[2023] JMCA Crim 7

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE EDWARDS JA
THE HON MRS JUSTICE BROWN BECKFORD JA (AG)

SUPREME COURT CRIMINAL APPEAL NOS 11 & 12/2016

BRIAN SIMMS
DALTON STEWART v R

Patrick Peterkin for the applicant Dalton Stewart

Gladstone Wilson for the applicant Brian Simms

Mrs Christine Johnson Spence and Janek Forbes for the Crown

22, 23, 24 November 2021 and 16 February 2024

Criminal law - Murder – Identification - No case Submission -Turnbull Guidelines - Nexus between the person killed and the victim named in the indictment

Criminal law - summing up - treatment of prejudicial statements - treatment of identification evidence - treatment of discrepancies and inconsistencies

BROWN BECKFORD JA (AG)

Introduction

[1] Mr Wayne Powell was shot and killed on the night of 21 April 2013, as he sat having a drink and socializing with three friends in Slowdown District, Golden Spring, in the Parish of Saint Andrew. Mr Powell was also called 'Oney' as he had a portion of one foot amputated. Mr Dalton Stewart ('Stewart') and Mr Brian Simms ('Simms') were identified as the assailants by two of the men present and, despite their denials, were convicted for his murder after a trial before a judge sitting with a jury. On 28 January 2016, each of them was sentenced to life imprisonment at hard labour, with no eligibility for parole before serving 18 years. They were both refused leave to appeal their

conviction and sentence by a single judge of this court. Before this court, as is their right, they have renewed their application for leave to appeal their convictions and sentences.

[2] Counsel for both applicants sought and were given permission by us to abandon the original grounds of appeal and to argue new grounds. On behalf of Stewart permission was granted to argue the following supplemental grounds:

> "i. The Learned [T]rial Judge erred in law when she failed to uphold the no-case submission made on behalf of the appellant in relation to:
>
> a. the inadequacy of the identification evidence;
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> b. the fact that there was no nexus between the deceased and the body at the post-mortem.
>
> c. the medical evidence [which] contradicts the account given by the witnesses. The other forensic and scientific evidence also contradicts the account given by the witnesses Vassell [sic] and Notice;
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> d. the inconsistencies and discrepancies among the Crown's witness [sic] rendered the case unreliable;
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> ii. The Learned Trial Judge gave insufficient warning regarding the identification which amounts to a misdirection;
>
> iii. The Learned Trial Judge failed to assist the jury adequately in relation to critical evidence in relation to the expert which rendered the expert direction a misdirection; and
>
> iv. The sentence was manifestly excessive in the circumstances."

[3] On behalf of Simms, permission was granted to argue the following supplemental grounds:

"Ground 1

The forensic evidence was totally ignored and never treated with any seriousness by the [the learned trial judge] as this piece of evidence is important enough to be seriously considered.

Ground 2

Despite the fact that the Pathologist who performed the autopsy indicated in evidence that the deceased did [not] have all extremities in place, the learned trial judge allowed the Crown to lead evidence to the contrary that the expert witness mis-spoke with respect to the physical capability of the deceased.

Ground 3

The Learned Trial Judge (LTJ) broadly accepted the evidence of the two witnesses and failed to observe the gaps and inconsistencies which made a difference to the credibility of their assertions.

Ground 4

Since this case depend largely on identification evidence, it is important to examine what was said by witnesses as against the truth.

Ground 5

Still on the question of what was really seen [sic].

Ground 6

[The witness, Delroy] Notice also fell into that trap [sic].

Ground 7

During the course of testimony Rhuel Vassell [sic] [made] a prejudicial statement [about] the Applicant Brian Simms about extorting residents at the opposite building which contributed to a jaundiced view of the Applicant."

Proceedings in the court below

The prosecution's case

[4] The prosecution's case was that the deceased was seated on a landing with three friends. They were sharing a drink and "shooting the breeze". It was about 7:20 pm. The area was lit by electric lights from a nearby house, in which one of the men lived, and a light strung on a tree. The prosecution called, as witnesses, Mr Rhuel Vassel ('Vassel') and Mr Delroy Notice ('Notice'), two of the men present at the scene with the deceased. Each man identified the applicants, who were known to them before, as the assailants. The first witness, Vassel, gave evidence that he heard "a sound go click click click". He looked in the direction of the sound and saw 'Scary', whom he identified as the applicant Stewart, with a gun in his hand, pointing at the face of the second witness Notice. He had known Stewart before for over 10 years. He immediately stood up and noticed Simms coming towards him. Simms also had a gun in his hand. He had known Simms for over three years. Vassel immediately ran away towards the bushes where he hid himself whilst looking towards where the applicants were. The other men who were seated with him had also run off, leaving Oney. From the bushes, Vassel observed Stewart walk back towards where Simms was standing with his gun pointed at Oney. Both men remained close to Oney who was still seated and Vassel heard gunshots ring out. He made his way to the Stony Hill Square, took a bus and left the area. The following morning, he made a report at the Stony Hill Police Station and gave a statement to the Major Investigation Task Force. Vassel next saw the dead body of Oney, sometime later, at the morgue.

[5] The witness Notice said he heard "click click" and turned around to see Stewart, known to him as Scary, with a gun pointed at his head. He also noticed Simms walking fast towards him also armed with a gun. He had known both men before for over 14 years. He immediately ran away towards the main road. As he ran, he looked behind him and noticed Stewart coming after him firing shots. He made his way to his mother's house where he spent the night. The following morning, he too made a report at the Stony Hill Police Station and gave a statement to the Major Investigation Task Force.

[6] The prosecution's case was that both applicants acted together in furtherance of a joint enterprise to kill.

