[2018] JMCA Crim 34

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 31/2012

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MR JUSTICE BROOKS JA
THE HON MISS JUSTICE EDWARDS JA (AG)

DWIGHT GAYLE v R

Bert Samuels, Ms Bianca Samuels and Ms Daynia Allen for the appellant

Mrs Karen Seymour-Johnson for the Crown

27, 28 February, 2, 3 March 2017 and 28 September 2018

BROOKS JA

[1] This is an application by Mr Dwight Gayle for leave to appeal against his conviction and sentence in the Circuit Court held in the parish of Clarendon. A single judge of this court refused Mr Gayle's application for permission to appeal but he has renewed that application before the court. Mr Gayle was convicted on 15 March 2012 for murder, resulting from the shooting death of Mr Ron Walcott on 24 March 2010, at Raymond's District in the parish of Clarendon. He was sentenced, on 19 March 2012, to imprisonment for life but was ordered to serve 25 years before becoming eligible for parole.

[2] A major question for this court is whether the learned trial judge's failure to give directions in respect of what is said to be a dock identification, is fatal to the conviction.

[3] The prosecution's case relied on evidence from a single eyewitness (referred to hereafter as "the witness"). The witness was, on 24 March 2010, at about 7:00 pm, sitting on the front perimeter wall of his residence. His friend, Mr Dennis Mills, was sitting with him. They were facing the road. Other people, including the witness' nephew, Mr Damion Anderson, were nearby at the time. The witness saw two men walk up to where he was. He knew them both before. One was Mr Gayle, whom the witness knew before as Dwight Gayle. The other was a man whom the witness knew only as "Big Youth". Mr Gayle and Big Youth remained at the location for some five to 15 minutes. During that time, Mr Gayle leaned against the wall, within touching distance of the witness, while Big Youth went across the road and was speaking to Mr Damion Anderson. The area was well lit by lights from the witness' house, other houses and a street light. At that time, Mr Gayle had a plaster of Paris cast on his left arm, which the witness had seen him wearing before.

[4] That was the situation when the witness saw Mr Walcott, walking with his young son, pass by along the road. Big Youth came to where Mr Gayle was and said something to him, which the witness heard and interpreted to mean that they intended to kill Mr Walcott. The witness said he saw Mr Gayle take a gun from his waist. The witness then said, "Not at my gate". The men then followed Mr Walcott.

[5] According to the witness, not far away, by the street light, which was mentioned above, Mr Gayle shot Mr Walcott. Thereafter, the men walked away, and made good their escape. Mr Walcott's son ran away when the shots were fired.

[6] Mr Gayle was taken into custody by the police on 1 April 2010, while he was a patient at the May Pen Hospital in the parish of Clarendon. At that time, he gave his name to the police as Orlando Brown and denied that he was named Dwight Gayle. He was detained in connection with Mr Walcott's death and was placed, as the suspect, on an identification parade in the name, Orlando Brown. The witness attended that identification parade for the purpose of pointing out the person who had killed Mr Walcott.

[7] The witness said that he knew Mr Gayle's family, and had known Mr Gayle, by name, since Mr Gayle was a child. He said that he knew that Mr Gayle was also called "G-Man". He had seen Mr Gayle two days prior to the incident, and he would see him three times per week between 2008 and the night of the incident. Mr Gayle, he said, had even visited his home to speak with the witness' nephew. Despite claiming that he knew Mr Gayle, he failed to point him out on the identification parade. In fact, the witness pointed out someone else as being the shooter. The person pointed out was a volunteer on the parade line-up.

[8] Mr Gayle was, nonetheless, charged with the killing. The prosecution did not provide an explanation for his being charged.

[9] At the trial, the witness pointed out Mr Gayle, as being the person who had shot Mr Walcott. Mr Gayle was then in the prisoner's dock. The witness testified that he had seen Mr Gayle in the line-up at the identification parade but had not pointed him out because he, the witness, was in fear for his life.

[10] In his unsworn statement from the dock, Mr Gayle stated that whereas he knew Big Youth, he denied any knowledge of the witness, denied that he had ever been to the witness' home and denied that he had ever had a broken arm or ever wore a cast on his arm. He stated that he was not in Big Youth's company on the night of the killing, and in fact had not been in Big Youth's company since Big Youth had come back to the island from abroad. Mr Gayle said that he was not in or near the place where the killing occurred. He said he was working in the parish of Manchester at the time of that incident.

[11] In this application, which has been treated as the hearing of the appeal, Mr Samuels, on behalf of Mr Gayle, with the leave of the court, abandoned the original grounds of appeal filed by Mr Gayle and advanced a number of additional grounds of appeal. In the additional grounds, which are set out below, Mr Gayle is referred to as "the accused". The grounds are:

> "**Ground 1**
>
> The learned trial judge failed to appreciate that if the jury rejected the explanation of fear given by [the witness] as the reason for not having identified the accused and having identified another individual at the identification parade, then the trial would have been the first time that the accused was being identified by the witness and therefore,

at its highest, the identification was by way of dock identification. That being so, she failed to give the appropriate directions to the jury."

"**Ground 2**

The Learned Crown Counsel was permitted to ask a leading question on the determinative issue of identification, rendering the trial unfair in the circumstances of the case."

"**Ground 3**

The learned judge failed to direct the jury that if they rejected the explanation of fear given by the witness as the reason for not having identified the accused and having identified another individual at the identification parade, the result was that there remained no explanation as to why the accused was charged and they were not at liberty to fill that gap with their own speculated explanation on matters not in the evidence before them."

"**Ground 4**

The jury became exposed to highly prejudicial statements during the course of trial that could not be cured by the Trial Judge's warnings which were insufficient, ill-timed and thus unhelpful, resulting in an unfair trial."

"**Ground 5**

The learned trial judge ought to have pointed out a strange feature of the case, that is, at no time was [it] told to the applicant the basis on which the charge of murder was preferred against him on the 21st of April 2010."

"**Ground 6**

The learned trial judge failed to deal adequately with the implications and/or effect of a possible rejection by the jury of the purported explanation of fear given by the witness alleged to have driven him to point out someone other than the accused at the ID parade and her failure so to do resulted in unfairness to the applicant.

Ground 6(a)

The learned trial judge erroneously treated the case throughout her summation as one of 'recognition', thereby depriving the accused of a verdict favourable to him."

"**Ground 6(b)**

The Learned Trial Judge failed to direct the jury that having heard the evidence, if they:

a. rejected the witness's explanation to the effect that he failed to point out the accused on the ID parade because of fear; or

b. were left in a state of doubt about that explanation,

then they would have to acquit the accused, as an ID parade was the best way of testing a person's knowledge about the person alleged to have committed an offence."

"**Ground 6(c)**

The learned trial judge failed to direct the jury on the issue of credit in relation to the evidence given by the witness in his evidence to the effect that though he saw the accused at the identification parade, he had deliberately pointed out someone else."

"**Ground 6(d)**

The Learned Trial Judge failed to instruct the jury that if they believed or were in doubt as to the explanation of 'fear', then the evidence of the witness to the effect that he deliberately pointed out someone other than the accused on the ID parade, is corroborative of the statement by the Applicant that he did not know the witness neither did the witness know him [P181-182] and further, that it was also corroborative of the Applicant's defence that he did not commit or have any part in the offence."

"**Ground 6(e)**

The learned trial judge having heard the evidence that the one-way mirror safeguard was used at the identification parade, failed to apply the reason for its use, having regard to the evidence of 'fear' relied on by the prosecution."

"**Ground 7**

The learned trial judge's comments and omissions throughout her summation, had the cumulative effect of diminishing the accused man's defence, resulting in an unfair trial.

Ground 7(a)

Duty to Relate Directions on Law to the Evidence

...

Ground 7(b)

Judge Usurped Function of the Jury - Explanation Of Fear

...

Ground 7(c)

JUDGE INTERROGATED THE ACCUSED ON A LIVE ISSUE"

"**Ground 8**

In the event the court is mindful to allow this appeal it is submitted that this is not a fit and proper case for the application of the proviso in the Judicature (Appellate Jurisdiction) Act, Section 14 (2)" (Bold type, underlinings and capitals as in original)

Ground one – the summation to the jury on the dangers of dock identification

[12] In this ground, Mr Gayle complains that the learned trial judge's summation to the jury was inadequate in respect of the issue of dock identification. This complaint arose because of the witness' identification of Mr Gayle during the trial, as the shooter, although he had failed to point out Mr Gayle on the identification parade.

[13] During her summation of the case, the learned trial judge directed the jury on the dangers of visual identification and pointed out the need for caution when assessing the evidence concerning such identification. Her directions, in this regard, were unobjectionable. She also, quite properly, brought to the attention of the jury the fact that the witness had failed to point out Mr Gayle at the identification parade. She reminded the jury of the witness' explanation for that failure and instructed them that it was a question of fact for them whether or not they believed his explanation for pointing out someone else.

