[2019] JMCA Crim 27

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS 34 & 25/2015

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MISS JUSTICE STRAW JA
THE HON MISS JUSTICE EDWARDS JA

CALVIN WALKER & LORRINGSTON WALKER v R

Miss Nancy Anderson for applicant Calvin Walker

Miss Gillian Burgess for applicant Lorringston Walker

Miss Paula Llewellyn QC, Director of Public Prosecutions and Hodine Williams for the Crown

17, 18 June and 31 July 2019

STRAW JA

[1] On 15 June 2019, the applicants were convicted of the offences of burglary and larceny (count 1) and wounding with intent (count 2) after a trial before Graham-Allen J (the learned judge) and a jury in the Circuit Court for the parish of Saint Catherine. The applicants were each sentenced on 19 June 2015 to serve 15 and 20 years' imprisonment for the aforementioned offences. They both sought leave to appeal against their convictions and sentences. Their applications were considered on paper and refused by a single judge of this court on 1 June 2017. This is a renewal of the application for leave to appeal against conviction and sentence.

[2] The applicants, Calvin Walker and Lorringston Walker are brothers. For convenience they will be referred to individually where necessary by their first names, no disrespect is intended.

The case for the prosecution

[3] The applicants worked on a farm in Dover Castle, Saint Catherine with Mr Peter Thomas (the complainant). As at 23 January 2012, the complainant had been working on the farm for approximately 11 months and he knew Calvin as "Tutu Walker" and Lorringston as "Larry Walker". He knew Calvin for 10 months and Lorringston for 11 months. The complainant and Lorringston both resided in separate living quarters in a dwelling house on the farm. Calvin resided elsewhere.

[4] On 23 January 2012 at approximately 7:30 pm, the complainant was in his living quarters when he saw his door "shub off". Lorringston entered first and Calvin followed. Both had handkerchiefs tied around their mouths beneath their noses. They had nothing on their heads. They were each armed with a machete.

[5] As the complainant was laying on a bed, the applicants tried to tie him with an electrical cord. As he wrestled with them, the complainant fell from the bed to the floor. While in the process of wrestling, Lorringston used the machete to injure the complainant in the area of his groin. He also received an injury to his hand when Lorringston tried to stab him and he tried to box the machete away. Calvin took up the complainant's cellular phone, which was on his bed, as Lorringston held him down on the floor trying to tie his hands.

[6] Approximately eight minutes after they entered, the complainant managed to run out of his room to the dining hall and then to the back room where he slid and fell outside to the back of the house. When the complainant fell, Calvin held him to his belly and held down his hands. Lorringston then used a machete to chop the complainant twice to his neck. Both then ran back into the house.

[7] The complainant eventually drew himself into bushes nearby as he thought they would have returned to look for him. He remained there for approximately 25 to 30 minutes. At around 10:00 pm the complainant went and laid down on a roadway. Sometime after, a van drove towards him and stopped. He was assisted into the van. The applicants were also in the van and they went for a sheet to help the complainant who was bleeding.

[8] The complainant was then transported to the hospital with the applicants in the van and they made enquires of the complainant to the effect, "a who do dis?". It is the complainant's evidence that he was unable to talk at the time. The complainant first attended the Linstead Hospital (in Saint Catherine) and was subsequently transferred to the Kingston Public Hospital (in Kingston) where he was admitted and received medical treatment.

[9] On 17 February 2012, the investigating officer, Constable Gregory McLeod, recorded the complainant's statement at the Linstead Police Station. Two days later, Constable McLeod along with other officers apprehended the applicants at their family house in the Dover Castle area. They were both informed by Constable McLeod of his

intention to have them participate in an identification parade. However, it was not held as their attorney-at-law declined to have either of them participate.

[10] On 2 April 2012, both applicants were formally charged for the offence of attempted murder.

The case for the applicants

[11] At the trial, both applicants gave evidence on oath denying that they attacked the complainant. They both had alibis. Calvin called one witness, his sister Miss Stacy-Ann Walker, who stated that he was with her at the time of the attack. She gave evidence that around 10:30 to 11:00 pm, Calvin was at her home along with a number of other family members when Lorringston came to their house informing them that "Dem jus cut 'Chung' choat dung di road." In response they went to assist the complainant. They travelled in the van belonging to Mr Wayne Grant.

[12] Lorringston called two witnesses to account for his whereabouts. These witnesses were the said Mr Wayne Grant and Mr Andre Plunket. Mr Grant gave evidence that he heard some news from his baby-mother that there was someone bleeding on the road, and that the person looked like Lorringston's co-worker. He then went to ask Lorringston where the complainant was and to inform him of what he heard. Mr Grant stated that Lorringston asked him to take him to the spot. Mr Grant did not state what time this took place but the inference is that it would have been sometime between 10:30 pm to 11:00 pm as that would have been the time he received information that someone was bleeding on the road.

[13] Mr Plunket gave evidence that between 10:30 pm and 11:00 pm, Lorringston was with him by the district where there is a shop. He recalled waiting on the domino table for a game, drinking and being in the company of Lorringston and a number of other persons. He also indicated he had been in Lorringston's company for "a very long hours", but also said that the 10:00 pm news was on at the time. Mr Plunket's evidence is that Mr Grant came on the scene and asked Lorringston if "the man on his farm was okay". Lorringston said yes, that he "leave him okay". Mr Grant informed him that he was not as he passed him by the roadside at a light post with his throat cut. It was in response to this that they went to house where Calvin (Tutu) was and then a group of them went towards the farm to assist the complainant.

