SAINT VINCENT

IN THE COURT OF APPEAL

CRIMINAL APPEAL NO.30 of 1991

BETWEEN:

DOUGLAS HAMLET

Appellants

and

THE QUEEN

Respondents

Before: The Honourable Sir Vincent Floissac - Chief Justice
The Honourable Mr.Justice Byron J.A.
The Honourable Mr. Justice Redhead J.A.(Ag.)

Appearances: Mr. A. Williams for the Appellant
Mr. S. Joseph for the Respondent

1992: April 8, 9;
July 20.

JUDGMENT

REDHEAD J.A. (Ag.)

The Appellant Douglas Hamlet was convicted on 22nd day of October 1991, by a jury for the murder of Fanny Daroux in the Criminal Assizes of October 1991 in St.Vincent and the Grenadines and was sentenced to be hanged.

The deceased up to the time of her death worked as a Fisheries Officer, in St.Vincent and the Grenadines. At about 12.20 p.m. on 18th October 1991, she was seen by some of her colleagues leaving work on her way to her home. Just after the luncheon period it was discovered that a lot of smoke was coming from the house of the deceased. The Fire Brigade eventually arrived on the scene at about 2:25 p.m.

P.C.Brown and other personnel from the fire department arrived at Daroux's house. By this time fire was seen coming from the northern section to the house. Entry to the house was gained through a sliding door by using a fire axe to break the door.

In a northern bedroom which was smoke filled, the body of Daroux was seen lying face down on the floor. The body was clad in black bra and a torn duster. The lower part of the body was naked. There were injuries to the head and blood in both palms of the hands. P.C.Brown observed that there was a broken wooden stool close to the head of the body. The post-mortem examination revealed that the cause of death was due to severe head injuries

with smoke inhalation being a possible contributory factor.

At the trial the only evidence to link the Appellant to the crime was that of Maxwell Samuel a fourteen year old boy at the date of the incident.

He testified that on the day in question he was standing by his aunt's pig pen, some distance away when he observed smoke coming from the house of the deceased. In his testimony before the jury Maxwell said that he saw the Appellant running from the direction of the house. He described the Appellant as dressed in a white cap, white jersey and blue long pants. On oath Maxwell said that the Appellant was running towards a white car, with black streak by the sides and white mag rims. According to Maxwell the car was parked on the other side of the road from the house. He said that before the Appellant got into the car he stopped turned around for about fifteen seconds and looked at the house, then got into the car and sped off. Maxwell said in evidence that when the Appellant turned around the front of the Appellant's body was facing him, Maxwell said he was able to see the Appellant's face. He was able to recognise him as the man running from the house.

Maxwell said at first, on oath, that he had seen the Appellant once before at Arnos Vale at the park. He said the Appellant he had seen, had a gun in his hand setting off sports people going to run. Later in cross-examination Maxwell said:

> " I said I saw him one time before, but I had seen him another time."

Shortly after the incident on 18th October 1990, when Fanny Daroux's body was removed from the house, and the fire was extinguished, Maxwell gave a written statement to the Police. The statement on the face of it speaks of the statement being recorded at 4.20 p.m. In that statement Maxwell said that it was about 2.00 p.m. when he observed that smoke was coming from Daroux's house. It is a reasonable assumption in my view, that the statement was given shortly after the incident. Be that as it may in that statement to the Police, Maxwell did mention that he had seen the Appellant before the date of the incident.

At this point I think it is pertinent to say that the way the trial proceeded, this Court felt it was prudent to see the statement of Maxwell.

He however gave the Police a description of the Appellant and repeated at the trial substantially what he told the police in his

statement. In his statement to the police he said inter alia:-

"I noticed that there was a white car parked in the public road in front of the house, he got into the white car and the car moved off very fast, travelled down the hill towards Cane Hall. The man I saw ran towards the car, is dark in complexion, slim built about 5 ft 8 inches tall and was wearing a long dark to blue pants, a white jersey and a whitish cap. Before he went into the car, he looked back at the house. I could not have seen the registration number of the car, but it is one of the same kind as Mr. Carr at T.G. Agencies car. I have seen the car several times with the dark slim man driving it. I do not know the man's name, but I will be able to identify him anywhere I see him..... The car I am referring to has white mag rims and I like the mag rims and this is why I know that car anywhere I see it in Kingstown."

The defence requested to see the statement from the prosecution made by Maxwell to the police. This the prosecution refused. The defence appealed to the judge to order the prosecution to produce the statement.

