[2020] JMCA Crim 25

JAMAICA

IN THE COURT OF APPEAL

PARISH COURT CRIMINAL APPEAL NO COA2019PCCR00016

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MRS JUSTICE SINCLAIR-HAYNES
THE HON MRS JUSTICE V HARRIS JA (AG)

MARK WILLIAMS & KEVIN SHIRLEY v R

Hugh Wildman and Ms Indira Patmore for the appellants

Mrs Cadeen Barnett Plunkett and Ms Ruth-Anne Robinson for the Crown

26 May and 26 June 2020

V HARRIS JA (AG)

Introduction

[1] On 3 May 2019, Mr Mark Williams and Mr Kevin Shirley ("the appellants") were convicted by Her Honour Mrs T Carr ("the learned judge") in the Parish Court for Saint Catherine for the offence of simple larceny. On 6 September 2019, they were each sentenced to pay a fine of $250,000.00 or three months' imprisonment at hard labour. The appellants, at the time they were convicted and sentenced, were members of the

Jamaica Constabulary Force ('JCF'). Mark Williams was a corporal of police and Kevin Shirley a constable.

[2] The appellants filed notices and grounds of appeal challenging their convictions and sentences on 30 and 31 July 2019. On 26 May 2020, we heard the appeal and made the following orders:

> "1) The appeals of both appellants are dismissed;
>
> 2) The convictions and sentences are affirmed;
>
> 3) The sentences are reckoned as having commenced on 6 September 2019."

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

Factual background

[3] The appellants were convicted of stealing 227 board feet of wood, valued at $39,725.00, being the property of Tulloch Estates Limited ('Tulloch Estates'), located in the parish of Saint Catherine.

[4] The complainant and main witness for the prosecution was Mr Roger Turner. In March 2014, he was the managing director of Tulloch Estates. Mr Turner's evidence was that, on 25 March 2014, sometime after 9:00 am, he was travelling along a service road on the property when he heard a chainsaw in operation. This immediately prompted him to launch an investigation.

[5] On reaching a certain location, Mr Turner saw the appellants and two other men beside a freshly felled cedar tree. He observed one of the men with a chainsaw cutting

up the tree. Another man was moving and holding the logs that were being cut. The appellants, dressed in blue police denim, were seen loading wood into the boot of a marked police service pick-up truck ('service vehicle').

[6] Mr Turner said he observed the activities of the men for about two to three minutes before approaching and telling them that they were trespassing on private property. He also accused the men of stealing lumber. When he made this accusation, the appellants said nothing. After Mr Turner spoke to the men, they removed the pieces of wood from the service vehicle and threw them on the ground.

[7] The appellants then left the property through a gate. The appellant Kevin Shirley was seen opening and closing the gate. The other two men were left behind on the property. According to Mr Turner, after the appellants left, he later saw them return to the property, driving the same service vehicle. He observed when they picked up the two men and they all left the property together.

[8] Mr Turner took photographs of the men and recorded a video of their activities, using his cellular phone. The photographs and video were admitted as exhibits in the trial. On the video, which we viewed at the hearing of the appeal, Mr Turner could be heard telling the appellants and the other men that they were trespassing on private property and accusing them of stealing lumber. Neither appellant said anything in response to the accusations levelled at them. The video also showed the appellants loading wood unto the service vehicle, a man walking around with a chainsaw in hand,

another man placing an item in the trunk of the service vehicle and the vehicle leaving the property through a gate.

[9] Mr Turner reported the matter to the police and the appellants were subsequently arrested and charged.

[10] The appellants each made an unsworn statement from the dock and called witnesses as to their good character. Their statements were substantially the same.

[11] Both appellants were assigned duties on the North-South Highway, which was being constructed by China Harbour Engineering Company ('CHEC') at the time. The appellant Kevin Shirley stated that he was aware that CHEC had given permission to persons residing in the vicinity of the work sites to cut down trees that were on properties that had been acquired for the construction of the highway.

[12] On the day in question, the appellants were on duty in the community of Treadways, Linstead, in the vicinity of the CHEC headquarters, when they heard what sounded like a chainsaw being operated. They saw two men cutting up a log and packing away pieces of wood.

[13] The appellants said they travelled, in the service vehicle, on an off road to reach the area where the men were. During their journey they saw several Chinese and Jamaican workers, and saw no signs to indicate that they were on private property. Consequently, they were of the view that the two men were on property that was under

the management and control of CHEC, and their purpose was to determine whether or not these men had permission to cut down trees.

[14] On arriving at the location where the men were, they enquired of them if they had received permission from CHEC to cut down the tree. The response that was given caused the appellants to become suspicious. As a result, the appellants instructed the men to place the wood onto the service vehicle. The appellants stated that it was their intention to take the men to CHEC headquarters, along with the pieces of wood, to verify if they had been given permission to fell the tree.

[15] It was at this point, they said, that Mr Turner arrived and confronted them in a boisterous manner. The appellants said that they identified themselves to Mr Turner as police officers. They then told him that they were of the view that the property belonged to CHEC and that they were investigating whether or not the men had received permission from CHEC to cut down trees. Mr Turner was also informed, by the appellants, that they had made checks to see if they were on private property and had seen no signs to indicate this.

[16] According to the appellant Mark Williams, he sought Mr Turner's permission to prosecute the two men. His request was refused. Mr Turner insisted on having his wood returned to him and indicated that he would use his own connections in the JCF to deal with the matter. The wood was then unloaded from the service vehicle and, according to Mr Williams, the two men took up the chainsaw and made their escape into the woodland. Mr Williams further stated that he and Mr Shirley chased after the men but

were unable to catch them because of the thick vegetation. Mr Shirley made no mention of this in his unsworn statement.

[17] After leaving the property, the appellants made several reports about the incident to their superiors. They were adamant that they did not steal any wood on the day in question. It was their case that they were investigating whether the two men were committing a crime, and were in the process of apprehending them when Mr Turner confronted them.

Grounds of appeal

[18] At the hearing of the appeal, counsel for the appellants, Mr Wildman, abandoned the original ground of appeal, and sought and obtained leave to argue the following supplemental grounds:

> **"Ground 1**
>
> The learned Parish Court Judge erred in law in failing to direct herself on the possible mistake of fact on the part of the Appellants as to whether the wood, the subject of the charge, formed part of the property of the Complainant. It is submitted that this issue of mistake of fact arose on the evidence and goes directly to the lack of mens rea on the part of the Appellants and would have entitled the Appellants to a complete acquittal."
>
> **"Ground 2**
>
> The learned Parish Court Judge did not give complete and adequate directions to herself of the effect of the Appellants [sic] good character, having regard to the nature of the evidence led by the prosecution and the strong denial of those allegations by the Appellants, who asserted that they were in fact carrying out their functions as police officers. It is submitted that it behoves the Parish Court Judge to pay particular regard and importance to the credibility limb of the good character direction in determining

whether or not to believe the Appellants when they asserted that they did not steal any wood and were just carrying out their functions as police officers."

