[2022] JMCA Crim 55

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE BROOKS P
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MRS JUSTICE G FRASER JA (AG)

SUPREME COURT CRIMINAL APPEAL NO 27/2016

PATRICK THOMPSON v R

Leroy Equiano for the applicant

Mrs Sharon Milwood Moore, Ms Alexia McDonald and Ms Tashell Powell for the Crown

14 June and 11 November 2022

SINCLAIR-HAYNES JA

[1] On 11 March 2016, Mr Patrick Thompson ('the applicant') was convicted in the Home Circuit Court for the murder of Constantine McKenzie. He was sentenced by Straw J (as she then was) to life imprisonment with the stipulation that he serves a period of 24 years before eligibility for parole. Aggrieved by the learned judge's decision, he applied for leave to appeal.

[2] His application for leave to appeal was refused by a single judge of this court and his renewed application before this court, for leave to appeal both his conviction and sentence, suffered the same fate.

The background

[3] The pertinent facts of the instant case are that whilst the deceased, Mr McKenzie was being transported to the hospital by police officers, he allegedly uttered words identifying his assailant to be "Stamma", in the hearing of the sole police officer who was seated with him in the open back of the service vehicle (a pickup). None of the officers seated in the front heard. He, unfortunately, succumbed to his injuries upon arrival. who were seated in the back of the service vehicle with him.

[4] At the trial of the matter, the Crown's attempt to have the witness state what was allegedly told to him by the deceased, was objected to by defence counsel, Mr Clive Mullings, on the ground that its admission into evidence offended the hearsay rule. The learned judge consequently heard submissions from both Mr Mullings and Crown Counsel. Having heard those submissions, the learned judge overruled Mr Mullings' objection.

<u>His application for leave to appeal</u>

[5] Mr Thompson's complaints in this application concerned the learned judge's treatment of the sufficiency and credibility of the Crown witnesses' evidence, particularly the:

a) identification evidence;

b) unfairness of the trial in light of the police officer's evidence; and

c) conflicting testimonies.

He contends that his conviction was a miscarriage of justice because he has been convicted of a crime of which he is entirely ignorant.

[6] On 15 June 2022, in refusing the applicant's renewed application for leave to appeal, we ordered as follows:

i. The application for leave to appeal is refused.

ii. The sentence shall be reckoned as having commenced on 11 March 2016.

We promised that our written reasons would follow. This is a fulfilment of that promise.

The evidence

Sergeant Leslie Linton

[7] It was Sergeant Linton's evidence that he was stationed at the Duhaney Park Police Station and he had been in the police force for 20 years. In April of 2010 he was stationed at the Hunts Bay Police Station.

[8] On the morning of 7 April 2010 at approximately 11:15, attired in his uniform, he was on mobile patrol duty in the Hunts Bay police area with other police officers in a marked service vehicle. Whilst travelling along Olympic Way, upon arriving in the vicinity of Olympic Way and Tower Avenue, he observed a group of citizens, "beckoning to the service vehicle". The vehicle stopped near the citizens. There the citizens brought:

> "… a man of Rastafarian decent [sic] He had dreadlocks … towards the vehicle, he had what appeared to be … gunshot wounds to the upper body, which bled."

[9] The man was placed on the floor of the open back of the pickup. He was "bleeding and he looked faintish". He was "groaning" and there were "slight movements of the foot". He was taken to the Kingston Public Hospital ('KPH'). Anticipating that the witness was about to repeat what the deceased told him whilst *en route* to the hospital. Crown Counsel suspended her examination of the witness.

[10] The learned judge heard submissions from counsel in the absence of the witness and the jury regarding the direction in which the sergeant's evidence was headed. At that juncture, Crown Counsel applied to rely on the *res gestae* principle. Relying on the principles enunciated in the case of **R v Donald Joseph Andrews** [1987] AC 281

('**Andrews**'), the learned judge granted the Crown's application and admitted the statement into evidence and the officer continued as follows:

> "Whilst on my way to the hospital, I heard the man continuing moaning and in so doing, I tried to talk to him… I asked him what happened to him … He said 'a Stamma shot mi.'… I then ask [sic] him who is 'Stamma' and he replied 'Charm boy'… I tried keep talking to him but his voice went low. During this time, we arrived at the hospital and he was handed over and admitted… In serious condition… I returned to the vicinity of the incident there I saw and spoke to Detective Corporal Daye of MIT."

[11] It was also his evidence that upon his arrival at the intersection of Tower Avenue and Olympic Way, bloodstains were seen. The area was deemed a crime scene and was cordoned off with yellow tape. The deceased's funeral programme was shown to Sergeant Linton who identified the photograph thereon as that of the man whom he had assisted to the hospital on 7 April 2010.

[12] Under cross examination, the officer's attention was drawn to his evidence at the preliminary enquiry at Half Way Tree Court in which there was no mention by the deceased of "Charm boy". The officer however insisted that he did. He also testified that he was the only officer in the back of the vehicle with the deceased and the only officer who heard what the deceased said. The other two officers, he said, were seated at the front of the pickup service vehicle.

Miss Donna Josephs

[13] Miss Josephs, the mother of the deceased, testified. The salient portion of her testimony was that in April of 2010 she resided in Olympic Gardens with her children, including the deceased who lived in the same yard but in another house. The deceased, earned his living by doing "cement work", selling cigarettes, 'Rizzla' and weed at the corner of Olympic and Tower Avenue and wherever he worked.

[14] Her son died on Tuesday 7 April 2010 and was buried on 2 May 2010 in Thompson Town, Clarendon. She last saw him alive at approximately 9:00 am on the day he died.

Whilst on a bus headed to the country later that morning, a telephone call from her daughter-in-law caused her to visit the KPH. On her arrival at the KPH, she spoke with the nurses and security officers and was directed to the morgue where she saw her son's body. On 21 April 2010, an autopsy was conducted on his body.

[15] Miss Josephs' evidence was that she knew "Charm". They had lived in the same community for "about a ten years or five years or suh". She identified "Stamma" (Patrick Thompson) by pointing to him as one of Charm's children who lived with her (Charm) and whom she had known before 7 April 2010. She told the court that the applicant was called "Stamma" because:

> "…when him talk, him word hard fi come out him mouth, that is why them call him "Stamma" "whenever him talk him tek long fi bring out the words."

[16] It was also her evidence that whenever she called him by that name, he responded.

[17] The applicant, she testified, had been known to her for about 20 to 30 years and he was someone with whom she spoke. She also knew the all-age school he attended and that "He use to sell DVD, the shows… on Tower Avenue". They both sold, "side by side" (which is interpreted as, beside each other) at Olympic Way and asked each other to assist with making change for customers. Her deceased son and the applicant were known to each other and were friends. She also knew the applicant's aunts, uncles and cousins. They all lived in the Olympic Gardens community.

[18] She had seen the applicant on the Thursday and Friday nights before her son's death, but was unable to recall if he had been selling at the time. She has, however, not seen "Charm" and her children, including the applicant, in the community since the death of her son. That observation was first made the day after his death.

[19] Under cross examination she was reminded of her testimony at the Half Way Tree court in March 2012 that she had last seen "Stamma" about two months before her son's

death. In re-examination she testified that: "I did see him the two times, Saturday, Friday and the month before. I am not lying. Mi and him use to sell out on the piazza." She insisted that she saw the applicant on both occasions.

Miss Clarese McKenzie's evidence:

[20] Ms Clarese McKenzie testified that she resided in Deeside, Linstead and was the mother of Patrick Thompson Senior and the grandmother of the applicant, Patrick Thompson Junior.

[21] Ms McKenzie confirmed that the applicant was called "Stamma" and the reason he was so called was that he stutters when he speaks. It was her evidence that the applicant once resided with her in the country but he later, after the death of his father, went to live with his mother, "Charm Ogle", in Kingston.

[22] One morning in April 2010, she saw the applicant (whom she identified as her grandson) in Deeside with his mother. She ran and hugged him and saw a "mark in his face. One mark, one cut like". She enquired of him as to the cause of the mark and he told her that he was handling some old things on a truck and he slipped over. He told her that he was "among some old things on a truck, like zinc and so piece cut him".

[23] It was also her evidence that she saw him every day because he ate at her house and she gave him money. The applicant, she told the court, caught fish which he gave her with wood with which she cooked.

[24] She recalled that in June 2010 whilst she was carrying out her goat, she saw "some police operation". Police jeeps were coming from a lane called Programme Lane where her grandson and his father's generation, including a "Handsome Ogle", lived.

Detective Corporal Leighton McAnuff

[25] Detective Corporal Leighton McAnuff testified that on 7 April 2010, whilst on duty at the Kingston and Saint Andrew Major Investigation Force, he was assigned a murder scene at Tower Avenue in the vicinity of Olympic Way. At the corner of Olympic Way

beside premises 95, he saw a wooden fruit stall behind which was a wooden planter box with a blue plastic drum in front. Behind the planter box, was a fruit shop painted in the colours, red, white and blue. In front of the fruit stall and the planter box, he observed five spent casing and an expended bullet.

[26] In front of the planter box was:

> "a dark brown spot resembling blood. A further examination revealed one bullet fragment…"

Upon examining the dark spot, he observed:

> "…another bullet fragment and a silver looking piece of neck lace near the dark brown spot resembling blood."

