[2020] JMCA Crim 6

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 20/2014

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MISS JUSTICE PHILLIPS JA
THE HON MISS JUSTICE P WILLIAMS JA

NORRIS JOHNSON v R

Gladstone Wilson for the applicant

Miss Paula Llewellyn QC, Director of Public Prosecutions, Mrs Natiesha Fairclough-Hylton and Miss Natallie Malcolm for the Crown

16, 17 January 2018 and 23 March 2020

P WILLIAMS JA

Background

[1] On 12 February 2009, after a trial in the Home Circuit Court before N McIntosh J (as she then was) and a jury, Norris Johnson, the applicant, was convicted for the murder of Jermaine Barrant. On 27 February 2009, he was sentenced to life imprisonment with the stipulation that he would not be eligible for parole until after he had served 30 years' imprisonment at hard labour.

[2] By notice dated 17 March 2014, the applicant applied for leave to appeal against conviction and sentence on the following grounds:

> "1. Misidentity [sic] by the witness: - That the prosecution witness wrongfully identified me as the person or among any persons who committed the alleged crime.
>
> 2. Lack of evidence: - That the prosecution failed to present to the Court any material, scientific or specific evidence to link me to the alleged crime.
>
> 3. Unfair Trial: - That the evidence and testimonies upon which the Learned Trial Judge relied on [sic] to instruct the jury, lack facts and credibility thus rendering the verdict unsafe in the circumstances.
>
> 4. Miscarriage of Justice: - The identification parade was not conducted in a manner as prescribed by law, thus compromising my innocence and calls into question the sincerity of the verdict in the end."

[3] On 21 March 2016, a single judge of this court considered his application and found that the summation, conviction and sentence could not be faulted in any way. The application was refused. As is his right, the applicant renewed his application before us.

[4] Before us, Mr Wilson sought and was granted permission to abandon the original grounds and to argue two supplemental grounds of appeal:

> "1. The three (3) instances of recognition by the virtual eye witness are fraught with inaccuracies that render the verdict unsafe. Based on the evidence adduced at trial, the witness identified someone he knew not an assailant he saw on the night in question.
>
> 2. Apart from reciting the evidence led by the prosecution, the LTJ made no effort in assisting the Jury to treat with the mixed statements by the Accused and whether the action by the Investigating Officer in not holding a Question and Answer (Q & A) strengthened or weakened the prosecution's case."

[5] On 17 January 2018, having heard and considered the submissions of counsel, we refused the application for leave to appeal and ordered that the sentence be reckoned as having commenced on 27 February 2009. As promised, we now put our reasons in writing with apologies for the delay in doing so.

The background

[6] In the early morning hours of 15 June 2004, Jermaine Barrant was shot and killed at his home in Central Village, Saint Catherine. The facts relied on by the prosecution, which were not in dispute, were as follows. The deceased was at home with Sharlee Barrant, his sister, and Troy Barrant, his brother, on the morning of 15 June 2004. The brothers were asleep in the same room with their sister sleeping in a room nearby. For convenience, the siblings will be referred to by their first names only.

[7] At approximately 3 am, Sharlee was awoken by the sound of "the front door of the house pulling". She ran to her brothers' room and woke Jermaine. She spoke to him and then started screaming.

[8] Troy was awoken by the sounds of his sister's screams. He then heard sounds as if someone was trying to enter the house forcefully through the front door.

[9] Sharlee hid under a bed in her brothers' room and Troy hid under a curtain closet. Jermaine went behind a wardrobe which served as a partition between the bedroom and the kitchen area. Troy said that, where he hid, there were some spaces between the boards "like creases" estimated at being about half inch wide. Through these spaces he was able to see four men enter the house. Three of the men had long guns and one had

a short gun. Troy identified the weapons as being a 'nine', a 'pump rifle', a '1616' and an 'AK-47'.

[10] After they entered, the men went towards the wardrobe where Jermaine was and he said "weh me do dog, weh me do?" The men did not respond. From his position, Troy said he was not able to see the men at this time. He then heard a shot fired and shortly after saw Jermaine with an injury to his knee. Troy concluded that his brother had received a shot to his knee.

[11] A door leading outside into the backyard was beside the curtain closet under which Troy was hiding. Jermaine walked towards the door, passing where Troy was, opened the door and went into the yard. The men followed him out into the yard, also passing the area where Troy was.

[12] When they went into the yard, one of the men stood up in front of Jermaine with the other men standing on either side. He heard one of the men say "use the nine, use the nine". The man who was standing in front of Jermaine used the 'nine' and shot Jermaine in the region of his face. Further, Troy said, he saw the men "fire shot". Eventually, he watched as Jermaine fell to the ground. After this, one of the men said "salute" and the men then "fire shot up in the air" and ran from the yard.

[13] On 8 July 2004, Dr Ere Seshaiah performed a post-mortem examination on Jermaine's body. He testified that he found "a gunshot wound and five shotgun wounds" on the body. He formed the opinion that Jermaine's death was due to these wounds.

