[2024] JMCA Crim 2

JAMAICA

IN THE COURT OF APPEAL

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

SUPREME COURT CRIMINAL APPEAL NOS COA2018CR00064 & 67

CLIFFORD SAUNDERS
RANFORD SAUNDERS v R

Pierre Rogers instructed by Rogers and Associates for the appellant Clifford Saunders

Leroy Equiano for the appellant Ranford Saunders

Miss Kathy-Ann Pyke and Dwayne Houston for the Crown

17, 18 July 2023 and 19 January 2024

Criminal Law – Visual identification – Mask of perpetrator falling – Perpetrator said to have been known before - Whether fleeting glance

Criminal Law – Identification by voice – When permissible in evidence – Number of words spoken – Whether sufficient opportunity to identify perpetrator

Criminal Law – Identification case – No case submission – Case to answer – Whether order justified

Criminal Law – Wounding with intent – Whether trial judge correct to allow evidence of wounding with intent in respect of victim who did not give evidence and absence of evidence as to how victim was injured

Evidence – *Res gestae* – Victim fatally wounded – Victim making statements before and after injury – Whether statements admissible in the circumstances

BROOKS P

[1] At about midnight on 22 August 2013, two masked men armed with guns invaded a house at New Bowens in the parish of Clarendon. They discovered the occupants, a family, comprising a father, Mr Damion Saunders ('Damion'), his son, DS and daughter, DS1 (the children were both minors), cowering in a bathroom. One of the men reached over the son and shot the father. The children fled and the men left thereafter. The police were called. They took the family to the hospital for treatment for their respective injuries. There, the father later died. However, the father survived long enough to tell the police the names of the attackers. The son also told the police the same names. They identified the attackers as the appellants, Messrs Clifford Saunders, otherwise called "Ker" or "Kerr", and Ranford Saunders, otherwise called "Touta" or "Touter Man". Because of their common surnames, these people will be referred to by their respective first names. This is for convenience only; no disrespect is intended.

[2] At their trial in the Circuit Court for the parish of Clarendon, before a judge ('the learned trial judge') sitting with a jury, the appellants accepted that they were related to the victims of the home invasion. They, however, denied any involvement in that invasion or the shooting to death of Damion.

[3] They were, nonetheless, on 25 May 2018, both convicted for Damion's murder. In addition, they were both also convicted of two counts of wounding with intent; one count for each of the children. For the offence of murder, the learned trial judge sentenced each of them to imprisonment for life at hard labour, with the stipulation that Clifford would not be eligible for parole before the expiry of 23 years and Ranford not eligible before 18 years. He sentenced each of them to serve 15 years' imprisonment for each of the counts of wounding with intent. All the sentences were ordered to run concurrently.

[4] The appellants have sought leave to appeal against the convictions. A single judge of this court refused their applications, but they have renewed their respective applications before the court.

[5] Learned counsel appearing for them have criticised the learned trial judge's dismissal of a no-case submission, made on their behalf, and his directions to the jury concerning the identification evidence and the evidence of Damion's statement to the police. The convictions for the offence of the wounding of DS1, when she did not give evidence at the trial, was also the subject of complaint.

The prosecution's case

[6] DS testified that during that night he thought that he saw Damion head toward the bathroom. He went there to check on Damion and saw him and DS1 in the bathtub. He also went into the tub. While there, he saw two men enter the kitchen through a space they had made under the kitchen sink (the house is a board structure). He said that each man had a gun.

[7] The men went toward the bedrooms, but one returned and looked in the bathroom. DS heard that man say, "Mad lock, see the boy yah". He heard the other man answer "Way him de, way him de" and run into the bathroom. During that interchange, the first man who had looked into the bathroom turned his head, and the handkerchief that was on his face fell to his neck. DS recognised that man as Kerr. DS recognised the voice, forehead, and body structure of the other man. He knew him before as "Touter Man" and that he was DS's grandfather's brother.

[8] DS said that Touter Man came into the bathroom with a gun in hand. He said that Touter Man leaned over DS and put the gun over DS's shoulder. He heard his father say, "Touter, you ago kill me left me pickney dem". Touter Man then started firing while the gun was over DS's shoulder.

[9] DS ran from the bathroom and out of the house. His sister followed, and they both went to a neighbour's house, which was along the same lane as their house. The neighbour, known as "Tuffy", called the police and a police patrol came within minutes. The children went out to the police and, while there, DS saw some men lifting his father and putting him in a police vehicle. The children also went into that vehicle and the

police transported the three family members to the hospital, where all three were treated for various injuries, sustained during their ordeal. Unfortunately, as mentioned before, Damion's injuries proved fatal.

[10] DS said that some months before that fatal night, Damion and Kerr had a quarrel and that neither Damion nor he had spoken to Kerr since. Ranford, DS said, had menacingly pulled a machete during that quarrel. Damion's stepdaughter, Miss Jessica Rose, supported DS's evidence concerning the quarrel. She said that it started between Damion and Ker over cement and tools, but Touter came to the spot and intervened. When Damion objected to Touter's intervention, the quarrel took a turn to a dispute as to whether the land that Damion was living on was Touter's land. She said when Touter fetched a cutlass from his car, Damion and her mother threw stones at him, and he ran away and left the car.

