[2011] JMCA Crim 27

JAMAICA

IN THE COURT OF APPPEAL

SUPREME COURT CRIMINAL APPEAL NO. 57/2008

BEFORE: THE HON MR JUSTICE HARRISON JA
THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE McINTOSH JA

GARNETT EDWARDS v R

Patrick Atkinson QC for the appellant

Jeremy Taylor, Mrs Ann-Marie Feurtado-Richards and Miss Kelly-Ann Boyne for the Crown

12, 13 October 2010 and 30 June 2011

PHILLIPS JA

[1] This is an appeal from the conviction and sentence of the appellant on 2 May 2008 in the Home Circuit Court. The appellant was charged with the offence of murder, the particulars of the offence being that on 13 February 1999, the appellant murdered Dougal Wright in the parish of Saint Andrew in the course or furtherance of a robbery. He was sentenced to life imprisonment with a stipulation that he not be eligible for parole before 15 years. On 6 July 2009, a single judge of appeal granted leave to appeal on the basis that, although there was no medical or other evidence to support the prosecution's theory that the gunman's bullet had gone through the body of the

witness Mr Donovan Bailey and lodged in the body of the deceased, the learned trial judge left this to the jury as an "inescapable inference".

History of the proceedings

[2] This matter has had a long history. The appellant was first convicted on 15 March 2002 after a trial in the Home Circuit Court before Marsh J and a jury for capital murder and sentenced to death. His appeal against conviction was dismissed and his sentence affirmed by this court on 25 June 2003. The appellant appealed to the Privy Council and on 25 April 2006, his appeal was allowed, the conviction set aside and the matter remitted to this court for it to determine whether a new trial should be held. On 27 April 2007, this court ordered that there should be a new trial in the interests of justice. The retrial took place between 31 March and 2 May 2008, with the result already indicated above.

[3] The Crown adduced evidence through six witnesses, two of whom were civilian witnesses. The main witness for the Crown was Deputy Superintendent Donovan Bailey (DSP Bailey), who held the rank of sergeant at the time of the incident in February 1999. The appellant gave sworn evidence.

The case for the prosecution

[4] DSP Bailey, who at the time of the incident had been a police officer for over 28 years, testified that on 13 February 1999, between 10:30 am and 11:00 am, he was at a wholesale meat processing shop at the Dames and Anderson Roads intersection. He had driven to the shop and while there he saw a friend, Dougal Wright (the deceased)

and other patrons. Subsequently both DSP Bailey and Mr Wright went across the road to the Mango Tree Bar. Both men approached the bar with Mr Wright being to the left and ahead of DSP Bailey. Mr Wright asked the bartender for a cold "red stripe" and DSP Bailey requested a cold "Heineken". DSP Bailey further testified that as soon as he had asked for the beer, he heard a voice behind him say, "Big man, give me wha yuh have". He said that he immediately spun around to his right, and saw a man pointing a gun in the direction of his chest. He told the court that he had never seen the person before. He described the gun that he saw as a 9 millimetre pistol with an extended magazine. He immediately put his hand in the air and said, "I have nothing". The man was two arms' length from him, and he said, "I was actually seeing from his face to the hand where the gun was". He said he hesitated and the assailant said "Pussy hole, lif up you shut". He still hesitated, and then he said that he shifted to his left and with his right hand grabbed at the firearm, which was pointed at him.

[5] He testified further that the assailant had the firearm in his right hand and when he grabbed at the firearm, his hand actually touched the firearm. At the same time, he heard an explosion, which he assumed was coming from the firearm, and then he felt a burning sensation in the right side of his abdomen "to the front". He grabbed his side, felt heated fluid on his hand and ran outside the building, back to the wholesale shop.

[6] DSP Bailey gave evidence that neither the head nor the face of his assailant was covered, and so there was nothing blocking his view of him. He described him in examination-in-chief, as a "man with very very low cut hair". He gave an estimate of

two minutes as having elapsed from the time he entered the bar until the time he ran out of it, and one and a half minutes from the time he spun around to the time he ran from the bar. He said that he had observed his assailant's face for about one minute from the time he spun around, and then for a few more seconds after he had received the wound. He was taken to the hospital in his car, where he remained and received treatment for 30 days. He showed the jury a residual scar at the right side of his abdomen where he had felt the burning sensation and the heated fluid. He told the court that he could not recall if there were any other persons in the bar that day and also that he had not seen Dougal Wright alive since that date.

[7] DSP Bailey told the jury that two months later, on 14 April 1999 at 2:00 pm he was driving through the Allman Town area in the vicinity of the said Mango Tree Bar. When he reached the stop sign at the intersection of Anderson Road and Dames Road, he saw, standing in the middle of the road, about 35 feet away from him, the same person who, on 13 February, had stood in front of him at the Mango Tree Bar, confronted him with the firearm and had shot him. He said that he had made a mental picture of his assailant when he had confronted him in the bar, and when he saw him in April, at the intersection, he was "very afraid and frightened". His assailant was then dressed in a "lime green shocking colour pants and a white shirt", and he stopped for a moment at the traffic sign and "take a good look at him". Then he turned onto Dames Road, drove slowly past him at approximately 10 miles an hour while he (his assailant), was still in the road, being as close as 6-8 feet to him. He then saw a police patrol car and signaled the driver to stop. He pointed out his assailant to the police at which time

he would have been about 100 metres away from him. He said that on this occasion, from the stop sign, and while he drove past, he would have had the assailant under his observation for about two minutes, and throughout that period he would have observed his face, as there was nothing blocking his view, and it was a bright sunny day. He did say, however, that the windows of his car were wound up and were lightly tinted, which allowed one to see from the inside of the car to the outside easier than a person outside could see inside the car.

[8] DSP Bailey then informed the court that having received a call at his home, he went to the Cross Roads Police Station guard room approximately two and half hours later, and saw the said assailant sitting on a bench there. He stated that the person was still dressed in the same "shocking green pants" and white shirt that he had seen him wearing earlier. He said that his hairstyle was different from it had been on 13 February, as his hair was "taller" and on that day in February he had worn a light blue shirt. He identified the person whom he had seen in the police station as the appellant in the dock.

[9] In cross-examination DSP Bailey accepted, as an experienced member of the Jamaica Constabulary Force (28 years), that observation is a very important tool in the trade. He said that where possible, one looks for distinct features in making identifications and that one would be able to describe a distinguishing mark on a person's face "if it is observed". He agreed that in his statement to the police he had described the appellant as having a dark brown complexion, being 5'6"

tall, approximately 23 years old, with black, low cut hair, having a clean oval face, and a normal voice, and accepted that there was nothing specific in the description that he had given.

[10] In further cross-examination he stated that he had heard the voice of the appellant about 30 seconds after he had entered the bar. He said the light in the bar was not as bright as it was on the road but "it was very bright". He said that he did not sit down that day, nor did his friend, the deceased, do so. He confirmed that he did not notice other persons in the bar that day, and stated that he had not taken any special note of the bartender. He had not seen her face. He reiterated and maintained that he was absolutely sure that the mental picture that he had of the person who shot him on 13 February was the said man that he saw on 14 April, "after viewing him for that period of time".

