**[2019] JMCA Crim 28**

**JAMAICA**

**IN THE COURT OF APPEAL**

**SUPREME COURT CRIMINAL APPEAL NO 104/2014**

**BEFORE:** **THE HON MR JUSTICE MORRISON P**
**THE HON MRS JUSTICE SINCLAIR-HAYNES JA**
**THE HON MISS JUSTICE P WILLIAMS JA**

**EUGENE DOUGLAS v R**

**Roy Fairclough and Miss Tamara Spencer instructed by Bert Samuels, Miss Bianca Samuels, Miss Dahlia Allen, Ms Marisa Benain and Isat Buchanan for the applicant**

**Mrs Christene Johnson-Spence for the Crown**

**19 December 2017 and 31 July 2019**

**P WILLIAMS JA**

[1] The applicant, Mr Eugene Douglas, was convicted on 21 October 2014 in the Western Regional Gun Court held at Montego Bay in the parish of Saint James by Fraser J sitting without a jury. The offences for which he was convicted were illegal possession of firearm and shooting with intent. On 30 October 2014, he was sentenced to serve 10 years' imprisonment in respect of the charge of illegal possession of firearm and 15 years' imprisonment for the offence of shooting with intent. The sentences were ordered to run concurrently.

[2] Mr Douglas' application for permission to appeal against the conviction and sentences was refused by a single judge of this court on 11 May 2017. He has sought to renew his application before this court, as is his right.

**The case in the court below**

[3] The charges against the applicant arose out of an incident on 9 October 2013 in the Camp Savannah Mountain area of Westmoreland. A party of police officers and soldiers were on foot patrol in the area at about 6:10 in the morning on that day. The mission was described as a search for "serious violence contributors or wanted men". The party was divided into two teams.

[4] Constable Levaughn Morrison and Constable Duan Barrett, the complainants, along with some soldiers, were in one team proceeding in one direction, while a second team of two other police officers and the other soldiers went in the opposite direction. The team of soldiers with Constables Morrison and Barrett proceeded ahead of them.

[5] Constables Morrison and Barrett heard several loud explosions that sounded like gunshots coming from the direction the other team had gone in. At this time, they were unable to give the location of the soldiers who had been a part of their team or the members of the other team.

[6] Constables Morrison and Barrett left the track they were then on and proceeded in a southerly direction, in bushes, towards the direction they had heard the explosions. They saw two men approaching. They noted that one had a rifle and the other was armed

with a chrome pistol. They took cover and observed the men as they approached for a while, until Constable Morrison stood and alerted the men to their presence.

[7] The men pointed the firearms in the direction of the police officers and fired. The officers returned fire and the men ran off in different directions firing as they ran. A search of the area thereafter for the men proved futile.

[8] Both Constable Morrison and Constable Barrett testified that they recognised the two men who had fired at them. One was known as Torneal Haughton, otherwise called Malta and the other was the applicant, also known to them as Nepaul. The applicant had been in possession of the chrome pistol.

[9] The incident was reported to Detective Sergeant Howard Richards later that same day. He visited the scene and caused it to be processed by an officer from the Technical Services Division. There was no evidence as to whether or not any spent shells or warheads were recovered at the scene.

[10] On 10 October 2013, he received information that resulted in his going to the Savanna-La-Mar Police Station lockup. There he saw the applicant who he subsequently arrested and charged. When first advised that he was a suspect, the applicant told the officer "mi neva up deh, me deh a mi girlfriend yard".

[11] In his defence, the applicant denied being in Camp Savannah Mountain on 9 October 2013. He denied shooting at policemen in bushes at Camp Savannah on that day. He said he was at his "baby mother's" house at West End, Negril, Westmoreland.

He said he had gone there from 7:00 pm on 7 October and remained there until at about 12:00 pm on 9 October. He said he lived in Westmoreland for his entire life and admitted to having travelled to different areas of the parish. He was then living in Little London, which was in south Westmoreland. He agreed that Camp Savannah was also in south Westmoreland. He however denied having any knowledge of Camp Savannah Mountain.

[12] His "baby mother", Trishawn Ricketts, testified that on 9 October the applicant left her house between 12:30 and 1:00 pm and did not return. She said that at 6:10 that morning he was at her house.

**The appeal**

[13] At the commencement of the hearing, the court granted permission for Mr Fairclough to argue the "additional grounds of application" that had been filed. Mr Fairclough stated that these were in effect an expansion on the original and holding grounds.

[14] The following were the grounds argued:

> "(1) The learned trial judge treated with the case for the defence unfairly, resulting in a substantial miscarriage of justice
>
> 1(A) The learned trial judge treated the witness for the defence unfairly during the cross-examination of the said witness and in his summation, resulting in a substantial miscarriage of justice.
>
> 1(B) The learned trial judge failed to give any or any sufficient reasons as to why he rejected the Defendant's and his witness'

evidence, which resulted in a denial of the Applicant's right to a fair trial, amounting to a substantial miscarriage of justice.

