[2010] JMCA Crim 19

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL 52/2008

BEFORE: THE HON. MR JUSTICE PANTON P
THE HON. MR JUSTICE MORRISON JA
THE HON. MISS JUSTICE PHILLIPS JA

NORMAN HOLMES v R

Delano Harrison QC for the applicant

Miss Paula Llewellyn QC, Director of Public Prosecutions, and Miss Kadean Barnett for the Crown

1 December 2009 and 23 April 2010

MORRISON JA:

Introduction

[1] On 18 April 2008, the applicant was convicted on two counts of an indictment charging him with the offences of illegal possession of firearm and robbery with aggravation, after a trial before Donald McIntosh J, sitting without a jury, in the High Court Division of the Gun Court. He was sentenced to 12 years imprisonment on each count and the sentences were ordered to run concurrently.

[2] At the conclusion of the hearing of his application for leave to appeal against conviction on 1 December 2009, we granted the application and announced that we would treat the hearing of the

application as the hearing of the appeal. The appeal was allowed and the applicant's conviction quashed and we directed that a judgment and verdict of acquittal be entered. These are the reasons for that decision.

The evidence at trial

[3] These are the facts, as they were presented at the trial by the prosecution. The complainant in this case, Mrs Sonjie White-Delzie, was at the material time a constable in the Island Special Constabulary Force. As such, she was assigned a firearm (a .38 Smith and Wesson revolver, with 12 cartridges) for the performance of her duties as well as for keep and care. She was also the owner of a brown 2001 Toyota Corolla motor car, registration number 9611 ER, which she valued at approximately $900,000.00.

[4] On 1 November 2007, the complainant paid a visit to her hairdresser in the Central Plaza on the Constant Spring Road in the parish of St Andrew. Having parked her car at a spot in the plaza, she went into the hairdresser's shop, where she remained for several hours. Upon leaving at about 9.00 pm in the evening, she went towards her car, opened the door on the driver's side of the car (the right hand side) and got into the car, closing the door behind her. She then placed the key in the ignition (thus activating the car's central locking mechanism) and started the car,

but when she put it in gear she found that it would not move. As she tried to ascertain what was wrong and continued her efforts to get the car to move, her attention was attracted by something or someone pulling forcefully on the door on her side of the car and, when she looked to her right to see what it might be, she found herself looking into the nozzle of a firearm. Her evidence was that the plaza was fully lit (with lights shining on the outside of the buildings and her own headlights on) and that she was able to see the face of the person who was holding the gun for about six or seven seconds. He was a man who she later described to the police as being about five feet, six inches tall, wearing a cap with a peak at the front "looking like a baseball cap". She appeared to agree with a suggestion in cross-examination that the peak of the cap covered a part of the man's face, but insisted that "It wasn't all the way down on his face" and that it didn't prevent her from seeing his face.

[5] At this point, the complainant then tried to reach for her handbag, which was on the front seat to her left, with a view to getting hold of her own firearm, though she at that point was very frightened (she told the court that so frightened was she that she actually wet herself on the spot). The man with the gun, still pulling at the door forcefully, obviously saw her reaching for the handbag and ordered her not to move and to open the door, saying "Hey gal, open the door". She complied by releasing the lock on the driver's door and pushing the door open. The man then

ordered her to get into the back of the car, at which point she took hold of her handbag and complied by clambering between the two front seats. Just before she got into the back seat, she heard and then saw the right rear door being opened and saw another man, dressed in full black, and heard when the man with the gun told this other man to get into the back of the car with her, which he did. The man in black then pulled her down fully into the back seat beside him and the man with the gun got into the driver's seat and closed the door of the car, at which point he turned around to face her and gave the gun to the man beside her and ordered him to "hold dis pan har". During this manoeuver, she was able to see the man in the driver's seat for another nine seconds. In all of this activity, she was still holding on to her handbag.

[6] The man in the driver's seat then reversed the car from where it was parked, before driving off into the Constant Spring Road. As they traveled down the road, the complainant began pleading with the men to let her go, telling them that she was the mother of three children and begging them to let her go home to them and both men assured her that they were going to carry her home (she having in answer to their enquiry told them that she lived on Molynes Road). On the instructions of the driver that he should check her handbag for a firearm, the man in black in the back seat beside her then grabbed the handbag, which was still clutched under her right arm, from her and began to search it, telling her

not to move and to remember that the gun was trained upon her. This is the complainant's graphic account of what happened next:

"**HIS LORDSHIP**:	Yes?
A:	Right there and then, I tell myself I was going to die while he was searching the bag.
MISS BROOKS:	Who was searching the bag?
A:	The man at the back
HIS LORDSHIP:	Yes?
A:	I took my left hand, put it up to the handle of the door, gently the knob on the door.
Q:	Hold on. This was which door?
A:	The left rear passenger door.
Q:	What happened after?
A:	I flicked the knob on the door, I gently opened the door and rolled out of the car.
Q:	And you rolled out of the car?
A:	In the vicinity of the Pavillion Plaza on Constant Spring Road.
Q:	You rolled out onto where?
A:	Pardon me?
Q:	You rolled out onto where?
A:	The road.

