IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE

(Criminal Division)

SAINT LUCIA

CASE NO. SLUCR 0068, 0069, 0071 OF 2005

BETWEEN:

THE QUEEN

Claimant

and

[1] SHERVON RAMSAY
[2] KURT JAMES a.k.a. "Bertie" James
[3] EUSTACE JAMES a.k.a. "Boots"

For Murder

Defendants

APPEARANCES :

Mr. L. Mondesir for Crown
Mr. J. Walter for Accused Shervon Ramsay and Kurt James
Mr. Shawn Innocent for Eustace James

2006: July 24, 25, 26

JUDGMENT

Introduction

EDWARDS J: There are 2 Rulings to this Judgment, which interpret Sections 100 and 102 of the Evidence Act No. 5 of 2002 (St. Lucia). The First Ruling arises from an objection taken during the trial on the 24th July 2006 concerning the police officer's

explanation as to why an identification parade for one of the accused was not held. The second Ruling relates to the No Case and other Submissions at the end of the prosecution's case. The Judgment is arranged in the following sections:

RULING – 24TH JULY, 2006

RULING ON NO CASE AND OTHER SUBMISSION – 26TH JULY 2006

RULING - 24th July, 2006

[1] EDWARDS J: The 3 Accused are being tried on an Indictment for murder of Bryan St. Clair allegedly committed by them on the 30th April, 2003 at Marchand (St. Lucia). They were arraigned on the 24th July 2006.

[2] The sole eyewitness Terry Alfred testified that he has known the 3 Accused from they were little boys growing up in the Marchand Boulevard area. All of the Accused are in their early twenties. Mr. Alfred is 31 years old.

[3] His evidence was that he is a Rastafarian, and marijuana vendor, and he sells Marijuana by the Black Mallet Gap opposite the New Tronics Repair Shop.

[4] On the 30th April he was sitting on the steps of the New Tronics Shop at about 8:45 am, reasoning with his 'bretheren' Bryan St. Clair (deceased), when the 3 Accused came together from a gate by the side of the New Tronics building. His evidence was that the 3 Accused were in a line, one behind the other with "Boots" in front, Ramsay behind "Boots", and Kurt behind Ramsay. 'Boots' was armed with a handgun appearing to be either a .357 spin barrel or a .38 special. He was carrying it down in his hand.

[5] The Accused Shervon Ramsay had a Tech 9 he said, and he did not see Kurt James with anything. The 3 Accused turned to face the witness and the deceased, and at a distance of about 12 feet from witness and the deceased, Mr. Alfred had a quick glance at them and saw their faces. Shervon Ramsay began firing the Tech 9 at Mr. Alfred and the deceased.

[6] There was a burst of shots, 7 or 8 shots, during which Mr. Alfred got hit, moved from the steps and threw himself face down on the ground and lay there for about 5 seconds pretending to be dead.

[7] Upon getting up eventually from the ground after the shots had stopped bursting, he did not see the 3 Accused, and he discovered that he had been shot once in his belly and 3 times in his back.

[8] He noticed the deceased lying lifeless in the gutter by the step, bleeding. He sought assistance from a motorist on Marchand Road who took him to the Victoria Hospital, there, he was admitted for 1 ½ weeks.

[9] Police Constable Linus George who was at the Criminal Investigations Department (CID) at Police Headquarters, received a report at about 8:45 a.m. about the shooting. He arrived at the crime scene about 9:00 am. With the assistance of other police officers he cordoned off the crime scene and the police recovered 8 spent cartridge cases and 4 copper projectiles at various points on the crime scene.

[10] On his subsequent arrival at the Victoria Hospital that same day, he visited the Mortuary, and saw the body of the deceased. On the 1st May, 2003 he spoke to Mr. Terry Alfred in Ward 9 at the Hospital. Mr. Alfred give him the names of the 3 Accused in a written statement that day. Mr. Alfred gave no description of the three Accused to the police, or what they were wearing on the 30th April, 2003 when the shooting took place.

[11] On the 1st May, 2003 he executed a Search Warrant and arrested Accused Kurt James at Peter Baptiste's premises at Rock Hall. On the 5th May, 2003 the police detained Accused Shervon Ramsay. Constable George executed 2 search warrants at Moses Rismay and Shermain Ramsay's premises on the 6th and 7th May respectively, and nothing was found. He testified that he was searching for a firearm and a mask, after viewing the Police Statements of 2 witnesses Adolphus Purlogne and Tony Cyril.

[12] On the 16th October, 2003 Accused Eustace James was arrested for murder on Warrant 2097/2003.

[13] On 24th March, 2004 Accused Kurt James who apparently had been released between the 1st May, 2003 and 19th May, 2003 was re-arrested on a warrant and charged with murder.

[14] There is no evidence as to exactly what Police Constable George told each Accused when he arrested them. The warrants were not tendered as Exhibits. Constable George testified that Eustace James denied being on scene at Marchand Road on the 30th April, 2003.

