[2017] JMCA Crim 3

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 12/2013

BEFORE: THE HON MR JUSTICE MORRISON JA
THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE MCDONALD-BISHOP JA (AG)

DWAYNE KNIGHT V R

Mrs Caroline Hay for the applicant

Mrs Sharon Milwood Moore for the Crown

9, 10 June, 3 July 2015 and 20 January 2017

MCDONALD-BISHOP JA (AG)

[1] On 1 February 2013, after a trial before Gayle J, sitting without a jury in the High Court Division of the Gun Court in the parish of Clarendon, Mr Dwayne Knight, the applicant, was convicted on an indictment containing three counts. The first count charged him with the offence of illegal possession of firearm and counts two and three charged him with shooting with intent. The basis of the charges was that on 1 February 2012, the applicant had in his possession a firearm, not under or in accordance with the terms and conditions of a Firearm User's Licence, which he used to shoot at Sheldon Stewart and Annaliese Brown with intent to do them grievous bodily harm.

[2] The applicant pleaded not guilty to the charges but following a trial he was convicted and sentenced to 20 years imprisonment at hard labour on count one and 25 years imprisonment at hard labour on counts two and three. The sentences were ordered to run concurrently.

[3] Being dissatisfied with the decision of the learned trial judge, the applicant made an application for leave to appeal conviction and sentence and for an extension of time for doing so. His application was considered by a single judge who granted him the extension of time to make the application, refused his application for leave to appeal conviction and granted him leave to appeal sentence. The application for leave to appeal conviction was renewed before this court.

[4] On 9 and 10 June 2015, we heard arguments from counsel on both sides and on 3 July 2015, we gave our decision and made orders in the following terms:

> "(1) The application for leave to appeal against conviction is allowed. The application is treated as the hearing of the appeal. The appeal against conviction and sentence are allowed.
>
> (2) The conviction is quashed and the sentences are set aside.
>
> (3) Judgment and verdict of acquittal are entered."

[5] We promised then to reduce the reasons for the decision of the court to writing. Regrettably, we have taken a longer time to do so than intended, and for that we profusely apologise. These are the reasons as promised.

The case at trial

The prosecution's case

[6] The prosecution relied on the evidence of two civilian witnesses, Mr Sheldon Stewart and Miss Annaliese Brown. The witnesses testified that on 1 February 2012, they were living together as common law spouses in Clarendon. At about 9:20 pm, they arrived home with their child in a motorcar being driven by Sheldon Stewart. Miss Brown was seated at the back of the vehicle with the child. She was behind the front passenger seat. As they drove up through the driveway to the front of the house, they heard a loud explosion and saw a man step from the side of the house and stand in front of the car. They heard explosions sounding like gunshots coming from the direction in which the man was standing. They could not make out the object that was in the man's hand that was causing the explosion but Mr Stewart saw "glimpse of fire" and the object pointed towards them in the car. Something hit the car during the explosion, damaging one of the headlights. The light was not affected, however. The witnesses could not clearly make out the assailant at the time because he had a hoodie/pullover on his head.

[7] Mr Stewart, upon seeing the man and hearing the explosions, immediately reversed the car from the yard onto the road. His main aim was to get away from the house. Miss Brown started screaming and the child started crying. Miss Brown attended to the child in an effort to calm him. The man ran from the yard and fell on the road in front of the car. The witnesses then, with the aid of the headlight of the car, and while the car was reversing, identified the man to be the applicant whom they both knew

before. Mr Stewart had known him for 20 years and Miss Brown for five years. They knew where he lived and they knew his relatives. They would both see him on a regular basis. Mr Stewart had seen him one day before the incident and Miss Brown had seen him about two days before. They both saw him at daytime on those prior occasions.

[8] The witnesses were able to see the face of the applicant through the windscreen when he fell in the road and the hoodie/pullover fell from his head. The witnesses put the applicant at a distance between 18 and 20 feet from the car when he fell. Mr Stewart saw his face for about two to three seconds while Miss Brown saw his face for about two seconds before he ran off in nearby bushes. Both witnesses said that they were frightened during the course of the incident.

[9] The witnesses attended the police station that same night where they made a report to the police. They gave the police details concerning the applicant, to include his aliases, "Duppy", "Mutty" (Mr Stewart) and "Monty" (Miss Brown). They only knew him by his aliases. The police accompanied them back to the house on the night in question, where the police examined the scene.

[10] On 5 February 2012, at about 12:30 pm, Mr Stewart was at a church service in a district in Clarendon when he saw the applicant run in the church. The pastor spoke to the applicant until the police came and took him from the church. Mr Stewart later went to the police station where he identified the applicant to the police as the man who shot at him and Miss Brown at their house. There was no subsequent identification of the applicant by Miss Brown until she identified him in the dock at the trial.

The applicant's case

[11] The applicant made a very short unsworn statement from the dock. He said he lived at Eden District, Mocho, Clarendon and that when the incident occurred, he was not at the witnesses' home. He was at a dead yard at his sister's house in Rose Hill District. He said that he had witnesses to establish that he was at his sister's house but they were "coward to come to court". He therefore called no witness in support of his alibi.

The issues at trial

[12] The applicant, having set up an alibi by way of his defence, essentially, raised as the core issues at trial the correctness of the witnesses' purported identification/recognition of him as well as their credibility. The learned trial judge, however, found that the witnesses were credible and not mistaken in their identification of the applicant as the perpetrator and convicted him on all three counts on the indictment.