The case for the prosecution

[14] The Crown, through Troy, sought to establish that the applicant was one of the men who invaded the house that morning and shot and killed Jermaine. Sharlee testified that after she hid under the bed, she heard the gunshots. When they stopped, she went outside and saw Jermaine lying on the ground. She was unable to say who had entered the house or who had fired the gunshots she had heard.

[15] Troy, who was 15 years old at the time of the incident, testified that he had recognised the four men who entered the house. He knew the applicant by the name 'Quincy' and had known him for about five years prior to the incident. He said the applicant along with the other three men, whom he knew as 'John Boy', 'Barb Wire' and 'Jooks', used to play football in the community with his brother Jermaine. He said Quincy was the one who had the 'nine' and had shot his brother with it when 'Jooks' had given that instruction.

[16] Troy said he had two opportunities to see and recognise Quincy that morning, first in the house and then in the yard. He described the lighting, the distances and the length of the times he had to view the face of the applicant on those occasions.

[17] After the men exited the yard, Troy went to his father to relate what had happened. His father instructed him to go to the police station to make a report. On his way there, Troy said he saw the same four men. He was ordered to lie face down on the ground and when he looked up, Quincy kicked him in his face three times. Troy described

how he begged for his life until he was eventually told to "run go way you a come from and don't look behind you". He obeyed.

[18] Detective Sergeant Steadman Bailey was on duty at the Portmore Police Station that morning when he received a telephone call that caused him to visit the home in Central Village where he was shown Jermaine's body lying in the yard at the back. He made observations of the scene and commenced investigations. He eventually obtained warrants for the arrest of four men, including Quincy.

[19] Detective Corporal Jermaine Anglin from the Scenes of Crime Department visited the scene as well. He testified to finding a 9-millimetre spent casing and an expended bullet fragment in the house. At the back of the house he found six shotgun casings, five 9- millimetre spent casings and one 5.56 spent casing.

[20] On 1 May 2007, Detective Sergeant Bailey received information, which caused him to visit the Bridgeport Police Station where he was introduced to the applicant as the man known as Quincy. He said he cautioned the applicant and that the applicant made the following comment: "I was there, but a nuh me pull the trigger".

[21] Under cross-examination, it was suggested to the officer that the applicant never uttered these words and that at no time whatsoever did the applicant tell the officer that he was at the house. Sergeant Bailey insisted that the applicant did in fact use those words.

[22] On 28 May 2008, the applicant was placed on an identification parade at the Hunts Bay Police Station. Sergeant Jarvis Pounall conducted the parade. Troy identified the applicant to Sergeant Pounall as one of the men who had shot and killed Jermaine.

[23] On 29 May 2008, Detective Sergeant Bailey, having been advised by Sergeant Pounall of the result of the identification parade, executed the warrant he had prepared for 'Quincy' on the applicant and charged him for the murder of Jermaine Barrant. Detective Sergeant Bailey said that when cautioned, the applicant said the following:

> "A nuh me kill elder. Me nuh know nutten 'bout the murder.
> A call dem call me name pon di scene."

The case for the defence

[24] The applicant made an unsworn statement in which he said that he was from Central Village. He denied any knowledge of the murder and said that he "wasn't at the house".

Ground one

The three (3) instances of recognition by the virtual eye witness are fraught with inaccuracies that would render the verdict unsafe. Based on the evidence adduced at trial, the witness identified someone he knew not an assailant he saw on the night in question.

Applicant's submissions on ground one

[25] Mr Wilson highlighted what he identified as the three instances of recognition by the eyewitness. The first sighting he identified as follows:

> "From his position to the back of his room, the witness, Troy Barrant would have been looking through an opening ½ inch wide, from underneath a closet (p. 29 line 3), while sitting

> down (p. 84 line 10 – 11) in a room without light to a distance pass a wardrobe and kitchen ensconced between his and his sister's room."

[26] Mr Wilson highlighted the evidence concerning this sighting. He noted that the length of the room in which the assailants entered was estimated at 16 feet and Troy Barrant's room was estimated at 10 feet long. He noted further that Troy was not hiding to the side of the room but to the back in the closet near to where the back door was located. Counsel also noted that the closet behind which Troy hid was not directly in line with the opening through which Troy said he saw the men entering. Further, Counsel pointed out that Troy claimed that he saw the four men whom he recognised and the guns they were carrying all within three seconds.

[27] Mr Wilson contended that this sighting was "a fleeting glance observed in limited light and under difficult and frightening circumstances at 3:00 am in the morning".

[28] Counsel complained that the learned trial judge never acknowledged explicitly that the circumstances of the first sighting would best be a fleeting glance and of little evidential value, but inferentially suggested that the second instance of identification is the strongest part of the identification evidence.

[29] Learned counsel cited the cases of **Barrington Taylor v R** [2013] JMCA Crim 35, **Okedo Williams v R** [2012] JMCA Crim 28 and **Prince Emanuel Dell v R** [2012] JMCA Crim 27 as authorities which deal with the treatment of identification made in a fleeting glance in instances similar or comparable to the instant case.

