[2011] JMCA Crim 58

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS 27 & 81/2009

BEFORE: THE HON MR JUSTICE HARRISON JA
THE HON MR JUSTICE MORRISON JA
THE HON MRS JUSTICE MCINTOSH JA

DWAYNE BRISCOE v R
JERMAINE LITCHMORE

Mrs Jacqueline Samuels-Brown QC for the appellant Briscoe

Ms Jacqueline Cummings for the appellant Litchmore

Miss Claudette Thompson and Vaughn Smith for the Crown

Miss Carole Barnaby and Harrington McDermott for the Attorney General

19, 21 July, 16 November 2010 and 29 November 2011

HARRISON JA

[1] Following a trial before Sykes J, in the High Court Division of the Gun Court, Dwayne Briscoe and Jermaine Litchmore were convicted on an indictment which charged them on count one with the offence of illegal possession of firearm contrary to section 20 (1) (b) of the Firearms Act and on count two with the offence of wounding with intent contrary to section 20 of the Offences Against the Person Act. Briscoe was sentenced on 3 March 2009, on counts one and two, to terms of imprisonment of eight years and 10 years respectively. On 12 June 2009,

Litchmore was sentenced to similar terms of imprisonment. The sentences were ordered to run consecutively in respect of each appellant.

[2] A single judge of appeal refused their applications seeking leave to appeal against conviction but granted them leave to appeal against sentence. They renewed their respective applications against conviction to the court and leave was granted on 19 July 2010, to argue supplemental grounds of appeal. On 16 November 2010, having heard the arguments of counsel we reserved our decision, which we now set out.

THE CASE FOR THE PROSECUTION

Stephen Whyte

[3] Stephen Whyte (Stephen), the virtual complainant, works at his father's night club situated on Northwood Court, Portsmouth, Portmore. His father is called "Big Youth". On 8 November 2008, at about 3:00 o'clock in the morning he was at the club when a girl by the name of Nikiesha, also known as 'Coolie', came into the music room to take a picture. He told her she could not do this and he said that both of them "tangle up". Litchmore then came into the room and "girt" him up. By this he meant "drape him up". On seeing what was taking place, Stephen's father came into the room and parted them. There was a brief conversation between them and thereafter Litchmore and Briscoe, who was also present in the music room, left the club and went away.

[4] Red electric bulbs were burning in the club but Stephen said that they were bright so he could see the faces of both men and recognize them. At the time

Litchmore 'drape him up', he was looking in his face for about four minutes. He had also seen Briscoe's face. Briscoe had approached him and said to him, "Steve, what you and my woman have?" These words were spoken he said, after he, Litchmore and Coolie had "ketch up". Litchmore was wearing a white T-shirt but he could not recall the colour of his pants.

[5] Some 10 minutes later, Stephen and his father locked up the club, left and went on Northwood Court. They were walking and talking and on reaching in the vicinity of Northwood Road, Stephen said he saw both Litchmore and Briscoe walking towards him. According to Stephen, prior to them approaching him he had seen them at the corner of Northwood Road and Northwood Court, in close proximity to a street light. Litchmore was wearing the same white T-shirt that he had seen him wearing inside the club. His father then said to Litchmore, "Wah yuh come back fah? Everything nuh done already." Litchmore said, "A going to show you how man mek duppy." Stephen saw both Litchmore and Briscoe with guns in their hands. He was approximately 11ft from where Litchmore was standing and his father told him to "come". Briscoe, he said, was standing behind Litchmore when his father spoke to him. A third person was standing behind Briscoe but he could not make out that person. The distances were pointed out by Stephen in court.

[6] After Litchmore spoke to his father, Litchmore raised his right hand which held the gun and he heard two loud "shots". Immediately after the gun was discharged, all three men ran in the direction of Passage Fort. Stephen felt his "foot" start to burn and he said, "Big youth, I get shot. Dem shot me." He saw a

hole in one leg of his pants and there was blood in his shoes. He was taken by his father to Waterford Police Station where he gave a statement. Subsequently, the police took him to the Spanish Town Hospital where he was treated and sent home.

[7] Stephen said the gun which Litchmore used to "shoot" him was shiny. Litchmore held the handle and smoke came from its mouth after it was fired. He had seen the police and soldiers with guns before that day.

[8] Stephen testified that he had known both Litchmore and Briscoe before the date of the incident. He had known Litchmore for some 18 years. He also knew him by the name "Shocker". He had known him from he was "little" and that he had a little brother. They had attended the same school in Independence City and were in the ninth grade. They were both friends and had spoken to each other. He would visit the club almost every night. He had known Briscoe for between 19 and 20 years and knew him from he was "little bit". They did speak to one another; he knew Briscoe's family and according to him, he and Briscoe's family "move as one". Briscoe, he said, is also called "Biggs".

[9] Stephen further testified that he had seen Litchmore's face whilst he was on the road and that he had recognized his voice when he spoke. The men had returned approximately 10 minutes after they had left the club. He said that a streetlight was burning and that Litchmore was close to that light. They were about 7ft apart (the distance was pointed out by him). When he was asked about where Briscoe was in relation to the light he said "Dwayne was right behind Jermaine". When asked who was closer to the streetlight, he said both of them.

Afterwards he said he would say that Briscoe was closer. He also said that when he saw Briscoe on the roadway he could see his face for about six minutes and that this was during the time that Litchmore was talking.

[10] Both men were pointed out and identified in the dock by Stephen.

[11] Stephen was cross-examined by Mr Ballantyne on behalf of Litchmore. He said that between 10 and 20 persons were in the club that night. He disagreed that there was only one streetlight on the road on which the club is situated. He insisted that there were two streetlights, but after he was questioned by the learned trial judge, he said he agreed with counsel that there was only one streetlight on that road. He estimated the distance from the streetlight to the club to be about 25ft. He agreed that the club was at the dead end of Northwood Court. He said that two houses were on the edge of the roadway and that there was also a small football field in the area. He did not agree that there was no direct light coming from the streetlight because of the houses. The streetlight, he said, was very bright. The club's lights were also burning and he said that this had "bright up" the area. The club had five bright floodlights on the top and six small brightly coloured lights below. Two big floodlights were in the yard. The lights on the top were burning but the six small lights were off. The two bright floodlights, he said, were kept on throughout the night. He said that when he was shot he was between two streetlights on Northwood Road. He also said he had not yet reached the corner of Northwood Road when he got shot. He disagreed with the suggestion that Litchmore did not shoot him. He agreed that both of them were very good friends and that they had no fuss before.

[12] Under cross-examination by Mr Deans for Briscoe, Stephen was asked if he had said during his testimony that he had left the club and was standing at the corner of the Close (Northwood Court). His response was "Yes, that's Northwood Road". The following exchange then took place:

> "Q. And Northwood Close, no man, you told the Judge, 'M'Lord, I was right at the corner of the close.'
>
> A. Yes.
>
> Q. So, that's right in front of the club?
>
> A. It is at the corner.
>
> Q. Is it in front of the club?
>
> A. No."

He was asked how far he was standing from the grill gate of the club and he said it was not as far as 20 ft. He was then asked:

> "Q. And that's where you say the shooting occurred?
>
> A. Little bit from that. Little bit from that corner on Northwood Road."

It was suggested to him that there were only pepper lights on the outside of the club and that there were no floodlights but he disagreed. He disagreed that the lights which he referred to as floodlights were motion sensor lights which were not on all the time.

He disagreed with the suggestion that he did not see Briscoe at the club that night. He also disagreed with the suggestion that he had not seen Briscoe leave

the club with Litchmore. It was suggested to him that he never related in his statement to the police that he had seen Briscoe leave with Litchmore, but he disagreed.

[13] Under further cross-examination by Mr Deans, Stephen said that when he saw the two men approach him, their backs were turned towards the streetlight. They were on the road and his back was turned towards the club as both men faced him. He said that the streetlights were behind them. The learned trial judge then intervened:

> "HIS LORDSHIP: Both lights?
>
> WITNESS: No, one; one where mi would a sey is right up the street, the light bright up the whole of there and the next light is on the same side in between the two lights."

Mr Deans continued:

> "Q. Sir, I'm going to suggest that there's only one light on that road between the green house and blue house on Northwood Road.
>
> A. No, is two lights on that road."

