JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS: 37 & 38/2000

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

ONIEL ROBERTS
CHRISTOPHER WILTSHIRE v R

Dwight Reece for Oniel Roberts L. Jack Hines for Christopher Wiltshire

David Fraser, Ag. Deputy Director of Public Prosecutions, for the Crown

June 4, 5, 6 and November 15, 2001

SMITH, J.A. (Ag.):

On January 28th 2000, after a long trial before Cooke, J and a jury in the Home Circuit Court the appellants were convicted of capital murder (Count 1) and non capital murder (Counts 2 and 3).

The appellants were charged jointly with one Kharrie Shimms who was dismissed at the end of the prosecution's case. The particulars of the offences were, that they, on the 24th day of February 1997, in the parish of St. Andrew murdered Rosemarie Coultman (Count 1); Shane Hylton (Count 2); and Suzette Kelly (Count 3) in the course or furtherance of a burglary and robbery.

The following is an outline of the evidence on which the prosecution relied. During the early morning (2:00 a.m.) of the 24th February 1997 the witness Marlando Gordon was awakened by the touch of his mother, the deceased Rosemarie Coultman. "Wake up," she said, "man a come in a de house, hear de door". It was a one bedroom house with an enclosed verandah at 3 Madden Street in which the deceased Rosemarie and her three children Marlando, Kamara and baby Orlando lived.

Mr. Gordon heard a bang as if someone had kicked in the verandah door. It flew open. His deceased mother shoved him off the couch, covered him with clothes and told him to hide. He covered his face with a shirt. His sister Kamara went under the crib. Then the door to the room in which they were, was also kicked off. Five shots were fired into the house. He saw two men standing at the door. One of them pushed his hand behind a dresser and turned on the light. He then saw and recognized three (3) persons in the room as Bounty, Chris and Simon. He knew them from he was a little boy and at the time he was 21 years old. He identified the appellant Christopher Wiltshire as Chris and the appellant Oniel Roberts as Bounty. After the light was turned on all three men opened fire on his mother who in anguish shouted, "No kill off me pickney dem," as she tried to put her baby under the bed. Bounty i.e. the appellant Roberts said, " Mek we kill off the whole a dem ...". They fired on the deceased Coultman, and then ran out of the house. Bounty (Roberts) returned, took up a TV and fired more shots at the deceased Rosemarie Coultman who was lying on the floor before leaving with the T.V.

He testified that Kamara emerged from under the crib and ran out of the room. Mr. Gordon shook his mother who appeared to be dead. He heard his baby brother groaning – he was injured - grievously but not fatally. It was the evidence of this witness that after the men left his house he heard the firing of several more shots at the back of his house in the direction of the house where Shane Hylton lived. From the description of the place given by Mr. Gordon it seems that No. 3 Madden Street is a tenement yard i.e. an address with several houses. Shane Hylton lived in a house which was behind Mr. Gordon's house.

Miss Kamara Johnson a daughter of the deceased, Rosemarie Coultman, said she was also awakened by the deceased. She heard sounds as if someone was kicking off the door. Her deceased mother told her to hide. She went under the crib. From there she said she could see and did see Bounty come inside the room, then Simon and then Chris. She saw their faces. She identified the appellants Wiltshire as Chris and Roberts as Bounty. She knew them from she was six – she was 19 at the time. They lived in the same area. She and Chris used to live in the same yard. They grew up together. She said Bounty turned on the light before the other two entered the room. The three of them walked up to her mother who was on the ground with her baby Orlando and opened "fire" then they left the room. Bounty returned to the room and took up the T.V. After he had left Kamara Johnson came out of hiding. She ran outside and saw the men going towards Shane Hylton's house. Others were with them; in all they were about 10. She said she ran out to the road shouting for help as she ran to

her grandmother. Along with her grandmother Miss Pauline Ranns, she went back to her house. There she saw her mother lying on the floor; she was dead.

Another witness Albert Bentley testified that on the 24th February at about 2:15 a.m. he was at 1 Madden Street i.e. next door to Mr. Marlando Gordon. He was in his room watching T.V. His two sons and the deceased Suzette Kelly were with him. His sons were asleep. The door to his room was kicked in by gunmen who entered his house. He ran and escaped through a window; Suzette went under the bed. As he ran he heard gunshots. Before this, he had heard shots being fired next door. Later when he returned to his house he saw Suzette lying face down in a pool of blood. She had been murdered. The T.V. he was watching and a tape recorder were stolen; his house was ransacked.

