SAINT LUCIA

IN THE COURT OF APPEAL

CRIMINAL APPEAL NO. 4 OF 2006

BETWEEN:

URBAN ST. BRICE

Appellant

and

THE QUEEN

Respondent

Before:

The Hon. Mr. Brian Alleyne, SC	Chief Justice [Ag.]
The Hon. Mr. Hugh A. Rawlins	Justice of Appeal
The Hon. Mrs. Dancia Penn-Sellah, QC	Justice of Appeal [Ag.]

Appearances:

Mr. Shawn Innocent for the Appellant
Mrs. Charon Gardner, Crown Counsel, for the Respondent

2007: June 18;
October 29.

Criminal appeal - Murder – Appeal against conviction and sentence - Summing up on evidence of identification - Guidelines to be followed – Sections 102 and 136 of Evidence Act 2002 - Whether the case should have been withdrawn form the jury - Turnbull directions required – Whether adequate – Whether the appeal should succeed because of failure to give the directions specified by sections 102(2) and (3) and 136 of the Evidence Act 2002.

The appellant was convicted and sentenced to death for the murder of Dwain Andrew at Bois D'Orange during the night of 22nd October 2002. He appealed against his conviction and sentence. The appeal against conviction was mainly on the ground of mistaken identification or recognition. Counsel for the appellant contended that the identification

evidence, which the prosecution presented, was so unreliable, and the directions which the trial judge gave on that evidence was so inadequate, that the conviction was thereby rendered unsafe, and should accordingly be quashed. The prosecution's case was that the appellant "laid in wait" for the deceased and shot him at close range in an incident that was unprovoked. The prosecution's case depended mainly on the identification evidence of two witnesses, Laban Francis and Paul Sonson. Francis knew the appellant before the murder while Sonson did not. The nature of the lighting in the area where the murder occurred was in issue. The appellant contended that the trial judge erred in that he failed to direct the jury properly on identification in accordance with section 102 of the Evidence Act of St. Lucia, and, in particular failed give proper Turnbull directions, which section 102 of the Act requires. The appellant also contended that the trial judge erred in that he failed to give the jury any or any proper directions on identification to the jury in accordance with section 136 of the Evidence Act.

Held, allowing the appeal; quashing the conviction and sentence and ordering a retrial:

(1) Section 102(1) of the Evidence Act 2002 requires a trial judge to give identification directions in accordance with the Turnbull guidelines. Although the trial judge gave Turnbull directions, he erred in that he failed in his summation to clearly identify and deal with the specific weaknesses which appeared in the identification evidence; failed to highlight the variation in the evidence that was given by the witnesses in relation to the lighting at the scene of the murder, and failed to give the jury sufficient assistance in analyzing the identification evidence and relating it to each factor that arose for consideration on the Turnbull principles.

The statements by the Privy Council in Leroy Langford and Mwanga Freeman v The State of Dominica, [2005] UKPC 20; [2005] 66 WIR 194 and in Garnett Edwards v The Queen [2006] UKPC 23; (2006) 69 WIR 360 followed; the judgments of Sir David Simmons, CJ, in the Director of Public Prosecution's Reference No. 1 of 2001, Barbados Court of Appeal, considered, and judgment of this court in Gerald Joseph v The Queen, St. Lucia Civil Appeal No. 2 of 2006 considered and distinguished.

(2) Sections 102(2) and 102(3) lay down mandatory requirements for identification directions which must be given in terms of these subsections. The trial judge erred in that he did not give any of the warnings which these subsections require.

Gerald Joseph v The Queen, St. Lucia Civil Appeal No. 2 of 2006 followed.

(3) While it is not obligatory for a trial judge to give the section 136(2) warnings if he or she has good reasons for not giving them, the effect of failure to give the warnings has to be evaluated in each case, having regard to the totality of the evidence. A conviction will not be automatically quashed in every case in which the warning is not given, particularly if there is ample other evidence which could sustain the conviction. The trial judge erred in that he gave no section 136(2) warnings and gave no reasons for not doing so.

Gerald Joseph v The Queen, St. Lucia Civil Appeal No. 2 of 2006 followed; Jerome O'Neal Bovell v R, Barbados Criminal Appeal No. 23 of 2000 considered.

JUDGMENT

[1] RAWLINS, J.A.: The Appellant, Urban St. Brice, was charged for the murder of Dwain Andrew contrary to Section 178 of the Criminal Code of St. Lucia 1992, on 22nd October 2002 at Bois D' Orange in the Quarter of Gros Islet, St. Lucia. Dwain Andrew was also known as "Dwain DeWormer" and "Spanish".

[2] St. Brice was arraigned on 6th February 2006 and pleaded not guilty. He was tried before a judge and jury in the High Court between 6th and 20th February 2006. He was convicted on 20th February 2006 for the murder and on 7th April 2006 he was sentenced to an indeterminate term of life imprisonment following a sentencing hearing. St. Brice was previously tried before on the charge, but that trail was aborted as a result of jury misconduct. At the second trial the learned trial judge

adjourned the matter for 1 week at the close of the prosecution's case before summing up to the jury.

[3] St. Brice appealed against his conviction and sentence. His appeal against conviction was mainly on the ground of identification. In this regard, his complaint is that the learned trial judge failed to deal adequately in his summing up with the issue of identification. He has contended that the trial judge failed to direct the jury correctly, properly and/or adequately on the identification as it arose on the facts of the case, and that this makes his conviction unsafe and unsatisfactory. He said, in particular, that the learned trial judge erred by failing to direct the jury in accordance with Section 102 of the Evidence Act 2002.[1] He further complained that the judge failed, in particular, to direct the jury on the question of the special need for caution and the possible unreliability of the evidence of identification, and, in effect, failed to give any or any proper warning to the jury in accordance with Section 136 of the Evidence Act of St. Lucia.