[30] Learned counsel identified the second instance of recognition, as follows, in his written submissions:

> "The second opportunity occurred when the now deceased left the room after receiving a gunshot wound. Although Troy Barrant testified that he was able to see all the assailants and his brother from his position inside his room, other evidence of the actual location of where the deceased was found outside contradicted the evidence of the virtual witness."

[31] Counsel pointed to bits of evidence which, he contended, affected the ability of the witness to see clearly what was happening. He contended that although Troy testified that he was able to see all the assailants and his brother from his position inside his room, other evidence of the actual location of where the deceased was found outside contradicted that evidence. Further, it was counsel's submission that "the learned trial judge failed to point out to the jury that they should consider whether the witness was able to see the applicant from a light that was behind the men and these men were not directly behind the door through which the witness was looking from a seated position".

[32] Learned counsel went on in his submissions to identify the final instance in the following terms:

> "The third instance of identification occurred according to Troy Barrant while he was running to the station when the same four men walked out of one dark spot, 'one likkle dark bush area'. In 6 seconds, the witness was ordered on the ground, kicked in the face thrice, spoken to and he replied, see the face and footwear of the accused and 'Quincy crank the nine a me head'. And all that happened while he was on the ground [p. 61 line 11]. The witness saw the Appellant's [sic] face by the aid of a street light located 'about the length of this court' [p. 298 line 13 – 14]."

[33] Mr Wilson submitted that, by any measure, this sighting would also fall into the category of a fleeting glance made in difficult and terrifying circumstances. He further submitted that, "the distance of the street light was not subject to careful consideration of the requisite **Turnbull** treatment". Counsel said the learned trial judge was required to set out the evidence that supports the visual identification of the defendant and set out the particular weaknesses that attend that identification.

[34] Counsel further submitted that the trial judge should, as a matter of course, in circumstances where the Crown is relying on the testimony of a single eyewitness, highlight any additional matters of significance which might reasonably be regarded as undermining the reliability of the identification evidence. Counsel relied on **Omar Nelson v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 59/1999, judgment delivered 20 December 2001, **Okedo Williams v R**, **Prince Emanuel Dell v R** and **Turnbull v R** [1977] 1Q B 224.

The Crown's response

[35] In response on behalf of the Crown, Mrs Fairclough-Hylton submitted that the case at bar concerned the area of identification referred to as recognition and that the law as it relates to recognition type cases, as opposed to identification of a stranger, has been settled for some time. She contended that the recognition of the applicant must be viewed cumulatively. She submitted that while it can be conceded that on their own, the first and third sightings of the applicant may have been fleeting and in difficult circumstances, the eyewitness had the presence of mind to pay attention to what was happening and the identity of the men.

[36] Learned counsel highlighted the evidence as to the familiarity of the witness with the applicant as follows:

> "The evidence of the eye witness is that he knew the Applicant for about 5 years from he was 9 - 10 years old. He knew him as Quincy. He would speak to him and the applicant would ask the eye witness to run errands for him. He would see the applicant playing football and the deceased would also play with him. When the eye witness used to live on the hill, he used to see the Applicant everyday [sic], but when he moved to the flat he would see him weekly."

[37] Learned counsel, in her written submissions, reviewed the circumstances under which the witness sighted the applicant on three occasions during the ordeal that night. These were consistent with those identified by Mr Wilson in his submissions.

[38] Counsel submitted that, at page 303 of the transcript, the learned trial judge rightly indicated to the jury that they might well find that the second sighting of the applicant was a "longer opportunity, in lighting, and from a distance which he indicated to you where he could hear and see what was happening". Counsel's further submission was that there was no denying that the period, 15 to 16 seconds, which the witness said he had the applicant under observation while he stood at the door, was more than sufficient to properly and accurately recognise the applicant whom he had known before. This recognition of the applicant was later tested at an identification parade where the eyewitness pointed out the applicant.

[39] Learned counsel ended her submissions on this ground by urging that the verdict was beyond reproach and there was no merit in this ground. The learned trial judge gave full and careful directions on the law on identification/recognition with the requisite

warning. She concluded that the learned trial judge also carefully combed through the identification evidence and properly left it for the jury's consideration. She contended that the jury, having rejected the alibi of the applicant, went on to consider the case for the prosecution and found the eyewitness to be both credible and reliable.

[40] Counsel relied on the cases of **Jerome Tucker and Linton Thompson v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 77 and 78/1995, judgment delivered on 26 February 1996 and **Ian Gordon v R** [2012] JMCA Crim 11 in support of her submissions. She further submitted that the cases relied on by counsel on behalf of the applicant are distinguishable as they refer to cases where the witness did not previously know the accused.

