[2010] JMCA Crim 74

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 157/2008

BEFORE: THE HON MR JUSTICE PANTON, P
THE HON MISS JUSTICE PHILLIPS, JA
THE HON MRS JUSTICE M^{C}INTOSH, JA (Ag)

ORVILLE BROWN v R

Robert Fletcher for the appellant

Miss Meridian Kohler and Alwayne Smith for the Crown

19, 22 April and 3 December 2010

PHILLIPS, JA

[1] On 18 and 19 November 2008, the appellant was tried in the High Court Division of the Gun Court, holden in the parish of St James, for the offences of illegal possession of firearm (count one) and robbery with aggravation (count two). On 19 November 2008, he was convicted and sentenced to seven years and eight years imprisonment at hard labour, respectively. Both sentences were ordered to run concurrently. A single judge of appeal granted leave to appeal. On 17 June 2010, we dismissed the appeal and affirmed the convictions and sentences with an order that the sentences are to commence as of 19 February 2009. We promised to put our reasons in writing. This is a fulfilment of that promise.

The case for the prosecution

[2] The prosecution called two witnesses; the virtual complainant Mr Kemar Tomlinson and Detective Constable Courtney Ellis, the investigating officer. Mr Tomlinson gave evidence that at approximately 3:45 a.m. on 9 October 2008, he was at the Bay West Plaza in Montego Bay, Saint James. He had parked his taxi under a street light and had gone to purchase certain items from a cane cart man and on his return to his car, two men came up to him from behind, stood on either side of him and held him up; one of them with a handgun. The man on the left side of him asked for $100.00 which he said he did not have. The said man then asked him to turn out his pockets, which he did and took out his wallet at the same time. This man whom he later identified as the appellant, asked him how much money was in the wallet and when he told him it was $7,000.00, the appellant took the wallet from him and told him, "fi walk off and nuh look back". He described the hand gun held by the man to the right of him and said that as he was under the street light he was able to see it clearly. He was also able, by the said street light, to see the faces, and the whole of the two men who robbed him. He said that they both had on peak caps on their heads; one had on a black cap and the other had on a white one, but he was able to see the appellant's face from his "forehead come down" and the face of the man who accosted him on the right, "from him eye come down". Otherwise, he was able to see the "whole of them", as they were about two feet from him. He said that he saw their faces for about 3-4 minutes.

[3] After the men left, he drove his vehicle to the Freeport Police Station and made a report. He then returned with the police to the Baywest Plaza where the incident took place, in search of the men who had robbed him. It was his evidence that he was driving on Union Street in front of the police, when he saw one of the men in a lane near a club and he pointed him out to the police. He said that person was the assailant who had been on his left, whom he then said was the man with the gun, contrary to what he had said in evidence earlier. He said that the person was wearing a black hat, a black T-shirt and blue jeans pants and had on the same clothes that he had been wearing earlier when he had robbed him, but in his evidence earlier, he had not identified which of his assailants had on a black hat. The appellant was apprehended by the police and taken to the station.

[4] Mr Tomlinson testified that it was not the first time that he had seen his assailants, as before he started to operate his taxi, which he had been doing for about one year before the incident, he had been a conductor on a bus for about six years, and he had seen these men in the Montego Bay Bus Park, "all the while". He could not remember when last he had seen them, but he knew that he had seen them, "more than one time". In fact he made this statement, to which surprisingly there was no objection, "A nuh the first time me see dem do dem something deh but a nuh wid me, you understand". Toward the end of the examination in chief he was asked yet again about his knowledge of the appellant during the period that he used to 'run bus' and he said, "Really an truly, a whole heap of time mi see him". The bus route was from Negril to Montego Bay and he would sometimes see the appellant four times for the week. He

never exchanged any words with him at any time and did not know his name. He said, "Mi see how him behave all the while, so through that, mi stay far".

