

**JAMAICA**

**IN THE COURT OF APPEAL**

**SUPREME COURT CRIMINAL APPEAL NO 70/2010**

**BEFORE: THE HON MR JUSTICE MORRISON JA  
THE HON MR JUSTICE DUKHARAN JA  
THE HON MR JUSTICE BROOKS JA**

**ERVINE BROWN O/C MARLON ROBINSON v R**

**Dr Randolph Williams for the appellant**

**Mrs Paula-Rosanne Archer-Hall for the Crown**

**2, 6 and 20 March 2015**

**MORRISON JA**

**Background**

[1] On 14 May 2010, after a trial before Campbell J and a jury in the Westmoreland Circuit Court, the appellant was convicted of the murder of Delroy Campbell ('the deceased') on 2 January 2007. Also on 14 May 2010, the learned judge sentenced the appellant to a term of imprisonment of 30 years at hard labour. By notice dated 27 May 2010, the appellant applied for leave to appeal against his conviction and sentence and,

on 4 April 2013, the learned single judge of this court granted leave to appeal against the conviction only.

[2] At the conclusion of the hearing of the appeal on 2 March 2015, the court reserved its decision until 6 March 2015. On that date, the appeal was dismissed and the conviction and sentence affirmed, the court ordering that the appellant's sentence should run from 14 May 2010. These are our reasons for arriving at this decision.

### **The evidence**

[3] The deceased was murdered by the use of a firearm in the vicinity of his home at Nampriel Road, Negril, in the parish of Westmoreland. At the appellant's trial for his murder, the prosecution relied primarily on the evidence of two witnesses. The first, Garnette Irving, was a constable of police who happened to be a neighbour of the deceased at the material time; and the second was Miss Kemeisha Campbell, the daughter of the deceased, who lived in the same house as the deceased at the material time. Various other witnesses called by the prosecution spoke to, among other things, the results of forensic tests carried out on the appellant for the presence of gunshot residue on his hands, and the conduct of an identification parade in which he was identified by Miss Campbell as the person who shot and killed her father. The appellant's defence was that he was wrongly identified as that person.

[4] Constable Irving's evidence was that, from his home on Nampriel Road, it was possible to see the deceased's home across the road. At approximately 8:20 pm on 2 January 2007, as he lay in bed watching the evening news, Constable Irving heard

several explosions sounding like gunshots coming from the direction of the deceased's home. He went to a window and looked out in the direction of the explosions. At a distance of about 45 feet, he saw "a tall black man dressed in dark clothing with a gun in his right hand running from [the deceased's] yard on to the road, then ran [sic] behind the house...and into a gully". Constable Irving said that this man, who was initially coming towards him, got as close to him as 30 feet. The man was wearing nothing on his head and Constable Irving was able to see his face for about four seconds. Asked how it was that he was able to see at this time of evening, Constable Irving described light coming from the deceased's "garage verandah" lights; from outside lights on the deceased's neighbour's unfinished house; and from two outside lights on his own house, all electric. He had the man, whom he had never seen before, under observation for about 10 seconds in total.

[5] Constable Irving immediately went over to the deceased's home, where he saw Miss Campbell, screaming and crying for "Help" and "murder". After speaking with her, he tried unsuccessfully to find the deceased, before making a report by telephone to the Negril Police Station. He then went on the road by bicycle in search for the man whom he had seen running from the deceased's yard. While on the road, he intercepted and got into a police mobile patrol vehicle, which was at the time manned by two police officers. In due course, acting on information he received, Constable Irving took over the driving of the patrol vehicle and headed for Nampriel Heights, which is a road off Nampriel Road. His destination was the home of someone known to him as 'Bredda' or 'Genuine' and, upon arrival there, he saw three men seated on the verandah. His

evidence was that one of these men was the "said man that I saw running from [the deceased's] house". Constable Irving said that this man was wearing the same clothes as the man whom he had seen running from the deceased's yard about 45 minutes before. The man gave his name as Marlon Robinson and, a quick search of the house having revealed no weapons, Constable Irving and the other police officers escorted him to the Negril Police Station. Upon his return to Nampriel Road, Constable Irving saw a large crowd gathered at the deceased's home, where he was shown the body of the deceased lying face down in some bushes by the fence. The deceased appeared to have sustained multiple gunshot wounds.

