[2017] JMCA Crim 37

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 49/2015

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE EDWARDS JA (AG)

SHERWOOD SIMPSON v R

Peter Champagnie and Kemar Robinson for the appellant

Mrs Christine Johnson-Spence for the Crown

22, 23 March and 17 November 2017

F WILLIAMS JA

[1] This is an appeal by the appellant against his convictions and sentences for the offences of illegal possession of firearm contrary to section 20(1)(b) of the Firearms Act and wounding with intent contrary to section 20 of the Offences against the Person Act in the High Court Division of the Gun Court. The appellant was convicted on 17 June 2015 after a trial by a judge sitting without a jury, and, on 30 June 2015, sentenced to five years and 15 years imprisonment at hard labour for the said offences respectively. The sentences were ordered to run concurrently.

[2] The appellant on 14 July 2015, by use of the Criminal Form B1, filed an application for leave to appeal against conviction and sentence. On 16 February 2016,

the appellant filed four grounds of appeal. On 7 September 2016, the appellant was granted leave to appeal by a single judge of this court. The grounds of appeal sought to attack the soundness of the appellant's conviction as follows:

> "1. **Ground 1**
> The Learned Trial Judge failed to give fair consideration to the Appellant's defence of alibi in light of the evidence adduced on the case for the defence.
>
> 2. **Ground 2**
>
> The Learned Trial Judge failed to take into consideration the fact that the virtual complainant could have been mistaken about the identification of the Applicant as being the person responsible for the offences charged taking into consideration the evidence that was adduced at the trial.
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> 3. **Ground 3**
>
> The Learned Trial Judge did not take into consideration the Good Character of the Appellant as to his propensity to commit the offence for which he was convicted.
>
> 4. **Ground 4**
>
> That in light of Grounds 1 and 2 and 3 above the verdict is unreasonable having regard to the evidence."

The evidence in the court below

[3] The virtual complainant testified at the trial that on 23 December 2013, he had gone to Castleton Gardens Police Station to report on condition of his bail in respect of a particular charge. On leaving the police station, he was travelling home in a van, which was intercepted by a motor car. He was abducted by four armed men travelling therein, who transported him in the motor car to an isolated area where he was shot in

his abdomen and head then left for dead. He further testified that, despite being seriously injured, he managed to leave the bushes to premises some distance away, where he received assistance to the hospital.

[4] The complainant was the only witness who identified the appellant as one of the four men involved in the incident. He did so at an identification parade. He testified that the appellant had helped to haul him into the motor car which was used to abduct him; had sat to his right side in the back seat of the motor car and had put a 'scandal' bag over his head. He testified that he recognized the appellant to be a police officer who had previously taken a statement from him in relation to another incident and that he had also seen him at the Constant Spring Police Station where he (the complainant) had been held for some three months.

[5] The appellant at trial made an unsworn statement from the dock. He outlined his career development and stated that he had never been cited for any disciplinary breaches. He further stated that he joined the Jamaica Constabulary Force (JCF) in 2009 as a uniformed officer but had since been made a detective, which required him to wear plain clothes. He also stated that he was not the holder of a licensed firearm, and that the only firearm to which he had access, was a government firearm issued to him.

[6] His defence to the charges was an alibi. He completely denied any involvement in the attack on the complainant and stated that at the time the incident is said to have occurred he was at home on sick leave, as he had received injuries to his left shoulder

while on duty. The appellant further stated that he has distinctive scars on his face which had not formed a part of the complainant's description to the police of any of his assailants; and that he believed his features were deliberately exposed to the complainant prior to the identification parade. He stated that he would have had no motive to have committed the alleged offences.

[7] The appellant called one witness to support his alibi, his sister, Miss Stacey Simpson. She gave evidence to the effect that she was at the time of the trial and at the time of the alleged incident a student pursuing a bachelor of science degree in nursing. She stated that both she and the appellant resided at the same residence with their father and mother. She stated that on the day in question at about 7:00 am the appellant had informed her that he was on eight days' sick leave from work and would not be going to work that day. She testified to having cleaned the appellant's bite wound and preparing lunch for them both around midday. She stated that she was at home all day, however periodically she served in a shop operated from the front of their home.