[11] Sergeant Errol Morgan was a member of the police patrol that responded to the neighbour's call. He testified that when he got to the scene, he saw Damion and the two children in the lane. All were injured and bleeding. In response to Sergeant Morgan's question, Damion said "Ker and Touter shot me up" and that Ker and Touter were his cousins. Damion pointed to another house along the same lane, which he said was Ker's house. Sergeant Morgan transported the family to the hospital and left them there. He went back to the scene and made enquiries. He also searched Clifford's house (the house pointed out by Damion) but found nothing of interest to the case. He, however, took Clifford to the May Pen Police Station. Sergeant Morgan also arranged for investigators to process the scene and to swab Clifford's hands to test for the presence of gunshot residue ('GSR'). That process commenced just after 2:00 that morning but Clifford's hands were not swabbed until much later in the day.

[12] Mrs Marcia Dunbar, a government forensic expert, testified that the testing of the swabs taken of Clifford's hands revealed the presence of GSR at an intermediate level on his right palm and at a trace level on the web between his right thumb and forefinger.

The case for the defence

[13] Both appellants gave sworn testimony, in which they denied any involvement in the killings. Clifford said that he was at home in bed when he heard Damion calling for Tuffy, but that he, Clifford, did not go out to see what was happening. He said he had nothing to do with that attack. He said that he and Damion had good relations. He accepted that they did have an argument, but that it was two years before the incident. He denied that they had a more recent quarrel, as DS and Miss Rose had said. He called witnesses to attest to his good character.

[14] Ranford said that both Damion and Clifford were his nephews. He admitted that in August 2013, and for a long time before that, he was not on good terms with Damion, but denied going to Damion's house that night or being involved in that fatal attack. He said that he did not hear any explosions that night, but his wife woke him during the night and told him something. He did not go out to investigate. He smoked a cigarette and went back to bed. He called no witnesses.

The applications for leave to appeal

[15] The supplemental grounds of appeal, filed to support their respective applications, identified the following issues, which are whether the learned trial judge erred in:

1. rejecting the no-case submissions;
2. his directions to the jury on the issue of identification;
3. his admission of, and directions to the jury concerning, Damion's statements in the house and to the police; and
4. allowing the jury to consider the count of wounding with intent in respect of DS1, even though she did not give evidence.

[16] Issue three will be considered first since the matter of the evidence of Damion's statements is a necessary component of deciding on the sufficiency of the prosecution's case at its close. The rest of the issues will be considered sequentially thereafter.

Issue three: The admission of, and directions to the jury concerning, Damion's statements in the house and to the police

[17] The learned trial judge admitted into evidence two statements attributed to Damion. The second of those may be said to fall within an exception to the hearsay rule, conveniently termed the *res gestae* principle. The first is Damion's statement, made in the bathroom, identifying Ranford by the name "Touter". The second statement was made to Sergeant Morgan. In it, Damion identified both Clifford and Ranford as the attackers.

[18] Although the term *res gestae* is now said to be of doubtful currency, it is a convenient term for a principle that is an exception to the hearsay rule. The English Court of Appeal, in **R v Ronald John Turnbull** (1984) 80 Cr App Rep 104, cited by Miss Pyke, for the Crown, explained that the term *res gestae* spoke to "something said at the time so closely connected with the event to which it referred that the speaker had no time to concoct a story because he had not time to think about it" (page 108). O'Connor LJ, also on page 108 of the report of the case, explained that in "modern times it is no longer referred to as *res gestae* since the decision of the Privy Council in RATTEN v THE QUEEN (1972) 56 CR. App. R. 18; [1972] A.C. 378".

[19] The *res gestae* principle was applied in **Regina v Donald Joseph Andrews** [1987] 2 WLR 413. The headnote accurately summarised the House of Lords' finding that:

> "... where the victim of an attack informed a witness of what had occurred in such circumstances as to satisfy the trial judge that the event was so unusual or startling or dramatic as to dominate the thoughts of the victim so as to exclude the possibility of concoction or distortion and the statement was made in conditions of approximate but not exact contemporaneity, evidence of what the victim said was

> admissible as to the truth of the facts recited as an exception to the hearsay rule; ..."

Lord Ackner sets out the applicability of the *res gestae* principle in a more comprehensive way on pages 423 to 424.

[20] In **Ratten v The Queen** [1972] AC 378; [1971] 3 All ER 801, on page 808 of the latter report, Lord Wilberforce stated that their Lordships were firmly of the view that a statement made during an event was not hearsay and was admissible (see page 806). In the context of that case (a telephone call made by a victim just before she was murdered), he said, in part, on pages 805j-806a:

> "The [telephone call] had content when it was known that the call was made in a state of emotion. The knowledge that the caller desired the police to be called helped to indicate the nature of the emotion - anxiety or fear at an existing or impending emergency. It was a matter for the jury to decide what light (if any) this evidence, in the absence of any explanation from the appellant, who was in the house, threw upon what situation was occurring, or developing at the time."

[21] He, however, went on to "deal with [Mr Ratten's counsel's] submission on the assumption that…the words said to have been used [by the victim during the telephone call] involve an assertion of the truth of some fact stated in them and that they may have been so understood by the jury" (page 806).

[22] It was on that basis that His Lordship explained the admissibility of a statement under the *res gestae* principle. He stated that the test for admissibility should not be uncertain, but after examining previous cases on the point, he said, in part, on page 808:

> "…there is ample support for the principle that hearsay evidence may be admitted if the statement providing it is made in such conditions (always being those of approximate but not exact contemporaneity) of involvement or pressure as to exclude the possibility of concoction or distortion to the advantage of the maker or the disadvantage of the accused…."

