

ANGUILLA

IN THE COURT OF APPEAL

HCRAP 2008/001

BETWEEN:

DELANO SMITH

Appellant

and

REGINA

Respondent

Before:

The Hon. Mr. Hugh A. Rawlins

Chief Justice

The Hon. Mde. Ola Mae Edwards

Justice of Appeal

The Hon. Mr. Davidson Kelvin Baptiste

Justice of Appeal [Ag.]

Appearances:

Mr. Thomas Astaphan and Mr. Colin Meade for the Appellant

Mrs. Vernetta Richardson and Ms. Edwards for the Respondent

2009: November 16;
2010: March 22.

Criminal Appeal – Murder – Appeal against conviction – whether unsafe – lurking doubt – no case submission – failure to direct jury on alternative count of manslaughter – whether the jury failed to accept inferences on the evidence led at trial – whether the direction on intent was adequate – quality of identification evidence – whether there was a need for a Turnbull warning – whether the credibility or reliability of an eye witness necessitated a Turnbull warning – failure to direct the jury on how to treat the appellant's evidence –

The appellant was convicted of the murder of Clifford Christie and sentenced to life imprisonment. He appealed against his conviction on several grounds including that: (1) it was unsafe having regard to the failure of the trial judge to uphold the no case submission made at the close of the prosecution's case; (2) the trial judge failed to direct the jury to consider the alternative count of manslaughter; (3) the jury failed to accept the directions of the judge on inferences that could be drawn on the evidence led in the trial and that where two or more inferences can be drawn from the evidence that the one favourable to the appellant should be accepted; (4) the jury failed to accept that they were bound in law to accept the inference that was raised by the response of the deceased who on being

questioned by Sergeant Rogers for the third time as to who had injured him, replied “JJ. I want water”. The inference contended for by the appellant was that the deceased was referring to the prosecution’s star witness Jaiden Abbott as the person who had injured him.

The prosecution’s case was that Jaiden Abbott provided an eye witness account of the appellant stabbing Clifford Christie with a chrome knife in the back. Abbott was the only one who gave evidence of the stabbing and that the appellant had a knife. Two other prosecution witnesses stated that the appellant did not have a knife. The appellant denied having a knife and stabbing Christie, indicating that he was the peacemaker in the fight. He also stated that he did not see Abbott with a knife. It should be noted that the appellant also argued that the evidence of Abbott was not credible or reliable and he had lied to the police on a previous occasion.

Held: dismissing the appeal and confirming the conviction and sentence.

1. The evidence of the eye witness could not be described as out of reason and common sense, nor could it be said to suffer from inherent weakness or to be self contradictory but that the evidence was cogent with respect to all the material aspects of the case. The prosecution’s evidence taken at its highest is such that a jury properly directed could properly convict.

R v Galbraith [1981] 2 ALL ER 1060 applied.

R v Shippey [1988] Crim. L.R. 767 distinguished.

R v Pryer Sparks and Walker [2004] EWCA 1163 cited.

2. The trial judge is duty bound on the charge of murder to leave the alternative count of manslaughter to the jury if there is material before the jury to justify a direction that they should consider it. The duty to direct the jury on manslaughter arises if a jury might reasonably return a verdict of manslaughter on the whole of the evidence whether led by the prosecution or by the defence. Absent an evidential basis upon which to leave manslaughter to the jury as an alternative verdict, there was no error of law on the part of the learned judge.

Mancini v DPP [1992] AC 1 applied and **R v Muir** [1995] 48 WIR 262 followed.

3. It was open to the jury to find from the evidence that it was the appellant who had stabbed the deceased. The inference contended for by the appellant that it was Abbott who had stabbed the deceased could not arise on the evidence or on the facts the jury could have found.
4. The trial judge should have directed the jury that even though the attack by the defence was on the credibility and reliability of Abbott’s evidence they nonetheless had to be sure that Abbott was telling the truth and was not mistaken about the identity of the person who had stabbed the deceased. The failure to do so constituted a material omission.

5. In view of the appellant's denial that he inflicted the wounds on the deceased it would have been helpful for the trial judge to give the jury a specific direction as to how to treat his evidence. The trial judge should have pointed out to the jury that if they accepted his evidence or were unsure about it they should acquit him and that even if they rejected his evidence they would still have to be sure that the prosecution had proven his guilt.
6. While the omissions referred to above would have the effect of rendering the appellant's conviction unsafe the court is satisfied that this is an appropriate case to apply the proviso. If the jury were properly directed they would have reached the same conclusion and returned the same verdict.