The witness Samuel Laing who also lived at 1 Madden Street was in bed when he heard a voice outside his house saying "some a oono man go back round de soh". He said he jumped through a window and ran for it. When he later returned he noticed that the door to his room was kicked off. Mr. Laing said that he knew both appellants Roberts and Wiltshire, and that they were from the area. He knew the appellant Roberts as Bounty.

Sgt. Cecil Lewis of the Denham Town Police Station was early on the scene. He went first to No. 1 Madden Street. There he saw the body of Suzette Kelly. He observed that the place was ransacked. He found one spent shell and two fragmented bullets in the room. The spent shell and the bullets were placed in envelopes and marked G and F respectively (Exhibits 3

and 4). He then went to No. 3 Madden Street. There he saw the dead body of a female lying on the floor in a room. There were gunshot wounds all over the body. From this room he recovered six 9mm warheads. These were placed in an envelope which was sealed and labelled A. He also found in the room seven 9mm spent shells and one .380 spent shell. These were placed in envelopes labelled and marked B & C respectively. Later on the witness testified that he had also found six .380 spent shells.

He attended the post-mortem examination on the body of Rosemarie Coultman and received from Dr. Seshaiah an expended bullet. This was placed in an envelope which was labelled and marked D (Exhibit 9). The lock on the door to the deceased Coultman's room was damaged. Sgt. Lewis also went into another room on the same premises. This room was to the rear of the premises. There he saw the dead body of Shane Hylton lying across the bed splattered with blood. Blood was also seen on the floor and under the bed.

The lock of the room door was dismantled. In the room Sgt. Lewis saw one damaged warhead and one AK47 spent shell. These were placed in envelopes labelled D1. (Exhibit 11). The envelopes with items found in these rooms were handed over to Det. Sgt. Campbell. He later got a receipt from Sgt. Campbell purportedly signed by the ballistic expert Mr. Hibbert.

Subsequently he received a certificate from the ballistic expert along with the envelopes he had sealed and labelled and handed to Sgt. Campbell who testified that he took these envelopes to the ballistic expert. Deputy Supt. Fred Hibbert, the ballistic expert, gave evidence to the effect that tests

carried out on the cartridge cases, spent shells and warheads taken from the three houses in which the bodies of the deceased persons were found and from the body of the deceased Coultman, revealed that five firearms were involved. The tests also revealed that cartridge cases which were taken from the three houses were fired from the same firearms.

Dr. Sashaiah testified that he saw twenty gunshot wounds on the body of Rosemarie Coultman. A deformed lead bullet was found at the base of the brain. It was handed over to the police. The doctor found 3 gunshot wounds to the body of Shane Hylton. On the body of Suzette Kelly were two gun shot wounds. Warrants were issued on the 26th February, 1997 for the arrest of both appellants.

At the trial the appellant Roberts gave evidence. He was not involved, he said, in any incident in Craig Town on the 24th February 1997, where three (3) people were murdered. He did not know Marlando Gordon or Kamara Johnson. He was seeing them for the first time in court. He showed the court a scar on the left side of his face which he said had been there for about 16 years. He swore that he is not called Bounty.

The appellant Wiltshire also gave evidence. He too said that he did not know Kamara Johnson and Marlando Gordon and was seeing Marlando for the first time in court. He had seen Kamara at the Remand Centre when she visited an inmate. He used to live on Madden Street but he left there in 1996. His evidence is that on the 24th February 1997 he was in St. Elizabeth where he had been living since June 1996. He was at his home with his aunt

and family. During the night of the 24th February his girlfriend visited him and spent the night with him.

They were convicted and sentenced to suffer death. From these convictions, both have appealed.

Oneil Roberts

Mr. Reece for the appellant Roberts argued five grounds before this Court. Grounds 1 and 2 concerned the defence of alibi and were argued together. Grounds 3, 4 and 5 are directed at the all important issue of identification.

Alibi

Counsel for the appellant complained that the learned trial judge failed to point out to the jury that the evidence of the appellant raised the defence of alibi.

The appellant Roberts in his evidence did not say where he was at the material time. He merely said that he would not to into the area where the incident occurred because of his political affiliation. In substance he put the Crown to discharge the onus of proof. The learned trial judge told the jury (p.750):

> "Now the accused man Roberts says he knows nothing about the incident."