1(C) The learned trial judge fell into grave error when he said, 'First in relation to his defence, I have to consider the effect of the accused evidence and not that of his baby mother' (page 163, lines 9-10). In so stating his assessment of the defence was therefore incomplete and imbalanced thereby resulting in a substantial miscarriage of justice.

(2) The learned trial judge failed to demonstrate how the previous inconsistent statements, regarding whether the assailants were walking fast or running, affected the credibility of the two prosecution witnesses as well as their evidence in relation to the identification of the Appellant, and failed to demonstrate how he resolved these inconsistencies in arriving at the verdict."

**The issues**

[15] There are two issues which arise from the grounds, namely:

(i) The treatment of the defence.

(ii) The treatment of the inconsistencies.

**Issue 1**

**The submissions**

[16] Mr Fairclough, in advancing the submissions on behalf of the applicant, acknowledged that this case rested upon the learned trial judge's determination of issues of identification and credibility in the context of the defence of alibi.

[17] Counsel relied largely on written submissions that had been filed. The first complaint was focused on the disparity in the time the learned judge spent in his

summing-up in dealing with the case for the prosecution as against that of the defence, as was reflected in the pages each covered in the transcript of the proceedings. It was noted that some seven pages were devoted to the findings on prosecution's case whereas the findings in relation to the two witnesses for the defence occupied less than a page.

[18] The complaint therefore was that the learned trial judge failed to afford the defence due process, which was evidenced by his inequitable treatment of the case for the defence, as compared to his analysis of the prosecution's case. It was contended that the unsatisfactory, incomplete and inequitable treatment given to the case for the defence, when compared with the treatment of the case for the prosecution, deprived the applicant of his right at common law to a fair trial and his rights under the Charter of Fundamental Rights and Freedoms ('the Charter') to a fair trial by an impartial tribunal (see section 16(1) of the Charter). It was also contended that the applicant was denied his entitlement to equality before the law as guaranteed by section 13(3)(g) of the Charter. This resulted in a substantial miscarriage of justice.

[19] The first instance of unfair treatment that was highlighted was the treatment meted out to the witness for the defence, Miss Ricketts, during her cross-examination and in the learned trial judge's summation. The complaint of the treatment during cross-examination surrounded how the Crown Counsel put suggestions to the witness, the witness' response and the learned trial judge's intervention.

[20] It was submitted that the learned trial judge and the prosecutor had a duty at the commencement of the suggestions, to instruct the witness as to how to handle

suggestions as opposed to ordinary questions in the course of cross-examination. Further, it was submitted that the prosecutor ought to have guided the witness on how to respond to suggestions and that, where the prosecutor failed to do, it was the duty of the learned trial judge to give the witness that assistance. It was contended that to have left the witness unaided during the entire exercise resulted in confusion on the part of the witness and operated to diminish the strength and/or potency of the defence.

[21] The second complaint relating to the treatment of the defence was that the learned trial judge failed to give any or any sufficient reasons as to why he rejected the evidence of the applicant and his witness. This complaint was grounded, firstly, in the constitutional right of every defendant to be tried by an impartial tribunal as provided for in section 16(1) of the Charter. It was submitted that this meant that the defence must be the subject of adequate consideration and equitable treatment, as provided for in section 13(3)(h) of the Charter.

[22] It was conceded that the learned trial judge had no duty to express, in his analysis of the defence, his thoughts on every aspect of it. It was submitted however that arising from authorities the questions for this court are, firstly, whether the learned trial judge gave sufficient reasons for his conclusion of guilt; and, secondly, whether the accused knows the facts that were found against him and the reasons for those findings. It was contended that these questions must be answered in the negative as the learned trial judge had failed to fulfil these requirements. The authorities relied on in support of this submission were **Lowell Forbes v R** [2010] JMCA Crim 81; **Andrew Stewart v R** [2015] JMCA Crim 4 and **R v Locksley Carroll** (1990) 27 JLR 259.

[23] It was accepted that it was entirely within the power of the learned trial judge to reject or not accept the evidence of the applicant or his witness. However, it was submitted that the learned trial judge's approach, of stating his conclusion simpliciter, was not sufficient. Further, it was submitted that, without an analysis of the reasons for the rejection of the testimony of both the applicant and his witness, it is not possible for this court to categorise the summation as a reasoned one.

[24] The third instance of the unfair treatment of the defence arose from the following comment of the learned trial judge :

> "First, in relation to his defence, I have to consider the effect of the accused evidence and not that of his baby mother."

[25] It was contended that this statement was unfortunate, inexcusable and amounted to an unfair approach to the defence. Thus, the submission continued, the summation was incomplete and qualifies as a misdirection and there was therefore a substantial miscarriage of justice.