JUDGMENT

- [1] **BAPTISTE, J.A. [AG.]:** This is an appeal against a conviction for murder. In the evening of 10th November 2006, Clifford Christie (Christie) was fatally stabbed at the Ronald Webster Park in Anguilla. The stabbing stemmed from a brawl involving Christie, Jaiden Abbott (Abbott), Thelston Brooks (Thelston) and the appellant. In February 2008, the appellant was convicted of the murder of Christie and sentenced to life imprisonment.
- [2] Abbott was the main witness for the prosecution. He provided an eye witness account of the appellant stabbing Christie with a chrome knife in the back. The medical evidence confirmed that Christie died as a result of the loss of significant quantity of blood occasioned by stab wounds to the abdomen and back. The medical experts opined that the wounds were consistent with having been caused by a sharp bladed instrument such as a knife. Abbott was the only witness who gave evidence of the stabbing and was the only one who gave evidence that the appellant had a knife. Two other prosecution witnesses, Jordi Vanterpool and Yanique Hodge expressly stated that the appellant did not have a knife.
- [3] The incident which led to the stabbing occurred after a football match at the park. According to Abbott, Thelston and an unknown individual walked past Christie and himself. Christie turned back to Abbott, spoke to him and went down by Thelston and the other individual. Christie was talking to Thelston in the presence of the

other individual. The appellant was approaching Christie and Thelston from the east. Thelston chuckled Christie and Christie chuckled him back. The appellant pulled a chrome knife from his waist and stabbed Christie. Abbott also gave evidence that he threw a bicycle at the appellant. The appellant fired stabs at him and chased him with the knife. He threw a chair at the appellant and jumped over a wall.

[4] The appellant testified on oath. He was in the park with Jordi Vanterpool and Thelston. He and Thelston separated. Then he saw Thelston and an unknown person walking down the road. Thelston and the person passed Abbott and Christie. Then Christie said to Abbott "look the lil mother skunt there". Christie turned around on his bicycle and went back down to Thelston. He chuckled Thelston and they began fighting. The appellant further testified that he went to take Abbott and Christie off Thelston as they were boxing, kicking and choking him. He stated that Abbott started boxing him then burst off running. He ran after Abbott. Abbott threw a chair at him and jumped a wall. The appellant stated that he does not know anything about Abbott throwing a bicycle at him. The appellant denied pulling a knife from his waist. He denied having a knife in his hand. He denied stabbing Christie. He also denied firing stabs at Abbott.

[5] In cross-examination the appellant was asked whether he saw Abbott with a knife during the fight. He replied "I don't know, ma'am. I ain't see him with nothing like that." He stated that he did not see Christie with a knife nor did he see Thelston with a knife. In response to a question from the jury he replied that he did not see anyone with a knife.

[6] Mr. Astaphan, learned counsel for the appellant, attacked the credibility and reliability of Abbott's evidence. In cross-examination Abbott admitted that he lied to the police. That lie related to the statement he made in his police statement that he was on the scene when the police arrived. Mr. Astaphan tried to show that Abbott was not consistent in his evidence, for example on the issue as to whether

he had changed his shirt when he went home. Mr. Astaphan made much of the evidence of the two prosecution witnesses who stated that the appellant did not have a knife. In cross-examination of the prosecution witnesses Mr. Astaphan also explored the lighting conditions at the park at the time of the incident. At the end of it all Mr. Astaphan felt confident enough to make a submission that there was no case to answer. That submission did not find favour with the learned judge. In rejecting the no case submission, the learned judge ruled that: "I am satisfied in taking a view of the evidence as a whole that there is a case to answer." The appellant was eventually convicted, and filed a Notice of Appeal containing 7 grounds. Ground 4 which concerned the admitting into evidence of certain photographs was withdrawn. Additional grounds were also relied on by Mr. Astaphan when he argued the appeal.

Grounds of Appeal

[7] The grounds of appeal are:

1. The conviction is unsafe based on the evidence led at the trial.
2. There is lurking doubt about the guilt of the appellant.
3. The trial judge erred in law in ruling against the no case submission made at the close of the case for the prosecution.
4. The trial judge erred in law in failing to direct the jury to consider the alternative count of manslaughter which was open for them to consider based on the evidence led by the prosecution.
5. The jury failed to accept the directions of the trial judge that where there are two or more inferences that can be drawn on the evidence led in the trial, the jury is bound in law to accept the inference most favourable to the appellant. In particular, the jury failed to accept that they were bound in law to accept the inference that was raised by the response of the

deceased and who, on being questioned by Sergeant Emeris Rogers, for the third time as to who had injured him, replied “J. J. I want water”.

6. The jury was bound in law to accept the inference favourable to the appellant that the deceased was referring to the prosecution’s star witness, Abbott, as being the person who had injured him.

