[2018] JMCA Crim 25

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS 83 & 84/2012

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MRS JUSTICE McDONALD-BISHOP JA
THE HON MR JUSTICE F WILLIAMS JA

JOEL BROWN v R

LANCE MATTHIAS

Gladstone Wilson for the appellant Joel Brown

Mrs Emily Shields instructed by Gifford Thompson & Shields for the appellant Lance Matthias

Mrs Andrea Martin-Swaby for the Crown

20, 21 February 2017 and 1 June 2018

MCDONALD-BISHOP JA

[1] On 12 July 2012, the appellants, Joel Brown and Lance Matthias, were convicted in the Home Circuit Court for the murder of Dorran Edward Mitchell ("the deceased"), following a trial before Smith J sitting with a jury. On 20 July 2012, they were both sentenced to life imprisonment, with the stipulation that they should serve a minimum period of 25 years before being eligible for parole.

[2] Both appellants applied for leave to appeal their convictions and sentences. They based their applications on four grounds of appeal which in broad outline were: misidentification by the witnesses; unfair trial; lack of evidence; and miscarriage of justice.

[3] On 17 December 2014, the appellants' applications for leave to appeal were considered by a single judge of this court. Leave to appeal was granted by the single judge on the basis that although the learned trial judge gave a detailed, balanced and helpful summation, and repeatedly warned the jury of the need for caution in approaching the evidence of identification, she failed to expressly and specifically relate the warning to cases of recognition by pointing out to the jury that mistakes in the identification of even close relatives and friends are sometimes made. Leave was granted for the court to explore the effect of this omission on the appellants' convictions.

The case at trial

The prosecution's case

[4] The prosecution relied on the evidence of six witnesses, two of whom were eyewitnesses, to establish their case against the appellants at the trial. The following pertinent facts constituted the core of the prosecution's case, which was accepted by the jury.

[5] In the dead of night, on 2 July 2004, Miss Theresa Mitchell and Miss Tamika Miller, mother and daughter, respectively, were at their home at an Old Harbour Road

address, Spanish Town, in the parish Saint Catherine, when the premises were invaded by heavily armed men. There were other family members of Miss Mitchell and Miss Miller who were present at the premises, including the deceased and one Raymond Miller, who was also called "Raymo" or "Rambo". The deceased was the nephew of Miss Mitchell and cousin of Miss Miller. Raymond Miller was the son of Miss Mitchell and brother of Miss Miller.

[6] Miss Mitchell was in the dining room lying in the settee when she was alerted to the presence of someone on the premises by a dog barking. She got up and looked through a hole in one of two doors leading to the veranda and, aided by light from a 100 watt light bulb on the veranda of the house, she was able to observe three men enter the premises. They were all armed with firearms. Two of the men entered the veranda and one remained at the gate. She heard a male voice on the veranda say, "kick off the door". She recognized the voice to be that of the appellant Lance Matthias, as he had lived with her for five years and was someone she had taken care of and with whom she would ordinarily speak. She had known Lance Matthias for more than eight years. She had last seen him approximately one month prior to the incident, when he asked her for money and she gave it to him.

[7] She heard the door to the room in which Raymond Miller and the deceased were sleeping being "kicked off" and the sound of a gunshot. She was unable to see who had kicked the door or fired the gunshot. However, on opening the dining room door, she saw Lance Matthias exiting that room with a firearm in his hand. At this point, he was standing between 6 to 8 feet away from her. He was wearing a wig with a "bang" to

the front, on his head. She was, nevertheless, able to see his face clearly, still aided by the light from the 100 watt bulb that was on the veranda. Lance Matthias was the only one seen coming from the bedroom.

[8] Miss Miller, who was sleeping at the time, was awakened by Miss Mitchell, advising her that there were persons on the premises. Shortly after being awakened, Miss Miller heard the door to her brother's room being "kicked off" as well as gunshots being fired. On hearing the door being kicked, Miss Miller picked up her daughter and attempted to go outside. She observed her mother in front of the door that had been kicked off, arguing with Lance Matthias. She also observed Lance Matthias wearing a wig and with a firearm held at his side.

[9] Miss Miller knew Lance Matthias for between 10 to 15 years as he was always at her mother's house and was someone her mother would take care of. She had last seen him four months prior to the day of the incident. On the day of the incident, Miss Miller was standing within arm's length of Lance Matthias and was able to see him clearly. Her observation of him was also aided by the light from the 100 watt bulb as well as the light in a room. She observed his entire body, inclusive of a scar on his face, for approximately half an hour.

[10] Miss Miller attempted to leave the house with her daughter when she observed the appellant Joel Brown standing beside Lance Matthias at the door. He was also armed with a firearm. He pointed it at her and said, "hey gal come out a di house".

[11] Miss Miller returned to her bedroom and hid her daughter beneath the bed. She then returned to where her mother and Lance Matthias were still standing. She noted that Joel Brown was no longer there.

[12] Miss Miller had known Joel Brown for seven years prior to the day of the incident, as she would often see him with her cousin, Curtis, and by her aunt's house. She last saw him about a year prior to the incident, at which time she was an arm’s length away from him. This was during the night. He had received a gunshot wound and had entered a bar in which she was sitting. He came there seeking assistance to be taken to hospital.

[13] At the time of the incident, Miss Miller was able to see Joel Brown's face clearly as well as the upper part of his body. He was also wearing a wig and standing between 3 to 5 feet away from her. She observed him for approximately 10 minutes.

[14] Miss Miller then observed the deceased "rush" from behind a door, run from the inside of the house unto the veranda and kick Lance Matthias onto a washing machine. He then jumped over the railing on the veranda and ran from the house towards the back of the premises. While the deceased was jumping over the railing, Miss Mitchell heard two gunshots being fired. She, however, could not say who had fired those shots.

[15] Lance Matthias subsequently re-entered the house and attempted to get Raymond Miller, who had been shot and injured, from beneath a bed in his bedroom. Miss Mitchell managed to prevent Lance Matthias from reaching Raymond Miller by pushing him onto the bed. His efforts having been thwarted, Lance Matthias ran from

the house and left the premises. When he left, Miss Miller could hear gunshots being fired in the lane. An alarm was made and other residents from the community gathered. A search was conducted and the body of the deceased was found at the side of the house with "blood spotting on the upper part of his body". The police were called.

[16] Following the report to the police, Detective Inspector Fitz Richards, then Detective Sergeant stationed at the Spanish Town Police Station, attended the scene. There, he saw the body of the deceased to the left front of the house lying in a pool of blood. The deceased was identified to him by Miss Mitchell.

[17] On 8 July 2004, a post mortem examination was conducted by consultant forensic pathologist Dr Ere Seshaiah on the deceased. Dr Ere Seshaiah found two gunshot wounds on the body and opined that the cause of the deceased's death was due to multiple gunshot wounds.

The appellants' case

[18] The appellants each made an unsworn statement from the dock. They both denied involvement in the murder.

Joel Brown

[19] Joel Brown's defence was one of alibi and that he was medically incapable of committing the crime because of injuries he sustained to his left shoulder on 6 March 2004, roughly three months before the incident. He stated that at the time of the commission of the offence, he was at his father's house in Manchester where he

resided, recuperating from his injuries. He also stated that at the time of his arrest his right hand was still injured, which resulted in him being unable to perform such tasks as holding a pen or squeezing a rag. He relied on the evidence of two witnesses in support of his case, one of whom was a registered medical practitioner, Dr Melton Douglas, and the other, his sister, Miss Shereen Brown.

[20] Dr Melton Douglas gave evidence that on 6 March 2004, he and a team of other doctors saw Joel Brown at the Kingston Public Hospital. Although he and the team were not the primary doctors managing Joel Brown's case, he was able to confirm from hospital records that Joel Brown had sustained a gunshot wound with right brachial plexus injury that caused paralysis of the right arm. At the time of the initial examination, neither Dr Douglas nor the team of medical practitioners was able to say if Joel Brown's injuries were temporary or permanent, but the doctor opined that the recovery time could have been as early as between six weeks to 12 months. Joel Brown was scheduled for a follow-up examination within six weeks of his initial examination but failed to return. Dr Douglas did not see Joel Brown again until 18 May 2009, when he observed that, while there was some difference in the size of his hand, he had made a full recovery.

