**JAMAICA**

**IN THE COURT OF APPEAL**

**SUPREME COURT CRIMINAL APPEAL NOS.47 & 48 OF 2007**

**BEFORE: THE HON. MR. JUSTICE SMITH J.A**
**THE HON. MR. JUSTICE HARRISON J.A**
**THE HON. MISS JUSTICE GLORIA SMTH J.A (Ag.)**

**GLENROY GAYLE**

**JERMAINE CLARKE**

**V**

**REGINA**

**O'neil Brown for the Applicants.**

**Miss Kathy-Ann Pyke for the Crown.**

**May 12, 13 2008 and July 25, 2008**

**HARRISON, J.A:**

1. The applicants were convicted by Sykes J., on March 21 2007 in the Regional Gun Court, Montego Bay on an indictment containing two counts. On count 1 which charged them jointly with illegal possession of a firearm, they were each sentenced to ten years imprisonment at hard labour. On count 2 which charged them jointly with shooting with intent each applicant was sentenced to 13 years imprisonment at hard labour. The single judge refused to grant them leave to appeal so they have renewed their applications to the Court.

**The Case for the Prosecution**

2. On August 6, 2006 at or about 2:30 pm a team of policemen headed by Det. Sgt. Noel Laing received a report and proceeded to the intersection of Great George Street and Coke Street in Savanna la Mar. When the police were about a chain away from the intersection, gunshot explosions were heard and people were seen running in different directions. Sgt. Laing and others hurriedly alighted from the police vehicle and rushed down to the intersection. Sgt. Laing said he went close to a building and he saw a man who had what appeared to be blood all over his body lying in the road. Sgt. Laing moved away from the building; he went to Coke Street and whilst he was standing there, he saw three men armed with guns coming up Coke Street towards him and the man who was lying on the roadway.

3. Sgt. Laing immediately recognized the three men. Two were personally known to him by names. They were Glenroy Gayle otherwise called "Elephant" and Alexis Whyte otherwise known as "Smiley". He said he had seen the third man over a period of time. He subsequently learnt that his name was Jermaine Clarke.

4. All three men pointed their guns in the direction of Laing and opened fire. Whyte and Gayle were armed with 9mm pistols and Jermaine Clarke had a rifle.

5. Laing said he had to return swiftly to the front section of the building. Shots ricocheted off the edge of the building. The man who was lying in the roadway cried out desperately for help. Laing stooped down at the edge of the building; pushed his

hand around and fired several shots in the direction of the three men. The firing ceased momentarily so he went back on Coke Street. The men resumed firing at him. Cons. Ricketts came to his assistance and both of them engaged the men in a shoot-out. The three men retreated but continued firing shots at them.

6. When they went about a chain and a half up Coke Street, Alexis Whyte turned right on to Rodney Street. Laing and Ricketts pursued the other two men up Coke Street. The men turned into a community called "Russia" and made good their escape. Both police officers returned to the scene of the shooting and a number of spent shells including M16 5.5 calibre shells were found on the roadway and were handed over to Det. Inspector Simms.

7. The applicant Clarke was subsequently pointed out by Det. Sgt. Laing on an identification parade that was held at Negril Police Station on October 30, 2006. Warrants of Arrest were executed on the applicant Gayle whilst he was in custody at the Savanna-la-mar lock-up. Both men were arrested and charged with the offences of illegal possession of firearm and shooting with intent.

**The Defence**

8. Gayle gave evidence and denied that on the 6th August 2006, he was along Coke Street during the afternoon firing at the police. He said that on that date at about 2:00 pm he was in his yard on Hudson Street Savanna la Mar. He left there and then went to

visit his girl friend. He said he did not know Sgt. Laing and had only seen him in and around Savanna la Mar.

9. David Palmer was called as a witness on behalf of Gayle. He said that on August 6, 2006 he had seen a man lying down in the road. This man was bleeding and had asked the police to help him. Palmer said he heard gunshots and the man got up and ran off. The learned trial judge found Palmer's story farfetched and described him as a liar.

10. Jermaine Clarke also gave evidence. He testified that on the 6th August 2006, he was not on Coke Street along with other men firing at the police. He said that on that date he was at his home and at about 2 pm or thereabouts he heard explosions.

