[2020] JMCA Crim 52

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 63/2017

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MRS JUSTICE FOSTER-PUSEY JA

SHENIDY THOMAS v R

Keith D Knight QC and Ronald Paris instructed by Paris & Co for the applicant

Miss Paula Llewellyn QC, Director of Public Prosecutions and Miss Yanique Henry for the Crown

16, 17 July 2019 and 18 December 2020

PHILLIPS JA

[1] After a trial before B Morrison J in the High Court Division of the Gun Court in the parish of Saint James, Mr Shenidy Thomas (the applicant) was convicted of the offences of illegal possession of firearm, robbery with aggravation and assault. He was sentenced to seven, 12 and two years' imprisonment at hard labour, respectively, on each count, all set to run concurrently.

[2] Being aggrieved by that decision, the applicant sought leave to appeal his convictions and sentences. That application was first considered by a single judge of appeal, who refused leave to appeal the convictions on the basis that the learned trial judge had considered all the evidence, including any potential weaknesses in the

evidence, and had given himself all the necessary directions. The application for leave to appeal the sentences imposed for illegal possession of firearm and robbery with aggravation was refused on the basis that they fell within the appropriate range. However, leave was granted to appeal the sentence that had been imposed on conviction for assault, as the maximum sentence that could be imposed for that offence, was one year imprisonment with or without hard labour (see **Denmark Clarke v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 153/2006, judgment delivered 9 July 2009 and **Cornel Grizzle v R** [2015] JMCA Crim 15).

[3] The learned single judge's refusal to grant leave to appeal the applicant's convictions and sentences, save with respect to the sentence imposed for assault, prompted the renewal of his application for leave to appeal before us. The applicant argued that the learned trial judge had erred in his consideration of a no case submission that had been made on his behalf; misdirected himself when considering his unsworn statement; and had erred in his consideration of the evidence related to the issue of identification.

Background facts

[4] The applicant was charged on an indictment containing four counts: illegal possession of firearm (count 1); robbery with aggravation (count 2); assault (count 3) and wounding with intent (count 4). In support of these charges the Crown called five witnesses: Miss Nordia Reid; Mr Levaughn Headley; Miss Leonie Christie; Miss Chinae Downer and Detective Corporal Rajaun Ford.

[5] Miss Reid testified that she had shared a relationship with the applicant for approximately 13 years. They also share a five year old son. They had also lived together, intermittently, during those 13 years. Prior to October 2016, Miss Reid was living with the applicant in Retirement in the parish of Saint James. They had a good relationship, which eventually ended because Miss Reid "was cheating" and they argued as a result. Miss Reid then moved out of their residence in Retirement, and moved in with her mother, Miss Leonie Christie, in Kempshot District in the parish of Saint James. Her mother's house is also shared by Mr Headley (her brother), Miss Downer (her sister), and other relatives.

[6] The night before the incident, the applicant visited Miss Reid at her mother's house in Kempshot. At that time, Miss Reid was in her mother's bedroom, along with her mother (Miss Christie) and her sister (Miss Downer). While speaking to Miss Reid, the applicant was standing outside of her mother's house, by her mother's glass bedroom window (which was open with the "curtain up"), in the vicinity of an outside light. Miss Reid was looking in the applicant's face while they were speaking. The applicant asked her for "a glass of water" which she gave to him through the window. They spoke for about half an hour. During that conversation, the applicant repeatedly asked Miss Reid for sex and she refused. Her sister (Miss Downer) laughed. The applicant eventually left.

[7] Over three hours later, on the morning of 16 October 2016, Miss Reid was in her mother's room when she heard a loud explosion which sounded like a gunshot. She "cracked the window curtain a little bit ... so that [she] could peep", but saw no one.

She heard another loud explosion then she saw someone running. She ran and hid under her brother's bed in another bedroom. Her sister-in-law, Miss Peta Gaye Spence, Miss Spence's children, Miss Downer, Miss Christie and other relatives were also inside her brother's bedroom. She heard voices talking, in particular, a male voice saying "[w]hey Nordia deh?" Miss Spence (her sister-in-law) responded "I don't know". The person walked to where she was hiding and she could see the shoes that person was wearing, but she was unable to recognise the male voice enquiring as to her whereabouts because she was "panicking". She said that she had only heard this male voice "one time" but it was not a "rough voice". After this person with the male voice left, she came out from under the bed. She saw all her family members except her sister, Miss Downer, who later was seen at a neighbour's house suffering from a wound to her stomach. She accompanied her sister to the hospital and subsequently gave a statement to the police.

[8] It is evident on the transcript that Crown Counsel had a difficult time eliciting evidence from Miss Reid. In fact, Crown Counsel had commenced making an application to treat her as a hostile witness, but it was, in our view, correctly rejected by the learned trial judge as being premature, as the proper foundation for such an application had not been laid. Miss Reid's examination-in-chief ended shortly thereafter, and the defence declined to cross-examine her.

[9] Mr Headley (also known as "Bigga") is Miss Reid's brother and Miss Christie's son. He testified that he had lived with his mother, two sisters and two brothers at his mother's house in Kempshot. He stated that at about 12:10 am on 16 October 2016, he

was on his way home to Kempshot. He was walking along the road while talking on his Nokia flashlight cellular phone valued at $3,500.00. As he approached the lane where his mother's house was located, he noticed a car driving behind him. When he turned around to look, the car stopped with its light turned on brightly shining in his face. He then heard "a deep voice" say "Bigga, don't move!" He stated that he was the only person in the lane at that time, and he is the only person who lives in that lane called "Bigga". He recognised the voice to be that of the applicant, and he also indicated that when the applicant would speak to him he would address him by the name "Bigga".

[10] The applicant stepped out of the car with a gun in his right hand pointed to the ground with the nozzle exposed. Mr Headley was only able to see the applicant's eyes, as his head, nose, mouth and forehead were "wrapped up" in a green cloth. The applicant, he said, grabbed the front of his shirt (although in his statement to the police he said that the applicant had "held on to [his] shirt back"), and took his Nokia flashlight cellular phone. Thereafter, the following exchange took place:

> "A When he took the phone, he asked me who I was speaking to, if it was Nordia.
>
> ...
>
> A And I tell him no, it was not Nordia, it was my girlfriend.
>
> ...
>
> A That time he replied, it was not Nordia, I said no, it was my girlfriend I was talking to. I was lying.
>
> ...

A Then he replied, 'where is Nordia?' I said I don't know. I am just coming from road. I don't know where she is.

...

A After that he said, 'all right. Come on'. The other guys came from the vehicle.

