[2017] JMCA Crim 20

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS 12 & 13/2012

BEFORE: THE HON MR JUSTICE MORRISON JA
THE HON MRS JUSTICE McDONALD-BISHOP JA (AG)
THE HON MRS JUSTICE SINCLAIR-HAYNES JA (AG)

JASON BROWN v R
RICARDO LAWRENCE

Mrs Hannah Harris-Barrington for the applicant Jason Brown

Glenroy Mellish for the applicant Ricardo Lawrence

Mrs Tracey-Ann Johnson and David McLennon for the Crown

30 June 2015 and 17 May 2017

MCDONALD-BISHOP JA (AG)

[1] This application concerns the conviction and sentence of the applicants, Jason Brown and Ricardo Lawrence, who, on divers days between 10 and 19 January 2012, were tried on an indictment for the offence of murder before Marsh J, sitting with a jury, in the Home Circuit Court. The particulars of the

offence were that on 19 July 2005, in the parish of Saint Catherine, they murdered Errol Miller. Both applicants were found guilty and, on 19 January 2012, sentenced to life imprisonment, with the stipulation that they should serve a minimum period of 25 years before being eligible for parole.

[2] The applicants' applications for leave to appeal their convictions and sentences were considered and refused by a single judge of this court on 6 May 2014, who opined that there was no reason to disturb the jury's verdict or the sentences imposed, they being within the sentencing guidelines for offences of "this heinous nature and are not manifestly excessive".

[3] Notwithstanding the ruling of the learned single judge, the applicants renewed their applications before this court. On 30 June 2015, having considered the submissions of counsel on the renewed applications, we made the following order:

> "Applications for leave to appeal against conviction and sentence refused. Sentence to run from 19 January 2012."

[4] We promised then to put our reasons in writing. This is a fulfilment of that promise. Regrettably, we have taken a longer time to do so than intended, and for that we profusely apologise.

The case at trial

The prosecution's case

[5] The prosecution relied on 13 witnesses but only the evidence of Sabene Forrest and that of her mother, Corlett Bloise, referred to what took place in the area on the day in question. As such, the prosecution's case against the applicants was based, primarily, on the testimony of these two witnesses. Their evidence was to the following effect.

[6] On 19 July 2005, the two witnesses were at 18 Monk Street in the parish of Saint Catherine, where Sabene Forrest resided with her boyfriend Damion Williams (also known as 'Humphry') and her friend, Errol Miller (otherwise called 'Cracka' or 'Cracker'). Also present at the house at the time were: Keron Miller (also known as 'Smokey'), the son of Errol Miller; Screechy (Corlett Bloise's common-law partner); as well as some children.

[7] Sabene Forrest occupied the back room on the house with Humphry and Errol Miller occupied the front room. To the left of the house was a shop that went straight along a pathway ahead.

[8] Sometime between 11:00 am and 12:00 pm, Sabene Forrest, along with Keron Miller, left the house to attend a shop, which was situated at the back of the house, going towards Rivoli Lane. Sabene Forrest, having gone to the first shop, left to visit a second shop. Whilst proceeding to the second shop and

when she was in front of the shop, which was positioned to the left of her house, she saw Errol Miller on the other side of the shop. Errol Miller was alone, cursing and using a knife he had in his hand to beat a table.

[9] On seeing Errol Miller, she went up to him, spoke with him and then proceeded towards the shop to which she was heading. Upon turning to go to the shop, she saw two young men, one of them being the applicant, Jason Brown. They walked pass each other as they were heading in opposite directions. When they passed each other side by side, Jason Brown spoke to Keron Miller. It was a bright and sunny day and there was nothing that blocked her view of Jason Brown.

[10] Sabene Forrest, upon stepping into the yard where the shop was, heard an explosion, which sounded to her like a gunshot, coming from the opposite direction. Upon hearing this, she stepped outside the yard, looked in the direction from where she heard the explosion and could see that "Jason had a gun in his hand". She heard a second explosion, which also sounded like a gunshot. It was at this point that Errol Miller started running away from where she had left him. She saw Jason Brown with a gun in his hand outstretched, pointing it in the direction of Errol Miller. She then turned and ran off.

[11] Sabene Forrest subsequently returned to the scene of the incident and there she observed Errol Miller in the yard, lying face down in a pool of blood.

She saw a red, green and gold with black stripe tam that she had previously seen in the possession of Ricardo Lawrence, six feet away from the body.

[12] Sabene Forrest had known Jason Brown for a period of more than five years. Up to 19 July 2005, she would see him an average of two to three times per week and they would talk to each other.

[13] At the material time, Corlett Bloise was standing in Errol Miller's room and looking through a louver window. Whilst standing at the window, she observed three men, two of them she identified to be the two applicants. She saw the "three guys running down [Errol Miller], firing shots and [Errol Miller] was running". She saw "[Errol Miller] run pass the premises that [she] was standing in, at the window, and go towards Monk Street". She saw flashes of lights coming from the guns and heard about seven to eight loud noises. She described staring at the incident in shock, for no more than two minutes. After Errol Miller ran pass her window, she ran through the back door.

[14] Corlett Bloise described her view through the window as being unobstructed and stated that she could see all three men clearly. She knew Jason Brown for 10 years before the incident and Ricardo Lawrence, she knew well as he would come to her house every day.

[15] The Crown also led evidence from Detective Corporal Kirk Roache, the officer who initiated the investigations into the incident. He spoke of his

observations when he visited the scene of the crime as well as the post-mortem examination of Errol Miller. His evidence may be outlined as follows: When he arrived at the scene, he was directed to the premises located at 18 Monk Street where, at the rear of the premises, he saw the body of a male lying in blood and he observed the body to be dead. He could see wounds on the body and it had blood on it. The body was identified to him to be that of Errol Miller by Keron Miller and Nicola Laing (the common-law wife). He gave further evidence that there were spent bullet casings, fragments and warhead scattered along a pathway from in the yard, outside the premises and along a trail from the yard leading to an area where there were two shops.

[16] On 3 August 2005, Detective Corporal Roache returned to the scene of the crime where he found a tam in the same area where the body was found. He, along with Nicola Laing and Keron Miller, attended and observed the post-mortem examination on the body of the deceased, conducted on 9 August 2005. Dr Kadiyala Prasad, the consultant forensic pathologist, conducted the post-mortem examination and found four gunshot wounds on the body. He opined that the cause of death was due to multiple gunshot wounds.

The applicants' case

Jason Brown

[17] Jason Brown made an unsworn statement from the dock in the following terms:

> "Good afternoon, my name is Jason Brown. I live at 509 Laurel Path, Southborough, Portmore, St. Catherine. I am an Electrician. I did not shoot at anyone on the 19th of July, 2005 or at any other time. The witness [sic] are saying what I did not do. I am innocent. I had a goo [sic] job. I have no conviction. But I refuse to join the 'Clansman' gang and I being pressured for this now.
>
> I refuse to join the gang. I refused to join. I refuse to take a gun offered to me by Sabene Forrest who said I should extort money...And that [sic] I am being pressured for that now. I refused to join the gang. I refused to take a gun offered to me by Sabene Forrest, who said I should extort money. I refuse. I am a law-abiding citizen. I only went to the area to see my girlfriend. They said join di gang or else."

