[2021] JMCA Crim 28

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MISS JUSTICE P WILLIAMS JA
THE HON MISS JUSTICE STRAW JA

SUPREME COURT CRIMINAL APPEAL NO 6/2013

FABIAN DOCKERY v R

Robert Fletcher and Miss Nancy Anderson for the applicant

Miss Cheryl-Lee Bolton for the Crown

25 July 2019 and 30 July 2021

P WILLIAMS JA

[1] On 18 July 2012, after a trial before Campbell J ('the learned trial judge'), sitting without a jury in the High Court Division of the Gun Court in the parish of Kingston, Mr Fabian Dockery ('the applicant') along with his co-accused, Mr Rohan Edwards, were convicted of the offences of illegal possession of firearm, robbery with aggravation and shooting with intent. On 12 December 2012, the applicant was sentenced to seven years' imprisonment in respect of the offence of illegal possession of firearm and ten years' imprisonment in respect of each of the offences of robbery with aggravation and shooting with intent. The sentences were ordered to run concurrently.

[2] The applicant's application for leave to appeal both his conviction and sentence was considered and refused by a single judge of this court on 2 August 2016. He renewed his application before us and, on 25 July 2019, having heard and considered the submissions from counsel, we refused the application for leave to appeal conviction and sentence. We ordered that the sentences are to be reckoned as having commenced on 12 December 2012.

[3] We promised, then, to reduce into writing our reasons for the decision. This is a fulfilment of that promise, with apologies for the delay.

The case at trial

[4] On 3 October 2009, at about 1:45 pm, Mr Nakeiya Nesbeth was at his business place along the Linstead By-pass, Rosemont, in the parish of Saint Catherine. He was in the yard with several persons, including his uncle Carl Walters, a Detective Constable of Police in the Jamaica Constabulary Force, when two men entered the premises. Mr Nesbeth noticed that one man was dressed in short jeans pants and a plaid shirt and the other in brown pants with a purple shirt. He spoke to them and they expressed a desire to purchase some parts for a motor vehicle.

[5] When the men were entering, Constable Walters left the premises through the main gate and stood on the sidewalk at the front of the premises. He noticed a motor car at the gate with two men sitting in the front with the motor car's engine running.

[6] Constable Walters noticed one of the men push his head out of the left front passenger window of the car, look in Constable Walter's direction and then pull his head back in. Constable Walters then saw the other man, who was sitting around the steering wheel, turn around and look in his direction through the back windshield of the car. This aroused Constable Walter's suspicion, and he memorised the licence plate number. It was 2143 FN. He also noted that the car was a black Toyota Altis.

[7] Constable Walters remained at the gate and observed that the two men who had entered the premises were still with his nephew, Mr Nesbeth. He was able to observe them for about three to four minutes. He identified the applicant as one of the two men who had entered the premises and was with Mr Nesbeth in the yard before following Mr Nesbeth into the office.

[8] Whilst in the yard, Mr Nesbeth told the men that he did not have the parts they wanted but offered to source them. The man dressed in the short jeans pants asked him for his business card, and he walked off to his office to get it. The men followed him into

the office, and the man dressed in the short jeans pants told Mr Nesbeth that he had been given $300,000.00 to kill him. He asked Mr Nesbeth, "way you can do fi yuhself?". The other man, who was dressed in the purple shirt, pointed a gun at Mr Nesbeth, who held on to the firearm to keep it away and avoid getting shot. He told them that he only had $9,000.00 or $10,000.00 and begged them not to kill him. The man in the short jeans pants then relieved Mr Nesbeth of his wallet and removed all the money it contained. The man in the purple shirt took up his laptop but returned it to the desk after looking out into the yard.

[9] As they were about to leave, the man in the short jeans pants said to Mr Nesbeth, "Boy me nuh waan kill you you nuh but me nuh know weh fi do wid yuh". At his suggestion, the men locked Mr Nesbeth into a storeroom and left the office. Mr Nesbeth identified the applicant as the man dressed in the purple shirt who had been armed with the gun and who had taken up his laptop.

[10] While still at the gate, Constable Walters saw when the two men who had gone with Mr Nesbeth exit the office, walk past him, and enter the back of the Toyota Altis motor car. They walked at what he described as a "fairly moderate, not too fast" pace and got to 5 feet from him as they passed him. He was able to observe the entire faces of the men. He again identified the applicant as one of the two men.

[11] After the men entered the car, it was driven off "very quickly". Constable Walters saw Mr Nesbeth, who had by then managed to free himself from the storeroom, at the doorway of the office. He was shouting to Constable Walters, who noted that he appeared frightened. They spoke, then got into Mr Nesbeth's car and drove out of the premises in the general direction where the Toyota Altis had gone.

[12] Constable Walters called the Linstead Police Station and informed them of what had just taken place. Shortly after, he called Area 3 Control and spoke to the operator and soon thereafter, he received a call from Kingston Police Control.

[13] Whilst on the phone, Constable Walters saw a black motor car fitting the description of the one he had seen earlier, proceeding some distance ahead of them. Mr Nesbeth managed to get closer to it, and Constable Walters saw that it was a Toyota Altis, and he recognised the licence plate number, which was as he had memorised. He also noted that there were four men in the car. Constable Walters estimated that about eight minutes or less had passed since he had seen the vehicle drive off from the gate where he had seen it.

[14] They followed the Toyota Altis through the Bog Walk Gorge and into the Angels Estate housing scheme. Constable Walters kept the police operator advised of their location. Mr Nesbeth testified that although the Toyota Altis gained some distance ahead of him, he was able to keep sight of it. He said they eventually came closer to it when it was stopped at a dead end and was turned around facing them as they approached.

