[2021] JMCA Crim 15

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 2/2013

BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE EDWARDS JA
THE HON MRS JUSTICE FOSTER-PUSEY JA

KEMAR WHYTE v R

Leroy Equiano for the applicant

Miss Paula Llewellyn QC, Director of Public Prosecutions and Rosheide Spence for the Crown

11 February 2019 and 30 April 2021

F WILLIAMS JA

[1] This matter came before us as a renewed application for permission to appeal against the applicant's conviction in the Home Circuit Court, in Kingston, for the offence of murder. At the conclusion of the hearing, we reserved our decision. Our decision and reasons are now being made available, with apologies extended for the time it has taken to deliver same.

The trial

[2] The applicant was tried before L Pusey J ("the learned trial judge") and a jury between 21 and 29 January 2013. He was convicted on the latter date and thereafter sentenced on 1 February 2013 to life imprisonment with the stipulation that he should serve 25 years before becoming eligible for parole.

The prosecution's case

[3] The prosecution called 11 witnesses and elicited evidence that the applicant was one of three assailants who, in the early morning of 20 February 2011, entered a house where Dwayne Mundy ("the deceased") was sleeping and shot him several times, causing his death.

[4] Miss Ann-Marie Davis, the mother of the deceased, testified that the incident occurred at her house, which is located in a yard with several other houses, all occupied by family members. She gave evidence that at about 4:15 on the morning in question she heard noises outside. She testified that she woke her daughter and they both hid. She stated that the deceased and his girlfriend who were also asleep in the same room but on another bed also awoke and hid. She gave evidence that she and the deceased hid under the same bed in the room.

[5] She further testified that she heard when the front door to the room was kicked open and saw two persons enter. She stated that the door was located in the middle of the house facing the fence. She gave evidence that the assailants turned on the electric light in the room and shone a light under the bed where she and the deceased were

hiding. She stated that the two assailants stooped down and looked under the bed and that she saw their faces for about five seconds. She then heard explosions. The deceased, she said, was pulled from under the bed and shot in his head, after which the assailants retreated.

[6] Miss Davis testified that she later identified the deceased's body at a post mortem examination. She also identified the applicant, sitting in the dock, as one of the assailants. However, during cross examination, evidence was elicited from her that the assailants were unknown to her at the time of the murder but that she had not identified the applicant on an identification parade. As it turned out, she had not been asked by the police to attend an identification parade.

[7] Mr Dickie Blake Stephenson, the uncle of the deceased, testified that at the time of the murder he lived in the same yard, in a house located behind Miss Davis' house. He gave evidence that he had been awakened by the sounds of gunshots and that he went outside to investigate. He testified that he saw and recognised the applicant as the applicant was exiting the gate with two other men.

[8] He stated that he had a second sighting of the assailants after they had left the premises and were going up the road. He testified that he and Mr George Pitter (his brother) ran after the assailants and called out their names. He further testified that at that point the assailants were about 150 feet away and had started to fire gunshots in their direction.

[9] Evidence was further elicited that Mr Blake Stephenson had identified the applicant at a video identification parade.

[10] At the close of the case for the Crown, counsel for the applicant made a no case submission, which was rejected by the learned trial judge.

The defence

[11] The applicant made an unsworn statement from the dock. He stated that he was not in the community at the time of the murder but was in Western Kingston, at his girlfriend's house.

[12] The learned trial judge subsequently summed up the case to the jury, which, after retiring, returned a unanimous verdict of guilty.

The application for leave to appeal

[13] Dissatisfied with the fact of his conviction, the applicant, by Criminal Form B1 dated 1 February 2013, sought permission to appeal against his conviction on the grounds that the trial was unfair and that the identification evidence elicited at the trial was poor. On 4 July 2017, a single judge of appeal duly considered and refused his application. As is his right, the applicant renewed his application before the full court. That application is now before us for consideration.

The grounds of appeal

[14] At the commencement of this hearing, counsel for the applicant sought and obtained permission to abandon the original grounds of appeal filed and to argue in

their stead two supplemental grounds of appeal filed on 10 January 2019. These are the supplemental grounds of appeal that were argued:

> "1. The Learned Trial Judge erred in law by allowing the case to go to the jury for the following reasons:
>
> a. the identification evidence was grossly inadequate;
>
> b. the witness was afforded no more than a fleeting glance in the observation of the assailants;
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> c. the surrounding circumstances under which the observation was made rendered the identification unsafe.
>
> 2. The Learned Trial Judge having allowed the case to go to the Jury failed to assist them sufficiently with the identification evidence."

