[2017] JMCA Crim 5

JAMAICA

IN THE COURT OF APPEAL

SITTING IN LUCEA, HANOVER

SUPREME COURT CRIMINAL APPEAL NO 56/2015

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MISS JUSTICE EDWARDS JA (AG)

JASON RICHARDS v R

Leonard Green for the appellant

Ms Andrea Martin-Swaby and Stephen Smith for the Crown

29 November 2016 and 27 January 2017

SINCLAIR-HAYNES JA

[1] Cannigia Williams, also known as Danza, had his life snuffed out by gunmen on the morning of 18 December 2011. Jason Richards (the appellant) was tried and convicted of his murder. He was sentenced by Fraser J on 17 July 2015 to be imprisoned for life and not to be eligible for parole until the expiration of 27 years. The appellant, however, insists that he has been falsely accused. His application for a legal aid assignment, leave to appeal, and permission to file the following three grounds of appeal was granted by a single judge.

"1. Misidentity by the witness:- that the prosecution witness wrongfully identified me as the person or among any persons who committed the alleged crime.

2. Unfair Trial:- that the evidence upon which the learned Trial Judge relied on for the purpose to convict me lack facts and credibility thus rending [sic] the verdict unsafe in the circumstances.

3. Lack of Evidence: that during the trial the prosecution failed to put forward any material, Scientific, or forensic evidence, to Justified [sic], and substantiate the alleged Charge against me if [sic] which I was subsequently convicted there for.

4. Miscarriage of Justice:- that the prosecution failed to recognized [sic] the fact that I had nothing to do with the alleged crime for which I was wrongfully convicted of."

[2] At the hearing of the appeal counsel for the appellant, Mr Leonard Green, requested and was permitted to file the following additional grounds.

"1. In his summing up, the learned judge failed to have directed the jury to glaring weaknesses in the Prosecution's case and apart from enumerating the exhibits that were put in evidence as proof of the inconsistencies, the trial judge did not properly relate those inconsistencies to the testimony of the sole Prosecution witness and what effect those inconsistencies would have on the critical issue of the witness' credibility in determining the issue of the Appellant's guilt or innocence.

2. The learned trial judge failed to address a key weakness in the Prosecution's case that is to say what is the explanation for not giving a statement to the police prior to the time that the accused was in police custody and how did that fact relate to Exhibit 2 which speaks to the previous inconsistent statement made by witness [sic] that he told the investigating officer that 'I must now inform you that Jason is now in police Custody at the Hunt's Bay Police Station,'

and Exhibit 4 which speaks to the fact that his previous inconsistent statement was that he said that he did not know who had fired the shot at him.

3. The learned trial judge gave no adequate or proper direction on the issue of the Appellant's unsworn statement from the dock and was critical of the Appellant's exercise of his choice to make an unsworn statement when the trial judge said that the Appellant,'...had nothing to fear from unfair questions because he would be fully protected from these by his counsel and by me.' The comment made by the judge rendered the trial of the accused unfair and the verdict unsafe. 4. The learned judge erred in that he failed to give a good character direction in circumstances where counsel for the Appellant raised the issue of his client's popularity in a positive sense which was later explained in the Social Enquiry Report after his conviction."

Counsel made no submission on the original grounds filed by the appellant in person.

The eyewitness' testimony

[3] Mr Delano Messam was the sole eye witness. He testified that the deceased Danza was his neighbour and best friend. On that fateful morning he heard a banging on his door. Upon opening the door, he saw a friend with whom he spoke. Whilst speaking with his friend, he was also washing dishes in his yard. During their conversation he heard explosions which caused him to speak to his girlfriend. The explosion came from Danza's yard. By stepping slightly from where he was doing his dishes, he was able to see Danza's yard which was directly across from his. The distance between the two yards was adjudged to be approximately 20 to 30 feet.

[4] The explosions were continuous. Whilst still hearing explosions, he went across to Danza's "gateway" where he saw and spoke with Biggs whom he knew before. The

gate was approximately 2 - 2 ½ feet from Danza's house. During his conversation with Biggs, he said, "wild gunshots" were being fired at Danza who was in the house. It was his evidence that "while they are there killing 'Danza', wild gunshot firing at 'Danza' in the house [he was] there talking to Biggs".

[5] Biggs, he said, was looking up and down the road and was in and out of the yard. He (the witness) asked him (Biggs) why he killed Danza and they were all friends. During his conversation with Biggs, also called Glasses, he saw the appellant, Giggy Puss, Shane and Earlon.

