[2021] JMCA Crim 17

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 26/2017

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MRS JUSTICE FOSTER-PUSEY JA

ANDREW McKIE v R

Dr Mario Anderson for the applicant

Miss Paula Llewellyn QC, Director of Public Prosecutions, Atiba Dyer and Dwayne Green for the Crown

28 April, 1, 2 June 2020 and 7 May 2021

PHILLIPS JA

[1] Mr Andrew McKie (the applicant) was charged on an indictment for the offences of illegal possession of a firearm and wounding with intent. On 28 October 2017, he was convicted on both counts by S George J (the learned trial judge), sitting without a jury, in the High Court Division of the Gun Court held in the parish of Kingston. On 10 March 2017, the applicant was sentenced to serve 15 years' imprisonment at hard labour for each offence, with the sentences to run concurrently.

[2] By way of an application for leave to appeal filed on 3 April 2017, the applicant sought permission to appeal his convictions and sentences. He had set out five grounds of appeal, namely: misidentity by the witness; lack of evidence; unfair trial; conflicting testimonies; and miscarriage of justice. However, as his application for leave was filed outside of the prescribed time allotted for so doing, on 3 August 2018, he filed an application for extension of time within which to file his application. While the latter application was granted, his application for permission to appeal his convictions and sentences was refused by a single judge of this court on 9 October 2018.

[3] The applicant renewed his application for permission to appeal his convictions and sentences which was heard on 28 April, 1 and 2 June 2020. At the conclusion of the hearing, the application for leave to appeal was granted. Having treated the hearing of the application as the hearing of the appeal we allowed the appeal, quashed the convictions, set aside the sentences, and entered a judgment and verdict of acquittal on each count.

[4] We promised to provide brief reasons for that decision. These reasons are a fulfilment of that promise, with our sincere apology and deep regret for the delay in doing so.

Background facts

[5] It might be helpful to set out a brief summary of the facts which formed the backcloth of the applications and the determination of this appeal. The main witness for the Crown was Mr Robert Dunbar (the complainant). He testified that on 20 March 2012,

he was attacked by three men and shot several times at his home in Mount Tirza, in the parish of Saint Andrew. He described the terrain of the property on which his house was situated, where he was at the time when he was confronted by the men, and the fact that he was shot six times in this unfortunate incident.

[6] The complainant indicated that the applicant was the third man who joined the other two attackers. He said he did not see where the applicant came from, but the applicant pointed a "pump rifle" to the left side of his chest and asked him his name. He said that the "pump rifle" was about 18 inches in length and was touching him. He indicated that he had never known the applicant to talk to, but it was not the first time that he was seeing him. He admitted to seeing the applicant on more than one occasion, maybe two times, but he could not remember how many times in 2012. He testified that he pointed out the applicant at an identification parade on 11 April 2013, about a year after the incident. He pointed him out as the person who had the "pump rifle" at his home on 20 March 2012.

[7] In cross-examination, the complainant stated that he did not know any of the persons who attacked and shot him. He also did not tell the police that he had seen any of the persons before. He accepted that he had seen the applicant once during the year after the incident, and had told the police, who indicated to him that he should tell them when next he saw the applicant. He accepted that he had never specifically described the applicant to the police and agreed that he had not given the police any information as to the applicant's whereabouts. He denied suggestions made to him that on one occasion

when he had seen the applicant, he was at the applicant's yard, working on someone else's car.

[8] In answer to the court, the complainant indicated that he had not told the police who had done any of the shootings, as he did not know his assailants by name, and the police had not asked him whether he had seen the assailants before.

[9] In what appeared to be a challenge to previous inconsistent statements, Mr Ludlow Black, the attorney representing the applicant at the trial, attempted to adduce the complainant's entire statement into evidence, without first endeavouring to point at any alleged inconsistency. The learned trial judge reminded counsel that there were particular steps that he had not taken and encouraged him to follow the correct procedure, but counsel seemed unsure as to how or whether to proceed and ultimately, abandoned those efforts.

[10] Detective Sergeant George Roye also gave evidence. He indicated that he, with other police officers, conducted an operation at Salisbury Plain in the parish of Saint Andrew, where the applicant was seen in his house. He deposed that information that led them to the applicant's house came from a police unit and not the complainant. Detective Sergeant Roye testified that when he was taking the statement from the complainant in the hospital, the complainant did not tell him that he knew or had seen one of his alleged assailants, the applicant, before.

[11] On arrest, he said that the applicant when cautioned, gave no answer. He confirmed that the applicant was subsequently identified by the complainant at an

identification parade. The applicant also took part in a question and answer session with the police.

[12] In his unsworn statement, the applicant said that the police came to his gate, pushed him aside and searched his premises without giving him any reason for so doing. Subsequently, they put him in a jeep, and he overheard the police officer saying "[t]he operation don't successful, what we fi do with him?". He was taken to the police station and when he asked the detective "what you charge me for", the detective said "[h]im don't know an him soon tell me". He stated that no charge was laid against him for several weeks.

