[2013] JMCA Crim 32

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 94/2009

BEFORE: THE HON MRS JUSTICE HARRIS JA
THE HON MR JUSTICE DUKHARAN JA
THE HON MISS JUSTICE PHILLIPS JA

PAUL MURPHY v R

Mrs Nadine Atkinson-Flowers for the applicant

Miss Natalie Ebanks for the Crown

24, 27 September 2012 and 31 July 2013

HARRIS JA

[1] This is a renewed application by the applicant in which he seeks leave to appeal against conviction and sentence, a previous application having been refused by a single judge. The applicant, on 31 July 2009, was convicted on an indictment for two counts of murder. On count one he was charged with the murder of Mark Brown and on count two he was charged with the murder of Damion Archer. He was sentenced to life imprisonment on each count and it was ordered that he should not become eligible for parole until he has served 40 years.

Case for the prosecution

[2] At about 9:30 on the night of 16 September 1999, Mr Barrington Gibson, the main witness for the prosecution, was in an office at the Unipet petrol station in Seaforth, Saint Thomas, when Damion Archer entered. He was followed by the applicant who was armed with a gun. The applicant demanded money and guns but was told that the money had been sent to the bank and that there was no gun in the building. Mark was in the office with Mr Gibson. Damion, Mark and Mr Gibson were ordered by the applicant to sit down. Damion and Mark sat on the floor, while, Mr Gibson sat on a battery charger.

[3] The applicant attempted to enter an inner office but was unsuccessful because the door was locked. He then opened a drawer, which had a small amount of cash, looked in, but did not take any money from it. Shortly after, a car drove up. Mr Gibson heard shots being fired. Soon after the applicant and another man who had accompanied him, ran off. Mr Gibson was shot in the chest. He saw Damion bleeding and heard Mark groaning.

[4] Mr Gibson described the perimeter of the office to be 12 x 8 feet. The applicant had not been previously known to Mr Gibson. The witness said the office was well lit by fluorescent lights. There were lights on the outside of the petrol station and a streetlight close by. The witness also said he first saw the men arriving when they walked by a glass window at the front of the petrol station. He said he could have seen outside clearly through the window. He said that one of the things which struck him as the men walked by was that one had a hunch and

the applicant was the one with the hunch. At that time he only had a side view of him.

[5] The witness further said that when the applicant entered the office he was facing him. In examination in chief, he asserted that the incident lasted less than 15 minutes and he was able to see the applicant's face between five and eight minutes. However, in cross-examination he said that the men were in the office for about five minutes. The applicant, he said, was never more than 5 feet away from him while in the office.

[6] Mr Gibson proceeded to the police station where he made a report and was then taken to the hospital where he was admitted for approximately 24 hours.

[7] On 29 September 2001, Mr Gibson attended an identification parade which was held at the Central Police Station where he pointed out the applicant. The parade was conducted by Sergeant Neil Buckle by use of a one way mirror. Observing the procedure were, Mr Haynes, the applicant's attorney-at-law and Reverend Gentles, a justice of the peace. Sergeant Buckle said that after the applicant and his attorney selected eight men of similar colour, height, status and build, he inquired of the applicant and his attorney if they were satisfied with the persons selected on the parade. They responded in the affirmative.

[8] Sergeant Buckle further recounted that upon inquiry, Mr Gibson told him that he was there to identify the person who shot and killed two attendants at the Unipet Gas Station on 16 September 1999. Mr Gibson, he said, walked up and

down along the line of men for five minutes and finally pointed out the applicant. He also said that Mr Gibson asked that the men should be requested to turn sideways and this was done.

[9] About 10:30 pm on the night of the incident, the investigating officer, Detective Anthony Brown, went to the Unipet Gas Station where he saw the two deceased persons lying on the ground. Both appeared to be dead.

[10] On 19 September 1999, the investigating officer went to the Morant Bay Police Station where he saw and spoke to the applicant and pointed out the offences to him. After being cautioned, the applicant denied that he was involved in the murder and complained that he was framed.

[11] Detective Corporal James gave evidence surrounding the apprehension of the applicant. On 17 September 1999, he visited Seaforth where the applicant lived. On his approach to the applicant's home, he saw the applicant with a group of men close to the entrance of his home. They all ran in different directions. The applicant ran into his yard. Corporal James entered the yard where the applicant was standing with two other men. In the process of informing them of the reason for his visit, the applicant interrupted by saying, "Mi nuh know nothing 'bout nuh killing, mi and dem a friend." A warrant, with which Corporal James was armed, having been read, the home of the applicant was searched. Nothing of significance was found.