[14] In that context, the learned trial judge also directed the jury of the purpose of holding an identification parade and that the failure of the witness to identify Mr Gayle on the parade was a weakness in the identification evidence (pages 218-219 of the transcript). She then directed the jury, that this weakness in the identification evidence is the reason why the Crown had urged upon them the need to consider the witness' explanation for his failure to identify Mr Gayle. The learned trial judge also instructed them to consider what they made of the explanation in the light of the fact that counsel

for Mr Gayle, under cross-examination, sought to challenge the witness' credibility via various suggestions put to him (pages 219-222 of the transcript).

a. The submissions

[15] Mr Samuels submitted that the learned trial judge's directions in this context were inadequate. He argued that the learned trial judge ought to have also told the jury that, in the event that they rejected the witness' explanation for his failure to point out Mr Gayle, they would be left with a case of dock identification. The learned trial judge, should have, Mr Samuels submitted, pointed out to the jury the dangers of dock identification. He submitted that several decided cases clearly showed that this failure should be held to be fatal to the conviction.

[16] Mrs Seymour-Johnson, for the Crown, argued that this was not a case involving a dock identification in the strictest sense of the expression. She submitted that it could be inferred that the witness had told the police, prior to the trial, that he had seen the perpetrators and had given their names to the police. Hence, the police had sought out Mr Gayle. She commented that there was no indication from the defence, during the prosecution's case, that prior knowledge between the witness and Mr Gayle, was being denied. In the circumstances, she submitted, the prosecution was entitled to proceed as if the two were previously known to each other. Accordingly, learned counsel submitted, the failure of the learned trial judge to give a dock identification direction did not render the conviction unsafe.

[17] She submitted that the only reason that an identification parade was held for Mr Gayle was that he had lied to the police as to his true identity, when they had asked him for his name.

[18] Learned counsel accepted however, that if a dock identification direction had been required, the failure of the learned trial judge to give one would have required that the conviction be quashed.

b. **The relevant evidence**

[19] It is critical, for the purposes of this case, to highlight the witness' claimed previous knowledge of Mr Gayle. That previous acquaintance, as claimed, is an important backdrop, against which to view his conduct at the identification parade. It is a basis by which the jury could test the witness' credibility.

[20] The evidence, relevant to that previous knowledge is recorded at pages 78-83 of the transcript of the trial. The witness said that he knew Mr Gayle when he was a small boy. Mr Gayle was otherwise called "G-Man", he testified. He lived in the same district with Mr Gayle and knew Mr Gayle's family. The witness said that he left Jamaica in 1996 and came back in 2008.

[21] He said that between 2008 and the date of the incident he would see Mr Gayle regularly. Pages 80-81 of the transcript records that aspect of the evidence:

> "A. I would see him like twice, three times a week. My brother would bring him to the house and talk to him on the phone.
>
> ...

Q. Now, was Dwight Gayle someone you spoke to?

A. All the time.

Q. All the time, like you said you see him two to three times per week, how often you will [sic] speak to him?

A. Once a week but since my nephew came back to Jamaica, I see him almost every day come to my yard because him and my nephew [Damion Anderson] is like this.

...

Q. ...And where was Damion Anderson living?

A. At my house.

Q. And you say you see him almost every day?

A. Everyday going to [the area called] 'Sadam' and coming from 'Sadam', he call to my nephew and talk.

Q. So that time from 2008 to the time of the incident, how often would you speak to him?

A. In the incident, speak to him like two to three times a day per week used to call to each other and talk."

He testified that he had seen Mr Gayle about two days before the killing.

[22] The knowledge of Mr Gayle's family is recorded on page 81 of the transcript:

"Q. Do you know any of Dwight Gayle's family?

A. I know his mom, dad, his sister.

Q. What is his mother's name?

A. They call her Mary.

Q. And what's his father's name?

A. They call him 'Tivoli' but his last name is Gayle, don't know his first.

Q. And you know his sister's name?

A. Tameka.

Q. Where was Tameka living at the time in 2010?

A. May Pen, Racetrack."

[23] The witness placed much emphasis that at around the time of the incident, Mr Gayle had been wearing a cast on one of his hands. The witness used the cast as part of his recognition of Mr Gayle as Big Youth and Mr Gayle came to the scene on the evening of the incident.

[24] The cross-examination did not challenge much of that detailed knowledge. In fact, the cross-examination elicited evidence of contact between the witness and Mr Gayle after the killing. That too remained unchallenged. In cross-examination, defence counsel suggested to the witness that Mr Gayle was not a frequent visitor to the witness' house, that the witness would not see Mr Gayle two to three times per week, and that he would not speak with him by telephone. All these suggestions were rejected by the witness.

[25] The major thrust in challenging the witness was in respect of the opportunity to view the person who was with Big Youth that night. It was clearly suggested to the witness that the person with Big Youth was not Mr Gayle. The latter suggestion is recorded at page 135 of the transcript:

"Q. Yes. I am going to suggest to you, you see sir, that the person that you saw that night come up from the gully with Big Youth, was not [Mr Gayle]. That's my suggestion, what is your answer?

A. Yes, sir. I saw Dwight Gayle with a plaster polish [sic] on his hands. I know him."

[26] The witness also demonstrated his intimate knowledge of the characters involved. When defence counsel sought to find out more about Big Youth's association with Mr Gayle, the witness' knowledge was educational. This is recorded at pages 133-134 of the transcript:

"Q. All right. Listen to this. You use to see [Mr Gayle] in the company of 'Big Youth' before the night of the incident?

A. Few times, because 'Big Youth' came to Jamaica a few days ago.

Q. I am sorry?

A. Big Youth just came back to Jamaica a few days before this incident.

Q. So you never use to see him in 'Big Youth's' company?

A. Yes, sir.

Q. You just said - ?

A. I said 'Big Youth' came back to Jamaica a few days before this murder took place. Yes, sir. I see him in his company, sir.

Q. I am confused, you said 'Big Youth' just came back from America a few days before the incident?

A. Not America, Antigua.

Q. Oh, Antigua?

...

Q. So when it is, that him and 'Big Youth' used to come a di house?

A. They come there a few times. When 'Big Youth' come back, a few times from Antigua, because they were friends, 'Big Youth' never in a Jamaica two weeks before him get kill.

..."

[27] The witness accepted, during cross-examination, that he was away from the island up to 2008. He also accepted that his arrival in Jamaica at that time was because he had been deported from the United States of America. There were also suggestions that the witness was in hiding between 2008 and 2010. The witness denied those suggestions, saying that he only went into hiding after the incident.

[28] The evidence concerning the witness' attendance and actions at the identification parade arose during the witness' evidence in chief. The evidence is recorded at pages 92-94 of the transcript. It is as follows:

"Q. Yes. You said you recall going on a [sic] identification parade?

A. Yes, sir.

Q. Did you point out anyone at that parade?

A. When I go to the parade...

Q. Just tell me what you did. You point on somebody on that parade?

A. Yes, sir.

Q. What number was that person under that you pointed at?

A. Was seven.

Q. **Did you recognize anybody else on that parade?**

A. Yes, I recognize Dwight Gayle; he was in [sic] **six, sir.**

Q. Why did you go to that parade?

A. To point out the person I see kill Ron Walcott on the [sic] March 24, 2010.

Q. So, did you point that person out?

A. Never point him out, because the morning of the parade...

Q. Hold on, sir. Just answer exactly what I ask.

HER LADYSHIP: One moment.

Q. Was that person on the parade?

A. Dwight Gayle was on the parade, under number six, sir.

Q. Why didn't you point at Dwight Gayle?

A. Because the morning of the...

HER LADYSHIP: No, just tell us what happened.

A. I was scare [sic] for my life.

HER LADYSHIP: That is why you didn't point out Dwight Gayle?

THE WITNESS: Yes." (Emphasis supplied)

[29] It is also important to note that the witness had, earlier in his testimony, pointed out Mr Gayle. This was done when the witness described the scene of where he was sitting, and with whom, prior to the time that Mr Walcott was shot. His evidence is recorded at pages 63-64 of the transcript:

> "Q. And where exactly -- you say you were sitting where, exactly where you [sic] sitting?
>
> HER LADYSHIP: He was sitting or his friend was sitting.
>
> THE WITNESS: I sitting here. I was sitting right here and Dwight Gayle on the left.
>
> HER LADYSHIP: So you were sitting...
>
> Q. Sorry. Mr. [witness], you said you were in the middle?
>
> A. Yes.
>
> Q. And who was on each side of you?
>
> A. Dennis Mills on the right and Dwight Gayle on the left.
>
> Q. Who is Dwight Gayle?
>
> A. (Witness points.)
>
> HER LADYSHIP: Who are you pointing to?
>
> THE WITNESS: The fellow over there in the box.
>
> HER LADYSHIP: Gentleman sitting over there in the red plaid shirt, what is your name?
>
> ACCUSED: Dwight Gayle."

[30] The witness testified that he had earlier seen two men approaching where he was sitting. He identified the two as "Dwight Gayle and 'Big Youth'" (page 66 of the transcript). The witness described what occurred after the two men arrived at the place at which he was sitting. The relevant testimony is recorded at pages 69-70 of the transcript:

> "Q. Now, you said you saw these two men coming?
>
> A. Yes, sir.
>
> Q. And you recognized the two men?
>
> A. Yes, sir.
>
> Q. What next happened from there?
>
> A. Big Youth was talking to my nephew across from where I - - we were sitting on the wall. Dwight Gayle was leaning up here on the left.
>
> Q. Now, I saw you touch somewhere when you say Dwight Gayle lean up here on the left, what distance was he from you when you say he lean up on the left?
>
> A. Just about touching distance."

