JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE P WILLIAMS JA
THE HON MR JUSTICE BROWN JA

SUPREME COURT CRIMINAL APPEAL NO COA2020CR00070

FABIAN MANDERSON v R

Kemoy McEkron for the applicant

Jeremy Taylor KC for the Crown

20 February 2023 and 7 February 2025

Criminal Law - Identification evidence - Turnbull guidelines - Warning - Applicability of Turnbull Guidelines in Bench trials - Duty of judge to demonstrate their application of the relevant principles - Duty to demonstrate applications of warnings and cautions based on the law - Extent to which this should be demonstrated - Applicability of principles regarding evidence in judge alone trial and jury trials

BROWN JA

Introduction

[1] The applicant was arraigned before D Palmer J ('the learned judge'), sitting without a jury in the Western Regional Gun Court, on an indictment that charged him with consecutive counts of the offences of illegal possession of firearm and shooting with intent. At the end of a seven-day trial, the learned judge, on 1 July 2020, found him guilty on both counts. On 13 November 2020 the learned judge sentenced him to 10 years' imprisonment and 15 years' imprisonment on the respective counts.

[2] The applicant filed a Criminal Form B1 seeking leave to appeal his conviction and sentence on the grounds of unfair trial and false accusation by the witnesses. A single

judge of this court considered his application on paper and refused it on 1 September 2021. As is his right, the applicant renewed his application for permission to appeal his conviction and sentence before us.

Background

[3] Before we embark upon a discussion of the bases of the renewed application, a short background of the facts is necessary. On 23 July 2015, at about 10:30 pm, Corporal Hubert Smith ('Cpl Smith') and Constables Jerome Dunstan ('Cons Dunstan') and Delroy Cephas ('Cons Cephas') (all three are referred to collectively below as 'the policemen') were on mobile patrol in Mount Zion District in the parish of Saint James. Acting on information they received, they alighted from the service vehicle on the approach of a white Toyota motor car from the opposite direction. Cpl Smith signalled the driver of this vehicle to stop. The driver of the white motor car disobeyed the signal to stop. In response, the policemen boarded the service vehicle and went in pursuit of the white Toyota motor car.

[4] The policemen's chase of the white Toyota motor car came to an end on a marl road cul-de-sac when it stopped. Two armed men exited the white Toyota motor car and fired gunshots at the police. The policemen returned the gunfire, and the armed men ran in different directions, making good their escape. At about 1:25 am the following day, Detective Corporal Shantae McDonald ('Det Cpl McDonald'), and two other police personnel from the Summit Police Station Scenes of Crime office visited the area where the shooting took place.

[5] Some distance from what Det Cpl McDonald described as the primary crime scene was a yard with an incomplete fence, to the right of where the white Toyota motor car had been abandoned. In that yard were a few houses including a concrete structure, partially painted white. Near that structure, which was about 40 feet from the white Toyota motor car, Det Cpl McDonald found several items strewn on the ground. Those were, one foot of brown slippers marked "American Eagle Outfitters", phone cards and one Jamaican $50.00 note. Close to the fence of this yard another foot of slippers,

similarly marked, was found. In the vicinity of the fence to the right of this concrete structure, Det Cpl McDonald also found a brown envelope that contained passport size photographs, a birth certificate and other documents bearing the applicant's name (Fabian Manderson).

[6] The applicant surrendered to the police on 9 April 2017. He was subsequently identified by the three policemen who were on mobile patrol at the material time as one of the men who had fired at them.

The appeal

[7] At the commencement of the hearing, Mr McEkron sought and obtained the permission of the court to abandon the original grounds of appeal and to argue in their place three supplemental grounds. Those supplemental grounds are set out below:

> "1. The learned trial judge erred when he failed to warn himself or demonstrate that he did warn himself of the need for special caution in the form of the Turnbull directions in considering the identification evidence before he convicted the applicant.
>
> 2. The learned trial judge erred when he failed to demonstrate that he drew all the weaknesses in the identification evidence to the attention of his jury mind and critically analysed them, to wit, the danger of having an identification parade two years after the first purported identification (incident) and the effect of the biographical documents to include photographs of the accused which were alleged to have been found on the scene.
>
> 3. The learned trial judge erred when he found that the circumstantial evidence of the biographical documents which were not tendered as evidence in their original form automatically supported the correctness of the identification and pointed in one direction only."

Grounds one and two

Submission on behalf of the applicant

[8] Under ground one, Mr McEkron complained that the learned judge fell into error by not giving or abiding by the Turnbull directions and referred us to copious passages from the judgment of Lord Widgery in **R v Turnbull** [1976] 3 All ER 549. In his written submissions Mr McEkron argued that although the trial was without a jury, it was crucial for the learned judge to warn and caution himself in a clear and comprehensive manner, along the lines of the directions in **R v Turnbull**. In counsel's submission, the need for the warning was underlined by the weaknesses in the identification evidence itself, as well as the lack of credibility and reliability of the witnesses for the prosecution. In counsel's thinking it was insufficient for the learned judge to review the weaknesses as part of his rehearsal of the evidence. What was required was a comprehensive review conjoined with the directions in **R v Turnbull**, counsel advanced.

[9] In addition to the two weaknesses identified by Mr McEkron in the preceding paragraph, he listed four others: (i) the difficult circumstances and speed at which the incident unfolded; (ii) whether there was a fleeting glance or opportunity in the circumstances; (iii) how good was the lighting, there being only one source of light; and (iv) whether the photographs of the accused on the scene were viewed by the eyewitnesses inadvertently or not. Having analysed the identification and all the weaknesses, the learned judge was required by law to warn himself in clear and expressed terms of the "**possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken**" (bold as in the original).

[10] Mr McEkron went on to cite **R v Locksley Carroll** (1990) 27 JLR 259 for the proposition that a judge sitting alone is to demonstrate how he analysed the evidence and arrived at his conclusions. Counsel sought to buttress that submission with a quotation from the judgment of Rowe P at page 265. In that extract, Rowe P said that in **Leroy Sawyers and Others v R** (unreported), Court of Appeal, Jamaica, Resident

Magistrates' Criminal Appeal No 74/1980, judgment delivered 30 July 1980, the court pointed to the entitlement of an accused person to know the facts that were found against him and, where there are discrepancies and inconsistencies, how these are resolved, as practical reasons requiring a judge to give a reasoned judgment. Rowe P went on to identify an equal right in the public to understand the result of the trial, thereby inspiring its confidence in the process.