[14] Stephen disagreed with the suggestion that he was mistaken when he said he saw Briscoe on the scene when he got shot. He also disagreed with the suggestion that he was mistaken when he said he saw Briscoe with a gun in his hand. It was further suggested that Briscoe was not in the company of or presence of anyone who shot him, but he disagreed.

Errol Whyte

[15] Errol Whyte, father of Stephen Whyte, also testified at the trial. He operates a night club at Northwood Court, Portsmouth. On 8 November 2008 he was at the club at about 3:00 am and was standing on a step. He heard a "little noise" inside; he went inside the Club and saw Litchmore, who was known to him as "Shocker". He held him, told him to behave himself and then took him downstairs. He had also taken another man and a girl downstairs. Litchmore went into a car and told the others to join him. Before he drove off, he said, "Unnuh a goh si what happen".

[16] Errol Whyte said he went back upstairs, closed up the club, went on the outside and stood at the gate of the club. He told his son to come and after he spoke, he looked across the road and saw Litchmore. Errol Whyte was still at his gate when he saw Litchmore. There was a streetlight across the road from where he stood and he said to Litchmore, "How you love war so, how you love badness. Yuh left and goh a yuh yard and yuh come back". Litchmore did not answer him. He saw his son going towards Litchmore who then had a gun in his hand and he bawled out to him, "Come back, yuh a goh mek the man shoot you?" He said he "bawl him down" and went towards his son and said, "Steve, see him with the gun in a him hand, why yuh going to him?" Litchmore, he said, turned his hand and he heard "bow, bow". After he fired the two shots, Errol Whyte said he "run out" and said "See him shoot mi son deh." He ran to his house which is the floor below the club. Subsequently, his son then complained that he was shot and he said he saw

blood "bumping out" of the foot. He took him to the Waterford Police Station and thereafter, he was taken to the hospital. The learned judge asked:

> "HIS LORDSHIP: Yes. Was 'Shocker' alone at the time when he came back to the club?
>
> A. Okay, 'Shocker, I saw he come down the road, two was standing up more, but is three of them I saw."

[17] Errol Whyte said that Litchmore had faced him and another man stood behind him. He had known Litchmore from he was a "little boy" going to school. He said that Litchmore and his son went to the same school. He had known him for about 15 years. Crown Counsel continued with her examination in chief of the witness:

> "Q. What part of 'Shocker you saw why you say it was him?
>
> A. I saw all of him.
>
> Q. All of him like where?
>
> A. Whole a him front part because him lean up pan the front part of the building.
>
> Q. Where? What part you call him front part?
>
> A. Face go straight down to him toe.
>
> Q. And about how long after they left, 'Shocker' come back?
>
> A. Call it fifteen minutes; call it fifteen minutes.
>
> Q. And at that time, how were you able to make out 'Shocker's' face?
>
> A. 'Shocker' is one a my bwoy so I know him long time so him can't hide.

Q. At the time you saw him, how were you able to make out his face? You told us this was fifteen minutes after he left.

A. His place like right here, and I know him.

(Witness indicates)

Q. About how far was he from you?

A. Right cross the road.

Q. Point it out.

A. Like across there where the officer stand.

(Witness indicates)

….

Q. Was it dark or light?

A. Light up, but the streetlight them on."

Errol Whyte said that Litchmore had stood under the streetlight. The dialogue continued:

"Q. … about how long would you say you saw his face part then when he came back? Just an idea of time. Idea. How long you saw his face part when he came back?

A. When him came back, the same fifteen minutes. I did get time to look and talk to him.

Q. How long you talk to him and saw his face part?

A. Not even after him come back the fifteen minutes, it don't tek three minutes I talk to him."

[18] The gun which he said he saw Litchmore with was short and shiny. He also saw the part that fire comes out of. He called it the 'mouth part'. He had seen a "lot of" guns before. He had seen police officers with guns. When the gun was fired, he said he had seen fire come from the 'mouth part' of it.

[19] Errol Whyte further testified that two other men had come along with Litchmore but they were some distance away from him. He said that the streetlight was "bright, bright, bright".

[20] He was further questioned:

> "Q. How many street - what road was Litchmore on when you said he came back and stood under the lane light?
>
> A. Northwood Road same way. Facing the club same way. Just the road.
>
> Q. And you said the street light dem made you able to see him, how many street lights are on that road?
>
> A. On the road have two weh face my house, my place, and two more up on the road, that is four on the street coming down to me. But where him stand up, up under one bright one that under my gate.
>
> Q. Northwood Close that the club is on?
>
> A. Four street lights on all together, come down, our street light come straight down.
>
> Q. And what road is this, sir?
>
> A. Northwood Close where the club on.
>
> Q. Northwood Court, the same road you talking about?

A. Same road that mi speaking about, I live at 94 Northwood Court that road coming off Northwood Close.

Q. And when you talking about the road coming straight down, this is Northwood Court?

A. Yes, I live at Northwood Close and Northwood Court gone up.

Q. Now, Northwood Court pass Northwood Road?

A. Northwood Road gone up the scheme and Northwood Close me live on.

Q. Are the roads connected?

A. Yes."

[21] Errol Whyte was cross-examined by Mr Ballantyne. In cross-examination the following exchange took place:

"Q. Now, you say that four street lights are on Northwood Court? You said there were four street lights on Northwood Court?

A. No.

Q. Now, when you reach the corner of Northwood Road and Northwood Court, light at the corner there where they join, is there any light there?

A. At the corner?

Q. Yes?

A. Yes, sir,

Q. I am putting, no, sir.

A. You have a light at Northwood on the corner.

Q. Soon get to where the light is, 'cause I know where it is, Northwood Road and the close of

the court, whatever you call there, there is no light there?

A. Well, I can tell you, that's where I live. I live there from 1979, I can tell you what happened.

...

Q. Is there a street light at the corner of Northwood Road and Northwood Court?

A. There is a street light there.

Q. Answer my question specifically, is there a street light at Northwood Road and Northwood Court, right at the corner, sir?

A. Sir, a fourth street light between Northwood Road straight.

Q. Northwood Road, specifically, just want that specifically, now is whether the street light is at the corner of Northwood Road and Northwood Close?

A. I call that Northwood Road...

Q. ... I am putting, no light right at the corner there?

A. I have four light come straight 'round to me…

...

Q. I am putting, there is only one light on Northwood Court or Northwood Close, whatever you call it and it is at the end of the road.

A. So, it is one light?

Q. On that part of the Close?

A. Three lights deh from the corner come straight 'round to me and next fourth deh 'cross the road-

...

Q. Are there two sections of the road there, Northwood and...?

A. Boss, you have Northwood Close, Northwood Court and you have Northwood Road, me live on Northwood Court, ninety-four, Northwood Close gone up and Northwood Court weh me live 'pon.

Q. That is the far end of the house...?

A. All the light, three light come 'round the building cross 'pon Northwood Close.

Q. I am putting not three street lights on Northwood Court. And the answer to that is yes, or no?

A. Yes, street light deh pon it and one deh 'pon...

Q. On Northwood Court, is that what you are saying?

A. Mi can go out there and count dem fi you, mi can go over deh right now and count dem to you, please.

Q. There are not three street light on Northwood Close. I am putting it to you further that there are two street lights on Northwood Road, one by the playing field and one about the middle of the road.

A. (No answer)

Q. He hasn't answered. Are you going to answer my question? You have not answered it.

A. (No answer)

…

Q. I am putting it to you that there are two street lights on Northwood Road, one at the end of the playing field and one at the end of the road.

A. No, sir, the light deh same place.

…

Q. No, don't tell me, putting it to you that you are lying when you say there are three street lights on the Court.

A. I am not telling no lie, if you go there you see them now.

Q. I am putting it to you that one street light is on the court and at the far corner, at the dead-end actually.

A. 'Round the corner same place on Northwood Court, 'round the corner. One of the corner weh him stand up, my light bright, bright up there, anybody come there, from they come there — my light dem don't have to be bright.

Q. That is a motion light?

A. The whole of the light at 'Cool Breeze' house.

Q. I am putting it to you that Litchmore - you did not see Litchmore with a gun that night.

A. Sir?

Q. You did not see Litchmore with the gun that...

A. I wouldn't think it to lie, tell lie on Litchmore, mi grow them. I come to speak the truth and that's what I am here to do. I am not telling no lie 'cause I love God."

