[2021] JMCA Crim 43

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MRS JUSTICE V HARRIS JA
THE HON MR JUSTICE BROWN JA (AG)

SUPREME COURT CRIMINAL APPEAL 107/2014

JERMAINE PLUNKETT v R

Michael Jordan instructed by Jordan & Francis for the applicant

Mrs Tracy-Ann Robinson and Miss Vanessa Campbell for the Crown

30 June and 5 November 2021

V HARRIS JA

[1] The application and appeal before us concern a shooting in the early morning of 23 November 2010, which led to the tragic death of a young boy ('the deceased') as he slumbered in his bed. On 12 December 2014, following a trial in the Home Circuit Court before a judge ('the learned judge') sitting with a jury, Mr Jermaine Plunkett ('the appellant') was convicted for that murder. He was sentenced to life imprisonment with the stipulation that he should serve a minimum of 32 years before becoming eligible for parole.

[2] On 18 December 2014, the appellant applied for leave to appeal his conviction and sentence. On 19 April 2017, his application for leave to appeal conviction was refused by a single judge of this court. However, leave to appeal his sentence was granted on the basis that the period of imprisonment to be served before eligibility for parole seemed manifestly excessive.

[3] As is his right, the appellant has simultaneously pursued the appeal against his sentence and renewed the application for leave to appeal his conviction before this court. Accordingly, on 26 June 2021, an amended notice and ground of appeal were filed by counsel, Mr Jordan, on the appellant's behalf. The single ground of appeal identified in the amended notice is as follows:

> "i. The Learned trial Judge erred in law when she failed to uphold the no case submission made on behalf of the appellant in relation to the inadequacy of the identification evidence."

[4] At the start of the hearing, Mr Jordan sought and obtained leave to abandon the original grounds of appeal with respect to the conviction and to argue, instead, the single supplementary ground of appeal. However, in keeping with the ruling made by the single judge of this court, although no ground was filed, counsel was permitted to argue that the sentence imposed by the learned judge was manifestly excessive, in the event that the court did not accept that the conviction should be disturbed. Having heard the submissions from the parties, we reserved our decision which we now provide; but, first, a brief summary of the proceedings in the court below.

The trial

The prosecution's case

[5] Seven witnesses testified on the prosecution's case. However, the crucial evidence was that of the sole eye-witness, Mr Ricardo Williams, the deceased's elder brother. On 23 November 2010, at approximately 3:00 am, Mr Williams was in his room at 68 Chisholm Avenue, Kingston 13, in the parish of Saint Andrew, along with the deceased and a friend, Mr Duhaney Dallas. Mr Williams and the deceased were asleep on the bed while Mr Dallas was sleeping on a chair beside the bed. Mr Williams heard voices outside of his room and decided to check. As he stepped off the bed, three men forcefully entered the room and immediately began to fire several shots in the direction of Mr Dallas. Mr Williams had by this time jumped to what he described as a "corner" in front of a stack of buckets, with his back turned to the men.

[6] Mr Williams testified that when he turned around and looked towards the door, he saw the faces of the three men and "fire and smoke" coming from the guns in their hands. He identified the appellant as the person inside the room, in front of the other two men. One of the two men was partially inside the room while the other stood at the edge of the doorway.

[7] After firing several gunshots inside the room, the men then ran away. Mr Williams valiantly pursued the heavily armed men. He was subsequently alerted that Mr Dallas and the deceased had been shot. They were both taken to the hospital, but the deceased succumbed to his injury and died on 24 November 2010 (the day following the incident).

[8] Mr Williams gave two statements to the police in which he identified the appellant as one of the three men inside his room on the morning of the incident. He also gave evidence at the trial that he knew the appellant from primary school, and they were "close friends". In addition, Mr Williams would see the appellant daily in his community, and he (the appellant) often visited his room with others to "play game or a run boat or watch TV". Concerning the other two men, Mr Williams initially identified them as persons whom he knew by name. However, he later resiled from this position.

