[2016] JMCA Crim 20

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS 61 & 62/2012

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

SEIAN FORBES
TAMOY MEGGIE v R

Mrs Jacqueline Samuels-Brown QC, instructed by Mrs Velma Hylton QC, for the applicants

Miss Paula Llewellyn QC, Director of Public Prosecutions and Miss Cheryl-lee Bolton for the Crown

9 November; 1, 2, December 2015 and 10 June 2016

P WILLIAMS JA (AG)

[1] Messrs Seian Forbes and Tamoy Meggie, the applicants, along with Mr Kemar Gayle, were tried on indictment in the High Court Division of the Gun Court in the parish of Manchester on 5, 6, 7 and 8 June 2012 by Simmons J. They were tried for the following offences:

(1) Illegal possession of firearm – contrary to section 20(1)(h) of the Firearms Act

(2) Burglary – contrary to section 39(1)(a) of the Larceny Act

(3) Robbery with Aggravation – contrary to section 37(1)(a) of the Larceny Act

(4) Buggery – contrary to common law

(5) Shop breaking – contrary to section 40 of the Larceny Act

(6) Larceny – contrary to section 5 of the Larceny Act

[2] On 7 June 2012, Mr Gayle pleaded guilty in respect of the offences of illegal possession of firearm, burglary, shop breaking and larceny. On 8 June, Mr Meggie was convicted on all six counts and Mr Forbes was acquitted on the charge of buggery but was convicted on all other accounts. On 22 June 2012 the applicants were both sentenced to various terms of imprisonment. Sentences between three to 10 years were imposed on Mr Meggie and between three to six years on Mr Forbes with sentences for both men to run concurrently.

[3] In July 2012, the applicants applied for permission to appeal against conviction and sentence and at that time indicated their desire to apply for leave to call witnesses on their appeal. They also at that time, filed simultaneous applications requesting that they be released on bail pending the hearing of the applications for leave to appeal on such terms and conditions as this court may deem just in all the circumstances. A single judge of this court considered the applications, however, the transcript of the proceedings was not available then. In the application, affidavits from counsel who had represented the applicants at the trial were presented and submissions were made on behalf of both applicants as well as the Crown. The single judge requested copies of

the statements which had been taken in respect of this matter and which were on the file of the offices of the Director of Public Prosecutions.

[4] The applications for bail were refused. The applications for leave to appeal the convictions and sentences were adjourned until the production of the transcript. The applicants were advised that once the transcript was available, even in respect of the summation only, all the applications could be renewed, if thought desirable.

[5] On 7 March 2013, another single judge of this court considered the renewed applications made when the transcript had become available. It was the view of the single judge that the main issues which arose in the case had been appropriately dealt with by the learned trial judge in full and careful directions to herself. The applications for leave to appeal conviction and sentence were refused. As is their right, the applicants renewed their applications before the court itself. In pursuance of their applications, both also applied for permission to adduce fresh evidence before the court.

The evidence at trial

[6] On 10 February 2010 sometime after 8:30 pm, the complainant was at her home in Scott's Pass District in Clarendon. She had just got home from work and was getting ready to have a bath when something on television caught her interest. She sat watching the television, dressed in a shirt alone, with her six year old son who fell asleep with his head in her lap.

[7] She then heard a loud sound and the door of her home flew open. Two men entered, one with a gun and one with a knife. She got up and went towards the door, upon hearing the noise, and the men entered and came towards her. The men got within touching distance of her and she could see their faces. There were five lights on in her home, one in the hall where she had been watching television, one in the kitchen nearby, one in a bathroom also close by, one in her bedroom and one in the bedroom of her children.

[8] She saw the men's faces for about 30 seconds before they covered their mouths with their T-Shirts and demanded money and gold from her. She responded that she had none and was told by one of the men "A four a wi deh yah, if you mek nuh noise you know how it go". She recognized the two men she saw entering as Tammy and Jay. At the trial she identified Sean Forbes as Jay and Tamoy Meggie as Tammy. She saw Jay with the knife while it was Tammy who had the gun.

[9] She testified that she had known Jay for some six months prior to that night. She knew him to be a taxi operator and had on occasion taken his taxi from May Pen. The route he operated she said was from May Pen to Mandeville. She explained that she operated a business near to where she lived, approximately 100 yards away from the house. This business was a bar and restaurant. It was at the restaurant that she said she had come to be acquainted with Jay. He purchased food there almost every night and she had seen him earlier that night at about 8:25 pm. She also knew him to be a selector on a sound system which he operated with Tammy.

[10] She knew Tammy to be a police officer and had known him for about 17 years. She would often see him driving a police van transporting prisoners. She knew members of his family. She knew he often stayed at the home of his child's mother who lived approximately half an hour away from where she lived. She remembered speaking to him on one occasion and this had been in relation to the sound system. She knew that Tammy's child's mother was related to Jay.

[11] Once inside the house, that night of 10 February, the men demanded money and gold. Tammy held her hand and led her to a chair in the hall and put her to sit down. She was then blindfolded with a handkerchief. She was then asked if she had seen them and she responded "mi neva si uno". She said it was Tammy who did all the talking.

[12] She was led into a bedroom, and placed to lie face down on the floor. Her hand and feet were bound and clothes thrown on top of her back. As she lay on the floor, she heard sounds of the place being searched.

[13] She was then asked for the keys to the business place next door. Her eyes were uncovered briefly for her to identify the key but she was warned not to look up. She then heard more noises from both inside and outside of the house. Within minutes, she heard Tammy asking her if she was ready for her "fuck". The cord was removed from her feet and she felt something go in her bottom and despite her protest, this assault continued for about eight minutes. She said this thing felt like a penis. She did not see who it was who was assaulting her but it was Tammy who spoke to her during the act.

[14] After sometime the men left and her neighbour, Miss Joan Rueben, came in. Miss Reuben testified that she had awoken at about 12:45 am and had seen what appeared to be a phone flashlight in a trench beside the complainant's shop. She then heard a car move off. She made checks which eventually led her to the complainant's house and she knocked on the front door which fell to the ground. She called the complainant but got no response. She went inside and found the complainant lying on her stomach on the floor of the bedroom, with hands and feet bound and with clothes covering her back. Miss Reuben ran out and went and got her boyfriend.

[15] They both returned and released the complainant. The police were called. Detective Constable Jason Ricketts and Corporal Zena Harrison were on patrol duties in the area and, upon receiving the report, went to the complainant's home. The complainant was seen on the verandah of her home and she made a report to the officers. She told them of her ordeal and gave them the names of the persons she said were responsible. The officers made observations of the premises and personnel from the Scenes of Crime Unit were contacted.

[16] The complainant made checks and noted items missing from both her home and business place. The officers eventually escorted her to the Mandeville Regional Hospital where she was examined and treated by a doctor. This doctor testified that injuries were seen on the complainant's hands, feet and anus. In particular, the injuries seen to her anus were consistent with infliction by blunt force trauma and could have been caused by a penis.

[17] Detective Sergeant Bryan Donaldson was the officer from the Area III Scenes of Crime Unit who visited and processed the scene on 11 February at about 8:00 am. He took photographs of the scene, some of which were admitted into evidence. The officer also lifted readable fingerprints from a plastic container found under items of clothing on the floor of a bedroom. He compiled a disc and three backing cards with the developed latent fingerprint impressions.

[18] Detective Sergeant Wayne Butler of the automated fingerprints identification section on 25 February 2010 was given these items relating to the latent fingerprint impressions. On 1 February 2012 he was given rolled ink impressions on a CIB 01 fingerprint form bearing the name Kemar Gayle. He then compared both fingerprint impressions and found them to be identical. It was after this evidence was given that Mr Kemar Gayle pleaded guilty to illegal possession of firearm, burglary, shop breaking and larceny.

[19] Detective Sergeant Owen Hyatt was the officer who took charge of the investigations into this matter. He testified to receiving the initial report from Detective Constable Jason Ricketts at about 5:00 am on 11 February 2010. He visited the scene where he saw and spoke with the complainant. He made observations of the scene and assisted by interviewing potential witnesses.

[20] Detective Sergeant Hyatt testified that he subsequently received a statement from Detective Constable Ricketts and, realizing that one of the persons implicated was a police officer stationed at Christiana Police Station, he visited that station and made

enquiries into the movements of this officer, Special Corporal Tamoy Meggie who was also called Tammy. Sergeant Hyatt subsequently requested and received verified entries taken from the station diary and firearm movement register in relation to the activity of the applicant Meggie.

[21] On 17 February 2010, Detective Sergeant Hyatt went to the Christiana Police Station where he saw and spoke with the applicant Meggie. Having been informed of the incident that had taken place at Scott's Pass on 10 February in which he was implicated, Meggie responded, "mi hear 'bout de incident long time cause mi commando did call me from the morning dem say it happen and tell me bout it". Detective Sergeant Hyatt subsequently took from Meggie a black-coloured glock pistol issued to him during his duties.

