[2023] JMCA Crim 27

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MISS JUSTICE STRAW JA
THE HON MRS JUSTICE V HARRIS JA
THE HON MRS JUSTICE BROWN BECKFORD JA (AG)

SUPREME COURT CRIMINAL APPEAL NO 80/2017

ADRIAN CLARKE v R

Isat Buchanan and John Clarke for the appellant

Mrs Christine Johnson Spence and Mrs Nickeisha Young Shand for the Crown

10, 11 November 2021 and 23 June 2023

Criminal law – illegal possession of firearm – wounding with intent – visual identification – alibi – excessive interference by a trial judge – credit for time spent on pre-trial remand - section 20(1)(b) of the Firearms Act - section 20 of the Offences against the Persons Act

BROWN BECKFORD JA (AG)

Background

[1] On 14 March 2015, around midnight, the complainant was shot while driving home. He identified the appellant, Mr Adrian Clarke as one of his assailants. The prosecution advanced reprisal as a possible motive for the incident, as it was alleged that the complainant's cousin shot at the appellant's girlfriend in a previous incident. The appellant, however, denied that he was the person who shot the complainant and insisted, in his defence, that he was elsewhere at the material time.

[2] Subsequent to a trial by a judge sitting without a jury ('the learned trial judge') in the Western Regional Gun Court in the parish of Saint James, the appellant was convicted for the offences of illegal possession of firearm and wounding with intent. For each offence, he was sentenced to 20 years' imprisonment at hard labour with the stipulation

that he serve 12 years before becoming eligible for parole. The sentences were ordered to run concurrently.

[3] The appellant filed an application for leave to appeal against his convictions and sentences, which was considered by a single judge of this court. The application for leave to appeal his convictions was refused, and the application for leave to appeal against sentences was allowed. Before us, the appellant also renewed his application for leave to appeal his convictions. We heard that application along with his appeal against the sentences and reserved our decision.

Proceedings in the court below

The case for the prosecution

[4] The complainant, who was the main witness for the prosecution, gave evidence that he was at home on 13 March 2015 and, at approximately 10:25 pm, two of his cousins borrowed his car. He received a phone call about 15 minutes later which caused him to ask another cousin to take him to the Green Island Police Station, in the parish of Hanover ('the police station'). When he entered the police station, he saw, among other people, the appellant, whom he had known for 26 years and whom he called "Turbo". He had seen Turbo at a birthday party on Crawl Road earlier in the day (that is, 13 March 2015) between 4:00 pm and 5:00 pm. He also saw the two cousins who borrowed his car in handcuffs. Subsequently, he observed a young woman exit one of the rooms in the police station. She pointed to one of his cousins and said something. A few minutes after 12:00 am he left the police station in his car with the cousin who had driven him there and dropped him at his home on Crawl Street. He then headed in the direction of his home in Green Island.

[5] Upon reaching the vicinity of "Hog Shit Lane", between 12:15 am to 12:18 am (now 14 March 2015), he slowed down because there was a ditch in the road. On coming out of the ditch, he saw two men run across the road in front of his car, from left to right. One of the men ran up a slope, and the other man stopped at the "banking" right in front of him. The man who stopped at the banking about 15 to 20 feet away from him, turned around to face him, and raised his right hand.

[6] The complainant observed the appellant's face for eight to 10 seconds as he ran across the road and stopped at the banking. He was able to see because of the light that emanated from a nearby streetlight on the right-hand side of the road, multiple houses on both sides of the road with outside lights on, the car's headlights, and the "moon shine".

[7] The complainant noticed that the appellant was holding a handgun. Upon hearing multiple explosions and seeing flashes of light, he ducked behind the steering wheel and sped off. He subsequently realised that he had been shot; his left thumb and right shoulder were injured. He drove to the police station, which was nearby, and told the police officers that Turbo shot him "around the road". The police officers took him to the Lucea Hospital, where he received medical treatment. He was then taken back to the police station, where he made a report.

[8] The prosecution also called as a witness Detective Corporal Peter Johnson. On 14 March 2015, he was on duty as a detective constable at the Green Island Police Station when he heard gunshots coming from the direction of Salt Spring Road in the vicinity of Hog Shit Lane. This caused him to move to the front of the police station with other officers, and shortly after, he saw the complainant speed into the police station's yard. He observed that the complainant was bleeding from wounds on his left thumb and right upper shoulder. He also observed bullet holes to the car. The complainant made a report and gave the name of the person who shot him. He caused the complainant to be taken to the hospital. Detective Corporal Johnson, along with other police officers, went to the appellant's home in Crawl District but did not see him. Later, he went with the complainant to the scene, where he saw several spent shell casings along the roadway. He also gave evidence that a few days later, upon receiving certain information, he went to the Lucea Police Station where the appellant was in custody and subsequently charged him with the offences of illegal possession of firearm and wounding with intent.

The case for the defence

[9] The appellant gave sworn testimony in his defence. He gave his addresses as Crawl District and Hog Shit Lane in Logwood but he refuted that he lived in Crawl District at the material time and stated that he lived in Logwood and visited his mother in Crawl District

sometimes. On that day, 13 March 2017, he was in Logwood at his girlfriend's grandmother's house building a fowl coop until about 6:00 pm to 7:00 pm, when they finished the task. He did not leave the house that day. Later in the night, he received a telephone call from his girlfriend. He spoke with her and with a person who identified himself as Inspector Solan.

[10] The following morning, he went to the Lucea Police Station, accompanied by Mr Wayne Murray, and spoke with Inspector Solan. He was kept in custody at the police station until he was charged. He was eventually granted bail. The appellant denied shooting the complainant.

[11] The appellant called a witness who testified to his good character. The witness gave evidence that she had known him for almost all his life as they lived in the same district. She was also acquainted with other members of his family. She interacted with him often, as his girlfriend and her daughters were friends. She knew him to be engaged in operating a bike taxi and fishing. She characterised him as a hard-working person and said she did not know him as the type of person who would do what he was being accused of. She described him as kind, jovial, fun-loving and a peacemaker.

The decision of the court

[12] At the end of the trial, in his summation, the learned trial judge identified the issues as alibi, credibility, and identification (in particular recognition and mistaken identity). He reviewed the identification evidence and warned himself according to the **Turnbull** guidelines (see **R v Turnbull** [1977] QB 224). He gave himself directions on, among other things, the burden and standard of proof, inconsistencies and discrepancies, alibi and good character. The learned trial judge concluded that the complainant was a credible witness. He rejected the appellant's alibi and accepted that the appellant had been correctly identified and thus convicted him on both counts in the indictment.

The appeal

[13] The appellant sought and was granted leave from this court to abandon the grounds of appeal dated 14 September 2017 and to argue the supplemental grounds of

appeal encapsulated in the skeleton submissions filed on 25 October 2021. Those grounds are set out below:

> "1) The learned trial judge erred in law in failing to uphold the submission of no case to answer on the basis that the evidence of (recognition) identification was no more than unsupported fleeting glances of 1 witness made in very difficult circumstances.
>
> 2) The trial judge erred in law by failing to give adequate and appropriate directions in relation to the visual identification evidence pursuant to the principles enunciated in R v Turnbull [1977] 2 QB 224.
>
> 3) The learned trial judge erred in law by failing to properly analyse the specific weaknesses in the identification evidence.
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> 4) The learned trial judge denied the applicant a fair trial by his excessive interference in the giving of evidence by the applicant effectively becoming a participant at the bar instead of from the bench.
>
> 5) That the learned judge erred in failing to adequately discuss the strength and weaknesses of the applicant's case or properly assess and present the evidence (Defence) of the applicant, especially the unrebutted evidence in relation to his alibi, which he dismissed without any comment or analysis.
>
> 6) The Learned Trial Judge imported into his assessment of the evidence, queries and opinions for which there was no evidential basis. This treatment distorted the evidence in ways prejudicial to the applicant and in doing denied him a fair trial and a fair chance of acquittal.
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> 7) The learned judge erred in failing to specifically disavow any reliance on prejudicial evidence which was introduced by the complainant on the record in relation to the applicant.
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> 8) The learned Judge erred in law in failing to fully apply the issue of good character to the applicant's case and thus deprived him of the benefit of a good character direction. This failure renders the verdict unsafe and the trial unfair.
>
> 9) That the sentences on both counts imposed by the learned judge were excessive, having regard to all the circumstances."