[4] Learned counsel for St. Brice did not make a no case submission at the close of the prosecution's case. He however also appealed against his conviction on the ground that the verdict of guilty of murder was against the weight of the evidence and is therefore perverse. He therefore contended that the conviction is unsafe and unsatisfactory having regard to all the circumstances of the case. In this court, Mr. Innocent, learned counsel for St. Brice, stated that given the weak nature of the identification evidence, it may seem odd that a no-case submission was not made at the trial. He said that, in any event, it was highly unlikely that such a submission would have succeeded in view of the trial judge's statement that this was not a case that he would have stopped at that stage.

[5] In his appeal against the sentence, St. Brice contended that the trial judge failed to take any or any proper approach in determining whether, and what, if any period of

[1] Hereinafter referred to as "the Evidence Act of St. Lucia" for ease of making the distinction between it and the Evidence Acts of other countries to which references will be made in this judgment.

incarceration was required in the case having regard to the sentencing provisions contained in Section 1097 of the Criminal Code 2004 of St. Lucia. He also contended that the sentence of life imprisonment on the conviction for murder was excessive, having regard to the factual circumstances of the case, his character and antecedents, and the matters contained in the Social Enquiry Report that was submitted to the court.

[6] The brief factual background of the case will facilitate the consideration of the issues, which arise from these grounds of this appeal.

The Background

[7] The prosecution's case was essentially that St. Brice "laid in wait" for the deceased, Andrew, and shot him at close range in an incident that was unprovoked. According to the evidence presented on behalf of the prosecution, on 22nd October 2002 St. Brice was at Bois D'Orange. He was hiding in some bushes. He came out, walked up to the house of one Laban Francis and showed him (Francis) a firearm and cartridges. At the time St. Brice was approximately three feet away from Francis. It was dark, but there was a light inside Francis' house by which Francis was able to see St. Brice for a period of time. Francis' evidence was that St. Brice told him that he only realized that he (Francis) was at home because of his (Francis') dogs.

[8] Another neighbour, Paul Sonson, said that he observed the interaction between St. Brice and Francis from approximately 20-25 feet away from them. Mr. Sonson indicated he did not hear what they were saying because his radio was playing at the time, but that he saw them speaking with each other. He described St. Brice as tall and slim and wearing a "tam" on his head. He did not know St. Brice before that day.

[9] Both Mr. Francis and Mr. Sonson said that they saw Dwain Andrew, coming up the road. St. Brice then went towards Andrew. He passed within a few feet of Dwain

Andrew. According to Mr. Sonson, it was at that point that he heard a gunshot. Laban Francis said that he saw St. Brice shot Andrew when he (St. Brice) came close to Andrew. He said that there was a streetlight close to the area where the shooting occurred. However, there is evidence that that particular streetlight had a problem and might not have been lit at the material time. In his evidence, Sergeant Chicot, the investigating officer, said that the streetlight is usually lit for about a half an hour and then switches off for about ten to fifteen minutes before it illuminates again.

[10] The defence relied on mistaken and unreliable evidence of recognition or identification of St. Brice. In this regard, the defence insisted that the testimony of Laban Francis was weak and unreliable because Francis was an untruthful witness who had an interest to serve. The defence contended that Francis was an accomplice because he was arrested by the police on suspicion of having committed the murder. Additionally, the defence pointed out that Francis gave several inconsistent statements at the preliminary inquiry, made inconsistent statements to the police and there were several discrepancies in his testimony at trial.

[11] At the time of the incident, Francis was a tenant of the brother of St. Brice. Sergeant Chicot arrested him soon after the incident on suspicion that he committed the murder of Andrew. About 2 days prior to his arrest, Francis gave a statement to the police in which he said that he did not know who killed Andrew.[2] When he was arrested he gave another statement to the police in which he said, among other things, that it was St. Brice who shot and killed Andrew.

[12] St. Brice did not give evidence at the trial. He called no one to give evidence on his behalf. He had given a statement to the police on 9th November 2002. In this statement he said that he knew Andrew. They attended school together. They had a confrontation in early October 2002, during which Andrew called for his gun

[2] See Tab B page 118 lines 18–25; Tab B page 119 lines 4–7, and Tab B page 120 lines 9–18.

and one of Andrew's friends went to fetch the gun for Andrew. He (St. Brice) left and went to a shop in the vicinity. About 20 minutes later he saw Andrew approaching. Andrew stopped by the shop, took out his gun and cranked it. Thereupon he (St. Brice) jumped over the shop's counter. Andrew attempted to enter the shop but the owner prevented him from doing so. Since that incident he kept away from Gros Islet because he was afraid of Andrew. He returned for a short while on 30th October 2002 to collect money from someone. The following day he went to the Rodney Bay Marina close by to see someone who had money for him. He never came across Andrew since that day when they had the confrontation at Gros Islet.

Identification

[13] On the first limb of this ground of appeal, St. Brice sought to impeach the directions which the learned trial judge gave to the jury on the ground that the judge failed to direct the jury properly on identification in accordance with section 102 of the Evidence Act of St. Lucia. On the second limb, St. Brice contended that the judge failed, in particular, to direct the jury on the question of the special need for caution and the possible unreliability of the evidence of identification, and, in effect, failed to give any or any proper warning to the jury in accordance with Section 136 of the Evidence Act of St. Lucia.

The Directions Required by Section 102

[14] Section 102 of the Evidence Act of St. Lucia was amended earlier this year. However, it was the former section 102 that was applicable to this case because it was still in force at the time of the trial. The section provided:

> "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.
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> (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 -
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> (a) there are, in relation to 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.

[15] I considered the requirements of this section in Gerald Joseph v The Queen.[3] I noted that it was identical to section 102 of the Evidence Act of Barbados.[4] I drew upon the assessment of the provision by Sir David Simmons, CJ, in the Director of Public Prosecution's Reference No. 1 of 2001,[5] which came before the Court of Appeal of Barbados on a reference by the Director of Public Prosecutions of Barbados. The trial judge had withdrawn the case from the jury by virtue of section 102(4) of the Barbados Evidence Act because he thought that the evidence of identification was insufficient to permit the case to go to the jury. That evidence was given by the complainant and her sister. Neither of them knew the accused before the incident.

