

JAMAICA

IN THE COURT OF APPEAL

**BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP P
THE HON MISS JUSTICE SIMMONS JA
THE HON MRS JUSTICE DUNBAR GREEN JA**

SUPREME COURT CRIMINAL APPEAL NO COA2020CR00007

KENNETH POTTINGER v R

Ms Samoi Campbell for the applicant

Ms Debra Bryan and Ms Andrene Hutchinson for the Crown

1 July and 16 October 2026

Criminal law – Murder – Visual identification – Sole identifying witness – Identification of applicant as one of a group – Collective observation of several men – Whether evidence disclosed sufficient individualised observation of applicant – No-case submission – Whether learned trial judge erred in leaving case to jury – Summation – Whether jury adequately directed to specific weaknesses in identification evidence – Identification parade – Whether failure to correctly direct the jury on the function of the identification parade amounted to a material misdirection

DUNBAR GREEN JA

Introduction

[1] This was a renewed application for leave to appeal against conviction and sentence. The applicant, Kenneth Pottinger, was tried in the Home Circuit Court before G Fraser J, as she then was ('the learned judge'), and a jury on an indictment containing two counts of murder. The charges arose from a shooting incident, on 12 February 2008, along Saint John's Road, Spanish Town, in the parish of Saint Catherine. Count one concerned the murder of Devarowe Powell ('the deceased') and count two, the murder of Ronald Robinson.

[2] The applicant was convicted on count one and, on 10 January 2020, sentenced to life imprisonment with a stipulation that he should serve 23 years before becoming eligible for parole. The prosecution offered no evidence on count two, and a formal verdict of not guilty was entered.

[3] On 1 July 2026, we heard the application for leave to appeal and made the following orders:

- "1. The application for leave to appeal is granted.
2. The hearing of the application for leave to appeal is treated as the hearing of the appeal.
3. The appeal is allowed.
4. The conviction is quashed, and the sentence is set aside. Judgment and verdict of acquittal entered."

[4] These are our reasons.

Factual background

The prosecution's case

[5] Detective Constable Hector Clarke testified that at about 8:00 am, on 12 February 2008, he was travelling in a private motor vehicle along Saint John's Road, when he stopped at a roadside stall and purchased cigarettes from the deceased. About five to six minutes later, as he was returning to the area, he heard what sounded like gunshots ahead of him. He stopped his motor vehicle and saw three armed men standing over the deceased and firing at him. According to Detective Constable Clarke, the applicant was one of those men. He challenged them, whereupon they fired in his direction and then ran into a nearby lane with two other men. He, thereafter, observed the deceased lying on the ground.

[6] Detective Constable Clarke stated that, during the shooting incident, he observed the three men from head to toe and saw their faces for about 15 to 20 seconds. He estimated that they were initially about 35 feet away and, after he exited his motor

vehicle, between 28 and 30 feet away. He further testified that earlier that morning, he had seen the applicant among a group of five men whom he had allowed to cross the roadway. The group was then about 8 feet away and was observed for between four and seven seconds.

[7] Subsequently, on 26 February 2008, he identified the applicant at an identification parade as one of the three men whom he had seen shooting the deceased.

The applicant's case

[8] The applicant gave an unsworn statement from the dock denying involvement. His case was that Detective Constable Clarke was mistaken. He called three witnesses who testified to his previous good character.

The appeal

[9] The applicant was granted permission to abandon the original grounds of appeal contained in form B1 and to argue the following supplemental grounds:

- "1. The Learned Trial Judge erred in law by failing to uphold the no case submission in respect of count one, which related to the death of Devarowe Powell.
2. The Learned Trial Judge erred in law by failing to direct the jury's attention to the specific weaknesses in the identification evidence, resulting in a material misdirection.
3. The Learned Trial Judge erred in law by giving an unbalanced summation which diluted a material issue affecting the credibility and reliability of the sole eyewitness.
4. The Learned Judge erred in principle in imposing a sentence of life imprisonment with a stipulation that the Applicant serve twenty-three years before becoming eligible for parole."

Ground 1: The learned trial judge erred in law by failing to uphold the no-case submission in respect of count one, which related to the death of Devarowe Powell.