[22] It was put to Errol Whyte that Litchmore did not fire any shot at Stephen but he disagreed.

[23] Under cross-examination by Mr Deans, Errol Whyte disagreed with the suggestion that he did not see Dwayne Briscoe in the club during that morning. He maintained that he did see him in the club.

Constable Llewellyn Madden

[24] Constable Madden was the investigating officer. He was stationed at Waterford Police Station at the material time and was present at the station when Stephen came there and made a report to him. He saw him bleeding from the right leg. He took him to the Spanish Town Hospital where he was treated and sent home.

[25] Constable Madden and other police personnel went to Northwood Court in Portsmouth, St. Catherine later that day. He recovered two .45 spent shells and commenced investigations into a case of wounding with intent and illegal possession of firearm and ammunition. He recorded statements from the complainant and one witness. He later prepared warrants of arrest for two suspects known to the complainant before as Jermaine Litchmore, otherwise called 'Shacka' and Dwayne Briscoe, otherwise called 'Biggs'.

[26] On 19 November 2008, Litchmore was apprehended by the Portmore Special Operations Unit and was brought to the Waterford Police Station. At the station, he told Litchmore of the report he had received against him and told him that he would schedule a question and answer interview with him and that his lawyer would be present. Litchmore was pointed out and identified in court by Errol Whyte.

[27] On 20 November 2008, Briscoe went to the station and identified himself to Constable Madden who told him of the report and that he was also arranging a

question and answer interview, which would be held in the presence of his attorney.

[28] The question and answer sessions were held as indicated and thereafter Constable Madden arrested and charged both men for the offences of wounding with intent, illegal possession of firearm and ammunition. Upon being cautioned, Litchmore said, "Bwoy, officer, me 'salt'; me just deh a the wrong place at the wrong time". Briscoe said, "Officer, me nevah even inna Portmore at the time".

[29] Constable Madden recalled that when he visited the scene he had observed that streetlights were burning. So far as he recalled, there were two street-lights. One was situated at the point where the incident had occurred and the other was further down towards the club. He made no observations of the lightings on the club itself.

[30] When Constable Madden was cross-examined by Mr Ballantyne, the following exchange occurred:

> "Q. As far as you are concerned the incident occurred on Northwood Court?
>
> A. Road.
>
> Q. On Northwood Road?
>
> A. Yes.
>
> Q. Now, when you get out of Northwood Court there is a club just a little from the corner, slightly from the corner?
>
> A. The club faces Northwood Road directly, the club - you stay right where the incident happen and look at the club right ahead.

Q. But, however...

HIS LORDSHIP: The club faces what?

WITNESS: If you come out of the club and stand up you looking straight at Northwood Road where the incident occurred."

[31] During cross-examination by Mr Deans, Constable Madden was asked:

"Q. After you charged Mr. Briscoe, I am going to suggest, he, in fact, said to you, 'I was not on the scene', and did not say, 'Not even in Portmore he was…'

A. No. He said, 'Mi was not even in Portmore when it happened.'

Q. Putting it to you that he said he was not even on the scene, when it happened.

A. No, that is not what he said."

[32] The learned judge then asked Constable Madden a few questions:

"HIS LORDSHIP: Do you know that area well, officer?

WITNESS: Yes, m'Lord.

HIS LORDSHIP: What is the difference between Northwood Road and Northwood Court?

WITNESS: All right, m'Lord, Court is where the road - you go and if you need to get out you have to make - can I draw on a piece of paper and...

HIS LORDSHIP: Sure.
(Document shown to Judge)

HIS LORDSHIP: Yes, yes, based on what the officer has drawn, it will be admitted into evidence all. If there are any questions, there he is, that is his mark. That is Exhibit one, if nobody has any question of him and his drawing."

[33] Arising from the questions asked, Mr Ballantyne was allowed to further cross-examine the witness:

> "Q. Officer, Northwood Court that is Northwood Close too?
> A. I am not certain of the names like that, sir.
>
> Q. This area, corner? (indicates)
> A. Yes, that is the court.
>
> Q. It is L-shape like this, it goes along this side?
> A. No."
>
> Q. What is interesting is that on this part of Northwood Court, isn't there a light in the corner there?
>
> A. I had no interest around that side, at that time, sir.
>
> Q. Right at the corner isn't there a light there?
>
> A. I don't know, sir, I was on the main stretch of the road, there is where the incident occurred from there to the club.
>
> Q. There was no light on this part of the corner?
>
> A. I don't know, I wasn't down there."

[34] Under further cross-examination by Mr Deans the following is recorded:

> "Q. Again, officer, I put it to you that that diagram is not an accurate description of what is, in fact, there.
>
> A. As it relates to the playing field, it is perfect.
>
> MR. M. DEANS: So please you, m'Lord, nothing further."

[35] Crown Counsel was also permitted to further examine the witness:

"Q. Club and scene, point it out, what is the estimate, the actual distance from the club?

A. Probably about two chains, if so much.

MISS K. PRINCE: That would be my question, m'Lord."

THE DEFENCE

Jermaine Litchmore

[36] Litchmore made an unsworn statement from the dock. He said he was 24 years of age and operated a car wash business. He said he lived on Passage Fort Drive along with his girlfriend and a "kid". He continued:

> "… And whatever they talking about, m'Lord, I don't know anything about it, because the night... I was at the club. While I talking to Mr. Errol Whyte, when I was there... And when I was there I saw Mr. Stephen Whyte, him son and me cousin was in a fight and me went and part them... And me cousin fight and I went and part them and I ask him what is the problem and he start to tell me seh him and har was having an affair… What problem was with him and har and tell me seh him and har was having an affair. It build up the argument and talk it over and I went out the club and I leave. I did not threaten no one, and I did not came back. And me and Mr. Whyte is very good friends, because when I at the club me and him don't have any problem. So, I do not shoot anyone and anyone do not see me with a gun. I am well-beknown person by the Waterford Police Station. Me and all the police officers around the station have a good relationship. I can say I been accusing wrongfully. That's it, m'Lord."

Dwayne Briscoe

[37] Briscoe also made an unsworn statement from the dock.

"Your Honour, my name is Dwayne Briscoe. Yes, I am a hardworking young man. I work for Facey Commodity as a side man.

HIS LORDSHIP: You work for who?

ACCUSED BRISCOE: Facey Commodity. I am 22 years of age. That night I rode my bicycle up by the club, at the entrance the grill was locked, they would not let anyone in the club that night.

HIS LORDSHIP: You...

ACCUSED BRISCOE: And the entrance to the club the grill was locked. The entrance grill. They would not open it to let in anyone, your Honour. So, I decided to went back home. I was not on the scene at the time of the shooting. On the 20th of November, after coming from work I heard that police officers from the — around the Waterford Police Station was looking for me. I needed to know the reason, so I went around by the Waterford station and introduce myself. Give them my name and they said that they will hold me on a suspect of shooting and wounding. Did not shoot anyone, your Honour, and I am not guilty."

THE GROUNDS OF APPEAL IN RELATION TO BRISCOE

[38] Mrs Samuels-Brown QC for Briscoe sought and obtained leave to file and argue the under-mentioned supplemental grounds of appeal on his behalf.

"The Supplemental Grounds of Appeal

1. The Learned Trial Judge failed to sufficiently warn himself relative to the identification evidence in that he, inter alia:

    i. Did not take into account or sufficiently into account that the purported identification was under difficult circumstances having regard in particular to the fact that:

a. it was night

b. the evidence as to the positioning of the lighting was unclear

c. the evidence was that the Appellant/Applicant was behind the co-accused

ii. In concluding that the opportunity to view the Appellant/Applicant did not amount to a fleeting glance the Learned Trial Judge failed to take into account that having regard to what, on the Crown's case, transpired at the time and assessed by objective factors it would have been for a short time.

iii. There was no evidence as to the time most proximate to the incident that the prosecution witnesses had last seen the Appellant/Applicant.

2. The Appellant/Applicant was deprived of the benefit of character evidence and directions relative to same in his trial.

3. The sentence of the court is manifestly excessive having regard to, inter alia,

i. The Appellant's/Applicant's alleged role in the offences;

ii. The Appellant's/Applicant's age

iii. The Appellant's/Applicant's antecedents and in particular that he had no previous convictions, in light of the character evidence and Social Enquiry report.

iv. Consecutive sentences were imposed for offences that arose out of the same facts, one being

an incident or component of the other."