Q. ... Who said okay, come on?

A. Shenidy Thomas said, 'okay. Come on. We ago up a you yard'."

[11] Mr Headley said the applicant then proceeded to remove from his pocket a Samsung 4G Lite cellular phone, which he had purchased from a friend for $10,000.00. The gun was still in the applicant's right hand pointed to the ground but Mr Headley was able to see the nozzle. The applicant then said "all right. Come on". Two men alighted from the said motor car. The applicant held onto Mr Headley's shirt and walked up to the yard.

[12] When they arrived at the yard, the applicant ran up to the verandah. Although Mr Headley could not see what was happening, he heard the sound of the front door to his house being kicked off (although in his statement to the police Mr Headley said that he had seen the applicant "[kick] off the front door and went inside"). One of the men that had accompanied the applicant rushed towards the house firing a number of gunshots. Mr Headley was, however, able to see the light emanating from the gun after shots had been fired. He heard more gunshots inside the house, and started to move towards the house, but the man that had remained with him said "don't move". The

applicant and the other man that ran into the house, came to where he had been, stopped and looked at him, and then the three men ran towards their car. Mr Headley ran into the house and saw his mother at the verandah step. The front door to his house was wide open. He saw his sister, Miss Downer, at the hospital the day after the incident. He thereafter gave a statement to the police.

[13] Mr Headley indicated that the entire incident lasted for about 20-25 minutes and he heard the applicant's voice for about "a minute and a half". Prior to the incident, he had known the applicant for about four years before he had a child with Miss Reid, and five years since the child's birth. In the years preceding his nephew's birth, Mr Headley stated that he was employed to a carwash operated by the applicant in Mount Salem in the parish of Saint James. It was Miss Reid who had introduced the applicant to him, and had taken him to the carwash to work washing cars. He stated that the applicant "was his boss". He worked at that carwash for about two years, from 8:00 am to 9:00 pm "Sunday to Sunday; that is 7 days a week". He would see the applicant three to four times per day, about four days per week, when he visited the car wash, and they would speak for a couple of minutes. He said that the applicant had a "deep voice".

[14] In the years since his nephew's birth, he had not seen the applicant very often, but he would see the applicant either by his (Mr Headley's) mother's house or when he (Mr Headley) would deliver something to the applicant's house. When he would visit the applicant's house, he would remain there for about one and a half hours and they would speak for about two minutes. When the applicant visited his mother's house, their conversation would be shorter, "[j]ust hi and bye". The applicant came to his

mother's house about three times per week to wash his clothes or just to visit. He had seen the applicant the day before the incident, at about 7:00 am, at his mother's house, in his car.

[15] Under cross-examination, Mr Headley agreed with a suggestion that he had not seen the applicant go to the back of the house that night. However, he denied suggestions that he had only worked at the carwash for two months, and had been fired because a customer had complained that he had stolen something from a car. He accepted that the man who ran the carwash was the applicant's cousin named "Kirk", but maintained that the applicant would visit the carwash three to four times per week, and they would speak on those visits. Interestingly, he agreed with a suggestion that he was "mistaken when [he said] [he] saw Shenidy Thomas come to [his] yard and kick down the front door of [his] house and go in there". The learned trial judge repeated the suggestion, and enquired of Mr Headley "[a]re [y]ou are mistaken?", and yet he still maintained his agreement with that suggestion.

[16] Miss Christie (the mother of Miss Reid, Mr Headley and Miss Downer) testified that on the morning of the incident, she was in her son's bedroom when her daughter (Miss Reid) told her something and so too did another daughter, Miss Downer. She heard a gunshot from "out the road a come". She heard gunshots "coming straight round [her] yard, to [her] verandah". Miss Reid went under her son's bed to hide. Miss Downer tried to do the same. Miss Christie said that the applicant had "[kicked] the [front] door and fire the shot on the door and him run in". At that time, she was in the hall by the doorway leading to her son's room. She tried to pass the applicant but he

pointed the gun at her and said to her "hey gal, a Nordia mi come fah, you know, a Nordia mi come fah".

[17] The applicant, she said, grabbed her in her blouse and she told him "let me go and go look fi Nordia". Miss Christie then went for a machete and came up behind the applicant but did not chop the applicant because, she said, she was "nervous". The applicant then turned around and said "hey gal, if you chop me, mi shoot you. If you chop me, mi shoot you", while pointing the gun at her. She felt nervous because the applicant still held the gun at her and she began to tremble. She then heard shots outside and one of the men ran through the back door. Her son, Radian Maxwell, ran out the back, and so too did Miss Downer. She said the applicant stood there with the gun on her for about "half an hour". While shots were being fired outside, the applicant ran though the front door, to the verandah and then outside. While he was outside he said "[h]ey, who get shot?" The applicant then ran down the road. Miss Christie stated that she started to cry saying "[h]ey, boy Shenidy". She went looking for her children, and while she found her daughter Miss Reid under her son's bed, she did not see Miss Downer. The next time she saw Miss Downer, she (Miss Downer) was at her neighbour's house suffering from what appeared to be a wound over the left breast "goh tru di back" that had been bleeding. She then made a report to the police who later visited her house.

[18] Miss Christie recognised the voice to be that of the applicant and stated that "a di voice alone mek mi know seh a Shenidy". Using a paper towel, Miss Christie demonstrated that the applicant's face was wrapped up in cloth covering his eyes, his

nose, cheeks, mouth, chin, back of head, leaving his forehead and eyes exposed. The gun he was using was also tied up in grey cloth with only the nozzle exposed. She was able to see because of the electric light and a television that had been turned on in her house.

[19] She testified further that she had known the applicant for 13 years since he started dating her daughter. He would call her phone often, especially when there was an argument between Miss Reid and the applicant. In the period leading up to the incident, she stated that the applicant would call her phone so often that "sometime [she] haffi throw down the phone". He called her sometimes four times per day, four times per week causing her to "get grieve". Before Miss Reid had moved in with her, Miss Christie would see the applicant about twice per week on Barnett Street, Montego Bay. The applicant would speak to her "just to say hi" and to ask her "how she was doing". The applicant and Miss Reid would visit her house when they had no water at their home, and they would also spend weekends with her. She stated that whenever there was a quarrel between her daughter and the applicant, she would talk to him for "all half an hour straight". Miss Christie last heard the applicant's voice on the Sunday prior to the incident at about 5:00 pm. The applicant visited her house and said, "he wants to talk to Nordia". Her daughter (Miss Reid) was in the house at that time and she (Miss Christie) asked him "what him want [her] daughter fa". The applicant sat on the step and remained there "long, long till night come down... ago on wid him antics".

