[2013] JMCA Crim 34

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 26/2011

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MR JUSTICE DUKHARAN JA
THE HON MRS JUSTICE MCINTOSH JA

TESHA MILLER v R

Mrs Valerie Neita-Robertson, Bert Samuels and Mrs Roxann Mars instructed by Knight Junor and Samuels for the appellant

Miss Meridian Kohler, Garcia Kelly and Miss Sophia Thomas for the Crown

25 and 26 February, 22 March and 31 July 2013

MCINTOSH JA

[1] With the leave of a single judge of this court the appellant appealed his conviction for the offences of illegal possession of a firearm and robbery with aggravation as well as his respective sentences of seven and 15 years imprisonment at hard labour recorded in the High Court Division of the Gun Court on 15 April 2011.

[2] When his appeal came up for hearing on 25 February 2013 his attorney-at-law, Mr Bert Samuels, was permitted to abandon the single ground which the appellant had filed with his notice of appeal and, with the court's further leave,

argued instead 12 of the 14 additional grounds which counsel filed on 19 February 2013. The remaining grounds (grounds 2 and 3) were deferred for argument at a later stage, if the need arose. So it was that on 26 February 2013, at the conclusion of the initial submissions from Mr Samuels and Miss Kohler for the Crown, we took time to consider them and delivered our decision on 22 March 2013 in the following terms:

> **"Having considered the submissions advanced, the court has found that there is a point which has to be ruled in favour of the appellant as a result of which the convictions cannot be allowed to stand. Consequently, there is no reason for further submissions.**
>
> **Accordingly, the appeal is allowed. The appellant's convictions are quashed and the sentences are set aside. A judgment and verdict of acquittal is entered. Written reasons will follow shortly."**

These now are the court's reasons as promised**.**

A summary of the prosecution's case

[3] At the trial the prosecution's case depended on the evidence of three witnesses, the virtual complainant Stewart Clarke who was the sole witness as to the identification of the appellant and two police officers, Detective Sergeant Marvin Brooks and Detective Constable Machel Rosedom, both then stationed at the Spanish Town Police Station in St Catherine. The complainant testified that on 10 December 2010, at about 12 mid-day, as he stood talking to his cousin Roy, otherwise called Termite, on Corletts Road, Spanish Town, St Catherine, he

was approached by the appellant and two armed men. The appellant demanded the keys to his gray Toyota Corolla motor car which was parked nearby and he was persuaded to abandon his initial resistance after one of the men clearly indicated the possible result of non-compliance with the use of the words "hey bwoy Yu nuh hear di boss Yu want to dead right yah so". He formed the view that if he continued to refuse he would be killed so he handed over the car keys to the appellant who then instructed him to sign over the car documents to a named individual and walked away.

[4] Shortly after, the complainant reported the matter to Detective Sergeant Marvin Brooks at the Spanish Town Police Station. He later left the station with Detective Brooks and other police officers in search of his motor car. As they searched he saw and pointed out a car he thought resembled his and the police stopped it. The occupants alighted and while they were being searched by the police the complainant saw the appellant in a nearby yard, went inside the yard and pointed out the appellant as the man who had robbed him of his car which he said he had worked so hard to buy. The appellant was subsequently arrested and charged with the offences for which he was convicted and sentenced.

[5] Detective Brooks did not agree with the suggestion put to him in cross-examination that he had deliberately taken the complainant to a home where he knew that the appellant was likely to be. The complainant also disagreed with the suggestion that he and the officers had gone directly to the home of the

appellant and that he had lied about the interception of a vehicle and the search of its occupants. It was accepted, as was revealed in cross-examination, that there was no mention in his statement to the police of him pointing out a vehicle to the police that evening and of the searching of its occupants by the police.

[6] The prosecution also relied on evidence from Detective Constable Machel Rosedom, who was on duty at the station on the morning of 10 December 2013 and was the officer to whom the appellant reported at about 11:48 am as a condition of his bail in an unrelated matter. He had made the required notations in the condition of bail book kept at the station which included the reporting time of 11:48 am, the appellant's attire and his home as his intended destination after leaving the station. The appellant also had his own book in which the officer was to make similar notations. However, he had omitted to note the time in the appellant's book (although he accepted that times were recorded for all other entries on that same page where the entry for 10 December was made). He explained that the omission may have been the result of a lapse of memory or because the area had been very busy with several persons reporting at the time. Detective Rosedom denied that he had put in the time of 11:48 am after learning that the appellant was alleged to have committed a robbery sometime after 1:00 pm that day. When cross-examined on this aspect of the prosecution's case, Detective Brooks had testified that during the course of his investigations he had learnt that the appellant had

reported at the station on 10 December and he had checked the condition of bail book but while he recalled an entry that the appellant had reported he could not recall if a time had been included in the entry.

