[2020] JMCA Crim 7

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 25/2013

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MISS JUSTICE P WILLIAMS JA

RAYON WILLIAMS v R

Leroy Equiano for the appellant

Miss Kathy-Anne Pyke and Miss Kelly-Ann Boyne for the Crown

9, 10 May 2017 and 23 March 2020

MORRISON P

Introduction

[1] On 6 March 2013, after a trial before K Anderson J ('the judge') and a jury in the Saint Catherine Circuit Court, the appellant was convicted of the offence of murder. On 22 March 2013, the judge sentenced the appellant to imprisonment for life at hard labour, with a stipulation that he should serve 35 years in prison before becoming eligible for parole.

[2] The appellant was represented at the trial by Mr Roy Stewart, an attorney-at-law of considerable experience (and a former Resident Magistrate) and Miss Janetta

Campbell (sadly now deceased), an attorney-at-law with less than three years' experience.

[3] On 13 December 2016, a single judge of appeal granted the appellant leave to appeal and the appeal was in due course heard on 9 and 10 May 2017. On the latter date, the court announced that the appeal would be dismissed and ordered that the appellant's sentence should run from 27 March 2013. With apologies for the long delay, these are the promised reasons for the court's decision.

[4] The particulars of the charge against the appellant were that he and another person murdered Hugh Cover ('the deceased') between 4 and 5 September 2009, in the parish of Saint Catherine.

[5] At the trial, the chief witness for the prosecution – and certainly the only eye-witness - was the appellant's aunt, Miss Sharon Moore. Even in the barest outline, the facts as described by Miss Moore were gruesome in the extreme. She testified that at around midnight on the night in question she went to a yard at Oxford Road, Redemption Ground in the parish of Saint Catherine, where she saw the appellant and several other men surrounding the deceased who was seated on a metal pan. One of the men picked up a pick-axe stick and hit the deceased in the back of his head four times, whereupon the deceased fell to the ground, "flattering like foul". On the appellant's instructions, the deceased was then turned over onto his belly. The appellant then took up a sword which was leaning-up in a corner and used it to cut his neck. Miss Moore next heard a gushing sound, "like water running very hard", and saw

blood flowing from the deceased's throat. When the appellant directed one of the other men to "finish take off the head", Miss Moore ran off to her shop nearby.

[6] But Miss Moore later saw when the severed head and the body of the deceased were placed in a silver-coloured Toyota motor car. The appellant then forced her into the car and told her that she should go with the driver (who was known as 'Ruff'), and that they would be followed by another car (a white car) which would bring them back. They then travelled to the Braeton area of Saint Catherine, followed by the white car. The Toyota was abandoned on the Braeton Main Road, under "a big guango tree", and Miss Moore and Ruff then went over into the white car, in which they were taken back to Oxford Road.

[7] The police subsequently found a grey Toyota motor car parked on a dirt road in the Cumberland Housing Scheme area. The deceased's headless body was found lying on its back in the trunk of the car and his head was found in a bag wrapped in the same material in which it was when Miss Moore first saw a man's head being placed in the Toyota at Oxford Road. The Toyota motor car was registered in the name of the deceased.

[8] The deceased's brother identified his body to the pathologist. The pathologist's report was admitted in evidence at the trial and it revealed that the cause of death was blunt force injuries to the head, resulting in laceration of the brain and a fractured skull. These injuries were consistent with an impact from a heavy, hard, blunt object. The

pathologist noted that the deceased's head was severed from the neck and the remaining part of the body, but that this had happened after death.

[9] As part of its case at trial, the prosecution adduced evidence of a series of questions put by the police to the appellant under caution, and his answers to those questions. The written record of the questions and answers were admitted in evidence as Exhibit 1.

[10] The appellant gave an unsworn statement from the dock. He denied any knowledge of the incident in which the deceased had lost his life. His position was that Miss Moore was lying out of malice towards him, and he called two witnesses to support his assertion that Miss Moore had previously threatened to send him to prison because she believed that he had stolen a gun which belonged to her.

The appeal

[11] At the outset of the hearing of the appeal, Mr Leroy Equiano, for the appellant, sought and was given permission to argue the following supplementary grounds of appeal in substitution for the grounds originally filed by the appellant. The supplementary grounds of appeal are as follows:

> "1. The learned trial judge erred in law by preventing or deterring defence counsel from asking questions within the rules of evidence, which were crucial to testing the credibility of the Crown's sole witness, wherein the credibility of the witness was of fundamental importance.

2. (a) The learned trial judge's numerous interruptions of defence counsel during the cross examination of the sole eyewitness for the Crown, undermined defence counsel's ability to fulfill her obligation to vigorously defend her client.

   (b) The learned trial judge put questions to defence witness Collin Robinson that were unfair to the defence as the questions suggested that the defence witness should not be believed.

3. The learned trial judge erred in law by failing to guide the jury on how to treat with the evidence presented to the court and in particular, Exhibit 1.

4. The learned trial judge failed to give adequate guidance to the jury regarding treatment of the identification evidence in accordance with the Turnbull guidelines.

5. The learned trial judge failed to make an impartial and fair presentation of the defence case to the jury; and failed to guide the jury on how to treat the evidence adduced on behalf of the defence.

