JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 4/2009

BEFORE: THE HON. MRS JUSTICE HARRIS, J.A.
THE HON. MISS JUSTICE PHILLIPS, J.A.
THE HON. MRS JUSTICE MCINTOSH, J.A.(Ag)

CHARLES SALESMAN v REGINA

Barrington E. Frankson for the Applicant

Jeremy C. Taylor for the Crown

3 and 4 March; 16 April and 11 June 2010

MCINTOSH, J.A. (Ag)

[1] The applicant, Charles Salesman was convicted in the High Court Division of the Gun Court on 12 September 2006, for the offences of illegal possession of a firearm and shooting with intent. The following day, 13 September 2006, he was sentenced to serve concurrent terms of 8 years imprisonment for each offence.

[2] On 15 December 2008, some twenty-six months later, Mr. Salesman applied for leave to appeal his conviction and sentence and, as the application was woefully out of time, he also applied for an extension of time within which to file his application.

[3] The single judge of this court who first considered his applications on 7 August 2009, granted him an extension of time to 5 January 2009, but refused him leave to appeal.

[4] Thereafter, Mr. Salesman pursued his right to renew his application before the full court and was represented by attorney-at-law, Mr. B. E. Frankson, who had also appeared for him at his trial. We heard his application on 3 and 4 March 2010 and on 16 April 2010 we gave our decision, dismissing the application and affirming his convictions and sentences. We ordered that his sentences commence on 13 December 2006 and promised to give written reasons for our decision at an early date. We now fulfill that promise.

THE EVIDENCE

[5] The prosecution's case rested on the evidence of its sole eyewitness, the complainant, George Reid, who testified that sometime shortly before mid-night on 12 February 2005, as he was driving his Toyota Corolla motor car to his home in Greater Portmore, St. Catherine, with his fiancée, he

observed two men on foot, turning onto the road on which he was travelling and walking in his direction. He was able to see them as the intersection was well lit by a street light. They were walking in his direction and when he first saw them they were an estimated 50 to 55 feet away from him. He could see how they were dressed – one, later identified as the applicant, wore a tight creamish-looking long-sleeved polo shirt, tight jeans pants and blue and white sneakers. His hair was in a canerow which went all the way to the back. The other man was wearing tight blue jeans pants, white sneakers and a long-sleeved plaid shirt which he wore outside of his pants.

[6] It seemed to Mr. Reid that they were dressed for a party and that aroused his suspicion as he observed no activity of the kind in the area. On reaching near to them, he looked at them and their eyes met because they were also looking at him. The one with the canerow hair style, identified as the applicant, was actually walking in the street and was within an estimated 6 to 7 feet of him. It seemed that Mr. Reid's attention was particularly drawn to him because he was doing a kind of jig in the road. He said:

> "I was able to look at him from his face to his foot because I was driving very slowly at the time when I saw him."

When asked why he was driving slowly he said:

> "Normally when I see anybody on the street at that time I tend to want to observe them and then try and make a determination as to what to do afterwards as to just pass or turn around, whatever."

[7] Some fifteen seconds after reaching to his gate he was accosted by the applicant who came from around his fence, in a slight trotting motion, to the front of his vehicle. The applicant was then about two feet from him with a firearm in his hand which he, as an ex-army man, was able to recognize as a 9mm pistol. The applicant fired a shot at him and he returned the fire with his licenced firearm, then drove away immediately to the end of the road.

[8] There was a second encounter when he turned the vehicle around and was then facing the applicant who was right in front of his gate, about an estimated 75 feet away from him. The applicant was still armed and was joined by the other man who was armed with what seemed to him to be a submachine gun. They opened fire at him, hitting his vehicle at some point and after waiting until they came close together in the middle of the road, almost under the street light, he returned the fire and they fled. He saw the applicant stop beside a parked car, about 100 yards away, fire a shot in the air and then continue running. The area was well-lit from the street light and light from nearby houses.

[9] He made a report to the police and, on their arrival, investigations were carried out at the scene after which a statement was recorded from him at the Portmore Police Station. About 12 days later, 24 February 2005, he attended an identification parade and was able to point out the applicant as one of the two men involved in the incident that night.

[10] Mr. Reid's evidence of the lighting conditions was supported by the investigating officer, Detective Inspector Carl Malcolm, who described the scene as being properly lit when he went there that night. There he had met Mr. Reid whom he did not know before and was shown a green 1995 Corolla motor car with what appeared to be bullet holes in the windscreen and an indentation at the top which, in his opinion, may also have been caused by a bullet.