[16] The first question in the Reference was whether the trial judge erred when he withdrew the case from the jury. That question did not arise for consideration in Gerald Joseph because Joseph did not assert that the judge should have withdrawn it from the jury. Although counsel for St. Brice did not make a no case submission at the trial, section 102(4) of the Evidence Act of St. Lucia would have

[3] St. Lucia Civil Appeal No. 2 of 2006 (15th January 2007). See particularly paragraphs 35-44.

[4] Cap. 121 of the Laws of Barbados, 1971-1997 Revised Edition.

[5] Barbados Court of Appeal, 26th February 2002. Hereinafter referred to either as "the DPP's Reference" or simply as "the Reference".

required the trial judge to withdraw the case from the jury if he thought that the identification evidence was insufficient. The judge indicated that it was not a case that he would have withdrawn from the jury.

[17] The second question in the Reference was whether the trial judge erred by not giving the jury directions in accordance with subsections 102(1) and (2) of the Evidence Act of Barbados. I noted in Gerald Joseph that Sir David Simmons, CJ, stated, *inter alia*, that section 102(1) enacted the guidelines in R v Turnbull (Raymond)[6] in language that was quite similar to that of Lord Widgery CJ.[7] I stated that it however did not enact all of the principles of Turnbull.[8] However, as in the Reference, I concluded in Gerald Joseph that a trial judge is still required to give directions based on the Turnbull principles as well as the section 102(2) directions.

[18] I further noted in Gerald Joseph that the learned Chief Justice pointed out in the Reference that section 102(3) goes further to enact that the judge should instruct the jury that they should not identify the accused as the person committing the offence unless 1 of the 2 factors stated in this subsection is present.[9] The first factor is that there must be "special circumstances" tending to support the identification. Alternatively, there must be "other substantial evidence, tending to prove the guilt of the accused". The words "special circumstances" are defined to include 2 compendious elements. One element is that the identifier should know the accused. The second is that the identification should have been made on the basis of an unusual characteristic. In the Reference, the Chief Justice pointed out that the use of the word "includes" was critical because it was designed to permit enlargement, which permits a trial judge to consider other elements that are not specified in the provision. The Barbados Court of Appeal found that the trial judge

[6] [1977] Q.B. 224.
[7] See generally paragraph 27 of the judgment in the Reference.
[8] For example, it does not require the trial judge to draw the attention of the jury to any material discrepancies between the description of the accused given to the police by the witness and the actual appearance of the accused. It does not require the judge to point out the specific weaknesses in the prosecution's evidence.
[9] See generally paragraphs 31-33 of the judgment in the Reference and paragraphs 39 and 40 of the judgment in the Gerald Joseph case.

erred because he thought that section 102(3) constrained him to consider only the 2 matters stated in that subsection.[10]

[19] Following the reasoning in The Reference then, I concluded, in Gerald Joseph,[11] that section 102 of the St. Lucia Evidence Act required a trial judge to give directions in accordance with the Turnbull principles as well as the warnings which sections 102(2) and 102(3) of the Act mandated. I observed that these warnings are mandatory because these subsections were stated in mandatory terms and they state no circumstances in which the warnings that they require may be omitted. I noted, additionally, that these subsections were enacted for the benefit of defendants in criminal cases.

[20] The approach of the trial judge to the identification evidence will now be considered in light of the foregoing statements as to the requirements of section 102 of the Evidence Act of St. Lucia as it was at the material time. I shall first set out the identification evidence that was given at the trial.

The identification evidence

[21] Laban Francis was the main witness on identification. His evidence was supported in some regards by that of Paul Sonson. There were also minor aspects in the evidence of Sergeant Chicot and Sherma Lubin.

Laban Francis

[22] It will be recalled that Laban Francis, who was a tenant of a brother of Dwain Andrew, said that he saw St. Brice shoot Andrew. It will also be recalled that he was arrested on suspicion of having committed the murder. His evidence is important for the purpose of determining the quality of the identification evidence because it puts him closer to St. Brice at the material times than any other witness

[10] The Chief Justice noted that the evidence in the case was that the assailant was not known and the characteristics mentioned by one witness were his "big eyes" and the hat which he wore and these were not unusual. The trial judge withdrew the case from the jury because of the absence of unusual characteristics and the witnesses did not know the assailant before the night of the incident.
[11] At paragraph 43 of the judgment.

in the case. He also knew St. Brice for a couple of years before the murder. In relation to him, therefore, it was a question of recognition.

[23] Francis testified [12] that he saw St. Brice in Gros Islet many times. On the night of the murder of Andrew, St. Brice came to his home and asked him for a "joint". St. Brice told him that he had been waiting in the bushes for Dwain Andrew since 7 o'clock. St. Brice then pulled a gun from his waist and removed ammunition from it. The 2 of them then went close to a plum tree near to the house. He (Francis) saw Andrew coming through the track from the direction of the lamppost, which was about 40–60 feet away from where they were standing. Dwain Andrew was just about to cross a gutter when St. Brice went up to him and shot him when the 2 men were about 3 feet apart. He (Francis) knew Dwain Andrew for more than 5 years. The lamppost of which he spoke was "functionable" but it got a "chak" sometimes. He saw Dwain Andrew clearly when he was coming through the track. Nothing was blocking his view at the time. He saw St. Brice shoot Andrew. At that time he (Francis) was about 14 feet away from the 2 men and nothing was blocking his view of them. St. Brice was wearing a "tam". He described it. He identified St. Brice on 12th November 2002 at the Marchand Police Station. There was no identification parade.

