[2010] JMCA Crim 13

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 65/2008

BEFORE: THE HON. MR JUSTICE HARRISON, J.A.
THE HON. MRS JUSTICE HARRIS, J.A.
THE HON. MISS JUSTICE PHILLIPS, J.A.

ONEIL HIGGINS v R

Keith Bishop, instructed by Bishop and Fullerton for the Applicant

Mrs Sharon Millwood-Moore for the Crown

16 December, 2009 and 16 April 2010

PHILLIPS, J.A.

[1] The applicant was tried in the High Court Division of the Gun Court on an indictment containing two counts: on count one, he was charged with illegal possession of a firearm and on count two with wounding with intent. The particulars of the offences were that the applicant on 20 April 2006 in the parish of Saint Catherine unlawfully had in his possession a firearm contrary to section 20(1) (b) of the Firearms Act and not under and in accordance with the terms and conditions of a Firearm User's Licence, and that the applicant contrary to section 20 of the Offences Against the Person Act wounded Lyndon Barrett with the intent to do him

grievous bodily harm. He was convicted on both counts and on 30 May 2008, sentenced to 10 years and 12 years imprisonment at hard labour respectively, both sentences to run concurrently.

[2] His application for leave to appeal was refused by a single judge on 16 June 2009. He has now renewed the application for leave to appeal before this court.

The Prosecution's Case

[3] The case for the prosecution depended in the main on the sole eye-witness, the virtual complainant, Mr Lyndon Barrett. Mr Barrett gave evidence that in April 2006 he was living at 52B Corletts Road, Spanish Town, and that he was a haulage contractor. At about 8.30 pm on 20 April 2006 he had been sitting on a chair between his verandah and the dining room watching television. His mother and his niece were in the dining room also watching television. He said that he heard a banging at the fence to the right side facing the house. He said he got up and "walk beside the grill" to look, but as he did not see anything, he went back to his seat on the verandah. He said he heard the dogs barking and so he ran them away three times. On the fourth occasion, he flung a "nut and bolt and 'lick' the dog" and the dog ran to the back of the premises. Then the dog came back to the front, but this time he was "lapping his tail and looking frighten". Mr Barrett said he then thought something was wrong

and so he went to the grill, which was locked, and looked to the side of the house. At that time he said he saw the applicant at the side of the house in a "bending" position which he (Mr. Barrett) demonstrated to the court. The applicant had a gun in his hand, and was underneath the light, which was on at the time. He recognized the applicant whom he said he knew as Peter Holness.

[4] Mr Barrett told the court that he also saw another man behind the applicant who was also armed with a gun. He said he looked at them, and just as he was going to turn away, the applicant lifted his hand with the gun in it, dipped his hand toward him, which he (Mr. Barrett) also demonstrated to the court, and then he ran inside the house. It was Mr Barrett's testimony that as the applicant lifted his hand, he moved and then he heard a barrage of shots as he ran inside the house.

[5] Mr Barrett said that it was only five feet from where he had been looking at the side of the grill on the verandah, to the inside of the house. As he was about to enter the house he saw the applicant at the grill firing at him constantly. By then, the applicant was just two feet away from the grill. Mr Barrett said that as he ran inside the house, he looked back at the applicant, and then placed himself against a wall, when he felt a burning in his back and realized that he had been shot. He then turned to his mother who was sitting on the settee and told her who had shot him.

While he was talking to her, shots were coming in through the window, and though he "could not see the shots," he could hear the pop of the gun and the shots colliding on the wall inside the house. This shooting lasted for about fifteen minutes.

[6] Mr Barrett said that when the shooting stopped, he and his parents (although there is no indication or evidence as to when his father entered the house and was a part of this incident) ran to the back of the house, and as he turned into a room there he realized that he had been shot and had received injury to his hand which was bleeding. He heard thereafter someone talking at the back of the house, which he said he recognized as the voice of "Sound Boy". Sound Boy was "a well- known person to me, we grow up together in the community", he stated. He heard Sound Boy say, "Him get shot". He indicated that it was Sound Boy who was the other man with the applicant at the wall. He said after he heard the talking, he heard, "clunk, clunk", and then a single shot came through the back of the door, where he was standing.

