[2016] JMCA Crim 18

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 23/2011

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MR JUSTICE WILLIAMS JA
THE HON MISS JUSTICE EDWARDS JA (AG)

OMAR BROWN v R

Mrs Ann-Marie Feurtado-Richards for the applicant

Mrs Sharon Milwood-Moore for the Crown

25 and 27 April 2016

ORAL JUDGMENT

MORRISON P

[1] On 18 January 2011, after a trial in the High Court Division of the Gun Court holden in Kingston before Straw J and a jury, the applicant was found guilty of murdering Kalaed Graham, o/c "Collin", (the deceased).

[2] On 26 January 2011, Straw J sentenced the applicant to imprisonment for life and ordered that he should serve 28 years before becoming eligible for parole. The applicant's application for leave to appeal against his conviction and sentence was initially considered and refused by a single judge of this court on 21 August 2012 and this is therefore the applicant's renewed application for leave to appeal.

[3] The two issues which arose on this application are, firstly, whether the learned trial judge's directions on identification were appropriate; and, secondly, whether the period of 28 years stipulated by the learned trial judge was manifestly excessive. In order to understand how these grounds arose, it is necessary to give a brief account of the facts of the case.

[4] The principal witness for the prosecution at the trial was Miss Shenay Campbell, the girlfriend of the deceased. The circumstances as described by Miss Campbell in her evidence were these. On the evening of 31 October 2008, Miss Campbell and the deceased were in her room at her home at 14 Kensington Crescent, Kingston 5. The applicant, who had been known to Miss Campbell for about 10 years before, also lived at 14 Kensington Crescent. The applicant was known to Miss Campbell as "Goosey" and "Max," and they had apparently lived with their respective families at 44 Old Hope Road at the same point in time some years before.

[5] At about 10:30 on the said evening, Miss Campbell and the deceased were seated on her bed next to each other, facing the door. There was a light, described by Miss Campbell as "bright," in the room. The room itself was 9 x 5 feet in size. Miss Campbell then saw when the door to the room was opened. Someone moved the curtain and a man came into the room with what Miss Campbell described as a shine, short, silver gun in his hand. This man she identified as the applicant.

[6] Miss Campbell said that she saw the applicant point the gun towards the deceased. The deceased got up off the bed and move towards the applicant. The

applicant fired a shot at the deceased. She saw the deceased holding his neck and crying. She then began to scream and the deceased sat back down on the bed, still holding his neck and crying. The applicant then went over to the deceased and pointed the gun to his head. She, Miss Campbell, pushed the applicant's hand away and told him, "Don't kill him". The applicant said, "How you mean, nuh kill him?". Then, after pushing her hand away, the applicant pushed the deceased down on the bed and fired another shot to his head. Miss Campbell's evidence was that she saw the deceased's body jump and blood came of his mouth and nose. The applicant then pointed the gun at Miss Campbell and said, "Hey gal, yuh ever talk seh ah me kill him, me ah go come back and kill you". He then left the room. Thereafter, Miss Campbell said, the applicant came back into the room, took the deceased's cellular telephone from the deceased's belt, and then left again. The entire incident lasted for about 30 seconds, an estimate which Miss Campbell maintained throughout. The deceased succumbed to his injuries before the police arrived and in due course he was buried.

[7] Miss Campbell's evidence was that at Kensington Crescent, the applicant occupied a room next to hers, separated by a distance of about 5 feet. While living at that address, she would see the applicant at least three times per day and, during the earlier period when their family had lived at 44 Old Hope Road, she would see him daily and they would talk to each other. While at Kensington Crescent, she specifically recalled an occasion, some two weeks before the incident of 31 October 2008, when the applicant had asked her for some of the curried chicken and rice meal as she prepared it in the yard and she had given it to him. Miss Campbell also testified to an

occasion, a couple of weeks before 31 October 2008, on which she had seen the applicant and the deceased in conversation, apparently about a motor cycle, described by her as "a big red bike", which was parked nearby.