[6] Giggy Puss and the appellant each had a gun. He described the appellant's gun as barrel gun which was about 12 inches long. Its length was however adjudged to be 18 inches. It was his evidence that the appellant and Giggy Puss held "the gun and went towards Danza's grandfather's room". The appellant pointed the gun in the direction of the grandfather's room and he heard two explosions. The explosions came from the direction of the grandfather's room. It was his evidence that he was able to see into Danza's grandfather's room.

[7] Biggs told the appellant, Giggy Puss and the other men who were in the house that they should not allow him, Mr Messam, to escape. He was at that point in time an arm's length from Biggs and about 11 feet from the appellant. Biggs instructed them not to let him escape. He cursed and ran because he saw Shane who was the first to "burst" from Danza's room. During his flight he looked back and saw that the appellant and Giggy Puss had joined the chase telling persons to move out of the way.

[8] He ran in the direction the appellant and his friends were headed. In the process he jumped fences and got onto Fitzgerald Avenue. From Fitzgerald Avenue he attempted to get on to Nelson Road but upon nearing the pathway he saw the appellant "burst out of the path". He was about 26 feet from him. The appellant fired at him and remarked that he needed a new gun to kill him. He escaped by running down Fitzgerald Road, jumping a fence and going unto Nelson Road. At Nelson Road he saw Danza lying on the veranda in front of his grandfather's door suffering from gunshot wound.

The defence

[9] The defence was alibi. The appellant told the court that he was in bed. He woke up and took his medication. He returned to his bed and was awaken by noise outside. It was night and he went on the road where he heard that two persons were shot.

[10] Later in the week he was called by Officer Massey. He attended the station and the officer asked him if he knew Pearl Harbour. He told the officer that he did not know what was going on because he was in his bed. He was placed into the lock up and told he would be charged for murder. Whilst in the lock up, at his lawyer's request, he provided information about the schools he attended.

Grounds 1 and 2

The appellant's submission

[11] It was Mr Green's submission that the sole eye witness' testimony was rife with inconsistencies which were not adequately dealt with by the learned trial judge. The crux of his submission was that the trial judge was obliged to ensure that in his summation, he analyzed the evidence so as to assist the jury in their determination of the issue whether, on the Crown's evidence, they could be satisfied at the required legal standard that the accused was guilty of the charge.

Counsel pointed the court to a number of inconsistencies in the sole eye witness' testimony which he posited were not adequately dealt with by the learned trial judge.

The respondent's submission

[12] Counsel for the Crown, Mrs Martin Swaby, on the other hand, submitted that the learned judge was most careful in providing the general guidance as to the proper treatment of inconsistencies and discrepancies. The learned judge, she submitted, ventured further by highlighting the inconsistencies which were exhibited. She further posited that the learned judge was under no obligation to offer specific commentary in respect of the view to be taken of the witness' credibility in respect of each highlighted inconsistency. She relied on the case **Herbert Brown and Mario McCallum v R** SCCA Nos 92 and 93/2006, delivered 21 November 2008.

[13] Regarding the judge's treatment of Mr Messam's inconsistent statements in respect of his knowledge that the appellant was in custody, Mrs Martin-Swaby

submitted that the witness gave an explanation that he was told of the appellant's apprehension on the day his statement was recorded. She said he further indicated that it was the statement taker who advised him that he could not record the fact that this was told to him as it would be hearsay which could not be included in his statement. She argued that in the circumstances it fell for the jury to assess the witness and determine whether his explanation was credible.

[14] She contended that in respect of exhibit 4, the witness maintained that his testimony was accurate and if he had written the statement himself it would have borne reference to the account he gave in court. She contended that those issues were ultimately for the jury to assess and to determine whether the witness' explanation was credible. According to her, the learned trial judge, having eloquently guided the jury, no further commentary was required of him.

The judge's treatment of the inconsistencies

[15] The learned judge correctly gave the jury the following general directions:

> "Now, this is how you approach any inconsistencies or discrepancies you may find in the evidence, since you raise the issue of the credibility of a particular witness or of more than one witnesses. The first question is, is there an inconsistency or a discrepancy? If so, is there an explanation for the inconsistency or discrepancy; whether coming from a particular witness or witnesses or from any other evidence.
>
> The third question is, is the inconsistency or discrepancy important? And one way of deciding whether its [sic] important, is to determine whether for you the point on which the inconsistency or discrepancy occurs is vital to the case or credibility of the witness or witnesses.

> If you say it is vital, you have two choices. You may say that a particular witness or witnesses cannot be believed on the particular point or if it is serious enough you will say you can't believe the witness at all. If, however, the inconsistency or discrepancy is not important, you simply acknowledge that it exists but that it doesn't really affect the credibility of the witness one way or another. So you say you acknowledge it but then you say it's not important."

