[2018] JMCA Crim 45

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 17/2012

BEFORE: THE HON MR JUSTICE BROOKS JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MISS JUSTICE P WILLIAMS JA (AG)

NAVADO SHAND v R

Michael Lorne for the appellant

Miss Kathy Pyke and Mrs Taneshia Evans Bibbons for the Crown

28, 29, 30 June 2016 and 20 December 2018

P WILLIAMS JA (AG)

[1] On 20 January 2012, Mr Navado Shand, the appellant, was convicted in the High Court Division of the Gun Court held in the parish of Kingston for the offences of illegal possession of firearm, illegal possession of ammunition and shooting with intent. He was sentenced to 10 years imprisonment in respect of the illegal possession of the firearm, 10 years imprisonment for illegal possession of the ammunition and 12 years imprisonment on the count of shooting with intent. The sentences were ordered to run concurrently.

[2] The appellant's application for leave to appeal the convictions and sentences was considered by a single judge of this court who. on 17 May 2016, granted his

application. The single judge formed the view that the learned trial judge had correctly identified the two principal issues in the case as being credibility and identification but had not explicitly warned himself along accepted **Turnbull** lines.

[3] On 30 June 2016, after hearing the submissions from both sides, we made the following order:

> "(1) Appeal allowed.
>
> (2) Convictions are quashed.
>
> (3) Sentences are set aside.
>
> (4) Judgments and verdicts of acquittal entered."

[4] We promised, then, to reduce into writing our reasons for the decision. This is a fulfilment of that promise, with apologies for the delay.

The Crown's case

[5] The complainant in this case was Detective Constable David Bernard, who was on 15 April 2008 stationed at Old Harbour Police Station in the parish of Saint Catherine. On that day, at about 10:30 pm, he was on enquires in that police area. He was alone, driving an unmarked police vehicle, dressed in plain clothing but was also wearing a marked police ballistic vest.

[6] While driving along the Marley Acres main road, he saw a Suzuki 100 motorcycle with two men on board, proceeding in front of him in the same direction. The two men kept looking behind them in a manner that aroused his suspicion. He drove his motor

vehicle closer to the motorcycle. As he pulled beside the motorcycle, he was able to recognise one of the men. This was the pillion rider who he purported to recognise as the appellant. Detective Constable Bernard said he knew the appellant for a year prior to the incident and would see him at least one per week, when the appellant visited the police station.

[7] Detective Constable Bernard described the area in which he recognised the appellant as well lit. He explained that there were three streetlights in the vicinity. He was also aided by the moonlight in making his identification. Thus, he was able to see the appellant's face.

[8] Having driven his motor vehicle alongside the motorcycle, Detective Constable Bernard shouted "Police" and ordered that the men on the motorcycle stop. Instead, they rode off quickly to a distance of about 15 feet away where they jumped off the motorcycle.

[9] Detective Constable Bernard testified that at this time he observed the rider of the motorcycle pull an object from a bag, which had been on the rider's lap. Detective Constable Bernard said that this object resembled a shotgun. He saw the appellant pull a gun from his waistband. Both men were then behind the motorcycle which was on its side. They both pointed their respective weapons in the direction of Detective Constable Bernard.

[10] Detective Constable Bernard said that upon seeing this, he quickly stopped his motor vehicle and proceeded to exit it. As he was doing so, he heard loud explosions,

sounding like gunshots, coming from the direction of where the men were. He saw "light flashes" coming from the objects the men had in their hands. Detective Constable Bernard described how he took cover and returned the fire. The rider fell to the ground and the object he was holding fell from his hand. The appellant ran off, back in the direction they had been coming from.

[11] Detective Constable Bernard then retrieved the rider's firearm, and called for assistance. Other police officers who came on the scene took the injured man away. Detective Constable Bernard later that night identified a body at the Spanish Town Funeral Home as the rider who had shot at him. This man was subsequently identified as being Gary Craig.

[12] Once the injured man had been taken away, Detective Constable Bernard went to the Old Harbour Police Station where he made a report to Sergeant Carey Duncan. He handed the firearm he had recovered to Sergeant Duncan.

