[2017] JMCA Crim 32

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS 65, 66, 67, 69, 70 & 71/2012

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MR JUSTICE F WILLIAMS JA

DEMONE AUSTIN
LENNOX BROWN
KEMAR BROWN
TEXROY PERRY
CHRISTOPHER CAMPBELL
KIRKDAYNE VIRGO v R

Mrs Caroline Hay and Neco Pagon for the first applicant Demone Austin

Mrs Ann-Marie Feurtado-Richards for the second applicant Lennox Brown

William Hines for the third applicant Kemar Brown

Dr Randolph Williams for the fourth applicant Texroy Perry

Delano Harrison QC for the fifth applicant Christopher Campbell

Oswest Senior-Smith for the sixth applicant Kirkdayne Virgo

Mrs Christine Johnson-Spence for the Crown

22, 24, 26 May and 26 September 2017

MORRISON P

[1] On 13 June 2012, after a trial before McDonald-Bishop J (as she then was) ('the judge') and a jury in the Saint Ann Circuit Court, the applicants were convicted of the offence of wounding with intent. On 14 June 2012, the first applicant was sentenced to 15 years' imprisonment, the second to 12 years' imprisonment and the third, fourth, fifth and sixth to 14 years' imprisonment each.

[2] The applicants sought leave to appeal against their convictions and sentences, their applications for leave having previously been refused by a single judge of this court on 11 October 2013. On 26 May 2017, the applicants' renewed applications for leave to appeal against conviction and sentence were refused and the court ordered that their sentences should be reckoned as having commenced from 14 June 2012. These are the reasons for this decision.

[3] The applicants were charged with wounding with intent, contrary to section 20 of the Offences Against the Person Act. The particulars were that, on 26 May 2007 in the parish of Saint Ann, they wounded Mr Roger Foreman ('the complainant') with intent to do him grievous bodily harm. Also charged with them were Messrs Kenrick Wilson and Damion Raymond. However, the jury returned a not guilty verdict in respect of Mr Wilson and, on 13 April 2015, Mr Raymond's application for leave to appeal was refused by the court on the basis of a concession by his counsel. Nothing more needs therefore be said in respect of either of them.

[4] The prosecution's case at trial may be summarised as follows. The complainant was a barber by profession. On 26 May 2007, apparently in culmination of an ongoing feud between the complainant and his assailants, he was the victim of a vicious attack by eight men. He was unarmed, but his assailants were variously armed with machetes, knives and other implements.

[5] The altercation started at some point after 10:00 o'clock on the night of 26 May 2007. While the complainant and another man were walking in the vicinity of Nam's Hardware in Brown's Town, Saint Ann, they came upon the applicants on the road. There was a brief exchange between the complainant and the first and fourth applicants (referred to by the complainant as 'Kem' and 'Kitty' respectively). The latter then stepped off the piazza and said to the complainant, "hay boy, a gunshot you a go get in your head", before flinging a bottle at him. Shortly after that, another bottle was flung from the crowd, but the complainant could not say who threw it. A lady then intervened and the complainant left the scene.

[6] Not long after that, the complainant went to an establishment known as London House. This was an old building which housed a number of shops and business places. While there, the complainant again saw the applicants some 21-25 feet away. They were in separate groups of three, each group in front of the other. Some of them had machetes in their hands, two had knives, while another held a "golf stick". The complainant ran across the road and, when he looked behind him, he saw the applicants moving towards him. The complainant ran further away with the applicants

in pursuit. Running through Brown's Town Beef Market Street, he saw a bus parked in the middle of the street and some people packing their goods into the bus. There were some seven to eight people to his right and another three to his left. He ran into a gentleman, fell, got back up and started running again. He heard a male voice bawling out "thief". As they ran after him, the applicants were all chopping at him. The fourth applicant flung a bottle which hit the complainant in his back. In short order, all of the applicants caught up with him and started chopping him and stabbing him.

[7] During the attack, the complainant was chopped, stabbed and struck all over his body. In addition to multiple lacerations (in excess of 10), he sustained a fracture of the skull and an injury to his left hand of such severity that the doctor who treated him the day after the attack considered it unlikely that he would ever have a full restoration of function of that hand. Both the injury to the head and to the hand would have been inflicted by the use of severe force. In the doctor's view, these were serious injuries, which would all have been inflicted by sharp instruments, such as machetes, knives and broken bottles.

[8] The complainant positively identified all of the applicants as having been among his attackers. In relation to each of the applicants, his evidence was to the following effect:

(i) The first applicant, Kem, had been known to him for over 18 years. He was accustomed to seeing Kem every second week and used to shave his face and trim his hair. He and

Kem had had some kind of dispute before 26 May 2007, which had resulted in his causing injury to Kem on that occasion. On the day of the attack, Kem was one of the men who were armed with machetes. Kem came in close proximity to the complainant while others chopped at him and he was one of the men who also chopped at him, causing injuries to his face, his forehead and his left hand. Towards the end of the attack, before the men all ran off, Kem said to the others, "come on de boy dead".

(ii) The second applicant ('Hungry') was his cousin. He had known Hungry from the time, as he put it, he knew himself. He knew where Hungry lived, he had been to his house and they were friends who would usually see each other night and day. He would usually cut Hungry's hair almost every weekend. He and Hungry had had a dispute some two weeks before the incident, when Hungry approached him with a knife, but, as a result of the intervention of a third party, they did not have a fight. On the night of the incident, Hungry had a golf stick in his hand and approached him alongside two of the others who were armed with machetes. While he was being chopped by others, Hungry hit him in his head and chest using the golf stick.

(iii) The third applicant ('Spragga') had also been known to him from the time he knew himself. Although he was not as close to Spragga as to some of the others, he would see him at parties on weekends and he knew that he lived in Brown's Town. He had never cut Spragga's hair, but Spragga had been a student at Brown's Town High School at the same time as he was, albeit in a lower grade. During the course of the attack on him, Spragga was armed with a knife, which he described as being as big as a "lass", with which he cut him on his hand while the others were also cutting him and hitting him.

