

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS 80 and 81/2012

**BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MR JUSTICE BROOKS JA
THE HON MISS JUSTICE P WILLIAMS JA**

**TRAVIS MCPHERSON
ODEAN SAMUELS v R**

Dr Randolph Williams for the applicant McPherson

Mrs Caroline Hay for the applicant Samuels

Jeremy Taylor and Miss Ashtelle Steele for the Crown

4, 5 and 27 October 2017

BROOKS JA

[1] On 16 May 2012, the applicants, Messrs Travis McPherson and Odean Samuels, were convicted of the offences of illegal possession of firearm and shooting with intent. This was on an indictment, which charged them jointly, along with two other men. The other men were acquitted after submissions of no case to answer were made on their behalf. In this judgment, Messrs McPherson and Samuels will be jointly referred to as "the applicants".

[2] The applicants' convictions resulted from a trial in the High Court Division of the Gun Court presided over by Thompson-James J sitting without a jury. The applicants were, on 13 July 2012, each sentenced to serve seven years imprisonment at hard labour for the offence of illegal possession of firearm and 10 years imprisonment at hard labour for the offence of shooting with intent. The sentences were ordered to run concurrently in respect of each man.

[3] A single judge of this court refused the applicants' respective applications to appeal against their convictions and sentence. The applicants have both renewed their applications before the court, and learned counsel, on their behalf, advanced concise submissions seeking to have the respective convictions quashed. Having previously read the material, and after contemplating the submissions of learned counsel, we ruled, on 5 October 2017, as follows:

1. The applications for leave to appeal are refused.
2. The sentences are to run from 13 July 2012.

We promised at that time to give written reasons for our decision. This is in fulfilment of that promise.

[4] The main issues that were raised by the proposed grounds of appeal are, firstly, whether the evidence adduced in support of what was said to be a case of identification by recognition, was adequate or credible, bearing in mind a number of omissions from the police statements by the eyewitnesses and the investigating officer. Allied to that issue was a complaint about the adequacy of the learned trial judge's summation in respect of the issue of visual identification. The second issue is whether there was an

impermissible confrontation of the applicants with the virtual complainants in respect of the alleged shooting with intent. The third issue concerns the requirement for, and the adequacy of, the good character direction that was given in the summation. Each issue will be addressed in turn, but first an outline of the evidence is necessary.

The prosecution's case

[5] The convictions arose out of an incident which occurred on Saturday 6 June 2009. The evidence adduced by the prosecution's witnesses was that at about 10:30 that evening a contingent of police officers went into the Newlands area of Saint Catherine. District Constable Jason McKay and Corporal Rodney Matthews (as he then was) were members of that contingent.

[6] Together, these two police officers went to a section of the community. They went quietly, attempting not to be detected. As they carried out their tour they noticed a group of five men gathered by an open-sided hut. Some of the men were seated on rocks near to the hut. The police officers concealed themselves behind a zinc fence and, from a vantage point at a corner of that fence, observed the men. Corporal Matthews did so from a crouched position while D/C McKay lay on the ground on his stomach, at the corporal's feet.

[7] They had the men in view for a period of three to four minutes. According to D/C McKay, he recognized four of the men as persons whom he knew before. Three of them he knew by name. Among the three known before were the applicants. Mr Samuels was also known to D/C McKay as "Zeeks", Mr McPherson was also known by the name

"Shrek". The third man was known as Romaine Edwards, who was otherwise called "British". The fourth man that D/C McKay knew, was only known to him by the alias "Mad Max".

[8] Of the five men, Corporal Matthews knew both the applicants before, by name.

[9] It was then that the incident occurred. The police officers saw Romaine Edwards walking toward where they were. They became anxious that their presence would be discovered. When he got within about 15 feet of where they were, D/C McKay stood up and shouted "Police". The man also shouted "Police". Both police officers then stepped out from behind the fence. The applicants advanced toward the officers. Mr McPherson pointed a shotgun in the direction of the officers and simultaneously Mr Samuels pulled a handgun from his waistband. Both applicants fired in the direction of the police officers. They took cover and returned fire. The five men ran and made good their escape.

[10] After the men had gone, the police searched the area, and D/C McKay found a shotgun in the area where Mr McPherson was, when they say he fired at them. It was a double barrelled shotgun with two expended cartridges in it. Nothing else of interest was found at the scene at that time. Detective Corporal Wellington, of the Bridgeport Police Station, was assigned to investigate the case.