After giving the jury directions on Wiltshire's defence of alibi the learned trial judge turned to the evidence of Roberts and reminded the jury of the salient aspects. A proper direction on the burden and standard of proof was given. We accept the submission of Mr. Fraser, Deputy Director of Public Prosecutions, that in the circumstances the trial judge was not

required to give a specific direction on alibi in relation to the appellant Roberts. A direction on the burden of proof was adequate. Mr. Fraser relied on the decision of this Court in ***R v Noel Phipps, Shawn Taylor and Phillip Leslie*** SCCA Nos: 21, 22,and 23/87, delivered July 11, 1988.

In that case Taylor's defence was that he had never been to the deceased Witter's residence and that he did not participate in the killing of Mr. Witter. At p. 24 of the judgment the Court per Rowe, P. said:

> "The trial judge gave no specific direction on alibi in relation to Taylor. We are of the opinion that he was not obliged to do so as Taylor's defence consisted of a general denial. Direction on the burden of proof generally was an entirely sufficient treatment in this case."

We cannot therefore accept the contention of counsel for the appellant that alibi was raised by necessary implication having regard to the evidence of the appellant that he had no knowledge of the incident at Graig Town and had never been to 3 Madden Street is evidence in support of alibi. In ***Alden Johnson*** (1995) 2 Cr. App. R 1 at 9, the Court of Appeal (England) per Glidewill L.J. said:

> "In our judgment, evidence whether from a defendant himself or from any other person, which goes no further than that the defendant was not present at the place where an offence was committed is not evidence in support of alibi within section 11 (8) ..."

Section 11 (8) of the Criminal Justice Act 1967 (U.K.) defines evidence in support of an alibi as evidence tending to show that by reason of the presence of the defendant at a particular place or in a particular area at a particular time, he was not, or was unlikely to have been, at the place where

the offence is alleged to have been committed at the time of its alleged commission. There can be no doubt that this statutory language embodies the common law and is the meaning of alibi evidence in this jurisdiction. We accordingly hold that a trial judge is only required to give a direction on the defence of alibi where there is evidence that the defendant was at some other particular place or area at the material time. Evidence which merely states that he was not at the place where the offence was committed does not raise the defence of alibi. We agree with counsel for the Crown that the judge in the instant case was not required to put the clothes of alibi on the appellant's defence and a direction on burden of proof was sufficient.

Identification

Mr Reece contends that the learned trial judge failed to properly assist the jury with the identification evidence in relation to the appellant Roberts. Counsel complains that the trial judge merely rehearsed the Turnbull directions without analysing the applicant's evidence of an obvious scar on his face and the witness's failure to mention it. The applicant's evidence in this regard is as follows, (p. 598):

> "Q Now, did you have any marking on your face?
>
> A Yes, sir, scar on my face.
>
> Q Where?
>
> A On the left side of my face
>
> Q Can you show it to us?
>
> A Yes, sir. (shown)
>
> His Lordship: Where is it? (witness indicates)

His Lordship: You want the jury to see it?

Jurors : We saw it m' Lord

His Lordship: Let me see it. (accused shows to his Lordship)

Q Now how long since you have that scar?

A Sixteen years

His Lordship: Sixteen or from you are sixteen? How old are you now?

Witness Thirty-Two years old.

In his directions to the jury the judge dealt with the evidence of the scar in the following manner (p.752):

> " ... he has a scar across - remember the scar on his left, for sixteen years - he is thirty-on years old. That was led to say how comes these witnesses don't talk about the scars yet they know him."

It seems that at the trial the witnesses were not asked about any scar on the face of the appellant Roberts. Mr Fraser for the Crown submitted that, this direction when viewed in the context of the ***Turnbull*** direction which the judge gave the jury, was adequate. The direction of the learned trial judge was in our view, adequate to bring home to the jury the significance of the scar on the face of the appellant when examining the witness' identification evidence. The jury by that direction would have understood that the reason why that evidence was led by the defence was to cast doubt on the witness' knowledge of the appellant as he did not mention the scar. We are clear in our minds that the treatment of this aspect of the evidence by the trial judge was fair and adequate.

Counsel for Roberts also complained that the learned trial judge diluted his directions on identification by declaring that he was unaware of any cases of incorrect mistaken identification in Jamaica. The judge having told the jury that there had been notorious miscarriages of justice due to mistaken identification went on to say (page 711 line 20):

> "I myself am not aware of any such cases in Jamaica"

It is the contention of Mr Reece that such a direction would have left the jury with the impression that witnesses in Jamaican cases do not make mistakes and therefore the identification made by the witnesses in the instant case was beyond reproach. Mr Fraser correctly submitted that:

> "(i) The judge cannot be faulted for pointing out to the jury what is a jurisprudential fact.
>
> (ii) The judge was not required to warn the jury of notorious miscarriages of justice etc. and so cannot be justifiably criticised for having qualified that statement.
>
> (iii) The learned judge's direction whilst unnecessary did not in any way compromise his overall strong warning of the dangers of mistaken identification, the reasons for that warning and his detailed analysis of the strengths and weaknesses of the identification evidence. He relied on ***Desmond Amore v The Queen*** (1994) 1 WLR 547 at 554."

