

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Cr. App. No. 5 of 2002

BETWEEN

GLENROY BISHOP

APPELLANT

AND

THE STATE

RESPONDENT

PANEL:

L. Jones, J.A.
W. Kangaloo, J.A.
S. John, J.A.

APPEARANCES:

Ms. Sophia Chote for the Appellant
Ms. Dana Seetahal for the Respondent

DATE OF DELIVERY: 26th January 2005

REASONS

Delivered by S. John, J.A.

On December 21, 1994, around 9:15p.m., a maxi-taxi travelling east along the Eastern Main Road, Tunapuna stopped close to the corner of Basilon Street and the Eastern Main Road. Anthony Singh was standing nearby and he saw the appellant alight from the maxi-taxi followed by Michael Cabral, the conductor of the maxi taxi. At the time, the appellant was dressed in a red, yellow and green jersey with a hood to the back and a three-quarter pants.

2. Singh had known the appellant by name for about 15 years before that night. He also knew where he lived and used to see him about 2-3 times per week during the fifteen-year period.

3. Singh heard the conductor ask the appellant for his fare, whereupon the appellant spun around, drew a 'chrome' gun and shot him in the face. At that time the appellant was about 20 feet away from Singh. Death was instantaneous.

4. The appellant then ran past Singh, passing about 6 feet from him and ran up Basilon Street. Singh was able to see the appellant's face and whole body for about 3-10 seconds. Nothing obstructed his view of the appellant. He was able to see him because the area was well lit by four dusk-to-dawn lights from a gas station on the opposite side of the road and by lighting provided by passing cars. Singh spoke to the police on the fateful night and gave a written statement on January 04, 1995.

5. When arrested by the police and after being cautioned the appellant said, "*I ent know nothing about that.*" On January 05, 1995 he was placed on an identification parade. Three passengers who were in the maxi-taxi at the time were called to the parade but failed to identify him. Singh was not invited to attend the parade. The appellant was subsequently charged with murder.

6. At his trial the appellant raised the issue of alibi. He said that he lived at Macoya Settlement at the home of his aunt Merle Bishop. Also living at those premises were his cousins and on the night in question he was at home with his aunt Merle and one of his cousins Susan Bishop.

Earlier Trials

7. On January 16, 1996 the appellant was found guilty of murder and sentenced to death. On April 29, 1998 the Court of Appeal allowed his appeal principally on the ground that the trial judge had misdirected the jury on the question of identification. A retrial was ordered. At the conclusion of the retrial on November 26, 1998 he was again found guilty and sentenced to death. He appealed again to the Court of Appeal and on July 15, 1999 the court dismissed the appeal and upheld the conviction.

8. On appeal to the Privy Council the conviction was quashed and the matter remitted for the Court of Appeal to decide whether there should be a retrial. Although no reasons were furnished by the Privy Council it would seem that the appeal was allowed on the ground that the prosecution had failed to disclose that the two main prosecution witnesses had previous convictions.

9. On November 30, 2000 the Court of Appeal in a judgment delivered by Hamel-Smith, J.A. ordered that the appellant be retried. On January 30, 2002 after a trial before Madam Weekes, J (as she then was) and a jury he was again found guilty and sentenced to death. This appeal came on for hearing on December 09, 2004 when we dismissed it and promised to give our reasons later. This we now do.

The Appeal

10. Four grounds of appeal were filed on behalf of the appellant. The first ground was: *“the trial judge gave incomplete and inadequate directions to the jury on the issue of identification resulting in incurable prejudice to the appellant.”*

11. Counsel submitted that the case for the prosecution depended solely on the identification made by Singh and that the trial judge’s direction on the issue of identification fell short of what was required by *R v Turnbull [1997] QB 224*. Counsel further submitted that since the State had premised its case on recognition of the appellant by Singh as opposed to identification, the trial judge had failed to remind the jury that while recognition evidence may be more reliable than identification evidence, mistakes are sometimes even made in the identification of close friends and relatives.

