[2024] JMCA Crim 38

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE EDWARDS JA
THE HON MR JUSTICE D FRASER JA

SUPREME COURT CRIMINAL APPEAL NO COA2019CR00016

ANDREW CLEGHORN v R

Matthew Hyatt instructed by K D Knight KC of Knight Junor & Samuels for the applicant

Andre Wedderburn and Miss Cygale Pennant for the Crown

21 March 2023 and 15 November 2024

Criminal Law - Evidence - Identification evidence - Identification by recognition - Inconsistencies and discrepancies - Discrepancy between eyewitness evidence and medical evidence - Whether trial judge gave adequate directions - Whether trial judge made unorthodox comments

Criminal Law - Evidence - Alibi - Comments by the trial judge - Whether judge's comment in alibi directions went beyond that which is permissible resulting in a reversal of the burden of proof

Criminal Law - Summing up - Unsworn statement from the dock - No good character direction given - Whether issue of good character was distinctly raised - Whether accused entitled to propensity limb of the good character direction

EDWARDS JA

Introduction

[1] Andrew Cleghorn ('the applicant') was arrested, charged and convicted for the murder of Paul Christopher "David" Hines ('Mr Hines'). The applicant was tried in the Westmoreland Circuit Court holden at Savanna-La-Mar, before G Fraser J ('the learned

judge') sitting with a jury. After his conviction on 12 February 2016, he was sentenced on 18 February 2016 by the learned judge, to life imprisonment with the possibility of parole after serving 15 years' imprisonment. On 4 March 2016, the applicant filed an application in this court for leave to appeal against his conviction and sentence. His application was reviewed by a single judge of this court and refused on 9 February 2022. He renewed his application before this court, as he was entitled to do, but filed grounds of appeal in respect of conviction only.

[2] On 21 March 2023, having heard the application for leave to appeal conviction, this court refused the application, and the conviction and sentence of the applicant were affirmed. The sentence was reckoned to have commenced as at 18 February 2016, the date on which it was imposed.

[3] These are the brief reasons, as were promised, for making those orders.

Background

[4] On 29 January 2013, Mr Hines was stabbed to death, in a shop, in Ashton district in the parish of Westmoreland. The prosecution's case was largely based on the identification evidence of an eyewitness, Stephen Brown ('Mr Brown'), who was the next door neighbour of the applicant and the owner of the shop in which the murder occurred. Mr Brown said that, on the night in question, he witnessed the applicant stab Mr Hines causing his death. There was one other person in the shop, but that individual gave no statement to the police and was not called as a witness. Medical evidence was given by the doctor who performed the post-mortem examination on Mr Hines, to the effect that the cause of death was excessive blood loss caused by a stab wound to the abdomen. The applicant gave an unsworn statement from the dock in which he denied that he was the one who had stabbed Mr Hines, and in which he raised the defence of alibi.

The application

[5] At the commencement of the hearing before us, counsel for the applicant sought and was granted permission to abandon the original proposed grounds of appeal filed,

and to argue the proposed grounds filed on behalf of the applicant on 17 March 2023. These were as follows:

> "GROUND 1.: The learned trial judge failed to give an adequate Turnbull direction, due to unorthodox commentary and omissions, leaving her bereft of the necessary distance and required detachment in approaching a proper analysis and assessment of the evidence in order to adequately direct and warn the jury as to the issue of identification.
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> GROUND 2: The learned judge's comments and omissions in her ladyship's summation concerning the alibi of the accused unjustly prejudiced the minds of the jury against the accused, and therefore, reduced the viability of his alibi.
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> GROUND 3: The learned trial judge erred in law in failing to recognize the appellant's good character, and to afford him of the benefit of a good character direction thus rendering the verdict unsafe and the trial unfair."

Discussion

The learned trial judge failed to give an adequate Turnbull direction, due to unorthodox commentary and omissions, leaving her bereft of the necessary distance and required detachment in approaching a proper analysis and assessment of the evidence in order to adequately direct and warn the jury as to the issue of identification (ground 1)

A. Submissions

[6] Counsel for the applicant submitted that, although the learned judge correctly relied on the applicable guidelines from the case of **R v Turnbull and others** [1977] QB 224, identification being a live issue in the matter before her, her summation contained several "defects" which rendered the applicant's conviction unsafe and, cumulatively, deprived the applicant of the possibility of an acquittal. In that regard, the applicant made complaints in relation to three areas of the learned judge's summation: (1) the duration of the identification; (2) the general circumstances of the identification; and (3) the discrepancy between the identification evidence and the pathologist's evidence.

[7] In relation to the duration of the identification, counsel argued that there was a gap in the evidence, as the sole eyewitness was illiterate and unable to reliably measure time. This, he said, affected the correctness of the identification. In this regard, counsel pointed to Mr Brown's evidence-in-chief where the witness said the incident had lasted for five minutes and that he had seen the applicant's face for about five minutes. Counsel compared that with Mr Brown's answers in cross-examination, which counsel interpreted to mean that the witness had changed his position from five minutes to one minute.

[8] This inconsistency, counsel submitted, was not placed before the jury by the learned judge, who only mentioned the five-minute period, and did not direct the jury as to the implications on the reliability of the identification if the witness had only viewed the attacker for one minute. This, it was argued, was in contravention of the guidelines in Turnbull, which require that the judge specifically point out weaknesses in the identification evidence to the jury, and to direct the jury as to the reliability of the witness overall.

[9] It was further contended that the learned judge appeared "more anxious to reassure the jury than to warn them", as in the case of **Regina v Peter Paul Keane** [1977] 65 CR App R 247, and that her comment that the attacker had been in no hurry because he had stopped to wipe off his knife blade, wrongfully cured the weakness in the evidence as to the duration of the observation period. That the attacker was not in a hurry, it was argued, was an inference that only the jury was entitled to make, and by making that comment, the learned judge stepped into the jury's arena, usurping its power and prejudicing the minds of its members.

[10] Counsel argued that the learned judge made several omissions when assessing the strengths and weaknesses of the evidence surrounding the circumstances of the identification. Counsel submitted, firstly, that there was no mention in the summation that the identification took place at night, and that such an identification would be weaker than one done in the day. Counsel pointed to the fact that the learned judge only mentioned that there was a bright light inside the shop and another light at the door, and

she did not leave it to the jury, as she should have, to determine whether the lighting had been sufficient, given the time of day.

