[2012] JMCA Crim 5

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 103/2008

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MR JUSTICE MORRISON JA
THE HON MISS JUSTICE PHILLIPS JA

CHRIS BROOKS v R

Ronald Paris for the appellant

Jeremy Taylor for the Crown

5 April 2011 and 2 March 2012

MORRISON JA

Introduction

[1] This appeal is brought pursuant to leave granted by a single judge of this court on 16 September 2009. The appellant was convicted on 18 August 2008 in the Home Circuit Court, after a trial before Beckford J sitting as a judge of the Gun Court on an indictment charging the appellant with the offences of illegal possession of firearm (count one) and shooting with intent (count two). He was sentenced to 10 and 15 years' imprisonment at hard labour on counts one and two respectively.

[2] The appeal is concerned with (i) the quality of the identification evidence against the appellant and the manner in which the learned judge dealt with this issue; (ii) the admissibility and weight of certain forensic evidence adduced against the appellant at his trial; and (iii) whether the learned judge dealt adequately with the evidence put forward on his behalf as to his good character.

The evidence

[3] The evidence against the appellant at trial came primarily from two eye witnesses to the alleged offences, Constable Dwight Bessick and Sergeant Clive McLeod, who were both stationed at the material time at the Hunts Bay Police Station in the parish of St Andrew. In addition to these police officers, Constable Dennis Forbes gave evidence of having swabbed the appellant's hands for gunshot residue after the offences were allegedly committed and officers from the Forensic Science Laboratory also gave evidence as to the results of the analysis of the test samples received from Constable Forbes.

[4] At around 2:30 in the afternoon of 29 April 2007, a Sunday, Constable Bessick, Sergeant Clive McLeod and Corporal F. Beckford were together on mobile patrol in a marked police vehicle in the Olympic Gardens area of St Andrew. The evidence at the appellant's trial was given by Constable Bessick and Sergeant McLeod, Corporal Beckford having unfortunately died some time before the trial. The policemen were dressed in blue denims and they were all armed. As they travelled along Pennystone Avenue, they observed two men standing ahead of them in the road. As the police

vehicle approached them, the men moved off briskly in the direction of the gate at number 6 Pennystone Avenue. The policemen's suspicions having been aroused, the police vehicle stopped and the officers alighted, whereupon both men pointed guns in their direction and opened fire. Corporal Bessick took cover by throwing himself to the ground and returned the fire, as did his colleagues. The men then ran through the gate of 6 Pennystone Avenue, with Constable Bessick and Corporal Beckford in pursuit. Both men ran towards the fence at the rear of the premises, scaled it and went over into the adjoining premises. Constable Bessick and Corporal Beckford continued the chase and, while they were themselves in the process of going over the fence, one of the men stopped, turned around and again opened fire at them, forcing the policemen to take cover, though they did not return the fire at that point. Constable Bessick then saw the men go over a perimeter fence on those premises, at which point he lost sight of them for about six or seven seconds, before he and Corporal Beckford were again able to follow them over that fence into a third premises. There, at the gate of those premises, which turned out to be 26 Bishop Avenue (which, his evidence was, ran perpendicular to Pennystone Avenue), Constable Bessick finally caught up with the man who had actually fired shots at himself and his colleague. When this man was accosted, captured and searched, no firearm was found on his person.

[5] Constable Bessick and Corporal Beckford were soon afterwards joined by Sergeant McLeod, who had not taken part in the chase, but had returned to the police vehicle, reversing along Pennystone Avenue to Balmagie Avenue and then driving onto Bishop Avenue. There, he saw the appellant running across the road. Then, after

looking in the direction of the police vehicle, the appellant turned back into premises at 26 Bishop Avenue, which is where Sergeant McLeod came upon Constable Bessick holding on to the appellant.

[6] The man who had been captured, who was not previously known to either officer, was identified by both Constable Bessick and Sergeant McLeod as the appellant, from his "physical description", as well as from the fact that, when he was apprehended, he was dressed in the same clothing (either a "blue and white and red or blue and white", "plaid or stripe shirt", and "short jeans pants") as the man who had fired shots at them. Constable Bessick's estimate of how close he got to the fleeing men during the chase was about 40 feet and the duration of the entire chase was further estimated by him to have been about 25 to 30 seconds. During the chase, Constable Bessick stated that he had been able to see the appellant's face twice, on the first occasion, when the appellant turned around and fired at him, for about five seconds and, on the second occasion, when the appellant again turned around and fired at him the second time, for about three to four seconds. Sergeant McLeod, for his part, initially had "a glance at [the appellant's face]", for "[m]aybe a second or so" when he saw him on Pennystone Drive, but he gave no estimate of how long he had been able to observe the appellant when he next saw him on Bishop Avenue. Both officers said that there was no obstruction to their view of the appellant on each of these occasions and there were no other persons in the vicinity during the chase.