[11] The principles in **R v Locksley Carroll** were also relied on to support Mr McEkron's submissions under, ground two. The complaint was in the vein of the submissions under ground one, namely, the learned judge erred in not demonstrating how he treated with and resolved two issues concerning the identification parade. The issues which required focused treatment, according to the submission, were, one, the fact that the identification parades were held two years after the commission of the offences and two, the likelihood that the eyewitnesses may have seen the photographs of the applicant that were recovered at the scene.

[12] To that end, Mr McEkron also cited a passage from the judgment of Moses LJ in **R v I** [2007] EWCA Crim 923, at para. 17. The essence of the extract is Moses LJ's disapproval of the failure of the first instance judge to warn the jury about the danger of the witness picking out persons on the parade, not because he was identifying two of his attackers but rather, two persons whose photographs he had seen four days before attending the identification parade. The trial judge was under a duty, not only to identify this as a weakness for the jury but also to explain to them the rationale for describing it as a weakness.

[13] Consequently, it was not enough for the learned judge, in this case, to merely mention that the fairness of the identification parade was attacked. In Mr McEkron's submission it was both critical and incumbent on the learned judge to demonstrate how he resolved the issues arising from and attendant upon the holding of the identification parade; and especially since the applicant was previously not known to the eyewitnesses and his defence was alibi.

Submissions on behalf of the Crown

[14] Mr Taylor KC who appeared for the Crown, in his oral arguments, took aim at Mr McEkron's reliance on **R v Locksley Carroll**. He identified the issue raised by grounds one and two to be, when a judge is sitting alone, how far should he go in revealing his mind when dealing with issues such as identification. In his submission, there cannot be a resort to **R v Locksley Carrol** without first perusing **R v Dacres** (1980) 33 WIR 241. This court, learned King's Counsel argued, has to say whether **R v Dacres** should be distinguished from **R v Locksley Carroll** or reversed. According to learned King's Counsel, **R v Locksley Carroll** did not overrule **R v Dacres**, it was simply distinguished. Learned King's Counsel then referred us to several cases from this court in which the learning in **R v Dacres** was approved and applied. Learned King's Counsel submitted that the law, as propounded in **R v Dacres**, represents the modern approach, instantiated by **Dioncicio Salazar v The Queen** [2019] CCJ 15 (AJ) ('**Salazar**'). These cases will be fully discussed below.

[15] In his short reply, Mr McEkron agreed there was a need to revisit **R v Dacres** in light of the decision in **R v Locksley Carroll**. He directed the court to para. [25] of **Salazar**, which emphasised the constitutional principle of fairness in a criminal trial. Following on that, our attention was directed to para. [28] of the judgment, particularly the last sentence of a quotation in the judgment taken from **R v Thompson** [1977] NI 74. In that passage, the judge conducting a bench trial (sitting without a jury) is enjoined to give reasons for the conclusions at which he arrives and to highlight any difficult or unusual point of law to elucidate how his perspective of the law coloured his treatment of the law.

[16] In Mr McEkron's submission, the discussion starts with the constitutional principle of fairness. He submitted that his point was not that a judge sitting alone should sum up as if he were sitting with a jury. Rather, his point was that the judge should adopt a reasoned approach, giving reasons; and, borrowing from **Salazar**, note any difficult or unusual point of law. Identification is a special case requiring the judge to show more,

the submission continued. As a matter of practice, he argued, it would do no harm for judges sitting in the High Court Division of the Gun Court to demonstrate how they arrived at their decisions, in line with the constitutional principle of fairness.

Discussion

[17] Although Mr McEkron argued grounds one and two separately, they are more conveniently dealt with together, similar to learned King's Counsel's approach. We agree with the Crown that these two grounds raise the issue of how far a judge conducting a bench trial should go in articulating how he came to his decision in a criminal trial. The submissions disclose a fault line as to whether there is a requirement for explicit reference to the applicable principles, such as warnings and cautions and their application when assessing certain types of evidence in a bench trial. In learned King's Counsel's appreciation of Mr McEkron's position, that fault line arises from a perceived divergence, rightly or wrongly, between the pronouncements in the older case of **R v Dacres** (not relied on by Mr McEkron) from those in **R v Locksley Carroll**, the substratum of Mr McEkron's challenges in these two grounds. The principles articulated in **R v Dacres** and the tension, such as there may be, between those principles and the law as declared in **R v Locksley Carroll**, must, of necessity, form the backdrop of the succeeding discussion.

The development of the law requiring judges to demonstrate their application of the relevant principles in assessing certain types of evidence

[18] The trial of the applicant in **R v Dacres**, as in the present case, took place in the High Court Division of the Gun Court. A synopsis of the facts is instructive. The applicant's conviction arose from the robbery with aggravation of a taxi operator, at gunpoint, at night. The applicant and another man posed as passengers and carried out the robbery when they reached their previously announced destination. The identification of the applicant was by the facility of the roof light of the car. The day following the robbery, the complainant returned to the area where the applicant and his crony had disembarked. There, he saw both entering a business place. The complainant pointed out both men to

a passing policeman. At the trial, the identification by the complainant was challenged as either mistaken or deliberately lying.

[19] The principal challenge to the conviction was ground one which charged that "[t]he trial judge failed adequately to direct, warn and advise himself of the law and evidence in relation to identification". In sum, this court was entreated to render indivisible the principle it applied to identification whether the case emanated from a trial by a judge and a jury or a judge alone. So that, it was submitted, the court should make it a rule of practice in identification cases for a judge sitting alone to:

> "… direct, warn and advise himself of the law and evidence in relation to identification and in particular to analyse the weaknesses and any other features of the identification evidence which may effect [sic] the reliability of such evidence ..." (see page 243 of the judgment)

This submission was supported by cases emanating from bench trials in which the magistrate or judge was required to direct themselves on corroboration (see page 243 of the judgment).

[20] The court, while acknowledging that no distinction was made in the requirement of a judge, whether he sat alone or with a jury, to give the warning of the danger of convicting in the absence of corroboration in matrimonial or sexual offences case, refused to follow those cases. Instead, the court anchored its reasoning with this troika: the intention of the legislature in establishing the High Court Division of the Gun Court; the staffing of the court by professional judges, in contradistinction to laymen; and the requirement of giving a reasoned judgment. At page 247, Rowe JA (as he then was) said:

> "In legislating as it did to simplify the procedure for the trial of 'gun crimes' by authorising trial by judge alone instead of the time-honoured method of trial by judge and jury, Parliament ought not to be presumed to have intended that the courts should declare new technical rules of procedure which would add to the length of the trials without necessarily improving the standard and quality of the administration of justice. It is not to be lightly suggested that the judges who

> preside in the Gun Court (who are all judges of the Supreme Court, some with many years of experience as judges of fact and of law and others with many years of experience at the private Bar) will not have in mind the substantive rules of law in relation to identification evidence in any given case."