Summary of submissions

For the applicant

[10] In support of this ground, counsel for the applicant, Ms Campbell, submitted that the learned judge erred in rejecting the no-case submission because the prosecution's case rested entirely on the visual identification evidence of Detective Constable Clarke, which was of poor quality and unsupported by independent evidence capable of confirming its accuracy. Counsel observed that the constable's opportunities for observation were limited, consisting first of a sighting of five men crossing the roadway for approximately four to seven seconds and subsequently of a group of men observed for some 15 to 20 seconds during an exchange of gunfire.

[11] Ms Campbell emphasised that no separate period of observation was identified in relation to the applicant, who was previously unknown to the constable; Detective Constable Clarke was simultaneously observing multiple persons while returning fire and seeking cover; and no distinctive identifying feature of the applicant was described. Accordingly, counsel contended, the identification evidence was weak, unreliable and incapable of sustaining a conviction and, in those circumstances, the learned judge ought to have withdrawn the case from the jury. In support of those submissions, counsel relied on **R v Turnbull and others** [1976] 3 All ER 549; **Wilbert Daley v R** [1993] 43 WIR 325; **Dwayne Knight v R** [2017] JMCA Crim 3; **Prince Emanuel Dell v R** [2012] JMCA Crim 27; and **R v Ivan Fergus** [1994] 98 Cr App R 313.

For the Crown

[12] Counsel for the Crown, Ms Bryan, submitted that the learned judge correctly rejected the no-case submission. Counsel contended that the identification evidence of Detective Constable Clarke was of sufficient quality to warrant consideration by the jury. She highlighted the evidence that the constable observed three men standing over the

deceased, saw their faces in daylight conditions, viewed them from distances of approximately 35 feet and later 28 to 30 feet, and subsequently identified the applicant at an identification parade. Counsel further submitted that the fact that the constable observed the men collectively did not render the identification evidence weak or unreliable. Rather, any issues concerning credibility and reliability were matters for the jury. Counsel relied on **Wilbert Daley v R**, **Herbert Brown and another v Regina** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 92 & 93/2006, judgment delivered 21 November 2008 ('**Herbert Brown and another**'), **Ellis Taibo** [1996] 48 WIR 74 and **Irvin Goldson and another v R** [2000] 56 WIR 444.

Discussion and disposal of ground 1

[13] The applicable principles are well settled. In **R v Turnbull**, the court recognised the special danger of mistaken identification and required trial judges to examine the quality of identification evidence with particular care. Where the quality of the identification is poor, whether because it depends on a fleeting glance or a longer observation made in difficult conditions, the case should be withdrawn from the jury unless there is other evidence supporting the correctness of the identification (see page 553 of **R v Turnbull**). This principle was affirmed by the Privy Council in the Jamaican case of **Junior Reid v R** [1993] 4 All ER 95.

[14] The instant application engaged both the principles relating to visual identification and those governing a submission of no case to answer. The latter were authoritatively stated by Lord Lane CJ in **Regina v Galbraith** [1981] 1 WLR 1039 at page 1042:

"(1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case. **(2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence. (a) Where the judge comes to the conclusion that the Crown's evidence, taken at its highest, is such that a jury properly directed could not properly convict on it, it is his duty, on a submission**

being made, to stop the case. (b) Where however the Crown's evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence on which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury. It follows that we think the second of the two schools of thought is to be preferred.

There will of course, as always in this branch of the law, be borderline cases. They can safely be left to the discretion of the judge." (Emphasis added)

[15] The Board in **Daley v R** explained how the principles in **R v Turnbull** are to be applied within the **R v Galbraith** framework and reaffirmed that the withdrawal of an identification case may be required where the evidence, though honestly given, rests on a foundation so slender that it is incapable of supporting a safe conviction.

[16] The approach was helpfully explained by Morrison JA (as he then was) in **Herbert Brown and another**, after a review of the relevant authorities. At para. 35, 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 circumstances 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."

