ANTIGUA & BARBUDA

IN THE COURT OF APPEAL

CRIM. APP. NO.21 OF 1996

BETWEEN:

MICHAEL MASON

/Appellant

and

THE QUEEN

/Respondent

Before:

The Hon. Mr. Satrohan Singh	Justice of Appeal
The Hon. Mr. Albert Redhead	Justice of Appeal
The Hon. Mr. Albert N.J. Matthew	Justice of Appeal [Ag.]

Appearances:

Mr S. Christian Q.C. and Miss M. Walwyn for Appellant
Mr C. Cumberbatch, Director of Public Prosecutions and
Mr K. Thom for the Respondent.

……..

1997: November 10;
December 8.

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JUDGMENT

MATTHEW, J.A.[Ag.]

Peter Donald Newbiggin, a physician, who resides in Toronto at Woodbridge, Ontario, Canada arrived in Antigua on February 19, 1995 for a week's vacation with his wife Lois, older daughter Wendy, younger daughter Susan and younger son Michael. They resided at Club Antigua. On Friday, February 24, 1995 Dr. Newbiggin and Wendy, aged 26, were lying on their beach towels talking and facing each other. They were lying on their sides propped up on their elbows about six feet apart with their bags, about five in all, a distance of three feet up.

The other three members of the family were also on the beach but not in the immediate vicinity. Michael was standing up the beach, about thirty feet away from them and Lois and Susan had walked down to the opposite side of the beach away from Club Antigua.

According to Dr. Newbiggin it was a peaceful day, it was almost noon, and there was no one else around. Then a man strolled quickly past Dr. Newbiggin's head. He had a small handgun- a black short barrelled revolver - pointed to the sky. He said "Surprise" and reached for the bags. Dr. Newbiggin did nothing but just watched the bags. The man picked them up and was starting to take them away. Wendy reached for her bag and wouldn't let go. Dr. Newbiggin heard a shot but did not see the gun go off. Wendy released her grip on her bag. Dr. Newbiggin rolled back and looked at the man. The man looked at him and pointed the gun at him. He dropped his eyes and then he heard Wendy speak to him. He said the man then left and he turned his attention to his daughter. He said he saw a hole spurting blood in her upper right chest, then she gasped a few times and blood came out. Then her eyes glazed off and they just became unresponsive. She stopped bleeding and that was it. He said he screamed for his wife and Susan and he spoke to Michael. Dr Newbiggin stated that when he noticed the man with the gun the distance between them was about six feet.

He said hotel personnel, the police and other people came very quickly afterwards and Wendy's body was not removed for about 2-3 hours. He said the entire incident lasted about 15-20 seconds. He said the man was wearing a tank top or dark blue tomes and a cut-off faded jeans.

Corbette Smith who was then the Manager in charge of Security at Club Antigua at the time, went to the scene which was the Valley Church Beach on the same day, and he said he saw Wendy lying on her left side facing the sea with her feet drawn up and she appeared to be dead. It was he who identified the body of Wendy Newbiggin to the pathologist, Dr Lester Simon, at Barnes Funeral Home on Tuesday, February 28, 1995.

The Appellant was indicted for the murder of Wendy Newbiggin and his main defence was alibi. At the close of the case for the defence learned Counsel for the Appellant made a submission with a view to having the case withdrawn from the Jury. The submission was not entertained and on June 25, 1996 he was convicted

before Benjamin J. and a Jury and was sentenced to death by hanging. On July 2, 1996 he gave notice of appeal and in his notice he advanced the same four grounds of appeal which were argued on his behalf before this Court. For ease of reference I set them out as follows:

1. The learned trial Judge should have upheld the submission of the defence and should have withdrawn the case from the Jury because-

    [a] the quality of the identification evidence was poor;

    [b] the identification parade was flawed; and/or

    [c] there was no satisfactory corroborating evidence.

2. Having regard to the evidence of Inspector Christian, Superintendent Pompey and Ms Cheryl Corbin [the forensic expert] and the evidence of the eye witness Peter Newbiggin in relation to his identification of the cut-off jeans, the learned trial Judge should have directed the Jury to disregard the forensic evidence in this case because –

    [a] of the unsatisfactory nature of the chain of custody in relation to the multicoloured straw handbag and the cut-off jeans that were put in evidence;

    [b] of the manner in which the said exhibits were secured from the time they first came into the possession of the police; and/or

    [c] of the inability of the eye-witness Peter Newbiggin to identify the cut-off jeans shown to him in Court.