[26] It was submitted further that the testimony of the witness was inextricably bound up with the defence of alibi on which the applicant relied and which was indivisible and incapable of being examined in isolation of the other. Thus, a rejection of the applicant's testimony would not compel the learned trial judge to reject the evidence of his witness, as each witness must be considered independent of each other.

[27] It was noted that the learned trial judge's rejection of both the applicant's and his witness's evidence was done in the following statement:

> "I am not impressed with [the applicant's] evidence and I reject it. Further, the evidence of his witness, I do not accept. I find that she came to assist [the applicant] and was not being forthright."

[28] It was submitted that the learned trial judge failed to demonstrate his understanding that invariably a witness for the defence is called for the very purpose of supporting the defence. Further, in this regard, it was submitted that rather than demonstrating that support for the defence of the applicant was a legitimate reason for her being called by the witness; the learned trial judge used it as a basis of his rejection of her evidence, thereby wrongfully disregarding its value.

[29] It was further submitted that the learned trial judge's statement regarding a non-consideration of the witness's testimony was fatal to the applicant attaining a fair trial. The learned trial judge failed to rehabilitate his statement by giving consideration to her evidence in a fulsome way, or at all. It was submitted that the applicant was therefore deprived of the benefit of support of his defence of alibi, resulting in a substantial miscarriage of justice.

[30] Ultimately, it was submitted that before the evidence of the defence is rejected, it must be the subject of a reasoned analysis, so that the applicant may be made aware of the basis on which his case was rejected in preference to that of the prosecution. In furtherance of this submission, it was urged that this is inextricably bound up in the principle that the accused man has no burden to prove any facts in this case but where he gives evidence, it must be treated in a reasoned way before it is rejected.

[31] Further, it was opined that since this was a matter in which one of the key issues was identification, acceptance of the Crown's witnesses as witnesses of truth could not automatically have the effect of a rejection of the defence. This was so, for example, because an honest witness may be mistaken. Therefore, it was submitted, in the context of the facts of this case, the failure of the learned trial judge to demonstrate specifically why he rejected the evidence of the applicant and his witness, directly affected the conviction of the applicant.

[32] Mrs Johnson-Spence, on behalf of the Crown, reminded us that the burden of proof at all times lies on the prosecution and does not shift. She submitted that it is clear that the learned trial judge was mindful of this fact. She pointed to where he is recorded as saying:

> "… the Court, therefore, has to be satisfied to the extent of feeling sure of both the credibility and reliability of the witness as well as of the overall cogency of the Crown's case before any adverse finding can be returned against the accused."

[33] Counsel submitted that the treatment of the defence by the learned trial judge was wholly appropriate in the circumstances. She pointed to the fact that the learned trial judge fairly reviewed the case for the defence after properly directing himself on the approach he should take in dealing with it. He also fairly reviewed the evidence of the witness for the applicant. He then properly identified the defence as being one of alibi and went on to give the appropriate directions. She submitted that the observations of

the learned trial judge ought not to be considered in a vacuum but are to be considered in the entire context of his summation.

[34] She refuted the submission that the fact that the suggestions were not explained to the defence witness operated to diminish the strength and/or potency of the defence. She noted that the learned trial judge was in fact observant and fair to the witness when he indicated to the Crown Counsel she had to narrow her suggestions to a particular time.

[35] Counsel contended that the learned trial judge did not merely give a rehearsal of the facts found, but carefully juxtaposed them with the applicant's case. He then gave reasons why he believed the Crown's witnesses or whether he accepted one witness' evidence over another. She submitted that, most importantly, although he rejected the applicant's defence and rejected the evidence of his alibi witness, he was careful to state that he had to look back on the Crown's case as the burden of proof at all times rested on the Crown.

[36] Mrs Johnson-Spence opined that the sentence in which the learned trial judge is recorded as saying he would consider the effect of the applicant's evidence and not that of his witness seemed to be a typographical error. She submitted that the learned trial judge's reason for rejecting the evidence of this witness was not simply that she came to support the applicant's defence but that he did not find her to be a forthright witness.

**Discussion and analysis**

[37] There is no dispute that the learned trial judge correctly identified the issues that arose as being those of credibility and the correctness of the identification. There is also

no dispute that he demonstrably applied the relevant principles in coming to the conclusion adverse to the applicant. It is however correct, as asserted on behalf of the applicant, that even in the face of an inability to show that the learned trial judge fell into error in this regard, if the applicant did not receive a fair trial then his conviction cannot stand.

