man" were attributed to "Samuda" as she was "worried and scared." The defence, as would be expected, made much of the "mistake." Counsel for the accused emphasized that she was meeting the appellant for the first time and so the possibility of making a mistake between her then boyfriend, "Samuda" and a man she had just met was almost impossible. However she did say in her statement to the police and maintained it to be correct when she gave evidence in court, that "Samuda"

also said, "we shot a man and then he ran." She insisted though, in response to a suggestion that she was not in any car with Wayne Palmer and the appellant that night, that she was, as they came for her at "Baldhead's" house. She testified that the police did ask her to give a statement against "Samuda" and "Bracey" and she said she did so and continued to say, "I talk off a what "Bracey" told me."

[11] Dr Victor Lindo gave evidence that he had conducted the post mortem examination on the body of the deceased, Levi Knight, whose body was identified to him by his sister Paulette Morgan. He said "Buck" had received a gunshot wound and died as a result of haemothorax or excessive bleeding due to the firearm wound of the left lung.

[12] Detective Sergeant Elijah Woodhouse, the investigating officer, testified that having received certain instructions on 18 February 1999, later that day, he was directed to a track leading to some bushes in the Sheep Pen Hill district where he saw the body of the deceased, who appeared to be dead, lying on his back with what appeared to be a gunshot wound to the left side of the chest. On 21 February 1999, he carried out an operation at the New Longsville District in Clarendon with other police personnel and several persons were held at two different houses on one premises. Wayne Palmer identified himself as "Samuda" and the appellant as "Bracey", to him. The appellant and Wayne Palmer were taken into custody on suspicion of the murder of "Buck", and on 1 March 1999 he charged both men with the offence. On caution

Wayne Palmer said "Den ah who tell yuh sey mi kill man?." The appellant said, "Mi nuh know nutten bout it sah."

[13] Sergeant Woodhouse told the court that both Miss Oxford and her friend Tamika Kerr, were in the custody of the police for a period of five days, a part of which time they were locked up in cells at the Four Paths Police Station. Both ladies, he said, gave statements relating to this matter while in the custody of the police, but did so in the C.I.B. office in May Pen. With great difficulty, the Sergeant eventually admitted that if questions were asked of a person by the police and answers were given, one would expect that the questions and answers would have been recorded as such, and not represented as a statement which is given voluntarily as the person's story. He also said that as he would not do it, he would not encourage anyone under his supervision to tell a witness that the police wished for that witness to give a statement against a particular person. In answer to the court, he stated that Miss Oxford and Miss Kerr had been taken into custody because they "expressed fear", not because they were considered suspects of any crime. He agreed however, under further cross-examination from counsel for the defendants, that both Miss Oxford and Miss Kerr had attended court on several occasions when one or both the accused had been admitted to bail.

The No-case Submission

[14] Counsel for the accused Wayne Palmer submitted successfully that there was no connection between him and the death of Levi Knight o/c "Buck." The only evidence adduced relevant to that accused, counsel persuaded the court, were the statements

made by him in the car on the night of 23 January 1999, which could not ground the charge. The submission that there was no link between the appellant and the death of the deceased, particularly since there was no evidence that he knew him before, or that any difficulty existed between the two men, did not succeed. The jury was directed to return a verdict of not guilty in respect of Wayne Palmer, although Miss Oxford, under cross-examination had accepted as correct her statement to the police that on 18 February 1999, she had heard "Samuda" saying, "We shoot a man and the man run." This aspect of her evidence did not appear to have been brought to the attention of the court at the time when the no-case submission was being made.

The case for the defence

[15] The appellant made a brief unsworn statement, which was as follows:

> "My name is Sheldon Palmer from New Longsville P.A. I do mason work, m' Lord. I don't know what she talking about. I never in any car with her, m' Lord.
>
> [His Lordship: You were not?]
>
> I never in any car with her, m'Lord. I don't know what she talking about m' Lord. Just that m'Lord... Finish."

At the end of the summing up by the learned trial judge, the jury returned a verdict of guilt in respect of the appellant for the murder of Levi Knight o/c "Buck", and as indicated he was sentenced to life imprisonment, not being eligible for parole before serving 15 years.

The submissions on appeal

[16] Counsel for the appellant abandoned the original ground of appeal filed by the appellant that the verdict was unreasonable and did not accord with the evidence, and filed on 28 March 2011, three supplementary grounds of appeal which were later also abandoned. On 8 April 2011, he filed amended supplementary grounds which indicated that he intended to rely on only one ground of appeal which encapsulated all previous grounds filed and which is set out below:

Ground one

> The learned Trial judge failed in his summation to do the following things;
> Give appropriate directions on the nature and elements of circumstantial evidence.
> Give adequate assistance on the facts in the context of this particular case and assist the jury with the legal issue of identification as it arose in the case.