[14] The several grounds of appeal were conveniently grouped by counsel under the issues of (i) identification, (ii) the judge's role and (iii) sentencing. We will adopt the same approach in our analysis of this matter.

(i) Identification

Submissions

The appellant

[15] Grounds 1, 2 and 3 relate to the learned trial judge's treatment of the identification evidence. The gravamen of the appellant's complaint under this ground is that, firstly, the learned trial judge should have upheld the no-case submission; secondly, he did not demonstrate that he analysed the evidence applying the **Turnbull** guidelines, which he mechanically repeated; and thirdly, he did not identify and analyse the weaknesses in the identification evidence.

[16] Counsel for the appellant, Mr Isat Buchanan, submitted that the learned trial judge erred in law in failing to uphold the submission of no case to answer on the basis that the identification evidence was tenuous and amounted to no more than unsupported fleeting glances of one witness made in very difficult circumstances. Counsel further submitted that it was "mathematically" impossible for the complainant to have made the observations he did in eight seconds. He argued that the material upon which the purported identification was based, that is, a moving car, men running from left to right of the road, the observation of the face of the appellant while being fired upon, then ducking and speeding away, was not sufficiently substantial to obviate the risk of mistaken identification. He pointed out that the learned trial judge, in his ruling on the no-case submission, merely said that there were factual issues in relation to the opportunity of the complainant to see his assailant and that this was a "case of recognition". Counsel further submitted that the learned trial judge's curt comment in his summation that the lighting, time, and distance, mentioned in the evidence, were sufficient and demonstrated that he failed to properly and adequately scrutinise and treat with the specific weaknesses in the prosecution's case before ruling on the no-case submission. The case of **R v Cameron** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 77/1998, judgment delivered 10 November 1989, was relied on in support of this submission.

[17] Counsel also submitted that despite giving himself the requisite and well-known warning of the dangers inherent in relying on identification evidence, the learned trial

judge failed to demonstrate how it was applied to the facts before him, having merely regurgitated the evidence. This should have included, the argument continued, resolving the omissions and discrepancies in the prosecution's case to determine what effect they had on the reliability of the identification by the complainant, which he failed to do. Counsel pointed to omissions in the complainant's evidence, such as that there was a ditch in the road and that other cogent aspects of the prosecution's case, which enhanced the reliability of the identification evidence, came out during the witness' testimony but were absent from his witness statement. Counsel noted that the learned trial judge's response to these omissions was simply to note that "a statement is mostly a guide". It was submitted that his failure to adequately deal with major omissions had the effect of bolstering the prosecution's case. Counsel also pointed out the discrepancy between the complainant's evidence that he saw the appellant at the police station prior to the incident and the evidence of Detective Corporal Johnson that the appellant was not there at that time. He submitted that the learned trial judge ought to have resolved this discrepancy in light of the ability of the complainant to recognise the appellant and his credibility and reliability generally. Mr Buchanan relied on **Dwayne Knight v R** [2017] JMCA Crim 3, which restated the principle from **Jermaine Cameron v R** [2013] JMCA Crim 60 that what is important is whether the complainant had "…a sufficient opportunity to effect a reliable identification of someone whom he knew before and was accustomed to seeing on a regular basis…".

[18] This general lack of proper analysis could also be seen in the learned trial judge's misquote of the evidence, Mr Buchanan submitted. Specifically, he pointed to the learned trial judge's misquote of the evidence that the car was not tinted and that the windscreen was shot up instead of the right driver's door, as the witnesses said. These matters, counsel further submitted, were important to the learned trial judge's assessment of the complainant's ability to recognise his assailant. This misquote by the learned trial judge, counsel argued, meant he acted with the belief that the car was not tinted, which would have erroneously bolstered his view of the ability of the complainant to identify his assailant.

[19] Mr Buchanan also complained that the learned trial judge failed to specifically address the weaknesses in the identification evidence. He pointed to, as examples, the

learned trial judge's failure to conduct a proper assessment of weaknesses, such as the complainant being the driver of a moving car that was darkly tinted; the natural fear of the complainant who was being shot at; shots were fired into the complainant's side of the car; the complainant had only eight seconds to observe the face of the assailant; he accelerated and ducked when the shots were fired; and that he was travelling around a "stern" corner. Counsel complained that the learned trial judge merely noted that the lighting, time and distance were sufficient and failed to demonstrate a proper analysis and application of the pertinent principles in relation to identification. The learned trial judge, it was contended, had a duty to assess the effects of the weaknesses in the identification evidence on the prosecution's case, and this was clearly not done.

[20] It was also his submission that the learned trial judge failed to properly examine the factual circumstances of the case and referred to precedent without regard to the principle. Counsel contended that the slavish dependence on precedent to establish an appropriate or acceptable time for viewing in a recognition case, from a quantitative perspective, could lead to a miscarriage of justice. He submitted further that the learned trial judge failed to demonstrate that he sufficiently identified the salient issues and applied the proper judicial approach.

[21] Finally, Mr Buchanan submitted that the cumulative effect of the learned trial judge's failure to properly scrutinise the identification evidence resulted in the ghastly risk that on the material facts of the case, the ultimate tribunal of fact did not have regard to factual material which may have had a bearing on its finding. This undesirable situation robbed the appellant of a fair trial and rendered his conviction unsafe in all the circumstances. He pointed the court to the cases of **R v Newton Clacher** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 50/2002, judgment delivered on 29 September 2003 ('**R v Clacher**'), and **R v Alex Simpson**; **R v McKenzie Powell** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 151/1988 and 71/1989, judgment delivered on 5 February 1992, as supporting his submission.

[22] Another issue raised by counsel in his submissions was that the Scene of Crime Compact Disc ('CD') (which contained the evidence, such as pictures from the scene of

the incident), had not been tendered into evidence, having been misplaced. He contended that it might have assisted the appellant since there are things that could be verified from the CD, such as the presence of a ditch in the road. It was the duty of the prosecution to put the said CD before the court, he argued.

The Crown

[23] Mrs Christine Johnson Spence, for the Crown, submitted that based on the identification evidence adduced, the learned trial judge (sitting as judge of law and fact), having properly warned himself, would have been able to make a finding of guilt in relation to the appellant.

[24] Counsel further submitted that the complainant gave evidence that at the time of the incident, he was able to see the appellant's face, which he was able to observe for eight to 10 seconds. Although the incident occurred during the night, the complainant gave evidence that there were several sources of light which included a streetlight, eight to 10 feet from where the appellant stood, lights from houses on both sides of the road, his car headlights, as well as the fact that there was moon light. The complainant also said that when he first saw the two men, they were about 40 feet away from him, and by the time the incident occurred, the appellant was about 15 to 20 feet away from him.

[25] It was pointed out that the issue of whether the car was tinted came up when the complainant was being cross-examined. While the complainant admitted that the vehicle was tinted, and the tint was dark, he said at page 44, lines 23-25 of the transcript:

> "yes, dark tint and l said dark tint, but I didn't see through the part weh tint. I see through the front windscreen."

[26] Counsel emphasised that the complainant also gave evidence that he recognised the appellant, whom he had known all his life for approximately 26 years. They were both from the community of Crawl in Hanover and lived across from each other at some point. The complainant further gave evidence that he knew the appellant's entire family (mother, brother, sister, aunt, father, and cousins). The appellant would "hail" him sometimes, although he had not spoken to the appellant in about two and a half years before the incident. Counsel additionally pointed out that it was not challenged that the

complainant had seen the appellant at a party in Crawl earlier in the day on 13 March 2015.