(iv) The fourth applicant, Kitty, had been known to him for a long time. However, he did not know what his real name was. Before May 2007, he would see Kitty three times per week or so and he would call to him every time he saw him. He knew where Kitty lived and he used to cut Kitty's hair every three weeks or a month for many years, although he had not done so for some time. Kitty was the one who had told him, before the attack, that "a gunshot you a go get in your head". Kitty was one of the men who chased him down, with two bottles in his hands, and used a bottle to hit him in the back. Kitty was there during the attack on him,

while the other men were cutting and stabbing and hitting him in his head.

(v) The fifth applicant ('Caesar') had been known to him for 15 years. He would see him every weekend and, while he did not know where he lived, he would see him at the hardware store and at parties. Caesar was armed with a knife and was one of the men who ran after him and attacked him. Caesar stabbed at him, causing a stab wound to the left side of his stomach in the area of his ribs.

(vi) The sixth applicant ('Riggy') had also been known to him from he knew himself. He would see him almost every weekend or every other weekend. He would see Riggy while he "outlined" his face and shaved him. Although he did not know Riggy's real name, they were good friends, he knew where he lived and he had been to his house. During the incident, Riggy was armed with a machete and was one of those who chopped him at the same time as the others chopped, cut and hit him.

[9] The complainant said that he had no difficulty identifying any of these men, given the state of the lighting, which was ample, the distance from which he was able to observe them and the absence of any obstruction. But the applicants all gave brief

unsworn statements, in which they denied attacking the complainant and asserted that they were elsewhere on the night on which he was attacked. However, there was no challenge from any of them to the complainant's account of the circumstances in which they were known to him, nor was there any denial that they were known by the nicknames which he attributed to each of them.

[10] After the judge had summed up the case to the jury in admirable detail, they returned verdicts of guilty and each of the applicants was in due course sentenced in the manner which we have already indicated.

[11] When the applicants' renewed applications for leave to appeal came on for hearing on 22 May 2017, both Mrs Ann-Marie Feurtado-Richards and Mr Delano Harrison QC, for second and fifth applicants respectively, told the court that there was nothing which they could properly urge in support of their clients' applications for leave to appeal against conviction. However, Mrs Feurtado-Richards indicated that she would make submissions with regard to sentence. Save therefore for the case of the fifth applicant, upon which nothing now turns, it will be convenient to deal with the cases of each of the other applicants in turn.

The first applicant (Kem)

[12] Mrs Caroline Hay for this applicant sought and was given permission to argue two supplemental grounds of appeal filed on 18 September 2014 and 22 May 2017 respectively. These were as follows:

> "1. The learned Trial Judge failed to tailor her directions to the Applicant's case on the issue of the virtual complainant's omissions and its [sic] effect on his credibility. Further, in explaining to the jury the given reasons for the omissions the learned Trial Judge weighted the case for the prosecution thus making her summation unbalanced and unfair."
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> "2. The learned Trial Judge erred in law by admitting into evidence the prior consistent statement of [the complainant] that 'Kemp [sic] also came over me', given that the primary issue at trial was the credibility of the virtual complainant. By doing so, the credibility of [the complainant] was impermissibly strengthened. This called for a more careful direction on omissions and general credit tailored to the case of the Applicant. The failure to do so unfairly weighted the case for the prosecution thus making the summation unbalanced and unfair."

[13] In support of the first ground, Mrs Hay identified three pieces of "vital information", as she described them, which were given by the complainant in his evidence but were missing from his witness statements to the police. These were that (a) in his first witness statement, the complainant failed to mention the first applicant as being present at London House; (b) in his second witness statement, he failed to mention the first applicant as being present at London House or to mention London House at all; and (c) at the preliminary enquiry, although he said that he knew that the first applicant had chopped him, he could not say where on his body he had done so. Mrs Hay accordingly submitted that, given the fact that there was evidence of recent conflict between the first applicant and the complainant, the latter had a clear motive to lie, therefore calling for the most careful direction on omissions and inconsistencies from the judge. Mrs Hay complained that, although the judge dealt in general terms

with omissions and inconsistencies, she did not do so with specific reference to the first applicant's case; and that, when she did come to deal with the evidence in respect of the first applicant, she did not alert the jury to the materiality of the omissions complained of. Had this been done, Mrs Hay submitted, it is by no means certain that the jury would inevitably have convicted the first applicant.

[14] Mrs Hay referred us to the decision of this court in **R v Linton et al** (unreported) Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 3, 4 and 5/2000, judgment delivered 20 December 2002; JM 2002 CA 59, page 6, in which Harrison JA (as he then was) explained how discrepancies in the evidence of a witness should be dealt with by a trial judge:

> "Discrepancies occurring in the evidence of a witness at trial ought to be dealt with by the jury after a proper direction by the trial judge as to the determination of their materiality. The duty on the trial judge is to remind the jury of the discrepancies which occurred in the evidence instructing them to determine in respect of each discrepancy, whether it is a major discrepancy, that which goes to the root of the case, or a minor discrepancy to which they need not pay any particular attention. They should be further instructed that if it is a major discrepancy, they the jury, should consider whether there is any explanation or any satisfactory explanation given for the said discrepancy. If no explanation is given or if the one given is one that they cannot accept they should consider whether they can accept the evidence of that witness on the point or at all … . Carey, P (Ag.) as he then was, in **R v Peart et al** S.C.C.A. 24 and 25/1986 delivered October 18[,] 1988, said of discrepancies, at page 5: 'We would observe that the occurrence of discrepancies in the evidence of a witness, cannot by themselves lead to the inevitable conclusion that witness' credit is destroyed or severely impugned. It will always depend on the materiality of the discrepancies.' "

[15] In response to these submissions, Mrs Johnson-Spence for the Crown submitted that the judge had been scrupulously balanced and fair in her summation as regards the evidence relating to the first applicant, and that those directions had to be read in conjunction with the judge's general directions as to how to treat with inconsistencies, discrepancies, omissions and the like.

