HAREWOOD (Leston) v. R.

[COURT OF APPEAL - CRIM. APPEAL NO. 39 OF 1991

(Williams, P, Husbands and Smith, JJ.A.)

April 25, 26, 1994 and June 6, 7 and 10, 1994]

(1994) 30 Barb. L.R. 283

Criminal evidence - Pre-trial disclosure - Extent of duty of prosecution to furnish appellant withdescriptions of assailant given by a material witness.

Practice and procedure - Directions to jury - Whether the Turnbull Rules on issues ofindentification were breached - Whether there were misdirections on use of expert evidence.

Practice and procedure - Admissibility of record of previous trial - Whether record of first trialshould be admitted so that appellant's counsel culd cross-examine certain witnesses on evidencegive at that trial.

Facts: The appellant was convicted of the murder of A.W. at Balls Plantation and sentenced todeath. He appealed against conviction on the grounds that (a) the prosecution should havefurnished him with full particulars of all the descriptions given by KS, who had been in the carwith the deceased when she was ordered to drive to the place where she met her death; (b) therehad been a breach of the rules laid down in Turnbull for the guidance of judges when directingjuries on issues of identification.

Counsel for the appellant also contended that the records of the previous trial should be madeavailable to him so that he could cross-examine certain witnesses on the evidence which they hadgiven.

Held: (i) The directions of the judge revealed a conscientious endeavour to follow and complywith the Turnbull guidelines;

(ii) in relation to the evidence of the expert witness, the relevant passages from the summing upshowed that the judge left acceptance or rejection to the jury;

(iii) on the question of providing the appellant's counsel with descriptions given by the witness, theDirector of Prosecutions gave the description which he had to the appellant's counsel and wasunder no duty to do more;

(iv) with regard to admissibility of evidence of witnesses at the previous trial, in this case theevidence was requested by the appellant for the purpose of contradicting the witnesses in asubsequent trial. The court had examined the evidence of the witnesses and was satisfied that noprejudice was caused the appellant by failure to allow the transcripts to be brought in.

Appeal dismissed.

Cases referred to:

R. v. Dyer; R. v. Fergusson [1925] 2 K.B. 799. [283]

R v. Hill [1973] 1 All E.R. 1

R. v. Lanfear [1968] 1 All E.R. 683.

R. v. Penman (1985/86) 82 Crim. App. R. 44.

R. v. Turnbull [1976] 3 All E.R. 549.

R. v. Vratside [1988] Crim L.R. 251.

Mr. Alair Shepherd for the appellant.

Mr. E. Garvey Husbands for the respondent.

WILLIAMS, P. On October 22, 1991 the appellant Leston Leroy Harewood was convicted ofthe murder of Arlene Watts and sentenced to death. Watts died sometime between the lateevening of June 4, 1986, when she was last seen alive, and 11 a.m. on the following morning whenher body, which had been found lying in a canefield at Balls Plantation, Christ Church, wascertified by Dr. Ramulu to be dead. Her throat had been cut.

The case for the prosecution was that the appellant had killed Watts and it was based on theevidence of Kim Straughn, who shared accommodation in Regency Park with Watts; of policeofficers who testified that the appellant confessed to the killing, and of Sergeant SydneyBrathwaite, a fingerprint examiner.

The appellant, when informed of his rights, elected to make an unsworn statement in which heraised an alibi and denied his involvement.

Straughn testified that about 8.10 p.m. on June 4, 1986 she was a passenger in the front of Watts'car, an 800 Suzuki, which Watts was driving from a video club in Hastings to which they just hadreturned a video tape. Watts turned left to go towards Oistins and a man, one of two men standingby a bus pole, asked for a ride to the bottom of Rendezvous. Watts obliged and the man got intothe back of the car and sat behind Straughn. Watts drove towards Oistins and when she reachedRendezvous the man asked for a ride up Rendezvous Hill. Watts again obliged and when shereached the top of the hill and was about to turn into a gap leading to their home, Straughn felt asharp object to her throat. The man told Watts to keep driving, that he had a knife to Straughn'sthroat and ordered Straughn to get into the back seat with him and keep her head down. She losther bearings after Watts had driven for a while and eventually the man ordered Watts to turn fromthe main on to a cart road that was surrounded by canes. Watts continued to drive and stoppedthe car when the man told her to. Straughn spoke of what took place in the cart road: the mantold them to get out of the car and give him the keys; they got out and Watts gave him the keys;he asked them if they had any money and she told him that she had $15, Watts said that she hadnone; he produced some string and cord and other things and told Watts to tie her up; Watts tiedher hands behind her back, the man opened the trunk of the car, and she got into it on his order todo so. After about four minutes the man re-opened the trunk, she got out, Watts was told to untieher hands which she did, and she was told to tie Watts' hands. Watts got into the trunk on theman's order, it was closed and she went with the [284] man to the front of the car on hisinstructing her to do so. After about five minutes they returned to the rear of the car where theman tied her up, lifted the trunk and told Watts to get out; that Watts got out, the man untied herhands and ordered Straughn to get into the boot. Straughn described the last time she saw Wattsin these words:

