Privy Council Appeal No. 33 of 1992

Wilbert Daley *Appellant*

v.

The Queen *Respondent*

FROM

THE COURT OF APPEAL OF JAMAICA

REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL OF THE 19TH MAY 1993, DELIVERED THE 18th AUGUST 1993

Present at the hearing:-

LORD CHANCELLOR (LORD MACKAY OF CLASHFERN)
LORD GOFF OF CHIEVELEY
LORD MUSTILL
LORD SLYNN OF HADLEY
CHIEF JUSTICE ZACCA

[Delivered by ***Lord Mustill****]*

On 25th November 1986 after a trial in the Circuit Court of St. Elizabeth, Jamaica before Miss Justice McKain and a jury Wilbert Daley was convicted of the murder of Mrs. Beryl Smith and was sentenced to death. An application for leave to appeal to the Court of Appeal of Jamaica was dismissed. He now appeals by special leave to Her Majesty in Council. At the conclusion of the argument the Board intimated that it would humbly advise Her Majesty that the appeal should be allowed, for reasons to be given at a later date. These reasons now follow.

The circumstances in which Mrs. Smith met her death were not in dispute at the trial. At 2.00 a.m. on 25th October 1985 Mr. Kenneth Smith and his wife were woken from sleep by a barking dog. Looking through a window Mr. Smith saw two men approaching the house. They went round to the back and broke in through a window. Mr. and Mrs. Smith went into the hall which ran down the middle of the house. The men switched on a light in one of the rooms, and then entered the hall. One of them ("the first man") struck Mrs. Smith to the ground with his gun, and then shot her in the body, inflicting a wound from which she later died. The other man ("the second man")

told Mr. Smith to fetch the key to his shop and to come with him to open up the shop and see whether money could be found there. Shortly after Mr. Smith and the second man had left the house Mr. Smith managed to escape, and hid in a place from where he could see the house. After the two men eventually departed Mr. Smith returned and took his wife to hospital. He also reported the matter to the police. Four months later he was called to an identification parade at which he pointed out the appellant as being the first man.

At the trial the only issue was whether the appellant was in fact correctly identified as the first man. The evidence of Mr. Smith to this effect was uncorroborated. The appellant did not give evidence, but made an unsworn statement from the dock concerned entirely with the identification parade. He concluded "I know nothing about this case. I am innocent." The entirety of the evidence at the trial was completed in a little over two hours. What strikes the eye on reading the transcript is how very little of this comparatively brief time was spent on an exploration of the crucial question whether Mr. Smith had a sufficient opportunity to identify and recognise the first man on the occasion of the crime. Thus -

(1) Mr. Smith saw the first man on three occasions. First, whilst the two men were approaching the house. Second, during the episode in the hall when Mrs. Smith was shot. Third, whilst Mr. Smith was hiding outside the house. No evidence was led to found any identification at the first stage. As regards the third stage, which Mr. Smith testified to have lasted for half an hour, he said that the first man ransacked the house, but not that he saw the ransacking being carried out. All that emerged from his evidence was that there was an illuminated street lamp outside the house, and that the light in the room through which the men had entered was still lit when he escaped. No attempt was made to establish for how much of the half hour the first man could be seen from where Mr. Smith was hiding; which parts of the interior of the house were in Mr. Smith's view; whether during the half hour any of the interior lights were switched on or switched off; how much of the interior of the house was illuminated by the street lamp; whether the first man was seen by the light of the street lamp or an interior light; and so on.

(2) The opportunity for Mr. Smith to observe the first man during the fatal incident in the hall was scarcely investigated. Whilst it was established that the hall light was not on at the time, and that if the first man's features were illuminated this must have been by the light shed from the room into which the intruders had entered, there was no questioning about how much of the hall was thus illuminated, in what part of the hall the various participants were positioned during the incident, and whether the first man was in such a position that the light shone on his face. After the incident Mr. Smith was compelled to "pick up" the shop key. No enquiry was made as to whether Mr. Smith could have seen the first man whilst he was doing this, or whilst leaving the house with the second man.

(3) The case was presented to the jury as one of recognition. Mr. Smith said in evidence that he knew the first man's face - "I always see them some a di time ... Him come all to my shop" - but that he did not at that time know the man's name. Mr. Smith was cross-examined at some length as to evidence which he was said to have given at the preliminary hearing about knowing the appellant as Wilbert. At the trial he denied that he knew the appellant's name. He was not asked how often he had seen the appellant before the incident, or over what period of time.