[27] It was submitted that this was a recognition case and the learned trial judge's warning was in keeping with **R v Turnbull**. The learned trial judge, in summing up, first noted that identification, in particular, recognition, is an issue in the case and, subsequently, gave himself extensive directions.

[28] Counsel contended that the learned trial judge was not required to use any particular formula in dealing with identification. What is important is that he must have demonstrated that he knew the principle of law that was to be applied. Counsel relied on the case of **R v Gerald Cross** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 81/1993, judgment delivered 24 May 1994, and reminded the court that in **Separue Lee v R** [2014] JMCA Crim 12, it upheld a conviction based solely on a recognition made in a viewing time of two seconds. It was, therefore, submitted that the eight seconds, in this instance, would be sufficient time for the complainant to make out his attacker, especially since he was able to see his face before the shooting started.

[29] Counsel also relied on **Jerome Tucker and Linton Thompson v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 77 and 78/1995, judgment delivered 26 February 1996, for the proposition that the time that is required for making a reliable recognition need not be as long as in a case in which identification is being made of a defendant who was not previously known to the witness, and submitted that the learned trial judge demonstrated that he knew the principle of law to be applied, and he, in fact, applied it.

Analysis

No case submission

[30] At the trial, counsel for the appellant initially submitted that there was no evidence to support the correctness of the identification. Secondly, he argued that the circumstances were not conducive to positively identifying the assailant. Finally, he asserted, the time of eight to 10 seconds was exaggerated, and based on the narrative, the time for which the assailant was under observation amounted to no more than a

fleeting glance under difficult circumstances. The learned trial judge, however, refused the no case submission without calling on the prosecution to respond.

[31] The analysis conducted by this court in **Separue Lee v R** offers a good signpost to consider how the learned trial judge should have approached a submission of no case to answer in an identification case. In that case, McIntosh JA, on behalf of the court, pointed out at para. [18]:

> "[18] A good starting point for trial judges when called upon to rule on a submission of no case to answer is the guidance to be extracted from **R v Galbraith** [1981] 2 All ER 1060 where at page 1062 the court had this to say:
>
> 'How then should the judge approach a submission of 'no case'?
>
> (1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case.
>
> (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence.
>
> > (a) Where the judge comes to the conclusion that the Crown's evidence, taken at its highest, is such that a jury properly directed could not properly convict on it, it is his duty, on a submission being made, to stop the case.
> >
> > (b) Where however the Crown's evidence is such that its strength or weakness depends on the view to be taken of a witness' reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence on which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury. ... There will of course, as always in this branch of the law, be borderline cases. They can safely be left to the discretion of the judge.'"

[32] Referring to the case of **Herbert Brown and Mario McCallum v Regina** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 92 and 93/2006, judgment delivered 21 November 2008, McIntosh JA had this to say:

"[20] The real question, Morrison JA said, was whether the evidence rested on so slender a base as to render it unreliable and therefore insufficient to found a conviction. He continued at paragraph 35:

> 'So that the critical factor on the no case submission in an identification case, where the real issue is whether in the circumstances the eyewitness had a proper opportunity to make a reliable identification of the accused, is whether the material upon which the purported identification was based was sufficiently substantial to obviate the 'ghastly risk' (as Lord Widgery CJ put it in **R v Oakwell** [1978] 1 WLR 32, 36-37) of mistaken identification. [If the quality of that evidence is poor (or the base too slender), then the case should be withdrawn from the jury (irrespective of whether the witness appears to be honest or not), but if the quality is good, it will ordinarily be within the usual function of the jury, in keeping with ***Galbraith***, to sift and to deal with the range of issues which ordinarily go to the credibility of witnesses, including inconsistencies, discrepancies, any explanations proffered, and the like.'

[21] As [Crown Counsel] correctly pointed out, this court has held, following a long line of well established authorities, that if the identification evidence depends solely on a fleeting glance or on a longer observation made in difficult circumstances it would be the duty of the trial judge to withdraw the case from the jury and direct an acquittal (see **Alphanso Tracey and Andrew Downer v Reginam** (1996) 33 JLR 150; **Junior Reid et al v The Queen** [1990]1 AC 363)…"

[33] The above principles also apply when a judge is sitting without a jury. In **Sadiki Heslop v R** [2021] JMCA Crim 48, Fraser JA, stated that such guidance can be found in Lord Parker CJ's **Practice Note** [1962] 1 WLR 227, which outlined the appropriate test when a submission of no case to answer is considered by a judge sitting as the tribunal of law and fact as follows:

> "[44] The guiding principles were stated in this way:
>
> > 'A submission that there is no case to answer may properly be made and upheld: (a) when there has been no evidence to prove an essential element in the alleged offence; (b) when the evidence adduced by the prosecution has been so discredited as a result of cross-examination or is so manifestly unreliable that no reasonable tribunal could safely convict on it.

> Apart from these two situations a tribunal should not in general be called on to reach a decision as to conviction or acquittal until the whole of the evidence which either side wishes to tender has been placed before it. If, however, a submission is made that there is no case to answer, the decision should depend not so much on whether the adjudicating tribunal (if compelled to do so) would at that stage convict or acquit but on whether the evidence is such that a reasonable tribunal might convict. If a reasonable tribunal might convict on the evidence so far laid before it, there is a case to answer.' "

[34] Fraser JA went on to examine the tenets established in **R v Galbraith** and elucidated as follows:

> "[46] Both formulations counsel a restrained judicial approach to dealing with any perceived weaknesses in the case against a defendant; [sic] where at the close of the prosecution's case a no case submission is made, [sic] based on challenges to the credibility of the prosecution's witness or witnesses. **Therefore, absent situations where there is no evidence to prove an essential element or elements of the offence charged, a submission of no case to answer should only be upheld**, **if a reasonable jury properly directed, or in a judge alone trial, a reasonable judge applying the appropriate legal principles, could not form a view of the evidence on which a conviction could properly be returned.**" (Emphasis added)

[35] The question for the learned trial judge on the no case submission was, therefore, did the complainant have sufficient opportunity to make a reliable identification? The circumstances in which the purported identification was made are starkly outlined in this bulleted list:

- The appellant was known to the complainant for 26 years.
- The complainant had seen him earlier that day.
- There were streetlights on the right hand side of the road.
- There were multiple houses on both sides of the road with electric lights on.

- There were LED headlights on the vehicle.
- The night was lit by "moonshine".
- The appellant faced the complainant, who was 40 feet away and driving towards him.
- The appellant ran in front of the car and faced the complainant at a distance of 15 to 20 feet away.
- The complainant was driving towards him slowly, coming out of a ditch.
- The complainant was able to view the appellant through the windscreen, which was not tinted.
- The complainant was able to see the appellant's face for eight to 10 seconds.
- The complainant was also able to observe the second man and could describe his clothing, shoes, height and complexion.

[36] As pointed out by the Crown, in its submissions, the time for viewing and recognising someone well known need not be as long as when the assailant is unknown. The narrative shows that the time, even if not eight to 10 seconds, was certainly longer than a fleeting glance. The lighting would have been sufficient for the complainant to be able to see and make out his assailant. It is our view that the identification evidence was sufficient to "obviate the ghastly risk of a mistaken identification" and was properly assessed by the learned trial judge, sitting alone, using his jury mind. The learned trial judge, therefore, cannot be faulted for not upholding the submission of no case to answer.

Application of the Turnbull guidelines

[37] Mr Buchanan submitted that the learned trial judge erred in law by failing to give adequate and appropriate directions in relation to the visual identification evidence pursuant to the principles enunciated in **R v Turnbull**. The **Turnbull** guidelines have become entrenched in our jurisprudence with the force of law such that failure to adhere

to them will render a conviction unsafe. At the same time, it is also well established that the judge need not stick slavishly to the set form of words used by their Lordships. More importantly, however, rather than regurgitating the guidelines, the judge must show how they are applied to the evidence in the case.