In that case the defendant was charged with the murder of a man who had been shot by an intruder who had broken into his house. The prosecution relied wholly on evidence of visual identification by the deceased's wife, which the defence claimed to have been mistaken. The trial judge did not refer to the experience of miscarriages of justice due to

mistaken identification. This Court dismissed the defendant's application for leave to appeal against conviction. On his appeal to the ***Judicial Committee of the Privy Council*** it was held, dismissing the appeal, that since wrongful convictions were not known to have occurred in Jamaica as a result of mistaken identification, reference to such miscarriages of justice elsewhere was unnecessary and would be unhelpful. We entirely agree with Mr Fraser that the direction was not necessary and therefore the appellant had no justifiable reason to complain of its dilution.

Ground 4 concerned the ballistic evidence. Counsel for the appellant Roberts complained that the trial judge failed to give adequate directions on the ballistic evidence (which by his own admission was confusing) and its possible significance in relation to the issue of identification. The evidence of the ballistic expert was that certain warheads and shells which he received from the police came from four (4) different guns. The evidence of the police was that these particular warheads and shells were found in the room of the deceased Rosemarie Coultman. The evidence of the witnesses Marlando Gordon and Kamara Johnson was that three gunmen entered the room and all three fired at the deceased.

It is the contention of the appellant's counsel that the judge should have told the jury that the witnesses might have been mistaken when they said three men entered the room. It might have been four men or more. The implications being that witnesses were mistaken about the number and identity of their assailants. Further, counsel contends that without the ballistic evidence counts 2 and 3 would fail. Mr Fraser submitted that the

ballistic evidence was not essential to a finding of guilt on counts 2 and 3. The judge he said, correctly directed the jury that a finding of guilt on counts 2 and 3 would only be based on a continuing common design and circumstantial evidence.

From the evidence of Marlando Gordon, the deceased Rosemarie Coultman and Shane Hylton lived in the same yard but in different houses and the deceased Suzette Kelly lived beside them. The picture we get from Kamara Johnson's evidence is that the three men having exited the house in which the deceased Coultman was, went towards the deceased Hylton's house. They were joined by others who were outside the house.

The trial judge in directing the jury on counts 2 and 3 said (p. 737):

> "Now in respect of counts 2 and 3, that is the murder if you so find it is murder, of Shane Hylton and Suzette Kelly, the prosecution has not called or has not put before you any direct evidence of who did the shooting. What the prosecution is relying on are two concepts, one, common design and the other circumstantial evidence."

The judge then proceeded to explain the principle of common design to the jury and continued:

> "In this case the prosecution is saying that a group of men ... six or seven ... the crown is saying that about 2:00 a.m. in that morning the two accused men were among a group of armed persons who invaded the premises 1 to 3 Madden Street with intention to murder persons who lived there."

The trial judge then moved to deal with circumstantial evidence. He defined and explained this concept to the jury and went on to say:

> "Now what are the circumstances? It is 2:00 o'clock in the morning a group of men go to premises 1 to 3 Madden Street, they are armed

> with guns. Rhetorical question. Why have they guns? These premises are virtually one yard, let me remind you between 1 and 3 - one gate open premises gate 3. The evidence of the baby father I can't remember his name – the baby father of Suzette – Bently, is at Coultman's house but just about thirty feet from his house that is why I said virtually one premises the killings take place within a short time of each other... The doors of each were kicked off. Bentley's evidence was that you had men encircling the house. Laing's evidence is that there are attempts to circle the house and then there is this wanton shooting, and two of the houses televisions or electronic equipment is taken. So now use your common sense and experience is it a different group? Well, you also have the evidence of Kamara, if you accept her about the men going around to where Shane lives. So is it the same group if you accept that there was a group of men who is responsible for Coultman's death, that is responsible for Shane Hylton's death and is responsible for Suzette Kelly's death. Or is it a different group? A matter entirely for you!"