[5] In cross examination Mr Tomlinson was challenged that he could not have seen the men for as long as 3-4 minutes. He insisted that he had. He was asked whether with one man on either side of him, he could have seen the faces of either, in particular the appellant's face for that period. His response was, "Mi did a look pon the two of them because mi nuh know what dem up to". It was put to him that the police did not take the appellant directly to the police station but on a winding route in Montego Bay and all the way down to the foot of "Long Hill" where they stopped the vehicle, and when he drove up the policemen said to him, "is him dis?", to which, he responded, "I am not sure". Mr Tomlinson vehemently denied this. He said, "any way me see dem me know dem. Any way me see the next one, me nuh know a name, me can identify dem any way me see dem. me can identify dem." It was suggested to him that he was mistaken in respect of the appellant and his response was, "Nothing like that me know him definitely. He cannot miss me". Finally it was suggested to him that it was not true when he said that he had known the appellant from the bus park many years ago, as he did not know him at all. Mr Tomlinson's response was, "Of course, him can't hide me. A something way him do already but a no wid me. Him say...one him can't hide".

[6] Detective Constable Courtney Ellis, the investigating officer also gave evidence. He testified that one night in October 2008, Mr Tomlinson attended on the Montego Bay Police Station at about 4:00 a.m. and made a report which led him to go with Mr

Tomlinson to the bottom of Union Street and Strand Street where at about 6:00 a.m. Mr Tomlinson identified the appellant as one of the persons who had robbed him. He was searched and $3,000.00 found on him, which he said belonged to him. The appellant was apprehended and taken to the station. He recorded a further statement from Mr Tomlinson. The appellant was arrested and charged. After being cautioned, he said, "me no know nothing bout dat".

[7] In cross examination Detective Corporal Ellis denied taking the appellant to Flankers and around Montego Bay and to "Long Hill" foot. He said that Mr Tomlinson had driven behind the police car to the police station, and he denied any confrontation between the appellant and Mr Tomlinson at "Long Hill" foot. He also denied having taken $2,000.00 from the appellant's pocket and giving the same to Mr Tomlinson.

The case for the Defence

[8] Counsel for the defence Miss Sharon Barnes made a no case submission on the basis that the identification of the accused man was tenuous. The learned trial judge ruled that there was a case to answer. The appellant made an unsworn statement. He said that on the night in question at about 4:30 a.m. he was at "Bottle" with a girl. He said the police directed him into the police car, and he said, "I don't know nothing, bout nothing". He was taken to Flanker, Norwood, Devon and past the Freeport Police Station and when he inquired about his destination and the fact that they were driving past the station, a bag was placed over his head. He said he feared that the police were going to kill him. He prayed for his safety. He said he did not see anywhere else on the

journey, and when the car stopped, the bag was taken off his head. A car drove up and the police inquired of a young man whether this was the man who had robbed him, and he responded that he was not sure. Nonetheless the police, he said, took $2,000.00 from him and gave to the young man. The appellant was in effect denying the Crown's case and saying it was not him who had committed the robbery.

The appeal

[9] The appellant filed two grounds of appeal on 14 December 2008. At the hearing of the appeal those grounds were abandoned and Mr Robert Fletcher for the appellant sought and was granted leave to argue three supplementary grounds of appeal, filed on 15 April 2010. These are set out below.

Ground of appeal one

> The learned trial judge erred in admitting the evidence of similar fact and having admitted it made improper use of it in his consideration of the evidence.

[10] Counsel for the appellant complained at first that similar fact evidence arose in two places in the evidence. In examination in chief of Mr Tomlinson on page 12 line 2 of the transcript, where he said:

> "A nuh the first time me see dem do dem something deh but a nuh wid me, you understand."

And on page 19 line 10:

> " Mi see how him behave all the while, so through that mi stay far."

It was counsel's contention that although the information provided by the witness appeared to be spontaneous, it was not lost on the learned trial judge and informed his ruling on the no case submission, as the judge said that the previous activity, noted by the virtual complainant, related to the question of identification as it was the reason that the appellant "stood out". Counsel submitted that the judge considered the admissibility of this "similar fact" evidence and used it thereafter for believing the identification evidence of the complainant.