No Case Submission

- [8] Mr. Astaphan contended that the Crown’s case was inherently weak or tenuous and was fortified by the lies of Abbott, the principal witness for the prosecution. The conflicts and inconsistencies in Abbott’s evidence whether taken individually or cumulatively justified the court withdrawing the case against the appellant at the no case submission. Mr. Astaphan argued that there was simply no evidence of a credible nature to link the appellant with the murder of Christie on 10th November 2006. Mr. Astaphan pointed out that Abbott was the only witness who testified to the appellant having a knife. Not only was Abbott’s evidence not supported by any other witness but it was manifestly contradicted by the evidence of the two witnesses for the prosecution, Jordi Vanterpool and Janique Hodge. They both deposed that at no time did the appellant have a knife.
- [9] In advancing his submission Mr. Astaphan relied on the second limb of **R v Galbraith**¹ and placed much emphasis on **R v Shippey**². In **R v Shippey**, Turner LJ held that the requirement to take the prosecution’s evidence at its highest did not mean “picking out all the plums and leaving the duff behind”. The judge should assess the evidence and if the evidence of the witness upon whom the prosecution’s case depended was self contradictory and out of reason and all common sense then such evidence was tenuous and suffered from inherent weakness. Turner J did not interpret **Galbraith** as meaning that if there are parts of the evidence which go to support the charge then that is enough to leave the

¹ [1981] 2 ALL ER 1060

² [1988] Crim. L.R. 767

matter to the jury, no matter what the state of the evidence is. It was, he said, necessary to make an assessment of the evidence as a whole and it was not simply a matter of the credibility of individual witnesses or of evidential inconsistencies between witnesses, although those matters may play a subordinate role. Mr. Astaphan argued that on Shippey's reasoning it would be manifestly unsafe to make a decision on Abbott's evidence that the accused had a knife and stabbed the deceased.

[10] Ms. Richardson argued that **R v Shippey** was not applicable to the case. Abbott's evidence was not self contradictory nor was it out of reason and common sense. Ms. Richardson agreed that Abbott was the only witness to place a knife in the appellant's hand but contended that on the evidence Abbott was the closest person to the fight, was observing the accused prior to the fight, saw him pull the knife from his waist and stab Christie in his back. Abbott was about three to four feet away when the accused tried to stab him with the knife. He ran away from the accused and the accused pursued him.

[11] Ms. Richardson submitted that the evidence led was such that a reasonable tribunal might convict. Further, the case fell within the second limb of **R v Galbraith**, as on one view of the facts there was evidence upon which a jury could properly come to the conclusion that the appellant was guilty. The matter therefore should be left to the jury and the judge was correct in rejecting the no case submission.

The Law

[12] There is settled guidance on the approach of the court in treating a no case submission. Lord Parker CJ in **Practice Direction (No Case Submission)**³ stated that: A submission that there is no case to answer may properly be made and upheld: (a) when there has been no evidence to prove an essential element in

³ [1962] 1 WLR 227

the alleged offence; (b) when the evidence adduced by the prosecution has been so discredited as a result of cross-examination or is so manifestly unreliable that no reasonable tribunal could safely convict upon it. Apart from these two situations a tribunal should not in general be called upon to reach a decision as to conviction or acquittal until the whole of the evidence which either side wishes to tender had been placed before it. If however a submission is made that there is no case to answer, the decision should depend not so much on whether the adjudicating tribunal (if compelled to do so) would at that stage convict or acquit but on whether the evidence is such that a reasonable tribunal might convict. If a reasonable tribunal might convict on the evidence so far laid before it, there is a case to answer.

[13] Then there is the oft-quoted judgment of Lord Lane in **R v Galbraith** in which he laid down the following test:

- (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.

[14] In **Director of Public Prosecutions v Varlack (British Virgin Islands)**⁴, the basic rule was stated as follows:

“The basic rule on a submission of no case at the end of the evidence adduced by the prosecution is that the judge should not withdraw the case if a reasonable jury properly directed could on that evidence find the charge in question proved beyond a reasonable doubt.”

[15] As stated earlier, Mr. Astaphan placed much emphasis on **R v Shippey**. This case was put in its context in **R v Pryer Sparks and Walker**⁵ in which Hooper LJ deprecated resort to the “plums and duff principle”. He pointed out that **Shippey** was a case which depended almost entirely on the evidence of a single complainant whose evidence suffered from internal contradictions and inconsistencies. He treated it as “no more than another case on the facts” and not a case which laid down any principle of law. See **R v Salisbury**⁶.

[16] In **R v Pryer** it was stated:

“27. It has been the experience of at least two members of this court that Shippey is often cited by counsel at the close of the prosecution’s case. What counsel often do is to convey Shippey from what it actually is, namely, a decision on the facts, into a decision on the law. [Counsel] seek to find in Shippey, as many have done before them, some principle of law called the ‘plums and duff principle’.

28. What a trial judge being asked to do when a submission of no case is made...? He has a task to perform which is stated simply and clearly in Galbraith: ‘could a reasonable jury properly directed be sure of the defendant’s guilt on the charge which he faces?’

29. Although the test is a very simple one, it is often difficult to answer the question. Help may sometimes be found in the case of Shippey in resolving the question provided it is remembered that Shippey is no more than another case on the facts.”