[23] Lord Wilberforce went on to state that in addition to the subject statement, there should be evidence that places the speaker into the "pressure of the drama". He also said on page 808:

> "…there is one other matter to be considered, namely the nature of the proof required to establish the involvement of the speaker in the pressure of the drama, or the concatenation of events leading up to the crisis. On principle it would not appear right that the necessary association should be shown only by the statement itself, otherwise the statement would be lifting itself into the area of admissibility. There is little authority on this point. In *R v Taylor* [[1961 (3)] S.A.L.R. 616] where witnesses said they had heard scuffles and thuds during which the deceased cried out 'John, please don't hit me any more. You will kill me', Fannin AJ said that it would be unrealistic to require the examination of the question (sc. of close relationship) without reference to the terms of the statement sought to be proved." (Italics as in original)

[24] In **R v Ronald John Turnbull**, a fatally wounded man was asked, just minutes after he was injured, who had stabbed him. He gave the appellant's name. The two had left the victim's house together earlier that evening. The court found that the evidence of the question and answer was admissible, as being sufficiently proximate to the incident to eliminate the risk of the answer being concocted.

[25] Applying those guidelines to this case there can be little doubt that, firstly, DS's evidence as to Damion's statement in the bathroom was admissible, not as an exception to the hearsay rule, but, to use the words of Lord Wilberforce, evidence "to indicate the nature of the emotion - anxiety or fear at an existing or impending emergency". Secondly, Sergeant Morgan's evidence of his conversation with Damion was admissible pursuant to the *res gestae* principle. Damion made the latter statement shortly after the shooting in the bathroom. Sergeant Morgan said that he and his team were on mobile patrol in the vicinity of Damion's home when he heard a radio transmission. They went to the lane where he heard someone calling for help. The evidence is recorded on pages 288-289 of the transcript:

"Q. And as a result of hearing the sound of someone calling out for help, what, if anything, did you do?

A. Constable Livingston drove the police vehicle in the lane and there I saw…

Q. He drove the police vehicle into?

A. Into the lane on the right-hand side of the road, where the sound was coming from.

Q Now, at that time what, if anything, did you observe, or who if anyone did you see?

A. I saw a man who subsequently identified himself as Damion Saunders along with a little boy and a little girl in the lane.

Q. Now the man you saw and identified himself as Damion Saunders what, if anything, did you observe about him?

A. I saw him with what appears to be blood, or bloodstain in the region of his chest or his upper body, my Lord. I asked him what had happened to him, he said, 'Ker and Touter shot me up'. I asked him…

…

A. …who was Ker and Touter and he replied, 'me cousin them'. While I was speaking to him, my Lord, and assisting him inside of the police vehicle along with the two children, he pointed in the said lane and showed me a house in the lane, which he said Ker was living."

[26] Mr Equiano, appearing for Ranford, submitted that, whereas the material may have been technically admissible, "the court must consider its fairness to the Defendant, particularly where such evidence is tainted by unreliability and can potentially cause unfairness or excessive prejudice. 'O' Leary [sic] (1988) 87 Cr. App. R 387" (para. 7.3 of his written submissions).

[27] Learned counsel pointed to the fact that the assailant who shot Damion was masked. He argued that Damion's statements constituted "poor identification evidence masquerading as supporting evidence" (para. 7.7 of his written submissions).

[28] Those submissions cannot be accepted. The statements were admissible, based on the well-established authorities set out above. The learned trial judge had a discretion whether to reject them on the basis that their prejudicial value outweighed their probative value, but the defence counsel did not object to those portions of the evidence, and, even if there were objections, the learned trial judge would have been entitled to rule the evidence as admissible. Their Lordships in **Regina v Donald Joseph Andrews** guided, at page 424, that "[w]here the trial judge has properly directed himself as to the correct approach to the evidence and there is material to entitle him to reach the conclusions which he did reach, then his decision is final, in the sense that it will not be interfered with on appeal…."

[29] **Terence O'Leary** (1988) 87 Cr App R 387, to which Mr Equiano referred, is distinguishable as it turned on its peculiar facts and a statutory provision, namely, section 78(1) of the Police and Criminal Evidence Act 1984 of England. The case not only turned on that statutory provision but more importantly, it was a combination of the impugned evidence with other unsatisfactory elements of the case, that left the appellate court with a "lurking doubt" about the safety of the conviction.

[30] The learned trial judge's direction to the jury in respect of these statements is also unobjectionable. It may be considered in the context of the guidance given by their Lordships in **Regina v Donald Joseph Andrews**. Lord Ackner, in delivering their Lordships' judgment gave that guidance on page 424:

> "…having ruled the statement admissible the judge must … make it clear to the jury that it is for them to decide what was said and to be sure that the witnesses were not mistaken in what they believed had been said to them. Further, they must be satisfied that the declarant did not concoct or distort to his advantage or the disadvantage of the accused the statement relied upon and where there is

> material to raise the issue, that he was not activated by any malice or ill-will. Further, where there are special features that bear on the possibility of mistake then the juries' attention must be invited to those matters."