Law and analysis

[41] In **Dwayne Knight v R** [2017] JMCA Crim 3, McDonald-Bishop JA (Ag) (as she then was) revisited the legal principles distilled from the authorities governing the treatment of the issue of visual identification by trial judges in their summation. At paragraph [21] she had this to say:

> "[21] In **Turnbull**, Lord Widgery CJ (at pages 228 and 229) stated the seminal principles applicable to identification cases, which provided the starting point from which our analyses have begun. His Lordship directed, as was usefully summarized by Morrison JA (as he then was) in **Jermaine Cameron**, that whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused, which is alleged to be mistaken, the judge should warn the jury of the special need for caution before convicting in reliance on the correctness of that identification. The judge is to instruct the jury as to the reason for the need for the 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. The judge should also direct the jury to examine closely the circumstances in which the identification by each witness came to be made. Finally, he should remind the jury of any specific weaknesses which had appeared in the identification evidence. The jury should be further directed that, although recognition may be more reliable than identification of a stranger, mistakes in recognition of close relatives and friends are sometimes made. All these matters go to the quality of the identification evidence. If the quality is good, and remains good at the close of the accused's case, the danger of a mistaken identification is lessened but the poorer the quality, the greater the danger."

[42] This court has further recognised that the viewing time in recognition cases need not be as long as in cases where the assailant is a stranger to the witness (see **Jerome Tucker and Linton Thompson v R** and **Ian Gordon v R**). However, where identification involves recognition, the jury must still be reminded that mistakes in recognition are sometimes made and the need for assessment of all the evidence surrounding the identification remains.

[43] The learned trial judge, early in the summation, when she was giving instructions on the law applicable, alerted the jury to the fact that identification was the main issue in the case. At page 248 of the transcript she stated:

> "Now, in this trial, you may well have concluded that the case against the accused depends to a large extent on the correctness of his identification as one of the persons who committed this offence."

[44] The learned trial judge went on to warn the jury of the special need for caution since the evidence for the prosecution connecting the appellant to the crime resided solely

in Troy Barrant and was challenged by the applicant. The learned trial judge continued at pages 249 and 250 as follows:

> "The witness, Troy Barrant has told you, that he is one of the persons that he saw break into his house that night, and whom he saw along with others, shoot his brother to death. The accused said Mr Barrant is mistaken. He wasn't there at all.
>
> I must therefore warn you of the special need for caution before convicting the accused and relying on the evidence of visual identification. This is because, it is possible for even an honest and convincing witness to make a mistake of identification. There have been wrongful convictions in the past as a result of such mistakes.
>
> You should, therefore, examine carefully, the circumstances to which the identification was made. You must consider, for instance, the length of time which the witness had to observe the person who he said is the accused; the distance which he had to view this person; the lighting conditions in which he was able to view this person; whether there was anything that interfered with his observation; anything that obstructed his ability to speak[sic] with this person; and whether the person was a person who knew the witness.
>
> In this case, the evidence of identification involves recognition. I must point out that mistakes are sometimes made in recognition even of relatives and close friends. There is still a need for caution even where it involves recognition.
>
> The defence has brought certain features of identification to your attention for you to view them in a particular way. When I come to deal with the evidence, I will take you through the features of the identification and point out to you the areas which require special treatment. If at the end of the day, after you consider this warning and you look at all the circumstances of the evidence presented to you and have accepted as [sic] true, it is open to you to act upon the evidence of identification."

[45] It was against that backdrop that the learned trial judge ultimately directed the jury's attention to the circumstances surrounding the three sightings given in evidence by the witness. She recounted fairly and accurately the witness' evidence of the lighting, his distance from the applicant, the physical layout of the house and yard, the times he had for observing the applicant and other evidence that touched on the circumstances surrounding the identification. She also juxtaposed any evidence from other witnesses that could be viewed as affecting Troy's evidence and, where necessary, she reminded the jury of the directions she had given on discrepancies and inconsistencies.

[46] Importantly, the learned trial judge did not let her summation rest at this point after her review of Troy's evidence. She went on to again speak generally about the duration of each sighting and then continued to draw the jury's attention specifically to each of the sightings. At pages 299 to 300 she said:

> "Now he told you how long he was able to see the faces of the men, and in particular, the face of the accused man before you. First, he said he saw Quincy in the front room from he entered the room until he got to his line of vision, when he went to where the wardrobe area was and that length of time was about three seconds. Then he was asked how long he saw the face of the accused men in the yard. I noticed he paused and seemed to be thinking about it; he was trying to assess the time, then he said, "I would say about 15 to 16 seconds". The time he spent on the ground to the [sic] when he ran off, he estimated that to be six seconds. Those were the times he said he had to see the face of the accused, to enable him to recognize him."

[47] Of the first sighting at page 300 she said:

> "First the three seconds when he told you he was looking through a space of about half-inch wide with the aid of the light in the ceiling of the front room. **This is for you to say if you accept that he told you the truth. If that was sufficient opportunity for him to see and recognise someone known to him for five years from a distance of 16 feet. He was in a position behind a curtain.**" (Emphasis supplied)

This evidence was not of the nature of a "fleeting glance" such that the learned trial judge was obliged to so instruct the jury. It being identification involving recognition, the manner in which the learned trial judge dealt with it was wholly appropriate.

