[2019] JMCA Crim 20

JAMAICA

IN THE COURT OF APPEAL

PARISH COURT CRIMINAL APPEAL NO 3/2017

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MISS JUSTICE PHILLIPS JA
THE HON MISS JUSTICE P WILLIAMS JA

OLIVER JOHNSON & KARL ROBERTS v R

Kimani Brydson for applicant Oliver Johnson

Kemar Robinson for applicant Carl Roberts

Miss Paula Llewellyn QC, Director of Public Prosecutions, Mrs Natiesha Fairclough Hylton and Miss Natalie Malcolm for the Crown

17, 18, 19 January 2018 and 24 May 2019

PHILLIPS JA

[1] The appellants, Mr Oliver Johnson and Mr Karl Roberts, were members of the Jamaica Constabulary Force. They were jointly charged on two informations, contrary to section 14(1)(a) of the Corruption Prevention Act, with corruptly accepting $19,000.00 and soliciting $50,000.00 from Mr Curtis Gardner, as a gift or advantage for themselves for not prosecuting Mr Gardner for the offence of possession of ganja. They were tried and convicted before Parish Court Judge, Her Honour Mrs Grace Henry-McKenzie, who, on both counts, sentenced Mr Johnson to nine months imprisonment at hard labour and

Mr Roberts to six months imprisonment at hard labour. These sentences were ordered to run concurrently.

[2] The appellants lodged an appeal against their convictions and sentences. We heard this appeal on 17, 18 and 19 January 2018. Counsel for the appellants submitted that the appeals in respect of convictions and sentences should be allowed and their sentences set aside on the basis that: (i) there were several significant and material inconsistencies that had rendered the Crown's case tenuous and manifestly unreliable; (ii) prejudicial information was led that could not have been sufficiently cured by any warning given by the learned Parish Court Judge; (iii) the learned Parish Court Judge failed to properly direct herself with regard to whether there was indeed a joint enterprise; and (iv) the learned Parish Court Judge failed to properly apply the principles relating to identification.

[3] Crown Counsel, Miss Natalie Malcolm, after proffering arguments on the inconsistencies and discrepancies, prejudicial information and joint enterprise, ultimately conceded that she could not proffer an appropriate or adequate response with regard to the issue of identification. She made this concession on the basis that, in her view, there was indeed, in the summation by the learned judge, a disregard of the principles relating to identification. Crown Counsel therefore agreed that the appeals against the appellants' convictions and sentences ought to be allowed and their sentences quashed.

[4] On 19 January 2018, having found that the grounds relating to inconsistencies and discrepancies, and the inadequacy of the identification evidence, had merit, we therefore allowed both appeals, quashed the convictions, set aside the sentences, and entered judgments and verdicts of acquittal for both men. We promised to give our reasons for this decision in writing. These reasons fulfil that promise. The delay in providing the same is deeply regretted.

The Crown's case

[5] Mr Gardner testified that on 3 February 2008, at about 8:00 am, he and his girlfriend Miss Jessica Hutchinson were at his home located at 2 Mais Avenue, Duhaney Park in the parish of Saint Andrew. He also has a shop located to the back of the house. Whilst there, both appellants, who were police officers, and whom he had known before, came to his house. Mr Gardner said that Mr Johnson indicated that they had received information that there was a firearm inside his house. He testified that he allowed the appellants to search his house and his shop to the back. Both appellants, he stated, found 10 bags of ganja, in small packages valued at $20.00 each, and $14,000.00 inside the shop, and they also found firecrackers inside the house. Mr Johnson then informed Mr Gardner that he would charge him with the offence of possession of ganja and placed him inside the police service vehicle.

[6] Mr Gardner indicated that, when he was placed in the police service vehicle, Mr Johnson was the driver and Mr Roberts sat in the front passenger seat. He then embarked upon a circuitous journey with both appellants to various areas in Saint Andrew. Mr Gardner said that his friend, Mr Lansford Powell, also called "Boogie",

arrived at some point, and drove behind the police service vehicle in order to ascertain what was happening to him. During that journey, Mr Gardner testified that Mr Johnson asked him "what can [he] can do to help [himself]", told him that the $14,000.00 he had found inside the shop "was not enough to share" for both appellants, and said that they required $50,000.00. Mr Gardner's evidence was that he interpreted that to mean that they wanted him to pay money in order to avoid being charged for possession of ganja and the firecrackers. While on that journey, Mr Gardner made several calls to friends, including a call to Mr Powell, in an attempt to secure a loan to pay money to both appellants. However, he was only able to borrow $5,000.00 from a neighbour upon his return to Duhaney Park, which he gave to Mr Johnson.