[39] The appellant Briscoe was granted further leave to argue the under-mentioned supplemental grounds of appeal. These grounds are set out hereunder.

"Further Supplemental Ground of Appeal

1. The Learned Trial Judge erred in finding that the Appellant/Applicant Dwayne Briscoe was acting jointly with the co-accused when the co-accused discharged his firearm.

2. The Appellant's conviction for illegal possession of a firearm cannot stand for the reason that:

   (a) The prosecution provided no or no sufficient evidence of his being in possession of a firearm and/or

   (b) Any invocation of or reliance on Section 20(5) of the Firearms Act to justify his conviction is impermissible for the reason that the said Section is contrary to Section 20(5) of the Constitution of Jamaica.

3. The Appellant did not receive a fair trial as he was deprived of the benefit of character evidence and the appropriate considerations and directions relative to such evidence prior to his conviction."

[40] Counsel from the Attorney General's Chambers was invited by the court to file and argue submissions in relation to ground (2) (b) supra.

SUBMISSIONS BY MRS SAMUELS-BROWN
ON BEHALF OF BRISCOE

Supplemental Ground One - The Identification Issue

[41] At the trial, the crucial issue was whether the appellant Briscoe was in fact correctly identified as one of three men who were present on the road at the time when the shooting incident occurred. The evidence of Stephen to this effect was uncorroborated. The appellant did not give evidence but made an unsworn statement from the dock to the effect that he knew nothing about this incident. Stephen it will be recalled had disagreed with the suggestion put to him by counsel for Briscoe that he was mistaken when he said that the appellant was on the scene. The question for determination therefore, was whether Stephen had sufficient opportunity to identify and recognize Briscoe.

[42] Mrs Samuels-Brown QC argued that it was for the prosecution to produce clear evidence to satisfy a court that the circumstances of identification were sufficient to properly base a conviction. She submitted that in the instant case, the evidence was so confusing that it was left to the learned trial judge to express his findings relative to the length of time available for viewing the assailants in negative terms. She argued that he was unable to make a positive finding in relation to this.

[43] Learned Queen's Counsel further submitted that this was a case of recognition but no evidence was led as to the time most proximate to the incidents of 8 November 2008, that the prosecution's witnesses had last seen the applicant Briscoe. No evidence she said, was led as to the circumstances under

which the main Crown witness would have seen him while they were at the club. She submitted that the learned trial judge ought to have placed no reliance on the purported identification evidence and/or he ought to have concluded that in the circumstances he could not base a conviction on same.

[44] Miss Thompson for the Crown submitted inter alia, on the other hand, that the learned judge had demonstrated throughout his summation that he was aware that identification was the key issue. She submitted that he had warned himself on the dangers of convicting persons based on mistaken identification (the **Turnbull** warning) and that he had carefully examined the circumstances relating to the identification.

[45] Bearing these submissions in mind, we do agree that it was important for the learned trial judge to have directed himself properly on the issue of identification. The general requirements for such directions have been laid down in the judgment of Lord Widgery CJ in **R v Turnbull** [1977] QB 224 at pages 228 and 229:

> "First, whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition, he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Provided this is done in clear terms the judge need not use any particular form of words.

> Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? If in any case, whether it is being dealt with summarily or on indictment, the prosecution have reason to believe that there is such a material discrepancy they should supply the accused or his legal advisers with particulars of the description the police were first given. In all cases if the accused asks to be given particulars of such descriptions, the prosecution should supply them. Finally, he should remind the jury of any specific weaknesses which had appeared in the identification evidence.
>
> Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made. All these matters go to the quality of the identification evidence. If the quality is good and remains good at the close of the accused's case, the danger of a mistaken identification is lessened; but the poorer the quality, the greater the danger."

[46] In **Shand v R** (1995) 47 WIR 346 at 350, Lord Slynn of Hadley, giving the advice of the Board, said:

> "The importance in identification cases of giving the ***Turnbull*** warning has been frequently stated and it clearly now applies to recognition as well as to pure identification cases. It is, however, accepted that no precise form of words need be used as long as the essential elements of the warning are pointed out to the jury. The cases in which the warning can be

> entirely dispensed with must be wholly exceptional, even where credibility is the sole line of defence. In the latter type of case the judge should normally, and even in the exceptional case would be wise to, tell the jury in an appropriate form to consider whether they are satisfied that the witness was not mistaken in view of the danger of mistake referred to in ***Turnbull***."

[47] For present purposes, it is enough to quote the following passages from the judge's summing-up:

> "Now, this is a case that depends upon visual identification, and in all cases of visual identification, the position now is that one has to switch between honesty and reliability, that is to say, an honest witness may be a convincing witness, because a witness is honest, but nonetheless be unreliable. And unreliability may be disguised if the court does not focus on it specifically and conveniently. We have erroneous convictions arising from mistaken identification and that is really what the warning on visual identification is designed to deal with, that is to say, minimize or eliminate the risks of wrongful conviction arising from the statement.
>
> In cases it has been said that persons have been wrongfully convicted, because you have witnesses who are genuinely mistaken, but who you believe that they are speaking the truth, and, because, they have proven or thought of to be honest witnesses, then the possibility of error arising from an honest mistake is overlooked. So, for that reason it is important to look at the evidence of the identification in two parts, that is to say, evidence of prior knowledge and the purpose of evidence of prior knowledge, to indicate that the risk of the mistaken identification is reduced, because the witness knows the defendant before. But, that in, and of itself doesn't mean that the witness is correct, one still has to look at the objective circumstances to see if in the circumstances, at the time the crime is alleged to have been committed the witness had the good objective conditions to make an identification that is reliable."

He said further:

> "Now, as far as the evidence of prior knowledge of both men is concerned, I am satisfied, so that I feel sure, that Mr. Stephen Whyte knows both defendants for an extended period of time; 18 years in respect of Litchmore, 19 years in respect of Briscoe. I accept his evidence when he says he would describe himself certainly up to that time, at any rate that he and Mr. Litchmore were friends. I am satisfied so that I feel sure, that Litchmore is a regular patron. He said he is there almost every night. So, the question now of prior knowledge being settled in respect of Litchmore, is it as settled in respect of Briscoe? I had known him for 19 years and so on.
>
> Now, onto the night in question, the evidence in [sic] which I rely on, the point on the aspect now is Mr. Whyte, Mr. Stephen Whyte's evidence from the narrative given by him, even by his father, he was, he, Stephen Whyte, was closer to the persons than Mr. Errol Whyte was, and, therefore, he would have been in a better position to make any identification. I am satisfied, so that I feel sure that this was not a fleeting glance. Though I said it is not long, it is three minutes, not as long as six minutes, what is quite clear, having regard to the time given by Stephen Whyte, it is not a fleeting glance. I do not have to necessarily make a find as to a specific time.
>
> So, the question for me is, whether the time when the identification is made, there is sufficient time to make any identification.
>
> And, in addition to that, in respect of Litchmore, there is also the question of recognition of him. And this identification is taking place shortly after the altercation in the club. Mr. Litchmore was draping up the witness, Stephen Whyte, leaving the club and then coming back. I am satisfied, so that I feel sure, that the lighting was sufficient to enable Mr. Stephen Whyte to identify Litchmore and Briscoe, evident by the fact that he was able to describe the colour of the firearm that Mr. Litchmore had. He was able to describe the firearm that Dwayne Briscoe had. As I indicated earlier, he distinguished between the shine gun and the dark gun without the barrel, all of that

> assisted when with [sic] the witness is saying that both these men, Litchmore and Briscoe was closer to one of the street lights. So, at the time of the incident Mr. Stephen Whyte was making an identification of men who were known to him, 18 and 19 years respectively and men he had seen a few minutes before. I am satisfied, so that I feel sure, that he saw Mr. Briscoe at the club ... Mr. Whyte places Mr. Briscoe at the club. As I said, insofar as the identification outside now, I act upon the evidence of Stephen Whyte."