[22] Also on 17 February, Detective Constable Ricketts was a part of a police party which went on operations in the area of Scott's Pass. The applicant Forbes was seen and informed of this matter under police investigation in which he was a suspect. After being cautioned he responded, "Mi know officer, because Meggie did call and tell me seh dem have it fi seh a we rob Cheryl".

[23] The applicants were on that said day both placed into custody and Detective Sergeant Hyatt informed them that identification parades would be held in respect of them both. On 17 February, Detective Sergeant Hyatt made the necessary applications to Sergeant Valdin Amos of the Visual Identification Unit for the parades to be conducted. Having received the request, Sergeant Amos communicated with the

applicants and they advised him of their attorney-at-law being Queen's Counsel, Miss V Hylton.

[24] Contact was made with their attorney-at-law and arrangements were made for the visual identification parades to be held on 18 February. The complainant attended the police station on that date and in the presence of the attorney-at-law for both applicants, two video identification parades were held, one for each applicant. The complainant identified both. Detective Sergeant Hyatt was subsequently advised of the result of the identification parades.

[25] Upon being so advised, Detective Sergeant Hyatt conducted a question and answer session with each applicant on 19 February 2010. The first was held with Meggie who was asked and answered a total of 61 questions in the presence of his attorney. Forbes was later on the same day asked and answered a total of 39 questions. Also in the presence of his attorney-at-law. Both men were eventually arrested and charged on 24 February 2010.

[26] At the conclusion of the case for the prosecution, Forbes gave evidence on oath. He denied going to the home of the complainant on the night of 10 February 2010 and doing any of the acts he was being accused of. His defence was an alibi. He was at home taking care of his then one year old son. He had arrived home that evening from about 6:00 pm and had remained there all night. Upon his arrival home, he had proceeded to his aunt's house which was in the same yard. This aunt, Philon Forbes, was the person who cared for his child when he and the child's mother were at work.

[27] Miss Forbes was called as a witness for her nephew. She testified that she had seen Mr Forbes some minutes after 6:00 pm on 10 February 2010. At that time she had handed him his child, then he went into his house and she next saw him the following morning. Miss Forbes also testified to seeing the applicant Meggie on that night. Miss Forbes was the mother of the woman who had a child for Meggie.

[28] She testified that she saw the applicant Meggie sometime after 11 o'clock that night. He had spoken to her earlier that evening and she had left dinner for him. He had come into her room while she was watching news and had taken up his dinner and gone into her daughter's, his lady friend's, room. Miss Forbes described how it was she who had awoken him the next morning at about 8:00 am. She explained that Meggie spent most of his time at her house since that was where his then three year-old child and her mother lived.

[29] Mr Forbes admitted knowing the complainant. He acknowledged being a taxi-driver but said his route was from Mandeville to Toll Gate not to May Pen. He also acknowledged his involvement with a sound system which he operated with Mr Meggie. He recalled having had a conversation with the complainant about the sound system. He admitted going to the complainant's restaurant on the evening of 10 February but had not bought any food as he had had to leave before it was ready. He testified that Meggie was one of his best friends.

[30] The applicant Meggie also gave sworn evidence. He testified to being at work on 10 February at the Christiana Police Station from 7:00 am to 3:00 pm. He left work at

about 6:00 pm and went from Christiana to Mandeville. Earlier that day his mother had called him and asked that he purchase a loaf of bread. He did make the purchase and eventually left Mandeville at about 8:30 pm, travelling by taxi to Scott's Pass. Once there he proceeded to walk to his mother's house at St Toolis Road, Porus. As he walked, a car driven by Orett Blake "stop at [his] feet". He got into the car and eventually got to his mother's home some time after 9:00 pm, where he remained in the company of family members and friends until 11:00 pm.

[31] His mother then drove him to his child's mother's home where he remained until the next morning. He testified to seeing Miss Philon Forbes, getting his dinner and then returning to his lady friend's room. He denied going to the complainant's home at any time during the night of 10 February. He denied robbing, assaulting or terrorizing her.

[32] Mr Meggie acknowledged that he knew the complainant. He admitted that he had spoken to her on one occasion in relation to the sound system he operated with Jay. He knew of the shop the complainant operated and had been there on two occasions. He admitted that on the night of 10 February he did have a firearm in his possession. This however, was a service firearm which he was entitled to have in his possession by virtue of his being a police officer.

[33] Sonja Bryan, the mother of Mr Meggie, testified that she had called her son on 10 February requesting him to buy a loaf of bread. He came to the home in St Toolis with it at about 8:00 pm or 9:00 pm. He remained at the house until she took him to his girlfriend's house at Park Village.

[34] Mr Greyson Martin was also called as a witness by Mr Meggie. He testified to being a passenger in the motor vehicle which had been driven by Orett Blake and which had stopped for Mr Meggie on 10 February. It was at about 9:00 pm that Mr Martin had seen Mr Meggie walking on the St Toolis Road. Mr Martin recalled Mr Meggie entering the vehicle with a bag which he thought contained a loaf of bread. He had formed that opinion because it smelled freshly baked.

[35] Mr Meggie also called his brother Mr Aaron Thompson as a witness. Mr Thompson testified that he had been at home in St Toolis where he lived with his mother, on the night of 10 February. He remembered his brother arriving there at about 9:00 pm and remaining there until about 11:00 pm, when his mother drove him away.

[36] The major issue in the case was whether the identification of the applicants as the persons who forcibly entered the home of the complainant and robbed and assaulted her was correct.

The application for leave to appeal

[37] The applicants, with the permission of the court, replaced the original grounds filed with supplemental grounds as follows:

> "(1) The evidence as to the identification relative to the two appellants have [sic] been so discredited and/or rendered unreliable that the appellants ought not to have been convicted on the said evidence; whereupon there has been a miscarriage of justice.

(2) In her summing up the learned trial judge failed to have regard to and/or to demonstrate that she took into account patent weaknesses in the identification evidence whereupon the appellant's chances of acquittal was, [sic] impaired.

(3) The learned trial judge failed to apply the law as it relates to alibi evidence tendered on behalf of the appellants whereby the appellants' chances of acquittal was, [sic] impaired

(4) The learned trial judge erred in convicting the appellants as she ought to have accepted the evidence of alibi tendered on behalf of the appellants and thereby find them not guilty.

(5) There has been no evidence tendered to support the charge of robbery with aggravation as set out in count 3 of the indictment and accordingly verdicts of not guilty ought to have been arrived at with respect to both appellants on this count.

(6) The learned trial judge erred in convicting the appellant, Tamoy Meggie of the offence of buggery as there was no evidence or not sufficient evidence to support the charge.

(7) The appellants were deprived of the benefit of the law relative to character evidence in that the learned trial judge failed to apply the said law to the evidence and rejected evidence of character in the absence of any or any sufficient basis for doing so.

(8) The fact of discovery of the co-accused Kemar Gayle's fingerprints on a cup found in the virtual complainant's premises and the guilty plea of the co-accused Kemar Gayle while the trial proceeded are all matters that the learned trial judge ought to have taken into account in the appellants' favour and as supportive of their defence and/or innocence. The learned trial judge failed to do so whereby their chances of acquittal was[sic] impaired.

(9) The learned trial judge erred in finding the appellants guilty as there is no evidence that they acted in concert with Kemar Gayle whose guilty plea was accepted by the learned trial judge.

(10) The summing up is unbalanced and/or unfair as the learned trial judge has overlooked inconsistencies and weaknesses on the prosecution's case disregarded evidence favourable

to the defence and rejected the appellants' defence for reasons which are inadequate and/or unsupportable in law.

(11) The appellants did not receive a fair trial as material which impacted on the credibility of the prosecutor's case and which was in the possession of the prosecution and as well was not available to the appellants during the trial.

In the premises there has been a miscarriage of justice relative to both appellants."

[38] The application to adduce fresh evidence before the court was considered over 5 days in September, October and November 2013 and 16 May 2014. This court determined that the evidence the applicants were seeking to place before the court was in respect of two aspects of the case. The first was in respect of the identity of the individuals involved with Mr Gayle in the commission of the offence and the second concerned whether the complainant told the police, when they first attended her home, the names of her attackers. The admission into evidence of the following documents was being sought:

(i) Extract from the Station Diary of the Porus Police Station being entry number 27 made on February 11, 2010 by Constable J Ricketts.

(ii) Statement made by Detective Sergeant Owen Hyatt, [in] the form of a note handed to Queens Counsel Velma Hylton and as referred to in her affidavit sworn to on July 16, 2012 and affidavit of Lorenzo Eccleston sworn to on September 25, 2013.

