[2010]JMCA Crim 40

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 114/2007

BEFORE: THE HON. MR JUSTICE PANTON, P
THE HON. MR JUSTICE MORRISON, JA
THE HON. MRS JUSTICE McINTOSH, JA (Ag.)

MAITLAND RECKFORD v R

Robert Fletcher for the applicant

Miss Kathy-Ann Pyke and Miss Annette Austin for the Crown

10, 12 May and 9 July 2010

MORRISON, JA:

Introduction

[1] This is an application for leave to appeal against a conviction and sentence for the offence of murder in the Home Circuit Court, before Brooks J and a jury, on 27 July 2007. The applicant was sentenced to imprisonment for life and the court specified that he should serve a minimum of 25 years before becoming eligible for parole. His application for leave to appeal was considered and refused by a single judge of this court on 18 February 2009 and it has accordingly been renewed before the full court.

[2] The applicant was indicted for the murder of Conroy Llewellyn, otherwise called Derrick, which took place on 23 February 2003, in the yard in which the deceased lived in August Town District, Bog Walk, in the parish of St Catherine. The case for the Crown depended almost entirely on the evidence of Miss Anita Morrison, who was a resident of the premises in question, in which there were four houses occupied by various members of her family.

The facts in outline

[3] At about 8:15 p.m. on the evening of 23 February 2003, which was a Sunday, Miss Morrison, her two small children, Mr Carlton Wilson, who is the father of her children, her sister, the deceased and others were all sitting together under a cherry tree in the yard. They were able to see each other by the light of two street lights, which were estimated in court to be 10-12 feet away. While sitting there, Miss Morrison saw two men come into the yard. Both men were known to her before, as 'Shakka' and 'Sugar' respectively and in court she identified the applicant as 'Shakka'. She had known him for about two years before that evening and had last seen him on the Friday before. She would in fact see him often, almost every day, because, she testified, she used to comb his hair and she also knew his grandmother and some of his cousins. In addition, he lived within walking distance of her house.

[4] Both men were armed with guns when they came into the yard that evening and both of them immediately opened fire at Mr Wilson and the deceased, both of whom immediately got up and started to run. But the deceased was unable to escape the fire and fell to the ground. The applicant and the other man then turned to run away, but, before leaving, 'Sugar' bent over the mortally wounded deceased and exclaimed "yuh nuh si yuh kill di wrong man", whereupon the applicant said "yuh nuh si seh di BC man dead, weh yuh nuh come on". The applicant then "buss a shot and ran". Miss Morrison's estimate of the time that passed from the moment the applicant and the other man entered the yard to the moment they left was that it was "about 50 seconds", for about 30 seconds of which she was able to see the applicant's face at a distance of approximately six feet.

[5] When she was cross examined by the applicant's counsel, it turned out that, when the men came into the yard, Miss Morrison was actually in the doorway of the house on the premises occupied by her sister, with her four year old boy beside her. In the position in which she was, she was beside the communal outside kitchen on the premises. Miss Morrison was then questioned further about where she was in relation to this kitchen:

> "Q. And that position where you were beside the kitchen, did it block your view, did it

prevent you from seeing what was happening?

A. No, sir.

Q. Did it prevent you from seeing the men?

A. No, sir.

Q. Did you ever say that, "The kitchen prevented me from seeing their faces," at any time during the proceedings in this matter? Did you ever say that; the exact words being, "The kitchen prevented me from seeing their faces clearly?

A. Yes, sir."

[6] It also emerged from the cross examination of Miss Morrison that she had not reported the incident to the police on the night in question and had not in fact given a statement to the police until 25 March 2003, more than a month later. The reason for this, she told the court, was that she had been "scared and afraid".

[7] Counsel for the Crown thought it necessary in re-examination to revisit the matter of the previous inconsistent statement which Miss Morrison had admitted to having made with regard to her ability to see the faces of the gunmen who invaded the yard. After she was reminded of the evidence which she had already given that she had in fact said on a previous occasion that the kitchen had prevented her from seeing the men's faces clearly, she was then asked the direct question "Did the

kitchen prevent you from seeing their faces?", to which her response was "No ma'am". Apparently satisfied that she had done enough in this respect, Crown counsel then moved on briefly to something else and the re-examination ended in short order.

