**[2014] JMCA Crim 35**

**JAMAICA**

**IN THE COURT OF APPEAL**

**SUPREME COURT CRIMINAL APPEAL NO 32/2010**

**BEFORE:** **THE HON MR JUSTICE MORRISON JA**
**THE HON MR JUSTICE BROOKS JA**
**THE HON MS JUSTICE LAWRENCE-BESWICK JA (Ag)**

**DALTON REID v R**

**Linton Gordon and Miss Tamiko Smith instructed by Frater, Ennis & Gordon for the applicant**

**Miss Sanchia Burrell for the Crown**

**20 February and 31 July 2014**

**MORRISON JA**

**Background**

[1] On 10 February 2010, after a trial in the Home Circuit Court before G Smith J and a jury, the applicant was convicted of murdering Sheryl Powell ('the deceased'). He was sentenced to imprisonment for life and the learned judge ordered that he should serve 25 years in prison before becoming eligible for parole.

[2] His application for leave to appeal having been considered and refused by a single judge of this court on 5 October 2012, the applicant now renews the application before the court itself.

[3] The case against the applicant was substantially based on evidence of a statement allegedly made by the deceased to Constable Christopher Royale at the Spanish Town Hospital in the late evening of 17 February 2002. Having conducted a *voir dire* in the absence of the jury as to its admissibility, the learned trial judge admitted the statement as a dying declaration. Constable Royale testified that, in it, the deceased had named the applicant and another as the persons who inflicted the gunshot wounds from which she subsequently died. In addition to the dying declaration, the prosecution relied on some items of circumstantial evidence. The applicant's defence was a complete denial of any knowledge of the matter.

**The evidence**

[4] In February 2002, Constable Royale was stationed at the Old Harbour Police Station in the parish of St Catherine. He lived, as he had done practically all his life, in the School Lane area of Old Harbour. At that time, he testified, he had known the deceased and the applicant, both of whom lived in the same area, for over 10 and 20 years respectively. He was accustomed to seeing the applicant on a regular basis, maybe once per week; he had often spoken to him and he knew most of his (the applicant's) relatives.

[5] As a result of a radio transmission received while on duty at the Old Harbour Police Station at about 9:30 pm on 17 February 2002, Constable Royale and other police personnel went to an address, where a large group of persons was gathered, in the School Lane area. Constable Royale went into a particular house which was pointed out to him. There was, as far as he could observe, no sign of forced entry to the house. He entered the front bedroom, which was about 10 feet by 10 feet in size and lit by an electric light bulb on the "roof", and saw what appeared to be blood on the mattress. Bullet holes were also seen in the mattress. Female clothing and pictures were seen in the room and, among the persons depicted in the pictures, Constable Royale recognised the deceased and other persons from the area.

[6] Accompanied by a colleague, Constable Royale then went to the Spanish Town Hospital. There, he observed the deceased, who was still alive, but appeared to be bleeding from the chest region of her body and was being tended to by nurses and doctors. With the permission of a doctor, Constable Royale spoke to the deceased, who seemed to him to be "breathing short". Constable Royale said that the deceased responded to him, stopped speaking for about half a minute and then said the following:

> "Mr. Royal [sic], mi a goh dead. A 'Brass' and Dane shot mi. Yuh nuh know Dane, 'Lagga' bredda, Miss Ena son, 'Brass'. Dem call him 'Castie' and Cast Iron. Dem shot mi…wi live 'pon the same road."

[7] The deceased died either that same night or early the following morning. The post mortem examination, which was conducted by Dr Kadiyala Prasad, would subsequently reveal that she had received two gunshot wounds. One of the bullets had entered the deceased's body on the lower posterior abdomen, directed upwards and forward to the left underlining tissue on the left lower anterior chest. The second, after entering her body in the vicinity of the left buttocks, had travelled upwards to the left, through the underlying tissues, pelvic and abdominal cavities, bowels, spleen and diaphragm, before exiting in the mid-anterior chest region. The pathologist indicated that no gunpowder deposition was seen in the area of the entrance wounds and that the significance of this was that the muzzle of the gun that was used was beyond 2 feet, possibly even up to 20 feet, away from the body when it was discharged. The cause of death was given as "multiple gunshot wounds". Although Dr Prasad agreed that both wounds were to the deceased's back, his evidence was that it did not necessarily follow that she had been shot from the back, as the shooter could also have been to her side.

