

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Cr. A. No. 71 of 2000

BETWEEN

CLIFFORD BECKLES

Appellant

AND

THE STATE

Respondent

CORAM

**M. de la Bastide C.J.
L. Jones JA
A. Lucky JA**

Appearances

**Miss S. Chote for the Appellant
Mr. R. Dolsingh, S.C. and Ms. M. Wilson
for the Respondent**

Delivered

18th October, 2001.

J U D G M E N T

Delivered by de la Bastide C.J.

The appellant Clifford Beckles (who is also known as 'Paps') was found guilty by a jury on the 28th September, 2000, of the murder of Valentine June Sydney ('June') and sentenced to death. The appellant had had an intimate relationship with June and she had borne him a son. They had lived together for about 7

months in June's house at Cachipe Village, Moruga. This was in 1993 or 1994. They had separated and the appellant had gone back to live with his parents in Rio Claro. June struck up a relationship with another man, Don Douglas, also known as 'Dougie', and not long before her death he began living with her in the same house in which she and the appellant had previously lived together. It was a modest building measuring only 20ft. by 20ft., and located about 40 ft. from, and below the level of, the main road between Moruga and Princes Town. A feature of the house was that the front or western wall stopped short of the roof leaving a gap of about 20 inches. Within this wall was the bed-room.

The evidence against the appellant was provided by two witnesses, Don Douglas and Christopher Lendor who lived in a house estimated to be between 100 and 500 feet (depending apparently on the route taken) from June's house. Douglas testified that just after midnight on the night of the 28th/29th September, 1998, June and he were lying in bed. June was asleep but he was half-awake having just got up to urinate. He saw what he described as a 'ball of fire' come through the opening between the wall and the roof and land on June. She screamed "Oh God Paps, you burn me". He got up, put on the light and went to a barrel of water which was beside the front door and in front of some louvres. He pulled the curtain aside and peered through the louvres. There was a light on outside the front door. He saw a man about 12ft. away on the second or third step leading up to the road. He was bare-backed and wearing dark shorts. The man turned and looked in his direction and he recognised that it was the appellant. He then filled a bucket with water and threw it on June and on the bed. June was badly burnt, her skin was peeling off. He was also burnt. He went first to his nearest neighbour, a relative, and spoke to her. He then went to Lendor's house and spoke with him. Lendor followed Douglas back to June's house and drove Douglas and June in Douglas' pick-up van to the San Fernando hospital. June was admitted to the Intensive Care Unit and Douglas himself was warded and kept for about two weeks. June died on the 6th October, 1998, from the burns she had received

When the investigating officer, P.C. Hazelwood, went to June's house on the morning of the 29th September, he found a heavy duty oil container and a twisted partly burnt newspaper which was damp and smelt of kerosene, on the burnt out bed on which June and Douglas had been sleeping, but tests for fire accelerants later performed at the Forensic Centre on these items, proved negative.

The evidence of Christopher Lendor was that he had received a visit from the appellant at about 9 p.m. on the 28th September, 1998. He testified that like Douglas, he had known the appellant for about 4 years previously. When he came to his home that night, the appellant was bare-backed, bare-footed and wearing a pair of dark shorts. According to Lendor the appellant talked with him for about half an hour. He questioned Lendor as to who was living in June's house. Lendor replied June's children. The appellant threatened to burn the house down with everyone in it. He also asked if June was still 'by Dougie'.