[15] Constable George testified under cross-examination that he did not conduct or arrange for an identification parade in respect of Accused Kurt James. There was a confrontation between the Accused Ramsay and Mr. Alfred on the 26th May, 2004 before ASP Gregory Montoute. Mr. Alfred identified Ramsay as the "Shervon" who he had said in his statement had shot him at Marchand on the 30th April, 2003. ASP Montoute testified that Shervon Ramsay said after caution – "Officer I never shot Terry, I never had any problems with that man."

[16] Learned Counsel Mr. Mondesir attempted on re-examination to elicit from Constable George, the reason why he did not conduct an identification parade for Kurt James.

[17] Learned Counsel Mr. Walter objected to this evidence being adduced with assistance from Learned Counsel Mr. Innocent. Having upheld the objection with an oral ruling, I promised to elaborate on my ruling in writing for future guidance, subject of course to appellate correction.

[18] Both Counsel relied on the Judicial statement of Lord Carswell in the recent Privy Council decision: Garnett Edwards v The Queen Privy Council Appeal No. 29 of 2005 UUPC/2006/23 (Jamaica) delivered 25th April 2006.

[19] At paragraph 23 of this judgment Lord Carswell opined – "[The police witness] ... was wrongly allowed to give evidence on a couple of matters. He should not have given his opinion on the need for an identification parade; and again the Judge should have prevented it or at least directed the jury that his opinion on the point is irrelevant and should be disregarded."

SECTION 100 OF THE ACT

[20] In Jamaica there is no statutory provision comparable to Section 100 of our Evidence Act No. 5 of 2002 which states –

"100 – (1) Identification evidence adduced by the prosecutor is not admissible evidence unless –

(a) either –

(i) an identification parade that included the defendant was held before the identification was made; or

(ii) it would not have been reasonable to have held an identification parade and subsection (5) applies; and

(b) the identification was made without the person who made it having been intentionally influenced to make it.

(2) Without limiting subsection (1), the matters to be taken into account in determining whether it was reasonable to hold an

identification parade as mentioned in that subsection include -

(a) the kind of offence and the gravity of the offence concerned;

(b) the importance of the evidence;

(c) the practicality of holding such an identification parade having regard, among other things –

(i) to whether the defendant refused to co-operate in the conduct of the parade, and to the manner and extent of and the reason, if any, for, the refusal; and

(ii) in any case, to whether identification was made at or about the time of the commission of the relevant offence; and

(d) the appropriateness of holding such an identification parade, having regard, among other things, to the relationship, if any, between the defendant and the other person who made the identification.

(3) Where –

(a) the defendant refused to co-operate in the conduct of an identification parade unless an Attorney-at-Law acting for him or her was present while it was being held; and

(b) there were, at the time when the identification parade was to have been conducted, reasonable grounds to believe that it was not reasonably practicable for such Attorney-at-Law to be present;

it shall be presumed that it would not have been reasonable to have held an identification parade at that time.

(4) In determining whether it was reasonable to have held an identification parade, the Court shall not take into account the availability of pictures that could be used in making identifications.

(5) Where it would not have been reasonable for an identification parade to be held and a group identification, video film identification or in the case where neither was practicable; a confrontation was held, the identification evidence is admissible.

[21] The judicial statement of Lord Carswell in Garnett Edwards ought not to be unreservedly applied in St. Lucia in my opinion, without having regard to Section 100 of the Evidence Act, particularly Section 100 (2) (c).

THE LAW BEFORE NOVEMBER 2005

[22] Prior to the 1st November, 2005 when the Evidence Act became operative, the Common law and the Police and Criminal Evidence Act 1984 U.K. (PACE), Section 78 (1), applied to criminal trials in St. Lucia. At common law a Judge always had discretion to exclude legally admissible evidence, if justice so required, particularly where the admission of that evidence was unfair. (See: Lamb (1980) 71 Cr. App. R. 198 at p. 202 (C.A.); and for a case where the discretion was exercised, Leckie and Ensley [1983] Crim L.R. 543). Pursuant to Section 78 (1) of PACE, a Judge is permitted to exclude evidence on which the prosecution intends to rely "if it appears to the Court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the Court ought not to admit it." This provision was "the principal method for seeking the exclusion of identification evidence on the basis that it was insufficiently tested or was generated by the police in an undesirable way." This provision could be relied on to seek the exclusion of evidence of an identification which was never tested by a former identification procedure, or evidence of the results of such a procedure if it was

organized improperly or unfairly: Phipson on Evidence 16th ed. (2005) para 15-07).

[23] At the time when the 3 Accused were detained or arrested for murder, prior to the 31st July 2004, the PACE Code D, paragraphs 2.0 to 2.21B and Annex A, B, C and E were the guidelines that police officers should use for the identification of suspects by witnesses in St. Lucia. These guidelines do not have the force of law. Paragraph 2.0 requires the police to make a record of the first description of the suspect by a potential witness and serve it on the suspect. Paragraph 2.1 states that: "In each case which involves disputed identification evidence, and where the identity of the suspect is known to the police and he is available, the methods of identification by witnesses which may be used are: (i) a parade; (ii) a group identification; (iii) a video film; (iv) a confrontation.

2.2 The arrangements for, and conduct of these types of identification shall be the responsibility of an officer in uniform not below the rank of Inspector who is not involved with the investigation ('the identification officer'). No officer involved with the investigation of the case against the suspect may take part in these procedures." Reference to a suspect being "known" means there is sufficient information known to the police to justify the arrest of a particular person for suspected involvement in the offence.