[11] Three days later, on Tuesday 9 June 2009, both Corporal Matthews and D/C McKay were part of a police team carrying out an operation in the Newlands area. Corporal Matthews saw Mr Samuels and pointed him out to some other police officers.

Mr Samuels was then taken into custody. While on the same police operation, D/C McKay saw Mr Samuels being placed into the back of a police vehicle. Later that day, both Corporal Matthews and D/C McKay went to the Greater Portmore Police Station, also called the "Hundred Man Police Station", where they pointed out Mr Samuels to Corporal Wellington as being one of the persons who shot at them on 6 June 2009.

[12] On 2 January 2010, at about 4:00 pm, Corporal Matthews was at the Greater Portmore Police Station when he saw Mr McPherson being taken into the station. Corporal Matthews pointed out Mr McPherson to police officers in the CIB office as one of the men who shot at him on 6 June 2009. D/C McKay was also at the Greater Portmore Police Station when Mr McPherson was brought into the station. D/C McKay made a telephone call to Corporal Wellington, and on 4 January 2010, Corporal Matthews and D/C McKay went with Detective Corporal Wellington to the cell block of the Greater Portmore Police Station. There they pointed out Mr McPherson as being one of the men who shot at them on 6 June 2009.

[13] Detective Corporal Wellington charged each of the applicants separately for the offences for which they were eventually convicted. No warrant of arrest had been sworn out for either of the applicants, nor was any identification parade held. Corporal Matthews and D/C McKay said that the matter of warrants was for the investigating officer. Detective Corporal Wellington, at one point, said that it was based on advice from senior officers that he did not swear out any warrants of arrest, later, he said he did not have any reason not to have done so. He said that in any event he did not have

any time, before Mr Samuels was taken into custody, to swear out any warrant for his arrest.

[14] Detective Corporal Wellington said that he saw no reason to hold identification parades for the applicants because, by the time they came to his attention, they had already been seen and identified by D/C McKay and Corporal Matthews. He testified that he took the view that an identification parade was unnecessary.

The case for the defence

[15] Both applicants made unsworn statements.

[16] Mr McPherson said that he worked at a wholesale store from 8:00 am to 10:30 pm daily. He denied shooting at any police officer. He said that he was nowhere near where the alleged incident took place. He stated that he was on his way to work one morning when police officers took him into custody. He was taken to the Greater Police Station where Detective Corporal Wellington had him in custody for three weeks before charging him.

[17] Mr Samuels denied being present at, or having anything to do with, the shooting incident on 6 June 2009. He said that at that time he was at his home. He said that on 9 June 2009, he was on an errand for his mother when he was taken by the police to the Hundred Man Police Station. There, he said, D/C McKay and Corporal Matthews accused him of shooting at them, but he told them that he did not know what they

were talking about. He was later arrested and charged by Detective Corporal Wellington.

[18] An officer from the Scenes of Crime section of the Police Force was called by the defence. He testified that he went to the scene in Newlands on 12 June 2009. There, in an open area surrounded by stones, he picked up two spent shells for a firearm. He also noticed indentations on a zinc fence. The indentations looked as if they could have been made by shotgun pellets. He also took photographs of the area.

The proposed grounds of appeal

[19] Dr Williams, with the permission of the court, proposed the following supplemental grounds of appeal in favour of Mr McPherson:

- "1. The evidence adduced in support of recognition of the Applicant at the scene of the crime was inadequate.
- 2. The Applicant was denied the opportunity to stand on an identification parade without a good reason.
- 3. The learned trial judge erred by permitting prosecution witnesses to point out the Applicant in the dock before enquiring why there was no identification parade.
- 4. The failure of the learned trial judge to exercise her discretion to allow or disallow dock identification deprived the Applicant of the protection of a fair trial."

[20] Mrs Hay and Dr Williams also co-operated in arguing a fifth supplemental ground of appeal on Mr McPherson's behalf, namely that:

"The good character directions were wholly inadequate thus depriving the Applicant of any assessment of propensity and

occasioning a miscarriage of justice. The convictions ought thus to be quashed.”