6. The learned trial judge's summation was overly biased in favour of the Crown. Whilst downplaying the defence case, the Court emphasized the strengths in the Crown's case and proceeded to prop up the evidence of the main witness for the Crown in such a manner as to prompt the jury to believe the witness.

7. The learned trial judge failed to assist the jury with identifying weaknesses in the Crown's case and in particular evidence that impacted on the credibility of the main witness for the Crown.

8. The Appellant was of unblemished character prior to the instant charge. Counsel for the Appellant failed/neglected to adduce evidence before the jury of

the Appellant's good character. The Appellant lost the opportunity to have the jury weigh his character against the charge. Consequently no 'good character direction' was presented by the learned trial judge to the jury and this exclusion deprived the Appellant of a fair trial.

9. Although not directly stated there was evidence adduced from which it could have been inferred that the Appellant was of good character. The trial judge therefore erred in not giving a good character direction to the jury."

[12] It may be convenient to group these grounds into three broad heads:

(i) The judge's conduct of the trial (grounds 1 and 2)

(ii) The judge's directions to the jury (grounds 3-7)

(iii) Whether the appellant was entitled to a good character direction (grounds 8 and 9)

Issue (i) - The judge's conduct of the trial (grounds 1 and 2)

[13] In ground 1, the appellant's complaint was that the judge erred in preventing or deterring counsel for the defence at the trial from asking certain crucial questions by which it was sought to test the credibility of Miss Moore, the prosecution's sole eyewitness. In ground 2, the complaint was that, first, the judge's numerous interruptions of defence counsel, during her cross-examination of Miss Moore, undermined counsel's ability to properly defend her client; and, second, that the judge's questioning of a witness for the defence was unfair.

[14] We will sub-divide these complaints into 'the judge's interruptions' and 'the judge's questions'.

The judge's interruptions

[15] Mr Equiano directed our attention to two extracts from the transcript of the trial, both arising from the cross-examination of Miss Moore by Miss Campbell.

[16] In the first, it appears that Miss Campbell was concerned to establish that Miss Moore may have had a motive to tell untruths about the appellant, thereby impugning her credibility. In order to establish the context, it is necessary to quote in full the passage referred to and relied on by Mr Equiano (pages 111-116 of the transcript):

> "Q. Have you ever owned a gun?
>
> A. Gun? What am I doing with a gun?
>
> Q. Does that mean no, Miss Moore?
>
> A. No.
>
> Q. I suggest to you, Miss Moore, that you have bought a gun
>
> HIS LORDSHIP: Have what?
>
> MR ROY STEWART: She has bought a gun, m'Lord
>
> A. No, ma'am
>
> HIS LORDSHIP: All right. At this stage counsel, because of the line of questioning that you are embarking upon I think I have a duty to let you know that because of the line of questioning that you are embarking on, you actually are opening the door for your client at an appropriate stage, if such is able to be done, to be challenged in certain respects vis-a-vis character. Just need to let you know that you are opening the door for that and you need to be very much

aware of it. The judge has a duty to let you know because you are putting certain questions to the prosecution witness which impinges upon her character and in so doing you are in essence opening the door for your client's own character to be challenged. Be very careful with that.

MISS J. CAMPBELL: Guided, m'Lord. Crave your indulgence, m'Lord.

Q. Miss Moore, I am suggesting to you that you did buy a gun and that you cannot find it.

HIS LORDSHIP: All right, let's just stop there for a second. Don't hear the prosecutor saying anything but now I have to ask what's the relevance of all of this?

MISS J. CAMPBELL: It will be seen, be made clear.

HIS LORDSHIP: Is it relevant to the charge against the accused?

MISS J. CAMPBELL: Yes, m'Lord and the next question, I believe, will add some clarity to it.

MRS. S. MILWOOD-MOORE: M'Lord, it is the reading of the deposition that cause me to be silent at this time.

HIS LORDSHIP: I am not going to pay any regard to the deposition. I am focusing on the evidence, that's really what I need to focus on. So, the suggestion is that she did buy a gun and what.

MISS J. CAMPBELL: And, she doesn't know where it is.

HIS LORDSHIP: And you don't give her a time period when this was done? 'You did buy a gun and you don't know where it is', counsel?

MISS J. CAMPBELL: Crave your indulgence, m'Lord.

HIS LORDSHIP: You want - I am not telling you to change the question but it just seems to me it is entirely lacking in specificity. If you wish to let it remain as it is, I don't know how that can be of any value but you seem to think it is. Proceed.

Q. Miss Moore, sometime in 2009, sometime before the incident in which the man died, you bought a gun and you cannot find the gun, I am suggesting to you and …

MRS. S. MILWOOD-MOORE: M'Lord, I believe the suggestion I becoming multi …

HIS LORDSHIP: Compound?

MRS. S. MILWOOD-MOORE: Compound, thank you.

HIS LORDSHIP: So, you will put it to the witness counsel, sometime in 2009 before the incident in which the man died, the suggestion is being put to you, ma'am, that you did buy a gun and you don't know where it is.

THE WITNESS: Don't know what they are talking about, your Honour. I am not along with a gunman and I don't have a son that is gunman.