Q: Tell us what happened?

A: I rolled until I came to a halt on my stomach. I heard a female voice saying, 'Lord Jesus Christ, watch yah!'

Q: After you heard the female voice?

A: I looked up and saw another vehicle coming towards me.

Q: After you saw the vehicle coming towards you?

A: I used the training that I got. I fold my two arms into my bosom and rolled again to my right out of the road in a pool of water."

[7] Having thus by her own heroic effort freed herself, the complainant was initially assisted by a passerby and then by police officers in a passing radio car, who took her up and carried her to the Half Way Tree Police Station, by which time it was about 9:30 pm. By the complainant's estimate, the entire ordeal itself lasted about 10 to 11 minutes. Having made a brief report, the complainant was then taken by the police officers to the nearby Andrews' Memorial Hospital, where she was treated and spent the night.

[8] Neither of the robbers was known to the complainant before that evening. Some seven weeks later she was asked to attend an identification parade at the Half Way Tree Police Station where she

identified the applicant as the man with the gun who had first come upon her and who subsequently drove her car out of the plaza. Before making her identification, the complainant asked the applicant to say the words which the man with the gun had used to her at the beginning of her ordeal ("Hey gal, open the door") and, when pressed by the judge as to her reason for making this request, she said that "even though I identified him, I just wanted to hear his voice…[to]…see if I recognize as well as identify him, the voice, sir…". The evidence of Sergeant Wayne Jemmison, who conducted the identification parade, was that the applicant was represented by an attorney-at-law at the parade and made no complaint at the end of it as to the manner in which it had been conducted. Neither has any complaint been made about it in any of the grounds of appeal filed on behalf of the applicant or during the hearing before this court.

[9] Detective Corporal Debbia Jennings was on duty at the Half Way Tree Police Station at about 9:30 pm on the night of I November 2007 when the complainant was brought to the station by the two police officers who had picked her up on the Constant Spring Road after her ordeal with the robbers. She also accompanied the complainant when she was taken to hospital later that night. Her evidence at the trial was that on 28 November 2007, "acting on information", she along with other police officers went to a location in Twickenham Park in St Catherine

where she saw the applicant "who fit the description of [the] suspect", informed him that she was taking him into custody as a suspect in a matter in which an identification parade was to be held at Half Way Tree. When told of the allegations in respect of which the parade was to be held and cautioned, the applicant asked "Where is Central Plaza?". Subsequently, on 9 December 2007, Corporal Jennings arrested the applicant and charged him with the offences of illegal possession of firearm, robbery with aggravation, abduction and conspiracy, in response to which the applicant protested "I am innocent, I don't go anywhere but from work to home and I hardly have any friends".

[10] When she was cross-examined by the applicant's counsel at the trial, Corporal Jennings told the court that during the course of her investigations she had received "certain information" which led her to go in search for the applicant. She had also learnt at some point that he worked as a security guard at the Springs Plaza. No property belonging to the complainant had been found in the applicant's possession after he had been arrested. His home had not been visited by the police as part of the investigation, no other witnesses to what had taken place at Central Plaza on the night of 1 November 2007 had been found and neither the firearm which had been taken from the complainant nor the car which had been stolen from her had ever been recovered. When it was specifically put to Corporal Jennings that she had arrested the

applicant because of “just what someone told you”, her answer was that “Based on the description that was given he was arrested”.

[11] This was the case for the Crown. Counsel for the applicant then made a brief, but pointed, submission that the applicant ought not to be called upon to answer because of “the weaknesses of the identification”. However, the submission did not find favour with the judge, who felt able to call upon the applicant to answer without having to trouble counsel for the Crown for a response.

[12] The applicant gave sworn evidence in his defence. He told the court that he lived with his parents at Mary’s Field district, Kitson Town in the parish of St Catherine and that he was employed to Ranger Security Company as a junior supervising officer. He had been employed to the company in question since November 2005. His evidence was that on 1 November 2007 he had worked at the Springs Plaza, to which he was assigned to work as a guard between the hours of 7:00 am and 7:00 pm. On that day, he left work after being replaced early at 6:30 pm and went to a barber shop in Central Plaza, which is right next door to Springs Plaza. Although he was not watching the time, his estimate was that he left the barber at about 7:30 pm and proceeded to the Nelson Mandela Park in Half Way Tree, accompanied by a young lady, to purchase a pair of sneakers from a roadside vendor. He remained there in the park for

about 30 to 45 minutes before catching a bus – alone – bound for home in Kitson Town, via Spanish Town, where he changed buses. When he was asked to say where he was at 9:00 pm his answer was that he "would have been on his way home at that time". Upon getting to Kitson Town at about 10:00 pm he stopped off at his baby's mother's house, which is almost next door to his home.

