

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

SAINT LUCIA

SLUHCRA2015/0004

BETWEEN:

CURLAN JOSEPH

Appellant

and

THE KING

Respondent

SLUHCRA2015/0005

BETWEEN:

CLINTON GILBERT

Appellant

and

THE KING

Respondent

Before:

The Hon. Mr. Davidson Kelvin Baptiste

Justice of Appeal

The Hon. Mde. Gertel Thom

Justice of Appeal

The Hon. Mde. Margaret Price-Findlay

Justice of Appeal [Ag.]

Appearances:

Mr. David P. Moyston for Curlan Joseph

Mr. Lorne Theophilus for Clinton Gilbert

Mrs. Tanya N. Alexis-Francis for the Respondent

2021: June 29;
2022: November 25.

Criminal appeal – Non-Capital murder – Admissibility of identification evidence – Sections 100, 102 & 136 of the Evidence Act – Whether the learned judge erred in the application of section 100 of the Evidence Act – Whether the learned judge erred in the application of the binding precedent of Earl Hunte v The Queen – Whether the learned judge failed to adequately direct the jury pursuant to section 102 of the Evidence Act – Whether the learned judge failed to adequately direct the jury as regards a witness’ contradictory identification evidence – Whether the learned judge failed to consider whether the trial should have been aborted when one of the prosecution’s witnesses intimated that the reason for him mistakenly saying that the men he saw on the night in question were masked was because he was afraid – Whether the learned judge failed to apply the correct sentencing principles in sentencing the appellants to whole life

The prosecution’s case against Curlan Joseph (“Curlan”) and Clinton Gilbert (“Clinton”), together (“the appellants”), was predicated on a joint enterprise in which the appellants shot and killed Richard Augustine (“Augustine”) on 31st December 2005, while he was seated with some friends under a lamp post. The following morning, eyewitnesses to the shooting – Lincoln Phillip and Garvin Bellasse - gave statements to Corporal Labadie, containing a complete identification of the appellants by name as the persons who had shot Augustine. The next day, another eyewitness, Nathalbert Joseph (“Talbert”), gave a statement also identifying the appellants as the individuals who shot and killed Augustine. The prosecution’s case depended heavily on the identification evidence of Talbert and Garvin Bellasse (“Bellasse”). There is no other evidence tying the appellants to the murder. The defence challenged the credibility of the witnesses and asserted that they were mistaken and were not telling the truth.

In the court below, before the trial started, counsel for the appellants applied to exclude the identification evidence on the basis that the prosecution had failed to comply with section 100 of the Evidence Act and the Court of Appeal’s judgment in Earl Hunte v The Queen. At the voir dire, the investigating officer Athanatius Mitchell, tendered the statements of the eyewitnesses. The learned judge considered that Talbert had known both appellants for approximately 20 years, and that Bellasse had known them for about 20 years and had attended primary school together with them. The judge considered the evidence, heard submissions on admissibility from both sides and ruled the identification evidence admissible. The appellants were thereafter convicted and sentenced to life imprisonment for non-capital murder of Augustine.

The appellants appealed against their conviction and sentence on six grounds of appeal which may be summarised as follows: (i) whether the learned judge erred in the application of section 100 of the Evidence Act; (ii) whether the learned judge erred in the application of the binding precedent of Earl Hunte v The Queen; (iii) whether the learned judge failed to adequately direct the jury pursuant to section 102 of the Evidence Act; (iv) whether the

learned judge failed to adequately direct the jury as regards Talbert's contradictory identification evidence; (v) whether the learned judge failed to consider whether the trial should have been aborted when the prosecution's witness, Bellasse, intimated that the reason for him mistakenly saying that the men he saw on the night in question were masked was because he was afraid; (vi) whether the learned judge failed to apply the correct sentencing principles in sentencing the appellants to whole life.

Held: dismissing the appeal in respect of both appellants and affirming their convictions and sentences of life imprisonment for non-capital murder, that:

1. Section 100(5) of the Evidence Act does not mandate a confrontation in all circumstances where it would not be reasonable to have held an identification parade. In circumstances like the present, there is no evidential value in having the witness confirming the identity of the person whom they already have identified, at a subsequent identification parade or identification procedure. The subsequent identification procedure far from adding anything to the identification already made, could positively mislead the jury in thinking that the subsequent identification parade confirmed the identity of the accused as the person who committed the crime. This principle is also applicable to whether a confrontation should be conducted after a witness has already made an unequivocal identification of the accused. The learned judge took full cognisance of the dictates of section 100, conducted a voir dire and satisfied himself of the quality of the identification. He considered the proper construction of section 100(5) and concluded that section 100 does not make a hierarchical scheme of identification procedure mandatory. Accordingly, the learned judge did not err in his application of section 100.

Section 100 of the **Evidence Act** Chapter 4.15 Revised Laws of Saint Lucia, 2019 applied; **Solicitor for Public Prosecutions (NSW) v Aaran Walford** [2011] NSWSC 759 considered; **Aaran Walford v Director of Public Prosecutions (NSW)** [2012] NSWCA 290 considered; **The Queen v D** [2008] ACTSC 82 considered.

2. The Court of Appeal in *Earl Hunte v The Queen* was not required to address the issue of whether subsection 100(1)(a)(ii) should be construed as mandating the conducting of a confrontation in circumstances where it was determined that it was not reasonable to conduct an identification parade. Accordingly, the learned judge was not bound by the principles in *Earl Hunte v The Queen* in determining whether a confrontation was mandatory in the circumstances.

Earl Hunte v The Queen [2011] ECSCJ No. 4 (delivered 19th January 2011) distinguished.

