[2021] JMCA Crim 25

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE P WILLIAMS JA
THE HON MRS JUSTICE FOSTER-PUSEY JA

SUPREME COURT CRIMINAL APPEALS NO 24 & 25/2014

ROHAN REID
DAMIAN WALKER v R

Leroy Equiano for both applicants

Miss Donnette Henriques, Ms Sasha-Ann Boot and Ms Kelly Hamilton for the Crown

24 July 2019 and 5 July 2021

F WILLIAMS JA

Introduction

[1] In these consolidated applications, the applicants seek this court's permission to appeal against their convictions in the Home Circuit Court on 19 February 2014, after trial by a judge and jury, for two counts of murder. They were sentenced on 21 March 2014 to imprisonment for life, with the periods to be served before eligibility for parole stipulated to be as follows: (i) Reid (indicated in the evidence to have been the "trigger man") – 30 years; and (ii) Walker (indicated in the evidence to have been the one who gave the instructions to Reid) – 35 years.

[2] These are in fact renewed applications, a single judge of this court having, on 6 June 2017, refused their applications for permission to appeal against conviction and sentence. On Mr Equiano's application, we granted permission for the applicants to abandon their original grounds of appeal and to replace them with the following supplemental grounds:

> "1. The Learned Trial Judge erred in allowing the case to go to the jury for the following reasons:
>
> a. The opportunity afforded to the identifying witness to make an Identification [sic] was very short and amounted to no more than a fleeting glance.
>
> b. The identification opportunity afforded to the witness was under very difficult circumstances.
>
> c. The surrounding circumstances under which the observation was made rendered the identification unsafe.
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> d. The witness first identified the Appellant in court and there was no justifiable reason for not holding an identification parade. [This ground was specific to the applicant Reid.]
>
> 2 The Learned Trial Judge having allowed the dock identification of Reid failed to give adequate and cogent direction on how to treat with this evidence.
>
> 3. The Learned Trial Judge having allowed the case to go to the Jury failed to assist them sufficiently with the identification evidence.
>
> 4. The identifying witness also purported to have identified the men by words spoken which would in effect corroborate her visual identification evidence. The Learned Trial Judge failed to give the jury any direction on how to treat with this evidence. [This ground was specific to the applicant Walker.]"

[3] It is apparent from these, the supplemental grounds, that the applications for permission to appeal against the sentences imposed were not pursued. Neither did Mr Equiano, at the hearing of the applications, seek to advance any arguments in respect of the sentences imposed on the applicants.

Summary of the background facts

[4] The prosecution's case against the applicants was that, around 2:30 am on 28 July 2007, they, Reid being armed with a handgun, entered the dwelling house occupied by the eyewitness, ('GR') then 11 years old and, at trial, 18 years of age, along with her seven-month-old infant sister and her mother. The applicants shot and killed GR's mother, whilst she held her infant daughter.

[5] GR testified that she was awakened by her mother and that she had heard banging sounds on the door. GR also stated that her stepfather had run through the back door and that she and her mother, along with her infant sister, hid under the bed in her room. Whilst hiding, she heard her stepfather talking briefly to the assailants on the zinc roof of their home, and then she heard explosions. She further stated that she then heard the men coming down from the roof.

[6] GR further gave evidence that the men then entered the house through a window and threw over the bed under which she and her mother (who held the infant) were hiding. On her evidence, the witness GR, at first, was not able to see the faces of the men but was only able to hear a voice and to see that one of the assailants (whom she later identified as the applicant Reid, or "Stone") wore a pair of blue and white sneakers. It was Bruno's voice, she testified, that she heard tell Stone to turn the light on in the room. It was also he who told Stone that her mother was not dead, after she had been shot initially, and Stone returned and shot her mother again to make sure that she was dead. It was when her mother was first shot and when she was shot again to ensure her death, that she was able to see the faces of the men, from her hiding place under the bed with her back propping up the bed base. The throwing over of the bed by the men enabled her to see. After the men she said were the applicants had left the house, she ran to her mother's room where she (holding her infant sister) hid under the bed until daylight came around 5:00 or 6:00 am. The police arrived shortly after.

