

**REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE COURT OF APPEAL**

**Cr. App. No. 39 of 2001**

**BETWEEN**

**SYLVESTER DOWERS**

**APPELLANT**

**AND**

**THE STATE**

**RESPONDENT**

**PANEL:**

S. Sharma, C.J.  
R. Nelson, J.A  
W.N. Kangaloo, J.A.

**APPEARANCES:**

Mr. D. Allum, S.C. and Mr. R. Persad appeared on behalf of the Appellant.

Ms. C. Brown-Antoine appeared on behalf of the Respondent.

**DATE DELIVERED:** 14<sup>th</sup> March 2003.

## JUDGMENT

### Delivered by Kangaloo J.A.

The appellant was convicted of the offence of possession of a dangerous drug, namely cocaine, for the purpose of trafficking. On the 25<sup>th</sup> May 2001 he was sentenced to 12 years imprisonment with hard labour. He has filed three grounds of appeal which are as follows:

#### “Ground 1

*The learned Trial Judge erred in law when he failed to direct the jury in accordance with the guidelines laid down in the case of **R v Turnbull** such a direction being both necessary and critical in the circumstances of this case.*

#### Ground 2

*The learned Trial Judge erred in law when he failed to direct the jury on how they should deal with alleged oral statement of the accused. Such a direction being necessary in the circumstances of this case.*

#### Ground 3

*The learned Trial Judge erred in law when he allowed the Prosecution witness Campbell to identify the Applicant in the Dock. This evidence was highly prejudicial and was further aggravated by the fact that the learned Trial Judge in his Summing Up left it open to the jury to find that Campbell’s evidence was “the same sort of evidence” as the other Prosecution witness who had known the Applicant before.”*

The Prosecution’s case at the trial, as given in evidence by police officers Grant and Campbell, was that as a result of information received by Grant, he obtained a search warrant on Friday 26<sup>th</sup> July 1996 to search the premises of the appellant at Upper Nicholas Street, Maraval for arms and ammunition. Grant testified that he had known the appellant for about 6 years before that date, he having seen him “*more than ten times in that 6 years*”. Grant further testified that on the said date he, together with a party of

other police officers including officer Campbell, went to the premises of the appellant at about 11:00 a.m. He said that he looked through an open louvre window and he saw the appellant walking from the western side of the house with a plastic packet under his left arm and a scale and a brown paper bag in his right hand. At this time, he was about 15 to 16 feet away and had an unobstructed view of the appellant. He spoke with Corporal Campbell and again looked through the open louvre window when he saw the appellant place the packet, the scale and the brown paper bag on a nearby counter. The counter was about 12 feet from where Grant was. He again spoke to Corporal Campbell who also looked through the said window. Grant said he observed the appellant for about 2 minutes before he shouted: "*Dowers, police, open up*". He said that the appellant looked in the direction of Campbell and him and then he saw the appellant run in the direction from which he had earlier seen him come and he heard a loud crashing noise.

Grant and Campbell ran to area from which the noise came and saw the accused running out of an open doorway. He ran into some bushes and eluded capture. Grant and Campbell then entered the house through a broken wooden door through which the appellant apparently had run. They went to the counter and observed the packet, the scale and the brown paper bag. Grant testified that he examined the packet and it appeared to contain cocaine. He examined the brown paper bag and found it contained \$499.00 made up of one-dollar bills. Grant took possession of these items. After ensuring that no one else was in the house he returned to the Port of Spain CID where the exhibits were all marked.

Grant testified that later, on the 26<sup>th</sup> July 1996 he went to the Magistrates' Court in Port of Spain and obtained a warrant for the arrest of the appellant. He said that on the 6<sup>th</sup> August 1996 after receiving information, he went to the CID in Port of Spain and saw the appellant in custody. He cautioned the appellant and advised him of his rights and of what transpired on Friday 26<sup>th</sup> July 1996. He showed the scale and the brown paper bag containing the money with the markings thereon and cautioned him. The appellant then replied: "*they came from by me the same day you were there*". The appellant refused to

give this in writing. Grant said that on the said 6<sup>th</sup> of August 1996 he executed the warrant of arrest on the appellant.

Campbell, the only other witness to testify on behalf of the prosecution essentially supported Grant in the evidence which he gave, but in addition, gave the following evidence: *“I went to assist Police Constable Grant in executing a search warrant at the home of the accused Sylvester Dowers. I see him here (points)”*. The appellant when called upon elected to remain silent but called two witnesses in his defence.

The first was Marcus Romain who testified that on the 26<sup>th</sup> July 1996 he was working with the appellant doing renovations on the house of one Anthony Geoffrey. He said that the appellant got to the job site at about 7:25 a.m. and left sometime after lunch. He left after his brother Egbert came and spoke with him. He testified that Egbert came about lunchtime, which was between 12 and 1:00 p.m. when he Romain was having lunch.