HIS LORDSHIP: Listen. You answered the question once. You answered. There is no need for you to get into a sort of like a quarrel.

THE WITNESS: Thank you very much, your Honour.

HIS LORDSHIP: It is a question and answer process, all right?

THE WITNESS: Okay.

HIS LORDSHIP: So, you don't know what they are talking about.

Q. In this regard, my last suggestion to you, Miss Moore, is that you have accused Rayon, 'Bo-Bo' of stealing your gun.

A. I know not what you talking about, ma'am.

HIS LORDSHIP: That she has accused who?

MISS J. CAMPBELL: Mr. Williams, the accused man in the dock, of stealing the gun.

HIS LORDSHIP: Put it again to her please.

Q. I am suggesting to you, Miss Moore, that because you cannot find the gun, you have accused your nephew, Mr. Williams, of stealing the gun.

A. I don't know what you are talking about.

HIS LORDSHIP: You mean your client? Can we, just for the record, because he has brothers, could you just put it that she accused your client of stealing the gun so that we have it very clearly. You are referring to not just Mr. Williams, not someone that you point to. I can't have that pointing to on the record, your client, can you just have that very clearly put to her please.

MISS J. CAMPBELL: Guided, m'Lord.

Q. Miss Moore, I am suggesting to you that because you cannot find this gun that you bought, you have accused Mr. Rayon Williams, my client, of stealing your gun.

A. Miss, I know nothing of what you talking about.

HIS LORDSHIP: I am still at loss in terms of relevance, counsel but hopefully you will be able to explain it to me at some point in time, whether in the presence or absence of the jury but I am at a loss.

MISS J. CAMPBELL: May I ask one more question then, m'Lord, about the gun?

HIS LORDSHIP: Yes.

Q. And, so, Miss Moore, I am suggesting to you that in order to avenge yourself, you have brought this charge against – you have given the evidence against Mr Rayon Williams.

A. No, ma'am."

[17] In the second extract, counsel put to Miss Moore a suggestion of a completely different nature (page 117):

> "Q. I suggest to you, Miss Moore, that you are in a relationship with this person called 'Ruff'.
>
> A. Miss, you are only embarrassing my character. 'Ruff' is a little boy. 'Ruff' could be my son."

[18] The judge immediately invited the jury to withdraw, telling them that "[t]here is a legal issue I need to discuss with counsel and I am going to do it in your absence, please". The following exchange between bench and bar then ensued (pages 118-119):

> "HIS LORDSHIP: Miss Campbell, what is the relevance of this evidence? All right, let's assume that she is in a relationship or had been in a relationship with 'Ruff', let's assume that she blames your client for a gun which has gone missing, what's the relevance of these things to your client's present case?
>
> MISS J. CAMPBELL: M'Lord, these are the instructions from my client and I believe m'Lord, they indicate that she is not a truthful witness.
>
> HIS LORDSHIP: They don't indicate that she is not a truthful witness. They may indicate, if a jury were minded to accept it, that she may have a reason to be untruthful, perhaps the first aspect of it in terms of the gun that has gone missing which she allegedly blames your client for. But let's go to the next stage that you have gone to now, some relationship with 'Ruff'. How would that interact with this case in relation to your client who is not 'Ruff'? 'Ruff' isn't even charged along with your client. 'Ruff' is not here at court. 'Ruff' is not a witness, how is that relevant?
>
> MISS J. CAMPBELL: M'Lord, I believe it also goes to her character because she is, according to my instructions, carrying on with this young person and hiding it from her gentleman, m'Lord.
>
> HIS LORDSHIP: Yes but what's the relevance to the charge? Yes, all right, so she is of bad character, let's assume that, assuming that you have the evidence to establish it, what's the relevance?"

[19] The judge then continued in much the same vein, pointing out to Miss Campbell at some length that she had not yet put her client's case to the witness. He also advised her that she should not "just widely throw out everything that your client gives you, that's why you are a lawyer".

[20] Mr Equiano submitted that, given Miss Moore's role as the sole prosecution eyewitness to the murder of the deceased, and given the appellant's position that he was not party to any killing and that Miss Moore was either mistaken or lying, her character was an essential element in the jury's assessment of her credibility. He submitted that, once the line of cross-examination being pursued by counsel was proper and relevant to the issue of the witness's character and credibility, the judge ought not to have prevented her from pursuing the matter.

[21] In skeleton arguments filed on behalf of the prosecution, Miss Pyke and Miss Boyne submitted that the interruptions complained of were entirely proper in the circumstances, given the judge's obligation to ensure that all questions asked by counsel related to relevant matters. In any event, they pointed out, the judge's principal concern was to guard against inadvertent prejudice to the appellant arising from counsel's line of questioning.

[22] We will mention two of the cases to which Mr Equiano referred us. In **R v Sweet-Escott** (1971) 55 Cr App R 316, the court was concerned with the limits of cross-examination as to credit. In the course of his ruling in a Circuit Court trial in the

Derbyshire Assizes, Lawton J stated the principle upon which the judge should draw the line as follows (at page 320):

> "Since the purpose of cross-examination as to credit is to show that the witness ought not to be believed on oath, the matters about which he is questioned must relate to his likely standing after cross-examination with the tribunal which is trying him or listening to his evidence."