[15] Mr Nesbeth said that as they approached the Toyota Altis, it sped off and drove past them. He turned around to follow it again. He testified that Constable Walters then said something to him, and he stopped the car so that Constable Walters could exit. He said Constable Walters proceeded to run behind the Toyota Altis. Mr Nesbeth was not able to see what happened then because he said he had stopped, but he heard several gunshots. He eventually continued driving until he saw the Toyota Altis stopped again, elsewhere in the housing scheme, with the four doors wide open and no one inside. A police vehicle was parked directly in front of the Toyota Altis.

[16] Constable Walters testified that he had exited Mr Nesbeth's car while the Toyota Altis was in the process of being turned around and he shouted 'police'. It was eventually driven towards him, and he noticed that there still were four men inside. He saw one man sitting at the right side to the back of the car point a firearm in his direction, and he heard a loud explosion. Constable Walters fired several shots and took cover behind a column in a yard nearby. He gave chase and saw when a marked police vehicle arrived and drove in the direction of the Toyota Altis. He said that by that time, Mr Nesbeth had picked him up and their chase continued. He heard several loud explosions.

[17] Inspector Eric Byfield, then assigned to the Saint Catherine North division, was on patrol with other officers when he heard a transmission from police control and proceeded to the Angels Estate. Upon arrival in the scheme, he testified that he saw a black Toyota Altis being pursued by another vehicle, and he heard gunshots being fired. He saw four men alight from the Toyota Altis and run in different directions. Inspector Byfield testified that one man came out of the bushes with his hands up and shouted, "[o]fficer, do nuh shoot mi, mi with[sic] talk, mi we talk". He further testified that a search of the area was conducted for other men, and a man was found in an unfinished building. He said both these men were taken to the Spanish Town Criminal Investigation Branch office, where they were handed over to Detective Corporal Kirk Roache.

[18] Detective Corporal Roache, who was then stationed at the Spanish Town Criminal Investigation Branch, testified that he was on supervision duties at the Spanish Town Police Station when he heard a transmission from police control. He was dispatched to the Angels Grove area, where upon arrival, he saw several police officers and observed a Toyota Altis parked along the roadway. Within half an hour of his arrival on the scene, he saw a man being led from some bushes and taken to him. Both Mr Nesbeth and Constable Walters identified this man as one of the men who had been in the Toyota Altis. This man was the applicant's co-accused, Mr Edwards.

[19] Detective Corporal Roache then gave instructions and participated in the search of the area. After searching for less than an hour, he came upon a house that was under construction and spotted a man stooping in a darkened corner of the building. He ordered the man to stand up and asked him who he was. The man replied, "[o]fficer, do nuh shoot mi". Detective Corporal Roache said the man had a purple shirt and a purple handkerchief wrapped up in his hand. Detective Corporal Roache identified the applicant as the man he had seen in the unfinished building.

[20] Whilst there in Angels Estate, Mr Nesbeth pointed out the applicant as one of the men who had entered his premises earlier that day and robbed him. Constable Walters also pointed out the applicant as the man who had entered his nephew's business place,

talked to his nephew, went into the office, and left in the Toyota Altis. Both men placed emphasis on the purple t-shirt seen in the hands of one of the police officers, which they said, was the shirt one of the robbers was wearing. The purple t-shirt and handkerchief, which Detective Corporal Roache said he had taken from the applicant, were admitted into evidence.

[21] Both the applicant and Mr Edwards were taken to the Spanish Town Police Station where Detective Corporal Roache said the applicant was cautioned and admitted that he had robbed Mr Nesbeth but said he was not the man with the gun. Detective Corporal Roache said the applicant also said it was another man who shot at the police.

[22] The applicant's co-accused, Mr Edwards gave sworn testimony in his defence. While acknowledging that he and three other men were in the Toyota Altis that day, which at some point had been stopped at premises somewhere in Saint Catherine, he denied any knowledge of or participation in the robbery of Mr Nesbeth. He testified that the applicant, who he had known prior to that day, was one of the men in the car. He also largely agreed with the sequence of the chase as had been outlined by Mr Nesbeth and Constable Walters. He, however, denied that anyone in the Toyota Altis was in possession of a firearm or that anyone had fired at Constable Walters, who had fired at them.

[23] In his defence, the applicant, in a brief unsworn statement, denied robbing anyone, denied having a firearm or shooting at the police. He insisted that he was an innocent man and knew "nothing that dem talking about".

The appeal

[24] Before us, Mr Robert Fletcher was permitted to abandon the original grounds of appeal that had been filed by the applicant. He also indicated that he was not pursuing the appeal against sentence. He was granted permission to argue six supplementary grounds. They were as follows:

> "**GROUND ONE:**

The Learned Trial Judge failed to deal adequately with weaknesses and to properly examine the circumstances of the identification evidence of the applicant, and to sufficiently warn himself relative to identification in that:

(a) There were material discrepancies in the identification of the applicant Dockery;

(b) The descriptions by the two identifying witnesses were given to the police, after the Applicant, Dockery, was taken into custody by [Detective Corporal] Roache;

(c) The major item for identification was the purple shirt allegedly found in [the applicant's] hand by [Detective Corporal] Roache though he failed to mention this in his initial statement after the arrest."

The applicant was therefore denied a fair trial and this led to a grave miscarriage of justice.

GROUND TWO:

The Learned Trial Judge failed to give himself the proper corroboration warning when considering the evidence of [Edwards] concerning the Applicant OR the Learned Trial Judge failed to properly treat with and assess the evidence of Edwards, concerning [the applicant], as a witness with an interest to serve, thus depriving the Applicant of a fair trial.