[8] A Detective Inspector, Marvin Brooks, also gave evidence on behalf of the appellant. He testified that as of 13 June 2013, he was assigned to the Constant Spring Police Station as a divisional detective inspector and that the appellant was a detective assigned to that station. He spoke to the appellant's good character and indicated that the appellant had a 'pronounced scar' to the left side of his eye. He spoke of an incident having occurred at the station in which a prisoner of unsound mind had bitten

the appellant on his shoulder for which he (the appellant) had received medical treatment and sick leave.

[9] During the course of the trial certain discrepancies arose in the evidence adduced by the prosecution regarding the identification of the appellant.

[10] The learned trial judge, during the course of his summation, noted that the issues to be resolved included those of identification, credibility of the prosecution's main witness, alibi and joint enterprise. After giving himself warnings in relation to the issues which he had identified, he found the appellant guilty of the offences charged. He thereafter sentenced the appellant to the statutory minimum of 15 years imprisonment for the offence of wounding with intent.

Submissions for the appellant

[11] In the main, Mr Champagnie submitted that the discrepancies in the prosecution's evidence significantly affected the virtual complainant's credibility in relation to his identification of the appellant and that that factor, paired with the lack of a good character direction from the judge, rendered the conviction unsafe. Counsel submitted that the trial judge did not give the appellant a good character direction in relation to his propensity to commit the offences charged in circumstances in which he was entitled to such a direction. Counsel argued that the issue of the appellant's good character was raised in the appellant's unsworn statement and in the evidence of Detective Inspector Marvin Brooks, both of which, it was submitted, chronicled the

appellant's progressive employment history and his lack of internal disciplinary breaches.

[12] In his concluding submissions counsel submitted that, in the event the court should agree with him that the conviction was unsafe and ought to be set aside, that the proviso to section 14(1) of the Judicature (Appellate Jurisdiction) Act to order a retrial should not be applied, as a retrial would not be in the interests of justice.

[13] For the appellant, Mr Robinson helpfully addressed several authorities which he invited the court to consider. These included: **R v Lovell** [1987] 24 JLR 18; **Denhue Harvey v R** [2011] JMCA Crim 22 (at paragraph [17]); **Horace Kirby v R** [2012] JMCA Crim 10; **Kevaughn Irving v R** [2010] JMCA Crim 55; and **Michael Reid v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 113/2007, judgment delivered 3 April 2009. (The majority of these cases were cited in an effort to demonstrate that a witness must first be found credible before any reliance could be placed on his identification evidence.)

Submissions for the Crown

[14] In relation to the issues of alibi and identification that were raised, Crown counsel, Mrs Johnson-Spence submitted that the learned trial judge properly treated with each issue and had given himself the appropriate warnings.

[15] Crown counsel, however, conceded that the issue of the appellant's good character had in fact been raised and that he indeed would have been entitled to a good character direction in relation to his propensity to commit the particular offences;

but that the trial judge did not give himself the classic direction. However, Crown counsel contended that that fact would not disturb the soundness of the conviction as it was evident that the matter of the appellant's good character had operated on the mind of the trial judge as stated by the trial judge during sentencing. Ultimately, the omission to give the warning would not have affected the soundness of the conviction of the appellant.

[16] In addressing ground 4, counsel, in the main, relied on **R v Joseph Lao** (1973) 12 JLR 1238, to submit that the appellant had failed to demonstrate that the verdict was obviously and palpably wrong. Given the cumulative effect of all the warnings given by the trial judge, Crown counsel submitted, there was no miscarriage of justice and as such the proviso to section 14(1) of the Judicature (Appellate Jurisdiction) Act ought to be applied to dismiss the appeal.

Issues

[17] In considering this appeal, we found the main issues to be: (i) whether in the light of the circumstances of this case, the learned trial judge properly dealt with the impact of the discrepancies raised in the evidence for the prosecution on the credibility of the complainant; and (ii) whether the effect of the learned trial judge's failure to direct himself in relation to the appellant's good character affected the soundness of the conviction.