[7] He further said that the police were called and they came to the house. He said that he told them exactly who shot him. He was taken to the Spanish Town Hospital where he was admitted, and treated. He was discharged the following day.

[8] He stated that he had known the applicant for about one year. He also said that he had seen him the night before the incident and earlier on the evening of the incident. He said on the night of the incident, he had passed the applicant on the road just before the incident and had seen him for about two minutes, while riding his bicycle, and he saw the applicant facing him in a three-quarter grey pants and shirt. Mr. Barrett said on the night before, he had seen the applicant at a wall near a shop and a bar, which were about a chain from his house. He said that was where the applicant "hangs out". He said he passed him and saw his face that night for about two minutes. He said although the applicant was "an outsider" he had seen him often during that year, about three times a week.

[9] On the night of the incident, Mr Barrett said that he was able to see the applicant, as he came to the grill and looked sideways to the wall. He was only five feet away and there was light at the side of the house and on the street. He said he looked at him for about a minute.

[10] In cross-examination, Mr Barrett reiterated that he had observed the men for a minute or more, as he did not think that they were coming for him. He was challenged that in his statement to the police he had stated that both men had pointed their guns toward him and started shooting, and he had run towards the living room and the bedroom. In fact that

portion of the statement was entered in evidence as Exhibit 1. He stated that the applicant was wearing a three-quarter pants and grey shirt and had fine plaited hair, although this latter description was not given to the police, and also that he was shot as he was about to enter the house. He maintained that he looked at the men very well for about two minutes, before he moved into the house, and that there was light on the verandah that night. He said that he had told the police that the applicant had a "tall face" and his "hair plait fine". It was suggested to him that because Sound Boy was dead, he was "trying to put it on Peter", but he responded that Sound Boy died after he had given his statement to the police.

[11] Sergeant Clifton Bryan told the court that he conducted an identification parade at the Spanish Town Police Station on Friday, 30 August 2007, where the applicant was represented by counsel Mr Keith Bishop. Sergeant Bryan gave evidence that the applicant and members of the cell staff selected the other men on the parade. At the request of the applicant the men tied their heads with handkerchiefs. The applicant was pointed out and the parade was dismissed. The applicant initially, on appeal, was challenging the propriety of the conduct of the parade with regard to how the men were selected, the fact that they were not sufficiently similar in appearance and that the rules relevant to the conduct of the parade had not been followed. However, at the hearing

of the appeal, counsel for the applicant abandoned this ground of appeal so we will say no more about it.

[12] Constable Jameson Ricketts gave evidence that he went to the Spanish Town Hospital in April 2006 and met with the witness Barrett who had bandages on sections of his body. Based on certain information received he apprehended the applicant, and told him of the report he had received from Mr Barrett. The applicant, he said, was cautioned. Later he was charged with the offences of illegal possession of firearm and wounding with intent. When cautioned, on both occasions he said, "Officer a nuh mi shot Randy". Constable Ricketts also gave evidence that he went to Mr Barrett's home and he observed the electric light shining there that night at the side of the house. He also observed the grill and the verandah and the street lights which illuminated the premises. He said that the light illuminated the grill area and "all the way down". He said that Mr Barrett told him that the applicant and Sound Boy had come to his house and shot him.

The Defence

[13] The applicant gave sworn evidence. He told the court that he lived at 19 March Pen Road, Spanish Town, and he was a tiler. His defence was one of alibi. He said he recalled that on 20 April 2006, he was at a friend's home. Her name was Doreen Deacon. He said that Doreen lived

between March Pen Road and Corletts Road, and on that particular day he had been at her house from about midday until 5.00 pm. He then went home to bathe, returned at about 6:30 pm and then stayed there until 10:00 p.m. He said that he did not really know "Randy" (Barrett). He did not remember if he had seen him before and if they had ever exchanged words. He knew where he lived, which was Corletts Road. He had heard that somebody had been shot. He knew Sound Boy, but they were not friends, although he had been to his funeral. Also he had not gone to Mr Barrett's house on the night of 20 April, 2006. He had no gun and he did not shoot Mr Barrett. He did say however that he knew the area, that there was a bar along the road where he would go to buy phone cards and he did pass that area at nights.