[6] Miss Campbell's evidence was that the deceased came home at about 7:30 on the evening of 2 January 2007. After he had had a shower, he came onto the verandah, where she was with her little sister and her son, and started to talk to her. She was sitting "slantway", facing the road, while the deceased sat facing the house, with his back to the road. As they sat there, Miss Campbell saw a man, at a distance of about 30-45 feet away, approach the gate and enter the yard. As she watched this man approaching, the deceased continued talking to her with his back to the road. At a distance of about 3-4 feet from where she was sitting, the man, who she did not know before, looked at her and said "good night". At this point, the deceased turned around and the man said, addressing the deceased (who was a Rastafarian), "good night Ras", to which the deceased responded, "good night". The man then "paused for three seconds", before pulling a gun from the pocket of the windbreaker he was wearing and pointing it at the deceased's forehead, from a distance of about 7 inches. After saying,

“but wait”, the deceased used both hands to knock the gun away from his forehead, jumped off the verandah railing and ran outside to the back of the house. Pointing the gun at the fleeing deceased, the man fired one shot, whereupon Miss Campbell took her little sister and her son and ran into a room off the verandah, closing the door to the room behind them. While there, she heard “[g]unshots going around the house”, maybe about seven in all, the last four of them seeming to be near to the window to her room. As she stood there screaming, and after hearing the last of the shots being fired, people started running into the yard, including Constable Irving, who Miss Campbell described as “the police officer that was living next to us”. Opening the door to the room, she ran outside, where she saw a crowd of people standing in a group. Then she saw the deceased, lying on the ground face down, near to the window to her room.

[7] Miss Campbell’s original estimate was that maybe 10-15 minutes passed from the point at which the man came to the verandah to the point when she could not see him again and that she was able to see the attacker’s face for about four to five minutes during the ordeal. Although the man was wearing a ‘hoodie’, it did not obscure his face and she was able to see him clearly from the light on the verandah when he said good night to her and the deceased. According to her, at the point at which the man paused for about three seconds before pointing the gun at the deceased, she was able to make him out, as that was when she had “a full view”.

[8] Later that same evening, Detective Sergeant Adrian Dennie, the investigating officer, removed four spent 9mm cartridge casings and two expended bullets from the scene. The deceased, who appeared to have sustained gunshot wounds, was removed to the Savanna-la-Mar Public General Hospital, where he was pronounced dead by the doctor on duty. As the post mortem examination would subsequently show, the deceased had received seven gunshot wounds in total to his body. Death, which would have been immediate, was due to haemorrhagic shock, consequent upon the gunshot wounds the deceased received to his neck, chest and abdomen.

[9] Also on the evening of 2 January 2007, the appellant's hands were swabbed for the presence of gunpowder residue and he was told by Detective Sergeant Dennie that he would be placed on an identification parade with respect to the murder of the deceased. On 12 January 2007, Inspector Fearon Williams, then a sergeant of police stationed at the Negril Police Station, received the request for the conduct of the identification parade. After advising the appellant of his intention to hold a parade in respect of him in relation to a murder committed on Nampriel Road on 2 January 2007, Inspector Williams told him that he could have a lawyer present. Having received telephone numbers for a lawyer and some of his relatives from the appellant, Inspector Williams tried unsuccessfully to contact them. Inspector Williams next offered the appellant the option, which he accepted, of having two justices of the peace sit in on the parade. These arrangements were put in place and the parade was scheduled for 17 January 2007.

[10] On 17 January 2007, Miss Campbell attended an identification parade at the Negril Police Station, for the purpose of identifying the man who had approached her and the deceased on their verandah a couple weeks before. The parade was to be conducted by use of one-way mirror, with the persons on the parade standing in a line on one side and the witness standing on the other. It is necessary to set out in full the transcript of Inspector Williams' evidence (at pages 246-248) as to what occurred before the parade commenced:

“THE WITNESS: Mr. Robinson was told that he could choose any position under these numbers written on the wall, as also he could choose any person that he want [sic] to be on either side of him. He was also told that he could change, exchange any part of his clothing with any member on the parade. He exchanged his shirt with the person at number three position. He was told that he could not change his position after I leave from inside the parade room and go on the outside.

HIS LORDSHIP: He was told what?

THE WITNESS: That he could not change his position. He had taken up number two position.

HIS LORDSHIP: Yes.

THE WITNESS: This was said, all this was said in the presence and hearing of the two Justices of the Peace.

