BARBADOS

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Criminal Appeal No. 3 of 2016

BETWEEN:

CARLTON JUNIOR HALL **Appellant**

AND

THE QUEEN **Respondent**

Before The Hon. Mr. Justice Andrew D. Burgess, the Hon. Madam Justice Kaye C. Goodridge, Justices of Appeal and the Hon. Madam Justice Margaret A. Reifer Justice of Appeal (Acting)

2018: July 17
2019: January 23

Mr. Andrew Pilgrim QC, in association with Ms. Kamisha Benjamin and Ms. Rashida Edwards for the Appellant

Mr. Anthony Blackman in association with Mr. Oliver Thomas for the Respondent

DECISION

REIFER JA (ACTING):

INTRODUCTION

[1] In this appeal, the appellant has raised a narrow point of law surrounding identification evidence. It touches and concerns the construction, import and

breadth of **section 102** of the **Evidence Act Cap. 121 (the Act)**. In that regard, this Court is invited to do one of two things: first, to reverse itself and declare that **DPP's Reference Criminal Appeal No. 1 of 2001, B'dos [unreported] decision of 26 February 2002 (DPP's Reference)** was wrongly decided; or second, to find that the circumstances of this case are distinguishable and ultimately not governed by the principles of law enunciated in that case.

THE FACTUAL BACKGROUND

[2] The facts relevant in the consideration of this appeal are sparse and simple.

[3] The appellant was convicted by a jury of his peers on 2 March 2016 of the offence of murder by shooting. He had entered a plea of not guilty to the charge. The victim was Adrian Wilkinson who the appellant was found to have murdered on 14 August 2011.

[4] He was sentenced to death in accordance with **section 2** of the **Offences Against the Person Act, Cap. 141 (Cap 141)**.

[5] The Crown's case against the appellant was the identification evidence of Julian Benn, a friend of the deceased, who was present at the time of the shooting.

[6] The defence of the appellant at trial was that it was a case of mistaken identity. Thus, the crux of this case was the quality of the identification evidence, viewed in the context of **section 102 (section 102)**.

[7] When this appeal first came on for hearing, counsel for the appellant took the view that the then pending decision of the **CCJ**, **Dwayne Severin v The Queen CCJ Appeal No. BBCR 2017/003 (Dwayne Severin)** was central to this matter and that this case should therefore be adjourned to await its outcome. However, as it turned out, the **CCJ** delivered its decision in **Dwayne Severin** on 25 January 2018 and we were therefore able to review the **CCJ** ruling in the case and assess its relevance, if any, to this appeal. In the final analysis, counsel for the appellant submitted that it could be distinguished from this case.

THE GROUND OF APPEAL

[8] The appellant filed one ground of appeal, namely, that the conviction was unsafe and/or unsatisfactory for the following reason:

> "1. The learned trial judge erred when she failed to uphold the No Case Submission made by counsel for the Appellant. The case should have been withdrawn from the jury for the following reasons:
>
> a. The case for the Crown was based solely on identification evidence and there were no special circumstances as required by section 102 of the Evidence Act Cap 121 to support the identification evidence. As such the case should have been withdrawn from the jury

> under section 102(4) of the Evidence Act; and
>
> b. The identification evidence of the Crown's principal witness was tenuous and did not reach the standard of beyond reasonable doubt. Moreover the identification evidence conflicted with the forensic evidence adduced by the Crown."

SETTING THE CONTEXT

[9] We consider it useful to begin by examining **section 102, DPP's Reference** and **Dwayne Severin**.

Section 102

[10] **Section 102** makes provision for the directions which a trial judge should give to a jury and the circumstances in which an accused person should be acquitted by a trial court:

> "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) there is substantial evidence, not being identification evidence that tend 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."

[11] **Section 136(2)** makes further provision that the judge

"(a) warn the jury that identification evidence may be unreliable;

(b) inform the jury of matters which may cause the evidence to be unreliable; and

(c) warn the jury of the need for caution in determining whether to accept the identification evidence and the weight to be given to it."