Ricardo Lawrence

[18] Ricardo Lawrence also made an unsworn statement from the dock, which was also very brief and can conveniently be set out in its entirety as follows:

> "My name is Ricardo Lawrence. I am 27 years of age; live in the parish of St. Catherine, Spanish Town. I know these persons that tell the lies on me but we are not good friends as dem seh. I did not involve in any shooting or know about any shooting. I can't even recall where I was at that time. I can't even record [sic] where I was at dat time that you are talking about. And I did not wear a tam, sir, nor a hat. I travel [sic] with migraine headache. So, I can't wear a hat. ...
>
> I travel [sic] with migraine. So, I can't wear a tam much less a hat, sir. Sincerely, from my heart, I am innocent and I really really need to go home to my lovely daughter and fambilies [sic] that miss me from the depths of their heart. Thank you very much."

The appeal

[19] Being aggrieved with the outcome of the trial, the applicants each filed an application for leave to appeal their convictions and sentences. Their original grounds of appeal were as follows:

> "(1) **Misidentify [sic] by the Witness**:- that the prosecution witnesses maliciously identified [the applicants] as the person or among any persons, who committed the alleged crime.
>
> (2) **Unfair Trial**:- that the evidence and testimonies upon which the learned trial judge relied on for the purpose to convict [the applicants] lack facts and credibility thus rending [sic] the verdict unsafe in the circumstances.
>
> (3) **Lack of Evidence**:- that during the trial the prosecution failed to put forward any piece of material, ballestic [sic], or scientific evidence to justify and substantiate the alleged charge against [the applicants] of which [they were] subsequently convicted therefor.
>
> (4) **Conflicting Testimonies**:- that the prosecution witnesses presented conflicting, and contrary testimonies in court which raise doubt about the credibility of the evidence as presented by the court."

Jason Brown's application

[20] At the commencement of the hearing, Mrs Harris-Barrington indicated that she intended to rely on, and argue three of the original grounds of appeal (grounds one, three and four) and also sought and obtained the leave of the

court to argue three supplementary grounds of appeal. The supplementary grounds of appeal were set out by counsel in her written submissions as follows:

> "4. **The honourable trial judge erred by failing to uphold the No Case Submission**. The colossal variance in the testimony of the two Prosecution witnesses was so great that the evidence was fatally flawed. The honourable trial judge should have directed himself that irreconcilable differences in the testimonies of both witnesses often without explanation should not have been placed before a jury of fact as the facts upon which they based their judgment were so conflicting that the judge should have allowed the No Case Submission.
>
> 5. **That the honourable trial judge misdirected the jury** by failing to direct them how to treat the variance between the evidence of the two witnesses for the Prosecution. Rather than making a general observation about the discrepancies he should have made it crystal clear that the two testimonies could not stand together and invite them to consider that the conflicting testimonies given under oath raised a reasonable doubt that the witnesses for the Prosecution were not telling the truth. Rather the Honourable trial judge saw fit to intervene constantly to prevent and interrupt Counsel for the Appellate[sic] from conducting her questioning and indicated in the presence of the jury that it was Counsel for the Appellant who was in fact mistaken; thus causing serious prejudice to the Appellant. Despite the fact that Sabean Forrest admitted to lying under oath. As a result **the Appellant did not receive a fair trial**, thereby resulting in a miscarriage of justice and the conviction is unsafe.
>
> **6. The learned trial judge erred in the execution of his judicial duty** in the latitude and preferential treatment he allowed Counsel for the Prosecution; this hampered the raising of a legitimate defence. The trial judge continued with his

> interruptions of Counsel for the Appellant (a senior retired solicitor) right through the trial. Thus unbalancing the fairness of the proceedings, thereby resulting in a miscarriage of justice."

Identification

The prosecution's witnesses maliciously identified the applicant, Jason Brown (ground (1)).

The submissions

[21] Mrs Harris-Barrington contended that the case for the Crown against Jason Brown depended wholly on the correctness of the visual identification of the witnesses, Sabene Forrest and Corlett Bloise. Counsel submitted that these witnesses maliciously identified Jason Brown as the person or one of the persons who committed the alleged crime. Counsel questioned, firstly, the veracity of the identification evidence of Sabene Forrest that when she heard the explosions and turned around, she saw Jason Brown with a gun in his hand and that she could see his entire body, despite his back being turned to her. Secondly, she also highlighted Corlett Bloise's testimony that her eyes were good at the time of the incident, that she could see well, and was not wearing glasses during the incident, although she was wearing glasses at the time of the trial.

[22] The case for Jason Brown and the general tenor of Mrs Harris-Barrington's arguments on issues of credibility, which formed the basis of ground one, were that the source of the alleged malice was gang related in two respects. Firstly,

the malice emanated from the disappearance of Sabene Forrest's boyfriend, Humphry, who was a member of the Clansman gang to which Sabene Forrest and Corlett Bloise were affiliated, and secondly, from Jason Brown's refusal to join that gang upon the encouragement of Sabene Forrest.

[23] In response, Mrs Johnson for the Crown contended that there was no merit in these arguments raised on behalf of Jason Brown that he was maliciously identified, the jury having rejected his case. She maintained that there was very compelling and cogent identification evidence by the witnesses in relation to his identification and the learned trial judge had adequately reviewed the identification evidence as presented by the witnesses. This, she submitted, was done by the learned trial judge within the context of a proper identification warning and directions, which were given to the jury in relation to how they should approach the evidence of identification. Counsel for the Crown further submitted that there was ample and cogent evidence of the identification of Jason Brown on which the jury could rely in finding, as they did, that he was present at the scene of the crime and was one of the perpetrators who shot and killed the deceased. The learned trial judge's directions in this regard were adequate, she maintained.

Discussion and findings

[24] The question of whether the witnesses purported to identify Jason Brown out of malice was one for the consideration of the jury, upon adequate and careful directions from the learned trial judge as to how to treat with the evidence of identification and the factors to be taken into account in assessing the witnesses' reliability and credibility. The general requirements for proper directions and the guidelines to be adhered to in treating with evidence of visual identification, which was challenged at the trial, were thoroughly set out by Lord Widgery CJ in the oft-cited landmark case, **R v Turnbull and Another** [1977] QB 224. These guidelines were subsequently affirmed by the Privy Council in **Junior Reid v R and other appeals** [1993] 4 ALL ER 95, as being applicable "with full force and effect to criminal proceedings in Jamaica".

[25] At pages 228-229 of **Turnbull**, Lord Widgery CJ instructed:

> "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."

At page 229, the learned Chief Justice continued:

> "In our judgment when the quality is good, as for example when the identification is made after a long period of observation, or in satisfactory conditions by

> a relative, a neighbour, a close friend, a workmate and the like, the jury can safely be left to assess the value of the identifying evidence even though there is no other evidence to support it: provided always, however, that an adequate warning has been given about the special need for caution. Were the courts to adjudge otherwise, affronts to justice would frequently occur. A few examples, taken over the whole spectrum of criminal activity, will illustrate what the effects upon the maintenance of law and order would be if any law were enacted that no person could be convicted on evidence of visual identification alone."

[26] In **Shand (Karl) v R** (1995) 47 WIR 346 at 351, Lord Slynn highlighted the importance of giving the **Turnbull** warning, even in recognition cases where credibility of the identifying witness is the sole line of defence. He opined:

> "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**."

