EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCRAP2013/0003

BETWEEN:

ALLEN BAPTISTE

Appellant

and

THE QUEEN

Respondent

Consolidated with
BVIHCRAP2013/0004

YAN EDWARDS

Appellant

and

THE QUEEN

Respondent

Before:

The Hon. Mde. Louise Esther Blenman	Justice of Appeal
The Hon. Mde. Gertel Thom	Justice of Appeal
The Hon. Mr. Douglas Mendes	Justice of Appeal [Ag.]

Appearances:

Mr. Patrick Thompson for Allen Baptiste
Mr. Andrew Morrison with him, Ms. Ruthilia Maximea for Yan Edwards
Ms. Leslie-Ann Faulkner with her, Mr. Garcia Kirt Kelly for the Respondent
in both appeals

2017: February 1;
2018: January 30.

High Court criminal appeal – Voice identification evidence – Direction to jury – Judge's failure to give direction pursuant to section 112 of Evidence Act of the Virgin Islands and in keeping with Turnbull guidelines – Whether judge's failure rendered conviction unsafe – Whether retrial should be ordered – Factors to be considered in ordering retrial

The appellants, Allen Baptiste ("Baptiste") and Yan Edwards ("Edwards") were convicted of the murder of Keri Harrigan ("Harrigan") and were sentenced to life imprisonment with no eligibility for parole. They appealed their conviction and sentence on several grounds; the main ground being the judge's failure to give the warning required under section 112 of the Evidence Act of the Virgin Islands in relation to the voice identification evidence adduced by the Crown.

At trial, the Crown's case was based on circumstantial evidence with voice identification evidence at the core. While the witnesses for the Crown testified that they saw the gunman, they could not identify him. The visual identification was that shortly before Harrigan was killed, the appellants were seen driving in the area where he was killed in a maroon jeep which belonged to Edward's girlfriend and which he often drove. Cameron, a Crown witness and friend of the appellants, testified that although the tinted windows of the jeep were wound up, he was able to recognise the appellants as the jeep was being driven at a cruising speed. The visual identification was made during the early evening.

The voice recognition evidence came from very short telephone conversations. In relation to Baptiste, Cameron testified that after telephoning Edwards, he recognised the voice of the person who answered Edward's phone to be Baptiste's voice albeit the words spoken amounted to two short sentences. In relation to Edwards, Richards, a Crown witness who had never spoken to Edwards on the telephone testified that he recognised Edwards' voice from only a single word which was said over the telephone. Cameron had, on several occasions spoken to Edwards on the telephone. The day before Harrigan was killed the evidence was that Cameron spoke to Edwards on the phone. On the day of the incident, the words spoken by which he made the recognition were very brief. There was no evidence of the quality of the cellular transmission of any of the telephone calls.

The appellants submitted that it was incumbent on the learned judge to give a warning in accordance with the Turnbull guidelines and section 112 of the Evidence Act. They contended that the judge was required to direct the jury on the circumstances in which the voice recognition was made. The appellants asserted that the failure to give the requisite warning resulted in the summation being unbalanced and thus rendered the conviction unsafe.

The Crown conceded that the judge gave no direction in relation to voice recognition evidence. However, the Crown submitted that the failure to give the warning was not fatal in view of the other circumstantial evidence and the exceptionally high quality of the visual identification evidence of Cameron. The evidence being of a high quality, the jurors would not have arrived at any other conclusion.

This Court therefore had to determine whether the judge's failure to give a direction in relation to the voice recognition evidence as was required under section 112, rendered the conviction unsafe.

Held: allowing the appeal, quashing the conviction, setting aside the sentence and ordering a retrial of the case:

1. Section 112 of the **Evidence Act** of the Virgin Islands is in the same terms as the **Turnbull** guidelines and is applicable to both visual and voice identification. The definition of identification evidence in section 2 includes evidence of voice identification. Thus, when voice identification evidence is admitted, the judge is required to direct the jury on voice identification and in so doing the judge must address the factors outlined in the section. In directing the jury, the judge is not required to follow a specific formula. There may be instances where the evidence is such that some of the factors may be irrelevant. The judge's summation must be tailored based on the evidence adduced at the trial.

   Gerald Joseph v The Queen SLUHCRAP2006/0002 (delivered on 15th January 2007, unreported) followed.