[7] GR testified that she had known both applicants for some time: she stated that she had known the applicant Rohan Reid for about a year (page 19, line 21 of the

transcript); and that she had known the applicant Damian Walker, whom she knew as "Bruno", for around the same time (page 30, line 18). She gave three statements in the matter, the first having been given on the very morning of the incident. She testified that she did not, in her first statement, tell the police what had actually happened. The reason for that, she said, was:

> "I was afraid- I was afraid that they would come back for me and my families [sic]." (Page 70, lines 5-8).

Summary of the applicants' defences at trial

[8] Both applicants gave unsworn statements from the dock.

Rohan Reid

[9] The essence of Reid's statement was that he did not know GR or her stepfather. He also gave an address (McDonald Lane, Kingston 13) that was different from the one at which GR said he lived (Park Lane); and he further sought to contradict GR's testimony that his mother had a stall in the community, by saying that his mother did not sell at a stall.

Damian Walker

[10] This applicant also gave an address (Bunion Crescent, Kingston 20) outside the area in which GR said he lived (Park Lane). He also indicated that he did not know the witness and had not been in any problems with anyone.

The issues on appeal

[11] The various grounds of appeal can, it appears to us, be dealt with under the following issues:

> (i) Whether the identification evidence was of a sufficiently-good quality for the case to have been left to the jury; and formed a sound basis for a conviction, given the circumstances in which the identification was made.

(ii) Whether the learned trial judge, having allowed the case to go to the jury, gave them proper and sufficient directions in respect of the identification evidence. (Grounds 1a, 1b, 1c and 3)

(iii) Whether (a) a dock identification of the applicant Reid ought to have been permitted and; (b) the case having been allowed to go to the jury with the dock identification, whether the learned trial judge gave the jury sufficient directions as to how to treat with that type of identification. (Grounds 1 d and 2)

(iv) Whether the learned trial judge properly dealt with the issue of voice identification. (Ground 4)

Issue (i): whether the quality of the identification evidence permitted the learned trial judge to have left the case to jury

Issue (ii): whether the learned judge properly directed the jury on the identification evidence, the case having been left to them

Summary of submissions

For the applicants

[12] On behalf of the applicants, Mr Equiano submitted that the quality of the identification evidence was poor and there was a risk that the witness GR mistakenly thought she recognized the applicants. He reviewed the evidence of identification given by GR and said, in summary, that: in respect of the applicant, Reid, the only opportunity that GR had of identifying the person who wore the blue and white sneakers was "...whilst she was under the bed with the bed resting on her back, she being face down and shots being fired within a period of seven seconds" (paragraph 4.16 of the applicants' written submissions).

[13] Similarly, he submitted that: "Taking into consideration the time and the circumstances under which the witness purported to identify the appellant Walker [the identification] was no more than a fleeting glance made in very difficult circumstances" (paragraph 4.21 of the applicants' written submissions).

[14] The case ought not to have been left to the jury, Mr Equiano submitted. And even though it was, the learned trial judge, in the directions that he gave to the jury, did not meet the requirements of the case of **R v Turnbull** [1976] 3 All ER 549.

For the Crown

[15] It was submitted on behalf of the Crown, citing the case of **Dwayne Knight v R** [2017] JMCA Crim 3 and also **Herbert Brown and Mario McCallum v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 92 and 93/2006, judgment delivered 21 November 2008, at paragraph 35, that the learned trial judge did not err in leaving the case to the jury.

[16] The Crown submitted that, when all the evidence of GR against the applicants is taken together, the circumstances of the identification could not reasonably be viewed as a "fleeting glance". In fact, the quality of the identification evidence in this case, it was submitted, took this case out of the realm of those cases characterized by having such "a slender base" of identification evidence that they ought not, in all fairness, to be left to the jury.

[17] It was also submitted that there was other evidence in the form of the testimony of the investigating officer, that supported, in some respects, the evidence of GR. For example, the investigator stated that Reid admitted to him that he and GR's stepfather were friends and that he went by the name "Stone".