[21] Rowe JA went on to compare the legislative requirements of a Resident Magistrate (now styled, judge of the Parish Court). Although the Resident Magistrate was required to give a summary of his findings of fact in a criminal case, there was no similar requirement to record that he fully warned himself on corroboration; more particularly, the law laid down no special mandate for him to do so in relation to identification evidence. From there Rowe JA went on to conclude, at page 248, that:

> "The cases on identification evidence, have not established a principle that in the absence of a particular warning as to the dangers of identification evidence there would be an irregularity in the trial notwithstanding the quality of the evidence ..."

[22] The upshot of that reasoning, the court remained unpersuaded that laying down such a rule would enhance the administration of justice. Citing **R v Whylie** (1977) 25 WIR 430, 432, the court concluded, at page 248 of the judgment, that "[I]n every such case what matters is the quality of the identification evidence".

[23] A brief excursus. In **R v Whylie**, a trial before a judge and a jury in which the correctness of the identification evidence was challenged, the trial judge was enjoined to warn the jury to consider the evidence of identification "with the utmost caution" (see page 432 of the judgment). There, the trial judge neither gave the jury the general warning nor told them of the reason for the warning. Significantly, the trial judge never told the jury how to approach the evidence of the sole eyewitness. For those failures or, non-directions, the summation was held to be unfair and inadequate (see page 433 of the judgment).

[24] Consistent with the evaluative standard of fairness and adequacy of the summing-up, the court in **R v Whylie**, after considering several authorities on visual identification

including **R v Turnbull**, concluded that the warning was but one component of assaying the summation relative to the stated standard. At page 433, Rowe JA (Ag) (as he then was) said:

> "… Whether or not a specific warning was given to the jury on the dangers of visual identification is one of the factors to be taken into consideration in determining the fairness and adequacy of a summing-up."

[25] Returning to **R v Dacres**, it was against the background of failures of the trial judge in **R v Whylie**, relative to the requirements imposed on him in identification cases, that Rowe JA declined to apply the same strictures to a judge sitting alone and contrasted the professional judge with a jury of laymen. In the words of the learned judge of appeal, at page 248, "we can see no reason in principle to extend a rule applicable to trial by jury to a trial by judge alone". According to Rowe JA, on the one hand, a jury is comprised of laymen who must await instructions on the law from the judge, without which they are left without guidance and, critically, they do not give reasoned judgments, which leads to speculation about their findings of facts. On the other hand, the fact of being a Supreme Court judge makes the judge practised in the art of giving a reasoned judgment for the verdict at which he arrives. That reasoned judgment has two expectations. One, it must set out the facts the judge found proved and two, it must make clear his method of resolving any conflict on the evidence. Furthermore, the professional judge benefits from astute counsel's alertness in bringing to his attention relevant aspects of the case, including the guidance laid down in **R v Whylie**, discussed above (see page 248 of the judgment).

[26] The last reason which militated against the postulate of counsel for that applicant was the caution from Scarman LJ in **R v Keane** (1977) 65 Cr App Rep 247, that **R v Turnbull** should not be inflexibly interpreted or applied (see page 248-249 of the judgment).

[27] Those premises drove the court to decisively reject the proposition advanced on behalf of the applicant in **R v Dacres**. That rejection was based on the following:

"a. The cases on identification did not establish any principle that a failure to give a particular warning as to the dangers of uncorroborated identification evidence was tantamount to an irregularity, irrespective of the quality of the evidence;

b. The rule of practice requiring a judge sitting alone in matrimonial or sexual offences cases to not only have the caution in mind but articulate it fully, cannot be analogized with, and extended to, identification evidence;

c. It would be inimical to the simplified procedure of trial by judge alone of gun crimes, to overlay it with technical rules of procedure viz, requiring the judge to direct, warn and advise himself on the law and evidence in relation to identification. Imposing this technical rule of procedure would result in lengthening the trial without necessarily advancing the standard and quality of the administration of justice;

d. The High Court Division of the Gun Court is presided over by judges of the Supreme Court, who will have in mind the substantive rules of law relevant to identification evidence by virtue of their experience, either as judges accustomed to finding facts and law or lawyers with years of practice at the private Bar;

e. Adoption of the rule of practice for trial in the High Court Division of the Gun Court would not enrich the administration of justice as it is the quality of the identification evidence that is important; and

f. In practice, judges presiding in the High Court Division of the Gun Court give reasoned judgments which should set out the proved facts and the methodology adopted to resolve conflicts in the evidence."

[28] **R v Dacres** was considered in **R v Clifton Donaldson, Leroy Newman and Robert Irving** 25 JLR 274 ('**R v Donaldson and others**'). The facts of the latter case may be omitted for present purposes, save to say the convictions arose out charges for illegal possession of firearm, robbery with aggravation, attempted rape and rape and were tried in the High Court Division of the Gun Court. It was strenuously argued that a

duty was imposed on the trial judge to demonstrate that his mind was adverted to the dangers of acting on the uncorroborated evidence of the complainant, "since the nature of the case called for corroboration" (see page 279 of the judgment). Carey JA gave this submission short shrift. He simply referred to the fact that the like point was raised in **R v Dacres**, and quoted Rowe JA's pronouncement that there was no established principle that the result of the absence of a warning in identification cases resulted in an irregularity in the trial, irrespective of the quality of the evidence (see paras. [21] and para. [27], item a. above).

[29] The court in **R v Donaldson and others** was invited to lay down a rule of practice requiring a judge sitting in the High Court Division of the Gun Court to warn himself, after the fashion of the requirement to explicitly warn the jury, that, in the absence of corroboration in cases of sexual offences, it was dangerous to convict but may nevertheless do so, if they believed the complainant. The court's accommodative response to this invitation had been telegraphed in **R v Dacres**.

[30] Carey JA referred to Rowe JA's acknowledgment of the duty on the judge to have the caution in mind and fully express it, in cases of adultery, at page 10 in **R v Dacres**. Carey JA then cited with approval a trilogy of English cases, in particular **R v Trigg** [1963] 1 WLR 305. In **R v Trigg** reference was made to the Privy Council decision of **Chiu Nang Hong v Public Prosecutor** [1964] 1 WLR 1279. In the view of Their Lordships, a judge sitting alone should make it clear that he had the requisite caution in mind when convicting upon the uncorroborated evidence of the complainant in a sexual offence case. There was, therefore, in the view of the Privy Council, no difference in the requirement of the judge, whether sitting with a jury or alone, to administer the caution concerning the absence of corroboration in cases of sexual offence.

