JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP P
THE HON MR JUSTICE D FRASER JA
THE HON MR JUSTICE LAING JA (AG)

SUPREME COURT CRIMINAL APPEAL NOS COA2021CR00016 & 00019

DANTAY BROOKS v R
ANDRE HINDS

Hugh Wildman for Dantay Brooks

Oswest Senior-Smith and Kemar Robinson for Andre Hinds

Ms Kathy Ann Pyke and Ms Andrene Hutchinson for the Crown

10, 11 December 2024 and 7 March 2025

Criminal Law - Appeal against conviction and sentence - Identification evidence - Turnbull guidelines - Applicability of Turnbull guidelines in bench trials - Duty of judge to demonstrate the application of the relevant principles in bench trials - Applicability of principles regarding the treatment of evidence in bench trials

LAING JA (AG)

[1] Messrs Dantay Brooks ('Brooks') and Andre Hinds ('Hinds') (together referred to as 'the applicants'), were tried in the Home Circuit Court by a judge sitting alone, by mutual agreement between the applicants and the Crown. They were tried for the offences of murder (count one), illegal possession of firearm (count two), shooting with intent (count three), and arson (count four). On 27 January 2021, they were convicted on three counts, namely counts one, two and four. On 19 March 2021, they were sentenced. Brooks received a sentence for murder of life imprisonment with the stipulation that he serve 22 years before becoming eligible for parole. For illegal possession of firearm, he received a sentence of 20 years imprisonment and a sentence of 15 years imprisonment for arson. Hinds was sentenced to life imprisonment for murder,

with a stipulation that he serve 17 years before becoming eligible for parole. He was sentenced to 15 years' imprisonment at hard labour for illegal possession of a firearm and received the same sentence for arson. The sentences were not expressly ordered to run concurrently.

[2] A single judge of this court refused their applications for leave to appeal their convictions and sentences, but the applicants now renew their applications before this court, as they are entitled to do.

The prosecution's case

[3] The evidence against the applicants primarily came from a single eyewitness, Lancelot Thomas ('Mr Thomas'). He testified that on the evening of 4 June 2018, around 6:00 or 7:00 pm, he was walking home from the local corner shop while talking to his son, Lorenzo Thomas (the deceased), on the phone. During this time, Brooks approached him and attempted to take the phone. Mr Thomas pushed Brooks away, and after a brief verbal exchange, Brooks left. Mr Thomas went to see his employer, then continued home.

[4] Later that evening, at about 9:00 pm, Mr Thomas went out to meet the deceased. On his way home, he saw Brooks again, this time with friends near his gate. About two hours after Mr Thomas returned home, the deceased came to the house. They spoke outside for a few minutes before going inside, where their conversation continued. Afterwards, they both went into the yard, and Mr Thomas began pointing out certain people to the deceased through a "crease" in the zinc fence that enclosed his yard. The individuals he pointed out included the applicants, a girl named "Zee Zee", and another person with the aliases "Knacka Knacka" and "Knock and Get It".

[5] At approximately 3:00 am on 5 June 2018, Mr Thomas and the deceased were inside his house when he heard the front door of the deceased's room being kicked in, followed by a loud explosion. He got out of bed and went to the doorway of the deceased's room, where he saw the deceased clutching his chest as he fell to the ground.

[6] Mr Thomas then turned around and noticed several individuals standing inside his house. One of them had a handkerchief covering his face, positioned below his nose. Mr Thomas was pushed to a spot in his room, where a towel was placed over his head, and he was instructed to stay there.

[7] Mr Thomas removed the towel, stood up, and attempted to go to his son's room, but he was prevented from doing so by the same individual wearing the handkerchief, who pushed him back into his room. At that moment, he also heard a voice he recognised as Hinds, saying, "yuh nah kill him", and another voice he recognised as belonging to Brooks, saying, "Lance nuh fi dead".

[8] After recognising the voices, Mr Thomas stepped out of the room again. The person who had been wearing the handkerchief had now pulled it down, and Thomas recognised him as Knacka Knacka. He said he also recognised Brooks and Hinds, whose faces he could see.

[9] Knacka Knacka pushed Thomas back into his room, and the deceased crawled to Mr Thomas' room, but Knacka Knacka pulled him away. Thomas said he heard explosions and then went to the doorway of his room where he stood over the deceased's head. Knacka Knacka then asked for a cutlass which was handed to him by Brooks. Thomas stepped back, and Knacka Knacka then repeatedly chopped the deceased, who was now dead. Brooks told Knacka Knacka that someone needed the head, but Knacka Knacka said "you cant chop it off you know".

[10] Knacka Knacka, thereafter, took a gun, pointed it at the head of the deceased and fired several bullets. He then asked for "gas" and Hinds took a bottle from a knapsack that Zee Zee carried and handed it to Knacka Knacka, who sprinkled its contents all around, some of which caught Mr Thomas. Brooks, Hinds, and Zee Zee then left the room, and Knacka Knacka took out a lighter, lit it, and the place became engulfed in flames. Mr Thomas then ran into his room, headed outside to the neighbour's house next door, where he hid. He remained there until morning when he was ordered from his

hiding place by a police officer. He was taken to the Constant Spring Police Station where he gave a statement.