[16] As part of her general directions to the jury, having indicated how they should deal with contradictions in the evidence, the judge dealt with the issue of omissions in detail and at some length:

> "Now, I have spoken to you about contradictions but I must highlight to you, falling in the same band as issues going to credibility, is the question of omission. Now, omissions will occur where before you at the trial the witness says something about the incident in question and when he is questioned about giving an account previously, that is previous, on a previous occasion before coming into court, you find that it is now before you, that he is saying that thing for the first time. I say this because in this case we have had some several instances where counsel said to the complainant, you said this now but you didn't tell the police and you heard him say it is not in his statement or you didn't tell the Judge or the Resident Magistrate at the preliminary enquiry and shown his deposition and he said it is not there. What that is, but before you -- for Madam Foreman and your members is just like inconsistency, a discrepancy they are saying to you here. The witness who you have had an opportunity before to give the same account, did not mention this. So they want you -- it is about his standing before you when he gives evidence on oath. It arises in this way, if you have spoken about this before and you never mentioned that and you're mentioning it here, it gives rise to the question, is he saying it for the first time because he is making it up, or could it be that he didn't mention it before now because he might not have remembered then. There

are several explanations but it goes to the person's credibility.

Now, when you look at omissions you have to ask yourselves in the same way you do inconsistency or other contradictions, how come he is saying this for the first time. Then you have to look at what it is he is now saying, is it substantial and so material that you would expect him, each time he gives the account, he would have mentioned that. The lawyers kept saying to him, you just saying that now because you making it up. You have to consider, do you think he is making up the thing that he did not tell the Judge at the preliminary enquiry, or the police in his statement to come to your determination. You have to look at any explanation given by the witness for this omission. When we go through the evidence and I highlight them, I will show you if he has offered any explanations for you to say, do you find the explanation, if any, offered to be satisfactory and reasonable; or do you find that it is not. Omissions, Madam Foreman and your members, like contradictions go to the question of credibility and reliability of the witness. Now, you would remember yesterday, ma'am crown counsel [sic] took - - and when we look at the exhibits, when we go there, the evidence she sought to say to you, yes, it was put this way but the wording was not as it were in the statement that way. You have the exhibit, you have to determine is the witness saying nothing different really. Is the witness saying something he did not say to the police, or is it just a matter that he did not use the words that were put to him. That is why the things are before you for you to say, it is an omission, or is it in a different way he said it. Is it an omission? Is it serious, so that now we believe he is lying or making up stories. When we go through the evidence, you will have to look and see what you find to be omissions are so grave that they affect the credibility of the witness. If you find that it is slight and not serious, then you treat it the same way as you would contradictions. But you bear in mind what the witness said to you about when he spoke on prior occasions. Remember, and it is a matter for you, do you believe him, because you have Sergeant Nichols that came and said something, but he is telling you, that he was telling the police everything in the hospital. The police stopped him and he continued another time. He told you that the police said to him, you don't have to tell me that, when you go to

> Court you can tell the Court that. He said the Judge, he told the Judge something, but the Judge got it wrong and he told the Judge but it is still in the deposition, you will have to say what you make of Mr. Foreman in light of the omissions that are proved to your satisfaction and inconsistency and contradictions. You bear in mind too, he said he was questioned at the preliminary enquiry because you would have seen here, that he was being questioned and he was answering questions, so you will have to have evidence to say to you, he was asked a particular question at the preliminary enquiry and he gave a different answer or he did not answer because there were many issues here. Was he asked that question before which is asked now, but then you still look at certain matters and say, this is of such importance that I would have expected him, if this has happened the way he said it happened, to have been mentioned before today. You would have to look at the nature of the omission and to the significance of it to the witness. Madam Foreman and your Members, the issue of contradictions and omissions are matters that go before you to suggest that the witness ought not to be believed on oath and it relates to his standing before you after cross-examination, that is to say, at the end of the day and all the challenges posed to him revealing inconsistency, discrepancy and omissions for you to say, can I believe him or act on his evidence as being reliable in relation to the issue that we have to determine."

[17] And then, in the context of her detailed review of the complainant's evidence in relation to the first applicant, the judge said this:

> "... he was subject to cross-examination by Mr. Brown in relation to [the first applicant] and then you heard he had given statements to the police and it was suggested to him that when he gave the police the statement about what happened at London House he said he saw [the first applicant] at London House and the only names he mentioned at London House were Daney, Mickey, Pretty and one this lady, the same was known to him and he said to you he did not see in his statement where he mentioned [the first applicant] as one of the men at London House and

he agreed the names in the statement did not include [the first applicant]. So the question arises, remember I told you about inconsistency and or omissions. What Mr. Brown is saying before you the jury, the witness said he saw [the first applicant] with a machete at a London House, he could make out [the first applicant] and [the first applicant] ran him down but yet in the statement he gave the police before this occasion he called names but [the first applicant] was not one of them. He gave another statement on the 31st and again he agreed that nowhere in that he mentioned [the first applicant] at London House or anything pertaining to London House. That is put before you, do you believe [the complainant] is making up something about [the first applicant] and lying about [the first applicant] …? If he is lying about [the first applicant] being at London House how then can you believe him when he said [the first applicant] chop him up at Brown's Town Mall, that is what they are putting before you and you have to consider it but as I said to you, you have to consider any explanation given and the witness said is not everything he told the police is there. He insisted that [the first applicant] was also at London House … but [sic] is a question for you, did he tell [the police] about [the first applicant] at London House and if he didn't do it, the question arise [sic], do you believe him now or bearing in mind the evidence is what you hear at the trial, does the omission goes [sic] to credibility. He maintained that [the first applicant] chop [sic] him on his forehead and his hand and that [the first applicant] chopped him at specific parts. Then he was asked by Mr. Brown's [sic] if you [sic] had told the Resident Magistrate at the prelim [sic] that he knew [the first applicant] chopped him but don't [sic] know what part of the body he chopped, he said he didn't remember saying that; then it was read to him and he agreed that he told the Resident Magistrate that he saw [the first applicant] chop him but can't say what part. His explanation is that he was referring to when they started chopping him up, he does not know who gave him some of the injuries so what he is saying here by way of explanation, if you accept it, is that he got a chop to his forehead before everybody started chopping him but when everybody started chopping him, he can't say where [the first applicant] chopped, that is his explanation, that is what he said he was telling the Resident Magistrate.

> I pause here to say, once you find [the first applicant] was there, if you accept him as a witness of truth and you are sure he was not mistaken and [the first applicant] had a 'lass [sic] and [the first applicant] chopped him, Madam Foreman and your members, it really doesn't matter where [the first applicant] chop him or many chops he gave him."