[14] Doreen Deacon also gave sworn evidence in support of the alibi put forward by the applicant. She said that she lived at 87 Corletts Road which is a lane between March Pen Road and Corletts Road. She knew the applicant as 'Peter' and she told the court that on 20 April 2006 he was "among us". She confirmed the applicant's story that he was at her house at midday, watching an African movie, and then he left to go to the shop. He came back, cooked some dumplings and chicken back, left the house at 5.00 p.m and returned after 6.00 pm. He did not leave again until about 10.30 pm when she was going to bed. This she said she remembered, "because the day the police hold on to him, everything

start to reflect in my mind so I know he was there…" She said that Mr Barrett's house was not far from where she lived; the distance was about 3 lengths of a court room.

Grounds of Appeal

[15] At the hearing, the applicant abandoned the original grounds of appeal filed (a and b) and sought and obtained permission to argue five supplemental grounds. These grounds are set out below:

> "c. That the learned trial Judge erred in law and fact in concluding that there was no obstruction to the observation made by the witness despite ample evidence that the observation was made by looking down the line of a grill and in difficult circumstances;
>
> d. That the learned judge fell into error in not recognizing and carefully consider (sic) the inconsistency in the testimony of the Crown (sic) witnesses;
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> e. That the learned judge erred in law in that the summation and assessment of the evidence by the learned Judge was neither fair nor adequate having regard to the fact that the evidence for the prosecution connecting the Appellant to the crime rests wholly or substantially on visual identification and as such the learned Judge was required to deal with the strength and weaknesses of the identification evidence and consider all the surrounding circumstances;
>
> f. That the learned judge erred in failing to adequately discussed (sic) the strength and weaknesses of the Appellant's case or properly assess and present the evidence (Defence) of the Appellant, especially the evidence of the alibi witness, which she dismissed because of her good memory; and

g. That the sentences on both counts imposed by the learned judge were excessive, having regard to all the circumstances."

[16] Counsel for the applicant submitted that four issues could be distilled from these grounds as follows:

> "(a) Whether or not the summation and assessment of the evidence by the learned Judge was fair or adequate having regard to the fact that the evidence for the prosecution connecting the applicant to the crime rests wholly or substantially on visual identification and as such the learned Judge was required to deal with the strength and weaknesses of the identification evidence and consider all the surrounding circumstances;
>
> (b) Whether or not it was fair to the applicant for the learned judge to admit and rely on evidence relating to the identification parade;
>
> (c) Whether or not the learned judge fairly and adequately present (sic) and consider (sic) the case of the applicant; and
> (d) Whether or not the sentences imposed by the learned judge was (sic) excessive, having regard to all the circumstances."

[17] As counsel's submissions addressed these issues as identified, we will deal with them accordingly save to say that issue (b) was not pursued.

Issue 1

Was the summation fair and adequate?
(Identification and strengths and weaknesses of the case)

[18] Counsel for the applicant in his written submissions stated that there was no dispute that the evidence for the prosecution rested wholly or substantially on visual identification. In those circumstances, he said, it was

incumbent on the trial judge to explain the significance of the evidence and not just to give a narration of it. If the learned judge did not deal with the strengths and weaknesses of the identification evidence then, it was submitted, the summation was unlikely to be fair and adequate. Counsel complained specifically that the learned trial judge did not deal adequately with the obstruction that the grill must have presented, particularly since Mr Barrett was looking down the side of the grill. Additionally, the learned judge, he submitted, also did not comment adequately on the lapse of time between the date of the crime and the identification parade nor on any specific peculiarities which may have assisted Mr Barrett in identifying the applicant on the identification parade, which was held approximately one year later, nor did she deal cogently with the evidence relative to how well the applicant was known by Mr Barrett prior to the date of the crime.