[8] The day after he had spoken to the deceased at the hospital, 18 February 2002, Constable Royale returned to the house at School Lane. Photographs were taken, a search for spent shells was conducted and blood and other samples were collected. While there, he recovered five spent shells (but no warheads) from what he described as "the unfinished section behind the room where [the deceased's] bedroom is". From that section, Constable Royale said, it was possible to see into the bedroom. There was a door to the unfinished section that was "boarded up", but there was a space over the door about 8 to 10 inches wide. That space was about 6 feet from the ground. In

response to counsel's suggestion that, "in order to see through that space, you would either have to climb up or you have to be more than six feet tall", Constable Royale's response was, "I would say so." But he did not see any evidence anywhere of anyone climbing up.

[9] Constable Royale was asked about the view from inside the bedroom into the unfinished section:

> "Q. When you were inside the room, that is the bedroom, that first occasion or anytime, when you were inside Sheryl's bedroom that the alleged shooting took place, when you stand inside the bedroom, could you have seen outside on the ground through that open space?
>
> A. Yes, I could have
>
> Q. Could you see the flooring of the unfinished section by standing in the bedroom?
>
> A. If I stand in the bedroom, I could see the flooring but not immediately behind.
>
> Q. You were telling us that there was a bed inside the bedroom?
>
> A. Yes, I did say so, sir.
>
> Q. How far was the wall to the unfinished section of the bed [sic]? Do you understand what I am asking? You said there was the bedroom and there was the unfinished section, right? How far in the bedroom was the bed from the wall adjacent to the unfinished section?
>
> A. Some feet maybe 4, 5 feet away, walk between the bed and the wall that separates…"

[10] Then there was a further exchange between defence counsel and Constable Royale on the point:

> "Q. If someone was standing on the unfinished section, which is adjacent to the bedroom, and that person was less than 15 feet from the wall of the bedroom, am I correct, you couldn't stay in the bedroom and see this person?
>
> A. If the person is lying on the bed, I don't think this person could see. If the person is standing in the room and the person is standing on the unfinished section, you would see before the 15 feet, sir, as long as the person is standing, sir.
>
> Q. What if the person in the room was lying on the bed would that person…
>
> A. I don't know if the person would be able to see the person, sir."

[11] Both the persons described by the deceased as 'Lagga' and his brother Dane were also known to Constable Royale from the School Lane area. And, in court, Constable Royale pointed out the applicant as the person known to him as 'Brass', 'Castie' and 'Cast Iron'.

[12] Sergeant Everald Bennett, who was the investigating officer, accompanied Constable Royale to the deceased's home on the morning of 18 February 2002. The front door appeared as though it had been kicked in and he observed when Constable Royale recovered three expended bullets from different sections of the bedroom, one of them from under the bed. Four or five spent shells were also recovered from the unfinished section of the house. He also observed what appeared to be bullet holes in the mattress and blood on the bed and on the floor. Later that day he commenced an investigation into the deceased's murder and on the following day, 19 February 2002, he saw and spoke to the applicant at the Portmore Police Station.

[13] From the examination of the expended bullets and the spent shells recovered from the scene, Inspector Sydney Porteous, the ballistics expert, concluded that the bullets had all been discharged from the same Glock semi-automatic pistol and that the spent shells had also been ejected from the same semi-automatic pistol. However, Inspector Porteous was not able to say whether the bullets and the spent shells were fired from the same firearm.

[14] On 20 February 2002, the applicant's hands were swabbed for gunshot residue and on the following day the results of that exercise were delivered to the Government Forensic Laboratory for testing and analysis. At the trial, Mrs Marcia Dunbar, then an analyst attached to the laboratory, testified to finding gunshot residue at the intermediate level on the back of the applicant's right hand (suggesting that it had come into contact or was in the path of gunshot residue), and at the trace level in the palm of the right hand and on the back of the left hand (suggesting that they were in the path of gunshot residue). Mrs Dunbar's opinion was that these findings suggested that the person could have discharged a firearm some three to six hours before, barring "any deliberate action to remove gunshot residue". She explained that a finding of gunshot residue at (i) elevated level would indicate "a large amount of gunshot residue"; (ii) trace level would indicate "a small amount of gunshot residue"; and (iii) intermediate level would be in between elevated and trace levels.

