JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS. 92 & 93/06

BEFORE: **THE HON. MR. JUSTICE HARRISON, J.A.**
THE HON. MR. JUSTICE MORRISON, J.A.
THE HON. MISS JUSTICE G. SMITH, J.A. (Ag)

HERBERT BROWN
MARIO MCCALLUM
V REGINA

Mr Ernest Smith instructed by Ernest A. Smith and Co. for the applicant Herbert Brown
Mr F.M.G. Phipps, Q.C. for the applicant Mario McCallum
Miss Deneve Barnett, and Miss Claudette Thompson, Crown Counsel for the Crown.

7, 8, July and 21 November 2008

MORRISON, J.A.:

Introduction

1. These applicants seek leave to appeal against their convictions for murder in the St James Circuit Court on 5 April 2006, after a trial before Sykes J and a jury. On 19 May 2006 each applicant was sentenced to 20 years imprisonment and it was ordered that they should each serve a minimum period of 10 years before becoming eligible for parole.

2. The applicants were indicted for the murder of Miss Angela Brady, who died as a result of gunshot injuries received on 5 July 2003, while she

was seated in the passenger seat of a motor vehicle parked in a vacant lot of land off Greenwood Avenue in St James.

The factual background

3. Mr Devon McLean, who gave evidence for the prosecution, testified that sometime after midday on 5 July 2003, he drove his red Nissan pick-up vehicle to a location on Greenwood Avenue where he was in the process of constructing a building. He was joined on the construction site by Miss Brady at about 2:00 p.m. and she was with him subsequently when he drove the pick-up onto a lot of land beside the site and parked the vehicle in a clearing.

4. While seated there, Mr McLean heard "what sounded like a knock," but which was actually the back door of the pick-up being opened. When he looked up, he found himself "looking down the barrel of a revolver... [then]... there was just explosion after explosion, after explosion." Mr McLean was hit in the neck, causing his necklace to break, and also in his chest, after which he saw a hand reach into the car and take up the necklace. He then heard a voice declare "this is a robbery", at which point Miss Brady screamed out saying "Devon me a go dead", which was when Mr McLean realized that there was another gunman on her side of the car and that Miss Brady also appeared to have been seriously injured. He was not able to see either of the two gunmen, but during the ordeal he glimpsed a white Toyota Corolla motor car parked

on the side of the road nearby. He tried to drive off in his vehicle to seek medical attention, but was unable to do so because of his injures, when a neighbour came to his assistance and drove them to the Mobay Hope Hospital where Miss Brady was pronounced dead. As Mr McLean was being driven away from the scene, he observed the same white Corolla some distance ahead "heading out of the community". He himself was treated at Mobay Hope Hospital, transferred to Cornwall Regional Hospital for emergency surgery and ultimately airlifted to Canada for further hospitalization and treatment.

5. Apart from Mr McLean, the prosecution's main witness was Mr Dennis Wiggan, a mason who was one of his employees on the construction site. While so employed, Mr Wiggan also acted as caretaker for and actually lived on the second floor of another unfinished house less than two chains away, from which he had an unimpeded view of the construction site.

6. On the afternoon of 5 July 2003, Mr Wiggan was in his room when he saw Mr McLean drive his red Nissan pick-up onto the construction site, ahead of a truck carrying a delivery of construction material to the site. In due course he himself went down onto the site at Mr McLean's request to assist with the unloading of the truck and while this was taking place he observed a white Toyota motor car with all four windows up "creeping along the main road" past the construction site and after a few minutes

saw it come back down the street again, creeping still. He had seen this same car going up and down the road in the same manner "couple of times" before that day.

7. After the unloading of the truck was completed, and the truck had left the site, Mr Wiggan observed Mr McLean and a young lady sitting in the stationary pick-up close to the site and he went off down the road to the supermarket to purchase a drink. On his way back up to the house he again saw the white Toyota, parked on the road, and this time he recognized the applicant Herbert Brown, who was known to him before, sitting in the driver's seat, using his mobile phone. Mr Wiggan greeted him, but received no response and continued on his way up the road back to his house.

8. Back at his house, as Mr Wiggan returned to the second floor, he heard explosions, as a result of which he ran to the back verandah and looked across to the construction site, which was the direction from which the sound of the explosions had come. There he saw the applicants and a third man, all of whom were known to him before, run from "out of the bush". The applicant Mario McCallum had an object resembling a gun in his right hand, as did the third person not before the court, known to Mr Wiggan as "Pops". He observed the applicant Brown for "about five to six, seven seconds somewhere in dem region deh" and the applicant McCallum for about thirty seconds "could be less or can be more". All

three men boarded the very same white Toyota which he had earlier observed and the car then sped off down the road.

9. Three days later, on 8 July 2008, Mr Wiggan gave a statement to the police and, at an identification parade held on 22 July 2008, he pointed out the applicant McCallum as one of the men seen by him at the construction site on 5 July 2008. The applicants were subsequently arrested and charged with, and ultimately convicted of, the murder of Miss Brady.

The appeal

10. Both applicants filed appeals from their convictions and they were in due course given leave by this court to argue supplemental grounds of appeal in substitution for the grounds originally filed. The supplemental grounds were as follows:

> "**HERBERT BROWN**
>
> 1. That the Learned Trial Judge erred in failing to uphold the submission of No Case having regards to the un-reliable and contradictory nature of the testimony of Dennis Wiggan the sole eye witness called by the prosecution on the issue of identification.
>
> **Particulars**
>
> (a) The witness contradicted himself on where he was, when he saw the Applicant near or on the scene of the crime.
>
> (b) The witness contradicted himself on the amount of time he was able to see and recognize /identify the Applicant.

(c) The evidence of Dennis Wiggan, as(sic) best, amounted to a fleeting glance.

2. That the Learned Trial Judge failed to warn the Jury, adequately on the dangers of convicting on tenuous identification evidence as set out in ***R v Turnbull*** thereby depriving the Applicant of an acquittal.

