[2016] JMCA Crim 33

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 17/2013

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MISS JUSTICE P WILLIAMS JA (AG)
THE HON MISS JUSTICE EDWARDS JA (AG)

LAWRENCE BROWN v R

Mrs Emily Shields and Miss Kimm Daley instructed by Gifford Thompson & Shields for the applicant

Miss Kerri-Ann Kemble and Miss Trichana Gray for the Crown

11, 12, 13 May and 20 December 2016

EDWARDS JA (AG)

[1] The applicant was charged on an indictment containing three counts. The first count charged him with the offence of illegal possession of firearm contrary to section 20(1)(b) of the Firearms Act; the second and third counts charged him with robbery with aggravation contrary to section 37(1)(a) of the Larceny Act. He was tried and convicted in the High Court Division of the Gun Court by Daye J and sentenced to ten years imprisonment at hard labour on count one and 16 years imprisonment at hard labour on each count of robbery with aggravation. The sentences were to run concurrently.

[2] The applicant applied to this court for leave to appeal against his conviction and sentence. His application went before a single judge of this court for consideration and on 27 October 2014, it was refused. As he is entitled to do, he has renewed his application before the full court.

The facts

[3] At the trial before Daye J sitting alone without a jury, the Crown called five witnesses. The two virtual complainants, Mr Lennox Hetridge and Mr Mark Richards, gave evidence that on 15 April 2012, sometime after 12:00 pm, whilst they were standing at the gate to Mr Richards' home in Old Harbour, in the parish of Saint Catherine, they were held up and robbed of a number of items by two men, one of whom had a gun. Both witnesses identified the applicant as one of two men who had held them up. Mr Hetridge gave evidence that the men took his chain, his wallet which contained $6,000.00 in cash and his car key. Mr Richards' evidence was that the men took his wedding ring, bracelet and Blackberry cellular phone.

[4] Interestingly, the matter may have rested there, but for the ingenuity of Mr Richards. An oral report had been made at the Old Harbour Police Station in the parish of Saint Catherine, immediately after the robbery, but nothing else happened until about three weeks later, when Mr Richards discovered that his Blackberry cellular phone was being used. As a result, he borrowed a friend's phone, changed the profile and name to that of a female and started communicating with the person who was using his phone. The profile of the person using his Blackberry cellular phone was "DJ Rushane". Mr Richards, pretending to be female, made arrangements to meet with DJ Rushane.

Mr Richards (quite prudently, we think) sought the assistance of the police to accompany him to meet this person in Papine in the parish of Saint Andrew. The person who came to meet him at the pre-arranged spot in Papine was Mr Rushane Henry. Mr Henry was taken into custody by the police.

[5] The police then took Mr Henry to the Flying Squad office at 127-129 Harbour Street in the parish of Kingston, where he was interviewed. A few days later, based on information he gave the police, he was taken to an address in Central Village, Spanish Town in the parish of Saint Catherine. When the police arrived at the premises, the applicant and another man were seen. Both the applicant and this second man were taken into custody; however, the other man was later released without charge. Both Mr Hetridge and Mr Richards later pointed out the applicant at a video identification parade as one of the men who robbed them. They also identified him as the one who had the firearm.

[6] At the trial of the applicant, both complainants testified that the incident lasted for about five minutes, that they were able to see the applicant's face, on the evidence of Mr Hetridge, for the entire five minutes and on that of Mr Richards for about four minutes. They both recounted having verbal interaction with the men during the incident when the robbers were making demands of them.

[7] Mr Henry gave evidence for the prosecution. He told the court that he had known the applicant for three years and had purchased the Blackberry phone from him for $6,500.00. The phone was not recovered. According to Mr Henry, he bought the

phone for his cousin Andre, who was present at the time of the transaction, but he kept the phone a few days because they could not open it at first. However, according to the evidence of the investigating officer, neither the phone nor Andre was found.

Grounds of appeal

[8] At the hearing before this court, counsel for the applicant abandoned the original grounds of appeal filed by the applicant himself and sought and received permission to argue four supplemental grounds of appeal. These were that:

> "1. The learned trial judge failed to properly examine the circumstances in which identification of the applicant was made and to sufficiently warn himself relative to the identification evidence in that:
>
> (a) Although the identification took place in the broad of day, in good light, in close proximity, after a 3 to 5 minute stare at the [applicant] there were irreconcilable material discrepancies in the description of the applicant given by the two complainants to the police;
>
> (b) The descriptions of the applicant by the two eyewitnesses were given to the police after the applicant was picked up by the police following his naming based on the self-serving words of a man who was charged with aiding and receiving stolen property in relation to a cell phone;
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> (c) The descriptions of the applicant by the eyewitnesses were given to the police after at least one or both of them visited the Flying Squad at which the applicant was held and at a time when he could be seen by him or them; and

(d) The identification itself was unfair and fatally flawed by antecedent matters.

2. The learned trial judge failed to recognize that the witness Rushane Henry was an accomplice therefore his evidence would require the appropriate corroboration warning OR the learned trial judge failed to properly treat with and assess the evidence of a witness with an interest to serve.

3. The Crown failed in its duty to disclose the charge or charges that were laid against the witness Rushane Henry thus depriving the applicant of the ability to properly prepare his defence regarding that witness.

4. The trial of the applicant was a miscarriage of justice in that the learned trial judge failed to give any good character directions where the applicant gave sworn evidence, placed his character in issue and credibility was a major issue in the case."

[9] Counsel for the applicant found it convenient to argue grounds two, three and four first and then ground one. We will, however, for the sake of convenience, depart from that approach in analysing the merits of this appeal. We will, therefore, approach the issues raised firstly in grounds three and two and then go on to grounds four and one.

Ground three - failure to disclose the nature of the charge against Rushane Henry

[10] Counsel for the applicant complained that the prosecution was in breach of its duty to disclose. Counsel pointed out that the prosecuting counsel in her final question to the witness Mr Henry asked him whether he had any charges before any court for anything at this time, to which he responded yes. There were no further questions from the prosecution as to the nature of the charge. The nature of the charge appeared on

the record for the first time in the judge's summation. Counsel for the applicant in making her complaint in this ground, relied on this court's decision in **Harry Daley v R** [2013] JMCA Crim 14 at paragraph [49]. Counsel argued that the prosecutor, having elicited from the witness that he was charged for an offence, had a duty to disclose the offence with which the witness had been charged. Counsel complained that no one gave any information as to the charge, and there had been no update at the trial as to what had become of the charge against him.

[11] Counsel for the Crown accepted that the prosecution had a duty to disclose which was ongoing throughout the trial. Counsel argued however, that on the facts of this case, where Mr Henry bought a phone valued at $30,000.00 for $6,500.00, commonsense would dictate that he was a person who may be charged or who had been charged. Counsel pointed out that the defence counsel at trial had sought to vigorously discredit the witness, a fact which was not lost on the learned trial judge. Counsel argued that in those circumstances, there was no miscarriage of justice.

Analysis of ground three

[12] The contention in this ground is that the Crown failed to disclose that Mr Henry was charged and the details relating to those charge(s). There is no question that there is a duty on the part of the Crown to disclose information relevant to the case in general. This is an important aspect of fair trial. In **Harry Daley v R**, at paragraph [49], Panton P in discussing the prosecution's duty to disclose said this:

> "In this country, whenever a person is charged with a criminal offence, he is entitled to receive a fair trial. Fairness

> involves, among other things, the prosecution not putting obstacles in the path of the conduct of the defence of the person charged, or withholding material relevant to the case. For example, where there are matters that are likely to be of importance to the defence and they are under the control of the prosecution, such matters ought to be disclosed. "The prosecution" means not just the prosecutors who appear in court but includes persons such as police officers and other state officials connected with the investigation and conduct of the case against the accused person."