[7] While in Duhaney Park, Mr Gardner's evidence was that Mr Johnson said that since they had already received $19,000.00 (the $14,000.00 found inside the shop and the $5,000.00 Mr Gardner had borrowed), a balance of $31,000.00 remained. He testified that Mr Johnson had given him a cellular number through which he could be contacted. Mr Gardner stated that he did not call Mr Johnson that day, and so the appellants retuned the next morning. Mr Johnson then made enquiries of him as to why he did not call, and stated, in Mr Roberts' hearing and presence, that he required the balance of the money which he expected to be paid by 3:00 pm that day, failing which "[Mr Gardner] would know how it goes". Mr Gardner said that in his view that statement was a threat. He stated that ultimately he was never charged with possession of ganja and the firecrackers, and further that the $19,000.00 was not willingly given to the appellants, but was done to avoid being charged for possession of

the ganja and the firecrackers. The bag containing the ganja and the firecrackers was returned to him. He also said that throughout his entire ordeal, Mr Roberts was present but said nothing.

[8] Based on this perceived threat, Mr Gardner, acting on advice, spoke to Detective Senior Superintendent Cornwall Ford of the Flying Squad at the Central Police Station and gave him a statement. Based on instructions given to him by Detective Senior Superintendent Ford, he visited the Hunts Bay Police Station, where he spoke to a police officer named "Cowboy" and gave two police officers a statement.

[9] Mr Gardner's credibility was severely challenged under cross-examination. He was questioned with regard to his bad character, as he had previously been deported from the United States of America. Many inconsistencies and discrepancies in his evidence were highlighted and identified, relating to, *inter alia*, how the $14,000.00 was found; at what time did Mr Powell arrive; whether his girlfriend Miss Jessica Hutchinson was present; and the number of statements he gave to the police.

[10] Mr Powell testified on the Crown's behalf. He indicated that, when he had visited his friend Mr Gardner's house on the date in question, he saw a police service vehicle at the gate. He went inside Mr Gardner's house where he saw him with two police officers whom he had not known before. Nobody else was in the house with Mr Gardner at the time. Mr Powell stated that the men he saw there that day were not the appellants, and further that when the police left with Mr Gardner, he "didn't see them with anything in their hands". He said that he drove behind the police service vehicle in which Mr

Gardner was travelling because Mr Gardner was his friend, "and if he was going to station, something must went down and [he, Mr Powell] wanted to know". He also accepted that while on the journey Mr Gardner had called him on his cellular phone and spoke to him. He later saw Mr Gardner in Duhaney Park speaking to two police officers for about 5-10 minutes. He later drove off.

[11] Under cross-examination Mr Powell stated that he was aware that Mr Gardner had "kept a dance which was turned off by officers", and that Mr Gardner had mentioned that incident to him more than once. He also testified that Mr Gardner had a girlfriend that worked at a Shell Gas Station, but he had not seen her at Mr Gardner's house on the day in question.

[12] Corporal Winston Harding, the investigating officer, testified that he had received instructions and a file to conduct an investigation into the said matter. Only three statements were on the said file, one from Mr Gardner and one from each accused. He recorded a statement from Mr Powell, but not from Mr Gardner's girlfriend, because he was unable to find her. The appellants were charged in September 2011, and no identification parade was held. Under cross-examination he indicated that, after making several enquiries, no evidence was unearthed showing that Mr Gardner had given a statement to Detective Senior Superintendent Ford.

[13] No-case submissions were made by counsel in respect of both appellants. They contended that since the central issue in the case was one of credibility, and Mr Gardner's evidence was filled with material discrepancies and inconsistencies, the

Crown's case was tenuous and manifestly unreliable and that no jury properly directed could rely on it. The learned Parish Court Judge ultimately ruled that there was a case to answer but, before doing so, she directed that Detective Senior Superintendent Ford be called to testify as to whether he had collected a statement from Mr Gardner.