Of the inconsistencies the judge said:

> "...I will just remind you of them quickly. Now the first exhibit had to do with the number of persons that Mr. Messam said he would see from his yard across 'Danza's yard. He told us in evidence that he would see 'Biggs' at the gate and he saw Shane and Jason. It was put to him that it was said in his police statement before that when he looked in the yard he saw six persons. It was shown to him and he denied that and so the following extract was put into evidence 'On hearing this I looked into Danza's yard and noticed that there were about six men including Jason standing at the door to Danza's room'. So, that's the first exhibit which went into evidence.
>
> The second one had to do with the fact as to whether or not he said he knew Jason was custody and he denied saying that he knew. He said he didn't say to the police, 'I informed you that he was in custody', he said it was hearsay. He having denied it, this is what went into evidence as Exhibit 2: 'I must now inform you that Jason is presently in police custody at the Hunt's Bay lock-ups after he was picked up by the police in the area on Saturday the 7th of January, 2012'. His explanation was, 'I did not say to the police I informed you, I say I hear say and the police told me they can't write that when I told them that is what I hear'.
>
> Now, this is my comment and as I said you don't have to accept it if you don't think it makes sense. But, bring back to mind the witness Delando Messam, you saw in the witness-box. Remember the language he used as he gave his evidence and ask yourselves whether you think he told the police, 'I must now inform you that Jason is presently in police custody'. Does that sound like something he would have said or as his explanation that he told them he heard

something and the officer said I can't write that and he wrote it his own way? So, its [sic] a matter for you to determine what you make of that exhibit whether you find it affects Mr. Messam's credibility or not.

The third exhibit was in relation to the fact that in evidence Mr Messam said, before you that he saw Jason and Shane running, and he said he never mentioned any time before in any statement that he had seen Shane and Jason walking. So the third exhibit was this quotation from the police statement, 'I also notice that Shane and Jason started to walk in my direction.'

Again, it's a matter for you how significant you find that to be, whether walking or running is vital in the nature of the case which you heard and whether you think it affects his credibility materially.

Now Exhibit Four, you should consider carefully because, in evidence, he said that he saw Jason and Shane with guns on the veranda. He said he didn't recall saying to the police it was when Shane and Jason start to walk in my direction he realized that they had guns. So, he has not denied saying that. This is what was put in evidence as Exhibit Four:

'I also noticed that Shane and Jason started to walk to my direction, and at that point I now realize that Shane and Jason had guns in his hand.'

Now Mr Lorne made quite a bit about this, because he is saying that Mr. Messam said that he saw Jason and Shane on the veranda firing towards Danza's grandfather's room, and so if that was the case, why is it that after that had happened he would be saying that he now realized that Shane and Jason had guns in their hands.

On the other hand, the Prosecutor is saying that the real issue is who was there, and what they had, and so the sequencing is not that important. It is a matter for you to determine what you make of that.

> Now the final Exhibit from the statement was that while giving evidence, he said that when he was running away, it was Jason who came out of the pathway and buss' {SIC} a shot off a him. He had said in his statement that he didn't know who had fired the shot at him, denied that he had said that and it was put in evidence as Exhibit Five:
>
> 'While they were chasing me, I heard one shot, but could not say who fired it as I was focusing on making my escape.'
>
> Mr. Lorne says that Mr. Messam is just here to blame Jason for everything. The Prosecutor says no, he knew who it was who fired the shot at him. It is a matter for you, again, to determine what you make of the Exhibit.
>
> You, therefore, have to consider what you find there to be any inconsistency in the case, whether highlighted by me or not, and any explanation for those inconsistencies; you should determine, in keeping with the directions I have given you concerning how to treat inconsistencies and discrepancies, what effect any such inconsistency or inconsistency may have on the credibility of Mr. Messam or any other witness for the Prosecution? That is on your ability to believe Mr. Messam or any other witness and to determine what you accept to be the truth, and what you ultimately find to be the proven facts in this case." (Emphasis supplied)

The Law

[16] Counsel Mr Green directed the court's attention to the Privy Council decision, **Peter Michel v The Queen** [2009] UKPC 41 which provides guidance for trial judges as what constitutes a fair summing up which would allow a convicted accused and indeed an observer to leave the proceedings satisfied that an accused was afforded a fair trial. Lord Brown, in expressing the view of the Board, reminded judges of the importance, especially in criminal cases, to "steer clear of advocacy". At paragraph 33, however, he made it plain that judges presiding over criminal trials ought "to assist the jury to arrive at the truth". It is "a part of their task", he said.