Lendor said that she was. The appellant complained that Douglas had been “horning” him for a long time. At about 10 p.m. the appellant returned to Lendor’s house still dressed in the same way. He asked Lendor if June had got her insurance money as yet. Lendor said he did not know. The appellant threatened to kill Lendor if he told anyone that he had been there. The appellant also said that Lendor knew that he had spent money on June’s house and that if she did not pay him back something he would “fuck them up”. Lendor then saw the appellant walk down the road to a shop which was about 45 feet from Lendor’s home. The shop was well lit and there was moonlight. The appellant went a few feet into a small street across the road from the shop and picked up something in the grass. Lendor could not see what it was but the appellant walked away, carrying it on his right side, in the direction of June’s house. Between 12.15 and 12.30 that night Lendor was in his dining room eating when he heard a woman’s screams coming from the direction of June’s house. He then heard dogs barking, looked out and saw a person who stood up on the road about 20-25 feet from the shop and about 70 feet from where he was. The person looked up at Lendor’s house and Lendor recognised that it was the appellant, dressed as he had been earlier. The appellant then ran off along the Moruga Road towards Princes Town. Later Douglas came to Lendor’s home and spoke to him. He followed Douglas back to his home and drove him and June to the hospital.

The appellant testified in his own defence. He claimed that the last time he had been in Moruga was on the 12th July, 1998, when he had been badly chopped on both his arms. He denied having been in Moruga or having visited Lendor on the night of the 28th /29th September, 1998, or having had anything to do with the throwing of the fire-ball into June’s bed-room. He testified that he had been at home with his parents in Rio Claro from early evening on the 28th September until the next morning. His father also testified to similar effect. Although he never said so expressly, it was his case that the disability he suffered as a result of the injuries he had received in July, rendered him incapable of throwing the fire-bomb into June’s bedroom. What he said in evidence was that he ‘could not do anything as my two hands was unable’. He also testified, and this was not in dispute, that at the time there were two charges pending against him which arose out of a report which Lendor had made, and in which Lendor was the virtual complainant. He claimed that Douglas also harboured a grudge against him because he suspected that he was continuing to have a sexual relationship with June, as indeed he claimed he was. He said in evidence that June would meet him from time to time in Princes Town for the purpose of having sex at a friend’s home.

There were originally six grounds of appeal filed but one of them, the fifth, was not pursued. I do not propose to address the other grounds in order, but I shall deal first with what we consider to be the most substantial complaint made by the appellant. This is the complaint made in grounds 2 and 3 of the introduction of inadmissible and highly prejudicial evidence.

The first piece of evidence to which exception was taken was the evidence of Douglas that June cried out “Oh God, Paps you burn me”. We must express our surprise that no objection was taken by counsel who appeared for the appellant at the trial (not the same counsel who appeared for him on appeal) to the admission of this evidence. In the first place, no mention was made of this by Douglas at the preliminary inquiry. It was a significant piece of evidence, not just a detail which filled out something spoken of in his deposition. There was no notice served on the defence of intention to lead additional evidence and no application made at the trial for leave to lead it. Accordingly it might have been excluded on this ground alone. But there was a more fundamental reason for not admitting it. It was argued before us by the State that it was admissible as part of the “res gestae”. When a Court is invited to admit a declaration like this as part of the “res gestae”, the trial Judge has a discretion to exercise and the considerations which govern the exercise of that discretion were set out by the House of Lords in ***R v Andrews*** (1987) AC 281. The consideration most frequently referred to is whether in all the circumstances of the case there is a possibility of fabrication or concoction by the person whose statement it is proposed to give in evidence. Another consideration mentioned by Lord Ackner, however, is the possibility of error by that person. Relating that to the facts of this case, if the possibility of June being mistaken in her identification of the appellant as the person responsible for her burns, might lead to the exclusion of the evidence of what she shouted out, then a fortiori Douglas ought not to have been allowed to give that evidence when it is perfectly clear from the evidence that June could not have identified the appellant as the man who threw the fire-ball as a result of having either seen him or heard his voice. At no point in Douglas’ evidence was there any suggestion that June had gone close to the window, far less looked through it, or that the man who threw the fire-ball had spoken. Assuming that June did shout “Oh God Paps you burn me” that could only have been an assumption by her, based on grounds that one can only speculate about. As pointed out, she had not seen the man responsible nor heard his voice, so all that she was in a position to say was “I am sure it must be Paps who has burnt me”. If she had survived and had given evidence about the incident, she would not have been allowed to say that in evidence: Clearly Douglas ought not to have been allowed to do so at second-hand.