[8] The post mortem examination revealed that the deceased had died from a single gunshot wound to the back of the head. On 18 April 2003, a warrant for the arrest of the applicant was executed on him by Detective Sergeant Asa Leslie at the Portmore police lock-up in St Catherine. The applicant was charged for the murder of the deceased and illegal possession of firearm and, when cautioned, he said "Ah through dem know mi dem ah tell lie pon mi". It emerged from Sergeant Leslie's evidence that he had intended and tried to arrange an identification parade for the applicant before he was charged, but had not in fact done so because, he told the court, the applicant (then the suspect) had been exposed.

[9] The applicant made an unsworn statement in his defence. He denied any knowledge about the murder of the deceased, and he also denied knowing Miss Morrison at all. He further denied living in the August Town community although, he said, he had a "babymother" in the community and his grandmother lived there. He asserted that he in fact lived in Portmore. That was the case for the defence and it was followed

by the trial judge's summing up and the ultimate conviction of the applicant by the jury.

The submissions on appeal

[10] When the matter came on for hearing before us on 10 May 2010, Mr Fletcher for the applicant sought and was granted leave to abandon the grounds previously filed by the applicant himself and to argue in their stead a single ground, which was as follows:

> "The summation of the learned trial judge failed to put in proper perspective certain elements of the law on identification as well as aspects of the prosecution case which were critical for a fair and balanced consideration of the applicant's case."

[11] The aspects of the case which had not been dealt with properly by the judge were identified by Mr Fletcher as (i) the law on dock identification and its significance to the prosecution's case; (ii) the significance of the previous inconsistent statement that went to the heart of the circumstances of identification; (iii) the direction to the jury that an honest witness can be mistaken; and (iv) the absence of a warrant in evidence, the length of time taken to make the report and its significance when looked at in conjunction with the previous inconsistent statement. In each of these instances, Mr Fletcher's complaint was that the learned trial judge had either given no direction or had given directions which

were incomplete and insufficient to provide the jury with the assistance which was necessary to enable them to assess the evidence properly. In the result, Mr Fletcher submitted, the summing up as a whole had not been fair and balanced in all of the above respects.

[12] In support of these submissions, we were referred by Mr Fletcher to the decisions of this court in ***Kevin Tyndale & Brenton Fletcher v R*** (SCCA Nos. 15 and 23/2006, judgment delivered 24 October 2008) (in respect of the judge's duty in cases of dock identification) and ***R v Hugh Allen & Danny Palmer*** (1988) 25 JLR 32 (in respect of the judge's duty to deal with inconsistencies in the summing up).

[13] With regard to Mr Fletcher's first point, Miss Pyke for the Crown submitted that this was not a case of dock identification at all, but was a recognition case, in which a sufficient description of the applicant had been given to the police. Further that the recognition evidence in the case was incapable of serious dispute, so that, although holding an identification parade is usually good practice, the cogency of the identification evidence in the case was such that a parade was not required in this instance. In this regard, Miss Pyke also reminded us to keep in mind the statement attributed to the applicant after caution, which was an implicit admission that he was not a stranger to Miss Morrison. With regard to the complaint about the previous inconsistency, Miss Pyke

submitted that the trial judge had dealt with this aspect of the case fairly and comprehensively and that at the end of the day inconsistencies were a matter for the jury's determination. She invited the court, if it considered it necessary, to exercise its powers pursuant to section 28(a) of the Judicature (Appellate Jurisdiction) Act to call for the production of the witness's deposition in which the inconsistency is contained, for the purpose of ascertaining the context in which it arose at the preliminary inquiry. And finally, in respect of the judge's general directions on identification, Miss Pyke submitted that although the judge did not tell the jury in so many words that an honest witness could be mistaken, he did direct them in terms that sufficiently embodied the spirit of the ***Turnbull*** guidelines.

[14] Miss Pyke also referred us to a number of decisions of this court as well as of the Privy Council in support of her submissions. Thus we were referred to ***Brian Rankin & Carl McHargh v R*** (SCCA Nos. 72 and 73/2004, judgment delivered 28 July 2006), ***Goldson & McGlashan v R*** (2000) 65 WIR 144 and ***Capron v R*** [2006] UKPC 34 (as to when an identification parade is necessary), ***R v Brown, Ellis, Goldson and McGlashan*** (SCCA Nos. 37, 38, 39 and 40/1996, judgment delivered 27 October 1997) (on the functions of judge and jury with respect to inconsistencies) and ***Watt v R*** (1993) 42 WIR 273 and ***Rose v R*** (1994) 46 WIR 213 (to make the point that no particular form of words is necessary in summing up to the jury in

identification cases, so long as the spirit of the ***Turnbull*** guidelines is adequately conveyed to the jury).