This court thinks it is most undesirable that the prosecution would have a statement made by an important witness for the prosecution and when the defence requests to see the statement, that request would be refused.

At an identification parade held two days after the incident, Maxwell picked out the Appellant as the person he saw running from Daroux's house on the 18th October 1990. The Appellant is now appealing against his conviction.

Ten grounds of appeal were filed on behalf of the Appellant, they are as follows:

Ground 1) There was no proper identification parade.

2) The conviction cannot be supported having regard to the evidence.

3) The rule of procedure and evidence not having been strictly followed. There was a miscarriage of justice, and the Appellant may have had a change which was fairly open to him of being acquitted.

4) There being a significant failure to follow the guideline laid down.

In **R v Turnbull 1976 All E.R. Pg. 549.** There was a miscarriage of justice.

5) The judge erred in law.

(a) Having regard to the evidence of Sergeant Cornelius Charles, that he had seen the car registration number P9109 at 1.20 p.m. and having regard to the evidence of Superintendent Rogers that they search several days and several places for the car, that was at the scene of the crime.

The judge should have withdrawn the case from the jury, at the conclusion of the case for the prosecution and directed an acquittal.

(b) The quality of the identification evidence being poor. The judge should have withdrawn the case from the jury and directed there being no other evidence supporting the correctness of the identification.

(c) There being insufficient evidence to support the prosecution case, a submission of no case to answer should have succeeded.

(d) The prosecution witness Maxwell being discredited to the extent, then he was manifestly unreliable to the extent that the judge pointed that out to the jury in her summing up. She should have upheld the submission of no case to answer.

(e) Having regard to the evidence of Anthony Williams and Eric Hackswan as to the height of the hedge at the place where the car was said to be seen, from the evidence of Maxwell Samuel, the judge should withdraw the case from the jury at the conclusion of the case and directed an acquittal.

(f) P.C.Gabriel not having remembered if Maxwell Samuel had told him whether he had seen the defendant before the act of offence, and Maxwell Samuel having said he did not tell Gabriel, because Gabriel did not ask him, the defence on request should have been given a copy of the statement given to the police by Maxwell Samuel.

(g) There being a discrepancy between the evidence given by P.C. Gabriel and Maxwell Samuel, as to the description of the defendant, when he was first described by Maxwell Samuel to the Police, the judge erred in law, in not ordering the prosecution

to supply the defendant with a copy of the statement of Maxwell Samuel, when such a statement was requested by the defendant.

(6) The prosecution's case being based on circumstantial evidence and the investigating Officer, Inspector Caesar not being present to be cross-examined, his statement should not have been admitted in evidence, and the jury should not have allowed to take Inspector Caesar's deposition to assist them in their deliberation, in as much as his evidence conflicted with the evidence of Maxwell Samuel, on the issue of identification.

(7) The case for the defence was not adequately put to the jury.

(8) The language used by the judge in her direction amounted to directing to the jury to return a verdict of not guilty.

(9) The verdict of the jury is unsafe and unsatisfactory.

(10) The judge should have withdrawn the case since she identified numerous material weaknesses in the identification evidence on which the prosecution rested, and expressly stated that there was no corroboration of the eye witness evidence. It is expressly stated in **Turnbull**, the judge should withdraw a case from a jury when the identification was made in difficult conditions "UNLESS there is other evidence which goes to support the correctness of the identification" and again there was no corroboration.

Learned Counsel for the accused argued four (4) grounds of appeal, he argued grounds (3) and (4) together. He dealt with grounds (1) and (2) and particularly (5) separately. I now analyse carefully ground (1). The complaint learned Counsel for the accused made in relation to this ground is that the police officer who was involved in the investigation took part in the identification parade and as a result that vitiated the parade. Learned Counsel quoted many authorities in support of his argument. He referred to **Christopher Innis' Work "Criminal Procedure" 3rd Edition**. At page 375 the learned Author says:

"None of the investigating Officers may take part in arranging of or conducting of the parade."

The record shows that Inspector Caesar who was involved in the investigation took part in the identification parade. There is no provision in the law of St.Vincent and the Grenadines for the holding of identification parade. Section 3(2) **Criminal Procedure Act of St. Vincent and the Grenadines** stipulates that where this is, the practice and procedure observed by the Crown Court in England may be followed.

The practice and procedure followed in England is to be found in Archbold. Learned Counsel referred to **Archbold 42nd Edition paragraph 4305.** It is there stated in the **Home Office circular No.109/1978** on Identification Parades Rules, Rule 9.