DPP's Reference

[12] The import of this case is best summarised by **Simmons CJ**, at **para [3]** of the judgment in the following words:

"[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 of **R v Turnbull [1977] 1 QB 224**."

It is impossible to resist stating that this appears to summarise precisely the issues in this appeal.

[13] In **DPP's Reference**, **Simmons CJ** determined at **para [29]** that the **Act** was "not exhaustive of the law and, in our opinion, is not a codification of the law of evidence in Barbados". The core issue in the case was therefore whether **section 102** is to be read as totally excluding the operation of the guidelines in **R v Turnbull [1977] 1 QB 224 (**the **Turnbull** guidelines**)**, or whether, conversely, **section 102** is to be read in conjunction with those guidelines. The answer to this question, as expressed by this Court, was that the statutory framework given in **section 102** for warning and directing the jury has gaps, and that those gaps must be filled by the application of common law principles.

[14] Stated differently, in Barbados the statute law of identification evidence is to be applied together with the common law principles.

[15] We note in passing and in contrast with Barbados' **section 102** that, section 112 of the St. Kitts Evidence Act 2011-30 in that part of the **Act** dealing with identification evidence and under the rubric "Directions to jury", codifies the common law principles. That section enumerates, from subsection (a) to (h), a comprehensive check-list of the common

law/**Turnbull** principles to be applied by the trial judge in warning and directing the jury.

[16] In **DPP's Reference,** the Court examined the meaning and import of **section 102**. It made the observation that **section 102** and the **Act** generally were modelled on the Report of the Australian Law Commission. However, ironically, when the Australian Evidence Act was passed, this section was not adopted and there is therefore no persuasive Australian authority on the construction of **section 102.**

[17] **DPP's Reference** has been recognised in the region as strong authority. In interpreting section 102 of the St. Lucia Evidence Act 2002, which is *in pari materia* with **section 102 of Cap. 121**, Rawlins JA (as he then was) in the OECS Court of Appeal in the cases of **Urban St. Brice v The Queen (Criminal Appeal No. 4 of 2006 (St. Lucia)** and **Gerald Joseph v The Queen, St. Lucia Civil Appeal No. 2 of 2006 (15th January 2007)** drew upon the assessment of the provision by **Simmons CJ**.

[18] In **DPP's Reference**, this Court observed at **para [31]** that the **Act** 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."

[19] The second factor is easily dismissed as it is fact sensitive, being purely a question as to what evidence exists other than the identification evidence.

[20] The real challenge in the construction of **section 102** relates to the first factor namely, the determination of what constitutes "special circumstances" in the context of identification evidence. This was the core issue in the case that provoked the **DPP's Reference**, and the fundamental challenge of the present appeal.

[21] Of significance to the Court was the fact that there was a notable departure from the wording of the Australian Law Commission Report by our legislature in the passing of the **Act**, which eschewed the use of the phrase "exceptional circumstances" in favour of "special circumstances".

[22] Widgery CJ in **Turnbull** rationalised avoiding the use of the specific term "exceptional circumstances" as an attempt to avoid a build-up of case law as to what circumstances could properly be described as exceptional and what could not. He stated:

> "Case law of this kind is likely to be a fetter on the administration of justice when so much depends upon the quality of the evidence in each case. Quality is what matters in the end. In many cases the exceptional circumstances to which the report refers will provide evidence of good quality, but they may not: the converse is also true."

[23] We observe that the UK legislature opted not to use any special phrase.

[24] Unfortunately, inclusion of the words "special circumstances" in our **Act** may not have avoided the need to develop our jurisprudence as to what circumstances could properly be described as special and what cannot.