[20] In cross-examination, Miss Christie stated she was not particularly happy about the relationship between the applicant and her daughter which had commenced "when

her daughter was going to school" and her daughter had moved in with him shortly thereafter. She accepted counsel's suggestion that the applicant had never been her friend, and that Miss Reid "would go back home every now and then when the treatment got bad". In response to questions from defence counsel, Miss Christie stated that when she had looked through the window, she had seen the applicant put her son, Mr Headley, to kneel down, and then he ran up to the front door and kicked it off. She also said that he had run to the back door. She rejected a submission that the voice she had heard that night was not the applicant by saying "Shenidy voice cannot fool mi".

[21] In her testimony, Miss Downer said that although she had not checked the time, she said that it was "round 11:00 pm" the previous night, when the applicant had come to the house and knocked on the window to her mother's bedroom. He and Miss Reid had been talking when he requested a glass of water which Miss Reid gave to him. He also told Miss Reid that "she must stop move like little pickney and fi mek him and she come ina di car". She knew it was the applicant who came to the window because she saw his face. He was standing by an outside light at the step, and he was there for about 30 minutes.

[22] At about 11:58 pm, Miss Downer heard a loud explosion that sounded like a gunshot. Miss Reid peeped through the window, and said something to her, and they both went into their brother's bedroom. Miss Downer heard the front door being kicked off, and the applicant said "Weh Nordia? A Nordia mi come fa eenuh". Her mother, Miss Christie, was standing by the doorway to her brother's room door. Her brother, Radian Maxwell, opened the back door and she ran through it. She saw a tall guy that she did

not know before. She continued to run very fast and she could hear gunshots being fired. She then felt a stinging sensation in her upper right back and she fell in some bushes. She was later found by family members, who took her to the hospital.

[23] Miss Downer testified that she has known the applicant since she was seven years old, for 13 years. She had lived with the applicant and her sister while she was in grade nine in 2010. She acknowledged that the applicant would leave the island for many months, but maintained that she would be present at his house with her sister upon his return, and she pointed out that she had lived with them for an extended period of time. While she lived with them, she stated that she heard the applicant's voice every day, and would hear it for longer periods of time when he and her sister quarrelled. The applicant would speak to her and she would speak to him as she would normally ask him for lunch money, which her mother would send for her in the mornings. She described his voice as being "rough" and she attempted to mimic it, saying "G-H-E-R-R-A". The learned trial judge was unable to say what that description really represents. We too are similarly unable to do so.

[24] Detective Corporal Rajaun Ford was the investigating officer in the matter. At that time, he was stationed at Granville Police Station in the parish of Saint James. On 16 October 2016, he received information and proceeded to the Keith Hall Community in Saint James. Miss Christie, Mr Headley and Miss Reid made a report to him. He visited the hospital where he saw Miss Downer with a mask over her nose and mouth, and bandages to her back. He prepared a warrant and an information for the applicant on 17 October 2016. The applicant was apprehended on 31 October 2016. He was

arrested and charged and when cautioned he said "[o]fficer, mi nuh know nothing bout dat".

[25] At the close of the Crown's case, a no case submission was made that was refused by the learned trial judge.

[26] The applicant then gave an unsworn statement in which he said the following:

> "My name is Shenidy Thomas. I am 34 years old. I live at Retirement in the parish of St. James. I know nothing about these charges that have been laid against me... At that night, I was at my home with my son Ricardo Thomas. I am a hundred percent innocent in front the court [sic] and that's all I have to say."

[27] Thereafter, the applicant was convicted and sentenced as indicated at paragraph [1] herein. However, he was found not guilty on the charge for wounding with intent (count 4) as the learned trial judge stated that the evidence led, relating to the injury received by Miss Downer, did not satisfy him to the extent that he felt sure on that count.

The application for leave and the issues raised therein

[28] Four grounds of appeal were advanced by the applicant as follows:

> "1. The Learned trial judge erred in his consideration of the submission of no case to answer in that he made findings of fact and came to the conclusions on the evidence in advance of hearing the [defence]...
>
> 2. The Learned trial judge erred in law in determining whether there was a case to answer in that he said in coming to his decision '*it is for my jury mind properly directed to say whether or not following [**R v Galbraith** [1981] 2 All ER 1060]':*

'Where on one possible view of the facts there is evidence on which the jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury'.

(b) The Learned Judge failed to recognise that the decision was for his 'legal mind'...

3. The Learned trial judge failed to properly or at all assess the unsworn statement of the Applicant and simply dismissed it as being 'of no value' in circumstances where it raised an alibi and constituted a complete denial of any involvement in criminal activity as charged...

4. The Learned trial judge failed to adequately assess the identification evidence and in particular failed to consider the totality of such evidence." (Italics as in original)

[29] Those grounds and the submissions of both counsel, raise three issues for determination in this appeal:

1. Did the learned trial judge err in his consideration of the no case submission in that:

    (a) he made findings of fact and came to conclusions on the evidence in advance of hearing the defence; and

    (b) he had failed to recognise that in determining whether there was a case to answer, the decision was for his legal mind and not his jury mind? (grounds 1 and 2)

2. Did the learned trial judge properly assess the applicant's unsworn statement? (ground 3)
3. Did the learned trial judge adequately assess the identification evidence, in particular, the voice identification evidence? (ground 4)

No case submission

[30] Counsel for the applicant in the court below had made a submission of no case to answer on the basis that a reasonable jury properly directed would find it impossible to return a verdict adverse to the applicant. The instant case, he said, was based on the sole issue of voice identification or voice recognition. Miss Reid was not convinced, in her own mind, that she had recognised the voice she had heard. Mr Headley had testified that he had recognised the applicant by virtue of his voice, but at the end of his cross-examination, when it was suggested to him that he had been mistaken when he said that the applicant was present that night, he agreed, and, in so doing, failed to advance the Crown's case. Miss Christie was not exposed to the applicant's voice on any consistent basis. Additionally, the fact that she had said that the mask worn by the perpetrator was covering his mouth, this could have had the effect of distorting or completely obscuring the perpetrators voice. Miss Downer's interaction with the perpetrator amounted to a fleeting glance in difficult circumstances. In applying the principles emanating from **R v Turnbull and others** [1976] 3 All ER 549, the evidence fell short, and, in those circumstances, a ruling that there was no case to answer was appropriate.

[31] In response to those submissions, Crown Counsel stated that on the evidence adduced, a reasonable jury properly directed would have been able to make a finding of guilt in relation to the applicant. In reliance on **R v Rohan Taylor and others** (1993) 30 JLR 100, she submitted that sufficient evidence had been led, which identified the applicant by his voice. Although she conceded that Miss Reid's evidence did not greatly assist the Crown's case in relation to voice identification, she indicated that Miss Reid's evidence corroborates testimony from the other witnesses, particularly with regard to their knowledge of the applicant. She submitted that, on Mr Headley's evidence, the applicant spoke to him on a number of occasions that night. He was familiar with the applicant's voice, having worked for him for two years, and having seen him multiple times per day each week. Miss Christie, she said, was sufficiently close to the applicant to hear him speak, had heard him speak on multiple occasions that night, and had prior knowledge of his voice, having known him for 13 years. Miss Christie also spoke with the applicant on the Sunday prior to the incident. Miss Downer was another witness who had heard the applicant's voice and had also been familiar with it.