HIS LORDSHIP: You - - he was told he could not change what position?

THE WITNESS: He choose [sic] number two position in the line.

HIS LORDSHIP: Yes.

THE WITNESS: Yes, my Lord, and he was told that after I leave from inside there he could not change position.

HIS LORDSHIP: Why you told him that?

THE WITNESS: Why I told him that he could not change position, my Lord?

HIS LORDSHIP: Yes, after you leave inside there.

THE WITNESS: A previous - - I have, uhm, on previous occasion [sic], sir, when we have written up the card, the ID parade sheet, we have to write that up and to state their position that they were in. Now he had chosen number two position, the parade card was written up with him at number two if he had removed...

HIS LORDSHIP: Yes.

THE WITNESS: ...then it would not be a true reflection.

HIS LORDSHIP: What would not be a true reflection, the card?

THE WITNESS: Yes, sir, when I write that he is in number two position on that card, the sheet the ID parade sheet.

HIS LORDSHIP: Yes, go ahead.

Q. He was told he could choose any position that he wanted?

A. Before the sheet was written up.

Q. Yes. Continue for us, please."

[11] The preliminaries having been completed, Inspector Williams and the two justices of the peace who were in attendance went on the obverse side of the one-way mirror and Miss Campbell was called to view the parade. After walking half way down the line-up, consisting of the appellant and eight other men who were as close as possible to him in complexion, height and general appearance, Miss Campbell identified

the appellant as the person who had shot and killed the deceased on 2 January 2007. Inspector Williams then informed the appellant that he had been positively identified and asked him if he was satisfied with the manner in which the parade was held. The appellant answered "no" and, when asked why, he said, "they point me out and I was not the person who draw the trigger". However, when asked to do so by Inspector Williams, the appellant did sign the identification parade form, as did the two justices of the peace.

[12] Under cross-examination by counsel for the defence at the trial, Inspector Williams was tackled about his having told the appellant not to move from the position he had chosen. Asked, "...isn't there an inherent danger, a risk when you fettered this man's right to stand where he wants to stand?", Inspector Williams' answer was, "No. He choose [sic] the position that he want to stand under." When it was then put to Inspector Williams that he had breached the appellant's right to a fair identification parade by restricting him "from choosing what number he wants to stand under anytime before the witness got into the room", he responded that, "I did not restrict him".

[13] Later that same day, after being advised that the appellant had been pointed out at the parade, Detective Sergeant Dennie charged him with the offence of murder. Cautioned, the appellant made no statement.

[14] The evidence of the Government Analyst at the trial was that, when tested, the swabs received by her department in relation to the appellant revealed the presence of

gunpowder residue at trace level on his right palm, left palm and the back of his left hand. Under cross-examination, the analyst accepted that a number of things could account for the presence of gunpowder residue at trace level, which was the lowest level. Among these were touching a surface on which there is gunpowder residue; using handcuffs used by the police; cleaning a firearm; and failure by the police officer doing the swabbing to take precautionary measures, like wearing gloves, to avoid contamination during the swabbing.

[15] That was the case for the Crown. Opting to give evidence in his defence, the appellant identified himself at the outset of his examination-in-chief as Marlon Robinson. He was, he said, the owner of a "registered car on the road at the time of the incident, 2007", who drove "taxi or private anywhere". Asked to explain the origin of the name 'Ervine Brown', which also appeared in the indictment to which he had pleaded, his response was that he had received a driver's licence in that name from, "the government...registration place...where you are able to show people, the instructor, that you can drive and they allow you to pay for your driver's licence". However, the licence in the name of Ervine Brown did not bear his photograph.

[16] The appellant went on to deny any involvement in the murder of the deceased, whom he denied knowing. He also denied knowing Miss Campbell, whom he had seen for the first time at court. His own home was about seven or eight miles away from Nampriel Road and, at the time of his apprehension, he and two others were visiting at Genuine's house, which was next door to his. At 8 o'clock on the evening of 2 January

2007, he had been there for about an hour. He said that his hands had never held a gun and he denied telling Inspector Williams after the identification parade that, “[t]hem point mi out and a neva me pull the trigger”. Further, the appellant told the court that, at age 29 at the time of trial, he had “never [been] in no problem with people on the street or for my name to be in no arguments or anything regarding anything dealing with just problem”. In answer to the judge’s specific question, “You have never been in any kind of trouble?”, the appellant responded, “no trouble, no record”. According to him, the case against him was made up by the investigating officer, Sergeant Dennie, and he had not been paid by Genuine, or anyone else, to murder the deceased.