[48] It is seen that in summing-up, the learned judge did not use the precise words enunciated in **Turnbull** but he did warn himself carefully about the dangers of identification evidence. He reminded himself of the special need for caution and that it is possible for even an honest witness to make a mistaken identification. Although he did not use the word "recognition" in the summing-up he nevertheless warned himself to the effect, that even where the witness knows the defendant before, that mistakes can still be made, so he would have to look at the evidence with caution and be extremely careful about it. As to the sufficiency of lighting on the roadway, the learned trial judge accepted the evidence presented by the prosecution that the area was brightly lit. He also found that the time specified by Stephen that he had seen the face of the appellant Briscoe could have been exaggerated but this was certainly not a fleeting glance encounter or a sighting in difficult conditions. Stephen did say he was able to see Briscoe's face during the time that Litchmore was talking. The learned judge further found that Stephen was an honest and reliable witness.

[49] So far as the evidence of prior knowledge of Briscoe was concerned, the learned judge was satisfied, so that he felt sure, that Stephen had known Briscoe

for 19 years. He was a family friend and he did visit the club almost every night. The evidence which the learned judge also accepted is that Briscoe had been seen by Stephen at the club a few minutes before the shooting incident had taken place. During the altercation between Stephen and Nikeisha at the club, the evidence did reveal that Briscoe had approached Stephen and said, "Steve what you and mi woman have?" There was no suggestion put to Stephen that this conversation did not take place or that it was simply fabricated. The learned judge having found the witness to be honest and reliable was therefore in a position to act upon this evidence.

[50] We are therefore firmly of the view, that ground one is devoid of merit. We find that the judge adequately dealt with the issues raised in this ground and we see no reason to interfere with his judgment in that regard. Indeed, at the close of the case for the prosecution the quality of the identifying evidence which involved the question of identification by recognition of the appellant Briscoe by the witness Stephen was, we think, good.

Supplemental Ground two and Further Supplemental Ground three - The Character Issue

[51] Ground two of the supplemental grounds of appeal complained that Briscoe was deprived of the benefit of character evidence and directions relative to same in his trial. Mrs Samuels-Brown complained in respect of ground three of the further supplemental grounds of appeal that he did not receive a fair trial as he was deprived of the benefit of character evidence and the appropriate considerations and directions relative to such evidence prior to his conviction. We

are of the view that there is an overlap of these two grounds, so they can be dealt with conveniently together.

[52] Mrs Samuels-Brown submitted that where an accused person makes exculpatory statements to the police and this forms part of the prosecution's case, then the credibility limb of the character direction must as a matter of law be given. Similarly an unsworn statement in court must, as a matter of law, be accorded the same treatment. Additionally, she submitted that evidence of good character without any previous conviction must be taken into account when the court comes to consider the propensity or the likelihood of the accused committing the offence.

[53] In the present case, an affidavit was filed on behalf of Briscoe by counsel who had represented him at the trial. Counsel admitted that he had neglected to take instructions from and advise his client on the calling of a character witness in support of his defence. The affidavit, which was sworn to on 20 July 2010, states:

> "I, MICHAEL DEANS, being duly sworn make oath and say as follows:
>
> 1. I am an Attorney-at-Law duly qualified to practice in the several courts of Jamaica and my address for the purposes of this affidavit is 33 Duke Street, Kingston.
>
> 2. I represented the Applicant herein at his trial for illegal possession of firearm and shooting with intent.
>
> 3. I did not discuss with him or advise him of the usefulness of calling character evidence in the course of his trial prior to conviction.

4. I made a judgement call not to explore or solicit the calling of a character witness.

5. I did discuss with him calling a witness as to fact but after consultation and with his agreement took the decision not to call that witness.

6. A character witness was called after Mr. Briscoe's conviction and based on the sentence imposed on him by the Learned Trial Judge, I am of the opinion that calling such witness before judgement would have made no difference to the Learned Trial Judge."

[54] Learned Queen's Counsel submitted that this omission on the part of counsel had deprived Briscoe of evidence which could operate to his benefit relative to the determination of his guilt and that accordingly, he had been denied a fair trial. The learned trial judge, she said, was dismissive of the defence characterizing it thus:

> "This nonsense we hear in the unsworn statement I reject it completely."

Learned Queen's Counsel submitted that had the character evidence been adduced the learned trial judge would have been obliged to give it due weight and consideration before making such short shrift of the unsworn statement.

[55] Miss Thompson submitted, on the other hand, that no blame could be attached to the learned judge for not directing himself on the good character of the appellant since there was no duty on him to give those directions when the issue of good character had not been raised on the defence's case - see **Kizza Sealey and Marvin Headley v The State** Privy Council Appeal No 98/2001,

delivered 14 October 2002 (para. 29). She argued that although the Privy Council held that the conviction in **Sealey** was unsafe due to the lack of a character direction, that case is distinguishable from the instant matter. Additionally, she submitted that there was a background to the incident that logically connected the appellant to the confrontation and shooting of the complainant while he stood on Northwood Road. She also submitted that the evidence had revealed that Briscoe did ask the complainant "what you and mi woman have?"

[56] Miss Thompson further submitted that, having regard to the learned trial judge's findings that he was satisfied with the conditions that aided recognition of Briscoe, any character evidence and directions given would have been outweighed by the coherent, consistent and overwhelming identification evidence of the witnesses for the Crown. She referred to **Bally Sheng Balson v The State** Privy Council Appeal No 26/2004, delivered 2 February 2005.

[57] It should be noted that quite recently, their Lordships in the Privy Council had to deal with a similar situation. In that case counsel for the accused did not put forward good character evidence on his behalf at the trial - see **Peter Stewart v Regina** Privy Council Appeal No 61/2010, delivered 18 May 2011, where one of the grounds of appeal was that the accused was a man of previous good character and his counsel ought properly to have elicited this fact in evidence and thereby procure for his client, a full good character direction to the jury. The appellant's good character had emerged when his antecedent report was read at the subsequent sentencing hearing. The reason for counsel not putting his client's good character into evidence was disclosed in a letter which was a

response to a request for an explanation from those acting for the Crown. The letter stated:

> "I did not raise the issue of Mr Stewart's good character. I did not discuss it with him. The primary reason for this was that at the time the question of raising 'good character' in those trials was not a practice. Certainly not as far as I was aware. It has begun to be a practice to some extent, in the past few years. At the time I felt that my efforts would stand a more realistic chance of success focusing on the issue that I thought most germane for a Kingston jury, always the most difficult jury to persuade."

[58] Lord Brown who delivered the judgment of the Board stated inter alia:

> "13. …The Board is also prepared to overlook the fact that the incompetence of counsel was not raised as a ground of appeal in the Court of Appeal notwithstanding that the appellant was already by then represented by fresh counsel. As for trial counsel's observation that it "was not a practice" at the time (2003) to raise the defendant's good character, whilst indeed this accords with the Board's own experience in these cases, it cannot be said to have been justified: the law as to good character directions had already been made clear by the Board's judgments in cases such as *Sealey and Headley v the State* [2002] UKPC 52.
>
> 14. Given that good character had not been raised here by the defence at trial, clearly the judge cannot be criticised for not giving the direction: *Thompson v The Queen* [1998] AC 811, *Barrow v The State* [1998] AC 846. There was accordingly no material non-direction and no question now arises, therefore, as to the application of the proviso. The question rather is, assuming (as we do) that the failure was due to counsel's incompetence, whether that occasioned an unfair trial resulting here in a miscarriage of justice: in short, whether the Board can be satisfied that the jury would necessarily have reached the same verdict

even had they been given the full direction as to the appellant's good character.

15. Again this is an area of the law that I discussed in some detail in giving the Board's judgment in *Bhola v The State* [2006] UKPC 9 and again the Board think it unnecessary to rehearse the case law afresh here. The one further general point that is perhaps worth making on this appeal is that the credibility limb of the direction is likely to be altogether less helpful to the defendant in a case like this, in which he has chosen to make a statement from the dock (or, indeed, chosen simply to rely on pre-trial statements) than when he has given sworn evidence. In applying Bhola the very next month in *Simmons and Greene v The Queen* [2006] UKPC 19, the Board (at para 35) inferred as much in a brief parenthesis: 'Nor realistically could they have benefited from a direction as to credibility (least of all Simmons who chose not to give evidence on oath anyway).'

