[2016] JMCA Crim 34

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 80/2011

BEFORE: THE HON MR JUSTICE BROOKS JA
THE HON MRS JUSTICE McDONALD BISHOP JA
THE HON MISS JUSTICE WILLIAMS JA (AG)

RUSSELL ROBINSON v R

Mrs Valerie Neita-Robertson, Dwight Reece, Miss Kimberly Whittaker and Courtney Rowe instructed by Robertson and Company for the applicant

Jeremy Taylor and Gavin Stewart for the Crown

14, 15, 16 December 2015 and 20 December 2016

P WILLIAMS JA (AG)

[1] On 29 November 2010 Mr Russell Robinson, the applicant, was arraigned in the High Court Division of the Gun Court on an indictment containing 19 counts. The first 18 counts charged him with offences of illegal possession of firearm and the 19th with illegal possession of ammunition. After a trial that lasted 13 days over several months, the applicant was convicted on all counts on 20 July 2011. On 26 July 2011, he was sentenced to 15 years imprisonment at hard labour on each of the first 18 counts and to 10 years imprisonment at hard labour on count 19 and the court ordered that these sentences should run concurrently.

[2] The applicant applied for permission to appeal against conviction and sentence on 18 October 2011, on the following grounds:

> "(1) **Misidentify by the witness:-**that the prosecution witness wrongfully identified me as the person or among persons who committed the alleged crime.
>
> (2) **Unfair Trial: -** that the evidence and testimonies upon which the learned trial judge relied on to convict me lacks facts and credibility, thus rendering the verdict unsafe in the circumstance.
>
> (3) **Lack of Evidence:-**That the prosecution's witnesses presented to the court conflicting and contrasting testimonies which calls into question the sincerity of the evidence was presented to link me to alleged crime.
>
> (4) **Miscarriage of Justice:-** That the learned trial judge erred in law when refused to upheld [sic] the no case submission as presented by Defence Attorney."

[3] The application was first considered on paper by a single judge of this court. On 17 April 2015 the learned single judge extended the time for filing the application for leave to appeal and refused the application. The learned single judge ordered that the applicant`s sentence should commence on 7 September 2011. As is his right, the applicant renewed the application before the court itself.

[4] When the matter came on for hearing, the applicant, with the leave of the court, replaced the original grounds filed with the supplemental grounds as follows:

"1. The learned trial judge erred in law in failing to uphold the submission of no case to answer by the Defence at the close of the Crown's case. That this resulted in a substantial miscarriage of justice.

That in assessing the evidence had the learned trial judge considered the whole case as it stood at the close of the crown's case and had he examined the Prosecution's case at its highest and take into account the evidence which was self contradictory and out of reason and all common sense he would have been led to the conclusion that the case was tenuous and suffering from inherent weakness.

2. The learned trial judge failed to identify, examine and analyse the several major inconsistencies/discrepancies and to assess the effect of the weakness in the crown's case caused by these inconsistencies/discrepancies. He failed to demonstrate how he resolved them in coming to his determination that he accepted the crown's witnesses as credible.

The learned trial judge in finding the witnesses truthful failed to direct his mind to the flawed credibility of those witnesses due to the numerous inconsistencies.

3. The learned trial judge failed to give himself any or any adequate directions to the propensity and likelihood of having committed the offence when assessing the evidence of the Applicant/Appellant's character.

That this non-direction amounted to a mis-direction in law and resulted in the applicant/appellant not having a fair trial.

4. The learned trial judge erred in ruling that counsel for the defence was not allowed to ask pertinent and relevant questions; in doing so

he prejudiced the case for the defence and rendered the Defendant an unfair trial.

5. That the learned trial judge gave no directions at all on inferences. That his failure to direct his mind to inferences and how to deal with them indicates that the facts of the case did not raise issues in relation to the Law of circumstantial evidence .

That this non-direction amounted to a mis-direction."

The Crown's case

[5] The prosecution relied on 14 witnesses to prove its case. The narrative they presented commenced at the Elleston Road Police Station at about 3:00 am on 4 February 2010. On the premises of this station, the armoury and stores for the Jamaica Constabulary Force are located. On that morning, Constable Keneal Forde and Corporal Michelle Campbell were two of the officers on duty at the station.

[6] Constable Forde was patrolling the premises shortly after 3:00 am, when he came upon two men who he recognised as workers at the stores. One man, upon being confronted by Constable Forde, made a call on his cellular phone. Shortly thereafter the applicant came up. Constable Forde had known the applicant for some two years prior to that morning and had often seen him at the stores. The applicant explained his presence on the compound at that time as being to collect gun oil and some oil from the generator for his bus. He pointed to a white Hiace bus parked in front of the stores but outside of the perimeter fence for the stores. He indicated that the two men were there to assist him.

[7] After leaving the men, Constable Forde returned to the guard room of the station. About 15 minutes later, the applicant came to the back door and Constable Forde spoke with him. Corporal Campbell heard Constable Forde speaking with someone and then saw someone walking away from the back door. She recognised that person as being the applicant who she had known for over 12 or 13 years.

[8] At about 3:15 am Sergeant Dorrell White, Corporal Kamoi Miller, Constable Oral Clark and District Constable Garnett Taylor were patrolling along Mountain View Avenue in a marked police service vehicle. Sergeant White was the driver. A man was observed with what appeared to be a firearm in one hand. The man was approaching the service vehicle when he suddenly turned and ran through some premises in the direction of Munster Road. Sergeant White drove down Mountain View Road and turned on to Munster Road with a view to apprehending this man.

[9] While travelling along Munster Road the officers saw a green Toyota Corolla motor car parked on the right hand side of the road in the vicinity of No 14 Munster Road, under a street light. Two men were seen standing beside this motor vehicle. The men were recognised as being David and Morris, auxiliary workers at the stores at the Elleston Road Police Station. Upon the approach of the police service vehicle, Morris was observed walking briskly across the road to the premises at No 14 Munster Road.

[10] Sergeant White eventually stopped the police service vehicle at the gate to those premises. A fat man was seen at the gate. This man later gave his name as Garnet

Pellington. The applicant was seen coming from the rear of the premises. Sergeant White had known the applicant for about five years and had been accustomed to seeing him sometimes three times a day at the canteen behind the guardroom at the Elleston Road compound or at the stores and armoury. Corporal Miller knew the applicant for about four years.

[11] Sergeant White enquired of the applicant as to the reason for the presence at those premises. The applicant explained that he was there to help his friend deal with a dispute. He indicated Mr Pellington was the friend. Sergeant White noticed that the applicant was "sweating heavily". He also noticed that the gate on which Mr Pellington was resting was vibrating. He formed the opinion that Mr Pellington was causing the vibrations due to the fact the he was shaking and concluded that this must have been because Mr Pellington was nervous.

[12] The officers then re-entered the service vehicle and drove off. Sergeant White stopped the vehicle about a chain from the premises. After speaking with his team members, Sergeant White called Superintendent Michael Bailey who was at the time the Superintendent in charge of the Kingston Eastern Police Division. As a result of the conversation Sergeant White turned back to No 14 Munster Road. As they approached the premises, the applicant and the two men, Morris and David, were seen getting into the green Toyota Corolla motor car which then drove off in the direction heading to Mountain View Avenue.

[13] Sergeant White stopped the police service vehicle at the gate of No 14 Munster Road. He decided to call for assistance given the volatile nature of the area. Within five minutes, Inspector Linford Forsythe and a party of police personnel arrived at the location.