3. That the verdict of the jury is unreasonable and cannot be supported, having regard to the evidence.

MARIO McCALLUM

1. The verdict was unreasonable and cannot be supported having regard to the evidence. The applicant was convicted solely on the tenuous and uncorroborated identification evidence of the witness Dennis Wiggan.

Particulars

a. The witness contradicted himself in relation to where he was when he heard explosions and saw Mario McCallum emerge from the bush.

b. There was the unexplained contradiction in his evidence about whether he saw two or three men emerge from the bush.

c. Wiggan had incorrectly identified Mario McCallum as Kirk McCallum, another co-accused at the Preliminary Enquiry.

d. Wiggan testified at the trial that he had identified Mario McCallum under number five at the identification parade when McCallum was at number 4.

e. The identification parade was unfairly conducted and was improperly prejudicial to the defence when the witness, Dennis Wiggan, knew before going on the parade that the suspect, Mario McCallum would be there.

2. Misdirection by the learned trial judge

a. The learned trial judge misdirected the jury by failing to direct them adequately on the evidence of recognition by Dennis Wiggan.

b. The learned trial judge misdirected the jury by failing to tell them that there was no corroboration of Wiggan's evidence.

c. The learned trial judge misdirected the jury by failing to tell them that the evidence of the identification parade was not corroboration of Wiggan's testimony.

d. The learned trial judge withdrew the evidence of the expert Marcia Dunbar from the jury's consideration without an appropriate direction telling the jury that Dunbar's evidence was not corroboration for Dennis Wiggan's testimony.

e. The learned trial judge misdirected the jury by failing to tell them that it was dangerous to convict on the uncorroborated the (sic) evidence of Dennis Wiggan."

11. These grounds taken together raise the issues of (a) whether the learned trial judge erred in law when he dismissed the no case submission made on behalf of the applicant Brown, (b) whether the learned trial

judge's directions to the jury on the evidence of visual identification of both applicants were adequate and (c) whether the verdict of guilty of murder in respect of both applicants were unreasonable having regard to the evidence. It will therefore be convenient to deal with the matter under these headings and in the same order.

The no case submission

12. At the close of the Crown's case, submissions were made on behalf of both applicants that they should not be called upon to answer. The basis of these submissions was that the evidence of identification was unreliable as a result of a number of inconsistencies and discrepancies in the evidence of Mr Wiggan, the prosecution's sole eyewitness, as to the identity of Miss Brady's attackers. These submissions were considered with obvious care by the learned trial judge, who ruled that the case did not fall into the category of case in which he would be justified in withdrawing it from the jury's consideration and that the matters complained of were accordingly for the jury to resolve after appropriate directions.

13. Mr Ernest Smith, who appeared for the applicant Brown in this court, as he had at the trial, identified a number of inconsistencies and contradictions in Mr Wiggan's evidence which, he submitted, stood in "total contrast" to each other. The overall effect of this was, Mr Smith further submitted, that Mr Wiggan's evidence identifying this applicant lacked credibility and the jury ought not to have been left with "such

diametrically opposed" evidence on the single issue in the case. This, he concluded, would be tantamount to inviting the jury to speculate.

14. In order to underpin these submissions, Mr Smith pointed to a number of instances in which evidence of statements inconsistent with Mr Wiggan's evidence at the trial had either been admitted as exhibits going to his credit or accepted by him, albeit with an explanation. All of these instances emerged at the trial during Mr Smith's cross-examination of Mr Wiggan on Monday 3 April 2006, after he had completed giving his evidence in chief on the Friday afternoon before.

15. Firstly, it was Mr Wiggan's evidence at the trial that he had seen three persons run out of the bush after he heard the explosions and he identified the applicant Brown as the first person in the group. It turned out that in his statement to the police given three days after the event, Mr Wiggan had stated that, after he heard the explosions, he had seen "Kirk and Mario run from the bushes near the site." When pressed with this contradiction in cross-examination, Mr Wiggan's comment was "I never really tell him that."

16. Secondly, Mr Wiggan said in his evidence that it was after he had seen the three men run out of the bush that he saw all three of them get into the white Toyota motor car, which then sped off in the direction of the main road. However, it turned out that in his statement to the police he was recorded as having said that "about two to three minutes after

the men emerged from the bush he saw the same white Toyota car" approaching the construction site along Greenwood Avenue, pull up beside Mario and Kirk who "both entered it from the front left side and it sped off". Again, when pressed in cross-examination, Mr Wiggan denied having given the police the account attributed to him in the statement.

17. It was further put to Mr Wiggan that he had said in his statement that "when I saw the car drive from up Greenwood Drive, I saw that it was being driven by [the applicant] Delroy Brown". While he agreed that he did tell that to the police and that it was true ("of course, it's the truth"), Mr Wiggan nevertheless insisted that there had to have been "some mix up", presumably on the part of the police officer who took the statement.

18. Mr Wiggan was then taken by counsel to 6 February 2004, which was the date on which he had given evidence at the preliminary enquiry in the matter. He readily accepted that his deposition taken by the learned Resident Magistrate was a true account of the events that he had witnessed on 5 July 2003. He was then asked whether he had told the Resident Magistrate that after he had heard the explosions coming from the construction site and gone "around the back of the verandah" of his house, he had seen the applicant Brown sitting in the white Toyota motor car. Mr Wiggan agreed that he had said that. It was then put to him by counsel that in his evidence in chief on the previous Friday he had told the court that he had seen the applicant Brown "running from out of

the bush", a suggestion that Mr Wiggan flatly denied, insisting that, "I did not say that."

19. Under further cross-examination, Mr Wiggan then said that what he had seen was the applicant Brown entering the open door of the car, but that he could not say which direction he had come from and that he had not seen him open the door of the car (though initially he had stated that he had). And then, pressed still further by Mr Smith, the following exchange took place:

> "**Q:** So, Mr. Wiggan, the two of them, the two statements couldn't be true, Mr. Wiggan?
>
> **A:** Of course.
>
> **Q:** You told her Honour at the Preliminary Enquiry that you saw this car parked in the road with Brown sitting inside of it?
>
> **A:** Yes.
>
> **Q:** And then?
>
> **A:** That is not what I told her.
>
> **Q:** And then the man them come and go in a di car?
>
> **A:** That is not what I told her.
>
> **Q:** But, you remember the lady read what you said a while ago?
>
> **A:** Yes but...
>
> **Q:** Are you able, hold on, are you telling us then that the learned Resident Magistrate

wrote in your statement what you didn't say?