The learned trial judge was clearly indicating to the jury that even without the ballistic evidence there was sufficient evidence from which they might conclude that the persons who were criminally responsible for the death of Rosemarie Coultman were also responsible for the deaths of Shane Hylton and Suzette Kelly. It was after the judge had invited the jury to examine the circumstances already referred to, in determining whether or not the appellants were guilty that he dealt with the ballistic evidence. He said (740):

> "Then there is the ballistic evidence and I must confess in respect of this I have some difficulty. I have some difficulty. Because what the Crown is trying to do is to link by means of ballistic evidence to say that the same set of firearms were used in 1, 2 and 3, and in so far as there is any link you may come to that conclusion."

The judge then embarked upon an analysis of parts of the evidence of Sgt. Lewis and Sgt. Hibbert. He referred to an inconsistency in the evidence of Sgt. Lewis and asked:

> "How do you explain that? As I say I have a little difficulty with him. I don't know if you have any, but for what it is worth if anything at all, he said that 1(2) and 1(3) (i.e. warhead and expended cartridge case found in deceased Hylton's house) bore resemblance to bullet found in Coultman's house and bullet and a cartridge case bore resemblance to what was found in Kelly's house."

After inviting the jury to make what they wish of the ballistic evidence the learned trial judge revisited what he described as the critical question in this way:

> "But now I return to the critical question you know what. We are going back to identification. Were Roberts and Wiltshire part of the group, and were they part and parcel of the common design, if you find so, to kill people who were in those premises, Coultman, Hylton and Kelly? If you are satisfied so that you feel sure in respect of each of them because remember I told you already, you look at each one separately then it would be open to you to find each of them guilty of non-capital murder in respect of counts 2 and 3."

We cannot accept Mr Reece's submission that without the ballistic evidence counts 2 and 3 would fail. In our view the trial judge correctly directed the jury that the critical question was whether the appellants were parties to a joint criminal enterprise and that the issue of identification was crucial. We accept the submission of Mr Fraser that the judge correctly directed the jury that a finding of guilt on counts 2 and 3 could only be based on common design and circumstantial evidence. The ballistic evidence which Mr Fraser conceded was unattractively led, was left to the jury only as a

possible component of the circumstantial evidence. The judge in reviewing the ballistic evidence invited the jury to consider whether in fact that evidence had any worth at all.

Finally counsel for the appellant Roberts questioned whether it was appropriate for the judge to ask the jury to consider whether one man might have had more than one gun. The judge in reminding the jury of the arguments by counsel concerning the apparent discrepancy between the ballistic expert's evidence and the evidence of the two eye witnesses told them (p. 730):

> "Now, there were more weapons, more than three weapons, evidence of more than three weapons being fired in that room. Defence counsel in their addresses say that means that more than three people were in the room and she says it is only three. Counsel for the prosecution says there were shots being fired from outside. I don't know if that makes much sense what was put forward by crown counsel, because that means they would be shooting through their very buddies who were standing at the door. So to me this does not make sense. But I ask myself, why? It is that one man can't have more than one firearm? ... There is evidence that there were twenty shots in all. It is a matter for you."

We do not find any fault with this direction. It is our view that the judge was generous to the defence in his comments but rather caustic in his comments on the contention of the prosecution. As he was entitled to do, the judge put forward his own view based on the evidence and in the end left it to the jury to decide. In view of the very strident direction the judge had earlier given the jury as to how to deal with comments made by himself or by counsel it cannot be gainsaid that the jury was left in any doubt that it was for them to

say what they made of the evidence. Accordingly we reject the submissions of counsel for the appellant Roberts.

Christopher Wiltshire

Mr Hines for the appellant Wiltshire advanced two grounds on his behalf. They are:

> "1. The learned trial judge erred in that he failed to remind the jury that if they rejected the alibi then that rejection did not necessarily support the identification evidence. See ***Turnbull*** (1976) 3 All E.R. 549; (1977) QB 224.
>
> 2. The learned trial judge failed to highlight, outline and explain the significance of the special weaknesses in the identification evidence and to assist the jury by enlightening them with his experience and wisdom."

Ground One - Alibi

The defence of Wiltshire was one of alibi. The trial judge directed the jury thus (pp 750-1):

> "So he is running – as we say in law he is putting forward what is known as an alibi. This defence, that is the defence of Wiltshire, is one of alibi which simply means that the accused says he was somewhere else at the material time. But as the burden of proof is on the prosecution the accused does not have to prove he was elsewhere. On the contrary, it is for the prosecution to disprove the alibi.
>
> If you conclude that the alibi was false, that does not of itself entitle you to convict the accused. The prosecution must still establish his guilt to the standard where you are satisfied so that you feel sure. And how does the prosecution disprove his alibi if they satisfy you so that you feel sure of the correctness of the identification by Kamara or Marlando or both. That is how the alibi operates."