Counsel submitted that as a result of the failure of the learned trial judge to do all of the above the appellant was denied a fair and balanced consideration of his case and a real chance of acquittal.

[17] Counsel for the appellant submitted that although this court in ***Loretta Brissett v R*** SCCA No 69/2002, judgment delivered on 20 December 2004, applied ***McGreevy v DPP*** [1973] 1 All ER 503, which decided that no special direction was required by the judge in cases based on circumstantial evidence (thus overruling the rule in **Hodge's** case [1838] 2 Lew CC 227), the ***McGreevy*** case did not lay down a

blanket rule precluding any direction explaining the nature of circumstantial evidence or treating with that type of evidence with regard to its special characteristics. The rule in **Hodge's** case, counsel said, was that a jury must be directed that before they could find the prisoner guilty they must be satisfied:

> ..".not only that those circumstances were consistent with his having committed the act but they must be satisfied that the facts were such as to be inconsistent with any other rational conclusion than that the prisoner was the guilty person."

In ***McGreevy,*** he maintained, the judgment was "complete with concern for the preservation of appropriateness in summations." He summarized what in his view the case does, namely;

1. Places primacy on the direction on the standard of proof: that directing the jury that they must be satisfied so that they feel sure is enough to alert a jury of assumed ability that evidence is to be examined to see whether it reaches a standard where other rational conclusions beside guilt have been excluded.

2. As a corollary of this expressly excludes that direction flowing from Hodge's case as (a) formulaic and (b) redundant and (c) an implicit interference with their right to, having been given appropriate guidance, decide for themselves if what they believe leads to a verdict of guilty.

[18] The crux of counsel's submission was that circumstantial evidence as a category of evidence requires careful treatment from trial judges and therefore, as a category of evidence the requirement for appropriate directions from the judges had not been abolished. His submission was supported, he said, by the view expressed in the 2010 English Judicial Studies Board – Crown bench book, Chapter Five, which deals with guidance to judges on circumstantial evidence. It was counsel's contention that an

explanation of the nature and elements of the circumstantial evidence case is required, and among other requirements, is the identification of evidence which may weaken or destroy the inference of guilt even, if as accepted, no rigid formula is required. Counsel submitted that in the instant case, the learned judge did not explain expressly or impliedly that this was a case of circumstantial evidence and what the elements were. Further, the learned judge also did not alert the jury to the evidence which might weaken the inference of guilt that the prosecution asked them to draw, apart from indicating to them that the witness admitted a mistake and that it was a matter for them whether they thought that was fundamental.

[19] Counsel argued that the critical evidence in the case from which the inference of guilt was to be drawn was that of the witness Oxford who gave evidence that the appellant told her that he was involved in killing a man named "Buck." It was therefore crucial to assess the circumstances under which the statement was given and the omissions and inconsistencies were critical to any assessment of the cogency of her evidence. Counsel very helpfully set out in tabular format the evidence of the relevant circumstances which we shall endeavour to summarize, namely:

(i) Miss Oxford went to the police as she had heard that the police were looking for her. (T-79, 16-22)

(ii) She knew before she gave her statement that Tamika Kerr, Wayne Palmer and the appellant were in custody and were locked up. (T-104 1-4,105, 11-16)

(iii) She never went to the station and told the police that she wanted to give a statement. (T-83 18-20)

(iv) The police said that they wanted her to give a statement against "Samuda" and "Bracey." (T-111, 1-6)

(v) She could not read. (T-84, 11-13)

(vi) Her statement was given in a room with four police officers present; no-one else was present (T 81, 20-25, 82 7-11)

(vii) The police asked the questions; she answered them, they wrote. (T 83 1-17)

(viii) The interview took six hours. (T 83 24)

(ix) Miss Oxford was worried about her child. (T 88, 6-16)

(x) She was crying during the interview (T 84, 1-5)

(xi) During the interview she was confused and scared (T-107, 17-20)

(xii) It was during the period of five days whilst in custody that she gave her statement. (evidence of Sergeant Woodhouse. (T 126, 2-10)).

Counsel submitted that the sum total of these circumstances is that they were oppressive and designed to have Miss Oxford give evidence against the appellant. The circumstances seriously undermined her evidence.

