JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 79/2008

BEFORE: THE HON MRS JUSTICE HARRIS P (Ag)
THE HON MR JUSTICE DUKHARAN JA
THE HON MISS JUSTICE PHILLIPS JA

CHRISTOPHER LEWIS v R

Linton Gordon and Miss Tamiko Smith instructed by Frater, Ennis and Gordon for the appellant

Miss Paula Llewellyn QC, Director of Public Prosecutions and Mrs Andrea Martin-Swaby for the Crown

29 February, 1 March 2012 and 3 June 2013

PHILLIPS JA

[1] The appellant was tried in the Home Circuit Court over a period of several days commencing on 26 May 2008 for the offence of murder. The particulars of the charge were that, on 14 June 2003, in the parish of Saint Andrew, the appellant murdered Neil Wright in the course or furtherance of a robbery. He was convicted of murder on 5 June 2008 and, on 13 June 2008 he was sentenced to life imprisonment, with a stipulation that he should be ineligible for parole until he had served a period of 40 years

imprisonment. On 7 January 2011, a single judge of this court granted him leave to appeal.

The case for the prosecution

[2] The prosecution's case in a nutshell was that on 14 June 2003, two armed gunmen, one of whom was the appellant, entered the "jerk pork pit" located at Lot 65F Golden Way in the parish of Saint Andrew, and shot and killed one of the patrons attending the establishment. The prosecution called 12 witnesses, four of whom were civilian witnesses, namely Gifton Gillings, Frank McCaulsky, Robert Reynolds and Grace Plummer, who were all at the "jerk pork pit" on that fateful night.

[3] Mr Gifton Gillings gave evidence that he was a farmer and on that night he had attended the business place of Miss Plummer, the said "jerk pork pit" with his friend, Mr Reynolds and some of his (Reynold's) co-workers, including the deceased, Neil Wright. Mr Gillings stated that he was seated around a table drinking beer, with his back against the shop, and facing a private driveway which ran from the premises. Mr McCaulsky and Mr Reynolds were seated to his left at the table and Mr Wright was standing to his right. He testified that the premises were well lit, and he saw when a motor car reversed into the driveway and two men alighted from it. The men came to about 9 feet from where he was and said, "[t]his is a hold up, nobody move". The men, he said, were both armed with what he thought was a snub nose revolver, and what appeared to be a 3.8 automatic gun, which they pointed in his direction.

[4] It was Mr Gillings' evidence that the man with the revolver stepped past him, went to Miss Plummer who was at the jerk pork pit, and said, "Gal, gimme the money. You gal, gimme the money, yuh want a buss yuh?" That assailant was then 6 feet away from him. Miss Plummer, he said, indicated that she had only $5.00 which she was willing to give him. The other man who he later identified as the appellant, was still at the entrance, and he ordered, "Unno put unno han' pon unno head." Mr Gillings, who gave evidence that he was a licensed firearm holder got up from his seated position and fired two shots at the appellant. He then, he said, turned the muzzle of his gun to the other armed intruder and fired three shots in his direction, and heard Miss Plummer say, "Him get it , him get it". He stated that he saw Mr Reynolds fire two shots at the appellant who "jumped up" and then retreated to the motor car which was in the private driveway. The car sped off, but not before both he and Mr Reynolds had fired shots at it. He said he thought he heard gunshots being fired back at him, and after the men drove away, he saw Neil Wright lying face down on the ground. He also realized that he had been shot in his elbow and had been hurt in one of his fingers. He was taken to the hospital, where he remained for six days and was treated for a fractured arm.

[5] Mr Gillings estimated that the appellant spent about 15 minutes, at the premises, during which time he had been "looking at him" under strong lighting conditions. He described his licensed firearm as a "super 38 pistol" which used super 38 ammunition, and which held 10 rounds, which he had discharged that night. He also indicated that he had given his firearm and ammunition to the police for them to be subjected to

ballistic examinations. He further testified that he attended an identification parade and after walking along the line up of men "two, three times", he asked the appellant to step forward, turn left, move his hand from behind him, resume his original position, and he then identified the appellant standing under the number eight, as the man who had shot him.

[6] He was challenged in cross-examination that he had said in his statement to the police that he had given a description of the appellant, namely, that he was of a light black complexion, slim build, about 5' 6"-7" and sporting a low cut hair style. He indicated to the police in his statement, however that he was not able to give a description of the clothes the appellant had been wearing that night. He admitted that he had said in the statement, "I might be able to identify the other gunman. If seen again I might be able to identify him" (emphasis supplied), which statement he said, was with reference, to the appellant, as the other gunman had succumbed to injuries received that night.

[7] He explained that he made that statement, due to "shocks", but maintained that he was speaking the truth. He also said that he would not be able to identify the car if seen again. He accepted that he had walked the room at the identification parade three times, and had said when he stopped in front of the appellant at the parade at number eight that "it looked like number 8". He said that this did not mean that he was not sure who the assailant was. In fact, he explained this statement by saying, "I did that because I was scared of my life, I did that because I was scared". He finally concluded in cross-examination by saying, "yes, the truth is, it look like him, it was really him", but

also agreed with the suggestion put to him by counsel for the defence, that if the person on the parade, had really been the assailant that night, he would not have said "it look like him", but that "it was him". In re-examination, he stated that the person that he had identified at the identification parade, was the person who had held him up and shot him on 14 June 2003.

[8] Mr McCaulsky gave evidence that he was sitting at the table with Mr Gillings, with his back towards the pathway. He confirmed that the area was well lit. He said that he heard the car drive up, looked around and saw the two men coming down the pathway. He said that the men got to a distance of 4 feet from him, indicated that it was a hold up. One of them went on to the jerk pit, and then the man, closest to him who remained in the pathway, pointed a semi-automatic gun at him. He indicated that both of the men were armed. He then heard gunshots coming from the jerk pit. After several shots were fired, he saw the man who was in the pathway stumble and then go back up the pathway into the car. He said that he had seen Mr Gillings and Mr Reynolds with firearms that night and he observed that after the shooting, he saw that Mr Gillings was bleeding from his left arm and he saw another man lying face down in the pathway. He was not cross-examined.

