[2013] JMCA Crim 10

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 89/2010

BEFORE: THE HON MR JUSTICE MORRISON JA
THE HON MR JUSTICE DUKHARAN JA
THE HON MR JUSTICE BROOKS JA

WAYNE SAMUELS v R

Everton Bird for the applicant

Mrs Sharon Millwood-Moore for the Crown

19, 20, 23 November 2012, 25 January and 22 February 2013

BROOKS JA

[1] This is an application by Mr Wayne Samuels for leave to appeal against his conviction, which occurred in the High Court Division of the Gun Court on 12 May 2010. The presiding judge was McDonald J, who sat without a jury. As a result of that conviction Mr Samuels was sentenced, on 4 August 2010, to imprisonment at hard labour for seven years, for the offence of illegal possession of a firearm, 10 years imprisonment for each of two separate counts of robbery with aggravation, 12 years imprisonment for shooting with intent and four years imprisonment for illegal possession of ammunition. All the sentences were ordered to run concurrently.

[2] A single judge of this Court refused Mr Samuels' application for permission to appeal, but Mr Bird, in his usual comprehensive and elegant style, renewed the application on Mr Samuels' behalf. Mr Bird urged us to set aside the convictions on the basis that they were unsafe.

[3] On 25 January 2013, we announced our decision to refuse the application for permission to appeal and ordered that the sentences be reckoned as having commenced on 4 November 2010. At that time, we promised to put our reasons in writing. We now fulfil that promise.

[4] At the time of hearing the application, we granted Mr Bird permission to abandon the grounds of appeal filed by Mr Samuels and to argue four supplemental grounds in place thereof. The essence of the grounds argued by Mr Bird was as follows:

> **Ground 1**
> The learned trial judge erred on the facts and was wrong in law in arriving at [her findings of fact].
>
> **Ground 2**
> The learned trial judge erred and consequently misdirected herself on the facts and was wrong in law in [accepting the evidence by the prosecution that the applicant made a voluntary admission of having participated in the crimes in issue].
>
> **Ground 3**
> The learned trial judge misdirected herself on the applicable law and was wrong on the facts in rejecting the submission of no case to answer made by the defence counsel on behalf of the [applicant].

> **Ground 4**
> Failure of the learned trial judge to make any or any sufficient reference to, or comment on, obvious weaknesses, contradictions and inconsistencies in the case for the prosecution and the irregularities associated with the manner in which the prosecuting counsel chose to conduct it...have the effect that the verdict handed down by the learned trial judge cannot be supported...as the aforementioned shortcomings in the process of the trial had the result that the [applicant] did not receive a fair trial.

We shall examine the issues raised by each ground in turn. Before doing so, however, it is necessary to outline the respective cases that were presented at the trial.

The case for the prosecution

[5] On 14 December 2012 the Nelson family, of a Portmore address in the parish of Saint Catherine, collected a family member at the Norman Manley International Airport and drove home. On entering their yard at about 1:00 am, they were pounced upon by two men, at least one of whom was armed with a firearm. The men robbed them of money and other valuables and drove away in Mr Nelson's blue Honda CRV motorcar.

[6] Mr Nelson promptly made a report to the police, and a transmission was made on the police communication system concerning the robbery.

[7] At about 2:30 that morning, a police mobile patrol spotted the Honda CRV along Burke Road in Spanish Town and chased it. The chase took them along Old Harbour Road where the Honda ran off the road and crashed into an embankment. This was in the vicinity of Sydenham Villas, also in the parish of Saint Catherine. The police car stopped behind the Honda and the two police officers aboard, alighted. They noticed

that two persons were in the Honda. The police were still beside their vehicle when the driver of the Honda alighted from that vehicle.

[8] As he alighted, the driver pointed a gun in the direction of the police officers and opened fire. The officers took cover and returned the fire. The driver of the Honda fell to the ground, and the firearm fell from his hand. One of the police officers, Corporal Gladstone Allen, went to where the driver was, took up the firearm and, leaving the driver where he lay, injured, went to assist the other police officer, Corporal Dalton Gordon (who was then a constable), with the other occupant of the Honda.

[9] While the police officers were engaged with the other occupant, the driver got up and fled the scene. He made good his escape. The other occupant, Mr Wesley Walters, was taken into custody. He led the police to an address at Saint John's Road, where some of the Nelsons' property was recovered.