[23] And, in **R v Cleland** [1995] Crim LR 742, 743, the English Court of Appeal (Criminal Division) held that the trial judge had been wrong not to allow cross-examination on matters "which were capable of going to the heart of the complainant's credibility".

[24] In this case, it seems to us to be plain from the first of the two passages to which Mr Equiano referred us that what the judge was seeking to do initially was to alert counsel to the danger that, by asking questions which impugned Miss Moore's character, she might unwittingly be exposing the appellant to cross-examination as to his own character should he elect to give evidence (as to which, see section 9(f)(ii) of the Evidence Act). In a word, the judge was only trying to be helpful.

[25] But, in any event, in the face of counsel's determination to pursue the matter, and even despite his own continued reservations as to its relevance, the judge allowed the suggestion to be put to Miss Moore that her giving evidence against the appellant was an act of revenge against him for stealing her gun. So, in the end, counsel had it

her way and there was absolutely no basis for the complaint that the judge's interruptions had resulted in unfairness to the appellant.

[26] As regards the interruption of Miss Campbell when she attempted to question Miss Moore about a supposed relationship with 'Ruff', it seems to us that the judge's response was equally unexceptionable. Even if Miss Moore's credibility was in issue, which it clearly was, the question of whether or not such a relationship existed was, as the judge indicated, wholly irrelevant to that issue. In our view, therefore, there was absolutely nothing in this point.

The judge's questions

[27] As we have indicated, the appellant relied on the evidence of two witnesses in his defence. The first of them, Mr Carlton Barrett, characterised Miss Moore as "a evil". He stated that he did not "want him [Miss Moore] know me name, me nuh want him obeah me" (page 423). He testified to an occasion on which Miss Moore accused the appellant of having taken away her gun, an allegation which the appellant denied. He stated that Miss Moore had declared that "if [the appellant] nuh carry back the gun to him a either send him go a prison or obeah him …" (page 427).

[28] The appellant's second witness was Mr Junior Robinson, who also gave evidence along similar lines. Although he regarded Miss Moore and the appellant as persons who got along "all right", he was also aware of a disagreement between them arising out of Miss Moore's allegation that the appellant had taken away her gun, an allegation which the appellant had denied.

[29] After Mr Robinson had been cross-examined by counsel for the prosecution, the judge asked him the following series of questions (pages 468-469):

> "Q. Do you know if Sharon practises obeah?
>
> A. No, sir.
>
> Q. You have never seen her doing anything like that?
>
> A. No, sir.
>
> Q. You know a man by the name of Carlton Barrett?
>
> A. Carlton Barrett? No.
>
> Q. No. What caused you to come to court to testify?
>
> A. What caused me to come to court to testify?
>
> Q. Yes.
>
> A. Because I know that Rayon have been accused by his aunt.
>
> Q. Yes
>
> A. And I never see Rayon in that situation yet.
>
> Q. Okay. So that's what caused you to come forward?
>
> A. Yes.
>
> Q. Cause you have never seen him in that situation yet?
>
> A. Yes, sir.
>
> Q. And he is accused by his aunt?
>
> A. Yes, sir.
>
> Q. Did you try to give a statement to the police about what you telling the court now?
>
> A. No, sir.
>
> Q. Any particular reason why you didn't do that?

A. I never asked by any police or have any reason.

Q. Any particular reason why you didn't go in to the police to give a statement?

A. No, I never go to the police to give a statement.

Q. Any particular reason why you did not go in to the police?

A. 'Cause I never have any reason, sir.

Q. When you say cause you never have any reason, what you mean by that?

A. I never asked by the police or anyone.

Q. So did someone ask you to come here today and give evidence?

A Yes, sir.

Q. Who asked you?

A. Is Rayon mom.

Q. All right.

HIS LORDSHIP: All right. Mrs. Moore, questions arising?

MRS. MILWOOD-MOORE: No, m'Lord.

HIS LORDSHIP: And Mr. Stewart, questions arising?

MR. STEWART: None, M'Lord."

[30] Mr Equiano submitted that this was a most unfair line of questioning by the judge, in that the impact of it was to convey to the jury that the witness was not one to be believed. In the result, it was submitted, the judge became an advocate on behalf of the prosecution.

[31] Miss Pyke submitted, to the contrary, that a trial judge is entitled to ask questions and may in fact have a duty to do so if necessary. In this case, the judge's questions were relevant to the witness's credibility .

[32] We agreed with Miss Pyke. The judge's question with regard to the practice of obeah was obviously prompted by the evidence which Mr Barrett had given in relation to Miss Moore. In fact, nothing turned on it and it may have reflected no more than the judge's own curiosity. The other questions asked by the judge were, as it seemed to us, perfectly reasonable explorations of some other issues which the jury might well have found it helpful to consider in assessing Mr Robinson's credibility. In accordance with accepted best practice, the judge waited until the cross-examination of the witness had been completed before asking his questions (see Blackstone's Criminal Practice 2010, paragraph F7.4); and, having asked them, he quite properly offered counsel on both sides an opportunity to ask further questions if they wished. In these circumstances, we were unable to see what prejudice the judge's questions could possibly have caused the appellant.