Submissions at the end of the prosecution's case

[9] At the end of the prosecution's case, counsel for the appellant made two submissions. The first concerned Mr Dallas' statement, which contradicted some aspects of the identification evidence given by Mr Williams. Mr Dallas could not be located to give evidence at the trial. His absence led to a submission by counsel to the effect that the learned judge should call Detective Corporal David Burrell, the police officer who took Mr Dallas' statement, to testify. The learned judge rejected this submission on the premise that the circumstances required in law for her to exercise her discretion in this manner had not been met. In the end, Detective Corporal Burrell was called as a witness on the appellant's case. His evidence will be discussed below.

[10] The second submission made by defence counsel was that the identification evidence given by Mr Williams was riddled with inconsistencies and discrepancies, and so the appellant ought not to be called upon to answer the prosecution's case. Counsel relied on the leading case of **R v Galbraith** [1981] 2 All ER 1060, as well as **Herbert Brown and Mario McCallum v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 92 and 93/2006, judgment delivered 21 November 2008. In response, counsel for the prosecution submitted that inconsistencies and discrepancies are matters for the jury.

[11] After hearing the submissions, the learned judge acknowledged that there were several inconsistencies in relation to the lighting. Nonetheless, she agreed with the prosecution that the matter was to be left to the jury to decide what lighting was available and whether it was sufficient to allow Mr Williams to correctly identify the appellant.

The case for the defence

[12] The appellant, on his case, made a brief statement from the dock denying the allegations. He also raised his previous good character by asserting that he was a hard-working young man who had never killed anyone.

[13] The only witness called by the appellant was Detective Corporal David Burrell. He testified that on 23 November 2010, he went to 68 Chisholm Avenue in the parish of Saint Andrew, where he made certain observations. He also recorded a statement from Mr Dallas at the Kingston Public Hospital. Detective Corporal Burrell was permitted, based on the ruling of the learned judge, to refresh his memory from Mr Dallas' statement and thereafter was allowed to give evidence of the contents of a specific portion of that statement, which relates to the identification of the perpetrators. It is recognised that the evidence given by Detective Corporal Burrell was clearly hearsay. However, it is gleaned from the transcript (page 441 lines 9-15) that the learned judge allowed this evidence to be placed before the jury "in the interests of justice" so that "the contradictory evidence" in Mr Dallas' statement could be considered by them.

Presumably, this was due to Mr Dallas' unavailability and the very late service of his statement on the defence by the prosecution (the statement was served on the defence the day before the prosecution closed their case).

[14] The evidence elicited from Detective Corporal Burrell was discrepant with that of Mr Williams in two areas. Firstly, on Mr Dallas' account, he was lying on the bed, and not sitting on a chair near the bed when the assailants entered the room, as Mr Williams testified. Secondly, the person in front of the others (identified as the appellant by Mr Williams) was described as wearing a hoodie covering his head, with the result that his face could not be seen clearly by Mr Dallas. Mr Williams, on the other hand, denied that the appellant was wearing a hoodie. It is fair to say that this discrepancy cannot be deemed immaterial especially when examined in the context of Mr Williams' testimony that based on where he was positioned in the room, he could only see the left side of the appellant's face. In addition, Mr Williams agreed in cross-examination that the appellant would have been facing Mr Dallas during the incident.

[15] In her summation, the learned judge correctly identified the main issues as identification and credibility. She invited the jury to give careful consideration to the circumstances of the identification, particularly the lighting, the distance between Mr Williams and the men, and the time during which he had the men under his observation. The learned judge also highlighted the inconsistencies and discrepancies for the jury, especially those that arose on the identification evidence. She adequately and accurately directed the jury on how they were to treat with those inconsistencies and discrepancies in the context of Mr Williams' credibility. The appellant has not taken any issue with the learned judge's summation. Rather, the single issue of importance that has arisen on his application to appeal conviction is whether the learned judge erred when she did not withdraw the case from the jury at the end of the prosecution's case.

Discussion

[16] The appellant's conviction rested entirely on the uncorroborated visual identification of him by Mr Williams. Before us, as in the court below, the appellant asserts that Mr Williams was either mistaken or deliberately lying when he identified him as one of three assailants who was involved in the incident. He further complains that the identification evidence presented by the prosecution, given its inherent inconsistencies, not only lacked cogency, but was also rendered so unreliable and inadequate that the learned judge was wrong in law when she dismissed the no case submission. Mr Jordan also submitted, on the appellant's behalf, that in circumstances where the case against the appellant depended wholly on the correctness of his identification by Mr Williams, the learned judge had a duty to assess the quality of the identification evidence before leaving it to the jury.