[31] He testified that he spoke to Mr Gayle just before the time of the shooting. After Big Youth had spoken to Mr Gayle, Mr Gayle had pulled a gun from his waist and the witness, on seeing this, the witness said to Mr Gayle, "Not at my gate" (page 73 of the transcript).

c. The relevant law

[32] An analysis of the law that is relevant to the circumstances of this case and these competing submissions requires, firstly, a definition, for these purposes, of the term "dock identification". In **Mark France and Rupert Vassell v The Queen** [2012] UKPC 28; (2012) 82 WIR 382, the Privy Council stated, at paragraph 33 of its judgment, that a dock identification entails "in the original sense...the identification of an accused person for the first time by a witness who does not claim previous acquaintance with the person identified". Their Lordships accepted, however, that sometimes the term "dock identification" was used to encompass an identification in court, which followed an earlier identification of the accused to the police. That earlier identification may be by way of a pointing out, or by way of a detailed description of the perpetrator, whom the witness claims to have known before. Their Lordships indicated that the direction to be given to the jury could differ according to the nature of the identification. They stated at paragraph [34]:

> "There has been a tendency to apply the term 'dock identification' to situations other than those where the witness identifies the person in the dock for the first time. This is not necessarily a misapplication of the expression but it should not be assumed that the dangers present when the identification takes place for the first time in court loom as large when what is involved is the confirmation of an identification already made before trial. **Nor should it be assumed that the nature of the warning that should be given is the same in both instances.** Where the so-called dock identification is the confirmation of an identification previously made, the witness is not saying for the first time, 'This is the person who committed the crime'. He is saying that 'the person whom I have identified to police as the person who committed the crime is the person who stands in the dock.'" (Emphasis supplied)

[33] The issues involved in the present case have been the subject of a number of fairly recent decisions from their Lordships in the Privy Council. Some of those decisions have been from this jurisdiction. It is only necessary to tabulate the relevant principles emanating from those cases.

[34] First, an identification parade should only be held if it would serve some useful purpose (see **France and Vassell v The Queen** at paragraph 28). If the perpetrator of the offence was not known to the witness before, if that person is only known by an alias, or if the witness' claimed prior knowledge is disputed by the suspect, an identification parade should be held (see **David Ebanks v R** [2006] UKPC 6, at paragraph 17 and **Ronald John v The State of Trinidad and Tobago** [2009] UKPC 12, at paragraph 16). If, however, a witness claims prior knowledge of a person, whom the witness asserts committed an offence, and there is no challenge to that prior knowledge, it would be unnecessary, and possibly misleading, to place that person on an identification parade in order to test the witness' ability to identify the suspect. The witness, in such a case, would be pointing out the person that he or she knows (see **France and Vassell v The Queen** at paragraph 28).

[35] Second, dock identification, in the original sense, is undesirable in principle. It lacks the safeguard of an identification parade and it increases the risk of an incorrect identification. A witness may identify a person who is sitting in the dock, as being the

perpetrator, simply because of his presence there (see **Holland v Her Majesty's Advocate** [2005] UKPC D1; [2005] SC (PC) 3, at paragraph [47]).

[36] Third, evidence by way of dock identification is not, by itself, inadmissible. It will be a matter for the trial judge's discretion whether to admit it. The trial judge must consider whether admission of that evidence, particularly where it is the first occasion on which a witness would be purporting to identify the accused, would render the trial unfair to the accused. If the admission of that evidence would be unfair, it should not be allowed. The decision to admit the evidence of dock identification should be based on the "particular circumstances of the individual case" (see **Maxo Tido v The Queen** [2011] UKPC 16, at paragraphs 21 and 22).

[37] Fourth, where the dock identification evidence is allowed, particularly where it is the first occasion on which a witness would be purporting to identify the accused, it will be necessary for the trial judge to give careful directions on the dangers of that type of identification (see **Maxo Tido v The Queen** at paragraph 21).

[38] Fifth, a trial judge's direction to the jury on the dangers of relying on visual identification, according to the direction guidelines set out in **R v Turnbull and others** [1976] 3 All ER 549, does not satisfy the requirements for directing the jury on the special dangers associated with a case of dock identification. The issues involved are different, and where they both arise, the trial judge should address them both (see **Leslie Pipersburgh and another v R** [2008] UKPC 11, at paragraph 15).

[39] Sixth, uncontroversial evidence that the person accused was previously known to the witness, and the witness had previously identified the accused, would be a basis for allowing an identification in court. The identification in court would be no more than a formality (see **Terrell Neilly v The Queen** [2012] UKPC 12 at paragraph 32).

[40] Seventh, where a witness claims prior knowledge of the person accused, if the challenge to that prior knowledge is diffident and there is no other basis for doubting that prior knowledge, no useful purpose would be served by holding an identification parade, and an identification by the witness, in court, will not be deemed a dock identification in the original sense (see **Peter Stewart v The Queen** [2011] UKPC 11 at paragraph 10 and **France and Vassell v The Queen** at paragraph 32).

[41] Eighth, if however, the challenge to the claimed previous knowledge is more than tenuous, or there is some other reason to question the cogency of the claimed prior knowledge, it would be wrong to say that an identification parade would serve no useful purpose; it could test the honesty of the witness' assertion of prior knowledge (see **David Ebanks v The Queen** at paragraph 17).

[42] Those principles represent paths well cleared by their Lordships. There are, however, cases which do not fall neatly within the ambit of any of those principles. One such case is **Ovando Anderson v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 133/2004, judgment delivered 8 November 2006. In that case, this court held that a trial judge's failure to give a direction on dock identification was not fatal to the conviction for non-capital murder.

[43] The circumstances of that case were that the identification witness, who had been a co-accused of Mr Anderson, but had pleaded guilty to manslaughter, testified that it was Mr Anderson who had killed the victim. The witness said that he did not know Mr Anderson before the day of the killing, but had spent several hours with him that day, before going to the victim's house, where the killing occurred. Because Mr Anderson had been previously exposed to the witness, there was no opportunity for the holding of an identification parade.

[44] This court ruled that, although the trial judge did not give the required direction on dock identification, given the peculiar circumstances of the case, the omission "would not have amounted to a miscarriage of justice, vitiating the conviction" (see page 22 of the judgment).

[45] Also less well defined, is the law regarding a situation where an identification parade is held, the witness fails to point out the suspect, and yet purports to identify that person by way of a dock identification. The situation raises a conundrum. The accused has had the benefit of not having been pointed out on an identification parade. The result of such a parade contests at least one of the following:

a. the assertion by the police that the suspect is the perpetrator;
b. the ability of the witness to have seen the perpetrator;
c. the recollection of the witness; and

d. the honesty of the witness that he knew the suspect before.

On what basis, therefore, should that witness be allowed to point out the accused in court?

[46] A situation, as described above, is not a common occurrence, but it did occur in the cases of **R v Norman Tricoglus** (1977) 65 Cr App R 16, **R v George Robert Creamer** (1985) 80 Cr App Rep 248, **Holland v HM Advocate**, **Jason Lawrence v The Queen** [2014] UKPC 2; [2014] 4 LRC 236 and **Errol Rochester v R** [2017] JMCA Crim 8. None of these cases is, however, on all fours with the present case.

[47] In **R v Tricoglus**, the victim of a rape, Mrs G, attended an identification parade but failed to point out the suspect, who was on the parade. In fact, Mrs G pointed out someone else as being her attacker. She was, however, a witness in the trial of Mr Tricoglus in respect of a charge of rape of another woman, Miss A. At that trial, Mrs G pointed out Mr Tricoglus, as being her, Mrs G's, attacker. At that time, he was seated in the prisoner's dock. Mrs G did not claim any other prior association with, or knowledge of, him.

[48] The trial judge failed to direct the jury on the unsatisfactory nature of the dock identification. The English Court of Appeal ruled that a combination of the dock identification, the absence of any other identification evidence, some other improperly prejudicial evidence led during the trial, and the absence of a direction in respect of the

dock identification, rendered the conviction unsafe. The court, therefore, allowed the appeal.

[49] In **R v Creamer**, the sole eyewitness failed to point out Mr Creamer on the identification parade, on which he was the suspect. In fact, she did not point out anyone. She did not claim any prior association with Mr Creamer, but pointed him out at the trial, where he was the accused. The eyewitness in that case, shortly after leaving the parade, had informed the investigating officer that she had seen Mr Creamer on the parade. At the trial, she testified as to his location on the parade. Her explanation for failing to point him out on the parade was that she was frightened.

[50] In answer to the complaint that the eyewitness ought not to have been allowed to point out Mr Creamer in court or testify as to her reason for failing to point him out on the parade, the English Court of Appeal held that "there was no dock identification made in [the] case" (page 251). The court took into account the accuracy of the eyewitness' testimony as to the location of Mr Creamer on the parade. It also took into account the eyewitness' testimony that, at the parade, she had stopped in front of Mr Creamer, but that he had stared at her.

[51] Both issues were brought to the jury's attention by the recorder in charge of the trial. He told the jury that it was a question of fact for them to decide. The English Appeal Court stated that the whole issue:

> "was correctly crystallised by the learned recorder when he said to the jury…that the question that they had to ask themselves was: 'Are we satisfied so that we are sure of

> what she is saying when she comes out of the room being correct and that she is in fact identifying this defendant as that person?'" (See page 252 of the report)

[52] The court held that, in principle, the jury was entitled to consider whether the eyewitness had, in fact, seen the suspect on the parade. It said at page 253 of the report:

> "It appears to us that provided the opportunity for identification of a suspect was not so poor that the case has, on that account, to be withdrawn from the jury, there is no reason why the jury should not be invited to consider (as they were) whether the defendant was in fact identified by the witness following the identification parade...."