[27] In addressing the concerns raised by Mrs Harris-Barrington in relation to the identification of Jason Brown by Sabene Forrest, we reviewed the relevant portions of that witness' examination-in-chief recorded at pages 44 to 47 of the

transcript. Her clear evidence was that on her way to the shop, she passed Jason Brown going in the opposite direction. On entering the yard in which the shop was located, she heard an explosion coming from the direction from which she had come. She looked and saw the applicant with a gun in his hand. There was then a second explosion that sounded like gunshot. She then saw Errol Miller running away from where she had left him and Jason Brown was behind him with the gun in his hand outstretched. Jason Brown was pointing the gun in the direction of Errol Miller. She then panicked and ran.

[28] Despite this evidence of a positive identification of Jason Brown at the time of the incident, Sabene Forrest was probed by Mrs Harris-Barrington during cross-examination as to whether the reason for identifying Jason Brown was because she was angry with him due to the disappearance of Humphry. This is what is recorded of that aspect of the cross-examination of the witness at page 101 of the transcript:

> "[COUNSEL] I put it to you that you were vexed, angry, with Mr. Jason Brown.
>
> [WITNESS] No, ma'am. I was scared by the look of him.
>
> [COUNSEL] I put it to you that you have come to Court to see Jason Brown and to tell lies on Jason Brown...
>
> [WITNESS] No, ma'am.
>
> [COUNSEL] ...because you are blaming him for Humphrey's disappearance.

[WITNESS] No, ma'am.

[COUNSEL] Do you have any evidence that would make you blame Jason Brown for Humphrey's disappearance?

[WITNESS] No, ma'am, and that is not the reason why I am here today."

[29] The jury had all the evidence adduced both in examination-in-chief and cross-examination to consider against the background of the learned trial judge's directions. In directing the jury in relation to Sabene Forrest's identification of the applicant at the time of the shooting, the learned trial judge reminded them of the critical features of the evidence going to the identification of the applicant. At pages 472 and 473 of the transcript, he directed the jury in this regard:

> "Now, [Sabene Forrest] said it was a bright and sunny day. Mr. Foreman and your members, you can take your knowledge of the average Jamaican July days. This was the 19th of July, 2005, she said. She said she went up to him, she talked to him, she did, in fact, speak to him and she turned around to go to the shop that she was heading towards. She turned to the left. She said at the time that she went and spoke to Errol Miller, alias 'Cracka', she was alone. She said that she finished speaking to 'Cracka', he was still at the table and as she turned around, she saw 2 young men, one of them was Jason and the other one was Jermaine and that each of them she had known before.
>
> She said she did not then know Jason's surname, but she knew him up to that time for more than 5 years. And you will recall she called him 'City Puss'.
>
> ...

> She said that up to the 19th of July, 2005, she used to see Jason about 2 to 3 times a week; that they would talk. She said she can't remember the last time she had seen him before the 19th of July, but she said she knew she saw him readily about 2 times. She said that there was nothing on his head that blocked her view of him and she identified the accused Jason Brown, in the dock sitting in Court, as the person she called Jason, the person she saw that day.

[30] At pages 456 and 457 of the transcript, the learned trial judge further stated:

> "I am obliged to tell you, Mr. Foreman and your Members, that wherever as, in fact, the situation now, the case against the accused depends wholly or partially upon the correctness of one or more identifications of the accused, which the defence alleges to be mistaken, it is my duty to warn you for the special need for caution before convicting on the reliance or the correctness of the identification. And this is so because a mistaken witness can be a convincing one and a number of such witnesses can also be mistaken. It is going to be your duty, Mr. Foreman and your Members, to examine closely the circumstance in which the identification by each witness' [sic] claimed to be made, how long the witness had their views [sic] under observation, at what distance, in what light, how was the observation made, have the witness or witnesses ever seen the accused before, if so, how often? if it is a case where the witness occasionally saw the accused, is there a special reason for remembering the accused? How long it lasted between the original observation and the consequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness, when last seen by them and the accused actual appearance? All of these are considerations..."

[31] The learned trial judge did remind the jury of the applicant's defence when he placed before them the contents of the unsworn statement with the requisite directions in law as to how they should treat with it, bearing in mind on whom the burden of proof lay and the standard of proof. Having done so, he again reminded the jury, almost at the end of the summation, of the possibility of mistaken identity in these terms (at page 522 of the transcript):

> "Mr. Foreman and your members, you may also remember that [even] when one knows somebody very well, one can make an honest mistake. So, bearing that in mind, you take that into consideration when you are assessing the evidence of identification. Remember I told you to take it in terms of how long they knew, the opportunity for seeing, time of day, the lighting, the amount of time that they had known the person and all that. So, those are the things that you take into consideration when you are assessing the evidence as it regards identification."

[32] It can clearly be seen from the learned trial judge's summation that he faithfully adhered to the **Turnbull** guidelines, whilst at the same time, reminding the jury of the applicant's case that the identification was maliciously done for the reasons advanced by him. Also, the learned trial judge's specific directions to the jury on how to approach the identification evidence would have been augmented by his general directions to the jury on how to perform their role as judges of the facts. He impressed upon them that they were the sole judges of the facts and so it was for them alone to decide which of the witnesses they found to be a witness of truth, what part of their testimony to accept, or what

part to reject. He also advised them of the value of observing the witnesses' demeanour in assessing their credibility as well as the impact of inconsistencies and discrepancies on the issue of credibility. All these matters that would have had a bearing on the honesty and credibility of the witnesses were adequately addressed by the learned trial judge.

[33] Despite her valiant effort, Mrs Harris-Barrington failed to convince this court that the learned trial judge's summation to the jury on the issue of identification was flawed. In the end, there was no basis on which this court could find that it was not open to the jury, as the finders of fact, and upon being properly directed as they were, to properly find that the witnesses' evidence of identification of the applicant was not malicious but was reliable and credible. Accordingly, it could not at all be said that the identification evidence, presented by the prosecution in support of the charge brought against the applicant, Jason Brown, could not support his conviction. We therefore formed the view that ground one was completely devoid of merit.

Lack of credibility of the witnesses

Whether the trial was unfair and the verdict unsafe due to lack of credibility of the witnesses and the trial judge's failure to direct the jury on the conflicting testimonies of the witnesses, which affected their credibility (grounds (3), (4) and (5)).

[34] The issues raised in grounds three, four and five, which will be examined together, raise the following closely connected questions:

(i) whether the evidence adduced from the main witnesses in relation to Jason Brown lacked credibility due to inconsistencies and discrepancies, thereby rendering the verdict and conviction unsafe; and

(ii) whether the learned trial judge failed to direct the jury on how to treat with these conflicts in the evidence of the two witnesses, thereby amounting to a misdirection that has rendered the trial unfair and the conviction unsafe.

[35] The focal point of Mrs Harris-Barrington's submissions on behalf of the applicant on grounds three, four and five was that the witnesses were not credible in the light of the various conflicts in their evidence. On this issue of credibility, learned counsel extracted several aspects of the evidence (actually amounting to 11), which showed inconsistencies and discrepancies in the evidence of the two main witnesses, Sabene Forrest and Corlett Bloise. Learned counsel's contention was that the learned trial judge, "[r]ather than making a general observation about the discrepancies, he should have made it crystal clear

that the two testimonies could not stand together and invite them to consider that the conflicting testimonies given under oath raised a reasonable doubt that the witnesses for the [p]rosecution were not telling the truth".