[14] Sergeant White entered the premises and called out "Fatman, Fatman". Mr Pellington answered and permitted Sergeant White to enter the premises along with other officers. A search was conducted in the house. Sergeant White found a firearm in a black plastic bag in a shoe box inside a wardrobe in one of the rooms.

[15] Upon exiting the house, Sergeant White was standing outside, still on the premises with Mr Pellington when the applicant, Morris and David were seen standing on the road in front of the premises. Some seven to ten minutes had passed since they had been seen driving away in the green Toyota Corolla motor car.

[16] The applicant approached Sergeant White and asked him "Whitey how yuh a mash up di ting man". Sergeant White responded "no, it's not your thing anymore, a firearm is recovered so step aside let me carry out the function". At that point the applicant pointed to a white Toyota Hiace bus which was parked in the premises, behind the gate to No 14 Munster Road. He said to Sergeant White that what is inside that bus is more important to him than life. When asked by Sergeant what was inside that bus, the applicant replied "arms and ammunition".

[17] Upon hearing this, Sergeant White disarmed the applicant of his service pistol which was handed to Constable Kamoi Miller for safekeeping. Sergeant White then

asked the applicant again what is inside the bus. The applicant responded in a low tone of voice "whole heap of arms and ammunition".

[18] Sergeant White then instructed Constable Miller to check the bus. Constable Miller tried to open the door to the bus but discovered it was locked. Sergeant White asked the applicant if he had the keys to the bus and upon answering in the affirmative, the applicant then took from the front pocket of the overalls that he was wearing, a pair of keys on a red Digicel strap. One key was silver-looking with DC 3X121 inscribed on the middle and the word Forcost below that. The other key was gold-looking with STAR USA T0 4X174 inscribed on it. The strap with the keys were handed to Constable Miller who then used one to open a door to the bus. These keys were eventually admitted into evidence. At trial the keys were taken from an exhibit bag.

[19] Upon opening the door and looking inside Constable Miller saw what he described as a lot of guns and ammunition. He shouted out to Sergeant White 'Whole heap a guns and ammunition like hell, White".

[20] Sergeant White cautioned the applicant, arrested him and placed handcuffs on him. He then took the applicant over to the bus and showed the applicant the arms and ammunition in bags on the floor of the bus.

[21] The applicant started to cry and Sergeant White began to cry also. The applicant then asked Sergeant White to remove the service vehicle from in front of the gate so that he could drive out the bus. When Sergeant White refused, the applicant shouted out to him "White, mi a beg you please shoot me, please shoot me". Sergeant

White again refused and the applicant said "Well then give me back the police gun mek me shoot miself in a mi head and end everything now". Sergeant White replied "No way, no I won't do that". At this point the applicant said "Whitey, mi nuh have mi visa but mi a beg yuh pull the handcuff mek mi run nuh". Once again Sergeant White refused.

[22] Constable Miller handed the keys back to Sergeant White. Sergeant White called Superintendent Bailey for the second time that morning. Superintendent Bailey who had gone to the Elleston Road Police Station to dress in his uniform after receiving the earlier call, now proceeded to the location at Munster Road. Sergeant White handed the keys to Superintendent Bailey who made observations of the bus and its contents. Superintendent Bailey later handed the keys to Deputy Superintendent Errol Williams.

[23] Later that morning another officer Detective Constable Stephanie Brown came to the location and made observations of the bus and its contents. She also saw the applicant who she had known for about three or four years prior, and she noted that he was in handcuffs. She asked him what was going on and as he turned to her, she started crying. He said to her "Boy Miss Brown a needs". He also asked her to "pull the handcuffs" but she refused.

[24] Deputy Superintendent Errol Williams eventually attended the scene later that morning and assumed the function of the investigating officer. He made contact with the Scene of Crime Division and Detective Corporal Gouldbourne arrived from that Division. After discussions with Deputy Superintendent Williams, Detective Corporal

Gouldbourne proceeded to take several digital photographic images of the premises as also of the bus and its contents. He also later visited the Elleston Road Police Station and took photographs of that location to include the armoury and the stores. Several of the photographs were admitted into evidence.

[25] Deputy Superintendent Williams also gave Constable Brown some instructions after which she proceeded to take notes of what was found in the bus. She recorded as Detective Corporal Gouldbourne photographed and labelled the contents. She noted that 18 firearms and 4540 rounds of live ammunition were in the bus - some in boxes which were described as having been eaten up by "chi chi'. These activities took place in the presence of the applicant.

[26] The contents of the bus were eventually transferred to the trunk of a service vehicle and transported to the Elleston Road Police Station. The applicant along with Deputy Superintendent Williams also travelled to the Elleston Road Police Station in the said vehicle.

[27] At the station, the items were placed in Deputy Superintendent Williams' office where they remained until the following day. The investigating officer remained at his office for that entire night as well.

[28] The Toyota Hiace bus was taken by wrecker to the Elleston Road Police Station. The keys for the bus were handed over to Deputy Superintendent Williams by Superintendent Michael Bailey. Deputy Superintendent Williams later gave the keys to Detective Constable Stephanie Brown who placed both keys in the transparent exhibit

bag and wrote a label on a piece of white paper which was placed in the same bag. She wrote on the piece of paper the words "one van key belonging to Mr Garnet Pellington taken from him on 4th February 2010 Hiace bus registered 3171 DR in which arms and ammunition were found".

[29] On February 2010, Deputy Superintendent Williams spoke with Detective Sergeant Roy McRae as a result of which Detective Sergeant Roy McRae and Detective Constable Brown went into the Deputy Superintendent Williams' office and proceeded to put the guns in exhibit boxes and labelled the boxes. Detective McRae said it was 19 guns that were placed in 19 exhibit boxes. He labelled the boxes alphabetically. He also labelled the assorted rounds of ammunition. All these items were eventually transported to the Government Forensic Laboratory by Detective Sergeant McRae and Detective Constable Brown. At the laboratory the items were handed over to Detective Superintendent Carlton Harrisingh, the Government Ballistics Expert.

[30] Detective Superintendent Harrisingh received 18 evidence boxes, two sealed envelopes, three canvas bags, six polythene bags and one carton box which were all sealed. After carrying out the requisite tests and examinations, Detective Superintendent Harrisingh concluded that the items were 18 firearms in good working condition and capable of discharging deadly bullets along with 10,500 assorted rounds of ammunition.

[31] Deputy Superintendent Reginald Mowatt was the officer in charge of the armoury at Elleston Road Police station at the time of this incident. He had gone to No 14

Munster Road on the morning of 4 February 2010 and had recorded the serial numbers of the firearms he had seen in the Hiace bus. He subsequently checked those serial numbers with the records of the firearms being stored at the armoury. This check revealed that the serial numbers matched those for eight of those listed as being government issued firearms in storage and 10 non-government issued firearms. Deputy Superintendent Mowatt also compared some of the serial numbers which were on the boxes of ammunition at the armoury with those found in the bus and found that some matched.

[32] Deputy Superintendent Mowatt knew the applicant for over 10 years and knew him to have worked at the stores at Elleston Road Police Station for that period. This was confirmed by Deputy Superintendent Naomi Gordon who was the officer who had overall responsibilities for the stores and the armoury. She said the applicant had in fact been assigned to the stores for some 13 years.