[12] Deputy Superintendent Bryan Thompson testified that he was the supervisor of Corporal Junior Brown who had given evidence on the applicant's behalf. Deputy Superintendent Thompson was unaware that Corporal Brown would have been a potential witness in this case. The general practice in the constabulary force demands that if a policeman intends to give evidence in a case, this information should be disclosed to his superior officer. However, Corporal Brown did not inform him of his intention to give evidence on behalf of the applicant.

[13] There was evidence from Doctor Tin Htut who carried out a post mortem examination of the bodies of the deceased men on 22 September 1999. His examination revealed that the deceased Damion Archer died from a laceration of the brain as a result of multiple gunshot wounds. He found that Mark Brown's death was as a result of internal bleeding due to multiple gunshot wounds.

The applicant's case

[14] The applicant made an unsworn statement. He said he operated a shop in Seaforth and on the night of the incident he was at his shop from 5:00 until 11:00 pm. Corporal Brown, who had a girlfriend living in Seaforth, was in the shop playing dominoes. He, the applicant, heard a gunshot and his brother Dwight came in and told him to close the shop. Corporal Brown, he said, told him that the shooting did not appear to have anything to do with them.

[15] Three days later, while he was in his house, the police came and told him that he had killed a man. He said he told the police that other persons were in the shop when he heard the shots and heard that the young man was shot. He denied killing anyone and also denied running from the police.

[16] Two witnesses testified on the applicant's behalf, his brother Dwight Campbell and Corporal Junior Brown. Mr Campbell lives in Seaforth, in a home which he shares with his mother, the applicant and his sister. He said that on the day of the incident, he left home at 7:00 am for work and returned at 7:30 pm. On his arrival home, he saw the applicant. His home is in close proximity to the shop which is operated by the applicant and their mother. At about 9:30 pm, having heard a barrage of explosives, he went to the shop where he saw the applicant, Corporal Brown, who was not known to him, and others. Four of these persons were engaged in a game of dominoes. He asserted that, having heard the shots, he was of the view that the shop should be closed but Corporal Brown assured them that it would not be necessary to do so. After spending about two more minutes in the shop he returned home and retired to bed before 11:00 pm.

[17] He also said that on Sunday, 19 September, the police came to his house and that to the best of his recollection, he did not see anyone else in the yard except his mother, the applicant and the police. The applicant left with the police. He then went to the police station and spoke with Corporal James about the applicant but Corporal James was uncooperative, so he left. That day, or the

following day, he spoke to Corporal Brown and they both went to Mr Haynes' office where he gave a statement to the attorney.

[18] The applicant's second witness, Corporal Junior Brown, was assigned to Area Two Highway Patrol unit in Saint Mary but was stationed in Saint Ann. On 16 September 1999, at about 9:30 pm he was at a bar at School Lane, Seaforth, operated by the applicant, whom he had known for several months. Four of them were engaged in a game of dominoes at the bar. While there, he heard five or six explosions when Mr Campbell who had been previously known to him came to the door and the applicant went to him. They spoke for about two or three minutes but he could not hear the discussion. Mr Campbell left. Thereafter, the applicant said that he would be closing the shop because shots were being fired but he, Corporal Brown, dissuaded him from doing so. After spending 40 or 45 minutes in the shop, his girlfriend, who is from Seaforth, came and they both left. He left Seaforth the following day but never made a report to the police in Morant Bay about hearing gun shots being fired in the area the previous day.

[19] He said that he first learnt that he would have been a potential witness sometime in or about 2000 when he was contacted by Mr Wright, a lawyer. He said he spoke to one Inspector Lewis about the possibility that he might be a potential witness.

Grounds of Appeal

[20] The following grounds of appeal were filed:

"1. The Learned Trial Judge failed to deal adequately with the weaknesses in the identification evidence.

2. There was an improper enquiry by Learned Crown Counsel and the effect of that improper enquiry vitiated any warning the Learned Trial Judge gave to the jury about the issue as it (the enquiry) effectively impugned the credibility of Det. Cpl. Junior Brown and is therefore fatal to the conviction."

