**[2024] JMCA Crim 19**

**JAMAICA**

**IN THE COURT OF APPEAL**

**BEFORE: THE HON MR JUSTICE F WILLIAMS JA**
**THE HON MRS JUSTICE DUNBAR-GREEN JA**
**THE HON MRS JUSTICE G FRASER JA (AG)**

**SUPREME COURT CRIMINAL APPEAL NO 19/2015**

**HUGH POWELL v R**

**Anthony Williams for the applicant**

**Mrs Christine Johnson Spence and Miss Ruth-Anne Robinson for the Crown**

**12, 13, 15 December 2023 and 26 April 2024**

**Criminal Law – Application to appeal conviction and sentence - Whether verdict unsupported by the weight of evidence - Whether jury adequately directed on issues of visual identification evidence and inconsistencies - Totality and quality of evidence - Section 14(1) of the Judicature (Appellate Jurisdiction) Act**

**G FRASER JA (AG)**

## Introduction

[1] On 15 December 2023, after giving due consideration to both the oral and written submissions, this court made the following orders:

> "1. The application for leave to appeal conviction is refused.
>
> 2. The application for leave to appeal sentence is granted.
>
> 3. The hearing of the application for leave to appeal the sentence is treated as the hearing of the appeal.
>
> 4. The appeal against the sentence is allowed.

> 5. The sentence of 20 years' imprisonment is set aside. Substituted therefore is a sentence of 18 years two months and 16 days' imprisonment at hard labour with the stipulation that the applicant serve 15 years before becoming eligible for parole (after crediting the applicant for one year nine months and 14 days in pre-sentence custody).
>
> 6. The sentence is reckoned to have commenced on 13 March 2015, the date on which it was imposed."

Provided now, as was indicated to the parties, are our promised reasons.

**The application**

[2] The applicant, Mr Hugh Powell, was convicted of the offence of rape on 12 March 2015, in the Saint Elizabeth Circuit Court after trial before P Williams J (as she then was, 'the learned trial judge') and a jury. On 13 March 2015, he was sentenced to 20 years' imprisonment at hard labour.

[3] The applicant had filed a Criminal Form B1, seeking leave to appeal his conviction and sentence. It is to be noted that the notice of appeal would have been signed more than 14 days after sentence and was therefore out of time. This breach in the procedure was cured when the applicant also filed a Criminal Form B2 seeking an extension of time wherein to file his appeal. Both documents were signed and dated 2 April 2015. On 17 October 2017, a single judge of this court considered his application and granted an extension of time to apply for leave to appeal. Still, his application for leave to appeal was refused. The application for leave to appeal against conviction and sentence has now been renewed before this court.

**The background**

[4] The case for the prosecution was that, on the night of 2 April 2013, the complainant, a 15-year-old girl was heading home, walking on the road from Lititz to Brinkley in the parish of Saint Elizabeth. There were streetlights along the roadway. Whilst en route she noticed two men standing in an escallion garden which adjoined the roadway

where she was walking. One of the men called to her but she did not answer his call and continued her journey. From the illumination of the streetlight, she had recognized him, identifying him as the applicant herein. The complainant testified that she knew the applicant by the name "Burke" and had seen him before selling sweet peppers in Junction, Saint Elizabeth.

[5] At a further distance along the roadway, the complainant said she was grabbed from behind. While she struggled with the person, she noticed with the aid of another streetlight, that it was the applicant. Despite the valiant resistance that the complainant mounted, the person she said was the applicant managed to pull off her clothing, push her onto the ground and insert his penis into her vagina, raping her. Owing to her continued efforts to fight off the applicant, the complainant was ultimately able to escape. On escaping she ran naked to the house of a man named Barry, but her knocks went unanswered. While knocking, she saw the applicant again and hid in an outside kitchen on Barry's property. The applicant, she said, came and peeped into the kitchen where she was hiding, he however went away. Barry eventually answered her calls for help and assisted her. She was later taken to the police station where she made a report. On the identification parade conducted on a subsequent date, the complainant identified the applicant, as her attacker.