[17] The authorities also make clear that the assessment is not confined to the duration of the observation. In **R v Ivan Fergus**, the English Court of Appeal emphasised that a

trial judge must analyse the weaknesses affecting the purported identification when deciding whether the evidence should be left to the jury. A similar approach was adopted by McDonald-Bishop JA (Ag), as she then was, in **Dwayne Knight v R** [2017] JMCA Crim 3, where it was observed that identification evidence must be evaluated qualitatively rather than merely quantitatively. That approach accords with the principle underscored in **Separue Lee v R** [2014] JMCA Crim 12 that a brief observation is not, without more, insufficient. Matters such as the witness's focus, distance from the person observed, lighting, prior familiarity and the surrounding circumstances must all be considered.

[18] Read together, those authorities establish that, where a no-case submission is made in a case resting on visual identification, the trial judge's task extends beyond asking whether there is some evidence implicating the accused. The trial judge must determine whether the material upon which the purported identification is based is sufficiently substantial to obviate the "ghastly risk" of mistaken identification. If the quality of the evidence is poor, or its foundation too slender, the case must be withdrawn from the jury.

[19] Accordingly, it was necessary for the learned judge to examine closely the observations on which Detective Constable Clarke's purported identification of the applicant was said to rest. The first observation occurred when the constable saw five men crossing the roadway. Three of those men, he later asserted, were among those whom he subsequently saw shooting the deceased and exchanging gunfire with him. In cross-examination, Detective Constable Clarke accepted that this was a collective observation lasting between four and seven seconds. His evidence did not indicate how his attention was distributed among the five men, whether it was focused on the man said to be the applicant, or whether the latter was observed for any identifiable period.

[20] The second observation occurred in markedly more difficult circumstances. It too involved the observation of a group. Detective Constable Clarke testified that three armed men were firing at the deceased and later in his direction. He identified himself as a police officer, returned fire and sought cover behind his motor vehicle. The entire episode lasted

some 15 to 20 seconds and occurred at approximately 28 to 35 feet. Once again, there was no evidence identifying any distinct period during which the man said to be the applicant was solely under observation. Further, the estimated period of 15 to 20 seconds appeared to have encompassed the entirety of the incident, from the constable's arrival at the scene until the men fled into the nearby lane.

[21] The absence of any separate or individualised observation assumed particular significance because the applicant was previously unknown to the constable. Equally significant was the absence of evidence of any meaningful distinguishing feature. The description given was of a man wearing "a jeans pants and a dark shirt". As to his appearance, Detective Constable Clarke said only that his hair was "rough", and that he could not say whether it was in "cornrows" or otherwise.

[22] The Crown properly relied on the fact that the purported observations occurred in daylight and that Detective Constable Clarke testified that he saw the faces of the men. Those were undoubtedly relevant considerations. They did not, however, conclude the qualitative inquiry. In neither instance was the constable observing a single stationary individual. More significantly, the second observation occurred amid a rapidly unfolding and dangerous confrontation, during which he was simultaneously observing multiple men, reacting to gunfire, and attempting to protect himself.

[23] The Crown also relied on the fact that Detective Constable Clarke subsequently identified the applicant at an identification parade. That circumstance would have had significance only if the original opportunity for observation was itself of sufficient quality. An identification parade is a test of a witness' recollection of a person previously seen; it cannot compensate for, or cure, a deficient original observation (see **Irvin Goldson v R**).

[24] The distinction between this case and **Separue Lee v R** is significant. Although the viewing time in that case was short, there was evidence of direct and focused observation of the individual identified. This court, accordingly, concluded that the

witness' observation amounted to more than a fleeting glance. Here, the applicant's complaint was not simply that the opportunities for observation were brief. It was that there was no evidence of any focused or individualised observation of him at all. There was force in that contention.

[25] Detective Constable Clarke's evidence disclosed periods of collective observation of groups of men but identified no period during which the person said to be the applicant was the subject of focused observation. Observation of a group is not, without more, evidence of sufficient observation of each member of that group.

[26] In our respectful view, the learned judge did not sufficiently engage with that issue. Instead, the weaknesses in the identification were treated as matters for the jury to "grapple with", concomitant with the learned judge's view that the observations were "beyond a fleeting glance" (pages 101-102 of the transcript).

[27] Had the learned judge sufficiently analysed that difficulty, she might well have concluded that the quality of the identification evidence was poor and that, in the absence of any supporting evidence, the case ought not to have been left to the jury. We, therefore, concluded that the learned judge erred in rejecting the no-case submission. Ground 1, accordingly, succeeded.