GROUND THREE:

The Learned Trial Judge erred in failing to state how he viewed and treated with the Applicant's unsworn statement from the dock and the Applicant's defense [sic] that he was not involved in any of the offences, thus denying the Applicant fair consideration of his defense [sic] and amounting to a miscarriage of justice.

GROUND FOUR:

The Learned Trial Judge erred in failing to set out how he addressed the issue concerning the discrepancy in

the evidence of the two virtual complaints [sic] concerning the offence of shooting with intent and how he treated this discrepancy in reaching his final decision, thus denying the Applicant a fair consideration of any doubts, that were raised by the discrepancy.

GROUND FIVE

The Learned Trial Judge erred in failing to deal with the issues of confrontation identification/dock identification from several prosecution witnesses and holding that an identification parade was not necessary.

GROUND SIX:

The Learned Trial Judge erred in a Bench trial by not making it clear that all the issues in the case had been correctly addressed, leaving no room for any serious doubts to arise, as several issues were not clearly addressed such as:

(a) Identification – as set out in Ground 1;

(b) A proper warning concerning evidence by a co-defendant – Ground 2;

(c) Treatment of the unsworn statement- Ground 3;

(d) The issue of discrepancies – Ground 4;

(e) Accepting confrontation evidence/dock [identification] – Ground 5." (Emphasis and underlined as in original)

Grounds one and five - The treatment of the identification evidence

The submissions

[25] The complaint about the learned trial judge's treatment of the identification evidence was firstly concerned with the way the evidence had been assessed. Mr Fletcher submitted that there was a failure by the learned trial judge to deal adequately with

weaknesses that arose in the evidence, and this resulted in the applicant being denied a fair trial. Counsel noted what he described as material discrepancies in the identification of the applicant. He contended that, in any event, it was unfair that a description of the applicant had been recorded after he had already been in police custody.

[26] Counsel submitted that the circumstances under which the applicant was pointed out at the location amounted to confrontation and should be frowned upon by the court. He contended that there should be questions as to whether the confrontation was truly spontaneous or whether it could be viewed as a deliberate attempt to negate the need for an identification parade. It became counsel's further complaint that, in the absence of an identification parade, there had been dock identification of the applicant, which, in these circumstances, was unfair to the applicant. Counsel submitted that the dock identification needed to have been considered in a more serious light and the failure to hold an identification parade was a serious miscarriage of justice. Counsel referred to **Dwight Gayle v R** [2018] JMCA Crim 34 in support of the submissions.

[27] Mr Fletcher noted that this court, in **Michael Burnett v R** [2017] JMCA Crim 11, extensively considered the issue of confrontation evidence. He submitted that the question which arose, in this case, was whether the circumstances of the instant case had breached the principles to be applied. The circumstances that counsel highlighted for consideration were whether identification by the purple shirt was sufficient, whether the statement from Mr Nesbeth that the applicant "looked familiar" was triggered by the colour of the shirt and whether the officer asking Mr Nesbeth if he recognised the applicant was proper.

[28] In response, on behalf of the Crown, Miss Cheryl-Lee Bolton submitted that the quality of the identification evidence was extremely strong and that the learned trial judge dealt with the issues arising from it appropriately and had warned himself accordingly. She contended that a judge sitting alone must expressly warn himself and must demonstrate in language that does not require to be construed, that in coming to a

conclusion adverse to an accused person, he has acted with the requisite caution in mind. She referred to **R v George Cameron** (1989) 26 JLR 453 in support of this submission.

[29] Crown Counsel pointed to the sequence of events that led to Mr Nesbeth identifying the applicant at the scene and submitted that there was no evidence that he had been prompted by any police officer. She contended that what occurred was not confrontation identification but contemporaneous identification. She submitted that the learned trial judge dealt with this issue adequately, and his treatment of the issue cannot be faulted.

Analysis and disposal

[30] It is well settled that a judge sitting without a jury, when summing up the case, is required to demonstrate an awareness of the applicable legal principles. In one of the early cases from this court dealing with this issue, **R v Lebert Balasal and Soney Balasal and R v Francis Whyne** (1990) 27 JLR 507, Gordon JA, put the requirement as it relates to cases of identification as follows, at page 511:

> "In the development of the law on visual identification evidence in this jurisdiction, the weight of authority in the cases of [**R v Dacres** (1980) 33 WIR 241] through [**R v Clifford Donaldson and Others** (1988) 25 JLR 274] and [**R v George Cameron**] requires a trial judge in the Gun Court faced with evidence of visual identification to 'demonstrate in language that does not need to be construed that in coming to a conclusion adverse to the accused person he acted with requisite caution in mind'."

[31] The principles applicable to identification cases were definitively set out by Widgery CJ in the seminal decision of **R v Turnbull and Others** [1977] QB 224. It is therefore necessary for a judge sitting without a jury, in a case which turns on the correctness of the identification evidence, to demonstrate that he has accurately assessed and treated with that evidence in keeping with the guidelines set out in **Turnbull**.

[32] The complaint about the learned trial judge's treatment of the identification evidence was not based on any significant departure from the guidelines in **Turnbull**.

The learned trial judge rehearsed the evidence in a comprehensive and fair manner. He warned himself and analysed the evidence in keeping with the guidelines. In so doing, he appropriately considered the circumstances and the issues relating to the opportunity the identifying witnesses had to view the robbers, and assessed their demeanour before arriving, ultimately, at his finding that the applicant was guilty.