[27] In front of the planter box and beside the blue drum was yet another bullet fragment. He photographed the scene, collected, secured and marked the potential exhibits. Thereafter, he proceeded to the KPH morgue where he photographed the body which appeared dead. He also collected blood samples to compare with other body tissue which could have been at the scene. He swabbed the deceased's hands for gunshot residue and took finger prints. The area was also checked for finger prints but none was found.

[28] Under cross examination he explained the process utilised in "checking for finger prints". The first, was an examination of the area to determine if it was "conducive to fingerprints being obtained". No fingerprint was however retrieved from the scene.

[29] The Crown also relied on the evidence of Constable Damion Johnson, Corporal Devon Brown and Sergeant Mike Henry. The officers did not testify. Their statements and the ballistic report were admitted into evidence by agreement.

Dr Kadiyala Prasad:

[30] Dr Kadiyala Prasad, a Consultant Forensic Pathologist who had been attached to the Ministry of National Security, since September 1997, performed the post-mortem examinations on the deceased. It was his evidence that he made notes whilst conducting the post mortem examinations. He explained that in conducting these examinations, he examined bones and performed other medical legal work. The reports were prepared at a later date and signed.

[31] Regarding the instant matter, he conducted a post mortem on the deceased, Mr Constantine McKenzie, at the Spanish Town Hospital Morgue on 21 April 2010. The body was identified by Miss Donna Josephs. He observed the following:

> "… five (5) gunshot wounds. No. 1 entrance gunshot wound 0.5x0.8 cm on the left lower anterior neck just above sternal notch 30 cm below top pf head and 1 cm from midline without gunpowder deposition… trajectory upwards, backwards and to right. Restricted to underlying muscles of anterior neck and the bullet exited on right upper lateral neck on middle of sternomastoid 20 cm below top of head and 9cm from midline… size 0.5x0.6cm Laceration 0.5x0.9cm and subcutaneous deep present 1cm below and 0.5cm lateral to exit wound. Absence of gunpowder indicated that the distance between the muzzle of the gum and the victim is beyond two feet at the time of the discharge of the firearm... No. 2 entrance gunshot wound 2.8x1.1cm on left side of the face, 16cm below top of head and 9 cm away from the midline without gunpowder deposition and marginal abrasion. The bullet travelled through the underlying tissues shattering left ramus of the mandible, lodged in the soft tissues on left upper posterior neck, 22cm below top of head and 5 cm from midline. External carotid injured, which is the major artery that supplies the blood to the brain. …. that supply the blood to the brain. Extensive soft tissue haemorrhage present... that means there is a lot of bleeding in the muscles...No. 3 an entrance gunshot wound below top of head and 21cm from midline the bullet exited on left upper posterior arm…. No. 4, an entrance wound … mid chest. without gunpowder deposition. that means blood in the chest cavity. No. 5, an entrance gunshot wound hem thorax and pericardium of 2.2

> litres of blood clots present. Hemopericaridum means blood in the pericardium cavity surrounds the heart…abrasions. on left arm The cause of death 'due to haemorrhage and shock haemothorax on hemopericardium due to multiple gunshot wounds'." (Pages 109-114)

[32] The doctor explained the significance of the injury to the carotid (injury No 2) thus:

> "[the carotid] is the major blood vessel that carries blood to the brain… Because the blood vessel is injured, it will bleed, lots of bleeding into the tissues as well as outside. But in this case, because of the involvement of the heart in injury No. 5, there may not be much bleeding externally…because pump to the heart, heart will loose [sic] pumping power… Blood supply to the other parts of the body become less. Injury No. 2, 4, and 5 can cause death independently." (Pages 114-115)

He opined that the time of death from the wounds being inflicted was "about two to five minutes" (page 115).

[33] He further explained that the time that it would take the injured person to die:

> "all depended on the individual's response…It can be less it can be more... like physiological response which you cannot assess…Each person physical response and physiological response. For example, a pin prick might not be painful for me but for the person who is highly reactive it will be very painful."

[34] In relation to the position of the shooter he opined as follows:

> "He can be standing…The victim can be standing, and in most case the assailant is in front of him or to the side of him…To the left side of him…The muzzle of the gun is either to the front of him or to the left side of the victim at the time of the discharge of the firearm. If the victim is lying down the assailant is on top of him, the muzzle of the gun is on top of him, being like this, pointing down…the muzzle is pointing downwards."

[35] Under cross examination Dr Prasad further explained that there have been cases:

> "… where a victim of a gunshot wound to the heart, ran couple blocks, went to the hospital and died in hospital after two hours."

[36] In observing the deceased in the instant case, he noted the absence of injury to the voice box and the fact that he was able to speak. He, however, requested the court's permission to correct an error. In so doing, he explained as follows:

> "The carotid is not the major …external cavity artery is not the major blood supply to the heart—to the brain, I am sorry… But it supplies the major blood supply to the face... Because it is the major artery, major branch of the heart, direct branch of the carotid artery. What I said about the bleeding would stand…In general if there is no involvement of the heart, as occurred in this case, there would not be lots of bleeding…There would be some bleeding externally…Suppose if the victim got his wounds after the injury to the heart, there may not be much bleeding. There may not be spotting of blood outside."

[37] The doctor was unable to state the order in which the injuries were inflicted. He, however, indicated that the deceased had abrasions to the:

> "Middle of the arm to the elbow…Abrasion is a graze in common terms, it could be a fall to the ground, graze."

In response to the judge's query as to the absence of gunpowder deposition from any of the injuries, the doctor explained that the muzzle would have been "beyond two feet."

Corporal Jermaine Daye (Investigating officer):

[38] At the trial of the matter, Corporal Jermaine Daye had been a member of the Jamaica Constabulary Force for 10 years. He was then stationed at the Major Crime and Anti-Corruption Agency and was so stationed at the time of the incident. On 7 April 2010 whilst at the station, he received a radio message from police control. Consequently, he with a team, proceeded in a marked service vehicle to the intersection of Tower Avenue and Olympic Way; a Kingston 11 community.

[39] On arrival at the scene, a large gathering of onlookers and police personnel were at different sections of the roadway. The police had cordoned off Tower Avenue and Olympic Way roadway and he "observed spent casings on the ground... within the same vicinity where the bloodstains were". He explained that spent casings are also called spent shells.

[40] Detective Corporal McAnuff, was some distance away photographing the scene from different angles and he drew his attention to his observation of a particular "spot" from which spent casings were collected and blood samples were taken. He spoke to several curious onlookers who provided him with information. He also spoke with Corporal Sergeant Kerr, the initial investigator in the matter.

[41] The information received upon completion of the processing of the scene led him and Sergeant Kerr to the KPH where Sergeant Kerr pointed out the deceased's body. He observed a gunshot wound to the left side of the chest and to the forehead. He caused the body to be photographed and commenced investigation into the murder of Constantine McKenzie. In furtherance of that mission, he went in search of "Stamma"; a suspect in the matter. His enquires (more than 10) in the Olympic Gardens area and in "Eastside", Linstead, were unsuccessful.

[42] On 22 June 2010, he received a phone call from the Linstead police and spoke to Detective Inspector O'Connor. He consequently proceeded to the Linstead Police Station lock up. There an officer pointed him to the applicant who was not previously known to him. The applicant provided him with both his name and alias. He cautioned the applicant and advised him of the murder investigation. The applicant, however, did not comment.

[43] He identified the applicant to the court as the person whom he cautioned. It was also the officer's evidence that he noticed that the applicant:

> "…stutters in his voice…….at the time he had a scar on the left side of his face."

[44] It was his evidence that he enquired of the applicant about the scar and his response was that:

> "...he went to river and bamboo cut him on his face."

Thereafter, he escorted the applicant to the Hunts Bay Police Station.

[45] On the 29 June 2010, he visited the Hunts Bay Police Station Lockup and conducted a Question-and-Answer session with the applicant who, in responding to the questions, stuttered. He returned to the police lockup on the 30 June 2010, and informed the applicant that he was charged for the offence of murder. In response, the applicant said:

> "a nuh me do the murder."

[46] On the 21 April 2010, he attended a post mortem which was performed on the deceased at the Spanish Town Hospital. The deceased's mother, Miss Donna Josephs, was present and she identified the body to Dr Prasad as that of her son. The body was that which he had seen at the KPH's morgue. At that juncture, the witness was shown a photograph on a funeral programme which he identified as that of the deceased.

[47] It was also Corporal Daye's evidence that he recorded statements from the deceased's mother, Miss Joseph, and both the applicant's grandmother, "Miss Karen McKenzie" and his mother Miss "Charmaine Aughle". In September of 2015 he received instructions regarding Miss Karen McKenzie and Miss Charmaine Aughle, in response to which he went in search of them on several occasions with subpoena. His efforts to locate them were, however, futile.

[48] Under cross-examination the officer conceded that his written statement of 18 July 2010, was that via a telephone conversation, he was advised by Inspector O'Connor that the accused was in his custody and had given him his name and his alias. It was also put to him that the applicant did not provide him with any information regarding the cut on his face. He was asked to examine the applicant's face and identify a scar. The officer

was, however, unable to point to any. He, however, told the court that five years ago there was a mark. It was also his evidence that he made notes in his note book, which included notes of the persons interviewed.