[32] Crown Counsel asserted that since no evidence had been adduced to show that the cover on the applicant's mouth was sufficient to distort or muffle his voice, nor was there any evidence pointing to any difficulty recognising the applicant's voice, the evidence was cogent and credible, and the submission of no case to answer ought to be refused.

[33] In making his ruling, the learned trial judge had regard to the principles stated in **R v Galbraith** [1981] 2 All ER 1060, at page 1062, with regard to the approach to be taken by a judge on a no case submission, as stated below:

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

[34] The learned trial judge reminded himself that he sat as judge and jury, but stated that he would address his "jury mind" to the issues raised in **R v Galbraith**. He indicated that this court in **Herbert Brown and another v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 92 and 93/2006, judgment delivered 21 November 2008, had explored the issue as to the adequacy of identification evidence, when a no case submission had been made, and stated that consideration had to be given to "whether the evidence rested on so slender a base as to render it unreliable and therefore insufficient to found a conviction". The learned trial judge once again indicated that, in answering that question, he had to direct his "jury mind".

[35] He reminded himself that an honest witness may be mistaken. With regard to the strengths and weaknesses of identification evidence, he accepted that the law on voice identification had to be addressed along the lines suggested by Crown Counsel in **R v Rohan Taylor**, at page 107, as follows:

> "In order for the evidence of a witness that he recognized an accused person by his voice to be accepted as cogent there must, we think, be evidence of the degree of familiarity the witness has had with the accused and his voice and including the prior opportunities the witness may have had to hear the voice of the accused. The occasion when recognition of the voice occurs, must be such that there were sufficient words used so as to make recognition of that voice safe on which to act. The correlation between knowledge of the accused's voice by the witness and the words spoken on the challenged occasion, affects cogency. The greater the knowledge of the accused the fewer the words needed for recognition. The less familiarity with the voice, the greater necessity there is for mere spoken words to render recognition possible and therefore safe on which to act."

[36] The learned trial judge also stated that he would omit any reference to Miss Reid's evidence, as she had indicated that she was confused and unable to recognise the male voice she had heard. Reference to Mr Headley's evidence had also been omitted, as the learned trial judge noted that he had said that he was "mistaken when [he said] that he saw [the applicant] [went] to [his] yard and kicked down the door and go inside the house". He said the case turns on the sufficiency of words spoken in the presence of Miss Christie and Miss Downer, and following **R v Rohan Taylor**, the sufficiency of the words used by the intruder in their presence. In making that assessment, he said the following:

"... [I]t seems to me, based on Leonie Christie's evidence, having known him for a period of 13 years and going through my notes, I counted the number of instances over which they had exchanged whether they be pleasantries, hi or bye or used words more than those. Suffice to say that there was a degree of familiarity with his voice. That was the voice she purported to identify on the occasion she said, 'a Nordia mi come fa, a Nordia mi come fa'. He said, 'hey gal, if you chop mi, mi ago kill yuh'. She repeated, she heard him say while he was on the verandah, 'hey, who get shot?'

The degree of familiarity of which I have already spoken, she said would speak to him for all four times for the day, him call mi phone. Four times a day everyday fi the week, sometimes mi just get grieve that him would call mi. He would call mi and say, 'hey dutty gal come fi Nordia', he would call me everyday. When they met on Barnett Street he would say, 'weh deh gwan?' She said she would go to Barnett Street sometimes two times for the week, when she have luck to see him she see him. During the 13 years which she knew him for, he would come to her house and he would say hi and bye, that's it.

So it [seems] to me that there was as a sufficiently long period of time for that familiarity with his voice to have occurred.

The same can be said of the witness Chinae Downer. In her evidence she speaks of the occasion which she had to interact with him through verbal exchanges. And so it is for my jury mind properly directed to say whether or not following [**R v Galbraith**]:

> 'Where on one possible view of the facts there is evidence on which the jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury'.

In other words, I should allow the matter to proceed and call upon him to answer. Case to answer."

[37] In the application before us, counsel for the applicant, Mr Keith D Knight QC, argued that the learned trial judge erred in his ruling on the no case submission, as he had made findings of fact in advance of hearing the defence. He stated that the learned trial judge made findings that: (i) Miss Christie knew the applicant for 13 years; (ii) Miss Christie and the applicant had spoken on several occasions; and (iii) she had a degree of familiarity with his voice. These findings of fact, Queen's Counsel submitted, had "plainly or obviously" indicated that the learned trial judge accepted that the prosecution witness knew the accused for a number of years before the alleged incident, and was sufficiently familiar with his voice to have enabled her to identify him, before hearing from the applicant (see **Oscar Serratos v R** (unreported), Court of Appeal, Jamaica, Resident Magistrates' Criminal Appeal No 26/2004, judgment delivered 28 July 2006; **R v Joan Olive Falconer-Atlee** (1973) 58 Cr App Rep 348; and **R v Eric Mesquita** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 64/1978, judgment delivered 9 November 1979).

[38] Mr Knight also submitted that the learned trial judge had fallen into "grievous error" when he prematurely engaged his "jury mind" in determining the issues identified in **R v Galbraith**. He was analysing the evidence as a juror, instead of as a judge, and, in so doing, "poisoned his jury mind". The "jury mind", he said, does not and should not affect any consideration of the principles in **R v Galbraith**, as it is the legal mind which determines whether there is a case to answer. By so doing, the learned trial judge had compromised the fairness of the applicant's trial and had rendered his convictions unsafe.

[39] In response to these submissions, Miss Paula Llewellyn QC, the Director of Public Prosecutions, submitted that the learned trial judge had made no findings of fact or comments on the evidence, nor did he assess the credibility of the witnesses. In his consideration of **R v Galbraith**, she said, he clearly demonstrated that he had applied his legal mind throughout his ruling, although he had referred to his "jury mind". In assessing **R v Galbraith**, he reminded himself of the principles in **R v Turnbull**, and its applicability to visual identification cases, as endorsed by **R v Rohan Taylor**. She indicated that it was also stated in **Donald Phipps v R** [2010] JMCA Crim 48 that voice identification was to be treated in the same manner as visual identification, and that pursuant to **Wilbert Daley v R** (1993) 43 WIR 325, identification evidence should not have a base so slender that it was unreliable. As a consequence, the learned trial judge was duty bound to analyse the evidence in order to ascertain whether the identification evidence that had been led was sufficient, and, in so doing, would not have compromised the fairness of the trial.

