[2010]JMCA Crim 35

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 53/2007

BEFORE: THE HON. MR JUSTICE HARRISON, J.A.
THE HON. MISS JUSTICE PHILLIPS, J.A.
THE HON. MRS JUSTICE McINTOSH, J.A. (Ag)

DANNY WALKER v R

Ms Gillian Burgess for the applicant

Ms Dahlia Findlay for the Crown.

23, 24, February and 9 July, 2010

PHILLIPS, J.A.

[1] On 23 March 2007, the applicant was convicted on an indictment charging him with the murder of Nyrokie McDonald, o/c 'Rokie', after a trial before Marjorie Cole-Smith, J and a jury in the Home Circuit Court, in the parish of Kingston. He was sentenced to life imprisonment, and the court further ordered that he was not to be eligible for parole until he had served 30 years. The sentence was also ordered to begin after the expiration of the sentence that he was then serving.

[2] On 23 June 2009 his application for leave to appeal against conviction and sentence was reviewed by a single judge of this court and was refused. His application was therefore renewed before us.

The evidence at trial

[3] In this case, the crown called 10 witnesses. However there was only one eye-witness to the incident, Mr Christopher Robinson. The trial judge in her summation dealt with the evidence as it unfolded fairly accurately, and we shall therefore, in the main, utilize her summary of the evidence given by the witnesses. The learned judge also very early in her summation indicated that the issues in the case were credibility and identification.

[4] Mr Christopher Robinson gave evidence stating that he was otherwise called 'Troy' and that he did construction work. He stated that on 1 October 2002, at about 10:00 p.m. he was on Sheffield Road, in the community of Doncaster. He said he was 'hanging out' with two friends, his cousin Damion Robinson and 'Tom'. The three of them decided to cook and so they went to a shop in the community of Sheffield Road and bought certain food items. Having left the shop, on his way home, Mr Robinson said that he saw 'Bulla' and 'Rokie' on Bellevue Avenue. He did not know 'Bulla' by any other name, but he knew 'Rokie's' name to be 'Nyrokie', although he did not know his "other name". He said he stopped to talk with them. The area was well lit. There were street lights and house

lights in the community. He said that the nearest street light was at the corner of Bellevue Avenue, where the three of them were standing. It was about 20 feet from him. The street light was at the intersection of Bellevue Avenue and Sheffield Road and the next street light was about 15 feet away. There was also a light at the end of every house.

[5] Mr. Robinson said that while he was standing on Bellevue Avenue, and 'Bulla' and 'Rokie' were standing on the sidewalk at Bellevue Avenue, close to each other, he saw a white Sunny Nissan car drive up from Sheffield Road. The car drove past him standing on Bellevue Avenue and then reversed onto Bellevue Avenue and stopped. He said he was very close to the car, about a 'handshake' away, and he bent down and looked in the car to see who was in there. He saw 'Mr Piggy' and a lady in the car. The car was a right hand drive car and 'Mr Piggy' was nearest to him. Although he did not know 'Mr Piggy' by any other name, he had known him for two to three years before that night. He had known him from a community called Bowerbank. Mr Robinson said that he had lived on Sheffield Road for some time and then he had moved to Bowerbank. He had lived in the Doncaster community for over three to four years and had reason to go to Bowerbank as he had a "baby mother" living there. When asked what was the relation between the two communities, he said they were "just a wall apart".

[6] He indicated that he knew 'Mr Piggy' as he ('Mr Piggy') would walk on the street in Bowerbank and every day 'Mr Piggy' would pass him "going to work and coming back." The last time he had seen 'Mr Piggy' was about two years before, off Windward Road. 'Mr Piggy' was also someone whom he had spoken to before. He knew 'Mr Piggy's' brother who had done some carpentry work for him and the brothers looked alike, but he did not know the brother's name, nor did he know any other members of 'Mr Piggy's' family.

[7] Mr. Robinson said that he was able to recognize 'Mr Piggy' as he was not wearing anything on his head that night. There was nothing covering 'Mr Piggy's' face and nothing blocking his view of him, and so when he looked in the car that night he saw 'Mr Piggy's' face.

[8] After the car stopped, Mr. Robinson said he saw 'Mr. Piggy' looking in the direction of 'Bulla' and 'Rokie', who were then about 10 feet away, and he saw when 'Mr Piggy' pulled out a gun, rested it on the car door, pointed the gun at both 'Bulla' and 'Rokie,' and then at 'Rokie', and then he saw "fire coming out of it". He said he heard two explosions and the explosions sounded like gunshots, and immediately thereafter all three of them ran off. He ran behind the car in the direction of Bellevue Avenue and they ran on Sheffield Road. The car also drove off on Sheffield Road, but not in the same direction as 'Bulla' and 'Rokie' had gone. Mr.

Robinson said that after he had run off, he went back to look for 'Bulla' and 'Rokie.' He came off Bellevue Avenue and turned onto Sheffield Road and saw 'Rokie' lying face down in the road. He shouted for help and eventually was able to obtain assistance from a white van which took' Rokie' to the hospital. He noticed that Rokie had blood running down his chest and on his chin. He visited the hospital later that night and saw 'Rokie' lying in the said van and he "looked dead".

[9] Mr Robinson said that two minutes had elapsed between when he first saw the Nissan motor car and when it drove away. He saw 'Mr Piggy's' face for about a minute. He did not however give a statement to the police until 3 June 2003, nine months later. He said: "there is a reason why I waited so long to give the statement, I didn't want to get shot." He also said he decided to go and give the statement in June as 'Mr Piggy' was "not around the area". He gave his statement at the Elletson Road Police Station as he said he knew a policeman there.

[10] Mr Robinson was cross-examined at length with regard to the positioning of the two roads. Bellevue Avenue and Sheffield Road intersect at a T-Junction. Mr Robinson said that the windows of the Nissan motor car were tinted, but the front door windows were down. He did not speak to the occupants of the car, and they did not speak to him or his friends. He just bent down and looked in the car which took about

two seconds, and then one minute later he saw the gun. When he saw the gun, he said he was shocked. He was sure that there were only two occupants in the car. The man was nearest to him and where the gun rested could 'be right at his waist'. He said 'Rokie' was a little shorter than him or perhaps the same height. He was challenged about the length of time that he took to give a statement to the police especially since on the night of the incident on the way to the hospital he would have passed at least three police stations. This was his response:

> "I was not thinking about police at the time. Nyrokie was my friend. I saw him shot I knew who shot my friend. I didn't tell the police. I waited some nine months later to give the police a statement after I saw "Piggy" shot my friend."