2. In this case, the prejudicial effect of the voice recognition evidence was no doubt considerable. Having regard to the visual evidence, which cannot be classified as of an exceptionally good quality as was found in **Freemantle v R** and **Karl Shand v R**, and the nature and difficulties associated with voice identification evidence as pointed out in the case of **R v Flynn and St. John**, the omission of the learned judge to give the identification direction pursuant to section 112 invalidated the convictions.

   Freemantle v R [1994] 3 All ER 225 applied; **Shand v R** [1996] 1 WLR 67 applied; **R v Flynn and St. John** [2008] EWCA Crim 970 applied.

3. In determining whether a retrial should be ordered, the Court is required to make an assessment of how the interest of justice would be best served. In making that determination, the Court must consider both the defendant's interest and the public interest in convicting the guilty and maintaining confidence in the effectiveness of the criminal justice system. In so doing, the Court is required to consider several factors including whether the defendants could get a fair trial, the time that has elapsed since the commission of the offence and the likely time of the retrial, whether key witnesses for the defendants are no longer available, persons guilty of an offence should not escape because of an error in the summation of a judge, the serious nature of the offence, the prevalence of the offence in the society, and the strength of the prosecution's case. While the offence here was committed six years ago, there was no indication the appellants would be unable to get a fair trial or that the defence witnesses are no longer available. It is also notable that the offence is of a very serious nature. The evidence against the appellants although not exceptionally good was not tenuous. Thus, the interest of justice would be best served if a retrial is ordered.

Sherfield Bowen v The Queen ANUHCRAP2005/0004 (delivered 20th June 2007, unreported) followed; **Reid v The Queen** (1978) 27 WIR 254 applied ; **Bowe v The Queen** [1979] 2 All ER 904 applied.

JUDGMENT

[1] **THOM JA**: The appellants, Allen Baptiste ("Baptiste") and Yan Edwards ("Edwards") were convicted of the murder of Keri Harrigan ("Harrigan") and were sentenced to life imprisonment with no eligibility for parole. They appeal both their conviction and sentence.

Crown's Case

[2] The case for the Crown was that the deceased, Harrigan, as well as the appellants, Baptiste and Edwards and the Crown's witnesses Vaughn "Larry" Cameron ("Cameron"), Henito Penn ("Penn"), Deshon Richards ("Richards") and Keithroy Joseph ("Joseph") were known to each other. They all frequented the Long Look area in the vicinity of the clinic, the chicken shop operated by a woman called "BA", and the residence of Irvin Smith called "Basha".

[3] Baptiste, Edwards, Cameron and Penn were friends. They all knew Allen Wheatley ("Wheatley") who lives in the East End District in a two-storey house. Edwards and Baptiste were regular visitors to his home. Several other young men who reside in the East End District also visited Wheatley's home regularly. Edwards was friends with Harrigan, while Harrigan and Joseph were friends.

[4] On 15th March 2011, at the request of Edwards, who was then a fire officer, Cameron visited the East End fire station. While there Edwards enquired of Cameron whether he had seen Harrigan, to which he responded he did not. Edwards then told Cameron that Harrigan was running his mouth a lot and

that he was going to deal with him. Edwards then asked Cameron to collect his (Edwards) son from school along with some other children.

[5] While Cameron was on his way to the school, he saw Baptiste walking towards the fire station. On his return to the fire station, he met Edwards and Baptiste. Edwards was speaking about a package which was to be delivered by DHL containing among other things two skeleton masks and that he would allow Baptiste to deal with Harrigan. Baptiste agreed to deal with Harrigan. Edwards then told Cameron that he (Cameron) had to get more serious.

[6] Later that evening, Edwards telephoned Cameron and they agreed to meet at Wheatley's residence. When Cameron arrived at Wheatley's residence, Wheatley showed him to a room on the upper storey of the house where he met Edwards, Baptiste and Penn. They opened a box from which they took out a baby stroller, a beach chair, about 5lbs of marijuana, some old shoes, books, three guns – one silver and two black, some .45 ammunition, 9mm ammunition, AK-47 ammunition, and either .357 or .38 ammunition. They all checked the guns to determine whether they were working. Edwards waived one of the guns in the air and said 'I am going to give Keri some of these'. At the request of Edwards, Cameron went to Basha's residence and collected a scale to weigh the marijuana.