The defence's case

[11] A no-case submission was made on behalf of both applicants. The learned trial judge ruled that there was a case to answer on all counts except for count three, shooting with intent, in respect of which the Crown conceded that there was no evidence in support thereof.

[12] Each applicant gave an unsworn statement at the trial. Brooks, in his unsworn statement, raised an alibi as his defence. He denied being at the scene of the deceased's murder and claimed that, on the night in question, he was at home with his grandmother, stepfather, and brother. His stepfather testified in support of his alibi and stated that he returned home sometime after 1:00 am on the morning of 5 June 2018, and he saw Brooks at their home before going to sleep.

[13] Hinds also raised the defence of alibi. He insisted on his innocence of all the charges against him and asserted that on the night of the incident, he was sleeping with his girlfriend and not at the deceased's house. His girlfriend testified on his behalf, stating that she arrived at Hinds' house at 2 - 4 Cassava Piece at around 8:00 pm on 4 June 2024, and went to bed between 8:30 and 9:00 pm. She mentioned that at approximately 3:00 to 3:30 am on 5 June 2018, she was awakened by what sounded like gunshots coming from outside. After hearing the noises, she spoke with Hinds, and then his aunt, who was in the passageway, called out to him.

The appeal – Brooks

[14] The original grounds of appeal filed by Brooks were:

> "(a) **Misidentity by the witness**: That the prosecution witness wrongfully identified me as the person or amoung [sic] any persons who committed the alleged crime.

(2) **Lack of Evidence**: That the prosecution failed to present to the court any 'concrete' piece of evidence (material, forensic, scientific or otherwise) to justified [sic] and substantiate the alleged charges perferred [sic] against me by the police which subsequently led to my conviction.

(3) **Conflicting Testimonies:** That the prosecution witness presented to the court conflicting testimonies which amount to purjury [sic] thus call into question the soundness of the verdict.

(4) **Unfair Trial:** That the evidence and testimonies upon which the learned trial judge relied on for the purpose to convict me, lack facts and credibility thus rendering the verdict unsafe in the circumstances.

B. That the verdict is unreasonable having reguards [sic] to the evidence.

(5) **Miscarriage of Justice:** That I was wrongfully convicted for a crime I knew nothing about and could not have committed.

Note: Other grounds will be filed by my Attorney at law if needed."

[15] Brooks was granted permission by the court to argue the following additional grounds, namely:

"i. The learned trial judge erred in law when, at page 10 of the transcript, he allowed the Prosecution to elicit inadmissible hearsay evidence that the witness Thomas said that he was told by a lady, 'Yuh nuh hear seh dem a guy kill you, son?' This prejudiced the Applicant from having a fair trial.

ii. The learned trial judge erred in law when he allowed the Prosecution to elicit further inadmissible hearsay evidence when, at page 10 of the transcript, he allowed the witness, Thomas, to repeat that the person told him the same thing about killing his son. This deprived the Applicant of a fair trial.

iii. The learned trial judge erred in law when, at pages 16 and 17 of the transcript, the witness, Thomas, gave

inadmissible hearsay evidence about what he told Mr. Edwards. This deprived the Applicant of a fair trial.

iv. The learned trial judge erred in law at page 549 of the transcript when he allowed the Prosecution to elicit inadmissible hearsay evidence from Sergeant Love when he stated that immediately after he reviewed the police statements, he went to the Metcalfe Street Remand Centre in search of the Applicant Brooks, who was held at the remand centre as a Juvenile. This deprived the Applicant of a fair trial.

v. The learned trial judge erred in law when, at page 826, he allowed the Prosecution to cross-examine the defence witness on what was said by the accused man in Court.

vi. The learned trial judge erred in law by failing to direct himself on the question of the Applicant's alibi, which deprived the Applicant of a fair trial.

vii. The learned trial judge did not properly direct himself on the question of voice identification.

viii. The learned trial judge erred in law, in failing to warn himself adequately of the dangers of mistaken identification/recognition and placed considerable reliance solely on the truthfulness of the witness, Thomas, as opposed to the accuracy of the identification. See page 919 of the summation. This deprived the [Applicant] of a fair trial.

ix. The learned trial judge erred in law by failing to identify the weaknesses in Mr. Thomas' recognition of the Applicant, as exemplified in his failure to identify the Applicant as one of the assailants in his initial statement. This deprived the Applicant of a fair trial.

x. The learned trial judge erred in law in failing to consider the issue of the handkerchief over the face of the assailants who entered Mr. Thomas' house as a possible weakness in the identification /recognition of the Applicant as one of the persons in Mr. Thomas' house that night. This deprived the Applicant of a fair trial.

xi. The learned trial judge failed to warn himself that people have been wrongly convicted on identification/recognition evidence. This deprived the Applicant of a fair trial.

xii. The learned trial judge failed to consider that a convincing witness may still be mistaken, and he ought to have warned himself of this. This deprived the Applicant of a fair trial."

The submissions on behalf of Brooks

[16] Mr Wildman, counsel for Brooks, made submissions supporting all the grounds as filed, but for purposes of this judgment, the court will concentrate on his submissions in respect of grounds vii to xii, which, for convenience, may be encapsulated in the composite issue of whether the learned trial judge adequately addressed the issue of identification, which includes visual and voice identification.

