JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 121/94

BEFORE: THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MR. JUSTICE GORDON, J.A.
THE HON. MR. JUSTICE PATTERSON, J.A.

REGINA
vs.
DALTON DALEY
MILTON MONTIQUE

Bert Samuels and Anthony Williams for the applicant Daley

Bert Samuels for the applicant Montique

Deborah Martin for Crown

September 25, 26 and October 23, 1995

PATTERSON, J.A.:

On the 7th November, 1994, both Dalton Daley and Milton Montique ("the applicants") were convicted in the Home Circuit Court on all three counts of an indictment which charged them with the capital murder of Delores Campbell and Juliet Martin on the 19th March, 1992, and Andrew Blake on 7th April, 1992, committed in the course or furtherance of an act of terrorism. The applicants were sentenced to death and they now apply for leave to appeal against their convictions.

All three deceased lived at 9 Blount Street in Denham Town where there are a number of high-rise buildings. Juliet Martin occupied an adjoining apartment to that of Delores Campbell and her son Andrew Blake on the ground floor of one of the four-storey buildings, known as Block 6 or Building 6. One George Brown occupied an apartment on the floor above. A flight of stairs leads from the ground floor to the floors above. Hyacinth Sterling, the mother of the deceased Juliet Martin, occupied a front room on the second floor of a two-storey building on Upper Oxford Street. That room had a window which overlooked Upper Oxford Street. A gully separated her building

on Upper Oxford Street from Blount Street, but it seems that it was easily traversed by means of a bridge.

Hyacinth Sterling testified that at about 9:30 p.m. on the 18th March, 1992, she looked through her window and saw the applicants and three other men standing in a circle on Upper Oxford Street. She knew the applicants by alias names, Daley as "Daney" and Montique as "Pepsi". She also knew a third man as "Berger", but she did not know the other two men. She was able to recognise the applicants by the light which shone on them from a street light some six yards off. The applicant Montique had a gun in his hand loading it, and she saw when he put it in his pocket. The applicant Daley was standing beside him then, and all five men stood talking for some time. They then walked by the side of her building towards the gully and went across towards Blount Street. About five minutes later, she heard the sound of gunshots coming from the direction of Blount Street area. The next day she went to the Kingston Public Hospital where she saw the dead bodies of her daughter Juliet Martin and of Delores Campbell. She had known both applicants for about three years prior to that night and during that time she had seen them quite often. The applicant Montique had at one time lived as man and wife with her sister. On the 27th April, 1992, she pointed out the applicant Daley on an identification parade.

She was cross-examined at length and she said that she mentioned four names in her statement to Inspector Rowe of the Denham Town Police Station and not three, but when confronted with her statement she admitted that it was only the names "Daney", "Pepsi" and "Clive Berger" that was mentioned. She explained that she ascertained the names of the other two men subsequently, and informed Inspector Rowe. She first reported her daughter's death to Constable Amin at the Hannah Town Police Station, but he told her he did not believe her. She could not recall if she had also told him the names of those she saw with guns and that he said he did not believe her story.

George Brown it was who gave evidence of what transpired at 9 Blount Street that night. He said that at about 9:30 p.m.

the 18th March, 1992, he was lying in bed, looking out ough a window into a yard between his building and another ır-storey building on the same premises. The yard was well hted by the light from open doors and windows in both ldings which faced it, and by a "floodlight" in the yard self. He saw five men coming from behind the other building vards his building. They were facing him as they approached s building, and he recognised three of them, the two plicants and "Clive". He went from his room unto the steps tside, and watched persons running in alarm and saying, "Man a me". The applicants and "Clive Berger" ran "under the ilding" that he was in, meaning that they ran to the ground oor of the building. The deceased Andrew Blake was one of ose persons in the yard who fled when the men approached. The plicant Daley fired a shot at him and he ran into the "house" the deceased Juliet Martin and the door was closed behind m. The applicant Daley kicked the door, pushed his hand side the house and fired three shots. He then fired shots at e door of the room where the deceased Delores Campbell and ndrew Blake lived. "Clive" was then a short distance away from the applicant Daley, bending down and looking out with a gun in his hand. The applicant Montique was at that time engaged in kicking in the door of the deceased Delores Campbell and firing shots at it. Shortly after, the applicants and "Clive" ran from the building towards the gully at the back of the other building, joined by the other two men.