[7] The police officers were unable to carry out any further searches of the area because, shortly after the appellant was taken into custody, a crowd of people

descended on the car, smashing it up and puncturing some of the tyres. Finding themselves outnumbered, the officers requested assistance by radio and in due course reinforcements arrived from the Hunts Bay Police Station.

[8] With a view to suggesting that his account of having pursued the appellant from Pennystone Avenue to 26 Bishop Avenue was not credible, Constable Bessick was extensively cross examined by the appellant's counsel on the physical layout of and the relationship between Pennystone Avenue, Balmagie Avenue and Bishop Avenue. Thus, it was specifically put to Constable Bessick that "no two yards cannot [sic] take you to Bishop Avenue from number 6 Pennystone Avenue" (to which the response was, "[w]ell that is the situation"); and further, "that to reach Bishop Avenue from Penny Stone Avenue you would be going in over…five sets of dwelling houses in excess of five dwelling houses" (to which the response was, "no"). Further pressed by counsel on the point, Constable Bessick held his ground with the following remark:

> "We are talking about some informal setting so the place is not how it is normally in some areas. They are combust [sic] and jumbled. It's a ghetto area."

[9] The cross examination ended with a series of suggestions by counsel to Constable Bessick. Firstly, that he did not chase the appellant from Pennystone Avenue to a yard on Bishop Avenue; secondly, that the appellant "was at no time firing any shots at you or anybody else"; thirdly, that the appellant was apprehended by him at 28 Bishop Avenue, after he and Sergeant McLeod had entered those premises through the front gate; that the appellant was at that time dressed in "a brown jeans shorts and a blue

shirt" and that a shirt "was thrown on to him by Constable Beckford"; and that, "the fence at 26 Bishop Avenue is more than 6 feet tall".

[10] Sergeant McLeod was also challenged in cross examination about the layout of the area. In particular, he was pressed about the route that he took and the time that it took him to drive the police vehicle from 6 Pennystone Avenue, after his colleagues had allegedly gone in pursuit of the appellant, to 26 Bishop Avenue. Sergeant McLeod maintained that it took him about 20 seconds to reverse onto Balmagie Avenue and then to go around to Bishop Avenue and that the time that had elapsed from when he and his colleagues had arrived on Pennystone Avenue to the point at which the appellant was accosted was about "[t]hirty, thirty five, forty seconds most".

[11] Among the suggestions put by the appellant's counsel to Sergeant McLeod in cross examination were that the appellant had at no time that day fired shots at the police party; that the appellant was not chased by any member of his party to Bishop Avenue; and that he, Sergeant McLeod, and Constable Bessick "entered 28 Bishop Avenue and saw [the appellant] sitting on the ground with Constable Beckford over him".

[12] The appellant was taken to the Hunts Bay Police Station, where, about half an hour later, his hands were swabbed for gunshot residue by Constable Dennis Forbes, who was stationed at the scene of crimes division of the police force. The samples taken from the appellant were placed in an envelope, which was sealed and labeled by Constable Forbes, and stored by him at CIB Headquarters in a "special refrigerator

prepared especially for exhibits". On 15 May 2007, the sealed envelope was retrieved by Constable Forbes from the refrigerator and taken to the Government Forensic Laboratory. There, it was handed over by him for testing and analysis, in exchange for an official receipt, bearing "FL number 1204/2007". The delay of over two weeks in submitting the samples to the laboratory was attributed by Constable Forbes to the fact that he had fallen ill in the interim and had only been able to take the samples to the laboratory upon his return to work.

[13] Miss Stacy-Ann Spencer, a forensic officer at the Forensic Science Laboratory had the responsibility of assisting the Government Analyst in receiving and testing samples for court purposes. She confirmed that she received a sealed envelope, containing four transparent plastic bags with swabs enclosed, from Constable Forbes on 15 May 2007. After confirming that what was indicated on the bags was in fact what was received, Miss Spencer assigned a "forensic lab number" to the case and secured the exhibits by placing them in a vault, for the attention later that day of the Government Analyst, Mrs Marcia Dunbar. A receipt for the envelope containing the four bags was also given to Constable Forbes.

[14] The analysis was carried out by Mrs Dunbar, whose findings revealed the presence of gunshot residue, at an elevated level, on the swabs taken from the appellant's left hand and palm and, at intermediate level, on the swabs taken from his right palm and the back of his right hand. Mrs Dunbar explained to the court that an elevated level of gunshot residue "would arise from firing a firearm or being in the direct path of gunshot residue as it is emitted from a firing firearm within a distance of

nine inches". On the other hand, residue at an intermediate level could arise, firstly, if there was an initial deposit at an elevated level "and with the passage of time and activity there was a loss of gunshot residue which results in an intermediate level being produced"; and, secondly, "from being in the path, direct path of gunshot residue as it is emitted from a firing firearm", within a distance of 18 inches.