[11] The evidence of the bartender Miss Jennifer Smith was important to both the prosecution and the defence. Unfortunately, Miss Smith died before she could give sworn evidence in court and her statement, which had been taken by Deputy Superintendent Maurice Goodgame (since retired), was admitted into evidence as exhibit 2, without objection, pursuant to the provisions of the Evidence Act. Since various aspects of the statement have been relied on by counsel in the appeal, we have set it out in its entirety for easy comprehension. Miss Smith stated:

> "I am a bar assistant employed to Icilda Thompson, who is the proprietor of the Mango Tree Bar situated at 36

Anderson Road, Kingston 5. The telephone number is 928-1829. I live at the same address.

I have been working at this bar for the past twelve years during which time it changed three owners. The bar is located at the corner of Anderson and Dames Roads. The entrance faces Anderson Road and the building is closed with roller shutter. The counter is L-shape, (sic) a long and a short side. The long side faces the entrance, and customers who sit at that side backs would turn to the road. There are high stools around the counter. There is a gate leading from the short side of (sic) counter to the section where I stay.

I have known Mr. Duval (sic) Wright since I started working at the bar. He would always come and buy meat at Jamaica Pre-Pack which is a meat mart situated at 4 Dames Road which is opposite the bar. He would (sic) and buy meat an average of three times per week. He was a regular customer of the bar and whenever he came to buy meat he would come in the bar and have a drink.

On Saturday the 13th of February, 1999, at about 6:35 a.m., I went to the bar, but did not open the shutter. Customers who are from the area used a back entrance to get inside the bar. I opened the shutter at about 9.00 a.m. and customers came in and started playing poker machines.

Around 10:30 a.m. four persons (male) were in the bar with me. They are known to me as Jasper, Bull, Tuby, and Tony. The first three named persons were playing the poker machines and Tony was drinking wine. Jasper and Bull were playing the machines on the left corner, and Tuby was on the right as one enters from the road. Tony was sitting at the short side of the counter.

Around that time Mr. Wright and another man entered the bar. He threw a piece of paper at me and said, "Wha happen browning." I said to him, "What happen? From last week me see yuh and me no see yuh again." He then ordered a Heineken and Red Stripe Beer. Mr. Wright sat on one of the stools with his right side turned to the entrance and the other man sat on a stool with his back turned to the road. Mr. Wright was facing the man.

> I opened the cooler, took out a Heineken and as I was about to take out the Red Stripe I heard an explosion. My back was turned to the road. I looked around and did not see either Mr. Wright or the other man on the stools. I only saw a man standing at the entrance of the bar where the shutter is, and immediately I threw myself to the ground. The men who were playing the machines ran to the back of the building. I also crawled on my knees to the back of the building.
>
> When I came back in the bar I saw Mr. Wright lying on the floor. I saw blood on his shirt and he appeared to be dead. I did not see the other man. The man I saw is of a black complexion, a little bit taller than me about 5 feet 5 inches. He is of a medium build. I can't say anything more about him. I can't even say what clothes he was wearing. I would not be able to identify him if I were to see him again.
>
> The police visited the scene and I saw one of them pick up a spent shell which was beside the counter on the floor. Mr. Wright's body was photographed, and then removed by Madden.
>
> The same day (sic) about 3 p.m. I went to the Cross Road C.I.B office where I gave this statement to the police which I read over and signed as correct.
>
> Signed Jennifer Smith Dated 13-2-99"

The certificate and declaration were attached, to the effect that the statement had been read over by her and she had declared the statement to be true to the best of her knowledge and belief. The certificate was signed by Deputy Superintendent Maurice Goodgame.

[12] Detective Sergeant of Police Lloyd Crawford, gave evidence that at the material time on 13 February 1999, he was stationed at the photographic section at the C.I.B. Headquarters, and that at 11:30 am he went to the scene of the crime, the Mango Tree

Bar at the intersection of Anderson Road and Dames Road, in Allman Town, accompanied by Constable Michael Morrison. He said that he saw the body of an elderly man lying face down on the bar floor. The body was "before the counter" of the bar. He instructed Constable Morrison to take photographs of the deceased, and monitored the development of the shots taken from negatives to photographic enlargements. Three sets of the photographs, numbered 1-3, were tendered into evidence, without objection, as exhibit 1. Detective Sergeant Crawford testified that he had never before seen the person whose body lay on the floor and was the subject of the photographs, and he confirmed that on the day that he had been at the bar, "it was in the morning and the area was brightly lit, sunshine".

[13] Dr Kadiyala Prasad, who is a registered medical practitioner and a consultant forensic pathologist attached to the Ministry of National Security, testified that he had been a registered medical practitioner since 1976 although only in Jamaica since 1997. He had been a consultant forensic pathologist since 1983, and in the latter capacity he had conducted several post-mortem examinations. On 25 February 1999 he conducted a post-mortem examination at the Spanish Town morgue on the body of one Dougal Wright, whose body had been identified by one Lorretta Wright. Dr Prasad gave evidence that there was one gunshot wound, and the entrance wound to the body was 0.9 centimetres in diameter on the right anterior chest. It was between and medial to the nipple, 50 centimetres below the top of the head and 6 centimetres from the midline. There was no gunpowder deposit. He indicated that the trajectory of the bullet was directed downwards, backwards and to the left. He said that "it travelled through

underlying tissues, thoracic cavity, both lungs, heart and lodged in the soft tissues over the left flank of chest 56 centimetres below the top of the head and 26 centimetres away from the midline. The recovered deformed copper jacket bullet [was] handed over to [the] police for the necessary action. The cause of death is due to gunshot wound to chest". The doctor indicated that the deceased measured 5ft 10 inches and weighed 200 pounds. He concluded that the point of entry of the bullet was by the right chest and it exited the chest and lodged above the left waist. The bullet was therefore projected from "up downwards". He informed the court that the significance of the wound being without gunpowder deposit was that, "the distance from the muzzle end of the gun to the victim is beyond two feet at the time of discharge of the firearm".

The case for the defence

[14] The appellant gave evidence that in 1999 he was living with his parents. He was familiar with Woodford Park as every day, since 1998 he took his niece to the Gresham Road Basic School in Woodford Park, which is "just as you turn off Anderson Road", and would return to collect her from school at about 2:15 pm. He said that he had a stall in the community, where he sold "dry food, biscuits, bun and cheese and so on", and his girlfriend lived there also. He had had a long association with the community, as he had lived there since he was 10 years old. He still had relatives living there, namely his brother and a cousin. In the early days he used to play the bass guitar in a band by the name of Unity Plus Music.

[15] He said that he knew Jennifer Smith from he was a child, as she was living just a little distance from him. She was like a mother to the young children in the community. He knew that she worked at the Mango Tree Bar. He was very familiar with that bar as he used to go there every day as a boy, when he was about 11 or 12 years old. He only went to the bar as an adult when "I have any occasion, like I want to buy something". He said that he absolutely had not been to the bar on 13 February 1999, "because I did not have no occasion". He was however in the Woodford Park area that day as he had taken his niece to school.