[13] Sergeant Duncan testified that upon receiving the report, he commenced investigations into the case of shooting with intent, illegal possession of firearm, illegal possession of ammunition and fatal shooting. The following exchange took place between the officer and the prosecutor, at page 36 of the transcript:

> "Q: So in investigating the case you were looking for a particular suspect? I should ask you this, having received the name of a suspect; did you take any steps to have the suspect apprehended?
>
> A: Yes, ma'am,

Q: And those steps involved what?

A: I went to a [sic] area name [sic] Goulbourne Lane and Laffe Avenue.

...

Q: ...And your purpose for going there was?

A: To apprehend the suspect Mr. Bernard [sic].

Q: Were you able to apprehend that suspect on that night?

A: No, ma'am."

[14] Under cross-examination by Mr William Hines, who appeared for the appellant at trial, the following exchange occurred, as counsel explored the evidence of the visit the officer had made in search of the suspect, at pages 43-44 of the transcript:

"Q: You said in relation to this incident you visited two locations?

A: Sorry?

Q: You said you visited two locations?

A: Yes, sir.

Q. You said you visited Goulbourne Lane and Laffe Avenue?

A: Yes, sir.

Q: What time of the day did you visit that location?

A: That particular night it would have been about 11:00/11:30.

Q: About 11:30 that night. And you said you know Navado Shand before the date you got that report from Corporal Bernard?

A: Constable Bernard.

Q: Constable Bernard.

A: Yes, sir.

Q: Did he know where Mr. Shand lives?

A: Not exactly, sir.

Q: At that time he didn't know?

A: No, sir."

[15] Sergeant Duncan testified that on 16 April 2008 the firearm recovered from Gary Craig was handed over to an officer from the Bureau of Special Investigations. The Crown called Detective Corporal Tazio Stewart and Corporal Jason Morgan from the Bureau of Special Investigations to testify as to their respective roles in receiving the firearm and transporting it to the Forensic Lab. Sergeant Duncan later retrieved the firearm.

[16] On 17 April 2008, the appellant and a man he said was his uncle attended the Old Harbour Police Station. Sergeant Duncan informed the appellant of the report made against him. About an hour or so later, Detective Constable Bernard came to the station, saw the appellant, and identified him as the man who had fired on him.

[17] Sergeant Duncan arrested and charged the appellant. Upon being cautioned the appellant responded "me nuh shoot after nuh police".

The appellant's case

[18] The appellant gave sworn evidence in his defence. He denied shooting at Detective Constable Bernard who he said he knew but was not aware that he was a police officer. The appellant said that at 10:30 pm on 15 April he was at home at Lot 8

Goulbourne Lane. He lived at that address at the time with his mother, grandmother, sister and brother.

[19] The appellant said that he had gone to Guys Hill on the morning of 15 April and returned home at 8:00 pm where he remained until the next morning. Sometime during 16 April 2008, he received a phone call from his grandmother who he said was then staying in May Pen. She advised him that the police were looking for him. On 17 April 2008, his uncle accompanied him to the Old Harbour Police Station.

[20] He said that at no time on 15 April 2008 was he on a motorcycle with Gary Craig. He also denied being in possession of a firearm or ammunition on that day. He said he did not know whether any police came to his home on that night.

[21] After the appellant was cross-examined, the learned trial judge asked a few questions of him. At pages 98-99 of the transcript, the following exchange is recorded as having taken place:

> "His Lordship: Before you go down, tell me this, you know when the police came to your house?
>
> A: No, I don't know.
>
> His Lordship: You know when your grandmother saw the police?
>
> A: No.

His Lordship;	You know where your grandmother saw the police?
A:	No, Your Honour.
His Lordship:	When she told you that the police were looking for you, she never told you that they came to your house looking for you?
A:	No, she didn't tell me that, she only call mi and say, 'Navado, mi hear that the police looking for you'."

[22] The appellant called two witnesses in support of his defence. The first was his mother, Mrs Fay Miller. When asked by Mr Hines if she could recall 15 April 2008 her response was that she could not. When asked why she had come to court, she explained that she was there to give testimony concerning her son. The learned trial judge then intervened and asked what testimony she was there to give; her response was "[t]o confirm if Navado was at home at a particular night". Neither Mr Hines nor the prosecutor asked this witness anymore question given her admission that she could not recall the night of the incident.