[7] On leaving Wheatley's residence, Edwards took the .45 mm gun and ammunition and Penn took the other two guns, the 9mm and .357 or .38 ammunition. Penn testified that the two guns were not working and that he had hid them in his grandmother's yard. He subsequently checked for them but could not find them. Penn testified that he and Edwards made the plan to import the firearms, ammunition and cannabis.

[8] On 16th March 2011, between 6:30 p.m. and 7:00 p.m., Cameron received a telephone call while by the chicken shop. He recognised the voice of the

caller to be Edwards. Edwards asked him if he had seen "the girl". "The girl" was a code for Harrigan. The day before while at the fire station, Edwards had referred to Harrigan as "the girl". Cameron told Edwards that he had not seen "the girl" to which Edwards retorted that Cameron was loafing and sleeping on the block. A few minutes later Cameron saw a maroon jeep, which is owned by Edwards' girlfriend and which Edwards often drove pass by. Cameron recognised Edwards as the driver and Baptiste seated in the front seat of the jeep. Although the windows of the jeep were tinted, Cameron testified that he was able to recognise Edwards and Baptiste as the jeep was not being driven at a fast speed but at cruising speed and it was early evening. Cameron then telephoned Edwards using Richard's phone, Richards was at that time on the opposite side of the road. Cameron recognised the voice who answered the phone to be Baptiste's voice. Baptiste said 'don't worry we already see the girl and when you hear the shots stay put'. At that time Harrigan was by the clinic. Richards confirmed in his testimony that on the evening of 16th March 2011, he lent his telephone with number 441-6646 to Cameron for him to make a telephone call but he did not know who Cameron called. Richards testified that he never made a telephone call to the number 445-6337.

[9] About 7-8 minutes after Cameron spoke to Baptiste, he heard three gun shots in the area of the clinic. He looked in the direction of the clinic and saw Harrigan lying on the ground with a lot of blood by his body. Cameron got into his car with one Mr. Springette and drove to Mr. Springette's residence at Belle Vue and then to West End by a friend. Penn, who was at Basha's residence watching a DVD, also heard three gun shots around 7p.m. Before hearing the shots, he saw a person dressed in black, wearing a black and white mask jump over the fence by Basha's property over to the clinic. After the gunshots, the person jumped back over the fence and left. He could not identify the gunman.

[10] Joseph, who was at the Long Look clinic with Harrigan, also saw a masked man with a gun in his hand and he heard three gunshots. On hearing the gunshots he ran away. He subsequently returned and saw Harrigan on the ground with blood on his face. He gave a description of the gunman to be 5'5" and medium built. He could not identify the gunman.

[11] Around 7p.m., Richards also heard gunshots. About 5 -10 minutes after he heard the gunshots, he received a telephone call and the caller said "Larry". He told the caller that Larry was not there. He recognised the voice to be Edwards's voice. He was very familiar with Edward's voice. He had known Edwards for a very long time although he had never spoken to him on the phone before.

[12] Sergeant Hall, a communications data analyst, testified that based on his examination of the telephone data, on 16th March, 2011 at 7:15:46 p.m., the following telephone calls were made; from telephone 540 3805 (which number was ascribed to Edwards) to telephone 442-6569 (which number was ascribed to Cameron), the call lasted 31 seconds; at 7:22:20 p.m. from 441-6646 (number ascribed to Richards) to telephone 545 6322 (number ascribed to Edwards), the call lasted 22 seconds; and at 8:02:08 from telephone 545-6337 (number ascribed to Edwards) to telephone 441-6646 (number ascribed to Richards) the call lasted 12 seconds.

[13] Dr. Hyma who performed the post-mortem examination testified that Harrigan died as a result of gunshot wounds.

[14] During the police investigations, three spent cartridges were found in the area of the body of Harrigan. Mr. Maurice Cooper, who was deemed a firearm expert, testified that he examined the three cartridges and in his opinion the cartridges were all fired from the same firearm. Mr. Cooper was unable to give an opinion on whether they were fired from a particular type of firearm. In

his opinion, that type of cartridge could have been fired from various types of rifles and handguns. The police also executed a search warrant at Wheatley's home where they found a beach chair and stroller in a room over the garage. Those items were identified by Penn and Cameron as the same items that were taken from the box at Wheatley's house on 15th March, 2011. Wheatley testified for the prosecution that he did not know how the items got to his home.

