[2025] JMCA Crim 5

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE SIMMONS JA
THE HON MRS JUSTICE DUNBAR-GREEN JA

SUPREME COURT CRIMINAL APPEAL NOS COA2020CR00003 & 00004

OWUSU COOPER
RYAN REID v R

Lord Anthony Gifford KC and Miss Danielle Archer on behalf of Owusu Cooper

Anthony Williams on behalf of Ryan Reid

Jeremy Taylor KC for the Crown

23, 24, 26 October 2023 and 7 March 2025

Criminal law - Leave to appeal against convictions and sentences - Illegal possession of firearm - Shooting with intent - Murder - Whether learned trial judge failed to adequately direct jury on the special weaknesses in identification evidence - Whether learned trial judge failed to properly direct jury on how to treat the evidence of an honest but possibly mistaken witness - Whether learned trial judge gave proper consideration to the good character of one of the applicants - Whether the verdict is unreasonable, having regard to the evidence - Whether sentence of life imprisonment with 40 years before becoming eligible for parole was manifestly excessive - Section 20(1)(b) of the Firearms Act - Section 20(1)(a) of the Offences Against the Person Act

F WILLIAMS JA

Background

[1] The two applicants in this case, Owusu Cooper ('Cooper') and Ryan Reid ('Reid'), were jointly charged on an indictment containing four counts: illegal possession of

firearm, contrary to section 20(1)(b) of the Firearms Act (count one); shooting with intent, contrary to section 20(1)(a) of the Offences against the Person Act (count two); and murder (counts three and four). Both applicants pleaded not guilty to the charges and on 3 October 2019, after trial by Harris J (as she then was, 'the learned trial judge') and jury, both were convicted on all counts.

[2] On 18 December 2019, both applicants were sentenced. Cooper was sentenced to 10 years' imprisonment at hard labour in relation to count one; 15 years' imprisonment at hard labour in relation to count two; and life imprisonment on counts three and four, with the stipulation that he serve a period of 40 years before becoming eligible for parole, all sentences to run concurrently. Reid was sentenced to seven years' imprisonment at hard labour in relation to count one; 15 years' imprisonment at hard labour in relation to count two; and life imprisonment on counts three and four with the stipulation that he serve a period of 10 years before becoming eligible for parole, all sentences to run concurrently.

Summary of evidence at trial

The Crown's case

[3] The Crown called a total of nine witnesses, but the primary evidence was led through Alair Franklin ('Franklin') and Andre Beckford ('Beckford'), the brothers of the deceased men, who gave evidence as eyewitnesses. Their evidence was that they and a group of friends, including Bryan Franklin and O'Neil Beckford ('the deceased'), were walking along Olympic Way in the parish of Saint Andrew, at about 10:30 pm on 11 May 2008. When the group reached in the vicinity of the entrance to a car wash, several men armed with guns opened fire at them. They all ran for their lives but the deceased were fatally shot. In their evidence, these two Crown witnesses both identified Cooper and Reid as being among the group of gunmen that opened fire at them on the night of the incident.

[4] Franklin (the brother of the deceased, Bryan Franklin) gave evidence that he had known Cooper for over seven years, that they attended school together and had been friends. Franklin also testified that he grew up with Reid, with whom he also attended school, and once considered a friend. Beckford (the brother of the deceased, O'Neil Beckford) gave evidence that he had known both Cooper and Reid for over 10 years. He and Cooper grew up in the same community within close proximity to each other and he would see and speak with Reid every day.

The defence's case

Cooper's case

[5] Cooper gave sworn evidence in which he admitted that he knew the Crown's eyewitnesses. However, he denied being involved in any shooting. He gave evidence that he was drinking with friends at 10 Hibiscus Avenue, off Olympic Way, at the time of the shooting, and called a witness who supported his evidence of his whereabouts at the time of the shooting. The defence also raised the issue of Cooper's good character, the circumstances of the shooting and the 11 years that had elapsed between when the murders were committed and the trial.

Reid's case

[6] Reid also gave sworn evidence admitting that he knew the Crown's eyewitnesses but denied being friends with them. He also denied being armed and involved in the shooting which took place on 11 May 2008. His evidence was that he was at his gate around 9:00 pm talking with someone, when some passers-by told him about the shooting on Olympic Way.

The application for leave to appeal

[7] Both applicants, being dissatisfied with the outcome of their trial, made applications for leave to appeal against their convictions and sentences. These were refused by a single judge of appeal. The renewed applications for permission to appeal against the applicants' convictions and sentences are now before us. At the conclusion of

the hearing, we reserved our decision. Our decision and the reasons for making them are now being made available, with apologies extended for the time it has taken to deliver them.

Supplemental grounds of application for Cooper

[8] Cooper now seeks to renew his application on the following supplemental grounds, having been granted permission to abandon the original grounds and to argue these:

> "1. The learned judge in dealing with the case of Owusu Cooper, was obliged to take special care to prevent, in so far as she was able, the conviction of an innocent man, because:
>
> > (1) The case against him depended entirely on the correctness of the identification of him made in difficult circumstances by two witnesses as one of several men with guns who shot and killed the two deceased young men;
> >
> > (2) He gave evidence of his alibi at the time of the shooting;
> >
> > (3) He called a witness, Shorni Goodison, who supported his evidence of alibi;
> >
> > (4) The learned judge herself commented that the defence evidence had not strengthened the prosecution's case (Page 1117).
> >
> > (5) He called a witness as to character, Cleveland Farquarson, who expressed his shock at the verdict because he did not know the Appellant to be that kind of person.
> >
> > (6) He was a man aged 29 at the time of the offence who had no previous convictions except for possession of ganja.
>
> 2. The learned judge erred in law in that she failed to give the full direction recommended in the case of **R v Turnbull** [1977] QB 224, in that she failed to direct the jury that a witness who is honest may be wrong even if they are convinced that they are right. (See page 1004). The learned

judge erred in treating the main issue as one of 'credibility' and 'who do you believe? [']' and 'who is speaking the truth?' (page 1175). Although she also said that the jury must be sure that the witnesses were not mistaken, she failed to place the same emphasis on the issue of mistake, which was the case put on behalf of the Appellant.

3. The learned judge failed to remind the jury that the case put by counsel for the Appellant Owusu Cooper was different from the case put by counsel for the co-accused Ryan Reid, in that the case for the Appellant was that the witnesses were mistaken, but the case for the co-accused was that the witnesses were either lying or mistaken.

4. The learned judge erred in law in that when directing the jury as to weaknesses in the identification evidence, she referred only to the fact that the time available to the witness Andre Beckford to see the gunmen was only a few seconds and that shooting was going on. The learned judge failed to include among the weaknesses:

a. The delay of two and a half months between the crime and the time when the witnesses Andre Beckford and Alair Franklin told the police about what they claimed to have seen.

b. The discrepancies between the evidence of the witnesses and what they had told the police, for instance that the description by Alair Franklin that the appellant was wearing cut-off trousers and no shirt, features which he recounted to the court but had not mentioned to the police.

c. The overall weakness that the trial took place eleven and a half years after the shootings. The learned judge ought to have warned the jury that over that period of time there was a real danger of confusion between what a witness saw and what he thought he saw.

5. The learned judge directed the jury that one of the main issues in dispute was the state of the lighting conditions. The prosecution relied on the evidence given and photographs taken during the night of the events in question after the police had been called to the scene, by scenes of crime officer

Detective Corporal Brown. The learned judge erred in law in not directing the jury that the photographs and CD should not be used by them in their assessment of the state of the lighting, since:

a. It was not disputed by DC Brown that the image taken by the camera with the assistance of [the] flash was brighter than the same image seen with the naked eye;

b. The gap in time meant that the images as taken by the witness were taken of the scene as at after 11:40pm, and that the lighting conditions at 10:45 pm, especially with regard to lights in houses, may have changed.

