**[2020] JMCA Crim 18**

**JAMAICA**

**IN THE COURT OF APPEAL**

**SUPREME COURT CRIMINAL APPEAL NO 92/2013**

**BEFORE: THE HON MR JUSTICE F WILLIAMS JA**
**THE HON MISS JUSTICE EDWARDS JA**
**THE HON MRS JUSTICE FOSTER-PUSEY JA**

**JEROME THOMPSON v R**

**Mrs Emily Shields and Miss Marissa Wright instructed by Gifford, Thompson & Shields for the applicant**

**Miss Paula Llewellyn QC, Director of Public Prosecutions and Rosheide Spence for the Crown**

**13, 14 February 2019 and 1 June 2020**

**FOSTER-PUSEY JA**

[1] This is a renewed application by Mr Jerome Thompson ("the applicant") for leave to appeal his conviction and sentence. On 24, 25 and 31 October 2013, 6 and 7 November 2013, the applicant was tried and convicted for the offences of illegal possession of firearm and robbery with aggravation before L Pusey J ("the trial judge"), sitting without a jury, in the High Court Division of the Gun Court for the parish of Manchester.

[2] On 7 November 2013, the applicant was sentenced to 15 years' imprisonment at hard labour for illegal possession of firearm, and five years' imprisonment at hard labour for robbery with aggravation. The sentences were ordered to run concurrently.

[3] A single judge of this court had reviewed his application for leave to appeal and had refused it on 12 June 2017. In doing so, the single judge of appeal expressed the view that the issues which the trial judge had to determine related to jurisdiction, identification, including confrontation, recent possession of stolen articles and generally issues of inconsistencies and discrepancies. The single judge of appeal opined that the trial judge had addressed these issues adequately. Insofar as sentence was concerned, the single judge of appeal noted that the trial judge used a starting point of 20 years, but stated that he would be discounting two years for time spent in custody. The single judge of appeal made no other comment in respect of the sentences imposed and so it appears that the single judge of appeal considered the sentences to be reasonable.

[4] At the hearing of the renewed application before this court, counsel for the applicant sought and was granted permission to argue supplemental grounds of appeal and to abandon the grounds of appeal originally filed.

[5] We listened keenly to the oral submissions of counsel, which were made on 13 and 14 February 2019, and have also reviewed the transcript and the helpful written submissions of counsel. We now give our decision and reasons.

**Background**

**The prosecution's case**

[6] Ms Carlene Gordon ("the complainant"), was a shopkeeper in the community of Knockpatrick in the parish of Manchester. The shop adjoins a bar, where Ms Ann Marie Blair was a bartender. The shop and the bar, together referred to as "Blakey shop", are separated by a partition of transparent glass and an unused door. On 12 November 2011, some minutes after 7:00 pm, the complainant was behind the counter in the shop wrapping some seasoning and having a conversation with Ms Blair. Ms Blair later left that area and went to the bathroom. Whilst the complainant was in the process of wrapping the seasoning, a man wearing a dark blue or black hooded jacket entered the shop, looked around and then left.

[7] Shortly afterwards, an individual with a cornrow hairstyle, dressed in a white T-shirt and wearing a pair of rusty looking earrings in both ears, entered the shop and pointed a black gun at the complainant. This individual was later identified as the applicant. After "clicking" the gun, the applicant said: "hey gyal don't move!" At this time the complainant was able to see the applicant's upper body; from the chest area up, including his hands and face. There was light in the shop from light bulbs, and nothing obstructed her view of the applicant's face. The applicant again instructed the complainant not to move. He then went around the counter, closer to the complainant, and demanded of her to "gi mi di money". She complied and handed to him three $1000.00 bills, four $500.00 bills, 12 $100.00 bills and about 10 $50.00 bills. She also

handed to him seven $100.00 Digicel phone cards, a $500.00 bill and three $100.00 bills, along with some coins. These were monies from the sale of phone cards.

[8] The first man who had entered the shop, then re-entered and instructed the applicant to "pick up har phone dem". At this time, the applicant pushed the complainant, then used the gun to hit her in her forehead and said: "hey gyal, mek yuh move so slow". The first man took up the complainant's cellular phones: a Nokia Express 5225, black and red, which was personalized with her children's picture as the screensaver, and a silver Samsung flip phone with the colour stripping off. It was personalized with numbers endorsed on a tape on the inside of the cellular phone, which could be seen if the back of the phone was slid off.

[9] The applicant then grabbed the complainant and started pushing her out of the shop towards the bar. At this time the complainant was able to see the first man inside the bar holding a black "scandal" bag and taking down bottles of liquor from the shelves. While the complainant was being pushed into the bar by the applicant, the first man was about to exit, but upon seeing the applicant and the complainant, he turned and stood with his back to them. Subsequently, the applicant pushed the complainant to the wall and ordered her not to move. The complainant complied with these instructions and faced the wall. She remained in that position for about four minutes and after no longer hearing the men, she turned around. Not seeing the men, she ran into the shop.

[10] The complainant testified that the entire incident at the shop lasted for approximately 10 minutes, in the course of which she was able to see the applicant's face for about two minutes. When the applicant came around the counter and towards her in the shop, he was about a foot away from her.

[11] In cross-examining the complainant, counsel for the defence referred her to a previous statement which she had given, in which she had said that she had noticed that the applicant was "bleaching". The complainant insisted that the applicant's face in fact appeared as if he was "bleaching" his skin. She also insisted that she was able to identify the applicant by his eyes and also his voice as "during the whole time he was talking" and "he had a coarse voice".

[12] Ms Blair recounted that, while in the bathroom at the premises, she looked through a window and saw three men laughing and running down the road. Although she did not see their faces, and was not able to identify anything in particular about two of the men, she noticed that the man who was at the back of the group was wearing a white T-shirt and blue jeans with the foot area cut off. After observing this, Ms Blair returned to the shop where she saw the complainant crying. The complainant then told Ms Blair what had transpired.

[13] Ms Blair went to the bar where she observed that about $4,000.00 (three $1000.00 bills and the other $1,000.00 comprising of $50.00 and $100.00 bills), sealed packs of cigarettes (about eight Craven-A and seven Matterhorn), two sealed bottles of

Magnum, a sealed bottle of Boom, four sealed flasks of vodka, and two phones (a Nokia and a Motorola) were missing.

[14] Special Constable Everald Morrison gave evidence at the trial. He testified that on 12 November 2011 he was a part of a police patrol in the Grey Ground community in the parish of Manchester. While on vehicular patrol, his police team received a radio transmission. As a result of the transmission received, he and other members of the police party, at some minutes before 9:00 pm, went to a location in the Knockpatrick area in the parish of Manchester where a robbery had taken place.

[15] There, he spoke with the complainant and Ms Blair who made a report to him. In light of the information received and the description that the ladies had given of the individuals involved in the robbery, Special Constable Morrison and his team went in pursuit of three men. The ladies had also described various items which had been stolen. The stolen items included a black and red Nokia Express Music 5225 cellular phone, a silver and black Nokia and a silver and black C261 Samsung cellular phone.

[16] At about 9:20 pm, while searching for the men said to have been involved in the robbery, Special Constable Morrison and his team saw three men at the intersection of top Albion. Albion is an adjoining district to Knockpatrick. He and his team stopped the three men because: "the description that the lady gave me fit all three gentlemen".

[17] He cautioned the men and they allowed him to search them. Upon carrying out the search, he found three cellular phones (a red and black Nokia, silver Samsung and a black and silver Nokia), some liquor, seven $100 phone cards, about five packs of

Craven-A and Matterhorn cigarettes, and cash amounting to $12,300.00. The liquor found comprised of two opened bottles of Magnum and one flask of vodka.

[18] Special Constable Morrison testified that, in particular, the applicant, when searched, had two packs of Matterhorn, one pack of Craven A, two $100 Digicel phone cards, one red and black Nokia Express 5225 cellular phone, one opened bottle of Magnum and cash amounting to $3,900.00. The bottle of Magnum was in the applicant's hand, while the other items were distributed between his front and back pockets. When questioned as to how he came by the items found on him, the applicant said he had just bought the cellular phones from a man whom he did not know before, and had earlier bought the liquor, cigarettes and phone cards in the town of Mandeville.

[19] In an attempt to find the firearm alleged to have been used in the robbery, Special Constable Morrison and his team conducted further searches in bushes near to where the men were picked up, but no firearm was found.

[20] The applicant, and the two other men that had been picked up with him, were then taken by the police team to the Mandeville Police Station. While on the way to the police station the team picked up a fourth person. In re-examination, Special Constable Morrison explained that the men that had been picked up had been taken to the CIB office at the Mandeville Police Station so that he could receive instructions as to where they should be taken. This was because, at the time, the holding area there was under reconstruction.

[21] On his arrival at the Mandeville Police Station, Special Constable Morrison saw the two ladies from whom he had earlier taken a report at the scene of the robbery. He handed over the four men (including the applicant), to Detective Corporal Miles at the Criminal Investigation Branch (CIB) office.

[22] Special Constable Morrison deponed that, at the time when the applicant was picked up and handed over, he was wearing a white T-shirt and a black sweater with a hoody. The applicant was one of two men in the group of those picked up, who had a cornrow hairstyle.