[33] The first challenge to the learned trial judge's treatment of the identification evidence was concerned with the description given of the applicant. On the one hand, it was submitted that there were material discrepancies in the description given. A careful reading of the transcript failed to reveal any evidence that supported that assertion. Both Mr Nesbeth and Constable Walters gave evidence of the way the men who entered the yard were dressed, which was the only evidence relating to any description of the applicant. Mr Nesbeth said one man was wearing short jeans pants and a plaid shirt, and the other wore brown pants and a purple shirt, and he identified the applicant as the man who was in the purple shirt. Constable Walters gave similar evidence, that the applicant was dressed in a purple t-shirt when he came to the premises. Both men also testified that the applicant was wearing a white merino when he was apprehended in Angels Estate.

[34] Mr Fletcher pointed to the fact that in the transcript of the evidence, it is recorded that the learned trial judge stated that, while in the yard, Mr Nesbeth "saw two men entered, and his description of these men who he had known before was by their clothing they were wearing". There was indeed no evidence from Mr Nesbeth that he had known the men before. This was, therefore, clearly an error on the part of the learned trial judge. However, it is notable that nowhere else in the summation does the learned trial judge again refer to any possible prior knowledge. He did not demonstrate that this was a case where he found recognition to be an issue. Indeed, at the point where he was summarising the evidence the Crown was relying on against the applicant, the learned trial judge had this to say:

> "In respect of [the applicant], the evidence that the prosecution is relying on is largely identification evidence, the Court has to look at the factors that we have highlighted and I have looked at [sic] throughout to see whether in fact there is a sufficiency of opportunity for the complainants to point out the person who came in the yard and held up Mr Nesbeth. Because in relation to [the applicant], Nesbeth said, [sic] has described the clothing he saw him in, purple shirt, he described the situation in the yard, in the office where the [applicant] pulled the gun, he told us of what he said to the [applicant], all the money he had."

[35] The learned trial judge then reviewed what he called "the sufficiency of opportunity", noting that the incident happened in the day. He also considered the distance between Mr Nesbeth and his assailant, and the time Mr Nesbeth had to view his assailant. He then concluded that having seen Mr Nesbeth giving his testimony on oath, he was satisfied that Mr Nesbeth was not mistaken. It was, therefore, apparent that any error the learned trial judge may have made in the extract that was highlighted did not impact his ultimate finding, such that this court can say that there was any unfairness to the applicant.

[36] The second challenge concerning how the learned trial judge treated the identification evidence, related to the fact that the descriptions given by Mr Nesbeth and Constable Walters were given to the police after the applicant was already in custody. This is a fact that cannot be denied but, perhaps, could not be avoided, given the sequence of events and the role the complainants played in the apprehension of the applicant.

[37] The learned trial judge accepted that, during the chase, the Toyota Altis remained in the view of Mr Nesbeth and Constable Walters and that no one was seen entering or leaving the car during the chase. The learned trial judge considered all the evidence to satisfy himself as to the correctness of the identification, and he did so in a manner that cannot be faulted. He did not merely rely on the description that was given.

[38] The final complaint concerned the fact that Detective Corporal Roache had failed to mention in his statement that he had found the "major item for identification", the purple shirt, in the applicant's hand. In our view, this was an issue that would have mainly affected the credibility of the officer, rather than the issue of the correctness of the identification of the applicant, by Mr Nesbeth and Constable Walters, as the person who was dressed in a purple shirt and who had participated in the robbery. Significantly, Mr Nesbeth testified about seeing an officer on the scene in Angels Estate holding a purple shirt. In any event, Detective Corporal Roache gave an explanation for the omission in his statement, which the learned trial judge was entitled to consider, and which, ultimately, did not affect the evidence of Constable Walters and Mr Nesbeth.

[39] The assertion that the learned trial judge's treatment of the identification evidence was such that it resulted in the applicant being denied a fair trial, which led to a grave miscarriage of justice, was without merit. The learned trial judge, in our view, dealt with the identification evidence in an entirely appropriate manner. Accordingly, ground one failed.

[40] In addressing the issue raised in ground five of whether the learned trial judge erred, in failing to deal with confrontation identification, it would be useful to bear in mind what this court has said on the issue. In **Michael Burnett v R**, McDonald-Bishop JA, writing on behalf of the court, usefully distilled from various authorities the principles relating to the identification of a suspect to the police. At para. [27], she outlined them as follows:

> "i. The identification of a suspected person must be carefully conducted.
>
> ii. The usual and proper way is to conduct an identification parade in which the suspect is placed with a sufficient number of other persons similar in gender, appearance and the likes and to have the identifying witness pick out the suspect without assistance.

iii. The object of an identification parade is to make sure the ability of the witness to recognise the suspect has been fairly and adequately tested, and every precaution should be taken to exclude any suspicion of unfairness or risk of erroneous identification through the witness' attention being directed specifically to one suspected person instead of equally to all persons on parade.

iv. It is quite wrong to suggest to the witness that the prisoner was believed by the authorities to be the offender. Nothing should be done to influence or affect the recollection of the witness and thus destroy the value of the evidence of identity.

v. Outside of an identification parade, other methods of identification, even if sometimes undesirable, are nevertheless accepted by the court, with sufficient safeguards.

vi. The courts have deprecated confrontation that is contrived by the police to circumvent the safeguards of the Identification Parade Regulations 1933. **Confrontation is where the police confront the identifying witness with the suspect in order to have the witness verify that the suspect was the assailant. The sort of confrontation that is denounced is the tendency for the police to confront a suspected person with the person who is required to identify him in circumstances in which it is possible for the identifying witness to say that he merely came upon him**." (Emphasis added)

[41] McDonald-Bishop JA went on to note the following statement of Melville JA (Ag) in **R v Leroy Hassock** (1977) 15 JLR 135 at page 138:

> "…Confrontation should be confined to rare and exceptional circumstances, such as those in *R. v Trevor Dennis* [(1970) 12 JLR 249], where the court would not be inclined to frown too unkindly on the procedure adopted there. Although it is always difficult to formulate universal rules in these circumstances, where the facts may vary so infinitely, a prudent rule of thumb would seem to be: where the suspect

> was well known to the witness before, there may be confrontation. That is, the witness may be asked to confirm that the suspect is the proper person to be held. If the witness did not know the suspect before, then the safe course to adopt would be to hold an identification parade, with the proper safeguards, unless of course there are exceptional circumstances."

