[2017] JMCA Crim 30

JAMAICA

IN THE COURT OF APPEAL

SITTING IN LUCEA IN THE PARISH OF HANOVER

SUPREME COURT CRIMINAL APPEAL NO 52/2013

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MISS JUSTICE EDWARDS JA (AG)

VERNALDO GRAHAM v R

Trevor Ho-Lyn for the appellant

Mrs Andrea Martin-Swaby for the Crown

28, 29 November 2016 and 10 July 2017

EDWARDS JA (AG)

[1] The appellant was convicted of the offence of murder in the Home Circuit Court on 19 June 2013, after a trial before Thompson-James J and jury and was sentenced to 30 years imprisonment at hard labour. He applied for and was subsequently granted leave to appeal his conviction and sentence by a single judge of this court. We heard arguments in his appeal on 28 and 29 November 2016, and reserved our decision.

[2] The facts of this case, in brief, as far as they are relevant, are that, in the early morning of 25 March 2006, at approximately 2:30 am, Tracy Ann Morgan was shot and

killed in her dwelling house situated at 60 Chisholm Avenue, Kingston, Jamaica. Two persons, Vernaldo Graham (the appellant) and Leroy Collins were charged for the offence of murder in furtherance of a burglary, and murder. Leroy Collins was acquitted.

[3] The prosecution called only two witnesses, Miss Carlene Morgan and Miss Denise Morgan, who are both sisters of the deceased. However, the main witness for the prosecution was Miss Carlene Morgan, who was the only eye witness to the incident.

The case for the prosecution

[4] Miss Carlene Morgan (who will be referred to hereinafter as the witness) gave evidence that at the material time, there were three bedrooms on the premises where the incident took place, which she described as a board house. Present in her bedroom at the time were her boyfriend and a four month old baby who was sleeping beside her. In the other room, which she referred to as the children's room, were her sister Tracy Ann Morgan and two young boys (both children of the witness). In the third room, was a tenant referred to in the evidence as Mark. The door to the witness' bedroom opened out into the yard and there were three electrical lights in the yard, all of which shone into her bedroom and the children's room. This was made possible as there were two glass louvre windows in her room, and one in the children's room. The lights were on at the material time.

[5] Whilst asleep, the witness heard a male voice say, "Open up, open up, police, police". Her boyfriend went towards the window and looked outside. She, however,

remained on the bed and her boyfriend came back to bed and lay down. Thereafter, the door to her room was kicked open and three men all armed with firearms entered her room. She recognized two of the men, one being the appellant, whom she said she had known since attending high school but only knew his first name (the witness was 32 years of age at the time of the incident) and the other whom she said she knew as 'Eva' or 'Gallis'. The third man was wearing a mask which prevented her from seeing his face. The appellant, she stated, wore a handkerchief tied around his forehead, thereby preventing her from seeing his forehead, but she claimed that she was able to see the rest of his face.

[6] Whilst the men were in her room, they instructed her to, "hug up yuh man". In complying with these instructions, she hugged her boyfriend and the baby and looked down. The appellant, she said, stood close beside her whilst the other men removed items of furniture from the room, including two television sets. The men then went over to the room where Mark lived, and pushed him into the room where the witness, the baby and her boyfriend were. They then removed items from Mark's room.

[7] The appellant then kicked in a side door in the witness' room. On the other side of that door was the children's room which was adjacent to the witness' room. The appellant then instructed them to go into the children's room, and particularly that Mark and the witness' boyfriend should go under the bed in the children's room. They complied. The witness went on the children's bed with the baby lying on her stomach. Her sister Tracy Ann Morgan sat on the bed. The witness' two sons were also in the

room. One was seated on the bed, and the other rested in front of the deceased Tracy Ann Morgan. Mark and the witness' boyfriend were under the bed.

[8] At this time the appellant stood at the side door (which he had kicked open), whilst the co-accused Leroy Collins removed a television from the children's room, and took it into the witness' room.

[9] After the co-accused removed the television, he remained in the witness' room with the man in the mask and the appellant remained at the side door. The appellant was observed to turn his head in the direction of the men and spoke to them. The witness could not hear what was said. Following this, the appellant asked for their jewellery. He then looked at Tracy Ann Morgan's foot and 'grabbed' an ankle bracelet which was on her foot. The appellant then asked for their mother. The witness told him she did not know where their mother was. At this time, the appellant turned and spoke to the men in the other room. Again, the witness was unable to hear what was said. The appellant then turned towards the children's room and told Tracy Ann Morgan that the men wanted sex. She responded by telling them to, "come round yah so come tek it noh".

[10] The appellant then turned and spoke to the other two men. Having done so, he then said to Tracy Ann Morgan, "Yuh deaf, you nuh hear mi seh mi fren dem want some pussy from you round de so". Tracy Ann Morgan responded by saying, "mi noh tell yuh already say dem mus come roun here soh fi it."

[11] It was at this time that the appellant pointed the gun at Tracy Ann Morgan's left ear and shot her. He then approached the witness, placed the gun on the 'dresser', removed a knife from his waistband and stabbed her all over her body.

The case for the defence

[12] The appellant, in his defence, made an unsworn statement from the dock in which he denied any involvement in the crime and indicated that he was in the parish of Westmoreland at the time of the incident. He further alleged that the witness had a motive for accusing him as the killer, as his (the appellant's) mother had been murdered and the person accused of the murder had threatened to have his sister-in-law accuse him, (the appellant) of murder. That person, the appellant said, had demanded that he asked his family members not to come to court to give evidence against him and that he, in turn, would cause his sister-in-law not to come to court to give evidence against the appellant for murder. The defence was therefore, one of alibi and that the witness had a motive to lie.

The grounds of appeal

[13] Counsel for the applicant filed four grounds of appeal as follows:

> "1. The learned trial judge failed to deal, adequately, with specific weaknesses in the visual identification evidence and failed to address, sufficiently, the material inconsistencies that cast doubt on the reliability of the said visual identification evidence. Consequently, the learned trial judge failed to assist the jury adequately or properly and this deprived the Applicant of a fair trial and resulted in a substantial miscarriage of justice.

2. The learned trial judge erred in law in directing the jury as to how to treat the evidence of the Prosecution witness vis-à-vis their previous inconsistent statements or inconsistencies. This was a material misdirection particularly as the learned trial judge did not assist the jury by highlighting the weaknesses in the Crown's case due to the said inconsistencies. The Applicant was, therefore, denied a fair trial and this led to a grave miscarriage of justice.

3. The trial judge erred in law by failing to give adequate and appropriate directions in relation to the visual identification evidence pursuant to the principles enunciated in **R v Turnbull** [I977] 2 QB 224.

4. The directions on Alibi were inaccurate and misleading and resulted in the summing up failing to properly put the Appellant's defence to the jury resulting in a miscarriage of justice."

Grounds 1 and 3: Weaknesses in the identification evidence and the inadequacies in the Turnbull directions

[14] We found it useful to follow counsel's approach and discuss grounds 1 and 3 together as they, to a large extent, cover the same issues. Counsel for the appellant identified material areas of weakness in the evidence, which he said were inadequately dealt with by the trial judge, to wit; the appellant's scars, the voice identification and the identification parade. We will deal with each in turn.

A. *The scars*

Submissions

[15] In highlighting the weaknesses in the identification of the appellant, counsel for the appellant pointed to the fact that the appellant had significant scarring on his face

which the sole eye witness to the murder did not mention or describe to the police; although at the trial she did admit to being aware of one scar to the appellant's upper lip that ran to his cheekbone. However, she was not aware of: (a) the scars on the left side of his left eye, (b) a scar below his right eye; or (c) one below his left ear. Counsel argued that this was a significant weakness in the reliability of the identification evidence which the learned trial judge did not deal with adequately. He argued that the trial judge gave no analysis of the scarring neither did she direct the jury on how to treat with it.

[16] Counsel also argued that it was clear from the evidence that the witness was prevented from seeing the assailant properly because he was wearing a handkerchief across his forehead. He submitted that the witness was the sole witness as to fact for which there was no support for the correctness of her identification of the appellant and that there was a duty on the trial judge to point out the significance of this weakness in her identification of the appellant.

[17] Counsel for the Crown, in her submissions, pointed to the fact that the learned trial judge carefully noted the main issues in the case which were identification and credibility (at page 367, lines 11-13 of the transcript). Counsel argued that the judge had given a careful outline of the identification evidence and gave an adequate **Turnbull** warning which required no particular form of words. The identification evidence, Crown Counsel said, could be summarised as follows:

1. That after the door was kicked off, the witness recognized two men, one being Vernaldo Graham. He had a handkerchief tied around the top of his forehead.

2. The witness had known the appellant for over five years; from the time she was living with her grandmother at Chisholm Avenue and whilst she attended the Norman Manley Comprehensive High School. The witness was 32 years of age at the time of the incident and would see the appellant in the lane immediately in front of her lane. She saw him regularly between the ages of 14 and 21 and would see him everywhere. Between the ages of 21 and 32 years she would see the appellant on East Road sitting on the corner. She saw him every single day and she knew that he lived at East Road. In Mr Vernaldo Graham's unsworn statement he indicated that his family home is along Chisholm Avenue (page 233, line 1-2).

3. The witness indicated that the last time she saw the accused was on 10 March 2006, along her lane.

[18] Counsel for the Crown noted that the appellant's scars would have been visible to the jury who saw it and would who have made their own determination having been given the requisite warning.

The evidence before the court below

[19] During the cross-examination of the witness by counsel for the appellant the following exchange took place (at page 157 of the transcript).