Case for the defendants

[7] Both applicants made unsworn statements in which they denied being present at the scene and being the perpetrators. Each raised the defence of alibi. Stewart stated that he was at home with his family. Simms' alibi was that he was with his girlfriend at the hairdresser. Each called a witness who testified to their good character.

Submissions in this court

Submissions for the applicants

Stewart

[8] In relation to ground one, counsel Mr Patrick Peterkin argued on behalf of Stewart that the learned trial judge ought to have upheld the no-case submission, having regard to the inadequacy of the identification evidence. He pointed out that in relation to the circumstances of identification, the witness Vassel had two opportunities to view the attackers. First, when he heard the clicking sounds and looked around. At this time, Vassell saw the face of Stewart for, as he said, a split second before he ran away. This first opportunity, counsel submitted, would have amounted to no more than a fleeting glance, made in difficult circumstances. He had a further opportunity to see Stewart while in the bushes. Counsel submitted that Vassel's evidence of this second sighting lacked details. There was no evidence led, counsel submitted, as to whether he saw the face of the assailant, and if so, for how long.

[9] With respect to the witness Notice, counsel submitted that, although he also had two sightings of Stewart, both sightings amounted to no more than fleeting glances. In the first place, counsel argued, Notice ran off quickly when he turned to see the gun pointed at him. The second sighting was a quick glance behind him as he ran. Counsel relied on **Prince Emanuel Dell v R** [2012] JMCA Crim 27, in submitting that the base

of the identification was so slender that the case ought to have been withdrawn from the jury.

[10] Counsel further submitted that the Crown had not proven the nexus between the deceased body found on the scene and the body on which the post-mortem examination was carried out. The evidence of Vassel and Notice described Oney as being an amputee, however, the pathologist who performed the post-mortem examination described the body as being without deformities. Counsel argued that the Crown's attempt to cure this contradiction by using a photograph which the eyewitnesses identified to be Oney, and which the police witnesses agreed was the photograph of the body taken from the scene and the same body on which the post-mortem examination was conducted, could not succeed. This was because the pathologist was not shown the photograph and there was no contradiction of his evidence.

[11] Counsel also contended that the learned trial judge did not deal properly with the challenged evidence of Detective Constable Kerry Fearon, who identified the body at the morgue. Detective Constable Fearon had given evidence that he made notes that he saw the face of the deceased when he attended the scene on the night of the incident. However, he did not have his notes at the trial. He also gave evidence that he did not write a statement about anything at Slowdown. Counsel submitted that the learned trial judge failed to deal with this discrepancy in the summation.

[12] On this evidence, he submitted, the Crown had failed to prove that there was any nexus between the deceased and the person Stewart is alleged to have murdered. This failure by the Crown to prove an essential element of the offence ('the Bish Nexus') should have led to the learned trial judge upholding the no-case submission. He relied on the case of **R v Florence Bish** [1978] 16 JLR 106 ('**Bish**').

[13] Counsel also submitted, in support of what he argued was the poor quality of the identification evidence, that the evidence of Vassel led to the inference that the shooting of Oney was at close range. However, no gunpowder residue was detected on the

deceased. Counsel further submitted that the absence of the gunpowder residue contradicted the evidence of Vassel, which had implications for the reliability of his evidence relating to identification. Further, the evidence that no spent shells were recovered from the scene also contradicted the eyewitnesses' accounts, in particular the evidence of Notice, in which he claimed that he was able to recognize Stewart and that Stewart was armed with an automatic gun.

[14] Counsel also pointed to the inconsistencies and discrepancies on the Crown's case which, he argued, were so numerous as to cumulatively destroy the Crown's case, such that it would fall under the second limb of **R v Galbraith** [1981] 1 WLR 1039 ('**Galbraith**'), it having been rendered so unreliable that no jury properly directed could convict on it. Counsel pointed to some of the conflicts in the evidence, which he said showed the unreliability of the witnesses, such as: whether the witnesses saw each other after the incident; how the witness Vassel knew the direction in which Notice ran; whether the witnesses met up and went to the police station together, versus whether they met at the police station; and the conflicting evidence of the type of bulbs which provided lighting.

[15] With respect to ground two, counsel submitted that the learned trial judge's failure to direct the jury that several witnesses could all be mistaken, was a fatal misdirection as the jury could have been left with the view that the evidence of identification was true, as two witnesses had identified the applicants.

[16] In relation to ground three, it was submitted that the learned trial judge gave inadequate directions with respect to the effect of the absence of gunpowder residue on the body of the deceased. Counsel asserted that the learned trial judge should have directed the jury that the presence or absence of gunpowder residue becomes an issue where muzzle of the firearm is closer than two feet from the victim . The learned trial judge, he said further, should have directed the jury that the pathologist's evidence that gun powder residue would be deposited on the body if the shooting occurred within 2 feet, which was uncontested, was in conflict with the evidence of the witness Vassel that

the shooter was inches away from Oney. Instead, he submitted, the learned trial judge invited the jury to speculate that the pathologist might have left out something.

[17] Counsel did not argue the ground against sentence.

Simms

[18] For Simms, counsel Mr Gladstone Wilson submitted, in relation to ground one, that the forensic evidence as to the nature of the injury and whether any spent shells were recovered puts into question the validity of the Crown's contention as to how the murder occurred and circumstances surrounding the killing of the deceased. He pointed to the absence of any finding of gunpowder residue on the body, in the pathologist's report, which would indicate that there was evidence of close proximity between the victim and the weapon. This evidence, he submitted, was totally ignored by the learned trial judge in his summation. He submitted that the presence of gunpowder residue is a sure sign of close contact between a victim and the weapon, and would confirm the evidence that was given that Simms was inches from Oney at the time of the shooting. He further submitted that in the absence of such a report, one would have to question whether the murder occurred "at that spot". He also submitted that the absence of any gunshot residue on the victim would also mean that no shooting took place as described by the witnesses.