[15] Sergeant Bennett arrested and charged the applicant on 2 March 2002 for the murder of the deceased and, when cautioned, the applicant said, "Mi nuh have nothing fi seh." The applicant was interviewed at the Portmore Police Station on 7 March 2002

and Sergeant Bennett's evidence was that the applicant, who identified himself as Dalton Reid, acknowledged that he was also known as 'Brass'. After the applicant had been cautioned, a total of 43 questions were asked of him, during which, Sergeant Bennett testified, no threats, promises or inducements were offered to the applicant, nor was any force used against him. At the end of this process, during which the applicant was represented by counsel, the record of the questions and answers was signed by the applicant and witnessed.

[16] Over objection from the applicant's counsel at trial, the judge admitted the questions and answers into evidence and they were read to the jury by Sergeant Bennett. As was his right, the applicant declined to answer the majority of the questions, including the question (no 30), "Are you called 'Brass' in your community by other people in the community?" But, in response to the question (no 20), "Do you know Sheryl Powell?" his answer was, "Yea man, I know her."

[17] That was the case for the Crown. The applicant elected, after an unsuccessful submission of no case to answer was made on his behalf, to give an unsworn statement from the dock:

> "THE ACCUSED: My name is Dalton Reid. I live at Old Harbour, St. Catherine. Do construction work. Leave work on mi way home, I stop at a bar, have a few drinks, leave the bar and go home, deh home watching TV, drop a sleep, yes. After I wake up in the morning hear of di incident, somebody getting kill. When I going to work in the morning, on mi way to work, reach dung at di bank, stand up at di bank, di bank a di bus stop, stand up right there waiting on a taxi, policeman just walk dung and hold on pon mi, carry mi by di station, over di the [sic] station there until in the

night. There about five thirty in the evening, dem carry mi to Hundred Man Police Station, when dem carry mi to Hundred Man Police Station, dem lock mi up. Yes. Yes, Your Honor. After dem lock mi up, di policeman come back fi mi inna di evening 'bout six o'clock, because man a come from court…

HER LADYSHIP: Yes, continue for me, please.

THE ACCUSED: Yeah. Di policeman carry mi go in a room, I told him I did not shot anybody. After I told him dat him bring mi back over to the lock-up an' lock mi up.

HER LADYSHIP: Anything else you were saying, sir?

THE ACCUSED: Dem come back fi mi now and to and fro…

HER LADYSHIP: You have to give me a little volume, sir. I am not hearing you clearly.

THE ACCUSED: Yeah, di police dem go an' come, go an' come, your Honor, tek mi out, carry mi over, tek mi out, carry mi over, go an' come. Yes, your Honor.

HER LADYSHIP: Whenever you are finished you must indicate, you know. I won't know whether you are finished or not.

THE ACCUSED: Yes, ma'am."

[18] That was the case for the defence. After the learned judge's summing up, the jury returned a verdict of guilty and the applicant was sentenced in the manner already indicated (see para. [1] above).

**The application for leave to appeal**

[19] The application for leave to appeal was initially considered on paper by a single judge of the court, and refused, on 5 October 2012. The application was accordingly renewed before the court itself and Mr Linton Gordon, for the applicant, sought and

was given permission to argue five supplemental grounds of appeal in place of the original grounds filed by the applicant, namely:

> "1. The verdict arrived at in this case was unreasonable and inappropriate having regard to the evidence before the court.
>
> 2. That the Learned Trial Judge failed to adequately direct and guide the jury to a proper understanding and appreciation that the burden of proving the case for the Crown rest [sic] on the Prosecution throughout the trial of the case.
>
> 3. That the Learned Trial Judge failed to adequately caution/warn the jury of the real possibility that the Deceased in her Dying Declaration could have given evidence regarding the identification of the accused which would be mistaken, inadequate and unreliable. The Learned Trial Judge ought to have highlighted to the jury the real possibility that the Deceased could have been mistaken in her Dying Declaration which was relied on to identify the Applicant/Appellant as the person who attached [sic] her.
>
> 4. That the Learned Trial Judge failed to explain fully to the jury that circumstantial evidence should not only point to the accused but must be inconsistent with any other conclusion for it to be relied on.
>
> 5. That the Learned Trial Judge failed to adequately direct the jury on the issue of identification bearing in mind that the sole source of the identification being relied on is that contained in the Dying Declaration."