[25] In construing **section 102** in **DPP's Reference,** this Court considered the significance of the word "includes" in contradistinction to the use of the word "means", the effect of which is that the trial judge in that case under reference erroneously limited himself to the two situations enacted as "special circumstances" under **section 102(3)** and no other. **Simmons CJ** at **para [35]** there observed that "the usage of the word 'includes' in a statute is designed to permit enlargement. It signifies that which is in fact included is in addition to something else not specifically stated to be so included". In our opinion, this demonstrates the evident recognition by our legislature of the impracticality of precise enumeration and the reluctance to unnecessarily fetter the trial judge: the wisdom in allowing the circumstances of each case to speak for themselves.

[26] This Court, at that time, did not attempt to further define or delimit the ambit of the phrase "special circumstances".

Dwayne Severin

[27] **Dwayne Severin** is the notable case in which the **CCJ**, in an appeal against conviction and sentence, declared the mandatory sentence of death to be unconstitutional.

[28] One ground of appeal in that case which is significant to this appeal, and the core ground of the appellant's appeal against his conviction, was that, the trial judge erred when he directed the jury that there were special circumstances supporting the identification of the appellant in accordance with **section 102**.

[29] This submission mirrors counsel's submission in this case; not surprisingly, as Mr. Pilgrim QC was lead counsel in that case as well.

[30] After outlining the circumstances of the identification, the **CCJ** at **para [11]** of the judgment agreed with the Court of Appeal that these circumstances can justifiably be "special circumstances" within **section 102(2)** and **(3)(a)**, "such circumstances needing to be such as to provide clear support for the reliability of the identification of the appellant". However, the "special circumstances" referred to in this case was the fact that the impugned identification led to the police finding one of the two guns involved in the victim's murder in the appellant's bedroom, and so tending to provide evidence of the guilt of the appellant, if the jury accepted such evidence, as

it did. There was, therefore, in **Dwayne Severin** significant evidence other than identification evidence.

[31] The **CCJ** clearly accepted, as the relevant law of Barbados, the common law principles of identification as expounded by **Turnbull** as well as **section 102(1)** of the **Act** and rejected all the grounds of appeal against conviction. The **CCJ** expressed its satisfaction that no injustice had been done to the appellant.

Should DPP's Reference be followed?

[32] In view of counsel's submission that this Court should overrule its decision in **DPP's Reference**, it is necessary to take a cursory look at the law of Barbados relating to *stare decisis*.

[33] The governing principle was recently outlined by **Burgess** and **Mason JJA** in **Munroe Haywood v the Queen, Civil Appeal No. 26 of 2010 (29 January 2016) (Munroe Haywood)** in determining whether this Court was bound by its previous decision in the case of **Mentor et al v R Crim App Nos. 31, 32** and **33** of **1992 (unreported) (Mentor)**. *Stare decisis* was stated by their Lordships to be a "central plank and defining characteristic of our legal system". They explained that the doctrine dictates that a previous decision of this Court in a criminal case is binding on this Court save in four exceptional circumstances.

[34] These four exceptions are explicated at **para [23]** as follows:

> "[23] ... First, if it were shown that there was another decision of this Court conflicting with **Mentor**, this Court would be free to consider itself not bound by **Mentor** and to choose to follow the other decision. Second, this Court would be bound to refuse to follow **Mentor**, if **Mentor** conflicts with a decision of the Caribbean Court or Justice **(CCJ)** or the Privy Council even though that decision has not expressly overruled **Mentor**. Third, we would not be bound to follow **Mentor** if that decision were reached *per incuriam.* Fourth, this Court would not be bound by **Mentor**, it being a criminal case, if to follow it would cause injustice to the appellant: see, e.g. **R v Gould [1968] 2 QB 65; Williams** at **548** per Rees JA.

[35] This point was also discussed by **Professor Rose-Marie Belle Antoine: Commonwealth Caribbean Law and Legal Systems Second edn** at **pages 118** to **165**. There, the author highlights the deference paid to past decisions and established precedent observing that "the mere fact that the final court views a past decision as being wrongly decided is not usually sufficient to bring about an overruling of precedent".