[21] Miss Shereen Brown, the sister of Joel Brown, stated that he had visited her at her house that she shared with other family members in Manchester in March 2004. At the time of his visit, she observed that his face was swollen, he had a bandage on his neck and his right hand was in a sling. She had to take care of him because his right

hand was "dead" and the left hand was "weak". Joel Brown continued to reside at her home until sometime in July 2004, when the police took him into custody.

Lance Matthias

[22] Lance Matthias had told the police, upon being cautioned, that he was at home at the time it was alleged that he murdered the deceased. However, in his unsworn statement from the dock, he said nothing about being at home at the time of the incident. He maintained that he knew nothing of Miss Mitchell's relatives or the killing. He stated that he had not resided with Miss Mitchell and that she did not send him to school or care for him, as she had asserted. His response to the allegations was that they were fabricated. His defence was that Miss Mitchell was telling a lie on him because he and her son were friends and they had found a firearm which they took to her. He then left, went home and told his mother about the firearm. Thereafter, both his mother and Miss Mitchell took the firearm to the police station. Subsequent to this, Miss Mitchell told him that, "she don't want mi back over her yard because she say I am [an] informer...'true' the police tell her to 'carr' in her son" and that it was due to this that her son was "running wanted".

The grounds of appeal

[23] At the hearing of the appeal, leave was granted to counsel appearing for the appellants to abandon the original grounds of appeal and to argue supplemental grounds as filed.

Joel Brown

[24] The supplemental grounds of appeal, argued by Mr Gladstone Wilson on Joel Brown's behalf, were stated as follows:

> "**GROUND 1**
>
> Although there was insufficient description of a gun in possession of the [appellant], the learned trial judge failed to assist the jury with respect to the standard required to find [the appellant] in possession of a firearm.
>
> **GROUND 2**
>
> The learned trial judge gave no directions in law of how to treat the issue of recognition of the appellant, particularly where there are troubling aspects in the evidence adduced at trial.
>
> **GROUND 3**
>
> The ingredients of knowing [the appellant] before the incident was insufficient to establish knowledge and the issue was inadequately treated by the learned judge thereby rendering the guilty verdict unsafe."

Lance Matthias

[25] The grounds of appeal, argued on Lance Matthias' behalf by Mrs Emily Shields, were as follows:

> "1. The learned trial judge's summation to the jury on joint enterprise/common design was wholly insufficient and incorrect in law having regard to the recent decision of the Privy Council in **Ruddock and Jogee v R** [2016] UKSC 8; [2016] UKPC 7 which affirms the guidance in **R v Anderson and Morris** [1966] 2 All ER 644; **R v Barry Reid** (1976) 62 Cr App R 109; **R v Collison** (1831) 4 Car & P 565 [sic] in that:

(a) The learned trial judge failed to properly guide the jurors on the need for them to identify the common purpose of the joint enterprise thereby directing the jurors that the common purpose was to commit the offence or were part of the plan (murder) when on the evidence, it may have been different.

(b) The learned trial judge failed to leave an alternative verdict of manslaughter for the consideration of the jury in that the learned trial judge failed to direct the jury that if there was a common design to use unlawful violence short of the infliction of grievous bodily harm, then the appellant, Lance Matthias, could be found guilty of manslaughter if the victim's death was an unexpected consequence of the carrying out of that common design.

(c) The learned trial judge failed to tell the jury that if they accepted that the appellant, Lance Matthias, was present at the crime scene (to intimidate the occupants of the house) with a gun, it did not automatically follow that he was also party to the murder of the deceased.

(d) The learned trial judge erred in that she gave no direction at all when there should have been one as to whether the unknown principal went beyond the scope of what was tacitly agreed or encouraged by the appellant, Lance Matthias, and the consequence of such departure.

2. The insufficient and incorrect directions on joint enterprise/common design of the learned trial judge were misdirections in law which have rendered the conviction of Lance Matthias a miscarriage of justice.

3. The learned trial judge's direction on recognition was insufficient in that though she dealt with the weaknesses in identification and gave the appropriate **Turnbull** caution she failed to tell the jury that though recognition may be more reliable than identification of a stranger, mistakes in recognition of close relatives and friends are sometimes made - a crucial compulsory aspect of the Turnbull warning which renders the conviction a miscarriage of justice."

The issues

[26] Three core issues have been extracted from the grounds of appeal for the consideration of the court; they are:

(i) Whether the learned trial judge erred in failing to assist the jury with respect to the standard required to find Joel Brown in possession of a firearm in the light of the insufficient evidence of the description of the firearm alleged to have been in his possession (Joel Brown: ground 1).

(ii) Whether the learned trial judge failed to give the jury adequate directions in law on how to treat with the witnesses' purported recognition of the appellants, thereby rendering their convictions a miscarriage of justice (Joel Brown: grounds 2 and 3 and Lance Matthias: ground 3).

(iii) Whether the learned trial judge misdirected the jury on joint enterprise/common design, in the light of the decisions in **R v Jogee; Ruddock v The Queen** [2016] UKSC 8, and as a consequence, erred in failing to leave manslaughter for the jury's consideration, thereby rendering the conviction of Lance Matthias a miscarriage of justice (Lance Matthias: grounds 1 and 2).

Issue (i)
The failure of the learned trial judge to assist the jury with respect to the standard required to find the appellant Joel Brown in possession of a firearm (Joel Brown: ground 1)

[27] Mr Wilson submitted that Miss Miller was unable to assist the court with a description of the firearm that she said she saw in Joel Brown's possession. Relying on such authorities as **Julian Powell v R** [2010] JMCA Crim 14, **R v Neville Purrier and Tyrone Bailey** (1976) 14 JLR 97 as well as the Firearms Act, counsel argued that the witness was required in law to describe some element of a firearm, instead of merely stating that she had seen one in the possession of Joel Brown. The absence of this evidence was fatal, counsel contended, because if Joel Brown was present at the scene, without a firearm, that would not have made him a part of the common design to commit murder but, arguably, a mere look out man.

[28] Mr Wilson contended that without assisting the jury as to whether the evidence from the only witness to say Joel Brown had a firearm met the legal standard, the learned trial judge removed any doubt in her view of this aspect of the evidence. Counsel argued further that on a close review of the learned trial judge's directions, it can be seen that she failed to direct the jury's attention to the failure of the witness to describe the firearm. This crucial bit of evidence, counsel submitted, was ignored and amounted to a misdirection.

[29] In her response on behalf of the Crown, Mrs Andrea Martin-Swaby contended that there was no merit in the arguments raised on Joel Brown's behalf that the learned

trial judge's failure to assist the jury with respect to the description of the firearm and the standard required to establish that he was in possession of a firearm, was fatal. Such a direction from the learned trial judge, counsel contended, was not warranted, given the offence for which Joel Brown was being tried.

[30] Counsel submitted that the cases relied on by Mr Wilson were irrelevant, they having referred to the issue of the sufficiency of the description of a firearm, where the offence for which a defendant is being tried is illegal possession of a firearm. She argued that the appellant was not being tried for illegal possession of a firearm under the Firearms Act, which would have required, in law, a sufficient description of the object alleged to have been a firearm. She further submitted that the act which the prosecution contended had caused the deceased's death, was the discharge of a firearm and although there was no evidence led as to who fired the fatal shots, the case against Joel Brown, was one of joint responsibility arising from a joint enterprise.

[31] Mrs Martin-Swaby maintained that there was very compelling and cogent identification evidence from Miss Miller in relation to Joel Brown on which the jury could rely in finding as they did that he was present at the scene of the crime and was one of the perpetrators who participated in the killing of the deceased. The learned trial judge's directions in this regard, counsel maintained, were adequate.

[32] It is indeed indisputable that Miss Miller gave no particular description of the firearm she alleged she saw in the hand of Joel Brown on the morning in question. Her testimony was that she could not recall what it looked like, the size of it and how it was

pointed at her. She only stated that she said it was "a gun" because she knew it was "a gun".