"<u>Ground 3</u>

The learned Parish Court Judge failed to deal adequately with the evidence agreed on by the defence and prosecution in determining the veracity of the claim made by the complainant that the Appellants were caught loading the wood on the service vehicle they were driving, having regard to the defence's case that the Appellants were in the process of questioning the two civilians who were in the process of cutting the wood and whom the Appellants had directed to load the said wood onto the service vehicle in order for the appellants to determine whether in fact the two civilians had obtained permission from China Harbour to cut the wood on the said property."

[19] The grounds of appeal raise the following issues:

1. Whether the learned judge erred in law in failing to direct herself on the possible mistake of fact on the part of the appellants as to whether the wood formed part of the property of Tulloch Estates (ground 1);

2. Whether the learned judge erred in failing to give complete and adequate directions in respect of the appellants' good character (ground 2);

3. Whether the learned judge failed to adequately deal with the agreed evidence in determining the veracity of the complainant's assertions, having regard to the defence raised in the appellants' unsworn statements (ground 3).

Scope of review

[20] In assessing the appeal, the court was mindful that it may only interfere with the findings of fact of a judge in the court below where those findings are so against the weight of the evidence that they are plainly wrong (see **Alrick Williams v R** [2013] JMCA Crim 13 and **R v Joseph Lao** (1973) 12 JLR 1238). Also, where those findings depend on the view the judge took concerning the credibility of the witnesses, this court must be satisfied that the decision reached by the learned judge cannot be sufficiently explained by the advantage she would have had of seeing and hearing the witnesses herself (see **Watt (or Thomas) v Thomas** [1947] AC 484; **Clarence Royes v Campbell and Anor** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 133/2002, judgment delivered 3 November 2005). If the learned judge misdirected herself in law, the court may set aside the decision, if that misdirection was such as to have resulted in a substantial miscarriage of justice (see section 14, of the Judicature (Appellate Jurisdiction) Act).

Ground 1: Whether the learned judge erred in law in failing to direct herself on the possible mistake of fact on the part of the Appellants as to whether the wood formed part of the property of Tulloch Estates.

The appellants' submissions

[21] In essence, the appellants complained that the issue of mistake of fact, which was central to the lack of *mens rea* on the part of the appellants, arose on the evidence, and in failing to direct herself as to that possible mistake, the learned judge's treatment of the issue of *mens rea* was "woefully inadequate" and fell short of the analysis of law and evidence to be expected.

[22] In that regard, learned counsel for the appellants, Mr Wildman, argued that the undisputed evidence that there was no sign or notice that the property was private, that the appellants were assigned as police officers to protect employees of CHEC and properties under the control of CHEC from unlawful activity, as well as, that Tulloch Estates was in close proximity to the highway, called into question the state of mind of the appellants and whether they were genuinely and honestly under the belief that the property belonged to CHEC, and, that they were entitled to enter the property to determine whether the two men they saw were engaged in unlawful activity. He contended that the evidence led by both the prosecution and defence confirmed that the appellants held a genuine and honest belief that they were on property under the control of CHEC, rather than on private property, and they honestly believed that, having instructed the men to place the wood into the service vehicle, they were in possession of the wood in execution of their duties as police officers.

[23] It was submitted that the offence of larceny requires the prosecution to prove that the appellants had "specifically intended to take the property of the complainant and to deprive him permanently thereof". The Privy Council authority of **Solomon Beckford v Regina** [1987] 3 All ER 425, as well as, the English case of **DPP v Morgan** [1975] 2 All ER 347, applied by the Board in **Beckford**, were relied on in support of this submission. Those cases were also relied on for the principle that, in determining *mens rea*, an accused person should be judged based on his or her honest belief in a set of circumstances that would justify the impugned act, rather than on the question of whether a reasonable man would have believed same. These cases, counsel

argued, were of equal application in respect of the assessment of criminal culpability in relation to the allegation of larceny, notwithstanding that they dealt with the offences of murder and rape, respectively. It was therefore, insufficient, he submitted, for the learned judge to have given a "laconic definition" of larceny without assessing the evidence to determine whether, in all the circumstances, the appellants had entertained an honest belief in their actions. He further argued that her "terse rejection" of the appellants' case and acceptance of the prosecution's case, as she did, were insufficient to deal with the principles germane to the facts of the case.

[24] It was submitted that it was inconceivable that the appellants' actions on the property were felonious, because:

> "1. The evidence disclosed that they were in fact assigned to CHEC;
>
> 2. They were driving a service vehicle;
>
> 3. They were clothed in police garb;
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> 4. There was no attempt to conceal their identity as police officers;
>
> 5. There was no sign or notice placed on the property to indicate who was the true owner of the property;
>
> 6. They made a report to their superiors;
>
> 7. The same report was made on more than one occasion."

[25] Consequently, it was argued that the learned judge's failure to ask herself whether the appellants, at the material time, had an honest belief that "they were on property belonging to CHEC and that they took possession of the wood in execution of

their duties", renders her findings on the question of *mens rea* impeachable, and as such, the conviction should be quashed.

[26] It was submitted further that based on the authority of **R v Locksley Carroll** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 39/1989, judgment delivered 25 June 1990, it could not be assumed that the learned judge considered these principles in arriving at her findings, and that, in the absence of a demonstration by her of how the conflict in the evidence in respect of the ownership of the property was resolved, she would have erred.

[27] Mr Wildman also relied on the case of **Glenroy McDermott v Regina** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 38/2006, judgment delivered 14 March 2008, which applied the case of **Tennyson Palmer v R** (1971) 16 WIR 499, for the proposition that a judge is duty bound to consider all defences that arise on the evidence, regardless of whether it is raised by the defence. This, he said, the learned judge failed to do in the instant case. He argued that since it was evident that the appellants did not know they were committing a trespass and that they were exercising their functions as police officers in respect of the two men they thought were committing a felony, the learned judge "should have paid attention to what the [appellants] were saying" and should not have just rejected their defence on the basis that she did not believe them. These assertions by the appellants formed a critical part of their defence and at no time, it was submitted, did the learned judge advert to them. In support of these contentions, Mr Wildman further relied on the

authority of **Regina v Lancelot Webley** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 84/1989, judgment delivered 12 November 1990, for the principle that where the trial judge fails to relay the law to the defence raised on the evidence, he or she would have erred and the conviction cannot not stand, because the accused would have been denied a fair trial. Counsel asserted that, in the instant case, the learned judge dealt with the evidence led by the prosecution and made a finding without looking at the defence. He emphasised that there was no other evidence, apart from the placing of the wood in the vehicle, that the appellants participated in the cutting down of the trees.