[28] Although that conclusion made it unnecessary to determine the remaining grounds, since they were fully argued and are of materiality to the outcome of the application for leave to appeal, we went on to address them briefly.

Ground 2: The learned trial judge erred in law by failing to direct the jury's attention to the specific weaknesses in the identification evidence, resulting in a material misdirection.

Summary of submissions

For the applicant

[29] Relying on **R v Turnbull**, **R v Ivan Fergus**, and **Dwayne Knight v R**, Ms Campbell submitted that the learned judge failed to relate the **Turnbull** warning to the

specific weaknesses in Detective Constable Clarke's evidence. The complaint focused on an alleged failure by the learned judge to direct the jury's attention to the fact that Detective Constable Clarke did not give evidence of any distinct period during which he observed the perpetrator, said to be the applicant, by himself; the difficult circumstances in which the purported identification was made; and the absence of any meaningful or distinctive identifying feature capable of strengthening the reliability of the identification.

[30] Those deficiencies, it was submitted, were compounded by the learned judge's misdirection on the function and evidential value of the identification parade. It was argued that the learned judge misled the jury by directing them that, if they found the identification parade to have been fairly conducted, it was open to them to regard it as strengthening the identification of the applicant. That direction, it was argued, could have misled the jury as to the true evidential value of an identification parade. The relevant issue, Ms Campbell submitted, was not confined to whether the identification parade had been fairly conducted because even a properly conducted identification parade could not, by itself, cure deficiencies in Detective Constable Clarke's original purported observations at the scene of the murder.

[31] Counsel submitted further that the jury required a clear direction that the identification parade did not, of itself, strengthen Detective Constable Clarke's identification of the applicant unless they were first satisfied as to the quality and reliability of his original observations. The probative value of the identification parade, it was argued, depended on whether Detective Constable Clarke had a reliable opportunity, or opportunities, to observe the person, he said was the applicant, at the material time. If the original observations were weak or unreliable, the subsequent identification parade could not properly be treated as strengthening the prosecution's case on identification.

For the Crown

[32] Ms Bryan, in written submissions, resisted the applicant's challenge, submitting that the learned judge had properly warned the jury of the dangers inherent in the identification evidence; highlighted the weaknesses in the case; and drew attention to

the brevity of Detective Constable Clarke's first sighting of the assailant, the fact that the applicant was previously unknown to the witness, the traumatic circumstances of the encounter, and the possibility of error. Counsel further argued that no particular form of words was required and that the directions were consistent with the requirements of **R v Turnbull**.

[33] However, in oral arguments, counsel properly conceded that the learned judge misdirected the jury on the evidential value of the identification parade, resulting in a substantial miscarriage of justice.

Discussion and disposal of ground 2

[34] The applicant's complaint was not that the learned judge omitted the **Turnbull** warning altogether. Rather, it was that the warning was not sufficiently related to the deficiencies in the identification evidence. A trial judge's duty is to assist the jury in examining the actual weaknesses that arise on the facts of a case. The more central the identification evidence is to the prosecution's case, the more important it becomes that those weaknesses are clearly identified and explained. Here, the principal weakness lay in the absence of any individualised observation of the person said to be the applicant. So, the jury needed to appreciate that a collective observation of multiple men over a period of four to seven seconds was not necessarily an observation of the applicant for that period.

[35] They should also have been told that the second purported sighting had to be assessed in the light of the constable's divided attention during an exchange of gunfire and while he was seeking to protect himself, and not simply by reference to the overall estimate of 15 to 20 seconds. That guidance was not given.

[36] The learned judge did alert the jury to several factors, including duration, distance, daylight, lack of previous knowledge, and stress. But the most important consideration, namely that the applicant was never identified as having been separately observed for any distinct period, was not brought home to the jury.

[37] The direction on the identification parade also required much greater care. At page 216 of the transcript this is what learned judge told the jury:

“...Foreman and members of the jury, you are to look at the evidence surrounding the conduct of the parade, and you decide whether the identification parade process was fairly conducted. If you find that it was fair then it is open to you to also find that it supports and strengthens the identification of the [applicant] by the witness, Constable Clarke. However, if you are unsure whether it was fair or find that it was unfair the [applicant] would have lost the benefit of the safeguard provided by a fair parade, and you must take that into account in assessing the whole case and give it such weight as you see fit. Additionally, if you find that the process was unfair then in those circumstances the pointing out of the [applicant] by Constable Clarke as he was seated in court, and he pointed out [the applicant] in the dock would be of no value, and then you would have to totally disregard it.”