(iii) Statement of Kemar Gayle dated June 22, 2012 and referred to in affidavit of Lorenzo Eccleston dated September 25, 2013.

(iv) Evidence contained in the affidavits of Queen's Counsel Velma Hylton sworn to on June 21, 2012, July 16, 2012 and July 31, 2012.

[39] This Court in its decision reported as [2014] JMCA App 12 found and ordered as follows:

> "(a) The application to adduce into evidence, at the hearing of the appeal, the statement of Mr Kemar Gayle made on 22 June 2012, is refused.
>
> (b) The application to adduce into evidence at the hearing of the appeal, the note written by Sergeant Hyatt, is refused.
>
> (c) The application to adduce into evidence at the hearing of the appeal, the entry made by Constable Jason Ricketts on 11 February 2010 in the station diary of the Porus Police Station is granted.
>
> (d) Constable Ricketts shall be summoned to attend the hearing of the appeal in order to be cross-examined.
>
> (e) The sub-officer in charge of the Porus Police Station shall be summoned to produce the said station diary at the hearing of the appeal."

The fresh evidence

[40] At the hearing of the fresh evidence, this court was advised that Constable Jason Ricketts had resigned from the force and had left the island. This court decided to proceed with the order made at (e]), that is, to have the sub-officer attend with the relevant station diary with its entry made by Constable Ricketts. However, the challenge was recognized that the entry could only properly be admitted through the maker.

[41] The learned Director, quite commendably, indicated that if the interest of justice would be served by this court having sight of it, there would be no objection taken to

this being done given the narrow use that any court could make of the entry. She reminded the court of the authority of **R v Charles Jones and Raymond White** (1976) 15 JLR 20 where it was held:

> "A police station diary is not a public document and evidence as to the contents of an entry therein cannot, therefore, be led to establish the truth of such entry as distinct from the fact that such entry was made."

[42] In light of the stance taken by the learned Director, this court decided to allow the diary to be given into evidence, for what it was worth. It was made clear that by this ruling we were not purporting to contradict the decision of **R v Jones and White** in anyway insofar as the evidential status of the station diary is concerned.

[43] Superintendent Vendolyn Cameron-Powell, the commanding officer for the Manchester Division since 7 September 2015, testified and identified the station diary from the Porus Police Station with the entry made on 11 February 2010. She further identified the entry no 27 as having been signed by Constable Ricketts. Under cross-examination, the superintendent opined that the entry had been written by two persons.

The Station Diary

[44] The entry bore the time 12:30 pm and was titled: Report Burglary & larceny (2) Rape (3) Robbery with aggravation. It stated:

> "Constable J Ricketts is reporting on behalf of [complainant] 32 years old. DOB 19/7/77, Businesswoman of Scott's Pass District,

> Clarendon on a case of Burglary and Larceny Rape and Robbery with Aggravation committed on Wednesday, the 10th of February 2010 about 9:30 pm at Scott's Pass District, Clarendon. Information on hand is that complainant who operates a bar along the Scott's Pass Main Road securely locked up her business place about 8:30 pm and retired to her dwelling which is about fifty yards away. Whilst watching television the front door to her dwelling place was forced open and two (2) men, one armed with a gun and the other with a knife entered. The men demanded money and then proceeded to tie her up and ransacked the premises. The men then stole therefrom one blender and a tool pan from the house. Before leaving one of the men had sexual intercourse with her against her will. The men also took the keys for the business place, went there and removed a quantity of assorted alcohol beverages, one (1) 32 inch colour television set, one (1) component set and One (1) Luxon DVD Player. The men then escaped in a waiting motor car which was parked nearby. The value and brand names of the items stolen are not yet ascertained. The items are not insured. Complainant was taken to the Mandeville Regional Hospital where she was medically examined. Scene was visited by DSP I/O Crime "L" and members of the Porus Police to include CIB staff and also members of the Area III Crime Scene Department # 10579 Constable J. Ricketts of the Porus CIB is carrying out investigations supervised by #1377 Detective Sergeant O Hyatt."

The appeal

[45] In making the submissions on behalf of the applicants, Mrs Samuels-Brown QC dealt with some grounds together and that manner will be used in considering the application.

Ground 1

The evidence as to the identification relative to the two appellants have been so discredited and/or rendered unreliable that the appellants ought not to have been convicted on the said evidence; whereupon there has been a miscarriage of justice.

Ground 2

In her summing up the learned trial judge failed to have regard to and/or demonstrate that she took into account patent weaknesses in the identification evidence, whereupon the appellants chances of acquittal was [sic] impaired.

The Submissions

[46] Mrs Samuels-Brown observed that the learned trial judge correctly isolated the main issues in the case as being the reliability of the identification evidence and the credibility of the prosecution's witnesses, in particular the complainant, as well as the alibi and the character evidence adduced. However, she complained that the learned trial judge overlooked weaknesses in the prosecution's case and omitted to take into account or sufficiently into account evidence favourable to the defence and that as a whole her summing up was biased in favour of the prosecution.

[47] Learned Queen's Counsel recognized that the case put forward by the prosecution was one of recognition but that this does not by itself make identification evidence unchallengeable or obviate the requirement for appropriate warning. She acknowledged that while there were inconsistencies in the evidence of the complainant relative to her prior knowledge of the appellants, and while there were differences between her evidence and that of the appellants as to the circumstances and/or occasions on which they were in contact, there was agreement that the complainant and the applicants were known to each other before the night of the incident.

[48] The main thrust of learned Queen's Counsel's attack on the issue of the correctness of the identification of the applicants as the men who entered the complainant's home that night was that the evidence, on an objective analysis, revealed that "to a probability, the opportunity presented to the complainant to identify her assailants was so limited as to amount to a fleeting glance". The complaint was that the learned trial judge failed to take this fact into account.

[49] Mrs Samuels-Brown contended that whether it is in a case of "first identification" or one of "recognition", the evidence in relation to the opportunities to observe the assailants and evidence which impugns the credibility of the witness must be specifically taken into account and the "Turnbull/Junior Reid warning" applied. She relied on the well-known authorities **R v Turnbull** [1976] 3 All ER 549 and **Junior Reid v R** [1990] 1 AC 363.

[50] In highlighting weaknesses in the identification evidence, learned Queen's Counsel pointed to the fact that the complainant said she had been blindfolded within seconds of the men entering the house, and this must be considered along with her assertion that they had put their shirts over their mouths as soon as they had entered the house. The complainant was noted to have given two different estimations of the time she had been able to observe the faces of the men. At one point she had said 30 seconds but when, while being cross-examined she was confronted with the statement she had given to the police where she had said a few seconds, she accepted it was a few seconds. It was further submitted that the time for the complainant's observation

of the men was shortened even further since during that time her attention was divided between the two men and was not restricted to their faces.

[51] Mrs Samuels Brown submitted that the fresh evidence had serious implications for the issues of identification and credibility. It was her contention that it cannot be said that if the court had had the benefit of the entry made by Constable Ricketts in the station diary, it may not have had reasonable doubt as to the identification evidence which was being challenged by the defence.

[52] Mrs Samuels Brown emphasized that the fresh evidence was supportive of the applicants' cases that since their names were not initially called by the complainant, it supported their alibi evidence thus impugning the credibility of the recognition previously coming from the prosecution witnesses. It was Mrs Samuels-Brown's contention that although the complainant had testified that she had named her assailants and the officers had supported her assertions that she had done so, the fact that the names did not appear in the station diary meant that the credibility of all three witnesses ought to be brought into issue. The learned Queen's Counsel contended further that, in these circumstances, the learned trial judge was prevented from taking account of this additional weakness of the prosecution's evidence because material evidence was kept from the court and not just the defence. She submitted that the learned trial judge's summation would have had to be tailored to take into account this fresh evidence.

[53] On the relevance of the fresh evidence, Mrs Samuels Brown relied on **R v Page** [1967] 10 JLR 79, **R v Collin Mann** SCCA No 1/2003, delivered 30 July 2004, and **R v Shawn Allen** SCCA No 7/2001, delivered 22 March 2002.

[54] There was further complaint relating to the fresh evidence in that there was a breach on the part of the prosecution of full disclosure in their failure to share the station diary entry with the defence. The case of **R v Ward** [1993] 2 All ER 577 was relied on. In that case the court had held that it was the prosecution's duty at common law to disclose all relevant material and had included four categories of individuals and organizations in the term "the prosecution". The non-disclosure of certain items to the defence was there held by the court to have cumulatively amounted to a material irregularity which, on its own, undoubtedly required the appellant's conviction to be quashed.