[33] From the evidence of Deputy Superintendents Mowatt and Gordon, the procedure for gaining access to the armoury where the weapons were stored was made clear. The keys to the armoury itself were kept in a vault that was located in Deputy Superintendent Gordon's office at the stores. This vault required a combination to be opened. Keys were also required to gain access to Superintendent Gordon's office.

[34] The applicant was said to have access to the keys for Superintendent Gordon's office and had been told the combination to open the vault by Superintendent Gordon. In any event, the applicant had clearance to access the armoury.

The Defence's case

[35] The applicant made an unsworn statement. He had served in the Jamaica Constabulary Force for 16 years over which period he had never faced a disciplinary hearing. His performance in the Jamaica Constabulary Force he said had been without blemish.

[36] He stated that every police officer in the East Kingston Police Division knew Garnet Pellington who he referred to as "Fat man." He had left his motor vehicle at Mr Pellington's house because it had broken down so he had left it there for safe keeping until he could get a mechanic.

[37] The applicant denied taking any guns or ammunition from the armoury on that night of 4 February, 2010 or at any other time. He denied having the combination for the vault with keys as to give him access to either would have been a breach of security. He said he never drove a white Hiace bus with guns and ammunition that night or any other night. He said that all the police witnesses said happened at Munster Road was a lie. His arrest and charge he said was to deflect attention from senior police officers who were actually involved. He said that promotions had been given to police officers as a reward for implicating him.

[38] He explained the reason for the raid at Mr Pellington's premises on that night. He said whilst he and Mr Pellington were in custody, Mr Pellington had told him that there had been a "fall out over the sharing of money" between senior police officers and himself, that is, Mr Pellington and this had led to the raid.

[39] One witness was called for the defence. Pastor Owen Bowen as a minister of religion had known the applicant from 1982. The parents and a sibling of the applicant had been members of the church that he pastored. He described the applicant as being very pleasant, kind and helpful. He also said he knew the applicant to be a person of honesty and of integrity.

[40] Under cross examination, the witness explained that the applicant had actually attended church regularly up to the time he had left that church. Thus he accepted that the opinion he had formed of the applicant was done over a period of 17 years, from 1982 to 1998 and post July 1998, he was unable to speak to the applicant's character.

The Appeal

Ground 1

The learned trial judge erred in law in failing to uphold the submission of no case to answer by the defence at the close of the Crown's case. That this resulted in a substantial miscarriage of justice.

The Submissions

[41] Mrs Neita-Robertson noted that the submission of no case to answer made at the close of the Crown's case was made under "line 2 (a) of **Galbraith**". Further she pointed out that the defence had based its submissions on the authority of **R v Collin Shippey**, **Steven Jedynak and Malcolm Jedynak** [1988] Crim LR at page 767.

She submitted that certain principles of law were laid down in **R v Shippey** which the learned trial judge was obliged to consider but failed to properly do. Ultimately she

submitted that the evidence presented was "out of all reason and all common sense b) improbable, c) inconsistent, d) self contradictory" and can be viewed as tenuous. She contended that "if these weaknesses are apparent and irresolvable then the learned trial judge ought not to call on the accused to answer". Further she contended that at the end of the Crown's case the minimum standard of evidence required as a matter of law, in order to leave the matter to the jury had not been reached, and that the evidence far from pointing in one and one direction only which is what is required to ground a conviction on such evidence, was pointing in several directions.

[42] Counsel highlighted certain features in the Crown's case which she said supported her view that the evidence presented was tenuous. She noted that in respect of the evidence and the inferences that the firearms at Munster Road came from the armoury, there was no proof to the required standard that this was so. Similarly, she contended that there was no evidence that the ammunition came from the armoury. She argued that the evidence of the similarity of the batch numbers found on boxes seen in the armoury with those on the boxes found in the bus and of the condition of the boxes in the bus with some found in the armoury was insufficient as there was no evidence that the batch numbers and the condition of the boxes were circumstances exclusive to the armoury.

[43] Mrs Neita-Robertson submitted that in relation to the bus, once again there was insufficient evidence to conclude that the bus found at Munster Road was the same bus seen by Corporal Forde at Elleston Road on the early morning of 4 February 2010 and

that the applicant identified as his for which he had come to get gun oil and gas oil from the armoury compound.

[44] Counsel acknowledged that the Crown had relied on the circumstances surrounding the key which was used to open the bus to further establish possession, knowledge and control by the applicant of the contents of the bus. She submitted that there can be no denial that the evidence of the label on the key falls in the category of a major contradiction going to the root of the case given the words on the label found in the exhibit bag which indicated that the keys had been taken from Mr Pellington.

[45] She contended that while the evidence that it was the applicant who took the keys from his pocket and handed them over to Sergeant White after using words which clearly indicated his knowledge of the contents of the bus, the label found in the exhibit bag with the key was significant. She urged that the evidence must be considered in the context of No 14 Munster Road being the property and residence of Mr Pellington, the bus being owned and registered in the name of Mr Pellington; a gun and ammunition along with money being found in a shoe box in Mr Pellington's bedroom and large quantities of guns, ammunition and money being found at Mr Pellington business place that same day.

[46] She contended further that this was not simply a matter of credibility or evidential consistencies but a matter of the substantial and significant nature to be viewed in the context of the Crown's case as a whole. She argued that there was no

explanation for the disparity as to the labelling of the key which remained "in-explicable".

[47] Mrs Neita-Robertson also urged that the demeanour of the applicant when he was shown the guns and ammunition found in the bus ought not to be overlooked in examining the case as a whole. She stated that the evidence of his crying and the statements he is said to have made can be viewed as demonstrating a level of great anxiety and distress which would be inconsistent with his returning to the premises, drawing attention to the minibus and eventually handing over the key. She described it as mind-boggling and ludicrous for any human to behave in that manner. She also submitted that the applicant's actions before and after handing over the key does not accord with logic and common sense and is quite incredible.

[48] Mrs Neita-Robertson also challenged the Crown's case for what she described as presenting two cases in proof of the guilt of the accused. She identified them as being the Elleston Road case and the Munster Road case. She then pointed out that the evidence presented as to the "timeline" for both cases suggested that the applicant would have to have been at both places at the same time. She noted that based on the evidence, the applicant would have been seen at Elleston Road Police Station between 3:00 am and 4:00 am whilst the officers on patrol in the Munster Road area would have seen him between 3:00 am and 3:15 am, with the discovery of the weapons in the bus his presence occurring before 4:00 pm as well.

[49] Mrs Neita-Robertson continued her submissions on this issue by urging that having regard to the evidence about the time, the whole of the structure upon which the prosecution has built collapses and falls on the impossibility of the applicant being in two places at the same time. Further, she submitted that the learned trial judge cannot be expected to elect which one of the venues the applicant should be accepted as being present at as to do so would be to speculate. Counsel referred to **R v Abbott** [1955] WLR 369 at 375 in support of her contention that the effect of the impossibility of the timeline would be to cause the structure of the Crown's case to disintegrate.

[50] Mrs Neita-Robertson went on to make reference to other aspects of the evidence adduced by the prosecution which she said supported her contention that the evidence was impossible and inconsistent as well as out of reason and all common sense. She referred to what she described as the illogical explanation offered by the applicant that he was in the armoury compound in order to get gun oil and generator oil to use in the bus. She pointed to the suspicion of Constable Forde that some wrong doing was going on yet he failed to apprehend the men, failed to bring it to the attention of his superior officer, failed to note what happened in the station diary and also failed to identify on a parade at least one of the men he had seen on the armoury compound that morning although he said the man was known to him for a number of years.