Issues

[15] The supplemental grounds of appeal are directed at the issues of the sufficiency of the identification evidence and the adequacy of the learned trial judge's direction to the jury on the issue of identification. Supplemental ground 1 questions whether the learned trial judge had correctly rejected the no case submission or whether he ought properly to have withdrawn the case from the jury, due to an insufficiency of identification evidence. Supplemental ground 2, on the other hand calls into question whether, having allowed the case to go to the jury, the learned trial judge had provided them with sufficient directions to allow them to properly assess the identification evidence.

[16] We will now proceed to an assessment of the grounds.

Supplemental ground 1: the learned trial judge erred in allowing the case to go to the jury

Submissions for the applicant

[17] Counsel for the applicant argued that in this case the identification evidence was tenuous. Accordingly, the learned trial judge should have upheld the no case submission and withdrawn the case from the jury. Counsel further submitted that the inherent weakness of the identification evidence heightened the risk of a mistaken identification.

[18] Counsel argued that the instances of identification by Mr Blake and Mr George Pitter occurred in short periods under extremely difficult circumstances. Counsel argued that Mr Blake's first sighting was weak for a number of reasons: (i) the assailants were exiting the gate at the time of the sighting; (ii) the assailants were moving quickly; (iii) recognition was made within two seconds of the sighting; (iv) the witness Dickie Blake Stephenson made reference to having a "glimpse [at] his face"; (v) observation was made from a distance of 25 feet; and (vi) the assailants were constantly changing position.

[19] In relation to the sighting on the road by both Mr Blake Stephenson and Mr Pitter, counsel submitted that the evidence of lighting had been challenged in cross examination. Further, in relation to Mr Pitter's account of having observed the men for 15 seconds, counsel argued that it was not unreasonable to infer that the period of observation would have been less, considering that the assailants had opened gunfire at them. In the circumstances of this case, counsel submitted, an inherently poor

identification could not be improved by mere repetition of evidence from different witnesses.

[20] Counsel relied on the case of **R v Carlton Taylor** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 57/1999, judgment delivered 20 December 2001. That case, counsel submitted, endorses principles emanating from **R v Turnbull** [1976] 3 All ER 549 to the effect that, when the only evidence connecting an accused to a crime consists of visual identification, in circumstances which amount to a mere fleeting glance, the proper approach is for the trial judge to withdraw the case from the jury. Accordingly, counsel submitted, the learned trial judge erred in that he failed to withdraw the case from the jury.

Submissions for the Crown

[21] Ms Llewellyn QC argued that the learned trial judge correctly allowed the case to go to the jury, in circumstances in which the main issues were identification by recognition and credibility. Queen's Counsel conceded that the identification had been made under difficult circumstances but averred that the length of the observation was sufficient to constitute a proper identification. In support of that submission Ms Llewellyn relied on an extract from the Privy Council case of **Larry Jones v R** (1995) 47 WIR 1 which states that:

> "Where the defence sought the dismissal of a charge on the ground that there was no case to answer as the essential identification evidence of the only witness was not sufficiently reliable to found a conviction, the trial judge was entitled to rule that the case should be left to the jury even

> though the circumstances relating to the identification were not ideal."

[22] Queen's Counsel highlighted the evidence of Mr Blake Stephenson's sighting to posit that identification by recognition, in tandem with the circumstances of the identification, met the required standard for the case to be turned over to the jury with the proper directions.

Discussion

[23] The law has long been settled in regard to the principles on which a no case submission ought properly to be upheld or refused by a trial judge in a criminal matter. In this case, counsel for the applicant contends that the no case submission ought to have been upheld based on the tenuous nature of the identification evidence and therefore seeks to rely on the second of the two limbs set out in the seminal case of **R v Galbraith** [1981] 2 All ER 1060. The relevant dicta of the English Court of Appeal in that case at page 1062 read as follows:

> "(2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence. (a) Where the judge comes to the conclusion that the Crown's evidence, taken at its highest, is such that a jury properly directed could not properly convict on it, it is his duty, on a submission being made, to stop the case. (b) Where however the Crown's 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 on 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."

