[2010] JMCA Crim 1

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 136 OF 2006

BEFORE: THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MRS. JUSTICE HARRIS, J.A.
THE HON. MR. JUSTICE DUKHARAN, J.A.

RICARDO PINNOCK
v
REGINA

Oswest Senior-Smith for the Applicant

Miss Natalie Ebanks, Crown Counsel for the Crown

September 28, 29, 2009 and March 12, 2010

HARRISON, J.A.

Introduction

[1] Ricardo Pinnock was tried and convicted before Brooks, J. and a jury in the St. Ann's Bay Circuit Court, for the murder of Dean Davis on July 28, 2006. He was sentenced to life imprisonment and was ordered to serve a period of thirty (30) years before he becomes eligible for parole. A single judge of this court refused his application seeking leave to appeal his conviction so he now renews that application to the court.

[2] The Crown's case depended mainly upon the evidence of Eversley Adams and Cheryl Wolliaston, who were at McDowell's Texaco Service Station, Claremont, St. Ann and saw when the deceased was shot and killed sometime after 2:00 pm on December 13, 2003. These two witnesses testified as to the role played by the two men who had robbed the deceased of cash. Pinnock (the applicant) was identified by the witnesses as the "second man". The other man is still at large.

The Case for the Prosecution

[3] On December 13, 2003 at about 2:30 pm, Eversley Adams, a bus operator went to McDowell's Texaco Service Station in order to purchase a car windscreen wiper. Cheryl Wolliaston and Dean Davis (the deceased), who was a pump attendant at the service station, were seated around a wooden desk in the office. Cheryl was seated facing the doorway whilst Adams was standing in a corner not too far away from the desk.

[4] Adams said he heard a voice behind him say, "This is a hold up". He looked around and saw a man pointing a gun at the deceased and asked him, "Where is the money?" The deceased told the man that, "There is no money there." The man repeated the question and the deceased told him again that there was no money.

[5] A second man then walked into the office and as the deceased got up and attempted to walk out of the office the second man who was also armed with a gun pushed the deceased and said, "Where is the money?" He also said to him, "If yuh

don't tell mi where di money deh, mi a goh shoot yuh." The second man then stretched over the desk, pulled out a drawer and removed what Adams called a "chest". The second man began to back out towards the door and the deceased called out twice to a co-worker named Michael. The first man then fired a shot at the deceased hitting him. Adams was also shot and he fell to the floor. He was taken to St. Ann's Bay Hospital and whilst he was there the deceased man was brought there.

[6] Adams testified that he had never seen the first man before but he had known the second man who he said was the applicant. He had known him by the names Ricardo Pinnock and 'Ritchie' and he was someone who usually "loaded" Adams' bus with passengers at the bus terminus.

[7] Cheryl Wolliaston's version of the events that took place that day was slightly different to the account given by Adams. She testified that on the day in question she and the deceased were seated around a desk and Adams was standing in a corner behind the desk. She said that she felt as if someone had entered the office and when she held up her head she saw a man standing over her with a gun in his hand. He pointed the gun at her and said, "Nobody move". She then said to him, "my youth, move from in front of mi nuh" and he responded, "gi mi di money whey yuh have". She said to him: "Boss man, mi nuh wuk yah eenuh, so mi nuh have nuh money fi gi yuh". The man then pointed the gun at the deceased and said to him, "Gi mi di money". Adams was still standing in the corner and the deceased got up and shouted to Michael, a co-worker who was outside. Michael answered and was coming towards the building

when the man pointed the gun at Michael who then ran off. This man, she said, used his hand to beckon to someone and a second man came through the door.

[8] The second man who entered the office passed her and the first man. He went around to where the deceased was seated behind the desk, and without saying a word pulled out a desk drawer and took out a blue pan which contained money. He pushed the pan underneath his shirt and according to her he "reversed back towards the doorway". Both men, she said, then went towards the door of the office but the first man returned and according to her "open fire" at the deceased who was then standing beside the desk. She was unable to say how many shots were fired and both the deceased and Adams fell on the "ground."

[9] Wolliaston further testified that she said to the two men, "Yuh can't shoot me yuh nuh" and the second man who she identified as the applicant, said to her, "gal shet yuh mouth." She continued speaking to them and after they left the building and went outside, she heard gunshots.

[10] Wolliaston estimated that the incident lasted for about ten to fifteen minutes. She had never seen any of the two men before.

[11] On January 8, 2004 Wolliaston attended an identification parade that was held at Ocho Rios Police Station and pointed out the applicant who was on the parade as one of the two men who had robbed the service station. When she pointed out the applicant she said to him, "Murderer".

[12] The parade was conducted by Sergeant Sydney McDonald but he said that when Wolliaston pointed out the applicant she had said to him: "Ah yuh, ah yuh, ah yuh kill him."

