BARBADOS.

[Unreported]

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

DPP's Reference No.1 of 2001

IN THE MATTER OF A REFERENCE by the Director of Public Prosecutions under Section 18 of the Criminal Appeal Act, Chapter 113A

AND

IN THE MATTER OF THE ACQUITTAL ON Indictment No.2 of the July Assizes 2001

Before: The Hon. Sir David Simmons, K.A. B.C.H., Chief Justice, the Hon. Errol DaC. Chase, Justice of Appeal and the Hon. Frederick L.A. Waterman, Justice of Appeal

2002: January 17, 31 and February 26

Mr. C. Leacock Q.C., Director of Public Prosecutions and Mr. D. Saddler on behalf of the Crown

Mrs. S. Commissiong for the Respondent

OPINION OF THE COURT

SIMMONS C.J.: In accordance with section 18 of the Criminal Appeal Act, Cap. 113A, the Director of Public Prosecutions has referred to the Court of Appeal two points of law on which he desires the opinion of this Court. We are prohibited from identifying the principal parties at the trial by their proper names by virtue of Rule 27(2) of the Criminal Appeal Rules, 1983. So, for the purposes of this decision we shall be content to refer to the former accused as "the assailant" and the virtual complainant as "the complainant". The assailant was acquitted as a result of the trial judge's withdrawal of the case from the jury. The Director of Public Prosecutions is not satisfied that the basis of the judge's [1] decision was correct in law and so he brings this Reference for our opinion.

[2] The two questions on which our opinion is sought under the Reference are these:

(i) Whether the learned trial judge erred in law in withdrawing the case from the jury under section 102 of the Evidence Act, Cap.121.

(ii) Whether the learned trial judge erred in law in not giving a summation after addresses by both the Crown and the Defence in the circumstances.

[3] This Reference raises important questions of law about the conduct of criminal trials. It touches and concerns the perennial problem of identification evidence, the right of a trial judge to withdraw a case from the jury, an interpretation of certain sections of the Barbados Evidence Act ("the Act") and the status of those sections having regard to the guidelines issued in the leading case R. v. Turnbull [1977] 1 Q.B.224.

[4] It will be convenient to deal with both questions in order of their formulation after we record the factual and evidential background of this matter.

The Complainant's Evidence-in-Chief

[5] August 2, 1999 was Kadooment Day in Barbados. It was a Bank Holiday on which day thousands of people go to the Spring Garden Highway ostensibly to celebrate the end of the sugarcane reaping season. The Highway is used for a street carnival.

[6] About 9.30 p.m. on August 2nd, the complainant and her sister were on their way back from the Spring Garden Highway walking along Constitution Road in the City of Bridgetown. There were two [2] others with them, their cousin and a friend – all young ladies. When they reached a point opposite to the building known as "Parts Unlimited", heading east towards Belmont Road, in single file, with the complainant bringing up the rear, the complainant heard a voice say: "Go through there!" The evidence of the complainant is that she looked back and saw two men. She turned around and looked back at the men but continued walking.

[7] Suddenly one of the men reached out to grab the chain she was wearing around her neck. She in turn grabbed him and pushed him off her towards the Parts Unlimited building. He went across the road from her and the second man also went across the road. The complainant and assailant had an exchange of words across the road. They were about 18 feet apart. She asked him words to the effect "You want to come and take what is mine, what I worked for?" He said nothing. But he pulled a knife from the waist of his trousers and charged at her. He had been standing under a street light before he charged at her, and by the time he charged at her, they were standing on Constitution Road itself.

[8] Complainant and assailant then started to fight but the complainant's sister came behind her, grabbed her and pulled her away. As a result of this tugging, the complainant fell in the road. Her assailant brandished the knife at her and ran through an alley towards "the van stand". In the melee, the complainant received a cut to her hand. She went with her friends to the Central Police Station and reported the attack to an officer.