12. Counsel pointed to several deficiencies in the case for the prosecution on the issue of identification and submitted that those weaknesses were not properly marshalled by the judge. She identified them as follows:

- a) *The identification was not simply very fast. It may have been as brief as three seconds. That was a classic “fleeting glance” situation;*
- b) *The incident took place in the night;*
- c) *While evidence was given of lighting, the lights were on the other side of the street;*
- d) *There were differences in the witness’ account as to the circumstances surrounding the identification. For example, the witness had differed as to distance. He said that he was 20 feet away from the scene but at the preliminary enquiry had given an estimate of 40 metres and in his statement had said 40 feet. He said it all meant the same thing.*
- e) *He had said at the preliminary enquiry that the assailant had his back to him. At a previous trial it appears that he had said that the back of the person who fired the shot was facing him for some time. At this trial he said he could not recall if his back was to him. He later said that at some point he had a side view of the assailant.*

13. Counsel referred specifically to this part of the summation:

“In the past, there have been wrongful convictions as a result of such mistakes. An apparently convincing witness can be mistaken. So that in this case, as in every case of identification, the jurors must examine carefully the circumstances in which the identification was made. And among the things that you need to consider – and when I come to review the evidence, I will stress the evidence surrounding these points –but you must bear in mind when you decide whether Anthony Singh’s identification evidence is correct and reliable, how long did

Anthony Singh have the assailant under observation? At what distance or distances? In what kind of lighting? Was there anything interfering, or blocking or impeding his observation? Had he ever seen the assailant before? And, if so, how often had he seen him? Is there any marked difference between the description of the assailant given by Singh to the police and the actual appearance of the accused in this matter?

When I come to the evidence, I will remind you of what all of the evidence is, but at this point, I must remind you of the following specific weaknesses which appeared in the identification evidence: One is that the incident occurred very fast or quickly. Two, at some point, the gunman turned, and so his face was no longer full front to Singh. And three, part of Singh's observation was made while the gunman was running. You need, of course, also to take into consideration the fact that when the shot was fired, Singh said he was frightened or shocked. So that, all of these things you must consider in deciding whether or not Singh's observations and identification are reliable. For example – and you will use your common sense – Mr. Charles, in his address to you, made the point that if you are frightened or shocked, then your powers of observations are reduced. Well, you will use your own experience. Is that the case, or is it sometimes even though people are frightened, they are able to make good observation? Does fright stop you from making a good observation? And this is where matters of your experience will come in, but those are matters all for you.

So, as I say, I am going to come back in the evidence to the specific evidence given by the relevant witnesses in respect of these factors I have pointed out to you, but these are the things, together with any other matter you consider important, in deciding whether or not you are able to rely on the evidence of Anthony Singh; and whether you do so or not is entirely a matter for you in your good judgment.”

14. Counsel referred the court to the following authorities in support of her submission: ***R v Turnbull [1977] Q.B. 224; Aurelio Pop v The Queen (unreported) Privy Council Appeal No. 31 of 2002; R v Bentley [1991] Crim. L.R. 620 and R v Fergus 98 Crim. App. R. 313.***

15. It is beyond question that the entire case turned on the issue of identification and so it was of utmost importance that the jury should receive proper directions on how to approach the evidence of Anthony Singh identifying the appellant as the person who shot the deceased. The guidance a judge should give a jury has been well set out in the judgment of Lord Widgery LCJ in ***R v Turnbull [1977] QB 224***. There is no need to repeat them here.

16. In the case of *Aurelio Pop v The Queen* the issue was one of identification. The main witness said he knew the appellant prior to the incident. On the question of recognition evidence this is what the Board had to say:

“Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made. All these matters go to the quality of the identification evidence. If the quality is good and remains good at the close of the accused’s case, the danger of a mistaken identification is lessened; but the poorer the quality, the greater the danger.”