[38] In the case at bar, the learned trial judge warned himself, at pages 143 to 145 of the transcript, as follows:

> "Another issue is that of identification, as I have mentioned before. This is a trial, where the case against the accused man depends wholly, or to some large extent on the correctness of the identification of the accused man.
>
> …When [the] defence is alleging that it's a mistaken identification and putting forward an alibi, or the witness is lying and he is saying that he knows nothing about this and he did not do any shooting at anyone. So identification is a live issue. Because of this I must, therefore, warn myself of the special need for caution before convicting the defendant in reliance on the evidence of identification. That is because it is possible for an honest witness to make mistaken identification. It has happened before. Also, a convincing witness can make mistaken identification. In this case, also one of recognition. Even with a close friend and family members mistake [sic] can be made and have been made before. I must warn myself that mistakes can be made in recognition cases.
>
> The Court must therefore examine carefully the circumstances under which the identification by the witness was made. The Court must consider how long the witness had the person he says was the defendant, how long he had him under observation, at what distance, in what lighting condition, did anything interfere with his observation, did the witness know the person before. In this case both the accused and the witness are saying they knew each other and each other [sic] respective families. How often they see each other. When was the last time he saw the defendant, any special reason for remembering the accused man. I must also mention any weakness in the identification. I must also take into consideration that it's easier to identify a person who you knew before and it take [sic] less time to identify a person you knew before, or [became] familiar with over the years."

[39] There is no dispute that this extract contained all the elements of the required warning. Counsel for the appellant contended, however, that the learned trial judge did not display, in his summation, his analysis of these considerations as applied to the evidence. This includes a consideration of how the learned trial judge dealt with the weaknesses in the identification evidence, which will now be treated with below.

Weaknesses in the identification evidence

[40] In **R v Clacher,** the appellant made similar complaints against the trial judge. In that case, there were several inconsistencies, the cumulative effect of which went to the central issues of identification and credibility. The court found (at page 18) that the trial judge had not "sufficiently identified the salient issues and applied the proper judicial approach". That case demonstrates that the trial judge is bound to expose in his summation his resolution of the material inconsistencies in the case.

[41] We note that in **R v Clacher**, the trial judge had simply set out his findings and had not warned himself of the dangers associated with visual identification in keeping with the **Turnbull** guidelines. In the case at bar, however, the learned trial judge did warn himself. He also expressly indicated that he considered all the evidence, even if he did not repeat it in his summation. At page 146, lines 6 -12 of the transcript, the learned trial judge said:

> "Before I analyze the evidence, let me say that I don't intend to go through the evidence word for word as presented by both sides. This does not mean that I did not give due consideration to all of the evidence presented by both sides and the submission by both sides. I have given due consideration to all the evidence presented."

[42] We find as unwarranted Mr Buchanan's submission that the "only discernible application" of the law on identification evidence in the learned trial judge's summation was:

> "… I find that the lighting condition as mentioned in the evidence, the time as mentioned in the evidence, the distance as mentioned in the evidence, is sufficient for [the complainant] to recognize somebody he know [sic] over the years and a person he had seen the day before at a party. …" (page 164 of the transcript)

This was said after the learned trial judge went through the evidence. He pointed to the evidence that the complainant saw the appellant's mother at the police station, which was supported by other witnesses, as evidence that he knew the appellant's family. He also recounted the evidence of how well the complainant knew the appellant, and the circumstances of the incident.

[43] The learned trial judge further examined the evidence of the different sources of light and noted that the police witness confirmed the presence of the streetlight and houses with electric lights. He ascertained from the evidence that as the attack unfolded, the distance between the men and the complainant's car closed from 40 feet to 15-20 feet allowing for closer observation. He recounted the length of time the appellant was under the complainant's observation and pointed out that case law supported that a proper identification could be made in even less time. Additionally, the learned trial judge remarked on the complainant's powers of observation, noting that he was able to see what the other man was wearing, including his shoes, and that he appeared to be bleaching. Of importance, the learned trial judge found, was the evidence that the complainant gave the shooter's name the same night, which was also confirmed by the police witness. It is therefore pellucid that the learned trial judge's statement, as quoted earlier in this paragraph, was his conclusion following his examination of the evidence.

[44] As it relates to the omissions and discrepancies between the complainant's evidence and his witness statement, the learned trial judge recalled the complainant's evidence that he was "scared" and "fearful" at the time he gave his statement, which was the same night of the incident. The learned trial judge's pronouncement that "the Court recognizes that a statement is mostly a guide", which was criticised by counsel for the appellant, was said in the context of his assessment of the omission from the complainant's statement about slowing down. He also referred to the omission in the complainant's statement that the road was bad but pointed out that it was not suggested to the witnesses (including the police officer who visited the scene) that there was no ditch or that the road was not bad. I believe this demonstrates that he considered the complainant's credibility in the context of these omissions. In any event, the learned trial judge was not bound to mention every omission, especially since he identified those that

would have affected the main issue in the case, which was the complainant's ability to correctly identify his assailant.

[45] The learned trial judge also addressed the weaknesses in the identification evidence. Although he did not specifically use the word "weakness", he not only pointed out material omissions, as previously established, but he warned himself as to how to treat with such matters. I have taken note, however, that the learned trial judge did not specifically highlight the main weakness in the identification evidence, which was that it was made under difficult circumstances. Nevertheless, having given himself the requisite warning, this would have been the background against which he recounted the important features of the complainant's evidence. In so doing, he pointed to the complainant ducking and speeding off because he was under attack.

[46] Some of the weaknesses identified by Mr Buchanan were clearly due to a misunderstanding of the evidence, for example, counsel asserted that the complainant indicated that he could not see through the tinted part of the front windscreen when the complainant indicated that he did not view his attacker through the tinted windows **but** through the front windscreen.

[47] It is true that the learned trial judge misquoted the evidence as to whether the car was tinted. This was potentially material since it would have affected the complainant's ability to view his assailants. However, as quoted earlier at para. [25] the evidence of the complainant was that he did not observe the appellant through the tinted windows but instead through the part of the windscreen that was not tinted. There was no contest to this evidence given by the complainant. Accordingly, this error, in the circumstances, would not amount to a miscarriage of justice.

[48] In relation to the additional complaint of the appellant that the Scene of Crime CD could have confirmed whether there was a ditch in the road and whether the car was tinted, we are guided by the case of **Lescene Edwards v R** [2018] JMCA Crim 4, in which the relevant considerations for missing evidence were traversed by this court. In that case, the deceased died from a single gunshot that went through her head. Mr Edwards was charged with her murder. His defence was that the deceased had committed suicide. These were the competing questions for the jury that convicted Mr Edwards of

murder. One ground of appeal was that the defence was hampered at the trial by the absence of critical evidence in testing the prosecution's expert witnesses. The court reviewed **R (on the application of Ebrahim) v Feltham Magistrates' Court and DPP; Mouat v DPP** [2001] 1 All ER 831 ('**Ebrahim**') and adopted the guidance given by Brooke LJ. Brooks JA (as he then was) summarised the factors to be considered when evidence that had been collected was lost or destroyed. He stated:

> "[56] In adapting that guidance to the present case, it may be said that the factors that courts should consider are:
>
> > 1. whether the investigating authorities were under any obligation to collect the evidence;
> >
> > 2. if there were no such duty, whether any request was made by the defence for the material, before it became unavailable;
> >
> > 3. if there was a breach of duty in the collection or preservation of evidence, the court should consider whether there could have been a fair trial, bearing in mind that the trial process does compensate for many of such defects in providing evidence; and
> >
> > 4. whether the conduct of the prosecution was so egregious that it should not have been allowed to prosecute the accused and a quashing of the conviction is the only appropriate remedy."