[24] Under cross-examination, Francis testified that the street lamp was lit when he first saw St. Brice. The street lamp went out but the place was not in total darkness.[13] He later said, "… yeah the lights went off - - - the lights did go off when I first saw the deceased. It was dark when the light went off. It was a common situation that the lamp post would go off suddenly for a while."[14] Francis admitted that he gave a statement to the police 2 days after the incident.[15] He further admitted that in his first statement to the police he said that he did not know who shot Andrew. He also admitted that he said in his first statement to the police that while he was at

[12] It is contained at Tab B pages 87–131 of the Record of Appeal.
[13] See Tab B page 112 lines 13-14 of the Record of Appeal.
[14] See Tab B page 113 lines 11-15 of the Record of Appeal.
[15] See Tab. B. pages 114–118 of the Record of Appeal.

his home he heard what sounded like a single gunshot followed by a voice, which he recognized to be that of Dwain Andrew. He then agreed that he said in his first police statement that he did not hesitate to open the door to see what was happening.[16] He agreed that he had stated in his first statement to the police "I left my girlfriend on the telephone and I opened the door to see what had happened".[17] He also admitted that he stated in his first statement to the police that he had looked outside but there was nobody around.[18]

Paul Sonson

[25] Paul Sonson testified at the trial[19] that he knew Dwain Andrew for some 11 years. He was his neighbour and they lived some 5 houses apart. On the night in question he went to the house of Laban Francis, which was in the said area as his (Sonson's) house, to play dominoes, but there was no one else there. His dogs were barking incessantly so he took out his flashlight and checked to see why they were barking. About 15 minutes later he noticed someone who looked like St. Brice emerging from the bushes. From his observation the person was tall and slim. The person went to Laban Francis' house and stood at the door speaking with Francis.[20] He could only recall that the person wore a "tam", because he was not really watching.[21] He did not hear the conversation between the person and Francis because of the distance that they were from him. A short while later he saw Dwain Andrew emerge from the track. He saw the person who had been speaking to Francis leave Francis' home and walked to the area that Dwain Andrew was coming from. He could have seen both Andrew and St. Brice. When they were about 3 feet from each other, just before they crossed each other's paths, he heard a gunshot coming from their direction and the light from the

[16] See Tab B page 119 lines 4-23 of the Record of Appeal.
[17] See Tab. B page 120 line 9 of the Record of Appeal.
[18] See Tab. B page 119 lines 18 -19 of the Record of Appeal.
[19] His evidence is contained at Tab. B pages 19 et seq of the Record of Appeal.
[20] See Tab. B page 19 lines 13-25 of the Record of Appeal.
[21] See Tab. B page 20 lines 1-13 of the Record of Appeal.

lamppost went off instantly.[22] He then could not see either of them anymore because the light went out.[23]

[26] On cross-examination, Mr. Sonson said that he gave a statement to Sergeant Chicot on 11th November 2003 – about a year after the incident. He also said that he did not know St. Brice before the incident.[24]

Sherma Lubin and Sergeant Chicot

[27] Sherma Lubin, the sister-in-law of Dwain Andrew, testified[25] that she heard the gunshot which killed Andrew. After she heard it she went outside and found Andrew lying in the bushes. She noticed that he had been shot just above his navel. It was not exactly "pitch dark" at the time. In cross-examination she agreed that she stated in her deposition at the preliminary inquiry that when she went outside the place was "pitch dark" and that the lamppost was not near her house but some distance away.

[28] Sergeant Chicot testified that, at the scene of the murder, he observed that there was a street light which was about 30 feet away from the home of Dwain Andrew. From his observance the light was defective in that it would light up for about 30 minutes at a time and would go out for 10–15 minute intervals. He said that when the light was illuminated there is adequate lighting in the surrounding areas, but when it is not lit the entire area is in darkness.[26] He admitted that he had arrested Laban Francis on suspicion of having murdered Dwain Andrew.[27]

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[22] See Tab. B page 23 lines 7-8 et seq of the Record of Appeal.
[23] See Tab. B page 24 lines 19-23 of the Record of Appeal.
[24] See Tab. B page 36 lines 6-10, and page 69 lines 19-25 of the Record of Appeal.
[25] See her evidence at Tab. C lines 17 et seq of the Record of Appeal.
[26] See Tab. C page 111 lines 21-22 and page 112 of the Record of Appeal.
[27] See Tab. D page 90 lines 19–25 and page 91 lines 1 – 20 of the Record of Appeal.

The identification directions

[29] In light of the critical importance of the identification issues raised in this appeal, I think that it is necessary to set out fully the identification directions, which the learned trial judge gave. He stated as follows:[28]

> " …[T]he defence is saying that the identification is mistaken. That apart from Laban Francis lying to you, that's what they are saying, you will have to determine that, apart from Laban Francis lying to you, his … identification is mistaken … This case — but you will have to determine if you accept Laban Francis' evidence, whether he could be mistaken having regard to the evidence he gave. He knew him for five years; he came to the door; he spoke with him; he saw him; his light was on. They went down the steps, said when Spanish-(Dwain Andrew) was coming through the track, he was able to see Spanish. He saw the Accused walked up to Spanish…and shot him. In those circumstances, can you say that Laban Francis, if you accept his testimony is mistaken.
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> The law says where the case against the Defendant, the Accused, depends wholly, you'll have to determine that, or substantially on the correctness of one or more identifications of the Defendant, which the Defence alleges to be mistaken, I must therefore warn you of the special need for caution before convicting the accused in reliance on the correctness of the identification.
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> The reason for this is that it is quite possible for an honest witness to make a mistaken identification, and notorious miscarriages of justice have occurred as a result. For this reason, a mistaken witness can be a convincing one, and even a number of apparently convincing witnesses can be mistaken. You must examine therefore carefully, the circumstances in which the identification by each witness was made. How long did he have the Defendant under observation? Well, the evidence is that the accused came to his house … that's the evidence of Laban Francis -- came to his house, his lights were on, he spoke with him, he asked him for a joint, they spoke, they went down … he's the man whom he had known for five years, they spoke, they went down the stairs.
>
> I beg your pardon, Laban Francis, said, he knows DeWorms [St. Brice] for a couple years now, couple of years. A couple of years, you'll make out what he means by that, couple of years. Yes. It's a man he had known for a couple years. He used to see him, he used to see him in Gros Islet all the time. How long did he have the Defendant under observation? At what distance? Well, they were in the house together, if you accept the evidence, one in front of the door together. You will determine at what distance, in what light. He said he had his lamp – his light on in his house. Was the observation impeded, that is, blocked in any way? You heard