[13] Cross-examination of both Adams and Wolliaston was quite detailed. Counsel for the applicant was able to bring out certain areas of discrepancies and inconsistencies in their evidence. We will highlight just a few at this stage because ground 3 makes serious challenges where these issues are concerned.

[14] Under cross-examination, Adams described the door at the front of the office as a glass door. He said that it was half opened during the incident. Adams agreed with counsel for the applicant, at the trial, that at the preliminary examination he had said that it was the first man who had discharged his firearm whereas in a written statement to the police he had said that it was the applicant (the second man) who had fired a shot whilst he was backing out. He said that he had made a mistake when he said that the second man had fired the gun.

[15] It was suggested to Adams under cross-examination that he did not get a good look at the second man that day. He disagreed with the suggestion and insisted that that man was someone he had known.

[16] Wolliaston said in evidence that when the second man entered the office he did not say anything. Neither did the first man say anything. She had never seen the first man before. She said she was able to see from the head of the second man "straight

down" and that he was wearing a navy blue hat. She identified the second man who she did not know before as the applicant. She said she was able to see him throughout the incident as he stood close to her. The incident she said lasted for 10 -15 minutes. Under further examination by Crown Counsel, she said it was the first man who was wearing a hat and that the second man was not wearing anything on his head.

[17] Under cross-examination, Wolliaston said that it was only one man who was wearing a cap which had a peak. She also said that the peak was turned to the front and that it had partially obscured the person's face. She said she did not see anyone wearing a red cap. She did not remember telling Detective Sergeant Campbell in her statement that the second gunman had on a red cap; that his hair was loose and that the cap had "barely fit down" on his hair. When she was confronted with her statement given to the police, she denied the foregoing statement. That portion of her statement was admitted in evidence as exhibit 2.

[18] During further cross-examination of the witness the following dialogue is recorded at page 137 (lines 3 – 10) of the transcript:

> "Q: ...Is it your evidence, ma'am, that when both men got to the door, one of them came back inside?
>
> A: Both of them came back inside. One came back exactly in the office.
>
> Q: Yes
>
> A: And while the other man blocking the entrance to the office."

[19] She subsequently said that it was the first gunman who had returned to the office and that he was standing "almost beside her" when he fired the shot.

[20] Detective Sergeant Campbell who was the investigating officer had visited the scene of the shooting and made certain observations. On December 31, 2003 the applicant was brought to him at St. Ann's Bay Police Station. He informed him that he intended to place him on an identification parade and the applicant said to him: "Mr. Campbell, mi waan yuh fi speed up the arrangement for the parade because I am innocent." That parade was held and as we have said before, the applicant was identified by the witness Wolliaston.

[21] Detective Sergeant Campbell who became ill handed over the investigation of the case to Detective Sergeant Simpson. Detective Simpson testified that sometime between January 17 and 22, 2004 he saw the applicant at St. Ann's Bay Police Station and arrested and charged him for the offence of murder.

[22] A postmortem examination was performed on the body of the deceased by Dr. Kondisetti at St. Ann's Bay Hospital on December 17, 2003. Dr. Kondisetti was unavailable for the trial, having returned to India. Dr. Horace Betton, the supervisor of Dr. Kondisetti at St. Ann's Bay Hospital at the material time, was called as a witness by the Crown. Through him, the postmortem examination report of Dr. Kondisetti was tendered and admitted into evidence. The report revealed that the deceased had sustained a gunshot injury to the right side of the chest below the right clavicle. There was also another penetrating wound to the left upper arm, lateral to the axilla. Death

was due to extensive laceration to both lungs and great vessels in the superior mediastinum as a result of a gunshot wound. Under cross-examination Dr. Betton agreed that the injuries which were seen on the body of the deceased were entry and exit wounds and could have been caused by one shot.

The No Case Submission

[23] At the close of the Crown's case, a submission was made by counsel for the applicant that there was no case for the accused to answer. Counsel submitted that the prosecution's case was riddled with inconsistencies as to facts outlined by the two eyewitnesses. He also submitted that there were inherent dangers involved in the visual identification evidence of both eyewitnesses. The court ruled however, in the absence of the jury, that there was a case to answer and called upon the applicant.

The Defence

[24] The applicant made a very brief statement from the dock. He said he was a fisherman who lived at Windsor Road, St. Ann's Bay and that he was innocent and knew nothing of the robbery.

The Grounds of Appeal

[25] The original grounds of appeal were abandoned and leave was granted to Mr. Senior-Smith to argue five supplemental grounds of appeal which we now set out:

1. Evidence of an apparent gun-shot injury to the main prosecution witness was adduced in the Trial of the Applicant/Appellant resulting in severe prejudice to him and thereby depriving him of the protection of the Law.

2. The Learned Trial Judge's directions on Common Design and Joint Enterprise were respectfully, inadequate and unhelpful to the Jury wherefore the Applicant/Appellant was convicted.

