**[2013] JMCA Crim 60**

**JAMAICA**

**IN THE COURT OF APPEAL**

**SUPREME COURT CRIMINAL APPEAL NO 34/2011**

**BEFORE: THE HON MR JUSTICE MORRISON JA**
**THE HON MISS JUSTICE PHILLIPS JA**
**THE HON MS JUSTICE LAWRENCE-BESWICK JA (Ag)**

**JERMAINE CAMERON v R**

**Mrs Jacqueline Samuels-Brown QC for the applicant**

**Mrs Sharon Millwood-Moore for the Crown**

**3, 4 June, 14 October and 29 November 2013**

**MORRISON JA**

[1] On 29 March 2011, after a trial before Brown J without a jury in the High Court Division of the Gun Court sitting in the parish of Saint Mary, the applicant was convicted on all three counts of an indictment charging him with illegal possession of firearm (count one) and robbery with aggravation (counts two and three). On 31 March 2011, he was sentenced to 10 years' imprisonment at hard labour on count one and 15 years' imprisonment at hard labour on each of counts two and three. The court ordered that the sentences should run concurrently.

[2] The applicant's application for leave to appeal against his conviction and sentence was refused by a single judge of this court on 27 April 2012 and, on 3 and 4 June 2013, his renewed application for leave was heard by the court itself. At the end of the hearing, the court reserved its decision and, on 11 October 2013, announced that the application would be refused. It was ordered that the applicant's sentence should run from 31 March 2011. These are the promised reasons for the court's decision.

[3] At the trial before Brown J, the applicant relied on the defence of mistaken identity and set up an alibi. As was the case below, identification is the single issue that arises on this renewed application.

[4] At the outset of the hearing, Mrs Samuels-Brown QC moved an application for the admission of fresh evidence pertaining to the state of the applicant's mental health before the offences for which he was charged were allegedly committed. We were told by Mrs Samuels-Brown that this evidence, which was contained in an affidavit sworn to on 15 May 2013 by Mrs Brenda Cameron, the mother of the applicant, was primarily directed at the issue of sentencing. It was decided that the court would defer a ruling on the application to adduce fresh evidence pending the hearing of the substantive application and we will therefore return to this matter at a later stage of this judgment.

[5] The charges against the applicant arose in the following way. In the early morning of 5 September 2010, Mr Alwayne Hannam ('the complainant') was asleep in his bed at his home in Content District, Castleton, in the parish of St Mary. The complainant's girlfriend was in bed with him. Earlier, in preparation for bed, the complainant had taken steps to secure the house. However, the lock on the door to the bedroom was

not working properly, so that, although the door “did draw up”, it was not locked. Before retiring, the complainant had turned off all the lights in the room. However, he had plugged in and turned on what he at first described as a bedside lamp, but later confirmed, in response to the judge’s enquiry, to be “one of those little night lights that you plug right in the socket”.

[6] At a point between 2:00 and 3:00 am, the complainant was awakened by “strange sounds” inside the house. Once awake, he heard a “big bang”, as if the door to the bedroom had been kicked open. As he heard the bang, he sat up in the bed and he saw a man standing at the door to the room about 10 feet away from him. From his sitting position in the bed, the door was straight ahead of him and he immediately recognised this man as someone previously known to him as ‘Stagger’. The man was wearing a “hoody”, which covered the back of his head and ears, leaving his face exposed. The complainant was able to see his “entire face, the eye, the nose, the skin tone and them thing”, including his mouth. The man remained in that position for “like about 2 seconds, bam bam, like him frighten when him see me”. He then “dressed back”, taking maybe about two steps backwards, out of the complainant’s sight.

[7] After about five to six seconds, the man came back into the room, now with a handgun in his hand. By this time, the hoody seemed like “it did flip back”, allowing the complainant to see his “whole face”. Immediately upon entering the room, he ordered the complainant and his girlfriend to get off the bed and told them both to go under the bed. When the complainant got out of the bed, the bedside light was still on and he and the man were within “like hand reach” of each other. The complainant and his girlfriend

complied with the order to go under the bed, since, as the complainant put it, "[w]ell, he had a gun, so I just have to obey his command". Once they were under the bed, the man demanded the complainant's gun and money. The complainant told him that he did not have a gun, but directed him to $12,000.00 in cash (his rent money) which was on an entertainment centre in the room. The man continued to demand other things, apparently not believing the complainant when he told him that there was no more money in the house. The complainant then heard sounds as though the place was being "pulled up". The man appeared to have a light, which he had turned on and was using to help in the search of the room. From his position under the bed, the complainant was able to see things, like books and lamps, falling to the floor. As the man continued, as the complainant put it, to "ransack" the place, he appeared to find some more money, shouting out, "Boy have more money, see more money yah because me find 6,000 more dollars."