[10] At about 5:00 the same morning, a police party, including Corporals Allen and Gordon, went to Sydenham Villas, mentioned above, where Mr Samuels was found lying in a yard suffering from gunshot injuries. He was wearing clothing identical in description to that worn by the man who had alighted from the Honda and fired at the police officers. Both officers identified Mr Samuels as the man who had fired at them. Mr Samuels was taken to the hospital, where, on the following day, and after being cautioned, he admitted to having robbed the family.

[11] The Nelsons were summoned to the Bridgeport Police Station that morning. There, at about 7:00 o'clock, they identified their possessions that had been stolen earlier. Those items had been retrieved from the Honda as well as from the premises at Saint John's Road.

[12] An identification parade was held for Mr Walters and Mrs Nelson identified him as one of the robbers. No parade was held for Mr Samuels. While Mrs Nelson was giving testimony at the trial she pointed Mr Samuels out as being one of the robbers. It was during the course of that testimony that Mr Walters pleaded guilty to the firearm and robbery charges. Mr Samuels was called upon to answer the charges against him, after an unsuccessful no-case submission which was made on his behalf.

The case for the defence

[13] Mr Samuels made an unsworn statement in his defence. He stated that on the morning in question he was just a passerby, visiting his girlfriend, when he heard a loud explosion sounding like a gunshot. He said that he felt something hit him. He, thereafter, fell to the ground and lost consciousness because he was bleeding very badly. He woke up in the hospital. He, of course, knew nothing about the robbery or the shoot-out with the police. He stated that he did not give any statement to the police admitting participation in a robbery. He called no supporting witness.

Ground 1 **The learned trial judge erred on the facts and was wrong in law in arriving at her findings of fact**

[14] In ground one of his grounds of appeal, Mr Bird made a detailed dissection of what, he said, were discrepancies and inconsistencies in the respective testimonies of Corporals Allen and Gordon. The thrust of his submissions, in that regard, was that there was no sound basis on which the learned trial judge could have believed the testimonies of those officers.

[15] A major portion of Mr Bird's submissions in respect of this ground dealt with inconsistencies between Corporal Allen's written statement and his evidence in chief. The most significant of those inconsistencies concerned the time at which Corporal Allen retrieved the firearm. That inconsistency had a significant impact on the issues of identification and credibility. Mr Bird submitted that the basis on which the learned trial judge believed the oral testimony of Corporal Allen was fragile. We do not share that view. The learned trial judge demonstrated that she considered the evidence and made her finding accordingly. After identifying the inconsistency, the learned trial judge said in her summation (set out at pages 561-2 of the record):

> "The evidence before the court is what is given in the witness box and not what the witness said on a previous occasion, this is not evidence unless the witness admits that that is the truth. There is a difference in the sequence of the taking up [of] the gun as to whether Corporal Allen took up the gun before the man ran as stated in Court or after the man ran as stated in his statement. I accept the evidence of Corporal Allen that he took up the gun before the man ran. Corporal Allen testified that after he took up the firearm, he looked at the accused man for five seconds and then went across to Constable [sic] Gordon. Corporal Allen admitted that this

> five second observation is not recorded in his statement. His explanation for this omission is that he had no guidance that he should have written it in the statement, he is not an investigator, he is more an office-type officer, he said it had to do with knowledge, how to include that, he had no knowledge. **Having seen and heard this witness I believe him when he says that he looked at the accused lying on the ground for five seconds**." (Emphasis supplied)

[16] That extract, and particularly the portion emphasised, demonstrates that, not only did the learned trial judge identify the inconsistency and accept the explanation given for it, but she went on to explain that the witness' demeanour assisted her in arriving at her conclusion. The portion of the summation, which has been emphasised above, highlights the reason for this court being slow to disturb findings of fact by the tribunal entrusted with that task. The principle was stated in **R v William March and Others** SCCA No 87/1976 (delivered on 13 May 1977), at page 5 of the judgment:

> "...this Court will only interfere with the verdict of the jury, where any question of fact is involved, if the verdict is shown to be obviously and palpably wrong."