[11] Counsel argued, secondly, that the learned judge failed to mention the evidence of the eyewitness that there was a third person who was in the shop at the time of the incident and the fact that that person had given no statement against the applicant. This, it was said, left the witness' identification uncorroborated. Thirdly, counsel argued that the learned judge had failed to highlight, as a weakness, the questionable nature of Mr Brown's evidence as it related to the duration of time he first witnessed the applicant visit the bar (five minutes), the time that elapsed between the first and second visit, and the duration of the second visit during which the attack took place. It was argued that the evidence as to the duration of the first sighting was prejudicial, as it could have wrongfully bolstered the evidence of the second sighting. This failure, it was contended, meant that the jury was not given the benefit of understanding the true length of time the witness had observed the attacker, if he had at all, nor was the jury shown the link between the duration of the purported initial identification and the witness' inability to tell time.

[12] Regarding the discrepancy between the evidence of Mr Brown as to how many stabs he saw the applicant inflict on Mr Hines, and the medical evidence as to the actual number of stabs Mr Hines received, counsel submitted that there was a conflict in the evidence which was not adequately dealt with by the learned judge. Counsel pointed to Mr Brown's evidence that he had seen the applicant "stab up" the deceased, including stabs to the belly and neck, whereas the pathologist's evidence was that he only observed one stab wound to the abdomen of the deceased, and none to the neck or anywhere else on the body. This, it was contended, was a material discrepancy in the witness' evidence, which was not adequately dealt with by the learned judge, who did not treat the discrepancy as material, and who unfairly prejudiced the minds of the members of the jury by providing possible justifications for the discrepancy that did not arise on the evidence. Counsel also pointed to the fact that the learned judge had suggested to the members of the jury, at page 133 of the transcript, that it was up to them to decide if

the discrepancy was material or not, which in effect, counsel said, incorrectly invited them to reject the scientific evidence in favour of the evidence of a layman. This, it was argued, was a material misdirection that affected the safety of the conviction overall, as the jury might reasonably have come to a different conclusion had they been properly directed.

[13] Counsel submitted that the learned judge not only failed in her duty to warn the jury of the danger of convicting the applicant in light of the weaknesses in the prosecution's evidence, but also compounded that failure by making improper comments that minimized the impact of those weaknesses. The cases of **Byfield Mears v R** [1993] UKPC 13 and **Regina v Peter Paul Keane** were relied on in support of these submissions.

[14] Counsel for the Crown, Mr Wedderburn, in response, submitted that this ground had no merit as the learned judge gave correct and adequate directions on visual identification to the jury in accordance with the Turnbull guidelines, directions which were tailored to the circumstances of the instant case.

[15] In relation to the discrepancy between the identification evidence and the medical evidence, Mr Wedderburn argued that it was not disputed that the deceased had died from a sharp force injury to the front right side of his abdomen, and submitted that the learned judge left the issue of the number of stabs open to the jury, to decide whether to reject the evidence of Mr Brown, as she was entitled to do. The learned judge, he further argued, had pointed out to the jury that the number of stabs the eyewitness said he saw had some bearing on the witness' credibility. As regards the issue of inconsistencies and discrepancies generally, counsel submitted that it was settled law that a judge is not under a duty to point out every discrepancy or inconsistency that arises on the evidence.

B. Analysis

[16] This ground raised the issue, generally, as to whether the learned judge failed to adequately direct the jury on how to treat with the weaknesses in the identification

evidence. Based on the specific complaints made by the applicant under this ground, this court had to decide whether: (a) the circumstances under which Mr Hines' attacker was identified were such that the witness could have correctly and credibly identified the applicant as the attacker; (b) the medical evidence was in such conflict with Mr Brown's evidence so as to destroy its credibility; and (c) the learned judge's comments in respect of both of those issues had the effect of unfairly bolstering identification evidence that, by itself, was too weak to be reliable.

[17] For the following reasons, it was determined by this court, that the identification of the applicant was not so poor or weak, that a jury properly directed could not have relied on it to find that the applicant was the attacker. It was also determined that it could not correctly be said that the learned judge's directions on identification were deficient, and that certain comments she made unfairly bolstered what was a 'weak identification'. This can be demonstrated by a brief examination of the learned judge's treatment of the identification evidence.

(i) *The relevant portions of the learned judge's directions*

[18] The learned judge recounted the evidence of Mr Brown to the jury in detail. In giving her directions, the learned judge explained the burden of proof on the prosecution to prove the accused man's guilt, and noted the applicant's denial of the charge. She advised the jury that the case depended on the identification evidence given by Mr Brown, since he was the sole witness as to identification called by the prosecution, and his evidence was the only evidence connecting the applicant to the murder. She also correctly pointed out that, since the applicant had not only denied stabbing the deceased but had also denied being in the vicinity of the attack at the relevant time, the credibility of Mr Brown was important. She noted that Mr Brown had known the applicant prior to the incident, and that it was up to the jury to determine whether they believed him as to how he said Mr Hines was killed, and that the applicant was the one who had killed him. She warned that the prosecution must make them feel sure that the applicant was the one who had caused Mr Hines' death.

[19] The learned judge then gave the usual directions based on the Turnbull guidelines, warning the jury as to the special need for caution before convicting the applicant in those circumstances. She also warned that an honest or convincing witness could be mistaken, even in cases where the person was very well known to the witness before. The learned judge directed the jury that they were to carefully examine the circumstances in which the witness had made the identification, and reminded them that they were to examine closely the circumstances in which the identification was said to have been made, at the same time highlighting the weaknesses in that evidence. She identified three weaknesses in the identification evidence given by Mr Brown, including the issue as to the duration of time under which Mr Brown said he had the applicant under observation and the fact that the identification took place under frightening circumstances as described by Mr Brown. The learned judge directed the jury that they were to consider what impact those weaknesses had on their assessment of the credibility and reliability of Mr Brown's identification of the applicant.

