

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

SAINT CHRISTOPHER AND NEVIS

SKBHCRAP2004/0012

BETWEEN:

NARDIS MAYNARD

Appellant

and

THE QUEEN

Respondent

Before:

The Hon. Dame Janice M. Pereira DBE
The Hon. Mde. Gertel Thom
The Hon. Mr. Gerard St. C. Farara

Chief Justice
Justice of Appeal
Justice of Appeal [Ag.]

Appearances:

Ms. Siobhan Grey, QC with her, Ms. Talibah Byron for the Appellant
Mr. Valston Graham, Director of Public Prosecutions and Ms. Terrilyn Hunte for the Respondent

2022: March 25;
June 10.

Criminal appeal — Appeal filed against conviction and sentence — Abandonment of appeal against conviction — Reopening of appeal against conviction — Whether abandonment of appeal against conviction was a nullity — Whether abandonment was deliberate and informed decision of appellant — Application to tender fresh evidence of alibi on appeal — Test for reception of fresh evidence on criminal appeal — Whether failure to call alibi witnesses at trial rendered conviction unsafe — Identification evidence — Turnbull guidelines — Whether judge failed to identify weaknesses in the identification and other evidence in summing up the case to jury — Good character direction — Whether judge erred in not giving good character direction to jury on behalf of the appellant — Application of the proviso

In 2003, the appellant, Nardis Maynard ("Maynard"), and Ingle Rawlins ("Rawlins") were charged for the murder of Ernest Henry ("Henry"). The crux of the prosecution's case at trial was that, during an argument among the men, Maynard attacked Henry killing him. The prosecution mainly relied on the evidence of several eye-witnesses to the incident. Rawlins was acquitted when the learned judge upheld a no case submission and the trial proceeded against Maynard. He gave evidence on his own behalf that he was at home with his sister and brother, Yvette and Terence Maynard, at the time of the incident. His evidence raised primarily the defence of alibi but no alibi witnesses were called at trial. Maynard was convicted by the jury and sentenced to life imprisonment.

Maynard appealed against his conviction and sentence. In 2006, at the hearing of the appeal, his counsel informed the Court that the appeal against conviction was being abandoned and proceeded with the appeal against sentence only. The Court dismissed the appeal against sentence. Fourteen years later, Maynard, having obtained new counsel, filed an application to render the abandonment of the appeal against conviction a nullity and to reopen his appeal against conviction. He stated that he had only become aware that his appeal against conviction was abandoned by his former counsel in 2014. He also sought permission to tender fresh evidence on the appeal in the form of an affidavit of Yvette Maynard in support of the alibi defence raised at trial.

Upon hearing submissions from Maynard's counsel and in light of the respondent's concession on the point, the Court declared the abandonment a nullity and promised to provide its reasons for so doing at a later date. The Court accordingly proceeded to hear Maynard's appeal against conviction, admitting the fresh evidence of Yvette Maynard *de benne esse* and reserving its decision on the merits of the fresh evidence application. The issues which arose for the Court's determination on the substantive appeal are: (1) whether the failure to call alibi witnesses, Yvette and Terence Maynard, at the trial rendered Maynard's conviction unsafe; (2) whether the judge failed to identify for the jury, the weaknesses in the identification evidence during his summing up of the case; and (3) whether the judge erred in not giving a good character direction to the jury on Maynard's behalf.

Held: dismissing the application to tender fresh evidence and dismissing the appeal against conviction, that:

1. The proper procedure for abandoning an appeal is by the appellant giving written notice of abandonment in Form 15 in Appendix C of the **Eastern Caribbean Supreme Court, Court of Appeal Rules 1968** to the Registrar. Upon such notice being given, the appeal shall be deemed to have been dismissed. An abandonment will only be deemed a nullity if it was not the result of the appellant's deliberate and informed decision. In this case, no written notice of abandonment was given by Maynard. His appeal against conviction was abandoned orally by his former counsel. There being no evidence that Maynard had either directed his former counsel to abandon his appeal against conviction or had been informed that such a course of action would be adopted, the position as to whether the abandonment was Maynard's informed decision was placed in serious doubt. The Court accordingly

declared the abandonment a nullity and proceeded to hear Maynard's appeal against conviction.

Rule 59 of the **Eastern Caribbean Supreme Court, Court of Appeal Rules 1968** considered; **R v Medway** [1976] 1 QB 779 applied; **R v Smith** [2013] EWCA Crim 2388 applied; **R v Furniss (Michael)** [2019] EWCA Crim 2224 considered.

2. The Court of Appeal may receive fresh evidence on an appeal if the evidence is credible and there is a reasonable explanation for the failure to adduce it at trial. In this case, the test for admission of fresh evidence has not been met as the evidence contained in the affidavit of Yvette Maynard is not credible. There has also been no explanation for the failure to call her evidence at trial. It therefore cannot be said that her evidence is fresh in the sense that it could not have been obtained for the trial with reasonable diligence. In any event, even if Yvette Maynard's evidence were both credible and fresh, it would not have had any effect on the safety of Maynard's conviction given the quality of the evidence against him at trial. Accordingly, there is no basis on which the affidavit of Yvette Maynard should be admitted as fresh evidence on this appeal.

Section 49 of the **Eastern Caribbean Supreme Court (Saint Christopher and Nevis) Act**, Cap. 3.11, Revised Laws of Saint Christopher and Nevis 2009; **Lescene Edwards v The Queen** [2022] UKPC 11 applied; **Lundy v The Queen** [2013] UKPC 28 applied.

3. In relying on the conduct of defence counsel as a ground of appeal, it must be shown that the decision in question is one which no reasonably competent counsel would have made in light of the information available to him or her. In this case, there was no evidence of what informed Maynard's former counsel's decision not to call the alibi witnesses. There was also no assertion made as to the lack of competence of Maynard's former counsel. It would therefore be inappropriate for this Court to infer that there was no good reason for the failure to call Yvette or Terence Maynard to give evidence at the trial. In any event, the evidence of Yvette Maynard raises issues of credibility and does not establish a cogent alibi. In the circumstances, it cannot be properly concluded that the failure to call the two alibi witnesses at the trial rendered Maynard's conviction unsafe.

R v Doherty & McGregor [1997] 2 Cr App R 218 considered.

4. In giving a **Turnbull** direction, the judge is required to point out any specific weaknesses in the identification evidence to the jury. However, it is not essential that he or she lists all those weaknesses or every argument made against the credibility of a particular witness. In this case, while the judge failed to highlight certain weaknesses in the evidence to the jury, this failure did not undermine the safety of Maynard's conviction as the quality of the identification evidence and other evidence weighing against him remained compelling.

R v Turnbull [1976] 3 All ER 459 considered; **Mills et al v R** [1995] 1 WLR 511 considered; **Omar Grieves and others v The Queen** [2011] UKPC 39 applied.

5. The failure of a trial judge to give a good character direction where a defendant was entitled to one does not automatically render the conviction unsafe. The critical question is whether the good character direction would have made a difference to the result of the trial had it been given. In this case, while Maynard was entitled to a good character direction, it cannot be said that such a direction would have changed the view of the jury that Maynard was guilty in light of the evidence weighing against him at trial. Accordingly, the judge's failure to give a good character direction on behalf of Maynard did not undermine the safety of the conviction.

Jay Marie Chin v The Queen ANUHCRA2012/0005 (delivered 5th April 2017, unreported) followed; **Bhola v The State** [2006] UKPC 9 applied.

6. In the circumstances, even if the judge's non-direction on the specific weaknesses in the evidence were to be considered as a misdirection to the jury, and even when considered cumulatively along with the judge's failure to give a good character direction, no miscarriage of justice has actually occurred. It is clear considering the quality of the evidence weighing against Maynard that the jury would have inevitably come to the same conclusion that he was guilty of murder. It would therefore have been proper for this Court to dismiss the appeal in any event by applying the proviso contained in section 44(1) of the **Eastern Caribbean Supreme Court (Saint Christopher and Nevis) Act**.

Section 44(1) of the **Eastern Caribbean Supreme Court (Saint Christopher and Nevis) Act**, Cap. 3.11, Revised Laws of Saint Christopher and Nevis 2009 considered; **Jevone Demming v The Queen** BVIHCRA2015/0001 (delivered 14th January 2020, unreported) followed; **Cassell and another v The Queen** [2016] UKPC 19 considered; **Michael Freemantle v The Queen** [1994] UKPC 29 considered.