[13] In **Harry Daley v R**, the credibility of the complainant was a critical issue and disclosure of information relevant to the case was of primary importance to the defendant having a fair trial; the question of relevance of the material to be disclosed being one for the court to determine. In the instant case, there is no doubt that the fact of whether the prosecution witness had a charge against him relating to the incident for which he is giving evidence is something which the prosecution had a duty to disclose. However, the question posed by the prosecution, whilst it stopped short of disclosing the actual charge, based on Mr Henry's involvement and role in the case, as astutely pointed out by counsel for the Crown, it would have been patently clear to the defence that he could have been charged for a criminal offence based on his recent possession of the stolen phone and how he claimed to have come into possession of it. Equally clear was, as a matter of law, what those possible charges could be. Further, he had been arrested before the applicant, so it was clear that the police had an interest in him in relation to the phone.

[14] What is required is for the entire facts relevant to the charge against the applicant and the credibility of witnesses called to give evidence against him are

disclosed. We agree with counsel for the applicant that it ought to have been disclosed, especially where the issue of a possible accomplice giving evidence for the prosecution was a live one in the case. In the circumstances of this particular case however, we do not think it can reasonably be argued that the failure to disclose the offence or offences for which Mr Henry was charged in and of itself deprived the applicant of a fair trial. The circumstances described or contemplated in this court's decision in the **Harry Daley v R** do not exist in this case. This ground therefore, has no merit.

Ground two - failure to treat Rushane Henry as an accomplice

[15] In relation to ground two, it was argued that the learned judge failed to properly treat with and assess the evidence of Mr Henry who was an accomplice. It was also argued that the warning he purported to give was not sufficient. Additionally, it was argued that Mr Henry's evidence in relation to the location of the cellular phone and his efforts to assist the police to locate it was different from the investigating officer's evidence. Counsel for the applicant complained that the learned judge did not indicate the basis on which he concluded that Mr Henry was a witness of truth, in the light of the conflict between his evidence and that of the investigating officer regarding the attempts made to locate the phone. It was contended that the learned judge failed to treat this aspect of the evidence with the degree of care required. The applicant relied on the decision in **Tillett (Dean) v R** (1999) 55 WIR 104 in support of this contention.

[16] It was also argued that, for the purposes of the requirement for a warning, receivers were held (*per curiam*) to be accomplices in **Davies v Director of Public Prosecutions** [1954] AC 378. Counsel complained therefore, that the witness Mr

Henry, being the receiver of the stolen phone, was an accomplice and that his evidence thereby required special treatment. Counsel relied on the definition of accomplice in Halsbury's Laws of England, 4th Edition Reissue, Volume 11(2) at paragraph 1143.

[17] Counsel also relied on the judgment of Rattray P in **R v Mark Phillips** SCCA No 68/1996, delivered 27 February 1998. In that case Rattray P noted that where a witness was designated an accomplice, the evidence of that witness was to be subjected to a higher test than that of a witness with an interest to serve. Counsel for the applicant submitted that based on the charges of aiding and abetting and of receiving stolen property levelled against Mr Henry, there was evidence that he was an accomplice and the learned trial judge failed to consider this fact. Counsel argued that the learned trial judge treated the witness as a witness with an interest to serve which was a lower test than that required for an accomplice and thereby fell into the error of applying a lower level of warning than that which was necessary for an accomplice. In that regard, counsel submitted, the applicant was deprived of the benefit of a crucial warning and further that there was in fact no corroborating evidence.

[18] Counsel for the Crown argued that the learned trial judge took the correct legal approach when he warned himself that Mr Henry had an interest to serve. Counsel argued that the absence of the corroboration warning, where the witness was an accomplice, was only fatal if it was the only evidence relied on in the case. Counsel argued that the absence of the warning in the case of **R v Mark Phillips** was only fatal because, at the end of the day, the accomplice evidence was the only evidence relied

on in the case against the appellant. Counsel argued that in the instant case, Mr Henry's evidence was not the only evidence against the applicant.

[19] It was also counsel's contention that the evidence of Mr Henry could not, by itself, place the applicant before the Gun Court. It was only the evidence of the two complainants which could have done that. Counsel pointed out, that Mr Henry's evidence that the applicant sold him the phone, at its highest could only point to the fact that at some point the applicant had been in possession of the phone. Counsel argued that it was the identification by the two witnesses which placed the applicant before the Gun Court for illegal possession of firearm. Counsel noted that in all the cases where the absence of the warning was fatal, the evidence of the accomplice was the only evidencing linking the accused to the offence. Counsel argued that in this case, there was no miscarriage of justice and the absence of the warning was not fatal.

Analysis of ground two

[20] The question for determination is whether Mr Henry was in fact an accomplice. There is great merit in counsel for the applicant's submission that there was sufficient evidence from which a jury, properly directed, could conclude that he was in fact an accomplice. In Halsbury's Laws of England, 4th Edition Reissue, Volume 11(2) at paragraph 1143 it states that:

> "A witness is an accomplice... (2) if he is a handler giving evidence against the thief from whom he received stolen goods,..."

[21] In considering the question of who was an accomplice the House of Lords in **Davies v Director of Public Prosecutions** stated at page 400 that:

> "On the cases it would appear that the following persons, if called as witnesses for the prosecution, have been treated as falling within the category:-
>
> (i) On any view, persons who are participes criminis in respect of the actual crime charged, whether as principals or accessories before or after the fact (in felonies) or persons committing, procuring or aiding and abetting (in the case of misdemeanours). This is surely the natural and primary meaning of the term 'accomplice.' But in two cases, persons falling strictly outside the ambit of this category have, in particular decisions been held to be accomplices for the purpose of the rule: viz.:
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> (ii) Receivers have been held to be accomplices of the thieves from whom they receive goods on a trial of the latter for larceny (*Rex v Jennings* 37: *Rex v Dixon)* 38..."

[22] Their Lordships also formulated three propositions at page 399, which we respectfully adopt as correct statements of the law, that:

> "First proposition:
> In a criminal trial where a person who is an accomplice gives evidence on behalf of the prosecution, it is the duty of the judge to warn the jury that, although they may convict upon his evidence, it is dangerous to do so unless it is corroborated.
>
> Second proposition:
> This rule, although a rule of practice, now has the force of a rule of law.

> Third proposition:
> Where the judge fails to warn the jury in accordance with this rule, the conviction will be quashed, even if in fact there be ample corroboration of the evidence of the accomplice, unless the appellate court can apply the proviso..."

[23] It is for the tribunal of law to determine whether there was any evidence on which a tribunal of fact could find that a witness was an accomplice and it is for the tribunal of fact to determine whether on that evidence, the witness is in fact an accomplice. However, it is necessary, to determine firstly, as a matter of law, who or what, is an accomplice. The first category identified in **Davies v Director of Public Prosecutions** is easy. Anyone who was a participant in the crime for which the accused is charged is an accomplice. This is so whether the person participated as a principal, an accessory before or after the fact to a felony or participated as an aider or abettor, counsellor or procurer to a misdemeanour. It is the second category referenced in **Davies v Director of Public Prosecutions**, with which we are most concerned viz, the receiver. The receiver, though not necessarily a *participis criminis* to the substantive crime of larceny, is treated as an accomplice for the purpose of the warning that the judge is obliged to give. In **Davies v Director of Public Prosecutions** the House of Lords sought to justify the inclusion of receivers as accomplices. It was put in this way:

> "(... A receiver may on the facts of a particular case have procured the theft, or aided and abetted it, or may have helped to shield the thief from justice. But he can be a receiver without doing any of these things.) The primary meaning of the term 'accomplice' then has been extended to embrace these two anomalous cases. In each case there are special circumstances to justify or at least excuse the extension. A receiver is not only committing a crime intimately allied in character with that of theft: he could not

> commit the crime of receiving at all without the crime of theft having preceded it. The two crimes are in a relationship of "one-sided dependence".”