A: I don't know.

Q: Emn?

A: But I told him...

Q: No, answer my question. Are you telling us that the learned Resident Magistrate wrote what you never say, is that what you telling us?

A: I don't know.

Q: But how you mean you don't know?

A: I don't know, no one is perfect, anyone can mek a mistake.

Q: Who mek the mistake, you or the Magistrate?

A: Anyone can make a mistake, all myself can make a mistake.

Q: All right, did you make a mistake when you...

A: I tell her...

Q: Hold on, let me ask you something, when you told us on Friday, that you saw three men run out of the bush, was that a mistake?

A: I didn't tell you that three men run out of the bush. I see three men yes, I see three persons board a car.

Q: You saw three men go in a car?

A: Yes.

Q: Wey the three men came from? Where did the three men come from?

A: I saw when that man actually board the car and those two 'Pops' and Mario, those are the two last man come out of the bush.

20. In the result, Mr Wiggan's previous statements to the police referred to at paragraphs 15,16 and 17 above were put in evidence, without objection from the Crown, as exhibits 1, 2 and 3. However, with regard to his deposition, the court took the view that, he having admitted saying what had been read to him from it, there was no need to tender it as his admission was now part of the record of the trial.

21. All of this accordingly led Mr Smith to submit in conclusion that the different versions given by Mr Wiggan as to the circumstances in which he had seen the applicant Brown could not all be true, that the identification evidence was therefore lacking in credibility and that the case ought on that basis not to have been left to the jury. In any event, it was further submitted, the witness' observation of the applicant amounted to no more than a fleeting glance.

22. Mr Smith referred us to the decision of this court in ***R v Curtis Irving*** (1975) 13 JLR 139 and relied heavily on it for the proposition that, although as a general rule the credit worthiness of a witness was a jury matter, a trial judge would nevertheless be justified in withdrawing a case from the

jury where that witness' evidence has been so completely discredited as to render it manifestly unreliable.

23. For her part, learned counsel for the Crown, Miss Barnett, submitted that at the end of the prosecution's case the essential issue was whether Mr Wiggan's evidence was credible, which was, as the trial judge ruled, a matter for the jury to consider after proper directions on how to approach that evidence. When the test with regard to submissions of no case propounded in ***R v Galbraith*** [1981] 2 All ER 1060 is "superimposed" on the general principle regarding identification evidence laid down in ***R v Turnbull*** [1977] QB 224, Miss Barnett submitted, there had clearly been a case to answer in the matter and the trial judge had accordingly been correct to leave it to the jury.

24. ***Galbraith*** settled, in the following well known (and oft cited) passage, the correct judicial approach to a no case submission (at page 1062):

> "How then should the judge approach a submission of 'no case'?
> (1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case.
> (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence. (a) Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty,

> upon a submission being made, to stop the case. (b) Where, however, the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there *is* evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury ... There will of course, as always in this branch of the law, be borderline cases. They can safely be left to the discretion of the judge"

25. The first limb of ***Galbraith*** speaks to cases in which there is an evidential gap in the prosecution's case, which makes a conviction logically impossible in the light of the legal ingredients of the offence charged. The second limb has been said to be "less clear-cut" (see Roberts & Zuckerman, Criminal Evidence, 2004, at page 74), seeming on the one hand in part (a) to call for some preliminary weighing or assessment of evidence by the trial judge, while on the other hand in part (b) seeking to maintain the traditional position that questions of credibility and reliability of witnesses are properly matters for the jury (see ***R v Barker (Note)*** (1975) 65 Cr App R 287, per Lord Widgery CJ at page 288).

26. What is clear, however, is that although it did reserve to the trial judge a narrow discretion to stop the case where the prosecution evidence was tenuous, ***Galbraith*** was nevertheless primarily concerned to prevent trial judges withdrawing cases from the jury because they thought the prosecution witnesses were lying. ***Curtis Irving*** was a case, as

Graham-Perkins JA described it, "of a self-confessed liar who claimed to have seen the applicant commit an act of murder and, at the same time, admitted that he had not seen any such thing" (page 141). Though predating ***Galbraith***, the decision of this court in that case can therefore sit easily within part (a) of the second limb of Lord Lane CJ's judgment. The even earlier statement of Wooding CJ in ***R v Daken*** (1964) 7 WIR 442, 444, that "it should never be forgotten that in the final analysis questions of fact are to be decided by a jury and not by the presiding judge", which was distinguished by this court in ***Curtis Irving***, is equally consistent with part (b) of the second limb of ***Galbraith.***

27. ***Turnbull,*** decided some four years before ***Galbraith,*** had confirmed that identification evidence fell into a class of its own, requiring special warnings and directions to be given to jurors as to the special need for caution in approaching such evidence. Lord Widgery CJ, delivering the judgment of a five member Court of Appeal specifically assembled for the purpose of considering the question, emphasized that it is the quality of the identification evidence that can ultimately minimize the risk of mistaken identification. All of this has of course long since become part of the everyday fare of trial judges in Jamaica and throughout the Commonwealth.

28. But in ***Turnbull,*** after setting out in detail the warnings required, Lord Widgery CJ also said the following (at pages 229-30):

> "When in the judgment of the trial judge, the quality of the identifying evidence is poor, as for example when it depends solely on a fleeting glance or on a longer observation made in difficult conditions, the situation is very different. The judge should then withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification."

29. After an initial period of partial reservation in this court (as to which see ***R v Whylie*** (1977) 25 WIR 430), the Privy Council confirmed in ***Reid, Dennis & Whylie v R*** (1989) 37 WIR 346, 354, that that part of Lord Widgery's judgment quoted in the foregoing paragraph "applies with full force and effect to criminal proceedings in Jamaica" (per Lord Ackner).