"Arlene and the man walked away from the car. She was about an arm's length in front ofhim. She was staggering. Accused and Arlene were going towards the canes. The accusedhad the white handle knife with him. Arlene was just an arm's length in front of him. Theywent out of my view."

Straughn told of how she was able to identify the man: he told Watts to leave the parklights onafter he stopped the car and Watts did so; there was a full moon, she was just an arm's length fromhim - they were face to face; they were initially to the front of the car for about four minutes andsubsequently for about five minutes; there was nothing blocking her view and she got a good viewof his face. The appellant, she said, was the man. Straughn described how she managed to freeherself of her bonds, make her escape and sound the alarm. She testified that about a year later, onJune 2, 1987, she identified him to the police at Central Police Station.

Sergeant Sydney Brathwaite testified as to his training and experience in fingerprint identificationand was accepted at the trial as an expert. A left thumb fingerprint impression was found on therear glass of the car and, after comparing it with the left thumb print from the appellant'sfingerprint form, he was of the opinion that it was made by the appellant's left thumb.

Police officers, Inspector Cumberbatch and Sergeant Jones, gave evidence of chasing andapprehending the appellant on June 2, 1987, of an oral and a written confession made by him andof his identifying various objects and pointing out various spots. According to the officers, theappellant made the following oral confession after he was cautioned:

"I is who cut the woman throat drop she in the cane field".

and then made the following confession which was recorded and produced as Exhibit EE:

" I used to go to church with some people in Lodge Road, Christ Church and I start to getacquainted with some of the members, then one of the brothers Michael Bayne from AshbyLand, Christ Church allow me to live at him. One evening in the month of June in 1986, Iwent down by the Garrison watching a football match. After the match finish, I walk upHastings Road and stop at the bus stop in front the video spot. I see one little boy there. Iwas going to catch a bus to go back to Ashby Land. I see a brown Suzuki car come outfrom at the video spot with two women. I ask them for a lift to Goddards and the [285] onedriving tell me to get in. I get in the back seat. When them get by Rendezvous Corner, thewoman went to stop the car, I ask she if she was going up the hill and she say yes, and I tellshe that I was going up the hill. When we get to the top of the hill and the woman stop forme to get out, I put my knife to the other woman throat and tell the woman who wasdriving to keep driving because I really wanted some sex. She keep driving up the roadthrough Sargeants Village. I made the woman who I had the knife to she throat get in theback seat and I hold down she head in my lap. I told the woman to drive straight throughVauxhall and then after we get right up to the top when you pass the Drive In, I tell she toturn left. So then when we get by Balls Plantation I tell she to swing off the road and go upthrough Balls cart road. So then when we get by the half of the cart road, I tell she to stopthe car and I make them get out. I ask them if them got money and one say she only gotabout fifteen dollars and the next one say she don't have any money. I get some string frommy short pants I had on and I make the young girl tie up the woman who was driving withit. Then I rip off piece the cloth off my short pants and tie she mouth and then I tie up theyoung girl hand behind she back with some wire which I find down by the video place. Itake away the key from the woman who was driving and make the young girl get in thetrunk.