[24] In the case of **R v Mark Phillips**, the witness, who was clearly an accomplice, was treated as a witness with an interest to serve and the learned trial judge gave himself that warning. On appeal, Rattray P in considering the issue of whether the trial judge, sitting alone without a jury had given himself the requisite warning stated at page 4 that:

> “Whilst an accomplice would be - not maybe - a witness with an interest to serve, there are many other types of witnesses who could be categorized as being witnesses with an interest to serve, for example close relatives of a complainant, whose evidence would not be subject to the same sort of taint as that which attaches to the evidence of an accomplice. The accomplice is participis criminis with the person charged. He therefore has a compelling reason to give evidence which will extricate himself and shift full responsibility for the crime on the accused. There is in my view also a distinct difference between doing something dangerous and doing something which is undesirable. In my opinion, therefore the learned trial judge substantially watered down the legal requirement of the necessary warning in these regards.”

[25] We accept that the extension of the term accomplice to a receiver forms a part of the common law not only of England and Wales but also of our common law, as applied in the case of **R v Mark Phillips**. It therefore means that, in a straightforward case such as this, where a witness admits to being in possession of a stolen item in circumstances where it could be inferred that he had knowledge of the theft and there is evidence that he has been charged or could be charged as a receiver or for aiding and abetting the theft, then there is ample evidence on which a reasonable tribunal of

fact could find that he was an accomplice. This is a question of law. It is for the jury to find as a fact, whether on that evidence he was in fact an accomplice. This is a question of fact.

[26] Where there is evidence on which a jury properly directed could find that the witness was an accomplice, the judge should warn the jury that, if, on the evidence, they consider that the witness was an accomplice, it is dangerous to convict on that evidence unless it is corroborated, even though they may do so, if after considering the warning, they believe the witness nevertheless. A judge sitting alone as judge and jury, commits an error of law if he fails to consider whether there is evidence that the witness might be an accomplice and having so found, fails to give himself the requisite warning.

[27] As previously indicated, the learned trial judge in the case of **R v Mark Phillips** treated the witness as one with an interest to serve wherein it would have been desirable to have some corroborating evidence. This court accepted that there was evidence that the witness was in fact an accomplice, he being a receiver of the stolen goods, and ought to have been treated as such. This court found that the learned trial judge failed to warn himself of the danger of convicting on the evidence of an accomplice, where that evidence is uncorroborated. Rattray P in delivering the judgment of the court found that the learned trial judge had watered down the legal requirement of the warning. He pointed to the fact that the learned trial judge had rejected the visual identification evidence, so all he was left with was evidence of the

accomplice and the recent possession of three gold bangles identified by the complainant as hers and which had been taken from her during the robbery. The learned trial judge having failed to give the requisite warning, Rattray P looked at the remaining evidence in the case and found that the learned trial judge had also failed to treat properly with the recent possession of the three bangles found on the accused and the statement of the co-accused which was not evidence against the appellant. For those reasons the appeal was allowed, the conviction was quashed and the sentence was set aside.

[28] In the instant case, the learned trial judge (on page 134 of the transcript) stated that Mr Henry was charged with aiding and receiving stolen goods in relation to Mr Richards' cellular phone which he claimed to have purchased from the applicant. It is unclear where the learned trial judge came by this information, since it appears nowhere else on the evidence in the transcript. Perhaps, the learned judge took a commonsense view of the facts; nevertheless, it is clear that there was evidence from which a reasonable jury could find that Mr Henry was an accomplice.

[29] This was how the learned judge dealt with Mr Henry's evidence at pages 134-135 of the transcript:

> "I therefore also will direct myself how to treat the witness Rushane Henry. I find he is a witness with an interest to serve and therefore I should approach his evidence with caution and defense [sic] attorney did cross-examine along that line. He is somebody who ends up with a phone, bought a phone, yes, a Blackberry phone which cost over thirty thousand for six thousand five hundred. He was charged with aiding and receiving stolen goods, he was charged and

> he didn't have the phone when they apprehended him he gave it to another person called Andre, his cousin and when the police apprehended him he never carried them to Andre where the phone was, he carried them to the accused."

He went on to say further at page 135 that:

> "... [That] conduct on his part where he could not assist in the physical recovery of the phone is a conduct that one has to consider when I look at him as a witness with an interest to serve. All I am saying is that I warn myself to approach his evidence with caution and the reason is someone that is charged and might be implicated has an interest of his own to give unfavourable evidence against somebody and favourable evidence in his favour or favourable evidence on his part. So that is the warning I give to myself."

[30] The learned trial judge viewed Mr Henry's evidence regarding the Blackberry phone as supportive of the identification evidence. After considering and applying the principles in **Turnbull and another v The Queen** (1977) QB 224, he said (at page 140 of the transcript) that:

> "Of course, I must find the evidence credible [sic] given and I find it credible. I accept Rushane Henry is a witness of truth. He was challenged. I said already he is a witness with [sic] interest to serve and having warned myself to approach his evidence with caution which I did I nonetheless find that he is truthful. He is someone who knows the accused ...There is some dispute whether it is three years or five years. That doesn't destroy the credibility of Roshaine [sic] if he says it was three years or a longer time. Roshaine [sic] says he bought it from the accused. The accused says you came to me about it in Spanish Town, I was fixing my phone and all I did was to put you buyer and seller together that is the substance of his explanation. On the question of the cell phone I prefer and accept Roshaine's [sic] evidence and I reject Mr Lawrence Brown's evidence..."

[31] The learned judge clearly fell into error due to his failure to treat Mr Henry as an accomplice and give himself the appropriate warning. The warning is always necessary where there is evidence from an accomplice whether it is the only evidence in the case or not. Nevertheless, we do agree with the Crown's submission that the omission to give the warning may not be fatal if there is other independent, credible and cogent evidence on which a tribunal of fact could rely to come to a verdict of guilt.

[32] In this case, where there was a failure to give the requisite accomplice warning when such a warning was clearly required, the manner in which the learned trial judge treated with Mr Henry's evidence, by finding that it gave support to the identification of the applicant by the two eyewitnesses, we believe, makes it necessary for this court to consider whether the identification evidence is credible and cogent, independent of the evidence of the accomplice. This is so, because, the omission in this case is fatal unless this court can apply the proviso and the proviso can only be applied if we are satisfied that there is no possibility of any injustice having been done.

[33] The applicant also complained that the learned judge did not demonstrate the basis on which he accepted Mr Henry as a witness of truth, in circumstances where he gave evidence which was totally opposed to that of the investigating officer in relation to the location of the cellular phone. In the light of our decision in relation to the failure to give the appropriate accomplice warning we do not think it necessary to say anything with regard to this complaint.

[34] However, before considering the weaknesses in the identification evidence which formed the basis of the complaint in ground one, we will consider, briefly, ground four which complains of the learned judge's failure to give a good character direction.

Ground four - the failure to give a character direction

[35] In relation to this ground of appeal, counsel for the applicant argued that there had been a miscarriage of justice as the learned judge failed to give any good character directions where the applicant had given sworn evidence, had placed his character in issue and where credibility was a major issue in the case.

[36] Counsel also submitted that the issue of the applicant's good character was raised by the applicant when he gave sworn evidence that he had no previous convictions and therefore he was entitled to the full good character direction, consisting of both limbs. Counsel further argued that the defects in the learned judge's summing up are individually and cumulatively sufficient to warrant the quashing of the conviction of the applicant.