Issue (ii) - The judge's directions to the jury (grounds 3-7)

[33] The appellant made five complaints under this head:

(i) The judge failed to give adequate guidance in relation to Exhibit 1 (The treatment of Exhibit 1).

(ii) The judge failed to give adequate guidance in relation to the identification evidence (The identification directions).

(iii) The judge failed to make a fair and impartial presentation of the case for the defence to the jury (The judge's presentation of the defence case).

(iv) The judge's summation was "overly biased" in favour of the prosecution (Biased summation).

(v) The judge failed to assist the jury by pointing out the weaknesses in the prosecution's case (Failure to point out weaknesses in the prosecution's case).

The treatment of Exhibit 1

[34] As we have noted, Exhibit 1 consisted of the written record of the 94 questions asked and the answers given by the appellant in the question and answer session conducted by the police (see pages 238-253). The appellants answered the majority of the questions by saying, "I do not wish to answer". As Mr Equiano acknowledged in his skeleton argument, "[t]he answers given by the Appellant were not adverse to him in law". Nevertheless, he submitted, "without guidance a jury may construe certain answers or lack of answers as indication on guilt" (appellant's skeleton argument, paragraph 5.3).

[35] In his summing-up, the judge dealt with the question and answer session as follows (at pages 559-560):

> Now, I must go on to tell you that there has been, given in evidence in this case, evidence of a Question and Answer

> session between the accused and a police officer. The accused man answered certain questions during that Question and Answer session and he refused to answer other questions. I am saying this to you now very clearly, matter of law, whatever the accused refused to answer when questioned after he had been cautioned and on the advice of his lawyer, the right to remain silent should not be held against him. He had the right to remain silent or, in other words, to refuse to answer certain questions; and if he exercised that right, do not hold that against him. He answered other questions. You can look at these answers and see to what extent they may assist, if at all, in enabling the prosecution to prove its case or enabling the defendant's defence to be established. You can look at it and assess, just as you assess any other evidence, but do not draw any inference adverse to the accused arising from his refusal to answer certain questions. That was his right."

[36] Although Mr Equiano submitted that the judge should have given the jury "guidance" with regard to Exhibit 1, he did not indicate what further should have been said. In our view, as counsel for the prosecution submitted, the judge's directions were pointed, clear and balanced. In particular, we considered that these directions were sufficient to warn the jury that no adverse inference should be drawn from the appellant's failure to answer questions posed to him in the question and answer session.

The identification directions

[37] At the trial, counsel for the prosecution led evidence from Miss Moore to establish that the appellant was her sister's son, at the relevant time he lived "right beside" her, she knew his nickname ('Bo-bo') and that she usually saw him every day,

more than once for the day (pages 13-15). (Under cross-examination, Miss Moore would add that the appellant was her favourite nephew – page 110.)

[38] Further, that she was in the yard in which the deceased was allegedly murdered for about 10 minutes, during which time she was able to see the appellant clearly from his head to his foot ("because he was also talking to me"), there was nothing blocking her view of his face during the entire incident and there was a light on a house very close by focussing on the very crowded ("chuck-up") yard in which the men were standing (pages 48-50).

[39] When Miss Moore was cross-examined, Miss Campbell suggested to her that, "because the yard kind of 'chuck-up' you could not see what was happening", to which her response was "I could have seen because they were close to me at the fence" (page 108). The state of the lighting was specifically challenged when it was put to Miss Moore that, when the deceased fell on his back, she could not see his face properly, "because the lighting was poor". Miss Moore's response to this suggestion was that "[t]he light was bright" (page 128). Shortly after that exchange, Miss Campbell suggested that "if, as you say the lighting was good, then you are not speaking the truth", to which Miss Moore answered, "I am speaking the truth" (page 130). Miss Campbell's final suggestion was that "you did not see your nephew Rayon Williams on that night", to which Miss Moore responded simply, "I saw him" (pages 134-135).

[40] So the evidence in the case called for adequate directions to the jury on how to approach the issue of identification. Clearly appreciating this, the judge directed the jury on the matter at some length in the following passage (pages 515-521):

> "I am going to begin now, madam forelady, members of the jury, to look at the evidence and give you certain other specific legal directions vis—vis as regards the evidence. Madam Forelady and members of the jury, this is a case in which Miss Sharon Moore has asserted before you in evidence, that she saw on a particular occasion, Rayon Williams do certain things. Rayon Williams has said no she is either mistaken or she is lying.
>
> I am going to direct you in that regard at this time. I must warn you and do in fact warn you, members of the jury, that insofar as Sharon Moore's identification of the accused, as having done and said certain things at 'winer man's' yard on the occasion when she was there and allegedly witnessed the killing of a man who was then seated on a pan, at the time when she arrived at the yard, insofar as that is concerned, firstly, you should take into account, as a matter of law, that even as honest witness can be a mistaken witness. In other words, madam forelady, members of the jury, I can tell you I am the worst at this. I look at people all the while and I will just not be able to recognize them. I may even have spoken with them two or three times before, I will just not remember them. In all likelihood if I were ever to see you members of the jury in St. Catherine sometime in the future, in all likelihood I probably may not remember you. You may not remember me either because different things happen to persons when they are communicating with someone or have seen someone. The persons may be someone you take special note of because of some special reason but just because you have looked at a person once or twice or even several times does not mean that you will be able to recognize them on each and every occasion when you see them and I need to warn you that mistakes even in recognition of close friends and relatives are often made.
>
> Sometimes you see a person down the road and say, 'John Boy, John Boy', because you think it is John Boy who you know from the time when you grew up. When you come up