THE SUBMISSIONS

The case for the appellant

[36] The main submission of counsel for the appellant is that, since the case for the prosecution was based solely on the identification evidence of Julian Benn, **section 102** requires the existence of special circumstances or

evidence other than the identification evidence adduced which tend to support the guilt of the appellant.

[37] It was counsel's further submission that no special circumstances arose from this evidence and that the learned trial judge misdirected the jury when she told them that special circumstances existed because the witness had seen the appellant on two previous occasions on the night that the incident occurred. Counsel also submitted that to say that the appellant was known to the witness was a misdirection by the trial judge, as the witness at best could only recognise the appellant as someone he had seen before. It was the submission of counsel for the appellant that the following direction by the trial judge on special circumstances, was a misdirection:

> "It remains only to ask what are the special circumstances which tend to support the identification. A special circumstance may be recognition. I have already said to you that there is no such previous recognition. It may be based on an unusual characteristic, there is no such characteristic mentioned by the witness. A special circumstance in this case may also include the fact that the witness on the night gave evidence that he saw the accused man on two previous occasions and on one he had the opportunity to look at him very closely over a period of fifteen minutes or so before he saw him shoot his friend."

[38] Counsel cited this Court's decision in **Oliver et al v The Queen BB2007 CA 26** where it was held that a misdirection with respect to special circumstances was fatal to the conviction.

[39] Counsel argued that previous sightings, as in this case, are contemplated by **Turnbull** as one of the factors that the jury should bear in mind when determining whether the witness had correctly identified the accused as the offender. It was counsel's submission that **section 102** has gone above and beyond the law expounded in **Turnbull**, although, in his oral arguments, he concedes that the effect of **DPP's Reference** is to leave one with the view that **section 102** added nothing to the common law. It is his argument, however, that **section 102 (4)** introduces a 'new power' to a trial judge. At **page 27** of the transcript counsel states:

> "In our submission we cannot escape the fact that this is a new requirement being provided for by statute that if certain circumstances are not met the judge has an obligation to do something."

Counsel stated "that special circumstances must exist to buttress the identification. To be known to the witness requires more than seeing the accused on two previous occasions on the same night."

[40] Counsel's very significant argument was that the phrase "special circumstances" being derived from the phrase "exceptional circumstances", "special circumstances" would have to be circumstances other than those found in the case of **Turnbull**.

[41] For the reasons outlined below, this argument is rejected.

[42] As regards the witness Julian Benn's credibility and hence his reliability as a witness, counsel for the appellant also introduced into the equation the fact that Julian Benn admitted that he consumed alcohol on the night of the incident. It is clear from this line of argument and the record that the amount of alcohol consumed was a matter of dispute. Counsel's attack on the witness' reliability and credibility was evidently not accepted by the jury.

[43] What follows organically from this line of argument is counsel's next submission, namely, that the case should have been withdrawn from the jury under **section 102 (4)** on a submission of no case to answer.

[44] At the end of the prosecution's case, such a submission was made by counsel for the appellant who argued that the evidence such as there is, was tenuous and did not meet the required standard of proof established by the *locus classicus* **R v Galbraith [1981] 2 All ER 1060 (Galbraith)**. In this regard, counsel relied on the **English Practice Note [1962] 1 All ER 448** as reflecting the law in our jurisdiction. This Note stipulates that a submission of no case may be upheld in two situations:

> (a) When there has been no evidence to prove an essential element of the alleged offence; or
> (b) When the evidence adduced by the prosecution has been so discredited as a result of cross-examination or is so manifestly unreliable that no reasonable tribunal could safely convict on it.

[45] The no case submission was overruled by the trial judge.

[46] Counsel submitted on the authority of the Ontario Court of Appeal case of **The Queen v Goran 2008 ONCA 195**, that evidence of identification should be given closer scrutiny by a Court of Appeal than is given to other findings of fact. Counsel also argued both limbs, unreliability and lack of credibility. A subsidiary argument was that the evidence of the eye witness did not accord with the forensic evidence.