[20] Counsel also set out the inconsistencies and contradictions in the evidence of Miss Oxford submitting that they went to the root of her testimony and weakened it considerably. He indicated the following:

(i) The foundation of the case for the prosecution was that the appellant had said, "We kill a man" and later had said "im name "Buck." Miss Oxford gave evidence that she told the police that in her statement.

(ii) These damning words were not attributed to the appellant in the statement given to the police, but to "Samuda" although the

statement was read over to her and she was invited to make changes (T 96-99)

(iii) Miss Oxford admitted in evidence that she had told the police that on the night when "Samuda" came she heard him saying, "We shot a man and the man run" (T 94, 20-24; 95, 1-15)

(iv) Miss Oxford however also admitted in evidence that in her statement to the police she had said that while "Samuda" was driving he told "Priest" and "Tamika" that, "We shoot a man", but that statement she said was a mistake as he did not say that, it was "Bracey" who did. (T 93, 13-25; 94, 1-15)

[21] Counsel submitted that the inconsistencies might not have been so significant had there been several conversations between the witness, the appellant and "Samuda." The fact, however, that the inconsistencies and the omissions related to one conversation only, made their significance considerable. As a consequence there should have been specific directions from the learned judge inviting the jury to consider the circumstances in which the statement was given, such as to make her evidence equivocal, motivated by fear or the desire to protect "Samuda", her current boyfriend, or whether it was yet capable of belief in all the circumstances. This was of importance, counsel contended, bearing in mind that the evidence of this witness was the linchpin of the case for the prosecution.

[22] He underscored his submissions that the learned judge neither gave the jury the appropriate directions on circumstantial evidence or assisted them on the facts of this particular case by reminding the court that the transcript disclosed that they retired and returned indicating that their verdict was not unanimous, to which the learned judge's response was that, "… it was a straight question of fact all for you. So, try

again, try a little harder", which he argued confirmed that the jury were confused as the learned trial judge did not address the earlier inadequacies in the summation as indicated.

[23] Counsel addressed the third aspect of ground one - the issue of identification - and submitted that this was not a recognition case. Miss Oxford had stated that she had met and was seeing the appellant for the first time the night of 17 February 1999. She was in the back seat of the white deportee car and he was in the front passenger seat. Counsel queried whether there could not have been the possibility of misidentification, which he said seemed not to have been of importance in the case, when it ought to have been, since the appellant denied being in the car with her. He argued that there was no evidence of the length of the journey, or how long Miss Oxford observed the face of the appellant on that occasion or on any other occasion. Further, he asked, why wasn't an identification parade held, as identification was an important aspect of the case. There was a serious issue as to whether the appellant was in the car on that night, and spoke the crucial words, or whether Miss Oxford was mistaken, bearing in mind the evidence that she gave that she was confused and scared, all of which counsel maintained was absent from the summation of the learned trial judge.

[24] Counsel therefore insisted that the summation was "woefully lacking in all the critical elements" which amounted to fatal misdirections and the appeal ought to be allowed. The court, he said, in all the circumstances of this case should not consider applying the proviso.

[25] Counsel for the Crown in reply to the appellant's submissions stated that the learned judge was under no duty to give a specific direction on circumstantial evidence. Counsel relied on the dictum of Lord Morris on pages 510-511 of the judgment in **McGreevy**, indicating:

> "In my view, it would be undesirable to lay it down as a rule which would bind judges that a direction to a jury in cases where circumstantial evidence is the basis of the prosecution case must be given in some special form provided always that in suitable terms it is made plain to a jury that they must not convict unless they are satisfied of guilt beyond all reasonable doubt."

[26] Accordingly, counsel submitted, to require a judge in all cases in which the case for the prosecution, or any essential part of it, depends entirely on circumstantial evidence, to be duty bound, in addition to giving the usual direction that the prosecution must prove its case beyond reasonable doubt, to explain to the jury, in appropriate terms, that this direction means that they must not convict on circumstantial evidence, unless they are satisfied, that the facts proved are not only consistent with the guilt of the accused, but also exclude every reasonable explanation other than the guilt of the accused, would be unnecessary and undesirable. Thus, counsel argued, the traditional direction on circumstantial evidence is no more than an amplification of the rule that the prosecution must prove its case beyond reasonable doubt. In other cases, particularly where the amount of circumstantial evidence involved is slight, a direction in those terms may be confusing rather than helpful.