30. In ***Farquharson v R*** (1993) 43 WIR 305, 311, the Privy Council considered that the criteria applied to prosecution evidence in general in ***Galbraith*** "are less favourable to the accused than the more subjective approach to identification evidence in ***Turnbull*** and the difference is no doubt attributable to the well-known danger associated with identification evidence and the equally well-known risk that a jury may rely unduly on such evidence" (per Lord Lowry).

31. The relationship between ***Galbraith*** and ***Turnbull*** was definitively explored by the Privy Council in a judgment delivered just over three weeks later in ***Daley v R*** (1993) 43 WIR 325. In that case, Lord Mustill, with admirable clarity, traced the origins of ***Galbraith*** to a controversy (that actually predated ***Turnbull***) between two schools of judicial thought as to

the proper approach to submissions of no case. The traditional school maintained the position that "It is not the judge's job to weigh the evidence, decide who is telling the truth, and to stop the case merely because he thinks the witness is lying" (per Lord Widgery CJ in ***R v Barker*** (1975) 65 Cr App Rep 287, 288). However, over the years, as Lord Mustill's account of the history continues (at page 329), "a substantial number of judges had come to think it right that, when their own assessment of the credibility and consistency of the evidence led by the prosecution was such that a conviction on this evidence would be unsafe, they should withdraw the case from the jury so as to make sure that the defendant was not the victim of a miscarriage of justice".

32. This then was the background to ***Galbraith*** and the authoritative resolution of the controversy that it was ultimately to provide in favour of the traditional view as it had been expressed by Lord Widgery in ***Barker.*** It was therefore a decision which explicitly limited the circumstances in which a no case submission was likely to succeed on purely factual grounds. But by this time, of course, ***Turnbull*** had already been decided and it is in this context that Lord Mustill in ***Daley*** came to address the question of how the principles of ***Turnbull*** and ***Galbraith*** "are able to live together" (pages 333-334):

> "How then are the principles able to co-exist? There appear to be two possibilities. The first is simply that the ***Turnbull*** rule is an exception superimposed on the general rule of ***Galbraith***,

> taking identification cases (or, more accurately, the kind of identification case which was the subject of ***Turnbull***, for ***R v Galbraith*** was itself concerned with identification) outside the general principle, while otherwise leaving it completely intact. This is certainly a possible view ... Their Lordships doubt, however, whether it is necessary to explain the two lines of authority in this way. A reading of the judgment in ***R v Galbraith*** as a whole shows that the practice which the court was primarily concerned to proscribe was one whereby a judge who considered the prosecution evidence as unworthy of credit would make sure that the jury did not have an opportunity to give effect to a different opinion. By following this practice the judge was doing something which as Lord Widgery CJ had put it, was not his job. By contrast, in the kind of identification case dealt with by ***R v Turnbull*** the case is withdrawn from the jury not because the judge considers that the witness is lying, but because the evidence even if taken to be honest has a base which is so slender that it is unreliable and therefore not sufficient to found a conviction and indeed as ***R v Turnbull*** itself emphasized, the fact that an honest witness may be mistaken on identification is a particular source of risk. When assessing the 'quality' of the evidence, under the ***Turnbull*** doctrine, the jury is protected from acting upon the type of evidence which, even if believed, experience has shown to be a possible source of injustice. Reading the two cases in this way, their lordships see no conflict between them."

33. In the result, any apparent contradiction between the two rules was resolved by ***Daley,*** as Cross and Tapper put it (Evidence, 10th edn, page 206), "on the basis that while the honesty of a witness should properly remain to be decided by the jury, there were situations, such as

identification, where the evidence even of an honest witness might be regarded as tenuous".

34. ***Daley*** was applied by the Privy Council in ***Jones (Larry) v R*** (1985) 47 WIR 1, which was a case in which, despite the fact that the Board considered that the "real attack" by the defence on the sole eyewitness's evidence "was principally that it was not sufficiently reliable to found a conviction and therefore should not have been left to the jury" (essentially a ***Galbraith*** point). It was nevertheless held that the trial judge had been entitled to allow the case to go to the jury on the question of identification "even if the circumstances were not ideal" (per Lord Slynn, at page 4). The real question was, therefore, applying ***Turnbull***, whether the evidence of identification could be said to have rested on so slender a base as to render it unreliable and therefore insufficient to found a conviction. In this case the evidence was held to have cleared the threshold and the no case submission to have been rightly rejected by the trial judge on this point.

35. So that the critical factor on the no case submission in an identification case, where the real issue is whether in the circumstances the eyewitness had a proper opportunity to make a reliable identification of the accused, is whether the material upon which the purported identification was based was sufficiently substantial to obviate the "ghastly risk" (as Lord Widgery CJ put it in ***R v Oakwell*** [1978] 1 WLR 32, 36-

37) of mistaken identification. If the quality of that evidence is poor (or the base too slender), then the case should be withdrawn from the jury (irrespective of whether the witness appears to be honest or not), but if the quality is good, it will ordinarily be within the usual function of the jury, in keeping with ***Galbraith,*** to sift and to deal with the range of issues which ordinarily go to the credibility of witnesses, including inconsistencies, discrepancies, any explanations profferred, and the like.