[7] An important feature of the prosecution's case that bears highlighting was the testimony of the complainant that he was able to recognize the appellant as the person who had committed the offence based on his prior knowledge of him. On two previous occasions he had had the opportunity to see the appellant he said, once in March 2010 and again some time in about June of that same year. In March he had seen the appellant for about half an hour when the appellant came into his community and walked about talking to people there. He had seen him walk into his yard and talk to his cousin, Termite. The closest the appellant had come to him was an estimated 15 feet and he remained at that distance for about 10 to 12 minutes during which time he saw all of him. He also said he had seen the appellant for the entire half an hour of his visit to the community.

[8] His sighting of the appellant on the second occasion lasted four to five minutes as he observed the appellant alighting from a van and walking in the community. This time he had come about three feet from the complainant and had walked pass him. However, he did not look in the appellant's face – "Him walk pass me. I can see him go down there. I don't look in his face. I don't stare at him. I just look take back off my eyes". In a demonstration permitted by the

court in cross-examination those four to five minutes appeared to have amounted to no more than a few seconds. When the date of that second opportunity was challenged the complainant said that it was "a good time before December 10 2010 some time around June". He said "I don't really remember when. Could be June or somewhere about. I don't really remember. It didn't register at the time". He disagreed with the suggestion that he had not seen the appellant before the evening of 10 December 2010 and was therefore lying.

[9] Of note too is the complainant's denial of an account said to have been given by him to one Adwayne Hall to the effect that the car had not been stolen but that he had lent it to some men who had refused to return it on his request. He agreed that he had summoned Mr Hall to the station to produce the documents for his motor car which were in Mr Hall's possession but the complainant maintained that he had not told him that he had lent out the car.

The defence summarized

[10] The appellant gave evidence on oath in which he raised the defence of alibi. He had gone to the Spanish Town Police Station on 10 December 2010 "sometime after 1:00 pm or around 1:00 pm" to report as a bail condition and was accompanied by his mother. He had been at home watching the mid-day news and they left for the station when the news ended. The time could therefore not have been 11:48 am as the prosecution alleged. He did not notice

that the officer to whom he reported had not recorded the time in the condition of bail book which he kept as his personal record until some time later while he was in custody in this matter and he observed that a time was recorded for all the other entries on the page. It was his evidence that after leaving the station he had returned to his home where he remained until "the police come hold on to me in the house". However, later in cross-examination he said he had picked up his sister at his gate and then his daughter and went to a restaurant to purchase food before eventually returning home.

[11] That evening, at about 7:30 pm while he was in a room at home with his mother, the police arrived and requested to see him outside. When he went to the door he saw Detective Brooks, another police officer and a Rasta man in the yard. Detective Brooks then said in a loud tone "Miller whe yu do wid the man car". The Rasta man was talking to his mother and Detective Brooks prodded him twice saying "ah him name Tesha Miller". The appellant said he had never seen the man before that night and on 10 December 2010 did not rob him of his motor car.

[12] He described his physical appearance at the material time as clean shaven with visible scars and marks on his face and missing teeth which could not have been overlooked in any identification of him. Further, he could not have been seen by the complainant in June as he was in custody at the Central Police

Station lock-up from the last week of May to the last week of August 2010. He maintained that at the time when the complainant said he was robbed of his motor car he was at home.

[13] The appellant's mother, Miss Sharon James, confirmed that she had accompanied him to the station on 10 December 2010 and although she was uncertain about the exact time she recalled that it was after midday. She further recalled that they had gone straight home afterwards where she had left him talking to his sister.