[15] Asked what would be the effect of swabs taken from someone being "kept for say, ten days before being tested", Mrs Dunbar's response was that, if the swabs were not stored under refrigerated conditions, "there could be fungal growth on the swabs and this fungal growth would possibly make it more difficult for the results of the test to be observed". Mrs Dunbar agreed in cross examination that where one person fired a firearm while touching another person or holding on to their hands, "there can be transference of gunshot residue under that condition". As regards the period of time for which gunshot residue would remain on a person's hand, Mrs Dunbar told the court that, "unless there's a deliberate attempt to remove the gunshot residue, within three to six hours there is a rapid loss of gunshot residue".

[16] The investigating officer was Detective Sergeant Alan Love. On the basis of the report which had been made to him by Sergeant McLeod and Constable Bessick, he commenced an investigation of the offences of illegal possession of firearm and shooting with intent. When first told of the policemen's report against him, and cautioned, the appellant's response was, "[m]i nuh shoot after no police" and, when subsequently arrested and charged, he repeated this statement, adding, "[m]i in a mi yard, mi hear gunshot a fire, mi see man a run through the yard with gun, mi get

scared and run in a one 'nedar' yard". Sergeant Love testified that the hands of the policemen who had been involved in the shooting incident were also swabbed, although there was no other evidence in the case of what had become of the samples obtained from that exercise.

[17] The appellant gave sworn evidence in his defence. At the time of the trial, he was 25 years of age and he was - and had been for two years up to the time of his arrest - a security contractor to Guardsman Ltd. His evidence was that at about 2:30 p.m. on 29 April 2007, while he was at the gate at the front of his residence at 34 Bishop Avenue, he heard the sound of gunshots being fired. His attention was attracted to the fence at the back of the yard, where he saw "two unknown men coming over the fence with…two black object [sic] in their hand". Thinking that the men had come to invade the community, because of a gang feud that was going on at the time, the appellant said that he became frightened and ran to his neighbour's premises at 28 Bishop Avenue. While there, a policeman ("the police officer that is not here") came into the yard behind him and, in answer to his question, the appellant indicated that his address was 34 Bishop Avenue. When asked if he had been running, his reply was "[m]i hear shot a fire and mi see man a run through mi yard", whereupon the officer grabbed him in his waist and ordered him to sit down on the ground. He was at that time, the appellant told the court, dressed in "a blue shirt and a brown cut-off foot jeans and a white sneakers". At this point, Constable Bessick and Sergeant McLeod came into the yard and Corporal Beckford then took a shirt and threw it on the appellant, telling his colleagues that "is him did a fire the shot dem after we". The

policemen then started to search the yard, during which, the appellant said, he tried to protest his innocence to them, but was told to "shut up". He then heard a loud noise from outside the yard, "like the residents come down and was outside", prompting one of the policemen to call for assistance. In due course, other policemen came on the scene and the appellant was taken to the Hunts Bay Police Station, where his hands were swabbed.

[18] The appellant gave a detailed description of the general geography of the Pennystone Avenue area and reiterated that he had been apprehended at 28 Bishop Avenue. His reason for going to those premises, he said, was that he had seen "a man run inna mi yard with gun…I run leave them in mi yard". The appellant denied having engaged the policemen in a shootout, insisting that –

> "I was at my yard on Bishop Avenue, 34 Bishop Avenue, that's where I was…I don't know where it was taking place, the loud explosions were far away…I know I was at my yard when I heard explosions."

[19] Mr Nicholas Gong, who had been identified by the appellant as his supervisor at Guardsman Ltd, was called as a witness for the defence. Like the appellant, he was 25 years of age. He confirmed that he was a security supervisor employed to Guardsman Ltd, which was the capacity in which he had known the appellant, and that he had supervised him as a security contractor for two years. The appellant was stationed at the offices of the Jamaica National Building Society in Half Way Tree, where he was responsible for manning the doors, opening and closing the doors for customers and

"also to check to see that everything is okay inside the bank". Mr Gong considered the appellant to be someone whose word he could take on matters of importance and regarded him as "a humble individual", who was serious about his work and also very patient. Mr Gong was "shocked" when he heard about the allegations that had been made against the appellant, considering him to be "just not that type of person", but a person who was "very serious, come to work, leave work, just go home, that's it".

[20] On this evidence, the learned trial judge found the appellant guilty on all four counts on the indictment and sentenced him to imprisonment as already indicated.

The appeal

[21] The appellant himself filed three grounds of appeal on 24 August 2008 and these were supplemented by further grounds filed on his behalf by Mr Ronald Paris, who did not appear at the trial, on 14 January 2011 and 1 April 2011. In his skeleton argument, Mr Paris very helpfully summarised the issues raised by these grounds as follows:

> "1. Identification being the main issue what is the quality of the identification Evidence?
>
> 2. What weight if any should be given to the forensic evidence consequent upon the swabbing of the hands of the Appellant?
>
> 3. Did the Learned Trial Judge sum up the case coherently and fairly setting out the strengths and weaknesses of the case for the Appellant and for the prosecution respectively?
>
> 4. The Learned Trial Judge failed to give a good character direction in terms of the evidence led by the Appellant and his witness in support of his good character."