[17] The reason for the reluctance of the appellate tribunal is based, in part, on the principle that the tribunal of fact, unlike the appellate tribunal, had the opportunity of hearing the witnesses and observing the demeanour of each. The principle was stated by this court in **R v Horace Willock** SCCA No 76/1986 (delivered 15 May 1987), where, at page 5, the court said, in part:

> "...the absence of reasons or findings in the summation would not necessarily provide a basis for disturbing the verdict of **the learned trial judge, who as the tribunal of fact, had the clear and distinct advantage of**

> **seeing and hearing the witnesses at the trial and of weighing and assessing the demeanour of the witnesses**." (Emphasis supplied)

[18] Our comments also extend to the issue of identification, on which Mr Bird also spent much time addressing. It is sufficient to say that there was adequate evidence upon which the learned trial judge could have based her finding that the opportunity to view the driver, before he fled, was sufficient to enable Corporals Allen and Gordon to recognise him if they saw him again.

[19] Mrs Millwood-Moore, for the Crown, helpfully identified the relevant bits of identification evidence which were presented by the prosecution at the trial. These, she set out at paragraph 5 of her written submissions:

> "(i). *Corporal Allen's evidence*: (pages 559-561)
>
> (a). the service vehicle passed the rear of the crashed vehicle, slightly to the right of it;
>
> (b). all the service vehicle lights were on, as well as the road was brightly lit by street lights;
>
> (c). he looked at the applicant's face for some seven seconds, during which time he was coming out of the vehicle and firing at them;
>
> (d). he said he imagined that as soon as the applicant's foot touched the ground, he started to fire at him and so he took cover at the tail pipe of the service vehicle;
>
> (e). he said he got as low as possible but was still able to see the man's upper body, navel, arm, shoulder, straight up to his head and face;

(f). he was able to see the applicant's face without any obstructions;

(g). after he returned fire, the applicant fell and a gun fell from his hand;

(h). he went up to the applicant, took up the firearm, looked at him for five seconds, he could see his face;

(i). he thought the man was seriously hurt and went across to assist Corporal Gordon with the man seated in the observer seat of the CRV;

(j). Corporal Gordon spoke and he saw the applicant running over into the open land, bushy area with houses;

(k). It is noted that Corporal Allen testified that the applicant appeared groggy before he exited the vehicle and that he was able to see his face at that time.

(l). There was an inconsistency between the officer's evidence in chief and his statement: He admitted that in his written statement, he said that the man came out of the car with the gun in hand, looked at him for about seven seconds, fired shots in his direction and ran away;

(ii). Corporal Gordon’s evidence:

(a). the street light was immediately beside the CRV;

(b). the applicant came out of the vehicle, looked in his direction for five to six seconds, after which he heard explosions and saw flashes of light;

(c). the accused man was five feet from the street light;

(d). the police vehicle was to the rear of the CRV, which was completely off the road and pointing in the direction of the bushes, while a part of the service vehicle was on the other side of the road, some twenty five feet away from the CRV;

(e). he saw the applicant come out of the CRV, point a gun towards him, he took cover behind the left front door of the service vehicle;

(f). he heard explosions and saw flashes of yellow and red from the firearm, he returned the fire;

(h). [sic] There was an inconsistency between the evidence of the officer in court and the contents of his written statement: Corporal Gordon indicated that in his statement he said that when he saw the man get up and run into a yard, Corporal Allen then took up the gun."

[20] Those aspects of the evidence were for the tribunal of fact to have considered. The learned trial judge, after giving herself the appropriate **Turnbull** warnings (at pages 552–556 of the transcript), found both officers credible and reliable and accepted their testimony with regard to the identification. The indications are that the learned trial judge approached the issue of identification with an open mind. It is to be noted that she, at page 556, rejected Mrs Nelson's dock identification of Mr Samuels.

[21] It is to be noted that the identification evidence concerning the shooting incident is to be considered separately from the identification evidence given in respect of the robbery of the Nelsons. The identification evidence, with respect to the robber who

drove away the Honda CRV, was, at best, tenuous. The opportunity to observe that robber was affected by Mrs Nelson's position, with respect to that person.

[22] The only connections between the robbery and the shooting were the Honda CRV and Mr Walters' presence at both incidents. The presence of the Honda raised the issue of the doctrine of recent possession. The learned trial judge referred to that issue. She said at page 572:

> "I accept the evidence of Corporal Allen and Constable [sic] Gordon that they saw the accused Wayne Samuels in the Honda CRV motor car, the property of Mr. Winston Nelson. **I find that the accused man was in possession of the said car shortly after it was stolen and he must have been one of the robbers**. The circumstances of the recent possession was [sic] such that the court draws the inference that the accused man was one of the persons who robbed the CRV on the 14th of December, 2007. The Court does not find him to be a receiver in the circumstances." (Emphasis supplied)

The learned trial judge's application of the doctrine of recent possession is, admittedly, not consistent with the law regarding the application of the principle in the context of a robbery.