[17] Under cross-examination by counsel for the Crown, the appellant was tackled on the issue of his driver’s licence. The learned judge, who was obviously keenly interested in this aspect of the matter, also participated in the exchanges<sup>1</sup>:

“Q. Tell us, sir, you were the registered owner of the car according to you, did you have a driver’s licence?

A. Yes, sir.

Q. Where is that driver’s licence today?

A. Sir, I have so many driver’s licence [sic].

HIS LORDSHIP: You have what?

THE WITNESS: He asked me where is that driver’s licence.

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<sup>1</sup> At pages 298-299 of the transcript

Q. You, hold on, let us go slowly. You have several driver's licence [sic], that's what you said?

A. Yes, I have one in Marlon Robinson.

HIS LORDSHIP: Just a minute, I have several driver's licence [sic]. You have driver's licence in Marlon who?

THE WITNESS: Marlon Robinson.

HIS LORDSHIP: Yes.

Q. How many driver's licence [sic] you have in Marlon Robinson?

A: One, sir.

...

Q. One driver's licence in the name of Marlon Robinson, that would mean therefore that you have driver's licence [sic] in other names other than Marlon Robinson?

HIS LORDSHIP: You hear what the lawyer is asking you? You have licence, driver's licence [sic] in other names, that's what he is asking you?

THE WITNESS: I only have one in Ervine Brown, there is no other driver's licence."

[18] Further cross-examined on the matter, the appellant said that there was no one named Ervine Brown. He had more than one driver's licence in different names because of a traffic violation involving "[s]omething about a broken taillight", for which he had been given a traffic ticket. Asked why he chose to get "an illegal driver's licence in another name", the appellant responded with a question of his own, again attracting the judge's obvious attention<sup>2</sup>:

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<sup>2</sup> At pages 304-305

"A. An illegal driver's licence? That's not illegal. You consider it illegal?

HIS LORDSHIP: You don't consider a second driver's licence in a different name illegal?

THE WITNESS: It is the people at the examination place, you have to go and get it.

HIS LORDSHIP: It's the people them give it to you?

THE WITNESS: How can I say the driver's licence is illegal, I cannot say that, my Lord.

Q. Sir, is your name Ervine Brown?

A. No.

HIS LORDSHIP: I am going to ask you, Mr. Foreman and members of the Jury, to just pay attention to what's happening, you hear. Yes, go ahead."

[19] In answer to a further question from the judge, the appellant said that the driver's licence which he had had in the name of Marlon Robinson was taken away by the police at the scene of the traffic violation of which he had spoken. In acquiring the second licence in the name of Ervine Brown, he continued, he had used the same date of birth as on the licence in the name of Marlon Robinson, but he had given a different address, that of his aunt in St Catherine.

[20] That was the case for the defence. After counsel's addresses and the judge's summing-up, the jury retired for 37 minutes, before returning a verdict of guilty of murder. After a short adjournment, the appellant's antecedents were placed before the court, followed by a plea in mitigation by the appellant's counsel on his behalf. As

already indicated, the appellant was then sentenced to 30 years' imprisonment at hard labour.

### **The grounds of appeal**

[21] When the appeal came on for hearing before us, Dr Randolph Williams for the appellant abandoned the very general grounds of appeal originally filed by the appellant. In substitution for these grounds, Dr Williams sought and was granted leave to argue two supplemental grounds of appeal:

1. The learned judge in his summing up did not adequately assist the jury to determine the fairness of the identification parade.
2. The appellant having given sworn evidence and put his character in issue the denial of a good character direction in the circumstances was a misdirection.

[22] On the first ground ('unfairness of the identification parade'), Dr Williams submitted that the identification parade conducted by Inspector Williams was unfair, in that (i) the appellant was denied the right to change position in the line-up; and (ii) the fact that the officer left the parade after the line-up was formed and went outside the building, before re-entering on the reverse side (the witness side), gave rise to a suspicion of unfairness in the conduct of the parade. In these circumstances, it was submitted, the learned trial judge was obliged to bring these departures from proper practice to the jury's attention and to tell them that they had to be sure that the parade was fairly conducted before they could rely on its outcome. On the second ground

(absence of a good character direction'), Dr Williams reminded us that the appellant, a young man with no criminal record, gave evidence on oath at the trial. Accordingly, the learned trial judge was in these circumstances under a duty to direct the jury on the significance of his good character, both as regards his credibility as a witness and the likelihood that he would commit the crime of which he was charged. While acknowledging that the absence of a good character direction is not necessarily fatal to a conviction in every case, Dr Williams nevertheless submitted that the identification evidence in this case was "not strong". Therefore, it could not be said without a doubt that the verdict of the jury would have been the same had the jury had the benefit of either a full, or even a modified, good character direction.

