[2010] JMCA Crim 68

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 123/2008

BEFORE: **THE HON. MRS JUSTICE HARRIS, J.A.**
THE HON. MISS JUSTICE PHILLIPS, J.A.
THE HON. MRS JUSTICE M^{C}INTOSH, J.A. (Ag)

RICHARD FRANCIS v R
O/C DELROY REID

Alando Terrelonge and Miss Kristina Exell instructed by Patrick Bailey and Company for the applicant

Mrs Karen Seymour-Johnson for the Crown

4, 6 May 2010 and 22 October 2010

HARRIS, J.A.

[1] On 8 October 2008 the applicant was convicted in the High Court Division of the Gun Court on an indictment which charged him with three counts. On count one he was charged with illegal possession of firearm, on count two, with illegal possession of ammunition and on count three robbery with aggravation. He was sentenced to 12 years imprisonment at hard labour on count one, two years imprisonment at hard labour on count two and 15 years imprisonment at hard labour on count three. It was ordered that the sentences should run concurrently.

The application for leave to appeal was treated as the hearing of the appeal and on 6 May 2010 we allowed the appeal, quashed the convictions, set aside the sentences and ordered a new trial. We promised to put our reasons in writing. This we now do.

[2] The main witness for the prosecution, Mr. Wayne McIntyre, a telephone technician employed to Cable and Wireless, was on an assignment in the Johnson Pen area of the parish of Saint Catherine on 19 September 2007. He arrived there in a white Toyota Hiace van. While carrying out repairs in the area, between 10:00 and 10:40 in the morning, a man who he said was the applicant and another man approached him. At this time, he was standing beside the van. The applicant, he declared, pulled a firearm from his waist and pointed it at him, ordering him not to move and informed him that they would be taking his van. He said at that time the applicant was approximately an arm's length away. He had the men under observation for about two minutes and was able to see the applicant's face clearly as he was focusing on him. In the meantime, the other man entered the vehicle and sat behind the steering wheel. The applicant then ordered Mr McIntyre to enter the vehicle and to lie face down. He obeyed.

[3] The applicant entered the vehicle and sat in the front passenger seat. He turned around facing Mr McIntyre, pointing the gun at him as

they drove away. The applicant, although still having the gun pointed at Mr McIntyre, turned his head to the front of the vehicle and began looking ahead. Mr McIntyre, a licensed firearm holder, pulled his firearm and fired two shots at the applicant. Both men then jumped from the vehicle, leaving the vehicle in motion. Mr McIntyre, realising that the vehicle was out of control, also jumped from it.

[4] He then looked around and saw the applicant and the other man lying on the ground nearby. He, Mr McIntyre, discharged two more shots from his firearm in their direction. The applicant then ran into a lane, attempting to pull the other man with him. Thereafter, Mr McIntyre saw fresh blood at the spot where the men had been. He subsequently made a report to the police. On 30 October 2007 he attended an identification parade where he pointed out the applicant who had not been previously known to him.

[5] Corporal Stafford Aicheson testified that at about 2:00 o'clock in the afternoon of 19 September 2007, he swabbed the hands of Mr McIntyre. Thereafter, he proceeded to the Saint John's main road where he found some spent shells along the roadway. He also saw a brown substance on the road which appeared to be blood. This brown substance he swabbed by use of a pair of clean latex gloves and clean cotton swabs. He placed the swabs in a package and then into an

envelope which he sealed with a tape, labeled it 'B' and placed his signature on the tape and placed the package in a refrigerator at the police station. On 27 September 2007, he took the package to the forensic laboratory.

[6] There was also evidence from Corporal Leonard Stewart that on the day of the incident, he visited Johnson Pen where he received some information from Mr McIntyre and was shown a white van in which he saw a .38 revolver with two rounds of ammunition on the floor of the left passenger seat. He said that Mr McIntyre pointed him to the direction in which the men ran, which was along a track where he saw trails of blood leading from the asphalt on the roadway to the track.

[7] An identification parade was conducted by Sergeant Devon Campbell. He observed that the right hand of the applicant was injured and encased in plaster of paris. The plaster of paris was covered with blue fabric. Eight men of similar built, complexion, appearance and height as the applicant participated in the parade and the right hand of each was covered with similar blue fabric. The applicant was represented by counsel.