Defence

[15] Following the arrest of Baptiste and Edward, they both raised the defence of alibi in their interview with the police. Baptiste stated that he was at his home and did not leave until the following day. Edwards stated that he was at Wheatley's residence from around 6 p.m. and only heard of Harrigan's death when Wheatley returned to his home that evening.

[16] At the trial Baptiste did not testify or call witnesses.

[17] Similarly, Edwards did not testify but called two witnesses, Basha and Officer Smith. Basha's testimony in summary was that in March 2011, Cameron was not his friend and that Cameron did not visit his home to borrow a scale. Police officer Smith testified that he had recorded a statement from one Samantha Green who was the girlfriend of Cameron. Ms Green, in her statement, said that Edwards had asked her to destroy Cameron's phone and the call was made on Edwards' phone 445-6337. However, the officer confirmed that during the time it was alleged Edwards made the call he was in custody. The defence relied on this evidence to show that Edwards' phone number was 445-6337 and he did not use telephone with a number commencing 540.

Grounds of Appeal

[18] Both Baptiste and Edwards filed several grounds of appeal. At the hearing of the appeal, while counsel relied on their written submissions, their arguments centred around three grounds, being:

(1) the judge failed to give the warning required under section 112 of the **Evidence Act, 2006**[1] (the "Evidence Act") in relation to the voice identification evidence adduced by the Crown;

(2) the summation was unbalanced which resulted in the trial being unfair and the conviction unsafe; and

(3) the judge failed to direct the jury on how to treat with the evidence of Henito Penn and Vaugh Cameron in relation to the importation of firearms, ammunition and cannabis the day before Harrigan was killed.

Their main ground was ground 1, the judge's treatment of the voice identification evidence.

Voice Identification

[19] In their written submissions, the appellants made submissions both on the admissibility of the voice identification evidence and the failure of the judge to give the jury an appropriate warning in relation to the voice identification evidence. However, at the hearing of the appeal the appellants did not pursue the admissibility issue; the arguments were confined to the failure of the learned judge to give a warning pursuant to section 112 of the **Evidence Act** and in keeping with the **Turnbull**[2] guidelines.

[20] Both Mr. Thompson and Mr. Morrison, counsel for the first and second appellant respectively, submitted that it was incumbent on the learned judge to

[1] Act No. 15 of 2006, Laws of the Virgin Islands.
[2] R v Turnbull [1976] 3 All ER 549.

give a warning in accordance with the Turnbull guidelines and section 112 of the **Evidence Act**. Counsel referred the Court to several cases including the cases of **Gerald Joseph v The Queen**;[3] **R v Flynn and St. John** [4] and **Phipps v DPP**.[5]

Mr. Thompson submitted that there was no evidence that Cameron had ever spoken to Baptiste on the telephone prior to the telephone call of 16th March, 2011 when Cameron testified that he recognised that the person who answered Edwards' phone was Baptiste. Also, only a few words were spoken. In those circumstances, Mr. Thompson submitted that the learned judge was required to direct the jury pursuant to section 112.

[21] Mr. Morrison submitted that the judge was required to direct the jury to consider the following matters in dealing with the circumstances in which the voice recognition was made. In relation to the recognition of Edwards' voice by Richards:

(a) the fact that the witness testified that prior to the telephone conversation whereby he claimed to have identified the Edward's voice, he had never spoken to the appellant via telephone;

(b) the caller did not identify himself;

(c) there was no evidence led as to the quality of the telephone transmission, the presence/absence of ambient noise, and the volume of the caller's speech;

(d) there was no evidence of the distinctiveness of the voice or speech patterns and accents of the caller;

[3] SLUHCRAP2006/0002 (delivered on 15th January 2007, unreported).
[4] [2008] EWCA Crim 970.
[5] [2012] UKPC 24.

(e) the duration of the calls was extremely short – Richards testified that the caller only said "Larry".