The treatment of discrepancies in the prosecution's evidence by the learned trial judge and their effect on the complainant's credibility

[18] As stated earlier, a number of discrepancies were identified by counsel for the appellant, in relation to some of which it was submitted that the learned trial judge failed to demonstrate how he had resolved them. While, in light of how we propose that the appeal be disposed of, it is unnecessary to set out all the discrepancies raised by counsel in detail, it is important to have regard to how this court has stipulated that discrepancies should be treated with which arise in trials in the High Court Division of the Gun Court where the trial judge sits without a jury.

[19] In **R v Dacres** (1980) 33 WIR 241, this court recognised that there was no statutory or other requirement for judges in the High Court Division of the Gun Court to specifically direct themselves on the law in relation to identification evidence and to analyze the weaknesses and strengths of such evidence; but noted that the practice had developed for a reasoned decision to be given. Further, the court reasoned that it would be undesirable for the Gun Court Act to impose new fetters where the said Act was intended to operate to simplify the trial of such offences. See, for example, what was stated at page 248, f-h:

> "In legislating as it did to simplify the procedure for the trial of 'gun crimes' by authorising trial by judge alone instead of the time-honoured method of trial by judge and jury, Parliament ought not to be presumed to have intended that the courts should declare new technical rules of procedure which would add to the length of the trials without necessarily improving the standard and quality of the administration of justice. It is not to be lightly suggested that the judges who preside in the Gun Court (who are all judges of the Supreme Court, some with many years of

> experience as judges of fact and of law and others with many years of experience at the private Bar) will not have in mind the substantive rules of law in relation to identification evidence in any given case."

[20] Also of significance is what is stated at page 249, g-h:

> "By virtue of being a judge, a Supreme Court judge sitting as a judge of the High Court Division of the Gun Court in practice gives a reasoned decision for coming to his verdict, whether of guilt or innocence. In this reasoned judgment he is expected to set out the facts which he finds to be proved and, when there is a conflict of evidence, his method of resolving the conflict."

[21] The above-stated position was again reiterated in the case of **R v Junior Carey** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 25/1985, judgment delivered 31 July 1986, at page 8 of the judgment, where the court, in response to counsel's complaint that the trial judge had failed to consider adequately or at all the discrepancies in the Crown's case and analyse in its entirety all the evidence, stated:

> "This criticism does not appear to be justified, unless it is being suggested that a trial judge exercising jurisdiction to try cases summarily under the Gun Court Act, is obliged to take each piece of evidence, and viva voce minutely analyse it so that his analysis appears on the record. The learned trial judge is not statutorily required to do any such thing even though a desirable practice has developed which it is hoped will be continued of setting out salient findings of fact which is of inestimable value should an appeal be taken."

[22] The principles enounced above are to the effect that the requirement for a detailed summation by a judge to a jury is not necessary where a judge sits alone,

although it is desirable that the judge sets out the facts on which the decision is grounded.

[23] While the above cases demonstrate that a minute analysis of every piece of evidence for the purpose of the record of the court is not necessary in Gun Court matters tried by a judge sitting without a jury, it is noted that the complaint in this case was that the trial judge failed to resolve the discrepancies. However, importantly, the case of **Uriah Brown v The Queen** [2005] UKPC 18 at paragraph 33, reinforces the point that it is the effect of the totality of the judge's summation which is of critical importance.

[24] As such, in these circumstances where there is a challenge to the trial judge's failure to resolve discrepancies relating to identification, such a challenge cannot be viewed without reference to the nature of the identification evidence before the court and the credibility of the complainant who was the sole witness identifying the appellant.

