EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CRIMINAL)

ANTIGUA AND BARBUDA
CASE NO. ANUHCR2015/0103

BETWEEN:

THE QUEEN

-and-

JEMORE ATHILL

Appearances:
Mr. Adlai Smith for the Crown
Mr. Sherfield P. Bowen for the Defendant

2016: October 18; November 23

At the close of the prosecution's case during the trial into a charge of aggravated robbery, on the court's invitation, submissions were made as to whether the quality of the identification evidence was such that the matter should be withdrawn from the jury and a directed verdict given.

Two witnesses testified for the prosecution. The first was the virtual complainant who gave the only evidence related to identification. The second was the investigating officer who took the initial report and obtained two exculpatory statements from the Accused which also raised the issue of an alibi. No disclosure had been given that this alibi was investigated but evidence that it was but that the alibi witness had refused to assist the police, was given at the trial.

During the trial, the virtual complainant stated that he was walking home from King's Casino in St. John; after midnight on the 14th October 2012 when he was attacked and robbed by a man who had 'flung something at his face, and pulled a gun on him. Essentially the identification evidence comprised of one 'glimpse' of a person behind a post at about 1.30 am on a lit street, and a slightly longer moment of observation some 25 minutes later, lasting at best no more than seconds, when the complainant was surprised by a man behind him – on turning this person threw something at him, and he dropped everything he was carrying (chicken, beer, and wallet) to shield his face. Realizing that he had been injured and that he was under attack, he reached for the beer bottle on

the ground and saw the person reaching for and pulling out a gun. He ran for his life. He reported to the police that he had been robbed. His evidence was that he had seen this man several times a month over a period of about eight years on the streets in St. John's. There is no evidence of any description or any feature of the person he saw that night which made him identify or recognize the person that night. About a week later, he returned to the police and informed them of an alias and an address of a person who he said was the robber. He admitted that he had obtained this information from his own investigation by speaking to a certain lady. There was no evidence as to what that conversation was about, or whether he gave that lady any description of the person who had attacked him. The accused was then arrested on the later information and charged. He claimed an alibi but there was no identification parade. In court, the complainant pointed out the Accused as the man who had attacked and robbed him that night.

Held: allowing a no case submission and directing a verdict of not guilty, that

1. Even when a no case submission is not made, a court has a duty when faced with poor and unreliable identification, and there being no other evidence to link the Accused to the crime, to invite submissions and hear both sides on whether the matter ought to be withdrawn from the jury. In these types of cases, it is accepted that as a matter of law, that "[*w]here the quality of an identification is good, the jury can safely be left to assess the value of the identifying evidence even if there is no other evidence in support, provided always that an adequate warning has been given about the special need for caution. However, where in the opinion of the judge the quality of the identifying evidence is poor, he should withdraw the case from the jury and direct an acquittal unless there is other evidence which supports the correctness of the identification. That other evidence may be either corroboration in the legal sense or something which convinces the jury that the identification is not mistaken; any odd coincidence, if unexplained, may be supporting evidence."*

   Applying: *Galbraith [1981] 1WLR 1039 and Turnbull [1977] QB 224*

2. In this case the identification evidence comprised solely of the complainant's evidence that he 'glimpsed' a person behind a post at night, and seeing the 'same' person about 25 minutes later for a fleeting moment made under very difficult circumstances. There is no corroboration in any sense of this evidence. What makes this evidence even more dangerous is that quite apart from the complainant's failure to provide any kind of description of the person the complainant saw that night, the police only arrested the Accused when one week after the robbery, they were given the alias 'Sizzla' and an address by the complainant. There was no evidence how the complainant actually obtained this information and what he may have said to the person who gave him the alias or whether that person even knew the Accused as the person who was named as 'Sizzla'.

   Per Incuriam

3. In cases of this nature, the police ought to request and make a record of a full description of the alleged perpetrator of the offence. That record should form part of the file submitted

to the Office of the Director of Public Prosecutions, and should normally form part of the routine disclosure to the defence. At the trial, statements made by the complainant describing the alleged perpetrator, or a failure to so describe, are admissible as to his credit where it has been suggested to him in cross examination that he failed to give a proper description to the police on making the report.

4. There was a failure in this case by the police to conduct an identification parade or some appropriate identification procedure. Where the police are presented with an assertion from a witness relating to the identification of a suspect, they should always consider whether an identification parade or procedure would serve a useful purpose and whether it would be reasonable to hold an identification procedure such as parade having regard to all the events known to the police at that time.