[40] It is indeed impermissible for a judge to comment on the evidence or the credibility of witnesses when ruling on a no case submission (see **Oscar Serratos v R**; **R v Joan Olive Falconer-Atlee**; and **R v Eric Mesquita**). What is required in assessing a no case submission made on the second limb of **R v Galbraith**, is a determination as to "whether the prosecution's evidence is too inherently weak or vague for any sensible person to rely on it" (see Blackstone's Criminal Practice, 2020, paragraph D16.56). Rowe JA (Ag) (as he then was) in **R v Eric Mesquita**, at page 6, stated that "[i]n essence, a no case submission is an invitation to the trial judge to

make a provisional evaluation of the evidence adduced by the prosecution and to rule in favour of the defence if on that evaluation, the prosecution has not made out a prima facie case".

[41] The learned trial judge was, in our view, correct to place reliance on dictum by Morrison JA (as he then was) in **Herbert Brown and another v R**, indicating that in assessing the adequacy of identification evidence, in the context of a no case submission, regard must be had to "whether the identification evidence rested on so slender a base as to render it unreliable and therefore insufficient to found a conviction". Harrison JA in an earlier decision from this court in **R v Omar Nelson** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 89/1999, judgment delivered 20 December 2001, has also said at page 6 that:

> "A trial judge is ... required to make an assessment of the quality of the evidence, exclusive of the jury, as a preliminary issue, and then [make] a further determination as to whether or not to leave it the jury for them to decide the ultimate issue of guilt or otherwise of the accused. Consequently, he has to consider certain factors in order to make that determination, namely, inter alia, the lighting at the relevant time, the length of time the victim had to observe [the defendant], the circumstances existing when the observation was made and whether or not the [defendant] was recognised as known before by the victim. A mature consideration of those factors will usually assist the trial judge in coming to a proper conclusion as to whether or not he should withdraw the case from the jury."

[42] Accordingly, the real issue to be determined is whether, in making that assessment, the learned trial judge had made findings of fact, and had commented on the evidence or the reliability of the witnesses.

[43] Ideally, the learned trial judge ought to have followed the dictum of Roskill LJ in **R v Joan Olive Falconer-Atlee**, at page 356, where he said that if [a judge] was going to leave the case to the jury, he should have left it saying no more than that there was evidence to go the jury and it is for them to say whether or not the appellant should be convicted". His detailed and lengthy ruling on the no case submission was also unusual, and ought not to be encouraged. However, in our view, there was no indication in the learned trial judge's ruling that he had made any assessment as to the credibility or reliability of the Crown witnesses, or had made any findings of fact on the evidence.

[44] In the light of dicta stated in **R v Rohan Taylor** and **Donald Phipps v R**, the learned trial judge was, no doubt, assessing the identification evidence in order to ascertain whether its quality was capable of pointing to the applicant's guilt. In so doing, he expressly stated that he would not consider the evidence of Miss Reid and Mr Headley. He indicated that the instant case turned on the sufficiency of words spoken, by the applicant, in Miss Christie's presence and that of Miss Downer. He recounted the unchallenged evidence of the length of time Miss Christie and Miss Downer had known the applicant (13 years); their prior conversations with him; and the frequency of those conversations. In fact, it was suggested to Miss Christie, by counsel for the applicant, that she was unhappy with the relationship between the applicant and her daughter (Miss Reid), which had commenced when her daughter was still in school. Miss Christie agreed with that suggestion. Accordingly, the fact that there was a relationship for 13

years between the applicant and Miss Reid was not in dispute, and there was no finding on it.

[45] The learned trial judge had also utilised this evidence of the degree of familiarity with the applicant's voice, and the number of times that Miss Christie and Miss Downer heard a voice that night, to make an assessment of the quality of the identification evidence as a preliminary issue, and whether it was sufficient for a jury to determine that the voice heard by Miss Christie and Miss Downer that night belonged to the applicant. After so doing, the learned trial judge indicated that there was a sufficiently long period of time for familiarity with the applicant's voice to be established, in order to decide whether the voice heard by the witnesses that night, could have been that of the applicant (as is required in **R v Rohan Taylor** and **Donald Phipps v R**). He did not find, at that stage, that those witnesses had identified the applicant's voice that night, and he qualified his statement with regard to familiarity with the applicant's voice by referring to **R v Galbraith**.

[46] Additionally, this was not a situation where the Crown's evidence taken at its highest was such that a jury properly directed could not convict on it, in which case, the judge would have a duty to stop the case. The instant case was one where the strength or weakness of the Crown's evidence on voice identification depended on the view that the jury would take of the witnesses' reliability and credibility.

[47] At this juncture, we must say, that Mr Knight was correct in his assertion that the learned trial judge erred in stating that he was engaging his "jury mind" in his

consideration of whether there was a case to answer. It is evident that in assessing the principles stated in **R v Galbraith**, a judge must engage his "legal mind" and not his "jury mind". However, when one examines the learned trial judge's ruling on the no case submission, in it its entirety, it is clear, that although the learned trial judge had said he was engaging his "jury mind", he had, in fact, utilised his "legal mind" to examine the quality of the identification evidence.

[48] Indeed, the second time he refers to his "jury mind", he highlights principles of identification to be determined by the jury, such as, whether an honest witness may be mistaken, and the strengths and weaknesses of the identification evidence. He also said that his assessment was being made in the context of **R v Galbraith**, and with regard to the principles emanating from **Herbert Brown and another v R**; **R v Rohan Taylor**; **Donald Phipps v R**; and **Wilbert Daley v R**.

[49] The third time he refers to his "jury mind", he does so in the context of having to make an assessment of whether the evidence was capable of pointing to the applicant's guilt once he had been directed pursuant to **R v Galbraith**. He thereafter found that there was a case to answer, confirming that he had been utilising his legal mind.

[50] It is worth restating that judges should heed the wise words of Lord Roskill in **R v Joan Olive Falconer-Atlee**, that when ruling on a no case submission, a judge need only say that there is evidence to go to the jury, and it is for them to say whether or not the defendant should be convicted. However, in all the circumstances, when the learned trial judge's ruling on the no case submission is examined within its context,

and in the light of the cases upon which he had placed reliance, it is evident that the learned trial judge had merely explored aspects of the evidence, in order to the ascertain the quality of the voice identification evidence, to determine whether the case should be submitted for an assessment on the facts, to arrive at a verdict of guilty or not guilty, by his jury mind. We cannot therefore say that he erred in that regard, and so grounds 1 and 2 fail.

