[2020] JMCA Crim 36

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 24/2012

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MRS JUSTICE FOSTER-PUSEY JA

DORON FERGUSON v R

Ms Shantel Jarrett for the applicant

Ms Paula Llewellyn QC, Director of Public Prosecutions, Atiba Dyer and Dwayne Green for the Crown

27 April, 1 May and 25 September 2020

FOSTER-PUSEY JA

[1] This is a renewed application for leave to appeal by Doron Ferguson ('the applicant'). On 29 February 2012, after a trial before P Williams J (as she was then) ('the judge'), sitting without a jury in the High Court Division of the Gun Court held in the parish of Saint Ann, the applicant was convicted of the offences of illegal possession of firearm and wounding with intent. On 8 March 2012, the judge sentenced the applicant to five years' and 15 years' imprisonment respectively at hard labour for the offences of illegal possession of firearm and wounding with intent, with the sentences to run concurrently.

[2] On 27 December 2017, a single judge of appeal refused the applicant leave to appeal against conviction and sentence. The single judge opined that the judge gave herself adequate directions as to the correct way to treat with the evidence and the sentence imposed for wounding with intent was the mandatory minimum.

[3] We heard the application on 27 April 2020. On 1 May 2020 we announced that the application for leave to appeal was refused and the sentences imposed in the court below would be reckoned as having commenced on 8 March 2012. These are the promised reasons for our decision.

The application

[4] At the hearing of the application, counsel for the applicant abandoned the grounds of appeal originally filed, then sought and was granted permission to argue supplemental grounds of appeal.

[5] The following are the grounds on which the applicant has challenged his conviction and sentence:

> "i. That the Learned Judge failed to fully examine the quality of the identification evidence and in particular, the cogency of the Complainant's identification evidence with respect to the Applicant's teeth.
>
> ii. That the Learned Judge failed to fully examine the quality of the identification evidence with regards to the circumstances of how the Applicant was identified by the Complainant on July 12, 2011.
>
> iii. That the Learned Judge failed to properly examine the circumstances in which the identification of the Applicant was made and to sufficiently warn herself relative to the identification evidence that:
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> a. That although identification took place approximately 2 months after

the incident that at no point between the time of the incident and the time of the identification of [the applicant] did the complainant state that she had seen the Applicant on a prior occasion;

b. The prior occasion on which the Complainant alleged to have seen the Applicant was according to her years before;

c. That the Complainant's evidence is that she was not certain of who her attacker was until the night when she saw the applicant at her night club;

d. That considering all the circumstances the complainant was mistaken in the identification of the Applicant as the person who attacked her.

iv. The sentence is excessive in the circumstances."

The trial

[6] The principal witness for the prosecution was the complainant, Mrs Ingrid Campbell, also called 'Kola'. The complainant ran a business place called 'Kitty Cat', comprising of a bar and a club with exotic dancing in Salem in the parish of Saint Ann.

[7] On 9 May 2011 at about 9:00 pm the complainant opened the club and went to the bar. Two bartenders were sitting on the serving side of the bar while the complainant stood on the side for patrons. The bar was well lit with fluorescent lights. In addition, there were lights on the adjoining verandah, a street light on the outside, a light at the club gate and a light at an almond tree on the premises.

[8] The complainant went to the doorway of the bar. While standing there she saw a young man, later identified as the applicant, walking on the road and holding a food box. The applicant came off the roadway and headed towards the bar. He was wearing

jeans pants with 'pickpocket' and a blue hat which covered his ears. She did not remember the colour of his shirt but described his mode of dress as 'young boy dressing'. She went inside the bar and leaned on a corner of the bar counter. The applicant entered the bar and sat on a stool at the other corner of the bar, approximately 10 feet away from her.

[9] The complainant stated that she and the applicant sat on stools facing each other and she was able to see all of the applicant 'from head to toe'. She saw his 'forehead…eye, teeth…every part of him'. While he was wearing a hat, it covered his ears, but not his face.