[23] The learned trial judge, however, questioned Mrs Miller about the various places where she had lived. She explained that she lived at 31 Darlington Drive when she was married. She said that at some point, she had lived at 8 Goulbourne Lane before moving to Marley Gardens where she was residing at the time of the trial. She further

explained that she had lived at Goulbourne Lane "[a]round 2003", but had lived at 31 Darlington Drive when she got married in 2005. She went on to explain, when asked, that she was no longer married since her husband had left "[a] long time ago". She had lived at Goulbourne Lane with her mother and her children to include the appellant. Her husband had never resided at that address.

[24] The second witness called by the appellant was Mr Julian Henry, his brother, who testified that on 15 April 2008 at about 10:30 pm he was at home at 8 Goulbourne Lane where he lived with his grandmother, his mother, his brother and sister. He explained that he had gone home at about 6:00 pm and was there when the appellant had come home about half hour later.

[25] The learned trial judge also asked this witness about the police visiting the home. The following exchange took place, at pages 113-114 of the transcript:

"His Lordship:	You remember the police coming to your house?
A:	No, sir.
His Lordship:	You remember the police coming to your house to look for your brother?
A:	No, sir.
His Lordship:	You don't remember police coming to your house to look for your brother while your grandmother was there?
A:	No, sir because I am not at home during the day.
His Lordship:	Oh! What about in the night, sir?

A: No, sir."

The grounds of appeal

[26] Before us, Mr Michael Lorne, counsel for the appellant, adopted the original grounds of appeal that were filed by the appellant. They were as follows:

> "(1) Misidentify [sic] by the Witnesses: - That the main prosecution witnesses wrongfully identified me as the person or among any persons who committed the alleged crime.
>
> (2) Unfair Trial: - That the evidence and testimonies upon which the Learned Trial Judge relied on for the purpose to convict me, lack facts and credibility thus rendering the verdict unsafe in the circumstances.
>
> (3) Lack of Evidence: - That during the Trial the prosecution failed to present to the Court any form of material, ballestic [sic] or scientific evidence to link me to allege [sic] crime.
>
> (4) Mis-carriage [sic] of Justice: - That the finding and verdict of the Court cannot be justified when all the defence arguments are taken into consideration."

[27] Mr Lorne was granted leave to argue supplementary grounds. He had filed 10 supplementary grounds of appeal but abandoned two at the commencement of the hearing.

[28] The eight grounds he therefore argued were as follows:

> "1. That the Learned Trial Judge failed to warn himself of the dangers of convicting where the evidence of the main witness for the Crown relies heavily on Identification.
>
> 2. ....

3. ...

4. That the Defense [sic] of alibi was not adequately dealt with by the Learned Trial Judge and that he failed to warn himself that a false alibi could still contribute to a genuine defense [sic].

5. That the learned Trial Judge constant interference of Defense [sic] Counsel, Mr. William Hines, Esq. made it virtually impossible for him to cross examine the witnesses adequately and substantially and difficult in presenting his client's case and Defense [sic].

6. That the Learned Trial Judge, after the Cross Examination of the Applicant by the Prosecution, and no re-examination by the Defense [sic] Applicant [sic], took over the trial thereafter and conducted his own examination, which he is permitted by law to do, however, the Applicant is of the view that it was excessive and overbearing in all the circumstances.

7. That the impatience of the Learned Trial Judge seemed to have continued with the Second Witness for the Defense [sic]; Mrs. Fay Miller, in that the bulk of the examination in chief was carried out by his Lordship to the extent that the prosecution was not even asked whether they had any questions in cross examination, nor the Defense [sic] consulted as to whether there were any questions arising on the Learned Trial Judge's Inquiry.

8. That these errors by the Learned Trial Judge coupled with the unreliability of the witness and the absence of Identification warning, makes [sic] this conviction and sentence unsafe and the Appeal ought to be Allowed.