[18] In our view, while these directions may not have conformed in every respect with the letter of the formula proposed in **R v Linton et al**, they certainly made it plain to the jury that the potential impact of the complainant's omissions was that, if they were unable to accept his explanation for them, they went to his credibility. In a trial of relatively short duration, it seems to us to be unlikely that the jury could have failed to have in mind the judge's earlier exhortation to "look at certain matters and say, this is of such importance that I would have expected [it], if this has happened the way he said it happened, to have been mentioned before today". Therefore, as attractively as it was put by Mrs Hay, there is in our respectful judgment nothing in this ground.

[19] Mrs Hay's complaint on the second ground arises out of the fact that, during the cross-examination of the complainant by counsel who appeared at the trial for the first and the fifth applicants, the judge, apparently of her own volition, admitted a previous consistent statement by the witness. In that statement, the complainant was recorded as saying, "[the first applicant] also came over me".

[20] But it is fair to say that, in her submissions before us, Mrs Hay did not, as she could well have done, make too much of this as an example of the judge having stepped into the arena. Rather, her essential complaint was that, when set against the

complaint on the first ground, this incident demonstrated the importance of directions from the judge which would forcefully bring home to the jury the materiality of the omissions to which she drew their attention. In the absence of such directions, it was submitted, the summing up was unbalanced and unduly weighted against the first applicant. However, in light of the fact that we have already expressed the view that, taken in their entirety, the judge's directions on how to treat with the complainant's omissions cannot be faulted, we do not think that the complaint on the second ground takes the matter any further. So we will leave for another day, when it is directly in issue, any further consideration of the extent of a judge's power, whether under section 17 of the Evidence Act or otherwise, to put in evidence the previous statement of a witness of her own volition.

[21] For completeness, we should add that Mrs Hay quite properly told us that, although her instructions did not permit her to abandon the ground of appeal originally filed by her client on the question of sentence, she was unable to advance an argument that the sentence imposed by the judge in respect of the first applicant was manifestly excessive.

The second applicant (Hungry)

[22] As we have already indicated, Mrs Feurtado-Richards for the second applicant addressed us on the question of sentence only. She contended that the sentence of 12 years' imprisonment imposed on this applicant by the judge was manifestly excessive, given his antecedents and his alleged role in the commission of the offence. She relied

on the fact that this applicant, who was 30 years of age as at the date of the offence, had no previous convictions and was gainfully employed up to the time of his arrest. Mrs Feurtado-Richards also suggested that the fact that this applicant was in possession only of a golf stick during the attack on the complainant, spoke to a lesser role on his part, as against the others who were armed with knives and machetes.

[23] In support of these submissions, Mrs Feurtado-Richards referred us to the sentencing decisions of this court in **R v Gilbert Barnes** (1968) 10 JLR 457 (in which a sentence of eight years' imprisonment for a bad case of wounding with intent was reduced to one of five years' imprisonment, principally on the ground of the applicant's previous good character); **R v Paul Jones** (1989) 26 JLR 144 (in which a sentence of 10 years' imprisonment for wounding with intent was reduced to one of seven years' imprisonment, principally on the ground that the appellant was a juvenile of 15 years at the time of the offence); and **R v Marcellous Robinson** (1998) 35 JLR 325 (in which a sentence of 15 years' imprisonment for wounding with intent was reduced to one of seven years' imprisonment, principally on the ground that the appellant's role in the commission of the offence was that of an aider and abettor).

[24] Mrs Johnson-Spence submitted that the sentence imposed on this applicant was entirely appropriate in all the circumstances of the case. She pointed out that, in imposing a lesser sentence on him than was imposed on the others, the judge clearly had in mind the fact that he was said to have been armed with a golf stick 'only', although the evidence suggested that he was himself part and parcel of the attack.

[25] Mrs Johnson-Spence very helpfully referred us to **Ronald Webley and Rohan Meikle v R** [2013] JMCA Crim 22. In that case, after a comprehensive review of previous cases involving sentences for wounding with intent (including all three cases cited by Mrs Feurtado-Richards), the court considered that sentences of 12 and nine years' imprisonment, in a case in which the attack had left the complainant with a serious disability, could not be said to have been manifestly excessive.

[26] In our view, **Ronald Webley and Rohan Meikle v R** bears a far closer analogy to the circumstances of the instant case than those referred to by Mrs Feurtado-Richards. Accordingly, given the fact of the second applicant's obviously willing participation in the vicious attack on the complainant, we can see no ground for interfering with the sentence of 12 years' imprisonment imposed by the judge. Insofar as this applicant's possession of 'only' a golf stick may be said to distinguish his role from that of the others, we would only add that, in our view, the judge, in sentencing him to 12 years' imprisonment, plainly had this in mind and by that means made a sufficient allowance for this factor.

The third applicant (Spragga)

[27] Mr Hines for the third applicant was permitted to argue two supplemental grounds of appeal as follows:

> "(i) The Learned Trial Judge had failed to consider whether the evidence of dock identification should have been adduced at the appellant's trial. This failure jeopardized the fair trial of the [applicant].

(ii) That having allowed the dock identification the Learned Trial Judge failed to give adequate directions to the jury as to the dangers of relying on such identification. The said failure has resulted in a miscarriage of justice and vitiates the conviction."

[28] In his submissions on this ground, Mr Hines readily acknowledged that the judge's general directions on identification were "superbly outlined to the jury". However, after pointing out that there was no evidence that the applicants were placed on an identification parade or were otherwise identified before the trial, Mr Hines submitted that the judge ought to have considered the admissibility of the dock identification in this case and, assuming that the dock identification was found to be admissible, given an appropriate warning as to the dangers of such an identification.

[29] In support of this ground, Mr Hines referred us to the decision of the Privy Council, on appeal from the Court of Appeal of The Bahamas, in **Terrell Neilly v The Queen** [2012] UKPC 12. In that case, the Board explained that, while the kind of warning required in identification cases by the well-known decision in **R v Turnbull** [1977] QB 224 spoke to the circumstances in which the witness saw the defendant at the time of the offence, it was often also necessary to consider the circumstances in which he later identified him and whether the evidence of identification should be admitted without the safeguard of an identification parade. In the case of dock identifications, there is an added and separate need for caution, given the circumstances inherent in dock identification. Thus, as the Board pointed out in **Maxo**

Tido v The Queen [2011] UKPC 16, paragraph 21, also an appeal from the Court of Appeal of The Bahamas –

> "… Where it is decided that the evidence [i.e., a dock identification] may be admitted, it will always be necessary to give the jury careful directions as to the dangers of relying on that evidence and in particular to warn them of the disadvantages to the accused of having been denied the opportunity of participating in an identification parade, if indeed he has been deprived of that opportunity. In such circumstances the judge should draw directly to the attention of the jury that the possibility of an inconclusive result to an identification parade, if it had materialised, could have been deployed on the accused's behalf to cast doubt on the accuracy of any subsequent identification. The jury should also be reminded of the obvious danger that a defendant occupying the dock might automatically be assumed by even a well-intentioned eye-witness to be the person who had committed the crime with which he or she was charged."