5. There is no general rule that in a recognition case, that is a case where the witness claims to have recognized someone known to him as being the perpetrator of a crime, the police are not required to hold an identification parade. In such a case, the police must assess carefully the contents of the assertion or report being made by the witness, and go to consider whether there may still be a good reason to hold the parade. Good reason to hold an identification parade even where the identifying witness is saying that he has recognized the defendant, may include situations where the defendant is disputing the identification[1] or where such a dispute may reasonably be anticipated' in circumstances when the subsequent parade may serve a useful purpose.

DECISION

[1] RAMDHANI J. (Ag.) This was an oral decision given during the course of the trial. It was indicated that this would be reduced into writing. This fulfills that promise.

[2] This was a two-witness trial into to a charge of aggravated robbery. It was alleged that on the 14th day of October 2012, at Steven Street, St. John's, being armed with a gun, the Accused Jemore Athill robbed Hamadi Peters of a wallet and cash altogether valued EC$27,200.

[3] Of the two witnesses in this very short case, the first was the virtual complainant. He stated that at about 1:30 am on the 14th October 2012, he was walking going home when he was attacked and robbed. He said that he had been gambling at King's Casino and after he left

[1] R v Palmer (1994) 98 Cr. App. Rep. 191

on his way home, he bought chicken and a beer at Popehead's Street. Just after he had purchased the chicken and the beer, he 'glimpsed' a person behind a post under the Ministry of Social Transformation building. He said that the crossed the road and continued walking towards his home in Villa.

[4] He said that as he was walking along Steven Street, he heard the dogs barking and this caused him to turn around. This was about 25 to 39 minutes after he had glimpsed the man behind the post at the Ministry Building. He said that when he turned, he saw the same man about four to five feet away from him and that the man flung something at him. He said that he dropped everything he had in his hands and threw up his hands to protect his face. He realized that that he was bleeding and he attempted to pick up the bottle that he had dropped to defend himself.

[5] As he reached for the bottle he saw the person pull a gun from his waist or pocket. It looked like a magnum he said. He said he ran for his life to a nearby yard shouting 'murder'. The man came behind him, but after a lady put on her lights, he ran away.

[6] In his evidence in chief he stated that this man he saw is a man he had seen on previous occasions. That he would 'see him whenever he would go out about four times a month' over an eight-year period. He would pass him in the street, but he never spoke to him.

[7] He said that he dialed 911 and called the police who came and he told them that he had been robbed. The police took his report.

[8] He said that he then made his own investigations and spoke to some people including a lady by a place where he had seen the man visit from time to time, and then returned to the police station on the 20th October 2012 and told the police that the man who had robbed him was named 'Sizzla' and he lived near the cemetery in Gambles, St. John.

[9] He said that he knew it was the Accused who robbed him, and in court, pointed out the Accused as the man who robbed him that night four years ago.

[10] The second and final witness was the investigating officer. He said that at about 3.30 am on the 14th October 2012, one Hamadi Peters came into the St. John's Police station and made a report that he had been robbed at Stevens Street. He said that he saw the virtual complainant bleeding and issued him with a medical form but the latter declined the form. He said that the complainant gave him a 'full description' of the robber including 'his nationality'. He did not say what was this description, nor did he say what nationality was said to him.

[11] He said that on the 20th the VC returned to the Station and gave him some information. This information amounted to an 'alias' and an address for the person the complainant believed robbed him. The officer said that on the 21st October 2012, he saw the Accused at the station; he was detained. He interviewed the Accused twice and on both occasions the Accused gave statements denying the offence and gave an alibi that he was with his girlfriend that night together with her son who was sick that night.

[12] This witness gave evidence that he spoke to the girlfriend about this alibi and she refused to give a statement. He accepted under cross examination this was not contained in his police statement but insisted it was in his 'report' which had not been disclosed.

[13] This was the sum total of the relevant evidence on the issue of identification in this case.

[14] At the close of the prosecution's case, the court invited submissions from the Defence as to whether the case should be withdrawn from the jury.

[15] Both sides made submissions on this matter and at the end of those the prosecution conceded that this was not a proper case to go to the jury as the evidence on identification had fallen short.

[16] This Court agrees that this is not a proper case for the Accused to be called upon to answer a prima facie case and that a directed verdict should be returned.