[17] Mr Jordan further contended that the learned judge erred in her assessment of the no case submission. He posited that she did not place sufficient emphasis on the quality of the identification evidence, specifically the lighting. In advancing his arguments in support of the ground, counsel relied on **R v Daley** (1993) 43 WIR 325. He argued that the learned judge ought to have considered whether a proper identification could have been made in the circumstances. Mr Jordan also submitted that there were inherent weaknesses and serious inconsistencies in Mr Williams' identification evidence, notwithstanding the learned judge's views on his honesty. As such, the learned judge should have upheld the no case submission. He also relied on the case of **Dwayne Knight v R** [2017] JMCA Crim 3, in support of his submissions.

[18] In contrast, counsel for the Crown initially advanced the argument that the identification evidence was properly left to the jury for their consideration. As the tribunal of fact, it was their responsibility to assess the inconsistencies and determine which of the versions given by Mr Williams they found proved, if any. Crown Counsel further submitted that when considering the no case submission, the learned judge voiced her concern regarding the adequacy of the lighting which aided Mr Williams in

identifying the appellant. The learned judge also acknowledged that there were several weaknesses and inconsistencies regarding the identification evidence. It was conceded, however, that the learned judge ought to have expressly identified them.

The law on no case submission and identification

[19] In considering the issue raised, a review of the law applicable to no case submissions, particularly in respect of cases founded on visual identification, is imperative. The landmark judgment of Lord Lane CJ in **R v Galbraith** outlined the test to be applied in determining whether an accused should be called upon to answer the case against him. Relevant to the present case is the second limb of that test which in the headnote of the reported case reads as follows:

> "…if there is some evidence but it is of a tenuous character (e.g. because of inherent weakness or vagueness or because it is inconsistent with other evidence), it is the judge's duty, on a submission of no case, to stop the case if he comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict on it; but, where the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability or on other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence on which a jury could properly come to the conclusion that the accused is guilty, then the judge should allow the matter to be tried by the jury…"

[20] In fact, in identification cases, the duty of a trial judge to withdraw the case from the jury, further to a submission of no case to answer, is broader than the general duty laid down in **R v Galbraith** (see **R v Ivan Fergus** (1994) 98 Cr App R 313). Lord Widgery CJ, in the oft-cited case of **R v Turnbull and Another** [1977] QB 224 ('**R v Turnbull**') at pages 229 to 230, established the considerations of a trial judge when contemplating a no case submission in identification cases; he articulated:

> "When, in the judgment of the trial judge, the quality of the identifying evidence is poor, as for example when it depends solely on a fleeting glance or on a longer observation made in difficult

> conditions …[t]he judge should then withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification."

[21] The judgment of Lord Mustill in **R v Daley** re-stated the law in **R v Galbraith**, within the context of **R v Turnbull**. At page 334, he stated:

> "…in the kind of identification case dealt with by *R v Turnbull* **the case is withdrawn from the jury not because the judge considers that the witness is lying, but because the evidence even if taken to be honest has a base which is so slender that it is unreliable and therefore not sufficient to found a conviction**: and indeed, as *R v Turnbull* itself emphasised, the fact that an honest witness may be mistaken on identification is a particular source of risk. **When assessing the 'quality' of the evidence, under the *Turnbull* doctrine, the jury is protected from acting upon the type of evidence which, even if believed, experience has shown to be a possible source of injustice.** Reading the two cases in this way, their Lordships see no conflict between them." (Italics as in the original) (Emphasis added)

[22] In **Dwayne Knight v R**, the applicant was convicted for illegal possession of a firearm and shooting with intent. The witnesses for the prosecution, Mr Stewart and Miss Brown, lived together in the parish of Clarendon. At 9:20 pm, as they drove up their driveway towards their home, a man with a hoodie pulled over his head appeared from the side of the house and began firing shots at them. Mr Stewart immediately reversed his motorcar out of the yard and onto the road. The man ran from the yard and fell in the road in front of the car, at a distance of between 18 to 20 feet. With the aid of the car's headlight, Mr Stewart and Miss Brown stated that they could observe the man. They identified him as the applicant, whom they previously knew for 20 years and five years, respectively.