[17] What was the state of the Crown’s case at the close of its case? The Crown’s case depended heavily on the evidence of Abbott. Critically Abbott said:

⁴[2008] UK PC 56

⁵ [2004] EWCA 1163

⁶ [2005] EWCA CRIM 3107

“And I see Thelston chuck Clifford, Clifford chuck him back and I see Delano pull a chrome thing from the left side of he waist. Delano pull a chrome knife from the left side of his waist...and head in the direction of Clifford and Thelston. Clifford was facing south. Thelston was facing north and Delano was facing south stabbing up Clifford in he back. So I run in a westerly direction to him; heading to um. Yeah, to Delano and Clifford and them. When I reach close to him, Delano fired to stab me. I took up the yellow bicycle that Clifford was riding and I throw the bike inside of Delano. And now when I see the size of the knife and I see him coming to me again I run in a west direction, to enter the volleyball gate. While I running through the gate Delano fire two more stabs at me and I run in the direction of an iron chair that was on the park. Yeah and I took up the iron chair and I throw in him...I was running in an easterly direction Delano was still behind me and I jump the netball wall. While I was jumping the wall I look back, I see Delano turn back and went back out to the gate...I call Clifford phone. Clifford answer he phone and say “J, I get stab” but I already done know Clifford had done get stab because I see Delano stabbing up Clifford.”

Abbott stated that he jumped back over the wall to go back in the netball field, went back where the incident happened and saw Clifford on the ground. As soon as he reached Clifford, Clifford asked him for water.

- [18] Under cross-examination Abbott admitted lying to the police when he stated in his police statement that he left the park after the police arrived. His evidence in cross-examination was that he was not on the scene when the police arrived. He stated: “I wasn’t there when the police arrived. I went to get help to call he father to get help”. Abbott was also shown his police statement in which he said: “I then changed my shoes and work shirt and I went by the hospital”. In examination in chief Abbott had stated: “After I spoke to my family I went in my room, put a next shirt over my work shirt and then after I catch a lift by the hospital.” In response to a question from Mr. Astaphan as to whether he was saying that putting on a shirt over his work shirt is the same as changing his work shirt. Abbott replied “yeah! That’s what I mean all the time.” Abbott also stated that he can’t recall telling the magistrate at the preliminary inquiry that: “when I told the police that I changed my shirt I was not telling the truth.” At the trial when he was shown his deposition where these words are recorded, he stated that the magistrate “must be misunderstand”. He told the magistrate that he was telling the truth.

- [19] Discrepancies or inconsistencies in the evidence of a witness and the credibility or reliability of witnesses are all matters within the province of the jury. The matters upon which Abbott was found wanting in cross examination, are all within the domain of the jury. The jury may well conclude that whether or not Abbott changed his shirt when he went home or whether he was on the scene when the police arrived were not matters of substance that tarnished his evidence. The jury may also conclude that the lie told by Abbott did not go to a material issue. I must point out here that the evidence of Abbott with respect to the stabbing of Christie by the appellant remained unshaken in cross-examination. It is also noted that the pathologist testified that there were four separate injuries on the body of Christie. They were all stab wounds. One wound was located on the abdomen, two were on the back of the body and the other was on the right upper limb.
- [20] An important plank of Mr. Astaphan's attack related to what he referred to as a manifest contradiction between the evidence of Abbott and two other Crown witnesses Jordi Vanterpool and Janique Hodge as to whether the appellant had a knife. Vanterpool testified to a fight at the park after a football match. The fight involved four persons – Thelston, Christie, Abbott and the appellant. Vanterpool stated that he did not see when the fight started but when he saw the fight, Thelston was fighting with Christie and the appellant was fighting with Abbott. He gave evidence of the appellant chasing Abbott into the park and returning shortly after. In cross-examination, he stated that he did not take his eyes off the activities that were going on with the fight. He could see clearly. He did not see the appellant with a knife in his hand or with anything in his hand during his observance of the fight. The appellant did not have anything in his hands when he was chasing Abbott or when he came back out. He did not see the appellant fire any stabbing motions at Abbott during the time he observed them fighting and getting into the park. He did not see the appellant making any stabbing motion at anyone.

- [21] Janique Hodge testified that she saw two boys fighting and recognized Christie as one of the two. She stated that she saw the boy who was on top of Christie. His hand was moving up and down. She did not know who the boy was. Janique Hodge also gave evidence of Abbott running and somebody running behind him but she did not know the person. When she saw the fight she was over on the next side of the netball court. In cross-examination Janique Hodge stated that the person running behind Abbott did not have anything in his hands.
- [22] Gustave Caines, another prosecution witness, testified that he saw two persons wrestling. A little while after he heard a shouting. He looked up and saw Christie in a crouching position holding his stomach and someone in a white T-shirt standing over him. At that point, he saw someone throw a yellow bike at the person standing over him. A little while after he saw three persons running. When Caines was cross-examined about the lighting condition he said that it was not clear, it was just after the sun had set. "It was a little fady like cloudy." Caines admitted that he does not have vision in both eyes. He however stated that he does not have a problem with his eyes. He stated that at the time he did not know whether the person he saw in a crouching position was Christie. This was the first time he was giving evidence about the person holding his stomach. He said that he didn't see anybody holding their stomach, he was just saying that now.
- [23] While it is true that Caines resiled from his evidence that he saw someone holding their stomach, his evidence about the throwing of the bike is capable of corroborating that of Abbott. Abbott had testified that when he reached close to the appellant, the appellant fired a stab at him, so he took up the yellow bike that Christie was riding and threw it inside of the appellant. It is also instructive that he gave evidence of the clothing worn by the person standing over the individual on the ground. His evidence that the person wore a white T-shirt is consistent with the evidence of Jordi Vanterpool that the appellant had a white T-shirt.

