[2012] UKPC 12
Privy Council Appeal No 0112 of 2010

JUDGMENT

Terrell Neilly *v* The Queen

From the Court of Appeal of the Commonwealth of the Bahamas

before

Lord Hope
Lord Mance
Lord Dyson
Lord Sumption
Sir Stanley Burnton

JUDGMENT DELIVERED BY SIR STANLEY BURNTON ON

10 May 2012

Heard on 20-21 March 2012

Appellant	*Respondent*
David Farrer QC	Howard Stevens
Jonathan Bertram	
(Instructed by S J Berwin LLP)	(Instructed by Charles Russell LLP)

SIR STANLEY BURNTON:

Introduction

1. This is another case in which the admissibility of a dock identification falls to be considered.

2. On 18 October 1999, the Appellant was convicted, by a majority verdict of 10 to 2, of 10 counts of armed robbery and of one count of possession of a firearm with intent to endanger life. On 25 October 1999, he was sentenced to 20 years' imprisonment on each count of robbery, to run concurrently, and to 5 years' imprisonment for the firearms offence, to be served consecutively. He was given leave to appeal against the robbery convictions. His appeal against those convictions to the Court of Appeal of the Commonwealth of The Bahamas (Zacca P, Churaman and Ganpatsingh JJA) was dismissed on 7 September 2000. It was not until 13 December 2010 that his notice of appeal to the Judicial Committee of the Privy Council was filed. Special leave was granted on 15 March 2011 and his appeal heard on 20 March 2012.

The facts

3. During the evening of 15 January 1998, two men committed an armed robbery at the Comfort Zone Restaurant, New Providence, Bahamas. It was the prosecution's case that the Appellant was one of the two men involved. One of them was armed with what was described as an Uzi-type automatic firearm; the other had a shiny or chrome handgun.

4. On 17 January 1998, outside a house in Haven Road, Nassau Village or Redland Acres the Appellant was arrested with Roland Cartwright and Devaughn Rolle for the armed robbery at the restaurant. It was the prosecution's case that during the course of the arrest, the Appellant fired at the arresting police officers as they approached him. It was the Appellant's case that the officers fired at him without provocation and that he did not return fire. The Appellant sustained injuries from what occurred during the arrest and he required hospital treatment. Upon arrest, the Appellant was found in possession of a silver and black handgun and two items of jewellery, which were later identified as items stolen during the robbery. Other items stolen in the robbery were also found in the house.

5. An identification parade was held on 17 January 1998. Both Cartwright and Rolle participated. The Appellant was then in hospital, being treated for the injuries he

had suffered when he was arrested. Six witnesses to the robbery attended the parade. Two of them identified Cartwright as one of the robbers. They did not identify Rolle. The other witnesses who attended the parade made no identification.

6. The Appellant was discharged from hospital on 27 January 1998. When told that he was suspected of the armed robbery at the Comfort Zone Restaurant he denied the offence, saying that he had been "in the back of South Beach in Farmer Brown yard all night". He did not thereafter participate in any identification parade.

7. The Appellant, Cartwright and Rolle were jointly charged with ten counts of armed robbery at the Restaurant on 15 January 1998, contrary to section 360 (2) of the Penal Code of the Commonwealth of the Bahamas (counts 1-10). The Appellant was also charged with one count of possession of a firearm with intent to endanger life on 17 January 1998, contrary to Section 23 of the Firearms Act (count 11) and two counts of receiving stolen property between 15 January 1998 and 17 January 1998, contrary to section 379 of the Penal Code of the Commonwealth of The Bahamas (counts 12 and 15). The receiving counts were alternatives to the armed robbery counts.

8. The Appellant and his co-defendants were tried before the Supreme Court between 5 May 1999 and 11 May 1999. This trial was aborted when two jurors were discharged for personal reasons and the judge discharged the remainder and directed that there should be a retrial. The second trial, to which we shall simply refer as "the trial", took place between 4 and 18 October 1999.

The trial

(a) The admission of the dock identification

9. At the trial, before Allen J and a jury, the prosecution called a number of witnesses who had been present when the robberies were committed. No one purported to identify the Appellant, other than Larry Fernander. Mr Fernander had not been invited to attend any identification parade. He testified that one of the robbers, the man with the machine gun, had taken his bracelet, which was one of the items recovered from the house in Haven Road, together with his wallet and mobile telephone. He had had a view of his face, and could recognise him if he saw him again.