[13] The following morning he returned to Kingston and to work at the Springs Plaza in time for the 7:00 am shift, but later that same day he was taken by his supervisor to another location, described as the Wisynco warehouse in Lake's Pen, where he took up duties as a guard from that date until 7 December 2007, when he was arrested at the workplace and taken into custody by Corporal Jennings. He had obtained a clean police record when he was first employed as a security guard and he had never before been held for questioning in connection with any offence. While he did sometimes have to wear a peaked cap as part of his uniform, he did not like wearing it and did not wear it most of the time (although this had caused him a problem with his boss), because wearing it caused him a migraine headache. He was innocent of the charges against him. When it was put to him in cross-examination that he had held up the complainant with a gun, his response was "I have never held a firearm in my life". Finally, recalled by his counsel for the purpose, the applicant told the court that he was five feet, eleven inches in height.

[14] The applicant called two witnesses to testify in his defence. The first was Captain Ashley Jones, the Director of Operations at Ranger Security Company. He confirmed that the applicant had been employed to the company from November 2005 and that he had been employed initially as an unarmed guard and then as a supervisor. In neither position was he required to handle a firearm and he had received no training from the company in the use of firearms. Captain Jones described the applicant as someone who performed his duties very well and abided by all the rules and regulations of the company, prompting his promotion to supervisory level in May 2006, within months of his joining the company. On his assignment at the Springs Plaza he supervised three other guards. At the beginning of November 2007 he was transferred by the company to Wisynco, Lakes Pen, because of the need for experienced guards for what was a new assignment for the company. Captain Jones said that when he received news that the applicant had been arrested and charged he was surprised, because as far as he knew the applicant "was never of that character". In answer to the judge's question, Captain Jones could not say whether the applicant ever went without wearing his cap, but he did wear it whenever he saw him.

[15] The applicant's second witness was Mr Howard Daley, who was Assistant Operations Manager of Ranger Security Company. He

confirmed Captain Jones's evidence in respect of the applicant's reliability and trustworthiness, describing him as honest, very hardworking and responsible at all times. After he was briefly cross-examined by Crown counsel, the learned trial judge then asked the witness a number of questions of his own, initially exploring the circumstances in which the applicant's reassignment to Wisynco came about, and then venturing farther afield.

[16] Firstly, he was asked by the judge about the number and frequency of reports about the theft of cars from plazas such as Mall Plaza. Central Plaza and Springs Plaza (in respect of which the witness was not very helpful, basically saying that although he sometimes heard such reports on the news, he was not able to recall how many). The judge then asked Mr Daley a series of questions which gave rise to one of the applicant's complaints before us and which we therefore reproduce in full:

"HIS LORDSHIP:	You don't know anything about that man outside of work?
A:	No, Your Honour.
HIS LORDSHIP:	Did you understand that there was a car ring operating, stolen ring operating in the Kitson Town area of St. Catherine?
A:	I heard about it on the news.

HIS LORDSHIP: Big ring?

A: Once it makes the news it should be big.

HIS LORDSHIP: Supposed to have involved police officers?

A: No, sir, didn't hear that.

HIS LORDSHIP: So the news alleged, and those persons would not have criminal records if police were involved, they won't have criminal records.

A: No, Your Honour.

HIS LORDSHIP: You know Kitson Town, by the way?

A: I go there one time.

HIS LORDSHIP: Only one?

A: (Witness nods)

HIS LORDSHIP: How far it is from Spanish Town, any idea?

A: I don't know it by mile.

HIS LORDSHIP: How long it would take from Spanish Town?

A: Maybe half-an-hour or forty-five minutes.

HIS LORDSHIP: Anyway, you don't know it.

Officers suppose to request transfers from one place to another?

A: Yes, Your Honour

HIS LORDSHIP:	Has Mr. Holmes ever requested a transferred?
A:	No, Your Honour.
HIS LORDSHIP:	Not that you know?
A:	It would have to come to me.
HIS LORDSHIP:	It would have to come to you. Has he ever been reprimanded by the company for wearing his cap, his uniform cap?
A:	No, Your Honour.
HIS LORDSHIP:	You are sure?
A:	Sure.
HIS LORDSHIP:	You would know?
A:	Yes."

[17] That was the case for the defence, at the end of which the judge summed up the case and found the applicant guilty on both counts of the indictment, with the result already indicated.

The application for leave to appeal

[18] The applicant filed an application for leave to appeal against conviction and sentence, which was considered and refused by a single judge of this court on 21 April 2009, and in due course the application was renewed before the court itself. Counsel for the applicant, Mr Delano

Harrison QC, sought and was granted leave to argue six supplementary grounds of appeal on his behalf. The grounds were as follows:

> "1. In convicting the Applicant the learned trial judge plainly relied on inadmissible hearsay material on which the prosecution substantially founded its case of visual identification. The Applicant's conviction accordingly constituted a grave miscarriage of justice.
>
> 2. The learned trial judge erred insuperably, in that he himself elicited from Howard Daley, a witness called by the applicant, evidence which was not merely irrelevant but was also wholly inadmissible hearsay and which, it is submitted, from its tenor and extent, could only serve to have prejudiced the applicant's cause.
>
> 3. The learned trial judge erred in law in his failure to uphold the submission that the prosecution had failed to make out a prima facie case against the applicant.
>
> 4. The verdict is unreasonable and cannot be supported having regard to the evidence.
>
> 5. In his summation, the learned trial judge omitted to direct himself as to the implication of the evidence of the Applicant's previous good character, with respect to the credibility of the Applicant as a witness in his own defence. This non-direction, it is submitted, is so grave as to warrant interference with the verdict.
>
> 6. In his summation the learned trial judge's approach to the Applicant's defence was inadequate and unfair. As a result, the Applicant suffered a grave miscarriage of justice."