3. The case for the Defence was not adequately put to the Jury, and the learned trial Judge failed adequately to explain the importance of the defence witnesses Sonia Alred and Phillip Meyer and the documentary exhibits put in evidence on behalf of the Defence and the attempt made by the Prosecution to refute the alibi put forward by the Defence.

4. The verdict of the Jury is unsafe and unsatisfactory and cannot be supported having regard to the evidence.

For convenience I shall deal with grounds 1 and 2 together and deal separately with the issues of identification of the assailant on the beach, the proceedings at the identification parade, and the forensic evidence.

IDENTIFICATION OF THE ASSAILANT ON THE BEACH.

As the learned Director of Public Prosecution submits, the Crown relies essentially on the evidence of Dr. Peter Newbiggin and the forensic evidence. I will concern myself here only with the evidence of Dr. Newbiggin for the time being. According to him the time was about 11:30 a. m. There was sunshine, for Wendy was preparing to lie in the sunshine to get a tan. Dr. Newbiggin was about 6 feet away from his daughter. They were lying on their beach towels facing each other and speaking to each other. They had about five bags in all, beyond their heads about three feet away. It was a peaceful day.

No one else was around. Then a man strolled quickly past his head and I have already described what next happened.

Learned Counsel for the Prosecution submitted that on the facts there was no obstructed view of the man by Dr. Newbiggin, and Dr. Newbiggin was looking at him directly. Counsel submitted that this is not a case he would describe as a fleeting glance case.

Learned Counsel for the Appellant drew attention to the fact that the witness had said in examination in chief, that he had never seen this man before and that the witness was a Canadian, a person of entirely different ethnic origin, and because of this he would have a difficulty in identifying Antiguans. Counsel further drew attention to the evidence of the witness in examination in chief that the entire incident lasted about 15-20 seconds and he only looked at the assailant for about 4-5 seconds.

Learned Counsel referred this Court to **Evans v R** [1991] 39 W.I.R. 290 and no doubt based his submission on that case, for in that case a similar contention was

advanced by the Appellant that the quality of the identification evidence was so poor that the judge should have withdrawn the case from the jury at the end of the prosecution's case and directed them to acquit.

In Evans' case the Judicial Committee of the Privy Council were of the opinion that the quality of the identifying evidence was indeed poor. The head-note indicates that the only identification evidence linking the accused to the crime of murder was a glance by one witness lasting only five or six seconds in difficult circumstances.

According to Lord Ackner who delivered the opinion of the Board at page 293, letter [d]:

> "….her observation of the Appellant was made in very difficult conditions. She was suddenly woken by an explosion. She was lying in an unusual position, across the bed and on her stomach. She merely raised her head to see what could be seen. She did not sit up, let alone stand up….
> She was understandably very frightened at the time. Having turned towards the deceased and seeing that he was bleeding and hearing two more explosions, she kept her head down until the men left."

Of course the circumstances of Evans' case occurred some time after 2:00 a.m. when some kind of light, we are not told, was left on.

Let me digress for a moment to observe a passage cited by Lord Ackner in Evans' case. It comes from **R v Turnbull** 1977 QB 224 at pages 229/230 where Lord Widgery C. J. gave the following direction:

> "When, in the judgment of the trial judge, the quality of the identifying evidence is poor, as for example when it depends solely on a fleeting glance or a longer observation made in difficult conditions… the judge should then withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification."

Returning to the facts of the instant case Peter Newbiggin stated in evidence that the man was perhaps five or six feet away from him looking down at him and he in turn was looking at his eyes and his face. He said "I looked at his face for about 4-5 seconds when we stared at each other."

Now this period of 4-5 seconds relates only to the period they stared at each other. Dr. Newbiggin had also looked at him as the man stooped. He said then: "In reaching for the bags he had to stoop to get them. He reached with one hand

holding the gun with the other. As he stooped I was looking at his hand and his arm, mostly at the bags and what he was doing. He had them in his possession. Wendy grabbed her bag and would not let go. She held one side and he held the other. The gun went off and Wendy released her grip on the bag. The man straightened up with the bags in his hand and he faced me directly. The man was perhaps 5 or 6 feet away from me looking down at me."

When one looks at the evidence more closely it will be seen that Dr. Newbiggin did not have a glance at all. As he said it was a stare made in bright daylight between Dr. Newbiggin and the Appellant.

I do not take too seriously the submission made by learned Counsel for the Appellant on ethnicity. That did not feature in the evidence at the trial and in particular it was never put to Dr. Newbiggin on cross-examination whether because he was a Canadian that made it difficult for him to identify the Appellant.

In his identification of the assailant Dr. Newbiggin states that he was wearing a cut-off faded jeans. The significance of this will become evident later on.

