[2023] JMCA Crim 19

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE STRAW JA
THE HON MISS JUSTICE EDWARDS JA

SUPREME COURT CRIMINAL APPEAL NOS 16 & 17/2017

SHAUN CARDOZA
LATHON HALL v R

Mrs Caroline Hay QC and Neco Pagon for the applicant Shaun Cardoza

Anthony Williams and Miss Shannan Clarke for the applicant Lathon Hall

Adley Duncan and Miss Alice-Ann Gabbidon for the respondent

25, 27 February 2020 and 26 May 2023

Credibility – Witness' testimony conflicting with statement – Visual identification evidence – Inconsistencies, discrepancies and omissions - Good-character direction

F WILLIAMS JA

Introduction

[1] This is a renewed application for leave to appeal convictions and sentences following a refusal of leave by a single judge of appeal on 9 April 2019. The applicants were convicted for the offences of illegal possession of firearm and wounding with intent on 25 November 2016 and, on 16 February 2017, they were each sentenced to 10 years' imprisonment for the former offence and 15 years' imprisonment for the latter, both at hard labour and to run concurrently.

[2] They were tried by a judge alone ('the learned judge') in the Circuit Court Division of the Gun Court for the parish of Clarendon, holden at May Pen, on allegations that the applicants, on the morning of 25 February 2015 in the parish of

Clarendon, were in possession of firearms, which they used to shoot and wound the virtual complainant, André Carr ('Carr'), thereby intending to kill him or cause him really serious harm.

Summary of the Crown's case

[3] The evidence given by Carr was to the effect that he had been in the company of the two applicants in Effortville, Clarendon, from the night of 24 February 2015, to the following morning, smoking and drinking, when he left to go home in their company and that of another man whom he referred to as "Three Star". As they walked along a shortcut, with him in front of the others, they opened gunfire at him, injuring him. He fell and returned fire with a pistol with which he was armed, and ran off. He ran to the house of one Ingrid, where he left the firearm and was taken to the May Pen Hospital by a taxi driver. He was treated there and transferred to the Kingston Public Hospital ('KPH'), from which he was discharged after a few days.

[4] Carr was not a licensed firearm holder, and, at the time he gave his testimony, was serving a sentence of some five years for the illegal possession of the firearm he used in the incident.

[5] He testified that he had known the applicant Cardoza for many years, they having attended May Pen Primary School together, and later saw him during their high school years. His testimony in relation to the applicant Hall was that he had known him for about a month before the incident; but would sit and drink with him, Cardoza and others on many occasions over that month, before the incident. He also testified that, the night before the incident, he had been picked up in St Andrew by someone driving a car that Cardoza had sent for him and taken to Effortville, where he met with Cardoza, Hall and others.

[6] Detective Sergeant Fletcher Grayson, the investigating officer, testified that he had spoken with Carr on 27 February 2015 at the KPH and taken a statement from him as to how he became injured and came to be in the hospital. At that time, he was investigating a case of illegal possession of firearm. In April of the same year, he again spoke with Carr at the office of the May Pen Criminal Investigation Branch and commenced investigation into a case of wounding with intent committed against Carr.

He took a statement from Carr at that time. Det Sgt Greyson testified that he had in fact taken three statements from Carr. Additionally, he further gave evidence of leading a team of police personnel on an operation in Ackee Walk, Saint Andrew on 8 May 2015, and arresting the two applicants at that time. He charged them on 13 May 2015, after identification parades were held, with the offences that are the subject of this appeal. He also denied suggestions put to him that Carr had absconded (and not been discharged) from the KPH.

Summary of the learned judge's decision

[7] The learned judge found the main issue in the case to be credibility. He also found that identification was important. The credibility issue arose mainly from the fact that Carr was shown in cross-examination to have given, in his first statement to the police, dated 27 February 2015, an account that was significantly at odds with the evidence he gave at the trial. That statement (which was the first of three statements he gave to the police) was admitted in evidence as exhibit 1. There were three main areas of divergence between his statement and his evidence. In summary, the divergences were as follows: (i) In his statement, he stated that he was shot by two men whom he did not name and whom he did not give the impression that he had known before; whereas at trial he named the applicant Cardoza, the applicant Hall (whom he referred to as 'Ras') and Three Star, as the persons who shot him. (ii) In his statement, he indicated that the shooting had occurred at an intersection; whereas in his testimony, he stated that it had occurred whilst they were walking through a shortcut. (iii) In his statement, he gave the impression that the incident was a chance encounter in which he just happened upon the unknown men who shot him; whereas he testified at trial that he had known the men who shot him for some time and, as they all walked through the shortcut, he kept looking at them, as he did not trust them.

[8] In essence, the learned judge appears to have rejected Carr's first statement in its entirety. His reason for doing so was his acceptance of the reason advanced by Carr for giving in his first statement a different account from that stated at trial: that is, that he was in fear of the applicants and someone he referred to as "their don". The learned judge also found the identification evidence to have been good, despite

one part of the identification being made in what he acknowledged to be "harrowing circumstances".