[11] He left the scene for the Spanish Town Hospital some minutes to 2:00 a.m. and there he saw two injured men, one of whom he identified as the applicant. He observed that the applicant had a wound to his left hand which was bleeding, that he had plaited hair and that he was neatly dressed in shirt, jeans and white sneakers. He asked the men how they received their injuries but got no response and he left them being treated by hospital medical staff to return to the Portmore Police Station. Then, at about 8:00 a.m., the applicant was taken to the station, by which time Mr. Reid had already left.

[12] In cross-examination, Inspector Malcolm said he collected spent shells from the scene and was not aware of any swabbing of the hand or hands of the applicant for the presence of gunshot residue nor had he ever seen the results of any such test. However, the prosecution's case concluded with evidence from Constable Derron Wright who testified that he had swabbed the hands of the applicant at the request of Woman Detective Corporal Thompson. This he had done at the Spanish Town Hospital but he was not privy to the results of the swabbing test.

[13] When questioned about factors which may lead to an imperfect result, he said that severe washing with an uncontaminated liquid will impact on the ability to recover gunshot residue and, no doubt, the prosecution posed that question in the context of Detective Malcolm's evidence that the injured hand of the applicant was bloody and being treated when he left him at the hospital. Constable Wright was not asked about the time that the swabbing was done, save to say that he was on duty at the area 5 Scene of Crime Unit in the early morning hours of February 13, 2005 and that he went first to the crime scene that morning, then to the Portmore Police Station and then to the hospital.

[14] The applicant gave sworn evidence in which he told the court that he was a 40 year old father of twelve children who has been working in the personnel division of Matrix Engineering Company since 19 October

2005. He also does mechanic work and coaches the Rivoli Juvenile Football Team for which he played professionally from 1981 until his retirement in 1999. He also assists on the Executive Board. That very night of 12 February 2005, at about 10:15 p.m., he had been at a party on Rivoli Avenue, where he was one of the guests of honour. He left the party at about 11: 00 to 11: 50 p.m. with two other men and they stopped at a stall on March Pen Road in St. Catherine where he purchased "a spliff and a rizzler".

[15] At the very time when the complainant spoke of being shot at by him, the applicant said he himself was shot and injured by the occupants of a white car which had pulled up beside him as he stood by the stall preparing to put his purchases to use and after he was shot, he ran. His attire was different from that described by Mr Reid as he was wearing a blue short-sleeve checkered shirt, sky blue baggy pants and blue and white sneakers. His hair was done in a kind of rope twist all the way to the back and hanging down at the back.

[16] The injury he received was to his right hand (not the left hand as the prosecution maintained) and he had sought medical attention at the Spanish Town Hospital where he was taken by one of the Rivoli team managers who happened to be passing by. Officers from the Spanish Town Police Station had come to the hospital and, while he was awaiting

treatment, officers from the Portmore Police Station had attended and had caused his hands to be swabbed.

[17] After treatment he was taken to the Portmore Police Station, arriving there at about ten minutes past three the next morning. He was put to sit in a room in which there were about ten other persons, only one of whom he recognized. That was a female police officer named Miss Thompson. Then he was taken through the CIB office where "they" took his shirt after which he was taken to the Booking Room where he was strip- searched and put in a cell. "It was then minutes to 4:00 or 4:00 am". Later that morning, between 7:30 to 8:00 o'clock, he was removed from the cell and taken through the CIB office to a little room where he was questioned by the police and, after facing an identification parade, some days later, he was subsequently charged with the offences for which he was convicted. He had not seen Inspector Malcolm at all until when he was charged.

The Grounds for the Application

[18] Counsel abandoned the three (3) original grounds of appeal which were filed with the application and, in their stead, he sought and was granted leave to argue five supplementary grounds although, ultimately, only grounds 1 and 3 were argued as filed, ground 2 was re-formulated and argued with the leave of the court and grounds 4 and 5

were abandoned. Supplementary grounds 1, 2 as reformulated and 3 are set out below:

Ground 1

[19] "The learned Trial Judge erred in law when he failed and/or refused to uphold the no case submission made on behalf of the Appellant in that:-

(a) The evidence as to identification was tenuous and made in difficult circumstances particularly where there was inadequate lighting. Further, the evidence discloses that the witness had the opportunity to view the Applicant at the police station prior to the Identification Parade.