The grounds of appeal

[14] The original grounds contained in the notices of appeal which were both filed on 12 April 2016 on behalf of the applicants were abandoned. Leave was sought to rely on the separate supplemental grounds which were filed on 17 January 2018 on behalf of each applicant. At the hearing before this court, both counsel elected to advance the same grounds as set out below and to divide the arguments between themselves. Counsel for both applicants subsequently filed the amended grounds of appeal jointly on 19 June 2019. They are as follows:

> "GROUND ONE
>
> The failure of defence counsel to lead evidence of the applicants' good character during the trial before the jury deprived them of the opportunity to present their full defence, in particular, as it relates to propensity to commit the offence and credibility, which resulted in an unfair trial

GROUND TWO

The Learned Trial Judge failed to properly direct the jury on identification in that (1) she failed to give any direction concerning the recognition when the mouth and nose of the Applicant was hidden, (2) she failed to properly warn the jury about an honest witness being mistaken and (3) she erred in explaining the lack of an identification parade.

GROUND THREE

The Learned Trial Judge failed to direct the jury on how the lack of medical evidence concerning the injuries sustained by the complainant should be treated in view of the length of time between the incident and trial;

GROUND FOUR

The sentence of each applicant was manifestly excessive. The Learned Trial Judge (a) erred in stating that there was a minimum of 15 years for wounding in the circumstances of the case; (b) mis-stated [sic] the general principles of sentencing; and (c) failed to consider several mitigating factors, including age, assistance to the victim, family commitments and time in custody.

GROUND FIVE

The delay in the hearing of the trial and this appeal is a breach of the applicants' constitutional right to a fair trial within a reasonable time – section 16(1) of the Charter of Fundamental Rights and Freedoms, Chapter III of the Constitution."

Ground 1: The failure of defence counsel to lead evidence of the applicants' good character during the trial before the jury deprived them of the opportunity to present their full defence, in particular, as it relates to propensity to commit the offence and credibility, which resulted in an unfair trial

Submissions on behalf of the applicants

[15] In respect of this ground, counsel Miss Burgess made submissions on behalf of both applicants. She stated that they were represented at trial by the same attorney, Miss Janetta Campbell and asserted that a single attorney representing two accused is a bad practice.

[16] Miss Burgess referred the court to a handwritten affidavit filed 14 June 2019, wherein Lorringston stated that Miss Campbell did not advise him that he could call persons from the community to say that he was a good person, until after he was convicted. At paragraph 4, he stated, "[a]fter they found us guilty the lawyer told us that we could call people from the community to say that we are good persons." This affidavit was signed by Lorringston.

[17] Miss Burgess indicated to the court that in the ordinary course, counsel would have been invited to respond to assertions that tend to suggest the provision of ineffective assistance. However, this was not possible as counsel is deceased.

[18] She went on to advance that it has been held that the failure to marshal good character evidence is a ground on which an appeal can be allowed on the basis of incompetence of counsel. Miss Burgess sought to make a distinction between situations in which clients fail to instruct counsel and where counsel ought to advise the client. She contended that in the case at bar, counsel ought to have advised the applicants that their good character could form part of the trial.

[19] It was acknowledged that in some instances it may be argued that counsel ought not to be criticised where they are taking a strategic step. In support of this point, reference was made to **Noel Campbell v The Queen**.[1] However, she submitted that

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[1] [2010] UKPC 26

in this case where the applicants had no previous convictions, it did not seem to occur to counsel Miss Campbell that good character evidence could have been called. The court was pointed to the exchange between Miss Campbell and the trial judge captured in the summation (specifically at page 53, line 11 and page 61, line 12). Miss Burgess contended that no character evidence was called and it was only after the conviction that counsel appeared to have appreciated, based on the remarks of the trial judge, that character evidence could be presented. All the good character evidence, therefore, came after the verdict. She argued that this evidence was important during the trial, especially since both applicants gave sworn evidence. None of them were asked if they had ever gotten into trouble before.

[20] Miss Burgess forcefully contended that character evidence would have been available during the trial and should have been called, having regard to the large number of persons from the community who came forward to provide character evidence on behalf of the applicants during the sentencing hearing, which occurred within four days of the completion of the trial. She further contended that the issue of good character was particularly important where the case was not supported by any forensic evidence, but was, what she called a "he said, he said" type of case. Miss Burgess emphatically stated that it would have made a difference.

[21] If this were not so, Miss Burgess submitted that the law would not have developed in the manner it has. She commended to the court as an indicium, that where a judge failed to give a good character direction, it was fatal, (presumably to the

conviction) as a person who behaves well is entitled to get credit for it. She submitted that the failure to lead good character evidence deprived both applicants of a fair trial and thus the conviction was unsafe and should be quashed.

[22] In answer to this court, Miss Burgess submitted that if her submissions were to be accepted then the appropriate course would be for a retrial.

Submissions on behalf of the Crown

[23] Miss Paula Llewellyn QC, stated that this ground of appeal fell within the remit of incompetence of counsel, in that, as a result of the incompetent, unreasonable or negligent conduct of defence counsel at trial, the applicants were denied a fair trial. It was submitted that the authorities essentially provide guidance that the overarching consideration in cases of this nature is whether the alleged incompetent conduct of counsel caused the appellant's conviction to be occasioned by a miscarriage of justice.