[14] Called as a defence witness, Adwayne Hall testified that he went to the station with the documents for the complainant's car at about midday on 10 December 2010 at which time the complainant told him that he had lent the car to some men who would not return it. Mr Hall said that as he had previously told the complainant not to lend out the car since it was registered and insured in his name making him responsible for anything that happened to it while on loan, he became upset and turned over the documents to the complainant. He had remained at the station until "it dust up" (which in Jamaican parlance would mean at least early evening) and made several efforts to tell the police what the complainant had told him, even trying to speak to Detective Brooks just before "Officer Brooks, Stewart Clarke and two more officers who accompanied Stewart Clarke to the premises of Tesha Miller ... drew out of the station" but all his

efforts were in vain. Three days later, on 13 December 2010, the car was returned to him.

The grounds of appeal

[15] As earlier indicated, Mr Samuels filed 14 additional grounds of appeal. With the exception of the two grounds that were deferred these additional grounds embodied complaints concerning the learned trial judge's treatment of the appellant's alibi defence and the evidence of his witness Adwayne Hall (which, according to counsel's submission, directly impacted the appellant's alibi defence); her failure to adequately assess the credibility of the prosecution's witnesses and the related failure to properly deal with discrepancies and inconsistencies in their evidence; her erroneous treatment of the complainant's identification evidence which involved impermissible confrontation of the appellant at his home on the night of 10 December 2010; and her error in applying the provisions of section 20(5)(a) of the Firearms Act to the particular circumstances of this case. However, after very careful and mature consideration we determined that the starting point for our deliberation should be grounds 10 and 11 and we therefore focused our initial attention on the arguments pertaining thereto.

Grounds 10 and 11

[16] These were the grounds that concerned the complainant's identification of the appellant as his assailant on 10 December 2010:

"Ground 10 - The learned trial judge erred in concluding that the appellant was well known to the complainant therefore making confrontation permissible.

Ground 11 - The Identification evidence was unsatisfactory and tenuous for, inter alia, the following reasons:

a. failure of the complainant to give description of the appellant to the police
b. The fact that the complainant alluded to a sighting in June 2010, a time when the appellant was in custody which seriously impeached his credit/reliability.
c. The fact that this is a case of one (1) sighting only
d. that the robber had on a cap which was demonstrated in court to be "just above the eyebrows" (page [sic] lines 12-13)
e. at [sic] was pointed out to the Complainant admitted that the cap obstructed his view "a bit, if you don't know him" (page 41 line 33)
f. The scars on his chin, lip, nose and his missing teeth which the Appellant testified unchallenged he had on the 10th December 2010 and was pointed out to the Judge at pages 398 and 399.

The failure of the Learned Trial Judge to consider the weaknesses in the identification evidence, what was the cumulative effect they had on the crown's case and say how she resolved them in entering a verdict adverse to the Appellant, deprived the appellant of a fair trial."

They were considered together.

The arguments

[17] It was Mr Samuels' contention that the appellant could not have been said to be well known to the complainant after only two brief sightings of him prior to the incident. Further, the complainant's evidence that the first sighting in March 2010 lasted for about half an hour was inaccurate as it was demonstrated in cross-examination that he was unable to properly assess the passage of time and that his half an hour was likely to have been of much shorter duration. (Counsel submitted that when that assessment of time was tested in cross-examination, the time had amounted to no more than a fleeting glance of about three seconds but this conclusion was based on a confusion of the evidence relating to the first and the second sightings of the appellant). The second sighting was similarly unreliable, counsel submitted, as that viewing time was reduced in cross-examination to a few seconds. Additionally, counsel argued, the learned trial judge had accepted the evidence of the appellant that he was in the custody of the police at the material time which meant that the complainant could not have seen the appellant in June 2010 and his evidence that he had seen him, put his credibility seriously in issue.

[18] Mr Samuels further submitted that the learned trial judge was clearly wrong in placing any reliance on the first sighting to support a finding that the complainant knew the appellant sufficiently well for a confrontation to be acceptable. Additionally, the learned judge failed to identify and properly assess

the weaknesses in the identification evidence such as outlined in ground 11 above and, having found that there was orchestrated confrontation, ought to have found that it was not permissible based on only one, if any, sighting of the appellant by the complainant. In all the circumstances, Mr Samuels argued, the identification evidence was unsatisfactory and the conviction based on the poor quality of that evidence should not be allowed to stand.