[16] He told the jury that he had not known DSP Bailey before, and had first seen him in the Half-Way Tree preliminary inquiry court in 1999. He denied any knowledge of the matters deposed to by DSP Bailey in court, with specific regard to his being in the bar and pointing a gun at him. He was arrested by the police while, he said, he was standing on Dames Road, and taken in a marked, licensed police car to Central Police Station, and then to Cross Roads Police Station. He remained there for several hours "until the night" as he was told that the police wanted to ask him some questions. He was promised that he would be taken on an identification parade but that never happened. He said that he was beaten very badly and later taken to the Half-Way-Tree Police Station where he remained for about two weeks before he was charged.

[17] Towards the end of his examination in chief, the appellant was asked this question:

> "Q. Now, sir there is a particular mark below your right eye, do you know how it came to be there?"

He gave this answer:

"A: As far as, I know, from I am a baby, it is a birth mark."

[18] In cross examination the appellant told the court that he had to walk through the intersection of Anderson Road and Dames Road to take his niece to Gresham Basic School. However, he did not travel that route every day as sometimes he also had another niece to take to Alpha Primary School and that would determine the route he took each day. He said that on 13 February 1999, he did not pass the intersection when taking his niece to school. At first, he said that he had heard nothing on 13 February 1999 of the shooting at the Mango Tree Bar which took place on that day. Then he later said that he had heard it on that day and he gave various times that he had heard of the shooting, namely before he dropped his niece to school, after he had done so, before he went to his brother's house, then after he had done so. At one time he said he did not know exactly but he had heard about the shooting at sometime between 8:30 am and 9:00 am. At first he said that he did not always take his niece from the same place to go to school and then he later denied that he had said that, and said that his niece lived in the same "yard" where he lived.

[19] He told the court that he did not go to the Mango Tree Bar on 13 February, which day he had remembered very clearly as he had been charged for the incident which occurred that day, but he could not remember where he was on that said day between 10:30 am and 11:00 am. It was his evidence that he usually did the drop off to school trip by bicycle, but on 13 February he "got a drop". He confirmed that he used

to live on Dames Road but had moved to Franklin Town in 1991. On the day in question he said that he took one niece to Alpha Primary School, and then he went on foot to Gresham Basic School, to drop off the other niece, which is about 15 chains from the Mango Tree Bar. He then went to his brother's house, who lived on Anderson Road, which in distance was about "4 yards or 8 chains" from the bar, and in time was just three minutes away from the bar, if walking. He said that from his brother's gate he could see the Mango Tree Bar. After he left his brother's house it was his evidence that he went straight home. He said that some days and nights after, he had been back to that intersection, but he denied vehemently, that he was at the Mango Tree Bar on 13 February 1999 and that he had attempted to rob anyone, or pointed a gun at anyone, and he had certainly not shot and killed Dougal Wright. In his words, "I am innocent in the sight of God and man".

The appeal

[20] On 7 May 2008, when the appellant filed his application for leave to appeal against conviction and sentence, he filed two grounds of appeal, namely:

(a) unfair trial; and

(b) poor description given by witness.

On 21 May 2010, counsel for the appellant filed four supplemental grounds of appeal, and at the hearing of the appeal indicated that the original grounds of appeal would be encompassed by the supplemental grounds filed. He requested and was granted permission to argue the supplemental grounds submitted. The four supplemental grounds are as follows:

"1. The Learned Trial Judge failed to adequately direct the jury as to the weaknesses in connecting the Appellant to the crime and incorrectly directed the jury that... "the inescapable inference"... was that the bullet that killed the deceased must have come from the "sole explosion". This it is submitted, incorrectly interpreted the evidence and rendered the conviction unsafe.

2. The Learned Trial Judge failed to give the jury sufficient assistance in analyzing the evidence relating to identification and also treated the witnesses' failure to note the birthmark on the Appellant's face in a manner which was unfair to him. This was a misdirection in law which prejudiced the Appellant's case to the jury.

3. The Appellant's first trial was delayed for three (3) years while he was in custody, during which time an important witness died. This placed the Appellant in the unfair position of having to rely on her written statement, of which the jury was directed that it was of limited value as the witness was not tested by cross-examination. This severely prejudiced the Appellant's right to a fair trial.

4. The Learned Trial Judge failed to accurately instruct the jury as to the evidence on which the jury could find that the shooting of (sic) deceased was an accident. This was a non-direction which amounted to a misdirection in law, whereby the Appellant's conviction for murder was unsafe."

Counsel submitted that essentially the learned trial judge had:

(1) failed to instruct the jury on identification; and

(2) failed to adequately put manslaughter to the jury.

Ground of appeal one

The appellant's submissions

[21] Counsel submitted that there was no direct evidence that the deceased was shot by the same bullet or at the same time as DSP Bailey. There was some evidence put before the jury from which they could conclude that one possible explanation was that the same bullet that hit DSP Bailey caused the death of the deceased, but there were other persons in the bar, and there was the absence of any evidence to make that the only reasonable inference to be drawn. There was no evidence of anyone seeing the deceased fall, or with regard to how much time had elapsed after DSP Bailey was shot and the deceased's body was found. There was also no evidence with regard to how the bullet travelled, in relation to the two men, whether standing or sitting, in order to explain how it exited one body and entered the other. There may, counsel argued, be a strong suspicion on the evidence, it could even be considered likely, but it had not been proven. There was no scientific ballistic evidence to say that the bullet which caused injury to DSP Bailey was the same one that had been removed from the body of the deceased. There was no evidence of bullet trajectory when DSP Bailey was shot. There was no medical evidence connecting the injury to DSP Bailey and the cause of death of the deceased. Counsel therefore submitted that when the learned judge directed the jury that the inference was inescapable, it was a complete misdirection, and a usurpation of the functions of the jury. It is for the jury to make that determination. The learned trial judge in doing so substituted her own views in relation to proven facts

on which the prosecution's theory of the crime was based. Counsel submitted that this misdirection would warrant a quashing of the conviction.

The prosecution's submissions

[22] Counsel for the Crown submitted that ground of appeal one encompassed two issues, the first being the weaknesses in the evidence connecting the appellant to the crime. Counsel stated that the case was based on circumstantial evidence, and referred the court to a statement in the learned judge's summation that "certain matters cannot be proved by direct evidence", and argued that the learned judge aptly indicated that:

> "a reasonable inference has to be made in those circumstances. In the instant case there was no witness who saw when the deceased was actually shot and so it is circumstantial evidence that had to be relied upon and upon which the jury has to act."

[23] Counsel submitted further that the learned trial judge had indicated in her summation that the case turned on the evidence of DSP Bailey and submitted therefore that his evidence should be examined to determine the quality of evidence connecting the appellant to the crime. Counsel referred to certain aspects of his evidence which counsel considered important and relevant. There was one firearm which DSP Bailey saw pointed at his chest, he said, by the appellant. There was one explosion between 10:30 am and 11:00 am. The deceased was alive when he entered the bar, was slightly ahead of DSP Bailey and was to his left at the counter when he ordered drinks. Counsel also argued that the evidence of Jennifer Smith was consistent with that given by DSP Bailey, in that she heard a single explosion, and she saw when the police officer retrieved one spent shell from the ground after the incident. She saw the deceased

lying on the floor shortly thereafter in what appeared to be a pool of blood. The time span must have been short, it was submitted, as the body was observed by her before Detective Sergeant Lloyd Crawford went to the scene at 11:30 am. Counsel also referred to the detailed directions given by the learned trial judge with regard to the evidence relating to the circumstances of the identification of the appellant by DSP Bailey and the weaknesses in relation thereto, with particular reference to the discrepancies between his evidence and that of the statement of Jennifer Smith, and also the time he observed the appellant in the bar, compared with the later sighting at the Anderson and Dames Roads intersection when he later identified him to the police.