[33] The principle on which the prosecution relied as a basis for Joel Brown's conviction, was that of joint enterprise/common design, in that, he was among a group of men who were armed with firearms who killed the deceased and that his presence was not merely accidental but that he was there aiding and abetting the commission of the offence with the requisite intention to do so. There was, therefore, no onus on the prosecution to prove, and no duty on the learned trial judge to ensure, that the object alleged to have been a firearm was, in fact and law, a firearm within the meaning of the Firearms Act. It would not have made a difference to his criminal responsibility if he were merely the lookout man, as Mr Wilson argued.

[34] Provided there was evidence, to satisfy the requirements of the law as to joint responsibility, then whether or not the object he had was a firearm, strictly speaking, within the meaning of the law, is irrelevant. He had armed himself with an object that, at least, resembled a firearm and the cause of death were gunshot wounds, which the deceased sustained on those premises at the material time. This was more than sufficient to give rise to the reasonable and inescapable inference that he was there to assist and encourage others who were themselves armed with firearms to carry out a hostile invasion of the premises in the dead of night. Indeed, even if what he had was an imitation firearm, his participation would still have taken the form of providing support by contributing to the force of numbers in a hostile confrontation. The question

for the jury would have been whether he acted as a participant with the requisite intention for him to be found criminally liable for the murder.

[35] We, therefore, cannot agree with Mr Wilson's submission that the learned trial judge's directions were inadequate due to her failure to point out to the jury the absence of sufficient evidence establishing the fact that Joel Brown was in possession of an object which was in law a firearm. In the circumstances, this aspect of the appellant's complaint, concerning the description of the firearm that was alleged to have been in his possession, cannot avail him as a basis on which this court could justifiably disturb his conviction. This ground of appeal, therefore, fails.

Issue (ii)

The failure of the learned trial judge to adequately direct the jury in respect of the purported recognition of the appellants (Joel Brown: grounds 2 and 3 and Lance Matthias : ground 3)

[36] In mounting his arguments that the learned trial judge failed to give adequate directions on the evidence of visual identification in relation to Joel Brown, Mr Wilson highlighted the following aspects of Miss Miller's evidence as being inadequate to ground a reliable recognition of the appellant:

a. she last saw Joel Brown one year prior to the incident;

b. stating that she saw Joel Brown for 10 minutes, although her evidence of what she witnessed would not comport with that length of time;

c. her initial assertion in her statement to the police that she had known Joel Brown for seven years prior to the incident, then later changing the time to two years in her evidence in cross-examination, and then again to seven years upon re-examination, without reference to a date or the circumstances of the length of that association; and

d. she had seen Joel Brown in the company of Curtis, her cousin, whom he might have known by the aliases "Kuto" or "Topi".

[37] Relying on the decision in **Kevin Williams v R** [2014] JMCA Crim 22, Mr Wilson contended that the evidence of Miss Miller did not satisfy the "cognitive elements" that recognition required and that the dock identification of the appellant in the circumstances was, therefore, questionable. Counsel contended that this was so, particularly, in the light of (a) the absence of interaction; (b) the brevity of the witness' previous sightings; and (c) the lack of specifics as to time and circumstances.

[38] Mr Wilson also submitted that in circumstances such as these, the learned trial judge was required in law to give the directions as outlined in **R v Turnbull and another** ("**Turnbull**") [1976] 3 All ER 549, that mistaken identification of close relatives, friends and acquaintances can be made. The need for this warning was particularly important, Mr Wilson contended, given that (a) Joel Brown was identified by only one of two witnesses who were in close proximity at the time of the incident; (b) Miss Mitchell did not see anyone confront Miss Miller with a firearm; and (c) the time of

Miss Miller's observation of Joel Brown was not lengthy her observation of Lance Matthias.

[39] Mrs Shields, in her submissions on behalf of Lance Matthias on this ground, argued that whilst the learned trial judge's summation was otherwise unassailable, she, had failed to remind the jury that mistakes in the recognition of close relatives and friends are sometimes made. These directions were salient, she said, particularly in circumstances where the eyewitnesses gave evidence that Lance Matthias was known to them for a long time and was treated by them as a member of the family.

[40] Mrs Martin-Swaby submitted in response on behalf of the Crown that, this being a recognition case, evidence was appropriately led as to the length of time within which Miss Miller was said to have known Joel Brown prior to the incident, how often he was seen during that period as well as the particulars of the last occasion prior to the date of the incident on which he was seen. She contended that whilst she accepted that there were inconsistencies in the period of time the witness said she had known Joel Brown, prior to the date of the incident, it was never challenged that she did, in fact, know him. On this basis, she submitted that the dock identification would not have been objectionable and so, the decision in **Kevin Williams v R**, relied on by Mr Wilson, would be inapplicable.

[41] In relation to Lance Matthias, Mrs Martin-Swaby noted that the questions that were posed to Miss Mitchell in cross-examination suggested that Lance Matthias' contention was that she was "deliberately lying" and through wicked invention had

accused him of committing the crime. He never challenged her prior knowledge of him and he never alleged that she was mistaken. In relation to Miss Miller, there was also no challenge to her evidence that she had known him before.

[42] Mrs Martin-Swaby submitted further that in assessing the submissions of counsel for the appellants, this court should first consider the nature and context of the evidence that was led at trial. She argued that whilst the learned trial judge had omitted to specifically state that mistakes in recognition of close relatives and friends are sometimes made, the authorities suggest that whilst the importance of a **Turnbull** warning is not limited to cases of pure identification, and, in fact, extends to cases of recognition, there is no precise form of words that is to be used, so long as the essential elements of the warning are pointed out to the jury. Crown Counsel relied on such cases as **Omar Grieves and others v R** [2011] UKPC 39 and **Shand v R** [1996] 1 ALL ER 511, in support of this aspect of her submissions.

[43] Also relying on **Wayne Watt v The Queen** (1993) 42 WIR 273, Mrs Martin-Swaby pointed to the dictum of the Privy Council that the **Turnbull** guidelines were primarily designed to deal with "the ghastly risk run in cases of fleeting encounters" and that what must be considered is whether there was a significant failure on the part of the trial judge to follow the guidelines. She maintained that in this case, there was no significant failure to follow the guidelines. She further contended that, in keeping with the authorities, this court ought to conduct an assessment of the learned trial judge's directions on visual identification, together with the quality of the identification evidence in determining the effect of "a less than fulsome **Turnbull** direction" on the appellants'

convictions. In her words, "the direction by itself is not conclusive of the matter". She derived support from the dicta of the Privy Council in **Michael Rose v The Queen** Privy Council Appeal No 3 of 1993, judgment delivered 10 October 1994 and **Michael Freemantle v The Queen** Privy Council Appeal No 1 of 1993, judgment delivered 27 June 1994, in advancing this point.

[44] We accept the principles extracted from the authorities, relied on by the Crown, that whilst the importance of a **Turnbull** warning is not confined to cases of first time identification, and is applicable to purported recognition cases, there is no precise form of words that need to be used. What is imperative is that the critical elements of the warning are brought to the attention of the jury.

[45] This has led us to critically examine the directions of the learned trial judge on identification. The charge of the learned trial judge in relation to identification is contained principally in the following passages:

> "Now this is trial--case against the accused depends to a large extent on the correctness of identification of the accused, which incidentally, both accused are alleging is not correct.
>
> In the case of Mr. Matthias, he is saying lies are being told against him because there was bad blood between himself and the deceased man's family;...
>
> In the case of the accused, Mr. Brown, Mr. Joel Brown, he is saying this is a case of mistaken identity, and he was never present there that night. You recall he, in his unsworn statement, said that he was very sick and was at home being attended by his relatives.