[38] In **Barry Randall v R** (2002) 60 WIR 103, Lord Bingham of Cornhill in delivering the advice of the Privy Council, at page 119, said:

> "But the right of a criminal defendant to a fair trial is absolute. There will come a point when the departure from good practice is so gross, or so persistent or so prejudicial, or so irremediable that an appellate court will have no choice but to condemn a trial as unfair and quash a conviction as unsafe, however strong the grounds for believing the defendant to be guilty. The right to a fair trial is one to be enjoyed by the guilty as well as the innocent, for a defendant is presumed to be innocent until proved otherwise in a fairly conducted trial."

[39] The complaint that the learned trial judge's treatment of the defence was unsatisfactory, incomplete and inequitable when compared with the treatment of the case for the prosecution is premised on the number of pages devoted to the findings in prosecution's case in comparison to that in relation to the defence's. It seems to us that, on one view of the matter, this complaint could be countered with a comparison of the pages devoted to the evidence of the witnesses for the prosecution, which was over 100 pages, and that of the witnesses for the defence, which covered some 20 pages. In our view, however, this would be a trivial way of addressing the issue. Ultimately, the

consideration must be the content of the pages demonstrating what the learned trial judge actually took into account and whether there can be seen any error in his doing so.

[40] From early in his summation, the learned trial judge sought to summarise the respective cases in a way that has not been the subject of any complaint. He stated:

> "By way of a summary of the prosecution and defence case, the prosecution's case is that two policemen, part of a joint police/military patrol, searched in the Camp Savannah area of Westmoreland, searching for wanted men, came under gunfire from two men, including the accused, whom they knew before, that is both knew before. The fire was returned by these policemen and the assailants escaped into nearby bushes, still firing at the policemen.
>
> The defence case, on the other hand is one of alibi. The accused man maintains that at the material time, when he is alleged to have been firing at the policemen, he was actually at home with his baby mother Chris-Ann Ricketts, along with their child Jada. Miss Ricketts also attended and testified on the accused [sic] behalf supporting his alibi."

[41] The learned trial judge later went on to acknowledge the burden and standard of proof. He quite properly recognised that, "if the prosecution does not discharge this burden to the requisite standard, the presumption of innocence which clothes the accused cannot be displaced".

[42] The learned trial judge repeated this recognition of the fact that the applicant did not have to prove anything. He appreciated that it was necessary "to review and closely analyse the evidence of these prosecution witnesses to determine whether or not the Court considers them firstly, capable of belief and secondly whether or not the evidence is reliable". He cannot be faulted for that approach.

[43] There is no complaint that the learned judge's rehearsal of the evidence for the defence was inaccurate or that it was not fairly rehearsed. It is noted that after considering the evidence for the prosecution, the learned trial judge had this to say:

> "Turning to the case for the accused. In presenting his case the accused had three options; he could have remained silent, he had the option of making an unsworn statement or he could do as he did and give sworn testimony, his evidence is to be treated in the same manner as the other testimony in this case, that's the same standard of credit or otherwise must be applied as in the case for the Crown's witnesses. I also remind myself that it's not for the accused to convince me of the truth of the defence but if I believe the accused or if after hearing his case I am left in a case of doubt as to whether I should believe him or his witness, then he is entitled to be acquitted. However, even if I disbelieve the accused and his witness, he cannot be convicted on such disbelief. I am obliged to return to the Crown's case to determine whether or not the evidence led by the Prosecution makes me feel sure of the guilt of the accused."

[44] This was an entirely accurate pronouncement of what the learned trial judge was required to do. Thereafter, he embarked on the exercise. He reviewed the evidence of the applicant and his witness. There is no issue with the accuracy of this review.

[45] The learned trial judge then again recognised that the defence was that of an alibi. He gave himself sufficiently correct and appropriate directions:

> "The accused is saying that he wasn't at the scene of crime when it was committed but that he was at his baby mother's home. He called his baby mother, Chris-Ann Ricketts, to support his evidence but it is the prosecution who has to prove his guilt beyond a reasonable doubt. He does not have to prove that he was elsewhere at the time. On the contrary, the prosecution must disprove the alibi and even if I conclude that

> the alibi is false, that does not, of itself, entitle me to convict the accused. The prosecution must satisfy me beyond a reasonable doubt of his guilt. I remind myself that an alibi is sometimes invented to bolster a genuine defence."

[46] The lines that have been pointed to as the learned judge's findings on the defence's case was not the sum total of the learned trial judge's consideration of the case. The learned trial judge was obliged to consider the Crown's case carefully before he could convict the applicant. The number of pages over which this consideration was done demonstrates his awareness that it was for the Crown to satisfy the tribunal of fact of the applicant's guilt. In any event, the burden that the Crown bears in a criminal trial means the Crown's case requires especially careful scrutiny, even while it is true that the case for the defence must also be fairly considered. In all the circumstances, the complaint that the number of pages devoted to both cases demonstrated any unfairness in the treatment of the defence case is entirely without merit.