[9] Mr Reynolds was also sitting at the table with Mr Gillings, when he saw a car coming along outside the driveway. The car, he said, was a beige Toyota motorcar. He said the car backed into the driveway and a male person alighted from it. He came within 4 yards of him, with a pistol in hand and ordered the persons at the table to put their wallets on the table. He said another man with a revolver walked past them, and

Mr Gilllings pulled his firearm and fired two shots, one to the person in front of them and one to the man who had walked past them. The person in front of them returned the fire, and he (Reynolds) then pulled his firearm and fired shots also. In his words, "[i]t was all pandemonium", people were running around. He shot at the car that was then moving away. After the shooting stopped, he noticed that his worker Neil Wright had been shot and killed. He said that the gun used to kill him was a .38 revolver, and he described the guns held by the gunmen as "chrome, shine". He testified that he was a licenced firearm holder and that his firearm was a "super 38" which used super 38 ammunition, and on that night he had used five rounds. He confirmed that the place was well lit. He said that the police came on the scene and searched the area and found "the firearm". They also took his gun from him, although it had since been returned to him. He was not cross-examined.

[10] Miss Grace Plummer gave evidence that she operated the jerk pit at 65 Golden Way and on that night she was in the jerk pit about 6 feet from the table where Mr Gillings was seated with Mr McCaulsky, Mr Reynolds and others. She confirmed that Mr Gillings was facing the passage, whereas with regard to the other two men, one had his back turned to the entrance and the other faced the side of Mr Gillings. She observed a brown silver looking Corolla motorcar reverse into the entrance with the engine still running and the lights still on. She saw a man come out of the car with a silver and black gun which he pulled from his waist and indicating that it was a hold up, ordered that no-one move, and that they should empty their pockets and keep their hands on their heads. She noticed a second man come out of the car and approached her with a

gun in his hand also, which looked like a 38. He directed her to "[g]ive mi what you have". She offered him two $5.00 which she placed on the table, he chucked her, then she heard several explosions coming from the front of the premises and the man who had been pointing the gun at her was on the ground, still clutching his gun. After shouting "him get it, him get it", and the shooting had stopped, she called the police, and assisted one of her patrons who had been shot. She located a gun at the rear of her premises about 22-23 feet away from where the second gunman had fallen. She placed a bucket over the gun and later pointed it out to the police who had come to the scene, and saw them hand it over to Detective Sergeant Henry.

[11] She went on to say that the scenes of crime police attended on the premises and took samples of blood from the entrance to the passage way and off the table. She said that she also saw one foot of white slippers at the rear of the premises which she had also seen on the foot of the person who had pointed the gun at her.

[12] Inspector Garfield Edwards testified that on the night of 14 June 2003, he had been on mobile patrol, at about 10:00 pm dressed in uniform, with another policeman in the Manor Park area of Constant Spring in a marked police car, when he received certain information and drove up to Stillwell Road and saw a beige Toyota Corolla sedan motor car with license no 8466 DA. He noticed that the two front tyres were punctured, the rear left glass was shattered, what appeared to be gunshot holes were in the left rear door, and that there were bloodstains on the rear seat of the car. He said that he instructed that a search should be made of the general area. He joined in the search. He went towards the vicinity of Constant Spring Road and he heard "a

groaning" coming from a certain direction. It was coming from the left of the road. He said that he saw a male adult sitting up in a ditch which ran alongside the main road. He said that he pointed a flashlight at the person, who he identified as the appellant, and asked him what was wrong with him. The appellant responded and said, "[g]unman hold up the bus mi did deh pon and shot me". He said that the appellant was not wearing a shirt, but was holding one in his hand, which he later said was his. The shirt had a hole in the right side. He said that he noticed that the appellant was bleeding from his right hip. There were also bloodstains on the shirt. He said that he took possession of the shirt. He took the appellant with the assistance of other police, to where the Toyota car was, which was about 4 chains up the road. The appellant, he said, indicated that he did not know the car. The appellant, he said, gave him his name, and he directed that the appellant be taken to the hospital. He remained on the scene, and observed the processing of it, including the taking of photographs of the car which was taken by wrecker to the Constant Spring Police Station. He indicated that he secured the shirt by placing it in a metal safe at the station and later gave it to Detective Sergeant Henry. He testified that he had not received any information about any shooting that had taken place on a bus.

[13] In cross-examination, Inspector Edwards denied that the appellant had told him that he had asked someone to make a call to the police. He also denied that he (the inspector) had received a phone call indicating that someone had been beaten, and that someone had been robbed and shot in the Stilwell, Constant Spring Road area. It was suggested that, contrary to his statement that the appellant had said to him that he had

been held up on the bus, what the appellant had said was that he had tried to open the door to a taxi and that someone in the taxi had shot him. The inspector denied that suggestion. He also denied that it was not true that he had taken a shirt from the appellant, and that the appellant had said that it was his.

[14] Detective Sergeant Linval Henry, stationed at the Major Investigation Task Force at the material time, said that, having received certain information, he went to the jerk pork pit, at about 9:45 pm on 14 June 2003. He observed a crowd of persons there. He said that he was given, by one of the policemen there, a black plastic bag containing a .38 Colt revolver bearing serial no. 44058, three cartridges and two spent shells. He said that he was taken by Miss Plummer and Mr Reynolds to a passageway leading to the driveway of the premises, where he observed a grey cellular phone marked Motorolla, which had brown substances on it resembling bloodstains. The phone, he said, had indentations on it. He saw brown colour substances on the table and on the floor at the premises all resembling bloodstains, and several spent shells on the ground. He went to the back of the premises, separated by a wire fence, and he saw a pair of white slippers and a yellow Seimens cellular phone. The latter, he said, had brown substances on it resembling blood stains. There was a trail of the brown substance resembling blood stains leading to adjoining premises which he followed and located a red T-shirt and an adult male lying in the bushes in the front of those premises, with wounds to the right jaw, left thigh and abdomen. He placed him in a police service vehicle and sent him to the Kingston Public Hospital. He later discovered that this man's name was Kenroy Hepburn and that he subsequently died. He also discovered that Mr

Neil Wright had died. Mr Gillings had been hospitalized at Medical Associates and had been treated for injuries received that night.

[15] He said that on 15 June 2003, Inspector Edwards gave him a grey short sleeve shirt with certain information. He also pointed out to him a beige Toyota Corolla sedan motorcar which was parked at the station, bearing licence no. 8466 DA. He noted bullet holes on the left rear door, that the glass window of the door was shattered, and that there were brown looking substances on the back seat of the car. He indicated that he caused the car to be photographed and processed and then sent to the Government Forensic Laboratory. He testified that he attended on the University Hospital of the West Indies on ward five and he saw the appellant who was handcuffed to the bed. He said that the appellant's right ring finger and another and the right side of his abdomen were bandaged. In response to a question from him as to how he had received the injuries described, the appellant said "Mi goh a Constant Spring Square goh check a girl and some man rob mi and shot mi up". He asked him for information on the girl, whether he had made a report of the incident to the police or otherwise, and the appellant's response he said was that his mother and stepfather with whom he lived had told him "nuffi say anything to the police until mi lawyer come". He was cautioned, and his response was "mi nuh know weh yaah chat 'bout'".