close you realize it is not John Boy at all, it is Tim Jones, not John Boy. These things happen because people look alike. People dress alike and sometimes is only when you come up to a person face to face and get to look in their eyes for a considerable period of time that maybe you might be able to say yes this is the person I saw on that occasion but mistakes are made. Mistakes are made and I have to warn you of that. That does not mean a person cannot identify someone correctly. But you have to determine, as a matter of the evidence which you either accept or reject, you have to determine in this case the extent to which, if at all, you accept the evidence of identification of the accused at the particular scene, 'winer man's' yard, on the relevant occasion. You have to determine that.

Bear in mind that the witness Miss Moore has given evidence that she used to see the accused everyday because they lived beside each other. The accused has a shop which is beside her shop. Where is the shop? Redemption Ground. You will recall that Miss Moore testified that Rayon Williams is her favourite nephew and his mother is her favourite sister, sees him all the time. Could she be mistaken? It is a matter for you, I can't determine that. You have to decide.

Bear in mind also that even where a person claims to be able to recognize another, a lot could depend in terms of whether or not the identification by recognition is correct on the circumstance surrounding the time when the person is allegedly identified. In other words, where the situation is a particularly frightening situation and perhaps you only have a few seconds to glance at an individual, whom you claim you know and perhaps the conditions surrounding that identification are not particularly good. So, the lighting is not particular good, things were obstructing you view. All of these things have to be considered by you in deciding whether or not the identification as made by Miss Moore of the accused in 'winer man's' yard, on the 5th at around midnight, is an accurate one. You have to decide that. And there can be no doubt that what Miss Moore has put forward in her evidence as having occurred at 'winer man's' yard during those early morning hours after 12:00 a.m., early morning, that what occurred in all likelihood, would have been significantly and in fact she did indicate as much that those events were significantly disturbing and troubling to

her, so much so that she says that after the accused used the sword and cut the neck of Hugh Cover with that sword, that she ran away from that location. Allbeit she says that she still had further interaction with the accused and others that night. But she says she ran away because she was just disturbed by it all.

Consider that. How long did she have within which to view these events? She said that from the time she came until the time that she ran away, which was just about that, after that sword was used, according to her evidence, was about ten minutes. Ask yourselves, is that long enough to make an identification of someone whom you know as your nephew, whom she sees everyday, sometimes twice a day, next door neighbor? Matter for you. You have to decide. She was asked whether when she was there was anything blocking her view of the event. She says no. So, and I must tell you that there was a barb wire fence. Would a barb wire fence block your view? Matter for you. You have to decide. How far away was she, according to her evidence, from the accused, when she saw him that night, and saw what he was doing, if anything? She said she was only an arm's length away from him and she showed you, she demonstrated. How afar away was 'Bomber'? The person whom she called 'Bomber' whom she said was hitting – well, began in her presence to hit this man in the back of his head with a pick-axe stick. She said that "Bomber' was a distance she demonstrated for the court and this court estimated as being approximately eight feet away from where "Bobo', the accused, Rayon Williams, was at that time. So, she says Rayon Williams was just an arm's length way. "Bomber' was just eight feet away from Rayon Williams, close enough for her to make a proper identification. Matter for you.

You have heard defence counsel suggest to Miss Moore that she is either lying or she is either lying or she is mistaken. Matter for you.

What was the lighting like? She says there was a light which was shining down on the men. Good enough light? Matter for you. She did say the yard was 'chuck-up chuck-up'. So defence has suggested that she couldn't see, 'chuck-up chuck-up', she couldn't see. It is a matter for you, members of the jury, you have to decide, not for me to decide, for you. It is for you to decide."

[41] The judge returned to the issue briefly when he told the jury that "the primary issue for you to determine is whether the accused was there, giving certain instructions" (page 531); reminded them of Miss Moore's evidence that the yard was "chuck-up" (page 532); and directed them that, "[i]f you are unsure about Miss Moore's identification of the accused at that scene, you must acquit" (page 534).

[42] Mr Equiano submitted that these directions were inadequate. Specifically, he complained that the judge did not (i) warn the jury that they should approach the evidence of identification with caution; (ii) indicate to the jury the reasons for the caution; (iii) refer to the possibility of a mistaken witness being a convincing one; and (iv) remind the jury that mistakes are sometimes made in the recognition of close relatives and friends.