Constable Damion Johnson

[49] It was Constable Damion Johnson's evidence that he was stationed at Major Investigation Task Force and was trained as a crime scene investigator. On 21 April 2010, whilst on duty, he received information in relation to the post-mortem examination for the deceased, Mr McKenzie, who was shot and killed on 7 April 2010. Consequently, he proceeded to the Spanish Town morgue where he observed the body and spoke with Dr Prasad, the pathologist.

[50] Miss Joseph was escorted into the morgue by the investigating officer, Detective Corporal Daye, where, in whose presence, she identified the body of the deceased to Dr Prasad. Constable Johnson photographed the body and observed Dr Prasad removing blood and a bullet from the body which were packaged and handed to him. He returned to his office where he logged and placed the evidence in a temporary storage area to await transportation to the forensic laboratory.

Detective Corporal Devon Brown

[51] The ballistics expert's certificate was tendered into evidence through Detective Corporal Devon Brown. It was the finding of Detective Sergeant Mike Henry, the ballistic expert, that the exhibits were, *inter alia*:

> "9 mm calibre damaged fired firearm bullets and bullet fragments that were discharged from the barrel of one 9mm calibre firearm."

There was also:

> "…a portion of lead core from a fired firearm bullet that had no markings for comparison and identification."

Inspector Donovan O'Connor's evidence

[52] At the trial of the matter, Detective Inspector Donovan O'Connor was stationed at the Half Way Tree Police Station. In April 2010 he was the sub-officer in charge of crime at the Linstead Police Station. He recalled that on 9 June 2010 at about 5:00 am he was in command of a party of police officers conducting operations in Deeside, Linstead, Saint Catherine in search of a Patrick Thompson o/c "Stamma", who was not known to him.

[53] In furtherance of that mission, he went to a house where a male identified himself as Patrick Thompson. The person confirmed that he was also called 'Stamma'. Inspector O'Connor was unable to recall whether there was anything strange about the person to whom he spoke. He attributed his inability to do so, to the passage of time because/as five years had elapsed since the applicant's detention. The applicant, was escorted to the Linstead Police Station and Senior Superintendent of Police Grant of the Major Investigation Task Force was later informed.

[54] The inspector informed the applicant that he was a suspect in the murder of a Denzil Constantine McKenzie committed on 7 June 2010. He cautioned the applicant who denied knowing anything about the murder.

[55] Under cross examination, upon being asked if he noticed anything about the applicant, it was his evidence that he:

> "…had a scar to the right side of his face. I asked him… How he get the scar. He said to me, he fall down and wire cut him… He paused for a while… And he said to me, 'Mr. Husk. Mi get work and give him. ...Yes, And I owe him $50.00 for two cigarettes… And him a dis me...And a call me pussy hole and mi and him start fight and him cut me in ah mi face...started to fight and him cut mi in ah mi face but ah nuh mi kill him."

[56] It was suggested to him that the applicant did not use those words. He however insisted that he did, but he did not write what he was told. In demonstrating to the court where he saw the scar, he said it was:

"From his head come down to here."

The learned judge confirmed that "here" meant "right across the cheek".

[57] He identified the applicant to the court. The officer was also asked to look at the right side of the applicant's face. His evidence was that he saw no scar.

Applicant's unsworn statement

[58] Mr Thompson testified that he was 29 years old. He was a farmer and fisherman and had spent six years of his life in prison regarding an incident of which he had no knowledge. He explained that his father and aunt were deceased and that he was responsible for taking care of his grandmother. It was also his evidence he had used his shoes money to fix her teeth. He lamented that he was:

> "now suffering for something I don't know nothing about [he knows nothing about] … I can't talk anything about the case."

The learned judge's ruling on the reception into evidence of the deceased's statement

[59] The officer's attempt to repeat that which was told to him by the deceased was objected to by counsel for the applicant. In responding to counsel's objection to the admission of the deceased's statement as falling within the *res gestae* principle, the learned judge, at pages 74 – 85 of the transcript, opined and ruled as follows:

> "There are two stages you know… The first stage is for the judge to decide whether it can be admitted in evidence ...Once the judge decides, then there are certain directions that the jury would have to be given… wouldn't that be the stage where the judge would now direct the jury as to the whole issue of identification and what is there and what is not before them?
>
> I'm merely asking because, based on what I'm understanding from Andrews, that [sic] what I had satisfied myself about was that the event was so unusual or startling or dramatic as to dominate the thoughts of the victim, so as to exclude the possibility of concoction and distortion and that the statement was made in conditions of approximate but not exact contemporaneity.

So, unless you are telling me that there is something else that has shifted, those are the two conditions that I would satisfy myself with and if it is so, then there are certain factors that would now have to be left to the jury including, I would have to draw their attention to any issues in relation to identification and what is there and what is not there etc. So, what I'm asking you to do now is to look at that issue, the issue of identification and whether-- because for me to make the decision at this stage, that [sic] because there is no evidence that somebody said they saw the man being shot ten minutes before the police took him, but this is where you have what is called reasonable inferences that must be drawn from evidence.

And having looked at the case of, Andrews, the Queen against Andrews, because the man had been injured in his flat. It says two police officers arrived within minutes and the man informed them that 'O', the defendant had been the assailant, he died two months later and the evidence was led as to him saying that 'O' was his assailant but as far as I can see that [sic] there was no one else in the flat to say how he was able to see them or anything like that.

So, in other words, certain things would have to be left to the jury properly for them to decide whether or not they can feel safe…It doesn't have to be based on what Andrews is saying, it doesn't have to be the exact contemporaneity, it doesn't have to be that exact. But obviously, we are not talking about something that happened the day before if you are going to go under the res gestae principle, but there [sic] going to have to be some level of contemporaneity. If a man is shot and suffered from gunshot wound and bleeding then, they are asking that the inference be drawn and then here the citizens now come, stopping the police, putting the man in the case, they are asking that there is some level of contemporaneity with him receiving the injuries and him being put in the police vehicle.

The other alternative, of course—is it that the Crown intending to – what are you doing in relation to the doctor?... yes, because usually they are able to say having received these types of injuries he would have lasted so long before he died, so it would assist in the whole issue of contemporaneity for the jury. The issue, however, is—well ... that is something that I would have to – once I'm satisfied that I would have to

> – once I'm satisfied as to the contemporaneity and the starting of the dramatic event, the jury would now have to be warned about all these factors, how they would have to approach this evidence and they would have to be warned because identification would be an issue, recognition or otherwise. They would have to be satisfied as to certain things. So, that would not be my area, that is for the jury. My area is to be satisfied as to those things… the issue is, now as to where this evidence should come, that is the only thing, Madam Crown…
>
> So this is a matter where the Court believes that he would have had time or the matter was not so dramatic that it's something he could have concocted then it would not be allowed, but what the Crown is putting before me is that a man is seen by his mother at a certain time he is being taken in to the police car to the station and that same day he is dead.
>
> The officer is saying what he saw appeared to be gunshot wound as the man was bleeding and he was groaning, and so it does appear to be that there is evidence of this startling or unusual situation that is existing. The issue has to do with contemporaneity and as I said, based on what is before me, I would be satisfied that that conditions has [sic] been satisfied. So, I will admit the statement under the res gestae principle and as I indicated to counsel, then it would be for me now, at the appropriate time, if there is a case to answer. If there is a case to be left to the jury, then it would be for me, at that appropriate time, to give certain directions to the jury to warn them about the factors that they have to consider surrounding the res gestae. Certainly, identification would be one of the issues that will be left to them. I do bear in mind that really, there is no other evidence except for this thing… Yes, that is also the case with Andrews, so I will allow the statement in."

The learned judge's address to the jury on the issue of *res gestae*

[60] In explaining the principle of *res gestae* to the jury and their treatment of it, at pages 304, line 17 to page 305 line 17 of the transcript, said as follows:

> "What you have that relates to the identity of the shooter, is what we call, Mr. Foreman and your Members [sic], *res*

> *gestae*. It is a legal term I just want to describe what this legal term, 'res gestae' is, the principle of res gestae. It is things said in close proximity or contemporaneously with an event and it can be said by a witness to a crime, or the victim himself and that is allowed in evidence, but there are certain guidelines surrounding this principle, certain factors that I will have to tell you that you have to consider when you are going to judge whether you can accept the things that were said by this--- in this case by the victim himself, Mr. McKenzie to Sergeant Linton, to see whether it is credible evidence on which you can rely, because Mr. Foreman and you Members, the things said by Mr. McKenzie to Sergeant Linton, is the only evidence pointing a finger at this man. It is the only evidence. There are [sic] other evidence in the case that the prosecution has put before you to say, look at it to see if it supports what has been said, but the only evidence that points a finger at this man are those words used by the deceased to the Sergeant Linton."

[61] The learned judge continued her review of Sergeant Linton's evidence and the surrounding circumstances thus:

> "So what I am going to do, Mr. Foreman and your Members, I am going to review Sergeant Linton's evidence and the circumstances surrounding the use of those words and other elements that the Crown has presented before you in relation to this issue, and then I am going to direct you as to factors that you have to consider and judge before you can determine that those … you can act on those words.
>
> Before I do that, before I go to review the evidence, no doubt, you appreciate and you remember that the words that Sergeant Linton said that Mr. McKenzie told him while he was in the back of the cab taking him to the hospital were 'Stamma shot me'. And when he asked him who is 'Stamma' he said, 'Charm Boy'. So, those are the words you have before you, as 'Stamma' shot me. 'Charm' boy."