[23] In light of the grounds of appeal, it is important to recount other evidence given by the complainant who, as was indicated earlier, was taken to the CIB office at the Mandeville Police Station. While at the CIB office, the complainant saw, on a table, her telephones, a number of Digicel $100.00 phone cards as well as the "shop money". She also identified liquor which had been stolen from the bar.

[24] In her examination-in-chief, the complainant stated that while she was seated in a cubicle in the CIB office, she saw when the police took four men into the station. The cubicle did not have high sides, and so she was able to see above it. The men were placed to sit on a bench. One of the men was sitting at the end of the bench and his back was turned in her direction. She got up and went to look at his face, whereupon she said to him: "You was the one that hit me with the gun". The applicant replied saying: "My girl a nuh me lick you wid no gun". According to the complainant, when she saw the applicant at the station, he was wearing a hooded jacket.

[25] The complainant also testified that she was certain that the man that she pointed out at the station was the man who had hit her in the head with the gun, as he had a deep voice, was of the same height as her attacker and had "cornrows" in his hair.

[26] In cross-examination, defence counsel asked the complainant what had prompted her to stand up to look at the men who had been brought in by the police. She responded:

> "I only saw three faces and there were four sitting on the bench, so I got up to see the other person."

When asked why she needed to see the face of the fourth individual, the complainant testified that she did not recognize the first three faces that she had seen and said:

> "I wanted to see if it was the person who robbed me because the police carry them in. I wanted to see if it was… I wanted to see the other face."

She deponed that when she saw the applicant at the station he was wearing a pair of rust coloured earrings. She denied that the police officers had prompted her to identify the applicant.

[27] Detective Corporal Peter Miles was the other police officer who gave evidence at the trial. He testified that, on 12 November 2011 at about 8:30 pm, he was on duty at the Mandeville Police Station CIB office. He heard a police radio transmission concerning a robbery which had taken place at Blakey's shop in Knockpatrick, Manchester. He later saw Ms Blair and the complainant at the CIB office at the station.

[28] At about 9:30 pm, while he was conducting an interview with the complainant, other police personnel took four males, including the applicant, to the CIB office. The four males were seated on a bench in the CIB office, and shortly after, the complainant pointed at the applicant and said, in his presence and hearing, that he was "the person who had a gun in his hand" and used it to hit her.

[29] Upon hearing what the complainant said, the applicant responded: "My girl, mi nuh lick yuh wid no gun", whereupon the complainant retorted: "I don't forget a face". Detective Corporal Miles stated that, to the best of his recollection, while at the CIB office the applicant was dressed in a white T-shirt.

[30] In the presence and hearing of the applicant, Special Constable Morrison showed Detective Corporal Miles items which were taken from the applicant. These were: a red and black coloured Nokia Express Music 5225 Claro brand cellular phone, a silver coloured flip cellular phone, an open Magnum tonic wine, three $100.00 Digicel phone cards, two $1000.00 bills, one $500.00 bill, 12 $100.00 bills and four $50.00 bills. The red and black Nokia Music Express cellular phone had the photograph of a little boy and a little girl on its screen.

[31] The applicant told Detective Corporal Miles that he had, earlier in the day, and before he had been held by police in the Albion area, bought the cellular phones from a man. The applicant also told him that he had bought the Magnum tonic wine, the two boxes of Matterhorn and one pack of Craven-A cigarettes earlier in the evening in Mandeville.

[32] Detective Corporal Miles told the applicant that, in light of the items found in his possession, and the identification made by the complainant, he was a primary suspect in the case of robbery with aggravation and assault occasioning bodily harm. He also searched the applicant and found two rust-coloured ear knobs in his pants pocket along with a receipt for two ear knobs.

[33] At about 10:30 pm that night, Detective Corporal Miles also visited Blakey's shop where the robbery had taken place. He took note of the lighting of the premises. Both the shop and the bar were approximately 14 by 14 feet in size. The bar had a fluorescent lamp as well as a small receptacle with a small light bulb. There was also a bulb inside the shop, in a small receptacle, providing lighting.

**The applicant's case**

[34] The applicant gave an unsworn statement from the dock. He stated that on the night in question he was on his way to a party in the Hillside area. He said that he had just disembarked a taxi when he, along with two other men, was stopped and searched by police officers who took his two cellular phones, a wallet, a pair of earrings, a chain and a watch. They were then placed in the back of the police van. The police officers repeatedly questioned them in relation to a firearm that was used in a robbery; however, they told the police that they did not have any firearm.

[35] Thereafter, they were taken out of the police van and the police officers began to beat and threaten to kill them. At that point they began to "yell" and persons from a nearby shop began to look in their direction. He said that, as a result, the police officers

decided not to kill them. They were again placed in the back of the van where the applicant saw some cellular phones and other items on its floor. They were taken to the Mandeville Police Station at the CIB office. When they arrived there, all the items in the back of the van were grouped together by the police, and he and the other men who had been picked up were instructed to take out what belonged to them. The applicant took out his two cellular phones, a chain, a watch and a pair of earrings.

[36] When the applicant and the other men arrived at the CIB office, they were placed to sit on a bench. While seated there, he heard a police officer ask the complainant whether they were the men who had robbed her, and she shook her head saying "no". Subsequently, three police officers began to interrogate them, asking them for the firearm and then started to beat them. The applicant stated that while he and the other men were being beaten, he saw a police officer whispering to the complainant. The police officer then asked her again if they were the persons who robbed her and she then said: "yes". The applicant and the other men were then taken to the lock ups. The applicant called no witnesses in support of his case.

**The supplemental grounds of appeal**

[37] The supplemental grounds of appeal which the applicant has urged this court to consider are as follows:

> "i. The learned trial judge failed to properly give and apply the Turnbull guidelines in the circumstances where the conditions for identification were good but the complainant's identification of the applicant was poor/weak and changing;

ii. The learned trial judge failed to address his mind to the need for a more stringent and suitably adapted Turnbull warning in the circumstance where the complainant claims to have been assisted in identifying the applicant, whom she did not know, by voice identification;

iii. The learned trial judge allowed himself to be convinced of the guilt of the applicant by reason of the applicant's recent possession of the articles which were robbed from the complainant and used recent possession to bolster poor identification, confrontation identification and to establish the guilt contrary to established legal precedent;

iv. The learned trial judge failed to give even the minutest consideration that on the Crown's case that the applicant could have been a receiver as opposed to a robber;

v. The learned trial judge failed to properly treat with the undesirable and dangerous confrontation identification of the applicant in circumstances where the applicant was not known to the complainant resulting in a grave miscarriage of justice rendering the conviction unsafe; and

vi. The sentence of fifteen (15) years for illegal possession of firearm is manifestly excessive having regard to the fact that the normal sentence imposed in cases where the charge is illegal possession of firearm is seven (7) years."

[38] We will now address each supplemental ground of appeal. Grounds i and ii will be addressed together, as they both deal with issues pertaining to the Turnbull guidelines (see **R v Turnbull** [1977] QB 224) that ought to be followed by trial judges when identification is a live issue in a case.

**Grounds i and ii:**

> **The learned trial judge failed to properly give and apply the Turnbull guidelines in the circumstances where the conditions for identification were good but the complainant's identification of the applicant was poor/weak and changing.**

> **The learned trial judge failed to address his mind to the need for a more stringent and suitably adapted Turnbull warning in the circumstance where the complainant claims to have been assisted in identifying the applicant, whom she did not know, by voice identification.**

**Applicant's submissions**

[39] Mrs Shields, counsel for the applicant, submitted that, while the conditions for identification were good, the complainant's identification of the applicant was "poor/weak and changing", and the trial judge failed to properly give and apply the Turnbull guidelines in these circumstances. Counsel argued that there was no detailed description of the applicant's facial or physical features. Further, the description of the applicant was transient, ephemeral and changeable.

[40] In support of her submissions, counsel for the applicant relied on **R v Alex Simpson and McKenzie Powell** (unreported) Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 151/1988 and 71/1989, judgment delivered 5 February 1992, in which it was stressed that a judge sitting without a jury while conducting a trial, must state and apply the caution required by the Turnbull guidelines in assessing the evidence. The judge should demonstrate in clear language that he has acted with the requisite caution in mind and has heeded his own warning.

[41] Counsel also relied on **R v Andrew Stewart** [2015] JMCA Crim 4 in which the question as to the treatment of inconsistencies in the evidence led by the Crown also

arose. She argued that the inconsistencies and discrepancies in the case were not properly addressed by the trial judge.

**Respondent's submissions**

[42] Ms Llewellyn QC, Director of Public Prosecutions (DPP), argued, on behalf of the Crown, that the trial judge had applied the Turnbull warning appropriately. She referred to aspects of the trial judge's summation and also stated that the applicant was identified under good conditions. The DPP submitted that the trial judge realized that the main issue in the case was identification, and, in the course of his summation, honoured the spirit of the directions in Turnbull by succinctly and pellucidly warning himself as to the dangers of relying on the evidence of the complainant, who was the sole eyewitness.