11. Clarke further testified that in October 2006, he was held by the police in an arcade and taken into custody. One week after he was detained, the cell guard took him out of his cell and brought him around to the front. On his way to the front of the lock-up he saw Sgt. Laing who said to him "a you dem call Stamina"? He told him no and Laing walked away.

12. He was taken to Negril Police Station and was told that he would be placed on an identification parade. He said he was told by the officer in charge of the identification parade that the police had pointed him out. He also said that he was not given anything to sign after the parade ended.

13. Clarke denied under cross-examination that he was armed with a rifle on the 6th August. He also denied that he and other persons fired at the police and that during the exchange of gunfire he was pursued by the police and that he had escaped.

## The Grounds of Appeal

14. The applicants relied on their original ground of appeal that they were convicted on insufficient evidence. Mr. Brown was granted leave to argue five (5) supplementary grounds of appeal on their behalf.

**Ground 1.**

> "The learned trial judge erred in law in placing strong or any reliance on a particular aspect of the prosecution's case, to prove proper and positive identification of the appellants, viz, when the two police witnesses were on the road and the main police witness came "....from behind the building the second time", as he did not properly relate the law to the evidence. That the difficulty of the circumstances of the incident prohibited against any proper, reliable visual identification, whether by means of recognition or otherwise".

15. The Crown's case against both applicants was based on the visual identification of the eyewitnesses. The guidelines in **R. v. Turnbull** [1977] Q.B. 224 are therefore fundamental and oblige a trial judge to withdraw the case from the jury if in his opinion the identification evidence is poor; for example, in the case of a "fleeting glance or on a longer observation made in difficult circumstances."

16. The learned trial judge expressed the view that although there was an exchange of gunfire between the gunmen and police officers he was satisfied nonetheless to the

extent where he felt sure that Detective Sgt. Laing and Cons. Ricketts were able to make positive identifications of the applicants.

17. However, Mr. Brown, submitted that the learned judge did not properly relate the evidence to the applicable law on identification. He argued that the purported identification of both men occurred in very difficult conditions. In his written submissions Mr. Brown submitted that there was evidence of terrifying and no doubt distressing circumstances of the shootout incident so, the learned judge ought to have cautioned himself about the possibility of mistaken identification even though the Crown's case was based on recognition. He referred to and relied on the case of **R v Gladstone Hall** (1994) 31 JLR 386.

18. The evidence of Sgt. Laing reveals that the applicants were less than a chain away from him when he arrived on the scene and had proceeded to Coke Street. He was able to see the faces of both applicants because they had approached him whilst they walked abreast of each other. Their heads were not covered and Laing said that his view of the men was unobstructed. He also said that he had seen their faces for about four to five seconds before he took cover at the side of the building at the corner of Coke and Great George Streets.

19. Laing also testified that he had known the applicant Gayle for about seven years prior to August 6, 2006. During these years he had seen him between two to four times per week. He had last seen him in Savanna la Mar about two weeks prior to the

incident. Laing also said that he had first seen Clarke in or around January 2005 and had only known him by face. He said he had last seen him in August 2006.

20. Cons. Ricketts on the other hand did not know the applicant Clarke. The learned judge found that his evidence was valueless so far as Clarke was concerned.

21. Cons. Ricketts testified however, that he had known the applicant Gayle and that he was also called "Elephant". He said that when he and Sgt. Laing went on Coke Street he saw the men running "backwards and sideways" up Coke Street. The men had kept firing and the police returned the fire. One man ran on to Rodney Street and Gayle and the other man continued going up Coke Street and then made their escape when they turned on Hudson Street.

22. Cons. Ricketts said he had last seen Gayle about two weeks before the incident. He said he could have seen Gayle's face clearly when Gayle was on Coke Street. Nothing was covering his face and he saw it for about five (5) minutes. He had known Gayle for about three years before the incident and would see him at least once per week.