[24] Reliance was placed on **Clinton v R**[2] where the court was of the view that an appellate court in assessing an incompetence allegation, will usually attempt to reconstruct the circumstances surrounding the alleged incompetence. It was acknowledged that this exercise cannot be conducted with a high degree of exactitude given the significant time that ordinarily passes between the appellant's original instructions to the attorney, the trial, and the hearing of the appeal. This difficulty is particularly exacerbated where there is no written record of the client's instructions to

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[2] [1993] 2 All ER 998

his attorney, and/or where the attorney fails to provide the court, by way of affidavit, with an account of their management of the case. As a result, the circumstances in which a guilty verdict should be set aside on the basis of the incompetence ground should "of necessity be extremely rare."

[25] It was acknowledged that in the instant case, counsel for the applicants were unable to obtain an affidavit as defence counsel passed away in early 2019. Accordingly, it does not appear that counsel for the applicants obtained any written record of their instructions to counsel at their trial.

[26] It was contended also that the viability of this ground of appeal depends on the applicants' ability to prove:

(i) There was some case mismanagement or act of incompetence which fell below the standard of a reasonable attorney in the circumstances; and that

(ii) The attorney's mismanagement or incompetence adversely affected the outcome of the trial, thereby causing the trial process to be unfair and/or denying the appellant of due process.

[27] It was submitted that whether the conduct amounts to incompetence or mismanagement is a matter for this court's determination and that an assessment ought to be made of counsel's conduct against what would be reasonably expected of counsel in the particular circumstances. Reference was made to the dicta of Justice

Hayton, in delivering the judgment of the Caribbean Court of Justice in **Tyrone DaCosta Cadogan v The Queen**,[3] who approved the remarks of Sir David Simmons CJ in the Barbadian case of **Weekes v The Queen**[4]:

> "Unless in the particular circumstances, it can be demonstrated that, in light of the information available to him at the time, no reasonably competent counsel would sensibly have adopted the course taken by him at the time when he took it, [this] ground of appeal…should not be advanced."

[28] A distinction was drawn by counsel between unwise or mistaken strategies employed in good faith, and acts of incompetence or mismanagement. It was submitted that where counsel, after proper consideration of the competing arguments and after due discussion with his client has, in good faith, taken strategic decisions in the conduct of a case, and those decisions in retrospect are unwise or mistaken, the court should be reluctant to set aside a conviction on the basis of the incompetence ground.

[29] It was submitted further that even if the applicants have possibly, satisfied the first limb of the two stage test, it would not be sufficient to invite this court to quash their convictions. The court was referred to the decision of the Court of Appeal of New South Wales in **R v McIntyre**[5] wherein it was opined:

> "It does not follow that misconduct by counsel necessarily entails that the trial in which it occurred was unfair, or that there has been a miscarriage of justice."

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[3] [2006] CCJ 4 (AJ)
[4] Criminal Appeal No 4 of 2000 (unreported)
[5] [2000] NSWCCA 6

[30] It was contended that an appellate court must be further satisfied by cogent arguments that the second limb of the incompetence ground has been made out. Reference was made to the approach of this court in **Leslie McLeod v R**[6].

[31] Counsel submitted that the courts therefore are concerned with identifying a nexus between counsel's incompetent conduct/case mismanagement and the conviction; or, in other words, assessing the impact of what the appellant's retained counsel did, or did not do, on the outcome of the trial. This assessment is made "with a reasonable degree of objectivity", having regard to the evidence of counsel's conduct in the matter *vis-a-vis* the accused's instructions. The second limb is satisfied where the court is able to identify a nexus between counsel's mismanagement of the case and the resultant conviction and, that there is a possibility that the appellant would not have been convicted had defence counsel conducted the case differently.

[32] Further, it was submitted that the case for the applicants at trial was adequately put by defence counsel to the prosecution witnesses. Additionally, counsel at trial called three alibi witnesses, one who gave evidence on behalf of Calvin and two who gave evidence on behalf of Lorringston, and conducted extensive and detailed cross-examination of the prosecution witnesses, which was sufficient to foreshadow their case.

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[6] [2012] JMCA Crim 59

[33] In essence, the Crown's position was that the failure of counsel to lead good character evidence could not affect the outcome of the trial and did not deprive the applicants the opportunity to present their full defence thus resulting in an unfair trial.

Discussion and analysis

[34] There is no doubt that it is open to this court to allow an appeal in an appropriate case in which complaint is made of the conduct of counsel on the ground that there has been a miscarriage of justice (per Morrison P (Ag), as he then was, in **Rohan Squire v R**[7] at paragraph [19]). The court in **Leslie McLeod v R**[8] at paragraph [64] set out the correct approach to such cases:

> "[64] But it nevertheless seems to us that it would be right for us to consider the matter briefly on the hypothesis that the applicant's version is the correct one and that he was not – or not adequately – advised on whether he should make an unsworn statement or give evidence. In so doing, we will adopt the approach sanctioned by ***Clinton*** and subsequently developed and refined in the later authorities, that is, to consider (i) the impact which the alleged faulty conduct of the case has had on the trial and the verdict; and/or (ii) whether the misconduct alleged on the part of counsel was so extreme as to result in a denial of due process to the applicant."