[20] Summing up on what she found to be the weaknesses in the case, the learned judge said this:

> "I must, however, point out to you the following specific weaknesses which appear in the identification evidence. Firstly, although the accused man was well-known to Mr. Brown, and this is not disputed, well before the 29th of January 2013, the relevant sighting took place during a horrible and tragic experience. Mr. Brown said he was shaking because of the horror of the death and he was frightened. He said he never know somebody could kill somebody like you killing a cow, so that frightened him. So, you will have to take that into consideration.
>
> He also said he had only a side view of the assailant's face at the time when the stabbing occurred. You must, therefore, consider whether these factors would have impaired the witness' ability to make a correct identification. Mr. Brown has also given an estimate of time to be five minutes.
>
> He was cross-examined as to his ability to tell time. He quite frankly told you that he is illiterate, he can't read, and based

> on his responses when he was cross-examined about 15 seconds and Usain Bolt and 9 seconds, you might well come to the conclusion that he has an imperfect concept of time. He regards five minutes, he says, as a short period or a short time. You must, therefore, ask yourselves whether all that the witness described happened and if, in those circumstances, whether the time period of five minutes given is realistic or whether it all happened in a much shorter time as challenged by Defence Counsel. You might well conclude that the sighting was for a much shorter duration than five minutes. You will then have to assess, by way of the narrative and what Mr. Brown said happened during that time, and to determine whether there was sufficient time for the witness to make a correct identification of the assailant. Consider whether the assailant and witness spent a long or short time in each other's company and what opportunities there were for Mr. Brown to make a correct identification of that assailant.
>
> In considering all the circumstances of the purported identification made by Mr. Brown, you are to assess and determine if these weaknesses pointed out by me has [sic] impacted your assessment of the correctness of the purported identification on whether Mr. Brown has satisfied you so that you feel sure that it was Mr. Cleghorn who was the perpetrator that night." (See pages 124 and 125 of the transcript)

[21] The learned judge, therefore, did in fact place before the jury, as a weakness, the issue of the duration of time in which the witness said he observed the applicant. She pointed out that the witness was illiterate and that he had an "imperfect" concept of time. Crucially, the learned judge advised the jury to examine the narrative of what the witness said took place, to assess for themselves the opportunities the witness had to observe the assailant, and whether there had been sufficient time for the witness to have accurately and reliably identified the applicant as the assailant so as to make them feel sure that the applicant was, in fact, the perpetrator.

[22] The learned judge did comment that the assailant seemed not to be in "any hurry". Her exact words, as recorded at page 123 of the transcript, were that "this is not a person you might say that was in any hurry but that's a matter for you". This was an invitation to the jury to consider one possible inference that could be drawn from the evidence.

However, based on the evidence, the learned judge's comment did not go beyond the bounds of what is permissible, nor was it capable of prejudicing the jury in any way. It neither added to nor detracted from the narrative given by the witness that the assailant had rushed into the shop, stabbed up the deceased, wiped off the blade on his pants and then walked out of the shop. The witness had time to observe that the type of knife used in the stabbing was a ratchet knife. The fact that the assailant was in no hurry was an inference the jury could properly have drawn from the narrative of what the assailant did after the attack. Whether within that narrative there would have been sufficient time for the witness to accurately identify the applicant, was a matter for the members of the jury to decide, as the learned judge properly directed. Furthermore, the jury had been directed by the learned judge to ignore any comments she made unless they accorded with their own views.

[23] There was also no merit in the complaint that the learned judge failed to point out to the jury, as a weakness, the issue of the sufficiency of the lighting, as this was not a particular weakness in the evidence. The learned judge clearly recounted the evidence as to what time in the evening the incident had occurred, at which time it would have been dark. Further, she recounted the evidence of Mr Brown that he was able to see clearly because of the light bulbs that were in the shop and at the door, bearing in mind that the shop measured only 10 x 10 feet.

[24] There was no merit in the complaint that the learned judge failed to point out to the jury that there was a third person in the shop who had been named as a person of interest, but who had given no statement against the applicant. Any comment made by the learned judge on that issue would have served no purpose other than to lead the members of the jury to improperly speculate.

(ii) *The identification evidence and the circumstances surrounding the identification*

[25] Mr Brown's evidence as to his prior knowledge of the applicant was as follows. Mr Brown had known the applicant for about a year prior to the incident. During that period,

the applicant lived next door and was renting a house from Mr Brown's son. Mr Brown used to go to school with the applicant's mother. He knew the mother's name as Herwin, and the applicant's uncle as Clifton. Mr Brown would see the applicant every day and would talk to him. His description of their relationship was that he and the applicant "eat out of the same pot", that the applicant "beg me wife tea", and that they played "ball" together. Before the incident, Mr Brown had last seen the applicant earlier that same day. There was, therefore, sufficient evidence for the jury to conclude that the witness knew the applicant well.

[26] The circumstances surrounding Mr Brown's identification of the attacker were that, on the evening of the murder, at about 7:50 pm, Mr Brown was sitting around the counter in his board shop, whilst Mr Hines and another man were also in the shop seated on the opposite side of the counter. Mr Hines was to the left of Mr Brown. The three men were talking. The shop was around 10 x 10 feet. The applicant, who Mr Brown knew as "ginger", came into the shop and purchased a beer from him. The applicant poured some of the beer onto the floor of the shop and then stepped out of the shop. Within five minutes, the applicant rushed back inside the shop with a ratchet knife open in his hand, uttered some expletives, pushed the knife into Mr Hines' belly and 'stab up' Mr Hines. After the applicant stabbed Mr Hines, Mr Hines uttered "Ginger, weh you stab me up for and me no do you nutten"? Mr Hines then fell off the stool and dropped in the corner. The applicant wiped off the knife on his pants and left the shop. Mr Brown then bawled out "Ginger kill David in the shop". After that people "come down" and the police came and took Mr Hines away.

[27] In relation to how he was able to see the applicant in order to be able to identify him, Mr Brown said that there was a bright light from a bulb hanging low from the middle of the shop. There was also an outside light at the doorway of the front of the shop. He was able to see the applicant's whole face and body. He saw the applicant's face for five minutes when he first came in to buy the beer. He saw the side of the applicant's face when the applicant was stabbing the deceased in the corner. Mr Brown said he was

standing at the counter by then. He said he saw the side of the applicant's face for about five minutes when he was stabbing Mr Hines, and that the whole incident, from the time the applicant came into the shop to buy the beer, until he left after the stabbing, took about 15 minutes. Under cross-examination, Mr Brown said Mr Hines was stabbed more than once. He said he saw the applicant hold Mr Hines' head and stab him once in his neck.

[28] Based on this evidence, the issue became one of credibility that fell to be decided by the jury, in accordance with the directions given by the learned judge.

[29] Counsel for the applicant contended that Mr Brown had contradicted himself in cross-examination as to the duration of his period of observation during the attack, changing it from five minutes to one minute. However, the reference to "one minute" by Mr Brown was his response to the question from counsel, found at page 45 of the transcript, as to what 15 seconds was. The witness' response was "maybe a minute". The witness maintained that the attack took about five minutes. There was, therefore, no basis to find that there was an inconsistency on his part, in that aspect of his evidence. This, by itself, would not have weakened the evidence so as to cause the learned judge to err in not directing the jury on that aspect of it.