[43] The DPP submitted that the identification evidence was extremely strong, and though the trial judge was pithy in the manner in which he dealt with the issues, his summation and directions, in the context, were adequate. The DPP highlighted the fact that the area was well lit and the witness was able to see parts of the upper body of the applicant, including his face, without obstruction. The complainant also saw the applicant when he came around the counter and was a foot or less away from her. The DPP emphasized that the trial judge is only required to reveal his mind as to the manner in which he has dealt with the issues, and what is impermissible is "inscrutable silence". She referred to **R v Trevor Dennis** (1970) 12 JLR 249, **R v Alex Simpson**

**and McKenzie Powell** (which was also relied on by the applicant), **R v Locksley Carrol** (1990) 27 JLR 259 and **Andrew Stewart v R** [2015] JMCA Crim 4.

**Analysis**

[44] In any case in which identification is in issue, a trial judge must observe the guidelines as enunciated in the English Court of Appeal case of **R v Turnbull** in which it is stated at pages 228-231:

> "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?... Finally, he should remind the jury of any specific weaknesses which had appeared in the identification evidence…
>
> When, in the judgment of the trial judge, the quality of the identifying evidence is poor, as for example when it depends

> solely on a fleeting glance or on a longer observation made in difficult conditions, the situation is very different. The judge should then withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification. This may be corroboration in the sense lawyers use that word; but it need not be so if its effect is to make the jury sure that there has been no mistaken identification...
>
> The trial judge should identify to the jury the evidence which he adjudges is capable of supporting the evidence of identification. If there is any evidence or circumstances which the jury might think was supporting when it did not have this quality, the judge should say so…
>
> A failure to follow these guidelines is likely to result in a conviction being quashed and will do so if in the judgment of this court on all the evidence the verdict is either unsatisfactory or unsafe."

[45] In the Privy Council case of **Watt (Wayne) v The Queen** (1993) 42 WIR 273, the court noted that the Turnbull guidelines were primarily designed to deal with the "ghastly risk run in cases of fleeting encounters" and, therefore, what should be considered is whether there was a significant failure on the part of the trial judge to follow the guidelines. Any significant failure to follow the Turnbull guidelines will result in the conviction being quashed. At page 279, Lord Lowry delivering the advice of the Board noted:

> "Both *R v Turnbull* [1977] QB 224 and *R v Keane* (1977) 65 Cr App Rep 247, per Scarman LJ at page 248, while emphasising the principle, dismiss the need for a particular form of words. Their lordships could in this connection refer also to *R v Bentley* [1991] Crim LR 620. It will, too, be recalled, as Lord Widgery CJ stated in *R v Oakwell* [1978] 1 WLR 32 at page 36, **that the *Turnbull* rules were primarily designed to deal with 'the ghastly risk run in cases of fleeting encounters'**.

> **Their lordships detect in the present case nothing in the nature of 'a significant failure to follow the guidelines laid down in *R v Turnbull*'**, such as Lord Ackner mentioned in *Reid, Dennis and Whylie v R* (1989) 37 WIR 346 at page 356. Considering that in this recognition case the identification evidence was strong, they are of the clear opinion that the *Turnbull* principles were sufficiently well applied by the judge and that there was no significant failure to follow them." (Emphasis added)

[46] In **Mills v The Queen** (1995) 46 WIR 240, the Privy Council reiterated that the Turnbull principles do not impose a fixed formula for adoption in every case. It will suffice if the trial judge's directions comply with the sense and spirit of the guidelines.

[47] In **Maitland Reckford v R** [2010] JMCA Crim 40, counsel for the applicant criticized the summation of the trial judge in relation to the identification evidence. He contended that the trial judge omitted to indicate to the jury that an honest witness can be mistaken, as well as to tell the jury that, even in cases where the witness purports to recognise the defendant, care must be taken. Morrison JA (as he was then) in addressing this issue had this to say at paragraphs [25], [26] and [29] of the judgment:

> "[25] In the subsequent decision of the Privy Council on appeal from this court in **Scott and Others v. The Queen** [1989] 2 W.L.R. 924, Lord Griffiths, giving the judgment of the Board, reiterated the importance of the judge discussing with the jury the fundamental danger in identification evidence of the honest but mistaken witness, who is convinced of the correctness of his identification, giving impressive evidence. However, as regards the actual terms of the directions to the jury, there is ample support in the authorities for the following statement in Keane, The Modern Law of Evidence, 6th edn (at page 252):
>
> > '… **R v Turnbull** is not a statute and does not require an incantation of a formula or set of words: provided that the judge

> complies with the sense and spirit of the guidance given, he has a broad discretion to express himself in his own way.'
>
> [26] **Watt v R** and **Rose v R**, both cited by Miss Pyke, provide express authority for this statement. **The latter case is of particular interest in the present context, as an example of an unsuccessful challenge on appeal to a summing up in an identification case in which the judge did not in terms tell the jury that a 'convincing' witness may nevertheless be mistaken, though he did say that 'an honest witness may be mistaken, and not be aware of his mistake' (see Lord Lloyd's judgment, at page 217). The Privy Council held that, taken as a whole, the summing up had adequately conveyed the essence of the Turnbull warning to the jury and that the absence of the words 'convincing' and 'weakness' from the summing up was not fatal.**
>
> …
>
> [29] We agree with Miss Pyke's submission on this aspect of the case that in its totality there was no significant failure by the judge to follow the Turnbull guidelines in his summing up." (Emphasis added)

[48] The case law in this area indicates that there is no precise form of words to be used when giving a Turnbull warning, as long as the essential elements of the warning have been pointed out to the jury. In **Omar Grieves and Others v R** [2011] UKPC 39, the case of **Shand v R** [1996] 1 All ER 511 was accepted and relied on. At paragraph 32, in **Omar Grieves and Others v R**, Sir Rodger Toulson, delivering the judgment of the court, stated:

> "In *Shand* [1996] 1 WLR 67 the defence case was that the identifying witnesses were deliberately lying, and it was not suggested that they were mistaken. Lord Slynn, delivering the judgment of the Board, said at page 72:

> 'The importance in identification cases of giving the *Turnbull* warning has been frequently stated and it clearly now applies to recognition as well as to pure identification cases. **It is, however, accepted that no precise form of words need be used as long as the essential elements of the warning are pointed out to the jury.** The cases in which the warning can be entirely dispensed with must be wholly exceptional, even where credibility is the sole line of defence. In the latter type of case the judge should normally, and even in the exceptional case would be wise to, tell the jury in an appropriate form to consider whether they are satisfied that the witness was not mistaken in view of the danger of mistake referred to in *R v Turnbull* [1997] QB 224'." (Emphasis added)

[49] In **Joel Brown and Lance Matthias v R** [2018] JMCA Crim 25, McDonald-Bishop JA stated at paragraph [44]:

> "We accept the principles extracted from the authorities, relied on by the Crown, that whilst the importance of a Turnbull warning is not confined to cases of first time identification, and is applicable to purported recognition cases, there is no precise form of words that need to be used. What is imperative is that the critical elements of the warning are brought to the attention of the jury."

**Did the trial judge's summation comply with the Turnbull guidelines?**

[50] The trial judge stated, at pages 145-147 of the transcript:

> "In dealing with the evidence, **I remind myself** and the defence has pointed it out **that identification is in issue and I remind myself that one has to be very careful in relation to identification, based on the fact that an honest witness and a genuine witness may be**

> **mistaken and that the court has to look at the particular circumstance in which the identification was made. The question of the lighting; the circumstances; the opportunity to observe and other things.**
>
> In this particular case, the **complainant says that she was able to see the accused for some ten minutes**; saw his face for most of that time and **saw his face for two of the ten minutes**. She indicated **she was quite close to him and pointed out a distance which was one foot**, or closer. She indicated that **the place was properly lit and we had that confirmation from the police officer** who, at the same night, went and looked at the place and was able to indicate that there was light both in the shop where this incident started, and in the bar that the matter was into afterwards…
>
> She indicated that just to go back in relation to the evidence that at the time of the robbery there were two men. One man had on a white t-shirt and she couldn't see what was below his waist, based on where she was. The other one was in a black or blue hoody and that person's face she did not see. **The man in the white t-shirt was the one with the gun. That was the one she was able to see for the two minutes, two of the ten minutes**. She was able to indicate that **he was the one who she was close to** and **that is the person who she says had the cornrow hairstyle, the rust coloured earring and that was the person who she saw at the police station**." (Emphasis supplied).

[51] At page 151 of the transcript the trial judge also stated:

> "Again, we know that an honest witness can be mistaken, but in terms of what Miss Gordon said, that she saw and she identified, **and what she was not sure of, that indicated a discerning witness**…" (Emphasis added)

[52] Counsel for the applicant has argued that, even though the trial judge warned himself that an honest witness can be mistaken, he did not warn himself that a mistaken witness can be convincing. It is true that the trial judge did not use the words

"a mistaken witness can be convincing" but, in our view, the use of the words "an honest witness and a genuine witness may be mistaken" convey the fact that the trial judge understood that such a person can be convincing. The trial judge had also assessed the reliability of the complainant and concluded that she was a "discerning" witness.

[53] The fact that the trial judge did not say that "a mistaken witness can be convincing" in those precise words, does not, by itself, render the summation flawed as he substantially complied with the spirit of the Turnbull guidelines.