[28] Finally, Mr Wildman submitted that, based on the case of **McDermott**, where the defence of the appellants was that they were carrying out their duties as police officers, section 13 of the Constabulary Force Act is applicable, and the failure of the learned judge to make reference to that specific provision is fatal.

Submissions on behalf of the Crown

[29] In response to this ground, learned counsel for the Crown, Mrs Barnett Plunkett, submitted that, having accurately advised herself as to the elements of the offence of simple larceny in accordance with the principles enunciated in **Georgette Tyndale v R** [2016] JMCA Crim 24, and what the prosecution had to prove, the learned judge, at paragraph 31 of her findings, addressed her mind to the fact that all the elements of the offence had been established by the prosecution. Further, it was submitted, the learned judge assessed the accounts of the appellants in their unsworn statements in

light of the evidence before her, and rejected the explanations they gave for their actions, including that they were mistaken and had an honest belief.

[30] Counsel for the Crown argued that, although she was cognizant that the burden of proof rested with the prosecution throughout, it was imperative to note that at no stage of the trial did the appellants suggest that they had received consent from CHEC to remove wood from the estate at the material time. Further, it was submitted that this ground was diametrically opposed to the appellants' unsworn statements. In their statements, the appellants asserted that they were seeking to ascertain whether the men had permission from CHEC to cut down trees. However, when the complainant declared that they were on private property, neither of the appellants did or said anything to confirm that this was so, nor did they ask the complainant whether the men had his permission to cut down the tree.

[31] The court was referred to paragraphs 20 and 21 of the learned judge's reasons and findings of fact. Mrs Barnett Plunkett contended that, in assessing the mental element of the offence, the learned judge evaluated the conduct of the appellants in the video and considered that they did not act in accordance with what would be expected of police officers who were apprehending suspects. Particularly, she considered that the other two men, whom the appellants were purportedly apprehending, could be seen walking around freely in their presence and appeared to be familiar with them. Additionally, she took into account that the appellants did not confiscate the chainsaw, deny the accusations made by Mr Turner, nor make any

reference to these men being under investigation. The appellants, it was further submitted, said nothing until the complainant mentioned that he would be making a report to the Commissioner.

[32] Counsel on behalf of the Crown directed the court's attention to paragraph 19 of the learned judge's reasons and findings of fact, and pointed out the remarks she made about *mens rea*. The learned judge, it was submitted, stated that *mens rea* was to be determined by a consideration of all the circumstances of the case, including the defence of the accused. Although she did not use the exact words, it was argued, this demonstrated that she had addressed her mind to the issue of honest belief, and, that she was balanced in her assessment of that issue.

[33] Mrs Barnett Plunkett noted that, having properly directed herself and conducted this balanced assessment of the accounts of the complainant and the appellants, the learned judge found as a fact that the property, where the men were seen removing the wood, belonged to Tulloch Estates. Further, although she did not mention it, she addressed her mind to joint enterprise at paragraph 29 of her reasons, when she pronounced that she accepted that the appellants had participated in loading the boards onto the truck and found that they were "acting jointly with the other two men in the commission of the offence".

Discussion and analysis

[34] This ground of appeal called into question the learned judge's treatment of the evidence in assessing the mental element of simple larceny.

[35] Section 3(1) of the Larceny Act provides that:

> "a person steals who, without the consent of the owner, fraudulently and without a claim of right made in good faith, takes and carries away anything capable of being stolen with **intent**, at the time of such taking, **permanently to deprive the owner thereof**…" (Emphasis added)

[36] The mental ingredient the prosecution was required to prove, therefore, was that the appellants had the intention 'to permanently deprive the owner' of the wood when they did the relevant act (the taking and carrying away of the wood), without the consent of the owner and without a claim of right made in good faith. As underscored by Mrs Barnett Plunkett, how a court is to treat with the offence of simple larceny was comprehensively outlined by Edwards JA (Ag) (as she then was) in the authority of **Georgette Tyndale v R**, at paragraph [27] of the judgment:

> "[27] Larceny is a crime involving two elements; the actual physical trespassory 'taking' and the 'carrying away' which forms the actus reus of the offence; and the dishonest intent, which is the mens rea or mental element of the offence. The actus reus involves the taking, which amounts to taking actual physical possession and control of the property (even if for a short time), and such control must be complete. The law also requires there to be a 'carrying away' or *asportation*. This means that the thief must not only have gained possession of the goods, but must have taken it from its original position. The slightest movement of goods is sufficient. This is the general rule. There must be the intent to steal at the time of the taking, *animus furandi*, that is, a dishonest intent to permanently deprive the owner of his goods. All this must be done without the consent of the owner. The taking and carrying away coupled with the intent is an imperative for the offence to be complete."

[37] We agreed with Mrs Barnett Plunkett that the learned judge addressed her mind to the ingredients of the offence in accordance with **Tyndale v R**, and accurately outlined what it was that the prosecution had to prove. In this regard, the learned judge remarked that the *mens rea* was to be determined by a consideration of all the circumstances, and did in fact consider this, which included a thorough examination of the explanation given by the appellants in their unsworn statements. At paragraphs 12 and 13 of her reasons, she said:

> "12. The Prosecution has to prove the elements of the offence:
>
> a) That the property belonged to Tulloch Estate,
>
> b) That the men had the intention to steal,
>
> c) That the men did take and carry away the items with the intention to permanently deprive the owner of same.
>
> 13. '[C]arries away' includes removal of anything from the place which it occupies, but, in the case of a thing attached, only if it has been completely detached. The general principle of law, therefore, is that the slightest removal of the thing being stolen from its original position is sufficient asportation to constitute the offence, provided it is done with the intent to steal."

[38] At paragraph 19, she continued as follows:

> "19. The issue as to the mens rea cannot be determined by looking into the mind [sic] of the [appellants], and so the court must consider all the circumstances of the case to include the defence posited by the accused…"

[39] The learned judge then assessed the issues of honest belief and mistake of fact, by conducting a detailed examination of the video evidence in light of the prosecution's case and the defence. She analysed what she observed in the video, including that all

four men were in the vicinity of the vehicle, the two men were walking around without restraint, one man was allowed to walk around with the chainsaw in hand, the other man was placing an object in the service vehicle, and importantly, when confronted with accusations that they were stealing, the appellants said nothing. We found instructive the following statement made by the learned judge, at paragraph 21 of her reasons, which is set out in part:

> "21. …When exhibit 4 [the video] is looked at all four men are seen in the vicinity of the pick-up. One has a chain saw in hand, the other man is seen putting something into the back of the pick-up. The officers said they were confiscating the wood yet the man was allowed to walk around with the chain saw? Wouldn't this have been confiscated as well? The men in the video appear to be familiar with the officers. As the complainant is heard telling them that they are trespassing on private property and they are stealing the police officers are standing beside the truck, they are not heard saying anything in response. There is no denial of the accusation, there is no reference to the men as being under investigation, there is no attempt to hold on to the men or the chain saw. The video belies the statement of the officers. Although the complainant indicated that he was not recording the entire time, from Exhibit 4 the court draws the reasonable inference that these men are not strangers to the police officers."