Discussion

[18] The starting point in respect of this issue is, of course, a brief review of the bases for the making of a successful no-case submission. What are the circumstances that might, on the one hand, properly lead a judge to leave a case to the jury; and, on the other, oblige a judge not to do so? The authority that is most often referred to in this area of the law and that is usually cited in the making of no-case submissions is that of **R v Galbraith** [1981] 2 All ER 1060. In that case it was opined by Lord Lane CJ at page 1062 as follows:

> "How then should the judge approach a submission of 'no case'? (1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case. (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence. (a) Where the judge comes to the conclusion that the Crown's evidence, taken at its highest, is such that a jury properly directed could not properly convict on it, it is his duty, on a submission being made, to stop the case. (b) Where however the Crown's evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence on which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury."

[19] Accordingly, the **R v Galbraith** principles behove a trial judge to withdraw a case from the jury's consideration where there is no evidence that the accused committed the offence, and, additionally, where the sum total of the evidence adduced is insufficient to allow a jury, properly directed, to find the accused guilty of the commission of the offence. However, the distinction here, as opined by Lord Lane CJ, is that there can be no successful reliance on the second limb based on the contention that the case is weak because of a lack of credibility of the witness, as that issue falls within the purview of the jury.

[20] Of course, where, as in this case, identification is the central issue or one of the primary issues to be considered, the guiding considerations are to be found in the case of **R v Turnbull** [1977] QB 224. There Lord Widgery CJ observed at page 228 as follows:

> "First, whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition, he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Provided this is done in clear terms the judge need not use any particular form of words. Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? If in any case, whether it is being dealt with summarily or on indictment, the prosecution have reason to believe that there is such a material discrepancy they should supply the accused or his legal advisers with particulars of the description the police were first given. In all cases if the accused asks to be given particulars of such descriptions, the prosecution should supply them. Finally, he should remind the jury of any specific weaknesses which had appeared in the identification evidence."

[21] Further, at page 229 of the report, he observed:

> "When, in the judgment of the trial judge, the quality of the identifying evidence is poor, as for example when it depends solely on a fleeting glance or on a longer observation made in difficult conditions, the situation is very different. The judge

> should then withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification."

[22] There are several cases in which guidance has been given on the interplay between the **R v Galbraith** principles and the **R v Turnbull** principles – that is, when the basis of the no-case submission is founded on the contended inadequacy of the identification evidence. One such case is that of **Wilbert Daley v R** (1993) 43 WIR 325. In that case, the Privy Council at page 334 made the following observation:

> "A reading of the judgment in **R v Galbraith** as a whole shows that the practice which the court was primarily concerned to proscribe was one whereby a judge who considered the prosecution evidence as unworthy of credit would make sure that the jury did not have an opportunity to give effect to a different opinion. By following this practice the judge was doing something which, as Lord Widgery CJ had put it, was not his job. By contrast, in the kind of identification case dealt with by **R v Turnbull** the case is withdrawn from the jury not because the judge considers that the witness is lying, but because the evidence even if taken to be honest has a base which is so slender that it is unreliable and therefore not sufficient to found a conviction: and indeed, as **R v Turnbull** itself emphasised, the fact that an honest witness may be mistaken on identification is a particular source of risk. When assessing the 'quality' of the evidence, under the Turnbull doctrine, the jury is protected from acting upon the type of evidence which, even if believed, experience has shown to be a possible source of injustice. Reading the two cases in this way, their lordships see no conflict between them."

[23] Thus, as demonstrated by the dicta quoted above, the principles enounced in **R v Galbraith** and **R v Turnbull**, when read together, ensure a balanced approach. The jury ought not to be given a case, based on evidence, which, even if given by an apparently-honest witness, provides an insufficient basis to ground a conviction. On the other hand, and equally importantly, a jury is allowed to deliberate on cases in which the resolution of issues of credibility will determine the view to be taken of the strength and/or weakness of the evidence.

[24] Similarly, in the case of **Larry Jones v R** (1995) 47 WIR 1 the Privy Council stated, in the headnote thereto, that:

> "Where the defence sought the dismissal of a charge on the ground that there was no case to answer as the essential identification evidence of the only witness was not sufficiently reliable to found a conviction, the trial judge was entitled to rule that the case should be left to the jury even though the circumstances relating to the identification were not ideal."