[21] Mrs Hay, also with the permission of the court, argued the following proposed supplemental grounds of appeal on behalf of Mr Samuels:

- “1. That the learned Trial Judge failed to adequately treat with the Crown witnesses’ serial omissions and their effect on reliability. The failure to attach sufficient weight to critical omissions led to inadequate treatment of credibility. This in turn led to material non-direction and/or misdirection on issues of credibility. The convictions are thus unsafe and by that miscarriage of justice they ought to be quashed and the sentences set aside.
2. The learned Trial Judge erred in law by failing to properly analyse the specific weaknesses in the identification evidence. By placing undue weight on the evidence of recognition, the learned Trial Judge paid insufficient attention to the manifest weaknesses in the identification evidence on the Crown’s case. This non-direction amounted to material misdirection occasioning miscarriage of justice. The convictions ought thus to be quashed.”

The grounds will not be analysed individually but will be assessed and determined in accordance with the issues raised.

The adequacy of the identification evidence and the summation thereon

[22] Dr Williams submitted, in respect of this issue, that although D/C McKay and Corporal Matthews testified that they knew Mr McPherson before, for between two and three years, they were unable to give any details of that acquaintance in order to support that assertion of prior knowledge. He argued, therefore, that their evidence in that regard was a mere assertion.

[23] Learned counsel submitted that other factors demonstrated that the identification evidence ought to have been rejected by the learned trial judge. Firstly, Dr Williams submitted, there was no description of any of the attackers, given in any of the police statements by these witnesses. Neither was there any description of the clothing they were wearing at the time. Secondly, although Mr McPherson was said to have been known before, no warrant was sworn out for his arrest and no explanation was given for that failure. Thirdly, Dr Williams submitted, the circumstances of the sighting were such that the witnesses' ability to see their attackers was limited. In particular, Dr Williams submitted, Mr McKay's posture, on the ground, at the location was such that his ability to see the men must have been restricted. Fourthly, on learned counsel's submission, Mr McPherson's name was not mentioned in any of the police statements until after his arrest.

[24] Mrs Hay also submitted that the learned trial judge should have found that the evidence of Corporal Matthews and D/C McKay lacked credibility. Learned counsel adopted Dr Williams' submissions on this issue and also pointed out that, according to Detective Corporal Wellington, it was his recollection that when a record was made in the station diary, only aliases were used for the men. That evidence, learned counsel submitted, undermined the evidence of both Corporal Matthews and D/C McKay, that they knew both applicants by name before the day of the incident.

[25] Mrs Hay also submitted that the opportunities for Corporal Matthews and D/C McKay to observe the men at the scene were not only limited, but it was noted that the

witness statements did not mention the lighting that these witnesses, in evidence to the court, said was there, and aided them in seeing the men.

[26] Both Dr Williams and Mrs Hay submitted that the learned trial judge failed to properly analyse the identification evidence and the omissions in respect of that issue. Mrs Hay submitted that the learned trial judge particularly failed to analyse the weaknesses in the identification evidence and failed to give a reason for accepting the evidence of Corporal Matthews and D/C McKay. Consequently, learned counsel submitted, the convictions were flawed and ought to be quashed.

[27] We were unable to accept learned counsel's submissions on these points. The learned judge did a comprehensive analysis of the identification evidence. She recounted the evidence of both Corporal Matthews and D/C McKay in regard to the issue of visual identification. She gave herself the warning of the dangers of relying on visual identification and she recounted the points that militated against recognition, namely, the time of night and the fact that there were five men being observed, thus dividing the attention that could be paid to any one person.

[28] It is true that the learned trial judge did not use the word "weaknesses" in recounting those points, but it is a well-established principle that no set formula of words is needed in giving such directions. This principle was repeated by their Lordships, at paragraph 14 of their judgment in the decision of the Privy Council in **Mark France and Rupert Vassell v R** [2012] UKPC 28; (2012) 82 WIR 382, which was cited to us by Mr Taylor for the Crown.

[29] There was ample evidence upon which the learned trial judge could have based on her decision. She accepted that both Corporal Matthews and D/C McKay knew both men before for two to three years and that Mr McKay would see Mr Samuels at the racetrack. The learned trial judge accepted that there was adequate lighting at the hut and that the viewing was for three to four minutes. She accepted that the men were, initially, some 40 feet away, but that Corporal Matthews and D/C McKay saw the men who were there and recognized the applicants.