JUDGMENT

Introduction

- [1] **PEREIRA CJ:** The circumstances of this matter are quite extraordinary. In July 2004, the appellant, Nardis Maynard ("Maynard") was convicted for the murder of Ernest Henry ("Henry") and sentenced to life imprisonment. He subsequently appealed to the Court of Appeal seeking to set aside his conviction and sentence. At the hearing of the appeal on 21st March 2006, counsel informed the Court that the appeal against conviction was being abandoned and proceeded with the appeal

against sentence only. On 22nd May 2006, the Court of Appeal dismissed the appeal against sentence. Approximately fourteen years later, on 30th June 2020, Maynard filed an application to render the abandonment of the appeal against conviction a nullity, to reopen his appeal against conviction and for permission to tender fresh evidence on the hearing of that appeal. It is necessary to set out in some detail the factual background of this matter to give context to the issues presently before this Court for determination.

Background

- [2] On 3rd September 2003, Maynard and Ingle Rawlins (“Rawlins”) were arrested and charged for the murder of Henry. They were tried before the learned judge and a jury. Both men were represented by counsel. After the close of the prosecution’s case, Rawlins was acquitted when the learned judge upheld a submission of no case to answer. The trial proceeded against Maynard as the sole defendant. He gave evidence on his own behalf. His evidence raised primarily the defence of alibi. On 22nd July 2004, he was convicted for Henry’s murder and sentenced to life imprisonment.

The First Appeal

- [3] On 4th August 2004, Maynard appealed against his conviction and sentence. When the appeal came on for hearing before the Court of Appeal, Maynard’s then counsel who had also represented him in the court below informed the Court of Appeal, orally and in the presence of Maynard, that Maynard’s appeal against conviction was being abandoned and that he was pursuing his appeal against sentence only. The Court proceeded to hear the appeal against sentence. By a written judgment delivered on 22nd May 2006, the Court of Appeal dismissed Maynard’s appeal against sentence.¹
- [4] Almost eight years later, on 26th March 2014, Maynard wrote to a law firm based in London, United Kingdom seeking legal assistance. He informed them that he had

¹ Saint Christopher and Nevis Criminal Appeal No. 12 of 2004 (delivered 22nd May 2006, unreported).

recently become aware of the abandonment of his appeal against conviction by his former counsel. He sought assistance as to whether he could seek to reopen his appeal against conviction. The law firm ultimately took over the conduct of the matter.

- [5] On 30th June 2020, Maynard's new counsel filed an application seeking an order that the abandonment of his appeal against conviction be rendered a nullity, mainly on the ground that the abandonment was not made with his knowledge or on his instructions. Permission was accordingly sought for his appeal against conviction to be reopened. Maynard also sought leave to tender fresh evidence on the appeal in the form of an affidavit sworn to by his sister, Yvette Maynard, on 30th June 2020 in support of his defence of alibi raised at the trial.

- [6] As a preliminary issue, engaging as it does the Court's jurisdiction to reopen the appeal against conviction, the Court considered whether the abandonment of Maynard's appeal against conviction was a nullity (the "Abandonment Issue").

The Abandonment Issue

Submissions on behalf of Maynard

- [7] Learned Queen's Counsel for Maynard, Ms. Siobhan Grey, strenuously argued that the abandonment of the appeal against conviction was a nullity and the appeal against conviction should be reopened. Her submissions on this issue were two-fold. She first submitted that the abandonment failed to comply with the requirements of rule 59 of the **Eastern Caribbean Supreme Court, Court of Appeal Rules 1968** (the "**Court of Appeal Rules**"). Learned Queen's Counsel stated that rule 59 requires that an abandonment of an appeal should be set out in writing by giving notice of abandonment in Form 15 in Appendix C to the Registrar and upon such notice being given the appeal shall be deemed to have been dismissed by the Court. She referred the Court to email correspondence dated 3rd July 2015 in which one of Maynard's former counsel indicated that, to the best of

his knowledge, no written notice of abandonment of the appeal against conviction was filed in the Court of Appeal.

- [8] Ms. Grey then reminded the Court that the test in assessing whether an appeal has been properly abandoned is whether the appellant's mind went with the abandonment. She relied on the decisions of **R v Smith**² and **R v Furniss (Michael)**³ in support of her submission. Ms. Grey argued, based on Maynard's affidavit filed in support of his application, that the abandonment was not made on Maynard's instructions nor was he notified that such a course of action would have been taken. She stated that it could not therefore be said that Maynard's mind went with the abandonment. For these reasons, she urged that the abandonment should be deemed a nullity and the appeal against conviction be reopened.

Submissions on behalf of the Crown

- [9] The Director of Public Prosecutions, Mr. Valston Graham, initially opposed the application to render the abandonment of the appeal against conviction a nullity. However, before the matter came on for further hearing after the Court had given time for the filing of evidence by one of Maynard's former counsel touching on this issue,⁴ Mr. Graham quite properly conceded this aspect of the application. He invited the Court during the hearing to provide guidance on the proper procedure which ought to be invoked by an appellant desirous of abandoning an appeal against conviction. We consider it useful for guiding future practice and now do so as part of this judgment.

Discussion

- [10] In Saint Christopher and Nevis, the proper procedure for abandonment of an appeal is contained in rule 59 of the **Court of Appeal Rules**. Rule 59(1) sets out that an appellant is free to abandon his appeal by giving notice of abandonment in Form 15 in Appendix C to the Registrar of the Court. Upon such notice being given, the

² [2013] EWCA Crim 2388.

³ [2019] EWCA Crim 2224.

⁴ By the time of the hearing of this application one of Maynard's former counsel had died.

appeal shall be deemed to have been dismissed by the Court. It is well-settled by a long line of authorities that the giving of such notice of abandonment is generally irrevocable unless it is deemed a nullity by the appellate court. The general principle which emerges from these authorities is that the abandonment of the appeal will only be deemed a nullity if it is shown that the appellant's abandonment of his or her appeal was not the result of a deliberate and informed decision. Indeed, in **R v Medway**,⁵ Lawson J speaking on behalf of the English Court of Appeal put it this way:

"In our judgment the kernel of what has been described as the 'nullity test' is that the court is satisfied that the abandonment was not the result of a deliberate and informed decision; in other words, that the mind of the applicant did not go with his act of abandonment. In the nature of things, it is impossible to foresee when and how such a state of affairs may come about; therefore it would be quite wrong to make a list, under such headings as mistake, fraud, wrong advice, misapprehension and such like, which purports to be exhaustive of the types of case where this jurisdiction can be exercised. Such headings can only be regarded as guidelines, the presence of which may justify its exercise."

[11] Jackson LJ in **R v Smith**, reviewing the earlier authorities on the point, distilled the relevant principles governing the Court's power to deem the abandonment of an appeal a nullity as follows:

"(i) a notice of abandonment of appeal is irrevocable, unless the Court of Appeal treats that notice as a nullity;

(ii) a notice of abandonment is a nullity if the applicant's mind does not go with the notice which he signs;

(iii) if the applicant abandons his appeal after and because of receiving incorrect legal advice, then his mind may not go with the notice which he signs. Whether this is the case will depend on the circumstances; and

(iv) incorrect legal advice for this purpose means advice which is positively wrong. It does not mean the expression of opinion on a difficult point, with which some may agree and others may disagree."

⁵ [1976] 1 QB 779.

These principles were recently reaffirmed by the English Court of Appeal in **R v Furniss (Michael)**.

[12] The short point on this issue is that the **Court of Appeal Rules** prescribe the procedure for an appellant to abandon his appeal. Under the Rules, a notice of abandonment of appeal must be given in writing to the Registrar in the form prescribed under the Rules. While a notice of abandonment given orally may be effective,⁶ the proper procedure for abandoning an appeal is in my view the procedure outlined under rule 59. If a written notice of abandonment was not provided and the appeal was abandoned orally as in this case and the appellant later seeks to deem the abandonment a nullity and have the appeal reopened, the Court is enjoined to consider whether the principles espoused in **Medway, Smith** and subsequent authorities are engaged. Such a determination is of course dependent on an assessment of the circumstances of each case.

[13] It appears to be common ground between the parties that no written notice of abandonment in the prescribed form was provided. As no written notice of abandonment was given, for the oral abandonment to have been effective, there must be evidence that Maynard wished for his counsel to abandon his appeal against conviction and that he understood the significance of this course of action. Adopting the language used in **Smith**, the abandonment should only be deemed a nullity by this Court if it is shown that Maynard's mind did not go with the abandonment.

[14] In his affidavit in support of the application to render the abandonment of the appeal a nullity, Maynard asserted that he had no intention to abandon his appeal against conviction nor did he sign any documents abandoning his appeal against conviction. He indicated that he only signed the notice of appeal against conviction and sentence. He further maintained that he always wished to pursue his appeal against conviction and never instructed his trial lawyers otherwise. Maynard also claimed

⁶ See: *R v de Courcy* [1964] 1 WLR 1245.

that his former counsel never discussed with him the issue of abandoning the appeal against conviction neither did they communicate with him after the appeal was filed. Maynard's assertions are supported by correspondence from one of his former counsel dated 3rd July 2013 who expressed that as far as he could recall, there was no notice to abandon the appeal against conviction filed and that Maynard did not sign any document indicating that he agreed to abandon his appeal against conviction.