9. The verdict against the Applicant is unreasonable and cannot be supported having regard to the evidence and the circumstances of the case.

10. That the Learned Trial Judge failed to warn himself or to adequately deal with the discrepancies and material inconsistencies, which came out in the totality of the Evidence."

The Issues

[29] The critical issues which were raised by these grounds of appeal can adequately be dealt with under the following headings:

(1) Identification;

(2) Interference by the learned trial judge; and

(3) Alibi.

Identification

[30] Mr Lorne complained that the learned trial judge failed to warn himself when considering the main issue in this case; that of the correctness of the identification evidence. Mr Lorne submitted that this identification was a fleeting glance that was uncorroborated and therefore the learned trial judge was obliged to give himself even some semblance of a warning in keeping with the guidelines, which had been well established in **R v Turnbull** [1977] Q B 224.

[31] Mr Lorne referred to two cases from this court where the need for such a warning was explored and expressly declared to be a requirement namely **R v Locksley Carroll** (1990) 27 JLR 259 and **Barrington Taylor v R** [2013] JMCA Crim 35. He also relied on **Kenneth Evans v R** (1991) 39 WIR 290; [1991] UKPC 30 in support of his contention that a case should be withdrawn from the jury where the evidence of identification is poor.

[32] In response, Miss Pyke readily acknowledged that the learned trial judge did not warn himself in the usual manner. She submitted, however, that when considered as a

whole the summation of the learned trial judge demonstrated that he adequately considered the evidence and demonstrated that he addressed his mind to the dangers associated with identification evidence.

[33] Miss Pyke further submitted that although the safest approach is to use specific language, there are no inflexible rules as to the words to be expressed, so judges are free to express themselves provided the judge reveals his mind on the matter. Counsel further submitted that a failure to utter the express warning is not fatal once the judge reveals that he bore the caution in mind and applied it to the facts. She relied on **R v Devon Williams** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 146/1990, judgment delivered 23 March 1992 and **Raymond Hunter v R** [2011] JMCA 20 in support of her submissions.

[34] In any event, counsel contented that failure to follow the guidelines will not inexorably lead to the quashing of a conviction if there are exceptional circumstances, such as where the evidence is of an exceptional good quality. She referred to **Christopher Campbell v R** [2014] JMCA Crim 8 in support of this submission.

Discussion and analysis

[35] In **Barrington Taylor v R** Harris JA, in dealing with the requirements for judges when dealing with the issue of identification, stated:

> "[21] ...It is well established that where the prosecution's case depends wholly or largely on the correctness of the visual identification of an accused, a judge must give a warning as laid down by Lord Widgery CJ in ***R v Turnbull***. This requires the judge to inform the jury of: (i) the special

> need for caution before reliance is placed upon the uncorroborated evidence of visual identification; and (ii) the reason for such caution, which is that, an honest witness can be mistaken. Lord Widgery also pronounced that the judge is obliged to focus the jury's attention on the circumstances surrounding the identification. He has, however, expressly pointed out that there is no prescribed verbal formula to be used by a trial judge in administering the warning.
>
> [22] ...
>
> [23] A judge sitting alone is not relieved of the obligation to fully advise himself of the warning. In ***R v Locksley Carroll*** Rowe P, stated that:
>
> > 'Judges sitting alone in the High Division of the Gun Court, when faced with an issue of visual identification must expressly warn themselves in the fullest form of the dangers of acting upon uncorroborated evidence of visual identification.'
>
> [24] The requisite warning is no less significant where the case is one of recognition. However, it is important that in addition to the requirement for special caution, a judge must inform the jury that it is easy for an honest witness to make a mistake on the purported recognition of a person who is previously known to the witness. It follows that the judge must show that he addressed his mind to the possibility of a mistake being made in the identification of an accused."