**Did the trial judge examine and/or adequately examine material discrepancies or inconsistences which weakened the identification evidence?**

Clothing

[54] Counsel for the applicant contended that there were certain material discrepancies in the case that were not examined and/or were inadequately examined by the trial judge. It was submitted that, for example, there were discrepancies in the evidence as it related to the clothing that the applicant was wearing at the time of the commission of the crime in contrast with when he was apprehended and brought into custody by the police.

[55] The DPP did not specifically address the issue of discrepancies on the Crown's case in relation to the clothing alleged to have been worn by the applicant.

[56] There is no doubt that the recognition of clothing can be a valuable aid to identification. The complainant testified that, at the time of the incident, the applicant

was wearing a white T-shirt, however, when she saw him at the station he was wearing "the hooded jacket". Special Constable Morrison testified that when the applicant was taken into custody he was wearing a white T-shirt under a black hoody. Detective Corporal Miles, in his recount, stated that at the CIB office in Mandeville, to the best of his recollection, the applicant was wearing a white T-shirt but he could not recall the pants or the shoes that the applicant was wearing.

[57] We note that, in his summation, at pages 147-148 of the transcript, the trial judge highlighted the discrepancy which arose in respect of the applicant's clothing. After noting that the complainant had said that the man who pointed the gun at her had been wearing a white T-shirt, he said:

> "At the police station she says he was, at the stage, wearing a blue or black hoody and the police officer, Mr Morrison, identified this person, [the applicant], when he picked him up wearing a blue or black hoody and a white T-shirt under that."

[58] The trial judge did not move on to comment on the view that he had of this discrepancy and what weight, if any, he placed on it. This would have been useful; however, we did not see this as a material discrepancy.

[59] The complainant in her evidence stated that the applicant was wearing a white T-shirt at the time of the commission of the crime. The fact that he was wearing a blue or black hoody over the white T-shirt at the police station, where he was identified by the complainant, does not affect the strength of the identification of the applicant.

The earrings

[60] On the Crown's case, there was a discrepancy in relation to whether the applicant was wearing rusty looking earrings when the complainant identified him at the police station. The complainant had testified that the applicant was wearing rusty looking earrings at the time of the incident as well as when she saw him at the CIB office in Mandeville. Special Constable Morrison stated that he had searched the pockets of the applicant and had taken out all that he had found. He did not mention finding any earrings. On the other hand, Detective Corporal Miles stated that he later searched the applicant's pockets and found two rust coloured ear knobs along with a receipt for the purchase of a pair of earrings in the applicant's wallet. Interestingly, the applicant, in his unsworn statement, said that the police had taken a pair of earrings from him.

[61] At page 152 of the transcript the trial judge in his summation said, in part:

> "There is, as the defence pointed out, a small difference between what [the complainant] said and what Mr. Miles said. I think [the complainant] gave a more comprehensive view and I accept that."

[62] Again, in our view, in agreement with the view of the trial judge, this was not a material discrepancy. The complainant's identification of the applicant did not rest solely on whether he was wearing earrings at the police station. What is important is that a "rusty looking" pair of earrings, which the witness said the perpetrator had been wearing at the time of the incident, was found in the applicant's possession, a short time after the incident.

The number of persons involved in the incident

[63] The trial judge gave a further example of a discrepancy at page 152 of the transcript. He said:

> "I also noticed, for example, that Miss Blair did see three persons running away, even though there were only two persons inside the place, inside the building and I notice that she clearly indicated that she was not able to identify them at a later stage and so therefore, I am satisfied with the evidence of the Crown."

[64] It would have been useful for the trial judge to have indicated the view that he had of this issue. In our opinion, however, on the overall view of the matter, the evidence given by the witness, Ms Blair, does not contradict that of the complainant. Ms Blair stated that she saw three men running away, whilst it would appear, based on the complainant's evidence, that she only saw two men during the robbery. However, it is noteworthy that shortly after the incident, three men were stopped by the police, and the stolen items were found divided among them. The fact that the complainant only saw two men in the course of the incident, does not mean that another man could not have been outside the premises.

"Bleaching" by the applicant

[65] Counsel for the applicant submitted that, although in cross-examination the complainant described the applicant as a person who was bleaching, she did not at any time indicate that the bleaching of skin was one of the reasons she identified the applicant. In fact, counsel expressed a concern that the evidence regarding the bleaching of the applicant's skin, was not dealt with at all by the trial judge.

[66] The Crown did not address this issue.

[67] It is correct that the trial judge did not address the complainant's evidence that the applicant was "bleaching". Interestingly, as counsel for the applicant conceded, this issue of bleaching by the applicant was introduced during defence counsel's cross-examination of the complainant. The transcript reflects the following at pages 42-43:

> "Q. You have also said in your statement that you noticed the person was bleaching. You remember that?
>
> A. Yes.
>
> Q. Please describe to the court what does bleaching indicates. In our Jamaican terms, what does that mean?
>
> A. Like lightening of the skin colour.
>
> Q. What caused you to draw that conclusion?
>
> A. Because after, when they are bleaching and stop, you tend to have two colour.
>
> Q. Two colours?
>
> A. Yes, getting dark; some dark spots tend to dark before others.
>
> Q. Okay. So in your estimation that was a dark person that was bleaching to be brown, or light, based on the fact that he was bleaching and had two colours, some parts would have been black and some light?"

[68] On another occasion in the course of the cross-examination defence counsel suggested, at page 47 of the transcript:

> "Q. I am further suggesting to you that the period of time that you were there, that you said that you were looking at his face, that you were clearly examining the bleaching that you

> said you saw and that this was not the person that you saw that was bleaching, that is in the dock today.
>
> A. It's the same person.″

[69] While counsel for the applicant has complained of the failure of the trial judge to address the matter of the bleaching, and has argued that this matter arose as a discrepancy in the evidence of the Crown, there was in fact, no discrepancy which arose from this aspect of the evidence. There was no other witness who gave evidence to the contrary, nor was the complainant contradicting a previous statement that she had made on this matter.

[70] Although the trial judge did not directly address every discrepancy in the case, he highlighted a number of them, and it cannot be said that in failing to search for and highlight each and every discrepancy in the evidence, he fell into error which resulted in a miscarriage of justice. In **R v Barnes** [1995] 2 Cr App Rep 491, The Times 6 July 1995, Lexis UK CD M2, Official Transcripts (1990-1997), the English Court of Appeal noted that it is not necessary to catalogue every minor divergence; nor is any particular format mandatory. Lord Taylor of Gosforth CJ, in delivering the judgment of the court stated at pages 7-8:

> "Relying upon the decision of this Court in R v Fergus (1993) 98 Cr App Rep 313, Mr Cooke in the course of the learned judge's summing up on three occasions ventured to criticise and make suggestions as to the judge's treatment of weaknesses. It is right to say that on the third occasion the trial judge invited counsel, who had twice shown himself dissatisfied, to give assistance as to the matters he contended should be mentioned to the jury.
>
> In Fergus Steyn LJ said at page 318:

> 'But in a case dependant on visual identification, and particularly where that is the only evidence, Turnbull makes it clear that it is incumbent on a trial judge to place before the jury any specific weaknesses which can arguably be said to have been exposed in the evidence. And it is not sufficient for the judge to invite the jury to take into account what counsel for the defence said about the specific weaknesses. Needless to say, the judge must deal with the specific weaknesses in a coherent manner so that the cumulative impact of those specific weaknesses is fairly placed before the jury.'

Basing himself upon that passage, Mr Cooke contended, in effect, that every discrepancy between what one identifying witness said and another said or did not say, should have been mentioned by the judge as a specific weakness. Moreover, instead of dealing with weaknesses witness by witness, the weaknesses ought to have been gathered together in one section of the summing up so as to maximise 'their cumulative impact'. **We do not consider the last sentence in the passage quoted from Fergus imposes such a rigid and extensive regime upon the judge. His duty clearly extends to reminding the jury of weaknesses, for example, lapse of time between the incident and the identification, brevity of the incident, difficult conditions at the time of the incident and major discrepancies between what the particular witness may have said from one time to another or between one identifying witness's description and that of another. But we do not consider that every minor divergence has to be specifically categorised as a potential weakness.** Here, for example, Mr Cooke raised matters such as the distinction between estimates of height of 5ft 10ins and 6ft and a distinction between one witness's estimate of the assailant's weight and that of another. **It must be a matter for the judge's discretion as to whether such minor matters are simply referred to in his review of the evidence or categorised as potential weaknesses. Moreover, providing the learned judge does remind**

> **the jury of the specific weaknesses he identifies as such, we do not consider that any particular format for doing so is obligatory**." (Emphasis added)

In the instant case the trial judge reminded himself of various discrepancies, although he did not necessarily identify them as weaknesses. Having thoroughly analysed the evidence in this matter, it is our considered view that the discrepancies highlighted by counsel for the applicant were not material. Furthermore, we do not believe that the applicant suffered any injustice in the circumstances.

**Voice identification of the applicant**

[71] The complainant deponed that she was also able to identify the applicant by his deep or "coarse voice" because, during the incident, he spoke to her. Counsel for the applicant argued that the trial judge failed to address his mind to the need to give a stringent Turnbull warning related to voice identification. She stated that the trial judge did not address the question of voice identification at all during his summation.

[72] The Crown did not address this issue in its submissions.