It was in this state of the evidence that counsel made a submission to the trial judge that there was no sufficient case to go to the jury. In response, counsel for the prosecution cited *R. v. Galbraith* [1981] 1 W.L.R. 1039 and the decision of the Court of Appeal of Jamaica in *R. v. Roy Dennis* (Court Decision number 25/84). The trial judge rejected this submission, without giving reasons. After the appellant had made his unsworn statement and counsel had addressed the jury, the judge summed up the law and the evidence in a manner which need not be analysed in detail. For present purposes it is enough to quote the following passages:-

> "You have to ask yourselves, in this particular case, did he have an opportunity, was he there observing him long enough to recognise him? Identification is very, very necessary here.
>
> I have not gone into the conditions about what the officer said because I am going to deal specifically with identification and I will have to tell you that unfortunately there are serious weaknesses in the prosecution case from the point of view of identification, but it is a matter for you, Mr. Foreman and members of the jury ..."

Then, after commenting at length on the weaknesses in the evidence of Mr. Smith:-

> "As it stands, as I said, the matter of identification is one for you and I must warn you that the identification has not been a very good one. There is much left to be desired as far as the identification of this accused man is concerned."

Finally, at the very end of the judge's directions:-

> "So, Mr. Foreman and members of the jury, how do you look at it? Do you say that the prosecution made out a case that I am satisfied, that I am sure? Well, when you look on the entirety of the case and if you say you are not satisfied, the verdict is not guilty; but you are to bear in mind when you go to deliberate that this is a question, as I say again, of identification and that the prosecution's case has not made the identification clear enough. That is my opinion. If you are satisfied that the identification

was good enough, you are judging the facts, you are the judges as to facts." (Emphasis added)

Although it may seem strange that in these circumstances the trial judge should have left the case to the jury, and stranger still that the Court of Appeal of Jamaica should not have mentioned in its judgment the ground upon which their Lordships have advised that the appeal should be allowed, the reasons will become clear from an account of the history of this branch of the criminal law.

It has for very many years been recognised that the trial judge has the power and the duty to withdraw the issue of guilt from the jury if he considers that the evidence is insufficient to sustain a conviction. The judge had, and still retains today, the power so to intervene of his own motion. Much more commonly, however, the intervention of the judge is prompted by a formal submission on the part of counsel for the defendant, in the absence of the jury, at the close of the prosecution case. This practice has no statutory warrant, but the background to its exercise was provided by section 4(1) of the Criminal Appeal Act 1907, which required the Court of Criminal Appeal to quash a conviction "if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence". This provision came to be understood as signifying that the appellate court would intervene only if there was no evidence on which, if it were uncontradicted, a properly directed jury could convict. It appears that against this background the practice was that the trial judge should intervene to stop the case only in situations where, if the trial had proceeded to a verdict and the jury had convicted, the verdict would have been quashed on appeal. Over the years, however, this practice was relaxed to the extent that a substantial number of judges had come to think it right that, when their own assessment of the credibility and consistency of the evidence led by the prosecution was such that a conviction on this evidence would be unsafe, they should withdraw the case from the jury so as to make sure that the defendant was not the victim of a miscarriage of justice. This movement gathered strength when the power of the appellate court to intervene under the Act of 1907 was replaced by the very different test under section 2(1)(a) of the Criminal Appeal Act 1968, whereby the court is required to quash a conviction if "under all the circumstances of the case it is unsafe or unsatisfactory". Some judges took the view that, if in their estimation the evidence was so poor that a verdict based upon it would be "unsafe", it would be wrong to allow the case to go to the jury with the possibility of returning a verdict of guilty which (if the appellate system worked correctly) would inevitably be quashed on appeal.

Their Lordships are not required for present purposes to consider the intellectual merits of this argument, on which the controversy is not yet wholly resolved. What matters is that on more than one occasion the appellate courts have

intervened to circumscribe the exercise of the power to stop a trial at the end of the evidence from the prosecution. First, there was a practice direction to magistrates, embodied in *Practice Direction (Submission of No Case* [1962] 1 W.L.R. 227 in which the Divisional Court commented adversely on the excessive use of this practice. Although this Practice Direction is still in force it has received surprisingly little weight in the general development of the law in this field. Later, there was an important statement of principle in relation to trials on indictment in *R. v. Barker* (1975) 65 Cr.App.R. 287, 288 where, in the course of refuting a submission that the trial judge should have stopped the case because of inconsistencies in a crucial document, Lord Widgery C.J. said that:-

> "It is not the judge's job to weigh the evidence, decide who is telling the truth, and to stop the case merely because he thinks the witness is lying."