[24] The second issue identified by the Crown under ground of appeal one was the misdirection of the trial judge in saying that it was an "inescapable inference" that the bullet that killed the deceased must have come from "the sole explosion". The Crown referred to the principle enunciated by Lord Morris of Borth-y-Gest in ***McGreevy v DPP*** [1973] 1 AC 503 at page 507:

> "It is however, not for the judge but for the jury to decide what evidence is to be accepted and what conclusion should be drawn from it."

Counsel for the Crown conceded that the statement by the learned trial judge was "unfortunate", as that determination should have been left to the jury, and it could appear that she had usurped the functions of the jury as to what facts were to be proved and what inference was permissible to be drawn. Nonetheless, counsel submitted, if the directions in her summation with regard to inferences were examined as a whole, her treatment of the same minimized the mistake, and the trial was

therefore not unfair. The learned trial judge had stated clearly that, "It must be the only inference that can reasonably be drawn", which led counsel to conclude and to submit "that if it is the only inference that can reasonably be drawn, then perhaps it is inescapable". Counsel drew the court's attention to several excerpts of the summation of the learned trial judge in this regard. Additionally counsel referred the court to the directions of the trial judge in respect of the burden of proof indicating that it never shifts from the prosecution, and that even if the jury did not believe the appellant they would still have to look back at the prosecution's case. Counsel therefore submitted that although the statements of the trial judge were "unfortunate", there was no miscarriage of justice and the ground was without merit.

Analysis

[25] The law in relation to circumstantial evidence has been stated consistently over the years and recently by this court in ***Loretta Brissett v R*** SCCA No 69/2002, judgment delivered 20 December 2004, where Smith JA did a masterful canvassing of all the authorities on the subject, and again in ***Wayne Ricketts v R*** SCCA No 61/2006, judgment delivered 3 October 2008, where Smith JA referred to the decision of the House of Lords in ***McGreevy v Director of Public Prosecutions***, in which it was held:

> "In a criminal trial it is the duty of the judge to make it clear to the jury in terms which are adequate to cover the particular features of the case that they must not convict unless they are satisfied beyond reasonable doubt of the guilt of the accused. There is no rule that, where the prosecution's case is based on circumstantial evidence, the judge must, as a matter of law, give a further direction that

> they must not convict unless they are satisfied that the facts proved are not only consistent with guilt of the accused, but also such as to be inconsistent with any other reasonable conclusion."

The House was also of the view that (page 507 f):

> "The particular form and style of a summing-up, provided it contains what must on any view be certain essential elements, must depend not only upon the particular features of a particular case, but also upon the view formed by a judge as to the form and style that will be fair and reasonable and helpful. The solemn function of those concerned in a criminal trial is to clear the innocent and to convict the guilty.
>
> ... It is not to be assumed that members of a jury will abandon their reasoning powers and, having decided that they accept as true some particular piece of evidence, will not proceed further to consider whether the effect of that piece of evidence is to point to guilt or is neutral or is to point to innocence. Nor is it to be assumed that in the process of weighing up a great many separate pieces of evidence they will forget the fundamental direction, if carefully given to them, that they must not convict unless they are satisfied that guilt has been proved and has been proved beyond all reasonable doubt."

At page 510(h) their Lordships said:

> "It requires no more than ordinary commonsense for a jury to understand that if one suggested inference from an accepted piece of evidence leads to a conclusion of guilt and another suggested inference to a conclusion of innocence, a jury could not on that piece of evidence alone be satisfied of the guilt beyond all reasonable doubt unless they wholly rejected and excluded the latter suggestion. Furthermore a jury can fully understand that if the facts which they accept are consistent with guilt but also consistent with innocence they could not say that they were satisfied of guilt beyond all reasonable doubt. Equally a jury can fully understand that if a fact which they accept is inconsistent with guilt or may be so they could not say that they were satisfied of guilt beyond all reasonable doubt."

The learned trial judge recognized that the prosecution's case rested on circumstantial evidence. She directed members of the jury firstly, that:

> "The burden of proof or of proving the case against the accused man rests on the prosecution throughout and it never shifts. You cannot convict this accused man unless and until the prosecution has satisfied you, by the evidence, so that you feel sure of the accused (sic) guilt."

Later on she said:

> "The accused man is innocent he has not got to prove anything."

Nearing the end of her summation, at page 215 of the transcript she said the following:

> "... if you believe his evidence you have to acquit him. Because it means that the prosecution has not satisfied you so that you feel sure of his guilt. If what he has told you leave you in doubt, you are not quite sure as to what he is saying, and then you have to acquit him, because it means the prosecution has not satisfied you. If you don't believe a word he says to you, you cannot say, I don't believe him, he is guilty," You have to say all right, I don't believe him, all right and then you have to go back and look at the prosecution's case and see whether or not the prosecution has satisfied you so that you feel sure. Only then can you find him guilty."

With these directions the learned trial judge was making it abundantly clear to the jury that they should not convict unless they were satisfied beyond reasonable doubt of the guilt of the appellant. The learned judge also gave directions to the jury correctly, initially, as to their role and function. She told them that they were the sole judges of the facts, and that apart from finding actual facts proved, they were entitled to draw reasonable inferences from the facts that they found proved. She made it clear that "it must be a reasonable inference and it must be the only inference that can reasonably

be drawn". She also directed the jury not to leave their knowledge of everyday life or their common sense outside and to take it into account when dealing with the identification issue. Then came the impugned passage in the summation (page 197 of the transcript), which occurred when the learned trial judge was addressing the statement of Miss Jennifer Smith, which we set out below:

> "... Miss Smith says its one explosion she heard. Deputy Superintendent Bailey says it was one explosion. The Superintendent said the shot went through him; so, remember I told you, about inescapable inference? There is only one shot, one firearm. The persons Miss Smith spoke of were playing poker machine and one drinking; so there is only one shot, so the inescapable inference is the shot, the bullet that went - that killed Mr. Wright must have come from that sole explosion. That is the inescapable inference. Remember I told you about drawing inference and I said to you, the inference must be the only one that reasonably can be drawn. You don't hear about anybody else having a gun and hear shots firing. Both witnesses (sic) are saying one shot fired. Of course, you are to look at that against the accused man saying, "Look I was not there, I wasn't there not me". So, that is the statement of Miss Smith and that is what you have to look at when you look at the identification evidence, because remember, it is a question of whether or not you find Deputy Superintendent Bailey a believable witness."