**Analysis**

[73] In considering this issue we have examined **Vernaldo Graham v R** [2017] JMCA Crim 30. In that case, counsel complained that no analysis of voice identification had been done by the trial judge. The appellant in that case was wearing a handkerchief over his forehead, and counsel for the appellant argued that the alleged perpetrator could not have been properly identified as his forehead was covered. The complainant in that matter had stated that she was able to identify the appellant by his

voice. Hence, there was a very real possibility that there had not been any strong visual identification but only voice identification.

[74] Edwards JA (Ag) (as she was then), stated at paragraph [66]:

> "Counsel for the Crown argued that the voice identification was not decisive of the conviction. We are unable to say that is a positive fact. In **Derrick Beckford v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 88/2001, judgment delivered 20 March 2003, **this court held that the voice identification was merely confirmatory of the visual identification.** Unfortunately, we are unable to take the same stance in this case. The evidence of voice identification was more than confirmatory of but was supplemental to and would have served to bolster the visual identification of the appellant which had its own inherent weaknesses. It was absolutely imperative that the jurors be told of the weaknesses in voice identification evidence with respect to the appellant before they could rely on it, or be told not to rely on it at all." (Emphasis added)

[75] In the instant case, the visual identification of the applicant was very strong, in contrast with the circumstances which existed in the **Vernaldo Graham** case. The complainant had an unimpeded view of the upper body of the applicant including his hands and face for around 10 minutes and specifically his face for at least two of the 10 minutes. It is clear from the evidence that, although the complainant referred to the coarse voice of the applicant, this was only one aspect of the many other observations that she used to identify him. It was not the most significant matter on which the complainant had relied. It is also clear that the trial judge did not consider voice identification to be a significant feature of the case. This was indeed a case in which it could be stated that the voice identification was merely confirmatory of the visual

identification. While it would have been useful for the trial judge to have referred to the evidence of voice identification, because voice identification was not used to buttress the complainant's identification of the applicant, the failure of the trial judge to specifically warn himself with respect to voice identification, in this case, is not fatal.

[76] In the course of his summation, the trial judge, among other things, highlighted the following:

i. the complainant saw the applicant for approximately 10 minutes and saw his face for at least two of those 10 minutes;
ii. at one point, she was in close proximity to him-he was a foot or less away from her;
iii. the premises where the incident took place were properly lit;
iv. at the premises, the man in the white t-shirt had the gun;
v. that man had a cornrow hairstyle and wore rust coloured earrings; and
vi. the man whom the complainant identified at the police station fit the description of the person that she had seen during the incident.

Contrary to the submissions made by counsel for the applicant, the complainant's evidence as to identification was not weak and changing, instead it was strong and consistent.

[77] It is clear that the trial judge:

a. warned himself that identification was in issue;

b. warned himself that an honest and genuine witness may be mistaken;

c. closely examined the circumstances in which the identification was made;

d. highlighted certain discrepancies in the evidence; and

e. identified evidence which he felt supported the evidence of identification.

[78] The trial judge, after hearing the evidence, accepted the complainant's evidence. He expressed the view that she was a fair, truthful and comprehensive witness. On the other hand, the trial judge "regarded the statement made from the dock" by the applicant and gave it "no weight at all in terms of the circumstances". The trial judge also expressly stated that he "believed the Crown's witnesses".

[79] Taking into account that this was a judge sitting alone, who was not "inscrutably silent", we find that the summation of the trial judge complied with the sense and spirit of the Turnbull guidelines and there was no miscarriage of justice in this regard.

[80] Grounds i and ii of the supplemental grounds of appeal therefore fail.

**Grounds iii and iv:**

> **The learned trial judge allowed himself to be convinced of the guilt of the applicant by reason of**

> **the applicant's recent possession of the articles which were robbed from the complainant and used recent possession to bolster poor identification, confrontation identification and to establish the guilt contrary to established legal precedent.**
>
> **The learned trial judge failed to give even the minutest consideration that on the Crown's case that the applicant could have been a receiver as opposed to a robber.**

[81] Grounds iii and iv are connected and so we have decided to treat with them together. The main issues raised relate to the question of the applicant's possession of the articles which were stolen a short time before from the bar and shop.

**Applicant's submissions**

[82] Counsel for the applicant argued that the trial judge, as a result of the applicant having been found in possession of recently stolen articles, was convinced that the applicant was guilty of the offences, and used this to bolster poor identification, among other things. In addition, the trial judge did not consider the possibility of the applicant being a receiver of stolen goods.

[83] Counsel submitted that in **Jerome Thompson v R** [2015] JMCA Crim 21, at paragraph [24], reference is made to **Ronique Raymond v R** [2012] JMCA Crim 6 and **Ashan Spencer v R** (unreported) Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 14/2007, judgment delivered 10 July 2009, in which it was held that recent possession of goods stolen during a robbery was insufficient to support weak identification evidence. Counsel however acknowledged that in **Calvin Powell and Lennox Swaby v R** [2013] JMCA Crim 28, it was accepted that recent possession,

along with other evidence when considered as a whole, may connect an accused person to more than just the receipt of stolen property.

[84] Counsel contended that the applicant, on the Crown's case and under caution, told the two police officers that he had bought the items from the adjoining community and from a vendor that afternoon. She submitted that the nature of the stolen items was such that they could have passed hands between the time of the robbery and when the applicant was held by the police, requiring consideration of the possibility that the applicant was a receiver. Counsel argued that the trial judge gave no such consideration.

**Respondent's submissions**

[85] The DPP disagreed with these submissions and asserted that at no time did the trial judge seek to bolster identification with recent possession. In fact, in all the circumstances, the identification of the applicant could not be considered to be weak. All relevant issues and applicable principles of law in this case were assessed by the trial judge.

[86] The DPP referred to **Dwight Robinson v R** [2018] JMCA Crim 38, which reaffirmed that a judge sitting alone in the Gun Court is required to give a reasoned decision, should set out the facts he finds to be proved, and when there is conflict of evidence, he is required to state his method of resolving the conflict. In this case, the DPP argued, the trial judge adequately outlined the reasons for his decision.

**Analysis**

[87] The recent possession of stolen articles is a matter to which a judge and the jury can properly give weight in a criminal trial. In **Jerome Thompson v R** Brooks JA said:

> "[22] With respect to the conviction we agree with Mr Gordon that the learned trial judge properly identified the relevant law and applied it to the evidence. She could, however, have more fully addressed the issue of recent possession.
>
> [23] Although she did identify one of the issues as being recent possession, the learned trial judge did not explain that the usual presumption applied in recent possession cases, does not apply in cases involving violence. The rationale being that the accused person may well only be a receiver of stolen property."

[88] Brooks JA went on to state at paragraphs [24] and [25]:

> "In both **Ronique Raymond v R** [2012] JMCA Crim 6 and **Ashan Spencer v R** SCCA No 14/2007 (delivered 10 July 2009), it was held that recent possession of goods stolen during a robbery was insufficient to support weak identification evidence. It was established in **Calvin Powell and Lennox Swaby v R** [2013] JMCA Crim 28, however, that recent possession along with other evidence, when considered as a whole, may connect an accused person to more than just the receipt of stolen property.
>
> In the circumstances of this case it would not be wrong to consider the principle of recent possession. The description of the clothing and the handkerchief by Dr Mohammed, the clothing being wet when found at Mr Thompson's home, the evidence of a confession by Mr Thompson, and the finding that Mr Thompson's explanation of his possession of the items was untrue, could properly be considered along with the recent possession of Dr Mohammed's property to conclude that Mr Thompson was the robber."

This leads to the question as to whether it was necessary for the trial judge to have considered the possibility of the applicant being a receiver of the goods in question, as against being the actual "robber" and whether he failed to do so.

[89] The trial judge stated at pages 149-151 of the transcript:

> "The additional factor I mentioned is the fact that these three men were held on the road, at about 9:20, Mr. Morrison says. Mr. Thompson was searched and on him was found two phones, which were identified by the complainant. One of the phones was identified very specific, [sic] the red and black Nokia Music Express 5225, with a screen saver which had the personalized pictures of the children of the complainant. He had on him seven phone cards which were taken. He had on him, in his hand, a magnum, half a bottle of a magnum which is something that was also taken and, importantly, the clothing, the white t-shirt, the blue or black hoody. All of those factors indicated that this was the particular person.
>
> So I say this, that in this case the evidence together, accumulatively the evidence of the clothing, the evidence taken from the accused person, the evidence of the phones which are so specific - pointed to the accused man and in those circumstances, in the circumstances of this case, the confrontation identification though not ideal, would be accepted, all pointing to the accused man in these circumstances.
>
> I also need to point out that the time period was important, that these accused persons were found at 9:20, the robbery was just after 8 o'clock. Miss Blair says that about 8:10, I think Miss Gordon says just after 8 o'clock. So these persons would have been arrested and searched, some time, about an hour after the incident, within a short distance from the scene of the crime and all these things point to the accused man. Let me say, for the avoidance of doubt, that I believe the Crown witnesses. I thought Miss Gordon was a very good witness. I thought she was fair, especially in terms of the indication of identification."