[11] In his written submissions, counsel referred to the House of Lords case of ***DPP v P*** [1991] 2 AC 447, for the proposition that where the identity of the offender is in issue, similar fact evidence, (in addition to being relevant) must always provide something in the nature of a signature or other special feature. He submitted though that in relation to identification evidence and the applicability of this principle of law, the law is evolving. Counsel argued that in ***John W*** [1998] 2 Cr App R 289, "the court disapproved any rigid rule, recognizing that there could be circumstances where relationships of facts in time and circumstances could be of sufficient probative value to justify admitting and relying on such evidence in identification cases". In the case at bar, he submitted, there was neither signature, special feature nor relationship in time and circumstances.

[12] At the hearing of the appeal having had sight of and reviewed Crown Counsel's submissions, counsel submitted that he was then strengthened in his view that the evidence ought not to have been admitted as similar fact evidence, as Crown Counsel agreed that the evidence could not be construed as similar fact evidence, but he did not accept that it could be and had been treated as background or explanatory evidence as contended by the Crown. He referred to the authorities cited by Crown Counsel and in particular ***Kemar Williams v R*** SCCA No. 142/2001 delivered on 20 December 2004, pages 7-10 indicating that the facts were different in the instant case and that the principle was not applicable. He said that:

> (1) in the cited cases the activity took place almost contemporaneously with the acts that the accused was charged with;
>
> (2) evidence given by the witness related to an event which had happened to him personally and therefore it was reasonable for him to remember the accused.

In the instant case neither of those ingredients was present. Indeed, he submitted, what categorised the case at bar was the lack of particulars as to that which was complained of: in relation to the impugned evidence and its relevance to the appellant, he queried, when, where, how, and in what circumstances did those activities occur? What were they wearing? What was the lighting condition like? The answers to these questions he submitted were important even if the evidence was being adduced merely as background/explanatory evidence. On what basis, he asked, could the impugned evidence have been acceptable when given in such unspecific terms? He submitted finally, that the threshold for explanatory evidence required some detail and

particularity or the prejudicial effect would far outweigh its probative value. In the instant case, the disparity was great, and the learned trial judge had therefore admitted and considered evidence that ought not to have been admitted.

Ground of appeal two

> The learned trial judge's consideration of the identification evidence was deficient.

[13] Counsel for the appellant submitted that there were several facts relating to the identification of the robber which were not in issue. These are set out below:

(i) that the incident occurred at about 3:45 in the morning;

(ii) that although it took place under a street light the men had on hats covering down to the eyebrows at least;

(iii) that the men came up suddenly and were at all times positioned one on the left and one on the right;

(iv) that the complainant viewed them for about 3-4 minutes looking from side to side;

(v) that the men told him not to look as they left;

(vi) that the last time he would have seen the accused was at least 12 months before; and

(vii) that he has never spoken to the accused.

Counsel noted that the learned trial judge had looked very carefully at the evidence of identification and the inferences that he could or could not have drawn from the same. He did not challenge any of the inferences. He noted that the learned trial judge found that based on the evidence of what the complainant said had occurred, the entire

incident could not have lasted for more than 2-3 minutes, as against the estimated time of 3-4 minutes given by the complainant. Counsel therefore challenged the opportunity to properly observe his assailant in that time, bearing in mind the cap on his head and the fact that the assailants were on either side of him, which would make their identification punctuated, by looking from one person to the other. The complainant also took out his "billy", as directed and that would also have distracted him somewhat from focusing on the faces of his assailants. Counsel challenged the "recognition" of the assailant having really viewed him from behind, (as he was told to walk and not look back), particularly when he had shown a confusion with regard to which of the men, whether the one to his right, or to his left, had the handgun at the material time. This failure, he said, to be able to say who did what, pointed clearly to the fact that the quality of the identification was not strong. The assailants came up suddenly from behind, he did not see where they came from, and the time to observe them was short.

