JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS. 4 & 7/2004

BEFORE: **THE HON. MR JUSTICE SMITH, J.A.**
THE HON. MR JUSTICE COOKE, J.A.
THE HON. MR JUSTICE MORRISON, J.A.

BRUCE GOLDING
DAMION LOWE

V

REGINA

Leroy Equiano for the 1st applicant

Hugh Wilson and Delano Franklyn for the 2nd applicant

Miss Maxine Jackson, Crown Counsel, for the Crown

8, 9, and 10 July and 18 December 2009

MORRISON, J.A.:

Introduction

1. On 18 December 2003, after a trial in the Home Circuit Court lasting 16 days before Norma McIntosh J and a jury, the applicants were both convicted of murder. They were each sentenced to imprisonment for life, with a direction that they should not be eligible for parole within a period of 30 years from the date of conviction. Their applications for leave to appeal were considered by a single judge of this court and refused, and

they have accordingly both renewed their applications before the court itself.

2. The applicants were charged with the murder of Mr Conroy Blake ("the deceased") on 3 December 2001, in the parish of St Andrew. Both applicants pleaded not guilty to the charge. As at the trial, the main issue on these applications is the question of identification.

The case for the prosecution

3. The prosecution's case was that at some time after 10:30 p.m. on the night of 3 December 2001, the deceased, his cousin Mr Junior Bowes and their friend, Mr Horace Hall were on their way home to Mount Salus, part of the Mannings Hill district in the parish of St Andrew. They travelled from Stony Hill to Guava Gap by taxi and then set out on foot along the Mannings Hill main road in the direction of the Mannings Hill square. After passing through the square, they continued walking ("down the hill") in the direction of Mount Salus. While on their way, the deceased said something which attracted the attention of the others to a group of four men walking about 25 feet behind them in the same direction in which they were headed. Mr Bowes recognised all four of these men as persons whom he knew before, three of them by the names, "Damion", "Bear" and "Las" and he described the fourth, who he knew by sight, but not by name, as "a brown Ras". In court, he identified the first applicant (Mr

Damion Lowe) as "Damion" and the second applicant (Mr Bruce Golding) as "Bear".

4. All four men, were armed, according to Mr Bowes' account, with guns in their hands, Damion and Las with handguns, Bear and the Ras with shotguns. Mr Bowes, who had turned around to look behind when the deceased had spoken, told the court that he was able to see the men clearly because they were "right under the street light" and he had them all in his sight at that point for about a minute and a half. Damion had a handkerchief tied around his forehead and knotted at the back of his head but, Mr Bowes insisted, he was able to see him by the light from the streetlight and he was also able to make out "Bear" by the same means.

5. It is at that point, Mr Bowes continued, that he heard "the first shot", whereupon the deceased ran off down the hill, as did he, and Mr Hall went off the road into the bushes somewhere. As he and the deceased ran down the hill, Mr Bowes said, he kept looking back and observed Damion and the Ras coming down, some 40 feet behind them, by the light of another streetlight closer to the bottom of the road, perhaps about 32 feet from where he and the deceased were. Just then, he heard further explosions (there were four or five in all, he said), whereupon he saw the deceased, who appeared to have been hit and injured, continue to run down the road for some distance before falling at the bottom of the road close to the intersection with Mount Salus Road. Mr

Bowes' evidence was that he had Damion under observation for about half a minute during this chase down the road. After the deceased had fallen, Mr Bowes continued running until he got to the nearby home of a relative of his, where he remained for a little while before traveling by car to the Stony Hill Police Station, where he made a report of what had happened. He later returned to the scene, where he saw the deceased lying in the road bleeding from his mouth. There was no sign of any of the four gunmen. He remained there until police officers arrived and the deceased's lifeless body was removed.

6. Damion had been known to Mr Bowes for several years before this incident ("from him a youth"). They lived in the same area, he would see him perhaps five or six times per month and he was able to say where Damion lived and to identify Damion's mother and stepfather by name ("Charmaine" and "Joko"). "Bear" he had also known for several years ("from him a youth, little youth") and he would usually see him once per week. He also knew where "Bear" lived, knew his father by the name "Fire" and that his surname was Golding. He was accustomed to telling both Damion and "Bear" "howdy", whenever he saw them.

7. On 2 January 2002 and 19 January 2002 respectively, Mr Bowes identified both Damion and "Bear" on identification parades at the Constant Spring Police Station.

8. When he was cross-examined, Mr Bowes agreed that he may have overstated the position when he said that he had been able to observe the men for as much as a minute and a half in the first instance and then for another half a minute after hearing the first shot, saying in respect of both periods that "I guess it wasn't so long". However, he was insistent that he had taken "a good look" at the men, though he "wasn't timing it". Pressed some more as to how long the entire incident lasted, he stated that it was "a couple seconds" and finally, in re-examination, with the help of counsel's watch, he put both periods of observation at about five seconds each, though he continued to insist that he was not "timing" the events as they unfolded.

9. Mr Hall generally supported Mr Bowes' account of what had happened on that night. His evidence was also that he saw four men coming down the hill behind the group of himself, Mr Bowes and the deceased, but he was only able to recognize Damion, "Bear" and "this rasta brown guy". On his account, three of the men were armed with guns in their hands, Damion with "a small gun", "Bear" and the Ras each with a "long gun". He had known Damion for 18 years before the incident, he knew where he lived and he was accustomed to seeing him on weekends in Mount Salus. He also knew Damion's mother and stepfather by name. With regard to "Bear", Mr Hall had known him for some 22 years before the incident, he knew where he lived and he knew

his father and mother, as well as his sister and brother. "Bear" was someone he was accustomed to greeting by raising his hand or "shaking" his head.

10. Mr Hall also said that the area was well lit on the night in question and that he had had an unobstructed view of the men. After another exercise again involving the use of counsel's watch, he estimated the period during which he had the men under observation, while looking back at them as they proceeded down the hill, to be 48 seconds. He also gave an estimate of having observed Damion and "Bear" for 25 seconds each.

11. After the first shot was fired, and the deceased and Mr Bowes started to run down the hill, Mr Hall ran off into the bushes at the side of the road, where he remained, hearing several more shots, until he eventually heard the sound of vehicles passing up and down on the road and "people bawling for murder". By the time he emerged from the bushes and continued down to the intersection with Mount Salus Road, he saw the deceased's motionless body lying there, bleeding from the mouth and ears.

12. Mr Hall also attended identification parades at the Constant Spring Police Station on two occasions, pointing out "Bear" at the first, but failing to point out anyone at the second. He attributed his failure to identify

anyone at the second parade to the fact that the faces of all nine men in the parade "were white up".

13. Both Messrs Bowes and Hall were minutely cross-examined as to various inconsistencies and discrepancies in their evidence, particularly in relation to their police statements, as well as the state of the lighting and the physical layout of the area between Mannings Hill square and the Mount Salus Road.

14. Also giving evidence for the Crown was Mr Andre Blake, the brother of the deceased and also a long time resident of Mount Salus. His evidence was that on the morning of 3 December 2001, he and the deceased had left home together on foot at about 8:30 a.m. They were headed for the bus stop, where they hoped to catch the bus to Mannings Hill and Guava Gap. They were actually walking away from the bus terminus, which was at Mount Salus, but because they were late they set out to meet the bus to ensure that they would be able to obtain a seat. While walking, a taxi-cab came along headed in the opposite direction (towards Mount Salus) and the deceased got into it, leaving Mr Blake to continue walking alone towards Mannings Hill.