[10] In the complainant's presence and hearing, the applicant called someone on his phone and said "Mi haffi get da catty de tonight, mi haffi get da catty de tonight". After hearing this, the complainant spoke to the applicant, asking him, as reflected at page 15 of the transcript:

> "My sey, how you suh aggressive, nice young girl deh here you can go in de club and get a girl."

The applicant responded that "him nuh want dem girl deh." The complainant then told the applicant that she would take him. The applicant told her that he was 'trouble'. The complainant then stated:

> "So I turn to him and said a the trouble mi want because mi can cook you steam fish…"

[11] The complainant stated that she shared approximately 12 minutes of conversation with the applicant in the course of which she was facing him. He was the only patron in the bar at that time. After purchasing a bottle of water, the applicant

said that he was going to eat some food and come back. He took up the food box, put the bottle of water in his back pocket and went to the doorway of the bar.

[12] After the applicant had walked to the doorway, the complainant turned to speak with one of the bartenders, Shedeen Campbell, who was facing the doorway of the bar, shouted "'Kola', duck gun." The complainant spun around and was shot on the right side of her face. She also received a shot in her chest and in her right hand.

[13] The complainant stated that it was the applicant who shot her while he was about three feet away. She testified, at page 21 of the transcript:

> "Mi feel it, mi see the gun a fire, mi see and he was right there, close range he wasn't far, he was like — I was here while he was here shooting mi him never deh far, right same place side a mi him a shoot me. Same place him never deh far."

[14] After she was shot, the complainant sank to the ground on her belly. She peeped and saw the applicant come over to her. He kicked her on her foot and shot her in her arm and then in her back. He then ran off from the scene. While he ran, the cap that he was wearing fell off his head. The complainant testified that it was the same man with whom she had been speaking who shot her. He was wearing the same clothes, he dropped the food box on the ground and threw the water away when he was leaving. The applicant headed to the main road and it appeared that a vehicle picked him up.

[15] The complainant, in describing the applicant said, at page 27 of the transcript:

> "he was a very cute boy, a pretty boy, when him come in nice boy dress hot, never bad looking, age 21/22 … teeth them no shape straight, them twist, that mi know because when him shot mi him a skin out him teeth … him have

> some young beard him never shave … him hairstyle did lickle bit neater than that. And him walking mi can 'figet' that neither… Him just a walk a young-boy walk is just mi get fi pree everything, him walking in, him walking leaving, every 'lickle' thing."

[16] The complainant recalled that years before the applicant had come to the club with a young man named 'Red Square'. She had seen his face as he passed her to go into the club.

[17] As a result of her injuries, the complainant was admitted to the Saint Ann's Bay Hospital for two days. While she was at the hospital the police came and took a statement from her.

[18] On Monday 12 July 2011 the complainant was at home when she said:

> "Something kick me and I went out of the bed and I walked to the verandah…"

While there, she had a conversation with the gateman and looked towards the road. Then she saw the applicant walking with his "dainty walk". She told the gateman that that was the man who had shot her. The applicant came towards her and they looked at each other at which point the complainant said, "my head raise a bit and my body feel cold like ice". The complainant called the police station nearby and told them that the man who had shot her was at the premises.

[19] The applicant went into the bar. He then went to the club gate where he was told that he had to buy a drink to enter the club. The applicant argued with the security officer asking him, "You know me a who; you know me a who?" Sometime later the police arrived at the premises and the complainant pointed out the applicant as the person who had shot her. At page 35 of the transcript she stated to the police officer:

> "Mr. Rose, that's the guy who shoot me, that's him. I don't need no ID Parade, me know everything bout him, see him deh."

[20] In cross-examination the complainant was asked why she had not mentioned in her statement that the applicant was Red Square's friend. She explained that it was only after she saw him face to face again that she remembered.

[21] The applicant was asked to stand and show his teeth whereupon the complainant stated "Him can come nearer…it twist…Him have a 'lickle' come out, it no straight like everybody own".