[31] Carey JA was persuaded by the pronouncements in **Chiu Nang Hong v Public Prosecutor** to adopt this rule, which pierced the veil between the jury and judge alone fora in this procedural aspect. At page 280 of **R v Donaldson and others** he declared:

> "We think that we should follow this rule and state in positive terms that a judge sitting alone in the trial of any sexual offence, should state or make it clear in his summation (which is for the benefit not only of the parties before him, but also for the assistance of this Court in the event of an appeal) that - (a) he has in mind the dangers of convicting on the victim's uncorroborated testimony; and (b) nevertheless, he is satisfied, that he feels sure, that she is speaking the truth."

In short, stating that he was alive to the danger of convicting upon the uncorroborated evidence but was nevertheless persuaded by its truth to the criminal standard, is in part a fulfilment of his general duty to give a reasoned judgment.

[32] That was Carey JA's understanding, evidenced by his comment that incanting the correct formula approximating to irrefutable proof of the judge's awareness that it is incumbent on him to give a reasoned judgment. Accordingly, Carey JA anchored his view in the authoritative statements of Rowe JA in **R v Dacres** about the Supreme Court judge's practice to give a reasoned judgment, and the expected constituents of that reasoned judgment (see para. [27] item f. above). In the language of Carey JA, at page 280:

> "It is the duty of this Court in its consideration of a summation of a judge sitting in the High Court Division of the Gun Court to determine whether the trial judge has fallen into error either by applying some rule incorrectly or not applying the correct principle. If then the judge inscrutably maintains his silence as to the principle or principles which he is applying to the facts before him, it becomes difficult if not impossible for the Court to categorize his summation as a reasoned one."

[33] The court went on to expressly declare that on the trial of rape (or other sexual offence) the requirement that the tribunal of fact must be warned of the danger of convicting on the uncorroborated evidence of the victim must be given, is trans fora. That is, whether the trial is taking place before a judge sitting with a jury in the circuit court or a judge sitting alone in the High Court Division of the Gun Court, the rule applies with equal force. To that end, in a trial in the latter forum, "the tribunal must warn itself; it is no less important that he must be seen to do so" (see page 281 of the judgment).

[34] It is therefore clear that the law, as declared in **R v Donaldson and others**, affirmed the position taken in **R v Dacres**. That is to say, whereas **R v Donaldson and others** explicitly required a judge conducting a bench trial of a sexual offence case to warn himself, as he would have when sitting with a jury (a position portended in **R v Dacres**); **R v Donaldson and others** did not impose similar strictures upon the judge sitting alone in the trial of a case where the correctness of uncorroborated identification evidence was the sole or substantial issue, it merely applied the law pronounced in **R v Dacres**.

[35] In both **R v Dacres** and **R v Donaldson and others**, the trial judge is expected to use the vehicle of the reasoned judgment to convey to the parties, public and court of appeal that he was alert to the live issues in the case. The emphasis in **R v Dacres** was on the facts found and the resolution of conflicts in the evidence. This is unsurprising having regard to the holding that there was no principle of law which rendered the failure to warn himself of the inherent danger in acting on uncorroborated identification evidence resulted in an irregularity, whatever the state of the evidence. Carey JA in **R v Donaldson and others** required more. The principle applied to the facts should be expressed without the need for construction.

[36] **R v Donaldson and others** was applied in **R v George Cameron** (1989) 26 JLR 453. Curiously, perhaps, **R v Dacres** was not listed among the cases considered here, although Rowe P sat on the panel of all three cases. The convictions in **R v George Cameron** arose from a shooting incident which occurred about one hour post-midnight, in the yard of the home of a serving superintendent of police. The other person charged with the applicant was acquitted at the trial. The sole or substantial issue was therefore visual identification of the applicant by the two victims, the superintendent and his wife. Both were irreconcilably discrepant in their narration of the incident. The trial judge, preferring the evidence of the wife, convicted the applicant but acquitted his co-accused.

[37] Although the trial judge recognised the real issue in the case to be identification, and commented on the demeanour of the witnesses, he arrived at his verdict without any

intimation that he had considered the dangers inherent in visual identification evidence. The question which faced the court in **R v Dacres,** and which was given short shrift in **R v Donaldson and others**, again arose for consideration. That is, should a judge sitting in the High Court Division of the Gun Court in the trial of a case in which the sole or substantial issue is the correctness of visual identification, be required to warn himself, as he would warn a jury, when sitting in the circuit court?

[38] Wright JA, after making observations on the matriculation of identification evidence, in jury trials, to the specialised category of cases requiring the exercise of caution before convicting in the absence of corroboration, opined that the absence of the warning is fatal to a conviction in those cases. That class of cases is exemplified by the following, evidence of accomplices, children and rape. Wright JA also noted that the failure to give the warning in that species of cases is fatal to the conviction. The requirement of the warning was settled. In that regard, **Junior Reid v R and Others** [1989] 3 WLR 771 was cited (see page 457 of the judgment)

[39] Although Wright JA was fully aware that dire consequence which resulted from the failure to give the warning concerned cases tried with a judge and jury, he made the unconventional declaration that the difference in fora was of no moment. In Wright JA's articulation, at page 457:

> "... The importance of visual identification evidence in such a case is not diminished because of the forum and the immediate concern is to determine what is required of the judge in such a situation."

The reference to the forum was a less than subtle rejection of the learning in **R v Dacres**, which laid stress on the economy of time expected in the unique endowment of the jurisdiction of trial by judge alone in the High Court Division of the Gun Court; itself a radical departure from the time-honoured trial by jury.

[40] Wright JA sought to answer the question of what was required of the judge sitting alone, by reference to his pronouncement that there was no cross-forum diminution in

the importance of visual identification evidence. Accordingly, Wright JA explicitly adopted Carey JA's position in **R v Donaldson and others** where Carey JA declared a requirement to give the warning irrespective of the forum in which a case of rape was being tried. Wright JA, then commented, at page 457:

> "The relevance of [**R v Donaldson and others**] to present consideration is that it states emphatically that **where the judge sits alone [,] he is required to deal with the case in the manner established for dealing with such a case though he is not fettered as to the manner in which he demonstrated his awareness of the requirement**. What is impermissible is inscrutable silence." (Emphasis added)

This was a cross pollination of the rules of practice concerning the requirement for rape cases, which was what Carey JA wrestled with in **R v Donaldson and others**, with the requirements of a judge sitting alone where visual identification was the sole or substantial issue.

[41] Wright JA did not explicitly say what he meant by "deal with the case in the manner established for dealing with such a case," but the implication is clear from his earlier reference to the requirement when the trial is with a jury. Simply, the law requires the tribunal of fact to be warned of the danger of convicting upon the uncorroborated evidence of visual identification.

[42] We are fortified in this view by Wright JA's ensuing pronouncement. At page 457 H-I, Wright JA declared:

> "He must demonstrate in language that does not require to be construed that in coming to the conclusion adverse to the accused person he has acted with the requisite caution in mind."