[19] On the other hand, Miss Kohler submitted that the state of the identification evidence was more than sufficient for the learned trial judge to find that it met the guidelines accepted by these courts as established in **Turnbull** and could be relied upon to support a verdict adverse to the appellant. Counsel contended that by the time the complainant saw the appellant in the yard that evening he was sufficiently familiar with the appellant to make confrontation permissible and this distinguished the instant case from cases such as **Courtney Lawes v R** [2011] JMCA Crim 55 a judgment of this court delivered on 10 November 2011 where the confrontation was found to be impermissible. It was Miss Kohler's further contention that the circumstances of the robbery having taken place in broad daylight, the close proximity of the appellant to the complainant and the prior sighting(s) were almost in keeping with the principles emanating from the authority referred to by the learned trial judge namely, **Gavaska Brown Kevin Brown and Troy Matthews v Regina** SCCA Nos 84, 85 & 86/1999 judgment delivered on 6 April 2001.

[20] She referred us to cases such as **R v Trevor Dennis** [1970] 12 JLR 249; **R v Errol Haughton and Henry Ricketts** SCCA Nos 122 & 123/1980 (judgment delivered on 27 May 1982); and **Regina v Alfred Flowers** SCCA No 4/1997 (judgment delivered on 14 July 1998) and submitted that while the courts have condemned the practice of confrontation and have held that identification on a parade is the ideal way of identifying a suspect (as held, for instance, in **R v Leroy Hassock** (1977) 15 JLR 135), it is not the only satisfactory way and that the particular circumstances of a case may well dictate otherwise. Counsel contended that as long as the identification was not in any way induced deliberately by the action of the police the conviction may be upheld and in this regard she referred us to **R v Joseph Lao** SCCA No 50/1973 (a judgment delivered on 16 November 1973). She also referred us to **R v Gilbert** (1964) 7 WIR 53 and **R v Woodrow Myrie** SCCA No 72/1980 as cases in which convictions were not overturned in spite of confrontation identification.

[21] It was Miss Kohler's further submission that the learned trial judge had placed the threshold for a finding that confrontation had occurred, particularly high but in the circumstances where the complainant had given the appellant's name to the police, spoke of prior sightings of the appellant, had a special reason to recall the appellant, namely that he believed the appellant to be the person referred to as "the boss" and wanted to know who the boss was, the

officer could have opted to hold an identification parade or have a formal confrontation without any condemnation. It was in reality three sightings counsel argued, as the one on 10 December would count since it was before the confrontation. Furthermore, Miss Kohler contended, the complainant whom the learned trial judge found to be a witness of truth and Detective Brooks had categorically denied that a confrontation had been arranged. She pointed out that although the instant case is not on all fours with any of the cases in which a conviction was upheld they demonstrate that the list is not exhaustive as to the fact situation that will pass the threshold. It was counsel's contention that there was no substantial miscarriage of justice in the instant case and that these grounds should therefore fail.

Discussion

[22] Judicial wisdom emanating from the great number of authorities dealing with visual identification of a suspect has firmly established that fairness is the paramount objective in the identification process. Where the case against a suspect rests upon the correctness of his or her identification by a witness or witnesses, great care must be taken in considering all the circumstances of the identification to see that there was no unfairness and that the identification was independently made, without any prompting. To this end a duty is placed on the police to ensure that the identification process is carried out with the utmost

fairness. In **Dickman** (1910) 5 Crim App R 135 @ 143 the Lord Chief Justice who delivered the judgment of the court, put it this way:

> "The police ought not either directly or indirectly to do anything which might prevent the identification from being absolutely independent and they should be most scrupulous in seeing that it is so."

[23] In our jurisdiction it has long been accepted that where the suspect is not known to the identifying witness or witnesses before the alleged incident the suspect should be placed on an identification parade. That has been held to be the ideal and fair method of testing the witness' ability to identify a suspect whom the witness had never seen before the incident. Confrontation of the previously unknown suspect by the witness without an identification parade being held has received the strongest condemnation by the courts. Lewis JA had left it beyond doubt in 1964 in **Gilbert** where no parade had been held and the suspect was confronted while in the custody of the police, that in our jurisdiction this method of identification by confrontation was highly unsatisfactory. In his words:

> "The court feels strongly that this method of identification is a most improper one … Where it appears as it must have appeared clearly in this case that the evidence against the suspected person is going to depend to a great extent upon identification, there is a distinct duty upon the police to take every care to see that the witness who is going to identify that person is not brought into proximity with him before the identification parade is held."