[36] It is now well settled that a judge sitting without a jury, when summing up the case, is required to demonstrate an awareness of the applicable legal principles. In one of the early cases from this court dealing with this issue, **R v Lebert Balasal and Soney Balasal and R v Francis Whyne** (1990) 27 JLR 507, Gordon JA put the requirement as it relates to cases of identification, in a manner that bears repeating, at page 511:

> "In the development of the law on visual identification evidence in this jurisdiction, the weight of authority in the cases of *Dacres* through *Clifford Donaldson* and *George Cameron* requires a trial judge in the Gun Court faced with evidence of visual identification to 'demonstrate in language that does not need to be construed that in coming to a conclusion adverse to the accused person he acted with requisite caution in mind'...."

[37] The learned trial judge correctly identified the issues in this case to be those of credibility and identification. In dealing with the second issue, at page 130 of the transcript, the learned trial judge said:

> "...And while the Officer is saying that he saw his face for the better part of 30 seconds on a well lit road at night, the Officer did not even indicate that his lights were on or that he was not leveled or that his light assisted, but indicated that he first recognised the accused man when he was about 5 feet from him and thereafter for a period of time amounting to some 30 seconds. Now, there is no indication that the Officer [sic] head or face the accused or the interference [sic] to be able to see the accused because he was saying the accused was at all time [sic] the pillion rider so he could have been able to see and did say he saw his face and he did say he recognised him. And of course, if one takes into consideration the strictures laid down by the law upon consideration of the judge when dealing with evidence of identification it does seem that bearing these strictures in mind there can be no issue of the correctness of the identification."

[38] The learned trial judge succinctly identified issues of lighting, distance and the opportunity for viewing the appellant in this review of the evidence. He certainly did not use the words as would be necessary to be in strict compliance with the **Turnbull** guidelines and the authorities that followed therefrom.

[39] In **Raymond Hunter v R** Morrison JA, as he then was, had this to say at paragraph [29]:

> "However, in his well known work, The Modern Law of Evidence (6th edn, page 252), Professor Adrian Keane makes the point that '… ***R v Turnbull*** is not a statute and does not require an incantation of a formula or set words: provided that the judge complies with the sense and spirit of the guidance given, he has a broad discretion to express himself in his own way' (for an example of a case on appeal from this court which was held by the Privy Council to fall within the category, see ***Rose v R*** (1994) 46 WIR 213). Further, it is also clear that, in 'exceptional circumstances', a conviction following on from a failure by the trial judge to give the ***Turnbull*** directions altogether may nevertheless be upheld on appeal (see ***Scott v R*** [1989] 2 All ER 305, 314 - 15). A good example is provided by ***Freemantle v R*** [1994] 3 All ER 225, in which the Board held (in a judgment delivered by the late Sir Vincent Floissac CJ) that 'exceptional circumstances' might include the fact that the evidence of identification was of exceptionally good quality and, accordingly, applied the proviso in a case in which the failure of the trial judge to give the requisite warning was conceded by the Crown to have been a non-direction amounting to a misdirection."

[40] This court in **Christopher Campbell v R** looked at the position where a trial judge sitting alone failed to warn himself of the reason for the need to carefully examine the evidence of visual identification. The failure in the circumstances of that matter was not found to be fatal to the conviction. This court found that the trial judge had sufficiently dealt specifically with the issue of visual identification and had examined the evidence concerning the sighting, and the fact that the applicant was known before to the police officers. It was further found that it was clear from the examination of

that evidence that the "very experienced judge had those issues in mind" (paragraph [14]).

[41] The learned trial judge here can also be said to have had the issues relevant to visual identification in mind in the way he examined the evidence as seen in the extract from his summation as quoted in paragraph [37] above. Certainly, by referring to the "strictures laid down by the law" the learned trial judge could be viewed as demonstrating an awareness of the existence of the guidelines. However, this acknowledgement of the "strictures" does not demonstrate in language that does not need to be construed that the learned trial judge was acting with the requisite caution or the reason for such caution. In the circumstances of this case, this manner of dealing with the applicable legal principles fell short of what would be considered satisfactory.

Interference by the trial judge

[42] Mr Lorne complained that the defence was in effect, hampered by the interference and interruptions by the learned trial judge. Counsel pointed to sections of the transcript where the learned trial judge had interrupted defence counsel's cross-examination of Detective Constable Bernard as also that of the investigating officer Sergeant Duncan. Counsel contended that some of these interruptions prevented defence counsel from exploring issues critical to the defence's case.