[25] Also of significance in explaining the judge's role in cases in which a challenge to identification evidence forms the basis of a no-case submission, Morrison JA (as he then was) observed as follows at paragraph 35 of **Herbert Brown and Mario McCallum v R**:

> "35. [The] critical factor on the no case submission in an identification case, where the real issue is whether in the circumstances the eyewitness had a proper opportunity to make a reliable identification of the accused is whether the material upon which the purported identification was based was sufficiently substantial to obviate the 'ghastly risk' (as Lord Widgery CJ put it in **R v Oakwell** [1978] 1 WLR 32, 36-37) of mistaken identification. If the quality of that evidence is poor (or the base too slender), then the case should be withdrawn from the jury (irrespective of whether the witness appears to be honest or not), but if the quality is good, it will ordinarily be within the usual function of the jury, in keeping with Galbraith, to sift and to deal with the range of issues which ordinarily go to the credibility of witnesses, including inconsistencies, discrepancies, any explanations proffered, and the like."

[26] These dicta point in the direction of a need to examine the identification evidence given in this case by GR against the background of the **R v Turnbull** guidelines, as follows:

Turnbull Guidelines	**Reid**	**Walker**
1. How long did the witness have the defendant under observation?	Six to seven seconds (page 16, line 15). And for additional seconds when he returned to the room.	About four seconds (page 29, line 14).
2. At what distance?	"About three hand away" ("hand" taken to be arm's length) (page 15, line 24).	About "two hand" (page 29, line 21).
3. In what light?	There was an electric light between her room and the "living hall" in a room measuring some 10x13 feet (page 17, line 6 to page 19, line 15).	The same as described in relation to Reid. From Bruno to the light was about "four hand" (page 39, lines 7 to 13).
4. Was the observation impeded in any way?	The witness said "no" but she was in hiding, under a bed that was resting on her back. Page 16, line 11 of the transcript.	The same as in respect of Reid. Page 29, lines 15 to 18 of the transcript.

5. (a) Had the witness seen the accused before?	Yes.	Yes.
(b) If yes, how often?	On Saturdays and Sundays for about a year and he would visit her stepfather at home. He was her father's friend; she had spoken with him and he lived next door to her step-father's shop. She knows members of his family. She last spoke with him two days before the incident. (Pages 21 to 26).	He and her father were, before they fell out, "very good friends" who would "hang out" together, drinking and smoking. She had spoken with him from time to time and last saw him the afternoon before the incident (or at least the Thursday before). There was also an incident between Bruno and her father in which they both drew knives, the Wednesday before the incident. (Page 30-37).
(c) If occasionally, any special reason for remembering him?	Not applicable. Or, if applicable, the answer to (b) would apply.	Not applicable. Or, if applicable, the answer to (b) would apply.

6. Time between original observation and subsequent identification to the police.	From 28 July 2007 to the trial in February 2014.	From 28 July 2007 to 18 October 2008 (some 15 months) at an identification parade. (Page 39, lines 16 to 19 of the transcript).
7. Any material discrepancy between description and actual appearance?	No.	No.

[27] Based on the evidence given by GR, and other evidence giving details of knowing the families of the two applicants, it could not fairly be said that the base of the identification evidence in this case was slender or its quality poor. Although several challenges were made in respect of her evidence, based on the inconsistencies and omissions in her testimony, these were matters that went to the witness' credibility and so were matters for the jury's consideration. In light of that, the learned trial judge could not fairly be said to have erred in leaving the case to the jury by rejecting the no-case submission. That aspect of the issue, therefore, fails.

[28] The other aspect of the applicants' challenge in relation to the identification evidence had to do with their contention that the learned trial judge's treatment of it and his directions to the jury were inadequate. We reject that contention for the reasons that follow.

[29] At page 314 of the transcript, the learned trial judge is clearly recorded as pointing out to the jury the very important nature of the identification evidence in the case on which they had to deliberate. He said (at lines 10 to 25):

> "Now, let me warn you again, how you are going to approach the matter of identification, because here we have it, madam

> foreman and your members, the opportunity for observation is very crucial and important." (Emphasis added)

[30] Even before that, at page 295, line 15 to page 296, line 7, the learned trial judge directed the jury as follows:

> "Now, madam foreman and your members, mistakes in recognition of close relatives and friends are sometimes made. So, you have to examine the circumstances very closely. There is the possibility, always the possibility of honest mistake. A mistaken witness can be a convincing one. And this is the reason why identification evidence – visual identification evidence has to be approached with a certain degree of caution. As I said before, you have to examine the circumstances of the identification. What are these circumstances of the identification?"