[31] In the present case, the learned trial judge directed the jury to consider if there were any weaknesses in the visual and voice identification evidence, particularly the aspects of fear and the general prevailing circumstances. Thereafter, he gave directions in respect of Damion's statements and recounted the relevant evidence by DS and Sergeant Morgan. The learned trial judge then directed the jury that it was for them to decide if the words were said and, if so, the weight to be given to them. His directions on this aspect of the case are recorded on pages 694 – 701 of the transcript. The following extracts from pages 694 – 696 assist the analysis:

> "If you find [Damion] said the words indicated by [DS] and by Sergeant Morgan before you can use the alleged statements in any way adverse to the accused to whom the statement in each case have alleged to refer, you must be sure that Damion's mind was so dominated by the events that were occurring that on neither occasion did [Damion] lie, make up or distort what he was saying to his advantage or to the disadvantage of either of the accused.
>
> You also have to determine whether you are sure that [DS] and Sergeant Morgan were not themselves lying or mistaken with regard to what each believed had been said by [Damion] and did not themselves in either case, make up or distort what Damion had said to their advantage or to the disadvantage of either or both of the accused. You should also consider the fact that unlike [DS] and Sergeant Morgan, the deceased [Damion] was not present to be examined and cross-examined before you, concerning the circumstances affecting identification under which he purported to identify Kerr and 'Touta' who he said shot him and you are also not able to hear from him as to any prior knowledge of the accused men as Kerr and 'Touta'."

[32] Unlike the other cases mentioned above, dealing with the *res gestae* principle, another person was present at or about the time that the fatal injury was inflicted, and therefore, other evidence existed as to the opportunities for Damion to have reliably identified his assailants. It is relevant to that context, that the learned trial judge gave

directions concerning Damion's prior knowledge of Clifford and Ranford and the situation that existed at the time of the shooting before DS left the bathroom. He specifically reminded them that they had not heard "directly from Damion" in respect of the prior knowledge.

[33] In respect of the statements Damion made, the learned trial judge gave these further directions, which are consistent with the guidance in **Regina v Donald Joseph Andrews**. His directions are recorded on pages 699 – 700 of the transcript:

> "In relation to the words allegedly spoken during the incident in the hearing of [DS], it is only if you [sic] sure A, that Damion spoke in the hearing of [DS]; B, that Damion identified 'Touta', meaning the accused, Ranford Saunders, in the hearing of [DS] as being one of his assailants. Three, that there was no distortion by Damion and he was not lying or mistaken and, fourthly, that there was no lying, distortion or mistake by [DS] as to what was said by Damion. It is only if you are sure of those four things that you would be able to use the evidence of [DS] concerning what he testified Damion said about 'Touta' to support the return of a verdict adverse to the accused Ranford Saunders. And, in relation to the words allegedly spoken shortly after the incident to Sergeant Morgan, it is only if you are sure that Damion spoke to Sergeant Morgan, that Damion identified the accused as Ker and 'Touta' to Sergeant Morgan as being his assailants and pointed to a house nearby as being Ker's house. Thirdly, that there was no distortion by Damion, he was not lying or make [sic] any mistake and fourthly, that there was no distortion, lying or mistake by Sergeant Morgan as to what was said by Damion. It is only if you are sure of those four things that you would be able to use the evidence of Sergeant Morgan, concerning what he said Damion said about his assailants to support the return of a verdict adverse to either or both of the accused men."

[34] Based on this analysis this ground fails. The statements were properly admitted, and the learned trial judge's directions were accurate and appropriate.

Issue one: Rejecting the no-case submission

The submissions

[35] Learned counsel, for both appellants, complained that the learned trial judge ought not to have rejected the no-case submissions made at the trial. A synopsis of the grounds is that the learned trial judge erred in this regard because:

a. DS's opportunity to observe and identify the attackers amounted to a fleeting glance or, at best, a slightly longer observation in very stressful conditions;
b. the covering on the face of at least one of the men should have caused the learned trial judge to find that the voice would have been distorted and accordingly the identification by voice was unreliable;
c. the purported identification by Damion, by way of his statements, was unreliable because the evidence indicated that his opportunity to view his attackers was at best no better than DS's; and
d. the evidence of the presence of GSR on Clifford's hands was "so indeterminate as to offer no assistance" on the issue of identification.

[36] The emphasis of these submissions was not identical. Mr Rogers, appearing for Clifford, concentrated more on the visual aspect of DS's purported identification, while Mr Equiano placed more stress on the purported identification of Ranford by way of the latter's voice. Both counsel pointed out that DS would have only been about 13 years old at the time of the attack, was close to the gun attack, and was frightened and crying during the attack.

[37] Mr Rogers submitted that an examination of the evidence reveals that when DS joined his father and sister in a bathtub in the bathroom, DS was facing his father and using his body to try to cover his father. Learned counsel submitted that, consequently,

there is no explanation of how DS came to see the men coming into the house through the kitchen or into the bathroom. The evidence, Mr Rogers argued, was that it was only when the men came closer in the bathroom, that DS turned around with his back facing his father. It is also unclear, learned counsel submitted, how DS came to see Clifford's face, when, on DS's evidence, Ranford came between DS and Clifford in the close confines of that bathroom. That entire account, learned counsel submitted, demonstrates that DS's opportunity to see the attackers, particularly the one said to have been identified by his facial features, was so compromised as to make it patently unreliable, and as a result, the learned trial judge ought not to have rejected the no-case submission.

[38] Learned counsel also submitted that the presence of GSR on Clifford's hand was equivocal as Clifford's hands were not covered before they were swabbed, he had travelled in the same police vehicle, in which the gunshot victims had been transported, and was in the police station for hours before his hands were swabbed. Mr Rogers said these were opportunities for contamination of Clifford's hands.