However the jury interpreted this piece of evidence, there is no doubt that it was highly prejudicial to the appellant. At no time did the Judge warn the jury not to treat June’s exclamation as a statement of fact based on her own observation of the person responsible. Such a direction would at least have served to soften the prejudicial effect of this inadmissible evidence but it was never given. In these circumstances, notwithstanding the failure of defence counsel to object to it, the admission of this evidence must be regarded as a material irregularity.

The second piece of evidence to which objection was taken, was elicited from Douglas in re-examination when at State Counsel’s instance, he related an

incident which took place outside June's home on the night of the 6th September, 1998, when he and June were lying in bed. His evidence was as follows:

"About 11.30 p.m. I recognised Paps' voice calling June. He was saying "Dougie, Dougie". He said "send June outside. If you don't send her outside I have something to blow up the house". The louvres start breaking. He run up the step and run down the road. A little while later I heard a loud explosion. Early next morning we made a report at the Moruga Police Station. When I made the report the police told me something. I leave the station and went back home."

Again, this was evidence which had not been led at the preliminary inquiry and in respect of which no notice of intention to lead further evidence had been served and no application for leave had been made. It is true that with one important difference, the same incident was reported in Douglas' second statement to the police, which was in the possession of defence counsel and which counsel had (ill-advisedly in our view) tried, but happily had failed, to put into evidence. The important difference was that in Douglas' statement to the police there was no mention of any explosion. In this case, however, the new evidence, unlike the evidence of what June shouted out, was admissible as it was relevant to the issue of the appellant's guilt and was not hearsay nor speculation, so that no objection could have been taken to it had it been given by Douglas in chief, first at the preliminary inquiry and then at the trial. But this is not what happened. This evidence was led for the first time in re-examination of Douglas at the trial. Furthermore, the purpose for which it was led was not to prove the appellant's guilt, but to provide an explanation of why Douglas had lied in his first statement to the police about having seen the appellant throw the fire-bomb into the house. Douglas gave his first statement to P.C. Hazelwood from his hospital bed on the night of the 29th September and gave a second statement on the 4th October, 1998. In the second statement he admitted that he had lied in the first statement when he said he had actually seen the appellant throw the fire-bomb into the house, and offered by way of explanation that when on the 7th September, 1998, he reported to the police the incident which had occurred outside June's house the previous night, and also the fact that after that incident the windscreen of his pick-up van had been damaged, the police told him that unless someone had seen the offences being committed, no one could be charged with them. The explanation, therefore, hinged on what the police had told him about what was required for a charge to be laid, namely the evidence of an eye-witness. It was no doubt with a view to providing this explanation after the lie told in the first statement had been exposed in cross-examination, that State counsel broached with Douglas in re-examination the incident of the 6th September. As appears from the passage from Douglas' evidence quoted above, however, evidence of what the police told Douglas in response to the report was never elicited, presumably in the mistaken belief that it was hearsay and therefore inadmissible, even though it would not have been used for the purpose of proving the truth of what the police said, but rather to establish Douglas' state of mind. The

unfortunate result of all of this was that the jury was left with no explanation of why Douglas had lied in his first statement but evidence which was incriminatory of the appellant was introduced for the first time in re-examination of a witness at the trial, ostensibly for a purpose which it did not ultimately serve, and without the trial Judge being called upon to consider whether he should allow it to be introduced as additional evidence. It is true that defence counsel was allowed to cross-examine further after Douglas had been re-examined, but it is not surprising given the circumstances in which the fresh evidence was led, that counsel did not appear to notice that Douglas had introduced into his account something i.e. an explosion (misreported incidentally by the Judge in his summing-up as 'two explosions'), which he had not mentioned in his second statement to the police. Clearly the prosecution was entitled to elicit from Douglas an explanation of why he had lied in his first statement to the police but this could have been done without reference to the substance of the reports which he and June had made to the police. The imposition of such a restriction was an option which the learned trial Judge should have been invited to consider. We accordingly find that there were elements of unfairness in the way in which the incident of the 6th September was introduced into evidence, and in the circumstances the admission of this evidence also constituted a material irregularity.