[13] When asked if he would be willing to go on an identification parade, the applicant's response was "[y]es, I don't have anything hiding". Detective Sergeant Roye, he said, told him that he was a gunman, and his response was:

> "I am not a gunman. You come to my yard and you come si mi with mi family and mi tell you dat, I mean I am not a gunman. I am a hardworking man that does roofing. I raise pigs, cows and things like that."

[14] The applicant indicated in his unsworn statement that the complainant would "fix motor vehicles all outside mi gate", and he had known him for a long time before the incident, so it surprised him that the complainant had waited for so long, up to a year, to say that it was he (the applicant) who had injured the complainant. The applicant stated that the complainant "did deh wid one of mi friend baby mada and mi tell him. So I feel like that is where it start from, because a mi friend baby mada and mi tell him and dem seh mi a infauma". The applicant told the court that he and the complainant had several

mutual friends, whom he named, to confirm that he had known the complainant long before the incident.

The applications before this court

[15] The matter unfolded before the court in a rather unusual way. We shall endeavour to set out the course the applications and the appeal took, in an effort to explain how we arrived at the orders set out above.

[16] In addition to the renewed application for leave to appeal the applicant's convictions and sentences, on 21 March 2019, he filed two separate applications: a notice of application seeking permission to amend the notice and grounds of appeal; and an application seeking permission to adduce fresh evidence. Both applications, were filed on the same day, and were assigned the same number. In addition, the grounds overlapped, and counsel did not distinguish the different grounds in his arguments in support of either application.

[17] The notice of application seeking permission to amend the notice and grounds of appeal had been filed on the following grounds:

> "1. The Court pursuant to Rule 1.12(2) of the Court of Appeal Rules 2002 may give permission to amend a notice and grounds of appeal or counter-notice.
>
> 2. The Defence Counsel failed to:
>
> a) raise the issue of alibi, and to call witnesses to support the [applicant's] alibi at trial,
>
> b) enter into evidence the statement of the complainant to the police and thus failed to highlight inconsistencies between the statements of the

complainant to the police and his viva voce evidence, as it relates to identification of the accused, and the description of the guns allegedly used, which would have affected the outcome of the trial, resulting in an unfair trial, and a miscarriage of justice.

3. The Learned Trial Judge unnecessarily interrupted learned defence counsel whilst he was attempting to put into evidence the statement of the complainant to the police, which would have highlighted several inconsistencies related to the identity of the [applicant] thus rendering the trial unfair.

4. The Learned Trial Judge though giving the required [**R v Turnbull** [1976] 3 All ER 549] warning as it relates to [sic] identity of an accused by the complainant in the absence of any other evidence failed to analyse appropriately the weaknesses related to the identification of the [applicant], and the circumstances surrounding the said identification and erroneously focussed exclusively on the issue of how well the complainant and the [applicant] knew each other before, completely ignoring the fact that the complainant initially told the police that he had not seen the alleged shooters before as well, rendering the conviction unsafe."

[18] He also filed an application seeking permission to adduce fresh evidence, including all the statements made by the complainant to the police and entries made by Detective Sergeant Roy in the Stony Hill Police Station diary on 20 March 2012. In addition, the applicant asked the court to allow three witnesses to give evidence on his behalf, namely: Karen Edwards, Sasha McKie and Dorothea Lynette James. In this application, he relied on six grounds as set out below:

"1. The Court has the power to grant the orders sought pursuant to Section 28 of the Judicature (Appellate Jurisdiction) Act.

2. At the time of trial, the witnesses, Karen Edwards, Sasha McKie and Dorothea Lynette James were not called to give evidence and the latter two witnesses were not at court, nor requested to be on the day of the trial and were therefore not available.

3. The witnesses Karen Edwards and Sasha McKie both indicate that the [applicant] had an alibi at the alleged time of the incident on March 20, 2012 as outlined in their affidavits sworn to on the 18th day of March 2019.

4. Further all the witness [sic] provide evidence of the [applicant's] good character and physical descriptions of the [applicant] which appear to be markedly different from that reported by the Complainant, Robert Dunbar.

5. The statement of the complainant to the police does not appear to have been formally entered into evidence by Defence Counsel which highlights several inconsistencies of the complainant as it relates to the identity of the alleged shooter and his knowledge of the identity of the alleged attackers.

6. The evidence form [sic] these witnesses is capable of belief and would undoubtedly have affected the outcome of the trial had it been before the learned trial judge."

