**[2024] JMCA Crim 15**

**JAMAICA**

**IN THE COURT OF APPEAL**

**BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA**
**THE HON MISS JUSTICE EDWARDS JA**
**THE HON MISS JUSTICE SIMMONS JA**

**SUPREME COURT CRIMINAL APPEAL NO 22/2018**

**KEMOY KESTO v R**

**Oswest Senior-Smith for the appellant**

**Miss Paula Llewelyn KC, Director of Public Prosecutions, and Janek Forbes for the Crown**

**10, 12, 13 May 2022 and 22 March 2024**

**Criminal law – Appeal against convictions and sentence – Trial by judge alone – Visual identification evidence – Whether judge should have withdrawn the case given weaknesses in visual identification evidence – Identification parade – Whether judge applied wrong test to determine the need for a formal identification parade – Duty of judge to properly consider defence – Defects in police investigation – Impact of defective investigation on fairness of trial process – Whether judge's treatment of defects in investigation resulted in miscarriages of justice – Section 14(1) of the Judicature (Appellate Jurisdiction) Act**

**MCDONALD-BISHOP JA**

[1] Between 9 and 16 February 2018, Mr Kemoy Kesto ('the appellant') was tried and convicted by a judge sitting alone in the High Court Division of the Gun Court held in the parish of Saint Ann. He was charged on a three-count indictment for the offences of illegal possession of firearm (count one), assault (count two), and unlawful wounding (count three). The offences were all allegedly committed in the course of an incident that occurred on 13 December 2012.

[2] On 19 February 2018, the appellant was sentenced to 10 years' imprisonment at hard labour for illegal possession of firearm, one year's imprisonment at hard labour for assault, and two years' imprisonment at hard labour for unlawful wounding. The sentences were ordered to run concurrently.

[3] The appellant was aggrieved by this outcome and successfully applied to this court for permission to appeal.

[4] On 13 May 2022, having considered the appeal and counsel's submissions, we allowed the appeal, quashed the convictions, set aside the sentences and entered judgment and verdict of acquittal. At the time, we promised to reduce our reasons to writing later, and we do so now with sincere apologies for the delay.

**The background**

A. <u>The prosecution's case</u>

[5] It is only necessary to provide a relatively brief outline of the case brought by the prosecution at the trial. The salient facts were these. On 13 December 2012, the complainant was a taxi operator plying the Ocho Rios to Saint Ann's Bay route in the parish of Saint Ann. At about 10:45 pm, he was at the Total Gas Station in Ocho Rios, awaiting passengers to leave for Saint Ann's Bay, when he noticed a man wearing a multi-coloured jacket and a baseball cap in the company of a "fluffy-haired" woman. He saw the man at the time because the man was leaning on a light post, and the roof lights in the gas station were shining brightly. He saw the man's face for over 15 seconds. After the man and his female companion boarded the taxi, the complainant turned to look at the rear of the car and saw the man's face for five seconds.

[6] On the way to Saint Ann's Bay, the complainant dropped off several passengers, leaving the man and his female companion as the only remaining passengers. They were both seated on the left side of the rear seat of the taxi. The man asked him to leave him at the hospital. While on his way to the hospital, the complainant stopped at the entrance of the Marcus Garvey Preparatory and High schools ('the school gate') when he heard

someone say, "[d]river a here so made [sic] do it". He then said to the person who spoke, "but you said you want to go up to the hospital". He turned around to the rear of the car when he saw the man with a gun pointing at him. The man squeezed the trigger, and the complainant heard the gun make a "click click" sound, five times.

[7] The complainant drove off when he realised the gun was not firing. The man hit him in the head with the gun, which caused a wound. There was a struggle for the steering wheel between the man and the complainant which caused the complainant to lose control of the car. The car slammed into a fence and a tree at the school gate. The female passenger jumped from the vehicle and ran along the roadway. The man started to leave the car, exiting backwards, when the complainant took a "chopper" (a short machete) he had beside the hand brake and swung it in the direction of the man. It caught the man in his face. The man left the car and ran off. The complainant exited the vehicle and got assistance from a passing motorist to the Saint Ann's Bay Hospital.

[8] According to the complainant, between a few minutes to an hour later, whilst at the hospital receiving treatment for the wound to his head, he saw a man come in with a handkerchief wrapped around a part of his face. The man resembled the assailant. The man was in the company of another male. He was not wearing the multi-coloured jacket or the peak cap the man had worn in the taxi. The complainant asked a nurse to take him to where the man was, and he took a "great look" at him. The complainant saw the man's face with the aid of light in the hospital for about 10 seconds at a distance of six feet. The doctor asked the man to remove the handkerchief and, after initially refusing, the man eventually complied. When the man removed the handkerchief from his face, the complainant identified him as the assailant to the attending doctor. The appellant was the man identified as the assailant. The appellant denied the complainant's accusation. The doctor then called the police.

[9] Corporal Marcus Bent attended the Saint Ann's Bay Hospital in response to the call from the doctor. The complainant made a report to Corporal Bent and pointed out the appellant to him. Corporal Bent advised the appellant of the report made against him and

cautioned him. The appellant gave his name to Corporal Bent, who observed that the appellant had a wound on the left side of his face. According to Corporal Bent, the appellant told him that he sustained the injury when he fell and hit his face on a stone. However, he did not say where the appellant told him he had hit his head, although he was asked that question during the examination-in-chief. Corporal Bent transported the appellant to the Saint Ann's Bay Police Station where he was handed over to personnel at the Saint Ann's Bay Criminal Investigations Branch.

[10] The next day, Detective Constable Alicia Jones, the investigating officer, interviewed the complainant at the police station and took a written statement from him. She eventually saw and spoke to the appellant at the Saint Ann's Bay Police Station lock-up and later charged him. She advised the appellant that, based on the allegation against him that he was injured in the complainant's motor car, she needed a sample of his blood for DNA analysis. The appellant consented and was escorted to the Saint Ann's Bay Hospital where samples of his blood were taken. The investigating officer later submitted the blood samples to the forensic laboratory for testing. The test result had not been received up to the end of the trial.

[11] Detective Constable Jones also noticed a bandage on the appellant's face. When she asked him about the injury, he explained that he was hit by a stone at a "dead yard" and blacked out. She made requests of scenes of crime personnel for the taxi to be processed, but that was not done. She also requested that an identification parade be conducted due to her concerns about the complainant's identification of the appellant, but that too was not done. She testified that the appellant had denied committing the offences since the time she initially spoke to him at the lock-up. She did not attend the "dead yard" the appellant had told her about to make further enquiries.