[47] The complaint about the treatment of the defence witness is based on three exchanges between the prosecutor and the witness, the first of which is as follows:

> "Q: I am going to suggest to you, Miss Ricketts, that the reason that you are here today in court is so that Mr Douglas won't get in any more trouble with the law.
>
> A. Was that a question?
>
> Q. I am suggesting to you that the reason that you came to court is that he don't get into any more trouble with the law.
>
> A. Yes ma'am."

[48] It is true that the witness may well not have understood the significance of a suggestion being put to her in this manner. Although it may have been useful for the prosecutor to explain to the witness what "suggesting to you" meant, there was no obligation to do so.

[49] In any event, whatever perceived problem may have arisen from the witness' answer that she did not want her baby father to get into any more trouble with the law, was addressed in re-examination. The following exchange took place between Mr Fairclough and the witness:

> "Q. When you say you are here to prevent him getting into further trouble what you mean by that?
>
> A: Well, my hope, it wouldn't make sense being home, knowing the truth and not coming to say that was in fact what happened, so my hope now is that I am hopeful that he gets off and then this would just be finished, like no reoccurrence. It's hard on me being a single mom and trust me, I would love for this just to be over.
>
> Q: You come here to tell any lie on behalf of Eugene?
>
> A: No, I am not telling any lies."

[50] The second exchange which is the subject of the complaint was as follows:

> "Q: Suggesting to you Miss Ricketts, that when it is that you say that Mr. Douglas was at your house on the 9th October last year, that is not true- -I am saying to you that it's not true that he was at your house.

His Lordship: Counsel, your instructions speak to a particular time right, so the suggestion is very broad.

Miss Gillies: Indeed, m'Lord.

Q: Miss Ricketts?

A: Yes ma'am.

Q: At 6:10 on the morning of the 9th of October last year, Mr Douglas was not at your house.

A: You are telling me that, ma'am.

Q: I am suggesting to you, that he was not at your house.

His Lordship: You agree or you disagree, she is putting her case to you, if you agree say you agree or if you disagree, say you disagree.

A: I disagree.

His Lordship: I didn't hear what you said.

The Witness: I am saying you didn't brief me to say if I agree or disagree.

His Lordship: The brief you get is to speak the truth."

[51] From this sequence, the intervention of the learned trial judge seems to have been appropriate and timely. The witness was displaying some lack of understanding of what was being suggested. The learned trial judge explained and the witness responded.

[52] It may be noted that the witness' evidence was that the last time she saw the applicant was when he left her house between 12:30 and 1:00 pm on 9 October. She had not testified as to when he had got to her home or how long he had been there. It was while being cross-examined that the applicant had testified that he had gone to her house

from about 7:00 am on 7 October and stayed there until when he left at 12 noon on 9 October.

[53] In effect, the witness' evidence did not at first support the applicant's alibi as to his whereabouts at 6:10 am on 9 October, when the prosecution was alleging the incident took place. The first suggestion put by the Crown Counsel did not specify a time, which was in keeping with the evidence that had been given. The intervention by the learned trial judge in directing the prosecutor to be more specific as to the time could only have been to the benefit of the case for the applicant.

[54] There is no duty on the prosecutor or the judge to instruct the witness as to how to handle suggestions. The party on whose behalf he is being called should generally prepare a witness. Certainly, where it becomes clear that the witness was not so prepared and therefore appear not to understand what is required, the judge may intervene to assist the process. The learned trial judge acted in a manner which demonstrated his attempt to assist the witness fairly.

[55] The complaint that the witness for the defence was treated unfairly during the course of the cross-examination is without merit. There was one suggestion made which required the learned trial judge's intervention at the appropriate time to explain to the witness what was required of her.

[56] The next complaint was that the learned trial judge failed to give any or any sufficient reasons as to why he rejected the defence and that this resulted in a denial of the applicant's right to a fair trial. The learned trial judge, it is conceded, had no duty to

express in his analysis of the defence his thoughts on every aspect of it. This judge cannot be accused of inscrutable silence. He expressed clearly that he considered but was not impressed by the applicant or his witness. He found not only that the witness came to assist the applicant, but also, more importantly, he found that she was not being forthright. There can be no question, in our view, why the learned trial judge rejected the defence: the witnesses were not believed.

[57] In **R v Horace Willock** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 76/1986, judgment delivered 15 May 1987, this court said:

> "… the absence of reasons or findings in the summation would not necessarily provide a basis for disturbing the verdict of the learned trial judge, who as the tribunal of fact, had the clear and distinct advantage of seeing and hearing the witnesses at the trial and of weighing and assessing the demeanour of the witnesses … Provided therefore, that on an examination of the printed record, there existed material evidence upon which there was a sufficient basis for the learned trial judge to come to the decision at which he arrived, there should be no reason for this court to interfere with the decision at which he arrived."