[8] After the killing, Miss Campbell moved away from 14 Kensington Crescent. A couple weeks later, at about 12 midnight on 25 November 2008, Miss Campbell testified, she was awakened by the ringing of her cell phone, which was underneath her pillow. She answered the phone and she heard a male voice which she did not recognise. The person said "Is me man Goosey". She hung up the phone, but the applicant called back, asking her if she had hung up the phone because she was afraid. She did not respond to him, but, she said, the applicant was saying a lot of things. She then asked the applicant why he had killed the deceased, to which he replied, "remember mi bike what the bwoy dem come tek weh, a Colin bring dem back fi di bike dats why me kill him". Miss Campbell said that the applicant spoke to her in a friendly manner, as if he wanted her to forgive him. She further stated that the applicant asked her if she "rate him," but she did not know what he meant by that and she did not ask. The entire conversation lasted about 30 minutes.

[9] In due course, on 27 May 2009, after the matter has been investigated by the police, the applicant was arrested and charged with the murder of the deceased. When cautioned, his response was "I am innocent".

[10] The applicant gave evidence at the trial. He confirmed that he had lived at 14 Kensington Crescent, that his room was close to Miss Campbell's, that he would see her

on a regular basis and that they would talk to each other sometimes. He described her as a friend, whom he had known since childhood. However, he denied being known by either the name "Goosey" or "Max". The applicant testified that in June 2008, he had moved from 14 Kensington Crescent and had gone to live with his aunt in Greater Portmore; and that, since August 2008, he lived with his girlfriend, Kemisha Grant, in Waterford, St Catherine. At 10:30 pm on 31 October 2008, the night the deceased was killed, the applicant said he was at home with Miss Grant watching a movie and Miss Grant also gave evidence to the same general effect. The applicant maintained that he was therefore not the person who had attacked and killed the deceased. In addition, he denied having had any conversation with Miss Campbell on 25 November 2008 along the lines described by her.

[11] On this evidence, the jury returned a unanimous verdict of guilty of murder, after retiring for a few minutes short of one and a half hours.

[12] When this application came on for hearing before us, Mrs Ann-Marie Feurtado-Richards for the applicant sought and was granted, without objection from the Crown, permission to argue four supplemental grounds of appeal, as follows:

> "1. The Learned Trial Judge erred in failing to adequately direct the jury on voice identification of the Applicant, amounting to a non-direction.
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> 2. The Learned Trial Judge erred in allowing the Respondent to lead evidence relating to the 'admission' allegedly made by the Applicant on November 25, 2008 as the prejudicial effect far outweighed the probative value and/or in the alternative, the Learned Trial Judge by failing to give

a special direction on the treatment of this evidence amounted to a misdirection in law resulting in the Applicant receiving an unfair trial.

3. The Learned Trial Judge erred in failing to adequately direct the jury on visual identification of the Applicant, amounting to a non-direction, on the evidence applicable to the recognition of the Applicant.

4. The sentence imposed by the Learned Trial Judge was manifestly excessive in the circumstances."

[13] It may be convenient to deal with grounds 1 and 3 together, ground 1 raising the issue of voice identification and ground 3 raising the issue of visual identification. As has been seen, the prosecution adduced evidence of an alleged conversation between the applicant and Miss Campbell in which, if believed, the applicant effectively admitted killing the deceased. As regards this evidence, the learned trial judge directed the jury on its effect, as follows:

> "… So based on her evidence do you feel sure that she recognized the voice? Because if you are not sure that she recognize [sic] the voice, or you believe that she did not recognize the voice, then you must totally disregard the evidence that she has given you in relation to the person who called her that night and what was said. So if you are not sure she recognized the voice, then disregard what she said during that conversation. Do not use it to draw any adverse inferences against this accused man or to support her identification of him."

[14] The learned trial judge then added this:

> "But it is only if you are sure that she did recognize the voice that you can go on to consider the conversation, and if you are sure that she recognized the voice as 'Goosey' who she is telling you is Orandy Brown, then you can consider the

> words that were said; what you make of these words and what they mean."

[15] And then finally on this point, the learned trial judge said this:

> "You bear in mind what I told you. You have the [sic] decide whether or not you are sure that she did recognize his voice. Bear in mind the inconsistencies and if you come to [the] conclusion, Mr. Foreman and your Members, she did not recognize his voice and she was not speaking the truth when she said she did recognize his voice, then you must decide how this affects her overall credibility as a witness; in general, how it affects the Crown. It is a matter for you."