17. In *Shand v The Queen [1996] 1 W.L.R. 67, 72* referred to in the aforementioned case Lord Slynn of Hadley, giving the judgment of the Board said:

*“The importance in identification cases of giving the **Turnbull** warning has been frequently stated and it clearly now applies to recognition as well as to pure identification cases. It is, however, accepted that no precise form of words need be used as long as the essential elements of the warning are pointed out to the jury. The cases in which the warning can be entirely dispensed with must be wholly exceptional, even where credibility is the sole line of defence. In the latter type of case the judge should normally, and even in the exceptional case would be wise to tell the jury in an appropriate form to consider whether they are satisfied that the witness was not mistaken in view of the danger of mistake referred to in **R v Turnbull [1977] QB 224.**”*

18. In *Shand*, the conviction was upheld by the Board, despite the judge’s failure to follow the *Turnbull* guidelines, where the appellant had been identified as the gunman by two independent witnesses who had known him for four, and at least five years, respectively. The witnesses saw the appellant at close quarters and in daylight and, at the time of the incident, one of them spontaneously mentioned his name. In those circumstances the Board regarded the identification evidence as being “exceptionally good”. Another factor that the Board took into account was that one of the witnesses gave evidence of an admission by the appellant while in custody.

19. The case of *Aurelio Pop* can be distinguished from the instant case since in that case the killing took place in July 1995 and it was not until December 1995 that a statement was taken from the main witness. The appellant was arrested in August 1998 and the extent of the witness’ acquaintance with the appellant was in dispute and no identification parade was held.

20. In the light of the authorities and principles set out we now examine the evidence and directions given to the jury on the question of the identification evidence by Singh:

Singh said the incident happened fast. It could have been between 3-10 seconds and he admitted he was frightened when it happened. But it must be recalled that Singh was attracted to the appellant from the time the appellant came out of the maxi taxi. In other words he had the opportunity to see him before the actual shooting and in addition he had known the appellant for fifteen years.

21. When she was dealing with the question of identification it is quite clear that the trial judge had well in mind the problems relating to visual identification and the guidelines laid down in *Turnbull*. The direction given at page 10 of the summation contained all the essential requirements set out by Lord Widgery. The judge gave a snapshot of things to come when she said: *“When I come to the evidence, I will remind you of what all of the evidence is, but at this point, I must remind you of the following specific weaknesses which appeared in the identification evidence.”* She there and then identified three specific weaknesses and indicated that she will address them in greater detail when she was going through the evidence.

22. At page 22 of the summation the judge went into further details when she said:

“He said as the accused ran past him, he saw his face and his whole body. He said when the accused first got out of the maxi, he was heading west, that is, towards Singh, and there was nothing obstructing his view of the accused. He said while the accused was headed towards him, he saw his face and his whole body. He said when the accused turned and pointed the object at the conductor, he (Singh) was a few footsteps away from the accused, and he pointed out the distance which the court estimated to be about 10 feet.

He said, in all, that night, he had the accused’s face under observation for 3 to 10 seconds; everything happened fast. He then described the lighting in the area. He said there were lights from the main road by the corner of Basilon Street; there were lights in the gas station opposite to where the incident happened; and there were lights from passing vehicles and there were lights from the main road, dusk to dawn lights. He said there were about four lights at the gas station which faced the main road. He said the police came to the scene and he was interviewed.

It is clear from the above passage that the judge did address the issue of lighting and no legitimate complaint can be made on that matter.

23. Counsel also complained that the inconsistent statements of Singh and his credibility were not properly dealt with by the trial judge. In dealing with Singh’s inconsistent statement the trial judge said:

“You will remember in this case, in respect of the prosecution witness, Mr. Singh, he said that at the Magistrate’s Court, the estimate he had given of

the distance from himself to the maxi was 40 metres. In the first trial, he had given an estimate of 40 feet. In the second trial, he had given an estimate of 40 feet. And here, before you, he gave an estimate of 20 feet.