[38] It does not appear that any issue of procedural irregularity or breach of the requirement of fairness was raised by the defence. The fairness of the identification parade was, nevertheless, still a relevant consideration for the jury, and, in this regard, it was proper for the learned judge to direct them generally on the requirement of fairness. However, the error lay in the learned judge’s direction that: “If you find that the [parade] was fair then it is open to you to also find that it supports and strengthens the identification of the accused man by the witness...”. This amounted to a misdirection.

[39] An identification parade cannot, without more, support and strengthen the identification of an accused person. Lord Hoffmann, delivering the advice of the Board in **Irvin Goldson v R**, observed at page 448 that “the normal function of an identification parade is to test the accuracy of the witness’s recollection of the person whom he says he saw commit the offence”. That was precisely its function in the present case.

[40] The learned judge’s failure, therefore, was to accurately explain to the jury the function and evidential significance of the identification parade. Having directed the jury that the fairness of the identification parade was a matter for their consideration, the

learned judge ought to have made clear that a properly conducted identification parade cannot cure a poor original identification and that its evidential value depends upon the reliability of the witness's initial observation.

[41] By way of further explanation, the jury should have been told of the requirements, firstly to determine whether the identifying evidence was of sufficient quality to make them sure that Detective Constable Clarke was not mistaken in identifying the applicant as one of the perpetrators. Secondly, if they were to treat the identification parade as supporting the identification, they had to be satisfied that Detective Constable Clarke had made a reliable observation of the perpetrator at the scene. This is consistent with the observation of McDonald-Bishop JA (as she then was), in para. [24] of **Julian Brown v R** [2020] JMCA Crim 42 – “that it was the first purported identification at the time of the commission of the offence which was of critical importance in proving that the accused was the shooter”.

[42] Immediately following the misdirection on the evidential value of the identification parade, the learned judge said this:

“So, members of the jury, your assessment of the correctness of the identification rests mainly on the observations made by Constable Clarke on the scene on the 12th of February 2008. It is for you to determine whether his ability to recall the image of the perpetrator and his subsequent attendance on the identification parade if it strengthens that sighting of the alleged perpetrator, one of whom he says is [the applicant].”

[43] However, that direction was not only incapable of nullifying the misdirection but also failed to adequately explain the relationship between the reliability of the original observation and the evidential value of the identification parade. Neither did it sufficiently bring home to the jury the possibility of honest but mistaken identification. There was, therefore, a real risk that the jury could have regarded the identification parade as independent evidence strengthening the prosecution's case, rather than as a mechanism designed to test the accuracy of Detective Constable Clarke's recollection of the person,

he said he had seen commit the offence. We, accordingly, agreed with Ms Campbell that the learned judge erred in her directions concerning the identification parade.

[44] In the circumstances, having regard to the nature of the case and the errors identified in the learned judge's summation to the jury, we concluded that the learned judge did not sufficiently assist the jury in dealing with the weaknesses in the identification evidence, while the direction on the identification parade constituted a material misdirection which occasioned a miscarriage of justice. Ground 2, therefore, succeeded.

Ground 3: The learned trial judge erred in law by giving an unbalanced summation which diluted a material issue affecting the credibility and reliability of the sole eyewitness.

Summary of submissions

For the applicant

[45] Ms Campbell submitted that the learned judge diluted a defence point arising from the absence of damage to Detective Constable Clarke's motor vehicle. Counsel contended that the absence of damage to the motor vehicle was capable of undermining the reliability of Detective Constable Clarke's account that he was fired upon while standing near his motor vehicle, which was approximately an arm's length away from him, and that the assailants came within approximately 15 feet of him at the time. Moreover, the learned judge provided an explanation for the absence of damage to the motor vehicle with words to the effect that some people cannot fire accurately, without adding that the absence of damage to the motor vehicle was also capable of undermining the reliability of Detective Constable Clarke's account. It was, therefore, argued that the summation failed to leave the issue evenly in circumstances where there was no independent evidence connecting the applicant to the offence.