[22] In re-examination the complainant explained that on the night of the shooting when she saw the applicant she kept thinking that she had seen him before, but it was only when he returned to the premises in July that she remembered when she had first seen him with Red Square.

[23] Shedeen Campbell, who, as previously indicated, was one of the bartenders there at the time of the shooting, gave evidence. Ms Campbell testified that a man came into the bar carrying a food box, which he placed on the counter. The man spoke on the telephone, ordered and was served a bottle of water. She testified that the man had a conversation with the complainant, for around 10 minutes, after which he said that he was going outside. She saw when the man dropped the food box he was carrying and walked back to the complainant pointing the gun at her "headback", because at the time the complainant was facing her. Once shots were fired she ran out through the side door to call the police. Ms Campbell purported to identify the applicant as the assailant while he was in the dock. She also testified as to the lighting

conditions in the bar and that the man she saw was the only patron in the bar at the time of the incident.

[24] Detective Corporal Joseph Rose also testified at the trial. On 9 May 2011 he received information as a result of which he went to Kitty Cat Night Club and received a report from one of the bartenders there. He spoke to the lighting of the premises, saying that it was properly lit and he identified a number of lights on the premises as well as a nearby street light. He saw the complainant at the Saint Ann's Bay Hospital and observed that she had sustained several wounds. He thereafter commenced an investigation into a case of wounding with intent and illegal possession of firearm.

[25] On Monday 11 July 2011, while he was at the Runaway Bay Police Station, at about 1:25 am, he received a telephone call from the complainant. She provided him with a description of a man. Along with a team of police officers, he proceeded to the Kitty Cat Night Club where the complainant pointed at the applicant and said "Offica, si di man deh weh shot mi". The applicant, in response, said that he did not know what the complainant was talking about, but the complainant insisted that he had shot her. After conducting a question and answer session with the applicant some days later, he charged the applicant with the offences of wounding with intent and illegal possession of firearm ammunition.

[26] The applicant gave an unsworn statement. He stated that sometime in late November or early December 2010 he secured a job in Montego Bay at the Aquasol Theme Park. He remained there from that time and only returned to Runaway Bay in July 2011. He was then arrested in Salem.

[27] Miss Kadian Jackson gave evidence for the applicant. She stated that on the night of 9 May 2011 she was seated on the outside of the Kitty-Cat Club with her two friends. While they were there, a man with rasta locks, wearing a hat and black pants, came up to ask to have a three-some with them. After a while he went away and headed into the bar with a box of food in his hand. While still outside, she heard gunshots and then she saw the same rasta man with whom she had been speaking with a gun in his hand. Two men ran behind him and they jumped into a car and drove away. She did not speak to the police in relation to the matter.

[28] In cross-examination Miss Jackson was not able to speak to the time when the incident to which she referred had happened. She testified that if she were to see the rasta man again she would not have been able to identify him as she did not "notice him that much". She was not inside of the bar when the shooting occurred.

Submissions for the applicant

[29] Although the applicant's attorney-at-law outlined two grounds of appeal with various subheadings the main matter concerned whether the judge correctly treated with the issue of identification.

[30] After referring to the locus classicus of **R v Turnbull** [1977] QB 224, counsel submitted that the judge failed to adequately assess the omissions, inconsistencies and discrepancies in the identification evidence and the effect that these could have had on the accuracy of the identification. One instance was the judge's failure to assess the discrepancy in the complainant's description of the applicant's teeth as against its actual appearance. Counsel submitted that when the applicant was asked to show his teeth it did not match the complainant's description, and the judge herself

did not notice anything particularly unusual about his teeth. Counsel submitted that **Tesha Miller v R** [2013] JMCA Crim 34 provided guidance on how a trial judge should proceed when there is a material discrepancy between the description of an assailant and the actual appearance of the applicant. She submitted that the judge failed to fully examine the discrepancy of appearance in the case at bar as well as the effect such a discrepancy would have had on the identification evidence.