- [15] In our view, there was no real evidence which demonstrated that Maynard had either directed his former counsel to abandon his appeal against conviction or had been informed that such a course of action would be adopted. There was very little evidence from Maynard's former counsel on this issue. His former lead counsel merely stated in an affidavit sworn to by him on 17th March 2022 (which was requested by this Court when the matter came on for hearing on a previous occasion) that he took instructions from his junior counsel who is now deceased and surprisingly, that he did not speak with Maynard at any time. Given the paucity of evidence from Maynard's former counsel, the position as to whether the abandonment was the informed decision of Maynard was placed in serious doubt. The inescapable conclusion was that Maynard's mind could not be said to have gone with the abandonment. It was therefore quite proper for the Crown to have conceded this aspect of Maynard's application. Notwithstanding that an appeal should only be reopened in exceptional circumstances, the Court considered that it was in the interests of justice in this case to do so. The Court accordingly declared the abandonment a nullity and proceeded to hear Maynard's appeal against conviction.

The Appeal Against Conviction

- [16] Learned Queen's Counsel, Ms. Grey, invited the Court to find that Maynard's conviction was unsafe and should be set aside, advancing the following three grounds of appeal: (1) the failure to call alibi witnesses Yvette and Terence

Maynard,⁷ a sister and brother respectively of Maynard at trial to support his testimony that he was at home with them at the time of the murder, which failure renders the conviction unsafe; (2) the learned judge failed to identify for the jury the weaknesses and inconsistencies in the identification evidence during his summing up of the case; and (3) the learned judge erred in not giving a good character direction to the jury on behalf of Maynard. The Court considered it appropriate to hear submissions on the first ground of appeal admitting the fresh evidence *de benne esse*. I will therefore treat with the first ground of appeal, taking the case advanced on behalf of Maynard at its highest, and address the merits of the fresh evidence application later in this judgment.

- [17] Before delving into the substance of these complaints, it is necessary to set out the evidence adduced at Maynard's trial relevant to the issue of identification and other relevant circumstances which necessarily also bears on the defence of alibi to provide context.

The Evidence Adduced at Trial

- [18] At the trial, the prosecution relied on evidence from several witnesses. The main thrust of the prosecution's case however was based on the identification evidence of several eye-witnesses which I set out in brief below.
- [19] The prosecution led evidence from Ms. Marilyn Lowrie ("Ms. Lowrie"). Her evidence at trial was largely consistent with her witness statement. She stated that, between 12 a.m. and 1 a.m. on Saturday, 22nd March 2003, she was at her home on Market Street. She was in her bedroom, which is situated close to the street, when she heard two men outside arguing. She then opened her window and looked outside. She saw a Rasta man (Henry) and Maynard, whom she described as a fair-skinned young man, arguing on the opposite side of the street. Ms. Lowrie indicated that she saw the Rasta man giving Maynard money after which they continued to argue.

⁷ By the time of this second appeal hearing the Court was informed that Terence Maynard is now deceased, he having died in an accident in 2012.

She then went into the bathroom. Ms. Lowrie then heard someone in the house scream 'fight fight' and left the bathroom. Her daughter, Ms. Kimesha Powell ("Ms. Powell"), who was sitting at the dining table then got up and went into her (Ms. Lowrie's) bedroom to look through the window. Ms. Lowrie ventured onto the verandah where she saw Maynard walking down the road with his left hand under his shirt. As he was walking down the road, she observed that he looked back, watched and then continued walking. She saw the Rasta man sitting in the road with blood coming from the middle section of his body. She heard him say "boy what you do me" and saw him fall backwards into the road. Shortly afterwards, she saw a police officer whom she identified at trial as PC Mark Handley ("PC Handley") arrive at the scene. She also stated that she did not see Rawlins at any time.

[20] In her evidence, Ms. Lowrie explained that she was able to see both the Rasta man and Maynard clearly as the area was well lit by a lamp post which was right by her house. She stated that she knew Maynard for 5 years prior to March 2003. She knew him by his alias 'Daddy Screw'. She said that Maynard was wearing 'a white T-shirt and a blue three-quarter jeans pants', the jeans pants appearing as if it was once a long pants which had now been cut. She described the Rasta man as wearing a khaki-coloured long pants but was unable to recall what colour shirt he was wearing. She indicated that she observed Maynard and the Rasta man for an estimated 10 to 15 minutes and that there was nothing blocking her vision.

[21] The Crown also led evidence from Ms. Powell. Ms. Powell's evidence largely mirrors Ms. Lowrie's evidence. Ms. Powell was 21 years old at the time of the incident and knew Maynard all her life. She also knew him as 'Daddy Screw'. In her evidence, Ms. Powell stated that between 12 a.m. and 1 a.m. on 22nd March 2003 she was in her house sitting at the dining table when she heard her sister alerting the house of a fight. Ms. Powell ventured into her mother's bedroom and looked through the window. She stated that she saw Maynard walking towards a Rasta man. She then observed Rawlins holding Maynard by his hand trying to restrain him. According to her, Maynard pulled away and Rawlins subsequently lost

his balance. Maynard continued advancing towards the Rasta man and pulled out a knife from the pocket of his pants with his left hand. Maynard swung the knife twice towards the Rasta man's chest. Rawlins then left the scene. Maynard then swung the knife again towards the Rasta man's lower body. Ms. Powell indicated that she knew that the swing had caught him as she saw blood coming from the area. She then saw Maynard put his left hand with the knife under his shirt and run away from the scene. She observed the Rasta man sitting in the road for a short time and heard him say 'mother, mother, Selassie I boy what stupidity you do me'. He then fell on his back in the street. At this point, Ms. Powell ran onto the verandah where Ms. Lowrie was. She later stated that a policeman came who made a call on his cellular phone and an ambulance arrived on the scene.

[22] In her evidence, Ms. Powell described the street as being well-lit by streetlights. She stated that Maynard was wearing 'a white T-shirt and blue three quarter jean pants with a baby blue head tie on his head'. She described the knife as having been wrapped in a white cloth or material. Ms. Powell also stated that she had observed Maynard for approximately 15 to 20 minutes and that she had a clear view of the incident.

[23] The prosecution also led evidence from a third eye-witness, PC Handley. PC Handley's evidence is that, just after midnight on 22nd March 2003, he was driving along Market Street heading home when he noticed three persons braised towards a wall on his right-hand side. He stated that the area was clearly visible as there were streetlights along the road. He recognised the first man as Rawlins. He stated that there was also a short person there in a white T-shirt. He described the third man as a Rasta man. He observed that Rawlins and the person in the white T-shirt had the Rasta man braised towards the wall and that the Rasta man was trying to 'wriggle out of them'. He stated that at this point he was close to the men, about 15 feet away from them.

- [24] PC Handley explained that he saw the Rasta man run backwards from the other two men. He then saw the man in the white T-shirt run towards the Rasta man. At that time, PC Handley got out of his vehicle and saw the man in the white T-shirt swing with his left hand towards the Rasta man in the area of the groin. At this point, he was a little over 30 feet away from them and there was nothing blocking his vision. He then heard the Rasta man say "O God you all going kill me". The man in the white T-shirt and Rawlins then ran into a nearby street. PC Handley ran towards them but did not see them. He later returned to the scene of the incident where he saw the Rasta man lying on the ground bleeding. He tried to communicate with him but there was no response. PC Handley reported the matter to the Basseterre Police Station and called for an ambulance.
- [25] The prosecution also relied on evidence from another eye-witness, Mr. Jason Hamilton ("Mr. Hamilton"). Mr. Hamilton's evidence is that on 22nd March 2003 at about 12:15 a.m., he went to visit Mr. James Hanley at his home on Market Street, Basseterre. He stated that after he parked his vehicle on Market Street and was exiting the vehicle he noticed two men by the road standing and talking. He said both men wore white T-shirts. He was unable to remember the colour of the pants they were wearing. He said he recognised one of the men as the brother of a man he knew by the name of 'Bishop'. He did not know his name but recognised his face as he had seen him frequently before. He estimated his height to be around 5'10" and described him as slender in build and light brown in complexion. He stated that he was 'facing west'. He described the other man who he did not know as wearing a white T-shirt and having dreadlocks. He described the area as being well-lit and estimated that he observed the men from about 10 to 15 feet away.
- [26] Mr. Hamilton further stated that the walk from his vehicle to Mr. Hanley's house would have taken less than a minute. He went inside Mr. Hanley's premises and had a conversation for no more than five minutes. When he left, the two men were still outside talking. He got into his vehicle and drove northwards on Market Street. After receiving information from Mr. Hanley, he returned to the scene and saw an

ambulance parked in front of Mr. Hanley's gate. When he looked inside the ambulance, he saw the man he described as wearing a white T-shirt and having dreadlocks. Mr. Hamilton identified the man he described as 'facing west' as Maynard. He stated that he now knows him as 'Screw' but did not know his name at the time. He indicated that he did not see Maynard when he returned to the scene of the incident and at no time did he see Rawlins at the scene.