[62] She then directed the jury to first arrive at a finding as to whether they were able to act on that evidence. They were further instructed on how to treat with/apply the evidence. In reviewing the officer's evidence regarding the deceased's statement that

"Stamma shot me" and that Stamma was "Charm Boy", the learned judge directed the jury to determine:

1. whether the words pointed conclusively to the applicant; and

2. whether inferences could be drawn from evidence given to arrive at such a determination.

[63] The learned judge further directed the jury that, in arriving at a determination, they were to examine the evidence of Donna Joseph, *inter alia,* that she had known the applicant for about 20 to 30 years 2010. She knew him as a child of "Charms", and that they resided in the same community. She also directed their attention to the witness' evidence that:

a. The applicant and her son knew each other and were friends in April of 2010.

b. The applicant and her son attended the same age All Age School;

c. She knew the names of some of his family members;

d. He sold DVDs on Tower Avenue in 2010;

e. She and the applicant both sold "side by side" on Olympic Way and would speak to each other. As an example, she said they asked each other "for change"; and

f. she saw him on Thursday, Friday and Saturday nights.

[64] The learned judge also directed the jury to have regard to:

I. Ms. McKenzie's evidence regarding the applicant being called "Stamma" and, *inter alia*, his mother's name being Charmaine Aughle.

II. Inspector O'Connor's evidence regarding the applicant admitting he was called "Stamma".

III. Sergeant Lincoln's evidence regarding the circumstances under which the deceased "utilised/uttered" the words in which he advised him that "Stamma" shot him.

IV. Dr Prasad's evidence regarding the time span between the deceased's receiving the injuries and his demise and also that the deceased would have been able to speak after he was shot.

[65] The learned judge, at page 316, further directed the jury thus:

> "Now, Mr Foreman and your members, if you accept that the words use [sic] points [sic] to this man, then that is when you now have to look at the whole circumstances to say whether it is credible evidence on which you can rely. The first point is, does it point to him.
>
> Secondly, you have to judge the credibility of the words now, because the prosecution is relying on the evidence of what Sergeant Linton told you that McKenzie said to him, to put before the identity of McKenzie's shooter."

[66] On the issue of concoction, the learned judge also referred to Inspector O'Connor's evidence regarding a dispute the applicant allegedly told him he had with the deceased which resulted in the deceased having "cut him". The learned judge, however, reminded the jury of the applicant's statement from the dock denying having told the inspector any such thing and she further drew their attention to the fact that the applicant had no scar on his face.

[67] The learned judge continued her directions:

> "If you accept that 'Stamma' told O'Connor those words, then the inference that could be drawn from those words, is that something had happened between these men at some point prior to McKenzie's death. We have no idea when it was, we don't know, but if you accept that he told O'Connor that something had happened between them, who the mother said had been friends, so you must resolve whether you think …so because of that, one of issues that you have to grapple with then is that, because if you find that something might have happened between them, did the deceased concoct the statement to get at Mr Thompson? Because you have to ask yourselves, did he concoct it? You bear in mind, that as Madam Crown Counsel tells you that, here is this man with five shots, bleeding, groaning on his way to the hospital. **Would he be in that state of mind to have time to sit down to decide, you know something, 'me and the man have a dispute you know. I am going to blame him for this.' You have to look at it to assess whether you find that, yes, he might have concocted it.** That is one of the questions you have to answer, because one of the things you will have to ask yourselves is, did he…if you find that he used the words, 'Ah 'Stamma' shot me', was it actuated by malice or ill will for him to tell the police that. So you have to look at that. And apart from concoction, you have to ask yourselves, did he distort the statement, considering his condition as I outlined to you. You must feel sure that the deceased did make a statement in response to the question of Sergeant Linton, and it is for the prosecution to make you feel sure that what the content of the statement was, and it is only then that you can act on that evidence." (Emphasis added)

[68] The learned judge also pointed the jury to the evidence of the deceased' s mother, Miss Joseph, that she saw her son alive "after 9:00 am" that fateful morning and to Sergeant Linton's evidence that Mr McKenzie was taken to him by citizens at about 11:15. The learned judge then directed the jury as follows:

> "The inference that you are being asked to draw, Mr Foreman and your members, that he was shot sometime after Miss

> Josephs saw him and before Sergeant Linton came on the scene."

[69] Although the learned judge was (and indeed this court is also) bereft of evidence as to when exactly the deceased was shot, the reasonable inference is that it would have been after 9:00 am; before the sergeant's arrival.

The grounds of appeal

[70] Counsel for the applicant, Mr Equiano, by way of his written submissions, sought, and was granted leave of the court to abandon the original grounds of appeal and instead, to rely on the following supplemental grounds:

> i. "The learned trial judge erred in Law [sic] by permitted [sic] the statement alleged to have been made by the deceased to be admitted as evidence as an exemption. under the hearsay rule.
>
> ii. If the statement of the deceased, qualified as part of the res gestae as an exception to the hearsay rule, the learned judge should had [sic] exercised her discretion to exclude the evidence as being unfair to the [applicant]. The learned trial judge erred in not doing so.
>
> iii. The learned trial judge erred in law by allowing the case to proceed to the jury.
>
> iv. The learned trial judge's summation on identification was inadequate and biased in favour of the prosecution.
>
> v. The learned trial judge's emphasis on lies and directions in her summation were excessive and unfairly averse to the Applicant."

[71] Grounds 1 and 2 can be conveniently dealt with together as both 1 and 2 challenge the admissibility of the deceased's statement to Sergeant Linton regarding the identity of his assailant.

Ground 1

> **The learned trial judge erred in Law [sic] by permitted [sic] the statement alleged to have been made by the deceased to be admitted as evidence as an exemption under the hearsay rule.**

Ground 2

> **If the Statement of the deceased, qualified as part of the *res gestae* as an exception to the hearsay rule, the learned judge should had [sic] exercised her discretion to exclude the evidence as being unfair to the [applicant]. The learned trial judge erred in not doing so.**

Submissions on behalf of the applicant

[72] By his written submissions, Mr Equiano contended that the *res gestae* principle was not applicable to the instant case because there was a possibility that the statement was concocted and was influenced by utterances from the crowd who carried the deceased to the police officer. In support of that submission, Mr Equiano relied on Lord Ackner's pronouncements in **Andrews**. Learned counsel submitted that:

1. There was the likelihood of concoction or distortion.
2. The statements attributed to the deceased lacked the requisite spontaneity because it was not the evidence of the police that they responded to the sound of a gunshot, the evidence was that the patrol unit was already in the community.
3. There was no corroborating evidence regarding:
    a) the deceased's presence in the vicinity of the community on the morning of the incident;
    b) the circumstances under which the identification of the applicant was made; or that

c) the deceased could have positively identified his attackers.

[73] Learned counsel also referred the court to several authorities, including **Ronald v Turnbull** [1984] 80 Cr App R 104, **Ratten v The Queen** [1972] AC 378, **Brian Nye v R** [1972] 66 Cr App R 252, **R v McCay** [1990] 1 WIR 645 and **Edwards and Osakwe v DPP** [1992] Crim LR 576 and argued that the applicant was deprived of the opportunity to challenge the deceased's identification of him which rendered the process unfair to the applicant.

[74] Learned counsel posited that even if the deceased's statement fell within the *res gestae* exception the learned judge ought to have exercised her discretion and exclude the evidence as being unfair to the applicant and erred in failing to do so. He directed the court's attention to the absence of evidence on the Crown's case that the applicant was in the area at the time of the incident and near to the deceased to facilitate identification.

[75] In support of that submission, he referred the court to the following aspects of Donna Josephs' evidence. Firstly, at page 34 lines 13 to 25.

"Q. Yes. So I am asking you how often you would see Mr. Thompson?

HER LADYSHIP: You are talking about in a particular period of time?

Q. Yes – well, over the period of time that you were selling on Olympic Way?

A. I see him sell on Thursday night, Friday night and Saturday night.

Q. So, you would see him on Thursday nights, Friday nights and Saturday nights. When was the last time before the 7th of April, 2010, you had seen him, Patrick Thompson?

A. He was selling.

A When I was selling out there on the Thursday night, I see him Thursday night, Friday night before my son died, I see him.

[At counsel's request, her statement was handed to her with instruction to find the after portion which stated when she last saw the applicant.]

Q. Now, having read it, do you recall having said that the last time you saw 'Stamma' before your son died is two months?

A. Yes.

MR. C. MULLINGS: Obliged, m'Lady.

Q. What you say here today is incorrect, what you said to the judge in 2012 is incorrect?

A. I don't hear.

Q. What you said to the judge in 2012 is correct, is right?

A. Yes"

Submission on behalf of the Crown

[76] In response to Mr Equiano's complaints, Mrs Milwood Moore, for the Crown, directed the court's attention to the close connection between grounds 1 and ground 2 and submitted on both simultaneously. It was Mrs Millwood Moore's submission, *inter alia*, that there was no basis on which this court could interfere with the learned judge's exercise of her discretion because, in arriving at her decision, she had properly directed herself as to the approach to be taken in analysing the evidence and the material which was before her.