[43] For these submissions, Mr Equiano naturally relied on the oft-cited guidelines on identification evidence laid down in **R v Turnbull** [1977] QB 224, 228-229:

> "First, whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Provided this is done in clear terms the judge need not use any particular form of words.
>
> Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to

> be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? If in any case, whether it is being dealt with summarily or on indictment, the prosecution have reason to believe that there is such a material discrepancy they should supply the accused or his legal advisers with particulars of the description the police were first given. In all cases if the accused asks to be given particulars of such descriptions, the prosecution should supply them. Finally, he should remind the jury of any specific weaknesses which had appeared in the identification evidence.
>
> Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.
>
> All these matters go to the quality of the identification evidence. If the quality is good and remains good at the close of the accused's case, the danger of a mistaken identification is lessened, but the poorer the quality, the greater the danger.
>
> In our judgment when the quality is good, as for example when the identification is made after a long period of observation, or in satisfactory conditions by a relative, a neighbour, a close friend, a workmate and the like, the jury can safely be left to assess the value of the identifying evidence even though there is no other evidence to support it: provided always, however, that an adequate warning has been given about the special need for caution ..."

[44] Miss Pyke accepted that the judge did not give what she described as "classic Turnbull directions". However, she submitted that, taken as a whole, the judge's directions had made it clear to the jury, albeit in his own language and style, that they

should approach the identification evidence with care and adequately conveyed the essential elements of the **Turnbull** guidelines, *viz*, the need for caution, the reason for caution and the opportunity for observation. She further submitted that, given the circumstances of the identification and the fact that the appellant was previously known to the witness, the judge's omission to mention the fact that miscarriages of justice have occurred in the past was not fatal.

[45] It is generally recognised that the essential elements of the **Turnbull** guidance are that the jury should be told (i) that there is a special need for caution in cases based on identification evidence; (ii) that the reason for the special need for caution is that experience has shown that visual identification (even by way of recognition) is a category of evidence that is particularly vulnerable to error; (iii) that no matter how honest and convincing the identifying witness (or a number of such witnesses) may seem to the jury, there is always a possibility that he (or they) may be mistaken; (iv) to examine closely the circumstances in which the identification by the witness or witnesses came to be made (bearing in mind the factors mentioned in **Turnbull** (lighting, period of observation, distance and the like); and (v) of any specific weaknesses which may have appeared in the identification evidence (see generally, in addition to **Turnbull** itself, **Scott v The Queen** [1989] 1 AC 1242; **Reid (Junior) v The Queen** [1990] 1 AC 363, **Beckford and Others v Regina** (1993) 97 Cr App R 409, and a host of later decisions of the Board and of this court too numerous to mention).

[46] Two further points may be noted. Firstly, **Turnbull** made it clear that, once the substance of the warning is adequately conveyed to the jury, the trial judge is not required to use any particular form of words (see also **Maitland Reckford v R** [2010] JMCA Crim 40, especially paragraphs [25]-[26]). And, secondly, the decision of the Board in **Michael Freemantle v The Queen** [1994] UKPC 24 confirmed that, although a failure by the trial judge to give the requisite warning to the jury in an identification case will nearly always be fatal to a conviction, there may be cases in which the exceptionally good quality of the identification evidence can justify the application of the proviso to section 14(1) of the Judicature (Appellate Jurisdiction) Act ('the proviso'). (See also **Fitzroy Salmon v R** (unreported), Supreme Court Criminal Appeal No 147/2007, judgment delivered 25 July 2008, to which Miss Pyke referred us, in which this court applied the proviso in a case in which no **Turnbull** warning was given by the trial judge.)

[47] We naturally recognise that the **Turnbull** guidance does not have statutory effect. Trial judges are therefore at liberty to craft their directions on identification in their own language, adapting them as necessary to the circumstances of the case. But the constant theme through all the authorities over the years since **Turnbull** has been the need for the trial judge's directions to reflect the substance, even if not the form, of the guidance given in that case.

[48] In this case, the judge's directions to the jury on the issue of identification were, in our view, plainly deficient in a number of respects. First, and obviously foremost, he

nowhere told the jury of the special need for caution before convicting the appellant based on Miss Moore's identification evidence. Nor did he say anything about the reasons why caution was required. So, while it is true that he did devote some time to the important consideration that an honest witness may nevertheless be mistaken, he failed to locate his directions within the wider context of the inherent dangers of evidence of visual identification. Again, while he did tell the jury something of the unreliability of recognition as the basis of identification, he did not make it clear that this the principal reason for the special need for caution in relation to recognition cases as well. And, finally, it is true that, towards the end of the passage from the summing-up which we have set out at paragraph [40] above, the judge did make an attempt to remind the jury of some of the salient features of the circumstances in which Miss Moore identified the appellant. However, it seemed to us that that attempt, like the summing-up as a whole, was somewhat diffused and insufficiently focussed on the special need for caution in the assessment of Miss Moore's evidence.

[49] But this is, of course, not the end of the matter. It is still necessary for this court to examine the identification evidence for itself and consider whether this is a case in which it can be said to have been exceptionally good. In our view, it clearly was. Indeed, there was in fact very little challenge to Miss Moore's evidence of the circumstances of the identification. While it is true that there was a question (albeit somewhat diffidently put) as to whether the state of the light was as good as Miss Moore said it was, there was none in relation to the duration of the incident in the yard, the absence of any obstruction or the distance at which the horrible events were being

observed. Perhaps above all, it was common ground that Miss Moore and the appellant were well known to each other and would usually see each other on a daily basis. In these circumstances, it seemed to us there was an ample basis on which she could make a reliable identification of the appellant. We therefore considered this to be a suitable case in which to apply the proviso, on the basis that, although the identification point might have been decided in the appellant's favour, no substantial miscarriage of justice actually occurred.