[14] Detective Senior Superintendent Ford testified that Mr Gardner had made a report to him and he gave him certain instructions. He did not take a written statement from Mr Gardner nor did he cause a written statement to be taken from him by anyone at his office. Mr Gardner was referred to someone else regarding the report. Detective Senior Superintendent Ford said that he later contacted Assistant Commissioner Derrick Knight, Commanding Officer of the Saint Andrew South Division.

The case for the defence

[15] Both appellants gave unsworn statements and called no witnesses to support their respective cases. Mr Johnson stated that he was a police officer. He denied knowledge of the allegations of corruption made against him by Mr Gardner, and stated that Mr Gardner was telling lies and being vindictive. He said that he was innocent. Mr Roberts indicated that he was also a police officer and that his father was a former Superintendent of Police who had taught him to be "honest, fair and not to be a part of any corruption". He described himself as being honest, hardworking and said that he had never been the subject of any disciplinary complaint whilst serving as a police officer. He also denied knowledge of Mr Gardner's allegations. He said that Mr Gardner was telling lies on "two hardworking police officers" and described Mr Gardner as being vindictive and spiteful. Mr Roberts also told the court that he was innocent.

Reasons for judgment

[16] Both appellants were convicted and sentenced as indicated at a paragraph [1] herein. We intend to summarise the reasons of the learned Parish Court Judge briefly.

[17] In delivering her reasons for judgment, the learned Parish Court Judge examined the issues related to Mr Gardner's identification of the appellants and found that he was not mistaken as to his identification of both appellants whom she accepted that he knew before.

[18] She assessed Mr Gardner's credibility having regard to whether the numerous inconsistencies and discrepancies indentified were material. She juxtaposed the testimony of Mr Gardner with that of Mr Powell with regard to whether the appellants were indeed present on the date in question, and indicated that she preferred Mr Gardner's evidence that they were indeed present. She found that the discrepancies as to whether Mr Gardner's girlfriend was present at the time; when Mr Powell had arrived; how the $14,000.00 was received by the appellants; and whether both appellants had "turned off" Mr Gardner's dance were immaterial. While she accepted Detective Senior Superintendent Ford's testimony that he had not collected a written statement from Mr Gardner, she found that that discrepancy would not affect Mr Gardner's credibility, since he was possibly mistaken as to whether he gave an oral or written statement to the police.

[19] The learned Parish Court Judge also found that both men were acting as part of a joint enterprise since Mr Roberts was present throughout the incident, he returned

the next day with Mr Johnson, and gave no indication that he had disassociated himself from the events that had transpired.

[20] Her Honour Mrs Henry-McKenzie assessed the appellants' unsworn statements and found them to be "evasive and insincere" and untruthful. She accepted that Mr Gardner was a witness of truth. She also found his evidence to be credible and reliable, since, in her view, it was void of any fabrication, and the inconsistencies and discrepancies identified, did not, in her view, destroy his credibility.

[21] It is for these reasons that she found both appellants guilty of accepting $19,000.00 and soliciting $50,000.00 from Mr Gardner being a gift or advantage for themselves for not prosecuting Mr Gardner for possession of ganja in the performance of their public functions contrary to section 14(1)(a) of the Corruption Prevention Act. As indicated, Mr Johnson was sentenced to nine months imprisonment at hard labour on both counts, and Mr Roberts to six months imprisonment at hard labour on both counts.

The appeal

[22] The appellants filed several grounds of appeal summarised as follows:

1. The learned Parish Court Judge erred when she failed to uphold the no-case submission as there were material discrepancies and inconsistencies that rendered the Crown's case tenuous and manifestly unreliable.

2. The learned Parish Court Judge erred when she admitted prejudicial evidence during the trial.
3. The learned Parish Court Judge failed to have sufficient regard to the principles relating to identification, and in particular dock identification and so erred in convicting both appellants.
4. The learned Parish Court Judge failed to adequately direct herself in relation to the law on joint enterprise.

Issues

[23] Based on the grounds of appeal filed and the submissions advanced by counsel, in our view, four issues arose for consideration by the court as follows:

1. Did the learned Parish Court Judge err in failing to uphold the no-case submission having regard to the inconsistencies and discrepancies on the Crown's case?
2. Did the learned Parish Court Judge err in her treatment of the prejudicial evidence that was elicited during the trial?
3. Was sufficient regard had to the principles relating to identification, particularly those relating to dock identification?