[77] Relying on Lord Ackner's statement in the **Andrews** case, counsel submitted that the learned judge had properly complied with the guidance provided by Lord Ackner; had properly applied same; and had rightly concluded that:

1. there was no possibility of concoction and distortion; and

2. the event prior to the statement was sufficiently proximate.

[78] In support of her contention that the learned judge had properly guided the jury on how to treat with the *res gestae* issue, Mrs Milwood Moore also directed the court's attention to the learned judge's statement at pages 75 and 84 of the transcripts. It is important, at this juncture, to note that the statements made by the learned judge at those pages were not her address/direction to the jury but a discussion on the law regarding *res gestate.*

Law/discussion

[79] The issue is whether the learned judge erred by her finding that the deceased's statement qualified as *res gestae.* It is important to note the difference between a dying declaration as an exception to the hearsay rule, and the *res gestae* exception, as the rational for both rules differs. Likewise, the test to determine whether the statements ought to be exempted from the hearsay rule also differs.

[80] To qualify as a dying declaration, concisely stated, the deceased must have been, when the statement was made, in a state of, "settled hopeless expectation of death" and was of the view "that death was imminent."

[81] *Res gestae* is the common law exception to the hearsay rule which allows statements made by a deceased as to the cause of his death to be admitted at a trial for murder or manslaughter as *res gestae* (a part of the transaction) if at the time it was made, the deceased was, as put by Lord Ackner in **Andrews**, "so entirely overpowered by an event that the possibility of concoction or distortion can be disregarded". It is an exception to the hearsay rule, which prevents the admission into evidence of hearsay statements by allowing the officer to state what he was allegedly told by the deceased.

[82] The case of **Andrews** is considered a leading authority if not the *locus classicus* on the issue. In the **Andrews** case, Andrews and another man, armed with knives, invaded M's home. They not only stole his property; he was grievously wounded. Within

minutes, two police officers arrived and were informed by the victim that Andrews and another man were his assailants. He, however, succumbed to his injuries two months after.

[83] Andrews and another man were charged for his murder and aggravated burglary. The Crown's attempt to tender the deceased's statement into evidence as to the truth that he was attacked by the appellant thereby falling within the *res gestae* exception to the hearsay rule, and not as a dying declaration, was resisted by the defence, however, the objection did not find favour with the trial judge.

[84] His appeal to the Court of Appeal failed and the court certified that the following point of law was involved in its decision:

> "Where the victim of an attack informed a witness of what had occurred in such circumstances as to satisfy the trial judge that the event was so unusual or startling or dramatic as to dominate the thoughts of the victim so as to exclude the possibility of concoction or distortion and the statement was made in **conditions of approximate but not exact contemporaneity,** evidence of what the victim said was admissible as to the truth of the facts recited as an exception to the hearsay rule; that accordingly, in the circumstances the deceased's statement had rightly been admitted." (Emphasis added)

[85] His appeal to the House of Lords against the Court of Appeal's decision was also unsuccessful. In dismissing the appeal, Lord Ackner, at page 300, explained:

> "My Lords, may I therefore summarise the position which confronts the trial judge when faced in a criminal case with an application under the res gestae doctrine to admit evidence of statements, with a view to establishing the truth of some fact thus narrated, such evidence being truly categorised as 'hearsay evidence?'
>
> 1. The primary question which the judge must ask himself is – can the possibility of concoction or distortion be disregarded?

2. To answer that question the judge must first consider the circumstances in which the particular statement was made, in order to satisfy himself that the event was unusual or startling or dramatic as to dominate the thoughts of the victim, so that his utterance was an instinctive reaction to that event, thus giving no real opportunity for reasoned reflection. In such a situation the judge would be entitled to conclude that the involvement or the pressure of the event would exclude the possibility of concoction or distortion, providing that the statement was made in conditions of approximate but not exact contemporaneity.

3. In order for the statement to be sufficiently 'spontaneous' it must be closely associated with the event which has excited the statement, that it can be fairly stated that the mind of the declarant was still dominated by the event. Thus, the judge must be satisfied that the event, which provided the trigger mechanism for the statement, was still operative. The fact that the statement was made in answer to a question is but one factor to consider under this heading.

4. Quite apart from the time factor, there may be special features in the case, which relate to the possibility of concoction or distortion. In the instant appeal the defence relied upon evidence to support the contention that the deceased has a motive of his own to fabricate or concoct, namely, a malice which resided in him against O'Neill and the appellant because, so he believed, O' Neil had attacked and damaged his house and was accompanied by the appellant, who ran away on a previous occasion. The judge must be satisfied that the circumstances were such that having regard to the especial feature of malice, there was no possibility of any concoction or distortion to the advantage of the maker or the disadvantage of the accused.

5. As to the possibility of error in the facts narrated in the statement, if only the ordinary fallibility of human recollection is relied upon, **this goes to the weight to be attached to and not to the admissibility of the statement and is therefore a matter for the jury.** However, here again there may be special features that may give rise to the possibility of error. In the instant case

> there was evidence that the deceased had drunk to excess, well over double the permitted limit for driving a motor car. Another example would be where the identification was made in circumstances of particular difficulty or where the declarant suffered from defective eyesight. In such circumstances the trial judge must consider whether he can exclude the possibility of error." [Emphasis added]

[86] Later, in **Arthur Mills**, **Garfield Mills**, **Julius Mills and Balvin Mills v The Queen** (1995) 46 WIR 240 at page 11, the Privy Council pronounced as follows:

> "Their lordships accept that modern approach in the law is different: the emphasis is on the probative value of the evidence. That approach is illustrated by the admirable judgments of Lord Wilberforce in the Privy Council in **Ratten v R** [1972] AC 378 and Lord Ackner in the House of the Lords in **R v Andrews** [1987] AC 281, and notably by the approach in the context of the so-called *res gestae* rule that the focus should be on the probative value of the statement rather than on the question whether it falls within an artificial and rigid category, such as being part of a transaction. *Non constat* that their lordships should now reject the exception governing dying declarations. On the contrary, a re-examination of the requirements governing dying declarations, against the analogy of **Ratten** and **Andrews**, may permit those requirements to be restated in a more flexible form. How far such a relaxation should go would be a complex problem."

[87] The learned editors of Blackstone's Criminal Practice 2000, referring to **Andrews** and **Ratten** explained the principle thus, at page 2210; f16.31:

> "'*Res gestae*' 'is an inappropriate label for this common-law exception to the hearsay rule, in which admissibility depends on proof of what Lord Ackner in *Andrews* [1987] AC 281 called the 'close and intimate connection' between the exciting events in issue and the making of the statement, the theory being that the spontaneity of the utterance is some guarantee against concoction. The nomenclature has in the past led to confusion and to incorrect decisions, but *Andrews* clarified the law by approving the test for admissibility adopted by the Privy Council in *Ratten v the Queen* [1972] AC 378. In *Mills v the Queen* [1995] 1 WLR 511, the Privy Council praised the changes effected by these decisions, regarding

> *res gestae* as a modernised exception to the hearsay rule under which the focus was on the probative value of evidence rather than on the question whether it falls within some artificial and rigid category."

Gleaned from the authorities is that although the event need not be strictly contemporaneous to the event, the stress or pressure created by it must be ongoing and the statement made before "there is time to contrive or misrepresent".

[88] At paragraph 6 of Halsbury's Laws of England (4th edition) Vol 17 the learned authors explained the principle thus:

> "**The res gestae.** Items of evidence are sometimes said to be part of the res gestae owing to the nature and strength of their connection with the matters in issue, and as such are admissible. "*Res gestae*" is an expression mainly of utility in the criminal law concerning the contemporaneity of statements to incidents but, insofar as contemporaneous statements are relevant and accompany and explain matters in issue, they will be admissible." (Bold as in the original)

[89] In light of the foregoing, in satisfying the requirements for the statement to be deemed "*res gestae*" and thereby admissible, the Crown bore the burden of satisfying the court that:

> "The deceased's statement was made spontaneously and sufficiently contemporaneously (although not necessarily exactly contemporaneously) with the "startling" incident so as to eliminate the possibility of concoction or distortion."

[90] If the statement is deemed admissible by the learned judge, thereafter the 'proverbial ball' then shifts to the jury's court for their determination as to whether the witness who heard the statement was "mistaken" or "untruthful". It is therefore the jury's responsibility, in their role as triers of the facts, to ensure its "veracity" and "accuracy" and that it can safely be relied on.

[91] The issue which arises at this juncture is whether the learned judge erred by overruling counsel at the trial Mr Clive Mullings' objection to the reception of the officer's

evidence regarding what he was allegedly told by the deceased. Examination of the circumstances under which the statement was made is, therefore, required to determine whether there was any likelihood that the statement was concocted or distorted by the deceased. If that issue is determined in the negative, the question which follows would then fall solely within the purview of the jury, that is:

> Whether the sole police officer, in who's hearing the words identifying the applicant as his assailant, were allegedly uttered, was mistaken or untruthful as to what he allegedly heard.

[92] On the issue of the consideration of the deceased's statement, the learned judge continued her directions to the jury as follows:

> "So, before you even go on to consider the factors that can affect the credibility in relation to this statement, if you can rely on it, the first thing you have to do, Mr. Foreman and your Members, is to decide first of all whether those words point to the accused man before you in the dock, Patrick Thompson. That is the first thing you are going to have to do. Those Words 'Stamma' and 'Charm' boy. You have to say whether you find that it is pointing conclusively to this man, Patrick Thompson.
>
> So, the first person you have to look at and examine their evidence is the evidence of Donna Josephs."