[16] Mrs Feurtado-Richards submitted that, in these circumstances, given that the applicant denied having had any such conversation with Miss Campbell, it was incumbent upon the learned trial judge to direct the jury on the need for caution in approaching evidence of voice identification particularly bearing in mind the real possibility of mistaken identification, and the fact that the witness, though honestly believing that the person at the other end of the line was the applicant, might nevertheless have been mistaken. It was submitted, the learned trial judge had failed to do and there was therefore a real possibility that there had been a miscarriage of justice which affected the fairness of the applicant's trial.

[17] In support of these submissions, Mrs Feurtado-Richards, very helpfully, referred the court to a number of cases, of which it is necessary to mention but a few. First, there is the case, **R v Rohan Taylor et al** (1993) 30 JLR 100, 107, in which Gordon JA said this:

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

[18] Secondly, there is **Kenneth Christie v R** (SCCA No 181/2006 judgment delivered 19 June 2009 at para. 3), in which Cooke JA said:

> "… In respect of voice identification evidence, … the caution that **Turnbull** mandates, is to be equally adopted in respect of the approach to voice identification."

[19] And thirdly, there is the decision of this court in **Donald Phipps v R** [2010] JMCA Crim 48 in which, at para. [137], this court said this:

> "In our view, the considerations which have influenced these developments in the United Kingdom and elsewhere are equally applicable to this jurisdiction, with the result that in cases of voice identification the judge should at the very least give to the jury a **Turnbull** warning, suitably adapted to the facts of the particular case before him. As with visual identification, much will depend on whether the defendant's voice was known to the witness before and with what degree of familiarity, but even in such cases the danger of mistaking one voice for another will need to be highlighted for the jury. It will also be necessary for the jury to consider

> whether at the time of recognition there was a sufficient opportunity for the identifying witness to properly identify the voice in question. While much of the standard **Turnbull** warning will probably be appropriate in most cases, the actual warning given in a particular case should nevertheless take into account the fact that some aspects of that warning may carry less, but sometimes more, importance in cases of voice identification. So that, for example, the circumstances of the actual identification in cases of violent crime, may be less stressful to the witness than in visual identification, but on the other hand, unlike with visual identification, the effects of the stress of the situation could well affect the speaker's voice. These are but examples and what is important is that the warning given in each case should reflect all the nuances of the particular case."

[20] Mrs Milwood-Moore for the Crown did not dissent from any of these propositions. Indeed, she readily acknowledged that the learned trial judge's directions on voice identification could not be described as comprehensive, bearing in mind the approach dictated by the authorities. However, she submitted:

> "… careful scrutiny of the directions in the context of the evidence that was led and the summation as a whole, reveals that the directions were adequate."

[21] As can be seen from the authorities cited by Mrs Feurtado-Richards, evidence of voice identification requires to be approached in much the same way as evidence of visual identification. What is called for is a suitably adapted **Turnbull** warning, which invites the jury to consider, among other things, the fact that an honest witness may nevertheless be mistaken. In our view, Mrs Milwood-Moore's concession that Straw J's directions in this case fell short of this standard was well made. For, as has been seen,

the learned trial judge's directions invited the jury to decide whether they were sure that Miss Campbell did recognise the applicant's voice without specifically alerting them to the possibility that, as convincing as Miss Campbell's evidence seemed on the point, she could equally have been making a mistake. It accordingly seems to us that, had the case for the prosecution depended solely on Miss Campbell's voice identification, it might have been difficult to sustain the conviction, given the learned trial judge's non-direction on the point of voice identification.

[22] But Mrs Milwood-Moore also called attention to the decision of this court in **Siccaturie Alcock v R** (SCCA No 88/1999 judgment delivered 14 April 2000), which was referred to with approval by this court in **Donald Phipps** (at para [135]), in which the court held that "… 'the evidence of voice identification was not decisive to the conviction' …" In the light of this, Mrs Milwood-Moore submitted that "[i]t is therefore necessary to look at the evidence of visual identification in the case".

[23] We agree with this submission. We will therefore go straight to ground 3, in which a complaint was made as to the learned trial judge's directions on visual identification.

