COMMONWEALTH OF THE BAHAMAS

IN THE COURT OF APPEAL

SCCrApp No. 66 of 2017

BETWEEN

LYNDEN PROSPER

Appellant

AND

REGINA

Respondent

BEFORE:	**The Honourable Mr. Justice Isaacs, JA** **The Honourable Sir Brian Moree, Chief Justice** **The Honourable Mr. Justice Jones, JA**
APPEARANCES:	**Mr. Anthony Delaney, Counsel for the Appellant** **Ms. Jameca Basden, Counsel for the Respondent**
DATES:	**11 December, 2018; 14 February, 2019; 4 April, 2019; 13 May, 2019; 4 July, 2019; 6 November, 2019; 16 January, 2020; 4 March, 2020; 23 July, 2020**

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Criminal Appeal – Appeal against conviction - Murder - Attempted Murder – Identification evidence – Dock Identification

On 3 November 2010, Sheria Curry and Shanko Smith were in their yard in the Fox Hill area when a Hyundai SUV drove up and shots were fired into the yard hitting them. Ms. Curry was killed and Mr. Smith was injured. Witnesses to the tragedy identified the appellant as one of the shooters. He was charged along with two others for the murder and attempted murder. At the trial witnesses gave evidence that the appellant was the shooter and that they knew him prior to the incident. The appellant was convicted and now appeals his conviction on the grounds that the **"Learned Trial judge erred in law by allowing the witnesses to give a dock identification of the Appellant, in circumstances where an identification parade ought to have been held"** and **"erred in law by failing to give adequate specific directions on the unique dangers of reliance on a dock identification."**

Held: appeal dismissed; conviction and sentence affirmed.

We do not take issue with the position that there is an additional issue in play where a witness has made a dock identification in a trial, to wit, those summarized in **Holland**. Moreover, we would accept as a general principle that it is a good practice to hold an identification parade as

their Lordships said at paragraph 31 of **Neilly**. However, it may not always be conducive to fairness, good practice or good sense for an identification parade to be held, for example, if the holding of an identification parade would have been of little utility because each eyewitness had testified that they had known the appellant beforehand for significant periods of time during which periods they interacted with him on multiple occasions.

In the present appeal several of the witnesses identified the appellant to the police around the time of the incident and claimed familiarity with him through long periods of diverse associations. Many said they knew the appellant, "all their life". We appreciate that no precise period of time is provided by that phrase but we understand that bit of Bahamian parlance translates to "a long time" or "for many years". The issue with which the Judge would have to wrestle, therefore, was the quality of the witness' association with the defendant sufficiently good to allow the witness to perform an identification from the witness box.

The Judge did not direct the jury using the phraseology employed by Sir Stanley Burton in **Terrell Neilly** at paragraph 32, **"Where, for example the uncontroversial evidence is that the defendant was well known to the witness before the offence, and the witness has previously identified him, dock identification may alone be no more than a formality"**; nor did he explain the benefits of an identification parade and the weaknesses of a dock identification as set out in paragraph 47 of **Holland**. However, we are satisfied that in the circumstances of this case the Judge has brought to the attention of the jury the essential matter the jury should bear in mind as contained in the judgment of Lord Hodge in paragraph 9 of **Lawrence**, **"But, if the evidence is admitted, the judge must warn the jury to approach such identification with great care."**

Artis v Regina [2014] 1 BHS J. No. 119 considered
Jason Lawrence v The Queen [2014] UKPC 2 considered
Maxo Tido v The Queen [2011] UKPC 16 considered
R v Turnbull [1977] QB 224 considered
Terrell Neilly v The Queen [2012] UKPC 12 considered

JUDGMENT

Judgment delivered by the Honourable Justice Mr. Jon Isaacs, JA:

1. The appellant was charged with the murder of Sheria Curry and the attempted murder of Shanko Smith; and after a trial, was convicted and sentenced on both counts. On 4 March 2020, after hearing this appeal, we reserved our decision and adjourned this matter to await the event. We render it now. For the reasons articulated below, we dismiss this appeal and affirm the convictions and sentences.