[43] Mr Lorne noted that the learned trial judge had questioned the appellant and his witnesses in a manner he described as being intimidating, belittling and badgering.

Ultimately, it was Mr Lorne's contention that the interruptions and interference by the learned trial judge resulted in the trial not being balanced or fair for the appellant.

[44] Miss Pyke agreed that there were instances of robust questioning of the witnesses by the learned trial judge. She submitted that the interventions in the matter were not such that the learned trial judge was unable to make a proper evaluation and assessment of the evidence.

[45] Miss Pyke referred this court to authorities, which she said demonstrated that the essential issue for consideration was the quality of the interventions. She noted observations of this court in **Omar Bolton v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 72/2002, judgment delivered 28 July 2006, and **Christopher Belnavis v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 101/2003, judgment delivered 25 May 2005. She also referred to **R v Hamilton** (unreported), Court of Appeal (Criminal Division), England, judgment delivered on 9 June 1969.

[46] She concluded that these interventions relied on by Mr Lorne cannot be said to be of such a character that they resulted in a miscarriage of justice.

Discussion and analysis

[47] Miss Pyke was correct that what remains critical in a complaint of this nature is the quality of the interventions. In **Omar Bolton v R**, Smith JA, at page 8 of the judgment, identified the correct principle of law as regards interventions by a trial judge which will lead to the quashing of a conviction. These, the court commented, were

stated at paragraph 7-81 of the 2001 edition of Archbold: Criminal Pleading Evidence and Practice. From those principles there are two of particular relevance in a case such as this, namely:

> (1) where the judge has made it impossible for a defence counsel to do his duty; and
>
> (2) where the judge has effectively prevented the defendant or a witness for the defence from telling his story in his own way.

[48] The ultimate concern for this court when faced with a complaint about the interference of a trial judge is whether the interference can be viewed as denying the appellant a fair trial. It has been recognised and accepted that a trial judge may ask questions, which are necessary but not appear to be descending into the arena.

[49] In **Christopher Belnavis v R** Panton JA, as he then was, said at paragraph 10 of the judgment:

> "It is obvious that the judge asked many questions. That by itself is not an indication of bias, and does not necessarily detract from a fair trial. There are so many factors that have to be taken into consideration, for example, the importance of the content of the question in the context of the case. There are questions that are necessary for clarification of what a witness is saying, in order that the judge may get a proper appreciation of the case that is being put forward. Having said that, although a judge is not expected to remain mute throughout a trial, he should be careful to ask only necessary questions, and not give the impression that he has descended into the arena."

[50] The examination of the transcript supports the view that the learned trial judge did not make it impossible for defence counsel to do his duty in properly presenting the case for the defence. Further, although the learned trial judge did appear to take over and ask questions of the defence witnesses, the complaint about the manner of the questioning appears to be without merit. However, as will become apparent, when the final issue related to the learned trial judge's appreciation of the defence is considered, the line of questioning the learned trial judge embarked on, may well have contributed to the appellant being denied a fair trial.

The treatment of the defence of alibi

[51] Mr Lorne initially focused his complaint on the fact that the learned trial judge failed to warn himself that the mere fact that he believed that the appellant lied is not sufficient evidence of guilt since the appellant may have lied for innocent reasons. Further, Mr Lorne submitted the learned trial judge should have reminded himself that a false alibi could still support a genuine defence. It was Mr Lorne's contention that the learned trial judge ought to have given himself the **Lucas** (**R v Lucas** [1981] 1 QB 720) warning but dismissed the alibi out of hand.

[52] It was during discussions with the bench that Mr Lorne sought to explore the learned trial judge's treatment of the evidence as it related to the alibi. This led to the contention that the learned trial judge had misunderstood the evidence and therefore had dismissed the alibi in a manner, which was unfair to the appellant.

[53] In response, Miss Pyke acknowledged that the requisite warning had not been given but submitted that there was no prejudice occasioned to the appellant because the learned trial judge had correctly focused upon whether the Crown had established the case. She however looked at the evidence and the summation, distilled the relevant sections of both, and concluded that the learned trial judge had in fact misquoted the evidence. She, commendably, recognised that this misquoting of the evidence affected the decision, and it may well have resulted in the defence not being accorded due weight and consideration.