15. As he walked along, he saw "Bear" (by which name the applicant Golding was also known to him) standing in front of a shop. As he approached him, "Bear" walked off in the direction of Guava Gap. Mr Blake continued on his way, passing the shop where he had seen "Bear"

and, as he proceeded further along the road past a house on the corner, he looked behind him and saw "Bear", another man known to him as "Judah" and yet another man known to him as Damion or "Redman". All three men were in company with another man known to Mr Blake as "Tazza". Damion, Juda and Tazza were armed with cutlasses, while "Bear" was "holding on to his waist". The men were coming towards him, at first walking and then, after he started to run, running after him. The taxi-cab which the deceased had taken was at that point coming back in the direction in which Mr Blake, pursued by the four men, was running and, as it came alongside him, the deceased alighted and started to run with him. The four men continued to chase Mr Blake and the deceased until a lady stepped out of a shop near to the road and stopped the men, saying "What unno a run down the youth dem fah?" Damion it was, according to Mr Blake, who replied saying "we must pass back later", and all four men then turned back, whereupon Mr Blake and the deceased proceeded to catch a bus to Stony Hill, where they made a report at the police station.

16. Mr Blake's evidence was that both applicants had also been known to him for a long time, Damion "from him small growing up" and "Bear" "from school days". He had never had any dispute with either of them before that day. Cross-examined on behalf of the applicant Lowe, Mr Blake rejected the suggestion that he (the applicant) was not one of the

four men who chased himself and his brother on the morning of 3 December 2001 and he also denied that he was deliberately implicating the applicant because he had decided to build up a case against him at some point after his brother Conroy's death. Cross-examined on behalf of the applicant Golding, it was also put to Mr Blake that Mr Golding was not present at all on the morning of 3 December 2001, and was not one of the four men who allegedly gave chase to Mr Blake and his brother that morning. Several alleged inconsistencies were also put to this witness on behalf of both applicants and, in respect of the applicant Golding, he did accept that he was mistaken when he had said that on the morning of 3 December 2001 he had seen him "holding up his waist". According to him, he had mixed this up with a previous occasion when a group of men had also given chase to himself and his brother.

17. Dr Kadiyale Prasad, a registered medical practitioner and Consultant Forensic Pathologist, gave evidence that the deceased had died from injuries caused by a single gunshot wound to his chest. There was an absence of gunpowder deposition, the significance of which was that the distance between the muzzle of the gun and the victim was more than two feet. From the injuries seen by him on post mortem examination, Dr Prasad's opinion was that death would have occurred between two to five minutes. The trajectory of the bullet after entering the body was "upwards, forwards and to the right", indicating that the firearm would

have been at an angle to the body, pointing upward, at the point of discharge.

18. Detective Corporal Mark Foster was the investigating officer (he had by the time of the trial been promoted to the rank of Corporal). At about 11:30 p.m. on the night of 3 December 2001, he was on duty at the Constant Spring Police Station and, in response to a telephone call from the Stony Hill Police Station, he went to Mannings Hill district. At the intersection of Mannings Hill Road and Mount Salus Road, he observed the body of a man lying on his back in a pool of blood in the roadway. This body was in due course identified as the body of Conroy Blake. Corporal Foster observed three street lights between that intersection and Mannings Hill square (where there were two shops and a telephone booth along the roadway). Two of the street lights were on the left (looking up towards the square) and one on the right, and all three lights were on. The first street light on the left was actually at the intersection of the Mannings Hill and Mount Salus roads.

19. Detective Corporal Foster's investigations in due course led him to procure warrants of arrest for four men, Damion o/c Brownman, "Bear", Brownman (all of Mannings Hill) and "Lus" of Kingswood District. Subsequently both applicants were taken into custody, placed on identification parades and ultimately charged with the murder of Conroy Blake on 3 December 2001. After caution, the applicant Lowe, allegedly

said "officer, a people waan sen mi go a prison", while the applicant Golding allegedly said "A nuh mi sah". Corporal Foster's evidence was that both men were placed on identification parades because the witnesses from whom statements had been taken had only used aliases in describing them. The other two men were never found.

20. Sergeant Dennis Needham conducted two identification parades on 4 January 2002 at the Constant Spring Police Station in respect of the applicant Lowe. The applicant, who was represented on the parade by counsel of his choice (Mr Hugh Faulkner), was identified by Mr Bowes as one of the four men at the scene of the killing of the deceased on 3 December 2001. However, on the second parade conducted on that day, the applicant was not identified by Mr Horace Hall.

21. The applicant Lowe had certain blemishes ("black spots") on his face which were covered by toothpaste "applied lightly" to his face and the same was done in respect of each of the volunteers on the parade. This, Sergeant Needham testified, was standard procedure in respect of a suspect with blemishes on his face "which the other volunteers did not have".

22. When he was cross-examined on behalf of the applicant Lowe, Sergeant Needham accepted that of the nine men (including the applicant) on the parade, seven were described as being "black" in complexion and two were described as being "brown", the applicant

being one of the latter two persons. Despite initially resisting the further suggestion by counsel that these latter two persons "would have stood out on the parade because of the difference in their complexion from the other seven", Sergeant Needham appears in the end to have accepted that in that line-up a person such as the applicant Lowe "would stand out".

23. Corporal Osmond Osbourne, who was stationed at the Constant Spring Police Station at the time, also gave evidence for the prosecution. On 2 January 2002, he assisted Sergeant Needham with the conduct of an identification parade held in respect of the applicant Lowe and on 19 January 2002 he also assisted Sergeant Colquhoun (who died before the trial) with a similar exercise in respect of the applicant Golding. He was specifically responsible for completing the identification parade forms.

24. Corporal Osbourne testified that he had made an error in completing the forms relating to the first parade held on 2 January 2002, in that he had recorded one of the volunteers in the line-up as "brown" in one and as "black" on the other. This error could have been due, he said, to his own "bad judgment as to his complexion". Cross-examined on behalf of this applicant, Corporal Osbourne agreed that he had recorded the applicant's height as being five feet, eleven inches and that there were at least two volunteers on the parade whose height was recorded as being five feet, six inches and another whose height was recorded as

being five feet, eight inches. He also agreed that on the first parade in respect of this applicant (at which Mr Bowes was the witness), there were two men recorded as being of brown complexion (one of whom was the applicant), with the other seven recorded as being of black complexion. However, in relation to the second parade held that day in respect of this applicant (at which Mr Hall was the witness), Corporal Osbourne also agreed that, the parade having been made up of the same set of men as on the first, he had recorded four of them as being of brown complexion and five as being of black complexion. In both instances, Corporal Osbourne told the court, he had exercised his "best judgment" in assessing the men's complexion.

25. Corporal Osbourne confirmed that, on the first of these parades, the applicant Lowe had been pointed out by Mr Bowes, but that, on the second, Mr Hall had failed to point out anyone. He also confirmed that all the men on the parade had had toothpaste applied to their faces, though he again agreed that he had not recorded this detail on the identification parade forms, leading counsel for this applicant to suggest to him that he had "failed miserably" in his duty to ensure that all important matters on the parades were properly recorded.