[6] Mr Powell, in his defence, made an unsworn statement denying any involvement in the attack on the complainant. He made repeated references to the night of 22 April and not 2 April. Nonetheless, he said that on that night, he was on his way home after selling in Junction and stopped at a shop near his home for half an hour and watched the news on television. Thereafter he proceeded home. He denied being in any escallion garden at the time or that he followed the complainant or anyone. He further denied committing the offence of rape or the act of grabbing the complainant.

**Issue**

[7] Upon this application coming on for hearing, counsel for the applicant, Mr Anthony Williams, sought and obtained permission from the court to abandon the initial grounds

of appeal filed by the applicant (holding grounds) and instead advanced four supplemental grounds of appeal filed 7 December 2023. These are as follows:

> "**1. <u>Ground 1</u>**
> The verdict is unreasonable and cannot be supported having regard to the weight of the evidence which has resulted in a Miscarriage of Justice and by that Miscarriage of Justice the conviction cannot stand and ought to be quashed and the sentence set aside.
>
> **2. <u>Ground 2</u>**
> The Learned Trial Judge erred or failed to adequately direct the Jury as to how to arrive at the proper verdict should they believe the Applicant's side of the story.
>
> **3. <u>Ground 3</u>**
> The Learned Trial Judge failed to properly and/or adequately direct the Jury on major weaknesses as to identification evidence which amounted to a substantial miscarriage of justice in assessing the quality of the identification evidence.
>
> **4. <u>Ground 4</u>**
> The totality and quality of the purported identification evidence was inherently and palpably tenuous and fragile in several material respects which amounted to "a fleeting glance" and/or identification purportedly made in difficult and/or terrifying circumstances. This led to a miscarriage of Justice thus rendering the conviction unsafe."

[8] The pivotal issues in this case concerned identification and credibility. So, to achieve efficiency and curtail the many areas of overlap and repetition generated by the four grounds of appeal, we have approached the analysis herein by adopting an issue-based method. The issues which the court has identified as arising for consideration in this appeal, are as follows:

> Issue one (Grounds 1, 3, and 4): - Whether the quality of the identification evidence was adequate and whether the verdict of guilty can be supported having regard to the weight of the evidence.

Issue two (Ground 2): - Whether the learned trial judge had adequately directed the jury on how to treat the applicant's account and denial.

**Issue one (Grounds 1, 3, and 4): - Whether the quality of the identification evidence was adequate and whether the verdict of guilty can be supported having regard to the weight of the evidence.**

Applicant's submissions

[9] Counsel for the applicant relied on the case of **R v Joseph Lao** (1973) 12 JLR 1238 in support of his contention that the verdict was unreasonable. In referring to the evidence elicited during the trial, counsel submitted that the case is riddled with contradictions, inconsistencies, and discrepancies, which are critical to the issue of the correctness of the identification of the applicant by the complainant as her attacker. These material discrepancies and inconsistencies, counsel contended, undermined the complainant's credibility and reliability. The significant submissions by counsel in this regard are that the complainant admitted that (i) she did not relay the name "Burke" to the police as the assailant, even though she testified that she had known the applicant to be called Burke, before the incident; (ii) that she did not tell the police that the assailant who raped her, had a scar to his left cheek, although she did state there was a scar to his face; (iii) that when her statement was recorded shortly following the incident, the complainant had failed to mention that she had seen two men in the escallion garden but instead stated she noticed 'a man'. These omissions, counsel contended, particularly, the failure to name "Burke" to the police on the recording of her statement, or to Barry to whom she made a recent complaint, undermined the credibility and reliability of the complainant as a witness.

[10] Counsel Mr Williams reiterated that the complainant said she knew the applicant before the attack. Although she had never conversed with him, she had seen him on at least three occasions before the incident. It was significant, he said, that she did not name him as her attacker. Counsel also submitted that no evidence was elicited from the complainant of seeing the applicant's face on these prior sightings or the position of the applicant when she saw him on the night in question. Counsel contends that when all

these complaints are considered cumulatively, and when coupled with the poor quality of the identification evidence, the complainant's purported identification of the applicant was rendered "unreliable, tenuous, and fragile". Thus, making the conviction unsafe and resulting in a miscarriage of justice.

