IN THE COURT OF APPEAL OF BELIZE A.D. 2004

CRIMINAL APPEAL NO. 7 0F 2003

EARLIN WHITE	**APPELLANT**
v.	
THE QUEEN	**RESPONDENT**

—

BEFORE:

The Hon. Mr. Justice Mottley	**-**	**President**
The Hon. Mr. Justice Sosa	**-**	**Justice of Appeal**
The Hon. Mr. Justice Carey	**-**	**Justice of Appeal**

Mr. Simeon Sampson S.C. for appellant.
Mr. Kirk Anderson, Director of Public Prosecutions for Crown.

—

2 March & 18 June, 2004.

CAREY JA

1. At the conclusion of the hearing on 2 March 2004, we dismissed this appeal. We now give our reasons for that decision.

2. The appellant was convicted during the Central Criminal Session before Gonzalez J and a jury on 13 October 2003 on an indictment which charged him with the murder of Dwayne Arnold. Sentence of

death was imposed on the 14 October following submissions by counsel for the appellant and on behalf of the prosecution.

3. The appeal was against his conviction and the sentence but counsel did not raise any argument with respect to the latter.

4. The solitary ground which was filed on behalf of the appellant was stated in these terms:

> **"The learned Trial Judge erred in that he failed to put adequately and fairly the defence of Mistaken Identity/Alibi to the jury qua defence with the necessary caution and warnings mandated in *R v Turnbull:- (p.282 line 21 to p.284 line 23)*. Nowhere in the summing up of the Defence was any of the guidelines in Turnbull discussed even though the entire evidence against appellant turned on the correctness of witness' identification of him".**

5. In light of this ground, it becomes necessary to rehearse the facts in some detail, but by way of introduction, the slain man Dwayne Arnold, a 31 year old businessman, was shot to death in his business place, Electrical Zone Rebuilders, 88A Cemetery Road, on 11 February 2002.

The Details

6. At about 5:00 p.m. Franz Hamilton, a sales clerk at the establishment of the victim, was engaged in closing down business for the day. As part of that exercise he had begun reversing his employer's car, a Toyota Camry with dark tinted windows onto the roadside outside the premises when the driver's door was pulled open and he heard a demand for money – a quarter, with which he did not comply, for the reason, as he explained to his assailant, he had no money. There was a man by his door pointing a gun at him. This person who was no more than about two feet away suddenly appreciated that Hamilton was not Dwayne Arnold for he exclaimed as much. However, this man was no stranger to Hamilton. Four to five years previously, when Hamilton was employed by one Sidney Bucknor, he frequently saw this man who then lived at a housing complex called Bingo King. In the course of a day he would see him three or four times. This man, he swore to the jury, was the appellant.

7. To resume the narrative, Mr. Hamilton testified that he parked the car and while closing the gate, through which he had driven the car, the appellant came across to where he was and warned him not to mention what had occurred. The appellant then came onto the compound through another gate. Hamilton told him that he could not come in because the business was closed. Indeed this was

said when the appellant had reached a cemented area in front of the shop itself. Hamilton went in, followed by the appellant. Hamilton lifted a flap in the sales counter and entered the employee side. At this time, Mr. Arnold who either heard or saw something left his office and enquired what was happening. The appellant responded by demanding “a quarter”. Immediately thereafter, the appellant produced a handgun and fired three shots at Mr. Arnold who fell, blood streaming from his head.

8. The appellant walked from the building and took to his heels once outside.

9. At the time of the shooting, there was one other eyewitness, Patricia Reynolds, the cashier. The only significance of her evidence was that a shooting took place which resulted in the death of Mr. Arnold. She confirmed the fact that Hamilton was accosted outside the building while he was parking Mr. Arnold’s car and watched as he was followed into the building. She had been reassured by Hamilton that he knew this person. She saw Mr. Arnold leave his office and heard him say – “what is the problem out here?” She assumed he was addressing her, and, as she said, buried her head in her accounts, informing him that she was short by $1.35. It was then she heard gunshots, and realized that Arnold had fallen.