4. Did the learned Parish Court Judge fail to adequately direct herself on the law on joint enterprise?

Discussion and analysis

Issue 1: The learned Parish Court Judge's failure to uphold a no-case submission in the light of inconsistencies and discrepancies on the Crown's case

[24] Mr Kimani Brydson asserted that the learned judge erred in failing to uphold the no-case submission as the witnesses for the Crown gave diametrically opposed evidence. He identified the inconsistencies and discrepancies that he considered to be material and, in reliance on **R v Galbraith** [1981] 1 WLR 1039, indicated that the evidence adduced was of such a tenuous nature that it could not support the appellants' conviction. He also cited **Taibo (Ellis) v R** (1996) 48 WIR 74 to support his contention that the learned trial judge's directions on these inconsistencies and discrepancies were insufficient as she ought to have scrutinized the evidence, rather than merely rehearsing it.

[25] Miss Malcolm conceded that there were a number of inconsistencies and discrepancies in the Crown's case. However, in reliance on **Galbraith** and **Director of Public Prosecutions v Selena Varlack** [2008] UKPC 56, she argued that they were not of such a degree that would render the Crown's case manifestly unreliable and the Crown's witnesses incapable of belief. She relied on **Steven Grant v R** [2010] JMCA Crim 77 to support her submission that the mere fact there were inconsistencies and discrepancies does not necessarily mean that a case has not been made out against the

appellants. Miss Malcolm highlighted the learned Parish Court Judge's treatment of the inconsistencies and discrepancies and further asserted that she had appropriately and adequately canvassed all the inconsistencies and had sufficiently scrutinized them. In so doing, she argued that the learned Parish Court Judge made findings of fact which this court has said in **Wayne Samuels v R** [2013] JMCA Crim 10, ought not to be lightly disturbed.

[26] There were indeed many inconsistencies and discrepancies on the Crown's case. In **Morris Cargill v R** [2016] JMCA Crim 6, Brooks JA cited various cases from this court which give guidance to judges on how to analyse inconsistencies and discrepancies. He stated that while "[t]rial judges are not, however, required to indentify every inconsistency and discrepancy that manifests itself during trial", "it would be remiss of a judge to fail to mention such inconsistencies and discrepancies that may be considered especially damaging to the prosecution's case". In making a determination as to whether these inconsistencies and discrepancies were "especially damaging to the prosecution's case" so that a submission of no case to answer ought to succeed, the Judicial Committee of the Privy Council has given some guidance in **DPP v Varlack**. In that case, the Board adopted a summary of the principles (stated in **Galbraith**) outlined by King CJ in the Supreme Court of South Australia in Questions of Law Reserved on Acquittal (No 2 of 1993) (1993) 61 SASR 1, 5 where he stated that:

> "... If there is direct evidence which is capable of proving the charge, there is a case to answer no matter how weak or tenuous the judge might consider the evidence to be... There is no case to answer only if the evidence is not capable in law of supporting a conviction."

[27] Having regard to these principles, we examined the discrepancies and inconsistencies identified by the learned Parish Court Judge and her analysis thereof.

[28] The learned Parish Court Judge highlighted the difference between Mr Gardner's and Mr Powell's testimony as to whether the appellants were present on the day in question. As indicated, while Mr Gardner stated that the appellants were present, Mr Powell stated that the appellants were not the police officers he saw that day. The learned Parish Court Judge rejected Mr Powell's evidence as: (i) she was more impressed with Mr Gardner's testimony; and (ii) Mr Gardner would have had the appellants under a longer period of observation, knew them before, and had a better opportunity to identify them than Mr Powell. She therefore found that the discrepancy with regard to identification of the appellants was not fatal to the prosecution's case, as the identification evidence was such that she could rely on it.

[29] Another discrepancy on the evidence was whether Mr Gardner's girlfriend was present at the time of the incident. Mr Gardner said that she was inside his house at the material time, but Mr Powell stated that apart from Mr Gardner and the police, no one else was at Mr Gardner's house that morning. The learned Parish Court Judge noted that Mr Gardner's girlfriend was not called as a witness and no statement was collected from her. She found that based on Mr Gardner's cross-examination in relation to that discrepancy, he and Miss Hutchinson no longer shared a relationship. She concluded that this discrepancy would not be material and would not have tainted Mr Gardner's credibility.