3. The Prosecution's case was impugned by a litany of fundamental contradictions/discrepancies/ inconsistencies within and between testimonies which precluded the Learned Trial Judge, respectfully, from commending a consistent and coherent account of the accusations to the Jury. In the resultant confession the Applicant/Appellant lost the protection of the law and was thereby convicted.

4. The Prosecution's case was irreparably affected by the variance within and between the witnesses Eversley Adams and Cheryl Wolliaston: the Learned Trial Judge ought therefore respectfully to have withdrawn the case from the Jury.

5. The Learned Trial Judge misapprehended the applicable directions and as a result respectfully, unwittingly and inadvertently coerced the Jury into returning a verdict adverse to the Applicant/Appellant.

Ground 1

[26] Mr. Senior–Smith submitted in respect of ground 1, that the learned trial judge had erred in allowing evidence relating to the gun-shot injury of Eversley Adams to be adduced during the trial. He submitted that this evidence had more of a potential prejudicial effect to the applicant and as a result of this, the minds of the jury may have been affected adversely in their deliberations as to his guilt. Learned counsel referred to, and relied on four authorities but concentrated in particular, on the cases of **Regina**

v Oliver Whylie (1980) 17 JLR 271, **Regina v Norris Taylor** SCCA 38/88 delivered on July 27, 1988 and **Peter McClymouth v Regina** (1995) 51 WIR 178.

[27] Miss Natalie Ebanks, Crown Counsel, submitted however, that the evidence in relation to the wound sustained by Mr. Adams was intricately linked to the shooting of the deceased. She submitted that the bullet which had exited through the deceased man's left upper arm was arguably the same bullet which had hit Mr. Adams. She further submitted that the learned judge had given proper directions in relation to the offence of murder, so in the circumstances, this ground of appeal ought to fail.

[28] It is our view, that the cases referred to by Mr. Senior-Smith are easily distinguishable from the facts of the instant case. In **McClymouth** (supra), the whole case had depended on the evidence and credit of a solitary witness. The court held that it was expecting too much of the jurors, that they should divorce from their minds that a credible witness had said that the appellant was a repeat murderer. Adverse comments were also made by the witness on the character of his counsel. In **Norris Taylor** (supra) the prosecution's case was that the applicant had committed the murder in concert with other persons, including one Dermot Harris, who were not before the court. In the course of the evidence of the investigating officer, the trial judge had unintentionally elicited from him that he had been informed that Dermot Harris had subsequently been killed by the applicant. In his summation, the trial judge directed the jury not to pay any attention to what the witness had said about Harris' death at the same time pointing out that it was hearsay. The applicant was convicted of

murder and appealed from his conviction. On appeal, the court agreed with the submission of the applicant's counsel, that the evidence was highly prejudicial and could adversely affect the minds of the jurors in determining whether the applicant had committed the murder for which he was being tried. In the circumstances it was the duty of the judge to inform the accused of his right to apply for the discharge of the jury and if he did so to consider, in his discretion, whether the trial should proceed.

[29] In **Oliver Whylie** (supra) a ground of appeal was that the trial judge erred in exercising her discretion to refuse an application by the applicant's counsel to have the jury discharged after Crown Counsel had adduced from a Crown witness that the applicant was a suspect in another offence for which an identification parade had been held. The court held inter alia, that the introduction of what might be prejudicial evidence can be admissible if they are relevant to the issue, notwithstanding that incidentally they suggest that the appellant has committed an offence.

[30] We are therefore unable to agree with the submissions of Mr. Senior-Smith. We do not think that the evidence adduced by the prosecution or reference to that evidence by the learned judge in his summing up to the jury had a potential prejudicial effect to the applicant and that as a result, the minds of the jury may have been affected adversely in their deliberations as to the guilt of the applicant. We adopt what Melville J.A. said in **Oliver Whylie** (supra).

> "At all events even if we are wrong in the view expressed, one cannot see that the applicant was so greatly prejudiced

by the admission of this bit of evidence that substantial injustice would have been done."

We therefore conclude that there is really no merit in ground 1.

Ground 2

[31] The applicant's argument on this ground is that the learned judge had failed to give the jury proper directions on common design. Mr. Senior-Smith submitted that the learned trial judge's directions on joint enterprise in the particular circumstances of this case were not "wholesomely comprehensive" as it would appear that the jury were unintentionally led to believe that "agreement to bear arms and to rob equated to the murderous actions by one". He submitted that nowhere in the learned trial judge's direction on joint enterprise were the jury told that if one of the adventurers went beyond what had been tacitly agreed as part of the mutual device, then the co-adventurer was not liable for the consequences of that unauthorized act. Counsel referred to and relied on the authorities of **R v. Rahman** [2009] 1 A.C. 129 and **Hayden Jackson et al v. R** Privy Council Appeal No. 81 of 2008 delivered July 7, 2009.

