JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE BROOKS P
THE HON MISS JUSTICE SIMMONS JA
THE HON MR JUSTICE BROWN JA

SUPREME COURT CRIMINAL APPEAL NOS 89 & 90/2019

SHANE RIDGE AND ANDREW ROWE v R

Mr Kemar Robinson for the applicants

Miss Paula Llewellyn KC, Director of Public Prosecutions, and Mr Paulio Williams for the Crown

8, 9 May 2023 and 31 May 2024

Criminal Law – No case submission - Identification evidence – Trial judge's duty when summing up to the Jury based on the Turnbull guidelines – Dying declaration – Applicability of the Turnbull guidelines to dying declaration – Trial judge's duty in summation in relation to statements admitted into evidence pursuant to the Evidence Act

BROWN JA

[1] The applicants were convicted on 17 July 2019 for the murder of Kevone Somers, alias "Reagan" ('the deceased'), after a trial lasting five days, before Lawrence-Beswick J ('the learned judge'), sitting with a jury, in the Home Circuit Court, in the parish of Kingston. On 26 September 2019, the learned judge sentenced both applicants to life imprisonment. The applicant, Mr Shane Ridge, also called "Cha Cha", was ordered to serve 20 years' imprisonment before becoming eligible for parole. The applicant, Mr Andrew Rowe, also known as "Arthur", was ordered to serve 17 years' imprisonment before parole eligibility.

[2] Each applicant filed a separate Criminal Form B1, but similarly dated 10 October 2019, seeking permission to appeal his conviction and sentence. The applicants listed two

identical grounds of appeal in their Criminal Form B1, namely, (a) the conviction is not supported by the evidence or the evidence does not support a verdict of guilty; (b) the no-case submission should have been upheld. Their applications were considered and refused by a single judge of this court on 11 February 2022. The applicants are, therefore, exercising their right to renew their applications for permission to appeal before the court.

Background

[3] To provide context to the legal submissions and analysis which follow, it is prudent to set out a short background of the events from which the charge arose. The sole eyewitness for the prosecution was Marcia McKenzie ('Miss McKenzie'). Miss McKenzie died before the trial. Therefore, her statement to the police was read into evidence under the relevant provision of the Evidence Act (section 31D (a)). That statement revealed the following. Miss McKenzie lived at Phase 2 in the town of Old Harbour, in the parish of Saint Catherine, since the year 2005. This area was described as a squatter or informal community; there were no street addresses or public utilities such as street lights and piped water. Through residing in that area, Miss McKenzie came to know the deceased, whom she called Reagan. They used to be very good and close friends. The same residential circumstance also made "Cha Cha" and "Arthur" known to Miss McKenzie. Miss McKenzie only knew the applicants by their aliases but gave details of their family connections and places of abode.

[4] And so it was that on Thursday 9 April 2019, at about 7:00 pm, Miss McKenzie walked from her home to a shop on Smith Avenue, in Old Harbour. On the way to the shop, Miss McKenzie passed a playing field ('the playing field'). On her way back home, Miss McKenzie saw the deceased walking towards Phase 2, ahead of her. The deceased was dressed in a white merino, jeans pants and black shoes. He had a lighter and a cigar in his hand. She was then about five yards behind him. Reaching about 50 metres from the playing field, Miss McKenzie observed two men seated close to each other on two stones. One of the men had on a hoodie and the other a multi-coloured pair of shorts. The men appeared to be speaking to each other.

[5] The deceased reached near to the men. As he did so, the man wearing the hoodie, whom she identified as "Arthur", got up, walked towards the deceased and said, "pussy hole a long time mi waan kill yuh". "Arthur" pointed a firearm at the deceased and Miss McKenzie heard a loud explosion, accompanied by the emission of smoke and fire from the firearm. The deceased turned and ran in the direction from which he was coming. The applicants chased the deceased.

[6] Seeing this, Miss McKenzie became frightened and was set to flight. She jumped across a canal and ran into a yard. While she was in the yard, Miss McKenzie heard several more gunshots. In her state of fright and flight, Miss McKenzie thought that she too had been shot. Returning to Smith Avenue shortly after, Miss McKenzie, upon investigating, found the deceased lying on a road in the vicinity of the playing field, groaning and bleeding.

[7] That was essentially the position in which the sister of the deceased, Jody-Ann Somers ('Miss Somers') came to find him shortly after. Miss Somers and her older sister were at home in Phase 2, where the deceased also resided, when she heard the sound of the gunshots. Not long after, a female visited the home and spoke to the older sister in the presence of Miss Somers. Whatever was said, led Miss Somers to leave immediately for the playing field.

[8] Not long after, other relatives of the deceased and Miss Somers, also arrived at the playing field. Two of those relatives were their uncles. One of the uncles, Frederick Anderson, arrived in his motor car. The deceased was placed in the back of the motor car where the other uncle and Miss Somers were passengers. The legs of the deceased were across the lap of the unnamed uncle, while the head of the deceased rested against Miss Somers' chest.

[9] They were heading to the Spanish Town Hospital. The deceased appeared to be frightened and was bleeding profusely as blood ran from a bullet wound in his head onto Miss Somers' chest. In this physical state, the deceased said to Miss Somers, "tell mommy

say a 'Cha Cha' and 'Arthur' kill me". After that his breathing calmed, then there was silence. Miss Somers knew both applicants for several years before the night of this incident, by their respective aliases.

[10] Mr Shane Ridge was known to Miss Somers as "Cha Cha". She had known him for over eight years. According to Miss Somers, Mr Shane Ridge hailed from Sharpers Lane, near the playing field. He had three sisters, Sandra, Twitty and Sasha. Like the other civilian witnesses, Miss Somers said Mr Shane Ridge's mother was a fry fish vendor at Mango Ground, who was known as Blossom. Before the year 2009, Mr Shane Ridge and the deceased were friends. Miss Somers had seen them together in excess of five times. The last time Miss Somers saw them together (in 2009) they were arguing, in the vicinity of the playing field.

[11] Miss Somers knew Mr Andrew Rowe as "Arthur" for about five years and that he resided on Smith Avenue, about 20 minutes' walk from her dwelling. He was someone she had spoken to a few times at the playing field at Smith Avenue, and she knew him to be a mechanic.

[12] Miss Somers testified that she had previously seen Mr Shane Ridge and Mr Andrew Rowe standing and talking together at Mr Rowe's gate.

[13] As in the case of Miss McKenzie, the statement of the investigator, Corporal Dennis Davis ('Cpl Davis') dated 21 April 2009, was read into the record, consequent upon his retirement from the Jamaica Constabulary Force before the trial. The following was gleaned from his statement. On Tuesday 14 April 2009 Cpl Davis prepared two warrants on information for the arrest of the applicants. On Monday 20 April 2009, Cpl Davis executed one of the warrants on the applicant Mr Shane Ridge, and cautioned him. Mr Shane Ridge denied knowing anything about the killing of the deceased when Cpl Davis cautioned him.

(i) The identification evidence

[14] Miss McKenzie described Mr Shane Ridge as of dark complexion, short, medium built, about 24 years of age, and sporting a very low-cut hairstyle. He resided near the highway, close to the hatchery. Miss McKenzie knew Mr Shane Ridge to be a footballer and was of the opinion that he was a good player. She knew his mother as Miss Blossom who sold fish at Mango Ground in Old Harbour. His father was known to her as Mass Gillie. Miss McKenzie also professed to know Mr Shane Ridge's two sisters, Sasha and Tweetie. Miss McKenzie said in her statement that Mr Shane Ridge, his parents and siblings all lived together. Miss McKenzie had known Mr Shane Ridge since she went to live in Phase 2, in 2005 (about four years). It was her statement that she used to speak to Mr Shane Ridge a lot.

[15] The evidence that the applicants went by these aliases was also received from Rod Langott, a district constable ('D/C Langott') who had served all his 12 years and seven months in the auxiliary of the Jamaica Constabulary Force at the Old Harbour Police Station. Through his participation in community policing, D/C Langott came to know both applicants. He knew Mr Shane Ridge for over 10 years and that he was otherwise called "Cha Cha". D/C Langott confirmed Miss McKenzie's statement that Mr Shane Ridge's mother was known as Blossom and was a fish vendor at West Street, Old Harbour, an area better known as Mango Ground. D/C Langot added that Blossom had died by the time he testified.

[16] On the night of the incident, Mr Shane Ridge was dressed in a multi-coloured pair of shorts. Miss McKenzie said she saw Mr Shane Ridge's face when the deceased was approaching him and Mr Andrew Rowe.

[17] In detailing her knowledge of Mr Andrew Rowe, Miss McKenzie said he was a mechanic by trade. She also said Mr Andrew Rowe lived on Smith Avenue and was the son of a Rastafarian, whose name she did not know. She described Mr Andrew Rowe as of slim built, taller than Mr Shane Ridge, of black complexion, was about 30 years of age and wore a very low-cut hairstyle. She had known him for approximately three years up

to the time of giving her statement. According to her, she also knew Mr Andrew Rowe's voice, gait and general appearance.

[18] D/C Langott also confirmed Miss McKenzie's evidence that Mr Andrew Rowe was also known as "Arthur", that he worked as a mechanic and lived on Smith Avenue. D/C Langott had known Mr Andrew Rowe for over 10 years.

[19] On the night of the incident, Miss McKenzie said Mr Andrew Rowe was dressed in a black hoodie.

[20] Generally, Miss McKenzie said there was no fence or anything preventing her from seeing what was happening. Further, she said there was light from a nearby shop.

(2) The evidence of the scenes of crime witness

[21] Detective Corporal Claudia Miller-Hunter ('Det Cpl Miller-Hunter') and her team from the Area 5 Scenes of Crime office visited Smith Avenue sometime after midnight on 9 April 2009. She observed that this was an informal community. The general area was not brightly lit. Under cross-examination Det Cpl Miller-Hunter accepted that in her statement she assessed the lighting as poorly lit and that there were no street lights in the general area. There was what resembled bloodstains on an area, variously described as a dirt track and a roadway. She recalled that there were structures (houses) in the vicinity of this substance, about 30 feet away, that had electric light on the outside. During cross-examination, Det Cpl Miller-Hunter said the structure with light on it was over 50 feet away from this area with the 'bloodstains'. There was also another structure with light over 100 feet away from the stone with what appeared to be a bloodstain. Yet another structure with light was further away, estimated at over 200 feet.

[22] Asked about the playing field, Det Cpl Miller-Hunter described a large open field bordered by large stones, close to the area of the roadway with the substance resembling bloodstains. In the area of the substance resembling bloodstains an expended bullet was found.

[23] Det Cpl Miller-Hunter photographed the expended bullet and the general area. These were later burnt onto a compact disc ('CD'), which was admitted into evidence as exhibit four. Image number six showed the playing field with the border of large stones. In the background of this image were structures with electric lighting on the outside. Image number nine showed a section of the playing field and roadway, as well as structures with electric lighting on their exterior. Image number 15 was of a plastic pouch with either a burnt cigar or cigarette, Det Cpl Miller-Hunter could not be sure which.

[24] Asked to view image number 20 from the CD, the roadway in the vicinity of the playing field near the stones, Det Cpl Miller-Hunter said that area beyond the roadway would be darker without the light from the flash from her camera. She refused to say it was "pitch dark" as was put to her. In her estimation it was dark. Similarly, she described the other side of this image which showed poles as dark, with the light from her camera's flash.