[53] It appears that the court was inclined to find that even if the eyewitness had not, immediately after the parade, communicated her identification of the suspect, she would have been allowed to testify at the trial to that identification. The court was prepared to hold that the issue of failure to point out Mr Creamer on the identification parade was a question of fact. It stated that the identification should be a question for the jury even if there was no indication of identification, prior to the trial. It went on to say at page 253 of the report:

> "…if the witness kept his own counsel when he recognised the individual of whom he was complaining, he merely ran the risk of having the bona fides or the consistency of his conduct attacked. **But if he could satisfy the court that he did genuinely recognise the accused at the parade and refrained from showing it for no improper motive, there seems no reason why his identification should be held invalid**." (Emphasis supplied)

[54] Whereas in **R v Creamer** the court was of the view that that was not a case of dock identification, their Lordships of the Privy Council adopted a different approach in **Holland v H M Advocate**. In the latter case, three of four prosecution witnesses failed to point out Mr Holland on the identification parade, on which he had been the suspect. One of the witnesses, however, had, before the holding of the parade, pointed out his photograph to the police, as being one of the persons who had invaded her house and robbed her of jewellery. She however, at the identification parade, pointed out two volunteers or "stand-ins" as being among the robbers. There was no indication that she knew Mr Holland before the time of the robbery.

[55] At the trial, she pointed out Mr Holland, while he was in the prisoner's dock, as being one of the robbers. Her explanation to the court, for having pointed out the stand-ins, was that the men on the parade were laughing and, she, being self-conscious, thought that they were laughing at her, and became flustered. She said she just picked out two people, but she wasn't sure if they were the robbers.

[56] Lord Rodger of Earlsferry, who gave the main judgment of the Board, had no doubt that the witness' pointing out of Mr Holland, in court, as one of the robbers, was admissible evidence. He took the view, however, that the pointing out was a case of dock identification, and being so, required a direction from the trial judge about the risks of such an identification, over and above the risks generally associated with visual identification.

[57] His Lordship seemed to be open to the existence of other factors that, despite an absence of a dock identification direction, may not have rendered the trial unfair. He said at paragraph [57]:

> "I respectfully agree that, except perhaps in an extreme case, there is no basis, either in domestic law or in the [European Convention on Human Rights and Fundamental Freedoms], for regarding [dock identification] evidence as inadmissible per se.…**In Scots law, as in any other system, the actual circumstances of any given trial have to be considered before one can say that it was fair**. In some cases, for instance, the dock identification evidence of one witness will have been confirmed by the evidence of witnesses who knew the accused. In other cases, there may be DNA evidence confirming the identification. In others again, however, the available corroboration may consist in facts and circumstances which are open to more than one interpretation, or else it may take the form of a dock identification by another witness who failed to identify at the identification parade. Similarly, in most trials counsel will have duly cross-examined the witness about the purported identification, but in some the cross-examination may have been perfunctory. In some trials defence counsel may have made a powerful submission to the jury on the point; in others counsel may have made little, or even nothing, of it. **The effectiveness of these and other potential safeguards in securing a fair trial depends on what actually happened in the individual case**." (Emphasis supplied)

[58] The remaining members of the panel agreed with his reasoning and conclusions. Based on the failure by the trial judge in that case, and other failures by the prosecution, the Board decided that the trial had not been fair. It, therefore, set aside Mr Holland's conviction. **R v Creamer** was not mentioned in the judgment.

[59] In **Lawrence v The Queen**, two eyewitnesses, one of them a woman, failed to point out Mr Lawrence on the identification parade, for which he was the suspect, yet purported to identify him, at the trial, in the dock. They had not, however, claimed to know Mr Lawrence before. The female eyewitness explained her failure to point out Mr Lawrence at the identification parade. Her reason was set out at paragraph 6 of their Lordships' judgment:

> "On cross-examination by Mr Salmon's counsel, Ms Linton explained that she had not been able to identify the person who stabbed Mr Madourie at the identification parades because on the fatal night he had had his red and white hat over his head and she did not see his face. On cross-examination by the appellant's counsel she confirmed that she had not been able to identify the appellant at the identification parades."

[60] Their Lordships, at paragraph 6 of their judgment, categorised the identification at the trial as "dock identifications properly so called as they identified the person in the dock for the first time". There was, however, another prosecution witness, who had known Mr Lawrence before. That witness identified him during the trial, as having been present at the scene. That previous knowledge was not disputed. The witness, who knew him before, did not, however, give any definitive evidence as to Mr Lawrence's actions as against the victim of the killing.

[61] The trial judge in **Lawrence v The Queen** gave the jury the requisite directions on the dangers of visual identification, but failed to give directions on dock identification. Their Lordships, in addressing the dock identification issue, opined that a direction on dock identification was, nonetheless, required. At paragraph 9 of their

judgment, they repeated their caution that, if the evidence of dock identification was admitted, the jury should have been warned of the undesirability and dangers of dock identification.

[62] Their Lordships recognized the similarity of the facts of that case to those in **Holland v H M Advocate**, and applied the relevant principles that were set out in **Holland v H M Advocate**. They held in **Lawrence v The Queen** that the previous failure of the two eyewitnesses to identify the suspect on the identification parade made it even more critical for the direction to be given if the dock identification was allowed to be admitted. After citing Lord Rodger's judgment in **Holland v H M Advocate**, on the dangers of dock identification, their Lordships said at paragraph 10 of their judgment:

> "...Those criticisms [of dock identification] were...at their most compelling when a witness who had failed to pick out the accused at an identification parade was invited to try to identify him in court."

[63] The Board ruled, at paragraph 11 of its judgment, that the trial judge's failure in **Lawrence v The Queen**, to give a direction on dock identification, constituted a misdirection. In ruling that the case should be remitted for re-trial, their Lordships directed, at paragraph 33, that the prosecution should avoid inviting the witnesses to make a dock identification. In justifying its conclusion, the Board stated that it is not appropriate to classify, as minor, the errors in relation to the dock identification.

[64] That was not, however, the only issue with which their Lordships wrestled, and found the conviction flawed. They also had to deal with the issue of the trial judge's errors in the presentation to the jury of the defence in respect of an alleged confession. They found that the errors that were made in respect of the dock identification and the confession could not be classified as being minor. Their Lordships were not satisfied that the jury would inevitably have returned a verdict of guilty if those errors had not been made. The conviction was therefore quashed. Again, **R v Creamer** was not cited to, or mentioned by, their Lordships.

[65] The next case is **Errol Rochester v R**. In that case, the virtual complainant had pointed out someone other than Mr Rochester, who was the suspect on the identification parade. There was, however, no dispute that the complainant and Mr Rochester had known each other before. The complainant's explanation for his actions on the parade was that "he had been threatened and he was afraid" (paragraph [10] of the judgment). The Parish Court Judge, who tried the case, held that it had been unnecessary to hold an identification parade. He relied on **R v Creamer** as authority for admitting into evidence the complainant's testimony identifying Mr Rochester in the dock and the explanation for not having pointed him out on the identification parade.

[66] This court, on Mr Rochester's appeal, took no issue with that approach by the Parish Court Judge. It agreed that the evidence was admissible. Importantly, for these purposes, it also found that "the learned Parish Judge might very well have been correct in concluding that an identification parade was not absolutely necessary" (see

paragraph [16] of the judgment). It however, found that he erred in holding that he did not have to consider the veracity of the complainant's evidence concerning the threat. F Williams JA, who delivered the judgment of this court, stated on this point, at paragraph [16] of the judgment, that:

> "…the resolution of that issue was necessary. It was required as being part and parcel of and inextricably bound up with the central question of whether the virtual complainant was a witness of truth...."

[67] Later in paragraph [16] of his judgment, Williams JA went on to be more expansive on the point. He said:

> "So that, while we think that, based on the case of **R v Creamer**, the learned Parish Judge correctly ruled admissible the virtual complainant's evidence in relation to the identification parade, there was a need for the actual consideration of that admitted evidence in relation to the virtual complainant's credibility. And while the learned Parish Judge might very well have been correct in concluding that an identification parade was not absolutely necessary, that fact ought not to have resulted in a failure to have considered (a) the reality that one was in fact held; (b) at that parade the virtual complainant pointed out a volunteer, and not the suspect; and (c) he claimed that the reason for not pointing out the suspect was that he had been threatened. **This failure on the part of the learned Parish Judge to have resolved the issue of credibility concerning the virtual complainant's pointing out of a volunteer instead of the suspect and his subsequent explanation (given for the first time at the trial), when it was necessary for that issue to have been resolved, in our view renders the conviction unsafe**." (Emphasis supplied)

d. Application of the law this case

[68] In this case, there is no dispute that there was no earlier pointing out of Mr Gayle, by the witness, to the police. Mrs Seymour-Johnson's submission that it could be inferred that the witness had previously given a name and description to the police, is not supported by any evidence. It is, at best, speculation. Three bits of evidence militate against the validity of that submission:

1. there were other persons present on the roadway outside the witness' premises at the time of the killing;
2. Detective Sergeant Marcia Murray, is recorded, at page 145 of the transcript, as having testified that she received the name Dwight Gayle in connection with the investigation into the death of Ron Walcott, from "[o]ne of [her] witnesses";
3. the witness testified that he said nothing to the police when they arrived on the scene. In fact, he is recorded at page 78 of the transcript as having said "in the ghetto you can't say anything to the police in the garrison, so you can't say anything law [sic] because they will kill you right away".