36. A recent example of this approach may now be found in ***Garnet Edwards v R*** (Privy Council Appeal No. 29 of 2005, judgment delivered 25 April 2006), which was a case in which one of the grounds of appeal argued before the Board was that the judge should have withdrawn the case from the jury in the light of what was described as "a number of irregularities" with regard to the identification evidence presented by the prosecution. Lord Carswell rejected this submission (at paragraph 21):

> "Their Lordships are satisfied that the identification evidence was not so slender that the judge was required on that ground alone to withdraw the case from the jury and direct a verdict of not guilty. Bailey had a close and unimpeded view of the gunman in lighting conditions of which no complaint is made, and his evidence was that he concentrated his gaze upon him. While he undoubtedly appears to have given in his evidence a substantial over-estimate of the time he had him in view, it was nevertheless neither a fleeting glimpse nor a sighting in difficult conditions. Their Lordships accordingly do not consider that the case falls into the category of those which require to be withdrawn on account of the inherent fragility of

> the identification although, as they will discuss later, there were undeniable weaknesses and the need for careful direction about them still remained." (Emphasis supplied)

37. Sykes J clearly had much of this in mind when he considered the no case submissions at the trial of this matter, though he was not referred to ***Jones*** (and ***Edwards*** had not yet been decided). But he also seems to have discerned a conflict between ***Farquharson*** and ***Daley***, leaving the law in what he described as "a state of confusion" and leaving it to him to make what he could of "all of this." As a result the judge turned to ***Doney v R*** (1990) 171 CLR 207, a decision of the High Court of Australia, in which it was held that if there is evidence (even if tenuous or inherently weak or vague) which can be taken into account by the jury in its deliberations and that evidence is capable of supporting a verdict of guilty, the matter must be left to the jury for its decision. Although there was some discussion about this case during the argument in this appeal, I do not myself find it necessary to comment on it, beyond observing, firstly, that it appears to proceed on the basis that ***Galbraith*** is not fully acceptable in that jurisdiction (a premise which it is not open to this court to accept in the light of Lord Mustill's accurate statement in ***Daley*** that ***Galbraith*** has "been consistently applied in Jamaica"), and, secondly, that it is not in any respect an identification case and is therefore of very limited assistance in the instant context.

38. However we are clearly of the view that Sykes J was correct in proceeding, as he then did, to a "qualitative analysis" of the prosecution's evidence, and in his conclusion that the matters complained of by counsel for the applicants in respect of Mr. Wiggan's evidence were essentially matters for the jury. The essential question for the court's consideration was whether the quality of the identification evidence at the close of the prosecution's case was so poor or had a base which was so slender as to be unreliable and therefore not sufficient to found a conviction. This was a case in which Mr. Wiggan purported, during daylight hours, to recognize the applicants, who were known to him before, in circumstances in which, though obviously unusual, he was not himself personally involved in the incident as it unfolded. Although his period of observation of the men before the white Toyota Corolla sped off was brief ("five to six, seven seconds, somewhere in dem region deh", in the case of the applicant Brown, and thirty seconds more or less in the case of the applicant McCallum, though the witness did reduce this estimate to fifteen seconds under cross examination), it cannot in my view be said that the identification was based solely on a fleeting glance, or that it was made in particularly difficult circumstances.

39. In a decision of this court referred to by Miss Barnett, ***Tucker & Thompson v R*** (SCCA Nos. 77 & 78/95, judgment delivered 26 February 1996), Forte JA, as he then was, observed as follows (at pages 6-7):

> "This was a recognition case in which, the length of time for observation need not be as long as in a case where the assailant was unknown to the witness at the time of the offence. In our view, having regard to the state of the light and the fact that the applicant Tucker was known to the witness for four years, and also the proximity in which he was viewed by the witness, the period of eight seconds was sufficient time for observation so that an accurate identification could later be made. The issue was therefore clearly one for the jury's determination".

40. We consider that a similar comment can be made about the evidence in this case, with the result that the quality of the identification evidence was therefore sufficient to enable the case to go to the jury. In these circumstances, the extent to which Mr. Wiggan's credibility was, if at all, affected or impaired by the various matters so expertly explored by Mr Smith in cross-examination was entirely a matter for the jury to resolve after appropriate directions in law from the trial judge.

41. For these reasons, we think that Sykes J was correct in his ruling that there was a case to answer, and this ground of appeal must therefore fail.

The directions to the jury on identification

42. Mr Phipps QC made submissions on this issue and, insofar as they affected his client, Mr Smith was content to adopt those submissions. Mr Phipps submitted that identification evidence requires something more than a ***Turnbull*** direction where that evidence is tenuous and uncorroborated and is challenged by the defence as unreliable.

Although the trial judge directed the jury generally on the need for caution in approaching identification evidence, there was no special direction highlighting (a) the fact that Mr Wiggan's evidence was uncorroborated, (b) that it would be dangerous to convict on that evidence, and (c) that evidence of the flawed identification parade and the finding of gunpowder residue on the applicant McCallum's hand was highly prejudicial, of no probative value and did not amount to corroboration.

43. Mr Phipps referred us to ***Farquharson*** (supra), and to Lord Lowry's observation that the trial judge in that case had not said anything "which would have conveyed to the jury a warning as to the special need for caution before convicting in reliance on the correctness of an identification" (page 312). In the instant case, it was submitted, the judge's directions were imprecise and could have been of very little assistance to the jury, in that they did not make it clear that it would be dangerous to act on the identification evidence in the case.

44. Miss Barnett, on the other hand, submitted that the judge had given adequate directions to the jury in accordance with the authorities and that no particular form of words was required in these circumstances.

45. The learned trial judge, after dealing with inconsistencies (as to which, see paragraph 59 below), moved straight into a general direction on identification, which is reproduced in full below:

> "So, the vital issue then, is one of identification. So, I need to tell you then about identification. And the Law says that you need to exercise special care when dealing with the question of identification for two reasons.
>
> The major one being that it has been known that there have been wrongful convictions, based upon mistaken identification. You know persons have been sent to prison for a long time, ten, fifteen years, after about ten, fifteen years they say, oh God, they find out their mistake. And they come and shake your hand and tell you, boy we sorry you know but these things do happen.
>
> So, the law recognizes that those things have happened, so that is why we need to examine the evidence of identification very carefully.
>
> The second thing that you need to be aware of, when you are looking at identification evidence, we spoke about them before and I am going to put it in a different context now, is the question of honesty and reliability in the context of identification evidence. What does that mean?
>
> It is said that an honest witness can be a convincing witness, because they are honest. So, you may look at Mr. Wiggan, and you say to yourself, boy, what an honest man, I believe he is trying to his best to speak the truth. I don't think he has to come here to deceive you.
>
> But the law says it is because witnesses are honest why they are convincing, because obviously a liar is not going to convince you. If you believe that he is honest, you are going to

want to believe him because you say well, here is an honest man.