[11] Counsel in his written submissions, also complained that the learned trial judge's summation was deficient in the following respects:

> "(i) No direction of the LTJ to jury as the distance of the other street light to where the witness was.
>
> (ii) No direction as to length of time the Witness viewed Appellant at this street light, why did she say it was him.
>
> (iii) No direction when the offender **"peeped in"** and went away what part of offender's body she was able to see or saw at all..."

Counsel also complained that there was no analysis of the complainant's evidence that she said she saw the applicant at "another street light" and she then entered the outside kitchen.

Crown's submissions

[12] In response to the applicant's complaints, counsel for the Crown, Miss Robinson, responded that there existed sufficient evidence at trial on which the jury could have convicted the applicant and on which they did so. Therefore, there is no basis for this court to disturb the finding of the jury's verdict. Counsel also relied on the authority of **R v Joseph Lao** where, in the headnote, on page 1238, this court had pronounced that:

> "Where an appellant complains that the verdict of the jury convicting him of the offence charged is against the weight of the evidence it is not sufficient for him to establish that if the evidence for the prosecution and the defence, or the matters which tell for or against him are carefully and minutely examined and set out one against the other, it may be said that there is some balance in his favour. He must show that the verdict is so against the weight of the evidence as to be unreasonable and insupportable."

[13] Counsel for the Crown contended that the learned trial judge in her summation gave a definition of the offence of rape and, at the close of the Crown's case, there was evidence supporting all the ingredients of that offence. The jurors' task was to determine if they accepted the complainant's allegations that it was the applicant who raped her. Based on the verdict returned, it was clear the jury accepted the complainant's evidence and that all elements of the offence had been established. Counsel Miss Robinson's further submission was that it was for the jury as the tribunal of fact to consider and determine the credibility of the witness in question, assisted by the directions of the learned trial judge. Directions concerning the inconsistencies, discrepancies, and omissions arising from the prosecution's evidence, especially the testimony of the complainant, were repeatedly provided to the jury.

[14] Crown Counsel posited that the learned trial judge directed the jurors' attention to two of the significant inconsistencies in the complainant's evidence and explained to them that it was a matter for them to determine whether they believed the complainant. Counsel further posited that the learned trial judge was under no obligation to comb through all the evidence and extract all the inconsistencies and discrepancies that arose in the case (see **R v Fray Diedrick** (unreported) Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 107/1989, judgment delivered 22 March 1991). Accordingly, the Crown submitted that the learned trial judge discharged her duty.

[15] Crown Counsel advanced in further submissions that the identification evidence could not be classified as tenuous and fragile, as the complainant gave ample evidence of the circumstances surrounding the identification of the applicant. Counsel contended that at the end of the prosecution's case, the quality of the identification evidence was good and cannot be said to have been a fleeting glance. Therefore, the issue of identification was a matter for the consideration of the arbiters of fact, who by their verdict of guilty, were satisfied by the complainant's evidence that it was this applicant

she had seen on the night in question, and it was he who raped her. Accordingly, there was no miscarriage of justice.

[16] In closing, Crown Counsel submitted that, if the Crown's arguments did not find favour with this court, nevertheless, this is a case in which the proviso of section 14(1) of the Judicature (Appellate Jurisdiction) Act may appropriately be applied.

Discussion

[17] Visual identification was a fundamental issue since this was how the complainant was able to confirm her attacker's identity, who she said was the applicant. It was the complainant's evidence that (i) when she saw the applicant on about three prior occasions in Junction and Brinkley before the attack she was able to see "His body and his face"; (ii) on the night of the attack when she passed the applicant in the escallion garden she had an unobstructed view of him, with a street light which was an estimated 20 feet from the escallion garden; (iii) her view of the applicant's face was unobstructed when he was on top of her while he raped her; (iv) assistance further came from the illumination of the second street light which was an estimated 25 feet away while the applicant was on top of her; (v) apart from a second street light she was assisted by the moonshine during the course of her ordeal; (vi) from the time she first saw him to when he removed her clothes she said was about two to three minutes; (vii) from when he placed her on her back to when he inserted his penis inside her vagina, the complainant said was about two minutes and (viii) from the point of ejaculation to when she escaped she stated was about three minutes.

