[2026] JMCA Crim 17

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MRS JUSTICE V HARRIS JA
THE HON MRS JUSTICE SHELLY-WILLIAMS JA (AG)

SUPREME COURT CRIMINAL APPEAL NO COA2021CR00086

AUSTIN REID v R

Mrs Melrose Reid instructed for the appellant

Mrs Lenster Lewis Meade and Luke Cook for the Crown

Criminal law – Identification evidence – Turnbull Guidelines – Warning – Applicability of Turnbull Guidelines in Bench trials – Duty of judge to demonstrate application of the relevant principles – Duty to demonstrate applications of warnings and cautions based on the law – Extent to which this should be demonstrated – Applicability of principles regarding evidence in judge-alone trials – Retrial – Fresh evidence application – applicable principles – Judicature (Appellate Jurisdiction) Act, section 28

15, 16 December 2025 and 25 June 2026

SHELLY-WILLIAMS JA (AG)

Introduction

[1] The appellant was tried in the Circuit Court Division of the Gun Court before a judge alone ('the learned judge'). The appellant was charged on an indictment containing three counts for illegal possession of a firearm (count 1), murder (count 2), and wounding with intent (count 3). He was convicted and sentenced, on 2 December 2021, to 20 years' imprisonment at hard labour on count 1; life imprisonment, with the stipulation that he is not eligible for parole before 20 years on count 2; and 30 years' imprisonment at hard labour on count 3. The sentences were ordered to run concurrently.

[2] On 16 December 2021, the appellant filed a B1 form seeking to challenge his conviction and sentence. The application was reviewed by a single judge of this court, and, on 21 March 2023, leave to appeal conviction was granted. I note that leave to appeal sentence was refused by the single judge. Counsel for the appellant, in her submissions, applied to the court and was granted permission to abandon the original grounds filed and to argue two supplemental grounds. The supplemental grounds of appeal were that:

> "1. The learned trial judge erred in law when he did not uphold the no case submission with respect to the identification of the appellant.
>
> 2. The learned trial judge erred in law when he convicted the appellant on identification evidence which had not met the criminal standard."

The case in the lower court

Crown's case

[3] The evidence elicited by the Crown was that Mr LaQwayne Irving ('the eyewitness') was on Barrett Street in the August Town community with friends Carlye Grant and Kareem around 8:30 am on 26 October 2018. He observed a vehicle stop nearby, from which the appellant emerged, armed with a silver handgun. The appellant wore a handkerchief over his nose, masking the lower half of his face. Frightened, the eyewitness froze for about 15 to 20 seconds and saw the appellant point the gun at Carlye Grant and fire multiple shots. Carlye ran along August Town Road while he ran downhill toward his home. The eyewitness' evidence was that he felt a gunshot hit his back and that he crawled into a nearby container shop. He heard more gunfire, lost consciousness, and woke up in the hospital, where he remained for two weeks. His testimony indicated he received gunshot wounds to his chest, back, right foot, and left hand, with a fractured spine. He is now unable to walk.

[4] The eyewitness testified that he had known the appellant for over 12 years, since high school. He also mentioned seeing the appellant in August Town up until 2018 and last saw him six to seven months before the incident. He was familiar with the appellant by both name and the alias 'Manny'. The witness stated that, before the incident, he regarded the appellant as a friend. He also knew the appellant's father, a barber, as well as his brothers and sister.

[5] The eyewitness described the appellant as being the same height as he was, approximately 5 feet 10 or 11 inches, with large eyes and an oval face. He mentioned that although the handkerchief covered the lower part of the face, he was still able to recognize the appellant. Later, he retrieved a picture of the appellant from Facebook and handed it over to the investigating officer.

[6] The evidence from the investigating officer, Constable Shawn Francis, was that, on 26 October 2018, based on information received, he went to August Town, where he saw the body of a man, later identified as Carlye Grant, lying on his back in the vicinity of 41 August Town Road, with what appeared to be gunshot wounds. He observed spent casings along the roadway in August Town and in a container shop along Barrett Drive. After the scene was processed, the body of Carlye Grant was transported to Kingston Public Hospital, where he was pronounced dead and later transported to Tranquillity Funeral Home. He collected a statement from the eyewitness, who later provided him with a picture of the then suspect, whom he (the eyewitness) identified as Austin Reid. No identification parade was conducted. The appellant was charged on 24 December 2018 for the above-mentioned offences.

[7] There were four statements that were agreed and read into evidence, namely: -

a. Damion Cole's statement, in which he indicated that he had identified the body of his cousin Carlye Grant at the post-mortem examination.

b. Detective Sergeant Michael Blackwood's statement, along with the medical report from Dr Richard Escoffrey and the

post-mortem report of Dr Pramanik. The statement indicated that he had observed the recording of Damion Cole's statement.

c. Corporal Andy Stephenson's statement indicated that he was at a murder scene near August Town. He heard gunshots and proceeded to Barrett Drive in August Town. He visited the scene and observed the body of a man lying on the ground, who was later identified as Carlye Grant. He received information and went to a shop along Barrett Drive, where he observed a man lying inside the shop suffering from what appeared to be gunshot wounds. The injured man, whose name he later learned was LaQwayne Irving, was rushed to the University Hospital.

d. Constable Luther King Ferguson's statement, which indicated that he is the forensic crime scene investigator. He received information, and he, along with Detective Woman Constable Soares, visited the scene at Barrett Drive in August Town, where he saw the body of Carlye Grant lying on the ground, which was later removed to the morgue. He observed spent casings on the scene, which were later photographed and collected by Detective Woman Constable Soares.