Analysis and Findings

[17] A court is entitled to withdraw a case from the jury where on a submission of no case to answer it is shown *inter alia* that the evidence is so tenuous that no jury properly directed could properly convict on it. The well-used formulation in Galbraith [1981] 2 All ER 1060 is as follows:

> *How then should the judge approach a submission of 'no case' '? (1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case. (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence. (a) Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case. (b) Where however the prosecution 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 upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury…*
>
> *There will of course, as always in this branch of the law, be borderline cases. They can safely be left to the discretion of the judge.*

[18] Where the only evidence in the case relates to the identification of the Accused and a question as to its quality arises the law is well settled: As was held in Turnbull [1977] QB 224:

> *Where the quality of an identification is good, the jury can safely be left to assess the value of the identifying evidence even if there is no other evidence in support, provided always that an adequate warning has been given about the special need for caution. However, where in the opinion of the judge the quality of the identifying evidence is poor, he should withdraw the case from the jury and direct an acquittal unless there is other evidence which supports the correctness of the identification. That other evidence may be either corroboration in the legal sense or something*

which convinces the jury that the identification is not mistaken; any odd coincidence, if unexplained, may be supporting evidence.

[19] That a trial judge should be required to exercise this narrow jurisdiction is well sourced in the jurisprudence of the common law. Over the centuries, the experience of the common law had shown that faulty and unreliable identifications had led to many wrongful convictions and grave travesties were being perpetuated by the very law that sustained our system of public justice. Today, the courts are regularly called upon to treat with such evidence, and in every case these courts remind themselves of the dangers of such evidence. As Mason J stated in Alexander v The Queen:

> *"Identification is notoriously uncertain. It depends upon so many variables. They include the difficulty one has in recognizing on a subsequent occasion a person observed, perhaps fleetingly, on a former occasion; the extent of the opportunity for observation in a variety of circumstances; the vagaries of human perception and recollection; and the tendency of the mind to respond to suggestions, notably the tendency to substitute a photographic image once seen for a hazy recollection of the person initially observed."*[2]

[20] Mr. Bowen for the accused also pointed me to 'the Innocence Project' which provides statistics that in the USA that estimates that 60 of the first 70 exonerated death row prisoners were convicted based in part on mistaken eye witness testimony.

[21] The experience of the common law has led to a recognition that the problem with such evidence is one of reliability as many honest witness bent on telling the truth and being very convinced about it, have erred in identifying persons who he or she swear he or she saw. The joint judgment of Gaudron, Gummow and Kirby JJ in MacKenzie v The Queen adverted to this problem in these terms:

> "Many of the problems which have arisen in respect of identification evidence have occurred not because witnesses have deliberately given false evidence to police, and later to courts, but because *it is an elementary feature of human psychology, in the words of the character witness in this case, to carry 'a true mistake …*

[2] Mason J also stated that: The problems which afflict identification evidence have their origin in four principal sources: (a) the variable quality of the evidence much of which is inherently fragile; (b) the use by the police of methods of identification which, though well suited to the investigation and detection of crime, are not calculated to yield evidence of high probative value in a criminal trial; (c) the consequential need to balance the interests of the accused in securing a fair trial against the interests of the State in the efficient investigation and detection of crime by the police; and (d) the difficulty of accommodating the reception of certain types of identification testimony to accepted principles of the law of evidence."

> *through with … conviction*'. The mind, recognizing perhaps the seriousness of the consequences of error, may seek unconsciously to reinforce conviction of the truth and accuracy of the recall, the subject of the testimony. This can lead to just such risks of dogmatism and certainty that have occasioned the requirements for court warnings in the case of identification evidence so as to prevent the risks of the miscarriage of justice which can otherwise, quite innocently, occur in that context."

[22] The common law had very quickly gotten to the point in recognizing the need to have fair and reliable evidence and developed a practice that whenever identification evidence is being considered as part of the evidence in a case, a court is required to carefully and properly direct the jury of the dangers and difficulties of identification evidence.[3] Special and strict formulations were initially developed and the common law courts are expected to ensure that the sense and spirit of there guidelines are structured in such a way that justice is done in any given case and the jury is fully sensitive to the difficulties and dangers of such evidence.[4]

[23] A number of jurisdictions, including St. Lucia, Australia, St. Kitts and Nevis and Jamaica have taken this a step further, and have actually reversed the common law approach to the admissibility of identification evidence requiring certain matters to be satisfied to ground admissibility.