[17] Counsel argued that this is a case that turns primarily on the correctness of the visual identification by Mr Thomas, the main witness for the prosecution, and it was incumbent upon the learned trial judge to properly warn himself on the correctness of the visual identification by Mr Thomas, as opposed to the truthfulness of it and the learned trial judge failed in this regard. He argued that it was not sufficient for the learned trial judge to resolve the issue of identification by considering whether, in his opinion, Mr Thomas was a witness of truth, but he had to go the added step of considering whether the identification by Mr Thomas of Brooks was accurate.

[18] Mr Wildman advanced the position that the learned trial judge, in his analysis of the accuracy of the purported identification of Brooks by Mr Thomas, failed to examine the possible weaknesses in the evidence of Mr Thomas that could detract from the accuracy of his purported recognition of Brooks. Counsel argued that this was a fatal error.

[19] Mr Wildman further argued that the learned trial judge's warning of the dangers of mistaken identification was not in accordance with the warning as recommended by

the seminal case of **R v Turnbull** [1977] QB 224 ('**Turnbull**') and, accordingly, was woefully inadequate.

[20] He commended the case of **Dwayne Knight v R** [2017] JMCA Crim 3 to this court, which, he submitted, identifies the guiding principles for a trial judge sitting alone when considering issues of identification and recognition when these are raised in a criminal trial.

[21] In relation to the purported voice identification of Brooks by Mr Thomas, Mr Wildman asserted that the learned trial judge did not give a specific indication of how the question of voice identification should be dealt with and did not demonstrate that he applied these principles. Counsel referred to the case of **Donald Phipps v The Director of Public Prosecutions and Attorney General of Jamaica** [2012] UKPC 24 ('**Donald Phipps**'), a Privy Council case from this jurisdiction, in which the Board proposed the appropriate warning that should be applied when the issue of voice identification arises for determination in a criminal trial.

The appeal – Hinds

[22] Counsel for Hinds applied for and was granted leave to abandon the original grounds of appeal that were filed and was permitted to argue the following grounds.

> "**Ground One (1)** - The subission of No Case To Answer ought properly to have been upheld by the Learned Trial Judge.
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> **Ground Two (2)** - The Applicant/Appellant lost the protection of the law concerning identification evidence and thereby was inevitably exposed to convictions.
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> **Ground Three (3)** - No judicial safeguards were applied by the Learned Trial Judge in relation to the evidence of voice identification he relied upon to ground his findings of guilt and the eventual convictions of the Applicant/Appellant.
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> **Ground Four (4)** - The defence of the Applicant/Appellant was not discretely considered and adjudicated upon by the learned

trial judge, resulting in irretrievable prejudice to the Applicant/Appellant, where, as a result, he lost his chances of acquittal.

Ground Five (5) - The Applicant/Appellant's defence did not receive sufficient consideration by the Learned Trial Judge.

Ground Six (6) - The Learned Trial Judge's dismissal of the Applicant/Appellant's character witness was, respectfully, unreasonable, and negatively affected the chances of acquittal.

Ground Seven (7) - Credibility, as among the foremost issues in the trial, was not appropriately analyzed by the Court, thereby causing insuperable prejudice to the Applicant/Appellant."

The submissions on behalf of Hinds

[23] Messrs Senior-Smith and Robinson presented arguments in respect of each of these grounds. However, as in the case of Brooks, we will concentrate on the submissions related to grounds one, two, three and seven which impact the learned trial judge's treatment of the issue of identification.

Ground one (1) - The submission of no case to answer ought properly to have been upheld by the learned trial judge.

[24] We have found it necessary to address ground one, although it concentrates on the no-case stage, because the arguments raised in support of it encompass the complaints against the learned trial judge's treatment of the evidence of identification having regard to what was characterised as the unreliability of the evidence of Mr Thomas. Mr Senior-Smith highlighted what was described as "a plethora of inherent inconsistencies, contradictions and overall variances in the evidence from the main witness for the Prosecution". These inconsistencies were meticulously identified and highlighted to the court in written submissions. He argued that it was incumbent on the learned trial judge to consider the quality and reliability of the evidence, which necessarily involved the court carrying out the assessment of the witness(es) and the evidence. Counsel posited that Mr Thomas undermined his own testimony, especially when the

differences within and across his narrative are viewed cumulatively and, in the absence of any other material to prove the prosecution's case, no jury properly directed could rely on the main witness' evidence and the no-case submission ought to have been upheld.

Ground seven (7) - Credibility, as among the foremost issues in the trial, was not appropriately analyzed by the Court, thereby causing insuperable prejudice to the Applicant/Appellant.

[25] Ground seven is closely connected to ground one, and, for that reason, it is being addressed outside the numerical sequence. Mr Senior-Smith argued that the inconsistencies, contradictions and variances in the evidence on the prosecution's case (which were addressed as supportive of a finding that there was no case to answer) were not fully addressed by the by the learned trial judge. Counsel highlighted the evidence of the attempt to behead the deceased, which he contended was not supported by the post-mortem report and this apparent discrepancy was not adequately resolved by the learned trial judge.