She was later taken to a clinic for treatment and the hand was sutured. Her chain had been broken but was found on the ground. [3]

[9] Ms. Babb, Counsel for the Crown at the trial, led the complainant's evidence very carefully within the guidelines of Turnbull (supra). Thus, it was elicited in evidence-in-chief that:

(a) the complainant was first able to see her assailant when she looked back and saw him "directly behind" her;

(b) when the assailant first ran he stood under a street light;

(c) when he attempted to grab her chain he was, at the most, 4 feet from her;

(d) they were so close that she actually made physical contact with him and pushed him away;

(e) she looked at his face and noticed that he had "big eyes";

(f) the whole incident lasted between two and five minutes;

(g) for that time she was looking at his face;

(h) nothing obstructed her view;

(i) she had never seen her assailant before but he was about 5′6″ tall, slim, brown-skinned and had thick eyebrows;

(j) he was wearing a plaid shirt with a white T-shirt inside and a khaki pants of about knee length;

(k) he also wore a dark coloured broad-rimmed hat;

(l) he was taller than she so that, when she looked up at him, she looked straight into his face "and so I saw him".

[10] Two days later, on August 4th, the complainant was in the area of the Treasury Building across the road from the Julie 'N Supermarket. Her sister was again with her. She saw a man leaning on one of the columns by Julie 'N. She recognized that this man was wearing a plaid shirt with a white T-shirt inside, blue jeans and a dark coloured broad-rimmed hat. It was about 4.30 p.m. Two police officers were also standing near Julie 'N. The complainant went across to them, [4] made a report and pointed out the man standing by the column. As a result, the police officers approached the man and asked the complainant to repeat in his presence what she had told them. She said that the man was the person who had "robbed" her two days earlier. When asked if he had heard what she said, the man replied "Yes. Take a good look at me. It ain't me." The police officers asked him to accompany them to the police station and he went with them.

[11] At the trial, the complainant identified the man in the dock as the person who had assaulted her on August 2nd and whom she had seen by Julie 'N on August 4th.

Cross-Examination of the Complainant

[12] Under cross-examination by Mrs. Commissiong, the complainant, as we read the transcript, appeared to stand firm in her testimony. She insisted that when she first turned around, she looked the person in his face and they got as close to each other as 3 feet; he was wearing a cloth hat but she could see his face, his eyebrows and his eyes; that she pushed him away as soon as he grabbed at her; there were two street lights near to the area where the incident took place and "throughout the entire incident" she saw his face. She stuck to the description of the clothes he was wearing. She answered Counsel to say that: "The person that attempted to snatch my chain was standing by the street light." And he was brown-skinned. She said that the exchange of words between them lasted between 2 and 5 minutes. She insisted too that she saw the assailant that night. His outstanding characteristics were his big eyes. [5]

Evidence of Complainant's Sister

[13] The complainant's sister also gave evidence and was cross-examined. She strongly supported the evidence of the complainant in virtually every material particular. But especially, she testified that she was looking at the assailant the whole time and she gave the description of what the man was wearing to the police. It was the same as her sister's description. It would be tedious to enumerate the sister's identification as we did in respect of the complainant's evidence. Suffice it to say that her evidence was compellingly supportive of her sister's and, under cross-examination, she was not shaken. She also identified the accuses as the assailant. She saw the assailant's face when he and the complainant were exchanging words on opposite sides of Constitution Road.

[14] No identification parade was held and the assailant was charged on August 6, 1999 having denied on August 4th that he had assaulted the complainant.

The Unusual Turn

[15] After the close of the prosecution's case, which consisted of the evidence of the two sisters and the three police officers who dealt with the assailant, the case took an unusual turn. First, a submission of no case to answer was not made. The identification evidence of the sisters had been admitted. It would therefore seem that defence counsel was satisfied that there was a case to go to the jury. Secondly, the trial judge invited counsel for the prosecution and the defence to address him. Next, he did not sum up the case for the jury but, instead, read and explained section 102 of the Evidence Act [6] to the jury, after which he directed them to return a verdict of "Not Guilty".

Section 102 of the Evidence Act

[16] Section 102 of the Evidence Act is in these terms:

“102(1) Where identification evidence has been admitted, the Judge shall inform the jury that there is a special need for caution before accepting identification evidence and of the reasons for the need for caution, both generally and in the circumstances of the case.

(2) In particular, the Judge shall warn the jury that it should not find, on the basis of the identification evidence, that the accused was a person by whom the relevant offence was committed unless -

(a) there are, in relation to the identification, special circumstances that tend to support the identification; or

(b) that there is substantial evidence, not being identification evidence that tends to prove the guilt of the accused and the jury accepts that evidence.