[18] Since the applicant contended that his purported identification by the complainant was false or mistaken, the complainant's credibility and reliability as a witness were of high importance. Therefore, it was incumbent on the learned trial judge in the circumstances, to have identified for the benefit of the jury, some of the main inconsistencies, discrepancies, and omissions that might have undermined the quality of the purported identification made by the complainant.

[19] Whenever conflicts, such as inconsistencies, discrepancies, and/or omissions arise on the evidence during a trial, the issue of credibility often arises to be resolved. As observed by H Harris JA in **Steven Grant v R** [2010] JMCA Crim 77:

> "[68] Discrepancies and inconsistencies are not uncommon features in every case. Some are immaterial; others are material. The fact that contradictory statements exist in the evidence adduced by the prosecution, does not mean, without more, that a prima facie case has not been made out against an accused. The existence of contradictory statements gives rise to the test of a witness' credibility. No duty is imposed upon a trial judge to direct a jury to discard the evidence of a witness containing inconsistencies or discrepancies. The aim of proving that a witness has made a contradictory statement is to nullify his evidence before the jury and it is for them to decide whether the witness has been discredited...
>
> [69] It must always be borne in mind that discrepancies and inconsistencies in a witness' testimony give rise to the issue of the credibility of that witness. Credibility is anchored on questions of fact. Questions of fact are reserved for the jury's domain as they are pre-eminently the arbiters of the facts. Consequently, it is for them to determine the strength or weakness of a witness' testimony.
>
> [70] Even in circumstances where a judge is of the view that, by reason of discrepancies and inconsistencies, a conviction could not be supported by the evidence, it is not the judge's duty to stop the case and this is so, even if he believes the witness to be lying…"

[20] The approach taken by the learned trial judge was to first give the jury the required special caution when relying on identification evidence, due to the inherent danger of a convincing and honest witness being mistaken (see **R v Turnbull** [1976] 3 ALL ER 549 ('**Turnbull**')). Although the prosecution presented its case as one of recognition, given the complainant's evidence of three prior sightings of the applicant's "body and face", the learned trial judge nonetheless further cautioned the jury that mistakes can still happen even in the case of relatives and close acquaintances. The learned trial judge then

outlined the circumstances in which the identification was purportedly made of the applicant by the complainant in keeping with the guiding principles of **Turnbull**.

[21] Secondly, the learned trial judge directed the jury to assess the complainant's reliability considering the traumatic nature of the offence and the lighting conditions that existed at the time of the attack. The learned trial judge highlighted to the jury, among other things, the lighting, being a streetlight; the distance of the streetlight from the place where the complainant was attacked; the time during which the complainant had the applicant under observation; what part of the applicant could be seen; the familiarity of the complainant with the applicant before the attack; and to consider the complainant's estimation of time given. Other weaknesses, such as inconsistencies arising in the complainant's evidence that affected the purported identification of the applicant were pointed out by the learned trial judge.

[22] In the instant case, it cannot be denied that the evidence of the complainant contained inconsistencies as she had admitted under cross-examination to certain variations in her accounts given to the police, at the preliminary enquiry and her evidence before the jury. It is our view, however, that such inconsistencies did not attain the level to cause the evidence to be described as weak, tenuous, or fragile as contended by counsel Mr Williams.

[23] There is a plethora of authorities guiding a trial judge on how to treat conflicts arising in and between the evidence of a witness or witnesses. In **Carletto Linton and Others v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 3, 4 & 5/2000, judgment delivered 20 December 2002, P Harrison JA (as he then was), at page 16, enunciated that:

> "Discrepancies occurring in the evidence of a witness at a trial ought to be dealt with by a jury after a proper direction by the trial judge as to the determination of their materiality.