[26] It was advanced that Mr Thomas' failure to identify the appellants when he had the first opportunity to do so was not effectively resolved by the learned trial judge, and this was a matter that affected the reliability of his evidence of visual identification. The argument was advanced that the explanation that the learned trial judge accepted as being reasonable, which was that Mr Thomas told untruths because he did not trust the police officers, was not reasonable on an objective assessment. Furthermore, it was also submitted that the learned trial judge wrongly utilised the evidence of police witnesses, who spoke of the reluctance of persons to give evidence in some of these matters in support for Mr Thomas' explanation for his conflicting evidence, since none of these witnesses gave evidence that the reluctance of these witnesses was because they thought the police officers at Constant Spring Police Station are corrupt. Counsel maintained that Mr Thomas' evidence that he was pressured to attend and give a statement at the Constant Spring Police Station, viewed objectively was not credible, because he was told to give a statement could not reasonably be considered to be pressure being brought to bear on him.

Ground two (2) - The Applicant/Appellant lost the protection of the law concerning identification evidence and thereby was inevitably exposed to convictions.

[27] Mr Senior-Smith asserted that the purported identification of Hinds was in "terrifyingly" difficult circumstances. These included poor lighting in the early morning hours, and the distance of the veranda light to the face of the person identified as the Hinds was not ascertained. Counsel argued that these and other difficult circumstances, including the fact that Mr Thomas had seen his son mortally wounded, were not adequately addressed by the learned trial judge.

[28] Counsel argued that although the learned trial judge made a reference to the authority of **Turnbull** during the summation, he did not apply, or apply in any sufficient measure, the guidelines distilled from **Turnbull**. This non-direction, he argued, amounted to a misdirection. In this regard, there was a convergence between the submissions of Mr Wildman and Mr Senior-Smith, and counsel adopted the submissions of Mr Wildman in relation to the issue of the learned trial judge's failure to properly treat with the issue of visual identification. In support of his submission, counsel also relied on the authorities of **Kemoy Kesto v R** [2024] JMCA Crim 15, **Jermaine Plunkett v R** [2021] JMCA Crim 43, and **Dwayne Knight v R** [2017] JMCA Crim 3.

Ground three (3) - No judicial safeguards were applied by the Learned Trial Judge in relation to the evidence of voice identification he relied upon to ground his findings of guilt and the eventual convictions of the Applicant/Appellant.

[29] It was advanced that the learned trial judge's summation did not embody the accepted principles regarding the need for caution before founding convictions on the basis of voice identification as outlined in the case of **Donald Phipps**. Counsel also relied on the case of **Karl Shand v The Queen** [1996] 1 WLR 67 for support.

The submissions of the Crown

[30] The Crown made separate submissions with respect to Brooks and Hinds, respectively. However, for purposes of the issue of identification, on which the court has focused, there is a considerable degree of overlap in the submissions, and we have

consolidated them for convenience. In relation to the issue of voice identification, the Crown admitted that the prosecution did not elicit the necessary evidence of Mr Thomas' knowledge of and familiarity with the voice of Brooks, which the authorities dictate must be present before voice identification can be utilised. Consequently, the Crown, quite properly, conceded that the learned trial judge erred in relying on the evidence of voice identification.

[31] The Crown addressed grounds eight, 11 and 12 together. The position initially advanced by the Crown was that the learned trial judge adequately warned himself of the need to assess evidence of visual identification with caution and of the necessity to bear in mind the **Turnbull** guidelines where the prosecution relies on the correctness of visual identification.

[32] It was acknowledged that there was no explicit statement by the learned trial judge regarding honest witnesses being mistaken or the fact that miscarriages of justice have occurred due to mistaken identification. However, it was contended in the Crown's written submission that despite this omission "the statement of the [learned trial judge] of the consideration of the **Turnbull** guidelines can reasonably be taken to include the full gamut and range of the **Turnbull** guidelines, which is inclusive of all the warnings and factors". On the foundation of this premise, it was posited that the statement of the learned trial judge referencing the **Turnbull** guidelines was sufficient to satisfy the duty of the learned trial judge to "give sufficient expression of the legal and factual considerations which underpinned the verdict". Conversely, in Ms Pyke's oral presentation, it was conceded that the learned trial judge did not demonstrate that he applied the **Turnbull** factors when he examined elements of Thomas' evidence such as his prior knowledge of Brooks and the opportunities he had to observe his assailants. The Crown highlighted particular portions of the judgment of the learned trial judge at pages 915 to 916 and 919 and acknowledged that there was only one limited reference to **Turnbull**.

[33] The Crown also argued that the learned trial judge appropriately acknowledged the inconsistencies in the evidence of Mr Thomas, including his failure to identify his assailants in his first statement to the police, and the learned trial judge accepted Mr Thomas' explanation for his earlier omission.

Analysis and disposition

[34] The common complaint of both applicants is that the learned trial judge did not give himself the appropriate **Turnbull** warning and did not adequately apply the process for the assessment of evidence that was suggested in that case, and which has been followed in these courts thereafter.