George Brown said he observed all that took place while stooping behind a flower pot on the steps outside his room and looking down to the ground floor, at times through the railings of the stairs. He did not wish to be seen by the men. He ventured downstairs after the shooting when the men had left. People on the building were shouting. He saw the deceased Juliet Martin run from her house holding her chest, and she fell to the ground in the yard. Her chest was in a bloody condition. Inside the room he saw the deceased Andrew Blake. His shirt was bloody all over. The deceased Delores Campbell was lying inside

her room entirely covered in blood. The police arrived shortly afterwards.

Brown said he was able to see and recognise the applicants since he had known them before that night and the floodlight focussed under the building. He knew both applicants for about two years prior to the incident, and would see them in the area of Blount Street almost daily, the last time being the very morning prior to the incident. He saw the face of Daley as he ran at Andrew Blake and fired and when Daley ran under the building. When he looked "over" he saw from Daley's head "right down to his foot" frontways; Daley was facing him. He subsequently pointed out Daley on an identification parade. He was asked, "How did you make out Pepsi (Montique) as he stamp off the door? How did you make him out?" and the transcript of his evidence (at page 88) reads as follows:

> "**A:** The way him walk.
>
> **Q:** What about his walk?
>
> **A:** About his walk?
>
> **Q:** What about his walk mek you say is Pepsi?
>
> **A:** Like you see a man there and you know the way how him walk. Him don't have no funny walking or nothing. You can make him out backway like if mi coming from down the road him can say is me that through how the way mi walk all the while; and him have a brown complexion.
>
> HIS LORDSHIP: Just a minute.
>
> **Q:** You say you saw him stamping off the door?
>
> **A:** Yes.
>
> **Q:** When you say him stamping off the door, what part of him you see why you say it was Pepsi?
>
> **A:** I see him fully that time when him stamping off the door. I see him fully.
>
> **Q:** From frontway or sideway or backway, sir?
>
> **A:** Backways.
>
> **Q:** And what part of him did you see when you said you saw him fully?
>
> **A:** Him turn around like this and when him come out now - when him come out like this now, reverse. (Witness indicates)

"**Q:** Where was he coming out from?

A: Him kick the door like this. When him kick the door like this and fire the shot him reverse from the door.

HIS LORDSHIP: Just a minute.

Q: And when he reverse from the door, what part of him could you see?

A: When he reverse from the door I can see him face to face. He can't see me but I can see him."

He was not able to say just how long he saw Montique face to face; "him just come out and I see him face, and then him move that way ...it was so quick ...him just come out and go that way. As mi see him face like this, him just go that way." The entire incident did not last a long time.

When cross-examined by counsel for Daley, the witness Brown said he did not know the other two men, he only saw them when they were coming and he did not think he would be able to recognise them should be see them again. It was suggested to him that he did not see Daley that night, and his reply was, "So why I am telling a lie on him? ...When the incident happen I see him." A further suggestion and the reply is quite revealing. The transcript (pages 131 & 132) reads:

"**Q:** I am suggesting to you further that Daney, as you call him, don't know you at all; <u>that you have never seen him before that.</u> [emphasis supplied]

A: I see him though.

Q: Never even speak to you either.

A: Me and him never hold any argument, but I always pass him."

Both applicants made unsworn statements from the dock. They did not call any evidence. Daley said he lived at 5 Upper Oxford Street and that he worked at "Shims". His defence was, "I am innocent on this case", and that he knew nothing about it. Montique said he too knew nothing about the murders. He lived at 8 Mulgrave Avenue, but he had gone to Hannah Town to see his brother. "He suppose to phone wi other brother who reside in Canada <u>that night</u>" [emphasis supplied]. He said they went to the Hannah Town Police Station to make the telephone call and

then he returned home. It is clear that he spoke of his movements on the night of the murders although he did not mention the date, and that although he was in the general area, he knew nothing about the murders.

At the close of the prosecution's case, counsel in turn made a submission that each applicant had no case to answer. The transcript disclosed that the trial judge asked each counsel if he wished to make the submission in the presence of the jury and each said yes. No further questions were asked and the trial judge allowed the jury to be present throughout the hearing of the submissions and his ruling. This was the usual procedure and it was not considered to be irregular before the judgment of the Board in ***Crosdale v. The Queen*** (unreported) Privy Council Appeal No. 13/94 delivered on the 6th April, 1995. Counsel appearing before us did not argue the irregularity, but we were constrained to examine the transcript and, suffice it to say that counsel for the applicants and the Crown have said that they are satisfied that the irregularity caused no prejudice to either applicant, and we share their view.