[24] At the close of its case the prosecution had presented the powerful eyewitness account by Abbott, of the appellant stabbing Christie. Abbott's evidence was unshaken in cross-examination on that issue. The medical evidence clearly stated that Christie had four stab wounds. While two prosecution witnesses testified that the appellant did not have a knife, the evidence was that one of them, Jordi Vanterpool did not see how or when the fight started. This was certainly a matter for the jury to consider. Further, there was evidence before the jury that Abbott was on the scene from the very start of the incident and was in closer proximity to the appellant at the material time than Jordi Vanterpool and Janique Hodge. In the situation of a chase of the kind described by Abbott it certainly would not be unusual to look back at your pursuer. It would be of interest to know, as the target of the pursuit, whether the pursuer was gaining ground on you.

[25] I am of the view that this case is distinguishable from **R v Shippey**. Abbott's evidence could not be described as out of reason and common sense. Further the evidence could not be said to suffer from inherent weakness or to be self contradictory. Abbott's evidence was solid with respect to all the material aspects of the case. Mindful that **Shippey** does not create any principle of law and applying the basic rule with respect to a no case submission, I have no doubt that the prosecution's evidence taken at its highest is such that a jury properly directed could properly convict. I am satisfied that this ground of appeal must fail.

Alternative Count of Manslaughter

[26] The defence alleges that the trial judge erred in law in failing to direct the jury to consider the alternative count of manslaughter which was open to their consideration based on the evidence led by the prosecution.

[27] The law in this area is well settled. The trial judge is duty bound on a charge of murder to leave the alternative count of manslaughter to the jury if there is material before the jury to justify a direction that they should consider it. The duty to direct

the jury on manslaughter arises if a jury might reasonably return a verdict of manslaughter on the whole of the evidence whether led by the Crown or by the defence. Thus in **Mancini v DPP**⁷, Viscount Simon LC said:

“...it is undoubtedly the duty of the judge in summing up to the jury to deal adequately with any other view of the facts which might reasonably arise out of the evidence and which would reduce the crime from murder to manslaughter ... if there is material before the jury which would justify a direction that they should consider it.”

Viscount Simon added at p 8:

“The possibility of a verdict of manslaughter instead of murder only arises when the evidence given before the jury is such as might satisfy them as the judges of fact that the elements were present which would reduce the crime to manslaughter, or at any rate, might induce a reasonable doubt whether this was or was not the case.”

[28] The question is: was there an evidential basis upon which the trial judge could have left manslaughter to the jury as an alternative verdict? In **R v Muir**⁸, a case relied on by the crown, it was stated at page 265:

“A jury should not be asked to speculate; their verdict must be based on the evidence in the case and the reasonable inferences that can be drawn from proved facts. In **R v Bonnick** (1978) 66 Cr App Rep 266, the court observed that the question of whether there was sufficient evidence to raise an issue fit to be left to the jury was one for the trial judge to answer, applying commonsense to the evidence.”

[29] The foundation of the Crown's case against the appellant was that he inflicted fatal stab wounds with a knife upon Christie. That evidence came from Abbott. The appellant denied having a knife and denied stabbing Christie. He has not admitted the doing of any act which could have caused the death of Christie. Essentially his defence is that he did not cause the death of Christie. I am of the view that on the totality of the evidence the question of manslaughter did not arise. Absent an evidential basis upon which to leave manslaughter to the jury as an alternative verdict, there was no error of law on the part of the learned judge. This ground of appeal accordingly fails.

⁷ [1942] AC 1

⁸ [1995] 48 WIR 262

Intent

- [30] Mr. Astaphan contended that the direction on intent was inadequate. The learned judge directed the jury that the prosecution must make them feel sure that the defendant intended to kill Christie or that he intended to cause him grievous bodily harm. In directing the jury on the issue of intent, the learned judge said:

“How do you decide intent? You decide intent because as you know, intention has to do with your mind. And, of course, none of us can see into a person’s mind. But what the law says is that you can basically determine what was in a person’s mind by looking at all the circumstances and in that way determine what their intention was at the time. So you are looking at your good commonsense and you are looking at all of the factors, all of the circumstances, all of the background. What the defendant did at the time, what he didn’t do, the effect of his actions, inactions what he said during, before and after the incident. You look at all of these factors because all of these things may shed light on the person’s intention at the critical time of the incident.”