> The duty of the judge is to remind the jury of the discrepancies which occur in the evidence instructing them to determine in respect of each discrepancy whether it is a major discrepancy that which goes to the root of the case, or a minor discrepancy to which they need not pay any particular attention. They should be further instructed that if it is a major discrepancy, they should consider whether there is any explanation, or any satisfactory explanation given for the said discrepancy. If no explanation is given or if the one given is one that they cannot accept they should consider whether they can accept the evidence of that witness on the point at all: (**R v Baker et al** (1972) 12 J.L.R 902) …"

[24] The learned trial judge was tasked to direct the jury on how to identify conflicts arising on the evidence, how to treat such conflicts and how to determine whether such conflicts weakened the case presented by the prosecution. Having reviewed the various instances that the learned trial judge brought to the attention of the jury the inconsistencies in the complainant's evidence and explaining thereafter to the jury their duty to decide what they accepted and believed, we agreed with the submissions made by the Crown that the learned trial judge had adequately discharged her obligation in keeping with the authorities dealing with conflicted evidence. One example of her careful direction in that regard was when she pointed out to the jury that, three records existed of the complainant's account of her ordeal, her written statement recorded by the police, her deposition recorded on oath at the Parish Court at the preliminary enquiry and her testimony at trial. She remarked that:

> "Logically when you think about it, if it is the same story they would be consistent; first record, second record and what is being told to you here. This is the trial of the matter. The other records were not taken in circumstances of a trial. This is where you have to decide as judges, the guilt or innocence of Mr Powell. But what was said before stands as record of what she claims so that Miss Green in testing her, would be able to point out to her that she may have said something different before."

[25] The learned trial judge went further and brought to the jury's attention, two of the inconsistencies that arose when the complainant's credibility was tested by counsel for

the applicant (the then accused man). The learned trial judge pointed out that the cross-examination conducted by counsel, Ms Green was an effort to show that the complainant was not speaking the truth or was mistaken. For example, when she was confronted with her police statement where it was recorded that she had previously attended the Mayfield Primary School ('Mayfield') which was different from her testimony that she had attended Top Hill Primary School. When confronted with her statement, the complainant agreed that indeed that was what was recorded in her statement, but even so, she insisted that she could not have told the police that she attended Mayfield, as she did not know where it was. The learned trial judge pointed out to the jury that despite what was recorded in the statement "but you saw her reaction. You must know which primary school you go to… Ms Banton told you what school she went to… that is put out there for you to see whether or not you believe her on important issues. Matter for you".

[26] The learned trial judge specifically in her summation addressed as a possible weakness, the fact that the complainant did not initially call the applicant by the name "Burke" when she had the first opportunity to do so, especially since she testified that she knew him before the night of 2 April 2013. We observed that no explanation was proffered by nor elicited from the complainant as to why she had not related the name "Burke" when she made her fresh complaint of rape, to Barry. She only described her assailant at that point. There was also no explanation why the complainant did not name her attacker when she recorded her police statement on the day following her ordeal, she again, only gave a description. Defence counsel, Ms Green, had also taxed the complainant about not telling Barry that her assailant had brandished a knife during his attack on her. The complainant's response about not telling Barry about the knife was that she did not have to tell Barry that information because he was "not the police and …I don't need to discuss every detail to Barry".

[27] The learned trial judge also pointed out as inconsistent the complainant's evidence that she saw two men in the escallion garden, as opposed to one man in the escallion garden as previously recorded in her police statement. The learned trial judge having

highlighted these conflicts in the complainant's evidence as issues of credibility, thereafter it was for the jury to decide whether the complainant was discredited.

[28] In her summation, the learned trial judge, moreover, directed the jurors that the fact that the complainant had failed to name her assailant as "Burke" when she made her complaint to Barry and the police, were weaknesses in her identification evidence. The fact that the complainant had not specified which of the assailant's cheeks had a scar on it was "also another possible weakness in her identification that you have to consider and consider carefully as you come to determine whether or not she is mistaken or whether or not this is the man." The learned judge referred to defence counsel Ms Green's address to the jury, on the applicant's behalf, pointing out that counsel highlighted that the applicant had several cuts on his face, yet the complainant had referred only to what she called a telephone cut. The learned trial judge urged the jury to consider counsel's submission in light of their observation of the applicant and to determine whether, in the circumstances of the incident, it was "unreasonable that she (the complainant) would not mention that, yes he has several scars, but he has one that stood out or would she only mention the one that stood out. This is a matter for you …".