[17] In clarifying the assistance a trial judge in a criminal trial is expected to provide the jury, he further explained at paragraph 33 that:

> "**None of this, of course, is to say that judges presiding over criminal trials by jury cannot attempt to assist the jury to arrive at the truth. On the contrary, they should. That is part of their task.** Judges exist to see that justice is done and justice requires that the guilty be convicted as well as that the innocent go free. But for the most part they must do so, not by **questioning of the witnesses but rather by way of a carefully crafted summing up**. As to that, Simon Brown LJ, giving the judgement of the Court of Appeal in *R v Nelson* (Garfield Alexander) [1997] Crim. LR 234 (transcript dated 25 July 1996) put it thus:
>
> > 'Every defendant, we repeat, has the right to have his defence, whatever it may be, faithfully and accurately placed before the jury**. But that is not to say that he is entitled to have it rehearsed blandly and uncritically in the summing up.** No defendant has the right to demand that the judge shall conceal from the jury such difficulties and deficiencies as are apparent in his case. Of course, the judge must remain impartial. But if common sense and reason demonstrate that a given defence is riddled with implausibilities, inconsistencies and illogicalities...there is no reason for the judge to withhold from the jury the benefit of his own powers of logic and analysis. Why should pointing out those matters be thought to smack of partiality? To play a case straight down the middle requires only that a judge gives full and fair weight to the evidence and arguments of each side. The judge is not required to top up the case for one side so as to correct any substantial imbalance. He has no duty to cloud the merits either by obscuring the strengths of one side or the weaknesses of the other. Impartiality means no more and no less than that the judge shall fairly state and analyse the case for both sides.

> Justice moreover requires that he assists the jury to reach a logical and reasoned conclusion on the evidence .... Judges who go to the trouble of analysing the competing cases and who give the jury the benefit of that reasoned analysis ... are to be congratulated and commended, not criticised and condemned.'" (Emphasis supplied).

Analysis

Whether the witness knew the appellant was in custody

[18] It was the witness' evidence that he never knew that the appellant was in custody. It is important to quote him:

> "I never know he was in custody, **all when I give this statement I still didn't know he was in custody**." (Page 84 of the transcript - Emphasis supplied)

[19] Indubitably the witness has categorically denied any knowledge of the appellant having been in custody when he gave his statement. So emphatic was he in refuting counsel's suggestion that he said:

> "No. No, sir. I could never turn to them and tell them where he was in custody or not, because after giving the statement they were the one who told me he was in custody." (Page 85)

[20] Having been confronted with his following statement which conflicted with his testimony that he never knew the appellant was in custody:

> "I must now inform you that Jason is presently in police custody at the Hunts Bay lock-ups, after he was picked up by the police in the area, on Saturday the 7th of January, 2012." (Page 89).

He responded thus:

> "You see that part that is in there that I read, I did not say I inform you, what I say, that I hearsay and him turn to mi and seh, no, mi can't say put no hearsay, a hear you hear, mi remember that part." (page 86)

Significantly the witness added:

> "... No, I told you I couldn't tell them that he was in custody, because is hear I hear, so I did not know for me to say yeah, he is in custody; is the day the police dem tell me that, mi know seh him did in custody, a dem a tell mi, soh mi hear, **but a you a tell mi now fi mi realize seh is true.**" (page 87 - Emphasis supplied)

At page 89 he said**:**

> "I did not say I informed, I seh I hear seh **and him turn to mi and seh hear seh, nuh tell me nuh hearsay, mi can't goh with nuh hearsay,** a hear mi hear. I didn't know until that day when they told me." (Emphasis supplied)

[21] It was also his evidence that he said certain things to the police, he pointed out certain errors but the police told him "no problem", the police wrote what "he thought was more appropriate".

[22] A curious factor was that the witness, who claimed to have known the appellant from primary school and who witnessed him shoot and kill his best friend, did not give a statement to the police until after he heard that the appellant was arrested and in police custody, although it was his evidence that the appellant also attempted to kill him. Importantly, his statement was given almost one month after the shooting.

[23] Prior to and after enumerating the inconsistencies, the learned judge gave the mandatory directions. But the issue is whether those directions were insufficient as

posited by Mr Green. In dealing with the inconsistencies between the witness' statement and his evidence under cross examination, the judge properly assisted the jury beyond the mandatory directions. His comments were however entirely favourable to Mr Messam. The learned judge certainly did not provide the jury with the same analysis in respect of the aspects of the evidence which favoured the defence.

[24] The thrust of Mr Lorne's cross-examination and the appellant's statement were to demonstrate to the jury, that the witness was not credible in his assertion that the appellant was among persons present at the scene. This ought to also have been dealt with by the learned judge.

[25] Counsel rightly pointed out the imbalance in the learned judge's summation in respect of exhibit 2. His failure to address the inherent improbability in the witness' statement that he did not know that the appellant was in custody and that "all when [he] give [sic] this statement [he] still don't know he was in custody". Moreover, if indeed it was the police who informed him of the appellant's detention, why would there have been a need for them to have him so state? It cannot therefore be said that the learned judge "[played the] case straight down the middle" by giving "full and fair weight to the evidence and arguments of each side". Nor can it be asserted in respect of this complaint that the learned judge "fairly ... [analysed] the case for both sides".