[19] Counsel submitted further that there was no evidence that any spent shells or any metal of an "evidential nature" were recovered by the police who visited the scene, despite the use of a metal detector, although both Vassel and Notice gave evidence that shots were fired at the scene. The absence of any spent casings, he reasoned, cast doubt on the evidence of both Vassel and Notice that guns were used at that scene on the night in question. He further submitted that there was no instruction given to the jury by the learned trial judge as to how this contradiction in the evidence should be treated.

[20] For ground two, counsel submitted that the pathologist, who was well experienced, indicated in his report that he conducted a post-mortem examination on the body of a

male with all his extremities, yet Detective Constable Fearon, who did not know the deceased, purported to identify the body of a man, who was an amputee, as Oney. This inconsistency remained as there was no photograph put into evidence showing the body "on the cutting table". This cast doubt on whether the deceased on the scene was the body on which the post-mortem examination was conducted. He complained that instead of so treating with the pathologist's evidence, the learned trial judge incorrectly instructed the jury that they could believe a part and reject a part of the pathologist's evidence.

[21] Counsel Mr Wilson emphasized that the doctor did not do all that was required of him in a post-mortem examination, which should include a proper external examination of the body including of the extremities, which caused a gap in the evidence.

[22] Grounds three to six were argued together as inadequate treatment of misstatements and inconsistencies and challenged the adequacy of the evidence relating to identification. Counsel submitted firstly that the split-second viewing time by Vassel was a very short time which meant he did not have a sufficient opportunity to identify the assailant. He further submitted that there was no photographic evidence to show the spread of the light at the location and to establish that there was sufficient light for him to recognise the attackers. Counsel submitted that the learned trial judge therefore ought to have upheld the no case submission and stopped the case.

[23] With respect to ground seven, counsel submitted that neither the Crown nor the learned trial judge did anything about the prejudicial statements made by Vassel about Simms being an extortionist. These prejudicial statements proved the *animus* of Vassel for the false accusations made against Simms.

Submissions by the Crown

[24] The Crown responded to the submissions of the applicants' counsel after restating the grounds of appeal as follows:

Ground One - No case submission.

Ground Two - The weaknesses in the identification evidence.

Ground Three - The Expert Evidence of the Pathologist

Ground Four - Inconsistencies

Ground Five -The prejudicial statement against the Applicant Brian Simms

Ground Six - Sentence

[25] Mrs Christine Johnson Spence, for the Crown, contended that there was both direct and circumstantial evidence of a sufficiently cogent and compelling standard to establish the guilt of each applicant. Counsel further submitted that the circumstances in which the witnesses identified the applicants, in terms of the lighting, distance, viewing time of the faces of the assailants, with nothing obstructing their view, were sufficient for the witnesses to have recognised the applicants who were well known to them. Counsel also submitted that the witness Vassel not only had the original sighting of the applicants, but also observed them for 10 minutes as he hid in the bushes. Both these opportunities had to be examined together, and thus, taken cumulatively, Vassel, she said, had sufficient time to recognise the applicants. Counsel submitted that the nexus between the deceased on the scene and the body on which the post-mortem examination was conducted, was established from the evidence of Detective Constable Fearon and the eyewitnesses, including photographic evidence of the deceased. The evidence showed that it was the body of Wayne Powell otherwise called 'Oney' who was shot and killed at Slowdown, that was the body on which the post-mortem examination was performed by the pathologist. Counsel further submitted that the state of the identification evidence was not such that it warranted the case being withdrawn from the jury.

[26] Counsel relied on **Larry Raymond Jones v The Queen** [1995] UKPC 47 and **Herbert Brown and Mario McCallum v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 92 & 93/2006, judgment delivered 21 November 2008, in support of the submission that even if the identification evidence was not the

best, it was for the jury in all the circumstances to decide whether the witnesses did recognise the applicants. The Crown also submitted that the identification evidence, as led from the witnesses, amounted to more than a fleeting glance. In all the circumstances the evidence was not so weak, tenuous or unreliable that a jury, properly directed, could not rely on it.

[27] Mrs Johnson Spence also submitted that the inconsistencies and discrepancies did not render the case for the Crown so unreliable that it should have been withdrawn from the jury. The Crown relied on **Director of Public Prosecutions (British Virgin Islands) v Selena Varlack** [2008] UKPC 56, which has been applied in this jurisdiction, which suggests that the basic rule in deciding on whether to accede to a no-case submission was whether the state of the evidence was such that a jury that was properly directed could find the charge proved beyond a reasonable doubt. The Crown submitted that this ground had no merit.

[28] With respect to ground two, the Crown submitted that the learned trial judge carefully pointed out the weaknesses in the identification evidence and also warned the jury of the dangers of those weaknesses. Counsel highlighted that the learned trial judge carefully sifted and dealt with the range of issues relating to identification, as she pointed out the special need for caution, gave a general warning of the inherent dangers, and pointed out the weaknesses relating to the lighting, to the traumatic circumstances in which the identification was made, the periods of observation, the distances from which the identification was made and that no identification parade was conducted. The Crown submitted that this ground should fail, as the learned trial judge dealt properly with the circumstances in which the applicants were identified.

[29] With respect to ground three, the Crown submitted that the learned trial judge gave the appropriate warning in respect of the expert evidence. It was submitted that the general directions on discrepancies and inconsistencies to the jury were sufficient, the learned trial judge having pointed out the discrepancy between the pathologist's evidence and that of the other witnesses regarding whether the body possessed all its

extremities. The learned trial judge also addressed the jury properly on the effect of the absence of gunpowder residue on the deceased and of spent casings on the scene.