[30] In response to these submissions, Mrs Johnson-Spence contended that this was in fact a case of recognition rather than of pure identification. On the evidence, this applicant was the complainant's cousin, whom the complainant had known for a long time ("from he knew himself"), they had attended the same high school, he would see him on the weekends at parties and they would greet each other. Mrs Johnson-Spence also pointed out that the complainant's prior knowledge of the third applicant was not challenged in any way at all by the defence. In these circumstances, she submitted that the decision of the Privy Council on appeal from this court in **Goldson and McGlashan v R** (2000) 56 WIR 444, in which it was held that an identification parade ought to be held where it would serve a useful purpose, applied. In the instant case, Mrs Johnson-

Spence urged, an identification parade would have served no useful purpose, given the unchallenged evidence of a long-standing acquaintance between the complainant and the third applicant.

[31] We agree with Mrs Johnson-Spence. Once the circumstances in which the complainant purported to have identified the third applicant at the time of the offence were sufficiently covered by an appropriate **Turnbull** warning, as Mr Hines accepted that it was, then the only remaining question was that of credibility, as was ultimately the case in **Goldson and McGlashan v R** (page 451):

> "Mr Thornton submitted that the judge should have given the jury a specific direction about the absence of an identification parade and the dangers of a dock identification. But their lordships consider that in the present case such directions were unnecessary. The judge told the jury that they should first consider whether [the witness] was a credible witness. If they thought she was lying, the accused had to be acquitted. This appears to their lordships to be sufficient, because if she was not lying, it would follow that there had been no need for an identification parade and the dock identification would have been the purely formal confirmation that the men she knew were the men in the dock."

[32] In these circumstances, we are clearly of the view that Mr Hines' contention on these grounds cannot succeed.

The fourth applicant (Kitty)

[33] Dr Williams for the fourth applicant was permitted to file and argue two supplemental grounds of appeal as follows:

"1. An identification parade was not held. The Applicant was pointed out in court by the complainant as one of his assailants.

a. The learned trial judge did not consider whether dock identification imperilled a fair trial and fail [sic] to exercise her discretion.

b. The learned trial judge failed to alert the jury about the dangers of dock identification.

c. The learned trial judge failed to instruct the jury to be cautious before convicting the Applicant in reliance on dock identification.

2. The verdict is unreasonable and cannot be supported having regard to the evidence.

Particulars

a. To implicate the applicant in the crime of wounding with intent to do gbh [sic] the prosecution relied mainly on the testimony of the complainant. The (applicant referred to as Kitty) denied he was present at the scene. The opportunity for the complainant to observe and recognized [sic] Kitty was limited. Observation was distracted by the pressing and distressing conditions and amounted to at best a fleeting glance. See page 53 line 1-83 line 25 of the Notes of Evidence.

b. The identification of Kitty in court was not reliable. The ability of the witness to recognize Kitty was not fairly tested. He was sitting in the prisoner's dock with the other accuse [sic] in the case no reason was given for failing to hold an identification parade within 16 months after the event. The jury were not alerted to the inherent weakness of the identification. The identification was not only unreliable but was also unfair.

c. The inconsistencies between the testimony of the witness and his previous statements put in question not only is [sic] credibility but also undermined the

reliability of is [sic] identification. Notes of Evidence pages 368, 370, 404."

[34] It will readily be seen that the first, and to some extent the second, of these grounds closely mirror the grounds filed by Mr Hines on behalf of the third applicant. In support of them, Dr Williams also relied on the decisions of the Board in **Neilly** and **Tido**. These submissions elicited the virtually identical response from Mrs Johnson-Spence, who again contended that the case against this applicant was one of recognition, in that he was well known to the complainant, who had been his barber for many years and whose knowledge of him was not disputed. In our view, the fourth applicant's position in this regard is no better than that of the third applicant. We therefore cannot accept Dr Williams' contention that his was a dock identification that required any special warning from the judge.

[35] But Dr Williams also submitted that the judge did not do enough to highlight both the strengths and weaknesses of the identification evidence. He submitted that the judge could have placed greater emphasis on the limited opportunity which the complainant had to identify the fourth applicant, at a time when he was being chased by eight men armed with machetes and knives.

[36] Mrs Johnson-Spence submitted that the judge's directions on identification were sufficient to take care of these complaints and, again, we agree. In her general directions on identification, the judge said this to the jury:

"I am going to look now at the critical issue. The critical issue is the identification now, of who - - of whom he said caused what he said to be his injuries. Mr. Foreman - - Madam Foreman and your members, this case turns on the correctness of the identification of the perpetrators and it turns on the credibility of Mr. Foreman. Why I say correctness of the identification, and I have to talk to you about identification, none of these men accepted that they were there. All of them said they were not there, and they only heard about it when police came or they heard from other persons. So naturally, if one man is saying you were over there chopping me up and the other man said I wasn't there, it raises two questions; is Mr. Foreman speaking the truth when he said he saw these men, or even if you think he is speaking the truth, you still have to look, could he have been mistaken because of the fact that the defence is saying, we were not there. In order to convict these accused men or any of them, you will have to be satisfied to the extent that you feel sure, that he was present and did what the complainant said he did.

I must therefore warn you of the special need for caution before convicting any of these accused men in reliance on the evidence of identification. Why I warn you to look at this, is because it is possible for an honest witness to make a mistaken identification. So you can say, you know, I believe Mr. Foreman but because of the possibility of a mistake, I have to be sure too as to whether he could have been mistaken albeit that you find him to be honest. There have been wrongful convictions in the past as a result of mistaken identification, because a convincing witness can be a mistaken witness. An honest witness can be mistaken and don't even know he is mistaken and a mistaken witness can be convincing.