[69] There is, however, a significant difference between this case, on the one hand, and **R v Tricoglus**, **Holland v H M Advocate** and **Lawrence v The Queen** on the

other. Unlike this case, the eyewitnesses in those cases (two of the three witnesses in **Lawrence v The Queen**), had not claimed any prior knowledge of the suspect. The explanation given by the identification witnesses in each of those cases, for their failure to point out the suspect had nothing to do with a deliberate omission on their part, as was the situation in this case. In fact, in **R v Tricoglus**, the initial apparent claim by the witness, in evidence in chief, to have seen the suspect on the parade, seems to have initially been misinterpreted by the prosecutor. When asked to clarify what she meant by her initial answer, she stated that it was the man in the dock who was her attacker. The report, at page 21 states:

> "When [the prosecutor] asked...what she meant [by saying that she recognised someone on the identification parade as her attacker] she then made it clear that she was saying that the man in the dock, that is the appellant, was the man who had raped her. In other words she was making from the witness-box what has come to be called a 'dock identification'."

[70] In **Holland v H M Advocate**, the eyewitness picked out people, other than the suspect, because she was flustered and "wasn't too sure". In **Lawrence v The Queen** the witness explained that her failure to point out the suspect was because the assailant, at the time of the incident, had on a hat and she did not see his face. Both those cases are therefore distinguishable on their facts.

[71] In **Creamer v R**, the witness said she had seen the suspect, but did not point him out because she was frightened. Similarly in **Rochester v R**, the witness deliberately pointed out a volunteer rather than the suspect, out of fear. The reasoning

of the English Court of Appeal in **Creamer v R** is, therefore, more applicable to the circumstances of the present case. The principle to be applied is that where a witness fails to point out a suspect on an identification parade, and gives a reason for deliberately so doing, it is credibility that is put in issue. Similarly, in **Rochester v R**, the credibility of the witness, in respect of the reason for the omission or failure to point out the suspect, was said to be a question for the tribunal of fact to have resolved.

[72] It may also be said, as in the cases of **Stewart v The Queen** and **France and Vassell v The Queen**, that the challenge to the witness' claim of prior knowledge of Mr Gayle, was somewhat diffident. This is despite Mr Samuels' strong suggestion that the prosecution's case of recognition was contested. It is true that the witness was cross-examined as to his presence in the area for an extended period, so as to have been able to see Mr Gayle, as he claimed, but there was no challenge to his knowledge of Mr Gayle from Mr Gayle was a small boy, as they were from the same district, or as to the witness' knowledge of Mr Gayle's relatives, his mother, Mary, his father, Tivoli, and his sister, Tameka.

[73] The learned trial judge is recorded at page 215 of the transcript of having reminded the jury of that evidence. She did make an error in seeming to say that the witness had said that he would have seen Mr Gayle two to three times a week from he was a small boy, but the error is not fatal. The evidence is clear that although he had known Mr Gayle from Mr Gayle was a small boy, the witness was accustomed to seeing Mr Gayle two to three times per week between 2008 and 2010, when the incident occurred.

[74] As far as Mr Gayle's connection to Big Youth was concerned, the suggestion to the witness, in cross-examination, was that it was because he had seen Big Youth at the time of the incident, why he was saying that it was Mr Gayle whom he saw with Big Youth. This was at page 136 of the transcript:

> "Q. So, one; you see Big Youth, you associate him with this accused?
>
> A. I saw them together.
>
> Q. No. I say one; you see Big Youth, you associate him with Big Youth?
>
> A. They was together that night, I know.
>
> Q. Sir, you refuse to answer the question. Mi seh to yuh now, that once yuh si Big Youth, yuh associate him with Big Youth?
>
> A. Yes sir.
>
> Q. Thank you."

The clear implication being an acceptance that the witness would have seen Big Youth and Mr Gayle together on previous occasions.

[75] Based on that reasoning, and the reasoning in **France and Vassell v The Queen**, this was not a dock identification in the original sense of the term. The witness could, therefore, properly have been allowed to point out Mr Gayle in the dock as the person whom he saw shoot Mr Walcott. The learned trial judge's failure to give a separate warning about dock identification was therefore not fatal to the conviction.

[76] The witness' knowledge of Mr Gayle, and his reason for not pointing out Mr Gayle on the identification parade, were, according to the judgment in **Creamer v R** and **Rochester v R**, issues of credibility. The learned trial judge gave the warning in that regard. She said, in part, at pages 218-219 of the transcript:

> "[The witness] had said it was a Dwight Gayle who performed the act, but the police had killed somebody, so they put him under [sic] identification parade to see if he was the person because an identification is the best way of testing the accuracy of a person's knowledge about the person alleged to have committed an offence.
> So in this case, you have the witness saying, I deliberately went and pointed out the wrong man because I was scared for my life but the right man was there and he was standing under number six. The person who conducted the parade said yes, the accused was the man standing under number six. **So when you consider [the witness], you consider that bit of evidence because it is a weakness in his evidence as to identification and that is why the crown has urged you to consider the circumstances under which he has now come and admit what he did and he has told you why he did it, you have to consider what you make of it, cause under cross-examination, [the witness] was tested constantly by** [defence counsel] **Mr. Smith so as to establish his credibility to you**." (Emphasis supplied)

The learned trial judge's direction was, therefore, adequate in the circumstances of this case, and the failure to give a dock identification direction would not be fatal to the conviction.

[77] Although ably and persuasively argued by Mr Samuels, and causing a great deal of anxious consideration, this ground should fail.

Ground two – the fairness of the questions that led to the witness stating that Mr Gayle was on the identification parade

[78] The thrust of Mr Samuel's complaint in respect of ground two may be distilled from a selective quote from his written submissions thereon:

> "The witness having said he pointed out number 7 at the parade, an answer which was fatal to the crowns [sic] case, the prosecution sought to rehabilitate the witness with an inherently leading question which was tailored to produce an answer which favoured the prosecution….
>
> [The prosecutor] virtually embarked on what seemed to have been a cross-examination of his own witness….
>
> [T]he leading questions here, sought to put into the mouth of the witness, the evidence necessary to reconstruct the Crown's case on the delicate issue of identification….
>
> What is more, is that the leading questions appeared to have been implicitly sanctioned by the learned trial judge…
>
> Crown Counsel's blatant disregard for the rules guiding examination in chief, amounted to an irremediable miscarriage of justice, rendering the trial unfair."

[79] Pages 93-94 of the transcript record the subject of Mr Samuel's complaint. It has already been quoted above, but the leading questions about which Mr Samuels speaks are:

a. "Q. Did you recognize anybody else on that parade?"

b. "Q. So, did you point that person out?"

c. "Q. Was that person on the parade?"

The intervention by the learned trial judge that Mr Samuels sought to impugn is the following:

"HER LADYSHIP: That is why you didn't point out Dwight Gayle?"

[80] Mr Samuels cited **R v Simms** (1966) 9 JLR 535, **Kevin Tyndale and Brenton Fletcher v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 15 and 23/2006, judgment delivered on 24 October 2008 and **Junior Reid and Others v The Queen** [1990] 1 AC 363, in support of his submissions.

[81] Mrs Seymour-Johnson rejected the contention that the question concerning the presence of the killer on the parade, was a leading question. She submitted that since it could have been answered either "yes" or "no" demonstrated that the question was not leading. Learned counsel also pointed out that there was no objection, at the trial, to the questions quoted above, and that the answers were not inadmissible. The answers, she submitted, were material for the consideration of the tribunal of fact. She argued that the complaint was an oversimplification of the case.

[82] Mr Samuels is correct that these were leading questions. In the context of the case, they suggested the answer to the witness. The evidence as to what had transpired at the identification parade could have been secured with more careful questioning from the prosecutor. The issue is, however, whether that misguided line of questions led to a miscarriage of justice.

[83] The resolution of that issue lies in the fact that, as has already been demonstrated during the discussion of ground one, by the time this point in the evidence in chief had been reached, the witness had already identified Mr Gayle as the

person who had shot Mr Walcott. It is also a fact that by the time the witness had come to give evidence, Sergeant Donovan Grant, who had conducted the identification parade, had already given evidence. The jury would have known, therefore, that Mr Gayle was the suspect on the parade and that the witness had not pointed him out. The jury was therefore entitled to hear the witness' explanation, if there was one, for not pointing out Mr Gayle. The question asked by the learned trial judge was entirely reasonable in the circumstances.

[84] It is not surprising that the learned trial judge would not have raised the issue of leading questions with the jury. She did, however, leave with them the issue of the witness' credibility as to his reason for not pointing out Mr Gayle. The directions on that issue have already been set out above.