[28] See Tab. F pages 61-63 of the Record of Appeal.

what he said, if he was speaking to him, a man he has known for a couple of years. You will come to the conclusion that if he was speaking to him – went to the door and speaking to him, that they were confronting each other face to face. He took out his gun, he showed him the gun, he showed him the bullet, and how long elapsed between the original observation and the subsequent identification to the police. Well, is that identification, [he] is someone he's known. Was it identification or recognition, you must determine that.

I must remind you, members of the jury, that you have to take into consideration the Statement he gave to the police. … He was cross-examined, that's Laban Francis, was cross-examined by Mr. Foster. ... I must also tell you, on the question of recognition, if you have any reasonable doubt, as to the identification of the Accused, then you must resolve that doubt in favour of him. But if you are satisfied that he was the person, that Laban Francis recognised him, and if you accept Laban Francis' evidence, then, you'll have very little difficulty in finding as a fact that it was the Accused.

And he said, he can't recall if he told the court, that's the Magistrate's Court, that the Accused was waiting for the Deceased. It is not true that when he first saw Dwain that night, the light was off – went off. The light went off but the place did not go totally dark. He said he used to have an outside light at the house. The light was off when he first saw Dwain. The place was not totally dark. He said he used to have an outside light at the, at the house. The light was off when he first saw Dwain. The place was not totally dark. … Yes, it was dark when he just - - when the light on the lamp post went off. And he said he agreed at that night, he had no outside light - - outside bulb - - it was not on. It is right that the lamppost had a, a chak, that is, it goes off suddenly and comes back on suddenly."

Submissions by counsel for the appellant

[30] Mr. Innocent, learned counsel for St. Brice, complained that the evidence presented several difficulties of identification. He pointed to discrepancies in the identification evidence of the main witness for the prosecution, Laban Francis, contained in his 2 statements to the police. He also noted the uncertainties in the evidence which Laban Francis gave at the trial concerning the state of the lighting and where he was when he heard the shot. Mr. Innocent submitted that that evidence indicated that the conditions in which Francis said that he identified St. Brice and the circumstances in which he said it happened made his identification evidence poor and unreliable. Mr. Innocent also referred to the absence of an

identification parade and the fact that the evidence of Laban Francis with respect to having identified St. Brice as the perpetrator was led at the trial otherwise than in conformity with appropriate practice.

[31] Mr. Innocent insisted that it was also critical that the only positive evidence of identification of St. Brice came from Francis, who was arrested as a suspect for the murder and who therefore had an interest to serve as an accomplice. Mr. Innocent noted that Paul Sonson gave his statement to the police over a year after the incident occurred. He asked this court to note that there was no other evidence, scientific or otherwise, which linked St. Brice to the commission of the offence.

[32] Mr. Innocent insisted that in light of the difficulties that he highlighted, it was incumbent on the trial judge to give a prudent, careful and comprehensive warning to the jury based on the Turnbull guidelines. He said that the trial judge should have warned the jury in a systematic manner to ensure that they understood clearly the reasons for the need for caution.

[33] In the end, however, Mr. Innocent accepted that the trial judge gave a comprehensive Turnbull direction and that he mentioned the factors that may cause the identification or recognition to be unreliable. He submitted, however, that the judge erred in that he failed to treat each of these factors separately and failed to highlight the evidence related to each factor before moving on to consider the other factors in turn. He said that it was particularly necessary that the judge should have taken special care to give full, precise and adequate directions and warnings to the jury on the identification evidence because he had adjourned the case for a week after the trial was well underway and because the prosecution's case which so heavily relied on Francis' identification evidence was weak. He insisted that in these circumstances the judge should have led the jury to the parts of the identification evidence that were unreliable and he should also have told them why those aspects were unreliable.

[34] Mr. Innocent cited as authority the judgments and decisions of the Privy Council in Leroy Langford and Mwanga Freeman v The State of Dominica,[29] and in Garnett Edwards v The Queen,[30] in particular, to support his submissions. He insisted that it appears that the trial judge made errors that were similar to those which the judge made in Langford and Freeman, in so far as he failed to tailor his summing up to highlight the strengths and weaknesses of the identification to assist the jury to clearly appreciate and weigh that evidence in reaching a verdict. He further submitted that the trial judge failed to tailor his summing up in the manner as suggested in Langford and Freeman, in that whereas he identified the evidence capable of supporting identification he failed to relate each of the material factors in the particular case to the evidence given at the trial. Mr. Innocent submitted that although the judge gave the required warning with respect to mistakes made in recognition cases and, as in Langford and Freeman, the judge gave a proper general direction on identification and fully and accurately recounted to the jury the evidence led at trial, he failed to examine the aspect of the unreliability of Laban Francis' evidence.

Submissions by counsel for the prosecution

[35] Learned Crown Counsel, Ms. Gardner, submitted that the identification directions adequately complied with the requirements of the Turnbull guidelines and section 102(1) of the Evidence Act. She said that the terms of this subsection are virtually identical to the guidelines.[31] She pointed out that although Mr. Sonson did not know St. Brice, he described him as a tall slim man wearing a "tam" and this coincided with the evidence of Laban Francis. She submitted that the trial judge had correctly told the jury that if they accepted the evidence of Laban Francis it could have been corroborated by the evidence of Paul Sonson and this was in keeping with the principles in Thomas Henry Weeder[32] and Anthony Barnes.[33]

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[29] [2005] UKPC 20; [2005] 66 WIR 194.
[30] [2006] UKPC 23; (2006) 69 WIR 360.
[31] See Tab. F pages 61-63 of the Record of Appeal.
[32] (1980) 71 Cr App R 228, at page 231.