[32] Mr. Senior-Smith contended that the learned trial judge was obliged in the particular parameters of the evidence to direct the jury to give especial attention to the evidence of the witness Adams wherein he had asserted that the person whom he perceived to be the applicant, came into the office and removed the "chest/cash-pan" and then "backed out". It was only after this development, when the deceased Dean

Davis shouted to "Michael" that the first intruder discharged his firearm thus hitting the deceased.

[33] Miss Ebanks submitted that the directions given by the learned judge on common design were sufficient. She argued that it was apparent that the applicant was present to aid or assist in the commission of the offence of murder and that since both men had embarked on the joint enterprise, each became criminally liable for the acts done in pursuance of that joint enterprise. She submitted that each man was armed with a firearm so it must have been clear to the applicant that the act of murder was well within the scope of the concerted action. Furthermore, she submitted that the presence of the firearm and the words used by the applicant and the other man, showed that the men would use whatever force was necessary to achieve their objective. She contended that in these circumstances, the action of one became the action of both.

[34] Finally, Miss Ebanks submitted that even if the court were to find that the directions on common design were faulted, this was a proper case for the application of the proviso to section 14 of the Judicature (Appellate Jurisdiction) Act.

[35] The law is patently clear that for a conviction of murder, the Crown has to prove that the person who struck the fatal blow did so with the intention to kill or to cause serious injury. The most up-to-date guidance on the law of joint enterprise is to be found in speeches of Lord Brown of Eaton-under-Heywood in **R v Rahman** [2009] 1 AC 129 and Lord Rodger of Earlsferry in **Jackson and Ors. v R** [2009] UKPC 28

delivered July 7, 2009. The guidance given in **Rahman** (supra) is to be found at page 165, paragraph 68 where His Lordship stated:

> "If B realises (without agreeing to such conduct being used) that A may kill or intentionally inflict serious injury, but nevertheless continues to participate with A in the venture, that will amount to a sufficient mental element for B to be guilty of murder if A, with the requisite intent, kills in the course of the venture unless
>
> (i) A suddenly produces and uses a weapon of which B knows nothing and which is more lethal than any weapon which B contemplates that A or any other participant may be carrying and
>
> (ii) for that reason A's act is to be regarded as fundamentally different from anything foreseen by B."

[36] The headnote to the earlier case of **R v Anderson and Morris** [1965] 50 Cr. App. R 216 reads as follows:

> "Where two adventurers embark on a joint enterprise, each is liable for acts done in pursuance of it and also for the unusual consequences of such acts, provided that they arise from the execution of the joint enterprise; but if one of the adventurers goes beyond what has been tacitly agreed as the scope of the enterprise, his co-adventurers is not liable for the consequences of that extraneous act."

[37] In the instant case, the evidence of Adams was that the applicant was armed with a firearm at the time of the robbery and had threatened to shoot the deceased man upon his refusal to hand over the money. Both Adams and Wolliaston had also testified that the first man (the man still at large) had also demanded the deceased to

hand over the money. It was after the money was taken by the applicant and according to Adams, he was "backing" away to the door, that the deceased called out to his co-worker and the first man fired his firearm thereby hitting the deceased. The question then, is whether the shooting of the deceased by the first man was "fundamentally different" from anything foreseen by the second man.

[38] In the circumstances outlined above, the learned judge would have been obliged to give the jury careful directions on the concerns raised by Mr. Senior-Smith, that is, whether one of the adventurers went beyond what had been tacitly agreed.

[39] At an early point in his summing-up the learned judge said at page 188 (lines 11-17):

> "Now, it is only if you are sure that Mr. Pinnock was there, when Mr. Dean Davis was killed and you are sure that the ingredients of the charge of murder, which I will explain to you are proven, it is only in those circumstances that you would say that Mr. Pinnock is guilty of the charge for which he is being tried before you."

[40] It is clear from these directions that the trial judge was merely indicating to the jury the need for them to be sure of the applicant's presence at the scene during or at the time of the alleged shooting and also for them to be sure that the ingredients of the charge of murder had been proved by the prosecution. It is trite that mere presence is insufficient evidence to establish that an applicant is a part of the joint enterprise.

[41] And at page 201 (line 25) and page 202 (lines 1-25) the learned judge stated:

"Crown Counsel has mentioned the matter of what we call Common Design or Joint Enterprise (sic).

It is simply this, that even though the second man was not the person who fired the shot, according to this witness, it was the first man who fired the first shot, the second man would be just as guilty of the act of firing that shot as the first man was. This would be based on the concept of Common Design, which as I said was where two persons go together - especially, in this case - armed and they agree to do a certain thing and during in (sic) course of that, one does a particular act, then this other one is just as culpable, just as liable for that act the first one did.