[19] The first affidavit referred to in the application for permission to adduce fresh evidence, was sworn by Karen Edwards on 16 March 2019. She deposed that she resided with the applicant at Salisbury Plain, Race Course Road, Above Rocks in the parish of Saint Andrew, together with their two children who were born in 2008 and 2010. She indicated that the applicant was a very gentle person and "does not like fuss". She said that she worked at Tastee in Stony Hill, on a 10:00 am - 6:30 pm shift, on the night of the alleged incident, and when she reached home, just before 8:00 pm, the applicant was at home with the children watching television. When she got home, she was not

feeling well, he made soup for her, rubbed her with alcohol and did not leave the house at all that night. She said that it was impossible for the applicant to have been involved in that incident, as he was at home with her and the children, as she had not been feeling well. She indicated that she had given that information to the applicant's attorney when she learned that he was accused of having been involved in the incident.

[20] Karen Edwards deposed that on the day of the trial, when she went to court with her two children, the applicant's attorney did not call her to give evidence, and she was told by the police officers present at court that she could not go into the courtroom with the children. She stated, however, that there was nobody with whom she could have left the children.

[21] Sasha McKie also swore to an affidavit on 16 March 2019. She deposed that she too lived in Salisbury Plain, Above Rocks. She was unemployed. She stated that the applicant is her father and has always been "a good father and is not a violent person". On the day of the alleged incident, at approximately 6:00 pm, she saw her father in the house watching television with her brother and sister. Her stepmother was not there as she was at work. She later saw the applicant at the shop by her gate at about 7:00 pm. Her stepmother did not get home until about 8:00 pm. She was never contacted by her father's attorneys to give evidence.

[22] On 15 May 2020, Sasha McKie swore a further affidavit indicating that at the time of the alleged shooting, she was 17 years old, attending Glengoffe High School and had just recently given birth to her son. After the birth of her son, she went to live with her

mother who was nearby. Her stepmother, Karen Edwards, had never told her about the court date. She deposed that had she known of it, she would have made arrangements to go to court to give evidence. Karen Edwards, she said, had since migrated. Although she had tried to contact her on several occasions, she had not succeeded and did not know her current address.

[23] Dorothea Lynette James swore to an affidavit on 10 March 2019, indicating that she was a retiree residing in Liguanea, in the parish of Saint Andrew. She deposed that the applicant had worked for her as a gardener for over 20 years and stated that he "has always been honest and trustworthy and is a very gentle person". She attached to her witness statement, a statement that the complainant had given to the police on 27 March 2012, while he was at Kingston Public Hospital. She noted that in the statement, the description given by the complainant of one of the assailants, which was allegedly the applicant, was that he had a "picky picky hairstyle", was "slim built" and had a "long face". She stated that the applicant was 5 feet 9 inches tall, with a round face, could not be described as thin, was always neatly dressed, had a low cut hairstyle, and never wore locks or plaited hair. She exhibited to her affidavit a copy of the applicant's Rural Agricultural Development Authority, Agricultural Business Information System identification card, with his picture.

[24] Dorothea Lynette James indicated that she was shocked when she heard of his arrest, and subsequently had discussions with his then attorney, Mr Earl DeLisser. However, Mr DeLisser subsequently died, and she had had no contact with the attorney who represented the applicant at trial, except to assist with legal fees. She said that she

did not believe that the applicant was capable of committing the crimes in respect of which he was charged.

[25] Dorothea Lynette James swore to a further affidavit on 13 May 2020, in which she stated that at the time of signing the affidavit, she was not in Jamaica and was not able to return home until travel restrictions (which had been imposed in Jamaica due to the COVID pandemic), had been lifted. She confirmed statements made in her earlier affidavit and indicated that she had made efforts, on several occasions, to contact Mr Ludlow Black, the attorney who represented the applicant at the trial, but was unsuccessful until after the trial. She stated that Mr Black did not, at any time, ask her to attend court to give evidence, and she did not know the date of the actual trial.

[26] The applicant specifically sought permission to adduce as fresh evidence, the complainant's statement that he gave to the police on 27 March 2012. The statement was exhibited to the affidavit of Dorothea Lynette James. No other statements made by the complainant were produced. This statement contained information about his address, occupation and his recollection of the events as they unfolded on the night of 20 March 2012. The complainant spoke of the injuries he had received and the description, as he recalled, of his assailants, who allegedly included the applicant.

[27] On the first date of the hearing before this court, we gave the applicant permission to file supplemental affidavits in support of the applications. The matter was adjourned, part heard, to continue in the week commencing 1 June 2020. The further affidavits referred to above were duly filed in keeping with that order.

[28] The applicant deposed to an affidavit which was filed on 14 May 2020. In addition, he filed an affidavit by his defence counsel at the trial, Mr Black, as well as an affidavit by Karrena McKie in support of his applications.