(3) Special circumstances include –

(a) the accused being known to the person who made the identification; and

(b) the identification having been made on the basis of a characteristic that is unusual.

(4) Where

(a) it is not reasonably open to find the accused guilty except on the basis of identification evidence;

(b) there are no special circumstances of the kind mentioned in paragraph (2)(a); and

(c) there is no evidence of the kind mentioned in paragraph (2)(b),

the Judge shall direct that the accused be acquitted.”[7]

Withdrawal of case from the Jury

[17] This section clearly deals with directions to be given to the jury. Such directions will usually be given during a summation. Without seeing the need for a summation, the trial judge proceeded to analyse only a part of the evidence in relation to section 102(2)(a) supra. His examination of certain aspects of the identification evidence led him to the conclusion that, having regard to the provisions of the Act, the prosecution’s case hinged upon identification evidence exclusively and, in so far as there were no special circumstances, he was obliged to withdraw the case from the jury.

[18] It will be instructive to reproduce the trial judge’s directions to the jury so far as material. First, he cited section 102(1) and explained the reasons for caution in dealing with identification evidence. Then, he cited subsections (2), (3) and (4) (supra) and continued:

“When we examine this case are there any special circumstances that tend to support the identification? The evidence is that the virtual complainant and her sister had not seen the accused man before the night of the incident. So there is no special circumstance of the accused man being known to the virtual complainant before.

Secondly, has the identification been made on the basis of a characteristic that is unusual. Does the evidence show any unusual characteristic to associate the accused man with the crime? Does the evidence of identification show any unusual characteristic? The witnesses said that the accused man had big eyes. I don’t think big eyes is particularly unusual and that the accused man wore some “Clench” hat. Someone told us that that is a hat which young boys nowadays wear so I don’t think again that you can consider that as an unusual characteristic.

Continuing the quotation from the Act:

“Where

(a) it is not reasonably open to find the accused guilty except on the basis of identification evidence; [8]

(b) there are not special circumstances of the kind mentioned in paragraph (2)(a); and

(c) there is no evidence of the kind mentioned in paragraph (2)(b); the Judge shall direct that the accused be acquitted.”

What the law states in a nutshell is, that if the accused – if there is no special circumstance in the identification, for example, there is no evidence that the accused was known to the parties before hand and where there is no unusual characteristic involved in the identification and where there is no other evidence to connect the accused with the offence, and in this case there is none. There is no confession from the accused, there is no other evidence the accused has said all along I’m not guilty. I have not done it.

The Act mandates that the Judge direct that the accused be acquitted. That is what our Evidence Act requires and in keeping with the Act, it is my duty to direct you to return a verdict of not guilty on both counts because of the circumstances of identification and in keeping with the Evidence Act of Barbados.

I therefore direct you to return a verdict of not guilty."

The Turnbull Guidelines

[19] In R. v. Turnbull, the English Court of Appeal held that where the case against an accused person depends 'wholly or substantially' on disputed identification evidence, a detailed warning for the need for caution before acting on it should be given. It stressed that the reason for the warning should be stated. The jury should be warned that not only can one identification witness appear convincing and yet be unshaken, but the same is true when a number of witnesses identify an accused. Attention should be drawn to any material discrepancy between the description of the accused given to the police by the witness and the accused's actual appearance. As to the warning, the Court of Appeal stated that the Judge should warn the jury of the special need for caution before convicting in reliance on the correctness of the identification. This warning need be in no [9] particular words but should include the reason for the warning, the possibility of a mistaken witness being a convincing one and a caution that several witnesses may all be mistaken. The Court went on to say that the judge must also indicate any specific weakness in the prosecution evidence and invite the jury to examine the circumstances in which the identification was made. Where the evidence is of good quality it may be put to the jury without more, subject to the warning being given. However, where in the opinion of the judge the identification evidence is of poor quality he should direct an acquittal unless there is "other evidence which goes to support the correctness of the identification".

[20] The Turnbull guidelines were an attempt to implement, as a matter of practice, the recommendations of Lord Devlin in a 1976 Report – Report to the Secretary of State for the Home Department of the Departmental Committee on Evidence of Identification in Criminal Cases (1976).