Then I went to have some sex with the woman who was driving, but she was sick so I putshe back in the car and take out the young girl out of the trunk and had some sex with she.When I finish I tie she back up and put she back inside the trunk. I take back out the womanwho was driving again to make she suck me but she pull at my balls and I cut she throat anddrop she in the cane field. I decide to kill the young girl too but when I get back to the carfor she, she was gone. I walk back down the road, went through Lodge and went back toAshby Land. When I get home Michael was at home, his mother and sisters were at home,but I did not tell anybody anything. Then the next morning early I wash out the clothes Iwas wearing the night because I realised that my pants had some blood on it and I hangthem on the line in the yard. The next evening I hear in Oistins that the police know who theman is that cut the girl throat, so I get frighten and move out from Ashby Land. I start tosleep in a boat down Bay Street and I pelt away the knife in the sea out there. I decide that Idid not want the police to catch me, so I stay away from houses."

Dr. Ramulu testified that on June 6, 1986 he performed a post mortem examination on the body ofArlene Watts which was identified by her father. He gave evidence of the injuries that were on thebody and his opinion was that death had been caused by a cut-throat injury inflicted by a sharpedged weapon.

At the close of the case for the prosecution the appellant elected to make an unsworn statement inwhich he said that he remembered June 4, 1986 well. He did not leave home that day. About 4.30p.m. he was at the Baynes and Layne family when Margaret Bayne left for work and he

was stillthere about 9.30 p.m. when she [286] returned from work. He was playing scrabble withMargaret's sister Evelyn when Margaret returned from work and he was quite sure that she sawhim playing scrabble. He could not recall at any time in his life ever having been at any bus-stop inHastings, Christ Church and he never visited Balls Plantation or any cart road there. He knewnothing about the death of Arlene Watts.

He said that on the night of June 5, 1986, a police officer told him that the police were saying thatthey were going to charge him for the murder at Balls and, being aware of the police and theiractivities before, he got frightened that the police would put the charge on him. He therefore leftthe area of Ashby Land, Oistins where he had been living.

He spoke of June 2, 1987. He was at South Ridge, Christ Church and saw three men whoappeared to be police officers. He turned away from them and started to walk. When he saw themrunning after him, he ran but into the hands of three officers who handcuffed him and put him in apolice car.

He was taken to the Criminal Investigation Department, chained and handcuffed to a table and achair and questioned. He told of being harassed by police officers, of being put on identificationparades; and of being told to sign a statement. He was threatened when he said that he could notsign the statement unless he read it. He later signed the statement because he did not want to bekilled.

The Judge's directions

The learned judge gave the following directions on identification (at page 7):

"Mr. Foreman and members, I turn now to the question of the identification of the accusedas the man who allegedly cut the throat of Arlene Watts between the 4th and 5th days ofJune, 1986, and it is my duty to tell you that whenever the case against an accused persondepends wholly or even substantially on the correctness of the identification of the accusedyou must approach the question of identification with caution. The accused by his defence issaying that he is not the man. He is saying that he was not there at the time given by theprosecution witness Kim Straughn. The accused is saying that he recalls the 4th of June,1986 well and that he did not leave home that day. He is saying that on the evening of the4th of June, 1986 about 4.30 he was at the Baynes and Laynes family and that about 9.30that very night he was still there playing a game of scrabble. That is what the Defence aresaying and you will have to approach the question of identification with caution, to ensurethat you are satisfied with the identification evidence.

It has been found in the experience of the courts that a witness may be mistaken and yet atthe same time be a convincing witness. So that is the reason for the warning that you haveto approach the evidence of the identification of [287] the accused with caution and youmust also consider that a mistaken witness can be a convincing witness."

He went on to tell the jury that in dealing with and weighing the evidence of identification, theymust take into account all the circumstances in which the identification was made and to discussthe evidence as to the length of time that Straughn had the man under observation, the distance hewas from her, the light, whether there was any impediment to her view, whether she had knownhim before and whether there was any material discrepancy between the description given to thepolice and the man's actual appearance. He continued -

"Mr. Foreman and Members, you will take all these matters into account when you areconsidering the question as to whether or not there was a satisfactory identification of theaccused on that night by the witness Kim Straughn. These guidelines, sometimes referred toas Turnbull guidelines, established a principle that there is a special need for caution whenthere is an issue on the evidence as to the correctness of the identification and the practice inthe courts (is) for the Judge to give a careful summing up which contains not only thewarning for caution, but also exposes the jury to the weaknesses if any, and dangers ofidentification evidence generally and in respect of the particular case before the jury.