[30] Mrs Hay sought to emphasise the fact of the men shooting at the police officers, and the dynamics of the circumstances once the presence of the police had been revealed. She submitted those were weaknesses in the identification that militated against recognition. Learned counsel's submission on this aspect of the identification issue ignores the fact that the police officers were observing the men prior to their presence being revealed. The learned trial judge noted, at page 532 of the transcript, that Corporal Matthews testified that he saw Mr Samuels' face for the full four minutes that he had the men under observation before Mr Samuels pulled a gun, and a further eight seconds after pulling the firearm and when he ran off. She also noted, at page 533, that D/C McKay said the he was observing Mr McPherson for a little over three minutes before the shooting started.

[31] The learned trial judge dealt with the issue of the omissions in respect of the description of the men in the witness statements of Corporal Matthews and D/C McKay. She is recorded as saying at pages 537-538 of the transcript of the case:

"...I know that the Defense [sic] has made extremely, extremely heavy weather of both the policemen, as mentioned in the whole description of the men in their statement. These omissions I do not find either fatal or in any way affecting any area of the proof in the Prosecution's case, as the evidence came to the Court from the witness box. The accused men were known to both witnesses before, they had given the names of the accused, I accept and I find the Investigating Officer, so I do not find that their failure to describe the men in their statement is fatal. I am prepared to rely on the evidence in this case, I appreciate that warrants were not prepared for the arrest of the accused men, but I find that this would have been the responsibility of the Investigating Officer to whom the reports were made and not necessarily the responsibility of either District Constable McKay or [Corporal] Matthews, as the officers indicated that when the complainants are in the case, they were not to prepare warrants...."

[32] The issue of identification, as Dr Williams submitted, rested heavily on the credibility of Corporal Matthews and D/C McKay. The learned trial judge accepted these police officers as witnesses of truth. There is no basis to criticize her findings in this regard. The grounds dealing with this issue, therefore, failed.

Whether there was impermissible confrontation

[33] Dr Williams submitted that the confrontation of Mr McPherson by the police officers, the failure to hold an identification parade to test their claimed prior knowledge of him, and the learned trial judge's allowing Mr McPherson to be pointed out at the trial, without the benefit of a prior identification parade, deprived Mr McPherson of a fair trial.

[34] Learned counsel submitted that the circumstances surrounding Corporal Matthews and D/C McKay's pointing out of Mr McPherson to Detective Corporal

Wellington, by having Mr McPherson brought to them at the cell block, amounted to improper confrontation and should not have occurred. It was particularly egregious, Dr Williams submitted, in the light of the fact that over six months had elapsed between the June 2009 incident and the pointing out at the cell block.

[35] On behalf of Mr Samuels, Mrs Hay adopted Dr Williams' submissions. She did accept, however, that Mr Samuels' situation was somewhat different from Mr McPherson's, in the light of the shorter period of time between the date of the incident and the purported pointing out by Corporal Matthews and D/C McKay.

[36] Mr Taylor submitted that the learned trial judge was correct in her assessment of the circumstances of this case. He cited **France and Vassell v R** as a case in which the relevant principles were expounded.

[37] The learned trial judge carefully considered the matter of whether identification parades ought to have been held in respect of each of the applicants. She recounted Detective Corporal Wellington's evidence as to his reason for not securing an identification parade in each case. The learned trial judge accepted that no useful purpose would have been served by holding identification parades in these circumstances. She also found that the prior knowledge of Mr McPherson alleviated the situation where he was pointed out in the dock. She recounted and applied the relevant law in respect of these issues. This is set out at pages 539-542 of the transcript:

"...Holding an ID Parade would be unnecessary, and I can see some clarity [sic] in what Detective Wellington is saying in this respect. The accused men here had not been asked to stand in front of an Identification Parade or be involved in