[51] She also noted the fact that Woman Corporal Campbell heard of the find at Munster Road and saw the applicant at Elleston Road after that when it was said that it

was the applicant who brought the presence of the guns and ammunition on the premises at Munster Road to the attention of the police.

[52] In continuing her attack on the prosecution's case, Mrs Neita-Robertson highlighted some aspects which she said was of an improbable nature. She referred to the evidence of the officers on patrol in relation to having seen a man with a gun run into the premises which caused them to pursue him by driving on a road which she said was not proximate to the one the man could have run to. They then abandoned the apprehension of the gunman in circumstances she described as just not credible. Further she noted that lies were told to Mr Pellington such that the premises at No 14 Munster Road would be searched.

[53] She submitted that it is incredible and improbable that a police officer would enter a premises where a police operation is taking place and identify a bus load of guns and ammunition as belonging to him. Further, she said it is most incredible that he boldly claimed possession of a van load of weapons and ammunition, then proceed to cry when shown the items and make statements that demonstrate he did not want to take the consequences of being in possession of these items and that death was a better alternative. She also challenged the credibility of the applicant being seen to be sweating and nervous when Corporal White first arrived at the gate of the premises and yet leaving and then returning to claim the items for which he demonstrated nervousness.

[54] Ultimately, it was Mrs Neita-Robertson's submission that it is a reasonable inference to draw that Constable White and others went to the premises directly to carry out a raid and not as they said they did based on suspicion aroused by the alleged presence of a gunman. Further she contended that a detailed examination of the Crown's case as a whole tend to suggest or to raise questions relating to whether the reasons for going to No 14 Munster Road were contrived and spurious. It is also note-worthy that counsel urged that a competing hypothesis that could be reasonably drawn upon on the evidence was that the witnesses are not truthful and that there is a conspiracy by the police to implicate the applicant and deflect responsibility for the removal of the items from the armoury away from other persons.

[55] In response, Mr Taylor challenged the value of **R v Shippey** as an authority. He referred to several authorities where that decision has been critically analysed and found wanting, namely **R v Ashley Taylor Pryer**, **Paul Sparkes and Benjamin Ian Walker** [2004] EWCA Crim 1163; **R v Salisbury** [2005] EWCA Crim 3107; **R v Silcock and Others**; [2007] All ER (D) 156; and **R v Andreas Christou** [2012] EWCA Crim 450.

[56] Mr Taylor submitted that in relation to no case submissions, the law is that in deciding on a submission of no case to answer, the judge should not withdraw the case if a reasonable jury properly directed could on that evidence find the charge in question proved beyond reasonable doubt. He referred to the case of **DPP v Varlack** [2008]

UKPC 56 and a decision from this court, **Herbert Brown and Mario McCallum v R** SCCA Nos 92 and 93/2006 delivered on 21 November 2008.

[57] Mr Taylor contended that the reliance on **Shippey** is misplaced and that the learned trial judge acted properly and in accordance with the law when he relied on **R v Galbraith** and further properly identified the main issue as being one of credibility.

[58] In considering specific complaints levelled at the evidence, Mr Taylor considered firstly the division of the Crown's case into two parts and identified the main issue as being whether or not the firearms and ammunition came from the armoury. He submitted that the withdrawal of a count on the indictment for storehouse breaking and larceny meant that circumstantial evidence regarding proof of the ownership was no longer important and material to prove a charge but became a part of the narrative. It became his contention that it is open to the court to find that it is not satisfied that the guns and ammunition belonged to the armoury but still conclude that the applicant was still in illegal possession of them. He submitted that the learned trial judge did not find or hold that the firearms seized at Munster Road were those that belonged to the Elleston Road Police armoury and accordingly the applicant's reason for being at the precincts of the armoury ceases to be of important consideration.

[59] Mr Taylor submitted that in relation to the time line, the learned trial judge held as the finder of fact that the times were all approximate times and that the applicant was present at Elleston Road earlier in the morning and subsequent to that appearance was at Munster Road. He also pointed out that the learned trial judge had found that

he could not make a finding that the bus seen at the police station was the same one seized at Munster Road.

Discussion and analysis

[60] It is accepted that the first recognised attempt to give guidance on how to deal with a submission of no case was by Lord Parker CJ in a practice direction reported at [1962] 1 All ER 448. The Chief Justice stated:

> "Without attempting to lay down any principle of law, we think that as a matter of practice justices should be guided by the following considerations.
>
> A submission that there is no case to answer may properly be made and upheld: (a) when there has been no evidence to prove an essential element in the alleged offence, (b) when the evidence adduced by the prosecution has been so discredited as a result of cross-examination or is so manifestly unreliable that no reasonable tribunal could safely convict upon it.
>
> Apart from these two situations a tribunal should not in general be called upon to reach a decision as to conviction or acquittal until the whole of the evidence which either side wishes to tender has been placed before it. If however a submission is made that there is no case to answer, the decision should depend not so much on whether the adjudicating tribunal (if compelled to do so) would at that stage convict or acquit but on whether the evidence is such that a reasonable tribunal might convict. If a reasonable tribunal might convict on the evidence so far laid before it, there is a case to answer."

[61] The first ground upon which the no case submission may be properly made and upheld being the failure to prove an essential element of the alleged offence has largely not been of much difficulty to apply. The second ground concerning the quality of the

evidence presented has caused more difficulty and several judicial discussions and decisions have flowed from that ground.

[62] The well-known and often cited case of **R v Galbraith** considers the matter and is now regarded as the locus classicus on the point**.** Lord Lane at page 156 gave guidance to the approach to be adopted:

> "How then should the judge approach a submission of no case? (1) if there is no evidence that the crime alleged has been committed by the defendant there is no difficulty. The judge will of course stop the case. (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example, because of inherent weakness or vagueness or because it is inconsistent with other evidence (a) where the judge comes to the conclusion that the Crown's evidence, taken at its highest, is such that a jury properly directed could not properly convict on it, it is his duty on a submission being made to stop the case (b) where however the Crown's evidence is such that its strength or weakness depends in the view to be taken of a witnesses reliability, or other matter which are generally speaking within the province of the jury and where one possible view of the facts there is evidence, on which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury. It follows that we think the second of the two schools of thought is to be preferred."

[63] In **R v Shippey**, Turner J took what some commentators describe as a more robust view when ruling on a submission of no case. He said that "taking the prosecution's case at its highest" did not mean "taking out the plums and leaving the duffs behind". This approach has found favour with more defence attorneys than prosecutors. This decision, being one of the High Court, has been much criticised. There are no actual reports of the judgment and it is to be remembered that the record

relied on is that found in the criminal law review. In the decisions that have subsequently considered the value of **Shippey**, it has generally been accepted that the decision is not to be regarded as laying down any principles of law.

[64] This court has had to consider the matter in several decisions. In **Kevon Black v R** [2014] JMCA Crim 36, Harris JA undertook a careful and detailed review of the authorities that dealt with the approach to a submission of no case (paragraphs [21] to [23]). At paragraph [24] she concluded:

> "The quality of the evidence is the critical decisive factor which directs a trial judge's discretion in making a decision on a submission of no case. As can be gleaned from the foregoing extracts from authorities, a case ought not to be withdrawn from the jury where credible evidence, upon which a reasonable jury properly directed can act, exists. However, in balancing the scales of justice, if the evidence presented by the prosecution is found to be very poor so that an accused's right to a fair trial would be compromised, then, a conviction cannot be sustained on such evidence."