[40] In **Donald Parkes v The Queen** [1976] 1 WLR 1251, an appeal from this court, the Privy Council made it pellucid that, where a person is confronted with accusations of wrongdoing by another person speaking to them on even terms, it is permissible for the tribunal of fact to consider his silence and conduct in assessing whether he had accepted the truth of the accusation. This does not offend his right against self-incrimination.

[41] In the instant case, there is no question of the complainant's accusation, that the appellants were stealing, being made in the presence of any police officer or other person in authority who was charged with the investigation of the crime. Hence, the parties would have stood on even terms. In fact, the complainant, being a civilian, would have been on uneven keel with the two police officers who would have been in a more superior position as persons involved in law enforcement.

[42] Therefore, in these circumstances, it would be reasonable to expect that the appellants would have immediately denied the allegation and state their purpose on the property, particularly, if they were acting in the lawful execution of their duties. In light of their failure to do so, it was open to the learned judge to draw an adverse conclusion based on their silence and incriminatory conduct, and it cannot be said that she was "obviously and palpably wrong" having done so.

[43] Concerning the appellants' assertions that they mistakenly thought the property belonged to CHEC, the learned judge considered that in the video the appellants were seen exiting the premises through a gate, and one of them was seen opening and closing the gate. This, she found, gave credence to the complainant's evidence that that side of the property could only be accessed by opening that particular gate. She reasoned that the appellants had probably entered through that same gate. Therefore, this ought to have put them on notice that, despite there being no sign, it was private property. This was a factor which the learned judge used to discredit the appellants' assertions of honest belief and mistake of fact. We can find no fault with her approach.

[44] It is noteworthy that the learned judge did address her mind to the complainant's admission that he did not record the entire incident. However, she found that what she saw on the video belied the statements of the appellants. Additionally, having found that the complainant was a witness of truth, the learned judge implicitly accepted that, although he did not record the entire incident, the appellants, at no time during the incident, denied his accusation or informed him that they were investigating the activities of the two men, which they found to be suspect. Having had the advantage of seeing and hearing the complainant and observing his demeanour, the learned judge was well within her remit so to find.

[45] In arriving at her findings of fact, the learned judge assessed the appellants' unsworn statements. She considered the explanations given by them that they went to investigate "suspicious activity" on property which they thought belonged to CHEC and rejected their narratives. The learned judge sensibly questioned why the appellants would have been suspicious of these two men in particular, if CHEC had given permission to persons to chop down trees and remove wood from properties which belonged to them. She queried correctly, in our view, why then were they targeted by the appellants as engaging in "suspicious activity", given the fact that other persons (Chinese nationals and Jamaicans) were observed by the appellants doing exactly the same thing? She stated:

> "20. The accused men indicated to the court that they went to investigate what they perceived to be suspicious activity. If as they say CHEC had given permission for persons to cut down trees and to take the wood and this was not private property what would

> have caused them to be suspicious? The men were seen doing what other persons according to them were seen doing they were cutting down trees and packing them up. Chinese nationals as well as Jamaicans were observed doing the same thing, what then was so suspicious about these men in particular that they were stopped and questioned by the officers?

[46] The learned judge also highlighted the differences between the unsworn statements of the appellants in relation to what happened to the other two men after the confrontation. Mr Williams said the men ran off into the woodland and both he and Mr Shirley tried to catch up with them, but were unable to do so due to the thick vegetation. Mr Shirley made no mention of this. The learned judge found that this was a significant variance. She compared the accounts from both sides, and having done so, she accepted the complainant's account on this point. This was entirely in her purview as the issue before her was a matter of credibility.

[47] Mr Wildman boldly asserted that there was no other evidence, apart from the placing of the wood in the vehicle, that the appellants were involved in the commission of the offence. We respectfully disagreed. The learned judge considered the evidence of the complainant that he saw the appellants loading the boards into the service vehicle at the same time the chainsaw was being used by one of the two men, with the assistance of the other, to cut planks. She also contemplated that the two men appeared to be familiar with the appellants, were moving around without any restraint and, after leaving the property, the complainant's evidence was that the appellants returned and picked them up and they all left the property together in the service vehicle. As a result, the learned judge concluded that the appellants "were therefore

acting jointly with the other two men in the commission of the offence", and were caught "red handed" stealing lumber from property which belonged to Tulloch Estates. She also took into account the silence and conduct of the appellants in the face of the complainant's accusation that they were stealing. There was, therefore, ample evidence to support the findings of the learned judge, and it cannot be said that she was plainly wrong for concluding as she did.

[48] It is patent that the learned judge did, in fact, address her mind to the issues of mistake of fact and the alleged "honest belief" of the appellants. It is not accurate to say that she merely rejected the defence in a 'terse' or 'laconic' way. Having considered all of the evidence and the unsworn statements of the appellants, the learned judge took the view that the complainant was more credible and that the prosecution's case had been made out against the appellants.

[49] We formed the view that the authority of **Beckford v R** relied on by the appellants is unhelpful. **Beckford** involved a plea of self-defence by a police officer charged with murder, who had asserted that at the time the deceased was killed he had honestly believed that the deceased was firing a gun at him and his police team, and that their lives were in danger. The deceased was found to have had no weapon. The Privy Council held that, where a plea of self-defence is raised by a defendant and he acted under a mistake as to the facts, the defendant is to be judged based on whether he held an honest belief as to those mistaken facts, regardless of whether that belief

was reasonable in the circumstances. In **Beckford**, therefore, an honestly held belief would have provided a complete defence to the offence charged.

[50] In any event, we have found that the learned judge did advert her mind to the issues of mistake of fact and the honest belief of the appellants, and adequately addressed those matters (see paragraphs [38] to [43] above).

[51] In respect of the defences that were available to the appellants, whilst it is true that **McDermott v R** makes it clear that a trial judge must leave to the jury all defences that arise on the evidence, regardless of whether they are raised by the defence, this case does not take the appeal any further.

[52] In **McDermott**, the appellant had shot and killed the deceased, whilst on duty as a police officer. The prosecution's case was that the deceased, who was unarmed at the time of the incident, was pursued by the appellant and shot in the back. The appellant, however, gave an unsworn statement from the dock to the effect that the deceased was one of two men who had had approached his police team, pulled out firearms, and fired in their direction. The appellant gave chase of the men and returned fire in defence of himself and his colleagues, when the deceased and his companion continued to fire at them. The only defence raised by the appellant, therefore, was self-defence. The evidence revealed that the deceased died from a single gunshot wound to the back, and that he had no gunpowder residue on his hands. The appellant was convicted of non-capital murder. On appeal, counsel for the appellant argued that, although the appellant had only raised self-defence, the trial judge ought to have left

for the jury's consideration the possible defence that the officer had been acting in accordance with his duty to pursue and apprehend a fleeing felon, and in doing so was entitled to use force as provided by section 14(2)(b) of the Constitution. This court agreed and allowed the appeal on the basis that the learned trial judge had failed to direct the jury on a possible defence that arose on the evidence.

