Privy Council Appeal No. 24 of 1992

Anthony Bernard *Appellant*

v.

The Queen *Respondent*

FROM

THE COURT OF APPEAL OF JAMAICA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 26TH APRIL 1994

Present at the hearing:-

LORD LOWRY
LORD BRIDGE OF HARWICH
LORD SLYNN OF HADLEY
LORD WOOLF
LORD LLOYD OF BERWICK

*[Delivered by **Lord Lowry**]*

This is an appeal by Anthony Bernard ("the appellant") from the dismissal by the Court of Appeal of Jamaica (Carey, White and Ross JJ.A.) of the appellant's application for leave to appeal against his conviction of murder in the Home Circuit Court at Kingston on 11th March 1983 before Morgan J. sitting with a jury. The application was heard on 13th and 14th February 1985 and dismissed at the conclusion of the hearing and the reasons of the Court of Appeal for dismissing the application were given in a judgment delivered by Carey J.A. on 22nd February 1985. The appellant was granted special leave to appeal as a poor person on 19th December 1991 and the appeal came on for hearing before this Board on 2nd December 1993.

According to the prosecution case the appellant was one of three men who on 6th December 1981 about midnight invaded the house of Nelson Webster and his wife, Esmie Webster, at Glendevon in the parish of St. James and shot the husband dead and wounded Mrs. Webster. The prosecution case depended on the uncorroborated identification evidence of Mrs. Webster, who picked out the appellant at an identification parade held on 20th January 1982.

At the trial Mrs. Webster, who did not know the appellant, described how she had returned home with the deceased from their bar in Glendevon a little after 11.30 p.m. As she was locking up she saw three men armed with guns on the verandah. She rushed back into the house. Two of the men came into the bedroom. They confronted the deceased and asked him for money. Mrs. Webster described one of these men as tall and clear, meaning of fair complexion, and the other as short and dark. The "tall and clear" man, she said, was the appellant. According to this witness, the two men made the deceased lie down on the bed; the deceased then gave them a bag containing the night's takings from the bar, which he had brought home. The men then left the bedroom, but after a short time they came back. They made Mrs. Webster take off her chain and watch and made her lie on the bed face down. The appellant then shot the deceased and the other man shot her but only wounded her. The men ran outside and after a while she raised the alarm. Mrs. Webster said that at all times the electric lights on the verandah and in the house were lit. She came within touching distance of the appellant and was able to see him clearly. Neither of the men was masked. She described their clothing. The whole incident lasted for about 30 minutes and she was able to see the appellant for the whole of that time.

The appellant gave evidence at the trial and his main defence was an alibi. He said that from 7.00 p.m. that night until 1.00 a.m. he was playing dominoes with other men at his shop in Glendevon, where he lived, and in support of his alibi he called as a witness a neighbour, Pansy Dunn, who gave evidence that she was scoring at the domino game and, in agreement with the appellant's evidence, deposed that a group of people coming from church told them about 12.00 during the domino game that somebody had been killed down the road. This witness, who was extensively cross-examined, and the appellant further gave evidence that at the conclusion of the game of dominoes they went with one of the players, called Scarlett, to the appellant's girlfriend's house, where Scarlett bought and paid for a packet of cigarettes (the shop's supplies having run out). Scarlett was brought into court and identified by Miss Dunn but neither he nor any of the other players or alleged players whom the appellant named was called as a witness. Clearly the jury, in convicting the appellant, must have rejected his alibi.

Another witness for the defence was Detective Senior Superintendent Wray, a Government ballistics expert, who gave evidence that the two bullets which respectively killed the deceased and wounded Mrs. Webster were both fired from a .38 Special Amedeo Rossi revolver serial number D435918. The ballistic evidence revealed that this revolver had been used in a number of other armed robberies and murders, including the robbery and murder of a man called Allan Russell in the early hours of 7th December 1981, very soon after the murder of the deceased. The revolver had been recovered, with a number of other weapons, from the