And a number of apparently convincing witnesses can also be mistaken. Mistake, too, can be made in recognition of persons who you knew before.

Now, in this case, Mr. Foreman said he knew all the men. None of them has stood up and say to you he is not speaking the truth. You can accept it then as being unchallenged, that they are known to him. In fact, you would have heard about these [sic] friction between them, and some members of the group prior to the night, prior to

> the incident. They are not denying that they are called various names, so you can take it, it's accepted he knew them. You can take it, as accepted, he knew them quite well. But the law is that even when you knew somebody before you can still make a mistake in recognizing them. And I am sure you can relate to sometime in your life when you thought you had seen someone who you didn't see long time and when you go running down the person when you reach the person you say, 'Oh, I am sorry, you know, I thought it was my friend'.
>
> Mistakes can be made even with your close relatives. You can look and think you saw your daughter and when you get close it's not your daughter, so the law recognizes even in recognition cases mistakes can be made. So, you have to look at the evidence and see if you are satisfied that there was no mistake."

[37] The judge then went on to discuss with the jury the usual considerations relating to the state of the lighting; the proximity of his assailants to the complainant; whether his view of his assailants was obstructed in any way; the period of his observation of his assailants; and whether they were satisfied that he was speaking the truth when he identified the applicants as his assailants. Not only were the judge's general **Turnbull** directions detailed and complete, but, as she did in respect of each of the applicants, the judge devoted several pages of the summing-up to a full and careful review of the evidence given in respect of this applicant. For all these reasons, it seems to us, Dr Williams' thoughtful supplementary submissions cannot succeed.

The sixth appellant (Riggy)

[38] Mr Oswest Senior-Smith for the sixth applicant was permitted to file and argue five supplemental grounds of appeal.

[39] The first was that the prosecution "adduced prejudicial material which denigrated the Applicant's profile even before the events of the date in the Indictment were adduced and divested the Applicant of a fair trial". In support of this ground, Mr Senior-Smith directed our attention to the various bits of evidence relating to encounters between the complainant and some of the applicants (though not the sixth applicant) before the night on which the complainant was attacked. Next, Mr Senior-Smith referred to the complainant's evidence that, on the evening of 26 May 2007, he saw the applicants (including the sixth applicant) sitting down outside Nam's Hardware in Brown's Town. The complaint, as set out in Mr Senior-Smith's skeleton argument, was that "the tenor of the evidence is shown to be inexact and tending to broad-brush and taint the [sixth] **Applicant** with the deeds of others where [sic] he incurred prejudice accordingly" (emphasis as in the original). This was compounded, the submission continued, by the complainant's evidence that all of the applicants "rush down" on him to hurt him and, armed with weapons, surrounded him, therefore portraying the sixth applicant in a negative light without ascribing any particular role to him. In the absence of appropriate directions from the judge to mitigate the prejudice thus caused to him, the submission concluded that the sixth applicant had been deprived of the substance of a fair trial.

[40] In response, Mrs Johnson-Spence submitted that the evidence of what happened before the actual commission of the offence on 26 May 2007 provided relevant background to the charge against the sixth applicant and grounded his identification as one of the complainant's assailants.

[41] Among other cases, Mr Senior-Smith referred us to the decision of the Privy Council in **Mitcham v R** [2009] UKPC 5 (an appeal from the Court of Appeal of Saint Christopher and Nevis). In that case, prosecuting counsel sought to draw the court's attention, in the presence of the jury, to an allegation of "threats". The jury were then excused, without it having been specified in their presence by or to whom the threats were allegedly made. Upon the jury's return, no further reference was made to the matter during the trial, either by counsel or by the trial judge in his summing-up. Nor was it made a ground of appeal to the Court of Appeal. In discussing the appropriate judicial response to inadvertent disclosures of this kind, Lord Carswell said this (at paragraph [14]):

> "Once a matter has been referred to in the presence of the jury which could give rise to possible prejudice, the trial judge has a choice of courses open to him. He could elect to take no action, on the basis that the matter was insufficient to create a degree of prejudice which would make the trial unfair and that to refer to it again would only draw attention to it. He could at the appropriate stage or stages give the jury a warning to disregard what was said, if he considers that that would be sufficient to minimise the prejudice and prevent the trial from being unfair. Finally, he could decide to discharge the jury, if he considers that there is prejudice which would make the trial potentially unfair and that warnings would not diminish it to a sufficient extent. He should give consideration to the course which he should take, even if counsel have, for whatever reason, not asked for the jury to be discharged ... "

[42] On the facts of the case, the Board considered that the risk of prejudice was no more than minimal. As Lord Carswell pointed out (at paragraph [18]), the reference to threats by prosecuting counsel "was fleeting and oblique, very far from being a specific

reference to any action of the Appellant". Further, no request was made to the trial judge to discharge the jury and, "... if one had been made, he would have been justified in refusing it".

[43] The approach to the disclosure of potentially prejudicial material set out in **Mitcham** is fully in keeping with the approach that has been sanctioned by this court more than once (see, for instance, **Machel Gouldbourne v R** [2010] JMCA Crim 42, paragraph [21]). However, it seems to us that, as no question of inadvertent disclosure of prejudicial material arises in this case, **Mitcham** is of no assistance. In our view, the evidence of the sixth applicant's presence in the company of the other applicants in the run-up to the actual commission of the offence, deliberately adduced by the prosecution without objection from the defence, was a relevant and necessary part of the background to prosecution's case. As Mrs Johnson-Spence submitted, it laid the basis for the complainant's identification of the sixth applicant as one of the persons who ultimately attacked him.

[44] It seems to us, therefore, that this evidence falls more readily within the meaning and spirit of Lord Bingham CJ's explanation in **R v Sawoniuk** [2000] 2 Cr App Rep 220, 234 of the relevance of evidence which can better enable a jury to understand the background to and nature of the case for the prosecution:

> "Criminal charges cannot be fairly judged in a factual vacuum. In order to make a rational assessment of evidence directly relating to a charge it may often be necessary for a jury to receive evidence describing, perhaps in some detail, the context and circumstances in which the offences are said to have been committed."

(See also **Bruce Golding and Damion Lowe v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 4 & 7/2004, judgment delivered 18 December 2009, particularly at paras [79]-[84].)