The submissions

[19] In support of ground 1, Mr Harrison QC reviewed the evidence relevant to the complainant's identification of the applicant. He pointed out at the outset that, by her own account, the ordeal which she

experienced had so terrified her as to render her hysterical and unable to fully control her own body. During the entire ordeal, the face of the man who first accosted her with the gun was partially covered down to his forehead by a cap with a peak "looking like a baseball cap", and she had only been able to observe his face for two continuous periods of about six to seven and about nine seconds each. And yet, Mr Harrison pointed out, although the only description of this man given by the complainant to the police was that he was about five feet, six inches tall and wore a baseball-type cap with a peak (a description which Mr Harrison stigmatised as "plainly unhelpful"), Corporal Jennings was able, on 28 November 2007, to go to a specific location at Twickenham Park in search of a man who was not known to her before, where she accosted and arrested the applicant "who fit the description of her subject". On the officer's own evidence, she had gone in search of the applicant as a result of "certain information" which she had received and his arrest was based on the description that was given to her and on "other things".

[20] Mr Harrison accordingly submitted that the inescapable inference from Corporal Jennings' evidence was that a person or persons unknown, who were not called as witnesses, had identified the applicant as the complainant's principal assailant and that all of the factors referred to by Corporal Jennings as having assisted her in locating the applicant

constituted material that was "hearsay, highly prejudicial and wholly inadmissible".

[21] We were referred by Mr Harrison to three authorities in support of his submissions on this ground, two decisions of this court and the other a decision of the Privy Council. The cases are ***Winston Blackwood v R*** (1992) 29 JLR 85, ***Gregory Johnson v R*** (SCCA No. 53/1994, judgment delivered 3 June 1996) and ***Delroy Hopson v R*** (1994) 45 WIR 307. We will consider these authorities in detail in due course.

[22] In support of ground 2, Mr Harrison invited the court to recall that the applicant had testified in his defence that he lived in Kitson Town and worked at the Springs Plaza. One of the applicant's two witnesses was Mr Howard Daley, the Assistant Operations Manager at Ranger Security Company and one of the applicant's supervisors. After the witness had been cross-examined by Crown counsel, the trial judge himself then proceeded to question him, as set out at para. [16] above. Mr Harrison's submission on this was as follows:

> "16. It is submitted that, as respects the relevance (if any) of the questions cited, the learned trial judge was plainly seeking to forge some link between alleged car-stealing in the general area in which the Applicant worked and an alleged car-stealing ring operating in the general area in which the Applicant resided. Thus: Applicant worked in an area where cars were allegedly being stolen; Applicant lived in an area where a car stealing ring was

allegedly operating; ergo, Applicant was participant in the car- stealing which had occurred, at the material time, in the general area in which he worked ".

[23] Mr Harrison submitted further that the judge's questions complained of invited inadmissible hearsay evidence and that their tendency and the length of the questioning were a clear demonstration of prejudice on the part of the judge against the applicant, thus denying him the substance of a fair trial.

[24] With regard to ground 3, Mr Harrison relied on his submissions on ground 1, and also referred us to the no case submission that had been made by counsel who represented the applicant at the trial. That submission was, as we have already observed, brief but pointed, and also bears repetition in full:

"**MRS. BENJAMINE:** My Lord, I wish to submit that the accused man ought not to be called upon to answer to the charges, no case to answer. The case against him is really on identification. I know Your Lordship is aware of the authorities. And where the identification is so weak, that there is no case to answer. The witness, herself, said she saw him for only a matter of seconds, My Lord, six seconds at the window, nine seconds in the car. By her own words, she went into the back and she was looking at the back of his

head for the rest of the time. She was in a state of fright and hysteria, in her own words, and I believe it would be extremely difficult, if not impossible for making a proper identification in those circumstances. She didn't know him before, it was 9:00 p.m., at night there is a material distinction between the description she gave the police and her statement and his actual appearance. She described a short man, in fact, six inches and this is a tall man, five feet eleven. And, My Lord, nothing links this accused man to the complaint or to this crime. There is no other evidence. The case rests solely on identification and on the authorities of Turnbull and I submit that he should not be called to answer based on the weakness of the identification. He was also wearing a cap, in her own words, My Lord, a peak cap, further obscure his face.

HIS LORDSHIP: Are you through?

MRS. BENJAMINE: Yes, My lord.

HIS LORDSHIP: Case to answer."