[24] Paragraph 2.3 of Code D requires that "Whenever a suspect disputes identification, an identification parade shall be held if the suspect consents unless paragraphs 2.4 or 2.7 or 2.10 apply. A parade may also be held if the officer in charge of the investigation considers that it would be useful and the suspect consents."

[25] Paragraph 2.4 states that "A parade need not be held if the identification officer considers that, whether by reason of the unusual appearance of the

suspect or for some other reason, it would not be practicable to assemble sufficient people who resemble him to make a parade fair."

[26] Paragraph 2.6 states that: "If a suspect refuses or, having agreed, fails to attend an identification parade, or the holding of a parade, or the holding of a parade is impracticable; arrangements must if practicable be made to allow the witness an opportunity of seeing him in a group identification, a video identification, or a confrontation . . ."

[27] Paragraph 2.7 states "A group identification takes place where the suspect is viewed by a witness amongst an informal group of people. The procedure may take place with the consent or co-operation of a suspect or covertly where a suspect has refused to co-operate with an identification parade or a group identification, or has failed to attend. A group identification may also be arranged if the officer in charge of the investigation considers, whether because of fear on the part of the witness or for some other reason, that it is, in the circumstances, more satisfactory than a parade.

[28] Paragraph 2.8 requires that "The suspect should be asked for his consent to a group identification and advised in accordance with paragraphs 2.15 and 2.16 of this Code. However, where consent is refused the identification officer has the discretion to proceed with a group identification if it is practicable to do so."

[29] Paragraph 2.9 provides for the group identification to be carried out in accordance with Annex E; and for a video recording or colour photographs to be taken of the group identification in accordance with Annex E.

[30] Where video film identification is being used, paragraph 2.10 requires that: "The identification officer may show a witness a video film of a suspect if the investigating officer considers, whether because of the refusal of the

suspect to take part in an identification parade or group identification or other reasons, that this would in the circumstances be the most satisfactory course of action.

2.11 - The suspect should be asked for his consent to a video identification and advised in accordance with paragraphs 2.15 and 2.16. However where such consent is refused the identification officer has the discretion to proceed with a video identification if it is practical to do so.

2.12 - A video identification must be carried out in accordance with Annex B.

[31] Confrontation should only be resorted to in the following circumstances pursuant to paragraphs 2.13 and 2.14 –

"2.13 - If neither a parade, a group identification nor a video identification procedure is arranged, the suspect may be confronted by the witness. Such a confrontation does not require the suspect's consent, but may not take place unless none of the other procedures are practicable.

2.14 - A confrontation must be carried out in accordance with Annex C."

[32] In Goldson & Mc Glashon it was recognized by the Privy Council Board that where a witness has provided the police with a complete identification by name or description, so as to enable the police to take the accused in custody, an identification parade may be unnecessary where the Accused makes no request for an identification parade and is not disputing that the witness knows him: This was a case from Jamaica where the PACE Codes are inapplicable: ([2000) UK PC 9 delivered 23 March 2000).

[33] In Forbes v R. [2000] UKHL 66 delivered December 14 2000, the House of Lords had to evaluate the previous authorities decided, relating to the effect that a breach of paragraph 2.3 of PACE Code D would have, on identification evidence tendered at the trial of an accused person. Lord Bingham of Cornhill in delivering the Judgment said at paragraph 21:

> "We agree with the Court of Appeal in R v Popat [[1999] 2 Cr. App. R. 501] that paragraph 2.3 should not be construed to cover all possible situations. If an eyewitness of a criminal incident makes plain to the police that he cannot identify the culprit, it will very probably be futile to invite that witness to attend an identification parade. If an eyewitness may be able to identify clothing worn by a culprit, but not the culprit himself, it will probably be futile to mount an identification parade rather than simply inviting the witness to identify the clothing. If a case is one of pure recognition of someone well-known to the eyewitness, it may again be futile to hold an identification parade. But save in cases such as these, or other exceptional circumstances, the effect of paragraph 2.3 is clear if: (a) the police have sufficient information to justify the arrest of a particular person for suspected involvement in an offence, and (b) an eyewitness has identified or may be able to identify that person, and (c) the suspect disputes his identification as a person involved in the commission of that offence; an identification parade must be held if (d) the suspect consents and (e) paragraphs 2.4, 2.7 and 2.10 of Code D do not apply. ..." [At paragraph 23]. "It was readily and rightly accepted for the appellant that even if the failure to hold an identification parade was (as we have concluded) a breach of Code D 2.3, it does not necessarily follow that the evidence of Mr. Tabussum's identification should have been excluded. That would depend on an exercise of judgment under section 78 of PACE."