[31] Counsel for the applicant referred to the occasion on which the complainant said that the applicant had first come to the club with Red Square, as 'the first sighting'. She submitted that the complainant would not have had a sufficient opportunity to observe the man that she saw at that time. In addition, there was nothing to suggest that the complainant had any special reason to remember the man from that time. She submitted that 'the first sighting' was a mere fleeting glance and the judge failed to examine the specific weakness in the identification evidence. She relied on **Dwayne Knight v R** [2017] JMCA Crim 3 and **Norris Johnson v R** [2020] JMCA Crim 6 in support of her submission.

[32] Counsel then turned to the night of 12 July 2011, which she described as 'the third sighting', when the complainant said that she saw the man who had attacked her in May that year. She highlighted that this took place two months after the incident, at about 1:25 am, when the man was at a distance. She submitted that the complainant did not, at any time following the incident on 9 May 2011 and 12 July 2011 mention to the police that she knew the applicant or had seen him before. She identified this as a weakness in the identification evidence. Counsel argued that the judge did not properly examine the identification evidence in respect of this third

sighting, which was tenuous. She stated that the judge erred when she stated that there was no point in conducting an identification parade as the complainant did not know the applicant prior to the incident. She relied on **Courtney Lawes v R** [2011] JMCA Crim 55.

[33] Counsel did not advance any submissions in respect of the sentences imposed on the applicant.

Submissions for the Crown

[34] The Crown had also filed written submissions. The Director of Public Prosecutions ("DPP"), however, in making succinct oral submissions on behalf of the Crown, stated that the matter involved the issue of identification. She submitted that it was on 9 May 2011 when the incident took place that the complainant identified the applicant. The judge, in her thorough summation, identified all the tenets of law in respect of identification evidence, gave herself the required warning and looked at the lighting of the premises as well as the opportunity which the complainant had to observe the applicant.

[35] The judge also examined the issue as to whether the applicant's teeth were twisted. The DPP submitted that, given the cogency of all the evidence as to the incident on 9 May 2011, the question as to whether the applicant's teeth were twisted would have fallen under the issue of the complainant's general credibility. The fact that the judge did not notice any twisting of the teeth did not take away from the cogency of the evidence. In court, the complainant insisted that when the applicant showed his teeth, she was still seeing a twist in them.

[36] The DPP emphasized that, although counsel for the applicant made lengthy submissions concerning the first and third sightings, she did not address what occurred on the day of the incident when the complainant had 12 minutes of conversation with the applicant, looking directly at him in the well-lit bar. The complainant was taken with the applicant's looks. Although the applicant was wearing a cap, it covered his ears but not his face. While the judge did not speak to the issue of the cap, it was clear that it was not an obstruction. The complainant fell in slow motion and was able to see the applicant standing over her.

[37] On the matter of no identification parade having been held, the DPP submitted that the issue was correctly addressed by the judge. She submitted that an identification parade would not have served any useful purpose as it was the complainant who saw the applicant, called the police and insisted that he was the person who had shot her. In fact, it would have been unfair to the applicant to hold an identification parade. She referred to **Mark France and Rupert Vassell v R** [2012] UKPC 28.

[38] Although the applicant's counsel did not address the question of the sentences imposed, the DPP submitted that the sentence imposed for illegal possession of firearm was reasonable and that imposed for wounding with intent was the mandatory minimum required by law.

Analysis

[39] When identification is in issue in a case before the court, a trial judge must observe the guidelines as enunciated in the Court of Appeal case of **R v Turnbull** [1977] QB 224, at 228-231:

"First, whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition, he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Provided this is done in clear terms the judge need not use any particular form of words.

Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?... Finally, he should remind the jury of any specific weaknesses which had appeared in the identification evidence…

When, in the judgment of the trial judge, the quality of the identifying evidence is poor, as for example when it depends solely on a fleeting glance or on a longer observation made in difficult conditions, the situation is very different. The judge should then withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification. This may be corroboration in the sense lawyers use that word; but it need not be so if its effect is to make the jury sure that there has been no mistaken identification...

The trial judge should identify to the jury the evidence which he adjudges is capable of supporting the evidence of identification. If there is any evidence or circumstances which the jury might think was supporting when it did not have this quality, the judge should say so…

> A failure to follow these guidelines is likely to result in a conviction being quashed and will do so if in the judgment of this court on all the evidence the verdict is either unsatisfactory or unsafe."

[40] Counsel for the applicant relied on **Dwayne Knight v R**, where the witnesses' opportunity to view the face of their assailant did not exceed three seconds and the court felt that it was a classic fleeting glance. She also relied on **Norris Johnson v R**. In that case the witness referred to three sightings of the accused, three seconds from a distance of 16 feet, 15-16 seconds and then six seconds. This court determined that the identification evidence was not of a nature of a fleeting glance. Furthermore, it was a recognition case and, as a result, the viewing time need not be as long as in cases where the accused is a stranger to the witness.

[41] In the instant case, how did the judge handle the issues surrounding identification? The judge expressly acknowledged that identification was the main issue before her. At pages 137-138 of the transcript she stated:

> "The issue before me at this time therefore, is whether or not this man, [the applicant] was the person who shot and injured [the complainant]. So this is the case where the matter against [the applicant] depends wholly on the correctness of identification of him, which the defence is alleging is mistaken. I'm aware therefore, that I must warn myself as to the special need for caution because I can convict on this evidence and I do so warning myself in recognition of the fact that there have been wrongful convictions in the past based on mistaken identity. I remind myself that an apparently convincing witness can be mistaken and so can a number of apparently convincing witnesses. I remind myself that there can be mistakes made even in circumstances where recognition is what is alleged. So I must therefore carefully examine the circumstances in which the identification was alleged to have been made. I must also remind myself of any specific weaknesses which appear in the identification evidence."

[42] The judge considered the circumstances surrounding the complainant's identification of the applicant. At pages 139-145 of the transcript she stated:

> "The complainant described for us … this club, when she saw a young man entered [sic] the club, spent sometime in conversation with her, bought something at the bar and then said he was leaving and as she turned her back from him she was told by her bartender to duck as a gun was presented. She said as she turned back in the direction she was formerly she received her first injury. The circumstances then surrounding the identification of her assailant is not limited to that period when she actually feared the gun but both witnesses say that there was [sic] no other persons in the bar at that time … they are saying that it was the same person who engaged [the complainant] in conversation, who bought … this water from the bar … there has been no issue pertaining with the quality of the lighting that existed at that time. The witnesses … have indicated that the bar had sufficient lighting… So it would appear, and it hasn't been challenged, that there was adequate light in the bar that night… [The complainant] stood there looking out … she saw the young man. She described what he was wearing … a jeans pants with big pocket and farm work hat covering his ears … she saw him he was coming off the road and he turn into her building … she went back to the corner of the bar … at which point she was now facing the gentlemen [sic] who had come to the other side of the bar.
>
> Another important feature in terms of the ability to have seen her assailant is the distance at which she was able to observed [sic] him. She said he was at one corner and she was at the next. And there was an estimated distance of 10 feet from corner to corner … she saw the whole of him … his forehead, his eyes, she saw him from head to toe … she engaged him in conversation. Some chit chat which ended up in her offering him to cook him steam fish. He [sic] said he bought her a bottle of water which she was served. At which point he said he was going to eat some food and come back, he took up the closed food box … put the water in his back pocket and headed to the bar doorway. She said at that point she turned her eyes off him. She however estimated that the conversation, that had taken place between them lasted roughly about 12 minutes. She said during the conversation she was looking at him, directly at him, she said it was after she had taken