[19] At the hearing of the appeal although counsel for the applicant maintained that the real issue before the court was identification, much time and argument centred around the failure of the learned trial judge to deal with what he referred to as the several inconsistencies in the case. With regard to the issue of identification, counsel indicated to the court that the applicant was no longer taking any issue with the conduct of the identification parade, as mentioned earlier, and also that he could find no fault with the evidence adduced in respect of the lighting of the area

and how the learned judge dealt with the same in her summing-up. With regard to the grill however, he now focused on the presence of the same being very important to the identification of the applicant, particularly since there was no evidence of the pattern of the grill. He submitted that it must have been difficult to see what was outside, the house being grilled, and the judge did not deal with that at all. He complained that whereas Mr Barrett could identify the voice of Sound Boy he could not or did not do so in relation to the applicant which underscored the fact that he did not know him well, if at all, as the applicant had said in his evidence. Further, Mr Barrett had only given the name of "Peter" to the police and that could not be sufficient to apprehend anyone, particularly if the incorrect address had also been given. It then became very important, he submitted, as to whether the incident had lasted fifteen minutes or two minutes as stated by Mr Barrett in court and in his statement respectively. On this issue of identification counsel relied on seven authorities, (viz) **Regina v Turnbull** [1977] 1 Q.B. 224, CA; **Regina v Kirk Manning** SCCA No. 43/99 delivered 20 March 2000; **Jerome Tucker and Linton Thompson v R** SCCA Nos. 77 & 78/95 delivered 26 February 1996]; **R v Evon Smith** SCCA No. 232/2001 delivered 12 December 2002; **Karl Shand v The Queen** UKPC No. 8 of 1994 delivered 27 November 1995, [1996] 1WLR 67; **Mark McNeil v R** SCCA No. 61/2003 delivered 20 December 2004 and **Garnett Edwards v R** UKPC No. 29 of 2005 delivered

25 April 2006. We will deal with these authorities in due course in this judgment.

[20] With regard to the claim that there were several inconsistencies in the evidence of the virtual complainant, counsel brought four to our attention:

(1) For the first time in court, Mr Barrett mentioned that the applicant was crouching at the wall. He did not say this in his statement to the police.

(2) In evidence in court he had said that the applicant was five feet from the house, as well as that the applicant was right against the wall crouching.

(3) In court he gave evidence that the applicant had a straight face whereas he had never ever said that to the police.

(4) When he came to court he said that he had told his mother, at the time of the incident, who had shot him, but he had never before said that to the police.

It was the submission of counsel for the applicant that since the learned trial judge did not deal with any of these inconsistencies, then her summation was both unfair and inadequate.

[21] In reply, learned crown counsel submitted that the summing-up of the learned trial judge was fair in all respects. She argued that the judge

was impeccable and exhaustive in her analysis of the identification evidence. Counsel further submitted that the judge dealt with the positioning of the applicant at the wall, whether the grill could have been an obstruction, and what happened when the applicant came to the verandah. She explored the evidence as to whether the virtual complainant had an opportunity to look at his assailants before running into the house. The learned judge concluded, quite correctly, she submitted, that these were not circumstances in which the virtual complainant only had a "fleeting glance". The learned judge, she further argued, had dealt adequately with the evidence of Mr Barrett who had stated that he did not have any problems with the applicant, and as a consequence when he saw them, he did not think that they were coming for him, so he stood and looked at them, and it was only when they pointed the guns at him that he turned and fled into the house. The learned judge analyzed the conflicting evidence on the time given for the incident and for observation of the applicant and Sound Boy the other assailant, and concluded that in all the circumstances there was enough time for observation and recognition. Crown counsel also submitted that the learned judge had demonstrated that she was "seized of the complete picture and of the layout of the verandah".

[22] Crown counsel agreed with an intervention from the court that although there was an attempt to make an application to visit the locus it

had not been vigorously pursued, as there did not seem to be any good reason for this, especially since there was no credible challenge to the lighting and the case really turned on whether Mr Barrett could see his assailants before the firing started. Counsel submitted that based on the authority of **R v Turnbull**, in respect of the quality of identification evidence, there was support in the evidence otherwise for the correctness of the identification, which is set out below:

(1) the applicant was identified at the identification parade,

(2) Mr Barrett said that he had known him by the name of Peter, in fact he said that he knew him as "Peter Holness."