It was also submitted for the appellant that Lendor ought not to have been allowed to say of the appellant in re-examination: "He beat me up in my house concerning June and a bottle of rum he asked me to sell for him." We are inclined to agree with this submission but the evidence complained of here was of little or no consequence in the overall context of this case. In fact, it would have assisted the appellant by confirming that Lendor had a motive for testifying falsely against him.

The third ground of appeal also complained of a lack of balance in the Judge's summing-up in that he glossed over the weaknesses in the prosecution's case and failed to deal fairly and adequately with the appellant's defence. We do not intend to deal with all 13 criticisms which were made of the summing-up under this head, but will refer to those which we consider of some significance, as well as to one or two deficiencies in the summing-up which were not expressly relied on by counsel.

One criticism was that the Judge failed to invite the jury to consider the plausibility of Lendor's evidence that the appellant visited him twice on the night of the 28th September, and made what turned out in the light of later events to be a number of self- incriminatory statements to him in the course of those visits, having regard to the hostile relationship which existed between them. The facts with regard to that relationship were to a large extent not in dispute. Lendor admitted that as a result of some incident in June or July, 1998, he made a report to the police on the basis of which the appellant was placed on two charges which were still pending on the 28th September, 1998. As a result they had not

been on speaking terms. Lendor said that the last time they spoke prior to the 28th September, 1998, was on the 8th September, after the cases had been called and presumably been adjourned. He gave no evidence of what that conversation was about but he claimed that on the 29th September, they were on good terms. What the learned Judge said about this aspect of the matter was as follows:

“Of course, you have to consider what the accused is saying, which is that Lendor and he had a matter in court, and as a result Lendor has made up all this thing against him, the accused.”

In the first place it was not just the accused who was saying that Lendor and he had a matter in court. As I have just pointed out, Lendor was saying so too. Secondly, the question which the jury should have been asked to consider was whether the state of the relationship between Lendor and the appellant caused them to have any doubt as to whether the appellant did visit Lendor twice that night and have with him the incriminating conversations which Lendor said he had. The matter was never put to the jury in this way by the Judge in his summation.

In commenting on Lendor's evidence the learned trial Judge went on to make the point that Lendor was the first person that P.C. Hazelwood spoke to and suggested that there was insufficient time before Lendor gave his statement to the police for him and Douglas to have put their heads together and fabricated a story implicating the appellant. Initially the Judge spoke of P.C. Hazelwood having spoken to Lendor on 'the same night' as the incident, but he later corrected himself and acknowledged that it was not the same night but the next morning. P.C. Hazelwood's evidence was that he took up duty at the Moruga police station at about 8 a.m. on the 29th September and then left on instructions for June's house. No one was there but apparently he was assisted by Lendor in gaining entry to the house. According to his evidence it was only after he had collected various exhibits and returned to the Moruga Police Station that he took a statement from Lendor. Moreover, it is to be noted that Sgt. Harry testified that he also took a statement from Lendor on the 12th October, 1998. The suggestion, therefore, that Lendor was telling the same story from so early on that one could rule out the possibility of fabrication, rests on a rather tenuous factual foundation. In any event, since express evidence of self-corroboration is not admissible, it was not permissible in our view for the Judge to invite the jury to find support for Lendor's evidence by drawing the inference that he had been telling the same story from very early on.