[14] Counsel referred the court to two particular passages in the trial judge's summing-up. These were page 68, lines 19 -23 which state:

> "... what he was saying was, I know the faces of these two men because of their – my prior knowledge of them; six years in the bus park and the antisocial activities in which they were engaged."

and on page 71, lines 6 - 12 where the learned trial judge indicated:

> "That length of time to me is more than counter balanced by the fact that the witness indicated as I said, several occasions about the anti-social activities of Mr Brown and why it is that Mr Brown would have come to his attention and of course make a special note of him."

Counsel contended that it became abundantly clear, that the learned trial judge was weighing the weaknesses in the identification evidence, against his conclusion that the anti-social activities of the appellant, and his accomplice, would have given the witness reason to have remembered the appellant. Counsel reiterated his submissions made in respect of ground one; that there was no evidence as to the particulars of this anti social behaviour, for example, when did he see them and where? He submitted therefore that it begs the question: Were it not for the reliance on these previous alleged robberies would the learned trial judge have been satisfied with the standard of the evidence? Indeed would he not have found the quality of the identification evidence very weak so that the appellant would have been acquitted? Counsel submitted that the approach taken by the learned trial judge was flawed in this respect, and the verdict of guilty was unsafe and should be set aside.

Ground of appeal three

The verdict is unreasonable having regard to the evidence.

[15] Counsel indicated to the court that it was his understanding that to succeed on this ground the evidence must be very very poor, and that not being so in the case at bar, he withdrew this ground from the consideration of the court.

In Reply

Ground of appeal one

16] Crown Counsel in written submissions and at the hearing of the appeal,

submitted that counsel for the appellant, concluding that the learned trial judge had admitted evidence based on the principle of similar fact evidence, may have been based on the learned trial judge's reference to and comments on the ancient authority of ***Makin v Attorney General of New South Wales*** [1894] AC 57; 68 on pages 48 and 49 of the transcript. However on a closer examination of the summing up it was clear that the principle employed by the learned trial judge was that of background/explanatory evidence. Counsel in her thorough submissions detailed the difference between the two principles and identified the cases and excerpts from leading texts in support of her contention.

[17] Counsel submitted that, "the rationale for similar fact evidence is that two or more persons do not make up or mistakenly make similar allegations against the same person independently of each other", (David Robert Ryder [1994] 98 Cr App R 242; 250.) In the case at bar, the evidence was only from one source, Mr Kemar Tomlinson. Further, on the authorities of ***Makin; DPP v Boardman*** [1975] AC 421; and ***DPP v P***, the details to support the prior circumstances of misconduct in order to ascertain their comparative similarity were absent and were not adduced, which counsel submitted supported the point that similar fact evidence was not being relied on. It was counsel's further submission that the learned trial judge's reference to ***Makin*** was merely to underscore the exclusionary rule and not for the similar fact evidential value. She suggested that the use of the word "similar" was in its common sense, and not in the similar fact evidential context. Finally, she said that even if the learned trial judge's

references were to be construed otherwise, it was clear that the principles utilized by the learned trial judge were not those of similar fact evidence.

[18] With regard to the common law principle of background/ explanatory evidence, counsel submitted that the rationale could be stated thus: "Where it is necessary to place before the jury evidence of part of a continual background of history relevant to the offence charged in the indictment and without the totality of which the account placed before the jury would be incomplete or incomprehensible, then the fact that the whole account involves, including evidence establishing the commission of an offence with which the accused is not charged is not of itself a ground for excluding the evidence" (unreported judgment of Pettman, Court of Appeal, 2 May 1985, quoted in ***R v Steven*** Crim. L.R. 649; 652). Counsel relied on the commentary to the case note which states:

> "It is surely beyond argument that evidence of background should normally be admitted. In deciding the criteria for doing so, it is submitted that such evidence needs to be carefully distinguished from so called similar fact evidence. Similar fact evidence is employed as evidence which tends strongly to prove a particular fact (identity, intent, causal connection or whatever) which could be proven by other means but which the prosecution has chosen to establish by reference to other misconduct of the accused.
>
> ... background evidence, on the other hand, has a far more dramatic but no less important claim to be received. It is admitted in order to put the jury in the general picture about the characters involved in the action and the run up to the alleged offence. It may or may not involve prior offences; if it does so this is because the account would be as Purchas LJ says 'incomplete or incoherent' without them.