[8] Apparently continuing the search for money, the man asked, "So weh the big gold chain you have?" The complainant answered, telling him where the chain could be found on the dresser in the room. (The complainant told the court that this was a chain that he regularly wore and that he would have been wearing it the last time he had seen the man about a week before.) The complainant then heard a voice coming from the other room in the house saying, "You boy, what you a do so long?", to which the man answered, "Me a come." Then the voice from the other room said, "Yuh nuh find nuh phone?", to which the answer was "Yes", followed by, "The boy have more things and me a go fuck the gal." The voice from the other room told the man not to "bother

with that him fi come on", but the man kept insisting, calling out to the complainant's girlfriend under the bed to come out, "mek me fuck you from the room gal", to which she replied that she could not come out.

[9] In due course, after hearing the voice from the other room again calling out "come on", and after being satisfied that both men had left the house, the complainant came out from under the bed. He turned on all the lights that were off. The place had indeed been ransacked and he could see that things were missing, including the $12,000.00 cash, his gold chain, two DVD players, a pair of sneakers, a digital camera, a silver bracelet and three cellular telephones. It turned out that access to the house had been gained from the back, through a window from which a pane of glass had been removed.

[10] The complainant said that Stagger was someone who lived in the area and who had been known to him for about three years. He was accustomed to seeing him very often, like three days per week, mostly during the daytime, because "he used to walk up and down the road". He also said that Stagger had been to his house once, about a month before.

[11] When he was cross-examined by the applicant's counsel, the complainant said that, when Stagger entered the room and ordered him under the bed, he did not hesitate, but simply followed orders, because he was surprised and frightened. He described the room as "a little 10 x 10 room". He confirmed that, from the time the intruder ordered him under the bed to the point at which he determined that the

intruder had left the house, he was not able to see his face. He also said that Stagger "wasn't a friend like a brethren but me know him and we hail we one another".

[12] The complainant's girlfriend was not able to add much to the complainant's account, beyond confirming that, at minutes to 3:00 am on the night in question, an unknown man, armed with what appeared to be a "silver looking" gun, had come in on them suddenly while they were in bed and ordered them under the bed. She was not able to see any parts of the man and, during the entire episode, while the man was searching around the room looking for money, she remained under the bed, frightened and nervous. When the intrusion was finally over, she discovered that $6,000.00 was missing from her purse, which she had left in her handbag. Two cellular telephones and her gold bracelet were also missing from the handbag, which had been thrown down on the ground.

[13] The investigating officer was Detective Sergeant Errol McKenzie of the Annotto Bay Police Station. Having visited the complainant's home in Content District later in the morning of 5 September 2010 and received a report from the complainant, Sergeant McKenzie commenced investigations into a case of burglary, robbery with aggravation and illegal possession of firearm. The following day, the applicant was seen by Sergeant McKenzie at the Annotto Bay Police Station. When told of the investigation, the applicant's response was, "Dem no ketch me wid nutten."

[14] Arrangements were subsequently made for an identification parade to be held at the Ocho Rios Police Station on 24 September 2010. The parade was conducted by Sergeant Everald Brown and the applicant was represented by an attorney-at-law. The

applicant was pointed out by the complainant as the man, known to him as Stagger, who had entered his house armed with a gun and robbed him in the early morning of 5 September 2010. Neither the applicant nor his attorney raised any concerns about the conduct of the parade and the applicant duly signed the identification parade form when requested to do so.

[15] After being told that the applicant had been pointed out on the parade, Sergeant McKenzie arrested and charged him with the offences of illegal possession of firearm, burglary and robbery. When cautioned, the applicant made no statement.

[16] In his defence, the applicant made an unsworn statement from the dock. The entire statement, including the judge's helpful promptings, is reproduced below:

| | |
|---|---|
| "THE ACCUSED: | Your Honour |
| HIS LORDSHIP: | A little louder |
| THE ACCUSED: | On the ID parade, sir, I stood at No. 9 and he asked me to move from No. 9 and stand at No. 5, which I exchange. |
| HIS LORDSHIP: | Just a minute. Go ahead |
| THE ACCUSED: | In which I exchange the shirt and I signed the paper before I stood on the platform behind the glass. |
| HIS LORDSHIP: | Yes. |
| THE ACCUSED: | And pertaining to this robbery incident, I was nowhere near that vicinity at that time. |
| HIS LORDSHIP: | Pertaining to this robbery I was what? |

THE ACCUSED: Nowhere in the vicinity where he live, at no time.

HIS LORDSHIP: Just a minute. Go on.

THE ACCUSED: I live in a tenement yard where I pay a thousand dollars for month for rent, sharing a room with my sister and her baby father.

HIS LORDSHIP: Yes.

THE ACCUSED: And at that time I was in my bed.

HIS LORDSHIP: Sir, speak up.

THE ACCUSED: And at that time I was in my bed and she can give account for that because the room is like window apart. Each time she quoting [sic] I have to come out.

HIS LORDSHIP: Just a minute

HIS LORDSHIP: Go on, sir, if you are not through. You have anything else to say?