6. While the convictions included a double murder of two young men in an overt attack by a group of gunmen, for which a long sentence is mandated, it is submitted that by reason of the exceptional evidence presented about the good character of the Appellant and the respect and disbelief expressed in his community, a fixed term sentence was appropriate and not a life sentence with a minimum term, and so the sentence of life with a minimum of 40 years before being eligible for parole, which would mean that his earliest release date would be 2059 when the Appellant would be 80 and a half years old; is manifestly excessive."

Supplemental grounds of application for Reid

[9] Reid now seeks to renew his application on the following supplemental grounds, having also been permitted to abandon his original grounds:

"**Ground 1**

The Learned Trial Judge failed to properly or adequately assist the Jury to determine how to look at the evidence of an honest witness and by so doing it resulted in a substantial Miscarriage of Justice.

Ground 2

The totality and quality of the purported identification evidence was inherently and palpably tenuous and fragile in

several material respects which amounted to 'a fleeting glance' and/or identification purportedly made in difficult and/or terrifying circumstances. This led to a miscarriage of Justice thus rendering the conviction unsafe.

Ground 3

The Learned Trial Judge failed to properly and/or adequately direct the Jury on major weaknesses as to identification and other evidence which amounted to a substantial Miscarriage of Justice.

Ground 4

The verdict is unreasonable and cannot be supported having regard to the weight of the evidence. By that miscarriage of justice the convictions ought to be quashed and the sentence set aside."

Issues

[10] Based on the supplemental grounds filed by both applicants and the submissions advanced herein, the main issues to be addressed are:

I. Whether the learned trial judge erred in law by failing to adequately direct the jury on the major weaknesses of the identification and other evidence in relation to both applicants.

II. Whether the learned trial judge erred in law by failing to properly direct the jury on how to treat the evidence of an honest but possibly mistaken witness in relation to both applicants.

III. Whether the learned trial judge erred in law by failing to properly direct the jury that the cases for the applicants were different, in that Cooper's case was that the witnesses were mistaken while Reid's case was that the witnesses were either lying or mistaken.

IV. Whether the verdict was unreasonable, having regard to the evidence.

V. Whether the sentences were manifestly excessive.

Issue I. Whether the learned trial judge erred in law by failing to adequately direct the jury on the major weaknesses of the identification and other evidence in relation to both applicants.

Submissions for Cooper

[11] Lord Gifford KC, on Cooper's behalf, cited **R v Turnbull** [1976] 3 All ER 549, ('**Turnbull**') and referred, in particular, to para. 4 of that judgment to submit that the learned trial judge should have directed the jury to carefully examine the circumstances in which each witness purported to have identified Cooper. King's Counsel further contended that, in keeping with **Turnbull**, the jury should also have been directed to consider the period that elapsed between the original observation and the identification to the police. Further, the learned trial judge, he submitted, should have reminded the jury of any specific weaknesses that appeared in the identification evidence. King's Counsel referred to pages 1005 and 1039 of the transcript where the learned trial judge referred to discrepancies, but he submitted that that was not enough. He contended that the learned trial judge should have directed the jury on the 10-week delay before either of the eyewitnesses made a report to the police. King's Counsel also emphasised that the witnesses lived in the community in which the murders occurred, and the murders would have been the subject of conversation in the community, yet they delayed making a report without any good explanation for the delay.

[12] King's Counsel referred to page 930 of the transcript and submitted that the learned trial judge fell into error when she treated Cooper's delay in reporting the crime as a factor which could support the prosecution rather than treat it as a weakness that undermined the integrity of the witnesses' evidence. He also contended that, in keeping with the principles in **Turnbull**, the long gap between the incident and when the men made the report (as against a prompt report when the event was fresh in the witnesses' minds) would tend to weaken the integrity of the evidence. He further argued that the major discrepancies in the evidence were not mentioned by the learned trial judge in her directions to the jury, such as whether Cooper was wearing a shirt or cut-off pants. Lord Gifford submitted that the 11½ years between the incident and the trial heightened the

seriousness of a particular requirement – that is, the need for special caution by the jury when deliberating on the verdict in the matter.

[13] Lord Gifford also raised concerns about the lighting conditions in the area in which the shooting took place and submitted that the learned trial judge should have addressed this, as it would have enabled the jury to determine whether it would have been easy or difficult for the eyewitnesses to accurately identify the gunmen. King's Counsel referred to sections of the learned trial judge's summation, at pages 1044 to1045 of the transcript, where she addressed the fact that the flash on the camera illuminated the area more than it actually was, thus distorting the picture. He also referred to page 1054 where the learned trial judge directed the jury that the pictures were brighter than the actual area and that it was for them to decide whether the area was lit, based on Det Cons Brown's evidence that it was lit when he got there. Notwithstanding these references, Lord Gifford contended that the learned trial judge erred because she gave no kind of warning or caution that the photographs that the jury had with them when they retired for their deliberations, were of no value in determining the lighting issue.

The Crown's submissions in response to Cooper

[14] In response to Cooper, Mr Taylor KC submitted that the learned trial judge not only summarised the identification evidence of the two eyewitnesses, but she also reiterated the **Turnbull** warning and directed them on the importance of ensuring the correctness of the visual identification. Mr Taylor referred to page 1038 (lines 13 to 25) and page 1039 (lines 1 to 19) where, he argued, the learned trial judge outlined the weaknesses that appeared in the identification evidence and directed the jury on how to treat the evidence in light of each applicant's defence. He also referred to page 1011 (lines 17 to 25) of the transcript to support his argument that the learned trial judge mentioned the time that had elapsed between the incident and the trial and gave the jury directions on how to treat this aspect of the evidence. King's Counsel cited **Kemar Whyte v R** [2021] JMCA Crim 15 (a case, he said, that was similar to this one) and argued that, in that case, this court held that the learned trial judge had given sufficient directions to

the jury in relation to the identification evidence and the specific weaknesses in the evidence and submitted that this court should do the same in the instant case.

[15] King's Counsel submitted that Cooper's argument that the learned trial judge should have directed the jury not to use the photographs and CD in order to assess the lighting was illogical. He submitted that the images were the best evidence available as they actually enabled the jury to assess the evidence of the two eyewitnesses. Mr Taylor contended that the issues in relation to the lighting and inconsistencies were to be resolved by the jury as matters of credibility. Further, he argued that, in her summation, the learned trial judge reminded the jury that the images were enhanced by the flash on the camera and directed them to bear that in mind. Therefore, he submitted, the learned trial judge could not have deprived the jury of the photographs, as it was for them to decide what weight to put on them, if they wished to put weight on any of them at all.

Submissions for Reid

[16] Mr Williams, on Reid's behalf, submitted that the learned trial judge failed to properly direct the jury on the main weaknesses in the identification evidence, thus resulting in a miscarriage of justice. To support his argument, he referred to **Turnbull**, which, he submitted, provides guidance on how to treat the circumstances in which a visual identification was made by witnesses. Counsel submitted that this guidance was important because identification evidence of good quality (if it remained good at the end of the witnesses' evidence) reduces the danger of mistaken identification.