Mr. Foreman and Members, you have seen the manner in which the witness Kim Straughngave her evidence on the witness stand and you have had the opportunity to consider herdemeanour as she gave that evidence. Do you consider Kim Straughn to be a mistakenwitness as to the identity of the man who travelled in the car driven by the deceased ArleneWatts and directed them to stop the car in the cart road at Balls Plantation? Do you thinkshe is mistaken as to the identity of the man with whom she had the conversation outside thecar and was with in front the car - in each case just an arm's length away? The man whomshe also saw walking away with Arlene Watts; a man who she had originally observed forapproximately twelve minutes; and the man whom she subsequently pointed out at anidentification parade about a year afterwards. Did she impress you as a person who cameinto this court, took the oath and then deliberately lied on the man whom she has never seenbefore? Mr. Foreman these are some of the questions you may wish to ask yourselves inseeking to determine whether you are satisfied with the evidence given by Kim Straughnimplicating the accused with the incident which occurred between the 4th and 5th days ofJune, 1986.

The issue of identification is a matter for your determination and you will bring to bear yourcommonsense, experience and collective wisdom in coming to the conclusion whether ornot Kim Straughn is a mistaken witness as to the identity of the man she saw that night. TheDefence are saying that Kim Straughn may [288] be a truthful witness, but a mistaken one,because the accused was nowhere at the scene when Arlene Watts met her death. Theaccused was at home and the Defence is therefore saying that Kim Straughn picked out thewrong man at the identification parade. It is your task to assess the evidence and come to aconclusion as to the reliability of the evidence of Kim Straughn."

The judge gave the following directions with respect to the statements which the prosecutionalleged had been made by the appellant (at pages 3 to 6):

"Now, as regards the oral statements allegedly made by the accused to witnesses in thiscase: as judges of fact, you have two functions to perform. Firstly, you have to determinewhether the words were indeed spoken and secondly, if you find that they were spoken,then you will ask yourselves what do those words mean. If you find that the words werecapable of more than one meaning, then you must accept the meaning most favourable tothe accused. You must bear that in mind when considering the oral statements allegedlymade by the accused to any of the witnesses in this case; if you accept that they were madethen the question is, what do those words mean?

As regards the contents of the written statement, and that is Exhibit EE, which is attributedto the accused and recorded by Inspector

Cumberbatch and received in evidence withoutobjection from the defence as to its admissibility, it is for you to say whether you accept thatthe accused did in fact make the statement that was admitted in evidence; and if you findthat the accused did make the statement, then it is for you to determine the probative valueof the statement and to assess what weight, if any, you will give to the statement. Indetermining what weight you will give to that statement, you will bear in mind and haveregard to the circumstances in which the statement is said to have been obtained from theaccused. Inspector Cumberbatch told you that no threats, promises, force or violence weremade to or issued on the accused to obtain the statement, nor was the accused induced inany way to make the statement.

You have seen the manner in which Inspector Cumberbatch gave his evidence and it is foryou to determine whether you consider him to be a witness upon whom you may safelyplace your reliance in determining whether the statement was made in the circumstances inwhich Inspector Cumberbatch has attested. In short, you may wish to ask yourselves if thereis anything on the evidence before you to cause you to doubt that the statement was madeby the accused. If you entertain any such doubt, then you will resolve that doubt in favour ofthe accused and reject the statement."

After reviewing the Inspector's evidence as to the circumstances in which the statement was made,the judge continued: [289]

"You will therefore bear these matters in mind when you come to consider the probativevalue of the statement and to assess its weight and you will consider whether you acceptthat the accused used the words attributed to him before he made the statement which wasrecorded as Exhibit EE, and if he did use those words, what do they mean."

The judge later told the jury in relation to Exhibit EE (at page 47):

"In seeking to determine the weight to attach to the statement, you must look at all thecircumstances in which it was made. Inspector Cumberbatch is saying that it was givenvoluntarily without any threats or inducement or promises. The defence are saying it wasprepared and given to the accused to sign after he was interrogated and threatened."

And (at page 69) the judge reminded the jury of the direction which he had given them earlier inrespect of words allegedly spoken by the accused; that they had two functions to perform (1) theymust determine whether they accepted that the words were in fact spoken by the accused and (2)if they accepted that the words were indeed spoken, then they would ask themselves what thewords meant.