10. Counsel for the Appellant objected to any attempt at a dock identification. The witness and the jury withdrew while submissions were made as to whether the dock identification should be permitted. Counsel for the Appellant submitted that to allow the witness, who had not previously identified anyone or even indicated that he could

do so, to purport to identify one of three persons in the dock, would be inconsistent with the authority of the Court of Appeal in *Sheldon Alleyne v R* Case No. 50 of 1989. Counsel accepted that a dock identification was legally admissible, and that the judge had a discretion to exclude it if she felt that the effect would be more prejudicial than probative. He submitted that the dock identification, if admitted, would be more prejudicial than probative, and should be excluded.

11. Counsel for Rolle informed the judge that in the previous aborted trial, the witness had not identified anyone. That he said he could do so was new. He said that the judge could take judicial notice of this. The judge said she could not do so, since she did not know, among other things, what the witness had been asked at that trial.

12. Counsel for the prosecution was unable to say why Mr Fernander had not been given the opportunity to attend an identification parade. His submissions focused on the opportunity the witness had had to observe the robbers, and his witness statement to the effect he would be able to recognise one of them. He did not refer to the risk that the witness would identify one of the defendants simply because he was in the dock.

13. Giving her ruling, the judge said:

> "I am going -- I'm satisfied that the parameters which are set in the case of *R v Turnbull* have been laid. I am going to allow, in my discretion, the dock identification by Mr. Fernander of the person whom he says held the Uzi or the machine gun, and whom he said he observed for two to three minutes, and whom he said was at one point close - as close as two feet away from him. I am going to, as I said, exercise my discretion and allow the dock identification , for what it's worth."

14. Mr Fernander and the jury then came back into court. He then said that the robber whom he could identify was the man with the hand gun. The witness then identified the Appellant as the man with the chrome hand gun. He was shown the hand gun recovered when the Appellant was arrested, and said that it looked very much like the gun used in the robbery. However, in cross examination Mr Fernander reverted to saying that the man he had identified was the man with the machine gun.

15. The prosecution called a number of police officers who gave evidence relating to, among other things, the shooting, arrest and subsequent searches of the house in Haven Road and of the defendants. Detective Constable Nixon gave evidence that when he and other officers arrived at the house the Appellant pulled out a silver handgun, pointed it in his direction and fired several shots, and that he returned fire. Constable Farrington likewise gave evidence that the Appellant opened fire and that

he took cover and returned fire. Sergeant Hinzey gave evidence that he searched the Appellant and seized a number of items. These included items which were the subject of count 12, one of the counts of receiving.

16. Inspector Melvin Lundy gave evidence regarding the identification parade held on 17 January 1998 and the identification of Roland Cartwright by two witnesses. The Appellant had been in hospital and did not participate in the identification parade.

17. Finally the prosecution called Clement Paul (also known as Farmer Brown). Mr Paul gave evidence that he had seen Mr Rolle in his yard on the night of the robbery, but that he had not seen the Appellant.

(b) The submission of no case

18. Following the close of the prosecution case, counsel for all three defendants submitted that there was no case to answer. Counsel for the Appellant relied on the weakness of the identification evidence, and the well-known authority of *Galbraith.* Rejecting the submission on behalf of the Appellant, the judge said:

> "With respect to Terrell Neely, I simply find the evidence of a sufficient quality to safely leave to the jury to assess. I am satisfied that all of the factors which *Turnbull* says ought to be present are present, and I am going to leave that evidence to them. I accept that there is one witness that the identification was not tested on identification parade, however, I am satisfied that in the circumstances that there was a good reason for not holding the ID parade for Neely. In addition to that, there is the evidence of recent possession of some of the goods allegedly stolen which may support the correctness of the identification by Mr. Fernander. In the circumstances, I find that Terrell Neely has a case to answer on the counts of robbery and I am going to leave those to the jury for their consideration."

19. However, the judge upheld the submission made on behalf of Nolle, and withdrew the counts charging him with armed robbery from the jury. The counts of receiving remained against him, and one of those counts, count 12 remained against the Appellant also.

20. The Appellant gave alibi evidence. He denied having a gun or firing it at the police on 17 January 1998, and contended that the gun and the stolen property had been planted on him by the police. He called one witness in support of his alibi.