(b) The evidence of the sole eye witness for the prosecution was full of inconsistencies and contradictions that a reasonable jury properly directed would not convict. The manifest unreliability of his evidence is even more startling in that the prosecution had in its possession material that it failed to produce so as to corroborate its case, namely:-

(i) Photographs

(ii) Swab results taken from the Applicant

By virtue of the matters set out above the conviction of the Applicant is unsafe and ought to be set aside."

Ground 2

[20] "The Learned Trial Judge fell into error when he refused to allow the entire statement given to the police by the Applicant to be admitted into evidence."

Ground 3

[21] "The Learned Trial Judge in his summing up failed to appreciate and/or misunderstood the evidential significance of:-

(i) the photographs as it relates to the damage (if any) done to the motor car

(ii) That Mr. Reid returned fire "using his own weapon firing two shots to the left-side of the windscreen, damaging the glass."

(iii) That the Appellant's hands were swabbed for gun powder residue;

(iv) The admission by the Learned Trial Judge that the Applicant was not 'shaken in cross examination ... he was, however not as impressive a witness as the main crown witnesses."

and, in his skeleton submissions, the following was added, with leave:

"(v) That the Learned Trial Judge failed to warn himself of the danger of convicting upon the uncorroborated evidence of the sole eye witness for the Crown. His failure so to do was fatal and rendered the conviction unsafe."

The Debate

Ground 1

[22] In sum, ground 1 complained about the quality of the identification evidence including the identification parade and inconsistencies and

contradictions in the evidence which rendered it unreliable. These are the matters which, according to Mr. Frankson, should have led the learned trial judge to have favourably considered his no case submission and which rendered the conviction unsafe.

Quality of the Identification Evidence

[23] Mr. Frankson submitted that the evidence of the prosecution's sole eye witness, George Reid, was incapable of belief and ought not to have been accepted by the learned trial judge. His evidence of the maneuvering of the motor car, the speed at which he was travelling and the position he gave for the men made it practically impossible for Mr. Reid to have been able to make a proper identification of his assailants. It was impossible to look the men in the eye in the circumstances described by him – circumstances that could have given rise to no more than a fleeting glance, he argued.

[24] He further argued that Mr. Reid's ability to see his assailants would have been seriously impaired by the admitted presence of almond trees and fichus trees along his wall and in the vicinity of the street light. It was impossible for Mr. Reid to see that man who walked along the wall as the man would be walking under the trees. It was his contention that the second occasion was also a fleeting glance and, this time, in difficult circumstances.

[25] Mr. Taylor, on behalf of the Crown, argued that all the factors which make for reliable identification evidence, in accordance with the **Turnbull** guidelines were to be found in the evidence of Mr. Reid. Relying on the decision of this court in **Herbert Brown and Mario McCallum v Regina,** SCCA Nos. 92 & 93/2006, delivered on 21 November 2008, he submitted that, in all the circumstances of the instant case, the trial judge was correct in rejecting the no case submission and in calling upon the applicant to answer the charges.

[26] In **Brown and McCallum**, the Court of Appeal reviewed authorities such as **R v Curtis Irving** (1975) 13 JLR 139; **R v Barker** (1975) 65 Cr. App. Rep. 287, 288; **R v Turnbull** [1977] QB 224; **R v Galbraith** [1981] 2 All ER 1060; **Jones (Larry) v R** (1985) 47 WIR 1; **Reid, Dennis & Whylie v R** (1989) 37 WIR 346, 354; **Daley v R** (1993) 43 WIR 325; and **Garnet Edwards v R.** (Privy Council Appeal No. 29 of 2005 judgment delivered 25 April 2006), dealing with the judicial approach to a no case submission (the **Galbraith** guidelines) and the principles regarding identification evidence, (the **Turnbull** guidelines).

[27] The following is the **Galbraith** guideline, as set out in paragraph 34 of **Brown and McCallum:**

> "How then should the judge approach a submission of 'no case'?

(1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case.

(2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence. (a) Where the judge comes to the conclusion that the prosecution evidence taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case. (b) Where, however, the prosecution evidence, is such that its strength or weakness depends on the view to be taken of a witness's reliability or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty then the judge should allow the matter to be tried by the jury.... There will of course, as always in this branch of the law, be borderline cases. They can safely be left to the discretion of the judge."