[30] Mr Gardner had testified that he had given two statements to the police. One in a car park at Pembroke Hall, and the other to Detective Senior Superintendent Ford. Detective Senior Superintendent Ford testified that he did not record a statement from Mr Gardner, but had taken a report from him and referred him to the Hunts Bay Police Station. The learned Parish Court Judge accepted the evidence of Detective Senior Superintendent Ford. She stated that sometimes witnesses confuse reports given to the police with recorded statements. As a consequence, she found that that discrepancy did not affect Mr Gardner's credibility.

[31] An inconsistency arose as to how the appellants had received the $19,000.00 from Mr Gardner. In his examination-in-chief, Mr Gardner said that Mr Johnson took $14,000.00 from his shop, and he had borrowed $5,000.00 from a friend which he gave to Mr Johnson. However, in cross-examination, he stated that he did not know how much money was taken. He also admitted that, in the statement he had given to the police, he had not stated that any of men took money from his house or shop. In fact, he had stated that he "went to [his] house where [he] collected Fourteen Thousand Dollars ($14,000.00) from the shop and borrowed Five Thousand Dollars ($5,000.00) from a friend and walked to Salkey Avenue where [he] met [the appellants]". He said further that "[he] went into the car and gave the driver the Nineteen Thousand Dollars ($19,000.00)". He attributed this inconsistency to a genuine mistake as he had given the statements a long time ago in 2008, and the trial commenced in 2014.

[32] The learned Parish Court Judge found that the only inconsistency was with regard to how the appellants received the $14,000.00. While she noted that Mr

Gardner's statement would have been taken at a time closer to when the event had occurred, she nonetheless accepted Mr Gardner's explanation that this inconsistency was a genuine mistake. She found that this inconsistency was not fatal to the Crown's case as the $14,000.00 belonged to Mr Gardner and was paid to the appellants in order to avoid Mr Gardner's prosecution for possession of ganja.

[33] Mr Gardner testified in his examination-in-chief that when he got into the police vehicle, Mr Powell drove up, spoke briefly to the appellants, the appellants then drove off, and Mr Powell followed behind. However in cross-examination, Mr Gardner agreed that he had said in his statement to the police that Mr Powell came immediately after the appellants had informed him that they were going to search his house. In re-examination, Mr Gardner said that Boogie came around the time when the appellants were about to enter his house. The learned Parish Court Judge found this inconsistency to be immaterial as, in her view, Mr Powell's "absence or presence at the time of the search by the police, does not go to the core issue in the case". She also found that that inconsistency would not have been fatal to the Crown's case since there was no evidence that Mr Powell was present during the search, and since the incident had occurred about six years earlier, Mr Gardner's memory might have faded.

[34] An issue arose as to whether Mr Johnson was indeed the officer who had "turned off" Mr Gardner's dance sometime previously. During cross-examination, Mr Gardner indicated that Mr Johnson had visited his premises and "turned off" his dance. That issue was raised by the defence to provide a basis upon which Mr Gardner may have harboured some malice towards Mr Johnson and by extension, Mr Roberts. The learned

Parish Court Judge indicated that Mr Gardner had no direct knowledge that Mr Johnson had "turned off" his dance. Moreover, in her view, the incident was so remote that it revealed no discrepancy, inconsistency or contradiction that could materially affect Mr Gardner's credibility. She found that there was no malice on Mr Gardner's part.

[35] The learned Parish Court Judge identified, scrutinized and analysed the inconsistencies and discrepancies in the instant case. Although the court hesitates to differ from the findings of a judge sitting alone in the court below, taken cumulatively, in our view, those inconsistencies and discrepancies rendered the Crown's case tenuous and manifestly unreliable, and so, in this instance, the learned Parish Court Judge was clearly wrong. The inconsistencies and discrepancies in the evidence were sufficient to undermine the Crown's case in relation to crucial matters, namely, the identification of the appellants and the ingredients of the offences. The material issues raised on these inconsistencies and discrepancies relate to: (i) identification of the appellants having regard to whether they were present at the material time; and (ii) in relation to the ingredients of the offences, whether money was found, by whom, where was it found, to whom was it given, and in what amount. Therefore, the grounds of appeal that challenged her analysis of these inconsistencies and discrepancies succeeded.