[30] In respect of the sufficiency of the lighting in the shop at the time of the attack on Mr Hines, Mr Brown explained how he was able to see the attacker and identify him inside the shop, notwithstanding that it was late in the evening (7:50 pm). If the members of the jury believed his testimony that there was light in the middle of the shop and at the doorway of the shop, given the shop's small size (10 x 10 feet), it would have been up to them to conclude that there was sufficient lighting to enable Mr Brown to identify the applicant as the attacker, especially since he had known him so well before. The evidence as to the lighting was not a weakness in Mr Brown's evidence that required the learned judge to give a specific warning to the jury in that regard.

C. <u>The discrepancy between the eyewitness evidence and the medical evidence, and how the learned judge dealt with it</u>

[31] The medical evidence on the post-mortem examination conducted on the body of Mr Hines was given by Dr Sarangi. Dr Sarangi said he observed a single stab wound to the right side of Mr Hines' abdomen. Dr Sarangi did not observe any injury or abnormality in and around the head and chest of Mr Hines, or on his limbs or the extremities. However, Dr Sarangi explained that, although there was only one entry wound, he could not rule out the possibility of multiple stabs into the same entry wound. In that regard, at pages 80 to 81 of the transcript, he said the following:

> "The wound was solitary. A single but such a possibility could not be absolutely ruled out because when the blade is introduced into abdominal cavity and the blade could have been moved or pulled to some distance and pushed again, yes, that could be possible but the wound, the entrance wound, the stab wound was one. The knife, the blade could…the possibility, it could have been pulled and then pushed again; pulled and pushed again without completely pulling it out of the wound. It cannot be absolutely ruled out."

[32] Mr Brown's evidence was that he observed the applicant "push up" the knife into Mr Hines' "belly" whilst repeatedly uttering certain expletives, and that the applicant "stab up" Mr Hines. At no point was he asked, nor did he say, specifically how many times he saw the applicant push the knife into Mr. Hines "belly". Under cross-examination, he repeated that the applicant "push up" the knife into Mr Hines whilst uttering expletives. When asked, he said Mr. Hines was stabbed in his "belly", and after that, the applicant held Mr. Hines in his head and stabbed him in the neck. He then said that the applicant stabbed Mr Hines "all over his body". When counsel for the applicant queried that statement, Mr. Brown said he meant "in his belly and neck". When counsel questioned further as to the number of stabs, Mr Brown insisted that it was "more than one stab". This clearly conflicted with the medical evidence of Dr Sarangi, who observed only one stab wound, which was on the right side of the abdomen, going upwards towards the centre of Mr Hines' body.

[33] Counsel for the applicant submitted that this was a material discrepancy that was not adequately dealt with by the learned judge. Further, it was said, the learned judge,

unfairly prejudiced the minds of the members of the jury by providing possible justifications for the discrepancy that did not arise on the evidence.

[34] Discrepancies that arise on the evidence are matters that ought to be left to the jury for resolution, unless the discrepancy is so material that it weakens the prosecution's case to the extent that, taken as a whole, and at its highest, no jury properly directed could properly convict on it (see **Regina v Galbraith** [1981] 1 WLR 1039; **R v Andrew Peart and Garfield Peart** (unreported) Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 24 and 25/1988, judgment delivered 18 October 1988). Where the prosecution's case, as in this matter, depends solely on the credibility and reliability of a particular witness, then the judge must determine whether the discrepancy has discredited the witness to the extent that his evidence is so unreliable that it cannot be safely relied on. Where that is so, the case must be withdrawn from the jury. Otherwise, the question of which witnesses are to be believed is for the jury to decide (see **R v Turnbull and others**). If the matter is not withdrawn from the jury, the duty of the trial judge, in the summation, is to explain to the jury what discrepancies are and how to identify them. A trial judge ought to point out to the jury what could amount to a discrepancy that may affect their view of the case or undermine the evidence. Once the trial judge does this, it is for the jury to determine whether a discrepancy really does exist, whether it is material, and whether, because of it, the witness "has been so discredited that his evidence cannot be relied on at all" (see **Vernaldo Graham v R** [2017] JMCA Crim 30, **Lloyd Brown v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 119/2004, judgment delivered 12 June 2008, and **R v Noel Williams and Joseph Carter** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 51 and 52/1980, judgment delivered 3 June 1987).

[35] Brooks JA (as he then was), in **Morris Cargill v R** [2016] JMCA Crim 6, at para. [30], aptly explained the law in this area as follows:

> "…trial judges are required to explain to juries the nature and significance of inconsistencies and discrepancies and give them directions on the manner in which they should treat with

> those elements that occur in the evidence. Trial judges are not, however, required to identify every inconsistency and discrepancy that manifests itself during the trial. Nonetheless, it would be remiss of a judge to fail to mention such inconsistencies and discrepancies that may be considered especially damaging to the prosecution's case."

[36] In stating the law as such, Brooks JA relied on several oft-cited cases, including that of **Lloyd Brown v R**, in which Carey JA opined that it is sufficient for the trial judge to point out some of the major discrepancies to illustrate what they are, to give proper directions on how to identify them and decide whether they are material or not, and how to treat with them.

[37] Where the discrepancy has to do with medical evidence, the general principle is the same, since the jury is the ultimate arbiter of the facts. This will be so unless the expert testifies as to primary facts which are uncontroverted. The jury may not, in such a case, reject the evidence of the expert in favour of that of a lay witness where there is such a discrepancy (see **Anderson (Rupert) v R** (1971) 43 WIR 286 and the Supreme Court of Judicature of Jamaica Criminal Bench Book, at page 125, paras. 4 to 10).

[38] Based on the foregoing principles, the learned judge's duty was to, firstly, decide whether there was anything in the evidence that could amount to a discrepancy; secondly, determine whether any such discrepancy was so material and damaging to the prosecution's case that the case ought to be withdrawn from the jury; thirdly, if the case is not withdrawn, advise the jury as to how to treat with the discrepancies that may have arisen in the case; and fourthly, point out some of the major discrepancies as illustrations, leaving the issue to the jury to determine whether they found the discrepancies material or immaterial and how they affected their view of the evidence and the witnesses.