Defence's case

[8] The appellant gave sworn evidence and raised the defence of alibi, asserting that he was babysitting at the time of the incident. He testified that he was at his brother's house and later spoke to his father by phone. He further testified that his brother handed him the phone when his father called and that his father told him not to leave the house. The appellant denied being friends with the eyewitness and gave evidence that the picture submitted to the police was taken when he was 16 years old. He also testified that he was the same height as his brother and that they had the same body type.

[9] The appellant's father, Mr Carl Reid, gave evidence that he has four sons and one daughter, including the appellant. He stated that the appellant was at home at the time of the incident. His evidence was that he had heard gunshots, called his sons, and told them not to go on the road. He also stated that his children all look alike, highlighting their eyes, a mark under the chin, and their same complexion.

Application to adduce fresh evidence

Appellant's submissions

[10] On 15 December 2025, we heard an application to adduce fresh evidence. Having considered the application, we refused it, and these are our promised reasons. We had also indicated that, in light of that decision, the application for special measures would fall away and we would have no need to consider it.

[11] The appellant filed an application, on 14 April 2025, to introduce fresh evidence. The application was supported by two affidavits, one from the eyewitness, and the other from an attorney-at-law who represented the appellant.

[12] In her submissions, counsel for the appellant outlined the jurisdiction for admitting fresh evidence at the appellate stage. She relied on section 28 of the Judicature (Appellate Jurisdiction) Act ('JAJA'), rule 1.16(2) of the Court of Appeal Rules, and case law, including **Ladd v Marshall** [1954] 3 All ER 745 and **Orville Murray v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 176/2000, judgment delivered 19 December 2008.

[13] Counsel for the appellant submitted that this court should admit the fresh evidence, noting that, when juxtaposed with the evidence given at trial, its non-admission would result in a miscarriage of justice on the potent ground of identification. Counsel relied on the three criteria set out in **Ladd v Marshall** and then submitted that they had been met.

[14] Counsel argued that, based on the eyewitness' affidavit, he was coerced into giving false testimony due to threats against his and his family's lives. Counsel asserted that those who threatened and coerced the witness are now deceased, and the witness wants to rectify the situation. It was also argued that, due to these circumstances, the evidence was technically unavailable during the trial. While the witness was aware of the evidence, its unavailability prevented its production at trial.

[15] The appellant's counsel further argued that, if the evidence is accepted as fresh, there is a "very high probability" that the outcome of the case will change, because the only identification evidence before the court came from the sole eyewitness at trial. Counsel relied on **Dial and another v The State of Trinidad and Tobago** [2005] UKPC 4; [2005] 1 WLR 1660, which emphasised that the primary question for the court in relation to fresh evidence is whether it raises a reasonable doubt, and that the ultimate question for the court is whether the convictions are safe. It was submitted that if the evidence in the affidavit is accepted, the appellant's conviction could be overturned.

[16] Counsel for the appellant argued that the fresh evidence should be admitted:

(a) In the interests of justice,

(b) As the verdict would be unreasonable given the new evidence; and

(c) As it would be fair to hear it, especially since it came directly from the victim.

Counsel cited cases such as **Fairburn v R** [2010] NZSC 159 and **Lescene Edwards v R** [2022] UKPC 11 in support of this position.

[17] Counsel for the appellant submitted that she is aware of the delay in making the application to adduce the fresh evidence, noting that:

(i) The incident occurred in 2018;

(ii) The appellant was convicted in 2021; and

(iii) The witness only came forward in late 2023 or early 2024.

[18] The appellant's counsel stated that the delay was caused by fear, which prevented the witness from testifying sooner. The witness was able to testify only after December 2022, following the killing of the 'dons' who had threatened him. Despite the four-year delay, counsel argued that the reception of the fresh evidence was justified.

Crown's submissions

[19] Counsel for the Crown submitted that this court's jurisdiction derives from section 28 of the JAJA and cited **R v Parks** [1961] 3 All ER 633 as laying down the principles that the court should follow in admitting fresh evidence. Counsel noted that in **Mario McCallum v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 93/2006, judgment delivered 18 June 2008, the court reaffirmed the principles from **Parkes** and held that these principles are cumulative, meaning the appellant must satisfy all the outlined criteria.

[20] Counsel argued that new evidence should only be admitted in rare circumstances and under strict conditions. Counsel referenced **R v Erskine and Williams** [2010] 1 All ER 1196 and **Richard Brown v The Queen** [2016] UKPC 6, highlighting that courts should closely examine explanations for failing to present evidence at trial. Additionally, counsel for the Crown cited **Milton Baker v R** [2025] JMCA Crim 27 and **Omar Neil v R** [2015] JMCA Crim 30, which addressed the issues of the interests of justice and the standard of proof required for applications to introduce new evidence.