> "Q. Did you describe 'Vernan's' face to the police?
>
> A. Yes.
>
> Q. Are you aware Miss Morgan, on the 25th of March, 2006, 'Vernan' had a scar to the left-side of his left eye?
>
> A. All I know him have a...
>
> HER LADYSHIP: I'm sorry, just a moment.
>
> THE WITNESS: All I know he was [sic] had on 'kerchief' tie above his forehead.
>
> HER LADYSHIP: Just a moment. Mr. Wilson had said it already, but the question that he asked you, are you aware-did you say on the 25th? That on the 25th of March, Mr. 'Vernan' had a scar to the left-side of his left eye. Are you aware of that?
>
> A. No.
>
> Q. Are you aware that on the 25th of March, 2006, 'Vernan' had a scar to his upper lip, that runs to his cheek bone, Miss Morgan?
>
> A. Yes.
>
> ...
>
> Q. Did you tell the police that you saw that scar?
>
> A. No.
>
> Q On March 25th, 2006, Miss Morgan, did you know that 'Vernan' had a scar just below his right eye?
>
> A I said I don't know.

...

Q On that same day, Miss Morgan, that's the 25th of March, did you know that 'Vernan' had a scar below his left ear?

A No.

Q I am putting it to you, that it wasn't 'Vernan' you saw on that night.

A It was him.

...

Q Do you think that marks and scars on a person's face is good for their description?

A Yes, but...

Q So 'Vernan' you said stabbed you. So he was close enough to you? When he stabbed you, he was close to you?

A Yes

Q And you didn't see those marks on his face?

A No."

[20] The witness admitted that not only did she not know of the existence of the appellant's scars, with the exception of the one to his upper lip running to his cheek bone, but that she did not tell the police of that one which she did know of. Even though her evidence was that the appellant stood close to her during the incident and was close to her when he was stabbing her, she did not see his scars that night. Counsel for the appellant argued that this was a significant weakness in the identification evidence which rendered it unreliable.

[21] Since counsel for the Crown rested her submissions on the adequacy of the identification warning given to the jury by the learned trial judge, it may be useful to look at what was told to the jury in this regard.

[22] In dealing with the issue of the appellant's scars, the learned trial judge said (at page 342, lines 3-17 of the transcript) that:

> "She told you that she described Vernon's face to the police. She also told you that on the 25th of March, 2006, she was aware that the accused, Graham, had a scar to his left side of his left eye. She was also aware that he had a scar to the upper lip that ran through his cheeks. She did not tell the police about these scars that she knew about. She didn't know that he had a scar just below his right eye -- she did not know that he had a right scar to, yes, she did not, although she admitted these marks and scars on a person's face is good for description. All matters for you, Madam Foreman and members of the jury to consider."

[23] The trial judge's recollection of the evidence is not entirely correct as the witness admitted knowing of only one scar and not two as described by the trial judge. Counsel for the appellant made no complaint of this, however. Counsel however, argued that the direction was unhelpful as it did not explain to the jury the significance of the absence of any description regarding the scars. Counsel also submitted that it was clear from the evidence that the presence of the handkerchief on the head of the appellant prevented her from seeing the assailant properly.

[24] At page 377, lines 9-25 and page 378 of the transcript, the trial judge indicated that the case against the appellant (and his co-defendant) depended wholly on the correctness of their identification by the witness, which both asserted to be a mistaken

identification. She then warned them of the special need for caution before convicting in reliance on the evidence of identification. She pointed out that: (a) Miss Morgan's evidence stands alone and is unsupported by independent evidence, (b) a witness may be convinced in his own mind and as such may be a convincing witness, however that witness may be mistaken, and that a number of witnesses may be mistaken, (c) a mistake can also be made in the recognition of a close friend or relative and (d) they must carefully examine the circumstances in which the identification of the accused men was made. Those circumstances included the time of night, the distance that they were from the witness, the witness' prior knowledge of these men and the length of time she had them under her observation.

[25] At pages 378-380 of the transcript the learned trial judge said:

> "It seems to me here, Madam Foreman and members of the jury, that the witness, Carlene Morgan, and both accused are known to each other. It is not denied by both men. Graham says he knows Carlene before the incident. Carlene said she knew him as well. If you find that is so you may say what we are dealing with here is recognition. You now recognize someone, know them before, that is, Miss Carlene Morgan's recognition of the men. But this is a matter for you to determine in light of the circumstances, the time of the night and so on, distance that the men were from her. The inconsistency and discrepancy to say that Miss Carlene Morgan recognized those two men that night and recognition may be more reliable than identification of a stranger. You should here, however, Madam Foreman and members of the jury, carefully examine the circumstances in which the identification of these two men were made. Bear in mind how long both men were known to the witness, how long she had them under observation. Remember as I said before, inconsistency is between half hour, twenty-five minutes, ten minutes, three minutes, two minutes and so on. Remember earlier I outlined to you the evidence in

> relation to the three lights and the inconsistency in relation to the TV light? So, you have to look at all this, Madam foreman and your members, and see whether anything interfered with her observation of the men."

[26] Again, the trial judge was not entirely correct in her analysis of the appellant's statement because at no time in his unsworn statement did the appellant say he knew the witness. He referred to her as the 'girl' and that she was lying. He did, however, admit that his family home was on Chisholm Avenue. So while he did not deny knowing her (neither in cross-examination through his counsel nor in his unsworn statement) contrary to what the trial judge told the jury, he did not admit to knowing her either. Nevertheless, her evidence that she knew him was not challenged in cross-examination so it was open to the jury to accept that she did in fact know him as she claimed.

[27] The trial judge then went on to outline the matters which were considered by her to be specific weaknesses in the identification evidence. In doing so she pointed to: (a) the presence and position of the handkerchief tied around the assailant's head who was identified to be the appellant, (b) the fact that the evidence was that the witnesses were ordered by the assailants to "hug up" and that in complying, the witness had her head down, (c) the fact that the witness did not describe the appellant's scars to the police, (d) that even though the witness claimed to have been stabbed by the appellant at close range, she did not see the marks on his face, (e) that the witness admitted in cross examination that as you move away from the source of light, the lighting became less; and (f) that at the time of the incident, the witness was awoken from her sleep and was frightened. All these, she told the jury, were weaknesses in the evidence which she was duty bound to point out to them.

[28] The lighting conditions, the position of the witness and the position of the appellant were crucial aspects of the evidence for the jury to consider whether the identification of the appellant was correct. In that regard, the trial judge told the jury at page 381 line 3-13 that;

> "She said in cross-examination to Mr. Wilson, that it was the accused, 'Vernan', she saw that night, but she did not describe his scars to the police when she gave her statement and she consider [sic] these important. She also said that when the accused stabbed her, he was close enough to her, but she did not see the marks on his face. And it goes without saying that this was 2:30 a.m., this was in the night, night into the morning, which is not broad daylight."

[29] At page 374 to 375, she dealt further with the lighting. This is what she told the jury at page 374, lines 18 to 20:

> "...I am going to deal with lighting because when you are dealing with lighting in identification, lighting is important."

The trial judge then painstakingly went through the evidence of the witness with regard to the lighting which she said, aided her in her identification of the appellant as one of the assailants. She also reminded the jury that there was an issue (of inconsistency) with regard to the 'TV' light which was a matter for them.

Discussion

[30] The relevant issues are: whether the trial judge's directions made it clear to the jury that there was a special need for caution before convicting in reliance on the correctness of the identification evidence -in keeping with the **Turnbull** guidelines; and

critically, whether the judge gave the jury the necessary assistance as regards the treatment of the weaknesses identified in the evidence.

[31] In **R v Turnbull and others** [1976] 3 ALL ER 549, Lord Widgery CJ stated at page 552:

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

[32] The **Turnbull** guidelines further require that the judge invites the jury to conduct an examination of the identification evidence itself. In continuing, Lord Widgery CJ stated further that:

> "...the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as, for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often?..."

[33] In the Court of Appeal decision of **Regina v Bradley Graham & Randy Lewis** (1986) 23 JLR 230, Rowe P, in referring to the warning which a judge is required to give in a case of recognition, was of the view that a judge was not bound to the use of any particular form of words in conveying the warnings to the jury. Referring to the

decision in **R v Oliver Whylie** (1977) 15 JLR 163, he approved the statement made by this court in that case that a summing up which failed to specifically deal with all matters relating to the strength and weaknesses of the identification evidence was unlikely to be fair and adequate. This statement is as valid now as it was then.

[34] In the instant case, the trial judge's directions were in keeping with the standard **Turnbull** directions and ordinarily would be considered quite adequate. The trial judge's directions on the issue of visual identification were not only in keeping with the **Turnbull** guidelines but the trial judge also pointed out to the jury what she saw were the significant weaknesses in the identification evidence, including the fact that the witness admitted she had not seen the scars on the night of the incident.

[35] We cannot agree with counsel for the appellant that the trial judge paid only lip service to the cautionary warning which is required in cases where the main issue is one of visual identification. The trial judge not only outlined in detail the salient features of the identification evidence but also pointed out the weaknesses inherent in that evidence. However, despite this, we take the view that the trial judge failed to give the jury any assistance as regards the approach they should take to the weaknesses which she highlighted, where it was not only appropriate, but necessary to do so in this case. It was not enough in a case such as this to simply leave it as a matter for them.

[36] We agree with counsel for the appellant that the judge, having painstakingly listed the weaknesses in the prosecution's case which were material to the issue of

identification, failed to direct the jury how to treat with these weaknesses and to analyse the significance of them.