[16] Detective Sergeant Henry testified further that after the post mortem examinations of the deceased Neil Wright and Kenroy Hepburn, he obtained in respect of each deceased a glass tube with a blood sample and an expended bullet taken from the body. He said that he showed the appellant the cellular phones, the .38 revolver, a

pair of white slippers, a red T-shirt and a grey plaid shirt. He made no statement. He indicated that, having sealed the items mentioned, he had taken them to the forensic laboratory and these items were eventually tendered in evidence as exhibits. After the identification parade was held, he visited the appellant at the Constant Spring Police Station, and informed him that he had been positively identified on the parade, to which the appellant replied "mi nuh know 'bout dat'".

[17] Detective Inspector Carlton Harrisingh gave evidence in relation to the firearms, the expended and unexpended cartridges which had been exhibited. He explained the process utilized to ascertain whether a particular firearm had discharged a particular bullet, based on his observations relating to the firing pin, specific land or groove impressions. He had received from Detective Sergeant Henry several envelopes on three different days, namely 16, 23 June and 4 July 2003, containing several items, for testing. He indicated that he had examined the firearms owned by Mr Gillings and Mr Reynolds, which were exhibits in the case, and he identified certain of the cartridges which had been fired by those guns. He also testified that he had examined the .38 special Colt revolver taken from the scene on the night of 14 June 2003 (exhibit "B"), and concluded that certain of the .38 special unexpended and expended cartridges matched the markings of that revolver. There were also cartridges which belonged to none of the exhibited firearms but which he said had been discharged by a 9mm Luger Intratec semi-automatic pistol, not before the court. He indicated that the bullet which had been taken from the body of Mr Wright had not been fired by any of the three guns exhibited in evidence.

[18] Miss Sharron Brydson gave evidence concerning the blood and deoxyribonucleic acid (DNA) analysis, she had conducted in respect of certain items submitted to the Government Forensic Laboratory. She stated that between 23 and 26 June, she received from Detective Sergeant Henry the following items, in a sealed envelope marked as shown below labeled a – c:

G – a blue and grey cellular telephone
H - a pair of white and grey leather slippers
I - a red T-shirt
J - a sample of blood (Neil Wright)
K - a multi-coloured grey, white and black plaid shirt
L – a grey and yellow cellular telephone

[19] Miss Brydson testified that on 4 July 2003 she received a sample of blood taken from Kenroy Hepburn. She said that human blood was present on items "G", "I", "K" and "L". Those items along with item "J" were further analysed for the presence of DNA. She said that she found that the item "K" had two holes, one to the lower right front, and the other to the lower back.

[20] She further testified that on 16 July 2003, she also received for examination a grey, right-hand drive Toyota Corolla four-door sedan motor car bearing licence number 8466 DA, which also had human blood thereon, and which she analysed for the presence of DNA. Having observed the state of the car, in that there was a punctured left front road wheel, a damaged right front road wheel, scratched right front fender, and partially detached right front fender, with holes in the left rear window and door,

and right rear door, she concluded that the motor car had been in contact with a solid object and that the holes in the vehicle could have been caused by bullets. Additionally, she concluded that an injured individual had been inside the rear of the car based on the blood distribution that she had observed. There was also a handkerchief, which was on the rear seat of the car, on which blood was present.

[21] She described the unique quality of each person's DNA, the "blueprint of the individual" found in the nucleus of each cell, which she stated gives a different profile per person unless such persons are a twin and which would be very unusual to change over time. She stated that the DNA is made up of chromosomes, 23 from each parent, and codes relative to one's bodily functions and physical appearance. She indicated that a DNA profile or analysis could be conducted on, inter alia, blood and on skin cells, and she described the five steps taken to obtain the same. The profiles, she said, was represented by eight markers, all of which were utilized along the DNA which has been targeted and which is usual in Jamaica. The markers represent the base units of DNA which were repeated different times on different individuals, called the Short Tandem Repeats (STR). Having obtained the markers, she indicated that they were cross referenced with the population database in respect of Jamaica. She indicated that samples from the general population via the blood bank had been analysed to show the statistical distribution within the Jamaican population and that it had been compared to the data base. On this basis (in respect of the matters relevant to the determination of this appeal), she arrived at several conclusions:

With regard to items "G" the Motorolla telephone, and "K" the grey multi coloured T-shirt, having used two blood samples, she had received a full profile, on all markers. In respect of the motor car of the eight profiles obtained, she said that only four had given a full profile. She detailed that the blood taken from the headrest cover of the driver's seat, the front passenger seat, and the right rear door of the motorcar, and the handkerchief taken from the rear passenger seat all had a similar profile, and that profile matched the profile of the blood found on the multicloured grey plaid shirt entered into evidence as exhibit five. She testified that on her analysis of the DNA found on exhibit five and the blood found in the motorcar, the similarity expressed as a probability of frequency was 5.2 in 10 billion, or simplified, was one in one billion, 900 million. She explained that this occurrence was described as a product rule and was "a pretty rare profile". This meant, she said, that five persons out of 10 billion had the particular DNA profile. She also noted that 900 million would have been more than the population of Jamaica.

[22] In cross-examination, she confirmed that whereas she had received a blood sample from Kenroy Hepburn she had not received one from Christopher Lewis, and so was unable to match any of the profiles obtained in respect of other items, with any blood sample of his. She also confirmed that the multi coloured grey shirt which had allegedly been taken from, as stated therein, Christopher Lewis [o/c Martin Francis and o/c Marlon Francis] was, she admitted not necessarily taken from the same person if taken from one Christopher Lewis. Additionally, although she confirmed that the person who had bled on the grey shirt "could be" the same person who had been inside

the motor car on the probability frequency which she had given, she accepted that had she received a sample of blood from Christopher Lewis, otherwise called Marlon Francis, it was "possible" that she could have been "more affirmative, more sure".

[23] Inspector Stephanie Lindsay-Clarke testified about the conduct of the identification parade. She stated that eight persons of similar height, build, complexion and general appearance were duly selected by the appellant to stand with him in the parade room, fitted with a two-way mirror. His attorney was present. Having been told he could do so, he changed clothes with another person on the parade, and decided to stand under number eight. Mr McCaulsky did not point out anyone on the parade. Mr Gillings, she said, confirmed that he was there to identify someone who had robbed and shot him. He walked the line, walked back up, she stated, and then stopped and asked that number eight to step forward. She directed him to do so and he did. Mr Gillings, she said, then asked that the appellant turn sideways, and remove his hand from behind his back, which he also did in keeping with her directions. She said that Mr Gillings then said in a low voice, "it looks like, he looks like number eight". The inspector said, she asked him to speak louder so that everyone could hear and he then said, " it's number eight. It's number eight".