[27] In the instant case, counsel submitted that the learned trial judge in his summation, in treating with the evidence of Miss Oxford, reminded the jury that they should examine her evidence very carefully in order to ascertain if there was any truth in what she had said, and adverted the court's attention to several excerpts of the learned judge's summation. The learned judge, counsel stated, gave comprehensive directions on the burden and standard of proof, and counsel maintained that there was no merit in the claim that he had failed to assist the jury with the nature and elements of the circumstantial evidence that they had to consider.

[28] In any event, counsel argued that there was clear evidence to show that the ingredients of the offence had been established, that is, the murder of "Buck" and also that it was the appellant who had killed him. Counsel referred to the evidence of Salomie Benjamin hearing the two explosions sounding like gunshots, Sergeant Woodhouse attending the scene where Salomie left the deceased the morning after, and finding his body with the gunshot injury to the chest, which the doctor confirmed was the cause of death. There was evidence that Miss Oxford had spoken to the appellant on the night that "Buck" was killed. She also saw him with a gun on that night. The appellant had told her that, "We kill a man", and he had also said that the man they had killed was "Buck." All of this, counsel submitted, had been pointed out to the jury in the summation of the learned trial judge.

[29] With regard to the circumstances under which Miss Oxford gave her statement to the police, counsel pointed out that it was in specific response to the learned judge,

which he reminded the jury, that Miss Oxford had not been taken into custody because she was suspected of any crime but because she had expressed fear. Further, it had never been suggested to the witness that giving her statement to the police was not voluntary.

[30] Counsel further submitted that with regard to the previous inconsistent statements, it is important to recognize that Miss Oxford accepted that she had attributed in her statement the words "we shot a man" to "Samuda" but explained that it was a mistake. She said the learned judge dealt with this in his summation also the issue of inconsistencies and discrepancies generally, and adequately reminded the jury that this goes to the witness' credibility.

[31] In respect of the issue of identification, counsel argued that this aspect of the ground of appeal was entirely without merit. She submitted that on the basis of the cross-examination and the unsworn statement of the appellant, the issue before the court was whether he was in the car and whether he had spoken the words attributed to him at the trial, not whether he knew Miss Oxford. The Crown would not have known that any such position was being taken by the appellant and in fact would have had to have assumed that the appellant had accepted the Crown's version of events, bearing in mind that he was held in the New Longsville District with "Samuda" at a premises with two houses. Counsel submitted that the appeal ought to be dismissed or in the alternative a retrial ordered as there were no gaps in the Crown's case which a retrial could be used as an opportunity to fill and a technical blunder by the learned trial

judge, if that is what occurred, should not be permitted to affect the interests of justice.

Discussion and analysis

[32] There is no doubt that in this case the learned trial judge did not give any special direction to the jury with regard to circumstantial evidence. The main basis of the challenge to the summation is not that a special direction is required but that the law has not developed so as to exclude a direction explaining the nature of circumstantial evidence and treating with the same having regard to its special characteristics. In counsel's submissions, as we understand it, this would have necessitated dealing with the facts of the case in a manner which would expose any circumstances that could weaken or destroy the inferences which could be drawn from the evidence adduced.

[33] It would appear that the directions required to be given by the learned trial judge need do no more than express very clearly that proof of the particular offence must be established beyond reasonable doubt. As Lord Morris said in ***McGreevy v DPP,*** "…. The form in which this general requirement is emphasized to a jury is best left to the discretion of a judge without his being tied down by some new rule which would be likely to have the effect that a stereotyped form of words would be deemed necessary." He later went on to say at page 509:

> "In my view, the basic necessity before guilt of a criminal charge can be pronounced is that the jury are satisfied of guilt beyond all reasonable doubt. This is a conception that a

> jury can readily understand and by clear exposition can readily be made to understand. So also can a jury readily understand that from one piece of evidence which they accept various inferences might be drawn. It requires no more than ordinary common sense for a jury to understand that if one suggested inference from an accepted piece of evidence leads to a conclusion of guilt and another suggested inference to a conclusion of innocence a jury could not on that piece of evidence alone be satisfied of guilt beyond all reasonable doubt unless they wholly rejected and excluded the latter suggestion. Furthermore a jury can fully understand that if the facts which they accept are consistent with guilt but also consistent with innocence they could not say that they were satisfied of guilt beyond all reasonable doubt. Equally a jury can fully understand that if a fact which they accept is inconsistent with guilt or may be so they could not say that they were satisfied of guilt beyond all reasonable doubt."

