[2014] JMCA Crim 27

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS 112/2010 and 40/2011

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MR JUSTICE BROOKS JA
THE HON MS JUSTICE LAWRENCE-BESWICK JA (Ag)

RYAN PALMER
RICARDO DEWAR v R

Ms Jacqueline Cummings for the applicant Ryan Palmer

Delano Harrison QC for the applicant Ricardo Dewar

Miss Sascha-Marie Smith for the Crown

11, 12 February and 13 June 2014

PHILLIPS JA

[1] I have read, in draft, the judgment of my brother Brooks JA. I agree with his reasoning and conclusion and have nothing to add.

BROOKS JA

[2] On 15 May 2009 at about 5:00 pm, three men, Messrs Garfield Lowver, Lorenzo Burke and Orville Duncan were in an office at Mr Lowver's business place, at Bog Walk, in the parish of Saint Catherine, arranging pay packages for Mr Lowver's employees. Their work was interrupted when two men, one wearing a ski-mask and brandishing a

gun, entered the office. The man without the mask started "grabbing up" the money from the table at which Mr Lowver and the others were working. The intruders were, however, not going to have an easy time in their mission. Mr Duncan held on to the man who was taking the money and they started to wrestle. Mr Lowver grappled the man with the gun. Mr Burke ran out of the office and armed himself with a stone, which he used to hit the man without the mask, who had, by then, freed himself from Mr Duncan's grasp and was running away. That man made good his escape. He, however, managed to take $50,000.00 of the money with him.

[3] Meanwhile, Mr Duncan had joined in Mr Lowver's struggle with the masked man, who was dressed in black. The struggle had taken them outside of the office. During that struggle Mr Lowver managed to remove the mask and take the firearm from the miscreant. Mr Lowver was momentarily distracted, however, and the culprit wrested himself free and fled. He also escaped, but was obliged to leave the gun behind.

[4] On the prosecution's case, their freedom was short-lived. This is because both had been recognised by their victims, as people who were known to them before. Within minutes, the police, having received a report of the robbery, saw them together in a nearby community and chased them. The officers caught one. He was, again just minutes later, identified by Mr Lowver as being one of the robbers, specifically the one who had been armed with the gun. He is the applicant Mr Ryan Palmer.

[5] Two months later, Mr Burke pointed out the other man, the applicant Mr Ricardo Dewar, on an identification parade. He had known him for two years before the day of the robbery and, during that time, would see him daily.

[6] At their trial before Marsh J in the High Court Division of the Gun Court, both men denied involvement with the robbery. Mr Palmer said that he was at home when the police came there and took him to the police station, where they beat him and then detained him. He said that, when asked, he told the police that he had known both Mr Burke and Mr Lowver before.

[7] Both applicants were convicted on 21 October 2010 for the offences of illegal possession of firearm and robbery with aggravation. They were each sentenced on 22 October 2010 to 10 years and 12 years imprisonment for the respective offences. Mr Palmer was also convicted for the offence of illegal possession of ammunition, with which the firearm, taken by Mr Lowver, had been loaded. He was sentenced to three years imprisonment for that offence.

[8] When their applications came on before this court, Mr Harrison QC candidly acknowledged that Mr Burke's identification of Mr Dewar was "ample and quite compelling". Learned Queen's Counsel submitted that the convictions and sentences in respect of Mr Dewar were unassailable. We completely agree.

[9] Ms Cummings, appearing for Mr Palmer, argued that the same could not be said of his conviction. She submitted that Mr Lowver's claimed prior knowledge of Mr Palmer was tenuous and his opportunity to see his attacker was beset with difficulty.

She argued that the learned trial judge, Marsh J, was therefore wrong in finding that the prosecution had discharged its burden of proof in respect of the identity of the masked robber.

The grounds of appeal

[10] Ms Cummings argued four grounds of appeal that Mr Palmer had filed with his application for leave to appeal. They are:

> "(a) **Misidentify** [sic] **by the Witness**: - that the prosecution witnesses wrongfully identified me as the person or among any persons, who committed the alleged crime.
>
> (b) **Lack of Evidence**: - that the prosecution failed to put forwards [sic] any material, or scientific, evidence to link me to the alleged crime.
>
> (c) **Unfair Trial**: - that the Court failed to recognized [sic] that I was wrongfully arrested for no apparent justificable [sic] reason and was charge [sic] for a crime I knew nothing about.
>
> (d) **Miscarriage of Justice**: - that the prosecution failed to recognized [sic] the fact that I had nothing to do with the alleged crime for which I wrongfully convicted of [sic]." (Emphasis as in original)

These issues will be considered individually.