CONCLUSIONS

[34] Since the Evidence Act came into force on the 1st November 2005, the law has changed. There is no longer an assumption or presumption that identification evidence is admissible until challenged by the Defendant or questioned by the Judge. Instead, Section 100 (1) now states it is INADMISSIBLE until the prosecution satisfies the statutory criteria provided by Section 100 (1) (a) and (b), (2), (3), (4) and (5). It would seem that Section 100 of the Evidence Act has replaced the common law and Section 78 (1) of PACE Act 1984 and the PACE Code D guidelines. However, in Garnette Edwards Lord Carswell observed at paragraph 26 of his Judgment that the principle's contained in Code D may in appropriate cases give some guidance to Jamaican Courts, (and I daresay St. Lucia Courts) which presently are not governed by the PACE Act 1984 and its Codes.

[35] Pursuant to Section 134 of the Evidence Act, the prosecution's standard of proof for satisfying the Judge that the criteria under Section 100 has been met is proof on a balance of probabilities; and in determining whether the prosecution has discharged this burden of proof, the Judge must take into account the importance of the evidence in the proceedings.

[36] In my opinion therefore, the prosecution would have to lead evidence in the absence of the jury for the Court to determine whether or not the criteria in Section 100 has been satisfied. This inquiry should apparently take the form of a voire dire. Consequently in such circumstances, it seems permissible to disregard this judicial statement in Garnette Edwards. The police officer's opinion as to the need for holding an identification parade is relevant for the purposes of the voire dire, and should be canvassed therefore at the voire dire in my view. Ultimately however, it is not the police officer's subjective views that matters. In my opinion the Judge has to apply an objective test in determining whether it was reasonable to hold an identification parade, having regard to the criteria.

[37] The requirements in Section 100 were never met in this trial. I inadvertently allowed the prosecution to lead the identification evidence without any objection from either Counsel, without first determining whether or not the identification evidence was admissible. The Court must be watchful to ensure that the provisions in the Act are complied with and that there are no procedural irregularities in future trials.

[38] Had Section 100 been complied with, in my opinion the prosecution would have had to adduce evidence as to the reason why no identification parade or group identification or video film identification was held for each of the 3 Accused, the circumstances existing at the time which made it impracticable to hold such identification procedure, any lack of co-operation from each Accused, and the reason for their refusal, whether the witness had identified the Accused by name, description of any distinctive marks given about each Accused, whether the Accused was known to the witness prior to the incident, and the nature of any relationship between the Accused and the witness, whether the Accused refused to co-operate unless his Attorney-at-Law was present at the identification parade or procedure, what steps were taken to contact the Accused's Attorney-at-Law, and what was the results of such attempts, and the reason for holding a confrontation where such confrontation was held.

[39] Since at the time when Learned Counsel Mr. Walter objected the identification evidence had already been admitted, albeit procedurally incorrect, in my opinion, any evidence as to the reason for not conducting an identification parade would be irrelevant and inadmissible and the judicial statement of Lord Carswell would be applicable.

RULING ON NO CASE AND OTHER SUBMISSIONS – 26TH JULY, 2006

[40] At the close of the prosecution's case, no case submissions were made. The submissions of both Counsel for the Accused were two fold, relating to:

[1] Whether or not the prosecution's case had passed the test established in R v Galbraith [1981] 2 All E.R. 1060 and R v Turnbull (1976) 63 Cr App R. 132; [1997] Q.B. 224?

[2] Whether or not the prosecution has failed to discharge its standard of proof, having regard to Section 102 (2), (3) and (4) of the Evidence Act?

THE GALBRAITH TEST

[41] This test states that the prosecution will fail to discharge its burden of proof, and a submission of no case will succeed:

[a] if there is no evidence that the offence has been committed by the Accused; or

[b] where the evidence is so tenuous that a jury properly directed could not properly convict on it.

[42] Lord Lane C.J. further enunciated in GALBRAITH that "Where ... the Crown's evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury, and where on one possible view of the facts there is evidence on which a jury could properly come to a conclusion that the defendant is guilty, then the Judge should allow the matter to be tried by the jury ..." (at page 1062 para e).

[43] Learned Counsel Mr. Innocent submitted that since the credibility of the sole eye witness is in issue, the quality of his identification evidence coupled with the discrepancies in his testimony makes the prosecution's case tenuous.

[44] Mr. Innocent argued further that even though the law requires the Judge to give certain directions to the jury in terms of the Turnbull warning, such a direction may have no curative effect, since the evidence is of such that to allow it to go to the jury, runs the risk of an unsafe conviction.

[45] Mr. Innocent identified Mr. Alfred's misdescription of the handgun alleged to have been carried by Eustace James, and this witness's inconsistent testimony concerning the positions of the 3 Accused in the line when they came from the gate, as material discrepancies. The absence of any firearm being recovered, or ballistics test having been carried out on the recovered spent shells, means that it could not be said with any degree of certainty whether the Accused were at the scene of the crime and if so, what firearms they had, Counsel argued. He concluded that to leave the case to the jury is to incite them to confusion; and no amount of directions will prevent the inherent danger of an improper conviction.

[46] Learned Counsel Mr. Walter focused on the quality of the identification evidence. The fact that Mr. Alfred had a quick glance at his 3 assailants and then gave them his back upon diving to the ground, made the identification poor and therefore tenuous, he said. In his view, the fact that P.C. George went looking for a gun and mask at the house of Moses Rismay and Shermain Ramsay, this he argued, casts further doubt on the accuracy of Mr. Alfred's testimony, even though Mr. Alfred testified that the 3 Accused were not wearing masks.