[24] At this point it becomes appropriate to evaluate whether the totality of the evidence on the Crown's case was sufficient to allow a jury properly directed to return a verdict adverse to the applicant, or whether the strength or weakness of the prosecution's case depended on the view to be taken of the reliability of Mr Blake (the identifying witness') evidence.

[25] Three witnesses gave evidence purportedly identifying the applicant as one of the three assailants. The learned trial judge, however, gave directions to the jury that essentially had the effect of making Mr Blake Stephenson the sole identifying witness. His evidence was that he was able to observe and recognise the applicant when the assailants were going through the gate. He used the word "glimpse" to describe his sighting of the applicant and explained that this observation took place whilst he was scared and hiding in the dark at the side of the house.

[26] He stated that, whilst hiding at the side of the Miss Davis' house he heard another gunshot and saw three men going through the gate, in what he described to be a "military-like style". In his examination-in-chief he stated that he recognised two of the assailants. He described the first man as "the tall one", named "Wish Wash". The second man he described as, the "fat face one", who he stated was positioned in the middle, named "Blemma". He stated that the applicant was the same person called Blemma.

[27] He testified that it was moonshine and that there was an electric light at the gate which allowed him to see the applicant's face and entire body which was turned

towards the yard. He further gave evidence that the applicant had carried a "spin barrel" handgun.

[28] In cross-examination he conceded that he had seen the applicant's face for four to five seconds. In his own words he stated that "it was no good time because they were moving pretty fast, trying to make their escape". He stated that he was able to recognise the applicant's face in about two seconds, and that he was previously known to him for some 16 to 17 years.

[29] Having evaluated the identification evidence on the Crown's case, it becomes evident that its strength or weakness would be dependent on the view to be taken of the reliability of Mr Blake's testimony. Accordingly, it would fall within the jury's purview, they having been properly directed, to consider and determine whether Mr Blake, in four to five seconds, whilst hiding at the side of the house, with the aid of moon light and an electric light at the gate, and the other surrounding circumstances attending his identification, would have been able to recognise the applicant as one of the assailants.

[30] In the case of **Daley v R** (1993) 43 WIR 325, the Privy Council at page 334 reiterated its view of how the principles emanating from **Galbraith v R** co-existed with the **Turnbull** guidelines. It was stated that:

> "A reading of the judgment in **R v Galbraith** as a whole shows that the practice which the court was primarily concerned to proscribe was one whereby a judge who considered the prosecution evidence as unworthy of credit would make sure that the jury did not have an opportunity

> to give effect to a different opinion. By following this practice the judge was doing something which, as Lord Widgery CJ had put it, was not his job. By contrast, in the kind of identification case dealt with by **R v Turnbull** the case is withdrawn from the jury not because the judge considers that the witness is lying, but because the evidence even if taken to be honest has a base which is so slender that it is unreliable and therefore not sufficient to found a conviction: and indeed, as **R v Turnbull** itself emphasised, the fact that an honest witness may be mistaken on identification is a particular source of risk. When assessing the 'quality' of the evidence, under the Turnbull doctrine, the jury is protected from acting upon the type of evidence which, even if believed, experience has shown to be a possible source of injustice. Reading the two cases in this way, their lordships see no conflict between them."

[31] Accordingly, there is no incongruence between the principles emanating from **R v Galbraith** and **R v Turnbull**. The duty of a trial judge is not to withdraw from the jury a case which he or she believes unworthy of credit but rather to withdraw from the jury a case which, even if the evidence forming the prosecution's case is believed, its sum total is insufficient to found a conviction by a jury properly directed.

[32] Indeed, the learned trial judge correctly rejected the no case submission, as the issues raised by counsel for the applicant properly fell within the jury's purview. This ground accordingly fails.