[8] Sergeant Ottie Williams testified that on 19 September 2007 he went to the scene in Johnson Pen where he saw a blue and white Hiace van in a ditch along the Johnson Pen main road and Mr McIntyre took him to an

area where he saw spots of blood on the embankment of the road near to a lane. He contacted Corporal Aicheson who came and took samples of blood from the scene.

[9] On 20 September 2007 he went to the Kingston Public Hospital where he saw the applicant. He asked him for a sample of his blood. To this request he acceded. The sample of blood was placed in an envelope sealed and labeled "A". He took to the forensic laboratory, the blood sample and the .38 firearm with two rounds of ammunition in its chamber, which were recovered from the van and handed over to him. He subsequently attended the forensic laboratory and obtained the firearm as well as a ballistic certificate. The van was dusted for fingerprints but none was found.

[10] Mrs Tamara Comrie-Douglas, a forensic officer at the forensic science laboratory whose duties include assisting the analyst in the receipt and analysis of exhibits, stated that on 27 September 2007 she received a swab from Corporal Aicheson in a sealed envelope marked 'B' containing blood stains to which she assigned a case number and issued a receipt to him.

[11] There was also evidence from Miss Karen Hylton-Greyson who stated that on 20 September 2007 she received a sealed envelope from Sergeant Williams, containing a sample of blood allegedly taken from the

applicant. She said she ensured that the name on the vial matched the name of the applicant and assigned a file number to it.

[12] The government analyst, Miss Sherron Brydson, also gave evidence that in September 2007 she received a blood sample from Miss Karen Hylton-Greyson and a blood-stained swab from Mrs Comrie-Douglas which they received from the police officers. She carried out a DNA analysis of the blood as well as the blood stained swab. These, she said, revealed a profile calculated from statistical analysis done for the Jamaican population and this frequency or match was one in 50 billion. For the Jamaican population, this constituted a rare profile, Jamaica's population being 2.7 million.

[13] The applicant gave an unsworn statement. He denied that he was in Spanish Town and that he had robbed anyone. He also denied that he was in possession of a firearm and that any blood was taken from him. He asserted that on 19 September he was in Kingston 11 walking towards Three Miles when he was approached by two men, one of whom took his cellular telephone from him, which he tried to recover. He got a taxi to Kingston Public Hospital where he made a report to an inspector of police. Thereafter, several other police officers appeared and asked him what had happened and he told them. He remained in the hospital for

several days and other police men came, placed a handcuff on his feet and he was thereafter placed under police guard.

[14] He stated that while he was in hospital, a police officer by the name of D.C. Holness said to him, "Yuh tiefing bwoy from Spanish Town, yuh rob mi nephew and mi a go kill yuh, yuh must dead when yuh come a road." This police officer left and returned the following day and stood over his bed. He was accompanied by a man who first stopped at the counter where the doctors had some files. That man then looked in his face and then walked away. He, the applicant, said he brought to the attention of a nurse that the police officer had brought a man to point him out.

[15] He further asserted that he was taken to the Spanish Town Police Station. The following morning he was taken to a doctor and he had to walk from the police station to the hospital without a mask on his face. Sometime after he was taken to the Halfway Tree Police Station. He had a cast on his hand and a lawyer wrapped some material over his right arm and the arm was taken out of a sling. He had to sit in a certain position in the parade room while the other men who had their hands strapped in front of them were standing. He went on to say that after his hand was strapped, the man who said that he had robbed him was asked if he knew why he had come there and he replied that he was there "to point out a man on the 19th September 2007".

[16] The appellant filed six original grounds of appeal. He sought and obtained leave to argue seven additional grounds. Some of these grounds will be addressed simultaneously.

Ground 1

> "That the Learned Judge erred and/or misdirected herself in accepting the chain in the continuity from the taking of the blood sample purportedly taken from the Accused by one Dr. L. Douglas and later placed in a vial by Sergeant Willams and subsequently sent to the forensic lab for analysis."