[24] However in the development of the law since 1964 a deviation from that course has been permitted where there are rare and exceptional circumstances and in 1970 in the case of **Trevor Dennis**, the court made it clear that an identification parade is not the only satisfactory means of identifying a suspect. There the suspect was not known to the identifying witness but no parade was held and, on appeal, the court had this to say:

> "identification on parade was the ideal way of identifying a suspect but it was not the only satisfactory way as the particular circumstances of a case may well dictate otherwise; having regard to the elements of time and distance between the offence, the description to the police the apprehension and identification of the appellant no valid ground existed for holding that the identification of the applicant was improper."

Trevor Dennis has been cited with approval in several later decisions of this court.

[25] In the 1977 case of **Leroy Hassock**, for instance, Melville JA (Ag), expressing the views of the court, made it clear that:

> "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." (emphasis added)

His lordship referred to **Dickman** making clear the court's displeasure at what appeared to be a defiance of the warnings of Lewis JA and stating that:

> "… this pernicious practice has intensified whereby confrontation has now become the order of the day rather than the rare

> exception that it ought to be. …Confrontation should be confined to rare and exceptional circumstances such as those in **R v Trevor Dennis**."

Melville JA (Ag) went on to say:

> "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." (emphasis added)

[26] Carey JA delivering the judgment of the court in **Haughton and Ricketts** in 1982, referred to the decision in **Hassock** stating that:

> "If the effect of this suggested procedure is that an identification parade is, in the absence of exceptional circumstances, the proper method of testing a witness' ability to identify an assailant whom he does not know before the incident, then these observations are, we think, unexceptionable."

However, the court did not accept that **Hassock** was authority for any principle that where the suspect was unknown and a parade was required to be held but none was held, any confrontation in those circumstances would lead to an appeal being allowed. The court stated most emphatically that there is no such principle and referred to the decision in **Trevor Dennis** as making the court's position perfectly clear.

[27] Again in **Williams (Noel) v R** (1997) 57 WIR 202, a case from this jurisdiction, the Privy Council held in effect that the circumstances of the identification in that case were not improper, the identifying witness being a police officer who was present at the robbery and who participated in the arrest of the suspect at which time he identified the suspect who had not been known to him before the incident. The Board pointed out that there was no suggestion that the witness had been tutored with a view to assisting him in making the identification so that the identification was not tainted. The head note adequately reflects the Board's opinion and reads as follows:

> "Where a witness to an incident knows well the person suspected of involvement in the incident the suspect may properly be confronted by the witness so that the latter may confirm that the suspect is the proper person to be held in connection with the incident. Where the witness does not know the suspect well an identification parade is the proper means of identifying the suspect and confrontation should be confined to rare and exceptional circumstances."

In approving **Hassock** and the court's condemnation of confrontation identification save in rare and exceptional circumstances the Board said:

> "Their lordships wish to indorse what was said about the proper practice in that case. They agree that, confrontation, if it is to be resorted to at all should be confined to rare and exceptional circumstances. The essence of the objection is the elementary one, that it is improper for the police to tutor the witnesses."

[28] Smith JA (Ag) (as he then was) in delivering the judgment of the court in **Brown, Brown and Matthews**, on 6 April 2001 said of confrontation identification:

> "[t]he upshot is that where the suspect is **well known** to the witness, unless the suspect asks for an identification parade confrontation is permissible in this country." (emphasis added)

However, the court was of the opinion that there was a need for some proper guidelines to be followed and, in this regard, Smith JA (Ag) referred to the English Code of Practice, particularly to Code D which related to identification procedures, suggesting the adoption of some of those procedures in Jamaica. The court in assessing the quality of the identification evidence in the case of **Kevin Brown** where the appellant and the complainant were friends over a period of six years and the appellant was the complainant's barber the court concluded that in the circumstances of this case the viewing of the appellant at the police station by the complainant, was not unfairly prejudicial to the appellant and the conviction was not disturbed.