Egbert Dowers was then called. He testified that he recalled the 26<sup>th</sup> July 1996. He is the eldest brother of the appellant. He lived in a house on the same road, Upper Nicholas Street, as his brother. From his house he could see his brother’s house. He saw his brother at about 6:45 a.m. with tools in his hand leaving to go to a job. Later on that morning between 11:00 and 11:30 a.m. he saw three vehicles come by his brother’s place, one went down to his brother’s and the other two remained on the roadway. He saw about 12 to 15 police officers enter the yard and surround his brother’s house. He said that he went to the premises and told the officers no one was there and he asked them what was going on. He told the officers he was the appellant’s brother. He sat and observed the premises for close to an hour. When the officers left he observed that the back door was broken. He left the premises and went to the job site where he found the appellant. He also saw Marcus Romain and Geoffrey on the job site.

He testified that the louvres in his brother’s house were wooden and not glass and they faced downwards. He said that when the lights were not on inside the house one

could not see inside from outside. He testified he never saw his brother dart out of a door. He said when he arrived at the job site he saw his brother doing some concrete work and putting up blocks. He saw Marcus helping his brother at the site. Marcus was mixing mortar.

From the facts, which we have gone into in some detail, it is clear that the defence of the appellant was that of an alibi. The appellant was contending through his witnesses that:

- (a) he was elsewhere at the time; and
- (b) that no one was at home at the time of the arrival of the police.

It is not in dispute that:

- (a) the police came to the premises that day; and
- (b) that the premises were owned by the appellant.

The appellant through his witnesses questioned the veracity of the evidence of the police including the identification of the appellant as opposed to the accuracy of the identification. The flavour, if not the thrust of the cross-examination by the defence was that the police witnesses had fabricated the presence of Dowers in the building, the discovery of a prohibited substance therein and the so-called broken door.

When this is the case, a warning in terms of that suggested in **R. v Turnbull and Others [1977] 63 Cr. App. R 132 at 137-140** (a Turnbull warning) is not required and would only confuse a jury. (See **R v Cape and others [1996] 1 Cr. App. R 191.**)

However, the case of **Shand v R. [1996] 2 Cr. App.R 204** decided that:

*“Where the principal or sole means of defence was a challenge to the credibility of identifying witnesses, there might be exceptional cases where the (Turnbull) direction was unnecessary or where it could be given more briefly than in a case where the accuracy of the identification was challenged. Such cases would be wholly exceptional and even where credibility was the sole line of*

*defence the judge should normally direct the jury that they had to be satisfied that the identifying witnesses were not mistaken”.*

Having considered the summing-up and the notes of evidence, which latter were not available on the appellant’s application for bail pending appeal, we are firmly of the view that the real question that arises in this appeal is whether this appeal falls into the category of wholly exceptional cases, which do not require a Turnbull direction. We think it is for the following reasons:

(1) The defence as set out above was clearly that no one was in the house of the appellant at the time of the arrival of the police and that no one ran out of the house. For the learned trial judge, in light of this, to direct the jury that some one other than the appellant may have run out of the house would involve an issue not raised by the defence at all. The appellant could then legitimately complain if such a direction were given that it was prejudicial to him because his case was that no one ran out as there was no one there. The prejudice arises from the fact that the premises were undisputedly the appellant’s premises so that if such a direction had been given, the jury could legitimately have come to the conclusion that if someone ran out it was he, when his case was that no one ran out at all as no one was there at the time.

(2) The instant factual scenario is different from that which obtained in Shand. The defence was also one of alibi and the appellant contended that the witnesses were lying when they said they saw the appellant commit the murder. So that if the jury believed that the witnesses observed the murder the possibility existed that the witnesses were mistaken as to the identity of the perpetrator of the crime. In the instant case no question of mistaken identity arises because of the nature of the defence as set out above. If the brother’s evidence was that the appellant was not home but someone else may have been and that someone ran out then the situation would have been as in Shand. But that was not the brother’s evidence. In other words as has been mentioned before, the question for the jury was whether the appellant was at

home at the material time and fled upon the arrival of the police as the prosecution contends, or whether no one was at home at the material time and the prosecution's case that the appellant was home was a fabrication.

For these reasons, we are of the view that in the circumstances of this case although veracity of the prosecution's witnesses was the main line of the defence, the learned trial judge was not obliged either to give a full Turnbull warning or even a warning to the jury on the dangers of convicting on the evidence of a witness who may be mistaken. We therefore find no merit in ground 1.