[48] Of the second sighting the learned judge had this to say, continuing on page 300:

> "The next time he spoke of opportunity [sic] to see them was in the yard when he was looking at them near an opened door with aid of the light at the side of the house. He said the door that they walk to go through, there was a curtain on that side and "I shift the curtain and look outside. I barely draw away the curtain, about this wide". It was estimated to be about 4 inches. This time he had longer time to see the face of the man he had known as Quincy, 15 to 16 seconds. He said nothing was blocking his view of the accused. **Did you accept that as true and was it sufficient time to recognize a person well known to you for five years?**
>
> Those are the men he said he saw enter the house from the front and walk through the back door into the yard. He said they were … well, as I told you before, about seven, eight feet. You have the evidence of Sergeant Bailey and Sergeant Anglin who put it a little less than that.
>
> Troy told you all of what took place in the yard, took about 15 to 16 seconds, and you heard all he said took place and you may well find his assessment of the time to be reasonable. **As judges of the facts, you also have the ability to assess-- put in your mind all of what he said took place, if you accept all of those things, to see whether that is reasonable, 15-16 seconds more or less according to how you see it.**" (Emphasis supplied)

[49] Of the third sighting, the learned trial judge said at page 302:

> "There is another encounter that you heard about, that is after the killing and in another location. What the prosecution is asking you to consider, that not long after, it would be in the time the witness went to his father's house, which you may recall he told you it was a three-minute walk and you will find it easy to infer in these circumstances, he did not walk. He would take a shorter time to get back out on the road where he said he was running to the station, shortly after what took place in the yard. This witness saw these four men in the area still in each other's company and still in the area. That time, he said he saw the face of the accused for six seconds.
>
> **If you accept this evidence, it is for you to say their presence lends itself support to his identification of them at the house as the men who came there earlier and shot and killed his brother**." (Emphasis supplied)

[50] The learned trial judge ended this aspect of her summation by stating the following at page 303:

> "You do have the evidence of the incident in the yard. However, he had spoken of a longer opportunity in lighting and from a distance which he indicated to you where he could hear and see what was happening. And if you accept that evidence you may well consider it to be the strongest part of the identification evidence and sufficient opportunity by himself to allow Troy Barrant to see and recognize the accused as one of the killers that night. As Judges of the facts that is a matter for you. Now, because you were given an alias name, 'Quincy', for the person he said was one of those who committed the crime, an identification parade was held by the police and there he pointed out the accused, who was in the number six position, as the person he knows as 'Quincy', whom he recognizes as the one who shot and killed his brother on the 15th of June, 2004. **So that is the prosecution's evidence from this witness from which you would have been able to extract all of the bits and piece [sic] of identification opportunities and see if you believe that that identification is satisfactory**." (Emphasis supplied)

[51] In relation to Mr Wilson's complaint about the learned trial judge's reference to the opportunity for viewing the applicant in the yard as being the strongest part of the identification evidence, it is clear that given the times the witness had outlined he had to observe the applicant, the statement was a fair one. In any event, the learned trial judge was careful after making the comment to remind the jury that it was a matter for them.

[52] Further, concerning the complaint that the summation failed to treat weaknesses in the identification evidence, it is significant that Mr Wilson did not specifically point to any that ought properly to have been pointed out to the jury. It is clear that the issue of the layout of the house, which could have had some effect on the ability of the witness to see the men, was a cause for concern. The learned trial judge recognised this when she said that she had to "come back to that area about the closet, kitchen and room because in cross-examination certain things were said and [she had] to give a fair balance of account of what transpired". She spent some time reviewing the evidence relating to this issue and referred to the demonstrations done by Troy while giving his evidence.

[53] The learned trial judge eventually had this to say at page 315:

> "Mr Foreman and members of the jury, it may be that you feel that there are some discrepancies and inconsistencies in the evidence concerning the physical layout of the house as to exactly the layout of the kitchen and the movement from room to room. Remember my directions on discrepancies and inconsistencies and record [sic] them. What did Troy Barrant and the two officers who visit [sic] the scene told [sic] you? Was that there were two bedrooms and kitchen. What Troy Barrant told you, was that there was an area with some creases or spaces there, the board through which he could see into the sister's room, and that is how he was able [sic] see the four men enter the house. In his position behind the

> curtain where he was hiding and peeping, he saw the four men walked through the back room into the yard and there he saw the faces of the men. Again, as Judges of the facts, it is these matters that are there for your determination."

[54] The learned trial judge's summation relating to the issues of identification was fair and adequate in all the circumstances. She took sufficient care in bringing to the attention of the jury all the criteria relating to the identification evidence, which involved recognition. The learned trial judge warned the jury of the need for caution along the **Turnbull** guidelines and then she assisted the jury in identifying and assessing the evidence related to the issue. There was no basis for the contention that the witness, at the identification parade, pointed out someone he knew and not the assailant. Ultimately, there is no merit to this ground.