[12] The medical reports for the complainant and the appellant were admitted at the trial as agreed evidence. In so far as is relevant, the appellant was observed with a one-centimetre superficial laceration which the doctor opined could have been caused by a

sharp instrument. Neither the complainant nor the appellant's injuries were considered serious.

B. The defence

[13] Counsel for the appellant made a no-case submission on several grounds, chief of which were: (a) the quality of the identification evidence, which he described as tenuous; (b) the failure of the police to conduct inquiries regarding the appellant's alibi; (c) the failure of the prosecution to obtain the DNA results in circumstances where the appellant had willingly given his blood sample with the expectation that the police would have caused the forensic analysis to be done; (d) the inconsistencies in the complainant's evidence concerning the lighting at the place where he was assaulted; and (e) the nature of the wound to the complainant's face. The no-case submission failed.

[14] In his defence, the appellant made an unsworn statement from the dock in which he denied involvement in the commission of the offences. He stated that he was at a "dead yard" in Mammee Bay playing dominoes when he was hit in the face with a stone and rendered unconscious. He regained consciousness on his way to the hospital and was told that one, Normaine Arscott (otherwise called 'Normy'), had flung the stone, which hit him in the face. While being treated at the hospital, he was approached by police officers who advised him of the allegations against him. They took him to the police station and, the next day, he asked for DNA testing to be done and gave samples of his blood to the police. After he was granted bail, he tried to press charges against Normy, but Normy was never charged.

[15] The appellant called Miss Ruth Matthews to testify in support of his alibi and his good character. In essence, Miss Matthews gave evidence that on the night of 13 December 2012, at about 10:00 am, a "dead yard" was being kept at her house for her deceased daughter, and the appellant was there playing dominoes. The men at the domino table asked her for some liquor, and she was serving them when she saw her nephew, Normy, slap the appellant in his face with a stone. The appellant fell to the ground and was taken to the Saint Ann's Bay Hospital. She knew Normy and the appellant

to have been in a conflict a month before that night. She knew the appellant to have been a calm person who had never been in trouble with the law before he was charged in this case.

[16] The learned trial judge accepted the evidence led by the prosecution and found the appellant guilty.

**The appeal**

[17] The appellant filed a notice and grounds of appeal against his convictions and sentences. He was granted leave to abandon the original grounds and to argue seven supplemental grounds of appeal instead. The supplemental grounds were expressed in these terms:

(1) "The No Case Submission, at the end of the Prosecution's Case, ought, respectfully, to have been upheld by the learned trial judge."

(2) "The learned judge fell into error whereby the appellant lost the protection of the law and was exposed to the risk of conviction when she determined that no identification parade was necessary."

(3) "Upon the learned trial judge declaring that credibility was not in issue, the appellant's chances of acquittal became severely impugned."

(4) "The learned trial judge respectfully did not give the Appellant's Defence sufficient consideration."

(5) "The learned trial judge betrayed flawed reasoning in arriving at her verdict which ultimately led to the Appellant's conviction."

(6) "The learned trial judges' recollection of the evidence was faulty and unreliable."

(7) "The sentence of ten (10) years was in the circumstances manifestly excessive."

[18] This was a case in which visual identification and credibility were in issue. Therefore, the matters raised in the grounds of appeal against conviction and the submissions in support of those grounds primarily concerned the purported visual identification of the appellant, failure of the police to conduct an identification parade, shortcomings in the investigative process, and the learned trial judge's treatment of the appellant's defence in the light of the deficiencies in the prosecution's case. Given the closely interrelated issues that arose from grounds 1, 2, 4, 5 and 6, we commenced our evaluation of the appeal with an examination of the learned judge's treatment of the identification evidence, which was the fulcrum of the prosecution's case.

## Discussion and findings

A. The judge's treatment of the visual identification evidence

[19] The case for the prosecution was based wholly on the complainant's evidence of identification, which the defence challenged to have been mistaken. Therefore, as the learned judge correctly recognised, the guidelines set out in the seminal case of **R v Turnbull and others** [1977] QB 224 ('**Turnbull**') regarding the proper approach the court should take in cases dependent on visual identification was crucial to the resolution of the case.

[20] In **Jermaine Plunkett v R** [2021] JMCA Crim 43, V Harris JA conveniently summarised the law concerning the duty of a trial judge to withdraw the case from the jury in cases where identification is in issue. At paras. [20] and [21], she stated that:

> "[20] In fact, in identification cases, the duty of a trial judge to withdraw the case from the jury, further to a submission of no case to answer, is broader than the general duty laid down in **R v Galbraith** (see **R v Ivan Fergus** (1994) 98 Cr App R 313). Lord Widgery CJ, in the oft-cited case of **R v Turnbull and Another** [1977] QB 224 ('**R v Turnbull**') at pages 229 to 230, established

the considerations of a trial judge when contemplating a no case submission in identification cases; he articulated:

> '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 …[t]he 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.'

[21] The judgment of Lord Mustill in **R v Daley** re-stated the law in **R v Galbraith**, within the context of **R v Turnbull**. At page 334, he stated:

> '…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.** Reading the two cases in this way, their Lordships see no conflict between them.'" (Emphasis and italics as in original)

[21] Unsurprisingly, the learned judge did not express her reasons for rejecting the no-case submission, as she was a judge sitting alone. However, her summing-up of the case revealed her thought process regarding the quality of the identification evidence. She referenced the guidelines set out in **Turnbull** ('the Turnbull guidelines') and found, in so far as is immediately relevant to our consideration of the identification evidence, that:

i. The identification was not mistaken, having regard to the time the complainant saw the appellant's face, the favourable quality of the lighting at two locations, and the proximity between them in Ocho Rios, the car, and the hospital.

ii. The complainant had an unobstructed view of the appellant's face even though the appellant wore a cap.

iii. Any evidence of identification would be based on the complainant's description of the man's clothes. The man wore a multi-coloured jacket and cap throughout the incident. At the hospital, within a few minutes to an hour after he had arrived, the complainant saw his assailant come to the hospital dressed in a white t-shirt and a cap. It was not put to the complainant that the appellant wore no cap to the hospital.

iv. The appellant had a handkerchief wrapped around his face at the hospital, and he initially refused to remove it when asked to do so.

v. The left side of the assailant's face would have been closest to the driver's seat, the car being right-hand driven, and the evidence was that the assailant sat in the left rear seat.

vi. As a weakness in the identification, the complainant's attention may have been divided as he noticed the fluffy-haired woman who also occupied the rear seat. The other weakness was that the assailant had a gun which was pointed at the complainant. This would have affected the complainant's ability to see the assailant's face because he started to drive to get help. He would have been more focused on controlling the car than observing the face.

vii. Identification by confrontation did not arise because the identification at the hospital was spontaneous, independent, and unaided by the

police or a witness. Therefore, an identification parade was unnecessary, and the investigating officer's opinion that one was required was irrelevant.

viii. The complainant admitted under cross-examination that he told the police where he was told to stop was dark. That inconsistency did not go to the root of the Crown's case.

ix. This was not a case of a fleeting glance or a longer observation made in difficult circumstances. There were several instances in which the complainant had the opportunity to identify his assailant, and these came about before any injury or trauma to the head of the complainant.