[23] It has been established that culpability for the robbery cannot be based solely on a finding of recent possession of the goods that were taken (**Ashan Spencer v R** SCCA No 14/2007 (delivered 10 July 2009)). It has also been established that recent possession cannot establish facts central to the offence of robbery (**Dillon v The Queen** [1982] AC 484; **Leon Schroeter v R** [2010] JMCA Crim 47). For those reasons, the learned trial judge's finding, as expressed above, that Mr Samuels was the

robber, based on the consideration of the fact of recent possession of the stolen Honda, is objectionable.

[24] It is open to a tribunal of fact, however, to find that the fact of recent possession of property taken during a robbery can support even poor identification. In **R v Turnbull** [1977] 1 QB 224 at pages 229-230, Lord Widgery CJ, in giving the judgment of the court, explained that concept. He said:

> "When in the judgment of the trial judge, the quality of the identifying evidence is poor, as for example when it depends on a fleeting glance or a longer observation made in difficult conditions, the situation is very different. The judge should then withdraw the case from the jury and direct an acquittal **unless there is other evidence which goes to support the correctness of the identification**." (Emphasis supplied)

[25] This court, in **Alcott Smith v R** [2012] JMCA Crim 30, considered that evidence of recent possession could constitute that "other evidence", to which Lord Widgery referred. That recent possession may be strengthened by the fact that the explanation for the possession is untrue. Morrison JA, in giving the judgment of the court, opined, at paragraph [32], that an untrue explanation for the possession of recently stolen property, could have been treated by the tribunal of fact, "as additional evidence tending to support the correctness of the identification of the appellant as one of the armed robbers". Admission of culpability would, of course, be even stronger support for poor identification evidence.

[26] On that reasoning, the learned trial judge in the instant case was entitled to rely on the evidence of the admission by Mr Samuels, in order to find that he was one of the robbers. This she did, also at page 572:

> "I accept the evidence of Constable Smith that on the 15th of September, 2007, the accused Wayne Samuels made a statement to him at the hospital admitting to his involvement in holding up and robbing the complainant."

In the circumstances, her erroneous statement, concerning the recent possession, cannot be held to have resulted in a miscarriage of justice.

[27] For these reasons, ground one fails.

[28] Despite our refusal to disturb the learned trial judge's findings of fact, two things must be noted. Firstly, Mrs Millwood-Moore's comment about the learned trial judge's approach to the issues is most apt. She said at paragraph 8(iv) of her submissions:

> "There were a number of weaknesses in the evidence of identification that warranted consideration. It would have been of greater assistance, had the learned trial judge detailed her method of resolving the various conflicts. The tribunal could have, in a more fulsome way, considered the impact of both [officers] having the same inconsistency in their evidence, particularly where the matter concerned identification and further, where the defence was alleging recent fabrication, and mistaken identity."

[29] Secondly, it must be noted that Mr Bird quite correctly identified the failure of the investigative branch of the prosecution to produce forensic evidence that could have assisted the trial court in its task. He pointed out that there was no effort to produce any fingerprint evidence from the Honda or the firearm recovered, in order to

link Mr Samuels to those items. Mr Bird also identified the fact that no swabs were taken of Mr Samuels' hands to determine if he had gunshot residue on them. Learned counsel also brought to our attention the failure to link Mr Samuels, by way of forensic evidence, to the scene of the shoot-out, by a comparison of his blood to that left at that scene by the driver of the Honda. All these lapses, Mr Bird submitted, demonstrate the weakness of the prosecution's case. Despite our acceptance that these were deficiencies in the prosecution's case, the admission by Mr Samuels, if properly admitted and capable of belief, would be a powerful compensating, if not overwhelming, factor.

[30] It is in ground two that Mr Bird attacked the learned trial judge's acceptance of the evidence concerning Mr Samuels' admission. We now address this ground.