Identification by Mr Lowver

[11] Ms Cummings relied, as did defence counsel at the trial, on the principle stated in **R v Turnbull** [1976] 3 WLR 445 and [1976] 3 All ER 549, that where the quality of the identification evidence is poor, such as when it is as a result of a fleeting glance or a longer observation in difficult circumstances, the trial judge should withdraw the case

from the tribunal of fact. Ms Cummings submitted that the evidence revealed that Mr Lowver's observation, unsupported by any other evidence, was not only a fleeting glance, but was one made in difficult circumstances. She argued that Mr Palmer, therefore, ought not to have been convicted.

[12] Learned counsel pointed out the following difficulties with the prosecution's case against Mr Palmer. She referred to Mr Lowver's evidence in this regard, and pointed out that he said that he had seen the attacker's face for two to five seconds. This observation was made during the time that there was still a struggle going on, at least between Mr Duncan and the robber. Ms Cummings also pointed out that the prosecution did not adduce any evidence of the lighting conditions at the time of the observation of the robber's face. Although it was 5:00 pm, she said, it was not identified whether the mask was removed inside the office or outside and there was no evidence as to the lighting inside the office at the time.

[13] Ms Cummings submitted that other evidence also cast doubt on Mr Lowver's purported identification of Mr Palmer. She pointed out that when Mr Lowver made his report at the police station, he did not, at that time, identify the person who had robbed him. Although he claimed to have known the names of Mr Palmer's family members, including his mother "Peaches", he did not tell the police any of those details. He did not give any indication that he knew that robber before. Instead, according to Sergeant Sebert Nelson, who had received the complaint of the robbery, Mr Lowver gave the police the name of "Ricardo Dewar o/c [otherwise called] 'Ricky' of Pineapple Settlement in Bog Walk" (page 65 of the transcript). Yet it was Mr Lowver's evidence

that he did not take any notice of the second man and so was unable to give any information about that man from his own knowledge and observation.

[14] In addition to that cloud over Mr Lowver's purported identification of Mr Palmer, learned counsel submitted, it seems patent that what occurred at the police station was a clear case of improper confrontation. She pointed to the fact that Sergeant Nelson, having received the report of the robbery, left the police station in search of the robbers, and left Mr Lowver at the station. Having taken Mr Palmer into custody, and having no indication that Mr Lowver would have known Mr Palmer before, Sergeant Nelson made no effort to isolate Mr Palmer from being seen by Mr Lowver. He took Mr Palmer into the police station's guard room where Mr Lowver is said to have pointed out Mr Palmer as one of the robbers.

[15] That confrontation, Ms Cummings submitted, was unlike that in **R v Trevor Dennis** (1970) 12 JLR 249, where the suspect was apprehended close by and brought back to the complainant's home within 30 minutes of the commission of the offence. Ms Cummings sought to distinguish **Dennis** on the bases of the length of time between the commission of the offence and the later confrontation, and on the location at which the confrontation occurred. Learned counsel submitted that the confrontation identification at the police station in this case, ought not to be relied upon. She relied, in support of her submissions on this aspect, on a number of cases, including **Noel Williams v R** (1997) 51 WIR 202, **R v Gilbert** (1964) 7 WIR 53 and **R v Cargill** (1987) 24 JLR 217.

[16] Other cases relied upon by Ms Cummings on the issue of identification were **Daley v R** [1993] 4 All ER 86 and **R v Omar Powell and Another** SCCA Nos 18 and 19/2001 (delivered 11 November 2003).

[17] Miss Smith, in response to those submissions, contended that this was not a case of a fleeting glance. She submitted that it was an identification made in adequate circumstances that would render it reliable. Learned counsel pointed to the evidence that Mr Lowver knew Mr Palmer before and that Mr Palmer had also admitted knowing Mr Lowver before. She pointed out that Mr Palmer stated that he lived in Bog Walk and argued that that is in the same area that Mr Lowver has his business place. In addition, Miss Smith argued, Sergeant Nelson testified that when he went in search of the robbers, he saw Messrs Palmer and Dewar together as the only two adult males in a group of people congregated by a wall in the Bog Walk area. They both ran on the approach of the police.

[18] In respect of the lighting, learned counsel submitted that when Sergeant Nelson saw the two men in the group of persons, it was 5:30 pm and was "bright sunlight". There would be no issue, therefore, as to the adequacy of the lighting at Mr Lowver's premises. She relied on the cases of **Tucker and Thompson v R** SCCA Nos 77 and 78/1995 (delivered 26 February 1996), **Kevin McKenzie v R** [2011] JMCA Crim 38 and **Cameron v R** [2013] JMCA Crim 60 in support of her submissions.

[19] In assessing this ground, it may be best to summarise the elements of the identification evidence that had been adduced. In support of proper identification, they are:

a. Mr Lowver said that he knew Mr Palmer before and would see him around the area.

b. He knew members of Mr Palmer's family and would see Mr Palmer as he grew older.

c. He saw his face for five seconds after the mask had been removed.

d. He saw the face from a distance of two feet.

e. It was bright at the time although the sun was about to go down.

f. The mask was removed after the struggle had taken the men outside.

g. A description (although not outlined in the evidence) of the robbers was given to the police together with Mr Dewar's name.

h. Mr Dewar and Mr Palmer were seen together within minutes of the report to the police. They were in a nearby community and were the only two adult males among a group of people.

i. Both men ran when a child in the group said "Police".

j. Mr Palmer was pointed out by Mr Lowver at the police station by 5:45 pm, that is, within an hour of the robbery having been committed.

k. Mr Palmer was wearing the identical clothing at the police station as the robber wore at Mr Lowver's office.