(3) The evidence of the pathologist

[25] Consultant forensic pathologist Dr S N Prasad Kadiyala ('Dr Kadiyala') performed the post-mortem examination on the body of the deceased. His examination revealed three entrance gunshot wounds, with corresponding exit wounds on the body: (a) an entrance gunshot wound, without gunpowder deposits, at the left occipital (back) region of the head with a corresponding exit wound on right of the neck below the right mandible, having travelled through the brain; (b) entrance gunshot wound at the upper right anterior chest, just below the clavicle, without gunpowder deposits, passing through major organs such as the right lung, liver and bowels before exiting at the right upper posterior abdomen; (c) entrance gunshot wound on the right mid-posterior thigh, without gunpowder deposits, travelling through the underlying tissues and muscles then exiting on the posterior-lateral aspect mid-thigh. The pathologist opined that the absence of gunpowder deposits at the site of the entrance wounds indicated that the distance of the end of the muzzle from the victim, at the time of the bullet's impact, was greater than 2 feet.

[26] Dr Kadiyala determined the cause of the deceased's death to be multiple gunshot wounds. He opined that each injury could have resulted in death. However, it was possible, though not definite, for death to have occurred within 15 minutes from injury (a), the head of the deceased. On the other hand, it was unlikely for death to have occurred within a similar timeline from injury (b), the chest.

[27] In Dr Kadiyala's opinion, injury (a) would determine the lapse of time before the deceased fell into a coma. He agreed that it was possible for someone who sustained the injuries observed on the deceased to have been able to communicate for some time after the injuries were inflicted.

The defence

[28] Mr Shane Ridge gave an unsworn statement and called no witness. According to him, on the night of the murder he was at a fish fry in Gutters. The fish fry started at 6:00 pm and he did not leave there until about 11:00 pm. It was after his return to the community that night that he heard of the death of the deceased. From the information he received, the death of the deceased was attributed to a man from Patrick Street. He spoke of ongoing violence between some residents from Patrick Street, Smith Avenue, Phase 2 and others in the general area.

[29] Mr Andrew Rowe also gave an unsworn statement. He too spoke of rivalry between the residents of Patrick Street, Smith Avenue and Phase 2. On the night of the murder he was with his child's mother and, accordingly, knew nothing about the murder. He did not call any witness.

The no case submissions and the prosecution's reply

(a) <u>Submissions on behalf of Shane Ridge</u>

[30] Learned counsel appearing below for Mr Shane Ridge submitted that there was no case to answer on two limbs, identification and dying declaration. Taking first the former, it was submitted that the critical factor for the court in considering the submission of no case to answer was whether the identification evidence had a sufficiently substantial base

to obviate the ghastly risk of mistaken identification. For that proposition **R v Oakwell** [1978] 1 WLR 32, was cited.

[31] Thereafter learned counsel sought to impugn the quality of the sole eyewitness, Miss McKenzie. In his assessment, the opportunities Miss McKenzie had to make a proper identification of Mr Shane Ridge were "fragile". That "fragility" was exacerbated by the difficult and terrifying circumstances in which Miss McKenzie purported to make the identification. Underlining his point, it was submitted that the area was dark. Specifically, the area with the substance resembling blood had no lighting, the nearest housing structure with lighting being 200 feet away. Consequently, counsel argued, there was no substantial evidential basis upon which the identification could be said to be correct. Therefore, he urged the court to withdraw the case from the jury. Counsel went on to expend much energy in dissecting the evidence about the lighting, Miss McKenzie's assertion that nothing obstructed her view and the distance from which the identification was made.

[32] Turning his attention to the second plank of the no case submission, counsel advanced that under the second limb of **R v Galbraith** [1981] 1 WLR 1039 there was no evidence to connect Mr Shane Ridge to the person referred to as "Cha Cha". Counsel submitted that the deceased's use of that alias was "limiting and vague". The prosecution's case did not reveal a sufficient description of this "Cha Cha" and consequently required something more to create a "positive nexus to the accused as "Cha Cha" and the "Cha Cha" the deceased was referring to". To that end, counsel contrasted **Neville Nembhard v R** [1982] 1 All ER 183; [1981] 1 WLR 1515 ('**Nemhard v R**'), in which the deceased gave more details of his assailant than a name.

(b) Submissions on behalf of Mr Andrew Rowe

[33] Counsel for Mr Andrew Rowe adopted the submissions made by counsel for Mr Shane Ridge. He went on, however, to challenge Miss McKenzie's evidence of recognition of Mr Andrew Rowe. He submitted that there was no evidence that she ever spoke to Mr Andrew Rowe, how many times she had seen him before and if she had, where and under

what circumstances. In counsel's submission, the lynchpin was Miss McKenzie's absence from court to facilitate a dock identification of Mr Andrew Rowe as the "Arthur" she referred to. Miss McKenzie's absence meant that there was "absolutely no evidence" that "Arthur" and Mr Andrew Rowe were one and the same person. Counsel pressed on, along this line, the fact that Mr Andrew Rowe did not disavow the alias "Arthur", did not relieve the prosecution of its burden to adduce evidence connecting the alias with Mr Andrew Rowe and not some other person the witness called "Arthur".

[34] Miss McKenzie's purported identification of Mr Andrew Rowe was frontally challenged. In counsel's submission, that Miss McKenzie said she knew it was "Arthur" because she knew his "voice … walking and general appearance", made it evident that she never saw the person's face. Furthermore, there could be no reliance on voice identification as it lacked the necessary foundation such as whether she had heard him speak before, and if so, how many times.

[35] Turning to the conditions affecting the visual identification, counsel spoke to the poor quality of the light and said the deceased would have been similarly affected as Miss McKenzie was. He echoed counsel for Mr Shane Ridge that the conditions under which the identification took place were very difficult, if not impossible. He went on to point out the discrepancy between Miss McKenzie's evidence and that of Det Cpl Miller-Hunter concerning the location of the light. He submitted that the gaps in Miss McKenzie's evidence on matters such as the duration of her observation and the angle from which it was made, would leave the jury to speculate. All those matters rendered the identification evidence not just inadequate, but wholly unreliable.

[36] Submitting more pointedly on the dying declaration, counsel characterized it as extremely tenuous. Coming in for emphasis was the sparsity of detailed particulars of the deceased's assailants beyond their sobriquets. Counsel charged that there was no evidence that Mr Andrew Rowe was actually known to the deceased, and the extent of that knowledge, sufficient to support the deceased purported recognition. That void in the evidence, according to counsel, would lead the jury to speculate, not only about

whether Mr Andrew Rowe was known to the deceased, but also if the "Arthur" the deceased spoke of is Mr Andrew Rowe. The lack of personal details from the deceased was contrasted with the facts in the **Dalton Reid v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 65/2006, judgment delivered 21 November 2008, **Ziggy Mills v R** [2018] JMCA Crim 35 and **Nembhard v R**. Counsel concluded that on the totality of the identification evidence Mr Andrew Rowe should not be called upon to answer the charge.

(c) The prosecution's reply to the no case submissions

[37] Relying on **Larry Jones v R** (1995) 47 WIR 1 and **Separue Lee v R** [2014] JMCA Crim 12, learned counsel for the prosecution submitted that even if the identification evidence was not ideal, that was no reason to withdraw the case from the jury. That proposition telegraphed the prosecution's concession that the circumstances in which the identification was made in this case were "far from ideal". That notwithstanding, it was argued, it did not mean that there was not sufficient evidence for the case to be left to the jury.

[38] In particular, in relation to the quality of light, counsel for the prosecution drew the distinction between the time Miss McKenzie made her observation (after 7:00 pm) and when Det Cpl Miller-Hunter visited the scene and made her assessment of the available lighting conditions (after midnight). In this submission, 7:00 pm would have been closer to nightfall than midnight. Hence, Det Cpl Miller-Hunter's description of "poorly lit" was understandable. In that vein, it was highlighted that Miss McKenzie was able to see the deceased and the two persons who were seated on the stones, from an initial distance of 50 feet away. At the material time Miss McKenzie was walking five yards behind the deceased. Therefore, counsel argued, it stood to reason that the deceased was closer to the men and would have been able to see what she saw.

[39] In respect of the nexus between the aliases and the Messrs Shane Ridge and Andrew Rowe, counsel for the Crown rehearsed the evidence of the witnesses who

identified them as such (Miss McKenzie, Miss Somers and D/C Langott), and submitted that all that evidence was adduced and allowed to stand without challenge.

[40] In response to the submissions concerning the dying declaration, counsel for the prosecution sought to distinguish the cases cited by the defence, particularly **Ziggy Mills v R**, in which particulars of the perpetrator were given by the deceased. The gap in details in the instant case was capable of being filled by the evidence of Miss McKenzie, in spite of its weaknesses, counsel argued. From Miss McKenzie's description, the deceased was face-to-face with his attackers before he turned and ran in the opposite direction, counsel posited. That said, **Ziggy Mills v R** was relied on for the directions a trial judge should give in a case involving a dying declaration.

(d) Ruling on submissions of no case to answer

[41] The rather lengthy submissions of no case to answer and the equally lengthy reply were met with the pithy response from the learned judge that a *prima facie* case had been established and both Mr Shane Ridge and Mr Andrew Rowe were called upon to answer.

The appeal

[42] When the hearing of the appeal commenced, Mr Robinson, appearing for both applicants, sought and obtained the leave of the court to abandon the original grounds of appeal that were filed with the applicants' Criminal Form B1. In their stead, learned counsel wished to argue the supplemental grounds of appeal, filed with his written submissions. The court granted Mr Robinson permission to argue the supplemental grounds of appeal.

[43] Five grounds of appeal were argued on behalf of both applicants. The grounds are replicated below:

> "i. The Learned Trial [Judge] erred by not upholding the no case submission made on behalf of the applicants at the close of prosecution's the case.

ii. The Learned Trial Judge failed to adequately warn the jury on the dangers of convicting the applicants on the identification evidence in circumstances where the prosecution's case relied wholly on the correctness of the identification evidence which the applicants asserts [sic] to be mistaken identifications.

iii. The Learned trial judge failed to adequately direct the jury to examine closely the circumstances under which the identification was made in assessing whether the identification was good resulting in a substantial miscarriage of justice.

iv. The Learned Trial Judge erred by failing to assist the jury with the application of the Turnbull guidelines to the dying declaration of the deceased and adequately directing them of the severe disadvantages that the applicants faced as a result of not only the deceased not being cross-examined, but also an eye-witness [sic].

v. The Learned Trial judge's summation was unbalanced and unfair to the applicants in many regards rendering the trial unfair."

Ground one: The Learned Trial [judge] erred by not upholding the no case submission made on behalf of both applicants at the close of the prosecution's case.

Submissions

[44] Mr Robinson prefaced his submissions with this general statement. The applicants, he submitted, were severely disadvantaged for two reasons. Firstly, evidence was led of a dying declaration. Secondly, the eyewitness did not testify. Her statement was tendered into evidence under section 31D of the Evidence Act. In those circumstances, the applicants did not have an opportunity to cross-examine or confront their accusers. Against that background, the **Turnbull** safeguards and guidelines should have been followed to the letter.