[27] The Crown also led evidence from Dr. Hazel Williams-Roberts, who medically examined Henry when he was taken to the hospital. Dr. Williams-Roberts stated that she examined Henry at about 12:40 a.m. on 27th March 2003 and provided a medical report setting out her findings. She found that Henry had three 2.0 c.m. lacerations about his body namely, one at his left parasternal area at the level of the nipple, one at the left lower chest in the mid axillary line and one to the anterior aspect of the proximal right thigh. A puncture wound was also found at the posterior aspect of the left upper chest. The autopsy report, which Dr. Stephen Jones, Consultant Pathologist, presented at the trial mirrored the findings of Dr. Williams-Roberts. Dr. Jones concluded that Henry's death resulted from the stab wound that he sustained to his left thigh which severed the femoral artery and vein causing haemorrhage and shock.

[28] The investigating officer, Sergeant James Sutton, also gave evidence on behalf of the prosecution. His evidence sought to explain why the police apprehended Maynard and Rawlins. He stated that the police had received an anonymous call with information about Maynard's brother, Vincent also known as 'Baldhead'. Sergeant Sutton stated that when the police arrived at Maynard's house in the early hours of the morning, not long after the murder, Maynard was at home. He was not the subject of the police's investigation at that time. As the police were leaving, they met Vincent in the road. He had been out in the early hours of that morning and was returning home. Vincent was taken into custody by the police. He later revealed that, based on the information of PC Handley, Vincent was released from

custody and Maynard and Rawlins were subsequently arrested and charged with the murder of Henry.

[29] Maynard gave evidence in his defence. He stated that, on the night of the murder, he was at home with his brother and sister, Yvette and Terence. Neither Yvette nor Terence was called as an alibi witness in support of Maynard's testimony. Maynard also alleged that Ms. Powell and Ms. Lowrie fabricated their evidence against him.

[30] I now turn to consider the first ground of appeal which relates to Maynard's trial counsel's failure to call Yvette and Terence as alibi witnesses.

Ground 1 – Failure to Call Alibi Witnesses

Submissions on behalf of Maynard

[31] On the first ground of appeal, Ms. Grey submitted that the failure to call Yvette and Terence as alibi witnesses undermined the case for the defence as the jury would have speculated as to why Maynard's family had not sought to support his testimony if he was indeed being truthful about his whereabouts at the time of Henry's murder. She reminded the Court that Maynard's case at trial was one of alibi. Ms. Grey posited that Yvette Maynard has now provided an affidavit which supports Maynard's account given at trial that he was at home with her and his brother at the time of the murder. She contended that, without such supporting testimony, the jury must have concluded that Maynard was being untruthful.

[32] Ms. Grey also pointed the Court to the existence of contemporaneous evidence in the form of two letters dating back to 2003 which illustrates a clear intention on the part of Maynard's former counsel to call the alibi witnesses at trial. She contended that the failure of Maynard's former counsel to call Yvette and Terence to support Maynard's alibi evidence rendered his conviction unsafe and urged the Court to set aside his conviction on this basis.

[33] She strenuously argued that the affidavit evidence of Yvette Maynard supporting the defence of alibi was important on two bases: first, that it undermines the

identification evidence and second, that it provides independent supporting evidence of alibi. She contends therefore that this fresh evidence is central to the appeal.

Submissions on behalf of the Crown

[34] In response, Mr. Graham submitted that the failure to call the two alibi witnesses did not render Maynard's conviction unsafe. He stated that the evidence does not properly demonstrate what transpired in the court below or what informed Maynard's former counsel's decision not to call Yvette and Terence. Mr. Graham further contended that there was no reasonable explanation for the failure to call Yvette Maynard as an alibi witness. He stated that the circumstances lead to the inference that the decision to not call Yvette at trial was a deliberate decision. Mr. Graham relied on the fact that notice of the alibi witnesses was given yet the evidence was not called; a decision which was made at some point and which remained unchanged while Yvette Maynard was in attendance, she says, outside of the courtroom.

[35] Mr. Graham further argued that, in any event, Yvette's evidence is not credible. He highlighted discrepancies between her evidence and Maynard's evidence at trial. Mr. Graham also contended that Yvette had an interest to serve as Maynard is her brother. He stated that the jury would not have accepted her evidence as credible for this additional reason. Mr. Graham therefore urged the Court to dismiss this ground of appeal.

Discussion

[36] It is well-settled that the decision whether to call the evidence of a particular witness is within the discretion of counsel. Indeed, defence counsel has the discretion, by virtue of the skills attendant on the legal profession, to decide on the tactical steps to take in advancing the accused's case. The English Court of Appeal at paragraph

83 of **R v Doherty & McGregor**⁸ cautioned against an appellant relying on the manner in which defence counsel conducted the trial as a ground of appeal in the following terms: 'unless in the particular circumstances it can be demonstrated that in the light of the information available to him at the time no reasonably competent counsel would sensibly have adopted the course taken by him at the time when he took it, these grounds of appeal should not be advanced'. Put another way, it must be demonstrated by way of cogent and credible evidence that the decision not to call Yvette and Terence was one which no reasonably competent counsel would have taken in the circumstances of the case.

[37] Having considered the submissions, I am satisfied that the evidence does not demonstrate what informed Maynard's former counsel's decision not to call the evidence of Yvette or Terence. Indeed, neither of Maynard's former counsel have provided any explanation for the failure to call the two alibi witnesses. Maynard's former lead counsel indicated that he was taking instructions from his junior counsel and never spoke with Maynard at any time. The junior counsel merely stated that he was unable to recall what factors would have caused him not to call the alibi witnesses at trial or whether any witness statements were taken from them.

[38] While Ms. Grey sought to persuade the Court that there had been a settled intention on the part of Maynard's counsel to call Yvette and Terence from as early as 2003 when notice of alibi was given to the prosecution, it does not follow automatically from the giving of the notice of alibi that there could not have been any good reason which arose either before or during the course of the trial for not calling their evidence. To my mind, the decision not to call Yvette or Terence is a matter which during the course of Maynard's trial could have been made for a myriad of reasons. It is quite possible during the course of any criminal trial that defence counsel opts to not call a witness which he or she intended to call having reconsidered how credible the witness will appear to the jury or how well the witness' testimony will stand up to scrutiny under cross-examination by the prosecution. It may even be

⁸ [1997] 2 Cr App R 218.

that the witness' evidence is no longer relevant or necessary in light of the evidence which has been led in the trial so far. Further, no assertion is being made as to the lack of competence and/or skill of Maynard's former counsel. In the absence of evidence of what informed Maynard's former counsel's decision not to call the alibi witnesses, it would not be appropriate for this Court to simply infer that there was no good reason for the failure to call Yvette or Terence to give evidence at trial. The record reflects that inquiry was made as to the witnesses for the defence and the court was informed that there were none.

[39] This brings me to examine the affidavit of Yvette Maynard. In her affidavit, Yvette Maynard states that Maynard was at home on the night of Henry's murder and during the early hours of the next day. She asserts that she does not remember Maynard leaving home and that her boyfriend was also home with her; however, he was asleep. She states that she saw Maynard that evening at home and they left home together and went to the police station when their brother, Vincent, was arrested. She also states that her room was right next to Maynard's room. She indicates that a short partition divided the rooms so whenever she stood on her bed, she could look over into Maynard's room. She states that her bed was jammed up right next to the partition and Maynard was watching television that night. She further asserts that if Maynard left his room, she would have been able to hear him open and close the door and that he always told her when he was going anywhere. Later in her statement, she indicated that she was never asked by Maynard's lawyers to give a written statement and that she was unaware that she could have given a statement if she wished to do so. She also stated that the police never spoke with her in respect of her or Maynard's whereabouts on the night of the murder.