[24] She was asked in cross-examination why she had not asked others in the line-up to do what had been asked of the appellant, and also why she had not asked Mr Gillings the basis for the requested instructions. She responded firstly to say that she had merely followed the requests from the witness, and secondly, that as one tried to

minimize conversations between the officer and a witness on a parade, limited questions were posed to witnesses.

[25] Dr Clara Mullings gave expert evidence in respect of the cause of death of Neil Wright. She carried out a post mortem examination on his body. She said that on examination, she observed that the spinal cord and the aorta had been broken in two, the trachea and the bronchi were congested, and the pancreas was damaged. Mr Wright died, she opined, from a single gunshot wound to the abdomen, causing blood to flow freely in the stomach and below the kidney. He experienced hypovolemic shock.

The case for the defence

[26] The appellant gave a very long unsworn statement from the dock. We will try to summarise it as best as we can without doing an injustice to his case. He said that he was a time keeper who worked on construction sites for Blacks Brothers. On 14 June 2003, he said that he had been with his girlfriend, who he later identified as Shara Smith. He said she took a taxi to Papine and he waited at the bus-stop for another one. He approached a taxi which had pulled over to his side of the road, and as he tried to open the door to go inside the vehicle, he saw a man pushing a gun out of the car and he ran off. He said that he heard two to three gun shots. He ran, slid and fell in a drain. He called for help. A man came who he asked to call the police, as a man had just shot and robbed him. Later, he said, a vehicle came with an inspector and corporal who assisted him to the University Hospital. He was, he said, taken straight

into surgery where they cut off all his clothes including his black and white shirt, dark blue jeans and a black Nike sneakers. He woke up the following morning and realized that he had been handcuffed to the bed, and that he had had an operation as he had dressing on his right hand finger, and plaster on his "belly goh round to mi bottom and on mi ankle".

[27] He said that his fingers had been swabbed and that his girlfriend had received his clothes. He said that the police had accused him of murdering a man which he said that he knew nothing about. He said that he was taken to the Constant Spring Police Station and, as he had been told that an identification parade was coming up, he removed the plaster from his belly and bottom and took the stitches out of his stomach himself.

[28] He said that he was placed on two different parades, the first at Constant Spring Police Station where there were three witnesses who did not identify him. Then he was placed on another parade at Half Way Tree Police Station where one witness also did not identify him. Thereafter he was placed on the third identification parade, again at Constant Spring Police Station. He said he was represented by attorneys-at-law on all parades.

[29] On the third parade, he said the witness in the parade room "walk up and down, up and down, up and down", then the witness asked number eight (where he was standing), to come to the light then "dress back little bit from the light", "show his right hand, lift it up in the air, and then put it back at his side, and then step back". He

complained that no-one else was asked to do these things. He said the witness walked off and then returned and said "number 8 look like". He said that on that basis he should have been released. He said when Mr Henry came to charge him, he (the appellant) asked him "how yuh fi charge mi and the man sey look like. You noh hold mi wid nothing, you noh si mi pon nothing". He denied strenuously that he had given any shirt to the inspector. He said that he had seen the grey shirt for the first time in court. He also said that he knew nothing about the robbery and the shooting, and asserted that he was not known by any name other than Christopher Lewis. He reiterated that he did not go by Martin Francis or Marlon Francis or Brando.

[30] His girlfriend, Miss Shara Smith, gave evidence in support of his defence. She stated that the appellant was her "baby father". On the night of 14 June 2003, she went to the University Hospital as she had received certain information with regard to him. On arrival, she was directed to the waiting area in the hospital, and was later given a scandal bag by a nurse, which she said contained the appellant's clothes, namely a torn black and white shirt, a blue jeans pants, and a black sneakers, all of which were bloody. She said as they were bloody, and as "she would not wash them", she disposed of them. She said that she had not seen the appellant that night in the hospital. In cross-examination, she indicated that she had not seen him the evening before either, but she had seen him the day before at his mother's home. She said that she had not gone anywhere with him that day. To the court, she clarified saying that when she said that she had disposed of the appellant's clothes, what she meant, was that she had burnt them.

The appeal

[31] The appellant was granted leave to abandon the original grounds of appeal filed and to file and argue four amended supplemental grounds of appeal. They are as follows:

> "1. The verdict arrived at in this case was unreasonable and inappropriate having regard to the evidence before the court.
>
> 2. That the learned trial judge failed to adequately direct the jury on the issue of visual identification given the weakness in the evidence of the sole identifying witness.
>
> 3. That the learned Trial Judge failed to adequately caution the jury of the possibility of the sole eye-witness being in error given that that witness used the expression "look like" in identifying the accused in the ID parade. The learned trial judge ought to have highlighted that this is an inherent weakness that should have been carefully taken into consideration in assessing the evidence of identifying the witness.
>
> 4. That the accused man was denied a fair trial by the failure of the prosecution to use DNA evidence from a blood sample taken from the accused man to compare with the blood taken from the motor-car in which it is alleged the gunmen escaped. There is no evidence that the accused was requested to give a DNA sample and there is no evidence that the accused man was made aware that this process could have been used to establish that it was not his blood in the car. Further, there is no evidence of any fingerprints of the accused or ballistic evidence which would have been in possession of the police from the time he was charged."

[32] The issues in this appeal are quite narrow, namely: (i) Did the trial judge deal with the law and the evidence adduced in relation to visual identification adequately?

and (ii) did the learned trial judge deal effectively with the DNA evidence particularly in light of the failure of the prosecution to obtain a sample of blood from the appellant?