[45] Getting into the core of his submissions, Mr Robinson referred the court to that well-known passage from Lord Widgery's seminal judgment in **R v Turnbull and others** [1976] 3 All ER 549 ('**R v Turnbull**'). In that section of the judgment, trial judges are

enjoined to withdraw cases dependent wholly on visual identification, from the jury, once they adjudge the quality of the identification evidence to be poor. Lord Widgery's time-honoured examples of poor quality identification, in the same passage, are: (i) identification dependent on a fleeting glance or (ii) identification made under difficult circumstances; have, over the years, become the litmus test of good quality identification. Against the background of that learning, Mr Robinson submitted that at the close of the prosecution's case the quality of the identification failed to pass Lord Widgery's acid test as, in Mr Robinson's characterisation, the evidence of identification was poor, uncertain and amounted to a fleeting glance under difficult circumstances. Accordingly, the learned judge should have withdrawn the case from the jury.

[46] Underlining his point, Mr Robinson cited **Wilbert Daley v R** (1993) 30 JLR 429; (1993) 43 WIR 325, in which Their Lordships in the United Kingdom Privy Council demonstrated that there was no conflict between **R v Galbraith** and **R v Turnbull**. According to Their Lordships, in essence, **R v Galbraith** was primarily concerned with uprooting the practice of trial judges withdrawing a case from the jury because they, the trial judges, found the witnesses' credibility questionable, thereby overstepping the divide between their function as judge of the law and the jury's, as the tribunal of fact. On the other hand, in identification cases, of which **R v Turnbull** is emblematic, the premise upon which the case is withdrawn from the jury is the slender base of the identification evidence, which, by that fact, makes it an unreliable and insufficient substratum upon which to found a conviction, not a want of honesty in the witness or a judgment of prevarication. The ultimate aim of **R v Turnbull** is to protect juries from acting upon evidence which, by dint of experience, has been shown to be a potential source of injustice.

[47] For good measure, Mr Robinson also cited **Brown and McCallum v R** (unreported) Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 92 & 93/2006, judgment delivered 21 November 2008. Para. 35 of the judgment of Morrison JA (as he then was) was quoted. In that extract, Morrison JA opined that the paramount

consideration, at the stage of a no-case submission, in a case dependent on eyewitness evidence in which the pivotal issue was whether the witness had a sufficient opportunity to make a reliable identification, is whether the evidence grounding the identification was sufficiently substantial to make the risk of mistaken identification pale to a vanishing point. So that, if the quality of the identification evidence is poor, the case should be withdrawn from the jury, regardless of the witness' apparent honesty or not. However, if the converse is true, that is, the quality of identification is good, the case should be left to the jury. It will then be the jury's function, as demarcated in **R v Galbraith**, to separate the wheat from the chaff and weigh issues affecting credibility such as inconsistencies and discrepancies.

[48] Having laid out the principles, Mr Robinson isolated 11 features in the evidence for the prosecution which he asked the court to take into consideration in assessing the case, in the light of the principles advanced. We reproduce his list below:

> "i. The area where the incident occurred was dark or poorly lit;
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> ii. There is no evidence of the distance of the nearest light to where the incident occurred;
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> iii. The fact that one of the applicants had on a hoodie;
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> iv. There is no evidence of the distance from which the witness was able to identify the applicants;
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> v. There is no evidence of the period of time over which the witness had the applicants under observation for;
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> vi. The fact that the deceased received two gunshot wounds to the back;
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> vii. No evidence how long the incident occurred for;
>
> viii. No evidence as to who fired the gun;
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> ix. The extent of the description was that one had on a black hoodie shirt and the other had on a multi-coloured shorts;

> x. The eyewitness indicated that at the time of the incident she was frightened; and
>
> xi. There is no evidence of the eyewitness seeing the face of the person she identified as Arthur to confirm that it was in fact Arthur."

In his oral submissions, Mr Robinson added another feature which he categorised as a weakness in the identification evidence. That is, since Miss McKenzie put herself behind the deceased, the deceased would have been obstructing her view of the men. Concluding his arguments under this ground, counsel submitted that the case ought not to have been left to the jury when the objectives and intention of the **Turnbull** guidelines are taken into consideration.

[49] Miss Llewellyn KC ('the learned DPP'), who submitted on behalf of the Crown, argued that the learned judge was correct in not upholding the submissions of no case to answer. Those submissions were rooted in **R v Galbraith** and **Reid, Dennis & Whylie v R**. In the latter case the decisively indicative test of good quality identification evidence, coming from the examples in **R v Turnbull** was cited (set out above at para. [45]). The learned DPP also referred us to **Larry Jones v R** for the Board's comment at page 4 that:

> "… the trial judge, in ruling that even if the circumstances were not ideal the case should be left to the jury on the question of identification, was entitled to take the course he took. Whether Mrs Taylor recognized the accused man in all the circumstances was essentially a question for the jury rather than for the judge to decide. The jury would be familiar with the degree of light available at that time …"

[50] From there, the learned DPP directed the court's attention to its own decision in **Separue Lee v R**. The import of this case, gleaned from the summary in the learned DPP's written submissions, is the acceptance of the evidence of the sole eyewitness that she saw the face of that applicant, someone she had seen before, for about two minutes. From the summary provided, the eyewitness' evidence of prior knowledge of that applicant was, at best, sketchy: the witness could not remember when she had last seen

the applicant before the incident, underlined by the admission that that last sighting had been a long time ago; and they had never spoken. Against that background, McIntosh JA, at para. [22], while characterising the circumstances as "not ideal", reasoned that, taken as a whole, the evidence met the threshold of "a sufficient basis" for a properly directed jury to return of verdict of guilty.

[51] That judicial pronouncement provided fertile ground for the learned DPP's frank admission that Miss McKenzie's evidence "was not the most ideal". That concession notwithstanding, the learned DPP argued that in this case Miss McKenzie's evidence does not stand alone. It is supported by the dying declaration. Accordingly, the learned DPP advanced, this case is distinguishable from those relying solely on either a single eyewitness or a dying declaration. The compound effect of the evidence of Miss McKenzie and the dying declaration, it was submitted, is the reduction of the chances of mistaken identification.

[52] The learned DPP sought to answer specific points raised by Mr Robinson. Firstly, the absence of evidence of the distance of the nearest light from where the incident occurred. The learned DPP replied by pointing to the evidence of Det Cpl Miller-Hunter who said the nearest structures with light was about 30 feet away (page 204 line 19 of the transcript). Secondly, the fact that Mr Andrew Rowe was wearing a hoodie. The learned DPP's counter was that there was no evidence that the hoodie was being worn at the time in a manner which hindered viewing of Mr Andrew Rowe's face. Thirdly, the fact that the deceased received two entry gunshot wounds to his back. In the learned DPP's submission, this supports Miss McKenzie's evidence that after the first explosion, the deceased turned and ran in the opposite direction, and was chased by both Mr Shane Ridge and Mr Andrew Rowe. Fourthly, that there is no evidence as to who fired the gun. The evidence discloses, ran the rejoinder, that the speaker was the one who fired, that is, Mr Andrew Rowe; further, the doctrine of common design renders it irrelevant who actually fired the gun. Fifthly, the void in Miss McKenzie's evidence in respect of time. The learned DPP argued that the narrative and sequence of Miss McKenzie's evidence is

clear. So that, although there is no evidence of how long she saw them, the narrative and sequence were enough to cause the learned judge to leave the case to the jury.

[53] The learned DPP's concluding submission was that the entirety of the identification evidence goes beyond a fleeting glance. The learned judge was therefore correct in leaving the case to the jury for them to sift and make their determination, with appropriate directions. Accordingly, the learned DPP contended, this ground is without merit and should fail.

Discussion

[54] As was observed in **Separue Lee v R**, at para. [41], this court has consistently declared that, following a long line of time-honoured authorities, where the identification evidence either depends solely on a fleeting glance or a longer observation made under difficult circumstances, it is incumbent upon the trial judge to withdraw the case from the jury. Identification cases dependent solely on either of these two planks fall squarely into the category of cases characterized as of poor quality, and should by that very fact, be withdrawn from the jury's consideration (**R v Turnbull**). The withdrawal of such a case from the jury is independent of any consideration of the apparent honesty of the witness (**Brown and McCallum v R**). The case is taken from the jury simply to avoid the "ghastly risk" of mistaken identification, since, the identification evidence would rest on a foundation of sand or, to resort to hackneyed language, a "base too slender" (**R v Oakwell)**.

[55] Mr Robinson's argument that the no case submissions should have been upheld in respect of both Mr Shane Ridge and Mr Andrew Rowe, rests on both prongs of Lord Widgery's exemplification of poor quality identification namely, a fleeting glance and a longer observation made under difficult circumstances. A close examination of the evidence compels us to disagree with Mr Robinson on his assessment of the evidence, notwithstanding its superimposition on a correct statement of the law.

[56] Any fair analysis of Miss McKenzie's evidence must have regard to the sequence of the events as she described them. That analysis reveals Miss McKenzie to have been a disinterested observer, first from a distance of about 50 metres away. So, leaving aside the physical circumstances for the moment, Miss McKenzie appears to have made her identification of both applicants before the shooting commenced. She saw Mr Shane Ridge's face as the deceased was approaching them; and she recognized Mr Andrew Rowe's voice (as well as gait and general appearance) when he addressed the deceased (see page 196 of the transcript, lines 6-13). It is noteworthy that Miss McKenzie does not speak to making any observations after she took flight and while she secreted herself in the yard in which she sought refuge. It seems fair to conclude, therefore, that the identification was made before she came under any personal threat of injury by virtue of her proximity to the events. And if so made, the identification was unimpaired by having to take evasive action for her safety.

[57] Mr Robinson highlighted the fact that Miss McKenzie was frightened during the incident. However, applying the word 'incident', to Miss McKenzie's admitted psychological state is unfair to her in two critical respects. Firstly, 'incident' gives an unjustifiably broad sweep to the identification evidence. That is, it connects the event of the firing of the gun to when the identification was made. Sequentially, the facial recognition and voice identification had already been made before the first explosion, after which Miss McKenzie said she became frightened (see page 195 of the transcript, lines 8-22). Secondly, to say Miss McKenzie was frightened during the incident is to make a false correlation between that psychological state and the quality of her identification evidence. The implication is, in that mental state Miss McKenzie's powers of observation, and possibly her ability to recall also, would have been adversely affected, thereby making her identification less reliable. However, as we have already said, her admission of fright, chronologically, came after she had made the identification of both Mr Shane Ridge and Mr Andrew Rowe.

[58] Not only was Miss McKenzie's observation unimpaired by the later actions she took, it was unimpeded by physical obstruction, for the most part. She asserted that there was no fence or anything (interpreted, any other physical structure) preventing her from seeing what was happening (see page 196 of the transcript, lines 13-15). Mr Robinson took the indirect route in attacking Miss McKenzie's evidence that her view of the attackers was not obstructed. In Mr Robinson's submission, since Miss McKenzie was behind the deceased at the material time, the deceased himself must have been an obstruction to her clear view of Mr Shane Ridge and Mr Andrew Rowe. This, we think, is too narrow a view of the evidence.