Ground 2

Apart from reciting the evidence led by the prosecution, the learned trial judge made no effort in assisting the jury to treat with the mixed statements by the Accused and whether the action by the investigating officer in not holding a Question and Answer (Q & A) strengthened or weakened the prosecution's case.

Applicant's submissions on ground two

[55] Mr Wilson, in this ground, noted that the investigating officer, Detective Sergeant Steadman Bailey, had been challenged as to the truthfulness of the confession of the applicant who had made mixed statements at the instance of being cautioned twice. Counsel submitted that, given Detective Sergeant Bailey's response about his failure to hold a question and answer ('Q & A') session, the learned trial judge should have assisted the jury as to how to treat the absence of a usual police procedure.

[56] Mr Wilson complained that the jury was left to pool common sense, wisdom and experience together, and make a determination of fact. Counsel contended that there was no evidence or suggestion that any member of the jury knew whether it was appropriate to hold a Q & A session when an accused made conflicting statements or whether, in law, the police have a duty to proceed in clearing up such mixed statements made while the individual is in custody.

[57] Counsel went on to refer to **Wayne Samuels v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 89/2010, judgment delivered on 22 February 2013, where he noted Brooks JA, at page 12, stated "[a]dmission of culpability would of course be even stronger support for poor identification evidence". He submitted that this observation was the reason why the learned trial judge "ought to have assisted the jury to treat with equal measure, mixed statements where the inculpatory statement was challenged as inaccurate". He said the learned trial judge ought to have guided the jury on how to treat the twin issues of mixed statements and the need for a Q & A session, instead of telling the jury perfunctorily, "that is a matter for your determination". Counsel submitted that it was of importance that, in her last instruction to the jury on mixed statements, the learned trial judge isolated the exculpatory statement and only presented the statement that was adverse to the applicant for the jury's consideration.

[58] Counsel referred to the cases of **Domican v R** (1992) 173 CLR 555, **Davies and Cody v R** (1937) 57 CLR 170 and **Delroy Stewart v Regina** (unreported), Court of

Appeal, Jamaica, Supreme Court Criminal Appeal No 98/2004, judgment delivered on 31 July 2006.

The Crown's response

[59] Mrs Fairclough-Hylton, in response, accepted that it is clear that where the issue of mixed statements arises, a trial judge ought to bring both to the attention of the jury for their equal consideration. She cited **R v Sharp** 86 Cr App R 274 and **R v Aziz** [1996] AC 41 in support of her submissions.

[60] Learned counsel submitted that the treatment by the learned trial judge on this point was to place both statements before the jury for their contemplation. She further submitted that, coupled with the other directions in relation to the role and function of the jury, the learned trial judge's treatment of the statements was fair and in keeping with the tenets of the law.

[61] Counsel submitted that there is no law that states that a suspect is entitled to a Q & A session or that the failure to hold one by an investigating officer results in unfairness to the accused. She contended that, although it is a useful tool and a practice/policy that has developed, there is no miscarriage of justice for failing to hold one. Counsel submitted that the failure to hold a Q & A session in this case did not affect the prosecution's case, which was centred on the recognition of the applicant.

Law and analysis

The mixed statement

[62] A discussion on the proper approach to be taken by a trial judge to a "mixed statement", that is, a statement made by an accused person that is in part an admission and in part exculpatory, must commence with the observations of Lord Lane CJ in **R v Duncan** (1981) 73 Cr App R 359. At page 365 he said:

> "Where a 'mixed' statement is under consideration by the jury in a case where the defendant has not given evidence, it seems to us that the simplest, and, therefore, the method most likely to produce a just result, is for the jury to be told that the whole statement, both the incriminating parts and the excuses or explanations, must be considered by them in deciding where the truth lies. It is, to say the least, not helpful to try to explain to the jury that the exculpatory parts of the statement are something less than evidence of the facts they state. Equally, where appropriate, as it usually will be, the judge may and should, point out that incriminating parts are likely to be true (otherwise why say them?), whereas the excuses do not have the same weight. Nor is there any reason why, again where appropriate, the judge should not comment in relation to the exculpatory remarks upon the election of the accused not to give evidence."

[63] This formulation by Lord Lane CJ was considered and approved by the House of Lords in **R v Sharp** [1988] 1 WLR 7. After a review of several other authorities dealing with the issue, Lord Havers said this at page 15:

> "…the weight of authority and common sense lead me to prefer the direction to the jury formulated in *Duncan,* 73 Cr. App. R 359 to an attempt to deal differently with the different parts of a mixed statement. How can a jury fairly evaluate the facts in the admission unless they can evaluate the facts in the excuse or explanation? It is only if the jury think that the facts set out by way of excuse or explanation might be true that any doubt is cast on the admission, and it is surely only

> because the excuse or explanation might be true that it is thought fair that it should be considered by the jury."

[64] It is also useful to bear in mind observations made by Harrison JA in **R v Michael Stewart** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 52/1997, judgment delivered 26 February 2003. At page 5 he had this to say:

> "The extra-judicial statement of an accused is not evidence unless the prosecution makes it so by using it as a part of its case against the accused (**R v Higgins** (1829) 3 C&P 603)."