- [31] I do not agree that the direction on intent was inadequate. The trial judge made it clear to the jury that they had to decide intent by looking at all the circumstances. They had to consider what the defendant did or did not do [and the effect of his actions or inaction] and what he said or did not say. They should look at his actions before, at the time of and after (the alleged offence). All these things may shed light on his intention at the critical time. In the circumstances, I do not find any inadequacy in the learned judge’s direction on intent. There is no merit in this ground.

Inferences

- [32] The fifth and sixth ground of appeal can be dealt with together. They do not allege any misdirection on the part of the trial judge. On the contrary they allege failure on the part of the jury to accept the directions of the trial judge that where two or more inferences can be drawn from the evidence they must accept the inference most favourable to the accused. In particular, the grounds charge that the jury failed to accept that they were bound in law to accept the inference that was raised

by the response of the deceased who, on being questioned by Sergeant Emeris Rogers for the third time as to who had injured him replied “J. J. I want water”. The jury were bound in law to accept the inference favourable to the appellant that the deceased was referring to the prosecution’s star witness, Abbott, as being the person who had injured him.

[33] The circumstances giving rise to the complaint raised in grounds five and six arose in this way: Sergeant Rogers received a report of an incident at the Ronald Webster Park and proceeded there. He noticed a young man with a large wound on the right side of his stomach and asked the young man if he knew who had injured him. The young man replied: “I want water”. Sergeant Rogers also asked the young man whether he was involved in a fight. The response was: “I want water”. Sergeant Rogers continued to ask the young man whether he knew who had injured him. The young man shouted “J. J. I want water”. PC Gumbs, who is also known as “Avi”, was standing there. The young man said “Avi, I want water”. There was also the evidence of Constable Olivacce that Sergeant Rogers asked Christie some questions and he merely said “give me some water” and in response to a question from Sergeant Rogers as to who had injured him. Christie replied “where is J?”

[34] It is fair to assume that as a general rule juries understand and follow the directions given by trial judges. In **R v Coutts**⁹, Lord Roger stated at paragraph 87:

“The appeal court cannot inquire into what went on in the jury room...yet the foundation of the system of trial by jury is the assumption, which is thought to be borne out by experience, that juries apply the directions which the judge gives them.”

We are dealing here with inferences. Inferences cannot be drawn in a vacuum. The drawing of inferences is really part of the fact finding role of the jury. From the facts found by the jury, they may draw inferences with respect to other facts and they may rely on those inferences in deciding whether or not the accused is guilty.

⁹ [2006] UK H. L. 39

The jury is entitled to draw inferences, that is, come to commonsense conclusions based on the evidence that they accept. They however cannot speculate. Fundamentally, if there are two or more inferences which can be drawn from the facts, the jury must draw the inference that is more favourable to the accused.

[35] The jury had for their consideration the following bits of evidence: the evidence of Abbott that he had seen the appellant stab Christie with a knife; the appellant firing stabs at Abbott; the appellant chasing Abbott after the stabbing; Abbott jumping over a wall. When Abbott got over the wall he called Christie's phone. Christie answered "J. J. I get stab"; Abbott returning to the scene of the incident and as soon as he reached Christie asked him for water.

[36] The jury also heard evidence from the appellant that during the fight he did not see Abbott with a knife. He did not have a knife neither did he see Thelston or Christie with a knife. It certainly would not have been lost on the jury that during cross-examination, it was put to Abbott by Mr. Astaphan that it was he, Abbott, who had a knife and was the one who had stabbed Christie. Not only did Abbott reply that he did not know what Mr. Astaphan was talking about, it is also noteworthy that the appellant did not support that proposition when he gave evidence.

[37] It was open to the jury to find as a fact from the evidence that it was the appellant who had stabbed Christie. No issue or inference as to who had stabbed Christie could therefore arise from the response he gave to Sergeant Rogers. The only conclusion the jury could have arrived at was that there was a seriously injured individual desperately in need of water. The inference contended for could not arise on the evidence or on the facts the jury could have found. These grounds of appeal must accordingly fail.

[38] Mr. Astaphan had also referred to the following passage in the learned judge's summation:

"You will recall that the defence also pointed to the responses made by Clifford Christie to Sergeant Emeris Rogers when he asked him how he

came about his injuries when he shouted “J. J. I want water”. The defence urges that a possible interpretation of that response is that he was saying “J. J.”. “It is a matter for you”.

Mr. Astaphan complained that the direction is incomplete because the learned judge should have further directed that it is a matter for you whether that inference can properly be drawn. While this may be so, looking at the matter in context the jury would have been under no misapprehension that the learned judge meant that it was a matter for them whether that inference could properly be drawn.

Relating Law to Evidence

[39] Mr. Astaphan complained that the trial judge did not relate the law to the evidence. This criticism concerned the grounds relating to lurking doubt, the conviction being unsafe and the alternative verdict of manslaughter. In support of that ground Mr. Astaphan relied on **Alphonse (Denis) v R**¹⁰ where Sing JA said:

“In summing up a case to the jury, a judge should not engage himself in only a theoretical discourse of the law. He should adequately explain how the jury should apply that law to the contesting versions of the facts that had emerged during the case.”