[20] Dealing first with ground two, Mr Gordon complained that, by telling the jury that, "[i]n order to discover his intention you look at what he did and ask whether as an ordinary responsible person he must have known that death or really serious bodily harm would result from his action", the learned trial judge had directed them on the

assumption that the applicant was the person who had caused injury to the deceased. This direction, it was submitted, was fatal to a fair trial, in that it assumed the very thing that the prosecution was required to prove, that is, that the applicant had committed the offence. The applicant was therefore deprived of an objective analysis by the jury of the case against him.

[21] Taking grounds three and five together, Mr Gordon submitted that the judge had failed to direct the jury adequately with regard to the various challenges and difficulties which would have faced the deceased in identifying her attacker/s, particularly given the physical layout of the deceased's house and the evidence as to where the spent shells were found. With specific reference to the evidence of the deceased's dying declaration, Mr Gordon pointed out that it was not corroborated and that the judge had failed to assist the jury as regards the issue of identification. On ground four, Mr Gordon's complaint was that the judge did not give the jury sufficient guidance as to how to approach the items of circumstantial evidence. It was submitted in particular that the jury ought to have been told that, for the applicant to be found guilty, the evidence must point in one direction only and must also be inconsistent with any other conclusion. And returning finally to ground one, Mr Gordon submitted that, taking everything together, the verdict of the jury was unreasonable having regard to the evidence.

[22] On ground two, following Mr Gordon's order, Miss Burrell for the Crown accepted that, in the passage complained of, it would have been helpful for the judge to have qualified the words "you look at what he did" by the use of the word 'allegedly'. But she

submitted that it is necessary to take what the judge said in the context of her overall directions, in which the judge had given adequate directions which were not overridden by the words isolated in counsel's complaint. To similar effect, Miss Burrell submitted on grounds three and five that the judge was under no duty to deal minutely with the evidence and that, while the judge did not deal specifically with the difficulties inherent in the identification evidence, she had done enough to make the jury aware of their task. On ground four, Miss Burrell's submission was that the judge's directions on circumstantial evidence were adequate and in keeping with what the authorities required. In all the circumstances, it was submitted, the verdict of the jury was fully in accordance with the evidence.

[23] The grounds and counsel's submissions give rise to the following issues:

(1) Whether the trial judge gave adequate directions to the jury as to (a) the burden of proof; (b) the proper approach to the dying declaration, particularly as regards the identification of the applicant; and (c) the circumstantial evidence.

(2) Whether the verdict of the jury was unreasonable in the light of the evidence.

**Issue (1) - The judge's directions**

(a) Burden of proof

[24] Close to the outset of her summation, the learned judge told the jury this:

> "Now, Mr. Foreman and members of the jury, the accused as he sits in the dock, is presumed to be innocent until you, by your findings, says [sic] he is guilty. He is not required to

> prove his innocence. There is no duty on the accused to prove anything. The burden or duty of proving the case against the accused is on the prosecution throughout and it never shifts. So, before you can convict the accused, the prosecution must satisfy you by the evidence presented so that you feel sure of the accused [sic] guilt.
>
> The accused has no duty to prove his innocence but he may attempt to do so and if he attempts and succeeds then he is not guilty. If he fails, then you must consider all the evidence including what the accused had said and see whether you are satisfied to the extent you feel sure that the prosecution has proved its case.
>
> So, likewise if you are left in a state of reasonable doubt, then the law says that, that reasonable doubt must be resolved in his favour. But, even if you don't believe a word he says, that is not the end of the matter. You can't say you don't believe him, that he is guilty. You will have to look at the totality of the evidence in the case and when you look at that, it is only if you are satisfied to the extent that you feel sure of his guilt, then you can return a verdict of guilty."