[21] Counsel for the Crown compared the relevant portion of the eyewitness' affidavit with his trial testimony and the explanation he gave for the attempt to recant. She also noted that the eyewitness' affidavit lacked specifics, including the date he was contacted, his location at the time of approach, and who was present. Counsel argued that these omissions raised additional concerns about the new evidence the witness intended to submit to the court.

[22] Counsel submitted that Detective Corporal Shawn Francis' affidavit indicated that the eyewitness had been threatened in an attempt to deter him from testifying, not to coerce him into giving false testimony. Detective Corporal Francis also confirmed that the witness and his family had relocated after the threats and had stayed away from August Town until he gave his testimony.

[23] Counsel for the Crown argued that the witness had discussed the threats with the police, undermining his claim that he had spoken only to "people" about threats in 2023. Counsel for the Crown submitted that if the threats had changed, the witness had numerous opportunities to inform the police or prosecutors and to present his recantation. Furthermore, counsel argued that the new evidence the appellant seeks to introduce is not credible and should be excluded by the court.

Analysis

[24] The starting point in addressing an application for fresh evidence is section 28 of the JAJA, which provides the statutory authority for this court's power to admit fresh evidence. Section 28 states that:

> "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 [sic] 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;…"

[25] There have been several cases that have established the threshold for admitting fresh evidence before this court. Lord Parker CJ, in **R v Parks**, gave guidance on the interpretation of the court's power under the English provision, which is similar to section 28 of the JAJA. Lord Parker 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 appellant if that evidence had been given together with the other evidence at the trial."

[26] Lord Kerr, writing on behalf of the Board in **Lundy v R** [2013] UKPC 28, stated at para. 42 of the decision that the test for admitting fresh evidence is that "the new evidence should be admitted if the interests of justice require it". In **Lescene Edwards**, a recent decision of the Privy Council, Sir David Bean, writing on behalf of the Board, at para. 42, affirmed that the test laid down in **Lundy v R** was to be adopted in the admission of fresh evidence. The test laid down in para. 120 of **Lundy** was:

> "The Board considers that the proper basis on which admission of fresh evidence should be decided is by the application of a sequential series of tests. If the evidence is not credible, it should not be admitted. If it is credible, the question then arises whether it is fresh in the sense that it is evidence which could not have been obtained for the trial with reasonable diligence. If the evidence is both credible and fresh, it should generally be admitted unless the court is satisfied at that stage that, if admitted, it would have no effect on the safety of the conviction. If the evidence is credible but not fresh, the court should assess its strength and its potential impact on the safety of the conviction. If it considers that there is a risk of a miscarriage of justice if the evidence is excluded, it should be admitted, notwithstanding that the evidence is not fresh."

In order to determine if it is capable of belief the evidence of the eyewitness must be compared to the affidavit evidence submitted in the application for fresh evidence.

The eyewitness' evidence at the trial

[27] The eyewitness testified that he saw the appellant exit a motor vehicle, wearing a mask that covered the lower part of his face from his nose down. He explained that he froze before fleeing the scene. The eyewitness also saw the deceased, Carlye Grant, nearby, who ran away. The appellant was holding a dark silver handgun. He heard a gunshot, sustained injuries, and was later admitted to the hospital, and he is now wheelchair-bound due to his injuries. The eyewitness identified the appellant as the person he saw that day, providing details about his familiarity with him, when they last met, and how he was able to identify him despite the face covering. To aid identification, he downloaded a photo of the appellant from Facebook and shared it with the police, both in hard copy and via WhatsApp. The eyewitness testified that he knew the appellant from school, was familiar with the appellant's family members, and knew the appellant's alias. He described the appellant's features and highlighted differences between the appellant and his relatives.

[28] In his affidavit seeking to introduce new evidence, the eyewitness claimed he was coerced and threatened by two 'dons' into testifying at trial. He averred that after leaving the hospital, the 'dons' approached him and his family members, threatening them. The affidavit explained that he was instructed to state that the appellant was the offender, and he complied by providing the police with a detailed statement. He was with the 'dons' when the appellant's image was retrieved from Facebook and was guided on how to participate in the identification parade. The eyewitness indicated he did not see who committed the offences and now wishes to tell the truth.

[29] The second affidavit in support of the application for fresh evidence was from an attorney-at-law who represented the appellant. He averred that family members informed the appellant that new information regarding the eyewitness was available.

[30] The Crown submitted an affidavit in response from Detective Corporal Shawn Francis, the investigating officer. He stated that he collected the statement from the eyewitness, who provided him with a photograph of the appellant. The officer averred that the eyewitness had told him that he had received text messages from gang members

in the August Town area and from his brother, who was incarcerated, both instructing him not to testify in the case. He also faced threats from a gang leader. The eyewitness informed him that his brother was a gang member, and there was an implied exchange wherein the eyewitness would not testify in Austin Reid's case, and in return, gang members would prevent the witness from testifying in his brother's case. The eyewitness expressed distress, saying he was the one suffering and unable to support his spouse and children. He had moved to another community, and inquiries were made about whether he wished to participate in the witness protection programme, but he chose not to. No affidavit was filed by the appellant in response to the investigating officer's affidavit.