[22] Mr Paris made it clear from the very outset of his submissions that he considered identification, or, more specifically, the quality of the identification evidence, to be the main issue in the case. He referred us to the decision of the Privy Council in ***Noel Campbell v R*** [2010] UKPC 26, for the submission that the learned trial judge should have directed herself as to whether the witnesses for the Crown were telling the truth and that it was only when the evidence had so satisfied her that she should then have gone on to give directions in compliance with the ***Turnbull*** guidelines. In any event, Mr Paris submitted further, the judge had failed to give directions fully in accordance with the guidelines, by omitting to remind herself of any specific weaknesses in the identification evidence "in a coherent manner so that the cumulative impact of any weaknesses was fairly laid out"; that mistaken recognition can occur even in relation to close relatives and friends; and drawing attention to evidence capable of supporting the identification, "as well as any evidence which might appear to but does not in fact support the identification".

[23] Dismissing Corporal McLeod's evidence of visual identification as being of "little or no weight", Mr Paris spent some time on Constable Bessick's evidence, pointing out that his purported identification was made in difficult circumstances and that the judge had failed to undertake any analysis of his credibility, which was "essential to an acceptance of the truthfulness of his identification evidence". The judge also failed to remind herself in her summing up of a discrepancy in the evidence of the policemen, which had not been reconciled, as to the clothing which the appellant was allegedly

wearing on the day in question (a "plaid" or a "striped" shirt). She also failed to set out clearly "the geography of the crime scene", given that there was a dispute as to the premises on which the appellant had been arrested.

[24] Turning to the forensic evidence, Mr Paris complained of what he described as the "many unresolved questions" pertaining to it, particularly as regards the circumstances in which the samples taken from the appellant had been delivered to the laboratory for testing. There were questions in relation to the chain of custody as well as the fact that there had been no return from the analyst in respect of the swabbing of the policemen's hands, giving rise to the possibility that the samples could have been mixed up. This court should insist, it was submitted, on standards being maintained in respect of scientific evidence, particularly in the light of the importance placed on the evidence by the trial judge.

[25] On the issue of character evidence, Mr Paris pointed out that the appellant, who was a man of good character with no previous convictions, had given evidence to this effect, as had his witness, Mr Gong. However, it was submitted, the judge failed to give a proper good character direction, under either limb of ***R v Vye*** [1993] 3 All ER 241 and, while it was true that the failure to give a proper good character direction is not necessarily fatal to a conviction, the facts of this case made it imperative that such a direction be given. In the circumstances, the actual direction given by Beckford J in this case was inadequate and this was more than a mere technical blunder, but went to the issue of the fairness of the trial.

[26] In response to these submissions, Mr Jeremy Taylor for the Crown accepted at once that identification was a central issue in the case, in particular whether the evidence proffered on behalf of the Crown was of a kind and quality that could allow a tribunal of fact, properly directed, to convict the appellant. He submitted that the evidence of Constable Bessick, whom he described as "the main witness", was of adequate quality and that the circumstances of his sightings of the appellant were sufficiently favourable to enable the trial judge to find that the appellant was indeed the perpetrator of the offences for which he was charged.

[27] In addition, that evidence was supported by the forensic evidence, which in this case pointed clearly to the appellant as the person who had shot at the policemen and the judge had been correct to treat the evidence of visual identification as buttressed by the forensic evidence, which had not been impaired in any way by the matters, complained of by Mr Paris. After reviewing the evidence, in the light of the authorities, Mr Taylor submitted that there were no gaps in the continuity of the chain of custody, in that the Crown had shown the provenance of the swabs from the time of their collection to their analysis by Mrs Dunbar and there was no evidence that the sample had been contaminated in any way.

[28] As regards the learned trial judge's summing up on the issue of identification, Mr Taylor submitted that Beckford J had dealt with the identification evidence in "a comprehensive, extensive and thorough manner" and directed our attention to the passages in the summing up in which the trial judge had discussed the issue.

[29] On the question of good character, Mr Taylor accepted that the appellant had placed his character in issue and that the judge's directions on the point were, as he put it, "economical". However, Mr Taylor submitted that, on the authorities, this deficiency did not necessarily render a conviction unsafe and that this was a case in which, when all the evidence was considered, the court would inevitably have come to the same conclusion, even if a proper good character direction had been given. In his detailed skeleton argument, Mr Taylor very helpfully reminded us of all the leading modern authorities on this subject, to some of which we will refer in due course.

[30] Mr Taylor indicated, finally, that the Crown would also rely, if it became necessary, on the proviso to section 14(1) of the Judicature (Appellate Jurisdiction) Act.