Grounds one, two and three - identification evidence

[33] Counsel for the appellant submitted that the crux of the appeal concerned visual identification and circumstantial evidence. With regard to the visual identification, he said that the Crown relied on one of four witnesses who were purported eye-witnesses, namely, Mr Gillings, and on every occasion when he sought to make, or spoke to visual identification of the appellant there was uncertainty. Counsel referred to Mr Gillings statement to the police, eight days after the incident, in which he stated that he might be able to identify the other gunman. He referred to the identification parade on 19 July 2003 when Mr Gillings said that "it look like number 8", which evidence he said was corroborated by Inspector Lindsay-Clarke. It was of importance, he said, that Mr McCaulsky gave evidence that he saw the two gunmen, and that the business place was well lit, yet when he attended the identification parade he did not identify anyone. Additionally, he submitted, neither Miss Plummer nor Mr Reynolds, who also were alleged eye-witnesses to the incident, attended the parade. Counsel argued further that the explanation given by Mr Gillings in respect of his statement made to the police, and at the identification parade that he was in "shock" and that he was "in fear of his life" were not credible in the light of his very clear, strategic and cool headed actions on the night of the incident in the face of two armed robbers, namely with shots fired by him in the direction of one gunman to the front, and then at the other who was behind.

[34] Counsel complained that the learned trial judge had not directed the jury adequately in respect of this uncertainty in the alleged identification of the appellant. He submitted that "look alike" was not an identification accepted in the law. He submitted further that treating this as an identification on which the jury could rely, without qualification, was wrong in law, and the learned trial judge had erred, which was an error, he said, going to the root of the conviction, making it unsafe, and the conviction should therefore be quashed. Counsel relied on Lord Ackner's reference to a statement from the committee chaired by Lord Devlin to consider identification evidence in criminal cases, in his speech on behalf of the Board in **Junior Reid v R** [1993] 4 All ER 95 for support in respect of these submissions, which read thus at page 97-e:

> "The committee recommended that, where the evidence for the prosecution consisted wholly or mainly of evidence of visual identification, the jury should be informed that it was not safe to convict upon such evidence unless the circumstances of the identification are exceptional or unless the identification is supported by substantial evidence of another sort (see para 4.83, pp 94-95). It was however recognised that there would have to be exceptions to this general rule in special circumstances to be worked out in practice."

Counsel attached several authorities to his submission but did not refer to any of them specifically in support of these grounds.

[35] Counsel for the Crown, Mrs Martin Swaby, submitted that the learned trial judge had given a careful identification warning to the jury on identification within the guidelines enunciated in **R v Turnbull** [1976] 3 All ER 549, and she could not be faulted. Counsel also submitted that with regard to the facts of the instant case and the directions given by the learned trial judge, the cases of **Reid, Dennis and Whylie v R**

(1989) 37 WIR 346, **Regina v Horris Hylton and Billy Vernon** (1995) 32 JLR 242 and **Noel Riley v Regina** (1996) 33 JLR 137, which were submitted by counsel for the appellant, were all distinguishable, in that:

(i) the particular warning that an honest witness might be mistaken had been given and was neither vague nor general, and included a warning that visual evidence of identification is a category of evidence, which experience has shown is particularly vulnerable to error, errors made by honest and impressive witnesses which have led to wrongful convictions; (**Reid v R**)

(ii) the instant case did not contain manifest material discrepancies between the description of the accused by a witness and how the accused appeared in court on the day of trial; or between the witness' description of the accused and the recorded description at the correctional centre where he had been detained, or discrepancies between each witness of the accused and the description of the accused when he faced the identification parade. (**R v Horris Hylton**)

(iii) the identification parade in the instant case did not take place a year after the incident in circumstances where the complainant pointed out the accused in the parade but had not said before

> that that she knew him until seven months after the incident when she only said that the accused resembled her attacker. (**Riley v R**)

[36] Counsel argued that the learned judge had given detailed directions in her summation with regard to the testimony of Mr Gillings. The learned judge, she said, outlined the salient features of the witness' evidence in examination in chief and cross-examination with particular regard to the identification of the appellant. She submitted that the witness had indicated that he might be able to identify the appellant if he saw him again, and he had identified him at the identification parade. Counsel admitted that Mr Gillings had said that it look like the man, and that it was number eight, but that the explanations given by the witness with regard to these statements was a matter of credibility to be decided by the jury.

[37] Counsel submitted further, that on any review of the summation as a whole, it was clear that the learned trial judge had critically analyzed the evidence, and she submitted that there was no requirement to list specific weaknesses in the identification evidence and even if some were not stated and specific words were not used in referring to them, as long as the evidence was drawn to the attention of the jury, that was not fatal to the conviction. She relied on the Privy Council case of **Michael Rose v The Queen** [1994] WCPC 35, for that proposition in law.

Analysis

Grounds one, two and three

[38] In **Junior Reid v R**, Lord Ackner after referring to the excerpt of the recommendation from the Devlin Committee report referred to in counsel's submissions in paragraph [34], stated quite clearly, that shortly after the publication of the report, a number of appeals where identification was the central issue were listed for hearing, before the Court of Appeal in order to give the Court of Appeal the opportunity to set down guidelines, as stated in **R v Turnbull**. The court, he said, avoided the use of the phrase "exceptional circumstances" to describe "situations in which the risk of mistaken identification was reduced". In fact he referred to the statement of Lord Widgery CJ in **R v Turnbull** who, in giving the judgment of the court, said at page 554:

> "… the use of such a phrase is likely to result in the build-up of case law as to what circumstances can properly be described as exceptional and what cannot. Case law of this kind is likely to be a fetter on the administration of justice when so much depends on the quality of the evidence in each case. Quality is what matters in the end. In many cases the exceptional circumstances to which the report refers will provide evidence of good quality, but they may not; the converse is also true."

Lord Ackner then set out for convenience the well known and oft cited speech of Lord Widgery CJ where he stated what has come to be referred to as "the Turnbull Guidelines" and which ought to be followed by judges in their directions to the jury in matters where the case against the accused relates wholly or substantially to the correctness of visual identification.

[39] In the instant case, there is no doubt that the issue of the identification of the appellant by the sole witness Gifton Gillings was a crucial aspect of the case for the prosecution. It is our view that the learned trial judge complied fully with the guidelines. This is the caution she gave in her directions to the jury, at pages 555, lines 1-25 to 556 line 5 of the transcript:

> "Now, in this trial, the case against the accused depends on the correctness of his identification as the person who discharged that firearm which killed Mr. Neil Wright, an identification which the defence says is mistaken. I must, therefore, warn you of the special need for caution before convicting in reliance on the evidence of visual identification and this is because it is possible for even an honest witness to make a mistaken identification and, indeed there have been wrongful convictions in the past as a result of such mistakes. You should, therefore, examine carefully the circumstances in which the identification is made. You must consider, for instance, the length of time which the witness, the identifying witness, had to observe the person whom he said is the accused, consider the distance from which he was able to make this viewing and the lighting conditions, and you consider whether there was anything which interfered with the witness' observation of the person whom he says is the accused, and whether the witness had any special reason for remembering the person, how long was the person under observation and the identification made to the police. Is there any marked description given to the police about the appearance of the accused?"