[23] Mr Stewart later identified the applicant at a church service, and he was arrested. In his defence, the applicant made an unsworn statement from the dock, raising an alibi. The correctness of the witnesses' purported identification of him and

their credibility were the main issues at the trial. McDonald-Bishop JA (Ag) (as she then was) cited with approval, the judgment of Morrison JA (as he then was) in **Herbert Brown and Mario McCallum v R** on the proper approach to be taken on a no case submission in cases of disputed visual identification:

> "[25] … At paragraph 35 of the judgment, [Morrison JA] stated:
>
> > '35. So that the critical factor on the no case submission in an identification case, where the real issue is whether in the circumstance the eye-witness had a proper opportunity to make a reliable identification of the accused, is whether the material upon which the purported identification was based was sufficiently substantial to obviate the 'ghastly risk' (as Lord Widgery CJ put it in **R v Oakwell** [1978] 1 WLR 32, 36-37) of mistaken identification. If the quality of that evidence is poor (or the base too slender), then the case should be withdrawn from the jury (irrespective of whether the witness appears to be honest or not), but if the quality is good, it will ordinarily be within the usual function of the jury, in keeping with **Galbraith**, to sift and to deal with the range of issues which ordinarily go to the credibility of witnesses, including inconsistencies, discrepancies, any explanations proffered, and the like.'"

[24] Ultimately, it was held that the convictions were unsustainable because the trial judge failed to appreciate that the case was one of a fleeting glance or a longer observation made under difficult circumstances. As a result, this rendered the base of the identification evidence so slender that it was unreliable, and the trial judge should have upheld the no case submission. Additionally, the court found that the trial judge failed to properly assess the totality of the evidence within the context of the relevant law.

[25] The distinction between **Dwayne Knight v R** and the present case is that, in the former, the judge sat alone and acted as the tribunal of law and fact; in this case, the learned judge sat with a jury. Accordingly, it is crucial to elucidate the extent and nature of the learned judge's duty to assess the identification evidence to ensure that she would not infringe on the jury's duty as the finders of fact.

[26] The judgment of Harris JA (Ag) (as she then was) in the case of **R v Vincent Jones** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 187/2004, judgment delivered 7 April 2006, provides the following guidance at page 5:

> "In a case of disputed identity, the reliability of the evidence is essentially within the province of the jury while it's [sic] **adequacy is primarily the function of the trial judge**." (Emphasis added)

[27] In assessing the adequacy of evidence, especially in visual identification cases, the learned acting judge of appeal posited that it is incumbent on a trial judge "to address and scrupulously examine the weaknesses". In the case of **R v Ivan Fergus**, which was applied in **R v Vincent Jones**, the court found that it was necessary to consider the cumulative effect of the weaknesses on the quality of the identification evidence.

[28] In the same vein, in **Dwayne Knight v R**, McDonald-Bishop JA (Ag) at para. [30] expressed that:

> "…the learned trial judge had a non-delegable duty to assess the weaknesses in the identification evidence at the close of the prosecution's case. **It was incumbent on him, before calling upon the applicant to state his defence, to demonstrably consider the cumulative effect of such weaknesses on the quality of the identification** and to ensure, at the end of his assessment, that there was a substantial evidential basis upon which the identification could be found to have been correct." (Emphasis added)

[29] As already established, this is a case wholly dependent on visual identification, more specifically recognition. Although recognition may be more reliable than the identification of a stranger, it is well accepted that mistakes are at times made in recognizing even close relatives or friends (see **R v Turnbull**). Therefore, as the authorities clearly illustrate, it is the responsibility of the learned judge to identify any specific weaknesses in the identification evidence that were reasonably exposed, and to assess their cumulative effect, in order to determine whether the quality of the identification evidence was too poor to be left to the jury. This assessment is not merely

confined to the evidence at the end of the prosecution's case, but is also to be made at the close of the defence's case (see **R v Turnbull** and **R v Ivan Fergus**). Those weaknesses will now be examined.