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[3] Per Baroness Hale in John v The State of Trinidad and Tobago

[4] As Lord Kerr stated in France v The Queen 2012 WL 3062607 Privy Council (Jamaica) "the Board would observe that a formulaic recital of possible dangers of relying on identification evidence, if pitched at a hypothetical rather than a practical (in the sense of being directly related to the circumstances of the actual case that the jury has to consider) level may do more to mislead than enlighten. The purpose of what has become known as a Turnbull direction is to bring to the jury's attention possible dangers associated with identification evidence but that purpose is not achieved by rehearsing before the jury difficulties that might attend that evidence on a purely theoretical basis. A trial judge should always be conscious of the need to relate conceivable difficulties in relying on this type of evidence to the actual circumstances of the case on which they have to reach a verdict. As the Board said in Mills v The Queen [1995] 1 WLR 511, 518 the Turnbull principles do not impose a fixed formula for adoption in every case. It will suffice if the trial judge's directions comply with the sense and spirit of the guidelines.
"It was suggested that seven separate elements had to be present in a judge's charge to the jury in an identification case which relied on purported recognition of the accused. These were (i) a statement that there was a special need for caution; (ii) an explanation of the reasons for such need; (iii) a direction that a convincing witness can be mistaken; (iv) a close examination of the circumstances of the purported identification; (v) a direction as to whether there was any material discrepancy between the description of the accused given to the police by the identifying witness and his actual appearance; (vi) in cases of purported recognition a special warning that mistakes in recognition of close relatives and friends are sometimes made; and (vii) a review of the various aspects of the evidence which were said to support the claimed identification and those which cast doubt on it."

[24] It may be that a common law court would also have this discretion to exclude unreliable identification evidence. This ought to be so, as justice is not static and locked into old ideas without regard to changing notions of fairness. For now, where the evidence has already been admitted, the jurisdiction of the court is clear on its obligation to consider the quality of the identification evidence in keeping with the Turnbull formulation on a no case submission.

[25] The complainant in this case said that when he first saw the person that night he glimpsed him behind a post. Whilst he speaks about light from a street light nearby and the stop lights, he does not say what part of him, face or body was visible from behind the post. The evidence is quite clear that this was a 'glimpse'. He says so twice.

[26] He then says that he walked for 25 to 30 minutes and then on hearing the dogs barking he turns around and sees the 'same' person. Whilst he initially says that his confrontation took about 5 to 10 minutes during which he was looking at his attacker, he accepted in cross examination that it all happened very quickly and more significantly, that when he turned the person 'flung' something at him and he dropped all that he was carrying (chicken beer and wallet) threw up his hands to block his face. He got cut on both his hands and left side of his neck. He said that he reached for the bottle that had fallen to defend himself and when he saw the man pull a gun from waist, he ran for his life.

[27] The complainant stated that it all happened very quickly. What he does not say, is that when he is reaching for the bottle he was looking at the person's face or some other feature which made him recognize who he was looking at. At best the prosecution evidence here is that this was a split moment opportunity for this witness to look at the attacker before he dropped everything and threw up his hands to protect himself from the attack. Moments later he is running screaming murder. This would have been in a state of clear anxiety. He had been walking along on the quiet night street for about 25 minutes to suddenly turn and face an attacker four feet away who to use his words, 'immediately flung' something at him which actually injured both his hands and his neck.

[28] When he first saw a person behind the post at the Ministry Building, it was a fleeting glance. And there is no evidence as to what part of that person he saw since he said that the person was behind a post.

[29] The second time he says he sees that person, is again a split moment or perhaps at best a slightly longer opportunity under very challenging circumstances. He has given no evidence that there was something special or peculiar about this person which made him recognize him.

[30] Even when he reported the matter, there is no evidence of what he initially said except that a man had robbed him. There is no evidence that he told the police that he knew this robber or had seen him previously over the last eight years, or knew where he visited.

[31] Other than saying that a full description including nationality was given by the complainant on the night of the report, the police officer also failed to provide any evidence of this description and in fact failed to say what was reported as the nationality of the alleged robber.

[32] As the Accused sits in the dock he is clearly a man with notable characteristics. He is a black man with locks which is now tied up in a big bun. He has a goatee and has somewhat sunken eyes. There is no evidence that any of this was told the police. There is no evidence that this is what the complainant saw that night behind the post or at Steven's Street. In any event who knows what this man looked like in 2012?

[33] It is perhaps instructive that this so-called identification evidence did not result in an arrest after the report, and it was not until the complainant having carried out his own investigations, returned to the police with a name and an address that the arrest was almost immediately effected.