Sing JA went on to cite **Baldeo Dichal v R**¹¹, where it was held that “on a trial of a person charged with murder the judge should relate the law to the facts in the case.”

[40] There is an undoubted duty on the trial judge to relate the law to the evidence. In so far as the complaint of Mr. Astaphan concerning manslaughter it would have no merit as there was no evidential basis upon which manslaughter could be left to the jury. Mr. Astaphan raised the same concern with respect to the issue of a lie told by Abbott. I am of the view that there is no merit in this complaint as the trial judge adequately dealt with that issue in her summation to the jury. For reasons

¹⁰ (1996) 52 WLR 129 at 182

¹¹ (1960) 2 WIR 282

which will appear later I do not find it necessary to address the complaint in the context of lurking doubt or unsafeness of conviction.

Absence of Turnbull Guidelines – Safety of Conviction

- [41] Mr. Astaphan stated quite correctly that only one witness testified that he saw the appellant stabbing the deceased. Mr. Astaphan submitted that when the no case submission was made, the court should have directed the jury in accordance with the guidelines in **R v Turnbull**¹². Mr. Astaphan contended that the Turnbull guidelines require the court to make an initial assessment of the identification evidence and if that evidence is poor and unsupported the case should be withdrawn from the jury.
- [42] **Turnbull** provides that whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting in reliance on the correctness of the identification. When the quality of the 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.
- [43] Ms. Richardson pointed out that defence counsel never conducted the case on the basis that Abbott was mistaken as regards his identification of the appellant. Further, as the accuracy of the identification was not in issue at any time previously the **Turnbull** Guidelines were not applicable. It appears to me that the accuracy of Abbott's identification was not in issue at the trial. The position

¹² [1977] QB 224

adopted by the defence was that no other witness supported Abbott's evidence that the appellant had a knife and stabbed Christie. It was pointed out that two prosecution witnesses Vanterpool and Hodge said in cross-examination that the appellant did not have a knife. Interestingly, Mr. Astaphan put several questions to Abbott in cross-examination indicating that he (Abbott) was the one who had a knife, had rushed to help his friend in the fight and threw the stabs which unfortunately hit Christie. Abbott responded that he did not know what Mr. Astaphan was talking about.

[44] The quality of the identification evidence could not be described as poor thus obliging the judge to withdraw the case from the jury. Abbott stated that he knew the appellant for a long time. The appellant "used to be" his cousin. Abbott was able to describe the knife used by the appellant. He described its length. He also described the close distance he was from the scene when Christie was being stabbed, as well as how near he was to the appellant when the appellant fired stabs at him. He stated that he was able to see what was going on because it was still daylight. Although in cross-examination he stated that it was getting dark but you could still see. It was clear from the evidence of Abbott that it was not a fleeting encounter and he and the appellant were in close contact. He described how the fight started, how he saw the appellant stabbing Christie. He described his own intervention in the fight, his throwing a bicycle at the appellant. He described how the appellant chased him, threw stabs at him, and how he threw a chair at the appellant.

[45] In describing the light, Jordi Vanterpool stated that the "sun had done already set. It was getting kind of dark. You could not really see as good as you would see when it is daylight." Jordi Vanterpool was able to see the four persons who were fighting. He stated that the appellant had on a white T-shirt and Christie had on a white shirt. He also gave evidence of Abbot running into the Park with the appellant behind him.

- [46] The quality of the identifying evidence could not be characterised as poor or unreliable. There would have been no proper basis for the trial judge to withdraw the case from the jury on that issue. In the circumstances the trial judge did not err in not withdrawing the case from the jury.
- [47] Ms. Richardson further submitted that the trial judge was not required to give a **Turnbull** warning to the jury as the issue in the case was whether Abbott was a truthful witness. There was no issue of mistaken identity. The appellant gave evidence that he was present and was the peacemaker of the fight. It was a matter of credibility for the jury whether they believed Abbott. The appellant himself testified that when the fight was taking place it was nearly dark, the sun had just set and he could see. In support of her position, Ms. Richardson relied on **R v Courtneil**¹³. In **Courtneil**, it was held that the sole issue was the veracity of the witness. The defence did not allege that he was mistaken. A **Turnbull** direction in those circumstances would only have confused the jury. There was no evidence of mistaken identification. The appellant himself had said that he had visited the public house on at least three occasions in the previous week and on one occasion stayed for an hour and a half.
- [48] As will be seen shortly, the law has moved on from **R v Courtneil**. In **Beckford v R**¹⁴ the appellants and a co-accused had been charged with murder. The principal crown witness said that he had known one of the appellants for about a year, another since birth and the third from when he was a little boy. He heard two gunshot explosions and saw the three appellants armed with short guns about 8 chains away, subsequently saw them 2 chains away when they ran on to a track. The judge did not give a **Turnbull** warning about identification evidence but did alert the jury to the fact that the issue of identification was critical. The Court of Appeal of Jamaica dismissed the appeal. The Privy Council allowed the appeal. Lord Lowry said at page 415:

¹³ [1990] Crim L.R. 115

¹⁴(1993) 97 Cr App R 409

“The need to give the general warning even in recognition cases where the main challenge is to the truthfulness of the witness should be obvious. The first question for the jury is whether the witness is honest. If the answer to that question is yes, the next question is the same as that which must be asked concerning every honest witness who purports to make an identification, namely, is he right or could he be mistaken?”