[28] The Court then referred to the Privy Council's decision in **Jones (Larry) v R** (supra) and summarized the view of the Board at paragraph 34:

"34 ... despite the fact that the Board considered that the "real attack" by the defence on the sole eye witness's evidence "was principally that it was not sufficiently reliable to found a conviction and therefore should not have been left to the jury" (essentially a **Galbraith** point), it was nevertheless

> held that the trial judge had been entitled to allow the case to go to the jury on the question of identification "even if the circumstances were not ideal" (per Lord Slynn, at page 4)..."

[29] Reviewing the **Turnbull** guidelines, the court said at paragraph 35:

> "35 ... the critical factor on the no case submission in an identification case, where the real issue is whether in the circumstances the eye-witness had a proper opportunity to make a reliable identification of the accused, is whether the material upon which the purported identification was based was sufficiently substantial to obviate the 'ghastly risk' ...of mistaken identification ..."

[30] It has long been established that the principles enunciated in these authorities guide our courts in the approach to be taken to submissions of no case and it was clear to us that in the instant case the learned trial judge was entitled to take the course that he took.

[31] Another complaint was that the trial judge fell into error when he referred in his summing up to the description of the applicant as supported by the investigating officer who saw him that night at the hospital, because that was not correct. The transcript of the evidence of the inspector did show that he did not describe the clothing in the same way that Mr. Reid did, but as the trial judge said at page 193, "the description given by him fits very closely that which the Inspector saw Mr. Salesman had on the night in question just hours after the incident with Mr.

Reid". The Inspector had given a description of shirt, blue jeans and white sneakers and similarly described the plaited hairstyle (which the trial judge regarded as a specific feature – see page 193), worn by the man he saw at the hospital so that it was not unreasonable for the trial judge to have found that the inspector's description of the applicant fitted the description that Mr. Reid gave of his first attacker (see page 194). In our view, such a description was capable of lending support to the complainant's identification evidence.

The Identification Parade

[32] Mr. Frankson also sought to impugn the integrity of the identification parade though he was present and had made no complaint at the time. He submitted that when the applicant was taken from the hospital in the early hours of the morning to the police station, "in all probability Mr. Reid would also have been present and there was everylikelihood of a confrontation". Bearing in mind the time line as disclosed in the evidence, the inescapable inference, he said, was that, at the very least, Mr. Reid and the applicant were together in the same CIB office.

[33] The learned trial judge stoutly rejected this in his findings. He said at page 185:

> "I accept the Inspector's testimony that Mr. Reid had left before Mr. Salesman and the other man had been taken to the police station. I accept

> Mr. Reid's testimony that he was not confronted with Mr. Salesman or any person suspecting (sic) of being involved at the shooting at 8 West in Greater Portmore."

[34] Having accepted their evidence, there was no room for any possibility of any exposure of the applicant to the complainant prior to the holding of the parade which left the integrity of the parade intact.

[35] As part of the submissions on this complaint, counsel expressed concern about Mr. Reid's evidence that he had visited the Portmore Police Station at a later date and sought to refresh his memory from his statement. This was a most unusual action, Mr. Frankson said, and it tainted his credibility. He submitted that when one looked at his evidence as a whole and applied it to the issue of identification, then no reliance ought to be placed on Mr. Reid's evidence that the applicant was properly identified by him. We were unable to agree that there was any impropriety in the witness refreshing his memory and that refreshing his memory tainted his credibility. He was entitled to refresh his memory and we could see no significance in the place where this was done. And it is to be noted that there was no suggestion that there was any tampering with or alteration of the statement.

Discrepancies and Inconsistencies

[36] Mr. Frankson submitted that Mr. Reid was an unreliable witness upon whose evidence the learned trial judge ought not to have relied as it contained several discrepancies and inconsistencies. He referred to the witness's evidence that he had looked at his watch at a point as the incident unfolded and later indicating that he was referring to the car clock as a watch; to his evidence as to whether or not there was damage to his car and if so where and whether the car was stationary or moving during the second encounter when he fired at both men and as to the length of time he had the men under observation. He had agreed that he had told the police in his statement that he had observed the men for one minute while telling the court that it was two minutes. These were matters which rendered him an unreliable witness.

[37] In dealing with discrepancies and inconsistencies, the learned trial judge had this to say at page 179:

> "On two occasions he did seem less than frank with the court and there was one discrepancy during his testimony and his statement given to the police. At one time Mr. Reid, when he spoke of checking the time found himself in an unenviable situation where he described his car clock as a watch. The second was concerning the time for which he saw the men along First Avenue. In his testimony here he said at first two minutes, he agreed that he had told the police one minute when giving that statement in that context. The other discrepancy was where he

> told the court that he remained - his car was stationary when he fired shot at the two men. In his statement to the police he agreed that he said that the car was moving forward at the time he fired. Despite those three elements Mr. Reid remained an impressive witness with excellent demeanour and gave a very credible narrative as to the events of 12th February, 2005."