[25] As regards ground 4, Mr Harrison relied on his earlier submissions on grounds 1 and 2, and referred in particular to the unsatisfactory nature of the description of her assailant given by the complainant, the fact that his face was partially covered by a "peak" cap, the discrepancy between the height of the assailant given by the complainant (5 ft. 6 ins.) and the actual height of the applicant (5ft.11 ins.), the unsatisfactory treatment of

this discrepancy by the judge (describing it as the "only flaw" in the description given by the complainant) and the judge's general dismissive attitude towards this issue.

[26] The complaint in ground 5 related to the judge's failure to give a good character direction, in the light of the fact that the applicant had given sworn evidence and that both he and one of his witnesses (Mr Ashley Jones, the Director of Operations at Ranger Security Company) had spoken to his good character. In these circumstances, Mr Harrison submitted, the applicant was entitled to a direction as to the relevance of his good character both to the applicant's credibility, as well as to his propensity to commit the offences for which he was charged. While the trial judge had given the former direction, he had omitted to give the latter, as he was required on the authorities to do. This omission, it was submitted, was fatal to the conviction.

[27] And finally on ground 6, it was submitted that the judge had taken an "inadequate/cavalier approach" to the applicant's defence.

[28] It is in our view entirely to her credit that the learned Director of Public Prosecutions did not feel able to resist this application for leave to appeal. As she correctly observed at the end of Mr Harrison's submissions, the cumulative effect of all of the shortcomings identified by Mr Harrison "created a mountain for the prosecution" on appeal. While a number of

these shortcomings were primarily attributable to the judge himself, it also appears, as Miss Llewellyn QC also pointed out, that there was a clear gap in the police investigation of the offences, which in the end could not properly be closed by resort to hearsay and otherwise inadmissible evidence.

Ground 1

[29] The gap in the investigation to which the learned Director referred is clearly evident from the evidence in chief of Detective Corporal Jennings, who was the investigating officer. Having related to the court the circumstances in which the complainant was brought to the Half Way Tree Police Station on the night of 1 November 2007 and subsequently taken by her that same night to Andrews Memorial Hospital, the next step in the investigation on the corporal's evidence was when, some four weeks later, "acting on information", she went to a location at Twickenham Park where she saw the applicant, "who fit the description of my suspect", immediately took him into custody and made arrangements for the identification parade which was held on 9 December 2007.

[30] As Detective Corporal Jennings frankly accepted when she was cross examined on the point, she had gone in search of the applicant acting entirely on things that had been told to her, not only with regard to the description of the applicant, but also based on "other things".

Counsel's attempt to discover from the witness what those "other things" might be was firmly quashed by the judge's comment that "she told us already". But regrettably, at the end of the day this too remained a mystery. Not only was the applicant unknown to Corporal Jennings before she took him into custody at Twickenham Park, but nothing was found on his person or at his home (which was neither searched nor even visited by the police) that could have linked him in any way to the offences for which he was charged. There were no eyewitness reports of the crime, the firearm allegedly deployed by the complainant's assailant was never recovered, nor was her car ever recovered. In all the circumstances, the Director's comment, that this gap in the police investigation had been plainly filled at the trial by resort to hearsay and otherwise inadmissible evidence, was entirely apt.

[31] In ***Delroy Hopson***, a police officer gave evidence of his visit to the victim of a shooting (who subsequently died from his injuries) in hospital on the night of the shooting, and his subsequent investigations. In the course of his examination-in-chief, when he was describing the hospital visit, the following exchanges occurred:

> **"Question**: …Now did you speak to him?
>
> **Answer***:* Yes, sir.
>
> **Question**: Did he speak to you?

Answer: Yes, sir.

Question: And I believe in police language, 'he told you something?'

Answer: Yes, sir.

Question: After what he told you, corporal, did you make any decision to look for anybody in particular?

Answer: Yes, sir.

Question: I mean as part of your investigation?

Answer: Yes, sir."

[32] The following morning the police officer obtained a warrant for the arrest of the appellant. Allowing the appeal from the appellant's subsequent conviction for murder, the Board's comment on this evidence was that "[it]…was, of course, hearsay, highly prejudicial, and wholly inadmissible" (per Lord Nolan at page 310).

[33] In ***Winston Blackwood***, the sole witness to identify the appellant as one of the perpetrators of a murder did not know his name and so could not have named him to the police. At the trial, Crown counsel elicited from the investigating officer that some five days after the murder he begun looking for two persons, including the appellant, both of whom he identified by name. No witness who was called by the prosecution

testified to having supplied those names to the police, leading Wright JA to observe as follows (at page 90):

> "Accordingly, the evidence complained of was plainly hearsay and ought not to have been allowed. And the danger passed without being recognized because in his summing-up the trial judge repeated the evidence without any comment let alone a direction to disregard such evidence as being hearsay. Indeed, had he recognized it at all he may well have ruled differently on the 'no case' submission".