The grounds of appeal

[13] At the commencement of the hearing of the appeal, the original grounds of appeal that were filed by the applicant with respect to the application for leave to appeal conviction were abandoned with leave of the court and Mrs Hay was granted leave to argue the following supplementary grounds of appeal:

"**Ground 1**

The learned Trial Judge erred in law in failing to uphold the submission of no case to answer on the basis that the evidence of (recognition) identification was no more than unsupported fleeting glances of 2 witnesses, made in very difficult circumstances.

Ground 2

The learned Trial Judge erred in law by failing to properly analyse the specific weaknesses in the identification evidence. By placing undue weight on the evidence of recognition, the learned Trial Judge paid insufficient attention to the manifest weaknesses in the identification evidence, as well as to issues of credibility arising on the Crown's case. This non-direction amounted to material misdirection occasioning miscarriage of justice. The convictions ought thus to be quashed."

[14] The original ground three that the sentences were manifestly excessive was retained and argued by Mrs Hay. The supplementary grounds one and two were argued in detail before us by counsel on both sides.

The applicant's submissions

[15] In vigorously advancing her arguments on behalf of the applicant in support of the application for leave to appeal conviction, Mrs Hay made detailed submissions, the gravamen of which will now be outlined:

(i) The quality of the identification evidence at the close of the Crown's case was poor and so the case should have been

withdrawn at the end of the no case submission. Had the learned trial judge applied his mind to the specific weaknesses of the identification evidence at the end of the prosecution's case, he would have seen that what subsisted was no more than "two fleeting glances by closely connected witnesses" at dark night with the aid of light coming only from a vehicle, in difficult and terrifying circumstances, and at a distance. The identification evidence was inherently fragile and it mattered not that the witnesses knew the applicant before the date.

(ii) It is clear that for the learned trial judge, "the matter was comfortably resolved by the fact that both witnesses knew the Applicant before the incident". The "clear and unfortunate omission was that there was no analysis of whether in the circumstances of the identification, there was any other evidence to support the fleeting glances that the Crown relied upon". Further and importantly, there was no expressed consideration by him of the difficult circumstances in which the identification was made.

(iii) The case revealed very difficult circumstances, in the following regards- In relation to the evidence of Mr Stewart: (a) the incident happened very quickly; (b) Mr Stewart who

was the driver and the person positioned at the front of the motorcar admitted to being frightened and wanting to get away from the shooting by reversing the car; (c) he did not recognise the assailant before he fell in the roadway and a "hoodie" fell away from his head; (d) he saw the applicant for no more than three seconds whilst he was seated behind the wheel of his car, desperately trying to escape with the assailant some 22 feet away; (e) he was able to do so only by aid of the headlamp of the car while looking through the windscreen; (f) the evidence that he saw the applicant four days later at a church (the second sighting) "is not capable of improving the quality of the first sighting; all it allows for is a possible mistake to be confirmed". With respect to the evidence of Miss Brown: (a) Miss Brown purported to identify the assailant from the backseat of the car whilst he was on the ground around 18 feet away from the car; (b) at the time, she was screaming whilst her child was crying and she was trying to console the child; (c) her two seconds view of the assailant through the windscreen of the car was the only opportunity she had to observe him; and (d) she gave no other evidence of seeing him again that night or at all.

(iv) The evidence shows that both witnesses at the trial attempted to enlarge the time over which they saw the face of the assailant, which was a critical issue, but when confronted in cross-examination with their prior statements to the police they both admitted that they saw the assailant's face for between two to three seconds. The learned trial judge's findings that the witnesses were "credible" and "truthful" begs the question how they could have been credible, when they were caught trying to enhance the evidence on a crucial issue. "There [was] no analysis of how the learned Trial Judge resolved the issue of whether the sighting was for two and three seconds and not 25 seconds to a minute's observations ".

(v) The learned trial judge merely rehearsed the evidence and made bare findings of fact on the evidence and so there was no analysis of the specific weaknesses in the case, which was required of him based on the authorities. What was required, was for the learned trial judge to have arrived at a finding of truthfulness in the face of this evidence from the witnesses but this is not apparent from the reasons.

(vi) The acceptance of the lesser viewing times by the learned trial judge ought to have enured to the advantage of the

applicant, since the learned trial judge was accepting the sighting of the assailant as fleeting glances or observations made in difficult circumstances. There was no other evidence that supported the correctness of the identification. Therefore, the identification was "tenuous" and "the risk of mistake or collusion is very high", thereby resulting in a miscarriage of justice.

[16] In advancing her arguments in support of the grounds of appeal under consideration, Mrs Hay relied on the landmark dictum of Lord Widgery CJ in **R v Turnbull and Another** [1977] QB 224 and reminded the court in the words of his Lordship (at page 231) that "[q]uality is what matters in the end". She also relied on such authorities as **George Weir and Michael Kenton v Regina** SCCA Nos 46 & 47/1989, delivered 24 September 1990; **Ivan Fergus v Regina** (1994) 98 Cr App R 313; and **Edwards (Garnett) v R** (2006) 69 WIR 360.