> her eyes off him in a minute or second as she described it. Her bartender … called out, 'Cola duck, gun'. She described how she spun around received the first shot … the second one was to her chest. She then said that at this time her shooter was 3 feet away still pointing the gun at her and still firing the shots. She said she received a third shot… And as she described it she went down on the floor in decent slow motion style and lay on her stomach. She said she had her eyes shut but was peeping, was able to peep out through some sideways and she saw the same man over her, shot her one more time in her back and then he ran off… She was asked specifically how she was able to see it was the same man who she had spoken to, who had done the shooting. She said it was him because she had a good look at him, she saw him, she saw even the food box … afterwards on the verandah … she saw him throw the water in a rubbish bin…she saw his clothes and then she describes that he was not so ugly, she found him to be a cute boy… She … went on to describe his teeth of not being straight, they being twisted."

[43] In continuing to look at the issue of the applicant's teeth, at pages 145-146, the judge stated:

> "She also went on to say something about those teeth, she said, it was while he was actually firing at her that she [sic] did 'skin out' his teeth and in those circumstances I'll have to ask myself whether she would have been in a position to see whether those teeth were, indeed, straight or twisted because that became an issue. That was never a part of the description she had given to the police. [The applicant] was asked to show his teeth. From where I stand I frankly did not notice anything particularly unusual about his teeth. Crown counsel sat closer to him and spoke of seeing one tooth twisted, from the distance I sat from him I didn't see anything unusual about his teeth. The question is that the description of twisted teeth, something that is so sufficient that should be used ultimately to determine the identification of [the complainant's] assailant, because she goes on, when she was pressed to tell us, that years before, long, long time before he came to the bar with somebody name [sic] Red Square. She said it was at that time she had seen all of him."

[44] The judge went to the issue of when the complainant first recalled seeing the applicant. At pages 146-147 she stated:

> "She said, under cross-examination … she admitted not telling the police about this Red Square when she gave her statement and [the applicant] coming there with Red Square. In her cross-examination she explained, that night when the incident took place, when she saw her assailant, she thought he looked familiar, she couldn't remember where she knew him from and it was on the occasion, the 11th of July when she said he again came to her bar … when she made the connection with Red Square."

[45] The judge referred to what occurred on 11 July 2011. At pages 147-148 she stated:

> "So on the 11th of July… She got up out of her bed … she saw a man walking towards her business place and she said that she saw him, she recognized him. She said she told her gateman, 'see the man deh who shoot me'. She said this man walked up towards her and actually looked at her in her face and she looked back at him…She said she called the police in particular the investigating officer who came on the scene and said, 'see the guy deh weh shoot mi.' She said once Mr Rose held him she said, 'a him do it, a don't need any ID parade or nothing, see hi deh.' This of course was taking place some two months after the incident."

[46] At page 163 of the record of appeal, the judge concluded:

> "I am satisfied that [the complainant] was shot. I am satisfied that on the night she was shot there was adequate lighting in her establishment for her to see her assailant. I am satisfied that she was in a conversation with that assailant. I am satisfied that [the complainant] has described it in her particular manner based on the person who shot her as one she may well never forget that is why on 11th of July when she said the person returned to her establishment she was able to point him out. I am satisfied that I feel sure, that this is the man that [the complainant] says that shot her on that night. I am satisfied that she was not mistaken and accordingly I find [the applicant] guilty…"

[47] The judge did not rely on the dock identification made by Ms Campbell, although her other evidence was seen as confirming the fact that the complainant had had a conversation with her assailant, who had bought a bottle of water and had sat in the bar for a number of minutes.

[48] We agree with the submissions made by the DPP, that the judge identified and complied with the various tenets outlined in **Turnbull**. She warned herself as required and then undertook a detailed review of the evidence in respect of the circumstances under which the complainant was able to observe the applicant on the night of the incident. The judge referred to, among other things, the lighting, the time over which the complainant was able to see the applicant, his clothing, the distance between him and the complainant and other matters which the complainant said confirmed to her that it was the man with whom she had had the conversation, who later shot and injured her.