[40] In my view, Yvette Maynard's evidence raises significant questions which appear to undermine its credibility. First, while there is no responsibility placed on a witness to approach defence counsel or the police with information material to a criminal trial, it seems to be passing strange that Yvette, who presumably had a close

relationship with Maynard, did not seem to have made any effort to assist his defence. Yvette also did not seem to have made any effort to speak with her brother's former counsel at any time, particularly considering that she had gone to the courthouse over multiple days during Maynard's trial. Indeed, Yvette did not provide her affidavit until June 2020, some sixteen years after Maynard's conviction. It is not to be presumed that she ought to have been aware that she could have given a written statement at least; however, there is no compelling explanation for Yvette's delay in seeking to assist her brother's defence. While Ms. Grey argued that Yvette had been identified as an alibi witness from as early as 2003 and that the case is not one of a belatedly concocted alibi, it is quite curious that when Maynard (with whom she was quite close) was arrested at his home in Yvette's presence, and seeing the police taking him away she said nothing to the police about Maynard having been home with her on the night of the murder. Undoubtedly, there was sufficient opportunity for Yvette to inform the police that her brother had been at home with her all night and could not possibly have murdered anyone. Interestingly, she does not say that she ever sought at any time thereafter to contact the police. Neither does she say that she sought out her brother's lawyers. She surmised in her affidavit that it must have been her brother Maynard who gave his lawyers her name.

- [41] Furthermore, Yvette's evidence does not in my opinion provide cogent alibi evidence. In her affidavit, she states that a partition separated her room from Maynard's room in the house and that she was able to see into his room when she stood on her bed. However, it seems to me that for Yvette to have seen if Maynard left his room during the night of the murder, she would have needed to be standing on her bed for the entire night observing Maynard. Such a proposition is simply incredible considering that Yvette was heavily pregnant at the time. In addition, when the police first came to the house, Maynard was in the yard. There is nothing in Yvette's evidence which suggests that she was aware that Maynard had left the house and ventured into the yard. There is also nothing which suggests that she had observed Maynard in his room at any particular time. She merely states that she was able to see into his room when she stood on her bed and looked over the

partition; that his television was on; that he would tell her when he was leaving the house; and that she would have heard him leaving the house. Yvette's evidence to my mind falls short of cogent alibi evidence. Nowhere in her affidavit does she indicate that she saw Maynard in the house between 12 a.m. and 1 a.m. when Henry was killed nor does she positively exclude the possibility that Maynard had left home without her knowledge. I am therefore not satisfied that Yvette's evidence establishes a cogent alibi.

- [42] I also find no merit in Ms. Grey's submission that the failure to call Yvette and Terence Maynard as alibi witnesses undermined the case for the defence as the jury would have wondered why Maynard's family had not sought to support his testimony. In my view, the contention that the jury must have disbelieved Maynard because neither Yvette nor Terence gave supporting evidence is mere speculation as to what could potentially have been on the minds of the jury. It is equally possible that Yvette's evidence would have been rejected by the jury given that, as Maynard's sister, she would have had an interest to serve. What is critical is that the jury in deciding whether to accept or reject Maynard's alibi defence had the benefit of Maynard's evidence accompanied by directions given by the learned judge on the law of alibi, which have not been challenged in this appeal, as well as Sergeant Sutton's evidence that he saw Maynard at his home in the yard after the incident. Given the issues of credibility and cogency of Yvette's evidence, as well as the quality of the identification evidence in this case to which I shall turn shortly, I am not satisfied that the failure to call the two alibi witnesses at the trial rendered Maynard's conviction unsafe. I would accordingly dismiss this ground of appeal.

The Application to Adduce Fresh Evidence

- [43] In view of my findings on Yvette's evidence, it is clear that I am not satisfied that the threshold test for the admission of fresh evidence on appeal has been met. Shortly put, section 49 of the **Eastern Caribbean Supreme Court (Saint Christopher and Nevis) Act**⁹ (the "**Supreme Court Act**") provides that the Court of Appeal may

⁹ Cap. 3.11, Revised Laws of Saint Christopher and Nevis 2009.

receive fresh evidence on the appeal if: (i) it appears to it that the evidence is likely to be credible and would have been admissible at the trial on an issue which is the subject of the appeal; and (ii) it is satisfied that it was not adduced at the trial, but that there is a reasonable explanation for the failure so to adduce it. The Privy Council in the recent decision of **Lescene Edwards v The Queen**,¹⁰ affirmed the principles guiding the admissibility of fresh evidence on appeal. Sir David Bean, delivering the judgment of the Board, cited the earlier decision in **Lundy v The Queen**¹¹ which explains that:

“...the proper basis on which admission of fresh evidence should be decided is by the application of a sequential series of tests. If the evidence is not credible, it should not be admitted. If it is credible, the question then arises whether it is fresh in the sense that it is evidence which could not have been obtained for the trial with reasonable diligence. If the evidence is both credible and fresh, it should generally be admitted unless the court is satisfied at that stage that, if admitted, it would have no effect on the safety of the conviction. If the evidence is credible but not fresh, the court should assess its strength and its potential impact on the safety of the conviction. If it considers that there is a risk of a miscarriage of justice if the evidence is excluded, it should be admitted, notwithstanding that the evidence is not fresh.”

[44] **Lundy** makes plain that, if the evidence sought to be admitted is not credible, it should not be admitted. Having concluded that Yvette Maynard’s evidence is not credible, it follows that there is no basis on which it should be admitted on this appeal. In any event, even if I were to find her evidence to be credible, I am not satisfied that the second limb of the threshold test has been met. It is apparent that there had been an intention to call Yvette as an alibi witness from as early as 2003. However, as I stated earlier, there has been no explanation for the failure to call her evidence. It therefore cannot be said with any certainty that her evidence is fresh in the sense that it could not have been obtained for the trial with reasonable diligence. It is reasonable to infer that it was a deliberate decision on the part of Maynard’s former counsel not to call her evidence. The Privy Council in **Marcus Jason Daniel v The State**¹² cautioned against the reception of fresh evidence of

¹⁰ [2022] UKPC 11 at para.42.

¹¹ [2013] UKPC 28.

¹² [2012] UKPC 15 at para. 21.

this kind on an appeal. In any event, even if Yvette's evidence were both credible and fresh, I do not consider that it would have had any effect on the safety of Maynard's conviction given the quality of the evidence weighing against him. **Lundy** underscores that where the fresh evidence would have no effect on the safety of the conviction if admitted, it should not be admitted. For these reasons, I am not inclined to grant leave to admit fresh evidence on the appeal in the form of the affidavit of Yvette Maynard.

[45] This brings me to the second ground of appeal.

Ground 2 - Inconsistencies in the Identification Evidence

Submissions on behalf of Maynard

[46] The crux of Ms. Grey's submissions on this ground is that the learned judge's summing up of the identification evidence was inadequate. She stated that the judge failed to direct the jury on the weaknesses and inconsistencies in the identification evidence as required by the guidelines set out in **R v Turnbull**.¹³ She further complained that the judge erred in giving a general **Turnbull** direction as opposed to tailoring the direction to the evidence in the case before him. Learned Queen's Counsel referred the Court to the following inconsistencies in the evidence which she argued ought to have been highlighted by the judge in his summing up of the case to the jury:

- (a) That although Ms. Lowrie knew Mr. Rawlins, she did not identify him as being present on the night of the murder while Ms. Powell and PC Handley did. This, Ms. Grey stated, raises a question as to the quality of her observations having regard to the fact that she was observing matters from the same location as her daughter albeit at times from different rooms.
- (b) That only Ms. Powell referred to the killer as wearing a baby blue and white head tie and that the learned judge's summing up failed to remind the jury that

¹³ [1976] 3 All ER 459.

Ms. Powell was making an identification at night in neon lighting about an individual wearing a head-tie.

- (c) Despite the fact that Ms. Powell and Ms. Lowrie gave evidence that they knew Maynard and saw a police officer immediately after the incident who was standing in close proximity to them, neither informed him that Maynard was the assailant.
- (d) That PC Handley's first description of the individual that he asserts is Maynard is taken from his witness statement dated 26th March 2003. However, there was no mention of that individual's height until his deposition evidence dated 13th June 2003 and subsequent trial testimony while he is in court with Maynard that he refers to the assailant as short. This belated recollection as to Maynard's height was not referred to by the judge in the summing up.
- (e) Ms. Powell claimed that she had Maynard under observation for 15-20 minutes. This would include the period when she says Maynard was advancing towards Henry and there was a struggle with the three men followed by the stabbing and fleeing from the scene. On the other hand, PC Handley states that it was between 3 to 5 minutes from the time he saw the three persons against the wall to the time when the two men left the scene and went down the road.
- (f) In respect of Mr. Hamilton's evidence: (i) that his first account to the police in his witness statement dated 26th March 2003 refers to the assailant as 5'10" in height; however, Maynard is 5'1"; (ii) that he made a dock identification of Maynard; (iii) that at trial he accepted he made no mention of Maynard in his statement but instead made reference to his brother; and (iv) that the investigating officer, Mr. Sutton, described Maynard's height as approximately between 5'8"-5'10"; and

(g) That although witnesses described Maynard as using his left hand to stab Henry, there was also evidence that Maynard's brother Vincent also known as 'Baldhead' is left-handed.