[17] He also emphasised that **Turnbull** establishes the importance of considering the time that elapsed between the original observation and the identification to the police and whether there were any specific weaknesses in the identification evidence that the learned trial judge needed to remind the jury of. Counsel argued that, while the learned trial judge mentioned some of the weaknesses in the identification evidence, she failed to point out that the eyewitnesses did not report the incident to the police until approximately 10 weeks after the shooting, without any explanation for the delay. Further, the brutal death of the two deceased would likely have been a source of

discussion in the Olympic Way community, in which they lived. Mr Williams maintained that this was a fundamental and critical weakness in the identification evidence of both eyewitnesses and that the good or bad quality of the identification evidence was the central issue in the case. Counsel submitted that the learned trial judge should have pointed out this particular weakness to the jury for them to properly assess the quality of the identification evidence, on the basis that the witnesses' main evidence was that of recognition of the applicants. Mr Williams contended that the learned trial judge merely regurgitated the explanations of the two witnesses that they said caused them to take 10 weeks to make a report.

[18] Counsel for Reid also submitted that the identification evidence was palpably tenuous in several material respects as it amounted to "a fleeting glance" and/or identification made in difficult and/or terrifying circumstances. Mr Williams argued that the learned trial judge ought to have addressed the distance from the incident and position of the eyewitness Beckford (who was said to have been at the intersection of Lothian Avenue whilst the deceased were at the back of the group). As a result, Beckford's back would have been turned to the deceased men and he did not look back until a friend in the group said "watch da play yah". Counsel submitted that the sudden, unexpected and loud explosions of gunshots would have created shock for the eyewitness, Beckford, in the moment he looked back. Counsel contended that this would have created difficult and terrifying circumstances for the eyewitnesses to identify the applicants.

[19] Mr Williams also referred to Beckford's evidence that O'Neil Beckford (his deceased brother) had five gunshot wounds to the head whilst the post-mortem report revealed three to the body. Counsel then referred to Franklin's evidence when he said that "Ticka", the man who shot his brother, Bryan Franklin, was present as a shooter, while Beckford said that "Ticka" was not present. Counsel also referred to **Kenneth Evans v The Queen** Privy Council Appeal No 43 of 1990, judgment delivered 8 August 1991, ('**Kenneth Evans**') and submitted that, in that case, the Privy Council acquitted the applicant for murder on the basis that the witness' purported identification of the

applicant in difficult and challenging conditions rendered the said identification unreliable and the conviction unsafe. Upon the authority of **Kenneth Evans**, counsel argued that the identification evidence in the instant case was also poor and tenuous and was merely a fleeting glance in challenging circumstances.

[20] Counsel also cited **R v Linton et al** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 3, 4 & 5/2002, judgment delivered 20 December 2002, to emphasise the importance of a judge's instructing the jury in respect of each discrepancy and how to treat with these discrepancies based on whether they were minor or major and went to the root of the case. Mr Williams further cited **Vernaldo Graham v R** [2017] JMCA Crim 30 ('**Graham**') which, in his submission, establishes the principle that a trial judge ought to give the jury assistance in how to approach the weaknesses that have been highlighted. Mr Williams submitted that in **Graham**, this court quashed the applicant's conviction because the trial judge erred in failing to assist the jury with the weaknesses and inconsistencies. Counsel concluded that the learned trial judge merely repeated the eyewitnesses' evidence, but failed to give directions as to the possible interpretations and the effect of these weaknesses and inconsistencies on Reid's case, thus she fell into error.

The Crown's submissions in response to Reid

[21] In response to Reid, King's Counsel adopted his submissions in response to Cooper on this point relating to the weaknesses in the identification evidence. He emphasised that the learned trial judge drew the jury's attention to various important weaknesses in an effort to be as comprehensive as possible. Mr Taylor again referred to the case of **Kemar Whyte v R**, and submitted that the learned trial judge in the case from which this appeal arises gave full directions and that the jury was properly guided on how to assess the evidence of each witness.

Discussion

[22] The guidelines for judges to follow in dealing with the quality of evidence in identification cases were settled long ago in the seminal case of **Turnbull**, which we will now explore in order to determine this issue. In **Turnbull**, both Raymond Turnbull and his co-accused, Camelo, were convicted of conspiracy to burgle. They both appealed against their convictions and Turnbull applied for leave to appeal his sentence. Each of the appellants raised challenges in relation to what they said was the poor quality of the evidence of visual identification, reliance on which to convict them amounted to a miscarriage of justice. While the appeals were dismissed, as is well known, the court outlined guidelines (which we now refer to as "the Turnbull Directions" or "the Turnbull Warning") to reduce the potential for miscarriages of justice to occur in similar situations. These guidelines were outlined by Lord Widgery CJ, who, at pages 551 to 552 said:

> "First, whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition[,] he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Provided this is done in clear terms the judge need not use any particular form of words.
>
> Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his

> actual appearance? …Finally, he should remind the jury of any specific weaknesses which had appeared in the identification evidence.
>
> Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."

[23] **Turnbull** emphasises that a trial judge is required to direct the jury on how to treat identification evidence where the identification evidence comes solely or substantially from one witness or more who the defendant contends to be mistaken. When the accuracy of the identification is contested, the judge must direct the jury to exercise particular caution in its review of the evidence, as, among other things, mistaken witnesses can be convincing. The trial judge should also direct the jury to carefully consider the specific strengths and weaknesses of the identification evidence. Additionally, the trial judge must highlight the fact that, while recognition cases might be stronger than cases of first-time identification, there is still a risk of mistaken identification in cases of recognition.

[24] The case of **Kemar Whyte v R** is also applicable as it makes it clear that the trial judge ought to give special directions to the jury regarding the strengths and weaknesses of the identification evidence. Para. [42] of that case is relevant and is reproduced below:

> "… First, where the correctness of identification is in issue, the trial judge ought to direct the jury that they need to exercise special caution, because a convincing witness may be mistaken. Second, the trial judge should direct the jury to examine the particular strengths and weaknesses of the identification evidence; and further in that regard should state that, although cases of recognition may be stronger [than] cases of identification, there is still a risk of mistaken identification."

Direction on special weaknesses

[25] We have reviewed the transcript against the background of the principles outlined in **Turnbull** and **Kemar Whyte v R**. Having done so, we observe that the excerpts below highlight some of the trial judge's directions on the special weaknesses in the identification evidence. These directions are found at page 1005, lines 14 to 25 and page 1006, lines 1 to 4 of the transcript and are reproduced below:

> "It is also my responsibility, and I will do so, to remind you of any special weaknesses that appear in the identification evidence. So let us begin: and I will start with the identification evidence given by Andre Beckford, as it relates to defendant Owusu Cooper, otherwise called 'Ocho'. His evidence is that he knew Mr. Cooper for over 10 years; he knows that Mr. Cooper lives at Hibiscus Avenue—and Mr. Cooper told you that he lives at No. 24 Hibiscus Avenue and that he lived there in May of 2008. He told you that he knows Mr. Cooper's father; he said he is called Mickey—but, you would have heard from Mr. Cooper and Miss Goodison that the father is not called Mickey, but Gary."

[26] She also directed them thus on the difference in description of how the man was dressed at page 1011, lines 2 to 16:

> "Now, in [Mr. Beckford's] statement to the police, which was put to him… that when he gave that statement to the police what he had said is that Cooper, when he saw him out at Olympic Way, was dressed in dark – in jeans long pant pant[s] without a shirt. In his evidence, he said he was dressed in a dark coloured button-up shirt and dark coloured jeans pants. So, again, Mr. Foreman and your members, you have to decide if a conflict in the evidence has arisen on this aspect of the evidence, whether or not this conflict is serious, is slight. What view you take of the witness' credibility and what aspect of his evidence you will accept if any."

[27] Further, page 1012, lines 1 to 10 read as follows:

> "Now, on this aspect of the evidence, Mr. Alair Franklin also said that the defendant Cooper was not wearing any shirt, but the pants he was wearing was cut off. So, now again, you

> have to decide if there is a conflict of this aspect of the evidence. If it is serious or slight. What do you make of the credibility of the witnesses on this point. What evidence you will accept, if any, on this aspect of the evidence."