The case for the respondent

[47] Counsel for the respondent succinctly summarised his arguments in opposition into five substantive points. These are that:

i) the identification evidence of the witness Mr. Julian Benn was reliable and compelling;
ii) the judge identified and dealt with the possible weaknesses in the identification evidence in accordance with **section 102** supplemented by the **Turnbull** guidelines;
iii) notwithstanding the fact that the identification evidence was provided by one witness, it was capable of standing on its own;
iv) the judge warned the jury in accordance with **section 102 (2)**; and
v) the issue of the witness being drunk or stale drunk was adequately placed before the jury.

The specifics of the identification evidence

[48] This summary of the evidence of Julian Benn is lifted from the written submissions of counsel for the respondent. Its accuracy has not been challenged by counsel for the appellant:

> "8. The evidence of Mr. Benn in summary was that on the night of August 13, 2011, he attended a fete in the then carpark next to the Chefette Establishment at Speightstown, St. Peter with the deceased. He parked his motor car in a lighted area in the carpark. While he was in the immediate vicinity of his parked car, he saw a man alighting from a red car with some females. That car was parked close to his. Continuing, he said that the man walked to the rear of his car. He asked the man a question who walked over to the females who had alighted from the red car, without saying anything to him. He said that the man was behind his vehicle for a period of between three to five minutes. According to the witness, he entered the fete with the deceased and took up a position "on the outskirts of the crowd" in a well lit area and while there, he saw the same man walked past him and the deceased and took up a position behind them. Later according to him, he saw the same man holding the deceased by his vest while talking to him. Then he saw when the man took a gun and shot the deceased in his stomach. Four days later he identified the Appellant as the man who shot the deceased."

[49] Counsel for the appellant in his written submissions added that Julian Benn described the assailant, as being "of slim built, my height and fine features, with a low haircut. He had on a blue hat, a plaid shirt with predominantly blue and sneakers and a kind of tannish, khahish shorts". The clothing described differed from the description given by the appellant in his 'movement' statement. Counsel emphasised that this evidence was not in

the nature of recognition, because Julian Benn's evidence was that the assailant was previously unknown to him.

DISCUSSION AND CONCLUSION

[50] The issues arising from these submissions are all bound up with aspects of the law of evidence and procedure relating to identification evidence. In the final analysis, they call for a consideration of (i) what is meant by "special circumstances" within the meaning of **section 102**; and (ii) whether the evidence of identification in this case meets the standard of "special circumstances". In this context, it inevitably involves a consideration of whether the trial judge rightly overruled the no case submission or whether she was mandated by **section 102(4)** to withdraw this case from the jury.

[51] These matters are all explored under the headings below.

Is the appellant equating "special circumstances" with corroboration?

[52] There is no general requirement in the law of Barbados (or co-incidentally in the law of England and Australia) that evidence should be corroborated. Thus, a jury may decide an issue in favour of the party bearing the burden of proof on that issue on the uncorroborated evidence of a single witness. The question in those circumstances will be whether or not that witness is to be believed. In that regard, what is paramount is the reliability and trustworthiness of the witness and the quality of the evidence.

[53] Significantly **section 135(1)** is found in **Division 5** of the **Act** which deals with corroboration. That section states definitively and conclusively that:

> "(1) It is not necessary that evidence on which a party relies be corroborated."

[54] There are, of course, exceptions where corroboration is required as a matter of law and, also, situations where the law requires warnings to be given to the jury. In this regard, **section 136** in **Division 6** headed **Warnings** gives clear directions to a trial judge:

> "(2) Where there is a jury the Judge shall, unless there are good reasons for not doing so,
>
> (a) warn the jury that the evidence may be unreliable;
> (b) inform the jury of matters that may cause it to be unreliable; and
> (c) warn the jury of the need for caution in determining whether to accept the evidence and the weight to be given to it."

[55] At **section 136 (1) (b)** identification evidence is very clearly placed in the category of evidence requiring a warning and most obviously not falling within a category of exceptions to the corroboration rule.