(c) The summing up

21. During the course of the summing up, the judge withdrew from the jury the count charging the Appellant and Cartwright with receiving stolen goods, saying that she was doing so "For the sake of fairness and clarity and to avoid any confusion". It seems that she did so without informing counsel of her intention to do so or seeking their submissions.

22. The judge gave an unexceptional *Turnbull* direction, directing the jury to consider carefully the evidence as to the identifying witnesses' sightings of the persons they purported to identify during the course of the robbery. She then addressed the identification evidence of Mr Fernander. She said:

> "With respect to the identification evidence, I must point out to you just one weakness in the evidence of Larry Fernander, and that is that he did not attend an ID parade, and so his ability to identify the accused person from a number of other persons was not, in fact, tested.
>
> Now, it is usual that there is an ID parade if the police feel that it's necessary. You recall in this case the fact was that Neely was hospitalized, and that his evidence here is from the 17th to the 27th. Whether that is a reasonable explanation or not is a question for you. But you, at the end of the day, must determine whether you are sure that the evidence of Larry Fernander in relation to the identification of Mr. Neely was correct. That is the weakness.
>
> Now, if, after considering all of these matters which I have indicated to you, you conclude that the quality of the ID evidence is good, then you may convict on that evidence alone, notwithstanding that you find it is not supported by any other evidence, and provided you warn yourselves of the danger.
>
> Now, as I've said, there's other evidence which is capable of supporting that evidence. If you decide that that evidence is not -- you don't accept that evidence, then you are left only with the evidence of identification by those three witnesses. And, in any event, you must be careful when you come to consider that identification evidence.
>
> I also remind you that this matter is alleged to have happened some 20 months ago, and you're going to have to make allowances for the fact that with the passage of time memories do fade, and witnesses cannot be

expected to remember with crystal clarity what has happened 20 months ago."

23. The judge reminded the jury of the evidence of Mr Fernander:

> "He told you he did not attend an ID parade, but he identified Mr Neely as the man who took his bracelet, wallet and radio and the man who had the chrome gun, the chrome gun. You recall later he said that he as wrong about that. That the man was the man with the machine gun, the man he identified was the man with the machine gun as he had first said in his examination in chief. So it's a question for you. He did say on two occasions that it was the man with the machine gun that he observed and identified. He later said it was the man with the shiny gun, then corrected that to say it was, in fact the man with the machine gun. It's a question for you."

24. As mentioned above, the jury, by a majority, convicted the Appellant of the robberies.

The judgment of the Court of Appeal

25. It is not clear from the judgment of the Court of Appeal to what extent the objection to the dock identification of the Appellant was pressed before them. The only issue that is specifically mentioned in their judgment was whether the judge's withdrawing of the count of receiving stolen goods from the jury rendered their verdicts on the robbery counts unsafe.

The contentions before the Board

26. On behalf of the Appellant, Mr Farrer submitted:

a) The judge had erred in law in allowing the dock identification to be adduced before the jury.

b) The judge erred in rejecting the submission on behalf of the Appellant that there was no case to answer.

c) The judge should not have withdrawn the counts of receiving from the jury.

d) The summing up of the identification evidence against the Appellant was inadequate.

e) It followed that the convictions for armed robbery were unsafe, and they should be quashed.

27. For the prosecution, Mr Stevens submitted:

a) The judge was entitled, in the exercise of her discretion, to allow the dock identification to go before the jury.

b) She was similarly entitled to reject the submission on behalf of the Appellant at the close of the prosecution case.

c) The withdrawal of the count of receiving stolen property did not affect the safety of the convictions for armed robbery.

d) While he accepted that the direction to the jury was inadequate, on the evidence as a whole the convictions for robbery were safe; the Board should apply the proviso and the appeal should therefore be dismissed.

Discussion

Dock identifications

28. When considering the admissibility, and the strength, of identification evidence, it is often necessary to consider separately the circumstances in which the witness saw the accused and the circumstances in which he later identified him. The well-known judgment of the Court of Appeal of England and Wales in *R v Turnbull* [1977] QB 224 addresses the former circumstances. The directions that the Court of Appeal mandated must be given to a jury concern those circumstances: in other words the duration and the conditions of the witness's observation of the offender during or around the time of the offence. *Turnbull* itself, the first of the appeals considered by the Court of Appeal, was a case of recognition of Turnbull by a police officer. Both of the other appellants whose cases were before the Court, Roberts and Whitby, had been identified in identification parades. Nonetheless, their convictions were quashed because the circumstances in which the offenders had been seen by the identifying witnesses were not such as to give confidence as to the reliability of the identifications, and in this sense the quality of the identifications was poor.