> It is not so much that it would be an affront to common sense to exclude the evidence, rather that it is helpful to have it and difficult for the jury to do their job, if events are viewed in total isolation from their history."

[19] Counsel referred to and relied on several authorities, namely, ***Kemar Williams, Marcello D'Andrea*** SCCA No. 77/1998 delivered on 26 March 1999, ***Bruce Golding and Damion Lowe v R*** SCCA Nos. 4 & 7/2004, delivered 18 December 2009, ***R v Cholan*** [2006] 1 Cr App R 3, Blackstone's Criminal Practice, 2007, Dennis, The law of Evidence, 3rd Edition. In Blackstone's Criminal Practice at paragraph F 12.7, it states:

> "Where an offence is alleged it may be necessary to give evidence of the background, against which the offence is committed even though to do so will reveal facts showing the accused in a discreditable light."

Counsel then referred to several passages in the learned trial judge's summing-up where she said the learned trial judge relied on the impugned evidence from the virtual complainant to show prior knowledge of his assailants in support of the visual identification of the appellant.

[20] Counsel also relied heavily on the ***Cholan*** case which related to a witness who had seen the accused running away from the scene of a robbery and gave evidence that she was able to recognize him as she was a regular purchaser of heroin from him and over a period she used to see him every other day. She was taking heroin from him 3-4 times a day and used to meet him often close to where the crime took place. The frequency of their encounters was adduced under gateway c of section 101 (1) of the

Criminal Justice Act 2003 of the United Kingdom (which counsel submitted was a codification of the common law in respect of explanatory evidence). The judge admitted the evidence as, in his view, it would have been difficult to understand other evidence in the case without it, as it went to "the heart of matters". This was upheld on appeal as the court said that it was only if that evidence was admitted that the witness could sensibly explain the basis for her being able to identify the applicant in the circumstances of that case.

It was Crown Counsel's submission that the directions of the learned trial judge in ***Cholan*** and the case at bar were indistinguishable on the admission of the impugned evidence and the use to which it was made.

[21] Counsel submitted that the Turnbull guidelines indicate that the jury should consider the circumstances in which the witness came to make the identification. The learned trial judge stated that he was relying on the impugned evidence for the purpose of showing why the appellant would have come to the witness' attention and why the witness would remember him. The evidence was therefore only utilized for the sole purpose of strengthening the identification evidence of prior knowledge of the appellant. It matters not what the accused was involved in, as the evidence was not being relied on in that way and the learned trial judge disclosed that there was no such reliance.

[22] It was finally submitted that it was not necessary for the anti social activities to have been personal to the witness, or be the subject of direct evidence as submitted by

counsel. It is a matter of his perception and what he saw. It was also not necessary for further detailed evidence to be adduced from the witness of the said anti social behavior. The evidence given by Mr Tomlinson as set out earlier at paragraph 10 herein, required no further elucidation, particularly bearing in mind the purpose for which it was being relied on.

Ground of appeal two

[23] Crown Counsel relied on her submissions on ground one and stated that the learned trial judge considered all the evidence on identification and was correct in relying on the impugned evidence in support of the identification evidence. Counsel produced a chart giving a comparison of the factors relating to identification evidence in the ***Cholan*** case and the instant case indicating that the court had similar factors under consideration. It may be useful to reproduce it here as counsel relied on it heavily.