[39] Having not withdrawn the case from the jury, it is clear that the learned judge was of the view that the discrepancy between the medical evidence and Mr Brown's evidence was not sufficiently serious for the case to be withdrawn. If she was correct in that assessment, then she was required to leave it to the jury to decide whether the

discrepancy was material. That fell squarely within their role as judges of the facts. This would be so despite the fact that the "conflicting evidence" involved medical evidence.

[40] The learned judge properly identified the issue surrounding the number of wounds to Mr Hines' body as a discrepancy in the evidence and "a conflict in the Crown's case". She instructed the jury on how to treat with discrepancies generally, as well as inconsistencies and omissions. She directed them that it was a matter for them to decide what amounted to a discrepancy and how it impacted the case - whether it was significant, went to the root of the prosecution's case, and/or rendered the evidence of the witness untruthful in part or in whole. The learned judge directed that, in assessing the credibility of the witness, the jury was to consider various factors such as the age and ability of the witness to observe and recall, the length of time that had passed since the incident had occurred, whether there was any motive for the witness to tell lies, and also whether the witness had given any explanation for the conflict in the evidence. She cannot be faulted for these directions.

[41] The learned judge's general directions to the jury on how they were to treat with inconsistencies and discrepancies which may arise, found at pages 130 to 133 of the transcript, were as follows:

> "Now, conflict can, as I said, impact the credibility of a witness and can affect how you treat with the evidence of that witness and ultimately the decision you make concerning the guilt or innocence of the accused. And this is how you approach the conflict in this case, the discrepancy as I pointed out. Firstly, decide if there is, in fact, an inconsistency, a discrepancy or omission. If you decide that yes, there is such a conflict, each such instance of conflict identified by you must be carefully examined with a view to making a decision whether it has significance in relation to the truthfulness of the witness, the witness' account as a whole. You, then, consider, is there an explanation for the conflict whether coming from the witness or from any other source of evidence? Consider, is the conflict important or not? One way of deciding whether it is important is deciding whether for you the point on which the conflict occurs is vital to the case or credibility of the witness.

> If you say that it is vital to the case or credibility of the witness, you have two choices. You may say that the witness cannot be believed at all. That is, you can reject the witness totally and completely. If having given due consideration to the defence's argument you are sure that the essential parts of the witness' account is true, then you will no doubt act on that conclusion. If the conflict in the evidence is not important, you simply acknowledge that it exists and it does not go to the root of the prosecution's case so as to destroy it or affect the credit worthiness of the witness overall. But if you are left in doubt about the truthfulness of the witness' overall account because the inconsistencies cannot be satisfactorily explained or they are so grave, then you must find the defendant not guilty.
>
> Now in deciding what evidence to accept and what to reject, bear in mind that you can accept all that a witness has said, if you are satisfied that the witness spoke the entire truth. Equally, you can reject all the witness has said if you don't believe him or find his evidence otherwise unreliable. However, there is a third option. You can accept a part of a witness' evidence and reject another part if you are satisfied that the witness was truthful and accurate as regards parts of his evidence or was mistaken or lying in regards to other parts. So in other words in relation to Mr. Brown, you are to decide whether you have identified any conflicts in his evidence.
>
> Having identified any such conflict you are to decide whether these conflicts are so serious that you can't believe anything at all that Mr. Brown has said. But it is also open to you to say that, 'Yes, there is a conflict but it does not go to the root of the prosecution's case so that I am prepared to act on parts of his evidence and reject other parts.' So that is how…you treat with any conflict, that is inconsistencies, discrepancies and omissions that you find arising on the evidence presented by the prosecution."

[42] Of the discrepancy between Mr Brown's evidence and the medical evidence, she said the following, at page 133:

> "So it might be for you to say well, there is no issue that Mr. Hines was stabbed and killed. As to the number of stab wounds he received, that might or might not be important to you. The real issue for you might be the fact that he was

> stabbed to death not that he received one, two or three stabs. But that is all a matter for you, Madam Foreman and members of the jury."

[43] Then, at pages 142 to 143, the learned judge said:

> "He said David got stabbed in his belly part and then he was asked…if David get [sic] stab anywhere else. And he said yes. The man hold David like this and he had demonstrated the head part and stabbed him in the neck. So he said David was stabbed in both the neck and the belly and remember what I told you about Dr. Sarangi's evidence and how it conflicts with this aspect of Mr. Brown's evidence but that is for you to determine based on how I have instructed you to do in law."

[44] It is true that the learned judge could have gone on to point out to the jury the possible effects the conflict could have on their deliberations, for example that it could mean that Mr Brown was lying and was not present when the incident occurred. The learned judge's failure to do so is, however, not fatal.

[45] Regarding the correctness of the identification of the applicant in this case, the major issue was whether Mr Brown was telling the truth when he said (a) he witnessed the attack, (b) he saw the attacker, and, (c) he correctly identified the applicant as the attacker. The question, therefore, was whether the nature of the discrepancy was so grave that it totally discredited the witness on these fundamental issues. The conflict involved medical evidence that was a matter of fact for the jury. If the jury accepted the evidence, as an established fact, that Mr Hines only had one stab wound to the abdomen, the question that would arise would be whether that fact was totally irreconcilable with Mr Brown's evidence that he saw the applicant attack Mr Hines and stab him in the "belly" and the neck, to render Mr Brown's evidence incapable of belief.

[46] The evidence that Mr Hines had died from a stab wound to the right side of his abdomen accorded with Mr Brown's evidence that he saw the assailant stab Mr Hines in in his "belly". The evidence from Mr Brown and the pathologist as to the type of weapon used (a ratchet knife), and the location of the injury causing death, were in agreement,

and, therefore, went towards supporting the credibility of the identification. Mr Brown at no time said that Mr Hines was stabbed more than once to the "belly". What he did say was that he saw the applicant stab the deceased more than once, one stab having been delivered to the neck. He described what he saw as "stab up". However, this does not translate to more than one stab to the abdomen and may well have been a matter of descriptive colloquialism.

[47] Mr Brown was never asked specifically whether he saw Mr Hines get stabbed more than once to the abdomen. His explanation of his description of "stab up" was that Mr Hines was stabbed in the belly and the neck. Even if that was interpreted by the arbiters of fact to mean that there was more than one stab delivered to the abdomen, on the evidence, it was open to the jury to accept the doctor's evidence that it was possible that the knife was moved in and out of the same entrance wound. The doctor said the wound was inflicted with moderate to severe force and was deep into the abdominal cavity. It would have also been open to the jury to take the view that what Mr Brown saw were stabbing motions that missed their mark, as Mr Brown's evidence was not that he had seen the actual stab wounds. Even if the jury's interpretation of Mr Brown's evidence that the applicant had "stab up" Mr Hines meant that he was saying that Mr Hines had received more than one stab wound (including to the neck), as the learned judge directed, it would have been open to the jury to reject that part of his evidence, which was not corroborated by the pathologist, and accept the rest.