[93] At page 329 regarding Sergeant Linton's evidence, the learned judge further guided the jury as follows:

> "Is this something he could or would make a mistake about, or was this statement concocted by him? These are some of the questions you may wish to ask yourselves as you resolve the issue. It is for you to decide what was said, if you find anything was said and to be sure that Sergeant Linton was not mistaken in what he believe might have been said by the deceased to him."

[94] The learned judge at page 317 line 15 of the transcript further reminded the jury that Sergeant Linton was the "first responder" and also of the circumstances under which the deceased was taken to the police vehicle and his condition at that juncture.

This court's decision

[95] This is a classic case of a *res gestae* statement. The police vehicle was stopped by citizens who placed a bleeding man, with what appeared to have been gun shots to his upper body, into the vehicle. Although the court was bereft of evidence as to when exactly the deceased was shot, the reasonable inference is that it would have been shortly before the sergeant's arrival.

[96] This inference is also supported by the circumstances in which the deceased provided his assailant's name, and his death soon after his arrival at the hospital. The requirement that the statement be made closely and intimately to the "exciting event" had been satisfied. The "startling event" and his injuries would have so "dominated" his thoughts "that the possibility of concoction or distortion," was rightly disregarded. The learned judge's decision to admit the statement cannot be impugned.

[97] But was the police officer mistaken as to what he heard, or did he deliberately lie? Those were questions for the determination of the jury. In directing the jury on the issue, the learned judge, at page 316 of the transcript, further guided them as follows:

> "Now Mr Foreman and your members, if you accept that the words use [sic] points to this man, then that is when you now **have to look at the whole circumstances to say whether it is credible evidence on which you can rely**. The first point is, does it point to him.
>
> Secondly, you have to judge the credibility of the words now, because the prosecution is relying on the evidence of what Sergeant Linton told you that Mr McKenzie said to him, to put before you the identity of McKenzie's shooter."

The learned judge highlighted pertinent aspects of Sergeant Leslie's evidence, as aforementioned at paragraph [77].

[98] At page 328 line 23 continued on page 329, the learned judge said:

> "So I ask you again, to consider, is Sergeant Linton making a mistake about what he said was told him. You saw Sergeant Linton as he gave his evidence. Is this something he could or would make a mistake about, or was this statement concocted by him. These are the some of the question [sic] you may wish to ask yourselves as you resolve the issue. It is for you to decide what was said, if you find anything was said and to be sure that Sergeant Linton was not mistaken in what he believe might have been said by the deceased to him. So, that is one of the factors that you are going to examine, and the second factor that you have to examine now, in relation to this issue of what we call 'res gestae' Mr Foreman and your members, you must also be sure that the deceased, Mr McKenzie did not concoct. If you believe that Mr McKenzie used those words those words, he didn't concoct or distort the statement to his Mr McKenzie advantage or disadvantage to this accused man. Ask yourselves, did the diseased concoct this statement?"

[99] Her finding that the deceased statements conformed with the requirements to be deemed a *res gestae* statement and thus admitted into evidence cannot be impugned. The learned judge's directions to jury were adequate and fairly balanced. Grounds 1 and 2 therefore fail.

[100] Although there was ample evidence that the statement qualified as *res gestate*, the issue of identification remained. If the identification evidence was tenuous, the learned judge would have erred in having the matter proceed to the jury. Also, if there were material inconsistencies and discrepancies in the evidence adduced by the Crown and the jurors were not properly directed by the learned judge on how to treat with same, her summation would have been inadequate. Ground 3 and 4 will therefore be dealt with together.

Ground 3

> **The learned trial judge erred in law by allowing the case to proceed to the jury.**

Grounds 4

The learned trial judge's summation on identification was inadequate and biased in favour of the prosecution.

Submissions on behalf of the applicant

[101] It was Mr Equiano's submission that the learned judge erred by allowing the matter to proceed to the jury because reliance was placed on identification evidence which was based solely on utterances made by the deceased to Sergeant Leslie Linton. Sergeant Linton's evidence, counsel posited, did not support an identification of the deceased's assailant. Inspector O'Connor's evidence, he submitted, only supported the fact that there was a "discord" between the deceased and the applicant which could have provided a motive for the deceased to implicate the applicant.

[102] Counsel referred the court to the oft cited case of **R v Turnbull** [1977] QB 221 in which Lord Widgery outlined the conditions to be satisfied when identification is an issue and contended that the relevant conditions were not satisfied. Learned counsel also argued that the learned judge's summation on identification was biased because of her failure to state the strengths and weaknesses of the identification evidence which he contended, negated a fair trial.

[103] He submitted that the uncorroborated utterances of the deceased and the absence of evidence as to the cause of his demise affected the case. Counsel also complained that the judge had wrongly instructed the jury to speculate regarding the circumstances of the identification using the time it took to fire the number of rounds.

The Crown's response

[104] Mrs Milwood Moore, both in her written and oral submissions, directed the court's attention to the fact that defence counsel did not, during the trial, submit that there was no case for the applicant to answer. Learned counsel argued that the Crown had therefore provided sufficient evidence on which any jury, properly directed, could have arrived at

a verdict of guilt. She contended, inter alia, that the evidence identifying the applicant was neither slender nor dangerous that it ought not to have been left to the jury.

[105] It was her submission that there was other evidence before the learned judge which supported the identification of the applicant from which the jury could have drawn inferences. Learned counsel relied on **R v Galbraith** [1981] 1 WIR 103]. She also referred the court to the case of **Melody Baugh-Pellinen v R** [2011] JMCA Crim 26, in support of her submission that whenever circumstantial evidence is relied upon, the jury must determine whether the inference of guilt has been proven beyond a reasonable doubt, and not whether an individual item of evidence was proven beyond a reasonable doubt.

Law/discussion

[106] In **Turnbull,** in recognition of the serious problem caused by mistaken identification, Lord Widgery CJ, with whom the court agreed, enunciated the principles which ought to guide judges in cases in which identification is disputed. They are set hereunder as encapsulated by the learned author of Blackstone at page 2214:

> I. Cases in which the evidence against an accused is based wholly or substantially on identification evidence which the defence alleges to be mistaken the judge should warn the jury of the special need for caution before convicting the accused relying on said identification and advise of the reason for the warning. That is, a mistaken witness can be convincing and no particular words have to be utilised.
>
> II. The judge should have the jury examine carefully the circumstances in which the identification took place such as the length, distance, lighting of the observation, whether it was impeded, whether the person was previously seen by the witness, the period of time between observation and

identification to the police, whether discrepancy existed between the identification and the accused actual appearance.

III. the judge should remind the jury of any specific weakness which appeared in the identification evidence.

IV. 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 the situation is very different. The 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; and the judge ought to identify this supporting evidence of identification. Further, in assessing the quality of the identification evidence, they could take into account the fact that it was contradicted by any evidence coming from the deceased.

[107] Referring to **Turnbull v R**, at page 1403, the learned authors of Blackstone Criminal Practice 2000, in further explaining the correct approach to submissions of no case to answer stated:

> "… if the quality of the identification evidence on which the prosecution case depends is poor and there is no other justifying evidence to support it. Then the judge should direct the jury to acquit…. However, supporting evidence capable of justifying leaving a case to the jury even if identifying evidence is poor need not be corroboration in the strict sense."

[108] At page 2262 the learned authors pointed to the fact that:

> "It is easy for an honest witness to make a confident, but wholly false, identification of a suspect, even in some cases where the suspect is well known to him. There are several possible reasons for errors of this kind. Some persons may have difficulty in distinguishing between different subjects of only moderately similar appearance, and many witnesses to crimes are able to see the perpetrators only fleetingly, often in very stressful circumstances. Visual memory may fade with the passage of time, and may become confused or distorted by suggestive influences from photographs or other sources of contamination. There is evidence that false identification can sometimes be caused by a process known as unconscious transference, in which the witness confuses a face he recognises from the scene of the crime (perhaps that of an innocent bystander) with that of the offender. Such problems may then be compounded by the understandable, but often misguided, eagerness of many witnesses to help the police by making a positive identification."

[109] Was the learned judge's summation on the issue of identification inadequate and biased? The answer depends on:

1. whether in fact there were weaknesses in the identification evidence linking the applicant to the crime;

2. whether the learned judge failed to highlight that weakness to the jury; and

3. whether she failed to guide the jury on how to treat with the weakness.

[110] Examination of the judge's directions is necessary to determine whether her summation was in fact wanting.