On the facts of this case I would not consider the quality of the identification evidence by Dr. Peter Newbiggin as being poor. Rather I think the evidence of the visual identification of the Appellant was qualitatively good.

IDENTIFICATION PARADE

On the following day, Saturday, February 25, 1995 Rawlston Pompey, Assistant Superintendent of Police who was then attached to the CID saw the Appellant at Police Headquarters about 3.40 p.m. and invited him to the St. John's Police Station at the CID office. There he told the Appellant it was his intention to hold an identification parade concerning this matter and he asked the Appellant if he was willing to participate and he agreed. Subsequently, he had a conversation with Assistant Superintendent of Police Whyte, who conducted the identification parade in the absence of A.S.P. Pompey.

A.S.P. Charlesworth Whyte said that he went on duty at the St. John's Police

Station to conduct the identification parade comprising the Appellant and eight others where Peter Newbiggin touched the Appellant and said: “This is the man”. According to him the Appellant replied. “I am innocent. Me have evidence”. According to the Appellant he said “I innocent. I don’t know nothing about this”. And he said to the gentleman who pointed him out that he had never seen him before that day.

Peter Newbiggin’s version is that he did not hear the Appellant say “Not me. I am innocent. I have evidence”. But that after he was told to take a look and did so the Appellant said “Yes, take a look. Take a good look”. He went on to say it was the same stare and the same voice he had heard on the beach.

Evidently, there is a discrepancy as to what the Appellant said at the identification parade. The learned trial Judge dealt with discrepancies generally at the commencement of his summing-up to the Jury and he correctly told them how to deal with discrepancies. But in particular, he pointed out to them what appeared to be a material discrepancy in the evidence of Peter Newbiggin as against that of A.S.P. Whyte in relation to what the Appellant said at the identification parade. He left it to the Jury to decide which is the version they would accept.

The learned trial Judge followed this by telling the Jury that Dr. Newbiggin purports to identify the Appellant by the voice and he told them they would have to decide whether on the basis of one word, “surprise”, an identification could be made.

One would well appreciate that if in fact the Appellant uttered the words “take a look, take a good look” it would most probably be before identification. Learned Senior Counsel for the Appellant, however, states that words were uttered only after the identification.

One might wish to wonder how is it Peter Newbiggin hears one set of words from the Appellant and A.S.P. Whyte hears another set. As I read the record, I see a passage of A.S.P. Whyte’s examination-in-chief and my guess is that it could shed some light on the divergence. There A.S.P. Whyte stated:

“In the presence and hearing of the accused I told Mr. Peter Newbiggin that

> these men on the parade are here for identification purposes as a result of a report he made to the police earlier and I would like him to have a good look at each man, to go up and down the line and if he wished anyone of them to speak he must do so."

The thrust of Counsel's submissions to the effect that the identification parade was flawed was based on what he perceived to be breaches of the Identification Parade Rules Home Office Circular No.109/1978. Complaint is made of breaches to Rules 1, 2, 7, 14, 16 and 18. The first rule requires that the accused be told that he is not obliged to take part in a parade. There is evidence that A.S.P. Whyte told him of his right to object to participation in the parade and he said ok.

Rule 2 states that a suspect has the right to have a solicitor or a friend present at the parade provided that this can be arranged without causing unreasonable delay or difficulty. When the Appellant gave evidence he said he told A.S.P. Whyte if he was going to have an identity parade he wanted his lawyer and his people there and the officer said nothing in response.

However under cross-examination by learned Senior Counsel Peter Newbiggin stated: "When I left the police station I went to the airport. My wife and family were waiting for me at the airport."

According to Rule 7 the suspect should be told that he need not say anything at any stage during the parade, but that anything he does say will be recorded and may be given in any subsequent court proceedings. A.S.P. Whyte did not observe that rule even though all what the Appellant said was exculpatory.

Rule 14 requires that the suspect be placed among persons [at least eight or, if practicable, more] who are as far as possible of the same age, height, general appearance [including standard of dress and grooming] and position in life as the suspect.

This rule was substantially complied with. Perhaps here I should observe that there was an unsatisfactory feature about the dress of the accused who was the only person who did not have on long pants. According to A.S.P. Whyte he had on ¾ pants.

The Director of Public Prosecutions on this point submitted that the length of the trousers did not affect the identification parade. He cited the persuasive authority of **R v John** [1975] Crim. L. R. 456. In that case John was convicted after a retrial ordered by the Court, of wounding with intent and common assault. The issue was one of identity. Two victims of the assaults and an eyewitness picked him out at an identity parade held three days after the offences. One of the grounds of his appeal was that the assailant wore a leather jacket and he was the only person on the parade wearing such a jacket, relying on the Home Office Circular on Identification Parades.