[26] There is no question that the above was a misdirection. It is no function of the trial judge to direct the jury as to what **is** an inescapable inference. As already stated, even by the said judge, it is the function of the jury to draw their own inferences based on the facts proved. The learned judge however went on, later in her summation, to state the following:

> "The prosecution is saying to you, that they are asking you to accept the evidence of Deputy Superintendent Bailey, when he says that this accused man is the man that fired the shot, you have to also look at the evidence of the accused, weigh it in the same scale as you weigh the evidence of Superintendent Bailey, because the accused said to you, look, "I was not there". So you have to look at that. Weigh both of them in the same scale, but the prosecution is saying to you, that it was this accused man who fired the shot and remember I told you about drawing inferences as part of your function and that you must not draw an inference unless it is the only inference that can reasonably be drawn.
>
> Now, you have had all the explanations about reasonable inferences and how you draw them. There is only one shot fired; it is an enclosed place, the shot that went through – prosecution is saying is the shot that went through Deputy Superintendent Bailey is the one that entered and killed Mr. Dugal Wright that is what the prosecution is asking you to accept. You have no evidence of any other shot being fired. Remember, I told you there are some things that you cannot see, you cannot have evidence of somebody seeing or hearing; you must draw inferences. Now, this is one instance where you are asked to draw an inference."

[27] In reviewing this aspect of the direction to the jury the learned trial judge appeared to have got it right, as she was leaving the inference for the jury to conclude, which is why counsel for the Crown submitted that in examining the summation on a whole with regard to her treatment of the law on inferences generally, the effect of the mistake above was minimized. It would have been better if at some point she had indicated to the jury that her statement that "it was an inescapable inference" was in error, as it was a matter solely for the jury to decide. However, a further concern, which was not articulated by either counsel, was what could have appeared on the face of it to have been a misquoting by the learned trial judge of certain evidence relating to

the "shot going through Superintendent Bailey". On page 203 of the transcript, when dealing with "intention" as part of the ingredients of the offence of murder, the learned judge said this:

> "... You pull a firearm; the intention must be to cause serious bodily harm or to kill. That is how you are going to look at intention. There is nobody who can say, 'I see' or 'I hear his intention', so you have to draw the inference. So, you look at the facts proved and you draw the inference from the facts proved.
>
> Fact, if you accept it, that he pulled a firearm and pointed it at the chest of Deputy Superintendent Bailey; and fact too, that the firearm was discharged and that it went through the Superintendent and it hit the deceased."

On this occasion if we assume that the "too" was meant to be "two", then it would appear that the judge was putting to the jury, two different facts to be determined by them. On page 211, she said this:

> "...The bullet, the prosecution is saying to you, went through Mr. Wright, went through his body and lodged there and I have gone through Dr. Prasad's evidence with you also. So, I don't think I have to go through in detail with you, with that. He said death was due to (sic) gunshot wound."

The judge seemed to be telling the jury the prosecution's case, but she was also leaving the determination of the issue to them, to which there could be no objection. Also, on pages 203 - 204, the learned judge's directions read like this:

> ".. So that, not because there is no evidence that the gun was pointed at Mr. Wright, that killed him; there is evidence before you, that the gun was pointed at Deputy Superintendent Bailey; that the bullet went through him; there was an explosion; he felt (sic) his side; the bullet went through him and went into Mr. Wright and lodged there and

> he died as a result. So that, you now have to look at that and say, "Well, this is a sane man, if he pulls a gun, what would he intend?'..."

[28] Both references to there being "evidence" before the jury that the bullet went through Superintendent Bailey are not correct. There was no direct evidence in the case to that effect. The only direct evidence is that he felt blood at his side and to the back. The issue therefore in relation to this ground of appeal is, in the circumstances of this case, and given the misdirection and somewhat inaccurate recounting of the evidence as set out above, whether the summation taken as a whole, including the accurate directions on the burden of proof and the role and functions of the jury, and the evidence repeatedly otherwise accurately captured by the learned trial judge, resulted ultimately in the verdict being safe.

[29] We accept the submissions of the Crown that the learned trial judge in her directions to the jury, examined the evidence of DSP Bailey with great care, and duly pointed out the inconsistencies and the contradictions between his evidence and the statement of Jennifer Smith which we shall deal with later in this judgment. It should have been clear to the jury the matters upon which findings were required of them, and from which they could draw inferences. The judge drew these facts to the attention of the jury: the one shot/explosion; the gunshot injury to DSP Bailey; the positioning of the two men; the time frame within which the incident occurred; the path the bullet took as it entered, travelled and lodged in the body of the deceased; the sole bullet recovered from the said body; the one spent shell on the ground near the deceased's

body; and the absence of gunshot deposit in the vicinity of the entrance gunshot wound on the deceased. This was all evidence upon which the jury, in our view, could have concluded, in spite of the misdirection of the learned trial judge, that the inference was inescapable that the bullet that injured DSP Bailey killed the deceased, and thus could have arrived at the same verdict. This ground therefore fails.

Ground of appeal two

The appellant's submissions

[30] It was counsel's submission that the case had some unusual features relating to identification which were not dealt with adequately by the trial judge: DSP Bailey gave evidence that he had one and half minutes to observe his assailant. Counsel relied on certain comments made by Lord Carswell in the decision of the Board (Privy Council Appeal No. 29 of 2005 delivered 25 April 2006) when allowing the appellant's appeal, indicating that in their assessment in the circumstances of this case that time was clearly exaggerated. Counsel therefore submitted that the time in which he was held up, had grabbed at the gun and had been shot would only have afforded him a fleeting glance of his assailant. The trial judge did not address the jury thus. Counsel submitted that another feature in the case was DSP Bailey's focus on the gun, that is, only looking at the appellant from the waist up, afraid that at any time the gun would go off. Yet, counsel argued, with all that closeness, and all that time, and in good light, he had failed to observe the birthmark of the appellant which ought to have been noticeable, even more so to the jury as he had been in custody since 1999. Counsel complained that in the light of all this, two months later, DSP Bailey "sees" the

appellant in the vicinity of the bar where the incident took place, which he said, could only be described as an association of ideas. Counsel also submitted that contrary to the comments made by Lord Carswell in paragraph 25 of the decision of the Board, the learned trial judge did not give the jury appropriate directions with regard to the confrontation between DSP Bailey and the appellant at the Cross Roads Police Station, which was unforgivable, particularly as Lord Carswelll had said that the said confrontation at the police station was damaging to the quality of the identification. Counsel maintained that in the instant case, the credibility of DSP Bailey was not the main question but whether in all the circumstances he could have made an honest mistake.

[31] Counsel submitted that the fact that DSP Bailey did not see the birthmark was evidence that:

(a) he was not paying close attention to the face of his assailant; or

(b) if clearly visible and he was paying attention, then the irresistible conclusion was that the appellant was not his assailant.

Counsel submitted that the manner in which the learned trial judge dealt with the fact that the DSP Bailey did not see the birthmark was unfair. The learned trial judge told the jury that she herself did not see the birthmark, but that statement was not put in the context of the above facts, and that it was a weakness in the identification, as DSP Bailey was so close to his assailant and there was good light, sufficient time and adequate opportunity to observe the assailant. The learned judge ought to have done so, and when coupled with her comment which suggested that she did not find it

distinctive, it was submitted, on the whole, the directions to the jury in this regard were unfair.