[23] In response to the first ground, Mrs Paula-Rosanne Archer-Hall for the Crown submitted that the general directions given by the judge and his review of the evidence of what took place on the identification parade sufficiently alerted the jury to the need to determine the fairness of the parade. On the second ground, Mrs Archer-Hall submitted that, although the fact that the appellant had distinctly raised the issue of his good character entitled him to a good character direction, the nature of the issues in the case and the force of the evidence against the appellant were such that the failure of the judge to give such a direction had not resulted in a miscarriage of justice.

## Unfairness of the identification parade

[24] Dr Williams referred us to the guidelines for the conduct of identification parades contained in the Book of Rules for the Guidance and Direction of the Jamaica Constabulary Force<sup>3</sup>. Paragraph 7.12 states that –

“In arranging for personal identification, every precaution shall be taken:

(a) to exclude any suspicion of unfairness or risk of erroneous identification through the witnesses’ attention being directed to the suspected person in particular instead of indifferently to all the persons paraded;

(b) to make sure that the witnesses’ ability to recognise the accused has been fairly and adequately tested.”

[25] More specifically, paragraph 7.13 states that –

“It is desirable therefore that

...

(iv) the accused shall be allowed to select his own position in the line, and shall be expressly asked if he has any objection to the persons present with him or the arrangements made.”

[26] These rules reflect principles which are well established in the jurisprudence of this court. In this regard, we were referred by Mrs Archer-Hall to **R v Cecil Gibson**<sup>4</sup>

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<sup>3</sup> Issued by the Minister of National Security on 7 August 1988, in exercise of powers conferred on him by section 26(a), (b) and (c) of the Constabulary Force Act

<sup>4</sup> (1975) 13 JLR 207

and **R v Michael McIntosh and Anthony Brown**<sup>5</sup>. In the former case, Graham-Perkins JA stated the position in this way<sup>6</sup>:

“It is fundamental to the administration of our criminal justice system that where the prosecution relies solely on the identification of an accused person at an identity parade nothing should be done, or left undone, to impinge on the absolute fairness of that parade. An accused is entitled to no less. This is the clear duty of those charged with the responsibility of conducting, or arranging for, identification parades. Of paramount importance, too, is the right of a jury in a criminal trial to have placed before them the fullest disclosure of every material fact that might conceivably affect their deliberations; more particularly they are entitled to be informed of any impropriety, and the reason therefor, that may have occurred in or about the conduct of an identification parade.”

And, in the latter case, Forte JA (as he then was) observed<sup>7</sup> that “[w]hat must be the important consideration for the jury is whether in all the circumstances the identification parade was fair, and gave the witness the opportunity to independently and fairly and without any assistance identify his assailant”.

[27] In every case in which the prosecution relies solely or substantially on the outcome of an identification parade, therefore, fairness to the accused is the overriding consideration. Against this background, it is for the prosecution to demonstrate that there has been compliance with the letter and spirit of such guidelines as may from time to time be laid down for the conduct of such parades. And, in any case in which there has been a departure of any kind from the standard of fairness established by the

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<sup>5</sup>SCCA Nos 229 and 241/1988, judgment delivered 22 October 1991

<sup>6</sup> At page 209

<sup>7</sup> At page 7

guidelines, it will be the trial judge's responsibility to make the jury aware of the relevant circumstances, so as to enable them to make a proper assessment of what value can be placed on the outcome of the parade.

[28] The importance of the requirement that the suspect should be at liberty to select his position in the line-up (and, as its logical corollary, that he should also be free to change his position before the witness is called in), is that it secures to him a means of guarding against any actual or perceived attempt by the police to influence the parade by alerting the witness in advance of the position the suspect will occupy. It is therefore a critical component of the assurance of fairness and transparency that the guidelines seek to provide.