Now, in the second trial, when he said 40 feet, he was asked to point out what distance he meant; and he pointed out from where he was to the jury box and he called that 40 feet. In this trial, when he said 20 feet, he was also asked to point out the distance and, again, he pointed out the same distance, from where he was to the jury box. So that the distance pointed out is constant. What he has changed is the measurement, in words, so to speak. So you will have to decide whether in respect of that last trial there was an inconsistency at all, because he was pointing out the same distance even though he was naming it differently. And the explanation he gave for these differences of measurement is that after the last trial, he went back and had another look at the area, and he thinks that 20 feet is now the correct estimate. So it is for you to decide whether or not you find his explanation acceptable and whether you think that there was an inconsistency where he points out the same distance but calls it a different measurement. Those assessments are for you.

In respect of Singh, there was also a difference. He said in this trial that he was on the corner about 3 to 5 minutes before the maxi pulled up. In the previous trial, he said he had been there a few seconds before the maxi pulled up. And once again, he said having thought it over, after the last trial, the 3 to 5 minute estimate is more correct than when he had said a few seconds.

Thirdly, he told you in this trial that when the gunman turned towards the conductor, he was then getting a side-on view of the gunman. At a previous trial, he had said that when the gunman turned and shot, the gunman's back was to him. And he gave the same explanation, that yes, he had said so previously, but having thought it over, it really was a side view. So that he has given you the explanations; there have been these inconsistencies pointed out to him."

It is therefore clear to us that the judge brought to the forefront for the jury's attention the several inconsistencies in Singh's evidence.

24. As to his acquaintance of the appellant, Singh's evidence was quite clear. He said he first got to know the appellant when he (the appellant) was a little fella. He said that he (Singh) used to play football in the savannah and the appellant used to be there. He further said that he used to go to the savannah every day to play and he would see the appellant off and on while he was there. He also said that when the appellant came out of the maxi his face was to him but not all of the time. Whilst we agree that recognition evidence cannot be regarded as trouble free because many people have experienced seeing someone in the street whom they know, only to discover that they were wrong, we

are nevertheless of the view that the directions given to the jury were adequate although the judge did not specifically tell the jury about the possibility of Singh being mistaken. We say so because of the directions given in paragraph 13 above and the observations of Lord Hoffman in the case of *Ian Brown and Everitt Isaac v. The State Privy Council Appeal No. 9 of 2002*.

25. In that case the main issue at the trial was identification. The two principal prosecution witnesses had known both appellants prior to the date of the commission of the murders. It took the police some time to find the appellants but once they were taken into custody the two witnesses were brought to the police station to see and confirm that they were the right men. No identification parade was held.

26. The judge gave a very full direction on the problems of identification evidence according to the guidelines in *R v Turnbull [1997] QB 224*. He told the jury that respectable and honest witnesses could often be mistaken. The only criticism made of the summing up was that he did not expressly say that one can make a mistake even in thinking that one has seen a person one knows.

27. In delivering the opinion of the Board Lord Hoffmann said that the judge gave his warning to the jury against the background of a case in which the witnesses were claiming that the accused were people they knew. He went on to say: *“The jury could hardly have thought he was warning them about the dangers of mistakes in cases in which the witnesses had never seen the accused before. That would not have been relevant or helpful.”* In the instant case, Singh claimed that he had known the appellant very well. We are therefore of the opinion that a direction on the issue of recognition would not have been relevant or helpful to the jury.

28. An examination of the circumstances which determined the quality of the evidence of the visual identification, has revealed that the quality of the evidence was good. It was good enough to eliminate any danger of mistaken identification which necessitates the requisite general warning and explanation. We are therefore satisfied that there was no miscarriage of justice and so this ground fails.