26. On 19 January 2002, Corporal Osbourne also assisted in the conduct of the identification parade in respect of the applicant Golding. This applicant was also represented at the parade by counsel (Mr Peter

Champagnie). This applicant was identified on this parade by both Mr Bowes and Mr Hall one of the attackers at Mount Salus on 3 December 2001. Corporal Osbourne was also extensively cross-examined on behalf of this applicant, as regards different heights recorded by him in respect of the same volunteer on both the parades of 2 and 19 January, as well as different complexions. He agreed that this applicant was the shortest person on this parade and that he was one of the two persons who he described as being of brown complexion. He also agreed that those factors might make a suspect "stand out".

27. That was the case for the Crown, at the end of which no-case submissions were made on behalf of both applicants. The learned trial judge ruled against the submissions and they were accordingly both called upon to state their defences.

The case for the defence

28. The applicant Lowe gave sworn evidence, in which he told the court that on 4 December 2001, he had voluntarily turned himself in to the Stony Hill Police Station, having heard that it was being said that he was implicated in the murder of Conroy Blake. He denied having been a member of the group of men who, armed with machetes, had chased Andre and Conroy Blake at 8:30 a.m. on the morning of 3 December 2001. He testified that he had been at school (at the Institute of Higher Learning, in Cross Roads) at that time. On his return home from school

that evening he had had dinner with his aunt and his cousin, with whom he was at the time living in the Waltham Park/Molynes Road area and watched the evening news on television before going to bed in the usual way. He denied being one of the group of men who attacked and killed Conroy Blake on the night of 3 December 2001.

29. That was the case for the applicant Lowe. At that point, counsel for the prosecution sought and was granted permission from the court to call a witness in rebuttal. That witness was Mr Donovan Isaacs, the principal of the Institute of Higher Learning, which he described as an independent high school offering a number of courses. The school was located at 74 Slipe Road, Cross Roads, and had been at that location since 1997. Mr Isaacs confirmed that the applicant Lowe had in fact been registered as a student at the school in Form 4B during the Christmas term (October to December) 2001, but the school's attendance records showed him as being absent from school between 11 October to 11 December 2001. Specifically, the records showed him as having been absent on 3 December 2001. However, Mr Isaacs could not recall ever having met this applicant personally and the evidence was that these records were not kept by him, but by the form teacher assigned to Form 4B.

30. The applicant Golding chose to make an unsworn statement from the dock. He too denied giving chase to anyone, either on the morning of 3 December 2001 or later that evening, as the prosecution witnesses

had alleged. He was, he told the court, not a gunman, but "a working youth".

31. The jury by its verdict accepted the case for the prosecution and rejected the defence of both applicants. Both applicants were sentenced to life imprisonment with a recommendation that they should each serve 30 years before being eligible for parole.

The appeal

32. On behalf of the applicant Lowe, Mr Hugh Wilson sought and obtained leave to argue two supplemental grounds of appeal (in substitution for the original grounds filed) as follows:

> "1. The learned trial judge erred in law by failing to withdraw the case from the jury having regard to the poor quality of the visual identification evidence.
>
> 2. The learned trial judge erred in law by rejecting the no-case submission made on behalf of the appellant and, in so doing, applied the wrong test in determining whether or not the case should be left to the jury for its consideration."

33. In support of these grounds, we were referred by Mr Wilson to a number of "specific weaknesses" in the evidence of both Messrs Bowes and Hall, the cumulative effect of which, it was submitted, "undermined the reliability and quality of the identification evidence". Upon a proper analysis of these weaknesses, Mr Wilson submitted, the learned trial judge should have withdrawn the case from the jury, albeit that it was a recognition case, on the basis of the poor quality of that evidence. In this

regard, he relied heavily on ***R v Turnbull*** [1976] 3 All ER 549 and also drew the court's attention to a number of subsequent decisions of this court and of the Privy Council to make the point that the judge ought to have withdrawn the case from the jury and directed a verdict of acquittal.

34. In order to make good these submissions, Mr Wilson himself undertook the "critical assessment" of the evidence of Mr Bowes and Mr Hall which, he contended, the judge had failed to do. In relation to Mr Bowes' evidence, Mr Wilson identified nine weaknesses as follows:

> "a. He testified that the deceased told him something and as a result he looked behind him and saw four men, including the appellant, all armed with firearms. Two of the men were on the right side of the road, and two of them on the left side. He recognized the men who were standing under a street light and saw them for 1½ minutes. Under cross-examination he said that he saw the appellant for 30 seconds. When re-examined he said he saw the men for five seconds. **See p.222 of transcript.**
>
> b. The purported recognition of the appellant was made in difficult circumstances. The sudden appearance of the group of men, carrying firearms, who subsequently fatally shot the deceased must have been a frightening experience for Bowes, which no doubt, would have affected the accuracy and reliability of the recognition identification. See **Anthony Bernard v Queen (1994) 31 J.L.R 149.**
>
> c. He confessed that he had a memory problem
>
> d. There were fundamental material inconsistencies and discrepancies in the

> evidence he gave at the preliminary enquiry and the evidence at trial. These inconsistencies and discrepancies undermined his credibility.
>
> e. He did not give any specific description of the appellant in his statement to the investigating officer.
>
> f. He gave evidence at the preliminary enquiry that he knew the appellant for 5-6 years prior to December 3, 2001, at the trial he testified that he knew the appellant for 13 years.
>
> g. He did not have sufficient opportunity to observe his assailants. **See pp.137-139 of transcript.**
>
> h. In cross examination, he testified that the entire incident, from the time he observed the gunmen to the time the deceased was shot, lasted a couple of seconds. **See pp. 150-151 of transcript.**
>
> i. His evidence conflicted in material respects with the evidence of Blake and the investigating officer in terms of his ability to see at the top of the hill from where the deceased had fallen after he was fatally shot."

35. In relation to Mr Hall's evidence, Mr Wilson identified the weaknesses as follows:

> "j. The description he gave of the appellant was in conflict with the appellant's actual appearance. He described the appellant as "short and brown and stout and about 19 or 20 years old." When the appellant was asked to stand, Mr. Hall said "he is not short now." **See p.423 of transcript**.
>
> k. He claimed to have known the appellant for 19 years, yet he was unable to identify the appellant at an identification parade."

36. On behalf of the applicant Golding, Mr Equiano also sought and was given leave to argue three grounds of appeal, which were as follows:

> "1. The identification evidence did not reach the requisite legal standard. The learned Trial Judge should have upheld the No Case Submissions made on behalf of the Applicant.
>
> 2. Having allowed the case to pass to the jury, the Learned Trial Judge failed to assist the jury and or failed to point out to the jury crucial area [sic] of discrepancies in the ID evidence.
>
> 3. The direction given by the judge on character evidence in respect of the Applicant was inadequate."

37. In support of ground 1 Mr Equiano also relied on ***Turnbull*** (supra), citing as well the subsequent decision of the Privy Council (on appeal from this court) in ***Daley v R*** (1993) 43 WIR 325, submitting that the evidence against this applicant was sufficiently "poor and unsupported" that the judge ought to have withdrawn the case from the jury.

38. Just as Mr Wilson had done, Mr Equiano too subjected the evidence of Messrs Bowes and Hall to close scrutiny. In the case of Mr Bowes, Mr Equiano referred to the lighting (pointing out that the witness claimed to have observed the men, including the applicant, having looked back after hearing the deceased say something, under a street light for 1 ½ minutes); the period of observation (initially saying 1 ½ minutes, then "it was not so long", then "a couple seconds" and finally five seconds); the

possibility that the witness's view of the applicant had been partially obstructed by the Rastafarian man and that he had a handkerchief on his forehead; and the fact that the witness had been unable to give any description of the handkerchief or of any clothing worn by the person identified as the applicant.