[30] Addressing ground four, counsel for the Crown submitted that the learned trial judge not only highlighted the main inconsistencies and discrepancies for the jury, but also placed them in context in light of the defence's challenge to the evidence. She also reminded them that the conflicts in the evidence were raised to cast doubt on the creditworthiness of the witnesses' testimony, particularly as it related to the identification of the applicants. There was no merit, it was submitted, in this ground.

[31] Dealing with ground five, the Crown pointed out that the prejudicial statements made by the witness Vassel were elicited in cross-examination by defence counsel who was immediately cautioned by the learned trial judge. The learned trial judge also directly and adequately dealt with the issue in her summation to the jury. The Crown relied on **Morris Cargill v R** [2016] JMCA Crim 6 in submitting that where prejudicial material is introduced in the evidence, its treatment is a matter to be left to the discretion of the trial judge. It was submitted that the learned trial judge adequately dealt with the prejudicial statements and this ground should fail.

Discussion and analysis

[32] The main issues at trial were identification and credibility. The grounds of appeal for Stewart challenge the refusal of the learned trial judge to uphold the no-case submission, the sufficiency of the warning to the jury concerning identification, the learned trial judge's failure to assist the jury with the expert evidence, and the sentence. For Simms, a challenge was made to the learned trial judge's treatment of the scientific evidence, the pathologist's report, the prejudicial statements and the conflicts in the evidence.

[33] The issues raised by the grounds of appeal against the applicants' convictions concern:

1. whether the learned trial judge erred in failing to uphold the no-case submission;

2. whether the learned trial judge's failure to tell the jury that two or more witnesses may be mistaken in their identification was a fatal error;

3. whether the learned trial judge erred in her treatment of the expert report and the technical evidence;

4. whether the learned trial judge erred in her treatment of conflicts in the evidence;

5. whether the learned trial judge erred in her treatment of the prejudicial statements made about the applicant Stewart; and

6. whether the sentence was manifestly excessive.

We will discuss them in that order.

1. Whether the learned trial judge erred in failing to uphold the no case submission Identification

[34] It is now well settled in our jurisprudence that the question for the judge, on a submission of no-case to answer in a case involving identification, is whether the totality of the evidence of identification was so tenuous that the case should be withdrawn from the jury (see **Larry Raymond Jones v The Queen** and **Herbert Brown and Mario McCallum v R**). It is, therefore, necessary to examine the evidence of the witnesses in further detail.

[35] The witness, Vassel, had two opportunities to view the assailants. The first was when he heard a sound "go click click click" and he ran off. He described the time as a split second. Within that period of time, he said he saw Stewart whom he knew as 'Scary' with a gun to Notice's head. He was able to see that the gun was in Stewart's right hand

and was able to identify it as a handgun. He noted Stewart was wearing dark clothing. Stewart was then approximately 4 to 5 feet away from him. He was looking at Stewart's face. Stewart's head and face were uncovered. There was nothing obstructing his view. He knew Stewart for over 10 years and saw him every week. Stewart had also been his landlord for a short time. He last saw Stewart about the day before.

[36] Vassel was also able to see Simms walking towards him. He noted Simms had a "spin barrel" gun which Simms was pointing at him. He was able to describe the length of the gun (agreed at 8 to 10 inches), and that Simms was wearing dark clothing. Simms came as close as an arm's length or 2 feet away from him. Simms' head and face were uncovered. He knew Simms for over three years. He would see Simms about every two weeks.

[37] The witness Notice knew both men for some 14 years prior. He would see both men almost every day. He last saw them, separately, the day before the incident. At the time of the incident he heard the clicking sound and turned around and saw Stewart who was two arm's length away from him. He noted the gun was an automatic gun with a clip and that Stewart was dressed in a black t-shirt and black pants. He saw Simms, some 8 to 10 feet away, coming towards him, and he had a spin barrel gun. Notice gives the time he had to observe the men as a minute or less. There was nothing obstructing his view of either man. Neither had anything covering his face.

[38] This evidence, however, did not stand on its own. Both witnesses had an opportunity for a second sighting, Vassel, of both applicants, and Notice, of Simms only.

[39] The second sighting by Vassel was as he hid in the bushes, about 35 feet from where Oney remained, for a period he gave as 10 minutes. While the area where he hid was dark, the appellants and Oney remained in the light. Vassel was challenged in cross-examination on the time but he remained steadfast in his evidence. At issue is whether there is evidence of his ability to see the faces of the men, he said, were the applicants, during this time.

[40] With respect to Stewart, Vassel gave evidence that he observed Stewart walking towards where Simms stood with his gun pointed at Oney. He said he saw Stewart coming "facing me front way" because Stewart was looking where Oney was. Vassel would therefore have been able then to observe Stewart's face. As to the time for observation, Vassel stated that for the ten minutes he observed Stewart "heading towards Bobo direction and coming back from Bobo direction". Whilst Vassel would have viewed Stewart's face only on the return portion of the journey, which would be only a portion of the 10 minutes, it would clearly have been more than a fleeting glance.

[41] As to Vassel's ability to see Simms' face, a more detailed review of his evidence is necessary. Vassel gave evidence that he, Oney and the other men were seated looking at the main road. Simms, he said, was standing in front of Oney. Simms' back would, therefore, be to the main road. Stewart, whose face he was able to see, was returning from the direction of the main road where Notice and the other man ran. Vassel gave evidence that he observed Simms for the entirety of the 10 minutes he hid in the bushes.