[36] Counsel further submitted that in accordance with the decision of Harrison JA in **R v Carletto Linton, Omar Neil and Roger Reynolds** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 3, 4 and 5/2000, judgment delivered 20 December 2002, "discrepancies occurring in the evidence of a witness at a trial ought to be dealt with by the jury after a proper direction by the trial judge as to the determination of their materiality". According to counsel, the discrepancies in the witnesses' evidence were so material and rendered their evidence so unreliable, particularly as regards the issue of identification, that the learned trial judge erred in leaving the case for the jury's consideration. This error, she argued, has rendered the conviction unsafe.

Discussion and findings

[37] At pages 448 to 450 of the transcript, the learned trial judge, in so far as is relevant, directed the jury in these terms on contradictions in the testimony of the witnesses:

> "... But where it is proven that the witness made a previous statement inconsistent with his evidence, it is for your consideration as to whether that witness, having said one thing on one occasion and saying something different in the evidence before you, whether you can accept the evidence of that witness.

> Now, you remember that learned counsel for the prosecution told you about discrepancies and inconsistencies and what they are, Mr. Foreman and your Members, are situations where a witness says one thing on this occasion about a particular matter and on another occasion, perhaps even the same testimony, says something different on the same point. Now, in most cases where evidence is given, especially evidence given of an event that took place long time previously, and you recall that the evidence in this case is that the incident took place in July of 2005. This is 2012. In most cases you will find that there are inconsistencies and discrepancies, but if you find that in this case there are discrepancies and inconsistencies in the evidence of the witnesses then you have to decide whether those inconsistencies or discrepancies are slight or serious, whether they are material or immaterial.
>
> Mr. Foreman and your members, I don't propose to point out to you every discrepancies or inconsistencies [sic] that may have taken place in this case, but what I can do is to point out some aspect of the evidence that you, Mr. Foreman and your Members, it is a matter for you, may consider discrepancies or inconsistencies, and if there are any that you can recall I have not point out, bear in mind what I told you, how to treat them, you may deal with those as you recall them."

[38] The learned trial judge then carefully and systematically reviewed several paramount inconsistencies and discrepancies arising during the trial, by highlighting, for example: (a) the number of men that were seen by Sabene Forrest and Corlett Bloise; (b) the number of explosions heard by Sabene Forrest as opposed to those heard by Corlett Bloise; (c) Corlett Bloise's evidence that she saw flashes of light coming from the guns in the hands of the men and that of Sabene Forrest who saw none; (d) Corlett Bloise originally stating that she

was looking through some metal louver windows and later admitting that she looked through one louver window and that her previous evidence was a mistake; (e) Corlett Bloise's evidence that there was a veranda, which she changed to say that there was none and the explanation she gave for the inconsistency; and (f) Detective Corporal Roache's evidence placing the table that was being beaten by Errol Miller at a different place from that described by Corlett Bloise and Sabene Forrest.

[39] Having identified for the jury's benefit several conflicts in the evidence of the witnesses and putting before them the explanation, if any, offered by the particular witness for any inconsistency, the learned trial judge then continued at pages 451 to 452 of the transcript:

> "So Mr. Foreman and your members, it is for you to decide whether these are discrepancies and inconsistencies and if you decide they are, then you decide if they are slight or if they are serious, because if they are slight you may probably think they are not, they do not affect the credit of a particular witness who is concern [sic]. On the other hand, if you think that they are serious, you may say that because of them it will not be safe to believe a particular witness on that particular point and where Mr. Foreman and your members, you find that they are serious discrepancies and/or inconsistencies to the testimony of a witness it is open to you not only to disbelieve the witness on that particular point, but you may reject that witness' evidence because it is always a matter for you."

[40] Having examined the conflicts pointed out by Mrs Harris-Barrington, against the background of the directions given to the jury by the learned trial

judge on matters of credibility, we were moved to accept the submissions of Mrs Johnson that the learned trial judge adequately dealt with the discrepancies and inconsistencies that arose on the evidence and gave adequate and proper directions to the jury on how to treat with them.

[41] In **Regina v Fray Deidrick** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 107/1989, judgment delivered 22 March 1991, relied on by the Crown, it was made clear that trial judges are not required to highlight all inconsistencies or discrepancies that arise during a trial. Instead, it is incumbent upon them to explain to the jury the nature and significance of inconsistencies and discrepancies and to give them directions on how such matters are to be treated. In that case, the court, in addressing a complaint that a judge had failed to bring to the attention of the jury the fact that there were inconsistencies between a witness' testimony and a previous statement, stated through Carey JA (at page 9) that:

> "Implicit in this contention is the belief, which we think to be without any foundation, that because a witness has been shown to have made some statement inconsistent with his testimony in Court, a resultant duty devolves upon a trial judge to show that the witness' evidence contains conflicts with other witnesses in the case.
>
> The trial judge in his summation is expected to give directions on discrepancies and conflicts which arise in the case before him. There is no requirement that he should comb the evidence to identify all the conflicts and discrepancies which have occurred in the

> trial. It is expected that he will give some examples of the conflicts of evidence which have occurred in the trial, whether they be internal conflicts in the witness' evidence or as between different witnesses."

[42] In **R v Carletto Linton, Omar Neil, Roger Reynolds**, Harrison JA (at page 16), in delivering the judgment of the court, affirmed the guidance that was given in **Fray Deidrick**, and explained further that:

> "Discrepancies occurring in the evidence of a witness at a trial ought to be dealt with by the jury after a proper direction by the trial judge as to the determination of their materiality.
>
> The duty on the trial judge is to remind the jury of the discrepancies which occurred in the evidence instructing them to determine in respect of each discrepancy, whether it is a major discrepancy, that which goes to the root of the case, or a minor discrepancy to which they need not pay any particular attention. They should be further instructed that if it is a major discrepancy, they the jury, should consider whether there is any explanation or any satisfactory explanation given for the said discrepancy. If no explanation is given or if the one given is one that they cannot accept they should consider whether they can accept the evidence of that witness on the point or at all: (**R Baker et al** (1972) 12 J.L.R. 902)…"

[43] Similarly, in **Lloyd Brown v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal, No 119/2004, judgment delivered 12 June 2008, Harrison P emphasised that where there are major contradictions in the evidence, it is incumbent on the judge to point these out to the jury. He said:

> "A further complaint is made in this ground that the learned trial judge erroneously failed to point out certain discrepancies arising in the evidence of the various witnesses.
>
> There is no duty on a trial judge to point out to the jury each and every discrepancy which arises in a case. It is sufficient that the learned trial judge points out some of the major discrepancies, as illustrations of such discrepancies, give proper directions of the manner of identifying such discrepancies and further advising the jury to decide whether they are material or immaterial and the way in which they should be treated."

