

JAMAICA

IN THE COURT OF APPEAL

SITTING IN LUCEA, HANOVER

SUPREME COURT CRIMINAL APPEAL NO 62/2015

**BEFORE: THE HON MR JUSTICE BROOKS JA
THE HON MISS JUSTICE P WILLIAMS JA
THE HON MR JUSTICE PUSEY JA (AG)**

JOSEPH MITCHELL v R

Roy Fairclough and Mrs Tamika Spencer-Anderson for the appellant

Miss Paula Llewellyn QC, Director of Public Prosecutions and Ms Judi-Ann Edwards for the Crown

4, 7 December 2018 and 22 February 2019

BROOKS JA

[1] We heard this appeal on 4 December 2018 and, three days later, on 7 December, gave the following decision:

- “1. Appeal dismissed.
2. Convictions and sentences affirmed.
3. Sentences deemed to have commenced on 30 July 2015.”

At that time, we promised to put our reasons in writing. This is the fulfilment of that promise.

[2] On 9 May 2015, sometime after 9:00 pm, Mr Dane Lewis was on his way from Westgate to his home in Anchovy. Both places are in the parish of Saint James. He noticed a car following the taxi that he was in, and, as a result, he did not alight at his usual spot but went further along the route. He came off by the Anchovy High School.

[3] He walked toward home by way of a train line, which was near to the main road. As he got to the train line he saw the appellant Mr Joseph Mitchell, whom he knew before, stand up from behind some bushes, where he was apparently stooping, lying in wait for Mr Lewis.

[4] On Mr Lewis' account, Mr Mitchell pointed a gun at him and said, "'Hot Box', me hold yuh now. Dead yuh fi dead" (page 8 of the transcript). Mr Lewis said that he is also known as "Hot Box".

[5] In the face of that threat, Mr Lewis turned and ran.

[6] As he ran off, he heard four gunshots. He ran and hid in a nearby common. He telephoned the police from his hiding place, and they came and rescued him. As he waited for them, he saw a car, resembling one usually driven by Mr Mitchell, patrolling the area of the nearby main road.

[7] Two days later, Mr Mitchell went to the police station. There, he was arrested and charged for the offences of illegal possession of firearm and shooting with intent.

[8] At the trial before Martin Gayle J, sitting without a jury, in the Western Regional Gun Court, Mr Mitchell said, in an unsworn statement, that on that evening, he was at

home with his family. He called, as a witness, his child's mother, Ms Tasheka Vernon, who confirmed that alibi.

[9] On 17 July 2015, the learned trial judge, found Mr Mitchell guilty of the offences of illegal possession of firearm and shooting with intent. In his summation, he analysed the evidence, gave himself directions in law, on the various issues that arose during the trial, and concluded that he believed Mr Lewis' account, and did not believe Mr Mitchell's alibi.

[10] He sentenced Mr Mitchell to 15 years imprisonment in respect of the former offence and 20 years imprisonment in respect of the latter. The sentences were imposed on 30 July 2015 and ordered to run concurrently.

[11] Mr Mitchell has filed, with permission, an appeal against his conviction. Mr Fairclough, on behalf of Mr Mitchell, argued four grounds of appeal:

- (1) "The Learned Trial Judge erred in dealing with the issue of character when he held that the Appellant by giving an [unsworn] statement was thereby deprived of the right to have his good character considered on the issue of credibility."
- (2) "The learned trial judge failed to explore the feud between the accused and the complainant, resulting in a substantial miscarriage of justice."
- (3) "The learned trial judge failed to treat the issue of the credibility of the witness in the context of the case and mechanically applied the guidelines set out in *Turnbull* which was designed to guard against mistaken identity and gives no assistance where the complainant had volunteered in his evidence in chief that there is an ongoing feud between himself and the defendant."

- (4) "The learned trial judge grossly misstated the law on evidence of good character."

Grounds 1 and 4 were argued together and will be analysed before the others.

Grounds 1 and 4 - The treatment of the good character evidence

[12] Mr Fairclough submitted that the issue of credibility was critical to the resolution of this case. Learned counsel argued that, in that context, Mr Mitchell was entitled to a full character direction. He had not been given the benefit of such a direction, learned counsel submitted, and was, therefore, at an unfair disadvantage when the issue of credibility was considered.

[13] Learned counsel confidently submitted that despite Mr Mitchell having made an unsworn statement, he was still entitled to a good character direction, which addressed both the propensity limb and the credibility limb of that direction. This, learned counsel submitted, was because Ms Vernon had testified as to Mr Mitchell's good character.