[59] The only detail Miss McKenzie provided about her position, in relation to the deceased, was that she was walking about five yards (15 feet) behind him as they approached the playing field. This does not put her immediately behind the deceased. Her statement was not fine-tuned to reveal details such as whether she was directly behind him; or although behind him, she was to his left or to his right. From a distance of 15 feet, the most likely position from which it could be said the deceased himself was an obstruction to her clear view, is directly behind (not taking into consideration any height differentials, about which there was no evidence). But that is the least favourable, and most unnatural, position, unless Miss McKenzie and the deceased were members of a uniformed regiment. Given these imponderables, it was certainly a matter for the jury whether they accepted her evidence that nothing obstructed her view of the events, although she was 15 feet behind the deceased at the material time.

[60] A finer point on the issue of obstruction, is the fact that Mr Andrew Rowe was wearing a black hoodie; this was emphasised by Mr Robinson. The learned DPP is correct in her submission that there is no evidence indicating that the hoodie was being worn in a manner which interfered with Miss McKenzie's view of Mr Andrew Rowe's face. However, that submission does not give the matter its quietus. It is significant that when Miss McKenzie directed her mind to the fundamental question of the identity of the deceased's attackers, her list of factors did not include seeing Mr Andrew Rowe's face.

On the contrary, she specifically said she saw Mr Shane Ridge's face. The inference that Miss McKenzie may not have seen Mr Andrew Rowe's face at the time of the attack, is reasonable. We are fortified in this conclusion by the betrayal of her obvious attempt to bolster her assertion that Mr Andrew Rowe was one of the attackers by the particulars she provided (voice, gait and general appearance). As is well-known, gait and general appearance do not enjoy judicial approval as identifying traits. Therefore, even in the absence of evidence of how Mr Andrew Rowe was wearing the hoodie, the only fair assessment of Miss McKenzie's evidence is that the hoodie was an impediment to her view of Mr Andrew Rowe's face. We will return to this point briefly, below.

[61] Even with an unimpaired and partially impeded view, did Miss McKenzie have a sufficient opportunity to identify the attackers of the deceased as Mr Shane Ridge and Mr Andrew Rowe? To recapitulate, Miss McKenzie saw the men in apparent conversation while she and the deceased walked in their direction; nearing them, one got up, walked towards the deceased; that man spoke to the deceased, pointed a firearm at him then she heard an explosion; simultaneously, Miss McKenzie noticed fire and smoke emitting from the firearm; the deceased ran in the opposite direction, being chased by the men; Miss McKenzie then took to her heels. On the most favourable common sense view of this evidence, all of this would have transpired in a matter of seconds.

[62] In **Separue Lee v R**, upon which the learned DPP relied, the viewing time was two seconds. The sufficiency of two seconds appears to have rested on three premises. Firstly, the attacker was previously known to the identifying witness. Secondly, a shorter viewing period is acceptable where the assailant was not a complete stranger to the witness but someone previously known (see **Jerome Tucker and Linton Thompson v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 77 & 78/1995 delivered on 26 February 1996). Thirdly, there was adequate lighting inside the house where the incident took place. In this case, both Mr Shane Ridge and Mr Andrew Rowe were indisputably well-known to Miss McKenzie (four and three years respectively).

Since they were not strangers to Miss McKenzie, she would not have needed more than a matter of seconds to recognize them. That takes us to the third premise.

[63] The third premise marks Mr Robinson's point of departure from the learned DPP. Mr Robinson, in his reply, submitted that **Separue Lee v R** is distinguishable from the case at bar on account of the presence of what he correctly described as more than adequate lighting. In this case, the best approximation is that the incident occurred after 7:00 pm. There was an apparent acceptance that this was after night fall. In any event, Miss McKenzie did not purport to receive any assistance from natural lighting. Miss McKenzie referred to light shining from a nearby shop (see page 196, lines 15-16 of the transcript). In assessing the adequacy of the light, it is of some significance that it allowed Miss McKenzie to observe minute details such as the lighter and cigar in the hand of the deceased (Det Cpl Miller-Hunter found either a burnt cigar or cigarette at the scene). Together with that minutiae, Miss McKenzie gave a full description of the entire suit, down to his shoes, that the deceased was wearing; the lower body clothing Mr Shane Ridge (multi-coloured shorts); and the upper body apparel of Mr Andrew Rowe (a black hoodie). Additionally, from Miss McKenzie's description of the attack upon the deceased, there was but one explosion when the deceased was apparently facing his attackers. This is supported by the evidence of the consultant pathologist who reported one entrance gunshot wound to the front of the chest. Her evidence that the deceased turned and ran in the opposite direction is also supported by the presence of two entrance gunshot wounds to the back of the deceased's head and the rear of his right thigh.

[64] So, while the evidence about the lighting is a distinguishing feature with **Separue Lee v R**, it does not, by that token, lead inexorably to the conclusion that the lighting in this case was inadequate. The adequacy of the light at the material time is inextricably bound with the distance of the source of light from the events. Miss McKenzie said the area was lit by light from a nearby shop. While no distance was given by her, it is apparent that that shop was in the vicinity of the playing field. Det Cpl Miller-Hunter testified that there was what appeared to be bloodstain on a dirt track near the playing field. Det Cpl

Miller-Hunter estimated the distance between that apparently bloodstained-area and a structure with electric light on the outside at over 30 feet. While there are gaps in this evidence, the evidence suggests that light emanated from a structure that was not a great distance away.

[65] The foregoing circumstances in which Miss McKenzie purported to recognise Mr Shane Ridge and Mr Andrew Rowe, apply to the deceased with equal force, with two notable exceptions. Firstly, by virtue of the relative positions of Miss McKenzie and the deceased, in relation to the attackers, the deceased had the vantage point. Therefore, it seems reasonable to conclude that the deceased had a better opportunity to view his assailants, by virtue of his proximity to them. Secondly, although the deceased would have had an equivalent period of time, as Miss McKenzie, to observe his attackers, that he was the focus of the attack may have infused some difficulty in the circumstances for him.

[66] Bearing all these things in mind, we conclude, as this court did in **Separue Lee v R**, that while the circumstances of the identification were less than ideal, the evidence of Miss McKenzie and the deceased, viewed cumulatively, provided a sufficient basis upon which a jury, properly directed, could return an adverse verdict against Mr Shane Ridge and Mr Andrew Rowe. In short, the learned judge was correct in not upholding the submissions of no case to answer. Ground one, therefore, fails.

Ground 2: The Learned Trial Judge failed to adequately warn the jury on the dangers of convicting the applicants on the identification evidence in circumstances where the prosecution's case relied wholly on the correctness of the identification evidence which the applicants asserts [sic] to be mistaken identifications.

Ground 3: The Learned trial judge failed to adequately direct the jury to examine closely the circumstances under which the identification was made in assessing whether the identification was good resulting in a substantial miscarriage of justice.

Submissions

[67] In his written submissions, grounds two and three were kept separate. However, in his oral arguments Mr Robinson conjoined both grounds. The complaints under these grounds are, in sum, that the learned trial judge did not adequately warn or direct the jury that (a) a number of witnesses could all be mistaken, especially in light of the risk that the jury may have regarded Miss McKenzie's evidence as corroborative of the dying declaration; (b) although recognition may be more reliable than identification, mistakes in recognition of close relatives and friends are sometimes made; (c) they should examine the circumstances under which the identification was made, identify the specific weaknesses and analyse their significance.

[68] To substantiate his points, Mr Robinson drew our attention to several sections of the learned judge's summation. We will refer to a number of these passages in our discussion below. Mr Robinson also sought to anchor his submissions in case law, citing for our consideration, among others, **Omar Fear & Dwayne Donaldson v R** [2020] JMCA Crim 16 ('**Fear & Donaldson**') and **Vernaldo Graham v R** [2017] JMCA Crim 30.

[69] For her part, the learned DPP submitted that the learned trial judge gave the appropriate warnings on identification to the jury. That submission was moored in a lengthy extract from the judgment of Lord Ackner in **Junior Reid, Roy Dennis and Oliver Whylie v Regina** and **Errol Reece, Robert Taylor and Delroy Quelch** (1989) 37 WIR 346; (1989) UKPC 1. In that extract, Lord Ackner quoted at length from the judgment in **R v Turnbull**, in which Lord Widgery laid down the guidelines. Like Mr Robinson, the learned DPP also isolated several parts of the learned judge's summation to support her submissions.

Discussion

Scope of the learned judge's duty where identification is in issue

[70] The principles governing a trial judge's duty in cases where the evidence for the prosecution depends, either wholly or substantially, upon the correctness of visual

identification which is alleged to be mistaken, have been settled for nigh half a century. The watershed decision of **R v Turnbull** was decided in 1976. Since then, the guidelines laid down in **R v Turnbull** by Lord Widgery have assumed "canonical" status, in the language of Morrison P in **Fear & Donaldson**, at para. [10].

[71] In **Fear & Donaldson**, the complaint was that the learned judge's directions on identification were wholly inadequate. In order to evaluate the soundness of that contention, the learned President was constrained to first distil the canonical guidelines pronounced by Lord Widgery in **R v Turnbull**. The learned President's distillation appears at para. [12] of the judgment:

> "… The **Turnbull** guidelines require a trial judge to warn the jury … of (i) the special need for caution in cases based on identification evidence; (ii) the reason for the special need for caution; (iii) the fact that mistakes in even recognition of close relatives and friends are sometimes made; (iv) the fact that, no matter how honest and convincing the identifying witness (or a number of such witnesses) may seem, there is always the possibility that he (or they) may be mistaken; (v) the need to examine closely the circumstances in which the identification by the witness or witnesses came to be made (bearing in mind factors such as lighting, period of observation, distance and the like); (vi) the fact that, even if they reject the defendant's alibi, this does not by itself prove that he was the person identified by the identifying witness; and (vii) any specific weaknesses which may have appeared in the identification evidence."

We will adopt the approach of Morrison P in applying the above principles as the yardstick to measure the challenges to the summation.

Learned judge's directions on identification

[72] The learned judge commenced her directions to the jury on identification as follows (beginning at page 364 line 25 and continuing through to page 367 line 6):

> "In a case such as this, which rests primarily on the identification of each of these accused men. I have to warn you, and I do so now, of the special need for caution before

convicting each of these men in reliance on evidence of identification. And I am required to warn you in that way because there have been wrongful convictions in the past as a result of such mistakes. And I have to remind you that a witness who appears to be convincing, can indeed be mistaken. So you have to apply your minds very cautiously to the evidence. Bear in mind, Madam Foreman and your members, that when you have examined the evidence carefully of the identification, it is still open to you to convict, as long as you are sure.

So you apply caution, go carefully and look towards the proper verdict. Now as you consider the identification. [sic] **You have to consider and examine carefully the circumstances in which the identification by each witness was made**. You have to consider how long the person being identified was under the observation of the witness. How long they were looking at them.

You have to consider how far away they were, when they were looking. And then of course, you need to know what about the light, was there sufficient light whilst they were looking to see who it was. Then you consider if there was anything interfering with their ability to see who the assailant was.

Also you are going to consider if the witness had ever seen the person before. Did the witness know the person before? But I have to also warn you, that even in circumstances where the witness may know the person, it is still possible to make an honest mistake. So, as you consider the evidence of identification, you are going to consider if you find that the witness or witnesses know [sic] these accused persons and had seen them before, then you going to consider, how often had they seen them before? And then you need to consider, how long it was before the police apprehended these people. How long was it between when the witness say it was they who were the perpetrators and when the police apprehended them. [sic]

Madam Foreman and your members, take your time and cautiously examine all the evidence as it concerns identification. Consider the circumstances under which the identification was made, as you decide whether the Crown has satisfied you so that you are sure as it concerns the

participation of these men in the crime of murder." (Emphasis added)

[73] From this extract, it is evident that the learned judge followed the dictates of **R v Turnbull** in first warning the jury of the special need for caution before acting to the detriment of Mr Shane Ridge and Mr Andrew Rowe. In the same breath, the learned judge told the jury the reason for the warning. Following the contours of **R v Turnbull**, the learned judge next made reference to the fact that a convincing witness can be mistaken. However, the learned judge did not go the distance she was enjoined by **R v Turnbull** to traverse. That is, the learned judge should have gone on to say that a number of such witnesses can all be mistaken.