[34] In this case the learned trial judge commenced his summation in this way, he said:

> "Mr. Foreman, members of the jury, this case though short is serious. There are two fundamental principles you must bear in mind; they are basic to our system of justice.
> The burden of proof is on the prosecution, which means that the prosecution must prove that this man committed the offence. And the standard by which they must do so is that before you can convict him, you must be satisfied so that you feel sure."

The learned judge directed the jury that the prosecution sought to discharge that burden at that standard by calling five witnesses. He said that only one of them had given "real evidence" by which, he explained, he meant evidence which could shed some light on how " Buck" may have met his death. He directed the jury that they were the judges of the facts and no-one could tell them what evidence to accept and what

evidence to reject. They were to try to determine whether the witness was speaking the truth. After canvassing all the evidence adduced in the case he made this statement at page 165 of the transcript:

> "So, the evidence of Miss Oxford, is the crucial evidence in the case. So, that if at the end of the day – and when I say the end of the day – if after she had finished her evidence you were left in a state where you are not sure whether you can rely on her, you need not go any further with the case; its finished. Even if you believe Mr. Woodhouse, even if you believe the doctor, if you believe the girlfriend, what she said and all the other witnesses, if you don't believe Miss Oxford, or if you have any reasonable doubt - don't believe and reasonable doubt are two different things. If you don't believe her, you throw it out. Reasonable doubt is if there is something, something. Anything you can't make up your mind, you throw it out.
>
> If you believe what the accused man said, that he was not there, and he was not in the car, you don't have to believe both. If he said he was not there, that is the end of the case, because he could not be elsewhere and in the car at the same time. So, you have to consider that; if you have that, you have to acquit him."

[35] It would seem clear from the above that the learned trial judge, explained in his own words to the jury that they could only convict if they were sure beyond all reasonable doubt of the guilt of the appellant. Throughout the summation the learned judge reminded the jury of the importance of the evidence of Miss Oxford, and asked them to scrutinize the same with care and to examine the evidence to see if they could believe the content thereof. In our opinion thereof, the first limb of the ground of appeal must fail.

[36] With regard to the second limb of the ground of appeal, counsel for the appellant challenged the learned trial judge's directions claiming that he failed to give adequate directions with regard to the particular facts of this case. However, the learned judge dealt with the circumstances of the giving of the statement by Miss Oxford. He commented on the fact that she said that she had been in custody for six hours, but he pointed out to the jury that her information to the police would have had to have begun from night of 23 January 1999, through the entire story, including the night of 17 February 1999, and her various travels visiting family, ending with her attending on the police station in May Pen, which journey would have taken some time to impart and to be recorded. The learned judge mentioned that when the statement was taken Miss Oxford was in the C.I.B. office in the recreational room. She had later been placed in a cell at the Four Paths Police Station. He indicated that on the evidence, the reason (of the police) for keeping her was that she expressed fear.

[37] With regard to the inconsistencies and the discrepancies in the evidence, the learned judge drew the jury's attention to the words that Miss Oxford said were stated by the appellant. He pointed out to the jury that when considering her evidence they should bear in mind that she had admitted that she had made a mistake, and although counsel had described it as fundamental, the judge indicated that it was a matter for them to determine, and they should assess whether the explanation for the mistake was one that they could accept. If the jury could not accept the explanation she gave, he directed them to view her evidence as a whole "more closely" as the issue then became one of credibility. The learned judge did not however draw all the specific

"mistakes" admitted by Miss Oxford to the attention of the jury. For instance, she gave evidence that she could not recall giving evidence at the preliminary inquiry held in Chapleton in the parish of Clarendon, that it was sometime in April in 1999 that she had been sleeping at "Baldhead's" house when "Samuda" came, shook her and woke her up. Later on in cross-examination, she admitted that that statement was a mistake. In her statement to the police, she had also said that on the night that they came to the house she saw "Priest" and "Twelve Finger" with guns, although in her evidence in chief she had said that she had seen the appellant and "Twelve Finger" with guns. She gave no explanation for this latter inconsistency and the learned judge made no comment on these "mistakes" to the jury. He focussed on the statement Miss Oxford said was made by the appellant on the night of 17 February 1999.

[38] Indeed, he related the crucial facts in the case to this issue of credibility, on page 168, lines 19-25 to page 169 lines 1-6 of the transcript, when he directed the jury thus:

> "So Mr. Foreman and members of the jury, was she speaking the truth when she said that this man was in the passenger seat in front? The one who is not here now was in control, she was in the back seat in the middle with others and that man, this accused, Sheldon Palmer, otherwise called "Bracey" said, "We kill a man," and the other one said "Don't tell her anything; is her man." If you believe that after you consider all the evidence including the mistakes which she admitted or any which she might not have admitted, there is powerful evidence against this man but it is a matter for you. I don't know what you believe."