[29] The fact that essentially, the complainant was inconsistent with her evidence in these areas did not necessarily mean that her credibility had been destroyed so the jury could not have accepted such of her identification evidence as they believed. The jury would have heard her evidence in its totality and were at liberty to accept those portions that they were sure about and discard those portions that they assessed as unreliable. Ultimately, the jury accepted the complainant as a reliable witness as a whole and was convinced as to the purported identification she made of her assailant.

[30] Specifically, as it relates to the issue of identification the learned trial judge had directed the jury that the complainant's evidence:

> "…stands alone in terms of one important issue that you have to determine. She said it was this man, she said she knew him before. She said she was able to see him and make him out,

> and she said it is in those circumstances that she has identified him as being the person. So this is a trial where the case against Mr Powell depends wholly on the correctness of the identification of him, which the Defence is saying she may be mistaken when she said this is the man."

The learned trial judge then strictly adhered to the necessary directions as outlined in **Turnbull** and highlighted the factors that the jurors were to consider in deciding if the identification evidence satisfied them so that they were sure.

[31] She highlighted for the jurors' consideration, the lighting, the distance of observation, the period of observation, and whether the applicant had been previously known to the complainant. The learned trial judge urged the jurors to consider "the description (of the assailant) given after the observation was made" and "if there was any difference between the description given by the witness to the police when she first saw him and his appearance at this time (at trial)".

[32] The learned trial judge adequately assessed the identification evidence in her summation and highlighted as weaknesses some of the main conflicts in the complainant's account, particularly the omission to name her assailant as Burke, although there was "no challenge to the fact that he is called by this name, what is being challenged is that he is saying that it wasn't him, it wasn't him. So, consider the circumstances, therefore, that she (the complainant) had of observing this person".

[33] The reliability of the complainant's purported identification of the applicant was further tested by way of an identification parade. The parade was conducted via a two-way mirror with nine men, including the applicant, on the line-up. The applicant was at that time represented by counsel and, in addition, a Justice of the Peace was in attendance. These two individuals were present to ensure that the rights of the applicant were not violated and that the parade was conducted fairly. The applicant was positively identified by the complainant. There was no complaint at the trial that the integrity of the identification parade procedure was compromised, nor indeed was it said that the

complainant was aided by anyone when she pointed out the applicant. The learned trial judge had directed the jury that "what you need to be satisfied about the identification parade is that it was conducted fairly; that the witness was able to independently, without assistance, point out the person they said did the act to them". She again urged the jury to look at all the circumstances and determine whether the applicant was indeed the perpetrator or whether the complainant was mistaken.

[34] The authorities have made it clear that what is to be assessed by a trial judge is the cumulative effect of the weaknesses in the identification evidence, and whether there is substantial evidence on which the identification could be found to be correct (see **R v Plunkett** [2021] JMCA Crim 43). Keeping in mind the authorities and the cumulative effect of the evidence, we are of the view that the complainant's evidence was bolstered by her identification of the applicant on an identification parade. The applicant, during the parade, was among other men who had toothpaste on their left cheek. The daubing of toothpaste on the cheeks of all the participants in the line-up, seemingly, was an attempt by the applicant and his counsel on the parade to conceal the "telephone scar" on the applicant's left cheek. Despite this effort to disguise the scar, the complainant was still able to point out the applicant. This is evidence that the jury was entitled to consider and to determine whether it supported the complainant's purported identification of the applicant on the night of the incident.

[35] As far as we were able to discern, there were no other necessary directions relative to visual identification which the learned trial judge was obliged to give the jury and had failed so to do. The learned trial judge's directions in law given to the jury as to how they were to evaluate the evidence in this regard, is beyond reproach.