[42] In the circumstances of this case, the identifying witnesses were on the scene when two men were held by the police. It was on the information of the witnesses that the police had arrived on the scene and conducted the search, which culminated in the apprehension of the two men. There was no detailed evidence of the circumstances which led to Constable Walters identifying the applicant to the police. Mr Nesbeth testified he had heard some loud talking, and when he walked over to see what was happening, he saw the police holding a man, who "looked familiar". The following exchange then took place between Mr Nesbeth and the prosecutor:

> "Q: Elaborate, when you say familiar, from where?
>
> A: He looked like the gentleman that came to my office, held me up and robbed me, the gentleman that was wearing the purple shirt.
>
> Q: Did you speak to anyone on the scene at that time?
>
> A: Yes, I did.
>
> Q: Do you remember who you spoke to?
>
> A: I spoke to the policeman that was holding the gentleman in the white merino.
>
> Q: Did you say anything?
>
> A: He asked me if I recognised that man and I said yes.
>
> …
>
> Q: Can you please tell the court what was the answer you gave to the policeman?
>
> A: I said yes, that is one of them."

[43] With no details as to how Constable Walters came to identify the applicant after he was held on the scene, the learned trial judge carefully considered the evidence of Mr Nesbeth concerning the issue. On his assessment of Mr Nesbeth, he was satisfied that Mr Nesbeth's statement that the man "looked familiar" did not mean that Mr Nesbeth was not sure about the applicant being the man who had entered his office and pointed the gun at him earlier that day. In the circumstances, this could be viewed as one of those rare and exceptional circumstances where the procedure adopted cannot properly be frowned on.

[44] It was noticeable that no mention was made of the issue of confrontation in his summation and the learned trial judge stated that the defence had complained that what happened at the trial amounted to dock identification. He, therefore, recognised that no identification parade was held and went on to consider whether this was, in fact, a case involving dock identification and whether, under the circumstances, an identification parade would have been helpful.

[45] In **Dwight Gayle v R**, Brooks JA (as he then was), writing on behalf of the court, considered the issue of dock identification in some detail. At para. [32], he acknowledged that in **Mark France and Rupert Vassell v The Queen** [2012] UKPC 28, the Judicial Committee of the Privy Council stated that a dock identification entails "in the original sense…the identification of an accused person for the first time by a witness who does not claim previous acquaintance with the person identified".

[46] Brooks JA went on to set out relevant principles which he distilled from decisions from their Lordships in the Privy Council. They can be summarised as follows:

1. An identification parade should only be held if it would serve some useful purpose.
2. Dock identification, in the original sense, is undesirable in principle.

3. Evidence by way of dock identification is not, by itself inadmissible. It will be a matter for the judge's discretion whether to admit it.

4. Where the dock identification evidence is allowed, particularly where it is the first occasion on which a witness would be purporting to identify the accused, it will be necessary for the trial judge to give careful directions on the dangers of that type of identification.

5. A trial judge's direction to the jury on the dangers of relying on visual identification, according to the direction set out in **Turnbull**, does not satisfy the requirements for directing the jury on the special dangers associated with a case of dock identification. The issues involved are different, and where they both arise, the trial judge should address them both.

6. Uncontroversial evidence that the person accused was previously known to the witness, and the witness had previously identified the accused, would be a basis for allowing an identification in court.

7. Where a witness claims prior knowledge of the person accused, if the challenge to that prior knowledge is diffident and there is no other basis for doubting that prior knowledge, no useful purpose would be served by holding an identification parade, and an identification by the witness in court, will not be deemed a dock identification, in the original sense.

8. If however, the challenge to the claimed previous knowledge is more than tenuous, or there is some reason to question the cogency of the claimed prior knowledge, it would be wrong to say that an

> identification parade would serve no useful purpose; it could test the honesty of the witness' assertion of prior knowledge.

[47] More than once in his summation, the learned trial judge considered the evidence of the identification of the men and concluded that this was not a case of dock identification in the original sense. His conclusion was correct, as the witnesses had identified the applicant when he was held at Angels Estate and were clearly not purporting to do so for the first time at the trial. Nevertheless, the learned trial judge went on to properly acknowledge, that an identification parade would have provided an opportunity to test the witnesses' ability to identify the applicant. He addressed the issues adequately in coming to his ultimate finding that there was sufficient evidence, to satisfy him to the requisite standard, that the applicant was properly identified as one of the robbers. To say that the learned trial judge failed to deal with the issue of dock identification or that he needed to have considered it in a more serious light is unmeritorious. In the circumstances, the failure to hold an identification parade did not amount to a serious miscarriage of justice. Accordingly, ground five also failed.