[25] This, as Mr Gordon accepted, was a clear and correct direction. Then, having completed what she described as her "preliminary comments", the judge next turned to the question, "What is murder in law?". In this regard, the judge told the jury, the prosecution must prove, first, the death of the deceased; second, that it was the accused who killed her (described by the judge as "the big issue in the case"); third, that death was caused by a voluntary or deliberate act; fourth, that the accused intended either to kill the deceased or to inflict really serious bodily injury to her; fifth, that the killing was not in self-defence; and sixth, that the killing was unprovoked.

[26] It is in the context of her discussion of the fourth of these ingredients of the crime of murder that the judge added this:

> "The only practical way of proving a person's intention is by inferring it from either the person's word or [sic] person's conduct.
>
> In the absence of evidence to the contrary, you are entitled to regard the accused as a responsible man, that's to say an ordinary, responsible person capable of reasoning. In order to discover his intention, you look at what he did and ask whether as an ordinary responsible person, he must have known that death or really serious bodily harm would result from his action. If you find that he must have so known, then you may infer, and remember I tell [sic] you about inference, that he intended the result and this was mandatory of the intention required to establish the charge of murder. It is the actual intention of the accused that you are trying to discover so, you must take into account any statement given by him, in his action in this case. In this case, he said nothing and look at all the evidence in the case to see whether you can discover what the intention for the person who killed Ms. Powell was and on the totality of the evidence, you come to your decision, whether they [sic] required intention has been proved."

[27] And finally, close to the end of the summing-up, while discussing the applicant's defence of alibi, the learned judge's last words to the jury were the following:

> "[The applicant] said he was not at the scene of the crime when it was committed. Now, it is the prosecution's duty to prove his guilt so, that you feel sure he does not have to prove his innocence or that he was elsewhere at the time when the offence was committed. On the contrary, it is the prosecution who must disprove that alibi. Even if you conclude that the alibi was false that does not by itself, Mr. Foreman and members of the jury, entitle you to convict the accused. It is a matter which you may take into account, but you should bear in mind, that an alibi is sometimes invented to bolster a genuine defence."

[28] In our view, taking the summing-up as whole, there was no likelihood that the judge's directions (set out at para. [26] above) could have been misinterpreted to mean that she was herself approaching the matter on the footing that the applicant was present at the scene and that the only issue was whether he had the requisite intention. It is true that this aspect of the direction might have been improved by words to the effect that, if the jury found that the applicant was present at the scene, it would still be necessary for them to look at what he was alleged to have done or said in order to ascertain his intention. But it seems to us that it would have been clear to the jury from the judge's earlier direction on the burden of proof that her discussion of the question of intention proceeded on the basis only that they found themselves able to cross the critical hurdle of the applicant's presence at the scene ("the big issue in the case"). And further, her clear direction at the end that it was for the prosecution to prove the applicant's presence would have been more than sufficient to dispel any uncertainty on the question.

[29] In our view, ground two therefore fails.

(b) The dying declaration and the identification evidence

[30] There has been no challenge on appeal to the judge's decision to admit the deceased's statement as a dying declaration. No question therefore arises as to whether the precondition of admissibility of such a statement, that is, that the deceased was at the time she made it under a settled, hopeless expectation of death, was satisfied. At issue is the correctness or adequacy of the judge's directions to the jury.

[31] In this regard, both counsel referred us to the decision of the Privy Council (on appeal from a decision of this court) in **Nembhard v The Queen** [1982] 1 All ER 183. In that case, the appellant was charged with the murder of a police officer who had been shot at the gate of his home. There were no eyewitnesses, but when the deceased's wife heard the shots and ran out to the gate from the house, her husband told her that that he was going to die, that she was going to lose her husband and that the appellant was the person who had shot him. He died a few hours later and at the appellant's trial the deceased's wife's evidence of what he had told her was admitted into evidence as a dying declaration. There was no other evidence implicating the appellant.

[32] The appellant was convicted of murder and he appealed unsuccessfully to this court. Among the contentions advanced on his behalf on appeal to the Privy Council, it was submitted that the jury should have been warned that it was dangerous to rely on the words of a dying declaration in the absence of corroboration. It was held that there was no rule of law or practice requiring a special warning about the absence of corroboration where the only evidence implicating the defendant was a dying declaration. However, the Board reemphasised the need for trial judges in such cases to leave the jury with a clear consciousness of the need for care in assessing the significance of a dying declaration, particularly bearing in mind the fact that the evidence was not tested by cross-examination.