> "An officer concerned with the investigation of the case shall take no part of the parade, and if present at the parade shall not intervene in any way and if present should be so positioned that he can at all times be seen by those forming a parade line."

The 43rd Edition of Archbold contains no such rule neither does 1992 Edition of Archbold. However even assuming that there was a breach of this particular rule or code of practice in the holding of the identification parade, the important thing in my view is to see whether any unfairness resulted from the breach. In **Archbold 1992 Edition,** it is there stated as follows:-

> "What was equally important was to see whether any unfairness resulted from the breach. Where there was a breach it was a matter for the trial judge on submission made to him whether or not to allow the evidence to be given."

In the instant case the learned trial judge said in her direction to the jury:-

> "If you find that what Inspector Caesar said helped Maxwell in identifying the accused then the identification was not properly done and you should disregard it and put it out of your minds in considering the evidence."

In my view I think this is a proper direction given to the jury. (See **R v Gall 1990 90 C.A.R. 64**). Even if as Counsel for the accused contends that Maxwell was told by the Officer to pick out the man he saw coming from Daroux's house, there could be no unfairness because Maxwell said that he knew the Appellant and he would be able to recognise him anywhere he sees him. Learned Counsel in addition also attacked fairness of the identification

parade on the ground that he said that the identifying witness Maxwell was told to point out which one of the men he saw running from the house. Counsel said that Maxwell understood the police to say that the suspect was on the parade and that he Maxwell should pick him out. He argued that Maxwell having seen the Appellant in the motor car before the picking out of the Appellant then, under the circumstances his picking out the Appellant was automatic. I do not agree. The record shows that Maxwell said on oath that he knew one other person on the parade, that is someone who pushed a cart down by the market. Secondly and most importantly Maxwell said to the police in his statement of the accused:-

> "I do not know the man's name, but I will be able to identify him anywhere I see him again."

If one is to accept this, Maxwell is saying beyond any doubt that he knows the Appellant. Finally on the point of the identity, learned Counsel submitted that by the statement Maxwell gave, it was the motor car he was identifying and not the appellant. I do not agree. Even so, in my view this submission cannot be in the Appellant's favour. The record reveals that the Appellant was driving his Mother's motor car for the greater part of the day and had the motor car up to and beyond the time the incident occurred. Having regard to what the witness Maxwell, said in his statement about seeing the Appellant driving the motor car, his interest in the motor car and his description of the motor car, it is in my view reasonable, to conclude that in light of the particular circumstances of this case, the motor car is part and parcel of the identifying features of the Appellant. I now turn to consider ground one that the judge did not give proper direction on the question of identification.

At page 135 of the Record the learned trial judge told the jury:

> "The case against the accused depends substantially on the correctness of the identification made by Maxwell Samuel. Defence states that there has been a mistaken identification, that the person seen was not the accused. Defence does not have to prove that it was not the accused. The burden is on the prosecution that it was the accused, and they have to satisfy you beyond a reasonable doubt.... You must use the utmost caution in considering the evidence as it relates to identification, as there is always the possibility that Maxwell might be mistaken. A perfectly honest witness who makes positive identification might be mistaken and not be aware of his mistake, a mistaken witness can be a convincing witness. Mistakes have occurred even where close relatives and friends are concerned, so in order to determine whether Maxwell made a correct identification that it was the accused he saw running to the car outside Daroux's house, you must consider these factors:

> One, the opportunity which Maxwell had viewing the accused, how long did Maxwell have the accused under observation. According to Maxwell he said he was standing by the pig pen, but the man ran to the car, turned around for about fifteen seconds towards the house, then proceeded towards the car. Do you consider that Maxwell had sufficient time to make a ;positive and correct identification? The second factor was the accused known to Maxwell before the 18th October? If so in what circumstances and for what period? If the accused was known to Maxwell before 18th October he is less likely to make a mistake in identification.
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> Mr. Foreman and members of the jury, it is dangerous to convict the accused if, you thought that Maxwell Samuel had only a fleeting glace at the person across the valley, particularly as the person wore a hat and considering the distance across the valley."

It is in my view that in so far as the learned trial judge's summing up is concerned, on the question of identification, was impeccable, no justifiable criticism could be levied at the summing up on this aspect of the case.