[30] On the prosecution's case, the following weaknesses were noted:

(a) *Lighting*

In his first statement to the police, Mr Williams said that it was the light from his mother's kitchen that was about 12 to 15 feet from the back of his room, that assisted him in identifying the appellant. In his second statement to the police, Mr Williams said that it was the TV light and the light from his mother's kitchen that allowed him to see the appellant. His explanation for this inconsistency was that he did not remember what he said to the police. At the preliminary enquiry, he deposed that he was able to see the appellant's face with the aid of the television light and a blue light from a bass box that was inside the room close to the door. At trial, he testified that the light from the television, the blue light from the bass box and the overhead electric light in the room illuminated the room, enabling him to identify the appellant. He admitted that he did not give any evidence about the overhead light at the preliminary enquiry. He explained that he did not mention the overhead light at the preliminary enquiry because he "couldn't explain everything to [the court] one time".

Mr Williams presented four accounts of the available lighting at the time of the incident which made this evidence gravely inconsistent. It is evident that on each occasion that Mr Williams either gave a statement to the police or testified, the evidence as to the available light sources increased in numbers and so the lighting would have increased in intensity.

(b) *Time and opportunity for observation*

Mr Williams testified in examination-in-chief that the incident lasted between two to three minutes and that he was able to observe the assailants' faces while

shots were being fired inside the room. However, in cross-examination, further to questions and suggestions from defence counsel, he admitted that rapid firing occurred for 15-25 seconds and the men bolted through the door approximately five seconds after the last shot was fired. The total period would then be 30 seconds from when the men entered the room to when they left.

This evidence would tend to show that the time that the appellant was inside the room (as stated by Mr Williams in examination-in-chief) was clearly exaggerated. This would mean that the incident took place fairly quickly.

(c) *Identification of the appellant*

Mr Williams testified that he was only able to see the **left side** of the appellant's face, which he observed for two minutes. Despite agreeing that the incident lasted for about 30 seconds, he insisted that he saw the appellant's face for two minutes. When confronted with this inconsistency, Mr Williams eventually admitted that he could not say how long the men were in the room.

The evidence given by Mr Williams that he was able to see the appellant's face for two minutes would, therefore, be questionable in light of the shorter period of time he agreed that the appellant was inside the room. Also, at some point during this period, Mr Williams would have had his back turned towards the appellant and the period of his observation would have been shared among all three men. This would mean that the time that Mr Williams had to observe the left side of the appellant's face would be further reduced.

(d) *Identification of the two other men*

Mr Williams testified that he did not know the other two shooters. However, during cross-examination, he admitted that he identified them by name in the second statement he gave to the police. He later recanted his identification of these two men. Mr Williams explained that his incorrect identification of the two

men was as a result of him being afraid and having a wrong picture of who they were in his mind.

The purported identification of the two other men was made in similar circumstances to that of the appellant, albeit that the appellant was the person who was fully inside the room and in front of them. Nonetheless, the impact of this aspect of the evidence was required to be assessed in the context of Mr Williams' reliability (that is, his ability to correctly identify the appellant), and not only in relation to his credibility.

(e) *Distance and position*

Mr Williams put the appellant at a distance of approximately three to four feet from where he stood in "the corner" which, on cross-examination, turned out not to be a corner in the strictest sense. He maintained that his view was unobstructed. However, during cross-examination, he admitted that he told the police that the men were about four to five feet from where **he was hiding in a corner** where a stack of buckets were. Mr Williams subsequently testified that he was standing in front of those buckets. There was also some inconsistency in the evidence as to when he "jumped" to the corner. On one account, this took place after about three shots had been fired, while on another, this was before the shooting commenced.

Where Mr Williams was positioned at the time he purportedly identified the appellant is important, as one of the considerations would be whether or not his view of the left side of the appellant's face was obstructed in any way. Also, at what point he went to the corner is a matter that required attention because if it were that he was moving towards the corner when the shooting commenced, this would further reduce the time that he would have had to observe the appellant during the incident.

(f) *Observation made in difficult circumstances*

The purported identification of the appellant was made while shots were being discharged from at least two guns, including a high powered firearm, inside, what was agreed to be, a small room. Mr Williams testified that he saw fire and smoke coming from the guns and that he was "terrified" during the incident. Undoubtedly, the fear that he experienced would have been heightened because the perpetrators were firing gunshots in the general direction of the bed where he knew his younger brother was sleeping.

Whereas we disagree that, at its best, Mr Williams' purported observation of the appellant was a fleeting glance, it is beyond debate that it was a longer observation that was made in very difficult circumstances.