Discussion and analysis

Identification

[31] There can be no doubt, it seems to us, that the main thrust of the appellant's defence in this case was a direct challenge to the credibility of Constable Bessick and Sergeant McLeod. Thus, it was suggested to both of them that the appellant did not fire shots at them and that there was no chase, through 6 Pennystone Avenue to 26 Bishop Avenue, on 29 April 2007. Further, the appellant's evidence was that he was not apprehended at 26 Bishop Avenue, neither was he dressed, in the manner described by the policemen. These were therefore critical issues of fact for decision by the learned trial judge. But, as was made clear by the Board in ***Beckford et al v R*** (1993) 97 Cr App R 409, even if the sole or main issue raised by the defence is the

credibility of the identifying witnesses, that is, whether their evidence is true or false, a general warning on the dangers of mistaken identification is required in any case in which the Crown relies on visual identification, whether of a stranger or by recognition. In the instant case, the appellant having been previously unknown to both Constable Bessick and Corporal McLeod, both their credibility and the accuracy of their identification of the appellant were therefore very much in issue.

[32] In ***Noel Campbell***, the Board accepted a submission which was substantially along the lines of the one made to us by Mr Paris in this matter, that is, that (in accordance with the principle in ***Beckford***) since credibility and accuracy were both in issue, the judge should have given directions to the jury essentially in two stages. First, that they should consider whether the prosecution witness was telling the truth, and to disregard the evidence unless satisfied that he was; and then, if they were satisfied as to his truthfulness, to consider the witness' reliability in accordance with the guidelines laid down in ***R v Turnbull and others*** (1976) 63 Cr App R 132. The Board concluded on this point that the judge's directions were "open to the criticism that they did not clearly separate the issues of credibility and mistake, and moved repeatedly from one possibility to the other" (per Lord Mance, at para. [30]). However, despite the criticisms which could be made in this regard, the Board considered that at the end of the day the jury could not have been in any doubt that the fundamental issues in the prosecution case related to (a) the witness' truthfulness, and (b) if he was truthful, his reliability, bearing in mind the possibility of mistake. The judge had in fact covered

both subjects in his summing up, "albeit he did not treat them separately in the manner that would have been desirable" (para. [31]).

[33] In the instant case, Beckford J was therefore obliged to consider the issues so clearly raised regarding the credibility of Constable Bessick and Sergeant McLeod separately, satisfying herself as to their truthfulness, before going on to deal with the reliability of their identification of the appellant.

[34] In our view, Mr Paris' criticism of Beckford J's summing up in this regard is a fair one. From the outset, the learned judge approached the case as one in which the primary issue was identification, saying early in her summing up that "[t]he accused is saying that this is a case of mistaken identification". The clear contest on the evidence between the versions given by the policemen and by the appellant attracted very little specific mention by the judge, save in the context of two possible discrepancies in the evidence of the two police eyewitnesses.

[35] As regards Constable Bessick's evidence, the judge noted that, having said in examination in chief that the appellant was wearing a red, blue and white "plaid or stripe shirt", he admitted when he was cross examined that he had previously said that the appellant was wearing a "blue and white stripe shirt". The judge then commented as follows:

> "The question is, does this discrepancy go to the root of the case? I don't think so. Having seen and heard the witness, I do not think this affects his credibility. There is a weakness in the identification and I note it, but I do not

> think it is something that completely destroys the evidence of the witness."

[36] And as regards Sergeant McLeod's evidence, the judge noted a discrepancy in respect of whether he had first observed the appellant on the left or the right side of Pennystone Avenue, and dismissed it with the comment that "whether they went from left to right or right to left is not something that goes to the root of the case".

[37] There can, in our view, be no criticism (and none was offered by Mr Paris) of Beckford J's assessment of the significance of these discrepancies in the extracts quoted above. However, we think that it is also clear that in those passages, as in ***Noel Campbell***, the learned judge did not clearly separate the issues of credibility and mistake and indeed, particularly in relation to Constable Bessick's evidence, conflated these issues. However, having said that, it seems to us that, again as in ***Noel Campbell***, it could not have escaped the judge that the truthfulness of Constable Bessick and Sergeant McLeod was a crucial issue in the case. In this case, unlike in ***Noel Campbell***, absolutely no motive was suggested for these witnesses to have fabricated their evidence of the appellant's involvement. In these circumstances, we accordingly consider that the judge's concluding statement, that "I reject the defence, I believe and accept the witnesses for the prosecution as witnesses of truth", was adequate.

[38] Which therefore brings us to the other critical question, that is, the reliability of the identification evidence, in respect of which Beckford J was required to direct herself

in accordance with the canonical guidance of Lord Widgery CJ in ***Turnbull***. Thus, in the instant case, the judge was obliged (i) to warn herself of the special need for caution before convicting the appellant in reliance on the correctness of the identification, bearing in mind that a mistaken witness can be a convincing witness, and that a number of such witnesses can be mistaken; (ii) to examine closely the circumstances in which the identification by each witness came to be made; (iii) to remind herself of any specific weaknesses which may have appeared in the identification evidence; and (iv) to identify any other evidence in the case which was capable of supporting the evidence of identification. Further, if, in the judge's opinion, the quality of the identification evidence was poor, "as for example when it depends solely on a fleeting glance or on a longer observation made in difficult conditions" (page 138), she would have been obliged to withdraw the case from the jury and direct an acquittal, unless there was other evidence in the case which supported the identification.