Issue 2: Prejudicial evidence

[36] In his examination-in-chief, at page 18 of the notes of evidence, Mr Gardner said the following:

> "...The next time I saw Officer Roberts, he paid a visit to my house. I don't remember the date but I came to Court and

> went back home and about 8:00 - 8:30 in the evening, I saw two individuals in a car which pulled up by the shop and they called to me. The car reversed to the corner of Mais and Pasal Avenue and pulled up to my front gate.
>
> When I went around to the gate, I was approached by Mr. Roberts, asking me to help him. That's when he said the only job he knew was being a policeman and he was asking me to help him save his job. Then he made an offer of Twenty Five Thousand Dollars ($25,000) as payment not to come to Court that day. Then offered to pick me up the day of Court to some undisclosed place to cool out. [sic] It was a Court date for the same matter. I did not see Mr. Roberts before coming to Court."

[37] Counsel for Mr Roberts at the trial made an application for this portion of the evidence to be struck from the record as it was prejudicial and not contained in any statement provided to the defence. The learned Parish Court Judge ruled that that portion of the evidence "will not be taken into account in determining the matter". She also rejected an application for the trial to be commenced *de novo* before a different Parish Court Judge as she stated that "the Court's mind is not prejudiced" and that evidence "will not affect the decision of the Court".

[38] Counsel for Mr Roberts, Mr Robinson, submitted that prejudicial evidence was led during the trial. He argued that the warning the learned Parish Court Judge gave to herself was an "artificial wall" in her mind, as the evidence elicited disclosed an admission of guilt and possibly the commission of another offence which must have had some impact on her mind, thereby rendering the conviction unsafe. Crown Counsel conceded that that portion of the evidence was indeed prejudicial. However, she contended that it had no effect on the appellants' convictions as the learned Parish

Court Judge did not rely on it during her summation. She further contended that, pursuant to the dicta in **Calvin Powell and Another v R** [2013] JMCA Crim 28, the learned Parish Court Judge had exercised her discretion on how to consider that portion of the evidence appropriately in the instant case.

[39] Indeed, in **Calvin Powell and Another v R**, Brooks JA stated that when prejudicial evidence has been led, the matter is "largely left to the discretion of the trial judge". Thomas LJ in **R v Gosney** [2007] EWCA Crim 94, a case from the Court of Appeal of England and Wales, gave some guidance to courts as to ways in which they may treat with prejudicial evidence. He said at paragraph [16]:

> "...The modern practice is that where something of this kind occurs, there are a number of matters that a judge must consider. As for example was suggested in *Coughlan* and *Young* [(1976) 63 Cr App Rep 33] by Lawton LJ, where a remark is one that very casually occurs, and by saying anything about it attention would be drawn to it, the better course might be to say nothing, particularly in a long case. There are other circumstances where it might be right for a judge to consider with counsel, or if it is a litigant in person, with that litigant, what direction should be given or in an extreme case a judge might wish to consider discharging the jury."

[40] It is therefore evident that the learned Parish Court Judge has a wide discretion as to how to treat with prejudicial evidence when it has been led, and further, that discharging the matter before her so that it can be commenced de novo before another court, is only one way of dealing with the issue, and does not lightly occur. In our view, the evidence led that Mr Roberts, in an effort to save his job, offered $25,000.00 to Mr

Gardner not to attend court, was highly prejudicial. However, the learned Parish Court Judge indicated that she would not consider that prejudicial evidence in making her determination, and further stated that it would not prejudice her mind. The authorities indicate that dealing with prejudicial evidence is a matter entirely within the discretion of the judge. Moreover, that piece of evidence was not used to bolster her reasons for judgment. It was unfortunate that that evidence was adduced and it ought not to have been led, but it cannot be said that it "coloured" her mind (see **Harry Daley v R** [2013] JMCA Crim 14). It was not therefore fatal to the convictions. Accordingly, the ground of appeal relating thereto failed.