[65] A jury properly directed would be reminded that they could accept evidence they found to be credible and reject any not so found. The jury would be able to assess the credibility of the witnesses having been directed as to how to view any inconsistencies and discrepancies. Upon a submission of no case to answer, a trial judge, being well aware of these directions must not then seek to usurp the functions of the jury. Once there is sufficient evidence presented by the prosecution which, if it is found to be credible, a reasonable jury would have convicted upon it.

[66] It may well be argued that in **R v Shippey**, the learned trial judge had not departed and established any new principle as ultimately he had found that on the

evidence presented the evidence of the complainant was totally at variance with other parts of the prosecution's case and having "really significant inherent inconsistencies". The proper approach remains a consideration of whether there was sufficient evidence for a jury to consider.

[67] In the instant case, the learned trial judge in considering the submission of no case demonstrated that he was well aware of his responsibility. In stating his ruling he indicated his appreciation of the deficiencies in the Crown's case. He however expressly referred to the guidance given in **Galbraith** and concluded there was a case to answer.

[68] It remains necessary to consider the evidentiary material which was before the learned trial judge to see whether it had reached that threshold for the applicant to have been called upon to answer. The most significant bits of evidence would be that relating to the recovery of the firearms. There was no dispute that the applicant was at the scene when the discovery was made. The only attempt to explain his presence was in a suggestion which was made to Sergeant White, that Mr Pellington had been allowed to place a telephone call to the applicant resulting in his coming that location. This suggestion had been denied. The evidence also was that the keys which were used to access the bus was taken by the applicant from his pocket and handed to Detective Sergeant White. The fact that the labelling of the keys suggested otherwise was an issue to be resolved by assessing the credibility of Sergeant White especially since it was not he who gave directions as to what was to be written on the label and he was not present when the labelling was done.

[69] Mrs Neita-Robertson described the words allegedly spoken by the applicant to Sergeant White amounting to admissions and the alleged actions of the applicant before and after handing over the key as "not according with logic and common sense" and "quite incredible" and "so incredulous that it appeared to be contrived.". Ultimately however, this was an issue to be resolved by the learned trial judge upon an assessment of the credibility of the witness in the exercise of his jury mind.

[70] At the close of the prosecution's case there was sufficient evidence connecting the applicant to the bus and its contents for the learned trial judge to have formed the view that a prima facie case had been made out for which the applicant ought to be called upon to answer. As a consequence, the learned trial judge rightly rejected the submission of no case. In the circumstances this ground has no merit and must fail.

Ground 2

The learned trial judge failed to identify, examine and analyse the several major inconsistencies/discrepancies and to assess the effect of the weaknesses in the Crown's case caused by these inconsistencies/discrepancies. He failed to demonstrate how he resolved them in coming to his determination that he accepted the Crown's witnesses as credible. The learned trial judge in finding the witnesses truthful failed to direct his mind to the flawed credibility of those witnesses due to the numerous inconsistencies.

[71] Mrs Neita-Roberson identified what she considered as major inconsistencies and discrepancies in the Crown's case namely:

- the timeline
- the key
- the amount of guns and ammunition said to be found

- the events that occurred at No 14 Munster Road on 4 February 2010 between the hours of 3:00 am and 4:00 am

[72] As has already been noted in her submission, Mrs Neita-Robertson pointed to the evidence of the two witnesses which placed the applicant at the Elleston Road Police Station from about 3:00 am to about 4:30 am. This evidence is clearly at variance with that of the officers who testified to seeing the applicant at No 14 Munster Road at 3:15 am.

[73] The complaint in relation to the key was concerning the fact that although Sergeant White testified that he got the keys from the applicant the label found in the exhibit bag suggested otherwise.

[74] In complaining about the amount of guns and ammunition allegedly found, Mrs Neita-Robertson pointed to the differing evidence given with two officers testifying to seeing 19 guns inside the bus at No 14 Munster Road, while two others spoke of seeing 18 guns. Regarding the ammunition, it was noted that the amount varied from 9540, to 10232 rounds, in total being found. Further, she also noted that in relation to one exhibit 1450 rounds were first said by one officer to have been found but this amount was later accepted by the said officer to have been 1350 rounds.

[75] In considering the evidence as to what transpired at No 14 Munster Road, Mrs Neita Robertson pointed to several discrepancies. Firstly, she noted that two of the

officers testified to seeing a man walk briskly across the road on the approach of their police vehicle, whereas the other officer said a man was seen running across the road.

[76] The next variation arose where Sergeant White had testified that he had exited the police vehicle and spoken to Mr Pellington and the applicant following which the three officers who were patrolling with him had gone back in the vehicle. However, one of those officers testified that he had remained in the vehicle while Sergeant White was speaking to the two men.

[77] Mrs Neita-Robertson also noted the discrepancy between two of the witnesses as to whether it was a veranda light or an outside light that was on when the officers returned to the premises and spoken to Mr Pellington. Further the witnesses disagreed as to when it was that they had entered the premises, whether it was before or after Sergeant White had spoken with Mr Pellington. Counsel pointed to the additional discrepancy as to where one officer was, when they returned to the premises, whether he was in the car or not.

[78] The complaints about the events that took place also concerned when it was that Inspector Forsythe had arrived and whether or not the inspector had participated in the search of the building as also where he was when the search of the building took place. Mrs Neita Robertson concluded this aspect of analysing the evidence by pointing to the testimony of Inspector Forsythe that he had placed Mr Pellington and the gun recovered from the premises in the police service vehicle before the applicant had returned at the scene, whereas Constable Clarke had testified that when the applicant

and Sergeant White went to look at the bus, it was District Constable Taylor who had Mr Pellington.

[79] Mrs Neita Robertson submitted that the law required that a trial judge reminds the jury of the inconsistencies/discrepancies that occurred in the evidence by identifying each and giving instruction as to how to deal with those found to be major as against those found to be minor. She submitted further that the trial judge should inform the jury that inconsistencies/discrepancies should not be limited to the so-called central issues but that they should be considered in relation to peripheral matters as might be considered relevant. Additionally, counsel contended that a mere recital of the evidence is not considered a proper or an adequate summation in law as this will be of no assistance to the jury, as such a recital, without more, will not enable a jury to identify, apply and assess the evidence in relation to the direction that ought to be given.

[80] In support of these submissions, counsel referred **R v Carletto Linton et al** SCCA Nos 3, 4 and 5/2000 delivered 20 December 2002; **R v Noel Williams and Joseph Carter** SCCA Nos 51 and 52/1980 delivered 3 June 1987; **R v Lenford Clarke** SCCA No 74/2004 delivered 29 July 2005; **Carey Durrant v R** [2013] JMCA Crim 36 and **Fuller (Winston) v The State** (1995) 52 WIR 424.

[81] After identifying sections of the summation in which the learned trial judge dealt with discrepancies and inconsistencies, Mrs Neita Robertson submitted that there had been a mere recital of the evidence. She contended that the learned trial judge had

failed to identify each piece of what was to be considered inconsistent/discrepant in the evidence and failed to conduct a clear comparison and analysis of the evidence as a whole. Further, she submitted that he failed to give proper or adequate direction to himself and fell short of completing the direction as required by law.