(a) A number of witnesses may be mistaken

[74] That omission forms the basis of Mr Robinson's complaint that the learned judge's directions, itemised at (a) above, were inadequate. The gravamen of this omission, according to Mr Robinson, is the risk that the jury would consider Miss McKenzie's evidence to be corroborative of the dying declaration. Mr Robinson's point may be illustrated by the following example. Several spectators at a sporting event, for example the national athletics trials, each from a different vantage point but all affected by the press of persons together with the dynamics of the incident, observed an affray. Subsequently, these spectators all identified 'A' as one of the participants. It is inconceivable that a jury, directed to use their common sense, would not regard the identification of each witness as capable of confirming that of each other; although each could have been mistaken, having regard to the circumstances. Therefore, the risk about which Mr Robinson sought to sound the alarm is legitimate.

[75] According to the learned authors of Phipson on Evidence 20th ed, at para 15-16, where there is evidence which is capable of supporting the identification, or evidence which the jury might mistakenly think should be accorded that corroboratory character, this calls for a direction from the judge, in addition to the warning. Consistent with this, a trial judge may direct a jury that the identification by one witness can support the

identification of another witness, with two caveats. The identification evidence must be of a quality warranting the case be left to the jury and the jury must be warned in unambiguous terms that several honest witnesses can all be mistaken (see also **R v Thomas Henry Weeder** (1980) 71 Cr App R 228, 231 (‘**R v Weeder’**)).

[76] **R v Weeder** was applied in **Dwayne Knight v R** [2017] JMCA Crim 3. In the latter case the trial judge’s failure to give himself such a warning was described as a “material omission amounting to a misdirection” (per McDonald-Bishop JA, at para. [56]). This was said in the context of the trial judge having given himself a general warning, was alert to the pitfall of mistaken identity even in recognition cases, as the one before him was but, in the assessment of this court, failed to demonstrate that he was obliged to show that he was alive to his duty to highlight and specifically consider the weakness in the identification evidence (see para. [55] of the judgment).

[77] In this case, the learned judge not only warned the jury of the possibility of mistaken identification, she told them to “consider and examine carefully the circumstances in which the identification by each witness was made” (see para. [72] above). Being so directed, the jury would have understood that they had to assess the evidence of each identifying witness from the point of view of the potential for mistaken identification. If the jury are taken to have understood this direction in this way (which is the kernel of the omitted caution), that would blunt the effect of the non-direction of not telling the jury that both witnesses could have been mistaken. So, although Mr Robinson is correct that the learned judge omitted to direct the jury that a number of witnesses could all be mistaken, taking the summation as a whole, there was no miscarriage of justice.

(b) Recognition cases

[78] We turn now to consider complaint (b) namely, that the learned judge did not adequately warn the jury that although recognition may be more reliable than identification, mistakes in recognition of close relatives and friends are sometimes made. The learned judge was required to warn the jury in the terms submitted by Mr Robinson

(see para. [71] above, item (iii) in Morrison P's distillation of the principles in **Fear & Donaldson**). The learned DPP conceded the point but countered that the learned judge adverted to honest mistake even where the person was previously known. At page 366 of the transcript, lines 8-13, the learned judge, in directing the jury to consider the particular circumstance of recognition by the witness, said, "[b]ut I have to also warn you, that even in circumstances where the witness may know the person, it is still possible to make a mistake". This, we think, captures the essence or spirit of the intendment of the guidelines laid down in **R v Turnbull**. It has long been established that the requirement of trial judges in these cases is not a slavish recitation of the letter of the guidelines, *ipsissima verba* (the exact words used by Lord Widgery), but the impartation of their spirit. As Brooks JA (as he then was) had occasion to remark in **Germaine Smith and Otrs v R** [2021] JMCA Crim1, at para. [26]:

> "… Mrs Johnson O'Connor is correct in saying that, in giving the **Turnbull** directions, no set formula of words is required. Nonetheless, a trial judge must clearly communicate the spirit of the guidance to the jury ..." (Emphasis as in original)

This complaint is therefore without merit.

(c) Circumstances under which the identification was made

[79] That takes us to complaint (c), that is, the learned judge did not adequately warn or direct the jury that they should examine the circumstances under which the identification was made, identifying to them specific weaknesses and analysing their significance. The learned judge had a duty to direct the jury to examine closely the circumstances in which both Miss McKenzie and the deceased made their identification of Mr Shane Ridge and Mr Andrew Rowe; and to remind the jury of any specific weaknesses which had appeared in their evidence (see **R v Turnbull**, at page 552). The rigour of the learned judge's duty, in respect of this aspect of the trial, is made manifest in the injunction to: give careful directions to the jury in relation to the circumstances or conditions under which the identification was made; set out fully the strength and weaknesses of the identification; link the facts to the principles of law; and refrain from

engaging in a mere rehearsal or regurgitation of the principles (see **Garnett Edwards v R** (2006) 69 WIR 360, [2006] UKPC 23; **Dwayne Knight v R**, at para. [57]).

[80] The learned judge explicitly directed the jury to consider and examine with care, the circumstances under which each witness purported to identify Mr Shane Ridge and Mr Andrew Rowe (see page 365 lines 19-22 of the transcript, reproduced at para [72] above). Thereafter, the learned judge specifically directed the jury to consider (i) the length of the observation; (ii) the distance of the witnesses from the perpetrators; (iii) the sufficiency of the light; (iv) whether there was any obstruction that impeded the witnesses' ability to view the assailants; (v) had the witnesses seen the attackers before, and if so, how often? and (vi) the lapse of time between the disclosure of their identity to the police and when the police apprehended the perpetrators. Having done that, the learned judge then went on to direct the jury to examine: all the evidence pertaining to identification and the circumstances in which the identification was made, linking that consideration to the prosecution's duty to prove the case to the point where they could feel sure of Mr Shane Ridge's and Mr Andrew Rowe's participation in the murder (see page 365 line 22 to page 367 line 6 of the transcript, extracted above at para. [72]).

Length of the observation and the distance from which it was made

[81] The learned judge was seeking to fulfil her duty in directing the jury to consider the length of the observation and the distance the perpetrators were from the witnesses (see items (i) and (ii) in para. [80] above). The learned judge repeated her direction to take account of the distance from "each man" (see page 404 lines 4-6 of the transcript). However, there was no direct evidence of these two factors. Inviting the jury to consider the length of the observation was, in practical terms, asking them to make a determination as to whether the asserted identification was a fleeting glance. Hence, the jury could have been assisted by a reminder of the fact of the absence of that evidence and, in relation to the length of the observation, directions on what inference was permissible, based on the sequential description of the incident. On the question of the distance, the jury could have been assisted by a direction that they could conclude that

the shooting did not occur at point-blank range, based on the evidence of the pathologist. They should have been further directed that, based on the evidence that the muzzle of the gun was at a distance greater than 2 feet and the evidence that the shooter pointed the firearm, an arm's length being notoriously accepted as 3 feet, they could infer that the shooter (Mr Andrew Rowe) was at a distance greater than 3 feet from the deceased. How much greater? The evidence does not admit. However, viewed from the perspective of Miss McKenzie, who heard Mr Andrew Rowe's utterance, and was further away from than the deceased, they were close enough for Miss McKenzie to have heard Mr Andrew Rowe.

Lighting conditions

[82] We come now to perhaps the most obvious weakness in the identification evidence, and, unsurprisingly, the one that occupied much of the focus at the trial, the sufficiency of the light (item (iii) at para. [80] above). The learned judge returned to this circumstance, after an exhaustive review of the evidence of Det. Cpl Miller-Hunter, the scene of crime officer who was cross-examined thoroughly, in an effort to show that the area was either poorly lit or dark, at the time she visited the scene. On the one hand, the learned judge emphasised the import of Det. Cpl Miller-Hunter's evidence in determining the adequacy of the light. At page 412 lines 25 to page 413 line 9 of the transcript, the learned judge directed the jury as follows:

> "So this evidence from the witness, Madam Foreman and your members, is very important to assist you to decide if there was sufficient light for both the deceased and Miss McKenzie to see the assailants to be able to say that it was these men because remember, the deceased man is seeing his assailants right there by the [playing field] and Miss McKenzie is also saying she sees the assailants right there by the [playing field]."

On the other hand, the learned judge reminded the jury of the prosecution's contention that the occurrence of the shooting was approximately five hours removed from the time of Det Cpl Miller-Hunter's visit to the scene, and invited them to consider, using their

common sense, if they would expect any difference in the lighting on account of the hours removed (see page 413 lines 10-22 of the transcript).

[83] The learned judge went on to specifically categorise the lighting as a weakness in the identification evidence, reminded them that Det Cpl Miller-Hunter said the area was dark, then urged the jury to analyse the evidence, and, in the process, deploy their common sense (see page 414 lines 2-9 of the transcript). Mr Robinson submitted that in her discussion of the lighting as a weakness, the learned judge (i) nullified, what was presumably acceptable directions, by inviting the jury to conclude that the witnesses could see, despite the darkness; (ii) failed to give similar directions in favour of Mr Shane Ridge and Mr Andrew Rowe, to support the possible weakness namely, that the "darkness or poorly dimmed area meant that the witnesses could have been mistaken". This criticism was based on the highlighted extract from the learned judge's summation (see page 414 lines 9-16; page 414 line 25 to page 415 line 3), which we are compelled to quote, together with the remainder of the passage from which it was taken (page 414 line 1 to page 415 line 15). We set it out below:

> "[Det Cpl Miller-Hunter] says it was not pitch black, it was dark. You have to use your commonsense [sic] and you decide are the lighting conditions such that the witnesses could see? Because that is clearly a weakness in the case of the Crown, the matter of the amount of light. So you analyse that, use your commonsense [sic]. **Use your experience. The evidence is that the people, if you believe it, is that the deceased was able to walk. The witness McKenzie was able to walk. They were both walking along the road way [sic]. The evidence is that two persons were seated on the stone. Is that going to happen in a place that is pitch black that you cannot see anything.** Are the people going to be walking where you cannot see anything at all? Are those two assailants who were seated on the stone are [sic] going to be seated where they cannot see anything at all. If you believe the witness that guns came and shooting occurred, is the shooting going to occur where it is pitch black and you cannot see anything.

> **According to the evidence, if you believe it, not only was there shooting but the bullet connect [sic] up with somebody. Is that going to occur where it is so dark that you cannot see [?]** It is a matter that you have to consider carefully because [Det. Cpl Miller-Hunter] says the place was dark. You have to work with that, use your commonsense [sic] and be careful. Take your time and consider because the conditions of the street at the time of the incident, the conditions are vital to your decision. Could the deceased Kevone see his assailants in order to send a message to his mother if you believe that and could Marcia McKenzie see, in order to say to Detective Davis [who recorded her statement], I saw these people ..." (Emphasis added)

[84] Mr Robinson's criticism of the learned judge's direction is not well-founded. We accept the submission of the learned DPP that the learned judge did no more than point the jury to an inescapable question that was bound to arise during their deliberations. These directions, in our assessment, merely invited the jury to regard the evidence of lighting with passionless practical eyes, and to illuminate their analysis with the wisdom of their collective years.