The Crown's response

[17] Mrs Milwood Moore was equally forceful in her comprehensive response that the conviction should stand and the application for leave to appeal conviction be refused. These were the main planks of her submissions, in summary:

(i) The learned trial judge did not err in law in his treatment of the submission of no case to answer. He "had a sound basis on which to have called upon the Applicant to answer to the charges". The

evidence in this case could not properly be described as “having a base so slender that it is unreliable.” While it is accepted that the incident is said to have happened quickly, the circumstances of identification do not amount, in the strict sense, "to fleeting glances in difficult circumstances".

(ii) "In order to determine the measure of 'difficulty', it is necessary to carefully examine what precisely was taking place during the time of the purported identification". The opportunity of the two complainants to "observe, identify and recognise the Applicant arose when he fell on the ground in the path of the vehicle in which they were seated". There was no gunfire at that time or the image of anyone pointing an object in their direction. During the period when the applicant was reportedly "on the road, in front of the car, the degree of 'difficulty' would have been far less than that which presented itself in the previous moments, when he is said to have discharged his weapon in the direction of the vehicle" in which the witnesses were seated.

(iii) The evidence from the witnesses was that they knew the applicant very well before the incident and according to Mr Stewart, when the applicant fell in the road, he saw his face when he looked “straight” at them in the car. This evidence indicates that based on the fact that the assailant looked into the car, this would have

afforded the witnesses the opportunity to look directly in his face. It is also reasonable to describe the lighting conditions as "good" because the applicant was on the ground and not standing when the light shone on him. There is nothing to suggest that the "consciousness of the [witnesses] was so overwhelmed as to have rendered them incapable of recognizing a familiar face in their direct line of vision".

(iv) In relation to the submissions concerning the risk of collusion, it is accepted that the learned trial judge could have conducted a "fulsome analysis on the record". Considering the possibility of collusion would have been open to him given his function as both judge of law and fact. However, defence counsel at trial had "restricted his challenges to suggestions that the witnesses were mistaken, frightened, that they really had no opportunity to view their assailant and that the Applicant was not present on the night". No suggestion of collusion on the part of the witnesses was made, as a result of their over estimation of their periods of observation. There was also no attempt to cast doubt on the evidence of Miss Brown that she observed her assailant while seated on the back seat of the car. Further, there was no attempt by defence counsel at the trial to contradict the evidence of prior

knowledge and that information concerning the applicant was provided to the police.

(v) All issues regarding credibility of the witnesses fell within the domain of the jury mind of the learned trial judge. While he could have given additional details in terms of how he arrived at his conclusions that the witnesses were credible and truthful, he was in a particularly favourable position to make assessment of the witnesses, given the opportunity he had to observe their demeanour and to form a subjective impression based on the manner in which they testified.

(vi) The conclusions arrived at were reasonable, having regard to the evidence, and the learned trial judge demonstrated that he had the relevant cautions in mind, and that he had, indeed, applied them as he was required by law to do. In the circumstances, there had been no miscarriage of justice and so the conviction should be upheld.

[18] Mrs Milwood Moore drew the court's attention to, among others, such cases as **Herbert Brown and Mario McCallum v Regina** SCCA Nos 92 and 93/2006, delivered 21 November 2008; **Jerome Tucker and Linton Thompson v Reginam** SCCA No 77 & 78/1995, delivered 26 February 1996; **R v George Cameron** SCCA No 77/1978, delivered 30 November 1989; **Jermaine Cameron v R** [2013] JMCA Crim

60; **Separue Lee v R** [2014] JMCA Crim 12 and **Bruce Golding and Damion Lowe v Regina** SCCA Nos 4 and 7/2004, delivered on 18 December 2009.

Analysis and findings

[19] Given the clear interconnection between the grounds, as it relates to the judge's overall treatment of the evidence of identification, both grounds have been consolidated and considered jointly for the purposes of our reasoning, in so far as circumstances allow. It is to a consideration of the complaints embodied in the two supplementary grounds of appeal that we will now turn.

The legal framework

[20] We considered it apt to begin our analysis of the grounds of appeal by a reminder of the oft-cited principles of law relevant to judicial treatment of the issue of visual identification as enunciated in the various authorities that were prayed in aid by learned counsel on both sides.

[21] In **Turnbull**, Lord Widgery CJ (at pages 228 and 229) stated the seminal principles applicable to identification cases, which provided the starting point from which our analyses have begun. His Lordship directed, as was usefully summarized by Morrison JA (as he then was) in **Jermaine Cameron**, that whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused, which is alleged to be mistaken, the judge should warn the jury of the special need for caution before convicting in reliance on the correctness of that identification. The judge is to instruct the jury as to the reason for the need for

the warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. The judge should also direct the jury to examine closely the circumstances in which the identification by each witness came to be made. Finally, he should remind the jury of any specific weaknesses which had appeared in the identification evidence. The jury should be further directed that, although recognition may be more reliable than identification of a stranger, mistakes in recognition of close relatives and friends are sometimes made. All these matters go to the quality of the identification evidence. If the quality is good, and remains good at the close of the accused's case, the danger of a mistaken identification is lessened but the poorer the quality, the greater the danger.

[22] At page 229, Lord Widgery CJ continued:

> "In our judgment when the quality is good, as for example when the identification is made after a long period of observation, or in satisfactory conditions by a relative, a neighbour, a close friend, a workmate and the like, the jury can safely be left to assess the value of the identifying evidence, even though there is no other evidence to support it: provided always, however, that an adequate warning has been given about the special need for caution. Were the courts to adjudge otherwise, affronts to justice would frequently occur."