The elements militating against proper identification are:

a. Mr Lowver did not know Mr Palmer by name.

b. During the observation of the robber's face, after he was unmasked, there was a struggle in progress between that robber and Mr Duncan.

c. It is not clear whether Mr Lowver, by saying the mask was removed "outside", meant that the unmasking occurred in the open or just outside of the office, but still in an enclosed area, thus restricting daylight.

d. Mr Lowver said that he panicked when the gun was pointed at him.

e. Mr Lowver did not tell the police in his initial report that he knew the robber, whose name he had not supplied to the police.

f. There were discrepancies between the testimonies of the police witnesses as to how Mr Lowver came to be in contact with Mr Palmer at the police station.

[20] The law regarding the dangers inherent in visual identification received much attention at the trial. Learned counsel for both applicants submitted, in a comprehensive and admirable presentation, that they should not be called upon to answer the charges laid against them. Similarly vigorous and stimulating submissions were made by counsel before this court. It is not intended to re-cover that well trodden ground, but the question of the reliability of the evidence of the confrontation does require special comment.

[21] There were, as Ms Cummings pointed out, some contradictions in the evidence between the witnesses as to the way the confrontation came about. Mr Lowver stated that he was in Detective Corporal Brooks' office when Mr Palmer was brought to the police station. Mr Lowver's testimony on that point was as follows:

> "While I was at the station we were in the Detective section having a form of report, I heard a noise on the outside and I realized that I saw the officers with the said man that actually robbed me... [t]he man in the black [clothing]" (page 23 of the transcript).

He testified that the detective's office was separate from the guard room. It was an "enclosed area secured by a board door". Mr Lowver was not certain whether that office had any windows but the door was closed and the air-conditioning unit was on at the time.

[22] Along with that evidence was the evidence of Sergeant Nelson. He said that when he brought Mr Palmer to the police station he took him to the guard room. In his evidence in chief, Sergeant Nelson said that he "handed [Mr Palmer] over to Detective

Corporal Brooks who was then at the police station along with the complainant [Mr Lowver]" (pages 71-72 of the transcript). When he was asked to clarify that statement, Sergeant Nelson said that "[t]he complainant was at the station still".

[23] In cross-examination Sergeant Nelson said that when he handed Mr Palmer over to Detective Corporal Brooks, he did not see Mr Lowver, as Mr Lowver "was in Detective Corporal Brooks' office" at that time (page 75 of the transcript). Sergeant Nelson testified that after he handed over Mr Palmer, he was "then put in the lockup of the Bog Walk Police Station" (page 76). Sergeant Nelson confirmed that once the door to the detective's office was closed it was not possible to see anything in that office from the guardroom or anything in the guardroom from the office. Sergeant Nelson seems to have remained at the station until Mr Palmer was placed in the station's lockup, about 10 minutes after his arrival there. As with the guardroom, there was no line of sight between the inside of the cells and the detective's office.

[24] Against those testimonies was the evidence of Detective Corporal Brooks who testified that while he was in the guardroom with Messrs Lowver and Burke, "Sergeant Nelson and some other officer brought a man to the station" (page 109 of the transcript). He continued that "[a]t that point Mr. Garfield Lowver on seeing the man he pointed him out to me...as one of the men who had robbed him earlier" (page 110).

[25] On being tested in cross-examination on this evidence, Detective Corporal Brooks said that Sergeant Nelson was present in the guard room when Mr Lowver pointed out

Mr Palmer (page 123 of the transcript). Detective Corporal Brooks said that when Mr Palmer arrived at the station, he had not yet started recording Mr Lowver's statement.

[26] These discrepancies were brought to the learned trial judge's attention and, at page 191 of the transcript, he recounted defence counsel's submissions made in respect of them:

> "Mr Kinghorn for the accused replied that the Crown's case as presented had failed to reach the standard required; that the Crown had left many gaps to fill. Where was Palmer identified? At the Bog Walk Station [sic], the guard room or the CIB office?"

[27] The learned trial judge dealt with the issue at page 195. He said in that respect:

> "It is a matter of discrepancy between Lowver and the police witnesses as to where at the station Palmer was pointed out. However, I accept Lowver's evidence as to how he came to see the accused Palmer and to have pointed him out that evening. There was no contention that there was any confrontation and I find none."