[42] Notice, too, had an opportunity for a second sighting of Stewart as he ran away. His evidence is that he was chased by Stewart who was shooting at him as he ran away down some steps. As he was about to turn around a corner, he glanced back and saw Stewart. There was no obstruction to his view of Stewart. Pictures were admitted into evidence showing his location on the steps, two steps from the bottom, and the location of Stewart, 13 steps from the bottom. No time is given for this observation as Notice said he "just look back an move".

[43] This court has pointed out, in several cases, that the time to recognise someone known before need not be as long as when the person is unknown. The cases show that identification made in relatively quick periods, have been sufficient for the case to go to the jury. In **Separue Lee v R** [2014] JMCA Crim 12, for example, the witness was able to view her attacker, whom she knew for about two and a half months, for two seconds from an electric light which shone on his face. McIntosh JA, writing for the court, pointed out that, even if the circumstances were not ideal, what is important is whether the

evidence in its entirety provided a sufficient basis upon which a jury properly directed could convict the accused. In the more recent case of **Randeano Allen v R** [2021] JMCA Crim 8, a viewing time of "some two or so seconds" was considered sufficient time to identify the appellant who was known to the complainant. In **Kemar Whyte v R** [2021] JMCA Crim 15, the witness gave evidence that he was able to observe and recognise the applicant as one of three assailants when the assailants were going through a gate. This observation took place whilst he was scared and hiding in the dark at the side of the house. There was moonshine and an electric light at the gate which allowed him to see the applicant's face and entire body which was turned towards the yard. He also stated that the applicant had carried a "spin barrel" handgun. He agreed that he had seen the applicant's face only for four to five seconds. He stated that he was able to recognise the applicant's face for about two seconds, and that he was previously known to him for some 16 to 17 years. Though described as "a glimpse", the time was held to be sufficient to make an identification, given the narrative.

[44] These cases show, as said by Morrison JA (as he then was) in **Herbert Brown and Mario McCallum**, that:

> "38. …The essential question for the court's consideration was whether the quality of the identification evidence at the close of the prosecution's case was so poor or had a base which was so slender as to be unreliable and therefore not sufficient to found a conviction."

[45] Therefore, the circumstances in which the identification is made, more so than the description of the time given by the witness, is important to be analysed. The witnesses' description of time does not stand alone and must be viewed against the totality of the evidence. It is to be noted that both men gave evidence of looking around as they heard a clicking sound and running off at about the same time, as both said they ran off right away. It is clear then, that the descriptions of times of "a split second" and "a minute or less" are referring to the same period of time from the clicking sound to when both Vassel and Notice ran off.

[46] There was also evidence that the area was well lit from two light sources. It is also of note that the evidence was that both men came fairly close to the witnesses. We agree with the Crown that, even if not under ideal conditions, this evidence from Vassel and Notice of the circumstances in which the identification of both applicants was made, was of a sufficient quality to be left to the jury to judge whether, in all the circumstances, the witnesses correctly identified the applicants. There was undoubtedly sufficient time at the first sighting, on the evidence recounted above, for the eyewitnesses to recognise someone they knew well, saw frequently and had seen recently.

[47] Vassel also had a further opportunity, over a longer period of time, as he hid in the bushes, to identify both Stewart and Simms. The Crown, with which we agree, urged that the jury would also have seen pictures of the location and heard evidence of the positioning of the men and would have been able to determine if Vassel could have had the faces of the men under observation. It would have been open to the jury to make the reasonable inference that Vassel would have been able to observe Simms' face as he stood over Oney, who was seated. The sighting by Notice, however, could only have been the briefest of looks in the circumstances and could properly be described as a fleeting glance.

[48] The evidence, as it rested at the end of the Crown's case, was not so tenuous or so poor, that the case ought to have been withdrawn from the jury. That first opportunity, by both Vassel and Notice, to see the assailants, was sufficient for them to recognise both applicants. There was evidence that the area was sufficiently lit and that the assailants came in close proximity to each of the eyewitnesses. The learned trial judge, therefore, did not err in refusing to uphold the no-case submission on the basis that the evidence was so tenuous that the case should be withdrawn from the jury.

The Bish Nexus

[49] On a charge of murder, the prosecution is required to prove that the person named in the indictment as having been murdered by the accused is, in fact, dead, and that he died from injuries caused to him by the accused. The prosecution is also required to prove

that the person who is alleged to have been killed, is in fact the person on whom the post-mortem examination was conducted. The cause of death will assist in proving or disproving the prosecution's contention as to how the deceased met his death. In the case of **Bish,** this court commended the following guidance for prosecutors from the 3rd Edition Wilkinson's Road Traffic Offences at page 114:

> "The prosecution should be careful to see that there is evidence of the death of the actual victim, i.e., it may not suffice for a police witness to say that John Smith was knocked down by a car on Sunday and removed to the hospital and then for a doctor to say that John Smith died there on Monday. There must be evidence to show that the two John Smiths are the same person."

This evidence showing, in any given case, that "the two John Smiths are the same person" is now commonly referred to as "the Bish nexus".

[50] In the instant case, no challenge was made to the cause of death person on whom the doctor performed the post-mortem, that is, that he died from injuries caused by a gunshot wound. The contention by counsel for Stewart is that there is no evidence that the person on whom the post-mortem examination was conducted was the same Oney shot in Slowdown.