[31] These are the specific weaknesses which the learned judge ought to have "scrupulously" analysed at the end of the prosecution's case. It was also necessary for her to have considered their cumulative effect on the quality of the identification evidence. We agree, in principle, that inconsistencies and discrepancies are matters within the purview of the jury (as submitted by Crown Counsel). However, the learned judge was duty-bound, at the close of the prosecution's case, to properly evaluate the specific weaknesses in the identification, and assess their collective effect on the quality and adequacy of the identification evidence. This she failed to do. Had the learned judge done so, she would have been obliged to withdraw the case from the jury.

[32] In our judgment, the learned judge erred when she dismissed the no case submission. It follows, therefore, that, on this basis alone, the conviction must be quashed.

[33] We form the view, however, which accords with the concession of counsel for the Crown, that even if the judge were correct in not upholding the no case submission, she ought to have withdrawn the case from the jury at the end of the defence's case.

We arrived at that conclusion after a consideration of Detective Corporal Burrell's evidence.

[34] As indicated above at paras. [12] and [13], Detective Corporal Burrell gave evidence on the appellant's case about Mr Dallas' statement. That evidence was in diametric opposition to Mr Williams' evidence on an article of clothing that the appellant was wearing. Detective Corporal Burrell testified that Mr Dallas asserted that the appellant was wearing a hoodie that covered his head, and as a result, he could not see his face. Mr Williams agreed in cross-examination that when the appellant was inside the room, he was facing Mr Dallas. In light of the evidence that Mr Williams was only able to see the left side of the appellant's face, while Mr Dallas had a full frontal view, it would be fair to say that of the two, Mr Dallas would have been in a better position, all things being equal, to view the appellant's face. However, Mr Dallas' observation of the appellant's face was impaired by the hoodie that he said the appellant was wearing.

[35] While the legal basis for the admissibility of parts of Mr Dallas' statement may be questionable, the learned judge, having admitted it as material for consideration by the jury, would have had an obligation to address them on its significance as it relates to the identification evidence. The discrepancy that arose as a result, which we considered to be serious, was yet another weakness in the identification evidence that further eroded its already poor quality. Therefore, at the close of the appellant's case, the learned judge also had a duty (and ought to have taken the opportunity) to again assess all the specific weaknesses in the identification evidence, including any that had been exposed on the appellant's case. It was for her to determine, at that juncture, whether or not, cumulatively, the base of the identification evidence had been eroded to the point where it was unreliable and insufficient to support a safe conviction, and if so, to withdraw the case from the jury. This the learned judge failed to do and, regrettably, fell into further error.

[36] The cumulative effect of the inconsistencies, difficult circumstances under which the purported identification of the appellant was made, and the material discrepancy

that arose by virtue of the evidence given by Detective Corporal Burrell about the statement of Mr Dallas, undoubtedly, weakened the quality of the identification evidence and caused it to be manifestly unreliable. Accordingly, we accept the concession of Crown Counsel, as one that was rightly made, that, in any event, the learned judge should have withdrawn the case from the jury at the end of the appellant's case.

The summation

[37] Even with the concession of the Crown, and although the appellant made no complaints about the summation, we consider it necessary to state that the safety of the conviction would, nevertheless, have faltered on the failure of the learned judge to properly draw the attention of the jury to some specific weaknesses in the identification evidence.

[38] While the learned judge identified some of the weaknesses in the identification evidence, such as the inconsistencies in Mr Williams' evidence concerning the lighting, duration of the incident (although not in the context that it took place fairly quickly, in the light of Mr Williams' concession in cross-examination), identification of the two other men and where he was when the shooting began, she did not review and point out to the jury the following aspects of the evidence as specific weaknesses:

a) The incident happened quickly.

b) Mr Williams was only able to see the left side of the appellant's face.

c) Mr Williams was "terrified" during the incident and the identification of the appellant was made while shots were being fired inside the room, which could have adversely affected his ability to accurately identify the perpetrators.

d) Mr Williams' identification of the other two men, which was subsequently recanted, was also a matter that could have seriously impugned his reliability and credibility regarding the identification of the appellant.

e) The discrepancy concerning the hoodie that Mr Dallas said the appellant was wearing over his head, was not only to be viewed in the context of Mr Williams' credibility but also as another possible weakness in the identification evidence (as discussed above).