[47] Prompted by the Court to focus on the impact that the PACE Code D provisions would have on the prosecutions case in the absence of any of the identification procedures having been used by the police for Kurt James, and only confrontation for Shervon Ramsay, Counsel Mr. Walter focused on the existing Witness Statements of Adolphus Purlogne and Tony Cyril on the police file, which led Constable George to have searched Shervon Ramsay's house for a firearm and a mask. He argued that it should have been obvious to the police officer viewing these 2 Statements that identification was in dispute for all 3 Accused. In those

circumstances therefore it behoved Constable George to direct that an identification parade be held. The breach of Code D, he argued, is so fatal as to render the whole identification process one to be called into question. This breach makes the identification flawed, and provides another reason why the evidence is tenuous and should not be left to the jury.

[48] Learned Crown Counsel Mr. Mondesir countervailed, that PACE Code D paragraph 2.3 requires the suspect to dispute the identification, in contrast to the existence of conflicting evidence in police statements of other potential witnesses which may have put identification in issue. Relying on R v Lambert [2004] EWCA Crim 154 discussed in Phipson on Evidence (2005) at para. 15-11, he argued that whether a suspect disputed being the relevant person had to be answered by considering the position at the time that the police were conducting their investigation, and not in light of the evidence that was actually given at the trial. The Judge should consider what the witness had said in his Statement, the circumstances as they were known to the police, and the response if any, by the suspect, when questioned by the police. On the state of the evidence in the instant case, Mr. Mondesir contended that there was no disputed identification existing at the time the police was conducting his investigations.

[49] I do not agree with Mr. Mondesir that there was no disputed identification. In the very case he has referred to R v Lambert it is pointed out in Phipson that the Court confirmed that a suspect did not have to raise the dispute expressly in order to trigger the obligation if it was obvious in the circumstances that there was an issue relating to identification.

[50] It seems obvious to me that Constable George should have been aware from as early as the 6th May 2003 that identification was in fact in dispute, based on what Mr. Alfred told him, and on what Mr. Purlogne and Mr. Cyril had told other police officers in their police statements relating to the same incident. Police Officers conducting investigations cannot afford to be blinkered in their approach to

collecting and assessing evidence and surveying the circumstances in each case. Police officers need to know and pay attention to the requirements of the law, and in particular to paragraphs 33, 34 and 38 of this Judgment. They need to develop checklists based on these legal requirements which should serve to guide them as to the contents of their police statements from witnesses, and the information that they should elicit from eyewitnesses. The checklists will obviously assist them in deciding correctly whether or not an identification parade or other identification procedure is impractical or necessary in the circumstances presented in each case.

[51] I do not accept however, that the failure to conduct an identification parade, in circumstances where it is undisputed that the 3 Accused were well known to Mr. Alfred, and that he had provided Constable George with names of the 3 Accused, and none of the Accused requested an identification parade, or objected to the dock identification at the preliminary inquiry, that this will serve to weaken the quality of the identification evidence to the extent that it cannot support a conviction.

[52] Learned Counsel Mr. Innocent relied on several cases including R v Turnbull, (supra); Davis vs The Crown [2004] EWCA Crim. 2521 delivered 29/12/04 (C.A.) delivered October 29 2004; Goldson and Mc Glashon v the Queen (Jamaica) [2000] UKPC 9 delivered 23/03/00; Forbes v R [2000] UKHL 66 delivered 14/12/00; The Queen v William Labrador and others Cr. Case No. 16 of 2000 (BVI) delivered by Benjamin J. 3/05/01; David Valmond v the State Cr. App. No. 12/95 (Dominica) delivered by Singh J.A. 14/03/96; Wycliffe Liburd v DPP Cr. App. No. 16 of 2003 (St. Christopher & Nevis) delivered by Rawlins J. A. (Ag) 6/12/04; Leroy Langford and another v the State Privy Council App No 142 of 2004 (Dominica) delivered 11/05/05.

[53] THE TURNBULL TEST

In particular, Mr. Innocent and Mr. Walter focused on the judicial statements of Lord Widgery C.J. in Turnbull which provide guidance, as to when a case dependant only on Identification evidence such as the instant case, should be withdrawn by the trial judge from the jury. At pages 137 and 138 Lord Widjery C.J. stated:

> "If the quality [of the identification evidence] 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. In our judgment, when the quality is good, as for example when the identification is made after a long period of observation, or in satisfactory conditions by a relative, a neighbour, a close friend, a workmate and the like, the jury can safely be left to assess the value of the identifying evidence, even though there is no other evidence to support it, provided always however, that an adequate warning has been given about the special need for caution ...
>
> When, in the judgment of the trial judge, the quality of the identifying evidence is poor, as for example, when it depends on a fleeting glance or on a longer observation made in difficult conditions, the situation is very different. 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."

[54] I am dealing here with a case of recognition, since the 3 Accused were well known to Mr. Alfred. However, though Mr. Alfred had a reasonable close view of the 3 Accused, he saw their faces for a brief moment under stressful conditions, He testified that he was "jumpy", what with seeing them armed with guns, and he knew that something was about to happen. The other surrounding circumstances of recognition were good. The Cable & Wireless Box between the gate from which they appeared and the steps of New Tronics where he was seated, did not

obstruct his view he said. The lighting conditions were very good since it was broad day light at 8:45 am that morning.