The prosecution's submissions

[32] Counsel reiterated in detail and pointed out for the court, the references of all the evidence given by DSP Bailey with regard to his observation and ultimate identification of the appellant. Counsel also referred to Lord Carswell's statement in paragraph 21 of the decision of the Board where in commenting on the evidence given in the previous trial, which was similar to the evidence given below, he said that the circumstances were "neither a fleeting glance nor a sighting in difficult conditions". Counsel referred to portions of the learned trial judge's summation where she dealt with the lighting, the time of observation, the fact that there was no evidence of obstruction of the head or face of the appellant, the association of ideas in his apprehension, and the possibility of weaknesses in the identification evidence relevant to all, and submitted that with regard thereto, the summation could not be faulted. Counsel accepted that the learned trial judge had not given any directions with regard to the fact that no identification parade had been held, but submitted that as DSP Bailey had pointed out the appellant to the police, and had later identified him in the police station, the identification parade would have served no useful purpose. The failure of the learned judge to explain that to the jury, he submitted, did not therefore result in a miscarriage of justice. Counsel also conceded that the directions to the jury on the issue of confrontation were not given in "the most forensic terms", but were sufficient for the purposes of this case.

[33] Counsel submitted further, that on any review of the learned judge's treatment of the birthmark, in her directions to the jury, one must conclude that they were clear and appropriate. The learned judge was succinct in explaining that the failure to observe the same was a weakness in the identification evidence by the prosecution and was a question of fact for them to determine. The learned judge did say that she had not seen the birthmark but she did not say that it was not distinctive; she left it as a matter for the jury to decide. Counsel therefore concluded that it could not be said that the judge was unfair in her treatment of the birthmark.

Analysis

[34] DSP Bailey was the only witness in the case who had been at the Mango Tree Bar on 13 February 1999, who gave sworn testimony. His evidence was quite clear on the important matters relative to identification. There is no doubt that the lighting was good, better, he said, outside the bar, where there was bright sunshine, than inside, but he said that it was still bright inside the bar. Even if the time that he said that he had the appellant under observation (one and half minutes) may have been exaggerated, there was nothing obstructing his view of him and his attention was focused on the appellant's face. The appellant was also only two arms' length away from him, and he gave a fairly detailed description to the police which was recorded in his statement. When he saw and recognised the appellant on 14 April, two months later, it was again in the day, and he got as close as 6-8 feet to him. He observed the changes in his appearance and particularly noted his striking clothing. One must remember that this is a trained police officer, and the Court of Appeal in England has

held that whilst all witnesses must be subject to the same rules, honest police officers are likely to be more reliable than members of the general public, being trained and less likely to have their observations and recollections affected by the excitement of the situation (***R v Ramsden*** [1991] Crim LR 295). DSP Bailey certainly remained sufficiently calm throughout the incident at the bar to attempt to grab the firearm away from the appellant although he was not successful in doing so. However, the Privy Council has stated in ***Reid, Dennis, Whylie, Reece, Taylor et al v The Queen***, (1989) 26 JLR 336 that experience has shown that police identification can be just as unreliable as that of any ordinary member of the public, and is not therefore to be exempted from the now well-established need for the appropriate warnings (per Lord Ackner, page 350-E). What is important therefore, is whether the directions of the trial judge to the jury were adequate in keeping with the guidelines of ***R v Turnbull*** [1977] QB 224, whether they dealt with other aspects of the identification, and also whether the directions highlighted the discrepancies between the statement of Jennifer Smith and the sworn testimony of DSP Bailey.

[35] In her summation, the learned judge went through the identification evidence in great detail, and with regard to the lighting, the time, and the distance, she specifically warned the jury of the special need for caution before they could convict the appellant in reliance on the said identification evidence, because as she stressed and reiterated, "it is possible for an honest witness to make a mistaken identification". She indicated that this was applicable to the identification evidence given in respect of both 13 February and 14 April 1999. She told the jury that it was a matter for them as to

whether they accepted that DSP Bailey did observe the appellant's face for one and half minutes, but stated that there was enough evidence for the jury to say that it was not a fleeting glance. We agree. In our view, the learned judge's directions complied with the guidelines and there can be no reasonable complaint.

[36] The learned trial judge directed the jury that DSP Bailey had identified the appellant on 14 April 1999 near the place where the incident had occurred and he had been seriously injured and so as defence counsel had encouraged, "it could possibly have given rise to an association of ideas". However, she told the jury that it was a matter for their determination, as to whether they accepted the evidence or not. She warned of the difficulties experienced with visual identification, and whether the identification could be undermined by where the appellant was seen, but also reminded the jury of the differences in physical appearance that DSP Bailey had noted of the appellant in relation to the two sightings.

[37] With regard to the issue of confrontation the learned trial judge said this on pages 212-213 of the transcript:

> "The accused man tells you that the same officer that Mr. Bailey said he had reported the matter to, he said he know (sic) him and that man came out of a marked police vehicle and arrested and charged him, took him to Central Police Station and later to Cross Roads Police Station, where Mr. Bailey went by. Mr. Foreman and members of the jury, that kind of identification as defence counsel says to you, that identification is not really an identification, it is not desirable, the confrontational thing at the police station, because the evidence is there, you don't need that, the evidence is there that this is the man that Mr. Bailey is saying, 'That is the man, see him there', and he saw when the policeman went

> and picked him up. He said, 'That is the man', so he didn't have to go back to Cross Roads Police Station and look. That is dangerous, so you don't look at that part of it. So, that is – the case really Mr. Foreman and members of the jury, turns on the evidence of Deputy Superintendent Bailey and what you make of it. Do you believe him? That is the important thing you know. Do you believe him? You have to look at his evidence in relation to identification; the evidence of Dr. Prasad."

[38] This is not a clear direction on the issue of confrontation. The jury may have been put on guard as to the danger of identification of the appellant in that manner, as counsel for the Crown suggested, but that would only be if they understood the warning being given. This confrontation also in the circumstances of this case was entirely unnecessary and could only serve as Lord Carswell said, in the decision of the Board, to undermine the otherwise strong identification of the appellant, and in our view, was really an attempt at "overkill". It would have served much less purpose than having the Deputy Superintendant attend an identification parade. No more therefore need be said about it.

[39] With regard to the birthmark, it is obvious that DSP Bailey did not see it, and defence counsel did not specifically question him about it, so we do not have any evidence with regard to his comment or explanation for having not seen it, he being a trained officer, and having been in close proximity to the appellant, in good light, and focusing on his face. The attention of the jury was drawn to it though, for as indicated earlier, the appellant spoke to it at the end of his evidence in chief. The trial judge dealt with it comprehensively in her summing-up. This is what she had to say:

> "Now, Mr. Foreman and members of the jury, it is not (sic) photograph you are looking at. You are looking at the man himself. This is the accused man. So you determine whether or not this birthmark was so clear or did you have to have it pointed out because, you see, it is easy to say this is a distinctive feature on the man. He has a birthmark, but this is our country. We know how our people look. You look at him and you say whether there is an outstanding birthmark or is it something that you would pass over. A matter for you. It is a matter for you. This is why I am saying to you, you have to look at the witnesses.
>
> The man is saying to you, the superintendent says to you he is seeing his face. He never tells you he was looking at him sideways. He was seeing his face. He looked at his face. He was facing him; this is what he said. So you look at him and you say whether or not you accept that, when he says that to you. It is a question of observation, whether or not he saw that. He is a trained man, but he says to you, yes, he is trained and he is giving general description. Counsel put to him, 'You gave a general description. Would you be able to tell the difference with two people who looked alike?' He said he would have to see the two people side by side to say whether this is the man or not."