With respect to the evidence of Sergeant Brathwaite, the judge directed the jury on the evidenceof expert witnesses as follows (pages 21 and 22):

"Mr. Foreman and members, an expert witness is one who gives evidence relating to amatter of science, skill or trade and beyond the knowledge of the ordinary man in respect ofthe specific field of training. In the case of the witness Dr. Ramulu, in the field of forensicmedicine and Sergeant Brathwaite in the field of fingerprint identification. I listened to theevidence of the training, qualifications and experience of these two witnesses and I wassatisfied that they had knowledge of the relevant science and that their evidence would be ofappreciable assistance to you in your quest for justice in this case. I therefore declared thatthey were acceptable as expert witnesses.

Mr. Foreman and members, you will therefore pay due regard to the opinions given by thesewitnesses as being worthy of credit unless you find elsewhere in the evidence material whichoutweighs and displaces any opinion given by them. With respect to the fingerprint evidenceof Sergeant Brathwaite, there is no other expert evidence as such before you whose opinionconflicts with that of Sergeant Brathwaite, but you have the evidence of Police ConstableMarston Bayne who told you that if the fingerprints are dirty and caking, there is thelikelihood that a characteristic can be seen on the print which is not the original print: andwhen the fingers are washed and clean the characteristics can be clearly seen in the form;and his evidence is that before the accused's prints were taken on the form, his hands werewashed. In his evidence under cross-examination, Sergeant Brathwaite said that the scene ofthe crime print, [290] that is, the print on the motor car, was smudged and the defence issuggesting to you that whoever put the print on the car, that person did not wash his hands.

In your approach to the evidence of Sergeant Brathwaite there is therefore no presumptionin favour of acceptability of his conclusions, but what you are to be concerned with is thebasis or criteria upon which he based his conclusions. That is, on the analysis of thecomparison chart, he told you that he found sixteen characteristics in coincident sequencewhich led him to the conclusion that the left thumb print impression found on motor carX9357 was made by the left thumb print of the accused. He told you that the courts inBarbados only accept sixteen characteristics as constituting a positive identification of aperson. The defence are saying to you that Sergeant Brathwaite is a truthful witness but hisopinion is wrong."

The judge later (at page 43) told the jury that Sergeant Brathwaite responded to the suggestionthat he was a truthful witness but wrong in his opinion, by saying that his opinion was correctlybased on his findings. The judge continued:

"Mr. Foreman and members, I must again remind you of the direction given to you earlier inmy summation. You will pay due regard to the expert opinion given by Sergeant Brathwaiteas worthy of credit; and you will consider and weigh his evidence in the same way as youwould any other witness. Clearly, unless you find elsewhere in the evidence, material whichoutweighs or displaces the opinion given by Sergeant Brathwaite as to his findings, then hisevidence should be of assistance to you in evaluating and assessing the evidence beforeyou."

Mr Shepherd for the appellant makes various criticisms of the trial and the summing up and theseare now considered seriatim.

Pre-trial disclosure

The appellant's retrial commenced on October 2, 1991. On September 23 Mr. Shepherd made thefollowing request from the Director of Public Prosecutions:

"On the authority of R v. Turnbull [1976] 3 All E.R. 549 I ask that you supply me withparticulars of the description given by the witnesses to the

Police. I should like theseparticulars in relation to each witness. In relation to each witness, I wish to know whatdescription was given and the person to whom the description was given.

You would also remember that at the trial, the witness said that a photo-fit sketch wasmade. I would like to see a photocopy of the photo-fit sketch and I would also like to haveaccess to the original."

On September 30 the Director responded as follows:

"2. The description of her assailant as given by Kim Straughn to W/Sgt Julie Jones was asfollows:

`The man is about 5'3" tall, medium build, dark complexion, in his mid thirties with hair onhis face but no moustache, low hair style and was wearing a long khaki colour gaberdinepants.'

3. I have checked with the appropriate authority and I have been informed that no photo-fitsketch is now available."

Mr. Shepherd's submission is that the prosecution should have furnished him with full particularsof all the descriptions given by Kim Straughn of her assailant, oral or otherwise, to the variouswitnesses. The stand taken by the Director is that he gave the description that he had and wasunder no duty to do more. The prosecution, he said, had discharged its responsibility. The relevantpassage from Turnbull is:

"Was there any material discrepancy between the description of the accused given to thepolice by the witnesses when first seen by them and his actual appearance? If in any case,whether it is being dealt with summarily or on indictment, the prosecution have reason tobelieve that there is such a material discrepancy they should supply the accused or his legaladvisers with particulars of the description the police were first given. In all cases if theaccused asks to be given particulars of such description, the prosecution should supplythem."