Unsworn statement

[51] In addressing the applicant's unsworn statement, the learned trial judge said he regarded the applicant's unsworn statement as evidence. He recited the applicant's unsworn statement and then assessed it in the following manner:

> "Of course, if I am left in doubt, at the end of this case about what transpired there on that night, that doubt has to be resolved in the favour of the accused. If I accept his Unsworn Statement that he was at home with his son on that night, that would be the end of the matter, I would be duty bound to say that he is not guilty with respect to the four counts charged. But I am also to evaluate his evidence by the same fair standard by which I evaluate the witnesses for the Prosecution, but at the end of the day, it is for the Court, for me to say what weight I attach to his Unsworn Statement.
>
> The Unsworn Statement which Mr. Shenidy Thomas has given me in this court is of no value. And little, if any weight at all is attached to it, none. So, let me go back to the Prosecution's case to see if it satisfies me so that I feel sure." (see page 297)

[52] Mr Knight submitted that the learned trial judge seemed to have misunderstood the import of an unsworn statement. He stated that an unsworn statement had to be viewed from two perspectives: (i) what is the statement capable of establishing; and (ii)

what weight does the tribunal of fact place upon it. As a consequence, if an unsworn statement can cast doubt on the prosecution's case, it must be considered. He submitted that as the applicant had said that he had been elsewhere at the time of the incident, his unsworn statement raised the defence of alibi, which constitutes a complete defence to the charges, and had rendered his unsworn statement of some value. Mr Knight argued that the learned trial judge's failure to appreciate that there was some value to the applicant's unsworn statement, had deprived the applicant of a fair consideration of his defence of alibi and rendered the verdict unsafe (see **Alvin Dennison v R** [2014] JMCA Crim 7 and **Director Public Prosecutions v Leary Walker** [1974] UKPC 7; (1974) 12 JLR 1369).

[53] Miss Llewellyn submitted that the learned trial judge had given himself the appropriate directions in his consideration of the applicant's unsworn statement, pursuant to **DPP v Leary Walker**. The learned trial judge specifically stated that it was for him to say (as a judge sitting alone), whether the applicant's unsworn statement has any value and the weight that he would attach to it. She further stated that pursuant to **Mills and others v R** (1995) 46 WIR 240, as the applicant's alibi had been put forward in an unsworn statement from the dock, the learned trial judge was not required to give a direction on the impact of the rejection of the applicant's alibi. She therefore submitted that the applicant's defence was fairly considered by the learned trial judge and rejected, and so there was no merit in this ground of appeal.

[54] This court in **Alvin Dennison v R**, summarised the law in relation to an unsworn statement in this way:

"[49] ... It is unhelpful and unnecessary for the jury to be told that the unsworn statement is not evidence. While the judge is fully entitled to remind the jury that the defendant's unsworn statement has not been tested by cross-examination, the jury must always be told that it is exclusively for them to make up their minds whether the unsworn statement has any value and if so, what weight should be attached to it. Further, in considering whether the case for the prosecution has satisfied them of the defendant's guilt beyond reasonable doubt, and in considering their verdict, they should bear the unsworn statement in mind, again giving it such weight as they think it deserves. While the actual language used to convey the directions to the jury is a matter of choice for the judge, it will always be helpful to keep in mind that, subject to the need to tailor the directions to the facts of the individual case, there is no particular merit in gratuitous inventiveness in what is a well settled area of the law."

[55] In **Alvin Dennison v R**, this court stated that the learned trial judge had plainly substituted her own opinion of the weight to be attached to the applicant's unsworn statement for that of the jury. She had also repeatedly qualified the value and weight to be attached to the applicant's unsworn statement. In those circumstances, his defence was not fairly and adequately left to the jury, and his conviction was quashed. In the instant case, the learned trial judge expressly said that he regarded the applicant's unsworn statement as evidence. He indicated that he was evaluating the applicant's evidence based on the "same fair standard" applied to his evaluation of the evidence given on the Crown's behalf, and it was a matter for him to decide (as a judge sitting alone), what weight he would attach to it. In addressing his jury mind to that issue, he found that the applicant's unsworn statement was of no value, and so he would attach "little" or no weight to it. This was a conclusion he was entitled to make having

assessed the applicant's unsworn statement in the context of all the evidence. We cannot therefore say that he erred in making that determination.

[56] However, in our view, a defence of alibi had been raised on the applicant's unsworn statement, as the applicant had indicated that he had been elsewhere (at home with his five years old son) at the time the offence was committed. Although the learned trial judge did acknowledge that the applicant had said that "he was at home with his son on that night", he did not expressly state that the applicant had relied on an alibi defence. The question then arises as to what effect, if any, should the learned trial judge's failure to address the applicant's alibi defence have on his convictions?

[57] Pursuant to **Mills and others v R**, the Judicial Committee of the Privy Council has said that where an accused makes an unsworn statement, there is no need to give directions about the impact of the rejection of an alibi. It is sufficient if directions are given, as was done in the instant case, to accord such weight to the unsworn statement as the jury think it deserves.

[58] In any event, this court in **R v Damion Thomas** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 236/2002, judgment delivered 20 December 2004, held that a non-direction on alibi was not necessarily fatal to the Crown's case. In that case, the trial judge had also failed to specifically state that the appellant was relying on an alibi defence. However, as his directions on the burden of proof and his review of the appellant's case were "fair and adequate", the jury could

not be left in doubt as to where the burden of proof lay, and so that ground of appeal failed.

[59] In the application before us, the learned trial judge said that if he had any doubt about the events that transpired that night, that doubt would be resolved in the applicant's favour. He stated that if he accepted the applicant's unsworn statement that he was at home with his son that night, he was duty bound to find the applicant not guilty. After evaluating the applicant's unsworn statement, finding that it was of no value, and attaching little or no weight to it, he went back to the prosecution's case to ascertain whether the circumstances satisfied him to the extent that he felt sure. At the end of his summation, there would have been no doubt as to where the burden of proof lay, and there would also have been no doubt as to the consequences that would flow had the learned trial judge accepted the applicant's defence. In those circumstances, and given the clear directive of the Law Lords in **Mills and others v R**, we could not say, that the learned trial judge's failure to give a direction on alibi was wrong. As a consequence, ground 3 must also fail.

Voice identification

[60] Mr Ronald Paris argued ground 4 on the applicant's behalf. It was his contention that the learned trial judge had failed to adequately assess the voice identification evidence. The learned trial judge, he said, had erred when he failed to pay sufficient regard to Miss Reid's evidence as she was the person most familiar with the applicant, and yet, had not recognised his voice on the morning in question. He further stated that the learned trial judge's rationalisation of Mr Headley's evidence that he was mistaken

when he said that the applicant had kicked the door, "was illogical and flew in the face of the evidence". Mr Paris complained of the numerous examples of Crown Counsel leading evidence with regard to identification. Mr Paris combed through the evidence of each witness and identified the aspects which he found to be incredulous and undeserving of acceptance by the learned trial judge. He identified several inconsistencies and discrepancies on the evidence, which he said, affected the credibility and reliability of the identification evidence that had been led. Mr Paris contended that the deficiencies he had indentified in the voice identification evidence rendered the applicant's conviction unsafe.