[34] What is missing from the case, is evidence of those 'investigations'. The complainant did say he spoke to a lady about a person who visited her place, and she gave him a name, but this falls short of ensuring reliability. Who knows what this complainant said to that lady? Did he describe anyone to that lady, or did he simply say something about a man with dread locks? All we know is that he spoke to a third party and that person told him an alias. How would one ever be able to tell that even if he had spoken to that lady about a man with dread locks and there were several such men known to that lady, but that the lady was the one who got the wrong man? How do we even know that that person knew this Accused as that person she named as 'Sizzla; there is no evidence confirming that this Accused ever visited that person's residence.

[35] What compounds this is that after he got the alias for whatever description he gave, and he told the police, this Accused was arrested. He was interviewed twice and then charged. The investigation thereafter was packed up.

[36] Was there the view by the police that there was no need to do anything more? Was it perhaps because the complainant was saying that he had seen this man previously and he had brought in an alias and an address? Was it that the police were looking at this as a recognition case? Was that why an identification parade or procedure was not adopted?

The Failure to Conduct an Identification Parade

[37] Arguments were initially taken in this matter by the learned prosecutor that once a witness states that he knows the defendant and has recognized him at the scene of the crime, this would itself amount to the 'identification', and there would have been no need to conduct identification parade. In Goldson & McGlashan v R the Privy Council accepted that:[5]

> *"if the accused is accepted to be a person well known to the identifying witness, no parade need be held". As Lord Hoffmann went on to explain, in such a case, the*

[5] This court was assisted considerably by a paper entitled: 'New Wine in Old Wineskins – Some Development in the Common Law of Evidence' by Justice Dennis Morrison.

witness would naturally pick out the person whom he knows and whom he believes that he saw commit the crime. Further, the evidence of the parade might mislead the jury into thinking that it somehow confirmed the identification, 'whereas all that it would confirm was the undisputed fact that witness knew the accused'.

[38] Some of the cases show vivid examples where the circumstances make it unreasonable to require law enforcement to conduct an identification parade as in R v Thomason 'where the identification of the person was made only minutes after the incident and before the police have arrived.

[39] The same conclusion was arrived at in R v Reed and Carberry.[6] In this case, the police investigating a report of burglary gave chase to a suspicious car seen in the vicinity of the crime and managed to bring the escaping car to a stop. Two men jumped out and ran off. Stolen goods fell out of the car at that time. During the course of the car chase one of the officer in the police vehicle observed one of the persons in the car turn back and glance at her. Two other officers who had been alerted to escape of the men who had decamped the car, about five minutes later returned to the scene where the vehicles had stopped with one of the men they suspected as having been one of the passengers of the car. The police officer immediately identified him as the passenger she had seen in the car who had glanced back at her. At the trial, arguments were taken that those police officers should have taken the suspect to the police station and should not have returned him to the scene. At the station a proper identification parade should have been held, it was argued. In rejecting these arguments and admitting the evidence, the court reasoned as follows:

"Here, the police were involved in the very incident giving rise to the charges and the apprehension and return of a suspect to that scene a very short time after that incident does not appear to me to give rise to a situation where it could be said that an identification parade should be held before identification evidence could be given. The circumstances of the identification can be regarded as part of the continuum surrounding the offence to be taken into account having regard to s 114(3)(c)(ii) of the Evidence Act. I do not consider that the arresting officers can be said to have acted unreasonably in returning the person whom they had just apprehended to the stopped vehicle or that there was any circumstance calling for them to act in any different way. Once the accused was seen and purportedly recognised by Constable Warden, the prospect was that any subsequent identification parade involving Constable Warden would be affected by the

[6] [2003] ACTSC 6

identification already made and be a pointless exercise (R v Leroy and Graham [2000] NSWCCA 302 (unreported 17 August 2000) [18], DPP v Donald [1999] NSWSC 949).”

[40] In R v D[7], ‘D was charged with assault occasioning actual bodily harm. Immediately following the assault, the complainant went to his workplace and told his workmates that he had been assaulted by D. The next day he reported the assault to police and identified D as one of his assailants. The complainant knew D from their schooldays. D applied for a ruling that evidence by the complainant's identification of his assailant as D, be excluded.’ It was held *inter alia* that ‘on the facts, it would have been impossible to hold an identification parade that included D prior to the making of the identification, and therefore it would not have been reasonable to have held one.’