[44] It is therefore clear, in the light of the dicta distilled from the above authorities, that the learned trial judge in the instant case had no obligation to extract minutely every inconsistency and discrepancy arising on the evidence for the jury's consideration. We found, having closely examined the directions given by the learned trial judge, that he did all that was required of him by law in his directions to the jury. Furthermore, the jury were already directed from the very outset of the summation that it was for them to say who and what they believed and that, in doing so, they could accept or reject a witness' testimony or part of it. In fact, the learned trial judge made it clear to them, in directing them on discrepancies and inconsistencies, that where they found such conflicts to be serious, it was open to them "not only to disbelieve the witness on that particular point, but that [they] may reject that witness' evidence because it [was] always a matter for [them]". In our view, his directions and approach to the evidence on the issue of inconsistencies and discrepancies are unassailable.

[45] Mrs Johnson reminded the Court of the dictum of Carey P (Ag) in **Andrew Peart and Garfield Peart** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal, Nos 24 and 25/1988, judgment delivered 18 October 1988, that:

> "...the occurrence of discrepancies in the evidence of a witness, cannot by themselves lead to the inevitable conclusion that the witness' credit is destroyed or severly [sic] impugned. It will always depend on the materiality of the discrepancies. Counsel's job is hardly done if he is merely content to isolate the incidents of discrepancies which may often occur in testimony.
>
> ...
>
> It was for the jury having seen and heard the witnesses, to make up their minds in the light of the learned trial judge's directions, whether the witness impressed them as capable of belief on his oath."

[46] The learned trial judge, having given the jury the proper guidance and directions in law, the ultimate question whether the witnesses were credible, in the light of the conflicts in their testimonies, was one for the jury. In other words, the creditworthiness of the witnesses was a matter solely for the jury. It was for them, as the learned trial judge would have told them, to determine whether the evidence led by the prosecution had satisfied them to the extent that they were sure of the applicant's guilt. The witnesses' credibility and reliability were not matters for the trial judge. For this reason, the argument advanced on ground five that the learned trial judge should have made it "crystal

clear to the jury that the evidence of the two main witnesses for the prosecution could not stand or at all", was rejected.

[47] It cannot be said that the verdict is unsafe, given the cogency of the evidence against this applicant and the learned trial judge's directions to the jury on how to approach it. Accordingly, there is no proper basis on which the verdict could be impeached on the ground that the evidence identifying Jason Brown, as a party to the killing of Errol Miller, lacked credibility and so the trial was unfair and the conviction unsafe.

[48] We found on the basis of the foregoing analysis that there was no merit in grounds three, four and five.

The no case submission

The learned trial judge erred in not upholding the no case submission (ground (4)).

[49] At the end of the prosecution's case at the trial, counsel for the applicants both made submissions that the applicants should not be called upon to answer. The learned trial judge, however, ruled that there was a case to answer in respect of both applicants.

[50] At the hearing of the application for leave before us, only Jason Brown persisted in the contention that the learned trial judge erred by failing to uphold the no case submission. Ricardo Lawrence abandoned that ground.

[51] Based on the arguments advanced by counsel for Jason Brown on this ground, it seems safe to say that the complaint was two-fold with respect to the learned trial judge's failure to uphold the no case submission. The first basis was that the learned trial judge ought not to have left the case to the jury, given the irreconcilable differences in the testimonies of the two main witnesses for the prosecution that rendered the evidence fatally flawed.

[52] In support of her arguments that the no case submission should have been upheld in the light of the inconsistencies and discrepancies that affected the evidence of identification, Mrs Harris-Barrington placed reliance on **Herbert Brown and Mario McCallum v Regina** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal, Nos 92 and 93/2006, judgment delivered 21 November 2008, to make the point that, "if the quality of the evidence is poor (or the base too slender) it should be withdrawn from the jury". Her argument was that the evidence in this case was poor due to internal conflicts in the prosecution's case and so should have been withdrawn from the jury's consideration.

[53] The second aspect of the applicant's complaint embodied in ground four was that the learned trial judge erred in rejecting the no case submission because the prosecution had failed to prove an element of the offence of murder, that is, the death of Errol Miller.

Discussion and findings

[54] The general principles governing judicial treatment of a no case submission are so trite that it seems unnecessary to repeat them here, but for the avoidance of doubt that the learned trial judge treated properly with the no case submission, it is useful to repeat them.

[55] Our courts have approved and consistently applied **Lord Parker's Practice Direction** [1962] 1 WLR 227, when determining the question of whether or not a no case submission should be upheld. His Lordship directed that:

> "A submission that there is no case to answer may properly be made and upheld: (a) when there has been no evidence to prove an essential element in the alleged offence; (b) when the evidence adduced by the prosecution has been so discredited as a result of cross-examination or is so manifestly unreliable that no reasonable tribunal could safely convict upon it."

[56] The well known dictum of Lane CJ in **R v Galbraith** [1981] 2 All ER 1060 at page 1062 firmly reinforced the courts' approach in treating with a no case submission. The learned Chief Justice stated:

> "How then should the judge approach a submission of 'no case'? (1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case. (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence. (a) Where the judge

> comes to the conclusion that the Crown's evidence, taken at its highest, is such that a jury properly directed could not properly convict on it, it is his duty, on a submission being made, to stop the case. (b) Where however the Crown's evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence on which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury. It follows that we think the second of the two schools of thought is to be preferred.
>
> There will of course, as always in this branch of the law, be borderline cases. They can safely be left to the discretion of the judge."

[57] In relation to identification cases, the approach the court should take to a submission of no case was sufficiently captured by Morrison JA (as he then was) speaking on behalf of the court in **Herbert Brown and Mario McCallum v Regina**. After a thorough review of the relevant authorities, including **Galbraith** and **Daley (Wilbert) v R** (1993) 43 WIR 325, he stated:

> "[35] So that the critical factor on the no case submission in an identification case, where the real issue is whether in the circumstances the eyewitness had a proper opportunity to make a reliable identification of the accused, is whether the material upon which the purported identification was based was sufficiently substantial to obviate the 'ghastly risk' (as Lord Widgery CJ put it in **R v Oakwell** [1978] 1 WLR 32, 36-37) of mistaken identification. If the quality of that evidence is poor (or the base too slender), then the case should be withdrawn from the

> jury (irrespective of whether the witness appears to be honest or not), but if the quality is good, it will ordinarily be within the usual functions of the jury, in keeping with **Galbraith**, to sift and to deal with the range of issues which ordinarily go to the credibility of witnesses, including inconsistencies, discrepancies, any explanations proffered, and the like."

[58] It was against this background of the legal principles, governing a judge's treatment of a no case submission, particularly, within the context of a case involving disputed visual identification, that the ruling of the learned trial judge, which formed the complaint in ground four, was considered. The two aspects of the complaint have been examined in turn.

(i) The variance in the evidence of the witnesses

[59] There is no question that in this case, the quality of the identification evidence of the two main witnesses was good and remained good up to the end of the case for the prosecution. It could not at all be said that the quality of the evidence or its base was so slender so as to lead to a 'ghastly risk' of mistaken identity. The issues that remained pertinent to the identification would have concerned the credibility of the witnesses. As such, it fell within the province of the jury to determine whether the witnesses were honest or credible by taking into account all matters that touch on the question of their credibility and reliability, which would include such matters as inconsistencies and discrepancies. We have already indicated above, in treating with the complaint concerning the issue of the credibility of the witnesses (paragraphs [37] to [47]),

and will repeat now, for emphasis, that the conflicts in the evidence of the witnesses were properly left for the jury's consideration as matters going to the issue of credibility, which was for them to determine upon proper directions from the learned trial judge.