[33] In dismissing the appeal, the Board specifically approved (at page 186) Smith CJ's "eminently fair and sensible summing up…[which]…was more than adequate for

the purpose of giving every necessary assistance and direction to the jury". This is how Smith CJ summarised his directions on the issue of the dying declaration to the jury in that case:

> "If you feel sure the statement was made to her you have to examine the circumstances which must have existed at the time when [the deceased] was shot; you have to take into account his state of mind when he made the statement; was he in a state of mind where you would feel that you could safely rely on what he was saying, as being the truth? You have to take into account the caution that I have given about mistaken identity and whether the circumstances were such, having regard to the distance, light and so forth, that you can feel that a mistake was not made in the identity of the accused. And if you are not sure whether a mistake was made or not, or if you do not think you can safely rely at all on what the deceased is alleged to have said, then you must acquit the accused."

[34] Mr Gordon also referred us to **David Sergeant v R** [2010] JMCA Crim 2, in which this court confirmed that full **Turnbull** directions are necessary in a case depending on evidence of a dying declaration. Accordingly, in that case, an appeal was allowed and a new trial ordered where the court considered that, although the trial judge did give the required directions in general terms, "they were not sufficiently focused on the circumstances of the case" (per K Harrison JA at para. [24]).

[35] In this case, the learned trial judge told the jury to bear in mind that they had not had the advantage of seeing or hearing the deceased give her evidence, nor had what she said been tested by cross-examination. The jury were also warned that, despite the consideration that "where someone is about to die…it is unlikely that you

would be speaking falsely at that stage", it was nevertheless necessary to treat the dying declaration "with scrupulous care".

[36] Turning next to Constable Royale's evidence, the learned judge was careful to emphasise the importance of their view of his credibility to the case:

> "Do you believe that Mr. Royal [sic] spoke the truth? Do you believe him when he said he spoke with Miss Sheryl Powell at the Spanish Town Hospital? Do you believe that Miss Sheryl Powell told him these things which he said he was told?"

[37] And then, on the question of identification, the judge reminded the jury that the applicant's position was that he was elsewhere, and not at the deceased's home on the night in question. Therefore, the judge said, "identification is a live issue for your consideration". The judge then proceeded to give the general **Turnbull** warning:

> "I must therefore warn you of the special need for caution before convicting the accused in reliance of [sic] the evidence of identification. This is so because it is possible for an honest witness to make a mistaken identification. There have been wrongful convictions in the past, as a result of such, an apparently convincing witness can be mistaken. You must therefore examine carefully, the circumstances in which the identification by the deceased was made. You will have to consider, Mr. Foreman and members of the jury, such things as how long did she have, the person she said was the accused under observation; at what distance, in what light, did anything to [sic] interfere with her observation of that person? Had Miss Powell ever seen that person she observed before? If so, how often and how long was it between the original observation and the identification to the police and further, is there any mark [sic] difference between the description given by the deceased to the police and the appearance of the accused. So, those are some of

> the things when you are considering these questions of identification that you must look at."

[38] The judge then went on to point out that, in her view, a number of the questions that she had asked the jury to consider "were not answered on [sic] evidence presented by the prosecution". These included, the jury were told, how long the person said to be the applicant had been under observation by the deceased and at what distance; what the state of the lighting in the deceased's room was at the time of the shooting; and whether anything interfered with the deceased's observation. But the judge also pointed out that the evidence did suggest that the deceased did know both of her attackers "by their aliases or 'pet' names" and that she and the applicant lived in the same area. Having said all of this, the judge concluded her directions on identification in this way:

> "Having taken all of that into consideration, if you feel sure that the statement was made by Ms. Powell, you have to examine the circumstances which must have existed at the time when Ms. Powell was shot. Additionally, you will have to take into account her state of mind when she made the statement. Was she in a state of mind where you would feel, you could safely rely on what she was saying as being the truth? You will have to take into account also the caution I have given to you about mistaken identification and what the circumstances were having regard to the distance, light and all the other things, you can feel sure that a mistake was not made in the identification of this accused. If you are not sure that a mistake was made or not or if you do not think you can safely rely on what the deceased is alleged to have said, you must acquit the accused.