Ground 2

> "That the Learned Judge erred and/or misdirected herself in accepting the integrity of the DNA evidence adduced relating to blood sample allegedly taken from the Accused by the aforesaid Doctor and said to have been analyzed by the Government Forensic Expert."

[17] Mr Terrelonge argued that the learned trial judge erred and or misdirected herself in respect of her treatment of a blood sample allegedly taken from the applicant by Dr Lloyd Douglas. The applicant, he argued, disputed that he had given blood and as a consequence, in order to obviate the risk of error, and in fairness to the applicant, the doctor ought to have been called as a witness. There was no evidence to satisfy the integrity in the chain of custody of the blood sample and further, he argued, the applicant's blood was not sealed in his presence. In the alternative, he submitted that even if this court were to find that as

a question of fact the learned trial judge's acceptance of Detective Sergeant Williams' evidence of the applicant's presence when the blood was taken by the doctor, in the interest of fairness the DNA evidence ought not to have been admitted into evidence. He further submitted that there was an absence of the forensic certificate evidencing the result of the blood sample.

[18] Mrs Seymour-Johnson contended that the fact that the doctor had not given evidence at the trial does not make Sergeant Williams' evidence inadmissible. Sergeant Williams went to the hospital, spoke to the applicant who agreed to give the blood which was taken by the doctor in Sergeant Williams' presence. Sergeant Williams spoke of the police post being downstairs of the hospital where he labeled the vial, in which the blood was taken with the applicant's name, and placed it in a sealed envelope which he took to the laboratory, she argued. There was evidence, she contended, coming from Miss Hylton-Greyson of receiving the blood sample which she handed over to Miss Brydson.

[19] Before the learned trial judge was the evidence of Sergeant Williams who clearly stated that at his request, the applicant consented to have the blood taken. The blood was taken by the doctor. The fact that the doctor was not called as a witness would not in any way impact upon the chain in the transmission of the blood sample. Sergeant Williams

indicated that he sealed and labeled the envelope, which he marked "A" as "containing the blood samples of the suspect Richard Francis, taken by Dr Douglas at Ward 3". This, he took to the forensic laboratory which he delivered to Miss Hylton-Greyson who spoke of receiving it with the name of the applicant endorsed thereon. In recording it, she stated that she ensured that the name was correctly recorded before placing it in the refrigerator. It was subsequently handed over to Miss Brydson, the analyst. Miss Brydson confirmed its delivery. A forensic certificate was not before the court but the analyst testified that she had prepared one. The absence of the certificate would not in any way impinge upon the continuity of the integrity of the blood sample.

[20] We find no merit in Mr Terrelonge's attack on the transmission of the blood sample or his complaint as to its integrity. The issues as to the chain of the custody of the blood sample or the integrity of the blood sample are questions of fact. Questions of fact are matters exclusively within the province of the tribunal of facts and this court will not interfere with a trial judge's decision on questions of fact unless the judge was palpably wrong - see **R v Joseph Lao** 12 J.L.R 1238. The learned trial judge, being the tribunal of the facts, was entitled to decide what facts she accepted.

Ground 3

> "That the Learned judge commenced the Trial having pre-determined the issues, and approached the trial with a closed mind."

Ground 5

> "That in all the circumstances, the conviction is unsafe and ought not to stand."

Ground 8

> " That the Learned Trial judge failed to follow and/or misdirected herself as to the rules of practise and procedure appropriate to the protection of the Appellant."

[21] It was submitted by Mr Terrelonge that the learned trial judge, in remarks made by her prior to the commencement of the trial, stated that the case was one involving DNA evidence and informed defence attorney that he should advise his client to enter a plea of guilty, failing which, if he was found guilty, the court would not extend any leniency to him. These remarks, he contended, showed that she had predetermined the issues before the trial. Accordingly, the applicant was not afforded a fair trial.

[22] Mrs Seymour-Johnson conceded that the comments of the learned trial judge at the outset of the trial, by expressing her thoughts as to the cogency and power of the DNA evidence against the applicant, do show some measure of bias. Notwithstanding the unfortunate comments, she

argued, the applicant's plea remained not guilty even after he was consulted by his attorney-at-law. The court, therefore, must look at the totality of the evidence and based on the quality of the evidence in the case, it was exceptionally good to support the conviction, she argued.