Held, dismissing the appeal, it would have been better if other persons on the parade had worn leather jackets, but the witnesses based their identification on what they remembered of the assailant's face and dress really played no part in it."

I have no doubt that Dr. Newbiggin's identification of the Appellant was based on his facial appearance.

Rule 16 requires the suspect to select his own position in the line. The evidence in respect of this part of the rule is contradictory. But the rule also states that the suspect should be expressly asked if he has any objections to the other participants in the parade or the arrangements. It does not appear that A.S.P. Whyte paid any attention to this other part of the rule.

Rule 18 requires the officer-in-charge of the parade to tell the witness expressly that the person he saw may or may not be in the parade.

The evidence of Dr. Newbiggin under cross-examination is that he was told he was to point out the man in the room if he saw him. According to A.S.P. Whyte he told Newbiggin should he see the man who allegedly shot and killed his daughter he must touch him.

The preamble to the rules state that the object of an identification parade is to test the ability of a witness to pick out from a group the person, if he is present, who the witness has said that he has seen previously on a specific occasion. Identification parades should be fair and should be seen to be fair.

I am of the opinion that the identification parade conducted by A.S.P. Whyte in the case despite minor flaws was on the whole quite fair. I am of the further opinion that adequate directions were given to the Jury on the identification evidence in this case.

THE FORENSIC EVIDENCE

Cheryl Corbin, a forensic scientist, was deemed an expert by the Court after she gave evidence of her qualifications and experience and learned Senior Counsel for the Appellant declined to cross-examine her in that respect.

She testified that on April 7, 1995 she was in Antigua on other business but at approximately 11.00 a.m. A.S.P. Pompey delivered a number of items to her in reference to the death of Wendy Newbiggin. She said the items delivered were one brown and beige straw bag, one multi-coloured straw and leather bag, one yellow leather bag and one dark coloured jeans pants.

She said she took these items to Barbados for trace evidence, that is, the presence of hairs, fibres, etc. She gave the following results:

> "There was evidence of a red fibre approximately 3 mm in length that was found adhering to the jeans pants. The fibre was consistent in physical structure to that of a controlled red fibre which was removed by myself from the multi-coloured straw and leather bag that was submitted."

Cheryl Corbin stated that when she received them, each item was individually wrapped and sealed in a brown paper bag and she checked the sealed condition of

each bag before accepting the exhibits. In answer to the Jury at the trial she said:

> "I was satisfied that the standard police procedures were followed otherwise I would not have accepted the exhibits."

The bags and other items, but not the jeans, were collected by Inspector Henry Christian, police photographer and fingerprint expert, on Friday, February 24, 1995 after 1.11 p.m. when he went to Valley Church Beach as a result of information received. He took several photographs of certain items which he later took into his possession and dusted all the items for fingerprints and then packaged each item separately. Among the items which he later that evening handed to A.S.P. Pompey were three bags. When Inspector Christian was cross-examined he said: "I never saw any jeans from the car. I was never requested to make any forensic examination of the pair of jeans or of the vehicle."

A.S.P. Pompey stated that Inspector Christian handed over to him a yellow handbag and two ladies' leather and strawbags, one which was multi-coloured and the other plain light brown in colour on Friday, February 24, 1995 which he kept in his possession. He said the next day he met the accused at Police Headquarters and then later at St. John's police station. He said he drew the Appellant's attention to a Suzuki minibus in the yard of the police station and invited him to go to the bus with him and the Appellant did so. In the bus was a pair of short darkish coloured jeans and he asked the Appellant if he knew anything about that jeans and the

Appellant replied it was his and that he was sea bathing in it on the day before. A.S.P. Pompey said he took possession of the jeans.

A.S.P. Pompey stated that on April 7, 1995 he had a conversation with Cheryl Corbin at Police Headquarters and he handed over to her a yellow ladies' handbag, the other two leather and straw ladies' handbags and the darkish coloured jeans pants packaged and sealed. He said each bag was in a separate brown paper exhibit bag with a transparent plastic in the centre for easy identification. Pompey stated that he packaged the pair of short jeans pants on Saturday, February 25, 1995.

Learned Counsel for the Appellant has made heavy weather of the fact that Peter Newbiggin was unable to identify the pair of jeans at the trial. But the Appellant admitted that the jeans found in the Suzuki minibus on February 25, 1995 was his and he had them on the day before. This pair of jeans was found to contain a fibre consistent in physical structure to the red fibres of the multi-coloured straw bag. I am satisfied that there was no cross-contamination between the exhibits. In my judgment, this is strong evidence against the Appellant, which corroborates the identification by Peter Newbiggin.