Submissions

[21] In dealing with the first ground, although acknowledging that the learned judge had given the jury the general directions on the issue of identification, Mrs Atkinson-Flowers contended that the learned judge failed to have properly instructed them on three specific areas of weakness arising in the case. These she recounted to be the directions on: the time period during which the assailant was observed; the evidence of Mr Gibson of the assailant having a "hunch"; and his failure to have pointed out the applicant at two of three identification parades which were held.

[22] Counsel first submitted that the learned judge failed to have properly directed the jury on the approach they should adopt in treating with Mr Gibson's evidence when he admitted that the incident happened no less than 15 minutes, and then it happened no more than five minutes and that things were moving fast.

[23] The learned judge, she argued, also failed to instruct the jury adequately on the manner in which they should approach Mr Gibson's evidence in which he spoke of the applicant having a hunch, having admitted that he had not given this information to the police in his initial statement. It was counsel's further contention

that three identification parades were held but on two occasions Mr Gibson either failed to point out anyone or pointed out the wrong person. In light of the fact that the applicant was not known to the witness and an issue as to his having a hunch arose, the learned judge ought to have given additional direction to the jury in guiding them on these aspects in relation to his evidence, she argued. She cited the case of ***Barrington Farquharson v R*** (1993) 30 JLR 367 in support of her submissions.

[24] It was counsel's further submission that an improper enquiry made by Crown counsel, effectively impugned Corporal Brown's credibility and vitiated any warning that the learned judge had given to the jury and this being unfair and prejudicial to the applicant, was fatal to the conviction. She cited ***Barry Randall v R*** [2002] UKPC 19 and ***Christopher Thomas v R*** [2011] JMCA Crim 49 to bolster this submission.

[25] Miss Ebanks argued that the learned judge had dealt adequately with the evidence of identification. Further, she argued, it was for the prosecution to have questioned the witness to establish whether the evidence was tainted. She submitted that Crown counsel's remarks to the witness Brown when she said to him, "Are you calling me a liar, I took my two eyes and saw it?" was improper. This was cauterized by the learned judge when she said, "Madam Crown counsel you suggested to him and he has answered you, unless you are going to give evidence".

[26] The question, however, is whether the line of questioning undermined the fairness of the trial so as to cause injustice to the applicant, she argued. The learned judge exercised her control over the proceedings, intervened and stopped intervention by Crown counsel.

Analysis

[27] The applicant's complaint in ground one is that the learned judge did not fairly direct the jury in respect of the weaknesses of the identification evidence. In ***R v Long*** (1973) 57 Cr App R 871, the English Court of Appeal, in giving guidance as to the approach to be taken by a judge, in a summation in a trial, in which the issues in the case, among others, involve identification evidence, pronounced that the summation should be fair and that a summation would not be fair if the circumstances and weaknesses of an identification were not dealt with by the judge. At page 877, the court said:

> "Above all [it] must be fair; and in cases in which guilt turns upon visual identification by one or more witnesses it is likely that the summing-up would not be fair if it failed to point out the circumstances in which such identification was made and the weaknesses in it."

[28] Their Lordships' Board, in ***Ashwood and Others v R*** (1993) 43 WIR 294, speaking to the question of the assessment of a trial judge's approach to evidence of identification, at page 300, said:

> "In order to judge the adequacy of a warning in an identification case, its precise terms should properly be considered in the light of the strength of the identification evidence in the case."

[29] In ***Michael Rose v R*** (1994) 46 WIR 213 Lord Lloyd of Berwick, delivering the advice of their Lordships' Board, spoke to the requirements in instructing a jury on the weaknesses in a case. At page 217D he said:

> "But nothing in ***Turnbull*** or in the subsequent cases to which their Lordships were referred requires the judge to make a 'list' of the weaknesses in the identification evidence or to use a particular form of words when referring to those weaknesses. The essential requirement is that all the weaknesses should be properly drawn to the attention of the jury and critically analysed where this is appropriate." (emphasis mine)

[30] The applicant's first complaint relates to the time within which Mr Gibson said he had to observe the person he said was the applicant. In examination in chief, he said the incident lasted less than 15 minutes, while in cross examination he asserted that the men were in the building about five minutes and that the incident occurred quickly. In instructing the jury on this aspect of the evidence, the learned judge, at pages 367 to 369 of her summing up, said:

> "He first exhibits the timing, the timing of the entire incident the accused came into the station until the accused ran out, he put it at less than fifteen minutes. So, that's the time that the incident lasted: Less than fifteen minutes. He was asked, 'You said you saw him [sic] face on?' 'Yes.' 'What do you mean by that?' 'Like how I am seeing you, your face, your entire body, almost just below the knee.' And according to him of these less than fifteen minutes, he would have observed the face of this man, the accused ninety percent of the time.
>
> He says - So, the only time he did not see him is when he went behind him to go to the office, to the back because you remember Mr. Gibson told you there was a period of time after, he demand [sic] money, this man went to try to

> open the inner office door and went behind him to do that, couldn't get in and he came back. So, that's the only time he would not have seen him and so he estimate, [sic] he gave a further estimation of the time he would have seen him. He said at least eight minutes, five to eight minutes the most. So, that is his evidence in relation to the time.
>
> Under cross-examination by Mr. Fletcher, he said the men in the office were the men, were in the office for more or less five minutes. And he agreed with Mr. Fletcher that things were moving fast so it was a bit difficult to properly estimate the time. He said nothing obstructed his view of this man's face."

Later at page 371, she went on to say:

> "Now, when you are assessing the quality of the identification evidence, you bear in mind, according to Mr. Gibson, that he said it was a frightening experience, and from to time, he was looking at the gun."

At pages 382 to 383 she further said:

> "Even if you accept that the man was properly identified on the parade, it doesn't mean that you accept that he was pointed out at the parade [sic], that the man is guilty. If you accept that he has been properly identified at the parade, you still have to go back on the night of the 16th of September, to see if Mr. Gibson had sufficient opportunity and you are satisfied that he - that of the quality of his identification witness [sic] because even if you point that - that he points out the man at the parade, you still have to go and examine it, the circumstances of the 16th of September.
>
> The circumstances under which the witness observed the accused, and bearing in mind, the warning I have given to you about the special need for caution. You will have to say that this witness has some opportunity to view the accused and he is properly identified."

[31] This case was substantially dependent on visual identification. The evidence was compelling. The lighting was good. When the assailant entered the small office at the petrol station he was facing Mr Gibson. While in the office, he and the witness were 4 or 5 feet apart. The learned judge pointed out to the jury all the circumstances surrounding the identification of that person who the witness said was the applicant. Additionally, she did not fail to tell them that the witness would only have been precluded from observing the applicant's face when he attempted to gain entrance to the inner office of the building.

[32] The question therefore is whether the learned judge was required to go further than she had, in drawing to the jury's attention all the facts arising on the evidence of the identification, in particular the time within which Mr Gibson said he had to observe the assailant on the night of the incident despite his statement that he was frightened. She carefully informed them how those facts are to be treated. The jury heard the evidence. It was for them to decide whether a period of 5 minutes was enough time within which the witness could have positively identified the applicant, he having said that the experience was frightening.

[33] We will now turn to the complaint relating to the inadequacy of directions in respect of Mr Gibson's evidence when he spoke of the applicant having a hunch. The learned judge, in directing the jury on this aspect of the witness' testimony, said at pages 371 and 372:

> "Now, when you are looking at the identification evidence, I have to remind you what is said about this hunch, and I will be dealing with it when I speak to you about the

> identification parade, but remember, he told you that when he went on the parade, he asked that the men on the parade should turn a certain way. So he spoke about this hunch and what he told you, that he noticed the hunch when he saw the man from the side view through the glass window, but he admitted that he never told the police about the hunch, when he gave his statement in 2002. When he gave his evidence, he didn't tell the Court about the hunch, and he said he was never asked the question."

[34] She went on to remind them that Sergeant Buckle had informed them that Mr Gibson had requested that the men in the parade turn sideways and that Mr Gibson said that he was able to make a positive identification because the men had turned around. The instructions given by the trial judge were sufficient to guide the jury in their deliberations as to whether the witness had correctly pointed out the applicant as one of the persons at the petrol station on the night of the incident.

[35] The criticism of the learned judge's treatment of the witness' failure to have pointed out the applicant at two previous identification parades will now be addressed. At page 374 of the summation the learned judge said:

> "Evidence also came out, and it is there before you. There were actually three parades and the evidence that in another parade, he pointed out a wrong man, but this was not the man, and on the third parade he pointed out no one. Mr. Murphy was on parade number two.
>
> Madam Foreman and your members, you are not to speculate about other issues. What you are dealing with is Mr. Murphy and whether or not you are satisfied that Mr. Gibson as [sic] properly identify [sic] Mr. Murphy, as one of two men armed with gun, entered the Unipet Gas Station and fired shots, killing Brown and Archer. So, that is your consideration. You

> are not to speculate about anything else. If you are not satisfied, based on the evidence that is before you, that means the Crown has not fulfill [sic] the burden on them to make you feel sure. If you are not satisfied, that means you should find the man not guilty."