He also said he was afraid, and that was why he did not make any report to the police that night.

(11] It was suggested that there were several 'black outs' in the area at that time and particularly that night, but that was denied by him. He reiterated that he had been hit in the belly that night as a result of the explosion.

[12] He did not attend an identification parade, and before he went to court he had not identified the applicant to the police and the police had not asked him to identify the applicant. In fact the applicant was pointed out in the court by Mr Robinson as the person he knew as 'Mr

Piggy'. This was therefore a dock identification, which we will discuss later in this judgment.

[13] Mr Robinson told counsel in cross-examination that he had seen 'Mr Piggy' on Sheffield Road later that same night after he had left the hospital, between 11:00 pm and 12:00 a.m. 'Mr Piggy' had stopped the car, put his gun on the car and looked at him. This, however, he had not put in the statement that he had given to the police. In fact he accepted that in the statement he had given he had said that since the incident he had only seen 'Mr Piggy' once riding a Honda 50 motorcycle on Windward Road. He insisted in reexamination however that he had told the police that he had seen 'Mr Piggy' later that night. He also told the court that he knew 'Mr Piggy's' brother and that "they have a close resemblance. They could pass as a twin. His brother could not pass as him one is taller, one is shorter.'

[14] In re-examination he confirmed that 'Mr Piggy's' brother closely resembles him, and that they could pass as twins". However, he said he was not mistaken, with regard to his identification of 'Mr Piggy' on that night as he had known him "for far too long", and he had seen him for two minutes from his chest up to his face.

[15] Detective Inspector Phillip McIntosh gave evidence that although assigned to Organized Crime Division at the trial in May 2003, he was stationed at May Pen Police Station. Whilst on enquiries in the Richmond Park district in Clarendon, he, accompanied by three other police personnel in plain clothes and in an unmarked vehicle, approached a board structure building at a certain section to the left side of the road. He was seated in the left front passenger seat.

[16] Having approached the building, he noticed that the building contained a bar and that persons were inside the building. He saw the applicant who looked at him and then immediately started to walk towards the rear of the building. He became suspicious, and having entered the building with the other Police Officers, and having identified himself to the applicant, he apprehended the applicant and conducted a physical search of him. He took from the applicant's pant waist, a firearm resembling a 9mm semi-automatic Glock pistol. The firearm bore serial number KM 565 US. He said he took a magazine from the firearm loaded with 7 live 9mm cartridges and 1 live 9mm cartridge.

[17] Detective Inspector McIntosh said the applicant gave his name as Danny Walker and indicated that he did not have a firearm licence. He was then arrested and charged for illegal possession of firearm and

ammunition. The officer stated that the firearm and the ammunition were taken into police custody firstly, at the May Pen Police Station, then delivered to the Government Forensic Laboratory. It was given to the Clarendon Gun Court and thereafter returned to the May Pen Police Station. The applicant pleaded guilty to the above offences in the Clarendon Gun Court and was sentenced. Detective Inspector McIntosh identified the firearm in court in this case, from the above serial number, and also the envelope in which it was contained by his handwriting. The firearm was tendered into evidence as Exhibit 1.

[18] In cross examination Detective Inspector McIntosh stated that having been cautioned, after he was arrested and charged for the offences of illegal possession of firearm and ammunition, the applicant stated, "Officer a mi brethren give mi to sell", although it was suggested to him in court by counsel for the applicant that what was said by the applicant was really "mi bredda give mi to sell".

[19] Detective Inspector Walters gave evidence that he was originally the investigating officer stationed at the Elletson Road Police Station. He said that he received reports on 1 October 2002, at about 10:30 pm and based on those reports he went to the intersection of Sheffield Road and Bellevue Avenue in Doncaster, and thereafter to the Kingston Public Hospital (KPH), where he saw the body of the deceased in a white Toyota

Hiace minivan. He said that he observed what appeared to be gunshot wounds to both arms. The deceased, he said, was identified to him by his brother 'Troy'. He had summoned the scene of crime personnel, Detective Inspector Ramsarupe and Detective Corporal Marner, who came to KPH that night and then the following morning accompanied him to the scene at the Bellevue Avenue and Sheffield Road intersection. He said he observed two spent shells and one expended bullet along Bellevue Avenue about five feet from the intersection, and also blood stains along Sheffield Road, which he pointed out to both Police Officers. Detective Corporal Marner photographed the same and Detective Inspector Ramsarupe collected the two spent shells and expended bullet.

[20] Detective Inspector Walters also gave evidence about the lighting which he had observed on the night of 1 October 2002. He said he was able to observe the scene as there were street lights along the road, and one at the intersection of Bellevue Avenue and Sheffield Road. He said there was another street light along Bellevue Avenue, about 40 feet from the intersection and there were also several streetlights along Sheffield Road.

[21] It was also Detective Inspector Walters who, having commenced investigation into the case of the alleged murder of Nyrokie McDonald, caused a statement to be obtained from Carlton White otherwise called

'Bulla' and who prepared the warrant for the arrest of "a man known as 'Mr Piggy'". He said he prepared the warrant on 4 October 2002. He had not known this Mr Piggy' before, but based on the description received, he took out the warrant and began looking for the suspect in Franklin Town and Doncaster as well as Rollington Town. He said he took out the warrant twice but was unable to locate the suspect and he then went on leave and handed over the file to the sub-officer in charge of the homicide unit, Detective Inspector Harrington Forrest. The warrant was tendered in evidence as Exhibit 2. Inspector Walters gave evidence that Danny Walker was 'Mr Piggy'.

[22] In cross examination Detective Inspector Walters stated that the words "Danny Walker" which appeared on the warrant were not written there by him. He also stated that he had never met Carlton White. He had not taken the statement from him, himself; it had been taken by another Police officer, Detective Sergeant Clacken who although still in the Force did not give evidence.

[23] Detective Inspector Aston Ramsarupe when he gave evidence was stationed at the Major Investigating Task Force, but at the time of the incident in October 2002 he was stationed at Area 4 Headquarters in the parish of Kingston. He stated that he had received instructions and as a result he had visited KPH on the night of 1 October 2002, and the

intersection of Sheffield Avenue and Bellevue Road on the following Wednesday morning at 6:30am. At the intersection Detective Inspector Walters pointed out the spent shells and expended bullet which were about 10 feet from the intersection. The shells and the expended bullet were photographed at his instructions and the items were secured and labeled and later taken to the Government Forensic Lab. The spent shells and the expended bullet were tendered into evidence as Exhibit 3. Detective Inspector Ramsarupe indicated that he saw blood along Sheffield Road and instructed that the same be photographed also.