[28] With respect to the issue of the lighting of the area in which the shooting took place, the learned trial judge directed the jury at page 1012, lines 18 to 22 as follows:

> "In cross-examination by Miss Asher, Mr Beckford agreed no lights were on in the car wash. Mr Franklin, however, as I indicated, said that light were [sic] on in a bar, in the car wash…"

Page 1013, lines 1 to 23 is also important and reads:

> "The Scene of Crime Officer, Detective Corporal Devon Brown, told you that when he went to the scene that night, at about 11:40 p.m., so this would have been – he arrived at the scene at 11:40 p.m., which would have been about an hour or less when the incident occurred, all the lights that you see taken in the picture on the buildings inside the place he called 'the open area', which the witnesses are saying is the car wash, the building across the roadway, the streetlight, the one at the gully just before the car wash, the one up at the intersection of Lothian Avenue, and the others beyond that, all of them were on. So now, you have to decide as it relates to Mr. Beckford's and Mr. Franklin's evidence, if a conflict has arisen on this aspect of the evidence. Is it serious? Is it slight? What do you make of the credibility of the witness on this point, if you find the conflict has arisen? What evidence will you accept on this aspect of the evidence, if any?"

[29] The learned trial judge's directions continue at page 1015, lines 10 to 23 and read:

> "So, in evidence-in-chief, he [Mr. Beckford] said two yards coming up had on lights, and in his statement to the police, she said the second and third yards, which had separate houses were also in darkness. So, again, Mr. Foreman and your members, you have to decide if a conflict has arisen in the evidence of Mr. Beckford, based on what he told you in evidence and what he said to the police. If it is serious, if it is slight? Does it go to the root of the case? Is it vital to his credibility? What impact does this have on the view you take

> of his credibility? And what aspect of this evidence will you accept, if any?"

[30] Of course, it is not possible or necessary to reproduce the entire summation, but, based on our review of the transcript, we found that the learned trial judge gave adequate directions on the weaknesses and inconsistencies in the evidence. She also gave special directions on other issues raised by counsel for the then defendants, and directed the jury to carefully consider those issues. For example, she pointed out that Beckford said there was no light in the car wash while Franklin said that the light was on in the car wash. The learned trial judge also addressed the time periods for which the witnesses said they observed the defendants and noted the differences between what they said about it in their statements as opposed to their evidence in court. Further, she mentioned the distances that the witnesses said they were from the defendants when the shots were fired and directed the jury on that. The learned trial judge also directed the jury on the applicants' delay in making a report to the police. This can be seen at page 930, lines 6 to 20 of the transcript which are reproduced below:

> "Now, as it relates to omission, I want to give you some further directions on that. I want you to bear in mind, that when a witness gives a statement to the police, as in this case, for example, Mr. Franklin and Mr. Beckford, they gave their statement July 2008. That is the evidence. I can't remember the exact date. I think it is the 27th of July, 2008, but I will get back to that when I am reviewing the evidence, but I know it is July 2008 -- that when they gave their statement to the police, the incident which would have been the 11th of May, 2008, would have occurred two and [sic] half months before, just over two months before…"

The directions in this regard continue at page 970, lines 16 to 25 and page 971, lines 1 to 10, and read:

> "He [Beckford] agreed with Miss Asher that he never gave a statement to the police until July 2008, and the reason for that was that he was traumatized by the death of his brother and neighbour. And he told you that what propelled him to give the statement in July 2008, was that he missed his

> brother and his friend Robin; and, also, he was hurt when he saw his mother crying everyday -- and that was what, my words, galvanized him to give the statement. So this is the explanation that he has given to you, for the delay in making the statement; because, he never told the police when he went back to the scene and he saw them, that he had witnessed the events of that evening. So, it is for you, Mr. Foreman and your Members, to decide whether or not you find this explanation for the delay in making this statement to the police reasonable and acceptable. Matter for you."

[31] Counsel pointed out to the court that the learned trial judge did not specifically address the matter of the failure of André Franklin to give an explanation for the delay in giving his statement to the police. However, it is important to note that, whereas the witness, Beckford, was asked, when being cross-examined, questions about the delay in giving his statement, and so gave evidence in that regard, no similar enquiry was made of the witness, Franklin, when he was being cross-examined by counsel for both applicants. The issue, therefore, was not explored or even raised on Franklin's case, and so the challenge to the learned trial judge's summation on that score is unjustified. If, however, we are wrong in this regard, then, in our view, the circumstances of this case and the outcome of the other issues would justify the application of the proviso to section 14 of the Judicature (Appellate Jurisdiction) Act, which states that:

> "[T]he Court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred."

Identification evidence

[32] At page 1031 of the transcript the learned trial judge explored the evidence relating to the identification of the applicants. The relevant sections of the transcript in relation to this are reproduced below. Page 1031, lines 8 to 25, and page 1032, line 1 to 22 read as follows:

> "Now, he, said, in relation to Mr. Cooper, he saw him for about five minutes before the shooting commenced, while he was

> walking up Olympic Way from the gully area going towards Lothian Avenue… and at this point he saw Mr. Cooper's face for 10 to 20 seconds. He said that the guns that were being fired, fire also came from the guns and that this also assisted him in seeing Mr. Cooper's face 'clear, clear' as he said.
>
> Now, he, based on the evidence, a matter for you, said he was closer to the alleged perpetrators than Mr. Beckford was; and Mr. Beckford had gone ahead… but he said he made his observation of the defendant Cooper's face from about 12 to 15 feet away from him. He was at the car wash with gun and he said when he reached up to the carwash – what he is saying is that his observation of Mr. Cooper in the car wash took place before he reached up to the car wash… therefore, his observation of him would have been before he got to the car wash. When he first saw Mr. Cooper—so the first observation of Mr. Cooper, he is saying is before he passed the car wash, at 12 to 15 feet away. He now said that the second observation of Mr. Cooper, when he saw them, was from a distance of… about 10 to 12 feet, and this is when they were shooting at them. He said that the defendant Cooper was not wearing any shirt and he had a cutoff pants. You will remember that I have addressed this…"

Page 1033, line 6 to 12 reads:

> "So you have to decide, Mr Foreman and your members, that is his perception of Mr. Cooper, that is a matter for you. He also said that the gun that Mr. Cooper had was a chrome automatic gun - - he called it a 'matic' and not a spinner. Now, that was his evidence of identification in relation to Mr. Cooper."

[33] The learned trial judge also addressed Mr. Franklin's evidence in relation to the identification of Reid, beginning at page 1037, lines 1 to 12, which reads:

> "He said that he saw his face when he first observed him for about five minutes while he was walking from the gully towards the car wash, and after hearing the first shot, he saw his face again, from front ways, all of him in fact, for about 10 to 20 seconds before he ran off. And he said that both - - and the closest observation, the closest distance he had to

> make this observation of both Mr. Reid and Mr. Cooper was from a distance of 10 to 12 feet."

Page 1038, line 3 to 8 is also relevant and is reproduced below:

> "So you are to carefully examine this evidence to determine whether or not, in all the circumstance, Mr. Beckford and Mr. Franklin would have sufficient time, the distance that they observed them from; the lighting condition."

Lighting

[34] The learned trial judge also referred to the evidence in relation to the lighting conditions and directed the jury on it. Page 1030, lines 6 to 8 read:

> "Now, as regards the lighting condition that existed at the time, Mr. Franklin said that there were streetlights on the road."