[58] The learned trial judge was obliged to consider the accounts of the police officers and be satisfied from them as to the guilt of the applicant. He could not have speculated on what evidence there might have been. There was sufficient basis here for the learned trial judge, once he had properly considered the issues of credibility and identification, to come to the decision at which he arrived. He sufficiently demonstrated why he rejected evidence of this applicant and his witness. There is no reason for this court to interfere with the decision based on any lack of reasons for rejecting the defence.

[59] The final component of the complaint of an unfair trial arose from the following sentence in the summation:

> "First, in relation to his defence, I have to consider the effect of the accused evidence and not that of his baby mother."

[60] The context of this sentence cannot be divorced from what followed in the rest of this part of the summation:

> "Has that evidence inspired belief in his innocence or has it left me in a state of reasonable doubt? I keenly observed the demeanour of the applicant as he gave his evidence. His studious avoidance of the knowledge of Camp Savannah was significant, as was his insistence that he was not known by the policemen from the Little London area. I was not impressed with his evidence and I reject it. Further, the evidence of his witness I do not accept. I find that she came to assist the accused and was not being forthright."

[61] The learned trial judge in considering the defence seemed to have been saying that he would deal first with the applicant's evidence and not that of his witness. He however then went on and in fact considered the evidence of the witness, which he also rejected. It is apparent that even if the learned trial judge can be interpreted as saying he was not dealing with the evidence of Miss Ricketts, he demonstrated that he did in fact consider it. He fairly reviewed all she had said and properly recognised that the purpose of her evidence was to support the defence of alibi. He ultimately found that she was not forthright. He was entitled so to find and cannot be faulted for so doing on his assessment of the witness.

**Issue 2**

**Submissions**

[62] In the submissions, Mr Fairclough noted that the police officers both gave evidence that the applicant was "walking fast". This was however inconsistent with their having used the word "running" in their written statements, as was elicited under cross-examination of both witnesses. It was submitted that even though the inconsistencies on the surface may appear to be minor, the fact that they were identical inconsistencies on the part of both witnesses elevated their impact on the prosecution's case.

[63] Further, it was recognised that the learned trial judge did in fact note these inconsistent statements and stated that they went to the witnesses' credit and as to whom he should believe. However, it was contended that the learned trial judge failed to take the issue any further, and neglected to show how he resolved these inconsistencies. It was submitted that a mere recognition of the inconsistencies, without showing how they were resolved, had the same value of not recognising them at all. Further, it was submitted, the fact that the learned trial judge is assumed to be knowledgeable of the law does not strip him of his duty to exhibit just how it operated on his mind. The authorities of **Leroy Sawyers and others v R** (unreported), Court of Appeal, Jamaica, Resident Magistrates Civil Appeal No 74/1980, judgment delivered on 30 July 1980 and **R v Locksley Carroll** were referred to in support of these submissions.

[64] It was contended that the failure of the learned trial judge to resolve the said inconsistencies was seen in his finding that "the men were running at a speed or was walking fast." It was submitted that this formulation of his findings made it patently clear

that the inconsistencies were left unresolved but allowed to co-exist in circumstances that were mutually exclusive.

[65] It was submitted further that the learned trial judge took the same incorrect approach when considering the inconsistency which arose from the evidence as to the distance from which the witnesses had observed the men. The learned trial judge acknowledged that there was an inconsistency, finding that there was evidence that the men were 30 metres away when first observed, while in the statement it is reported that the men were about 20 metres away. He stated that he found that the policemen had enough time to see the men from where they were 20 to 30 metres away.

[66] The submission therefore was that the learned trial judge, in his findings in relation to these inconsistencies, merely recited them, as though they were all compatible, which was not the correct approach. This court's decision in **Andrew Stewart v R** [2015] JMCA Crim 4 was referred to in support of this submission.

[67] Ultimately, it was concluded that the failure of the learned trial judge to resolve the inconsistencies is even more damaging to the applicant's right to a fair trial, when one considers that it was not only the issue of credibility which was affected by these inconsistencies, but also that of collusion and identification.

[68] It was submitted that identical and unexplained inconsistencies between the two witnesses ought to have caused the learned trial judge to demonstrate that he was aware of the fact that the possibility of collusion arose on their evidence and further, the

weakening effect it ought to have had on the evidence of the Crown witnesses. Reference was also made to **Andrew Stewart v R** in support of this submission.

[69] The court was invited to consider whether an inference arose from the fact that both officers said the applicant was walking fast as against running in an effort to reduce the speed of the applicant, in order to create the impression that they had sufficient time to identify the persons walking towards them. It was submitted that the inconsistency was therefore directly related, not only to the credibility of the witnesses and their possible collusion, but also the material issue of the quality of the identification. Counsel referred to **Dwayne Knight v R** [2017] JMCA Crim 3.