Ground 2 – Delay

29. The issue raised was: *“The learned judge erred in law by overruling an application by counsel for the defence for these proceedings to be stayed. The trial judge further fell into error by giving the jury no directions with respect to the impact which delay had on the appellant’s case.”*

30. Counsel reiterated the history of the matter which we have already set out earlier in the judgment. The thrust of the submission was that as a consequence of the delay the appellant was denied the opportunity to have present at his trial two witnesses, namely the driver of the maxi-taxi and Susan Bishop. In the course of the hearing before this court, counsel for the appellant acknowledged that the delay was of the defence’s own making as there had been several applications by the defence at the stage of the cause list

hearing for adjournments. In that setting, it is questionable whether the appellant can really rely on delay.

31. With respect to Susan Bishop the evidence was that she had migrated. In alluding to her evidence the judge said:

“Now you heard read to you the evidence that Susan Bishop, cousin of the accused, gave at two previous trials: One in January ’98, one in December ’98. And you heard that Susan Bishop, since she last gave evidence in a trial against the accused, has migrated. So she is not available to go into the witness box and testify before you. You, therefore, are at the disadvantage of not seeing her to be able to make an assessment of her demeanour, as you would have been able to in respect of the other witnesses. You are also at the disadvantage of not hearing her being cross-examined to have her story tested before you. Bearing those two disadvantages in mind, however, what she said then and what was read to you is evidence in this case; evidence that you must deal with, that you will accept or reject according to your assessment of it. So, even though it is not on par, so to speak, with the other evidence in terms of seeing and hearing a cross-examination, it is evidence that you can act on, and you will give whatever weight you see fit to it, but it is evidence that you must consider.”

32. The defence of the accused was an alibi. It must be clear from the jury’s verdict that they rejected Susan Bishop’s testimony and it is not entirely clear how her absence from this trial prejudiced the appellant.

33. As regards the driver Tempro he was one of the persons who attended the identification parade but did not identify the appellant. At the last trial Tempro did not give evidence and at the time of the instant trial he could not be found. We therefore fail to see how the appellant suffered any prejudice as a consequence of the absence of Tempro. The trial judge in her summation pointed out to the jury that he (Tempro) was one of the persons who attended the identification parade and did not identify the appellant. This is perhaps the sum total of the assistance Tempro could have given had he been present.

34. Counsel referred to several authorities in support of her submission including *Curtis Charles, Steve Carter and Leroy Carter v The State [2000] W.L.R. 384, R. v Dutton [1994] Crim. L.R. 910, The State v Everol Lawrence H.C.A. 66/95* and the judgment of the Court of Appeal delivered upon the remit by the Privy Council.

35. In the case of *Charles and Carter v The State* Lord Slynn of Hadley in dealing with the question of delay referred to the statement of Lord Lane C.J. in Attorney General’s Reference (No. 1 of 1990) [1992] 1 Q.B. 630 where the Court of Appeal in England stressed that “*a stay on grounds of delay was to be imposed only in exceptional cases*”. At pages 643-644 he said:

“In principle, therefore, even where the delay can be said to be unjustifiable, the imposition of a permanent stay should be the exception rather than the rule. Still more rare should be cases where a stay can properly be imposed in the absence of any fault on the part of the complainant or prosecution. Delay due merely to the complexity of the case or contributed to by the actions of the defendant himself should never be the foundation for a stay.....no stay should be imposed unless the defendant shows on the balance of probabilities that owing to the delay he will suffer serious prejudice to the extent that no fair trial can be held: in other words, the continuance of the prosecution amounts to a misuse of the process of the court.” (Emphasis mine).

36. The instant case is distinguishable from *Charles* for two reasons:

- (1) *Charles* had been put on trial for a third time, one conviction had been quashed and on the second occasion the jury had failed to agree. To use the language of the Privy Council, *“It may be contrary to due process and unacceptable as a separate ground from delay that the prosecution having failed twice should continue to try to secure a conviction.”*
- (2) In addition, the appellants relied on specific difficulties in relation to the evidence. Steve Carter one of the appellants had said that he could not remember several matters very material to his defence with the passage of time.