[24] There was an issue in cross examination as to whether the items which were marked as Exhibit 3 were pointed out to him by Detective Inspector Walters at the scene, or given to him by Detective Inspector Walters, on the basis of a previous statement made to the Police, but Detective Inspector Ramsarupe maintained that they were pointed out to him, and so his observations as to their location in the street were accurate.

[25] Detective Corporal Marner gave evidence that he was stationed at Major Investigation Task Force and had also been summoned to the KPH and the scene at the intersection of Bellevue Avenue and Sheffield Road. At the instructions of Inspector Ramsarupe he took photographs of the deceased in the Hiace bus, the spent shells, the

expended bullets and the blood respectively. Five photographs were tendered in evidence as Exhibit 5.

[26] Corporal Marner however, under cross examination was unable to give evidence with regard to the relative distances in respect of Exhibit 3, the lights which run along Bellevue Avenue, and also the height of the wall which runs along Bellevue Avenue. He said a sketch would have been more useful with regard to measurements as he had not taken any measurements and the photographs could only be useful to show that the items depicted therein existed.

[27] Detective inspector Michael Garrick gave evidence that in assisting with the investigation of the murder of Nyrokie McDonald, he had been to the May Pen Police Station accompanied by Detective Inspector Forrest on 9 June 2003 to interview Mr Danny Walker, who refused to participate in the interview on that day, but later with counsel of his choice did so on 26 June 2003. Inspector Garrick said he cautioned him, and with his attorney Mr Hopeton Clarke present, proceeded to ask the applicant 23 questions, which were answered by the applicant, signed by him, duly recorded and tendered into evidence as Exhibit 4.

[28] In cross examination, he was challenged that the applicant only had five minutes with his attorney before the interview began, and even though the interview only lasted five minutes, he had been asked

important questions such as whether he had murdered Mr McDonald, which he denied. Detective Inspector Garrick also identified the applicant in the dock as Danny Walker.

[29] In Exhibit 4 the applicant gave his correct name as Danny Walker and said that he was also known as 'Mr Piggy' or 'Hoggy'. He said he had siblings including a brother, Albert Walker, who was a Cabinet Maker. On 1 October 2002 he said he had been driving a Nissan Station Wagon at about 10:00 pm, but not in the vicinity of Bellevue Avenue and Sheffield Road, and he did not have a female with him. He said he did not know Christopher Robinson or Carlton White, otherwise called 'Bulla' or the deceased Nyrokie McDonald, otherwise called 'Rokie'. He also said that he did not point a gun at some people, and open fire hitting and killing Nyrokie McDonald.

[30] The learned trial judge dealt with the expert evidence together that is, the medical evidence of Dr Adenola Odunfa and the evidence of the ballistic expert Inspector Harrisingh. This evidence is important to the case, as the manner in which the evidence has been treated by the learned trial judge in her summation and the inferences and conclusions which could be drawn therefrom, were the subject of serious challenge in the grounds of appeal argued before us, on behalf of the applicant.

[31] Dr Adenola Odunfa gave evidence that he was a registered medical practitioner and a pathologist who had conducted several post mortem examinations over the period of 25 years, 15 of which had been undertaken here in Jamaica. He said he had performed one such post mortem examination on the body of Nyrokie McDonald, whose body had been identified by Troy Miller at Madden's Funeral Home.

[32] He gave the injuries he observed and the conclusions he arrived at as follows:

(i) there was one penetrating gunshot wound - 1 cm in diameter without gun powder marks on the left side of the chest about 5cm below the top of the shoulder and 16cm from the anterior mid line.

(ii) The track of the projectile traveled through the skin and underlining tissues, and penetrated the left chest cavity, with associated laceration to the ascending thoracic aorta and massive bilateral haemothorax.

(iii) The bullet exited from the right side of the shoulder, about 10cm below the top and 20cm from the anterior mid line. It traveled across the chest. No bullet was recovered.

(iv) Death was due to the gunshot wound to the chest with massive internal haemorrhage.

(v) In the doctor's opinion, the shooter would have been anterior and to the left of the victim.

(vi) The bullet would have entered the body at a 30 degree angle (slanted) "slightly going down'.

(vii) One could not say definitively if the firearm was pointing down. It would depend on the position of the victim himself.

(viii) The entry of the bullet into the body was at a higher level than its exit of the body. It would suggest that the bullet was going slightly downwards from the left side to the right side.

(ix) The height of the deceased was 5ft 6inches.

(x) There was no damage to any bones.

(xi) No gun powder deposition suggests that the barrel of the gun would have been a distance of between 18- 24 inches away from the victim.

(xii) if the assailant was sitting, the bullet would be upwards but it depended on the position of the victim.

(xiii) if the victim was standing, one would expect the angle (the impact of the bullet) to be directed upwards.

[33] Inspector Harrisingh gave evidence that he was the government's ballistic expert attached to the ballistic section of the Forensic Laboratory

in the parish of St Andrew and that he had extensive qualifications and experience in forensic identification and technology, and indicated that he had been exclusively engaged in this discipline for the past 16 years.

[34] In his evidence he said that he had received certain articles at the Forensic Laboratory on 3 October 2002 and later on 5 June 2003, on which he had subsequently conducted an analysis and arrived at certain conclusions. He indicated that on 3 October he received from Detective Inspector Ramsarupe two 9mm Lugar expended cartridge cases, given case number 31596A, and one 9mm calibre firearm bullet, with case number 31596A1. On 5 June 2003 he said he received from Inspector McIntosh, envelopes “A” and “B” with case number 33079; envelope ‘A’ contained a 9mm Lugar Glock which he described as a semi-automatic pistol. The firearm had the serial number KM 565US and envelope B’ contained 9mm Lugar unexpended cartridges.

[35] Inspector Harrisingh said he conducted investigations and arrived at certain conclusions as follows:

(i) He test fired the firearm (case number 33079) in envelope marked “A” using two 9mm Lugar cartridges from the Laboratory stock and one cartridge from Exhibit B.

This indicated that the firearm was in good working order, capable of discharging deadly bullets from its barrel.

(ii) He conducted microscopic comparison of 31596A and 31596A1, with the test fire cartridge cases from Exhibit "A' of case 33079 (9mm Lugar Glock semi-automatic loaded pistol).

This disclosed matching of the firing pin and breech face impressions, that is to say that the two expended cartridge cases, and bullet 31596A and 31596A1 were fired by the 9mm Lugar Glock pistol with serial number KM 565 US (case number 33079).