[36] In Weeder, the English Court of Criminal Appeal, inter alia, reiterated the relevant Turnbull guidelines as follows:

> "(1) When the quality of the identifying evidence is poor the judge should withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification. The identification evidence can be poor, even though it is given by a number of witnesses. They may all have had only the opportunity of a fleeting glance or a longer observation made in difficult conditions, e.g. the occupants of a bus who observed the incident at night as the bus drove past.
>
> (2) Where the quality of the identification evidence is such that the jury can be safely left to assess its value, even if there is no other evidence to support it, then the trial judge is fully entitled, if so minded, to direct the jury that an identification by one witness can constitute support for the identification of another, provided that he warns them in clear terms that even a number of honest witnesses can be mistaken."

[37] Ms. Gardner insisted that given the evidence of Laban Francis, as supported by that of Paul Sonson, the matter fell within the second mentioned guideline and the judge gave the appropriate direction backed by the warning. Ms. Gardner submitted that the learned trial judge complied with the principles stated in Langford and Freeman because his directions show that he was seized of the importance of identification in relation to a witness who said that he knows the accused. He also directed the jury on mistaken identity and he did not diminish the need for a Turnbull direction since he addressed the issue of identification in 3 pages.

Did the judge err in his identification directions?

[38] In relation to the Turnbull principles, I stated in Gerald Joseph that the trial judge should have considered, for example, the circumstances under which the identification was made. He should also have identified and dealt with any specific weaknesses which appeared in the identification evidence. The trial judge should thoroughly examine the identification evidence presented by the prosecution, in

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[33] [1995] 2 Cr App R 491.

accordance with section 102 of the Evidence Act, supplemented by the Turnbull guidelines.[34] I concluded from the terms of the directions in Gerald Joseph that the judge had given very adequate Turnbull directions in the light of the identification evidence.

[39] In the Reference, the Barbados Court of Appeal thought that there should have been a thorough examination of the evidence of the complainant and her sister in accordance with section 102 supplemented by the Turnbull guidelines.[35] In this regard, the Court stated that the evidence of the complainant's sister was strongly supportive of the complainant's evidence, which was capable of standing on its own because visual identification of one witness could support the evidence of visual identification of another. The Court therefore said that the case was one for the jury[36] because there was cogent, reliable and compelling identification evidence which should have been left for assessment provided that an adequate section 102(2) warning was given.[37] In assessing the identification evidence in the light of the foregoing statements, the Court noted that there was the unshaken evidence of two witnesses attesting to having seen the assailant face to face for between 2 and 5 minutes, in an area lit by two streetlights. The Court noted that each witness gave identical description of the clothes he was wearing. They came as close as 3 feet to him and nothing obstructed their view of him. Two days after the incident they saw the assailant again dressed in clothes similar to those he was wearing on the day of the incident. Both witnesses were able to impart a high degree of particularity in their description of the assailant.

[40] In Langford and Freeman, the appellants were convicted for the murder of Ossie Charles after 11 pm in a street in Roseau, Dominica. They were sentenced to death. They appealed to this court on grounds that raised the issue of identification. By a majority, this court dismissed their appeals against conviction,

[34] See paragraph 42 in Gerald Joseph and paragraphs 36-37 of the judgment in the Reference.
[35] At paragraph 39 of the judgment.
[36] Ibid.
[37] See paragraphs 41 and 42 of the judgment.

but unanimously quashed their mandatory death sentences. On appeals to the Privy Council, their Lordships held that notwithstanding the judge's conscientious efforts to comply with *Turnbull* requirements, the summing up fell short of the standard required to ensure that the difficulties involved in the identification of the appellants were placed before the jury with sufficient clarity in an ordered fashion. Their Lordships concluded that taking the difficulties of the identification evidence and other matters into consideration the convictions could not be regarded as safe. They did not regard it as an appropriate case in which to apply the proviso, because they could not be sufficiently satisfied that a jury properly directed would have reached the same conclusion.[38] They therefore quashed the conviction of each appellant. They held, however, that in view of the length of time, which has elapsed since the incident and the weaknesses in the identification evidence they did not consider that a new trial should be ordered.

[41] It is instructive that in Langford and Freeman, one Joseph Alexander was the main eyewitness to the murder of Charles. The other eyewitness of any note was Roselyn Bridet. Their Lordships noted that there were considerable variations between the identification evidence which they gave.[39] They noted that Ms. Bridet did not recognize any of the 3 men who were allegedly involved in the incident, although she knew Langford before the incident. Her evidence was that she did not see their faces. She described the clothes that the 2 assailants wore and said that they both had locks. Her evidence was that there were no streetlights in the area where she stopped and saw the incident but she was able to see the incident from the lights of a vehicle and from the surrounding business places. Alexander's evidence was that the lights of his vehicle, in which he was seated during most of the incident, were on full beam. Their Lordships said that this evidence raised questions about the sufficiency of the lighting at the scene of the incident.[40] I think that the same comment holds fair in relation to the evidence variously given on the lighting at the scene of the shooting of Andrew at the material time.

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[38] See paragraph 29 of the judgment.
[39] See paragraph 7 of the judgment.
[40] See paragraph 9 of the judgment.

[42] In Langford and Freeman, their Lordships summarized[41] the many difficulties which they saw with the identification evidence thus: Alexander's ability to see the assailants with sufficient clarity to make a reliable recognition, given the state of the lighting, his distance for much of the time from the fracas and the possible obstruction of his view by the minibus; the fact that Ms Bridet did not recognize either Freeman or the victim Ossie Charles, both of whom she knew; the discrepancy concerning the route taken by the assailants to the scene of the incident; the discrepancies in the descriptions of the assailants' clothing; Alexander's estimate of time; his description of Langford running with a knife over the back of the victim; his failure to name Freeman to Inspector Laudat, and the uncertainty of motive for the appellants to attack the victim. Their Lordships said[42] that these difficulties tended to indicate that the light was not good enough for a reliable identification by anyone, or that Alexander was an unreliable historian, or both.