[37] In **Bernard v The Queen** (1994) 31 JLR 149, the Privy Council was faced with a similar situation where the trial judge's direction was considered adequate for a strong unflawed prosecution case, but in the case before them they considered that the judge failed to adequately direct the jury because, as the Board said at page 155:

> "...because of the presence of so many weakening elements in the prosecution case called for greater emphasis. This direction was therefore inadequate although in a strong, unflawed prosecution case it would no doubt have been accepted as adequate."

[38] In a case in which the identification of the assailant depended solely on the evidence of a single eyewitness, whose evidence was flawed in several material respects, the trial judge is required not only to draw the jury's attention to the weaknesses in the evidence, the possible effect on the credibility of the witness, any material discrepancy and inconsistency that may exist affecting the overall quality of the identification evidence, but must also analyse the significance of such weaknesses, where necessary.

[39] The failure of the witness to see and describe the appellant's several scars was a weakness which should not only have been pointed out to the jury but also required careful analysis by the trial judge. We have considered four cases in which the issue of the accused's scars featured prominently. The first is **Garnett Edwards v R** [2006] UKPC 23, in which the Privy Council held that the witness' failure to mention the very

prominent scar in his description of the assailant was a significant weakness. In **R v Noel Campbell and Robert Levy** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 135 and 136/2003, judgment delivered 27 April 2007, the witness failed to mention the appellant's scar, and it was held that the scar was not a distinguishing feature on which the witness relied and that it was clear that the witness did not purport to identify him by his scars. In **Delroy Ricketts v R** (1989) 26 JLR 133, the Privy Council took the view that in the circumstances where the witness had made a firm and clear identification of the appellant, the failure to mention the scar did not justify overturning the conviction. In that case the assailant had been wearing a hat and it was possible that the hat hid the scar to the forehead. In **R v Michael Tennyson** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 69/1992, judgment delivered 9 March 1994, the witness did mention the appellant's scar but there was an inconsistency as to whether the scar was to the left cheek or to the right cheek. That inconsistency was never resolved at trial. This court held however, that the important factor was the fact of the existence of the scar and that other cogent identification evidence, coupled with the identification parade and the fact that the appellant was known to the witness was sufficient to support the conviction.

[40] In this particular case, it was not one facial scar but four, none of which was mentioned to the police by the witness and none of which she saw during the incident. The description of the scars, given in cross-examination, suggests that they were prominent and were therefore a distinguishing feature of the appellant's appearance. The position of, at least, two of the four scars was such that, they could not have been

hidden by the handkerchief around the assailant's forehead. Based on the witness' answers on the record, it also cannot be said that she made a firm and clear identification of the appellant. This was a serious weakness in the identification evidence which called for an analysis by the judge in order to assist the jury in determining whether the identification of the appellant was correctly made. There was no other evidence of identification in the case. It was not enough to point out to the jury that it was a weakness and leave them to work out for themselves how to treat with it 'as a matter for them'.

[41] Counsel for the appellant relied on the case of **Fuller (Winston) v The State** (1995) 52 WIR 424, from the Court of Appeal of Trinidad and Tobago and commended to us the approach taken by that court. In that case, in referring to the trial judge's failure to properly instruct the jury on the **Turnbull** principles, that court said at page 433:

> "Great care should be taken in identifying to the jury all the relevant criteria. Each factor or question should be separately identified and when a factor is identified all the evidence in relation thereto should be drawn to the jury's attention to enable them not only to understand the evidence properly but also to make a true and proper determination of the issues in question. This must be done before the trial judge goes on to deal with another factor. **It is not sufficient merely to read to them the factors set out in Turnbull's case and at a later time read to them the evidence of the witnesses. That is not a proper summing-up. The jury have heard all the evidence in the case when the witnesses testified. It will not assist them if the evidence is merely repeated to them. What they require from the judge in the final round is his assistance in identifying, applying and assessing the evidence in relation to**

> **each direction of law which the trial judge is required to give to them and also in relation to the issues that arise for their determination. How that is done is best left to the discretion of each individual judge but, howsoever it is done, what is required is that the jury must be given in clear language the assistance that they need to enable them properly to discharge their function".** (Emphasis added)

[42] The approach taken by the Court of Appeal of Trinidad and Tobago has much to commend it, especially the latter half of the exhortation which we believe to be not only correct but also not novel. It was said by the Privy Council in **Michael Rose v The Queen** (1994) 31 JLR 462, at page 465, that the "...essential requirement is that all weaknesses should be properly drawn to the jury's attention and critically analysed where appropriate".

[43] In the instant case, in assessing the evidence of the scars, in light of the appellant's defence that the witness was lying, the trial judge ought to have told the jury that the witness' credibility was in issue; and that the first question they had to determine was whether she was an honest witness. If they found her to be honest and credible they then had to go on to consider whether she was correct in her identification or whether she was mistaken. See **Michael Beckford and others v R** (1993) 97 Crim App R 409.

[44] In analysing the weaknesses in the witness' evidence the trial judge ought to have directed the jury that in considering the credibility of the witness they were to consider firstly, whether she knew the appellant as well as she claimed. Her evidence

was that she knew him well but not his surname. Even though she specifically stated that she knew him for over five years, as the evidence unfolded she would have known him since she was 14 years old. She was 32 years old at the time of trial. This was over 18 years. The appellant said he had his scars since he was 19 years old. He would therefore have been scarred in his face for much of the period he was known to her. Yet the witness who claimed to know him well and to have seen him every day did not know of these scars and even more significantly, did not see them on the night of the incident.

[45] Secondly, it was equally important for the jury to be directed to consider whether, in light of the weaknesses in the evidence regarding the lighting, and the appellant's scars as they appeared to them, if the witness had been able to see the assailant's face in proper lighting as she claimed she would have missed seeing the scars. This should come in for special consideration in light of the fact that she said he had come close to her when he stabbed her. The jury should also have been directed to consider that even if the handkerchief hid the scars near the eyes, whether, if the witness knew the appellant as well as she claimed, she ought to have been aware of his scars and given a description of them to the police. They could also have been told to ask themselves the question whether, even if the appellant had been a stranger, if the lighting was adequate for her to see the assailant as she claimed, she would have missed seeing the scars.

[46] As the evidence stood, there was no explanation for her failure to see the four scars to the appellant's face or to give that description to the police. On that subject the witness said:

> "I was saying I never get [sic] the mark on him face, but I just give him what they call it, him description, how him stay, but I never give any mark".

[47] The issue of the scar was a material weakness in the evidence of the witness as to identification and the jury ought to have been told that they could not make a positive finding of fact or rely on the evidence of the witness on the point, if the failure had not been explained by the witness to their satisfaction. They should also have been told to consider that there was no explanation for her failure to see or describe the appellant's scars and that this went to the issue of her credibility.

[48] There is no evidence of what it was that the witness told the police as to how the appellant "stay" but it is difficult to say that it is possible to describe how the appellant "stay" without mentioning four scars to the face, three of which, based on their position ought to have been fairly obvious and all of which were of such effect that the appellant felt it necessary to ask the jurors not to hold them against him. From that we can only assume that at least the appellant felt they were obvious to the naked eye from the jury box.

[49] Thirdly, the jury ought to have been directed that they may consider that if the witness had sufficient lighting to see the assailant and did not see any facial scars, it may not have been the appellant she saw but someone who looked like him. She may

then have been mistaken. The jury ought also to have been told that in assessing the credibility of the witness they were entitled to draw whatever inferences they wished from her failure to see the scars.

[50] In the circumstances where there was no explanation for the witness' failure, and in the absence of any analysis of the weaknesses in the evidence by the trial judge in order to assist the jury, we are unable to see how the jury could have resolved the question of whether the witness accurately identified one of the assailants to be the appellant in order for them to be sure. We are mindful of the caution given by the Privy Council in **Garnett Edwards v R** at paragraph 29 that:

> "The prosecution case on identification had sufficient strength to be left to the jury, which may well have been entitled to accept it as sufficiently proved, despite its weaknesses. It was incumbent upon the judge, however, to give careful directions to the jury, setting out fully the strengths and weaknesses of the identification, linking the facts to the principles of law rather than merely rehearsing those principles. Their Lordships do not consider that the directions given by the judge were as clear or full as the case required."

[51] In our view, the circumstances of this particular case called for more than a recitation of the standard directions and required the trial judge to amplify her directions, linking the facts to the law and analysing and assessing the evidence for the benefit of the jury. This, the trial judge failed to do.

[52] Another feature of this case, which we consider important, is the fact that the witness was prodded into saying that she saw the appellant's face as opposed to hearing his voice.

[53] At page 99 of the transcript the following exchange took place:

"Q. **What part of Vernon you saw to know it was Vernon?**

A. **Him voice alone...**

HER LADYSHIP: Miss Morgan, just listen to the question. What was the question, what part of him...?

MISS SMITH: Yes.

Q. You saw to know it was him that night in your room?

A. Because I saw him.

HER LADYSHIP: Yes, What part of him you saw?

THE WITNESS: Di whole of him.

Q. **What part a Vernon yuh saw to know that's, oh, is Vernon?**

A. **Him talking.**

Q. Yuh hear him talking? You recognize his voice?

A. Yes

HER LADYSHIP: The question though is, what part of him yuh si?

THE WITNESS: As dem appear, come inside di house...

HER LADYSHIP: Miss, what part of mi yuh seeing?

THE WITNESS: Your face.

HER LADYSHIP: What part of Crown Counsel yoh seeing?

THE WITNESS: Har face.

HER LADYSHIP: Aah right. So, listen to what Crown Counsel is trying to ask you.

THE WITNESS: Him face."