Background

2. On 3 November 2010, Sheria Curry and Shanko Smith were in their yard in the Fox Hill area when a Hyundai SUV drove up and shots were fired from its back seat into the yard hitting them. Ms. Curry was killed and Mr. Smith received an injury to his thigh. Several persons who were present at the time identified the appellant as firing a number of shots into the Curry's yard. Additionally, one Anthony Brice told of an encounter with the appellant on 2 November 2010, when he said that the appellant threatened the life of one Dario Knowles, a resident in the Curry's yard.

3. The appellant was arrested and charged with murder and attempted murder. At his trial presided over by Mr. Justice Bernard Turner ("the Judge"), some six witnesses, all stating under oath that they knew appellant prior to the incident, identified him as the shooter in the SUV. None of the witnesses had previously identified the appellant on an identification parade.

4. On 22 September 2016, the appellant was convicted on the offences of murder and attempted murder; and sentenced on 9 February 2017, to forty-two years' imprisonment for murder and twenty-two years for the attempted murder. The sentences were reduced by the eleven months he had spent on remand awaiting trial. His initial Notice of Motion was filed on 14 March 2017; but on 18 September 2019, he filed an amended Notice of Motion containing the following grounds:

> **"1. The Learned Trial judge erred in law by allowing the witnesses to give a dock identification of the Appellant, in circumstances where an identification parade ought to have been held.**
>
> **2. The Learned Trial judge erred in law by failing to give adequate specific directions on the unique dangers of reliance on a dock identification."**

Ground 1- The Learned Trial judge erred in law by allowing the witnesses to give a dock identification of the Appellant, in circumstances where an identification parade ought to have been held.

5. Mr. David Cash, Counsel for the appellant submitted that the warning given to the jury by the Judge on the dangers of dock identification was inadequate; and he cited the Privy Council decision of **Maxo Tido v The Queen** [2011] UKPC 16 as his authority for so saying. He referred us to paragraphs 21 to 31 of the judgment but we find that their Lordships' observations do not assist the appellant in this case. At paragraph 21 the Board said:

> **"21. The Board therefore considers that it is important to make clear that a dock identification is not inadmissible evidence per se and that the admission of such evidence is not to be regarded**

as permissible in only the most exceptional circumstances. A trial judge will always need to consider, however, whether the admission of such testimony, particularly where it is the first occasion on which the accused is purportedly identified, should be permitted on the basis that its admission might imperil the fair trial of the accused. Where it is decided that the evidence may be admitted, it will always be necessary to give the jury careful directions as to the dangers of relying on that evidence and in particular to warn them of the disadvantages to the accused of having been denied the opportunity of participating in an identification parade, if indeed he has been deprived of that opportunity. In such circumstances the judge should draw directly to the attention of the jury that the possibility of an inconclusive result to an identification parade, if it had materialised, could have been deployed on the accused's behalf to cast doubt on the accuracy of any subsequent identification. The jury should also be reminded of the obvious danger that a defendant occupying the dock might automatically be assumed by even a well-intentioned eye-witness to be the person who had committed the crime with which he or she was charged." [Emphasis added]

6. In the Privy Council decision of **Terrell Neilly v The Queen** [2012] UKPC 12 the Board stated at paragraphs 28 and 29:

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

confidence as to the reliability of the identifications, and in this sense the quality of the identifications was poor.

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

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

> **positively increases the risk of a wrong identification.””** [Emphasis added]

7. In **Jason Lawrence v The Queen** [2014] UKPC 2, (Transcript), Lord Hodge, reading the judgment of the Board, said at paragraph 9, inter alia:

> **“9. In several cases this Board has held that judges should warn the jury of the undesirability in principle and dangers of a dock identification: *Aurelio Pop v The Queen* [2003] UKPC 40; *Holland v H M Advocate* [2005] UKPC D1, 2005 SC (PC) 1; *Pipersburgh and Another v The Queen* [2008] UKPC 11; *Tido v The Queen* [2012] 1WLR 115; and *Neilly v The Queen* [2012] UKPC 12. Where there has been no identification parade, dock identification is not in itself inadmissible evidence; there may be reasons why there was no identification parade, which the court can consider when deciding whether to admit the dock identification. But, if the evidence is admitted, the judge must warn the jury to approach such identification with great care.”**