[85] The cases cited by Mr Samuels do not assist in this context. In **R v Simms**, this court condemned the leading question because it was used to "obtain evidence on some vital ingredient of the offence" (page 539 of the report). In that case, the vital ingredient was the time of an entry to a house. In **Kevin Tyndale and Brenton Fletcher v R**, the leading question presumed an eyewitness' prior knowledge of an accused, when the issue of identification was the vital issue for the decision of the jury. There was no issue of leading questions in **Junior Reid and Others v The Queen**, but their Lordships stressed the need for a warning in respect of visual identification evidence.

[86] There is no gainsaying that the identity of the perpetrator of the killing in the present case was a vital ingredient of the prosecution's case, but the evidence identifying Mr Gayle as the killer, as was stated above, had already been given when the leading question was asked. The leading question did not lead to a miscarriage of justice.

[87] This ground should fail.

Grounds three and five – the absence of an explanation for Mr Gayle's arrest and charge for the killing of Mr Walcott

[88] These grounds are closely associated with ground one. Mr Samuels, quite correctly, pointed out that the transcript does not reveal why Mr Gayle had been charged for killing Mr Walcott.

[89] Again, this issue was confidently argued by Mr Samuels. Learned counsel submitted that at the time of being charged, there was no nexus between the offence and Mr Gayle. Prior to the witness testifying, Mr Samuels submitted, the jury would have been wrestling with an absence of any evidence as to who had committed the offence.

[90] Mr Samuels submitted that it was the responsibility of the police, which should be considered as part of the prosecution, to provide the evidence to fill the lacuna. Learned counsel argued that the connection between the killing and Mr Gayle, being made by a dock identification, prompted by a leading question, was a breach of Mr Gayle's right to a fair trial.

[91] Mr Samuels submitted that the situation, at the very least, demanded from the learned trial judge, a direction, which pointed out this strange feature of the case and the departure from protocol. This was not done, he said. The result of that unusual combination, Mr Samuels submitted, was a miscarriage of justice.

[92] Learned counsel cited **Junior Reid and Others v The Queen**, **Jason Lawrence v R**, **R v Ward** [1993] 1 WLR 619 and **Harry Daley v R** [2013] JMCA Crim 14 in support of these submissions.

[93] Mrs Seymour-Johnson conceded that there was no evidence placed before the jury, which explained why Mr Gayle was charged for the killing. Learned counsel contended, however, that there was no requirement in law for such an explanation. Accordingly, she submitted, there was no breach of Mr Gayle's constitutional right to a fair trial. She submitted that he was entitled to be told, at the time of being charged, the nature of the charge, but not the justification for the charge.

[94] It cannot be doubted that the situation described by Mr Samuels was unsatisfactory. Looking at the case from the vantage point of an appellate court, it must be recognised that there was a piece of the puzzle missing. The mosaic was incomplete. The only attempt made to fill the void was the legally inadmissible testimony of the investigating officer, Detective Sergeant Marcia Murray, that Mr Gayle's name had been given to her by one of the witnesses.

[95] Still, Mrs Seymour-Johnson is correct. Although section 16(6)(a) of the Constitution of Jamaica provides that every person charged with a criminal offence shall be informed of the nature of the offence for which he has been charged, there is no legal requirement for the prosecution to have justified the charge to Mr Gayle, at the time that he was arrested. None of the cases cited by Mr Samuels support a contrary principle. The cases speak to disclosing evidence to the defence which may be exculpatory of the accused (**R v Ward** and **Harry Daley v R**), and the requirement for directions to the jury on relevant issues (**R v Simms** and **Junior Reid v The Queen**), but they do not require the production of inadmissible material, which has been gathered during the course of investigation. In fact, in **R v Mills; R v Poole** [1997] 3 All ER 780 the House of Lords expressed doubt on some elements of **R v Ward**, although that doubt was more in respect of adherence to procedural rules that were applicable in England at the time.

[96] The prosecution obviously must, if it is to succeed at the trial, produce convincing evidence that links an accused to the offence. In this case, the evidence was that of the witness. The context in which the witness gave that evidence is important, especially as he failed to identify Mr Gayle at the identification parade, but the issue was one of the witness' credibility. It was an issue for the jury to decide, upon being given appropriate directions, whether the witness was to be believed. The absence of the evidence of the reason for Mr Gayle having been charged, at the time that he was charged, is not fatal to the conviction.

[97] Although the circumstances are troubling, the unique circumstances of this case, in particular, the witness' extensive previous knowledge of Mr Gayle, represent a counter-balancing factor. Persons ought not to be placed before the court in the hope that there may be a dock-identification. Such a practice creates an opportunity for abuse of the rights of individuals to a fair trial and an abuse of the process of the court.

[98] These grounds should, therefore, also fail.

Ground four – the issue of prejudicial statements

[99] Mr Samuels submitted that a number of prejudicial statements were made during the course of the trial. The prejudice, he argued, was incurable and as a result the trial was rendered unfair. In any event, Mr Samuels argued, the learned trial judge did not seek to mitigate the effect of the prejudicial statements at the time that each was made, and that when she did address the issue of prejudice during her summation, her effort was inadequate.

[100] The statements that Mr Samuels criticises were all made by the witness. They concerned the death of his nephew, Mr Anderson and his friend, Mr Mills, who were both at the scene at the time that Mr Walcott was killed. Mr Anderson was reportedly killed two days after that incident and Mr Mills was reportedly killed on the same morning that the identification parade for Mr Gayle was to have been held. The relevant statements are as follows, firstly, at page 76 of the transcript:

> "Q. Who is your nephew?
>
> A. Damion Anderson, the one that get kill, too."

The second is at page 80 of the transcript:

> "Q. How often would you see Dwight Gayle?
>
> ...
>
> A. Once a week but since my nephew came back to Jamaica, I see him almost every day come to my yard because him and my nephew is like this.
>
> Q. Which nephew is like this?
>
> A. Damion Anderson, the one that get killed."

The third, fourth and fifth occurred during the cross examination of the witness, and are recorded at pages 102-103 of the transcript:

> "Q. ...Your nephew you see...?
>
> A. What happen to my nephew.
>
> HER LADYSHIP: One moment, sir. He [defence counsel] is thinking about the question.
>
> Q. I am being very careful with the questions because I don't want you to answer in a certain way. Is your nephew, the one that you say you were out there with that night, is he alive?
>
> A. He died two days after we witness the murder?
>
> HER LADYSHIP: Okay, okay.
>
> Q. What about your friend Mills, the one name [sic] Mills?
>
> A. He got gun down the morning of [the] parade. When I going to the parade, he got gun down too, sir?
>
> [Prosecutor]: M'Lady, my friend is asking questions which I don't believe are necessary at this time.

HER LADYSHIP: **So you didn't see that happen to your friend?**

THE WITNESS: N. The morning… [sic]

HER LADYSHIP: **You didn't see that happen, you just know that he is now dead. Is that correct? You know that Mr. Mills is now dead**.

THE WITNESS: He get gunshot.

HER LADYSHIP: **You didn't see, yes**." (Emphasis supplied)

The witness also testified, at pages 105-106 of the transcript that he had been threatened before going to the identification parade. This was in answer to specific questions in cross-examination:

"Q. Listen to me, careful [sic], before you went on the parade, were you threatened by anyone?

A. Mi 'fraid.

Q. Were you threatened by anyone, sir?

A. Yes, sir. I was scared for my life.

Q. No, no. That's not my question. Were you threatened by anyone?

A. I get [a] call on my phone private number, threaten, I don't know is who, I know I was threatened.

Q. You got calls on your phone before you went on the parade threatening you?

A. Yes, all after the parade."

[101] Mr Samuels submitted that although the witness did not explicitly link Mr Gayle with the deaths of Messrs Anderson and Mills, there would have been a strong inference to that effect, for the jury to have drawn. The inference would have been

strengthened, Mr Samuels, submitted, by the witness' evidence that it was out of fear he did not point out Mr Gayle at the identification parade.

[102] Learned counsel submitted that the only feasible and fair option that was open to the learned trial judge, when each of those statements was made, was to have discharged the jury. He relied on the case of **McClymouth (Peter) v R** (1995) 51 WIR 178 in support of his submissions. Mr Samuels argued that instead of discharging the jury, the learned trial judge left the issue untended until she got to the summation, at which point, instead of giving a strong admonition to disregard the offending statements, she merely encouraged the jury not to consider them. That, he argued, was clearly inadequate in the circumstances.

[103] In her response to these submissions, Mrs Seymour-Johnson submitted that the circumstances of this case were different from those in **McClymouth v R**, and that that case was therefore distinguishable. Learned counsel argued that the learned trial judge's approach to the prejudicial statements was proportional to the situation and appropriate. She relied on **Calvin Powell and Lennox Swaby v R** [2013] JMCA Crim 28 in support of her submissions.

[104] Mrs Seymour-Johnson is correct in drawing a distinction between the circumstances of this case and those in **McClymouth v R**. In that case, the witness, during cross-examination, accused Mr McClymouth of committing a previous murder, and accused his counsel of having defended him on the previous charge. The prejudice was palpable in that case.

[105] In **Calvin Powell and Lennox Swaby v R** the witness made a statement that was potentially prejudicial when, in examination in chief, she was being asked about who was present at the time she was identifying the items which belonged to the deceased. She stated then, that, "one time I see the one that kill his baby mother". The statement was not ascribed to any particular person and the trial judge appeared to have curtailed the outburst at the time that it was made and gave directions with respect to the outburst during her summation to the jury. On appeal, this court found, at paragraph [98], that the statement "was not devastating" because, among other things, the witness did not ascribe the improper statement to any of the appellants.