[70] It was submitted that having failed to address his mind to the inconsistencies on the evidence of the Crown's witnesses and their cumulative effect on the circumstances surrounding the identification of the witnesses, the learned trial judge failed to properly assess the evidence in its totality. He ultimately failed to consider the weakening impact of the inconsistencies on the identification evidence of the police officers. **R v Cassells** (1965) 8 WIR 270 and **R v Bass** [1953] 1 QB 680 were referred to in advancing this submission.

[71] In response, Mrs Johnson-Spence submitted that the treatment of the inconsistencies must not be read in isolation, but should be considered in conjunction with the identification warnings and alibi warnings, which the learned trial judge gave himself. Further, she contended that the learned trial judge showed that he was mindful of the fact that a truthful witness can be mistaken in recognition cases. She concluded

that the learned trial judge adequately demonstrated how he resolved the inconsistencies in arriving at a verdict.

**Discussion and analysis**

[72] In **Steven Grant v R** [2010] JMCA Crim 77, Harris JA said at paras [68] and [69]:

> "[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, does not mean, without more, that a prima facie case has not been made out against an accused. The existence of contradictory statements give rise to the test of a witness' credibility. No duty is imposed upon a trial judge to direct a jury to discard the evidence of a witness containing inconsistencies or discrepancies. The aim of proving that a witness has made a contradictory statement is to nullify his evidence before the jury and it is for them to decide whether the witness has been discredited…
>
> [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 …"

[73] Constable Morrison had denied that he had written in his statement that the men were running. When confronted with his statement, he accepted that it did say "running". He demonstrated an understanding that there was a difference between walking and running. He however maintained that the men were "walking fast".

[74] Constable Barrett in his evidence-in-chief also said that the men were walking fast. When confronted with his statement, he agreed that it was stated there that the men

were running. He however maintained that there was not "a big difference" between walking fast and running.

[75] Questions were asked of Constable Barrett which were clearly to establish the possibility of he and Constable Morrison discussing whether the men were running or walking. The following exchange took place between the officer and Mr Fairclough:

> "Q. But to you is not a big difference between walking fast and run. You say walking fast, why you write run? I put it to you, you see Mr Barrett, and I beg you don't follow them, you spoke with him during the lunch hour and it was then that you were persuaded that you should go in the witness box and swear to something different from what you had written in your statement?
>
> A. No, sir."

[76] There was also an inconsistency, which arose in the evidence of Constable Morrison relating to the distance at which he had first seen the applicant and the other man. In his evidence, he said it was 30 metres, whereas in his statement he had said 20 metres. He was however consistent that he observed the men from behind cover for some time before alerting them to his presence.

[77] In his review of the evidence the learned trial judge made mention of the inconsistencies. In his reasoning leading to his decision, the learned trial judge also took into consideration the fact that the inconsistencies existed. He said the following in relation to the issue of the men walking fast or running:

> "Therefore the previous inconsistent statement that the men were running goes to their credit and as to who I believe."

[78] In relation to the distance under which the men were first observed he stated:

> "Again, the effect of the contradiction is to cause the court to question whether the policemen would actually have had adequate time to see who their assailants were before they opened fire and made good their escape."

[79] The learned trial judge was ultimately satisfied that the officers had the men under observation for some time before Constable Morrison shouted, "Police". The learned trial judge stated:

> "I find that the men were running at a speed or [were] walking fast and they were moving and looking around. However, I also find the policemen had enough time to see the men from where they were about 20 to 30 metres away. The distance given, an estimate given to the distance was close to the lower end. I find that the policemen who indicated that they immediately recognised the men, had enough time to make out who the men were before Constable Morrison shouted 'Police, don't move.' It is unlikely, in all the circumstances, that this initial observation would have been as much as 10 seconds. However, I am satisfied to the extent that I feel sure that the policemen would have had somewhere in the region of 5 seconds to view these men before Constable Morrison shouted 'Police'.
>
> … I find the incident took place for between twenty to 30 seconds and that the policemen saw the face of the men for upwards of five seconds but likely less that ten seconds before they ran away; men who they would have recognized as Torneal Haughton and Eugene Douglas also called 'Nepaul'."

[80] The evidence before the learned trial judge was that the men were walking fast or walking swiftly over a distance of 20 to 30 metres while under observation by the police officers. The learned trial judge correctly recognised that ultimately the issue was whether

he believed that the witnesses had sufficient opportunity to see and recognise the men. He resolved this issue by making findings of fact, which on the material before him; he was at liberty to make.

[81] These areas were in effect the only ones in which the credibility of the witnesses was challenged. The possibility of there being collusion between the officers was raised for the learned trial judge to consider. The officers were not so discredited that it can be said that the learned trial judge was wrong in his final assessment of the witnesses as being "honest and accurate when they say they saw the accused as one of the two men firing at them".