[25] The discrepancies in the trial included, for example, pieces of evidence where: the complainant stated that his assailants were not wearing tams (recorded at page 64 of the transcript, lines 7-20) and then stated that he could not remember whether or not they were wearing tams, while two other witnesses who were travelling in the van that was intercepted by the assailants gave evidence that the assailants were wearing tams. For example, at page 167 of the transcript, in the cross examination of the witness David Gibbons the following evidence was recorded:

"Q If I should see these men again I will not be able to identify them because they had on tams on their head and it was pulled down in their faces, right above their eyes, did you say those words?

A Yes sir.

Q Thank you. And when you said that you were being truthful?

A Yes sir."

[26] Another discrepancy in the evidence adduced by the prosecution occurred where the complainant stated that the four assailants (including the appellant) were in uniform when seen at the Constant Spring Police Station (recorded at page 55 of the transcript, lines 29 to 33) and then later stated that the appellant was not wearing a uniform at that time. Also, in cross examination at page 75 of the transcript, the complainant gave evidence that he had not been handcuffed by his assailants. When confronted by counsel that he had stated the opposite in his statement to the Independent Commission of Investigations (INDECOM), the complainant noted that he had told the INDECOM officer that that was an incorrect account of the incident. He further stated that he was to have given a further statement to clarify his account of the incident but that he did not get the opportunity to do so.

[27] In the summation, the trial judge warned himself in relation to the treatment of discrepancies. Below is an excerpt from page 381 of the summation which reflects the learned judge's caution to himself in relation to discrepancies:

"This is a matter in which we have had, the prosecution has [sic] pointed to several areas in the Crown witnesses case that they have deemed to be discrepancy. Now, if the court

> finds that there are discrepancies on the evidence, because it is the court who has to make that finding, it has to be determined first of all if the discrepancies are serious and I have already indicated most of the discrepancies that have been pointed out. Meaning, is it of such a nature that it destroys the very fabric of the witnesses' testimony and therefore make the court feel unable to accept and act upon the testimony of that witness.
>
> That is the state of mind in which a discrepancy leaves the court in relation to any particular witness in this case, then it would disregard the testimony of that witness. However, if when you look at the discrepancy you say it is not so serious, it does not in our view destroy completely the credibility of the witnesses or witness. If the court is satisfied that notwithstanding that a discrepancy, the witness has spoken truthfully in other areas then in the area which the court finds that the witness what [sic] has not spoken truthfully the court can reject that portion of the testimony, but in other areas in which the court finds that the witness has spoken truthfully the court can accept and act upon that portion of the witnesses testimony. Put another way, the court can reject all of the witnesses testimony or the court can accept all of it or the court can reject it in part or accept it in part."

[28] The warnings in relation to the treatment of discrepancies were, on the face of them, adequate. However, while the learned trial judge proceeded throughout the summation to recount some of the discrepancies, there is an absence of any analysis by the learned judge as to which version of the discrepancies was preferred and why. Furthermore there is an absence of a consideration of the impact of the discrepancies and inconsistencies on the complainant's credibility and ultimately on the prosecution's case.

[29] At page 348 of the transcript, for example, where the learned trial judge is recorded as indicating that he accepted the evidence of the complainant and found him

to be credible, there is no explanation as to why he preferred the complainant's evidence to the unsworn statement of the appellant. In relation to the appellant's alibi, while the learned trial judge gave what, on the face of them, might be regarded as standard directions, there is a total absence from the transcript of an indication of the basis for rejecting the appellant's alibi; and the learned trial judge failed to demonstrate that he assessed the credibility of the appellant's sister who gave evidence supporting the appellant's alibi.

[30] These factors are of grave concern to this court - especially in a case which is wholly dependent upon the complainant's credibility and, in particular, his credibility in respect of his identification of the appellant. The concern is also based on the fact that, in evidence which displays serious challenges to his credibility, there is no demonstration of how these issues were resolved. These considerations make the conviction unsustainable. However, there remains the other issue.

The effect of the learned trial judge's treatment of the issue of the appellant's good character

[31] Another critical issue arising in this case pertains to the learned trial judge's treatment of the issue of the appellant's good character. The cases of (i) **R v Aziz** [1996] AC 41; (ii) **Michael Reid v R**; and **Horace Kirby v R**, can be considered an appropriate starting point for this discussion. In **R v Aziz**, Lord Steyn spoke of the general application of the good-character direction, when he stated at page 50:

> "[I]t has long been recognised that the good character of a defendant is logically relevant to his credibility and to the likelihood that he would commit the offence in question."