[51] The evidence of Vassel is that after he heard the two explosions sounding like gunshots, he heard no more sound from Oney. He next saw the body of Oney at the government morgue situated on Orange Street, Kingston, where he had gone in the company of Oney's brother and girlfriend. Detective Constable Fearon gave evidence that he went to a scene at Slowdown, Golden Spring, Saint Andrew at about 10:20 pm on 21 April 2013. He saw a body lying on the ground clad in blue shirt, blue and khaki colour jeans pants. The left foot was amputated from the body at the instep. The body was processed and photographed in his presence by Detective Sergeant Robinson. The body was removed and taken to the Tranquillity Funeral home located along Orange Street, Kingston. On 1 May 2013, he observed a post-mortem examination conducted by Dr Pramanik on the body which he saw at Slowdown on the night of 21 April 2013. The

pathologist, Dr Pramanik, gave evidence that, on 1 May 2013, he conducted a post-mortem examination on the body of Wayne Powell. The body was identified to him by Detective Constable Fearon. Detective Sergeant Robinson gave evidence that he took pictures, to include the body of the deceased, at the scene. Vassel identified Oney in a photograph of the body taken by Detective Sergeant Robinson at Slowdown, which Vassel also identified as the body he saw at the government morgue on Orange Street. Detective Constable Fearon also said that the body of the deceased he saw on the scene was the said body he observed the post-mortem examination being conducted on. He also identified that body in the same photograph taken by Detective Sergeant Robinson.

[52] Despite the absence of a photograph of the body taken during the post mortem examination, there was ample evidence from which the jury could have concluded that the person on whom the post-mortem examination was conducted, was in fact Oney, who was shot and killed by persons identified as the applicants. We agree with the Crown that the Bish nexus was proven once the evidence of Vassel, Detective Constable Fearon and Detective Sergeant Robinson was accepted. As said before, the learned trial judge's directions to the jury as to how to treat with the discrepancy of whether the body on which the post-mortem examination was conducted was an amputee, was more than adequate.

[53] Counsel Mr Wilson submitted that the pathologist did not do everything required of him in a post-mortem, as he did not notice any deformity on the body on which he conducted the post mortem examination. There was overwhelming evidence that one of the deceased's feet was amputated at the instep. It was open to the jury, having been properly directed on how to treat with the evidence of the doctor who conducted the post mortem examination, to accept the evidence of Vassel, Detective Sergeant Robinson and Detective Constable Fearon, and accept that the person killed by the applicants was the same person on whom the post mortem examination was performed.

[54] For these reasons we find that the learned trial judge did not err in rejecting the no case submission. There is, therefore, no merit to this ground.

2. Whether the learned trial judge's failure to tell the jury that two or more witnesses may be mistaken in their identification was a fatal error

[55] The learned trial judge's directions were also impugned with respect to her failure to warn the jury that more than one witness could be mistaken in their identification, the danger being that the jury could believe in the accuracy of the identification because it was made by more than one person.

[56] The principle governing the duty of the trial judge where identification evidence is disputed, given by Lord Widgery CJ in **R v Turnbull and others** [1977] QB 224 ('**Turnbull**'), requires that the jury be warned of the dangers of relying on the identification evidence ('the **Turnbull g**uidelines'). Among these dangers, is the fact that a number of witnesses identifying the same person could all be wrong. As said time and time again, the warning need not be in the terms of the specific words used in **Turnbull**, as long as the appropriate meaning is conveyed.

[57] This is what the learned trial judge told the jury at page 1290 to 1291 of the transcript.

> "Now, I turn, first of all, to identification and I do that because this is a case which turns a lot on the correctness of the identification of each of the men and the Defence is alleging that these were not the men. I have to warn you of a special need for caution before convicting an accused person in reliance on evidence of identification and give you this word of caution because it is possible for an honest witness to make a mistaken identification. And I have to tell you that there have been wrongful convictions in the past as a result of such mistakes and I have to remind you or point out to you that a witness who appears to be convincing can still be mistaken. So you have to exercise care as you analyze and examine the evidence concerning identification.
>
> You have to examine carefully the circumstances in which the identification by each witness was made. You are going to consider how long it was the person that the witness says he identifies to be the accused, how long was he under observation. How far away was the person being identified?

> What was the lighting like? Was there anything interfering with the observation? Anything blocking the view? Did the witness ever see that person before? If the answer to that is yes, how often did the witness see the person that he is identifying? Questions such as these, Mr. Foreman and your members, you have to pose to yourself as you consider for each man and for each of the witnesses who purports to identify him when you consider if he has been properly identified."

She also reminded the jury, towards the end of her summation, of this caution. She did not, however, specifically warn the jury of the possibility that more than one witness could be mistaken in their identification of the same person. The question is whether this was a fatal omission.

[58] The case of **Joel Brown and Lance Matthias v R** [2018] JMCA Crim 25, which was relied on by the Crown, is instructive as to how to treat the issue of the learned trial judge's failure to give a complete **Turnbull** warning. In that case, the issue was that the learned trial judge, having pointed out to the jury that the defendants were not unfamiliar to the witnesses and was a recognition case, failed to tell the jury that, in a recognition case, mistakes are sometimes made in the identification of even close relatives and friends.

[59] The real question, this court said, was whether it was such a significant failure so as to render the conviction unsafe. It was determined that it was not. This court relied on the Privy Council decision of **Mark France and Rupert Vassell v the Queen** [2012] UKPC 28, for the principle that the **Turnbull** guidelines do not impose a fixed formulaic recitation to be repeated by judges, it is sufficient that the judge's directions encapsulate the sense and spirit of the guidelines. This principle still guides this court.