[39] Taking the last-mentioned requirement first, Mr Paris did not suggest, either by way of a formal ground of appeal or in his submissions, that Beckford J ought to have stopped the case at the close of the prosecution's case. This was perhaps understandable, since no submission to this effect was made at trial. However, he did complain in a general way about the quality of the identification evidence. In assessing this complaint, it is only necessary to consider for a moment Constable Bessick's evidence (which Mr Paris described as "the only possibly reliable identification evidence" and which the learned judge obviously found more reliable than that of Sergeant McLeod). As has already been indicated, Constable Bessick testified that he was able to

observe the appellant on Pennystone Avenue for about five seconds initially; and then, during the ensuing chase, over two fences and through two separate premises, when the appellant stopped, turned around and fired at the policemen again, for another three to four seconds. The closest he got to the appellant during the chase, which lasted about 25 – 30 seconds, was 40 feet; but at the end of it, having lost sight of the men for about seven seconds, he caught up with the appellant at 26 Bishop Avenue.

[40] There can be no question, in our view, that this account described conditions which were undoubtedly difficult, bearing in mind that Constable Bessick and his colleagues were under attack, while they and their attackers were in constant motion. However, it also seems to us to be clear that this could be said to be evidence with a base "so slender that it is unreliable and therefore not sufficient to found a conviction", which is the test for whether an identification case should be stopped by the trial judge (***Daley v R*** (1993) 43 WIR 325, per Lord Mustill at page 334). The incident took place during "broad daylight", as Beckford J observed, the constable's evidence was that he had an unobstructed and clear view of the men and, as the judge also said, "an identification made in difficult circumstances does not mean that it is not identification that can be accepted".

[41] This was therefore a case for the judge's 'jury mind', after proper directions on the law. In our view, it is also clear that Beckford J had the ***Turnbull*** requirements firmly in mind when summing up the case against the appellant. Thus, after recounting the first part of Constable Bessick's evidence of the chase of the men which began on

Pennystone Avenue, the judge reminded herself of his evidence that he had lost sight of the men for a few seconds and then said this:

> "Now, it is at this point that he, losing sight of the men that the identification comes into issue. Because his evidence is after six seconds, they jumped over the fence, the second fence, and saw the accused on the premises, on Bishop Avenue. The accused is saying that this is a case of mistaken identification.
>
> So, I therefore warn myself of the special need for caution before convicting the accused in reliance of evidence of this identification. That is because I am aware that it is possible for an honest witness to make a mistaken identification and even, too apparent, a convincing witness can be mistaken.
>
> That is why I have sought to examine carefully the circumstances in which the identification by the witnesses were led."

[42] The judge then went on to rehearse in detail the evidence of Constable Bessick and Sergeant McLeod, including the evidence of the time that they had the appellant in their view, the fact that the incident took place in the daytime and that there was nothing obstructing the witnesses' view of the appellant. She also reminded herself of the discrepancies in the evidence of both witnesses as regards the appellant's clothing, resolving them in the manner already referred to (at paras [34] and [35] above). However, the judge was obviously less than impressed by Sergeant McLeod's evidence, describing his purported sighting of the appellant as "a fleeting glance", clearly showing, in our view, that she approached the evidence with a careful and discriminating eye.

[43] It seems to us that, both in her directions and in her review of the evidence of visual identification, Beckford J did enough to satisfy the ***Turnbull*** requirements, including setting out fairly the appellant's defence, which was that he was an innocent bystander and had nothing to do with the shooting that took place that afternoon. ***Turnbull*** itself makes the point that, in giving the required directions on the need for caution in identification cases, the trial judge "need not use any particular form of words" (per Lord Widgery CJ, at page 137) and we are clearly of the view that what Beckford J did in the instant case was substantially in conformity with the guidelines. Ultimately, it was a matter for the judge to decide whether she considered the evidence of identification to be reliable, having given herself adequate, even if not expansive, directions on the law.

The forensic evidence

[44] Although the judge considered that the identification in this case was made in difficult circumstances, she also thought that, in any event, "the visual identification does not stand alone, it is buttressed by the scientific evidence". This was a reference to the forensic analyst's finding that there was gunshot residue on the appellant's hands, in one case, at an elevated level and, in the other, at the intermediate level, and leads us to Mr Paris' second major complaint about the appellant's conviction. The concern, as we understand it, arises (i) from the absence of any reference by Miss Spencer, who received the samples at the laboratory, to the receipt number which Corporal Forbes testified that had been assigned to it, and (ii) from the absence of any

evidence of what became of the swabs which were taken of the hands of the policemen who had been involved in the shooting incident. Both these matters, it was submitted, gave rise to 'chain of custody' issues, as well as questions of whether the sample of swabs taken from the appellant could have been mixed up with those taken from the policemen.