That acceptance of Mr Lowver's testimony in this regard came in the wake of the learned trial judge assessing Mr Lowver and finding him "an honest candid witness; his demeanour impressed...his evidence was totally convincing and credible" (page 193). The learned trial judge, as the tribunal of fact, was entitled to accept Mr Lowver's evidence in preference to the other witnesses. This court, having not seen and heard the witnesses, will not disturb those findings. It is true that Mr Lowver did not explain how he came to see Mr Palmer in the context of Mr Lowver being in an office separated from the guardroom by a closed door. It is not difficult, however, to picture what

would have occurred if, while he was in the detective's office, there were to be "a noise outside" (page 23 of the transcript).

[28] Although the learned trial judge did say that there was no confrontation, he should be understood to be saying that he found that the police did not deliberately bring Mr Palmer into Mr Lowver's presence. It does not seem, however, that the police made any effort to prevent Mr Palmer being exposed to Mr Lowver. From that point of view it may be said that there was a confrontation in the sense of a deliberate exposure.

[29] Even if there had been a confrontation, in the sense of a deliberate exposure, however, the circumstances of Mr Lowver's claimed prior knowledge and the span of time between the robbery and the exposure at the police station would have justified that exposure. Three cases may assist the analysis of this alternative position.

[30] Their Lordships of the Privy Council, in **Noel Williams v R**, endorsed a description of the proper practice to be followed when suspects are apprehended. They emphasised that, unless the witness knows the suspect well, the proper course, unless exceptional circumstances exist, is to hold an identification parade. That guidance was given by this court in **R v Hassock** (1977) 15 JLR 135 at page 138:

> "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."

[31] The circumstances in **R v Dennis** (a case that pre-dated **Hassock**), were accepted as justifying confrontation of the suspect by the witness. The headnote of **Dennis** accurately sets out those circumstances:

> "The applicant was apprehended some 20 to 25 chains from the house in which he had allegedly committed a robbery. He was seen in the house for 10 to 15 minutes by the complainant [a minister of religion who thought that he had seen the applicant before during the course of his pastoral work]. He was arrested within half-an-hour of leaving the house. He was taken back there and identified by the complainant, who had given a description of the robber to the police."

This court found that the confrontation was not improper. It held:

> "that 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 applicant no valid ground existed for holding that the identification of the applicant was improper."

[32] The similarities between the present case and **Dennis** are striking. Although the complainant in **Dennis** had a longer time in which to view the robber, the difference between the two cases, as to the lapse of time between the robbery and the confrontation, is also not as significant as Ms Cummings has submitted.

[33] In these circumstances, on either the learned trial judge's finding of fact, or on the alternative position just assessed, the complaint that there was an improper confrontation must fail.

[34] The other complaints about the identification evidence must similarly fail. The outline of the identification evidence reveals that that evidence was not so slender as to justify the epithet "poor". Although the period for observation was very short, and the observation was made in stressful circumstances, it cannot be ignored that there were other aspects which supported Mr Lowver's evidence of visual identification.

[35] The supporting evidence is significant. The evidence is that having been given a description of the two robbers as well as Mr Dewar's name, the police went in a motor vehicle to look for them. Within 15 minutes, and apparently not far away, the police saw Mr Palmer and Mr Dewar together. The evidence also is that upon being alerted as to the presence of the police, both men ran. It is also not to be ignored that Mr Lowver testified that Mr Palmer was dressed in clothing identical to that in which he was dressed at the time of the robbery. There is also the evidence that Mr Palmer accepts that he knew Mr Lowver before. This was not a case of the visual identification standing alone.

[36] The learned trial judge properly addressed the issue of law with regard to visual identification. He gave himself a comprehensive **Turnbull** warning at page 192 of the transcript and went on to apply those principles to the evidence. Having accepted Mr Lowver as an honest witness, the learned trial judge then assessed the evidence in

respect of the lighting, the distance of the observation, the fact that Mr Lowver said that he panicked but had the presence of mind to grab the gun and pull away the mask from his attacker.

[37] Also on the issue of the visual identification is the evidence of the available lighting at the time that Mr Lowver unmasked the robber. Mr Lowver testified that this event occurred "outside of the office". There is no evidence to indicate that he was in any other part of the building, indeed, at page 15 of the transcript, he gave the distinct impression of being outside in the open. He said:

> "I pulled the mask from his face and **I looked through the window** and I saw the other man in the office." (Emphasis supplied)

If he were outside at 5:00 pm in May, there would be no question that he would have had ample natural lighting to see his attacker's face.

[38] Finally on the issue of identification, is the learned trial judge's failure to address, in his assessment of Mr Lowver's testimony, the fact that Mr Lowver did not mention to the police that he knew before, the robber who was dressed in black. He had at least two opportunities to have communicated that information. He could have communicated it to Sergeant Nelson at the time of the initial report or he could have told Corporal Brooks so at the time that Mr Palmer was brought to the police station.