Discussion and disposal

[54] The evidence of Sergeant Duncan was that on the night of the incident, he had gone into the area where the appellant was known by Detective Constable Bernard to live but that he had not in fact gone to the actual home of the appellant. This may not have been clear in his evidence-in-chief but, certainly, under cross-examination Sergeant Duncan revealed that Detective Constable Bernard did not know where the appellant lived. These portions of the evidence are already reproduced at paragraphs [13] and [14] above.

[55] It is perhaps useful to also note that Mr Hines did in fact return to this issue. At pages 52-53 of the transcript, the following exchange took place:

> "Q: So Sergeant Duncan, within the time that Constable Bernard made the report to the time when Mr. Shand turned up at the police station, you had only gone once at two locations?

A: No sir, I said I went the same night and I went the succeeding day.

Q: And the purpose of your visit of location?

A: To apprehend the suspect.

Q: But you don't know where he was living, right?

A: No, I didn't."

[56] The fact of the police visiting the area in which the appellant lived was raised with the appellant by his attorney-at-law. In examination-in-chief, the following exchange took place between the appellant and Mr Hines at page 91 of the transcript:

"Q: On Tuesday, the 15th of April, 2008, did the police come to Goldbourne Lane that night?

A: I don't know, I was inside the house.

Q: They didn't come to your house?

A: I don't know if they come to my house because I was inside."

[57] It is therefore significant to note that it was the learned trial judge, who then specifically raised the issue of the police actually visiting the home of the appellant. This questioning is already reproduced at paragraph [22] above. Also reproduced are the questions the learned trial judge asked of the brother of the appellant in relation to this issue (see paragraph [26]).

[58] It is clear from the line of questioning embarked on that the learned trial judge formed the view that Sergeant Duncan had actually gone to the appellant's house. This was of course clearly in stark contradiction to what the officer had said.

[59] Further to these questions, the learned trial judge had also subjected the mother of appellant to questions about where she lived in an effort to see whether she lived at the home at the time. Ultimately, this was irrelevant in the light of the fact that Sergeant Duncan never went to the home. However, for the learned trial judge it also played a significant role on the issue of the credibility of the case for the defence.

[60] In his opening remarks at the start of his summation, the learned trial judge correctly recognised the burden and standard of proof. He demonstrated an appreciation of the fact that the evidence of appellant and his witnesses was to be judged by the "same fair standard [as] the court judges the evidence of any witness" (page 120 of the transcript). He quickly and succinctly went on, at page 121 of the transcript, to identify the defence as being "essentially…one of alibi".

[61] After reviewing what the appellant and his witnesses had said, the learned trial judge rejected the evidence given by the appellant's mother outright. He found from the evidence she had given that she was not residing at the home at the time. The learned trial judge went on to say at pages 125-126 of the transcript:

> "...And if the police had gone to look for the accused at his home on the 15th April, for the grandmother to be telling the accused that the police were looking for him it must mean that the accused was not at home seems to me, but it stretches one's imagination to the extent where perhaps the grandmother was not at home, perhaps heard it on the street, she still didn't tell him according to the accused, until the following day of the 16th of April….. but it does when one looks at it, indicate quite clearly that what the accused man is putting forward as an alibi is something which is an afterthought not properly thought out; is riddled with holes and excessive lies and does not commend itself to the court.

> Of course, as Crown Counsel has indicated, he does not have to approach [sic] alibi, it is the prosecution that has to negative it and the prosecution cannot [sic] do that by placing before the court evidence which is cogent and reliable evidence upon which this court can rely to show that there is no substance and there should be no wit attached to the purported alibi. Let me say, even at this stage that this court attaches absolutely no weight to this purported alibi.
>
> Further, this court does not find the accused to be a witness of truth, this court does not accept his evidence nor the evidence of his witnesses who came here. As I said before the mother coming trying to help her first born and dearly beloved, and a brother who also loves his brother in an effort to assist him in manufacturing a false alibi."