[61] Miss Llewellyn submitted that the learned trial judge had thoroughly assessed the prosecution's case with regard to voice identification. She stated that the learned trial judge had recited the evidence of all the witnesses and the inconsistencies and discrepancies stated therein. The learned trial judge, she said, had at the outset recognised that the issue of voice identification was crucial to the prosecution's case. He had therefore given himself the appropriate warning as outlined in **R v Turnbull**, and had addressed any disabilities or circumstances that could have affected the identification of the applicant by his voice. She submitted that the learned trial judge had also emphasised the risk of a witness being mistaken, even where that witness had recognised the defendant, and that even an honest and convincing witness can be susceptible to error. As a consequence, she stated that there had not been any error in his consideration of the issue of voice identification.

[62] In relation to Mr Paris' attack on the findings of fact made by the learned trial judge, it was important to recall the ratio decidendi from this court in **Everett Rodney v R** [2013] JMCA Crim 1; the Privy Council in **Paymaster (Jamaica) Limited and another v Grace Kennedy Remittance Services Limited; Paymaster (Jamaica) Limited v Grace Kennedy Remittance Services Limited and another** [2017] UKPC 40; and the United Kingdom Supreme Court in **Henderson v Foxworth Investments Ltd and another** [2014] UKSC 41, which places constraints on an appellate court when reviewing findings of fact. Indeed, in **Mavrick Marshall v R** [2020] JMCA Crim 20, at paragraph [34], this court said:

> "... an appellate court does not lightly interfere with findings of fact made by a trial judge, and will only do so if there is a material or demonstrable error in the finding made or it cannot be reasonably explained or justified. Therefore, this court must make an assessment as to whether the findings made by the learned trial judge are demonstrably wrong or cannot reasonably be justified."

[63] It is relevant to recall that pursuant to **Morris Cargill v R** [2016] JMCA Crim 6, a judge is not expected to identify every inconsistency and discrepancy which arises in a case. It is sufficient if he gives examples and directs himself as to whether they are material or immaterial. The learned authors of Stair Memorial Encyclopaedia, Reissue, Volume 5, at paragraph 305, remind us that "a judge or jury is entitled not only to select which witness he or it will regard as credible and reliable, but also to select which parts of a witness's testimony he or it will accept or reject".

[64] Gordon JA in **Rohan Taylor v R** endorsed the ratio decidendi in **Bowlin v Commonwealth** 242 SW 604 195 Ky 600 indicating that:

> "The law regards the sense of hearing as reliable as any other of the five senses, so that testimony witness recognised accused by his voice [sic] is equivalent to testimony he was recognized by sight."

[65] We should also state that the law on voice identification has already been stated in **Rohan Taylor v R** at paragraph [35] herein. Morrison JA on behalf of this court in **Donald Phipps v R** at paragraph [137] explained the law on voice identification in this way:

> "In our view, the considerations which have influenced these developments in the United Kingdom and elsewhere are equally applicable to this jurisdiction, with the result that in cases of voice identification the judge should at the very least give to the jury a **Turnbull** warning, suitably adapted to the facts of the particular case before him. As with visual identification, much will depend on whether the defendant's voice was known to the witness before and with what degree of familiarity, but even in such cases the danger of mistaking one voice for another will need to be highlighted for the jury. It will also be necessary for the jury to consider whether at the time of recognition there was a sufficient opportunity for the identifying witness to properly identify the voice in question. While much of the standard **Turnbull** warning will probably be appropriate in most cases, the actual warning given in a particular case should nevertheless take into account the fact that some aspects of that warning may carry less, but sometimes more, importance in cases of voice identification. So that, for example, the circumstances of the actual identification in cases of violent crime, may be less stressful to the witness than in visual identification, but on the other hand, unlike with visual identification, the effects of the stress of the situation could well affect the speaker's voice (see the editorial commentary on **R v Hersey** [[1998] Crim LR 281], at page 283). These are but examples and what is important is that the warning given in each case should reflect all the nuances of the particular case."

[66] With all these considerations in mind, we will now examine the learned trial judge's assessment of the identification evidence that had been led in the instant case.

[67] The learned trial judge devoted considerable attention to summarising the evidence of the prosecution witnesses, with particular reference to evidence which tended to show voice identification.

[68] He stated that nothing turned on Miss Reid's evidence because she did not "purport to identify anyone or any voice".

[69] He stated that Mr Headley had known the applicant for a number of years, had been employed by him at a car wash, and would speak to the applicant often. He noted that, on the night in question, Mr Headley indicated that the applicant had spoken to him for about "a minute and half" and on multiple occasions. The learned trial judge also indicated that there were a number of inconsistencies which arose on Mr Headley's evidence. The first related to the grabbing of his shirt and whether he was grabbed in the back or front of it. Another inconsistency identified related to whether Mr Headley had been walking before or behind the applicant when the applicant was holding onto his shirt. In his statement to the police, Mr Headley said that the applicant ran up to his front door and kicked it off, but he testified in court that he did not see who kicked off the door, nor did he see the applicant go to the back of the house.

[70] Mr Headley had agreed with counsel's suggestion that he had been mistaken when he said that he had seen the applicant go into his yard and kick down the door and go inside the house. However, the learned trial judge resolved this inconsistency by

indicating that the suggestion made to the applicant indicated that he had been "mistaken as to what he saw, but was not mistaken as to what he had heard". The learned trial also noted, as important, the fact that it had never been suggested to Mr Headley that the voice he had heard that night was not that of the applicant.

[71] In reviewing Miss Christie's evidence, he stated that she had known the applicant for 13 years, spoke to him on a number of occasions, and had seen and heard him speaking the Sunday prior to the incident. He recounted the events as Miss Christie described that night, but stated that when Miss Christie had said that half an hour had elapsed from the time the applicant had kicked off the door to when he pointed the gun at her, "on the face of it... would seem to be an exaggeration". The learned trial judge noted that Miss Christie was frank in her assertion that she was not happy about the applicant's relationship with her daughter. He also mentioned a discrepancy between her statement to the police that the applicant had kicked down the back door and come into her house; her testimony that the applicant kicked down the front door and came into her house; and her statement, in cross-examination, that the applicant was the man who had put Mr Headley to kneel down and run to the back of the house. The learned trial judge commented that "that can't be". But indicated that the crucial question to be determined is whether it affected the credibility of the witness as to whether the applicant was one of the three men present that night. He indicated that Miss Christie repeatedly asserted that it was the applicant's voice she had heard that night, and had said that "the voice alone mek mi know sey a Shenidy. Shenidy's voice

cannot fool me. It is a voice I talk to all the while". She also denied suggestions that she had been mistaken when she said she had heard his voice.