[39] The learned trial judge did not completely ignore the point. He did recount Mr Lowver's evidence on the matter. He did so at page 181:

> "Garfield Lowver contended that the accused Palmer was no stranger to him. He had seen him around the area, knew

> his mother, brother and sister. In fact he said he knew the whole family. He had known the accused for about fifteen years before the date of the incident. However, he said that he did not know the accused man's name."

The learned trial judge did not, however, raise as a question in his analysis, why Mr Lowver had not given this information to the police. This was a significant issue, but it must be looked at in the overall impression of the witness on the tribunal of fact. On several occasions the learned trial judge commented on the way Mr Lowver impressed him as an honest and credible witness. If, therefore, as he said he did, the learned trial judge believed that Mr Lowver knew Mr Palmer before, he was entitled to do so and the failure to question that omission by Mr Lowver should not fatally undermine that finding.

[40] In the circumstances, the learned trial judge was entitled to find, as he did, that not only was Mr Lowver an honest witness in terms of his evidence of prior knowledge of Mr Palmer, but that he was also a reliable witness in the matter of the visual identification. This ground fails.

The adequacy of the evidence

[41] Ms Cummings, in respect of the complaint that the evidence against Mr Palmer was inadequate, argued that there was no forensic evidence adduced by the prosecution in support of Mr Lowver's testimony. She argued that although a mask had been taken from the robber, no attempt was made to lift material from it for DNA testing. Learned counsel submitted that the learned trial judge did not warn himself on the absence of corroboration of the visual identification by Mr Lowver.

[42] Learned counsel is correct that there was no forensic evidence in support of Mr Lowver's identification evidence. The absence of forensic evidence in this case does not, however, render the conviction flawed. Lord Widgery CJ, at page 448G of **R v Turnbull**, did speak about "corroboration, in the sense that lawyers use that word", being allowed to support poor evidence of identification. There is, however, no requirement for corroboration, in that technical sense, where there is adequate evidence of visual identification. Many a conviction has rested on the testimony of a sole eye-witness.

[43] In the instant case, the learned trial judge had evidence before him, which, as the tribunal of fact, he accepted. The absence of forensic evidence cannot detract from that decision.

[44] There is no merit in this complaint.

The fairness of the trial

[45] Ms Cummings contended that the trial was rendered unfair by the learned trial judge's finding that there was no confrontation of Mr Palmer by Mr Lowver. She also highlighted the discrepancies in the prosecution's case in respect of how that confrontation took place.

[46] Miss Smith, in response, argued that confrontation was allowable in certain circumstances, such as when there is no challenge by the suspect to the witness' claim to previous knowledge. Such previous knowledge, learned counsel submitted, would

obviate the need to hold an identification parade for the suspect. She relied on **Alfred v R** SCCA No 39/2007 (delivered 30 October 2009) in support of her submissions.

[47] The issue of the discrepancies in respect of the confrontation has already been assessed and will not be revisited here. On the question of the learned trial judge's reference as to confrontation not having been raised as an issue, it must be noted that he did say at page 195:

> "There is no contention that there was any confrontation and I find none."

[48] It does seem that the learned trial judge was correct in saying that confrontation had not been raised as an issue. A review of the no-case submission reveals that although defence counsel addressed the learned trial judge extensively, on the circumstances of Mr Lowver's observation of Mr Palmer at the police station, he did so in the context of the inconsistencies and the credibility of that evidence, rather than from the standpoint of an improper confrontation having occurred. It has already been said in this judgment that even if the learned trial judge was wrong in stating that there was no deliberate confrontation, the circumstances of this case could be deemed exceptional, given Mr Palmer's mode of dress, the short time between the robbery and the identification at the station, and Sergeant Nelson's evidence concerning having seen Mr Palmer with Mr Dewar. Those exceptional circumstances would justify the confrontation.

[49] In **Alfred v R** as well as in **France and Vassell v R** [2012] UKPC 28, the courts have confirmed the principle of an identification parade being required only when it

would serve a useful purpose. The learned trial judge in this case described a scenario that would have made an identification parade unhelpful. He said at page 193 of the transcript:

> "...I accept that [Mr Palmer] was well known to Garfield Lowver on the day in question. Although he may not have known the accused Palmer's name, he knew members of his family. Palmer in his statement also said that he knew Garfield Lowver."

An opinion has already been rendered, during the analysis of ground one, that the confrontation was not an improper one in the circumstances. That analysis included a comparison of this case with that of **Dennis**, in which the confrontation was not deemed improper.

[50] Miss Smith's submissions that this ground is without merit is correct.

The complaint of miscarriage of justice

[51] Ms Cummings, in respect of the fourth ground, argued that there was a miscarriage of justice because:

> "(a) The Trial Judge should have upheld the no case submission made by the Applicant's lawyer and removed the case from his jury mind having regard to the lack of independence and weakness of the identification of the Applicant by the witness Mr. Lowver.
>
> (b) The Trial Judge erred when he held that the witness Mr Lowver denied giving the name of Ricardo Dewar as one of his assailants to the police when he made his report to the police (page 31 of witness [sic] evidence compared to page 195 of Judge's summation)."