[36] As can be observed from the foregoing, the learned judge brought to the jury's attention that the witness failed to point out the applicant at the two parades which were held. She rightly directed their attention to the critical issue in the case and instructed them that they should consider whether or not, on the evidence, the applicant had been properly identified. She went on to instruct them that if they were not satisfied of the applicant's guilt, he should be acquitted.

[37] ***Farquharson v R*** is distinguishable from the present case. Although that case was one in which visual identification was a critical issue, the trial judge failed to warn the jury of the special need for caution before convicting the appellant on the correctness of the identification. This was fatal to the conviction. It cannot be said that in this case the learned judge, in giving the appropriate warning to the jury, did not do so in conformity with the prescription of the well-known ***Turnbull*** principles.

[38] Counsel's complaints of the manner in which the learned judge instructed the jury on the weaknesses of the identification evidence are not well founded. Ample instructions were given to the jury in this regard. The learned judge properly directed them and left it for them to consider whether the evidence of identification was of any value. The weaknesses in the evidence were properly

brought to their attention and she impressed upon them to consider the overall picture in order to decide whether they could feel sure of the applicant's guilt. In our view, the learned judge had not only given the jury the general directions on the issue of visual identification but had satisfactorily brought to their attention the potential hazards in the evidence of identification.

Impeached questioning on the part of counsel for the Crown

[39] The complaint here is that the line of questioning of Corporal Brown by counsel for the Crown destroyed his credibility and as a consequence this operated unfairly to the applicant. Mrs Atkinson-Flowers, relying on the case of ***Krishna Persad and Ramsingh Jairam v The State*** (2001) 58 WIR 433, contended that the evidence elicited from Corporal Brown during an area of his cross-examination, did not relate to the evidence which had been given on behalf of the applicant but would only relate to that which could be deemed a collateral issue. In ***Persad and Jairam v The State,*** the case turned on, among other issues, the failure of the prosecution to disclose to the defence information as to the probable unreliability of a potential witness for the prosecution. The Board stated that in a trial the inquiry into the credibility of a witness must be kept within bounds and the admission of evidence upon matters collateral to an issue must be discouraged.

[40] The area of cross examination of Corporal Brown which forms the subject matter of the complaint, is as follows:

> "Q. Mr. Dwight Campbell, brother of the accused, he is a friend of yours?

A. No, ma'am.

Q. Is he someone that you would speak to, from time to time, say on the phone or in person?

Mr. Brown, remember our thing yesterday, don't look at Mr. Fletcher, look at me.

A. No, I am not looking at him.

Q. See me here. Look at me as I am looking at you.

A. No.

Q. You don't normally talk to him?

A. No.

Q. Not on the phone?

A. No.

Q. You see him in person, from time to time?

A. Only when I came yesterday, I saw him.

Q. And, so you speak with him for a little while?

A. No, ma'am.

Q. You never spoke to him for a little while?

A. No, ma'am.

Q. Let me give you an opportunity one more time. You never spoke -- well, are you having a difficulty when I say, little while?

A. No, ma'am.

Q. So, you are saying that you never spoke to him a little while?

A. Just briefly, outside.

Q. Outside where?

A. The courthouse.

Q. You mean out in the courtyard there?

A. No, ma'am.

Q. Where?

A. Along King Street.

Q. And, this conversation between you and him took place from after 4:00 until about, call it seven minutes past 5:00?

A. That's not true.

Q. Constable Junior Brown, are you telling me, as counsel for the Crown, that at seven minutes past 5:00, you were not standing with Mr Dwight Campbell, along King Street and having a conversation, that is what you are telling me?

A. Yes, ma'am.

Q. Good. And, I am going to suggest to you, that you are not speaking the truth.

A. It is the truth, ma'am.

Q. How long you said you talked to him for?

A. Briefly, about one to two minutes.

Q. And, hold on a second, tell me something, you spoke to him along King Street for one to two minutes?

A. Yes, ma'am.

Q. So, you weren't standing out there in the courtyard, talking to him?

A. No, ma'am.

Q. So, you and he never walked up to King Street?

A. I can't recall.

Q. You mean yesterday, and you can't recall yesterday evening. That's what you are telling me, officer? I want an answer.