[22] Counsel for the appellant, Mr Senior-Smith, launched his attack on the learned judge's reasons for convicting the appellant against the background of the relevant law and evidence. According to counsel, the evidence of visual identification was "weak, tenuous, insufficient, unreliable and emerged from a distressing and difficult set of circumstances". He pointed to several aspects of the evidence, which he said revealed "factors attenuating the cogency of the evidence of identification". Notably, these aspects of the evidence included the relatively poor lighting, the wearing of the peak cap, the absence of any distinguishing feature of the appellant, and the different clothing the appellant was wearing when he was seen at the hospital.

[23] Counsel also noted that there was a difficulty with the identification of the appellant at the hospital because, at the highest, the complainant could only say, at first, that the appellant resembled the assailant. The fact that the complainant purported to identify the appellant only after the handkerchief was removed from the appellant's face, should have led the learned judge to properly direct herself on whether or not the complainant used the injury to the appellant's face, alone, to identify him.

[24] Mr Senior-Smith maintained that, on an objective assessment, the quality of the identification evidence was poor and unsupported and, as a result, the case should have

been withdrawn from the jury mind of the learned judge in accordance with the applicable guidelines.

[25] In response to these submissions, the Crown submitted, through Mr Forbes, that at the close of the prosecution's case, the identification evidence showed sufficient opportunities for the complainant to have viewed his assailant in circumstances that were sufficiently ideal for him to make a correct identification. Counsel for the Crown maintained that the subsequent identification of the appellant, within an hour, lends support to the correctness of the identification evidence.

[26] Relying on such cases as **Turnbull**, **R v Galbraith** [1981] 1 WLR 1039 ('**Galbraith**') and **Orville Brown v R** [2012] JMCA Crim 74, Mr Forbes contended that on the complainant's evidence, "lighting, period and distance of observation, and the part of the assailant observed were all sufficient when measured against the Turnbull standard" and were "certainly sufficient to surmount the Galbraith test". In the Crown's view, ground one, which challenges the upholding of the no-case submission, is unmeritorious, having regard to the cumulative potency of the complainant's evidence.

[27] Having assessed the evidence within the context of the law and the helpful submissions of counsel on both sides, we observed that this was not a case in which the identification evidence was free from difficulties. The complainant gave evidence of four opportunities on which he observed the face of the appellant and the time he did so, which were, at best, estimated (expectedly so). Having considered the relevant portions of the transcript highlighted by counsel, we found that, objectively, the period in which the complainant purportedly observed the appellant would have been less than the time he initially stated. In examination-in-chief, he said he saw the face of the appellant for a cumulative period of 30 seconds before seeing him at the hospital. It was later revealed in cross-examination that, on the fourth occasion, when he said he had seen the appellant's face for five seconds, the area was dark. This, the learned judge found, should not be counted as an opportunity for a proper identification to be made. This means that

the time of viewing given by the complainant would have been reduced to about 25 seconds.

[28] However, the time for observation of the assailant would be subject to further reduction because it is not unreasonable to conclude, as the learned judge herself opined, that the first sighting in Ocho Rios was not as significant as the Crown would want the court to believe. Nothing was happening at that time in Ocho Rios for the complainant to have been paying any particular attention to the person he said was the appellant standing at the light post. This helps to explain his inability to provide any specific identifying feature of the appellant beyond his attire. The learned judge herself opined that the appellant's attention was divided between the fluffy-haired woman and the man in the multi-coloured jacket, wearing a peak cap. She found that this weakness in the identification evidence reduced the period of the initial sighting of the assailant. In effect, this would have reduced the initial sighting that the complainant said was of 15 seconds duration, thereby negatively affecting the overall viewing, rendering it less than 25 seconds.

[29] The second and third sightings were in the car when the complainant said he looked at the rear from the driver's seat and saw the face of the appellant. Objectively considered, these sightings could not have been more than two fleeting over-the-shoulder glances, since there was no evidence that anything was happening in the rear of the car that would have detained the complainant's attention and observation of the persons at the rear.

[30] More importantly, the sightings of the assailant were in circumstances that were in no way ideal for a first-time identification of a stranger. The first point of consideration of the difficult circumstances is that the incident took place at night. Additionally, the man wore a peak cap pulled down to his forehead, concealing his hair. Mr Senior-Smith made heavy weather of this. He contended that the cap would have affected the complainant's ability to correctly identify his assailant, as the hair, an identifying feature, was not visible under the cap. The assailant's forehead was also covered.

[31] Furthermore, while nothing could be reasonably argued regarding the proximity of the complainant to his assailant while they travelled together in the car, the opportunity for the complainant to view his assailant effectively would have been affected by the positioning of the complainant in the driver's seat of the vehicle vis-à-vis the assailant seated at the rear. In addition, apart from the sighting in Ocho Rios outside of the car, all light sources for the purported identification of the appellant were external to the vehicle. The lighting conditions were, therefore, not ideal for a first-time identification.

[32] It is also noteworthy that, in coming to her conclusion regarding the correctness of the identification, the learned judge made several errors regarding the evidence, failed to resolve a material inconsistency and discrepancy, and failed to assess the identification evidence, which compounded the problem adequately.

[33] In this regard, the learned trial judge made repeated errors regarding the appellant's attire at the hospital. At several points in the transcript, she stated repeatedly in her summing-up that the appellant was wearing the same peak cap at the hospital that he was wearing in the taxi (see pages 172, line 2; 174, lines 12 to 14; and page 187, lines 12 to 15 of the transcript). Then, further in the transcript, it is recorded that she said that the clothing the appellant was wearing at the hospital strengthened the identification evidence of the complainant (see page 194 of the transcript). These utterances by the learned judge prompted counsel on both sides to correct her during her summing up (pages 188 – 190 of the transcript).