10. She gave no evidence identifying the appellant as the assailant. Thus the prosecution case depended wholly on the recognition evidence of Mr. Hamilton. An identification parade was held but evidence in that regard was challenged by the defence and ruled out by the trial judge.

11. For completion, the medical evidence showed, not surprisingly, that the cause of death was traumatic shock, the consequence of a gunshot to the head.

12. As to the defence, the appellant made an unsworn statement in which he stated that he spent the day at the home of a Mrs. Seferina Torres, a teacher, assisting her with the domestic arrangements and tending to an elderly and sick woman who lived on the premises. Mrs. Torres confirmed his presence at her home at the material time on 11 February 2002. The jury obviously rejected the alibi defence.

The Ground of Appeal

13. Despite the wording of the ground of appeal, Mr. Sampson S.C. acknowledged that the trial judge made ample references to the applicability of certain aspects of the Turnbull guidelines in identification or recognition cases. But he said that the trial judge "failed to do so when directing the jury on the case for the defence

which rests more substantially on mistaken identity". We confess that we had some difficulty in appreciating the true nature of the criticism being leveled at the directions on identification. We gathered ultimately that basing himself on a view expressed in Archbold Criminal Pleading, Evidence and Practice (1997) at para 14 –12 as follows:- *"…Moreover, the position as regards identification evidence needs to be assessed not only at the close of the prosecution's case but also at the close of the accused's case: R v. Turnbull (ante para 14 –5; R v. Fergus, ante)",* the proposition was being put forward that the guidelines articulated in Turnbull were obligatory as respects the defence case. It is true to say that Mr. Sampson S.C. found himself quite unable to respond when invited to demonstrate the practicability of his submission.

14. We have no hesitation in saying that his proposition rested on a complete misconception of the above formulation extracted from Archbold which touches and concerns the duty of a trial judge to withdraw a weak case based on identification evidence. We accept and understand that this duty of the judge to withdraw such a case from the jury does not end even after an unsuccessful no case submission, but extends to the close of the defence case. The learned editors of Archbold subsumed their observation under the heading "withdrawing the case from the jury". It is perfectly obvious that the view referred to, has nothing whatever to do with directions

to a jury on identification evidence. In our view, there is nothing of substance in the ground. We think that the directions which faithfully followed the guidelines in *Turnbull (supra)* were adequate and clear in the circumstance of the case.

15. However, because of the nature of the case, we have thought it necessary to examine the case as a whole to ensure the fairness of the trial. In so far as the directions to the jury on identification evidence were concerned, we did note that the trial judge did not bring to the jury's attention the fact that although five years previously the witness Hamilton habitually saw the accused, he had seen him only once since, that is, some six months before the incident. This possible weakness in the prosecution case was clearly and rightly indicated to the jury by counsel who appeared on behalf of the appellant at trial. Counsel for the prosecution made a passing reference to it in his address.

16. We think this was an aspect in the identification evidence which ought to have been discussed with the jury by the judge in his directions. That said, we wish to observe that this omission must however be considered in the context of the case. So far as the opportunity for identification on the occasion of the shooting, the conditions as to lighting, distance and opportunity for observation were good. This was not really a situation of identification in

difficult circumstances or a fleeting glance scenario. The witness was not in a state of panic or terror. The evidence of prior knowledge was good so that this was a recognition case involving a person well known to the witness. We do not think the five year hiatus was such that time would have dimmed his recollection. In the circumstances of a small society, we are satisfied that no miscarriage of justice has occurred.

17. Finally, we would observe that although there was an appeal against sentence, counsel did not advance any arguments in that regard. For the above reasons, we saw no reason to interfere with the verdict at which the jury arrived nor the sentence passed.

_____

MOTTLEY P

_____

SOSA JA

_____

CAREY JA