[37] Counsel for the Crown, although conceding that the learned trial judge had failed to give a good character direction where the applicant had given sworn evidence and had distinctly raised the issue of his good character, submitted that the omission of the trial judge to give a good character warning was not fatal to the fairness of the trial or to the safety of the conviction as there was ample and cogent evidence on which to convict the applicant. In support of this submission, reliance was placed on decisions in the cases of **Ervine Brown o/c Marlon Robinson v R** [2015] JMCA Crim 7, **Michael**

Lawrence v R [2015] JMCA Crim 24, **Nigel Brown v The State** (2012) 82 WIR 418, **Nigel Hunter, Joseph Saruwu and others v R** [2016] 2 All ER 1021 and **Teeluck and another v The State** [2005] UKPC 14; (2005) 66 WIR 319.

Analysis of ground four

[38] The general principles in relation to the defendant's entitlement to a good character direction were laid down in **R v Vye** [1993] 3 All ER 241. In **Michael Reid v R** SCCA No 113/2007, delivered on 3 April 2009, Morrison JA (as he then was) cited with approval, at paragraph 16, a passage from **R v Vye** when he stated:

> "The starting point in the modern law is now generally taken to be **R v Vye** [1993] 3 All ER 241, 248 where the relevant principles were stated as follows:
>
> > '(1) A direction as to the relevance of his good character to a defendant's credibility is to be given where he has testified or made pre-trial answers or statements. (2) A direction as to the relevance of his good character to the likelihood of his having committed the offence charged is to be given, whether or not he has testified, or made pre-trial answers or statements'."

[39] In another decision from this court, **Ervine Brown o/c Marlon Robinson v R**, Morrison JA in a thoroughly reasoned judgment, summarized all the principles in relation to good character direction at paragraph [33] as follows:

> "...First, the good character of a defendant is logically relevant to his credibility and to the likelihood that he would commit the offence with which he is charged. [**R v Aziz** [1995] 3 All ER 149]. Second, the defendant who is of good character and who gives evidence is generally entitled to expect a direction from the judge comprised of two

> elements, the credibility limb and the propensity limb, the former signifying that 'the defendant who has no previous convictions is entitled to claim that he should be more readily believed than one who has been convicted previously'; while the latter means that 'someone who has not been found guilty of an offence in the past should be regarded as less likely to have a predisposition to offend than someone who has a criminal record'. [Per Lord Kerr in **Mark France and Rupert Vassell** [2012] UKPC 28, para. [47]. Third, generally speaking, as a precondition to the right to such a direction, the defendant's good character must be 'distinctly raised, by direct evidence from him or given on his behalf or by eliciting it in cross-examination of prosecution witnesses'. [Per Lord Carswell in **Teeluck v The State of Trinidad and Tobago** [2005] 1 WLR 2421, para [33]...] Fourth, 'a trial judge has a residual discretion to decline to give any character directions in the case of a defendant without any previous convictions if the judge considers it an insult to common sense to give [such] directions'; [**R v Aziz**, page 158] put another way, 'a judge is not required to give a good character direction if it would make no sense to do so'. [Per Brooks JA **Horace Kirby** [sic], at para. [17]] Fifth, failure to give a good character direction in a case which the defendant is entitled to one will not automatically result in an appeal being allowed. **Patricia Henry v R** [2011] JMCA Crim 16, para. [51]]"

[40] In this case, the applicant having given sworn evidence and having stated that he has no previous conviction, there is no question that he was entitled to a full good character direction (see **Nigel Hunter, Joseph Saruwu and others v R**). The learned trial judge failed to direct himself accordingly. Based on the relevant principles, this failure is not necessarily fatal to the conviction (see **Jagdeo Singh v The State** (2005) 68 WIR 424). It will depend on the nature of the case, the issues raised in the case, and any other available evidence (see also **Balson v The State** [2005] UKPC 2.

[41] The question is therefore, what is the consequence of omitting that direction and would the outcome have been different if the direction had been given? The approach of this court in a case in which it considers that the direction should have been given is to "make its own assessment of the evidence and to consider whether the outcome would have been the same had the trial judge given the proper direction" (see **Patricia Henry v R** [2011] JMCA Crim 16).

[42] In **Bhola v The State** [2006] 68 WIR 449 the Privy Council considered the decision in **Teeluck v The State** (2005) 66 WIR 319 and accepted the Board's declaration in that case that, where credibility is in issue, a good character direction is always relevant. However, the Privy Council in **Bhola v The State** disapproved of the statement made in **Teeluck**, that the direction is capable of having some effect in every case where it is appropriate to give it and that if it is omitted, the court could rarely say the direction could not have affected the outcome of the trial.

[43] Accepting these basic principles to be correct statements of the law, the issue to be determined in this case is, whether, based on the circumstances, the failure to give a good character direction resulted in a miscarriage of justice and rendered the conviction unsafe. In **Michael Reid v R**, Morrison JA in stating the approach of this court when determining this issue, said at paragraph 44 of the judgment that:

> "...(v) The omission, whether through counsel's failure or that of the trial judge, of a good character direction in a case in which the defendant was entitled to one, will not automatically result in an appeal being allowed. The focus by this court in every case must be on the impact which the errors of counsel and/or the judge have had on the trial and

> verdict. Regard must be had to the issues and the other evidence in the case and the test ultimately must always be whether the jury, properly directed, would inevitably or without a doubt have convicted (***Whilby v R***, per Cooke JA (Ag) at page 12, ***Jagdeo Singh v The State*** (2005) 68 WIR 424 per Lord Bingham at pages 435 – 436)."

[44] In considering the merits of this appeal we bear in mind that this is a case where the evidence was heard by a judge sitting alone without a jury. The central issue in the case was whether or not the applicant was one of the two men who held up and robbed the two complainants. This depended mainly on the correctness of the visual identification evidence of the two complainants. The learned trial judge took the view that Mr Henry's evidence that he had purchased the Blackberry cellular phone, one of the items that had been stolen from Mr Richards, bolstered the identification of the applicant. The applicant denied being the robber and denied selling any phone to Mr Henry. The credibility of the witnesses and the applicant was clearly in issue. The learned trial judge was required to take into consideration the fact that the applicant placed his good character in issue and give him the benefit of a good character direction.

[45] There is no doubt that the applicant was entitled to a good character direction which the learned judge failed to give, but this being a case tried by judge alone it is arguable whether the outcome would have been different if that direction had been given. However, we do not think it necessary to the outcome of this appeal to make that determination in light of our conclusions on grounds one and two, as regards the

defects in the identification evidence and the learned trial judge's treatment of the weaknesses in the evidence and his failure to give the requisite accomplice warning.

Ground one - The challenge to the learned judge's treatment of the identification evidence

[46] Counsel for the applicant submitted that the identification of the applicant was weakened as a result of: (1) the material discrepancy in the description of the applicant by the two eyewitnesses; (2) the lapse of time between the original observation and the identification parade; (3) the circumstances that resulted in the apprehension of the applicant; (4) the fact that one or both of the witnesses were present at the Flying Squad on the day the applicant was taken into custody; and (5) the identification parade itself served no useful purpose as the eyewitnesses merely identified the person detained by the police after that person was named by Mr Henry. As a result, it was argued, that the identification evidence called for greater examination by the learned trial judge.

[47] It was further argued that in the circumstances of this case, a general **Turnbull** direction was insufficient. It was submitted that the learned trial judge therefore needed to have been more 'nuanced' in the warnings he gave to himself, where, in all the circumstances, there was a danger of mistaken identity resulting in the trial of the applicant being prejudiced.

[48] It was also submitted that the trial judge did not address the difference in the description of the applicant by the two complainants and failed to show how he resolved this discrepancy since he accepted them both as truthful witnesses.

[49] Counsel argued that the reasoning of the Law Lords in **Langford (Leroy) Freeman (Mwanga) and another v The State** [2005] UKPC 20, applied to the instant case in that the learned trial judge failed to apply **Turnbull** in its entirety, in circumstances where there were several weakening factors. The omissions in this case, it was argued, should result in the conviction being quashed because those weakening factors were not properly dissected by the learned trial judge.