16. In this very case, for example, had the credibility direction been given, it would have been appropriate to balance it with a full direction about the weight to be accorded to unsworn statements – see the guidance given in *DPP v Walker* [1974] 1 WLR 1090 at 1096B-E. True, the judge here did point out to the jury that the defendant's unsworn statement from the dock "is not sworn evidence which can be tested in cross-examination" and that "it is entirely up to you what, if any, weight you will give to it". She would have been entitled to go further, however, and add that the jury might perhaps have been wondering why the accused had elected to make an unsworn statement; it could not be because he had any conscientious objection to taking the oath since, in that event, he could affirm. 'Could it be that the accused was reluctant to put his evidence to the test of cross-examination? If so, why?'"

His Lordship continued at para. 18:

> "…This was an overwhelmingly strong recognition case and no one has ever suggested any reason why Ms Minnott should want to identify the appellant as the killer if in truth it was someone else. She may well have been, indeed almost certainly was, mistaken in saying that the appellant had actually been in the same class as her at primary school. But that had been some 18-20 years before she gave evidence at trial and mainly her knowledge of him had come from his repeatedly purchasing goods from her for years afterwards. The jury had ample opportunity to decide on Ms Minnott's credibility and reliability from her lengthy evidence in the witness box. It is hardly surprising that at the end of the day they were convinced by it. Realistically the appellant's statement from the dock did little to refute it. After all, if really the appellant's mother had never been known as "Miss Patsy" or if, say, she had died before the killing, evidence of such matters could and surely would have been adduced to this effect. In short, this was, in the Board's view, a straightforward case and it can safely be said that, even had a full character direction been given, the jury would inevitably still have convicted."

He also stated:

> "… It is sufficient to say that it was never this appellant's case, and certainly never put to Ms Minnott, that she was in no position to recognise him – indeed, knowing as she did the whole family, it really would have been an impossible case – and, of course, unsurprisingly, he never asked to be put up on an identification parade. It would have been pointless to hold an identification parade here. There is, in short, nothing in this ground of appeal."

[59] Now, the critical factor which has been emphasized by the Board in a number of recent cases, is whether it would have made a difference to the result of the case if a good character direction had been given: see, for example, **Bhola**

v The State [2006] UKPC 9, (2006) 68 WIR 449, para 17, per Lord Brown of Eaton-under-Heywood.

[60] It is abundantly clear that Mr Deans, who was then counsel for Briscoe at the trial, did not lead any evidence as to Briscoe's good character with the result that a direction was not given by the learned trial judge. This omission was clearly counsel's fault. We do not believe that a satisfactory explanation has been given for this omission in his affidavit. He simply stated that he did not discuss with the applicant the usefulness of calling character evidence in the course of the trial before conviction and that he had made his own "judgment call not to explore or solicit the calling of a character witness". There seems to be some incompetence on the part of counsel but it should also be noted that no ground of appeal was filed in this regard.

[61] It would appear from Briscoe's antecedents that he had no previous convictions so he ought to have had the benefit of an appropriate direction. But as their Lordships said in **Teeluck v The State of Trinidad and Tobago** [2005] UKPC 14, [2005] 1 WLR 2421, 2430, "this is not, however, the end of the matter". When one looks at the evidence adduced at the trial as a whole, we are of the view that in this particular case, a good character direction would have made no difference to the result. This ground of appeal therefore fails.

Further Supplemental Ground One - The Joint Enterprise Issue

[62] Mrs Samuels-Brown submitted that the learned trial judge had erred in finding that the appellant Briscoe was acting jointly with the co-accused Litchmore when the latter discharged his firearm. She submitted that it is trite law that mere

presence is not enough to ground a finding of being an aider and abettor and that there must be active participation. She submitted that in the instant case it was not alleged that the appellant did or said anything which it could be said amounted to direct or circumstantial evidence in proof of there being a joint enterprise. Accordingly, she submitted, the learned trial judge had erred in convicting the appellant on this basis.

[63] In response to these submissions, Miss Thompson submitted that the learned judge had properly directed himself on the law as it relates to joint enterprise. Having done so, she argued that at page 127 of the transcript of the summing-up he directed himself as follows:

> "...I am satisfied so that I feel sure that Litchmore had the shine [sic] firearm open and visible, Mr. Briscoe was present. This is case [sic] of contrary deliberate presence ... I accept the conversation and the exchange of words that Mr. Stephen Whyte said took place between the father and Jermaine.
>
> All this is being said in the presence of Mr. Briscoe, up to that point is [sic] not a single word or deed indicative of disassociation from a man who is armed with a gun who expresses an intent to use the firearm and when the firearm is discharged, Mr. Briscoe runs off with the man…"

[64] Miss Thompson submitted that the learned judge had distinguished the instant case from the "mere presence arena". She submitted that the evidence revealed that while in Litchmore's presence, Briscoe would have heard Litchmore say "A going to show you how man mek duppy", and would then have seen him with a gun. Furthermore, the evidence had also revealed that he, Briscoe, was also armed with a firearm. Miss Thompson argued that Litchmore's intention was

made clear at this point but Briscoe made no attempt by word or conduct indicating that he was disassociating himself from Litchmore's action. She relied on **R v Sutcliffe and Barrett** SCCA No 148 and 149/78.

[65] Sykes J directed himself thus:

> "Now, as far as joint enterprise is concerned, the law is that where two or more persons carry out a joint enterprise each person is responsible for the acts of the other in carrying out that enterprise. The Crown is extending [sic] that the participation by the accused, the joint enterprise between two or more persons, each with prior understanding and arrangement amounting to an agreement between them. To commit a crime the understanding or arrangement need not be expressed and its existence may be inferred from all the circumstances it need not be reached at any time before the crime. So, circumstances in which two or persons [sic] participating together in the commission of a particular crime may themself [sic] accomplish an unspoken understanding or arrangement amounting to an agreement formed between them then and there to commit that crime. So, the application of that principle is that, I am satisfied so that I feel sure that Litchmore had the shine firearm open and visible, Mr. Briscoe was present. This is case [sic] of contrary deliberate presence. This is not accidental presence. I accept the conversation and the exchange of words that Mr. Stephen Whyte said took place between the father and Jermaine.
>
> All this is being said in the presence of Mr. Briscoe, up to that point is not a single word or deed indicative of disassociation from a man who is armed with a gun who expresses an intent to use the firearm and when the firearm is discharged, Mr. Briscoe runs off with the man. So, this nonsense we hear in the unsworn statement I reject it completely on both defendants. What is quite clear is that Mr. Litchmore and Mr. Briscoe went back to this club and as Mr. Whyte tells us, that's where he lives. And these two young men are well known to the Whytes' [sic] so all what was happening there is the typical lawlessness in Jamaica:

> The way the man dis mi, go deal with it. And what is happening in Jamaica today is typical with this kind of lawless behaviour."

He said further:

> "I also accept the evidence of Mr. Whyte, Stephen Whyte that Dwayne Briscoe had an object that would at the very least be an imitation firearm since there's no evidence that it was fired and that is clear evidence of not just voluntary and deliberate presence but being willing to participate in essentially, in [sic] an enterprise to shoot and to maim. So, in respect of Count Two both gentlemen are guilty of shooting Mr. Stephen Whyte. On his evidence, I am satisfied that this object that Mr. Litchmore had was discharged and the evidence he gives as to what he saw: The fire and smoke and the hole in his pants and the bleeding. All of that, consistent with the object being a lethal weapon and capable of discharging deadly missiles. So, gentleman [sic], guilty on this indictment. Through Jamaican lawlessness: The bwoy a goh diss man so."

[66] We respectfully disagree with the submissions of learned Queen's Counsel. We agree that it is the law that mere presence of an accused person without more is inconclusive that he is an aider and abettor in the commission of a crime. Where, however, his presence is non-accidental, his continued presence without dissent during the commission of the offence, is evidence for the tribunal of fact to consider whether or not he is an aider and abettor. There must therefore be some active participation on the part of that accused - see **R v Anderson and Morris** [1966] 2 QB 110.

[67] We do agree with Miss Thompson that the facts of the instant case are distinguishable from the fact of "mere presence". The evidence presented on behalf of the prosecution revealed that while Briscoe was in close proximity to

Litchmore who was then armed with a firearm, the latter was heard by Errol Whyte to have said, "A going to show you how man mek duppy". The term "man mek duppy" is well known to most Jamaicans, so there would be no doubt as to what he had intended. It was abundantly clear from the evidence that Litchmore had made his intention known to the witness Errol Whyte, yet Briscoe made no attempt by word or conduct which indicated that he was disassociating himself from Litchmore's action.