This court does not think that there is any obligation on the prosecution to go beyond whatTurnbull envisages, that is, to supply particulars of the descriptions that it had. No authority hasbeen shown for the proposition which is, in effect, that it is the duty of the prosecution to have thevarious witnesses interviewed in order that the defence may be provided with the particulars ofany descriptions of the accused that may have been given to them. With respect to the photo-fitsketch, there is no evidence contra the Director's response to Mr. Shepherd that it was notavailable at the time of the retrial.

The Photographs

In R. v. Dwyer, R v Ferguson [1925] 2 K.B. 799 at page 802 Lord Hewart C.J. said: [292]

"The circumstances of different cases differ greatly and it is not easy to lay down generalrules. One distinction, however, is quite clear. It is one thing for a police officer who is indoubt upon the question who shall be arrested, to show a photograph to persons in order toobtain information or a clue upon that question; it is another thing for a police officer toshow beforehand to persons, who are afterwards to be called as identifying witnesses,photographs of those persons whom they are about to be asked to identify. It would bemost improper to inform a witness beforehand, who was to be called as an identifyingwitness, by the process of making the features of the accused person familiar to him througha photograph. But even where photographs are employed for the purpose of obtaininginformation on the question of arrest, it is fair that all proper precautions should beobserved. The fair thing is to show a series of photographs and to see whether the personwho is expected to give information can pick out the appropriate person. And where theprocess has been gone through, no matter with what care, it is quite evident that afterwardsa witness who has so acted in relation to a photograph is not a useful witness for the processof identification, or at any rate the evidence of that witness for the purpose of identificationis to be taken subject to this, that he has previously seen a photograph."

It is a matter of balancing the duty of the police in seeking to detect the perpetrator of a crimewith what is fair to a suspect. In this case there is nothing to suggest that the police did anythingimproper. After the body was found Straughn was shown photographs in an album for thepurpose of assisting in the apprehension of the offender. About a year later she was invited toidentify the suspect. The evidence on the matter was part of the totality of the evidence that fell tobe considered and assessed by the jury.

The Turnbull rules

The submission is that there was a breach of the rules laid down by Turnbull for the guidance ofjudges when directing juries on issues of identification. However, in our view, the directions of thejudge, which were reproduced earlier, reveal a conscientious endeavour to follow and complywith the Turnbull guidelines. It is unnecessary to reproduce those guidelines. It is sufficient to saythat their substance is reflected in the summing up.

It is said in Turnbull:

"Care should be taken by the judge when directing the jury about the support for anidentification which can be derived from the fact that they have rejected an alibi. False alibismay be put forward for many reasons: an accused, for example, who has only his owntruthful evidence to rely on may stupidly fabricate an alibi and get lying witnesses to supportit out of fear that his own evidence will not be enough , further, alibi witnesses can makegenuine mistakes about dates and occasions like any other witnesses can. It is only when thejury are satisfied that the sole reason for the fabrication was to deceive them and there is noother explanation for its being put forward, that fabrication can provide any support foridentification evidence. The jury should be reminded that proving the accused has told liesabout where he was at the material time does not by itself prove that he was where theidentifying witness says he was."

The judge directed the jury on the alibi defence (at pages 82 and 83) as follows:

"Mr. Foreman and members, at the beginning of my summation I told you that the accusedman is presumed to be innocent and therefore does

not have to prove his innocence. Theburden of proof remains on the prosecution and it is for them to make you feel sure of theguilt of the accused by the evidence which they have placed before you. The defence in thiscase is one of alibi and there is no burden cast on the accused to prove to your satisfactionthat he was indeed where he said he was on the night Arlene Watts was killed in theCanefield at Balls Plantation and you must bear that in mind. It is the prosecution's task toprove by the evidence before you that he was not where he said he was."