[31] In reviewing the affidavit evidence submitted in support of the fresh evidence application, we found that it falls within the category of evidence that is incapable of belief. We say so based on the following:

a. The contents of the affidavit evidence from the attorney-at-law who represented the appellant amounted to hearsay and had no evidentiary value.

b. The eyewitness averred that he was being threatened by two 'dons' along with other gang members. The eyewitness' position was that the two 'dons' are now deceased, which has enabled him to tell the truth about the appellant's absence at the scene. If gang members had been threatening the eyewitness, the passing of the two 'dons' would not have eliminated those threats. For the eyewitness to now claim that the threats against him have been eliminated and that he is ready to speak the truth is very convenient.

c. The affidavit of the investigating officer, Detective Corporal Francis, was that the eyewitness had been threatened and, as a result, he had relocated to another community. There is no mention of this relocation in the affidavit of the eyewitness. The eyewitness was also offered the option to enter the witness protection programme, but he declined. Again, there was no mention of this offer in the eyewitness' affidavit.

d. In addition, there was no affidavit filed by the eyewitness that sought to contradict the arresting officer's affidavit. The eyewitness appeared to omit several details in his affidavit, including that his brother was a gang member and that other gang members had threatened him.

We found the fresh evidence incapable of belief, and, as such, the application for fresh evidence was refused.

[32] The issues raised in the grounds of the substantive appeal will now be considered.

Ground 1: Should the no-case submission have been upheld?

Appellant's submissions

[33] Counsel for the appellant submitted that the evidence from the sole eyewitness was of poor quality and that the case should have been discontinued at the no-case submission stage. Counsel highlighted portions of the eyewitness' evidence that she argued should have led to the no-case submission being upheld, including:

a. The evidence from the eyewitness was that the appellant was wearing a mask that covered the bottom half of his face.

b. Conflicting evidence as to whether the witness froze after seeing the appellant with a firearm.

c. The only part of the face visible to the witness was the appellant's eyes. This was coupled with the eyewitness' evidence indicating that the appellant's father and brother also had similar eyes.

Counsel based her arguments on the cases of **R v Turnbull and Others** [1976] 3 All ER 549 ('**Turnbull**'), **R v Galbraith** [1981] 1 WLR 1039 ('**Galbraith**') and **Herbert Brown and Mario McCallum v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 92 & 93/2006, judgment delivered 21 November 2008 ('**Herbert Brown**').

The Crown's submissions

[34] Counsel for the Crown argued that the evidence from the sole eyewitness was sufficient to allow the learned judge to reject the no-case submission, as there was sufficient evidence from the sole eyewitness to allow the case to proceed beyond the no-case submission stage. Counsel emphasized the eyewitness' testimony regarding his prior knowledge of the appellant, the duration of his observation, and evidence showing he could distinguish the appellant from other family members despite the handkerchief covering the lower part of the face. To support their argument, counsel for the Crown cited cases, including **Herbert Brown**; **R v Daley** (1993) 43 WIR 325; **Jerome Tucker and Linton Thompson v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 77 & 78/1995, judgment delivered on 26 February 1996; and **Jermaine Cameron v R** [2013] JMCA Crim 60.

Analysis

[35] Lord Lane, in the case of **Galbraith**, summarised, on page 1042 of the judgment, the key points to consider on a submission of no case to answer:

> "… (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 prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case. (b) Where however the prosecution 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 upon 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."

[36] In the case of **Herbert Brown** Morrison JA (as he then was) gave guidance on the approach to be taken at the no-case submission stage, where the issue is identification. At para. [35] of the judgment, he stated:

> "[35] So that the critical factor on the no case submission in an identification case, where the real issue is whether in the 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 profferred, and the like."

[37] What was the evidence presented to the court at the no-case submission phase? The Crown introduced testimony from one eyewitness, the scene-of-crime officer, and the investigating officer. Additionally, four other statements were agreed upon and admitted as evidence. The eyewitness' evidence was that he knew the appellant before the incident, explaining how long he had known him, when they last saw each other, how long he observed him on the day of the event, and their distance at the time. The eyewitness indicated that he froze upon seeing the appellant because he was fearful. The evidence before the court was that the appellant was wearing a handkerchief covering the lower part of his face. This testimony was tested under cross-examination, and the eyewitness maintained that the appellant was the person he saw that day.

[38] In **Wilbert Daley v R** [1994] 1 AC 117, the Privy Council, with Lord Mustill delivering the decision on behalf of the Board, opined at page 129 as to the approach to be taken by the trial judge at the no case submission stage in a case of identification.

> "… By contrast, in the kind of identification case dealt with by Reg. v Turnbull [1977] Q.B. 224 the case is withdrawn from the jury not because the judge considers that the witness is lying, but because the evidence even if taken to be honest has a base which is so slender that it is unreliable and therefore not sufficient to found a conviction: and indeed, as Reg. v. Turnbull itself emphasized, the fact that an honest witness may be mistaken on identification is a particular source of risk …"

A detailed review of the eyewitness' testimony appears in paragraphs 50 to 56 of the judgment. Given the difficult circumstances, including the eyewitness freezing in fear and the appellant wearing a handkerchief that covered part of his face, the evidence available to the judge at the no-case submission stage was, at best, weak. We conclude that the judge erred in failing to uphold the no-case submission; therefore, the appeal is allowed on ground 1.