The first issue – dock identification

[15] As the judgment of Lord Hoffmann in ***Goldson & McGlashan v R*** (at para. 14) confirms, the normal function of an identification parade is to test the accuracy of the witness' recollection of the person whom he says he saw commit the offence. In some cases, it may also serve the other purpose of testing the honesty of the identifying witness' assertion that he knew the accused before. On the question of when an identification parade ought to be held, the guidance given by the Privy Council in that case is that the principle stated by Hobhouse LJ, as he then was, in ***Reg. v Popat*** [1998] 2 Cr App R 208, 215 is the one which should be followed: that is, that in all cases of disputed identification "there ought to be an identification parade where it would serve a useful purpose" (per Lord Hoffmann, at para. 18). This guideline has been applied in this court on more than one occasion, perhaps most notably in ***Tyndale & Fletcher v R***, where Cooke JA, in delivering the judgment of the court, stated (at para. [7]) that in a case in which complaint is made that an identification parade ought to have been held in respect of the defendant, the following two questions arise:

> "The first is whether or not in the circumstances of this case an identification parade would have served a useful purpose. If the answer to this

> question is in the affirmative then the second question would be whether or not the learned trial judge gave appropriate directions pertaining to dock identification".

[16] As regards the first of these two questions, Brooks J obviously agreed with Sergeant Leslie's assessment that this was an appropriate case in which to hold a parade. This is what he told the jury on the point:

> "There is another thing which I need to let you know about very early in the proceedings, which is that there has been mention of an identification parade.
>
> Now, and (sic) I.D. parade serves two very important functions. One is that where the person, the perpetrator, is not known before and a suspect is placed on a parade, an I.D. parade, the witness is being tested on that witness' powers of observation, the witness' ability to recollect who it was they saw perpetrating that act, and to identify that person. That is the first important purpose of an identification parade.
>
> The second important purpose that it has is that where the witness claims to know the individual before, perpetrator before, then it serves to test the credibility of that person, that witness, as to whether in truth and in fact they knew the perpetrator, that individual before. You have heard that no identification parade was held in this case. The police officer testified that he intended to have one done, and I would say to you, that that was the proper thing to have done since the witness said she only knew this person, this perpetrator, Shucka, (sic) by this name, alias name or nickname, Shucka (sic). So, it would have been the proper thing since you don't have the correct name, to have an I.D. parade to see whether it is the right Shucka (sic) who had

> been placed on this I.D. parade; but it was not done and the police officer has given you an explanation for that. He said that the accused man was exposed to the public. And so, if he was improperly exposed, exposed at all, then the identification parade would fail to serve the purpose that it is to serve, that is, to give a fair test of the witness, and so one was not held. You decide whether you believe the officer, whether in fact all things taken into account, it would have been a waste of time to hold this identification parade, bearing in mind that the person, the suspect in this, now accused man, was exposed to the public."

[17] There is no question that this was a perfectly accurate direction. Neither is there any reason to doubt, in our view, the correctness of the assessment of both the police officer and the learned trial judge that this was a case in which an identification parade would plainly have served a useful purpose and so ought to have been held. Despite Miss Pyke's submission that this was a recognition case and therefore did not fall into the category of case in which a parade would normally have been required (as to which, see the judgment of Panton JA, (as he then was), in ***Rankin & McHargh v R***, at para. [13]), there were at least two unusual features in the case which suggest to us that it would have been a proper case in which to hold a parade. The first is the one mentioned by Brooks J in the passage from the summing up quoted in the foregoing paragraph, that is, that it could have served to confirm that the person known and identified by Miss Morrison as 'Shakka' was indeed the person in police

custody. The second is that it would also have been helpful to confirm the accuracy of Miss Morrison's identification in the light of the time that had elapsed between the date of the incident and the date on which she first gave a statement to the police.