The Prosecution doesn't have to show that they sat down and agreed. The Prosecution doesn't have to show the exchange of words between them or any signal between them. When you look at the circumstances, if you decide they must have been acting together - remember, one came in; held the gun. The other one came in; went to the desk; took out the pan or chest and backed out. Are they acting together? Did they act together with arms? That is one; both - each of them with a gun and in those circumstances, use of the words,

"If yuh nuh tell me weh de money deh, I am going to shoot yuh."

Did those things lead you to think that there was a joint enterprise and common design between these two persons? You are the ones who decide that..."

[42] Finally at page 235 (lines 5-8) the learned judge stated as follows:

> "... And bear in mind those things I said to you about joint enterprise, common design and murder, about intention when you consider the evidence."

[43] The critical issue for determination is whether the directions given above, were sufficient for the jury to find that the applicant was not only a participant in the

enterprise to commit robbery but also, was party to the common design to cause serious injury to the deceased.

[44] The question whether the applicant had demonstrably withdrawn from the enterprise and that the first man had acted entirely on his own when he shot the deceased man, were pertinent issues for consideration by the jury. The learned judge had clearly omitted to give directions in this regard. However, it is our view that although the learned judge failed to give directions on the issue of withdrawal, this would be a proper case for the application of the proviso to section 14 of the Judicature (Appellate Jurisdiction) Act.

[45] We respectfully cannot agree with Mr. Senior-Smith when he submitted that it cannot be readily distilled from the text of the evidence that there was an apparent tacit agreement to resolve or resort to the use of force. The evidence has shown that at the time of the robbery, both men were visibly armed with firearms and that the second man who has been identified to be the applicant, did use these words: "if yuh nuh tell me weh de money deh, I am going to shoot yuh." The evidence further revealed that the shooting did take place whilst the applicant was still inside the office. It was when the deceased raised the alarm that the first man discharged his firearm.

[46] In our judgment, it would indeed be rare for parties who are armed with lethal weapons on a criminal expedition not to contemplate the possibility of the use of those firearms resulting in at least serious harm. From their verdict, the jury must have been so convinced. We therefore find no merit in ground 2.

Ground 3

[47] Mr. Senior-Smith has highlighted fourteen (14) instances of inconsistencies between the testimonies of Adams and Wolliaston but we do not think it is necessary to list and discuss all of them. We therefore propose to deal with those which we think are of some significance. He also referred us to previous inconsistent statements of the witnesses and contradictions within the testimonies.

Inconsistencies between Testimonies of Crown Witnesses

[48] At page 11 of the transcript Adams testified that whilst he was in the office he heard a voice say, "This is a hold up". Wolliaston at page 48 said, that the voice said: "Nobody move". Adams said he turned around to see who it was and then saw a man pointing a gun at the deceased. The man then asked the deceased, "Where is the money?" The deceased responded by saying "There is no money" (page 11-line 16). However, Wolliaston testified that the man pointed the gun at her and she said, "My youth, move from in front of mi nuh." The man said to her, "Gi mi di money wheh yuh have." She responded, "Boss man, mi nuh wuk yah eenuh, so mi nuh have nuh money fi gi yuh." The man then pointed the gun at the deceased, (page 78 - lines I9 - 25; page 79, lines 1 -12). Adams also testified that the second man came in after the first man had asked the deceased for money and before he shouted for Michael (another employee) (pages 12 and 13). Wolliaston testified that the second man came in after the deceased shouted for Michael (page 80 - lines 5-8; page 81 - lines 1-20).

[49] Adams also testified that the second man had on a cap on his head, with the peak turned behind him (page 46, lines 19-25). Wolliaston said the second man had nothing on his head but the first man had on a dark blue peak cap with the peak turned to the front (page 127, lines 7-14). Adams had also said that Wolliaston did not speak throughout the incident (page 40, lines 8-10) whereas Wolliaston said she spoke several times throughout the incident. Adams testified that the incident lasted for about 5 minutes (page 19, lines 14-19) but Wolliaston said it lasted around 10-15 minutes (page 90, lines 7-11).

Previous Inconsistent Statements

[50] There were instances where the Crown witnesses had made previous inconsistent statements. Adams admitted that at the preliminary enquiry he had said that it was the second man who fired shots while "backing out" of the office. However, his evidence at trial was that the second man who he recognized as the applicant did not fire any shots that day. In her statement to the police, Wolliaston told Detective Sergeant Campbell that the second man had on red cap, that his hair was loose and that the cap 'barely fit him down on it'. In that statement she had also said that the incident lasted over 5 minutes. However her testimony in court was that it was the first man who was wearing a hat and not the second man. She had also testified that the incident lasted about 10 -15 minutes.