<u>Ground 2</u> **The learned trial judge erred and consequently misdirected herself on the facts and was wrong in law in accepting the evidence by the prosecution that the applicant made a voluntary admission of having participated in the crimes in issue**

[31] Constable Shackhart Smith testified that he conducted an interview with Mr Samuels at the hospital and secured an admission that Mr Samuels participated in the robbery of the Nelsons. Constable Smith said, at page 423 of the record, that after he cautioned Mr Samuels on 15 December 2007 (the day after the incident), Mr Samuels said:

> "Mr Smith, let mi tell you the truth, a town mi a come from with Wesley and Twinny who did a drive a white car and mi see the van at the Portmore Toll booth and we follow them go a dem yard where Twinny let out mi and Wesley out a di

> car and drive round the block and we hold them up and rob them and took the properties to St. John's Road and go drop off the van a Old Harbour Road with the document and the ID eena it."

[32] Mr Bird criticised that evidence. He complained that it had appeared in a statement written, by Constable Smith, possibly six months after the incident. By that time, learned counsel submitted, all the information contained therein would have been brought to Constable Smith's attention, quite independently of Mr Samuels. According to Mr Bird, this evidence was a "bed of quick sand laid by Cons Smith to delude an unsuspecting gullible or impressionable tribunal".

[33] Despite Mr Bird's harsh characterisations, we do not agree with his criticism of the finding, by the learned trial judge, that Constable Smith was a credible witness. She was alive to the dangers of oral admissions and addressed the issue appropriately. She said, at page 570:

> "The Court is aware that it is difficult to disprove oral admissions. Having warned myself of the special need for caution before using the oral admission evidence to convict, I find that the accused man said these words and they are true, that he said so voluntarily and spontaneously and without coercion. I accept that he was properly cautioned in accordance with the Judge's rule [sic], that it was communicated properly with [sic] Constable Smith. **I accept Constable Smith's evidence that he informed him of his rights to legal representation before the accused man said, 'Mr Smith, let me tell you the truth.'** I accept Constable Smith's evidence that he got the permission of a doctor to speak to the accused man...." (Emphasis supplied)

[34] It is also to be noted that the learned trial judge had, before her, the evidence of what Mr Samuels had said, at the Sydenham Villas location, to Corporal Harrock Darnells:

> "Officer, it is Twinny make me in a this. Me glad me nuh dead. Help me. Carry me go a hospital. Me a go back in a church." (Page 373 of the transcript)

She said, at page 568, that she accepted "Corporal Darnells as a witness of truth and was impressed by the way he gave his evidence". Mr Bird criticised the learned trial judge's use of these statements to link Mr Samuels to the shootout with the police, but we find that, given his injured state and the testimonies of Corporals Allen and Gordon, the link was indeed, fully supported by evidence.

[35] Constable Smith's police statement was also the subject of some controversy at the trial. During Constable Smith's testimony, counsel for the defence complained that they had not been previously been provided with his statement, concerning the alleged admission. The transcript reveals that there was some uncertainty, between counsel, as to whether Constable Smith's statement, had previously been given to the defence. It is also not clear from the transcript, whether defence counsel, having complained, had had their want, satisfied. Counsel for both the prosecution and the defence, produced affidavits to us, as to what had transpired, but those affidavits did not clarify the issue as to whether the statement was shown to, as opposed to being served on, defence counsel.

[36] It seems to us, however, that the fact that extensive cross-examination of Constable Smith ensued after the complaint by defence counsel, without any further mention of a missing statement, meant that defence counsel were eventually provided with, at least sight of, the statement. The reasonableness of this conclusion is bolstered when one considers the importance of evidence concerning the admission (Mr Bird referred to it as a "bombshell"), and the extensive experience of defence counsel, then appearing. It is impossible to conceive of the trial having continued, as it did, without that issue having been resolved to their satisfaction.

[37] Based on that reasoning, we find that ground two also fails.

Ground 3 **The learned trial judge misdirected herself on the applicable law and was wrong on the facts in rejecting the submission of no case to answer made by the defence counsel on behalf of the applicant**

[38] In his extensive submission that Mr Samuels should not have been called upon to answer the prosecution's case, counsel for Mr Samuels argued that:

a. the sighting by Mrs Nelson was made in difficult circumstances and her dock identification of Mr Samuels should be ignored;

b. the supposed recent possession of the vehicle was countered by the fact that one of the perpetrators of the robbery, said to be Mr Samuels, was dressed differently from the driver of the vehicle at the time that it had crashed;

c. the sightings by Corporals Allen and Gordon were made over a very short period of time, in very difficult circumstances and should be considered poor;

d. the testimony of both officers should be discarded as being recent concoctions, as critical parts thereof had not been included in their witness statements.