an Identification Parade method. The men are known, I find, to both witnesses, for a period in excess of a year and I accept the witnesses' testimony in this respect, so we are dealing with recognition, as I have said before.... [Corporal] Matthews and DC McKay were saying that Samuels and McPherson committed the offences stated in the indictment. In the Privy Council's case of **[Ronald John v The State** (2009) 75 WIR 429]...he was pointed out in the check off of parades, is to test the reliability of the identification at a much earlier stage before either witness or a jury has had a chance. In cited cases....good practice in a number of situations, require the holding of an Identification Parade...It may be useful to hold one in order to establish that a witness cannot identify a suspect, as well as to establish that he can. There also is to be an ID Parade where [it] could serve a useful purpose, as failure to hold one may affect the fairness of the trial and the safety of the verdict. As in the case of...**[Pop v R** [2003] UKPC 40], succinctly puts it, the Judge should have gone on to warn the jury of the dangers of identification without a parade and should have explained to them, the potential advantage of an inconclusive parade to a defendant. Having warned myself and having found that both men were already known to DC McKay and [Corporal] Matthews before the commission of the offense [sic] or before they were seen committing the offence on the 6th of June – and having found that Samuels was seen on the 9th of June...and McPherson on the 2nd of January, and having found that they informed Detective Wellington of this, **I find that there has been a prior identification of both men and these prior identification [sic] was not about confrontation and certainly there was no need to hold an Identification Parade.** No useful purpose would be served and no unfairness would have been to either [man] in the absence of the holding of the Parade. I find, therefore, that the identification was carried out under new condition [sic], no risk of any corruption as regarding of [sic] the identification made by both policemen of the accused men. **Identification is complete, and it should be said that no further identification, I find is required, no useful purpose would be served.** In the circumstances of the case, I find, therefore, that there is no obligation to hold an ID Parade and there is no reason to suspect that DC McKay's and Corporal Matthews' identification of both men to Detective Wellington was unreliable. **I take note that [Corporal] Matthews had pointed out one of the**

accused in the dock and I appreciate that dock identification is inherently undesirable and to be frowned upon, but I go back to the situation where both the men were known to the policemen before, they were seen subsequent to the commission of the offence and they were pointed out to Officer Wellington, and I do not find, therefore, that absence of an Identification Parade is unfair.” (Emphasis supplied)

[38] The learned trial judge’s careful summation on this point is consistent with the direction given by their Lordships in **France and Vassell v R.** In that case, the eyewitness to a shooting claimed to have had prior knowledge of the shooters. One of the persons accused denied knowing the eyewitness, but no identification parade was held. The eyewitness only knew that person by, what was, apparently, an alias. He also did not give a description of the shooters to the police. In the appeal against conviction, complaints were made that no identification parade was held and that the witness was allowed to point out the accused in the dock.

[39] In considering these complaints, their Lordships made a number of pronouncements that are relevant to the present case. In response to the complaint that no description had been given to the police, their Lordships said the possible reason for the absence of a description was that the perpetrator was so well known. They said at paragraph 22 of the judgment:

“Although this argument was advanced persuasively, on analysis there is more than a hint of contrivance, not to say unreality, about it. The obvious but prosaic reason that no detailed description of the appellants was recorded from [the eyewitness] was that he had identified [the assailants] as persons whom he had recognised....Despite the attractiveness and ingenuity with which it was argued, the Board considers that there is no merit in this point.”

[40] On the complaint that that was not a case of recognition, their Lordships said at paragraph 27:

"Although counsel for the appellants submitted that these were not cases of recognition, there is really no basis on which that claim can be made. [The eyewitness] described how he knew both appellants before the shooting of his brother. He gave evidence about his knowledge of where they lived. He was not challenged on that evidence. Nor was he challenged about his claim that [Legamore [the man known only by an alias] attended the betting shop on Half-Way-Tree Road or on the evidence that France rode a red CBR motor cycle. It is true that [the eyewitness] did not know Legamore's proper name before the killing but that is nothing to the point. His acquaintance with both men before the murder was extensive. He had had countless opportunities to observe them. His claim to be able to identify them on the basis of those earlier contacts cannot be characterised as anything but recognition. **The judge was plainly right to direct the jury that this was a recognition case and...his directions as to how it was to be approached cannot be criticised.** (Emphasis supplied)

It is accepted that the circumstances of knowledge in **France and Vassell v R** are not on all fours with the present case. Whereas the eyewitness gave evidence of extensive acquaintance with the perpetrator in that case, Corporal Matthews and D/C McKay did not do so in this case, but both police officers testified that they previously knew both applicants by name, by alias and knew the general area in which they lived.

[41] It must similarly be accepted that the evidence concerning prior acquaintance allowed their Lordships to conclude that there would have been no useful purpose to have been served in holding an identification parade in that case. It was clear, however,

that the evidence of the prior knowledge was important to the conclusion. They said, in part, at paragraph 32:

"It is difficult to resist the conclusion that, against this background, it is extremely likely that [the eyewitness] would have picked out the man that he claimed to have known as 'Legamore' for eight years and more and whom he had already identified to the police as one of the [assailants]. It is, therefore, at least, very doubtful that any useful purpose would have been served by holding an identification parade. In any event, it cannot be plausibly suggested that the failure to hold an identification parade caused a serious miscarriage of justice. The appellants' arguments on this aspect of the appeal must be rejected."