[38] At page 180, he went on to say:

> "The court reminds itself that it is entitled to believe some of what a witness says and reject some."

In this case, it was the trial judge's view that the rest of Mr. Reid's testimony could be used in a credible manner so as to meet the standard that the prosecution is required to meet and that such discrepancies as he found did not destroy the prosecution's case.

[39] Their Lordships in **Jones** (supra) held that even if there were some discrepancies in the evidence and even if the quality of the identification was not of the best, it could not be said that in that case, no reasonable jury could convict. Similarly, in the instant case, we were of the view that it could not be said, at the end of the day, that after assessing the discrepancies and inconsistencies, the learned trial judge, as the tribunal of fact, did not have material sufficient to found a conviction so that the trial judge was entitled to take the course that he did. As the Board in **Jones** went on to say, however, it was important that, leaving it to the jury,

the judge should then give sufficient directions to the jury in accordance with **Turnbull.**

[40] At page 190 of the transcript the learned trial judge made it clear that he was following the **Turnbull** guidelines. He carefully examined the circumstances under which the identification was made, taking into account the evidence as to lighting, distance, time and whether there were any difficulties in the circumstances that would tend to weaken the identification. In assessing this evidence at page 192, he said:

> "In terms of time for viewing, the witness purported to say that he saw the men for two minutes at first along First Avenue then it was reduced to a minute. But I think Mr. Frankson is quite correct in saying that for the distance pointed out especially where the Inspector who says that it is a distance of a chain between those two roads ... Mr. Reid is saying that he is not very good at distance. Mr. Frankson is correct in saying that the witness could not have seen those two men as they walked along First Avenue, he could not have seen their faces for more than three to four seconds in any detail."

[41] He considered the evidence of the second opportunity that the complainant had to view the face of his assailant and concluded that that time could also only have been three to four seconds. He then considered the impact of the trees on the lighting conditions and said:

> "...although there is a streetlight, there would be the matter of shadows as the men walked away from the streetlight. Also the matter of shadows

> as the first attacker walked beneath the almond tree to come to where Mr. Reid's car was; those aspects must be taken into account. Similarly, danger which Mr. Reid faced, when faced with a man armed with a 9mm firearm, albeit that he is an ex army officer, there is that element of surprise which would take even an ex army officer to a point where it is (sic) normal observation, powers of observation could be affected."

[42] The learned trial judge added that he also had to take into account, that within 12 days Mr. Salesman was pointed out on a properly conducted identification parade. We hasten to point out here, however, that it is well established that identification of a suspect on a parade does not bolster poor evidence of visual identification. That evidence must be of a sufficient quality in order to benefit from a positive identification on an identification parade so that the trial judge would have first had to satisfy himself of the quality of Mr. Reid's evidence of identification at the time of the incident.

[43] Notwithstanding his abridgment of the viewing time given by Mr. Reid, we did not agree with the submission that the opportunities to identify the applicant amounted to a fleeting glance. Taken as a whole, we found that the identification evidence consisted of a sequence of events which took into account not only viewing of facial features but observation of clothing and conduct and surrounding circumstances, so

that it would have been incorrect to view this as a case of a fleeting glance.

[44] The learned trial judge concluded his assessment of the identification evidence at pages 194 and 195 and summed it up in this way:

> "Having considered all the evidence in this matter I find so as I feel sure that...the circumstance of the sighting of Mr. Reid's attackers was such that Mr. Reid would be able to recognize his attackers, certainly the first one if he saw him again and that he did in fact see him again at the identification parade. "

[45] So, having satisfied himself that Mr. Reid's identification evidence was of good quality, he was then entitled to find support for it in the identification at the parade. As the tribunal of fact, it was entirely a matter for the trial judge to assess the evidence and to decide who or what he believed. There was cogent evidence before him on which he could and clearly did rely and it is not the function of this court to substitute any findings of fact for those arrived at by the trial judge, especially without the benefit of the opportunity which he had to see and to assess the witnesses as they testified. This is what it seemed that learned counsel was inviting the court to do.