In connecting the link between the appellant and the deceased, he had earlier commented that based on the above evidence, and on the evidence that Miss Oxford's former boyfriend was killed that night the learned judge posited the question;

"Wouldn't it be reasonable to conclude that the man they were talking about is "Buck", which other man?" But there was clear evidence given by Miss Oxford that the appellant had said when they all arrived at the house in New Longsville that the man who had been killed was named " Buck." In any event the learned judge made sure to leave as his final charge to the jury the issue which in his view was crucial to their determination on the question of guilt. He said,

> "…. if this man didn't say a word, if you so find, you know, if this man didn't say a word we would not be here because all of the case turns on whether you find that Sheldon Palmer said the words which the witness has hung on to and the other one said, "Don't say anything." She told you that when she told the police that is Samuda she was confused and scared and it was a mistake, and you have to determine whether when she came here and said it was this one, Bracey, Sheldon Palmer, she was speaking the truth or she is still confused and scared."

So, the issue would be, in respect of the summation, has the learned trial judge done enough to bring to the attention of the jury all the matters relevant to her credibility, her evidence being so crucial to the case for the prosecution. In the circumstances of this case we believe that he did.

[39] Miss Oxford's evidence of what the appellant said in the car is very powerful evidence and was obviously decisive in this case. The appellant's denial in his unsworn statement, of having been there at all was a matter for the jury to determine, which

they did adverse to the appellant, as they were entitled to do. In our opinion the second limb of the ground of appeal also fails.

[40] With regard to the issue of identification we agree with counsel for the Crown that the defence did not raise the question before the jury that the appellant did not know the complainant, and that there was only a short journey from the Sheep Pen Hill district to the New Longsville area in which she could have observed him. The challenge before the court remained one of whether the appellant was in the car, and whether it was he who had said the words admitting to being one of the persons who had killed a man, whose name he later gave as "Buck." The case was therefore not about mistaken identification, but about the credibility of the main witness Miss Oxford, and the learned trial judge gave more than adequate directions on that. In fact, there were no directions given pursuant to the **Turnbull** guidelines. The learned authors of the current edition of Archbold (paragraphs 14-15), state however, which has been accepted and endorsed by the Privy Council in **Omar Grieves and others v The Queen** (Privy Council Appeal No 0025 of 2010) delivered 20 October 2011, [2011] UK PC 39 that the Turnbull warning is not required and would only confuse the jury in circumstances where the challenge by the defence is to the veracity and not the accuracy of the identifying witness. Although, it was also stated that there was an obvious need to give a general warning, even in recognition cases, where the main challenge was to the truthfulness of the witness. In the instant case, the learned judge in his summation focused on whether Miss Oxford was telling the truth.

[41] In the Privy Council case of **Shand v R**, (1995) 47 WIR, Lord Slynn of Hadley in delivering the decision of the Board stated that in identification cases, (including those based on recognition) the Turnbull warning could be entirely dispensed with, but this should only be done in exceptional cases, even where credibility is the sole line of defence. The Board maintained that even in the exceptional case, the court would be wise to tell the jury that they should consider whether the witness could not be making a mistake, bearing in mind the view of the danger of mistake referred to in Turnbull.

In the instant case, it may have been prudent for the learned trial judge to have given a general warning on mistaken identification, but as this was not an "identification" case, and the issue was really one of credibility, that of Miss Oxford's testimony, in those circumstances, in our view, even the general warning may have added nothing, and served only to confuse. We could not therefore conclude that the absence of the warning rendered the verdict unsafe.

[42] In any event, in respect of identifying the appellant, there was evidence that the appellant came to the house of "Baldhead" on the night of 17 February 1999, to collect Miss Oxford; that she saw him putting a gun beneath the mattress when they arrived in New Longsville and that he was one of the persons with whom she fled from the house without their respective children a few days after the night of 17 February 1999. Much of this latter evidence was essentially unchallenged. Whether Miss Oxford was in a position to readily identify the appellant, as the person in the car who had spoken those words on that fateful night, was not an issue in the case. As indicated,

the defence never raised it. It appears to be an afterthought and ought not to succeed. This limb of the ground of appeal must also fail.

[43] In the circumstances, the appeal is therefore dismissed. Conviction and sentence are affirmed. Sentence is to commence from 25 October 2002.