> It is only if you are satisfied to the extent that you can feel sure of his guilt, would it be opened [sic] to you to convict him on the basis of that dying declaration."

[39] While these were, as Mr Gordon readily accepted, virtually exhaustive directions, he nevertheless made two specific complaints. The first was that, as full as they were, the directions were not tailored to the particular circumstances of the case. As an instance of this we were referred to the judge's invitation to the jury (in the passage quoted at para. [37] above), to consider whether there was "…any mark [sic] difference between the description given by the deceased to the police and the appearance of the accused": given that there was no evidence that any such description had been given in this case, Mr Gordon complained, this was a purely formulaic direction by the judge.

[40] This was an obvious mistake on the part of the very experienced trial judge, who gave the standard **Turnbull** direction, without reminding herself that this aspect of it was clearly inapplicable on the facts of the case before her. (Indeed, at an earlier point in the summing-up, the judge herself had reminded the jury "Mr. Royal [sic] said that when he spoke to Miss Powell before she died, he didn't get a description of the men.") But, that having been said, it is difficult to see how this isolated lapse could have diverted the jury from their essential task; that is, to determine whether, in the light of the evidence and bearing in mind the judge's otherwise clear directions on the need for caution in approaching the evidence of identification contained in the dying declaration, they felt sure that the deceased's identification of the applicant was not mistaken.

[41] Mr Gordon's second complaint, which was that the judge failed to give the jury any or any adequate directions as to the "challenges and difficulties" which would have faced the deceased in making a correct identification, merits closer scrutiny. The challenges and difficulties referred to by Mr Gordon arose, he submitted, from the evidence given by Constable Royale under cross-examination as to the physical relationship between the deceased's bedroom and the unfinished section of the house (see paras [8]-[10] above).

[42] In fact, in reminding the jury of what Constable Royale had said, the learned judge did bring this evidence to their attention:

> "He said the spent-shells were recovered in the unfinished section of the building. He said from where the spent-shells were recovered in that unfinished section, you could see inside the bedroom. He said he was able to do so because there was a door between the bedroom on an unfinished section which was boarded up. However, there was a space over this door about eight to ten inches wide, he said, which you could see, the space at the top of the door was about six feet from the ground and he agreed that in order to see through that space, you would either have to climb or you have or [sic] be more than six feet tall.
>
> The witness went on to say he did not see any evidence of anyone climbing up there, his observation. Mr. Royale said there inside, he could see the open section of the door into the unfinished section. He could see the flooring, the section that was immediately behind the door. He said the bed in the bedroom was about four to five feet from the wall which was adjacent to the unfinished section. He told Mr. Davis that he was unable to say if someone could stand on the ground in the unfinished section and fire a shot through the open space and if it would catch someone on the bed in that bedroom. Also, he said he was unable to say if someone was lying on the bed in the bedroom, if that person would be able to see someone in the unfinished section and

> remember what I told you about speculation, you see, because from his observation, he said he could not answer those questions."

[43] Although, as Miss Burrell accepted, the judge did not go further to give specific directions with respect to this evidence, it is difficult to see what more could have been required of her in the circumstances. The evidence which was taken from Constable Royale in cross-examination started from the hypothesis that, because the spent shells were found in the unfinished section of the deceased's house, her attacker/s must have shot the deceased in her bed from that location and that she could not therefore have had an opportunity to see, far less identify, them. While this was clearly a possibility, Dr Prasad's evidence was that the deceased could have been shot from a distance of anywhere between 2 and 20 feet and that, although both wounds were to the her back, the shooter could have been to her side. Constable Royale's evidence was that blood was found on the deceased's bed. According to Sergeant Bennett, a bullet was found under the bed. In these circumstances, and in the absence of any direct evidence of what actually happened in the deceased's house on the night in question, it seems to us that any further directions as to the "difficulties and challenges" created by Constable Royale's diffident and inconclusive answers in cross-examination could only have, as the judge obviously thought they might, increased the danger of speculation on the jury's part.

[44] Accordingly, grounds three and five must also fail.