The applicants' cases at trial

Cardoza

[9] At their trial, both applicants gave unsworn statements. In his unsworn statement, Cardoza stated that one day (around 10 March, 2015), whilst at a shop operated by his girlfriend in Ackee Walk (Saint Andrew), he was approached by Carr, who had on bandages, and who asked him whether he had attended May Pen Primary School. He stated that, on another occasion, Carr told him that he had escaped from KPH, was wanted by the police but was being put out by his girlfriend's family, with whom he was staying, and asked Cardoza to help him by providing him with somewhere to hide from the police. Cardoza said that he told Carr that his stepfather was a corporal of police who would kill him (Cardoza) should he do something like that. He, therefore, could not help. Cardoza further said that he next spoke with Carr whilst in custody for the offences at the May Pen Lockup, and that Carr told him that the reason why he (Carr) was "doing this" was that he (Cardoza) and his friend refused to put him up, causing him to be imprisoned for seven years on a gun-possession offence; and that he and his friend would, therefore, have to "do some of the time" with him.

[10] Cardoza further stated that he had not run afoul of the law since being charged for "a ganja spliff" at age 16 and he was then 30. He also said: "I am a law-abiding citizen, I work to provide food and work to provide my kids wants and needs" (page 129, lines 10-12 of the transcript).

Hall

[11] The applicant Hall, for his part, stated that he knew nothing about how Carr got shot. His first time in Clarendon, he said, was when he was arrested for these charges and taken there, and he had no idea why Carr would "do or say something like this". He also stated that where he lives, he sells fried chicken and chips.

The appeal

[12] In seeking to challenge their convictions and sentences, the applicants each filed an application for permission to appeal (form B1) dated 24 February 2017. The grounds set out therein were the same in each case and read as follows:

> "1. **Misidentity by the witness** – that the prosecution witness wrongfully identified me as the person or among any persons who committed the alleged crime.
>
> 2. **Lack of evidence** – that the prosecution failed to present to the court any "concrete" piece of evidence (material, forensic or scientific) to link me to the alleged crime.
>
> 3. **Unfair trial** – that the evidence and testimonies upon which the learned trial judge relied on [sic] for the purpose to [sic] convict me lack facts and credibility thus rending [sic] the verdict unsafe in the circumstances.
>
> 4. **Conflicting testimonies** – that the prosecution witness presented to the Court conflicting and contrasting testimonies which amount to perjury, thus call [sic] into question the soundness of the verdict.
>
> 5. **Miscarriage of justice** – that the prosecution failed to recognise the fact that I had nothing to do with the alleged crime for which I was wrongfully convicted of [sic]."

[13] On behalf of Cardoza, Mrs Hay QC sought leave to argue supplemental grounds. Though not, as is usually done, applying to abandon the original grounds, she advanced no arguments in relation to them. The following are the supplemental grounds that she was permitted to argue:

Supplemental grounds of appeal

Cardoza

> Ground 1:
>
> "The learned Judge failed to sufficiently analyse and treat with the primary issue of credibility from the sole eyewitness given its manifest unreliability. This failure led to material misdirection or non-direction occasioning the Applicant's convictions. The convictions are unsafe and by

> that miscarriage of justice they ought to be quashed and the sentences set aside".
>
> Ground 2:
>
> "The learned Judge's treatment of the Applicant's unsworn statement was inadequate and/or manifestly unfair depriving him of a fair trial. By that miscarriage of justice, the convictions ought to be quashed and the sentences set aside".
>
> Ground 3:
>
> "The learned Judge failed to give any direction on good character in a case where it would have had great value and could have affected the outcome of the trial. That failure rendered the Applicant's trial unfair. By that miscarriage of justice, the convictions ought to be quashed and the sentences set aside."

<u>Hall</u>

[14] On Hall's behalf, Mr Williams was granted permission to abandon the original grounds of appeal and to argue the following supplemental grounds of appeal:

> "1. The learned Trial Judge misdirected himself in relation to the quality of the identification evidence by accepting that the quality was good when the identification was made in difficult and challenging circumstances which led to the conviction and sentence of the 2nd Appellant which is a miscarriage of Justice. By this mis-carriage [sic] of Justice the convictions ought to be quashed and the sentences be set aside.
>
> 2. The learned Trial Judge erred in law in failing to give any directions or to apply his mind to the relevance of the 2nd Appellant's good character to his propensity to commit the offence and in circumstances where it would have had great value and could have affected the outcome of the Trial and as a consequence was denied a fair trial. By this mis-carriage of Justice the convictions ought to be quashed and the sentences be set aside.
>
> 3. The learned Trial judge failed to sufficiently analyse and treat with the primary issue of credibility for the sole eye-witness given its manifest unreliability this failure led to a material mis-direction or non-direction

[occasioning] the Appellant's convictions which are unreasonable and cannot be supported by the evidence. By this mis-carriage [sic] of Justice the convictions ought to be quashed and the sentences be set aside.

i. The learned Trial Judge failed to identify, examine and analyse the several material inconsistencies/discrepancies and omissions and to assess the effect of the weaknesses in the crown's case as a result of these.

ii. He failed to demonstrate how he resolved them in coming to his determination that he accepted the crowns [sic] case as credible. He failed to sufficiently deal with the primary issue of credibility from the sole eyewitness given its manifest unreliability.

iii. This failure led to a material misdirection or non-direction occasioning the Applicant's conviction. The convictions are unsafe and by that miscarriage of Justice they ought to be quashed and the sentences set aside.

4. The verdict is unreasonable and cannot be supported having regard to the weight of the evidence by virtue of Grounds 1, 2 and 3."