[55] In the instant cases, learned Queen's Counsel contended that the entry in the station diary could have been effectively utilized in the course of cross-examination as a previously inconsistent statement by Constable Ricketts and it could have been of assistance in the cross-examination of the supervising investigator. Mrs Samuels-Brown concluded on this point, that this "was a breach of duty on the prosecution of full disclosure which is independent of any application by the defence, more so in a case such as this where the information which can be of the assistance of the defence is in the custody of and peculiarly within the knowledge of the prosecution, were it otherwise the defence would be required to whistle in the dark and run the risk of drowning on fishing expeditions".

[56] There was also specific areas of complaints made by Mrs Samuels-Brown about the manner in which the learned trial judge dealt with the facts found on the evidence given on identification. She complained that the learned trial judge ought to have given consideration that an invasion by the applicants of the complainant's house without any attempt to disguise themselves before entering defied logic and common sense. Further, she submitted the learned trial judge had erred in her conclusion that in the context of the case there was no material difference between 30 seconds and a few seconds. Queen's Counsel also complained that the learned trial judge undertook no analysis whatsoever of the extent of the contact between each appellant and the complainant prior to 10 February 2010 or the passage of time between the only occasion that the complainant spoke to one of the applicants and the date of the incident.

[57] Mrs Samuels-Brown contended that the learned trial judge, in assessing whether the complainant could have been mistaken, erroneously factored in that the applicants were subsequently identified by the complainant at separate identification parades omitting to take into account that it was agreed on all sides that the men were known before. There was also complaint that although referenced, there was no account taken by the learned trial judge of the evidence that despite reference to her assailants some 24 times in her statement, nowhere does the complainant call the men's names.

[58] In response for the prosecution, the Director submitted that the circumstances of the identification are neither tenuous nor can it be said to have a base so slender that it can be deemed to be unreliable. Additionally, she contended that the learned trial

judge dealt with the issue of identification, visual and voice, carefully and extensively in her directions to herself and the warnings she gave herself were in keeping with the required warning per **R v Turnbull**. The learned Director submitted that the transcript clearly revealed the mind of the learned trial judge and demonstrated that the correct warnings and principles had been embraced.

[59] It was the Director's contention that since there was no denial that the complainant and the men were known to each other, it became academic as to whether the circumstances detailed by the complainant as to how she knew the men were consistent with theirs. What remained important was the assessment of her credibility.

[60] Miss Llewellyn QC took issue with the submission made that the complainant had referred to the men 22 times in her statement without once calling their names by indicating that the names had in fact been mentioned in the first paragraph of the statement, since the complainant had indicated that-

> "… both of the men were known to me by face and alias name Jay and Tammy".

[61] Thus Miss Llewellyn contended that all other references were foreshadowed by her assertion in this first paragraph. Further, she submitted, the learned trial judge noted that the complainant had explained any omission in calling their names as being as a result of her telling Constable Ricketts and Woman Corporal Harrison the applicants' names on their arrival at the scene and therefore the officers would have known who she was referring to. The officers testified to having been told the names

and whereas the challenge to Woman Constable Harrison under cross-examination was as to when she learnt of the names, Constable Ricketts was not challenged on this matter.

[62] The learned Director urged that the failure of Constable Ricketts to record the names of the assailants in the station diary entry cannot be viewed as impugning the complainant's assertion that she had seen and recognized her assailants. She submitted that as the trier of fact, the learned trial judge was at liberty to dissect and accept parts of the witnesses' evidence accepted as being credible and ultimately the identification evidence of the complainant remained untouched by the station diary.

[63] The learned Director sought to distinguish the cases of **R v Shawn Allen** and **R v Collin Mann** since in the instant case there was an abundance of evidence which was highly credible such that the station diary entry could not affect the conviction in the manner it had in those two cases.

[64] Miss Llewellyn submitted that the learned trial judge had considered the inconsistencies in the complainant's evidence but had found correctly that they did not seriously undermine the complainant's credibility and that the complainant had remained consistent throughout her evidence in chief and under cross-examination. The learned Director concluded that the applicants' complaint as to the value and treatment of the identification evidence is misconceived.

Discussion and analysis

[65] There can be no question that the learned trial judge, quite appropriately, from early in her summation properly identified, the issues which arose in this case as being visual identification, voice identification, recognition, credibility, alibi, joint enterprise and good character.

[66] The duty of a trial judge, sitting as both judge and jury in the Gun Court relative to his summation is well settled. The judge is expected to indicate the principles applicable to the particular facts and demonstrate his application of those principles. Carey JA in **R v Clifford Donaldson et al** SCCA No 70, 72 and 73/1986, delivered 14 July 1988, set out the duty of this Court relative to reviewing such a summation:

> "It is the duty of this Court in its consideration of a summation of a judge sitting in the High Court Division of the Gun Court to determine whether the trial judge has fallen into error either by applying some rule incorrectly or not applying the correct principle. If then the judge inscrutably maintains silence as to the principle or principles which he is applying to the facts before him, it becomes difficult if not impossible for the Court to categorize the summation as a reasoned one."

[67] It is now accepted that where the case is to be resolved on matters concerning the correctness of the identification evidence, trial judges sitting alone must expressly warn themselves, in the fullest form, of the danger of acting upon uncorroborated evidence of visual identification. In **R v Locksley Carroll** (1990) 27 JLR 259, Rowe P stated:

> "…the Privy Council in two cases **Scott and Others v The Queen** [1969] 2 WLR 924 and **Junior Reid and Others v the Queen** [1969] 3 WLR 777 have laid it down that visual identification evidence does fall within a special class of evidence and is to be given special and specific treatment by the trial judge in a trial before a jury. The trial judge is required to give a clear warning the danger of a mistaken identification, explain the reasons for such a warning and advise the jury to heed the warning when considering their verdict."

[68] In **R v Lebert Balasal and Soney Balasal** and **R v Francis Whyne** (1990) 27 JLR 507 at page 509, Gordon JA (Ag) as he then was, after referring to this statement made in **R v Locksley Carroll**, went on to state:

> "In this reasoned judgment that a judge gives he must therefore deal with the current law and where a warning would be appropriate in a trial with a jury he must give himself the requisite warning."

[69] In the instant case, given the complaint of the applicants, the question then becomes whether the learned trial judge had failed to appreciate the principles applicable pursuant to the guidelines set in **R v Turnbull**. At pages 558 and 559 of the transcript the learned trial judge said the following:

> "A very live issue in this case is that of visual identification…
>
> I have warned myself in respect of the visual identification. Where the case for the prosecution rest wholly on substantial evidence of visual identification. I have a responsibility to be careful in my assessment of the evidence. I must bear in mind that a perfectly honest witness may be mistaken and a mistake is no less of a mistake because the maker is an honest person. I must also warn myself that it is dangerous to convict on evidence of

> visual identification, unless I am satisfied to the extent that I feel sure that the person who says that they have seen the accused men at the scene of the offence had sufficient opportunity to make the identification and to recall the circumstances of that identification. I must be sure that the witnesses is [sic] not mistaken.
>
> In order to make that assessment, I have an obligation to look at the evidence to see whether or not the complainant in this matter has been able to recall the circumstance and had a clear opportunity to make the identification. I also bear in mind the complainant has given evidence in which she indicates that she recognizes her assailant as being Tamoy and his friend Jay. But I must also remind myself that mistakes can be made in cases of recognition."

[70] The learned trial judge demonstrated her awareness of the applicable principles. The manner in which she warned herself is sufficient for the purposes of this case.

[71] The learned trial judge appropriately considered the evidence as it related to the issue of recognition by reviewing the complainant's evidence as to how she claimed to have come to know the two men. She later reviewed the evidence of the applicants and accepted that the parties did know each other. She considered the evidence concerning the opportunity the complainant had for viewing her assailants in terms of the lighting available and the time for the viewing as also the fact that the men pulled T-shirts over their mouths at some point upon entering. The learned trial judge noted the inconsistency in the complainant's evidence as to when the T-shirts were placed over the mouths of the two men. She also acknowledged the discrepancy in the complainant's evidence as to the time she allegedly saw the faces of her assailants. She found the discrepancy not to be material.

[72] The learned trial judge at 572 of transcript dealt with the matter in this way:

> "The question is whether these discrepancies and inconsistencies seriously undermine the credibility of the complainant with respect to the issue at hand. I find that they do not."

[73] It would seem therefore that both in her directions and in her review of the evidence of visual identification, the learned trial judge did sufficient to satisfy the Turnbull requirements. Ultimately it was for the judge, sitting as she was as the tribunal of fact and law, to decide if she considered the evidence of identification reliable. She found the complainant to be a witness of truth and it does not appear from the transcript that the complainant had been so discredited and/or rendered unreliable that the learned trial judge was palpably wrong to have accepted the evidence.