3. A perusal of the summation shows that the learned judge adequately complied with the mandatory stipulations of subsections 2 and 3 of section 102 of the Evidence Act. He highlighted that the directions related to the reliability of the evidence and emphasised that there was no other evidence connecting the appellants to the crime except the identification evidence. He warned the jury that they could only act on

the identification evidence of either Talbert or Bellasse, assuming they found it credible and believable, if they find as a fact there is some special circumstance that tends to support the identification. The trial judge also gave the requisite Turnbull direction. Accordingly, the learned judge did not fail to adequately direct the jury pursuant to section 102 of the Evidence Act.

Section 102 of the **Evidence Act** Chapter 4.15 Revised Laws of Saint Lucia, 2019 applied; **Gerald Joseph v The Queen** [2007] ECSCJ No. 3 (delivered 15th January 2007) considered.

4. When viewed in the context of the entire summation, the learned judge adequately cautioned the jury in relation to how to treat with the contradictory evidence of Talbert. The jury received guidance as to how to treat with the issue of credibility of the witness and what weight to attach to his evidence if they believed him to be a witness of truth, having regard to his testimony that he had identified the appellants on the night in question. The learned judge adequately warned the jury of the danger of convicting on the basis of the unreliability of identification evidence in accordance with section 136(2) of the Evidence Act and adequately warned of the dangers of the contradictory evidence given by Talbert. In the circumstances ground 4 failed.

Section 136 of the **Evidence Act** Chapter 4.15 Revised Laws of Saint Lucia, 2019 applied.

5. The discharge of a jury is a matter of discretion and evaluation by the trial judge. Discharging a jury is a serious matter and must not be lightly done. A jury should not be discharged unless a high degree of need arises, resulting in undue prejudice to the accused, which cannot be cured by an appropriate direction to the jury. The trial judge addressed the issue of what Bellasse said about being scared and would have been of the opinion that the evidence would not result in unfairness or undue prejudice to the appellants. He was well placed to make that determination having the advantage of knowing the atmosphere of the case and the way in which the evidence later complained of appeared in court at the time. It cannot be said that the trial judge exercised his discretion wrongly in not discharging the jury. There is no real possibility or danger that the jury would have been prejudiced against the appellants. Neither can it be said that the trial was unfair to the appellants as a consequence of which the conviction would be unsafe.

Mitcham v The Queen [2009] UKPC 5 followed; **R v Lawson** [2005] EWCA Crim 84 considered;

6. The learned judge considered the statutory principles of sentencing and the individual circumstances of each defendant as disclosed in their pre-sentence reports. Although the judge considered an appropriate starting point, he found that in the case before him, starting points may become irrelevant when the offence is so serious in the context of its aggravation that no other punishment is appropriate other than a term of life imprisonment. The learned judge was guided by the principle in *Desmond Baptiste and others v The Queen* that the weight to be attached to the

fact that an offender was a first – time or young offender, would be of less relevance the more serious the offence. Accordingly, it cannot be said that the learned judge erred in law or principle in imposing the sentence of life imprisonment.

Desmond Baptiste and others v The Queen [2004] ECSCJ No. 350 (delivered 6th December 2004) followed.

JUDGMENT

- [1] **BAPTISTE JA:** Curlan Joseph (“Curlan”) and Clinton Gilbert (“Clinton”), together (“the appellants”), have appealed their conviction and sentence of life imprisonment for non-capital murder of Richard Augustine (“Augustine”). The prosecution’s case was predicated on a joint enterprise in which the appellants shot and killed Augustine on 31st December 2005, while he was seated with some friends under a lamp post. Curlan walked up to him with a firearm and fired about seven shots in his face. Augustine got up and tried to run away. Clinton ran after him, saying he was going to finish him, and shot him in the back with a twelve-gauge shotgun, shooting Curlan in the process. Augustine fell and Clinton hit him in the head several times with the butt of the gun; he was pronounced dead on the spot.
- [2] The following morning, eyewitnesses to the shooting – Lincoln Phillip and Garvin Bellasse - gave statements to Corporal Labadie, containing a complete identification of the appellants by name as the persons who had shot Augustine. The next day, another eyewitness Nathalbert Joseph (“Talbert”), gave a statement also identifying the appellants as the individuals who shot and killed Augustine.
- [3] The prosecution’s case depended heavily on the evidence of Talbert and Garvin Bellasse (“Bellasse”), who in their evidence identified each of the appellants as the two persons who came up to the deceased and fired the shots at him. There is no other evidence tying the appellants to the murder. The defence challenged the credibility of the witnesses and asserted that they were mistaken and were not telling the truth.

[4] In the court below, before the trial started, counsel for the appellants applied to exclude the identification evidence on the basis that the prosecution had failed to comply with section 100 of the **Evidence Act**¹ and the Court of Appeal's judgment in **Earl Hunte v The Queen**.² At the voir dire, the investigating officer Athanatius Mitchell ("Mitchell"), tendered the statements of the eyewitnesses.

[5] Ramdhani J considered that Talbert had known both appellants for approximately 20 years, and that Bellasse had known them for about 20 years and had attended primary school together with them. The learned judge questioned Mitchell as to why he did not conduct an identification parade. He responded thus:

"My Lord, I took into consideration the length of time that the Witness knew the Defendants, the lighting conditions - - ... - - from which they were able to identify and see the Defendants approaching and coming towards them, My Lord, no obstruction - - ... - - some of them went to school together with the Defendants, My Lord ... A Witness saw them growing up as young boys, My Lord - -"

[6] Ramdhani J considered the evidence, heard submissions on admissibility from both sides and ruled the identification evidence admissible. He distinguished **Earl Hunte** on the basis that Edwards JA had not addressed the issue which fell for determination, namely, whether upon a proper construction of section 100 of the **Evidence Act**, subsection 5 made a confrontation procedure mandatory in circumstances where it was not reasonable to have conducted an identification parade. The learned judge gave a purposive construction of section 100(5) and ruled that there was no:

"mandatory requirement [to conduct a confrontation] if the police could have shown this court that one was not, would not have served any useful purpose and the other measures would not have also served any useful purpose then, the police would have been entitled to disregard them. ... I find that the investigating officer has made out quite a good case for the reasons he has presented to this court for avoiding one."