[36] The inspector gave further detailed evidence of how the examination was conducted, the importance of the markings, the firing pin, the soft material in the primer of the cartridge case during firing and how the breech face impressions were created when the cartridges were fired. He explained the fact that the firearm was manufactured to eject the firing cartridge case through the ejector part of the firearm on firing and this expended the bullet from the barrel. In cross examination the inspector stated that from the direction in which the barrel is pointed, the bullet will travel in that straight line to the target. So, if someone points the firearm in a downward direction, and there is no obstruction, the bullet will continue in a downward direction; and if the firearm is resting on a window of a car pointing slightly in an upward direction, and there is no obstruction, the bullet will continue, over a distance of 15 feet, in an

upward direction. He stated further that on point of impact, the bullet will also be traveling upwards.

[37] In re-examination Inspector Harrisingh clarified that the clothing of a person could affect the angle of the bullet so as to vary the said angle on entry into a person, but indicated in further cross examination, that in order to vary the angle of the bullet, or to cause any deflection of its trajectory, it would not be the clothing that mattered, but the material that the clothing is made of.

[38] The final witness for the prosecution was Detective Inspector Harrington Forrest, who when giving evidence had already retired from the Jamaica Constabulary Force, but who was stationed at Elletson Road Police Station in 2003, when he was handed the case file relating to the murder of Nyrokie McDonald from Inspector Walters. In pursuing investigation into the matter, he endeavoured to locate one 'Troy' and eventually did so as Christopher Robinson otherwise called 'Troy' came to the police station and he collected a statement from him.

[39] He then made further enquiries in an effort to execute the warrant on a man named 'Mr Piggy' which was the only name written on the warrant, at that time. He said he went to the May Pen Police Station accompanied by Detective Inspector Garrick. He saw the applicant there, cautioned him and indicated that he intended to arrange an

identification parade for him. The applicant's immediate response was 'Officer, how yuh a guh put mi pan parade and mi guh a court several times already".

[40] Detective Inspector Forrest said he spoke to Detective Inspector Mcintosh, who was in charge of the matter in respect of which the applicant was being held in custody at the May Pen Police Station lock-up. Inspector Forrest gave evidence that subsequent to this discussion, he formed the view that putting the applicant "on identification parade would not be appropriate". Why was this? He said: "From what he (the applicant) said and what I gathered from Inspector McIntosh, he was exposed to view whilst he went to court".

[41] He then obtained the question and answer document from Inspector Harrisingh and on 27 June 2003 he went to the May Pen Police Station Lock-up armed with the warrant, read the contents thereof to the applicant, executed the same on him, and wrote the endorsement on the reverse side of the warrant. He gave evidence that he had inserted the name 'Danny Walker' on the warrant beside the name 'Mr Piggy'. He identified the warrant which had been tendered into evidence as Exhibit 2, as the said warrant on which he had made the amendment. He charged the applicant for the murder of Nyrokie McDonald and cautioned him. Having been cautioned, he said the applicant said, "Mi

nuh kill nobady, mi don't even know de man". The inspector said prior to the arrest, he did not know the applicant and before he took the statement from Mr Robinson he had not known him either.

[42] The inspector was challenged under cross examination in respect of three matters:

(i) the failure to hold an identification parade even in another parish in the country;

(ii) The defacing of the warrant subsequent to the signing of the same by the Justice of the Peace and without any notification to the said Justice of the Peace; and

(iii) the fact that there was no mention in the statement taken from Christopher Robinson, that later on the night after the shooting, he had seen 'Piggy' leaning on a car, with a gun in his hand, which was an important statement and which therefore, meant that it had not been said by the witness when giving his statement.

[43] In her summation the learned trial judge captured the essence of the unsworn statement of the applicant which I shall simply set out below as recorded therein:

> "Now, this is what he said, Good morning, m'Lady, good morning jury. I Danny Walker swear before this

court and jury that I know nothing about this murder. I was held in Clarendon on the 30th of May by my (sic) cousins property in Clarendon where they conduct business where they frequent in town. I was held in the property when they conduct business with a firearm on property. Officer charge me and I plea guilty to the gun because they say it will help me out and I did. In times I was accused of many other things which I knew nothing about. While I was on cell block at May Pen Police Station I was visited by the Investigating Officer from Eastern Kingston Division and he then questioned me on a number of things. I cooperated with them because I knew nothing about it, there was nothing to hold back because I was innocent of what they accused me. I came to town sometime in June, I did an identification parade at the police station in Central Kingston which I was released. Mr. McIntosh came back for me from Vineyard Town where I was locked up and came back to station and I was charged by Mr. Forrest. I cooperate with them all through the process because I know nothing about it. This is what I have to say, this is where my evidence lie to prove my innocence. Now that is his statement.'

The application for leave to appeal

[44] At the hearing before us, counsel for the applicant indicated that she was abandoning the original grounds filed on his behalf, and sought and was granted permission to argue supplemental grounds 1, 2 (a-d), and 3 with a specific request to argue ground 2 first. The grounds of appeal are set out below:

"1. That the Appellant had an unfair trial.

2. That the learned trial judge misdirected the jury on the following points:

a) The learned trial judge failed to give the directions required when the witness identifies the accused for the first time in the dock

b) That the learned trial judge mis-stated the evidence at 249 (sic) of her summations in that she indicated that the witness had seen 'piggy 2 days prior to the day of the incident when the witness in fact said he had not seen him for two years (p. 33 line 18.

c) That the learned trial judge at p.. 308 of the transcript erred in directing the jury that if they accepted that the expended bullet and spent shell came from the firearm found on the accused nine months later was capable by itself of making the jury feel sure that the appellant was guilty. Especially having regard to the fact that the appellant was not found in possession of the gun until seven months later.

d) The learned trial judge erred in law, in failing to give the full **Turnbull** warning in that she failed to direct the jury that a mistaken witness can nevertheless be a convincing witness.

3. That the sentence is manifestly excessive."

The Submissions

Grounds of Appeal 2(a), (b)& (d)

[45] Counsel submitted that "it is an accepted principle that it is desirable to hold an identification parade even when the witness claims that he knows and recognize (sic) the accused". Counsel submitted that in the instant case it had been the intention to hold an identification parade but the applicant had objected to participating in the parade on the basis that he had already been exposed. Counsel submitted that in

this case the trial took place almost five years after the crime had been committed, and the witness Christopher Robinson gave evidence that at that time, he had known the applicant for 2-3 years, but had only seen him about 2 years before the incident. Further, this was also a case of disputed recognition, as the applicant from an early stage, had denied in the question and answer session, that he knew either the deceased or the witness. (transcript p 161 lines 20-21)

[46] Additionally, counsel relied on an error in the summation, wherein the learned trial judge referred to the period where the witness (Robinson) had last seen the applicant "Mr Piggy" as being two days before the crime, when in the evidence the witness had said two years, as having the effect of bolstering the identification evidence, and unfairly prejudicing the applicant.

