COMMONWEALTH OFDOMINICA

IN THE COURT OF APPEAL

CRIMINAL APPEAL NO. 12 OF 1995

BETWEEN:

DAVID VALMOND

APPELLANT

AND

THE STATE

RESPONDENT

Before: The Rt. Hon. Sir Vincent Floissac — Chief Justice
The Hon. Mr. Justice C.M. Dennis Byron — Justice of Appeal
The Hon. Mr. Justice Satrohan Singh — Justice of Appeal

Appearances: Appellant in person
Mr. Pestaina, Director of Public Prosecutions,
for the Respondent

[1996: March 14th]

J U D G M E N T

SATROHAN SINGH, J.A.

On February 6th 1995, the Appellant was convicted by a Jury before **Adams J.** of the offence **Unlawful Carnal Knowledge** contrary to Section 3(1) of the Sexual Offences Act Chapter 10:36 of Revised Laws of Dominica 1990 as amended by Section 3(1) of the Sexual Offences (Amendment) Act 1992 (No. 9 of 1992). He was sentenced to imprisonment for 10 years.

At his trial, the appellant pleaded an alibi. He claimed in that plea that at the time of the alleged rape, he was at a meeting at the home of one Charles Williams, some 12 - 15 minutes drive or 45 minutes walk away from where the alleged rape occurred. He claimed that he was there from about 7:30 p.m. to around 10:30 p.m. when the meeting was finished, and that at no time did he leave that meeting. In support of his alibi, Charles Williams and several other persons present at the meeting testified. They gave strong testimony supportive of the appellant's alibi. The

identification of the appellant as the alleged rapist therefore became the real issue at his trial. The only evidence of this real issue came from the victim, a girl fourteen years old. There was no corroboration of this evidence.

Given these circumstances, and following the decision of the Court of Appeal of England in **R v Turnbull (1977) 1QB 224** as explained in decisions of Her Majesty's Privy Council in **Scott v. The Queen (1989) 1 A.C. 1242, Reid (Junior) V. The Queen (1990) 1 AC 363, Palmer v. R. (1990) 44) WIR 2&Z, Beckford and others v. Regina (1993) 97 Cr. App. R. 409, and Michael Freemantle v. The Queen (1994) 1 WLR 1437**, the learned Judge was under a strict judicial duty to give a clear warning to the Jury in accordance with the "Turnbull" principles, of the danger of a mistaken identification which they must consider before arriving at their verdict. These authorities show that in the absence of such a warning, a conviction based on uncorroborated identification evidence would only be sustained in the most exceptional circumstances.

In Scott v The Queen, Lord Griffiths at p. 1261 said:

> "Their Lordships have nevertheless concluded that if convictions are to be allowed upon uncorroborated identification evidence there must be a strict insistence upon a judge giving a clear warning of the danger of a mistaken identification which the jury must consider before arriving at their verdict and that it would only be in the most exceptional circumstances that a conviction based on uncorroborated identification evidence should be sustained in the absence of such a warning."

In Palmer v. R. Lord Ackner at p. 285 said:

> "The trial judge never told the jury that visual evidence of identification is a class of evidence that is particularly vulnerable to mistake, and the reasons for the vulnerability, nor that honest witnesses can well give inaccurate but convincing evidence. Their Lordships have previously stated in Barnes, Desquottes and Johnson v. R; Scott and Walters v R (1989) 37 WIR 330 at page 343, and repeated the observation in Reid, Dennis and Whylie v. R. that unless there are exceptional circumstances to justify such a failure the conviction will be quashed, because it will have resulted in a substantial miscarriage of justice."

In **Beckford and others v. Reginam**, Her Majesty's Council, in a judgment delivered by Lord Lowry, concluded that failure on the part of the Judge to give this general warning will nearly always by itself be enough to invalidate a conviction which is substantially based on identification evidence.

In **Freemantle Sir Vincent Floissac**, having reviewed the aforementioned authorities crystallised the judicial duty imposed on the Judge as follows:

> "According to these decisions, whenever the case against an accused person depends wholly or substantially on the disputed correctness of one or more visual identifications of the accused person, the judge should warn the jury of the danger of convicting and of the special need for caution before convicting the Accused in reliance on the correctness of the identification or identifications. The judge should also explain to the jury the reason for the danger and the special need for caution. The reason required to be explained is that experience has shown that visual identification (even by way of recognition) is a category of evidence which is particularly vulnerable to error and that no matter how honest or convinced the eye witnesses may be as to the correctness of their visual identifications and no matter how Impressive and convincing they may be as witnesses, there is always the possibility that they all might nevertheless be mistaken in their identifications."