[32] In **Michael Reid v R**, Morrison JA (as he then was), after a helpful and comprehensive review of all the authorities then existing concerning good character directions, summarized the position applicable to a case such as the present at paragraph 44(iii) of the judgment as follows:

> "(iii) Although the value of the credibility limb of the standard good character direction may be qualified by the fact that the defendant opted to make an unsworn statement from the dock rather than to give sworn evidence, such a defendant who is of good character is nevertheless fully entitled to the benefit of the standard direction as to the relevance of his good character to his propensity to commit the offence with which he is charged (**Muirhead v R**, paragraphs 26 and 35)."

[33] At paragraph [11] of **Horace Kirby v R**, Brooks JA, on behalf of the court, made the following pronouncements in recounting the principles along the lines of which the court exercises its discretion to give a good character direction:

> "The second principle to be recognized is that where an accused does not give sworn testimony or make any pre-trial statements or answers which raise the issue of his good character, but raises the issue in an unsworn statement, there is no duty placed on the trial judge to give the jury directions in respect of the credibility limb of the good character direction. The accused is still entitled, however, to the benefit of a direction as to the relevance of his good character as it affects the issue of propensity. That was set out by Morrison JA in **Michael Reid** as principle (iii) on pages 26 - 27 of the judgment of this court."

[34] In light of the above, it may be necessary briefly to consider whether the issue of the appellant's character had been raised. Crown counsel in her submissions conceded that the issue of the appellant's good character had indeed been raised. We find it convenient for this purpose to have regard to the trial judge's summation at page 340

of the transcript, lines 25 to 30, wherein he recounted that the appellant's defence in his unsworn statement was to the effect that:

> "I am a young dedicated police officer who had a career, a viable career in banking and who chose to serve in the police force. I am of good character, my superior officers saw my potential and made me a detective and since my tenure in the force I have never been to the orderly room or have any disciplinary actions taken against me."

[35] There can be no denying that those statements clearly bring into issue the good character of the appellant. The trial judge in fact identified that the appellant was saying that he was of good character. However, regrettably, there was an absence of any express good character direction indicating that the learned trial judge directed his mind to the fact that a person of good character would have been less likely to have committed the offences with which the appellant was charged. Thus, the trial judge would have erred in not giving himself the good character direction in relation to propensity; or, at the very least, demonstrating that he bore that consideration in mind. However, that failure by itself does not conclude the issue.

[36] There is another principle concerning a good character direction that is relevant here. That principle was addressed by Morrison JA in **Michael Reid v R**. At pages 27 to 28, paragraph 44(v) of the judgment he stated as follows:

> "The omission, whether through counsel's failure or that of the trial judge, of a good character direction in a case in which the defendant was entitled to one, will not automatically result in an appeal being allowed. The focus by this court in every case must be on the impact which the errors of counsel and/or the judge have had on the trial and the verdict. Regard must be had to the issues and the other

> evidence in the case and the test ultimately must always be whether the jury, properly directed, would inevitably or without doubt have convicted (**Whilby v R** [(unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 72/1999, judgment delivered 20 December 2000] per Cooke JA (Ag) at page 12, **Jagdeo Singh v The State** (2005) 68 WIR 424, per Lord Bingham at pages 435 -436)."