> I must, therefore, warn you, Mr. Foreman and members of the jury, of **the special need for caution before convicting the accused in reliance on the evidence of identification. And the reason for caution is because it is possible for an honest witness to make a mistaken identification**. There have been wrongful convictions in the past as a result of such mistakes.
>
> An apparently convincing witness can be mistaken, so can a number of apparently convincing witnesses. You should, therefore, carefully examine the circumstance under which the identification by each witness was made and you will have to look at such things as, how long did the witness have the persons, he or she is saying were the accused, under observation.
>
> ...
>
> **As I said, I must warn you, because the law says I must warn you that it is possible for even an honest witness to make a mistake in cases of visual identification. But as I said, you will have to look at the evidence and bearing those aspects that I have pointed out to you, determine whether you think there was any mistaken identification**." (Emphasis added)

Then, after directing the jury's attention to the evidence of Miss Mitchell that she had recognised Lance Matthias by his voice when she first heard him say "kick off the door", the learned trial judge warned the jury again in these terms:

> "**I must tell you, you must be very cautious in the examination of this evidence, and the reliance that you place on it as persons' voices can be mistaken for other persons' voices.**
>
> Therefore, in order for the evidence of the witness who stated that she recognized the accused person by his voice, to accepted [sic] it as cogent, there must be evidence of the degree of familiarity the witness has had with the accused and his voice. Including the fair opportunities that the

> witness may have had to hear the voice of the accused..." (Emphasis added)

Having instructed the jury on all those matters and having assisted them in their approach to the evidence against the background of the warning she had already given them, the learned trial judge concluded her summation on the issue of identification in this way:

> "However, in closing on this area **I will emphasize the need for caution in acting on this type of evidence because there is always the possibility of mistakes being made**. **So, as you approach the voice identification and visual identification you must bear that caution in mind, that mistakes can be made and you have to examine the evidence of visual identification and voice identification very carefully**." (Emphasis added).

[46] As the learned trial judge correctly recognised and pointed out, the case for Joel Brown was mistaken identity whereas for Lance Matthias, it was essentially that the witnesses were lying although his counsel at the trial had put to Miss Miller that she was mistaken as well as lying. She also properly recognised that the prosecution had also put forward voice identification in respect of Lance Matthias.

[47] There is no question that the **Turnbull** warning was required in respect of both appellants and in respect of visual as well as voice identification. It is well settled that even where the challenge to the witness is one that he is lying rather than being mistaken, a trial judge is still required to give the **Turnbull** warning as to mistaken identification: see **Shand v R** and **Omar Grieves and others v R**.

[48] In **Omar Grieves and others v R**, the Privy Council said this, in so far as is relevant:

> "[31] ... to what extent a *Turnbull* direction is required where the issue is whether the identifying witness has fabricated his evidence rather than whether he has made an honest mistake. Mr Birnbaum accepted that the following passage in the current edition of *Archbold*, at para 14-15, is an accurate and succinct summary:
>
> > 'A *Turnbull* warning is not required and would only confuse a jury where (a) the defence attack the veracity and not the accuracy of the identifying witness . . . . There is, however, an obvious need to give a general warning even in recognition cases where the main challenge is to the truthfulness of the witness. The first question for the jury is whether the witness is honest; if he is, the next question is the same as that which must be asked of every honest witness who purports to make an identification, namely, whether he is right or might be mistaken: *Beckford v R* 97 Cr App Rep 409, (PC); but the judge need not go on to give an adapted *Turnbull* direction (reminding the jury that people can make mistakes in recognising relatives, etc) where such a direction would add nothing of substance to the judge's other directions...'
>
> [32] In Shand [1996] 1 All ER 511, [1996] 1 WLR 67, [1996] 2 Cr App Rep 204 the defence case was that the identifying witnesses were deliberately lying, and it was not suggested that they were mistaken. Lord Slynn, delivering the judgment of the Board, said at p 72:
>
> > 'The importance in identification cases of giving the *Turnbull* warning has been frequently stated and it clearly now applies to recognition as well as to pure identification cases. It is, however, accepted that no precise form of words need be used as long as the essential elements of the warning are pointed out to the

> jury. The cases in which the warning can be entirely dispensed with must be wholly exceptional, even where credibility is the sole line of defence. In the latter type of case the judge should normally, and even in the exceptional case would be wise to, tell the jury in an appropriate form to consider whether they are satisfied that the witness was not mistaken in view of the danger of mistake referred to in *R v Turnbull* [1997] 1 QB 224'."

[49] Having considered the helpful submissions of counsel on both sides, and having assessed the relevant aspects of the learned trial judge's charge to the jury on identification, the arguments advanced by Mrs Martin-Swaby on this issue concerning the adequacy of the learned trial judge's directions have found favour with us. The learned trial judge did point out to the jury that this was a recognition case. She extended her directions by specifically saying that this was not a situation in which the appellants were unfamiliar to the witnesses. She, however, did not direct the jury that mistakes in the identification of close relatives and friends are sometimes made, of which the appellants complained. The pressing question is whether this was such a significant failure so as to render the convictions unsafe. It is our view that it is not. We say so for the reasons detailed below.

[50] The reasoning of the Privy Council in **Mark France and Rupert Vassell v The Queen** [2012] UKPC 28, proves quite instructive and reflects the position of this court in assessing the learned trial judge's treatment of the **Turnbull** guidelines. In that case, it was argued by counsel for the appellants that the judge had failed to give sufficiently explicit directions on the dangers inherent in purported recognition cases,

although she gave the **Turnbull** warning in all other respects. The judge's warning to the jury on the basis that it was a recognition case was simply this: " ...this case may be classified as a recognition case. However, despite the fact that this is a recognition case, my warning to you on the caution to be exercised is not to be watered down at all". The judge in that case, like in the case at bar, did not go as far as to say that mistakes can be made even in the recognition of close family and friends.

[51] The Board was asked to consider whether the learned judge ought to have drawn the jury's attention to the fact that a common experience was that people mistakenly believed that they recognised someone well known to them. In fact, counsel had suggested to their Lordships that seven separate elements had to be present in a judge's charge to the jury in an identification case, which relies on purported recognition of an accused. One of the elements recognised by counsel is the special warning that mistakes in the recognition of close relatives and friends are sometimes made.

[52] In rejecting the arguments of counsel, Lord Kerr, in giving the opinion on behalf of the Board, reiterated their Lordships view as stated in **Mills v The Queen** [1995] 1 WLR 511, that the **Turnbull** principles do not impose a fixed formula for adoption in every case. It will suffice, they said, if the trial judge's directions comply with the sense and spirit of the guidelines.

[53] Their Lordships, having considered the trial judge's charge to the jury on the issue of visual identification, had this to say:

> "18. The need for special caution in dealing with identification evidence had therefore featured prominently in the judge's charge. Likewise the reason that caution was required (viz that it was possible for an honest witness to be mistaken) was expressly drawn to the jury's attention.
>
> ...
>
> 23. It was submitted that the judge failed to give sufficiently explicit directions on the dangers inherent in purported recognition cases. It was suggested that he ought to have drawn to the attention of the jury that a common experience was that people mistakenly believe that they have recognised someone well known to them, the phenomenon colloquially described as, "I could have sworn it was you". In the present case the judge suggested to the jury that the need for caution in this case (which was plainly one of purported recognition) was just as great as in an identification case which did not involve the witness claiming to have recognised the appellants. He advised the jury that they should examine closely the question whether Mr Sutherland was correct in his claim to have known them and whether he had had sufficient opportunity to register their features so as to be able to make a reliable identification of them. In the Board's judgment this fulfilled the need to comply with the sense and spirit of the *Turnbull* guidelines."

[54] We are of the view that the foregoing dicta sufficiently answer the complaint of the appellants in the instant case regarding the learned trial judge's treatment of the warning specifically relating to visual identification based on recognition. The jury would have known that the case that was before them for consideration was a case based on the purported recognition of persons indisputably known to the witnesses. This was made clear by the learned trial judge. The learned trial judge, in those circumstances, had repeatedly warned them of the need to approach the evidence with caution. They would have known the fundamental reason for the warning, which, as

was pointed out to them by the learned trial judge, was the danger of mistaken identification, even by an honest but convincing witness. They would also have known, as it was told to them by the learned trial judge, that two or more honest witnesses could be mistaken. The learned trial judge also made it abundantly clear to them that a miscarriage of justice can result from mistaken identification because persons have been wrongly convicted in the past based on mistaken identification.

[55] In the end, the jury would have been made to understand quite clearly that the warning given to them by the learned trial judge was applicable, in all respects, to the case before them, which was one based on purported recognition. They would have been directed that it was incumbent on them to carefully examine the circumstances in which the purported identification of each appellant was made, while bearing in mind the weaknesses in the evidence highlighted by the learned trial judge.