But the law is saying it is at this point that a particular danger arises and the danger that because the witness is honest you may overlook the question of reliability. Is the witness reliable? So, you can have an honest but mistaken witness, and a mistaken witness is still mistaken whether it is a mistake honestly made or mistake in quotation marks, because the witness is lying.

So that is why the law says identification evidence now, you distinguish between honesty and reliability. And that is why from the outset, I put in that way. Is the witness honest? Is he reliable? And on the question of identification in particular, is he honest? Is he reliable? Is he accurate? Is it that he is not mistaken. Those are the things that you are looking for.

Let me look at the circumstances under which the identification was made. Then we look at time of day. Let me look at the distance. Let me look at the time he said he saw the men. Did he know these persons before? All of these things you bear in mind when you consider the question of identification.

Even if you know someone before, and you know them exceptionally well, it doesn't mean, that you can't make a mistake. All it means is that you are less likely to make a mistake. But a mistake can still be made. And this is why the law says to look closely at the circumstances under which the identification is supposed to have been made. What distance was the witness away from the person? What were the persons doing? How long did he have them under observation. Is there anything that obstructed his view? Does he give additional details.

> All of these things arise when you are trying to determine the reliability of the witness, when it comes to the question of identification. As I say, reliability is a different thing from honesty. And remember honest witnesses can be convincing because they are honest, but it does not make them reliable."

46. Subsequently, as he moved on from these general directions to a detailed consideration of the evidence, the trial judge indicated that "most of the summation will be concerned with the evidence of Mr Wiggan, since the Prosecution's case stands or falls with Mr Wiggan." Thereafter, throughout his review of the evidence, the learned trial judge related it back to his general identification warning by asking the jury to consider the question of the period of time during which one or other of the applicants was under observation by the witness, whether the identification took place in stressful circumstances, what was the distance, the lighting, what was the impact of all the inconsistencies, and so on. And finally, towards the end of the summing-up, having reviewed all the other evidence in the case, the judge returned to this question and to Mr Wiggan:

> "So, having regard to how we have reviewed the evidence of Mr. Wiggan, firstly, is he honest? Two, is he reliable? Three, has he convinced me, that despite the inconsistencies, if you say that they are inconsistencies, has he convinced me that he had sufficient time on the 5th of July, 2003, to make the identification that he says he made? Bearing in mind that the circumstances under which he saw the two men are different. Mr.

Brown, he claims that he first saw him in this car at the intersection of Tortuga and Greenwood Avenue, saw him there, with a cellphone in his left hand, with a yellow cap that didn't come down in his face. He was looking straight ahead, and the man never looked at him at any point. Is that sufficient time to recognise Mr. Brown, who he said he knew before?

The second sighting; heard the shots; came out of the balcony; saw Mr. Brown and as I said, this is for you to decide, but it seems to me this settled position was when he saw Mr. Brown. The second time he was actually going into the car; body was in and head was out. Is that sufficient time to make the identification, bearing in mind he said that the gentleman that he saw at the second occasion, who he identified as Mr. Brown, had on the same or rather not the same yellow cap?

So those are the circumstances of Mr. Brown.

In respect, of Mr. McCallum, he was seen once and only once. After the shooting he said that Mr. McCallum came out of the bush and it appears that his settled position was; came out of the bush; got into the car; car sped off and he says, coming out of the bush, getting into the car, the car speeding off is about fifteen seconds in total. So he is not saying that he saw his face for fifteen seconds. What he is saying is the total time: Coming out, entering, speeding off, is fifteen seconds.

He said he told the Magistrate that that coming out, getting into car, speeding off could be about four to five seconds. Is that sufficient time, but firstly, is it fifteen seconds in all, or is it four to five seconds in all? Of course, the smaller the time, the less opportunity to see and the greater the risk of error, even though you may very well be satisfied that he knew both men very well, but

> the question is, at the specific time now, having regard to all that was happening, is he accurate? Is he reliable so much so that you can feel sure that he is not mistaken at all?"

47. These directions were in our view not only full, clear and eminently fair to the applicants, but also entirely in keeping with the principle of ***Turnbull*** and the other authorities cited, despite the judge not having adhered to any special verbal formula for this purpose. The special need for caution before convicting in reliance on the correctness of the identification evidence was, in our view, fully brought home to the jury by the learned judge's ample directions on the matter.

48. Mr Phipps's final complaint was that the judge did not tell the jury that the evidence of gunpowder residue on the hands of the applicant could not be taken to be corroborative of Mr Wiggan's evidence. The only thing that need be said about this, we think, is that the prosecution's attempt to rely on expert evidence that gunpowder residue was found on the hands of both applicants foundered completely on the judge's explicit direction to the jury that that evidence was unreliable and of no probative value. Having pointed out the evidential gaps in the prosecution's case in this regard, the learned judge told the jury to disregard the evidence entirely:

> "So remember now, they are on trial for murder, not any other thing. So you cannot say 'well,

> boy, since the expert find gunpowder residue, old gunman them, man'. You cannot use it like that. So that is why I say to you that the presence of the gunpowder residue on the hand does not assist the prosecution in any way whatsoever."

49. Miss Barnett's comment was that this direction was "very favourable" to the defence and, even if this perhaps puts it too high, it certainly cannot, in our view, be regarded as anything but fair to the applicants in the circumstances.

50. We would therefore conclude that the grounds of appeal on the question of the identification evidence must fail as well.

Verdict unreasonable

51. This ground of appeal was common to both applicants, Mr Smith relying primarily on his earlier submissions on the no case to answer point. Mr Phipps also drew our attention to what he described as the "many unexplained contradictions and inconsistencies" in Mr Wiggan's evidence, pointing out in particular that in his evidence in chief, Mr Wiggan had said that he was in the house when he saw the accused men came from the bush to enter the car, while in his statement to the police he had said he was on the road. He also pointed out that Mr Wiggan's evidence in chief was that he had observed the applicant McCallum for some thirty seconds more or less, but that in cross-examination he gave an estimate of "about fifteen seconds" as the time

which passed between when he saw the men come from the bush and get into the car and when the car sped off. In fact, Mr Phipps observed, given Mr Wiggan's evidence as to his period of observation of the applicant Brown (five to seven seconds), neither of his estimates in relation to the applicant McCallum could be true. Mr Phipps also referred to the various contradictions in Mr Wiggan's evidence highlighted by Mr Smith insofar as these were relevant to the witness's ability to identify the applicant McCallum as well.