[14] Mr Fairclough submitted that the learned trial judge erred when he ruled that Mr Mitchell was not entitled to a favourable direction on the credibility limb of a good character direction. Learned counsel also criticised certain aspects of the summation, which seemed to suggest that the learned trial judge had withdrawn a consideration of both limbs of the good character direction. "By so doing", learned counsel submitted, the learned trial judge "excluded from consideration a vital element of the defense [sic] and thereby caused a substantial miscarriage of justice".

[15] Learned counsel relied, in support of these submissions, on **Patrick Forrester v R** [2010] JMCA Crim 17 and **Chris Brooks v R** [2012] JMCA Crim 5.

[16] The learned Director of Public Prosecutions, Miss Llewellyn QC, was diffident in her submissions on the requirement of a credibility limb direction. She was somewhat constrained by written submissions, which had been previously submitted by the Crown, but had not been settled by her. Those written submissions conceded that, in this context, the learned trial judge had erred in four respects, namely:

- “[1] That the then accused was entitled to only the propensity limb of the direction (p.75:19-22);
- [2] That he could not examine his propensity because he gave an unsworn statement and that statement was not tested by cross examination (p.76.2-5).
- [3] That where credibility is in issue that a good character direction is always relevant [**Teeluck (Mark) and John (Jason) v The State**] The LTJ identified that credibility was one of the main issues in the trial (p.72:11-12 and 76:1-6). Especially in light of the fact that the witness Dane Lewis stated that the appellant had a vendetta and a feud with him (p.6:13-18).
- [4] Tasheka Vernon having given sworn evidence of the then accused’s good character he was entitled to both limbs of the direction – the credibility and the propensity direction. [**Teeluck (Mark) and John (Jason) v The State**]” (Square brackets as in original)

[17] In oral submissions, learned Queen’s Counsel departed to some degree from the written submissions. She submitted that the context of the summation did not support the assertion that the learned trial judge had denied Mr Mitchell the benefit of a

direction on the propensity limb. She eventually submitted, however, with some hesitation, that since Mr Mitchell had not given sworn testimony, he would not have been entitled to the benefit of the credibility limb of a good character direction. She referred to both cases that were cited by Mr Fairclough and also relied on **Teeluck (Mark) and John (Jason) v The State** (2005) 66 WIR 319.

[18] Miss Llewellyn submitted, however, that any errors made in this area by the learned trial judge would not be fatal to the convictions. She argued that, given the fact that this was an overwhelmingly strong recognition case, there was no miscarriage of justice in the matter. The learned Director submitted that the proviso to section 14(1) of the Judicature (Appellate Jurisdiction) Act, should therefore, be applied.

[19] In analysing these submissions, it is first necessary to assess the directions that the learned trial judge gave to himself. These are recorded at pages 75-76 of the transcript. There, he said, in part:

"The accused man is running what is known as an alibi. It is for the prosecution to disprove the alibi. He raises his good character by saying he has a child, he lives with a lady and he takes care of his child. So he is saying he is a good person. He gave what is known as a [sic] unsworn statement. A statement from the dock. The court can give it what weight it thinks, if any. **When he raised his good character, since it is an unsworn statement the court can only look at one limb, that is the limb of propensity.** Does he have a propensity? He is saying that he is not of that propensity to commit such an offence. Because he gave an unsworn statement I cannot look at the credibility issue of his good character. **I cannot look at propensity.** His evidence was not tested by cross-examination. So a great deal of this case rests upon credibility and the identification." (Emphasis supplied)

[20] Although the learned trial judge, as shown in the second highlighted portion of that quotation, stated, "I cannot look at propensity", it seems clear, from the context, and from the first highlighted statement, that he misspoke, and meant to say, "I cannot look at credibility". This can be deduced from his earlier statement, "the court can only look at one limb, that is the limb of propensity". He later said, "[b]ecause he gave an unsworn statement I cannot look at the credibility issue of his good character".

[21] Despite Mr Fairclough's submissions on this aspect, it seems readily apparent that the learned trial judge did give Mr Mitchell the benefit of the propensity limb of the good character direction. Miss Llewellyn's oral submissions, in this regard, are correct.

[22] The next issue is whether, despite not giving evidence himself, the fact that a witness gave sworn testimony in the case, concerning Mr Mitchell's good character, entitled him to a direction on good character, based on the credibility limb.

[23] This issue has already been decided by this court in at least three cases. The cases are **R v Syreena Taylor** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 95/2004, judgment delivered 29 July 2005, **Leslie Moodie v R** [2015] JMCA Crim 16 and **Vince Edwards v R** [2017] JMCA Crim 24. Whereas the origins and development of the law, in relation to the issue, do not need a detailed analysis, some basic principles may be helpful to lay the framework for the points that those cases make.