Exception was also taken by counsel for the appellant to the Judge referring to the defence's challenge of the evidence of Douglas and Lendor as a "conspiracy theory". It was submitted that this "trivialised" the defence. It was conceded that this was a small point but we think that there is substance in it. A Judge in summing-up is free to point out the weaknesses in the defence to the jury, but

he must be careful not to disparage or discredit the case for the defence by referring to it in a snide way. More importantly perhaps, the Judge was not being altogether fair to the appellant when he portrayed the defence as claiming that Lendor and Douglas had “put their heads together to frame” an innocent man. If Lendor was lying about having seen the appellant that night, the extent of the collusion which that implied between himself and Douglas was minimal, being limited in fact to how the appellant was dressed. Further the cases in which witnesses give false evidence implicating a person whom they believe to be innocent, must be quite rare. More often than not such witnesses are convinced of the guilt of the accused and so do not see anything very wrong in doing their part to ensure that he does not go free, even if that involves lying under oath. Such an attitude is of course deplorable, but it is one which a jury is much more likely to attribute to an otherwise reputable witness than participation in a conspiracy to frame an innocent man. Accordingly, when a Judge in summing-up invites a jury to consider the likelihood of a witness having given false evidence against the accused, he should do so in a way which does not unfairly tilt the balance against the accused. In this respect, the learned trial Judge fell from grace in the following passage:

“So, members of the jury, is this a case in which Lendor and Douglas have put their heads together to frame the accused? If it is that you find that they have done this, then you must go no further. We will stop the case immediately, because it means that you cannot rely on the evidence of either of those two men, because anyone who conspires to bring about the conviction of an innocent man, no matter what charge it is, is unworthy of belief, is indeed a criminal himself, and you would have to reject the evidence entirely and go no further”.

It was also submitted by Ms. Chote that the Judge had failed in his summing-up to deal adequately with a number of weaknesses in the prosecution’s case. Pre-eminent among them was the lies admittedly told by Douglas in his first statement to the police. The Judge did tell the Jury: “Well obviously, when someone lies and admits that they lie, it is not a matter that a jury can or should take lightly”. Where the Judge fell short in our view was in his failure to point out that in fact no explanation had been given by Douglas either for the admitted lie he told about having seen the appellant throw the fire-bomb or as to why he omitted from that statement (and indeed his deposition) any mention of June having exclaimed “Oh God, Paps you burn me”. I have already pointed out that in relation to the lie about having seen the appellant throw the fire-bomb, the evidence elicited from Douglas in re-examination failed totally to provide the explanation which it was intended to provide. But the learned trial Judge appears not to have recognised this for having referred to Douglas’ evidence of the incident of the 6th September, he said:

“So what he is suggesting, and it is open to you to find, is that at that point in time, in giving this statement he was blaming the accused by

putting the flammable device, if I may call it that, in the hand of the accused not knowing that there was no need, perhaps, for him to do so.”

It was simply impossible to deduce from Douglas’ evidence in re-examination that he thought it necessary to put the “flammable device ... in the hands of the accused” or if he did think so, why he did. To find the explanation given for that, one has to go to the second statement which as I have already said, was not in evidence. Accordingly (although no complaint was made of this by counsel for the appellant), the passage from the summing-up which I have just quoted amounted to a misdirection in that it invited the jury to draw an inference which the evidence could not support and suggested to them that an explanation for the lie had been given, when in fact none could be gleaned from the evidence.

With regard to the evidence of what June shouted out, we have already held that this should never have been admitted. Having admitted it, however, the Judge ought to have drawn the jury’s attention to the absence of any explanation for Douglas having omitted it both from his first statement and from his deposition. This, however, was not done.

Ms. Chote also criticised the Judge for having failed to point out to the jury that certain damaging evidence given by Sgt. Harry was not supported by P.C. Hazelwood. The evidence in question was that at the Homicide Office in San Fernando on the 17th October, 1998, the appellant upon being asked to take the police to the home of his brother and one Marlon whom he said he had been staying with, replied that he did not know where those persons were living. Although P.C. Hazelwood was present at the time when that was alleged to have been said, he gave no evidence of it. This is something which the trial Judge might well have mentioned in his summing-up, but we do not think that it was a matter of such importance that his omission to do so amounted to a misdirection.