[22] In relation to the evidence of Cameron, Mr. Morrison submitted that while there was evidence that Cameron had spoken to Edwards on 15th March when Cameron testified that Edwards telephoned him and requested him to go to the fire station, and Edwards had also called Cameron to arrange for Cameron to meet him "at the top", that is at Wheatley's residence, the caller on the evening of 16th March, only asked whether Cameron had seen "the girl" and admonished him that he was sleeping on "the block". The words spoken were very limited from which the recognition was made.

[23] Mr. Morrison also submitted that the recognition was made by friends and in the case of Cameron, there was evidence that Cameron and Edwards were together the day before at the fire station and at Wheatley's residence. In those circumstances, there was a clear and present danger that the jury would make the seductive conclusion that the witnesses had correctly recognised the voice of Edwards. The learned judge was required to warn the jury that mistaken recognition can occur even of close relatives and friends.

[24] Mr. Morrison also referred to the cases of **Max Tido v The Queen**[6] and **Aurelio Pop v The Queen**[7] and submitted that since no identification parade was held in accordance with section 110 of the **Evidence Act**, the learned judge was required to warn the jury of the dangers of voice identification in the absence of a voice identification parade.

[25] Mr. Kelly in response conceded that the judge gave no direction in relation to the voice recognition evidence. However, he submitted that there was no need for a direction pursuant to section 112, since the cross-examination of the witnesses in relation to the voice identification evidence related not to

[6] [2011] UKPC 16.
[7] [2003] UKPC 40.

mistaken identity but that it was a "frame up" on the part of the witnesses. He relied on the following passage in **Archbold Criminal Pleading, Evidence & Practice**[8] and the decision of the Privy Council in **Omar Grieves v The Queen**:[9]

> "A *Turnbull* warning is not required and would only confuse a jury where, (a) the defence attack the veracity and not the accuracy of the identifying witness; (b) there is no evidence to support the possibility of mistaken identification: *R v Cape* [1996] 1 Cr. App. R. 191, CA: or (c) The identifying witness states that he was mistaken and the prosecution do not rely upon his earlier statement: *R v Davis* [2006] 8 *Archbold News* 4, CA. There is, however, an obvious need to give a general warning even in recognition cases where the main challenge is to the truthfulness of the witness. The first question for the jury is whether the witness is honest; if he is, the next question is the same as that which must be asked of every honest witness who purports to make an identification, namely whether he is right or might be mistaken: *Beckford v R*., 97 Cr. App. R. 409, PC; but the judge need not go on to give an adapted *Turnbull* direction (reminding the jury that people can make mistakes in recognising relatives, *etc*) where such a direction would add nothing of substance to the judge's other directions: *Capron v The* Queen ([2006]) UKPC 34 (considering *Beckford*, and *Shand v The Queen* [1996] 2 Cr. App. R. 204, PC); and see R v Giga [2007] Crim L.R. 571, CA."

Discussion

[26] The issue of voice identification was discussed in the case and of **R v Flynn** and **St. John**. In **R v Flynn and St. John**, the English Court of Appeal heard testimony from several experts on voice identification. The Court summarised the expert evidence which was accepted as follows:

> "(1) Identification of a suspect by voice recognition is more difficult than visual identification.
>
> (2) Identification by voice recognition is likely to be more reliable when carried out by experts using acoustic and spectrographic techniques as well as sophisticated auditory techniques, than lay listener identification.
> (3) The ability of a lay listener correctly to identify voices is subject to a number of variables. There is at present little research about the effect of variability but the following factors are relevant:

[8] Archbold Criminal Pleading, Evidence & Practice (Sweet & Maxwell 2014) 1565 at paras 14-16.
[9] [2011] UKPC 39.

i. the quality of the recording of the disputed voice or voices;
ii. the gap in time between the listener hearing the known voice and his attempt to recognise the disputed voice;
iii. the ability of the individual lay listener to identify voices in general. Research shows that the ability of an individual to identify voices varies from person to person;
iv. the nature and duration of the speech which is sought to be identified is important. Obviously, some voices are more distinctive than others and the longer the sample of the speech the better the prospect of identification.
v. the greater the familiarity of the listener with the known voice the better his or her chance of accurately identifying a disputed voice

However, research shows that a confident recognition by a lay listener of a familiar voice may nevertheless be wrong.…