THE ACCUSED: They search my premises, they didn't find any firearm or nothing illegal or whatsoever.

HIS LORDSHIP: Just a minute. Yes

THE ACCUSED: They ask me to took up [sic] a pair of shoes, shoes and my belt, which I did.

HIS LORDSHIP: Yes.

THE ACCUSED: And I sign it in when they took me to the Annotto Bay lock-up.

HIS LORDSHIP: Which lock-up?

THE ACCUSED: Annotto Bay lock-up

HIS LORDSHIP: Go on.

THE ACCUSED: And when they took me on the ID parade I couldn't recover it back neither the belt, the shoes nor the belt, and

then nobody can give account to it and I signed in the book down there and that's all I have to say, your Honour."

[17] That was the case for the defence. And, after closing addresses from counsel on both sides and his own brief summing up, the learned judge concluded as follows:

> "I find that the prosecution has discharged it's [sic] burden and I am in no doubt whatsoever, although the standard is a reasonable doubt, entertain no doubt that the assailant in the room was the accused man. And accordingly I find him guilty on counts one, two, and three."

[18] As recorded in the transcript, the following then ensued:

"MR. TAYLOR: M'Lord, I have been informed by the Court Detective that the antecedent are [sic] being typed at this time. In that case it should be ready by tomorrow or ready for tomorrow.

HIS LORDSHIP: That's one area I have not had the occasion to say that I am pleased with. Yes, matter is postponed for sentencing on Thursday.

MR. HIBBERT: Yes, m'Lord.

HIS LORDSHIP: On Thursday the 31st of March. The accused man is remanded in custody.

HIS LORDSHIP: Just a minute. Take the shackles off, please. Yes, go on back there and sit down a minute. Out of ex abundant [sic], I have withdrawn that [sic] I ought to have said that I am required to give your unsworn statement only such weight as I see fit. I didn't find it to be of any value, I didn't give it any weight whatsoever, as in, I rejected it and

> having so corrected it, I based my decision on the Crown's case. Yes."

[19] The following day, the judge heard a report on the applicant's antecedents (which revealed that he had been gainfully employed since leaving school and had no previous convictions) and his counsel's plea in mitigation on his behalf. After indicating to the applicant that there was nothing he could find "to mitigate the defence and my first duty…in a matter such as this, is the protection of the public, that's my first duty", the judge concluded as follows:

> "In carrying out this duty, I am to bear in mind the seriousness of the offence, the danger that the offence poses to society, the danger that you as the individual offender poses [sic] to the society and I also bear in mind the purposes of sentencing but in the circumstances of this case, sir, you must be removed from society and you must do so [sic] for a period of time. So, on count one, the sentence of the court is ten (10) years. On counts two and three, the sentence of the court is fifteen (15) years, they are to run concurrently."

[20] When the application for leave to appeal came on for hearing before us, Mrs Samuels-Brown sought and was granted leave to argue two supplemental grounds of appeal, in substitution for the grounds originally filed by the applicant himself. The supplemental grounds are as follows:

> "1. There has been a miscarriage of justice in that the learned trial judge erred in convicting the appellant [sic] on the evidence of identification. The central issue in the case being identification, the said identification being by way of a fleeting glance in circumstances of admittedly poor lighting and under difficult circumstances and thereby being rendered manifestly unreliable the appellant ought not to

have been called upon to answer the charges or alternatively the conviction cannot stand. In particular, but without prejudice to the generality of the foregoing:-

a. The learned trial judge erred in his finding that the purported identification of the appellant was not by way of a fleeting glance; as on the evidence the opportunity for the witness to have observed the appellant was so brief as to amount to a fleeting glance.

b. The learned trial judge, having found that the identification was made under difficult circumstances, to include poor lighting with the witness in a state of fright ought to have rejected the identification evidence.

c. Additionally, the learned trial judge erred in his effective rehabilitation of the hopeless identification evidence by his reliance on the identification parade evidence as, in any event, the appellant had been known to the virtual complainant before and thus the virtual complainant would have been able to point out his assailant independently of having seen him at his (the virtual complainant's house) on the 5th of September 2010.

d. In assessing the reliability and cogency of the identification evidence, the learned trial judge omitted to take into account or sufficiently into account the fact that, on the evidence, the virtual complainant's attention was divided between his observation of the firearm and his observation of the assailant.

e. In assessing the reliability and cogency of the identification evidence, the learned trial judge omitted to take into account or sufficiently into account the absence of any evidence as to the period of time during which he observed the appellant's face.

f. The learned trial judge did not appreciate or demonstrate that he appreciated or sufficiently appreciated that these issues affecting the cogency of identification apply equally to cases of purported recognition.

g. The learned trial judge failed to demonstrate that he applied the stipulated warning in identification cases to the facts of the instant case.