(c) The circumstantial evidence

[45] As regards the Crown's reliance on circumstantial evidence in proof of certain aspects of the case, the learned trial judge directed the jury as follows:

> "Circumstantial evidence consists of this: That when you look at all the surrounding circumstances which pointed to the facts which you find proved, you find such a series of undesigned, unexpected coincidences, that as reasonable persons, you find your judgment compel [sic] to one conclusion only. All the circumstances relied on have pointed to one direction and one direction only and that direction must be the guilt of the accused.
>
> Now, if the circumstantial evidence falls short of that standard, it does not satisfy that test. In other words, if it leaves gaps, then it is of no use at all. Circumstances may point to one conclusion, but if one circumstance is not consistent with guilt, it breaks the whole thing down. You may have all the circumstances consistent with guilt, but equally consistent with something else too and that would not be good enough. What you want Mr. Foreman and members of the jury, is an array of circumstances which point only to one conclusion and to all reasonable minds, that conclusion would be the guilt of the accused.
>
> Now, when you consider the facts and you find the facts in this case, it may well be that none of the facts when taken separately, points exclusively to the guilt of the accused and each may be equally consistent with innocence as with guilt. But, when you consider the totality of them, they constitute such a series of undesigned, unexpected coincidences, so as to satisfy you, that the facts are such as to be inconsistent with any other conclusion and that the accused is guilty. But, you must remember that if the totality of the evidence is consistent with innocence as well as with guilt, or if the totality of the evidence only amounts to a high degree of mere suspicion, then the Prosecution would not have proven its case, and in that event you will have to return a verdict of not guilty. So, this circumstantial evidence must point to one conclusion before you can accept it and if it points to

> the guilt of the accused and if that is how you feel, then in these circumstances you can rely on it."

[46] Mr Gordon complained that the judge ought to have gone further, by telling the jury that the circumstantial evidence "should not only point to one and only one conclusion but that it should be inconsistent with any other conclusion". In our view, this submission was a clear echo of the now long abandoned rule in **Hodge's case** (**R v Hodge** (1838) 68 ER 1136), which was to the same effect. The beginning of the end of the rule in **Hodge's case** was the decision of the House of Lords in **McGreevy v Director of Public Prosecutions** [1973] 1 All ER 503, which held that there was no such rule and that in cases of circumstantial evidence no special direction to the jury is necessary. What is required in such cases is that the judge should, as in every criminal case, make it clear to the jury, in terms which are adequate to cover the particular features of the case, that they must not convict unless they are sure of the guilt of the accused. This was confirmed by this court in **Loretta Brissett v R** (SCCA No 69/2002, judgment delivered 20 December 2004) and **Wayne Ricketts v R** (SCCA No 61/2006, judgment delivered 3 October 2008), in both of which **McGreevy** was cited with approval and applied.

[47] In the instant case, it seems to us that the learned trial judge's directions on circumstantial evidence in fact went further than the modern law requires. As Miss Burrell pointed out, the judge's directions were faithful to the guidance given by Carey JA in **R v Everton Morrison** (1993) 30 JLR 54 (at page 56), in which Carey JA had

observed (at page 55) that the rule in **Hodge's case** was still applicable in Jamaica. But although coming after **McGreevy**, that judgment was a long way before **Loretta Brissett** and the later decisions of this court which have treated **McGreevy** as equally applicable in this jurisdiction (see, for instance, **Melody Baugh-Pellinen v R** [2011] JMCA Crim 26, paras [39]-[40]).

[48] As part of her general directions, Smith J told the jury that "apart from finding the actual facts proved in the case, you are also entitled to draw reasonable inferences from such facts as you may find proved, in order to assist you in coming to your decision". Further, she said, "the prosecution must satisfy you by the evidence presented so that you feel sure of the accused [sic] guilt". It seems to us that it would have been clear to the jury from these directions that all the evidence, including the circumstantial evidence, had to be taken into account before they could conclude that the case against the applicant was proved beyond reasonable doubt.

[49] In our view, ground four must therefore fail as well.

**Issue (2) – verdict unreasonable**

[50] Mr Gordon advanced nothing specific, additional to what he had submitted on the other grounds, in support of this ground. In our view, the jury's verdict was one which was clearly open to them on the evidence in the case. There is therefore no basis to disturb the jury's verdict on this ground.

**Disposal of the case**

[51] In the result, the application for leave to appeal is dismissed. It is ordered that the applicant's sentence should run from 10 February 2010.