[50] Counsel argued that the learned trial judge in this case did not examine:

(1) How much time had elapsed between the original observation and the subsequent identification to the police;

(2) 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;

(3) The learned trial judge did not address the fact that one witness described the applicant as having cornrow hairstyle on the day of the robbery but the other made no mention of it; and

(4) The fact that one witness described the applicant as having a beard and a moustache and the other made no mention of that in his description of the applicant.

[51] Counsel noted that Mr Hetridge's evidence was that he had been to the Flying Squad on the day the applicant was taken into custody but did not see him. In the case

of Mr Richards, he had given a statement on 1 May 2012, after the applicant had been taken into custody whereas Mr Hetridge, gave his statement on 2 May 2012, two days after the applicant had been arrested. Counsel pointed out, that based on the evidence, it is still not known if on the day of the robbery, the robber had a beard and a moustache; neither, it was argued, was it known what the man at the Flying Squad looked like on 30 April 2012. Counsel argued that the description of the man only came after the man had been apprehended on 30 April 2012 and the identification parade was then held on the 9 May 2012. This, it was argued, caused the identification parade itself, under the circumstances, to be unfair and ultimately deprived the appellant of a fair trial

[52] Counsel for the Crown, on the other hand, argued that the discrepancy complained of, regarding the identification of the applicant, was in relation to the description of his complexion by the witnesses. Counsel noted that the witness Mr Hetridge, described the appellant as 'fair-skinned' whilst Mr Richards described him as 'dark-skinned'. It was argued that this was 'clearly' a matter of the perception of the applicant's complexion by each witness.

[53] It was also submitted that the accuracy of the identification evidence of both complainants should be tested by the circumstances at the time of the robbery and by the identification parade. Further, that the correctness of the identification was a matter of fact for the trial judge who adequately warned himself on the issue.

[54] In relation to the complaints under paragraphs (b) and (c) of ground one (stated in paragraph [8] herein), it was submitted that the fact that the description of the assailant and the statements by the witnesses were given after the applicant was arrested by the police, was addressed in a fair and comprehensive manner by the learned trial judge in his summation.

[55] It was submitted that the identification was not unfair as the conditions under which the applicant was observed were excellent in terms of lighting, distance, time period and lack of obstruction. Further, that the learned judge accepted, as a fact, that the complainants did not see the applicant at the police station on 30 April 2012.

Analysis of ground one

[56] This being a case tried by judge alone, counsel for the applicant addressed this court regarding the principles which ought to guide a judge sitting alone without a jury when summing up a case. Counsel relied on the dictum in **R v Alex Simpson and McKenzie Powell** SCCA Nos 151/1988 and 71/1989, delivered 5 February 1992, where Downer JA stated that:

> "… [The] trial judge sitting without a jury must demonstrate in language that does not require to be construed that he has acted with the requisite caution in mind and that he has heeded his own warning. However, no particular form of words need be used. What is necessary is that the judge's mind upon the matter be clearly revealed." (page 13)

[57] Downer JA also stated expressly that it was insufficient to merely "utter the warning" while failing to show that it had been applied. Counsel also cited **Orville Campbell v R** [2014] JMCA Crim 14, where Panton P reiterated that "a judge's

reasoning requires different treatment from a summing up to a jury". In **Bernard (Anthony) v R** (1994) 45 WIR 296, the Privy Council noted that giving the appropriate directions in cases which depended on identification evidence involved an important principle in a criminal trial and the Board would interfere if it found that there was a significant failure to apply the **Turnbull** and **Whylie** doctrine (**R v Oliver Whylie** (1977) 25 WIR 430 which deals with weak identification evidence which ought to be withdrawn from the jury); such failure might become significant "when the presence of the weakening factors in the prosecution case called for greater emphasis, even though the direction would have been sufficient in the context of an unflawed prosecution case".

[58] Since the challenge is to the judge's treatment of the evidence, it is perhaps prudent to examine the merits of this ground of appeal in light of the judge's summation. The learned trial judge early in the summation (at page 115 of the transcript), recognized that the applicant was challenging the correctness of the identification evidence being relied on by the prosecution to connect him to the offence and therefore, visual identification was a live issue in the trial.

[59] The judge then went on to warn himself on how to treat visual identification evidence. He directed himself in terms which he said was in keeping with the authority of **Turnbull**. He then went on to allude to an aspect of the **Turnbull** case which he said was not often used (and we will return to that aspect later in this judgement) and directed himself in these terms:

> "The case against the accused depends wholly or substantially on the correctness of one or more identification of the accused and the defense [sic] challenged his identification and the defense [sic] alleged by their challenge that the identification is mistaken. I therefore warn myself that there is a special need to exercise caution before I convict the accused in reliance on the correctness of the identification of the witnesses, Lennox Hetridge and Mark Richards respectively, having given their evidence in that order. I instruct myself the reason to approach such evidence with caution is that experience has shown in the courts that there has been miscarriages of justice based upon wrongful or erroneous conviction of accused persons where visual identification has been relied upon. In addition a mistaken witness can be a convincing witness. A [sic] honest witness can be a mistaken witness and a number of such witnesses can all be mistaken." (page 116-117 of the transcript)

[60] The learned judge then went on to consider the circumstances in which the identification of the applicant by each witness came to be made, while noting that this was not a recognition case. At pages 120-121 of the transcript, the learned trial judge considered the account of the incident given by the witnesses and the opportunities which existed for a proper identification of the accused to be made. He outlined the allegations, the fact that the witnesses did not know the accused before and the position of both robbers, including the applicant, *vis-a-vis* the witnesses at the material time. He examined the distance the men stood from the witnesses and concluded that there was ample distance for Mr Hetridge, at 8-10 feet, to see the assailant. The learned judge also considered the time the witnesses had the assailant under observation which he concluded was ample time for a correct identification to be made.

[61] In dealing with the evidence of Mr Hetridge, the learned trial judge accepted not only his evidence that he was able to see the applicant for three minutes but also accepted that this was sufficient time to see his face. There was no complaint by counsel for the applicant of the judge's summation in this regard and we find nothing to concern us as far as the judge's treatment of what is generally required of a trial judge sitting alone in respect of the **Turnbull** guidelines.

[62] The challenge to the learned judge's treatment of the description of the applicant by the witnesses is a separate issue. The learned judge found that Mr Hetridge's description of the man with the gun, who he said was the applicant, was that he was "light brown" and later that "he was brown". The actual description given by Mr Hetridge was that the assailant was "fair" but not as "fair" as himself and that the applicant who was in the dock he would describe as "fair". The learned judge however, found that that there were different shades of brown. He found that there was an issue with the accuracy of Mr Hetridge's description in terms of complexion.

[63] However, in our view, the learned trial judge failed to demonstrate that he considered the accuracy of that description in light of the actual appearance of the person standing before him in the dock, who described himself as "clear skinned" and in light of the evidence by Mr Richards that the man with the gun was "dark skinned". This is how the learned judge dealt with the issue at pages 123 - 124 of the transcript:

> "The correctness I said was challenged and the main area of challenge in cross-examination was that as far as Mr. Hetridge was concerned it concerned a description and that is irrelevant and I direct myself that is a factor that is

> relevant to identification. One of the description [sic] had to do with the complexion, light-brown or something like that. He described the accused man as light-brown….
>
> That is Mr. Hetridge, but he is saying that he Mr. Hetridge would describe himself as brown, not quite light-brown, but is not the same shade, you see. So there is a difference of shades in complexion but he gave one description that the man is light-brown which is a darker shade of brown than he Mr Hetridge. So there is an issue about accuracy on his part, the description and whether he saw his assailant because of one of the fact of that description, that description in terms of complexion...."

[64] The learned judge then went on to also consider the challenge to the identification evidence that Mr Hetridge had seen the applicant at Flying Squad before giving his written statement and before going on the identification parade. However, the learned judge did not reconcile the effect of the description in terms of complexion given by Mr Hetridge and that given by Mr Richards, who said the assailant with the gun was "dark-skinned", especially in the light of that allegation made by the applicant regarding Mr Hetridge's visit to the Flying Squad.