[29] In **Courtney Lawes,** however, in a judgment delivered by Phillips JA on 10 November 2011 the court affirmed the well established principle that where the suspect was unknown to the witness an identification parade should be held and that confrontation was to be confined to rare and exceptional circumstances. In that case there was confrontation of the suspect by the witness at the police station. Prior to the incident he was unknown to the witness and no rare and exceptional circumstances were shown. The court concluded that the exposure of the applicant to the complainant before the identification parade severely tainted the identification and made the quality of the identification evidence

poor. In the circumstances, the court held that a conviction on that evidence was unsafe and had to be set aside.

[30] In sum, while condemning identification by confrontation of the suspect by the identifying witness or witnesses the authorities indicate that it may be permissible if the suspect is **well known** to the witness but it nevertheless should be a last resort (see **Brown, Brown and Matthews v Regina**) and where the suspect is unknown to the identifying witness should be confined to rare and exceptional circumstances as in **Trevor Dennis**. Further, where the suspect is known to the witness before and no identification parade was held, if there has been confrontation the evidence should be viewed with caution to ensure that the confrontation is not a deliberate attempt by the police to facilitate easy identification by the witness.

Analysis and conclusion

[31] In the instant case, the learned trial judge concluded that the meeting of the complainant and the appellant on the evening of 10 December 2010 was the result of an orchestrated confrontation. At page 581 of the transcript the learned trial judge summed it up this way:

> "The Prosecution relies on this evidence that Mr Stewart Clarke pointed out the accused on the premises on the evening of the day of the incident. Is this confrontation identification? The Prosecution argues that the opportunity for Mr Stewart Clarke to point out the accused man occurred by happen stance. I do not accept that. I do not believe that of all the houses in Spanish

> Town … the house before which the police stopped just happened to be the one in which the accused was."

Then at page 584 the learned judge said

> "Applying common sense I formed the view that the police took the accused [sic] to the place where the police expected Mr Miller to be. Thereafter, the police orchestrated a confrontation."

[32] Miss Kohler, while accepting that it was a matter for the trial judge's determination in her assessment of the circumstances of the identification, submitted that the complainant and Detective Brooks had both denied that any confrontation had occurred and that the learned trial judge had accepted the complainant as a witness of truth. It need hardly be said that as the tribunal of fact it was entirely open to the learned trial judge to reject any part of the witness' evidence not believed while still being at liberty to accept the parts believed to be true and she clearly rejected the denial. As tribunal of fact the learned trial judge concluded on the evidence before her that there was a confrontation of the complainant and the appellant that evening and that it was by virtue of the actions of the police. In our opinion the learned judge was entitled to arrive at that finding on the evidence before her.

[33] It may be argued that there was certainly support for the learned trial judge's conclusion in the evidence of Adwayne Hall who testified that he had remained at the police station until the complainant and the police left the station for the home of the appellant. He was there, according to his evidence,

trying to talk to the police and may well have gathered that that was their intended destination. In **Hassock** three witnesses to whom the applicant was previously unknown were allowed to see him at the police station with a view to identifying him. Melville JA (Ag) remarked:

> "The conclusion cannot be avoided that the police here had embarked on a deliberate course of confronting the applicant with the various witnesses."

The result of that action the court said would operate unfairly and to the prejudice of an accused person. The evidence of identification would be gravely impeached and would have no weight.

[34] Carey JA in **Haughton and Ricketts** referring to that conclusion said that in the circumstances of that case the court did not consider that view of the facts to be unjustified and we have formed a similar view in the circumstances of the instant case.

[35] The learned trial judge as tribunal of fact, having determined that the identification of the appellant was by way of a deliberate confrontation, had next to determine whether the appellant was well known to the witness or, if not, whether there were rare and exceptional circumstances involved such as would make confrontation a permissible way of identifying him. In our view there were no rare and exceptional circumstances which could make confrontation identification permissible and the learned trial judge was clearly not of the view

that those considerations were warranted here as she found that the confrontation was permissible on the basis that the appellant was well known to the complainant before the incident.

Was there evidence that the appellant was well known to the complainant?

[36] For this determination reliance was placed on the complainant's evidence that he had seen the appellant on two occasions prior to 10 December 2010 first in March and again in about June of 2010. At page 584 of the transcript the learned trial judge expressed her understanding of the law pertaining to confrontation identification thus:

> "The law in Jamaica as I understand it is that confrontation is permissible in certain circumstances one of which is if the suspect is well known to the witness."