[35] In **R v Locksley Carrol** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 39/1989, judgment delivered 25 June 1990, this court provided guidance regarding the duty of a trial judge when sitting alone in the High Court Division of the Gun Court and addressing the issue of visual identification. At page 13, Rowe P stated:

> "…the Privy Council in two cases, Scott and Others v. The Queen [1989] 2 W.L.R. 924 and Junior Reid and Others v. The Queen [1989] 3 W.L.R. 771 have laid it down that visual identification evidence does fall within a special class of evidence and is to be given special and specific treatment by the trial judge in a trial before a jury. The trial judge is required to give a clear warning of the danger of a mistaken identification, explain the reasons for such a warning and advise the jury to heed the warning when considering their verdict. Scott's case (supra) and Junior Reid's case (supra) are binding upon this Court. This Court considered these Privy Council decisions in R. v. George Cameron [1989] S.C.C.A. 77/88 (unreported) a case of a judge sitting alone in the Gun Court and we said concerning a judge's summation:
>
> > 'What is impermissible is inscrutable silence. What is of critical importance here is not so much the judge's knowledge of the law but his application. Even if there is a presumption in his

> favour regarding the former there is none as to the latter.'
>
> We do not read this passage as meaning that this Court will be prepared to infer that the trial judge had in his mind the applicable principles of law relating to visual identification evidence in any given case….
>
> We hold, that given the development of the law on visual identification evidence since the decision in R. v. Dacres (supra) in 1980, judges sitting alone in the High Court Division of the Gun Court, when faced with an issue of visual identification must expressly warn themselves in the fullest form of the dangers of acting upon uncorroborated evidence of visual identification. In this respect we hold, that there should be no difference in trial by judge and jury and trial by judge alone." (Underlining as in the original)

[36] In the recent decision of this court in **Fabian Manderson v R** [2024] JMCA Crim 2 ('**Fabian Manderson**'), Brown JA performed a detailed analysis of the applicable law governing the duty of the judge sitting alone to adequately warn himself. After reviewing numerous cases, he concluded that to the extent that **R v Locksley Carroll** suggests that the judge sitting in the High Court Division of the Gun Court should direct himself in the same exhaustive manner as he would when warning a jury, that case is an outlier. However, such a course may be prudent and safer. As Downer JA while commenting on **Loxley Carroll** stated in **Regina v Alex Simpson and McKenzie Powell** (unreported) Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 151/1988 and 71/1989, judgment delivered 5 February 1992 ('**Simpson and Powell**'):

> "Rowe, P., also "made some general remarks on the law, which, if followed by Supreme Court judges, will result in clearer reasons for decisions and fewer successful appeals. The essence of those remarks is that the safest course for a judge when giving reasons for his judgment in the High Court Division of the Gun Court, is to warn himself expressly of the potential unreliability of identification evidence and to heed his warning when he comes to analyse the evidence."

[37] A modern approach to the single judge warning himself is suggested in the Caribbean Court of Justice case of **Dioncicio Salazar v The Queen** [2019] CCJ 15 (AJ) ('**Salazar**'). The observations of the court are helpful in highlighting the distinction between a bench trial and a trial with a jury and, at paras. [28] and [29], the court stated as follows:

> "[28] The Court of Appeal in Northern Ireland stated in *R v Thompson* [[1977] NI 74] with respect to the duty of the judge giving judgment in a bench trial:
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> > He has no jury to charge and therefore will not err if he does not state every relevant legal proposition and review every fact and argument on either side. His duty is not as in a jury trial to instruct laymen as to every relevant legal aspect of the law or to give (perhaps at the end of a long trial) a full and balanced picture of the facts for decision by others. His task is to reach conclusions and give reasons to support his view and, preferably, to notice any difficult or unusual points of law in order that if there is an appeal it can be seen how his view of the law informs his approach to the law.
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> [29] Equally, a judge sitting alone and without a jury is under no duty to 'instruct', 'direct' or 'remind' him or herself concerning every legal principle or the handling of evidence. This is in fact language that belongs to a jury trial (with lay jurors) and not to a bench trial before a professional judge where the procedural dynamics are quite different (although certainly not similar to those of an inquisitorial or continental bench trial). As long as it is clear that in such a trial the essential issues of the case have been correctly addressed in a guilty verdict, leaving no room for serious doubts to emerge, the judgment will stand."

[38] We agree with Brown JA's conclusion in **Fabian Manderson v R**, at para. [71], that in relation to the current state of the law, as gleaned from the cases, a judge sitting

in the High Court Division of the Gun Court, or conducting other bench trials, is required to give a reasoned judgment. Among the requirements of a reasoned judgment is an explanation of the methodology employed to resolve conflicts in the evidence and:

> "…
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> VI. Where the evidence against the defendant depends solely or substantially on the correctness of visual identification evidence, a statement in clear language by the judge that he had the **R v Turnbull** warning in mind (see **R v Cameron** [(1989) 26 JLR 453]).
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> VII. In cases of visual identification, a sufficient demonstration on the record that the trial judge appreciated all the issues and how they were resolved. So that, failure to explicitly warn himself that an honest witness could be mistaken, may not be fatal to the conviction (see **Downer and v R** [[2018] JMCA Crim 28]).
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> VIII. The judge is unfettered in the language he uses to demonstrate that he had the requisite warning in mind (see **R v Cameron** [(1989) 26 JLR 453])."