[47] Counsel conceded that a dock identification was not inadmissible but she submitted if admitted in evidence, then it is incumbent on the learned trial judge in her summation to give very clear and specific warnings so that the proper safeguards are in place. Counsel relied on two Privy Council cases: ***Leslie Pipersburgh and Patrick Robateau v the Queen*** (unreported PC appeal No 96 of 2006 delivered 21 February 2008); and ***Aurelio Pop v the Queen*** (unreported PC Appeal No. 31 of 2002

delivered 22 May 2003). We will consider these authorities in detail later in this judgment.

[48] Counsel submitted that if a dock identification is admitted in evidence, a particular type of treatment of the same is required in the summation. The jury must be told, she submitted, of the importance of holding an identification parade, and they must also be told that the failure to hold one, deprives the applicant of the possibility of the benefit of an inconclusive identification parade. Counsel further submitted that the fact that the applicant had been taken to court already, was not sufficient reason not to hold the identification parade. This was not a case where the identification evidence was exceptional. In fact, counsel submitted, the identification was made at night, where the visibility is less, and although on the Crown's evidence it was a recognition case, as the witness had said that he had known the applicant over a two to three year period, but since he had also said that he had not seen the applicant for two years before the crime had been committed, this made the opportunity to view the applicant on the night even more important. The witness said that he had seen the applicant for about two to three minutes, and his face for about one minute, as there were street lights, but on the night he had not spoken to the applicant, and the applicant had not spoken to anyone either. So, it was submitted, the extent of how well

the witness knew the applicant, and how much he had seen that night, was a matter of interpretation.

[49] Counsel also submitted that the said authorities say that the full **Turnbull** warning must always be given, save in exceptional cases, and that included a direction to the jury that a mistaken witness can nevertheless be a convincing witness (***Pop v R***). Counsel submitted that whereas the failure to give the latter direction, which is the subject of ground 2(d) of appeal, may not be fatal, taken together with the failure to hold the parade, the failure of the learned trial judge to give the significant warning in respect of the absence of the parade, and the misstatement by the judge in the summation in respect of the last sighting of the applicant by the witness, there has been a misdirection in the law, and the conviction must be set aside.

Ground of Appeal 2(c)

[50] Counsel challenged the direction given by the learned trial judge in her summation at page 308 lines 8-13, which states:

> "There is also the scientific evidence that is, that the expended bullet and the spent shells came from the firearm which was found on the accused which if you accept you can find the accused guilty but it is a matter entirely for you…"

Counsel submitted that the scientific evidence was a very important

piece of evidence in the trial which required very careful directions. It was submitted that whilst the scientific evidence may place the gun at the scene of the crime, possession of the firearm simpliciter in the hands of the applicant seven months after the crime, was not sufficient to place the applicant at the scene of the crime. Many things could have intervened, submitted counsel, in that time period, and even in a much shorter time frame, which would put one on enquiry with regard to the applicant's presence at the scene of the crime, but the longer the period between the crime and the apprehension of the applicant, the weaker the nexus to the crime became. In fact the applicant could have come into possession of the firearm after the crime had been committed. Counsel conceded that the scientific evidence of the spent shells and the bullet, being fired from the gun found on the person of the applicant, would have been probative evidence, if the firearm had not been discovered on the person of the applicant seven months after the crime. Since, counsel submitted, possession of the firearm seven months later could not prove that the applicant was at the scene and only possession coupled with proximity to the incident would have been of any probative value in respect of the offence charged, then the evidence adduced in respect of the identification of the applicant and the directions to the jury on that issue became an even more crucial issue in the case.

[51] It was submitted that the learned trial judge should have given very

clear directions to the jury, on this aspect of the case, but instead, it was her direction that the expended bullet and the spent shells, having come from the firearm found on the applicant "then that evidence alone is capable of making you feel sure that the accused is guilty, but it is a matter for you". It was submitted that instead of warning the jurors of the dangers and pitfalls of the inferences and conclusions to be drawn from the evidence adduced, the learned trial judge usurped their function and indeed gave directions as though on a special verdict, that is to say, "If you find this, then you must conclude that" . This, counsel submitted, was a grave error on the part of the learned trial judge, and the conviction therefore could not stand.

Ground of Appeal 1

[52] Counsel submitted that the evidence given by Dr. Odunfa with regard to the location of the bullet wound and the trajectory of the bullet was inconsistent with the evidence given by Christopher Robinson, who said the applicant was in the car seated, and the deceased was standing. She further submitted that Dr. Odunfa gave evidence that the bullet wound was in the shoulder of the deceased and that the bullet traveled downwards at an angle of 30 degrees. Dr. Ofunla also stated that "it depends relative position of the of the victim himself, if assuming that victim was just standing straight then I would expect that the angle

would be slanted upwards."(page 16). Dr. Ofunla also said that the bullet entered the body at an approximate 30 degree angle.

[53] Counsel queried whether on the basis of the evidence given by the doctor, the incident could have occurred in the manner in which Christopher Robinson told it, (that is, in circumstances of the assailant being seated and the victim standing) when the bullet hit the body at an angle slightly downwards. Counsel submitted, this was a significant issue in the case particularly as it had relevance with regard to the credibility of the sole eye-witness in the case, and the learned trial judge should have treated with this aspect of the case with great care. To the contrary however, counsel submitted the learned trial judge did not deal with this evidence properly or adequately and did not assist the jury to analyse the situation. The learned trial judge need not have given her comments on the evidence, but, it was submitted, the judge should have explained to the jury the inconsistency in the evidence, with regard to the trajectory of the bullet, with particular reference to the 'aorta" the "anterior "and the "midline," and should have stated specifically that the bullet entered the body at a higher level and exited the body at a lower level.

[54] Counsel submitted that this particular defect in the summation, may have been able to have been overlooked, however, coupled with the

other defects outlined in grounds 2 (a), (b) and (d) which even if taken individually may not have been fatal, which was not conceded, taken cumulatively, made the verdict unfair, and the conviction must therefore be quashed.