[35] She also said the following at page 1044, lines 24 to 25; and page 1045, lines 1 to 5, as set out below:

> "The issue is whether or not the camera illuminated the area more than the area was, and had given you a distorted picture of the lighting in the area; that is the issue, by the use of the flash on the camera - - and that would be something for you to decide."

[36] She also gave these directions, seen at page 1053, lines 2 to 4; and 18 to 25 and at page 1054, lines 1 to 22 of the transcript, in relation to the evidence of Det Corporal Brown:

> "Now, in terms of the working of the camera, Detective Corporal Devon Brown told you that he used his flash to take these pictures.
>
> …
>
> So when you come now to view the images, I want you to bear in mind that Detective Corporal Devon Brown, remember he even told you that when he was taking some of the ballistic

> evidence he turned down the flash; and he agreed that this was to illuminate the area more. So when you come now to view the images, I want you to take this into account that when you assess them the flash of the camera was used. And Mr. Foreman and your Members, remember Miss Jobson asked him about these reflexes in the pictures, and so on and so forth, and he agreed that there would have been some distortion with the pictures… and the flash would make the picture more illuminated and things like that, so you bear that in mind when you come to assess the evidence. What the Defence is saying, is that these pictures that showed the area so bright and beautiful, the area was not so bright and beautiful; it was more in darkness. So that is going to be an issue for you to decide, because Mr. Brown's evidence is that the area was well lit when he got there. The question for you is whether or not the area was well lit when the incident occurred and whether or not it was sufficiently lit to allow the witnesses to identify the two defendants. That is the issue."

[37] The case of **Jerome Thompson v R** [2020] JMCA Crim 18, ('**Thompson**') is also applicable. In that case, Foster-Pusey JA, at para. [70], cited **R v Barnes** [1995] 2 Cr App Rep 491, The Times 6 July 1995, Lexis UK CD M2, Official Transcripts (1990-1997) and referred to what Lord Taylor of Gosforth CJ said at pages 7 to 8, which is reproduced below:

> "Relying upon the decision of this Court in R v Fergus (1993) 98 Cr App Rep 313, Mr Cooke in the course of the learned judge's summing up on three occasions ventured to criticise and make suggestions as to the judge's treatment of weaknesses. It is right to say that on the third occasion the trial judge invited counsel, who had twice shown himself dissatisfied, to give assistance as to the matters he contended should be mentioned to the jury.
>
> In Fergus Steyn LJ said at page 318:
>
> > 'But in a case dependant on visual identification, and particularly where that is the only evidence, Turnbull makes it clear that it is incumbent on a trial judge to place before the jury any specific weaknesses which can arguably be said to have been exposed in the evidence. And it is not sufficient for the judge to invite

> the jury to take into account what counsel for the defence said about the specific weaknesses. Needless to say, the judge must deal with the specific weaknesses in a coherent manner so that the cumulative impact of those specific weaknesses is fairly placed before the jury.'
>
> Basing himself upon that passage, Mr Cooke contended, in effect, that every discrepancy between what one identifying witness said and another said or did not say, should have been mentioned by the judge as a specific weakness. Moreover, instead of dealing with weaknesses witness by witness, the weaknesses ought to have been gathered together in one section of the summing up so as to maximise 'their cumulative impact'. We do not consider the last sentence in the passage quoted from Fergus imposes such a rigid and extensive regime upon the judge. His duty clearly extends to reminding the jury of weaknesses, for example, lapse of time between the incident and the identification, brevity of the incident, difficult conditions at the time of the incident and major discrepancies between what the particular witness may have said from one time to another or between one identifying witness's description and that of another. <u>But we do not consider that every minor divergence has to be specifically categorised as a potential weakness.</u> Here, for example, Mr Cooke raised matters such as the distinction between estimates of height of 5ft 10ins and 6ft and a distinction between one witness's estimate of the assailant's weight and that of another. It must be a matter for the judge's discretion as to whether such minor matters are simply referred to in his review of the evidence or categorised as potential weaknesses. Moreover, <u>providing the learned judge does remind the jury of the specific weaknesses he identifies as such, we do not consider that any particular format for doing so is obligatory</u>." (Emphasis added)

[38] **Thompson** establishes the principle that there is no particular format that is prescribed when addressing the weaknesses in the evidence in a case, as long as all matters in relation to the significant weaknesses in the evidence are addressed. Once a trial judge does this, then it cannot fairly be said that the verdict is unsafe. We believe that in the instant appeal, the learned trial judge adequately identified the main weaknesses and inconsistencies in the evidence. Also, in keeping with **Turnbull**, the

learned trial judge not only identified the main weaknesses and inconsistencies, but she also gave adequate directions to the jury on how to treat with them. Therefore, based on our review of the learned trial judge's summation and upon the authority of all the cases we have considered, we agree with the submissions of King's Counsel for the Crown that the learned trial judge gave adequate directions to the jury regarding the special weaknesses of the identification evidence in relation to both applicants. As a result, this ground of appeal fails.

Issue II. Whether the learned trial judge erred in law by failing to properly direct the jury on how to treat the evidence of an honest but possibly mistaken witness in relation to both applicants.

Summary of submissions for Cooper

[39] Lord Gifford cited the case of **R v Vincent Jones** (unreported) Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 187/2004, judgment delivered 7 April 2006, in which this court quoted from the words of Steyn LJ in **R v Fergus** (1994) 98 Cr App R 325, which, counsel submitted, made it clear that **Turnbull** requires that the learned trial judge direct the jury that there was a special need for caution before convicting an accused based on visual identification primarily by one witness. King's Counsel then submitted that the learned trial judge in the instant case did not give any assistance to the jury as to how to treat the evidence of an honest but possibly mistaken witness. He emphasised that the word 'honest' did not appear anywhere in the passage in the transcript where the Turnbull Warning was given (he referred to pages 1005 to 1038 of the transcript).

The Crown's submissions in response to Cooper

[40] Mr Taylor submitted that the learned trial judge adequately directed the jury on the need for a careful analysis of the evidence before arriving at a verdict. King's Counsel argued that the learned trial judge directed the jury to consider whether the witnesses were lying or mistaken that it was Cooper and Reid that they saw commit the offences. Mr Taylor referred to pages 939, 950 and 955 of the transcript where, he submitted, the

learned trial judge reiterated the need to resolve the issues of credibility and the possibility of mistaken visual identification. King's Counsel also referred to page 1002 (lines 20 to 25) and page 1003 (lines 1 to 25) and submitted that the learned trial judge directed the jury that a convincing witness could be mistaken in their identification. The members of the jury were also directed that they could only come to a verdict of guilty if they found the witnesses to be truthful and not mistaken and that they could not arrive at a verdict without inferring both.

[41] Mr Taylor also contended that, even though the learned trial judge did not use the exact wording found in **Turnbull**, she still communicated the formulation that was outlined. Counsel submitted that the learned trial judge was very comprehensive in her directions to the jury, which would have enabled them to make an informed and careful assessment of the identification evidence in accordance with **Turnbull**. Therefore, he concluded, the learned trial judge did not err in law or fail to give the full Turnbull Directions.

Submissions for Reid

[42] Mr Williams submitted that the learned trial judge erred in that she failed to properly direct the jury on how to treat with the evidence of an honest but possibly mistaken witness, and that that resulted in a miscarriage of justice. He also cited **Turnbull**, and submitted that that case establishes the principle that a mistaken witness can be a convincing one and so the learned trial judge should have alerted the jury to that possibility and given directions on how to treat with that issue. Counsel also submitted that, in keeping with **Turnbull**, the learned trial judge was required to warn the jury of the special need for caution before they arrived at a verdict based primarily on the visual identification of a witness or witnesses. **R v Fergus**, was also cited in this regard, and counsel submitted that that case explains that the jury ought to have been directed that a seemingly honest witness may give a mistaken account, which can be convincing. Mr Williams then referred to a section of the learned trial judge's summation where she directed the jury that a witness who is convinced in their own mind may be

very convincing even though mistaken. Nonetheless, counsel submitted that the learned trial judge fell short of properly directing the jury to assess the credibility and reliability of the two eyewitnesses as it related to their visual identification evidence.