We turn now to the grounds argued before us in support of the applications. In their first and principal ground, both applicants contended that "the learned trial judge erred when he refused to uphold the no case submission made on behalf of the applicant." Mr. Samuels argued that the prosecution's case was so tenuous that the trial judge should have acceded to the no case submissions and so withdraw the case from the jury. In support of his argument, he referred to the evidence of the chief prosecution witness George Brown which he said contained a number of inconsistent statements. He said further that the evidence was uncorroborated, vague and was so tainted by contradictions that the prosecution's case was destroyed. He referred to what he said were unfavourable conditions in which the identification of both witnesses was made; terrifying circumstances, poor light, obstructed view, were highlighted.

It is undoubtedly a question of law to be determined by the judge whether the prosecution has adduced sufficient

evidence at the close of their case which, if believed, will support the charge. We find support in this view in the words of Lord Diplock, when he said in ***Haw Tua Tau v. Public Prosecutor*** [1981] 3 All E.R. 14 at 19:

> "It is well established that in a jury trial at the conclusion of the prosecution's case it is the judge's function to decide for himself whether evidence has been adduced which, if it were to be accepted by the jury as accurate, would establish each essential element in the alleged offence, for what are the essential elements in any criminal offence is a question of law. If there is no evidence (or only evidence that is so inherently incredible that no reasonable person could accept it as being true) to prove any one or more of those essential elements, it is the judge's duty to direct an acquittal, for it is only on evidence that juries are entitled to convict; but if there is some evidence, the judge must let the case go on."

It is not the judge's function to weigh the evidence at the close of the prosecution's case to say whether or not the witnesses were telling the truth, and then to take away the case from the consideration of the jury should he form the view that the witnesses had lied. However, when identity is an issue, as in this case, the judge is obliged to consider the quality of the identifying evidence at the close of the prosecution's case. If the quality of the identifying evidence was good, the case should be left for the jury to assess the value of it. But when, in the judgment of the judge, the quality of the identifying evidence was poor, and there was no other evidence to support its correctness, then in such a case he should withdraw the case from the jury and direct an acquittal. For example, when the identifying evidence rests solely on a fleeting glance or on a longer observation made in difficult conditions, the case should be withdrawn from the jury. These basic principles were laid down as guidelines in ***R. v. Turnbull and others*** [1977] Q.B. 224 and their importance was reiterated and applied by the Privy Council in ***Reid v. The Queen*** [1990] A.C. 363.

A perusal of the record in the instant case confirms that the points argued before us were advanced before the trial judge in the no case submission. The trial judge ruled as follows:

> "I rule, having heard the submissions from both sides, the submissions made on behalf of each accused and the reply by prosecuting counsel that there is a case to answer against each accused man on each count of this indictment."

The trial judge obviously had in mind the ***Turnbull*** guidelines as well as the guidelines on how a judge should approach a submission of no case to answer, which were laid down in ***R. v. Galbraith*** [1981] 73 Cr. App. R. 124. The following are the guidelines set out in the headnote:

> "If there is no evidence that the crime alleged has been committed by the defendant, the case should be stopped. (2) If there is some evidence but it is of a tenuous character, i.e. because of inherent weakness or vagueness or because it is inconsistent with other evidence (a) where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case. (b) Where, however, the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury."

It seems quite clear to us that the prosecution had adduced sufficient evidence for the case to be left to the jury. This was undoubtedly a recognition case and the identifying evidence remained strong at the close of the prosecution's case. There was, in our view, cogent evidence which established each essential element in the offences charged. In the circumstances, we do not agree that the trial judge fell in error in refusing to uphold the no case submission, and accordingly, this ground fails.

The next ground argued, again on behalf of both applicants, was that the jury was not cautioned regarding the possibility of a mistaken identification by the witness George

Brown, which was made under terrifying circumstances. It was argued that this was a specific weakness in the identification evidence which was not pointed out to the jury. We were referred to the Board's judgment in ***Anthony Bernard v. The Queen*** (unreported) Privy Council Appeal No. 24/92 - delivered on the 26th April, 1994 where, identification being the issue, their Lordships said that "the judge ought to have reminded the jury that, in an area where mistakes are so easy to make, the possibility of error must have been enhanced by the terrifying and distressing circumstances already depicted." The circumstances in that case were that three men invaded the house of a couple at about midnight and after robbing them of money, shot and killed the husband and shot and wounded the wife. The wife picked out Bernard on an identification parade as one of the men, and the prosecution case rested solely on her uncorroborated identification evidence. Her ordeal that night must have been both terrifying and distressing. But those circumstances did not obtain in the instant case. The factual situation is quite different. The witness Brown was not subjected to any terrifying circumstances; he was able to watch the proceedings on the ground level from the safety of the second floor of the building. In our view, given the factual situation, there was no need to give any such directions to the jury. We find no merit in this ground.