[62] It would seem that the learned trial judge premised his rejection of the alibi, firstly, on his accepting that the police had gone to the appellant's home on the night of the incident. This demonstrated his misunderstanding of the Crown's case. Having formed this view of the case for the Crown, the questions he asked of the appellant and his witnesses were in keeping with the view he had formed. This treatment on the part of the learned trial judge deprived the appellant of having his case accurately and fairly considered.

[63] The learned trial judge's rejection of the alibi was absolute. In the circumstances, it was an omission by the learned trial judge to have failed to consider the warning that a false alibi could support a genuine defence. The complaint by Mr Lorne that the learned trial judge failed to give himself the appropriate warning has merit. Mr Lorne is however not correct that it was a **Lucas** direction that was called for.

[64] In **Oniel Roberts and Christopher Wiltshire v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 37 & 38/2000, judgment delivered 15 November 2001, this court was asked "to indicate whether the guidelines laid down by *Lord Widgery C.J.* in **Turnbull** ([1976] 3 All ER 549), should be followed in all cases where there is actual evidence of an alibi" (page 19 of the judgment). Smith JA (Ag), as he then was, in the judgment given on behalf of the court stated at pages 19 and 20:

> "It is necessary to state that a trial judge is required by the guidelines to identify to the jury evidence which he adjudges is capable of supporting the evidence of identification. It is in this context that Lord Widgery C.J. said:
>
> > 'Care should be taken by the judge when directing the jury about the support for an identification which may be derived from the fact that they have rejected an alibi.' (p. 553)
>
> The reasons for such care are stated:
>
> > 'False alibis may be put forward for many reasons: an accused for example who has his own truthful evidence to rely on may stupidly fabricate an alibi and get lying witnesses to support it out of fear that his own evidence will not be enough. Further alibi witnesses can make genuine mistakes about dates and occasions like any other witnesses can.'
>
> The learned Lord Chief Justice went on to state that:
>
> > 'It is only where the jury is satisfied that that the sole reason for the fabrication was to deceive them and there is no other explanation for its being put

> forward that fabrication can provide any support for identification evidence.'
>
> The first observation we wish to make is that the warning concerning the rejection of alibi by the jury is applicable in the following circumstances:
>
> (i) Where the fact of rejection of the alibi is identified by the judge as capable of supporting the evidence of identification
>
> (ii) Where because of discrepancies inconsistencies and contradictions in the evidence adduced by the defence the alibi evidence is in such a state that there is a risk that the jury may conclude that a rejection of alibi necessarily supports the identification evidence....
>
> (iii) Where the alibi evidence had collapsed as in ***James Pemberton v R*** [(1993) 99 Cr App Rep 228] and there was a risk that the jury might regard the collapsed alibi as confirming a disputed identification. See also ***R v Drake*** (1996) Crim. L.R. 109."

[65] The learned trial judge's treatment of the defence was flawed in two respects. The first was that he did not fairly and accurately consider it due to his misunderstanding of the Crown's case. This led him to reject the defence as being a false alibi and a purported alibi to which he attached no weight. The second flaw is that having rejected the alibi, for a demonstrably unfair reason, the learned trial judge failed to give himself the appropriate warning. This was especially necessary since the learned trial judge ultimately concluded, at pages 130-131 of the transcript, that the appellant

had "assisted the prosecution in his identification of him". One of the things that led the learned trial judge to that conclusion was what he described as "the efforts [the appellant] made at manufacturing that alibi" (page 131 of transcript).

[66] In these circumstances, the fact that the warning that the learned trial judge gave himself in respect of the visual identification was deficient provided another reason why cumulatively, the conviction would not stand.

Conclusion

[67] It was for these reasons that the decision at paragraph [3] was given. In quashing the conviction, we did give consideration as to whether to order a new trial pursuant to section 14(2) of the Judicature (Appellate Jurisdiction) Act. We however concluded that given the time, which had elapsed between the offence and the new trial, it would not be appropriate to do so. At the time of the hearing of the appeal, it had been approximately eight years since the commission of the offence and four years since the trial and subsequent convictions.