[82] In **R v Crawford** [2015] UKPC 44, the Board reviewed the role of an appellate court in matters such as this and at paragraph [9] stated:

> "[9] There has been no dispute before the Board as to the proper role of an appellate court when reviewing a decision of a trial judge which amounts to a finding of primary fact based upon his assessment of the credibility and reliability of witnesses whom he has seen and heard. It is well established that an appellate court should recognise the very real disadvantage under which it necessarily operates when considering such a finding only on paper. There are many statements of this principle. It is enough to set out the formulation of it by Lord Sumner in *The Hontestroom* [1972] AC 37 at 47-48:
>
> > 'What then is the real effect on the hearing in a Court of Appeal of the fact that the trial judge saw and heard the witnesses? I think it has been somewhat lost sight of. Of course, there is jurisdiction to retry the case on the shorthand note, including in such retrial

the appreciation of the relative values of the witnesses, for the appeal is made a rehearing by rules which have the force of statute. …It is not, however, a mere matter of discretion to remember and take account of this fact; it is a matter of justice and of judicial obligation. None the less, not to have seen the witnesses puts appellate judges in a permanent position of disadvantages as against the trial judge, and, unless it can be shown that he has failed to use or has palpably misused his advantage, the higher court ought not to take the responsibility of reversing conclusions so arrived at, merely on the result of their own comparisons and criticisms of the witnesses and on their own view of the probabilities of the case. The course of the trial and the whole substance of the judgment must be looked at, and the matter does not depend on the question whether a witness has been cross-examined to credit or has been pronounced by the judge in terms to be unworthy of it. If his estimate of the man forms any substantial part of his reasons for his judgment the trial judge's conclusions of fact should, as I understand the decisions, be left alone. In *The Julia* (1860) 14 Moo PC 210, 235 Lord Kingsdown says: 'They, who require this Board under such circumstances to reverse a decision of the court below upon a point of this description undertake a task of great and almost insuperable difficulty. …We must, in order to reverse not merely entertain doubts whether the decision below is right, but be convinced that it is wrong'."

[83] The learned trial judge sufficiently demonstrated his appreciation of the main issues and of the process of reasoning by which those issues were resolved (see **Andre Downer and Darren Thomas v R** [2018] JMCA Crim 28). There is no basis to disturb the conviction based on this complaint about the manner in which the learned trial judge treated the issue of the inconsistencies.

**The sentence**

[84] In the original grounds, there had been the complaint that the sentence was manifestly excessive. Although in relation to this ground not much argument was advanced on behalf of the applicant, it will be considered.

[85] The learned trial judge imposed sentence before the recent authorities from this court, which have definitively set out the principles and guidelines for such an exercise, in particular **Meisha Clement v R** [2016] JMCA Crim 26. There is now also the guidance set out in the Sentencing Guidelines for use by Judges of Supreme Court of Jamaica and the Parish Courts, December 2017 ('the Sentencing Guidelines').

[86] In **Curtis Grey v R** [2019] JMCA Crim 6, Edwards JA summarised the approach being taken by this court in circumstances such as this at paragraph [19]:

> "Since the **Meisha Clement v R** was handed down, and the later Sentencing Guidelines were established, this court has reviewed sentences by having regard to whether the sentence imposed by the sentencing judge was arrived at by applying recognised accepted principles, and whether it was in keeping with the present guidelines. The sentence imposed must reflect the range of sentences usually imposed for that offence, or like offences in similar circumstances, unless some

> exceptional circumstances exist. The trial judge must also give reasons for imposing the sentence, he or she so imposed."

[87] The learned trial judge took into consideration the seriousness of the offence and the fact that this is an offence highly prevalent in Jamaica. He considered mitigating factors including the fact that the applicant had no previous convictions and that his antecedents were good. He also noted that the applicant would have been in custody for about a year prior to trial and considered this in favour of the applicant.

[88] The learned trial judge acknowledged the fact that there was a minimum sentence in respect of shooting with intent and did not see any circumstances that required him to go above the minimum sentence. Indeed, the learned trial judge expressed that if it had been within his discretion, he would have been prepared to go below the minimum sentence. Hence, the sentence of 15 years' imprisonment at hard labour for shooting with intent cannot be considered excessive.

[89] The Sentencing Guidelines provide that the normal range for the offence of illegal possession of firearm is seven - 15 years with the usual starting point being 10 years. The learned trial judge imposed a sentence consistent with the usual starting point of 10 years imprisonment for illegal possession of firearm which in these circumstances cannot be said to be manifestly excessive.

[90] In the result, the order of the court, by majority (Sinclair-Haynes JA dissenting), is that this application for leave to appeal against conviction and sentence is refused. The

sentences imposed are affirmed and reckoned to have commenced on 30 October 2014.

The delay in the delivery of this judgment is regretted.