[45] In ***Damian Hodge v R*** (HCRAP 2009/01, judgment delivered 10 November 2010), a decision of the Court of Appeal of the Virgin Islands, Baptiste JA said this:

> "The underlying purpose of testimony relating to the chain of custody is to prove that evidence which is sought to be tendered has not been altered, compromised, contaminated, substituted or otherwise tampered with, thus ensuring its integrity from collection to production in court. The law tries to ensure the integrity of the evidence by requiring proof of the chain of custody by the party seeking to adduce the evidence. Proof of continuity is not a legal requirement and gaps in continuity are not fatal to the Crown's case unless they raise a reasonable doubt about the exhibit's integrity."

(See also ***R v Larsen*** [2001] BCSC 597, per Romilly J, at paras [61] – [66]; and ***Grazette v R*** [2009] CCJ 2 (AJ), at para. [43].)

[46] It follows from this statement of the legal position, which we accept and adopt, that the purpose of establishing the chain of custody of the envelope containing the swabs taken from the appellant was to demonstrate its integrity, so that the court could be satisfied that the sample which was examined by the analyst was that which was taken from him. This is not so much a legal issue, as it is one which goes to the degree

of reliance which the court can properly place on the findings of the analyst in the particular circumstances of this case.

[47] There is absolutely no suggestion in the evidence that the integrity of the sample was in any way compromised at any stage, whether in the actual physical custody of Corporal Forbes, in storage in the refrigerator at the CIB Headquarters between 29 April and 15 May 2007, or in the custody of Mrs Dunbar and her staff at the Government Forensic Laboratory. While we accept that it would have been helpful to know what became of the samples which were said to have been taken from Constable Bessick and his colleagues on 29 April 2007, we have been unable to see in what respect this lacuna in the evidence could possibly avail the appellant. As for the suggestion that those samples may have somehow been "mixed up" with that taken from the appellant, we are bound to say that, in the absence of any evidence whatsoever to support, can only be regarded as fanciful.

[48] The appellant's complaint about the custody of the sample and, by extension the reliability of the results of the forensic analysis not having been made good, it therefore seems to us that the learned trial judge was fully entitled to treat the forensic evidence as a factor which confirmed the reliability of the evidence of visual identification.

The good character directions

[49] It is not in issue that the appellant put his character in issue in this case, although, as Mr Taylor pointed out, no evidence was adduced as to whether or not he had any previous convictions. Mr Gong's evidence was plainly directed to establishing

that the appellant was a serious and reliable person, employed to a security company, and to whom a responsibility of trust had been assigned by a financial institution. He was, in short, if this evidence was accepted (and no reason was advanced in this case why it should not have been), a person of good character.

[50] In such circumstances, and the appellant having given evidence in his defence, it is beyond controversy that he was entitled to a direction from the judge as to the relevance of his good character to (a) his credibility, and (b) to the likelihood of his having committed the offences for which he was charged (***R v Vye*** [1993] 3 All ER 241, 248, per Lord Taylor of Gosforth CJ; ***R v Aziz*** [1995] 3 All ER 149, 156, per Lord Steyn; ***Michael Reid v R***, SCCA No. 113/2007, judgment delivered 3 April 2009, para. [17], per Morrison JA; ***Steven Grant v R*** [2010] JMCA Crim 77, para. [132], per Harris JA; and ***Nurse v R***, CA No. 34/2004, para. [32], per Simmonds CJ).

[51] After reminding herself of Mr Gong's evidence in the instant case, the learned trial judge said this:

> "A good character evidence [sic] by itself cannot provide a defence to a criminal charge but I expect this should be taken in the accused man's account."

[52] This direction was not only "economical", as Mr Taylor put it, but it was also incomplete and therefore apt to mislead. The evidence was plainly relevant to the questions whether the appellant's evidence should be believed over that of Constable Bessick and Sergeant McLeod (that is, his credibility), and whether the appellant was

the kind a person, given his background and the attributes of which Mr Gong had spoken, who would commit the offences for which he was charged (his propensity).

[53] The question which next arises, therefore, is what should be the consequence of the judge's failure to give a full and accurate good character direction in this case.

[54] As this court pointed out in ***Patricia Henry v R*** [2011] JMCA Crim 16, para. [50], the giving of such a direction in a case in which it is called for by the evidence is an aspect of the trial judge's duty to put the accused person's defence in "a fair and balanced way" (per Lord Steyn in ***R v Aziz***, at page 156). A failure to give the direction in an appropriate case can therefore have an impact on the issue of whether a defendant has been afforded a fair trial and may result in the quashing of the conviction. However, as the Board made clear in ***Noel Campbell***, which we have been discussing in another context, "The absence of a good character direction is by no means necessarily fatal" (para. [42]), since, as the Board had earlier observed (in ***Jagdeo Singh v The State*** (2005) 68 WIR 424, para. [25]), "Much may turn on the nature of and issues in a case, and on the other available evidence". (See also ***Michael Reid***, para. [44(v)], and ***Kevaughn Irving v R*** [2010] JMCA Crim 55, para. [12]).