39. In the case of Mr Hall's evidence, Mr Equiano identified an even longer list of factors, including the lighting (a light on the shop in the square, which illuminated the piazza of the shop, and the street light on the right hand side of the road); the distance from which the men were observed (12 yards); the time (observing the men after looking behind him and continuing to look at them while stepping backwards for a total of 2 ½ minutes, which when tested in court was revised to 48 seconds, with this applicant under observation for 20 seconds); the obstruction of the witness's view by the handkerchief on the attacker's forehead and the fact that this applicant was said to have been standing behind the brown man; variations between the evidence at the Preliminary Enquiry and the trial as to who had fired the first shot; the fact that the witness could only say that he "assumed" that this applicant was armed with a long gun; and the inability of the witness to give any description of the handkerchief which allegedly covered the attacker's forehead.

40. On his ground 2, Mr Equiano submitted that the trial judge had failed to identify all of the specific weaknesses in the identification evidence in relation to the applicant Golding, including all of the matters set out in the preceding paragraphs, as well as the time of night of the purported identification, the inability of the witnesses to give a description and the inconsistencies and discrepancies in the evidence with regard to the witnesses' opportunity to see the men.

41. And finally, on ground 3, Mr Equiano referred the court to the well known decision in ***R v Vye*** [1993] 3 All ER 241, to make the point that the learned judge had failed to give an appropriate warning to the jury with regard to this applicant's credibility, as she was required to do in the light of his having asserted his good character in his unsworn statement from the dock.

42. Miss Jackson for the Crown emphasised the fact that this was a recognition case and submitted that the evidence of identification in respect of both applicants did not rest on a slender basis and was therefore reliable. She pointed out that Mr Bowes' evidence was that he recognised both applicants before a shot was fired and that this could not therefore be regarded as identification in difficult circumstances. Neither, Miss Jackson submitted, could the opportunity of the witnesses to observe the attackers be described as no more than a fleeting glance. In this regard, she referred in particular to the decision of this court in ***Jerome***

Tucker & Linton Thompson v R (SCCA Nos. 77 & 78/95, judgment delivered 26 February 1996), in which it was held that observation of the applicant by the witness for a total of eight seconds, in a recognition case, "was sufficient for observation so that an accurate identification could be later made" (per Forte JA at page 7). Given that the applicants were said to have been known to the witnesses before, it was a matter for the jury to decide whether the identification evidence in the case was reliable.

43. Miss Jackson also submitted that the judge had adequately pointed out such weaknesses as there were to the jury and, with specific reference to the evidence of Andre Blake, further submitted that the evidence was admissible evidence of the relevant context as the "background" against which the events of 3 December 2001 had taken place.

44. Finally, as regards Mr Equiano's ground 3, Miss Jackson pointed out that the judge had given the 'propensity' warning and she submitted that, in the circumstances, this was sufficient.

The issue of identification

45. The discussion which follows covers both grounds argued on behalf of the applicant Lowe, as well as ground 1 argued on behalf of the applicant Golding. In ***Turnbull*** (supra), Lord Widgery CJ said this (at page 553):

> "When in the judgment of the trial judge, the quality of the identifying evidence is poor, as for

> example when it depends solely on a fleeting glance or on a longer observation made in difficult conditions, the situation is very different. The judge should then withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification."

46. In ***Daley v R*** (1993) 43 WIR 325, 334, Lord Mustill explained Lord Widgery CJ's dictum as follows:

> "...in the kind of identification case dealt with by ***R. v. Turnbull*** the case is withdrawn from the jury not because the judge considers that the witness is lying, but because the evidence even if taken to be honest has a base which is so slender that it is unreliable and therefore not sufficient to found a conviction: and indeed, as ***R v Turnbull*** itself emphasised, the fact that an honest witness may be mistaken on identification is a particular source of risk. When assessing the 'quality' of the evidence, under the ***Turnbull*** doctrine, the jury is protected from acting upon the type of evidence which, even if believed, experience has shown to be a possible source of injustice."

47. This statement of the law was applied by this court in ***R v Barrington Osbourne*** (SCCA 93/97, judgment delivered 16 March 1998) and more recently applied (and fully discussed) in ***Brown & McCallum v R*** (SCCA Nos. 92 & 93/06, judgment delivered 21 November 2008, especially at paragraphs 32-34.)

48. In ***Kenneth Evans v R*** (1991) 39 WIR 290, ***Turnbull*** was applied in a case in which the only prosecution witness who identified the appellant at the trial had been awakened, as she slept in her boyfriend's bedroom in the early hours of morning, by the sound of gunshots in the room. When

she awoke, she looked up and saw five men, one of whom was armed with a gun. She only looked at the group of men for about five or six seconds and then turned around and saw her boyfriend bleeding from his side. In her evidence, she said that she recognised only one of the five intruders, a man standing by the door wearing red, whom she identified by the name "Scabby–Diver". After the men left, the witness, accompanied by two friends whom she had called, set out to report the incident to the police. However, while on her way, she saw "Scabby-Diver" and four other men coming up the lane towards them, as a result of which she returned to her boyfriend's house, where she waited until dawn before finally making a report to the police. The appellant, who was identified by the witness as "Scabby-Diver", gave sworn evidence at his trial, in which he denied having been at the scene of the crime, denied knowing either the deceased or the witness, denied that he had ever been to the shop in Maiden Lane where, she alleged, she had regularly seen him and further denied that he had ever been called "Scabby-Diver". As to his whereabouts on the night in question, he set up an alibi.

49. The Privy Council agreed with the appellant's contention that the quality of the identification evidence was so poor that the trial judge ought to have withdrawn the case from the jury with a direction to acquit. Not only had the witness's opportunity to observe the appellant been

"fleeting" ("only about five or six seconds" - per Lord Ackner at page 292), but in the face of it being seriously disputed by the appellant whether she had ever seen him at any time before the murder and therefore been able to recognise him, "the judge was not entitled to direct the jury on the basis that he was known to her" (per Lord Ackner at page 4). Lord Ackner continued:

> "But even treating this as a case which did not depend solely on a fleeting glance but upon a witness recognising someone whom she had frequently seen before, her observation of the appellant was made in very difficult conditions. She was suddenly woken up by an explosion. She was lying in an unusual position, across the bed and on her stomach. She merely raised her head to see what could be seen. She did not sit up, let alone stand up, although the judge on two occasions during his summing up wrongly stated that she got up or stood up and then saw the accused. She was understandably very frightened at the time. Having turned towards the deceased and seeing that he was bleeding and hearing two more explosions, she kept her head down until the men left."

50. In the result, the Board concluded that the quality of the identifying evidence "was indeed poor" and that, since there was no other evidence to support its correctness, the judge should have withdrawn the case in accordance with Lord Widgery CJ's dictum.