On page 181, the judge commented on the distance relative to the observation; she said this:

> "Was this distance close enough for him to see his attacker? Because it is a fact, that he did not see and speak to the birthmark that the accused showed you, a weakness that is drawn in the identification evidence. Is that birthmark one that you saw outstanding that it could not be missed or ought not to be missed? It is a matter for you."

And then finally on page 217 there is the statement about which there is much complaint that she projected her views into the analysis, making the treatment generally of the birthmark unfair to the appellant. This is what she said:

> "Mr. Foreman and members of the jury, you saw it, you determine – or did you see it? It's a matter for you. Was it distinctive? It's a matter for you. You recall that he was there. I didn't see it. It is important, because the defence is saying it is so distinctive that Deputy Superintendent Bailey, ought to have seen it and mention (sic) it if he is the person that he said shot him. He said that is a weakness in the identification."

[40] It is unfortunate that the learned trial judge thought it necessary to give her personal views on the subject by way of comment, and having made the statement, it would have been better if she had later withdrawn the comment. Notwithstanding that, in our view, it did not take away from the clear directions that the issue of the distinctiveness of the birthmark and whether in the circumstances of this case DSP Bailey ought to have seen it, was for the determination of the jury. She reminded the jury that he said that he was there, he was close to the appellant, was looking directly at the appellant's face, and he was trained. This, she suggested was a weakness in the identification evidence. She instructed the jury to look at the man himself and the birthmark. It was clearly, at the end of the day, a matter for the jury. In our view, the learned trial judge's directions said just that; they were balanced and fair, and in no way prejudiced the appellant. We found this ground to be without merit. The issue of the discrepancies between the statement of Jennifer Smith and the testimony of DSP Bailey will be dealt with in ground three.

Ground of appeal 3

The appellant's submissions

[41] Counsel submitted that it took three years before the appellant was afforded a trial and by that time Jennifer Smith had died and the appellant had to rely on her written statement. That, he said, prejudiced the appellant, but moreso was the loss of her sworn testimony which could have assisted the appellant generally. In her statement she said that after the explosion she did not see either the deceased or DSP Bailey when she turned around, but she saw someone whom she did not know. She never mentioned seeing someone whom she knew. The appellant said that he knew her very well. Had she been able to give sworn testimony, she could have corroborated him to say that she too knew him well, and she had not seen him that day. Also, if she knew him she would have been familiar with the birthmark, and spoken to it. She also gave some conflicting evidence, as she stated that the deceased and DSP Bailey were seated in front of the bar. She may also have assisted with the positioning of the men to challenge the prosecution's theory of the bullet going through DSP Bailey to the deceased. Counsel complained that the trial judge "was at pains" to point out that it was not tested testimony and therefore of limited value. Counsel therefore concluded that "effectively the discrepancy between DSP Bailey's testimony and her statement was neutralized as a result. Thus the powers of observation and recall of DSP Bailey which were important to his ability to identify his assailant were effectively unchallenged". Counsel said that if delay has caused the loss of certain evidence, then the appellant has been prejudiced, the trial was unfair, and the conviction ought to be quashed. It

mattered not, counsel submitted, who was responsible for the delay, for even if it was due to the actions of defence counsel, the Constitution of Jamaica mandated that the appellant was to have a fair trial, and that meant the trial should take place within a reasonable time, and to wait for a period of three years for one's trial was, he argued, inherently unreasonable.

The prosecution's submissions

[42] Counsel pointed out that it is trite law that a statement can be admitted in evidence if the maker of the statement has died. Counsel submitted further that the learned trial judge was very careful to explain to the jury the dangers of relying on the statement of Jennifer Smith, though deceased, as she had not been available for cross-examination, as DSP Bailey had been. The learned trial judge, counsel said, gave the appropriate warnings so that the jury could give the statement such weight they thought necessary. Counsel said the learned trial judge in her summation dealt with the discrepancies between the viva voce evidence of DSP Bailey and the witness statement of Jennifer Smith. Counsel therefore submitted that the learned trial judge's directions could not have prejudiced the defence in any way. The appellant had received a fair trial, and no miscarriage of justice had occurred.

Analysis

[43] Section 31D of the Evidence Act reads as follows:

> "**31D**. Subject to section 31G, a statement made by a person in a document shall be admissible in criminal proceedings as evidence of any fact of which direct oral

evidence by him would be admissible if it is proved to the satisfaction of the court that such person -

(a) is dead;

(b) is unfit, by reason of his bodily or mental condition, to attend as a witness;

(c) is outside of Jamaica and it is not reasonably practicable to secure his attendance;

(d) cannot be found after all reasonable steps have been taken to find him; or

(e) is kept away from the proceedings by threats of bodily harm and no reasonable steps can be taken to protect the person."

There was evidence in the case that the witness Jennifer Smith had died before she could give sworn testimony, and as indicated previously, her statement was adduced into evidence pursuant to the above provisions, without objection. The challenge on appeal was that due to the **three year** delay before the trial, and the death of Miss Smith, the appellant had lost the benefit of her sworn testimony and also that the judge's treatment of the use of her statement at the trial was unfair. Unfortunately, however, we were not given any information with regard to the reasons for the delay, and this court could not, without more, in respect of such a serious offence and in the circumstances of this case, act upon that to quash the conviction and set aside the sentence imposed.

[44] The learned trial judge gave adequate directions in our view with regard to how the jury should deal with discrepancies in the evidence before them. She told them to

take into account each witness' level of intelligence, the witness' ability to put into words what he had seen, as well as the powers of observation. She warned the jury that "different persons will see the same thing yet give a different interpretation of what they saw and heard". The judge went on to say that it did not mean that either individual was lying, but the jury would just have to determine which one they accepted. She referred to the fact that Miss Smith said that DSP Bailey and the deceased were sitting on stools before the bar, yet he said that they were standing 1½ feet from the counter with the deceased to the left of him. She brought to the attention of the jury the fact that he said that he heard the appellant within 30 seconds of his having entered the bar. Miss Smith did not say anything about that. In fact, she gave no time frame before she heard the explosion. She was in the process of obtaining the second beer and her back was away from them. She said that she had exchanged light banter with the deceased; DSP Bailey did not mention hearing that. In fact, he did not appear to have paid too much attention to the bartender, as he told the court he would not recognize her. Miss Smith spoke about four other persons in the bar, three playing the machines and one drinking wine. DSP Bailey could not say anything about either the machines or **any other person** being present in the bar at the material time. The learned judge warned the jury that it was a question of differences in perception as to what had happened and they should not speculate. She said that Miss Smith said that when she turned around she saw a man standing at the entrance whom she did not know, and would not recognize again. She did not see him with anything, yet she threw herself to the ground. The judge put to the jury the question of why she would have

done that, as by that time the other men would have run out through the back. She commented that "something must have caused her to dive to the floor and crawl out". She left it with the jury as a matter for them, advised them to use their common sense particularly since they were hampered by the fact that Miss Smith had not given evidence from the witness box.