[74] The learned trial judge having accepted that the time the complainant had to observe her assailants was sufficient for her to recognize them also ought not to be faulted. In the case of **Jerome Tucker and Linton Thompson v Regina** SCCA Nos 77 and 78/1995, delivered 26 February 1996, this court recognized that in cases of recognition, the time for observation need not be as long as in the cases where the witness had no prior knowledge of the assailant. Forte JA (as he then was) said:

> "This is a recognition case in which length of time for observation need not be as long as in a case where the assailant was unknown to the witness at the time of the offence. In our view, having regard to the state of the light and the fact that the applicant Tucker was known to the witness for four years, and also the proximity in which he was viewed by the witness, the period of eight seconds was sufficient time for observation so that an accurate

> identification could be later made. The issue was therefore clearly one for the jury's determination."

[75] It was also the contention of Mrs Samuels-Brown that the learned trial judge in assessing whether the complainant could have been mistaken, erroneously factored in that the applicants had been pointed out on identification parades and omitted to take into account that it was agreed on all sides that the parties were known to each other. The learned trial judge said at page 593 of transcript:

> "There was no challenge in respect of the identification parade which was held on 18th of February 2010. However, I do bear in mind that the purpose of an identification parade in recognition cases is twofold. Firstly, it is test the ability of the witness to accurately identify the persons. Secondly, to test her honesty in relation to whether she knew the person who she said committed the offence."

[76] It would seem in making this statement the learned trial judge appreciated the significance of the matter that was complained about as she appeared to be mindful of the guidance given by the Privy Council in matters such as this. In **Ebanks v R** [2006] UKPC 6 Lord Carswell at paragraphs 17 and 18 stated:

> "17 In **Goldson v McGlashan v R** [2000] 56 WIR 444 the board accepted the proposition advanced by the appellant's counsel that the holding of an identification parade was desirable where the witnesses claim to have known and recognized the suspect is disputed. Lord Hoffman, giving the judgment of the Board, said at page 448, referring to the defendant's denial that he was the person whom the identifying witness Claudette claimed, as in the present case to know by his nickname:

> 'The truth of this issue could have been tested by an identification parade. If Claudette had failed to pick out the accused on the parade, her assertion that the accused were known to her would have been shown to be false. By not holding identification parades, the police had denied the accused an opportunity to demonstrate conclusively that she was not telling the truth. On, the other hand, if she had picked them out, the prosecution case would have been strengthened although the judge would have had to direct the jury that the evidence went only to support her claim that she knew them and did not in any way confirm her identification of the gunmen.'"
>
> 18 The function of the parade would accordingly have been not the normal one of testing the accuracy of the witness' recollection of the person identified, but to test the honesty of her assertion that she knew the accused. The same opinion was expressed by the Board in **Aurelis Pop v R** [2003] UKPC 40 [2003] 62 WIR 18, a similar case of disputed identification, where Lord Rodger of Earlsferry referred (paragraph 9 of the judgment) to the potential advantage of an inconclusive parade to a defendant such as the appellant."

[77] In the instant case, it cannot be said that the learned trial judge dealt with the evidence of the identification parade inappropriately. The complainant had referred to her assailants by aliases and had given indication of her knowledge of them. In the circumstances, it was proper and correct for the applicants to face identification parades. To fail to hold the parades would have deprived the applicants of an opportunity of not being pointed out. Ultimately, also, the learned trial judge paid the proper regard to the evidence when she commented at page 595.

> "I am satisfied that the complainant had ample opportunity to observe and recognize both accused men and recall the circumstances of that identification and that this is not a case of fleeting glance that is bolstered by a positive identification of the accused men at the identification parade."

The Fresh Evidence

[78] In a recent decision of this court the duty of the court once fresh evidence had been accepted was re-visited. In **Morris Cargil v R** [2016] JMCA Crim 6, Brooks JA stated at paragraphs [55] to [57]:

> "[55] In **Patrick Taylor v R** SCCA No 85/1994 (delivered 24 October 2008) Panton P stated that there were two tasks which the court should undertake in the consideration of fresh evidence. The first is to decide whether or not to accept the fresh evidence. The second task is to decide whether or not to allow the appeal. In performing this second task the court has to decide whether the fresh evidence raised any doubts as to whether the verdict is unreasonable or there had been a miscarriage of justice, as contemplated by section 14(1) of the Judicature (Appellate) Jurisdiction Act.
>
> [56] It is a decision that the court must make based on its view of the evidence and not based on what it considers would have been the effect of that evidence on the jury. Their Lordships in **Bonnett Taylor v R** [2013] UKPC 8, in an appeal from a judgment of this court, confirmed at paragraph 41, the validity of the view stated in **R v Pendleton** [2001] UK HL 86, [2002] 1 All ER 524 concerning the correct approach of an appellate court, in such circumstances. Their Lordships, in **Pendleton,** reminded appellate courts that their duty is not to determine whether or not the appellant is guilty, but rather to decide whether the conviction was safe.

> Their Lordships stated that the appellate court may, in a case of any difficulty, test its own view by considering whether the evidence "might reasonably have affected the decision of the jury to convict." (paragraph 19 of **R v Pendleton**).
>
> [57] In **Orville Murray v R** SCCA No 176/2000 delivered 19 December 2008, this court accepted the validity of the principles laid down in **Pendleton.** Harrison JA adopted the following passage from paragraph 31 of Lord Brown's judgment in the Privy Council decision of **Dial and Another v the State of Trinidad and Tobago** [2005] UKPC 4; [2005] 1 WLR 1660:
>
> > 'In the Board's view the law is now clearly established and can be simply stated as follows. Where fresh evidence is adduced on a criminal appeal it is for the Court of Appeal, assuming always that it accepts it, to evaluate its importance in the context of the remainder of the evidence in the case. If the Court concludes that the fresh evidence raises no reasonable doubt as to the guilt of the accused it will dismiss the appeal. The primary question is for the Court itself and is not what effect the fresh evidence would have had on the mind of jury…' "

[79] Having seen the entry in the station diary which amounted to fresh evidence, the only issue for this court's consideration must be whether there remains credible evidence that the applicants had been correctly identified as the men who had entered the complainant's house on the night of 10 February 2010 and robbed and assaulted her in the manner she described. At the trial the reliability of the identification of the applicants rested substantially on the evidence of the complainant.

[80] Mrs Samuels-Brown QC urged that the failure of Constable Ricketts to record the names of the assailants impacted on his credibility but also on that of his fellow officer who said she had also been told the names and ultimately on the complainant's credibility as well. The case of **Shawn Allen v R** is significant because this court had held in circumstances similar to this one, where no name had been included in an entry in a crime book in a situation in which the officer claims that he was given a name, that:-

> "It follows that the applicant has a right to challenge the officer in respect of his claim to have been given a name. Further, this may well affect the evidence of the civilian witnesses to whether they gave any name to the officer. In short, it is not only the officer whose credibility would be in question but also that of the civilian witnesses."

[81] In that case, this court determined that one ingredient for their consideration was "whether there might have been a reasonable doubt in the minds of the jury as to the guilt of the applicant if that entry in the crime book had been made available to them together with the other evidence at the trial". In those circumstances, the appeal was allowed and a new trial was ordered in the interests of justice.

[82] The other decision from this court relied on by Mrs Samuels-Brown in support of her submission that, even where the evidence in the station diary is second hand evidence made by a third party, the court will take it into account in a proper case in assessing credibility is **R v Collin Mann**. It would be useful to consider that decision.

[83] The appeal before the court concerned the refusal of the learned trial judge to admit into evidence an entry from the station diary of the Denham Town Police Station. The appellant was contending that the entry made supported his case that he had not been seen shooting at the police as they alleged and that his name was called by them as an afterthought. The applicant submitted that he had been deprived of a verdict in his favour and there had been a miscarriage of justice. Issue was taken with the prosecution's witnesses maintaining at all times that the entry was made at one and the same time. Suggestions were made that part of the entry which actually named the appellant was made at a time subsequent to the initial entry and was done by way of an "addendum" as described by defence counsel.

[84] This court looked at the entry and noted that "previous to that part of the entry coming after the word 'continuing' and in which the applicant was named, the perpetrator of the crime was described three times as a 'gunman' and once as 'a man armed with a handgun'". Significantly, in either case the reference made was to an "unnamed person." At the trial, the defence called as a witness, retired Senior Superintendent of Police, Carl Major, who opined that the diary entry made by the investigating officer was not all made at once, that part of the entry which followed the word continuing and which contained the name and alias name of the applicant had been added to the rest of the entry at a subsequent time.

[85] This court found that the trial judge had fallen into error in not admitting the diary entry into evidence and had completely misunderstood the purpose of defence counsel in seeking to adduce that evidence. Further it was determined that the cardinal

issues in the case were firstly the issue of identification and secondly the issue of credibility of the several witnesses. The issue of whether the name of the applicant was added after the original entry made was considered to be an issue the trial judge had a judicial responsibility to resolve. This was so since the officer who had been shot at maintained he had called the name of the applicant in making his report to the investigating officer who had testified that if the name had been divulged to him, he would not fail to record it when making a diary entry of that report.