[23] In the present case, the applicant pleaded not guilty. After the plea was taken and prior to the commencement of the trial, the following exchange took place between the learned trial judge and the applicant's attorney-at-law, as shown at pages 4, 5, 6 and 7 of the transcript:

> **"HER LADYSHIP:** I tell you what, Mr. Davis, I am going to take the break until 2:00 o'clock. I prefer that you prepare it.
>
> **MR. DAVIS** And that might be in our favour, M'Lady, because you might just offer no evidence after that.
>
> **HER LADYSHIP:** Don't bother with that.
> What I would suggest to you in the mean time is if you have DNA you should talk to your client and explain the importance. If you have DNA which is a blood sample, only one in so many thousands or millions of people can have that blood, that is why it is DNA and a whole heap of people came off death row in the United States because of DNA. Now, when blood is taken from you it is one in so many millions, and we only have two point something million people in Jamaica. So you explain to him what DNA result means. If the blood was taken on the spot where the complainant says the person fell and the blood was taken that same day by the expert and when they take the blood from him they find that

the blood matched that blood – you have the DNA results, Mr. Davis?

MR. DAVIS: Yes, ma'am.

HER LADYSHIP: You should take it and explain it to him. You understand the DNA?

MR. DAVIS: Yes, ma'am.

So it doesn't make sense to say after you have gone through all of that now to then say look here, after you put the court through all of this to try the case and if the court says all right, yes, I accept what the expert says – because it is scientific evidence we are talking about you know – it is not somebody who says I see, you can make a mistake with I see, and when the court says all right, we accept the scientific evidence and the court finds him guilty, it doesn't make sense you plead for …

MR. DAVIS: … mercy.

HER LADYSHIP: Yes, at that stage. So what I suggest is that you talk to your client, show him.

MR. DAVIS: I take your advice and I am grateful to you, M'Lady.

HER LADYSHIP: You talk to him and that time you can make representation, not after you called 10, 12 witnesses and we sit down three days and then you say well, will you kindly deal leniently with me; there is no room for leniency.

MR. DAVIS: What time, M'Lady?

…

HER LADYSHIP: …You can take advice and come back at 2 o'clock.

MR. DAVIS Yes M'Lady.

HER LADYSHIP: Call the witnesses.

(Witnesses called)

Gentlemen, I think Crown Counsel wishes to speak with you before we start the trial. We are starting it at 2:00. We hope that good sense will prevail. If it doesn't, then we are going to start the trial at 2:00…"

[24] It is obligatory on the part of a trial judge, in the execution of his duty, to maintain an impartial attitude at all times. In **R v Bernard** 12 J.L.R. 1203 Fox J.A, in dealing with a trial judge's functions, at page 1213, said:

> "Firstly, the judge must adopt and maintain an objective and impartial attitude to the proceedings. He must refrain from inordinate intervention during a trial, from usurping the functions of counsel, from interfering with the continuity of examination and cross-examination, from prejudging the outcome of the trial, from indicating that he favours the prosecution or the accused, and from indulging in comments, observations and discussions which may tend to compromise or reduce that patience, that willingness to listen, that humanity and that prestige, power, and probity which makes him the epitome of our judicial system, and, in the eyes of the public, 'a very special person'.
>
> Secondly, the trial judge must take control of his court, he must insist upon strict adherence to the adversary rules of trial. For this purpose he may be obliged to delimit the bounds of proper advocacy, and while giving the fullest opportunity of cross examination he may have to take steps to ensure that the right is not abused by prolix, irrelevant or insulting questions. He may even find it incumbent to scotch dilatory tactics, to check unnecessary delays, to forbid frivolous and pointless questions and to restrict all proceedings and conduct which may be time-wasting."

He continued by stating:

> "It is obvious in endeavoring to control his court to see that justice is done, a trial judge runs the real danger of being in breach of his duty to be impartial. The only workable safeguard against this danger is to have in mind at all times a clear concept of his essential role as a judge and to regulate his conduct of the trial proceedings in terms of that concept. He should see himself as a pilot whose first duty is to guide the trial in accordance with rules of evidence and the relevant law along lines as sedate and as orderly as the circumstances allow."