[82] Mr Taylor commenced his response to these submissions by referring to a decision of this court, namely, **R v Andrew Peart and Garfield Peart** SCCA Nos 24 and 25/1986, delivered 18 October 1988, where Carey P (Ag) said at page 5:

> "we would observe that the occurrence of discrepancies in the evidence if a witness, cannot by themselves lead to the inevitable conclusion that the witness' credit is destroyed or severely impugned. It will always depend on the materiality of the discrepancies."

[83] This provided the backdrop for Mr Taylor's contention that an examination of the summation in relation to the issue leads to the conclusion that the learned trial judge dealt with the matter adequately. Mr Taylor pointed to instances in the summation where the learned trial judge highlighted a discrepancy and dealt with it by either pronouncing it a minor one or by finding that it had its material effect on the credibility of the witness.

[84] He also noted where the explanation offered for another discrepancy was found to be satisfactory. On the matter of the key, Mr Taylor pointed out that the learned trial judge had dealt with the issue by finding Sergeant White to be a witness of truth.

[85] Mr Taylor submitted that it was always the prerogative of the tribunal of fact in determining credit worthiness of a witness to decide how much of the witness' evidence

it will accept or reject. He referred to another decision of this court: **R v Omar Greaves et al** SCCA Nos 123, 125 and 126/2003 delivered 30 July 2004.

[86] Mr Taylor contended that the learned trial judge had made findings of facts which ought not to be disturbed since there was credible evidence to support such findings. He relied on **Watt v Thomas** [1947] AC 484 in this regard and referred to two decisions of this court which have restated the principle namely **Everett Rodney v R** [2013] JMCA Crim 1 and **Dodrick Henry v R** [2013] JMCA Crim 2 as well as a recent decision of the Privy Council **R v Crawford** [2015] UKPC 44.

Discussion and analysis

[87] It is apparent that the main thrust of the applicant's defence in this case was that the entire case against him was contrived and was a deliberate attempt to falsely implicate him in the finding of the firearms and ammunition. Thus, the credibility of not just the witnesses individually but of the entire case which was presented was subject to attack by the defence and required careful scrutiny by the learned trial judge. The existence of discrepancies and inconsistencies therefore took on increased significance in these circumstances where credibility was the major issue.

[88] In **R v Fray Diedrick** SCCA No 107/1989, delivered on 22 March 1991, this court set out, what remains, the correct approach for the trial judges when dealing with issues of discrepancies and inconsistencies. Carey JA said at page 9:

> "The trial judge in his summation is expected to give directions on discrepancies and conflicts which arise in the case before him. There is no requirement that he should

> comb the evidence to identify all the conflicts and discrepancies which have occurred in the trial. It is expected that he will give some examples of the conflicts of evidence which have occurred in the trial, whether they be internal conflicts in the witness' evidence or as between different witnesses."

[89] It is settled law that it is the obligation of a trial judge sitting alone in the Gun Court to indicate the principles applicable to the peculiar facts of the case before him and demonstrate his application of those principles. This has been recognised as being necessary such that the thought processes of the trial judge can be clearly seen. The iconic statement of Carey JA in delivering the judgment of the court in **R v Clifford Donaldson and Others** [1988] 25 JLR 274 remains relevant. He said:

> "it is the duty of this court in its consideration of a judge sitting in the High Court Division of the Gun Court to determine whether the trial judge has fallen into error either by applying some rule incorrectly or not applying the correct principle. If the judge inscrutably maintains silence as to the principle or principles which he is applying to the facts before him, it becomes difficult if not impossible for the court to categorise the summation as a reasoned one."

[90] It is thus required in trials in the High Court Division of the Gun Court that where there are discrepancies and inconsistencies arising, the trial judge in his summation must make clear that he appreciates the significance of such conflicts in the evidence. He must demonstrate whether such conflicts can be resolved, and, if so how they have been resolved and the overall impact they may have on the quality of the evidence presented. There is, however, no necessity for the trial judge, in his reasoned

judgment, to identify every inconsistency or discrepancy but he must set out the facts he has found proven and the resolution of any conflicts which go to support the finding of guilt for the particular offence charged.

[91] In the instant case the learned trial judge correctly identified the issues in the matter and did so from early in his summation. He said as follows:

> "Now what essentially are the issues in this case in light of his defence especially: the issue of credibility of the witnesses, those called, because it is the defence of the accused that he is the victim of an orchestrated conspiracy against him, hence his implication in this case."

[92] It is against that understanding of the issues before him that the learned trial judge then embarked on a comprehensive review of all the evidence that had been presented. It was during his review of the evidence of what had transpired at the Elleston Road Police Station that the trial judge identified a discrepancy and having done so made the following comments:

> "So here there is a discrepancy and the question one asks one's self: Is this a discrepancy that can be considered minor, or is this a discrepancy that may be considered major? Because if it is considered minor, then it means that it is not a very important consideration in the assessment of his testimony. However, if it is considered major, then it goes to the issue of his credibility and the court may be minded not to accept him as a witness of truth on that point or as a witness of truth at all. It should be noted that in the court's definition that this is a minor discrepancy and it is in the order in which he said he saw the two men."

[93] The manner in which the learned trial judge dealt with this discrepancy clearly demonstrated his awareness of what was required. It is however true that he did not conduct a similar analysis of each and every possible discrepancy as he continued his comprehensive review of all the evidence. After conducting the review the learned trial judge made this comment:

> "Now where there are discrepancies and inconsistencies in the testimony of a witness or witnesses the court is obliged to look at these discrepancies and inconsistencies, and to ask itself whether the discrepancies are merely discrepancies or whether there are major or minor discrepancies. Because if they are major, the court may feel that it should not believe the witness on the point or to believe the witness at all. If they are minor discrepancies then the court may conclude that they are not discrepancies or inconsistencies which affect the credit of the particular witness or witnesses. And in this case it is my conclusion that there are discrepancies and inconsistencies between the witnesses and on a couple occasions witnesses [sic] own testimony."

[94] At that point, the learned trial judge failed to carry on and give examples of these discrepancies and inconsistencies and failed to demonstrate how he resolved them. However, he did not leave the matter there. While making his findings of facts, he commented as follows:

> " I found that the witnesses Ford, Brown, White, Bailey and Miller were witnesses of truth although there may have been inconsistencies, but unimportant inconsistencies, not the sort if inconsistencies or discrepancies that I could say I do not accept their evidence as to what allegedly took place that morning at 14 Munster Road."

[95] The question that now arises is whether the learned trial judge's approach of the matter in this global way can be deemed to be insufficient. Mrs Neita-Robertson complained about four instances where she submitted the discrepancies were to be considered major. In regards to the time line, the learned trial judge had this to say:

> "I find as a fact that the accused was seen on Elleston Road in the wee hours on the 4 February and within a relatively short time and I say this because almost all the witnesses kept referring to about, and I have concluded that nobody was giving evidence about an exact time that he was later seen at 14 Munster Road."

[96] The learned trial judge in this way resolved the inconsistencies and resolved them by making the finding of fact that he did.

[97] The learned trial judge also addressed the matter of the keys as follows:

> "I accept the evidence of the witnesses who indicated that the accused not only pointed out the bus but indicated what it contained, and that it was he who passed the keys when asked to pass it to Sergeant White. I am not convinced that there was any elaborate conspiracy that morning or at all."

[98] In effect therefore, the learned trial judge seemed to have resolved the matter by making findings of fact indicating what aspects of the evidence he accepted, which were critical to the resolution of the issues before him.