8. He then referred to paragraph 21 of Lord Kerr’s judgment in **Maxo Tido v R.**

9. We do not take issue with the position that there is an additional issue in play where a witness has made a dock identification in a trial, to wit, those summarized in **Holland** (above). Moreover, we would accept as a general principle that it is a good practice to hold an identification parade as their Lordships said at paragraph 31 of **Neilly** (above). However, it may not always be conducive to fairness, good practice or good sense for an identification parade to be held, for example, if the holding of an identification parade would have been of little utility because each eyewitness had testified that they had known the appellant beforehand for significant periods of time during which periods they interacted with him on multiple occasions.

10. In **Artis v Regina** [2014] 1 BHS J. No. 119, at paragraph15, John, JA wrote:

> **“If the police had conducted an identification parade with respect to Flowers it would have been nothing but a farce as Curry was bound to pick out Flowers who was well known to him and whom he had seen the morning Williams was fatally shot. While placing reliance on the dicta of Lord Kerr in Maxo Tido counsel ought to be mindful that the situation in that case was quite different from the instant case. Curly testified about the familial relationship that existed between himself and Flowers. Accordingly, no useful purpose would have been served in holding the conventional identification parade. The alleged dock identification could not be said to have been conducted in a setting in which Curly was identifying Flowers or Aritis for the first time. To quote Sir**

Stanley Burton in delivering the advice of the Board in Terrell Neilly v The Queen at paragraph 32:

> **"Where there has been no identification parade, then whether there is any and if so what good reason for that is a material circumstance. Where, for example the uncontroversial evidence is that the defendant was well known to the witness before the offence, and the witness has previously identified him, dock identification may alone be no more than a formality.""** [Emphasis added]

11. In the present appeal several of the witnesses identified the appellant to the police around the time of the incident and claimed familiarity with him through long periods of diverse associations. Many said they knew the appellant, "all their life". We appreciate that no precise period of time is provided by that phrase but we understand that to mean in Bahamian parlance "a long time" or "for many years". Therefore, the Judge had to consider, with regard to each of the witnesses who made a dock identification, the quality of the previous association with the appellant to determine whether to allow the witness to perform an identification from the witness box. He did so and, in our view, based on the evidence before him, the Judge cannot be faulted for concluding in each case that the dock identification was permissible.

12. In the circumstances of this case, there has been no error by the Judge in allowing the dock identifications to be made. Thus, we find no merit in this ground.

Ground 2 - The Learned Trial judge erred in law by failing to give adequate specific directions on the unique dangers of reliance on a dock identification

13. Mr. Cash submitted that the Judge directed the jury in relation to a mere general "Turnbull" warning on identification but did not give adequate specific directions on the unique dangers involved in the jury placing reliance on a dock identification.

14. The Judge's directions on identification appear, in part, at page 588 of the transcript. I reproduce his remarks insofar as they relate to the appellant. At page 588 the Judge said, inter alia:

> **"So the prosecution's case depend (sic) upon the correctness of the identification of these defendants by these witnesses. And in these circumstances, I must warn you of the special need for caution before convicting the accused men, Lynden Prosper and D'Angelo Adderley, on the evidence of the identification of the witnesses alone. And as I have indicated there is one other**

bit of evidence in respect of statements made by the defendants and I will come to that."