Factors	**Cholan**	**Brown**
1. Time of incident	(not known)	4:30 a.m.
2. Wearing of headgear	A hat	Peak cap down to his forehead
3. Prior Knowledge	One year	Six years
4 Lighting	(not known)	Streetlight
5. Distance	(not known)	2 feet away
6. Identified to the police	Identification Parade	Pointed out shortly after to the police

7. Reason for recollection	Heroin dealer	Known robber
8. Observation of face	'a minute or so'	Less than 2 minutes
9. When observation made	When Applicant was running away	Standing still
10. Other evidence in support of identification	None	None

[24] Counsel then pointed to the strength of the identification in the instant case. She conceded that the witness did appear a little confused with regard to whether it was the appellant who was supposed to have been on the left of him, had the gun. But, she said in all other aspects the identification evidence was strong. It was not a fleeting glance case, there was time for observation, he had seen the men before, there was time for dialogue, the incident happened at 3:45 a.m. and the appellant was apprehended at 6:00 a.m. that same morning. That, counsel submitted, was an added reason for recollection of the appellant by the witness. The learned trial judge, counsel submitted, had recounted the evidence accurately and in great detail. His summing-up was correct on all material matters, and the verdict of guilty should be upheld.

Analysis

Grounds of appeal one and two

[25] Three issues arose on this appeal:

(1) Was the impugned evidence admitted as background/explanatory evidence and not similar fact evidence?

(2) If so, was proper use made of the evidence?

(3) If not, was the identification evidence sufficiently strong to dispose of the appeal in any event?

On any perusal of the leading authorities on the subject, to wit, ***Makin; DPP v Boardman; DPP v P; John W,*** similar fact evidence (generally inadmissible save in certain circumstances) embraces the following-

(i) Evidence tending to show that the accused is guilty of other acts than those for which he is charged, is admissible (a) only if the issue is whether the acts charged against the accused were designed or accidental or unless to rebut a defence otherwise open to the accused, (***Makin***) or (b) because of the striking similarity to other acts being investigated and because of their resulting probative force, (and it was for the judge to decide and rule accordingly, whether the prejudice to the accused was outweighed by the probative force of the evidence) - ***DPP v Boardman.***

(ii) In all cases, the essential feature of admissibility of evidence in respect of one victim in connection with an offence against another is a question of whether the probative force of such evidence was so great as to make it just to admit it notwithstanding that it was prejudicial to the defendant in that it indicated that he had committed another crime, and the question as to whether such

evidence had sufficient probative value was always one of degree - ***DPP v P.***

(iii) Evidence tending to show that an accused had committed an offence on one count may be used to reach a verdict on another count but only if the circumstances to both offences are such as to provide sufficient support for that conclusion, and it would be fair to do so, bearing in mind the potential prejudice to the defendant. Striking similarities may do so but are not pre-requisites - ***John W.***

[26] It is clear on the facts of this case that the evidence referred to in paragraph 10 herein, could not and was not similar fact evidence. As indicated earlier, counsel for the appellant originally submitted on this, which was conceded by Crown Counsel to be so, and therefore both counsel having accepted that the evidence was not similar fact evidence, which we agree was correct in law, no more need be said about that, except when we look at how the learned trial judge treated with the said evidence in his summing-up.

[27] ***Kemar Williams***, was a case in which the Crown had led evidence from an eye-witness to a murder which included a subsequent attack on him. The admissibility of the evidence of the attack was challenged on appeal, on the basis that it was irrelevant to the appellant's trial as he was only charged for the murder, and that it showed or tended to show that the appellant had a propensity for violence. The conviction was affirmed and this court held that the evidence was correctly led in support of the visual

identification evidence. Harrison JA (Ag), as he then was, in delivering the judgment of the court stated at pages 8-9 thus:

> "We are of the view that the evidence complained of was elicited by the prosecution in order to strengthen the visual identification in the case. The events that led up to the slashing of the throat of McDonald allowed further contact between the witness and the appellant. This contact would have allowed the witness greater opportunity to identify the appellant. The evidence was therefore brought in as part of the narrative and in the circumstances its probative value far outweighed the prejudicial effect."