[15] As would have become apparent from a perusal of these grounds, Cardoza's ground 1 and Hall's ground 3, both seek to challenge the adequacy of the learned judge's treatment of the issue of credibility. These two grounds will, therefore, be considered together. Similarly, Cardoza's ground 3 and Hall's ground 2 both deal with the learned judge's failure to give a good-character direction and so these grounds as well will be considered together. The other grounds will be considered separately.

Cardoza's ground 1: the learned judge failed to sufficiently analyse and treat with the primary issue of credibility from the sole eyewitness given its manifest unreliability. This failure led to material misdirection or non-direction occasioning the applicant's convictions. The convictions are unsafe and by that miscarriage of justice they ought to be quashed and the sentences set aside.

Hall's ground 3: the learned trial judge failed to sufficiently analyse and treat with the primary issue of credibility for the sole eye-witness given its

manifest unreliability this failure led to a material mis-direction or non-direction [occasioning] the Appellant's convictions which are unreasonable and cannot be supported by the evidence. By this mis-carriage of Justice the convictions ought to be quashed and the sentences be set aside.

> **(i)The learned Trial Judge failed to identify, examine and analyse the several material inconsistencies/discrepancies and omissions and to assess the effect of the weaknesses in the crown's case as a result of these.**
>
> **(ii)He failed to demonstrate how he resolved them in coming to his determination that he accepted the crowns case as credible. He failed to sufficiently deal with the primary issue of credibility from the sole eyewitness given its manifest unreliability.**
>
> **(iii)This failure led to a material misdirection or non-direction occasioning the Applicant's conviction. The convictions are unsafe and by that miscarriage of Justice they ought to be quashed and the sentences set aside.**

Summary of submissions

For Cardoza

[16] Queen's Counsel submitted that, having regard to Carr's conflicting accounts of the incident in his evidence on oath and exhibit 1, which revealed serious inconsistencies and omissions, the learned judge ought to have stated how he resolved them, before relying on Carr's evidence. She contended that neither this court nor counsel have any way of knowing how the learned judge resolved the material inconsistencies and omissions itemized at para. 7 of her submissions. Those were as follows:

> "a. On oath he said that at around 11:30 pm the night before, the 1st Applicant called him by phone and sent a motor car to collect him.
>
> b. 'Youth Man' and Three-Star were in the car, Youth Man [was] the driver. He knew them before. They arrived to collect him and took him to a house where he stayed with 3 men, drinking, eating and smoking. In the Exhibit none of this is mentioned; (although AC insisted he so told the

> police and that some of the statement was 'not right' – p.34);
>
> c. On oath he said that at around 5:30 am he left Effortville in the company of the same 3 men – the 1st Applicant, Three-Star and Ras but in **Exhibit 1**, he left Effortville alone;
>
> d. On oath he admitted to being in possession of a firearm but in **Exhibit 1** he was unarmed;
>
> e. On oath he said that the **3** known men shot him from behind in the shortcut (p.27) but in **Exhibit 1** he said **2** (unidentified – p.78) men shot him after he passed the tall man and whilst they were standing in the middle of a three-way intersection;
>
> f. In **Exhibit 1** AC said the tall man grabbed him by the shoulder and there was a struggle between them. The tall man stumbled back and then the shooting started. However, on oath he said whilst walking through the shortcut with the 3 men behind him, he heard explosions and then fell to the ground." (Bold as in original)

[17] Mrs Hay also identified as a further inconsistency, the fact that exhibit 1 made no mention of Cardoza's contacting Carr by phone, sending a car to pick him up and transporting him to the house where they spent the morning hours drinking, eating and smoking, matters about which Carr testified. She also pointed to Carr's telling the court that he left Effortville in the company of the applicants and Three-Star; yet Exhibit 1 stated that he had left Effortville alone.

[18] Queen's Counsel relied on the case of **Sherwood Simpson v R** [2017] JMCA Crim 37, commending the approach taken by this court in that appeal, finding the convictions to be unsafe due to the trial judge's failure in the summation to appropriately treat with the discrepancies in the testimony of the Crown's main witness. She argued that, in the trial in the court below, the learned judge simply warned himself about the issue of corroboration in respect of a witness with a possible interest to serve, and then treated with identification. Mrs Hay also referred us to the submissions of the applicant's counsel in **Eugene Douglas v R** [2019] JMCA Crim 28 at paras. 62 to 70 in support of her arguments.

For Hall

[19] Mr Williams submitted that, while it was not necessary for the learned judge to demonstrate that he had conducted a minute analysis of every piece of evidence in his summation, it would have been desirable for him to have set out the facts on which his decision was grounded, due to the discrepancies and inconsistencies in the virtual complainant's evidence. He argued that this failure to indicate which version of the discrepancies was preferred and why, as well as the absence of any consideration of the impact of these discrepancies and inconsistencies on the complainant's credibility, amounted to a miscarriage of justice. He relied on, among others, the cases of **R v Dacres** (1980) 33 WIR 241 and **R v Junior Carey** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 25/1985, judgment delivered 31 July 1986), in support of his submissions.