Ground 2: Did the learned trial judge err in law when he convicted the appellant based on identification evidence?

[39] This ground of appeal has two limbs, namely:

a. Whether the identification of the appellant was a result of dock identification.

b. Whether the overall evidence of the Crown that resulted in a conviction met the standard of proof.

Dock identification

[40] The appellant's counsel argued that, since the eyewitness did not take part in an identification parade, simply pointing out the appellant in court constituted a dock identification. Counsel conceded that if the eyewitness knew the appellant prior to the incident, identifying him in court would not strictly amount to a dock identification. However, she pointed out that because the assailant was masked, an identification parade should have been held. Without this parade, recognising the appellant in court effectively amounted to a dock identification. Counsel referenced cases such as **Tido v The Queen** [2011] UKPC 16, ('**Maxo Tido**'), **Stewart v R** [2011] UKPC 11, **France and Vassell v**

R [2012] UKPC 28, ('**France**') and **Pipersburgh v The State** [2008] UKPC 11 to support her position.

[41] Counsel for the Crown submitted that, in this case, because the eyewitness already knew the appellant, merely identifying him in court did not constitute a dock identification. Counsel for the Crown cited cases such as **Pipersburgh, Maxo Tido**, **and Stubbs Davis and Evans v The Queen** [2020] UKPC 27 ('**Stubbs and others**') to support their position.

Analysis

[42] The eyewitness stated that he knew the appellant prior to the incident, thereby making it a recognition case. The difference between identification and recognition in relation to dock identification was emphasised in the case of **Stubbs and others** where, after reviewing the **Stewart** and **France** cases, the Board noted at para. 79 of its decision that:

> "In the Board's view, the distinction drawn by the authorities between cases of identification and recognition is more to the point. Where an identifying witness claims previous acquaintance with the person identified, different considerations will apply. In *Stewart* [2011] UKPC 11, (2011) 79 WIR 409 the identifying witness claimed to have known the accused and his family for a long time. In that case the Board considered that the identification in court could not properly be regarded as a dock identification at all. By the time the witness came to point out the accused in the dock she had already told the police precisely who he was. The dock identification was a 'pure formality' (per Lord Brown at para 10). Similarly, in *France v R* [2012] UKPC 28; (2012) 82 WIR 382, another case of recognition, Lord Kerr, delivering the opinion of the Board, observed (at para 33) that a dock identification in the original sense of the expression entails the identification of an accused person for the first time by a witness who does not claim previous acquaintance with the person identified and that the dangers inherent in such an identification are clear. He continued (at para 34):

> 'There has been a tendency to apply the term 'dock identification' to situations other than those where the witness identifies the person in the dock for the first time. This is not necessarily a misapplication of the expression, but it should not be assumed that the dangers present when the identification takes place for the first time in court loom as large when what is involved is the confirmation of an identification already made before trial. Nor should it be assumed that the nature of the warning that should be given is the same in both instances. Where the so-called dock identification is the confirmation of an identification previously made, the witness is not saying for the first time 'This is the person who committed the crime'. He is saying that 'the person whom I have identified to police as the person who committed the crime is the person who stands in the dock'."

[43] In this case, the eyewitness gave evidence that he had prior knowledge of the appellant. The eyewitness clarified that he knew the appellant's name and alias, obtained a photograph, and showed it to the police. The main issue for the court is not whether this was a dock identification, since the eyewitness already knew the appellant, but whether he could still recognise the appellant even with his face partly covered. The evidence clearly demonstrated the eyewitness' familiarity with the appellant, so the eyewitness' identification cannot be classified as a dock identification.

Whether the overall evidence of the Crown that resulted in the conviction met the standard of proof

[44] The appellant's counsel contended that the Crown's evidence was insufficient, leading the learned judge to mistakenly convict the appellant. Counsel argued that there was a lack of proper analysis of the evidence and that the learned judge only briefly referred to the **Turnbull** warning. Counsel also pointed out that the learned judge did not evaluate the reliability or precision of the identification evidence. Additionally, counsel observed that, aside from the weak identification, there was no additional supporting evidence for the eyewitness' testimony. She highlighted that even though this was a judge-alone trial, a specialized warning about the risks of mistaken identification without corroboration should have been issued. Counsel cited **Scott and another v The Queen** [1989] 1 AC 1242.

[45] Counsel for the Crown acknowledged that the learned judge did not review all the specifics of the identification evidence. Nonetheless, it was argued that the evidence elicited showed that this was not a case of a fleeting glance. She contended that, although the learned judge's discussion of the identification was brief, he pinpointed the main issues. Additionally, Counsel argued that, as the sole decision-maker, the learned judge found the eyewitness credible and was convinced of his reliability, despite the mask the appellant wore. The learned judge reviewed and accepted the evidence, ultimately finding the appellant guilty of the offences.