Lord Rowry emphasised that the failure to give a **Turnbull** warning will nearly always by itself be enough to invalidate a conviction which is substantially based on identification evidence.

[49] In **Capron v The Queen**¹⁵ at paragraph 16 it was stated that:

“Perusal of the cases where the Board either has, or has not, allowed an appeal where the trial judge has omitted to give a Turnbull direction in a recognition case indicates that, not unexpectedly, the result depends on such matters as whether the evidence is corroborated, whether the conditions for observation were good, whether it was a fleeting glance etc.”

This suggests that even in a recognition case, the trial judge should always give an appropriate **Turnbull** direction unless, despite any defence challenges, the nature of the eye witness evidence is such that the direction would add nothing of substance to the judge’s other directions to the jury on how they should approach that evidence.

[50] The question is whether this is a case where a **Turnbull** direction could be dispensed with or where it could be sufficient to give it in an attenuated form. In this case there is no corroboration of Abbott’s evidence that the appellant stabbed the deceased. With respect to the conditions for observation, the incident occurred towards dusk but from the evidence it appeared that conditions were good enough to see. The identification took place at close quarters. It was not a fleeting glance encounter. The appellant and Abbott were involved in the incident from the very inception. Although the appellant denied having a knife and firing stabs at Abbott, he gave evidence that he chased Abbott and Abbott threw a chair at him. In that regard he supports the evidence of Abbott.

¹⁵(The Bahamas) [2006] URC 34

[51] I am of the view that this was a case in which it was not necessary to give a full **Turnbull** direction. That however, does not dispose of the matter. The trial judge should have told the jury that even though the defence attacked the credibility and reliability of Abbott's evidence and was not saying that he was mistaken about the appellant being the person who had stabbed the deceased, they nonetheless had to be sure that Abbott was telling the truth and was not mistaken about the identity of the person who had stabbed the deceased. That approach would have brought home to the jury that even if they rejected the defence position and came to the view that Abbott was speaking the truth, they still had to be sure that he was not mistaken about the identity of the person who had stabbed the deceased. No such direction was given. This constituted a significant omission in the directions to the jury. What is the effect of that omission on the safety of the conviction? The answer has to be viewed also in context of another aspect of the summation.

[52] In her summation the learned judge identified two critical questions for the jury to answer: "How did Clifford end up with the stab wounds which resulted in his death?" "The critical question is who inflicted those wounds?" The judge went on to ask: "Do you accept Jaiden's account of the incident? If you do then you must go further and consider the issue of self defence." The two critical questions posed by the judge certainly went to the core of the matter.

[53] The prosecution's case was that the wounds were inflicted by the appellant with a knife. In view of the appellant's denial, it appears to me that it would have been helpful for the trial judge to give the jury a specific direction as to how to treat the evidence of the appellant. It would have been instructive to tell the jury that if they accepted the appellant's evidence they should acquit him. If they are not sure about his evidence they should also acquit him. Even if they rejected his evidence they would have to go back to the case for the prosecution and ask themselves whether they are sure of his guilt. They could only convict if they are sure. Although this was not a matter raised by the defence, in the context of this case, this was a significant omission. I am of the view that the two significant omissions

referred to above would have the effect of rendering the conviction of the appellant unsafe. In light of this it is unnecessary to consider the ground of lurking doubt.

Proviso

[54] The question is whether this is an appropriate case to apply the proviso. The applicable test for applying the proviso is that the court would have to be satisfied that if the jury were properly directed they would have reached the same conclusion, that is, they would inevitably have convicted. In all circumstances I am satisfied that this is an appropriate case to apply the proviso. In arriving at that conclusion, I am persuaded by the following factors: (1) the appellant was the only person who was seen with a knife; (2) Abbott and the appellant were on the scene from the very commencement of the incident which led to Christie being stabbed; (3) the appellants involvement in the brawl, although he described his role as that of a peacemaker; (4) Abbott's compelling eyewitness account of the appellant stabbing Christie and (5) the undisputed evidence that Abbott ran away from the appellant and the appellant chased him.

[55] In my judgment there has not been any miscarriage of justice as the jury would undoubtedly have come to the same conclusion and returned the same verdict even in the absence of the omissions. The appeal is accordingly dismissed. The conviction and sentence are affirmed.

Davidson Kelvin Baptiste
Justice of Appeal [Ag.]

I concur.

Hugh A. Rawlins
Chief Justice

I concur.

Ola Mae Edwards
Justice of Appeal