In other words, in arriving at his verdict, the judge sitting alone must make it clear in his reasoned summation that he had the required warning in mind, in language of his choosing. No formula or incantation is required.

[43] This, therefore, was the state of the law in 1989, when the reasons in **R v Cameron** were delivered. The judge presiding over a trial in the High Court Division of the Gun Court for the offence of rape or any case in which the sole or substantial issue was the correctness of the visual identification evidence was required to do three things. Firstly, he must give a reasoned decision (see **R v Dacres**). Secondly, he must warn himself of the danger of convicting upon the uncorroborated evidence of the victim in a rape case (see **R v Donaldson and others**). Thirdly, he must warn himself of the inherent dangers of convicting on the uncorroborated identification evidence in a case dependent for its proof upon the correctness of the visual identification of the accused (see **R v Cameron**).

[44] **R v Locksley Carroll**, on which counsel in the present application for leave places reliance, was decided in the wake of the decision in **R v Cameron**. Once again, the conviction in the High Court Division of the Gun Court arose in circumstances which made the correctness of the visual identification evidence the central issue in the case. The trial judge neither warned himself as required by **R v Cameron** nor resolved pertinent conflicts in the evidence as enjoined by **R v Dacres**. This was, therefore, fertile ground for counsel for the applicant to ask the appellate court, "is a judge sitting without a jury required to warn himself of the dangers of acting on the evidence of visual identification?"

[45] Rowe P instantly recognised that the question harked back to the issue raised in **R v Dacres** and that the court then refused to elevate "identification into a special category" of cases requiring by rules of practice that the tribunal of fact should be warned of the dangers of convicting on uncorroborated evidence (as was done in **R v Cameron**, see paras. [38]-[39] above). Rowe P then quoted what he had said in **R v Dacres**, at page 247 (reproduced at para. [21] above), that the absent warning did not result in an irregularity in these types of cases. Rowe P, in the same breath, unequivocally renounced the statement made in **R v Dacres**. He declared, at page 13, "[t]his statement cannot now be regarded as good law …". The major premise for his recant, rested on two

decisions of the United Kingdom Privy Council, delivered several years after **R v Dacres**: **Scott and others v The Queen** [1989] 2 WLR 924 and **Junior Reid v R and others**.

[46] For present purposes it is only necessary to refer to **Junior Reid and others v R**, in which the former was cited, save for the following extract to which Their Lordships referred. In **Scott and Others v The Queen**, Lord Griffiths said:

> "... if convictions are to be allowed upon uncorroborated identification evidence there must be strict insistence upon a judge giving a clear warning of the danger of mistaken identification which the jury must consider before arriving at their verdict and that it would only be in the most exceptional circumstances that a conviction based on uncorroborated identification evidence should be sustained in the absence of such a warning ..."

The Privy Council, in these cases, made the warning an indispensable ingredient of the judge's charge to the jury. This was a seismic shift from the position of this court that a failure to warn the jury of the inherent dangers of convicting on the uncorroborated identification evidence was but one of the factors to be taken into consideration in deciding whether the summation was fair and adequate: **R v Oliver Whylie** (1978) 25 WIR 430**; R v Bradley Graham and Randy Lewis** (1986) 23 JLR 320. That position was weighted in the balance and found wanting. In the language of the Privy Council, it gave "too little weight to the recognised dangers of convicting on uncorroborated evidence of identity" (see **Scott and others v the Queen).** Their Lordships proclaimed that a significant failure to follow the guidelines in **R v Turnbull**, which includes giving the warning, was tantamount to a substantial miscarriage of justice resulting in the conviction being quashed.

[47] It is convenient at this time to address learned King's Counsel's criticism of Rowe P's reliance on these cases as cases which dealt with the trial judge's failure to warn the jury, as dictated by **R v Turnbull**. The intellectual mooring of **R v Dacres** was the absence of any principle in identification evidence cases which made the failure to give the warning fatal to the resulting conviction. Hence, the general posture of this court was

the fairness and adequacy of the summation. Therefore, the failure to give the warning was but another factor to be put in that scale. That position was turned on its head with the Privy Council's declaration, in **Junior Reid and other v The Queen**, that the substantial failure to follow the guidelines in **R v Turnbull** resulted in a miscarriage of justice.

[48] Although the Privy Council made its pronouncements within the confines of its review of convictions before a jury, those statements of the law on identification evidence were of general application. This much had been recognised in **R v Cameron** when Wright JA, after citing **Junior Reid an others v R** and noting that the court was not considering a case that resulted from a jury trial said, at page 457, "the importance of visual identification is not diminished because of the forum". Therefore, in taking guidance from those 'jury cases', Rowe P was doing no more than following the path charted by **R v Cameron**.

[49] We noted earlier that **R v Dacres** was not considered in **R v Cameron**, although the law it laid down was impliedly repudiated in the extension of the requirement for the judge sitting alone in a rape cases to warn himself, laid down in **R v Donaldson and others**, to identification evidence. **R v Locksley Carroll** confirmed **R v Cameron's** departure from **R v Dacres**, in so far as it removed the incongruity of relegating the requirement for the warning in identification evidence cases to, time-consuming "new technical rules of procedure," while insisting the warning be given in rape cases.

[50] The renunciation in **R v Locksley Carroll**, of the law enunciated in **R v Dacres** that insulated the judge sitting alone in the High Court Division of the Gun Court from giving the warning in identification evidence cases, was explicit and complete. Explicit because Rowe P, pointedly identified his statement of the law in **R v Dacres** and said it could no longer be regarded as good law (see paras. [21] and [45] above). Completeness in the rejection of the position in **R v Dacres** was made manifest both in the adoption of the law as pronounced in **R v Cameron** and adding its own elaboration. That is, firstly,

Rowe P extracted Wright JA's remarks, denounced inscrutable silence concerning the warning and advocated express application of the principle (see para. [40] above).

[51] Secondly, in classic volte-face, the formal pronouncements of Sir Boyd Merriman P in **B v B** [1935] All ER 428, at page 429, that a magistrate's directions to himself, concerning uncorroborated evidence, should contour directions given to a jury, that was rejected in **R v Dacres**; now became one of the cornerstones of new articulation in **R v Locksley Carroll**. At page 13 of the latter judgment, Rowe P said, "[w]e would adopt the position of Sir Boyd Merriman P in **B v B**". An abbreviated portion of the speech of Sir Boyd Merriman P then followed, extracted in **R v Dacres**, is set out below:

> "… Magistrates should direct themselves, just as a judge should direct a jury, that it is safer to have corroboration, but when the warning has been given, and given in the fullest form, there is no rule of law which prevents the tribunal from finding the matter proved in the absence of corroboration."