[29] He deposed that he was an inmate at the Tower Street Adult Correctional Centre and, while he had great difficulty reading and writing, he could sign his name. He stated that prior to his conviction and sentence, he resided at Salisbury Plain for 10 years and had worked as a roofer and gardener. On 29 March 2013, the police came to his house and conducted a search without showing him a warrant or indicating the basis for the search. He stated that Mr DeLisser, who had initially represented him, was the brother of one of his employers. He deposed to much of what he had said in his unsworn statement at the trial. He stated that subsequent to the death of Mr DeLisser, he was referred to Mr Black. He attended at Mr Black's office, told him that he had not committed the crimes in respect of which he had been charged and that he was home on the night of the alleged shooting with his two young children, as his children's mother, Karen Edwards, had to work the late shift at Tastee in Stony Hill. He stated that he also told Mr Black that there were several houses in the yard in which he resided, and about 15 people could have confirmed his whereabouts on the night in question. The applicant also stated that he had not told any of them the exact date of the trial, as he did not know when the trial would have started, as it had been adjourned several times, and when it actually started, he had been remanded in custody.

[30] The applicant confirmed that Karen Edwards was the mother of their two children, aged two and three years at the time of the alleged shooting. He stated that she had

been told to come to court to give evidence, but no arrangements had been made by Mr Black for her to do so, and she had been prevented from testifying. He deposed that Mr Black had never told him when witnesses, other than Karen Edwards, should come to court. The applicant also deposed, in reference to Mr Black "he did not prepare me to speak at the trial". The applicant reiterated his surprise that the complainant had stated that he did not know him. He recalled telling the same to the learned trial judge when he was in the dock, and also that he was not guilty of the charges.

[31] Mr Black swore to an affidavit on 15 May 2020. At the time when he swore to the affidavit, he was no longer working as an attorney in Jamaica, as he had been working in Belize since 2019. He deposed that he had been retained by the applicant in August 2015 to defend him subsequent to the passing of his previous attorney-at-law, Mr DeLisser. He deposed that the applicant had given him specific instructions that he was innocent and that his girlfriend, Karen Edwards, the mother of two of his children, would testify at his trial with regard to his whereabouts on the night of the alleged shooting of the complainant. He stated that Karen Edwards "was unreasonably denied entry to the Court and so I was not able to call her as a witness to pursue his defence of alibi". He also indicated that, although there were several inconsistencies between the complainant's testimony and his previous statement to the police, he (Mr Black) was prevented by the learned trial judge from entering the previous statement into evidence, even though he had indicated to the court, that there were inconsistencies.

[32] Karrena McKie, the niece of the applicant, deposed that on the day following the alleged shooting of the complainant, she had heard of it from members of the community.

She subsequently moved away from the area and was no longer in regular contact with the applicant, although she visited there. She stated that she was visiting relatives at Salisbury Plain, a year later, when they arrested the applicant. She stated that she did not know why they had arrested him and was surprised when she was subsequently informed of the reason for his arrest. Karrena McKie said she recalled that she had bought a cigarette from the applicant at his shop in front of the yard at about 7:30 pm on the night in question. She said she had just finished watching the 7:00 pm news. She also indicated that she stayed with the applicant and some other persons, until about 10:00 pm that night. She confirmed that Karen Edwards came home at about 8:00 pm. She also indicated that she had never been told about the court date, and no one had asked her to give evidence at court. However, she had given this information to Mr Brown at the Stony Hill Police Station.

[33] In the light of the applications and the affidavits filed in support, we were tasked to determine whether to allow the fresh evidence to be adduced on the hearing of the appeal.

Fresh Evidence

Submissions on Fresh Evidence

[34] Due to the evolving nature of the hearing, with additional affidavits filed subsequent to both of counsels' initial arguments, it will be seen that the arguments cover both the period before and after the additional affidavits had been filed, including that from the applicant and counsel, Mr Black.

[35] In his written submissions, counsel for the applicant in the instant proceedings, Dr Mario Anderson, indicated that the main issue in the application was:

> "Whether the applicant had an alibi, which was not raised at trial, and whether such evidence ought to be adduced as fresh evidence."

[36] Counsel submitted that pursuant to section 28 of Judicature (Appellate Jurisdiction) Act (JAJA), this court has the power to admit fresh evidence in an appeal. He referred to and relied on the dictum of Brooks JA (as he then was) in **Brian Smythe v R** [2018] JMCA App 3, where he set out the relevant principles for the consideration of an application to admit fresh evidence. He referred to the Judicial Committee of the Privy Council's decision in **Clifton Shaw and others v R** [2002] UKPC 53, in which those principles are also outlined. He directed the court to the evidence of the applicant being at his home at Salisbury Plain in the parish of Saint Andrew, and the evidence of Karen Edwards and Sasha McKie, allegedly confirming his whereabouts at his home at the material time. That evidence, counsel said, made it impossible for the applicant to have been at the complainant's home, at Mount Tirza, at 7:30 pm.