[54] Mr. Alfred's testimony remained unshaken in my view by cross-examination, but for the inconsistency concerning the type of handgun, (and he explained the reason for the inconsistency), and the positions each Accused occupied in the line up behind each other.

[55] Learned Counsel Mr. Mondesir submitted in substance that this statement of Lord Widgery in Turnbull provides no authority for the view that the trial judge should recklessly withdraw the case from the jury, on the basis of any existing material inconsistencies in the evidence of Mr. Alfred. Such material inconsistencies and questions of credibility are matters for the jury, he argued, while relying on the judicial pronouncements of Lord Mustill in Daley v Reginam (1994) 98 Cr. App. R. 447 (P.C.).

RECONCILIATION OF GALBRAITH AND TURNBULL PRINCIPLES

[56] In Daley, it was held that where the prosecution's evidence is such that it depends upon reliability of witnesses, and other matters within the province of the jury, and where on one possible view of the facts, there is evidence upon which a jury could properly convict, then the judge should not prevent the case going to the jury, even though he considers the prosecution's evidence uncreditworthy. At page 454 of the Judgment, Lord Mustill reconciled the principles in Turnbull (a case involving recognition evidence) with the Galbraith principles in the following manner:

"A reading of the judgment in Galbraith as a whole shows that the practice which the Court was primarily concerned to proscribe was one whereby a judge who considers the prosecution evidence as unworthy of credit would make sure that the jury did not have an opportunity to give effect to a

different opinion ... By contrast, in the kind of identification case dealt with by Turnbull, the case is withdrawn from the jury not because the judge considers that the witness is lying, but because the evidence even if taken to be honest has a base which is so slender that it is unreliable and therefore not sufficient to found a conviction; and indeed, as Turnbull itself emphasized, "the fact that an honest witness may be mistaken on identification is a particular source of risk. When assessing the "quality" of the evidence under the Turnbull doctrine, the jury is protected from acting upon the type of evidence which, even if believed, experience has shown to be a possible source of injustice. Reading the two cases in this way, their Lordships see no conflict between them."

CONCLUSIONS BASED ON COMMON LAW

[57] I have already assessed the quality of Mr. Alfred's evidence as I have been exhorted to do by Rawlins J.A. (Ag.) in Wycliffe Liburd supra where he states at paragraph 10:

> "The judge should examine closely the circumstances in which the identification was made; the length of time that the witness had the Accused under observation; the distance, the light, whether observation was impeded at any time; whether the witness saw the accused before and if so how often; if occasionally whether he or she had any special reason for remembering the Accused.
>
> The judge should also consider the time that lapsed between the original observation and the subsequent identification, and whether there was any material discrepancy between the description of the Accused that the witness gave to the Police and the actual appearance of the accused."

[58] In my opinion, the fact that Terry Alfred was frightened would not hamper his ability to see and accurately recognize the 3 Accused at a glance from a distance of about 12 feet from them. It was not a sighting in difficult circumstances though a fleeting glance. The identification evidence is not inherently fragile so as to require a judge to direct the jury to return a verdict of not guilty. There are discrepancies and weaknesses in the prosecution's case, but they are not fatal. The evidence is not of the poor quality that Lord Mustill stated Turnbull seeks to protect the jury from. In my opinion the evidence is of such that it requires the judge to give very careful and clear directions to the jury. If the evidence of Mr. Alfred was to be

accepted by the jury as truthful and reliable after applying my adequate directions, I am satisfied that there is material on which a jury, without irrationality, can convict the 3 Accused of Murder.

[59] Applying therefore the Galbraith and Turnbull principles only, I would rule that there is a case for all 3 Accused to answer. However, that is not the end of the matter, in light of the provisions in Section 102 of the Evidence Act.

STATUTORY STANDARD OF PROOF FOR IDENTIFICATION EVIDENCE

[60] It is necessary to reproduce Section 102 of the Evidence Act in its entirety.

> "102. – (1) Where identification evidence has been admitted, the Judge shall inform the jury that there is a special need for caution before accepting identification evidence and of the reasons for the need for caution, both generally and in the circumstances of the case.
>
> (2) In particular, the Judge shall warn the jury that it should not find, on the basis of the identification evidence, that the defendant was a person by whom the relevant offence was committed unless -
>
> (a) there are, in relation to the identification, special circumstances that tend to support the identification; or
>
> (b) there is substantial evidence, not being identification evidence, that tends to prove the guilt of the defendant and the jury accepts that evidence.
>
> (3) Special circumstances referred to in subsection (2) include -
>
> (a) the defendant being known to the person who made the identification; and
>
> (b) the identification having been made on the basis of a characteristic that is unusual.
>
> (4) Where –
>
> (a) it is not reasonably open to find the defendant guilty except on the basis of identification

evidence;

(b) there are no special circumstances of the kind mentioned in subsection 2 (a); and

(c) there is no evidence of the kind mentioned in subsection (2) (b);

the judge shall direct that the defendant be acquitted.