[31] At that juncture, the learned trial judge proceeded to review the evidence of the sole purported eyewitness, GR, and, in doing so, highlighted those matters that, according to the **R v Turnbull** guidelines, ought to be considered. So, for example, on page 299 of the transcript, the learned judge reviewed the witness' evidence as to lighting, distance and the period of time for which the witness said that she had known Reid or "Stone". Again, as one example, the learned judge reviewed GR's evidence in relation to what she said was her observation of Walker or "Bruno" at page 300, line 24 to page 301, line 7: the period of observation of four seconds; the distance and the circumstances in which she got the opportunity to see his face. This review continues at page 303 where he mentions GR's evidence concerning how long she had known Walker or "Bruno" and where she knew him from and other matters relating to his child's mother and so on.

[32] Included in the summation were examples of inconsistency (and hence a possible weakness) in GR's evidence. One example of this may be seen at page 340 lines 6 to 24 as follows:

> "Remember on a very important and crucial point which was raised in assessing her evidence, she said one thing in relation to the first statement and she gave an explanation why it is

> that she had not said the things which she said in the second statement, but this one important caveat and it is for you to decide, just a minute, it came under cross-examination by learned counsel for Walker, this is what she said after a number of suggestions and questions have been put to her. Question, when you said it was Bruno who said, she nuh dead, you were lying to the police, when you said that it was Stone who returned and said she nuh dead, were you lying to the police? She said, yes. Suggestion was put to her, there are many things you lied to the police about the incident in your second statement and she said yes."

[33] Thereafter, the leaned trial judge reviewed GR's testimony in re-examination and her eventual explanation for the different accounts as being due to the fact that she was afraid the men would come back to harm her family.

[34] The learned trial judge, near to the end of his summation, directed the jury as follows at page 341, lines 19 to 22:

> "So, it for you, madam foreman and your members, to decide whether or not young [GR] saw what she said she saw."

[35] That in essence was the jury's duty in this case, and, with what we consider to have been the comprehensive and detailed review of the identification evidence with the required warnings, it is apparent that the applicants' complaint in respect of issues (i) and (ii), (or grounds 1a, b and c and 3) has not been made out.

Issue (iii) – admissibility and treatment of the dock identification of Reid

[36] There is no dispute that no identification parade was held in respect of Reid, unlike in the case of Walker.

Summary of submissions

For the applicant Reid

[37] Mr Equiano submitted that, in a question-and-answer session with the applicant Reid, he had denied being known as "Stone". He further submitted that the matter of GR's purported knowledge of the applicant Reid was suspect. One example of this, he

argued, was that the evidence of Detective Sergeant Mark Foster that he had met Reid's mother at McDonald Lane, supported Reid's statement that he lived at that address; and ran counter to GR's testimony that Reid lived at Park Lane and that she knew his mother. The substance of his contention in relation to the failure to hold an identification parade; and what he argued were the learned trial judge's inadequate directions on that failure, are summarized in paragraphs 4.27, 4.28 and 5 of the applicants' written submissions as follows:

> "4.27 In the circumstances of this case an identification parade should have been held and the absent [sic] of an identification opportunity to test the witness knowledge of the person she referred to as Stone deprived the Appellant of a fair trial. There was no other evidence supporting the identification evidence of [GR].
>
> 4.28 For the reasons outlined above, the Learned Trial Judg[e] …erred in not upholding the submission of no case to answer made on behalf of the Appellants…
>
> 5….
>
> The Learned Trial Judge having allowed the dock identification of Reid failed to give adequate and cogent direction on how to treat with this evidence."

[38] In support of these submissions, Mr Equiano relied on the cases of **Terrell Neilly v The Queen** [2012] UKPC 12 and **Jason Lawrence v The Queen** [2014] UKPC 2.

[39] Mr Equiano further submitted that, although a limited warning on dock identification was given by the learned trial judge, that warning was totally negated on examination of a passage in the summation which wrongly gave the jury the impression that it was a fact that the applicant Reid was known to the witness. That, he submitted, was not the case. Two such examples, Mr Equiano submitted, are to be seen at page 319, lines 2 to 5; and page 321, line 8 to 19 as follows, respectively:

> "That would have been the case if it were accepted or incapable of serious dispute that the accused was known to the – [GR] before."