2. The sentences imposed on the appellant [sic] is [sic] manifestly harsh and excessive having regard to the evidence."

[21] In her skeleton arguments and in her oral submissions, Mrs Samuels-Brown concentrated her attack on the applicant's conviction on the complaints that, first, the evidence upon which the identification of the applicant as the intruder was based amounted to no more than a fleeting glance and therefore the applicant ought not to have been called upon to answer at the end of the prosecution's case; and second, the trial judge "failed to demonstrate that he applied the stipulated warning in identification cases to the facts of the instant case". Our attention was directed to a number of factors which, it was submitted, negatively affected the ability of the complainant to effect a reliable identification of the applicant as the man who entered his house on the night in question, and, hence, the safety of the conviction. Among these were (i) the inadequate lighting in the bedroom at the material time; (ii) the limited opportunity that the witness had to observe the intruder; (iii) the fact that, by his own admission, the witness was surprised and frightened by the sudden intrusion; and (iv) the fact that the witness' attention would have been divided, in that the gun which was in the intruder's hand would also have been the focus of his attention. It was submitted that in these circumstances, even if the applicant had been called upon to answer the charges against him, the judge was obliged not only to give the standard warnings required in identification cases (as to the terms of which no complaint was made), but to share his

thought processes in such a way as to demonstrate that, in coming to his decision, he had these warnings in mind.

[22] In support of these submissions, Mrs Samuels-Brown referred us to the decisions of the Privy Council in ***Evans v R*** (1991) 28 JLR 448, ***Daley v R*** (1993) 30 JLR 429 and ***Beckford, Birch & Shaw v R*** (1993) 30 JLR 160. She also referred us to the decision of this court in ***R v Balasal, Balasal & Whyne*** (1990) 27 JLR 507. This may be a convenient point at which to discuss these cases briefly.

[23] But, before doing so, we should perhaps frame the discussion by referring to the source of all modern authority on the question of visual identification, ***R v Turnbull and Others*** [1976] 3 All ER 549, 551-552, in which Lord Widgery CJ established guidelines for the use of judges in identification cases. As is well known, the oft-quoted guidelines require that, whenever the case against an accused person depends wholly or substantially on the correctness of one or more identifications of the accused which is alleged to be mistaken, the judge should warn the jury of the special need for caution before convicting in reliance on the correctness of the identification. He should instruct them as to the reason for that warning and should make some reference to the possibility that a mistaken witness could be a convincing one and that a number of witnesses could all be mistaken. He should also direct the jury to examine closely the circumstances in which the identification by each witness came to be made, reminding them of any specific weaknesses which may have appeared in the identification evidence. Further, the jury should be reminded that, although recognition may be more

reliable than identification of a stranger, mistakes in recognition of close relatives and friends are sometimes made.

[24] But, Lord Widgery CJ went on to direct (at page 553):

> "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] 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."

[25] The decision of the Privy Council in ***Evans***, a case in which the appellant was convicted of murder, engaged both aspects of the ***Turnbull*** guidance. The sole eyewitness to the offence was the girlfriend of the deceased. While they were both asleep in bed on the night in question (the deceased lying across the head and the witness lying across the bottom end of the bed), the witness was awakened by the sound of a gunshot. As a result, she raised her head and saw five men in the room, one of whom she recognised as a person previously known to her as 'Scabby Diver'. This occurred over a period of five or six seconds and, on turning, she saw the deceased bleeding from his side. She then ducked her head, heard two more shots, followed by some clicks from the gun. The witness gave evidence that she had known the intruder for about a year before the incident, but had never spoken to him. She would see him, she said, in a particular shop where she went every other day and she had also seen him once at a dance. But this was strongly disputed by the appellant in his evidence, in which he denied having been at the premises occupied by the witness and the deceased on the night in question.

[26] The appellant was convicted and his application for leave to appeal was dismissed by this court. On appeal to the Privy Council, it was contended on his behalf, on the basis of ***Turnbull***, that (i) the quality of the identification evidence was so poor that the trial judge should have withdrawn the case from the jury at the end of the prosecution's case and directed an acquittal; and (ii) alternatively, that the judge had failed to direct the jury in accordance with the established guidelines. After noting that no identification parade had been held and that the question of whether the appellant had been seen by the eyewitness at any time before the murder was "a serious issue to be tried", the Board said this (at page 450-451):

> "But even treating this as a case which did not depend solely on a fleeting glance but upon a witness recognising someone whom she had frequently seen before, the observation of the appellant was made in very difficult conditions. She was suddenly woken up by an explosion. She was lying in an unusual position, across the bed and on her stomach. She merely raised her head to see what could be seen. She did not sit up, let alone stand up…She was understandably very frightened at the time. Having turned towards the deceased and seeing that he was bleeding and hearing two more explosions, she kept her head down until the men left.
>
> In their Lordships' opinion the quality of this identifying evidence was indeed poor. Since there was no other evidence which supported its correctness, the judge in accordance with…[**Turnbull**]…should have withdrawn the case from the jury at the conclusion of the prosecution's case and directed an acquittal. His failure so to do is in itself a sufficient reason for the quashing of this conviction."