The judge sitting alone was, therefore, required to warn himself about the dangers of returning an adverse verdict on uncorroborated evidence, as he would a jury.

[52] Rowe P summed up the new position and, at the same time, stated the rationale for the change in positions, in the following quotation. At page 14, he said:

> "We hold, that given the development of the law on visual identification evidence since the decision in R v Dacres (supra) in 1980, judges sitting alone in the High Court Division of the Gun Court, when faced with an issue of visual identification must expressly warn themselves in the fullest form of the dangers of acting upon uncorroborated evidence of visual identification. In this respect we hold, that there should be no difference in trial by judge and jury and trial by judge alone." (Emphasis as in the original)

In essence, the judge sitting alone should address the issue of visual identification evidence in the same manner as when sitting with a jury. The pith of Rowe P's encapsulation echoes **R v Cameron**, as well as **R v Donaldson and others**, that the forum is irrelevant in so far as the corroboration warning is concerned.

[53] So then, notwithstanding the about face in **R v Locksley Carroll**, learned King's Counsel submitted that there was no overrule of **R v Dacres**, it was merely distinguished. While we sympathise with learned King's Counsel's reticence, there was in fact a partial overrule of **R v Dacres**. In **R v Locksley Carroll**, this court was also asked, to what extent was it open to the appellate court to examine whether the trial judge heeded his own warning while assessing the evidence? Rowe P, at page 16 of the judgment, responded that it was the court's settled practice to interrogate the summation to see if the trial judge took into consideration his own warning as to corroboration and visual identification, where those were in issue. The giving and adhering to the warning is part of the trial judge's duty to give a reasoned judgment, established or encouraged by a long line of cases. Rowe P's allusion to the requirement to give a reasoned decision, and short review of the cases, commenced with what was said in **R v Dacres** (see para. [25] above); thereby affirming that part of the decision. In fine, while the part of the judgment which rejected the proposition that the judge sitting alone should warn himself in visual identification cases, could no longer be followed, the section of the judgment dealing with the responsibility to give a reasoned judgment was affirmed. Hence, **R v Dacres** was only partially overruled by **R v Locksley Carrol** and the substructure of the decision remained good law.

[54] This takes us to learned King's Counsel's submission that this court should say whether **R v Dacres** should be overruled. Having considered the matter, going that distance does not present itself as an imperative. The substratum that the decision in **R v Locksley Carroll** left undisturbed has been accepted and applied by this court in a number of its 21st century decisions. And, as learned King's Counsel argued, the broader proposition in **R v Dacres**, that a judge sitting alone, although required to give a reasoned judgment and is not, by that token, expected to be expansive in his summation, is emblematic of the modern approach. The ensuing discussion will make this position palpable.

[55] **R v Dacres** was considered and applied in **Sherwood Simpson v R** [2017] JMCA Crim 37, another case from the High Court Division of the Gun Court. The relevant issue arising in the latter case was whether the trial judge had properly dealt with the impact of the discrepancies in the evidence for the prosecution on the credibility of the complainant. In addressing this challenge, F Williams JA, who wrote on behalf of the court, noted, at para. [19], that this court in **R v Dacres** (i) observed that the absence of a legislative constraint on judges in this forum to specifically direct themselves on identification evidence and to analyse the strengths and weaknesses of that evidence (by analogy with the position in the then Resident Magistrates Court); (ii) the development of the practice to give reasoned judgments; and (iii) accepted the undesirability of imposing new fetters on the summary court.

[56] F Williams JA observed that the posture of the court in **R v Dacres** was reiterated in **R v Junior Carey** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 25/1985, judgment delivered 31 July 1986. F Williams JA opined, at para. [22], that the effect of those principles is that a judge sitting alone is not required to give a detailed summation as he would, were he sitting with a jury, but should set out the facts which ground his verdict. F Williams JA found that the trial judge in **Sherwood Simpson v R** gave himself an adequate warning in relation to discrepancies, but his treatment of the issue amounted to a regurgitation of the discrepancies that was devoid of any analysis. The lack of analysis had a two-fold effect. Firstly, there was no explanation for preferring the evidence of the complainant over the unsworn statement of the applicant and the evidence of his witness. The corollary of this was the absence of an explanation for rejecting the defence of alibi. Secondly, in a case in which credibility loomed large, there was no evidence of how this issue was resolved in relation to the identification of the applicant. (see paras. [27]-[30] of the judgment).

[57] In short, this court found that there was a nigh complete failure to follow the injunction in **R v Dacres** to show the methodology by which conflicts in the evidence were resolved. There is equivalence between this declaration of the law and the holding

in **R v Locksley Carroll** that findings of facts, unsupported by a reasoned assessment of the facts does not equate to a reasoned judgment (see page 17 of the judgment).

[58] In **Andre Downer and Darren Thomas v R** [2018] JMCA Crim 28 ('**Downer and Thomas v R**'), although the trial judge was mindful that the court had to exercise particular care when the resolution of the case depended on the correctness of the visual identification evidence, he did not expressly caution himself that an honest witness could be a mistaken witness. Relying on the **R v Dacres** line of cases, this court decided that the transcript must reveal a sufficient demonstration of the trial judge's appreciation of the issues and the intellectual methodology by which he resolved those issues. Further, any challenge which sounds in the vein of the adequacy of the trial judge's caution or directions must be weighed against the quality of the identification evidence (see paras. [30]-[31] of the judgment).

[59] The pith and substance of those principles were perspicuously articulated in **Salazar**, cited by learned King's Counsel and written by Wit JCCJ. Wit JCCJ commenced his look at the requirements of a judge sitting alone with a summary of the rudiments of the constitutional guarantee of a fair trial. The indispensable conditionality to ensuring a fair trial is the ability of, the defendant, as well as the society, to understand the verdict. Being able to understand the verdict promotes the idea of the rule of law and repudiates arbitrariness. The inevitable by-product of this is the promotion of public confidence in the system of justice as they imbue it with objectivity and transparency (see para. [25] of the judgment).

[60] Wit JCCJ makes the like contrast, as Rowe P in **R v Dacres**, between the lay jury and the professional judge. On the one hand the lay jury is not required to give reasons for its verdict. The safeguard against arbitrariness in this forum is dichotomous. The first, is the adherence to the rules of evidence in taking scrupulous care in what is admitted into evidence (that is, what the jury is permitted to hear and see). Secondly, the trial judge, in the discharge of his duty, provides the jury with "clear, precise, sometimes even detailed" instructions on the relevant legal issues and the rules of evidence. The

indispensable predicate of trial by jury is that having comprehended these instructions, the jury will follow them in arriving at a decision. By these premises the constitutional guarantee of a fair trial is fulfilled (see para. [26] of the judgment).