[52] On the aspect of the no-case submission, learned counsel relied on **Daley v R** and **R v Omar Powell and Another** in support of her submissions. The decisions in those cases echoed the reasoning of Lord Widgery CJ in **R v Turnbull**, to the effect that where the identification evidence is so poor as to be unworthy of credit, then the trial judge ought to withdraw the case from the jury's consideration. The actual words used by Lord Widgery CJ (at page 448G), and adopted by the Privy Council in **Daley v R** were as follows:

> "When, in the judgment of the trial judge, the quality of the identifying evidence is poor, as for example when it depends solely on a fleeting glance or on a longer observation made in difficult conditions, the situation is very different. The judge should then withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification."

[53] In **Daley v R**, the Board considered the interface between the principles in **R v Turnbull** and those in **R v Galbraith** [1981] 2 All ER 1060; [1981] 1 WLR 1039. **R v Galbraith** is well known for its guidance as to when a no-case submission should succeed and when the jury should be left to decide the matter. Lord Lane CJ, in his judgment in that case, said at page 1062:

> "How then should the judge approach a submission of 'no case'? (1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case. (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence. (a) Where the judge comes to the conclusion that the Crown's evidence, taken at its highest, is such that a jury properly directed could not properly convict on it, it is his duty, on a submission being made, to stop the case. (b) Where however the Crown's evidence is such that its

> strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there *is* evidence on which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury. It follows that we think the second of the two schools of thought is to be preferred.
>
> There will of course, as always in this branch of the law, be borderline cases. They can safely be left to the discretion of the judge." (Emphasis as in original)

[54] The Board in **Daley v R**, seems to have been of the view that there was a different standard for no-case submissions when identification was in issue. This is apparent from Lord Mustill's reasoning (representing the judgment of the Board) at page 93a of the report:

> "…The history which their Lordships have summarised leaves little room for doubt as to the reasons why McKain J felt impelled to leave the case to the jury, applying *R v Galbraith* in preference to *R v Turnbull*, notwithstanding her strong opinion on the weakness of the prosecution's case. **Their Lordships also feel little doubt that if the law on identification had been understood in Jamaica in the year 1986 as it is understood today the trial judge would have acceded to the submission that the appellant had no case to answe**r." (Emphasis supplied)

In explaining that there was no incongruity between the principles in **R v Turnbull** and **R v Galbraith**, Lord Mustill said at page 94g-h:

> "…A reading of the judgment in *R v Galbraith* as a whole shows that the practice which the court was primarily concerned to proscribe was one whereby a judge who considered the prosecution evidence as unworthy of credit would make sure that the jury did not have an opportunity to give effect to a different opinion. By following this practice the judge was doing something which, as Lord Widgery CJ

> had put it, was not his job. **By contrast, in the kind of identification case dealt with by *R v Turnbull* the case is withdrawn from the jury not because the judge considers that the witness is lying, but because the evidence even if taken to be honest has a base which is so slender that it is unreliable and therefore not sufficient to found a conviction**: and indeed, as *R v Turnbull* itself emphasised, the fact that an honest witness may be mistaken on identification is a particular source of risk. When assessing the 'quality' of the evidence, under the *Turnbull* doctrine, the jury is protected from acting upon the type of evidence which, even if believed, experience has shown to be a possible source of injustice. Reading the two cases in this way, their Lordships see no conflict between them." (Emphasis supplied)

The issue was extensively assessed in this court in **Herbert Brown and Another v R** SCCA No 92 and 93/2006 (delivered 21 November 2008). Morrison JA, in expressing the opinion of the court, accepted that **Daley** had resolved any apparent contradiction between the principle in **Turnbull** and that in **Galbraith** (see paragraph 33 of **Herbert Brown**).

[55] Despite that difference in the standard in identification cases, there was sufficient evidence that would have allowed the learned trial judge to reject the no-case submission and call upon the applicants to answer the prosecution's case. Those matters have been outlined above and will not be repeated here.

[56] An examination of the transcript in respect of the second limb of Ms Cummings' complaint in this ground, reveals that the learned trial judge did misquote Mr Lowver's evidence concerning what he had told Sergeant Nelson about the names of the robbers. That portion of Mr Lowver's testimony is set out at pages 31-32 of the transcript:

"Q: In making your report to Mr. Nelson, am I correct that you gave him a name of the person who had robbed you?

A: No sir.

Q: …Am I correct to say that when you made your report to Mr. Nelson at Bog Walk Police station the name **you gave him of the person who robbed you was Ricardo Dewar, otherwise called Ricky of Magazine Lane** otherwise called Garfield Lowver [sic] also?

A: **Yes sir**.