(Emphasis added)

[54] This fact and her failure to see the scars and to describe them to the police should have been drawn to the jury's attention by the learned judge, who should have directed them that for this reason they were to give even greater scrutiny to the evidence of the witness that the appellant was the assailant. See the Privy Council decision in **Pop (Aurelio) v R** (2003) 62 WIR 18, paragraph 10, where the Board considered it an important feature of the case that the evidence identifying the appellant Pop, emerged as a result of a leading question from Crown Counsel and held that the trial judge should have pointed it out to the jury and direct them that for that reason it required greater care in assessing the evidence.

B. *The voice identification*

Submissions

[55] Counsel for the appellant submitted that based on the evidence given by the witness, there was a very real possibility that there had not been any visual identification but only voice identification; especially in light of the fact that the applicant was said to have had something tied around his forehead. Counsel pointed out that the witness had said in evidence that it was the appellant's voice that helped her to identify him. Counsel complained that no analysis of voice identification had been done by the learned trial judge.

[56] Counsel for the appellant submitted that in light of the evidence, the directions on voice identification were inadequate and that the trial judge did not relate them to

the issues which were raised in the case. Counsel argued that the directions which were given fell short of the standard set in **Rohan Taylor and others v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 50-53/1991, judgment delivered 1 March 1993.

[57] Counsel for the Crown submitted that the evidence of voice identification in this case was not decisive of the conviction. She noted that there was ample evidence of opportunities for visual identification and that even the portion of evidence outlined by counsel for the appellant, where the voice recognition is spoken of, the witness also asserted that she saw, "di whole of him". Counsel concluded that the voice identification must be assessed together with the evidence of visual identification. She also cited the case of **Donald Phipps v The Director of Public Prosecutions and Attorney General of Jamaica** [2012] UKPC 24, which approved the application of the **Turnbull** guidelines to voice identification.

The evidence before the court below

[58] The evidence from the witness as to her knowledge of the appellant's voice went as follows:

"Q.	Now, between the age of 21 and 32, yes, so from your grandma passed away to the 26th of March 2006, how often would you see him, vernon?
HER LADYSHIP:	Between When?
MISS SMITH:	Twenty-one and 32.
Q.	How often would you see Vernon?

HER LADYSHIP:	That's your age, you know, miss.
A.	Every single day.
Q.	During the time that you had known him, you ever talk to him?
A.	Only...
HER LADYSHIP:	Yuh ever talk to him?
THE WITNESS:	Just call to him, that's all."

Discussion

[59] This is to us, an altogether troubling exchange. It is clear that the witness, for whatever reason, had difficulty saying, or was reluctant to say she saw the appellant's face. It took some prodding from the trial judge before she finally said so. She however, had no hesitation in saying she saw the judge's face and on the face of the record it seemed she was only moved to say she saw the appellant's face after the intervention of the judge. She was asked twice what caused her to know it was Vernon she saw on the night in question and both times she said it was his voice. On the face of the record, even though she eventually, with much prodding, said she saw the appellant's face, it was not clear on her evidence in examination-in-chief that she identified him by seeing his face as opposed to recognizing his voice.

[60] In the decision of **Rohan Taylor and others v R** Gordon JA, stated at page 13:

> "In order for the evidence of a witness that he recognized an accused person by his voice to be accepted as cogent there must, we think, be evidence of the degree of familiarity the witness has had with the accused and his voice and including the prior opportunities the witness may have had to hear the voice of the accused. The occasion when recognition of the voice occurs, must be such that there

> were sufficient words used so as to make recognition of that voice safe on which to act. The correlation between knowledge of the accused's voice by the witness and the words spoken on the challenged occasion, affects cogency. The greater the knowledge of the accused the fewer the words needed for recognition. The less familiarity with the voice, the greater the necessity there is for more spoken words to render recognition possible and therefore safe on which to act ..."

[61] On page 74 of the record, the witness claimed to have known the appellant since childhood but she would only call to him. However, she gave evidence of hearing him speak words, which we would describe as short sentences at different points during the incident. That was in short shrift the evidence of voice identification. The learned trial judge in summing up to the jury on voice identification said at page 373 to 374 of the record;

> "Now, Madam Foreman and members of the jury, the witness, Carlene Morgan, had told you that 'Vernan' had said, "Weh oono jewelery?"
>
> 'Vernan' asked her for her mother. 'Vernan' had said to her sister, you know, mi friend dem 'round deh soh asking yuh for some 'P' and then he had repeated it. He also spoke to his friends, but she could not hear what they were saying. Miss Morgan also told you that she heard the accused, Collins, talk. They talked to each other. She told you about 'Vernan' that she recognized his voice. She told you that when she was in the children's room, she also heard 'Ever' speaking. She knows his voice. She told you that she would hear him talk all the time."
>
> .....
>
> Madam Foreman and members of the jury, when I get to the visual 'I see' identification, I am going to give you some directions, and the same directions I will give you in relation to visual identification, you have to apply the same principle to voice identification, and to remember that mistakes can

> be made in recognition of close friends and relatives. So, you have to examine carefully the circumstances in which Carlene Morgan identified the voices of both accused, how long she knew them and how long she heard them speak that night, and how long she heard them speak before."

[62] The learned trial judge clearly outlined the evidence surrounding voice identification. She then went on to point out that the same directions given in relation to visual identification, must be applied to voice identification, and that mistakes can be made. The jurors were then advised that they must examine carefully the circumstances in which the witness identified the voices of both accused, how long she knew them and how long she heard them speak that night, and how long she heard them speak before.

[63] The judge went further (at page 374) to point out that academic research had shown that voice identification may be even more difficult than visual 'I see' identification, and as such the warning was more stringent when placing reliance on voice identification.

[64] The learned trial judge in her summation (page 373, lines 1-18) outlined the evidence of the accused speaking during the incident. The evidence in the case is that the appellant had made verbal demands for jewellery and also made enquiries for the witness' mother. He was also the one who spoke to her sister concerning the personal demands being made by the other two men. Having outlined this bit of evidence, the judge administered the cautionary warning to the jurors as to how they were to approach the evidence before relying on it. At page 394 of the record, in coming to the

end of her summation, the judge again reminded the jury of the warning she gave them in respect of both voice and visual identification. She reminded them of the need to warn themselves if they were going to rely on the evidence of the witness alone and that mistakes can be made in the recognition of close friends and relatives.

[65] In the present case, there was some evidence of voice identification, in addition to evidence of visual identification. It was incumbent on the trial judge to point out any weaknesses in the purported voice identification in the same way she was obliged to point out the weaknesses in the visual identification. The greatest weakness in this voice identification by the witness of the appellant is that the witness had never spoken to the appellant except to "only call to him". There is no evidence that the appellant had ever spoken to her or that she had ever otherwise heard him speak. We find the failure to point out this weakness to be a fatal omission. There were major weaknesses in the visual identification evidence and it is quite possible that without the glaring and blatant weakness in the voice identification being pointed out to them, the jury may have felt that despite the weaknesses in the visual identification, they could safely rely on the voice identification to bolster the prosecution's case against the appellant.

[66] Counsel for the Crown argued that the voice identification was not decisive of the conviction. We are unable to say that is a positive fact. In **Derrick Beckford v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 88/2001, judgment delivered 20 March 2003, this court held that the voice identification was merely confirmatory of the visual identification. Unfortunately, we are unable to take the same stance in this case. The evidence of voice identification was more than

confirmatory of but was supplemental to and would have served to bolster the visual identification of the appellant which had its own inherent weaknesses. It was absolutely imperative that the jurors be told of the weaknesses in voice identification evidence with respect to the appellant before they could rely on it, or be told not to rely on it at all.

C. *The identification parade*

Submissions

[67] Counsel for the appellant submitted that the trial judge failed to properly assist the jury to assess the evidence dealing with the identification parade, especially in light of the fact that there was evidence that the parade was not properly conducted. Counsel submitted that the evidence given by the witness shows that she went into the identification parade room twice. On the first occasion, it would appear that she strolled into the room, unsupervised, before the parade room was set up with the one way mirror in place. It resulted in what could be described and was described by counsel for the appellant, as a confrontation between the witness and the appellant. Counsel further submitted that what happened at the parade amounted to an improper confrontation and in those circumstances the parade lacked weight. Counsel argued that this should have been pointed out to the jury.

[68] Counsel for the Crown posited that it was arguable whether an identification parade served any useful purpose in the present case in any event, a doubt she said was shared by the trial judge as expressed at page 382 of the record. There, whilst reminding the jury of the witness' attendance at an identification parade the trial judge

said "I don't know that this is the issue here, but this is held, the identification parade is held before the accused is placed in the dock".

[69] Counsel argued that a parade only becomes necessary in the following circumstances, as summarised from the Privy Council decision in **Irvin Goldson and Devon McGlashan v The Queen** PCA No 64 of 1998, judgment delivered 23 March 2000:

1. Where the witness does not know the defendant or cannot give cogent details about the defendant.

2. Where the defendant requests a parade.

3. In cases of disputed identification where it would serve a useful purpose.

[70] Crown Counsel submitted that in that case Lord Hoffmann was careful to note that the normal function of an identification parade is to test the accuracy of the witness' recollection of the person he says he saw committing the offence, that is, to test his ability to correctly identify the offender. In the instant case, she argued, the witness was never challenged regarding her evidence of prior knowledge of the appellant. Counsel submitted that the practice, for the most part, has been that where the suspect is known to the witness and especially by proper name, and for a very long time, an identification parade would usually be seen as unnecessary.