[21] It seems to us that the authorities support at least three situations in which a trial judge may withdraw a case from the jury.

(i) At the close of the prosecution's case, upon a submission by the defence that there is no case to answer, if the judge is satisfied that there is no evidence that the crime was committed by the accused, he should stop the case.

(ii) If, however, there is some evidence but it is of a tenuous character, it is the duty of the judge, on a submission of no case, to stop the case if he comes to the conclusion that the prosecution's evidence, taken at [10] its highest, is such that a jury properly directed could not properly convict on it.

Those principles were clearly expressed in R. v. Galbraith [1981] 2 AER 1060 by Lord Lane CJ.

In the Caribbean, Massiah C surveyed a wide range of Commonwealth authorities during the course of his illuminating and erudite judgment in The State v. Alvin Mitchell (1984) 39 W.I.R. 185. He found the principles relevant upon a submission of no case to answer firmly established and speaking with similar voice in Canada, the United Kingdom and Australia – see p.190

The learned Chancellor then observed:

"A distillation of the principles stated in those authorities, stripped of whatever philosophical or esoteric content some may conceive them to possess, yields the following. A trial judge ought to send the case to the jury where in his opinion there is sufficient evidence upon which a reasonable jury, properly directed, might convict. I place the emphasis on the word "might" and on its subjunctive character. The trial judge ought, on the other hand, to withdraw the case, if the evidence is so unsatisfactory or unsound (established through cross-examination or otherwise) that no reasonable jury could convict on it, or if the evidence, even if all is believed, is so weak, tenuous or insufficient, that it cannot yield a lawful conviction." – p.190

(iii) Where a case depends wholly or substantially upon disputed visual identification evidence and the quality of the identification evidence is poor, the judge should withdraw the case from the jury unless, of course, there is other evidence capable of supporting the identification – R. v. Turnbull. This can mean that, even in the absence of a submission, the judge may still invite submissions from counsel when, in his opinion, identification evidence is poor and not supported. It [11] may then be appropriate to withdraw the case from the jury.

For some time there appeared to be confusion about the boundaries between the principles enunciated in Galbraith and the Turnbull guidelines.

[22] However, in Daley v. R. (1993) 43 W.I.R. 325, Lord Mustill delivering the advice of the Judicial Committee of the Privy Council was of opinion that the decisions in Galbraith and Turnbull could properly co-exist if properly understood. In fact, Lord Mustill pointed out that, in the unreported case of R. v. Heffernan (1986), the English Court of Appeal rejected the view that Galbraith and Turnbull were in conflict. Lord Mustill said (at p.334):

"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 CJ 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 emphasized, 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."

This explanation of the two cases was cited with approval by Lord Steyn in Jones v. R. (1995) 49 W.I.R. 1 at p.4. [12]

[23] In an identification case, the trial judge's duty to withdraw the case from the jury is wider than the general duty of a trial judge on a submission of no case to answer – R. v. Fergus (1993) 98 CAR 313.

[24] The observations of Haynes C in the State v. Greene and Alleyne (1979) 26 WIR 395 at 402 are salutary. The learned Chancellor said:

"It may well be that the general approach should be to apply the Turnbull rules wherever the conditions of identification are difficult or poor or otherwise such that the possibility of mistake is real, whether the person identified was known to the identifier or not."

The Status of Evidence Act

[25] The Evidence Act of Barbados, Cap.121, was proclaimed on September 1, 1994. In the view of this court it is not a codifying statute properly so called. Indeed, its Long Title states: "An Act to reform the law relating to evidence in proceedings in courts in Barbados and to provide for related matters." It provides for the Attorney General to make codes of practice in respect of various matters, including, "the detention, treatment, questioning and identification of persons by police officers." – Section 170. None has yet been made.

[26] An essential feature of a codifying statute is that it expressly states that there must not be reliance upon any prior enactments or decisions of courts after the commencement date of the codifying statute.