[41] This last case is really crucial in making the point that in some cases there can be no doubt that the defendant has been recognized and the evidence is prima facie very credible. In these cases, any analysis at the time of a decision as to whether to conduct a parade leads irresistibly to the conclusion that it would have been unreasonable to require the police to conduct an identification parade.

[42] A vivid illustration of this is also found in traffic stop cases. One example of this is the case of Wade v Evans[8] where it was argued ‘that the magistrate erred in the way she dealt with the identification evidence. The evidence was the evidence of the officers conducting the random breath testing where the vehicle was stopped, to the effect (1) that they identified W as the person whose photograph was on the licence there produced; and (2) that the address provided by that person was in fact the address of W's girfriend. W and his girlfriend gave evidence to the effect that he was not driving a vehicle that night, evidence rejected by the magistrate. W argued that the respondent's evidence was unreliable and should not have been accepted. The respondent argued that the identification was admissible pursuant to s 114 of the *Evidence Act 1995* (Cth) as at the time of the

[7] R v D 220 FLR 169 187 A Crim R 521; 2008 WL 4176786; [2008] ACTSC 82; [2009] ALMD 142; 2 ACTLR 225, Supreme Court of the Australian Capital Territory

[8] 180 FLR 290 39 MVR 301; 2003 WL 22457005; [2003] ACTSC 85; [2004] ALMD 4083 Supreme Court of the Australian Capital Territory

identification when the decision was made to proceed against the driver by way of summons, it was not reasonably practicable to conduct an identity parade. It was held that 'the magistrate did not err in admitting the identification evidence.' The court reasoned that 'if this is not sufficient evidence of identification, the Court would be sending a message to police that it is never appropriate to proceed by way of summons, because a driver stopped and producing a photographic driver's licence may later challenge whether he or she was the driver. Should police proceed by way of arrest in all cases, immediately detaining all persons alleged to have committed driving offences, and only releasing them upon some further proof of identity.'

[43] There are then those cases that actually make the point that not only will an identification parade not serve a useful purpose, but it might also have the effect of contaminating the earlier identification evidence.

[44] In DPP v Donald & McEntee, the victim had been robbed by three young women on the 12th November 1998. On the 28th November, the victim was driving along when she saw the two defendants and recognized them as two of the three who had robbed her. She reported the matter to the police, and the two were arrested. The magistrate had ruled the evidence inadmissible on the basis that an identification parade should have been held following the arrest of the two women having regard to the provisions of section 114(2) of the Evidence Act. On the application to review the magistrate's decision, Bell J of the Supreme Court, found that 'the identification, upon which the prosecution relied, was the act of identification prior to the arrest of the two defendants. It was not possible for the police to have held an identification parade prior to that time.' Bell J accepted 'that had the police arranged an identification parade following the arrest of the two defendants any identification made at that parade by Ms Flinders might be said to have been contaminated by her earlier identification of the two women…'

[45] I would agree with the learned prosecutor that it follows as a matter of logic, that to require law enforcement to resort to any of the other available identification procedure in these types of cases may equally be without any rational basis.

[46] On the other hand, the common law has shown that the identification parade or other identification procedures, such as photo line-ups or confrontations are in certain cases important to the investigation process in promoting the reliability of the identification evidence. In this regard, experience had shown that good reason to conduct a parade even where the identifying witness is saying that he has recognized the defendant, may include situations where the defendant is disputing the identification[9] or where such a dispute may reasonably be anticipated', and the circumstances indicate that a parade would serve a useful purpose.[10]

[47] The case of Goldson and McGlashan is a good example of such a dispute. In this case the appellants had been identified by the witness by the use of nickname. From the outset this appellant had stated that the witness was not known to him and that he was not known by this nickname. The Privy Council accepted that where there is a dispute as to whether the defendant is known to the witness, this would have been good reason to have held a parade even where the witness was asserting firmly that she knew the appellant. Lord Hoffman stated:

> *"The normal function of an identification parade is to test the accuracy of the witness's recollection of the person whom he says he saw commit the offence. Although, as experience has shown, it is not by any means a complete safeguard against error, it is at least less likely to be mistaken than a dock identification. But an identification parade in the present case would have been for an altogether different purpose. It would have been to test the honesty of [the witness'] assertion that she knew the accused."*