[18] But Mr Fletcher's real complaint is that, having told the jury, correctly, that an identification parade ought to have been held in this case, the judge did not then go on to address the second issue postulated by Cooke JA in ***Tyndale & Fletcher v R***, that is, the giving of an appropriate direction to the jury on the treatment of a dock identification. In his judgment in that case, Cooke JA went on to cite the following passage from the judgment of the Privy Council (delivered by Lord Rodger) in ***Pop v R*** [2003] UKPC 40, at para. [9]:

> "The facts that no identification parade had been held and that Adolphus identified the appellant when he was in the dock did not make his evidence on the point inadmissible. It did mean, however, that in his directions to the jury the judge should have made it plain that the normal and proper practice was to hold an identification parade. He should have gone on to warn the jury of the dangers of identification without a parade and should have explained to them the potential advantage of an inconclusive parade to a defendant such as the appellant. For these reasons, he should have explained, this kind of evidence was undesirable in principle and the jury would require to approach it with great care: ***R v Graham*** [1994] Crim LR 212 and ***Williams (Noel) v The Queen*** [1997] 1 WLR 548."

[19] We accordingly consider that in this case, as in ***Tyndale & Fletcher v R***, the learned trial judge was in error in failing to give the appropriate directions in respect of the dock identification of the applicant (see further on this point ***R v Allen & Palmer***, which is also considered on a different point at para. [20] below).

The second issue – the previous inconsistent statement

[20] As Mr Fletcher pointed out, Miss Morrison's admitted previous inconsistent statement as to exactly where she was when the gunmen invaded the yard on the evening in question remained entirely unexplained at the end of the day, the prosecution's re-examination on the point having done no more than to reiterate the starkness of the inconsistency (see para. [7] above). This was obviously a matter of the first importance as, on the account given by Miss Morrison at the trial, she would have been able to see the attackers, while, in the statement previously made by her at the preliminary inquiry, her vision would have been obstructed by the kitchen. While, as Miss Pyke also correctly observed, inconsistencies in the evidence of a witness or witnesses are for the jury to resolve (as to which, see the judgment of Harrison JA, as he then was, in ***R v Brown et al***, at page 23), it is equally clear that it is the prior duty of the judge to undertake, for the benefit of the jury, a careful analysis of the effect of the alleged (or, as in the instant case, the

admitted) inconsistency and to direct the jury in what way the inconsistency, particularly if unexplained, would undermine the evidence given by the witness. This is how White JA put it in ***R v Allen & Palmer*** (at page 35), a case in which the appeal was based in part on the unexplained inconsistencies in the complainant's evidence at the preliminary inquiry:

> "It was certainly incumbent on the judge to direct the jury in what way her testimony at the trial which was in conflict with the deposition would constitute the undermining of the evidence which she gave at the trial, no less as to what would be the result if they found that the discrepancy was material. This standard was not met merely by telling the jury that it was a matter for them. This defect became glaring in the absence of any mention of the omission of any explanation by the witness for what was a serious inconsistency in her evidence, upon which the prosecution entirely depended for a conviction. There was no explanation which dissipated the inconsistency and had the proper directions been given, the jury would undoubtedly have rejected the complainant as a witness of truth in so far as concerned the identification of the appellant Allen."

[21] In the instant case, Brooks J dealt with this issue in two places in his summing up, the first in a general context:

> "If you are sure that Miss Anita Morrison is speaking the truth that she knew this accused man before, that she saw him on the night of the 23rd of February 2003, that he did have a gun

> and that he did fire that gun causing the death of Conroy Llewellyn, and you feel sure of all of these things then you would find the accused man guilty.
>
> However, if you are not sure whether to believe Miss Morrison, based on the fact that she has given an inconsistent bit of evidence, as Mr. Sheckleford has reminded you about; based on the fact that she took so long to come and give a statement, based on the fact that she has said that she doesn't know whether or not her baby father gave a statement or anybody else gave a statement; if you are not sure whether she is a credible witness for those or any other reasons, then it is your duty to say that the accused man is not guilty. If you disbelieve her outrightly then obviously, you are going to say that the accused man is not guilty. "

[22] The judge then returned to the point in the context of his specific directions to the jury on how they should treat with discrepancies and inconsistencies:

> "Is there an inconsistency? Is there a contradiction? I will give you an example of one. Mr. Sheckleford, hammered home to you that at one stage, you don't know when, but Miss Morrison admits that - at one stage she says that the kitchen prevented her from viewing the faces of men clearly and yet in this court she has said to you the kitchen is not preventing her from seeing the faces of the men clearly. Now, two things you have to decide which you believe. The statement inside this court, inside the witness box is the only thing that is evidence before you, but the fact that she said something differently on a previous occasion, allows you to ask yourself why is this lady saying something different now from what she said before?