[56] In our view, the submissions of counsel for the appellant erroneously equates "special circumstances" with corroboration. Where a case turns on disputed identification evidence, the judge must take special care in directing

the jury. There never has been any common law rule that the evidence of a witness as to identification must be corroborated, nor is there a rule of law requiring a judge to warn the jury of the dangers of convicting in the absence of corroboration.

[57] Counsel's submissions, if accepted, would lead to the clearly unintended outcome that identification by a single individual would not be permissible.

[58] Counsel's vigorously argued position was that **section 102(4)** is a revolutionary departure from **Turnbull**. Such an argument if accepted, would effectively redefine the role of judge and jury, in other words, resulting in the judge usurping the role of the jury or undermining it.

[59] There is no evidence that Parliament changed or intended to change the law to this effect. And there is nothing to suggest that Parliament intended that this was an exception to **section 102**.

[60] This brings us to the **Turnbull** Guidelines.

The Turnbull Guidelines

[61] The English Court of Appeal in 1977 in **Turnbull**, in recognition of the risk that a witness who is honest and well-meaning may impress the jury even though he is in fact mistaken, laid down guidelines to be observed by the trial judge when summing up. The **Turnbull** guidelines were an acknowledged attempt to implement the recommendations of Lord Devlin in

the 1976 Report to the Secretary of State for the Home Department of the Departmental Committee on Evidence of Identification in Criminal Cases.

[62] At **page 228** to **231** the court expressed the view that the guidelines involved changes of practice but not of law:

> "First, whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Provided this is done in clear terms the judge need not use any particular form of words.
> Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example, by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness 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 to believe that there is such a material discrepancy they should supply the accused or his legal advisers with particulars of the description the police were first given… Finally, he should remind the jury of any specific weaknesses which had appeared in the identification evidence.
> Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize

someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.

All these matters go to the quality of the identification evidence. If the quality is good and remains good at the close of the accused's case, the danger of a mistaken identification is lessened; but the poorer the quality, the greater the danger.

In our judgment when the quality is good, as for example when the identification is made after a long period of observation, or in satisfactory conditions by a relative, a neighbour, a close friend, a workmate and the like, the jury can safely be left to assess the value of the identifying evidence even though there is no other evidence to support it: provided always, however, that an adequate warning has been given about the special need for caution…

When, in the judgment of the trial judge, the quality of the identifying evidence is poor, as for example when it depends solely on a fleeting glance or on a longer observation made in difficult conditions, the situation is very different. The judge should then withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification. This may be corroboration in the sense lawyers use that word; but it need not be so if its effect is to make the jury sure that there has been no mistaken identification: for example, X sees the accused snatch a woman's handbag; he gets only a fleeting glance of the thief's face as he runs off but he does see him entering a nearby house. Later he picks out the accused on an identity parade. If there was no more evidence than this, the poor quality of the identification would require the judge to withdraw the case from the jury; but this would not be so if there was evidence that the house into which the accused was alleged by X to have run was his father's. Another example of supporting evidence not amounting to corroboration in a technical sense is to be found in **R v Long, (1973) 57 Cr. App. R. 871**…

The trial judge should identify to the jury the evidence which he adjudges is capable of supporting the evidence of identification. If there is any evidence or circumstances which the jury might think was supporting when it did not have this quality, the judge should say so…

> Care should be taken by the judge when directing the jury about the support for identification which may be derived from the fact they have rejected an alibi. False alibis may be put forward for many reasons: an accused, for example, who has only his own truthful evidence to rely on may stupidly fabricate an alibi and get lying witnesses to support it out of fear that his own evidence will not be enough. Further, alibi witnesses can make genuine mistakes about dates and occasions like any other witnesses can. It is only when the jury is satisfied that the sole reason for the fabrication was to deceive them and there is no other explanation for its being put forward can fabrication provide any support for identification evidence. The jury should be reminded that proving the accused has told lies about where he was at the material time does not by itself prove that he was where the identifying witness says he was…
>
> A failure to follow these guidelines is likely to result in a conviction being quashed and will do so if in the judgment of this court on all the evidence the verdict is either unsatisfactory or unsafe."