> "Having given you the warning, Madam Foreman and your members, it is open to you to say in the circumstances of this case, the fact that the accused was known, Reid that is, was known to [GR] before and that it would have served no useful purpose had a parade been held for her to attend on that parade to say this is Rohan Reid, then the Defence would have said, 'Ha, she has come to point out some one she had known before' So, that is how you are going to deal with dock identification."

For the Crown

[40] For its part, the Crown, relied on the case of **Max Tido v The Queen** [2011] UKPC 16, and submitted that the identification evidence led at trial was sufficient for the trial judge to have permitted the dock identification, which was a decision that fell within his discretion. The quality of the identification evidence, it was argued, obviated the risk in having the witness identify the applicant Reid in the dock.

[41] It was further submitted that the learned trial judge adequately discharged the duty that was imposed on him by the authorities in relation to dock identification. Specifically, it was pointed out, he dealt with: (i) the undesirability of a dock identification; (ii) the purpose of holding an identification parade; (iii) the benefits to a defendant of the holding of an identification parade; and (iv) the reason for the fact that no parade was held for the applicant Reid in this case. It is significant, it was argued, that the learned trial judge did not direct the jury to find as a fact that Reid was known to GR, instead, he said: "…it is open to you to say…". What the learned trial judge was doing in directing the jury in that way, it was argued, was leaving that issue for their determination.

Discussion

[42] In the case of **Jason Lawrence v The Queen**, the Board, after referring to several cases that were previously decided by it, made a number of observations in relation to the admissibility and treatment of dock identification at paragraph 9 of its advice:

> "9. In several cases this Board has held that judges should warn the jury of the undesirability in principle and dangers of a dock identification: *Aurelio Pop v The Queen* [2003] UKPC 40; *Holland v H M Advocate* [2005] UKPC D1, 2005 SC (PC) 1; *Pipersburgh and Another v The Queen* [2008] UKPC 11; *Tido v The Queen* [2012] 1 WLR 115; and *Neilly v The Queen* [2012] UKPC 12. Where there has been no identification parade, dock identification is not in itself inadmissible evidence; there may be reasons why there was no identification parade, which the court can consider when deciding whether to admit the dock identification. But, if the evidence is admitted, the judge must warn the jury to approach such identification with great care. In *Tido v the Queen* Lord Kerr, in delivering the judgment of the Board, stated (at para 21):
>
> > '…Where it is decided that the evidence [i.e. the dock identification] may be admitted, it will always be necessary to give the jury careful directions as to the dangers of relying on that evidence and in particular to warn them of the disadvantages to the accused of having been denied the opportunity of participating in an identification parade, if indeed he has been deprived of that opportunity. In such circumstances the judge should draw directly to the attention of the jury that the possibility of an inconclusive result to an identification parade, if it had materialised, could have been deployed on the accused's behalf to cast doubt on the accuracy of any subsequent identification. The jury should also be reminded of the obvious danger that a defendant occupying the dock might automatically be assumed by even a well-intentioned eye-witness to be the person who had committed the crime with which he or she was charged'."

[43] One of the first observations that must be made in this discussion is that a dock identification is not of itself automatically inadmissible (see **Max Tido v R**, at paragraph 17). In exercising its discretion whether to admit such identification, the court is required to consider whether there was any reason for the fact that no parade was held. It will be recalled that there was such a reason in this case. This can be seen at page 234, line 21 to page 235, line 9 of the transcript as follows in the examination-in-chief of Det Sgt Foster:

"Q. Did you take any steps for an identification parade in respect of Mr. Reid?

A. Yes, madam.

Q. What steps did you take, sir?

A. I contacted persons from the Witness Protection Unit.

Q. Yes?

A. In respect of Miss [GR].

Q. Yes. Did you as a result of that, contact, convened a parade in respect of Mr. Reid?

A. No m'lady. I was told that…

Q. You can't say what you were told; but you did not convene a parade?

A. No, m'lady I could not."

[44] Further, at page 251, line 16 to page 252, line 5, the following exchange took place:

"HIS LORDSHIP: One other question for you and then I am through. You said that you had made contact with the persons from the Witness Protection Unit in respect of the witness, [GR]?