¹ Chapter 4.15 Revised Laws of Saint Lucia, 2019.

² [2011] ECSCJ No. 4 (delivered 19th January 2011).

He accordingly ruled the identification evidence of the eyewitnesses admissible in the trial, thus informing some of the grounds of appeal against conviction.

[7] The appellants filed five grounds of appeal against conviction, and joint submissions in support. Grounds 1 and 2 are related and will be considered together. These grounds respectively allege that (1) the learned judge erred in the application of section 100 of the **Evidence Act** and (2) in the application of the binding precedent of **Earl Hunte**. The gravamen of the complaint in relation to these grounds is that the judge allowed the prosecution to lead evidence of identification in the absence of an identification parade or any of the hierarchical identification procedures prescribed by the **Evidence Act**, including a confrontation as mandated by the **Evidence Act**.

[8] Counsel for the appellants posited that the prosecution's case was based solely on identification evidence and complained that the evidence was admitted contrary to section 100 of the **Evidence Act** without which, no jury properly directed could have returned a verdict of guilty to murder. Counsel argued that the provisions of section 100 are mandatory and do not grant the court any discretion. A confrontation is mandatory. The court erred in importing into the **Evidence Act** a discretion that does not exist in respect of the application of section 100(5). Counsel further contended that there is no ambiguity in the wording of the section and as such it was not open to the learned judge to 'legislate in [his] judicial capacity' by reading down section 100(5). The specific wording of subsection 5 of section 100, mandates that a confrontation be held. By reading down subsection 5, the judge acted outside his judicial function. Further, the learned judge was bound by Court of Appeal judgment in **Earl Hunte** which had concluded that the hierarchical identification scheme was mandatory.

[9] Counsel stated that at no material time was there a description of the appellants by the witness Bellasse, who was allowed to adduce identification evidence at the trial. The learned judge did not address his mind to the failure of the investigating officer

to conduct or even approach the appellants to participate in an identification parade. In the premises, it was submitted that the judge erred in law in failing to address the failure of the investigating officer to comply with the relevant section and erroneously read down subsection 5 of section 100 of the **Evidence Act** in deciding that identification evidence could be admitted. In the premises, counsel submitted that the evidence was inadmissible.

[10] Mrs. Tanya Alexis-Francis, counsel for the respondent, contended that the main issue raised by grounds 1 and 2 engages the proper construction and application of section 100, namely, whether subsection 5 thereof made a confrontation procedure mandatory in circumstances where, as in the instant case, it was not reasonable to have conducted an identification parade. Counsel submitted that on a proper construction of section 100, it was not necessary in the instant case to have conducted an identification parade nor was there a requirement for there to be a confrontation.

[11] I agree with Mrs. Alexis - Francis' identification of the main issue and the importance of a proper construction of section 100 in its resolution. Section 2 of the **Evidence Act** defines identification evidence in relation to criminal proceedings to mean, evidence that is –

“(a) an assertion by a person to the effect that a defendant was, or resembles a person who was, present at or near a place where –

(i) the offence for which the defendant is being prosecuted was committed, or

(ii) an act that is connected with that offence was done, or about the time at which the offence was committed or the act was done, being an assertion that is based wholly or partly on what the first-mentioned person saw, heard or otherwise noticed at that place and time; or

(b) a report, whether oral or in writing, of an assertion as mentioned in paragraph (a);”

[12] Subsection (1) of section 100 of the **Evidence Act** provides that:

“Identification evidence adduced by the prosecutor is not admissible evidence unless –

(a) either -

(i) an identification parade that included the defendant was held before the identification was made, or

(ii) it would not have been reasonable to have held an identification parade and subsection (5) applies; and

(b) the identification was made without the person who made it having been intentionally influenced to make it.”

[13] Subsection (2) states:

“Without limiting subsection (1), the matters to be taken into account in determining whether it was reasonable to hold an identification parade as mentioned in that subsection include-

(a) the kind of offence and the gravity of the offence concerned;

(b) the importance of the evidence;

(c) the practicality of holding such an identification parade, having regard, among other things –

(i) to whether the defendant refused to co-operate in the conduct of the parade, and to the manner and extent of, and the reason, if any, for, the refusal; and

(ii) in any case, to whether the identification was made at or about the time of the commission of the relevant offence; and

(d) the appropriateness of holding such an identification parade, having regard, among other things, to the relationship, if any, between the defendant and the other person who made the identification.”

[14] Subsection (5) states:

“Where it would not have been reasonable for an identification parade to be held and a group identification, video film identification or in the case where neither was practicable, a confrontation was held, the identification evidence is admissible.”