[61] Section 2 of the Act defines "identification evidence" in relation to criminal proceedings, to mean:

"evidence that is -

(a) an assertion by a person to the effect that a defendant was, or resembles a person who was present at or near a place where –

(i) the offence for which the defendant is being prosecuted was committed; or

(ii) an act that is connected with that offence was done; or about the time at which the offence was committed or the act was done, being an assertion that is based wholly or partly on what the first-mentioned person saw, heard or otherwise noticed at that place and time; or

(b) a report, whether oral or in writing, of an assertion as mentioned in paragraph (a);

SUBMISSIONS

[62] Learned Counsel Mr. Walter contended that Section 102 (2) and (3) of the Evidence Act has gone beyond the Turnbull principles (reproduced at paragraph 53 above). He scrutinized the prosecution's case to see whether there were "special circumstances that tend to support the identification"; or whether there was "substantial evidence, not being identification evidence that tends

to prove the guilt of the defendant [s]" Shervon Ramsay and Kurt James for whom he appeared.

[63] He examined the definition of "special circumstances" in section 102 (3) of the Act. He concluded that the definition meant that apart from the existing evidence that Mr. Alfred knew the 3 Accused for a long time and was able to recognize them, there should also have been evidence that Mr. Alfred made the identification on the basis of an unusual characteristic on each Accused.

[64] Learned Counsel Mr. Innocent's views varied from Mr. Walter's conclusions, concerning the statutory alteration of the law: Mr. Innocent argued that the relevant Evidence Act provisions have merely codified the position that existed under the Common law as stated in Turnbull and PACE; since the Judge always had the power, to "withdraw the case from the jury and direct an acquittal, unless there is other evidence which goes to support the correctness of the identification", where the quality of the identifying evidence is poor: (Turnbull supra at 138).

[65] Both Mr. Innocent and Mr. Walters concluded that there was no supporting evidence in the case that can be called "special circumstances." Neither was there any substantial evidence that is not identification evidence, that tends to prove the guilt of the Accused, in the absence of any corroborative evidence coming from Police Constable George.

[66] Learned Crown Counsel Mr. Mondesir pointed to the evidence of Mr. Alfred that he knew the 3 Accused very well before the shooting in question. In his view the requirements in Section 102 (4) (b) were met, since there were special circumstances that tend to support the identification, that special circumstance being, that the 3 Accused were well known to Mr. Alfred.

[67] I therefore must determine which of the two competing interpretations placed on Section 102 (2) (3) and (4) is the correct one.

THE MEANING OF SECTION 102

[68] One of the rules of English Statutory Interpretation is the plain meaning rule. It states that Acts of Parliament:

> "... should be construed according to the intent of the Parliament which passed the Act. If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in that natural and ordinary sense.": (PER Tindal C.J. in Sussex Peerage Case (1844) 11 Cl & FN 85, at 143).

[69] Before I decide whether the words in Section 102 (2) (3) and (4) are "in themselves precise and unambiguous", I must have regard to the whole of the enacting part of the Statute: Cross on Statutory Interpretation 3rd ed. 15).

[70] I am further guided by the pronouncements of our eminent Chief Justice Sir Vincent Floissac in Charles Savarin v John William (1995) 51 W.I.R. 75 at 79 where he stated:

> "... I start with the basic principle that the interpretation of every word or phrase of a statutory provision is derived from the legislative intention in regard to the meaning which that word or phrase should bear. That legislative intention is an inference drawn from the primary meaning of the word or phrase with such modifications to that meaning as may be necessary to make it concordant with the statutory context. In this regard the statutory context comprises every other word or phrase used in the statute, all implications therefrom and all relevant surrounding circumstances

which may properly be regarded as indications of the legislative intention."

[71] I do not consider the words in section 102 (2) (3) and (4) to be imprecise, or ambiguous, or unclear. The definition of the words "identification evidence" is also precise and unambiguous. Applying this definition to Section 102 (2), this provision in its plain and ordinary sense, conveys the following meaning in relation to the instant case in my opinion –

> The jury cannot find the accused guilty of committing murder on the testimony of Mr. Alfred that:
>
> (a) the Accused were present at or near the place where the murder was committed; or
>
> (b) the Accused were present or near the place where the shooting was done, or
>
> (c) that at about the time when and place where the murder was committed or the shooting was done, the Accused were present, unless there are either special circumstances that tend to support Mr. Alfred's identification of the Accused, or there is substantial evidence other than this identification evidence of Mr. Alfred that tends to prove the guilt of the Accused.

[72] On looking at the provision in Section 102 (3) it is immediately clear that subsection (a) does not exist independent of subsection (b) because of the presence of the word "and" after the semicolon at the end of subsection (a). The word "and" conveys that subsection (a) and subsection (b) are to be read conjunctively and not disjunctively. The event in subsection 102 (3) (a) and subsection 102 (3) (b) must therefore occur together. The plain and ordinary meaning of the words "characteristic that is unusual" in Section 102 (3) (b) in my opinion, conveys, that there should be not just evidence that Mr. Alfred was able to identify the 3 Accused because he knew them before, but there should

also be evidence that he recognized them on the basis of a peculiar attribute that each Accused possesses.