[39] Mr Equiano not only made similar submissions to arrive at the same conclusion as Mr Rogers but also argued that the purported identification of Ranford by way of his voice added another layer of unreliability to the prosecution's case. Learned counsel submitted that identification by voice is even more dangerous than visual identification. In addition to those difficulties, Mr Equiano submitted, are the added factors of:

a. the limited number of words spoken by the attacker who was identified by voice; and
b. the fact that that attacker had a kerchief over his face, which would have distorted the voice.

[40] Both counsel submitted that the statements said to have been made by Damion, both in DS's presence and to Sergeant Morgan, not only failed to provide corroboration for DS's evidence but were fraught with the same difficulties that plagued DS's account.

[41] Learned counsel cited several cases in support of those submissions, including **R v Galbraith** [1981] 2 All ER 1060, **Dwayne Knight v R** [2017] JMCA Crim 3, **Daley v R** (1993) 43 WIR 325 and **R v Hersey** [1998] Crim LR 281.

[42] Miss Pyke argued that the learned trial judge was correct in rejecting the no-case submission. She said that there was evidence from which it could be found that DS had sufficient time to see Clifford before Ranford came between him and DS. The time (five seconds) and the distance (7 feet), given in respect of that sighting, Miss Pyke submitted, meant it was neither difficult nor fleeting. It was even more powerful, she submitted, in the context of DS's previous knowledge of Clifford, who was not only a relative but lived next door. Learned counsel argued that DS, despite being young and frightened, was capable of identifying the assailants.

[43] Miss Pyke submitted that, as far as Damion is concerned, there was a further opportunity for him to have seen the attackers after the children left the bathroom. Miss Pyke pointed out that there was no opportunity for Damion and DS to compare notes before the police arrived. On the issue of the identification of Clifford, she accepted that DS, in his original statement to the police, gave a different name for the second person who had entered the bathroom, but argued that even if DS's account, in respect of that person, is removed, Damion's evidence was sufficient for the learned trial judge to have found that there was a *prima facie* case for both appellants to have answered.

[44] On the issue of the presence of GSR on Clifford's hands, learned counsel submitted that that evidence must be considered, along with the other identification evidence and not segregated as the appellants have suggested.

[45] Among the cases, on which Miss Pyke relied, were **Herbert Brown and Mario McCallum v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 92 and 93/2006, judgment delivered 21 November 2008 ('**Brown and McCallum**') and **Patrick Thompson v R** [2022] JMCA Crim 55.

The analysis

[46] The classic guidance from the landmark case of **R v Galbraith** is always relevant to considering no-case submissions. Lord Lane CJ stated in part, on page 1062:

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

[47] In **Daley v R**, their Lordships in the Privy Council sought to reconcile the guidance in **R v Galbraith** with that in **R v Turnbull** [1977] QB 224; [1976] 3 All ER 549 ('**R v Turnbull**'), as they concern visual identification and no-case submissions. Lord Mustill, in delivering the judgment of the Board in **Daley v R**, said, in part, on page 334 of the judgment:

> "… **in the kind of identification case dealt with by *R v Turnbull* the case is withdrawn from the jury not because the judge considers that the witness is lying, but because the evidence even if taken to be honest has a base which is so slender that it is unreliable and therefore not sufficient to found a conviction**:

> and indeed, as *R v Turnbull* itself emphasised, the fact that an honest witness may be mistaken on identification is a particular source of risk. When assessing the 'quality' of the evidence, under the *Turnbull* doctrine, the jury is protected from acting upon the type of evidence which, even if believed, experience has shown to be a possible source of injustice. Reading the two cases [**R v Turnbull** and **R v Galbraith**) in this way, their lordships see no conflict between them." (Emphasis supplied; italics as in original)

[48] Morrison JA, as he then was, put the guidance of **Daley v R** into his own words in para. 35 of **Brown and McCallum**:

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

[49] Miss Pyke is correct that, in considering the submission of no-case to answer, the learned trial judge was obliged to look at the prosecution's case, as a whole, as it concerns the identification of the assailants. An examination of the individual aspects, cannot, however, be avoided. There are essentially three aspects to the evidence of identification: they are, DS's evidence, Damion's statements, and the presence of GSR on Clifford's hands.

DS's evidence

[50] There is ample evidence for the learned trial judge to have found that the jury should consider DS's identification of Clifford. DS's evidence was extracted in a curious

way (narrative of events, then identification, then words said), and the transcript does not specifically reveal which one of the assailants entered the bathroom first. It is clear, however, on DS's account, that it was Clifford who first looked into the bathroom, which was a small space, and then summoned the other assailant, who fired the shots. DS states that he saw the face of the assailant who first looked into the bathroom. He saw that assailant's face when the 'kerchief fell from covering the face. He saw the face from 6 to 7 feet away for a period of five seconds. The area was well-lit. Electric lights were on in the bathroom and shining from the kitchen. He knew the assailant before. It was a relative who lived in a house along the same road and near his house. That evidence could not be said to be of so slender a character upon which a jury, properly directed, could not rely.

[51] The issue of how quickly the second assailant came to the bathroom after being alerted as to the location of the family, and whether that assailant blocked DS's view of the first assailant, is evidence that the jury was entitled to consider in determining whether to find DS's account reliable. The account itself, however, was sufficient for the learned trial judge to find that it required the jury's consideration.

[52] DS's evidence linking Ranford to the incident is less definitive. DS purports to identify Ranford by his, forehead, build and voice, when the speaker said, "[w]ay him de, way him de". Those words were said at a time when the person speaking was, apparently, outside of the bathroom. That person had his face covered with a 'kerchief and was wearing a cap.