[49] It is interesting that counsel for the applicant, in her written and oral submissions, said very little about the day on which the incident actually occurred. In fact, in the grounds of appeal, there is no specific reference to the date on which the incident occurred. Instead counsel focused on what she called the 'first sighting' when the applicant had been seen with Red Square and the 'third sighting' when the complainant pointed out the applicant to the police. The judge referred to the first sighting and the explanation given by the complainant that when she saw the applicant on the night of the incident, he seemed familiar but she was unable to identify when she had seen him before. It was only when she saw the applicant again in July 2011 that she recalled that she had seen him at the club with Red Square some time before.

This evidence, contrary to the submissions of counsel for the applicant, cannot be seen as a weakness in the identification evidence which came from the complainant in respect of the date of the incident in May 2011. In fact, the complainant's evidence on this point could highlight her powers of observation and recollection. In the final analysis, however, we agree with the DPP's submissions, that where the question of identification arises, the focus would need to be on the evidence given regarding the actual incident on 9 May 2011.

[50] Counsel for the applicant spent quite some time addressing the alleged discrepancy between the description of the applicant and the assailant and had relied on **Tesha Miller v R**. This court, in addressing the issue of confrontation identification, considered whether the appellant had been well known to the complainant. McIntosh JA, in delivering the reasons of the court stated at paragraph [39]:

> "…The learned trial judge was therefore depending on one prior sighting when according to the complainant he saw the appellant 'head to toe face to face' for about 30 minutes, 10 to 12 minutes of which the appellant was about an estimated 15 feet away from him talking to Termite. With such a good opportunity to view the face of the appellant the absence of any mention of those visible facial features-scars and missing teeth-must in our view amount to a weakness in the identification evidence (See **R v Garnet Edwards** SCCA No 63/2002 delivered on 27 April 2007 where the court expressed concern about a particular facial feature (a birthmark under one of the appellant's eves) said to have been plain and obvious but which had not been included in the identifying witness' description of his assailant and regarded it as a weakness in the identification evidence). It seems to us that when the authorities speak of 'well known' much more than one sighting even of half an hour, without any interaction between the complainant and the appellant, was intended…"

[51] Counsel for the applicant had submitted that the complainant claimed that her assailant had twisted teeth, but at the trial, when the applicant was asked to show his teeth "it was revealed that his teeth were not twisted". This is not, however, a true reflection of what occurred during the trial. When the applicant was asked to show his teeth, the complainant insisted that his teeth were twisted (see page 52 of the transcript). While the judge said that she did not notice it from where she sat, she noted that Crown Counsel claimed to have seen the twist in the applicant's teeth. It is also important to note that the complainant said that she saw the twisted teeth when the applicant 'skin out' his teeth while he was firing shots at her. This could not then be described as a plain and obvious or highly visible physical feature of the applicant. It is clear that counsel for the applicant had seen this as a major point, however, upon an examination of the transcript, it is clear that, in the end, it did not have much force. The judge queried, in any event, whether this issue of the twisted teeth should be used to ultimately determine the identification of the applicant. In our view, the twisted teeth did not appear to be a major part of the complainant's identification of the applicant, in circumstances which allowed for her detailed viewing of and interaction with him prior to the shooting.

[52] The other issue which was raised by counsel for the applicant concerned the fact that the complainant had not participated in an identification parade to identify the applicant. Counsel relied on **Courtney Lawes v R** as establishing the principle that, where the suspect was unknown to the witness, an identification parade should be held and confrontation was to be confined to rare and exceptional circumstances. In that case, an identification parade had in fact been held, but the applicant had been

exposed to the complainant before the parade. Phillips JA, who delivered the judgment on behalf of the panel, concluded as follows at paragraph [46]:

> "… In our view, the exposure of the applicant to the complainant prior to the identification parade severely tainted the identification of the applicant, made the quality of the identification evidence poor, and the case ought to have been withdrawn from the jury..."