[29] In this case, as the evidence clearly shows, the appellant was invited to – and did - choose his position in the line-up. The primary basis for Dr Williams' complaint was that, this having been done, the appellant was told by Inspector Williams that he could not change position after he (Inspector Williams) left "from inside the parade room and go on the outside"<sup>8</sup>. In addition, Dr Williams urged us to say that a suspicion of unfairness arose from the fact that Inspector Williams moved from the side of the room on which the line-up was established to the obverse side from which the witness would view the parade.

[30] In our view, these are slender complaints indeed. There was absolutely no evidence to suggest that the appellant, having freely chosen position number two in the

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<sup>8</sup>Para. [10] above

line-up, either wished or indicated any desire to change his position and was prevented or deterred from doing so by Inspector Williams. In fact, the evidence suggests the contrary, since, when it was over, the appellant's only complaint about the parade when asked was that, "they point me out and I was not the person who draw the trigger"<sup>9</sup>. Nor, it appears to us, was there any evidence from which it could possibly be inferred that Inspector Williams' movement from one side of the parade to the other had a malign objective of any kind. In fact, the Inspector was closely cross-examined, re-examined and questioned by the judge on the layout of the building in which the identification parade was held. The Inspector insisted<sup>10</sup> that he did not leave the building and, although he had to go through a door that led to the guard room, that door was kept closed.

[31] In any event, the learned trial judge gave full and careful directions to the jury on the issue of identification. In addition to telling them at the outset<sup>11</sup> that it was "the...main issue joined between the [C]rown and the defence on this case", the judge reminded the jury in detail of Inspector Williams' evidence, before telling them this<sup>12</sup>:

"In this case the defence is saying [that] you cannot rely on this ID parade to any great extent because one important thing is that the officer who conducted the parade told the accused man that he should not move.

Why did the officer do this? The officer did that, he says, because he felt that his form had to be completed, and the form is before you. He would have completed the form,

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<sup>9</sup>Para. [11] above

<sup>10</sup>At pages 266-269

<sup>11</sup>Page 369

<sup>12</sup>At pages 420-421

which is to be signed at the end of the parade and he thought it was necessary to have them in a particular position before the witnesses were called. He had earlier informed the accused that you are at liberty to stand anywhere you want, among other changes, and the accused man made his choices, but the complaint by...the defence is that there ought to be no restriction at all at any point, because what it does is to fix him in a particular position before the witness comes on, which may be transferred to the witness. Well, you heard Miss Campbell came [sic], I think it was asked of her, in fact, whether she had been given a description, which she denied. She denied being given any description of this accused man. It is a matter for you..."

[32] Therefore, it seems to us that the jury were fully alerted to the contention of the defence on this point and the matter left to them for their determination.

### **Absence of a good character direction**

[33] In considering this aspect of the appeal, it may be helpful to restate some well-established principles. First, the good character of a defendant is logically relevant to his credibility and to the likelihood that he would commit the offence with which he is charged<sup>13</sup>. Second, the defendant who is of good character and who gives evidence is generally entitled to expect a direction from the judge comprised of two elements, the credibility limb and the propensity limb, the former signifying that "the defendant who has no previous convictions is entitled to claim that he should be more readily believed than one who has been convicted previously"; while the latter means that "someone who has not been found guilty of an offence in the past should be regarded as less likely to have a predisposition to offend than someone who has a criminal

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<sup>13</sup> **R v Aziz** [1995] 3 All ER 149

record”<sup>14</sup>. Third, generally speaking, as a precondition to the right to such a direction, the defendant’s good character must be “distinctly raised, by direct evidence from him or given on his behalf or by eliciting it in cross-examination of prosecution witnesses”<sup>15</sup>. Fourth, “a trial judge has a residual discretion to decline to give any character directions in the case of a defendant without any previous convictions if the judge considers it an insult to common sense to give [such] directions”<sup>16</sup>; put another way, “a judge is not required to give a good character direction if it would make no sense to do so”<sup>17</sup>. Fifth, failure to give a good character direction in a case in which the defendant is entitled to one will not automatically result in an appeal being allowed<sup>18</sup>.