[39] The issues raised in this case concern a bench trial to which the applicants consented, and the question is raised as to whether, in analysing the reasoning of the learned trial judge, accommodation should be made by this court of what might be reasonably presumed to be his unexpressed understanding of the law, and, if so, the extent to which this is permissible. The court must also consider the sufficiency of the learned trial judge's warning to himself, specifically regarding the identification evidence, and, in doing so, determine whether his analysis of the evidence demonstrated that he fully appreciated the dangers inherent in this category of evidence.

[40] The main portion of the judgment at which the learned trial judge refers to the **Turnbull** caution, and on which the Crown initially relied, until it conceded, is located at pages 915, line 19 to 917, line 9 of the transcript, and it is helpful to reproduce it as follows:

> "I go back to the evidence of Mr. Lancelot Thomas. This is a case then which if I accept-- if I have accepted that Mr. Thomas was there, the question then comes to the issue of

> identification through recognition. I consider the fact that I give myself the necessary Turnbull caution, namely: The fact that I needed to consider his opportunity to see; the knowledge he had of these persons; how recently he saw them; the questions of how the circumstances were.
>
> In these-- this particular matter, the evidence is that he knew both of these gentlemen very well in the community. He indicates, and I accept that he saw them shortly before the incident, looking through the fence. I accept there is a light there and he could see them at that particular time, and that he had seen them earlier in the night. I accept that the circumstances in which he saw them inside the house were not difficult circumstances. I accept that, as Mr. Thomas says, there was a light from the veranda and he was able to see them. I accept his indication of seeing them for what he called two minutes. I note that there were some discussions in relation to two minutes or seven seconds or seven minutes. I note that the estimation of time is always difficult for witnesses, as it is for all of us who try to do that without a clock. Mr. Thomas was very clear that he saw these particular persons and although at least one of them was trying to daunt him or avoid him, he was able to see them.
>
> He indicates that there was also voice recognition, that he recognized the voice of both of them and these were persons that he knew, in fact, one of them is his near neighbour and the other person was somebody that he had seen and spoken to the evening before."

[41] Despite the observations in **Salazar**, we are of the opinion that the learned trial judge's reference to the **Turnbull** caution and what it should entail did not adequately convey the importance and full tenets of the warning, the necessity of which arises from the inherent and serious risks associated with visual identification evidence. We emphasise that the learned trial judge's caution and the specific reference to **Turnbull** was in the following terms (see pages 915, line 23 to 916, line 4 of the transcript):

> "I consider the fact that I give myself the necessary Turnbull caution, namely: The fact that I needed to consider his opportunity to see; the knowledge he had of these persons; how recently he saw them; the questions of how the circumstances were."

[42] In **Simpson and Powell**, Downer JA, in analysing the essential elements of the identification warning, made the following observation at page 3 of the judgment:

> "It must be noted that these important passages appear in the context of jury trials and it was essential to stress three aspects of these directions in law namely, the "warning" the "directions" or "the explanation of the special caution required" when considering the categories of evidence which are potentially unreliable. These aspects of the warning and the reasons for the warning were recognised from the outset in **R. v Turnbull & Ors.**"

It is against the background of what would be an appropriate warning to a jury that this court must assess the learned trial judge's judgment. If the learned trial judge were directing a jury, he would have had to express other crucial aspects of the warning, the reasons for the warning and the nature of the analysis that is required in much greater detail. We accept as settled that no precise form of words is necessary, however, the learned trial judge was not excused from demonstrating his appreciation of the warning in similar terms, with appropriate modification.

[43] The learned trial judge is very experienced; however, this court is unable to presume that his reference to the **Turnbull** caution was a sufficient demonstration of his appreciation of the approach as suggested in that case, especially the particular warning in respect of recognition cases since the learned trial judge accepted the evidence of Mr Thomas that "he knew both of these gentlemen very well in the community". In the circumstances of this case, we do not accept the submission of the Crown that the statement of the learned trial judge referencing the **Turnbull** guidelines was sufficient to satisfy the duty imposed on him by law to "give sufficient expression of the legal and factual considerations which underpinned the verdict".

[44] It is important to bear in mind that Mr Thomas was the only eyewitness. He gave a narrative of the events leading up to the killing of the deceased, but in relation to the identification of the applicants at the time of the incident, it is important to highlight some key elements of his testimony. He stated that when he was at the door to his son's room, he saw Brooks, Hinds and "Zee Zee". At that point, Hinds was about 6 feet from him as

estimated by the court and counsel (based on Mr Thomas' demonstration). In relation to the length of time during which he observed the faces of the applicants, Mr Thomas said he saw Brooks standing behind "Knacka Knacka". "Knacka Knacka" was then within Thomas' reach (as he demonstrated), and he looked at the face of Brooks and realised it was him. He said he stared at both of them and "tek one stone and kill two birds" (as he characterised it) at which time he saw Brooks' face for two or three minutes. He said he did not see "Zee Zee" at that point because she had not come into the room as yet. In cross examination, Mr Thomas was challenged with his statement made on 7 June 2018, which recorded him as saying "[a]t the time I looked around and recognised [Brooks], was about seven seconds". He suggested in his response to counsel that he said seven minutes, but the police wrote seven seconds. He confirmed to counsel that he "would not have said seven seconds, [since] it was more like seven minutes".