Contradictions within Testimonies

[51] With respect to contradictions, Adams had said in chief that when the second man came in, he (Adams) was turned sideways and was looking at the other man because he did not want the second man who he knew to recognize him. In cross-examination he said he did not do anything even though he did not want to be recognized. He said he did not turn his face away but he was looking at the second man, whose face he claimed to have observed for two minutes. The witness Wolliaston had testified that it was the second man who had on a navy blue hat but later admitted that the first man had on a hat, and not the second man.

Trial Judge's Treatment of the Issues Raised

[52] How did the judge deal with the above issues?

[53] With respect to contradictions and discrepancies he stated at page 190, lines 11-25; and page 19, lines 1-14 of the summing-up as follows:

> "Something also that you can look at, Mr. Foreman and ladies and gentlemen, is whether somebody tells you one thing and at one time and says another thing at another time. That will give an indication as to whether you can believe that person, whether you can accept that person as being reliable or it maybe that the two persons tell you two different things.
>
> You have on (sic) decide what sounds like it is true to you; what sounds as if it is something that would make you feel sure. If you are not sure or if you don't believe, then reject the evidence. Reject the evidence of the witness who you do not accept or does not make you feel sure.

> You recall, Mr. Foreman and ladies and gentlemen, we all called those things discrepancies or contradictions. We look to that sort of thing when assessing evidence. In this case, we have had a number of contradictions and discrepancies. I will go through some of them, but, no doubt, you will remember some, even if I don't mention them. Just before I go into that, let us just say that if I do not mention something that you think is important, don't say, "Well, the judge did not mention that, therefore, we are not considering it." You are the persons in charge.
>
> So, once you think it is important in terms of the facts; in terms of the evidence, then you make use of it if you think it is important."

[54] The judge then gave examples of what he considered to be discrepancies. At page 191, (lines 15 - 25) page 192, (lines 1-25) and page 193, (lines 1-18) he said:

> "So, let us give an idea of some of the discrepancies that I noted in this evidence. One was Mr. Brown mentioned the kind of door. Mr. Adams said it was a glass door.
>
> Miss Wolliaston (sic) said it was a wooden door and the Sergeant came and said he believed it was a metal door, but to be fair to him, he wasn't positive. He said he believed it was metal. He wasn't sure if it was made up of anything else.
>
> Mr. Foreman, and ladies and gentlemen, this thing - the thing about discrepancies is that sometimes discrepancies are minor discrepancies.
>
> Minor discrepancies are something that you can say, "Well, yes, yes, they said different things, but it really did not affect the case. We can - you can put it aside."
>
> If, however, you think it is important – what is being said, if you think it is important; that it affects the decision that you have to make, then you look at it carefully and you ask yourselves the question, "Why is it that this person is saying one thing at one time and another thing at another time." Is it that this person is trying to deceive me? Is it that this

person has forgotten or is it that a person's powers (sic) of observation is not as good as someone else's?

You apply that also to where you have two people telling you two different things. You are the ones who decide whether something that is a discrepancy is important or not. If you look at it and you say it is important, ask yourselves, "Why is it that you are being faced with the two different things."

Another discrepancy, Mr. Foreman, ladies and gentlemen, was the matter of who had on a cap that day. You remember Mr. Adams said that it was the first man who had on a peek, cap with the peek or the brim turned to the back.

Miss Wolliaston (sic) said, "No, it was the second man that had on the cap and the peek, brim or the peek was turned to the front." (Demonstrating). You decide whether it is important. Remember now, we are talking about visual identification, who was present and you look at whether a peek cap with the brim forward would affect somebody's view.

Another discrepancy was the sequence of events. Remember, Mr. Adams, said that Michael was called after the second man took the chest out of his drawer and backed out of the door.

According to Mr. Adams, that is when he, Dean, called out to Michael. Miss Wolliaston (sic) said something different. She said Michael was called before the second man came in."

[55] And at page 195 the judge stated inter alia:

"...The important thing though is that you look at the discrepancy and you decide if there is an explanation for it and what that explanation is ..."

[56] The learned judge also directed the jury on how they should deal with the previous inconsistent statements made by the witness Adams. At page 217, (lines 17-25) and at page 218, (lines 1-9) of his summing up the judge said:

> "Mr. Adams was questioned concerning whether he was positive as to what happened that day and he said, yes, but he agreed that on a previous occasion he had described some things differently from how he had described them to you last week. In this Court, he said that the second man did not fire a firearm that day yet he said that he had told somebody previously that the second man fired a shot while backing out. He said that that was a mistake about the shot being fired and that he only saw it when he was going over on the Wednesday morning before he started to give evidence. You have to decide whether that was a mistake or whether Mr. Adams is just not sure what happened and more importantly whether you can believe him when he says that Mr. Pinnock was there that day."