THE WITNESS: Yes, m'Lord.

HIS LORDSHIP: Was she made available to you for the purpose of an I.D. parade?

THE WITNESS: No, m'Lord.

HIS LORDSHIP: Anything arising from that counsel?

MRS. MILLWOOD-MOORE: No, m'Lord, nothing arising from that.

HIS LORDSHIP: Defence counsel?

MR. ARMSTRONG: No, m'Lord.

MR. FABIAN CAMPBELL: No, m'Lord."

[45] The unavailability of the witness, GR, to attend an identification parade, despite the efforts of Det Sgt Foster, was a factor which the learned judge could have considered in permitting the dock identification. Det Sgt Foster gave further evidence of informing the applicant, Reid's attorney-at-law of his intention to put Reid on an identification parade; and, to that end, taking steps to have his face covered from public view. A reading of the transcript also discloses that no challenge was raised to the making of the dock identification at the time that it was done; and the evidence concerning GR's not being made available was not explored.

[46] Additionally, a review of the relevant section of the transcript shows that the learned trial judge did give directions in keeping with the guidance contained in such cases as **Terrell Neilly v R** and **Jason Lawrence v The Queen**. For example, in respect of the requirement that a judge warn the jury of dangers of relying on that evidence and of the purpose of an identification parade and its benefits, page 319, line 10 to page 321, line 7 of the transcript reveal that the learned trial judge said as follows:

> "The normal and proper practice was to have held an I.D. parade. One of the dangers, Madam Foreman and your members, of dock identification, is that he would have been deprived of the potential advantage of an inconclusive parade. That kind of evidence, Madam Foreman and your members, is undesirable in principle and as such, you are required to approach that dock identification with caution.
>
> Identification parades, Madam Foreman and your members, offer safeguards which are not available in which the witnesses are asked to identify the accused in the dock at each trial. An identification parade, Madam Foreman and your members, is usually held much nearer to the time of the offence when the witness' recollection is fresher by placing the accused among a number of standings of generals [sic], similar appearance, provides a check on the accuracy of the witness's identification by reducing the risk that the witness is simply picking out someone who resembles the perpetrator.

> The positive disadvantages [sic] of an identification parade carried out when the accused is sitting in the dock is this. The implication is that the Prosecution is asserting that he is the perpetrator. That is plain. When a witness is invited to identify the perpetrator in court, there must be a considerable risk that his evidence would be influenced by seeing the accused sitting in the dock.
>
> So, Madam Foreman and your members, a dock identification is deficient in two ways: It lacks the safeguards that are offered by identification parade and the accused position in the dock positively increases the risk of a wrong identification. So, that takes me back to where I had started with respect to identification parades.
>
> The purpose of an identification parade is to test the ability of the witness to recognize the suspect on the parade. To which end, every precaution should be taken to exclude any suspicion of unfairness or risk of the witness knowing beforehand the identity of the suspect on the parade."

[47] It should be clear from these extensive directions that the learned trial judge addressed all the matters that he is required to address according to cases such as **Terrell Neilly v R** and other similar cases; and so the applicants' complaint as to the inadequacy of those directions are without merit.

[48] It was after these extensive directions that the learned judge mentioned the words the applicants complain of – to wit, "the fact that the accused was known…" in relation to the applicant Reid. We think that it is unfortunate that the learned trial judge expressed himself that way. However, there are several other matters to note, rather than look at this statement in isolation. For one, in relation to Reid, the learned trial judge, at another part of the summation, when reviewing the unsworn statements of the men, mentioned their denial that they knew GR, stating, immediately after reviewing Walker's unsworn statement, in a case based on joint enterprise, that: "…he is taking issue with the identification of [GR]". Additionally, however, apart from the applicants stating in their unsworn statements that they did not know GR, they left unchallenged specific and pointed bits of evidence through which GR sought to show that she in fact knew them.

For example, in cross-examination, the thrust of the suggestions made was to the effect that GR did not see the men in her home on the night in question, not that she did not know them at all. Neither did the applicant Reid deny (as GR testified) that he has a son named "Jaheem" or that she knew his "baby mother".