[27] The Board also went on to observe (at page 451) that, even if the judge had been justified in not withdrawing the case from the jury, in his directions to the jury he had failed in a number of important respects to comply with the ***Turnbull*** guidelines:

> "The jury were never directed that visual evidence of identification is a class of evidence that is particularly vulnerable to mistake or the reasons for that vulnerability. The jury were never told that honest witnesses can well give inaccurate but convincing evidence and that mistakes in the recognition of even close relatives and friends are sometimes made. The jury were never instructed that visual evidence of identification has therefore to be treated with special care. Indeed, in his summing up the judge presented [the witness] as either an honest witness who was therefore telling the truth and upon whose evidence of identification they could safely rely, or a dishonest witness who had invented the evidence she gave. That she might be an honest witness but mistaken in identifying the appellant as one of the intruders was never an alternative suggested for the jury's consideration."

[28] Following on from ***Turnbull***, ***Daley*** is also well known for Lord Mustill's memorable articulation (at page 436) of the basis upon which a trial judge will withdraw a case dependent on visual identification from the jury:

> "…the case is withdrawn from the jury not because the judge considers that the witness is lying, but because the evidence [of identification] even if taken to be honest has a base which is so slender that it is unreliable and therefore not sufficient to found a conviction…the fact that an honest witness may be mistaken is a particular source of risk."

[29] In light of the fact that there is no complaint in this case as to the general ***Turnbull*** warning given by the trial judge, it is unnecessary to do more than note ***Beckford, Birch & Shaw***, in which the Board considered (at pages 165-166) that

"[t]he need to give the general warning even in recognition cases where the main challenge is to the truthfulness of the witness should be obvious".

[30] Perhaps more to the point, given Mrs Samuels-Brown's complaint that the judge failed to demonstrate in his summing up that he had the relevant warnings in mind, is ***Balasal, Balasal & Whyne***. In that case, Gordon JA observed (speaking for the court, at page 509) that it is "the duty of a judge in his summation in the Gun Court to indicate the principles applicable to the particular facts and demonstrate his application of those principles". The learned judge of appeal went on to quote from ***R v George Cameron*** (1986) 29 JLR 453, 457, in which Wright JA said (also memorably) that a judge sitting without a jury is obliged to "demonstrate in language that does not require to be construed that in coming to the conclusion adverse to the accused person he has acted with the requisite caution in mind".

[31] For the Crown, Mrs Millwood-Moore submitted that the trial judge had not only directed himself in accordance with the established guidelines, but had demonstrated in his summing up that he had the required warnings in mind and applied the necessary caution. As regards the quality of the identification evidence, Mrs Millwood-Moore pointed out that, although the circumstances of the purported identification, in particular the lighting in the complainant's room, were not "ideal", this was a recognition case in which the witness had a clear view of the intruder's face and the quality of the evidence could not therefore be dismissed as poor. She submitted that, while the length of the period over which the witness was able to observe the intruder is an important factor, it is "but a single factor". It is therefore for the court to examine

what the witness said had occurred during that period and to make a qualitative assessment of whether the conditions under which the identification was made amounted to a mere fleeting glance. In these circumstances, it was submitted, the level of difficulty was not such as to compromise the witness' positive identification of someone who was previously known to him. The judge took all of the relevant factors into account and there was no basis upon which the case could have been withdrawn from further consideration at the end of the Crown's case.

[32] Mrs Millwood-Moore sought to distinguish the cases cited by Mrs Samuels-Brown on their facts. She pointed out that in ***Evans***, the circumstances in which the witness purported to identify the appellant were far more difficult, in that five men had entered the room, gunshots had been fired and the witness' boyfriend had been injured; in ***Daley***, the single eyewitness purported to identify the appellant as one of two men who had broken into his house at night from his hiding place some distance away outside the house; in ***Beckford***, ***Birch & Shaw***, the purported identification was from a distance of 8 chains, while the witness was in the bushes; and in ***Turnbull*** itself, the identifying witness (a police officer) only had a brief fleeting view of the side of the defendant's face at night, albeit in a well-lit street, from a moving motor car (although, in the result, Turnbull's application for leave to appeal was dismissed in view of the fact that the court considered that "there was ample other evidence which went to support the correctness" of the identification – see page 556).

[33] Mrs Millwood-Moore also referred us to the decision of the Privy Council in ***Michael Rose v R*** [1994] UKPC 35. In that case, the Board, in upholding a conviction

based on the evidence of the single eyewitness, said this (at page 3) in relation to his estimates of the time that the incident in question had lasted:

> "Estimates of half an hour or an hour are obviously exaggerated. But the whole incident must have taken minutes rather than seconds. Their Lordships are satisfied that during that period the witness would have had a sufficient opportunity to make a reliable identification as the two men approached him."