[90] The evidence led was that three men were seen running away from the scene of the robbery which took place at Blakey's shop in the district of Knockpatrick in the parish of Manchester. Subsequently the police apprehended three men, including the applicant, at the intersection of top Albion, a district adjoining Knockpatrick. The three men were searched and together they had in their possession items which had been stolen from the shop and bar.

[91] While counsel for the applicant has argued that this is a case of poor identification, the evidence is to the contrary. This immediately undermines the strength of the arguments being made by counsel, in that she has argued that the recent possession of the stolen goods was used to "bolster the poor identification of the applicant." On the contrary, the identification evidence was not weak, and so it could not be said that recent possession was used to bolster the "poor" identification.

[92] In our view the trial judge approached the matter quite properly. He considered a number of relevant factors in making a determination in this case. It was an appropriate case in which to take into account the applicant's recent possession of the goods in question. However, unlike some other cases in which the doctrine of recent possession is used as a part of circumstantial evidence in the absence of good identification evidence, there was strong identification evidence buttressed by the applicant's recent possession of some of the goods which were stolen from the shop and bar.

[93] The trial judge considered the time period within which the applicant was apprehended, in light of the time when the offence had been committed, as an important factor. He took into account the fact that the applicant was arrested an hour or a little more than an hour after the incident, in an adjoining district and in possession of the items. As the trial judge properly said: "all these things point to the accused".

[94] When questioned by the police officers on the night in question, the applicant told them that he had bought the items. In his unsworn statement, however, the applicant did not address the question as to how he came to be in possession of the items that matched the description of those which had been stolen. On the contrary, he referred to the two telephones as "my two phones". It is clear that the trial judge, in rejecting the applicant's unsworn statement in which he described the phones as "my two phones", did not believe that the applicant had recently purchased the phones, or, in other words, that he was a receiver of stolen goods. As the trial judge noted, the description of the stolen phones was quite specific. Bearing in mind the strong identification evidence, the timing of the apprehension of the applicant in an adjoining district, and the other evidence in the case, the trial judge was entitled to arrive at the conclusion that the applicant was indeed the robber and not a receiver of stolen goods.

[95] Grounds iii and iv therefore fail.

**Ground v:**

> **The learned trial judge failed to properly treat with the undesirable and dangerous confrontation identification of the applicant in circumstances where the applicant was not known to the complainant**

**resulting in a grave miscarriage of justice rendering the conviction unsafe.**

**Applicant's submissions**

[96] Counsel for the applicant submitted that the evidence of Constable Morrison and Detective Corporal Miles was accepted by the trial judge without question. The trial judge did not consider whether, if what Special Constable Morrison needed from the CIB office were instructions as to where to take the men who had been held, why did he not seek instructions by radio transmission, so as to avoid the undesirable outcome of identification by confrontation, especially where the suspect was not known to the complainant. Counsel argued that the trial judge accepted the identification by confrontation on the basis that the applicant was not the only suspect, but the complainant was able to identify him.

[97] Counsel for the applicant argued, further, that there was nothing exceptional about the circumstances such that an identification parade could not have been held. She submitted that the trial judge's treatment of the issue of confrontation, with all its inherent prejudices and the disregard for due process, did not reflect the care and duty required especially in a case of this nature. The duty imposed on the police officer, to ensure that a suspect is not brought into close proximity with the witness before the identification parade is held, was breached.

[98] Counsel also submitted that the applicant and the complainant were deliberately taken to the CIB office, and the complainant was placed within a plain view of the

entrance, so that she could see the police arriving with the men. The applicant was then placed on a bench directly in front of the complainant's seat.

**Respondent's submissions**

[99] The DPP, however, in response, submitted that the trial judge was aware of the undesirable nature of confrontation evidence and treated with the issue adequately and in a "fulsome" manner, which would render the conviction safe. She submitted that the trial judge, in light of all the circumstances, came to a reasoned decision as to why the identification by confrontation, though not ideal, could be accepted. Importantly, the acceptance or rejection of the evidence of identification by confrontation, was a question of fact "which resided solely with the learned trial judge". Counsel relied on **R v Leroy Hassock** (1977) 15 JLR 135 to support the principle that confrontation should be confined to rare and exceptional cases. Further references were made to **R v Errol Haughton and Henry Ricketts** (1982) 19 JLR 116 (CA) and **R v Trevor Dennis**.

**Analysis**

[100] Identification by confrontation, involving the deliberate effort on the part of the police for the witness to see and identify a suspect without holding an identification parade, is to be deprecated. As indicated in the case of **R v Gilbert** (1964) 7 WIR 53, there is a distinct duty upon the police to take every care to see that the witness, who is required to identify a suspect, is not brought into proximity with him before an identification parade is held.

[101] There are, however, certain circumstances in which identification by confrontation does not necessarily lead to a miscarriage of justice. McIntosh JA, in **Tesha Miller v R** [2013] JMCA Crim 34, looked extensively at the evolution of the law concerning identification by confrontation. At paragraphs [22] – [24] of the judgment she underscored that:

> "[22] Judicial wisdom emanating from the great number of authorities dealing with visual identification of a suspect has firmly established that fairness is the paramount objective in the identification process. **Where the case against a suspect rests upon the correctness of his or her identification by a witness or witnesses, great care must be taken in considering all the circumstances of the identification to see that there was no unfairness and that the identification was independently made, without any prompting.** To this end a duty is placed on the police to ensure that the identification process is carried out with the utmost fairness. In **Dickman** (1910) 5 Crim App R 135 @ 143 the Lord Chief Justice who delivered the judgment of the court, put it this way:
>
> > 'The police ought not either directly or indirectly to do anything which might prevent the identification from being absolutely independent and they should be most scrupulous in seeing that it is so.'
>
> [23] In our jurisdiction it has long been accepted that where the suspect is not known to the identifying witness or witnesses before the alleged incident the suspect should be placed on an identification parade. That has been held to be the ideal and fair method of testing the witness' ability to identify a suspect whom the witness had never seen before the incident. Confrontation of the previously unknown suspect by the witness without an identification parade being held has received the strongest condemnation by the courts. Lewis JA had left it beyond doubt in 1964 in Gilbert where no parade had been held and the suspect was confronted while in the custody of the police, that in our

jurisdiction this method of identification by confrontation was highly unsatisfactory. In his words:

> 'The court feels strongly that this method of identification is a most improper one … Where it appears as it must have appeared clearly in this case that the evidence against the suspected person is going to depend to a great extent upon identification, there is a distinct duty upon the police to take every care to see that the witness who is going to identify that person is not brought into proximity with him before the identification parade is held.'

[24] However in the development of the law since 1964 a deviation from that course has been permitted where there are rare and exceptional circumstances and in 1970 in the case of Trevor Dennis, **the court made it clear that an identification parade is not the only satisfactory means of identifying a suspect**. **There the suspect was not known to the identifying witness but no parade was held and, on appeal, the court had this to say:**

> **'identification on parade was the ideal way of identifying a suspect but it was not the only satisfactory way as the particular circumstances of a case may well dictate otherwise; having regard to the elements of time and distance between the offence, the description to the police the apprehension and identification of the appellant no valid ground existed for holding that the identification of the applicant was improper**.' …

**Trevor Dennis** has been cited with approval in several later decisions of this court." (Emphasis added)

[102] The facts which led to the ruling in **R v Trevor Dennis** are particularly useful in this matter. The headnote, which is sufficient for our purposes, states:

> "The applicant was apprehended some 20-25 chains from the house in which he had allegedly committed a robbery. He was seen in the house for 10 to 15 minutes by the complainant. He was arrested within half-an-hour of leaving the house. He was taken back there and identified by the complainant, who had given a description of the robber to the police. On appeal against conviction, the substantial complaint was the impropriety of the confrontation of the applicant with the complainant."

The ruling made by the court in **R v Trevor Dennis** was outlined in the excerpt from **Tesha Miller v R**.

[103] In the instant case the trial judge stated, at pages 146-148 of the transcript:

> "As I said, the defence counsel indicated that identification is in issue and it is, in fact, the major issue in this matter. The issue of confrontation was something that the defence counsel, Mrs. Hanson-Burnett, raised and the Crown admitted that this was not ideal. The complainant was in the C.I.B. office when four persons were brought in. This was some, something less than two hours after the complainant had gone there to make her report and she saw three persons. She saw four persons, three of them she saw very clearly and then she says there was one person whose face was away from her and that she got up, went and looked at that person, and then identified that person who held her up and that is the accused before the court today…
>
> At the police station she says he was, at that stage, wearing a blue or black hoody and the police officer, Mr. Morrison, identified this person, Mr. Thompson, when he picked him up to be wearing a blue or black hoody and a white t-shirt under that…
>
> **Now, as I said, confrontation is not ideal, but the police officer, Mr. Morrison, gave evidence that the**

**guardroom area was being renovated at the time and therefore he took the accused person to C.I.B. to ask where they should be carried**…

There is no indication that he or anyone else knew that the complainant, or witnesses were there. Yes, they having found that the witnesses were there, they could have taken them out, but I noticed two things: One, there were four persons there. The witnesses clearly indicated that she didn't recognized three of them, but she recognised one, the accused.