[46] We accordingly found no merit in the submissions that the learned trial judge erred in law in rejecting the no case submission and ground 1 therefore failed in its entirety.

Ground 2

Refusal to admit the Applicant's statement to the police.

[47] In cross examining the applicant, prosecuting attorney had asked him questions about a statement he had given to the police, in an effort to show that he was giving a different account to the court from the account in that statement. After several questions and the production of the statement he agreed that he had given the police the information which the statement contained. Then, at the conclusion of his evidence, the following exchange occurred between Mr. Frankson and the learned trial judge:

> "MR. FRANKSON: My Lord, my learned friend put a portion of his statement given by the witness to the police.
>
> HIS LORDSHIP: The witness answered that he did give that portion of the statement.
>
> MR. FRANKSON: I am guided by Your Lordship. I intend to put the statement and ask him, the entire statement and admit admit it into evidence.
>
> HIS LORDSHIP: Pardon me?

MR. FRANKSON: I intend to put the statement to him.

HIS LORDSHIP: As a previous consistent statement? And is that allowed?

MR. FRANKSON: To prove the fact that a statement was made

HIS LORDSHIP: You want to have it? Mr. Salesman, come down.

MR. FRANKSON: That, may it please you, is the case."

[48] It is this expression of counsel's intention that formed the basis of this complaint and, in support of his submissions in this regard, he relied on the principles concerning the admissibility of statements from an accused, as enunciated in **R v Storey and Anwar** [1968] 52 Cr. App. R. 334 and **R v Donaldson** (1977) 64 Cr. App. R. 59 and as summarized in **R v David Anthony Pearce** (1979) 69 Cr. App. R 365 and discussed in Archbold "Criminal Pleading, Evidence and Practice", 1993 Volume 1, paragraph 15-330.

[49] Counsel was of the view that the principle relevant to the circumstances of the instant case was the principle numbered 2 at paragraph 15 -331, with particular reference to parts (a) and (b) which read as follows:

> "2 (a) A statement which is not an admission is admissible to show the attitude of the accused at the time when he made it. This however is not to be limited to a statement made on the first encounter with the police ...
>
> (b) A statement which is not in itself an admission is admissible if it is made in the same context as an admission whether in the course of an interview or in the form of a voluntary statement. It would be unfair to admit only the statements against interest while excluding part of the same interview or series of interviews. It is the duty of the prosecution to present the case fairly to the jury; to exclude answers which are favourable to the accused while admitting those unfavourable would be misleading."

[50] In our view, the exchange clearly demonstrated that no application was actually made to the judge to admit the statement and there was accordingly no refusal to admit it. But, even if that exchange could be said to contain such an application, was the statement admissible? This was a statement by the applicant, as a complainant, given when he made a report about the circumstances of his injury - a statement taken in the course of enquiries into his allegation of a shooting along March Pen Road, as Mr. Taylor, submitted. It was not a statement taken in the course of the investigation of the incident involving Mr. Reid. Mr. Taylor referred us to page 159 of the transcript which made that clear, as it was the applicant's evidence that he reported the incident in which he was shot, to the police and gave a statement in that regard.

[51] Bearing in mind that the defence was one of alibi, Mr. Frankson submitted, the statement of the applicant fell within 2a and 2b. It was given spontaneously so that the learned trial judge could assess the response of the witness when first taxed. This submission was, however, misconceived. While the authorities no longer restrict the admissibility of such a statement to the occasion when an accused is first taxed, (see **R v Pearce**, supra), the statement clearly must relate to the "incriminating facts" – that is, it must relate to the offence being investigated by the police.

[52] The questions that were asked by the prosecution in cross examination sought to impeach the applicant's credibility in relation to his account of the circumstances in which he said he had received his injury. There was no evidence before the court, nor were there any submissions made, regarding the basis for the admission of the statement, especially as it did not fall within the **Storey and Anwar** principle.

[53] Furthermore, such a statement, if admitted, would not have been evidence of the truth of its contents and its non-admission did not prejudice the applicant in his defence as the trial judge did not come to any adverse conclusions about his credibility based on the prosecution's attempt to discredit him with questions on his statement.

[54] We found this ground unsustainable and therefore it too failed.

Ground 3

[55] The complaint in ground 3 was four-fold, listing as areas of concern the absence of photographs taken at the crime scene that morning as well as the test results from the swabbing of the applicant's hand/hands (also part of ground 1); the flawed assessment of credibility and the absence of a corroboration warning for the evidence of the complainant, as sole eye-witness.