Nowhere in the summing up did the judge suggest to the jury that they could find support for theidentification evidence or for the prosecution's case if they rejected the alibi as false or found thatthe appellant had lied about his whereabouts at the crucial time. There was no misdirection. It ispertinent to refer to R. v. Penman (1985-86) 82 Crim. App. Rep. 44 where the defence was analibi and the appellant was convicted. One of the grounds of appeal was that the judge had failedto direct the jury that, even if they found that the alibi was untrue, this did not necessarily meanthat the appellant had committed the offence. Reliance was placed on the passage from Turnbullreproduced above. The Court of Appeal held that there is no rule which requires that a judgeshould warn a jury that the mere fact that a defendant has told lies does not prove his guilt or thatsuch a warning should invariably be given whenever the veracity of the defendant or the truth ofan alibi defence is challenged. Hutchinson, J. who delivered the judgment of the Court said (atpage 49) -

"However, his argument finally came to this: that wherever an alibi was relied upon andthere was a possibility that in rejecting the alibi evidence the jury might conclude that thedefendant was lying, the judge was obliged to give a warning of the sort mentioned inTurnbull. While it was unnecessary for Mr. Salmon in the present case to contend for anywider proposition, it is difficult to see why, if his argument in relation to cases where an alibiis relied on be correct, the judge should not be obliged to give a similar warning in any case[294] where the jury are invited to conclude that the defendant had lied either to the policeor in evidence.

Counsel were unable to refer us to any case which supported so wide a proposition and weknow of none."

Expert evidence

R. v. Lanfear [1968] 1 All E.R. 683 was referred to in argument on this point. That case wasconcerned with the evidence of a doctor, but the substance of the decision is applicable to allexpert witnesses. It is that a judge should not direct a jury that the evidence of an expert witnessought to be accepted by them in the absence of reasons for rejecting it. The relevant passagesfrom the summing up reproduced earlier show that the judge did not direct the jury that theyshould accept Sergeant Brathwaite's evidence but left acceptance or rejection for them to decide.Mr. Shepherd sought to discredit Sergeant Brathwaite's evidence by showing a contradictionbetween his evidence and that of Police Constable Bayne, the photographer, but he was unable todirect the Court's attention to any such contradiction.

There is no merit in this ground.

Shackling

It is not in dispute that at the retrial the appellant was mechanically restrained when he wasbrought into the courtroom. Each day the restraints were removed before the proceedingscommenced and re-imposed after the court rose.

Mr. Shepherd was aware that members of the jury were able to see the appellant in shackles andwas concerned that this might be prejudicial to the defence. Consequently, he applied to theDirector of Public Prosecutions for his assistance. He made no complaint or application to thejudge.

Shackling of a prisoner is necessary when the gaoler believes that there may be violence or anattempt to escape. The position of the local courts and the available facilities make it impossiblefor gaolers, who fear violence or escape, to take a prisoner into or out of a court roomunshackled. Where an application or complaint is made to a judge that the use of shackles on aprisoner may cause prejudice to the defence, an appropriate direction should be given.

R v. Vratsides [1988] Crim. L. R. 251 was cited, but the case is entirely different from the present.There the jury learnt that the appellant had two sentences of life imprisonment for attemptedmurder and the Court of Appeal held that the prejudice was so great and overwhelming that itcould not have been removed by a direction to the jury. [295]

The record of the previous trial

The final point to be dealt with is that relating to the record of the first trial which Mr. Shepherdsought to have admitted in order to cross-examine certain witnesses as to certain evidence whichthey had previously given. This court thought that the record should have been admitted for thepurpose and it seems that some support for this view is to be found in R v. Hill [1973] 1 ALLE.R. 1 at Page 7:

"From this line of authority, we think it plain that a deposition properly taken before aMagistrate on oath in the presence of the accused and where the accused has had theopportunity to cross-examination was always admissible at common law in criminal cases ifthe original deponent was dead despite the absence of opportunity to observe thedemeanour of the witness. Provided it is authenticated in some appropriate way, as bycalling the shorthand writer who took the original note, there seems no reason to think thatsuch a transcript should not be equally receivable in evidence."

The question here is different. There the question was the admissibility of evidence of a witness ata previous trial of an accused against the accused at a subsequent trial. Here the question is as tothe admissibility of the evidence of a witness at a previous trial for the purpose of contradictingthat witness at a subsequent trial.

This court has examined the evidence of the witnesses and that given by them at the previous trialand is satisfied that no prejudice was caused by the failure to allow the transcripts to be used.

In the result there has been no miscarriage of justice and the appeal is dismissed. The convictionfor murder and the sentence of death are to

stand. [296]