For the Crown

[46] The Crown properly conceded that the summation, as regards this point, was unbalanced.

Discussion and disposal of ground 3

[47] At pages 204 to 205 of the transcript the learned judge stated:

"....Now, counsel had also challenged him, and he has commented you that the vehicle that Mr. – that Constable Clarke was driving was parked right there and yet there was no, ahm, bullet holes, ahm, in the vehicle, there was no shot up of the vehicle, Constable Clarke himself was not shot. And, ahm, yet he says he was in an exchange of gunfire with these men. Well, Madam Foreman and members of the jury, I don't know, and for me to say anything in relation to that would be mere speculation. **A lot of people who have guns in their possession don't know how to use them, so if they have to fire further than two foot or two feet they can't hit anything. I don't know; I don't know the skills level of these men, but one thing is for sure there can be no issue that guns were fired on the scene that morning.** If you recall the evidence of DSP Higgins he told you that at several places along St. Johns Road he had seen a number of spent shells. Spent shells he told you is what is left off when you fire the gun, and the warhead gone off on the ground, that is spent shell. So, you might well say that there is evidence that guns were fired. And also he said that, ahm, not he said, the pathologist said that the deceased was killed by multi-gunshot wounds. So, that's evidence to corroborate Constable Clarke's evidence that guns were fired in the vicinity of St. Johns Lane, that is a matter for you. I don't know why, and thankful that Constable Clarke was not shot and killed. I can't say why it is that he wasn't shot, I can't say why it is the vehicle was not damaged, but that is not to say that shots were not fired, and that he did not fire any, and that none were fired at him." (Emphasis added)

[48] A summation must be balanced. A trial judge is entitled to comment on the evidence and may do so strongly where circumstances warrant it, provided that the ultimate determination of the facts remains with the jury. What a trial judge must not do is effectively neutralise a material point favourable to the defence. The decisions of the Privy Council in **Byfield Mears v R** [1993] 42 WIR 284 and **Lescene Edwards v The Queen** [2022] UKPC 11 place that principle beyond doubt.

[49] The issue raised by the defence bore directly on the credibility of the sole identifying witness and on the circumstances in which he claimed to have identified the applicant. The absence of damage to the motor vehicle did not necessarily mean that Detective Constable Clarke's account had to be rejected. It was, however, capable of supporting an inference that his account of being fired upon at close range was inaccurate, or that his estimates of distance and position were unreliable. Rather than placing those competing considerations fairly before the jury, the learned judge highlighted only one possible explanation, namely that persons in possession of firearms may not be able to use them accurately. While that was an inference properly available on the evidence, the competing inference favourable to the defence was not placed before the jury with comparable clarity. In a case depending entirely on the evidence of a single identifying witness, greater balance was required. Ground 3, therefore, succeeded.

[50] For the reasons above, we granted leave to appeal and allowed the appeal against conviction.

Ground 4: The learned judge erred in principle in imposing a sentence of life imprisonment with a stipulation that the applicant serve twenty-three years before becoming eligible for parole.

[51] In the light of our conclusion on the conviction, it was unnecessary to determine whether the challenge to sentence had any merit.

Conclusion

[52] The conviction depended entirely upon the visual identification evidence of Detective Constable Clarke. For the reasons given, that evidence was of such poor quality that the learned judge ought to have withdrawn the case from the jury at the close of the prosecution's case. Having failed to do so, the jury was, thereafter, not adequately directed on the central weaknesses in the identification evidence, particularly the absence of any distinct period of individualised observation of the perpetrator said to be the applicant, the collective nature of the purported observations, and the limited evidential

significance of the identification parade. The direction regarding the identification parade amounted to a material misdirection. Additionally, the summation failed to address, with the requisite balance, a matter bearing directly on the credibility and reliability of the sole identifying witness.

[53] These deficiencies were not peripheral. They struck at the core of the prosecution's case, and the fairness of the jury's assessment of the only evidence said to link the applicant to the offence. This was, therefore, not a case in which the proviso to section 14(1) of the Judicature (Appellate Jurisdiction) Act could properly be applied.

[54] It was for those reasons that the court made the order set out at para. [3] above.