[24] In this regard, Mrs Feurtado-Richards submitted that, notwithstanding what she described as a conscientious effort by the learned judge to comply with the **Turnbull** requirements, the summing-up fell short of the standard required to ensure that the difficulties involved in the identification of the applicant were placed before the jury with sufficient clarity. A complaint was also made as to the adequacy of the learned trial

judge's warning and the risk of false identification in recognition cases. Further, Mrs Feurtado-Richards submitted that the learned trial judge failed to relate the directions on identification to the evidence; and, further still, that the learned trial judge's direction to the jury on the proper approach to the applicant's alibi defence fell short of the required standard.

[25] Mrs Milwood-Moore, for her part, submitted that the learned trial judge's directions on identification were unimpeachable, in that, they had touched upon and isolated all the relevant factors for the jury's consideration. For the purposes of this judgment, it is only necessary, in our view, to restate what was described by the Board in the case of **Langford and Freeman v The State of Dominica** (2005) 66 WIR 194, to which Mrs Feurtado-Richards referred us. In that case, Lord Widgery CJ's well-known discussion of the principles in **R v Turnbull** [1977] QB 224, 228 was described as "the classic exposition of the position in relation to identification evidence". It reads as follows:

> "First, whenever the case against an accused depends wholly or substantially on the correctness of one or more identification 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.
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> 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.
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> Recognition may be more reliable than identification of a stranger: but, even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."

[26] We should also draw specific attention to Lord Widgery's observations on alibi evidence (at page 236):

> "Care should be taken by the judge when directing the jury about the support for an identification which may be derived from the fact that they have rejected an alibi. False alibis may be put forward for many reasons: an accused, for example, who has only his own truthful evidence to rely on may stupidly fabricate an alibi and get lying witnesses to support it out of fear that his own evidence will not be enough. Further, alibi witnesses can make genuine mistakes about dates and occasions like any other witnesses can. It is only when the jury is satisfied that the sole reason for the fabrication was to deceive them and there is no other explanation for its being put forward, that fabrication can provide any support for identification evidence. The jury

> should be reminded that proving the accused has told lies about where he was at the material time does not by itself prove that he was where the identifying witness says he was."

[27] It is against this background that we come now to what Straw J actually told the jury in this case. In her directions, the learned trial judge expressed the standard need for caution, as well as explored with the jury the issues relating to the lighting, the opportunity for identification, previous knowledge of the applicant by the witness, which was admitted by the applicant, and also incorporated a warning that even in recognition cases mistakes can be made in identification. This is what the learned trial judge said:

> "Now, Mr. Foreman and your members, the most important thing that this Crown has to prove to you, if you accept all of that, what I just put to you, is the identity of the person who fired those shots because that is what is in issue. You know, what is in issue, is not that Mr. Graham is dead or that he died from gunshot injuries, the defence not taking any issue with that. What they taking issue with, is who Shenay Campbell said did it, because what Mr. Graham is telling you, I was not there. So the major issue in this case concerns the visual identification of the shooter by Shenay Campbell and I will now have to direct you on how to treat identification evidence.
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> This is the trial where the case against the defendant depends wholly on the correctness of the identification of him and which is, he is alleging, is mistaken. I must therefore warn you of the special need for caution before directing the defendant in reliance on the evidence of identification. That is because it is possible for an honest witness to make a mistaken identification and this is so even when it is a case of recognition as it is in this case because this is not a case where the parties didn't know each other before. Both of them, both Shenay and Orandy, are telling you they know each other before. So this is not a case of

seeing the person for the first time, this is the case of recognition; even in a case of recognition, mistakes can be made.

You may have your own mistakes of seeing someone that you thought you knew and when you went up to the person, you realized that it wasn't the person. So even in a case of recognition, mistakes can be made, an honest witness can be a convincing witness. So you have to therefore examine carefully, the circumstances in which the identification was made. There are some questions you need to ask and consider when you are examining it. How long did the person say that they had the accused under observation and I will just remind you of the evidence as we go along. That's one question. The length of time they had to observe the person? What distance they were from the person? In what light? Did anything interfere with the observation? Was the person's face covered or masked or a hat pulled down? All of these things, you have to consider. Has the witness ever seen the person before and in this case, you know that this was so and if so, how often. So these are some of the issues that you have – will have to consider and so what I am going to do now, Mr. Foreman and just remind you of what Miss Campbell is telling you about these issues of identification.