[53] In the instant case, the appellants raised as their defence that they had been acting in the execution of their duties. This was also the only defence that emerged on the totality of the evidence, and it was apparent that the learned judge considered it. There was no need for her to mention section 13 of the Constabulary Force Act, which merely recites the duties of the police and does not provide a defence for any criminal offence. Moreover, there was no dispute that the appellants, as police officers, were entitled to apprehend the men if they had, in fact, committed a crime, were in the process of committing a crime or were reasonably suspected to be committing a crime. Having considered the defence, which, in effect, was a reliance on their power under section 13 of the Constabulary Force Act, the learned judge simply rejected that this was, in fact, what the appellants had been doing. We find no reason to say that she was palpably wrong for having done so or for failing to explicitly mention section 13 of the Constabulary Force Act.

[54] The authority of **R v Locksley Carroll** is also not helpful to the appellants' case. That case had to do with issues relating to the problematic identification of the appellant by witnesses who had been victims to a violent night robbery at gun point,

and the judge's treatment of the evidence. The trial judge had failed to reconcile certain discrepancies arising on the evidence. Those discrepancies relate to the height of the appellant, compared with that initially given by one witness; whether there had been adequate lighting for the witness to accurately identify the accused; and whether that witness had been shown a photograph of the appellant prior to the identification parade. This court found that trial judges sitting alone in the High Court Division of the Gun Court, ought to, when faced with issues relating to visual identification, "expressly warn themselves in the fullest form of the dangers of acting upon uncorroborated evidence of visual identification" (page 14). Further, that a trial judge is required to demonstrate by way of reasoning (1) that he or she actually considered and applied the relevant cautions and warnings in the assessment of the evidence, and (2) how conflicts arising on the evidence were resolved. It was in this context that the court found that the trial judge had failed to properly assess the evidence and quashed the appellant's conviction.

[55] In the case at bar, contrary to Mr Wildman's submission, no real conflict arose on the evidence as to the ownership of the property. Although counsel who appeared for the appellants at trial had raised the issue that the property may not have belonged to Tulloch Estates, title to the property was tendered by the complainant, which, along with the agreed evidence of Chalene Laughton, legal officer at the National Land Agency (Land Titles Division), confirmed the authenticity of the title and its contents. The learned judge, on the basis of this evidence, accepted that the area on which the appellants were found was, in fact, owned by Tulloch Estates. No evidence was

tendered that suggested otherwise, and there was no dispute that Tulloch Estates had not given the men permission to cut down the tree and take the wood. What would have remained, therefore, in respect of the ownership of the property, would have been the question as to whether the learned judge believed, as a matter of credibility, that the appellants were honestly mistaken as to the ownership of the property as part and parcel of their defence that they were carrying out duties as police officers, and whether they had a dishonest intent to permanently deprive the owner of its wood. We are not of the view that the appellants' purported mistaken belief as to the ownership of the property at the material time can be equated with a conflict on the evidence, and even if this were so, the learned judge fully dealt with it.

[56] From the foregoing, we have found that the learned judge properly applied her mind to, and accurately directed herself on, the honest belief and mistake of fact, purportedly, held by the appellants. She also adequately demonstrated in her reasons how she resolved those issues. This ground, therefore, fails.

Ground 2: Whether the learned judge erred in failing to give complete and adequate directions in respect of the appellants' good character.

The appellants' submissions

[57] Under this ground, the appellants asserted that the learned judge's treatment of the good character direction was inadequate and flawed, having regard to the nature of the evidence led by the prosecution and the strong denial of those allegations by the appellants, and was therefore fatal to the conviction.

[58] The complaint was two-fold. The first was that the learned judge, in giving her direction, wrongly used the word 'may', when directing herself on the propensity limb of the good character direction. The learned judge at paragraph 19 of her reasons and findings of fact stated:

> "I also consider that given the qualities of the men described by the witnesses that came on their behalf that it **may** mean that they are less likely to have committed the offence." (Emphasis added)

[59] Mr Wildman submitted that the proper direction is that the fact that the accused is of good character "makes him less likely to have committed the offence", and there is no room for the use of the word 'may' in the direction. The use of the word 'may', he contended, resulted in an unfair trial, and as such, the conviction should be quashed.

[60] Secondly, it was submitted that the authorities make it abundantly clear that in giving the good character direction, a judge is duty bound to direct herself that the good character of an accused has both a credibility and a propensity limb, the former having the effect of 'strengthening the appellant's credibility to make him more believable than a man with a bad character', and the latter 'rendering him less likely to have committed the offence with which he is charged'. The authority of **Anneth Livingston v Regina** [2012] UKPC 36, which applied the principles in **R v Aziz** (1996) 1 AC 41, was relied on in support of this submission. The Privy Council decision of **Linton Berry v R** [1992] 2 AC 364 was also cited to emphasise that, where credibility is in issue, the directions should be 'tailor-made to bring out the importance of the credibility direction in evaluating issues of fact'. Mr Wildman contended that the learned

judge should have paid particular regard to the credibility limb of the direction in evaluating the 'evidence' of the appellants, in determining whether they were speaking the truth. Counsel confidently argued that it made no difference that the appellants made only an unsworn statement from the dock, because the authority of **Edmund Gilbert v The Queen** [2006] UKPC 15 establishes that the full direction must be given.

[61] Consequently, it was advanced, that, in failing to treat with the direction in the above-stated manner, the learned judge erred and, therefore, deprived the appellants of a fair trial.

Submissions on behalf of the Crown

[62] Mrs Barnett Plunkett rejected this ground on the basis that the directions given by the learned judge adequately covered both the credibility and propensity limbs of the direction, notwithstanding that the law only requires her to give directions in respect of the propensity limb. It was submitted that, as long as a judge addresses his/her mind to the evidence and the applicable law, there is no prescribed formula or method for the delivery of his or her directions and findings.

[63] Mrs Barnett Plunkett submitted that the authorities are clear that, where a defendant does not give evidence, he/she does not benefit from a credibility direction, but only a propensity direction. Therefore, given that the appellants gave only unsworn statements and called character witnesses, the credibility limb was not required. The authorities of **Craig Mitchell v R** [2019] JMCA Crim 8 and **Joseph Mitchell v R** [2019] JMCA Crim 2 were cited in support of this submission. In any event, it was

asserted that the learned judge addressed her mind to this limb at paragraph 19 of her findings.