[43] Their Lordships stated[43] that the foregoing circumstances made it incumbent upon the trial judge to give a careful direction to the jury, and it was desirable that he should have tailored it so that the strengths and weaknesses of the identification could be clearly appreciated and weighed up in reaching a verdict. They said that the need for a very careful summing-up on identification or recognition was the greater because there was no scientific evidence linking either appellant with the crime. Neither of them made even a partial admission at any time and Ms. Bridet was unable to make any identification. Everything therefore turned on the reliability of Alexander's account.

[44] Their Lordships noted that the trial judge appreciated this need, because his summing-up in which he dealt with the identification issue contained clear echoes of the classic exposition of the Turnbull guidelines. Their Lordships noted that he

[41] In paragraph 15 of the judgment.
[42] At paragraph 16 of the judgment.
[43] Ibid.

exhorted the jury to carefully examine the circumstances in which the identification by each witness, and in this case the sole prosecution witness, Joseph Alexander was made. He asked the jury to consider, in determining the correctness of the identification of the men by Joseph Alexander, how long Alexander had the accused or the persons he said he saw beating Charles under observation; at what distance? In what light? Whether anything interfered with that observation? Whether he had ever seen the persons he observed before? If so, how often? If only occasionally, had he any special reason for remembering them? How long was it between the original observation and the identification to the police? Whether there was any marked difference between the description given by the witness to the police of the accused persons from when he first saw them and the appearance of the accused?

[45] Their Lordships further noted[44] that the judge then told the jury that he would remind them of the specific weaknesses which appeared in the identification evidence. He went on to deal with the changes in Alexander's evidence about the length of time that he had known Freeman, the errors and discrepancies in his description of the clothing of the assailants, the discrepancies in the witnesses' evidence concerning their hair styles, and Alexander's failure to refer to Freeman by name. They highlighted, however, the fact that the judge did not discuss in specific terms the lighting at the scene, the distance from which Alexander saw the incident, his position when he first recognized the appellants, the possibility that his view may have been obstructed by the minibus, the discrepancy between the witnesses' accounts over the route which the assailants had taken or the obvious incorrectness of Alexander's time estimate.[45]

[46] In my assessment, the trial judge in the present case should have highlighted the variations in the evidence that was given in relation to the lighting.

[44] At paragraph 17 of the judgment.
[45] See also paragraph 26 of the judgment.

[47] Their Lordships commended to trial judges the following statement by Ibrahim JA. in Fuller v The State:[46]

> " each factor or question should be separately identified and when a factor is identified all the evidence in relation thereto should be drawn to the jury's attention to enable them not only to understand the evidence properly but also to make a true and proper determination of the issues in question. This must be done before the trial judge goes on to deal with another factor. It is not sufficient merely to read to them the factors set out in Turnbull's case and at a later time to read to them the evidence of the witnesses. This is not a proper summing up - - - -it will not assist them if the evidence is merely repeated to them. What they require from the judge in the final round is his assistance in identifying, applying and assessing the evidence in relation to each direction of law which the trial judge is required to give them and also in relation to the issues that arise for their determination."

They then stated[47] that another factor of general importance is that, even in cases in which the identification depends upon the recognition by the witness of a person or persons previously known to him, the jury should be reminded that there is room for mistake just as in cases which turn on the identification of a person thitherto unknown to the identifying witness who is recollected by description. In summary, the need in recognition cases for an appropriate Turnbull direction is not diminished.

[48] Similarly, in the judgment of the Privy Council in Garnett Edwards v The Queen,[48] their Lordships said that while the directions on identification correctly set out the proper approach under the Turnbull guidelines, it fell short of giving the jury sufficient assistance in analyzing the evidence and relating it to the principles.[49] It is my view that the summation in the present case also fell short in this respect. It is also my view that the trial judge could have more clearly identified and dealt with any specific weaknesses which appeared in the identification evidence. He should have more thoroughly analyzed the evidence that related to the lighting at the scene at the time when Andrew was shot. In the

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[46] (1995) 52 WIR 424 at page 433. See paragraph 23 of the judgment in Langford and Freeman.
[47] In paragraph 24 of the judgment.
[48] [2006] UKPC 23; (2006) 69 WIR 360.
[49] See paragraph 15 of the judgment.

premises, I would allow the appeal on the grounds that, in the circumstances of the present case, the learned trial judge erred in that he did not direct the jury as fully as he should have in order to satisfy the requirements of section 102(1) of the Evidence Act of St. Lucia, as supplemented by the Turnbull guidelines.

[49] In Gerald Joseph, I found that the trial judge had given very adequate Turnbull directions. I therefore did not allow the appeal on this ground. However, I found that the trial judge did not give the warnings for which subsections 102(2) and 102(3) provided, that were mandatory requirements.[50] In the present case, the judge also failed to give the warnings, which these subsections require. In the premises, I find, as I did in Gerald Joseph, that the learned trial judge erred in that he failed to give these directions, and, consequently, I would also allow the appeal on this ground.

Section 136(2) Warnings

[50] Section 136 of the Evidence Act of St. Lucia states:

> "136(1) This section applies in relation to the following kinds of evidence -
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> (a) … ;
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> (b) identification evidence;
>
> (c) … ;
>
> (d) in criminal proceedings -
>
> (i) …;
>
> (ii) oral evidence of official questioning of a defendant, where the questioning is recorded in writing that has not been signed or otherwise acknowledged in writing by the defendant;
>
> (e) in the case of a prosecution for an offence of a sexual nature, evidence given by a victim of the alleged offence;
>
> (f) … .
>
> (2) Where there is a jury the Judge shall, unless there are good reasons for not doing so -
>
> (a) warn the jury that the evidence may be unreliable;
>
> (b) inform the jury of matters that may cause it to be unreliable; and
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> (c) warn the jury of the need for caution in determining whether to accept the evidence and the weight to be given to it.