[45] We acknowledge that the learned trial judge did analyse some of the essential matters in his attempt to determine whether the evidence of Mr Thomas concerning his ability to identify the applicants was reliable. This is demonstrated at pages 915 to 916 of the transcript, to which we have previously referred. However, we agree with the submission of Mr Senior-Smith that the learned trial judge did not give sufficient weight to the possible weakness in the identification evidence, caused by the poor lighting in the early hours of the morning. Having regard to this issue and the reliance on lighting from the veranda, the distance of the light source on the veranda from the faces of the applicants, at any point, was not ascertained. Mr Thomas said he had electric light on the veranda and could see Hinds' face from the reflection of the veranda light because the door was wide open, but the relative position of the door in relation to Hinds was not ascertained. The learned trial judge stated that "I accept that, as Mr Thomas says, there was a light from the veranda and he was able to see them" (page 916, line 15), but there was no objective analysis of the adequacy of the lighting which provided a reasonable basis for accepting Mr Thomas' assertion in that regard. The learned trial judge also did not sufficiently address the terrifyingly stressful circumstances under which Mr Thomas purported to identify the applicants, with his son being killed before his eyes.

[46] In the case of **Fabian Manderson**, it was not disputed that the learned judge did not specifically warn himself of the dangers of convicting on uncorroborated identification evidence. He also did not remind himself of the reason for the warning. Nevertheless, this court found that, consistent with the authorities, he demonstrated that he had the warning in mind when he considered the identification evidence.

[47] However, the instant case is unlike **Fabian Manderson** and has commonalities with **Dwayne Knight v R** [2017] JMCA Crim 3, on which counsel for the applicants relied. In that case, McDonald-Bishop JA (Ag) (as she then was), at para. [53], noted the observations of Downer JA **Simpson and Powell** that:

> "Merely to utter the warning and yet fail to show that the caution has been applied to the analysis of the evidence, will result in a judgment of guilty being set aside. The best course in delivering the reasons is to state the warning expressly and apply the caution in assessing the evidence."

[48] McDonald-Bishop JA performed an analysis of the trial judge's approach in that case and identified deficiencies in the treatment of the weaknesses in the identification evidence, which is a complaint in the case at bar, and, at paras. [54] and [55], the following was stated:

> "[54] In this case, the learned trial judge did utter, to an appreciable extent, the requisite warnings at the commencement of the summation and, particularly, within the context of a recognition case. He expressly stated that he had borne in mind 'that even in recognition cases where persons have known each other for a long time and are sometimes friends and family members, mistakes could still be made'. Against that background, he recognised that he had to look at the circumstances under which the identification was made. In that regard, he made reference to the need to examine the distance; the time the witness was able to view or observe his assailant; whether there was anything obstructing his view; what was the lighting condition at that time; how long the witness had known the assailant before; when was the last time he saw the assailant; how often the witness would see

> him, whether night or day; and if the witness knew any family members.
>
> [55] He failed, however, to demonstrate that he was mindful of his duty to highlight and explicitly consider the specific weakness in the evidence that would touch on the quality and accuracy of the identification, for example, the respective positioning of the witnesses in the car; the fact that the car was in motion reversing; the preoccupation of the driver to get way from the scene as fast as he could; the concern of Miss Brown for her crying child; the distance from the assailant; the lighting and the obviously terrifying circumstances."

[49] An equally important issue that impacted the learned trial judge's acceptance of the identification evidence was his treatment of the credibility of Mr Thomas, having regard to the inconsistencies in his evidence. Both counsel for the appellants, and Mr Senior-Smith in particular, meticulously identified and highlighted numerous inconsistencies in Thomas' evidence. Chief among these were his evidence relating to the identity of his attackers and what was advanced by counsel to be a discrepancy between Mr Thomas' evidence of the attempt to sever the deceased's head from his body and the scientific evidence stemming from the post-mortem report.

[50] Mr Thomas admitted in his evidence in chief that in his first statement, which was made at the Constant Spring Police Station on 5 June 2018, he said the men had on masks, but that was not true because they did not have on any, although he testified in examination-in-chief that "Knacka Knacka" initially had a handkerchief covering his nose that he pulled off his face and placed under his chin. He also admitted that he lied when he said it was four men and not three men and a woman who entered his house. He explained that he did not speak the truth in this first statement because he was afraid due to the Constant Spring Police Station being a "corrupt station", and he knew of incidents happening there as a result of having done construction work there.

[51] Mr Thomas gave a second statement on 27 June 2028 at the Spanish Town Road Police Station and admitted during cross-examination that in that second statement, he

said in relation to the 5 June 2018 statement that he was "pressured to say certain things" and "I was then pressured to sign it".

[52] One major point taken by counsel for the applicants at trial was that Mr Thomas did not identify his assailants on the first reasonable opportunity when he had an opportunity to do so at the Constant Spring Police Station. The learned trial judge considered this omission and arrived at the following conclusion, which was expressed at page 906, line 11 to page 907, line 5 of the transcript:

> "When I take into consideration the witness' evidence, when I take into consideration the circumstances of the case, the circumstances of the statement, I accept his evidence that he told untruths at the police station, the Constant Spring Police Station in the first statement because he did not trust the police officers. I accept his evidence in relation to that. I thought that it would be something which was reasonable, and it was supported by the evidence of some of the other officers who spoke about the reluctance of persons to give evidence in some of these particulars matters. I didn't find him to be a witness that, despite his defensiveness in terms of cross-examination, was trying to mislead the court in any way, and I found that all in all he was a witness of truth, and that his evidence will be examined, to see whether or not they were made out."