bodies of two wanted men, Patrick Hamilton and "Shorty" Keith Harrison, who were shot and killed by the police on 19th or 20th January 1982. The appellant's counsel submitted that these two men were likely to have been the men responsible for the death of the deceased. In reality this evidence merely showed that there was a link between the murders of the deceased and other crimes, including the murder which had been committed almost immediately after the deceased's murder, but it did not serve to exculpate the appellant or to inculpate him any further than Mrs. Webster's evidence inculpated him already. But what the evidence of Senior Superintendent Wray may have done was to cast doubt on Mrs. Webster's description of the incident (and thereby on her reliability as an observer) by tending to show that the two bullets which respectively wounded her and killed her husband had been fired from the same gun and presumably by the same person. Their Lordships say "tending to show" because there was no direct evidence that the bullet which (by implication from Superintendent Wray's evidence) related to Mrs. Webster was the actual bullet which wounded her. Indeed, the whole of this witness's evidence, save that the test-fired bullets and the bullets which were handed to Superintendent Wray came from the same gun, was hearsay and, except by rather vague implication, did not indicate whether the different bullets had been extracted from the bodies of the persons named as victims. Although the trial judge had said, "these bullets have to be identified", Superintendent Wray's evidence, both hearsay and at first hand, was admitted without objection and went unchallenged by the prosecution. It is interesting to reflect that the most natural inference from Superintendent Wray's evidence is that on each of three occasions, namely on 21st November 1981 (when the Summervilles were shot), on 6th December 1981 (when the deceased was killed) and in the very early hours of 7th December 1981 (when the Russells were shot), the same revolver may have been used, by one gunman on each occasion, to shoot two victims. And that gun was still being used by either Patrick Hamilton or Keith Harrison on 19th or 20th January 1982, when those "wanted men" were shot dead by the police and the appellant was already in custody.

Detective Corporal Calbert Bowen saw Dr. Yalla, who performed the post mortem on the deceased, remove the bullet from the deceased's body. He then received the bullet and gave it to Detective Corporal Shand, who was in charge of the case but who died before the trial. Corporal Bowen later resumed possession of the bullet and gave it to Superintendent Wray. Dr. Yalla's deposition was admitted, upon proof in compliance with the law of Jamaica that he was absent from the island. None of the evidence, including Dr. Yalla's (except the evidence of Senior Superintendent Wray) made any reference to the second bullet which was said to have been fired from the Amedeo Rossi revolver on the occasion of the deceased's murder.

The grounds of appeal considered by the Court of Appeal were elaborate but did not recognisably include a reference to the principles enunciated in *R. v. Turnbull* [1977] Q.B. 224 and *R. v. Oliver Whylie* [1978] W.I.R. 430. Carey J.A., however, when giving the court's reasons for rejecting the application for leave to appeal, said this:-

> "The main thrust of learned counsel's arguments challenged the learned trial judge's treatment of the evidence relating to the crucial issue of identification. We were impressed by the commendable pragmatism in approach of counsel to his task. He urged that the learned trial judge failed to afford the jury adequate assistance and guidance on the issue of identification, so that they could properly deliberate on the matter."

Carey J.A. then referred to the general guidance given by the trial judge, when she said:-

> "I must warn you that, as counsel for the Crown and counsel for the defence have told you, you must exercise caution when you are relying on the correctness of any identification because a witness can be mistaken and still be a very convincing witness, so you have to examine very closely the circumstances under which the identification came to be made by the witness."

Carey J.A. continued:-

> "Learned counsel considered this warning as impeccable. We do not dissent from that view."

Remembering that adherence to principle is more important than the adoption of a particular formula, their Lordships would not seriously criticise the general warning given by the learned judge.

Carey J.A. proceeded to note a number of factors which the judge had set out for the jury's guidance, such as the distance between the assailant and the witness, the lighting, whether the witness knew the assailant, the length of time for observation and the question whether the witness could be honestly mistaken and concluded:-

> "On any reading of the extract we have quoted, it is plain that the learned trial judge related the evidence adduced at the trial to those factors which we have set out and which appear in the extract. To assert, as learned counsel for the appellant did, that the directions did not fall within the guidelines (he actually said injunction) of *R. v. Whylie* 25 W.I.R. 430, must be put down to exuberance in a cause."

After disposing of an argument about the lighting he added:-

> "We are therefore unable to agree that the learned trial judge was not alert to the responsibilities cast upon a trial judge where the evidence for the prosecution

> connecting an accused with the crime rests wholly or substantially on visual identification of an eye-witness. In our view, the learned trial judge gave the jury every assistance on this aspect of the case."

The judgment then dealt with two aspects of the identification parade. One was the contention that the parade was unsatisfactory because only one tall person besides the appellant was included. The other point was the possibility (a fact, if the appellant's evidence was to be believed) that Mrs. Webster had seen the appellant at the lock-up on the day before the parade. In the court's view, the trial judge had dealt satisfactorily with these points as matters of fact for the jury's consideration.

The appellant had complained that his defence of alibi had not been adequately put and that the trial judge had undermined it by dwelling on the discrepancies between his evidence and that of Pansy Dunn. The court, however, pointed out that the judge had given a proper and fair account of the evidence, and concluded:-

> "We note that the trial judge left it to the jury to consider the defence of alibi in the light of the disarray in the evidence of the applicant and his supporting witness."

The last major point which the Court of Appeal dealt with was the defence argument (based on the ballistic evidence) that the men who invaded the Websters' house were likely to have been Hamilton and Harrison. The court pointed out that the trial judge, in leaving the question to the jury, had dealt in some detail with this point and with the evidence (of doubtful admissibility) from which it was derived, concluding that the appellant had suffered no prejudice.