[40] Counsel for the appellant submitted that the statements made by the appellant to the police and at the identification parade indicate uncertainty and made the identification unsafe. We do not agree. The learned trial judge painstakingly went through the circumstances of the identification of the appellant by the witness, and the statements made and the evidence relating to the explanations given by the witness.

Although it may be a long excerpt of the transcript, we think it is prudent to set out this aspect of the summation at pages 567 – 574 of the transcript, in its entirety, as it shows, in our view, that the directions were comprehensive and fair.

> "Now, Mr Foreman and members of the jury, you must use your common sense, your collective wisdom acquired over the years, your experience, pool all of that together, and it becomes a powerful tool to assist you in your deliberations.
>
> Here you have a situation where these persons are within arm's reach of each other. He said that they did not move from the position where they were during this incident, of course, apart from the man who ran. So do you understand what Mr. Gillings meant when he said he saw the face of the man whom he says is the accused, even though he was seeing those other persons as well. Other persons who were in his immediate vicinity, were in his vision, sitting as close as they were to him.
>
> As Judges of the facts, it is a matter for you to determine whether that means that he really did not see the face of the accused for the time that he said, given the whole scenario that he has revealed to you.
>
> If you accept the evidence that he has given, about the lighting, the distance from him, and his ability to see the face of this man, as judges of the facts, it is entirely a matter for you to make up your minds whether you accept that this was indeed a direct identification with good lighting conditions.
>
> And from that close distance, Mr. Gillings told you that he saw the face of the man. And approximately one month later, because the identification parade was on the 19th of July, 2007. So approximately a month later, he was able to recognize him when he saw him in a line-up of eight other men on the identification parade.

Now, it was put to him that he had said in a statement that he might be able to identify the man if seen again.

And he agreed that when he said that, what he means – what he says and what he means - he agrees that when he said that, that was what he meant. But he further told you that when he said that, he was still in shock. Not only was this witness a victim of a hold up, with men armed with one at least a semi-automatic weapon, and one you have seen exhibited here, but he was shot and injured. He had spent about six days in the hospital. He showed you his hand with the resulting deformity of his fingers. He said he was under shock. Do you find that difficult to understand? Do you believe him?

At the time of the statement which was shortly after the incident, the 22nd of June, 2003, he said "I might be able to recognize them". Then on the parade, he walked up and down the line-up of men, who you are told by the Prosecution, according to the routine for the identification parade, supported by what the accused man had to tell you in his statement, these are persons who would be similar in appearance to the accused who was there. He walked up and down, he said about two to three times, and then he stopped at the man in the number eight position.

There is no evidence that he paid any attention to any other man on the line-up in that particular way. He stopped at the number eight, and asked him to step forward. And you have heard the accused saying something about asking him to step in the light.

Now, there was a light there when Mr. Gillings said – I'm sorry – there is a light there where he asked the accused to step forward, according to the accused: And you will recall Mr. Gillings in his evidence of that night, when he said that the accused was standing right under the streetlight in front of the premises.

So he looked at him under those conditions of lighting and at the identification parade, he asked him to step forward.

And according to the accused, there was light there. And asked for him to remove his hand from behind him. And then he stepped back into position.

Mr. Gillings' evidence to you is, "I realized he was the one who shot me." He said he was the one with the automatic gun. Then he told you how that night the accused was wearing a low hairstyle, but he was able to point him out because his face never change.

You see, you look at the whole evidence, don't just pick out a little part here and a little part there, you have to consider the evidence in its totality. And here he is saying that at the time that night, he was wearing a low hairstyle but he was able to point him out because his face never change, he had seen his face. It was put to him in cross-examination that he described the man to the police as a light black, slim build man about 5ft, 6" tall and sporting a low cut hairstyle, matter for you. You see him now, he has a different hairstyle, according to Mr. Gillings, but he said his face never change, he has seen his face for some 15 minutes and recognized him, he realized he was the one who shot me [sic].

Now, he said from the time the men came on the scene to when the car drove off it was about 15 minutes, up to the point in which he put his hands on his head about five minutes had passed and when asked at first how long he had seen the face of the accused he said 20 minutes and then he was asked about the time he came on the premises when the shooting started, how much time had passed and he said about 15 minutes and he could recall the man was close to him because he said he was about 9ft from him when the firing started.

Now, you also are able to make your own determination according to the evidence which you accept as proof, which you accept as true and when you look at the whole scenario, it is open to you to say whether what you have had described to you could have or would have been this time-

frame. He says that it was 15 minutes and during that time, he had seen the face of the man. After walking in the line two or three times and then making the request, he did not move again but he speaks and he agrees that at this point he said, "It look like the man," and when he was asked if he meant that he said no he did not mean that. He said it's because he was afraid and bear in mind that the evidence is that, he said it in a low voice and when the officer told him to speak up he said number eight. When it was suggested to him that he had said he might be able to identify the man in the statement and then at the parade he said 'it look like him' is because he was not sure, he said, "I was sure but I just use that word." It was further put to him that when he said it look like the man that is what he meant, he responded that he did not mean it, it was because he was scared for his life. Now defence attorney said you were speaking the truth when you said it look like him and the witness said the truth is, he said it look like him but it was really him. At one point it was put to him that if this was really him he would not have said 'it look like him' but you say it was him and he said he agreed with him. However, he was asked by prosecuting attorney whether it was correct when he said the accused was the man or as he told defence attorney, when he agreed that he said 'it look like him' he said that is the person. Was he in a position, after seeing the man under the condition which I just reviewed to be able to recognize the man on the parade as the man he saw that night? Matter for you, Mr. Foreman and members of the jury.

Members of the jury, is he saying to you even if he said that he might be able to identify him and was saying that he was not sure, does that mean that when he saw him now and he was able to look into the face of this person that he would be able to say, 'yes, this is the man'? There was no suggestion that anything was done to unfairly bring his attention to the accused. The witness was being asked to identify the suspect, he asked for the person to step forward and even with all the persons on the parade, the witness

> was clearly interested in only number eight and was looking at number eight."

[41] The summation of the learned trial judge in our view, when viewed in the whole, addressed the weaknesses in the identification of the appellant although she may not have referred to them in that way. She had complied with the dictum of Lord Lloyd of Berwick in **Michael Rose v The Queen**, in which he, in dealing with the question of the manner and extent of the obligations of a trial judge to address the weaknesses in evidence of identification, had this to say:

> "Now it is true that the judge did not list the weaknesses in numerical order, nor did he use the word "weakness" when drawing the jury's attention to the points made by the defence. But nothing in *Turnbull,* or in the subsequent cases to which their Lordships were referred, requires the judge to make a "list" of the weaknesses in the identification evidence, or to use a particular form of words, when referring to those weaknesses. The essential requirement is that all the weaknesses should be properly drawn to the attention of the jury and critically analysed where this is appropriate."