[23] His Lordship then went on to further instruct (pages 229-230):

> "When, in the judgment of the trial judge, the quality of the identifying evidence is poor, as for example when it depends solely on a fleeting glance or on a longer observation made in difficult conditions, the situation is very difficult. The judge should then withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification. This may be corroboration in the sense lawyers use that word; but it

> need not be so if its effect is to make the jury sure that there has been no mistaken identification..."

[24] In **Junior Reid v R** [1993] 4 ALL ER 95, their Lordships of the Privy Council affirmed that **Turnbull** was applicable to Jamaica and stated by reference to Lord Widgery's celebrated dictum thus:

> "Their Lordships have no doubt that the direction of Lord Widgery CJ that '[w]hen, in the judgment of the trial judge, the quality of the identifying evidence is poor, as for example when it depends solely on a fleeting glance or on a longer observation made in difficult conditions... [the] 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', applies with full force and effect to criminal proceedings in Jamaica."

[25] In **Herbert Brown and Mario McCallum v Regina**, Morrison JA (as he then was), after a review of the relevant authorities, such as **R v Galbraith** [1981] 2 All ER 1060 and **Daley (Wilbert) v R** (1993) 43 WIR 325, delineated the proper approach to be taken on a no case submission in cases of disputed visual identification. At paragraph 35 of the judgment, he stated:

> "35. So that the critical factor on the no case submission in an identification case, where the real issue is whether in the circumstance the eyewitness had a proper opportunity to make a reliable identification of the accused, is whether the material upon which the purported identification was based was sufficiently substantial to obviate the 'ghastly risk' (as Lord Widgery CJ put it in **R v Oakwell** [1978] 1 WLR 32, 36-37) of mistaken identification. If the quality of that evidence is poor (or the base too slender), then the case should be withdrawn from the jury (irrespective of whether the witness appears to be honest or not), but if the quality is good, it will ordinarily be within the usual function of the jury, in keeping with **Galbraith**, to sift and to deal with the

> range of issues which ordinarily go to the credibility of witnesses, including inconsistencies, discrepancies, any explanations proffered, and the like."

[26] In **Ivan Fergus v Regina**, the prosecution's case was based solely on the witness' visual identification of the appellant. The appellant's case, however, was that the witness was mistaken in his identification of him. The appellant appealed against his conviction on the grounds that, among other things, (1) because of the weakness of the identification evidence, the judge should have withdrawn the case from the jury; and (2) that the judge failed adequately to deal with those weaknesses in his summing-up. The court, in allowing the appeal, held that "had the specific weaknesses been properly analysed, the judge would have been bound to withdraw the case from the jury...".

[27] The court went further to note, what it said may appear to be trite, that a trial judge's duty to withdraw the case from the jury in an identification case is wider than the general duty of a trial judge in respect of a submission of no case to answer as enunciated in **Galbraith** (1981) 73 Cr App R 124, [1981] 1 WLR 1039 and that **Turnbull** plainly contemplates that the position must be assessed not only at the end of the prosecution's case but also at the close of the accused's case.

[28] The court then examined the specific weaknesses in that case and concluded that:

> "These are the specific weaknesses which ought to have been considered at the end of the prosecution case. And it was necessary to consider the cumulative effect of these matters on the quality of the identification evidence.

> If the specific weaknesses had been properly analysed the judge would have been bound to withdraw the case from the jury."

[29] In **George Weir and Michael Kenton v R**, this court gave full effect to the **Turnbull** guidelines and the principles applicable to a no case submission in identification cases. In that case, the incident in question occurred during the night at about 1:40 am. The complainant and both appellants knew each other very well before the night in question. Both appellants raised an alibi as their defence. The case was, therefore, one that turned on the correctness of the complainant's recognition of his assailants. In respect of the appellant, Kenton (who is the relevant one for our consideration for present purposes), the complainant said that the light shone in his face and that he recognised him during the course of a struggle between them for five seconds. He later identified both appellants at an identification parade. The court observed that the five second viewing of Kenton that the trial judge had described as a "short time span" was a "classic fleeting glance" and plainly a weakness, which the trial judge did not view in that way. After reference to **Junior Reid v R** and the passage cited from the case at paragraph [24] above, the court concluded in the words of Morgan JA that:

> "If the judge were sitting with a jury then he would be obliged to withdraw the case from the jury. This could be described as a 'weak case'. We, therefore, agree with Mr. Nicholson that the learned trial judge should not have called upon the appellants for their defence."

Whether the learned trial judge erred in not upholding the no case submission

[30] In considering the complaint embodied in ground one, concerning the learned trial judge's treatment of the no case submission, against the background of the applicable law extracted from the various authorities examined above, it is safe to say that the learned trial judge had a non-delegable duty to assess the weaknesses in the identification evidence at the close of the prosecution's case. It was incumbent on him, before calling upon the applicant to state his defence, to demonstrably consider the cumulative effect of such weaknesses on the quality of the identification and to ensure, at the end of his assessment, that there was a substantial evidential basis upon which the identification could be found to have been correct.

[31] At the point of the learned trial judge's consideration of the no case submission, it is clear that he had paid no attention to the specific weaknesses that were highlighted by defence counsel, or any other that arose on the evidence. This exchange between the learned trial judge and counsel for the defence bears this out (pages 58 and 59 of the transcript):

> "MR. HAISLEY: At this point, my Lord, I wish to make a submission of no case to answer, m' Lord, based on the lack of strength of the identification evidence.
>
> HIS LORDSHIP: Why you say so?
>
> MR. HAISLEY: There was, at best, my Lord, a fleeting glance. One witness said two seconds; had admitted to have told the police three seconds. She admitted afterwards that she told the police two seconds.