Counsel argued, as a third ground, that the witness George Brown had only a fleeting glance in difficult circumstances of the applicant Montique, and for that reason the learned trial judge erred in law when he failed to take the case from the jury's consideration. He referred to the transcript where the witness said he saw the face of the applicant Montique as he reversed from the door. This is how the record reads (at page 92):

> "**Q:** How long you saw his face for?
>
> **A:** I could not tell you how long; him just come out and I see him face, and then him move that way.
>
> **Q:** Can't you even estimate how long?

> "**A:** No, it was so quick, him just come out.
>
> **Q:** I didn't hear.
>
> **A:** Him just come out and go that way. As mi see him face like this, him just go that way."

But that was not the only evidence of identification of the applicant Montique that the prosecution relied on. The witness said he knew the applicant and had seen him on a regular basis over a two year period. He knew how he walked, although there was nothing peculiar about it. He saw and recognised the applicant from the time the applicant emerged from behind the other building. He saw the applicant in the yard face to face as the applicant approached the building where he (the witness) was. He saw the applicant from behind as he kicked the door. The evidence of Hyacinth Sterling supported the identification evidence of Brown, in that Sterling saw the applicant Montique and the others in close proximity to and going towards the scene of the crime at the material time. She, too, knew him before. He once lived with her sister. We do not consider this to be a case of a "fleeting glance" in terms of ***Turnbull***. This is definitely a "recognition" case. In our view, there was ample opportunity for the witness to have seen and recognised the applicant.

The quality of the identification evidence at the close of the prosecution case remained good, and accordingly, the trial judge was duty-bound to leave the identification evidence to the jury, to assess the value and weight of it. For these reasons, we reject this ground.

As a fourth ground, it was argued that the trial judge failed to adequately assist the jury and give sufficient guidance on the specific weaknesses in the identification evidence. Mr. Samuels submitted that the learned judge did not identify <u>all</u> the weaknesses, and that even those he did, they were not dealt with adequately. He referred to what he said were lacunae in the identification evidence which should have been highlighted as weaknesses. But a jury is not required to assess the value of evidence by what is not there, it is their

duty to consider the evidence presented, and it is the duty of the judge to remind the jury of any specific weaknesses which appears in the identification evidence. We do not think that the trial judge failed in his duty. Hyacinth Sterling testified that she saw Montique "sideways" as he stood on Upper Oxford Street, and this is how the jury were directed (page 273):

> "She said she saw him sideways. That in itself could not have been good evidence I must tell you, and that is a distinct weakness of the identification evidence of the prosecution given by Hyacinth Sterling insofar as identifying Pepsi, the man she says she saw sideways."

There was in fact no other specific weakness in her identification evidence. In dealing with the identification evidence of George Brown, the learned judge said this (page 273):

> "Then George Brown; he didn't give you any time in relation to why he was able to make out any of these men and in particular each of these accused man. He was on his bed, lying on his bed looking through a window and he saw them at the back of the building. He didn't say where this window was, whether it overlooked the back or just the side or what but, of course, if you believe him you may think that he was at a position where he could see them at the back. He said he looked through his window and saw them but, of course, it is for the prosecution to lead evidence to say whether he was in a position to see them from the window and say where the window was in relation to the back. As to that, there is an absence of evidence. He was there just lying down on the bed."

Further on he said this (page 274):

> "He says in order to see the men he looked over the flower pot and through the railing so it is a question now of there being a clear view. There are railings between him and the men. We don't know how wide these railings are but he says he looked through the railings and this is night, not day, where you may think it is easier to make out people in daylight rather than at night but he said the place was served by lights."

Then at page 275 he said:

> "This is what the witness Brown tells you, that he was on the step and he was looking down. You may think, members of the jury, looking down from a height may not afford you as much ability to make out someone, even in broad daylight, as when you are on the same level as the person and looking at the person. So, again, you have to

> "take into account that piece of evidence that it is from an elevation that he is looking and according to him he saw the heads of the persons. Was it only head he saw or did he see the faces as he said he did, the faces of these two accused when he said he saw them at the back and did he see the face of Daney when he said Daney fired shots at the door, pushed the door, because remember he said Daney fired shots at this little boy, this little boy ran into Juliet Martin's room and the door was braced back and then he fired shots and then managed to push his hand in and continued firing shots.