[53] Several cases, including **R v Hersey**, affirm the principle that the **Turnbull** guidelines should also be adapted and applied to voice identification evidence. In **R v Rohan Taylor and others** (1993) 30 JLR 100, on page 107, for example, Gordon JA reiterated the following guidance:

> "In order for the evidence of a witness that he recognized an accused person by his voice to be accepted as cogent there must, we think, be evidence of the degree of familiarity the witness has had with the accused and his voice and

> including the prior opportunities the witness may have had to hear the voice of the accused. The occasion when recognition of the voice occurs, must be such that there were sufficient words used so as to make recognition of that voice safe on which to act. The correlation between knowledge of the accused's voice by the witness and the words spoken on the challenged occasion, affects cogency. The greater the knowledge of the accused the fewer the words needed for recognition. The less familiarity with the voice, the greater necessity there is for mere spoken words to render recognition possible and therefore safe on which to act…"

[54] The number of words used by the second assailant is very small, "[w]ay him de, way him de". The level of previous knowledge with Ranford is therefore relevant to the issue of whether that number is sufficient to identify the assailant as Ranford.

[55] DS stated that he knew Ranford before and had heard him speak. He said that he had spoken to Ranford more than one time but only gave one specific instance of having heard Ranford speak. It is accepted that Ranford, in giving evidence, agreed that he had spoken to DS before, but Ranford's evidence cannot be considered at this point since this discussion is about the strength of the prosecution's evidence.

[56] DS's evidence in respect of Ranford must be considered along with the evidence of:

a. Damion's statements identifying Ranford;
b. DS leaving Damion and the men in the bathroom;
c. the familial connection; and
d. the familiarity and interactions between Damion and Ranford.

This provides a convenient segue to considering Damion's statements, while in the bathroom, and to the police officer.

Damion's statements

[57] The prosecution asserted that Damion's two statements, which were admitted into evidence, supported DS's identification of both Clifford and Ranford. The first

statement identifying Ranford by the name "Touter" has to be considered in the context of Damion's opportunity to identify the second attacker. Both counsel for the appellants submitted that Damion's opportunity, up to the point of the shooting, would be almost identical (that is, similarly restricted), to DS's. It cannot be denied, however, based on Miss Rose's evidence, that Damion would, however, have had a greater familiarity with Ranford than DS. Ranford lived along the same road as Damion and just a few houses away from his. The impression from the evidence is that several family members have land in that area, hence, none of the personalities in this unfortunate drama were recent arrivals.

[58] As mentioned before, Damion's statement to Sergeant Morgan, identified both Clifford and Ranford as the assailants. The learned trial judge would have had to consider whether there was an opportunity for Damion to have reliably identified the assailants, particularly the one with the mask, who had shot him. The children had left Damion and the assailants in the bathroom but there is no evidence as to what had occurred after their departure.

[59] The support that Miss Pyke seeks to take from these factors is, however, not as sure as learned counsel contends. Except for a greater familiarity with Ranford, than DS, Damion would not have had any better opportunity than DS, up to the time that the children left the bathroom, for identifying the second person who entered the bathroom. The fact that the children left Damion with the men does not provide any evidence that Damion's opportunity for identifying the second man improved. At best, Damion was in the bathroom for a longer time with a masked man who had shot him. It is there that Damion's greater familiarity with Ranford becomes important. It was sufficient material for the jury's consideration.

The presence of GSR on Clifford's hands

[60] The presence of GSR on Clifford's right hand, although criticised by Mr Rogers, is evidence that the jury was entitled to consider. Detective Corporal Ronald Hall swabbed both of Clifford's hands (page 717 of the transcript). Mrs Dunbar analysed those swabs

and found GSR as indicated above. The presence of GSR on the swabs, Mrs Dunbar testified, revealed that Clifford's right hand was either in the path of GSR as it left a firearm or had come "in contact with some surface that has a deposit of" GSR (pages 429-430 of the transcript). Although equivocal, the evidence at the close of the prosecution's case, taken along with the other bits of evidence examined above, was material for the jury to consider.

[61] Mr Rogers argued a specific ground of appeal that the learned trial judge misdirected the jury by inviting them to speculate that Clifford had a gun because of what DS said, and because of the presence of GSR on Clifford's hand.

[62] The learned trial judge is quoted, on pages 688-689 of the transcript as having said, in this context:

> "Now, you might recall, from the evidence, that [DS] did not say that he saw Ker fire. However, the finding of gunshot residue on Ker's hand, if you accept that, is capable of supporting the finding that Ker would have fired a gun that night. The effect of the doctrine of common design is such that if you find that both the accused men were present and engaged in a joint enterprise in murdering [Damion] and to wound [DS] and [DS1], it would not matter who fired or whose bullet caused the harm, both would be liable for the actions of the other. In those circumstances, if you so find them, it would be open to you to find both of the accused equally guilty of murder and of wounding with intent."

[63] DS did say at page 92 of the transcript that each of the men had a gun. Whereas it is correct to say that DS did not describe the item in the hand of the person whom he identified as Ker, Mr Rogers' complaint, as Miss Pyke pointed out, could not detract from the prosecution's case nor invalidate the conviction. The principle of joint enterprise made it irrelevant as to whether the item said to be in Clifford's hand was a firearm within the definition of the Firearms Act. The fact is that Damion died from gunshot wounds in circumstances where, on the prosecution's case, Clifford was present, alerting the shooter to Damion's location in the house, and aiding and abetting the infliction of the injuries that proved to be fatal. The way in which GSR got on

Clifford's hand would be irrelevant if the jury found that he was present and assisting in the common enterprise.