(4) Dr Holmes states that the crucial difference between a lay listener and expert speech analysis (sic) is that the expert is able to draw up an overall profile of the individual's speech patterns, in which the significance of each parameter is assessed individually, backed up with instrumental analysis and reference research. In contrast, the lay listener's response is fundamentally opaque. The lay listener cannot know and has no way of explaining, which aspects of the speaker's speech patterns he is responding to. He also has no way of assessing the significance of individual observed features relative to the overall speech profile. We add, the latter is a difference between visual identification and voice recognition; and the opaque nature of the lay listener's voice recognitions will make it more difficult to challenge the accuracy of their evidence."[10]

[27] The above shows that voice identification has the same if not more dangers as visual identification. Therefore, the very reasons why the direction is required to be given as explained in **R v Turnbull**[11] in cases of visual identification are also applicable to voice identification.

[28] The issue of whether it is necessary to give a **Turnbull** direction where the challenge to the identification evidence by the defence related to the credibility of the witnesses as was the situation in this case, was discussed in several

[10] [2008] EWCA Crim 970 at para.16.
[11] [1976] 3 All ER 549.

cases including the cases of **Beckford and Shaw v R**,[12] **Karl Shand v the Queen**[13] and **Capron v R**.[14]

[29] In **Beckford** Lord Lowry stated:

> "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?
>
> "Of course no rule is absolutely universal. If, for example, the witness's identification evidence is that the accused was his workmate whom he has known for twenty years and that he was conversing with him for half-an-hour face to face in the same room and the witness is sane and sober, then, if credibility is the issue, it will be the only issue. But cases like that will constitute a very rare exception to a strong general rule."[15]

[30] In **Shand** Lord Slynn having reiterated that the **Turnbull** guidelines applies to cases where the identification is by recognition stated:

> "…The cases in which the warning can be entirely dispensed with must be wholly exceptional, even where credibility is the sole line of defence. In the latter type of case the judge should normally, and even in the exceptional case would be wise to, tell the jury in an appropriate form to consider whether they are satisfied that the witness was not mistaken in view of the danger of mistake referred to in *R v Turnbull* [1977] Q.B. 224."[16]

[31] The Privy Council considered both **Beckford** and **Shand** in **Capron** and stated:

> "The Board notes that in both **Beckford** and **Shand** there is a suggestion that only in "wholly exceptional" or "very rare" cases could a court dispense with giving a *Turnbull* warning even where the main issue is the credibility of the witness or witnesses. In their Lordships' view, experience tends to show the wisdom of Lord Widgery's apprehension in *Turnbull* that using the phrase "exceptional circumstances" to describe situations in which the risk of mistaken identification is reduced would be liable to result in the build-up of case law as to which circumstances can

[12] (1993) 42 WIR 291.
[13] [1996] 1 WLR 67.
[14] [2006] UKPC 34.
[15] At p.298.
[16] At p.72.

properly be described as exceptional and which cannot. Such case law is liable to divert attention from what really matters, which is the nature of the identification evidence in each case. 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."[17]

[32] Also, while in **Flynn and St. John,** the English Court of Appeal was dealing with the issue of admissibility of voice recognition evidence, in the postscript to the judgment, the Court expressed the view that in cases of identification by voice recognition, the judge in his summation must give the jury a very careful direction warning the jury of the dangers of mistakes in such cases. The instant case was a case of recognition by visual and voice identification.

[33] The Legislature of the Territory of The Virgin Islands has enacted legislation to address this issue.

[34] Section 112(1) of the **Evidence Act** provides as follows:

"Where identification evidence has been admitted, the court shall

(a) warn the jury of the special need for caution before convicting on that evidence;
(b) instruct the jury as to the reason for such need;
(c) refer the jury to the fact that a mistaken witness can be a convincing witness, and that a number of witnesses can be mistaken;
(d) direct the jury to examine closely the circumstances in which each identification was made;
(e) remind the jury of any specific weakness in the identification evidence;
(f) where appropriate, remind the jury that mistaken recognition can occur even of close relatives and friends;

[17] [2006] UKPC 34 at para. 16.

(g) identify to the jury the evidence capable of supporting the identification; and
(h) identify evidence which might appear to support the identification but which does not in fact have that quality."