[56] Consequently, the failure of the learned trial judge to recite, in a formulaic manner, the **Turnbull** prescriptions in relation to purported recognition cases, is not fatal in the light of her detailed warning to the jury as to how to approach the identification evidence in the case. Her directions would have brought home forcefully to the jury the need to critically examine the identification evidence in respect of both appellants because of the "ghastly risk" of mistaken identification and the miscarriage of justice that could result from it. She adhered substantially, and in all fundamental respects, to the letter, sense and spirit of the **Turnbull** guidelines.

[57] Quite apart from an examination of the directions of the learned trial judge, we have also assessed the quality of the identification evidence in relation to both appellants. We found the identification evidence to be strongly supportive of the convictions.

[58] In relation to Joel Brown, we do accept that the witness, Miss Miller, did not say that she had him under observation as long as she did the appellant Lance Matthias. We also do not believe, upon an objective assessment of the occurrences at the time, that she would have seen him for approximately 10 minutes as she had stated. The observation time would have been shorter. That, notwithstanding, it cannot be said to have been a recognition based on a fleeting glance or a longer observation made under difficult circumstances that could have prevented a reliable identification of the appellant. She had sufficient lighting, ample time and was in close proximity to him to make a positive identification of someone she knew before and had seen relatively regularly, even at night. The jury obviously found that to have been the case, having been properly warned by the learned trial judge to consider carefully the circumstances in which the identification was made, and the weaknesses in the evidence as pointed out by her, against the background of the inherent dangers of mistaken identification.

[59] We also find that Mr Wilson's argument that the dock identification of Joel Brown was questionable cannot be accepted in the circumstances of this case, where there was no dispute that the identifying witness had known him before. The witness also gave his full name to the police. In the light of all that, an identification parade would have served no useful purpose in this case and so there was no danger attendant on

the identification of the appellant in the dock (see **Mark France and Rupert Vassell v The Queen**). We agree with Mrs Martin-Swaby that the decision in **Kevin Williams v R**, does not assist the appellant Joel Brown in this regard.

[60] At the end of the case, the jury had all the evidence, including the fact that Joel Brown was not named by Miss Mitchell, the other witness, as being present on the scene. They, nevertheless, accepted Miss Miller as a witness of truth who was not mistaken, having been properly directed by the learned trial judge on issues of credibility and the possibility and dangers of mistaken identification. It was for the jury, as the judges of the facts, to say what they accepted as true and what they would reject as being untrue or unreliable. Joel Brown gave an unsworn statement, supported by alibi evidence, which was evidently rejected by the jury, after accurate directions in law were given to them as to alibi and the burden and standard of proof.

[61] There is nothing in the evidence of visual identification, and the learned trial judge's directions on the issue, which would form a proper basis for interfering with the jury's verdict in relation to Joel Brown. We, therefore, do not accept the submissions of Mr Wilson that the learned trial judge failed to sufficiently address some pertinent issues, which may have called into question the reliability of the identification evidence in respect of Joel Brown.

[62] We have thoroughly assessed the evidence that was before the jury in relation to Lance Matthias, as we have done in relation to his co-appellant. We have found the identification evidence in relation to him to be overwhelming. The witness' claimed prior

knowledge of him was strong and, largely, undisputed. There was ample opportunity for both witnesses to observe him in good and sufficient lighting and in very close proximity. There was ample opportunity for them to have heard and recognised his voice. The circumstances surrounding his identification were good and remained good up to the end of his case. The learned trial judge, having warned the jury that even two or more witnesses can, nevertheless, be mistaken, would have brought home to the jury the need for caution in relying on the identification evidence of the two witnesses in relation to him, even though it appeared strong. This warning was given, despite the case advanced by this appellant that the witnesses, particularly Miss Mitchell, were fabricating a story against him out of ill-will and spite. There was no significant failure in the directions of the learned trial judge in relation to identification in relation to him that would be fatal to his conviction.

[63] The jury was, in the end, told to consider whether they were satisfied to the extent that they were sure that the witnesses were not mistaken in relation to both appellants, in view of the danger of the possibility of mistaken identity. The jury would have had to make that assessment in the case before them, which was one of recognition. In all the circumstances of the case, and given the cogency of the identification evidence in relation to both appellants, we form the view that even if the specific direction on the recognition of familiar persons was fully given, it would not have made a difference to the convictions. There can be no miscarriage of justice based on the omission in the learned trial judge's directions on the issue of identification.

[64] The grounds of appeal challenging the learned trial judge's directions on recognition in relation to both appellants, therefore, fail.

Issue (iii)

The adequacy and accuracy of the learned trial judge's treatment of the issue of common design/joint enterprise and the failure to leave manslaughter for the consideration of the jury in the light of *R v Jogee; Ruddock v The Queen* (Lance Matthias: grounds 1 and 2)

[65] Mrs Shields submitted on behalf of Lance Matthias that the learned trial judge, throughout her summation to the jury on the issue of joint enterprise, referenced only murder. This, counsel contended, was flawed in the light of all the evidence in the case and the applicable law. Counsel submitted that when one examines the evidence, Lance Matthias displayed no intention to kill or cause grievous bodily harm, which would ground the necessary intent for murder. She maintained that at the highest, Lance Matthias' actions displayed an intention to cause unlawful violence or, at least, an intention to intimidate.

[66] Relying on the principles enunciated in **R v Jogee; Ruddock v The Queen**; **R v Barry Reid** (1976) 62 Cr App Rep 109; **R v Smith (Wesley)** [1963] 3 ALL ER 597; and **R v Collison** (1831) 4 C & P 565, counsel submitted that the learned trial judge failed to properly guide the jurors on the need for them to identify the common purpose of the joint enterprise, thereby directing the jurors that the common purpose was to commit the offence or that the appellants were part of the plan to murder when on the evidence, it may have been different. Mrs Shields complained that the learned trial judge, at several points, in outlining the case for the prosecution, and in giving

directions on joint responsibility, made reference to the commission of "the offence" and that it was clear from the summation that "the offence" to which reference was being made was the murder of the deceased.

[67] Mrs Shields highlighted several aspects of the evidence in her effort to convince the court that there was no evidence that Lance Matthias intended to kill or cause serious bodily harm, although he was present in the house and armed with a firearm. She noted, in particular, the following: (a) he had the firearm at his side at all times during a lengthy argument with Miss Mitchell; (b) he went into the house and tried with one hand, having the firearm in the other, to lift the bed under which Raymond Miller was hiding; (c) there was bad blood between Raymond Miller and him but he did nothing to Raymond Miller when he was trying to get him from under the bed; (d) although there is evidence that Raymond Miller was shot in the foot, the spent shell found in the room matched a long firearm and not one fitting the description of the firearm he is said to have carried; and (e) no one saw him fire any shot in Raymond Miller's room.

[68] Counsel further pointed out that the prosecution, in responding to the no case submission of Joel Brown at trial, had said that both men were present at the house, armed with firearms and that that action was to intimidate the occupants of the house. The prosecution went on to rely, she said, on "reasonable foreseeability" in common design, a principle disapproved by the Privy Council.

[69] Mrs Shields contended further that a jury properly directed could have believed the evidence of Miss Miller and concluded that there were joint adventurers with offensive weapons present on the day the deceased died, with an intention to do "some harm" but not necessarily murder or serious bodily harm. This is premised, she said, on the fact that there was no evidence of Lance Matthias having any intention to kill or cause grievous bodily harm, neither was there any evidence from which it could be deduced that he intended to assist or encourage the commission of murder or the infliction of grievous bodily harm.

[70] In the light of this, counsel opined, that the learned trial judge's failure in her summation to properly identify the common purpose, led to a "narrowing of the minds of the jurors" on one common purpose, which led to a miscarriage of justice. Also, by misdirecting the jury in relation to the law on joint enterprise/common design, and by focusing the minds of the jury on one common purpose, the learned trial judge erred by failing to leave manslaughter as an alternative offence for the jury's consideration. The learned trial judge's failure to do this, counsel maintained, led to a miscarriage of justice.