[60] In the instant case having given the warning, making it clear that the reason for the special caution was that it is possible for an honest and convincing witness to be mistaken, the learned trial judge carefully analysed each witness' evidence in light of the warning she had given. She pointed out, in regard to each witness, the evidence of

lighting conditions, the distances between the witnesses and the assailants, the periods of observation, whether there was any obstruction in the viewing by the witnesses, that this was a recognition case, and that the identification was made in circumstances where the witnesses were terrified. In her final charge to the jury, the learned trial judge reminded them to consider the circumstances of identification, including the initial sightings, whether the conditions allowed the witnesses to identify their assailants, that the men were terrified, and that they should be satisfied about the lighting. The jury could not have been but impressed that there was a need for special caution in considering the identification evidence. The learned trial judge also told the jury in her summation that in analysing the identification evidence, they should consider the evidence given by each witness. In our view, although it would have been desirable for the learned trial judge to direct the jury that more than one witness could be mistaken, in all the circumstances of this case, looking at the totality of the summation, the failure to do so, did not render the conviction unsafe. There is, therefore, no merit in this ground.

3. Whether the learned trial judge erred in her treatment of the expert report and the technical evidence

[61] Counsel Mr Wilson complained, in general, that the forensic evidence was ignored and not treated with any seriousness by the learned trial judge. This related to the evidence of the pathologist that he did not observe any gunshot residue on the victim as well as the absence of spent shells. Counsel contended that these issues put into question whether the deceased was killed at the place and in the manner said by the witnesses. Counsel also contended that the presence of gunshot residue would have confirmed that the shooting occurred at close range as stated by the witness.

[62] Counsel also submitted that Vassel's identification evidence was unreliable as his evidence that both men were inches away from Oney when he was shot was impugned by the evidence given by the pathologist that there was no gunshot residue found on the body of Oney. Counsel bolstered this point by submitting that the further evidence of the pathologist was that, if the shooter was only inches away, he would expect to see gunshot

residue on the body of the deceased. The corollary to these submissions, that the absence of gunshot residue meant the incident did not occur as the witness said, is not borne out by the evidence.

[63] The evidence of the pathologist was that gunpowder residue can be deposited in close-range shots and usually it is not found beyond three feet of firing. He further said that at 12 inches it is sometimes not found. He also gave evidence that, whether or not gunshot residue is present depends on the type of gun used. No other evidence was led concerning gunpowder residue. For instance, it was not asked how long gunpowder residue would remain on the body. The incident occurred on 21 April 2013. The post-mortem examination took place on 1 May. The body had been placed in a body bag. There is no evidence that the doctor carried out any test for gunshot residue or indeed that he was competent to do so. What was before the court was a visual inspection of the body by the doctor, 11 days after it had been shot, where the type of gun used was not known.

[64] A similar complaint was made in the case of **Ricardo Medley v R** [2019] JMCA Crim 34. McDonald-Bishop JA, writing for the court, stated that these were "all matters for the consideration of the jury, having been properly directed in law by the learned trial judge".

[65] In the instant case, in her directions to the jury, the learned trial judge told the jury how to treat with the testimony of the expert witnesses and gave extensive directions on how to treat with conflicts in the evidence. She highlighted the evidence of the doctor on the absence of gunshot residue and the possible conflict with the evidence of the witness Vassel that both applicants were inches away from the deceased when he was shot. The following extract of the summation from page 1367 to page 1368 is highlighted.

> "… Did the body have gunshot residue? If so, why did the doctor not notice it.
>
> If it did not have gunshot residue, what does that mean? Was the victim shot in close proximity to the attacker?

> Was the attacker and the victim close, so that there would be a deposit from the gun on the body? There is some evidence concerning the gun being close to the victim, but there is no residue on the body. What do you make of that? Is it that the doctor overlooked this, or is it that it was not there? The doctor says he has done over five thousand autopsies. Should he be careful? What could account for that? Is it a raw error? It is a matter for you.
>
> … and bear in mind that his evidence is the same as any other witness' evidence, any other evidence from any other witness, sorry. That is to say, you can accept all, some or none of it."

It is clear therefore that these directions to the jury are unassailable. The learned trial judge adequately placed the evidence before the jury for their consideration.

[66] Counsel Mr Wilson also contended that the absence of spent shells casts doubt that any guns were used at that scene that night. Counsel further argued that Notice had given evidence that Stewart had a gun with a clip, which type of gun, counsel argued, ejects spent shells. This submission can shortly be dealt with by reference to the overwhelming evidence before the jury that the deceased was shot at that location, removed by the police from that location and that he died from a gunshot wound. There was absolutely no suggestion to the witnesses that the killing of Oney took place elsewhere and he was then brought to that location. In any event, the absence of spent shells, in our view, merited no further treatment than that given by the learned trial judge at page 1344 to page 1345 of the transcript where she said to the jury:

> "There have been some challenges as to the presence of a gun, remember there were questions asked about whether any gun casings were ejected. The evidence was that there were no spent shells found. At the same time, Mr Foreman and your members, bear in mind that there has not been any challenge to the evidence that death was caused from, eventually, a gunshot."

And at page 1379 to page 1380

> "This witness [Detective Robinson of Scenes of Crime] ...detected no metal anywhere he tested, no spent shells. What do you make of that? Were spent shells expended? Well, we did not have any evidence of the working of the guns. So, you have to make of this what you will.
>
> Are these guns, guns that will expend shells or not? You have no evidence of that. Do you expect to have metal—expended shells there? Do you expect that the officer should pick up any expended shells with his metal detector? Do you believe that he would be sufficiently diligent and detailed and accurate to do that? Matter for you. Remember no speculation, but it is something for you to consider, as he used his metal detector there that evening.
>
> Remember also that there is evidence that there is bush and trees around, and you saw the location. It certainly was not the most paved or easy to access state of affairs. You could see the steps in the hillside, and the bush and the dilapidation; and all the various aspects of the scene that may or may not contribute to metal being detected. But, I have to come back to the bottom line; in all this you cannot speculate, but you have to allow your common sense to kick in also, based on the evidence that you have."