[27] The Evidence Act contains no such language. It was proclaimed 17 years after the decision in Turnbull and we are absolutely sure that the drafters would have been aware of the advice in that case. In fact, the statutory enactment of the Turnbull warning in section 102(1) in language very similar to that of Lord Widgery CJ suggests very strongly that the drafters were aware of Turnbull. [13]

[28] Nevertheless, the Act does not enact all of the principles of Turnbull. For example, it does not require the attention of the jury to be drawn to any material discrepancies between the description of the accused given to the police by the witness and the actual appearance of the accused. It does not require the judge to point out the specific weaknesses in the prosecution's evidence.

[29] The statutory framework for warning and directions to the jury has gaps. Those gaps must be filled by the application of common law principles. The Act is therefore not exhaustive of the law and, in our opinion, is not a codification of the law of evidence in Barbados.

[30] The real issue in this Reference then is whether section 102 of the Act totally excludes the operation of the Turnbull guidelines or whether, conversely, that section is to be read in conjunction with those guidelines. The answer will require a construction of section 102. The Act is modeled after the Report of the Australian Law Commission which proposed a new Evidence Act for Australia but whose enactment was preceded by detailed study, proposals, counter proposals and an interim report.

[31] The warning in section 102(2) is a statutory enactment of the warning that Widgery CJ in his guidelines said was desirable. However, the Barbados legislation enacts that the jury should not identify the accused as the person committing the offence unless one of two factors is present. First, there must be special circumstances tending to support the identification or alternatively, there must be other substantial evidence, not being identification evidence, tending to prove the guilt of the accused. [14]

[32] A critical problem in this Reference is the phrase "special circumstances". In his Report, Lord Devlin had used the term "exceptional circumstances". At paragraph 8.4 he said, inter alia –

"….it is only in exceptional cases that identification evidence is by itself sufficiently reliable to exclude a reasonable doubt about guilt."

Foreseeing difficulties inherent in this phrase, Lord Widgery CJ in Turnbull was at pains to explain that "We have not followed that report in using the phrase "exceptional circumstances" to describe situations in which risk of mistaken identification is reduced. In our judgment the use of such a phrase is likely to result in the build-up of case law as to what circumstances can properly be described as exceptional and what cannot." How farsighted!

[33] Whereas the U.K. eschewed the use of any special phrase, Barbados has imported the words "special circumstances". They greatly influenced the trial judge in this Reference. However, we think that

the learned trial judge did not correctly construe section 102(2) and (3). In subsection (3) the statute says that "special circumstances INCLUDE" – (emphasis supplied)

(a) the accused being known to the identifier; and

(b) the identification having been made on the basis of an unusual characteristic.

[34] In legislative drafting it is a commonplace for a statute to explain a definition of words or phrases appearing in the statute by use of the words "means" or "includes". Where "means" is used, the effect is that the definition is conclusive. For example, in section 2 of the Evidence Act it is provided that: "admission" or "confession" means a previous representation made by a person who is or becomes a party to proceedings, being a representation that is adverse to the [15] person's interest in the outcome of the proceedings." On the other hand, the definition of "evidence" in the Act is that "evidence includes unsworn evidence".

[35] In our opinion, the use of the word 'includes' in a statute is designed to permit enlargement. It signifies that what is in fact included is in addition to something else not specifically stated to be so included. O'Halloran JA in the Canadian case R. v. Hall (1954) 14 W.W.R. 241 at 244 explained the drafting technique thus:

"The word 'includes' in contrast to 'means', signifies that which is included is an addition to something else that is not stated to be included or may not be so included."

[36] The trial judge seems merely to have asked himself two questions: Was the assailant known to the witnesses? Was the identification made on the basis of an unusual characteristic?

The assailant was not known and the characteristics mentioned by the witness were his “big eyes” and the hat which he wore. Since these were not unusual characteristics and the witnesses did not know the assailant before the night, the Judge perfunctorily withdrew the case.

[37] The trial judge seemed to think that his evaluation of the evidence was limited to the two situations enacted as “special circumstances” under section 102(3) and no other; that he was not permitted to have regard to other matters. He therefore did not consider adequately or at all many of the circumstances under which the identification was made by the two sisters as we set out at paragraphs 8 to12 supra. In construing the section so narrowly we are of opinion that the learned trial judge erred.