[25] As can be readily observed from the foregoing, trial judges should always be mindful of their roles as impartial arbiters and should proceed with great care in discharging their duties. They should at all times be aware that, in the execution of their functions, they are duty bound to ensure that an accused is accorded such fairness as the system permits. Any act of a judge which can be perceived as an infringement of the rights of an accused may operate so as to affect the safety of his conviction.

[26] The heart of Mr Terrelonge's complaint is one of bias on the part of the learned trial judge in directing the applicant to change his plea from not guilty to one of guilty by issuing a threat. The question therefore is whether the learned trial judge could be said to have acted prejudicially in seeking to have the applicant change his plea. The test for apparent

bias is whether after taking into account all the relevant circumstances, an objective observer would be led to believe that there is a real possibility or real danger of bias - see **R v Gough** [1993] AC 646 and **Re Medicaments & Related Classes of Goods** No. 2 [2001] 1 WLR 700.

[27] In the case of **R v Barnes** (1970) 55 Cr. App R 100, cited by Mr Terrelonge in support of his submissions, during the trial, the judge, in the absence of the jury, commented adversely on the hopelessness of the defences raised by the applicant and requested counsel to reconsider his position. Counsel withdrew from the case in light of the judge's comments and the advice which he had given to the applicant. On inquiry from the judge whether he wished his counsel to continue to represent him or whether he would defend himself, the applicant opted to defend himself but sought an adjournment until the following day. This request was refused by the judge. The applicant subsequently agreed to continue to be represented by the counsel. He was convicted. On appeal, his conviction was quashed and he was discharged. In quashing the conviction, the court concluded that the conduct of the trial judge was improper in that:

> "(1) It was putting extreme pressure on the appellant to plead Guilty, whereas after advice from his counsel the choice of plea was his. Indeed, if as a result the appellant had changed his plea, the Court could not have allowed his conviction to stand.

(2) It was bound to make the appellant think that the judge had taken so adverse a view of his case that he was unlikely to obtain a fair trial.

(3) Without knowing what advice counsel had in fact given to the appellant before arraignment, the judge forcibly conveyed what that advice should have been and should be now, thus attempting to interfere with the independence of counsel in his duty to give the appellant the best advice he could.

(4) It resulted in counsel feeling that he must excuse himself by revealing what advice he had in fact given, something which should never be revealed; indeed the revelation of this advice and counsel's agreement with the judge's view destroyed the relationship of confidence between client and counsel. Counsel would appear to the appellant to be siding with the judge, and indeed the appellant expressed the view that in all the circumstances he should defend himself, and counsel expressed a view that it would be in the appellant's interests that he should withdraw.

(5) It was wholly unreasonable in all the circumstances to refuse the appellant's request that the case be adjourned until the next morning in order that he might be in a position to take over the defence, thus forcing the appellant to continue with counsel in whom he no longer had full confidence."

It can be discerned from the case of **Barnes** that the comments made by the trial judge were made in the absence of the jury. This notwithstanding, the conviction was quashed.

[28] Although pressure was improperly imposed upon Barnes to plead guilty, he held his ground and did not succumb to the influence exerted by the trial judge. Thus, the pressure exerted for him to change his plea would not in itself have rendered his trial unfair. However, the trial judge's interference with counsel in his conduct of the defence, placed undue pressure upon counsel to the extent that the applicant would have lost confidence in him. The learned judge forcibly imposed upon the applicant the advice which, in his view, counsel ought to have given the applicant.

[29] In the instant case, it could not be said that the learned trial judge interfered with counsel's conduct of the trial, as the trial had not yet commenced. However, this is not the end of the matter. The applicant through his counsel, was called upon to change his plea under a threat issued by the learned trial judge. It cannot be ignored that this was a case in which the learned trial judge performed the dual role of judge and jury. In extending the command to the applicant to enter a guilty plea, under the threat that no leniency would be granted to him if he were to be found guilty, it is apparent that the learned trial judge was

influenced by the fact that a DNA report was in existence. Significantly, at that time, no evidence had been adduced.