[37] Dr Anderson submitted that the evidence of Karen Edwards and Sasha and Karrena McKie would have satisfied the test of fresh evidence, as their evidence was: (a) not available at the trial; (b) was relevant, as it provided an alibi for the applicant at the alleged time of the shooting; and (c) was plainly or well capable of belief. He also submitted that the court has an overriding discretion to receive fresh evidence if it is in the interests of justice to do so, even if the application did not meet all the relevant criteria. Counsel argued that the complainant's statement could be admitted into evidence

as an exception to the hearsay rule and submitted that it could be adduced through Dorothea Lynette James.

[38] The learned Director of Public Prosecutions (the learned Director) submitted that it is a general rule of practice that each party must call all available evidence that is necessary, and on which he intends to rely, during the presentation of his case, in order to deal with the issues that may arise. The learned Director drew attention to the *locus classicus* of **R v Alfred Parks** [1961] 3 All ER 633, and the principles enunciated therein, including the three important tests for the admission of fresh evidence. She also referred to **Mario McCallum v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 93/2006, Application No 78/2008, judgment delivered 18 June 2008.

[39] In response to Dr Anderson's submission that it was in the interests of justice to admit, in particular, the complainant's statement, the learned Director referred to paragraphs 33-35 of the dictum of Lord Toulson, on behalf of the Board, in **Richard Brown v The Queen** [2016] UKPC 6, a case on appeal from Jamaica. She referred to the fact that at the time when she began to make her submissions, on 28 April 2020, the applicant had not filed an affidavit to refer to any of the material that he wished to have adduced as fresh evidence. In the court below, in his unsworn statement, he had not even indicated where he was at the material time when the complainant was shot. Additionally, he had not even attempted to raise the defence of alibi.

[40] In the material before the court, as at 28 April 2020, the applicant had not explained why the persons, who were all closely related to him, were not available to give

evidence at his trial. Furthermore, as at 28 April 2020, there was also no material from the applicant relating to the instructions that he gave to his attorney, bearing in mind that Karen Edwards and Sasha McKie would have been critical witnesses to call in support of his defence of alibi. The learned Director submitted further that that evidence could have created a doubt in the jury mind of the learned trial judge if it had been adduced at trial, particularly if it had been juxtaposed with the evidence of the good character of the applicant. The learned Director therefore submitted that, as at 28 April 2020, there was no sufficient information before the court, relating to the instructions which the applicant had given to counsel, with regard to the witnesses available to support his alibi evidence.

[41] The learned Director also commented on what she viewed as the inexperience of counsel when, in the complainant's statement, he described the assailant, who was allegedly the applicant, as having "picky picky head", and counsel, Mr Black, had not vigorously explored this at the trial.

[42] In relation to the complainant's statement, the learned Director submitted that Mr Black was required to explore the inconsistency in the complainant's evidence, with particular reference to identification evidence, but through inexperience, appeared unable to do so in terms of utilizing sections 16 and 17 of the Evidence Act.

[43] The learned Director indicated her concern in relation to the failure of counsel to pursue these matters, which resulted in grave consequences for the applicant. She maintained, however, that, regrettably, the applicant had not satisfied the well-known criteria for permission to adduce fresh evidence. She also said that there was a paucity

of material to support a submission that the fresh evidence submitted should be allowed in the interests of justice.

[44] In concluding, the learned Director said that the application to adduce fresh evidence was on 'shaky ground' as the applicant could not demonstrate that the evidence was not available at the time of trial.

Discussion

[45] Section 28 of JAJA empowers this court to admit fresh evidence on the hearing of an appeal. It states as follows:

> "For the purposes of Part IV and Part V, the Court may, if they think it necessary or expedient in the interest of justice-
>
> (a) order the production of any document, exhibit or other thing connected with the proceedings, the production of which appears to them necessary for the determination of the case; and
>
> (b) if they think fit, order any witnesses who would have been compellable witnesses at the trial to attend and be examined before the Court, whether they were or were not called at the trial, or order the examination of any such witnesses to be conducted in manner provided by rules of court before any Judge of the Court or before any officer of the Court or justice or other person appointed by the Court for the purpose, and allow the admission of any depositions so taken as evidence before the Court; …"

[46] It is important to refer to the seminal statement of Lord Parker CJ in **R v Parks**, in which guidance is provided on the interpretation of that statutory authority. At page 634, Lord Parker CJ stated:

> "…As the court understands it, the power under s 9 of the Criminal Appeal Act, 1907, is wide. It is left entirely to the discretion of the court, but the court in the course of years has decided the principles on which it will act in the exercise of that discretion. Those principles can be summarised in this way: **First**, the evidence that it is sought to call must be evidence which was not available at the trial. **Secondly**, and this goes without saying, it must be evidence relevant to the issues. **Thirdly**, it must be evidence which is credible evidence in the sense that it is well capable of belief; it is not for this court to decide whether it is to be believed or not, but it must be evidence which is capable of belief. **Fourthly**, the court will after considering that evidence go on to consider whether there might have been a reasonable doubt in the minds of the jury as to the guilt of the applicant if that evidence had been given together with the other evidence at the trial." (Emphasis supplied)

[47] In **Mario McCallum v R**, this court stated that the party seeking the admission of fresh evidence must satisfy all of the first three requirements identified in the above extract from **R v Parks**.