The evidence before the court below

[71] The evidence given about the parade begins at page 105 of the record where the witness indicated that she did not know that the mirror was to be 'put up'. At pages 109-110 of the transcript there is the following exchange:

> "A. Is two time I went in there because the first time I went in there I didn't know di mirror mus put up because he saw me an him turn to mi an seh, "yuh a goh dead like yuh sista gal."
>
> ....
>
> Q. The first time you went into the room, did you see Vernon?
>
> A. Yes, miss.
>
> Q. Hold on. Did you point him out on that first occasion?
>
> HER LADYSHIP: First time, did you point out Vernon?
>
> THE WITNESS: No mi neva point him out, a di police...
>
> HER LADYSHIP: Thank you.
>
> Q. No. Is there any reason you didn't point him out on that first occasion?
>
> HER LADYSHIP: Listen carefully and answer the question, please.
>
> A. Yes, because the police said that mi neva fi goh inside there until dem put up di mirror.
>
> Q. Okay. And so you left the room?
>
> A. An sit an wait until the mirror put up."

Discussion

[72] This exchange indicates that the witness had entered the parade room twice. On the first occasion they were not ready for her and she did not attempt to point out anyone at that time but the appellant spoke to her in terms which could be considered either as a threat or an admission of guilt.

[73] She went further to indicate that at that time she was also able to see that he stood under number 8. On the second occasion he was still under number eight and she pointed him out on that occasion. There was no explanation as to how or why the witness was allowed to enter the parade room before they were ready for her. There was also no explanation as to why the appellant remained under the same number for the parade. Neither the officer who conducted the parade nor the investigating officer gave evidence in this case.

[74] The trial judge's summation on the identification parade is to be found at pages 382-383 of the transcript and states to the extent that it is relevant to this issue that:

> "Now, Madam Foreman and members of the jury, Miss Carlene Morgan, told you two times October and December she went to an identification parade. I don't know that this is the issue here, but this is held, the identification parade is held before the accused is placed in the dock, when the witness' recollection is fresh, where they placed the accused among a number of men standing, a number of men, line-up, which provides a check in the accuracy of the witness' identification, by reducing the risk that the witness is picking out someone who resembles the perpetrator.
>
> The objective of a parade, Madam Foreman and your members, is to test the reliability of the identification at a much earlier stage, that is, before the witness has had time

> to go wrong. The practice, Madam Foreman and members of the jury, led a number of situations requiring of an ID parade, clearly useful to do so, is whether it would assist the interest of justice. It may also be useful to establish that a witness cannot identify a suspect. This is what we call, "the advantage of an inconclusive parade of the accused, "as well as to establish that he can."

[75] It is clear that the trial judge recited only the standard directions. No direction was given to the jury as to how to treat with the incident of the witness entering the parade room and being spoken to by the appellant before actually pointing him out. In fact it was not mentioned by the judge anywhere in the summation. What took place before the identification parade was actually held was clearly an irregularity and the jury ought to have been directed on how to treat with it. The trial judge was clearly of the view that the identification parade was not an issue because it was a case of recognition, but as judge of the law, it was her duty to tell them why in law, it was not an issue. It was certainly not sufficient to simply recite the standard directions on identification parades. It is the role of the judge to instruct the jury that as part of their function they were required to ensure that the identification parade was fairly conducted. Clearly a confrontation between the witness and the accused before the parade takes place could affect the fairness of the parade. The fact that it took place should not simply be ignored.

[76] It is also clear that the judge failed to point out to the jury that even if the evidence of the witness that she knew the appellant well was true and she accurately pointed him out as the person she knew, they still have to consider whether she was mistaken in identifying him as the assailant on the night in question. See **Ronald John**

v The State of Trinidad and Tobago [2009] UKPC 12, per Lord Brown of Eaton – Under-Heywood. There it was held that where the witness and suspect are well known to each other and neither of them disputes it, an identification parade could not help the situation and may be misleading. This is so because the witness would naturally pick out the person she knows and a positive identification may mislead the jury into thinking that it confirmed the identification as the assailant, in circumstances where the witness might in fact be mistaken in thinking it was the appellant who committed the offence. The danger of that in this instant case is patently clear to this court.

[77] In this jurisdiction, the conduct of identification parades is governed by the identification parade rules under the Jamaica Constabulary Force Act and in particular the amendment to the principal rules contained in the Jamaica Constabulary Force Amendment Rules of 1977. Rules 552 and 554 were gazetted 29 July 1939, Jamaica Gazette Extraordinary. These rules have been held by this court to be procedural and not mandatory but where there are clear breaches, it is the duty of the trial judge to point out the breach and give a clear warning, then leave it to the jury to make their own determination as to what weight they should give to it. See **R v Bradley Graham and Randy Lewis** (1986) 23 JLR 230.

[78] These rules were amended and gazetted by the Jamaica Gazette Proclamation Rules and Regulations dated 23 December 1977, by the inclusion of rule 554A (as inserted by Jamaica Constabulary Force (Amendment) Rules 1977, to make provision for the conduct of identification parades by one way mirrors.

[79] Rule 552 provides:

> "Identification Parades.-
>
> In arranging for personal identification, every precaution shall be taken
>
> (a) to exclude any suspicion of unfairness or risk of erroneous identification through the witnesses' attention being directed to the suspected person in particular instead of indifferently to all the prisoners paraded, and;
>
> (b) to make sure that the witnesses' ability to recognise the accused has been fairly and adequately tested."

[80] Rule 553 provides:

> "553. It is desirable therefore that:
>
> I. ...
>
> II. ...
>
> III. ...
>
> IV. The witnesses shall be introduced one by one and on leaving shall not be allowed to communicate with witnesses still waiting to see the persons paraded, and the accused shall be allowed, if he so desires, on being informed of his right to change his position after each witness has left. A witness shall be required to touch any person whom he purports to identify."

[81] However, in the case of the use of the one way mirror the amendment to the rules provide that the witness shall not be required to touch the person he purports to identify.

[82] Apart from introducing the new one-way mirror system, 554A simply speaks to the requirement for an attorney-at-law and a Justice of the Peace to be present on the

parade and governs their position and role on the parade. It also provides for a postponement of the parade once if an attorney-at-law is not available.

[83] The issue of a witness entering the parade room twice in the circumstances outlined by the witness, is cause for concern and may well be a breach of rule 552 and 553(iv). Certainly, it is more troubling because there is no explanation as to how this occurred.

[84] There is also the evidence of what the appellant is alleged to have said on the first occasion the witness entered the parade room, which could be interpreted, if believed, that the appellant knew her and knew about the murder and in which the appellant could be said to have incriminated himself. It is an unexplained fact also that on the second occasion the appellant remained in the same position on the parade and was pointed out by the witness, who had already seen him the first occasion and had been spoken to by him whilst he stood under that same number in the line.

[85] In our view, this resulted in the identification parade being irregular, and as a result it required a clear warning to the jury with regard to their consideration of the fairness of the parade as well as how to treat with the fact that the witness claimed the appellant spoke to her. There was always the possibility that the jury may have thought that the fact that the appellant spoke to the witness confirmed the identity of the appellant as the assailant, whereas on one possible view of the evidence it might only have confirmed, if they believed it took place, that the appellant knew the witness and the fact of the murder and that the witness knew the appellant.

[86] We agree with counsel for the Crown that, in the circumstances, where the witness claimed to have known the appellant since childhood, and there was no clear challenge to this fact, the purpose of the parade in such a case would be simply to confirm that the appellant was the person she claimed to know. In those circumstances the irregularity of what took place at the parade, may not be sufficiently fatal by itself to affect the conviction. See **David Kildare v R** (unreported) Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 164/1999, judgment delivered 20 December 2000. In the end it goes to the weight to be given to the evidence of the identification at the parade.

[87] What is of greater concern to this court, however, are the words which the witness claims that the appellant is said to have spoken to her when she went into the room on the first occasion. She told the jury that the appellant said; "Gal you ago dead like you sista". It was never suggested to the witness that the appellant did not say these words to her and the appellant did not address it in his unsworn statement and so it was therefore left unchallenged before the jury. However, the trial judge did not direct the jury with regard to those words and in fact did not deal with them at all. In fairness to the trial judge it might have seemed more prudent not to highlight them, but the nature of the words were such that a jury not properly directed could have inevitably drawn from them an inference of guilt and therefore we believe it called for careful directions to the jury. We considered the opinion of the Privy Council in **Leroy Burke v The Queen** (1992) 29 JLR 463, where the Board held that a judge was obliged to direct the jury to approach evidence of an undocumented oral confession

with caution. Even though what was alleged to have been said by the appellant in this case was not a confession, it was an undocumented, unsupported assertion that the appellant said something from which the jury could draw an inference adverse to the appellant. It required no less a caution in our view.

[88] We also considered a similar approach which was taken by this court in the case of **Ian McKay v R** [2014] JMCA Crim 30, where the accused, on being shown a body, shouted out "Mi neva touch har", at a time when the sex of the body was not yet visible to him. It was held that the summation was inadequate because the inferences that could be drawn from the applicant's statement was not spelt out and the jury were not told that they had to rule out all inferences consistent with innocence before they could be sure of the applicant's guilt.

[89] Whilst we accept that no rule of evidence was breached in the admission of the evidence of what the appellant is alleged to have said, in our view the jury ought to have been told to approach it with caution. They should have been told that they had to determine firstly, whether or not they believe it was said and if they do, they were to go on to consider what it may mean and what value they may wish to attach to it. They ought to have been directed that even if they do believe it was said, they should not use it to bolster the witness' identification of the appellant as one of her assailants and further that if they thought the prosecution's case was weak, they should not rely on it to bolster a weak case. Lastly, they should have been told that, even if they believed the appellant had made the statement, they should not assume that he was guilty just because of it. However, they may take it into account as support for the prosecution's

case if they believe it was said and they considered it too much of a coincidence that the man she said killed her sister and who had also attempted to kill her, now tells her that she is going to die like her sister did. But while it may provide some support of the prosecution's case they cannot convict wholly or mainly because of it. See also **Karl Shand v The Queen** [1996] 1 WLR 67 and **Leroy Barrett** (unreported) Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 45/1989, judgment delivered 16 July 1990. The failure of the trial judge to direct the jury accordingly, we believe was a fatal omission.