Grounds 1 and 2 of the appeal fail.

CASE FOR DEFENCE NOT ADEQUATELY PUT TO JURY

One of the complaints made by learned Counsel for the Appellant is that by

the mention of the word “lies” in the summing-up on a few occasions the learned trial Judge may be inadvertently telling the Jury to regard the evidence of the Appellant and his witnesses as lies. Counsel referred to a part of the summing-up dealing with the statements as to the whereabouts of the accused. The learned trial Judge was really stating the Prosecution’s view of certain statements. What the learned trial Judge said is this:

> “Now the Prosecution are relying upon these statements as to the whereabouts of the accused, and they are contending that these statements are lies and can be used in support of the identification evidence.”

We were only told of one statement made by the Appellant which we understood, was similar to what he gave as evidence on oath. Marvel Hughes in particular and Phillip Meyer to some extent gave evidence which placed the Appellant at a place or places different to where he is placed by the Prosecution.

So although it would certainly be a misdirection if anything the learned trial Judge said could be interpreted to treat their evidence as lies, he was merely stating the Prosecution’s view. After he made the statement quoted above the learned trial Judge went on to give the classical Lucas directions which relate to statements made by a defendant out of court.

But since the Appellant had gone on to give in evidence a version of things just as he had said in his statement it might well have been wise to avoid the Lucas directions or at any rate if it was given to remind the Jury there and then that the Appellant had given testimony on the same lines.

Under this ground learned Counsel for the Appellant also submitted that the learned trial Judge failed adequately to explain the importance of the defence witnesses Sonia Alred and Phillip Meyer and the documentary exhibits put in evidence on behalf of the Defence and the attempt made by the Prosecution to refute the alibi put forward by the Defence.

The Prosecution relied to some extent on the evidence of Sean Roberts and Adrian Joseph both of whom testified to seeing

the Appellant and Phillip Meyer at in the one case, and near in the other case, the shop of the said Adrian Joseph at Johnson's Point at a time on February 24, 1995 when the Appellant testified that he was at his girlfriend's home. Phillip Meyer denies that he was with the Appellant at the time of the day in question and the Appellant's girlfriend, Marvel or Arlene Hughes, also puts him at her home.

The learned trial Judge dealt adequately with the main thrust of the defence, alibi, as he put it, and consistently reminded the Jury that it was for the Prosecution to disprove the alibi. Specifically he reminded the Jury that the Appellant was disputing the evidence of Sean Roberts and Adrian Joseph. He dealt at length with the defence of the Appellant and the evidence of his supporting witnesses Marvel Hughes known as Arlene Hughes, Phillip Meyer, Sonia Alred and referred to the exhibits tendered by the last two.

Notwithstanding the observation I made earlier with respect to the Lucas

directions I am of the view that on the whole the Appellant's case was fairly, clearly and quite adequately put to the Jury.

THE VERDICT IS UNSAFE AND UNSATISFACTORY AND CANNOT BE SUPPORTED HAVING REGARD TO THE EVIDENCE

We have found that the evidence of the visual identification by Dr. Peter Newbiggin was qualitatively good. Far from it being a fleeting glance, it was a direct stare from a distance of about 6 feet apart in good light when the sun was shinning. This was followed 28 hours later by his selection of the Appellant from an identification parade.

The Prosecution tendered witnesses who if believed by the Jury went to show that the Appellant did not remain at his home all morning as he and his witnesses testified. The Prosecution witness Sean Roberts on the day of the death put the Appellant in a blue Suzuki van. He said the Appellant was the driver.

The next day a pair of jeans, which the Appellant admitted to be his, was found in a blue Suzuki mini-bus. The Appellant said he wore that pair of jeans the previous day. Dr. Newbiggin described the Appellant as wearing jeans although he could not identify them in court.

When the jeans was examined by the forensic expert it was found that a fibre from one of the bags which the Appellant is alleged to have snatched was found

attached to it.

We are content to let the matter stand as it is as there is no lurking doubt in our minds which makes us wonder whether an injustice has been done.

This ground of appeal likewise fails.

The appeal is dismissed. The conviction and sentence are affirmed.

ALBERT N.J. MATTHEW
Justice of Appeal [Ag.]

I Concur.

SATROHAN SINGH
Justice of Appeal

I Concur.

ALBERT REDHEAD
Justice of Appeal