Ground two – The treatment of the evidence of the applicant's co-accused

The submissions

[48] Mr Fletcher highlighted instances in the summation where the learned trial judge referred to the evidence that the applicant's co-accused, Mr Edwards, had given. He contended that the learned trial judge relied on the evidence of Mr Edwards, without any attempt to indicate an awareness of the need for a warning when relying on the evidence of an accomplice. Mr Fletcher referred to **Lawrence Brown v R** [2016] JMCA 33 in support of this submission.

[49] Counsel contended that there was no dispute that Mr Edwards, who was charged with the very same offences as the applicant, was a co-defendant or accomplice of the applicant. He posited that, in any event, Mr Edwards was to be viewed as a witness with an interest to serve. He submitted that there could be no dispute that the learned trial

judge failed to mention any concern about the evidence from Mr Edwards, which implicated the applicant. Counsel submitted further that the learned trial judge needed to give himself a careful and thorough direction on the need for corroboration of Mr Edwards' evidence. He argued that given the nature of Mr Edwards' evidence, the circumstances in which Mr Edwards gave his evidence, and the terms in which the learned trial judge summed up Mr Edwards' evidence, the applicant was denied a fair trial, and his conviction was unsafe.

[50] In her response on the Crown's behalf, Miss Bolton invited the court to examine how the learned trial judge looked at all the evidence and not just the sworn testimony of Mr Edwards before concluding that the applicant was guilty. She accepted that the learned trial judge did not warn himself in the manner Mr Fletcher had contended, but she submitted that, nevertheless, there was no need for any such warning, since an examination of the summation revealed that the learned trial judge did not rely heavily or at all on Mr Edwards' evidence, when considering the evidence against the applicant. She contended that any failure of the learned trial judge to warn himself was not fatal to the conviction of the applicant.

Discussion and disposal

[51] The issue of whether a corroboration warning is required when an accused gives evidence that implicated a co-accused was addressed by the English Court of Appeal in **R v Cheema** [1994] 1 WLR 147. After reviewing several authorities dealing with the issue, Lord Taylor, writing on behalf of the court, stated the following at pages 156-157:

> "In our judgment, English law does not recognise a rule requiring a full corroboration direction in respect of a co-defendant's evidence. Despite the existence of the early cases upon which [Counsel] placed reliance, we are not persuaded that they represent the present law. The issue does not seem to have been fully argued in those cases and although they have not been expressly overruled, the weight and frequency of more recent authority to the contrary effect is now overwhelming. It may, in terms of pure logic, seem incongruous that a witness should be treated as an

> accomplice if called by the Crown, but not so treated if he gives like evidence as a co-defendant. However, there are a number of practical grounds for maintaining the distinction so long as the present rules concerning corroboration are maintained.
>
> First, one must look at the basic rationale for requiring an accomplice's evidence to be corroborated. It is summarised in the passage from *Rex v Baskerville* [1916] 2 K.B. 658, 655, cited by Lord Hewart C. J. in *Rex v Barnes* [1940] 2 All E.R. 229 quoted above. The burden of proof being upon the prosecution, if they call a witness of doubtful reliability, it is necessary that the jury be warned of the danger of convicting upon the witness's evidence if it is uncorroborated. The same consideration does not apply in relation to the evidence of a co-defendant.
>
> Secondly, it would be unfair to defendant A, whose evidence implicates defendant B, for the jury to be given a full corroboration direction. This, of course, does not apply to a witness for the Crown said to require corroboration since that witness is not in peril in the particular proceedings…
>
> Thirdly, the complication involved in requiring a judge to give full corroboration directions in respect of co-defendants implicating each other, would be likely to confuse and bewilder a jury…
>
> Accordingly, in our judgment, what is required when one defendant implicates another in evidence, is simply to warn the jury of what may very often be obvious—namely, that the defendant witness may have a purpose of his own to serve."

[52] We must first appreciate that Mr Edwards was not a witness called on behalf of the Crown and, as such, there was no duty on the learned trial judge to warn himself about the dangers of convicting on his uncorroborated evidence. The sworn testimony he gave became admissible as evidence implicating the applicant. However, it was subject to the caveat that the sworn testimony of one accused against another, may be relied on in support of an adverse finding against the co-accused, subject to a warning that the accused who so testifies may have his own purpose to serve (see **Valdano Smith v R** [2020] JMCA Crim 46).

[53] It would be useful to briefly consider aspects of the evidence given by Mr Edwards. He testified to being in the Toyota Altis on that day after he had accepted a ride from the driver, who was someone he had known before and who he had actually assisted in securing the rental of the car. When he entered the car, he noticed that there were two other, men apart from the driver. Mr Edwards said that he had fallen asleep and woke up when the car was stationary and noticed that it was only the driver in the car at the time. After the two men returned to the car, they drove off, and Mr Edwards testified that the driver at one point proceeded to drive at a "heavy speed", overtaking several cars along the Bog Walk gorge and into the Angels Estate. He said that it was "like the car was being chased by somebody or something" and he observed that a white vehicle was following them. He first mentioned seeing the applicant, after he said he had surrendered to the police and was transported to the police station, where he saw the applicant full of blood. When asked if that was the first time that he had seen the applicant, Mr Edwards responded: "[n]o, from the time I came to the car and all the way to the station".

[54] During cross-examination, Mr Edwards explained that the applicant was in the car from he had accepted the lift. He knew the applicant from before that day and was accustomed to seeing him in the neighbourhood where he lived. Thus, by placing the applicant in the car, Mr Edwards' evidence was capable of implicating the applicant in the offences. However, Mr Edwards maintained that he did not see anyone with guns in the Toyota Altis and that no shots were fired from the car.