[35] Both applicants, having given sworn evidence, would have been entitled to a good character direction on both limbs (credibility and propensity) if evidence relevant to their good character had been solicited (see **Jason Richards v R**[9]). Morrison JA (as

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[7] [2015] JMCA Crim 27

[8] [2012] JMCA Crim 59

[9] [2017] JMCA Crim 5

he then was) in **Michael Reid v R**[10], at paragraph 44, set out the principles to be considered in circumstances where it is alleged that the conduct of defence counsel has led to a miscarriage of justice and specifically as it related to the good character direction:

> "**<u>The applicable principles</u>**
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> 44. In our view, the following principles may be deduced from the authorities to which we have been referred:
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> > (i) While it is only in exceptional cases that the conduct of defence counsel can afford a basis for a successful appeal against conviction, there are some circumstances in which the failure of counsel to discharge a duty, such as the duty to raise the issue of good character, which lies on counsel, can lead to the conclusion that there may have been a miscarriage of justice (***Sealy and Headley v The State***, paragraph 30 and the Judicature (Appellate Jurisdiction) Act, section 14(1)).
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> > (ii) Such a breach of duty may also include a failure to advise, in an appropriate case, if necessary in strong terms, on whether the accused person should make an unsworn statement from the dock, give sworn evidence, or say anything at all in his defence (***R v Clinton***).
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> > (iii) Although the value of the credibility limb of the standard good character direction may be qualified by the fact that the defendant opted to make an unsworn statement from the dock rather than to give sworn evidence, such a defendant who is of good character is nevertheless fully entitled to the benefit of the standard direction as to the relevance of his good character to his propensity to commit the

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[10] (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 113/2007, judgment delivered 3 April 2009

> offence with which he is charged (***Muirhead v R***, paragraphs 26 and 35).
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> (iv) On appeal, the court will approach with caution statements or assertions made by convicted persons concerning the conduct of their trial by counsel, bearing in mind that such statements are self-serving, easy to make and not always easy to rebut. In considering the weight, if any, to be attached to such statements, any response, comment or explanation proffered by defence counsel will be of relevance and will ordinarily, in the absence of other factors, be accepted by the court (***Bethel v The State***, page 398; ***Muirhead v R***, paragraph 30 and 37).
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> (v) The omission, whether through counsel's failure or that of the trial judge, of a good character direction in a case in which the defendant was entitled to one, will not automatically result in an appeal being allowed. The focus by this court in every case must be on the impact which the errors of counsel and/or the judge have had on the trial and verdict. Regard must be had to the issues and the other evidence in the case and the test ultimately must always be whether the jury, properly directed, would inevitably or without doubt have convicted (***Whilby v R***, per Cooke JA (Ag) at page 12, ***Jagdeo Singh v The State*** (2005) 68 WIR 424, per Lord Bingham at pages 435-436)."

[36] The affidavit of Lorringston, as referred to in paragraph [16] of this judgment, is before this court for consideration. Unfortunately, we are unable to consider any response, comment or explanation from counsel, Miss Campbell, as we were informed that she is deceased. We were not furnished with any death certificate, but counsel, Miss Burgess, did provide the court with a copy of the death announcement as set out in the Sunday Gleaner dated 5 May 2019. In that notice, the date of death is stated as 18 April 2019.

[37] It is difficult, therefore, to state with any certainty that counsel was incompetent in this particular instance in failing to advise the applicants in relation to good character evidence. But counsel, on behalf of both applicants, made cogent submissions as it related to the context of the trial process that would give some pause to this court before rejecting any such assertion. These included factors that cannot be disputed, such as the fact that both applicants had no previous convictions and so had nothing to fear in asserting this while giving evidence; they had several community members who were available shortly after conviction to provide character evidence during the sentence hearing and did do so. Inferentially, there is an illogical and unexplained reasoning in the sequence of events as to why good character evidence was not led during the trial process. In assessing this matter, therefore, the court is prepared to find that counsel at the trial may have failed to discharge her duty to raise the issue of good character.

[38] The secondary issue for consideration is whether this has resulted in a miscarriage of justice. In order to determine the potential effect of the absence of the good character direction, the court has to have regard to "the issues and the other evidence in the case and the test ultimately must always be whether the jury, properly directed, would inevitably or without doubt have convicted…" (as per Morrison JA in **Michael Reid v R**[11]).

[11] Paragraph 44, sub-paragraph (v)

[39] In **Nigel Brown v The State**[12], the Privy Council also set out similar principles for consideration. At paragraph [33] Lord Kerr stated:

> "It is well established that the omission of a good character direction is not necessarily fatal to the fairness of the trial or to the safety of a conviction - *Jagdeo Singh's* case [2006] 1 WLR 146 para 25 and *Bhola v The State* [2006] UKPC 9, paras 14-17. As Lord Bingham of Cornhill said in *Jagdeo Singh's* case, "Much may turn on the nature of and issues in a case, and on the other available evidence." (para 25) Where there is a clash of credibility between the prosecution and the defendant in the sense that the truthfulness and honesty of the witnesses on either side is directly in issue, the need for a good character direction is more acute. But where no such direct conflict is involved, it is appropriate to view the question of the need for such a direction on a broader plane and with a close eye on the significance of the other evidence in the case. Thus, in *Balson v The State* [2005] UKPC 2, a case which turned on the circumstantial evidence against the appellant, the Board considered that such was the strength and cogency of that evidence the question of a good character direction was of no significance. At para 38 the Board said this:
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> > '… a good character direction would have made no difference to the result in this case. The only question was whether it was the appellant who murdered the deceased or whether she was killed by an intruder. All the circumstantial evidence pointed to the conclusion that the appellant was the murderer. There was no evidence to suggest that anyone else was in the house that night who could have killed her or that anyone else had a motive for doing so. In these circumstances the issues about the appellant's propensity to violent conduct and his credibility, as to which a good character reference might have been of assistance, are wholly outweighed by the nature and coherence of the circumstantial evidence'.