[99] In a similar manner, he accepted the evidence of Deputy Superintendent Harrisingh that the firearms and ammunition found were examined by the Deputy

Superintendent, thus this finding determined how many firearms and ammunitions he accepted were in fact found.

[100] In the circumstances, it cannot fairly be said that the learned trial judge acted on the wrong principle of law where the issues of inconsistencies and/or discrepancies were concerned. Further, the learned trial judge demonstrated sufficiently how he resolved the inconsistencies or discrepancies to arrive at conclusions that he did. It cannot be said that the learned trial judge arrived at findings of fact which are shown to be palpably wrong. This ground must therefore also fail.

Ground 3

The learned trial judge failed to give himself any or any adequate directions as to propensity or likelihood of having committed the offence when assessing the evidence of the applicant/appellant's character. That this non-direction amounted to misdirection in law and resulted in the applicant/appellant not having a fair trial.

[101] Mrs Neita-Robertson noted that in his unsworn statement, the applicant stated that he had never faced a disciplinary hearing "not even an orderly room hearing, that his performance in the Jamaica Constabulary Force had been without blemish and that he had no previous conviction. He had called a witness, a minister of religion, who spoke of knowing him to be pleasant, kind and helpful and a person of integrity and honesty and someone whose word the witness would accept on important matters.

[102] Mrs Neita-Robertson's first complaint was that the learned trial judge "viewed the character evidence more in the light of an adjunct to the unsworn statement of the applicant and appeared to have put some emphasis on the weight of the evidence of

good character and did not seem to have regarded it as evidence at all". She also submitted that the learned trial judge failed to direct himself, and ultimately consider, the issue of the applicant's propensity to commit the offences having regard to his good character. She complained that the learned trial judge did not demonstrate an appreciation of the evidential significance of the evidence of the applicant's witness and ultimately stated that he placed little weight on this evidence. She referred to **R v Aziz** [1995] 3 WLR 53, **R v Vye** [1993] 1 WLR 471 and **R v Newton Clacher** SCCA No 50/2002 delivered 29 September 2003.

[103] In his response, Mr Taylor acknowledged that the applicant had indeed put his character in issue in this case, by alluding to his exemplary record of having never been brought up for disciplinary proceedings and not having any previous convictions. He also accepted that having given a statement in his defence, the applicant was entitled to a direction from the judge as to the relevance of his good character as to the likelihood of his having committed the offences for which he was charged. Mr Taylor also referred to **R V Aziz** along with decisions from this court **Michael Reid v R** SCCA No 113/2007 delivered on 3 April 2009; **Chris Brooks v R** [2012] JMCA Crim 5; and **Steven Grant v R** [2010] JMCA 77.

[104] Mr Taylor conceded that the direction given by the learned trial judge was sparse and "barebones". He submitted, however, that the resolution for this court is whether or not the consequences of the judge's failure to give a full and accurate good character direction in this case had the consequential impact of denying the applicant a fair trial.

He contended that there were certain factors which when considered cumulatively, this is a case in which, even if the learned trial judge had given the required good character direction, he would nevertheless inevitably still have convicted the applicant. He submitted that any assistance that such a direction might have provided was in this case wholly outweighed by the nature and cogency of the evidence.

The factors that Mr Taylor identified were:

> "[1] this was not a single witness case but it had more than one witnesses [sic] as to fact.
>
> [2] the evidence as to possession was so cogent and overwhelming that a good character direction would have made no difference to the result of the case, as any assistance that such a direction might have given was wholly outweighed by the "nature and coherence of the evidence" [**Balson v The State** 2005 UK PC 2 at paragraph (38)].
>
> [3] the tribunal as fact finder had every right to consider and reject the evidence of his clergyman who had not been in direct contact with him since 1998.
>
> [4] the court would also have considered and accepted the oral admissions made by the applicant to Corporal Darrel White and also his emotional breakdown.

Discussion and Disposal

[105] It is settled law that if an accused raises the issue of his good character in an unsworn statement only a trial judge would not be faulted for having given a propensity limb direction only (see **Golding and Lowe v R** SCCA Nos 4 and 7/2004 delivered 18 December 2009). If, however, he gives sworn evidence as to his good character, he is

entitled to a direction on the credibility limb as well. The applicable principles with respect to a good character direction have been clearly set out in several authorities form this court in recent years.

[106] In this case the learned trial judge quite properly recognised that the accused had indeed raised the issue and gave an indication of his awareness of its relevance. He said:

> "Now, the accused statement indicated he is a person of good character, he said that he had been a member of the Jamaica Constabulary Force for 16 years, have [sic] never faced a disciplinary hearing, not even an orderly room hearing, and that his performance in the Force had been without blemish, that he had no previous convictions. So that is a statement indicated with [sic] good character.
>
> Also called as a witness was Reverend Owen Gordon and Reverend Gordon indicated that up to July 1998, when he was in touch with the accused that he found the accused to be someone of good character. But he says that after July 1998, he couldn't speak to the character of the accused. Now, in deciding whether the prosecution has made me sure of the defendant's guilt I shall have regard to the fact that he is of good character. I have to remind myself that good character by itself cannot provide the defence of criminal character [sic] but I should take into consideration in this way.
>
> The defendant as I said, has made a statement and in considering that statement and what weight I should attach to it, I shall bear in mind that it was made by a person of good character that supports his credibility and relates to the confidence which may be added to the truthfulness and that is whether I believe it or not. It is for me to decide what weight I should give to this statement of good character."

[107] The learned trial judge, while appreciating the significance of the applicant raising the issue of his good character, fell into error when he considered it in the way he did. He failed to appreciate that the applicant was entitled to the benefit of a good character direction as it affects the issue of propensity.

[108] The learned trial judge further erred when he treated the evidence of the witness called as to the applicant's good character in the way he did. He stated:

> "Now, I reject the statement of the accused. I also put little weight on the evidence of his character witness. Because this is a witness who has indicated that his knowledge of the accused did not go beyond 1998."

[109] It is, however, well accepted that the failure to give the proper good character direction, when it is required, does not automatically mean that there is a miscarriage of justice. In the Privy Council decision of **Nigel Brown v The State** [2012] UKPC 2 the following was observed at paragraph 33:

> "33. It is well established that the omission of a good character direction is not necessarily fatal to the fairness of the trial or 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 an 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."

[110] In the instant case, there was what could be regarded as a "clash of credibility between the prosecution and the defendant" in that, the applicant's defence was in effect a denial of much of what the prosecution had said to implicate him. It was also his contention that he had been "set up". The learned trial judge expressly stated that he would bear the applicant's good character in mind as it related to his credibility. This being said in circumstances where the applicant had given an unsworn statement, must be viewed as having been to his benefit.

[111] The effect of the failure then to consider the issue of the applicant's propensity to have committed the crime must be resolved by considering whether the giving of the full good character direction would have made a difference to the conviction. The learned trial judge accepted and believed the applicant, who was then a serving member of the police force, not only pointed out the Hiace bus, but indicated what it contained. He believed that it was the applicant who passed the keys when asked to do so to Sergeant White. On this basis, the applicant was found to have had the necessary knowledge, possession and control to ground the conviction for illegal possession of the contents of that bus. The evidence was such that a good character

direction in terms of a propensity direction would not have made a difference to the verdict. This complaint must also fail.

Ground 4

The learned trial judge erred in ruling that the defence was not allowed to ask pertinent and relevant questions, in doing so he prejudiced the case for the defence and rendered the defendant an unfair trial.