[37] The evidence in the trial revealed that the credibility of the complainant was a major issue throughout the trial. Even a part of the identification evidence (that dealing with previous knowledge of the appellant) centred on the question of credibility. That part related to the complainant's testimony that he had previously seen the appellant at the Constant Spring Police Station in uniform. On the other hand (as previously mentioned), the appellant's unsworn statement and the testimony of Detective Inspector Brooks, were to the effect that the appellant had been assigned to the Criminal Investigation Branch (CIB) at the Constant Spring Police Station (a section whose members do not dress in uniform) at the time the complainant testified that he had seen him there dressed in uniform. Additionally, the appellant's counsel's cross examination of the complainant sought to show that the complainant was someone of questionable character, in that at the time of the incident he was reporting on condition of bail on gun-related charges; and had been involved in a prior incident in which he was the target of a shooting. On the other hand, the unsworn statement of the appellant and the evidence of Detective Inspector Brooks were to the effect that the appellant was a dedicated serving member of the JCF. Those factors would have made keener the importance of the consideration of credibility and would have heightened

the need for the trial judge to direct his mind to whether the appellant had the propensity to have committed the offence.

[38] In seeking to bolster her submission that the learned trial judge had in fact addressed his mind to the appellant's good character, Crown counsel identified a factor which was evidenced at page 397 of the transcript, lines 11 to 20. That was that, subsequent to the appellant being convicted and at the time of sentencing, the judge made the following remarks regarding the appellant:

> "...your conduct, you [sic] character has been exemplary. In fact, I may very well point that in the trial itself, that was something that bore very heavily on the strong evidence that we had to consider, that here you are, a man as the law ordains, a person of good character and that you have to be, that has to be put in this scale in your favour..."

[39] Those statements seem to suggest that the trial judge had considered the issue of the appellant's good character during the trial. However an express warning at the time of considering the guilt of the appellant is absent from the summation. Those observations of the learned trial judge are therefore robbed of their usefulness by the fact that they came after the finding of guilt.

[40] On this basis alone the appeal must be allowed.

[41] Another issue which comes to the fore is in relation to the sentence imposed on the appellant for the offence of wounding with intent. The appellant had been indicted under section 20 of the Offences against the Person Act for that offence. Section 20(2)(b) of the said Act provides that a mandatory minimum sentence of 15 years'

imprisonment is to be imposed for the offence of wounding with intent. At page 397, lines 23 to 25 of the transcript, recorded during the sentencing process, the trial judge, in relation to the imposition of the mandatory minimum stated that: "...I did invite both Counsel to show me a way around what the legislators impose".

[42] However, considering the egregious nature of the allegations, as the learned trial judge apparently found, where the evidence suggested that the intention of the complainant's assailants was to commit a premeditated murder or extra-judicial killing or to inflict grievous bodily harm, the sentence of 15 years would seem less than what would usually be imposed for offences of a similar nature. This in our mind lends credence to counsel for the appellant's complaint that, on a fair interpretation of the transcript, the issue of the appellant's good character may have operated on the mind of the learned trial judge only post conviction.

[43] Ultimately, having considered those matters cumulatively, we formed the view that the conviction cannot be said to be safe, as it cannot reasonably be maintained that the appellant would have been convicted in any event had the learned judge considered the good character of the appellant - especially in light of the challenge to the credibility of the complainant. In the light of these matters, we propose that the conviction be quashed and the sentences of the learned trial judge be set aside.

Retrial

[44] Section 14(2) of the Judicature (Appellate Jurisdiction) Act gives this court the power to order a retrial in certain circumstances. It states as follows:

> "(2) Subject to the provisions of this Act the Court shall, if they allow an appeal against conviction, quash the conviction, and direct a judgment and verdict of acquittal to be entered, or, if the interests of justice so require, order a new trial at such time and place as the Court may think fit."

[45] The Privy Council in interpreting the above provision in the case of **Dennis Reid v The Queen** (1978) 16 JLR 246, at page 247, held that "any consideration of what the interests of justice require in a particular case may call for a balancing of a whole variety of factors, some of which will weigh in favour of a new trial and some against". As such, the Privy Council proceeded to set out factors to be considered by the court in deciding whether to order a retrial (stating that those factors listed should not in any to be treated as exhaustive). It was stated at page 246, per curiam, that:

> "Factors which may be taken into account include the seriousness or otherwise of the offence, its prevalence, the length of the previous trial and the length and expense of a new trial, the ordeal to be undergone a second time by the accused, the length of time between the offence and the new trial and the effect of this on the quality of the evidence. The probability that a new trial will result in a conviction is not a precondition to ordering a new trial as the interests of justice may nevertheless demand that the matter should be determined by the verdict of a jury."