The judge's presentation of the defence case

Biased summation

Failure to point out weaknesses in the prosecution's case

[50] As Mr Equiano did, we will take these three points briefly and together. Mr Equiano submitted that, generally speaking, the summing-up as a whole was not fair to the appellant. He submitted that the judge's directions in relation to the appellant's case were perfunctory and, specifically, he complained that the judge did not, as he should have done, tell the jury that if they believed the witnesses for the defence, or if their evidence created doubt, they should acquit.

[51] Miss Pyke submitted that, given the nature of the defence and the evidence in the case, the judge was not required to tell the jury any more than he did. She pointed out that this was a short case in which the evidence was simple and submitted that the judge's directions were fair and balanced in making the jury aware of the cases for the prosecution and the defence.

[52] The judge reminded the jury of the case for the appellant in the following terms (pages 560-563):

> "Now in his defence, the accused had three options available to him. He could have made a dock statement, which he did, he also could have given evidence from the witness stand and he also could have said absolutely nothing at all. He choose to give a statement from the dock. He has explained to you and he has told you that Miss Moore is lying. And he has given a reason why she is lying, is because of this gun which she believes, wrongfully, that he stole from her. He didn't do any such thing; because she is of this mistaken view. And as a result of that has threatened to have him being in prison for 50 years. You have to decide on what weight is to be given to that dock statement.
>
> A dock statement is to be given such weight as you think it deserves. It doesn't carry ordinarily as much weight as sworn testimony from the witness stand but you will give it such weight that you think it deserves. In any event though, the defendant called two witnesses who testified and who supported his assertion that the witness, Miss Moore, is lying. There may be some inconsistency given by these witnesses. You may have heard the evidence. You have to decide at the end of the day though, I wish to tell you even if you do not accept as truthful what these witnesses put forward to you for your consideration and even If you do not believe that what the accused has told you in his dock statement in his defence is true, that does not mean that the accused is to be found guilty as charged. People lie for many reasons and sometimes people lie for innocent reasons. It does not mean that they are guilty.
>
> So, all in all you have to always go back to the Prosecution's case and see whether that case, that Prosecution's evidence has made you satisfied so that you can feel sure of the accused person's guilt."

[53] In our view, these directions were perfectly adequate to convey to the jury the essence of the appellant's defence and the standard they should apply in assessing his

unsworn statement. In telling the jury that they should give it such weight as they thought it deserved, the judge adhered to the well-known guidance of the Board in **Director of Public Prosecutions v Leary Walker** [1974] UKPC 7. He also made it clear to the jury that it was a matter for them to decide whether to believe the evidence of the two witnesses called on behalf of the appellant. And, contrary to Mr Equiano's submission, the judge told the jury in plain terms that, even if they rejected the appellant's unsworn statement and the evidence of his witnesses, they were not to find him guilty for that reason, but were required "to always go back to the Prosecution's case and see whether that case … has made you satisfied so that you feel sure of the accused person's guilt".

Issue (iii) – Was the appellant entitled to a good character direction?

[54] It is common ground that the judge did not give a good character direction in this case. Mr Equiano directed our attention to the answer given by the appellant's witness Mr Robinson to the judge's enquiry as to what caused him to come to court to testify. The answer was, it will be recalled, "I have never seen Rayon in that situation before", referring to the fact that he was charged for murder on the basis of evidence given by his aunt, Miss Moore.

[55] On this basis, Mr Equiano submitted that the judge should have given the appellant the benefit of a good character direction as to his propensity to commit the offence of murder. For this submission, Mr Equiano based himself on the decisions of this court in **Michael Reid v R** [2011] JMCA Crim 28 and **Horace Kirby v R** [2012] JMCA Crim 10, among other cases.

[56] While not conceding that the appellant was entitled to a good character direction on the basis of Mr Robinson's single answer to the judge's question, Miss Pyke submitted that, in any event, given the strength of the case against the appellant, this was a case in which a good character direction would have had no impact on the decision of the jury. In this regard, Miss Pyke referred us to **Muirhead v The Queen** [2008] UKPC 40, a decision of the Board on appeal from this court.

[57] We were strongly inclined to doubt whether, on the basis of Mr Robinson's exiguous statement that he had never seen the appellant "in that situation before", the appellant was in fact entitled to a good character direction at all. However, since this aspect of the matter was not fully argued before us, we make no definitive pronouncement on it.

[58] But, be that as it may, it is now well established that, even in a case in which the defendant is entitled to a good character direction, where the outcome of the trial would not have been affected by the lack of such a direction, then the absence of the direction will not make a conviction unsafe (see per Lords Carswell and Mance in their concurring judgment in **Muirhead v The Queen**, paragraph 35, citing **Bhola v The State** [2006] UKPC 9, (2006) 68 WIR 449). In this case, we were clearly of the view that, in light of the evidence given by Miss Moore against the appellant, such a direction would not have availed him in the eyes of the jury.

Conclusion

[59] These are the reasons for the decision we gave on 10 May 2017.