[55] In response counsel for the Crown, in respect of ground 2 (a), attempted to rely on the dicta in the case of ***Kevin Tyndale and Brenton Fletcher v R*** SCCA Nos. 15 & 23/2006 delivered 24 October 2008, a decision of this court, to say that the question in the instant case was, whether or not in the circumstances of this case, an identification parade could have served a useful purpose. The applicant, she submitted, had been exposed, through several attendances at court and it was probably quite "inappropriate" to conduct a parade in those circumstances. Counsel agreed that if the answer to the above question was in the affirmative, the evidence of the dock identification would not be inadmissible, however, the judge should have given adequate warnings to the jury in respect of the same, and in this instance, counsel was unable to say that the directions given were adequate. Counsel was also unable to give any further assistance to the court with regard to the other grounds filed.

Analysis

Ground 2 (a) and d).

[56] The authorities are very clear with regard to the requisite directions which ought to be given by the trial judge in respect of a dock identification. In this case, the sole eye-witness did not attend an identification parade. The incident took place on 1 October 2002; he gave his statement to the police on 3 June 2003, and he gave evidence in March 2007, when he identified the applicant in the dock. Mr Robinson said in evidence that he had known the applicant before, in fact for two to three years. The applicant denied knowing him at all, so the "recognition" was disputed.

[57] In the summation, the learned trial judge dealt with the issue of the eye- witness not attending an identification parade in four instances: twice when recounting different aspects of the evidence of the arresting officer Detective Inspector Forrest, and later when commenting on the issue for the benefit of the jury. In dealing with the evidence of Detective Inspector Forrest pertaining to when pursuing his investigation to locate the applicant, the learned trial judge noted the following:

> " ….He was accompanied by Detective Inspector Michael Peart, his enquiry led him to the cell block at the police station and at the lock-up, saw the accused. He cautioned him in the presence of Detective Inspector Garrick who told him he was investigating the murder of one Nyrokie McDonald, committed in October 2002, on Sheffield Road, in the Kingston 2 area and he attempted to place him on the I.D. parade. He said: 'officer how yuh ah guh put mi pon parade and mi guh court several times already'. He said, he contacted the investigating officer who is in charge of investigations and he had

> words with him and he was now of the view that putting him on I.D. parade would not be appropriate from what he said and what I gathered, he was exposed from going to court."

[58] Later in the evidence when dealing with the warrant, and the fact that the officer had amended the same by adding the applicant's name, the learned trial judge stated;

> "…Because remember at first, the name they had was "Piggy" but you cannot put a person on parade when he has been exposed and remember the accused told him that he was exposed and when he spoke to the officer, the officer said, yes he went to court several times and Detective McIntosh in his evidence said, yes there were several mention dates."

The learned trial judge also recounted this evidence of Inspector Forrest in cross-examination and made her comments:

> "…And in cross-examination for the defence, he said the parade could have been conducted in St. Elizabeth and in his opinion. I did not see it fit to conduct an I.D parade because the accused man said he was exposed to everyone. If he was taken to St. Elizabeth, Madam Foreman and members of the jury, he has been exposed. He should not be placed on an identification parade because the parade must be fair, and Detective Corporal McIntosh told him that he went to court on several mention dates…"

Finally, the learned trial judge when analyzing the evidence in respect of identification in keeping with the directions of **R v Turnbull,** concluded with this comment at page 307 of the transcript:

> "… Remember as I said before the accused was not placed on an ID Parade because it would be an ideal

situation to place him on a parade but having been exposed it would not be beyond all doubt again…"

[59] This statement in our view, is at best confusing and does not comply with the requisite directions as set out in the Privy Council cases referred to by counsel for the applicant viz ***Pipersberg et al v R*** and ***Pop v R,*** (supra).

[60] In ***Pipersburgh et al v R*** Lord Rodger of Earlsferry, in delivering the decision of the Board, said this at paragraph 6:

> " 6. At the trial, prosecuting counsel, Ms Moyston, adduced a total of five dock identifications of the appellants, as being involved in the murders at Bowen & Bowen's premises, from three witnesses- Karl Ventura (identifying Mr Robateau), John Ventura (identifying both appellants) and Virgilio Requena (also identifying both appellants). In the Court of Appeal the Director of Public Prosecutions accepted that the witnesses had not known the appellants' names. Moreover the police did not hold an identification parade for either of the appellants. This was on the advice of the Crown Counsel then acting apparently on the basis that an identification parade would have been inappropriate because the appellants' pictures had been published in the press and so there was a risk that witnesses would identify the appellants from the pictures. However well-intentioned that advice may have been, the decision not to hold an identity parade meant that the first time the three witnesses were asked if they could identify the men involved in the raid was more than eighteen months after the incident, when they were in the witness box and the appellants were sitting in the dock. In their Lordships' view, in a serious case such as the present, where the identification of the perpetrators is plainly going to be a critical issue at any trial, the balance of advantage will almost always lie with holding an identification parade."

[61] The facts of the instant case are similar in that the arresting officer was of the view that the applicant having been exposed in court, attending mention dates in another matter in the Clarendon Gun Court, the holding of an identification parade would have been "inappropriate". The identification of the applicant was plainly a critical issue in the case. The identification parade ought to have been held. The Law Lords have held, which was not an issue in this case, that a dock identification is not inadmissible. However, in circumstances where no identification parade has been held and the accused has been identified solely by a dock identification, as is the case here, the following comments made by the Board in ***Pipersburgh et al v R*** in paragraph 9 endorsing the judgment in ***Pop v R*** are equally applicable

> "9. First, the police held no identification parade and in consequence the identification of the appellant was a dock identification. The failure to hold an identification parade was contrary to the practice in Belize as explained by the Court of Appeal in ***Myvett and Santos v The Queen*** (unreported) (9 May 1994, Criminal Appeals Nos. 3 and 4 of 1994):
>
>> The detailed code adopted in England for the holding of identification parades to have suspects identified is intended to ensure that the identification of a suspect by a witness takes place in circumstances where the recollection of the identifying witness is tested objectively under safeguards by placing the suspect in a line made up of like looking suspects, the English

procedure is in practice followed here in Belize.'

The facts (sic) that no identification parade had been held and that Adolphus identified the appellant when he was in the dock did not make his evidence on the point inadmissible. It did mean, however, that in his directions to the jury the judge should have made it plain that the normal and proper practice was to hold an identification parade. He should have gone on to warn the jury of the dangers of identification without a parade and should have explained to them the potential advantage of an inconclusive parade to a defendant such as the appellant. For these reasons, he should have explained, this kind of evidence was undesirable in principle and the jury would require to approach it with great care: ***R v Graham*** 1994} Crim LR 212 and ***Williams (Noel) v The Queen*** [1997] 1 WLR 548."