But in dealing with this issue of identification, the first thing you have to decide is whether she is credible, in the sense that, is she deliberately lying about seeing him because they know each other, both of them say that. The first thing you have to decide, is she deliberately lying. If you are saying to yourself she is not lying, then you have to go on and consider, has she properly identified is she making a mistake, could she have been mistaken. So I am going to review her evidence about the issue of identification.

Let us speak about her knowledge of him, and I have spoken to you about some of it already. Shenay Campbell is telling you she has known the accused for about ten years up to the 31st of October, 2008. She knows him as Orandy Brown o/c 'Goosie' o/c 'Max'. He agrees that he knows her and she knows him and he is Orandy Brown, but he is not called 'Goosie' and 'Max'. She told you that at one time his family and hers were living at the same address on Old Hope Road and he has agreed with that. She knows his mother Christine, Daniel Henry, and he was living also at 14

Kensington and she saw him there. She tells you that she had a room to the back of the house at 14 Kensington Crescent and he had a room beside her; his door is about 5 feet from her. And up to two weeks before the incident he was living in the room beside her, but she said she last saw him two weeks before when she was cooking some chicken and curry and he asked her for some. She tells you he wasn't living at 14 Kensington Crescent on the month of October, but she can't say where he was living on the 31st. She cannot agree with the suggestion that he was not living at Kensington Crescent between July and August. Now, in relation to Old Hope Road, she said that she would see him every day, they would talk. And when he moved to Kensington, Orandy was already living there and at Kensington she would see him three times for the day; morning, day and sometimes in the evening. And she would see his face during those times, and they would speak to each other. She tells you that she also would see him in Manchester where they both have relatives living; so that is her knowledge of him, remember she told you that they would play childhood games together. She knew him as a child and he agreed to that and then both of them were living at Kensington.

Now, you heard that the incident took place at 10:30 p.m. so you know there was no flashlight, no sunlight. So you have to satisfy yourself that she had proper lighting to see him. She said she was in this room and there was a light there, electric light in the room. The light was on and it shines bright; so that is what she had told you. Remember Detective Constable Johnson also said that when he went into the room he observed light in the room, and Detective Paul Robinson told you he also observed light in that room. Now, the room, remember she went through and she described the dimension of the room and it was estimated by the court nine by five; so you can judge the size of the room. There is a bed in her room, the bed is position facing her door, the foot of the bed is closest to the door, two feet, the door. She told you that both herself and Kalead was sitting on the bed; she was by the foot and Kalead was touching distance of her. Now, Mr. Foreman and your members, remember Constable Dameon Johnson told you about his digital camera that he took to the scene and took

photographs of the room and the body. Remember he described to you all the details of when I review his evidence I will remind you of some of what he said. He explained to you that having taken pictures of the room, he downloaded the images, produced a booklet of the pictures he took at the scene. And that picture, Number 26, he did seven copies of it. Those copies were put into evidence as Exhibit Three.

Shenay Campbell later identified the picture, the photograph of the picture of her room, but it helps us to see the dimension of the room as you can see. Mr. Foreman and your members, you can see the doorway with the curtain as she described it to you, and you see a dresser and the fan and you see the foot of the bed there; so you can have a idea of dimensions of the room and how far the foot of the bed is away from the doorway. As you can see, it is not a very large room. So according to Miss Campbell, while herself and Kalead was there in the room, she saw the door opened and someone moved the curtain and entered with a gun. So then, you have an idea of the person coming into the room and how far she would have been from them. Because you have to satisfy yourself that she could properly see the person and she told you that she recognize this person to be Orandy Brown; she saw his face. There was nothing covering his face, nothing on his head and she could touch him. And she told you that he had a gun in his right hand and he was pointing the gun towards Kalead. Kalead got up and went towards him and she heard a sound, Bow! And she saw smoke and then Kalead held his neck and was crying and she sat back on the bed and then she told you that, remember, she on the bed you know, Orandy came up over him and put the gun to his head and she pushed his hand away and say, 'Don't kill him' and he said 'How you mean nuh kill him'. And Orandy push Kalead down on the bed and fired another shot and she said, at the right side of his head and she said at this time Orandy was close to her, she saw his face, and she could touch him. And as he was leaving he pointed the gun at her and said, 'Hey gal, if you ever talk sey a me kill him, a come back come kill you' and then he left the room and come back, took off Kalead's cell phone off his belt and then left again.