[61] On the other hand, it is the reasoned judgment of the professional judge in a trial by judge alone which encapsulates the safeguards adverted to in trial by jury. At para. [27] of the judgment Wit JCCJ quoted from **Taxquet v Belgium** (Application No 926/05, at para. 91), a decision of the European Court of Human Rights which speaks to the content and circumscription of the reasoned judgment. The reasoned judgement must evince objective arguments and preservation of the rights of the defendant. The nature of the decision and the circumstances of the case act to circumscribe the breadth, depth and length of the duty to give a reasoned judgment. We reproduce the extract below:

> "[reasoned judgments] oblige judges to base their reasoning on objective arguments, and also preserve the rights of the defence. However, the extent of the duty to give reasons varies according to the nature of the decision and must be determined in the light of the circumstances of the case… While courts are not obliged to give a detailed answer to every argument raised … it must be clear from the decision that the essential issues of the case have been addressed."

The touchstone of a reasoned judgment appears to be this. The judge sitting alone is expected to show that he addressed all the issues on which the case before him turned, but not every point raised in submissions.

[62] There is, therefore, no requirement for a judge sitting alone to instruct, direct or remind himself of the full gamut of legal principles or how he has treated with every bit of evidence, in the manner he would, had he been sitting with a jury. According to Wit JCCJ, at para. [29]:

> "… a judge sitting alone … is under no duty to 'instruct', 'direct' or 'remind' him or herself concerning every legal principle or the handling of evidence. This is in fact language that belongs to a jury trial (with lay jurors) and not to a bench trial before a professional judge where the procedural dynamics are quite

> different … As long as it is clear that in such a trial the essential issues of the case have been correctly addressed in a guilty verdict, leaving no room for serious doubts to emerge, the judgment will stand."

To view what Wit JCCJ said from another perspective, the judgment will fail, if the resolution of the essential issues in the case have been left shrouded in the judge's inscrutable silence, thereby raising doubts as to the soundness of the of the guilty verdict.

The learned judge's judgment

[63] Notwithstanding Mr McEkron's concession that the judge sitting the High Court Division of the Gun Court is not required to sum-up as though he were sitting with a jury, he argued that cases of visual identification are special and, as such, requires the judge to do more. In our view, consistent with the authorities discussed earlier, the dispositive question is whether the learned judge gave a reasoned judgment, addressing the salient issues and applied the relevant law.

[64] The primary issue in the case was the correctness of the visual identification evidence of the applicant. The learned judge was alert to this. He explicitly isolated visual identification as one of the bifurcated limbs of the case for the prosecution against the applicant. The other limb consisted largely of documents, coupled with the circumstances of their finding, tendered to bolster the identification evidence. The learned judge also recognised the paramountcy of the credibility and reliability of the witnesses for the prosecution (see page 364 lines 9-24 of the transcript; see also page 370 lines 18-23 for similar comments).

[65] The learned judge then directed his mind to the witnesses' opportunity to observe the applicant; whether they were mistaken or just plainly lying; and he dovetailed those two considerations with the possibility that their evidence of identification could have been tainted by the presence of photographs of the applicant in the vicinity of where the men abandoned the white Toyota motor car. Beginning at page 364, line 25 to page 365 lines 1-7, the learned judge asked himself:

> "Did they have adequate opportunity to see and to observe and correctly observe the persons who were attacking them? Or are they mistaken? Credibility. Did they, in fact, see this man or their attackers at all, or are they lying or mistaken when they say its [sic] this man and draw this conclusion because they saw photographs at the scene or close to the scene?"

Following this, the learned judge gave himself extensive directions on the treatment of alibi although he acknowledged the applicant's defence did not square with the legal definition of an alibi.

[66] The learned judge then reviewed the evidence of the three eyewitnesses and rejected all but one, Cons Dunstan.

[67] Had the learned judge been sitting with a jury, he would have been required to follow the guidelines laid down in **R v Turnbull**, accepted and applied by this court. Those guidelines require a trial judge to (a) warn the jury of the special need for caution in cases dependent for their proof on the correctness of the visual identification of one or more eyewitnesses; (b) instruct the jury on the reason for the warning; (c) direct the jury to examine the circumstances under which the identification was made by each witness: (d) bring to the mind of the jury any material discrepancy between the description given by the witness of the accused and his actual appearance; (e) remind the jury of any specific weaknesses in the evidence of identification; (f) instruct the jury that although recognition may be more reliable than identification of a stranger, mistakes can be made even in cases where the witness claims to have recognised the accused; (g) isolate for the jury evidence that is capable of supporting the identification evidence; and (h) instruct the jury on evidence which might, at first blush, appear to support the identification evidence, but does not bear that supportive quality (**R v Turnbull**, at pages 551-552).

[68] Had the learned judge in the instant case directed himself in this manner, he would have directed himself "in the fullest form of the dangers of acting upon the uncorroborated evidence of visual identification", as enjoined by Rowe P **R v Locksley**

Carroll; since, insofar as visual identification is concerned, "there should be no difference in trial by judge and jury and trial by judge alone," (see para. [52] above). However, the learned judge neither explicitly warned himself of the inherent danger of convicting in the absence of corroboration nor adverted to the reason for the warning. This is the essence of Mr McEkron's complaint. Is this a sustainable challenge?

[69] In **R v Dacres**, the learned judge was presumed to have the substantive rules of the law of evidence relative to identification evidence in mind. The presumption that the judge knows the law, was displaced by the requirement to state or make clear that he had the warning in mind (in relation to rape): **R v Donaldson and others**. In other words, the judge is required to demonstrably apply the relevant legal principles. That position calcified in **R v Cameron**. Wright JA subordinated the judge's knowledge of the law to his application of the law. Therefore, that the judge had the caution in mind must be expressed in language so clear that it requires no interpretation. **Sherwood Simpson v R** and **Andre Downer and Darren Thomas v R** were both decided based on the trial judge's failure to demonstrate his application of the law to the issues in the case before him, not for want of exhaustive directions in law.

[70] It may therefore be said, and with a reasonable degree of confidence, that the decisions (**R v Donaldson and others, R v Cameron**) upon which the court relied in **R v Locksley Carroll**, did not require the judge sitting in the High Court Division of the Gun Court to give a dissertation on the relevant legal principles. Rather, he was enjoined to demonstrate his application of those principles. Although Wright JA acknowledged the equivalence in importance of identification evidence, irrespective of the trial forum, he only required the trial judge to show that he had the warning in mind (see **R v Cameron**, at page 457). Moreover, the cases (**Scott and others v R** and **Junior Reid and others v R**) upon which Rowe P pivoted to disavow, in part, **R v Dacres**; laid down no marker for the judge sitting alone. Therefore, insofar as the language of **R v Locksley Carroll** implies that the judge sitting in the High Court Division of the Gun Court should direct himself in the exhaustive manner, he would a jury, that case is an outlier.