[35] In **Gerald Joseph** this Court considered section 102 of the Saint Lucia **Evidence Act**[18] which is in similar terms to section 112. Rawlins JA adopted the reasoning of the Barbados Court of Appeal in **DPP Reference No. 1 of 2001**[19] and held that the provisions were mandatory as they were stated in mandatory terms. In view of the mandatory nature of the provisions of section 112, it is incumbent on the learned judge when identification evidence is admitted into evidence to give a section 112 direction.

[36] Section 112(a) – (h) is in the same terms as the **Turnbull** guidelines. Section 112 is applicable to both visual and voice identification. The definition of identification evidence in section 2 includes evidence of voice identification. Thus, when voice identification evidence is admitted, the judge is required to direct the jury on voice identification and in so doing the judge must address the factors outlined in the section. In directing the jury, the judge is not required to follow a specific formula. There may be instances where the evidence is such that some of the factors may not be relevant. For example, there may be no evidence capable of supporting the identification, in such case sub-paragraph (g) would not be applicable. The judge's summation must be tailored based on the evidence adduced at the trial.

[37] Section 112 does not require the judge in every case where an identification parade was not held to direct the jury that an identification parade was not held. Depending on the circumstances of a case, the failure to hold an identification parade may be a weakness in the identification evidence. In those circumstances, the judge is required in accordance with section 112 to draw that weakness in the identification evidence to the attention of the jury.

[18] Cap 4.15, Revised Laws of Saint Lucia 2013.
[19] Court of Appeal, Barbados, 26th February 2002.

[38] The judge having given no direction in relation to the voice recognition evidence as he was required to do pursuant to section 112, the critical issue is whether this failure on the part of the judge rendered the conviction unsafe.

[39] Both Mr. Thompson and Mr. Morrison submitted that the failure of the judge to give the direction pursuant to section 112 rendered the conviction unsafe. They contended that there being no visual identification of the gunman, without the voice identification evidence the judge would have been required to uphold a no case submission.

[40] Mr. Kelly submitted in response that the failure to give the warning was not fatal in view of the other circumstantial evidence and the exceptionally high quality of the visual identification evidence of Cameron. The evidence being of a high quality, the jurors would not have arrived at any other conclusion. He relied on the case of **Freemantle v R**[20] and the following passage in **Shand v R** where Lord Slynn in delivering the judgment of the Privy Council referred to the following statement of Lord Widgery C.J in **Turnbull**:

> "A failure to follow these guidelines is likely to result in a conviction being quashed and will do so if in the judgment of the court on all the evidence the verdict is either unsatisfactory or unsafe."

Lord Slynn continued:

> "He [Lord Widgery] thus recognised that there might be exceptional cases where despite the fact that the warning was not given the court could still be satisfied that the verdict was neither unsafe nor unsatisfactory."

[41] In support of his submission Mr. Kelly referred to the evidence of Cameron in relation to Baptiste where Cameron testified (a) he knew Baptiste for 3 ½ years; (b) he heard Baptiste spoke the day before Harrigan was killed when Baptiste said he would deal with Harrigan; (c) the nature of the conversation supported the voice identification – "don't worry we already see the girl, when you hear the shots stay put"; (d) he saw Baptiste in the jeep, he was familiar

[20] [1994] 3 All ER 225.

with Baptiste's voice on the telephone since he spoke to Baptiste about two or three times a week when he drove Baptiste to various places.

[42] In relation to Edwards, Mr. Kelly referred to Cameron's testimony that (a) Cameron knew Edwards for approximately 6 years, he knew Edwards by the name Eddo; (b) he had Edwards' 545-6337 telephone number stored on his phone; (c) he was familiar with Edwards' voice on the telephone; (d) the nature of the conversation supported the voice identification, Edwards asked him if he had seen "the girl" and admonished him that he was loafing and sleeping on the block; (e) he was familiar with the voice of Edwards; (f) the evidence that Edwards was driving the maroon jeep going towards the clinic corroborated the voice identification of Cameron.

[43] In **Freemantle** and **Shand**, the learned judge did not give the jury a **Turnbull** direction. In both cases the Court found that the visual identification evidence was exceptionally good and consequently there was no miscarriage of justice.