[71] Mrs Martin-Swaby submitted in response that, contrary to Mrs Shields' arguments, the learned trial judge's directions were adequate and appropriate, particularly, in the light of the Court of Appeal's decisions in **R v Dennie Chaplin, Howard Malcolm and Peter Grant** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 3 and 5/1989, judgment delivered 16 July 1990; **R v Clyde Sutcliffe and Randolph Barrett** (unreported), Court of Appeal, Jamaica, Supreme

Court Criminal Appeal Nos 148 and 149/1978, judgment delivered 10 April 1981 and the "catalogue of events" which the jury was required to consider. Counsel for the Crown submitted that **R v Jogee; Ruddock v The Queen** is not applicable to the case at bar, and along with the other decisions relied on by the appellant, is unhelpful in assessing the adequacy of the learned trial judge's directions on common design in the particular circumstances of this case. She also refuted the suggestion that this was a proper case for manslaughter to have been left for the consideration of the jury.

[72] Once again**,** we find ourselves in complete agreement with Mrs Martin-Swaby that there is no basis, in law or in fact, to impeach the directions that the learned trial judge gave on common design/joint enterprise and to find that she erred in not leaving manslaughter for the jury's consideration. In our view, Mrs Shields' reliance on **R v Jogee; Ruddock v The Queen,** and the line of authority followed in that case, is misplaced in the circumstances of this case and, even more so, in relation to Lance Matthias.

[73] The main thrust of the prosecution's case against Lance Matthias was that he acted pursuant to a joint enterprise, which culminated in the murder of the deceased. The principal components of the evidence against him, and other aspects which are relevant to the commission of the offence, were that:

i. He had entered the premises with other men who were also obviously armed with firearms.

ii. Miss Mitchell, one of the two eyewitnesses, heard a voice on her veranda say, "kick off the door", which she recognized to be his voice.

iii. Miss Mitchell responded to say, "Lance, kick off which door, you put on door here". The door to the room occupied by the deceased and Raymond Miller was kicked off and shots were fired in that room.

iv. On opening the dining room door leading to the veranda, Miss Mitchell observed him running with a firearm in his hand from the bedroom in which the deceased and Raymond Miller were sleeping. He was the only person who was seen exiting that bedroom after the shots were fired.

v. Upon leaving the room, he came and stood in front of Miss Mitchell at the dining room door. She looked directly at his face and also observed that he had a firearm in his hand. There was a verbal exchange between them. She said to him, "my youth, is you that live in mi house five years, a feed you, a do everything for you, a come here come fire gunshot in a mi house" and he responded to her saying, "just cool nuh Miss Terry, just cool nuh Miss Terry".

vi. Following that exchange, the deceased was seen running from the bedroom he shared with Raymond Miller and on his way, he either kicked or jumped on Lance Matthias pushing him on to a washing machine. The deceased then jumped over the veranda railing into the yard. Shots were then heard coming from the outside where the deceased had gone.

vii. Following the discharge of gunshots on the outside, Lance Matthias re-entered the room where Raymond Miller was hiding under the bed. He was trying to lift the bed under which Raymond Miller was hiding with one hand, while the firearm was in the other hand. He was cursing expletives and repeatedly told Raymond Miller "to come from under the bed". Miss Mitchell said to him, "if you going to kill him, you have to kill me too". She then "[gave] him one push and push him down on the bed". According to Miss Mitchell, the firearm dropped from his hand onto the bed. He picked it up and ran from the room. (Miss Miller had said that the firearm had dropped from him at another point in time. However, it was open to the jury to reject her and accept Miss Mitchell. There was, therefore, evidence before the jury, which they could have accepted and found that the firearm dropped from him in the bedroom).

viii. He was seen leaving through the gate of the premises with the other men and they were firing "a lot of shots" as they departed.

ix. After they left, Raymond Miller was taken from under the bed by Miss Mitchell suffering from injuries to his leg. Miss Miller's evidence was that his foot was "shot off".

x. The deceased was found in the yard suffering from gunshot wounds. Both he and Raymond Miller were taken to the Spanish Town Hospital. The deceased succumbed to his injuries and Raymond Miller was admitted for treatment.

[74] The relevant aspects of the learned trial judge's summation on joint enterprise, in so far as is relevant, were as follows:

> "Now the Prosecution's case is that the [appellants] committed the offence jointly with other persons and where a criminal offence is committed by two or more persons, each of them may play a different part but if they are in it together as part of a joint plan or agreement to commit the offence, then they are each guilty. The word plan or agreement do not mean that there has to be any formality about it. They don't have to sit down and draft a plan or come to an agreement. An agreement to commit an offence may arise on the spur of the moment, no need [sic] be said at all. It can be made with a nod and a wink or a knowing look. An agreement can also be inferred from the behaviour of the parties in this case, the evidence is there. You have a group of men, at least three, including the two accused who were present at that premises that morning, armed with guns when the door of the deceased house was kicked and as he tried to escape, shots were heard and the deceased was subsequently found dead-- with gunshot injuries. You may therefore ask yourselves, if it can be inferred from

> those facts that the accused were part of the plan that unfolded at those premises...that morning."

[75] The learned trial judge went on:

> "The essence of joint responsibility...for a criminal offence, is that each defendant shared the intention to commit the offence, and took some part in it, no matter how great or how small, so as to achieve that purpose. Your approach to the case, therefore, should be as follows: In looking at the case of each accused, you have to be sure that they went there with the intention to either to [sic] kill or cause serious bodily harm; they took part in committing the offence, then they would be guilty as charged.
>
> ...
>
> [A]lthough they are charged together, and it is said that it is a joint enterprise, you have to look at the evidence against each and be satisfied to the extent that you feel sure, that they were part of this joint enterprise. Mere presence at the scene of a crime is not enough to prove guilt, but if you find that the particular accused was at the scene and intended, and did, by his presence, encourage the others to commit the offence, then he is guilty."

[76] The learned trial judge then embarked on an assessment of the relevant parts of the evidence, within the context of her directions on joint enterprise/common design. She assisted the jury with the approach they should take in examining the evidence against the background of the applicable law. She specifically pointed out the absence of direct evidence as to who had fired the fatal shot.

[77] The learned trial judge was concerned with the charge laid against the appellants, which was murder. The jury was required to return a verdict in respect of that offence. The learned trial judge explained the legal basis on which the men could

be convicted of murder, in the absence of evidence that any of them had fired the fatal shot. The only basis on which culpability could have been found would have been on the long established principle of joint enterprise/common design. The core of the principle, as restated in **R v Jogee; Ruddock v The Queen**, is that a person who assists or encourages another to commit a crime (the secondary party or the accessory) is guilty of the same offence as the actual perpetrator of the crime (the principal) if he "shares the physical act", that is, through assisting and encouraging the physical act. In their Lordships words, "[h]e shares the culpability precisely because he encouraged or assisted the offence". Their Lordships further explained:

> "Sometimes it may be impossible for the prosecution to prove whether a defendant was a principal or an accessory, but that does not matter so long as it can prove that he participated in the crime either as one or as the other."

These basic principles, their Lordships said, are "long established and uncontroversial".

[78] The learned trial judge in her directions to the jury did not depart from these well established and uncontroversial principles. In this case, the prosecution could not definitively prove whether the appellants, or any of them, was the actual shooter who caused the death of the deceased. That did not matter, however, as long as the prosecution could prove that they each participated in the commission of the crime with the requisite intention to commit it or aid in its commission and with knowledge of the facts constituting its commission. There was sufficient evidence presented by the prosecution to establish that fact. There is nothing objectionable in the directions given by the learned trial judge referencing murder as the offence for the consideration of the

jury. She was obliged to fit the directions within the framework of the offence for which the appellants were being tried.

[79] The danger in the learned trial judge intimating to the jury that Lance Matthias may have been at the premises for the purpose of intimidation or anything else, other than to kill or do serious bodily harm, as Mrs Shields suggests, is that his defence was that he knew nothing about what had transpired and that the case against him was a fabrication. Furthermore, and even more importantly, even if the jury were to reject his defence and accepted that he was there, there was no evidence that he could have been there merely to intimidate or to do anything else other than to do serious bodily harm to someone in the bedroom. This is so because gunshots were actually fired in the bedroom, occupied by the deceased and Raymond Miller, at a time when the evidence pointed to Lance Matthias being present in that room. This was before the deceased was shot and killed outside the house.