52. Mr Phipps was also highly critical of the identification parade at which the applicant McCallum was pointed out by Mr Wiggan, describing it as "fatally flawed". In the first place, he complained, there was no need for a parade to be held at all, given the witness's testimony that the applicant was a person whom he knew and had often spoken with during the period between January and July 2003. If this was what was told to the investigating officer shortly after the murder, then no parade should have been held and the evidence of the witness having pointed out the applicant on the parade was inadmissible self corroborating evidence (see ***R v Lawrence & James,*** SCCA Nos. 82 and 83 of 2003, judgment delivered 30 July 2004).

53. As to the conduct of the parade itself, Mr Phipps also pointed to a discrepancy between Mr Wiggan's evidence that the applicant was at number 5 on the parade, and the evidence of Sergeant Simpson, the

officer who conducted the parade, that the applicant was at number 4. Further, the officer also agreed under cross-examination that at an earlier aborted identification parade, Mr Wiggan had asked before going to the line up "if it was Mario's [the applicant's] parade", which clearly showed that the witness not only knew the applicant by name but expected to find him on the parade. This incident, Mr Phipps contended, should have resulted in the abandonment of the parade altogether.

54. In these circumstances, Mr Phipps submitted, it was necessary for the investigating officer, Detective Corporal James, to have given evidence at the trial so that the jury could have been made aware of the nature of the report first made to the police by Mr Wiggan. The officer was in fact abroad at the time of the trial and an attempt by the prosecution to have his deposition read in evidence failed when the judge ruled that the statutory preconditions for permitting this had not been satisfied.

55. For all of these reasons, Mr Phipps concluded, the verdict of guilty brought in by the jury was unreasonable and could not be supported having regard to the evidence.

56. Miss Barnett's response to these submissions was that the jury was fully entitled to reach the verdict in the light of the evidence and the judge's directions. The judge in his summing-up pointed out and analyzed carefully all of the alleged inconsistencies, which, in any event, went to Mr

Wiggan's credibility, a matter for the jury, and not to his opportunity to identify the applicant.

57. As to the complaint about the flawed identification parade, Miss Barnett submitted that the modern view on the authorities appeared to be that an identification parade should be held in most cases, referring to the decisions of the Privy Council in ***Goldson & McGlashan v R*** (2000) 56 WIR 444, ***Ebanks v R*** (Privy Council Appeal No. 4 of 2005, judgment delivered 16 February 2006) and ***Edwards*** (supra).

58. Miss Barnett further submitted that the absence of Detective Corporal James was not fatal and that in an event any evidence from him as to the reasons for holding an identification parade would have been inadmissible. The judge had alerted the jury to all relevant matters, including the allegedly flawed identification parade, and the verdict ought not therefore to be disturbed.

59. As might have been expected, the trial judge devoted a lot of time to Mr Wiggan's evidence in his summing up. He told the jury, firstly, that in looking at his evidence what they needed to focus on were his honesty and reliability and that, if they found him wanting in either respect, the applicants were entitled to be acquitted. He made it clear to them that "everything really comes down to Mr Wiggan" and that they needed to be satisfied with both his honesty and reliability before they could

convict. He then went on to direct the jury specifically on inconsistencies in this way:

> "Now, in this trial as in any other criminal trial, there are what you call inconsistencies; that is, witness saying something before you in evidence --but that is the evidence before you on which you can act -- but it has been proved that he has said something else, on previous occasions. Okay. The reason why all of that was done in this case is to expose you to the fact that he has said something on previous occasions that is different from what he is saying before you in evidence today and the purpose of that is to assist you in answering--you remember, two questions now, you know. Is he honest? Is he reliable? That is the purpose of it.
>
> So how do you deal with these inconsistencies? The first thing, is it an inconsistency? Then, is the inconsistency serious or is it slight? If the inconsistency is -- if you come to the conclusion that the inconsistencies are serious, then you would ask yourself well, does it mean that Mr. Wiggan is dishonest, or does it make him unreliable because, you know, some of you may be well brought up men and women. You may not like to call people liars. My mother always got upset whenever we use that term. She prefer untruth. Some people find the term liar offensive. So you may want to call Mr. Wiggan a liar. You may want to say well, perhaps he is not being as forthright as he ought to be. If that is your conclusion and you form the view that based upon that you cannot accept him at all on anything that he says, then, of course, the verdict is not guilty.
>
> You may say well, having looked at these inconsistencies, to me they are not really serious, you know, don't really affect Mr. Wiggan's credibility all that much, or you

> may say it don't affect his credibility at all. So if you say it does not affect his credibility, then, of course, you recognize that they exist, but you can still go on to accept his evidence generally so that when you are looking at inconsistencies, stage 1, is there an inconsistency? Stage 2, is the inconsistency a serious inconsistency? If it is a serious inconsistency, do I reject Mr. Wiggan totally and completely, or do I reject him on that specific issue?"