(3) The applicant accepted that he was known as "Peter'.

(4) Doreen Deacon who gave evidence in support of the applicant referred to him as 'Peter'.

(5) Mr Barrett and the applicant were not strangers.

(6) Mr Barrett said that he saw the applicant 2-3 times a week; he said that he saw him at the shop. This was supported by the applicant's supporting witness who said that sometimes he did go to the shop to buy cigarettes and cards which would suggest that he could have been seen and recognized on the night in question.

(7) The applicant was detained at the funeral service held for Sound Boy, the same person that was seen with the applicant

on that night. The applicant had said that he did not know Sound Boy, yet he was at his funeral.

Analysis

[23] On page 209 of her summation, the learned judge, clearly identified the main issue in the case. She stated:

> "The major issue in this case is the issue of the identification of the person or persons, because it is said that there were two men who shot Mr Barrett. So, the issue (sic) is for the court to examine is did he see? Did he have an opportunity to see the men in his premises that night, that he said fired on him and shot him?"

The learned judge said that this was a case of recognition, because Mr Barrett said that he knew the applicant before. However, she stated:

> "Now, although it is a case of recognition, I still have to warn myself in relation to the identification because the identification evidence is the only evidence in this case linking the accused man to the charges. And so, I have to warn myself of the special need of caution which I now do.
>
> I have to warn myself to be cautious before convicting the defendant, in reliance on the evidence of identification and this is so, because it is possible for an honest witness to make a mistaken identification. And this is even so, when it is a case of recognition, that is; a person known to the witnesses before, because mistakes can be made even in cases of recognition. So, I have to carefully examine the identification evidence, to assess its strength and weaknesses to see if I can rely on the identification by the complainant, Mr. Barrett."

[24] The judge stated that the defence was one of alibi, but warned herself appropriately. This is what she said:

> "The defence is alibi. The defendant himself gave sworn evidence and he called a witness and he is alleging that it was – he was not there at the time of the shooting. It is the prosecution who must prove his guilt so that I feel sure of it. He doesn't have to prove that he was somewhere else. The prosecution must disprove his alibi. I don't know if I conclude and even if I conclude that his alibi is false, it does not mean that I find him guilty. The prosecution must make me sure of his guilt, even if I find the alibi false."

The summation in this respect is balanced, fair and cannot be faulted.

With regard to the issue of the obstruction of the grill and whether Mr Barrett could see alongside the wall of the house in those circumstances, the learned judge recalled the evidence in this way:

> "So, now I go to review the identification evidence, because as I said this is the crucial issue. I have to bear in mind first of all, that the incident took place at 8:30 in the night. The complainant that (sic) said that he stood on his veranda, stood at a certain angle by the grill, around the veranda, looked to the side and he saw the two men. He said that the accused was one of them and he knew him as Peter…
> Peter was crouching and facing him. At this time, in terms of the distance, he was five feet away. Well at that time he said he saw the accused with a gun in his hand, the other man who he has identified as one called 'Sound Boy' he was standing behind Peter, but he did not indicate or gave (sic)any evidence as to whether 'Sound Boy' was crouching or not, he was behind Peter. In fact he said he used the word, 'Sound Boy' was standing by the wall, behind Peter."

[25] The learned judge also reviewed the evidence of Mr Barrett with regard to the time he had for observation of the applicant, and she had this to say:

> "He said, he looked at the men at that time, the men were not looking at him, based on where they were positioned. He said after he had observed them then he realized that after a certain stage the firearm was pointed at him and at that time.
>
> Then he made a move from the veranda back into his house. He heard a barrage of shots. He indicated that that was when he felt the burning pain. He went behind the wall in his living room there were further shots. He said, himself and his family went to some back room and then he recognized the voice of 'Sound Boy' saying, 'him get shot'. "

[26] She also addressed her mind to the question of whether in all the circumstances, Mr Barrett only had a fleeting glance:

> "So, based on the evidence, the time that he would have had to observed (sic) the men, would have been the time before he turned and ran into the house. Because although he did speak of seeing Peter, he would have been running away. So any view at that time would have been a fleeting glance. So the issue now is, was there sufficient opportunity to see the men before the firing started?"