[34] Wright JA went on to remark (at page 91) that "the problem with this sort of evidence is not novel", referring to the following well known dictum of Lord Devlin in **Glinski v McIver** [1962] AC 726, 780-781:

> "The defendant's case is that from then on his actions were governed by the advice he received from Mr. Melville, a solicitor in the legal department at Scotland Yard, and from the counsel whom Mr. Melville instructed. No suggestion of malice or bad faith is made against either solicitor or counsel. Since the defendant's state of mind was in issue, evidence of what he was told by the solicitor and counsel would in the ordinary way have been admissible. But it was thought, rightly or wrongly, that privilege would be claimed, either Crown privilege or the client's privilege that protects communication between himself and his legal advisers, to prevent the disclosure of what passed between the defendant and solicitor and counsel. So the customary devices were employed which are popularly supposed, though 1 do not understand why, to evade objections of inadmissibility based on hearsay or privilege or the like. The first consists in not asking what was said in a conversation or

> written in a document but in asking what the conversation or document was about; it is apparently thought that what would be objectionable if fully exposed is permissible if decently veiled. So Mr. Melville was not asked to produce his written instructions to counsel but was asked without objection whether they did not include a request for advice 'on the Glinski aspect of the matter.' The other device is to ask by means of 'Yes' or 'No' questions what was done. (Just answer 'Yes' or 'No': Did you go to see counsel? Do not tell us what he said but as a result of it did you do something? What did you do?) This device is commonly defended on the ground that counsel is asking only about what was done and not what was said. But in truth what was done is relevant only because from there can be inferred something about what was said. Such evidence seems to me to be clearly objectionable. If there is nothing in it, it is irrelevant; if there is something in it, what there is in it is inadmissible."

[35] And again in ***Gregory Johnson***, the prosecution adduced evidence from a police officer that on the same day of the murder with which the applicant was charged he received a report and started investigations as a result of which, two days later, he obtained a warrant for the arrest of the applicant, who was previously unknown to him. He had, the police officer testified, recorded statements in the matter, but he could not recall from whom. It was clear that the sole eyewitness called by the prosecution at the trial could not have been one of the persons from whom the officer took statements at that time, since in his case his statement was not given until some 19 months after the murder.

[36] Patterson JA, giving the judgment of the court, considered that "the instant case cannot be distinguished from ***Hopson's*** case", and concluded as follows (pages 7-8 of the judgment):

> "The evidence of [the police officer] went no further than to show that he obtained warrants for the arrest of the appellant on two charges of murder. His evidence had no probative value whatsoever, it was hearsay, inadmissible and must have conveyed to the jury that the appellant had been identified by person or persons other than [the eyewitness] as the murderer. The prejudicial effect of such evidence could not be cured in the judge's summation, and for that reason alone, the conviction could not stand."

[37] In our view, the evidence given by Detective Corporal Jennings in this case (which passed completely without comment by the judge either at the time it was given or in his summing up) clearly falls into the same category, with the result that it was, as Mr Harrison contended, hearsay and entirely inadmissible. It could have had no other effect than to convey the impression that information had been received by her from some unnamed and unknown source or sources that the applicant was the person who had held up the complainant at gunpoint on the night of 1 November 2007 in Central Plaza. It accordingly carried absolutely no probative value and could have had no effect other than prejudice,

which the judge made no attempt whatsoever to dispel or mitigate in his summing up. On this basis, therefore, ground 1 clearly succeeds.

[38] However, we cannot leave this ground without commenting on the stubborn persistence in our courts of the kind of forensic device to evade the rule against hearsay, on show in the instant case, which drew critical comment from Lord Devlin in ***Glinksi v McIver***, the Privy Council in ***Hopson*** and from this court in both ***Winston Blackwood*** and ***Gregory Johnson***. As Wright JA trenchantly observed in ***Winston Blackwood*** (at page 91) "Hearsay is hearsay whether fully exposed or thinly veiled", and we would certainly hope that, after the yet further reminder that this decision represents, resort to these devices will stop.

Ground 2

[39] The questioning of the defence witness by the judge, about which complaint is made in ground 1, was reproduced at para. [16] above. The learned Director's observation on them was that they amounted to "a most unfortunate intervention". That may be a polite understatement. Not only did the questions invite, as Mr Harrison submitted, inadmissible hearsay evidence, but they were also wholly irrelevant to the issues which the judge was required to consider. In addition to the fact that the general tenor of the questioning was obviously prejudicial, the questions themselves were also purely gratuitous in the sense that they sought to

construct a theory of the case which was, no doubt because there was absolutely no evidence to support it, not put forward by the prosecution.

[40] If this had been a jury trial, it would have been incumbent on the judge to make it clear to the jury that they should decide the case purely on the basis of the evidence adduced at the trial and not take into account unsupported speculation coming from any other source. In the instant case, where the judge was both judge and jury, it is difficult to avoid the conclusion that, as Mr Harrison put it well, "the tendency of the questions and the number of them laid bare the prejudice operating on the learned trial judge's mind against the Applicant's cause". This was certainly not consonant with the undoubted and overriding right of the applicant to a fair trial (see per Lord Bingham in ***Randall v R*** (2002) 60 WIR 103, 108), with the result that the applicant was therefore in our view entitled to succeed on this ground as well.