[64] In respect of the judge's directions as to propensity, counsel for the Crown submitted that, although the direction should indicate that the accused "is less likely to commit a crime", particularly one of the nature with which he or she is charged, the use of the word 'may' by the learned judge, instead of 'less likely', did not change the intended meaning of the direction, and as such, did not cause a miscarriage of justice.

[65] In any event, Mrs Barnett Plunkett noted, based on the authority of **Ricardo Wright v R** [2016] JMCA Crim 15, the absence of a good character decision is not necessarily fatal to the conviction. The court was urged that where there is overwhelming and cogent evidence against a defendant, as there was in this case, the failure to give a good character direction would not be detrimental to the conviction.

Discussion and analysis

[66] Firstly, we will address whether or not the appellants were entitled to both limbs of the good character direction.

[67] From the outset, we will declare that this ground has no merit.

[68] It is well settled, based on the numerous authorities coming from this court, that where a defendant does not give evidence and has given no pre-trial answers or statements, the credibility limb of the good character direction is not required to be given. These authorities clearly establish that what is called for, in those circumstances,

is the propensity direction. This principle is also applicable where a defendant does not give evidence but calls witnesses as to his good character (see **Joseph Mitchell v R**).

[69] These principles have been applied time and time again by this court, including in the recent decisions of **Craig Mitchell v R** and **Joseph Mitchell v R** cited by the Crown Counsel. They find their bases in the English decisions of **R v Vye; R v Wise; R v Stephenson** [1993] 3 All ER 241 and **R v Aziz** [1995] 3 WLR 53. Both cases were applied by this court in the **R v Syreena Taylor** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 95/2004, judgment delivered 29 July 2005, in which H Harris JA (Ag) (as she then was), on behalf of the court at pages 12-13, said the following:

> "An accused who exercises the option to give [an] unsworn statement does so at his or her peril. An unsworn statement is not commensurate with sworn testimony. It is open to a jury to attach to it such weight as it deems fit. The applicant having not given sworn testimony, no issue as to her credibility would have arisen. The trial judge was under no obligation to have given directions on her credibility. He would only have been under a duty to have done so, had there been in evidence a pre-trial exculpatory statement made by her in respect of her good character on which the applicant had placed reliance.
>
> In **R v Vye** [1993] 3 All ER 241 Lord Taylor of Gosforth C.J. declared: -
>
> > 'In our judgment, when the defendant has not given evidence at the trial but relies on exculpatory statements made to the police or others, the judge should direct the jury to have regard to the defendant's good character when considering the credibility of those statements.'
>
> He went on to state:

> 'Clearly if the defendant of good character does not give evidence and has given no pre-trial answers or statement, no issue as to his credibility arises and the first limb of the direction is not required.'

These principles were reproduced by Lord Steyn in **R v Aziz** [1995] 3 W.L.R. 53 at page 60 in the following terms:

> '(1) A direction as to the relevance of his good character to a defendant's credibility is to be given where he has testified or made pre-trial answers or statements.
>
> (2) A direction as to the relevance of his good character to the likelihood of his having committed the offence charged is to be given, whether or not he has testified, or made pre-trial answers or statements.'

[70] The case of **R v Syreena Taylor** was applied in the later case of **Leslie Moodie v R** [2015] JMCA Crim 16, in which Morrison JA (as he then was) reiterated these principles. At paragraph [127], Morrison JA noted that the case of **R v Vye** had "established definitively" that, while the propensity direction should generally always be given if the defendant is of good character, where such a defendant "does not give evidence and has given no pre-trial answers or statements, no issue as to his credibility arises and a [credibility] direction is not required". He then went on to say the following, at paragraph [128]:

> "...[I]n **R v Syreena Taylor**...this court, basing itself on **Vye**, did observe that the trial judge was under 'no obligation' to give directions as to the credibility of a defendant who made an unsworn statement. As far as we are aware, the Privy Council has yet to put the matter as categorically as this and it may well be that, at an appropriate time, this could be a question for further exploration."

[71] This learning, as far as we are aware, has still not been displaced by any authority from the Privy Council.

[72] The authority of **Anneth Livingston v R**, relied on by Mr Wildman, clearly does not assist, as in that case, the appellant gave sworn evidence at trial. **Edmund Gilbert v The Queen** is similarly unhelpful to the appellants' case, as contrary to the view posited by Mr Wildman, the case reiterates the above-stated principle that, in these circumstances only the propensity limb of the direction is required.

[73] In **Edmund Gilbert v The Queen**, the facts were that the appellant, a senior tax collector and bishop for many years, had been accused of the murder of a teenage girl. The evidence was that he was engaged in a sexual relationship with her at the time of the incident. The appellant gave an unsworn statement from the dock, avowing his innocence and speaking of his work as a minister of religion and tax collector for over 30 years. Although counsel who appeared at trial deponed that the issue of the appellant's good character was not specifically raised at trial, it was argued that the judge had erred in failing to enquire whether the appellant was relying on his good character and not directing the jury in relation to the appellant's truthfulness and likelihood of having committed the offence.

[74] The Board found that it was the duty of the appellant's counsel to ensure that the judge was aware that the appellant was relying on his good character. The Board also noted that a judge had a residual discretion in limited cases to dispense with the direction where to give it would be an insult to common sense. Further, it found that,

although in the circumstances, it had been understandable why a direction was not given, it would have been preferable for the trial judge to have given a direction in accordance with the principles in **R v Vye** (page 9). The Board held that it was the task of the judge to give such directions necessary to ensure the defendant had a fair trial, which would normally include directions in accordance with those set out in the case of **R v Vye**.

[75] In the case at bar, since the appellants had made unsworn statements, the learned judge would have been under no obligation to give directions on their credibility. Although it was not required, and although she did not use the standard words, the learned judge, nonetheless, did in fact give directions to herself on the credibility limb. At paragraph 19 of her reasons, having considered the evidence of the witnesses called by the appellants as to their good character, including that both men were honest and hardworking, as well as Mr Williams' own assertion of his good character in his unsworn statement, she said:

> "They are both men of previously good character. This does not mean that they could not commit the offence for which they are charged. However, **I do take this evidence into account in looking at their statements as I deal with the issue of credibility**. I also consider that given the qualities of the men described by the witnesses that came on their behalf that it may mean that they are less likely to have committed the offence." (Emphasis added)

[76] As a result, the appellants would have obtained an advantage when the issue of their credibility was considered. We find, therefore, that this complaint is misconceived.