[42] On the point of the dock identification, their Lordships repeated the principle that where the accused was known before, had previously been identified by name to the police prior to the trial, and was being pointed out in court, that was not a case that carried the dangers of dock identification as used in its strict sense. They said, in part, at paragraphs 33-36:

"33. The argument that the trial judge should not have permitted a dock identification of the appellants and that he failed to deal adequately with the dangers of such an identification can be taken together and dealt with briefly. **A dock identification in the original sense of the expression entails the identification of an accused person for the first time by a witness who does not claim previous acquaintance with the person identified. The dangers inherent in such an identification are clear and have been the occasion of repeated judicial warnings...**

34. There has been a tendency to apply the term 'dock identification' to situations other than those where the witness identifies the person in the dock for the first time. This is not necessarily a misapplication of the expression but **it should not be assumed that the dangers present when the identification takes place for the first time**

in court loom as large when what is involved is the confirmation of an identification already made before trial. Nor should it be assumed that the nature of the warning that should be given is the same in both instances. Where the so-called dock identification is the confirmation of an identification previously made, the witness is not saying for the first time 'This is the person who committed the crime'. He is saying that 'the person whom I have identified to police as the person who committed the crime is the person who stands in the dock'.

35. ...

36. ...This was not in any real sense a dock identification. It was, as Lord Brown said in [Stewart v The Queen [2011] UKPC 11; 79 WIR 409, a pure formality. The warning in the present case needed to be directed, therefore, not to the danger of the witness assuming that the persons in the dock, simply because of their presence there, committed the crime but to the need for careful scrutiny of the circumstances in which the purported recognition of the appellants was made...." (Emphasis supplied)

[43] The learned trial judge, having correctly identified the relevant law, could not be faulted in its application to the facts of this case, bearing in mind her finding of fact that the two police officers knew both applicants before. She was entitled to find, based on that finding that no useful purpose would have been served by holding an identification parade for either of these applicants. Her reasoning, concerning the identification of Mr McPherson in the dock, also cannot be faulted.

[44] The grounds relating to this issue also fail.

The adequacy of the summation in respect of good character

[45] The learned trial judge's summation in respect of good character of the applicants did not follow the typical formula of addressing credibility, where that was

relevant, or propensity. She did take the view however, that they were both raising the issue of their good character. She dealt with the point by saying that she took it into account and would give it the weight that she thought that it deserved. Her directions to herself on this point are recorded at page 546 of the transcript:

"Now, [Mr Samuels] in his unsworn statement said that on the 6th of June, he was at home. He was at home and his mom sent him to the supermarket. Now, first he said that he worked at a wholesale, so Samuels seems to be saying that he has been helpful to his Mother, McPherson is saying that he was gainfully employed. It seems to me that they are both saying that they are powerful [sic] characters, of course, with [sic] characters by itself cannot provide a defence to prove a charge, I have to take into account the accused status and decide what weight I should give to it. I have also taken this into consideration and [that] they are both young men...."

[46] The submission by counsel for the applicants, especially on Mr McPherson's behalf was that the direction on good character was inadequate. It was argued that Mr McPherson was at least entitled to a proper direction on the effect of good character on his propensity to commit such an offence. Learned counsel submitted that, in the context of the disputed evidence, the inadequate summation made the convictions unsafe and that they ought to be quashed.

[47] Miss Steele for the Crown, in her first appearance before this court, submitted that whereas Mr Samuels, who had a previous conviction for a firearm related offence, was not entitled to a good character direction, Mr McPherson, because of what he had said in his unsworn statement, was entitled to one dealing with a lack of propensity. Learned counsel submitted that the learned trial judge was entitled to infer from his

statement that he was asserting that he was gainfully employed. She argued that despite the fact that the summation on this point was not thorough, it was not inadequate, and there was no miscarriage of justice arising from it.

[48] She cited, in support of that submission, the case of **Michael Reid v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 113/2007, judgment delivered 3 April 2009. In that case, Morrison JA (as he then was) stated that it was not every case in which there was a failure to give a deserved good character direction, that would result in the conviction being quashed.

[49] In assessing these arguments, it is to be noted that there is case law to support Mr McPherson's entitlement to have the benefit of a good character direction. In **Bruce Golding and Damion Lowe v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 4 and 7/2004, judgment delivered 18 December 2009, the applicant Mr Golding told the court in an unsworn statement, that, "I am not a gunman, Your Honour, I am a working youth". Based on that assertion, the trial judge in that case gave the jury a good character direction in favour of Mr Golding. She, however, limited the direction to the propensity limb of that issue.