For the Crown

[20] Mr Duncan submitted that the law regarding the treatment of inconsistencies and discrepancies by a judge in bench trials did not apply in this case. He submitted that **Sherwood Simpson v R**, cited by Queen's Counsel, could be distinguished. He argued that, whereas in that case, the inconsistencies related to different aspects of evidence which the witness relied on to be true, in the case before us, the witness wholly rejected the contents of exhibit 1 and did not rely on its contents to be true in his testimony. He further argued that the witness had abandoned his first account of the incident altogether, and had given the reasons for doing so, in favour of his second statement and his *viva voce* evidence, which the learned judge had accepted. Crown Counsel submitted that, in the light of this, it would have been a hopelessly useless exercise for the judge to minutely examine the divergences between both accounts.

[21] Mr Duncan further submitted that, therefore, in the circumstances of the case, the learned judge was entitled to have treated exhibit 1 as a nullity, and as such, there were no inconsistencies which could be derived from it for resolution.

<u>Discussion</u>

[22] In any criminal trial, it is commonplace for inconsistencies, discrepancies and omissions to arise during the course of testimony. Where that occurs it oftentimes

give rise to issues of credibility to be resolved. In **Steven Grant v R** [2010] JMCA Crim 77, at paras. [68] and [69], Harris JA observed as follows:

> "[68] Discrepancies and inconsistencies are not uncommon features in every case. Some are immaterial; others are material. The fact that contradictory statements exist in the evidence adduced by the prosecution, does not mean, without more, that a prima facie case has not been made out against an accused. The existence of contradictory statements gives rise to the test of a witness' credibility....
>
> [69] It must always be borne in mind that discrepancies and inconsistencies in a witness' testimony give rise to the issue of the credibility of that witness. Credibility is anchored on questions of fact. Questions of fact are reserved for the jury's domain as they are pre-eminently the arbiters of the facts. Consequently, it is for them to determine the strength or weakness of a witness' testimony."

[23] In the trial in the court below, matters of credibility fell to be resolved, not by a jury (as this was a judge-alone trial), but by the learned judge, exercising his jury mind. An important question that arises is whether it escaped the learned judge's attention that this glaring conflict existed between exhibit 1 and Carr's testimony, in that, the two recounted two different scenarios. The issue became a matter for the judge's jury mind because Carr gave an explanation for the inconsistency.

[24] A review of the transcript makes it clear that the learned judge appreciated that there was a significant divergence between Carr's testimony and exhibit 1. The learned judge (beginning at page 163, line 20) discussed in general terms how a court should approach the treatment of inconsistencies and discrepancies, then addressed the main inconsistencies in this case, and demonstrated how he resolved them by saying, *inter alia*, the following:

> "…Or I might say, is there an explanation for that inconsistency?
>
> Indeed there is an explanation for that inconsistency because what Mr. Carr is saying, when he was--asked by crown counsel why didn't he call the names in the first statement, he says 'Because dem a plan fi kill mi. Dem have big don fi pay money fi kill me. I was afraid. I gave

> two statements to the police. I called their names in the second statement'. The question is whether or not I can accept that so I go now to [André Carr's] own statement…
>
> …I would still consider because all of them were in the house together whether or not this witness has any particular interest to serve. And so I warn myself here now, that a witness who has an interest to serve might do so for a number of reasons.
>
> The test is whether or not such a witness, his evidence is corroborated, that is to say, whether or not there is any independent witness which confirms the material what he has to say. There are none; but having warned myself, I am free to accept the statement of this witness, if what he says I accept to be true. So that's the warning. I do that out of an abundance of caution."

[25] The self-direction or warning made in the last paragraph of the quotation immediately above, also arose from another aspect of the trial: that is the fact that Carr had himself run afoul of the law and had confessed to doing so and, at the time he gave his evidence, was serving a sentence for possession of the firearm he said he used in the incident involving the applicants. This warning arose from the learned judge's recognition of the possibility that Carr could very well have had an interest to serve – by possibly giving untruthful or embellished evidence in the hope of gaining some advantage in the case(s) against him.

[26] Additionally, it is now generally accepted that there is a difference between how a judge directs himself or herself when sitting alone; and how a judge is required to give warnings in a jury trial. This can, for example, be seen in the decision of the Caribbean Court of Justice in the case of **Dioncicio Salazar v The Queen** [2019] CCJ 15 (AJ). In that case, Wit JCCJ at para. 29, observed as follows:

> "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."

[27] This dictum is in keeping with an earlier judgment of this court in **R v Dacres** (1980) 33 WIR 241, which is to the effect that what is required of a judge sitting alone is to give a reasoned judgment. In that case, at page 249, this court opined as follows:

> "By virtue of being a judge, a Supreme Court Judge sitting as a judge of the High Court Division of the Gun Court in practice gives a reasoned decision for coming to his verdict whether of guilt or innocence. In this reasoned judgment he is expected to set out the facts which he finds to be proved and when there is a conflict of evidence, his method of resolving the conflict."

[28] Ultimately, the learned judge recognised that the central issue was credibility and that that issue revolved around the question of whether he could have accepted that Carr knew the men who shot and injured him, and that it was the applicants who had done so, as Carr had testified; or that he had been shot by strangers, as he had stated in exhibit 1. That was a choice that was open to the learned judge based on the evidence before him and having regard to the explanation for the inconsistency between his statement, on the one hand (exhibit 1), and his evidence at trial. As he was entitled to do, the learned judge resolved this issue by rejecting exhibit 1, based on the explanation that Carr gave. There was a sufficient basis upon which to do so and so the submissions of the applicants on this ground and issue must be rejected. (It should be noted, as well, that the applicants did not expressly deny knowing Carr.) We can see no basis on which to disturb the conviction on this issue relating to how the learned judge treated with the discrepancies. This ground for each applicant, (Cardoza's ground 1 and Hall's ground 3), therefore, fails.