Analysis

[46] The case against the appellant rests on a single eyewitness, and as such, the evidence required great scrutiny. The case of **Turnbull** outlined the guidelines for the court to follow during summations regarding identification evidence that comes wholly or primarily from a single eyewitness. Lord Chief Justice Widgery, writing on behalf of the Court of Appeal in England, set out guidelines for judges regarding identification in paras. 3 to 6 of his judgment:

> "First, whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Provided this is done in clear terms the Judge need not use any particular form of words.
>
> Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example, by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any

> special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? If in any case, whether it is being dealt with summarily or on indictment, the prosecution have reason to believe that there is such a material discrepancy they should supply the accused or his legal advisers with particulars of the description the police were first given. In all cases if the accused asks to be given particulars of such descriptions, the prosecution should supply them. Finally, he should remind the jury of any specific weaknesses which had appeared in the identification evidence. Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.
>
> All these matters go to the quality of the identification evidence. If the quality is good and remains good at the close of the accused's case, the danger of a mistaken identification is lessened; but the poorer the quality, the greater the danger ..."

[47] The Caribbean Court of Justice, in the case of **Dioncicio Salazar v The Queen** [2019] CCJ 15 (AJ) ('**Salazar**'), sought to distinguish between bench trials and jury trials. Paras. 27 and 28 of **Salazar** sought to lay down the obligations of a judge when conducting a bench trial. They state that:

> "[27] In the case of a bench trial conducted before a professional judge, the safeguards are directly to be found in the reasoning in the judgment of the trial judge. In accordance with the European Court of Human Rights, reasoned judgments oblige judges to base their reasoning on objective arguments, and also preserve the rights of the defence. However, the extent of the duty to give reasons varies according to the nature of the decision and must be determined in the light of the circumstances of the case… While courts are not obliged to give a detailed answer to every argument raised … it must be clear from the decision that the

> essential issues of the case have been addressed [See *Taxquet v Belgium* (Application No. 926/05 at 91].
>
> [28] The Court of Appeal in Northern Ireland stated in *R v Thompson* [1977] NI 74 with respect to the duty of the judge giving judgment in a bench trial:
>
> He has no jury to charge and therefore will not err if he does not state every relevant legal proposition and review every fact and argument on either side. His duty is not as in a jury trial to instruct laymen as to every relevant legal aspect of the law or to give (perhaps at the end of a long trial) a full and balanced picture of the facts for decision by others. His task is to reach conclusions and give reasons to support his view and, preferably, to notice any difficult or unusual points of law in order that if there is an appeal it can be seen how his view of the law informs his approach to the law." (Italics as in the original)

[48] Regarding the evaluation of the identification evidence in the instant case, the learned judge was aware of the need for caution in assessing the evidence presented to the court, as he referenced the **Turnbull** warning at page 210 of the transcript, stating:

> "I warn myself in relation to what we call the Turnbull warning, that mistakes can often be made in terms of identification. That is, we can see someone and they may resemble someone that we know, and that even a genuine and completely convinced witness can make these mistakes. And one of the things that one should look at is the depth of knowledge that the person have of the individual, how often they have seen them, how well known they were and how recently they were seen."

[49] There was no issue as to whether the appellant and the eyewitness knew each other before. The eyewitness testified that he knew the appellant from school days and that he attended parties and football events with him. The eyewitness described the appellant as a friend. The appellant, in his evidence, agreed with the eyewitness that they knew each other prior to 26 October 2018, but denied that they were friends. The case then turned on the evidence before the court as to the identification of the assailant on

26 October 2018. What then was the evidence before the court as it relates to identification?

[50] The evidence of the eyewitness was that he was able to identify the appellant by: "Same eyes, mostly the eyes. He has big eyes, so he cannot hide". Under cross-examination, the eyewitness admitted that there were other persons who had the same type of eyes as the appellant, namely the appellant's father, sister, and brothers. The appellant's father gave evidence confirming that the appellant, his three other sons, and his daughter had similar eyes. The appellant's eyes could not then be the distinguishing feature that would confirm and identify him as the offender. The eyewitness testified that he could also identify the appellant by his hairstyle, oval-shaped face, height (5 feet 10 or 11), and complexion.

[51] The appellant testified under oath and denied the crimes. He claimed an alibi, stating he was caring for his baby at his brother's home during the incident. He acknowledged that the police received a photograph linked to him, which he said was taken when he was 16 years old. The appellant explained that, at the time of the incident, he did not have the low-cut hairstyle shown in the photograph; instead, his hair was plaited. He also stated that his eyes resemble those of his siblings and that he shares his height and complexion with his brother, who is about 5 feet 9 inches tall.

[52] The evidence of the eyewitness' ability to distinguish the appellant from other members of his family required careful scrutiny. The learned judge, in evaluating the evidence of the eyewitness, stated at page 207 of the transcript that:

> "The witness indicated he was able to identify Mr. Reid, despite the mask, because of his distinctive eyes, his complexion, and the shape of his face, and his height.
>
> Under cross examination he was able to point out the difference between Mr. Reid and his brother, who seems to be in the same age range, fairly close in age and he said that his brother was taller and I believe darker and that his face

> was shaped differently. But the defence did not stop there in terms of the issue of identification."