[12] [2012] UKPC 2

[40] In **Mark France and Rupert Vassell v The Queen**[13], Lord Kerr opined at paragraph [46]:

> "The Board concluded that the approach in *Bhola*, if and in so far as it differed from that in *Teeluck*, was to be preferred. It observed that there would be cases where it was simply not possible to conclude with the necessary level of confidence that a good character direction would have made no difference. *Jagdeo Singh* and *Teeluck* were obvious examples. But it recognised that there would also be cases where the sheer force of the evidence against the defendant was overwhelming and it expressed the view that in those cases it should not prove unduly difficult for an appellate court to conclude that a good character direction could not possibly have affected the jury's verdict. Whether a particular case came within one category or the other would depend on a close examination of the nature of the issues and the strength of the evidence as well as an assessment of the significance of a good character direction to those issues and evidence."

[41] In the present case, the major issues revolved around identification by recognition and credibility. If the jury were satisfied that the complainant was not mistaken in relation to his opportunity to view and recognize his assailants, they would also have to assess whether he was lying. In relation to the assessment of credibility, counsel for the applicants have highlighted their lack of previous convictions, the lack of forensic evidence to support the case for the Crown and that there was a sole witness of fact for the Crown.

[42] The jury would have had to weigh the reliability and veracity of the complainant as he alleged that both men, whom he knew before, committed the offences. Both applicants denied that they were involved and called evidence in support of their

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[13] [2012] UKPC 28

defence of alibi. There was no other evidence put forward by the Crown to implicate them and no motive was established. On that basis alone, the good character direction in relation to credibility and propensity would have been of great significance.

[43] In further assessing this issue, there is also an aspect of the trial judge's summation that is open to some criticism. Since the issue of credibility was significant in the determination of this case, it would have been of some importance for the learned judge to specifically separate the issues of mistake and credibility. She did not invite the jury to consider firstly, whether the complainant was lying and to disregard his evidence unless satisfied that he was not and then, if so satisfied, to go on to consider the cogency of the identification. It is useful to have regard to the dicta of Lord Mance from **Noel Campbell**. Lord Mance spoke to this issue at paragraph 28:

> "28. The Board turns to the substantive issues on the appeal. The appellant raises two points, both related to the summing up; first, the judge's directions regarding identification were inadequate, and, secondly, no good character direction was given not due to any fault of the trial judge, but by reason of counsel's incompetence. Starting with identification, both credibility and accuracy were in issue, and it is submitted that the judge should, in accordance with the principle in Beckford v The Queen (1993) 97 Cr App R 409, have given the jury first a direction to consider whether Mr Anglin was telling the truth and to disregard his evidence unless satisfied that he was, and then, if they were satisfied as to his truthfulness, directions in terms complying with R v Turnbull [1977] QB 224. These would include directions (i) warning as to the special need for caution, before convicting the appellant in reliance on the correctness of the identification, because the case against the appellant depended wholly or substantially upon it; (ii) giving the reason for such need; (iii) pointing out that a mistaken witness can be a convincing witness, and that a number of witnesses can be mistaken; (iv) telling the jury to examine closely the circumstances in which the

> identification was made; (v) reminding the jury of any specific weaknesses in the identification evidence in a coherent manner so that the cumulative impact of any weaknesses was fairly laid out: R v Fergus (Ivan) 98 Cr App R 313; (vi) reminding them that mistaken recognition can occur even of close relatives and friends; and (vii) identifying the evidence capable of supporting the identification, as well as any evidence which might appear to, but does not in fact, support the identification."

[44] Returning to the specific issue of good character, it could not be said that the sheer force of the evidence was against the applicants, so as to nullify the impact of any such direction to the jury. Further, there were specific pieces of evidence that would have had the potential to affect the credibility of the complainant or both applicants depending on the assessment of the jurors.

[45] While no motive was established for the assault, the complainant stated that the parties had not been getting along for several months before the incident. He had stated that they used to cook together but that only lasted four months out of the 10 to 11 months. This was contrary to the evidence of the applicants, who both stated that they had a good relationship up to time of incident and in fact, Calvin further stated that the complainant and themselves shared meals on a daily basis. The witness, Stacy-Ann Walker did support the testimony of the applicants to some extent in her assertion that the complainant was her friend and used to come to her house most Sundays for dinner. A good character direction would have provided some value for the case of the applicants in the jurors' assessment of their credibility on this point.

[46] Also, the evidence as led by the Crown of the role played by both applicants in coming to the aid of the complainant while he was lying on the road could also have

been significant in relation to the jurors' assessment of their defence. The obvious impact of this evidence is that the jury would have to consider whether applicants who behaved in the manner they did, would have the propensity to commit such an egregious act of violence. Similarly, they would have had to consider how this aspect of the evidence would impact their view of the applicants' credibility as both had denied being involved in the committal of the offences.

[47] It is in light of all the above, that a good character direction would have had its highest value. Therefore, this court is not sufficiently confident of the safety of the verdict to be able to discount the significance that a good character direction may have had on the verdict of the jurors.

[48] This ground of appeal therefore has merit.

[49] In the circumstances, the conclusion we have reached on ground one is sufficient to dispose of the appeal and it is therefore unnecessary to address every one of the remaining grounds. However, we thought it useful to consider grounds 2 and 3.

Ground 2: The learned trial judge failed to properly direct the jury on identification in that (1) she failed to give any direction concerning the recognition when the mouth and nose of the applicants were hidden, (2) she failed to properly warn the jury about an honest witness being mistaken and (3) she erred in explaining the lack of an identification parade

Submissions on behalf of the applicant

[50] Counsel, Miss Anderson sought to argue this ground on behalf of both applicants. She took issue with the judge's direction and contended that the judge

assumed that the identification by the complainant was acceptable and failed to direct the jury on how to treat this evidence.