[39] Mr Bird commented that, after hearing submissions from both sides, the learned trial judge merely said, "Yes, case to answer." Learned counsel submitted that the learned trial judge should have acceded to the submission. He also seems to be of the view that, having decided to reject the no-case submission, she ought to have revealed her reasons for coming to her decision. We do not agree with that stance.

[40] Firstly, in light of all the various threads of evidence making up the prosecution's case, this was certainly a matter for the tribunal of fact to consider. Secondly, no complaint can be made of a trial judge who "merely" rules "case to answer", after hearing a "no case" submission. All of the various elements addressed during those submissions can be addressed during the summation. There is no need to address them twice, first at the end of the prosecution's case and then during the summation. There is always the risk too, that an astute accused person, having heard the reasons for rejecting a submission that there is no case to answer, may contrive an untruthful statement or give false testimony, in order to address the points raised in the learned judge's ruling.

[41] Given the evidence concerning identification at the time of the shooting, the admission and the possession of the Honda, so soon after it had been taken from the Nelsons, it is not surprising that the learned trial judge dismissed the no-case submission. We entirely agree with her judgment in that regard.

<u>Ground 4</u> **Failure of the learned trial judge to make any or any sufficient reference to, or comment on, obvious weaknesses, contradictions and inconsistencies in the case for the prosecution and the irregularities associated with the manner in which the prosecuting counsel chose to conduct it, have the effect that the verdict handed down by the learned trial judge cannot be supported as the aforementioned shortcomings in the process of the trial had the result that the applicant did not receive a fair trial.**

[42] The object of Mr Bird's intricately worded last ground of appeal was the evidence by Constable Smith, concerning the admission said to have been made by Mr Samuels. According to Mr Bird, the manner in which three aspects of that evidence was elicited by the prosecution and dealt with by the learned trial judge, caused unfair prejudice to Mr Samuels.

[43] The first aspect of that evidence is the fact that Constable Smith's police statement was undated. Learned counsel argued that the learned trial judge did not address that omission with any critical thinking. What she did, he submitted, was to accept the defect and go on to state that the court was not to speculate on the date on which Constable Smith had made the statement. According to Mr Bird, the learned trial

judge's approach indicated a bias in favour of the prosecution and a willingness on her part "to sweep as many of [its shortcomings] under the carpet as she could".

[44] The second aspect, concerning the admission, is that the learned trial judge found that there were certain parts of its contents, of which Constable Smith could not have had any independent knowledge. The essence of Mr Bird's complaint is that, not only was that not so (which point we have addressed above), but that the learned trial judge did not deliberate on the question of whether Mr Samuels had, in fact, made the statement. According to learned counsel, the learned trial judge did not use any language to indicate her acceptance that Constable Smith's evidence was not above question, but was subject to her appraisal.

[45] The third aspect, which gave rise to Mr Bird's complaint, was the manner in which counsel for the prosecution dealt with the evidence of the reception by Constable Smith of the names of the accused. The "evidence" was elicited in two parts. The first part was done in defiance of a ruling by the learned trial judge. Immediately after ruling that Constable Smith would not be allowed to state the name that Mr Walters had given to him, when he first interviewed Mr Walters, counsel for the prosecution then asked:

> "Now, after he gave his name as Wesley Walters, you spoke to him?" (Page 418 lines 20-21)

Mr Walters had, by that stage of the trial, already pleaded guilty. The infraction went by without comment by either the learned trial judge or counsel for Mr Samuels.

[46] The learned trial judge was alert that the evidence could have been unfairly prejudicial. What Mr Walters had said to Constable Smith, even about himself, was, strictly speaking, hearsay, since Mr Walters was, by the time that evidence was being tendered, no longer a party to the trial. It was, therefore, wrong for counsel for the prosecution to have brought the information to the attention of the court in the way that he did. It was, however, not evidence and is unlikely to have caused any confusion in the mind of the learned trial judge. It certainly would not have been of any surprise to the court that that was the name that was given.