[45] The judge told the jury when dealing with the statement in her summation, as she was obliged to do:

> "I am duty bound to point out to you, however, that this is a statement. It has not been tested under cross examination. You have not seen Miss Smith, so you have not had the chance to determine whether or not she is a believable witness, so you give to her statement, what weight you think it deserves, because, why I am saying this, you have this conflict of evidence between her statement and the Deputy Superintendent's."

In our view, the learned trial judge canvassed the contradictions in the evidence comprehensively and fairly.

[46] The appellant had submitted that, as he knew Miss Smith well from childhood, her absence from the trial negatively affected his case, as she would have been able to say that he was not the man in the bar on that fateful day, and she could speak to his birthmark. But the corresponding argument would be that she may have said that she did not know him, or that she did, and had never noticed the birthmark. One thing we cannot do is to speculate. Further, Miss Smith in her statement said the incident occurred on a Saturday, and her oral testimony to that effect, might have affected

considerably the evidence of the appellant with regard to his position that he was dropping off and picking up his nieces from school on a day not ordinarily scheduled for school activities. All of this however, is otiose, as unfortunately Miss Smith was not available to give sworn evidence in either 2002 or 2008 in the subject trials. Such evidence that she may have given was therefore lost to the court, and in our opinion, the appellant cannot legitimately claim that the treatment of the statement or the trial was unfair or that he had lost the "benefit "of her testimony. This ground is also without merit and must fail.

Ground of appeal 4

The appellant's submissions

[47] Counsel's written submissions on this ground were very brief:

> "The Learned Trial Judge's summation relating to accident was confusing and inaccurate. In short, the jury was not left with the option to find that while Bailey had touched the gun when he lunged at it that may have caused the gun to go off accidentally."

In oral submissions he said that accident arose on the Crown's case and the judge failed to instruct the jury in that regard. Counsel submitted that DSP Bailey grabbed at the gun, touched the gun, then there was an explosion. Did the firearm go off accidentally? The learned trial judge should have formulated a direction which could have grounded a conviction of manslaughter. If the jury believed beyond reasonable doubt that the identification of the appellant was satisfactory, then the next step would be whether there was any evidence that would cause them to have a reasonable doubt

that the shot was discharged accidentally, and not deliberate. Counsel submitted that such a direction was not given and the appellant was entitled to it.

The prosecution's submissions

[48] Counsel relied on the principles enunciated in ***Regina v Hugh Anderson*** SCCA No 59/1999 judgment delivered on 20 December 2001 and ***R v Cedric Whittaker*** SCCA No 155/1989 delivered on 28 September 1990 with regard to the definition of the defence of accident in law. Counsel further submitted that it was the duty of the trial judge to leave to the jury any defence which fairly arose on the evidence in the case even if the defence did not specifically rely on the same. However, the judge was under no such duty if no evidence was adduced to warrant such consideration, as the jury should not be asked to speculate, but must return a verdict based on the evidence and reasonable inferences which can be drawn from the proved facts. Counsel relied on the following cases for these statements of the law: (***R v Muir*** (1995) 48 WIR 262, ***R v Porrit*** [1961] 3 All ER 463, ***R v Bonnick*** (1977) 66 Cr App R 266, ***Hyman v DPP*** [1974] 2 All ER 41).

[49] Counsel submitted that in the instant case the prosecution put forward a case of murder in the furtherance of a robbery with the weapon being a firearm. The murder was as a result of a deliberate act and the deceased was killed by transferred malice, which the appellant ought to have foreseen. The defence was a denial. The judge's directions with regard to intention and that a person may be taken as having intended the result of his act, as foreseen, was correct. Counsel therefore concluded that the

judge's directions in not leaving accident to the jury as it did not arise on the circumstances of this case, were also correct. Counsel submitted that the jury would have been asked to speculate which is not allowed and the ground therefore had no merit.

Analysis

[50] Accident in law is defined as any unintended or unexpected occurrence which has an adverse physical result or produces hurt (***R v Kenneth Morris*** (1972) 56 Cr App R 175 and ***Sankar (Lawrence) v the State*** (1990) 43 WIR 406). In this court, Carey JA in ***R v Cedric Whittaker*** gave greater clarity to the definition where he said:

> "Killing which arises by misadventure or accident occurs where a person is killed without intention in the doing of a lawful act without criminal negligence. The examples given in the books do not include circumstances of self defence. A typical illustration is where a man is at work with a hatchet, the head flies off and kills a bystander – 1 Hawk C29 S2. Similarly, where a huntsman shooting at game kills another by accident – Fost 259."

[51] It is very clear that the defence of accident does not arise in this case. On the prosecution's case the appellant pointed a gun in the chest of DSP Bailey, asked him for what he had, and he (DSP Bailey) grabbed at the gun in an effort to protect himself from harm. There was an explosion, he was shot, severely injured and was treated in hospital for 30 days. It was also the prosecution's case that Dougal Wright died through the principle of transferred malice. There was absolutely no lawful act occurring in this scenario. The defence was "I was not there". I was in the vicinity having taken my

nieces to school. Accident cannot arise on the case of the defence either. The learned trial judge directed the jury thus:

> "...Indeed, Mr. Foreman and members of the jury, the accused man gave sworn evidence and said, 'I was not there'. So, there is no question of self defence, nor is there any question of accident. You know if a killing is done by accident, then it is not an offence, but there is no question of accident here Mr. Foreman and your members. I will tell you why. If you are pulling a firearm, it's an unlawful act and you are using an unlawful weapon, so if that is so, you are doing an illegal act, it is not lawful, then accident will not arise..."

[52] Although the passage in its entirety may appear somewhat confusing, the learned judge got it right and the directions, with clarity, indicated plainly that accident did not arise in the circumstances of this case. We do not agree with counsel for the appellant that the appellant was entitled to a direction to the jury that the gun may have gone off accidentally.

[53] The learned trial judge however did leave manslaughter to the jury. She gave detailed directions with regard to the ingredients of the offence of murder, and indicated that the same applied to the offence of manslaughter, save and except for the absence of intention. This is what she said:

> "Now Mr. Foreman and members of the jury, you will probably be wondering what am I going to say now about the fact that the Superintendent grabbed at the firearm and that it went off. Now, if you feel that there was no intention on the part of the accused man to kill the Superintendent, then it is open to you to find that he committed the offence of manslaughter."

Later on she said:

> "...intention is what separates Manslaughter from Murder..."

[54] In our view, leaving manslaughter open to the jury in the circumstances of this case was perhaps unwarranted on the evidence, but certainly beneficial to the appellant. The learned judge left the possible verdicts to the jury: "guilty or not guilty of the indictment which charges murder in the course or furtherance of Robbery; Murder; Manslaughter; not guilty of anything". The jury, as they were entitled to do, returned a verdict of guilty as per the indictment. It was a matter for them and in the circumstances of this case, in our view, there can be no legitimate complaint.

This ground of appeal is entirely without merit.

Conclusion

[55] The appeal is dismissed. The conviction and sentence are affirmed. Sentence is to commence on 2 August 2008.