[30] Further, in addition to the DNA report, there was also the evidence of visual identification by the complainant which was yet to be canvassed before the court. The prosecution was relying on the visual identification evidence as well as the DNA evidence. The DNA evidence as well as evidence of identification would have had to be established. In addition, so far as the DNA evidence is concerned, it would have been open to the applicant to have challenged the integrity of such evidence at the trial.

[31] The learned trial judge's remarks were inopportune, and would be seen as an allusion to the possibility or likelihood of the applicant's guilt before any evidence was adduced. She clearly erred by directing the applicant to enter a plea of guilty and in threatening that no leniency would be accorded to him if he failed to adhere to the directive. This would have led a reasonable man to believe that the applicant's right to a fair trial had been compromised. In all the circumstances, these remarks may well have led to the particular outcome of the case. It follows therefore that we could not have permitted the conviction to stand.

Ground 4

> "The verdict is unreasonable having regard to the evidence."

[32] The incident occurred during daylight. There was evidence from the complainant outlining the opportunities which he disclosed that he had to view his assailants' face at the time when the men approached and while they were travelling in the vehicle. All of this is linked to the fact that the applicant was pointed out by the complainant at an identification parade. Additionally, there is DNA evidence emanating from the sample of blood which was taken from the applicant and from the blood found on the roadway where the applicant was seen after the complainant discharged his firearm. Given the nature of the evidence presented by the prosecution, it is without doubt that the facts in support of the case are formidable.

Ground 7

> "That the Learned Trial Judge sitting as both judge and jury erred and/or misdirected herself and/or failed to give herself any, or any sufficient warning regarding the special need for caution and the reason for said caution before convicting the accused in reliance on the identification evidence advanced by the complainant thereby disregarding the established Turnbull guidelines and rendering the conviction unsafe."

In this ground, Mr Terrelonge complained that the learned trial judge failed to warn herself of the dangers of convicting the appellant on the evidence of the complainant and also that she did not warn herself that,

if she found the complainant to be a convincing witness, he could have been mistaken.

Where the prosecution's case is wholly or substantially dependent on the correctness of the visual identification of an accused, the trial judge is under a duty to warn the jury of the special need for caution in placing reliance upon the evidence of an identifying witness and the reasons for such caution (**R v Turnbull** [1976] 63 Cr. App R 132). This mandate imposes upon the trial judge a two fold duty. The first is an obligation to administer a warning to the jury of the inherent dangers of convicting on evidence in support of the visual identification of the accused. The second, is a duty to direct them as to the reason for such caution, in that an honest and convincing witness may have been mistaken.

[33] A judge who sits alone is not absolved from adhering to the requirements of the **Turnbull** principles. He or she sits not only as judge of the law but also as the tribunal of fact. Accordingly, he or she must not only expressly warn himself or herself of the risks of convicting on evidence adduced in support of the visual identification of an accused but also should not fail to state the reasons therefor - see **R v Carrol** SCCA No. 39/89 delivered on 25 June 1990.

[34] Although the **Turnbull** principle prescribes the issuance of the particular warning and the reason therefor, no special formula is required.

However, the trial judge must illustrate that he or she is not only mindful of the principle but that he or she has fully employed and embraced its full effect.

[35] The prosecution's case was to a great extent dependent upon the correctness of the visual identification of the person whom the sole eye witness said was the applicant. It cannot be denied that the learned trial judge appreciated this fact. In dealing with the issue of visual identification at page 243 the learned trial judge said:

> "I am aware and I warn myself of the danger of convicting a defendant on visual identification, so I look at the evidence of the complainant Wayne Morris as to how he was able to identify this accused man."

[36] As will be observed, the learned trial judge had warned herself of the danger of convicting the applicant on the evidence of visual identification. However, the matter does not rest there. After satisfying herself of the danger of convicting on the evidence of the complainant, she went on to review the evidence given by him surrounding the opportunities which he disclosed that he had to observe his assailant. However, this having been done, it was incumbent upon her to have gone further. Having issued the requisite warning, she ought to have incorporated the second limb of the **Turnbull** principle by expressly advising herself of the reason for the warning in that, an honest and

convincing witness could be mistaken. The failure so to do, could lead to the conclusion that the guilty verdict may have been founded on the inadequate direction by the learned trial judge, notwithstanding the strength of the prosecution's case.