51. In ***R v Carlton Taylor*** (SCCA No. 57/1999, judgment delivered 20 December 2001), this court applied ***Turnbull,*** Harrison JA (as he then was) observing as follows (at page 3):

> "In our view this is a well-worn path. This Court has consistently adopted and followed the principles laid down in ***R v Turnbull*** [1976] 3 All ER 549, with regard to the proper approach of the trial judge in a case dependent on visual identification. Whenever the evidence connecting the accused to the crime consists of visual identification in circumstances which amount to a mere fleeting glance, and there is no other evidence in support thereof, the learned trial judge has an obligation, on his own initiative, to withdraw the case from the consideration by the jury, at the close of the prosecution's case.
>
> In the instant case, on a consideration of the facts most favourable to the prosecution, the prosecution witness was able to observe the appellant for a period of time while he the appellant traversed, running, a distance of approximately 8 feet. The witness would have been 18 feet away when he first saw the appellant, and 10 feet away when the appellant turned aside. In those circumstances, we agree with the observation of counsel for appellant that, whilst running, the appellant would have taken about two or three strides to cover the distance of 8 feet. The witness could not therefore have been able to see the appellant's face for "4 to 5 seconds", but for a much less period of time. While the men were being chased by the witness, he saw their backs, and a side view for about three to four seconds. In our view, the opportunity which the witness had to see who he claimed to be the appellant was a mere fleeting glance."

52. And in ***R v Omar Nelson*** (SCCA No. 89/99, judgment delivered 20 December 2001), in a judgment also given by Harrison JA, that learned judge said this (at page 6):

> "A trial judge is therefore required himself to make an assessment of the quality of the evidence, exclusive of the jury, as a preliminary issue, and then made [sic] a further determination whether or not to leave it to the jury for them to decide the ultimate issue of guilt or otherwise of the accused. Consequently, he has to consider certain factors in order to make that determination, namely, inter alia, the lighting at the relevant time, the length of time the victim had to observe her assailant, the circumstances existing when the observation was made and whether or not the assailant was recognized as known before by the victim. A mature consideration of those factors will usually assist the trial judge in coming to a proper conclusion as to whether or not he should withdraw the case from the jury."

53. It is against this background of fully settled doctrine that we come now to consider whether the nature of the identification evidence in this case was such that, as both applicants contended, it ought not to have been left to the jury. On the authorities, the test which the trial judge was obliged to apply at this stage was whether, even if taken to be honest, the evidence of identification adduced by the prosecution had a base so slender that it was unreliable and therefore not sufficient to found a proper conviction.

54. There can be no doubt that the events of the night of 3 December 2001 must have amounted to an extremely frightening experience for both Messrs Bowes and Hall, as Mr Wilson submitted. However, it must be borne in mind that it was not seriously disputed by either of the applicants that they were known by Messrs Bowes and Hall and had been so known for many years. In the case of the applicant Lowe, Mr Bowes' evidence at the trial was that he had known him for 13 years. While it is true that at the preliminary enquiry he had said that he had known him for a shorter period (five years), it is significant that under cross-examination the applicant Lowe himself confirmed that he and the witnesses were well known to each other. As regards Mr Bowes, he agreed that they "knew each other good – good", while in the case of Mr Hall, he agreed that he had known him "from I was little bit". This, then, was plainly a case of recognition and it seems to us that, in the light of the applicant's own evidence, the discrepancy in Mr Bowes' evidence of which complaint was made did nothing to weaken or undermine the identification.

55. As to the state of the light at the time and in the vicinity of the murder, both Messrs Bowes and Hall gave evidence, which was confirmed by the independent observation of Detective Corporal Foster at 11:45 p.m. or thereabouts on the very night in question, that the scene of events was adequately illuminated by street lights (three in all) on either side of the road leading from the square at Mannings Hill to the intersection of

Mannings Hill Road and Mount Salus Road. The question of whether the witnesses were able to make an accurate identification of their attackers in these circumstances was, it also seems to us, one for the jury.

56. Much effort was devoted during the trial to trying to tie down with precision the period of time during which both Messrs Bowes and Hall would have, on their accounts, had the attackers under observation. In the case of Mr Bowes, his estimates varied quite widely from an original estimate in examination-in-chief of 1½ minutes, reduced under cross-examination to 30 seconds and further reduced in re-examination to a mere five seconds. When pressed to give an explanation for this wide divergence, his answer was "I was not timing" and he maintained that it was not only the applicant Lowe that he was looking at for that period, but "the whole of them". Mr Hall, for his part, initially estimated the time during which he had the attackers under observation at "two minutes or a couple seconds more". However, when it was actually timed in court, he revised this estimate on the basis of the timing exercise conducted by counsel to 48 seconds, during which, he said, he observed the applicant Lowe for 25 seconds and the applicant Golding for 20 seconds.

57. Counsel for both applicants, naturally and perfectly understandably, made heavy weather of these divergences, both at the trial and in the hearing before this court. However, it is relevant to bear in

mind, we think, the comment made by both witnesses, that they were not "timing" the incident as it unfolded. It appears to us that, despite its superficial allure, there is a certain artificiality or unreality about the kind of reconstructive exercise performed by counsel in this case, no matter how well-intentioned. What might perhaps be more helpful in a case such as this is to consider what it is that the witnesses said took place within the given time in order to ascertain whether their evidence provides a basis for the reliable identification of the applicants, the actual decision as to whether that evidence is found to be acceptable at the end of the day being again a jury matter.

58. Both witnesses stated that, after having heard the deceased say something, they turned around and looked behind them where they saw four men, at least three of them armed with guns, walking down the road behind them (according to Mr Bowes, two on either side of the road). Both witnesses identified the applicants as being members of this group and both described a third man, who they did not recognise, as a "rasta man". Mr Bowes said that he turned around completely to look at the men (he demonstrated this maneuver to the jury, eliciting from the applicant Lowe's counsel, the comment "okay a hundred and eighty degrees"), while Mr Hall's evidence was that, having turned around, he stood still and looked at the men, before he started moving again, stepping backwards. Both witnesses said that the next thing that

happened after they turned back to look at the men coming behind them was that they heard the first shot (coming from the right side of the road), which is the point at which, according to Mr Bowes, "I take it serious and run", and, according to Mr Hall, he ran off into the bushes on the right side of the road.

59. It appears to us that, despite the various estimates of time given by both witnesses, irrespective of the discrepancies in the evidence as to the actual period of time during which the witnesses had their attackers under observation, the narrative described by them could hardly be said to have allowed them no more than a fleeting glance at the men who were chasing them. In this regard, we bear in mind that, as this court observed in ***Jerome Tucker & Linton Thompson v R*** (supra), in a recognition case "the length of time for observation need not be as long as in a case where the assailant was unknown to the witness at the time of the offence" (per Forte JA at pages 6-7). Nor can it be said, in our view, that the conditions described by the witnesses, even taking into account the fear and anxiety which their being chased by men armed with guns would naturally have generated, were more than ordinarily difficult. This therefore makes the evidence in this case qualitatively different from the evidence upon which the Crown relied in ***Kenneth Evans*** and ***Carlton Taylor*** (see paras. 48-51 above).

60. Mr Wilson also took issue with the description of the applicant Lowe given to the police by Mr Hall, which was, he submitted, in conflict with the applicant's actual appearance. When it was put to Mr Hall in cross-examination that he had told the police on the day after the murder that this applicant was "short and brown and stout and about 19-20 years old", he agreed, saying "He was short at that time sir". The applicant was then asked to stand in court and the witness was asked "Would you say that he was in the region of 6 feet tall?", to which the response was "No, your Honour...He look to me like he is 7 feet going up to 8".