The Crown's submissions in response to Reid

[43] Mr Taylor's arguments in response to Reid's submissions were, not unnaturally, quite similar to his response to the arguments presented on behalf of Cooper. He submitted that counsel for Reid was incorrect in arguing that the learned trial judge's use of the words "honest witness" may have led the jury to believe that an honest witness may never be mistaken. Mr Taylor disagreed with the submissions of both counsel and contended that the learned trial judge had in fact impressed on the jury the careful manner in which they were to assess the identification evidence. He also argued that the learned trial judge was also clear in explaining the reason for the need for caution and how the evidence should have been assessed. King's Counsel then reiterated his earlier argument that the learned trial judge did not err by not using the particular language in **Turnbull**, because her directions, though worded differently from the directions in **Turnbull**, were fully in keeping with the authority.

Discussion

[44] The case of **Turnbull** is applicable in the resolution of this issue. From the dicta in **Turnbull**, there is a possibility that a mistaken witness can be a convincing one, thus, a trial judge ought to direct a jury to carefully examine the circumstances under which the witnesses identified the accused. **Turnbull** also makes it clear that a trial judge ought to highlight to the jury for its consideration the circumstances in which the identification is purported to have been made. Such circumstances include matters such as: the length of time that the accused person was under observation, the lighting conditions, the distance at which the purported identification was made, and whether the witnesses had even seen the accused person before. Also, a trial judge ought to remind the members of the jury that mistakes can even be made in the purported recognition of close relatives and friends.

[45] The case of **Mills and Others v R** [1995] 1 WLR 511 ('**Mills**') is also relevant to this discussion. In **Mills**, the trial judge, in summing up, directed the members of the jury to be careful in their assessment of the identification evidence. However, while the trial judge directed the jury that a "perfectly honest witness" could be mistaken, he did not remind them that an honest but mistaken witness could be a convincing one. The defendants in **Mills** were convicted of murder, and, on appeal, this court dismissed their appeals, and the Judicial Committee of the Privy Council affirmed its decision. The Judicial Committee of the Privy Council held at page 512 - 513:

> "(1) that in directing the jury on identification evidence the trial judge had to comply with the sense and spirit of the established guidelines but a particular form of words did not have to be used and he had a wide discretion to express himself in his own way; that it was not necessary in every case for the judge to tell the jury that a mistaken witness could be a convincing one; that by stressing that a perfectly honest witness could be mistaken the judge had drawn the jury's attention to the fact that it was not sufficient for them to regard an identifying witness as being credible and they also had to consider whether that witness was reliable; and that, therefore, the judge had properly directed the jury (post, pp. *517H–518B*)."

[46] Also, at para. [33] of **Graham**, Edwards JA said:

> "In the Court of Appeal decision of **Regina v Bradley Graham & Randy Lewis** (1986) 23 JLR 230, Rowe P, in referring to the warning which a judge is required to give in a case of recognition, was of the view that a judge was not bound to the use of any particular form of words in conveying the warnings to the jury…"

[47] We are of the view that the cases of **Mills** and **Graham** establish that, when giving directions to the jury, a trial judge has the discretion to express himself or herself as he or she deems fit, as long as the sense and spirit of the Turnbull Directions are given to the jury.

[48] We have reviewed the relevant portions of the learned trial judge's summation on the evidence of an honest but possibly mistaken witness for a full discussion. Page 1002, lines 20 to 25; of the transcript are relevant to this discussion and are reproduced below:

> "Now, turning to the crucial issue in this case that of identification. Now, this case, it is agreed, depends wholly on the correctness of two identifications that have been made of the defendants, and each defendant are [sic] alleging that those identifications of them are either…"

Page 1003, lines 1 to 25 and page 1004, line 1:

> "mistaken or the witnesses are deliberately lying.
>
> Now to avoid the risk of any injustice in this case, such as has happened in some cases in the past, it is my responsibility to warn you of the special need for caution before convicting the defendants in reliance on the evidence of identification. This is a recognition case, Mr. Foreman and your members, and by that I mean, this is a case where it is agreed that the parties are known to each other. They would see each other in the community of Olympic Gardens. The prosecution witnesses have told you that, the defendants themselves have told you that. Their witnesses have also said so, and even though evidence as it relates to recognition case, identification evidence is more reliable, you still have to approach the evidence with caution, because a witness who is convinced in his/her own mind may as a result come and be a very convincing witness, but nevertheless may be mistaken in their identification, and this principle also applies where there is more than one witness purporting to identify a defendant as had happened in this particular case." (Emphasis added)

Page 1037 lines 21 to 25 and page 1038 lines 1 to 12 are reproduced below:

> "So, Mr. Foreman and your members, this is the identification evidence presented by the two main prosecution witnesses. This is the evidence that you are to examine carefully, approach it with caution, because mistaken identification can be made and witnesses who are mistaken, can come here and be very convincing, so you are to carefully examine this evidence to determine whether or not, in all circumstances, Mr. Beckford and Mr. Franklin would have sufficient time, the

> distance that they observed them from; the lighting condition. Not in issue that they are well known to each other. Whether or not it was conducive. All the circumstances was [sic] conducive to the correct identification of the defendants." (Emphasis added)

[49] The extracts above make it clear that the learned trial judge did indeed give the full Turnbull Warning to the members of the jury. While we have only reproduced a few extracts from the learned trial judge's summation, we have examined the summation in its entirety, and we are of the view that she adequately reminded the members of the jury of the relevant factors that they were to consider and adequately directed them on these factors - especially as they related to the identification evidence. Therefore, we disagree with the submissions of counsel for both applicants that the learned trial judge failed to properly direct the jury on how to treat the identification evidence of an honest but possibly mistaken witness in relation to the applicants.

[50] There are, *inter alia*, two extracts from the learned trial judge's summation that make this even clearer. The first was when she directed the jury at page 1003, line 19 to 23 that: "a witness who is convinced in his/her own mind may as a result come and be a very convincing witness, but nevertheless may be mistaken in their identification". The second was at page 1037 line 25 to page 1038 line 1 to 3, when she directed them that: "…mistaken identification can be made and witnesses who are mistaken, can come here and be very convincing…". The clear inference from the words "a witness who is convinced in his/her own mind" (page 1003, line 19 to 20) must be that the reference is to an honest witness, a witness who genuinely believes that he saw at the locus in quo the person whom he testified to have identified. The corollary of that is that a witness who is not convinced in his own mind would necessarily be a reference to a dishonest witness – that is, one who gives evidence as to matters that he knows he did not witness or does not truly believe that he witnessed.

[51] Important in this discussion is the guidance in **Turnbull** that no formulaic recitation of any words used in that case is necessary. On this issue, the guidance is that

a trial judge is to: "…make some reference to the possibility that a mistaken witness can be a convincing one". This requirement, in our view, has been clearly satisfied. In light of that, this ground, though initially, on its face, attractive, is exposed as being wholly unmeritorious when carefully considered.

Issue III. Whether the learned trial judge erred in law by failing to properly directed the jury that the cases for the applicants were different, in that Cooper's case was that the witnesses were mistaken while Reid's case was that the witnesses were either lying or mistaken.