[86] This court found that it was imperative for the trial judge to have had a look at the controversial entry as it was relevant evidence regarding the investigative process leading to the arrest and the trial judge considered and assessed the identification evidence in the case in isolation rather than in conjunction with a resolution of the issue surrounding the content and manner of recording of the controversial entry. The court concluded that the trial judge having erred, it cannot be said that the applicant received a fair trial.

[87] It is significant to note that this court felt constrained to point out certain curious features in the case which led them to conclude that it was a sloppy investigation of a crime. Firstly, the witnesses for the prosecution, who were all policemen, produced statements which were all undated. Secondly, potential exhibits had been lost. Thirdly, the applicant had been apprehended on 3 January 2002, yet the warrant which had been in existence since 24 December 2001, two days after the shooting, was not executed until three weeks later on 24 January 2002. Certainly in all the circumstances it could also have been argued that the conviction was unsafe.

[88] In the instant case, the issue as to the time of the calling of the names of the applicants had been raised even without reference to the station diary entry. The complainant had testified that she had told both Constable Ricketts and Corporal Harrison the names of her assailants when they had come to the house. Constable Ricketts was not cross-examined on it and there is no dispute that the defence was deprived of an opportunity of challenging his credibility on this issue for failing to have included the names in his entry into the station diary.

[89] However, Corporal Harrison was challenged directly on this matter. On page 216 of the transcript the following exchange is noted of the cross-examination of the officer:

> "Q: Corporal Harrison, when the initial, that is to say, the first report was made to you, were any names called?
>
> A: Yes, ma'am.
>
> Q: Did you write your statement in your own hand?
>
> A: Yes, ma'am.
>
> Q: Was the report to you to this effect 'Officer two men just rob mi and rape mi in a mi batty'?
>
> A: Yes, ma'am.
>
> Q: Any names mentioned in that?
>
> A: The names were mentioned after, ma'am.
>
> Q: That's what I said, initial report that was made to you. That's why I was being very specific.

A: That was part of the initial report, ma'am.

Q: Did you actually put those words that I read to you in inverted commas?

A: Yes, ma'am.

Q: Thank you."

[90] It would seem that the failure of Constable Ricketts to have recorded the names of the assailants in circumstances where it was alleged that both himself and Corporal Harrison would have been given them at same time, would not have significantly impacted the credibility of Corporal Harrison.

[91] There was other evidence given that ought to be considered in evaluating the importance of the fresh evidence. The investigating officer, Detective Sergeant Erwin Hyatt, testified that he had received a telephone call from Detective Constable Ricketts at about 5:00 am on 11 February. He had visited the scene, he saw and spoke to Detective Constable Ricketts and also the complainant. He also gave evidence of collecting information that caused him to determine that the matter was a complex one and given the fact that a police officer could be involved, he did not think the Constable should continue as investigator. As the senior officer on the scene at the time, he took over the investigations. Upon receipt of the statement of the complainant, which she said she had given the day after the incident, Sergeant Hyatt testified that he realized that one of the persons implicated was known as Tammy, a police officer stationed in

Christiana Police Station. This led him to enquiries into the movement of the applicant known to the investigator as Special Corporal Tamoy Meggie.

[92] These bits of evidence, to my mind, support the complainant's assertions that she had been able to and had identified and had named her assailants from the time of the incident. The failure of Constable Ricketts to include the names in the entry he made, does not significantly impact on the credibility of either the complainant or Corporal Harrison, when the fresh evidence is assessed in light of all the evidence presented at the trial. Thus, it cannot be said that the verdict is unreasonable or cannot be supported having regard to the evidence or resulted in a miscarriage of justice.

[93] Based on this analysis, the complaints about the learned trial judge's summation regarding the identification evidence cannot succeed.

Ground 3

The learned trial judge failed to apply the law as it relates to alibi evidence tendered on behalf of the appellants whereby the appellant's chances of acquittal was impaired.

Ground 4

The learned trial judge erred in convicting the appellants as she ought to have accepted the evidence of alibi tendered on behalf of the appellants and thereby find them not guilty.

The Submissions

[94] Mrs Samuels-Brown submitted that it is the law that alibi evidence must be taken into account before accepting the prosecutor's case but in the instant case the learned

trial judge approached it in the reverse order, rejecting the alibi evidence called on behalf of the appellants and stated that the prosecution had satisfied her so that she felt sure that the appellants were the perpetrators of the crime. She submitted that the evidence tendered on behalf of the applicants as to their whereabouts at the material time on 10 February 2010 was cogent, unshaken by cross-examination and ought to have been accepted by the learned trial judge.

[95] Further Mrs Samuels-Brown complained about the manner in which the learned trial judge assessed the evidence presented on behalf of the applicants' defence of alibi. Learned Queen's Counsel contended that the learned trial judge gave no reason for doubting the evidence called on behalf of the applicant Meggie and was in error when she stated the account of his witness Greyson Martin was different from the account given by the applicant himself as to his movements and whereabouts.

[96] In response, the learned Director referred to three decisions of this court, **Sheldon Brown v R** [2010] JMCA Crim 38, **R v Dean Nelson** SCCA No 138/2000, delivered on 3 April 2003 and **Fabian Donaldson v R** [2010] JMCA Crim 52. She submitted that the learned trial judge directed herself in a manner consistent with these decisions as she thoroughly reviewed the alibi evidence on behalf of the applicants. She further submitted that the learned trial judge assessed the evidence of the applicants, their alibi witnesses, as well as their demeanour, and found them not to be witnesses of truth, ultimately rejecting their evidence as she was entitled to do. Miss Llewellyn noted that the learned trial judge did not stop there but re-examined the prosecutor's case and found the complainant to be credible. She concluded her

submissions on the matter by contending that having accepted the complainant's evidence and recognizing that the applicants could not be in two places at once, the learned trial judge properly rejected their defence of alibi.

Analysis

[97] In **Fabian Donaldson v R**, Brooks JA (Ag) (as he then was) very usefully set out what he referred to as the important aspects of a direction on alibi at paragraph [15], namely:

> "(a) that the defence of alibi means the accused says that he was not at the scene of the crime when it was committed;
>
> (b) that he does not have to prove that he was elsewhere at the time and does not have to bring witnesses to support his alibi;
>
> (c) that it is the prosecution which has to prove, so that the jury feels sure, that he was at the scene of the crime;
>
> (d) that even if the jury concludes that the alibi was false, that does not by itself entitle them to convict the defendant, they should return to the Crown's case and determine if it convinces them, and;
>
> (e) they should be aware that a false alibi is sometimes invented to bolster a genuine defence."

[98] In the instant case the learned trial judge carefully reviewed the evidence given by the applicants and their witnesses. After she had recognized their defence as being that of alibi, the learned trial judge warned herself that they were not required to prove where they were but for the prosecution to prove the case against each of them and to disprove the alibi. She stated at page 592 of the transcript:

> "How then does the prosecution disprove alibi? They do no [sic] have to bring a witness or evidence to prove that these men were not where they said they were. Normal human experience shows that a person cannot be in two places at the same time, so if the prosecution satisfies me so that I feel sure that Mr Forbes and Mr Meggie were where [the complainant] says they were at the time of the incident then they would have negatived or disprove the alibi. I must also warn myself that an alibi may be invented to bolster a genuine defence and even if it is proved that the accused has told lies about where he was at the material time that does not by itself prove that either of them were at the scene of the crime."

[99] This approach by the learned trial judge cannot be faulted. It is observed that in reviewing the evidence presented by the defence, the learned trial judge noted that there were inconsistencies and discrepancies between the applicants and their witnesses, as well as between the applicants themselves, such that the complaint that she ought to have accepted the evidence of the alibi is without merit.

[100] There seems to be no basis for finding that the learned trial judge was wrong to have accepted the complainant as a witness of truth. She demonstrated a balanced assessment of all the evidence in her stating the following:

> "Having found her to be a credible witness, the accused men cannot be in two places [sic] at once, for those reasons I reject their defence of alibi. I now reach the point where I have gone through the evidence presented by the Crown and that given by each accused man, I have had the opportunity of seeing and hearing the witnesses and the accused men, then complainant had impressed me as a truthful and honest witness. Her credibility has not been affected in any way."

[101] The manner in which the issue of the alibi defence was dealt with cannot be said to be unfair to the applicants. In the circumstances, there is no merit to the complaints in grounds three and four.

Ground 5

There has been no evidence tendered to support the charge of robbery with aggravation as set out in count 3 of the indictment and accordingly verdicts of not guilty ought to have been arrived at with respect to both appellants on this count.