Mr Hines contends that these directions are incomplete in that the trial judge failed to warn the jury that if they rejected the defendant's alibi then that rejection would not necessarily support the identification evidence. Counsel relies on the guidelines given by Lord Widgery CJ in ***Turnbull*** (supra) and on observations made by this Court recently in ***R v Gavaska Brown et al*** SCCA 84, 85 and 86 of 1999, delivered February 1, 2001, as also in ***R v Pemberton*** (1994) 99 Cr. App. R. 228.

Mr Fraser for the Crown in his usually helpful manner submitted that the directions of the learned trial judge were adequate. These directions he said, contained the essential ingredients of alibi defence viz:

> (i) that the appellant is saying he was elsewhere at the material time – hence he could not be guilty of the offence charged;
>
> (ii) that the burden of proof is on the prosecution the appellant does not have to prove he was elsewhere at the material time, but rather it was for the prosecution to disprove the alibi, if it can;
>
> (iii) that the burden of proof means that the jury is not entitled to convict the accused/appellant solely because they reject the alibi as false, it is for the prosecution still to establish his guilt;
>
> (iv) that to convict the accused/appellant the jury had to be satisfied to the extent that they feel sure on the prosecution's evidence of his guilt or put another way, the jury can only convict the accused if the prosecution succeeds in disproving the accused's alibi and this is done if the prosecution's evidence satisfies the jury to the extent that they feel sure of his guilt.

Mr Fraser referred the Court to ***R v Alwyn McLean*** SCCA 122/95 delivered December 16, 1996; ***Nigel Coley v R*** (1995) 46 WIR 313; ***R v Geddes McTaggart and Sewell*** SCCA 56, 57 and 58/95 delivered July 31, 1996.

In our view Mr Fraser's submissions are correct. The learned trial judge's directions were adequate and fair: see ***Nigel Coley.*** This would normally dispose of this issue. However Mr Hines asked the Court to indicate whether the guidelines laid down by *Lord Widgery C.J.* in ***Turnbull*** ([1976] 3 All ER 549), should be followed in all cases where there is actual evidence of an alibi.

It is necessary to state that a trial judge is required by the guidelines to identify to the jury evidence which he adjudges is capable of supporting the evidence of identification. It is in this context that Lord Widgery *C.J.* said:

> "Care should be taken by the judge when directing the jury about the support for an identification which may be derived from the fact that they have rejected an alibi:" (p. 553)

The reasons for such care are stated:

> "False alibis may be put forward for many reasons: an accused for example who has his own truthful evidence to rely on may stupidly fabricate an alibi and get lying witnesses to support it out of fear that his own evidence will not be enough. Further alibi witnesses can make genuine mistakes about dates and occasions like any other witnesses can."

The learned Lord Chief Justice went on to state that:

> "It is only where the jury is satisfied that the sole reason for the fabrication was to deceive them and there is no other explanation for its being put forward that fabrication can provide any support for identification evidence."

The first observation we wish to make is that the warning concerning the rejection of alibi by the jury is applicable in the following circumstances:

(i) Where the fact of rejection of the alibi is identified by the judge as capable of supporting the evidence of identification.

(ii) Where because of discrepancies inconsistencies and contradictions in the evidence adduced by the defence the alibi evidence is in such a state that there is a risk that the jury may conclude that a rejection of the alibi necessarily supports the identification evidence. See for example, ***R v Gavaska Brown et al*** where the discrepancies between the defendant's unsworn statement and the alibi witness' evidence were pointed out to the jury. In the circumstances of that case this Court felt that the judge ought to have given the jury the ***Turnbull*** – false alibi – warning. However it should be observed that a full ***Turnbull*** direction may not be in the interest of the accused. It is open to the judge, to say that while an innocent person may put forward a false alibi out of stupidity or fear, the deliberate fabrication of an alibi, if it can be established beyond doubt, might properly be counted against the accused – ***Coley v R*** (supra) at p. 316 (d-e).

(iii) Where the alibi evidence had collapsed as in ***James Pemberton v R*** and there was a risk that the jury might regard the collapsed alibi as confirming a disputed identification. See also ***R v Drake*** (1996) Crim. L.R. 109.

Another observation is that where the alibi witnesses have been unshaken and there is no apparent weakness in the alibi evidence to suggest that the alibi might be false then as a matter of logic and common sense the jury should be directed that they can only reject the alibi if they are sure that the identification evidence is correct.