[48] Their Lordships in **Clifton Shaw v R**, approved the principles set out in **R v Sales** [2000] 2 Cr App Rep 431, in respect of considering the potential fresh evidence to be adduced, where Rose LJ stated, at page 438 that:

> "Proffered fresh evidence in written form is likely to be in one of three categories: plainly capable of belief; plainly incapable of belief, and possibly capable of belief. Without hearing the witness, evidence in the first category will usually be received and evidence in the second category will usually not be received. In relation to evidence in the third category, it may

> be necessary for [the] Court to hear the witness *de bene esse* in order to determine whether the evidence is capable of belief." (Italicized as in original)

[49] In **Brian Smythe v R**, Brooks JA referred to and agreed with all of the above as the applicable and relevant principles in applications to adduce fresh evidence.

[50] As Lord Parker CJ indicated in **R v Parks**, the first hurdle that must be crossed is that the evidence which is sought to be adduced must be evidence that was not available at the trial. The complainant's statement was very much available at the trial. Indeed, Mr Black attempted, incorrectly, to adduce the whole statement into evidence, as can be seen in the transcript. Having failed to and or abandoned his efforts to adduce excerpts of the complainant's statement into evidence to prove inconsistencies with his evidence in court, the complainant's statement could not be adduced into evidence on appeal through an application for fresh evidence or at all. That statement could certainly not be adduced through Dorothea Lynette James, who neither took the statement nor was present when the statement was taken. It was therefore inadmissible hearsay. The application to adduce this statement as fresh evidence was hopeless and failed.

[51] The affidavits that the applicant filed after 28 April 2020 were considered along with the ones filed originally. However, they did not strengthen his application to adduce fresh evidence. With regard to the evidence of Karen Edwards, Karenna McKie, Sasha McKie and Dorothea Lynette James, these affiants were the girlfriend, daughter, niece and employer of the applicant. They were all available to give evidence at the time of trial. Proper arrangements ought to have been made for any or all of them to attend court and give their respective testimonies. One cannot, with the greatest of respect,

claim that evidence is unavailable if one of the persons intending to give evidence on the applicant's behalf, is at the court door knocking, and the others are unaware of the trial date. There is no doubt that the information disclosed in the affidavits tendered in this court would have been relevant to the applicant's defence of alibi, and prima facie, they may all have appeared plainly or well capable of belief. This is not a case in which, in our view, it would have been necessary to resort to the *de bene esse* powers of the court. But, as all three requirements set out in the powerful guidance by Lord Parker CJ in **R v Parks** must be met, the application to adduce those four witness statements as fresh evidence, failed at the outset.

[52] Lord Toulson, in **Richard Brown v The Queen**, stated that if a defence was not raised at trial, which could have been raised, or evidence was not deployed which was available to be deployed, it was unlikely to be in the interests of justice to allow it to be raised on appeal unless a reasonable and persuasive explanation was given for the omission (see paragraph 33). So, not only would the evidence of the witnesses and the statement have failed the test of having been available at the trial, but because of that, as Lord Toulson suggests, without reasonable and persuasive explanation for that failure (which does not exist in this case), it would also not have been in the interests of justice, to allow that evidence to be raised or admitted as fresh evidence on appeal.

[53] As a consequence, we refused the application to adduce fresh evidence of the complainant's statement, and the evidence of Karen Edwards, Sasha McKie, Karrena McKie, and Dorothea Lynette James.

Incompetence of counsel

[54] It is clear that in this case, Mr Black failed to appropriately cross-examine the complainant in relation to sections 16 and 17 of the Evidence Act, so as to adduce excerpts of his statement into evidence, allegedly in proof of inconsistency in the identification evidence of the applicant. Mr Black also failed to adduce evidence of the three witnesses, in relation to his good character, and of his alibi, and one in relation to identification and of his good character. These failures resulted in grave consequences for the applicant. The court therefore granted the applicant permission to amend the notice and grounds of appeal to add a ground that the defence counsel (Mr Black) had failed to:

> (i) raise the issue of alibi and to call witnesses to support the defendant's alibi; and
>
> (ii) to enter into evidence the statement of the complainant to the police, with particular reference to the description and thereafter the identification of the applicant.

In essence, this ground challenged the competence of counsel in the conduct of the defence of the applicant at his trial.