[36] We have observed that the complainant had made a positive identification of the applicant on the identification parade. We also note that the prosecution had contended that the purported identification of the applicant was by way of recognition. There was no dispute or denial on the defense's case that the applicant and complainant were

previously known to each other. The applicant had made a very terse dock statement denying the allegation and there were no challenges to the complainant's evidence as to seeing the applicant before in various places. We were not persuaded by the applicant's submissions, canvassed by counsel Mr Williams, that the evidence was incapable of or insufficient in maintaining a guilty verdict. Therefore, we are of the view that it would have been inappropriate for the learned trial judge to have removed the case from the jury.

[37] The evidence that the jury heard, and which was left for their consideration, could support the verdict of guilty. Contrary to the submission of Mr Williams, this was not a case of a fleeting glance and, although the occasion was traumatic, the complainant would have had a sighting of the face of the applicant for some two minutes before the attack. On that first sighting, she was under no trauma as she leisurely viewed the applicant's face. During the attack and when he had his penis in her vagina they were face to face, nothing obscuring her view of his face, it was then she made out the significant "telephone cut in his face". This incident, she said, lasted another three minutes. The jury was directed by the learned trial judge to consider whether the length of time given was reasonable considering what the complainant said was happening at the time. Specifically, the jury was instructed to consider whether the complainant had an opportunity to see who her attacker was, "did she have sufficient time, enough light, at a certain distance to see who her attacker was? Is she making a mistake… That is what you have to decide…". So, the learned trial judge in her summation adhered to the recommended guidelines in **Turnbull**. She discharged her duty satisfactorily. It therefore cannot be reasonably said that there was a miscarriage of justice.

[38] Having regard to the foregoing analysis, we find that there is no merit in grounds 1, 3, and 4 and this issue, therefore, fails.

**Issue two (Ground 2): - Whether the learned trial judge had adequately directed the jury on how to treat the applicant's account and denial.**

[39] Counsel for the applicant contended that the learned trial judge, in her summation, confused the jury on what they should do if they believed the applicant's account. Counsel submitted that what the learned trial judge should have done was to direct the jury to find the applicant not guilty if they believed him and that it was wholly inadequate for the learned trial judge to have said "it may leave you in doubt as to whether you can believe the Crown's Case". Counsel contends that the learned trial judge's inadequate direction to the jury denied the applicant a favourable consideration.

[40] Counsel for the Crown responded that the learned trial judge's directions were clear, and the jury was aware of the possible verdicts open to them. The criticism, she submitted, was unfounded. Counsel further submitted that when the learned trial judge's summation is read and digested as a whole, the jury could not have been in any doubt as to the options available to them as possible verdicts. Ultimately, the learned trial judge made it clear that if the jury were not made sure of the applicant's guilt by the prosecution, then they could not find him guilty.

[41] We agree that the learned trial judge did not expressly direct the jury that if they believed the applicant (accused) they were to acquit him. That her failure to do so resulted in a misdirection or a miscarriage of justice, we cannot agree. We have observed from the transcript that the learned trial judge had made it pellucid, that the onus of proof rested on the prosecution and that this burden never shifted. She had repeatedly directed the jury that the prosecution had to prove the case against the applicant to the requisite standard, that is, the prosecution's evidence must make them feel sure before they were entitled to convict and that they were to carefully consider the evidence before them. She reiterated several times that the applicant had nothing to prove. She did not just baldly tell the jury that believing the applicant might leave them in doubt of the Crown's case, she also directed them:

> "[i]f after considering all the evidence, you are sure that he is guilty, then you must find him guilty and to say that you feel sure, is the same as saying they [the prosecution] need to prove the case to you beyond a reasonable doubt… If after considering all the evidence, you are not sure, you have reasonable doubts, then your verdict must be not guilty."