Q: …Am I correct when you made the report to Mr. Nelson not only did you give him the name Ricardo Dewar otherwise called Ricky of Magazine Lane, you also told him that you knew Ricardo Dewar personally, did you tell him that?

A: No sir." (Emphasis supplied)

Although there seemed to have been some contradiction in that evidence, Mr Lowver did testify that he gave the police a name. His stance in respect of that evidence remained unchanged even after re-examination.

[57] The learned trial judge's summation did not reflect that evidence quoted above. He said at page 195 of the transcript:

"…Admittedly, there is discrepancy between Lowver's evidence and Sergeant Nelson's as to Lowver giving him a name Ricardo Dewar. **I prefer Lowver's evidence that he did not give a name** and he did not know the name of either accused. **Notably it is Burke who said he had known Ricardo Dewar's name before and Burke and Lowver were at the station at the same time and both made reports to Sergeant Nelson**." (Emphasis supplied)

[58] It is correct to say that Mr Lowver said in examination in chief (page 18) that he did not know the name of the man whom he had unmasked. It is also true to say that he testified (at page 20) that he did not see the face of the other robber. For his part, Sergeant Nelson testified that it was Mr Lowver who had given "the description of the two gentlemen as also…the name Ricardo Dewar o/c 'Ricky' of Pineapple Settlement in Bog Walk" (page 65 of the transcript).

[59] The learned trial judge was, therefore, in error in saying that Mr Lowver had testified that he did not give a name to Sergeant Nelson. That error did not, however, result in a miscarriage of justice. The evidence was not a total invention by the learned trial judge. His reference to Mr Burke's presence at the time when the report was made to Sergeant Nelson is important. Mr Burke, at page 44 of the transcript, is reported as saying that he and Mr Lowver went together to the police station and when asked what happened when they reached there, he answered, "[w]e made a report, sir". It must be remembered that Mr Burke did testify that he knew Mr Dewar before and that he knew him by name.

[60] On the totality of the evidence, therefore, Mr Palmer would not have been improperly prejudiced by the learned trial judge's error. This aspect of the complaint also fails.

Summary and conclusion

[61] In summary, it must be found that the identification evidence presented by the prosecution was sufficient for the learned trial judge to have called upon Mr Palmer to

present his defence. Mr Lowver's evidence of prior knowledge of Mr Palmer, of being able to see the face of the robber, whom he had unmasked, for five seconds at close quarters in good lighting, despite the struggle between the robber and Mr Duncan, was supported by other evidence. Not only did Sergeant Nelson, having received a description of the two robbers, within minutes of the robbery and apparently not far from where the robbery was committed, see and chase two men, one of whom he knew before by name, but Mr Lowver testified that Mr Palmer was wearing the same clothing in which the robber, whom he had unmasked, was dressed. That evidence, in its totality, could not be considered to be on so slender a basis that it should have been withdrawn from the jury. The learned trial judge was, therefore, correct in rejecting the no-case submission.

[62] The learned trial judge was, as the tribunal of fact, also entitled to rely on the identification evidence to find that not only was Mr Lowver an honest witness, addressing the circumstances of his prior knowledge of Mr Palmer, but also that his testimony about the opportunity to observe the attacker was such that Mr Lowver's identification of Mr Palmer, as being one of the robbers, was reliable. This court should not disturb those findings.

[63] On these bases, both these applications for leave to appeal against the convictions should be refused.

LAWRENCE-BESWICK JA (Ag) (DISSENTING)

[64] I have had the privilege of reading in draft the judgment of my learned brother. I agree with his reasoning and conclusions on all issues except one. I have the misfortune of disagreeing with him on an issue concerning the identification of the applicant Palmer.

[65] The facts of the case are comprehensively reviewed by Brooks JA and I need not repeat them save as it concerns identification of the applicant. Mr Lowver and another were the victims of a robbery perpetrated by two men, one of whom wore black. The evidence showed that Mr Lowver had known the black-suited assailant for more than a decade and that he knew his family and their whereabouts. However, there is no evidence that he shared that vital information with the police at any time. The other victim present during the robbery recognized the second assailant as Mr Ricardo Dewar In their search for the assailants, the police were therefore looking for Mr Ricardo Dewar, whom the police knew before, and also a man in black.

[66] Sergeant Nelson saw Mr Ricardo Dewar sitting with a man in black, the applicant. Both men ran but the officer apprehended the appellant. Mr Dewar escaped. Sergeant Nelson had testified that Mr Lowver had given him a description of the two robbers. However, that aspect of the evidence was not explored. There was therefore no evidence to indicate if Sergeant Nelson had apprehended the appellant: (a) because of the description; (b) because he was dressed in black and was in the company of Mr Ricardo Dewar less than an hour after the robbery and ran on the approach of the police; or (c) both (a) and (b).