[28] ***Bruce Golding and Damian Lowe v R*** is another authority on point. In that case, evidence was taken from one of the witnesses to show that the applicant had with others, pursued him and the deceased armed with cutlasses earlier the same day. The admissibility of this evidence was challenged as being irrelevant or alternatively that its prejudicial effect outweighed its probative value. Further, counsel for the applicant complained that even if the evidence was admissible, the learned judge had not assisted the jury in how the evidence should be approached. Morrison, JA in delivering the judgment of this court, and after referring to the oft cited speech of Purchas LJ in ***R v Pettman*** (an unreported judgment of the Court of Appeal delivered on 2 May 1985), indicated that ***R v Pettman*** was specifically approved in ***R v Anthony Sawoniuk*** [2000] 2 Cr App R 220, where Lord Bingham CJ, as he then was, said this, at page 234:

> "Criminal charges cannot be fairly judged in a factual vacuum. In order to make a rational assessment of evidence directly relating to a charge it may often be necessary for a jury to receive evidence describing, perhaps in some detail,

> the context and circumstances in which the offences are said to have been committed."

[29] Morrison JA then in particular reference to the evidence of the witness in the ***Bruce Golding*** case said.

> "... that the evidence of [witness] to which no objection was taken by either of the applicants at the trial, was clearly relevant and admissible, not only for the purpose of showing context and motive, but also as a factor which the jury would have been entitled to bear in mind when considering whether they could safely act on the evidence (particularly with regard to identification) of the later events of 3 December 2001. We therefore consider that the trial judge was correct when she told the jury that this was evidence which, if they accepted it, "may provide some background information of the circumstances leading up to the incident on the night of December 3, 2001" and that it was for them to decide "whether it offers any support to the evidence of identification given by [the witnesses]."

[30] It is therefore patently clear that evidence can be led and will be considered relevant and admissible if providing a background against which the offence was committed and particularly if it is adduced to strengthen the visual identification. The learned trial judge in this case, in his summing up, commented on the previous knowledge of the virtual complainant and the appellant and his accomplice, and why in his view they would have stood out to the appellant, and why he would have remembered them. The learned trial judge also went through the visual identification evidence, recognizing that there was no corroborative evidence and that he should therefore proceed with caution. He set out the evidence in great detail and then analyzed it in order to show how he had arrived at his findings.

There are two particular excerpts of the transcript dealing specifically with this aspect of the case which we have set out below, as on a close reading and perusal of the same it is obvious, that the challenged evidence which was admitted, also without any objection, was adduced to give a complete version of the narrative, to put the commission of the offence within its context, particularly the background of the anti-social activities of the appellant. The judge showed how the evidence was being utilized and in our view, the proper course was adopted by him and the learned trial judge cannot be faulted. At pages 58 and 59 the learned trial judge said this:

> "... he goes on to say however, that in the time when he has seen the accused man and his companion, they never exchanged words at any time, never knew his name. And according to him, the accused man behaved like that all the time. So he, the witness stayed far from him and he also indicated that towards the end of his examination-in-chief, a something him do already but not with me, so him can't hide me.
>
> So, what he is saying then is, look, because of the behavioral pattern of the accused man, I know him, I keep away from him, I never exchanged words, never know (sic) his name. But now he is involved in wrong doing and previous robbery but none of these involve (sic) him. So, as I said before, this is the context now in which the identification is being made. So, it would seem to me, that if a man is identified by the witness, as a man who is habitually involved in robbery and those kinds of activities, that would he a kind of activity that would cause most reasonable persons to recall who this robber is and as he said, keep away from him; and has he said again, is not the first time them do that kind of thing. So, there you have it. These are the reasons then why it would seem to me, the witness is saying the accused man stands out in his memory that is the fact to be taken into the account in assessing the identification evidence."

And at pages 68 -71, the following was noted in the transcript:

> "So, what do I make of all this evidence to date now. I also have to take into account, that at one point in his evidence, when he said he was giving the colours of the hat the men had on, he was not very clear as to what colour hat the defendant had on. But later on, he said, "when I pointed him out to the police, he was wearing a black hat, black shirt and blue jeans; the same thing he was wearing when I saw him first, but that was not his evidence. His evidence was "he could not remember which of the two men had on the hat". So, that is something that has to be taken into account as well. The witness was not purporting to identify the defendant by the colour of the hat, he was identifying in so far as the ultimate identification of the defendant was concerned, what he was saying was, I know the faces of these two men because of their - my prior knowledge of them; six years in the bus park and the antisocial activities in which they were engaged. So here, the evidence of prior knowledge can satisfy as good and remains so at the end of the Prosecution's case.
>
> The evidence of the lighting, I am satisfied so that I feel sure is good, and remains so at the end of the Prosecution's case. Albeit that he said at one point, the car park a little bit before it ketch a KFC under a stoplight. I was - I am satisfied that, so that I feel sure, that he was actually parked under a streetlight and there is no necessary incompatibility between stoplight and a streetlight being in close proximity to each other. At least to those of us who are relatively familiar with the streets of Montego Bay. So I am satisfied, so that I feel sure, that he was parked under a streetlight and that he was able to see.
>
> I take into account, the point made by Miss Barnes, that the peak cap would have cast a shadow over the face of these two persons. However, because of the close proximity the witness indicated the defendant was from him, any difficulty that a peak cap might have posed, was reduced significantly because of the close proximity and also, one has to bear in mind that I observed the difference in height between the witness and the defendant. The witness is not really the words (sic) tallest man, so this is not a situation where his

eye level would be more of the level of the peak cap. So, from my estimation of the height of the accused man and the height of the witness, the witness' eyes would actually be below the peak cap; from 2 feet away, would be looking virtually in the face. You could almost feel the breath of the person if you were that close and he says he is turning now from one person to the other person, and that to my mind, taking into account the undoubted stress the gentleman would have been experiencing at that time, is not sufficient to the movement of the head. It is not such for me to say he did not have a good look, so that I am satisfied, that I feel sure that the witness had sufficient time to make the identification of the, of these persons, in this case, the defendant.

Persons who were known to him before, albeit that he had not seen them or seen the defendant for some time, possibly a 12 months before the incident, since he says he is now a proud operator of his own taxi and no longer subject to the vagaries of his former employer when he was a conductor on the bus and having regard to ... so that is a weakness in the identification evidence but that is not a weakness that makes me say, I have doubts as to whether the witness has made the correct identification. That length of time to me is more than counter balanced by the fact that the witness indicated as I said, several occasions about the antisocial activities of Mr Brown and why it is that Mr Brown would have come to his attention and of course make a special note of him. And I supposed, if you are still operating within the transport sector, then clearly, it is in your interest to be able to quickly recognize persons who may be involved in robbery and all that kind of thing; he may have picked him up one late night.

So those are reasons that cause me to say that Mr Tomlinson had good reasons to remember Mr Brown, so that I am satisfied, so that I feel sure, that what Mr Tomlinson saw on the night of (sic) question is a firearm.

For the purpose of this indictment, he had met the criteria laid down by the Court of Appeal."

[31] In our view, any possible prejudicial effect of the evidence of the anti social activities was far outweighed by its probative force. Additionally, we agree with Crown Counsel that it was not necessary for these activities to be personal to the witness nor for any more detail to be given. The observation of the men for a period of over six years was sufficient, and as counsel submitted, required no further elucidation.

[32] Issues one and two would therefore be answered in the affirmative. With regard to issue three, the following should be noted, which was also recognized by the learned trial judge: Although the incident may only have lasted 2-3 minutes as found by the learned trial judge, the incident took place under a streetlight, the appellant was standing to the left of the complainant only two feet away, and there was nothing covering his face. He had on a cap which only reached his forehead and so the complainant would have been eye to eye with him, and been able to see the whole of his body. The complainant was able to describe the gun held by the accomplice, and the fact that he had seen them over a period of about six years and would have seen the appellant three to four times a week, made the time and the opportunity to observe the appellant reasonable in all the circumstances.

[33] We therefore did not agree with counsel for the appellant that the visual identification was poor or weak. In fact, as outlined above, the identification evidence was quite strong. The impugned evidence only helped to strengthen it. Issue three would also be answered in the affirmative. Grounds one and two must therefore fail.

[34] As a consequence of all of the above, we dismissed the appeal and ordered that the sentence was to commence on 19 February 2009.