Then returning to the identification evidence of Montique, the trial judge said this (page 276):

> "He said as far as 'Pepsi' is concerned, he saw 'Pepsi' but what of 'Pepsi' did he see? He saw 'Pepsi' stamping down the other door, the door to Delores Campbell's room. He saw when 'Pepsi' was doing this. It was the back of 'Pepsi' he was seeing and he said he can make out 'Pepsi' from his back but members of the jury, if that were the only evidence, of just seeing the man from the back, that could not be evidence upon which you could act - identification evidence. Whether or not you may say that you understand what he means, you know the men or man and therefore you can make him out from his back, that would not be good enough. That would be insufficient evidence of identification, or it would not be evidence of identification which you could regard as accurate and reliable. But, according to him, and this you will remember came rather late in his evidence - well, in chief and, I think, later on in his evidence-in-chief, that when 'Pepsi' stamped the door, kicked it in or off, and had fired shots in Delores Campbell's room, he reversed - using his language he reversed backway and it was at that point that he saw 'Pepsi's' face. In your mind's eye as you follow that piece of evidence, he says it was quick-quick. Was that quick-quick - that action? Was he able on this step, looking over a flower-pot and looking through railings, the space you don't know about - how wide or what, but looking through railings at night and from an elevation, that is evidence upon which you can say this is accurate and reliable evidence of identification, where you can feel sure that he was able to make out 'Pepsi' by seeing his face?
>
> You will remember he said that - and for a long part of his evidence - that he was able to make out 'Pepsi' because he knows him and he knows his walk; although he does not have a special walk he was able to make it out and he made it out backways. Was it the back of the man, whoever he was, that he saw and nothing more? This is a comment I make, or a question I ask, because you will have to

> "examine his evidence and determine whether or not he is truthful when he said he saw his face. Was it just back he saw? because you will remember for much of his evidence-in-chief he was saying, 'I can make out the man. I know him before and know his walk.' Was it just the back of the man he was making out or did he see his face? Bearing in mind where he said he was and how he was able to see his face, did he have sufficient opportunity to make out the man whom he said is 'Pepsi'? And, as I say, he said that this thing happened quick-quick. You were told to look at what the man said was happening in order to gauge the time that he had to make out the face or faces, and to say whether or not you can accept that evidence as being accurate and reliable."

We have set out in extenso those areas of the summing-up where the trial judge correctly identified specific weaknesses in the identification evidence, and in our view, he gave adequate guidance to the jury on that issue. We hold that in the circumstances, the learned judge adhered to and sufficiently applied the ***Turnbull*** principles and we find no merit in the ground urged by counsel.

A further contention advanced on behalf of both applicants, related to the adequacy of the judge's directions on what was said to be the defence of alibi. Both applicants, in their unsworn statements, denied involvement in the murder of the deceased; they said they were innocent of the charges. Neither applicant put forward an alibi as a defence, and in our view, counsel's contention is misconceived. It is settled law that a direction on alibi along the ***Turnbull*** guidelines should not be given in cases where an accused makes an unsworn statement. (See ***Mills & ors. v. R.*** [unreported] - Privy Council Appeal No. 4/93, judgment delivered 20th February, 1995). The evidential status of an unsworn statement was clearly stated by the Privy Council in ***The Director of Public Prosecution v. Walker*** [1974] 1 W.L.R. 1090, and the trial judge followed the guidelines in directing the jury about the value of the unsworn statements. This was all that was required in the circumstances. This submission fails.

Mr. Samuels argued three other grounds, but the points raised were all subsumed in his argument in one or other of the

previous grounds. They were quite without merit and we need make no further reference to them.

Mr. Williams submitted that there was material in the evidence of both Hyacinth Sterling and George Brown which suggested recent concoction, and that the judge "failed to adequately or at all deal" with it. But his attention having been directed to the judge's directions on inconsistencies and discrepancies, which we think were particularly careful, he readily conceded that his submission was without merit. It is not a trial judge's duty to look for and point out to the jury all inconsistencies and discrepancies in the evidence that arise in a prosecution's case. Having explained to the jury how they should approach inconsistencies, discrepancies and contradictions, it is for the jury to say if there are any such, and if there are, to assess them in light of the directions.

The summing-up, when viewed as a whole, cannot be criticized. The trial judge was particularly careful in leaving all issues of fact for the decision of the jury, and he gave them correct directions on the law applicable in the circumstances. The real issue of identification was of paramount importance, and the directions to the jury in that regard were precise. We are satisfied that the jury were given adequate assistance, and there was cogent evidence to support their verdicts. In the event, the applications are refused.