[55] There was no dispute that the learned trial judge did not give himself any warning relative to the evidence given by Mr Edwards about the applicant. It was, therefore, of significance, whether the learned trial judge demonstrated reliance on any evidence from Mr Edwards in making an adverse finding against the applicant.

[56] Early in his summation, the learned trial judge expressly recognised that he had to consider the cases against the two co-accused separately. When he first summarised the respective cases for the two men, the learned trial judge did not mention what Mr Edwards had said about the applicant being present in the car. While reviewing Mr

Nesbeth's evidence, the learned trial judge referred to only what Mr Edwards had testified about the chase that ensued along the Bog Walk Gorge and into the Angels Estate. The learned trial judge found that Mr Edwards' evidence supported and bolstered the case for the Crown in that regard. This finding was entirely fair and justified in the circumstances and cannot be seen to have impacted the case against the applicant.

[57] When he reviewed the evidence of Mr Edwards in more detail, the learned trial judge did refer to the fact that Mr Edwards had said that he had seen the applicant upon entering the vehicle. Before leaving the review of Mr Edwards' evidence, the learned trial judge made the following comment:

> "But what the prosecution says, is that Mr Edwards's case support[s] their own case, there are very little points of departure between the two, but what he says is not evidence against his co-accused and the cases have to be looked at separately."

[58] It was, therefore, apparent that contrary to Mr Fletcher's assertion, the learned trial judge did not rely on the evidence from Mr Edwards in making an adverse finding against the applicant. It could well be argued that the error the learned trial judge made was in failing to recognise that he should decide the case against the applicant on all the evidence, including the evidence of his co-accused, Mr Edwards, so long as he bore in mind, that Mr Edwards may have an interest to serve. So, whilst it is correct that the learned trial judge did not give himself the requisite warning when dealing with the evidence of the applicant's co-accused, his treatment of that evidence did not result in any unfairness to the applicant. Accordingly, there was no merit to ground two, which also failed.

Ground three - The learned trial judge's treatment of the unsworn statement of the applicant

The submissions

[59] Mr Fletcher commenced the submissions on this ground by referring to **Alvin Dennison v R** [2014] JMCA Crim 7, where Morrison JA (as he then was) considered the

issue of an unsworn statement. Counsel noted that Morrison JA concluded at para. [49] that "the jury must always be told that it is exclusively for them to make up their minds whether the unsworn statement has any value and if so, what weight should be attached to it".

[60] Counsel contended that the learned trial judge, as the arbitrator of fact, said nothing about the weight to be attached to the applicant's unsworn statement, whether it had any value and what persuasive effect it may have had to his decision.

[61] Crown Counsel, in response, invited the court to note how the learned trial judge dealt with the issue of the unsworn statement. She submitted that the learned trial judge elevated the statement in a manner that inured to the applicant's benefit. She contended that the applicant suffered no injustice and the omission by the learned trial judge to treat the unsworn statement correctly was not fatal to the conviction of the applicant.

Discussion and disposal

[62] In **Alvin Dennison v R**, Morrison JA conducted a comprehensive and useful review of several authorities dealing with the issue of an unsworn statement. In his conclusion on the authorities, Morrison JA stated that:

> "[49] … It is unhelpful and unnecessary for the jury to be told that the unsworn statement is not evidence. While the judge is fully entitled to remind the jury that the defendant's unsworn statement has not been tested by cross-examination, the jury must always be told that it is exclusively for them to make up their minds whether the unsworn statement has any value and if so, what weight should be attached to it. Further, in considering whether the case for the prosecution has satisfied them of the defendant's guilt beyond reasonable doubt, and in considering their verdict, they should bear the unsworn statement in mind, again giving it such weight as they think it deserves. While the actual language used to convey the directions to the jury is a matter of choice for the judge, it will be always be helpful to keep in mind that, subject to the need to tailor the directions to the facts of the individual case, there is no particular merit in

> gratuitous inventiveness in what is a well settled area of the law.
>
> [50] … But at the end of the day, as this court has repeatedly emphasised, the jury must be told unequivocally that the weight to be attached to the unsworn statement is a matter entirely for their assessment. Given that the defendant's defence is more often than not stated in the unsworn statement, a failure to give directions along these lines may effectively deprive the defendant of a fair consideration by the jury of his stated defence. This is therefore essentially a fair trial issue."

[63] Mr Fletcher was entirely correct that the learned trial judge had failed to warn himself in keeping with this guidance of Morrison JA. When he came to consider what the applicant had said, the learned trial judge stated the following:

> "Finally, the evidence of [the applicant], well not the evidence, he gave an unsworn statement. Now, although there is no duty on the accused to prove his innocence, an accused person may deem [sic] to do so, if the attempt succeeds then he is not guilty, if by the evidence given the court is left in a state of doubt then the court has to say that he is not guilty. But even if the attempt of an accused person fails that is not automatically the end of the case, the Court cannot automatically say that he is guilty. So that in this case where the accused [the applicant] has given evidence, even if the Court rejects the unsworn statement of the accused the Court could not by that fact automatically say that he is guilty. What the Court does in such a case is to consider all the evidence in the case including what the accused has said and see whether the Court is satisfied so that the Court is sure that the prosecution has proven its case, because it is only when the arbiter of fact is so satisfied that the Court is sure that one can say that the accused is guilty."

[64] The learned trial judge apparently managed to merge the requirements for dealing with an unsworn statement, with that of dealing with evidence given by an accused person. He implicitly ascribed to it the weight and value of sworn testimony. He considered all that was said by the applicant and ultimately concluded as follows:

> "Having looked at all the evidence in the case, having looked the cases for the accused separately and each count separately and having reminded myself right throughout that the burden in this case, as in all criminal trials, is on the prosecution and it never shifts, it remains on the prosecution right throughout and that burden is to make the tribunal of fact sure of the guilt of the accused. I am satisfied to that extent and I find both accused guilty on all three counts of the indictment."