[44] It is not disputed that in this case the prosecution's case was based on circumstantial evidence. The voice identification evidence was therefore critical to the prosecution's case. While witnesses saw the gun-man they could not identify him. The visual identification on which Mr Kelly relies in summary is that shortly before Harrigan was killed the appellants were seen driving by the area where Harrigan was killed. According to the prosecution's case, Harrigan was not killed by a drive-by shooting, his attacker was on foot. There was no evidence of the maroon vehicle or either of the appellants in the area where Harrigan was killed at the time of the killing. The visual identification was made during the early evening. While it is not disputed that Edwards regularly drives a maroon jeep belonging to his girlfriend, at the time of Cameron's identification, the windows of the jeep were tinted and they were wound up. Further, the vehicle was driving by albeit at cruise pace when the

identification was made, it was between 6:30 – 7:00 p.m., and the witness, Cameron was about 20ft. away.

[45] The voice recognition evidence in relation to Baptiste came solely from the witness Cameron. While he testified that he recognised the voice of the person who answered Edwards' phone to be Baptiste's voice, as submitted by Mr. Thompson the words spoken amounted to two short sentences – "Don't worry we already see the girl. When you hear the shots just stay put."

[46] In relation to Edwards, two witnesses Richards and Cameron testified that they recognised his voice on the telephone. Richards had never spoken to Edwards on the phone before; he made the recognition and only a single word was said being, "Larry". It is not disputed that the evidence is that the witness Cameron had spoken on several occasions on the telephone with Edwards. Indeed, the day before Harrigan was killed the evidence is that Cameron spoke to Edwards on the phone. The words spoken by which he made the recognition were very brief being "you see the girl, you are sleeping on the block".

[47] There was no evidence of the quality of the cellular transmission of any of the telephone calls.

[48] Having considered the evidence and the written and oral submission of all counsels, while in my view the case against each appellant was not tenuous, I am unable to conclude that there was no substantial miscarriage of justice and that the verdicts are safe. The prejudicial effect of the voice recognition evidence was no doubt considerable. I am of the opinion that having regard to the evidence, which in my view cannot be classified as exceptionally good as was found in **Freemantle** and **Shand**, and having regard to the nature and difficulties associated with voice identification evidence as pointed out in the

case of **Flynn and St. John,** the omission of the learned judge to give the identification direction pursuant to section 112 invalidated the convictions.

[49] In view of the above finding, it is not necessary to consider the other grounds of appeal.

New Trial

[50] The remaining issue is whether there should be a retrial of the appellants.

[51] In determining whether a retrial should be ordered, the Court is required to make an assessment of how the interest of justice would be best served. In making that determination, the Court must consider both the defendant's interest and the public interest in convicting the guilty and maintaining confidence in the effectiveness of the criminal justice system. In so doing, the Court is required to consider several factors including whether the defendants could get a fair trial, the time that has elapsed since the commission of the offence and the likely time of the retrial, whether key witnesses for the defendants are no longer available, persons guilty of an offence should not escape because of an error in the summation of a judge, the serious nature of the offence, the prevalence of the offence in the society, and the strength of the prosecution's case. This is not an exhaustive list – **Sherfield Bowen v The Queen**,[21] **Reid v The Queen**,[22] **Bowe v The Queen**.[23]

[52] Both counsel for the appellants urged the Court not to order a retrial. They submitted that considerable time had elapsed since the incident and the prosecution's evidence was not cogent and compelling. Mr. Morrison also submitted that a retrial would afford the prosecution an opportunity to cure the serious evidential deficiencies in its case.

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[21] ANUHCRAP2005/0004 (delivered 20th June 2007, unreported).
[22] (1978) 27 WIR 254.
[23] [2001] UK PC 19.

[53] Mr. Kelly submitted that having regard to the serious nature of the offence and the strength of the prosecution's case a retrial should be ordered.

[54] While the offence was committed six years ago, there was no indication at the hearing of the appeal that the appellants would not be able to get a fair trial or that defence witnesses are no longer available. The offence of which they were convicted is a very serious offence. The evidence against the appellants although it was not exceptionally good was not tenuous. In view of these circumstances, I am of the opinion that the interest of justice would be best served if a retrial is ordered.

[55] For the reasons stated above, I would allow the appeal, quash the conviction, set aside the sentence and order a retrial of the case.

I concur.
Louise Esther Blenman
Justice of Appeal

I concur.
Douglas Mendes
Justice of Appeal [Ag.]

By the Court

Chief Registrar