[60] We found, as already indicated, that the jury were properly directed and so the variance in the witnesses' testimonies was not a proper basis on which the learned trial judge could have properly withdrawn the case from their consideration, especially in the light of the good quality of the identification evidence. It therefore could not be said, as urged by Mrs Harris-Barrington on this court, that the evidence of identification and the circumstances in their entirety were "sufficiently unreliable" so that the case, having been left to the jury, had rendered the conviction unsafe. We rejected that argument as one without merit.

(ii) Proof of identity of the deceased

[61] The second aspect of the ground of appeal that the no case submission should have been upheld because the prosecution had failed to prove an essential element of the offence of murder was also considered and rejected. It is trite that the prosecution must prove on a charge of murder that the person named in the indictment, as the one murdered by the accused is, in fact, dead and had died from injuries caused to him by the accused. The necessity of establishing the nexus between a deceased and the person the accused is

alleged to have murdered was well demonstrated in the decision of this court in **R v Florence Bish** (1978) 16 JLR 106.

[62] In connecting the person named in the indictment as the person whose body was seen at 18 Monk Street, and on whom the post-mortem examination was conducted, the prosecution, at the trial, relied on the evidence of Sabene Forrest and Detective Corporal Kirk Roache.

[63] Sabene Forrest knew the deceased by his name Errol Miller (as well as by his alias) prior to the incident. She saw the applicant pointing his gun in the direction of the deceased, while the deceased was running, and she heard explosions sounding like gunshots. She ran away from the scene. Shortly after, she returned to where she had last seen the deceased and the applicant and there she saw the deceased's body lying in a pool of blood. She said that by that time, the police were already there.

[64] Detective Corporal Roache's evidence was that he was a member of the police party that went to the same premises after the shooting, where he saw the body of a man lying in a pool of blood with wounds. He said that on seeing the body, he spoke with Keron Miller, the son of the man whose body he saw, and Nicola Laing, the man's common law wife. They both identified the body he saw lying in the pool of blood to be that of Errol Miller.

[65] We accept that what the officer was told by Keron Miller and Nicole Laing (who were not called as witnesses at the trial) as to the identity of the body of the deceased would have been hearsay and, therefore, inadmissible for the truth of the fact that the body was, indeed, that of Errol Miller. However, Detective Corporal Roache attended the post-mortem examination on 9 August 2005, where he saw the same body that he saw at 18 Monk Street on the day of the incident. This, indisputably, was the scene of the shooting described by Sabene Forrest where she had seen both the deceased and the applicant at the material time. On the evidence of Sabene Forrest, it was Errol Miller who was shot at that scene. So both witnesses saw the body of one person at those premises following the shooting incident allegedly involving the applicant.

[66] There was sufficiently cogent evidence before the jury, once they accepted it, that the body that was seen by Detective Corporal Roache, both at the scene of the crime and at the post-mortem examination, and which was identified to the pathologist by Nicola Laing, was one and the same. That body was Errol Miller as established on the evidence of Sabene Forrest. That body was examined by the pathologist who found that the cause of death was due to multiple gunshot wounds. There was enough evidence placed before the jury, from which they could have drawn a reasonable and inescapable inference and therefore ultimately found, as a fact, that the body of the person on whom the post-mortem examination was conducted, and who was declared to have died

from gunshot injuries, was Errol Miller, the person named in the indictment. The nexus was properly established to prove that Errol Miller died at the hands of the applicant. We found no merit in this aspect of the ground of appeal that an essential element of the charge of murder was not made out.

[67] Accordingly, we found ourselves unable to agree with the contention of the applicant, Jason Brown, that the learned trial judge erred in rejecting the no case submission for the reasons advanced. Ground four, in its entirety, had no prospect of success.

Improper judicial conduct

The learned trial judge erred in the execution of his judicial duty (ground (6)).

[68] The complaint of Jason Brown in ground six was that throughout the duration of the trial, the learned trial judge gave "preferential treatment" to counsel for the prosecution. Counsel argued on his behalf that the learned trial judge, in his "preferential treatment" of prosecuting counsel, "hampered the raising of legitimate defences" on behalf of the applicant. She argued too that the learned trial judge made several interruptions throughout the proceedings, which resulted in an "unbalancing of the fairness of the proceedings", and a miscarriage of justice.

Discussion and findings

[69] There are two issues that arose for consideration from these complaints embodied in ground six. The first was whether the learned trial judge hindered the applicant in presenting his defence by his "preferential treatment" of prosecuting counsel and the second was whether he unfairly interrupted defence counsel in the conduct of the proceedings on behalf of the applicant to the extent, and with the effect, that it resulted in a miscarriage of justice. Upon a careful consideration of the transcript of the proceedings, we were impelled to reject both contentions.

[70] We were unable to discern any instance where it could be said that the learned trial judge treated counsel for the Crown preferentially. There was also nothing to substantiate the assertion that the learned trial judge's treatment of counsel for the Crown had inhibited the applicant in raising "legitimate defences". These arguments were rejected. We now turn to examine the complaint that the learned trial judge interrupted defence counsel in the conduct of the proceedings, which led to unfairness in the trial.

[71] In assessing the issue of interruptions by judges during a trial, Denning LJ, in **Jones v National Coal Board** [1957] 2 All ER 155 at 159, instructed that**:**

> "... it is for the advocate to state his case as fairly and strongly as he can, without undue interruption, lest the sequence of his argument be lost; see ***R v Clewer*** (1953), 37 Cr App Rep 37). The judge's part

> in all this is to hearken to the evidence, only himself asking questions of witnesses when it is necessary to clear up any point that has been overlooked or left obscure; to see that the advocates behave themselves seemly and keep to the rules laid down by law; to exclude irrelevancies and discourage repetition; to make sure by wise intervention that he follows the points that the advocates are making and can assess their worth; and at the end to make up his mind where the truth lies. If he goes beyond this, he drops the mantle of a judge and assumes the robe of an advocate; and the change does not become him well."

[72] Further at page 160, his Lordship stated:

> "It is only by cross-examination that a witness's evidence can be properly tested, and it loses much of its effectiveness in counsel's hands if the witness is given time to think out the answer to awkward questions; the very gist of cross-examination lies in the unbroken sequence of question and answer. Further than this, cross-examining counsel is at a grave disadvantage if he is prevented from following a preconceived line of inquiry which is, in his view, most likely to elicit admissions from the witness or qualifications of the evidence which he has given in chief. Excessive judicial interruption inevitably weakens the effectiveness of cross-examination in relation to both the aspects which we have mentioned, for at one and the same time it gives a witness valuable time for thought before answering a difficult question, and diverts cross-examining counsel from the course which he had intended to pursue, and to which it is by no means easy, sometimes, to return."

[73] In **Dwayne Briscoe and Jermaine Litchmore v R** [2011] JMCA Crim 58, Harrison JA, in affirming the decision in **Kolliari Hulusi and Maurice**

Purvis (1974) 58 Cr App R 378, usefully enumerated the following instances, where interventions by a trial judge will lead to the quashing of a conviction.

> "(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..."