[24] The decided cases have established that there are two possible limbs to a good character direction. The details of the effect of these limbs were summarised in **Tino Jackson v R** [2016] JMCA Crim 13 at paragraph [24]:

“...The propensity limb speaks to the likelihood, or more accurately, unlikelihood, of the person accused having committed such an offence. The credibility limb speaks to the likelihood of his being truthful in his assertions of innocence to the court. If an accused raises the issue of his good character in an unsworn statement only, the cases suggest that whereas he is entitled to a good character direction on the propensity limb, a direction on the credibility limb may be of limited effect....[This point] was considered at paras [128]-[130] of **Leslie Moodie** [2015] JMCA Crim 16. If, however, the accused gives sworn evidence, in which he distinctly raises his good character, he is entitled to a full direction on both limbs.”

[25] The first case, which is recorded as having considered the point raised by Mr Fairclough, is **R v Syreena Taylor**. In that case, the accused, Ms Taylor, gave an unsworn statement. She, however, called two witnesses who gave good character evidence on her behalf. Harris JA (Ag), as she then was, in delivering the judgment of this court, said quite unequivocally that such an accused is not entitled to the benefit of a direction on the credibility limb. She said, in part, at pages 12-13 of the judgment:

“An accused who exercises the option to give unsworn statement [sic] does so at his or her peril. An unsworn statement is not commensurate with sworn testimony. **It is open to a jury to attach to it such weight as it deems fit. The applicant [Ms Taylor] having not given sworn testimony, no issue as to her credibility would have arisen. The trial judge was under no obligation to have given directions on her credibility.** He would only have been under a duty to have done so, had there been in evidence a pre-trial exculpatory statement made by her in

respect of her good character on which the applicant had placed reliance..." (Emphasis supplied)

Harris JA (Ag) then relied on **R v Vye; R v Wise; R v Stephenson** [1993] 3 All ER 241 and **R v Aziz** [1995] 3 WLR 53 for support for her ruling on the point. Although **R v Syreena Taylor** was decided some 13 years ago, it does not seem that the Privy Council has yet pronounced on this aspect, in the context of this or any similar jurisdiction, where an accused is entitled to choose to make an unsworn statement.

[26] This court, however, again considered the point in **Leslie Moodie v R**. The appellant, Mr Moodie, made an unsworn statement from the dock, but called a defence witness who testified that the appellant was a person of "exemplary character". When Mr Moodie's case came before this court on appeal, Morrison JA, as he then was, noted that this court had previously opined that where an accused has made an unsworn statement there was no obligation to give a good character direction, which includes the credibility limb. He said at paragraph [128] of his judgment:

"...in **R v Syreena Taylor** SCCA No 95/2004, judgment delivered 29 July 2005, at page 12, this court, basing itself on **Vye**, did observe that the trial judge was under 'no obligation' to give directions as to the credibility of a defendant who made an unsworn statement. As far as we are aware, the Privy Council has yet to put the matter as categorically as this and it may well be that, at an appropriate time, this could be a question for further exploration."

[27] Morrison JA went on in his judgment in **Leslie Moodie v R**, to set out the law, which applied in circumstances such as those in Mr Mitchell's case, where an accused does not give sworn testimony. He said, in part, at paragraph [130]:

“So it is plainly open to doubt whether, even assuming that the appellant [Mr Moodie] was entitled to a credibility direction, it would have been of any value at all to him, since the learned trial judge would have been equally entitled in those circumstances to remind the jury that, by opting to give an unsworn statement, the appellant had not exposed himself to cross-examination (see **Lawrence v The Queen** [[2014] UKPC 2], para. 23 and **Stewart v The Queen** [[2011] UKPC 11], para. 16)...”

[28] The circumstances in **Vince Edwards v R** are also identical, for the purposes of these grounds of appeal, to those in the present case. Mr Edwards gave an unsworn statement but called witnesses who testified to his good character, reliability and truthfulness. After an assessment of the relevant authorities, this court said at paragraph [96]:

“In the light of the foregoing, it would be correct to say that the law of this jurisdiction, as enunciated by **R v Syreena Taylor** and **Horace Kirby v R** [[2012] JMCA Crim 10], is that the trial judge was under ‘no obligation’ to give directions as to the credibility, in the context of good character, [of] an accused who has made an unsworn statement.”