Another criticism of the summing-up was directed at the way in which the learned trial Judge dealt with the evidence relating to the capacity of the appellant to throw the fire bomb over the wall of June’s house given the injuries to his arms. The relevant passage from the summing up reads as follows:

“Now, members of the jury, one of the matters raised by the accused, which I must remind you of is that he was disabled at that time. That is to say, he had been suffering certain injuries. Now, both he and his father speak of these injuries. The other witnesses, including the police officer who first saw him, did not speak about the type of injuries that he, members of the jury, was suggesting he had suffered or he was constrained by at that time. You recall all the evidence in this case, and it is a matter that you are entitled to take into account, if you believe the accused and his witness, his father, that at that time the accused was suffering from this incapacity in that he would not have been able to do what it was that he would have had to do, which would have been to throw

this thing through that opening. If you find that on that evidence he could not have done it, then that is cogent evidence from which you can find that he could not have done it and did not do it, and you would have to give him the benefit of any doubt that arises in that regard.”

Counsel’s criticism of this passage was that it would have given the jury the impression that the only evidence of the appellant’s injuries had come from his father and himself and that the police officers who saw him after his arrest had seen no sign of them. In fact Sgt. Harry said in his evidence that he recalled seeing an injury on one of the appellant’s hands and P.C. Hazelwood said that he saw that his left hand was cut on the side and demonstrated how the appellant was carrying it. We take judicial notice of the fact that in this country people often say ‘hand’ when they mean ‘arm’ Lendor confirmed that the appellant had been hospitalised in July, 1998. It is true that none of these witnesses did more than confirm that the appellant had received cuts on his ‘hands’ or at least one of them, and it was only the appellant and his father who gave evidence that his injuries were so incapacitating as possibly to have prevented him from throwing the fire-bomb into June’s bedroom on the night in question. Nevertheless, we agree that the direction which I have just quoted, did not fully or accurately represent the state of the evidence. The Judge should have made it clear that it was not in dispute that the appellant had received some injuries to his arms, but what they had to consider was whether those injuries had left him so incapacitated as to prevent him from throwing the fire-bomb into June’s house. It was in relation to that issue that they would have had to decide whether or not they could rely on the evidence of the appellant and his father.

We do not think that any of the other criticisms made of the summing-up justify individual attention. We have come to the conclusion that the cumulative effect of the deficiencies we have found is such as to render the jury’s verdict unsafe. Put differently, we are unable to say that but for these misdirections the jury’s verdict would have been the same. Accordingly, they constitute a separate and sufficient ground for quashing the conviction. We would like to make it clear, however, in fairness to the learned trial Judge that this is not a case of a fundamentally unbalanced summing-up, but rather of a summing-up which contained a number of specific flaws, which cumulatively may have impacted on the jury’s verdict.

I turn now to deal briefly with the other grounds of appeal. The first ground was that the Judge erred in law by permitting the whole of Douglas’ first statement to be put into evidence, although it contained material which was highly prejudicial to the appellant. The prejudicial material referred to is limited to part of the penultimate sentence of the statement, which read as follows: “About 8 months ago June and Paps separated and he was in the habit of beating and using threats to her”. Ms. Chote relied on the judgment in **Prakash Manraj v. The State** Cr. A. No. 109 of 1998 (unreported) in which this Court held, overruling an earlier decision in **Rampersad v. The State** Cr.A. No.s.37 and 38 of 1989, that it

was not necessary to put in the whole of a prior inconsistent statement or deposition, but what was put in should be limited to those parts that constituted the inconsistency or served to qualify it or put it in context. Clearly the words: "and he was in the habit of beating and using threats to her" were prejudicial and should have been edited out of the statement before it was put into evidence and read to the jury. It is also true that the statement in this case was read twice to the jury, firstly when it was put in, and again by the Judge in the course of his summing-up. On the other hand, there were three occasions, that is, at the time when the statement was put in and twice in the course of the summing-up, on which the Judge gave a very clear and forceful direction to the jury that the statement was to be used only for the limited purpose of establishing inconsistency between the account which the appellant first gave to the police and the evidence he gave to them under oath, and should not be used as proof of the truth of anything that it contained. There is no reason to believe that the jury did not obey this direction. Moreover, the offending sentence may well be understood as referable to an earlier period when the appellant and June were living together and in the overall context of the evidence in this case, was unlikely to attract much attention from the jury. While therefore there is some merit in this ground of appeal, we do not consider that it would have provided a sufficient basis for quashing the conviction.