23. The learned judge directed himself on the issue of identification at pages 127 – 128 of the transcript as follows:

> ".....In this particular case, the evidence is exclusively that of visual identification in respect of the accused man Glenroy Gayle. The evidence of identification comes from Detective Sergeant Noel Laing and from Mr. Damion Ricketts. In respect of Jermaine Clarke,

> the evidence of identification comes from Detective Sergeant Noel Laing. There was some evidence being given by Mr. Ricketts, Constable Ricketts, concerning the identification of Mr. Clarke, but I do not propose to take that evidence from Mr. Ricketts into account in respect of Jermaine Clarke, for reasons which I will explain as I go along. So that essentially what we are down to, is the Prosecution sincerely relying on Mr. Laing to identify both accused and Mr. Ricketts to identify Glenroy Gayle.
>
> The fact that there are two witnesses here for the Prosecution, this is not a case of one witness corroborating the other. That is to say, the question relating to identification, the identifications are to be looked at separately and not as using one witness to corroborate the other, since in law, relating to identification, great care has to be exercised when examining the evidence, because there has been miscarriages of justice based upon mistaken identification and two, a witness can be an honest witness and is convincing because they are honest, but nonetheless is mistaken or unreliable when it comes to the question of identification and the fact that you have a number of witnesses purporting to identifying the same persons, does not preclude the possibility that all the witnesses may very well be mistaken and so, consequently, the identification of each witness needs to be examined separately".

24. The learned judge noted the conditions under which the witnesses made the identification of the applicants and said at p. 149:

> "Now, the fact that someone is firing at you does not precludes (sic) you that there is no inevitable logic that precludes the conclusion [sic]. It precludes you from recognising the person who is firing at you [sic]. I do not accept that line of reasoning at all so that, nonetheless, the question is still whether the police officers are reliable when they come to the question of identification..."

25. He also said at pages 150 - 151:

> "What is the evidence, is that from the police officer which I accept, is that when the men were retreating up Cooke Street at some point they were looking at the police at other points they were running from the police and other points they were there with their sides to the police officer. The police officers who are minded to fabricate, surely, they could have done a much better job (sic).
>
> These are experienced police officers, if they really wanted to tell lies on these men they could have chosen goodness so many ways, so many times to make the evidence better and to make the evidence of identification better than it is. So that notwithstanding that they were fired on by these men. I do not accept the submission that these were circumstances as such that it prevents Mr. Laing from making the identification of Mr. Gayle and Mr. Clarke".

26. At pages 138 - 139 he stated inter alia:

> "...when I saw the men they were alternately firing and running. He was running tactically. He came out of the box and demonstrated as to what he was doing or what he seem to be doing. Apparently some side to side movement that would prevent the persons that were aiming at him from having a steady target to hit.
>
> He says this running and shooting lasted about five minutes and they were firing four to five minutes and he was taking cover and by taking cover, moving tactically, so that the man could not aim at him. He was not hit that day and he says that the men were running, skipping, and walking backwards. Sometimes he saw the back, sometimes he saw the sides..."

27. The judge concluded that the circumstances of the recognition did not amount to a fleeting glance situation. He said that the incident had occurred at 2:30 pm, the men

were not wearing any head gears, they were known to the police and there was nothing to obstruct the view of the police when they were seen on Coke Street. The judge also said that the identification parade that was held for the applicant Clarke, was fair and that there was really no challenge of the police officers' evidence about the holding of the parade. He also said that he was satisfied to the extent where he felt sure that the identification parade was properly conducted and that it presented a fair and reliable test of Sgt. Laing's ability to identify the person that he said he saw on Coke Street on the 6th August 2006.

28. We have thoroughly examined the evidence in the record and are of the view that although the learned trial judge did not say that the possibility of error must have been enhanced by the terrifying and distressing circumstances of the incident, the warning which he gave concerning the approach to evidence of visual identification was adequate in the circumstances of the case. In our judgment, the tenacious manner in which both Sgt. Laing and Cons. Ricketts fought off the gunmen in order to survive is a clear indication that they were not overwhelmed by the situation. We do not find any merit in Ground 1 and it therefore fails.

**Ground 2**

> "The learned trial judge erred in law when in the analysis of the identification evidence of prior knowledge and at the time of the incident, he misdirected or failed to properly or at all direct himself on the applicable laws and/or guidelines, generally regarding visual identification. That in the alternative, he erred in wrongly relying on the

> evidence of the recovery of spent shells as grounding the identification of the appellants".

29. Mr. Brown submitted that while the judge may have been aware of the caution necessary in dealing with identification evidence, he had failed to fully or adequately demonstrate that caution in his summing up. He referred to **R v Turnbull and Others** [1977] QB 224 at pages 228 – 231; **Mark Anthony Capron v Regina** Privy Council Appeal No. 32 of 2005 and **Reid (Junior) v Regina** [1990] 1 AC 1242. He also submitted that the learned judge ought to have given the general warning that even in recognition cases an honest witness could be mistaken. He referred to **Beckford and Others v Regina** (1993) 97 Cr. App. R 1409; **Regina v Hugh Modest and Another** (1991) 28 JLR 286 and **Regina v Dorr Campbell** (1992) 29 JLR 256.