HIS LORDSHIP: What about the principle of whether or not he knew the persons before, whether he needed a longer or shorter time to see them, what the court has said about certain times? You recognize that counsel? What time has the court held so far?

MR. HAISLEY: I will seek your guidance on that one. But, my Lord, having regard to the circumstances, it is my submission that the Crown has not put up a prima facie case as the identification evidence is weak and, m' Lord, none of the witnesses were able to give a description of this object that led to the explosion.

HIS LORDSHIP: The fact that the explosion sounds like gunshot. That is sufficient.

MR. HAISLEY: Very well, m' Lord. And it was at 9:20 at night. The only source of light was the headlight of the car, m' Lord.

HIS LORDSHIP: What they say is that he looked into their direction and they recognized him -- both of them.

MR. HAISLEY: Yes, m' Lord, but having regard...

HIS LORDSHIP: So they know him and they gave a name.

MR. HAISLEY: Yes, m' Lord.

HIS LORDSHIP: Case to answer."

[32] The learned trial judge, in concluding that the two to three second viewing time was sufficient, clearly placed significant weight on the fact that it was a recognition case and that the witnesses had given the applicant's name to the police. It would seem

too, that he was fortified in this view, by what he said the courts have held about such short viewing time in recognition cases, albeit that he referred to no authority.

[33] However, once the learned trial judge had accepted, as he did, that the sighting of the applicant was no more than three seconds by either witnesses in the conditions as existed, he should have recognised that that, in itself, was a weakness in the case, that warranted close consideration of the circumstances surrounding the purported identification. In other words, that specific weakness as to the short time for viewing ought then to have been evaluated within the context of other evidence or weaknesses in the case, in assessing the ultimate quality of the purported identification. The mere fact that the applicant was well known to the witnesses before, was not by and of itself, a sufficient basis to make such a finding.

[34] Mrs Milwood Moore relied on **Separue Lee** to make the point that although the period of observation was said to have been two to three seconds, it was sufficient for the learned trial judge to have left the case to his jury mind. In that case, there was a purported recognition of the assailant at night for a viewing period of what the witness said to have been two seconds. The contention of the defence was that the identification was no more than a fleeting glance with no evidence to support it and so the appellant should not have been called upon to answer as the case was tenuous and weak.

[35] The response of counsel for the Crown, however, which was seemingly accepted by the court, was that although the witness had said two seconds, she had

demonstrated during the course of giving her evidence, what was taking place during the time she viewed her assailant's face. The time was found to have been longer than the two seconds she had stated in her evidence. It means then that in that case, upon an objective assessment of the time, based on the evidence of the witness as to what was occurring during the time she had the face of her assailant under observation and the conditions that prevailed, the court was able to conclude that it was longer than what she had indicated in evidence and so was not a fleeting glance or observation made under difficult circumstances.

[36] Unfortunately, in this case, there is no evidence upon which, on an objective assessment of the witnesses' opportunity for viewing the face of their assailant, it could be said that the viewing would have been more than three seconds. The judge, himself, did not undertake such an analysis and did not so find because he accepted the viewing times as stated by the witnesses to be two to three seconds. What is clear is that, from all indications, the viewing of the applicant's face by both witnesses would have happened very quickly and could, in fact, have been less than the three seconds stipulated at the upper limit. The evidence given by Mr Stewart of his sighting of the man was to the following effect (page 15 of the transcript):

> "HIS LORDSHIP: So when he fell.
>
> [MR STEWART]: He drop exactly in the road.
>
> HIS LORDSHIP: So when you saw his face, what position he was in.
>
> [MR STEWART]: When I saw him face him drop in the road and him a look--him look straight

at me at the somebody in the car when him drop and get up him look straight."

[37] Miss Brown, for her part, testified to her opportunity for viewing the applicant thus:

> "A. After the shooting I saw when the person run from the side of the house and then the person drop in the road.
>
> Q Did you recognise the person?
>
> A. Yes, I recognised him.
>
> Q. As who?
>
> A. As Monty.
>
> Q ...
>
> A. Because the light shine on him I saw his face.
>
> HIS LORDSHIP: What light?
>
> THE WITNESS: Car lights."

[38] Both witnesses stated that after the applicant fell in the road, he immediately got up and ran away. There is no evidence that they saw his face while he ran or ever again that night.

[39] The time for viewing in this case would have been less than the five second viewing in **George Weir and Michael Kenton**, which was held by this court to have been a "classic fleeting glance" and, therefore, warranted the withdrawal of the case from the jury. Upon an objective assessment of the evidence in this case, there seems to be no basis on which we could say this case is not, similarly, one of a fleeting glance or, at best, a borderline fleeting observation made under difficult circumstances.

[40] It is useful to go further to note too, that in **Separue Lee**, counsel for the Crown had also argued that, in any event, even if it were a two second viewing by the witness in that case, the time would have been sufficient for the trial judge to have left the case to the jury. He based his argument on the decision of this court in **Ian Gordon v R** [2012] JMCA Crim 11. It could prove useful to briefly indicate the circumstances of the identification that existed in that case.