Supplemental ground 2: inadequate directions to the jury on how to treat with weaknesses in the identification evidence

Submissions for the applicant

[33] Counsel submitted that, in turning the case over to the jury, the learned trial judge had properly directed them that the deciding identification evidence was that of Mr Blake Stephenson. However, he failed to sufficiently guide them in how properly to

address the weaknesses in Mr Blake Stephenson's evidence. Counsel reiterated that the learned trial judge had failed to highlight to the jury the following pieces of evidence concerning Mr Blake Stephenson's first sighting: (i) it had lasted for four to five seconds; (ii) he testified that he was able to 'glimpse' the applicant's face (page 54 lines 9-14); (iii) that the sighting was "no good time because they were moving pretty fast" (page 68 lines 9-10); (iv) "there [sic] head was spinning, their head was like this, to and from, up and down, go through…" (page 67 lines 8-13); (v) the men were moving quickly (page 108, lines 16-19); and (vi) that recognition was made in about two seconds (page 69 lines 18-20).

[34] Counsel argued that the learned trial judge also failed to draw to the jury's attention the inconsistency in (i) Mr Blake Stephenson's evidence at trial that he had called out two names as the men made their escape, "Wish Wash" and "Blemma" and (ii) only "Wish Wash" being named earlier.

[35] It was also counsel's argument that the learned trial judge had not directed the jury on how to treat with the evidence that arose in Mr Blake Stephenson's testimony that "Wish Wash" and "Blemma" were friends and that "where you see one the see the other". The failure to address that piece of evidence, counsel submitted, could have resulted in Blemma being wrongly identified by virtue of his association with Wish Wash.

[36] Counsel also posited that the learned trial judge's direction to the jury that the second sighting was difficult to rely on was insufficient. Counsel argued that that piece

of evidence having been left to the jury, they were provided with no proper guidance on how to view it in light of the other instance of identification.

Submissions for the Crown

[37] Miss Llewellyn contended that the learned trial judge was correct to have allowed the case to go to the jury and that he adequately directed them on how to treat with the identification evidence, in keeping with the guiding principles of Lord Widgery CJ in **Regina v Turnbull and another** [1977] QB 224.

[38] Queen's Counsel also submitted that the learned trial judge had properly directed the jury not to place any reliance on the identification evidence of Miss Davis. Further, at page 472, lines 10 to 20 of the transcript, the learned trial judge had pointed out the possibility of a mistaken identification. The learned trial judge further identified the inconsistency in the evidence of Mr Blake Stephenson in his earlier admission that in his police statement he stated that he had called out one person's name and then later stating that he had called the names of all three.

[39] Queen's Counsel also relied on several cases, in which identification was made under difficult circumstances to posit that, in this case, though the circumstances were not ideal, Mr Blake was afforded sufficient time to properly recognise the applicant. Among the cases cited were **Jerome Tucker and Linton Thompson v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 77 and 78/ 1995, judgment delivered on 26 February 1996, **Separue Lee v R** [2014] JMCA Crim 12 and **Ian Gordon v R** [2012] JMCA Crim 11.

[40] It was submitted that this ground has no merit and, as a consequence, should fail.

Discussion

[41] The case of **Turnbull v R** sets out important considerations that should guide a trial judge's directions to the jury in the case of a contested visual identification. Lord Widgery CJ made the following observation at page 228 of that judgment:

> "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."

[42] Having regard to the dicta of the English Court of Appeal, a trial judge's duty to direct the jury on how to treat with identification evidence where the identification is alleged to be mistaken is two-fold. First, where the correctness of identification is in issue, the trial judge ought to direct the jury that they need to exercise special caution, because a convincing witness may be mistaken. Second, the trial judge should direct the jury to examine the particular strengths and weaknesses of the identification evidence; and further in that regard should state that, although cases of recognition may be stronger cases of identification, there is still a risk of mistaken identification.

[43] Having examined the transcript, it is evident that the learned trial judge gave directions to the jury in relation to the risk of a mistaken identifying witness. He likewise directed the jury to assess the circumstances of the identification. The following extracts illustrate some of the learned trial judge's directions, as contained at page 466, line 4 to page 467 line 16 of the transcript:

> "Now in relation to identification it is important that I warn you there is special need for caution before you are convinced of the evidence before the court here. In other words, this is a case where basically this gentleman saying I saw this man there, that is the thing that link him to the

> case and so there is a special need for caution in terms of that.
>
> The reason for this is simple, that in the circumstances of visual identification, what we may see may not be very apparent that this is the person, this is the person that we have seen. You can make a mistake in relation to people."