[47] Ms. Grey thereafter submitted that the importance of an identification parade in circumstances where one was not held was not explained to the jury in its proper context and the learned judge only dealt with it in the context of the recognition evidence. She posited that the failure to hold an identification parade should have been dealt with in relation to the non-recognition evidence of PC Handley, who did not know Maynard and was 15 feet away at the relevant time. Learned Queen's Counsel stated that the judge should have informed the jury that an identification parade enables suspects to test the reliability of an eye witness' identification, that Maynard had lost the benefit of that safeguard and that they should take account of that in their assessment of the whole case.

[48] Ms. Grey further contended that an identification parade would also have objectively tested the accuracy of the recognition evidence by Ms. Powell and Ms. Lowrie who were cross-examined on the basis that they were mistaken witnesses. Learned Queen's Counsel pointed out that PC Handley's evidence ran contrary to Ms. Powell's evidence that Rawlins had left before Maynard and contrary to Ms. Lowrie's evidence that she never saw Rawlins.

[49] Ms. Grey also drew the Court's attention to other weaknesses apart from the identification evidence which ought to have been pointed out to the jury. These, she stated, include that:

- (i) there was no forensic evidence linking Maynard to the crime; that when Maynard's clothes were seized from him on arrest, he was not wearing a white T-shirt, cut-off jeans or any cut-off trousers or a head tie and neither were such clothes found at his home;
- (ii) Maynard had no injuries while Rawlins had injuries to his hands;

(iv) Mr. Sutton stated in his evidence that he had received an anonymous call that Henry's killer was Vincent which is why he went to Maynard's home and observed Vincent returning home; and

(v) Vincent was not placed on an identification parade and neither were any of his clothes which he was wearing that night seized and forensically examined.

She urged the Court to conclude that the learned judge's failure to specifically identify these weaknesses to the jury undermined the safety of Maynard's conviction.

Submissions on behalf of the Crown

[50] In response, Mr. Graham argued that there is no deficiency in the identification evidence which undermined the quality of the evidence. He asserted that the identification of Maynard was not one of a "fleeting glance" but was unobstructed and under well-lit conditions in circumstances where he was previously known to three of the witnesses. In respect of the evidence of Ms. Lowrie and Ms. Powell, Mr. Graham contended that Maynard's case was not that they were mistaken witnesses, but that they had fabricated their identification of him as the killer because, he says, in essence, of ill will towards him. In respect of the evidence of Jason Hamilton, he stated that there was no material discrepancy which arose between his evidence at trial and his witness statement. His evidence was clear. He did not reference Maynard by name in his witness statement but referred to his height and that he knew Maynard's brother. The evidence of these three witnesses was that they knew Maynard previously and neither identification of Maynard was undermined in cross-examination. Mr. Graham also argued that there were no material inconsistencies among the witnesses' accounts. He submitted that where the issue is whether the identification of a defendant by witnesses who know him was fabricated, the potential relevance of weaknesses will be to that issue. Mr. Graham relied on **Omar Gieves and Others v The Queen**¹⁴ in support of this proposition.

¹⁴ [2011] UKPC 39.

[51] In respect of the contention that the learned judge failed to explain the importance of an identification parade in circumstances where one was not held, Mr. Graham submitted that the learned judge did not so err. He stated that as Maynard's case was that Ms. Lowrie and Ms. Powell fabricated their identification of him as the murderer, and not that they were mistaken, the identification parade would have served no useful purpose. Mr. Graham urged the Court to find that the learned judge did not err in his summing up of the identification evidence and to accordingly dismiss this ground of appeal.

Discussion

[52] The guidelines of the Court of Appeal of England and Wales in **Turnbull** are well known. The resolution of this issue may best be served by firstly examining the pronouncements of Lord Widgery CJ in **Turnbull** on the appropriate direction which a trial judge should give a jury in cases of identification evidence:

"First, whenever the case against the 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 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. [That will involve examining both the original sighting and the subsequent identification. Reference should be made to any material discrepancy between any description given to the police and the actual appearance of the accused.] 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 he knows, the jury should be reminded that mistakes in recognition of close friends and relatives are sometimes made. The trial judge should identify to the jury the evidence which he adjudges is capable of supporting the evidence of identification. If there is any evidence which the jury might think was supporting when it did not have this quality, the judge should say so."

I am guided by these very helpful pronouncements.

- [53] In summary, the principles in **Turnbull** apply when the case against an accused person depends wholly or substantially on the correctness of one or more identifications of the accused which the defendant says is mistaken. In giving a **Turnbull** direction, the judge should direct the jury to examine the circumstances of the identification. The circumstances which the jury should be directed to examine include the length of time the witness observed the accused, the distance from which they observed, the quality of the lighting, whether the observation was clear, whether they had seen the accused before, and any material discrepancy between witness description and the accused's appearance. The judge is required to warn the jury of the special need for caution before convicting in reliance on the correctness of the identification, instruct them as to the reason for the need for such a warning and inform them of the possibility that a mistaken witness could be a convincing one and that a number of such witnesses could all be mistaken. However, the trial judge is not required to use any particular form of words and is afforded some flexibility in summing up the case. In relation to whether the **Turnbull** guidelines should be rigidly adopted by a judge in summing up the case, the Board observed in **Mills et al v R**¹⁵ that:

“[We] emphatically reject this mechanical approach to the judge's task of summing up. Reg. v. **Turnbull** is not a statute. It does not require an incantation of a formula. The judge need not cast his directions on identification in a set form of words. On the contrary, a judge must be accorded a broad discretion to express himself in his own way when he directs a jury on identification. All that is required of him is that he should comply with the sense and spirit of the guidance in Reg. v. **Turnbull** as restated by the Privy Council in *Reid (Junior) v. The Queen* [1990] 1 A.C. 363.”

- [54] While the trial judge is required to point out any specific weaknesses in the identification evidence to the jury, it is not essential that the judge lists all those weaknesses or every argument made against the credibility of a particular witness.

¹⁵ [1995] 1 WLR 511.

Sir Roger Toulson, delivering the judgment of the Board in **Omar Grievess**,¹⁶ explained the proper approach in this way:

“An important part of the guidelines laid down in *Turnbull* [1977] QB 224 is that the judge should remind the jury of any specific weaknesses in the identification evidence. Later authorities establish that this duty entails explaining why something is a weakness which may cast doubt on the reliability of the identification, unless to do so would be to state the obvious. In *Langford v Dominica* [2005] WL 5249870, paragraph 23, the Board commended the advice given by Ibrahim JA in the Court of Appeal of Trinidad and Tobago in *Fuller v State* (1995) 52 WIR 424, 433:

‘It is not sufficient merely to read to [the jury] the factors set out in *Turnbull*’s case and at a later time to read to them the evidence of the witnesses. That is not a proper summing up. The jury have heard all the evidence in the case when the witnesses testified. It will not assist them if the evidence is merely repeated to them. What they require from the judge in the final round is his assistance in identifying, applying and assessing the evidence in relation to each direction of law which the trial judge is required to give to them and also in relation to the issues that arise for their determination’.

...
[*Turnbull*] does not require the judge to remind the jury more generally of every argument which there may be for not believing a witness.”

[55] As the failure to give a direction in accordance with the guidelines set out in **Turnbull** may affect the safety of a conviction, it is necessary at this juncture to consider the direction given by the judge to the jury to ascertain whether there was any error in the judge’s summing up.

[56] In his summing up of the case, the judge first reminded the jury that the burden of proof rests on the prosecution to prove the guilt of the accused. He correctly reminded the jury that they are the sole judges of fact. He advised them that if they were unsure whether Maynard was guilty, then their verdict must be not guilty. He suggested that they use their common sense to assess the credibility of each witness, that there was potential for innocent discrepancies and that such discrepancies do not mean that the evidence of the witness must be rejected. He implored the jury to consider that if in his summing up of the evidence he failed to

¹⁶ See n. 14 at para. 29.

mention something which they think is important, to give it such weight as they think fit. The judge then explained the elements of the offence of murder which ought to be satisfied.

[57] On the identification evidence, the learned judge first directed the jury that they must be sure of the identity of the accused and feel sure that he committed the offence of murder. He then explained the need for caution in respect of identification evidence, particularly in light of Maynard's accusation that Ms. Lowrie and Ms. Powell had fabricated their evidence against him. He reminded them that they must examine closely the circumstances under which Maynard was identified in determining the quality of the evidence. He also reminded the jury that a witness purporting to recognise someone he knows can make mistakes and that a mistaken witness can also be a convincing witness. The learned trial judge then summarised the evidence which was put before the jury throughout the course of the trial. He reminded the jury of the length of time the witnesses observed Maynard, the distance from which they observed, the quality of the lighting, whether the observation was clear as well as whether the witnesses had known the accused previously.