[9] R v Palmer (1994) 98 Cr. App. Rep. 191

[10] See R v Graham (1994) Crim. Law R 212 C.A. The Privy Council in John v The State of Trinidad and Tobago point to 'two English cases where there was "a dispute over whether the accused was in fact a person known, or sufficiently known, to the witness" and where the convictions had been set aside as unsafe because, in the absence of a parade, the evidence of identification (in each case by way of dock identification) was regarded as too weak to support the conviction.' The first is 'R v Conway (1990) 91 Cr App R 143 the witness said that she knew the accused, had seen him in a public house and entertained him to dinner, but did not know his name, where he lived, or anything of importance about him. No identification parade had been held despite the accused having denied that the witness knew him and having expressly requested a parade.' The second, is 'R v Fergus [1992] Crim. L.R. 363, where the witness had claimed only to have seen the accused once and to have heard his name from someone else, the Court observed: "The case where the complainant had seen the assailant only once or on a few occasions before might well be treated as that of identification rather than recognition."

[48] The cases do show that the police must nonetheless be careful to assess what the witness is really saying in any given case, and notwithstanding he is asserting that he has 'recognized' the defendant, it would be sensible to consider whether there may still be a good reason to hold the parade. The police should ask themselves whether there is some good reason, that is, any useful purpose[11] to hold such a parade where the witness was contending that he knew the defendant and recognized him at the scene of the crime or very shortly thereafter.[12]

[49] In fact, the Privy Council[13] has made the point that where the offence charged is a serious capital case, 'it would have been good practice for the police to have held an identification parade unless it was clear that there was no point in doing so. This would have been the case if it was accepted, or incapable of serious dispute, that the accused were known to the identification witness.' The cases have recognized that where the identification evidence amounts to a 'recognition' which is in real and serious dispute, a court at trial or the appeal court may take the position that the failure to hold the parade may actually deprive the defendant of 'the possibility of a change of mind and/or a failure to identify' him at such a parade.[14]

[50] One of the significant cases making the point that as an identification parade is necessary where it would serve a useful purpose is John v The State of Trinidad and Tobago [2009] 75 W.I.R 429. In this case the Privy Council expressed the view that where the offence is a capital charge carrying the possibility of a death penalty, and there is a dispute about the correctness of the identification, a parade should have been held as there was nothing to lose by holding a parade and it would have eliminated the risk, however small, of a false dock identification.[15]

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[11] Hobhouse LJ stated in R v Popat 1998] 2 Cr App R 208, 215: "There ought to be an identification parade where it would serve a useful purpose.'

[12] Rowe P in R v Oliver Thompson; that is, that "…it is certainly unusual for the police to decide to hold an identification parade for a suspect whom they know is well-known to the witness

[13] Goldson & McGlashan v R (2000) 56 WIR 444

[14] R v Harris [2003] EWCA Crim 174

[15] It is easy to see how the police may decide that where it is simply the credibility of the witness at stake that they may safely be able to avoid holding an identification parade, as the witness would simply pick out the person who he is saying he saw. John was a case where the witness was an accomplice and it is possible that the Board may have concluded differently had the witness been a presumptively neutral person. There is a greater reason why the police in

[51] In John, addressing the question of how to assess whether an identification parade would serve any useful purpose, Lord Brown considered three possible situations: the first where a suspect is in custody and a witness with no previous knowledge of the suspect claims to be able to identify the perpetrator of the crime; the second where the witness and the suspect are well known to each other and neither disputes this; and the third where the witness claims to know the suspect but the latter denies this. In the first of these instances an identification parade will obviously serve a useful purpose. In the second it will not because it carries the risk of adding spurious authority to the claim of recognition. In the third situation, two questions must be posed. The first is whether, notwithstanding the claim by a witness to know the defendant, it can be retrospectively concluded that some contribution would have been made to the testing of the accuracy of his purported identification by holding a parade. If it is so concluded, the question then arises whether the failure to hold a parade caused a serious miscarriage of justice."[16]

[52] The approach of the cases really reflects modern standards of fairness having regard to the very practical considerations such as time and resources in requiring the police to employ an identification procedure where it would serve a useful purpose and promote a fair trial. Even the present Code D of the English Police and Criminal Evidence Act 1984 (PACE 1984) has recognized the necessity to ensure that a common sense and practical approach to require, as a mandatory matter, where a witness expresses the ability to identify the suspect, the police shall hold an identification parade unless it is not practicable or it would serve no useful purpose in proving or disproving that it was the suspect who committed the offence.[17]

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capital case, should hold the parade where the identification is in dispute, and it is not a question of whether the witness is lying or not. In this latter situation, the views expressed by Baroness Hale who dissented in John comes vividly into focus and as being relevant where the eminent Baroness made the point that in capital cases involving the issue of identification 'the precondition for imposing the ultimate penalty was that the investigation, prosecution and trial were to be conducted with such fairness and propriety that there could be no real possibility of a mistake having been made and the wrong person convicted.' This also becomes more crucial where the identification evidence is the only evidence in the case. On this later point, as a practical matter, the prosecution may well run the risk that the trial judge may conclude that it was unreasonable for the police not to have held a parade in these types of cases and therefore not admit the evidence; in a case where there is no other evidence, the effect of such a ruling would mean that the prosecution would fail.