[51] She stated that the learned judge did not give the full **Turnbull** warning. It was submitted that the importance of the direction on recognition took on added importance in the context of the case. It was also contended that, although recognition is more reliable than identification, mistakes are sometimes made in identification of close relatives and friends. This, she said, was the most important part of the warning and it was not given and in these circumstances, it was contended that the verdict was unsafe and should be quashed.

[52] Miss Anderson also drew the court's attention to pages 43 to 45 of the summation. She contended that the judge gave a short, insufficient warning to the jury on the possibility that the complainant was mistaken in identifying the applicants as his assailants. She posited that an example of a mistake by an honest witness could have been given to assist the jury, and that the direction given by the judge was too general.

[53] Further, she argued that there ought to have been an explanation as to the partial covering of the face. Counsel contended that this aspect of the direction was lacking as there should have been more emphasis on the fact that the faces were partially covered and there was no assistance given with regard to how the complainant was able to recognise the assailants. In these circumstances, she observed that there was no evidence that the eyes of the applicants were remarkable or that either of them had a scar. Further, counsel referred the court to pages 28 to 32 of the summation and

in particular the judge's remarks to the jury at page 30 (lines 2 -3) that '[t]he accused men did not have anything on their heads". She stated that the evidence revealed that when the complainant was asked if the assailants had anything on their heads, his answer was recorded as "nod" (at page 48 (line 24 - 25)). Counsel contended that we do not know what this meant, whether this was a yes or a no.

[54] On the issue of the identification parade, it was submitted that the learned judge misdirected the jury when she stated in her summation (at page 38, lines 13 -19) that an identification parade was unnecessary in a case of recognition. Miss Anderson contended that this was not correct as the police wanted to conduct the identification parade but it was the applicants, on the advice of their attorney, who refused to appear.

Submissions on behalf of the Crown

[55] Counsel contended that the main issue in the case at bar was identification. She stated that the learned trial judge, having pointed out that the correctness of the identification was the main issue, warned the jury of the special need for caution before convicting a person in reliance on identification evidence and reminded the jury of the opportunity that the complainant had to identify the applicants. The learned trial judge was also mindful of the complainant's demeanour especially as it related to his difficulty with speech. Counsel stated that she also identified the weaknesses in the identification evidence but found that there was sufficient opportunity for the complainant to have seen the applicants.

[56] The court was directed to the following portions of the summation (at pages 43 to 45, lines 11 – 19) where the learned judge gave directions on the issue of identification:

> "This is a trial, where the case against the accused persons depends wholly or to a large extent on the correctness of one or more identification of which the defence is alleged to be mistaken. And I must, therefore, warn you of the special need for caution before convicting any of the defendants in reliance on the evidence of identification. This is, because it is possible for a honest witness to make a mistaken identification. An apparent convincing witness can be mistaken, so can a number of apparent convincing witnesses. **Examine carefully the circumstances by which the identification by Mr. Peter Thomas was made**. How long did he have the accused persons he says, under observation, at what distance, in what light? **Did anything interfere with that observation?** Had Mr. Peter Thomas ever seen the persons he observed before? If so, how often? How long was it between the original observation and identification to the police?
>
> "Now... you will recall that Mr. Peter Thomas told you that both accused persons, when they entered the room, **they had a handkerchief tied over their mouth**. You will recall that, and he demonstrated that to you, as a rule, **to determine whether that affected his identification of who he said he saw on the night of the 23rd of January, 2012**.
>
> "**This is a case of recognition**... because the accused persons and Mr. Peter Thomas are co-workers... So **they were not total strangers**, but I must still remind you that **mistakes, even in recognition of close friends and relatives are sometimes made**." (Emphasis supplied)

[57] The learned Director, in her oral submissions, argued that the cumulative effect was that these directions to the jury were adequate in guiding them as to their treatment of the identification evidence, which disclosed the fact that the assailants had their faces partially hidden at the material times. Due caution was given as to the

possibility of error, even in cases of recognition. She stated that this view finds support in the decision of this court in **Hunter (Raymond) v R**.[14]

[58] In her submissions before this court, the learned Director submitted that the learned judge would have acted outside of her purview if she had told the jury that the handkerchief over the applicants' mouths would have been an impediment. Instead she left it squarely to the jury. The learned Director also pointed out that the complainant was a simple man. In the transcript, the complainant was recorded as answering questions with "nod nod". There are instances when this seemed to suggest that he was answering in the affirmative and well as instances in which he was answering in the negative. She posited that this could have been due to discomfort as a result of the damage the complainant sustained to his vocal chords and the device he had to use to speak.

[59] She referred the court to page 48 of the transcript (line 4), where the complainant's response, when asked if they had anything on their heads, was recorded as "nod nod". It was emphasised that in any event, the jury had the benefit of the complainant's demonstration in relation to how the faces were covered and that the complainant worked with the applicants and even cooked with them. As such, even if there was something on their heads, he made it clear that he could see their eyes and noses. The learned Director also demonstrated the ambiguity of the complainant's

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[14] [2011] JMCA Crim 20

response which was recorded as "nod nod". She referred the court to the following examples. At pages 51 to 52 (lines 17 – 25, and 1) and 53 of the transcript (lines 19-25) the complainant is recorded as nodding and when he is pressed further or told to answer, he answers in the negative:

> (page 51)
>
> "Q. Now, you said that 'Larry' didn't say anything when he came into the room?
>
> A. (Nod, nod.)
>
> Q. Did 'Tutu' say anything when he came into the room?
>
> A. (Nod, nod.)
>
> Q. And now for the eight minutes that both men were in the room before you ran out, did anybody say anything inside the room?
>
> (page 52)
>
> A. I don't hear nobody say nutten."
>
> (page 53)
>
> "Q … Did he use his machete to do anything at all?
>
> A (Nod head.)
>
> Q You have to answer. You can't nod? [sic]
>
> A No."