[34] First, we will consider the contention that the learned trial judge ought not to have called upon the applicant to answer at the end of the Crown's case. We note at the outset that the applicant's counsel did not make a no case submission on his behalf at the trial. However, this would not, in our view, have prevented the judge from stopping the case if he thought at that stage that the identification evidence had not reached the threshold established by ***Turnbull*** and ***Daley***. (Although we would also note, in passing, Lord Phillips' observation in ***Eiley and Others v R*** [2009] UKPC 40, para. 50, that it would have been "an unusual and extreme step for the judge to have ruled that there was no case upon which the jury could safely convict in the absence of any submission to this effect from any defendant". In the light of the way in which the judge's imperative duty to withdraw the case from the jury in cases of poor identification was formulated by Lord Widgery in ***Turnbull***, we make no comment on whether such a step could be regarded as equally unusual or extreme in a pure identification case, which ***Eiley*** was not, despite the trial judge having thought it necessary to give a ***Turnbull*** warning.)

[35] The complainant's evidence revealed that –

(a) as soon as he was awakened by the strange sound in his house, he sat up in the bed;

(b) he saw a man standing at the door to the room straight ahead of him, about 10 feet away from him;

(c) he recognised the man right away as someone previously known to him for about three years to him as 'Stagger';

(d) he was accustomed to seeing this man very often, like three days per week, mostly during the daytime, the last time being about a week before;

(e) the man had also been to his house once, about a month before;

(f) although the man was wearing a "hoody", which covered the back of his head and ears, his face was exposed, as a result of which the complainant was able to see the man's "entire face, the eye, the nose, the skin tone and them thing", including his mouth;

(g) the man remained in that position for "like about 2 seconds", then took two steps backwards, for about five

to six seconds, before reentering the room with a handgun in his hand;

(h) the hoody had now "flipped back", allowing the complainant a view of the man's "whole face";

(i) the room in question was about 10 x 10 feet in size;

(j) the man spoke to the complainant and Miss Miller, ordering them to get under the bed;

(k) the man and the complainant were within "hand reach" of each other;

(l) the bedside light was still on.

[36] On the complainant's account, he and Miss Miller were actually under the bed for the greater part of the entire incident. His opportunity to see the man who had entered his room was therefore limited to the initial two second period before the man stepped back out of his sight and the subsequent period, in respect of which no estimate of time was given, between the moment when the man reentered the room and the point at which the complainant obeyed the order to go under the bed. The complainant was, he agreed, nervous and frightened, as anyone would naturally be in the face of the early morning intrusion which he described. It is also true, as Mrs Millwood-Moore realistically accepted, that the lighting in the room was not ideal.

[37] But, that having been said, we are satisfied from the complainant's detailed and coherent narrative of what occurred in his small room that he did have a sufficient opportunity to effect a reliable identification of someone whom he knew before and was accustomed to seeing on a regular basis. (And, in this regard, the complainant's evidence that he and the intruder were previously known to each other derived some support, in our view, from his evidence that the intruder enquired about the "big gold chain" which he usually wore – see para [8] above.) The period during which he had the intruder under observation, though not long by any standards, could not be described, in our view, as a fleeting glance: unlike the witness in ***Evans***, who neither sat up, nor stood up during the intrusion in which her boyfriend was murdered, the complainant did both, enabling him to have a direct and unobstructed view of the intruder at close quarters. The identification evidence, although describing obviously difficult conditions, could not be said in our judgment to have had so slender a base as to make it unreliable and therefore not fit for a jury's consideration. Accordingly, in common, it appears, with the applicant's counsel at the trial, we do not consider this to be a case that ought to have been withdrawn at the end of the Crown's case.

[38] Turning now to the criticisms levelled at the summing up, we have already pointed out that there is no challenge on appeal to the judge's general directions on identification. But in order to test the complaint that the judge "failed to demonstrate that he applied the stipulated warning in identification cases to the facts of the instant case", it is necessary to consider what the judge actually said in his summing up.

Setting the stage close to the beginning, immediately after dealing with the burden and standard of proof, the learned judge said this:

> "…both the Defence and the Prosecution are agreed that the issue is one of identification, that is in this trial, the case against the accused man depends wholly on the correctness of one identification, of course, which the accused man alleges is mistaken since he says that he was elsewhere, in his unsworn statement.
>
> So, therefore, I must warn myself and I warn myself of the special leave [sic] or caution [sic] before convicting the defendant in reliance on the evidence of identification and this is because it's possible for an honest witness to make a mistake identification; and whilst I am so warning myself, it is convenient at this time to say that I found Mr. Hannaman [sic] to be an honest and reliable witness.
>
> I further warn myself, I bear in mind that there have been wrongful convictions in the past as a result of such mistakes. I bear in mind that an entirely honest witness can be mistaken. So, I remind myself that I must carefully examine the circumstances in which the identification was made, the length of time the person was – the accused man was under observation, at what distance, in what light, was anything interfering with the observation, had the witness ever seen the accused man before, if so, how often? How long was it between the original identification and - - sorry the original observation and the identification to the police? And as I review the evidence in this area, I will advert to the specific witnesses in the identification evidence."