[57] The judge then gave directions on how the jury should treat the evidence which was given at the preliminary enquiry and stated at page 218, (lines 18-25); page 219, (lines 1-6)):

> "Now, the Resident Magistrate was not trying the case. The Resident Magistrate was only taking evidence to decide whether the case should come before you to try it and it is only what is said in this court that is evidence, but you can look at what was previously said, whether to the police or to the Resident Magistrate and if it is different from what is said to you in Court as evidence, then you have to decide whether you can accept this witness who is saying two different things, as being reliable. So, that is the significance of the preliminary enquiry which was held by the Resident Magistrate (sic)."

[58] With respect to the witness Wolliaston he stated at page 224, (lines 17-25):

> "She said she gave a statement on the day of the incident and that she told the police, in that statement, that the second man had on a red cap with his hair loose and the cap barely fitting down on it. That statement was put in as an exhibit because she denied that she had given it to the police. So, ask yourselves, the document was shown to her, she looked at it, she said that she saw her signature on the

> paper, so why is it that she is saying that she did not say so?"

[59] And at page 232, (lines 13 - 17) he stated:

> "...Ask yourselves, why it is that Cheryl gave a different description to the police on the day of the incident about this red cap and the loose hair and now she says something different? You decide what is the significance of that."

The Submissions

[60] Mr. Senior-Smith submitted that the prosecution's case was irreparably affected by the variance within and between the two witnesses who had witnessed the shooting. He submitted that the judge had failed to offer the jury a detailed, careful analysis of the effect of the inconsistencies between the evidence of the witnesses Adams and Wolliaston. The jury, he said, were not sufficiently directed on what ways the inconsistencies would undermine the creditworthiness of their evidence especially, the prosecution's case taken in its entirety, particularly as there was no explanation of the evidence. These non-directions he said amounted to fatal mis-directions.

[61] Mr. Senior-Smith referred to and relied upon the cases of **Regina v Hugh Allen & Danny Palmer** (1988) 25 JLR 32 and **Regina v Fray Diedrick** SCCA 107/89 (un-reported) delivered on March 22, 1991, in support of his submissions.

[62] Miss Ebanks, Crown Counsel, disagreed with the submissions made by Mr. Senior-Smith and referred us also to **Regina v Fray Diedrick** (supra) in support of her

submissions in respect of how the trial judge dealt with conflicts in the testimonies of witnesses. In that case, Carey J.A. stated at page 9:

> "The trial judge in his summation is expected to give directions on discrepancies and conflicts which arise in the case before him. There is no requirement that he should comb the evidence to identify all the conflicts and discrepancies which have occurred in the trial. It is expected that he will give some examples of the conflicts of evidence which have occurred in the trial, whether they be internal conflicts in the witness' evidence or as between different witnesses."

[63] Now, it is quite frequently possible to "pick holes" in a judge's summing-up but judges after all, have to do their summing-up sometimes in hard-pressed circumstances. Some of the faults may be of little consequence, others may be more important. But at the end of the day, the question for this court is whether in light of the criticisms of Mr. Senior-Smith it could be said that there would be a miscarriage of justice were the conviction to be upheld.

[64] In **R v Baker White Tyrell Johnson Brown and Phipps** (1972) 19 WIR 278 this Court said:

> "A trial judge is under a duty to assist the jury in assessing the credit worthiness of the evidence given by a witness whose credibility has been attacked on the ground of inconsistencies in his evidence; this duty is usually sufficiently discharged if he explains to the jury the effect which a proved or admitted previous inconsistent statement should have on the sworn evidence of the witness at the trial, and reminds them, with such comments as are considered necessary, of the major inconsistencies in the witness' evidence; it is then a matter for the jury to decide whether or not the witness has been so discredited that no reliance at all should be placed on his evidence."

[65] In this case the learned judge was at pains to point out to the jury the two different accounts which Adams had given in relation to the role the applicant played on the date of the shooting. In his evidence at the trial, he told the court that the second man who he identified as the applicant, did not fire a firearm that day, yet in his written statement he told the police that it was the second man who had fired the shot while "backing out". The learned judge told the jury that Adams had explained that he had made a mistake. And he said:

> "...You have to decide whether that was a mistake or whether Mr. Adams is just not sure what happened and more importantly whether you can believe him when he says that Mr. Pinnock was there that day."

[66] The judge had also directed the jury that the testimony of Wolliaston at the trial was in conflict with the statement given to the police quite early after the incident occurred. He had directed the jury in the following terms:

> "...Ask yourselves, why it is that Cheryl gave a different description to the police on the day of the incident about this red cap and the loose hair and now she says something different? You decide what is the significance of that."

[67] We do not believe that the jury were not sufficiently directed on what ways the discrepancies, contradictions and inconsistencies of the witnesses undermined the creditworthiness of their evidence. It was entirely a matter for the jury to decide whether or not the witnesses had been so discredited that no reliance at all should be placed on their evidence. We do not find any merit also in ground 3.

Ground 4

[68] Mr. Senior-Smith submitted with respect to this ground that the purported identification of the applicant was done in very traumatic and difficult circumstances and that this may have accounted for the differences in the assertions of the main witnesses.