[64] It cannot properly be said, on this analysis, that the learned trial judge erred in rejecting the no-case submissions on behalf of the appellants. Taken together, there was sufficient opportunity to see, hear and observe the assailants, to nullify the criticism that the prosecution's case in respect of identification was so slender that it should not have been left to the jury for consideration. The grounds in respect of this issue must fail.

Issue two: The learned trial judge's directions on the issue of identification

The grounds

[65] The grounds on which this issue is based contend that the learned trial judge erred in directing the jury about identification. Clifford contended that the learned trial judge:

> "a. …merely rehearsed the evidence relevant to identification without engaging in any analysis of the specific weaknesses or potential weaknesses which arose thereon in the manner required by the authorities. In so doing [he] failed to ensure that [Clifford] had a fair trial.
>
> b. …failed to direct [the jury] to examine closely the circumstances in which the identification by each witness came to be made and, in addition, failed to point out to them specific weaknesses which existed in the evidence of identification." (Notice and Supplemental Grounds of Appeal filed 11 July 2023)

[66] Ranford's ground was specific to the issue of voice identification:

> "The Learned Trial Judge having allowed the case to go to the Jury failed to assist the jury sufficiently with the identification evidence particularly voice identification."

The submissions

[67] Mr Rogers pointed out that some of the major decided cases on the issue of identification require a trial judge to point out to the jury the weaknesses in the identification evidence. Learned counsel said that those cases counselled that a trial judge should not simply tell the jury in a vacuum to look out for weaknesses and thereafter read the evidence to them. He said that a trial judge is to identify the weaknesses in the identification evidence and assess their cumulative effect.

[68] He said that the learned trial judge did not follow that guidance. He did not tell the jury about the weaknesses in the identification evidence in this case, such as the young DS being frightened and crying, and the fact that the second assailant would have gone between DS and the first assailant, thereby blocking DS's view of the latter, and generally, the limited time available for viewing the first assailant.

[69] Mr Rogers also submitted that the learned trial judge erred in making comments, in ruling on the no-case submission, indicating his findings of fact in respect of identification. That error, learned counsel submitted, manifested itself in the learned trial judge failing to identify the weaknesses in the identification evidence in the prosecution's case.

[70] Mr Equiano also argued that although the learned trial judge gave the classic directions on identification evidence, he did not tell them how to treat the weakness in that evidence. Learned counsel covered some of the same ground that Mr Rogers traversed in pointing out what they said were weaknesses in the identification evidence. In addition, Mr Equiano submitted that the learned trial judge failed to point out what learned counsel said were weaknesses in the voice identification evidence, namely, the possibility of voice distortion caused by the face covering that the second assailant wore and the fact that DS called a different name, in his first statement to the police, that was not related to Ranford.

[71] Learned counsel also submitted that the learned trial judge erred in leading the jury to consider that the evidence of Damion's statement identifying his assailant supported the identification.

[72] The cases cited by counsel for the appellants in respect of these grounds were **R v Turnbull**, **Langford v Dominica** (2005) WIR 194, **Fuller v The State** (1995) 52 WIR 424 and **Regina v Eric Mesquita** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 64/1978, judgment delivered 9 November 1979.

[73] Miss Pyke refuted those submissions as being without merit. She argued that the learned trial judge gave proper directions to the jury on the issue of identification.

The analysis

[74] It must first be said that a trial judge's directions to a jury in respect of assessing the identification evidence do not have to follow a specific script, provided that the judge alerted the jury to the dangers of visual, and in this case, voice identification, the reasons for care in assessing that evidence and related those cautions to the evidence in the case (see **Raymond Hunter v R** [2011] JMCA 20 at para. [29]). In the present case, the learned trial judge gave classic **Turnbull** directions, which are recorded on pages 689-693 of the transcript. He told them of the:

a. possibility that DS and Damion lied when they said the appellants were the assailants;
b. risk of DS and Damion being mistaken in their identification of the appellants;
c. previous instances of mistaken identification;
d. special need for caution before convicting the appellants on the visual and voice identification evidence;
e. potential for an honest but mistaken witness to be convincing;

f. risk of mistakes even in the case of people who are known before;

g. factors that the jury should evaluate with respect to the identification evidence, namely:

   i. the lighting;

   ii. the length of time for observation;

   iii. the distance at which the observation was made;

   iv. whether anything was blocking the view of the witness;

   v. whether anything was covering the mouth of the assailant "so that the voice would not be properly heard or might have been muffled" (page 692); and

   vi. whether there was previous knowledge of the persons accused; and

h. need to consider if there were "any weaknesses in the evidence, any factors that might affect the quality of the visual or voice identification and factors such as whether the witness was fearful or the circumstances prevailing at the time at which the identification was made … were such that they would have afforded the witness an opportunity to make a correct identification or whether the circumstances were such that in an attempt to make an identification, they [made] a mistake" (pages 692-693).

[75] On pages 696-697 and 724 of the transcript, the learned trial judge is recorded as directing the jury to consider the evidence (DS's and the photographic evidence) of the lighting and the distance in the bathroom to determine Damion's opportunity to see, hear, and reliably identify, his assailants.

[76] Although it is true, as counsel for the appellants have complained, that the learned trial judge did not specifically remind the jury of DS's age at the time of the incident or of his evidence that he was frightened and crying, the directions, as summarised above, would have been sufficient to link the general **Turnbull** directions to the evidence in the case. The failure did not result in a miscarriage of justice.