[58] The learned judge thereafter directed the jury on the usefulness of an identification parade when the witness claims only slight acquaintance with the accused or the accused denies that he is the person whom the witness claims to know. When an accused was not previously known to the witness, the proper course to be followed was to hold an identification parade. He reminded the jury however that the omission to hold an identification parade would not necessarily be fatal if the witness had ample opportunity to make an identification of the accused. He also reminded the jury that the onus was on it to decide whether the witnesses had an opportunity to make a true identification of the accused person.

[59] I will now consider the specific weaknesses which Ms. Grey argued that the judge failed to identify in his summing up of the case to the jury.

[60] First, while Ms. Grey contended that the credibility of Ms. Lowrie's evidence is impugned by her failure to place Rawlins at the scene of the crime, in my view, the discrepancy between Ms. Lowrie's evidence that she saw two men and the other witnesses' evidence that there were three men on the scene may be attributable to their observations from different positions and to some extent, different times. Ms. Lowrie speaks of hearing the talking and seeing the men and then going to the bathroom and then the shout 'fight fight' which attracted Ms. Powell's attention. Ms. Lowrie and Ms. Powell observed the incident from the verandah and a bedroom in their home respectively and PC Handley and Mr. Hamilton had a clear view from across the street. In any event, I do not consider this inconsistency between Ms. Lowrie's evidence and the other witnesses to be material. It is not at all unusual for different witnesses seeing and recalling a scene to which their attention is drawn differently. What is critical here is that Ms. Lowrie in her evidence places Maynard at the scene of the incident. I consider that it may have made a difference if Ms. Lowrie's evidence was that Maynard was present, and the other witnesses did not identify him as present. In such circumstances, there may be an arguable case that a failure to put such a discrepancy to the jury rendered a resulting conviction unsafe. In this case, however, Ms. Lowrie's evidence is corroborated by the evidence of Ms. Powell and Mr. Hamilton, who both knew Maynard prior to the incident - Ms. Lowrie and Ms. Powell knew him by his alias 'Daddy Screw' and Mr. Hamilton recognised him as the brother of a man he knew by the name of 'Bishop' who is Maynard's brother Eric.

[61] An examination of Ms. Lowrie and Ms. Powell's evidence would reveal more similarities than differences. They both observed the incident from a close range from different points in their home and both described the area as well lit. They also expressed a similar recollection of the events. Although Ms. Grey highlighted that Ms. Powell was the only witness who described Maynard as wearing a blue and white head tie, I do not consider this as undermining the quality of her identification evidence. What is crucial is that both Ms. Powell and Ms. Lowrie described him as

wearing a white T-shirt and 'three-quarter jeans pants'. Their evidence on this aspect is partially corroborated by PC Handley and Mr. Hamilton's evidence that Maynard was wearing a white T-shirt.

[62] Furthermore, I do not agree with Ms. Grey that the evidence of Ms. Lowrie and Ms. Powell is not credible because they did not give a statement to PC Handley who was present at the scene of the incident. To my mind, there is a plethora of reasons why a witness may choose not to give a statement immediately after an incident. Indeed, it is often a common occurrence in smaller societies that witnesses are hesitant to give statements to the police for the fear of possible retaliation. The Court cannot simply infer without more that, because Ms. Lowrie and Ms. Powell did not give a statement to PC Handley at the scene, they were uncertain about the accuracy of their identification of Maynard.

[63] In relation to the criticism that the judge failed to highlight to the jury that Mr. Hamilton made a dock identification of Maynard at the trial, I am not persuaded that this failure by the judge was fatal in the circumstances. There is no doubt that where a witness makes an identification of an accused person for the first time at trial the judge is required to alert the jury to the fact that a dock identification was made and explain its inherent weaknesses.¹⁷ However, in light of the fact that Mr. Hamilton had made plain in witness statement given shortly after the incident that he knew the attacker as the relative of a man he knew by the name of 'Bishop', who is Maynard's brother, Eric, and that his account of the incident is largely consistent with the accounts of the other eye-witnesses, I do not consider that Mr. Hamilton's dock identification of Maynard impugns the quality of his identification evidence.

[64] In relation to learned Queen's Counsel's complaints about the judge's failure to highlight the specific weaknesses in the evidence arising from the failure to hold an identification parade, I am similarly not of the opinion that this failure would have been fatal in the circumstances. It is settled that an identification parade should only

¹⁷ See *Mark France and Rupert Vassell v The Queen* (2012) 82 WIR 382.

be held if it would serve some useful purpose. If the accused person was not known to the witness before or if the witness' knowledge of the accused is disputed by the accused, an identification parade should be held.¹⁸ In his summation, the judge explained to the jury the purpose of an identification parade, advised that an identification parade is not necessary where it is accepted that the accused person is well-known to the witness and directed the jury that the failure to hold an identification parade is not fatal. It is clear that PC Handley's evidence was that he had not seen Maynard's face and did not recognise him. In that regard, it would not have served any useful purpose to have PC Handley attempt to identify Maynard in an identification parade. Furthermore, as Mr. Graham submitted, Maynard's case at trial was that Ms. Lowrie and Ms. Powell fabricated their identification of him as the murderer, and not that they were mistaken. If it were that Ms. Lowrie and Ms. Powell had fabricated their evidence against Maynard, they would invariably have identified Maynard on the identification parade as the killer. It therefore follows that the identification parade would again have served no useful purpose.

- [65] I agree with Ms. Grey's complaint that the judge in summing up should have highlighted the discrepancies between Ms. Powell and PC Handley's evidence on the duration of their observation of the incident, as well as Mr. Hamilton and Sergeant Sutton's evidence on Maynard's height. I do not however consider the judge's failure to do so as fatal. Evidence relating to the duration of one's observation and height are matters of subjective estimation. There is nothing which suggests that these discrepancies were explored in cross-examination to reveal whether Ms. Powell and PC Handley appreciated the distinction between 15 to 20 minutes on the one hand and 3 to 5 minutes on the other hand. It is quite probable that Ms. Powell began her observation of the incident before PC Handley did. There is also no evidence that either Mr. Hamilton or Sergeant Sutton could accurately identify a person's height or could readily distinguish between a height of between 5'8" and 5'10" and one of 5'1". Nor was there an exploration as to what height by admeasurement would be considered as 'tall' or 'short'. In the absence of this, the

¹⁸ Ibid at para. 28.

measurements are merely subjective. Critically, there is no material which confirms that Maynard is in fact 5'1". I am not persuaded on the state of the evidence that these minor discrepancies undermine the quality of their identification evidence.

[66] I also agree with Ms. Grey that the learned judge ought to have specifically highlighted to the jury other weaknesses in the prosecution's case, such as there being evidence that Vincent is also left-handed, that there was no scientific forensic evidence linking Maynard to the crime; that the clothing Maynard was described as wearing were never found; that Maynard had no injuries while Rawlins had injuries to his hands; and that Vincent was never placed on an identification parade and neither were any of his clothes which he was wearing that night seized and forensically examined. However, in my opinion, these matters do not in any way impugn the strength of the witnesses' identification of Maynard which was critical to the prosecution's case.

[67] While there is some force in Ms. Grey's criticism of lack of detail in the judge's summing up, I am not satisfied that the judge's lack of detail affected the safety of Maynard's conviction. The quality of the identification evidence in this case was quite compelling. The identification evidence reveals that the eye-witnesses observed the incident in well-lit conditions with an unobstructed view; that the observation was made at a relatively close distance; that three of the witnesses knew Maynard prior to the incident; that the identification of Maynard was not a fleeting glance for any of the witnesses; and critically, that the witnesses' accounts of how the incident occurred are largely similar. In light of this compelling identification evidence weighing against Maynard, I do not consider that Ms. Grey's criticisms of the judge are sufficient to throw any doubt on the conviction. The second ground of appeal is therefore without merit.

[68] I now turn to consider the third ground of appeal which concerns the judge's failure to give a good character direction in respect of Maynard.

Ground 3 – Judge’s Failure to Give Good Character Direction

Submissions on behalf of Maynard

- [69] On this point, Ms. Grey submitted that the learned judge erred in failing to give a good character direction in respect of Maynard in summing up the case to the jury. She stated that, as Maynard had no previous convictions and had given evidence in the trial, he was therefore entitled to both the propensity and the credibility limbs of the good character direction. Ms. Grey further stated that the good character direction was of significance in this case as it would have enhanced the credibility of Maynard’s alibi defence. She posited that in the circumstances of this case the learned judge’s failure to give a good character direction rendered Maynard’s conviction unsafe.