In such a case a false alibi warning would make no sense. To put it another way – where the only rational basis for the rejection of the alibi is the fact that the jury is otherwise convinced of the correctness of the identification evidence, a warning about false alibi would be, in our view, at the least confusing. Of course the judge would have told the jury that there is no burden on the defendant to prove the alibi, that it was for the prosecution to disprove the alibi and the prosecution would have succeeded in doing so if the jury were sure on the evidence, of the correctness of the identification by the prosecution witnesses.

This is in contradistinction to (ii) above where a jury may reject an alibi because of inherent weaknesses in the evidence of the alibi witnesses. Normally in such a case the jury should be warned that a false alibi does not by itself prove that the accused was where the identifying witnesses say he was.

Finally we must observe that it is the spirit of the guidelines that must be complied with. The judge may tailor his direction to fit the particular case he is dealing with – see ***R v Mills et al*** (1995) 1 WLR 511. As was said in ***R v Kevin Geddes et al*** (supra) a summing up must be custom built that is, it must have regard to the facts in the case and to the issues joined.

Ground Two

Counsel complained that the learned trial judge "failed to highlight, outline and explain the significance of the special weaknesses in the identification evidence." Mr Hines relied upon the well known case of ***R v Oliver Whylie*** 15 JLR 156 and a recent decision of the Privy Council namely

Bernard v R (1994) 45 WIR 296. In ***Oliver Whylie*** at p. 166 (e) Rowe J.A. (Ag.), as he then was, who gave the judgment of the Court, said:

> "It is of importance that the trial judge should not consider his duty fulfilled merely by a faithful narration of the evidence on these matters. He should explain to the jury the significance of these matters enlightening with his wisdom and experience what might otherwise be dark and impenetrable."

We do not think that the judge in the instant case can properly be criticised on this score. His summing up contained careful analyses of, and comments on the relevant evidence.

In ***Bernard v R*** at p. 302 Lord Lowry who delivered the advice of their Lordships' Board said:

> "Turning to the alleged specific weaknesses which ought, according to the appellant, to have been the subject of special directions their Lordships see considerable merit in the submission that the terrifying circumstances of Mrs Webster's ordeal and the appalling consequences at close quarters which ensued made it most desirable, if not imperative to caution the jury specifically about the possibility of a mistaken identification which those circumstances and consequences were likely to promote."

What are the weaknesses that counsel for appellant said should have been identified as such and should have been the subject of special directions? They are:

> (i) The circumstances in which the eye-witnesses identified the appellants as the intruders. Kamara was lying on her stomach under a crib; Marlando Gordon was behind a couch holding a shirt over his head.
>
> (ii) The scars - the discrepancy between Marlondo's evidence and his statement.

(iii) The little opportunity witnesses had to see the faces of the men.

(iv) The uncertainty as to whether Kamara was able to see the faces of the men she said she saw going towards Shane's house.

Mr Hines submitted that the identification of the men by the witnesses were made under terrifying circumstances and that it was imperative for the judge to caution the jury specifically about the possibility of mistaken identification which the circumstances were likely to promote.

Mr Fraser for the Crown submitted that the judge adequately dealt with the strengths and weaknesses of the identification evidence. It was not necessary, he argued, for the judge to use the word "weakness" or to list the weaknesses. The important requirement he said, was that the weaknesses should be brought to the attention of the jury and critically analysed. He relied on dicta ***in Michael Rose v R*** (1994) 46 WIR 213. In that case ***Lord Lloyd of Berwick*** who delivered their Lordships' advice said at p. 217D:

> "Mr Hooper's main point was that nowhere does the judge list the specific weaknesses in the identification. Now it is true that the judge did not list the weaknesses in numerical order, nor did he use the word "weakness" when drawing the jury's attention to the points made by the defence. But nothing in Turnbull or in the subsequent cases to which their Lordships were referred requires the judge to make a "list" of the weaknesses in the identification evidence or to use a particular form of words when referring to those weaknesses. The essential requirement is that all the weaknesses should be properly drawn to the attention of the jury and critically analysed where this is appropriate."