[62] The Board went on in paragraphs 16 and 17 to point out the reasons for the holding of the parade and the special treatment to be given to the evidence in respect of a dock identification by the judge in the directions to the jury, that is the special care with which the jury should approach this evidence. Paragraphs 16 and 17 of the judgment of the Board state:

"16. The problems posed by dock identifications as opposed to identifications carried out at an identification parade are well known and were summarized in Holland 2005 SC (PC) 1,17, at para. 47:

In the hearing before the Board the Advocate- depute, Mr Armstrong QC, who dealt with this aspect of the appeal, accepted that identification parades offer

safeguards which are not available when the witness is asked to identify the accused in the dock at his trial. An identification parade is usually held much nearer the time of the offence when the witness's recollection is fresher. Moreover, placing the accused among a number of stand-ins of generally similar appearance provides a check on the accuracy of the witness's identification by reducing the risk that the witness is simply picking out someone who resembles the perpetrator.

Similarly, the Advocate-depute did not gainsay the positive disadvantages of an identification carried out when the accused is sitting in the dock between security guards: the implication that the prosecution is asserting that he is the perpetrator is plain for all to see. When a witness is invited to identify the perpetrator in court, there must be a considerable risk that his evidence will be influenced by seeing the accused sitting in the dock in this way. So a dock identification can be criticized in two complementary respects: not only does it lack the safeguards that are offered by an identification parade, but the accused's position in the dock positively increases the risk of a wrong identification.

17. In the present case, it may well be that the judge bemoaned the fact that no identification parade had been held and pointed out the advantages of such a .parade. But, despite what the Board had said in ***Pop***, he did not point out that Mr. Robateau had thereby lost the potential advantage of an inconclusive parade. Moreover, while giving directions on the care that needs to be taken with identification evidence in general ,the judge did not warn the jury of the distinct and positive dangers of a dock

> identification without a previous identification parade. In particular, he did not draw their attention to the risk that the witnesses might have been influenced to make their identifications by seeing the appellants in the dock. And, perhaps most importantly, even if the judge's directions would have ensured that the jury appreciated that this type of identification evidence was undesirable in principle, he did not explain that they would require to approach that evidence with great care. On the contrary, the closing words of the direction really left the whole matter to the jury on the basis that the witnesses said that they knew the men and it was simply up to the jury to accept or reject their evidence."

[63] So what can be gleaned from the above is that the learned trial judge did not follow these guidelines. She did warn the jury generally with regard to identification as set out in ***R v Turnbull,*** but a judge does not properly discharge her duty if she fails to give proper directions with regard to the particular dangers associated with a dock identification. The learned trial judge did not give any of the warnings and or directions referred to in paragraph 17 of the opinion of the Board in ***Pipersburgh et al v R*** above and in fact she left the whole matter to the jury on the basis that Mr Robinson said he knew the applicant and it was simply up to the jury to accept or reject his evidence. In our view, she erred in this regard.

[64] Counsel for the Crown attempted to argue that in the circumstances of the exposure of the applicant, then no useful purpose

could be served in holding the identification parade, relying on the dicta in ***Kevin Tyndale v R,*** but as can be seen from ***Pipersburgh et al v R*** even in circumstances when the appellants' pictures had been published in the press, the Law Lords took the view that "the balance of advantage will almost always lie with holding an identification parade". Counsel did not, and in our view quite correctly, support a position that the directions given by the learned trial judge were sufficient and or adequate. Ground 2 (a) therefore has merit, and the applicant is entitled to succeed to have the conviction quashed.

[65] Finally on this point, with particular reference to ground 2 (d), in ***Pop v R,*** Lord Rodger emphasized the importance of a direction to the jury in respect of evidence of recognition as opposed to evidence of a fleeting glance, and reminded all of the need in any event for the full appropriate **Turnbull** direction also made it clear when he stated at paragraph 14 that:

> "!4…Here, however, the judge failed to explain to the jury that, even though Adolphus said that he recognized the appellant they required to be careful, because a mistaken witness can nevertheless be a convincing witness."

That statement, it would seem would sufficiently dispose of the complaint in ground of appeal 2 (d) and the applicant would also be entitled to succeed.

Ground of Appeal (b)

[66] With regard to this ground we can only say that the situation became worse, when the learned trial judge mis-stated the evidence, particularly when it related specifically as to how the jury should view the ability of the sole eye-witness to have correctly identified the applicant. The evidence of Mr Robinson is that he had known the applicant for two to three years. Over the period he had seen him every day going to and from work. However, he said he had not seen the applicant for two years before the incident on 1 October, 2002. That is important and relevant information. The learned trial judge on page 249 of the transcript, recounted the evidence of Mr Robinson in this way:

> "He said up to the 1st of October, not really every day, but a day apart, I would see 'Piggy'. He said, 'Up to the day of the incident, I had seen him two days before. I saw him on Windward Road.' He said up to that time has never spoken to him before and he knows a brother of 'Piggy'."

The evidence however on page 33 of the transcript, is that Mr Robinson had spoken to him, ("Mr Piggy") before, but that he had not seen him for two years before the date of the incident. The learned trial judge further compounded the error, when she stated on page 306 of the transcript:

> " … He sees the accused every other day and before the incident he saw him two days before

> off the Windward Road and up to this time the witness was living in the community and he the accused was in Bowerbank community."

[67] It is important for the judge to highlight parts of the evidence she views as important, but it must be done accurately. The summation is the last speech the jury hears before retiring, and the recollection of the evidence and the comments by the learned trial judge can have the effect of influencing their findings of facts and ultimately their verdict. We must state that this part of the summing- up appears to be a slight lapse on the part of the learned trial judge as otherwise the recounting of the evidence appeared accurate and could not be faulted. However, in light of the successful challenge to the directions relative to the dock identification, the misstatement of this important piece of evidence, also relative to identification would, in our view, amount to a misdirection rendering the trial of the applicant unfair.

Ground of Appeal (2c)

[68] There is no dispute that the applicant was apprehended, arrested and charged for illegal possession of the firearm bearing serial No. KM 565 US, for which he had no licence, and at the trial for the charge in the Clarendon Gun Court he pleaded guilty and was sentenced. There is no dispute that the said firearm was tendered in evidence in this murder case as exhibit 1. There did not seem to be any real challenge that the spent shells and expended bullet, tendered in evidence as exhibit 3 in the case

were fired by the said firearm, exhibit 1. The learned trial judge unfortunately made this statement on page 308 of the transcript (lines 13-19)

> "…If you do not accept the evidence of Christopher Robinson and you accept that the expended bullet and the spent shell came from the firearm found on the accused then that evidence alone is capable of making you feel sure that the accused is guilty but it is a matter entirely for you."