A. Yes, ma'am.

Q. That it is yesterday evening and you can't recall?

A. Yes, ma'am.

Q. And, I am going to suggest to you, Constable Brown, that I took my own two eyes and saw you?

A. That's not true.

Q. And, you are calling me a liar?

HER LADYSHIP: Madam Crown, you suggested to him and he has answered you, unless you are going to give evidence."

[41] It must be stated at the outset that the foregoing pales in comparison to the circumstances in ***Randall v R***. In that case, comments adverse to the appellant and persistent interruptions by the prosecutor were so excessive that they rendered the trial unfair. Prosecuting counsel repeatedly made prejudicial comments during the examination in chief and the cross-examination of the prosecution's witnesses. The unseemly conduct of the prosecutor continued by his

interruption of the examination in chief and re-examination of the appellant as well as his interruption of the summation of the trial judge by prejudicial comments. The Board held that the appellant was deprived of a fair trial by reason of the departure from good practice during the course of the trial. The prosecuting counsel, by his conduct, did not display the qualities of a minister of justice and the trial judge did not control the proceedings to enforce proper standards of behaviour.

[42] The Board reiterated the principle that every accused is entitled to a fair trial. At paragraph [9] Lord Bingham of Cornhill who delivered the opinion of the Board said:

> "A contested criminal trial on indictment is adversarial in character. The prosecution seeks to satisfy the jury of the guilt of the accused beyond reasonable doubt. The defence seeks to resist and rebut such proof. The objects of the parties are fundamentally opposed. There may well be disputes concerning the relevance and admissibility of evidence. There will almost always be a conflict of evidence. Some witnesses may be impugned as unreliable, others perhaps as dishonest. Witnesses on both sides may be accused of exaggerating or even fabricating their evidence."

At paragraph [10], he continued by saying:

> "There is, however, throughout any trial and not least a long fraud trial, one overriding requirement: to ensure that the defendant accused of crime is fairly tried. The adversarial format of the criminal trial is indeed directed to ensuring a fair opportunity for the prosecution to establish guilt and a fair opportunity for the defendant to advance his defence. To safeguard the fairness of the trial a number of rules have been developed to ensure that the proceedings, however closely contested and however highly charged, are conducted

> in a manner which is orderly and fair. These rules are well understood and are not in any way controversial."

[43] In ***Christopher Thomas v R*** the prosecuting counsel proceeded along a highly prejudicial path by going outside the latitude permitted by cross-examination. She suggested to the witness that she, the witness, was paid to give evidence on behalf of the appellant when in fact there was no evidence to support such allegation. This would have undoubtedly influenced the jury and would have led them to believe that the appellant was guilty. Such conduct being prejudicial and unfair to the appellant, was clearly irremediable by a warning which was issued by the trial judge.

[44] On the material outlined in the extract from the transcript relating to the cross-examination of Corporal Brown, by the prosecutor, it does not appear that there is any ground for the complaint by the applicant. The inquiry by the prosecutor does not fall in the category of collateral issue. Even if it does, it cannot be said that the questions posed by Crown counsel were so inappropriate that they would render the trial unfair. In ***Randall v R*** and ***Christopher Thomas v R***, the circumstances are undoubtedly distinguishable from those of the present case. In the case under review, the questions, taken cumulatively, cannot be regarded as prejudicial so as to undermine the integrity of the trial. However, even if the impugned aspect of Corporal Brown's evidence is considered to be a departure from good practice, in ***Randall v R*** the Board clearly pronounced that it is not every case in which the departure from good practice the trial ought to be

regarded unfair. If in all cases a departure from good practice was treated as being prejudicial rendering the trial as unfair, this would "emasculate the trial process, and undermine public confidence in the administration of criminal justice" - see ***Randall v R.***

[45] The evidence of Corporal Brown was the subject of clear and fair instructions to the jury by the trial judge. The questions asked of Corporal Brown by the prosecutor cannot be considered prejudicial. Additionally, as Miss Ebanks has rightly submitted, any perceived damage done by the prosecutor during the cross examination of Corporal Brown had been cauterized by the learned judge.

[46] The summation of the learned judge was commendably fair. She focused the jury's attention on their main task of considering the evidence in making a decision. The summation meets the requisite standard. It cannot be said that the learned judge's treatment of the evidence of identification or the impugned questions posed by the prosecutor to the defence's witness, were prejudicial so as to amount to a miscarriage of justice.

[47] The application for leave to appeal is refused. The sentence should commence on 31 July 2009.