[68] The evidence also revealed that both men were seen together in the club and had indeed left together after the altercation involving Stephen and Nikiesha. Litchmore had said to Errol Whyte after he told the others (including Briscoe) 'to come', that "Unnuh a goh si what happen". The evidence further revealed that within minutes both Litchmore and Briscoe and an unknown man, returned to the scene of the shooting. At the time of the shooting by Litchmore, Briscoe was in fact armed with a gun in his hand and both men had run off together immediately after the shots were heard.

[69] In our view, the evidence demonstrated that the appellant Briscoe, far from being accidentally present, was in fact voluntarily and purposely present at the scene, and his conduct during and after the shooting, was sufficient evidence upon which the learned trial judge could correctly find that he was present aiding and abetting Litchmore in the act and therefore a participant in the common design to shoot and to inflict the injury upon Stephen. The learned judge was therefore correct to find that both men were acting jointly and we find no reason to disagree with that finding. This ground of appeal also fails.

Further Supplemental Ground Two - The Firearm and Breach of the Constitution Issues

[70] Mrs Samuels-Brown submitted that the appellant's conviction for illegal possession of a firearm cannot stand for the reason that:

> (a) The prosecution provided no or no sufficient evidence of his being in possession of a firearm;
>
> and/or
>
> (b) Any invocation of or reliance on section 20(5) of the Firearms Act to justify his conviction is impermissible for the reason that the said section is contrary to section 20(5) of the Constitution of Jamaica.

[71] In relation to (a), Queen's Counsel submitted that on a reading of the notes of evidence it is clear that the evidence adduced did not establish that Briscoe was in physical possession of a firearm. Hence, the learned trial judge accordingly made no such finding.

[72] Miss Thompson submitted, on the other hand, that the learned trial judge had adequately addressed his mind to the gun being in Briscoe's hands (pages 101-102 of the transcript) and did pronounce (page 128) in his findings that Briscoe was in possession of "an object that would at the very least be an imitation firearm...". Counsel referred to **Christopher Miller v Regina** SCCA No. 169/1987, delivered 21 March 1988.

[73] The learned judge in summarizing the evidence of Stephen Whyte stated inter alia:

> "… The evidential description from the Prosecution is that there was enough lighting for the witness to see the gun and give a description of it. One might legitimately say then why describe a gun, why not describe the man who had the gun, or see who had the gun. He goes on to say that what Dwayne had was a gun, says it was dark, not a barrel gun, it was a handgun and he held it down. He held the handle in his hand. If the witness is accurate here, it means that he had enough lighting to see to describe between a shine gun as far as Jermaine was concerned and a dark gun which he said Dwayne had, and was able to see it sufficiently, clearly to say that it did not have a barrel. So, that evidential significance as far as I am concerned, as after the description given by the witness is one way of testing to see whether or not the lighting was sufficient to enable the witness to see what he said he saw."

Towards the end of his summing-up the learned judge said:

> "I also accept the evidence … I also accept the evidence of Mr. Whyte, Stephen Whyte that Dwayne Briscoe had an object that would at the very least be an imitation firearm since there's no evidence that it was fired …"

[74] In **Christopher Miller** this court held inter alia:

> "It is not necessary to give detailed descriptions of the firearms, because it must depend on the intelligence and the power of observation of the witness; it must be extremely difficult now-a-days to find a person who doesn't know a gun when he sees a gun."

In that case the description given was limited to "the mouth was brown coloured resembling small arms that police carry".

[75] We also bear in mind what our brother Morrison JA had said in **Julian Powell v Regina** SCCA No. 154/2007 delivered 16 April 2010:

> "[19] These cases appear to us to establish, therefore, that it is for the tribunal of fact to decide whether the evidence adduced by the prosecution is sufficient to support a finding that the instrument described as a gun satisfies the statutory definition of a firearm. But it is a matter to be resolved on the evidence and not, in the absence of any evidence, by resort to the doctrine of judicial notice. In assessing that evidence, however, the court is entitled to take into account the relatively high visibility of guns in the country and any special reason for being able to recognize guns put forward by the witness."

[76] We are therefore in complete agreement with the submissions made by Miss Thompson that the complainant had demonstrated his familiarity with firearms by being able to distinguish between a barrel gun and a handgun and did identify a firearm in the hands of the appellant, Briscoe. Paragraph (a) of the ground therefore fails.

[77] We now turn our attention to paragraph (b) of this ground of appeal.

[78] We must say that after we considered the submissions made by learned Queen's Counsel and Miss Barnaby of the Attorney General's Chambers in response, we have concluded that section 20(5) of the Firearms Act and section 20(5) of the Jamaica Constitution, really do not arise for consideration in this appeal. The learned trial judge did not place any reliance on section 20(5) of the Firearms Act and as Miss Thompson argued, there is no evidence that the Crown relied on that section. Indeed, it was stated in the written submissions of Mrs Samuels-Brown that the learned trial judge "had made no specific reference to section 20 (5) of the Firearms Act. Nevertheless to the extent that reliance may be

placed on this section it is the Appellant's position that this section is unconstitutional".

[79] We do realize, however, that much time was spent in making the submissions with respect to both section 20(5) of the Firearms Act and section 20(5) of the Jamaican Constitution, but another occasion will certainly arise for further discussion to take place in this court with regards to the constitutionality of section 20(5) (a) of the Firearms Act.

[80] In the instant case, the learned judge had focussed his attention entirely on the principle of joint enterprise where both Litchmore and Briscoe were concerned and as we have concluded above, there was evidence of such an enterprise. In the circumstances, there is no need on this occasion for the court to consider the principle of guilt by association or whether the statute creates a rebuttable presumption against the companion of a person proved to be in possession of a firearm in contravention of section 20(5)(a) of the Firearms Act. The facts of the instant case do make it distinguishable from the facts in **R v Bruce Reid et al** (1978) 16 JLR 262 and **R v Clovis Patterson** SCCA No 81/2004, delivered 20 April 2007. In both of these cases, the appellants were found in the company of another person who was armed with a firearm. In this case, the learned trial judge found that both appellants were in fact armed with firearms. He accepted the evidence led by the prosecution that Litchmore had discharged a firearm which had caused injury to Stephen and that Briscoe who was also present had an object that would at the very least be an imitation firearm since there was no evidence that it was fired.

[81] We therefore find no merit in ground (b).

Conclusion on the application by Briscoe

[82] We have treated the application made by Briscoe seeking leave to appeal as the hearing of the appeal and have accordingly dismissed the appeal against conviction.

THE GROUNDS OF APPEAL IN RELATION TO LITCHMORE

"Ground A - Misidentity of the Witness:

1. The Learned Trial Judge failed to consider that there was lack of evidence to prove the voice identification that he speaks of in his summation.

2. The evidence of identification was not credible as all three of the prosecution [sic] witnesses gave different locations of the actual place the incident took place along the roadway and hence the evidence of the lighting would have been different.

Ground B - Unfair Trial

3. The Learned trial Judge led the evidence of the witnesses and interfered with the cross-examination of the witnesses to the detriment of the Appellant.

4. The Appellant was not given the benefit of having credible character witnesses called before the verdict as his Attorney-at-law did not properly advise him that this could have been done despite them being available and willing to appear.

5. The probation officer wrote inaccurate information in her report to the prejudice of the Appellant.

Ground C – Lack of Evidence.

4. There was no medical evidence led by the prosecution to prove that the complainant suffered any injury as a result of a gun shot wound.

5. The investigating officer spoke of spent shell [sic] but the prosecution failed to produce any forensic report or evidence to prove this to the court.

Ground D – Miscarriage of Justice.

6. The sentence of the Leaned [sic] Trial Judge was harsh and excessive having regard to the circumstances of the case."

Ground A – Misidentity of the Witness

[83] In relation to subhead one of this ground, it was conceded by the Crown that there was no evidence from the complainant that he was familiar with the applicant's/appellant's voice. Miss Thompson submitted, however, that it was a harmless error, bearing in mind that the learned trial judge sat as both judge of the law and the facts, and that viewed in light of the overwhelming evidence of visual identification/recognition, its effect was innocuous and as such would not vitiate the conviction. We are in full agreement with these submissions.