Ground 2: discrepancies and inconsistencies

Submissions

[90] Counsel for the appellant submitted that there were several areas of contradiction and inconsistency relating to the identification evidence. These included the issues of: whether the witness knew the appellant before as a bus conductor, whether there was adequate lighting, how long the incident lasted, and whether the witness had given the name of the co-defendant to the police.

[91] Counsel, in impugning the judge's directions to the jury on the inconsistencies, relied on the case of **R v Hugh Allen and Danny Palmer** (1988) 25 JLR 32, per White JA, where he said at page 35 that:

> "These remarks fell short of what was required for a full direction to the jury. It was certainly incumbent on the judge to direct the jury **in what way her testimony at the trial which was in conflict with the deposition would constitute the undermining of the evidence which she gave at the trial, no less as to what would be the**

> **result if they found that the discrepancy was material**. This standard was not met merely by telling the jury that it was a matter for them." (Emphasis added)

[92] Counsel for the appellant complained that the trial judge had failed to render any assistance to the jury regarding the inconsistencies and failed to relay to them the key issues relevant to the identification of the applicant. He also complained that the trial judge, by failing to speak to what would affect the reliability of the identification evidence, had abdicated her responsibility by merely stating that "it was a matter for you".

[93] Counsel for the Crown pointed to the fact that the learned judge had been careful to explain to the jurors the meaning of inconsistencies and discrepancies, and how they ought to be dealt with in the assessment of the evidence (pages 313-316 of the transcript). She pointed to areas in the summation where the learned judge went through each of the above inconsistencies and discrepancies as itemized by counsel (pages 359-367). Counsel submitted that in the light of that, it cannot be said that the learned judge did not adequately outline the inconsistencies and discrepancies, or offer sufficient guidance to the jury.

The evidence before the court below

[94] With respect to the evidence regarding the appellant being a bus conductor on Eva's bus, (that is the co-accused), there was a rather long exchange between the witness and counsel for the appellant as to whether the witness had previously said that the appellant was a conductor on Eva's bus. This arose because at the trial the witness said she did not know the appellant to be a conductor on anybody's bus.

Counsel tried to get her to give an explanation of the inconsistency between her statement at trial and her statement at the preliminary enquiry at Half-Way-Tree. However, this led to the witness making what amounted to prejudicial remarks about the appellant which were adequately dealt with by the judge and for which no complaint is made to this court. The witness finally said she did not remember that she had said that the appellant was a conductor on Eva's bus when she gave her evidence at the preliminary enquiry. She however, denied that it was a lie that the appellant had been a conductor on Eva's bus.

[95] With regard to the issue of the light from the television there was another lengthy exchange between counsel and the witness. The witness agreed that when she awoke at 2:30 am none of the television lights were on. She also agreed that the televisions were one of the first things the assailants took from the rooms. Counsel put to her that in her statement to the police she had said she could see because the television in the room was on and the outside light was shining through the window. The witness denied telling the police that. The statement was shown to her and having seen it, she admitted saying that to the police but insisted they were not watching television. She also said that when she told the police that the television in the room was on it was true. She further said that when she said at trial that none of the television was on, it was not true, but she was not actually lying to the court. She also said she did not make a mistake. She went on to say that it was the 20 inch television which was on and agreed that it was the first one taken by the men. She however, insisted that the television set helped her to see the men along with the light outside.

She also said that the light from the television set was not the main lighting which helped her to see the men but that it was the light outside. At this point the trial judge intervened in the questioning of the witness by the defence counsel. After the learned judge sought the unnecessary clarification to the witness' clear answer of 'no', the witness then said the television light was important in helping to see the men.

[96] The credibility of the witness with respect to the lighting was therefore called into question.

[97] With regard to the name of the co-defendant being given to the police, the witness was asked if she knew Eva as Collins in March 2006, and she said 'yes'. It was put to her that at the time she gave the statement to the police in March 2006, she did not mention the name Collins. Her response was firstly that she gave their names then later she said she did not know Eva last name 'so good'. Again, there was an intervention by the trial judge which resulted in her saying she gave the name Collins to the police. Again, counsel asked if the name Collins was given to the police at which point the witness said she was not sure but she did give the last name to the police. The result of all this was that eventually the entire statement was read to the witness. She was then asked if she heard the name Collins mentioned in the statement to which she replied 'no'. She then agreed that she had made a mistake when she earlier told the court that she had given the name Collins to the police. In re-examination she told the court that when the statement was read to her by the Registrar she heard the name "Gallis" and "Eva" read out. She denied that she had said she knew his last name in order to make it seem as if she knew the appellant's co-accused well.

[98] With regard to the evidence as to the time the incident took, the witness said at trial that she saw the applicant in the room for 15 minutes, whilst at the preliminary inquiry at Half-Way-Tree she said it was two minutes and three minutes. Her explanation for the inconsistency was that it was a long time ago and she did not remember, she just knows that she saw him.

The learned trial judge's direction to the jury

[99] The trial judge gave the jury the general directions on inconsistencies and discrepancies and how to treat them if they appeared to exist. The trial judge gave directions on what inconsistencies and discrepancies were at pages 313-318 of the record. She told them they could reject the evidence of the witness or all of them as unreliable because of the existence of such discrepancies and inconsistencies or they could accept a part or reject a part. She also told them that it was for them to say whether, if they exist, they were profound, or inexplicable or whether the witness could be believed at all. It was for them to say whether the inconsistencies where they exist were central to the issue they had to determine or whether they were trivial. At pages 378-379 she told them that in light of the circumstances of the identification and the inconsistencies and discrepancies, it was for them to say whether the witness recognised the appellant that night. This direction, in addition to the itemizing of the inconsistencies as they appeared to the judge was, in our view, more than adequate assistance to the jury in an unflawed case.

[100] With regard to the inconsistencies, this is how the learned trial judge summed up the issue (found at page 359 of the transcript);

"Madam Foreman and members of the jury, let me go through the inconsistencies with you as I see them. Remember I told you, you can use them anyway. Miss Morgan had said something about a window in her room with a sheer piece of curtain, that was the only window in her bedroom. She later testified that there are two windows in the room. Matter for you. Remember I told you how to use those inconsistencies, discrepancies and contradictions. Initially, she testified that the door that was -- I'm sorry. Initially, she testified that Graham had nothing around his head, but she quickly said he had a 'kerchief' tied around the top of his forehead.

Miss Morgan also told you, that her mother's veranda and her veranda are on the same level, same height, same level, she said. She then when [sic] on to testify that the old kitchen is higher than her veranda. She then went on to say the old kitchen, same like veranda and height. Make of it what you may, Madam Foreman and your members.

In answer to Mr. Wilson, Miss Morgan admitted that she had told us that she saw the accused Graham's face whilst he was in the room and she also told me that she remember giving evidence at Half-Way-Tree.

Now, Half-Way-Tree is what you call - trials at Half-Way-Tree is what you called a preliminary enquiry, to look into matters of that nature to see whether or not they should come here for trial. So, this statement from the judge at Half-Way-Tree is call [sic] a deposition, that is her statement given to the judge at Half-Way-Tree. When that deposition was read to her by the Registrar, she said she thinks that she told the judge at Half-Way-Tree that she looked at his face for 3 minutes. She had said to us that he was in the children's room about 25 minutes. You remember how Defence counsel stated that [sic] -- counsel - - for 25 minutes, shot her sister and stabbed her up?

Again, the statement from the judge at Half-Way-Tree was put to her and she admitted that she had told the judge - in her explanation that she told the judge that – that she had said something about 15 minutes, because it is so long, she does not remember.

Matters for you. You remember that bit of evidence about 25, 15, 10 and after that what the lawyer said? In relation to the difference between the 25 minutes and what she had said to the judge at Half-Way-Tree, she said the incident happened from 2006, it is so long. She also told you that she told the magistrate at Half-Way-Tree, that the men stayed in the house for about 10 minutes, 5 minutes in each room. These are all matters for you. Remember I told you about slight, serious, profound, deep, not material, immaterial. She also told you that what he [sic] told the judge at Half-Way-Tree is true. She also said that, he, 'Vernan', was in the children's room for half-an-hour. Remember she said she told the judge the time limit. Her explanation, as I have said, I have said it already, the incident happened so long, 2006 to 2013. A matter for you.

HER LADYSHIP: Madam Foreman, members of the jury, these are matters for you to say whether they are slight or serious, whether they are immaterial or material, profound or deep.

Miss Morgan told learned counsel, Mr. McFarlane, that she knows that she gave to officer Campbell the name Collins or Allen, one out a dem two. Remember the Registrar read her entire statement to her and she said, I did not hear him read the name Allen or Collins. She agreed with the attorney-at-law that she had made a mistake when she said she had given the name Allen or Collins to the officer. She said I am not lying. It's just that she believed that is what happened. All she had given was the name. All matters for you, Madam Foreman and members of the jury, in your role and function.