Mr Fraser in a meticulous manner took this Court through the summing-up of the learned trial judge and the relevant evidence. The learned trial judge gave the jury a clear and accurate direction on the proper approach to visual identification i.e. the ***Turnbull*** direction. He emphasised the need for a careful examination of the circumstances, that is, the lighting, whether witnesses knew the appellants before the opportunity to observe them etc. He reminded them of the layout of the deceased Coultman's room with the various items of furniture and then told them (p.713 of the record):

> "Kamara is under this crib; her head peeping out, that is the crib comes down like this and it is just outside of it. From her head she says to the door, two to three feet. So this is where Kamara is. Now where is Marlando? He has his back to this wall, his feet resting on the couch, so I hope I have recaptured the layout. So with that layout in mind and with my directions to you as to your approach to identification we now go to revisit the identification evidence."

He went on to analyse the identification evidence of each witness as the evidence affects each appellant indicating aspects of the evidence which he said are of critical importance such as the opportunity the witnesses had to see the faces of the men. He commented on the evidence relevant to the issue as to whether the appellant Roberts was known as "Bounty." The learned trial judge stressed the importance of the time within which the witnesses said they saw the faces of the men. At p. 720 he said:

> "Then the time now, some time had been given, three minutes and four minutes ... You know what you must do, work it out. The room would be about five to six feet deep to walk. How long would it take to walk from the bed to the door and for how much of that distance would Marlando be

> able to see the faces of the persons coming out? Would that be an adequate amount of time for somebody who says he had known this man some eleven years they were living at the same place would that have been adequate time? Was the evidence such that you can be satisfied that you feel sure of the correctness of the identification?"

He dealt with Kamara's evidence in the same vein:

> "Well she sought refuge. While she was under the crib she saw Bountie come in first then Simon and then Chris; and after they came in they turned on the light and then fired, went over to the mother and fired. From where she was she looked up and saw the faces of the men coming in. So she would have been able to see the faces. She is lying down she saw the faces. You can work out how far she would see the faces. Then after that, it would be the backs that she would be seeing, and saw them sideways when they were going out walking. And then she said that Bountie came back and took the T.V. When he came in she again saw his face. So according to her she had two opportunities to see the face of the person she calls Bountie. Then when they left she came out of the house; saw Bountie and Chris going around to the direction of Shane Hylton's house."

The learned trial judge invited the jury to consider whether the fact that Marlando was awakened just before the men entered the room would affect his ability to properly and correctly identify the men. The learned trial judge subjected the evidence relating to the scars on Wiltshire's face to a similarly thorough analysis. He told them of the significance of the scars. In respect of the appellant Wiltshire, the judge said at (p. 722):

> "The question of the scars, the way in which the cross-examination was conducted is to show that he (the witness) never knew him at all so he could not know about the scars."

Then later he returned to this (p. 730):

> "Then I go back to the question of the scars. You have heard so much about this from Mr Bird and everything that he has said you are to take into consideration. He has said that he got the scars – never had any scars (at the time), any scars he had was through a motor vehicle accident, that was after the death.
>
> When the incident took place Marlando said he saw two scars. What is the importance of the scars? (Are) scars a vital or significant aspect that lends itself to the identification? If it is, then you have to take this aspect of the evidence into consideration. A matter entirely for you."

We are firmly of the view that this direction was correct and adequate. It was clearly for the jury to decide what evidence to accept in coming to a conclusion as to whether or not the appellant Wiltshire had scars on his face at the time of the murder.

In respect of the scars on the appellant Roberts the judge reminded the jury that he said he had scars for sixteen years and told them (p. 752-3):

> "That was led to say how comes these witnesses don't talk about the scars, yet they know him."

We mentioned this although no complaint is made by Roberts about the judge's direction in this regard.

As we journeyed with counsel through the summing-up it was demonstrated that the learned trial judge pointed out the potential difficulties. For example (at p. 727) he asked them to consider whether they can accept Kamara's evidence that when she was under the crib lying on her stomach she could look up and see anybody at all and whether "the range of her vision was such that she could see the features of those men." Later on

he pointed out certain inconsistencies and discrepancies and related them to the issue of identification. At p. 274 he reminded them of Marlando's position:

> ""Remember Marlando said the mother had shubbed him over the couch and threw clothes on him and he had this shirt – he showed you how he held the shirt over his head."

He even dealt with motive and malice as advanced by the defence. We note that the learned trial judge after carefully analysing the prosecution's evidence subjected the evidence of the appellants and of Paulette Wiltshire to much the same analysis. It is true to say that the learned trial judge in his critical analysis of the evidence pointed out all the relevant circumstances that could have impacted on the quality and cogency of the identification evidence. In our view this ground also fails.

We have treated the hearing of the applications for leave to appeal as the hearing of the appeals. For the reasons given, the appeals are dismissed. The convictions and sentences are affirmed.