Submissions

[55] Dr Anderson made submissions concerning the incompetence of defence counsel at the applicant's trial. Counsel submitted that the applicant's case was one of mistaken identification as well as alibi. He further submitted that defence counsel had failed to

utilize the complainant's statement effectively to cross-examine him, in order to prove inconsistencies with specific regard to the description of the assailants and whether the applicant had been properly identified as having been one of the assailants. Additionally, having not called Dorothea Lynette James, he lost the opportunity to adduce evidence, through her, as to the applicant's character and his appearance throughout the years. Counsel submitted that defence counsel was ineffective as he failed to raise the defence of alibi. In fact, he submitted that the circumstances were more serious, bearing in mind particularly that the applicant was illiterate. Counsel submitted that defence counsel had therefore not acted in the best interests of his client.

[56] The learned Director, with regard to the admissibility of the complainant's statement, submitted that contrary to the statement made by Mr Black in paragraph 7 of his affidavit, he had not been prevented from entering the statement, but his inexperience was evident as he was unable to do so in compliance with the provisions of the Evidence Act. The learned Director submitted that counsel was obliged to fully explore the complainant's identification evidence by way of a challenge to his alleged previous inconsistent statement. However, that was not done. The learned Director also pointed out that if the applicant's defence was one of alibi, then defence counsel ought to have made proper arrangements in respect of witnesses, particularly to ascertain if the witness is on the court compound so that the appropriate applications could be made for access to the courtroom. Counsel also should have advised other witnesses in respect of the applicant's defence of alibi, of the court date, and when they were to attend, which, on the basis of the material before the court, he failed to do.

[57] Additionally, the learned Director pointed out to the court that the applicant had raised his good character in his unsworn statement. It was counsel's duty, therefore, to adduce evidence from Dorothea Lynette James who, in her affidavit, stated that the applicant was "honest and trustworthy", and she had known him for over 20 years. She reminded the court that Dorothea Lynette James could also have spoken specifically to his description throughout the years.

[58] The learned Director therefore concluded that the incompetence of counsel, in failing to: (a) explore the inconsistencies in the complainant's statement through the use of the Evidence Act; and (b) adduce evidence to prove the defence of alibi, adversely impacted the applicant's case, and rendered the verdict unsatisfactory and unsafe, occasioning a miscarriage of justice. She referred to **Bethel v The State (Trinidad and Tobago)** [1998] UKPC 51 and **Tyrone Da Costa Cardogan v The Queen** [2006] CCJ 4 (AJ).

Discussion

[59] In **Tyrone Da Costa v The Queen**, the justices of the Caribbean Court of Justice reiterated the circumstances in which it is appropriate to raise the issue of the incompetence of counsel. They wrote:

> "Mr Shepherd further alleges that the incompetence of the Applicant's former counsel raises a realistic possibility of a miscarriage of justice if special leave is not granted. However, as stated by Sir David Simmons CJ in *Weekes v The Queen* [Criminal Appeal No 4 of 2000 (unreported)]
>
> > 'All attorneys-at-law will do well to take to heart the advice of Judge LJ in Doherty and Mc Gregor [[1997]

> 2 Cr App R 218, [1997] EWCA Crim 556]: **'Unless in the particular circumstances it can be demonstrated that, in the light of information available to him at the time, no reasonably competent counsel would sensibly have adopted the course taken by him at the time when he took it, these grounds of appeal [based on criticisms of former counsel] should not be advanced.'** There are difficulties which face counsel under the immediate pressure of the trial process and those difficulties should be carefully analysed. At all times newly instructed counsel should approach the matter with a reasonable degree of objectivity.'" (Emphasis supplied)

[60] In the instant case, it is clear what any reasonably competent counsel should have done. However, to the contrary, Mr Black demonstrated a lack of knowledge and understanding of the operation of certain provisions of the Evidence Act, and failed, in the proper conduct of the applicant's defence, as instructed, with regard to the issues of mistaken identification and alibi.

[61] In **Kenyatha Brown v R** [2018] JMCA Crim 24, Phillips JA outlined the principles to be taken into account when the court examines the issue of incompetence of counsel and wrote at paragraph [25] that:

> "In **Paul Lashley and Another v Det Cpl 17995 Winston Singh** [2014] CCJ 11 (AJ) from the Caribbean Court of Justice, Nelson, Saunders and Hayton JJA (Wit and Anderson JJA dissenting), commented on the issue of the incompetence of counsel. The court said that in resolving this issue, the proper approach does not depend on any assessment of the quality or degree of incompetence of counsel. Rather the court was guided by the principles of fairness and due process. There was no need, the court said, for any sliding scale of pejoratives to describe counsel's errors. The court made these comments at paragraphs [11], [12] and [13] of the judgment of the majority:

'[11] … **This Court is therefore concerned with assessing the impact of what the Appellants' retained counsel did or did not do and its impact on the fairness of the trial. In arriving at this assessment, the Court will consider as one of the factors to be taken into account the impact of any errors of counsel on the outcome of the trial.** Even if counsel's ineptitude would not have affected the outcome of the trial, an appellate court may yet consider, in the words of de la Bastide CJ in *Bethel* that the ineptitude or misconduct may have become so extreme as to result in a denial of due process. As this Court said in *Cadogan v The Queen* [[2006] CCJ 4 (AJ) at [14]] **the Court will evaluate counsel's management of the case 'with a reasonable degree of objectivity.' If counsel's management of the case results in a denial of due process, the conviction will be quashed regardless of the guilt or innocence of the accused.** See also *Teeluck and John v The State* [[2005] 4 LRC 259, 273-4; (2005) 66 WIR 319 at [39]].