Absence of photographs and swabbing test results

[56] Mr. Frankson argued that the photographs taken at the scene and the swabbing test done on the hands of the applicant ought to have been adduced into evidence to corroborate the complainant's weak evidence and thereby strengthen the prosecution's case. The learned trial judge failed to consider the prosecution's failure to adduce evidence as to whether or not gunshot residue was taken from the hand of the applicant and consequently failed to address his mind to the only inference to be drawn from this failure, namely, that there was no finding of gun powder residue and that would mean that the applicant was not present when the shooting occurred, he argued.

[57] It seemed that without those photographs and the spent shells, counsel was of the view that the complainant ought not to have been believed that anyone was shot at and that there was any damaged vehicle. However, we did not find this argument to be sound. In addition to the *viva voce* evidence of the complainant, the learned trial judge had for his consideration the evidence of Detective Malcolm who spoke of seeing the vehicle that night and observing what, as a police officer, seemed to him to be bullet holes and an indentation at the top of the car also apparently caused by a bullet. This was consistent with what the complainant had said and the inspector's evidence was never challenged. Therefore, the absence of the photographs still left the trial judge with material upon which he could act. It is the duty of the tribunal of fact to return a verdict on the basis of the evidence presented – to determine whether what has been presented suffices to make the tribunal sure of the guilt of an accused and this is clearly what was done in this case.

[58] The trial judge was in no doubt about the veracity of the complainant and in no doubt that the incident had taken place. He made that clear in his summation when at page 183 he said:

> "In looking at Mr. Frankson's complaint however, although there were things admittedly absent from the Crown's case, there were other bits of evidence, albeit viva voce from the witnesses Reid and Inspector Malcolm. These things support

> the evidence that there was an incident at Mr. Reid's road that night.
>
> ....I'm convinced that there was a shooting at Greater Portmore, 8 West that night of the 12th of February, 2005 and that Mr. Reid was involved in it. I find that absence of the 'real' evidence that Mr. Frankson speaks about with great passion does not prevent the court from being able to find there was such an incident and make that finding with confidence that it is sure."

[59] Further, it is no part of the function of the tribunal of fact to speculate on whether there was a negative finding on the swabbing test which was done on the hands of the applicant. The evidence disclosed that a swabbing test was done but on the prosecution's case that would have been after the applicant was treated for the injury to his left hand. In that event, according to the evidence of Constable Wright who did the swabbing, that would impact on the ability to have a proper test. The applicant sought to say that it was before his hand was treated that the swabbing was done but the trial judge rejected his account.

[60] In the final analysis, the submission that the prosecution's failure to produce a test result was because it was negative and that that meant that the applicant was not the person who discharged a firearm that night, could not be sustained.

Flawed assessment of credibility

[61] The gravamen of this complaint was that the learned trial judge ought to have made a determination on the creditworthiness of the complainant at the close of the prosecution's case based on the matters raised and rule that the applicant had no case to answer. Mr. Frankson submitted that in addressing his mind to which witness was more impressive than the other, the learned trial judge failed to properly assess the evidence and the issue of credibility.

[62] On the other hand, Mr. Taylor argued that the learned trial judge was quite correct to reject the no case submission and he found powerful support for this view in the authorities. He referred us to **R v O'Neil Hall et al** SCCA Nos.112, 115, 116 and 118 of 2004, a decision of the Court of Appeal delivered on 28 July 2006 where it was held that it was not for the trial judge to decide whether the witness should be believed and that credibility was normally a matter for the jury - (see **Brooks v DPP** [1994] 1 A.C. 568 at 581). The court further held at page 15 that:

> "Where the prosecution's evidence is such that its strength or weakness depends on the view to be taken of a witness' credibility, reliability or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence on which the jury could properly come to the conclusion that the defendant is guilty then a no case submission should be rejected (see **R v. Galbraith** 73 Cr. A.R. 124)."

[63] In the instant case, the trial judge, as tribunal of fact, had to assess the credibility of the witnesses and, at the end of the prosecution's case, he clearly took the view that there was credible evidence upon which a finding of guilt could result and properly rejected the no case submission. Then, at the conclusion of the case, he further addressed the issue and he utilized the generally recognized factors in so doing. He assessed the demeanour of the witnesses as they testified and how they answered questions put to them and determined that, as between the applicant and the prosecution's witnesses, the latter were the witnesses upon whose word it was safe to rely. That was a matter for him, as tribunal of fact and he was not to be faulted for the approach that he took.