[27] In dealing with the discrepancy in the evidence of the complainant as to whether he could have seen the applicant bearing in mind what he

had originally said to the police and the evidence he had given in court,

the learned judge stated and concluded:

> "He then went on to say, "when I saw Peter, when I looked through the grill and saw him, he was five feet from me. The light was over his head. He was facing me. I saw him at that time for about a minute". About one minute, looked at them, not specific, gave full description of their clothes. "Did not see him for less than five seconds, for abut one minute. I never knew it was me dem come for."
>
> But, he said no, because when he saw them, he stood up and looked at them, because he had no difficulty with these men. So, he never knew it was him they had come for, so he looked at them. And he went on to tell the Court that (sic) his yard, there is some boundary in the area, so he said that is the reason he was looking at them, because he didn't think that they came for him, so he was looking at them and observing them and after he did that, then at some stage, he can't really say that they saw him, but at some stage the firearms were now pointed at him and that is when he ran."

And then she made the following finding:

> "It is not a matter of seconds and I accept, as I said, Mr. Barrett is an impressive witness.
>
> In relation to why he said, he stood and observed the men, it is not a fleeting case and it is not a sighting at a time that is a difficult time, because at that time he saw and was observing Peter and the other man.
>
> As far as he is concerned, seeing them there or not seeing them at that time, he knew they came for him, and at the time he was being fired at, it is after that initial observation that the

> observation would have been done under difficult circumstances. What I find, it is not a fleeting glance and it is not a sighting, seeing under difficult circumstances. The men, the accused man, was known to him before as Peter and he pointed out Peter on a parade one year later."

[28] On the question of the discrepancy of the time of the incident and therefore the total time of observation with regard to identification, the learned judge analysed the different times given between the statement of fifteen minutes in court in evidence and two minutes in the statement to the police. In her summation she said this:

> "I have to look at the estimate in time, based on a second discrepancy in the matter. This has to deal with in his police statement that he described that the whole incident in terms of the barrage of the gun shots, lasted for fifteen minutes. He said that he doesn't remember telling the police that. He is telling the Court it lasted for two minutes. He told the Court it was two minutes, but he told the police it was fifteen, so what Mr. Bishop is saying that the Court cannot rely on this man's estimation of time and that is a discrepancy I have to consider because he is saying it was (sic) bout one minute, so I have to look at that in relation to the identification evidence. But as I said before, I do accept that he never just came out on the veranda, saw guns pointed on him and ran back inside. I do accept, that he looked to see the men, what he was saying, and at that time, there was no connection in terms of the men seeing him and I do accept that he did observe them, although I have to look at his estimate to see whether it is an over estimation of the time, as I examine the narrative of what he has said."

And she made her findings at page 226 of the transcript by stating:

> "In relation to the time, I will have to bear in mind that although, based on the narrative, there might have been some over estimation of the time by Mr Barrett."

But at the end of the day the learned judge having addressed her mind carefully to all the issues as they relate to identification made the specific finding:

> "The evidence is that there was no issues, or difficulties between these two men. So there is no issue of a malicious identification, so the issue really is one, whether or not it is a mistake and having assessed all the evidence, based on what the witness has said, which I accept.
> I accept him as an impressive witness, I do find he had sufficient opportunity to view the men and that it is a case where he knew them before that. I find that his identification of the accused man is a proper identification."

This finding is reasonable on the evidence adduced in this case.