[41] In **Ian Gordon,** three men entered premises at about 4:00 am and fired several shots through the front and both sides of a small wooden house located at those premises and then left. Two men received injuries and eventually died as a result. The appellant was taken into custody for the offences and forensic tests of swabs, taken of his hands that morning, revealed the presence of gunshot residue on his hands.

[42] It was argued on appeal that the sole eyewitness to the incident had only a fleeting glance of the gunmen and so the trial judge was obliged, yet failed to bring to the attention of the jury, the effect of this and other weaknesses in the visual identification evidence. As a result, it was submitted, the summation was fatally flawed. The court rejected that argument having examined the witnesses' opportunity for viewing.

[43] The evidence, as succinctly outlined by Brooks JA, disclosed, in so far as is relevant, that the witness knew the appellant for 20 years up to the time of the incident. He had seen the appellant about three hours earlier that morning before the shooting. At about 4:00 am, prior to the start of the shooting, while he was sitting on a

stone, he saw the three men walking towards him and as they walked in his direction, he could see their faces. It was then that he recognised the appellant. When the men entered the premises at that time, there were electric lights burning outside of four of the five buildings on those premises, which illuminated the premises. The men were "about a chain and a little bit" away, when he first saw them. He "gave a watchful eye on them stepping over the fence". He saw them with firearms in their hands and he ran. They were a chain away from him when he ran. The men then started shooting. He went some distance away and stopped. From an elevated vantage point, he saw the gunmen fire shots into the house where the deceased men were. He observed them as they fired shots at the house and he saw them some minutes later, as they walked along the road away from the premises after the shooting.

[44] The length of time that the witness said that he saw the men before he ran, was demonstrated at trial, and estimated to be at "about three seconds". Learned counsel on behalf of the appellant argued that the learned trial judge had failed to bring the significance of this short sighting to the attention of the jury. The court, however, agreed with the submissions of counsel for the Crown that the time for viewing was not a "fleeting glance", in light of the fact "of the other sightings" and the witness's previous acquaintance with the appellant. The court also held that it was not an observation made under difficult circumstances.

[45] The opportunity of the witness in **Ian Gordon** to view his assailants and his actual sighting of them, evidently, extended beyond the three seconds demonstrated at the trial. That was, therefore, much more than a three second viewing in good lighting

conditions and in far better circumstances. It follows that it cannot be stated, without more, that the court had upheld a three second viewing as being sufficient and not being a fleeting glance, for all intents and purposes. That would amount to a misapprehension of the reasoning and finding of the court.

[46] The same may be said too of the finding of this court in **Jermaine Cameron**, also relied on by the Crown. In that case, the identifying witness knew the applicant sufficiently well prior to the incident. He gave evidence that on the night in question, the applicant came inside his room, which was about 10 x 10 feet in size. He saw the applicant's face at that point for "like about 2 seconds". The applicant, at that time, was 10 feet from the witness. The applicant then took two steps backwards, for about five to six seconds, before reentering the room with a handgun in his hand. Upon the applicant's reentry to the room, the witness saw his face again. At that time, the applicant spoke to him, ordering him to go under the bed. They were within "hand-reach" of each other and the bedside light was still on. He obeyed the order. No evidence was given at trial as to how long this second sighting of the applicant would have been.

[47] The applicant was making demands of the witness while the witness was under the bed. While under the bed, the witness could not see the face of the appellant. During making his demands, the applicant said, among other things,"[s]o weh the big gold chain you have?" The witness told him where the chain could be found. The evidence from the witness was that he would regularly wear that chain and that the last time he saw the applicant, which was a week before, he was wearing it.

[48] The court held that it was satisfied from the witness' "detailed and coherent narrative of what occurred in his small room that he did have a sufficient opportunity to effect a reliable identification of someone whom he knew before and was accustomed to seeing on a regular basis". The court went further to say, parenthetically in this regard, that the witness' evidence that he and the intruder were previously known to each other derived some support from his evidence that the intruder enquired of the "big gold chain". The court concluded that even though the period during which the witness had the applicant under observation was not "long by any standards", it could not be described as a fleeting glance and although describing "obviously difficult circumstances" could not be said to have been so slender a base as to make it "unreliable and therefore not fit for a jury's consideration".

[49] We have treated extensively with the circumstances of the identification in the foregoing cases relied on by the Crown to examine their usefulness to our analysis and, more particularly, to illustrate the important point that we think should be made that every case must be examined on its own peculiar facts and circumstances before a conclusion can properly be arrived at as to what constitutes a good identification. Ultimately, what matters is the quality of the identification evidence in each case, having regard to all the circumstances. The slavish dependence on precedent to merely establish an appropriate or acceptable time for viewing in a recognition case, from a quantitative perspective, could lead to miscarriage of injustice.

[50] We formed the view that in the circumstances of this case, the findings of this court in **Separue Lee**, **Ian Gordon** and **Jermaine Cameron** could not assist the

Crown in taking the case out of the category of a fleeting glance or a longer observation made under difficult circumstances. The same applies to the other authorities that were prayed in aid by the Crown.

[51] We found that the material upon which the purported identification was based was not sufficiently substantial "to obviate the ghastly risk of mistaken identification". Accordingly, we concluded, with deference to the illuminating submissions of Mrs Milwood Moore, that there was much force in the submissions of Mrs Hay that managed to persuade us to the view that the learned trial judge had failed to properly and adequately scrutinize and treat with the specific weaknesses in the prosecution's case before ruling on the no case submission and calling upon the applicant to state his defence. This was a departure from the **Turnbull** guidelines and the other authorities that prescribed the approach to be taken in treating with a no case submission in identification cases. The learned trial judge, therefore, fell in error in treating with the no case submission. We found that there was merit in ground one.