30. Mr. Brown also submitted that the learned judge had erred in law when he failed to properly take into account the following:

(i) "the faultiness of the visual identification";

(ii) the weaknesses in the prosecution's case and;

(iii) the fact that the identification parade was held almost three months after the date of the incident.

31. We are of the view that there is no merit in these submissions. We have observed that the learned judge went through the evidence meticulously. This is readily seen from the directions (supra) when he summed up the case. He did highlight the dangers of visual identification and demonstrated in language that was clear that he had taken into account the weaknesses which arose on the evidence presented by the

prosecution. We are further of the view, that although the learned judge in directing himself did not use the words in relation to the possibility of a mistaken recognition, he had adequately directed himself on the risk of a mistaken identification.

32. The alternative argument in respect of ground 2(b) is clearly without merit. Mr. Brown submitted that the learned judge could not properly rely on the recovery of spent shells as supportive of any reliable identification of the applicants since no guns were recovered. Furthermore, he said that there was no ballistic report and that the men's hands were not tested for gunpowder residue. We are of the view that Counsel has misread the directions given by the learned judge and has taken them out of context. This is what the learned judge said at pages 152 -154:

> "...There is the evidence of recovery of spent shells. Those spent shells might not necessarily be during this exchange since the police officers testimony is that when they came down in the vicinity of the intersection they heard gunshots.
>
> So in coming to my conclusion again, in terms of identification, the period of time that I would be relying on is when Mr. Laing and Mr. Ricketts came from behind this building and went out on to Coke Street and the men were going up Coke Street and going along in the way that they said they were. So I therefore find Mr. Gayle and Mr. Clarke guilty on both counts of this indictment, illegal possession of firearm and shooting with intent at these police officers".

**Ground 3**

> "The learned trial judge erred in law and wrongly failed to properly consider the appellants' defences, in particular the evidence of the witness David Palmer and the appellant David Jermaine Clarke's evidence of exposure and the resultant faulty/tainted identification at his identification parade. In the alternative, that the learned trial judge erred

> in law by wrongly accepting on the evidence, that the identification parade held presented, "a fair, accurate and reliable test" of the main witness's identification of the appellant Clarke".

**The Applicant Gayle**

33. Mr. Brown submitted on behalf of the applicant Gayle, that the learned trial judge ought to have specifically referred to the salient features of the defence and to make a proper analysis of that defence. He referred to **R v Phillip Gillies** (1992) 29 JLR 167. In his written submissions he stated as follows:

(i) "The learned trial judge made no attempt to "properly analyse or reference" at all the substance of the applicant Gayle's evidence, save and except to seek to detrimentally link evidence given by him of a recent knee injury to a "limp" observed by the main witness Laing;

(ii) The learned judge wrongly/summarily dismissed the evidence of Gayle's witness and branding him "a total liar";

34. The record reveals that at the trial, Counsel for Gayle asked him ten questions during his examination in chief. His responses were extremely brief and his defence is summarized as follows:

> He was an electrician and on the 6th August at about 2:00 pm, he left his yard to visit his girl friend. He was asked if he knew Sgt. Laing and he said, "Yes, I see him". He denied that he was firing at Laing on Coke Street at about 2:30 pm on the 6th August.

35. We have examined the judge's summing up with great care and find that there is really no merit in relation to (i) above. Counsel's main objection, it would seem, concerned the comment made by the learned judge when he described David Palmer,

the applicant's witness, as a "total liar". He submitted that the learned judge should have directed himself that if Palmer's evidence in totality, raised a reasonable doubt about the applicant's guilt, he should acquit. He also submitted that Palmer had given a written statement to the police two days after the incident had occurred and that this statement was similar in all respects to his evidence at the trial but the prosecution had declined to use that statement.