Good character direction - Cardoza's ground 3 and Hall's ground 2

Cardoza's ground 3: The learned judge failed to give any direction on good character in a case where it would have had great value and could have affected the outcome of the trial. That failure rendered the applicant's trial unfair. By that miscarriage of justice, the convictions ought to be quashed and the sentences set aside.

Hall's ground 2: The learned trial judge erred in law in failing to give any directions or to apply his mind to the relevance of the 2nd appellant's good character to his propensity to commit the offence and in circumstances where it would have had great value and could have affected the outcome of the trial and as a consequence was denied a fair trial. By this miscarriage of justice the convictions ought to be quashed and the sentences be set aside.

Summary of submissions

For Cardoza

[29] Queen's Counsel relied on the cases of **Craig Mitchell v R** [2019] JMCA Crim 8, **Sherwood Simpson v R** and **Michael Reid v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 113/2007, judgment delivered 3 April 2009, in submitting that Cardoza, having raised his good character in his unsworn statement, was entitled to have his case considered in keeping with the propensity limb of the good character direction, which the learned judge failed to do. She argued that this propensity direction could have cast further doubt on the complainant's several versions of the incident, thereby affecting the outcome of the trial in favour of her client - especially if, also, the learned judge had appreciated the unsworn statement and correctly analysed it.

For Hall

[30] Mr Williams likewise argued that the learned judge, although required by the terms of Hall's unsworn statement to do so, failed to give any direction on good character, particularly on the propensity limb.

For the Crown

[31] Mr Duncan conceded that the learned judge erred when he took the view that the applicants were not entitled to a good-character direction simply because each gave an unsworn statement from the dock. However, Mr Duncan submitted that this error did not make the convictions unsafe. This was so considering the strength of the identification evidence. In support of this submission, he argued that the complainant spent hours in the company of the applicants, walked with them to the location of the shooting and saw their faces clearly with the aid of the streetlight. He also submitted that the judicial experience of the learned judge mitigated against the risk of a

perverse or incorrect verdict, which might be feared to arise from his failure to give a good-character direction.

Discussion

[32] There is a plethora of authorities emanating from this court that have dealt with the considerations required to be borne in mind by a court when dealing with the issue of a defendant's good character. The learning in these authorities have culminated in numerous (but non-exhaustive) guidelines for trial judges. We do not find it necessary to repeat all of those guidelines but will make mention of the guidance given by Morrison JA (as he then was) in **Leslie Moodie v R** [2015] JMCA Crim 16, and **Michael Reid v R**, which we consider to be of special significance, having regard to the issues in this case. In **Leslie Moodie v R**, at para. [125], the following pronouncements were made:

> "It is now fully settled law that where a defendant is of good character he is entitled to the benefit of a good character direction from the judge when summing up to the jury, tailored to fit the circumstances of the case. The standard direction will normally contain, firstly, a credibility direction, that is a direction that a person of good character is more likely to be truthful than one of bad character; and, secondly, a propensity direction, that is that he or she is less likely to commit a crime, especially one of the nature with which he or she is charged..."

[33] Also in **Michael Reid v R**, after a thorough review of the cases concerning good character, the following guidance was given at paras. 44(iii) and (v) of the judgment:

> "(iii) Although the value of the credibility limb of the standard good character direction may be qualified by the fact that the defendant opted to make an unsworn statement from the dock rather than to give sworn evidence, such a defendant who is of good character is nevertheless fully entitled to the benefit of the standard direction as to the relevance of his good character to his propensity to commit the offence with which he is charged…
>
> (v) The omission whether through counsel's failure or that of the trial judge, of a good character direction in a case

> in which the defendant was entitled to one, will not automatically result in an appeal being allowed. The focus by this court in every case must be on the impact which the errors of counsel and/or the judge have had on the trial and verdict. Regard must be had to the issues and the other evidence in the case and the test ultimately must always be whether the jury, properly directed would inevitably or without doubt have convicted…"

[34] Similarly, in **Horace Kirby v R** [2012] JMCA Crim 10, where the accused gave an unsworn statement, stating "I have no previous conviction", Brooks JA (as he then was), at para. [20] observed:

> "It seems to us that this general principle, that an accused who has no previous convictions, is prima facie entitled to a good character direction, may only be bypassed for good reason…"

[35] Also of relevance is the dictum of the Board in **Teeluck and John v The State of Trinidad and Tobago** (2005) 66 WIR 319 at para. 33(i) that:

> "When a defendant is of good character, ie, has no convictions of any relevance or significance, he is entitled to the benefit of a 'good character' direction from the judge when summing up to the jury, tailored to fit the circumstances of the case …"

[36] The learned judge's summation shows something of a difference in his treatment of the two unsworn statements. In respect of Cardoza, at pages 159, line 20 to page 160 line 5 of the transcript, the learned judge stated:

> "So here we have, in an unsworn statement, what Mr. Cardoza is alleging André Carr's motive to be. Because they didn't put him up. But to this witness, I have never been charged for nothing, I am a law-abiding citizen, that's all. So here we see, the accused man trying to throw reliance on his good character. Unfortunately, good character can't avail when it is unsworn. So, the law in this matter is that I must give the unsworn statement whatever weight I think it deserves."