The appellant's written case laid emphasis almost entirely on the failure, as alleged, of the trial judge to give the jury a sufficiently strong general warning on *Turnbull* lines and on her omission to draw attention to what were represented as specific weaknesses in the prosecution case. Before the Board the arguments developed on a wider front.

Their Lordships have indicated that they would not seriously criticise the trial judge's general warning but they wish to come back to this aspect of the appeal.

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. Subject to that, and even when allowance is made for the absence of any dramatic recognition features, the witness had an ample opportunity of seeing the assailants, even if the length of the incident was intrinsically likely to have been shorter than she supposed.

The ballistic evidence is puzzling and, in view of its vagueness as already noted by their Lordships, it is difficult to say what inference should properly be drawn. If, however, one legitimate inference is that the bullets which struck the deceased and Mrs. Webster came from the same gun, that would tend to impeach the reliability of Mrs. Webster as an observer, and thereby to cast some doubt on the correctness of her identification. It is true that this was not the focus of the argument derived from the ballistic evidence and Mrs. Webster was not cross-examined in such a way as to challenge her account of what had happened.

Their Lordships have mentioned the identification parade. It is accepted that in this area, as well as in other aspects of the trial, the judge was most careful to set out the facts and to leave their determination to the jury. But even if no objection was voiced against the composition of the parade, their Lordships consider that a warning note should have been sounded concerning the presence of only two tall men, one of whom was the suspect. Again, their Lordships acknowledge merit in the appellant's criticism of Mrs. Webster's answers as being equivocal when she was taxed with having seen the appellant the day before the parade was held. Two passages may be referred to:-

"(1) 'Q. Did you own a green dress at the time Miss Esmie? Think hard.

A. Green dress?

Q. Green dress.

A. No.

Q. True that Miss Esmie?

A. Don't remember.'"

"(2) 'Q. You remember the day before that? Think hard, Miss Esmie, very important, think hard. Well, isn't it true that you were at the station the day before?

A. (Witness shakes head).

Q. Not true?

A. If I were at the station the day before, they came for me to go on the same identification parade, but at the time they say they didn't have any, there weren't enough men.'"

When one turns to the alibi, it can be seen that in her summing up the trial judge effectively undermined its reliability by referring to discrepancies in the evidence. She also invited the jury to speculate that the witnesses may have been describing something which had actually happened but transferring the game of dominoes in point of time, which is a common way of lending verisimilitude to a narrative. In her summing up the trial judge said:-

> "Now when a man puts forward an answer to the charges against him in this form" [scil. an alibi] "he does not, in law, assume any burden. He hasn't got to prove that answer. There is no burden on him to show that on that night he was at his shop or he was by a domino game. The burden is on the prosecution. They are to establish to the extent that you feel sure that he was not at any domino game but that he was right at Mrs. Webster's house. So you can't convict him unless you definitely reject his story for, obviously, he can't be in two places at the same time. So you will have to look at his story and you will have to positively reject his story before you accept what the Crown says."

Their Lordships consider that the words emphasised give rise to an inference that, if the accused's alibi is definitely rejected, then he was at the Websters' house. However the passage quoted cannot be read in isolation, because the judge concluded her charge to the jury as follows:-

> "If you reject what he says - if you say - if you say he is a liar he is telling lies, you can't believe him, you still have to go back and look and see whether or not the prosecution has satisfied you on a complete review of the evidence. If on this review you are not satisfied so that you feel sure of his guilt, or if you are in doubt where the truth lies, then your duty is to acquit him, but if you are satisfied to the extent that you feel sure that on the night of the 6th December, 1981 he killed Nelson Webster, then it is open to you to bring in a verdict of guilty."

Nevertheless, while the direction given on the defence of alibi is admirable in most respects, their Lordships consider that the passage first quoted was likely to leave a jury with the impression that there were only two alternatives, either that the appellant might have been at the game of dominoes or that he was at the Websters' house. In their view, when dealing with a defence of alibi, the trial judge should normally tell the jury that, if they definitely disbelieve the alibi, they must still entertain the possibility that the accused was not at the scene of the crime and has produced a false alibi to strengthen his case that he was not there. One may also refer to *Turnbull* at page 230 for the proposition that disproof of an alibi does not corroborate identification evidence. Their Lordships take the view that the subsequent passage does not compensate for the failure to give the specific direction which was omitted in this case.