[34] When the error regarding the appellant's attire was brought to the learned judge's attention, this exchange followed between her and Crown Counsel (at pages 189 and 190 of the transcript):

> "[CROWN COUNSEL]: There was one instance, m'lady, I am not sure if this is what was said, that identification was aided by the clothing.
>
> HER LADYSHIP: In that he gave a description of the man's clothing being a multi-coloured jacket and cap.

> [CROWN COUNSEL]: The cap in the car juxtapose [sic] with the cap at the hospital, m'lady. When you indicated identification was aided by clothing, we thought that you juxtapose [sic] it with the hat being present in the car juxtapose [sic] with the hat being present at the hospital since we have now reconciled that there was no cap present.
>
> HER LADYSHIP: You want no reference to be made in wearing the cap at no point in the hospital?
>
> [CROWN COUNSEL]: Yes, m'lady
>
> HER LADYSHIP: And let the record so reflected [sic]. Thank you for that."

[35] As can be seen from the exchange between the learned judge and Crown Counsel, what the learned judge believed to have been evidence supportive of the identification evidence, did not exist. However, apart from stating that the record should not reflect a reference to the cap being worn at the hospital, she did not explicitly disclose any adjustment to her reasoning, if any, having been reminded that the appellant was not wearing a cap at the hospital. With the cap taken out of the equation, the appellant's attire at the hospital would not have supported the visual identification, as the learned judge initially thought it to be. The learned judge was required to disabuse that erroneous fact from her mind by expressly indicating that she did so and demonstrating that in the absence of that erroneous fact, the remaining evidence was cogent enough to establish the correctness of the identification as she had initially found.

[36] We also observed that the complainant's evidence contradicted in two material respects, which the learned judge failed to resolve. Firstly, the complainant told the police in his written statement that he did not know where the chopper had caught the appellant. In his testimony, however, he stated that he chopped the appellant to the left side of his face and that he saw a "big open chop" where he chopped the appellant. However, the medical evidence revealed only a one-centimetre superficial laceration to the appellant's cheek. There was no "big open chop" in keeping with the complainant's testimony.

[37] The learned judge did not address this inconsistency between the complainant's evidence and the prior statement to the police, and the discrepancy between the complainant's evidence and the medical evidence, as she was required to do (see **Michael Lorne v R** [2022] JMCA Crim 45 at paras. [46] and [47] and **Oliver Johnson & Karl Roberts v R** [2019] JMCA Crim 20 at para. [26]). Instead, she proceeded to accept the evidence of the site of the injury to the complainant's face as proof of the correctness of the identification. She concluded that the left side of the appellant's face would have been closest to the driver's seat, the car being one with a steering wheel on the right side, and the evidence was that the appellant sat at the left rear seat of the car.

[38] As it turned out, this reasoning by the learned judge, that the appellant was chopped while he was seated at the rear of the car, was erroneous. The complainant stated that when he chopped at the appellant, the appellant was exiting the car backwards. Therefore, the appellant was no longer seated in the rear of the car when he was chopped, as the learned judge reasoned. However, on the complainant's evidence that the appellant was exiting the car backwards when he sustained the injury, there is a possibility that his left side could have been turned towards the complainant. Therefore, it is enough to say that the evidence of injury to the left side of the appellant's face, while potentially supportive of the identification, was not free from difficulty. The complainant's credibility was in issue regarding his evidence that he caused a big, open chop to the appellant's face. Therefore, the presence of an injury to the left cheek of the appellant, though potentially probative, was diluted by the inconsistency in the complainant's evidence and the conflict between his and the medical evidence. The learned judge did not demonstrably resolve these contradictions in the prosecution's case, which she was required to do in the light of the appellant's case that he had sustained the injury to his face when he was hit with a stone in an unrelated incident.

[39] The Crown also prayed in aid the evidence of the complainant's sighting of the appellant at the hospital as an additional factor that would have strengthened his identification as the assailant at the time of the incident. Whilst the identification at the hospital might not have been identification by confrontation, in the sense discouraged by

law, there was still a risk that the fact that the appellant turned up at the hospital with an injury to his face could have been used by the complainant to identify him as the attacker. The learned judge had opined that the complainant's ability to identify the appellant, despite a change of clothing, strengthened the identification evidence. However, she failed to consider a converse but equally live possibility that the presence of the appellant at the hospital with an injury to his face shortly after the incident could have been wrongly used as confirmatory of the identification.

[40] The possibility of the injury to the face being used as support for the identification of the appellant is particularly significant, given that the complainant did not immediately, or definitively, identify the appellant when he first saw him at the hospital. It was when the handkerchief was removed that he saw the injury to the appellant's face, and he purported to make a positive identification. Therefore, it could be said, as contended on behalf of the appellant, that the only thing he used to identify the appellant as his assailant was the facial injury. He spoke to no other feature of the appellant, which assisted him in his identification. This possibility of a risk of mistaken identification, informed by the presence of the appellant at the hospital with an injury to his face, was never considered by the learned judge in assessing the weaknesses in the identification evidence.

[41] This was not a recognition case, as the appellant was previously unknown to the complainant. Cumulatively, the evidence of his sightings of the assailant would have amounted to no more than 20 seconds, at best. Given the noted difficulties with the identification evidence and the learned judge's failure to properly assess all the relevant circumstances, the identification would not have been of such good quality as the learned judge had considered it to be when she rejected the no-case submission. However, at the end of the case, she indicated in her summation that the purported identification of the appellant was not a fleeting glance or a longer observation made under difficult circumstances. This would mean that she would have had no reason in law to withdraw the case from her jury mind based on the identification evidence.

[42] We concluded that, even if the learned judge was correct to opine, as she did, that the identification evidence was not of such poor quality to warrant the withdrawal of the case from her jury mind, the case for the prosecution was, at best, a borderline one. As a borderline case, the learned judge had the discretion to withdraw it or leave it to her jury mind. As recognised in **Galbraith**, there will be borderline cases which can safely be left to the judge's discretion. The learned judge exercised her discretion to leave the case to her jury mind. We would not interfere with the exercise of her discretion on the basis of the identification evidence standing alone.

[43] However, we considered that the learned judge, having exercised the discretion to leave the case to her jury mind, was required to pay keen attention to the appellant's defence. She was under a duty to exercise caution in considering and accepting the visual identification evidence having regard to the difficulties or weaknesses in the evidence, the defence of alibi advanced by the appellant and the poor police investigation that was a major complaint by the appellant on the no-case submission. This is due to the ghastly risk of mistaken identification in cases of this nature. A fair and balanced assessment of the defence was, therefore, necessary in order for the court to avoid a miscarriage of justice in what would have been a borderline case.