[65] The identification parade for the applicant took place on 9 May 2012 and Mr Hetridge went to the Flying Squad on 30 April 2012, the same day the applicant was taken there, after which he gave a written statement on 2 May 2012. The learned trial judge appeared to understand the complaint as being that Mr Hetridge would have had the opportunity to see the applicant in custody before the identification parade was held and that may have aided him in his identification of the applicant on the parade.

[66] On the face of it, the circumstances of the identification at the time of the robbery, based on the evidence of the two eyewitnesses, were excellent. The incident

was alleged to have occurred sometime after 12:00 pm on a sunny day, out in the open and lasted for about five minutes. During this time, based on the evidence of the complainants, they were able to view the two men who were robbing them, one of whom, they both said, was the applicant. From their evidence it is clear that the opportunity to view the assailant was more than adequate. If that were all, there could be no complaint made of the judge's summation.

[67] However, the applicant's first complaint under this ground is that, even if the circumstances of identification were good, based on the discrepancies in the description of the applicant given by the two complainants to the police, the fact that the description was given after he was taken into custody by the police and the fact that the applicant's arrest was not as a result of any description given, but was based on information from a witness who should have been treated as an accomplice, resulted in the identification and the identification parade being fatally flawed.

[68] Whilst it is important to note that both witnesses maintained the description given in their statements and maintained their stance that it was the applicant that was the man being so described, we cannot say that being fair skinned and being dark skinned are the same thing. It was the judge's duty to reconcile the discrepancy in the description given by the two witnesses and demonstrate in clear terms how he did so. In our view, in focusing only on the description given by Mr Hetridge of the assailant's complexion the learned trial judge missed a crucial weakness in the evidence because that description is different from the one given by Mr Richards.

[69] However, if that was the only error perhaps it may have been possible to explain it away in the way counsel for the Crown attempted to do. However, in examining the transcript, a curious bit of information came from the evidence of Mr Hetridge which we believe called for careful assessment by the learned trial judge which he failed to address at all.

[70] Mr Hetridge said he looked at the face of the assailant for five minutes but he failed to note whether at that time the assailant had a moustache and a beard or not. The question was directly asked of him in cross-examination. It went this way:

> "Q: And the man that had the gun did he have a beard and moustache <u>at the time</u>?
>
> A: Yes
>
> Q: But in terms of your description of him though, you did not give that description in your statement?
>
> A: No." (Emphasis added)

[71] He admitted this description was not in his statement and when asked about it in re-examination he said he had not been focussing on the assailant's beard or moustache. He admitted he gave a description to the police but omitted from that description, what, on any account, would be a prominent feature of the assailant's appearance, if it existed at the time.

[72] Counsel for the Crown in re-examination sought to rehabilitate the witness on this point by attempting to clarify when it was that the witness saw the applicant with a beard and a moustache. This is how that exchange went:

> "Q: Now you also agreed with counsel that the one that had the gun had a beard and and [sic] moustache and that you had not said that in your statement. Now when was that that [sic] when you saw the accused he had a beard and moustache?
>
> A: I was not paying attention to his beard and moustache.
>
> Q: Listen carefully. When was it that you observed him with the beard and moustache?
>
> A: When I saw the video, also...
>
> His Lordship: Talk up Sir
>
> A: Also when I went up to that ID parade he wasn't sporting the corn row [sic] hair style that he had.
>
> Q: When had you seen him with the corn row hair style?
>
> A: On the 15th.
>
> Q: And what was his hair like when you saw him at the video ID, you said he was not sporting the corn row [sic] hair style?
>
> A: It was cut ma'am, the hair was cut."

[73] In our view there was nothing ambiguous in the question asked of Mr Hetridge by defence counsel at the trial. The witness was asked if the assailant who had the gun had a beard and moustache at the time. The "time" could only have meant at the time of the robbery. He was also asked and admitted that that description was not in the statement given to the police. The statement was given before the identification parade

so the question could not have been whether the applicant had a beard and moustache at the identification parade.

[74] Several things become clear from this aspect of Mr Hetridge's evidence. Firstly, Mr Hetridge did not describe the applicant as having a beard and moustache at the time of the robbery. Secondly, assuming that Mr Hetridge did not see the applicant at Flying Squad, as alleged by the applicant, and assuming that he did not notice whether the assailant with the gun had a beard and a moustache at the time of the robbery, the day of the identification parade was the first time Mr Hetridge was noticing that the applicant had a beard and moustache. Thirdly, the applicant who Mr Hetridge said had a cornrow hair style at the time of the robbery had his hair cut at the time of the parade. These three factors raised a question which the learned judge ought to have at least asked himself, that is, how was Mr Hetridge able to identify the applicant at the video identification parade, if at that time the applicant was sporting a beard and moustache, when Mr Hetridge admittedly did not notice this about the assailant at the time of the robbery and the applicant no longer had the only other prominent feature he did notice, that is, the cornrow hairstyle.

[75] The learned trial judge in assessing the evidence given by the applicant on oath recalled that the applicant's evidence was that he saw one of the complainants pass him in a room at the Flying Squad (by his description it seemed generally accepted that it was Mr Hetridge) and that he heard him say to a police officer, "the beard, him don't have so much beard". However, the learned judge's recollection of what was said was

different from what is recorded in the transcript as being said by the applicant. The applicant testified that the witness had said that he "need some more beard on my face". It is of some importance because the two statements mean two different things. One means that when seen at Flying Squad the beard was less than at the time of the robbery hence "need some more beard on my face"; the other means he had less beard at the time of the robbery than when he was seen at the Flying Squad hence "the beard, him don't have so much beard", either way it does not amount to the same thing.

[76] So here we have a situation in which the learned trial judge not only failed to reconcile, on the record, a difference in the description given of the applicant by the two eye witnesses; but he also did not demonstrate how he treated with that claim by the applicant of what was supposed to have been said at Flying Squad. He also failed to take into account Mr Hetridge's failure to describe the applicant in his statement, as having a beard and a moustache even though he (at worst) admitted that the applicant possibly had one at the time of the robbery but he took no notice of it. At best, the inference that could be drawn from Mr Hetridge's evidence in re-examination is that the applicant did not have a beard and a moustache at the time of the robbery but had a cornrow hairstyle, but at the parade his hair was cut and he was sporting a beard and a moustache. Either way, the learned judge was duty bound to deal with this evidence of the altered appearance of the applicant, especially in light of the alleged sighting at the Flying Squad, and consider whether, in his view, it may have affected the cogency of the identification of the applicant.

[77] In the case of Mr Richards the only evidence elicited in court of the description he gave of the assailant was that he was dark skinned. In his evidence before the court, he did indicate that the appellant had a cornrow hairstyle at the time of the robbery. He was however, specifically asked how he had described the applicant in his statement and he said he described him as dark skinned. There appears not to have been (on the evidence elicited at trial at least) any other description given in the statement. So Mr Richards' overall description of the applicant was of a dark skinned man with cornrow hairstyle.

[78] We are concerned that the learned trial judge did not address his mind to this aspect of the evidence at all and made no attempt to show how he reconciled this evidence of the change in the applicant's appearance with the image of the person before him. It was, we believe, incumbent on the trial judge to say whether he accepted that there was or was not a beard or moustache and if there was whether it did not in any way obscure the features of the appellant so that with or without them, he would be identifiable.

[79] The learned judge went on to say at pages 125 - 126 of the transcript that:

> "There is also some argument come up about the time of the incident he had cane row hairstyle but on the parade it was ordinary, nothing of that nature. So the accused man has given sworn evidence on that..."