The Submissions

[102] It was Mrs Samuels-Brown's submission that there was no or no sufficient basis on which to convict the applicants on robbery with aggravation of items from the complainant's home. She contended that there was no evidence of when the sheets and the tool box, which the complainant testified that she discovered missing after the men left her house, had last been seen by her. She also pointed to what she described as a contradiction regarding what Corporal Ricketts had testified had been reported to him as stolen. The main thrust of this complaint therefore, was, the items reported as stolen initially, were not consistent with items reported as stolen when the complainant was testifying.

[103] For the prosecution, in response, Miss Llewellyn focused on whether the legal requirements for the charge of robbery with aggravation had been made out. She contended that there really could have been no dispute that once the learned trial judge was satisfied that the persons who entered the house were armed with offensive

weapons and robbed the complainant of items from her home, the offence would have been proven. Thus, the learned Director concluded that there was more than sufficient evidence to ground a conviction on this charge.

Discussion and Analysis

[104] The particulars of the offence of robbery with aggravation in the indictment on which the applicants were pleaded, list the items that the complainant was robbed of as being sheet sets and a clothes basket. As the evidence unfolded the complainant had been asked to tell the court exactly what was missing and responded a basket, some sheets and one tool box. She also explained that she had noticed these items missing in the days after the incident as she was packing up everything.

[105] It was also her evidence, supported by the police officers, that the place had been in disarray after the invasion of her home. Hence her assertion that she initially did not note what was missing cannot be seen as unreasonable neither can her explanation of coming to a realization of what was missing as she was going about bringing back some order by packing up and putting away her things.

[106] It was Constable Ricketts' evidence that the complainant, after a brief check, had reported to him that a blender, a small fan, a clothes basket and a brown suitcase were missing from within the house. Learned Queen's Counsel is correct that some of the items Constable Ricketts testified to having been told were missing were not included in those given by the complainant. What is of more significance however must be

whether the prosecution led evidence that supported what was particularized in the indictment namely sheet sets and a clothes basket.

[107] In that regard, the complainant gave evidence consistent with the indictment. She was questioned in relation to those items and asked specifically where the sheet sets, the toolkit and the basket had been. She provided answers that the sheet sets had been in her wardrobe, the basket had been under the children's bed. She gave a value for the sheet set, tool kit and the basket. There was no evidence as to when last she had seen the items that were missing but there was sufficient in the circumstances for the learned trial judge to infer that the items for which the applicants had been charged were missing after the incident and thus would properly have been made the subject of this charge of robbery with aggravation. This ground also must fail.

Ground 6

The learned trial judge erred in convicting the appellant, Tamoy Meggie of the offence of buggery as there was no evidence or not sufficient evidence to support the charge.

[108] Mrs Samuels-Brown submitted that on a close reading of the transcript, there is no evidence of penile penetration of the anus to support the charge of buggery. She contended that, while the complainant asserted that this happened, the complainant also stated that she did not see who was "doing this to her".

[109] Mrs Samuels-Brown noted that the complainant also testified of the applicant Meggie's threat to penetrate her with a gun. Thus it became Mrs Samuels Brown's

contention that the evidence of the doctor as to signs of blunt force trauma to the complainant's anus that could have been cause by a penis does not assist in determining whether it was a penis that in fact penetrated the complainant's anus.

[110] In response, Miss Llewellyn in her submissions pointed to the evidence which was given by the complainant which she argued to be more than sufficient to ground the conviction from the testimony. The evidence which was given by the medical doctor was never challenged and those findings on the night of the incident when the complainant was examined and treated supported the complainant' evidence as to the nature of the assault she had suffered.

Analysis and discussion

[111] The complainant gave a very graphic account of the sexual assault which she said had occurred. She said in her evidence-in-chief that it was the applicant Meggie who had asked her if she was ready for her "fuck". She was blindfolded at the time but she recognized his voice. She then went on to describe what happened in the following terms:

> "Mi feel something a go to mi bottom...
> .... Mi feel like it a go ina mi bottom
> and mi seh no, no, nuh do it deh so"

[112] She said it was the applicant Meggie's voice she recognized, then, ordering her to stop the noise. She explained what happened next:

> "Mi feel the 'buddy' a go in and out now...

> Out mi anal, mi bottom ... Mi feel him buddy in a mi batty...
> For a bout 8 minutes ... Mi know it as cocky maam, and
> mi know it as penis.... An tek anything dem do to me...
> because gun and cutlass mi know deh pon mi."

[113] The medical doctor testified that the significant clinical findings were to the region around the anus and the anus. She spoke of fissures observed in the area around the anus, internal tenderness of the anus when a finger was inserted and blood and mucus seen at the anal margin. These injuries, the doctor testified, were consistent with infliction by blunt force trauma and she opined that this trauma could have been caused by a penis.

[114] The offence of buggery, relevant to this matter, is defined as an offence which consists of sexual intercourse committed by a man with a woman by the anus. There must be proven as an essential ingredient of this offence, the penetration of the anus by the male organ.

[115] There was sufficient evidence before the learned trial judge, if believed, to support this charge. Having found the complainant to be a witness of truth, a complaint that there was no evidence to support the charge of buggery is without merit. This ground therefore must also fail.

Ground 7

The appellants were deprived of the benefit of the law relative to character evidence in that the learned trial judge failed to apply the said law to the

evidence and rejected evidence of character in the absence of any or any sufficient basis for doing so.

The Submissions

[116] Mrs Samuels-Brown relied on the iconic decision of **R v Vye** [1993] 97 Cr App R 134 in making her submission that the learned trial judge was obliged to consider the impact of good character on the applicants' propensity to commit the offence and as well their credibility. She noted that this court had addressed this issue in **R v Clachar** SCCA No 50/2002, delivered 29 September 2003, and **R v Michael Reid** SCCA No 113/2007, delivered 3 April 2007. She also referred to **Hunter v R** 2015 EWCA Criminal 631.

[117] Learned Queen's Counsel contended that the learned trial judge signaled her recognition that evidence of good character was tendered but nowhere in the summation was it shown how this evidence was utilized in assessing the evidence and ultimately rejecting the defence and accepting the prosecution's case. Mrs Samuels-Brown also submitted that where evidence of good character is adduced via a witness for the prosecution it must be accorded even more weight as it now forms part of the prosecution's case. She relied on **R v Lobban** (1995) 32 JLR 91 in support of this submission.

[118] In the instant case, Mrs Samuels Brown complained that a prosecution witness, Special Sergeant Erwin Barrett, had given evidence as to the good character of the

applicant Meggie and the learned trial judge had without any explanation or justification given, rejected this witness as a witness of truth.

[119] Learned Queen's Counsel submitted that ultimately the inescapable conclusion is that the learned trial judge erred in that she failed to take into account the evidence of good character tendered on behalf of the applicants or unfairly discounted its judicial value.

[120] The respondent contended succinctly that the learned trial judge had reviewed the good character evidence and had extensively directed herself as was appropriate in these circumstances.

Discussion and Analysis

[121] It has now been well settled that where an accused person adduces evidence of his good character, this is relevant to his credibility and the likelihood of whether he would commit the offence in question. In **Teeluck and John v The State of Trinidad and Tobago** (2005) 66 WIR 319, 329. Lord Carswell summarised the principles in the following way:

> "The principles to be applied regarding good character directions have been much more clearly settled by a number of decisions in recent years, and what might have been properly regarded at one time as a question of discretion for the trial judge had crystallized into an obligation as a matter of law... Their Lordships consider that the principles which are material to the issues now before them can conveniently be encapsulated in the following series of propositions.
>
> (i) When a defendant is of good character, i.e. has no convictions of any relevance or significance, he is

entitled to the benefit of 'good character' direction from the judge when summing up to the jury, tailored to fit the circumstances of the case...

(ii) The directions should be given as a matter of course, not of discretion. It will have some value and therefore be capable of having some effect in every case in which it is appropriate for such a direction to be given... If it is omitted in such a case it will rarely be possible for an appellate court to say that the giving of a good character direction could have affected the outcome of the trial...

(iii) The standard direction should contain two limbs, the credibility direction that a person of good character is more likely to be truthful than one of bad character and the propensity direction, that he is less likely to commit a crime, especially one of the nature with which he is charged.

(iv) Where credibility is in issue a 'good character' direction is always relevant...

(v) The defendants' good character must be distinctly raised, by direct evidence from him or given on his behalf or by eliciting it in cross-examination of prosecution witness... It is a necessary part of counsel's duty to his client to ensure that a 'good character' direction is obtained where the defendant is entitled to it and likely to benefit from it. The duty of raising the issue is to be discharged by the defence not by the judge, and, if it is not raised by the defence the judge is under no duty to raise it himself..."