So, she told you the incident lasted about 30 seconds and she saw his face for that entire time. Remember I discussed with you the inconsistency of her not knowing seconds and

> times as she said previously and I told you that what the defence is telling you, she doesn't have a sufficient opportunity. That is a matter for you but I told you to use the narrative to see if she would have sufficient time in a room of this dimension to be able to make out the face of someone she knew before.
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> She agreed also that she was frightened and the defence is asking you to bear that in mind, that this is a frightened witness; so you have to be careful of how you can rely on the frightened witness in terms of identification. So that is a matter for you and remember that, Detective Huntley did tell you that she was frightened and that appeared to be – she appeared to be frightened and traumatized and she was crying. So there is evidence of this trauma, this fright. So you have to bear that in mind when assessing, if she properly identified the person. So Mr. Foreman and your members that is it in relation to identification. You look at the distance I said she was from the person. The lighting, was anything to obstruct the face; whether she knew the person before the time she had to see the person and when you look at all of that, you bear in mind that she is frightened. You bear in mind to see if she is a reliable person and having examined all of that, whether as I told you, is she deliberately lying about the person she saw and if you say she is not deliberately lying, you say to yourself, is she properly and correctly identifying the person that was in her room this night, bearing in mind the warning and caution I have given to you in relation to identification. So that is how you are going to approach identification evidence."

[28] In our view, absolutely no criticism can reasonably be made of these directions. As Mrs Milwood-Moore pointed out, in addition to giving the standard parts of the now traditional **Turnbull** directions, the learned trial judge reminded the jury of all factors relevant to the circumstances of the identification. As regards the period of observation of the assailant, we accept that, as Mrs Feurtado-Richards submitted, the learned trial judge was plainly wrong to suggest that the credibility of Miss Campbell's statement that the incident lasted 30 seconds was enhanced by the fact that she had said it on

five occasions. But it seems to us that this lapse on the part of the very experienced trial judge completely recedes in importance in the face of her very full and otherwise careful directions on identification.

[29] Finally, in this regard, Mrs Feurtado-Richards complained about the learned trial judge's directions on the question of alibi. What the learned trial judge told the jury was this:

> "Now, as I told you I am going to remind you of his evidence, but you know what his evidence is; that he was not there, he was at Shannon Way 10:30 that night, so he could not have been at 14 Kensington Crescent. So what he is telling you, he is raising a defence of alibi. The defence says that he was not at the scene of the crime when this was committed. Now, Mr. Foreman and your members, the Prosecution has to prove his guilt so that you are sure of it. He doesn't have to prove to you that he was elsewhere at this time. It is not his job, he has no duty to prove to you that he was not at Kensington, the Prosecution must satisfy you of his guilt. On the contrary, the Prosecution must disprove the alibi, and even if you conclude that the alibi was false, even if you come to that conclusion that does not, of itself, entitle you to convict the defendant. The prosecution must still make you sure of his guilt, because an alibi, sometimes, is invented to bolster a genuine defence. So, in other words, Mr. Foreman and members of the jury, he said he wasn't there and called a witness. So even if you come to the conclusion that he is lying and she lied, you can't say, you are guilty because they are lying. Even if you find that both of them are lying, you have to go back, look at the Crown's case and say, did Shenay Campbell identify the accused, Mr Orandy Brown."

[30] Mrs Feurtado-Richards submitted that, though "serviceable", these directions did not go far enough. In our judgment, when placed alongside the extract from Lord

Widgery CJ's judgment which we have already quoted (at paragraph [30] above) these directions cannot be faulted. What they did, as they were required to do, was to alert the jury to the dangers of allowing whatever view they might form as to the genuineness of the alibi to divert them from their real task, which was to consider whether the prosecution had satisfied them to the requisite standard of the applicant's guilt.

[31] We have therefore come to the clear conclusion that, despite the shortcomings in the learned trial judge's directions on the subject of voice identification, no complaint can be made about her approach to the question of visual identification. In these circumstances, it accordingly seems to us that the evidence of visual identification, which the jury obviously accepted after full and proper directions from the judge, was such that it cannot be said that there was any miscarriage of justice in this case.