Whether the learned trial judge paid insufficient attention to the weaknesses in the identification evidence in his summation

[52] We also found ourselves constrained, in the light of the authorities, to agree with Mrs Hay that the learned trial judge, having not upheld the no case submission, would nevertheless have had the responsibility, at the close of the case for the applicant, to carefully assess the quality of the evidence of identification and to demonstrate that he had done so within the prescribed guidelines. In **Turnbull**, Lord Widgery CJ directed that, it is incumbent on the trial judge to direct the jury's attention to any specific

weakness in the evidence of identification. The same is expected of a judge who sits alone.

[53] In **Regina v Alex Simpson & McKenzie Powell** SCCA Nos 151/1988 and 71/1989, delivered 5 February 1992, this court stated that the duty on the trial judge sitting alone is to do more than merely utter warnings. Downer JA stated it this way:

> "Merely to utter the warning and yet fail to show that the caution has been applied to the analysis of the evidence, will result in a judgment of guilty being set aside. The best course in delivering the reasons is to state the warning expressly and apply the caution in assessing the evidence."

[54] In this case, the learned trial judge did utter, to an appreciable extent, the requisite warnings at the commencement of the summation and, particularly, within the context of a recognition case. He expressly stated that he had borne in mind "that even in recognition cases where persons have known each other for a long time and are sometimes friends and family members, mistakes could still be made". Against that background, he recognised that he had to look at the circumstances under which the identification was made. In that regard, he made reference to the need to examine the distance; the time the witness was able to view or observe his assailant; whether there was anything obstructing his view; what was the lighting condition at that time; how long the witness had known the assailant before; when was the last time he saw the assailant; how often the witness would see him, whether night or day; and if the witness knew any family members.

[55] He failed, however, to demonstrate that he was mindful of his duty to highlight and explicitly consider the specific weaknesses in the evidence that would touch on the quality and accuracy of the identification, for example, the respective positioning of the witnesses in the car; the fact that the car was in motion reversing; the preoccupation of the driver to get away from the scene as fast as he could; the concern of Miss Brown for her crying child; the distance from the assailant; the lighting and the obviously terrifying circumstances.

[56] The learned trial judge also failed to demonstrate that he was mindful of the caution that a number of witnesses who purport to identify an assailant can also be mistaken, albeit that they may seem honest and convincing. This would have been a necessary warning in the circumstances of this case. In **R v Weeder** (1980) 71 Cr App R 228, the point was well made that:

> "The identification evidence can be poor, even though it is given by a number of witnesses. They may all have had only the opportunity of a fleeting glance or a longer observation made in difficult conditions...Where the quality of the identification evidence is such that the jury can be safely left to assess its value, even though there is no other evidence to support it, then the trial judge is fully entitled, if so minded, to direct the jury that an identification by one witness can constitute support for the identification by another, ***provided*** **that he warns them in clear terms that even a number of honest witnesses can all be mistaken**." (Emphasis added)

The learned trial judge gave himself no such warning in this case, which was a material omission amounting to a misdirection. He clearly placed great weight on the mere fact

that it was a recognition case. He also seemed to have placed some weight on what he regarded as the unchallenged evidence of Mr Stewart's subsequent identification of the applicant in the church. He found that identification to have been correct.

[57] In **Garnett Edwards** their Lordships, in finding the conviction unsafe in that case, opined at page 372, paragraph [29], that although the prosecution's case on identification had sufficient strength to be left to the jury, it was incumbent upon the trial judge "to give careful directions to the jury, setting out fully the strengths and weaknesses of the identification, linking the facts to the principles of law rather than merely rehearsing those principles".

[58] Also, in **R v George Cameron**, this court, after citing the oft - repeated dictum of Carey JA in **Regina v Clifford Donaldson and Others** (1988) 25 JLR 274, as to what is required of a judge sitting in the High Court Division of the Gun Court, gave this reminder through the voice of Wright JA:

> "The relevance of this decision to present consideration is that it states emphatically that where the judge sits alone he is required to deal with the case in the manner established for dealing with such a case though he is not fettered as to the manner in which he demonstrates his awareness of the requirement. What is impermissible is inscrutable silence. What is of critical importance here is not so much the judge's knowledge of the law but his application. Even if there is a presumption in his favour regarding the former there is none as to the latter.
>
> He must demonstrate in language that does not require to be construed that in coming to the conclusion adverse to the accused person he has acted with the requisite caution in mind."

In the instant case, the learned trial judge, in his assessment of the case, had failed to abide by these directives.

[59] In the end, we found that we agreed with the argument advanced by the applicant that the learned trial judge failed to demonstrate a proper analysis of the identification evidence in this case and to demonstrate sufficiently his application of the applicable law to the evidence before him. The identification was clearly fleeting or at most, would have been made under difficult circumstances. We agreed that had the learned trial judge recognised this fact, he would have found the case to be a weak one, with a slender base to support a conviction. It would have been manifestly clear to him that even though it was a recognition case, the quality of the identification evidence was such that the witnesses' prior knowledge of the applicant, on which he evidently attached significant weight, could not cure the deficiency. We also found merit in this aspect of ground two.