[26] Mr Green posited that because of the importance of that aspect of the defence, the trial judge ought to have dealt with the issue more carefully, particularly because

that was not the only inconsistency but rather there were five important areas of conflict.

[27] This aspect of the learned judge's summation was not as balanced as it could have been. A view could properly be formed that the learned judge obscured the weakness of Mr Messam's evidence in this regard by his comments. However, in light of his general directions, we are not of the view that this complaint is justified.

The number of persons

[28] Mr Green pointed the court to Mr Messam's statement to the police in which he stated that he saw six men including the appellant standing at the door to Danza's room, which contradicted his evidence under cross-examination that he saw three persons.

[29] He further pointed the court's attention to Mr Messam's evidence under cross-examination that at no time he saw the appellant walking in his direction, which was also at variance with his statement to the police and his evidence that the appellant and Shane came out of the room and "start to run [him] down".

[30] Counsel also pointed to the inconsistency between the witness' previous statement to the police and his evidence. It was his statement to the police that he saw the appellant and Shane with guns when they started to walk in his direction. His evidence however was that he saw them with guns on the veranda.

[31] It was counsel's submission that arguably the most important inconsistency was the witness' statement that he did not know who fired at him and his later evidence under cross-examination that the appellant was the person who fired a shot at him, and his evidence that he was unable to see who fired at him.

[32] Counsel submitted that the inconsistency justifies the reasonable inference that it was because the appellant was in custody why the witness gave the statement that the appellant was among the men who shot the deceased and fired at him.

Discussion

[33] It was the witness' evidence that he saw one person in the yard and two on the veranda at Danza's "doorway". Biggs was at the gate and Giggy Puss and the appellant were the persons on the veranda. His statement which he acknowledged that he read before he signed stated:

> " On hearing this I looked in Danza's yard and I noticed that there were about six men including Jason standing at the door to Danza's room."

[34] The witness however told the court that he did not remember telling the police that. He said he saw "three at first when the rest was inside the house, and when I eventually see the rest is when dem start to run mi down".

[35] Although the learned judge pointed out to the jury that Mr Messam's evidence that he saw the appellant and Shane standing at the door was discrepant with his statement to the police, he provided no comment as to the possible effect of the inconsistency on the witness' reliability and credibility.

[36] The witness also denied saying that he saw Giggy Puss "push away Jason and fired two shots in Danza's grandfather's room". He said he saw both of them. Upon being pressed by counsel, he told the court that he was not expected to remember. Although shown his statement, he spoke only of Giggy Puss, he insisted that he told the police that both men fired into the room.

Whether the appellant and Shane walked or ran towards the witness

[37] The witness' evidence was that at no time he saw the appellant walking in his direction. His evidence was that having fired in the room, the appellant and Shane came out of the room and "start to run [him] down" was at variance with his statement to the police that they walked in his direction.

[38] Under cross-examination, he denied telling police that when Biggs told the men not to allow him to escape, the appellant and Shane walked towards him. He emphatically insisted repeatedly that they did not walk towards him. They "ran him down" he said. Indeed it was his repeated evidence that if he had been walking he "wouldn't be here for [counsel] to cross question mi, mi woulda dead too". According to him, he "glimpsed back" while he was running and saw all of them running him down. He maintained that he never mentioned in his statement to the police that the appellant and Shane walked in his direction.

[39] His evidence was that having fired two shots in Danza's grandfather's room, and Biggs told them that they should not to allow him to escape, Shane first came out of

the room and chased him. He "glimpsed" behind him and saw all of them including Jason chasing him. Upon being ask whether he told the police that:

> "I also noticed that Shane and Jason started to walk in my direction."

[40] His answer was that he could not remember. However, when confronted by his statement to the police, the witness said:

> "I read it, and I recall I didn't mention no walking, and until today, I am still sticking to that, I didn't mention no walking."

[41] The judge again provided no assistance by way of analysis as to the likely effect this inconsistency could have on the witness' credibility.

At what point the witness realized that the appellant had a gun?

[42] It was the witness' evidence whilst he was at Danza's gate speaking to Biggs, he saw the appellant and Shane with guns going towards Danza's grandfather's room. He described the gun which he said the appellant carried. He saw the appellant point the gun towards the grandfather's room and he heard explosions. His evidence was in stark contrast to the statement to the police in which he stated that:

> "I also notice that Shane and Jason started walk in my direction and at that point, I now realize that Shane and Jason also had guns in their hands."