It was in this situation that Lord Widgery C.J. laid down in *R. v. Turnbull* [1977] Q.B. 224 the principle governing the duty of the trial judge in cases where the prosecution relies on evidence of identification, around which the present appeal revolves. It is unnecessary to quote extensively from the judgment. The passage (at pages 228-30 of the report) which bears directly on this appeal reads as follows:-

> "If the quality [of the evidence] is good and remains good at the close of the accused's case, the danger of a mistaken identification is lessened; but the poorer the quality, the greater the danger. In our judgment when the quality is good ... the jury can safely be left to assess the value of the identifying evidence even though there is no other evidence to support it: provided always, however, that an adequate warning has been given about the special need for caution ... 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 glance, or on a longer observation made in difficult conditions, the situation is very different. 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."

Meanwhile, in English circles the controversy about the proper response of the trial judge to a submission of no case to answer continued unabated. An authoritative resolution became imperative, and the opportunity was furnished by *R. v. Galbraith (supra)*. It is important to note the subject matter of this case. The conviction arose from an affray in a club. The defence of the appellant was that he was elsewhere in the club at the time. The prosecution called three witnesses, none of them satisfactory. The first had given a description which matched the appellant, but he later failed to

identify him on a parade. The second, who was an unwilling witness, and was treated at the trial as hostile, accepted in cross-examination that his identification might have been mistaken. The third witness agreed that the "little guy" whom he had seen near the fight was not the appellant. There was evidence that these witnesses had met before the trial to agree that they would play down the statements implicating the appellant which they had given to the police after the incident.

Given the weaknesses in this evidence the appellant might reasonably have looked for an acquittal. At the same time it was possible that the jury might accept as true those parts of the evidence which implicated the appellant, notwithstanding their subsequent dilution. In the event this is what happened. The judge left the case to the jury who returned a verdict of guilty.

On appeal, it was argued for the appellant that, given the analogy with the power to quash a conviction on the ground that it was unsafe, the judge ought to have pre-empted the risk of an unsafe verdict by withdrawing the case from the jury. This argument was rejected. First, the court expressed doubts about the soundness of the logic which transferred the power of the appellate court to the duties of the trial judge. Since this is not an issue in the present appeal their Lordships need not be detained by it. More to the point is what the court described as a much more solid reason for doubting the wisdom of the wider view of the judge's powers (at page 1041) - "If a judge is obliged to consider whether a conviction would be 'unsafe' or 'unsatisfactory', he can scarcely be blamed if he applies his views as to the weight to be given to the prosecution evidence and as to the truthfulness of their witnesses and so on". The court continued by quoting from the judgment of Lord Widgery C.J. in *R. v. Barker*, set out above, and went on to discuss the judgment in *R. v. Mansfield* [1977] 1 W.L.R. 1102, which had proved a source of difficulty since it seemed that, although one part of the judgment was consonant with what Lord Widgery C.J. had said in *R. v. Barker*, a later passage was capable of meaning that a case should be withdrawn from the jury if the judge considered that a verdict of guilty would be unsafe because, for example, the main prosecution witness was not to be believed. The Court of Appeal in *R. v. Galbraith* stated that if this was the effect of the judgment in *R. v. Mansfield* it was wrong, and that the words of Lord Widgery C.J. in *R. v. Barker* were to be preferred.

It was this analysis which led up to the passage now most often quoted from *Galbraith*, which it is convenient to repeat:-

> "How then should the judge approach a submission of 'no case'? (1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case. (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because

> of inherent weakness or vagueness or because it is inconsistent with other evidence. (a) Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case. (b) Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there *is* evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury. ... There will of course, as always in this branch of the law, be borderline cases. They can safely be left to the discretion of the judge."