We have not dealt so far with the first part of the second ground of appeal which was that State counsel was allowed to re-examine Douglas to establish consistency between his evidence and a statement (presumably the second one) given by him to the police. This point was never really expanded or explained in argument. Suffice it to say that what is complained of does not appear to us to have occurred judging from the notes of evidence.

The fourth ground of appeal was that the Judge's direction to the jury with regard to the issue of identification was defective in two respects. Firstly, because he omitted to tell them that an honest but mistaken witness could be convincing and secondly, because he told the jury that they could use the evidence given by Lendor to bolster Douglas' evidence of identification. With regard to the first of these two points, it is true that the Judge did not warn the jury of how convincing a witness who made an honest but mistaken identification could be, as he should have done in accordance with the guidelines set out in ***Turnbull*** (1976) 63 Cr. App. R. 132. In relation to Lendor's evidence this omission was of no significance as the burden of the defence's attack on his evidence was not that it was mistaken, but that it was dishonest. No question of mistake could seriously be raised with regard to his evidence of the two visits paid to him by the appellant on the night in question. In the case of Douglas' evidence, the question of mistake was relevant, having regard to the limited opportunity he had to observe the man whom he said he saw on the steps when he looked through the louvres, but there was also a substantial challenge of his honesty mounted on the basis of his inconsistent statements to the police and his alleged hostility towards the appellant. In all other respects the warning which the Judge gave about the

inherent dangers of identification evidence and his treatment of the evidence followed faithfully the guidelines set down in **Turnbull**. We do not consider that the omission relied upon was in the circumstances of this case so material that it would have warranted our quashing the conviction.

We also find no merit in the criticism of the learned trial Judge's direction that the jury could treat Lendor's evidence if they accepted it, as support for Douglas' evidence of identification. The principle laid down in **Turnbull** and confirmed in **R. v. Weeder** (1980) Crim. App. R. 228 is that the evidence of one identifying witness which is so weak as not to warrant being left to a jury, cannot be supported by the evidence of another identifying witness which is equally weak. This approach does not appear to have been followed in **R. v. Shelton & Carter** (1981) Crim. L.R. 776, but even assuming that it is correct, it has no relevance to this case. Whether or not the identification evidence given by Douglas fell into the "fleeting glimpse" category, the evidence of Lendor in so far as it related to the two visits paid to him by the appellant and the conversations which they then held, was obviously strong enough to provide circumstantial support for Douglas' evidence, and the Judge was perfectly correct to so direct the jury.

The sixth ground of appeal reads as follows:

"There was a possible miscarriage of justice as a result of the absence from the trial of medical evidence supporting the fact that the appellant was suffering from injuries to both arms at the time of the incident."

In support of this ground counsel for the appellant filed, and sought leave to use, an affidavit sworn by the appellant on the 7th April, 2001, to which was exhibited inter alia a medical report from Dr. S.V. Lutchman dated the 16th October, 1998 (the same day on which the appellant accompanied by his attorney gave himself up to the police at the Princes Town Police Station). We looked at both the affidavit and the report, but did not admit either into evidence. One reason was that while the report establishes that the appellant received quite severe lacerations of both arms, which left him with some residual disability, it does not address the specific question whether the appellant could have thrown a container containing flammable liquid over a wall some 10ft. high. Presumably it would have been open to the defence to call Dr. Lutchman to give evidence in terms of his report and also to address the crucial question just mentioned. We do not know why he was not called. In answer to a direct question from the Court, counsel for the appellant indicated that she was not alleging incompetence on the part of counsel who appeared for the appellant at the trial. We note that in his affidavit the appellant says that the original of Dr. Lutchman's report has been misplaced. We also note that the cross-examination of P.C. Haitoon, the police officer to whom the appellant surrendered on the 16th October, 1998, produced only the following cryptic sentence: "Counsel did not hand me a medical certificate". One is left to wonder if there is any connection between these two items.