61. In relation to the applicant Golding, Mr Equiano also directed us to Mr Hall's evidence that there was a handkerchief "totally covering his forehead", but that he was not able to remember what colour it was. However, according to the witness, he "was watching the face so I saw the 'kerchief on his forehead".

62. Again it seems to us that these were matters for the jury to assess and determine. With regard to the applicant Lowe's height, it was open to the jury to have taken the view that Mr Hall could not be relied on as a judge of height, given that at trial, when this applicant's height was put to him as being in the region of six feet by his counsel (it had actually been recorded at five feet, eleven inches at the identification parade – see para. 24 above), Mr Hall's best estimate was that he appeared to him to

be between seven and eight feet tall. In any event, there was no evidence to suggest that the applicant (who was 17 years of age at the time of the murder in 2001) was the same height at the time of trial (December 2003) that he had been at the time of the murder. And as for the handkerchief said to have been tied around the applicant Golding's forehead, given that there was no evidence that it completely obscured his features, it was for the jury to determine whether, in these circumstances, it was possible for the witnesses to make him out.

63. In the light of all of the above, we are unable to say that the base of the identification evidence given by Messrs Bowes and Hall in this case was so slender as to make it unreliable or insufficient to found a conviction. We accordingly conclude that the learned trial judge was correct in her determination that the case should be left to the jury.

64. This conclusion suffices to dispose of the grounds of appeal argued on behalf of the applicant Lowe (see para. 29 above) and ground 1 argued on behalf of the applicant Golding. Ground 2 argued on behalf of the latter applicant raises the questions of the adequacy of the trial judge's direction to the jury, in particular as regards discrepancies in the identification evidence, and the adequacy of the judge's directions to the jury on character evidence.

The judge's directions to the jury

65. Very early in her summing-up, the learned judge gave the jury a standard and accurate direction on the manner in which they were to treat discrepancies and inconsistencies, as follows:

> "Some people can express themselves well when telling about something that happened, some people cannot express themselves at all, they don't know how to put it so you can understand, because people are so different it very often happens in these trials that when witnesses come to give evidence differences are seen in their evidence. So one witness may say something in particular manner on one point in the evidence, and that same witness go [sic] on to say something different about the same matter at another stage in that witness' evidence. Or, one witness may say something about a particular point, and another witness say something different about the same point. We call these differences discrepancies and inconsistencies, and indeed you have heard about discrepancies and inconsistencies in this case.
>
> Indeed, you have heard about discrepancies and inconsistencies in this case. It is for you to say whether there are any such differences in the evidence you have heard in this trial. Remember you are the judges of the facts. Now, if you find that these differences exist, then you must go on to assess them, that is, you must decide whether they are slight or serious. If you decide that the discrepancy or inconsistency is slight, you would be well within your right to say that it does not really affect the credit of the witness concerned on the main issue and that you can still rely on the evidence of the particular witness.

> On the other hand, if you find that it is serious, you may well feel that it would not be safe to rely on the evidence of that witness on that particular point. Or it may be that you will feel it is not safe to rely on this witness' evidence at all. It is for you to say whether any difference that you find is slight or serious and then you go on to deal with it as I have directed you.
>
> Now, bearing in mind that a difference in a witness' evidence does not necessarily mean that a witness is lying, although it could be, because what you have to do is to consider the evidence carefully and when assessing the discrepancy or inconsistency, you should take into account for instance, the witness' level of intelligence -- we go back again to the witness' level of intelligence -- as it appears to you, as you have seen and heard the witnesses. You must form your own views about that, as well as the witness' ability to observe and recall with accuracy the details, and the witness' ability to express himself in words; also the lapse of time between the date when the incident occurred and the date when the witness is giving evidence."

67. After further general (and unexceptionable) directions on the burden and standard of proof and the definition of murder, the judge then gave the jury a warning on the need for special caution when looking at the evidence of identification:

> "Now, in this trial, the case against the accused men depends on the correctness of their identification as the persons who committed the offence in each case which the defence says is mistaken identification. It is therefore my duty to warn you of the special need for caution before convicting the accused men in reliance on the evidence of visual identification, and that

is because it is possible for an honest witness to make a mistaken identification. There have been wrongful convictions in the past as a result of such mistakes, and I must tell you that an apparently convincing witness can be mistaken, and so can a number of apparently convincing witnesses.

You must therefore examine carefully the circumstances in which the identification by each witness was made. You must consider the length of time which the witness had to observe the persons who he says, or they say were the accused men. At what distance they made this observation. What the lighting conditions were. Ask yourselves whether there was any interference with their observation; whether the witness had any special reason for remembering the person. How long it was between the original observation, that is to say, the incident where they saw these persons and the identification of these persons to the police; and whether there is any marked difference between the description given to the police and the appearance of the accused.

You would consider also whether the identification was made in difficult circumstances. In this case the evidence of identification though, involves recognition. It is not a case where the witnesses are saying they didn't know these persons before. This is a case where the witnesses are saying that they knew these men before for a considerable period and that they recognised them. But I must nevertheless point out that mistakes are sometimes made in recognition even of relatives and close friends. So that there is still a need for caution even when recognition of a person known is involved

Now, identification by one witness constitutes support for identification of another, but you must bear in mind that a number of honest witnesses

> can all be mistaken. On the review of the evidence I will point out what evidence is capable of supporting the evidence of identification.
>
> The Defence Attorneys have brought certain features of the identification evidence to your attention, asking you to view it in a particular way, so when I come to deal with the evidence I will take you through the features of the identification evidence and possibly will point out to you any area which requires special treatment. At the end of it all, if you believe each - well, you certainly must consider the evidence of each accused separately, the evidence of identification as it relates to each accused separately. If you believe each and find that he was not there, that he was not correctly identified as the man who committed the offence as charged, then your verdict must be not guilty. If you have a reasonable doubt about the identification of the person who committed the offence, then you must return a verdict of not guilty. It is only if you feel satisfied, until you feel sure, that they have been correctly identified as the persons who committed the offence, that you will be entitled to return a verdict of guilty"

67. Norma McIntosh J then reviewed the conduct of the identification parades, alerted the jury's attention to the rules governing such parades and explained the objectives which the rules seek to achieve. She left it to the jury to determine whether, based on the evidence, they considered the parades to have been fair and "whether it gave the witnesses the opportunity to independently and fairly and without any assistance, identify the persons who he says [sic] committed the offence."

68. The judge went on to remind the jury that, though each of the defendants had set up an alibi by way of defence, it was not for them to prove, but for the prosecution to disprove the alibi. She went on:

> "Even if you reject his alibi, the defence, that must not leave you to conclude that there is support for the evidence of identification and that he is therefore guilty without more, because there might be many reasons for putting forward a false alibi. For instance, he may be genuinely mistaken about dates and so on. It is only if you are satisfied that the sole reason for the fabrication was to deceive you that you may find support for the identification evidence."

69. She then reviewed in detail the evidence of Messrs Bowes and Hall, pointing out to them the distance at which the attackers were said to have been seen and the length of time that the applicants were said to have been known to the witnesses. She dealt with the lighting (telling the jury to "remember I told you about the things that you are to look out for when you are assessing the evidence of identification"), and, at length, with various discrepancies and inconsistencies which had emerged in the evidence and which had been highlighted by the defence (again reminding the jury that "we are talking about the evidence of identification and the evidence of credibility...and you must bear in mind my direction on discrepancies and inconsistencies as you come to deliberate on the areas that have been pointed out to you. What is important, is it slight or serious?").