[45] For these reasons, we concluded that the sixth applicant's first ground could not succeed.

[46] The second ground relied on by Mr Senior-Smith was that the evidence did not disclose any criminal participation by the sixth applicant. Mr Senior-Smith submitted that, although the complainant identified the sixth applicant as one of the group of men who attacked him on the night in question, there was no evidence of what this applicant actually did during the attack. In these circumstances, it was submitted, on the authority of well-known cases like **R v Coney and others** (1882) 8 QBD 534 and **R v Clarkson and others** [1971] 3 All ER 344, the sixth applicant was entitled to rely on the principle that mere presence at the time of an offence is not enough to found criminal liability.

[47] **Coney**, it will be recalled, was a case of an illegal prize-fight, in which two men fought each other, in the presence of a large crowd, in a ring formed by ropes supported by posts. The appellants were among the persons in the crowd, but it did not appear that they took any active part in the management of the fight, or that they said or did anything. The jury were directed, first, that the actual fighters in a prize-fight would be guilty of an assault; and, second, that if any person was shown to have been

present in the crowd looking on at the fight, that would, in the absence of explanation be conclusive proof that he was aiding and abetting the assault. On appeal, the appellants' convictions for assault as principals in the second degree were overturned, on the ground that the jury had been misdirected as to the effect of their presence at the prize-fight. The decision is best explained by the following oft-cited passage from the judgment of Hawkins J (at page 558):

> "In my opinion, to constitute an aider and abettor some active steps must be taken by word, or action, with the intent to instigate the principal, or principals. Encouragement does not of necessity amount to aiding and abetting, it may be intentional or unintentional, a man may unwittingly encourage another in fact by his presence, by misinterpreted words, or gestures, or by his silence, on non-interference, or he may encourage intentionally by expressions, gestures, or actions intended to signify approval. In the latter case he aids and abets, in the former he does not. It is no criminal offence to stand by, a mere passive spectator of a crime, even of a murder. Non-interference to prevent a crime is not itself a crime. But the fact that a person was voluntarily and purposely present witnessing the commission of a crime, and offered no opposition to it, though he might reasonably be expected to prevent and had the power so to do, or at least to express his dissent, might under some circumstances, afford cogent evidence upon which a jury would be justified in finding that he wilfully encouraged and so aided and abetted. But it would be purely a question for the jury whether he did so or not."

[48] **Coney** was applied in **Clarkson**, in which, after citing the passage from Hawkins J's judgment quoted above, Megaw LJ added that –

> "It is not enough, then, that the presence of the accused has, in fact, given encouragement. It must be proved that

> the accused intended to give encouragement; that he *wilfully* encouraged."

[49] Responding for the prosecution, Mrs Johnson-Spence submitted that this was not a case of mere presence, in that the complainant identified the sixth applicant as one of the group of nine men who actively participated in the attack on him. In these circumstances, it was submitted, there was no need for the evidence to be such as to assign a particular role to each man. **Coney** and **Clarkson** were therefore clearly distinguishable.

[50] Yet again, we agree with Mrs Johnson-Spence. As described by the complainant's evidence, the sixth applicant's role in the attack cannot in any sense be dismissed as "mere presence". The complainant said that this applicant was, in the company of the other applicants, also armed with a machete and that he too chopped at him while the others were chopping and cutting him. The case for the sixth applicant was that he was not present during the attack on the complainant, who was therefore telling lies on him. Having given appropriate general directions on the issues of identification and credibility, at the end of her summary of the case against and for the sixth applicant, the judge left it squarely to the jury to determine whether the complainant's identification of him as one of his assailants was reliable and credible:

> "When you look at what Reggie [sic] said, Reggie [sic] said he was not there, so the question arises was Mr. Foreman mistaken when [sic] he said about Reggie [sic] or was he lying on Reggie [sic] for whatever reason."

[51] The sixth applicant's third supplemental ground of appeal was that he was "unwittingly deprived of the benefit of a comprehensive analysis of the evidence", which resulted in a material non-direction resulting in an unsafe conviction. As it turned out, the real complaint on this ground was that in summing up, "in an obvious oversight", the judge omitted to refer to an aspect of the evidence which emerged during cross-examination of the complainant. The relevant extract from the cross-examination is as follows:

> "Q. All right. What Riggy do you that night?
>
> A. Meaning which night, sir?
>
> Q. The night of the incident, that's the only one we going talk about, the twenty-sixth of May, 2007, when you say them chop you?
>
> A Riggy were [sic] chopping me with the other gentleman.
>
> Q. With who?
>
> A. With the other gentleman.
>
> Q. Which part Riggy chop you?
>
> A. Sir.
>
> Q. Can you tell her Ladyship and the jury as to which part of the body Riggy chop you, can you do that?
>
> A. Sir, when he was chopping I have to cover, I can't tell exactly where he is chopping me.
>
> Q. So, please answer my question. Is it that you are saying that you cannot say which part of your body Riggy chop you, isn't that your answer?
>
> A. I cannot say which part he chop me.

Q. All right. Thank you. And I am going to suggest to you, with all the lights, that you say it was night, it was day in the night -- like the phrase, I never hear it before -- suggest to you with all the day in the night as it was, you can't say because Riggy was not there, agree with me?

A. Disagree with you, sir."

[52] Mr Senior-Smith submitted that this bit of evidence was clearly relevant to the sixth applicant's defence and that the judge's failure to mention it had deprived him of a fair trial. For her part, Mrs Johnson-Spence submitted that the judge had dealt adequately with this applicant's defence. Further, that the fact that the complainant was unable to pinpoint exactly which of his many wounds and other injuries were inflicted by this applicant was of no relevance, given the joint enterprise principle upon which the prosecution relied.