[50] See paragraph 42 of the judgment.

(3) It is not necessary that a particular form of words be used in giving the warning or information.

(4) This section does not affect any other power of the Judge to give a warning to, or to inform, the jury.

[51] The present case falls within the ambit of this section, which applies to identification evidence in criminal proceedings. In Gerald Joseph I held that the section does not create a mandatory requirement. However, it would be noted that section 136(2) requires a judge who does not give the warning, which it mandates, to give good reasons for not doing so. In this regard, I noted that in the case, Jerome O'Neal Bovell v R,[51] the Barbados Court of Appeal held that since it is not obligatory for a trial judge to give the section 136(2) warnings if he or she has good reasons for not giving it, the effect of failure to give the warning had to be evaluated in each case, having regard to the totality of the evidence.[52] From that perspective, that Court stated that a conviction will not be automatically quashed in every case in which the warning is not given. I also noted that in Bovell, the Court of Appeal dismissed the appeal notwithstanding that the trial judge failed to give the warning, because that Court found that there was ample other evidence which could have sustained the conviction.

This case

[52] In the present case there was no ample other evidence which could have sustained the conviction. The learned trial judge gave no reasons for not giving section 136(2) warnings. Ms. Gardner said that he did not have to give such reasons because he complied with the requirements of the subsection. She reminded us that subsection 136(3) of the Evidence Act of St. Lucia states that no particular form of words is necessary for the purpose of the section 136(2) warnings. She insisted that, in his summing up, the judge clearly warned the jury that the identification evidence of Laban Francis may have been unreliable and the matters that made it unreliable when the judge stated:[53]

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[51] Barbados Criminal Appeal No. 23 of 2000 (23rd April 2002).

[52] See paragraph 47 of the judgment.

[53] In Part F page 52 et seq. of the Record of Appeal.

> "… the defence have made out to you that Laban Francis is a liar. Laban Francis is not on trial, you must bear that in mind. The police said he was at one time a suspect, because he was a suspect does not necessarily mean that he is untruthful…..you will determine that …you alone can determine the truthfulness of a witness ….you have seen …their demeanour….would you say that because he was a suspect, he had a motive to lie. You will determine that."

She submitted, further, that the judge also clearly warned the jury of the unreliability of the identification evidence and the matters that made it unreliable by indicating to them that there may have been collusion between Laban Francis and Paul Sonson when he told them:[54]

> " … Laban and Sonson put their heads together to tell you a story, ….you may find both accounts of the shooting tallied, did both of them put their heads together, that is a matter for you."

[53] With respect, I do not think that these passages are sufficient for the purpose of warning the jury clearly of the unreliability of the identification evidence and the matters that made it unreliable for the purposes of section 136(2)(a) and (b). It is my view that even if I were to accept that the passages were adequate, and given that the judge warned the jury of the need for caution in determining whether to accept the identification evidence, I have not seen any direction which sought to indicate to the jury the weight to be given to that evidence. In my view, therefore, the judge erred in that the summation did not fully comply with section 136(2)(c) of the Evidence Act of St. Lucia. I would therefore also allow the appeal on the ground that the learned judge erred in that he failed to give adequate directions for the purposes of section 136(2) of the Evidence Act of St. Lucia, and gave no reason for not doing so.

Summary and Order

[54] In my view, the identification evidence is not so weak that the trial judge should have withdrawn the case from the jury. I would therefore dismiss the appeal on that ground. However, I would allow the appeal on the grounds that the trial judge

[54] See Part F pages 59-60 of the Record of Appeal.

erred in that, in directing the jury on identification, he failed to comply with sections 102 and 136(2) of the Evidence Act of St. Lucia. Similarly to the Privy Council in Langford and Freeman, I do not regard this as an appropriate case in which to apply the proviso, because there is little evidence outside of the identification evidence that could link the appellant, St. Brice, with the murder of Dwain Andrew. I therefore cannot be sufficiently satisfied that a jury properly directed would have reached the conclusion to convict St. Brice.

[55] Premised on the foregoing paragraph, I would quash the conviction of the appellant, set aside the sentence, and, as I did in Gerald Joseph, order that there should be a retrial.

[56] In ordering a retrial, I am mindful that in Sherfield Bowen v The Queen,[55] this court opted to use a formulation which ordered that the Director of Public Prosecutions be at liberty to initiate a retrial if he so decided.[56] This formulation was used because this court thought that the judgment of the Privy Council in Andre Bennett and Another v The Queen[57] indicates that this was the desired formulation. It is a formulation, which, in my view, reasonably commends itself in any event. Even if this court orders that a case should be retried, the decision whether there will be a retrial resides ultimately with the Director of Public Prosecutions, in whom the Constitution vests such purview to pursue or discontinue criminal proceedings. I have felt it necessary, however, to review the orders, which the Privy Council has made recently. It is noteworthy that in appropriate cases, their Lordships have either ordered that there should be a retrial or have remitted the matter to the Court of Appeal for that Court to determine whether there should be a retrial.

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[55] Antigua and Barbuda Criminal Appeal No. 4 of 2005 (20th June 2007)

[56] See per Rawlins, JA, at paragraph 47, per Barrow, JA, at paragraph 66, and per Alleyne, CJ, at paragraph 68 of the judgment.

[57] Privy Council Appeal No. 74 of 2000 (Delivered on 17th July 2001.). See particularly paragraphs 36 to 56 of the judgment.

I have accordingly, in ordering that there should be a retrial, erred on the side of abiding by the formulation recently used by the Privy Council.

This is the judgment of the Court.