[67] My concern lies in the fact that the learned trial judge did not comment on or analyse the effect of the failure of the complainant Lowver to give the police the vital information on the identity of the robber which he testified that he had. The judge rehearsed the evidence but did not say how he dealt with this important omission by Mr Lowver. In my judgment such an analysis would be critical to coming to a decision about the credibility of Mr Lowver, and in particular about the correctness of identification of the applicant Palmer.

[68] Mr Lowver had omitted to tell the police that:

1. He knew the applicant.
2. He knew the applicant for 15 years "from he was growing up".
3. He knew his family name as Palmer although that name could have been wrong.
4. He knew the name of his brother, Palmer.
5. That brother was his close friend.
6. He knew where his brother lived.
7. He knew his brother had become a security officer.
8. He knew his sisters.
9. He knew one of his sisters is named Peaches.
10. He knew his mother, also known as Peaches.
11. He knew his mother was a vendor on the Highway.

[69] The evidence is that Mr Lowver omitted to share that information on at least two occasions, the first being whilst making the initial report to the police and the second being when he identified Mr Palmer in the custody of the police. Instead, on this latter occasion, he described him only as one of the men who had robbed him earlier with a gun (pages 24 and 110 transcript).

[70] Further, the evidence is that Mr Lowver pulled off the mask of his assailant during the course of the robbery and the men were face to face. This may well be regarded as a third opportunity to indicate that he knew his assailant, but there is no evidence of his then acknowledging that he recognized Mr Palmer.

[71] In his summing up, the learned trial judge carefully and thoroughly reminded himself of the evidence in its entirety and found that Mr Lowver was an honest, credible witness. He accepted that the appellant Palmer was well known to Mr Lowver on the day of the robbery (pages 191 and 193 of transcript).

[72] However, he made no comment as to whether he gave consideration to the important omissions in paragraphs [68] and [69] supra and if so, how he treated with them in assessing the credibility of Mr Lowver. In my view these omissions go to the foundation of the identification of the applicant. This, I view, as sufficiently serious as to render the convictions unsafe.

[73] I must also add that, in my view, there was improper confrontation. The circumstances bear resemblance to those in **R v Trevor Dennis** [1970] 12 JLR 249 when this court did not find the confrontation improper. However, in my view, in this case there are important distinguishing circumstances which would cause the confrontation to be improper.

[74] In **Dennis**, the appellant was apprehended 20 to 25 chains from where the robbery had occurred and within half an hour of the robbery. Here the evidence is imprecise as to where the applicant was apprehended, except that the police drove to

the location, and it appeared to be in an adjoining community. That distance would be much greater than that in **Dennis**. In addition, Mr Lowver had had sight of the assailant for a considerably shorter period of time than did the complainant in **Dennis**. Mr Lowver had seen the assailant for 2 to 5 seconds whereas in **Dennis** the complainant saw the assailant for 10 to 15 minutes.

[75] Further, in **Dennis**, the complainant is reported as having said that he thought that during the course of his pastoral work he had seen the appellant. It was not clear however, whether he had said that to the police or in evidence at the trial. Here, there is no evidence of Mr Lowver informing the police of having prior knowledge of his assailant. He made that disclosure at the trial.

[76] The evidence is that up until the time of the confrontation in the police station, Mr Lowver had not said that he knew his assailant. In my view, at the moment when the confrontation occurred, it would therefore have been improper, given the circumstances. However that was only one aspect of the identification and subsequently, at the trial, evidence was given by the complainant, Mr Lowver, that he had in fact known the applicant for years. Indeed the applicant acknowledged that he also knew Mr Lowver.

[77] It is the other aspect of the identification evidence which has caused me grave concern – the failure of Mr Lowver to indicate at early opportunities that he knew his assailant to be the applicant Palmer. The confrontation established that Mr Lowver and the applicant Palmer knew each other. However, it did not establish that the man who

robbed Mr Lowver was the applicant. That issue became more important because of Mr Lowver's omission to state on more than one occasion that he knew his assailant.

[78] The absence of analysis of or comment on the omitted evidence of Mr Lowver, does in my judgment affect the safety of the convictions. The credibility of Mr Lowver is at the foundation of the convictions against the applicant Palmer and required the most thorough assessment and analysis in order to determine the accuracy of the identification of applicant Palmer. Mr Lowver repeatedly failed to indicate that he knew the applicant although he eventually testified that he had known him for 15 years. In the absence of an expressed analysis/comment by the learned trial judge as to whether this fundamental failure affected or should affect Mr Lowver's credibility, I would grant Palmer's application for leave to appeal, treat the hearing of the application as the hearing of the appeal, allow the appeal, set aside the convictions and sentences and, in the interests of justice, would order a re-trial. In relation to the applicant Dewar I agree with Brooks JA that the application for leave to appeal should be refused.

PHILLIPS JA

ORDER

By majority (Lawrence-Beswick JA (Ag) dissenting)

1. Applications for leave to appeal against conviction and sentences are refused.
2. All sentences shall run concurrently and shall run, for each applicant, from 22 October 2010.