With the passage of time both *R. v. Turnbull* and *R. v. Galbraith* have repeatedly been cited and acted upon by the Court of Appeal in England. Furthermore, as regards *R. v. Galbraith*, the principles stated by Lord Lane C.J. have, so far as their Lordships are aware, been consistently applied in Jamaica; and it may be noted that the impetus given to the wider view of the judge's powers by the important change in the basis of a criminal appeal in England brought about by the Act of 1968 was not a factor in Jamaica, where the appellate powers have continued to be expressed in terms corresponding to those of the Act of 1907. As regards *R. v. Turnbull*, however, the position in Jamaica was for a time different. The view was taken that the strict requirements of *R. v. Turnbull* were inappropriate to conditions prevailing in Jamaica, and the Court of Appeal of Jamaica upheld convictions which, under the English practice, would have been quashed because the directions to the jury did not contain the warnings on identification evidence called for by *Turnbull*. The reasons why this was so were fully explored in the judgments delivered by the Court of Appeal in *R. v. Roy Dennis (supra)*, one of the two authorities cited to the judge at the trial of the present appellant. Subsequently, through the medium of decisions given by their Lordships' Board after the refusal of leave to appeal in the present case it was established that the practice of the courts in Jamaica was in this respect erroneous. Conspicuous amongst these decisions were those reported under the name of *Junior Reid* [1990] 1 A.C. 363 (in which one of the convictions under appeal was that of Roy Dennis) and *Kenneth Evans v. The Queen* (unreported, 8th August 1991). In each of these it was made clear that the portion of the judgment in *Turnbull* which requires the case to be withdrawn from the jury if the quality of the identification evidence is poor is as much a part of the law of Jamaica as is the remainder of the statement of principle in *R. v. Turnbull*. The relevant laws of the two countries are thus once more in accord.

It was whilst the laws were for a time out of alignment that the trial of the present appellant took place. The history which their Lordships have summarised leaves little room for doubt as to the reasons why Miss Justice McKain felt impelled to leave the case to the jury, applying *R. v. Galbraith* in preference to *R. v. Turnbull*, notwithstanding her strong opinion on the weakness of the prosecution's case. Their Lordships also feel little doubt that if the law on identification had been understood in Jamaica in the year 1986 as it is understood today the trial judge would have acceded to the submission that the appellant had no case to answer.

It would appear to be the inevitable consequence of this conclusion that the appeal should be allowed. It was however strongly urged on behalf of the respondent that this is not so. Two reasons were advanced. First, it is said that the trial judge's assessment of the evidence of Mr. Smith was altogether too favourable to the appellant. In fact, so the argument runs, the trial judge made two mistakes; the first (favourable to the appellant) in her appreciation of the evidence and the second (adverse to the appellant) on the law. These two mistakes cancelled each other out. By setting both of them right, the Board will arrive at a position where, even under a strict application of *R. v. Turnbull*, the case should have been left to the jury, as in fact it was. There has thus been no miscarriage of justice of which the appellant can complain.

Notwithstanding the apparent logic of this argument their Lordships cannot accept it, for two reasons. First, because if the judge had understood the law, as it has now been established, she would have directed a verdict of not guilty and the appellant would have been set at liberty, whereas because of her understandable mistake he is now under sentence of death. This would be generally regarded, and in their Lordships' opinion rightly regarded, as a grave injustice which ought to be remedied.

Secondly, the respondent's argument would require the Board, on an appeal by a convicted person, to substitute a view of the facts more favourable to the prosecutor than the view expressed in public to the jury by the trial judge herself, so as to repair an error of law which would otherwise have been fatal to the conviction. Whether this would ever be a legitimate exercise of the criminal appellate function is not a matter on which argument was addressed to the Board. Their Lordships think it undesirable in the circumstances to express any concluded opinion upon it, but they believe that if any such course is in principle open to an appellate court it should be followed only in the exceptional case where the view formed by the trial judge on the facts is so far beyond the bounds of reason as to demand the substitution of the only rational opinion. The present case is far from being in this category. The opinion of the trial judge was perfectly comprehensible, even if perhaps some other judges might not have gone so far.