[49] On appeal to the Privy Council (**Lescene Edwards v The Queen** [2022] UKPC 11) their Lordships accepted this exposition of the law and approved **Ebrahim**. Sir David Bean, on behalf of the Board, went on to state:

> "60. Similarly, in *R v RD* [2013] EWCA Crim 1592 Treacy LJ said at para 15:
>
> > 'In considering the question of prejudice to the defence, it seems to us that it is necessary to distinguish between mere speculation about what missing documents or witnesses might show, and missing evidence which represents a significant and demonstrable chance of amounting to decisive or strongly supportive evidence emerging on a specific issue in the case. The court will need to consider what evidence directly relevant to the appellant's case has been lost by reason of the passage of time. The court

> will then need to go on to consider the importance of the missing evidence in the context of the case as a whole and the issues before the jury. Having considered those matters, the court will have to identify what prejudice, if any, has been caused to the appellant by the delay and whether judicial directions would be sufficient to compensate for such prejudice as may have been caused or whether in truth a fair trial could not properly be afforded to a defendant.'"

[50] It is clear that no prejudice was suffered by the appellant as a result of the absence of the Scene of Crime CD. The complainant's evidence that there was a ditch in the road, that the roadway was bad, or that the windscreen of his car was not tinted was not challenged. There was, therefore, no conflict in the evidence to be resolved by the Scene of Crime CD.

[51] Concerning the evidence of whether the appellant was at the police station the night of the incident, the learned trial judge clearly accepted the evidence of Detective Corporal Johnson that the appellant was not at the station. Moreover, in recounting the evidence of the complainant, he pointed out that the last sighting of the appellant by the complainant was at a birthday party in the day (13 March 2015) and that this was not refuted.

[52] For all of the above reasons, we find that the learned trial judge adequately analysed the evidence in applying the **Turnbull** guidelines and there is, no merit in these identification grounds. Accordingly, grounds 1, 2, and 3 fail.

(ii) The judge's role

Submissions

The appellant

[53] The first challenge was to the learned trial judge's interventions during the questioning of the witnesses. The appellant's counsel, Mr John Clarke, submitted that the learned trial judge hijacked the trial by making some 143 interventions. This was excessive and went beyond the scope of seeking to correct any material issues or clearing up any ambiguity, he argued. In particular, the learned trial judge made no less than 78 oral interventions/questions during the testimony of the appellant, some of which went

beyond the acceptable ambit. He further submitted that in some instances, the learned trial judge suggested to Crown Counsel what she should ask. He pointed out that 24 of the questions asked by the learned trial judge dealt with why the appellant went to a particular police station. In a trial in which the judge was the arbiter of law and fact, the nature and extent of the interventions raised the question of whether the appellant had been tried by an impartial court. This court, he submitted, could not say that there was no miscarriage of justice. Counsel relied on the case of **Lamont Ricketts v R** [2021] JMCA Crim 7.

[54] The second limb of attack was that the introduction and treatment of prejudicial evidence made the conviction unsafe. Counsel pointed out that evidence was led in relation to the appellant being the "notorious Turbo" and that his character contributed to his girlfriend being shot. Counsel further submitted that it was also intimated that it was the appellant's character that caused the witness and his family to move to Saint Catherine. This evidence was not plainly relevant to the viability of the charge against him for illegal possession of firearm. It was further submitted that these prejudicial statements would have undermined the credibility of the appellant where the main issue in the case was credibility, and the learned trial judge ought to have shown in his summation that he had no regard to these irrelevant and prejudicial statements. Counsel submitted that the learned trial judge erred in not specifically indicating that he would have no regard to this prejudicial material in making adverse findings against the appellant. Counsel relied on the cases of **Noor Mohamed v The King** [1949] AC 182 and **R v Flemming** (1987) 86 Cr App Rep 32.

[55] The third criticism was that the learned trial judge failed to properly deal with the appellant's defence of alibi, in that he failed to give himself the false alibi warning. Counsel submitted that the learned trial judge did not demonstrate how he came to reject the appellant's alibi. The evidence of the investigating officer, Detective Corporal Johnson is that when he visited the appellant's home, he was not there. This ought to have been addressed by the learned trial judge against the evidence of the appellant and his witness that he no longer lived at that address. It was the duty of the learned trial judge to have considered that evidence, but he confined himself to the set-piece legal directions.

[56] Counsel also submitted that the dismissal of the alibi without comment was noteworthy since the complainant, on two separate occasions, indicated that he passed the accused at the police station, which contradicts the evidence of Detective Corporal Johnson that the appellant was not at the station on the night of the incident. Counsel pointed out that the appellant gave sworn evidence, and considering the factual circumstances, the learned trial judge was obliged to warn himself that even if he rejected the alibi evidence, he was to go back to the prosecution's case. He relied on **Kenrick Dawkins v R** [2015] JMCA Crim 23 ('**Kenrick Dawkins**').

[57] The final complaint about the learned trial judge's summation concerns the appellant's good character. Counsel for the appellant advanced that the learned trial judge did not appreciate the evidential significance of the good character witness and did not consider the impact of the good character of the appellant before arriving at a verdict of guilty. It was also submitted that he did not consider, in view of the appellant's good character, the likelihood of him committing the offences.

[58] Counsel posited that the learned trial judge went through a checklist of the appropriate factors to guide his summation, and he noted good character as an issue to be considered. The learned trial judge indicated that the appellant gave sworn evidence and said he must consider the propensity and credibility limbs of the good character direction. Counsel noted that the learned trial judge pointed out that the appellant called a witness of his good character, but he did not show how he applied the appellant's good character to the evidence of the appellant.

[59] Counsel relied on the cases of **Joseph Stanley v R** [2021] JMCA Crim 27 and **Andrew Stewart v R** [2015] JMCA Crim 4, as authority for the proposition that this must be done. He said the direction and application of good character evidence are linked to the right to a fair trial. Counsel also relied on the case of **Michael Reid v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 113/ 2007, judgment delivered 3 April 2009, which demonstrated that where credibility is in issue, the failure to apply the good character direction would render the conviction unsafe. Counsel further complained that there was no analysis to show why the appellant was

not believed (reliance was placed on **Joseph Stanley v R** and **Patrick Williams v R** [2016] JMCA Crim 22).

The Crown

[60] The Crown agreed, unsurprisingly, given the number of complaints, that at some points the learned trial judge's interruptions were excessive. Counsel for the Crown submitted, however, that those interruptions did not hinder the defence from presenting its case in their own way. Counsel maintained that the interruptions did not reach the level of descending into the arena and were done with a view to helping the learned trial judge get an accurate note or clear up certain points. Counsel cited the case of **Randeano Allen v R** [2021] JMCA Crim 8, and submitted that the interruption did not rise to the point of making the trial unfair. Counsel also pointed out that the interruptions were mainly during the cross-examination of the appellant, and the purpose was to clarify evidence and add context; they did not prevent him from putting forward his defence. The circumstances were to be distinguished from that of **Lamont Ricketts v R**.

[61] Counsel also submitted that the learned trial judge gave a sufficiently balanced summation that highlighted deficiencies in the case (at pages 151 to 152 of the transcript).

[62] Counsel pointed out that the learned trial judge expressed that it was for the prosecution to disprove the alibi defence since the appellant had no burden of proof. She relied on the case of **Dal Moulton v R** [2021] JMCA Crim 14 ('**Dal Moulton**'), which indicated that the judge need only to warn himself regarding the alibi, and that was sufficient.

[63] Regarding prejudicial evidence being introduced, the Crown submitted that on the authority of **Morris Cargill v R** [2016] JMCA Crim 6, the treatment of prejudicial statements was for the learned trial judge's discretion. Counsel added that the learned trial judge intervened when prejudicial or irrelevant evidence arose and ruled that the comment about the "notorious Turbo" be struck from the record. Counsel further submitted that, though he did not comment when it was said, "That's why Turbo girlfriend got shot", the context of that comment was that it was in answer to the question about

why the complainant was scared when he left the Green Island Police Station. Counsel further noted that there was no objection to the comment.