Summary of submissions for Cooper

[52] Lord Gifford submitted that the learned trial judge erred when, in his submission, she misrepresented the case put forward by Cooper, whose case was that the witnesses were mistaken and not that they were lying. King's Counsel referred to Beckford's cross-examination at the trial where it was put to him by Cooper's counsel that he was mistaken that it was in fact Cooper whom he had seen. Lord Gifford then referred to Beckford's cross-examination in relation to Reid where Reid's counsel put it to him that he was deliberately lying or mistaken when he said he saw Reid on the night of 11 May 2008.

[53] King's Counsel submitted that it was important for the learned trial judge to have put Cooper's case accurately to the jury. He argued that, in her summation, she suggested that the issue of lying was at the heart of the case and, King's Counsel submitted, while she mentioned mistake, her emphasis was on the issue of lying. In King's Counsel's submission, the thrust of the learned trial judge's summation was that the jury should assess the honesty of the witnesses and this, he submitted, obscured Cooper's case.

[54] King's Counsel cited the case of **Michael Beckford and others v R** Privy Council Appeal No 23 of 1992, judgment delivered 1 April 1993, and submitted that the issue in that case was whether a Turnbull Direction should have been given. Lord Gifford argued that that case was applicable to the instant applications, and submitted that, while the

learned trial judge gave a Turnbull Warning at pages 1002-1005, she fell into error in not assisting the jury to understand how Cooper's case differed from Reid's case.

The Crown's submissions in response to Cooper

[55] In response, Mr Taylor disagreed with the submissions of counsel for Cooper that the learned trial judge failed to remind the jury that the case for Cooper was different from Reid's. He submitted that the learned trial judge, at every opportunity possible, reminded the jury of the difference between the cases and, to support his argument, he referred to page 937 (lines 8 to 25) of the transcript. Further, he argued that, after summarising the evidence of Cooper and Reid, the learned trial judge reiterated the defence of each before handing the case over to the jury. King's Counsel also argued that the learned trial judge went a step further by giving a proper direction on the defences of alibi (pages 1167 to 1174 of the transcript) and submitted that, with everything she had done, it could not fairly be said that the jury did not have a proper appreciation of Cooper's case.

Discussion

[56] The case of **Mills** is also relevant to this issue. We will outline the brief facts of the case for a full discussion. In **Mills**, there were four defendants who were charged with the murder of a man. The deceased was attacked by a group of men with machetes, and the prosecution's case relied heavily on visual identification of witnesses who claimed to have recognised the defendants. However, the defence claimed that the witnesses were mistaken. The defendants gave unsworn statements from the dock and the first, second and third defendants put forward alibis while the fourth defendant raised self-defence and provocation. The defendants were convicted of murder and appealed their convictions but this court dismissed their appeals, as did the Judicial Committee of the Privy Council.

[57] Apart from its relevance to what was previously discussed, **Mills**, also requires that where the accused men have different cases, the members of the jury are to be

directed to consider each person's case separately. In the instant appeal, we see where the learned trial judge made an effort in her summation to remind the members of the jury of each accused man's case. At page 1118 of the transcript, the learned trial judge reminded the members of the jury of Cooper's case and gave directions on how they were to treat with what she discussed. Page 1124, lines 24 to 25 and page 1125, lines 1 to 4 are reproduced below, being relevant to the issue:

> "So Mr. Cooper is raising what we call an alibi, that is his defence – and I am going to address you about it shortly, and he is also putting before you his good character, by raising it himself and by calling a witness, which I will also address when I am finished."

Also important is page 1161, lines 16 to 25, which reads as follows:

> "In fact, he said that it was whilst he was with Miss Palmer under his evergreen tree that there was a loud talking coming up the lane, and that persons were speaking loudly and it was those persons who told him about shots that had been fired on Olympic Way; because he said, based on where he was he could not have heard those shots…"

Page 1163, lines 6 to 17, also relevant, read as follows:

> "… and he said that after he heard from the persons about the shooting incident, Dawn now said she wanted to go home and that he accompanied Dawn home. However, before that, a youth as he described it, came to tell him that Miss Gloria was down at a bar and she was misbehaving herself, and he went to the bar and he fetch Miss Gloria. So, Mr. Reid also has raised in his defence, an alibi, saying he was not at the location at the time of the shooting; he was somewhere else…"

Also germane to the discussion are page 1167, lines 18 to 25 and page 1168 lines 1 to3, which read as follows:

> "<u>Now, Mr. Foreman and your Members, both Mr. Cooper and Mr. Reid has [sic] raised what in the law is called an 'alibi'. They have raised this issue, and each defendant is saying that</u>

> he was not present during the commission of the offence. Each of them is saying that they were elsewhere, and therefore, the prosecution witnesses who came and testified that they were there, were either mistaken in their identifications of them or are deliberately lying." (Emphasis added)

[58] Based on the sections of the summation that we have reproduced and our review of the summation in its entirety, we are of the view that the learned trial judge took the time to ensure that the members of the jury were aware of each accused man's case. The learned trial judge reminded the members of the jury that both the accused men raised an alibi and so the prosecution's witnesses were either mistaken in their identification or deliberately lying. She reminded them that Cooper said he was at No 10 Hibiscus Avenue and never left until after the shots were fired, while Reid said that he was at the front of his house by his gate with Miss Palmer until they heard about the shooting. The learned trial judge then gave the jury directions in relation to each applicants' alibi and reminded them that it was for the prosecution to disprove the alibi of each defendant. Looked at from one perspective, even if counsel is correct that the two defences were not differentiated (which we find not to be the case), Cooper may actually have benefitted from (and could not fairly be said to have been prejudiced by) the learned trial judge's references to the possibility of the witnesses lying. On his challenge to the witnesses on the basis of mistake, the focus of the directions would have been guided by **Turnbull**. We have already concluded that the Turnbull Directions given by the learned trial judge were adequate. The possibility that the witnesses might have been lying, would have raised on Cooper's case the issue of credibility, an additional rigorous factor for the jury to have considered in deciding on their verdict. In these circumstances, therefore, this ground also fails.

Issue IV. Whether the verdict was unreasonable, having regard to the evidence

[59] Counsel for Reid submitted that the verdict is unreasonable as it cannot be supported by the evidence due to the poor quality of the identification evidence and the failure of the learned trial judge to adequately put the specific weaknesses to the jury.

Discussion

[60] The case most often considered in discussing this ground is that of **R v Joseph Lao** (1973) 12 JLR 1238. In the headnote to that case, this court observed:

> "Where an appellant complains that the verdict of the jury convicting him of the offence charged is against the weight of the evidence it is not sufficient for him to establish that if the evidence for the prosecution and the defence, or the matters which tell for and against him are carefully and minutely examined and set out one against the other, it may be said that there is some balance in his favour. He must show that the verdict is so against the evidence as to be unreasonable and insupportable." (Emphasis supplied)

[61] Having regard to the previous discussions of the other issues, which have all been found to be unmeritorious, this ground also fails. The applicants have failed to show that the verdicts in this application are so against the evidence as to be unreasonable and insupportable.

Issue V: Whether the sentences were manifestly excessive.

Summary of submissions for Cooper (document filed on 28 March 2022)

[62] Lord Gifford contended that, although the convictions included the double murder of two young men; there was exceptional evidence about Cooper's good character. On this basis, King's Counsel submitted that a fixed term would have been more suitable, as the life sentence with a minimum of 40 years before being eligible for parole is manifestly excessive.