36. In his summing-up the learned judge said at page 146:

> "According to Mr. Palmer, he is at 12 Coke Street, fisherman, apparently just come in from fishing, heard loud explosion like gunshot. He heard one explosion, then he saw a fellow who was apparently shot or injured somewhere in the neck, first went up to Great Georges Street.
>
> "A couple of us went to assist him." He did not see any police officers at that time.
>
> Eventually the police officers came. He recognized Mr. Laing. He came in front of Sinclair's Bargain Center. One person come up Coke Street firing shots. "We ran away from the persons. The man who was there, that is the man in the street, got up and ran." So here we have a sharp difference between Mr. Palmer and the police officers, particularly Mr. Laing, because what Mr. Laing is saying, is that when he got there, there was a man already lying in the road, apparently covered in blood and the first time that he went out from this building where he said he saw the men, that is, let's call that the first sighting, the men fired on him. He came back around, put his hand around, started firing in the direction of the men. The man, according to Mr. Laing, is still lying on the road and it is during that exchange that the man is calling out to the police to help him, help him, not to leave him because the men are coming to kill him and so on and so forth.

37. And at page 148 he said:

> "Now, I have no reason to disbelieve the officer's account in that regard. I reject Mr. Palmer's evidence and find that he is lying when he said this man got up and run and what the police indicated and I accept this evidence. This man, was apparently bleeding heavily and was unable to do so because during the initial exchange between Mr. Laing and the men this man was still there. Mr. Palmer is a total liar. I reject his evidence so that I do not accept him at all".

38. The question we have to decide is whether or not the reference to Palmer when he was described as a "total liar" by the trial judge, operated unfairly against the applicant.

39. In **R v Horace Willock** SCCA 76/86 delivered May 15, 1987 it was held that 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.

40. We are of the view that the case of **Regina v Rohan Ricketts and Errol Williams** (1993) 30 JLR 144 can be of assistance in determining how we should treat the comment made by the learned judge. The head note reads as follows:

> "The deceased was killed by pellets from a shotgun as the result of being shot at night in a lane. The prosecution's chief witness identified the applicant W as the man who shot him and the applicant R as being armed and present. One of the defence witnesses gave evidence of seeing 3 men in the lane before the incident and none of these being the applicants; of the poor lighting in the lane; and of his

brother, the applicant W, being at home at the time of the shooting.

In his summing up to the jury, the trial judge said; "It seems to me that he (the defence witness) was a pathetic liar, but it is not what I think, you are the one that must say what you make of his testimony." The applicants were convicted and appealed on several grounds including that the judge's comments exceeded the bounds of permissible comment.

Held - a trial judge has the right to make comments, even strong ones on the evidence, so long as he makes it clear to the jury that they are under no burden to act upon his views; there are, however, limits to such comments, one such being situations where the comment made is unwarranted on the facts. In the instant case, the trial judge's comment was unwarranted as there is nothing in the testimony of the defence witness to substantiate this; he overstepped the lines of proper judicial comment and this must have had the effect of prejudicing the appellant's case. The fact that he also reminded the jury to form their own conclusions is of no consequence".

41. Forte J.A (as he then was) said at page 146:

"This Court, in several cases, have from time to time approved the right of a trial judge to make comments, even strong comments, on the evidence so long as he makes it clear to the jury that they are under no burden to act upon his views but must come to a finding of facts, based on their own view of the evidence. There are of course limits to such comments, and where the comment tends to ridicule the defence, or to suggest that there is some burden on the accused to prove his innocence, or erodes the defence, or is unwarranted on the facts, the judge would have overstepped the lines of proper judicial comment. (See **R. v. Dave Robinson** S.C.C.A. 146/89 (unreported) delivered 29th April, 1990 per Carey, J.A.). The comments must not be such as would inordinately affect the independent assessment of the jury of the evidence which they have heard. (See **R. v. Anthony Sterling** S.C.C.A. 78/86 (unreported) delivered 25th March, 1988 per White, J.A.).

42. The question to consider in the instant case, is whether there was any justification for the trial judge's expressed opinion of the witness. The learned judge who is sitting as judge and jury in the instant case said he found no reason to disbelieve Sgt. Laing's account about seeing the injured man who was covered in blood lying in the road during the exchange of gunfire between the police and the applicants. The learned judge rejected the evidence of Gayle's witness because he found him to be lying. He might have used strong language but the record does not reveal that he had summarily dismissed Palmer's evidence. He had considered both the prosecution and defence witnesses before arriving at his decision. Certainly, as the tribunal of fact he 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. We therefore find no merit in this ground argued on behalf of the applicant Gayle.