[72] The learned trial judge also canvassed Miss Downer's evidence. He mentioned the fact that she too had known the applicant for 13 years, and had even lived with the applicant and her sister while she was in grade 9. She heard his voice everyday during that time, and spoke to him on multiple occasions prior to the incident. On the night of the incident, she heard him talking to her sister by her mother's bedroom window (a statement corroborated by Miss Reid). Under cross-examination, she agreed that the applicant would spend months outside of Jamaica, but she had lived with the applicant and Miss Reid continuously, and would, in fact, be present at their home upon his return. She accepted that she knew two of the applicant's brothers, and indicated that they did not all sound the same, as, in particular, his brother David, spoke differently from the applicant as David had a stutter. He noted that Miss Downer was steadfast in her statement that she heard the applicant's voice saying "A Nordia mi come fa, weh Nordia deh?"

[73] The learned trial judge also summarised the evidence of Detective Corporal Ford. Thereafter, he stated the case for the defence, indicating that he regarded the applicant's unsworn statement as evidence. He directed himself with regard to the unsworn statement as outlined at paragraph [51] herein. In analysing the issue of identification, he said the following:

> "So, like in cases of visual identification I have to give myself the same **Turnbull** warning with respect to

recognition of voice. So, for the instances in which I have already highlighted, coming from Levaughn [Headley], the instances in which I have already highlighted from Leonie Christie. The instances which I have already highlighted from Chinae Downer. I have to warn myself that there is a need for caution to avoid the risk of injustice.

A witness who is honest and convinced in his or her mind may be wrong. A witness who is convincing may be wrong and, of course, more than one witness may be wrong. And a witness who is able to recognise the voice of a person even when the witness knows the defendant he or she may well be wrong. So, I have to look at the surrounding circumstances of the evidence of voice identification. If during the time which the witness heard the defendant's voice, if she was under the auditory observation of this person. And, of course, I have to look at the time in which the witness says she heard the person's voice for, that is to say the duration. The distance between them. Where there are any interferences between the person speaking and the person listening. And, of course, I would have to look at the occasions which I have already termed as the degree of familiarity with this person's voice to the time when the event in question took place how far removed are they. I have to look at the witness too. I have to look at the fact that the incident was unexpected and fast moving or shocking. And involved a number of persons so as to make the identification by voice of a single person difficult, and anything said or done at the time.

So, what are the potential witnesses in voice identification? As I said before, the audibility of the speech which she heard. The environmental factors affecting that person's speech, the duration of the voices heard, the number of voices heard, whether or not there was any identifiable attempt to disguise the voice, whether or not their ears suffer from any disability, and I don't know if it is established the degree of familiarity with the person's voice or the distinctiveness or accent of the speaker's voice, I take those into account in evaluating the evidence of these persons.

I have absolutely no doubt that the evidence must satisfy me so that I feel sure in relation to ... the four separate counts."

[74] The learned trial judge said he felt sure of the applicant's guilt with regard to counts 1, 2 and 3, but unsure of his guilt on count 4.

[75] In all these circumstances, we cannot say that there was any material or demonstrable error in the findings of fact related to voice identification made by the learned trial judge, nor can we say that those findings could not be reasonably explained or justified. It is clear that he addressed the principles to be applied when establishing voice identification as outlined in **Rohan Taylor v R** and **Donald Phipps v R**. Utilising these principles, the learned trial judge found that Mr Headley, Miss Christie and Miss Downer were familiar with the applicant's voice, and there was sufficient opportunity for them to identify his voice during the incident. The directions he gave on identification as stated at paragraph [73] herein, were in keeping with the sense and spirit of the guidelines in **R v Turnbull**. Additionally, the learned trial judge paid particular attention to the inconsistencies and discrepancies which arose on the prosecution's case, and at each juncture, reminded himself that he had to assess whether they were material, and the effect that they had on the credibility of the prosecution's witnesses. The learned trial judge cannot therefore be faulted in his assessment of the identification evidence, and so we can find no merit in ground 4.

Sentence

[76] The evidence of Miss Christie was that the applicant held a gun on her causing her to tremble and feel nervous. This evidence grounded the conviction on assault. No grounds of appeal were advanced before us relating to the issue of sentence in respect

of any count. However, as indicated, leave was granted to the applicant to appeal the sentence that had been imposed on the applicant on count 3 for assault.

[77] The applicant was sentenced to two years' imprisonment at hard labour for assault. However, pursuant to section 43 of the Offences Against the Person Act, and the authorities of **Denmark Clarke v R** and **Cornel Grizzle v R**, the maximum sentence that can be imposed for that offence, is imprisonment for one year. Although the learned trial judge had applied the correct sentencing methodology, he would have erred in the imposition of a sentence which exceeded the statutory maximum. The sentence imposed on count 3 must therefore be set aside. It now falls upon this court to ascertain the appropriate sentence on that count.

[78] The sentence to be imposed must be determined in accordance with the methodology outlined in **Meisha Clement v R** [2016] JMCA Crim 26 and the factors identified by the learned trial judge, which includes an analysis of the aggravating and mitigating features relative to the offence and the offender. The aggravating features in this case clearly cancelled the mitigating ones, and moreover, this case involved an assault using a firearm. The learned trial judge clearly indicated at the sentencing hearing, when imposing the sentence in respect of all counts that he had taken into account the fact that the appellant had spent six months in custody prior to being sentenced. In those circumstances, no further reduction in the sentence will therefore be made. Accordingly, we would set aside the imposition of the sentence of two years imprisonment at hard labour, which was imposed in error, and substitute therefor a sentence of one year imprisonment at hard labour.

[79] I sincerely apologise for the delay in the delivery of the judgment in this matter. It is indeed regrettable, but, unfortunately, unavoidable.

Disposition

[80] In all these circumstances, we would make the following orders:

1. The application for leave to appeal the applicant's convictions is refused.
2. The appeal against the sentence imposed on count 3, which charged the applicant with assault, is allowed.
3. The sentence imposed on count 3 for assault is set aside. Substituted therefor is a sentence of one year imprisonment at hard labour.
4. The sentences imposed on count 1 (illegal possession of firearm) and count 2 (robbery with aggravation), of seven years and 12 years respectively, are affirmed.
5. All the sentences imposed are to run concurrently.
6. The sentences are reckoned as having commenced on 28 June 2017, the day on which they were originally imposed.