[39] The judge next considered the lighting. He pointed out that, from the complainant's description, the bedside light to which he had referred "was not a lamp but what is commonly known as 'night-light'…it was not a light which illuminated the room after the order of a fluorescent bulb but would present something of a soft glow". This, the judge considered, "was light and light enough to see around a 10 x 10 room…it's not a huge area that had to be lit, but a 10 x 10 room".

[40] The judge then looked at the circumstances under which the complainant had observed the intruder, referring to the evidence that, after the "hoody" had slipped back, affording the complainant a view of his entire face, the intruder came within an arm's length of him. The judge went on to deal with the fact that, as he put it, this encounter between the complainant and the intruder "was not a meeting of total strangers":

> "The evidence is and it stands unchallenged, the evidence is that the accused man is someone who was known and has been known to Mr. Hannam for some three years before the incident. Further, that he was one who he was accustomed to seeing, probably three days per week and that he would see him mostly in the day. They were not friends but he was accustomed, they were accustomed to greeting each other, in his words, we just hail one another, so these two persons were not strangers, the persons [sic] known to each other before and though I was not told how he had seeing [sic] - - that the accused man coming to the house one month before the incident, if that was the most recent time he had seen the accused, it certainly would in the court's judgment be recent enough to have confirmed or at least reminded him of the features of the accused man, having seen him only one month before. I was not told how long the incident in the room lasted while the witness spoke to the number of seconds, the accused man stepped back, he did not say in his estimation how long he saw his face."

[41] After observing, correctly, that he had not been told how long the witness had the intruder under observation in the room itself, the judge then said this:

> "So was it a fleeting glance or an identification made under difficult circumstances? In my judgment it was not a fleeting glance. I accept the submission that it was an identification made under difficult circumstances. And so I bear the warning, which I reminded myself of at the beginning of the summation, in mind.

> He did say that he was afraid, in cross-examination, he was surprised, as would be expected if you are rudely awaken [sic] from your sleep and you find an armed assailant at the very door of your bedroom, so I will bear that in mind."

[42] And finally before pronouncing his verdict, the judge reminded himself that, just less than three weeks after the robbery at his house, while "the features of this person who was well known to the witness" were still fresh in his mind, the complainant had identified the applicant at an identification parade.

[43] In our view, it is difficult to see what more the learned judge could have said in the summing up in order "to demonstrate that he applied the stipulated warning in identification cases to the facts of the instant case". Starting with the terms of the warning, the need for caution and the reason the caution is necessary, the judge then proceeded to rehearse the complainant's evidence, reminding himself in some detail of the critical factors, including the lighting; the duration of the complainant's observation of the applicant; whether his view was obstructed in any way; the physical dimensions of the room; the fact that the applicant was previously known to him; the fact that the complianant was surprised and put in fear by the early morning intrusion; and the general conditions under which he purported to be able to identify the applicant. That having been done, the judge again reminded himself of the warning with which he had commenced the summing up, before finding the applicant guilty.

[44] In these circumstances, we do not think that it can fairly be maintained in this case that the trial judge was guilty of a failure to demonstrate that he acted with the requisite caution in mind.

[45] But before leaving this part of the case, we should mention one matter which, although not a ground of appeal (and upon which we heard no submissions from either counsel), did cause us some concern initially. We are here referring to the fact that the trial judge, after stating that he had found the applicant guilty, recalled him to the dock. The judge then reminded himself that he was required to give the applicant's unsworn statement only such weight as he saw fit and, having done so, said that "I didn't find it to be of any value, I didn't give it any weight whatsoever…I rejected it and…I based my decision on the Crown's case" (see para. [18] above). The immediate question that comes to mind upon reading this is whether it could be said that the judge, by dealing with the applicant's unsworn statement as an afterthought in this way, had failed to give any proper consideration to the applicant's defence before determining his guilt.

[46] A submission along these lines was made in ***Barrington Taylor v R*** [2013] JMCA Crim 35, which was also a case turning entirely on visual identification tried by a judge sitting without a jury in the Gun Court. The judge in summing up in that case warned himself that evidence of identification must be approached with caution, but failed to say anything about the reason for the warning, that is, that an honest witness may be mistaken. He then proceeded to pronounce the defendant guilty, at which stage counsel for the prosecution reminded him of the omission. The judge then supplied the reason for the need for caution, leading to the submission on appeal that he had arrived at a verdict of guilty before warning himself appropriately. This court agreed, Harris JA observing (at para. [26]) that the belated warning after counsel's reminder

"was far too late as he had already made a decision". For this and other reasons the appeal was allowed and a judgment and verdict of acquittal entered.