At any rate, no basis has been provided on which we could find that there was a miscarriage of justice arising out of the failure of defence counsel to produce medical evidence about the extent and effect of the appellant's injuries. Because the appeal succeeds on other grounds, however, and as a result of the course which we propose to take, there will be an opportunity to fill any gap that may have been left in the defence case at the trial.

No complaint was made in the grounds of appeal about the direction which the learned trial Judge gave to the jury with regard to the intent which they had to find in order to convict the appellant of murder. Nevertheless, having regard to the course which we intend to follow, we would simply like to make two observations. One is that it is always dangerous and often unnecessary and inappropriate to broach the question of foresight when directing the jury on the intention which they must find in order to convict the accused of murder. The second observation is that having regard to the evidence in this case it was desirable to focus the jury's attention (if they found that the appellant had thrown the fire-bomb) on whether the evidence satisfied them that the appellant had the intention of killing or doing serious bodily harm to June and/or Douglas, in which case their verdict would be guilty of murder, or whether they found that the appellant was merely reckless as to whether the occupants of the house were burnt as a result of his action, in which case their verdict would be guilty of manslaughter.

Having regard to (a) the wrongful admission of the evidence relating to June's outburst "Oh God, Paps you burn me" and to the incident outside her house on the 6th September, and (b) the several misdirections with regard to the evidence which we have found in the summing-up, we grant the appellant leave to appeal, treat the hearing of the application for leave as the hearing of the appeal, allow the appeal and quash the conviction and sentence. We have anxiously considered whether we ought to order a new trial. The charge here is one of murder and the time that has elapsed since the offence was committed, is just over three years. Until recently such a time lapse between arrest and trial would have been considered exceptionally short in Trinidad and Tobago. On the other hand we are very conscious that a new trial should not be ordered in circumstances in which it will provide the prosecution with an opportunity to correct mistakes which it has made in the presentation of its case. One mistake which the prosecution made in this case was in failing to lead evidence at the preliminary inquiry of the incident outside June's house on the 6th September, or to take the proper steps to introduce it as fresh evidence during Douglas' examination in chief at the trial. It may be that at a new trial the prosecution will seek properly to introduce this evidence. Whether any attempt is made to do so is a matter for the Director of Public Prosecutions and whether or not such an attempt, if made, succeeds, will depend on how the trial Judge exercises his discretion, a discretion which we prefer to leave intact. On the other hand, as already noted, the appellant will have the opportunity at a new trial of amplifying the evidence led with regard to his incapacity. We also note that in **R. v. Berry**

[1992] 3 All E.R. 881, the Privy Council remitted a case of capital murder to the Court of Appeal of Jamaica to decide whether there should be a new trial although one of the grounds on which the Privy Council allowed the appeal and quashed the conviction, was that two witnesses had given evidence which was not in their depositions, though it was in statements which had not been shown to the defence. The prospect of the same evidence being led at a new trial without the possibility of objection was obviously not regarded by the Privy Council as a decisive factor in determining whether the interests of justice required that a new trial be ordered. The other mistake made by the prosecution was in leading inadmissible evidence of what June shouted out when the fire-ball fell on her. The mistake here is really that of the Judge in not excluding the evidence notwithstanding the failure of defence counsel to object to it. Judicial error alone should not in the absence of some special circumstance which would render a new trial oppressive or unfair to an accused, afford him the opportunity of going free without a proper adjudication on his guilt. We have come to the conclusion that the interests of justice in this case require that there be a new trial. This should take place as soon as convenient and is to be given priority over new cases. Accordingly, we order that the matter be placed on the cause list of criminal cases in San Fernando which will be dealt with on the 12th December, 2001.

M.A. de la Bastide
Chief Justice

L. Jones
Justice of Appeal

A. Lucky
Justice of Appeal