[77] The complaints in the grounds comprising this issue, would not result in the conviction being set aside.

Issue four: The learned trial judge allowing the jury to consider the count of wounding with intent in respect of DS1, even though she did not give evidence

The ground

[78] The relevant ground was filed on behalf of Clifford:

> "It was grossly unfair for the learned trial judge to allow the Crown to pursue Count 3 if the complainant of that count was not called as a witness."

[79] Count 3 of the indictment charged the appellants with wounding DS1 with intent to cause her grievous bodily harm. As mentioned before, she did not give evidence at the trial, nor was any statement from her read into evidence. No explanation was given for the absence of that evidence.

The submissions

[80] Mr Rogers approached the issue from two paths. He submitted that the trial was unfair on this ground because Clifford did not get an opportunity to confront his accuser. Additionally, learned counsel submitted that the prosecution's case was defective because "no one speaks to how [DS1] received her injury, the type of injury or the cause of the injury" (para. 71 of the written submissions). Mr Rogers said that DS testified that he did not see when DS1 got injured. There was, he said, no proof beyond a reasonable doubt as to the injury and who caused it.

[81] Miss Pyke argued that DS1's absence was not fatal to the prosecution's case regarding this count. She said that the prosecution is entitled to prove its case inferentially and that there are other cases where the victim is absent, but the prosecution's case is proved. Learned counsel cited the case of **Thabo Meli and Others v The Queen** [1954] 1 WLR 288 in support of her submissions.

The analysis

[82] Miss Pyke is not on good ground with these submissions. It was incumbent on the prosecution to prove to the requisite standard that DS1 sustained a serious injury, which was caused by the appellants and was inflicted with the intention to cause such an injury.

[83] The evidence did not satisfy all these requirements. There was evidence that:

a. Sergeant Morgan saw DS1 with an injury when he went to the scene; and
b. Miss Rose saw when DS1's injury was being dressed at the hospital following the incident;

but there was no evidence as to the nature of the injury or how it was caused. DS only gave evidence as to the shooting over his shoulder in his father's direction. He testified that he ran from the bathroom before DS1. He had to jump over the gate to the yard and so did DS1. They both ran to Tuffy's yard and, after speaking to Tuffy, hid in the grass in the yard. That evidence is not sufficient to satisfy the requirements of the offence charged in count 3.

[84] **Thabo Meli and Others v The Queen** does not assist the Crown in this case. In that case, the appellants planned to kill someone. They hit him on the head and believing him to be dead, rolled him off a cliff and "dressed up" the scene to appear as if there had been an accident. The victim did not die from the blow to the head but rather from exposure. At the trial for murder, they raised a point of law that although the blow was inflicted with intent to kill, they did not push the victim off the cliff,

intending that he should have died by exposure. Their Lordships of the Privy Council summarised the issue thus on page 230:

> "The point of law which was raised in this case can be simply stated. It is said that two acts were necessary and were separable: first, the attack in the hut; and, secondly, the placing of the body outside afterwards. It is said that, while the first act was accompanied by mens rea, it was not the cause of death; but that the second act, while it was the cause of death, was not accompanied by mens rea; and on that ground it is said that the accused are not guilty of any crime except perhaps culpable homicide."

[85] Their Lordships rejected the appellants' contention, as recorded further on page 230 of the report:

> "It appears to their Lordships impossible to divide up what was really one transaction in this way. There is no doubt that the accused set out to do all these acts in order to achieve their plan and as parts of their plan; and it is much too refined a ground of judgment to say that, because they were under a misapprehension at one stage and thought that their guilty purpose and been achieved before in fact it was achieved, therefore they are to escape the penalties of the law."

[86] The difference between these cases is that there is no evidence as to what injury DS1 had or whether the appellants caused that injury. The evidence does not establish that there was one indivisible transaction.

[87] This ground should succeed. Both appellants should benefit from this finding.

Summary and conclusion

[88] In conclusion, the evidence presented by the prosecution was sufficient for the learned trial judge to find that the prosecution had established a case for the appellants to answer, except for ground 3 of the indictment, which charged them with wounding DS1 with intent. The complaints about the learned trial judge's directions to the jury on the issue of identification cannot succeed. In the circumstances, the appellants' applications for leave to appeal should be granted, the hearing of the applications

should be treated as the hearing of the appeal, the appeals against conviction in respect of the first and second counts of the indictment should be dismissed, but those against the convictions for the third count should be allowed, the convictions quashed, the sentences set aside, and judgments and verdicts of not guilty substituted therefor.

[89] There were no grounds that complained about the other sentences. Those sentences are therefore affirmed and are to be reckoned as having commenced on 25 June 2018, the date on which they were imposed.

[90] In light of the foregoing, the court makes the following orders

1. The applications for leave to appeal against conviction are granted.
2. The hearing of the applications for leave to appeal is treated as the hearing of the appeals.
3. The appeals against the convictions for murder (count 1) and for wounding with intent of DS (count 2) are dismissed, and those convictions are affirmed.
4. The appeals against the convictions for wounding with intent of DS1 (count 3) are allowed, the convictions quashed, the sentences, therefor, set aside and judgments and verdicts of acquittal substituted therefor.
5. The sentences in respect of counts 1 and 2 in respect of each appellant are affirmed, are to run concurrently and be reckoned as having commenced on 25 June 2018, the date on which they were imposed.