Absence of a corroboration warning

[64] While conceding that the judge addressed the dangers of convicting on evidence of visual identification, counsel submitted that he should have gone further to say that where there is a sole eye witness whose evidence is uncorroborated, then the identification evidence must be approached with special care and this was particularly so in the instant case where there was available to the prosecution evidence (that is, photographs, spent shells and swabbing test results) which was capable of corroborating the sole eye-witness.

[65] Mr. Frankson relied on the decision in **R v Lebert Balasal and Soney Balasal** and **R v Francis Whyne** [1990] 27 J.L.R. 507 as supportive of this ground. In that case it was held that:

> "a trial judge whether sitting with a jury or sitting alone should expressly warn the jurors or himself of the dangers inherent in acting upon uncorroborated evidence of visual identification."

Unlike **Balasal** where no warning at all about how to treat with evidence of visual identification was given, the trial judge in the instant case demonstrated that he was mindful of the need for caution in dealing with such cases and, in our view, this case is clearly to be distinguished from **Balasal.**

[66] The authorities are clear that no special words need be employed by a trial judge in order to demonstrate that he or she has applied the requisite warning. The word "corroboration" need not be mentioned (see **Ashwood, Gruber & Williams** (1993) 43 WIR PC 294 at 298. "It is the principle which is paramount and not a precise verbal formula." See also **Watt v R** (1993) 42 WIR 273 where it was held that "whilst the adequacy of the direction in identification cases is important, a summing-up need not follow any particular form of words").

[67] In **R v Keene** (1977) 65 Crim App. Rep. 247 referring to evidence which goes to support the correctness of identification evidence, the

court held that such supportive evidence "does not have to be what lawyers call 'corroboration' so long as its effect is to support the identification. Its weight is a matter for the jury,". At page 248, Lord Justice Scarman had this to say:

> "it would be wrong to interpret or apply **Turnbull** inflexibly. It imposes no rigid pattern, establishes no catechism which a judge in a summing-up must answer if a verdict of guilty is to stand."

[68] Mr. Taylor argued that **Balasal** represents the old position on the issue of the corroboration warning and it is now viewed by the courts as discretionary. He cited several authorities to support his submission but of particular note was the case of **Regina v Prince Duncan and Herman Ellis,** SCCA Nos. 147 and 148 of 2008, a decision of this court delivered on February 1, 2008.

[69] At page 13 of the judgment, the court addressed the complaint concerning the trial judge's failure to give a corroboration warning. After looking at what the court held was "a trend in the development of the law towards the abrogation of the corroboration requirement in sexual offences" (see **R v Chance** (1988) 3 WLR 661 and **R v Derrick Williams** SCCA No. 12 of 98 delivered 6 April 2001), the court referred to the judgment of Lord Taylor, C.J. in **R v Makanjuola** [1995]1 WLR 1348 (also relied on by Mr. Taylor in the instant case).

[70] The English courts now regard Lord Taylor's guidelines given in **Makanjoula** as "the rule of practice which now will best fulfill the needs of fairness and safety," (see **James v The Queen** (1970) 55 Cr. App. R 299). The following words were taken from a passage in the judgment of the learned Chief Justice (at page 1351):

> "... whether, as a matter of discretion, a judge should give any warning and if so, its strength and terms must depend upon the content and manner of the witness's evidence, the circumstances of the case and the issues raised."

[71] His lordship later continued, dealing with a witness shown to be unreliable:

> " It is a matter for the judge's discretion what if any warning he considers appropriate in respect of such a witness as indeed in respect of any witness in whatever type of case. Whether he chooses to give a warning and in what terms will depend on the circumstances of the case, the issues raised and the content and quality of the witness's evidence." (Emphasis added).

[72] This court approved the views expressed by the Court of Appeal in **Duncan and Ellis** (supra) and agreed that the decision in **Makanjuola** is applicable to this jurisdiction and we were strongly of the view that in the instant case the learned trial judge, sitting alone as tribunal of fact and law, dealt appropriately with the matter. He demonstrated a cautious approach to the identification evidence, identifying the areas of weakness and strength and we were not of the view that he needed to

convey more than he did, in the circumstances of this case. To add anything more would have been superfluous.

[73] Accordingly, ground 3 also failed in its entirety.

CONCLUSION

[74] For the reasons given above, we refused the applicant's application for leave to appeal and made the order as indicated at paragraph 4 herein.