[34] In this case, the appellant plainly raised the issue of his good character by stating that he had never been in any kind of trouble before and had “no record”. In these circumstances, he was, as Mrs Archer-Hall accepted, *prima facie* entitled to the benefit of a full good character direction on both limbs from the judge. But all that the judge told the jury was this<sup>19</sup>:

“...he said he has never held a gun. You may have well get [sic] the impression from what he says that I am not that type of man for the first twenty six years of life. Told you he wasn’t deported; never been in any trouble for twenty-six years. He would have spent most of his adult life abroad, came back here in 2005 and was never in trouble. Said there

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<sup>14</sup>Per Lord Kerr in **Mark France and Rupert Vassell** [2012] UKPC 28, para. [47]

<sup>15</sup>Per Lord Carswell in **Teeluck v State of Trinidad & Tobago** [2005] 1 WLR 2421, para. [33] (v). And see generally **Horace Kirby v R** [2012] JMCA Crim 10, where all the leading authorities on good character are very helpfully collected in the judgment of Brooks JA.

<sup>16</sup>**R v Aziz**, page 158

<sup>17</sup>Per Brooks JA in **Horace Kirby** JA, at para. [17]

<sup>18</sup>**Patricia Henry v R** [2011] JMCA Crim 16, para. [51]

<sup>19</sup>Page 432 of the transcript

was - - did not get in any problem with anybody on the road. Never got arrested for smoking marijuana.”

[35] Dr Williams submitted that this was more in the nature of a comment by the judge rather than a direction in law on propensity; and that in any event the judge did not direct the jury on how to treat the appellant’s good character in assessing the credibility of his evidence. We agree with this submission, so far as it goes. However, two further questions arise from this.

[36] The first is whether, in the light of the matters which emerged from the appellant’s own evidence, the judge was obliged to go further than he did. As will be recalled, the appellant told the court that, the police having taken away the driver’s licence held by him in the name of Marlon Robinson, he had proceeded to procure a driver’s licence in the name of Ervine Brown. Although the appellant stoutly resisted the characterisation of what he did as ‘illegal’, it is difficult to see what other adjective would be apt to describe the process whereby, by the use of a false name and address, he was able to obtain a second driver’s licence, by paying for it at the “examination place”. In these circumstances, the decision whether to give a full good character direction, and if so in what terms, was entirely a matter for the judge’s discretion. In our view, Campbell J, who was obviously fully alive to the significance of the appellant’s answers in cross-examination<sup>20</sup>, was fully entitled to consider that, in the context of the evidence which they had only recently heard, the jury would have found such a direction an insult to their common sense. There is therefore no basis upon which this

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<sup>20</sup>See in particular paras [17]-[19] above

court can interfere with the way in which the learned trial judge chose to exercise of his discretion in this regard.

[37] The second question is whether, even assuming that, contrary to our view, the judge erred in giving a propensity direction in attenuated form only and not giving a credibility direction at all, it would necessarily follow that the appellant's conviction should be quashed on this basis alone. It is clear on a long line of authority<sup>21</sup> (which it is not necessary to revisit in this judgment) that it does not. For present purposes, it suffices to refer to Lord Kerr's conclusion from a review of the relevant authorities in **Mark France and Rupert Vassell**<sup>22</sup>, which is that in every case the outcome will depend "on a close examination of the nature of the issues and the strength of the evidence as well as an assessment of the significance of a good character direction to those issues and evidence".

[38] As the learned judge told the jury at the very outset of the summing-up<sup>23</sup>, "[t]he issue that is joint [sic] between the parties is whether, in fact, this...accused man is the person who shot and killed the deceased". It appears to us that the evidence of both Constable Irving and Miss Campbell provided an ample and reliable basis for the jury to conclude that they were able to – and did -make a correct identification of the appellant as the man who shot and killed the deceased. In addition, the evidence of visual identification was to an extent supported by the finding of gunshot residue, albeit at trace level, on the appellant's hand. In these circumstances, we consider that the giving

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<sup>21</sup>Considered in detail by the Privy Council in **Nigel Brown v State of Trinidad & Tobago** [2012] UKPC 2

<sup>22</sup>At para. 46

<sup>23</sup>At page 328

of a full good character direction would have had no impact on the jury's verdict in this case.

### **Conclusion**

[39] No complaint has been - or indeed can be - made about the experienced trial judge's careful and accurate general directions on identification, which he chose to give immediately before inviting the jury to retire, and in the course of which he reiterated that identification was "the large issue" in the case. Against this background, we came to the clear view that the jury's finding of the appellant's guilt ought not to be disturbed and it is for these reasons that the court concluded that the appeal should be dismissed.