[65] The evidence presented by the Crown was that the applicant had made two statements to Detective Sergeant Bailey. He made the first on 1 May 2007, when Detective Sergeant Bailey had advised him of the investigations into the murder of Jermaine Barrant. Detective Sergeant Bailey said the applicant admitted to being present but denied pulling the trigger. On 29 May 2007, after the identification parade had been conducted, Detective Sergeant Bailey arrested and charged the applicant, at which time the applicant made the second statement denying presence at or knowledge of the murder. In cross-examination it was suggested to the officer that the second statement was the only one the applicant made and further that the applicant had never said he was present. (Hence, the applicant admitted authorship of the second statement only.) The officer disagreed with these suggestions.

[66] It is useful to consider all the directions the learned trial judge gave to the jury on this issue. After reviewing the evidence of the officer relating to this issue, the learned trial judge said this to the jury at page 275:

> "So it was suggested to him by the defence that the only thing that the accused said was the second thing which the officer said he said after charge, and that at no time did he ever tell him that he was there, the officer insisted that he did. As you have heard the facts, Mr Foreman and members of the jury, that is a matter for you. You might ask yourself why put two different words in the mouth of the accused? Is the officer speaking the truth about that? That is a matter for your determination."

[67] The learned trial judge later returned to the issue and had this to say at page 282:

> "…I will like to return to say, the first utterances when the accused spoke, when he first met and cautioned him---you recall Sergeant Bailey told you that the accused said he was there, but that he did not pull the trigger. This has been challenged by the defence, and it was put to the officer that the accused did not use those words and those words really amount to admission. It is for you, as judges of the facts to decide whether you believe he did use those words and if you believe he did, then consider whether you believe that was indeed so. And remember what I told you about common design or joint enterprise, when I gave you directions in law. If he went there with others on a joint mission to kill Jermaine Barrant, it would not matter if he pulled the trigger; he would be as guilty as the others."

[68] Finally, after giving directions on the case for the applicant and giving appropriate directions on his unsworn statement and his defence, the learned trial judge reminded the jury that they were obliged to see whether the prosecution had proved its case to their satisfaction. She then succinctly outlined the prosecution's case by pointing out what the prosecution was "asking them to accept", which included the following:

> "And to accept the evidence of Sergeant Anglin [sic] … that when he first spoke to the accused he did admit that he was at the house that night, though he said he did not pull the trigger—though I already told you it will not matter—but to accept he was part of the mission;..."

[69] The learned trial judge fairly outlined the circumstances surrounding the utterance of each statement, as she was obliged to do, prior to directing the jury that it was a matter for them to determine where the truth lies. The fact that the applicant was denying making the first statement meant that the learned trial judge was entirely correct when she directed the jury that they had to make a determination of whether the officer was being truthful when he asserted that the applicant had made both statements.

[70] The learned trial judge also demonstrated an appreciation of the fact that the admission of being present on the scene could have implicated the applicant in the murder, whether he pulled the trigger or not. The assertion that he did not pull the trigger was not entirely exculpatory. Her directions linking the statement to the issue of joint enterprise were therefore appropriate.

[71] There was no challenge to the fact that the applicant made the second statement denying knowledge of or participation in the murder. This statement would have been in the nature of a self-serving statement and therefore was a part of his defence, which was fairly and adequately left to the jury.

[72] Ultimately, a consideration of the mixed statement was inextricably linked to the credibility of Sergeant Bailey's evidence and the learned trial judge cannot be faulted for approaching the issue in this manner. In light of the circumstances of this case, the statement became part of the evidence presented by the prosecution in support of its

case for the consideration of the jury. There is no merit to the complaint about the manner the learned trial judge dealt with the statements.

The issue of a question and answer document

[73] It is noted that Mr Wilson referred to a Q & A session as a usual police procedure. Morrison JA (as he then was), in **Harold Berbick and Kenton Gordon v R** [2014] JMCA Crim 9, put the Q & A session in perspective at paragraphs [77] and [78]:

> "[77] The Judges' Rules, as is well known, were designed to secure that only answers and statements of accused persons which are voluntary are admitted in evidence, as well as to provide guidance to police officers in the performance of their duties. Rule 3(b) was relevant in **Peart v R** because the police had subjected the defendant to a question and answer session after he had been arrested and charged for the offence of murder. In explaining the rationale underlying the prohibition in rule 3(b) of questioning after a suspect has been charged, Lord Carswell quoted with approval (at para. [20]) the following passage from Lord Devlin's 'The Criminal Prosecution in England' (1960) (page 26):
>
> > 'The inquiry that is conducted by the police divides itself naturally into two parts which are recognisably different, although it is difficult to say at just what point the first part ends and the second begins. In the earlier part the object of the inquiry is to ascertain the guilty party and in the latter part it is to prove the case against him. The distinction between the two periods is in effect the distinction between suspicion and accusation. The moment at which the suspect becomes the accused marks the change.'
>
> [78] Thus, Lord Carswell concluded, 'the basic fundamental reason for the prohibition is the principle that to interrogate the prisoner at this stage tends to be unfair as requiring him possibly to incriminate himself'. The applicable principles were therefore summarised as follows (at para. [24]):

(i) The Judges' Rules are administrative directions, not rules of law, but possess considerable importance as embodying the standard of fairness which ought to be observed.