29. Issues as to the quality of a witness's observation of an offender, of the kind addressed in *Turnbull*, are relevant to dock identifications. In the case of dock identifications, however, there is an added and separate need for caution, arising from the circumstances inherent in dock identification. The purpose of an identification parade is "to ensure that the identification of a suspect by a witness takes place in circumstances where the recollection of the identifying witness is tested objectively under safeguards by placing the suspect in a line made up of like-looking suspects" (*Myvett and Santos v The Queen* (unreported) 9 May 1994, Criminal Appeals Nos 3 and 4 of 1994), cited in *Pop v The Queen* [2003] UKPC 40, in turn cited in *Pipersburgh v The Queen* [2008] UKPC 11, para 9.) The benefits of an identification parade and the weaknesses of a dock identification were summarised in *Holland v HM Advocate* [2005] UKPC D1, 2005 SC (PC) 1, 17, para 47:

> "…identification parades offer safeguards which are not available when the witness is asked to identify the accused in the dock at his trial. An identification parade is usually held much nearer the time of the offence when the witness's recollection is fresher. Moreover, placing the accused among a number of stand-ins of generally similar appearance provides a check on the accuracy of the witness's identification by reducing the risk that the witness is simply picking out someone who resembles the perpetrator. Similarly, the Advocate-depute did not gainsay the positive disadvantages of an identification carried out when the accused is sitting in the dock between security guards: the implication that the prosecution is asserting that he is the perpetrator is plain for all to see. When a witness is invited to identify the perpetrator in court, there must be a considerable risk that his evidence will be influenced by seeing the accused sitting in the dock in this way. So a dock identification can be criticised in two complementary respects: not only does it lack the safeguards that are offered by an identification parade, but the accused's position in the dock positively increases the risk of a wrong identification."

30. It follows that the fact that the circumstances of a witness's identification of a person were such as to enable him to make a reliable identification in an identification parade does not render a dock identification by the witness reliable. As was pointed out by the Board in *Pipersburgh* at [15], the issues as to the sufficiency of a witness's observation of a suspect are different from those as to the reliability of a dock identification.

31. It further follows that the normal and proper practice should be to hold an identification parade, and that in any case where a dock identification is admitted the judge should warn the jury of the undesirability in principle and dangers of a dock identification and give further directions along lines set out in *Aurelio Pop v The Queen* [2003] UKPC 40, para 9, *Pipersburgh v The Queen* [2008] UKPC 11, para 9

and *Tido v The Queen* [2012] 1 WLR 115 [2011] UKPC 16, para 17, as to which see paragraph 35 below.

32. The decision whether to admit dock identification evidence is one for the trial judge, to be exercised in the light of all the relevant circumstances. Ultimately the question is one of fairness, bearing in mind the judge's ability and duty to give appropriate directions in summing up, as indicated in the authorities referred to in the previous paragraph. Where there has been no identification parade, then whether there is any and if so what good reason for that is a material circumstance. Where, for example, the uncontroversial evidence is that the defendant was well known to the witness before the offence, and the witness has previously identified him, a dock identification may also be no more than a formality. Those were among the circumstances considered by the Board in *Tido v The Queen* [2012] 1 WLR 115 [2011] UKPC 16 which might have favoured the admission of the dock identification: see at [23].

The admission of the dock identification in this case

33. The explanation for the failure to hold an identification parade may, as stated, be a relevant factor favouring the admission of a dock identification. In the present case, it was submitted by Mr Stevens that there was a partial explanation for the failure to hold an identification parade, in that the Appellant was in hospital when the identification parade in relation to Cartwright and Rolle was held. However, this does not explain why no parade was held after the Appellant's discharge from hospital in the 16 months between his discharge and the first trial, let alone the period between the two trials. In any event, his unavailability on 17 January 1998 could not render a dock identification any more reliable.