> Is it that she made a mistake then? Is it that she is trying to mislead me now? Trying to build up the case far her own purposes? Is it that her recollections has (sic) faded over time? What is the explanation?
>
> If you can find no explanation which is in her favour, then you must reject her evidence as being unreliable; it would mean that you are not sure that you can rely on what this witness says to you. So, that is a way of looking at discrepancies. I would say that there are some things where you can have discrepancies, where it is minor, whether it is a date or whether it is a mix up in a name, something like that which, if it has an explanation, you can put it aside and say that really does not affect the decision that I have to make. But if it is something serious, something major, such as I have suggested, and Mr. Sheckleford had said such, as the crucial issue of I.D. and the ability to see somebody's face, then you look at it carefully to decide what it is, what has caused this difference. So, those are some of the skills that you use in assessing the evidence which has been presented before you."

[23] The question is therefore whether, by giving these directions, the judge dealt with the issues "fairly and comprehensively", as Miss Pyke submitted. In our view, the directions of the learned trial judge fell short of what was required of him in this case. Given that the correctness of Miss Morrison's identification of the applicant as 'Shakka', one of the two gunmen who invaded her yard that evening, was the central issue in the case, we are of the view that, in addition to pointing out the inconsistency to the jury, the judge ought to have taken the further step of telling the

jury that the witness had in fact offered no explanation for it and that consequently they needed to exercise even greater care in their assessment of her reliability. Instead, by leaving it to the jury to find such explanation as they could, the judge was in our view inviting them to speculate on a matter that went, as Mr Fletcher submitted, to the very root of the case.

The third issue – the judge's *Turnbull* directions

[24] The general requirement of a special warning to the jury in cases where identification is in issue and what that warning is required to convey are not in doubt. This is how Lord Widgery LCJ put it in the oft cited judgment of the court in ***R v Turnbull*** [1977] QB 224, 228–229:

> "First, whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Provided this is done in clear terms the judge need not use any particular form of words.
>
> Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused

> under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? If in any case, whether it is being dealt with summarily or on indictment, the prosecution have reason to believe that there is such a material discrepancy they should supply the accused or his legal advisers with particulars of the description the police were first given. In all cases if the accused asks to be given particulars of such descriptions, the prosecution should supply them. Finally, he should remind the jury of any specific weaknesses which had appeared in the identification evidence.
>
> Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made. All these matters go to the quality of the identification evidence. If the quality is good and remains good at the close of the accused's case, the danger of a mistaken identification is lessened; but the poorer the quality, the greater the danger."

[25] In the subsequent decision of the Privy Council on appeal from this court in ***Scott and Others v. The Queen*** [1989] 2 W.L.R. 924, Lord Griffiths, giving the judgment of the Board, reiterated the importance of the judge discussing with the jury the fundamental danger in identification evidence

of the honest but mistaken witness, who is convinced of the correctness of his identification, giving impressive evidence. However, as regards the actual terms of the directions to the jury, there is ample support in the authorities for the following statement in Keane, The Modern Law of Evidence, 6th edn (at page 252):

> ***"…R v Turnbull*** is not a statute and does not require an incantation of a formula or set of words: provided that the judge complies with the sense and spirit of the guidance given, he has a broad discretion to express himself in his own way".

[26] ***Watt v R*** and ***Rose v R***, both cited by Miss Pyke, provide express authority for this statement. The latter case is of particular interest in the present context, as an example of an unsuccessful challenge on appeal to a summing up in an identification case in which the judge did not in terms tell the jury that a "convincing" witness may nevertheless be mistaken, though he did say that "an honest witness may be mistaken, and not be aware of his mistake" (see Lord Lloyd's judgment, at page 217). The Privy Council held that, taken as a whole, the summing up had adequately conveyed the essence of the ***Turnbull*** warning to the jury and that the absence of the words "convincing" and "weakness" from the summing up was not fatal.