Upon being confronted with his statement to the police, he denied telling the police that he realized that the appellant and Shane had guns when he saw them walking towards him.

[43] The learned judge, in directing the jury in respect of the inconsistency between the Mr Messam's evidence and his statement to the police as to whether the appellant ran or walked towards him and also the point at which he realized that the appellant and Shane were armed with guns, did remind them of Mr Lorne's submission. His direction to the jury that the Crown's submission was "that the real issue [was] who was there and what they had, and so the sequencing is not that important", without more, diminished the significance of those inconsistencies.

[44] This inconsistency was a significant one in favour of the appellant in light of Mr Messam's description of Jason's gun; his evidence that he had not only seen them going towards the room with guns, he saw Shane and Jason point and fire towards the room. It was therefore inherently incredible that he would have only realised that the appellant and Shane had guns whilst they were walking (or running) towards him.

[45] It could not therefore have been an unimportant issue of sequencing in light of his evidence that he only glimpsed the gun whilst he was fleeing and had he not run he would have been killed. In fact the submission that the sequencing was unimportant was an incorrect and misleading one. The issue was indeed "who was there and what they had." In determining "who was there" the critical issue was however, Mr Messam's credibility.

[46] Mr Messam's credibility regarding the 18 inch barrel gun he said the appellant had when he saw him going towards the room/veranda, was also further brought into question by Detective Corporal Thomas's evidence. It was the officer's evidence that

the bullets he recovered at the scene could not have been from a barrel gun. There was however no analysis by the learned judge in respect of that very significant inconsistency in contrast to his very thorough analysis which favoured Mr Messam in respect of the statement.

[47] Although the learned judge's general directions satisfied the mandated standard, they did not accord the appellant the analysis which would have been fair and desirable. Moreover he erred by failing to comment on the Crown's assertion that the sequencing was unimportant.

Who fired at the witness during his flight?

[48] The witness' evidence that he saw the appellant shoot at him and his statement to the police was inconsistent. His statement to the police was that:

> "Whilst they were chasing me I heard one shot but could not say who fired it as I was focus [sic] on making my escape."

[49] Having not only told the police that he was unable to say who fired at him during the chase but also provided the reason for his inability to do so, that is, he was "focusing" on his escape was a categoric statement that he did not see. To resile from that statement and to assert in evidence in chief that he saw the appellant when he (the witness) reached the pathway he "push out him hand and point pon mi and fire shot after mi" is a significant inconsistency.

[50] So too was his answer to Crown counsel's question: "Why you said it was Jason who buss out and fired at you?"

> "Cause mi si him face, mi a look straight inna him eye dem...him pass a remarks and say come in like dem haffi get a new gun fi kill mi cause mi cyan dead enuh."

And his answer to Crown counsel's question whether anything blocked his view whilst he was running away and he "turned back and looked around and saw them for five or less seconds", was that when he looked around he "definitely saw them".

[51] Although the learned judge reminded the jury of this inconsistency, his following comment that: "Mr Lorne says that Mr Messam is just here to blame Jason for everything. The Prosecutor says no, he knew who it was who fired at him", was in my view inadequate. So too were his general directions which followed in light of the fact that Mr Messam was the sole eyewitness and his evidence on crucial aspects was so discordant. In fact, Mr Lorne's suggestion was that he blamed the appellant because he is from the other side.

[52] The appellant's complaint that the learned judge failed to direct the jury to the weaknesses in the Crown's case is not entirely justified as he did highlight some. The complaint that he failed to analyse the aspects of the evidence which were favourable to the appellant and he failed to relate them to the effect on the witness' credibility in determining the appellant's guilt or innocence, however bear some merit.

[53] That fact notwithstanding, the learned judge discharged his duty by highlighting the important areas of inconsistency and gave the general directions. The jury, who were the sole arbiters of the facts, would have noted the inconsistencies. In the circumstances, grounds 1 and 2 fail.

Ground III

The judge's treatment of the unsworn statement

[54] Mr Green complained that the learned judge's unfavourable comments regarding the appellant's decision to make an unsworn statement from the dock could likely have conveyed the impression to the jury that the appellant might have had "something to hide". He submitted that later statements made by the judge could not repair the damage done by his earlier statement.

[55] Mrs Martin-Swaby submitted that that aspect of the learned judge's summation was in keeping with the case **Alvin Dennison v R** [2014] JMCA Crim 7 in which Morrison JA (as he then was) relied on the Privy Council decision of **Director of Public Prosecutions v Walker** (1974) 12 JLR 1369.