[53] However, there is a clear distinction between, on the one hand, telling untruths because one does not trust the police, and, on the other hand, being pressured to say certain things in a witness statement and also being pressured to sign the statement containing those untruths. In our view, the learned trial judge did not adequately explain why he accepted the first explanation as reasonable, and by extension credible, in light of the alternative and contradictory explanation also coming from Thomas, of him being pressured. Furthermore, Mr Thomas did not provide any other explanation for giving conflicting statements to the police. The learned trial judge used the evidence of "some of the other officers" to accept Mr Thomas' explanation for the conflict between his police statements and his evidence at trial concerning the identity of the perpetrators, that "he did not trust the police officers". At no time did the police witness say that the reluctance

of persons (generally) to give information to the police emanated from their belief that the police "at Constant Spring Police Station are corrupt". The approach of the learned trial judge in advancing an explanation in support of Mr Thomas' conflicting evidence that did not, in fact, support the explanation accepted by the learned trial judge is, indeed, objectionable. Therefore, we agree with the submissions of counsel that the learned trial judge erred in this regard.

[54] The existence of many inconsistencies and discrepancies in relation to the evidence of Mr Thomas was acknowledged by the learned trial judge at page 895, line 16 to page 896, line 3 of the transcript as follows:

> "I have to consider in all of these matters the evidence of witnesses and the reliability of the witnesses in the case and in so doing, I will look at the demeanour of the witness, how the witness gave evidence in the witness box, the fact that he was led in-chief and he was cross examined extensively, in particular the main witness by counsel for the defence. I have considered the differences, the inconsistencies and discrepancies in his evidence between things that he said in the various statements that he has given and things that he said in the witness box."

[55] At page 898, line 22 to page 899, line 7 of the transcript, after referring to **Umar & Others against the State of New Delhi**, (**Dalip Kumar and others v State of Delhi** (unreported) High Court of Delhi, New Delhi, CRL. A. 45/2002, CRL. A. 315/2002 & CRL. A. 470/2002, judgment delivered 12 March 2020), which was commended to him by counsel, the learned trial judge warned himself of the need for caution and stated the following:

> "I do agree that the court ought to look very carefully at the evidence of the sole eyewitness and the circumstances of this particular case, where there is only one person and there are some differences in his evidence. The court has to look at it in a great deal of care, to see whether or not the court is convinced of the evidence of this witness. So, I go briefly through the evidence of Mr. Thomas."

[56] We agree with the submissions of counsel for the applicants that the numerous discrepancies in the evidence of Mr Thomas generally, required the learned trial judge to demonstrate a careful analysis of his evidence when considering his credibility and reliability generally. This amplified the need for the learned trial judge to demonstrate that he had specifically resolved the inconsistencies and discrepancies in relation to the visual identification of the applicants in particular. We have concluded that the learned trial judge failed to adequately do so.

[57] An additional issue in this case is voice identification. It was quite correctly conceded by the Crown that the evidence of voice identification should not have been admitted by the learned trial judge because the requisite foundation for its admission was not laid. The added complication and risk of injustice caused by its admission is that the evidence of purported voice identification was used in support of the visual identification. At page 919, line 7- 13 of the transcript, the learned trial judge in making specific findings about the evidence of Mr Thomas said:

> "I find that he saw the assailants; I find that he had ample opportunity to identify the two accused, Mr. Dantay Brooks and Mr. Andre Hinds, that he identified them, **both by voice and by sight**. I find that they were parties to the action of the group that attacked Mr. Lorenzo Thomas." (Emphasis supplied)

This improper use by the learned trial judge of voice identification to bolster the visual identification of the applicants further supports our conclusion that the conviction of the applicants was unsafe in all the circumstances.

Conclusion

[58] We are of the view that the failure of the learned trial judge to adequately warn himself of the dangers inherent in identification evidence combined with the deficiencies in his treatment of the identification evidence and matters going to the credibility of the prosecution's sole eyewitness, resulted in the applicants being deprived of the safeguards developed by the law to prevent the "ghastly risk" of convictions on unreliable evidence

of identification. In the circumstances of this case, the convictions of the applicants are rendered unsafe leading to a substantial miscarriage of justice. Accordingly, there is a justifiable basis for this court to quash the applicants' convictions and set aside the sentences imposed by the learned trial judge.

[59] The Crown, having candidly accepted that the learned trial judge erred in treating with the evidence of identification and the conflicts in the evidence of the prosecution's main witness, which critically affected his credibility and reliability, has, quite rightly, not argued for a retrial.

[60] For the reasons expressed herein, we make the following orders:

1. The applications for permission to appeal conviction and sentence are granted.

2. The hearing of the applications for permission to appeal is treated as the hearing of the appeals.

3. The appeals are allowed.

4. The applicants' convictions are quashed and their sentences set aside.

5. Judgment and verdict of acquittal is entered in respect of each applicant.