[48] Counsel for the applicant relied on the case of **Byfield Mears v R**, in which, during the trial on an indictment for murder, a discrepancy arose between the medical evidence and the evidence of a lay witness regarding the manner in which the deceased had been killed. The witness, who claimed the appellant had confessed to her, said that the appellant had told her he had shot the deceased in the ears and then burnt the body. The post-mortem report found that the cause of death was "head injury with skull fracture, extensive body burns with a possibility of strangulation". There was no evidence of any gunshot wounds. The appellant denied that he killed the deceased and that he

had given the witness any such confession. The Judicial Committee of the Privy Council found that the evidence the witness had given as to the cause of death was totally inconsistent with what "had in reality happened", and that this was the strongest point in favour of the appellant. The Board also found that the judge, in making comments to the jury to the effect that it was unlikely that the witness had lied about the confession, had erred in his directions to the jury, as the comments had the effect of diluting or destroying the cogency of the point. For those reasons, the conviction was overturned.

[49] **Byfield Mears v R** is, however, distinguishable from the instant case. In this case, there is no reliance on a confession to the killing but eyewitness testimony suggested that more injuries were inflicted on the deceased than the medical evidence bore out. This could be explained by the possibility that the witness saw stabbing motions which failed to connect with the deceased. **Byfield Mears v R** was a case where the prosecution was relying solely on what the witness was saying had been confessed to her regarding how the killing took place. In such a case, it would be imperative that the report of the confession as to how the deceased was injured bore some resemblance to the cause of death given in the medical evidence as to the injuries sustained by the deceased. This is so especially in a case where there could be no possible explanation for the divergence. However, in **Byfield Mears v R**, there was no evidence of the type of injury that the witness claimed the accused confessed to her he had inflicted on the deceased.

[50] In the case of **Rupert Crosdale v The Queen** [1995] 1 WLR 864, which was an appeal from this court in a murder case, the Privy Council had to examine a ground of appeal that involved a conflict between the pathologist's evidence that the deceased had died from a single stab wound to the heart, and the evidence of three eyewitnesses who had said that the deceased had been stabbed in the back repeatedly, by the appellant, after the deceased had fallen. The defence had argued that the conflict was irreconcilable and, therefore, there was no case for the appellant to answer. The Privy Council agreed with the Court of Appeal that, since the witnesses did not give evidence of seeing actual signs of injury to the deceased's back, and that the trial judge had had the advantage of

seeing demonstrations by the witnesses, the judge was within his right to interpret the evidence of the eyewitnesses as being "an act of stabbing at the deceased's back without necessarily wounding him" (see page 871).

[51] In the instant case, the evidence as to the cause of death was not inconsistent with the evidence given by Mr Brown. There was an explanation from Dr Sarangi as to the possibility of several stabbings into the same wound even though Mr Brown never said he saw Mr Hines being stabbed several times to his abdomen. That theory was not discredited. Furthermore, Mr Brown said he saw the stabbing but gave no evidence of seeing several wounds on Mr Hines. It is true that there is no explanation from Mr Brown or Dr Sarangi for the absence of a wound to the neck of Mr Hines. However, as in **Rupert Crosdale v The Queen**, the jury were entitled to find that what Mr Brown saw may have been what appeared to him to be a stabbing motion to Mr Hines' neck. This is all the more so since the jury would have heard that Mr Hines was seated when he was stabbed and that the applicant held him in the head. They also would have heard that Mr Brown only had a side view of the applicant at the time of the stabbing.

[52] The learned judge was correct in leaving the matter to the jury, as the arbiter of fact, having properly directed them on how to treat with discrepancies.

[53] The applicant's contention that the learned judge invited the jury to reject the uncontroverted medical evidence could not be sustained. On the contrary, the learned judge treated the medical evidence as a question of fact, but invited the jury to decide whether the conflict with Mr Brown's evidence as to the number of stabs was so important that it made the identification evidence of Mr Brown incredible and/or unreliable. This, she was within her right to do.

[54] We, therefore, found no merit in ground one.

The learned judge's comments and omissions in her summation concerning the alibi of the accused unjustly prejudiced the minds of the jury against the accused, and therefore, reduced the viability of his alibi (ground 2)

A. Submissions

[55] In relation to this ground, it was submitted that, although the learned judge correctly advised the jury of the prosecution's burden to disprove the applicant's alibi, she made a subsequent comment that contradicted her initial direction and, in effect, reversed the burden on the prosecution to disprove alibi. In that regard, it was noted that the learned judge told the members of the jury that although the applicant had said in evidence that he had been in an adjoining district at the time of the attack, he did not tell them which district he was in. Counsel submitted that this comment by the learned judge would have wrongfully placed the burden on the applicant to prove his alibi, and wrongfully given the jury the impression that it was necessary in law for the applicant to have disclosed the district he was in. The case of **Regina v Peter Paul Keane**, as well as the Criminal Bench Book, were relied on in support of this ground.

[56] Counsel for the Crown accepted that the judge had the duty to fairly put the defence raised by the applicant to the jury, and submitted that the learned judge, in fact, did so.

B. Discussion

[57] The applicant gave an unsworn statement from the dock in which he said that, on the day in question, he was in the same area building a house. He said he was decking that house the same day "they say the crime was committed". He left the community at about 5:00 pm and went to the adjoining community of York Mountain to visit his uncle. He spoke with his uncle for a while, then fell asleep there. He did not wake up until 7:00 the next morning. He, therefore, raised an alibi defence.

[58] The learned judge dealt with the applicant's defence of alibi, at pages 162 to 165 of the transcript, as follows:

> "The defendant in this case, Mr. Cleghorn, in his defence did not take the witness stand. He elected to make a statement from the dock. I point out to you that it is an accused man's right to make such an option. He can say nothing if he so

chooses, or if he wishes to speak, he can do so from the dock or from the witness box as other witnesses had done. But, having made that choice, he is not obliged to say anything at all because he is presumed innocent until you, by your verdict, say otherwise. He is entirely entitled to give a dock statement as he did and in which he has flat out denied the charge against him. In fact, **he said he was elsewhere at the material time. He said he was at his uncle's house in an adjoining district and, in so saying, he raises the Defence of alibi**.