With respect to the second ground of appeal, an examination of the summing up of the learned trial judge reveals that nowhere in it does the judge even mention the so-called oral confession. The issue is then whether the learned judge erred in failing so to do. We note that there was no evidence on behalf of the defendant to refute the allegation that he did utter the words "*they came from by me the same day you were there*" when confronted with the exhibits in the police station. We do not agree, therefore, that if these words amounted to a confession there was any issue between the prosecution and the defence, on the evidence that it was given.

From the notes of evidence it appears that the police officer was challenged by the defence on whether the appellant did utter these words. The case is therefore similar to what occurred in **Belcon v R 5 WIR 526**, where words were uttered by the appellant which may have amounted to a confession. The appellant did not give evidence or call witnesses.

Wooding CJ speaking of oral confessions said at p531G:

*"But when no objection has been or can be taken to their admissibility and the evidence of them has been tendered and received, the test to be applied is the same as with regard to any question of fact that is to say before the jury can act upon them, they must feel sure that the statements were made as alleged.*

*We accept that in some cases juries need to be warned to be cautious in acting upon alleged confessions, especially if they are not in writing. The case of **R v Simons** (1834) 6 C&P 540 is one such. There, two people gave evidence of overhearing remarks made by a prisoner to his wife but their respective reports of what they heard differed so vitally as to make caution absolutely essential. But in the instant case, apart from the general need to feel sure that the witnesses' testimony was credible and could be accepted, there was in our view no special need for caution."*

In the circumstances, we do not agree there was an onus on the learned trial judge to direct the jury on the so-called oral confession. For the sake of completeness we are of the view that whether it was made or not was a question of fact and the learned judge did in his summing up direct the jury that they were the sole judges of fact. We believe that jurors in this country are of sufficient intelligence to understand that this question of fact, was within their jurisdiction to decide even without a specific direction from the learned judge and we are fortified in that belief also because of the very short period of time over which the evidence was led and the summing up given in this case. In the circumstances, therefore, we find no merit in Ground 2.

With respect to the third ground of appeal, it is certainly questionable from the notes of evidence whether this was a classic case of dock identification at all. It appears to be, from the evidence already quoted above in the recitation of the facts, that officer Campbell was testifying with respect to the execution of a search warrant at the home of the appellant and the officer voluntarily and gratuitously indicated who the appellant was. There is no evidence before the jury to suggest either that officer Campbell did not know the appellant before the police raid on July 26, 1996 or that being so had not seen him since that date. From the evidence of officer Campbell it appears he was saying 'I went to the home of Sylvester Dowers. He is sitting over there' which is far different from saying 'the person whom I saw in the house that day whom I did not know before and have not seen since is sitting in the dock'. The latter is the classic case of dock

identification which according to **Cartwright (1914) 10 Cr. App. R 219** is improper. As was said also in **Cartwright** this improper identification is not the only evidence in this case. There was the identification of the appellant by officer Grant and there was the so-called oral confession.

In the case of **Williams v R (1997) 1 WLR 548** the evidence which amounted to dock identification was as follows:

*“Q. Now, as you proceeded in this bus, did you notice anything?”*

*A. Yes ma’am. On reaching the stop light at Lyndhurst Road, two men hopped on to the bus, one of them is in the dock.*

*His Lordship: Two men did what?*

*A. Hopped on to the bus, one of them is in the dock at the moment.*

*Q. One of them is where?*

*A. In the dock.”*

Their Lordships in the Privy Council observed at p554G:

*“It is plain, however, from the passage which their Lordships have quoted from the transcript of the evidence that there was no opportunity for Constable Lawrence’s evidence on this matter to be stopped. The witness volunteered his identification of the defendant in answer to two questions, one from prosecuting counsel and the other from the trial judge, neither of which had invited him to identify. Once that evidence was out, it was before the jury. What remained was for the trial judge to deal with the matter in an appropriate manner in his summing up. In their Lordships’ opinion he said all that he could reasonably have been expected to do in the circumstances. He made it plain that this kind of evidence was undesirable, and that the normal and proper practice was to hold an identification parade.”*

In the instant case the learned judge gave no direction on the undesirability of such identification. It could be that the learned judge was of the view, he receiving the

evidence first hand, as opposed to our attempting to glean it from the printed record, as we are, that this was no dock identification at all. But even if it were, we are of the view that just as in Cartwright, improper as it was, it was not the only evidence against the appellant, such as to render the conviction unsafe.

For these reasons we would dismiss this appeal and affirm the conviction and sentence of the learned trial judge. The sentence is to run from today.

S. Sharma  
Chief Justice

R. Nelson  
Justice of Appeal

W.N. Kangaloo  
Justice of Appeal