[42] As indicated, the judge did this, and in our view, the jury would have been in no doubt, that they were to approach the important issue of identification evidence, and particularly that of Mr Gillings with the utmost caution, and, we agree that as Crown counsel correctly stated, the explanations given by the witness Gillings were a matter of credibility for the jury.

[43] Additionally, the evidence of all the witnesses had been canvassed in great detail by the learned trial judge and recounted for the jury and they would therefore have had for their deliberations the following matters:

(i) that it was Mr Gillings who had been facing the entrance when the men came out of the car, and said that he had been "looking at" the appellant for about 15 minutes;

(ii) Mr McCaulsky's back was turned to the entrance;

(iii) Miss Plummer was at the jerk pork pit at the material time and closer to the other assailant Kenroy Hepburn who had died;

(iv) there was good lighting on the premises;

(v) Mr Gillings appeared to be an observant person based on his swift reaction to the assailants' actions in the incident, and given the fact that he was a licenced firearm holder;

(vi) there were no discrepancies given in respect of the description of the appellant; there was no evidence that he appeared to be different from the description given to the police by Mr Gillings; and

(vii) there was other evidence in the case which went to support the evidence of identification.

In our opinion, the evidence in respect of the identification of the appellant was more than satisfactory to support the conviction and these grounds must fail.

Ground four - DNA evidence

[44] Counsel for the appellant challenged the circumstantial evidence by submitting that the Crown had an opportunity to request a blood sample from the appellant but failed to do so and was therefore unable to "establish" through DNA analysis that it was the appellant's blood that had been found in the Toyota car and on the grey plaid shirt. The appellant had denied that the shirt belonged to him or that it had been taken from him, and this, he submitted, raised an issue "as to the use and weight of the DNA evidence found on the plaid shirt and adduced in an effort to link him to the Toyota car". In failing to obtain the sample and thereby frustrating a comparative analysis, counsel submitted forcefully that, "the Prosecution denied him of a right for a fair trial by using the most modern methods and certainly a method that is accepted as all but fool-proof in determining ownership of blood". Counsel also complained that the prosecution had failed to produce any evidence of fingerprints taken from the crime scene, war heads taken from the car, that the car was owned by the appellant or had been reported stolen, any analysis of the swabs taken from the appellant, or whether the bullet taken from the deceased was fired from a gun that was fired or could have been fired, by the appellant, and finally, that the appellant had fired a gun that night. As a consequence, he submitted that the circumstantial evidence adduced was weak and made the conviction unreliable and unsafe, and which should therefore be quashed.

[45] Counsel for the crown submitted that to the contrary, the failure of the prosecution to use DNA evidence taken from the appellant did not mean that he had

been denied a fair trial. In any event counsel submitted that had the sample been submitted, it would still have been a matter for the jury to decide having heard all the relevant evidence, whether it was the appellant's blood that matched the blood on the car and on the grey plaid shirt. She relied on an authority from this court in support of her arguments, namely **R v Hozen Horne**, SCCA No 176/2004 decided 23 January 2008. Counsel argued that the prosecution had discharged its burden of proof and sufficient evidence had been adduced to meet the requisite standard of proof.

Analysis - Ground four

[46] It is of importance that counsel for the appellant did not challenge the provenance of, or the ability of the expert to provide, or the general quality of, the DNA evidence adduced in the trial. This evidence had the potential, even in a case in which the identification evidence was otherwise poor, as Lord Widgery CJ said in **R v Turnbull** to be "evidence which goes to support the correctness of the identification". As we have already indicated, the identification evidence in this case, could not be considered to be poor. The challenge by counsel was, as we understand it, only that, had the sample of the appellant's blood been taken and submitted, the evidence from Miss Brydson would have been more conclusive.

[47] This court in **Melody Baugh-Pellinen v R** [2011] JMCA Crim 26, endorsed the principle enunciated in **McGreevy v Director of Public Prosecutions** [1973] 1 All ER 503, that the proper directions to a jury on the subject of circumstantial evidence "would be amply covered by the duty of the trial judge to make clear in his summing up

to the jury, in terms which are adequate to cover the particular features of the case, that they must not convict unless they are satisfied beyond reasonable doubt of the guilt of the accused.." (per Morrison JA). So, there is no rule requiring a special direction in cases relying wholly or partly on circumstantial evidence. This has been confirmed by this court in **Regina v Everton Gordon and Paul Holder** SCCA Nos 73 and 74/1998, judgment delivered 12 June 2003, and **Loretta Brissett v R** SCCA No 69/2002, judgment delivered 20 December 2004.

[48] In the instant case the learned judge gave, in our view, the general and adequate directions as required, firstly, on the question of inferences, and what can reasonably be drawn from proven facts, and then on the issue of proving guilt. This is how she put it at page 546 of the transcript:

> "Now, it isn't always possible to prove the matter which have to be proved in a criminal trial by direct evidence. That is to say evidence from a witness who can say I saw something with my own eyes or I heard something with my own ears. Some things have to be proved indirectly. And the law recognizes this. So the law permits you as judges of the facts, to draw inferences from the facts which you find to be proved. That is to say the law permits you to draw common sense conclusions, based on the evidence which you accept.
>
> However, before you can draw an inference, you must be satisfied that that inference is the only inference that can reasonably be drawn, and that the inference is really unavoidable. You could not escape it on the facts that you find proved or from coming to that conclusion. And you may draw an inference to establish either guilt or innocence.
>
> Now, the burden of proving the guilt of the accused is on the Prosecution. The accused is not required to prove his innocence. He remains in the dock, clothed in innocence until you, by your verdict decide otherwise. He may

therefore sit in the dock and say nothing but simply wait to see if the Prosecution can prove its case against him.

Now, the Prosecution has the task of proving the guilt of the accused beyond a reasonable doubt. That means, that the Prosecution must put before you evidence which satisfies you until you feel sure that he is guilty. If after considering all the evidence, you are sure that the accused is guilty, you must return a verdict of guilty. If you are not not sure, if you have any reasonable doubt, not just any doubts but doubt based on reasonable considerations, then your verdict must be not guilty."