[64] The Crown's position was that the learned trial judge gave the full good character direction on both limbs (credibility and propensity) and that evidence of the appellant's good character was highlighted in the summation. Counsel contended that the learned trial judge had assessed the complainant to be credible and had the evidential basis for the verdicts. His verdicts, therefore, should not be disturbed.

Analysis

Ground 4 – Excessive interference

[65] In **Lamont Ricketts v R**, F Williams JA followed a long line of authorities cautioning trial judges against an excess of interventions in a trial. He offered the following guidance for judges generally:

> "[30] …The main points gleaned from the authorities relating to interventions might be summarized as follows: (i) trial judges should, as much as possible, limit their questioning to what is necessary to clear up issues, better understand evidence and bring to the fore points overlooked or not sufficiently addressed; (ii) their questioning should not be of such a nature or go to such an extent as to give the impression that they have taken sides or have descended into the arena and lost their impartiality; (iii) they should try not to interrupt the flow of evidence and, as much as possible, should not take over the elicitation of evidence from counsel (though the temptation is likely to arise when the evidence is being led less than competently); (iv) they should not cross-examine witnesses; (v) they should not display any hostility or adverse attitude or convey any negative view of a particular case or witness whilst hearing arguments and evidence, although they are, of course, entitled to test the soundness of arguments and submissions; and (vi) they are required at all times and so far as is humanly possible to maintain a balanced and umpire-like approach to the task of adjudication."

[66] F Williams JA in **Randeano Allen**, at para. [48], had regard to the following observation of Lord Parker CJ in **R v Hamilton** [1969] Crim LR 486:

> "Interventions to clear up ambiguities, interventions to enable the judge to make certain that he is making an accurate note,

> are of course perfectly justified. But the interventions which give rise to a quashing of a conviction are really three-fold; those which invite the jury to disbelieve the evidence for the defence which is put to the jury in such strong terms that it cannot be cured by the common formula that the facts are for the jury…The second ground giving rise to a quashing of a conviction is where the interventions have made it really impossible for counsel for the defence to do his or her duty in properly presenting the defence, and thirdly, cases where the interventions have had the effect of preventing the prisoner himself from doing himself justice and telling the story in his own way."

[67] He also pointed out that the determining factor was the character of the questions. He referred, in para. [50] to **Peter Michel v The Queen** [2009] UKPC 41, in which Lord Brown said:

> "12. …Of altogether greater significance than the mere number and length of these interruptions was, however, their character. For the most part they amounted to cross-examination, generally hostile. By his questioning the Commissioner evinced not merely scepticism but sometimes downright incredulity as to the defence being advanced. Regrettably too, on occasion the questioning was variously sarcastic, mocking and patronising."

The consideration for this court is whether, in view of the interruptions by the learned trial judge, in all the circumstances, the appellant had a fair trial.

[68] The bulk of the learned trial judge's interventions in the prosecution's case occurred in the examination-in-chief of the complainant. There were relatively few in cross-examination. In examination-in-chief, the questions were less than one-third of the total interventions (many of which were the judge indicating that he was ready to move on, presumably after completing his notes). The others could mostly be categorised as clarification of the evidence or clear follow-ons from the preceding questions. Some of the questions reproduced below (see pages 16, 17, and 22 of the transcript) were, however, clearly to elicit evidence.

> "HIS LORDSHIP: Just a minute.
> Somebody you talk to before, you talk to this person?
>
> THE WITNESS: Just hi and bye, just hail me sometime.

HIS LORDSHIP: When was the last time before that night you spoke to this person?

THE WITNESS: 'Bout two years, a year, year and-a-half.

…

HIS LORDSHIP: So how close, when you say you saw the person, you got to the person?

THE WITNESS: In the day.

HIS LORDSHIP: How close you got to the person when you saw him?

THE WITNESS: In the day when, sir?

Q: When you say you saw his face for eight to ten seconds about how far away you were from him?

A. About from here to the end of the way; (indicates).

HIS LORDSHIP: What distance?

…

Q. When you said that the object in his right hand resembling [sic] a handgun, were you able to see anything in particular about this why you say it resembled a handgun?

A. Yes, because I know how handgun look.

Q. Which is how? What you saw that night -- weh you saw about that object?

A. I see flashes of light coming from it, I heard load [sic] explosions.

HIS LORDSHIP: You know gun before?

THE WITNESS: Yes, sir.

HIS LORDSHIP: Weh you see gun?

THE WITNESS: Police officers, internet, in movies."

[69] The evidence of the appellant proceeded in the same manner. Few interventions in the evidence-in-chief and a significant number in cross-examination. Some of these questions were unrelated to the evidence being elicited at the time. These clearly showed the learned trial judge had descended into the arena. An excerpt from the transcript (pages 104 - 106) will demonstrate the nature of the questions posed:

> "THE WITNESS: He said I should bring in myself to the police station.
>
> HIS LORDSHIP: Yes
>
> Q. You friend, the person that you say you know Wayne Murray that went with you to the station, how you and Wayne Murray got to the station?
>
> A. Pardon?
>
> Q. How you and Wayne Murray reach to Lucea Police Station?
>
> A. Drive.
>
> Q. Who drove?
>
> A. Wayne Murray.
>
> Q. And he drove you to the police station because you called him and asked him to take you?
>
> A. Yes. Yes, madam.
>
> HIS LORDSHIP: What type of work Wayne Murray do?
>
> THE WITNESS: Pardon?
>
> HIS LORDSHIP: What type of work Wayne Murray do?
>
> THE WITNESS: When I know him, him usually run a club.
>
> Q. I am suggesting to you that you never go to Lucea Police Station the next day which is the 15th, the 14th.
>
> A. Pardon me?

Q. You never go to Lucea Police Station the 14th of March, 2015.

A. I went to the police station the next day, in the morning the next day. The -- the night when I talk to Solan and they say they want me, a the next day I went in their possession.

Q. You know that police were looking for you?

A. Looking for me?

Q. Yes, the night after your girlfriend…?

HIS LORDSHIP: Madam, madam. You suggesting to the accused man that he did not go in to the station on the 14th of March?

MRS. T. EVANS BIBBONS: I was going to go there, but let me go there, very well.

Q. You actually went to the police station on the 16th of March?

A. I went to the police station the next morning after a speak...

HIS LORDSHIP: Did you go on the 16th of March, yes, or no?

A. No.

HIS LORDSHIP: Were you expecting when you went to -- with Wayne Murray that day to the station, 14th as you say, or the Crown Counsel suggest the 16th, did you expect to go back home?

THE WITNESS: Yes, Your honour."

[70] It is without question that the learned trial judge breached some of the guidelines above, and the warning for trial judges given by F Williams JA is apt to be repeated. The issue, however, is whether the cumulative effect of the questions posed by the learned trial judge was to deny the appellant a fair trial. To determine this, we must take a closer look at the questions quoted above.

[71] It is clear that the learned trial judge took over the role of Crown Counsel. It could be seen from his urging that Crown Counsel was inexperienced (see page 6 of the transcript).

> "HIS LORDSHIP: … Madam, you have to control. Don't wait for it to come out. Just get at the thing and get it right."

However, the questions did not demonstrate that the learned trial judge was biased to one side. The appellant's case was put unimpeded both in cross-examination of the complainant and in the appellant's testimony. The questions, therefore, could not be put in the category abhorred by Lord Brown in **Peter Michel**. We are of the view that, in the final analysis, the interventions by the learned trial judge were not of a character to impede the fair trial of the appellant. Ground four therefore fails.