[80] This statement by the learned judge is not quite correct. The applicant did not give evidence that he had a cornrow hairstyle at the time of the robbery. It was put to him and he denied it. He admitted he did not have a cornrow hairstyle at the parade

but denied the hair was high enough to plait. The learned trial judge also juxtaposed this with the evidence given by the two complainants and made the following statement at page 126 of the transcript:

> "Mr Hetridge and Mr Richards do accept that they went to the Flying Squad but they didn't pass no room and see any man in those circumstances and by inference were aided by that to go to the ID parade and say they saw the accused..."

[81] He went on to make the following findings:

> "I accept that Mr. Hetridge is a witness of truth... I find that he is a witness of truth and accept his that [sic] testimony that he did go to the Flying Squad and turned up there but he did not see any person in any room, and yes, the accused was at Flying Squad because that was where he was taken but I do not find that he was aided intentionally or unintentionally [sic] saw him in a room there. So I do not find that this circumstance of identification is a fleeting glance. I do not find the conditions of any extreme difficulty. There was no obstruction. There is the usual question of stress and fright and fear when somebody is pounced upon by one or more men with a gun robbing him. But this is a case where talking went on..."

[82] The learned judge then assessed the circumstances of the identification and found that:

> "The opportunity to see and the opportunity to [sic] existed. The men talked with the victims, the victims talked back to the men, all there. It was a face to face hold up. They were in close proximity to the men,... It was daytime, so there was [sic] no difficult circumstances, extraordinarily that would hinder Mr. Hetridge [sic] visual identification of his assailant and he had time for that."

[83] Having examined Mr Hetridge's evidence and finding no difficult circumstances hindering the visual identification, the learned trial judge ought to have considered the implication of Mr Hetridge's evidence that he paid no attention to the beard and moustache and the failure of either witness to describe the applicant thus.

[84] The learned judge was of the view that the main issues in relation to Mr Hetridge's evidence were (a) whether or not he was assisted in identifying the applicant because of the way in which he was apprehended and (b) the timing of his statement to the police. The learned judge, however, went on to acknowledge that "it would have been desirable to have a statement before to ensure as a basis that the witness is not describing the identity of the person after the fact". He then continued:

> "But the witnesses have explained the series of events and I do not find that that series of events though the statement came after means that Mr. Hetridge did not have the opportunity on the day in question to see his assailant and the same reason I apply to Mark Richards because he is also a victim, the complainant. He also went to Flying Squad on the 30th of April and his statement came after, I believe it was May the 2nd."

[85] Mr Richards gave no evidence that he went to the Flying Squad although the judge seemed to accept that he did go there and Mr Hetridge gave no explanation of why he went there apart from admitting that he went to give a statement after hearing something. The learned judge then went on to conclude that:

> "...I do not find that the sequence of how the statement came is a deliberate strategy to be unfair to the accused as far as identification is concerned and I find as it goes to this case that they were doing their investigation, happens many times and the police were doing their investigation and

> something prompted the investigation so that is the court's position in relation to the visual identification."

[86] It is also unclear at this point what investigation the learned trial judge is referring to, as at the time Mr Hetridge went to the Flying Squad Mr Henry was in custody and the applicant was also already in custody. This kind of situation where witnesses hear something after an accused is taken into custody and then visit the police station where he is being held in custody, is generally undesirable as it may lead to confrontation which will definitely undermine the probity of the identification evidence.

[87] In this case, the learned judge recognised the possible danger to the quality of the identification evidence by the presence of the witnesses at the Flying Squad before they gave their statements to the police and before the identification parade was held. He, however, accepted the evidence of Mr Hetridge that he did not see the applicant at the Flying Squad. But we believe he made a fatal error in not considering the implications of the visit along with the alleged viewing, *vis-a-vis* the discrepancies in the description of the applicant.

[88] In examining the circumstances of Mr Richards' identification of the applicant the learned judge recounted the evidence and said:

> "I already commented on the fact that he gave a statement after the accused was in custody at Flying Squad and he said he had gone to Flying Squad but I don't find that he was in a deliberate plot with the police to find the man or identity, physical description before he gave a statement. Might be the way in which the case was developed that

> caused the accused to be apprehended first after they were searching for this phone..."

[89] We are forced to conclude that it is directly because of how the case developed and how the applicant was apprehended which called for the learned judge to take what counsel referred to as a more "nuanced" approach. In failing to take that approach, the learned judge made the fatal error of not assessing the possible implications of the omission of a salient feature of their assailant's appearance in the description given by both witnesses, especially in light of what the learned judge found to be excellent conditions for a good identification to be made. He also made a fatal error in not recognizing firstly, that there was a discrepancy in the description between the two witnesses and in not considering and reconciling this discrepancy with the appearance of the accused before him in the dock. He also failed to deal with the issue of the applicant's altered appearance at the time of the identification parade.

[90] Another feature of this case which gave us some concern is what we previously noted, that the learned judge found that Mr Henry's evidence supported the identification evidence of the two eyewitnesses. In treating with Mr Henry's evidence, the learned judge fell back on, what he described, as the least used of the principles in **Turnbull** and concluded that Mr Henry's evidence would be the type of evidence referred to in **Turnbull,** as evidence tending to support the identification evidence. He also looked at the guidance given in **Turnbull** as to how this evidence should be treated.

[91] We have already stated that in treating the evidence in this way and failing to give the requisite accomplice warning, Mr Henry's evidence was rendered nugatory. Although the learned judge went on to find that the "chronology of the circumstances provided other evidence that supports the visual identification in the trial", we conclude from the way in which the learned trial judge dealt with the issue, that with Mr Henry's evidence bolstering the identification of the applicant in the learned judge's eyes, it caused him to overlook the other "weakening factors" in the case.

[92] The learned judge was obliged to consider the evidence that the assailant may have been a man who had a beard and a moustache at the time of the robbery, but that this description was not in the statement of the complainants and any possible implication of this. At the very least the trial judge should have considered Mr Hetridge's evidence that he was not paying attention to the assailant's beard and moustache and what this may or may not imply. As we have already noted, it could mean one of two things, both equally troubling. Firstly, that the man had a beard and moustache at the time of the robbery but Mr Hetridge was not paying attention to that and did not notice it, hence it was not in his statement. Secondly, and alternatively, he did not notice whether he had one at the time of the robbery but he noticed it definitely at the video identification parade. The same went for Mr Richards, who made no mention of a beard or moustache at all in his description, even though he was not specifically asked that question.

[93] If the learned trial judge had considered the evidence in this critical manner, he would have been bound to ask whether the identification of the applicant was flawed. He would have been bound to ask how and whether, in those circumstances, a correct identification could be made of a stranger who was first seen for four to five minutes in frightening circumstances without a beard and a moustache but with cornrow hairstyle; but who was identified two weeks later as the same person now sporting a beard, a moustache and a short hair cut. That, coupled with the fact that it was being alleged that before giving his statement, Mr Hetridge (and the learned judge seemed to have formed the view that Mr Richards too) was said to have seen the applicant at the Flying Squad and commented on the beard and moustache or lack thereof to a police officer, should have placed the trial judge on greater alert. He was obliged to consider all this and consider too the actual appearance of the applicant at the trial and at the identification parade and whether, if there was a beard and moustache on the applicant, it so obscured his features that with or without one, depending on what evidence he accepted, would it have so altered his features that it would be difficult to later identify him.

[94] The learned judge correctly identified the main issue in this case as whether the applicant was one of the persons who robbed the complainants, which would be dependent on the correctness of the visual identification evidence. He then quite correctly, based his assessment on the circumstances at the time of the incident and the opportunity the two witnesses had to view their assailant. However, in our view, he failed to examine or address the discrepancy between the two witnesses' evidence

regarding the description of the applicant's complexion; the absence of a salient feature such as a beard and a moustache from the complainants' description of the assailant and failing to ask himself the question whether, in light of the changed appearance of the applicant at the video identification parade, the witnesses or any one of them was in a position to properly identify the applicant as the assailant.