[44] In **Steven Causwell v R** [2020] JMCA Crim 41 ('**Steven Causwell**') at para. [113], this court, citing **R v Ramsay** [2000] 6 Archbold News 3, reiterated the instructive statement of the English Court of Appeal that in a borderline case. The principles extracted from that statement is that, even if the judge properly ruled that there was a case to answer, he may be under a duty to re-visit the evidence, taking account of the evidence called on behalf of the defence. In doing so, it would still be open to the judge to withdraw the case from the jury after a no-case submission had been earlier rejected. However, the discretion to withdraw the case from the jury should be exercised sparingly (see **Steven Causwell** at para. [115]). The authorities instruct that close and careful scrutiny of the defence may be, particularly, imperative in a borderline case such as this, and the trial judge's power to withdraw the case from the jury does not necessarily end at the close of the prosecution's case.

[45] We believed that in the circumstances of this case, it being, at best, a borderline case, it would have been within the discretion of the learned judge to refuse the no-case submission. However, the judge nevertheless had a duty to pay keen attention to the defence, given other difficulties in the case that warranted careful treatment as a matter of law. This leads to the immediate consideration of her treatment of the absence of an identification parade complained of in ground 2.

B. <u>The learned judge's treatment of the absence of an identification parade</u>

[46] Connected to the learned judge's treatment of the visual identification evidence at the close of the prosecution's case was her dismissal of the investigating officer's evidence that she requested that an identification parade be held due to concerns she harboured about the complainant's identification of the appellant. In dismissing the investigating officer's opinion at the trial, the learned judge opined that identification by confrontation did not arise because the complainant's purported identification of the appellant at the hospital was spontaneous, independent and unaided by the police. Therefore, she concluded that an identification parade was unnecessary, and the investigating officer's opinion that one was required was irrelevant and would be disregarded.

[47] There is strong and compelling authority which casts doubt on the accuracy of the learned judge's conclusion that an identification parade was not necessary because there was, in effect, no identification by confrontation. The test as to whether a formal identification parade should have been held is not the absence of confrontation but whether an identification parade would have served a useful purpose (see **Goldson (Irvin) and McGlashan (Devon) v R** (2000) 56 WIR 444 and **R v Popat** [1998] 2 Cr App Rep 208). This question is even more pressing in this case given that it involves a case of disputed identification of a stranger.

[48] In **Popat**, the court referenced and analysed the facts of and judicial pronouncements in what it described as two inconsistent streams of authority emanating from the United Kingdom Court of Appeal on the requirement for holding a formal identification parade. Provisions regarding holding a formal identification parade

applicable to that case were to be found in the Code of Practice to section 66 of the Police and Criminal Evidence Act 1984. The court cited, on the one hand, cases such as **R v Brown** [1991] Crim LR 368; **R v Conway** (1990) 91 Cr App Rep 143; **R v Macmath** [1997] Crim LR 586 and **R v Waite** (23 June 1997 unreported); and, on the other hand, **R v Rogers** [1993] Crim LR 386 and **R v Hickin and others** [1996] Crim LR 58. Having examined the two streams of authority, the court concluded that when a suspect has become known (that is, known to the police upon the information of a witness) and disputes his identification as the person who committed the alleged offence and the police wish to rely upon the identification evidence provided by that witness, the question must be asked whether that witness has already made out an "actual and complete identification" of the suspect. If the answer to the question is 'yes', that is to say, that the witness had made an actual and complete identification of the suspect, then an identification parade is not required. If the answer is 'no', that is, no actual and complete identification had been made, the requirement to hold a parade would apply. The court went on to note:

> "**What is an actual and complete prior identification of the relevant individual by the relevant witness will depend upon the facts of each individual case** and the difficulties of assessment which this may involve have already been illustrated by the cases to which we have referred…". (Emphasis added)

[49] The court, however, held that in the circumstances of that case, there had been "an unequivocal identification" of the suspect by the relevant witness properly carried out in accordance with the Code. So, an identification parade was unnecessary for the witness to identify the same man again.

[50] A close study of the authorities cited in **Popat** discloses that the question of whether an identification parade is required may not admit of easy assessment or resolution. As the court said, it will depend upon the facts of each case. Therefore, the learned judge's characterisation of the investigating officer's view regarding holding an identification parade as irrelevant is unfortunate and, perhaps, unfair. The decision to

conduct an identification parade may often require the exercise of the subjective judgment of the police since the circumstances in which an identification of a suspect may be made can vary infinitely. The crucial question for the judge was, therefore, whether the identification of the appellant by the complainant at the hospital was unequivocal, actual and complete so that no useful purpose could have been served by holding an identification parade. The learned judge should have enquired whether, in all the circumstances, the investigating officer had a basis to honestly believe that holding an identification parade could have served a useful purpose before disregarding her evidence. It was not simply a question of whether confrontation identification had occurred, because even the unaided identification by a witness of a suspect can, nevertheless, be doubtful (see **Popat** and the discussion of the cases cited therein).

[51] In a case such as this, where there were some troubling questions regarding the strength of the identification evidence, the circumstances under which the identification was made at the hospital, and the denial of the appellant, who was a stranger to the complainant, the learned judge would have been required to warn herself as to the practical effects of not holding an identification parade. This effect would have included the possibility that the absence of an identification parade might have deprived the appellant of the potential advantage of an inconclusive parade (see **Aurelio Pop v R** [2003] 62 WIR 18).

[52] Accordingly, it seems reasonable to hold that the learned judge failed to properly treat with the evidence and the law regarding the absence of an identification parade. However, we did not find it necessary to consider whether the judge's treatment of this issue would have been fatal to the conviction in light of the conclusion and belated concession of the Crown on ground 4, which we treated as the pivotal ground determinative of the appeal.

[53] Accordingly, we found it sufficient to hold that the duty of the learned judge to consider the impact of the absence of an identification parade on the appellant's case, though important, was not as imperative as her duty to consider the appellant's defence

and the related deficiencies in the police investigation of the case that proved to be detrimental to the appellant. This was the focus of our attention in considering the significant issues that emanated from ground 4, an examination of which now follows.

## C. The learned judge's treatment of the defence

[54] Ground 4 challenges the conviction on the ground that the learned judge did not give the appellant's defence sufficient consideration. This ground encompasses two discrete but significant complaints. The first is that the learned judge gave no reason for rejecting the alibi witness. The second is that the learned judge failed to consider the effect on the defence of the failure of the police to conduct a proper investigation and to procure scientific evidence for which purpose the appellant had willingly given his blood for DNA comparison. These complaints are considered in turn, commencing with the judge's treatment of the evidence of the alibi witness.