Then, at page 587 the learned judge said she accepted that the complainant had seen the appellant in March 2010 and that by the second incident:

> "the witness already knew him and I find that the second occasion was not in fact in June but rather a good time before December 10 2010 some time around June."

At page 588 the learned trial judge said:

> "I accept Mr Stewart Clarke's evidence as true that he had seen Mr Miller before and I regard those circumstances as showing that Mr Clarke had known Mr Miller sufficiently well to have been confronted by him. Indeed even if I am wrong about the second sighting, in my view the evidence of the first viewing is credible and would show that the complainant knew him sufficiently well to be confronted."

[37] It is clear to us that the learned trial judge had a correct appreciation of the law relating to confrontation identification acknowledging that "if confrontation is to occur it must certainly occur in a fair manner". She referred to the suggestions in **Brown, Brown and Matthews** which though not followed in the instant case the identification conditions were nevertheless fair and led her to the conclusion that:

> "... this could be viewed as the confrontation of a person whom the complainant knew before and who he was able to recognize or rather would be able to recognize in appropriate circumstances."

[38] The learned trial judge clearly had in mind the **Turnbull** guidelines in her assessment of the complainant's evidence as it related to the incident on 10 December 2010 and said at page 591

> "Anything interfering with the observation is something I must also consider. Yes, there is a cap involved and the witness has said that the cap went down to the forehead but because he knows the man it didn't impede his observation."

She went on to say:

> "I recognize that Counsel for the accused man has indicated that the accused' face has on it scars and that the scars have not been mentioned by the witness as being of assistance to him in identifying this man. I understand that, but it doesn't cause me to change my view because, in my opinion, the witness knew who he was talking. He knew it was Tesha and if you know it is Tesha, in my view it is not necessary to say it is the Tesha that had the injury to his face."

[39] In our view, however, the evidence of the prior sightings of the appellant by the complainant does not bear the weight attributed to it by the learned trial judge. She clearly accepted that there was a second sighting some time before December and after March 2010 but, on the evidence, that second sighting was a mere fleeting glance as according to the complainant all he had done was to look at the face of the appellant and quickly avert his eyes as the appellant walked pass him. The learned trial judge was therefore depending on one prior sighting when according to the complainant he saw the appellant "head to toe face to face" for about 30 minutes, 10 to 12 minutes of which the appellant was about an estimated 15 feet away from him talking to Termite. With such a good opportunity to view the face of the appellant the absence of any mention of those visible facial features – scars and missing teeth – must in our view amount to a weakness in the identification evidence (See **R v Garnet Edwards** SCCA No 63/2002 delivered on 27 April 2007 where the court expressed concern about a particular facial feature (a birthmark under one of the appellant's eyes) said to have been plain and obvious but which had not been included in the identifying witness' description of his assailant and regarded it as a weakness in the identification evidence). It seems to us that when the authorities speak of "well known" much more than one sighting even of half an hour, without any interaction between the complainant and the appellant, was intended. It is of significance that in **Brown, Brown and Matthews** the confrontation which

received the approval of the court involved a witness who had known the appellant for six years and would have interacted with him as the appellant was his friend and barber.

[40] Nor did the viewing of the appellant on the day of the incident do anything to enhance the evidence of the complainant's prior knowledge of him. The learned trial judge did not find the cap which the complainant said the appellant was wearing to have impeded his observation of him "because he knows the man" and when the complainant was asked the following question (at page 41):

> " Q This cap that he was wearing did it obstruct your view of seeing him that day, sir?"

responded:

> "A A bit, if you don't know him."

Since the complainant's knowledge would have been based in large measure on that March sighting it follows in our view that this was another area of weakness in the evidence of identification. It seems to us that caution would have dictated that the evidence be scrupulously examined and the weaknesses properly assessed with the inevitable conclusion that this case had to be dealt with as identification of a person not well known to the complainant.

[41] In our opinion the learned trial judge erred in concluding that the evidence could give rise to a finding that the witness knew the appellant

sufficiently well to allow for him to properly confront the appellant. In the absence of any rare and exceptional circumstances, confrontation identification was impermissible making this a case in which an identification parade ought to have been held to enable the witness' ability to point out his assailant to be properly tested.

[42] In the final analysis we found it unnecessary to consider the other grounds of appeal with the result that we allowed the appeal and entered a judgment and verdict of acquittal as indicated in paragraph [2] above.