[53] As she had done in respect of each of the applicants, the judge undertook a careful review of the complainant's evidence in respect of this applicant. She pointed out to the jury that this applicant was identified by the complainant as one of the group of men who were outside Nam's Hardware, later at London House and still later at Brown's Town Mall:

"So Reggie [sic] has a cutlass, so we are at Nams. He told you that Reggie [sic] also ran behind him and that Reggie [sic] was there at Brown's Town Mall when he is attacked. He said Reggie [sic] used the machete he had to chop him. He said when he had put up his hand in the air to block the chops from Lily, Reggie [sic] was one of those chopping him too while the others were chopping and cutting and who had the stick was hitting. So what he is saying to you here,

> Madam Foreman and your members, is that by the time Reggie [sic] started to hit him, he had already received the first chop to his shoulder from behind and he said is Kartel had given him this chop. By that time he would already received the chop to his mouth, if you believe that he got that chop when he said Kemp [sic] chopped at him and it missed and chopped his mouth. So you have to look and see if you accept that Reggie [sic] was there, do you believe he was mistaken or do you think he was lying. You look at the context, he said Reggie [sic] was there and you ask yourself, is Reggie [sic] guilty. He said when he fell to the ground Reggie [sic] was also there with the others and they were all chopping and cutting. He said after they chopped him, Reggie [sic] also ran off with the others. By that time Kemp [sic] would have said, 'come nuh, the bwoy dead.' So in effect what he is saying to you is that Reggie [sic] was there from start to finish and Reggie [sic] never leave until somebody said, 'come nuh, di bwoy dead.' He is saying Reggie [sic] was chopping him as well and therefore the crown [sic] is saying Reggie [sic] played a part in the commission of this offence, he had a cutlass and you look at what the wounds were."

[54] It is true that the judge did not mention specifically the passage in the cross-examination to which Mr Senior-Smith directed our attention. However, she did make it clear to the jury that they should address the issue of the sixth applicant's guilt or innocence in the context of the complainant's evidence of the circumstances of the attack as a whole. On the prosecution's case, if believed, this applicant was present at all three stages of the encounter on the night of 26 May 2007; armed with a machete, he, together with others, chopped at the complainant during the attack itself; and, when it was over, he fled with the others, apparently leaving the complainant for dead.

[55] In these circumstances, we find it impossible to discern how – or how better - the jury would have been assisted by a specific reminder that the complainant had been

unable to say which of the injuries he received was attributable to chops thrown by this applicant. The sixth applicant's liability turned on whether or not the jury accepted the prosecution's case that he and the other applicants, acting together, armed with machetes and other weapons, attacked the complainant and inflicted serious injuries on him. In our view, the judge's clear and comprehensive directions were sufficient to bring this home to the jury and, accordingly, this ground must also fail.

[56] The sixth applicant's fourth ground was that the judge's directions were, as Mr Senior-Smith put it in his usual elegant style, "devoid of directions on the Good Character of the Applicant". Citing this court's decision in **Patricia Henry v R** [2011] JMCA Crim 16, paragraph [46], Mr Senior-Smith accepted that "the defendant is not entitled to the benefit of such a direction unless he has distinctly raised the issue, either by direct evidence given by or on his behalf or by eliciting it in cross-examination of prosecution witnesses". In this case, Mr Senior-Smith suggested, such evidence was to be found in the complainant's evidence that he and the sixth applicant were "good friends", and that he had been to his house.

[57] We did not find it necessary to call upon Mrs Johnson-Spence on this ground, as we did not think that the evidence relied on by Mr Senior-Smith as having triggered the need for a good character direction could possibly bear the weight which he attributed to it. At the end of the case, there was no evidence of good character coming from either the witnesses for the prosecution, the sixth applicant himself or a witness called on his behalf. In short, the question of good character simply did not arise.

[58] And finally, in the fifth ground filed on his behalf, the sixth applicant contended that the sentence of 14 years' imprisonment was manifestly excessive, given his antecedents and the details of his alleged role in the commission of the offence. Mr Senior-Smith also observed that "the Applicant's prospects at sentence could never have been harmed by a Social Enquiry report". While making no comment on this last point, Mrs Johnson-Spence submitted that, given the severity of the complainant's injuries and the viciousness of the attack upon him, the sentence he received could not be said to be manifestly excessive.

[59] As regards the question of a social enquiry report, this court has on more than one occasion in recent times underscored what was described in **Michael Evans v R** [2015] JMCA Crim 33, paragraph [9], as "the utility of social enquiry reports". Indeed, it is now accepted that it is, in general, good sentencing practice to obtain a social enquiry report before sentencing. However, the court has also been at pains to emphasise that, in the absence of any mandatory requirement that a social enquiry report should be obtained as an aid to sentencing in all cases, "... it is very much a matter for the discretion of the sentencing judge whether any, and if so what, reports should be ordered in a particular case" (**Sylburn Lewis v R** [2016] JMCA Crim 30, at paragraph [15]). So in this case, in which it does not appear that any application for a social enquiry report to be obtained was made by counsel on behalf of this, or, indeed, any of the applicants, we are content to put the matter no higher than Mr Senior-Smith felt able to, which is that the sentencing process "could never have been harmed" had one been obtained.

[60] Turning now to the question whether the sentence imposed on this applicant was manifestly excessive, his antecedent report revealed that he was nearly 30 years at the date of sentencing, had no previous convictions, was married without children and was well regarded in his community. It was submitted to the judge by counsel on his behalf that "he is not the type of person who ought to be taken from society by reason of his conduct that night".

[61] In her sentencing remarks, the judge considered as aggravating factors, among other things, the viciousness of the attack on the complainant, the fact that all of the applicants were armed, the fact that they had all acted together and what she considered to be the clear inference from the evidence that their intention was to kill the complainant. On the side of mitigation, the judge took into account the fact that the sixth and the other applicants had no previous convictions, that five years had elapsed between the date of the offence and the date of sentencing and that there was no evidence that the applicants were "persons of serious criminality". Nevertheless, bearing in mind all the circumstances, the judge considered this to be one of the worst kinds of wounding cases she had seen and that, in terms of sentence, "it sits on the top of the range". This is how the judge came to sentence this applicant, who was armed with a machete and had himself aimed chops at the complainant, to 14 years' imprisonment.

[62] It suffices, in our view, to refer again to this court's decision in **Ronald Webley and Rohan Meikle v R**, in which it was held that sentences of 12 and nine years' imprisonment for wounding with intent, which resulted in serious disability to the victim,

could not be said to have been manifestly excessive. In this case, given the judge's careful analysis and balancing of all the aggravating and mitigating factors, we could not say that the sentence imposed on this applicant was manifestly excessive and we accordingly declined to disturb it.

Conclusion

[63] These are the reasons for the decision which we gave on 26 May 2017, as set out at paragraph [2] above.