[16] R v Popat [1998] 2 Cr App R 208 , France v The Queen [2013] Crim L.R. 213 Privy Council (Jamaica)

[17] Code D – Rule 13.2 reads in full: Circumstances in which an eye-witness identification procedure must be held 3.12

[53] The above analysis therefore shows that the fundamental question for the police is whether an identification parade would serve a useful purpose or whether it might even have the effect of adversely affecting the investigation and contaminating the evidence. Further, there is no general rule that an identification parade would serve no useful purpose where the witness is saying that he has recognized the defendant as someone he knows. Where the parade or some lesser procedure would serve a useful purpose it is expected that one should be held or else the prosecution faces the risk that the identification evidence may be excluded or considered inherently unreliable.

[54] In this case an identification parade or some lesser procedure would have served a useful purpose and one should have been employed.

[55] This was a serious charge. A man armed with a gun had committed aggravated robbery at night. The robber had escaped. When the victim made the report he was bleeding from the attack. He had claimed to have glimpsed a man behind a post and that about 25 minutes later he was the subject of a surprise attack by same man who had apparently been following him along the streets of St. John's after midnight. The police had only been able to arrest this Accused after the complainant had carried out his own investigations and brought in an alias and an address one week later. This was surely the smoking gun. It required vigilance. Upon being arrested the Accused denied being the robber. He claimed an alibi and the police was unable to disprove this when as the officer stated the alibi witness refused to cooperate.

Whenever:
(i) an eye witness has identified a suspect or purported to have identified them prior to any identification procedure set out in paragraphs 3.5 to 3.10 having been held; or
(ii) there is a witness available who expresses an ability to identify the suspect, or where there is a reasonable chance of the witness being able to do so, and they have not been given an opportunity to identify the suspect in any of the procedures set out in paragraphs 3.5 to 3.10, and the suspect disputes being the person the witness claims to have seen, an identification procedure shall be held unless it is not practicable or it would serve no useful purpose in proving or disproving whether the suspect was involved in committing the offence, for example:
• where the suspect admits being at the scene of the crime and gives an account of what took place and the eye-witness does not see anything which contradicts that.
• when it is not disputed that the suspect is already known to the witness who claims to have recognised them when seeing them commit the crime.
3.13 An eye-witness identification procedure may also be held if the officer in charge of the investigation considers it would be useful.

[56] Why then was the complainant not brought in to identify this man to ensure that the police had gotten the right 'Sizzla'? This was a failure by the police, and it materially affected the outcome of this case. What resulted was that after this complainant gave the alias to the police on the 20th October 2012, the next time he does anything by way of confirming that police had arrested the right man is during trial on the 13th October 2016 when he pointed out this man in the dock. There was a real risk in this case that this dock identification was false.

[57] This was compounded by the fact that the complainant failed to give any evidence that he had observed any feature of the person he saw that night. The only piece of evidence that he gave a 'full description' of the robber immediately after the robbery came from the investigating officer, who failed to say exactly what description as given. Whilst this officer did say that he had written down the description, this had never been disclosed and was unavailable even during trial.

[58] This was another curious feature of this case, and I am compelled to say that it is important and the police taking the report ought to request and make a full record of any description which is given in these types of cases. The record of such description should be made part of the police file and handed over to the Office of the Director of Public Prosecutions. This record should be made available to the defence as part of normal disclosure. Evidence of any statements made by the complainant relating to the description would be admissible at the trial going to his credit if it is suggested to him in cross examination he had failed to describe his attacker or had described him differently.

[59] In this case the police usual professionalism fell short of the required standard. An identification procedure was required.

[60] More fundamental, the evidence of the identification was so inherently unreliable that it was tenuous. No reasonable jury properly directed on such evidence could return a verdict

of guilty. In these circumstances a directed verdict of not guilty is the only appropriate result.

[61] I thank both sides for their assistance in this matter.

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Darshan Ramdhani
High Court Judge (Ag.)