Grounds 6 and 7- Prejudicial evidence

[72] A trial judge has a wide discretion when potentially incriminating evidence is introduced in a trial. It ranges from doing nothing at all to aborting the trial. The appropriate response will depend on the circumstances of each case. The appellate court will decline to interfere with a trial judge's discretion except for very good reason (see **Dwight Gayle v R** [2018] JMCA 34 at para. [107] and **Carl Pinnock v R** [2019] JMCA Crim 7 at para. [46]).

[73] An extract from page 48 of the transcript bears out the record relating to one of the impugned prejudicial statements.

> "Q. [The complainant], my friend asked you if you would agree that when you left the Green Island Police Station you were scared, and you said, yes, why were you scared?
>
> A. Now, that it [sic] is notorious Turbo…
>
> HIS LORDSHIP: No, no, no, no.
>
> MRS. T. EVANS BIBBONS: No.
>
> HIS LORDSHIP: Struck [sic] that from the record."

The learned trial judge entirely disabused himself of that statement by, as he said, striking it from the record. Unlike the present case, in **Noor Mohamed v The King**, relied on by the appellant, the prejudicial evidence was admitted despite the objection of the defence.

[74] In relation to other complaints, I agree with Crown Counsel that the comment, "that is why Turbo girlfriend get shot", must be understood in the context of the entire

case. The relevant question in cross-examination on which Crown Counsel was re-examining the complainant was if, when he left the police station, he was scared and that he was driving fast as a result. This was after his cousin had been accused of shooting the appellant's girlfriend. The complainant's response that he was scared because Turbo's girlfriend got shot was material, as the speed at which he was driving was relevant to the issue of identification. The complainant's evidence that he was living in Saint Catherine came of his own volition after re-examination ended and he was clearly speaking to the nature of the attack on him. He was also prevented from going any further by the learned trial judge.

[75] The learned trial judge made no references to any of these portions of the evidence in his summation. This suggests that he totally ignored the prejudicial statements, as it is within his discretion to do. Furthermore, there is no evidence that he took any of the statements into account in finding the appellant guilty. Indeed, during the sentencing phase, counsel for the appellant pointed out that these prejudicial remarks were repeated in the social enquiry report. The learned trial judge, however, retorted that he had rejected the comments during the trial and likewise rejected them again. There is, therefore, no basis for this court to interfere with the learned trial judge's treatment of these prejudicial statements.

[76] Counsel for the appellant also argued that the learned trial judge imported queries and opinions for which there was no evidential basis into his assessment of the evidence, which distorted the evidence in ways prejudicial to the appellant and denied him a fair trial and a fair chance of acquittal. In particular, he submitted, the learned trial judge made comments unfavourable to the appellant concerning the social enquiry report as he approached the point of sentencing. He pointed to comments made by the learned trial judge at pages 190 – 191 of the transcript, which will now be examined. Those comments were:

> "When I heard Mr. Alexander, the number of communities he has visited in Hanover there, Crawle [sic], Salt Spring, Logwood, and a place name Haughton Hall, and all those places, and they all spoke volumes of you too.

> And there are persons who have their negative views of you. And that you are involved in all sorts of things. I have read the Social Inquiry Report and it's a report I would refer to as a mixed one too. All that has said, is that you are -- you have no previous conviction. Is it that some persons really don't have any conviction or is it that time is the master of all things? Sometimes time catches up with us, not we catch up with time.
>
> It is sad, too, when the days have come when you call bad good, and good bad. Those are sad days.
>
> When I look at the incident itself, my words [sic], it is an ambush. And persons should be allowed in their country, and in this island, to drive freely without persons shooting at them."

[77] It is to be pointed out that the learned trial judge had already found the appellant guilty, so his comment on the information contained in the social enquiry report could not have had a bearing on the appellant's conviction. Accordingly, we find that there is no merit in grounds six and seven, and so they also fail.

Ground 5- Alibi

[78] Counsel for the appellant relied on **Kenrick Dawkins** in support of the argument that the learned trial judge failed to deal adequately with the alibi evidence in circumstances where there was evidence given in support of that defence. In **Kenrick Dawkins**, the learned trial judge had failed to give himself any specific directions on the defence of alibi. Counsel's contention that this was a material error on the part of the learned trial judge was rejected on the basis that as Mr Dawkins had made an unsworn statement, there was no evidence to support his statement as to where he was at the material time. The court noted at para. [22] that "…a trial judge is only required to give a direction on the defence of alibi where there is evidence that the accused was at some other particular place or area at the time of the commission of the offence".

[79] This court went further in **Dal Moulton** to make it clear that the trial judge is obliged to consider the defence of alibi, and warn himself accordingly, if it is raised in sworn testimony by an accused.

[80] The learned trial judge directed himself on the issue of alibi at page 145 of the transcript thus:

> "The accused raised the issue of alibi. It is for the Prosecution to disprove his alibi. No burden is on the accused man to prove his innocence or to prove his alibi, none at all."

[81] Though admittedly brief, these directions came after the learned trial judge had directed himself that the prosecution bore the burden to satisfy the court of the guilt of the accused, which never shifts. In **R v Gavaska Brown, Kevin Brown and Troy Matthews** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 84, 85 & 86/1999, judgment delivered 6 April 2001, this court pointed out that it was not obligatory for the judge to use particular words. What was required was that the judge, in "clear and unequivocal terms", direct that an accused does not have to prove that he was elsewhere at the material time. In **Peter Campbell v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 17/2006, judgment delivered 16 May 2008, this court identified the three essential ingredients of the alibi defence as:

> "24. …
>
> i) that the appellant is saying he was elsewhere at the material time;
>
> (ii) that the burden of proof is on the prosecution and that the appellant does not have to prove he was elsewhere at the material time but rather it was for the prosecution to disprove the alibi;
>
> (iii) that to convict the appellant the jury had to be satisfied to the extent that they feel sure on the prosecution's evidence of his guilt."

The learned trial judge's directions, in our view, contained these elements and met that standard.

[82] The learned trial judge, however, like the judge in **Dal Moulton**, did not warn himself that a false alibi is sometimes given to bolster an otherwise good defence. In **Dal Moulton**, it was pointed out that the false alibi warning is not necessary in every instance that an alibi defence is raised and is only necessary where there is some evidence suggesting or supporting an alibi that is shown or proven to be false. Further, where the

learned trial judge's acceptance of the cogency of the prosecution's evidence was the simple basis upon which the alibi was rejected, it was not necessary to give a false alibi warning. As pointed out at para. [55] of **Dal Moulton**, "…the inevitable consequence of an acceptance of the complainant's evidence as being true, is a rejection of the applicant's evidence, as no one can be in two places at once".

[83] The learned trial judge noted that the police visited the home of the appellant in Crawl District after the complainant reported the incident but did not see him there. Not surprisingly, this evidence was not treated as contradicting the appellant's alibi as this was after the incident and it was his evidence in any event that he no longer lived in Crawl District. It was after reviewing all the evidence, including the defence, that the learned trial judge indicated that he found the complainant to be a credible witness and a witness of truth and that he accepted his evidence. Having so found, he concluded that the appellant was present at the scene of the incident and shot the complainant and he rejected the appellant's alibi. It is clear, therefore, that the alibi was rejected solely on the complainant's evidence being accepted. In those circumstances, there was no need for the false alibi warning and ground five also fails.

Ground 8 - Good character direction

[84] The learned trial judge, in identifying the issues, noted that the good character of the appellant was in issue in relation to the questions of credibility and propensity. He said at pages 145 -146 of the transcript:

> "The accused in this case gave sworn evidence or testimony and as such the Court must look at both limbs of his good character. The accused is putting forward that he is a person of good character, or good credibility and that he is not of that propensity to do such an act. So I must look at the propensity and the credibility when it comes to his good character as he gave sworn testimony. So the Court must consider the propensity and the credibility limb of the good character."