[77] In respect of the appellants' challenge to the learned judge's use of the word 'may' in giving the propensity direction, this court held the view that the learned judge cannot be faulted. In **Michael Reid v R** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 113/2007, judgment delivered 3 April 2009 and **Horace Kirby v R** [2012] JMCA Crim 10, it was accepted that the standard direction is as set out by the Privy Council in **Teeluck and John v The State of Trinidad and Tobago** (2005) 66 WIR 319, as follows:

> "(iii) The standard direction should contain two limbs, the credibility direction, that a person of good character is more likely to be truthful than one of bad character, and **the propensity direction, that he is less likely to commit a crime, especially one of the nature with which he is charged**." (Emphasis added)

[78] The propensity limb of the direction has, however, been described using the word 'may' by the English Court of Appeal in the case of **R v Hunter and other appeals** [2015] EWCA Crim 631, a case which also cited the principles set out in **Teeluck**. At paragraph [78] of that case the following was said:

> "The second propensity limb means that good character **may make it less likely** that the defendant acted as alleged and so particular attention should be paid to the fact." (Emphasis added)

[79] This direction has been incorporated into the Supreme Court of Judicature of Jamaica Criminal Bench Book 2017 (the 'Supreme Court Bench Book'). At page 147 of the text, it is stated that "all directions on this topic [good character] must be crafted in accordance with the law as set out in the case of **Hunter**". At page 148 of the same publication, it is directed:

> "12. A full good character direction is as follows:
>
> (1) Good character is not a defence to the charge.
>
> (2) However, evidence of good character counts in D's favour in two ways:
>
> (a) his good character supports his credibility and so is something which the jury should take into account when deciding whether they believe his evidence (the 'credibility limb'); and
>
> (b) his good character **may** mean that he is less likely to have committed the offence with which he is charged (the 'propensity limb')." (Emphasis added)

[80] Directions of a similar nature can be found at page 168 of the Crown Court Compendium 2016. It was our view, therefore, that the directions on the propensity limb, which the learned judge adopted, are consistent with the principles in **Hunter** and the guidance provided by the Supreme Court Bench Book. Therefore, her use of them cannot be faulted.

[81] Additionally, it can be gleaned from the authorities that what is important is that the direction given is to the effect that the likelihood of the accused having committed the offence for which he is charged is less because of his previous good character (see **R v Vye** at page 479).

[82] In **R v Vye**, the court emphasised that it was up to the judge as to how to tailor the direction in each case:

> "Having stated the general rule, however, we recognise it must be for the trial judge in each case to decide how he tailors his direction to the particular circumstances. He would probably wish

> to indicate, as is commonly done, that good character cannot amount to a defence. In cases such as that of the long serving employee exemplified above, he may wish to emphasise the 'second limb' direction more than in the average case. By contrast, he may wish in a case such as the murder/manslaughter example given above, to stress the very limited help the jury may feel they can get from the absence of any propensity to violence in the defendant's history. Provided that the judge indicates to the jury the two respects in which good character may be relevant, ie credibility and propensity, this court will be slow to criticise any qualifying remarks he may make based on the facts of the individual case."

[83] We were, therefore, of the view that the use of the word 'may' by the learned judge did not detract from the intended effect of the direction, particularly because she was directing herself and not a jury of lay persons. She would have fully contemplated and appreciated the effect of the direction and given it the weight she believed it deserved.

[84] Furthermore, it is well established that the absence of a good character direction will not invariably lead to a conviction being quashed. What is important is whether, in all the circumstances of the case, the omission would have had such an impact so that the verdict would have been different. In **Ricardo Wright v R**, Brooks JA at paragraph [43] said this much, relying on the following passage from Morrison JA (as he then was) in the authority of **Chris Brooks v R** [2012] JMCA Crim 5:

> "The test is therefore whether, having regard to the nature of and the issues in the case and taking account the other available evidence, a reasonable jury, properly directed, would inevitably have arrived at [sic] verdict of guilty."

[85] These sentiments were echoed by the Privy Council in **Edmund Gilbert v The Queen**. *A fortiori*, even if the direction was inadequate, it would not necessarily be fatal.

[86] In this matter, we are of the considered view that the cogency of the evidence was such that would have rendered any inadequacy in the learned judge's directions as to good character inconsequential. This ground, also, fails.

Ground 3: Whether the learned judge failed to adequately deal with the agreed evidence in determining the veracity of the complainant's assertions, having regard to the defence raised in the appellants' unsworn statements.

The appellants' submissions

[87] In their written submissions, the appellants submitted that, notwithstanding that the photograph and video evidence were agreed by both sides at trial, aspects of that evidence amounted to double hearsay and ought not to have been relied on by the learned judge in assessing the evidence. It was further submitted that whilst section 31CA of the Evidence Act, as amended, allows for both the defence and the prosecution to agree to evidence being admitted, it does not facilitate double hearsay. The appellants relied on the authority of **R v Carlwood Thompson** (unreported), Jamaica, Court of Appeal, Supreme Court Criminal Appeal No 56/1989, for the proposition that hearsay cannot be used to establish a fact in issue, even where there is no objection to the evidence being admitted.

[88] Counsel for the appellants asserted that the section of the witness statement of Corporal Akeil Pladley, which made reference to his conversation with Sergeant Lewin

pertaining to the SD card containing photographs and video he had received from Mr Turner in relation to the larceny case, in the presence of Mr Turner, was given in the absence of the appellants and is therefore hearsay. The appellants complained that it was the effect of this evidence that the learned judge used to reject the defence and find that the complainant's evidence was more credible. Mr Wildman also submitted that this evidence was relied on to show the position of the men and that they were stealing the wood. Nonetheless, he submitted that nothing in the video dispelled the appellants' contention that they went to the property to investigate, in accordance with their duties under section 13 of the Constabulary Force Act.

[89] The learned judge, it was submitted, failed to warn herself of the importance of this evidence and to approach it with caution, and as a result prevented the appellants from having a fair trial.

[90] Under this ground, it was also complained that the learned judge's assertion that the appellants and the other men were attempting to leave the property together was not borne out by the record of proceedings, and it was contended that this raised questions as to whether she misconstrued the evidence in concluding that the appellants and the other two men appeared to have known each other and were acting in concert to commit the offence.

Submissions on behalf of the Crown

[91] Counsel Mrs Barnett Plunkett submitted that, having regard to the fact that the relevant evidence, including the statement of Corporal Pladley, had been agreed by the Crown and the defence, and no objection was raised as to the authenticity of the video or that the video had been tampered with by the complainant or anyone else, there was no need for the learned judge to determine the veracity of the claim that the appellants were caught loading wood onto the service vehicle. This would have no longer been merely a claim, as the learned judge would have observed this on the agreed video footage.

[92] It was further submitted that the learned judge did not err by relying on the photographs and video, as, in doing so, she adhered to the rules of evidence and admissibility, because the evidence was agreed by counsel for both the prosecution and the defence, and admitted into evidence as exhibit 4. In assessing the evidence, she made reference to the photographs and video and weighed that evidence in a balancing exercise against the accounts of the complainant and both appellants, including the issues raised by the appellants relating to their honest belief and the exercise of their duties. The learned judge arrived at a guilty verdict, having had the benefit of observing the demeanour of the complainant, viewing the photographs and video footage, and having assessed the cases for the prosecution and the defence.