[74] In the more recent decision of this court in **Carlton Baddal v R** [2011] JMCA Crim 6, Panton P reminded trial judges that:

> "...it is no part of their duty to lead evidence, or to give the impression that they are so doing. Where interventions are overdone and they are seen to have had an impact on the conduct of the trial, this court will have no alternative but to quash any resulting conviction. Trial judges should therefore be always mindful of the likely result of their conduct. However, the judge is not expected to be a silent witness to the proceedings. There is always room for him to ask questions in an effort to clarify evidence that has been given, or 'to clear up any point that has been

overlooked or left obscure'(**Jones v National Coal Board** [1957] 2 All ER 155 at 159G)."

[75] Having been guided by the relevant authorities, we found that none of the circumstances proscribed by them that would warrant the quashing of a conviction, based on the conduct of a trial judge, exists in the instant case. It was not at all evident on the submissions of Mrs Harris-Barrington, or from the transcript of the notes of the proceedings, where any interruptions by the learned trial judge could have hindered or did, in fact, hinder Jason Brown from presenting his defence. In fact, his case was quite clear and simple and he was allowed to place it squarely before the jury for their consideration. On top of this, his counsel was afforded reasonable opportunity to vigorously and sufficiently test the evidence of the witnesses on the matters raised by him in his defence.

[76] There were no instances of excessive questioning or interruption by the learned trial judge that could have affected the conduct of the defence. As Mrs Johnson pointed out, with the aid of the transcript, the instances of interventions by the learned trial judge were primarily confined to circumstances where it was necessary to guard against prejudicial material being elicited in the presence of the jury; to exclude irrelevancies and discourage repetition; to ensure that the rules of evidence were adhered to; and to have the trial proceed in a fair and timely manner. The learned trial judge could not be faulted in carrying out his role to ensure the conduct of a fair trial within a reasonable time.

[77] The learned trial judge, for his part, fairly put the applicant's defence in its entirety to the jury during the course of his summation. The applicant also put forward his good character, which earned him the requisite good character direction from the learned trial judge. The learned trial judge also adequately and correctly directed the jury on how to treat with the applicant's unsworn statement within the context of the burden and standard of proof.

[78] We concluded that Jason Brown's defence was not hindered, in any way, and that the learned trial judge's summation was clear and balanced. We endorsed the contention of the Crown that on the evidence presented to the jury by the prosecution, when considered along with the applicant's unsworn statement, the verdict in relation to him is reasonable, having regard to the evidence. We found that there has been no unfair trial, leading to a miscarriage of justice, arising from the learned trial judge's treatment of either prosecuting or defence counsel. Ground six was found to be totally devoid of merit**.**

[79] Having given due consideration to the grounds of appeal advanced on behalf of Jason Brown, and the detailed submissions of counsel on his behalf, we were unable to find any basis upon which the leave to appeal conviction could have been granted.

Ricardo Lawrence's application

[80] We will now turn to a consideration of the application of Ricardo Lawrence. Mr Mellish, in making his submissions on behalf of Ricardo Lawrence, indicated that to the extent that the submissions made on behalf of Jason Brown would apply to this applicant, he would adopt them. It is considered necessary to indicate, however, from the outset that we found nothing urged on behalf of Jason Brown that could have availed Ricardo Lawrence in his application for leave to appeal.

[81] Mr Mellish, with leave of the court, abandoned the original grounds of appeal one, three and four and only sought to argue ground two on behalf of Ricardo Lawrence, which was unfair trial. He posited the following question for the court's consideration of that ground:

> "Whether the directions of the learned judge on circumstantial evidence were adequate given the nature of the evidence against the 2nd Applicant, Ricardo Lawrence?"

[82] The focal point of Mr Mellish's submissions related to the quality of the evidence at the trial and the learned trial judge's treatment of the issue of circumstantial evidence during his summation.

[83] In advancing his submissions, learned counsel placed much reliance on the following items of evidence:

i. The evidence of Sabene Forrest that she saw a tam at the crime scene about 6 feet from the body of the deceased and that she had seen that tam being worn by Ricardo Lawrence on a number of occasions. She did not purport to see Ricardo Lawrence at the time of the commission of the offence.

ii. Corlett Bloise's evidence, naming Ricardo Lawrence as one of the men that she saw shooting at the deceased, and the challenge to her evidence on cross-examination as to the side of the road she was on, relative to the men she said she saw, and as to whether she was looking through a window or was behind a door.

[84] According to counsel, the jury had enough to reflect on whether Corlett Bloise "really did see what she claimed to have seen" and the evidence that a tam seen in the applicant's possession was found on the scene of the incident may have bolstered their confidence in her evidence that Ricardo Lawrence was one of the perpetrators.

[85] Counsel contended further that both witnesses gave evidence that they knew Ricardo Lawrence very well, nevertheless, only one of them claimed to have seen him on the scene and only one claimed to have observed a tam at the crime scene. In these circumstances, counsel submitted, the learned trial judge should have taken extra care in his direction to the jury concerning the value of the evidence about the tam, which was said to belong to Ricardo Lawrence.

[86] Mr Mellish also submitted that the summation 'fell short', and did not adequately contain appropriate guidance on circumstantial evidence, in treating with this aspect of the evidence in relation to the tam. This inadequacy, counsel maintained, may have caused the jury to use the evidence of the tam as corroboration that Ricardo Lawrence was on the scene of the shooting. Counsel relied on **Harrisons' Law Notes & Materials**, pages 33 and 34, in which reference is made to the cases of **R v Ronald Higgins** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 55/1987, judgment delivered 29 January 1988 and **R v Everton Morrison** (1993) 30 JLR 54. In those cases, the court ruled, inter alia, that the rule in **Hodge's case** (**R v Hodge** (1838), 2 Lewin 227, 168 ER 1136) was still applicable to Jamaica and so a judge's direction must be in keeping with that rule. Mr Mellish argued that the learned trial judge erred in failing to direct the jury in the terms enunciated in those cases.

Discussion and findings

The tam

[87] In relation to the evidence concerning the tam, the learned trial judge directed the jury in these terms at pages 480-481 of the transcript:

> "Now, Mr. Foreman and your members, [Sabene Forrest] tells us about a tam. That this tam was red, green and gold with black stripes. That she has seen the tam before and that she had seen the tam in the possession of Ricardo Lawrence. Mr. Foreman and your members, the Prosecution has indicated to you that the tam, evidence about the tam was led for that particular purpose.
>
> Now, Mr. Foreman and your members, **it's a matter entirely for you, but it is my suggestion to you that you disregard the evidence with regards to the tam**. You have not seen the tam, except for the description of what the tam looked like. It is my opinion, it is not your opinion, but there is nothing particular about the tam that one could use it in any way adverse to the persons who alleged to have seen it [sic]. And I do this to indicate how you should approach it." (Emphasis added)

Then, further at page 506 of the transcript, the learned trial judge continued:

> "And Mr. Foreman and your members, [Detective Corporal Roache] told you that he found a tam. And Mr. Foreman and your members, **I had indicated to you that you could not properly use the tam in any way adverse to Mr. Lawrence**. And the officer, having gone to the premises on the 19th of July, indicated that he made observations of the area. One could perhaps ask one's self, that having made observations of the area, a seasoned police officer of at least 16 years service up to that time, how come

> the tam was not located on the 19th of July and only on the 3rd of August." (Emphasis added)

[88] It is obvious that the learned trial judge, in initially addressing the issue of the tam, was, seemingly, mindful of his duty not to usurp the function of the jury as the sole judges of the facts. It is no doubt for that reason that he prefaced his comments by saying it was entirely a matter for them and then guardedly sought to impress upon them the weakness in the evidence concerning the tam and to give his opinion that they should disregard it because there was nothing particular about the tam for them to use it adversely against the applicant. It is quite clear that he did not definitively and unequivocally say to the jury, at that point in his summation, that they should disregard the evidence. This, it seems, may also have been influenced by his earlier directions to the jury that while they were obliged to take the law from him, it was a totally different matter where the facts were concerned. The facts were, of course, entirely a matter for the jury, which he would have told them and so he was evidently trying to strike a balance between his role as judge of law and the jury's role as judges of the facts by merely stating what he said was his opinion.