[85] This brings us to the underlying premise of Mr Robinson's criticism, which we consider to be unsound. That is, without the impugned directions, the jury was bound to find that the area was dark when the incident was committed; hence, it was unfair to Mr Shane Ridge and Mr Andrew Rowe to direct them that, notwithstanding the darkness the witnesses' observation was unimpaired. This conclusion is reached only by the route of truncating the summation. When the directions complained of are read together with the passage from which they taken, and in conjunction with the earlier reminder of the contrasting time of the incident in Miss McKenzie's evidence with the time of Det Cpl Miller-Hunter's visit to the scene, the inevitability of such a finding evaporates. On the totality of the learned judge's directions, the jury was being invited to pronounce on the quality of the lighting and, to say, whether the quality as they found it, was sufficient to allow the witnesses to describe the activities which constituted the prelude to the shooting, if they accepted that description as true. Further, if they accepted the

occurrence of those preludial activities, it was open to them to say there was a qualitative difference in the lighting at the material time, after 7:00 pm, and when Det Cpl Miller-Hunter visited the scene, after midnight.

[86] The second complaint in relation to the learned judge's directions on the lighting conditions was that there was a failure to direct the jury that darkness or a poorly lit area could have meant that the witnesses could have been mistaken, may be summarily disposed of. The directions the learned judge gave the jury on how critical the adequacy of the lighting was, coupled with the warning about mistake and several entreaties to proceed with caution, were more than adequate to alert the jury to the risk of mistaken identification.

Were there any obstructions impeding the witnesses' view

[87] And so we come to the question of whether there was anything obstructing the view of the witnesses (item (iv) at para. [80] above). In her review of the evidence of Miss McKenzie, the learned judge reminded the jury of Miss McKenzie's assertion that there was nothing preventing her from seeing and there was light shining from a nearby shop (see page 405 lines 23-25 of the transcript). The learned judge had earlier reminded the jury of the evidence Miss McKenzie relied on to anchor her identification of Mr Andrew Rowe (his voice, walk and general appearance). Although the learned judge reminded the jury that Miss McKenzie said Mr Andrew Rowe was wearing a "black hoodie shirt", the possibility of it impeding Miss McKenzie's view of his face was not broached.

[88] Instead, the learned judge unhelpfully raised with the jury the question of whether "general appearance" could also include Mr Andrew Rowe's face. At page 406 lines 7-12 of the transcript, the learned judge addressed the jury in the following terms:

> "… She makes reference to Arthur's general appearance. What does 'general appearance" mean? Does that include his face? Matter for you. Does this statement say enough to help you with the decision about the guilt of the accused?"

Respectfully, in the context of Miss McKenzie's evidence, the phrase "general appearance" could not fairly have been taken to include his face. The phrase is meaningless. Quite apart from the meaninglessness of the phrase "general appearance", in so far as visual identification is concerned, this was the learned judge's golden opportunity to bring home to the jury that it was significant that Miss McKenzie never mentioned seeing Mr Andrew Rowe's face; especially against the background of the specific mention of seeing Mr Shane Ridge's face. The learned judge should then have gone on to link that omission to the fact that Mr Andrew Rowe was wearing a hoodie, which may have impeded her view of his face. The possibility of the hoodie being a visual impediment, which would increase the risk of mistaken identification, should have been made clear to the jury. Of relevance too is that the deceased may, or may not, have been similarly affected since he was closer to Mr Andrew Rowe and there was no evidence of how the hoodie was being worn. Quite properly, the learned judge should have referred to Miss McKenzie's claim that she knew Mr Andrew Rowe's voice, then discuss with the jury the requirements for acceptable voice identification.

Whether the witness had ever seen the accused men (the appellants) before and the frequency

[89] After mentioning obstruction, the learned judge directed the jury to consider whether the witnesses had seen Mr Shane Ridge and Mr Andrew Rowe before, and if so, how often (item (v) at para. [80]). This was a case in which the issue of whether Mr Shane Ridge and Mr Andrew Rowe were known to the witnesses before the night of the incident was of critical importance, since the former was only known by an obvious alias and the latter by what may be either an alias or a pet name; and especially in light of the prosecution's reliance on the dying declaration. The learned judge rehearsed the evidence of Miss McKenzie and raised with them the questions: whether Miss McKenzie knew "Cha Cha" (Mr Shane Ridge) and "Arthur" (Mr Andrew Rowe); and were the "Cha Cha" and "Arthur" she spoke about, respectively, the men before the court? Although the learned judge, in her review of the evidence of Miss Somers, did not pointedly invite the jury to say so, if they accepted her evidence, that "Cha Cha" was known to the deceased, as

they had previously been friends, it was open to them to so find. Also, the learned judge could have directed the jury that it was open to them to infer that the deceased knew someone named "Arthur" from his mere utterance of that name, and that from the evidence of Miss McKenzie and D/C Langott, it was open to them to find that the "Arthur" the deceased referred to was the person before the court. On the basis that it was open to the jury to find that the applicants were "Cha Cha" and "Arthur", respectively, and they obviously were sure of that, the references below will use the applicants' names in the context of the analysis.

[90] There was no evidence of how often either Miss McKenzie or the deceased would see Mr Shane Ridge or Mr Andrew Rowe. With all due deference to the learned judge, in the absence any such evidence it was idle to direct the jury that they should look for it. What would have been helpful, was to highlight the absence of the evidence with a direction on how that might lend itself to mistaken identification.

The lapse of time between the incident and the formal identification of the appellants

[91] The final direction on identification (item (vi) at para [80] above, was expressed as quoted below, page 366 lines 19-23 of the transcript:

> "… And then you need to consider, how long it was before the police apprehended these people. How long was it between when the witness says it was they who were the perpetrators and when the police apprehended them. [sic]"

What the guidelines in **R v Turnbull** require, as a subset of the directions to the jury to examine closely the circumstances under which the identification was made, is consideration of the question, "how long elapsed between the original observation and the subsequent identification to the police?" (see **R v Turnbull**, at page 447).

[92] Although we do not wish to put too fine a point on it by requiring a set form of words from the learned judge, the lapse of time between the witnesses' assertion of identification and the eventual apprehension of Mr Shane Ridge and Mr Andrew Rowe, could not have conveyed to the jury what was appropriate for their consideration. Even

if "when the witness says it was they who were the perpetrators" could be taken as a substitution for "the original observation," when they were apprehended is not necessarily coincident with "subsequent identification to the police". In fact, there was no evidence of when Mr Shane Ridge and Mr Andrew Rowe were apprehended; that is, when they were taken into custody. While the evidence disclosed when Mr Shane Ridge was charged with the murder of the deceased, by the execution of the warrant upon him by Cpl Davis (20 April 2009), the corresponding information for Mr Andrew Rowe was not part of the evidence. Furthermore, there was no subsequent identification to the police by Miss McKenzie. Therefore, in this regard, the learned judge appears to have been merely reciting the principles without forging any analytical relationship with the evidence.

[93] The learned judge's directions on the evidence of identification was subjected to a final challenge under these grounds. Mr Robinson's challenge stemmed from the following passage from the summation at page 372, lines 1-7, of the transcript:

> "… and I point out to you that the main issues with which you have to grapple are identification and credibility. That is to say, **whether you believe the witness [sic] when they speak to you about what happened and when they speak to you about identification**." (Emphasis as it appears in the written submissions)

In Mr Robinson's submission, the direction is found wanting because it omits to call attention to the fact that an honest witness can be mistaken, contemporaneous with the direction to consider credibility.

[94] This complaint is, respectfully, ill-founded, divorced as it is from the learned judge's earlier and succeeding directions. The jury had already been given a fulsome warning of the need for caution, together with the reason for that warning; that is, wrongful convictions in the past were as a result of mistaken identification. More pointedly, the jury had been earlier directed that an apparently convincing witness can be mistaken (see page 365 lines 1-10 of the transcript). In her review of Miss McKenzie's statement, the learned judge not only focused the jury's mind on the question of whether the statement

had been given, but also, to consider, if they accepted that the statement had been given, its accuracy and veracity and, the opportunity Miss McKenzie had to see Mr Shane Ridge and Mr Andrew Rowe. These directions, taken together, would have impressed upon the mind of the jury the live issue of mistake, even if they believed the witnesses.

[95] From the preceding discussion, the learned judge did not consistently apply the analytical rigour to the identification evidence as demanded by the authorities (see **Garnett Edwards v R, Dwayne Knight v R and Fear & Donaldson**). However, viewed globally, the deficits in the analysis do not have the impact of occasioning any miscarriage of justice. Therefore, the ground while having some merit, on a micro level, when the complaints are taken up in the round, has to be decided against Mr Shane Ridge and Mr Andrew Rowe.

Ground four: The Learned Trial Judge erred by failing to assist the jury with the application of the Turnbull guidelines to the dying declaration of the deceased and adequately directing them of [sic] the severe disadvantages the applicants faced as a result of not only the deceased not being cross-examined, but also an eye-witness and the investigating Officer [sic].

Submissions

[96] Mr Robinson's arguments under this ground have two tributaries. Firstly, he submitted that a miscarriage of justice was occasioned by the learned judge's failure to direct the jury to tailor the **Turnbull** directions on identification evidence to the dying declaration. Counsel contended that the main feature of the prosecution's reliance on statements, admitted into evidence under section 31D of the Evidence Act, the absence of the witnesses, necessitated adequate warnings and directions by the learned judge. Mr Robinson cited **David Sergeant v R** [2010] Crim 2 ('**Sergeant v R**'), and **Neville Nembhard v The Queen** [1982] 1 All ER 183 ('**Nembhard**') in support of this submission. Secondly, the learned judge gave unbalanced directions when she, in the same breath, instructed the jury that the absence of the witnesses was a disadvantage but went on to say they could believe the statements, notwithstanding. In Mr Robinson's view, the objective of the direction ought to be a warning to the jury, expressive of an

effort to protect a defendant's right to confront his accusers and to highlight the resulting disadvantage, arising from the absence of the witness. For this second submission, Mr Robinson extracted a part of learned judge's summation at page 356 lines 17-25 of the transcript, and made reference to **Sergeant v R**.

[97] The learned DPP countered that the learned judge did not fail to assist the jury with the application of the **Turnbull** guidelines to the dying declaration; and that the learned judge's directions on the disadvantages of not seeing particular witnesses being cross-examined, were adequate. The learned DPP premised this submission upon **Mills, Mills, Mills and Mills R** (1995) 46 WIR 240 ('**Mills and others v R**'), in addition to the cases cited by Mr Robinson.

Discussion

The applicable principles on dying declaration

[98] In **Ziggy Mills v R**, included in the Crown's supplemental bundle of authorities, Brooks JA (as he then was), considered the leading authorities on dying declaration and extracted the following lodestar principles for trial judges, at para. [56] of the judgment:

> - "It is well established that the evidence of statements made by a deceased declarant are admissible as dying declarations provided certain conditions have been satisfied:
>
> (i) the declarant has died;
>
> (ii) a trial for murder or manslaughter ensued in the light of his death;
>
> (iii) the statements uttered by the declarant relate to his cause of death; and
>
> (iv) It can be demonstrated that the declarant was under a settled hopeless expectation of death at the time he made the statement.
>
> See **Nembhard** and **Sergeant v R**.