[63] In our opinion, both **Turnbull** and **section 102** direct the trial judge to assess the quality of the identification evidence. **Section 102 (4)** does no more than **Galbraith** and **Daley v R (1993) 43 WIR 325 (Daley)** in enjoining the trial judge, in a case where the quality of the evidence is exceptionally poor, to withdraw the case from the jury to avoid injustice. But in other circumstances, and we venture to say most circumstances, the trial judge's role is to give the statutory and **Turnbull** warnings to the jury.

Did the Judge satisfy the statutory warnings and did she satisfy the Turnbull Guidelines?

[64] In our view, the judge met the requirements of **sections 102** and **136** of the **Act** as well as the **Turnbull** guidelines.

[65] First, at **page 268** lines 19 to 23 and again at **page 269** lines 12 to 13, and **page 278** lines 1to 6 of the trial record, the trial judge informed the jury of the special need for caution before convicting an accused in reliance on the evidence of identification. In so doing, she also instructed the jury as to the reason for such need.

[66] Second, at **pages 266** to **269**, the trial judge assisted the jury on how to approach and analyse the identification evidence. And at **page 274** line 3 to **page 275** line 18, she analysed for them circumstances which could have affected the reliability of the identification and directed them to examine closely the circumstances in which such identification was made.

[67] Third, at **page 269** lines 1to 8 the trial judge correctly explained the law as it related to special circumstances and enumerated those circumstances for the jury. She stated:

> "You must examine the opportunity Julian Benn had to register and record the features of the man whom he said he saw and whom he says is the accused man. Secondly you must examine the reliable recall of those features when making the identification.

> You must first consider in relation to one, that is the opportunity to register and record the features. How long did Mr. Benn have the man under observation, at what distance, in what light and was his observation impeded and in what way?"

[68] Fourth, addressing the first limb of special circumstances, that is, the accused being known to the person who made the identification, the trial judge was at pains to point out to the jury that they should consider whether they were satisfied that the accused was seen by the witness before the event.

[69] Fifth, in addition, the trial judge discussed the length of time that the witness had the accused under observation. She thoroughly discussed what recognition was and whether the witness can be said to have recognised the accused from a previous occasion. She pointed out that it was more identification than recognition. The trial judge further discussed other considerations such as whether there was any material difference between the description given by the witness and the accused man's actual appearance and the period between the observation and the identification of the witness.

[70] Sixth, in addressing the second limb of special circumstances, the trial judge explained that there was no unusual characteristic mentioned by the witness

when at **page 277** lines 6 to 7 she stated: "it may be based on an unusual characteristic, there is no such characteristic mentioned by this witness."

[71] Throughout the case, the trial judge adhered to the guidelines provided by **section 102.** She identified and dealt with specific weaknesses which appeared in the identification evidence.

[72] In addition to discussing the special circumstances, the trial judge explored other matters pertaining to the evidence presented and, in particular, from **pages 286** to **291**, carefully analysed the evidence of Julian Benn for the jury. She looked at and analysed for the jury matters affecting the reliability of the identification evidence, such as the issue of alcohol consumption by the witness, Julian Benn, and his distance from the deceased and the shooter.

[73] There was a thorough examination of the evidence.

Withdrawing the case from the jury under section 102 (4)

[74] **Section 102 (4)** authorises a trial judge, whether on his own motion as in **DPP's Reference**, or where there is a submission of no case to answer, to withdraw the case from the jury by directing them that the accused be acquitted. The wording of the section makes use of the word "shall" which counsel for the appellant submits, as already stated above, gives the judge a "power" greater than that existing under the common law.

[75] At **para [21]** of **DPP's Reference, Simmons CJ** opines that there are at least three situations in which a trial judge may withdraw a case from the jury. He enumerated them as follows:

> "(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 its highest, is such that a jury properly directed could not properly convict on it;
> (iii) Where the 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**."