[42] Based on the foregoing, the learned trial judge's direction to the jury on this issue was sufficient and would have left the jury in no doubt as to how they were to arrive at their verdict based on the evidence that they accepted. She had also warned them that a rejection of the applicant's version did not mean that he was guilty, instead, it was for them to consider all the evidence, to determine whether the prosecution had proven its case. In very clear language, the learned trial judge directed the jury to apply the law to the facts as they found them to be and arrive at their decision of guilty or not guilty. These directions were more than adequate and in keeping with acceptable standards. In **OP v R** [2022] JMCA Crim 19, at para. [14], the court enunciated that:

> "It is also settled, that the law is not static. A trial judge is not bound by a particular formula or set of words to direct the jury on the standard of proof. The authorities demonstrate that it is satisfactory for trial judges to use the term "sure" when describing the standard of proof. **What is important is that trial judges must convey to the jury that the prosecution must prove its case against the accused and that they can only find the accused guilty if satisfied beyond a reasonable doubt or if they are sure of the accused's guilt**…" (Emphasis added)

[43] At para. [15] Brooks P, referring to a UK case, noted that:

> "Lord Goddard CJ stated, in **Regina v Hepworth and Fearnley** [1955] 2 QB 600], that 'that is enough'. He stated, on page 604 that:
>
> > 'I should be very sorry if it were thought that these cases should depend on the use of a particular formula or particular word or words. The point is that the jury should be directed first, that the onus is always on the

> prosecution; secondly, that before they convict they must feel **sure** of the accused's guilt. If that is done, that will be enough.' (Emphasis supplied)"

[44] The learned trial judge's summation directing the jury on how to properly arrive at a verdict was exemplary, the jury could not have been in doubt as to how they were to treat the evidence or indeed the options available to them as possible verdicts. There is no set way in which the learned trial judge should have summed up to the jury and, based on the authorities, it is apparent that the content of the summing up is more important than the format. What is recommended, through the guidance of case law, is coherence and ease of understanding. Ultimately, directions in that regard will be tailored to meet the circumstances of each case, as there is no set formula. Mr Williams' attempt to dissect and segment the summation of the learned trial judge found no favour with this court.

[45] This court noted that the applicant's lone mention of the sentence was in his prayers for this court to set it aside. Although there was no ground filed by the applicant regarding sentence, nor indeed was there any complaint that the quantum of the sentence was manifestly excessive, we observed from the transcript that there was no demonstration or mathematical calculations as to how the sentence was arrived at. Specifically, this court had made inquiries of Mr Williams and Miss Robinson whether the applicant had spent any time on remand pending trial and sentencing.

[46] The court was subsequently informed by Mr Williams that the applicant gave an approximation of two years spent on remand pending his trial. The time was subsequently agreed upon by both counsel and calculated as one year, nine months, and 14 days.

[47] We found no basis upon which the sentence can be said to be manifestly excessive in the circumstances. The applicant had 12 previous convictions involving breaches of the Larceny Act. We found that 12 is a high number for convictions ranging from dishonesty to personal assault. He can, therefore, be deemed recidivist. Furthermore, he was convicted and is currently incarcerated for a prevalent offence. This current conviction is

considered more serious as it involved violence to the person and is an offence which now attracts a statutory minimum sentence of 15 years' imprisonment. The applicant's antecedent report was mixed with both favourable and unfavourable elements. He was nonetheless entitled to be accorded full credit for the time he was in custody pending his trial and sentencing. We, accordingly, set aside the sentence of 20 years' imprisonment imposed by the learned trial judge. After crediting the applicant with the one year, nine months, and 14 days he was in pre-trial remand, the recalculated sentence was 18 years, two months, and 16 days imprisonment at hard labour.

**Conclusion**

[48] This was a case of visual identification. The evidence elicited by the prosecution can support the jurors' finding, that the complainant had ample opportunity to see and identify her attacker, as reflected in the verdict of guilty. The learned trial judge directed the jury on the relevant law and recounted all necessary evidence. She gave the necessary and proper directions on visual identification, bringing to the jurors' attention to the specific issues of conflict arising in the evidence of the complainant and the weakening effect of such conflict on the prosecution's case, overall.

[49] Having regard to the above, we found that the learned trial judge's summation and her treatment of the identification evidence was by no means inadequate and therefore could not be impugned. Further, it cannot be fairly said, that when taken in its totality the quality of the identification evidence was "palpably tenuous and fragile" and therefore the verdict of guilty returned by the jury resulted in a miscarriage of justice. For those reasons, the conviction should stand.

[50] In light of the foregoing, we made the orders set out in para. [1] above.