[55] There are cases to be found on both sides of the line. In ***Jagdeo Singh***, the Board's conclusion (at para. [26]) was that, even when all other factors were taken into account, it could not be said that, "properly directed on the appellant's credibility, the jury would inevitably or without doubt have convicted". In ***Teeluck and Anor v The***

State of Trinidad & Tobago [2005] UKPC 14, where the appellant's credibility was said to be "a crucial issue", the Board felt unable to conclude "that the verdict of any reasonable jury would inevitably have been the same if [the direction] had been given" (para. [40]). Similarly, in ***Noel Campbell*** itself, in which the credibility and reliability of the single prosecution witness "stood effectively alone against the credibility of the appellant's denial [on oath] of any involvement", the Board considered (at para. [45]) that "The absence of a good character direction…deprived him of a benefit in precisely the kind of case where such a direction must be regarded as being of greatest potential significance". ***Patrick Forrester v R*** [2010] JMCA 71 was an identification case in which the appellant gave evidence of his good character, but the trial judge failed to give a good character direction. Speaking for this court, Harris JA considered that had the judge done so, "this would certainly have been of some value as it would have been capable of having some effect on the outcome of the trial…she might have viewed the evidence in a different light" (para. [22]). In all these cases, the convictions were quashed as a result of the trial judge's failure in each to give an appropriate good character direction.

[56] Cases on the other side of the line include ***Balson v The State*** [2005] UKPC 2 (at para. [38]), in which the Board concluded that a good character direction would have made no difference to the result of the case, as any assistance that such a direction might have given was "wholly outweighed" by "the nature and coherence of the circumstantial evidence". A similar result was reached by the Board in ***Bhola v The State*** [2006] UKPC 9, in which the prosecution's case rested on the principle of

common design. The appellant's co-defendant gave evidence in his own defence in which, in seeking to exonerate himself, he implicated the appellant, and this evidence was not challenged by the appellant in cross examination in any respect. The Board considered (at para. [19]), as had the Court of Appeal of Trinidad & Tobago, that this provided "the clearest possible confirmation of certain critical elements of [the complainant's] story", particularly when added to the appellant's "bizarre account" of what had happened in the case. In these circumstances, the Board concluded, it was "difficult to see how a 'good character' direction could conceivably have made a difference" to the appellant's conviction (see also ***Brown v R*** [2005] UKPC 18, and ***Simmons v R*** [2006] UKPC 19).

[57] The test is therefore whether, having regard to the nature of and the issues in the case and taking into account the other available evidence, a reasonable jury, properly directed, would inevitably have arrived at verdict of guilty.

[58] It seems to us that, had the evidence of visual identification stood alone in the instant case, the matter might have been finely balanced, given the contest of credibility between the evidence of Constable Bessick and Sergeant McLeod, on one hand, and the appellant on the other. In these circumstances, it may well have been difficult for the Crown to maintain that an adequate good character direction would have had no value to the appellant.

[59] However, that evidence does not stand alone, given the forensic evidence in the case. That evidence was, it will be recalled, that the examination and analysis

performed on the swabs taken of the appellant's hands had revealed the presence of gunshot residue at an elevated level on the left palm and the back of his left hand. The presence of gunshot residue at intermediate level was also detected on the appellant's right palm and the back of his right hand. On the unchallenged evidence of Mrs Dunbar, the finding of gunshot residue at an elevated level would have arisen either from "firing a firearm" or "being in the direct path of gunshot residue as it is emitted from a firing firearm, within a distance of 9 inches". Gunshot residue at intermediate levels, on the other hand, would arise either secondarily from an initial deposit at elevated level dissipating with the passage of time and activity, or from being in the direct path of gunshot residue as it is emitted from a firing firearm within a distance of 18 inches.

[60] In our view, these hypotheses are not only consistent with the policemen's account of the appellant's involvement in the shooting incident on 29 April 2007, but they are also wholly inconsistent with the appellant's account, which was that he was an innocent bystander who had been wrongly identified. In the light of this evidence, we are clearly of the view that this is a case in which, even if Beckford J had given herself the benefit of a full and accurate good character direction, she must nevertheless inevitably have convicted the appellant. Any assistance that such a direction might have provided was in this case wholly outweighed by the nature and the cogency of the forensic evidence.

Conclusion

[61] In light of all of the foregoing, we have therefore come to the conclusion that this appeal must be dismissed and the conviction and sentences affirmed. The sentences are to run from 18 November 2008.