Now, what is an alibi? An alibi is the defendant saying, "I was not at the place where you said I was. I was elsewhere." That is simply what it is. But, **having raised an alibi, he does not have to prove it**…**he does not have to prove this having regard to the presumption of innocence which the law guarantees to him**. **It is the duty of the Prosecution to disprove the alibi as raised by the accused man**. The Prosecution discharges its obligation in this regard if the evidence of Mr. Brown satisfies you so that you feel sure that he was, indeed, at Ashton on the night in question as the Prosecution alleges and, therefore, could not have been in that other district where his uncle lives. This is because a person cannot be in two places at once. **So…when analysing the accused man's denial, you must consider the issue of alibi and whether the Prosecution has disproved it**.

You must look at the totality of the evidence in the case. If you believe the accused man's denial, then you must acquit him. Your belief of the accused is not the result of him having to satisfy any legal duty or to prove his innocence. It is simply the result of, having heard him, do you believe him? If the account given by the accused man puts you in doubt about the Prosecution's case, that is, you do not completely believe him, but you are not sure on the Crown's case that he stabbed Mr. Hines to death, you must also acquit him in those circumstances. Now, even if you find that Mr. Cleghorn is lying about where he was at the material time, this does not, without more, prove that he was in Ashton district committing the offence.

In order to convict him, you must do two things, firstly you must reject the Defence put forward by the accused, this does not entitle you to convict him because it is the Prosecution

> who must prove his guilt. If you reject his defence and his alibi or if the Prosecution has satisfied you in disproving the alibi, then you look at the Prosecution's case in total and say whether you are satisfied so that you feel sure of the guilt of the accused man. And, when you consider all the evidence and the challenges raised by Defence Counsel as to visual identification and the credibility of Mr. Brown, in particular, and if after considering all that, plus the warning that I gave you or warnings that I gave you, if your answer is, yes, the Prosecution has satisfied you so that you feel sure, then it is open to you to convict him." (Emphasis added)

[59] The learned judge recounted the applicant's unsworn statement in more detail at page 165 of the transcript. Then, at pages 167 to 168, she reminded the jury of the burden of proof in light of the fact that the case centred around the visual identification by Mr Brown and that the applicant was saying that he was not there. She said:

> "I remind you that in this case the accused man has nothing to prove. It is the Crown who must prove his guilt and they must prove his guilt to your satisfaction so that you feel sure and it is the evidence which they have brought before you which must be utilized by you to determine this case.
>
> I remind you that the accused man is saying that he was not there and therefore has brought into issue visual identification. And remember what I told you about visual identification and that you must take care when you assess the evidence of the witness who purported to identify this accused man as being the assailant who killed Mr. David Hines on the 29th of January, 2013. I also remind you that witnesses who are honest can, nonetheless, be mistaken and that mistakes can be made not only in relation to strangers but persons who you know as well. So bear that in mind.
>
> I remind you that the prosecution must disprove the alibi as raised by Mr. Cleghorn. He said he was not even in the district. He said he was in an [adjoining] district. He didn't tell us which district he was actually in, he only says he was in an adjoining district. So, you will have to grapple with that and determine whether Mr. Brown saw this accused man at Ashton District on the night in question."

[60] These directions sufficiently placed the applicant's defence of alibi before the jury. Counsel's complaint regarding the learned judge's comment on the failure of the applicant to say which district he was in, whilst valid, did not have the effect complained of. If the learned judge's statement that the applicant did not say which district he was in, was true, this would merely have been a statement of fact but, as it turned out, it was an inaccurate statement of fact. In fact, the applicant had, named the adjoining community he was in as York Mountain. However, this error in the recounting of the evidence was not so serious or detrimental as to prejudice the applicant in his defence. Neither did it result in the reversal of the burden of proof or have the effect contended by counsel. The learned judge instructed the jury that they need not accept her opinion or review of the facts or her emphasis on any particular aspect of the evidence, as it was their judgment on the facts that counted. She also emphasised that the facts in the case were their responsibility. The learned judge directed the jury as to the burden of proof on the prosecution in relation to the identification evidence, as well as the prosecution's duty to disprove the applicant's alibi. These directions, along with the fact that the members of the jury heard the applicant say, in his unsworn statement, that he was in the adjoining district of York Mountain, at his uncle's house, reduced any potential harm that might have been occasioned from the error made by the learned judge in her review of the evidence.

[61] The learned judge was required to put the applicant's defence squarely before the jury in a fair and accurate manner. The ultimate question is whether, in substance, the defendant had a fair trial (see **Rupert Crosdale v The Queen**, at page 871; see also the cases of **Michel v R** [2008] UKPC 41, at paras. 31 and 33-34 and **Regina v Peter Paul Keane**). In our view, notwithstanding the error that the learned judge made, as noted above, the effect of the summation as a whole was to fairly present the applicant's defence of alibi to the jury. No merit was found in this ground.

The learned trial judge erred in law in failing to recognize the appellant's good character, and to afford him the benefit of a good character direction thus rendering the verdict unsafe and the trial unfair (ground 3)

A. Submissions

[62] Counsel for the applicant submitted that the learned judge erred in failing to direct the jury as to the applicant's good character, as she was required to do in the circumstances. In that regard, it was submitted that the applicant was entitled to the propensity limb of the direction, since the applicant raised the issue of his good character during his unsworn statement when he stated that the deceased was his friend and that he "would never do something like that to him". This failure, it was contended, resulted in a miscarriage of justice given the weaknesses in the identification evidence and the material discrepancy between the medical evidence and the evidence of the eyewitness. In support of this ground, the following cases were relied on: **Teeluck and John v The State of Trinidad and Tobago** [2005] 66 WIR 319 ('**Teeluck**'), **R v Aziz** [1995] 3 WLR 53 as cited in **Horace Kirby v R** [2012] JMCA Crim 10 ('**Kirby v R**'), **Patricia Henry v R** [2011] JMCA Crim 16, and **Kevaughn Irving v R** [2010] JMCA Crim 55 ('**Irving v R**'). The applicant sought, in particular, to draw a parallel with **Irving v R**, a case involving rape in which the appellant's conviction was quashed due to the failure of the trial judge to give a good character direction where credibility was a live issue.