[95] We have considered the case in the light of the decision in **R v Noel Campbell and Robert Levy** SCCA Nos 135 and 136/2003, delivered 27 April 2007, in which one of the appellants had a scar under the right eye. In that case the witness told the court that the man she described as being of black complexion also had a scar. She could not recall if she had seen a scar on the one she described as brown at the time she was assaulted or at the time she pointed him out to the police. She also could not recall if she had told the police about seeing a scar on the black one. She was shown her statement and she agreed that she had told the police that one of them was brown and had a scar over the left eye. At the request of the prosecution she was allowed to examine the two appellants in the dock after which she pointed to a scar under the right eye of the one she described as black. In summing up the case, the trial judge who was sitting without a jury, had declared her to be an impressive witness despite the absence of that description, which he found was not material to the identification. In those circumstances, this court in that case agreed with the learned trial judge and took the view that the presence of a scar was not a distinguishing feature on which the witness had relied to identify her assailants. The application for leave to appeal in that case was refused. We believe the instant case is different.

[96] We take the view that, in this case, there was a danger that the identification evidence was coloured by the evidence of Mr Henry and the subsequent visit to the Flying Squad whilst the applicant was in custody there. The applicant's identification by Mr Henry as the man who sold him Mr Richards' phone, coupled with the possibility of a sighting at the Flying Squad before the identification parade was held, may have adversely impacted the cogency of the identification evidence. We believe this case to be similar to the circumstances in **Edwards (Garnett) v R** (2006) 69 WIR 360, where the cogency of the identification evidence was negatively impacted by what the Privy Council described as an "association of ideas". In that case the prosecution witness to a murder, which took place in a bar, had failed to mention a birth mark on the appellant's face in his description of the assailant, who he did not know before. The witness, who was a police officer, eventually pointed out the appellant to the police after seeing him two months later, in the vicinity of the same bar where the murder took place. The witness also attended the police station where the appellant was in custody in the guard room and again pointed him out to the police as the shooter. In those circumstances the Board considered the birth mark (having seen a photograph of the appellant) to be "fairly conspicuous and visible at trial" and its omission from the witness' statement to be of great concern, especially in the light of the inadequacy of the learned trial judge's directions to the jury on identification and confrontation.

[97] In the instant case, we have concluded that the learned trial judge's treatment of the weaknesses in the identification evidence, especially in light of the fact that he placed great weight on the evidence of Mr Henry in bolstering the identification of the

applicant, was inadequate in all the circumstances. We are unable to say with any certainty that, if it were not for Mr Henry's evidence, the judge would not have given closer scrutiny to the "weakening factors" in the identification evidence of the two complainants. Having found support for the identification of the applicant, unfortunately he glossed over those weaknesses, and we cannot say that if they had been properly considered, the verdict would have been the same.

[98] Furthermore, and less significantly, there were other discrepancies in the evidence of the two witnesses which the judge gave no thought to at all. Whilst a judge sitting alone is not expected to comb through all discrepancies and inconsistencies, it is surprising that the learned judge did not mention any at all. For instance:

(1) Mr Hetridge described the pistol as black and silver with the rust on the silver slide. Mr Richards described it as black with rust on the handle;

(2) Mr Hetridge said the items which were demanded from them were thrown on the ground and picked up by the second man. Mr. Richards said they were handed to the man doing the collecting;

(3) Mr Hetridge's account of how the robbery took place was that items were taken from Mr Richards first and on Mr Richards' account Mr Hetridge was robbed first;

(4) Mr Richards said they raised an alarm and gave chase after the men ran from the scene of the robbery. Mr Hetridge said he hid behind a column and made no mention of chasing after the robbers; instead his account was that Mr Richards ran inside for another phone and his firearm and called the police, who came ten minutes later; and

(5) Mr Hetridge also said the second assailant took up the machete that had been used to cut coconuts on his way out of the yard. Mr Richards makes no mention of this fact.

[99] There were several other minor discrepancies to include what the applicant said to Mr Richards' son as he came out of the house and even the position of the men as they exited the scene after the robbery, none of which were considered by the learned judge. It may be, that if they had been considered, the learned trial judge would have found them to be immaterial, but there is no indication he considered them at all. However, we cannot say that if he had given consideration to the discrepancies and inconsistencies which arose on the evidence, it may not have given him pause as to the reliability of the evidence given by the witnesses.

[100] When we consider the failure to treat Mr Henry as an accomplice and to give the requisite warning as to the need for corroboration, as well as the learned judge's failure to deal with and resolve the "weakening factors", along with the failure to give the

applicant the benefit of the good character direction, we find it difficult to treat this conviction as safe.

The sentence

[101] In relation to the sentence imposed by the learned judge, counsel for the Crown pointed out that the learned judge in passing sentence had asserted that he could impose a term of imprisonment of no less than 15 years in relation to the offence of robbery with aggravation. The following passage from page 145 of the transcript was drawn to our attention:

> "But just to let you know, you have to go to prison for that and you have to go to prison not less than fifteen years. I saw that the law says if a man takes a gun and commit [sic] a felony which is, robbery, shooting with intent particularly housebreaking Parliament pass the law that the minimum a man must go to prison is fifteen years."

[102] We are indeed indebted to counsel for the Crown, who drew our attention to the decision of this court in **Jerome Thompson v R** [2015] JMCA Crim 21, where Brooks JA at paragraph [33] of his judgment pointed out that the minimum sentence for robbery with aggravation could only be imposed in relation to a charge under section 25(1) of the Firearms Act. This is how he put it:

> "It may be that the learned trial judge thought that she was bound by the minimum sentence because of the stipulation in section 25(3), which is highlighted above. It must be noted, however, that that provision would only have been applicable, and a minimum sentence for robbery with aggravation could only have been imposed, if Mr Thompson had been charged with an offence under section 25(1) of the Firearms Act. That was not the case. The difference between charges laid pursuant to section 20(1)(b) of the Firearms Act

> as opposed to section 25(1) were explained in **R v Henry Clarke** (1984) 21 JLR 72, at page 75."

[103] As was correctly pointed out in **Jerome Thompson v R** the starting point for robbery with aggravation with a firearm, where the accused is charged contrary to section 37(1)(a) of the Larceny Act, is 12 years. However, based on our decisions in this appeal this issue is clearly moot. Nevertheless, it is our wish that trial judges would take note of the decision in **Jerome Thompson v R** when faced with the prospect of sentencing for the offence of robbery with aggravation in the Gun Court and the charge is not made contrary to the Firearms Act.

Disposition

[104] Section 14(1) of the Judicature (Appellate) Jurisdiction Act empowers this court, on hearing an appeal against conviction, to allow the appeal where in our opinion the verdict of the jury should be set aside on the grounds that it is unreasonable or cannot be supported having regard to the evidence. It also empowers this court to set aside a conviction by a court on the grounds of a wrong decision on any question of law or if on any ground there was a miscarriage of justice. The learned trial judge having failed to give the requisite accomplice warning and good character direction in circumstances where they were relevant in this case and having failed to resolve what we view as "weakening factors" in the case, for the reasons given it is our view that the cumulative effect of these complaints was such as to cause us to hold that the verdict is unsafe and should be set aside.

[105] Although the question of a retrial was not canvassed by counsel, on due consideration of the particular facts and circumstances of this case and on the application of the principles in **Dennis Reid v The Queen** (1978) 16 JLR 246, in particular the fact that the prosecution's case will still be dependent on the impugned identification evidence, we do not think it is in the interests of justice to order a new trial.

[106] The application for leave to appeal is therefore granted. The hearing of the application is treated as the hearing of the appeal and in that premise, the appeal is allowed, the conviction is quashed and sentence is set aside. We therefore, direct that a judgment and verdict of acquittal be entered.