[38] Moreover, the judge did not identify and deal with any specific weaknesses which had appeared in the identification evidence as he [16] would have been required to do if the case had gone to the jury. There were precious few. But since he was considering whether to withdraw the case, we think he was under a duty to examine any specific weakness which had been revealed in the identification evidence of the two sisters. The trial judge obviously did not think that he was obliged to apply this principle of Turnbull to himself. It was not mentioned in the statute and that was the end of the matter so far as the judge was concerned. We do not construe section 102 as excluding the Turnbull principles. It enacts some of them. But where it is silent and a Turnbull principle exists it should be applied.

[39] We think that what was called for was a thorough examination of the evidence (both in chief and in cross-examination) of the complainant and her sister in accordance with the Turnbull guidelines. Moreover, the trial judge did not appreciate that the evidence of the complainant’s sister was strongly supportive of the complainant’s evidence and was capable of standing on its own. Indeed, this was classically a matter for the jury. There is good authority for the proposition that evidence of visual identification of one witness is capable of supporting the evidence of visual identification of another.

[40] In R. v. Weeder (1980) 71 C.A.R. 228, a strong English Court of Appeal of 5 judges held that:

“Where the quality of the identification evidence is such that the jury can be safely left to assess its value, even though there is no other evidence to support it, then the trial judge is fully entitled, if so minded, to direct the jury that an identification by one witness can constitute support for the identification by another, provided that he warns them in clear terms that even a number of honest witnesses can all be mistaken.” – per Lord Lane CJ at p.231. [17]

[41] It seems to us that, in this case, there was the unshaken evidence of two witnesses attesting to having seen the assailant face to face for between two and five minutes, in an area lit by two street lights. Each gave the identical description of the clothes he was wearing; they came as close to him as 3 feet; nothing obstructed their view of him. Two days after the incident they saw the assailant again dressed in clothes similar to those he was wearing on August 2nd.

Both witnesses were able to impart a high degree of particularity in their description of the assailant.

The Director of Public Prosecutions carefully detailed and analysed the nature and quality of the identification evidence for us and characterized it, when assessed cumulatively, as being “cogent, compelling and reliable”. We agree.

[42] The acceptance or rejection of this evidence was, in our view, a matter eminently fit for a jury. In the language of Turnbull, we think that the quality of the identification evidence was good and the jury should have been left to assess its value; provided however, that an adequate warning as required by section 102(2) was given.

[43] We should also mention that, in addition to the evidence of visual identification by the two sisters, there was also in court identification by them. The dangers of such identification have been emphasized on many occasions – See Alexander v. R (1981) 145 CLR 395 at 399 per Gibbs CJ and R. v. Burchielli [1981] V.R. 611. Such an identification is particularly unreliable. But, of course, so long as the evidence principally relied upon is an out-of-court identification, then there is no inherent danger in [18] following this with an in court identification – R. v. Gorham (1997) 68 SASR 505. These principles were stated and explained by the Federal Court of Australia in Jamal v. the Queen [2000] FCA 1195.

[44] As regards the first question in the Reference it is the opinion of this court that the learned trial judge did err in withdrawing the case from the jury for the reasons stated above.

[45] In respect of the second question, we observed at paragraph 14 that the case “took an unusual turn”. In the vast majority of cases where the prosecution’s evidence is weak, defence Counsel would normally make a submission of no case to answer after the close of the prosecution’s case. The trial judge would hear counsel for the prosecution in reply and then rule.

But there was nothing inherently wrong in this Reference in the trial judge’s calling upon both counsel to address him as to the quality of the evidence if he felt that he needed their assistance in making up his mind.

[46] The reason why the learned trial judge gave no summation in this case was that he was of the view that section 102(3) limited his evaluation of the evidence to the two circumstances provided for therein. Since, in his view, the evidence was not good enough to satisfy the subsectional requirements he naturally thought that he had to obey the mandate of subsection (4) and direct an acquittal.

[47] However, on the particular facts of this case, in so far as we are of opinion that the trial judge should have allowed the matter to go to the jury, having regard to the totality of the evidence and the relevant principles of common law and statute, clearly it follows that, had he done so, he would have been obliged to give a [19] summation and assist the jury with the law - both statute and common law - in the customary manner.

Provision is made in the Act for an award of costs to the Respondent in these types of Reference and, in the circumstances we order that the

Respondent’s costs of this Reference be taxed. [20]

Chief Justice

Justice of Appeal Justice of Appeal