[37] In respect of Hall, he stated at page 160 lines 7 to 24 of the transcript:

> "Then Lathon Hall gave evidence [sic] in his own right. Lathon Hall says, he says good afternoon, I am 27 years

> old. He was born on the 22nd of the first 1989. He is presently living on Molynes Road. I know nothing about how this man was shot. Only time I have been in Clarendon was when I was arrested. I don't know why he would do or think…something like that. I do labourer work, at Cabana Central and I do chicken business in Kingston where I live. And I do fry chicken and chips. That's it. So, there it is. After all is said that he doesn't know why this accused would do anything or think something like this against him. Again, it is an unsworn statement, so I must give it whatever weight I think it deserves."

[38] Against the background of the learning contained in the authorities, it is evident that Cardoza had raised the issue of his good character in the course of his unsworn statement as itemized at para. [10] above, as, in that statement, he indicated that he effectively had no previous convictions. Cardoza, therefore, would have been entitled to a good-character direction on the propensity limb and the learned judge fell into error in opining otherwise. We do not, however, agree with Mr Williams' submission that Hall had "distinctly raised" the issue of his good character in his unsworn statement (as required by the dicta in **Teeluck and John v The State**). While it is not necessary to use any particular form of words in an unsworn statement to raise the issue of good character, the words used ought generally to imply without ambiguity that the accused was stating he had never run afoul of the law before or if he had, it was not for a serious, relevant offence. The applicant Hall mentioned nothing about any previous convictions or interaction with the police. He only mentioned that, in effect, he is gainfully employed. In our view, this was not sufficient to put his character in issue.

[39] In summary, therefore, the learned judge rightly mentioned the issue of good character only in respect of Cardoza, though he erroneously concluded that Cardoza was not entitled to a good character direction at all. Queen's Counsel is correct in her submission that her client was entitled to a direction on the propensity limb of the good character direction. However, as the authorities, such as **Teeluck & John v The State**, indicate, the learned judge's failure to direct himself on Cardoza's unlikelihood of being armed with an illegal weapon and shooting Carr is not the end of the matter and does not automatically render those convictions unsafe. The omission must be viewed within the context of the totality of the evidence and the

finding of the verdicts of guilty. Similarly, in the case of **France and Vassell v R** [2012] UKPC 28, at para. 46, the Board made the following observation:

> "46. The Board concluded that the approach in *Bhola*, if and in so far as it differed from that in *Teeluck*, was to be preferred. It observed that there would be cases where it was simply not possible to conclude with the necessary level of confidence that a good character direction would have made no difference. *Jagdeo Singh* and *Teeluck* were obvious examples. But it recognised that there would also be cases where the sheer force of the evidence against the defendant was overwhelming and it expressed the view that in those cases it should not prove unduly difficult for an appellate court to conclude that a good character direction could not possibly have affected the jury's verdict. Whether a particular case came within one category or the other would depend on a close examination of the nature of the issues and the strength of the evidence as well as an assessment of the significance of a good character direction to those issues and evidence."

[40] It is also significant that at least one aspect of Carr's evidence was supported by the evidence of the investigating officer. That relates to the issue of whether Carr was discharged or absconded from the KPH. It will be recalled that the applicant, Cardoza, said that Carr told him he was wanted by the police, had escaped from the hospital and needed Cardoza's help to hide; that he told him he could not put him up and that was the reason why Carr had framed him. Carr denied this and was supported in this respect by the evidence of the investigating officer, who testified that, on his information, had been discharged from the KPH. In summary, therefore, the learned judge had evidence from the investigating officer that supported the credibility of Carr and this went to the root of the motive given by Cardoza as to why he was being framed. In these circumstances, it is hardly likely, therefore, that if the learned judge had lent his mind to the issue of Cardoza's credibility or propensity to commit the offence (as Cardoza had given an unsworn statement; and not sworn testimony), that would have changed the verdict.

[41] Taking into consideration the totality of the evidence, it cannot be said that, if Cardoza had been given the benefit of the good-character direction as it relates to his

propensity to commit the crime, he would not have been convicted of the offences; even with the fact that credibility was a main issue throughout the trial. This was so because of the learned judge's treatment of exhibit 1 as discussed above. Once: (i) he accepted the version of events to which Carr had testified; (ii) resolved any credibility issues in Carr's favour; (iii) accepted his testimony of (a) his knowledge of the men; (b) spending a considerable period of time with them before the incident; (c) leaving with them to go home and keeping his eyes on them, all of that would, as the learned judge found, render the identification evidence good and sufficient to ground the convictions.

[42] Again, on the authorities, Hall cannot fairly be said to have distinctly raised the question of his good character and so would not have been entitled to a good character direction. Accordingly, this ground in respect of each applicant (Cardoza's ground 3 and Hall's ground 2) also fails.