[76] In our opinion, what is of critical importance in elucidating the matter before us, is **Simmons CJ's** reconciliation of the law in **Galbraith** and **Turnbull**. In his words, it puts to rest the confusion about the boundaries between the principles enunciated in **Galbraith** and the **Turnbull** guidelines. He does so by adopting the words of Lord Mustill in **Daley** at **334**, where he states:

> "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 in 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."

[77] Of note is **Simmons CJ's** observation and finding of law at **para [23]** as follows:

> "[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**."

[78] This, in our view, is the intended import of **section 102 [4]** and not the establishment of a "new power" as argued by counsel for the appellant.

[79] It must always be remembered that in the consideration of a no case submission by a trial judge, he/she must strike the balance between on the one hand, the usurpation of the jury's function and on the other hand, the danger of an unjust conviction. As stated by Lord Widgery CJ in **R v Barker (1977) 65 Cr. App R 287** at **288**:

> "... even if the judge had taken the view that the evidence could not support a conviction because of the inconsistencies, he should nevertheless have left the matter to the jury. It cannot be

> too clearly stated that the judge's obligation to stop the case is an obligation which is concerned primarily with those cases where the necessary minimum evidence to establish the facts of the crime has not been called. It is not the judge's job to weigh the evidence, decide who is telling the truth, and to stop the case merely because he thinks the witness is lying. To do that is to usurp the function of the jury ...".

CONCLUSION

Whether there were special circumstances

[80] The quality of the evidence adduced by the Crown in this matter, was of such a standard as to constitute "special circumstances" within the meaning of **section 102 (2) (a)** and was properly placed before the jury who were adequately warned. The witness observed the accused on three separate occasions, inclusive of the shooting incident, the circumstances of which were analysed by the trial judge in **Turnbull** fashion, at an event at which the appellant admitted his presence. This can easily fall within the ambit of the phrase "a long period of observation". The witness made two identifications of the appellant: one at an identification parade conducted within four days of the shooting and the other in a dock identification at the trial. The trial judge examined in detail, for the benefit of the jury, the matters affecting the reliability of the identification evidence and the evidence generally, including how they should deal with the expert evidence.

Whether DPP's Reference should be applied or distinguished

[81] On the authority of **Munroe Haywood**, the circumstances before us do not lend themselves to an exception to the principle of *stare decisis*.

[82] While the facts of this case can be distinguished from those of **DPP's Reference**, the *ratio decidendi* of that reference remains applicable.

The no case submission

[83] In our view, on the proper application of the principles of **Galbraith, Turnbull** and **section 102** to the facts of this case, the trial judge correctly overruled the no case submission.

The Appeal on Sentence

[84] Having been convicted of murder, the appellant was sentenced to death by the trial judge on the 2 March 2016, in accordance with **section 2** of **Cap. 141**.

[85] The landmark decision of **Nervais** and **Severin** was subsequently delivered on 25 January 2018 declaring unconstitutional the mandatory nature of the death penalty.

[86] In their judgment in **Nervais** and **Severin**, their Honours acknowledged the fact that there are persons who would have been sentenced to death prior to this decision and at **para [115]** stated as follows:

> "While we are cognizant that the decision of the Court will affect persons who have been sentenced to death pursuant to

> section 2 of the OAPA, we are mindful of making binding orders on behalf of litigants who have not appeared before us. This however, does not prohibit us from expressing our views on the procedure that should be adopted in relation to such persons. We are therefore of the view that those persons convicted of murder and sentenced to death pursuant to section 2 of the OAPA or who have had their mandatory death sentences commuted to life imprisonment be brought with reasonable expedition before the Supreme Court for resentencing".

DISPOSAL

[87] In view of the foregoing, the appeal against conviction is dismissed. The sentence of death is vacated and it is ordered that the appellant be brought before the trial court for resentencing at the earliest opportunity.

Justice of Appeal

Justice of Appeal **Justice of Appeal (Acting)**