**The Applicant Clarke**

43. The first question we have to ask is: was the summing up of the case in relation to the applicant Clarke fair and adequate? We do not expect that a judge sitting alone will give as long and detailed directions as when sitting with a jury. However, he is expected to use language which demonstrates his knowledge of the law and to correctly apply the facts that have been proved to the law. It is also well settled that a judge does not have to repeat all of the defence arguments, but he must always place the defence case fairly when he sits as judge and jury. See: **Regina v. Hugh Modest and Baldwin Parchment** (1991) 28 JLR 286.

44. In the present case, Counsel for Clarke submitted that the learned judge had failed to properly analyse the evidence and defence of this applicant, and that this had caused the summing-up to be imbalanced and unreasonable. We are of the view however, that whatever defects there might have been in the summing up process, they have not caused the fairness of the trial as it relates to the applicant Clarke, to be in doubt.

45. Mr. Brown further argued that the identification of Clarke by Sgt. Laing was tainted and unreliable having regard to Clarke's exposure to the sergeant before the identification parade was held and the fact that he had asked the applicant if his name was "Stammer". He submitted that the learned trial judge was in error when he stated that, *"...I do not accept that evidence at all. I reject it totally and completely"* because he had failed to properly or at all consider and assess the following:

"1. Sgt. Laing had testified that he had learnt the name of Clarke sometime after the incident but no evidence was adduced by the prosecution how he came by it;

2. Clarke had come to be in custody for a different matter and was informed by the investigating officer that he was to face an identification parade in respect of the instant matter;

3. That at the parade, Sgt. Laing said in evidence that he had identified the applicant Clarke and had said, "*His name is Clarke, Stammer, Sir*". Mr. Brown argued that the judge had "failed to enquire and adjudicate upon how did the officer come by this information by or at the I.D parade, especially in light of the appellant's evidence and defence of exposure"?

4. That it was elicited from Sgt. Laing under cross-examination that he had said that from the time of the incident he was "...looking for ... him, Jermaine Clarke and Smiley and Stammer"

46. Mr. Brown therefore submitted that when all of the above matters are taken into consideration, it would not have been safe for the learned judge to have relied on the evidence in relation to the identification parade where the applicant had been pointed out by Sgt. Laing.

47. We say that the issues raised at (1) and (2) supra, are really not relevant in respect of what the learned judge was called upon to decide in the case. The issue raised at (3) supra, is in our view taken out of context so far as the evidence is concerned. At pages 18 – 19 of the record the evidence of Sgt. Laing reads as follows:

> "Q. Now, Sergeant Laing, do you recall the 30th of October 2006?
>
> A. Yes, sir.
>
> Q. Can you tell us, what if anything you recalled about that day?
>
> A. Yes, sir, I went on an identification parade at the Negril Police Station.
>
> Q. And what was your purpose on that parade.
>
> A. To identify a man who had shot at me on the 6th of August on Cook Street, sir, Savanna-la-mar.
>
> Q. And can you tell us what transpired on that parade.
>
> A. Yes, sir I went in the parade room, sir, and I was told to look along the line up of men that was in the parade room and I was told that if I saw the person I should point him out sir. I did look along the line of men and I saw the man and pointed him out under number eight.

Q. And this person at number eight, did you learn the name of this person standing under number eight?

A. Yes, sir.

Q. And what is his name?

A. His name is Clarke, Stammer, sir.

Q. So, this person, Stammer, you know him by another name or any other name?

A. Jermaine Clarke, sir.

Q. Now, this person, Jermaine Clarke, you see that person in court today?

A. Yes, sir, he is sitting next to Glenroy Gayle".

48. Having read and considered that evidence, we do not think that Sgt. Laing was saying that he had known the applicant Clarke by name or alias at the time that the identification parade was held. He was asked by Counsel for the prosecution whether he had learnt of the person's name who he had pointed out. He said yes and he gave the names. He then identified the applicant sitting in court as the man who he learnt was Jermaine Clarke, also called "Stammer".