The appellant put his character in issue by saying that he had never been in trouble with the police and his evidence on this subject was not challenged or contradicted. On this aspect of the case the judge directed the jury thus:-

> "Learned counsel has put to you that he has proved - he told you of his character and that he is a person of good character. Mr. Foreman and members of the jury, the normal way of proving a previous good character is, of course, to bring somebody quite independent, put them in the box, a person who knows about the accused, who will take the oath and speak of what he knows of the person; and that the person, of course, is of good character. I must say that this is a novel way, to my mind, but then the accused speaks for himself, of his well-known character. He has gone in the witness box and on oath he has told you that he has not got into any trouble with the police before this, and if I may just mention an aside, it all matters, Mr. Foreman and members of the jury, there is always a first time. But, he says, he is twenty years old and he has hitherto lived a good life. If you believe him and if you think his say-so is sufficient evidence of his good character, if you think that he has proved to you that he is of good character, then you deal with it in this way.
>
> After you have examined all the facts if you find that there is any room for doubt, his good character, as he gives it to you, may be thrown in to the scales in his favour, and that is on the basis that a man of good character is much more worthy of belief than a person of bad character. But if the facts clearly prove, if the facts clearly prove his guilt then his good character cannot avail him. It is only if some reasonable doubt exists that it will be of any avail to him. So, it will have to be taken into account with all the facts and the circumstances, if you are satisfied with what he has said of himself."

No point was taken on this direction by the defence in the Court of Appeal, though there has been some discussion before this Board as to whether the judge ought to have also told the jury that the possession of a good character not only boosts the credibility of an accused person but makes it less likely that he will have committed a serious offence. Their Lordships here refer to a series of cases, starting with *R. v. Berrada* (1989) 91 Cr.App.R. 131 and the latest of which is *R. v. Vye* [1993] 1 W.L.R. 471. Many judges have long thought that, if evidence of good character is to be admitted, while evidence of bad character is generally not admitted, the second consideration, that is, the improbability of having offended, is more relevant than the first, but even now a direction on the second point is not considered to be obligatory (see *R. v. Thanki* (1990) 93 Cr.App.R. 12 and other cases) and was certainly not considered necessary at the time of the appellant's trial. But, referring now to the phrases in the learned judge's

direction which they have emphasised above, their Lordships are compelled to say that the way in which the judge left the issue of good character to the jury was calculated to prejudice him seriously in their eyes. For him to have given unchallenged and uncontradicted evidence that he had never been in trouble before was quite sufficient to make it the judge's duty to give the good character direction for what it was worth. But what she said clearly invited the jury to entertain doubts whether the appellant was entitled to the benefit of the good character direction which she was giving them.

Their Lordships now have to consider whether the trial judge's summing up, admirable in most respects as it was, fell short of what was required in order to ensure that justice was done. To begin with, they consider that, identification being the real issue, 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. Secondly, the ballistic evidence, while not firmly pointing in the appellant's favour, enhanced the need for a clear and firm *Turnbull* warning, out of loyalty to the principle that the less clear and convincing the prosecution's case the greater is the need for a clear warning. The twin defence argument about the identification parade, combined with the points already mentioned, also called for a clear and firm warning.

So far as the alibi was concerned, their Lordships take the clear view that the trial judge, when dealing with that aspect of the case, ought to have mentioned the possibility that the appellant, even if his alibi was manufactured, might not have been at the Websters' house. The last words of the summing up, although generally admirable, did not suffice to make that important point. Their Lordships have already commented on the good character direction, which they regard as seriously prejudicial.

The proper outcome of this appeal has caused their Lordships considerable anxiety. The question is whether the defects in the summing up are cumulatively sufficient to warrant their Lordships interfering with this conviction. Appeals to the Board, as well as applications for special leave to appeal, have to be decided in accordance with the well-known principles enunciated in *Badry v. D.P.P.* [1983] 2 A.C. 297 and *Buxoo v. R.* [1988] 1 W.L.R. 820. There have been a large number of recent decisions which illustrate the view held by the Board that the giving of appropriate directions in cases which depend on identification evidence involves a most important principle of a criminal trial. Consistency demands that this Board should interfere if it finds that there was a significant failure to apply the *Turnbull* and *Whylie* doctrine. Their Lordships are of the opinion that there was such a failure: a failure which was significant

but not gross, but which because of the presence of so many weakening elements in the prosecution case called for greater emphasis. This direction was therefore inadequate although in a strong, unflawed prosecution case it would no doubt have been accepted as adequate. To this must be added their Lordships' opinion that the direction on good character infringed an important principle that the words of such a direction must not give with one breath and take away with the other. Finally there is shortcoming as to the treatment of the alibi defence. Together these defects mean that the conviction should be quashed.

Nonetheless there was clearly a case to go to the jury but it would be unrealistic after all these years to contemplate a new trial. Accordingly, their Lordships will humbly advise Her Majesty that the appeal should be allowed and the appellant's conviction for murder should be quashed.