- A trial judge is to direct the jury on the basis for the admission of a dying declaration, which is admitted in evidence, as well as the test which must be satisfied in that regard, that is, the need to be satisfied that at the time of making the declaration the declarant had a settled, hopeless expectation of death – See **Nembhard**, **Sergeant v R** and **Dane Bonner v R**.

- A trial judge is obliged to, having adjudged a dying declaration to be admissible in principle, direct the jury that the reliability, meaning, effect and probative value of the declaration are matters for their consideration, provided they were satisfied as to the reliability of the witness who ascribed the declaration to the deceased declarant – **Nembhard** and **Sergeant v R**.

- In cases where dying declarations are relied on for the purposes of identification, it is necessary for the judge to give a full **Turnbull** direction as to the circumstances under which the deceased purported to have been able to identify his assailant as well as any potential weaknesses in the identification evidence – See **Nembhard**, **Sergeant v R**, and **Dalton Reid v R Nos 1 and 2**.

- The trial judge is obliged to direct the jury that the absence of the opportunity to hear and observe the declarant giving evidence, which could have been tested under cross-examination, as regards his purported identification of his assailant, constitutes a weakness in the identification evidence, acts to the disadvantage of the accused, and it ought to be taken into account when assessing what the declarant purportedly said – **Nembhard** and **Sergeant v R**.

- There is no rule of law or practice which requires the judge to give any special warning with regard to the absence of corroborative evidence where the prosecution solely relies on a dying declaration which implicates an accused – See **Nembhard**.

- No specific direction is required about the risks of mistaken identification as regards the declarant's purported identification of his assailant, in

> circumstances where there has been no cross-examination on the issue – **Mills and others v R**."

[99] A trial judge's predicate responsibility, therefore, is to be satisfied that the evidence of the supposed dying declaration meets the threshold, established by law, for admissibility. Beyond that, the judge is obliged to give directions: on the rationale for admitting the dying declaration; the certainty of cessation of life which operated on the mind of the deceased, to warrant the characterization, dying declaration; that they must be satisfied, firstly, of the reliability of the recipient of the dying declaration, and secondly, of the "reliability, meaning, effect and probative value" of the dying declaration. The trial judge would also be required to give the **Turnbull** directions in a fulsome manner, where the identification of the defendant is grounded in the dying declaration, relevant to the circumstances under which the declarant allegedly identified his attacker, highlighting possible weaknesses and that their inability to observe the witness being examined and cross-examined is, itself, a weakness which is disadvantageous to the defendant and must be taken into consideration when assessing what the declarant said.

[100] However, the judge is not required to give any specific or special directions on the absence of corroboration in cases where the declaration constitutes the only identification evidence against the defendant or where there was no cross-examination on the risk of mistaken identification.

Learned judge's direction on dying declaration

[101] How did the learned judge direct the jury in this case? Her directions on the dying declaration were given as part of her review of the evidence of Miss Somers, sister of the deceased. The learned judge told the jury that the last words of the deceased, spoken to Miss Somers, were admitted as a dying declaration, explaining that at the time the words were uttered, the deceased expected to meet his imminent death (see page 374 lines 21-25 of the transcript). The jury was also directed on the rationale behind admitting the statement as such, namely, that a person who believes he is about to die is likely to be impelled to speak the truth (see page 375 lines 3-11 of the transcript). Notably, the

learned judge did not usurp the jury's function by telling them a finding of settled hopeless expectation of death inexorable meant the deceased was speaking the truth, as was done in **Sergeant v R**.

[102] On the contrary, regarding the recipient of the dying declaration, Miss Somers, the learned judge instructed the jury that they were to decide on her reliability; to ask themselves if she was speaking the truth about what happened in the car (see page 375 lines 14-18). After referring to the queries of the defence concerning why Miss Somers never shared with either of her uncles what the deceased said to her, the learned judge, at page 376 lines 1-3, emphasised the importance of this witness' reliability.

[103] The jury was also instructed that they had to decide on the reliability of the dying declaration itself. The learned judge's directions to the jury made it clear that their acceptance that Miss Somers was reliable did not relieve them of their duty to be also satisfied of the reliability of the deceased. Those directions were dovetailed with directions on identification and harked back to the earlier directions on the guidelines in **R v Turnbull**; as well as the weaknesses arising from their inability to assess the demeanour of the deceased, not having seen him testify, especially under cross-examination.

[104] At page 376 lines 5-24 of the transcript, the learned judge directed the jury to pierce the veil of Miss Somers veracity and assess for themselves the truthfulness of the deceased and the circumstances in which he purported to identify his attackers. Her directions were as follows:

> "… Did Kevone Somers tell the truth? Let us say that the sister is telling us the truth about what he said that is Cha Cha and Arthur. Did he speak the truth as he lay there dying? The other question you have to answer, is, was he accurate about what he saw? Was he in a position to see and identify the persons who he later told his sister, if you believe her had killed him? Was he in a position to see? So here again, is a matter of visual identification. You consider the same things I told you about, the light, how far away, whether he knew

> them. All of that and as you consider the dying declaration remember that you did not get the chance to see the deceased being cross-examined nor to access [sic] his demeanour. And you wouldn't expect that because he is dead. And you also did not get to hear him being examined about the circumstances that existed at the time."

It is apparent that the learned judge did not expressly tell the jury that the lost opportunity, according to the circumstances of the case, to see the deceased responding to questions disadvantaged Mr Shane Ridge and Mr Andrew Rowe, and should be taken into their consideration. We think, however, that the summation, taken up in the round, particularly the directions on the burden and standard of proof and the several entreaties to tread cautiously, that no miscarriage of justice was thereby occasioned.

[105] The learned judge's obligation to give specific direction in relation to the dying declaration necessarily extended to the fact that Miss McKenzie's statement was read into evidence under section 31D of the Evidence Act. Although Mr Robinson cast his net very wide, to cover the absence of Cpl Davis, the investigator and the person who recorded Miss McKenzie's statement, Cpl Davis was not truly a material witness. However, as will be seen below, the learned judge's directions blanketed all the witnesses who were absent.

[106] Miss McKenzie was palpably in a different category from Cpl Davis. The learned judge was required to direct the jury along the following lines. The jury should be directed that: Miss McKenzie's statement was read to them because she could not attend the trial, on account of her death before the trial commenced; the fact that the statement was read into evidence did not mean the defence was agreeing that its contents were true, in particular, both Mr Shane Ridge and Mr Andrew Rowe denied that they were at Smith Avenue participating in the crime; it was a matter for them to decide how much importance, if any, was to be given to her evidence; in making up their minds on this question, they should view her evidence in the light of the other evidence in the case and take into their consideration the limitations of her evidence. These are that the statement was not made under oath or affirmation, notwithstanding the certificate in which Miss

McKenzie declared that the statement was true and made with the knowledge that she could be prosecuted if she deliberately included falsehoods in it; and if Miss McKenzie had testified, she could have been cross-examined, since she was not, they could not know how she or her evidence would have stood up under cross-examination. Finally, in deciding whether they could rely on what Miss McKenzie said in her statement, account should be taken of what they knew about her (see Supreme Court of Judicature of Jamaica Criminal Bench Book (2017) section 14-2, example 1).

[107] The above statements of the relevant law comprise the proverbial yardstick against which we seek to measure the soundness of the criticisms levelled at the learned judge by Mr Robinson, and refuted by the learned DPP. The learned judge prefaced her directions about the jury's treatment of the absent witnesses by general directions that it was their job to decide which witness was credible; that in arriving at that decision, they should apply their common sense and have regard to the witness' demeanour. The learned judge explained that by demeanour she meant, assessing how the witness looked while testifying. That assessment, the jury was told, was helpful to determine whether or not the witness was speaking the truth. The learned judge emphasised that it was equally important to listen and recall the evidence and, with the application of common sense, decide where the truth lay (see page 355 lines 8-21 of the transcript).

[108] Demeanour was the learned judge's segue into her directions on the impact of the absence of the witnesses upon the jury's search for truth. Beginning at page 355 line 22 through to page 357 line 1 of the transcript, the learned judge told the jury:

> "Now, when it comes to demeanour, there are some witnesses who you did not see. Those witnesses [sic] evidence was read in by other persons. Because in one of them, the witness was dead. And in another, the witness was not brought … So there are certain circumstances in which you do not see the witness who has spoken. One such person would be Miss Marcia McKenzie. So you will realize, as you are assessing the witnesses to decide who is credible and who is not. You cannot use that mile stone [sic], that guide, as you assess Miss Marcia McKenzie because you did not see her.

> So as you look at her evidence and you decide what to make of it, bear that in mind. Not only her evidence but the other witnesses who did not come in person. Those witnesses were not cross-examined; you couldn't see them in the box being cross-examined by all counsel. And you never got to see how they behaved in the box. So you bear that in mind and you assess the evidence, not because you did not see them it means that you can't believe, not at all. You look at the substance of what they said and you come to a determination based on that."

Firstly, it is clear the learned judge's directions communicated to the jury why the witnesses' statements were read into evidence instead of the usual manner when the witness would speak from the witness box, in court. Secondly, the learned judge focused the mind of the jury on the limitation arising from the use of the statement, that is, they were deprived of an obvious means of assessing the credibility of the witnesses on account of not seeing them go through the crucible of cross-examination; a fact they should bear in mind. Thirdly, although the learned judge did not couch her direction in the language of the specimen directions, in directing the jury that "… as you look at her evidence and you decide what to make of it," the jury would have understood that it was for them to decide what, if any importance, they should attach to Miss McKenzie's evidence in particular.

[109] The question of the importance of the Miss McKenzie's statement is intertwined with the provenance of the statement, a matter hotly contested at the trial. The learned judge made it clear to the jury that that was a question for their resolution. After discussing with the jury the controversy surrounding the apparent differences in the signatures on the statement which Miss McKenzie allegedly signed, the learned judge directed the jury that, at page 401 lines 13-19 of the transcript:

> "At the end of the day you have to decide if you are sure that these statements was [sic] signed by Marcia McKenzie as being true and correct, that is your job. Did she sign it as being true and correct? Do you believe District Constable Langott who said he saw that happen?"

The jury was asked to consider whether the statement was a fabrication or dictation from Miss McKenzie. Not only did the learned judge direct the jury to pronounce on the authorship of the statement, they were directed that it was for them to decide on the veracity of its contents. At page 406 lines 4-7 of the transcript, they were told, "[a]nd it is now for you to decide if what is written there was dictated by Marcia McKenzie, and if what was written is the truth".

[110] So that, although the jury was not told that the agreement for the statements to be admitted into evidence was not synonymous with an agreement that the contents of the statements were true, it was made clear to them that belief in truth of their contents fell squarely within their province. The jury would have understood that a belief in the statement, would have to abide heeding the directions on the limiting effects of no cross-examination, and, their assessment of the substance of the statements.