[47] It was the second part of the evidence concerning the name that, Mr Bird asserts, when combined with the first, resulted in prejudice to Mr Samuels. Learned counsel framed his argument, at page 41, of his written submissions, in this way:

> "It was at page 422 line [sic] 10-16 that it was revealed that the objective of the prosecution in fighting so valiantly to have the name Wesley Walters introduced into evidence was that it was the main plank of the identification evidence being adduced by the prosecution was [sic] that Wesley Walters was known to the injured man and that it was intended by the prosecution that [Mr Samuels] was to be proven guilty by association with co-accused Wesley Walters who pleaded guilty! The learned judge had been correct without hearing the evidence in presuming prejudice against [Mr Samuels]!"

[48] The evidence concerning this second part is recorded thus:

> "Q. What did you do?
>
> A. I conducted an interview with [Mr Samuels] where he was admitted on Ward 2.
>
> Q. Did you get a name?

A. Yes sir.

Q. What name did you get?

A. **Mr Wesley Walters he said at first, Mr. Wayne Walters**." (Emphasis supplied)

[49] The cumulative effect of these two portions of the examination in chief, according to Mr Bird, left the learned trial judge "in an unenviable position". In his view, it compromised Mr Samuels' entitlement to a fair trial.

[50] Mr Bird is not on good ground with these submissions. In respect of the first two aspects, we respectfully find that Mr Bird has not taken into account in his submissions, that the learned trial judge, as the tribunal of fact, made a finding that Constable Smith's evidence, as to the taking of the statement, was truthful. In addition to that finding, the learned trial judge also addressed the fact that the statement had not been dated. She did so at page 570 of the transcript:

> "At first Constable Smith said his statement was dated the 30th of May, 2008 but after being shown the statement he admitted that it was not dated, that the 30th was in fact the date he was due for Gun Court. It would have been the ideal situation for the statement to be dated but the statement is not evidence and there is no evidence before the Court that the contents of the statement indicating what the accused man said on caution is different from what the police officer had stated in Court that he said on caution."

We find nothing objectionable about the manner in which the learned trial judge treated with the issue of the undated statement. She was entitled to make the finding that she

did, that Constable Smith's evidence concerning the fact and contents of the caution statement, was credible.

[51] It is true that the learned trial judge did not reprimand counsel for the prosecution for his blatant disregard of her ruling. We note, however, that there was no objection to the prosecuting attorney's flouting of the ruling, and that he made no further effort to elicit any aspect of the conversation between Mr Walters and Constable Smith.

[52] It may well be that no one, except the prosecuting attorney, appreciated that the adducing of the name was preparation for evidence which was to come later. It does not seem, however, that the link with the later evidence had the prejudicial effect that Mr Bird propounds. Firstly, the learned trial judge made no mention of it. Secondly, the fact that Mr Samuels was charged in his own name rather than in the name "Walters" overshadowed the evidence that he gave a different name when he was approached by Constable Smith.

[53] It is true that the alleged use by Mr Samuels of the name "Wesley Walters", does link Mr Samuels with a person who was found in Mr Nelson's Honda, took the police to premises where some of the Nelsons' property was found and pleaded guilty to robbing them. That link was, however, overshadowed by Mr Samuels' admission of participation in the robbery. Those matters were all before the tribunal of fact and the finding was clearly to the effect that the admission was made and that it was truthful.

[54] On the question of whether Constable Smith could have known of all the elements of the content of the cautioned statement, we find that there is some amount of surmise by Mr Bird. The learned trial judge, at page 571 of the record, quite accurately stated the position. She said:

> "[Mr Samuels] gave certain details in the admission and **there is no evidence before the Court** that Constable Smith would have known of **all** of them at the time when the admission was made..." (Emphasis supplied)

[55] That finding is accurate, at least insofar as the statement mentions sighting the eventual victims (the Nelsons) at the Portmore toll booth and following them home. No other person gave any testimony with regard to that aspect of the cautioned statement. To assert that Constable Smith could have heard of this aspect from someone else amounts to speculation.

[56] In conclusion therefore, we find that the learned trial judge was entitled to make the findings that she did. The sentences imposed on the applicant were in accord with the sentences for offences of this nature. Indeed, no complaint was made by counsel about the sentences and we find that the learned trial judge's decision, in that regard, cannot be faulted.

[57] It is for those reasons that we arrived at the decision that was announced on 25 January 2013.