[69] Counsel also submitted that the learned judge had on his own volition, highlighted a very critical aspect of the identification evidence that amounted to a defect. That was the issue of lighting. He argued that the type of lighting in the office was not brought out in chief or in cross-examination. He submitted that the absence of any evidence as to light was a seminal weakness in the prosecution's case with respect to identification. He further submitted that a careful and detailed direction comprising of an assessment of the possible impact of that defect ought to have been done by the learned judge.

[70] He submitted that in these premises the learned judge was obliged to have acceded to the submissions of No Case to Answer or alternatively he ought not to have left the case for the jury's deliberation.

[71] On the issue of identification, the learned judge first of all told the jury at page 203:

> "Now, you have heard Miss Wolliston (sic) say that she went to an Identification Parade and that she pointed out Mr. Pinnock as the person who was present at the gas station office that day. Because the matter of identification, visual

> identification is so important in terms of the need for very careful attention, you have to look at the Identification Parade to ensure that it was conducted fairly."

[72] At page 225 he said:

> "Let me now tell you that this case turns almost entirely on the correctness of the visual identification of this second man as the perpetrator of the offence or as being present when this shot was fired. This is because, as you have heard Mr. Pinnock say, he was not there at the time. And, it was suggested to the witnesses that they are mistaken when they say that Mr. Pinnock was present when that offence, if you find that the offence was committed, when that offence was committed. So, in cases where there is evidence, where the major issue is visual identification, it is critical, and I warn you, that you have to take special caution in looking at the evidence. This is because even though the persons who are witnesses may be honest, they may be telling you what they saw happen honestly believing it to be so, but they could be mistaken, and the fact that they are mistaken doesn't mean that they can't be convincing, but they would be mistaken none the less and it has been known to happen that people have been wrongly identified as committing offences because the witness was mistaken."

[73] The learned judge then looked at the circumstances surrounding the visual identification. At page 227 he stated inter alia:

> "...you look at like, for example, whether the person was known before, whether the person although not known before, has been recently seen before that incident. How often before was the person seen? Was the person somebody that you would talk to? All those things you look at."

[74] He then emphasized the importance of light and at pages 227 and 228:

> "Then you look at what sort of lighting was present at the time when this sighting took place. Was it daylight or was it night? Was it artificial lighting?"

[75] At page 229 he said:

> "In terms of the time of day, 2:30 in the afternoon. So, it would have been broad daylight as we know it in Jamaica. We were not told, however, whether there was any light on inside this office, whether there was any window, or any other lighting inside. We are only told that this door was half opened and so that would be from that evidence, the source of light, to be able to see the perpetrator of this offence."

[76] The learned judge also directed the jury on the distance at which the person was observed and left it for them to consider whether there was anything obstructing the view of the person.

[77] The jury was also directed how to treat the question of time between the incident and when the person was identified to the police. As to discrepancies the judge said at page 228:

> "...you also look at whether there was any discrepancy or difference between this description given to the police and the person who appeared in court as the accused..."

[78] He emphasized some possible weaknesses in the identification and said at page 231:

> "And in terms of weaknesses in this identification, you must remember that Mr. Adams said, in answer to Mr. Brown, when he saw the gun, he got a little panicky. So you decide whether in those circumstances somebody's visual identification of an individual would be affected by the fact

> that they were panicky. Could he be making a mistake because of the panicky (sic)?"

[79] At page 232 he continued on the weaknesses and said:

> "And remember also that the second man was moving. According to Cheryl, he came in a hurry, went to the desk, took out the thing and backed out. So you decide whether sufficient time was there for that person to be observed."

[80] Finally, the judge said:

> "Ask yourselves, why it is that Cheryl gave a different description to the police on the day of the incident about this red cap and the loose hair and now she says something different? You decide what is the significance of that. Consider all those things and see whether you can rely on these witnesses. Ask yourselves whether Mr. Adams is making a mistake when he says that it is Ritchie who was there that day. All those things you decide for yourself in deciding whether this accused man, Ricardo Pinnock, was among the two persons who came to that gas station that day."

[81] We respectfully disagree with the submissions of Mr. Senior-Smith and are of the view that the learned trial judge had given adequate directions on the weaknesses in the identification evidence and the discrepancies which arose on the evidence of the two eye-witnesses. We therefore find no merit in ground 4.

Ground 5

[82] This ground complained that the learned judge had unwittingly and inadvertently coerced the jury into returning a verdict adverse to the applicant. This ground was not

really pursued in Mr. Senior-Smith's oral submissions, although it was briefly referred to in the written skeleton arguments. Having considered the ground, we found no merit in it and it also fails.

Conclusion

[83] In the circumstances outlined above, we have refused the application seeking leave to appeal. The sentence shall commence as of October 28, 2006.