[50] In that case, Mr Golding, in an application for leave to appeal against his conviction, complained that he was also entitled to the benefit of the credibility limb of a good character direction. In commenting on that complaint, Morrison JA (as he then was), in delivering the judgment of this court, agreed that Mr Golding was entitled to a good character direction. He stated that the trial judge could not, however, have been

faulted for limiting the direction to the propensity limb. He said at paragraph 92 of his judgment:

"In the instant case, we consider...that while the applicant was entitled to a good character direction, having distinctly raised his good character in his unsworn statement, the credibility limb of that direction would have been of doubtful or reduced value...."

[51] The learned trial judge in the instant case thought that Mr McPherson was entitled to a good character direction, as did the prosecutor, who told the learned trial judge that he had hoped that she would have given one. In her direction to the jury, there was, despite the absence of the mention of the term "propensity", a sufficient indication that the learned trial judge did consider the issue of good character. It cannot be said, however, that the direction was consistent with the usual standard required.

[52] The failure to give a proper good character direction, where the issue is raised, is not automatically fatal to the conviction. That point was made by Morrison JA (as he then was) in delivering the judgment of this court in **Patricia Henry v R** [2011] JMCA Crim 16. The learned judge of appeal said that, where a deserved good character direction was not given, this court was entitled to determine whether the failure resulted in a miscarriage of justice. He said, in part, at paragraphs [50]-[51]:

"[50] ...it is equally clear from the authorities that, as [counsel for the Crown] submitted, the approach required of this court in a case in which it considers that such a direction should have been given is to make its own assessment of the evidence ... and to consider whether the outcome would have been the same had the trial judge given the proper direction.

"[51] ...it appears to us that this is a case in which the potential benefit of a good character direction to the appellant was wholly outweighed by the nature and coherence of the evidence which [the trial judge] accepted...."

[53] In similar vein, we held the view that the evidence accepted by the learned trial judge was such that there would have been no difference in the result, had she given herself the typical direction on the propensity limb. We agreed with Miss Steele that there was no miscarriage of justice in respect of this aspect of the case.

[54] Having said that, however, it is noted that in **Michael Allison and Others v R** [2012] JMCA Crim 31, the applicant, Mr Allison, used very similar terms to those used by Mr McPherson, yet this court held that they did not entitle him to a good character direction. In that case, Mr Allison said in his testimony that he baked and sold "peanut, grater cake and peanut cake". He gave details as to how he carried out his trade, including the hours spent each day in plying that trade. In addition to that evidence, he said, at one point, "I don't really gamble". In addressing the point, at paragraph [24] of the judgment in that case, this court said that the evidence did no more than state that Mr Allison was hard-working and did not "really" gamble.

[55] If a distinction is to be drawn between the circumstances of **Bruce Golding and Damion Lowe v R** and **Michael Allison and Others v R**, it is perhaps that Mr Golding asserted that he was not a gunman. It is accepted, however, that the dividing line is not clear as it could, perhaps, be.

[56] In the present case, it may be said that the learned trial judge was generous in her determination that a good character direction was required. Having done so, however, she should have given a direction to the jury that addressed the propensity point, even if she did not use that particular term.

The sentences imposed

[57] Although the applicants both filed grounds of appeal complaining about the sentences that were imposed, both Dr Williams and Mrs Hay, quite candidly, accepted that the sentences were within the usual range for those offences. The concessions were appropriate and learned counsel are commended for their candour. The sentences could not properly have been disturbed.

Summary and conclusion

[58] In conclusion, we found that the evidence presented by the prosecution amounted to a strong case against the applicants. The learned trial judge identified the relevant issues, including visual identification, and dealt with them adequately. Her acceptance of the evidence of Corporal Matthews and D/C McKay that they knew both applicants before and recognized them at the location where the shooting took place cannot be faulted.

[59] Those findings were critical to the issues of identification, confrontation and dock identification as raised in this appeal. The conclusion was that those issues could not be decided in favour of the applicants.

[60] Although the learned trial judge did not give a typical direction in respect of good character, her treatment of the issue, which she viewed had been raised in Mr McPherson's unsworn statement, did not amount to a miscarriage of justice.

[61] It is for those reasons that we made the orders that are set out in paragraph [3] above.