In our view, this is a misdirection to the jury. We agree with counsel for the applicant that the scientific evidence places the firearm at the scene of the crime but does not, without more, place the applicant there. The applicant could have obtained the illegal firearm through any other number of ways throughout the intervening period, which is approximately seven months. The fact therefore that the firearm (exhibit 1) fired the shells and the bullet, (exhibit 3), by itself, is not in our view capable of making the jury feel sure that the applicant is guilty, and exhorting the jury thereafter that "it is a matter for you" cannot in our view, cure the error. It was incumbent on the learned trial judge, if she intended to make a comment on that particular evidence, to bring to the attention of the jury that there were other inferences that could have been drawn, such as suggested by counsel for the applicant, that the applicant came into possession of the firearm after the crime had been committed. However and even more importantly, that was a finding of fact for the

jury, and for the jury alone, and the learned trial judge erred in wrongfully assuming their role in this aspect of the trial. This ground therefore also has merit.

Ground of Appeal 1

[69] The learned trial judge having recounted the scientific evidence correctly then gave the jury no directions whatsoever with regard to the conflicting inferences which could have been drawn therefrom. There is no doubt that in the doctor's opinion, the bullet entered the body at a 30 degree angle, slanted slightly downwards. The submission of counsel that the bullet travelled downwards in the body at an angle of 30 degrees is not entirely accurate. Although one could not say whether the firearm was pointing downwards, the entry of the bullet was at a higher level than its exit from the body, which the doctor opined would suggest that the bullet was going slightly downwards. He also found that it traveled from the left side to the right side of the body. It was the doctor's evidence that if the assailant was sitting, (depending on the position of the victim) the bullet "would be upwards" and if the victim was standing, one would also have expected the angle of the bullet on impact, to be directed upwards.

[70] Although counsel for the applicant made no mention of Inspector Harrisingh's evidence in this context, in support of her arguments on this

ground of appeal, it is of importance that he said in evidence, that the bullet will travel in a straight line according to the direction in which the firearm is pointed, and so if the firearm is pointed downwards or upwards, the bullet will travel accordingly. So, if the firearm was resting on the car window, pointing slightly upwards, the bullet could travel accordingly.

[71] The evidence of Mr Robinson, however that the gun would have been at his waist, would not explain how the bullet on entry to the body appeared to be travelling slightly downwards, from the left to the right side of the body, and also that it entered the body at a higher level from where it exited. We agree with counsel for the applicant that this was a serious inconsistency in the evidence and ought to have been pointed out to the jury to assist them in their deliberations. The learned trial judge did not deal with this conflicting evidence at all in her summation, and the inconsistency could have affected the view the jury could have taken with regard to the credibility of the sole eye-witness in the case, bearing in mind that very early in her summing-up, the learned trial judge correctly identified credibility as a very important issue in the case, and, of course, the credibility of the sole eye-witness was of fundamental importance.

This ground too has merit.

Conclusion

[72] In light of the foregoing, we have treated the application for leave to appeal against conviction and sentence as the appeal and make the following orders: The Appeal is allowed, the conviction is quashed and the sentence imposed is hereby set aside.

[73] This leads to the question of the final disposition of the matter, that is, should the court make an order that there be a new trial in the interests of justice (s.14 of the Judicature (Appellate Jurisdiction) Act), or should the court enter a judgment and verdict of acquittal. The considerations which govern the question of whether a new trial should be embarked on in these circumstances were discussed by the Privy Council in the well known judgment of Lord Diplock in ***Reid v R***. In that case the Privy Council considered that, save for cases in which either the evidence for the prosecution was so strong that a jury would have inevitably convicted the defendant, despite any imperfections in the way the trial was conducted, (in which case the proviso would ordinarily be applied) or in cases in which no reasonable jury would, properly directed, convict, (in which case a verdict of acquittal should be entered), the decision whether to order a new trial or not is dependent on a number of factors. This is how Lord Diplock put it (at page 258-g):

> "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.

The strength of the case presented by the prosecution at the previous trial is always one of the factors to be taken into consideration but, except in the two extreme cases that have been referred to, the weight to be attached to this factor may vary widely from case to case according to the nature of this crime, the particular circumstances in which it was committed and the current state of public opinion in Jamaica. On the one hand there may well be cases where despite a near certainty that upon a second trial the accused would be convicted the countervailing reasons are strong enough to justify refraining from the course. On the other hand it is not necessarily a condition precedent to the ordering of a new trial that the Court of Appeal should be satisfied of the probability that it will result in a conviction. There may be cases where, even though the Court of Appeal considers that upon a fresh trial an acquittal is on balance more likely than a conviction, 'it is in the interest of the public, the

> complainant, and the appellant himself that the question of guilt or otherwise be determined finally by the verdict of a jury, and not left as something which must remain undecided by reason of a defect in legal machinery'. This was said by the full court of Hong Kong when ordering a new trial in ***Ng Yuk Kin v Regina***, (1955) 39 HKLR 49). This was a case of rape, but in their Lordships' view it states a consideration that may be of wider application than to that crime alone."

[74] A serious concern in this case is the period of time that has now elapsed since the offence was allegedly committed which was in 2002. The applicant's trial did not take place until 2007, and if this matter is to be re-tried it will not come on again until a date late in the current year or even early in 2011. In the Privy Council case of ***Neil v the Queen*** Privy Council Appeal No. 22 of 1994, which is also an identification case, though the facts are substantially different, the Lords stated that:

> "If the circumstances had been different the question would have arisen whether the proper course would be to direct a re-trial, but in a case where the conviction was founded on a single identification made seven years ago this would plainly be out of the question."

[75] Indubitably, we must recognize the passage of time as a crucial factor in our determination. However there is also no doubt that the offence with which the applicant was charged is one of the utmost seriousness and the prevalence of murder by shooting in Jamaica is well known. We recognize too, that there may be difficulties for the

prosecution to reassemble these 10 witnesses again in order to attempt to prove its case, and on the other hand, we also recognize that a re-trial will pose an ordeal to the accused having to undergo another trial which on the last occasion lasted six days. That not withstanding, in light of the particular circumstances in which the offence was committed in this case, in our view, in the interests of justice, and bearing in mind the guidance given in the authorities, there should be a re-trial. We therefore order that this matter be re-tried in the Home Circuit Court at the earliest possible time.