[29] As indicated previously counsel for the applicant relied on several authorities to support the issue that the summation was neither fair nor adequate. The oft cited case of **Regina v Turnbull** is always relevant when the main issue in the case is visual identification and even more so when there is, as in the instant case, one eye-witness as to the incident. However, as would have been seen from some of the excerpts of the evidence and the analysis of the same in the summation in this case, the learned judge was very careful in the manner in which she approached

the guidelines on identification evidence. She certainly warned herself of the dangers involved in relying on such evidence and the reasons to proceed with caution. Additionally in this case, there is no longer any challenge to the lighting conditions which were set out by Mr. Barrett and later confirmed by Constable Jameson Ricketts who went to Mr. Barrett's home and observed the electric light shining at the side of the house and also the street light illuminating the grill, the yard and "all the way down". This was also a recognition case and the virtual complainant identified the applicant on the identification parade. In **Regina v Kirk Manning** this court endorsed the principles to be distilled from **R v Turnbull** and expressed the view that in general the court must look at inconsistencies in the evidence and consider whether they are material. The learned judge did not accept that there were any material inconsistencies in this case.

[30] In **Jerome Tucker and Linton Thompson v R** this court discussed the issue of whether the circumstances of observation were fleeting glances, which in that case were eight seconds, six seconds, fifteen seconds and five seconds respectively. This court held that in the circumstances of that case, the evidence did not disclose a "fleeting glance". Further all the witnesses knew the applicants. No identification parade was held. This case can offer little assistance to the applicant. What it does show

however is that each judge must deal with the facts and evidence in the case before her.

[31] The cases of **R v Evon Smith, Karl Shand v The Queen, Mark McNeil v R** and **Garnet Edwards v The Queen,** are all cases dealing with the issue of visual identification and how the courts have dealt with different facts and circumstances: whether the applicant was known previously; whether statements of the deceased shouting the applicant's name are part of the res gestae; the importance of the **R v Turnbull** directions save in exceptional circumstances; the requirement of the judge to give careful directions setting out the strengths and weaknesses of the identification and linking the facts to the principles of law; the failure to follow the requisite guidelines resulting in a verdict that is unsatisfactory. In this case the learned judge is to be commended for the thorough detailed analysis of the evidence and her adherence to the principles that have been enunciated in the cases above.

In our view therefore, this ground of appeal has no merit.

Issue 3

Was the case for the defence properly presented and considered?

[32] Counsel for the applicant challenged the learned judge's treatment of the defence which was an alibi. He said that the learned judge had a duty to weigh the evidence on the same scale as that of the

prosecution. In this case, he submitted, it was clear from the transcript that there had not been any careful and thorough examination of the evidence adduced on behalf of the applicant before it was rejected, which had therefore made the trial unfair.

[33] Crown Counsel submitted that the learned trial judge gave full and detailed consideration to the defence of alibi and properly rejected it. She said the judge dealt with the different addresses of the applicant given to the court by the applicant and by Mr Barrett. Counsel referred to the fact that the learned trial judge had noted that the supporting witness of the applicant seemed to remember everything due to the fact that the applicant was at the funeral of Sound Boy and found, as she was entitled to, that the witness was not an impressive witness.

Analysis

[34] The learned trial judge set out in detail the sworn evidence given by the applicant and his witness, who gave evidence in support, that he had spent most of the day at her premises. She commented on the fact that Miss Deacon said that it was "when reflection took place and everything came back to her memory, right at that time, although it was one year later". She therefore addressed her mind to whether the witness Deacon was a witness of convenience, and or whether she was credible. At page 226 she concluded:

> "At any rate, the Defence does not have to prove anything because whatever I make of the alibi the Defence has nothing to prove. It is the Prosecution, I make that comment, that I am not really impressed with the evidence has (sic) given by Miss Deacon. As I said, I have to go back to the Crown's case in relation to the sufficiency of the identification evidence. And I will say this, as I said before, the witness is seeing two men to the side of his house, five feet away from him. There is lighting in the area where the men are, there is no obstruction of the faces. These are men he knew before."

Her analysis is clear and her findings are reasonable based on the evidence. There is no question that she gave equal consideration to the case for the defence as she did in respect of the evidence presented on behalf of the prosecution. We find no merit in this ground of appeal.

Issue 4

Sentence

[35] This ground was not seriously argued or vigorously pursued and rightly so, as in all the circumstances of this case the sentences imposed were within the range in respect of similar offences and the applicant could not reasonably argue that the sentences imposed were manifestly excessive.

Conclusion

[36] The application for leave to appeal against conviction and sentence is refused. The sentences will commence on 30 August 2008.