Issue 3: Identification

[41] The learned Parish Court Judge did not warn herself as to the dangers of dock identification. She stated that the case was one of visual identification, and warned herself as to the correctness of Mr Gardner's identification of the appellants. She found that the quality of identification evidence given by Mr Gardner was good and so she could rely on it. Mr Robinson submitted that the learned Parish Court Judge ought to have given directions on dock identification since no identification parade was held. She erred in failing to do so, rendering the appellants' convictions unsafe. Crown Counsel, tried at first blush to resist this ground, but ultimately conceded that she was unable to do, as directions on dock identification ought to have been given.

[42] We agree with counsel for the appellants that an identification parade ought to have been held as it would have served a useful purpose, since there were serious

questions as to the cogency of Mr Gardner's claim of prior knowledge of the appellants. These questions arise due to the following:

1. The discrepancy between Mr Gardner's testimony and that of Mr Powell's as to whether the appellants were present on the day in question.
2. Mr Gardner did not name Mr Roberts in his statement to the police.
3. Mr Gardner testified that he knew Mr Roberts from the Duhaney Park Police Station. However, in his Question and Answer interview with police, Mr Roberts stated that he had been stationed at the Hunts Bay Police Station for his whole career.
4. Under cross-examination, Mr Gardner had testified that he saw Mr Roberts at a barber shop in Duhaney Park located across from the Total Gas Station "a couple of times", but when the police collected a statement from him, he did not tell them that he recognised Mr Roberts as someone he had seen before at a barber shop.
5. Mr Gardner admitted under further cross-examination that the details he gave in court as to what was

allegedly said or done by each appellant was omitted from his statement to the police.

6. Mr Gardner denied that Mr Johnson had come to his dance once and "turned it off", in cross-examination, but in his statement to the police, he said that "[he] found out one of the policemen name to be Mr Johnson, ... he even came one time and lock off a dance I was keeping in front of my yard in early 2007". Mr Gardner also told the court that "[w]hen I said he came and locked off my dance, I was told it was him, I didn't see him specifically". This was yet another detail that was omitted from his statement.

7. The incident occurred in 2008. The appellants were arrested in 2011, over three years after the incident had occurred and yet no identification parade was held. Mr Gardner's statement to the police was devoid of specific details in relation to the appellants. The question that must arise is how did the appellants come to be arrested by the police?

[43] It is evident that Mr Gardner's identification of the appellants was questionable. An identification parade ought to have been held, but, having not been held, his identification of the appellants at trial was clearly a dock identification which is

undesirable in principle. Brooks JA in **Dwight Gayle v R** [2018] JMCA Crim 34 referred to the inherent dangers in the court accepting dock identification evidence. At paragraph [35] he said that dock identification "lacks the safeguard of an identification parade and increases the risk of an incorrect identification. A witness may identify a person who is sitting in the dock as the perpetrator simply because of his presence there (see **Holland v Her Majesty's Advocate** [2005] UKPC D1; [2005] SC (PC) 3, at paragraph [47])". So although dock identification by itself is not inadmissible and is a matter for the judge's discretion, it is incumbent on a judge to give a warning about those inherent dangers. Brooks JA also gave a thorough and comprehensive review of the law relating to dock identification at paragraphs [32]-[67] of **Dwight Gayle v R**, which we adopt wholeheartedly. In the light of these principles, it would seem, that an identification parade would have served a useful purpose, and directions on dock identification ought to have been given.

Issue 3: Secondary liability

[44] It is unnecessary for us to address the matter of whether Mr Roberts did anything to participate in the alleged offences by encouraging and assisting in the commission of the same, as we are of the view that the evidence/arguments in support of the grounds on the inconsistencies and discrepancies which arose in this case, and the inadequacy of identification of the appellants were sufficient to dispose of this appeal. There was no need, therefore, to address whether the learned Parish Court Judge erred in her consideration of the law on secondary liability.

Conclusion

[45] Accordingly, having regard to the fact that no identification parade was held, and a dock identification was made without a warning being given as to the dangers thereof, coupled with the manifest inconsistencies, discrepancies and omissions with regard to the identification evidence, and the ingredients of the offences, we found that the convictions of both appellants would have been unsafe. It is for those reasons that we allowed both appeals, quashed the convictions, set aside the sentences, and entered a judgment and verdict of acquittal for both men, as stated in paragraph [4] herein.