And at pages 582-583, she gave a summary of the inferences in this way:

"And you would have heard him (Inspector Edwards) tell you that that shirt that the Prosecution has in this trial as exhibit 5, was the very shirt that he saw on the hand of the accused man that night while he was shirtless. And which he said was his shirt…

"So the Prosecution is asking you to look at the total picture presented by the Prosecution witnesses, and draw the reasonable inferences that arise therefrom. Is it a coincidence that the accused was found in an area, some four chains from where the motor car which had holes appearing, to be gunshots, to the eyes of a trained police officer, and certain instances that the Prosecution witnesses told you that they fired gunshots into that car, and that the car had blood in it.

There is no evidence that the accused is known to the officers, so you may well be asking why would he tell these lies about him. He says he saw him, no shirt, with a shirt in his hand, no shirt on his body, shirt in his hand, and he took the shirt, locked it in a metal safe. And the next day, he handed it over to the investigating officer within that short period of time."

[49] The learned trial judge in her summation also directed the jury that expert evidence is given in a trial to provide the jury with, as in the instant case, medical and scientific information and opinions which may be outside their general knowledge and experience. It is not unusual, she stated, for this type of evidence to be called, and she told the jury that they should have regard to it, and give it careful consideration, but that they did not have to act on it, as they were the judges of the facts and it was for them to decide which evidence and opinions they accepted, if any.

[50] After setting out the five basic steps, which Miss Brydson, the expert, had explained were necessary to obtain the DNA profile, the learned trial judge said this at page 602 of the transcript:

> "This would then reveal a profile she says the profiles are made up of markers, and from this test that she did, she used eight. And she told you that the markers are basic units of the D.N.A called bases, which are repeated different times among different individuals. And the markers are cross-referenced with a population data basis.
>
> So you have examples of the general population, which have been analysed to show the statistical distribution call it the statistics within the Jamaican population.
>
> And the Forensic Laboratory arrived at two hundred which deems [sic] to be adequate for a population as of Jamaica. And frequency for each marker is therefore determined and final figure called a match probability is obtained."

[51] Then after stating the evidence of the expert, which she said indicated that the analysis of the blood on the shirt from which she stated that she had obtained a full profile, was similar to that which was found on the Motorolla cell phone, exhibit one,

and was similar to all the blood profiles obtained from the motorcar, she charged the jury thus:

> "Now when she did her frequent analysis, she determined a match probability of 5.2 individuals in ten billion, nine hundred million. She said at a pretty rare profile. 5.2 individuals, in ten billion, nine hundred million persons would have that profile.
>
> Now it would be for you to determine, a matter for you to determine whether you accept her evidence, accept her as an expert and accept the evidence that she has given about the results of her tests and analysis. And to say whether having regard to the evidence, you are sure that it was the accused who left that blood, well, that samething, left that blood in the car who had the D.N.A. on the shirt. Or whether it was left by one of these other persons who would have the same D.N.A characteristics".

[52] In **Allan James v Doheny** [1997] 1 Cr App R 369, Phillips LJ outlined 13 procedures which should be adopted where DNA evidence is involved, which have been approved in this court in **R v Asserope** SCCA No 279/2001 judgment deliver 19 December 2003, and **R v Hozen Horne**. These include obtaining a sample of DNA from the accused and submitting the sample to the defence. The expert should also explain the databases, and resolve any issues before trial, if possible. The expert should also explain the nature of the matching DNA characteristics, the random occurrence ratio, and how many people are likely to be found with the matching characteristics in the relevant location. It ought then to be left to the jury to decide on the basis of all the relevant evidence, if the defendant did leave the crime stain at the scene. It is not a matter for the expert. It is, of course, incumbent on the judge to give

careful directions. Indeed, Phillips LJ exhorted judges that in their summing-up they should:

> "explain to the jury the relevance of the random occurrence ratio in arriving at their verdict and draw attention to the extraneous evidence which provides the context which gives that ratio its significance, and that which conflicts with the conclusion that the defendant was responsible for the crime stain.."

[53] In our view, the learned trial judge may not have stated as clearly as she could have, the specific effect of the random occurrence ratio, which figures were also not captured by her completely accurately. Also, she appeared to have indicated on more than one occasion, that the profile of "the shirt" matched the profile of the Motorolla phone without making it clear that that shirt was the red shirt (exhibit three), which was also found at the crime scene, but was not connected to the appellant. That notwithstanding, she very clearly left it for the jury to consider whether they accepted the evidence of Inspector Edwards when he said that the appellant who when located in the ditch, without a shirt on, had in hand a blood stained grey plaid shirt with a hole in it, which he said was his, and which was preserved and later given to the forensic laboratory for testing, as against the case for the defence which was that the shirt had been disposed of, that is to say, burnt. It was also clearly left for the jury's consideration whether the evidence of the expert Brydson that the four different blood samplings in the car had the same blood profile, and that that blood profile matched the blood profile of the shirt, with such a strong probability frequency as to be

extremely rare. It was also a matter of inference for the jury as to whether the silver Toyota motor car was the get away car, from the jerk pork pit.

[54] In cross-examination on page 416 of the transcript, Miss Brydson, when asked how far she could go in her comparative analysis of the tested items, said:

> "A If it is that that was the person who was bleeding on the shirt, he could have been the person who was inside the motor car. If he is the person who bled on the shirt, yes (emphasis supplied)
>
> HER LADYSHIP: You say "could have been"?
>
> THE WITNESS: Yes, m'Lady with this statistical frequency."

[55] It was clearly a matter for the jury to decide, as they obviously did by their verdict, whether, even in light of the fact that no sample of blood had been taken from the appellant, the crime stain was his.

[56] We find it important to comment on the complaint of counsel for the appellant that there were several matters not undertaken in the investigation of the charge against the appellant for the murder of Neil Wright, and as a result of which no evidence was adduced in relation thereto before the jury, such as the lack of fingerprint evidence, *inter alia.* We wish to state as we did before in the case of **Charles Salesman v R** [2010] JMCA Crim 31, in addressing the issue of the absence of photographs and swab test results, in a matter heard by a single judge in the High Court Division of the Gun Court, that ".. it is no part of the function of the tribunal of fact to speculate on whether there was a negative finding on the swab test which was

done on the hands of the applicant.." So too, in the instant case, one ought not to speculate on whether prints were taken or warheads found, or shots fired from a particular firearm. The important requirement at the trial is that there is sufficient evidential material before the court, which is properly adduced, and on which a jury properly directed can convict.

[57] In the light of all that has been said we find that there was no merit in this ground and it therefore fails.

[58] The appeal is therefore dismissed and the sentence of life imprisonment without parole before 40 years stands and commences from 13 September 2008.