[60] For the foregoing reasons, we concluded, without more, that the conviction was unsafe and should be set aside. It was on this basis that the application for leave to appeal conviction was allowed.

Whether the learned trial judge erred by failing to deal with issues of credibility

[61] Before disposing of the application for leave to appeal conviction, it was considered fitting, for completeness, to treat with one other aspect of the applicant's criticism in ground two of the learned judge's treatment of the evidence pertaining to the purported identification of the applicant. The applicant contended in ground two,

that the learned trial judge also paid insufficient attention to the "issues of credibility arising on the Crown's case". The contention was that this failure on the part of the learned trial judge, coupled with his failure to treat with the specific weaknesses in the identification evidence, was a non - direction which amounted to material misdirection occasioning miscarriage of justice.

[62] The applicant's major grouse in relation to the issues of credibility concerns the inconsistencies in the evidence of the two witnesses as to the length of time they saw the applicant's face. The two witnesses gave evidence of a viewing time that was longer than what they had told the police in their witness statements. They both admitted at the trial, however, that the times they had given the police were correct and not the longer times given in evidence.

[63] Mrs Hay argued quite strongly that, based on these admitted inconsistencies, the risk of collusion was high in that it pointed to, what we would call, a concerted effort by the witnesses to enlarge the time they said they had the applicant under observation. According to learned counsel, the witnesses were "caught trying to enhance the evidence on a crucial issue" and there was no analysis of how the learned trial judge resolved the issue whether the sighting was for two or three seconds and not 25 seconds to a minute's observation.

[64] It is observed that the learned trial judge gave no thought to the question of collusion between the witnesses. We do accept that questions that touched and concerned the witnesses' credibility were matters for the learned trial judge to consider

and that where there were inconsistencies or conflicts in the evidence, that could adversely affect credibility, he should have demonstrated in his reasoning that he had taken them into account and had resolved them. This treatment of conflict affecting credibility is as important in a case of alleged mistaken identity as it is in any other case. In **R v Leroy Lovell** (1987) 24 JLR 18, it was held by this court that where the issue of identification arises in a criminal trial, two questions call for careful direction from the trial judge, (a) whether or not the witness was mistaken, and (b) whether the witness is credible. It is within this context that the inconsistencies in the witnesses' evidence would have been relevant.

[65] The learned judge's failure to expressly consider possible collusion seems understandable, however, in the light of the applicant's case at trial. As Mrs Milwood Moore correctly observed, the suggestion of collusion was never put to the witnesses at the trial or urged before the learned trial judge. The case for the defence was, basically, that the witnesses were mistaken. Furthermore, the failure of defence counsel to take that line of attack could well have been based on the fact that the two witnesses, in giving a longer viewing time, did not give the identical timing and the explanation each gave the court was that they did not remember the exact time due to lapse of memory. Furthermore, upon being shown their witness statements, they quickly admitted that the time they each gave the police was correct. So there was nothing in the evidence, that could have reasonably given rise to a suspicion that the witnesses were in collusion. Even more importantly, and as already indicated, the suggestion of collusion was never put to them for them to admit or deny it, which is what fairness dictates. In

the absence of any suggestion of collusion at trial, it would be unfair to use the risk of collusion as a basis to disturb the conviction. Therefore, the omission on the part of the learned trial judge to demonstrably consider the possibility of collusion could not be faulted.

[66] We found, in any event, that the learned trial judge did expressly apply his mind to the inconsistencies concerning the viewing times and accepted the witnesses' admitted time. In relation to Mr Stewart, he said (page 77 of the transcript):

> "I find one, that the witness Mr. Stewart is a witness of truth, a credible witness. I find that the three seconds that he saw this accused man who he knew before, who he saw recently, knows family members, sees him frequently, knows him for a long time. That he is not mistaken and that is sufficient time for him to recognise his assailant.
>
> ... I accept his explanation when he said twenty seconds and then agreed that it is three seconds. I accept that explanation. It is a long time ago and he did not remember."

[67] In relation to Miss Brown, he stated that he accepted her "as a witness of truth and when she said she saw him for two seconds". He did not expressly state that he accepted the explanation she also gave that the inconsistency was due to lapse of memory, as he did in the case of Mr Stewart, but it does appear that he did accept her explanation. It means that the learned trial judge, having accepted, expressly or by necessary implication, that the inconsistencies were due to lapse of memory on the part of the witnesses, would have implicitly rejected that the witnesses had colluded. There was thus no merit in this aspect of the applicant's complaint in ground two that could have further advanced his case on appeal.

Conclusion

[68] We were content to dispose of the application for leave to appeal conviction on the basis that the learned trial judge had failed to properly assess and/or demonstrate that he had properly assessed and treated with the evidence of identification within the ambit of the guidelines laid down by **Turnbull** and other relevant authorities. He failed to appreciate that the case was one of a fleeting glance or one of a longer observation made under difficult circumstances, which would warrant the case being withdrawn from his jury mind. Furthermore, and alternatively, even if it may be argued that the learned trial judge was correct in rejecting the no case submission, he would have failed, nevertheless, to properly assess the totality of the evidence within the context of the relevant law. Accordingly, on account of such failure, he erred in finding the applicant guilty, beyond a reasonable doubt, on the slender basis of the identification evidence adduced by the prosecution.

[69] The convictions were, therefore, unsustainable. This finding led, inevitably, to the consequential orders detailed at paragraph [4].