[111] It is convenient at this time to address one of Mr Robinson's criticisms, namely, in essence, that by going on to tell the jury they could believe the evidence in spite of not having seen the witnesses, neutralised the cautions that went before. Respectfully, this is a frivolous complaint. If the jury, having considered the evidence against the background of the cautions, could not then say, the cautions notwithstanding, we accept the evidence, the rationale of having a trial would be rendered nugatory. Consequently, the learned judge, in so directing the jury, neither overstepped her boundaries nor led the jury astray.

[112] There is, however, one noticeable deficit between the learned judge's directions and the specimen directions. That is, the jury was not told that the statements had not been given under oath or affirmation. However, the jury could not have failed to appreciate the difference between an out of court statement and evidence in court, under oath or affirmation, by virtue of the contrast between the two, evident from the learned judge's directions on how they could assess the demeanour of a witness in the witness box; and that that benefit was denied them by the absence of witnesses whose statements were read into evidence.

[113] This was not a case in which the identification of the attackers depended solely on the dying declaration, notwithstanding the weaknesses inherent in the evidence of the eyewitness, Miss McKenzie. Consequently, the learned judge's directions on identification were more than adequate to alert the jury to guard against the possibility of mistaken identification. The learned judge adequately addressed the major weakness, the lighting, in the identification evidence. Although the directions on identification, in places, were not as analytically robust as they might have been, viewed holistically, Mr Shane Ridge and Mr Andrew Rowe were not thereby disadvantaged. The directions on the dying declaration and the reliance on statements of absent witnesses were sufficient to bring home the pitfalls to the jury. Looked at globally, the directions on the matters raised under this ground were sufficiently substantive to rob the complaints of legitimacy. This ground should, therefore, fail.

Ground 5: The Learned Trial Judge's summation was unbalanced and unfair to the applicants in many regards rendering the trial unfair.

[114] Mr Robinson made two complaints under this ground. These will be discussed separately.

Inadmissible hearsay evidence

[115] Mr Robinson's first complaint was that the learned judge allowed the prosecution to elicit prejudicial hearsay evidence, which was repeated during the summation. That is, Miss Jody-Ann Somers, during her examination-in-chief, was allowed to testify that she was aware of a problem between Mr Shane Ridge and the deceased because the deceased had told her so. Mr Robinson submitted that this evidence had no probative value and was prejudicial as it served to convey to the jury that Mr Shane Ridge had a motive to kill the deceased. This, he submitted, was unfair to both Mr Shane Ridge and Mr Andrew Rowe.

[116] The learned DPP conceded that the hearsay complaint was valid and submitted that it should have been directly addressed as such. However, the learned DPP sought to contextualise the impugned evidence by reference to what the witness had earlier said.

There was evidence that the last time the witness saw Mr Shane Ridge and the deceased together, they were arguing. With that context in mind, the learned DPP argued that when the passage in the summation which contained both bits of evidence is examined, it cannot justly be said that the learned judge was referring to the hearsay. Instead, the learned judge was referencing the earlier evidence about the argument when the deceased and Mr Shane Ridge were last seen together. Therefore, the conclusion was, the learned judge was right in doing so as this latter evidence did not have the taint of hearsay.

Discussion

[117] It is perhaps best to first set out both sections of the evidence quoted by the learned DPP, that also contain the part about which Mr Robinson complained, then the passage from the summation. At page 33 lines 14-19 of the transcript, during the examination-in-chief of Miss Jody-Ann Somers, the evidence below was elicited:

> "Q. Can you remember when was the last time that you saw Cha Cha and your brother Kevone together?
>
> A. Yes.
>
> Q. When?
>
> A. When the two of them was [sic] arguing."

At page 35 lines 10-15:

> "Q. Miss Somers, were you aware of any problem between Cha Cha and your brother Kevone?
>
> A. Yes.
>
> Q. How did you become aware of the problem between your brother and Cha Cha?
>
> A. Kevone tell [sic] me."

The jury was reminded of this evidence in the learned judge's review of Miss Jody-Ann Somers' evidence, concerning their (Jody-Ann Somers and the deceased) previous

knowledge of Mr Shane Ridge and Mr Andrew Rowe. At page 378 lines 19-25; 379 lines 1-5 & 9-10 of the transcript, the learned judge said:

> "… This Cha Cha was friends with her brother. She saw them together more than five times. She says the last time she saw Cha Cha and her brother together was when the two of them were arguing in front of the playfield [sic] but she cannot remember when that was, but it was in the same 2009, and it was the first time that she had actually seen them arguing, and she never got to hear what they were arguing about. But what she did see was that after that, she did not see them like friends again … She was aware of a problem between Cha Cha and her brother."

[118] It was recognised by both sides that Miss Jody-Ann Somers' awareness of a problem between Mr Shane Ridge and the deceased was classic first hand hearsay, and should have been disallowed. The challenged evidence was elicited after the elicitation of detailed evidence demonstrating, that Mr Shane Ridge and the deceased were well-known to each other, underlined by their friendship; and that friendship had soured, following a public argument between the two (Miss Somers never saw them talking as friends after the argument, page 34 lines 12-15 of the transcript). That made it evident that there had developed a problem between them which severed their bond of friendship. Viewed against that backdrop, two points may be made. Firstly, the prosecutor's question, which was undoubtedly leading, that elicited the hearsay evidence served, to use an idiomatic phrase, "only to gild the lily". The question, and the answer obtained, achieved no more than the embellishment of the picture already painted for the jury. Secondly, since the jury already had a picture of broken friendship, at its lowest, or friends-turned-foes, at its highest, painted upon the canvass of the trial by admissible evidence, the superfluous inadmissible hearsay evidence could not have had the attributive effect for which Mr Robinson contended. Even if it is assumed that the inadmissible hearsay evidence could have led the jury to conclude "Cha Cha" (Shane Ridge) had a motive for killing the deceased, the potency of this evidence to achieve that result was no greater than the admissible evidence that preceded it. Hence, the jury could have come to the same conclusion on both parts of the evidence.

[119] That said, the learned judge had earlier directed the jury on the place of motive in the trial. After instructing the jury on the relevant ingredients of the offence of murder and that other elements of murder, such as self-defence and provocation, did not arise in the case before them, the learned judge moved seamlessly into directions on motive. The jury was told, specifically, that they did not have to consider motive. They were then directed that the prosecution did not have to prove any reason for the killing. They were explicitly told that motive was no concern of theirs, and that their concern was with the elements of the offence of murder, which did not include providing a motive. Although the learned judge included in her directions that an obvious motive made a case easier to understand, she also told them that sometimes the motive was never made known.

[120] The cumulative effect of these directions was to bring home to the jury, not only that the prosecution did not have to prove motive as a constituent element of the offence, but that, in the case before them, there was no such evidence. Consequently, the jury was further directed to concern themselves with determining whether the relevant elements of the offence of murder had been established. These instructions, together with our analysis of the evidence, show that the likelihood of the inadmissible evidence having the effect Mr Robinson argued that it did, was very remote.

[121] In spite of that conclusion, the learned judge had a duty to exclude the inadmissible evidence. Repeating it during the summation, without telling the jury to disregard it for reason of its inadmissibility, could only have left the jury to conclude they could have acted upon it. However, in light of the preceding analysis that the inadmissible evidence would have had little weight on the jury's deliberation, for the reason stated, this non-direction did not matriculate to a misdirection resulting in the verdict being either unsafe or unsatisfactory. We will now turn our attention to the second complaint.

Summation unbalanced and unfair

[122] In his second complaint, Mr Robinson submitted that the learned judge's summation was unbalanced and unfair. The solitary passage upon which this submission was based is quoted below, as it appears at page 415 lines 15-21 of the transcript.

However, to situate the direction in its immediate context, we will commence the extract at line 10, and continue through to page 416 line 4, highlighting the section on which Mr Robinson relied. We quote:

> "… Could the deceased Kevone see his assailants in order to send the message to his mother if you believe that and could Marcia McKenzie see, in order to say to Detective Davis, I saw these people**. Did the deceased man and Marcia make it up. [sic] Did they make it up. [sic] The two of them are saying the same thing, if you believe their evidence. Was there an opportunity for them to cook up the story when the deceased goes off to the hospital and is not seen again. Is there an opportunity for cooking up**?
>
> Is it based on what people say? Is it that the deceased never really said anything in the car? All of this what you are hearing now, is because there was gang violence and people's names were called. But in all of this, when you are thinking, bear in mind, exercise caution with the identification. Could the people, the two witnesses see? …" (Emphasis supplied)

This statement (the highlighted portion) had the effect, Mr Robinson submitted, of "giving veracity to the evidence of these witnesses". This effect should be considered with the learned judge's omission to direct the jury that a number of witnesses can be mistaken. Mr Robinson submitted that the jury should have been told that the opportunity existed for Miss McKenzie to have cooked up her story as she gave her statement months after the incident and the taking into custody of one of the applicants. Mr Robinson also submitted that there was no direct evidence of when Miss Jody-Ann Somers communicated what the deceased told her, in addition to not having told her uncles, in whose presence the declaration was made. These features, Mr Robinson submitted, were all weaknesses which should have been highlighted to provide balance to the summation.

[123] The learned DPP, in her written submissions, argued that the learned judge was neither unbalanced nor unfair. The remarks, it was submitted, were part of the learned judge's exercise of bringing to the jury important questions and observations which they should consider in determining the facts. In undertaking that exercise, the learned judge

made it clear to the jury that it was for them to say whether they believed the witnesses, the learned DPP argued. In their written submissions, the Crown provided a table with five extracts from the summation to demonstrate the balance and fairness, which they submitted was shown by the learned judge.

Discussion

[124] The directions Mr Robinson endeavoured to assail were given within the context of the learned judge's exhaustive treatment of the circumstance of the available lighting. By these directions, the learned judge was guiding the jury to consider if the deceased and Miss McKenzie could have seen the attackers, to afterwards report in the manner they did. Equally important, the jury were being told that even if they accepted that the witnesses could have seen the assailants, another test of their reliability was the possibility of concoction; not only as between the deceased and Miss McKenzie but also on the part of Miss Jody-Ann Somers and, Miss McKenzie individually, by the reference to what was being said. Far from tilting the scale in the prosecution's favour, the directions counselled the jury to take the broadest sweep of the case, within the ambit of the evidence, in coming to their verdict.

[125] While we acknowledge the value of the passages the learned DPP relied on and referred to above, we think the extract at para. [120] above, is sufficiently demonstrative of the balance and fairness which imbued the summation. That, together with the rejection of the arguments on the effect of the inadmissible hearsay evidence, renders this ground void of merit.

Conclusion

[126] The main issues this appeal presented for our determination were the correctness of rejecting the submission of no case to answer, identification, dying declaration and reliance on statements, admitted under section 31D of the Evidence Act. This was not a case in which the identification of Mr Shane Ridge and Mr Andrew Rowe depended on evidence which amounted to a fleeting glance nor a longer observation made under

difficult circumstances. The learned judge was therefore correct in rejecting the no case submission. The learned judge's directions adequately reflected the spirit of the guidelines in **R v Turnbull** which were dovetailed with the required directions on dying declaration. Those directions were supplemented by the equally adequate directions on how the jury should proceed in relation to the statements that were read into evidence. Accordingly, the challenges to the conviction must fail. There was no ground challenging the sentence imposed.

Orders

[127] We, therefore, make the following orders:

1) The applications for leave to appeal conviction and sentences are refused.

2) The sentence imposed on each applicant is reckoned to have commenced on 26 September 2019, the date the sentences were imposed.