[53] No identification parade was held in the case at bar and there is no issue of confrontation. The question to be addressed is the impact, if any, of the failure to hold an identification parade.

[54] The DPP helpfully referred to **Mark France and Rupert Vassell v R** in which the Privy Council outlined certain principles to be considered concerning the failure to hold an identification parade. In delivering the judgment of the panel Lord Kerr stated at paragraph 28 of their judgment:

> "**It is now well established that an identification parade should be held where it would serve a useful purpose**-*R v Popat* [1998] 2 Cr App R 208, per Hobhouse LJ at 215 and endorsed by Lord Hoffmann giving the judgment of the Board in *Goldson and McGlashan v The Queen* (2000) 56 WIR 444. In *John v State of Trinidad and Tobago* [2009] UKPC 12, 75 WIR 429 **addressing the question of how to assess whether an identification parade would serve any useful purpose, Lord Brown considered three possible situations:** the first where a suspect is in custody and a witness with no previous knowledge of the suspect claims to be able to identify the perpetrator of the crime; the second where the witness and the suspect are well known to each other and neither disputes this; **and the third where the witness claims to know the suspect but the latter denies this.** In the first of these instances an identification parade will obviously serve a useful purpose. In the second it will not because it carries the risk of adding spurious authority to the claim of recognition. **In the third situation, two questions must be posed. The first is whether,**

> **notwithstanding the claim by a witness to know the defendant, it can be retrospectively concluded that some contribution would have been made to the testing of the accuracy of his purported identification by holding a parade. If it is so concluded, the question then arises whether the failure to hold a parade caused a serious miscarriage of justice** - see *Goldson* at (2000) 56 WIR 444, 450." (Emphasis added)

[55] In our view, this matter fell within the third situation to which their Lordships referred, and so the question is whether, looking back, it is felt that some contribution would have been made to testing the accuracy of the complainant's identification.

[56] How did the judge treat with the issue? The judge addressed the question as to whether an identification parade ought to have been held at pages 151-153 of the transcript when she stated:

> "The issue of whether or not an identification parade ought to have been held … was raised by the defence…
>
> Ultimately, the court must be satisfied as to the fairness of the circumstances purported to identify [the applicant] as the assailant. In this particular circumstance it was [the complainant] herself who had called the police to point out the person she said was her assailant. She had that person under her observation that night of 11th of July from the time before the police arrived to hold him. She told the police she didn't want to go on any ID Parade because she sees [sic] him, she knows him, because she knew him well. It would not have been fair at that time to put [the applicant] on a parade when it is the complainant herself who had turned him into the police, because that is what it amounts to. What would have been the worth of the identification parade at that point? There is recognition in some of the authorities, the potential danger in putting such a person on the identification parade because the complainant, having been the one who turned him in as the assailant, could well have gone there and identify (sic) him but would she identify the person she turned in on the 11th of July as the person she saw shot her on the 11th of May. In her mind's eye it was one and the same person,

> so that danger, as indicated if [sic] the court in certain circumstances concerning the holding of an identification parade or failure to hold an identification parade, it does not automatically mean that the accused must be acquitted. All the fairness surrounding his identification and the possible weaknesses that arises [sic] from him not being placed on one must be borne in mind when trying to balance the scales, bearing in mind also that the standard requires proof beyond a reasonable doubt."

[57] We agree with the DPP's submissions that the judge approached the issue correctly. The holding of an identification parade in which the complainant was to participate would not have served any useful purpose, and in fact, would have been unfair to the applicant.

[58] Insofar as the question of the sentences imposed on the applicant are concerned we agree with the submissions made by the DPP. The five-year sentence imposed for illegal possession of firearm could not be described as excessive and the 15-year sentence imposed for wounding with intent reflected the statutory minimum outlined in section 20(2) of the Offences Against the Person Act.

[59] It was for the above reasons that we refused leave to appeal.