[65] Miss Bolton was correct in her assessment that the treatment of the unsworn statement may well have inured to the benefit of the applicant. It certainly did not deny him a fair trial. The learned trial judge's failure to direct himself in the well-settled manner required, when dealing with the unsworn statement did not demonstrably deprive the applicant of a fair consideration of his defence. Ground three was unmeritorious and therefore failed.

Ground four - The learned trial judge's treatment of the discrepancies

The submissions

[66] Mr Fletcher highlighted the evidence concerning the shooting which had taken place after the Toyota Altis had stopped in Angels Estate. He noted that Mr Nesbeth had said that he heard shots but could not say where the shots came from, and Constable Walters said he saw when someone in the back seat of the Toyota Altis fire a gun, which was pointed in his direction. He also noted that the only damage caused by a firearm was to the Toyota Altis. Counsel submitted that this was a major discrepancy concerning the proof of the offence of shooting with intent, and the learned trial judge should have pointed out the discrepancy and indicate how he had resolved it.

[67] In response, Miss Bolton submitted that the few discrepancies that there were, in this case, were not substantial nor of such a nature to have discredited either of the complainants and thus render the convictions unsafe.

[68] Crown Counsel noted that the learned trial judge did identify and consider a discrepancy between the evidence of the complainants but failed to demonstrate how he

treated the discrepancy identified. She submitted that such an omission was not fatal to the conviction as, overall, the learned trial judge found Mr Nesbeth to be a truthful and reliable witness, and such a finding would remove any potential effect of such an omission.

Analysis and disposal

[69] There was, indeed, what could be viewed as a discrepancy in the evidence from the two complainants in the accounts given about the sequence of events leading up to the shooting from the Toyota Altis. Mr Nesbeth and Constable Walters were consistent that at some point after they had pursued the Toyota Altis into the Angels Estate, they had seen it stopped at a dead end. Mr Nesbeth said that it was turned and facing them as they approached, whereas Constable Walters said that it was in the process of being turned around, when he had exited Mr Nesbeth's vehicle and approached it. Constable Walters said it was at that point that someone in the Toyota Altis pointed a firearm and shot at him. Mr Nesbeth said the Toyota Altis sped past his vehicle and that it was while he was in the process of turning to continue the chase that Constable Walters exited and proceeded to chase the Toyota Altis on foot. It was then that Mr Nesbeth said he heard shots being fired.

[70] As he was concluding his summation, the learned trial judge gave himself unexceptional directions on the issue of discrepancies and inconsistencies. He acknowledged that "[t]here was one such area of divergence as [he saw] it between the testimony of the two very important witnesses for the prosecution…as it concerns where in the housing scheme where the final scenes of that chase played out". He then made a detailed review of their respective testimonies on that issue but failed to demonstrate any effort to resolve any discrepancy that arose.

[71] However, earlier in his summation, the learned trial judge expressly reminded himself that as the judge of the facts, he was entitled to accept the evidence he found believable and reject what he did not. He subsequently went on to say the following:

> "I find as a matter of fact, that the officer [sic], the Court accepts what the officer said that there was a person sitting in the back seat of the black Toyota Altis vehicle who aimed at him and fired at him whilst he himself was discharging bullets in the direction of the car."

[72] Thus, the learned trial judge treated with the differences in the evidence by clearly demonstrating that he accepted the evidence of Constable Walters on the issue, as he was entitled to. Although he omitted to specifically address it in terms of resolving the discrepancy, his failure to do so was not sufficient to disturb his verdict. Accordingly, ground four failed.

Ground six - The learned trial judge erred in a bench trial by not making it clear that all the issues in the case had been correctly addressed

The submissions

[73] Mr Fletcher based the complaint on this ground on an observation by the judges of the Caribbean Court of Justice ('the CCJ') in **Dioncicio Salazar v R** [2019] CCJ 15 (AJ). He pointed to paragraph 27 of the judgment, where he contended that the court cited "a case from the European Court of Human Rights with approval; that while a bench court need not give a detailed answer to every argument raised…it must be clear from the decision that the essential issues of the case have been addressed". He submitted that the learned trial judge had failed to make it clear that he had addressed the issues set out in grounds one to five, thus denying the applicant a fair trial.

Discussion and disposal

[74] In addressing this complaint, it is useful to note a further observation of the CCJ at paragraph 29 of the judgment:

> "Equally, a judge sitting alone without a jury is under no duty to 'instruct', 'direct' or 'remind' him or herself concerning every legal principle or the handling of evidence. This is in fact language that belongs to a jury trial (with lay jurors) and not to a bench trial before a professional judge where the procedural dynamics are quite different (although certainly not similar to those of an inquisitorial or continental bench trial). As long as it is clear that the essential issues of the case

> have been correctly addressed in a guilty verdict, leaving no room for serious doubts to emerge, the judgment will stand."

[75] Given our conclusion that the learned trial judge had adequately dealt with each of the issues identified by the applicant, this ground was found to be devoid of merit and, accordingly, failed.

Conclusion

[76] The learned trial judge dealt appropriately with the issues which arose in the identification evidence. Although there may have been errors in his treatment of the evidence of the applicant's co-accused, the applicant's unsworn statement and the discrepancies that arose between the evidence of the two complainants, the errors were not such to have denied the applicant a fair trial or to affect the sustainability of the conviction.

[77] It was for these reasons that we made the orders outlined at paragraph [2] above.