- [15] The Saint Lucia **Evidence Act** is derived from the New South Wales Evidence Act of 1995. In construing section 100 of the **Evidence Act** of Saint Lucia, useful guidance is obtained from cases construing section 114 of the Evidence Act of New South Wales 1995. Section 114 is in terms similar to section 100 of the Saint Lucia **Evidence Act**.
- [16] In **The Queen v D**³ at paragraphs 45 and 46, Penfold J explained the starting assumption of section 114 (2) (a) of the Evidence Act of New South Wales, in terms with which I concur and apply to section 100 of the **Evidence Act** of Saint Lucia. In that regard, the starting assumption in section 100(1)(a)(ii) is that ideally identification evidence should have been tested through an identification parade before it is given in court, is qualified by, among other things, a recognition that in certain circumstances it would not be reasonable to hold an identification parade. As illustrated in this case.
- [17] The scheme of section 114 of the Evidence Act was addressed by Davies J in **Solicitor for Public Prosecutions (NSW) v Aaran Walford**⁴ at paragraph 36 and referred to with approval by Hoeben JA at paragraph 50 in **Aaran Walford v Director of Public Prosecutions (NSW)**.⁵ Davies J stated at paragraph 36:
- “In my opinion the scheme of the section [114] is understood by looking to when the ‘identification’ is first made by the witness. In that regard the ‘identification’ is to be contrasted with the ‘identification evidence’. If the witness has made an out-of-court identification it is at that time at which the reasonableness of holding the identification parade is to be considered. If the identification is made at or about the time of the commission of the offence the Court will have to consider whether it was not reasonable to have held a parade. If the identification was made at the time of the commission of the offence (e.g. a witness telephoning the police and identifying the person), it will clearly not have been reasonable to hold a parade because it will not have been practicable to do so.”

³ [2008] ACTSC 82.

⁴ [2011] NSWSC 759.

⁵ [2012] NSWCA 290.

[18] In **Aaran Walford v Director of Public Prosecutions (NSW)** in opining on section 114, Hoeben JA stated at paragraph 55:

“I have concluded that the word ‘identification’ as used in s 114 (2) (a) does not refer to the giving of visual identification evidence in court but to ‘the act of identifying the defendant in some way as the person whom the witness could link in some way to the offence (that is making an assertion of the kind described in paragraph (a) of the definition of ‘identification evidence’ in the dictionary to the Evidence Act)’...”⁶

In the present case, it would be an assertion of the kind described in section 2, paragraphs (a) and (b) of the **Evidence Act** of Saint Lucia.

[19] Does subsection 5 of section 100 of the **Evidence Act** make a confrontation procedure mandatory in circumstances where, as in the instant case, it was not reasonable to conduct an identification parade? The appellant’s position is that on a literal construction of section 100(1)(a)(ii), an identification parade must be held unless it is unreasonable to do so. Finding that it was not reasonable to hold an identification parade, subsection 5 is triggered and mandates the police officer to conduct a confrontation. It is only after conducting the confrontation that the identification evidence would be admissible.

[20] Mrs. Alexis-Francis contended that the phrase ‘and subsection 5 applies’ qualifies the application of section 100(5). In that regard, she submits that not every finding that it was not reasonable to have held an identification parade triggers the requirement of a confrontation. There has to be a further consideration of whether the circumstances are such so as to warrant the application of subsection 5. In my judgment, there is much force in these submissions.

[21] Prosecution witnesses had made a complete identification of the appellants at the scene of the crime as he was well known to them. It was never disputed that the witnesses knew the appellants. As a basic rule, an identification parade should be held whenever it would serve a useful purpose. Plainly, it serves a useful purpose

⁶ See R v D [2008] ACTS 82 at para. 12.

whenever the police have a suspect in custody, and a witness with no previous knowledge of the suspect saw him commit the crime. The normal function of an identification parade is to test the accuracy of the witness' recollection of the person whom he says he saw commit the offence. An identification parade would serve no useful purpose if it were accepted or incapable of serious dispute that the accused was known to the identifying witness.⁷

[22] I do not construe subsection 5 of section 100 as mandating a confrontation in all circumstances where it would not be reasonable to have held an identification parade. In circumstances like the present, there is no evidential value in having the witness confirming the identity of the person whom they already have identified, at a subsequent identification parade or identification procedure. The subsequent identification procedure far from adding anything to the identification already made, could positively mislead the jury in thinking that the subsequent identification parade confirmed the identity of the accused as the person who committed the crime. This principle is also applicable to whether a confrontation should be conducted after a witness has already made an unequivocal identification of the accused.

[23] Ramdhani J took full cognisance of the dictates of section 100, conducted a voir dire and satisfied himself of the quality of the identification. He considered the proper construction of section 100 subsection 5 of the **Evidence Act** and concluded that section 100 does not make a hierarchical scheme of identification procedure mandatory. I agree.

[24] In **Earl Hunte**, Edwards JA stated at paragraph [18]:
“Section 100 of the Saint Lucia [Evidence] Act promotes the holding of identification parades where it is reasonable and practicable to hold one for the purpose of having a witness to a crime identify the person suspected of committing the crime. It identifies several matters to be taken into account by a court in determining whether it was reasonable and practicable to hold an identification parade. It sanctions the identification procedure of

⁷ See R v Popat [1998] 2 Cr. App. R 208.

‘confrontation’ only where holding an identification parade would not have been reasonable; and a group identification or video film identification was not practicable. It also provides for the management of evidence relating to the issue of identification at trial.”

[25] Counsel argued that the learned judge was bound by **Earl Hunte**. The Crown properly pointed out that the Court of Appeal in **Earl Hunte** was not required to address the issue of whether subsection 100(1)(a)(ii) should be construed as mandating the conducting of a confrontation in circumstances where it was determined that it was not reasonable to conduct an identification parade. This, in my view, provides an adequate answer to the appellants complaint. This ground accordingly fails.

[26] For the reasons given, grounds 1 and 2 are dismissed.

[27] Ground 3 of the grounds of appeal alleges that the judge failed to adequately direct the jury pursuant to section 102 of the **Evidence Act** to exercise caution in relation to the identification evidence especially where the only evidence against the appellants was identification evidence.

[28] Counsel for the appellants argued that although the judge addressed the danger of convicting the appellants under section 102 of the **Evidence Act**, he did not adequately address the danger of convicting the appellants on the basis of identification evidence alone.