[49] Further, in spite of the denial by Reid that he was known as "Stone", there is the evidence of Det Sgt Foster at page 241, lines 14 to 15 that: "I knew Mr. Rohan Reid before and I know him as 'Stone'". Also, there is his further testimony at page 228, lines 21 to 24 as follows: "I cautioned him. When cautioned he said, 'Me and Jah Don ah friend.' I also asked him if he was called 'Stone' and he responded, 'People call mi Stone'". Yet further, on pages 233, line 24 to page 234, line 1, he testified as follows about his conversation with Miss Elaine Hines, mother of the applicant Reid:

> "She also, whilst interviewing her, she pointed out a young man, a little boy to me whose name was Jaheem."

[50] No suggestion was put to him that that was not so. That, therefore, if accepted by the jury, would be confirmatory of the evidence of GR that Reid had a son named Jaheim.

[51] Elsewhere in the transcript, at page 314, lines 14 to 25, the learned trial judge directed the jury as follows:

> "Let me tell you now, the case against Rohan Reid rest wholly on the correctness of the identification of him by [GR], which the defendant says is mistaken or is false. Because you must also remember that in counsel's summation to you – address to you, there was the suggestion of concoction. In other words, it's a made up story. You are going to have to determine whether or not [GR] said the things she claimed she saw."

[52] It appears to us that, although the learned trial judge's summation was not as organised and coherent as one would have liked, he adequately addressed all the issues that arose and presented the applicants' case fairly to the jury. In these circumstances, the applicants have failed to make out this issue.

Issue (iv): the learned trial judge's treatment of voice identification

Summary of submissions

For the applicants

[53] On the applicants' behalf, Mr Equiano argued that, in light of the fact that some of GR's testimony based her identification of Walker or "Bruno" on her familiarity with his voice, the learned trial judge ought to have given, but failed to do so, directions on voice identification. Those directions should have been given along the lines of a **Turnbull** direction, he submitted, citing the case of **R v Hersey** [1998] Crim LR 281.

For the Crown

[54] For the Crown, it was conceded that the learned trial judge ought to have given, in relation to the voice identification of Walker, directions in accordance with **Turnbull v R**. The case of **Donald Phipps v The Director of Public Prosecutions and the Attorney General of Jamaica** [2012] UKPC 24 was also cited in support of this concession. However, it was submitted that this failure to treat with the issue, did not render unsafe the conviction of the applicant Walker, as there was sufficient visual identification evidence and adequate directions from the learned trial judge so as not to render the conviction unsafe.

Discussion

[55] The importance of proper directions to a jury on the issue of voice identification was discussed at paragraph 27 of **Donald Phipps v The DPP and another**, where the Board observed as follows:

> "There is no doubt as to the importance of the guidance in *Turnbull* nor as to its application in principle to identification by voice recognition."

[56] That, as we know it, is the law. The Crown was therefore correct in conceding Mr Equiano's accurate submission on the learned trial judge's omission on this area of the

evidence. The omission is unfortunate, as the learned trial judge had indicated his intention to deal with the matter, as can be seen at paragraph 295, lines 1 to 5, as follows:

> "Let me tell you from straight off the bat, that a number of issues are going to arise, in respect of visual identification which I have already said to you and voice identification."

[57] He, unfortunately, omitted to return to it as he had indicated. In our view, however, that omission is not fatal to the Crown's case, as we accept the submission of the Crown that there is enough visual identification evidence and adequate directions on the main issues to form the basis of a sound conviction. Even if we are wrong in this regard, this, it seems to us, would be a fit and proper case in which to apply the proviso to section 14 of the Judicature (Appellate Jurisdiction) Act and hold that there has been no substantial miscarriage of justice, as the jury, had they been properly directed, would inevitably have reached the same conclusion. The applicants, therefore, also fail on this issue.

[58] In the result, we would refuse the applicants' application for permission to appeal; affirm the convictions and sentences and confirm that the sentences are to be reckoned as having commenced on 21 March 2014.

[59] The order of the court is therefore as follows:

(i) The applications for permission to appeal are refused.

(ii) The convictions and sentences are affirmed.

(iii) The sentences are to be reckoned as having commenced on 21 March 2014.