The law/analysis

The impugned directions

[55] The learned judge said:

> "An accused is not obliged to go into the witness-box. Mr. Richards had a completely free choice either to do so or to make an unsworn statement or to say nothing. You may be wondering why he elected to make an unsworn statement. It **could be that he was reluctant to put It could not be** because he had conscientious objection to taking the oath since he could affirm. **His evidence to the test of cross-examination**. If so why? He had nothing to fear from unfair questions because he would be fully protected from these by his own counsel and by me. It is for you members of the jury to make up your minds whether the unsworn statement has any value, you must decide what

> weight should be given to the unsworn statement." (Emphasis supplied)

Morrison JA in **Alvin Dennison v R**, with reference to the words of Lord Kerr from Judicial Committee of the Privy Council, said:

> "[29] In **Director of Public Prosecutions v Walker** (1974) 12 JLR 1369, the Board was invited by this court to give guidance on the 'objective evidential value of an unsworn statement', since, as Lord Salmon observed (at page 1373), 'it has for some time been standard practice in Jamaica to keep the accused out of the witness box'. This was the Board's response to this invitation (page 1373):
>
> > 'There are ... cases in which the accused makes an unsworn statement in which he seeks to contradict or explain away evidence which has been given against him or inferences as to his intent or state of mind which would be justified by that evidence. In such cases (and their Lordships stress that they are speaking only of such cases) **the judge should in plain and simple language make it clear to the jury that the accused was not obliged to go into the witness box but that he had a completely free choice either to do so or to make an unsworn statement or to say nothing.** The judge could quite properly go on to say to the jury that they may perhaps be wondering why the accused had elected to make an unsworn statement; that it could not be because he had any conscientious objection to taking the oath since, if he had, he could affirm. Could it be that the accused was reluctant to put his evidence to the test of cross examination? If so, why? He had nothing to fear from unfair questions because he would be fully protected from these by his own counsel and by the court. The jury should always be told that it is exclusively for them to make up their minds whether the unsworn statement has any value and if so, what weight should be attached to it; that it is for them to decide

> whether the evidence for the prosecution has satisfied them of the accused's guilt beyond reasonable doubt, and that in considering their verdict, they should give the accused's unsworn statement only such weight as they may think it deserves.'" (Emphasis supplied)

The words used by the learned judge were almost verbatim those recommended by the Privy Council and adopted by the court. Ground 3 therefore fails.

Ground IV

Was the appellant entitled to a good character direction?

[56] Mr Green submitted that the facts of this case and the evidence adduced necessitated out of an abundance of caution, a good character direction. Mrs Martin Swaby however submitted that the learned judge was not so obliged because the appellant elected to give an unsworn statement from the dock which disentitled him from the benefit of a full good character direction. He was only entitled to a direction as to his propensity to commit the offence. Learned counsel doubted whether the appellant had said enough in his unsworn statement which could properly raise the issue.

[57] She pointed out that the Social Enquiry Report which spoke to his good character was not before the court during the trial. According to counsel, for the issue of his good character to have been properly raised, the appellant ought to have used words within the tenet of the following excerpt from the decision of **Bruce Golding & Damion Lowe v R** SCCA Nos 4 & 7/2004, delivered 18 December 2009.

> " I never run down nobody that morning, I never run down nothing with no gun at no time, I am not a gunman, your Honour, I am a working youth." [paragraph 85]

[58] It was her further submission that if the court finds that the issue of his good character was properly raised, the effect of the omission must be considered and only if the court is doubtful whether the jury would have inevitably convicted the appellant even if the partial good character direction had been given, should the failure be deemed to render the conviction unsafe. For this proposition she relied on **Denjah Blake v R** [2014] JMCA Crim 19, a decision of this court.

The law/analysis

[59] In the Privy Council case, **Teeluck v State of Trinidad and Tobago** [2005] 1 WLR 2421, Lord Carson in delivering the decision of the Board said:

> "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: *Barrow v The State* [1998] AC 846, 852, following *Thompson v The Queen* [I998] AC 811,844. It is a necessary part of counsel's duty to his client to ensure that a good character direction is obtained where the defendant is entitled to it and likely to benefit from it. The duty of raising the issue is to be discharged by the defence, not by the judge, and if it is not raised by the defence the judge is under no duty to raise it himself: *Thompson* v *The Queen,* at p 844 ..."

Was the issue of the appellant's good character raised?

[60] The issue of the appellant's good character first emerged under the cross-examination of Mr Messam who told the court that the appellant was popular and he

saw him on television and on billboard. Soon after he however testified he did not know about billboard. The witness also said:

> "Sir, even on that morning, it also surprised me to know that this man who has a career ahead of dem, to really spoil it up just like dat...[he] should have sense to stick to him career and follow dem type of—dem type of friend."

[61] The appellant, in his unsworn statement, told the court that he has been living with HIV since he was 17 years and was employed to the Ministry of Health as an outreach officer for the National HIV\STI Program. He participates in television advertisements "steps in" for the Ministry. His picture also appears on billboards and in television advertisements. He is well known in the community. He speaks to the people in the community and greets them. Everyone in the community should know him, he said.