The learned judge at page 211 of the transcript indicated that:

> "As I have said, Mr Irving was able to distinguish between Mr Reid and his family and under cross-examination he was able to, as I have said, point out the fact that the brother who he admits look [sic] like him and there are these similarities, was different in particular ways that he could articulate very clearly and indicate in his evidence."

The learned judge then stated at page 213 of the transcript that:

> "I accept the evidence of the witness that Mr. Reid was present on the scene and had a gun and was firing ..."

[53] The only evidence against the appellant was from the sole eyewitness. There is no explanation or factual finding showing how the learned judge was convinced that the appellant was the person seen on 26 October 2018. Moreover, there is no detail explaining how the learned judge accepted that the witness could identify the appellant's facial features despite his wearing a mask. The eyewitness claimed he could tell the appellant apart from his brother by the appellant's oval face. However, there is no evidence or finding that explains how the witness observed the oval shape of the face while the mask covered the lower half of the face. The learned judge also did not clarify how he relied on the witness's ability to distinguish the appellant from his brother based on height. Additionally, the learned judge did not reference the appellant's hairstyle at the time, particularly since the appellant stated he had a different hairstyle from the one shown to the investigating officer. Overall, the learned judge's analysis of the identification evidence was notably inadequate.

[54] Counsel for the appellant's next concern was the length of time the eyewitness observed the appellant on 26 October 2018. The witness testified during examination in chief that he saw the appellant exit a vehicle and then freeze for about 15 to 20 seconds. In cross-examination, he was asked if his statement indicated he saw the appellant for 10 to 15 seconds, and he confirmed it was about 10, 15, or 20 seconds. Later, when

shown part of his statement, he agreed that it did not mention him freezing at the time of the incident. This was an important inconsistency that the learned judge needed to resolve.

[55] The eyewitness further testified that about five seconds of the time that he froze was spent looking at the firearm in the appellant's hand. He also stated that he froze out of fear. Two issues arise from the evidence:

a. The identification was made under challenging conditions; and

b. What was the duration of the witness' observation of the appellant?

[56] The learned judge, at page 205 of the transcript, indicated that there were inconsistencies regarding the length of time the eyewitness had to observe the appellant, where he said: -

> "She [Ms. Jobson], also pointed out and challenged him in cross-examination to difference between the time that he gave in the statement as to what happened. I think there was a difference between ten to fifteen seconds which he said in the statement and fifteen to twenty seconds that he said in court."

The learned judge later concluded in his summation that he accepted the eyewitness' evidence.

[57] We observe that the learned judge did not carefully review the eyewitness' evidence. The challenging circumstances of the incident and issues with the identification, which weakened the credibility of the evidence, were overlooked. Despite noting several inconsistencies, the learned judge did not clarify how they were addressed. The learned judge also disregarded the timeframe in which the eyewitness could have seen the appellant. The learned judge did not specify when he believed the witness observed the appellant or state the reasons for that belief. Additionally, the learned judge failed to

show how he concluded the eyewitness could identify the appellant despite a handkerchief covering the lower part of his face. Consequently, we find the conviction unsafe. Therefore, ground 2 of the appeal, so far as it relates to identification evidence, its deficiencies and shortcomings in the learned judge's summation, succeeds. In light of the foregoing analysis, the appeal must be allowed.

Retrial

[58] The appeal having been allowed on ground 2, we must then consider whether the case should be remitted for retrial. In considering whether a retrial should be ordered, we should first refer to section 16(9) of the Constitution, which states that:

> "(9) No person who shows that he has been tried by any competent court for a criminal offence and either convicted or acquitted, shall again be tried for that offence or for any other criminal offence of which he could have been convicted at the trial for that offence save upon the order of a superior court made in the course of appeal proceedings relating to the conviction or acquittal; and no person shall be tried for a criminal offence if he shows that he has been pardoned for that offence: …"

[59] Section 14(2) of the JAJA authorises this court to order a retrial if a conviction has been set aside. Section 14(2) provides that:

> "Subject to the provisions of this Act the Court shall, if they allow an appeal against conviction, quash the conviction, and direct a judgment and verdict of acquittal to be entered, or, if the interests of justice so require, order a new trial at such time and place as the Court may think fit."

[60] Several cases have helped to clarify what should be considered when applying section 14(2). In **Shawn Campbell v R** [2024] JMCA Crim 30, this court, in paras. [32] to [40] of the judgment, offers a detailed analysis of the relevant factors for ordering a retrial. At paras. [34] to [40] the following principles are stated:

> "[34] Section 14(2) permits the court to order a new trial only if 'the interests of justice so require'. Therefore, where the

interests of justice do not require a new trial, the court must direct that a judgment and verdict of acquittal be entered.