She told you as far as she is aware, Vernon does not do anything, but run the shop and sell. She didn't -- she has said she did not know of Vernon being a conductor on anybody bus. It was put to her by learned defence counsel, Mr. Lloyd McFarlane, "did you tell the judge at Half-Way-Tree, Vernon is a conductor on Eva's bus." She then admitted she told the judge that when she testified. You told the court at Half-Way-Tree -- also that she told the court also that three times per week he did that, that Vernon indeed work as a conductor. Her explanation, she didn't remember that she told the judge at Half-Way-Tree. She said I just sometime can't remember. And remember, Mr. McFarlane had said if anybody say that Vernon is a

> conductor on a bus, would they be telling a lie? And she said, yes, but it is not she telling a lie. All matters for you, Madam Foreman and members of the jury, as to whether you accept her explanation.
>
> She told Mr. McFarlane at about at about 2:30 a.m. she was asleep. She was not watching TV or anything like that at the time. None of the TV in her room was on. No light inside of her room or children's room to help to see the faces of the men. It was suggested to her that she had told the investigating officer, Miss Campbell, I could see because the TV light in the room was on, the outside light was showing through the window. Her response, I did not tell Miss Campbell that. When the Registrar read her statement to her saying that was what she said to the police, she said having heard the Registrar read the section, I now recall I told Miss Campbell when she was taking my statement. She said that was when she told Miss Campbell that and that was the truth. When she testified in court that none of the TVs -- testified here, that is what is here, that one of the TV was on, that was not a lie. She did not make a mistake. A matter for you. Initially, she said, the TV light was on in assisting to see the men's face. The light outside was on, too. Mr. McFarlane then asked her, what's the final answer? The TV light was important in helping you to see the men's face. Her answer, she did not tell us about the TV light here at the trial, because she did not remember. It's a matter for you whether or not you accept her explanation. She also told Mr. McFarlane, that in agreeing with him that from the time the men kicked down the door to when they left -- kicked down the door to when they left is about ten minutes. When she spoke about the ten minutes she is saying that she did not give a different time to the judge at Half-Way-Tree than she gave here to mek it look like she had more time, more opportunity than she really had. All these are matters for you."

[101] At page 388 of the transcript the trial judge again reminded the jury that the question of whether the appellant was a conductor on the co-accused's bus was in issue. At page 394 she reminded them of the defence and prosecution's comments regarding the discrepancy and inconsistency.

[102] In relation to the issue of whether the witness had given the name 'Collins' to the police other than pointing this out to the jury as an inconsistency and a weakness in the Crown's case, the learned trial judge gave no assistance to the jury as to how to treat with it.

Discussion

[103] In **R v Fray Diedrick** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 107/1989, judgment delivered 22 March 1991, Carey JA, in delivering the judgment of this court, said at page 9:

> "The trial judge in his summation is expected to give directions on discrepancies and conflicts which arise in the case before him. There is no requirement that he should comb the evidence to identify all the conflicts and discrepancies which have occurred in the trial. It is expected that he will give some examples of the conflicts of evidence which have occurred at the trial, whether they be internal conflicts in the witness' evidence or as between different witnesses."

This passage was cited with approval in **R v Rohan Vidal and Kevin Thompson** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 266 and 269 /2001, judgment delivered 25 May 2005 at page 6. In that case this court held that once the trial judge explained to the jury the effect which a proved or admitted previous inconsistency should have on the evidence at trial and reminds the jury of the major inconsistencies in the witness' evidence, it is a matter for the jury to decide whether or not the witness has been so discredited that his evidence cannot be relied on at all.

[104] Where the discrepancy or inconsistency in a witness' testimony calls into question her credibility on a point which is material to the issue the jury has to decide, they must be told that they cannot make a positive finding of fact and accept and rely on the witness' evidence regarding that fact unless it is resolved by an explanation from the witness. See **R v Noel Williams and Joseph Carter** (unreported), Court of Appeal, Jamaica Supreme Court Criminal Appeal Nos 51 and 52/1980, judgment delivered 3 June 1987. They should be reminded of the witness' explanation for the inconsistency and discrepancy, if there is one, and directed that it is for them to say if they accept it so as to find her a credible witness despite the discrepancy or inconsistency.

[105] In the case of the inconsistency with the lighting conditions, it was incumbent on the trial judge to point out to the jury that if the television light was important and they find as a fact that the television was not on and had been the first things taken by the assailants, they had to consider whether that affected the accuracy of the identification. But that it was entirely open to them to reject her evidence regarding the light from the television and accept it as regards to the outside lights.

[106] Based on the authorities, the duty of the trial judge in directing the jury in the case of inconsistencies and discrepancies appearing in the evidence at trial may be summed up as follows:

1. There is no duty to comb through the evidence to find all the inconsistencies and discrepancies there may be, but the trial judge

may give some examples of them or remind the jury of the major ones.

2. The trial judge should explain to the jury the effect a proved or admitted previous inconsistent statement should have on the evidence.

3. The trial judge should point out to the jury what the result may be if the inconsistency or discrepancy were to be found by them to be material and how it may undermine the evidence.

Once this approach is taken, it is then a matter for the jury whether they consider the witness to be discredited.

[107] In **R v Andrew Peart and Garfield Peart** (unreported) Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 24 and 25/1988, judgment delivered 18 October 1988, Carey P (Ag) said at page 5:

> "We would observe that the occurrence of discrepancies in the evidence of a witness, cannot by themselves lead to the inevitable conclusion that the witness' credit is destroyed or severely impugned. It will always depend on the materiality of the discrepancies."

[108] However, this was not an unflawed case and we are forced to agree with counsel that, because the inconsistencies in this case were so material to the issue of identification, the trial judge should have gone on to identify ways in which they may have undermined the prosecution's case. For example, the jury had to reconcile whether there was television light or not to assist the witness in recognising the

appellant, for even though the witness said she forgot to mention the television light at trial because she forgot she had said there was television lighting to the police in her statement, it was still not clear whether that was true or not bearing in mind she not only said two different things as to whether it assisted her in seeing the men but she admitted that it was the first item taken by the assailants. Also, during that period, her head would have been down having been ordered to do so by the men and having complied.

[109] Another example is the inconsistency with regard to the question of how long she saw the men. This was material to the issue of identity. Even though various times were put to her as her previous statement, there was no clear indication as to which time was the correct one. The jury therefore had to reconcile the evidence of how long the witness was able to see the appellant for in order to identify him. We are mindful of the words uttered by this court in **R v Oliver Whylie** at page 166 that:

> "It is of importance that the trial judge should not consider his duty fulfilled, merely by a faithful narration of the evidence on these matters. He should explain to the jury the significance of these matters, enlightening with his wisdom and experience what might otherwise be dark and impenetrable."

Ground 4: alibi

Submissions

[110] Counsel for the applicant submitted that the judge's summation on the issue of alibi was confusing, added to which there was no discussion as to the applicant's defence. Counsel argued that the summation omitted the motive ascribed to the

witnesses, which was central to the defence. He pointed out that nowhere in the summation did the trial judge refer to the appellant's alibi. He submitted that the summing up was deficient in that regard as there was no attempt to put the competing contentions to the jury. In any event, counsel argued, the trial judge misdirected the jury on alibi.

[111] Counsel for the Crown submitted that the directions regarding alibi were detailed, and were in-keeping with the decision of this court in the case of **Fabian Donaldson v R** [2010] JMCA Crim 52, in which the judgment of the court was given by Brooks JA (Ag) (as he then was). Counsel argued that the learned judge may not have used the precise words approved in **Fabian Donaldson v R**, however the essential principles were adequately conveyed to the jury. In fact, Brooks JA, she said, was careful to point out in paragraph [21] of the judgment, that, the critical issue was whether the summation taken as a whole, clearly brought the issue of alibi to the attention of the jury, and alerted them to the manner in which they should treat with that issue.

[112] Counsel pointed out that in the above case, the adequacy of the trial judge's directions on alibi was in fact challenged on the following bases:

1. That it did not include specific mention of the directions on alibi as recommended by the Judicial Studies Board in England which stipulated that the direction include the following:

> "...Even if you conclude that the alibi was false, that does not by itself entitle you to convict the defendant. It is a matter which you may take into account, but you should bear in mind that an alibi is sometimes invented to bolster a genuine defence."

2. That the judge did not specifically address the fact and implications of the sworn alibi evidence from the appellant's witness.

[113] The Court of Appeal in that instance concluded that those omissions resulted in a misdirection of the jury on the point, however they were satisfied that the summation when taken as a whole, sufficiently conveyed the issue of alibi and the manner in which it ought to be treated by the jury.

[114] In **Gavaska Brown, Kevin Brown and Troy Matthews v R** (2001) 62 WIR 234, this court considered the directions which ought to be given in circumstances where the appellant Troy Matthews had given an unsworn statement but had also called a witness to support his alibi. At page 242 of the report, the court said:

> "In *Mills*, *Mills*, *Mills* and *Mills v R* (1995) 46 WIR 240 the Privy Council held that the observations of Lord Widgery in *Turnbull* have no application to an alibi put forward only in an unsworn statement. However, in the instant case the appellant called an alibi witness. The trial judge pointed out the discrepancies between the appellant's unsworn statement and the witness's evidence. In these circumstances a rejection of the alibi evidence by the jury might have led them to think that that supported the identification evidence. In our judgment, because of this danger, the trial judge ought to have directed the jury in terms of Lord Widgery CJ's observation in *Turnbull*; see *R v Pemberton (*1993) 99 Cr App Rep 228.
>
> This omission further justifies our conclusion that the appeal of Troy Matthews must be allowed."