[37] Despite our conclusions on grounds 3, 5, 7 and 8 which we consider sufficient to dispose of the appeal, we will nonetheless deal with the remaining grounds briefly.

Ground 9

> "That in Her Summation, the Learned Trial Judge failed to have any, or any due regard, to important questions, objections and issues raised by the Defence throughout the trial and consequently failed to administer Justice and Fairness to the Appellant."

This ground is devoid of merit. On examination of the summation we are satisfied that the complaint cannot be justified. The learned trial judge adequately directed herself on the issues which arose. She carefully dealt with the evidence of the prosecution's witnesses and resolved the conflicts which arose thereon. She dealt with the unsworn statement of the applicant.

[38] There were no important questions or issues raised by the defence which she ought to have taken into account. Nor did the necessity arise for her to have taken into account any objections advanced by counsel for the applicant.

Ground 13

> "That the conduct of the Learned Trial Judge in the proceedings led to many interventions and interruptions to Defence counsel on behalf of the Appellant and made it difficult for Defence counsel to do justice to the defence of the Appellant particularly in his cross examination of the prosecution witnesses."

[39] Mr Terrelonge's complaint in respect of this ground is that the learned trial judge's approach to the evidence generally and her frequent interruptions of defence counsel during his cross examination of the witnesses were highly prejudicial to the applicant.

[40] A review of the transcript of the proceedings reveals that during the trial, the learned judge, at times, intervened by way of correcting and assisting both counsel for the defence and for the prosecution. She made inquiries and comments which were not outside the bounds of those which a trial judge is permitted to make. She essentially sought to clarify questions posed by counsel for the defence and to guide him along the proper conduct of the defence. In our assessment of the interaction between the learned trial judge and defence counsel, we see nothing which reveals that anything said by the learned judge by way of intervention or interruption of counsel for the defence in his cross-examination of the prosecution's witnesses could be viewed as prejudicial to the applicant and would have amounted to unfairness to

him. While one or two of the questions posed to counsel for the defence might have been better omitted, they must be seen in the context of the summing up as a whole, which could not be said to be fundamentally unbalanced.

Ground 10

> "That the Learned Trial Judge failed to consider, or to properly consider, the Dock Testimony proffered by the Appellant and dismissed and/or disregarded same as mere commentary without any, or any sufficient, consideration."

In this ground, Mr Terrelonge complains of the learned trial judge's failure to properly consider the unsworn statement of the applicant. This complaint is unsubstantiated. The narrative outlined by the applicant in his unsworn statement was faithfully recounted by the learned trial judge in detail. It was for her to place on it such value as she thought fit. There is no doubt that she balanced it against the evidence given by the virtual complainant. It has been observed that in dealing with the statement, she made special reference to an assertion by the applicant that while in custody, he was threatened by a policeman. She took into consideration the fact that it was suggested to the complainant that he had an uncle in the constabulary force which the complainant denied. It is obvious that she had taken the unsworn statement into account and had placed on it such weight as she felt it deserved.

[41] Grounds 6, 11 and 12 relate to sentence. In view of our decision that the appeal should be allowed, it would be unnecessary to consider these grounds.

[42] Generally, in ordering a new trial, the court is guided by the following principles enunciated in **Reid v R** [1979] 2 All ER 904; [1979] 2 WLR 221 :

(a) the strength or weakness of the case,

(b) the seriousness of the offence,

(c) the probable duration and expense of a new trial,

(d) the prevalence of the offence,

(e) whether a new trial would entail an ordeal for the appellant/applicant,

(f) the length of time for which the appellant/applicant had been incarcerated,

(g) the lapse of time since the date of the alleged offence.

[43] We are of the view that the evidence adduced by the prosecution is remarkably strong. The offence with which the applicant has been charged is a very serious one. It is unlikely that a new trial will proceed beyond two days. The commission of offences involving the use of firearms has been prevalent. It is not likely that a new trial would in any way be prejudicial to the applicant. The period of the applicant's

incarceration has not been inordinately long. In the interests of justice, a retrial, as opposed to an acquittal is the proper course, which, in our opinion, ought to be adopted and which has been ordered.