[85] He then went on to examine all the evidence, including that of the appellant and his witness. After doing so, the learned trial judge concluded that he accepted the complainant's evidence. He also found the appellant's credibility to be questionable. The learned trial judge was not required to state that he was viewing the evidence through

the lens of the appellant's good character as he analysed each piece of the evidence. It was sufficient for him to have indicated as he did. We also find that there is no merit in this criticism. Ground eight therefore fails.

(iii) Sentence

Submissions

The appellant

[86] Under this ground, it was submitted on behalf of the appellant that the learned trial judge received an antecedent report which showed the appellant had no previous conviction. However, the learned trial judge made a comment that suggested that he did not consider this as a mitigating factor. Counsel further complained that the learned trial judge did not have regard to the appropriate sentencing principles, failed to note his starting point for the sentences arrived at and failed to give the appellant credit for time spent in custody.

The Crown

[87] Counsel for the Crown submitted that this court should only intervene if it were demonstrated that the learned trial judge erred in principle. Counsel further submitted that the approach of the learned trial judge must be analysed considering the guidance from **R v Evrald Dunkley** (unreported), Court of Appeal, Jamaica, Parish Court Criminal Appeal No 55/2001, judgment delivered 5 July 2002 and **Meisha Clement v R** [2016] JMCA Crim 26. The Crown submitted that the learned trial judge identified that the offences attracted a minimum penalty of 15 years' imprisonment. He considered as mitigating factors the appellant's previous good record, that he had no previous convictions, his community report and the evidence of good character given by his witness. The learned trial judge also considered the aggravating factors as being the nature and seriousness of the offences, and that the complainant was ambushed. However, the submission continued, the learned trial judge erred in considering that the offence of illegal possession of firearm attracted a minimum mandatory penalty. Counsel pointed to cases where the range of sentences for this offence was eight years to 15 years. It was further contended that a sentence of 20 years' imprisonment for wounding with intent would be appropriate in the circumstances. The Crown, however, conceded

that the sentences should not be upheld as the learned trial judge failed to take into account the time the appellant spent in pre-trial custody.

Analysis

[88] The steps to be followed in the sentencing process are now well known (see **Meisha Clement v R** and **Daniel Roulston v R** [2018] JMCA Crim 20). Shortly stated they are:

i) Determine whether a custodial or non-custodial sentence is appropriate. If custodial,
ii) Identify the appropriate starting point within the possible range for the offence.
iii) Consider the aggravating factors.
iv) Consider the mitigating factors.
v) Consider whether a reduction for a guilty plea, if applicable.
vi) Decide on the appropriate sentence.
vii) Deduct time spent on pre-trial remand.

[89] In identifying the starting point from the possible range of sentences for the offences, the learned trial judge would have regarded the seriousness of the offences and other factors intrinsic to the offences. Underpinning all of these are the classical principles of sentence which are deterrence, protection of the public, punishment, and rehabilitation. Where the offence attracts a minimum mandatory sentence, then that period is the usual starting point.

[90] The learned trial judge made no distinction in his sentencing remarks between the offences. Though urged by defence counsel to use the minimum mandatory sentence of 15 years' imprisonment as his starting point, the learned trial judge clearly used the maximum penalty of life imprisonment as his starting point. He then rounded down, taking into account the mitigating and aggravating features. As pointed out in **Daniel Roulston v R**, the learned trial judge would have erred in principle, in using life imprisonment as the starting point, which is the maximum sentence that is to be reserved for the worst form of the type of offence. In these circumstances, it is appropriate for this court to review the sentences.

[91] We accept that **Dal Moulton**, relied on by the Crown, being the most recent case, and one with similar facts, as well as comparable aggravating and mitigating features, offers the most guidance. In that case, a sentence of 15 years' and two months' imprisonment (following a credit of 10 months for time spent in pre-trial custody) was deemed appropriate for illegal possession of firearm. A compelling feature of that case was that there were 35 spent shells recovered, which tended to show the deadly intent of the perpetrator. The starting point in that case was 13 years. Five years were added for the aggravating features and two years were subtracted for the mitigating factors. In this case, Detective Corporal Johnson's evidence was that four spent shells were recovered. Bearing in mind the nature of the incident, that is the complainant being ambushed in a car and the bullet holes to the window on his side and to the right of the front bumper of the car, we would also infer that this was intended to be a deadly attack. We would utilise the same starting point as the manner of committing the offences are similar. We would, however, add three years for the aggravating factors and deduct two years for the mitigating factors. This would result in a sentence of 14 years' imprisonment. This period will be further reduced for time spent in pre-trial remand below.

[92] With respect to the offence of wounding with intent, with the use of a firearm, using the statutory minimum of 15 years' imprisonment as the starting point is appropriate in this case. The aggravating features would justify an increase to 18 years, and a reduction of two years for the mitigating features would be appropriate. The resulting term is 16 years' imprisonment with a further reduction for time spent in pre-trial remand, which will be addressed now.

[93] At the time when the sentences were handed down on 1 September 2017, the learned trial judge would not have had the guidance of the Sentencing Guidelines for use by Judges of the Supreme Court of Jamaica and the Parish Courts, December 2017. Nevertheless, the rule that an accused person must be credited the time spent in custody immediately before sentencing, was recognised in cases such as **Meisha Clement v R** and **Daniel Roulston v R**. We agree with counsel, upon our perusal of the learned trial judge's sentencing remarks, that the appellant was not credited with the time he spent in custody prior to sentencing.

[94] On further enquiries we were advised by counsel for the appellant that he spent 10 months in pre-trial remand. Having not received any certain response from Crown Counsel in this regard, we will accept the appellant's report. Consequently, the sentence for the offence of illegal possession of firearm will be reduced to 13 years' and two months' imprisonment, and for the offence of wounding with intent, the sentence will be reduced to 15 years' and two months' imprisonment.

[95] We will now take this opportunity to point out that the learned trial judge incorrectly stated a minimum period of 12 years for both offences to be served before the appellant will become eligible for parole. The offence of illegal possession of firearm is contained in section 20(1)(b) of the Firearms Act and wounding with intent is contrary to section 20 of the Offences against the Persons Act ('OAPA'). Similarly to section 6 of the OAPA (the offence of manslaughter), those sections do not confer on the trial judge, the jurisdiction to stipulate a minimum period to be served before being eligible for parole. The parole period for illegal possession of firearm and wounding with intent is determined in accordance with section 6 of the Parole Act. For all of the above reasons, we have found merit in ground nine.

Conclusion

[96] The appellant has failed to show that the learned trial judge erred in his treatment of the issue of identification. The evidence adduced by the prosecution at the trial was sufficient for the learned trial judge to consider using his jury mind. He also showed that he applied the **Turnbull** guidelines in his analysis of the identification evidence. The learned trial judge adequately addressed the issues of alibi and good character. His treatment of the prejudicial evidence elicited similarly cannot be impeached, given the wide discretion as to how to treat with such evidence. The learned trial judge's interventions were excessive, however, they were not of such a character as to impede the appellant's fair trial. As such, there is no merit to any of the grounds of appeal against conviction. We, therefore, refuse the appellant's application for leave to appeal his convictions. However, we accept that the learned trial judge erred in his application of the sentencing principles and allow the appeal against sentence.

[97] In the circumstances, it is ordered as follows:

(1) The appeal against convictions is dismissed.

(2) The appeal against sentences is allowed.

(3) The sentence of 20 years' imprisonment at hard labour with the stipulation that the appellant serves 12 years before being eligible for parole for the offence of illegal possession of firearm is set aside and substituted therefor is a sentence of 13 years' and two months' imprisonment at hard labour (with 10 months of pre-sentence remand having been credited).

(4) The sentence of 20 years' imprisonment at hard labour with the stipulation that the appellant serves 12 years before being eligible for parole for the offence of wounding with intent is set aside and substituted therefor is a sentence of 15 years' and two months' imprisonment at hard labour (with 10 months of pre-sentence remand having been credited).

(5) The sentences are reckoned as having commenced on 1 September 2017, the date on which they were imposed.