This conclusion is sufficient to dispose of the appeal. It is however desirable to say something about the manner in which the principles of *R. v. Turnbull* and *R. v. Galbraith* are able to live together. That they must be able to do so, and that there has not taken place an accidental conflict of authority, is clear from their history. As has been seen, Lord Widgery C.J. delivered the judgment in *R. v. Turnbull* only eight months after he had so bluntly stated in *R. v. Barker* that it was not the job of the trial judge to decide questions of credibility. His Lordship could not have intended what he said in *R. v. Turnbull* to encroach upon the general principle, and the absence in argument and in the judgment itself of any reference to *R. v. Barker* or to the Practice Direction of 1962 shows that it never occurred to anyone concerned that something of this kind was taking place. Conversely, the judgment in *R. v. Gailbraith* was delivered at a time when the appellate courts were occupied in making sure that the principles of *R. v. Turnbull* were being properly observed in the courts. Indeed, fewer than twelve months previously, Lord Lane C.J. had himself delivered the judgment of a court of five judges in *R. v. Weeder* [1980] 71 Cr.App.R. 228 reiterating the duty of the judge to withdraw the case from the jury when the quality of evidence is poor. Although *R. v. Turnbull* was not referred to in *R. v. Galbraith* it is inconceivable that the court can have overlooked the parallel line of authority.

It is therefore plain that no incongruity between the two principles was perceived at the outset, and (with the exception of one unreported decision and a few isolated comments in academic writings) none has been perceived ever since. How then are the principles able to co-exist? There appear to be two possibilities. The first is simply that the *Turnbull* rule is an exception superimposed on the general principles of *Galbraith*, taking identification cases (or, more accurately, the kind of identification case which was the subject of *Turnbull* - for *R. v. Galbraith* was itself concerned with identification) outside the general principle, whilst otherwise leaving it completely intact. This is certainly a possible view. The division of responsibility between judge and jury is of great importance and is staunchly maintained because it serves the interests of justice. But it is no more adamantine than any other procedural rule serving the same ends, and must admit of exceptions if those interests so demand. An obvious exception is the long-standing duty of the judge, now embodied in section 76(2) of the Police and Criminal Evidence Act 1984, to rule on whether a confession by the accused has been, or may have been, obtained by oppression, or in consequence of anything said or done which was likely to render it unreliable. This is an issue of fact, and yet it is reserved for the judge because of a perceived risk that the jury may act upon evidence which is not to be relied upon. No doubt there are other examples elsewhere in the law of criminal procedure. Similarly the rationale of the *Turnbull*

principle is the need to eliminate the "ghastly risk" (as Lord Widgery C.J. called it in *R. v. Oakwell* [1978] 1 W.L.R. 32, 36-7) run in certain types of identification case. This risk may well be seen as serious enough to outweigh the general principle that the functions of the judge and jury must be kept apart.

Their Lordships doubt, however, whether it is necessary to explain the two lines of authority in this way. A reading of the judgment in *R. v. Galbraith* as a whole shows that the practice which the court was primarily concerned to proscribe was one whereby a judge who considered the prosecution evidence as unworthy of credit would make sure that the jury did not have an opportunity to give effect to a different opinion. By following this practice the judge was doing something which, as Lord Widgery C.J. had put it, was not his job. By contrast, in the kind of identification case dealt with by *R. v. Turnbull* the case is withdrawn from the jury not because the judge considers that the witness is lying, but because the evidence even if taken to be honest has a base which is so slender that it is unreliable and therefore not sufficient to found a conviction: and indeed, as *R. v. Turnbull* itself emphasised, the fact that an honest witness may be mistaken on identification is a particular source of risk. When assessing the "quality" of the evidence, under the *Turnbull* doctrine, the jury is protected from acting upon the type of evidence which, even if believed, experience has shown to be a possible source of injustice. Reading the two cases in this way, their Lordships see no conflict between them.

Before leaving this question, their Lordships should refer to one decision of the Court of Appeal in England which research by the Criminal Appeal Office has brought to light since the conclusion of the argument. In *R. v. Heffernan* (23rd May 1986) (Transcript No. 7576/B3/85), a case of recognition based on a "fleeting glance", the trial judge had, after argument, left the case to the jury, applying *R. v. Galbraith* in preference to *R. v. Turnbull*. On appeal, an argument on behalf of the prosecution that the decisions in *R. v. Turnbull* and *R. v. Galbraith* were in conflict was rejected, on a ground which (in a more compressed form) closely resembled the second of the reasons which their Lordships have given above.

It is for these reasons that their Lordships humbly advised Her Majesty that the appeal should be allowed and that the conviction of Wilbert Daley should be quashed. Other grounds in support of the appeal were advanced in argument, but in the light of the conclusion reached on the principal issue, their Lordships find no reason to enter into them.