The current state of the law as gleaned from the cases

[71] The current state of the law appears to be this. The judge sitting in the High Court Division of the Gun Court, or conducting other bench trials, is required to give a reasoned judgment. A reasoned judgment is indispensable to the administration of justice, especially in its bench trials iteration. The very essence of the reasoned judgment is the removal of the shrouds of secrecy that would otherwise hover the path to the verdict. In its purest expression, the reasoned judgment communicates: to the defendant whether his rights, constitutional, legislative and common law, have been safeguarded; what facts were found against him, together with the reasons therefor; to the public that it was a confluence of applicable law and facts which led to either an acquittal or conviction; allows the court of appeal to assess whether the conviction is safe or the sentence is appropriate. The following are the requirements of a reasoned judgement:

I. Set out the findings of fact (see **R v Dacres**).

II. Findings of fact should be accompanied by a reasoned assessment of all the relevant evidence (see **R v Locksley Carroll**).

III. Where there are conflicts (inconsistencies and discrepancies) in the evidence, an explanation of the methodology employed to resolve them (see **R v Dacres**; **Sherwood Simpson v R**).

IV. an explanation as to why the evidence of the prosecution was preferred to that presented by the defence (for example, the reason(s) why the alibi was rejected - see **Sherwood Simpson v R**).

V. Where the trial is for a sexual offence and the evidence of the victim is uncorroborated, the applicable warning by the judge to himself and a demonstration that he had the warning in mind and applied it (see **R v Donaldson and others**).

VI. Where the evidence against the defendant depends solely or substantially on the correctness of visual identification evidence, a statement in clear

language by the judge that he had the **R v Turnbull** warning in mind (see **R v Cameron**).

VII. In cases of visual identification, a sufficient demonstration on the record that the trial judge appreciated all the issues and how they were resolved. So that, failure to explicitly warn himself that an honest witness could be mistaken, may not be fatal to the conviction (see **Downer and Thomas v R**).

VIII. The judge is unfettered in the language he uses to demonstrate that he had the requisite warning in mind (see **R v Cameron**).

For the sake of clarity, this list is not meant to be exhaustive. The list comprises signposts, a useful checklist if you will, of the constituents of a reasoned judgment.

Did the learned trial judge demonstrate that he bore in mind the dangers inherent in identification evidence?

[72] Against the background of the preceding discussion of the principles, we will now consider the learned judge's treatment of the issue of visual identification, specifically, his assessment of the evidence. As was said above, the learned judge did not specifically warn himself of the dangers of convicting on uncorroborated identification evidence. Neither did he remind himself of the reason for the warning. Consistent with the authorities, did he demonstrate that he had the warning in mind?

[73] The learned judge examined the evidence of the three witnesses who purported to identify the applicant with scrupulous care. The learned judge dissected the circumstances in which the witnesses said they made their identification of the applicant, with reference to the length of the observation, the distance from which the observation was made, the quality of the light available and impediments to the observation. At the end of that analysis, the learned judge rejected Cpl Smith's evidence, based on its internal inconsistency as well as its discrepancy with the evidence of Cons Dunstan, leading to the conclusion that his identification evidence was not credible (see page 375 lines 17-25; page 376 lines 1-19 of the transcript). Similarly, the learned judge rejected the

evidence of Cons Cephas, not least because of his embellishment. His observation was made from about 49 feet, which the learned judge adjudged made it more difficult to see; as well as the fact that he did not have an unobstructed view of his assailants, although he claimed otherwise (see page 377 lines 2-22 of the transcript).

[74] Contrary to his findings in relation to Cpl Smith and Cons Cephas, the learned judge found Cons Dunstan's evidence to be cogent (see page 380 lines 18-25; page 381 lines 1-9 of the transcript). Specifically, the learned judge considered the length of Cons Dunstan's observation (20 seconds) and that he had an unimpeded view of the applicant as he laid on the ground, while both were on the same side of the vehicle (see page 375 lines 1-7 of the transcript); that observation was made from about 33 feet (page 375 line 10 of the transcript); and the headlights of the service vehicle shone in the direction of the applicant (see page 374 lines 23-24 of the transcript). The learned judge considered that although Cons Dunstan made his identification of the applicant under the difficult circumstances of a shootout, 20 seconds afforded him a sufficient opportunity to see the applicant, from a vantage point of unimpeded observation (see page 380 lines 23-24; page 381 lines 1-5 of the transcript).

[75] These passages from the transcript show that the learned judge had the warning in mind when he considered the identification evidence. The purpose of the guidelines laid down in **R v Turnbull** is to prevent the 'ghastly risk' of mistaken identification in fleeting encounters (see **R v Oakwell** (1978) 66 Cr App R 174). The meticulous care displayed by the learned judge in his consideration of the identification evidence shows that he was alive to the risk and endeavoured to insure against it.

[76] In our view, the learned judge's directions and treatment of the evidence adequately showed that he had the requisite warning in mind. We cannot agree with learned counsel for the applicant that more was required of the learned judge. Accordingly, grounds one and two fail.

Ground three

[77] The complaint under this ground is misconceived. The essence of Mr McEkron's complaint is that the learned judge erred in using the biographical documents since the originals were not produced. No issue was taken at the trial concerning either the authenticity of the documents or that they referred to the applicant. In the circumstances of this case, production of the originals was entirely unnecessary.

[78] Although the learned judge categorised this evidence as circumstantial, we prefer to regard the finding of the documents as an odd coincidence. The biographical documents were found about 50 feet from the abandoned motor car, in the vicinity of a fence. It is an odd coincidence that documents belonging to the applicant were found in an envelope on the very night of the shootout in which he was identified as one of the gunmen. Since there was no dispute as indicated earlier, one would have expected an explanation from the applicant for them being found where they were. None was forthcoming. As Lord Widgery said in **R v Turnbull**, at page 553 "… odd coincidences can, if unexplained, be supporting evidence" of evidence of visual identification.

[79] Notwithstanding our difference in the characterisation of this evidence, the learned judge was correct in thinking it invaluable and capable of supporting the correctness of the evidence of visual identification.

[80] The upshot of this brief discussion is that ground three is devoid of merit.

[81] We, therefore, make the following orders:

1. The application for permission to appeal conviction and sentence is refused.

2. The sentences are reckoned to have commenced on 13 November 2020, the date they were imposed, and are to run concurrently.