The Crown's submissions in response to Cooper

[63] Mr Taylor contended that the learned trial judge, in arriving at the sentence, correctly outlined the four sentencing principles. He submitted that the learned trial judge considered aggravating factors in the case, such as: the fact that two men were killed and they were only 17 and 18 years old at the time, the killing was unprovoked, the deceased men were shot in the back, firearms were used in the commission of the crime and a number of persons were present at the time of the shooting. The learned trial judge also considered the fact that Reid had a previous conviction for illegal possession of firearm and ammunition, he further submitted. In terms of the mitigating factors, counsel submitted that the learned trial judge considered Cooper's good character and the fact that he was employed, had no previous conviction, and had a positive social enquiry report. In relation to Reid, she also considered the fact that his community report was good for the most part.

[64] Mr Taylor submitted that, having considered all the factors, the learned trial judge was correct in using a starting point of 35 years for both men. In relation to Cooper, she added 15 years for the aggravating factors and deducted seven years for the mitigating factors, which resulted in 43 years and then she further deducted three years for his time spent in custody, which gave a total of 40 years. King's Counsel also contended that a fixed sentence would not have been appropriate due to the aggravating factors.

[65] King's Counsel also cited the cases of **David Russell v R** [2013] JMCA Crim 42, and **Ian Gordon v R** [2012] JMCA Crim 11, ('**Ian Gordon**') to submit that the learned trial judge correctly balanced the aggravating and mitigating factors and attached the relevant weight to them. Thus, he submitted that the sentences were not manifestly excessive and ought not to be disturbed.

Discussion

[66] The Sentencing Guidelines for use by Judges of the Supreme Court of Jamaica and the Parish Courts, December 2017 ('the Sentencing Guidelines'), at section 6, provide as follows:

> **"6. The sentencing process**
>
> 6.1 Assuming that the sentencing judge has gathered all the material necessary to enable him or her to arrive at a proper sentencing decision, the first step in the process is to determine the normal range of sentences for the particular offence under consideration.
>
> 6.2 This should usually be done by reference to the circumstances of the offence and the offender, the sentencing table in Appendix A, previous sentencing decisions and any submissions made by counsel for the prosecution and counsel for the offender.
>
> 6.3 Having determined the normal range, the sentencing judge should then sentence the offender in accordance with the following steps:
>
> (i) identify the appropriate starting point within the range for the particular offender;
>
> (ii) consider the impact of any relevant aggravating features;
>
> (iii) consider the impact of any relevant mitigating features (including personal mitigation);
>
> (iv) consider, where appropriate, whether to reduce the sentence on account of a guilty plea;
>
> (v) decide on the appropriate sentence;
>
> (vi) make, where applicable, an appropriate deduction for time spent on remand pending trial; and
>
> (vii) give reasons for the sentencing decision."

[67] Section 6 of the Sentencing Guidelines clearly outlines everything the learned trial judge ought to have considered in arriving at and handing down the sentences in relation to the applicant, which include:

I. The range of sentence for that offence

[68] In arriving at the sentence in the instant case, the learned trial judge considered the then Firearms Act, which provided for a maximum of life imprisonment for illegal possession of firearm and the maximum of life imprisonment with a minimum of 15 years for the offence of shooting with intent. She also considered the Offences Against the Person Act which provides a maximum sentence of life imprisonment for each murder. At page 1228, line 4 to 8 the learned trial judge said:

> "… because it involves two persons who were killed on the same occasion… [the] mandatory minimum period that is to be served before becoming eligible for parole is 20 years."

II. The aggravating features

[69] At page 1237 of the transcript, the learned trial judge highlighted the general aggravating factors in relation to both defendants. These aggravating factors included the number of persons killed and the number of persons who were present on the road at the time of the shooting. She also considered the fact that firearms were used in the commission of the offence, the age of the deceased, and the fact that the murders were committed in public. The learned trial judge even referred to Cooper's age as an aggravating factor as she said he was 29 years old at the time of the incident and was a mature offender. In relation to Reid, she considered the fact that he associated with negative peers, and she also considered his criminal history as he was previously convicted for illegal possession of firearm and ammunition in 2010 and served five years' imprisonment at hard labour (see page 1243 of the transcript).

The mitigating features

[70] In relation to Cooper, the learned trial judge said she considered that, prior to the incident, he was of good character, was gainfully employed, had no previous conviction and had a positive social enquiry report. In relation to Reid, she considered his age at the time of the incident (he was 18 years old), his antecedent report, his training in carpentry and the fact that he was gainfully employed. She also considered that, in his social enquiry report, his family background and the community report were mostly positive.

III. Whether the accused spent any time in remand

[71] At pages 1240 to 1245 of the transcript, the learned trial judge outlined the details of the sentence in relation to each count and clearly stated the deduction of three years from each of the applicants' sentences for the period they spent in remand. It is also important to note that we accept the Crown's submissions on the point in relation to the sentences given by the learned trial judge at the above paras. [57] and [58] of this judgment.

IV. The leaned judge's reasons for imposing the sentences that she did

[72] Based on our perusal of the transcript it is clear that the learned trial judge satisfactorily explained how she arrived at the sentences she imposed with respect to both applicants, and that there is no discernible error in the approach that she took.

[73] We are also of the view that the case of **David Russell v R** is relevant to the instant appeal. In **David Russell v R**, that applicant was sentenced to serve a period of 40 years before becoming eligible for parole, having been convicted of two counts of murder. Another relevant case is that of **Ian Gordon**, cited by Mr Taylor. In that case, two persons were shot and killed in their home and this court held that serving 30 years before becoming eligible for parole was appropriate. These authorities illustrate that it is not unusual for sentences of these periods to be handed down for the offence of murder – especially where there is more than one victim. Our only concern arose from the fact

that the learned trial judge did not comply with section 3(1E) of the Offences against the Person Act, which reads as follows:

> "(1E) Before sentencing a person under subsection (1), the court shall hear submissions, representations and evidence from the prosecution and the defence, in relation to the issue of the sentence to be passed."

[74] However, in the recent case of **Roland Bronstorph v R** [2024] JMCA Crim 29, at para. [32], this court (per McDonald-Bishop JA, as she then was), observed that:

> "…[I]n our view, the failure of the learned judge to specifically invite defence counsel to make those submissions is, in and of itself, not fatal to the sentence imposed."

[75] Further, we have read the transcript in its entirety. Having done so, it is apparent that, that non-fatal departure from the requirements of the law notwithstanding, the learned trial judge's summation and sentencing remarks clearly demonstrate that she followed the Sentencing Guidelines and gave due consideration to all the relevant factors. Neither do we find the sentences to be manifestly excessive in all the circumstances. Therefore, this ground also fails.

Conclusion

[76] We have already concluded that the learned trial judge's summation as a whole was more than adequate, as, in a case largely centred on the issue of identification by way of recognition, she adhered to the guidelines outlined in **Turnbull**. She summed up each witness' evidence, identified the strengths and weaknesses in the identification evidence and gave the necessary directions. She also reminded the jury of the lighting, the length of time of observation, the distances of the witnesses from the men they identified as the applicants at the time of observation and the conditions under which each identification was made and gave the required directions. Further, she warned them of the possibility that a seemingly honest witness may be mistaken and convincing even in cases of recognition and gave the jury other directions on how to treat with visual identification evidence. We find that the learned trial judge was thorough in her

summation and the directions she gave to the jury and, in arriving at the sentences given, she considered all the relevant factors outlined in the Sentencing Guidelines. We are also of the view that the sentences imposed fall within the range of sentences for the same offence in similar circumstances and cannot be said to be manifestly excessive.

[77] For the foregoing reasons, we make the following orders:

1. The applications for permission to appeal against conviction and sentences are refused.

2. The sentences are to be reckoned as having commenced on 18 December 2019, the date on which they were imposed.