60. The learned trial judge then focused specifically on inconsistencies in the context of what he described as the "vital issue" of identification:

> "Now let me tell you something about this case. In this case the inconsistencies relate to the whole question of identification of the accused men. So if you reject Mr. Wiggan totally and completely, then it's not guilty. It just so happens that in this particular case, if you reject Mr. Wiggan on that issue of identification, then that is the end of the case as well because there really is no challenge on any other area, so the inconsistencies that we are going to be looking at is really in relation to identification. So it turns out that in this particular case, whether you reject Mr. Wiggan on the specific issue, or you reject it generally, the end result is really the same.
>
> It does not often happen this way, but in this particular case that happens to be so. So if you reject him on the specific issue of identification, then that is the end of the case as well. So you may say to yourself, boy, you know, Mr. Wiggan, I believe you generally.
>
> You know the girl was walking with you; you went down to the bar, to the supermarket; you got the Pepsi; you coming up back. That kind

> of thing; that yes, you were the caretaker, the mason and you were caretaker of the premises on which you were staying. You may be willing to accept all of that evidence. Yes, you were working on the site; Mr. Brown paid you at one point and so on and so forth. Yes, you were there helping out with the truck.
>
> You may accept all of those things, you know, but on the critical issue of identification, if you say well, you know, Mr. Wiggan, having examined your evidence, looking at the inconsistencies and so on, I really not too sure about you and this identification business, you know, or, you may say, put it a bit stronger, 'I don't believe you when you say that you saw these men'. Either way, whether you are not sure, whether you don't believe him, the end result is the same; that is, the Prosecution would have failed if you reject it, or have doubts about it. So the vital issue then is one of identification."

61. After further general directions on the issue of identification, the trial judge proceeded to a detailed summary of "the all important gentleman, Mr. Wiggan". He carefully reviewed Mr Wiggan's evidence-in-chief in full, before turning to the cross-examination ("And now, we come to the parts of the evidence that are vital for you to consider, when considering the credibility of Mr. Wiggan"). He then reviewed with equal care and attention to detail the various areas of challenge to Mr Wiggan's evidence, reminding the jury at each stage what was being said about their impact by the defence and leaving it to the jury to say "what you make of these inconsistencies here, if you find that they are inconsistencies". And, again, "What do [you] make of all of this and how

does it affect the credibility of Mr. Wiggan?," "And further, even if you are minded to say that he is speaking the truth, the question is reliability. Did he have sufficient time on the second occasion to see Mr. Brown?"

62. No complaint has been made on appeal as to the manner in which the trial judge left these issues to the jury and we think it is fair to say that the jury was given every possible assistance with regard to them. In the light of these directions, it cannot be said that the jury was not entitled to reach the verdict which it did and which, in our view, was one which it was plainly entitled to reach on the evidence in the case.

63. As regards of the identification parade, Mr Phipps very helpfully referred us to the decision of this court in ***R v Lawrence and James*** (SCCA Nos. 82 and 83/2003, judgment delivered 30 July 2004) to make the point that there is in general no need for a parade to be held in cases where the accused has been positively identified by a witness as someone known to him before the incident. In that case, this court accepted the statement by Lord Hoffman in ***Goldson & McGlashan*** (supra, at pages 449-50), "that the principle stated by Hobhouse LJ in ***R v Popat*** [1998] 2 Cr. App. R. 208, 215, that in cases of disputed identification 'there ought to be an identification parade where it would serve a useful purpose', is one which ought to be followed."

64. However, the passage immediately following in Lord Hoffman's judgment is also important:

> "It follows that, at any rate in a capital case such as this, it would have been good practice for the police to have held an identification parade unless it was clear that there was no point in doing so. This would have been the case if it was accepted, or incapable of serious dispute, that the accused were known to the identification witness. At least in the case of ***McGlashan,*** that does not appear to have been the position here."

65. So in that case the Board accepted the appellant's contention that the holding of an identification parade was desirable where the claim by the witness that he knew and recognized the suspect was disputed. As Lord Carswell observed in the later case of ***Ebanks*** (supra, at paragraph 17), the function of the parade in that case "would accordingly have been, not the normal one of testing the accuracy of the witness's recollection of the person identified, but to test the honesty of her assertion that she knew the accused."

66. Subsequent decisions of the Board in ***Aurelio Pop v R*** (2003) 62 WIR 18 and ***Pipersburgh & Robateau v R*** (Privy Council Appeal No. 96 of 2006, judgment delivered 21 February 2008), both appeals from Belize, have also emphasized "the potential advantage of an inconclusive parade to a defendant" in cases of disputed identification (per Lord Rodger in ***Aurelio Pop*** at paragraph 9 of the judgment, though in both cases the

Board was careful to say that the fact that no parade is held and a dock identification takes place does not render the identification evidence inadmissible).

67. But while it is possible to discern in the later cases a tendency to suggest that an identification parade should be held in most cases, as Miss Barnett submitted, it is clear that the authorities have yet to go so far and that the view accepted by this court in ***Lawrence & James*** (that a parade ought to be held where it would serve a useful purpose) remains an accurate summary of the general position. In our view, in the instant case, the fact that there was a parade, far from prejudicing the applicant McCallum, provided him with the benefit of the additional safeguard of putting the eyewitness's reliability to the test (see ***R v Forbes*** [2001] 1 AC 473, per Lord Bingham at paragraph 27).

68. With regard to the conduct of the parade itself, the trial judge told the jury clearly that Mr Wiggan's unfortunate question at the previous aborted parade ought not to have been asked, but that in the end "nothing really turns on it since he claims he knew the man before, saw him come to the site". More to the point, we think, is that that parade was in fact aborted and that the parade which was eventually held was conducted without serious complaint, save for the discrepancy in the

position of the suspect. It is fair to say that Mr Phipps did not appear to press this point, which was essentially a matter for the jury's consideration.

69. Finally, on the question of the non-attendance of the investigating officer as a witness at the trial, there is obviously no complaint about the trial judge's ruling on the prosecution's attempt to have the officer's deposition read at the trial (indeed, Mr Phipps described the objection by the defence at trial as having been "timely, where there was insufficient proof of the unavailability of the witness"). But further, as Miss Barnett also pointed out, evidence from the investigating officer as to his reasons for deciding to hold an identification parade would in any event have been irrelevant and inadmissible (see per Lord Carswell in ***Edwards,*** supra, at paragraph 23).

70. For all of these reasons, we are of the view that the complaints of both applicants that the verdicts were unreasonable having regard to the evidence have not been made good.

Conclusion

71. In the result, the applications for leave to appeal are refused and it is ordered that the sentences of both applicants are to run from 12 August 2006.