[32] In the light of the view we have taken of the strength of the evidence of visual identification, the applicant's further complaint in ground 3 that the prejudicial effect of the evidence of voice identification outweighed its probative value assumes, it seems to us, far lesser significance. Suffice it to say, we think, that the evidence was obviously highly probative, constituting, as it did, a clear admission by the applicant of his direct involvement in the deceased's murder. The fault we have found with the reliance on that evidence has everything to do with the learned trial judge's handling of it in her summing-up, and nothing to do with its intrinsic quality and probative value. So therefore we do not think that the learned trial judge can be faulted for having admitted the evidence when she did.

[33] Finally, on the question of sentence, which is the subject of ground 4, Mrs Feurtado-Richards submitted that the learned trial judge's stipulation that the applicant should serve 28 years in custody before becoming eligible for parole was manifestly excessive in the circumstances. In particular, Mrs Feurtado-Richards complained that the judge had failed to take into account sufficiently (i) the applicant's age at the time of sentencing (21 years); (ii) the fact that the applicant had no previous convictions; and (iii) the fact that the applicant was gainfully employed at the time of his arrest. These are all, of course, highly relevant matters and we would have been constrained to look very seriously at the sentence imposed if we were led to believe that the learned trial judge had left them out of account in considering the sentence of the applicant. However, it is clear from what the learned trial judge said in her sentencing remarks that she in fact covered all of the relevant matters:

> "Mr. Brown, you have been found guilty, sir, of the most serious offence, the offence of murder. In passing sentence on you there are certain guidelines that I must consider.
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> I consider the individual standing before me; your antecedent, as your counsel, Mr. McFarlane, has asked me to do. Apart from your antecedents, I have to consider your age. You are a young man and based on the antecedents you have been gainfully employed. You have received education and has been gainfully employed steadily.
>
> You have no previous convictions, but on the other side I have to consider the serious offence committed and I have to consider the circumstance of the offence. It really was a cold-blooded killing; or should I say execution of a young man who was also in the prime of his life.
>
> It was committed in the presence of his girlfriend with a baby present in the room and you obviously had no fear. Nothing covered your face. She knew you.

> You went in and it was committed with a firearm which continues to be a serious concern in this nation. The multiplicity of illegal firearms available for use against other human beings, and apparently for some trivial reason you went into that room with the firearm, you fired a shot that caught him in his throat and you were not content with that and although his girlfriend begged you not to kill him, the words were 'How you mean mi mus'n kill him,' and you put the gun to his head and fired the second shot.
>
> It was cold-blooded. A cold-blooded execution of another human being and I am wondering if you have sat down to consider what you did. You took a life which you have no right to do, because God is the one who gives us life. You had no right to take that man's life, and no legal justification for it and so I have to consider the circumstances of the murder, apparently premeditated and the young lady was threatened after the act was committed.
>
> So it is a serious matter and I have to balance all of that in deciding what to do with you.
>
> Now, as your attorney said, it is a matter where it is life imprisonment, and I so do order that you be sentenced to prison for life, but I will now have to make a distinction as to how many years that you should serve before parole is considered, and so this is why I have to look at you and look at the circumstances.
>
> The antecedents said you believed in God. I hope you take the time to consider God. I hope you take the time to consider why he brought you into this life and maybe to gain a change of heart and a change of perspective about where you are going.
>
> So, it is life imprisonment. I will order that you serve twenty-eight (28) years before parole is considered."

[34] In our view, the learned trial judge considered all the pertinent matters and we do not therefore think that there is any basis for interfering with this exercise of the judge's sentencing discretion.

[35] It further seems to us that, given the circumstances of the offence in this case, a minimum period before parole of 28 years cannot be said to be manifestly excessive. So, in the result, the application for leave to appeal is refused and the court orders that the sentence is to run from the date on which it was imposed, which was 26 January 2011.

[36] We cannot leave this matter without placing on record our appreciation to Mrs Feurtado-Richards for the exemplary manner in which she has conducted the appeal on behalf of the applicant. Everything that could possibly be said on his behalf was not only said by her, but well said. We would also like to state our appreciation to counsel for the Crown, Mrs Milwood-Moore, whose usual sense of restraint and fairness was much in evidence in this matter.