[47] However, despite the surface similarity on this point between ***Taylor*** and this case, we consider it to be clearly distinguishable for a number of reasons, of which it is only necessary to state three. First, there were, as Harris JA described them (at para.[36]), other "glaring weaknesses" in ***Taylor***, including major – unresolved - discrepancies and inconsistencies in the prosecution's case and an inadequate direction on the effect of a finding that the defendant's alibi was false. Second, the judge's lapse in ***Taylor*** was in respect of a failure to state the full terms of the critical identification warning, while in this case, as Mrs Samuels-Brown accepted, the actual terms of the judge's directions cannot be faulted. And third, it seems clear from the language of the judge's late addendum in this case that he was concerned to state for the record the consideration that he had already given to the applicant's unsworn statement before finding him guilty ("I didn't find it to be of any value, I didn't give it any weight whatsoever…"), rather than to introduce an additional ground after the fact for doing so.

[48] For all these reasons, we therefore came to the view that this application for leave to appeal against conviction should be dismissed. We come then to the matter of sentence, on which the applicant complained that the sentences imposed by the judge were manifestly excessive. It is in this regard that Mrs Samuels-Brown wished to rely on the fresh evidence which she sought leave to adduce at the outset (see para. [4] above) and it may be convenient to deal with that application now.

[49] The power of the court to receive fresh or additional evidence on appeal is set out in section 28(b) and (c) of the Judicature (Appellate Jurisdiction) Act. The criteria for the exercise of the wide discretion given to the court by the Act are well settled: the evidence which it is sought to call must be (i) evidence which was not available at trial; (ii) relevant to the issues; and (iii) credible evidence in the sense that it is well capable of belief (see ***R v Parks*** (1961) 46 Cr App R 29, 32, applied by this court in ***R v Page*** (1967) 10 JLR 79, 83).

[50] The evidence which the applicant sought to adduce is found in an affidavit sworn to by his mother, Mrs Brenda Cameron. Mrs Cameron deponed that she had told her son's counsel at the trial that her son "had a mental condition so that his head come and go" (para. 4) and had been "a patient at the Annotto Bay Hospital for his mental illness from as far back as 2007" (para. 5). She exhibited to her affidavit a medical report dated 9 May 2011 from the Annotto Bay Hospital, which spoke to the applicant's initial diagnosis in 2007 (major depression with psychotic features) and his re-assessment in 2009 (bipolar 1 disorder).

[51] In our view, this evidence does not satisfy the first criterion for the admission of fresh evidence, in that it was plainly evidence which was available at the time of the trial. It is also doubtful, even if this evidence had been adduced at the trial, what use could have been made of it in the absence of any statutory provisions (comparable to those contained in section 82(3)(a) and (b) of the Powers of Criminal Courts (Sentencing) Act 2000, UK, to which Mrs Samuels-Brown helpfully referred us), allowing

a sentencing judge to receive information as to the defendant's mental condition before sentencing and to consider the likely effect of a custodial sentence on his condition.

[52] Accordingly, in our view, the application to adduce the fresh evidence falters at the threshold and must therefore be refused.

[53] But Mrs Samuels-Brown also submitted that it was not clear from the record that the trial judge gave any consideration in sentencing to the applicant's antecedents, in particular his good employment record and his clean criminal record. And she was obviously correct in this: the judge's remarks immediately before he passed sentence on the applicant (see para. [19] above) demonstrate plainly, in our view, that he did not take into account, as he ought to have, any factors relating to the applicant himself in determining the appropriate sentence to be imposed on him. Instead, the judge concentrated on what he conceived to be his "first duty" in sentencing the applicant, *viz*, the protection of the public. In this regard, we need only mention ***R v Sydney Beckford & David Lewis*** (1980) 17 JLR 202, 203, where Rowe JA, as he then was, spoke of the need for a trial judge, "in the face of mounting violence in the community [to] impose a sentence to fit the offender and at the same time to fit the crime".

[54] However that may be, the question remains whether the sentences imposed by the judge, albeit proceeding on an erroneous premise, can be said to be manifestly excessive. In our view, they cannot. Sentences 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. (As regards illegal possession of firearm, see, for instance, ***Kenneth***

***Hylton v R*** [2013] JMCA Crim 57, para. [22], in which, after a brief review of some recent sentences, Harris JA observed that "a starting point of 10 years for illegal possession of firearm is the preferred tariff". And as regards robbery with aggravation, see ***R v Walter Thomas***, SCCA No 50/1999, judgment delivered 28 May 2002, in which this court did not disturb the sentence of 15 years' imprisonment imposed by the trial judge on a first offender.) The sentences imposed in this case cannot therefore be said, in our judgment, to be manifestly excessive and it is for this reason that we concluded that the application for leave to appeal against sentence should also be dismissed.

[55] These are the reasons for the decision of the court that was announced on 11 October 2013 (see para. [2] above).