[43] Before parting with this issue we will note in passing, and for what it is worth, that, although we still take guidance from authorities on good character from this jurisdiction and the Privy Council, the utility of the good-character direction has been questioned in at least two judgments of the Caribbean Court of Justice. In **August and Gabb v R** [2018] CCJ 7 (AJ) by Justice Wit; and, in **Carlton Junior Hall v R** [2020] CCJ 1 (AJ) (to which the Crown referred us). Justice Anderson, in **Carlton Junior Hall v R**, made the following observation at para. [46]:

> "[46] But what is euphemistically referred to as 'good character' is usually, as Justice Wit suggests, a misnomer in that it is based on nothing more that the absence of a criminal record: see *Ramdhanie (Mantoor) v The State*; … *Re Nurse*…. Obviously, the mere fact that a person has not been convicted of a crime does not mean that he is of good character in the sense of being possessed of positive intrinsic moral qualities. It is not a matter of inexorable logic that because a person has no previous criminal convictions that he is likely to be truthful or unlikely to commit the crime with which he is charged. If it were otherwise there would be no first-time offenders and the prisons would all be empty."

Unsworn statement – Cardoza's ground 2

The learned judge's treatment of the applicant's unsworn statement was inadequate and/or manifestly unfair depriving him of a fair trial. By that miscarriage of justice, the convictions ought to be quashed and the sentences set aside.

Summary of submissions

For Cardoza

[44] Queen's Counsel contended that the learned judge misquoted Cardoza's unsworn statement in stating that Cardoza approached a man he did not admit to knowing and told him, he (Cardoza) wanted somewhere to stay. She argued that it was in fact Carr who approached Cardoza and because of this error, the learned judge rejected his entire unsworn statement. She submitted that the learned judge had a duty to accurately recall Cardoza's evidence, and carefully analyse it before determining what weight if any, to attach to it. Queen's Counsel also argued that the learned judge erred in giving the unsworn statement no weight, especially as the evidence in the trial had necessitated that some weight be accorded to it. She argued that this resulted in the proceedings on this issue being unfair and led to a miscarriage of justice. As such the convictions and sentences ought to be set aside.

For the Crown

[45] The Crown submitted that the learned judge, as the tribunal of fact, was at liberty to ascribe whatever weight he felt appropriate to the unsworn statement, then compare it with the weight of the evidence adduced by the prosecution and consider it with respect to the prosecution's burden of proof. He argued that the learned judge did this and that how the learned judge dealt with the matter did not render the conviction unsafe.

Discussion

[46] Queen Counsel's contention arises from that part of the learned judge's summation which is to be found at page 161 lines 1 to 19 of the transcript and which reads as follows:

> "I ask myself in evaluating the unsworn evidence [sic] of Cardoza, why would it be that having seen the complainant at a shop, he would say to him…somebody who he does not know, because Mr. Cardoza isn't saying that he knows him at all…that he has run away to Kingston from the hospital and had difficulty living in the community and he was looking refuge, somewhere to stay, I ask myself that. That would not make any sense at all because the last thing you would want anybody to know is that you are a fugitive from justice. And what is even more startling is this, he said he is only doing it, recalling the evidence, or his name or his friend's name because you didn't put me up. Because you didn't put me up, I am going to tell the police that it was you two men who had shot me up at Effortville in Clarendon."

[47] Further on page 162 at lines 2 to 5:

> "Incredulous but anyway, I am invited to give it whatever weight I think it deserves. In my respectful view, that deserves no weight at all."

[48] Although the learned judge could have been more specific in his reference to "he" and "him" at lines 3 and 4, we do not accept that the learned judge misquoted the unsworn statement, based on previous remarks in his summation and his review of Cardoza's unsworn statement, beginning at page 158 line 19 to page 159 line 22:

> "I have no grudge or nothing towards the complainant. I am innocent. I actually saw this man about the 11th March, that's in Ackee Walk…I saw a man come to the shop. He had run…sorry he had on a white merino, he had bandage on his shoulder, face…he asked me if I used to go to May Pen Primary School, we exchanged words. I understand he had a girlfriend living in the community. He says he ran away from KPH. And had difficulty living in the community. He was looking refuge, somewhere to stay. I told him that my stepfather would kill me, if I had a wanted man at my house. I told him I could not do anything…So here we have, in an unsworn statement, what Mr Cardoza is alleging Andre Carr's motive to be. Because they didn't put him up."

[49] Here, it is clear to us that the learned judge appreciated Cardoza was indicating to the court that Carr was seeking refuge and because he (Cardoza) refused to assist, that refusal became Carr's motive for stating he was shot and injured by Cardoza and

his friend, Hall. Having regarded Cardoza's account as incredulous, the learned judge was then entitled to reject his unsworn statement and attach no weight to it, as he did.

[50] In agreeing with the submission of the Crown, we refer to the case of **André Downer and Darren Thomas v R** [2018] JMCA Crim 28 which succinctly articulates our view at paras. [53]-[54] as follows:

> "[53] In the Privy Council decision of **Director of Public Prosecution v Walker** [1974] 1 WLR 1090, Lord Salmon at page 1096, in relation to the evidential value of an unsworn statement and the proper direction to be given to a jury in this regard observed that:
>
> > 'The jury should always be told that it is exclusively for them to make up their minds whether the unsworn statement has any value, and, if so, what weight should be attached to it; that it is for them to decide whether the evidence for the prosecution has satisfied them of the accused's guilt beyond reasonable doubt, and that in considering their verdict they should give the accused's unsworn statement only such weight as they may think it deserves.'
>
> [54] It is noted that this dictum relates to a trial by a judge and jury. However, even with this fact and the guidance from **R v Dacres** in mind, it is apparent that it was clearly within the purview of the learned trial judge to decide what, if any, weight was to have been accorded to the unsworn statements. In discharging his function as the tribunal of fact in the case before him, the learned trial judge was entitled to have decided (as he did) that he would place no weight on the unsworn statements of the applicants."