She also indicated that – I can't recall if she was the one who indicated, or Mr. Morrison, but the evidence is that two of the persons who were there had cornrow. She identified this accused man as one. There was further evidence, which I will go on to, so let me deal with confrontation…

**Confrontation was not ideal, but in the circumstances of this case I find that there was no deliberate act in terms of confrontation. I find that there were other persons there and in the circumstances of this case, I am willing to accept the identification because of the circumstances of the confrontation, which meant it was one person that was pointed out and the additional factor which I will now mention.**

The additional factor I mentioned is the fact that these three men were held on the road, at about 9:20, Mr. Morrison says. Mr. Thompson was searched and on him was found two phones, which were identified by the complainant. One of the phones was identified very specific, the red and black Nokia Music Express 5225, with a screen saver which had the personalized pictures of the children of the complainant. He had on him seven phone cards which were taken. He had on him, in his hand, a magnum, half a bottle of a magnum which is something that was also taken and, importantly, the clothing, the white t-shirt, the blue or black hoody. All of those factors indicated that this was the particular person.

So I say this, that in this case the evidence together, accumulatively the evidence of the clothing, the evidence taken from the accused person, the evidence of the phones which were so specific pointed - to the accused man and in those circumstances, **in the circumstances of this case,**

> **confrontation identification though not ideal, would be accepted, all pointing to the accused man in these circumstances.**
>
> I also need to point out that the time period was important, that these accused persons were found at 9:20, the robbery was just after 8 o'clock. Miss Blair says that about 8:10, I think [the complainant] says just after 8 o'clock. So these persons would have been arrested and searched, some time, about an hour after the incident, within a short distance from the scene of the crime and all these things point to the accused man. Let me say, for the avoidance of doubt, that I believe the Crown counsel witnesses. I thought [the complainant] was a very good witness. I thought she was fair, especially in terms of the indication of identification. Again, we know that an honest witness can be mistaken, but in terms of what [the complainant] said, that she saw and she identified, and what she was not sure of, that indicated a discerning witness. **I believe her that she was not prompted or pressured in any way. I believe Mr. Morrison, who indicated that he found the things, not just on the three men but on Mr. Thompson in particular. I believe Mr. Morrison in relation to the reason why he took the men into the CIB office and that there was no indication of any collusion. I believe Mr. Miles in relation to his evidence of the identification**." (Emphasis supplied)

[104] The trial judge, in his summation. was very cautious and accurately applied the relevant principles of law in his deliberation. In **R v Haughton and Henry Ricketts**, this court held at page 121 that:

> "Where a criminal case rests on visual identification of one accused by witnesses, their evidence should be viewed with caution and this is especially so where there is no evidence of prior knowledge of the accused before the incident; where an identification parade is held as is the case where there is no prior knowledge of the accused, the conduct of the police should be scrutinized to ensure that the witness has independently identified the accused on the parade. **Where no identification parade is held because in the**

> **circumstances that came about, none was possible, again the evidence must be viewed with caution to ensure that the confrontation is not a deliberate attempt by the police to facilitate easy identification by the witness. It will always be a question of fact for the jury, or judge where he sits alone, to consider carefully all the circumstances of identification to see that there was no unfairness and that the identification was obtained without prompting**. In a word, the identification must be independent." (Emphasis added)

[105] In this case, the trial judge, after listening to all the evidence and the submissions, noted that the complainant was a discerning witness. The complainant had testified that she was giving her report at a cubicle in the police station when four men entered and sat on a bench. She stated that she could only see three of the men clearly, and of her own volition, she went to look at the face of the other individual, who she later identified as the applicant. In our view, this was a spontaneous occurrence. The trial judge probed whether there was any deliberate act, collusion or prompting, and concluded that there was no indication that the complainant was prompted or prodded by the police officers, and no indication of collusion on the part of the police officers.

[106] The trial judge emphasized that identification by confrontation is not ideal, but found that the potential harm was alleviated by the fact that, at the time when the applicant was "confronted", he was in company of three other men, whom the witness did not know or recognize. Furthermore, the circumstances within which the offence took place, allowed an ample opportunity for identification of the applicant. The fact that the complainant saw the face of the applicant for at least two minutes in close

proximity, and that the period of time which elapsed between the robbery and the time when the applicant was apprehended, was less than two hours, are cogent aspects of the evidence, and were clearly taken into account by the trial judge. Indeed, the circumstances in this matter are quite similar to those in **R v Trevor Dennis**. Although the time period within which the applicant was identified is longer than that in **R v Trevor Dennis**, the confrontation was spontaneous and was clearly not contrived. As a result, we are not convinced that the trial judge erred in his treatment and acceptance of the evidence of identification by confrontation. As a consequence, no miscarriage of justice has occurred so as to render the conviction unsafe. This ground of appeal also fails.

**Ground vi:**

> **The sentence of fifteen (15) years for illegal possession of firearm is manifestly excessive having regard to the fact that the normal sentence imposed in cases where the charge is illegal possession of firearm is seven (7) years.**

**Applicant's submissions**

[107] Counsel for the applicant submitted that although the trial judge stated that he was not bound by the minimum sentence of 15 years, in light of the provisions made by Parliament in the law, he, nevertheless, fell into error and bound himself.

[108] To advance her argument that the normal sentence for illegal possession of firearms is seven years, counsel relied on the decisions of this court in **Marlon Blair v R** [2014] JMCA Crim 59, **William Francis v R** [2010] JMCA Crim 39 and **Lamoye Paul**

**v R** [2017] JMCA Crim 41, in which that sentence was either upheld on appeal or substituted for a longer sentence imposed at first instance.

**Respondent's submissions**

[109] Crown Counsel, Mr Spence, supported the sentence of 15 years and disagreed with arguments that it was harsh and manifestly excessive. He argued that a sentence of seven years would not have been appropriate, and a sentence of 15 years for illegal possession of firearm would be within the normal range provided for in the Sentencing Guidelines for Use by Judges of the Supreme Court of Jamaica and the Parish Courts (Sentencing Guidelines). These guidelines, which were published in January 2018, indicate that the statutory maximum for such an offence is life imprisonment, the normal range of the sentence is seven to 15 years and the usual starting point is 10 years' imprisonment. Counsel, however, acknowledged that they were not available for use in 2013, and therefore the trial judge would not have had the benefit of the guidance they provide.

[110] Counsel argued that the trial judge considered the relevant aggravating features such as the lack of remorse by the applicant and the fact that the firearm was used to inflict bodily harm. Mitigating features which the trial judge bore in mind were the antecedents of the applicant, the record of no previous convictions, and the fact that the applicant had already spent two years in custody.

[111] Mr Spence argued that it is only when a sentence appears to err in principle that this court will alter it. The case of **R v Kenneth John Ball** (1952) 35 Cr App R 164 was

used to support this point. He also referred to the relevant sections (sections 6.1-6.3) of the Sentencing Guidelines. Counsel distinguished the case of **Lamoye Paul v R**, on which counsel for the applicant had relied, on the basis that, in that case, the applicant had pleaded guilty to the offence of illegal possession of firearm.

**Analysis**

[112] The applicant was sentenced to 15 years' imprisonment at hard labour for illegal possession of firearm and five years' imprisonment at hard labour for robbery with aggravation. The sentences are to run concurrently. Hence, the applicant is to serve a maximum term of 15 years.

[113] The case of **Meisha Clement v R** [2016] JMCA Crim 26 is very instructive in outlining a systematic approach to determining the appropriate sentence to be imposed. Morrison P, at the following paragraphs outlined:

> "[41] As far as we are aware, there is no decision of this court explicitly prescribing the order in which the various considerations identified in the foregoing paragraphs of this judgment should be addressed by sentencing judges. However, it seems to us that the following sequence of decisions to be taken in each case, which we have adapted from the SGC's definitive guidelines, derives clear support from the authorities to which we have referred:
>
> i. identify the appropriate starting point;
>
> ii. consider any relevant aggravating features;
>
> iii. consider any relevant mitigating features (including personal mitigation);

iv. consider, where appropriate, any reduction for a guilty plea; and

v. decide on the appropriate sentence (giving reasons)

[42] Finally, in considering whether the sentence imposed by the judge in this case is manifestly excessive, as Mr Mitchell contended that it is, we remind ourselves, as we must, of the general approach which this court usually adopts on appeals against sentence. In this regard, Mrs Ebanks-Miller very helpfully referred us to **Alpha Green v R** 43, in which the court adopted the following statement of principle by Hilbery J in **R v Ball** 44:

> 'In the first place, this Court does not alter a sentence which is the subject of an appeal merely because the members of the Court might have passed a different sentence. The trial Judge has seen the prisoner and heard his history and any witnesses to character he may have chosen to call. It is only when a sentence appears to err in principle that this Court will alter it. If a sentence is excessive or inadequate to such an extent as to satisfy this Court that when it was passed there was a failure to apply the right principles then this Court will intervene.'

[43] On an appeal against sentence, therefore, this court's concern is to determine whether the sentence imposed by the judge (i) was arrived at by applying the usual, known and accepted principles of sentencing; and (ii) falls within the range of sentences which (a) the court is empowered to give for the particular offence, and (b) is usually given for like offences in like circumstances. Once this court determines that the sentence satisfies these criteria, it will be loath to interfere with the sentencing judge's exercise of his or her discretion."