[29] That trilogy of cases, **R v Syreena Taylor**, **Leslie Moodie v R** and **Vince Edwards v R**, are on all fours with the present case, insofar as the accused gave an unsworn statement, but called a character witness. It must be, respectfully, stated that the reasoning by Harris JA in **R v Syreena Taylor** is sound. The learned judge of appeal referred to the statement of Lord Taylor of Gosforth CJ in **R v Vye**, where he said, at page 245 of the report:

“Clearly, if a defendant of good character does not give evidence and has given no pre-trial answers or statements,

no issue as to his credibility arises and a first limb direction [that is on credibility] is not required.”

It is noted that the learned Law Lord did not expressly contemplate, as an option for triggering a direction on the credibility limb, the possibility of testimony by a character witness.

[30] That situation did arise, however, in one of the cases, to which Lord Taylor of Gosforth referred. In **R v Bryant** [1978] 2 All ER 689, Mr Bryant did not give evidence at his trial, but he called witnesses to testify as to his good character. The Court of Appeal of England, in his appeal, intimated that, in those circumstances, the accused would only be entitled to a good character direction based on the propensity limb. **R v Bryant** was decided before the 1982 abolition, in England, of unsworn statements.

[31] Lord Taylor of Gosforth, in referring to **R v Bryant**, did not disapprove of the court’s approach. He said, at page 244:

“In *R v Bryant* [1978] 2 All ER 689, [1979] QB 108 the defendant, a man of good character, elected not to give evidence. In his direction to the jury the judge appeared to suggest that good character was relevant only to credibility. In this court that approach was said to be ‘too restrictive’. Good character was relevant ‘primarily to the issue of credibility’. Nevertheless, juries ‘should’ be directed that it was capable of general significance of the kind suggested in the passage quoted from [**R v Stannard** (1837) 7 C & P 673 at page 675, which supported a direction based on the propensity limb]. However, notwithstanding the omission of a *Stannard* direction, the verdict was found neither unsafe nor unsatisfactory.”

[32] The issue raised by Mr Fairclough was specifically addressed by the Caribbean Court of Justice in **Gregory August and Another v The Queen** [2018] CCJ 7 (AJ).

That case was an appeal from the Court of Appeal of Belize. Although the facts in that case was slightly different from the present case, in that the appellant had given an unsworn statement but had not called any character witness, the pronouncement by the court is applicable to this case.

[33] The court ruled that an accused who gives an unsworn statement is not entitled to a good character direction, as to credibility. It said at paragraphs [48] and [49]:

“[48] The question which remains for us is whether a defendant who has given an unsworn statement from the dock should be entitled to the credibility limb of the good character direction. The jurisprudence coming out of Jamaica suggests that where a defendant either did not give sworn evidence or gave unsworn evidence of his character, a good character direction as to credibility would have a ‘reduced value’, would be ‘altogether less helpful’ or would be ‘qualified’.

[49] It is understood that the aim of a good character direction is to ensure fairness of the trial process. It is the duty of the trial judge to ensure that the trial is fair and even-handed and an appropriate good character direction plays an important part in ensuring that fairness and even-handedness. Where a defendant, of good character, has given sworn testimony and has subjected himself to cross-examination, the trial judge maintains fairness and balance in the trial by directing the jury that, because of his good character, the defendant is a person who should be believed. **Where however the defendant is not willing to place himself in a position where his credibility can be tested, we do not think that he should benefit from a good character direction as to credibility.** Where a defendant does not give sworn testimony therefore, it is in our view, unnecessary to ensure the fairness of the trial process, for the trial judge to direct the jury on the defendant’s credibility. **The defendant is,**

however, still entitled to the propensity limb whether or not he has given sworn evidence.”
(Emphasis supplied)

The reasoning of the court is gratefully accepted as being applicable to the circumstances in this jurisdiction.

[34] Based on those authorities and the reasoning set out above, it should be stated that in order to benefit from a direction on the credibility limb of a good character direction, an accused must either have made pre-trial statements or answers or have given sworn testimony in his defence, or both. He must also raise the issue of his good character. The issue may be raised in one or more of the following ways:

- a. in evidence of his exculpatory pre-trial statements or answers;
- b. by his sworn testimony; or
- c. through the testimony of a witness, either for the prosecution or for the defence.

[35] That reasoning is dispositive of Mr Fairclough's submissions on this point. The submissions, respectfully, cannot be accepted. Neither the case of **Patrick Forrester** nor **Chris Brooks**, cited by Mr Fairclough, assisted the analysis. In both those cases, the accused gave sworn testimony.

[36] It is also possible to agree with Miss Llewellyn, that the strength of the prosecution's case against Mr Mitchell was such that a good character direction, containing both limbs, would not have assisted him.