[63] Counsel for the Crown, however, submitted that, since the applicant did not distinctly raise his good character in his unsworn statement, a good character direction was not required. Further, it was submitted, since it was revealed at sentencing that the applicant does in fact have a previous conviction for unlawful wounding, which he deliberately withheld, it would be "an affront to good sense" for him to assert on appeal that he was entitled to a good character direction. Moreover, it was argued, had the applicant asserted that he had no previous conviction at the trial, it would have been open to the prosecutor to rebut that assertion with evidence, which could have had the result of showing to the jury that the applicant was untruthful.

[64] For this ground, the Crown relied on the authorities of **Seian Forbes and Tamoy Meggie v R** [2016] JMCA Crim 20 and **Kirby v R**. In relation to **Irving v R**, relied on by

the applicant, the Crown submitted that that case was not applicable because it was decided based on its own peculiar facts.

B. Discussion

[65] Where an accused raises the issue of his good character in an unsworn statement from the dock, he will be entitled to the propensity limb of the good character direction which is to the effect that an accused of good character would be less likely to have committed the crime with which he has been charged (see **Michael Reid v R** (unreported) Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 113/2007, judgment delivered 3 April 2009 and **Kirby v R**). This direction should be given as a matter of course, unless, based on the circumstances of the case, and the evidence before the court, there is a good reason not to do so. There is no duty on a trial judge to give directions to the jury in respect of the credibility limb in a case where the accused gives an unsworn statement from the dock.

[66] In the instant case, where the applicant gave an unsworn statement from the dock, the obligation on the learned judge to give the propensity limb of the good character direction presupposed two things. The first is that the accused had "distinctly" raised the issue of his "good character", and the second, is that the accused could actually have been considered as being of "good character" (see **Kirby v R**, **Leslie Moodie v R** [2015] JMCA Crim 16 at para. [125], and **Teeluck**, at para. [33]).

[67] In relation to the first criterion, we disagree with counsel for the applicant that the statement made by the applicant that "Mr Hines is my friend, and I would never do something like that to him" raised the issue of his good character. In **Shaun Cardoza and Lathon Hall v R** [2023] JMCA Crim 19, F Williams JA, in seeking to answer a question as to when good character is distinctly raised in an unsworn statement, where an accused was relying on the fact of having no previous convictions, stated the following, at para. [38]:

> "While it is not necessary to use any particular form of words in an unsworn statement to raise the issue of good character, the words used ought generally to imply without ambiguity that the accused was stating he had never run afoul of the law before or if he had, it was not for a serious, relevant offence."

[68] In that case, in concluding that the applicant Hall had not "distinctly raised" the issue of his good character in his unsworn statement, F Williams JA considered that the applicant had only mentioned that, in effect, he [was] "gainfully employed". That, F Williams JA said, was insufficient to raise the issue of the appellant's good character.

[69] In the case of **Teeluck**, the Privy Council found that the evidence of the appellant Teeluck that he had never been previously arrested or charged, and the evidence of the appellant John that it was the first time he had ever been under arrest, was not sufficient to distinctly raise the issue of good character (see paras. 34 and 35).

[70] In **Tino Jackson v R** [2016] JMCA Crim 13, Brooks JA (as he then was) took a less stringent approach in dealing with the issue of whether the evidence in that case had raised the issue of the appellant's good character at trial. The relevant evidence involved that of the mother of the appellant's child, in which she said that the appellant was a good person, and the appellant's own evidence as to his being a father. Brooks JA opined that whether the statement raised the issue of good character had to be looked at in the context in which it had been made. Brooks JA found that the mother's statement, regardless of how one looked at it, could only be considered as raising the appellant's good character. With regard to the appellant's statement that "he was a father of daughters and would not interfere with other people's little children", Brooks JA found that this did in fact raise the issue of good character.

[71] Having considered the approach taken in the cases of **Shaun Cardoza and Lathon Hall v R**, **Teeluck**, and **Tino Jackson v R**, it is clear that the applicant's statement, in the instant case, did not distinctly assert his good character but merely suggested that he would not do anything to harm Mr Hines in particular, who he

considered a friend. To highlight a state of friendship with an individual to whom you would cause no harm, speaks less to character and more to a state of fact. Even the most disreputable of individuals have friends to whom they owe loyalty and to whom they would cause no harm.

[72] Furthermore, subsequent to the trial, during the sentencing process, it was revealed that the applicant had previous convictions, so that his claim to having a good character was, at best, questionable. The most serious of the convictions was from the year 2000 for unlawful wounding, for which he was sentenced to six months' imprisonment at hard labour, suspended for 12 months. The other two involved the offence of uttering forged documents, for which he served six months' imprisonment because he was unable to pay the fine, and the offence of driving under the influence of alcohol for which he was fined. Whilst it could have been argued that the latter offence was not serious or relevant, the former two offences of unlawful wounding and uttering forged documents show a tendency towards violence and dishonesty. It could, therefore, be said that the applicant's claim to be entitled to a good character direction is a spurious one.

[73] In **Craig Mitchell v R** [2019] JMCA Crim 8, at para. [12], the obligation on the part of the trial judge to give a good character direction with respect to propensity was found by this court to have been negated by the later revelation that the appellant did in fact have previous convictions, and was, therefore, not someone of good character.

[74] The case of **Irving v R**, relied on by the applicant, did not assist him and is wholly distinguishable from the case at bar. In that case, the applicant had given sworn evidence at trial and the issue as to his good character had not been raised at all. However, a plethora of evidence as to his good character was called at the stage of his sentencing. There was evidence that these witnesses had been available to be called in the trial. The complaint was that the failure to call evidence of good character at the trial was due to the incompetence of counsel. Whilst this court blamed neither counsel nor the trial judge, in quashing the conviction and ordering a new trial, it said that "the peculiar

circumstances" warranted its intervention and that, where credibility was such a live issue, the applicant should be given the opportunity to present evidence as to his character to the tribunal of fact (see para. [13]).

[75] There was no merit in this ground.

Conclusion

[76] At trial, the prosecution's case centred around the identification evidence of an eyewitness who had known the applicant before. Although weaknesses arose in the eyewitness' evidence, and there was a discrepancy between the eyewitness' evidence and the medical evidence, these were not sufficiently serious so as to discredit the witness and to warrant the withdrawal of the case from the jury. That being so, the learned judge was correct in leaving the resolution of these issues to the jury, as the arbiter of the facts. The learned judge properly directed the jury how to treat with these issues and the burden of proof, and fairly placed the applicant's defence of alibi before the jury despite an error in her recounting of the facts.

[77] For the foregoing reasons, we made the orders outlined at para. [2] above.