[112] Mrs Neita-Robertson complained that the attempts made to cross-examine some of the witnesses for the prosecution in relation to certain issues proved futile on many occasions. She submitted that the learned trial judge, in exercising his inherent jurisdiction over the trial, unnecessarily and without legal and reasonable merit, prevented her on numerous occasions from adequately defending the applicant. She referred to six bits of evidence in support of her complaint. She contended that most of the issues on which she was seeking to cross-examine were relevant to testing their credibility and others were relevant in light of the defence that there was a conspiracy on the part of police officers to implicate the applicant.

[113] Mr Taylor in response to this ground submitted that this court has held that in the proper administration of justice, counsel must be allowed to perform their tasks fearlessly and must be allowed to raise such issues and advance such arguments that are relevant to the case being tried. He referred to the dictum of Patterson JA in **Gregory Johnson v R** (1996) 33 JLR 158 at page 165.

Discussion and disposal

[114] The first example of the learned trial judge preventing defence counsel from pursuing a particular issue concerned whether one could climb a "sweet sop tree". The learned trial judge prevented counsel from suggesting that such an action was not possible but subsequently allowed the witness to be asked specifically if he could climb a sweet sop tree that was seen on the compound of the armoury. In fact, counsel was permitted to ask the witness several questions in relation to whether he could have climbed the tree. In the circumstances, it cannot fairly be said that the learned trial judge prevented counsel from adequately exploring this issue and thereby testing the witness' credibility.

[115] Further, this same witness was tested as to whether he viewed failing to report the presence of persons in a high security area such as the armoury as a dereliction of the witness' duties. The learned trial judge formed the view that the witness' opinion was not important and prevented him from answering and how he could not be faulted for dealing with the issue in this way. In any event, it is not apparent how the witness' response to this question could have assisted the learned trial judge in determining whether he was to be otherwise believed.

[116] Significantly, counsel attempted to pursue this issue with another witness and once again, the learned trial judge ruled that the witness' opinion on the matter was unimportant and irrelevant to the issues in the case. It is noted that this witness, was in any event, subsequently permitted to answer questions relating to what would be the

steps he would take if he saw persons inside the armoury compound without authorization at night. It was when counsel sought to get the witness' opinion as to whether failure to do the things he outlined would amount to a dereliction of duties that the learned trial judge intervened. It is clear that the point counsel was seeking to make, in the circumstances, had in fact been made. Once again it cannot be discerned from this evidence that the defence suffered any prejudice from this attempt by the learned trial judge to control the trial by permitting questions in cross-examination only on matters that were relevant and admissible.

[117] The next example referred to by Mrs Neita-Robertson concerned the cross-examination of Superintendent Michael Bailey. The complaint regarding this example is best dealt with by repeating the section complained about:

"Mrs Neita-Robertson:	Thank you, M'Lord Prior to that call, you get no calls from him
A:	No
Q:	Did you direct that a warrant to search Munster Road should be obtained that night?
Mr. Harrison:	Still going along the same line
Mrs Neita-Robertson:	He is the man in charge of the operations, it is not hearsay, I am asking what he did
His Lordship:	I will not allow that question to be answered, but I will suggest that you do not go further down that road."

[118] It is however noted that immediately after that comment by the learned trial judge the witness asked for the question to be repeated and the following exchange took place

> "Mrs Neita-Robertson: Did you direct that a warrant to search 14 Munster Road be obtained.
>
> **A:** I gave no instructions to that thing
>
> **Q:** Immediately after you spoke to Corporal White you spoke with Inspector Forsyth?
>
> **A**: That is correct?"

[119] Clearly the witness eventually answered the question that earlier the learned trial judge seemed to try to prevent him from doing. Mrs Neita-Robertson in submitting that this was relevant to issues which would impact on the defence that the prosecution's whole case was an effort to hatch a conspiracy against the applicant is not borne out from this example.

[120] The other examples given were said to impact on the credit of the witness being challenged. The fact is that the transcript reveals that learned counsel was allowed to cross-examine witnesses extensively and piercingly. There was no ruling which impacted in a negative way, the ability of the defence to present his case. The fact that the thrust of the defence was that there was a conspiracy against the applicant was appreciated by the learned trial judge. He considered and ultimately rejected the defence. It cannot be said that any of these matters relied on, either cumulatively or

separately, resulted in the applicant being deprived of a fair trial. This ground must also fail.

Ground 5

The learned trial judge gave no directions at all on inferences. That his failure to direct his mind to inferences and how to deal with them indicates that the facts of the case did not raise issues in relation to the law of circumstantial evidence. That this non-direction amounted to the misdirection.

[121] Mrs Neita-Roberson submitted that the learned trial judge's failure to make reference to inferences in his summation was an indication that he did not recognise that the Crown was relying on circumstantial evidence in respect of "the Elleston case". Further, she submitted that some of the things allegedly said by the applicant could have been open to different interpretations and therefore it was vital, in the circumstances of this case, that the learned trial judge should have carefully examined the evidence and the possible inferences and rule out all inferences consistent with innocence before being satisfied beyond a reasonable doubt that the inference of guilt had been established.

[122] Learned counsel gave two examples of things the applicant did that could have been consistent with his innocence and supported the defence that he was being set up. Firstly, she said the statement made by him that the police were to kill him was capable of such an interpretation. Secondly, she urged that his demeanour in his crying on seeing the multitude of weapons in the bus could also be open to an interpretation

that he was distressed by the quantity of guns and ammunition that they were using to set him up.

Discussion and disposal

[123] The learned trial judge did not make reference to inferences during his summation and the question must therefore be whether this failure is fatal. The particular matters of which Mrs Neita-Robertson complains need be considered in the context of the entire evidence. The statements made and actions of the applicant were done in the circumstances of his having alerted Sergeant White as to the fact that arms and ammunition were inside the bus after having accused the Sergeant of "mashing up di ting". Further the applicant is the one who gave the Sergeant the keys to gain access to the bus. In those circumstances, it is difficult to imagine how the things said and done could be other than supportive of the guilt of the applicant. These things could not in the circumstances stand on their own, thus requiring the learned trial judge to determine whether they could infer that they were mere reactions to being set up.

[124] The Crown was trying to link the applicant being at the armoury with the firearms and ammunition being found thereafter which were said to have come from the armoury. It is noted however that while the learned trial judge accepted the evidence as to the system that avails at the armoury as well as the evidence that the applicant could well have been given the combination to the vault that housed firearms and ammunition, he was careful to remind himself that this was a case of illegal possession of firearm and illegal possession of ammunition. He even went on to

conclude that on the evidence he could not make a finding that the same bus that was at Elleston Road was the bus seen at Munster Road. Ultimately the learned trial judge did not make any findings adverse to the applicant from what had taken place at Elleston Road.

[125] The complaint that the failure to direct his mind to inferences and how to deal with them was a non-direction which amounted to a misdirection is therefore without merit.

Conclusion

[126] Although there was a misdirection on good character, there was no miscarriage of justice occasioned thereby. The learned trial judge properly assessed the evidence before him and made findings of fact which cannot be shown to be plainly unsound. This court remains guided by the established principle that an appellate court ought not to lightly overturn a trial judge's findings of fact - see **Industrial Chemical Jamaica Limited v Owen Ellis** (1986) 23 JLR 35.

[127] In the circumstances, the application for leave to appeal is refused and the sentences are to run from 7 September 2011.