Grounds 2 and 3 - The treatment of the evidence in respect of the vendetta

[37] Mr Fairclough argued that the learned trial judge did not sufficiently consider Mr Lewis' evidence that Mr Mitchell had a vendetta against him, and that they were in a feud. Learned counsel submitted that the learned trial judge should have considered the effect that that situation could have had on Mr Lewis' evidence.

[38] Allied to those submissions, learned counsel argued that the learned trial judge's application of the **Turnbull (R v Turnbull (1976) 63 Cr App R 132; [1976] 3 All ER 549)** guidelines was mechanical and insensitive to the possibility of a concoction, because of the feud to which Mr Lewis referred.

[39] Mr Fairclough is not on good ground with this submission. It must first be said that the learned trial judge gave himself an adequate **Turnbull** warning, with regard to the dangers associated with visual identification. He introduced the issue by summarising the defence of alibi as being that Mr Lewis "is either mistaken or lying" about Mr Mitchell being his attacker (page 73 of the transcript). Between pages 73 and 75, the transcript records the learned trial judge's warning to himself of:

- a. the need for caution in cases of visual identification;
- b. the possibility of mistake, even in cases of recognition;
- c. the benefit to recognition of previous knowledge of an individual; and

- d. the need to carefully examine the circumstances of the sighting.

He then went on to examine Mr Lewis' evidence in the context of the circumstances of the view that he had of his attacker. The learned trial judge's approach to the issue of the identification cannot be fairly said to be mechanical or insensitive to the evidence before him.

[40] The essence of the other aspect of Mr Fairclough's complaint is that the learned trial judge did not pay sufficient attention to the issue of Mr Lewis' credibility. In other words, the complaint is that the learned trial judge did not sufficiently take into account the possibility that the feud between Mr Mitchell and Mr Lewis may have motivated Mr Lewis to concoct a false accusation against Mr Mitchell.

[41] That would not be a fair or valid complaint. The learned trial judge said, very early in his summation, "a great deal of this case rests upon credibility and... identification" (page 76 of the transcript).

[42] In his conclusion, after his analysis of the evidence, the learned trial judge returned to the issue of credibility. He said, in part, at page 90 of the transcript.

"Having seen and heard Mr. Dane Lewis, I believe him when he says that he looked at this accused man for the 3 to 5 minutes -- for 3 to 5 minutes -- 3 to 5 seconds. I believe him when he said that the lighting condition was right above the guango tree, that street lights, which was corroborated by officer, Mr. Hilton. I believe [sic] when he said this man who he knew before shot at him, fired 4 shots. I believe him when he said he knew him before. I find that his credibility was good. I believe his evidence. I find that the distance, the lighting and the time in this case was good and is good.

I find that he made no mistake and he's a credible witness and his demeanour demonstrated such to me...."

[43] Mr Fairclough also identified certain issues of fact, which he submitted the learned trial judge wrongly relied upon in accepting Mr Lewis' evidence of visual identification. Among these, learned counsel pointed out, were:

- a. Mr Lewis' intimation that Mr Mitchell's car was trailing him while he was in the taxi, yet Mr Mitchell was waiting for him when he got out of the vehicle;
- b. the fact that the assailant called to Mr Lewis by his nickname, and
- c. the fact Mr Lewis said that, after the attack, he saw Mr Mitchell's car driving up and down along the road.

[44] Learned counsel submitted that the first of those items was contradictory. He contended that there was no explanation for Mr Mitchell being ahead of, and waiting for, Mr Lewis when the evidence was that he was driving behind the taxi.

[45] The other items, learned counsel submitted, could not have been helpful in identifying Mr Mitchell as the attacker. Firstly, Mr Fairclough submitted, other people would have known Mr Lewis by his nickname, "Hot Box". Learned counsel also submitted that all Mr Lewis could say was that he saw a silver Caldina motor car circling after the shooting, he could not say, with certainty, that it was Mr Mitchell's car. Although Mr Mitchell said that he did sometimes drive his mother's silver Caldina, there is no evidence identifying that vehicle as being the one that was "circling" that night.

[46] These were questions of fact for the learned trial judge. The learned trial judge would have considered that impugned evidence in the context of the very strong evidence of Mr Lewis that he knew Mr Mitchell before, that he saw him in good lighting and that Mr Mitchell spoke to him.

[47] The learned trial judge, who saw and heard Mr Mitchell, Mr Lewis, and indeed all the other witnesses, was entitled to accept, Mr Lewis as being truthful and reliable in respect of these areas of the evidence. His conclusions on them cannot be faulted.

[48] Based on all the above these grounds must also fail.