[29] Mrs. Alexis-Francis submitted that the judge gave adequate warning to the jury and complied with the mandatory stipulations of subsections 2 and 3 of section 102.

[30] Section 102(1) of the **Evidence Act** provides:

“Where identification evidence has been admitted, the judge shall inform the jury that there is a special need for caution before accepting identification evidence and of the reasons for the need for caution, both generally and in the circumstances of the case.”

[31] In particular, the judge shall warn the jury that it should not find, on the basis of the identification evidence, that the defendant was a person by whom the relevant offence was committed unless there are, in relation to identification, special circumstances that tend to support the identification; or there is substantial evidence, not being identification evidence, that tends to prove the guilt of the defendant and the jury accepts that evidence.

[32] Special circumstances referred to in section 102(2) are set out in section 102(3) and include –

- (a) the defendant being known to the person who made the identification;
or
- (b) the identification having been made on the basis that the quality of the identification is good.

Section 102(4) states:

“Where –

- (a) it is not reasonably open to find the defendant guilty except on the basis of identification evidence; or
- (b) there are no special circumstances of the kind mentioned in subsection (3),

the judge shall direct the defendant be acquitted.”

[33] In **Gerald Joseph v The Queen**,⁸ Rawlins JA stated that when giving the warning pursuant to section 102, the trial judge is required to give full Turnbull directions, which are in part subsumed under section 102(1), in addition to the full warning mandated by sections 102(2) and (3) of the **Evidence Act**.

[34] Ramdhani J began his warning by stating to the jury that where the case against the defendants depends wholly or substantially on the correctness of one or more identifications of the defendant which the defence allege to be mistaken, there is a

⁸ [2007] ECSCJ No. 3 (delivered 15th January 2007).

special need for caution before convicting in reliance of the correctness of the identification evidence.

[35] The learned judge gave the standard Turnbull directions and directed as follows:

“The reason for this is that it is quite possible for an honest witness to be a mistaken witness, and to make a mistake in identification and notorious miscarriages of justice have occurred as a result; for this reason, a mistaken witness can be a convincing one and even a number of apparently convincing witnesses can be mistaken. You must, therefore, examine carefully, the circumstances in which the identification of - - by each witness was made...”

[36] Ramdhani J underscored that there was no other evidence connecting each of the appellants to the crime except the identification evidence of one or more witnesses. In that regard, he warned the jury that they could only act on the identification evidence of either Talbert or Bellasse, ‘assuming [they] find it credible and believable, if [they] find as a fact there is some special circumstance, that tends to support the identification’.

[37] The learned judge considered section 102(3) and directed the jury that a special circumstance would be satisfied if they found after examining the case against each appellant that both appellants were known to the witness. The judge went through the evidence of each witness and directed the jury to consider how well they knew each appellant having regard to the length of time they had known them, the nature of the relationship and how often they had seen them. The learned judge also highlighted the circumstances which could affect reliability. In that regard he referred to matters such as the length of time of the observation, how long did the witness have the person under observation, the conditions existing at the time, and whether there was anything interfering with their vision.

[38] A perusal of the summation shows that Ramdhani J adequately complied with the mandatory stipulations of subsections 2 and 3 of section 102 of the **Evidence Act**. He was required to and gave the warnings mandated by section 102(2) and (3) of the **Evidence Act**. He highlighted that the directions related to the reliability of the

evidence and emphasised that there was no other evidence connecting the appellants to the crime except the identification evidence. He warned the jury that they could only act on the identification evidence of either Talbert or Bellasse, 'assuming [they] find it credible and believable, if [they] find as a fact there is some special circumstance, that tends to support the identification'. The trial judge also gave the requisite Turnbull direction. Ground 3 accordingly fails.

[39] Ground 4 states that the learned judge failed to adequately direct the jury as regards Talbert's contradictory identification evidence. Learned counsel complained that Talbert was allowed to give identification evidence in respect of the appellants, despite having deposed at the preliminary inquiry that he could not identify anyone who participated in the shooting. Such evidence being more prejudicial than probative contrary to section 136 of the **Evidence Act**.

[40] Essentially, the complaint is that the learned judge (i) failed to adequately warn the jury of the danger of convicting on the basis of the unreliability of identification evidence in accordance with section 136(2) of the **Evidence Act** and (ii) the warnings given did not adequately warn of the dangers of the contradictory evidence given by Talbert.

[41] Counsel contended that the jury should have been specifically directed in respect of the witness Talbert whose evidence at the preliminary inquiry contradicted what he gave at the trial; and that his evidence at the trial was such that it would be unsafe to convict based on the identification evidence. Further, the contradictory evidence raised issues of credibility and reliability of the evidence he gave at the trial. In particular, specific warnings pursuant to section 136 should be given as regards the identification evidence at the trial. Counsel submitted that the judge should have directed the jury not to take Talbert's evidence into account in arriving at their verdict as it was unsafe to do so.