### *(i) The treatment of the alibi witness' evidence*

[55] The witness who supported the appellant's alibi, Miss Matthews, was the aunt of Normy, who, the appellant alleged, had hit him with a stone, causing the injury to his face. The defence presented her as an eyewitness to the incident in which the appellant said he sustained his injury. The witness gave evidence that the appellant was at her house, where the "dead yard" was being held in respect of the death of her daughter. Mr Senior-Smith submitted that the learned judge did not explicitly consider that Miss Matthews gave evidence against her nephew and in support of the appellant. He contended that in these circumstances, the learned judge was "obliged to demonstrate a reasoned approach to the resolving of and ultimate rejection of the appellant's alibi witness' evidence".

[56] Having evaluated this complaint of the appellant, we concluded that it is not entirely correct to say that the learned judge gave no reason for rejecting the alibi witness. She indicated several reasons for rejecting the alibi defence at pages 186, 187 and 197 of the transcript, namely:

(i) The appellant and his witness "did not agree on how many stones were involved";

(ii) Miss Matthews' evidence was inconsistent in that she said big stones were used, as well as a handful of big stones were used by Normy;

(iii) Miss Matthews did not "actually" see the blow inflicted on the appellant;

(iv) Miss Matthews' "inconsistent account meant she had not seen what happened, and that weakened the defence case"; and

(v) "Having assessed the demeanour of the prosecution witness as to fact, as well as the evidence of the totality, having applied [her] common sense and experience, [she] rejected the defendant's case despite his good character and [found] that he and his witness are not speaking the truth".

(vi) Her rejection of the alibi was because she accepted the complainant's evidence as credible and reliable.

[57] However, the learned judge had erroneously stated that the witness said Normy had "stones", suggesting that he had more than one stone in his possession. As both counsel pointed out to her during her summing-up of the evidence, the witness had said that Normy had "a big size stone", meaning one stone. Having accepted the correction of counsel on that evidence, as she did, the learned judge was obliged to demonstrably indicate that there was no longer a conflict between the evidence of the witness and the appellant or in the witness' evidence regarding the number of stones Normy allegedly used. Furthermore, she was obliged to demonstrably declare the implication of that corrected evidence on her assessment of the witness' credibility and the appellant's defence. This she failed to do.

[58] The learned judge also did not expressly indicate that she had attached any weight to the fact that the witness was testifying against her relative. No clear motive for her to lie on behalf of the appellant and against her nephew, in such circumstances, was established on the evidence. Therefore, on the face of it, Miss Matthews appeared to have been a person without an interest to serve, and the learned judge had not demonstrably found otherwise. There is, therefore, some merit in the appellant's complaint that the learned judge might not have sufficiently considered Miss Matthews' relationship with Normy (his alleged attacker) and the circumstances in which she stated the reported incident had occurred in determining the weight to accord to her evidence in support of the defence.

[59] It seemed reasonable to conclude that the error on the learned judge's part, that there were internal inconsistencies in Miss Matthews' evidence and discrepancies between her evidence and the appellant's that affected her credibility, might have led the learned judge to disregard other aspects of the witness' evidence, especially regarding her relationship with Normy, as Mr Senior-Smith highlighted. Of course, that omission would have been unfair to the appellant and undermined his defence. However, we were not driven to conclude that this failure of the learned judge, to consider Miss Matthews as a likely witness with no interest to serve, was of such weight to affect the convictions. Instead, we viewed this complaint as part of the learned judge's treatment of the appellant's defence within the broader context of the quality of the police investigation, which formed a major part of the appellant's complaint.

*(ii) The failure of the police to investigate the appellant's alibi defence*

[60] Upon the allegations being made against the appellant at the hospital, before and after the arrival of the police, the appellant denied his involvement in the commission of the crime and indicated that he was at a "dead yard" where he sustained the injury to his face. The complainant overheard him saying that to the security guards at the hospital. The investigating officer, by the day after the incident, at the latest, had the information from the appellant himself that he was injured at a "dead yard". She made

no follow-up enquiry regarding his asserted whereabouts in circumstances where the appellant did not have the onus, in law, to prove his alibi. Still, notwithstanding the opportunity given to the police to conduct investigations into the reported alibi at a time closely contemporaneous with the commission of the offences, they failed to explore that avenue. This could have been done given that the appellant was apprehended on the same night of both alleged incidents. The learned judge, however, rejected the appellant and his alibi witness without taking into account, to the appellant's benefit and as a weakness in the prosecution's case, the failure of the police to conduct a proper investigation into his reported alibi when they had the best opportunity to do so. However, this shortcoming in the investigation, standing alone, was insufficient to affect the convictions.

[61] The failure of the learned judge to take account of the police approach to the investigation of the case was amplified by their inability to produce any scientific evidence in the case to rebut the alibi defence despite the appellant willingly providing samples of his blood for such purposes and the evidence of the complainant that he had chopped the appellant while the appellant was still in the car. On the complainant's evidence, he also left the chopper in the car.

*(iii) The failure of the police to procure scientific evidence in support of the identification evidence*

[62] In the no-case submission at trial, counsel for the appellant stressed the absence of forensic evidence, which was supportive of the purported identification of the appellant, even though the appellant willingly submitted himself to DNA testing. This line of argument was reiterated at the end of the case, as is gleaned from the learned judge's reasoning.

[63] The appellant's complaint regarding the absence of scientific evidence is better appreciated within the context of the evidence of Detective Constable Jones, the investigating officer. The officer testified that given the nature of the allegations that the appellant was chopped in the car by the complainant, she asked the appellant for his

blood. The appellant, on the other hand, stated that he was the one who requested DNA testing and voluntarily gave his blood for testing. Without determining which evidence is to be accepted in this regard, it is incontrovertible that the appellant voluntarily gave his blood for a forensic examination to be conducted, and it was reportedly taken to the forensic laboratory by the police.

[64] Additionally, the chopper that the complainant said he used to injure the appellant was left in the car. Detective Constable Jones, however, gave no evidence about a chopper having been seen or retrieved by the police. Also, she stated that she took a bullet from the car, but she said nothing further about the bullet. Furthermore, the investigating officer said she also requested the vehicle to be processed by scenes of crime personnel, but that was not done. No explanation was given for these failings on the part of the police, albeit there was evidence that the car was in the custody of the police up to January 2013 (when the bullet was recovered from the vehicle).