[80] There was evidence before the jury from which they could have properly inferred that Lance Matthias was the shooter in the bedroom and the person who injured Raymond Miller, even though no one saw when the shot was fired. It was open to them to also find that he was not merely a participant, but the ringleader, based on the evidence that he was the one who had given orders for the door to the bedroom to be kicked off in order for entry to be gained to the inside of the house. It was this armed invasion of the house by Lance Matthias, and the discharge of the firearm in the bedroom in which the deceased was sleeping, that led to the flight of the deceased from the house into the reach of those standing as armed guards outside the premises.

Lance Matthias' action on the scene would have constituted an integral aspect of the unfortunate events that unfolded that night, which led to the fatal shooting of the deceased.

[81] Mrs Shields highlighted her observation that the ballistic evidence was not consistent with the description of the firearm that was allegedly seen in the possession of Lance Matthias. It was her contention, based on that observation, that the ballistic evidence would serve to destroy any possible inference that could have been drawn that he had fired shots in the bedroom occupied by Raymond Miller and the deceased. This submission is, however, rejected upon an examination of the evidence and the learned trial judge's directions in this regard.

[82] The witness, Miss Mitchell, was clear that the only person who was seen coming from the deceased's bedroom, and later returning to it that night, armed with a firearm, was Lance Matthias. It is clear from the evidence that both witnesses had told the police that Lance Matthias was in possession of a long gun on the night in question. However, at the trial, there was, at times, a departure from that assertion, with both witnesses saying that the gun was not long. At one point, Miss Miller said it was medium sized and then upon re-examination, she insisted that the gun was long. Miss Mitchell, for her part said it was not "tall, tall".

[83] The witnesses tried to give an idea of the length of the firearm by demonstrating it to the court. It was then estimated by the court, that the length, as demonstrated by the witnesses, would have been somewhere between eight to 12 inches. The ballistic

evidence revealed that one spent shell that was allegedly taken from the bedroom, which was a 5.56 millimetre cartridge, was the type used in certain rifles, the shortest of which would be 14 inches in length. It is on this basis that Mrs Shields was strengthened to confidently advance the argument that the shot could not have been fired in the room by Lance Matthias, since the firearm he allegedly had, as described by the witnesses, would have been shorter than 14 inches.

[84] Admittedly, the evidence regarding the size of the firearm the witnesses allegedly saw in Lance Matthias' possession was not at all free from difficulties. The witnesses gave conflicting views and confusing evidence as to the length of the firearm in question. Their evidence, including what they had told the police in their written statements when the events were fresher in their minds, was before the jury. There was, in the end, evidence from Miss Miller, at least, that the gun was long, although her demonstration of the length in court would have fallen below the 14 inches described by the ballistic expert as the shortest rifle from which the spent shell in question could have been fired.

[85] The effects of discrepancies and inconsistencies in the evidence on the witnesses' credibility, and how to treat with them, were pointed out to the jury by the learned trial judge. It was also pointed out to them, repeatedly, to bear in mind that the witnesses were giving evidence eight years after the event, and that they should consider the effect that the passage of time would have had on the witnesses' recollection of the events. The learned trial judge painstakingly pointed out to the jury the matters that touch on the credibility and reliability of the witnesses, including the

fact that different things were said by them on different occasions, and that they could accept or reject a part or the whole of the witnesses' testimony. She properly instructed the jury how to treat with inconsistencies and discrepancies in the evidence in determining whether the truth had been spoken.

[86] The learned trial judge, having given the jury accurate directions in law regarding credibility, it was for them to say what they found on the evidence and what they made of the witnesses. The jury could have found that despite the contradictions in the evidence regarding the length of the firearm that was allegedly in the possession of the appellant, Miss Mitchell was, nevertheless, speaking the truth when she stated that he was present and was the only person who exited the bedroom with a firearm in hand, immediately after shots were fired in the bedroom. From this, the jury could have inferred that he was the shooter. They could also have accepted Miss Miller's evidence that he had a long firearm, but found her demonstration of the length in court to be unreliable and so rejected it. The conflicts in the evidence were for the jury to reconcile and it cannot be said that they were not capable of being reconciled.

[87] In any event, even if Lance Matthias was not the actual shooter in the bedroom, it would have been open to the jury to properly find that he aided and encouraged the invasion of the bedroom, and the discharge of a firearm within it, that led to the shooting of Raymond Miller and the flight of the deceased from the bedroom to his death on the outside of the premises. He would still be in the position to be regarded as an aider and abettor, once the jury was satisfied that he had the requisite intention and acted in the manner required by law for him to be regarded as a participant to

whom criminal liability attaches. We find therefore that any discrepancy between the eye witnesses' account and the ballistic evidence as highlighted by Mrs Shields would not be sufficient to render his conviction for murder unsafe. It was not a discrepancy, if, indeed, it is one, that would have affected the core of the prosecution's case against him.

[88] The important thing to note in treating with the judge's failure to tailor her directions in the terms proposed in grounds 1(b), (c) and (d), argued on behalf of Lance Matthias, is that there was no evidence led by him, and there was nothing arising on the prosecution's case, or from anywhere else, that raised any possibility that he was present but had no intention to, at least, inflict serious bodily harm on someone. All the men seen by the witnesses were allegedly armed with firearms, including him. Furthermore, following the discharge of gunshots on the outside of the premises, after the deceased had fled from the bedroom, Lance Matthias did nothing to disassociate himself from the enterprise. Instead, he continued in pursuit of Raymond Miller, with firearm in hand for a second time. By this time, Raymond Miller had already been shot and injured.

[89] The fact that the appellant did not fire at that point in time, as argued by Mrs Shields, does not take away from other evidence from which the jury could have properly found that he had the intention to, at least, cause serious bodily harm. The evidence was that he was in the company of the other armed men until he was seen leaving with them following the shooting of the deceased. And even after they withdrew from the premises, they continued to fire shots within the vicinity. The decision in **R v**

Clyde Sutcliffe and Randolph Barrett directs that in order for a defendant not to be found to be a part of a joint enterprise, there has to be some overt act, on his behalf, which demonstrates that he was distancing himself from the actions that took place at the material time, which led to the commission of the offence. There is no such evidence in this case showing any departure from the activities of the group on the part of Lance Matthias. He was there, from start to finish, actively participating in the events which led to the fatal shooting of the deceased.

[90] In **R v Jogee; Ruddock v The Queen**, the case on which Mrs Shields strongly relied, in mounting her arguments in respect of joint enterprise, the issue concerning what is now recognised to be parasitic accessory liability was brought into sharp focus and considered in great detail. This doctrine covers situations where two persons (D1 and D2) set out to commit an offence (crime A) and in the course of that joint enterprise one of them (D1) commits another offence (crime B). The question is whether the person who does not commit crime B, (D2) can be held liable for it.

[91] In **Chan Wing–Sui and others v The Queen** [1985] AC 168, it was held that foresight of the possibility of the crime being committed on the part of D2, plus his continuation in the enterprise to commit crime A, were sufficient in law, to bring crime B within the scope of the conduct for which he is criminally liable, whether or not he intended it.

[92] In **R v Jogee; Ruddock v The Queen**, this principle was, however, declared to be erroneous by the UK Supreme Court and the Privy Council in the two appeals which

were heard together. It was authoritatively established that foresight of the possibility that D1 might act the way he did, is not sufficient to ground criminal liability on the part of D2 for crime B, as established by **Chan Wing–Sui**. Their Lordships stated, in line with some previous authorities reviewed by them, that what is required to ground liability on the part of D2 for crime B, which was committed by D1, is an intention to participate in the commission of crime B or the intention to assist and encourage D1 in the commission of crime B, with knowledge of all the facts constituting the commission of the crime.