49. We have been able to discern from the record that Sgt. Laing had testified from the very outset, that three men had fired shots at the police during the afternoon of August 6, 2006. They were Glenroy Gayle also known as "Elephant", Alexis Whyte otherwise known as "Smiley" and the applicant Clarke who he had seen on occasions but was not known to him by name. It was suggested to the witness by Counsel for the applicants that "from the 8th of August, or from the time of the incident you have been

looking for a different man, not Mr. Jermaine Clarke". His response was: "I know who I was looking for sir, him, Jermaine Clarke and Smiley and Stammer". That answer would suggest that he was looking for three men, Clarke, Smiley and Stammer but this would have been in conflict with his earlier evidence that it was Smiley, Elephant and another man who he did not know by name but who he later learnt was Jermaine Clarke that had committed the acts of shooting and had made their escape. We are of the view that there is either a typographical error when it is recorded that Laing was looking for Clarke, Smiley and Stammer, or Laing was misspeaking when he said Stammer in addition to the other two men. One has to bear in mind that he had said that Clarke was also known as "Stammer". We also find no merit in this ground argued on behalf of Clarke. Ground 3, therefore fails.

**Ground 4**

> "That the learned trial judge erred in law by not discharging the appellant upon his own conclusion/finding that there was a significant material difference in the descriptions of the perpetrator purportedly identified as Jermaine Clarke and the appellant Jermaine Clarke. That mistaken identity was manifestly evident."

50. The major concern in this ground of appeal is that the applicant Clarke who was sought by the police was described by Laing as someone of "brown" complexion but the person whom he pointed out and identified in Court as Jermaine Clarke, was of "dark" complexion. Mr. Brown submitted that the learned judge himself had recognised this defect in the evidence and that this description of Clarke must of necessity place grave doubt on the reliability of the evidence of Det. Sgt. Laing. At page 139 of the record the learned judge said inter alia:

> "....Sometimes he saw the back, sometimes he saw the sides and then now comes the critical part as far as Mr. Brown also is concerned where he said he saw in his statement he saw a brown complexion man and it was being suggested that that is a material difference in the description between the man who appears before the court now and the statement given by the police, soon after the incident..."

51. During cross-examination of Sgt. Laing the following suggestion was put to him by Mr. Brown:

> "...I am putting it to you sir, that the man whose name you did not know but you say was of brown complexion".

Sgt. Laing responded:

> "A. Brown, but a him same one.
>
> Q. Sir?
>
> A. Brown, but a him same one sir, even on the identification parade him brown.
>
> Q. Mr. Laing?
>
> A. Say him was brown.
>
> Q. Mr. Laing, I am asking you, well, I am suggesting that the man that you saw, according to you, running on the road was of brown complexion?
>
> A. Yes, sir I am saying that sir, of course..."

52. It is quite obvious that the learned trial judge had treated the evidence concerning the complexion of the applicant Clarke seriously. He described it as "the critical part as far as Mr. Brown (also) is concerned...". Having considered the evidence which was before him the learned judge had warned himself of the dangers relative to visual identification evidence. We are therefore completely in agreement with Miss

Pyke, Counsel for the Crown, when she submitted that once Sgt. Laing was considered a credible and reliable witness then the learned judge could safely act upon his evidence.

53. It is abundantly clear that the learned judge had borne in mind the Turnbull guidelines and had alerted himself to the weaknesses in the evidence adduced on behalf of the prosecution. This ground of appeal also fails.

**Ground 5**

> "That the sentences of the Court were manifestly excessive. The learned trial judge erred in principle and law in sentencing the appellants by wrongly prejudiced (sic) his mind with respect to the sentencing of the appellants by solely focussing on the nature of the offences and not on the accused men and/or the relative quality of their antecedents."

54. We do not find that the learned trial judge applied any wrong test when he imposed the sentences. The sentences are well within the ranges which are normally handed down for offences of this nature. We will refer to a few of the decisions of this Court in order to demonstrate the point. In **R v Ian McDonald** SCCA 202/01 delivered 31st July 2003, the appellant was sentenced to 10 years imprisonment for illegal possession of firearm and 12 years imprisonment in respect of shooting with intent. In **R v Kerrick Thompson** SCCA 206/01 delivered December 20, 2004 the appellant was convicted of illegal possession of firearm and shooting with intent and was sentenced to imprisonment for 10 and 15 years respectively. In **R v Clovis Patterson** SCCA 81/04 delivered 20th April 2007 the appellant was convicted of illegal possession of firearm and shooting with intent and was sentenced to imprisonment of 13 years on each count.

We can find no reasons therefore to interfere with the sentences imposed by the learned judge in the instant case. This ground also fails.

**Conclusion**

55. We have treated the applications for leave to appeal against the convictions and sentences of the applicants as the hearing of the appeal. For the reasons set out above, the appeals are dismissed. The convictions and sentences are affirmed and sentence shall commence as of the 21st June 2007.