- [42] The issue with respect to Talbert's evidence arose because at the preliminary inquiry, he stated inter alia that he did not see Richard Augustine that night, he knows Scarla (Richard Augustine) and he did not see Scarla on the night in question. During cross-examination at the trial, Talbert denied telling the magistrate that he did not see Augustine that night.
- [43] Mr. David P. Moyston argued that the fact that Talbert's evidence at the trial flatly contradicted the evidence he gave at the preliminary inquiry automatically raised questions about his credibility and the reliability of the evidence he gave at the trial. Mr. Moyston submitted that in the circumstances, the judge should emphasise that Talbert was contradicting himself with what he said in the magistrate's court. He should also have directed the jury not to take Talbert's evidence into account in arriving at their verdict as it was unsafe to do so. Further, specific warnings pursuant to section 136 of the **Evidence Act** should have been given as regards the identification evidence given at trial.
- [44] Mrs. Alexis-Francis submitted that Talbert's contradictory evidence was an issue which went to his credibility and the judge adequately directed the jury on the issue.
- [45] In addressing the jury on the issue as to whether they could believe Talbert's evidence, Ramdhani J stated that they would have to consider that at the High Court trial, he told them what he saw, the shooting, the running. He reminded the jury that Talbert accepted that his signature was on the deposition which contained that he did not see the shooting, nor did he see Augustine. The judge stated that the two things are contradictory. Ramdhani J told the jury that if they found that Talbert said something completely contradictory to the magistrate than what he said at the High Court trial, they would be faced with a witness who in two separate courts has said two separate things.
- [46] The learned judge directed:
- "But, Talbert Joseph, you may believe, went to the Magistrates court and said ... he didn't see a shooting and didn't see the Deceased for the night,

and then comes to this court, and he tells you he saw everything. So here is a man you may very well find, who has first said he saw everything, second in the Magistrates Court, under oath said he saw nothing, if you believe that he did say these things in the Magistrates Court, and thirdly in this court telling you that he saw everything. ... you will have to decide ... whether this is a man, who you can believe, who you can trust his evidence, that he is telling you the truth, because, if you decide that, Mr. Talbert Joseph is not telling you the truth, as he stood there in the box, then, you are to reject his evidence completely and forget all about it.”

In continuing his direction, Ramdhani J stated:

“It is only if you believe that, notwithstanding, if you accept that he said this to the Magistrate, that you still find him a witness of truth in this courtroom swearing on oath, that you can act on his evidence; yes? You have to decide that issue; you have to decide; can I believe that, Mr. Talbert Joseph is speaking the truth about what he saw that night. ... that is something you have to decide; do I believe he is speaking the truth of what he said in this courtroom; so, that’s a matter of credibility.”

[47] With respect to the contrary evidence of Talbert, the learned judge directed the jury to consider whether he was telling the truth, and whether they can rely on his evidence. If they believe that he said something different in the magistrate’s court, look at it and consider whether he is telling the truth in this court when he gave his evidence. The learned judge directed that if the jury are in doubt as to whether he is telling the truth and:

“if [they] decide that, Talbert Joseph is not telling [them] the truth ... then, [they] are to reject his evidence completely and forget all about it. It is only if [they] believe that, notwithstanding, if [they] accept that he said this to the Magistrate, that [they] still find him a witness of truth in this courtroom swearing on oath, that [they] can act on his evidence.”

[48] Mrs. Alexis–Francis recognised that where a witness makes a previous inconsistent statement this affects his credibility. Counsel submitted and I agree, that when viewed in the context of the entire summation, the learned judge adequately cautioned the jury in relation to how to treat with the contradictory evidence. The jury received guidance as to how to treat with the issue of credibility of the witness and what weight to attach to his evidence if they believed him to be a witness of

truth, having regard to his testimony that he had identified the appellants on the night in question.

- [49] Section 136(1) of the **Evidence Act** provides a non-exhaustive list of evidence of a kind that may be unreliable. The list includes evidence of identification. Section 136(2) stipulates the content of the warning. It states that:

“Where there is a jury the Judge shall, unless there are good reasons for not doing so –

(i) warn the jury that the evidence may be unreliable;

(ii) inform the jury of the matters that may cause it to be unreliable; and

(iii) warn the jury of the need for caution in determining whether to accept the evidence and the weight to be given to it.”

Section 136(3) provides:

“It is not necessary that a particular form of words be used in giving the warning or information.”

- [50] The respondent submits, and I agree, that the learned judge warned the jury that identification evidence may be unreliable. He then informed the jury of the matters that may cause the evidence to be unreliable in relation to the appellant Curlan. After concluding the identification evidence given by the witnesses in relation to Curlan, the judge cautioned the jury in determining whether to accept the evidence and the weight to be given. The judge directed the jury:

“ ... when you have looked at that evidence, and you’ve assess the identification evidence, because you’re only entitled to act on it if you consider that it is reliable, because if you think it is not reliable, and that the witness may have been mistaken, or that the circumstances of the identification is such to make you doubt its correctness then you are to leave it alone, and if you leave it alone ... assess each witness separately, assess Talbert Joseph, and then assess, Garvin Bellasse[e]. If you end up, being unsure of both these witnesses, you are to reject it, and return a not guilty verdict for Curlan Joseph.”

- [51] Ramdhani J further directed:

“If you examine Talbert’s Joseph’s (sic) Evidence and you are unsure about it, leave it alone, in relation to the identification. If you go on to Garvin Belasse, and you are unsure about it, then leave it alone, in which case this

man must go home. If you look at any of these witnesses and you are satisfied, that any one of them is telling you the truth ... and you think that the evidence is reliable, that the identification is correct, and there's no mistake, then you can act on it in this case to return a verdict of guilty once you are satisfied of the other elements."

In relation to Curlan, the learned judge highlighted the matters that may have made the identification evidence unreliable. He also gave a similar caution on determining whether to accept the evidence and the weight to be given. He advised them that they would be required to embark upon a similar exercise in relation to Clinton.

[52] I am of the view that the learned judge adequately warned the jury of the danger of convicting on the basis of the unreliability of identification evidence in accordance with section 136(2) of the **Evidence Act** and adequately warned of the dangers of the contradictory evidence given by Talbert. In the circumstances ground 4 fails.