Submissions on behalf of the Crown

- [70] In response, Mr. Graham stated that the issue of Maynard’s good character was never raised during the trial, but conceded that since Maynard had no previous convictions and had given evidence at his trial, he was entitled to a good character direction. He however contended, relying on the decision of this Court in **Jay Marie Chin v The Queen**¹⁹ and the decision of the Privy Council in **Bhola v The State**,²⁰ that the failure of a trial judge to give the defendant a good character direction is not always fatal to a conviction. Mr. Graham argued that the failure to give a good character direction was not fatal to Maynard’s conviction given the overwhelming evidence against him at the trial. He therefore urged the Court to dismiss the appeal on this ground.

Discussion

- [71] This is a short point. As a general principle, a direction should be given by the trial judge as to the relevance of the defendant’s good character to the likelihood of him or her having committed the offence charged. This is known as the propensity limb of the direction which should be given whether or not the defendant has testified or

¹⁹ ANUHCRA2012/0005 (delivered 5th April 2017, unreported).

²⁰ [2006] UKPC 9.

made pre-trial statements. Another direction on the defendant's good character is to be given where a defendant has a good character and has testified or made pre-trial statements. This is known as the credibility limb of the direction. In **Jay Marie Chin**, the Court of Appeal made plain that the failure to give a good character direction where the defendant was entitled to one does not automatically render the conviction unsafe. At paragraph 29, Blenman JA, after reviewing a long line of authorities,²¹ explained that:

“The sole salutary test for this Court is whether the judge's omission to give a good character direction (which it must be recalled was not requested by counsel) undermines the safety of the conviction. In [Hunter v R [2016] 2 All ER 1021] Lady Justice Hallett acknowledged that there can be no fixed rule or principle that a failure to give a good character direction is necessarily or usually fatal. It must depend on the facts of the individual case and I totally agree with her observation.”

According to **Bhola**, the critical question is whether it would have made a difference to the result of the trial had the good character direction been given by the judge.

[72] In my view, the judge's failure to give a good character direction was not fatal in the circumstances of this case. As stated earlier, the evidence against Maynard at the trial was compelling. The prosecution relied on the evidence of several eye-witnesses who placed Maynard at the scene of the incident. Their observations of him were unobstructed and made in well-lit conditions from a relatively close distance. Three of these witnesses knew Maynard prior to the incident. In addition, the witnesses' accounts of the incident and descriptions of the assailant are largely similar. In light of the cogent and compelling identification evidence as well as other evidence against Maynard at the trial, it cannot be said that a good character direction would have somehow changed the view of the jury that Maynard was guilty. It therefore cannot be concluded that the judge's failure to give a good character direction undermined the safety of Maynard's conviction. Accordingly, I am of the considered view that the third ground of appeal is without merit.

²¹ See: R v Hunter [2016] 2 All ER 1021; Gilbert v R [2006] UKPC 15; Mark France and Rupert Vassell v The Queen [2012] UKPC 28; and Bally Sheng Balson v The State [2005] UKPC 2.

[73] For all the above reasons, I would dismiss the appeal and affirm Maynard's conviction.

The Proviso

[74] The complaints raised in the second and third grounds of appeal ultimately lead to a consideration of the applicability of the proviso. Section 44(1) of the **Supreme Court Act** provides that:

"The Court of Appeal on any such appeal against conviction shall (subject as hereinafter provided) allow the appeal if it thinks that the verdict of the jury should be set aside on the ground that under all the circumstances of the case it is unsafe or unsatisfactory or that the judgment of the Court before whom the appellant was convicted should be set aside on the ground of a wrong decision of any question of law; or that there was a material irregularity in the course of the trial and in any other case shall dismiss the appeal:

Provided that the Court may, notwithstanding that it is of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred."

[75] The application of the proviso was recently addressed by this Court in the decision of **Jevone Demming v The Queen**.²² The Court, referring to the decision of the Privy Council in **Stafford v The State**²³ stated at paragraph 39 of the judgment that:

"The application of the proviso requires the Court of Appeal to look beyond the errors of a trial judge to examine whether, having regard to the admissible evidence before the jury, a conviction was inevitable. A summary of the governing principles, the Court is required to apply when considering the application of the proviso, is found in *Stafford v The State*, [1999] 1 WLR 2026 where Lord Hope explained:

"The test which must be applied to the application of the proviso is whether, if the jury had been properly directed, they would inevitably have come to the same conclusion upon a review of all the evidence: see *Woolmington v. Director of Public Prosecutions* [1935] A.C 462, 482-483, per Viscount Sankey L.C.... . Where the verdict is criticised on the ground of a misdirection such as that in the present case, and no question has been raised about the admission of inadmissible evidence, the application of the

²² BVIHCRA2015/0001 (delivered 14th January 2020, unreported).

²³ [1999] 1 WLR 2026.

proviso will depend upon an examination of the whole of the facts which were before the jury in the evidence’.”

[76] In the judgment of the Board in **Cassell and another v The Queen**,²⁴ Lord Hughes further observed in relation to the application of the proviso that the test for whether a miscarriage of justice has actually occurred is not whether the appellate court is itself persuaded of guilt. The test is in fact whether the appellate court is satisfied that any jury acting properly must inevitably have convicted the defendant if the flaw(s) in the proceedings had not occurred. At paragraphs 29 and 30 of the judgment, Lord Hughes explained thus:

“29. It may be that there can be imagined cases in which the trial process is so perverted that an appellate court would be driven to the view that there was a miscarriage of justice even if satisfied that any jury would inevitably have convicted the defendant if the trial had been properly conducted. It is not necessary to attempt to define such cases; plainly this question will be fact specific and a matter of degree. It is possible that an example might be the bribery of the jury, or a case in which the jury was dismissed and the court purported to record a verdict of guilty of its own motion. But cases of this sort will be very unusual. Ordinarily the whole point of the proviso is that it falls to be considered precisely because there has been some significant defect, which may include unfairness to the defendant, in the trial.

30. However, short of such unusual cases of a wholly perverted trial process, it is plainly true that the more minor the error the easier it is likely to be for the appellate court to address and answer the question whether any jury must inevitably have convicted if the error had not occurred. Conversely the more extensive the error(s) at the trial, the more difficult it is likely to be to be sure that any jury must have convicted, and indeed there sometimes comes a point where the appellate court does not even embark on an analysis of the proviso question, the answer being obvious and/or the view being taken that it would plainly be a miscarriage of justice, because unfair, to sustain the conviction.”

[77] Of particular relevance is the decision of the Board in **Michael Freemantle v The Queen**²⁵ which considered the application of the proviso in circumstances where the requisite general **Turnbull** warning and explanation were not given by the trial judge to the jury. Sir Vincent Floissac, in delivering the opinion of the Board, made

²⁴ [2016] UKPC 19.

²⁵ [1994] UKPC 24.

plain that the failure of a trial judge to give the general **Turnbull** warning would not preclude an appellate court from finding that no miscarriage of justice had actually occurred, and upon that basis uphold the appellant's conviction applying the proviso. This would of course be appropriate in exceptional circumstances where, for instance, the identification evidence was of an exceptionally good quality. The reasoning underpinning the decision in **Freemantle** would in my view necessarily apply in circumstances such as in this case where the judge failed to highlight for the jury certain weaknesses in the evidence led by the prosecution.

- [78] It is clear from the authorities that the critical question is whether the jury would have inevitably found Maynard guilty of murder had the learned judge gone further in his summation to highlight these weaknesses and had he given a good character direction to the jury. In the circumstances, I am of the view that the jury would inevitably have come to the same conclusion that Maynard was guilty of murder upon a review of all the evidence in the case, in particular the compelling identification evidence. In addition to the compelling identification evidence, the jury also had before it the medical evidence of Dr. Williams-Roberts which indicated that Henry had sustained three lacerations on his body; namely, two lacerations to his chest and one to his right thigh. It is noteworthy that the medical evidence is plainly consistent with the witnesses' accounts of the attack, particularly Ms. Powell's account. This no doubt served to bolster the prosecution's case against Maynard. On the totality of the evidence, even if the judge's non-direction on aspects of the evidence were to be considered as a misdirection and even when considered cumulatively along with the failure to give a good character direction, no miscarriage of justice has actually occurred. The proviso to section 44(1) of the **Supreme Court Act** is therefore engaged. Accordingly, it would have been proper for this Court to dismiss the appeal in any event by applying the proviso contained in section 44(1) of the **Supreme Court Act**.

Conclusion

[79] In the premises, I would make the following orders:

- (1) The application for permission to adduce fresh evidence on the appeal in the form of the affidavit of Yvette Maynard sworn to on 30th June 2020 is dismissed; and
- (2) The appeal against conviction is dismissed and Maynard's conviction is affirmed.

[80] I am grateful to learned counsel for their helpful submissions.

I concur.
Gertel Thom
Justice of Appeal

I concur.
Gerard St. C. Farara
Justice of Appeal [Ag.]

By the Court

Chief Registrar