[35] In enacting section 14(2), the legislature gave no guidance on the approach to be taken by this court or the factors to be considered when determining whether the interests of justice require a new trial to be ordered. This court has consistently utilised the advice of the Privy Council in **Reid v R** (1978) 27 WIR 254 ('**Reid**') as a guide when making this determination. In summary, the Privy Council's advice in **Reid** was as follows:

> (1) Whether the interests of justice require a new trial in a particular case may call for a balancing of a variety of factors, some of which will weigh in favour of a new trial and some against. The weight to be given to the various factors is a matter for judicial determination and may differ from case to case, although there are cases in which one factor might be decisive of the question.
>
> (2) The interest of justice that is served by the power to order a new trial is the interest of the public in Jamaica that those persons who are guilty of serious crimes should be brought to justice and should not escape it merely because of some 'technical blunder' by the judge in the conduct of the trial or his summing up to the jury.
>
> (3) Some of the other factors deserving of consideration include, but are not limited to:
>
> (a) the seriousness or otherwise of the offence;
>
> (b) the prevalence of the offence;
>
> (c) where the previous trial was prolonged and complex, the expense and length of time for which the court and jury would be involved in a fresh hearing; (d) the effect of a new trial on the accused;
>
> (e) the length of time between the alleged date of the commission of the offence and the new trial if, one is ordered;
>
> (f) the evidence that would be available at the new trial; and

(g) the strength of the prosecution's case presented at the previous trial.

[36] Notwithstanding its vintage, the Privy Council's advice in **Reid** remains an appropriate starting point for determining whether a new trial should be ordered.

[37] More recently, the United Kingdom Supreme Court in **R v Maxwell** [2010] UKSC 48 ('**Maxwell**') adopted an approach similar to that of the Privy Council in **Reid**, when interpreting section 7(1) of the Criminal Appeal Act 1968, which permits the English Court of Appeal to order a retrial in the interests of justice. In construing that section, the Supreme Court stated at para. 19 that (i) the interests of justice is not a 'hard-edged concept'; (ii) a determination of what the interests of justice require involves an 'exercise of judgment in which a number of relevant factors have to be taken into account and weighed in the balance'; and (iii) given the evaluative nature of the exercise required to be done by the court, 'there may be scope for legitimate opinion' as to what the interests of justice ultimately require in difficult cases.

[38] Since **Reid**, several other factors and guiding principles relevant to the question of whether a new trial should be ordered have emerged from the case law. Counsel for the appellants submitted, and we accept, that of great significance is the consideration of the constitutional rights of the appellants. It goes without saying that in determining the manner in which we should exercise our discretion under section 14(2) of the JAJA, a paramount consideration has to be the appellants' fundamental rights and freedoms guaranteed and protected by the Constitution.

[39] In this regard, we adopt the statement of MacMenamin J in the Irish Supreme Court case of **The People (Director of Public Prosecutions) v JC** [2015] IESC 50, who, when dealing with the question of whether a retrial was in the interests of justice under Irish law, stated at para. [170] that '[t]the [sic] interests of justice must necessarily fall to be considered in a constitutional manner'. In similar stead, in **Mark Russell v R** [2021] JMCA Crim 31 at para. [61], this court, speaking through Brooks P, treated the possible breach of the appellant's right to a trial within a reasonable time as relevant to the question of ordering a new trial.

[40] Other relevant factors arising from case law cited before us and relied on by the appellants include such questions as to:

(1) whether there was some error, fault or misconduct on the part of the prosecution (see **R v Maxwell** [2010] UKSC 48);

(2) whether the appellant has served a significant portion or all of the sentence imposed at the first trial (see **R v Thomas Clive Berry** [1996] 2 Cr App R 226 and **Mikal Tomlinson v R** [2020] JMCA Crim 54);

(3) the likely penalty the appellant would face on a new trial (see **Mikal Tomlinson v R**);

(4) the impact of any prejudicial publicity on the prospects of a fair trial if a new trial is ordered (see **R v Stone** [2001] EWCA Crim 297);

(5) whether a change in the law applicable to the elements of the offence charged and/or the trial process would unfairly prejudice the appellants (see **The People v JC** [2015] IESC 50); and

(6) whether a new trial would be oppressive or unjust (see **Mikal Tomlinson v R** and **Bowe v The Queen** [2001] UKPC 19)." (Bold as in the original)

Analysis

[61] The sole evidence connecting the appellant to the alleged offences was from a single eyewitness account. This evidence was weak, and the case should not have moved past the no-case submission stage. The eyewitness later sought to withdraw his testimony by submitting an affidavit in support of an application to adduce fresh evidence. application. Considering the weaknesses in the crown's case, coupled with the eyewitness' attempt to recant, it would be difficult for the prosecution to mount a viable case against the appellant. We, therefore, concluded that it would not be in the interest of justice to order a retrial in this case.

Conclusion

[62] This case focused on the issue of identification. The evidence showed that the appellant wore a handkerchief covering the lower half of his face. This called for a careful review of the eyewitness' account to assess whether he could identify the appellant despite the appellant's partial facial disguise. We have concluded that, given the tenuous nature of the identification evidence, the no-case submission should have been upheld. The learned judge, having ruled that there was a case to answer, did not thoroughly analyze the identification evidence, especially the inconsistencies in the witness's identification testimony. As a result, the appellant was denied the protection meant to prevent wrongful convictions based on unreliable identification. Given these circumstances, the convictions are unsafe and must be overturned. The convictions are quashed, and the sentences set aside.

Orders

[63] This court, therefore, orders as follows:

1. The appeal is allowed.
2. The convictions are quashed, and the sentences set aside.
3. A judgment and verdict of acquittal is entered in relation to each offence.