It could not be said that the learned trial judge ignored the technical evidence or treated the evidence without seriousness or importance. There is no merit to this ground.

4. Whether the learned trial judge erred in her treatment of conflicts in the evidence

[67] Counsel submitted that the discrepancies in the evidence of the Crown's witnesses were such that the matter ought to have been withdrawn from the jury. We do not agree. Not only did the learned trial judge give fulsome directions to the jury on how to treat with conflicts in the evidence, but she also, very helpfully, pointed them out to the jury as she reviewed the evidence. She reminded the jury several times to consider whether an inconsistency affected the witnesses' credibility and reliability. There is no merit to this contention.

5. *Whether the learned trial judge erred in her treatment of the prejudicial statements made about the applicant Stewart*

[68] This court has reiterated in a number of cases (see **Carl Pinnock v R** [2019] JMCA Crim 7, **Dwight Gayle v R** [2018] JMCA Crim 34, **Machel Gouldbourne v R** [2010] JMCA Crim 42, **Jerome Dixon v R** [2022] JMCA Crim 2, and **Russell Samms v R** [2021] JMCA Crim 46, for example) that trial judges have a discretion as to how to treat with prejudicial statements, the most extreme treatment in a jury trial, being to discharge the jury and order a new trial. As stated by Phillips JA in **Oliver Johnson and Karl Roberts v R** [2019] JMCA Crim 20, a case relied on by counsel Mr Wilson, such an extreme course does not lightly occur. The appellate court will be loath to interfere with the trial judge's exercise of that discretion.

[69] The relevant bit of evidence from the witness Vassel which may be found at page 116 to page 117 of the transcript, is as follows:

> "Q. You were aware that he had taken over responsibility for the building in terms of collecting rent?
>
> HER LADYSHIP: Who?
>
> MR. D. THOMPSON: Simms, Simms.
>
> A. Well, since you brought me to that I tell you he is extorting the building.
>
> Q. Okay. Were you aware that Simms was responsible for the building and collecting rent, that is what I asked you?
>
> A. I am telling you, he is extorting the people in the building, and using badness to run away the owner of the building, like a house down the road.
>
> …
>
> Q. And Simms was collecting rent from him?
>
> A. I keep telling you it is extortion, it is not rent, you don't really understand what's going on up there. I am telling you it is extortion."

[70] Mr Wilson's specific complaint is that this evidence would have left the jury with the view that Simms was an extortionist, as the prosecutor ended his questioning on extortion and dealt immediately with another matter.

[71] A review of the transcript shows that this evidence was not elicited by the prosecution. This evidence was introduced during cross-examination of the prosecution's witness Vassel. The prosecution, in fact, objected to the line of questions eliciting this response, for the very reason that they were prejudicial in nature. The learned trial judge joined in that observation. It was with these cautions in mind that learned defence counsel, at the trial, moved on from this area. It appears that no counsel at the trial considered the statements to be so prejudicial as to seek to have the trial aborted.

[72] The learned trial judge also dealt with the issue, at page 1327, as follows:

> "…Then the witness was asked a question which elicited a response concerning extortion by Mr Simms. I pause here to tell you that Mr Simms is not here for any judgment on any matter besides murder. Although it is his own lawyer who brought up this matter by way of questioning, please accept and understand that it has absolutely nothing to do with the charge of murder. We are not here for any moral judgment, no trial on any matter of this size [sic] murder, your focus is on murder. Do not be distracted by any reference to anything illegal or immoral, not your business, only murder."

We are satisfied the jury would have understood that the statements should play no part in their consideration of the case. We do not believe in the circumstances that the words used could be said to be so devastating to the applicant Simms, such that their only effect was to render the trial unfair or that they caused any miscarriage of justice. We, therefore, see no basis on which to interfere with the learned trial judge's exercise of her discretion to treat with the issue in this way.

For the reasons given, we are of the view that there is no merit in the proposed grounds of appeal against conviction.

6. Whether the sentence is manifestly excessive

[73] Counsel Mr Peterkin conceded that, in all the circumstances of this case, the sentences could not be considered to be manifestly excessive. This court has consistently applied the principle stated by Hilbery J in **R v Kenneth John Ball** (1952) 35 Cr App R 164 that, in considering an appeal against sentence, the appellate court should only intervene if it is demonstrated that the sentencing judge erred in principle in imposing that sentence and this error resulted in a sentence that is manifestly excessive in that it is out of the range of sentences imposed for that offence. Given the concession by counsel, with which we agree, there is no basis for this court to interfere with the sentence imposed by the learned trial judge.

Conclusion

[74] It has not been shown that the learned trial judge erred in failing to uphold the no-case submission, as the evidence presented by the Crown was of a sufficiently reliable quality to go to the jury. The Crown also presented sufficient evidence to prove that the body on which the post-mortem examination was conducted, was that of the person shot by the applicants, who were acting together, and that the deceased died from one of the two shots fired. Though the learned trial judge failed to warn the jury that several witnesses can be mistaken, in keeping with the **Turnbull** guidelines, in the circumstances of this case, and on the totality of the submission, this error was not fatal and did not cause a miscarriage of justice. The learned trial judge also did not err in her treatment of the conflicts in the evidence or her treatment of the expert and technical evidence. No basis has been shown to interfere with the exercise of her discretion in the treatment of the prejudicial evidence against Simms. The proposed grounds were, therefore, without merit and the appeal would fail.

Order

[75] Accordingly, it is ordered as follows:

1. The applicants' applications for leave to appeal their convictions and sentences are refused.

2. The sentences are to be reckoned as having commenced on 28 January 2016, the date on which they were imposed.