[53] Ground 5 asserts that Ramdhani J failed to consider whether the trial should have been aborted when the prosecution witness Bellasse intimated that the reason for him mistakenly saying that the men he saw on the night in question were masked was because he was afraid. Bellasse's initial evidence was that he could not tell who shot Augustine as the persons were wearing masks. The following day he said he made a mistake in respect of his earlier evidence where he said he could not identify any of the shooters and ascribed this mistake to his being 'scared'. Counsel contended that this assertion was more prejudicial than probative, contrary to section 115 of the **Evidence Act**.

[54] Mr. Moyston submitted that Bellasse, by saying he made 'a mistake' when he on 21st October 2014 stated that he did not recognise either of the alleged shooters, only to return the next day to identify the appellants as the shooters because he was, in his words, 'afraid', by inference implying that the appellants were responsible for his fear.

- [55] Counsel argued that the statement to the effect that Bellasse was 'afraid' without more had, in the circumstances of the evidence adduced in the case, no probative value whatsoever and was extremely prejudicial. It could lead the jury to speculate that it was the appellants who were the source of this fear by their acts or omissions that lead to his fear. Mr. Moyston submitted that the whole question of fear is crucial in this matter and the learned judge did not adequately deal with it. Mr. Moyston submitted that Ramdhani J ought to have warned the jury not to jump to any conclusion in respect of fear, moreso, as that issue of fear was never raised at the trial.
- [56] In a nutshell, the appellants argued that Ramdhani J failed to consider whether or not the trial should have been aborted when Bellasse intimated that the reason for him mistakenly stating that the men he saw on the night in question were masked was because he was afraid. They argued that it was prejudicial and incapable of being cured by the directions the judge gave. The appellants rely on **The Queen v Marvin William**⁹ as the authority for the proposition that a mistrial should be ordered where evidence is adduced during the trial which cannot be cured by a direction by the presiding judge.
- [57] Mrs. Alexis-Francis submitted that the question of the abortion of a trial or the discharge of a jury ought to have been raised at first instance before the trial judge as he is best placed to make that determination. Further, where there was no application to abort the trial, it is only in exceptional circumstances that an appeal court would interfere with the exercise of a judge's discretion to continue the trial.
- [58] Mrs. Alexis-Francis pointed out that after Bellasse made the statement about the masked men, the judge immediately adjourned the matter to the following day. The following day, Bellasse said that he had made the statement because he was scared. Learned counsel stated that no application was made by defence counsel to discharge the jury because of the potential prejudice. Counsel submitted that

⁹ SLUCRD2009/0479 (delivered 11th February 2013, unreported).

were this done, it would have given the judge the opportunity to hear submissions on the real danger of prejudice as averted to by the appellants. Learned counsel also pointed out that before summing up, the learned judge sought the input of counsel as to the possible warnings to be given regarding the evidence led during the course of the trial. Mrs. Alexis-Francis argued that it was never raised that the offending statement created a special need for caution or direction or that it was so prejudicial that a continuation of the trial would have been unfair and would render a conviction unsafe. Further, there was no application made to discontinue the trial on that basis.

[59] Learned counsel, Mrs. Alexis-Francis, submitted that the judge would have been satisfied that having regard to the atmosphere in the trial and the jury's reaction to the offending statement, that it was possible to cure any potential prejudice with a warning and for the jury to return with a fair verdict. Also, the judge's direction to the jury in relation to Bellasse's statement in the context of the entire summation, though succinct, was adequate to dispel any potential prejudice.

[60] Ramdhani J directed the jury to look at Bellasse's evidence and consider what he said about the masked men the first time and what he said the next day and his explanation of being scared. The judge said that some people change their mind for all sorts of reasons and continued by saying:

"As the prosecution has said to you, it's a very frightening thing to come sometimes in this court and give evidence; people sit down there, silently and they get scared, much less when they have into (sic) the witness box. This is a serious matter, the Prosecution is saying ... that the witness said that they're scared, that is a reason that you can hold on to, to explain why he told you about mask the first time, and the second time he's saying I saw people; overnight he got his courage back; yes this is what the Prosecution is saying; it is a matter for you to consider. Think about it carefully and decide whether you can rely on this evidence..."

[61] All counsel advanced their positions as to whether the judge erred in not discharging the jury. Counsel for the appellants advocated in favour of discharging while Mrs. Alexis-Francis submitted that this ground is devoid of merit and should be

dismissed. The authorities relating to the matter as to whether a jury should be discharged will now be considered.

[62] The correct approach was enunciated by the Privy Council in **Mitcham v The Queen**¹⁰ at paragraph 14. In giving the advice of the Board, Lord Carswell stated:

“Once a matter has been referred to in the presence of the jury which could give rise to possible prejudice, the trial judge has a choice of courses open to him. He could elect to take no action, on the basis that the matter was insufficient to create a degree of prejudice which would make the trial unfair and that to refer to it again would only draw attention to it. He could at the appropriate stage or stages give the jury a warning to disregard what was said, if he considers that that would be sufficient to minimise the prejudice and prevent the trial from being unfair. Finally, he could decide to discharge the jury, if he considers that there is prejudice which would make the trial potentially unfair and that warnings would not diminish it to a sufficient extent. He should give consideration to the course which he should take, even if counsel have, for whatever reason, not asked for the jury to be discharged or even submitted that he should not do so... It is a decision which lies within the discretion of the trial judge, and an appellate court will not interfere with a decision made by him about the proper conduct of the case, unless satisfied that it was wrong and that the trial was unfair to the Defendant, in consequence of which the conviction would be unsafe and in contravention of ... the constitution ... It is always relevant for an appeal court to bear in mind that the trial judge had the advantage of knowing the atmosphere of the case and the way in which the matter later complained of appeared in court at the time. “

[63] In **R v Lawson**¹¹ at paragraph 65, Auld LJ set out the applicable principles in relation to a case concerning the improper admission of potentially prejudicial evidence. He stated:

“Whether or not to discharge a jury is a matter for evaluation by the trial judge on the particular facts and circumstances of the case, and this court will not lightly interfere with his decision. It follows that every case depends on its own facts and circumstances, including:

- 1) the important issue or issues in the case;
- 2) the nature and impact of the improperly admitted material on that issue or issues, having regard, inter alia to the respective strengths of the Prosecution and Defence cases;

¹⁰ [2009] UKPC 5.