[60] Regarding the absence of an identification parade, counsel pointed out in written submissions that the learned trial judge had this to say, at page 38 of the transcript (lines 13 to 22):

> "...Where a witness and suspect are well known to each other -- neither of them dispute it -- an identification parade obviously cannot help the situation. A parade then would not be merely

> unnecessary, but would positively be misleading. You will recall the evidence that 'Too-to' Walker and Larry Walker are co-workers and I'll give you directions in relation to identification when I reach there."

It was contended that these directions to the jury are adequate regarding their consideration of the lack of an identification parade and that this ground of appeal is therefore without merit.

Discussion and analysis

[61] The summation, as highlighted at paragraph [61] of this judgment, reveals that the learned trial judge gave adequate directions in relation to the issue of identification, essentially in keeping with the classic **Turnbull** formula. While she did not use specific words indicating that the partial covering of the face was a weakness in the evidence, she directed them to consider whether this affected the complainant's ability to properly identify the applicants.

[62] The learned judge, therefore, did point out the effect of this aspect of the evidence to the jury, which could be considered sufficient. Her directions were perfunctory on this point but the jury would have been aware of the need to determine whether the handkerchief, as positioned below the noses of the assailants, would have impeded the complainant's ability to properly recognise the assailants.

[63] In the case relied on by the learned Director, **Hunter (Raymond) v R**, Morrison JA (as he then was) said at paragraph [29]:

> "[29] ... in his well known work, The Modern Law of Evidence (6th edition, page 252), Professor Adrian Keane makes the point that,

> '…R v Turnbull is not a statute and does not require an incantation of a formula or set words: provided that the judge complies with the sense and spirit of the guidance given, he has a broad discretion to express himself in his own way'..."

The learned Director is, therefore, correct in her submissions that "an incantation of a formula or set words" is not required.

[64] The court notes that at page 44 of the transcript (lines 18 -21) the complainant's evidence on this specific point was as follows:

> "Q. How could you be certain that those were the two people, how were you able to see?
>
> A. Dem face neva hide, a just dem mout dem put di kerchief ova."

It is noted also that the jurors would have had the benefit of the complainant demonstrating where the handkerchiefs were tied. This is seen at page 21 of the transcript (lines 7- 15).

[65] It is also not clear, whether, when the complainant is recorded as nodding, he was answering in the affirmative due to the inconsistency in that movement and his undisputed disability in speech. Furthermore, it is noted that the trial judge, in her review of the evidence, never indicated that the assailant had something on their heads and neither counsel interjected at the end of her summation that she had failed to point that out. This aspect of evidence referred to by counsel for the applicants cannot be said therefore to be a feature of additional weakness that ought to have been pointed out by the learned judge.

[66] In relation to the issue of the identification parade, counsel for the applicants is correct that the learned judge did not remind the jury as to why no parade was held.

However, this was not necessary in order to assist the jury to a proper verdict, neither would it have been to the advantage of the applicants. All the parties agreed that they were known to each other and had worked side by side daily on the same farm for 10 and 11 months prior to the incident. It is unlikely that in these circumstances, he would not have pointed the applicants out on an identification parade.

[67] Therefore, the route of an identification parade would have been unnecessary in the particular circumstances. In **Goldson and McGlashan v R**, Lord Hoffmann, in considering the issue of when an identification parade ought to be held stated the following:

> "Their Lordships consider that the principle stated by Hobhouse L.J. in Reg. v. Popat [1998] 2 Cr.App.R. 208, 215, that in cases of disputed identification "there ought to be an identification parade where it would serve a useful purpose", is one which ought to be followed. It follows that, at any rate in a capital case such as this, it would have been good practice for the police to have held an identification parade **unless it was clear that there was no point in doing so. This would have been the case if it was accepted, or incapable of serious dispute, that the accused were known to the identification witness**…" (Emphasis supplied)

[68] And in the later decision of **John v The State of Trinidad and Tobago**[15], the Privy Council summarized the principles relevant to when an identification parade ought to be held. At paragraph [15], Lord Brown, who delivered the majority judgment on behalf of the Board expressed thus:

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[15] [2009] UKPC 12

> "[15] At the opposite extreme lies a case where the suspect and the witness are well known to each other and neither of them disputes this. It may be, of course, that on the critical occasion when the witness saw the crime being committed (or, for example, the person concerned en route), he thought it was the person he knew but was mistaken as to this. An identification parade obviously cannot help in this situation. Indeed, as Lord Hoffmann pointed out in *Goldson*, a parade then would be not merely unnecessary but could be 'positively misleading':
>
> > 'The witness will naturally pick out the person whom he knows and whom he believes that he saw commit the crime. In fact, the evidence of the parade might mislead the jury into thinking that it somehow confirmed the identification, whereas all that it would confirm was the undisputed fact that the witness knew the accused. It would not in any way lessen the danger that the witness might have been mistaken in thinking that the accused was the person who committed the crime'."

[69] Therefore, the learned trial judge's expression of similar sentiments in her summation as set out at paragraph [66] of this judgment cannot be faulted. The duty of the trial judge is to instruct the jury how to approach the evidence they had actually heard (see **John v The State of Trinidad and Tobago** per Lord Brown at paragraph [36]). There was no identification parade and a reason was expressed. But the issues the jury had to decide was whether the complainant was a credible witness and if he was, whether he could have been mistaken in his identification. As such, a dissertation on the lack of an identification parade in the above circumstances and the reason for such, would not have assisted them in the matters they had to consider.