34. The judge's reasons for allowing the dock identification to go before the jury related entirely to the circumstances of the witness's observation of the offender during the robbery. She erred in considering that there was a good reason for not holding an ID parade for the Appellant. She did not address the jury when summing up the risks of a mistaken dock identification and so may well not have had these in mind when deciding to admit the dock identification. The only other evidence as to the Appellant's involvement was consistent with his having been no more than a receiver: see paragraph 41 below. The judge thus erred materially in the exercise of her discretion. The Board's view is that a dock identification should have been regarded as inadmissible in all the circumstances of this case. The Board's conclusion on the admissibility of the dock identification renders it unnecessary to consider the Appellant's contention that the robbery counts should in any event have been withdrawn from the jury at the conclusion of the prosecution case.

The summing up

35. At para 21 of its judgment in *Tido*, the Board said:

> "…Where it is decided that the evidence [i.e., a dock identification] may be admitted, it will always be necessary to give the jury careful directions as to the dangers of relying on that evidence and in particular to warn them of the disadvantages to the accused of having been denied the opportunity of participating in an identification parade, if indeed he has been deprived of that opportunity. In such circumstances the judge should draw directly to the attention of the jury that the possibility of an inconclusive result to an identification parade, if it had materialised, could have been deployed on the accused's behalf to cast doubt on the accuracy of any subsequent identification. The jury should also be reminded of the obvious danger that a defendant occupying the dock might automatically be assumed by even a well-intentioned eye-witness to be the person who had committed the crime with which he or she was charged."

36. Allen J did not have the benefit of the Board's judgment in *Tido*, which considerably post-dates the trial. However, the dangers of a dock identification to which it refers have long been regarded as inherent in such evidence. The summing up was deficient in failing to warn the jury of the risks of the dock identification, as summarised in *Tido.*

The withdrawal from the jury of the receiving count

37. Mr Farrer relied on the judgment of the House of Lords in *R v Coutts* [2006] UKHL 39 [2006] 1 WLR 2154, in which the Appellant's conviction for murder was quashed on the ground that the alternative murder of manslaughter should have been left to the jury. As a matter of fact, the Appellant in that case was retried and he was again convicted of murder. *Coutts* was considered by the Criminal Division of the Court of Appeal of England and Wales in *R v Foster* [2007] EWCA Crim 2869 [2008] 1 WLR 1615, which held that the principle in *Coutts* does not extend beyond the ambit of the Criminal Law Amendment Act 1967. In a case such as the present, it is only necessary to section 6(3):

> "Where, on a person's trial on indictment for any offence except treason or murder, the jury find him not guilty of the offence specifically charged in the indictment, but the allegations in the indictment amount to or include (expressly or by implication) an allegation of another offence falling within the jurisdiction of the court of trial, the jury may

> find him guilty of that other offence or of an offence of which he could be found guilty on an indictment specifically charging that other offence."

38. The offence of receiving is a true alternative to theft or robbery. A person charged with an indictment alleging robbery cannot be convicted of receiving without a count alleging that offence being added to the indictment, since receiving is by definition otherwise than in the course of theft. In other words, the charge of robbery does not include the charge of receiving, since it is not a case of the greater including the lesser, but of different offences. It follows that under the law of England and Wales, in a case such as the present the trial judge could not have been required to direct the jury to convict of robbery if robbery were the only count before it. The principle in *Coutts* has no application to this case.

39. The Board agrees with the Court of Appeal that it was unwise of the judge to withdraw the count of receiving. However, if the evidence of the Appellant's participation in the robbery had been sufficient for the jury to have convicted of that offence, the Board would not have ruled the conviction unsafe by reason only of the withdrawal of the receiving count. To do so would be tantamount to finding that the jury did not comply with their oath and were not sure that the Appellant had been one of the robbers. There would have been no justification for such a finding.

The application of the proviso

40. Mr Stevens submitted that notwithstanding the deficiencies in the trial referred to above, the Board could be sure that the jury would in any event have convicted the Appellant. We cannot accept this submission. As pointed out above, apart from the identification, the evidence against the Appellant was as consistent with his having been a receiver, assuming dishonesty, as with his being a robber. It is impossible to conclude that if there had been no dock identification, or if the jury had been properly directed, the Appellant was bound to have been convicted.

Conclusion

41. For the reasons set out above, the conviction was unsafe. The Board will humbly advise Her Majesty that the appeal should be allowed and the conviction quashed.