Further at page 467, line 17 to page 468, line 14 of the transcript, the following directions were given:

> "One of the things you have to understand is that someone who is mistaken can be convincing. In our own personal experiences, we all have had that kind of situation where you may have seen someone somewhere and sometimes if you see them across the road, or you see them elsewhere, you go up to them and you are about to say something to them and just before you start to talk to them, you realise that it is not the person, and you have to apologise.
>
> ….
>
> So it is for that reason special that special care needs to be taken. And it is for that reason that the law requires me to warn you that one witness can be mistaken, and even more than one person can be mistaken…".

[44] And at page 469, lines 21 to 25 the learned trial judge directs that:

> "And as I said, if you do that, as jurors, because even though you may conclude that this person was honest, and the person really believed that they saw this person, they could be mistaken."

[45] The learned trial judge then gives the following direction in relation to the assessment of the circumstances of the identification evidence. This is to be seen at page 468, lines 19 to page 470, line 4 of the transcript:

> "So, when you are in situations where identification is crucial, it is for you to examine closely the circumstances in which the identification was made.
>
> You look at the particular circumstance in which the witness saw this person. How long they had this person under observation, how long could he have seen this person, what was the distance, the kind of lighting around, what kind of day it was. Did anything interfere with the observation.
>
> ….
>
> If it was the first time he saw the person, was there any particular reason for remembering the person and under what circumstances was the person seen?
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> So these are some of the things that you look at in terms of identification. The opportunity to see, and whether or not you can rely upon this person's observations.
>
> …So your role is to weigh that evidence and to consider very carefully whether or not this person could have seen this person in the circumstances and whether or not you can rely on that evidence…"

[46] From the extracts quoted above it is evident that the learned trial judge gave the standard **Turnbull** warning to the jury. Also when this court further examines the summation of the learned trial judge in relation to his direction on Mr Blake Stephenson's identification evidence, several matters were placed at the forefront of the jury's consideration. These related to the specific circumstances of the identification. At page 480, lines 13 to 15 the learned trial judge's directions referenced Mr Blake Stephenson's testimony that the men were moving "in a military style and covering each other". Then at line 23 the learned trial judge further speaks to Mr Blake Stephenson's evidence that he was able to see the applicant's entire body at a distance of 24 feet by the aid of a full moon and a 100-watt bulb at the gate. The learned trial

judge also mentioned that it was a case of recognition where the witness stated that the appellant was known to him for some 16 to 17 years prior and that he would see him regularly. At page 482 he then recounts that Mr Blake Stephenson stated that he saw the applicant for four to five seconds while he was going through the gate.

[47] The learned trial judge also sought to highlight specific weaknesses in the form of (i) a discrepancy between the evidence of Mr Blake Stephenson that his second sighting was at a distance of 150 feet in comparison with Det Cpl Milton Henry's evidence that the distance between the spent shells on the road and the front of the gate was 230 feet. (ii) The learned trial judge (at page 501, line 6), highlighted the inconsistency in the evidence that Mr Blake Stephenson had called out three names on the night in question and his admission that previously he said that he had called out one name. (iii) Also highlighted was Mr Blake Stephenson's evidence that Wish Wash had a rifle, when the ballistic expert testified to the recovered spent shells belonging to three different handguns.

[48] The learned trial judge at page 478, lines 6 to 14 also directed the jury that they could consider portions of the evidence which he may have omitted.

[49] We disagree with the submission of counsel for the applicant that the learned trial judge failed to sufficiently direct the jury in relation to the identification evidence. His summation, taken as a whole, would have drawn to the jury's attention the relevant important factors. We find the dicta of Harrison JA in the case of **R v Carlton Taylor**

to be instructive in providing guidance as to how a trial judge ought to treat with weaknesses in the identification evidence:

> "In **R v Barnes** [1995] 2 Cr App Rep 491, The Times 6 July 1995, Lexis UK CD M2, Official Transcripts (1990-1997), the English Court of Appeal noted that it is not necessary to catalogue every minor divergence; nor is any particular format mandatory… In Fergus [(1993) 98 Cr App Rep 313] Steyn LJ said at page 318: 'But in a case dependant on visual identification, and particularly where that is the only evidence, Turnbull makes it clear that it is incumbent on a trial judge to place before the jury any specific weaknesses which can arguably be said to have been exposed in the evidence. And it is not sufficient for the judge to invite the jury to take into account what counsel for the defence said about the specific weaknesses. Needless to say, the judge must deal with the specific weaknesses in a coherent manner so that the cumulative impact of those specific weaknesses is fairly placed before the jury.' Basing himself upon that passage, Mr Cooke contended, in effect, that every discrepancy between what one identifying witness said and another said or did not say, should have been mentioned by the judge as a specific weakness. Moreover, instead of dealing with weaknesses witness by witness, the weaknesses ought to have been gathered together in one section of the summing up so as to maximise 'their cumulative impact'. We do not consider the last sentence in the passage quoted from Fergus imposes such a rigid and extensive regime upon the judge. His duty clearly extends to reminding the jury of weaknesses, for example, lapse of time between the incident and the identification, brevity of the incident, difficult conditions at the time of the incident and major discrepancies between what the particular witness may have said from one time to another or between one identifying witness's description and that of another. But we do not consider that every minor divergence has to be specifically categorised as a potential weakness... It must be a matter for the judge's discretion as to whether such minor matters are simply referred to in his review of the evidence or categorised as potential weaknesses. Moreover, providing the learned judge does remind the jury of the specific

> weaknesses he identifies as such, we do not consider that any particular format for doing so is obligatory."

[50] In the court's view, the learned trial judge put the important elements of the identification evidence to the jury. He reminded the jury of Mr Blake Stephenson's having testified of the military-like movement of the men, and so the jury would have been aware that the assailants were moving and doing so quickly. Where the learned judge had omitted to use the word "glimpse" as used by Mr Blake Stephenson to describe his observation of the applicant, that of itself is not fatal to the conviction. Indeed, the learned trial judge reminded the jury of the duration of the sighting and also that it was a case of recognition.

[51] In **Jerome Tucker and Linton Thompson v R** this court held that the period of sighting needed to make a reliable recognition need not be as long as in cases where the assailant is unknown to the witness at the time of the offence. Further, in **Separue Lee v R** this court upheld a conviction for murder where there was evidence of identification by recognition in a viewing time of two seconds. That case concerned a home invasion and murder of a couple. The appellant was subsequently identified on an identification parade by a witness who was 13 years old at the time of the killings. She testified that she had seen the appellant's face for a period of about two seconds and that she had recognised him from having seen him in the area over the course of some two months prior. She testified that there had been an electric light on in the house and that she had seen the appellant twice on the morning after the killings. Counsel for the appellant in that case contended that the identification amounted to a fleeting glance that was unsupported by other evidence.

[52] In regard to counsel for the appellant's submissions in **Separue Lee v R**, this court held that the identification amounted to more than a fleeting glance and was substantial enough to have entitled the judge to conclude that the case ought to have been left to the jury. The court found that although the circumstances of the identification were not ideal, the evidence of the witness, taken in its entirety, was such that a jury properly directed could return a verdict adverse to the appellant. The court made that finding in circumstances in which the learned trial judge had given the proper **Turnbull** warning.

[53] In line with the rationale of the above-cited decision, in this case in which the jury accepted Mr Blake's evidence that the sighting was for some four to five seconds, it could not properly be described as being in the nature of a fleeting glance or (in spite of Mr Blake's use of the word) a "glimpse".

[54] Furthermore, the learned trial judge's direction that the jury had to be sure of the guilt of the applicant, would have provided adequate assistance to the jury that the applicant could not have been found guilty by reason of association.

[55] In relation to the second sighting, the learned trial judge directed the jury that it would be "very, very difficult" (page 485, lines 14-15) for them to rely on it. Counsel for the applicant took no issue with those directions.

[56] This ground, therefore, also fails.

[57] There was no challenge mounted to the sentence that was imposed in this case.

[58] It is for the foregoing reasons that we make the following orders:

1. The application for permission to appeal against conviction is refused.

2. The conviction and sentence are affirmed. The sentence is to be reckoned as having commenced on 1 February 2013.