[106] Despite the circumstances of **McClymouth v R** being distinguishable, Mr Samuels is correct that the witness' comments, about which he complains, were potentially prejudicial. The situation required direction to the jury that isolated Mr Gayle from the killing of Mr Mills and Mr Anderson and the threats made against the witness. The treatment of the situation must, therefore, be examined.

[107] In **Machel Gouldbourne v R** [2010] JMCA Crim 42, this court outlined the applicable principles where a potentially prejudicial statement is improperly made. The principles may be identified at paragraphs [21] and [22] of that judgment:

a. Each case will depend on its own facts.

b. In circumstances where potentially prejudicial statements are improperly made the trial judge has a wide discretion.

c. There are a number of choices that are open to a trial judge in exercising that discretion. These include, taking no action and making no mention of the matter, discharging the jury, immediately directing the jury appropriately, waiting until the summation to direct the jury on the matter, or combining both of the last two choices.

d. An appellate court will be loath to interfere with an exercise of that discretion. It will only do so in the most extreme cases. "As Sachs LJ put it in the well known case of ***R v Weaver*** [1967] 1 All ER 277, 280 ...the correct course 'depends on the nature of what has been admitted into evidence and the circumstances in which it has been admitted…' (see also Archbold, Criminal Pleading, Evidence and Practice 1992, para. 8-194, and the decision of this court in **McClymouth v R** (1995) 51 WIR 178)."

[108] It is clear from the excerpt from the transcript, cited above, that both the learned trial judge and the prosecutor were anxious to prevent any improper prejudicial statements being made by the witness. The fact that it was during the cross-examination that some potentially prejudicial statements were elicited, did not excuse the learned trial judge from doing her best to prevent improper prejudice to Mr Gayle.

[109] It seemed, however, that the learned trial judge opted to use a combination of immediate action and waiting until her summation, in order to address the issue of the prejudicial statements. This was within her discretion. This was not a case that obviously required the discharge of the jury. There was no accusation levelled against Mr Gayle. Nor was there any connection directly made between him and the threats that were made to the witness. During the witness' testimony, the learned trial judge made certain statements aimed at blunting the potential prejudice of some of the statements. It was during her summation, however, that she specifically addressed the jury on the point.

[110] The learned trial judge is recorded as having done so, at pages 191-192 of the transcript. Contrary to Mr Samuels' submission, she went beyond mere "encouragement". She directed the jury not to consider the evidence concerning the death of those other persons or to use those deaths to the prejudice of Mr Gayle. She said:

> "I think I should warn you from now, that in this case, there are some issues that arose, that you may be tempted to consider. **But I am encouraging you, not to do so.** It came out in evidence, that two persons who were there, the night the incident took place, are now dead. You heard [the witness] say that one die [sic] within days after the incident and one died on the morning of the identification parade.
>
> **You are not here to try anyone in relation to those deaths. You are not to allow yourselves to try to determine how those men met their death. That is not what you are here for. Importantly, you must not allow the fact of their death to influence you in**

> **anyway in relation to this accused man. He is not here charged in relation to anything other than the death of Ron Walcott**.
>
> I want you to bear in mind, at the end of the day, I don't want you to be distracted or sidetrack [sic] or prejudice [sic] from what is the issue, that you have to determine." (Emphasis supplied)

[111] Later in the summation she reminded them of that direction. She is recorded at pages 217-218 of the transcript saying:

> "...Remember I told you we are not speculating how that friend came to his death, we are not settling that at all with the accused man but what you have to consider is what effect it would have had on [the witness]."

[112] The direction was appropriate in the circumstances. There is no basis to disturb the conviction on this ground.

Ground six (a) - the directions to the jury in respect of the witness' claimed recognition of Mr Gayle

[113] Although ground six raised several sub-issues, grounds six (a)-(e) respectively raised different issues from the rest and from each other. For ground six (a), Mr Samuels contended that the learned trial judge incorrectly directed the jury that the visual identification in the case was one of recognition. The impugned direction is recorded at page 204 of the transcript:

> "You bear in mind, also, that since this is a case of recognition, you consider the time against the background, if there was sufficient time for [the witness] to have seen the person, to have observed the person, and to recognize the person. It is very important that you approach that evidence

> of identification with care, because that is the most important thing you have to consider."

[114] Mr Samuels argued that the claimed recognition by the witness was disputed by Mr Gayle. In such circumstances, he submitted, the learned trial judge ought to have left the issue of recognition as a live one for the resolution of the jury. The direction, learned counsel submitted, instead, drew a conclusion, which was not one for the learned trial judge to draw. The result, he said, was that the direction was unfair, and denied Mr Gayle of a fair trial. He relied, for support, on **Danny Walker v R** [2010] JMCA Crim 35, at paragraph 56, and **Richard Pearce v R** [2013] JMCA Crim 54, at paragraph 29.

[115] In **Danny Walker v R**, Phillips JA pointed out that Mr Walker had denied knowing the eyewitness. She therefore concluded, at paragraph [56] of the judgment, that "the 'recognition' was disputed". The disputed recognition came at an early stage in that case. Mr Walker denied, at the time that the questions and answers session was being conducted with him, that he knew the eyewitness. Whereas, Mr Gayle may not have had an opportunity prior to the start of the trial, to deny any knowledge of the witness, there was no definitive denial until he gave his unsworn statement.

[116] In **Richard Pearce v R**, Panton P, at paragraph [29] of his judgment, emphasised the point that the "[trial judge] should not be seen to be attempting to usurp the role of the [jury]".

[117] In this case, although the learned trial judge could have been more careful in her language at the point in her summation where she made the reference to the matter of recognition, the jury would not have been confused by that reference. It would have been clear to the jury that the learned trial judge was saying that this was a case of claimed recognition. Immediately before giving that particular direction, the learned trial judge told the jury that the claimed previous knowledge was an issue in dispute, which they had to resolve. She is recorded as so saying, at pages 202-203 of the transcript:

> "In this case, [the witness] is saying, he knew the person before….and therefore, he says that I recognize the person I saw that night….
>
> So…you have to test his knowledge of the person….**And, this is especially important, since on the other hand, you heard [Mr Gayle] say, 'I don't know this man, and this man don't know me'**….
>
> So, you consider what he has said. Give it what weight you think it deserves, and you consider the evidence of [the witness]. **Does [the witness] know Dwight Gayle? Does he know this man sitting in Court before you, to be Dwight Gayle? Does he know him to be the man he saw that night, when he was there with his friend, when Mr. Ron Walcott was shot? So, these are the things that you take into consideration**." (Emphasis supplied)

[118] It is therefore plain, that although the learned trial judge did say it was a case of recognition, having placed the statement in that context, she must have been interpreted to mean that the witness claimed to have recognised Mr Gayle. It cannot properly be said that the direction complained about resulted in the summation being

rendered unfair to Mr Gayle. The strictures set out in **Danny Walker v R** and **Richard Pearce v R** were not contravened. This aspect of the ground must fail.

Ground six (b), (c), (d) - the directions to the jury in respect of the witness' explanation for failing to point out Mr Gayle at the parade

[119] All these aspects of ground six revolved around the issue of the witness' explanation for failing to identify Mr Gayle on the identification parade. For these issues, Mr Samuels argued that the learned trial judge should have directed the jury that:

b. if they rejected the witness' explanation for failing to point out Mr Gayle, they should acquit him;

c. the witness' explanation for failing to point out Mr Gayle went directly to the impeachment of the witness' credit, having told a deliberate lie, especially as he sought to implicate someone else;

d. if they rejected the witness' explanation for his failure to point out Mr Gayle, it supported Mr Gayle's assertion that he did not know the witness and that the witness did not know him.

[120] Mrs Seymour-Johnson submitted that the learned trial judge's directions in respect of the burden and standard of proof, together with the directions on the credibility of the witness, were sufficient to guide the jury in this aspect of their duty.

[121] The learned trial judge's directions in respect of these specific matters may be found at pages 217-219 of the transcript. She is recorded as speaking to the witness' failure to point out Mr Gayle. She identified the failure as one of the factors that the jury should take into account in assessing the witness' credibility and reliability on the issue of visual identification. She said, in part, in this context, firstly at page 217:

> "...The lighting, the distance, the knowledge, these are the things you have to consider and against that background you have to consider what happened on the identification parade....So [the witness] admitted that yes, [I did point out another man standing beside Mr Gayle]. Mr. Smith taxed him about it, that you go and tell a deliberate lie on another man.
> [The witness] said, yes, why, he said he was scared for his life."

Then at pages 218-219:

> "So in this case, you have the witness saying, I deliberately went and pointed out the wrong man because I was scared for my life but the right man was there and he was standing under number six....So when you consider [the witness], you consider that bit of evidence because it is a weakness in his evidence as to identification and that is why the crown has urged you to consider the circumstances under which he has now come and admit [sic] what he did and he has told you why he did it, you have to consider what you make of it, cause [sic] under cross-examination, [the witness] was tested constantly by Mr Smith so as to establish [sic] his credibility to you.
>
> Mr. Smith was cross-examining him with a view to exposing his character to you, to say this is a man you should not believe...."