[73] It is also clear from Section 102 (3) that the events mentioned in subsections (a) and (b) are not the only type of events that can be regarded as "special circumstances." This is obvious from the presence of the word "include" at the end of the governing clause in Section 102 (3).

[74] This means therefore that the category of events that may be regarded as "special circumstances" is not closed. It is impossible to conclusively state what other events are contemplated by the provision, though it is obvious that circumstantial evidence, confessions by the Accused, as well as scientific evidence and fingerprint evidence may all qualify.

[75] It seems very clear from the provision in Section 102 (4), that the plain and ordinary meaning of the words convey: that the judge must direct the jury to acquit the Accused where there is evidence that the Accused were known to Mr. Alfred but there is no evidence that he was able to recognize them on the basis of their peculiar attributes or a peculiar attribute that each Accused possessed, in the absence of other evidence independent of Mr. Alfred's identification evidence, that links the Accused with the Murder.

[76] Had Section 102 (3) (a) existed independently from Section 102 (3) (b), by the presence of the word "or" instead of "and" at the end of the semi colon in subsection 102 (3) (a), then a different meaning would have been conveyed. In such circumstances, subsection 102 (3) (b) would be in the alternative, and all the prosecution would have had to prove as they did in this case; is that Mr. Alfred knew the 3 Accused very well prior to the shooting.

THE EFFECTS OF SECTION 102

[77] If my interpretation of Section 102 is correct, it has devastating consequences for the prosecution in future cases, as it has in the instant case.

[78] It is this consideration which has lead me to remind myself of Lord Reid's statement of other relevant principles in statutory interpretation in Pinner v Everett [1969] 3 All E.R. 257, at 258 where he said:

> "In determining the meaning of any word or phrase in a statute the first question is what is the natural or ordinary meaning of that word or phrase in its context in the statute. It is only when the meaning leads to some result which cannot reasonably be supposed to have been the intention of the legislature that it is proper to look for some other permissible meaning of the word or phrase."

[79] The question I have asked myself is, DID PARLIAMENT INTEND TO CHANGE THE COMMON LAW THAT EXISTED PRIOR TO THE EVIDENCE ACT?

[80] The Common law as exists in Turnbull, does not make supporting evidence mandatory in all cases where identification is in issue. It requires mandatory supporting evidence only where the identification evidence is poor. Section 102 (2) (3) and (4) has not just codified the common law in my view. It has gone further as Counsel Mr. Walter perceived it, by making supporting evidence mandatory in every case where the prosecution is relying on identification evidence, regardless of the strength and quality of the identification evidence. These statutory provisions have raised the evidential bar which the prosecution must surmount.

[81] There is a firmly established legal principle within the context of statutory interpretation which allows the Court to make certain presumptions in construing statute. "There is a presumption ... that in the absence of any clear indication to the contrary Parliament can be presumed not to have altered

the common law further than was necessary to remedy the "mischief." Of course it may and quite often does go further. But the principle is that if the enactment is ambiguous, that meaning which relates the scope of the Act to the mischief should be taken rather than a different or wider meaning which the contemporary situation did not call for": (PER Lord Reid in Black-Clawson International Ltd v Papierwerke Waldhof – Aschaffenburg AG [1975] AC 591 at 614.

[82] Against my better judgment that the relevant provisions of Section 102 are not ambiguous, I have examined the long title of the Evidence Act which is usually helpful in determining the intention of Parliament where the Statutory provision is ambiguous and unclear.

[83] The Long-title states that the Evidence Act is –

> "An Act to reform the law relating to evidence in proceedings in Courts in Saint Lucia and to provide for related matters."

[84] Since the intention of the Parliament was to make changes to the existing law of evidence that was being applied prior to 19th April 2002 which was the date of assent, by improving on it, then Parliament obviously intended to change the common law as it has done in Sections 100 and 102, contemplating that this is an improvement on the Common law.

[85] Parliament expressed its intention that the provisions of the Evidence Act should have retrospective effect. It came into operation on the 1st November 2005. Section 10 states that it applies to and in relation to all proceedings in a Court of Saint Lucia excluding proceedings the hearing of which begun before the commencement of the Act. Section 171 states that it does not apply to or in relation to proceedings in a Court the hearing of which commenced before the

commencement of the Act, and any such proceedings may be continued or completed as if the Act had not been passed.

[86] Though Section 143 of the Act provides that Sections 25 to 43,48 to 98 and 120 to 123 may be dispensed with where the parties consent, it is clear that Parliament never intended for Sections 100 to 102 dealing with Identification Evidence, to be dispensed with by the Court.

[87] I am therefore duty bound to apply the law as I have construed Parliament to have intended, regardless of my personal views, subject to appellate correction.

[88] It is obvious that this change in the law will result in the acquittal of persons who are not innocent, and cheat victims and their family of fair judgment. A famous quotation from Abraham Lincoln is: "The best way to get a bad law repealed is to enforce it strictly."

[89] I shall therefore direct the jury to acquit these 3 Accused.

Dated this 28th day of July 2006.

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OLA MAE EDWARDS
HIGH COURT JUDGE