(ii) The judicial power is not limited or circumscribed by the Judges' Rules. A court may allow a prisoner's statement to be admitted, notwithstanding a breach of the Judges' Rules; conversely, the court may refuse to admit it even if the terms of the Judges' Rules have been followed.

(iii) If a prisoner has been charged, the Judges' Rules require that he should not be questioned in the absence of exceptional circumstances. The court may nevertheless admit a statement made in response to such questioning, even if there are no exceptional circumstances, if it regards it as right to do so, but would need to be satisfied that it was fair to admit it. The increased vulnerability of the prisoner's position after being charged and the pressure to speak, with the risk of self-incrimination or causing prejudice to his case, militate against admitting such a statement.

(iv) The criterion for admission of a statement is fairness. The voluntary nature of the statement is the major factor in determining fairness. If it is not voluntary, it will not be admitted. If it is voluntary, that constitutes a strong reason in favour of admitting it, notwithstanding a breach of the Judges' Rules; but the court may rule that it would be unfair to do so even if the statement is voluntary."

[74] The Judges' Rules at rule 3(b) provides:

"It is only in exceptional cases that questions relating to the offence should be put to the accused person after he has been charged or informed that he may be prosecuted. Such questions may be put where they are necessary for the

> purpose of preventing or minimising harm or loss to some other person or to the public or for clearing up ambiguity in a previous answer or statement."

[75] In recent times, police investigators conduct a Q & A session as a part of almost every criminal investigation. However, there is no legal obligation for such an exercise such that the failure to hold one can be regarded as a breach, which adversely affects the entire investigation and consequently the prosecution of the offender.

[76] On the prosecution's case, the applicant had given two conflicting statements. It may well have been useful to question the applicant to clear up the ambiguity in his two statements. The investigating officer's understanding of the Q & A session was tested in cross-examination. He accepted the fact that the two statements were "in conflict". The following exchange eventually took place between the officer and the attorney-at-law appearing for the applicant:

> "Q. And, it is for that reason why I asked, what did you use to convince yourself against having a Question and Answer to clear up the conflict that existed from the two statements coming from the lips of Mr. Johnson?
>
> A. Sir, when a man is charged with an offence, after you caution that man and he makes a statement, the books teach me that if I need to clear up any ambiguity in the statement that he made after caution, when he charged with the murder…
>
> Q. I didn't hear that. Just repeat that for me, once more.
>
> A. Repeat from where, sir?
>
> ….
>
> A. All right, sir. When a person makes a statement after caution, when he is charged with a crime, to clear up

ambiguity or to minimize harm or loss to the public, that is when you have the right to question along that ground.

Q. That's exactly what I am saying. I just---we are singing from the same book. We are saying the same thing. You took a statement from Troy Barrant?"

The attorney-at-law, seemingly satisfied with the answer that showed the officers awareness of the Judges' Rules, then moved on from this line.

[77] In her summation, the learned trial judge rehearsed for the jury the officer's response as to why he did not hold a Q & A session:

> "…So the question was asked of defence attorney, 'why not have a question and answer to clear it up?' and the note that I have of his response was, 'where the person makes a statement after caution when he is charged with a crime to clear up ambiguities and minimize harm or loss to the public, that is when you have a right to question him along those grounds, along that ground'. So it is a matter for you if the officer is saying that in this case when the person makes the statement after caution when he is charged with a crime you have the right to have the question and answer session to clear up ambiguities or minimize harm or loss to the public.
>
> That is the ground on which it was asked, because the question that he was asked was, 'What then caused him not to do so.' You may well feel that is what the officer is saying. That is what I have recorded here.
>
> He also said, as I told you earlier, that at the first caution the accused made the admission, but after the identification parade that was when he gave the other statement which was about one month later. He did not think it was necessarily anything to clarify. As judges of the fact, Mr Foreman and Members of the jury, that is for your determination, make of it what you will."

[78] Given the way the evidence unfolded, the learned trial judge, in the circumstances, did no injustice to the applicant by failing to state whether the lack of a Q & A session strengthened or weakened the prosecution's case. The jury had sufficient evidence before them to understand the significance of the Q & A session and received sufficient direction to determine the effect of the lack of a Q & A session on the case presented by the prosecution. In any event, the fact that the applicant had denied making one statement meant that the officer's response would have been significant in the jury's assessment of his credibility. The learned trial judge dealt with the issue of a Q & A session in an appropriate and fair manner. This ground must therefore fail.

[79] It was for these reasons that the decision at paragraph [5] was made.