[46] It was also stated in the head note to that case that:

> "(iv) A distinction must be made between cases in which the verdict of a jury has been set aside because of the inadequacy of the prosecution's evidence and cases where the verdict has been set aside because it had been induced by some misdirection or technical blunder."

[47] Further, at page 251 of the judgment, the Privy Council set out these considerations:

> "... there may be many factors deserving of consideration, some operating against and some in favour of the exercise of the power. The seriousness or otherwise of the offence must always be a relevant factor; so may its prevalence; and, where the previous trial was prolonged and complex, the expense and the length of time for which the court and jury would be involved in a fresh hearing may also be relevant considerations. So too is the consideration that any criminal trial is to some extent an ordeal for the accused, which the accused ought not to be condemned to undergo for a second time through no fault of his own unless the interests of justice require that he should do so. The length of time that will have elapsed between the offence and the new trial if one be ordered may vary in importance from case to case, though having regard to the onus of proof which lies upon the prosecution lapse of time may tend to operate to its disadvantage rather than to that of the Accused. Nevertheless there may be cases where evidence which tended to support the defence at the first trial would not be available at the new trial and, if this were so, it would be a powerful factor against ordering a new trial."

[48] In that case the facts were such that the defendant was charged with murder. The prosecution's case was dependent upon the identification of the appellant by a single eye witness. The Court of Appeal had quashed the conviction and by a majority ordered a retrial pursuant to section 14(2) of the Judicature (Appellate Jurisdiction) Act. The Privy Council allowed the defendant's appeal against the order for retrial on the ground that where a verdict has been set aside on the basis that the evidence adduced by the prosecution was insufficient to ground the conviction by a reasonable jury properly directed then it is not in the interests of justice that the prosecution be given an opportunity to cure the defects in its case through a retrial.

[49] In the case at bar the appeal is being allowed on the basis of a technical error on the part of the judge in that: (i) he failed to expressly consider the good character of the appellant in determining his guilt, especially in the light of the challenge to the credibility of the complainant; (ii) he failed to demonstrate that he gave sufficient consideration to the defence of alibi; and (iii) he failed to demonstrate an analysis of the discrepancies. In applying the principles stated in **Dennis Reid v The Queen** to the circumstances at hand there would not be in this case (as there was in **Dennis Reid v The Queen**) an evidential obstacle to the court ordering a new trial. This is so as this appeal is not being allowed on the basis of an insufficiency of evidence to ground the conviction. Rather, it is being allowed on the basis of a technical error on the part of the judge, in failing to consider the good character of the appellant before conviction vis-á-vis the credibility issues; the defence of alibi and other issues.

[50] The allegations and offences involved in this case are of a serious and violent nature in which the complainant was seriously injured. Further, there can be no gainsaying the fact that gun-related offences are prevalent in our society. The incident occurred on 23 December 2013, and trial commenced on 9 June 2015. As such, the trial would have commenced, and the appellant convicted and sentenced approximately one year and six months after the incident. In other words, undue delay is not a consideration that looms large in this matter. Further, prior to his conviction, the appellant would have spent about one week in police custody before he was granted bail. The Criminal Form B1 giving notice of the appeal is dated 14 July 2015, and the appeal was heard 22 March 2017, thus another one year and nine months would have

passed since his conviction. These are not unduly long periods in our reality. On the Crown's case, the appellant is also said to have played an active role in the abduction and the events leading up to the complainant's being shot.

[51] The availability of witnesses (in particular, the complainant) would be critical to the successful completion of a retrial. There is no indication that they are not available. It is our view that in the interests of justice there should be a retrial in this matter. Once the witnesses are available, the retrial should take place as soon as is reasonably possible.

[52] In the result, the appeal is allowed; the convictions are quashed and the sentences are set aside and a re-trial ordered in the interests of justice.