[39] It was also observed that when the learned judge was directing the jury on some of the weaknesses in the identification evidence, she simply referred the jury to counsel for the appellant's submissions about them. For example, in the following passages taken from the transcript of the summation, the learned judge stated:

> "[W]hat the defence is asking you to do is, when you judging the issue of how much time [Mr Williams] had, [counsel for the appellant] said consider the rapid fire, that the incident happened quickly, because the Defence is saying, that based on that evidence, he is afraid and that things happened quickly..." (at page 585 lines 11-17)
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> "[B]ecause Defence is trying to say to you is rapid gunfire, [Mr Williams never had a long time to see…" (at page 592 lines 19-21)
>
> "[B]ecause what the Defence is saying to you, [Mr Williams] is afraid. Not only was – it is very difficult, because you in your bed lying down, somebody burst open your door and you just hear bam, bam, bam, bam, bam... [Mr Williams] is not agreeing that it was difficult circumstances, but Defence is saying to you, based on the evidence, you must find it was difficult and fleeting." (page 593 lines 2-13)

[40] Similarly, in the reviewing the discrepancy which arose on the evidence of Mr Williams and Detective Corporal Burrell concerning Mr Dallas' statement that the appellant was wearing a hoodie over his head, the learned judge directed the jury in this manner:

> "Mr. Dallas gave [Detective Corporal Burrell] a description of a man as tall and slim, but was unable to see the man's face clearly because he had a hoodie over his face (this should have been 'over his head') ... he said the man had a hoodie so [Mr Dallas] could not make out his face... Now, defence is asking you when you consider it, the evidence of Mr Williams about identification, bear this statement that is now in evidence [sic], consider it carefully." (pages 612 lines 10-15 and 613 lines 1-5)

[41] After correctly directing the jury on the weight to be attached to Mr Dallas' statement in light of the fact that he did not give evidence before them (page 613 lines 7-17), the learned judge continued:

> "[B]ut the defence is saying to you, look at what Dallas was saying; Dallas was shot, Dallas was in the room. Dallas is saying one man he saw and he couldn't make out his face and he was lying on the bed. So the defence is saying to you, if Mr. Dallas is saying that, how could Mr. Williams say that this man never had on a hoody [sic]. Remember Mr. Williams is saying that [the appellant] was the front man actually in the room, so how can Mr. Williams say that [the appellant] never had on a hoody [sic] on his face. But Mr. Foreman and your members it is a weight to attach what weight [sic], bear that in mind and realize that the burden is on the Prosecution and not the defence to make you sure that [the appellant] is guilty.
>
> Defence attorney has given you his view of Dallas' evidence. The prosecution has given his [sic] view. As I have said to you, you can reject the view because you are the judges of facts." (pages 613 lines 17-25 and 614 lines 1-12)

[42] The following observation of Steyn LJ in **R v Ivan Fergus** at page 321 of the judgment is apt in the circumstances:

> "...**It is not good enough for a trial judge simply to refer the jury to counsel's submissions about specific weaknesses in the identification.** Under *Turnbull*, he must fairly and properly summarise for the jury such specific weaknesses as arguably are exposed by the evidence. ..." (Emphasis added)

[43] We agree with and adopt the reasoning of Steyn LJ. As a result, it was the duty of the learned judge, not simply to refer to counsel's view on the specific weaknesses in

the identification evidence, but to put them all, fairly and properly, before the jury as weaknesses recognised by the court, as distinct from counsel, for their special consideration. It follows that even if the learned judge had not been obliged to withdraw the case from the jury, her summation was flawed in this respect and, in the light of all the evidence, would affect the safety of the conviction.

Conclusion

[44] For the reasons outlined above, the conviction is rendered unsafe. We find, therefore, that there is merit in the ground argued. As a result, it is not necessary for us to consider the ground relating to the sentence.

[45] Accordingly, the orders of the court are as follows:

1. The application for leave to appeal against conviction is granted.

2. The application for leave to appeal conviction is treated as the hearing of the appeal against conviction.

3. The appeal against conviction and sentence is allowed.

4. The conviction is quashed, the sentence is set aside and a judgment and verdict of acquittal entered.