[122] The significant development since this pronouncement concerns the possible effect of a failure to give a good character direction. It has become the standard that a failure to give this direction will not always be fatal to a conviction as ultimately the question to be determined will be if a reasonable jury, properly directed, would inevitably have arrived at a verdict of guilty.

[123] In **Regina v Alex Simpson** and **Regina v McKenzie Powell** SCCA Nos 151/1988 and 71/1989, delivered 5 February 1992, Downer JA in delivering the reasons for judgment on behalf of this court said at page 13:

> "...the trial judge sitting as jury demonstrate in language which does not require to be construed that he has acted with the requisite caution in mind and that he had heeded his own warning. However, no particular form of words need be used. What is necessary is that the judge's mind upon the matter be clearly revealed."

[124] In the instant case, the learned trial judge sitting without a jury was obliged in her summation to demonstrate a clear appreciation for and application of the good character direction. It has been acknowledged in the submission of learned Queen's Counsel that the learned trial judge recognized that evidence of good character had been adduced. It did not matter if it arose through cross-examination during the prosecution's case or whether it came by direct evidence from the defence. The obligation of the learned trial judge was to bear in mind the appropriate directions as she approached the evidence and it was of no greater significance if it had arisen only on the prosecution's case. The case of **R v Lobban** relied on by Queen's Counsel does not in fact provide any support for the proposition that where evidence of good character is adduced via a witness for the prosecution, it must be accorded more weight as it then forms a part of the prosecution's case.

[125] The learned trial judge at page 590 of the transcript said:

> "In deciding whether the prosecution has made me feel sure of the guilt of each of the accused men weight must be

> given to their good character. Good character is relevant when it comes to consider credibility and whether Mr Forbes or Mr Meggie is likely to have behaved in the way the prosecution said they did. I have heard that both men are of good character. I have heard that Mr Forbes is a responsible father. I also heard that he takes his job as a taxi driver quite seriously. He is also a certified plumber. I have heard that Mr Meggie is an exemplary officer. He too is a father. Of course good character by itself cannot provide a defence to a criminal charge but it is evidence that I should take into account in their favour. Evidence of good character supports each case that they are telling the truth. I must consider, for instance, whether Mr Forbes is likely to have placed his relationship with this child in jeopardy by being involved in the activities for which he stands accused. At the time of his arrest this child resided with him. Is Mr Meggie [sic] likely to have put his career in jeopardy by being involved in the activities for which he stands accused."

[126] The learned trial judge's mind upon this matter is clearly revealed. She properly appreciated the significance of good character evidence and adequately addressed the two limbs of the character direction as proposed by the authorities. In the circumstances, this ground too must fail.

Ground 8

The fact of discovery of co-accused, Kemar Gayle's fingerprints on a cup found in the virtual complainant's house, the absence of any fingerprints of any part of or item found in the virtual complainant's premises and the guilty plea of the co-accused Kemar Gayle while the trial proceeded are all matters that the learned trial judge ought to have taken into account in the appellant's favour and as supportive of their defence and/or innocence. The learned trial judge failed to do so whereby their chances of acquittal was impaired.

Ground 9

The learned trial judge erred in finding the appellants guilty as there is no evidence that they acted in concert with Kemar Gayle whose guilty plea was accepted by the learned trial judge.

[127] Mrs Samuels-Brown submitted that although the complainant asserted that "a four a wi deh yeh" no evidence was given to support this assertion. She contended that there was no evidence that intruders other than the two applicants entered the home and it was they who were alleged to have ransacked the house, turned off the lights and done other things in both the house and the bar. She pointed out that the scene was thoroughly dusted for fingerprints within hours of the intruders leaving the scene. The applicants were fingerprinted and their prints were not found on any of the items or anywhere in the house.

[128] Learned Queen's Counsel further submitted that it is trite law, that where persons are jointly charged, where the verdict in relation to any of them is inconsistent with that of another the appeal will be allowed. She relied on the cases of **R v Newton** 77 Cr App R 13 and **R v Pearlina Wright** (1998) 25 JLR 221 for her submission that when an accused pleads guilty the judge ought to make clear the facts on which the guilty plea has been accepted. This, she contended, must therefore be consistent with any verdict of guilty arrived at in relation to the accused who maintain their innocence to the end.

[129] Mrs Samuels-Brown complained that in the instant case the learned trial judge failed to indicate the factual or evidential basis on which the guilty plea had been

accepted. She contended that having heard the sworn evidence from the prosecution the learned trial judge should have invited Kemar Gayle to give his version of the facts on oath and clearly indicate whether she accepted or rejected this.

[130] It was the further submission of Mrs Samuels-Brown that on the case presented by the prosecution, there was no evidence that the appellants were working in concert with Kemar Gayle and in the circumstances, having accepted Gayle's guilty plea it was not open to the learned trial judge to then find the appellants also guilty.

[131] The learned Director's submission in response to this complaint was brief and focused on the evidence presented. She noted that the absence of the applicants' fingerprints in the premises does not mean that they were not present as there could be a number of reasons as to why their fingerprints were not discovered. The complainant's evidence was accepted that she saw the two of them together as they entered the house. They remained together during the commission of the offences and left in each other's company.

Discussion and Analysis

[132] The guilty plea of Kemar Gayle was offered after the expert evidence was given that his fingerprints were recovered from an item in the closet. This having put him clearly on the scene, it could not be disputed that his guilty plea was his acceptance that he was there and his acknowledgement that he was a participant in what had occurred that night.

[133] The reliance placed on **R v Newton** and **R v Pearlina Wright** is misplaced in these circumstances. These two authorities are relevant in a situation where there is a dispute between the prosecution and the defence as to the facts on which the guilty plea is being offered. The trial judge in those circumstances would have to determine the correct version for sentencing purposes. In **R v Newton**, the Lord Chief Justice proposed three ways in which a judge in those circumstances could approach the task of sentencing. In **R v Pearlina Wright** this court held that the rule of law is that when a person pleads guilty, the learned trial judge as the tribunal of fact should sentence on the set of facts which are most favourable to the accused.

[134] In the instant case there was no suggestion of any contending facts. The learned trial judge was under no obligation to hear, on oath or otherwise, the facts on which Mr Gayle had offered his plea of guilt.

[135] There is no dispute that the issue of joint enterprise formed an important part of the prosecution's case. Further it is clear from the complainant's evidence that it was possible that more persons other than the two men she had seen were involved in the invasion of her home. It was her evidence that the applicant Meggie had said something to her suggesting this. She had said he had told her "a four a wi deh yah, if you mek nuh noise you know how it go".

[136] Under cross-examination the complainant was asked whether she knew if anyone else had entered the house that night after she had been blindfolded and her response had been no. On the evidence it was open to the learned trial judge to find

that there could have been more men involved. This therefore would mean that there was nothing inconsistent with a verdict that the two applicants were guilty along with Kemar Gayle. The fact that only Mr Gayle's prints were recovered from the scene did not automatically lead to the inevitable conclusion that the applicants were not there. Ultimately, the learned trial judge was obliged to and correctly focused her attention on that issue once Mr Gayle had pleaded guilty. In the circumstances, these grounds are must also fail.

Ground 10

The summing up is unbalanced and/or unfair as the learned trial judge has overlooked inconsistencies and weaknesses on the prosecution's case and disregarded evidence favourable to the defence and rejected the appellant's defence for reasons which are inadequate and/or unsupportable in law.

Ground 11

The appellants did not receive a fair trial as material which impacted on the credibility of the prosecution's case and which was in possession of the prosecution as well was not available to the applicants during the trial.

[137] Mrs Samuels-Brown adopted and relied on the arguments made in support of the other nine grounds in support of these final grounds which could then be regarded as all-embracing.

[138] Miss Llewellyn in her response contended that the learned trial judge's summation was comprehensive and thorough as the inconsistencies and weaknesses of the prosecution's case as well as the evidence favourable to the applicant was

considered and ruled on. The Director also noted that the learned trial judge gave her reasons for accepting or rejecting various aspects of the evidence.

Discussion and Analysis

[139] The learned trial judge faithfully reviewed and analyzed all the evidence presented. There were adequate and careful directions to herself on all the issues which arose in the case. Ultimately the trial judge has not been shown to have been palpably wrong in her resolution of the issues of facts which arose. A careful review of the summation as a whole does not support the contention that there was any unfairness to the applicants, nor was there anything which could lead to the assertion that there was any miscarriage of justice.

Conclusion

[140] The case against each applicant depended substantially on the view taken by the judge of the credibility of the witnesses particularly the complainant. The learned trial judge cannot be faulted as to her directions to herself in this regard. In the circumstances, we find that there is no merit in the grounds that have been argued.

[141] The applications for leave to appeal are accordingly refused and the sentences for each applicant are to be reckoned to have commenced on 22 June 2012.