[65] In treating with the concerns raised by the defence at trial regarding the treatment of the appellant's blood sample by the police and the shortcomings in the police investigation, the learned judge said (page 186 of the transcript):

> "I considered that the investigation of this case left much to be desired. There was no forensic evidence, no fingerprints and that the investigating officer's evidence at trial was unimpressive as she seemed intent upon poking holes in the prosecution's case. Her evidence is not reliable. I rejected it."

[66] The precise reason for the learned judge's characterisation of the investigating officer's evidence as seemingly "intent upon poking holes in the prosecution's case" is not readily discernible from a reading of the transcript. However, we would refrain from commenting further on what the learned judge viewed as the "unimpressive" evidence of the witness, as she had the advantage of seeing and hearing the witness, an advantage we have not had the benefit to enjoy. We, therefore, deferred to the learning judge on that finding.

[67] What is palpably clear from the witness's evidence, however, is that the police investigation fell far below acceptable standards. This was appreciated by the learned judge herself, who viewed it as having "left much to be desired". Unfortunately, the learned judge did not proceed to demonstrate that she had considered the effects of the sub-standard police investigation on the appellant's defence because the appellant had voluntarily given samples of his blood to the police for forensic examination, and the police had taken the car left by the complainant at the crime scene into their custody.

[68] The effects of sub-standard investigation and/or missing evidence have been the subject of several decisions in this court. In **Lescene Edwards v R** [2018] JMCA Crim 4 ('**Lescene Edwards**'), **Steven Causwell** and **Russell Samms v R [**2021] JMCA Cr 46 ('**Russell Samms**'), for instance, this court examined the effect of missing evidence on the fairness of the trial process.

[69] In these cases, the court referenced **R (on the application of Ebrahim) v Feltham Magistrates' Court and another; Mouat v Director of Public Prosecutions** [2001] EWHC Admin 130; [2001] 2 Cr App 427 ('**Ebrahim**') in which the court enumerated several factors that should be considered in determining the effect that poor police investigation or missing evidence may have on a case. These are:

i) whether the investigating authorities were under an obligation to collect the evidence;

ii) if there was no such duty, whether any request was made by the defence for the material before it became unavailable;

iii) if there was a breach of duty in the collection or preservation of evidence, the court should consider whether there could have been a fair trial, bearing in mind that the trial process does compensate for many of such defects in providing evidence; and

iv) whether the conduct of the prosecution was so egregious that it should not have been allowed to prosecute the accused and a quashing of the conviction is the only appropriate remedy.

(See **Lescene Edwards** at para. [56]; **Steven Causwell** at para. [191]; and **Russell Samms** at para. [54]).

[70] For present purposes, conditions i) and iii), as summarised above, were of particular significance in resolving the issues in this case. There is no question that the police, having taken the complainant's car in their custody to carry out further investigation, were under a duty to do so. The processing of the motor vehicle would include securing and processing the chopper reportedly left in it. Similarly, the investigating officer, who submitted the appellant's blood for testing at the forensic laboratory, was under a duty to ensure that other biological properties be submitted for the necessary comparison to be made (for which it was taken) and the results of the DNA analysis provided to the police. Once the DNA or other scientific material was made available to the police, the prosecution should have been provided with such material. The prosecution would, in turn, have had a compelling duty to disclose those materials to the appellant.

[71] In **Clay v South Cambridgeshire Justices** [2014] EWHC 321 (Admin), Pitchford LJ clarified the proper approach to be taken in the light of **Ebrahim**, when such breaches of duty are identified. At paras. 46 – 48, Pitchford LJ stated:

> "…it seems to me that the question of whether the defendant can have a fair trial does not logically depend upon whether anyone was 'at fault' in causing the exigency that created the unfairness. **If vital evidence has as a matter of fact been lost to the defendant whether occasioned by the fault of the police or not, the issue is whether that disadvantage can be accommodated at his trial so as to ensure that his trial is fair.** There is in this respect no difference between an unfair trial occasioned by delay and an unfair trial occasioned by the loss of vital evidence." (Emphasis added)

[72] In light of these deficiencies in the police investigation, the ultimate question we then had to resolve, and which the learned trial judge should have resolved, was whether there could have been a fair trial in the light of the breach of duty on the part of the police. We considered this question regarding the fairness of the trial by considering the proposition from the authorities that the trial process itself could compensate for the defects in providing the evidence. Having regard to the nature of the potential evidence in this case that was not uncovered, and the impact it could have had on the visual identification evidence, which itself was not strong, we concluded that there was nothing in the trial process that could have compensated for the deficiencies in the investigation.

[73] The prosecution's case relied solely on the evidence of visual identification of the complainant, and so the safety of the convictions was wholly dependent on the correctness of that identification. This was not a case of recognition; the appellant was a stranger to the complainant. Based on the complainant's evidence, there ought to have been blood or other biological properties, at least on the chopper, which could have been compared with the sample of blood the appellant gave. There was also the possibility of the presence of fingerprints or other biological properties in the car, like the steering that could have provided valuable material for comparison with the appellant's blood or fingerprints. This could either have incriminated or exculpated him as the perpetrator. Procuring scientific evidence, which could have linked the appellant to the crime or exonerated him, was overlooked without any explanation on the prosecution's case. With the possibility of a wrongful conviction, as a consequence of mistaken identification, looming in these circumstances, we viewed these failures and omissions in the police investigations as a significant weakness in the case.

[74] Regrettably, the learned judge did not demonstrate her appreciation of the need to evaluate the effect of the failures in the police investigation on the appellant's case. Such a specific consideration was paramount in the context of this case in light of the borderline quality of the identification evidence, the submission of the appellant's blood for DNA comparison and the appellant's alibi defence that stood to be rebutted by the prosecution. The absence of DNA and other scientific evidence that the police could have

easily obtained was not a matter to be flippantly treated with in considering the appellant's guilt, having regard to the burden and standard of proof. It required serious consideration by the learned judge in light of the special need for caution required in cases dependent wholly on the challenged visual identification of a stranger, which the appellant would have been.

[75] As submitted by Mr Senior Smith, and candidly acknowledged by the Crown, there were deficiencies in the police investigation that were not sufficiently interwoven in the learned judge's analysis of all the evidence in a manner that gave full and fair consideration to the appellant's defence. Given that the correctness of the identification was the determinative issue, and the deficiencies in the police investigation were relevant to that issue, it could not comfortably be said that the appellant might not have benefitted from the results of a forensic examination and the investigation of his alibi, in light of the time his reported whereabouts on the night of the incident would have been brought to the attention of the police.