[89] Later, however, in treating with the issue again within the context of the investigating officer's evidence, the learned trial judge managed to make it much plainer to the jury that they could not properly use the tam in any way adverse to the applicant. In the end, he would have clearly put to the jury the problems

with the evidence concerning the tam and would have impressed upon them his view that the evidence should not be used against the applicant in coming to their findings. The jury would have seen it as a direction from the learned trial judge to disregard that bit of evidence because of its inherent weakness. The learned trial judge's direction was pointed and unequivocal that the evidence was unreliable and ought not to be acted upon by them. There is therefore no basis on which the learned trial judge could be criticised in treating with the evidence concerning the tam. This aspect of Ricardo Lawrence's complaint was found to be without merit.

The directions on circumstantial evidence

[90] With respect to the judge's directions on circumstantial evidence, we found that they were sufficiently accurate in assisting the jury in treating with the issue of circumstantial evidence and the evidence concerning the tam. As Mrs Johnson pointed out, Mr Mellish's submissions, based as they were on the cases that applied the rule in **Hodge's case**, were flawed. She correctly pointed out that there is a plethora of authorities from this jurisdiction, which have addressed the issue of the appropriate direction that is to be given to a jury in cases where the prosecution is relying on circumstantial evidence. It is absolutely clear from those authorities, that the rule in **Hodge's case** no longer has the applicability within our jurisdiction as contended by Mr Mellish. Learned counsel for the Crown drew support for her argument from dicta in **Melody Baugh-Pellinen v**

R [2011] JMCA Crim 26; **McGreevy v Director of Public Prosecutions** [1973] 1 All ER 503; **Loretta Brissett v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 69/2002, judgment delivered 20 December 2004 and **Wayne Ricketts v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 61/2006, judgment delivered 3 October 2008.

[91] In **Melody Baugh-Pellinen V R**, Morrison JA stated at paragraph [39] of the judgment:

> "As regards the proper directions to a jury on the subject of circumstantial evidence, **McGreevy v Director of Public Prosecutions** [1973] 1 All ER 503 resolved the question whether any special directions were necessary in such cases by holding that such evidence would be amply covered by the duty of the trial judge to make clear in his summing up to the jury, in terms which are adequate to cover the particular features of the case, that they must not convict unless they are satisfied beyond reasonable doubt of the guilt of the accused.
>
> Delivering the leading judgment of a unanimous House of Lords, Lord Morris of Borth-Y-Gest said this (at page 510):
>
> > 'In my view, the basic necessity before guilt of a criminal charge can be pronounced is that the jury are satisfied of guilt beyond all reasonable doubt. This is a conception that a jury can readily understand and by clear exposition can readily be made to understand. So also can a jury readily understand that from one piece of evidence which they accept various inferences might be drawn. It requires no more than ordinary common sense for a jury to understand that

> if one suggested inference from an accepted piece of evidence leads to a conclusion of guilt and another suggested inference to a conclusion of innocence a jury could not on that piece of evidence alone be satisfied of guilt beyond all reasonable doubt unless they wholly rejected and excluded the latter suggestion. Furthermore a jury can fully understand that if the facts which they accept are consistent with guilt but also consistent with innocence they could not say that they were satisfied of guilt beyond all reasonable doubt. Equally a jury can fully understand that if a fact which they accept is inconsistent with guilt or may be so they could not say that they were satisfied of guilt beyond all reasonable doubt.'"

[92] As part of his general directions, the learned trial judge told the jury at page 443 of the transcript that:

> "Now, when the accused men pleaded not guilty to this charge, it became the obligation of the Prosecution to produce evidence to satisfy you, Mr. Foreman and your members, until you feel sure of the guilt of each accused and that is because under our law, the accused is presumed to be innocent until the Prosecution, by the evidence produced, proves otherwise. The accused need not say a single word in his defence. There is no duty on the accused to prove his innocence and if the accused attempts to do so and succeeds, then he is not guilty. And, if his attempt fails, then you must consider all the evidence provided against the accused, and that includes what the accused has said, and see whether you are satisfied that you can feel sure that the Prosecution has proven its case."

He then said further at pages 460 and 461:

> "Now, it is often the case, that direct evidence of a crime is not available and you, Mr. Foreman and your members, are required to decide the case on so call [sic] circumstantial evidence. That simply means, that the prosecution is relying upon evidence of various circumstances relating to the crime, to demonstrate that some or all of the circumstances when taken together, establish the defendant's guilt, that is the only realistic conclusion which could be drawn from the evidence, and that it was the defendants who committed the crime to which each is charged.
>
> It is not necessary for the evidence to provide an answer to all the questions raised in a case. You may think it is an unusual case, indeed in which the jury can say we now know everything there is to know in a case. But the evidence must lead you to the sure conclusion, that the charge which each defendant faces is proved against them."

[93] These directions, coupled with the general directions given on inferences (page 447 of the transcript), clearly show that the jury would have been aware that all the evidence had to be taken into account before they could conclude that the case against the applicant was proved beyond reasonable doubt. They would also know that circumstantial evidence must point to the guilt of the accused and that there must be nothing to weaken the inference of guilt. The learned trial judge, by pointing out the problems with the evidence concerning the tam, and by telling the jury that they could not properly use it adversely against the applicant, would, in effect, have told them that that evidence was not such that they could properly view as part of the circumstances pointing to the applicant's guilt beyond a reasonable doubt.

[94] There is no basis to believe that the jury would have viewed the evidence of Sabene Forrest and the police about the tam as supporting the identification evidence of Corlett Bloise or as being useful in any other way. The identification evidence of its own was very cogent and, once accepted by the jury, they having been properly directed by the learned trial judge on how to treat with it, was sufficient to support the conviction of Ricardo Lawrence.

We therefore found that the learned trial judge properly directed the jury on the issues concerning the tam and circumstantial evidence. Accordingly, the sole ground of appeal argued on behalf of Ricardo Lawrence was without merit.

Conclusion

[95] We concluded that there was no basis on which the learned trial judge's conduct of the case and his directions to the jury could have been faulted. There was sufficiently cogent evidence to support the conviction of both applicants and so there was no unfair trial resulting in miscarriage of justice. For all the foregoing reasons, we were content to dismiss both applications for leave to appeal convictions and sentences, as recorded in paragraph [3] above.