Discussion

[115] The appellant in this case, gave an unsworn statement from the dock and called no witnesses in support of his case. In his unsworn statement, he told the jury that his mother had been killed and as a result his entire family moved from the area where they had been living. He also informed them that his sister returned to the area sometime thereafter and she too was killed. He said he had had a nervous breakdown as a result. He said he himself never returned to the area but on the night of Mothers' Day 2006 he was out enjoying himself and whilst outside a night club there was an affray. Even though he was not involved, the police came and detained everyone including him. He said that whilst in custody he was transferred to the Gun Court where he saw the man, who it was alleged, had killed his mother. This man, the appellant said, threatened to in effect, cause his sister-in-law to frame him for murder if the appellant did not get his brother to drop the charges against him. The appellant refused. It was this refusal, the appellant said, which led to this charge of murder against him. He also asked the jury not to judge him by his scars as he was not a bad person. He said he was not at the scene of the murder on Chisholm Avenue that night and swore on his life that he did not kill or stab anyone. He said the witness was lying.

[116] The judge in her summing up reminded the jury of all that was contained in the appellant's unsworn statement (at page 352-355 of the transcript).

[117] At pages 383-389 of the transcript, the trial judge dealt with the appellant's case. She reminded the jury of his statement that he had to leave for Westmoreland after his mother's death and that he was not at the scene of the murder that night. She told

them that the prosecution had to prove the appellant's guilt so that they felt sure. She then pointed out to the jury that the appellant had set up a defence of alibi. She pointed out that it was not for him to prove that he was not there but on the contrary, it was for the prosecution to disprove his alibi. The judge then went on to state as follows (recorded at pages 384 to 385):

> "Even Madam Foreman, members of the jury, if you conclude that the alibi made—the alibis given by Mr. Graham and Mr. Collins are false, that does not by itself entitle you to convict any of them. It is a matter that you must take into account, but you should bear in mind that an alibi is sometime [sic] invoke [sic] to bolster an otherwise genuine defence. What I am saying to you, the men are saying they were elsewhere on that fateful night and that he Graham was from Westmoreland and Collins, Lincoln Avenue. They did not have to prove where they say they were. The prosecution must disprove the alibi advanced by the accused men. The prosecution has to prove to you that both men, along with an unidentified third man, were in Miss Morgan's house that night removing things from the house and Susan was shot. If you accept Graham's statement that he was not there, then you must acquit him. If you are in doubt then you must also acquit him...
>
> The prosecution must make you feel sure that they were in Miss Morgan's house that night. Consider the evidence carefully. If you are in doubt either of [sic] both accused persons, you must acquit them. If you accept what Graham and Collins say, acquit. If you reject their alibi--they do not have to prove their alibi, the prosecution must prove [sic] it. If you reject the alibi, you do not automatically convict. You go to the prosecution's case and asked [sic] yourself whether or not you are satisfied as to the extent that you feel sure that they were in Miss Morgan's house that night doing what Miss Morgan said."

[118] In our view, these directions are perfectly adequate and clear. The jury were made to understand the appellant's answer to the charge was that it was a lie, that he

was not present at the place or time of the incident but was in fact somewhere else. Having been directed that the appellant need not prove his alibi, it was for the prosecution to disprove it, they were also told in no uncertain terms the options which were open to them in considering the appellant's unsworn statement in this regard. Having been told to give the unsworn statement what weight they think fit (at pages 351-352 of the transcript) it was open to the jury to reject the alibi because they disbelieved it. The judge's direction made it clear that even if they rejected it because they did not believe it, they could not convict on that basis alone. They were told, again in no uncertain terms, that they could only convict, if having considered the prosecution's case, it made them feel sure. There is therefore no merit in this aspect of ground 4.

[119] With regard to the second aspect of the complaint in ground 4, that the learned trial judge failed to mention the appellant's defence as to motive - whilst we reasonably expect the summing up to refer to the salient aspects of the appellant's defence - the omission of certain salient features cannot be considered fatal unless and until the summation is considered as a whole and a judgment is made on its possible effect on the jury. In this case however, we cannot say that there was any omission on the part of the learned trial judge.

[120] It is unquestionably true that nowhere in her summation did the learned trial judge tell the jury that what the appellant was saying was that the witness had a motive for saying he was the one who shot her sister. Neither did the trial judge tell them that in considering the evidence, especially the weaknesses in the identification

evidence, they should consider whether they accept that the witness was in fact operating under such a motive. This, omission, therefore, raises the question of whether firstly, she was obliged to do so and secondly, if she was, did her failure to do so, result in the appellant not getting a fair trial. In **R v Carl Peart** (1990) 27 JLR 13, it was said that where the defence is that the witness is deliberately lying and a motive is given the jury should be told that the credibility of the witness was being challenged and therefore the reasons being put forward as the motive for lying must be scrutinized with care.

[121] When what the trial judge said at pages 342 and 352-355 of the transcript is considered, we are unable to say that looking at the summing up as a whole the appellant's defence was not fairly put to the jury. At page 342, lines 21-22, the trial judge, in dealing with the witness' evidence, in effect contrasted her evidence with the statement made by the appellant. So she reminded the jury that the witness had said that Vernon had not left the area after his mother died but that Vernon had said he was in Westmoreland. She also reminded the jury that the witness admitted to knowing 'Paul' who had been arrested for the death of Vernon's mother. She also reminded the jury that the witness had denied talking to Paul before she knew Vernon was in the community or in the custody of the police and that she denied speaking to Paul about coming to court to give evidence.

[122] Even though the trial judge failed to alert the jury to scrutinize the reason for the motive and especially the fact that the sister of the witness was the girlfriend of Paul who is charged for murdering the appellant's mother, the jury would have been left

with the clear fact that there was a denial that it was the person who murdered the appellant's mother who had caused the witness to come to court to tell lies on the appellant, as he alleged in his unsworn statement.

[123] At pages 352 -355 of the transcript, the judge reminded the jury of what the appellant said in his unsworn statement of the threat to frame him for murder if he did not get his brother to drop the charge against his mother's alleged murderer. She also reminded them of his defence of alibi. Earlier (at page 310 of the transcript) the judge had reminded the jury that the appellant had given an unsworn statement although there was no burden on him. She reminded the jury that the burden of proof rests on the prosecution and correctly gave them the options available to them in treating with his unsworn statement.

[124] In our view, although the judge did not specifically remind the jury that the appellant was alleging that he was set up by a conspiracy between Paul and the witness, it could not fail to have been brought home to the jury that this was what he was alleging and that this was being denied by the witness. It is also clear that by their verdict the jury would have rejected his conspiracy theory, as they were entitled to do.

[125] We find that this aspect of the summing up, taken as a whole, was adequate and fairly highlighted to the jury the appellant's defence.

Disposition

[126] Section 14(1) of the judicature (Appellate Jurisdiction) Act states:

> "14 (1) The Court on any such appeal against conviction shall allow the appeal if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or that the judgment of the court before which the appellant was convicted should be set aside on the ground of a wrong decision of any question of law, or that on any ground there was a miscarriage of justice...
>
> (2) Subject to the provisions of this Act the Court shall, if they allow an appeal against conviction, quash the conviction, and direct a judgment and verdict of acquittal to be entered, or, if the interests of justice so require, order a new trial…"

[127] On the basis of the conclusion we have arrived at with regard to grounds 1 and 4, we find that there is a risk of a miscarriage of justice. The prosecution's case stands or falls on the evidence of the witness, whose evidence on the issue of identification, so vital to the prosecution's case, was so riddled with weaknesses that her credit was almost impeached. This was a case which called for careful analysis of the weaknesses in the evidence. Although the weaknesses in the prosecution's evidence were outlined to the jury by the trial judge, no proper analysis of them was done in order to assist the jury as regards how to treat with them. There was no other supporting evidence regarding the identification of the appellant, and in those circumstances where the weaknesses were material to the proper identification, a failure to properly analyse them for the benefit of the jury where it was most appropriate to do so, we feel is a fatal omission. This is the similar approach taken by the Court of Appeal in **R v Nugent and Hughes** (1974) 12 JLR 1355.

[128] The failure to direct the jury on the irregularity of the identification parade and what the appellant is supposed to have said to the witness at the time of the

irregularity, we find to have also been a grave omission. The verdict in this case was therefore unsatisfactory and unsafe.

[129] In light of the serious weaknesses in the identification evidence, we did not consider this a proper case to apply the proviso. The test for applying the proviso is whether the jury having been properly directed would inevitably have come to the same conclusion. The evidence must be so overwhelming that despite the mis-directions or serious omissions no miscarriage of justice had occurred. This is not such a case. We would therefore allow the appeal and quash the conviction.

[130] The question of whether to order a retrial also loomed large for our consideration and we have given anxious thought to this. We are grateful for the guidance provided by Lord Diplock in the seminal decision of the Privy Council in **Dennis Reid v The Queen** (1978) 16 JLR 246. This incident took place in 2006, we have not lost sight of the fact that it was a horrendous murder, during the course of which the witness herself was also injured. However, a serious consideration of the question of whether to order a retrial will depend on the particular case and whether it serves the interests of justice to do so.

[131] In this case the incident took place in 2006, the trial was in 2013. Although usually where the verdict is set aside because of a misdirection or fatal omission a retrial would most likely be ordered, in this case the evidence led by the prosecution on the crucial issue of identification was largely discredited. On much of the material facts the witness' explanation for inconsistencies and discrepancies was that the incident took

place a long time ago and she did not remember. That situation is not likely to be bettered with time. The witness' failure to see or describe the appellant's significant scarring to the face was left unexplained and it would be giving the prosecution a second bite at the cherry to attempt to explain the inexplicable. Ten years have passed and in view of the quality of the only identification evidence against the appellant on the record of this case, we do not consider that it is in the interests of justice or the accused to order a retrial. We would therefore enter a verdict of judgment and acquittal.

Order

[132] The orders of the court are that:

i) The appeal is allowed.

ii) The conviction is quashed and sentence is set aside.

iii) Judgment and verdict of acquittal entered.