[111] There is no dispute that the applicant and the deceased were known to each other. In fact, they were once friends. On the issue of identification, the learned judge, guided the jury thus:

> "Now, Mr. Foreman and your members, if you reach a stage where you feel sure that the words were used, that it points to this accused man and that you can act on that evidence, then before you act on it, there is one further thing that you have to examine. You have what you have to consider is whether you can act on the deceased's identification evidence when he said 'Stamma' shot him. And I don't want you to be confused, Mr Foreman and your members … After you get the whole issue of whether Sergeant Linton is reliable, not making a mistake; he heard the words, and you settle that point to this man and that it was not concocted by Mr Thompson. Or was it distorted. He said 'Stamma', Charm boy shot him, to the police, he never concocted it; is not a distortion; Sergeant Linton heard him say that and he was speaking about this man, **before you say you are going to act on it, to rely on it, you have to say to yourselves now, you have to look at the issue of identification. The circumstances surrounding the opportunity that McKenzie would have had to identify his attacker, and this is where the Crown is simply asking that you draw reasonable inferences from the evidence put before you. In this case the res gestae, the words used really involves the identification by Mr McKenzie of the man who shot him and although it is a recognition case, in other words they are not strangers, I have to tell you Mr Foreman and your members, that even in recognition cases, you can make mistake.**" (Emphasis added)

[112] The learned judge further explained than an honest witness can also be mistaken. She advised the jurors to examine the circumstances under which the identification of the applicant had been made. She also guided them as to the factors to consider. They were instructed to consider:

1. whether it was daylight or night;

2. the distance the persons were from each other

3. whether anything obstructed the face of the assailant; and

4. for how long he had his assailant under observation.

[113] In addressing the absence of any supporting witness, the learned judge explained that, on the evidence, the Crown was asking the jury to draw the reasonable inference that:

> "McKenzie would have had sufficient opportunity to view his assailant."

[114] She, however, pointed to the absence of evidence from Mr McKenzie as to how long the incident lasted, whether:

> "5 seconds, 30 seconds, 5 minutes."

[115] The learned judge further sought to assist the jury in estimating the time the complainant would have had his assailant under observation. In so doing at page 35, commencing at line 11, she said:

> "…what we do know is that Dr. Prasad, if you accept him, tell [sic] you the man got five gunshot injuries. So you have to judge, Mr Foreman and your members, 'bam, bam, bam, bam, bam', five gunshots. We don't know if they were spaced, but I'm just telling you, so you have to judge the time … So you are going to have to judge it now if somebody stood---and I will speak you about what the doctor told you that the assailant could have been in terms of where the injuries were."

[116] At page 385 line 7-11 the learned pointed to the fact that there was

> "… no evidence as to how long the assailant would have been there with Mr McKenzie to tell you, okay this incident lasted 5 seconds, 30 seconds, 5 minutes."

[117] It is important to point to, not only a deficiency in the learned judge's directions, but also an error. Her reliance on the shots fired, "bam, bam, bam", in her attempt at demonstrating the time the deceased would have had to view his assailant, was misplaced. The learned judge ought to have to have told the jury that, the deceased's

identification at that junction would have been made under difficult conditions. That error/deficiency however could not render her decision fatally flawed.

[118] Regarding visibility, the learned judge reminded the jury of Detective McAnuff's evidence that:

> "it was brightly sunshine" and therefore not "night-time"

She, however, pointed to the absence of evidence regarding the length of time the deceased would have been with his assailant/his shooter and reminded them of the possibility of mistaken identity.

[119] Of the inspector's evidence, the learned judge, at page 312, lines 3 to 20, said:

> "He identified himself to him and asked him his name, he says [sic] its [sic] Patrick Thompson and he asked him if he is known or called by any other name and he said some people called him 'Stamma'. Of course, he said he can't recall, he didn't remember anything strange about how the man spoke but, Mr. Foreman and your members, I do not think it's in issue that this gentleman, Patrick Thompson stammers. You actually heard him for yourself, his grandmother has told you that and it is not denied that it is Mr. O'Connor who detained him and put him in custody. He is just saying it was five years ago, he can't recall if he spoke, it there was anything strange about that, but he told you that he was also called 'Stamma'."

[120] At lines 17 through to 23 of page 329, the learned judge explained:

> "If you believe that Mr. McKenzie used those words, he didn't concoct or distort the statement to his Mr. McKenzie's advantage or disadvantage to this accused man, ask yourselves, did the deceased concoct this statement? Did the deceased distort this statement?"

[121] The learned judge further explained, that if they (the jury) accepted that the words were uttered by the applicant in denying killing the deceased, it could reasonably have been inferred from the words, as an acceptance that he knew the deceased. At page 355 line 7 to page 356 line 2, the learned judge addressed that issue thus:

> "**Mr Foreman and your members, if you are not sure that Mr. McKenzie properly identified the accused, or you are not sure if he could properly identify him, if you are not sure as to the circumstances that existed to say that he could properly identify his attacker then your verdict, Mr Foreman and your members, would be not guilty**……If you conclude that the deceased did not make the statement to Sergeant Linton as to who shot him, or you are not sure whether he did respond to Sergeant Linton, then you must disregard the evidence completely, his *res gestae*. And if you disregard it, if you say, 'Boy you are going to disregard it, you can't rely on it, then there will be no other evidence for you to rely on, the accused man would be not guilty." (Emphasis added)

[122] Of Inspector O'Connor's evidence in chief that he noticed nothing unusual about the applicant's speech, the learned judge expressed the view that the fact that he stuttered was not an issue because:

i. the jury heard him for themselves;

ii. his grandmother testified that he stuttered; and

iii. it was not denied that he was detained and placed in custody.

[123] The learned judge further directed the jury that if they accepted that the evidence pointed to the applicant as "Stamma" they should determine whether the evidence was credible. They were further directed to determine the circumstances under which Sergeant Linton testified that those words were spoken.

[124] It was, however, also suggested to the sergeant that neither in his statement nor in his evidence to the lower court, he mentioned that the applicant was "Charm's boy." There was in fact, no mention in the witness' statement or in the court below that of the applicant as "Charm's boy". That evidence might have been an embellishment by the officer to bolster the Crown's case which was a matter for the triers of fact to determine.

[125] The learned judge failed to assist the jurors in that regard. She was however not required to mention every discrepancy. Although the learned judge failed to address that

issue, she had however properly directed the jury to examine the evidence in its totality. She had also instructed them that if she had forgotten anything which they regarded important they were to treat with same accordingly. Her directions on the possibility of mistaken identity were also adequate.

[126] Issues of credibility and reliability are matters entirely within the purview of the jury. The learned judge adequately directed the jury as to the likelihood of concoction and her direction that it was for them to accept or reject the Crown's evidence, was pellucid. The learned judge's summation was fairly balanced and adequate.

[127] Moreover, in light of other cogent, evidence adduced by the Crown which pointed to the applicant, a prima facie case had been established. Her decision to allow the matter to proceed to the jury for their determination cannot be faulted. Grounds 3 and 4 also fail.

Ground 5

> **The learned judge's emphasis on lies and directions in her summation were excessive and unfairly averse to the applicant**
>
> **(a) by placing emphasis on lies; and**
>
> **(b) by her directions being excessive and unfairly averse to the applicant.**

Submissions on behalf of the applicant

[128] Mr Equiano also complained that the learned judge's emphasis in her summation on lies and her directions in relation to the applicant's explanation as how he came by the scar, were excessive and unfair to the applicant because how he came by the scar on the face had no probative value and the jury ought to have been directed accordingly.

[129] It was also counsel's submission that on the Crown's case, the discrepancy as to which side of the applicant's face the scar was seen, was immaterial and the judge placed too much emphasis on same. Counsel also complained that the learned judge equated

the applicant lying about the circumstances leading to the scar, to him lying about his involvement in the incident. Counsel relied on the case of **R v Burge; R v Pegg** [1996] 1 Cr App 163 in support of that submission.

The Crown's response

[130] In response to counsel's criticism of the learned judge's directions regarding the scars, it was counsel's submission that they were adequate and did not adversely affect the applicant. For these submissions she also relied on the case of **R v Burge; R v Pegg**; and also the cases **R v Lucas** [1981] 3 WLR 120 and **R v Goodway** [1993] 4 All ER 894.

Law/discussion

The learned judge's treatment of the complainant's evidence on the issue

[131] At page 277 and line 14, to page 289 lines 5-14, of the transcript the learned judge warned the jurors as follows:

> "Now, as I said to you, you must decide the case only on the evidence you have heard. There will be no more. You are not to speculate about what evidence there might have been or allow yourselves to be drawn into speculation. What you have heard is the evidence before you, and you have to make a decision based on what you have heard and not to speculate on what else could have been put before you. That is not your concern. It is what you have heard that you will have to judge on.
>
> …
>
> You are entitled, Mr. Foreman and your Members, to draw inferences that are quite inescapable, because you must not draw an inference unless you are quite sure it is the only inference that can reasonably be drawn.
>
> …

> ... 'discrepancy' between what one witness says and what another witness has said on the same point.
>
> …
>
> Now, in relation to discrepancy, and I will say to you, that in most cases, the differences in the evidence of witnesses are to be expected. The occurrence of disparity in testimony recognizes that in observation, recollection and expression the ability of individual varies. What do I mean by that, that their ability varies.
>
> …
>
> **You have seen and heard the witnesses and it is for you to say whether these discrepancies are profound and inexplicable or whether the reasons which have been given, if any, for these discrepancies are satisfactory and you bear in mind, that you are entitled to accept the evidence of one witness on a particular point and reject what another witness say [sic] on the same point, if you find one witness to be more reliable on that point.**" (Emphasis added)

The learned judge instructed the jury that it was within their sole purview to determine how to treat with the inconsistencies having regard to the witness' explanation.