[93] In **R v Jogee; Ruddock v The Queen**, the two appellants were convicted of murder on the basis of joint enterprise, after a co-defendant had actually killed the victim. In the case of Jogee, the cause of the deceased's death was a stab wound, which was inflicted by his co-defendant, Hirsi, during an angry exchange at the house where the deceased was present with the eyewitness. While Hirsi was inside the house, engaged in a hostile verbal confrontation with the deceased, Jogee was outside, armed with a bottle, which he was using to strike a car and shouting encouragement to Hirsi to do something to the deceased. At some stage, Jogee went to the doorway of the house, with the bottle raised in his hand, leaned forward past Hirsi, towards the deceased, saying that he wanted to smash the bottle over the deceased's head. Hirsi eventually used a knife to fatally stab the deceased in his chest, after which both he and Jogee ran off. Both men were eventually charged for murder. Neither man, however, gave evidence at the trial.

[94] The trial judge, in directing the jury, adopted the orthodox **Chan Wing-Siu** principle, stating that Jogee was guilty of murder if he participated in the attack on the deceased, by encouraging Hirsi, and realised when doing so, that Hirsi might use the knife to stab the deceased with intent to cause him really serious harm.

[95] In **Ruddock v The Queen**, the co-defendant in the case, Hudson, at the beginning of the trial, pleaded guilty to murdering the deceased, a taxi driver. The prosecution's case was that the murder was committed during the course of a robbery of the deceased's motorcar. The prosecution's case against Ruddock was primarily based on what he was alleged to have told the investigating officer that he was not the one who had cut the deceased's throat, that this was done by Hudson with a ratchet knife but that he had tied the deceased's hands and feet. There was also evidence that when the police accosted the defendants and told them that the owner of the car had been killed, Ruddock is said to have turned to Hudson saying, "[y]ou think a mi tell you fi cut di man throat".

[96] Ruddock did not give evidence, but made an unsworn statement from the dock to the effect that he was not present at the murder and had no knowledge of it. He gave an explanation for being in the car when he was picked up by the police. He said that he told the police that he knew nothing about the murder, but that they had beaten him and offered him a bribe to build a case against Hudson.

[97] Similar to the case of Jogee, the trial judge in directing the jury, gave his direction based on the **Chan Wing–Sui** principle. He stated, in part, that the

prosecution was required to prove that each defendant shared a common intention to commit "the offence", and that common intention included a situation in which "the defendant, whose case you are considering, knew that there was a real possibility that the other defendant might have a particular intention and with that knowledge, nevertheless, went on to take part in it". It was argued on appeal, inter alia, that Ruddock's admission to tying up the deceased was consistent with a simple intent to rob and a denial that he was responsible for the deceased's murder. The judge, it was argued, failed to tell the jury that if they were sure that Ruddock was a party to carrying out the robbery, it did not automatically follow that he was also a party to the murder. There was, counsel argued, evidence in Ruddock's words to the police which was intended to exculpate himself from the murder.

[98] In both appeals, the court was asked to review the doctrine of parasitic accessory liability and to hold that the Board took a wrong turn in **Chan Wing–Sui** and the cases which had followed it. The court, in reviewing the application of the **Chan Wing-Siu** principle to the conjoined appeal, remarked:

> "From our review of the authorities, there is no doubt that the Privy Council laid down a new principle in **Chan Wing-Siu** when it held that if two people set out to commit an offence (crime A), and in the course of it one of them commits another offence (crime B), the second person is guilty as an accessory to crime B if he foresaw it as a possibility, but did not necessarily intend it."

[99] This approach, the court concluded, was erroneous and "based on an incomplete and, in some respects, erroneous reading of the previous case law, coupled with

generalised and questionable policy arguments". Consequently, the convictions of both appellants were quashed. Their Lordships took the opportunity to restate, in detail, the core principles governing accessory liability in paragraphs 8-12, 14-16, and 88-98 of the judgment. We do not consider it necessary for the purposes of our analysis in this case to recite those principles here. It will suffice to say that we have noted them in treating with the issues in this case.

[100] The appeal for Ruddock was remitted to this court for a determination to be made whether there should be a re-trial or whether a verdict of guilty of manslaughter should be returned. In re-considering the appeal, this court, in giving its decision in **Shirley Ruddock v R** [2017] JMCA Crim 6, substituted a judgment and verdict of manslaughter for the conviction of murder. The court concluded that a re-trial would not have been appropriate and that there was evidence on which a jury, properly directed, could have found that Ruddock did not have the intention to assist Hudson in committing the offence of murder.

[101] It is this line of reasoning in the foregoing cases, which prompted Mrs Shields to argue before us that the learned trial judge's directions on joint enterprise/common design were flawed, and that there were alternative states of mind, other than the mens rea for murder, that could have been left to the jury and which would have justified a consideration of manslaughter in relation to Lance Matthias. The circumstances of the commission of the offence in this case, however, do not lend support to the arguments posited by Mrs Shields. Lance Matthias had not given evidence pointing to a lesser state of mind than that for murder and there was no

evidence before the jury from any other source, which would reasonably point to a joint enterprise/common design to commit any other offence, during the course of which murder was committed.

[102] In sum, this was not a case which, on the evidence, involved a plan to carry out one crime (crime A) and during the course of carrying out crime A, to which the appellant was a voluntary participant, murder, which was another crime (crime B), was committed by someone else. In short, the circumstances of this case do not warrant the application of the principles emanating from **R v Jogee; Ruddock v The Queen** treating with parasitic accessory liability.

[103] We conclude that there is no evidential basis on which the learned trial judge could have pointed the jury to a common purpose merely "to intimidate" or to "cause some harm" but not serious bodily harm, as posited by Mrs Shields. For the learned trial judge to have directed the jury in those terms, it would have been not only highly speculative but would have amounted to her putting fanciful possibilities to the jury, which had no realistic or credible evidential support in fact or law to commend them. Mrs Shields' criticism that it was wrong for the learned trial judge to narrow the minds of the jury to only consider murder (as the predicate offence in investigating the culpability of Lance Matthias), is, therefore, baseless on the facts of this case.

[104] It is specifically noted too, as a critical observation, that the learned trial judge at no time gave any direction that foresight of the possibility of the commission of the offence of murder on the part of any of the appellants was acceptable as the mental

element sufficient to ground joint criminal responsibility. There was thus no aspect of her directions which fell within, what we would call, the "**Chan Wang-Sui** error", which was denounced in **R v Jogee; Ruddock v The Queen**. The learned trial judge gave the jury the orthodox direction on joint enterprise, in keeping with the facts of the case which, in the end, did not run afoul of the applicable principles laid down in **R v Jogee; Ruddock v The Queen.** Her directions are, therefore, unobjectionable as a matter of law.

[105] Accordingly, we cannot properly disturb the conviction on the ground that the learned trial judge erred in her directions to the jury on joint enterprise/common design.

[106] It is also on the basis of the foregoing analysis and conclusion that we find that there was no basis, in fact or in law, for the learned trial judge to have raised manslaughter for the jury's consideration in relation to Lance Matthias. Mrs Shields' submissions that manslaughter should have been left for the consideration of the jury cannot be accepted, despite her commendable effort in seeking to convince us to find otherwise. The facts do not fit into any of the scenarios set out in **Jogee v R; Ruddock v The Queen,** from which a consideration of manslaughter would realistically have arisen. These grounds of appeal, therefore, fail.

Conclusion

[107] We conclude that there is no basis on which the learned trial judge's directions to the jury on identification and joint enterprise/common design may be faulted. There

was also no duty imposed on her, in law, to ensure that sufficient evidence of the description of the object, alleged to have been a firearm in the possession of Joel Brown, was adduced to satisfy the requirements of the law that he was in possession of a firearm. She, therefore, did not err in failing to direct the jury in that regard. There was sufficiently cogent evidence to support the conviction of both appellants for murder, once accepted by the jury, following the careful and sufficiently accurate directions from the learned trial judge. There was no proper basis on which manslaughter should have been left for the jury's consideration and the learned trial judge's failure to do so does not amount to a misdirection.

[108] In all the circumstances, it cannot be said that any omission or failure on the part of the learned trial judge in her directions to the jury has resulted in a miscarriage of justice in relation to any of the appellants. For all the foregoing reasons, we are content to hold that the convictions are safe and should be upheld with the sentences affirmed. We would order accordingly.

Order

[109] The appeal of both appellants is dismissed and the convictions and sentences are affirmed. The sentences are to be reckoned as having commenced on 20 July 2012.