Grounds 3 and 4

[41] As has been seen, counsel for the defence made an unsuccessful no case submission at the end of the Crown's case (see para. [24] above). The submission was explicitly based on "the weakness of the identification", counsel obviously having in mind that passage of Lord Widgery CJ's celebrated guidance in ***R v Turnbull and Others*** [1976] 3 All ER 549, 552, in which evidence of identification of a sufficient quality to be

"safely" left to the jury to assess its value was contrasted with evidence of lesser quality:

> "When, in the judgment of the trial judge, the quality of the identifying evidence is poor, as for example when it depends solely on a fleeting glance or on a longer observation made in difficult conditions, the situation is very different. The judge should then withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification. This may be corroboration in the sense lawyers use that word; but it need not be so if its effect is to make the jury sure that there has been no mistaken identification. For example, X sees the accused snatch a woman's handbag; he gets only a fleeting glance of the thief's face as he runs off but he does see him entering a nearby house. Later he picks out the accused on an identity parade. If there was no more evidence than this, the poor quality of the identification would require the judge to withdraw the case from the jury; but this would not be so if there was evidence that the house into which the accused was alleged by X to have run was his father's."

[42] In the instant case, the complainant had her assailant under direct observation for two periods of six and nine seconds between the time when he first accosted her in Central Plaza and the moment when she made good her escape in the vicinity of the Pavilion Plaza closer to Half Way Tree on the Constant Spring Road. While those two periods of observation might arguably have afforded her something more than (but, even then, only marginally so) a fleeting glance, there can be no doubt

that it was at best a longer observation made in excruciatingly difficult circumstances. On her own evidence, the complainant's first reaction after being confronted with the assailant's gun pointed directly at her (which is when she was able to see is face for the first period of six seconds) was to exclaim "Jesus!" and hold down her head. In short order, in her words, "I was frightened and right there and then I urinated on myself". Almost immediately afterwards she was directed, with the gun still being held directly at her, into the rear of the car where she was joined by the second assailant who dragged her down fully into the back seat, while the first assailant sat in the driver's seat of the car and turned around to hand over the gun to the newcomer who had joined her in the back of the vehicle (which is when she was able to see his face by the reflection from the lights on the plaza for the second period of nine seconds). For the remainder of the time that she was in the car, as it set off out of the plaza and down Constant Spring Road, she remained in the back seat, guarded by the man sitting beside her, trying to work out at the same time how to get hold of her own firearm which was in her handbag still clutched under her arm and, when that man grabbed the bag from her and started to search it, she felt like, as she put it, she "was going to die". Which is the point at which, completely defenceless now, she took the desperate, though, as it turned out, inspired decision to release herself by opening the rear door and rolling out of the car.

[43] There can be no doubt that the complainant's ordeal that night was one of utter terror. McIntosh J was obviously impressed by the presence of mind and resourcefulness which she showed, even in these circumstances, in keeping her wits about her and in the end managing to secure her escape by her own efforts. He also considered, after stating that "what is important is the credibility of the witness and what she transmits taking place during the time of her ordeal", that she was "a witness of truth…a compelling, competent and honest witness…".

[44] However, it seems to us that in focusing as he did on the credibility of the complainant, the trial judge failed to address the clear intent of Lord Widgery's statement in ***Turnbull*** of what a trial judge is obliged to do in a case of visual identification on a submission of no case, which is to assess the quality of the identification evidence in the manner explained by Lord Mustill in ***Daley v R*** [1993] 4 All ER 86, 94:

> "By contrast, in the kind of identification case dealt with by ***R v Turnbull*** the case is withdrawn from the jury not because the judge considers that the witness is lying, but because the evidence even if taken to be honest has a base which is so slender that it is unreliable and therefore not sufficient to found a conviction: and indeed, as ***R v Turnbull*** itself emphasised, the fact that an honest witness may be mistaken on identification is a particular source of risk. When assessing the 'quality' of the evidence, under the *Turnbull* doctrine, the jury is protected from acting upon the type of evidence which, even if

believed, experience has shown to be a possible
source of injustice."

[45] In our view, the identification evidence in the instant case, in addition to being based on observation in the difficult circumstances recalled above, was completely unsupported by any other evidence, such as the finding on the applicant or at his home of any property of the complainant. The evidence was equally unsupported, contrary to what the judge seems to have thought, by the actual appearance of the applicant when set against the description of him supplied to the police by the complainant. As Mr Harrison pointed out, not only was there a significant discrepancy in height (which the judge himself recognised, describing it as "the only flaw" in the description of her assailant given by the complainant), but the rest of the description (that he wore a cap with a peak "looking like a baseball cap") was "plainly unhelpful". It is therefore impossible to appreciate what the judge may have had in mind when he nevertheless asserted in his summing up that, save for the "only flaw" already referred to, "in all other aspects the description [given by the complainant] would have fitted the accused".

[46] In these circumstances, it appears to us that the applicant was also entitled to succeed on both ground 3, in which the complaint was that the judge ought to have acceded to the no case submission, and ground 4, which complained that the verdict of the trial judge at the end of the

day, founded as it was on unsatisfactory identification evidence, was unreasonable and could not be supported having regard to the evidence (see section 14, Judicature (Appellate Jurisdiction) Act).