[84] Ms Cummings submitted in respect of Ground A (2) that the evidence of identification was not credible since the prosecution's witnesses gave different locations of the actual place of the incident. In those circumstances, she submitted that the evidence of lighting would have been different.

[85] Miss Thompson both orally and in her written submissions argued otherwise. She submitted:

"The complainant's evidence (at pg. 7) is that he was "little bit a distance from the club on the same road" when he was shot. His father's evidence is that he was standing at the gate of his club when he saw Litchmore across the road. His son, the complainant went towards Litchmore and was shot. They both agree that the incident happened in the vicinity of the club. The Learned Trial Judge held that though there was evidence of Northwood Court, Northwood Road and Northwood Close, 'they were talking about one and the same place' (pg. 115 Ln. 10).

The more cogent evidence as it relates to the identification of the applicant is that:

1. Both witnesses knew him for about fifteen years before the day of the incident

2. They had both seen him in the club earlier that morning

3. He was within an arm's length when the complainant and his father saw his face as he 'girt up'/drape up the complainant.

4. He was eleven feet from the complainant in an area that was brightly lit. (even the defence puts a street light on the road)

5. The learned trial judge accepted that the area was brightly lit with a bright/flood light(s) one of which, he was close to (pg. 106 Ln. 20)

The Learned Trial Judge indicated, at pg. 97, that there was no evidence that the complainant and his father accompanied the police to the scene. '[S]o it is not clear to me how the police came up with that as the scene. So, to that extent I do not rely on his markings on this map indicating where the alleged incident took place'. The evidence of the third witness referred to was NOT relied on as it relates to the actual place the incident took place."

[86] We agree entirely with the submissions of Miss Thompson and repeat what we said at paragraphs [45]-[48] of this judgment. We conclude that there is really no merit in Ground A.

Ground B- Unfair Trial

[87] Ms Cummings complained that the learned judge had led the evidence of witnesses and had interfered with the cross-examination of witnesses to the detriment of the appellant.

[88] In **Kolliari Hulusi and Maurice Purvis** (1974) 58 Cr.App.R. 378 it was held by the English Court of Appeal (Criminal Division) that interventions by the judge during a trial which lead to the quashing of a conviction occur (i) when they have invited the jury to disbelieve the evidence for the defence in such strong terms that the mischief cannot be cured by the common formula in the summing-up that the facts are for the jury, and that they may disregard anything said on the facts by the judge with which they do not agree; (ii) when they have made it impossible for defending counsel to do his duty in conducting the defence; (iii) when they have effectively prevented the defendant or a witness for the defence from telling his story in his own way. Convictions have been quashed where there had been frequent interventions by the judge (i) during the cross-examination of witnesses for the prosecution, suggesting that defending counsel was not doing his duty; (ii) during the evidence-in-chief or re-examination of the defendants and their witnesses (a) suggesting that defending counsel had not fully put his case to witnesses for the prosecution during their cross-examination and (b) in effect preventing the defendants and their witnesses from telling their story - see also

Omar Bolton v R SCCA No 72/2002 delivered 28 July 2006. In that case the court held that the correct principle as it relates to the conduct of a trial judge is that which is stated at para 7-81 of the 2001 edition of Archbold.

> "Interventions by the judge during a trial will lead to the quashing of a conviction:
>
> a) when they have invited the jury to believe the evidence for the defence in such strong terms that the mischief cannot be cured by the common formula in the summing-up that the facts are for the jury, and that they may disregard anything said on the facts by the judge with which they do not agree;
>
> b) when they have made it impossible for defending counsel to do his duty;
>
> c) when they have effectively prevented the defendant or a witness for the defence from telling his story in his own way..."

[89] We agree with Miss Thompson that on the facts of this case, the interruptions made by the learned trial judge were not of such a degree as to warrant the quashing of the conviction since those interruptions were primarily directed at clarifying the evidence and ensuring that he had the correct notation. We wish however to remind trial judges of the principles enunciated in the above cases and that they should constantly bear them in mind. Ground of Appeal B (3) also fails.

[90] In relation to Ground B (4) we repeat what was said at paragraphs [51]-[61] of this judgment. This ground is devoid of merit and it also fails.

[91] Ground B (5) was abandoned by counsel for the appellant.

Ground C – Lack of Evidence

[92] Ms Cummings submitted in respect of Ground C (4) that the prosecution did not adduce any medical evidence that Stephen had suffered any injury as a result of a gunshot wound. We find no merit in this ground. Stephen's evidence was that he had heard two loud shots and that thereafter his foot started to burn him. He then realized that his leg was bleeding, that there was a hole in his pants and his shoe was filled with blood. He was taken to the hospital where he was treated and sent home. Errol Whyte and Constable Madden both testified that blood was seen on the leg of Stephen's pants. Bearing these factors in mind, the logical inference to draw, which the learned judge had done, was to conclude that Stephen was wounded to his leg when the shot was fired by the appellant Litchmore. This ground also fails.

[93] We also conclude that Ground C (5) has no merit and it also fails. It is quite evident that the Crown did not rely on the finding of the spent shell in proof of its case that the object that the appellant held in his hand was a firearm.

<u>Conclusion on the application by Litchmore</u>

[94] We have treated the application made by Litchmore seeking leave to appeal as the hearing of the appeal and have accordingly dismissed the appeal against conviction.

SENTENCE

Supplemental ground 3 of Briscoe- the sentence issue

[95] Mrs Samuels-Brown submitted that the sentence of the court was manifestly excessive having regard to, inter alia:

> "i. The Appellant's/Applicant's alleged role in the offences;
>
> ii. The Appellant's/Applicant's age
>
> iii. The Appellant's/Applicant's antecedents and in particular that he had no previous convictions, in light of the character evidence and Social Enquiry report.
>
> iv. Consecutive sentences were imposed for offences that arose out of the same facts, one being an incident or component of the other."

Queen's Counsel therefore submitted:

> (a) That a sentence of eight years is manifestly excessive for a first-time offender with a clean record.
>
> (b) That having regard to the secondary role which on the prosecution's case the appellant played in the commission of the offence this ought to be reflected in a lesser sentence imposed on him than on his co-accused.

Ground D (6) - The miscarriage of justice ground by Litchmore

[96] Miss Cummings for the appellant Litchmore argued that the sentence of the learned trial judge was harsh and excessive having regard to the circumstances of the case. She also adopted the submissions made by learned Queen's Counsel in relation to sentence.

Conclusion with regard to sentence

[97] In imposing sentence on the appellants, the learned trial judge had taken into consideration a number of factors. He did consider the evidence of those persons who were called on their behalf and who spoke to their character and upbringing. Moving pleas in mitigation of sentence were also made on their behalf by counsel. Each appellant was sentenced to eight years imprisonment on count one and on count two each was also sentenced to 10 years imprisonment. The sentences were ordered to run consecutively.

[98] The learned judge expressed the view that this shooting did arise from an essentially harmless incident which had occurred in the club, so what was done to the complainant far outweighed any factor in their favour. The learned judge had also looked at the serious nature of gun crimes and had compared sentences for offences similar to those that the appellants were found guilty of. We are of the view that the sentences that were imposed were quite proper, so they will not be altered.

[99] We are in agreement however, with learned Queen's Counsel in relation to the submissions with regard to consecutive sentences. We repeat what this court had said in **R v Walford Ferguson** SCCA No 158/1995 delivered 26 March 1999:

> "When imposing consecutive terms the sentencer must bear in mind the total effect of the sentence on the offender. Where two or more offences arise out of the same facts but the offender has genuinely committed two or three distinct crimes it is often the general practice to make the sentences concurrent.

> If offences are committed on separate occasions there is no objection in principle to consecutive sentences. However, if one bears the totality principle in mind it is more convenient when sentencing for a series of similar offences to pass a substantial sentence for the most serious offence with shorter concurrent sentences for the less serious ones." (per Langrin JA)

[100] We are therefore of the view that the sentences should run concurrently. Therefore this ground partially succeeds.

CONCLUSION

[101] The appeals in respect of both appellants are dismissed in relation to conviction. The appeals in relation to sentence partially succeed in that the sentences ordered are to run concurrently in lieu of being consecutive. The sentences are to commence as of 3 June 2009 in respect of Briscoe and from 12 September 2009 in respect of Litchmore.