70. And then, on the question of the period of time during which Mr Bowes had said that he had the attackers in his sight:

> "I am now in a position to tell you about the timing, that the minute and a half was timed as 45 seconds and the half a minute as 5 seconds. You saw it when it was timed and you saw the wait for him to indicate when the time was up and you must bear in mind what he is actually doing is trying to put himself back in his behind [sic] to say how long this incident took place. You of course are entitled to use your common sense and your experiences and put the circumstances together, so you know, if he says five minutes five seconds on ten seconds you look at the circumstances as they unfolded and come to some common sense conclusion about what is happening here. You certainly don't leave your common sense outside, when you come in here you bring it in here and that is a very very important tool for you to use in assessing this evidence and in coming to your decision."

71. And again:

> "Now, the length of time that he had to see the face of Bruce Golding was tested with the aid of a stopwatch, you will recall. Mr. Bruce Golding [sic] had said that while he was running and looking back he had seen 'Bear's' face for half-a-minute which has been referred to as thirty seconds, which is the same thing – half-a-minute/thirty seconds. Then later on he had said, well, it was less than that but longer than a second or two and when he was asked how much longer he said, "I was not timing it but I know it was long enough for me to get a good look." And again I will remind you of the test

> that took place and what your own view is as to the length of time that the testing took, albeit you hear about five seconds or two seconds, but the test of the pudding is in the eating. When that was going on you were sitting here and you had an opportunity to see and make your own assessment of that. The stopwatch said it was five seconds and it is for you to say whether according to what was demonstrated here you feel that that was a long enough viewing time to be able to recognise somebody known to you well".

72. In relation to the evidence of Mr Hall, the judge gave a similar direction:

> "Now, Mr. Hall said when he turned and was looking at the men he had stood still and when he made the move he was still facing the men because he was backing away; he was stepping back so he was still able to see the faces of the men. He felt that at that time when he stood still looking at them and when he was stepping back still looking amounted to about two minutes and could be a couple seconds more. However, that estimation was tested by the use of the same stopwatch which was used earlier, and that time amounted to forty-eight seconds.
>
> Now, Mr. Hall said that forty-eight seconds meant twenty-five seconds looking at the face of Damion and twenty seconds looking at the face of 'Bear'. Now again, I invite you to recall the passage of time when it was being tested and form your own view as to the adequacy or otherwise of the time you were able to look at and to see and recognise a person known to you for several years because it is Mr. Hall's evidence that he knew Damion for about nineteen years and would see him on both days of each weekend in Mount Salus. He knew where he lived and knew

> his relatives, knew his mother, Charmaine, and stepfather, Juda. He used to talk to Damion."

73. As to Mr Hall's description of the applicant Lowe as "short and brown and stout" and the demonstration in court which ended in the witness' observation that this applicant now looked to him to be seven to eight feet tall, the judge told the jury that "You saw Mr. Lowe and it is for you to make of that what you will in terms of what you see as this witness' ability...[this]...is a demonstration from which you can make your own determination".

74. The learned judge concluded her review of the evidence of Messrs Bowes and Hall as follows:

> "Now, that was the evidence from those two witnesses, who came to give you direct evidence as to what transpired on that night, on the 3rd of December, 2001. It is for you to assess them, having seen and heard them and to say what you believe and say whether you feel that these are witnesses of truth, upon whom you can rely. Remember, I told you that the issue is of identification and you need to look at the circumstances under which each person identified the persons, who are involved in this matter and to that extent you look at the evidence and say what the evidence is, as it unfolded in terms of what areas are important, the differences that goes [sic] to the heart of the case and you make your decision according to how you view the evidence, because it is your view of the evidence that counts. It is how you feel about the evidence that is material."

75. At the end of her review of all the evidence adduced by the prosecution, the judge again reminded the jury of the importance of the question of identification:

> "Now that, Mr. Foreman and members of the jury, is my review of the main features of the evidence from the prosecution witnesses. Remember the issues. You will no doubt agree with the prosecution and the defence that those are identification and credibility. With regard to identification, the prosecution relies on the evidence of the two eye-witnesses, Junior Bowes and Horace Hall. Remember the special need to approach the evidence with caution, being mindful that there have been mistaken identifications in the past resulting in wrongful convictions and that even a number of apparently convincing witnesses can be mistaken."

76. The judge then fulfilled her earlier promise to the jury to "recap the evidence as it relates to identification and point out areas which will require special attention". She reviewed yet again the evidence relating to the lighting, the "viewing opportunity", as she labelled it, of Messrs Bowes and Hall, the distances, the road conditions (as they related to visibility), the period of observation of the attackers by the witnesses, the conduct of the identification parades and the evidence of the events of the morning of 3 December 2001 (as to which, see further paras. 79-82 below).

77. And finally, the judge turned her attention to the "areas of the evidence of identification which require your special attention", that is, the "areas which tend to weaken the evidence of identification". Under this heading, she dealt with Mr Hall's description of the applicant Lowe (short, stout and brown), his failure to point him out at the identification parade (in fact, pointing out a different person), some aspects of the conduct of the parade itself (in particular the colour and height of the volunteers on the parade and the "whitening" of the men's faces), inconsistencies between the evidence of Messrs Bowes and Hall and whether their view of the attackers was obstructed in any way.

78. At the end of the thorough and, it appears to us, exhaustive summing-up, neither counsel for the defence nor the prosecution was able to point to any area, in the answer to the judge's enquiry, which should have been dealt with that had not been dealt with. Indeed, in opening the appeal, Mr Wilson, whose only ground of appeal on behalf of the applicant Lowe was that the judge should have upheld the no case submission, described the summing up as "a model of fairness and accuracy", a view with which we entirely agree. In our view, there can be no question that the learned judge gave the jury all assistance possible on the issue of identification, both in her general directions and in her detailed review of the evidence given by each of the witnesses.

Accordingly, the complaint in the applicant Golding's ground 2 that the judge "failed to assist the jury" must be dismissed.

The evidence of Andre Blake

79. In his submissions on ground 2, Mr Equiano complained that the evidence of Andre Blake as to the events of the morning of 3 December 2001 was irrelevant and therefore inadmissible or, alternatively, that its prejudicial effect outweighed its probative value. Even if the evidence was admissible, Mr Equiano submitted, the judge did not do enough in her summing up to assist the jury as to how it should be approached.

80. Miss Jackson submitted that the evidence was admissible as proof of motive and to provide the context or background in or against which the offences charged took place. In support of this submission, we were referred to ***Archbold*** (2003), ***R v Clarence Williams*** (1987) 84 Cr App R 299 and ***R v Anthony Sawoniuk*** [2000] 2 Cr App R 220.

81. Although no ground of appeal was filed taking issue with this evidence, we will nevertheless express our views on it briefly. ***Archbold*** (2003) states the position with regard to proof of motive in this way (at paras. 13-34 to 13-36):

> "A distinction should be drawn between evidence of similar facts usually relating to offences against persons other than the alleged

> victim of the offence charged and evidence of other acts or declarations of the accused indicating a desire to commit, or reason for committing, the offence charged, i.e. motive. This distinction is sometimes blurred in reported decisions.
>
> Although the prosecution does not have to prove motive, evidence of motive is always admissible in order to show that it is more probable that the accused committed the offence charged. The position is well stated in a dictum of Lord Atkinson during argument ***R v Ball*** [1911] A.C 47 HL...
>
> > 'Surely in an ordinary prosecution for murder you can prove previous acts or words of the accused to show that he entertained feelings of enmity towards the deceased, and this is evidence not merely of the malicious mind with which he killed the deceased, but of the fact that he killed him. You can give in evidence the enmity of the accused towards the deceased to prove that the accused took the deceased's life. Evidence of motive necessarily goes to prove the fact of the homicide by the accused, as well as his 'malice aforethought', in as much as it is more probable that men are killed by those that have some motive for killing them than by those who have not" (at p. 68)'."