[76] Given the weaknesses in the identification evidence, every aspect of the case relative to the issue of visual identification should have been closely scrutinised because the appellant willingly surrendered himself to the police and produced biological material for forensic examination. He gave his blood, and in the end, that availed him nothing – for better or worse. In all the circumstances, we were impelled to conclude that there was marked unfairness to the appellant.

[77] Our conclusion in this regard was also partly informed by the decision of the Privy Council, and this court, in **Mark Sangster and Randall Dixon v The Queen** [2002] UKPC 58 and **Mark Sangster and Randall Dixon v Regina** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 70 and 81/1998, judgment delivered 8 October 2003 (both referred to as '**Sangster and Dixon'**). In that case, the appellant, Dixon, was convicted of capital murder and his co-defendant, Sangster, of murder arising from a bank robbery. Their appeals to this court were dismissed but were

subsequently allowed by the Privy Council. Their convictions were quashed. The matter was remitted to this court to determine whether a retrial should be ordered.

[78] It was the appellants' contention at the Privy Council that there was a miscarriage of justice in terms of section 14(1) of the Judicature (Appellate) Jurisdiction Act ('the JAJA') because the prosecution had failed to investigate and disclose to the defence a video recording showing scenes of a particular area of the crime scene during the robbery. Their Lordships had the opportunity to see the video recordings, which were produced to them but were not available at the trial or the appeal. Some of the images were blurred, but their Lordships found some to be clear. Some of the video recordings showed the faces and clothing of men who were in the bank carrying out the robbery. Their Lordships observed that it was "common ground that none of the images show either Sangster or Dixon". According to them, "[t]he best estimate of counsel was that the images showed [four] robbers".

[79] Accepting the concession of the Crown on this point, their Lordships opined that had the video recordings been available, the images in them would have been material evidence at the appellants' trial. Their Lordships opined at para. 11, that:

> "…in a case where the crucial issue was identification and the prosecution were contending that the appellants had been inside the bank, the fact that the appellants were not among the robbers shown in the pictures would have been highly material. Indeed, had the video recording been available before and during the trial, the conduct of the trial by both the prosecution and the defence would inevitably have been different."

[80] In considering whether there should have been a retrial following the remittal of the case by the Privy Council, this court also observed that the photographs referred to by the Privy Council would have been crucial to the case. The police had provided affidavit evidence for the benefit of this court, in which they deposed that having viewed the video recordings, they found the images so blurred and distorted that they could not recognise anyone from the images. Concerning those assertions by the police, Forte P stated, at page 8, that:

> "Both police officers admit to having viewed the video in the earlier stages of the investigation and that the images were blurred. Although Mr. Nicely stated that he would have to get the images enhanced, **no effort was made to take them from Mr. Nicely and have them enhanced by the police. In addition, whether the images were blurred or not, it was encumbent [sic] on the investigators to retrieve them as part of the investigations and inform the Director of Public Prosecutions and the defence, perhaps through the prosecutors, of the video's existence. As we have seen, no such action was taken and it was left to defence counsel to bring them to the attention of the Privy Council.**
>
> **In our view, this was indeed a material irregularity which must result in a lack of confidence in the integrity of the investigation.** The fact that none of the employees of the Western Union office could identify the men, and the officers' conduct in relation to the video, must cast uncertainty on the purported identification of the appellants by the two police witnesses." (Emphasis added)

In those circumstances, the court concluded that a new trial should not be ordered. Instead, it entered verdicts of acquittal with respect to each appellant.

[81] While it is readily admitted that the facts of the instant case do not sit on all fours with **Sangster and Dixon**, the principles to be distilled from the latter case are, nevertheless, quite instructive. Immediately crucial for our purposes was the relevance of the missing evidence to the issue to be determined. There was no evidence in this case to be admitted as fresh evidence that could benefit the appellant, as in the case of **Sangster and Dixon**. But what is critical in this case, as it was in **Sangster and Dixon**, is the failure of the police to conduct the necessary investigation they were required to do and make relevant information or material available to the prosecution and the defence.

[82] By parity of reasoning in the instant case, the unexplained conduct of the police in failing to process the motor car, the chopper and other objects related to the crime scene for the necessary comparisons to be made with the appellant's blood that he willingly gave to the police, was a material irregularity that resulted in a lack of confidence in the

integrity of the investigation. Whatever the findings would have been, the police had a duty or an obligation to subject the objects taken from the crime scene to scientific analysis, having taken the appellant's blood for that purpose. The appellant's blood was something placed in the hands of the State that not only could have incriminated the appellant but, above all, could have exonerated him. However, the blood standing alone at the forensic laboratory was of no value to anyone, especially the appellant, whose liberty was at stake.

[83] Having co-operated with the police in their investigations, as he did, the appellant would have had a reasonable expectation that he would be furnished with the results of those inquiries. However, due to the deficiencies in the police investigation and the failure of the police to provide the appellant with the DNA results he reasonably expected, the appellant was deprived of an opportunity to put up the best defence that could have been available to him, in response to very serious allegations. Therefore, while any potential scientific evidence could have also assisted the prosecution if it had been procured, the State ought not to benefit from the police's dereliction of duty, which resulted in the absence of such potentially material evidence at the trial. The police must be held to a higher standard of accountability when a person accused of a crime voluntarily submits and offers biological material for DNA or other scientific examination, as in this case.

[84] We concluded that the learned judge failed to accord any or sufficient consideration to the significant weakness in the prosecution's case caused by the absence of scientific evidence that could have been made available to support the evidence of visual identification and, as a consequence, failed to properly assess the impact of those weaknesses on the appellant's case.

**Disposal of the appeal**

[85] Having examined all the evidence against the background of the applicable law, we were not persuaded to the viewpoint that the overall case for the prosecution was sufficiently cogent and reliable for the learned trial to have called upon the appellant to answer and to convict him given, what was at best, the borderline quality of the

identification evidence coupled with the failure of the police to properly investigate the case, to the detriment of the appellant.

[86] In any event, even if the learned judge was correct to reject the no-case submission and call upon the appellant to answer the charges, we accepted the submissions of the appellant and the concession of the Crown that the learned judge failed to adequately treat with the appellant's defence in the light of the sub-standard police investigation and the resultant absence of scientific evidence that possibly could have exonerated the appellant.

[87] In the circumstances, there appeared to be a miscarriage of justice, which rendered the convictions unsafe, within the contemplation of section 14(1) of the JAJA. Accordingly, we quashed the convictions and made the above consequential orders at para. [4], as there was no lawful basis to order a new trial.