In the instant matter, the trial Judge never adverted the Jury's attention to these guidelines. The learned Judge never told the Jury that visual evidence of identification is a class of evidence that is particularly vulnerable to mistake, and the reasons for that vulnerability, nor that honest witnesses can well give inaccurate but convincing evidence. I consider this non-direction to be a serious misdirection, especially in this case where the only evidence relevant to the issue of identification was the uncorroborated testimony of the 14 year old victim and especially where there is such cogent evidence from the several defence witnesses in support of the appellant's alibi.

Having expressed this opinion, the other issue to be decided is whether this Court, notwithstanding that this point was decided in favour of the appellant, should dismiss the appeal and allow the conviction to stand on the ground that no miscarriage of justice had actually occurred, in accordance with powers given to the Court by S38(1) of the Eastern Caribbean Supreme Court (Dominica) Act Cap. 4:02 of the Laws of Dominica hereinafter referred to as "the proviso".

In **Freemantle**, their **Lordships of Her Majesty's Council**, despite the dicta in the cases of **Scott, Palmer** and **Beckford**, did not consider the door to the application of the "proviso" closed whenever the trial Judge failed to give this warning. At **P.1440 Sir Vincent** expressed the opinion of the **Board** thus:-

> "Their Lordships are satisfied that none of these dicta was intended to close the door to the application of the proviso whenever the trial judge has failed to give to the jury the requisite general warning and explanation in regard to visual Identifications. On the contrary, the door was deliberately left ajar for cases encompassed by exceptional circumstances and has not been closed by the

> observations of the Board in **Reid (Junior) v. The Queen [1990] 1 *A.C.* 363 at 384C.** Their Lordships consider that exceptional circumstances include the fact that the evidence of the visual identification is of exceptionally good quality. Accordingly, the ultimate issue in this appeal is whether the evidence of the visual identifications of the appellant was qualitatively good to a degree which justified the application of the proviso".

This statement of the law was cited with approval and applied by the Judicial Committee of the Privy Council in **Shand v. R., Privy Council Appeal No. 8 of 1994** from Jamaica in a judgment delivered by **Lord Slynne** on November 27, 1995.

Based on this observation, it therefore becomes necessary to examine the quality of the victim's evidence on identification. As earlier mentioned, she was 14 years old and her evidence was uncorroborated. The evidence she gave showed that she knew the Appellant since she knew herself. The incident allegedly occurred shortly after 7:30 p.m. Her assailant held her, blocked her mouth with one of his hands and held a knife by her neck. He pulled her away from near a church and took her towards a banana field. She then purportedly recognised him by "a dim light coming from the church". There were no other lights. His head was near her face when she said she first recognised him. Before that she used to see him every day. She said she saw his face when he lay down on her and that his head was close to her face. The said light from the church "was reflecting by the banana trees". She knew his voice. She used to hear him speak often. During the incident he told her to "shut up" and she said she recognised his voice. He had on a black shirt. It is accepted that on that night, the appellant had on a black and red shirt. The victim testified that because it was dark, she did not see the red on the shirt. In making her complaint to her mother immediately after the Incident she told her mother it was the appellant who raped her. She said she was sure it was the appellant and that his whole face was exposed.

In my considered opinion, this evidence shows, on the issue of visual recognition, uncertainty. I say this because, despite the fact that the victim might have known the appellant for sometime and that his head might have been close to her face, the reality of the matter was that the light from the Church that she said aided her vision and which reflected by the banana trees, was so dim that it was' too dark for her to recognise the red portions of the appellant's black shirt. On the issue of voice recognition, there is also uncertainty despite her evidence that she used to hear him speak often. The utterances she heard were of merely two

words "shut up" (unlike **Freemantle** where there was purported recognition by implied acknowledgment from the appellant). As against this, there is an abundance of unshaken testimony from witnesses called by the appellant totally supporting his alibi from the moment that he boarded the bus to go to the meeting, and fact that he never left the meeting until it was finished at 10.30 p.m.

In keeping with the principle enunciated in **Freemantle by Sir Vincent Floissac**, the question is whether we can we say from the above that "the quality of the evidence was good enough to eliminate the danger of mistaken identification which necessitates the general warning and explanation". In my judgment, given these weaknesses in the evidence of the victim abovementioned and the strength of the evidence in support of the alibi, I cannot say that the evidence of the identification of the appellant was of "exceptionally good quality" or was "qualitatively good to a degree which justified the application of the proviso". I therefore cannot say that the concept of exceptional circumstances as contemplated by Her Majesty's Privy Council in **Freemantle** has been established. Consequently, I cannot with any certainty conclude that had the jury been properly directed they would inevitably have returned the same verdict.

I would therefore allow this Appeal and set aside the conviction and sentence.

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SATROHAN SINGH
Justice of Appeal

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SIR VINCENT FLOISSAC
Chief Justice

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C.M.DENNIS BYRON
Justice of Appeal