[70] There is no merit, therefore, in this ground of appeal.

Ground 3: The learned trial judge failed to direct the jury on how the lack of medical evidence concerning the injuries sustained by the complainant should be treated in view of the length of time between the incident and trial

Submissions on behalf of the applicants

[71] Miss Anderson argued that the injuries, particularly the injuries which caused the complainant to require the use of a device to speak, were highly prejudicial to the applicants. She took issue with there being no reference in the summation to any medical evidence. She pointed out that the complainant was treated at two hospitals yet there was no doctor called, nor was there a medical report tendered as an exhibit. In light of this, counsel contended that there was no nexus between the injuries which the complainant testified to and showed at the trial and those sustained during the incident.

[72] In the absence of medical evidence of the injuries sustained on 23 January 2012, Miss Anderson argues that the applicants should not have been convicted of wounding with intent.

Submissions on behalf of the Crown

[73] In written submissions, counsel for the Crown stated that there is no rule of law which requires the marshalling of formal medical evidence in proof of the charge of wounding with intent. Also, the learned trial judge adequately addressed the issue concerning the lack of medical evidence in this matter. At page 8 of the summation (lines 16 – 21), she said:

> "...you heard that Mr. Peter Thomas was admitted in hospital, but no medical evidence was placed before you. Do not speculate in

> relation to that. Decide the case only in relation to the evidence that has been placed before you."

[74] It was argued that the conviction was sound as there was sufficient evidence in support of the complainant having been wounded by the applicants whilst they held the specific intent of causing him grievous bodily harm. Further, the jury was duly aided by the sworn evidence of the complainant. Reference was made to pages 22 to 23 of the summation (lines 25, and 1 – 16):

> "You may recall the evidence of Mr. Thomas that while he was in the bush for 25 minutes to half an hour, he observed that he was bleeding from his neck, groin and left hand. He said while Larry Walker and 'Too-to' was in the room, Larry Walker used the machete to damage his groin and hand."
>
> "He went on to explain how he got the damage to his left hand. He said, 'Larry stab after mi belly an mi back it away.'"
>
> "Further, after he ran out of the room, he slid and dropped outside. 'Too-to' Walker held him down and Larry Walker used the machete to chop him two times on his neck."
>
> "If you accept that evidence, it is open to you to find they were..."

[75] The jury also had the benefit of the real evidence as to observing the complainant's physical state in the wake of the incident. Reference was made to page 32 of the summation (lines 1 - 2):

> "...You will recall he pointed out the scar to his neck and hand and pointed to the area of his groin that he says was damaged with the machete."

[76] It was submitted that the passage of time is only capable of rendering the injuries less pronounced on account of the natural process of healing. This alteration in the appearance of the injuries could only have favoured the applicants. Reference was made to the trial judge's comment at page 25 of the summation (lines 7 – 8):

> "Further, it is not disputed that he was wounded."

Discussion and analysis

[77] The court is of the view that there is no merit in this complaint by the applicants. The learned judge directed the jury on the necessary ingredients that the prosecution had to prove in order to make out a case for wounding with intent. This direction can be found at pages 22 to 24 of the summation. Also at pages 23 to 24 of the summation, she discussed the specific issue of intent and how it is to be proved, indicating that the jury would have to ask themselves "what must the accused men have intended at the time they inflicted the wounds..."[16]

[78] The jury would also have had evidence from the complainant that the issues with his speech commenced at the time of the infliction of the injury to his neck and how this injury, in particular, had affected his health and wellbeing. He stated that he had to visit the doctor every three to four months because of the "contraption" he had to wear around his neck and was unable to breathe without it. The effect of this would have been obvious, as the court had to allow intervals of rest during his testimony.

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[16] Page 24 of the summation, (lines 17-18)

[79] Furthermore, the applicants also spoke to seeing the complainant bleeding from his neck, that he was bleeding to the extent that Calvin had to get a sheet to wrap him in. As stated previously, Detective Constable Gregory McLeod was unable to speak to the complainant on the night of his admission. He stated that he could not speak because of the injury to his neck; that he saw several wounds to areas of his body which he identified as his head, neck, groin and left hand. There was cogent evidence therefore, if accepted by the jury, that the complainant had received wounds including a serious injury to his neck in spite of the lack of medical evidence and the passage of time.

[80] Once the jurors were satisfied that he had suffered those injuries which resulted in bleeding and that those injuries were inflicted with the requisite intent to cause serious bodily harm, it would have been open to them to act on that evidence and to return the verdict they did in relation to count 2.

[81] There is no merit also in this ground of appeal.

Conclusion

[82] Having regard to our decision to allow the appeal on ground 1, it is in the interests of justice that a retrial should be ordered. Counsel for the applicants have

conceded that this is required. We cannot improve upon the observation of Lord Diplock in **Reid v R**[17] and as such, we would adopt it as being apt to the case at bar:

> "The interest of justice that is served by the power to order a new trial is the interest of the public in Jamaica that those persons who are guilty of serious crimes should be brought to justice and should not escape it merely because of some technical blunder by the judge in the conduct of the trial or his summing-up to the jury."

Disposal

[83] The orders of the court are as follows:

1) The applications for leave to appeal against conviction and sentence for Calvin Walker and Lorringston Walker are granted.

2) The hearing of the applications for leave to appeal against conviction and sentence is treated as the hearing of the appeals.

3) The appeals are allowed, the convictions are quashed and the sentences set aside.

4) In the interests of justice, a new trial is ordered to take place in the shortest possible time.

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[17] (1978) 27 WIR 254, 257