¹¹ [2005] EWCA Crim 84.

- 3) the manner and circumstances of its admission and whether and to what extent it is potentially unfairly prejudicial to a defendant;
- 4) the extent to and the manner in which it is remediable by judicial direction or otherwise, so as to permit the trial to proceed.

We repeat, all these matters and their combined effect are very much an evaluative exercise for the trial judge in all circumstances of the case. The starting point is not that [the jury should be discharged] whenever something of this nature is put evidence through inadvertence. Equally, there is no sliding scale so as to increase the persuasive onus on a defendant seeking a discharge of the jury on this account according to the weight and length of the case or the stage it has reached when the point arises for determination. The test is always the same, whether to continue with the trial would or could, by reason of the admission of the unfairly prejudicial material, result in an unsafe conviction.”

[64] As indicated, the discharge of a jury is a matter of discretion and evaluation by the trial judge. Discharging a jury is a serious matter and must not be lightly done. A jury should not be discharged unless a high degree of need arises, resulting in undue prejudice to the accused, which cannot be cured by an appropriate direction to the jury.

[65] The trial judge addressed the issue of what the witness said about being scared and would have been of the opinion that the evidence would not result in unfairness or undue prejudice to the appellants. He was well placed to make that determination having the advantage of knowing the atmosphere of the case and the way in which the evidence later complained of appeared in court at the time. It cannot be said that the trial judge exercised his discretion wrongly in not discharging the jury. I am of the view that there is no real possibility or danger that the jury would have been prejudiced against the appellants. Neither can it be said that the trial was unfair to the appellants as a consequence of which the conviction would be unsafe. This ground is accordingly dismissed.

[66] Ground 6 alleges that the judge failed to apply the correct sentencing principles in sentencing the appellants to whole life with no account taken of the nine years spent

on remand; and more specifically, failed and or neglected to consider the individual circumstances of the appellants.

- [67] Counsel contended that by sentencing the appellants to life imprisonment the learned judge failed to take into account or give due weight to (i) rehabilitation as a principle of sentencing, (ii) mitigating factors like the appellants youthfulness – aged 20 and 22, (iii) the length of time on remand and (iv) the delay in the matter coming to trial. Rehabilitation must always be addressed even where the court considers a prolonged sentence of imprisonment is appropriate. Counsel argued that the learned judge addressed his mind wholly and solely to the principle of retribution to the exclusion of the other three principles of sentencing.
- [68] Counsel correctly identified the question whether a whole life sentence was appropriate, having regard to all the circumstances and the character of the appellants. He stated that it is only in exceptional cases that a sentencing court would not take into account time spent on remand, the youth of the defendant and other factors relative to him. Counsel submitted that the appellants should have a fixed term sentence, albeit for a lengthy period, taking into account the matter of delay in determining the sentence.
- [69] Mrs. Alexis-Francis submitted that the sentence could not be said to be disproportionate or arbitrary, nor was it unlawful. The judge concluded that the imposition of the maximum sentence of a natural life sentence was fair and just having regard to all the facts and circumstances surrounding the commission of the offence. Learned counsel submitted that sentencing is at the discretion of the judge who may impose such sentence as the circumstances of the crime and the aggravating and mitigating factors demand. Further, an appellate court should not substitute its discretion for that of the sentencing judge as long as the sentence is not outside of the generous ambit within which the discretion could have been exercised.

- [70] As pointed out by Mrs. Alexis-Francis, the learned judge considered the statutory principles of sentencing and the individual circumstances of each defendant as disclosed in their pre-sentence reports. He also considered the aggravating and mitigating factors of the offence. He found that ‘the [sole] mitigation generally, mitigating factors in this case would of be (sic) the fact that, two of you were generally without convictions’; but identified the aggravating factors as: a gang related killing; use of illegal firearms, a pistol and shotgun; killing carried out in a public place where other persons were present; the manner in which the offence was committed; and the time it occurred.
- [71] Further, the learned judge in his sentencing judgment considered the statutory principles of sentencing as informing the court’s determination as to the sentence in any given case. He considered the individual circumstances of each defendant as disclosed in the pre-sentence reports. Although the judge considered an appropriate starting point, he found that in the case before him, ‘starting points may become irrelevant when the offence is so serious in the context of its aggravation that no other punishment is appropriate other than a term of life imprisonment’.
- [72] The learned judge was guided by the principle in **Desmond Baptiste and others v The Queen**¹² that the weight to be attached to the fact that an offender was a first - time or young offender, would be of less relevance the more serious the offence.
- [73] In my view, the learned judge did not err in law or principle in imposing the sentence of life imprisonment. The ground of appeal against sentence is dismissed.
- [74] It is ordered that:
- (1) The appeal against conviction in respect of both appellants Curlan Joseph and Clinton Gilbert is dismissed and their convictions for non-capital murder affirmed.

¹² [2004] ECSCJ No. 350 (delivered 6th December 2004).

- (2) The appeal against sentence in respect of both appellants – Curlan Joseph and Clinton Gilbert is dismissed and the sentences of life imprisonment affirmed.

I concur.

Gertel Thom

Justice of Appeal

I concur.

Margaret Price-Findlay

Justice of Appeal

By the Court

Chief Registrar