[27] In the instant case, Mr Fletcher's criticisms of the judge's summing up in respect of the identification evidence were that the judge omitted to indicate to the jury that an honest witness can be mistaken, as well as to tell the jury that, even in cases where the witness purports to recognise the defendant, care must be taken. It is therefore necessary to examine the judge's general directions on identification. After reviewing in detail the evidence given by the prosecution witnesses, especially that given by the sole eyewitness, Miss Morrison, this is what the judge told the jury:

> "Those were the witnesses for the prosecution, and having given you the majority of the testimony, let me also remind you of this critical thing called identification evidence. The case turns on it as I have said, and the law says that where visual identification is an important or critical factor in a case, you have to be very, very careful in accepting that evidence. The law says it is dangerous to convict on 'I see' of visual identification evidence. And the reason for that is two fold.
>
> The first, and the reason you probably know of for yourselves is that people make mistakes. You no doubt, if not all of you, certainly some of you, we have had the experience where you see somebody, you think it is somebody you know, you call to the person, and when the person turns, either way they turn the head, or coming closer, you realize that it is not the person you thought it was. Or, you later, you call the person, but you are talking to the person on the phone or you see them somewhere else and you say, 'But I see you at such and such a place and you don't pay me any mind,' and the person said, 'What, I was not there.' So, that is day to day experiences that we have. People make

mistakes and if somebody is convinced that they saw an individual, they can be convincing, they can be persuasive in trying to convince a jury, twelve of you, that they did in fact see this person. But again, they could be mistaken.

So, that is the first reason why the law says you have to look very carefully at the evidence to decide whether to accept it or not.

The second reason is that in the past, innocent people have been convicted by persons giving testimony who have been mistaken, and it has turned out, prove sometimes subsequent by other method, that the individual who they say was there was not in fact there. So, the law says, because of these things, mistakes can be made; you have to *assess* the evidence, it does not mean you can't convict just because it is dangerous, but you have to go through it methodically and carefully to decide whether you accept what the witness is saying as being true. You look at whether the person was known before, how often the person is seen; how well the person is known, and when last the individual was seen. Because you know, if a long period of time passes, you can make a mistake, persons appearance is a little different from what you recall. So, you have to look at these.

The other thing that you have to look at, is the time of day, if it is not daylight time, what is the lighting like, is it bright enough for the person to see; what is the distance that the observation is made from. Because, as you are aware, the further away the person is, the more uncertain you are going to be, the more likely you are that there is a mistake to be made. What portions of the body was seen, how long was the person viewed for; is there any length of time between the observation and the time when the person is pointed out to the police. Is there any difference in the description given to the police initially of

> the individual who is eventually brought before the court.
>
> Was there any special reason to remember this particular individual who is the perpetrator and also whether there is any impediment, any weaknesses, any obstruction which could have prevented a clear view of the perpetrator. You take all those things into account in considering whether to accept the 'I see' evidence of this witness."

[28] The judge then reviewed Miss Morrison's evidence as it related to the identification of the applicant in further detail. In our view, taken as a whole, the summing up was apt to convey to the jury the dangers of an honest witness being genuinely mistaken, even though the word "honest" does not appear on the transcript, as well as the need for caution in recognition cases. Both ideas were adequately captured, it seems to us, in the judge's invitation to the jury to recall previous occasions on which they may have been mistaken about the identity of persons well known to them. In telling them that "if somebody is convinced that they saw an individual, they can be convincing, they can be persuasive in trying to convince a jury", the judge was in our view making it clear to the jury that in identification cases genuine conviction on the part of a witness was not the predominant factor for their consideration.

[29] We agree with Miss Pyke's submission on this aspect of the case that in its totality there was no significant failure by the judge to follow the ***Turnbull*** guidelines in his summing up.

Disposal of the case

[30] We therefore think that the applicant has made good his complaints on the first two issues raised by him in the single ground of appeal. We have given consideration to Miss Pyke's invitation to us, based on ***Freemantle v R*** (1994) 45 WIR 312, to apply the proviso to section 14(1) of the Judicature (Appellate Jurisdiction) Act to this appeal, on the basis that no substantial miscarriage of justice has occurred by virtue of those matters. But in our view, it cannot be said in this case that the quality of the evidence for the prosecution is so "exceptionally good" (as it was said to be in ***Freemantle v R***, at page 316) as to justify the application of the proviso. We accordingly consider that the issues upon which the applicant has succeeded are of sufficient importance in the context of the case as a whole that this application for leave to appeal must succeed.

[31] In the result, the application for leave to appeal is granted. The hearing of the application is treated as the hearing of the appeal and the appeal is allowed. However, in the interests of justice, a new trial is ordered in the Home Circuit Court at the earliest convenient date.