[114] In the instant case, in arriving at the sentence which he imposed the trial judge stated at pages 163-165 of the transcript:

> "Mr Thompson, I have listened very carefully to your attorney, and take note of the social inquiry report in this matter. I have also considered the antecedents report and I note that you have no previous convictions and I will take that to your credit.
>
> I note, however, that in this matter, you have indicated in your antecedents, the social inquiry report, that you do not see anything wrong with what you did although, as I indicated at trial, the evidence against you was particularly telling, in particular, the telephone, and there were other items and identification which the Court accepts.
>
> In these circumstances I will take into consideration the fact that you have spent two years already in prison for this matter and **so I need to consider the indications that Parliament gives – matter like this, maximum sentence is life. However, Parliament has indicated that in matter involving guns, shooting with intent and wounding with intent, but not robbery, the minimum sentence would be 15 years. I think that I am bound to take guidance from Parliament. The 15 years' minimum does not bind me in this case, but I will take guidance from Parliament because an indication of parliament's view is something that I will consider.**
>
> So therefore, in relation to this matter for illegal possession of firearm, I would have considered a sentence of 20 years. However, I would reduce it because you spent two years already, and time spent before has to be weighted heavily. So for the illegal possession of firearm, I am sentencing you to 15 years at hard labour. For the robbery with aggravation, I am sentencing you to five years at hard labour. Sentence to run concurrently which means that you will spend a maximum of 15 years…" (Emphasis added).

[115] At the time of sentencing, the trial judge did not have the guidance provided in **Meisha Clement v R**, and the Sentencing Guidelines. However, the trial judge was still required to approach the issue of sentencing in a systematic manner in keeping with established principles and guidelines available to him at the time in cases such as **R v**

**Everald Dunkley** (unreported) Court of Appeal, Jamaica, Resident Magistrates Criminal Appeal No 55/2001, judgment delivered on 5 July 2002, page 3, and **R v Sydney Beckford and David Lewis** (1980) 17 JLR 202, 203 referred to with approval in **Meisha Clement v R**.

[116] The trial judge referred to guidance from Parliament in matters involving guns, shooting with intent and wounding with intent but not robbery, and noted that in such matters, the minimum sentence would be 15 years. He stated that he was not bound by the minimum sentence in the particular circumstances, but that he would take guidance from Parliament, "because an indication of [P]arliament's view is something that I will consider". He then began at a starting point of 20 years. The question is whether this starting point was too high and whether the trial judge bound himself to not go below 15 years.

[117] The issue as to when a minimum sentence of 15 years is applicable in relation to a charge under the Firearms Act, has been explored in a number of cases including the recent decision of this court in **Peter Campbell v R** [2019] JMCA Crim 13. It has been made clear that the statutory minimum does not apply to offences tried pursuant to section 20(1)(b) of the Firearms Act, which is the applicable section in this matter. While the trial judge acknowledged that he was not bound by the statutory minimum, he nevertheless proceeded to indicate that he would "take guidance" from Parliament in relation to the statutory minimum of 15 years. The fact that, in the end, he arrived at a sentence of 15 years, suggests that he did not believe that, in light of "guidance" from

Parliament, he should go below a sentence of 15 years. In our view, in so doing, the trial judge erred. This therefore entitles this court to re-examine the circumstances and to indicate what would be an appropriate sentence.

[118] In **William Francis v R**, the complainant was in her room at about 1:30 pm, when two armed men entered and demanded money, cellular phones and other items. The applicant was charged with and convicted of illegal possession of firearm and robbery with aggravation. He was sentenced to seven years' imprisonment at hard labour for illegal possession of firearm and 15 years' imprisonment at hard labour for robbery with aggravation. The sentences were ordered to be served concurrently. His appeal against sentence was dismissed.

[119] In **Marlon Blair v R**, there was an application for leave to appeal in a matter where the applicant was convicted in the High Court Division of the Gun Court. In that case, at approximately 1:00 am, the complainant was chased and robbed by men while he was walking on the road. After the incident he saw police officers in the vicinity of two men and he shouted to the police not to let them go as they just robbed him. The applicant and another were both sentenced to terms of imprisonment as follows:

(i) illegal possession of firearm - seven years' imprisonment;

(ii) robbery with aggravation - seven years' imprisonment; and

(iii) assault - two years' imprisonment.

The sentences were ordered to run concurrently. The sentences were not challenged on appeal.

[120] Phillips JA in **Joel Deer v R** [2014] JMCA Crim 33, has provided a useful review of the normal sentencing range for the offence of illegal possession of firearm:

> "[12] A review of several cases from this court reveals that the range of sentences imposed for the offence of robbery with aggravation after conviction is between 10 and 15 years, although the maximum allowed by statute is 21 years. Of course, the length of sentence imposed within the range would be determined by the circumstances of the case. In **Jermaine Cameron v** R [2013] JMCA Crim 60 at para [54], Morrison JA noted that '**[s]entences of 10 years' imprisonment for illegal possession of a firearm** and 15 years' imprisonment for robbery with aggravation **are well within the usual range of sentences imposed at trial and approved by this court for like offences'**. In **Kemar Palmer v R** [2013] JMCA Crim 29, **sentences of 10 years** and 15 years imprisonment respectively were imposed for **illegal possession of firearm** and robbery with aggravation; in **Wayne Samuels v R** [2013] JMCA Crim 10, the sentences of imprisonment were 10 years, **seven years** and 12 years for robbery with aggravation, **illegal possession of firearm** and shooting with intent respectively; and in **Andrew Mitchell v R** [2012] JMCA Crim 1, sentences of 10 years, **10 years** and 17 years imprisonment were imposed for the offences of robbery with aggravation, **illegal possession of firearm** and shooting with intent respectively. In our view, unless the circumstances of a case of robbery with aggravation are extremely reprehensible or unless there are other compelling reasons to do otherwise, the sentence imposed should be in the range of 10-15 years." (Emphasis added)

[121] In **Lamoye Paul v R,** McDonald-Bishop JA, in dealing with the issue surrounding the sentence of illegal possession of firearm expressed the view that since that case did not involve the possession of a firearm "simpliciter", a starting point of anywhere between 12-15 years was appropriate. She then utilized a starting point of 12 years.

[122] Arising from the survey of sentences imposed for the offence of illegal possession of firearm, it will be seen that sentences of seven years to 10 years and upwards have been imposed, depending on the circumstances. Furthermore, where a firearm was used in the commission of an offence, and was not simply found in the possession of an individual, a starting point of anywhere between 12 and 15 years has been seen as appropriate.

[123] According to the Sentencing Guidelines, upon conviction for a charge of illegal possession of firearm or ammunition, pursuant to section 20 of the Firearms Act, the statutory maximum is life imprisonment, the normal range of sentence is seven to 15 years and the usual starting point is 10 years. These guidelines were developed bearing in mind relevant case law. It will be seen that, what has been outlined in the Sentencing Guidelines as regards the sentence for the illegal possession of firearm is fairly consistent with the range and trend seen upon the short review of cases which was outlined earlier in this judgment.

[124] We find that the starting point of 20 years, which was utilized by the trial judge, was excessive. In our respectful view, the trial judge failed to indicate any particular feature of the case which caused him to start at such a high end of the scale. In our view an appropriate starting point would have been 13 years, bearing in mind the fact that the firearm was used to threaten and inflict injury and was not merely in the applicant's possession. The fact that the applicant had no previous conviction would be a mitigating factor and we would reduce the 13 years by one year. The two years that

he had already spent in custody would also have to be taken into account. In the circumstances of the case, we find that the sentence of 15 years was imposed on the basis of erroneous legal principles and was manifestly excessive. In our view an appropriate sentence would be 10 years' imprisonment at hard labour for the offence of illegal possession of firearm. As such, the sentence of 10 years is substituted for 15 years for the offence of illegal possession of firearm.

**Conclusion**

[125] Having considered the various issues raised, we find that the supplemental grounds of appeal do not support a conclusion that the conviction was unsafe. Turning to the application for permission to appeal against sentence, insofar as the sentence for illegal possession of firearm is concerned, we agree that the sentence was manifestly excessive and the trial judge improperly took "guidance" from an inapplicable statutory provision. In so guiding himself, it appeared that the trial judge felt that it would not have been appropriate to impose a sentence of less than 15 years for the offence of illegal possession of firearm.

**Order**

[126] The order of the court is that:

(1) The application for leave to appeal against the conviction is refused.

(2) The application for leave to appeal against the sentence imposed for count one, the offence of illegal possession of firearm is granted.

(3) The application for leave to appeal against the sentence imposed for count two, the offence of robbery with aggravation, is refused.

(4) The hearing of the application for leave to appeal against the sentence imposed for the offence of illegal possession of firearm is treated as the hearing of the appeal against sentence.

(5) The appeal against the sentence imposed for the offence of illegal possession of firearm is allowed.

(6) The sentence of 15 years' imprisonment at hard labour in respect of count one, illegal possession of firearm, is set aside and a sentence of 10 years' imprisonment at hard labour is substituted therefor after taking into account the two years already spent in custody.

(7) The sentence of five years' imprisonment at hard labour in respect of count two, robbery with aggravation, is affirmed.

(8) The sentences are to be reckoned as having commenced on 7 November 2013 and are to run concurrently.