Turnbull's case decided among other things:

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

The question that must be addressed here was whether the quality of the identifying evidence in the instant case poor, when Maxwell said that he saw the Appellant's face for about fifteen seconds, was that sufficient time for him to make a positive identification of the Appellant? Was the Appellant known to him before the day in question? He gave the distance from which he said he saw the Appellant. The jury went to the scene and this was pointed out to them.

The trial judge dealt adequately, in my view, with all of the above issues, which were put before the jury. The jury must have accepted all of these issues.

"Is there other evidence which goes to support the correctness of the identification?"

Sergeant Charles gave evidence that about 1.17 p.m. he saw the said motor car pass him. According to Sergeant Charles' evidence the motor car was driving about 30-35 M.P.H. when it passed him. It came to a major road it was supposed to have stopped, but did not stop at the major road and drove straight unto the major road.

It is my view that having regard to the time that Sergeant Charles saw the car and the direction in which it was travelling, lends support to Maxwell's evidence that it was the accused who was driving away from Daroux's premises.

Our attention was drawn to the decision of the Privy Council in **Evans v R (1991) 39 W.I.R. 290** where the prosecution's case that the Appellant murdered the deceased depended solely or substantially on the correctness of the visual identification of the appellant by the deceased's girlfriend. There, Lord Ackner said at p293:

> "But even treating this as a case which did not depend solely on a fleeting glance but upon a witness recognising someone whom she had frequently seen before, her observation of the appellant was made in very difficult conditions. She was suddenly woken up by an explosion. She was lying in an unusual position, across the bed and on her stomach. She merely raised her head to see what could be seen. She did not sit up, let alone stand up, although the judge on two occasions during his summing-up wrongly stated that she got up or stood up and then saw the accused. She was understandably very frightened at the time. Having turned towards the deceased and seeing that he was bleeding and hearing two more explosions, she kept her head down until the men left.
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> In their Lordships' opinion the quality of this identifying evidence was indeed poor. Since there was no other evidence which supported its correctness, the judge, in accordance with the Turnbull direction set out above, should have withdrawn the case from the jury at the conclusion of the prosecution's case and directed an acquittal. His failure so to do is in itself a sufficient reason for the quashing of this conviction.
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> But even if the judge was justified in not withdrawing the case from the jury, his summing-up, as Mr. Guthrie frankly conceded, failed in a number of important respects to comply with the Turnbull guidelines."

The circumstances which determine the quality of the evidence of visual identification in this case are not as adverse as those in **Evans v R.** This is not a case of identification by a fleeting glance. The circumstances of visual identification are not such as to render the evidence of identification so poor as to have warranted the withdrawal of the case from the jury. The learned judge therefore correctly left the case to the jury with a warning to examine the circumstances closely. Moreover, the learned judge fully assisted the jury in an examination of every circumstance mentioned in **Turnbull** and could not have been more critical in that examination.

Learned Counsel referred to a number of cases on the question of identification. Among the cases he referred to are:-

R v Curtis Irvin 23 W.I.R. 434
Jackson and Thomas v R 20 W.I.R. 484
The State v Vibert Hodge 22 W.I.R. p303

The cases that were referred to this court, where the verdicts were overturned on appeal were either the quality of the identification was very poor and or the direction of the trial judge was inadequate. In the instant appeal it is my view, as I have said above, the direction of the trial judge on the question of identification was impeccable. In the instant case it is my view that the quality of the identification is not poor having regard to the fact that the identifying witness said in evidence that he knew the Appellant before. This the jury must have accepted.

In addition the jury had visited the scene and Maxwell pointed out to them where he was when he saw the appellant. Finally there is the evidence of Sergeant Charles who said that he saw the motor car P9109 at about 1.17 p.m. pass him and drove straight unto the main road and did not stop at the stop sign. The motor car turned out to be the same motor car which the accused was driving for the greater part of the day. The time Sergeant Charles saw the Appellant driving his motor car was just after the incident took place. In my opinion that is supporting the evidence of Maxwell that he had seen the Appellant's motor car where he said he had seen it, and from the evidence, it is a fact that the Appellant had the motor car about that time Maxwell said he identified him.

It is my view that there was sufficient evidence for the jury to come to the conclusion that Maxwell's identification of the Appellant was not a mistaken one.

In premise of the foregoing I would dismiss the appeal and confirm the sentence passed on the Appellant.

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A.J.REDHEAD
Justice of Appeal (Ag.)

I concur.

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V.F.FLOISSAC
Chief Justice

I concur.

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C.M.D.BYRON
Justice of Appeal