Ground 5

[47] There is no question that both the applicant, who gave sworn evidence, and his witnesses testified to his good character. Neither can there now be any question that in these circumstances the applicant was entitled to a credibility direction, that is, that a person of good character is more likely to be truthful than one of bad character, and a propensity direction, that is, that he is less likely to commit a crime, especially one of the nature with which he is charged (see ***R v Vye*** [1993] 3 All ER 241,248 and ***Michael Reid v R***, SCCA No. 113/2007, judgment delivered 3 April 2009, pages 12-13). As Lord Steyn said in ***R v Aziz*** [1995] 3 All ER 149, 156, "Fairness requires that the judge should direct the jury about good character because it is evidence of probative significance".

[48] While it appears from the summing up that McIntosh J was not entirely unaware of this requirement (twice referring to the evidence of the applicant's good character in terms which implied that he had the propensity limb of the direction in mind), there can be no doubt that he did not direct himself in accordance with the credibility limb of the now standard direction. As Lord Carswell pointed out in ***Teeluck & John v The***

State of Trinidad & Tobago (2005) 66 WIR 319, 329, "Where credibility is in issue, a 'good character' direction is always relevant", though it is also true that, as Lord Bingham said in ***Jagdeo Singh v The State*** (2005) 68 WIR 424, at para. [18], the "omission of a 'good character' direction on credibility is not necessarily fatal to the fairness of the trial or to the safety of a conviction", much depending on "the nature of and issues in a case, and on the other available evidence". (See also ***Vijai Bhola v The State*** (2006) 68 WIR 449, esp. at paras. [14] – [17].)

[49] It appears to us that in this case, it being essentially the complainant's word against the applicant's as regards his alleged participation in the robbery on 1 November 2007, the applicant's credibility was very much in issue and it cannot at all be said, in our view, that this is a case in which, even if a proper direction had been given, a conviction would inevitably have ensued. We are therefore of the view that this ground of appeal must succeed as well.

Ground 6

[50] Enough has been said in this judgment to indicate that in our view the trial judge treated with the applicant's defence, which was essentially an alibi, with scant regard (see the discussion on ground 2 at paras. [39] –

[40] above). In particular, Mr Harrison attracted our attention to the following passage in the judge's summing up, where he dealt with the applicant's evidence:

> "On the other hand, this accused man gave evidence and I was very careful to watch his demeanour, and I did not find him to be a witness of truth. I did not find him to be a honest witness [sic]; I did not find him to be a truthful witness, and I did not accept him and his evidence. He did not convince me of his innocence and did not raise in the mind of the court a reasonable doubt. The evidence of his supervisors did not help him. Although they tried to speak to his character and trying to convince the court that he is not the type of person that would do something like this, there were some very interesting coincidences, and I merely say coincidences: one is his attempts to disassociate himself from a peak cap and another is the fact that having been working at the Springs Plaza for some nine months to a year, he suddenly was transferred the day after this problem took place from St. Andrew to St. Catherine. Another, of course, is the fact that although he is careful to account for his presence in the area of Central Plaza from 6:30 when he says he was relieved up until 7:30, probably 8:30, he is not able to account for his whereabouts than to say he was on his way home. At best he is saying from 8:30 he was at NCB Bank on Half Way Tree Road which is within easy walking distance of Central Plaza. Then, of course, here is a man who is of such a good character, he says he has no friends, but this court, as I said before, having found the accused to be not a witness of truth, laying no store or weight on his evidence cannot convict him on that now, this court must look to the case brought against him by the Prosecution to see whether it satisfied the court beyond a

reasonable doubt of the guilt of the accused. "

[51] Not only did the judge in this passage seek to measure the applicant's case against purely speculative matters ("there were some very interesting coincidences"), but his further comment that the applicant was "not able to account for his whereabouts than to say he was on his way home" was also quite unfair, since it is difficult to understand what more the applicant could have said other than what he did say, which was that at the time the robbery was alleged to have taken place he was on his way home to Kitson Town, and was either in Spanish Town, where he changed buses, or on the bus actually taking him from Spanish Town to Kitson Town. And then, the coup de grace, so to speak, which was the apparent dismissal by the judge of the applicant's evidence with the comment "…of course, here is a man of such good character, he says he has no friends…". Quite apart from being a complete non sequitur, this was also, as Mr Harrison pointed out, a misrepresentation of the evidence, which was that upon arrest the applicant had told Corporal Jennings that "I hardly have any friends" and then, in answer to Crown counsel's question in cross examination, "You have any friends in the plaza?", his answer was "Just the proprietor".

[52] We therefore think that the applicant has also made good the contention that the trial judge's approach to his defence was inadequate and patently unfair and that on that basis ground 6 must succeed as well.

Conclusion

[53] These are our reasons for the decision announced on 1 December 2009 (see para. [2] above). It is, we think, right to add that, given the obvious gaps in the investigation of this matter, as well as the intrinsic weaknesses in the identification evidence in the case, we did not consider this a fit case in which to order a new trial pursuant to section 14(2) of the Judicature (Appellate Jurisdiction) Act.