[12] An appellate court, in adjudicating on an allegation of the incompetence of counsel which resulted in an unfair trial, has to bear in mind that the trial process is an adversarial one. Thus all counsel, including in this case the police prosecutor and retained counsel for the Appellants, are entitled to the utmost latitude in matters such as strategy, which issue he or she would contest, the evidence to be called, and the questions to be put in chief or in cross-examination subject to the rules of evidence. The judge is an umpire, who takes no part in that forensic contest. Therefore, in an appeal such as the instant one where no error of the magistrate prior to sentencing is alleged, the trial does not become unfair simply because the Appellants or their counsel chose not to call evidence, or not to put the accused in the

witness-box and to rely on their unsworn evidence.

[13] **A conviction can only be set aside on appeal if in assessing counsel's handling of the case, the court concludes that there has not been a fair trial or the appearance of a fair trial**: see *Boodram v The State* [[2002] 1 Cr. App. R 12, 19].'" (Italicized as in original and emphasis supplied)

[62] It is indeed evident in this case that a failure on the part of defence counsel to heed the instructions given to him by his client, resulted in a denial of due process, leading to an unfair trial. In the court below, Mr Black failed in his attempt to adduce excerpts of the statement of the complainant, utilising sections 16 and 17 of the Evidence Act to challenge the inconsistencies relevant to the identification of the applicant. That was unfortunate. Having not done so in the court below, the complainant's statement could not have been adduced as fresh evidence on appeal. There is absolutely no way it could have been adduced through Dorothea Lynette James, being inadmissible hearsay, and also, as it was clearly available at the trial, it did not satisfy the first criterion of the test enunciated by Lord Parker CJ in **R v Parks**. The application, therefore, to adduce the complainant's statement into evidence on appeal, as fresh evidence, failed.

[63] The applicant deposed in his affidavit that he had met with Mr Black and indicated that he was innocent, gave him details of his whereabouts at the time of the incident and persons who could support his contention. Mr Black confirmed that the applicant had given instructions of his innocence and his alibi. However, he made no specific arrangements for Karen Edwards or any other witness to attend court to give evidence

on the applicant's behalf. In his affidavit, the applicant also indicated that Mr Black had not prepared him to speak at the trial. Of significance, the applicant did not refer to his whereabouts at the time of the incident when giving his unsworn statement, or to the persons who could attest and confirm where he was at the material time.

[64] It is important too, that, had the learned trial judge heard evidence from Karen Edwards that the applicant had been with her from 8:00 pm throughout the night, and from his daughter Sasha McKie that she had seen the applicant at 6:00 pm watching television with her brother and sister, and also later at his shop at 7:00 pm; and from his niece Karenna McKie, that she had bought a cigarette from him at his shop at 7:30 pm, it might have impacted her jury mind as to whether he could have been one of the assailants of the complainant at Mount Tirza that night, and therefore provided more material with regard to her consideration and assessment of his guilt. Additionally, had the learned trial judge heard that he was a gentle person who does not like "fuss", is a good father and not a violent person, and that his former employer, who had known him for over 20 years found him to be an honest trustworthy and very gentle person, this could have affected her assessment as to whether he had the propensity to commit such a violent crime.

[65] We agree with the learned Director that in the absence of all of that information, the applicant's defence was based merely on an assertion that the complainant was lying. The learned trial judge was left with two main issues in the case: identification and credibility. With the addition of all of the above evidence, the learned trial judge would therefore have been afforded more material for the assessment of both the identification

of the assailants, and the credibility of all of the witnesses in the case, and through them, an assessment of the applicant's defence of alibi.

[66] However, in this case, what is even more unfortunate is that all four witnesses were available at the time of trial and, as indicated, no satisfactory reason had been given for their failure to testify on the applicant's behalf. There is no doubt that, regrettably, counsel's inexperience led to inadequate representation of the applicant, and ultimately, a miscarriage of justice.

[67] Additionally, in any event, the learned Director indicated her concern with the state of the identification evidence, and, in all the peculiar circumstances of this case, conceded that there was merit in the appeal, and that a miscarriage of justice had occurred. She took the position, which was proper in our view, that the case was not one in which a retrial would be appropriate.

[68] It was for all these reasons that we made the orders stated at paragraph [3] herein.