[51] Placing no weight on Cardoza's unsworn statement, the learned judge then went on to say he would need to return to the Crown's case to see if he was satisfied and sure, and so it cannot fairly be said that the learned judge was not thorough in his consideration of the unsworn statement. This ground of appeal therefore fails.

Quality of identification evidence – Hall's ground 1

The learned trial judge misdirected himself in relation to the quality of the identification evidence by accepting that the quality was good when the identification was made in difficult and challenging circumstances which led to the conviction and sentence of the 2nd appellant which is a miscarriage of justice. By this miscarriage of Justice the convictions ought to be quashed and the sentences be set aside.

Summary of submissions

For Hall

[52] Mr Williams, referring to the cases of **Kenneth Evans v R** (1991) 39 WIR 290 and **Okedo Williams v R** [2012] JMCA Crim 28, submitted that the identification of Hall was made in difficult circumstances. He argued that, when the shots were fired whilst Carr was walking, there was no evidence that he saw any of the two men who had fired the shots. He further submitted that, when Carr got shot and fell to the ground, he was on his back and so there would be no evidence to suggest that he would have been able to identify his assailants.

[53] The learned judge erred in concluding that the quality of evidence of the identification evidence was good when there was no such evidence, Mr Williams also submitted. This failure to properly assess the quality of the identification evidence resulted, he argued, in an unsafe conviction.

For the Crown

[54] Crown Counsel submitted that the visual identification evidence adduced was satisfactory and that the learned judge made no error in calling upon Hall to answer the case against him and in eventually finding him guilty.

Discussion

[55] We find it useful to closely examine the circumstances in which the identification was made by Carr in keeping with the guiding principles of Lord Widgery CJ in **R v Turnbull and others** [1976] 3 All ER 549 as set out in the table below:

Turnbull Guidelines	Hall
i. How long did the witness have the accused under observation?	15 seconds (page 17 of the transcript, lines 11 and16).
ii. At what distance?	"Round a arm [sic] length or arm-and-a-half" (page 14 of the transcript, line 14).
iii. In what light?	Street light shining in the road way and in the shortcut about 25 feet away (page 17 of the transcript, line 22; page 18 lines 10 to 12).
iv. Was the observation impeded in any way?	No (page 14 of the transcript, line 11).
v. Had the witness ever seen the accused before? vi. If yes, how often? vii. If occasionally, any special reason for remembering he accused?	Yes. Almost every day for a month prior to the incident when they would "[s]it down and drink and smoke" (page 19 lines 2-7). Not applicable. Or, if applicable, the answer to vi. would apply.

viii.	How long was the time between the original observation and the subsequent identification to the police.	From 25 February 2015 to 12 or 13 May 2015, (page 68 of the transcript, lines 1 to 15).
ix.	Was there any material discrepancy between the description of the accused given to the police by the witness and the actual appearance?	No.

[56] It should be apparent, from the evidence given by Carr in relation to identification, that the requirements of **R v Turnbull** were clearly satisfied. In his summation, as well, the learned judge also reminded himself of the need to approach the identification evidence with caution (see page 165, lines 6 to 23 of the transcript). In addition to the evidence summarized in the above table, it was also the evidence of Carr that he was in the company of Hall, Cardoza and Three-Star for a "couple hours well" before the shooting, smoking and drinking with them. Not only did he identify Hall as one of the men who shot him, he also told the court that he saw the gun that Hall was using and the "flames" from the gun, as the bullets were discharged. We find that these circumstances differ markedly from those described in **Kenneth Evans v R**. In that case, for example, the sole witness purported to have seen the appellant for only about five seconds in circumstances in which she had been awakened by the sound of a gunshot, looked up to see what had happened and immediately looked down again. There was also a vigorous challenge raised as to whether she had ever seen the appellant before, as she had testified, an allegation that the appellant denied. There were also failings by the trial judge in his direction to the jury on several matters. The facts of those case, therefore, were completely different from those in this appeal. This was clearly not a case of a fleeting glance and we can find no fault with the approach of the learned judge (having warned himself of the danger of acting on visual identification evidence by a sole witness), in finding

that, in the circumstances outlined in his testimony, Carr would have been able to see his assailants, even if there were weaknesses in the evidence, including the "harrowing circumstances" in which Carr had been shot.

[57] Therefore, it cannot fairly be said that the quality of the identification evidence was not good; or that the learned judge's treatment of it was inadequate. The applicant Hall's complaint in respect of this issue, consequently, has not been made out.

Verdict is unreasonable – Hall's ground 4

[58] No submissions were made on this ground. In our finding, it cannot fairly be said that the verdicts were unreasonable, having regard to the evidence, for the reasons outlined above.

Original grounds

[59] In the unusual circumstances in which the original grounds for Cardoza were not abandoned but were not argued, for the avoidance of doubt we say as well that those, too, have been considered and have been found to be without merit.

[60] The court apologizes for the delay in the delivery of this judgment, which is sincerely regretted.

[61] In light of the foregoing, by a majority (Edwards JA dissenting) the following orders are hereby made:

1. The applications for permission to appeal are refused.
2. The sentences are to be reckoned as having commenced on 16 February 2017, and, as originally ordered, are to run concurrently.