[62] Morrison JA (as he then was) in **Michael Reid v R** SCCA No 113/2007 judgment delivered 3 April 2009, a matter pursuant to section 29(1)(a) of the Judicature (Appellate Jurisdiction) Act, which concerned an attorney's failure to adduce evidence of his client's good character at his trial, in his scholarly style reviewed a number of decisions on the issue and succinctly summarized the principles enunciated in the authorities thus :

> "44. In our view, the following principles may be deduced from the authorities to which we have been referred:
> ...
>
> (ii) Although the value of the credibility limb of the standard good character direction may be qualified by the fact that the

> defendant opted to make an unsworn statement from the dock rather than to give sworn evidence, such a defendant who is of good character is nevertheless fully entitled to the benefit of the standard direction as to the relevance of his good character to his propensity to commit the offence with which he is charged (**Muirhead v R**, paragraphs 26 and 35).
>
> ...
>
> (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 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)." (Emphasis supplied)

[63] **Peter Stewart v The Queen** [2011] UKPC 11 is instructive on the issue. Lord Brown, who delivered the judgment of the Board, stated that an accused who chose to make an unsworn statement from the dock was not entitled to a full character direction. At paragraph 15 he said:

> "Again this is an area of the law that I discussed in some detail in giving the Board's judgment in Bhola v The State [2006] UKPC 9 and again the Board think it unnecessary to rehearse the case law afresh here. **The one further general point that is perhaps worth making on this appeal is that the credibility limb of the direction is likely to be altogether less helpful to the defendant in a case like this, in which he has chosen to make a statement from the dock (or, indeed, chosen simply to rely on pre-trial statements) than when he has given sworn evidence**." (Emphasis supplied)

Lord Brown noted that the **Peter Stewart** case "[W]as an overwhelmingly strong recognition case". The learned judge also made the following observation at paragraph 18:

> "In short, this was, in the Board's view, a straightforward case and it can safely be said that, even had a full character direction been given, the jury would inevitably still have convicted."

[64] The later Privy Council case **Nigel Brown v The State** [2012] UKPC 2 further confirmed the position which Morrison JA deduced from the authorities he examined. At paragraph 33 of the decision, Lord Kerr said:

> "It is well established that the omission of a good character direction is not necessarily fatal to the fairness of the trial or to the safety of a conviction - *Jagdeo Singh's* case [2006] 1 WLR 146 para 25 and *Bhola v The State* [2006] UKPC 9, paras 14-17. As Lord Bingham of Cornhill said in *Jagdeo Singh's* case, '**Much may turn on the nature of and issues in a case, and on the other available evidence." para 25 Where there is a clash of credibility between the prosecution and the defendant in the sense that the truthfulness and honesty of the witnesses on either side is directly in issue, the need for a good character direction is more acute.** But where no such direct conflict is involved,

> it is appropriate to view the question of the need for such a direction on a broader plane and with a close eye on the significance of the other evidence in the case. **Thus, in *Balson v The State* [2005] UKPC 2, a case which turned on the circumstantial evidence against the appellant, the Board considered that such was the strength and cogency of that evidence the question of a good character direction was of no significance**." (Emphasis supplied)

The following dicta of the Privy Council in **Mark France and Rupert Vassel v The Queen** [2012] UKPC 28 reaffirmed the principle of law. At paragraph 46, Lord Kerr stated that:

> "[That] there would be cases where it was simply not possible to conclude with the necessary level of confidence that a good character direction would have made no difference. **Jagdeo Singh and Teeluck** were obvious examples**. But it recognized that there would also be cases where the sheer force of the evidence against the defendant was overwhelming and it expressed the view that in those cases it should not prove unduly difficult for an appellate court to conclude that a good character direction could not possibly have affected the jury's verdict. Whether a particular case came within one category or the other would depend on a close examination of the nature of the issues and the strength of the evidence as well as an assessment of the significance of a good character direction to those issues and evidence**."(Emphasis supplied)

[65] The instant case is certainly not of the kind in which the evidence against the appellant is so overwhelming that the good character direction in respect of his propensity to commit the crime would have been futile. On the contrary, the cumulative effect of the numerous inconsistencies in the evidence of the sole eye witness seriously

undermined its cogency, credibility and reliability. It is therefore impossible to say with confidence that had the good character direction in respect of the appellant's propensity to commit the crime was given, the jury, properly directed, would inevitably have convicted. Ground 4 therefore succeeds.

Disposal

[67] The appeal is allowed. Conviction quashed and sentence set aside. In the interests of justice the matter is remitted for a retrial.