37. In the case of *Kelvin Culpepper v The State, Privy Council Appeal No. 68/1998* it was submitted that the lapse of over six years from the arrest of the appellant to his trial was such a period as gravely to prejudice the defence of the appellant.

38. In rejecting the submission the Board said *inter alia*:

“It is well-established that a trial court can stay proceedings on grounds of delay, but the circumstances must be exceptional and the defendant must show on the balance of probabilities that owing to the delay he will suffer serious prejudice to the extent that no fair trial can be held, in other words that the continuance of the prosecution amounts to a misuse of the process of the court.”

39. In *R v Henworth*, The Times January 30 2001, the appellant was placed on trial on four occasions. At the fourth trial he was convicted and on appeal complained about abuse of process. The court in dismissing the appeal said ‘*inter alia*’ that the question whether there had been an abuse of process had always to be related closely to the facts of the particular case.

40. Counsel also referred to *R v JK [1999] Crim. L. R. 740*. In that case the defendant was indicted on fifteen counts of rape and indecent assault. The complainant was in each case his stepdaughter, J, and the indictment covered the period from 1974 to 1988, when J was between six and eighteen years old. It was not until 1977 that J complained to the police. JK denied the offences, and his evidence was supported by that of his daughter, and his twin brother, who both said that they saw no sign of anything ontoward between JK and J. The defendant was convicted on three counts of rape and on three of indecent assault, but was acquitted on the remaining counts. He appealed against his conviction on several grounds one of them being that the judge should have been proactive and positive in directing the jury on the difficulties caused to the defendant by the lapse of time since the offences, whereas he dealt only with the difficulties caused to the complainant. In dismissing the appeal the court said *inter alia* that it would have been wiser for the judge to have given the suggested direction; but the court did not accept that such a direction was required as a matter of law or invariable practice. Here the defendant suffered no material prejudice: he was able to give evidence and call witnesses to deal with the allegations.

41. *In Flower v R [2000] 57 W.I.R.* another decision of the Privy Council one of the grounds of appeal related to the long delay between the date on which the appellant was charged with the capital murder and the date of the commencement of the third trial. Their Lordships took the opportunity to consider the issue whether an appellate court should take into account the consideration that the appellant is clearly guilty of a very serious crime in deciding whether to quash his conviction because he contends that lengthy delay has infringed his constitutional right to a trial within a reasonable time.

42. The Board said at page 331, “*In the present case the crime is a very grave one of murder in the course of a robbery, which is a crime which is very prevalent in Jamaica, and the public interest required that persons who commit such crimes and whose guilt can be proved should be convicted and punished. In Bell v Director of Public Prosecutions (1985)32 WIR 317, the Board stated that the right of an individual accused to be tried within a reasonable time is not an absolute right but must be balanced against the public interest in the attainment of justice.*” That statement is equally applicable in Trinidad and Tobago today where violent crimes and murders seem to be the order of the day.

43. Before leaving this ground we think it appropriate to repeat the statement of Hamel-Smith J.A. in dealing with the remit from the Privy Council in this matter (see *Criminal Appeal No. 125/98 Glenroy Bishop v The State*). At page 5 therein the judge said:

“We do not consider the lapse of time in this case to be so inordinate to render a retrial unfair. The case against him appears to be strong and will certainly turn on the credibility and reliability of the two main witnesses. The offence of murder is not only a serious one but a prevalent one in this society and while it is true that the innocent must be set free, it is equally important that the guilty be punished. The finding of guilt is a

matter for a jury after due deliberation and consideration of all the evidence.”

Accordingly, this ground also fails.

44. For the reasons we have set out and in the light of the evidence we do not consider the conviction unsafe. Accordingly, we dismissed the appeal and affirmed the conviction and sentence.

L. Jones
Justice of Appeal

W. Kangaloo,
Justice of Appeal

S. John
Justice of Appeal