[122] Mr Samuels is, therefore, correct in his observations that the learned trial judge did not give specific directions on the issues, which Mr Samuels has identified. It cannot

be denied, however, that she gave general directions which would have covered those issues.

[123] The extracts quoted above concerning the witness' failure to point out Mr Gayle on the identification parade show that the learned trial judge dealt with the issue of the witness' credibility. That direction should be considered against the background of the general directions concerning the burden of proof being placed on the prosecution.

[124] The learned trial judge, at several points during her summation, correctly directed the jury that the burden of proof rested on the prosecution, and as to the standard of proof required. She is recorded at page 192 of the transcript as saying, in part:

> "...It is the prosecution, who must prove [Mr Gayle's] guilt. And how do they succeed in proving that? The answer is, by making you sure of it. Nothing less than [that] will do."

[125] At page 194 of the transcript, she told the jury of their duty in the event that the prosecution had failed to meet the required standard. She is recorded as saying:

> "...If you are not satisfied, if you are not sure, if you have any reasonable doubt then your verdict must be, not guilty...."

[126] She also pointed out that the prosecution had only produced one eyewitness. She is recorded at page 188 of the transcript as saying:

> "Having brought [Mr Gayle] here, it is [the prosecution's] responsibility to prove the case against him. They have tried to do so, by calling the witnesses -- one eyewitness as to

> what happened that night or one person who says he is an eye witness to what happened that night...."

[127] She later told the jury, at pages 189-190 of the transcript, that they could reject what any witness said if they were not satisfied that the witness spoke the truth.

> "You are entitled, when you consider the evidence, to bear in mind that you can accept all of one witness' evidence, if you are satisfied, that, that witness spoke the truth. You can accept all of what they said. If you are not so satisfied, you can reject what the witness said, and importantly, you can also accept part of what one witness say [sic] and reject another part of that same witness, if you are satisfied that the witness was truthful about one aspect of his evidence, but you are not so satisfied that he is truthful on the other aspect, because at the end of the day, Mr. Foreman and your member [sic], what you have been asked to do, is to try and determine the truth."

[128] At pages 196-198 of the transcript, after repeating the direction on the burden and standard of proof, the learned trial judge went on to address the issue of credibility. She made oblique reference to the witness' stated reason for failing to point out Mr Gayle. She said, in part:

> "In some trials, in determining a witness' credibility, because this is what we are determining in this trial, the credibility in particular of [the witness], how do you do that. You saw him as he gave his evidence from the witness box, so you assess him as he presented himself to you. You do not consider, what would I have done in those circumstances. If the [witness], that you saw, that you must ask yourself, do I believe that he would have been behaving in this [manner]. This gentleman that gave evidence, do I assess him as being a truthful witness in all the circumstances, that is what you have to do. You have to assess his demeanour, assess his credibility whether you believe him....

> ...You have seen and heard all the witnesses and it is agreed that [the witness], being the person who alleges to have seen what happened that night, is the most important witness. It is for you to determine how you assess his credibility. Whether you believe him, whether you do not believe him."

[129] Taken as a whole, therefore, the direction to the jury cannot be said to have been inadequate on these material points. The jury's attention would have been sufficiently drawn to the issue of dealing with the witness' credibility. They would not have been uncertain of their duty if they rejected his testimony on this critical issue. These aspects of ground six also fail.

Ground six (e) – the significance of the one-way mirror

[130] For this aspect of ground six, Mr Samuels argued that the learned trial judge failed to direct the jury that the one-way mirror provided a safeguard for the witness, and so the issue of fear should be viewed in that context. Learned counsel contended that the one-way mirror system was created to provide the safeguard that the persons on the parade would not be able to see the witnesses who are attending the parade.

[131] He submitted that the learned trial judge should have directed the jury on the manner in which the safeguards could have affected the credibility of the witness' claim to have been fearful when he attended the parade. That failure, he submitted, negatived the advantage Mr Gayle obtained from the positive identification by the witness of another person.

[132] The evidence from Sergeant Grant included a description of the use of the one-way mirror. He is recorded at page 17 of the transcript as saying that the one-way mirror system was used. He said:

> "...It is a one-way mirror, so the person on one side can see the person standing underneath the number but the person standing underneath the numbers cannot see the person on the other side."

Sergeant Grant explained that that applied to the particular parade involving Mr Gayle. The following exchange is recorded at page 18 of the transcript:

> "Q. On which side [of the one-way mirror] did the witness go?
>
> A. A converse. The witness was on the side where he could see the persons on the parade but the persons on the parade couldn't see him."

[133] The transcript does not reveal that the protective feature of the mirror was explained to the witness. Even if that had been done, however, it was still an issue of the credibility of the witness for the jury's consideration. The absence of a description of the safeguard provided by the mirror would not be fatal to the conviction. This aspect of ground six also fails.

Ground seven

[134] Like ground six, ground seven had a number of sub-issues. These were on diverse aspects of the case. Learned counsel sought to encapsulate them under the heading of a complaint that the "learned trial judge's comments and omissions

throughout her summation, had the cumulative effect of diminishing [Mr Gayle's] defence, resulting in an unfair trial".

Ground seven (a) – relating the law to the evidence

[135] Mr Samuels' first complaint in respect of ground seven was that the learned trial judge had failed to relate her directions in law to the evidence. He particularly focussed on the issue of the witness having failed to point out Mr Gayle on the identification parade and the reason given for so doing. The complaint was, in essence, a variation on the complaint in ground six (b). Learned counsel set out the crux of his complaint at paragraph [128] of his written submissions:

> "Fairness required that in relating [the direction on the reason behind placing Mr Gayle on an identification parade] to the evidence in the case, the learned judge ought to have further directed the jury that should they find the explanation of fear given by the witness to be a lie, this would have exculpatory consequences for [Mr Gayle]."

[136] The issue has already been assessed. There is no need to repeat the exercise.

Ground seven (b) – the issue of the witness' claim of being fearful

[137] For this aspect of ground seven, Mr Samuels remained on the issue of the witness' explanation that he was fearful. Learned counsel argued that the learned trial judge, in her summation, usurped the role of the jury in treating as a fact, the death of the witness' friend, Mr Mills, and thereby authenticating the witness' claimed basis of fear and supporting his testimony that he was fearful. Learned counsel identified the following passage from the summation as demonstrative of his point:

> "...Remember I told you we are not speculating how that friend came to his death, we are not settling that at all with the accused man but what you have to consider is what effect it would have had on [the witness]." (See pages 217-218 of the transcript.)

Mr Samuels argued that the learned trial judge's approach to this aspect of the case was unfairly prejudicial to Mr Gayle and rendered the trial unfair.

[138] It has been pointed out twice before in this judgment that the learned trial judge, after making these comments went on to tell the jury that the witness' credibility concerning this aspect was "tested constantly by Mr. Smith" (page 219 of the transcript). It would therefore not be correct to say that the learned trial judge supported the witness' claimed rationale of fear.

[139] It may, however, be said, with some justification, that the death of Mr Mills was taken as having, in fact, occurred. Nonetheless, during the witness' testimony, the learned trial judge made it clear to the jury that the witness had not seen Mr Mills being killed and so was relying on hearsay. It was, however, the effect of the news of the death on the witness, on which the learned trial judge focussed. It can also be seen that she sought to ensure that Mr Gayle was not linked to the reported death of Mr Mills. The treatment would be consistent with the **Subramaniam** (**Subramaniam v Public Prosecutor** [1956] 1 WLR 965) principle and would not be prejudicial to Mr Gayle. The complaint is without merit.

Ground seven (c) – questions asked of Mr Gayle about his name

[140] As it relates to this aspect of ground seven, Mr Samuels candidly and properly abandoned the complaint. The issue regarding Mr Gayle's correct name was resolved very early in the trial by a statement made by defence counsel in the court below (see page 12 of the transcript).

Ground eight – the proviso

[141] The submissions supplied by counsel on both sides in respect of the application of the proviso to section 14(1) of the Judicature (Appellate Jurisdiction) Act, in the event that the court was favourably disposed to any of the grounds of appeal, were, as in the case of the other submissions, of a high standard and very helpful. However, since the court is not minded to allow the appeal on any of the grounds, it would not be necessary to comment any further on the submissions, except to say that the failure to refer to those submissions in detail should not be considered as being disregard or disrespect of them.

Summary and conclusion

[142] Mr Samuels relied on several grounds of appeal. A number of them greatly overlapped. The ground which required the greatest consideration was that dealing with the dock identification. Mr Samuels' submissions in respect of that ground were most attractive. They provided much food for thought. For that reason, the application for leave to appeal should be allowed and the hearing of the application considered a hearing of the appeal. Despite the attraction of Mr Samuels' submissions, however, the

circumstances of this case and the witness' claimed level of association, which were not challenged at the trial, in any detailed way, caused them to founder. The various other complaints about the learned trial judge's directions were without merit.

[143] The appeal therefore fails. An apology must, however, be made for the lengthy delay in producing the decision.

Orders

[144] These are the orders of the court:

(1) The application for leave to appeal is granted.

(2) The hearing of the application is treated as the hearing of the appeal.

(3) The appeal is dismissed.

(4) The conviction and sentence are affirmed.

(5) The sentence is deemed to have commenced on 19 March 2012.