15. He continued on pages 588-9 to explain that mistakes in recognition do occur and that the jury must exercise care where a witness says he knows the appellant:

> **"Now the need for the warning in respect of identification, is because it is possible for an honest witness to have made a mistaken identification. There have been wrongful convictions in the past as a result of such mistakes. Even apparently convincing witness can be mistaken. So can a number of apparently convincing witnesses. Even with identification involving recognition by the witnesses of the accused, as someone he knows, mistakes even in recognition of close family and friends are sometimes made and so care must be taken where the witness says that he knows the accused men. And as I have said, in respect of Lynden Prosper, the witnesses said they knew him. Some of them said they knew him basically all their lives."** [Emphasis added]

16. The Judge then went on to tell the jury about those matters which ought to engage the jury's consideration as they assessed each witness' evidence in relation to the correctness or otherwise of the identification of the appellant. The directions are consonant with the factors mentioned in **Turnbull**, for example, what was the lighting at the time of the incident, did anything obstruct the witness' view and how far away from the action was the witness. At page 591 the Judge said:

> **"The next question is how long between the observation and the identification to the police. And in that regard Lynden Prosper was identified by name by a number of the witnesses. He did not attend an identification parade and I will speak to you, give you directions on that.**
>
> **So, it appears from the evidence of those who identified Lynden Prosper, he was identified by name, and the statements were given to the police."**

17. Later, on the same page he said:

> **"The next question to consider is, have the witnesses ever seen the men before. Again, that evidence is given by each of the witnesses. They say, and you consider what their evidence is individually, of course; and the witnesses each said that they knew Lynden Prosper. As I have said already, some of them, for most of their lives …"**

18. At page 592 of the transcript the following appears:

> **"At this point I want to indicate relative to the issue of, as counsel for Mr. Prosper had objected to these witnesses identifying his client in the dock, as he described it, but each of those witnesses who identified the defendant Lynden Prosper, said that they knew him. That he used to be by the Currys' yard. Most of these witnesses, all of them testified of spending time in the Currys' yard with family members. And some of them even spent some time in his yard. In the case of Anthony Brice, he had said that he was really friends with Prosper's older brother. And, so, that was it. They gave, by name, this defendant, with the exception of Shanko Smith, and we'll come to his evidence.**
>
> **And, so, to place Lynden Prosper, persons who knew him 'all my life', as these witnesses had said on the identification parade. And had already given the police the name, you may well find that they picked out Lynden Prosper.**
>
> **So there was no identification parade, but these witnesses have said, "look, we knew Lynden Prosper all our lives". They said the name 'Lynden Prosper'.**
>
> **So you consider the circumstances under which he was identified. You consider the incident, how long the incident took, the lighting conditions to determine whether, as the questions indicate and as I warned you, whether they were mistaken as to the identification of the Lynden Prosper."**

19. The Judge concludes his directions on identification thusly having told the circumstances under which the identifying witnesses came to make their identification of the appellant:

> **"You consider the circumstances, the event, the time, the nighttime, the lighting conditions, what was taking place, to determine whether you can accept the evidence of these witnesses or any of these witnesses."**

20. The Judge did not direct the jury using the phraseology employed by Sir Stanley Burton in **Terrell Neilly** at paragraph 32, **"Where, for example the uncontroversial evidence is that the defendant was well known to the witness before the offence, and the witness has previously identified him, dock identification may alone be no more than a formality."**; nor did he explain the benefits of an identification parade and the weaknesses of a dock identification as set out in paragraph 47 of **Holland**. However, we are satisfied that in the circumstances of this case the Judge had brought to the attention of the jury the essential matter the jury should bear in mind as contained in the judgment of Lord Hodge in paragraph 9 of **Lawrence**, **"But, if the evidence is admitted, the judge must warn the jury to approach such identification with great care."**

21. Thus, there is no merit in this ground.

Conclusion

22. We are satisfied that there has been no miscarriage of justice in this case nor has there been any material irregularity affecting the fairness of the case; and that this appeal should be dismissed.

23. In the premises, we dismiss the appeal and confirm the convictions and sentences imposed.

The Honourable Mr. Justice Isaacs, JA

24. I have read the judgment of Isaacs JA and generally agree with its reasoning and concur with its conclusion that this appeal should be dismissed.

The Honourable Sir Brian Moree, CJ

25. I also agree with the reasoning of the judgment of Isaacs JA and agree that the appeal be dismissed.

The Honourable Mr. Justice Jones, JA