[93] Counsel for the Crown, therefore, submitted that, based on the authority of **Alrick Williams v R** [2013] JMCA Crim 13, the learned judge was correct in law when

she accepted the complainant's evidence and rejected the evidence of the appellants, and consequently, the verdict does not go against the weight of the evidence.

[94] Even if the above submissions were not accepted, Mrs Barnett Plunkett contended that this was an apt case for the proviso to section 14(1) of the Judicature (Appellate Jurisdiction) Act to be properly applied.

Discussion and analysis

[95] There is no dispute that the parties agreed to the admission of the photographs and video retrieved from the complainant's phone, as well as, the statement of Corporal Pladley. There also can be no doubt that the learned judge was well within her right to admit those items, pursuant to the rules of evidence.

[96] Section 31C of the Evidence Act (as amended) permits the court to admit the written statement of a person in criminal proceedings, where, *inter alia*, certain formal requirements have been met and the parties have agreed. Section 31CA permits the court, in any civil or criminal proceedings, to admit any document (which includes anything on which any information is recorded) into evidence without its maker being called as a witness to give evidence, and to treat any fact as being proved without evidence being led to prove such fact, notwithstanding the provisions of section 31CB, 31G or any other law.

[97] It would have been within the learned judge's discretion, as the tribunal of law, to decide whether there were any exclusionary bars to her consideration of the

evidence, and as the tribunal of fact, to decide how much weight she wished to attach to that evidence.

[98] It is trite that an out of court statement made by a person who has not been called to give evidence in court is generally inadmissible to prove the truth of its contents (see **Subramaniam v Public Prosecutor** [1956] 1 WLR 965). This rule, of course, is subject to the accepted common law and statutory exceptions that, once applicable, will render the evidence admissible. This court also accepts that **Carlwood Thompson v R** establishes that, even if no objection is taken to inadmissible hearsay evidence, the court ought not to give it weight in assessing the evidence.

[99] The question arises, therefore, whether the evidence complained of contained hearsay and ought not to have been given any weight by the learned judge.

[100] The portion of Corporal Pladley's statement that the appellants take objection to as 'double hearsay' is as follows:

> "On Wednesday September 9, 2014, Sergeant H. Lewin who is stationed at the Jamaica Constabulary Force Inspectorate of Constabulary Section attended the Communication Forensic and Cybercrimes Unit (CFCU) accompanied by Mr. Roger Turner. He informed me that he is Investigating [sic] a case of larceny in which Mr. Turner is the Complainant and he has photographs and video footage on his cellular phone which he believe [sic] is of relevance to this case. Mr. Turner indicated that these pictures and video footage are stored on the Micro Secure Digital (SD) card which is attached to his cellular phone and he uses his phone on a regular basis to conduct business."

[101] We can see nothing in this evidence that amounts to hearsay, let alone double hearsay. The witness was simply recounting the fact of how he came to be in

possession of the photo and video evidence and was not stating the truth of any assertion made to him to prove a fact in issue. There was no dispute that a case of larceny was being investigated and it was not disputed that Mr Turner took photographs and video footage of a part of the incident, which he stored on an SD card in his phone.

[102] The conversation that took place between Sergeant Lewin and Corporal Pladley, in the absence of the appellants, was, simply, to provide Corporal Pladley with the necessary instructions for the retrieval of the photographs and video from Mr Turner's phone. It was not disputed, in the court below, that they were downloaded by Corporal Pladley from the SD card in Mr Turner's cellular phone.

[103] Mr Turner, who was the maker of the photographs and video, was present with Sergeant Lewin, when the phone was handed over to Corporal Pladley, and when this conversation took place. He gave evidence of this fact. He also testified that the photographs and video that he created were stored on the SD card in his phone. These areas of his evidence were not challenged by the appellants at trial. Therefore, we are unable to appreciate why Corporal Pladley's evidence on this subject would be objectionable.

[104] In addition, the fact that there was no evidence to suggest that the photographs and video had been tampered with or were otherwise unreliable, meant that there would have been no reason in law for the learned judge to warn herself to approach the evidence with caution or to not give it full weight in her assessment of the case.

[105] At any rate, even if this aspect of Corporal Pladley's statement is hearsay, counsel would not be on good ground for two reasons. Firstly, the statement would have had no bearing on the admissibility of the photographs and video because they were made by Mr Turner and could have been received in evidence through him. Secondly, it would have been of limited significance as it could not be seriously contended that the admission of and reliance on this aspect of the statement would have caused a miscarriage of justice so as to render the conviction unsafe.

[106] Mr Wildman also submitted that the assertion made by the learned judge that the appellants and other men were attempting to leave the property together was not borne out by the record of proceedings. It was submitted further that this raised questions as to whether she misconstrued the evidence in concluding that the appellants and the other two men appeared to have known each other and were acting in concert to commit the offence.

[107] However, having perused the record of proceedings ourselves and reviewed the matter in its entirety, we were unable to find any evidence or assertion made by the learned judge, that the men were "attempting to leave with the appellants". Mr Turner's evidence on this point was that after the appellants left the property by themselves, they returned to the property, picked up the men and all four men actually left together in the service vehicle.

[108] The learned judge, having viewed the video, considered that the appellants were loading wood onto the service vehicle whilst the men, whom they, purportedly, went to

apprehend, were seen walking around freely, one of them with a chainsaw and the other placing an item in the service vehicle. Based on what she saw in the video footage, coupled with her acceptance of Mr Turner's evidence that:

i) the appellants were in the vicinity of the felled tree, whilst the man with the chainsaw was cutting up the log;

ii) the other man was assisting by moving the planks;

iii) the appellants were loading wood into the boot of the service vehicle during the time that this was happening;

iv) the appellants, after being accused of trespassing and stealing, said nothing in response; and

v) after leaving the property by themselves, the appellants returned for the men, and left the property with them;

the learned judge made the determination that the two men and the appellants were familiar with each other, and together were engaged in a joint enterprise to commit the offence. This was entirely a matter for the learned judge, as the tribunal of fact, and she had more than sufficient evidence to support her conclusion.

[109] In our opinion, the learned judge did not "misconstrue" the evidence on this issue and it cannot be said that she was plainly wrong in making her findings and arriving at the conclusion that she did. This ground, likewise, fails.

Conclusion

[110] The learned judge, as far as we can see, adopted a correct view of the law and there was more than enough evidence on which she could have found both appellants guilty of the charge of simple larceny. Therefore, we saw no reason to disturb her findings.

[111] It is for those reasons that we made the orders set out at paragraph [2] above.