[132] At pages 286 to 287 of the transcript she directed the jurors' attention to the discrepancies and the inconsistencies in Miss Joseph's evidence and instructed them that it was their view that mattered. She reminded them of the discrepancy in Miss McKenzie's *viva voce* evidence, that she had last seen the applicant on the Thursday and Friday nights before her son's death, but upon being confronted by her previous statement in which she stated that she had last seen him a month before her son's death. She also reminded them of the witness' explanation that she had seen the applicant on both occasions and her insistence that she was not lying. They were also instructed that it was within their sole purview to determine how to treat with the inconsistencies having regard to the witness' explanation.

[133] At page 280 and line 2, the learned judge further advised the jury as follows:

> "Equally, if in the course of my review of the evidence I appear to express any view concerning the facts that will assist a particular aspect of the evidence, do not adopt those views unless you agree with them. And if I do not mention something which you think is important, you should have regard to it and give it such weight as you think fit. When it comes to the facts of this case, it is your judgment alone that counts,"

[134] At page 283, line 11 onwards the learned judge explained the inconsistencies and discrepancies to the jury and how they ought to deal with same. She guided them as follows:

> "You must consider what we call, term as inconsistencies and or discrepancies in the evidence of the witnesses. And I will now direct you as to what these terms mean.
>
> Let's look at the issue of inconsistency first. In most trials it is possible to find inconsistencies in the evidence of witnesses especially when the facts about which they speak are not of recent occurrences. So, you are going to bear in mind when you assess the witnesses that the incident took place in April of 2010, and the witnesses are giving evidence before you in January of 2016. So, you understand the span of time that would have past, so you bear that in mind.
>
> Now these inconsistencies may be slight or serious, material or immaterial. If you find that these inconsistencies are slight or immaterial, you may think they don't really affect the credit of the witness or the witnesses concerned. On the other hand, if you think that these inconsistencies are serious or material, you may say that because of them it would not be safe to believe the witness or witnesses on that point or at all. It is a matter for you to say in examining the evidence whether there are any such inconsistencies, and if so, whether they are slight or serious, and bear in mind how I direct you. And in examining these inconsistencies you should take into account the witnesses [sic] level of intelligence and his or her ability to put accurately into words what he or he has seen, the witnesses [sic] powers of observation and any defects that the witness might have.
>
> The previous statement does not constitute evidence on which you can act unless the witness has admitted that what was said on the previous occasion is the truth.

> However, if what was said previously conflicts with the witness' sworn evidence before you, you are entitled to take that inconsistency into account, having regard to any explanation the witness may offer for the inconsistency for the purpose of deciding whether the evidence of the witness ought to be regarded unreliable, either generally or on the particular point."

[135] At pages 289 through to 290, the learned judge further:

1. explained the meaning of discrepancies in the law;

2. gave the jury examples of discrepancies; and

3. guided them on how to treat with same.

She then identified the following two discrepancies:

[136] The discrepancy between two officers and Miss Josephs' account of when the deceased was killed; and the location of the scar on the applicant's face.

[137] She pointed to Inspector O'Connor's evidence at the preliminary enquiry that at the material time he saw the scar on the right side of the applicant's face but at the trial there was no scar on his face. She also reminded the jury of Detective Daye's evidence that five years ago he saw a scar to the left side of the applicant's face but that on the trial date he admitted that there was none.

[138] The learned judge directed the jury to bear in mind that it was Miss McKenzie, the applicant's grandmother's evidence that she had seen a cut on the applicant's face in April of the same year the officer had seen the scar in June. She however did not state on which side of his face.

[139] There was no mention by the learned judge regarding the absence of a scar. The learned judge instructed the jury that if she failed to highlight any other discrepancy, they ought to warn themselves and deal with them as she directed. She further directed as follows:

> "If you find that it shows that they are making up the case, the police making up the case, because one say [sic] right and one say [sic] left, or it is a matter of human frailty honest mistake. So, that is how you judge the situation."

[140] At page 314 of the transcript, the judge also directed the jury to Inspector O'Connor's evidence that he had noticed a scar to the right side of the applicant's face and his evidence regarding the applicant's explanation as to the circumstances in which he sustained the injury, which was that he fell and a "wire cut him". The officer described the cut as being from the top down across the face.

[141] She also reminded them of the applicant's other explanation that the scar was as a result of the deceased cutting him during a fight which resulted from him owing the deceased for two cigarettes. However, he (the applicant) denied killing him.

[142] The learned judge further instructed the jury that it was for them to determine how to treat with the inconsistency having regard to the explanation which the witness had given on the issue.

[143] At page 123 in the case of **R v Lucas** it was stated thus:

> "To be capable of amounting to corroboration the lie told out of court must first of all be deliberate. Secondly it must relate to a material issue. Thirdly, the motive for the lie must be realisation of guilt and fear of the truth. The jury should in appropriate cases be reminded that people sometimes lie for example in an attempt to bolster up a just cause or out of shame or out of a wish to conceal disgraceful behaviour from their family. Fourthly, the statement must be clearly shown to be a lie by evidence other than that of the accomplice who is to be corroborated."

[144] Counsel for the applicant also relied on the case of **R v Burge**; **R v Pegg**. The court provided the following guidance as to how a judge ought to approach the Lucas direction:

> "…In particular, this Court is unlikely to be persuaded, in cases allegedly falling under number 4 above, that there was a real

> danger that the jury would treat a particular lie as evidence of guilt if defence counsel at the trial has not alerted the judge to that danger and asked him to consider whether a direction should be given to meet it. The direction should, as far as possible, be tailored to the circumstances of the case, but it will normally be sufficient if it makes two basic points:
>
> 1. that the lie must be admitted or proved beyond reasonable doubt, and
>
> 2. that the mere fact that the defendant lied is not itself evidence of guilt since defendants may lie for innocent reasons, so only if the jury is sure that the defendant did not lie for an innocent reason can a lie support the prosecution case."

[145] The fourth circumstance under which a **Lucas** direction is needed is where the prosecution did not rely on a lie to prove the accused's guilt but the judge reasonably envisaged that there is a danger the jury may do so.

[146] In **R v Burge**; **R v Pegg** the issue of whether a **Lucas** direction was required arose. In dismissing the appeal, the court found that said direction was not required in the circumstances of the case. The court was also of the view that, in any event, the direction given in the case would have been sufficient if such was required. At pages 289 through to 290 of the transcript, the learned judge provided examples of discrepancies and directed the jury on how to treat with them.

[147] The applicant, did not testify that he had no scar. Counsel's only request in that regard was for the officer show the scar.

[148] The judge also instructed the jury that if she failed to warn them of any other discrepancy, they ought to warn themselves and deal with them as she directed. She further instructed them as follows:

> "If you find that it shows that they are making up the case, the police making up the case, because one say [sic] right and one say [sic] left, or it is a matter of human frailty honest mistake. So, that is how you judge the situation."

The judge found on the Crown's case there were three versions as to how the cut came about.

[149] The learned judge reminded the jury as to the absence of evidence that the cut seen by the detective and the wound seen by the grandmother were one and the same. She however explained that the Crown was asking that an inference be drawn that it was one and the same cut, scar and wound. The learned judge also referred to the explanation the grandmother testified that she was given, that is: old things in a truck had cut him. She directed their attention to the fact that that evidence was never challenged. The judge pointed to the fact that that explanation sounded similar to the explanation given to one of the officers regarding the wire.

[150] The learned judge further directed the jury's attention to the fact that if they accepted that the officer was told that the deceased had a cut, the applicant might have "provide[d] motive". She further instructed them to first determine whether the applicant had lied in light of the fact that he did not deny having said those words and only the officers' evidence was challenged. She further directed them that if they were of the view that he lied, they were then to ask why would he have lied. She directed them as follows:

> "Now I have to tell you, Mr. Foreman and your members, that the mere fact that a defendant tells a lie is not, in itself evidence of guilt. A defendant may lie for many reasons and they may possibly be innocent ones in that they do not denote guilt. For example, he may lie to bolster a true defence or to protect someone else, to conceal some disgraceful conduct other than the commission of murder or he may lie out of panic or confusion. If you think that there is or may be an innocent explanation for his lies, then you should take no notice of them. It is only if you are sure that he did not lie for an innocent reason, that his lies can be regarded by you as evidence going to support the prosecution's case of guilt You have to examine whether he could have had any other innocent explanation for lying. It is only if you come to the conclusion that there is no innocent explanation, then you can say it goes to support the prosecution's case"

[151] The learned judge also directed to the jury's attention to the fact that the applicant has always maintained (from 2010 to 2016) that he did not murder the deceased. She further guided them as follows:

> 1. Because the applicant did not sit in the witness box and testify on oath/give sworn evidence should not to be used against him;
>
> 2. It was for them to attach what value and weight to attach to same; and
>
> 3. It is for the prosecution to convince them of the applicant's guilt.

[152] Having reviewed the relevant authorities, a perusal of the submissions and the transcript in the matter reveal no excessive or unfair references to lies in the learned judge's summation. The learned judge rightfully directed the jury to the material inconsistencies and discrepancies in both the Crown and applicant's cases. She further directed them to identify and consider any she might not have referred to and treat with them accordingly. The learned trial judge adequately directed the jury regarding the three explanations the applicant allegedly gave for the scar. Her directions on how to treat with same cannot be faulted.

[153] The learned judge's summation on the issue was fairly balanced. Ground 5 also fails.

Conclusion

[154] It is for those reasons the application for leave to appeal was refused.