82. In ***R v Williams*** (supra), the Court of Appeal re-examined ***Ball*** in the light of the authorities and concluded that Lord Atkinson's dictum correctly represented the law, holding that on a charge of making threats to kill, contrary to section 16 of the Offences Against the Person Act 1861, evidence of previous history was admissible in the judge's discretion as

tending to prove that the defendant intended his words to be taken seriously. The court also referred (at page 301) to ***R v Pettman*** (an unreported judgment of the Court of Appeal, 2 May 1985), in which Purchas LJ had stated the principle in this way:

> "...where it is necessary to place before the jury evidence of part of a continual background or history relevant to the offence charged in the indictment, and without the totality of which the account placed before the jury would be incomplete or incomprehensible, then the fact that the whole account involves including evidence establishing the commission of an offence with which the accused is not charged is not of itself a ground for excluding the evidence."

83. ***R v Pettman*** was specifically approved in ***R v Sawoniuk*** (supra), where Lord Bingham CJ, as he then was, said this (at page 234):

> "Criminal charges cannot be fairly judged in a factual vacuum. In order to make a rational assessment of evidence directly relating to a charge it may often be necessary for a jury to receive evidence describing, perhaps in some detail, the context and circumstances in which the offences are said to have been committed."

84. On this basis, it appears to us that the evidence of Andre Blake, to which no objection was taken by either of the applicants at the trial, was clearly relevant and admissible, not only for the purpose of showing

context and motive, but also as a factor which the jury would have been entitled to bear in mind when considering whether they could safely act on the evidence (particularly with regard to identification) of the later events of 3 December 2001. We therefore consider that the trial judge was correct when she told the jury that this was evidence which, if they accepted it, "may provide some background information of the circumstances leading up to the incident on the night of December 3, 2001", and that it was for them to decide "whether it offers any support to the evidence of identification given by Mr. Hall and Mr. Bowes".

The good character directions

85. In his unsworn statement from the dock, the applicant Golding said this:

> "I never run down nobody that morning, I never run down nothing with no gun at no time, I am not a gunman, your Honour, I am a working youth."

88. Norma McIntosh J's direction to the jury on this was as follows:

> "Now in so saying, Mr. Foreman and members of the jury, what Mr. Golding is saying to you is that he is a person of good character, hard working, not a gunman. So he is asking you to consider that he is a person who is less likely to be involved in incidents such as the one in this case. It is entirely a matter for you what weight you put on his unsworn statement."

84. The judge returned to this point towards the end of her summing up:

> "Similarly, you must consider the evidence of Bruce Golding and if you are satisfied until you feel sure that he was correctly identified as one of the men armed with a firearm on this joint mission to go after these men from Mount Salus, that he was a part of that joint mission, even if he did not discharge the firearm but that they were nevertheless all in it together and shared the intention to cause serious bodily harm or death and that notwithstanding his assertion from the dock that he is a hardworking man, not a gunman, although he said he is a person of good character, as I told you just now, and not likely to commit such an offence, but if you are satisfied that he has been correctly identified and that he was very much a part of what took place there, then it would be your duty to return a verdict of guilty."

89. Mr Equiano's complaint on this ground was that, having put his character in issue by his unsworn statement from the dock, the applicant Golding was entitled to a warning as to his propensity to commit criminal offences as well as a warning as to his credibility and that, while the judge had, in the passages cited above, adequately dealt with the former, she had not given the latter warning. As a result, this applicant "was deprived of the benefit of a complete direction with regard to his character". Miss Jackson, on the other hand, submitted that the judge had done all that was necessary in the circumstances, the applicant having elected to make an unsworn statement from the dock.

90. The principles governing the obligation of a trial judge to give good character directions were recently considered and restated by this court

in the case of ***Michael Reid v R*** (SCCA No. 113/2007, judgment delivered 3 April 2009, paras 15-19). It is now well established that, where a defendant's good character has been distinctly raised by him, the defendant is entitled to a standard good character direction containing two limbs, "...the credibility direction, that a person of good character is more likely to be truthful than one of bad character, and the propensity direction, that he is less likely to commit a crime, especially one of the nature with which he is charged" (***Teeluck & John v The State*** (2005) 66 WIR 319, 329 per Lord Carswell).

90. ***R v Vye*** (supra) is the foundation of the modern law on the subject of good character directions. On the question of the need for a credibility direction, Lord Taylor CJ said (at page 245) that "if a defendant of good character does not give evidence and has given no pre-trial answers or statements, no issue as to his credibility arises and a first limb direction is not required". This decision was subsequently confirmed by the House of Lords in ***R v Aziz*** [1995] 3 All ER 149 (see the judgment of Lord Steyn at page 157). It must be borne in mind, however, that, by the time these cases came to be decided, the right to make an unsworn statement from the dock had long been abolished in England (by section 72 of the Criminal Justice Act 1982, which came into effect on 24 May 1983). No question therefore arose in either ***Vye*** or ***Aziz*** as to what would

be the position where the defendant of good character gave an unsworn statement.

91. This point does not seem to have been canvassed in any of the several subsequent decisions of the Privy Council on the need for good character directions whenever the defendant's character was in issue, obviously because, in all the cases which we have seen, the defendant gave sworn evidence (see ***Berry v R*** (1992) 41 WIR 244, ***Barrow v The State*** (1997) 52 WIR 493, ***Sealey & Headley v The State*** (2002) 61 WIR 491, ***Teeluck & John v The State***, supra and ***Bhola v The State*** (2006) 68 WIR 449). However, ***Muirhead v R*** (Privy Council Appeal No. 103/2006, judgment delivered 29 July 2008) was a case in which the defendant made an unsworn statement from the dock. While the question of the need for a credibility direction in these circumstances (as a matter of entitlement) was not discussed in either of the judgments in the case, Lord Hoffman's comment, speaking for the majority (at para. 26), was that, the appellant not having given sworn evidence, "the value of the [credibility] direction may be doubtful, but he would have been entitled to the [propensity direction]". In their separate concurrence, Lords Carswell and Mance expressed a similar view (at para. 35), saying that "If the defendant has not given evidence, but has merely made an unsworn statement, the importance of the [credibility direction] is reduced, but the direction may still be material in respect of propensity".

92. In the instant case, we consider, similarly, that while the applicant was entitled to a good character direction, having distinctly raised his good character in his unsworn statement, the credibility limb of that direction would have been of doubtful or reduced value. In these circumstances, we do not think that the trial judge can be faulted for, having given the propensity limb of the standard direction, leaving his unsworn statement to the jury for them to give it such weight as they considered it to deserve (***Director of Public Prosecutions v Walker*** (1974) 21 WIR 406, 411).

Conclusion

93. On the basis of all of the foregoing, these applications for leave to appeal are dismissed. The sentences are to run from 18 March 2004.