

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

TERRITORY OF THE VIRGIN ISLANDS

BVIHCRA2017/0001

BETWEEN:

KENYATTA BOYNES

Appellant

and

THE QUEEN

Respondent

Before:

The Hon. Mr. Mario Michel
The Hon. Mde. Gertel Thom
The Hon. Mr. Paul Webster

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

Appearances:

Mr. Paul Taylor, QC for the Appellant
Mr. John Black, QC for the Respondent

2021: March 2;
2022: February 23.

*Criminal appeal — Appeal against conviction — Murder — Attempted murder — Identification evidence — Recognition evidence — Supporting Evidence — Admissibility of CCTV Evidence — Whether the judge failed to give directions pursuant to section 112 of Evidence Act/Turnbull guidelines – Whether direction as outlined in section 112 or in accordance with the **Turnbull** guidelines required in relation to inanimate object — Whether judge’s failure resulted in a substantial miscarriage of justice*

Mr. Kenyatta Boynes (“the appellant”) was tried and convicted of the murder of Paul Prentice and the attempted murder of Cadeem Thomas. He was sentenced to life imprisonment with eligibility for parole after 30 years imprisonment for the offence of murder and 10 years for the offence of attempted murder. Both sentences were to run concurrently.

The prosecution’s case was that on Sunday 14th December 2014 after 6.30 p.m., Cadeem Thomas and Paul Prentice were at Aaron’s Car Rental in Road Town when the appellant drove past in a grey minibus and looked at them. He then reversed into the car park and

drove off. Shortly after, Thomas heard gunshots and when he looked to his left, he saw a gunman standing directly in front of the car rental. The gunman was roughly 10 feet away. Thomas saw him for about 5 seconds. He described the gunman as being about 5'6" to 5'8", skinny with locks hanging down his back. His complexion was dark. Thomas could not see the gunman's face as it was covered with a white T-Shirt. However, his eyes were visible through the opening of the neck of the T-Shirt. Thomas recognised the eyes as those of the appellant who he had known for about two to three months and with whom he regularly socialized. After the gunman shot at Prentice and Thomas, he ran away. Prentice sustained injuries and died as a result. The appellant was charged with the murder of Prentice and the attempted murder of Thomas.

Kevin Gill who was at a neighboring ice cream parlor described the gunman as being about 6", skinny built wearing a black T-Shirt with a white T-Shirt covering his head. He saw the gunman for about 3 seconds but could not identify him.

The Crown further relied on images from CCTV from nearby buildings, in which a grey minibus was seen in the vicinity of the car rental on the day of the incident minutes before the shooting occurred. Thomas and two police officers DS Shortte and DC Bakker identified the grey minibus to be the Motions bus which the appellant occasionally drove. The appellant in his interview with the police stated that he drove the Motions bus on the day of the shooting but stated that at the time of the shooting the bus was parked at Boynes' welding. The Crown also led evidence of telephone data from the appellant's phone which showed that the telephone was used at 7:37 pm in the Road Town area contrary to the appellant's statement in his interview that the phone was at Cane Garden.

The appellant did not give evidence at the trial. He denied the prosecution's case; however, he raised the defence of alibi during his police interview. He claimed he was with his girlfriend at Sea Cows Bay at the time of the shooting. The jury accepted the prosecution's version of events and found the appellant guilty of murder and attempted murder.

The appellant appealed his conviction. He contended among other things, that the trial judge erred in that she failed to direct the jury properly in accordance with section 112 of the Evidence Act and the Turnbull guidelines, in relation to recognition evidence and supporting evidence, wrongly admitted evidence of CCTV images which were inadmissible and misdirected the jury in relation to the CCTV evidence.

Held: dismissing the appeal and affirming the appellant's conviction that:

1. A failure to fully comply with the provisions of section 112(1) of the **Evidence Act** would not automatically result in a conviction being quashed. The court is required to consider whether the safety of the conviction has been affected. Pursuant to section 112(1)(f) of the **Evidence Act** the judge is required to warn the jury that mistaken recognition can occur. The judge in so doing must identify not only the weaknesses in the evidence but also to the fact that mistakes could be made in recognition cases even of close relatives or friends. The judge is not required to use a specific form of words, however section 112(1)(f) requires the direction to

encompass both close relatives and friends. The learned judge's direction only made mention of close friends and in dealing with mistaken identity, the learned judge did not specifically stress that it occurred also in recognition cases, this omission however was not fatal, as the evidence was that Thomas and the appellant were close friends before the incident, he knew the appellant very well, they socialized with others and the learned judge gave a very detailed summary of the identification evidence including all of the weaknesses of the identification.

Section 112(1) of the **BVI Evidence Act** No. 15 of 2006, Laws of the Virgin Islands applied.

2. Sections 112(1)(g) and (h) of the **Evidence Act** require a judge to identify to the jury evidence which supports the identification of the accused, and where there is evidence which appears to support the evidence of identification of the accused, but it does not in fact possess the quality of supporting evidence, the learned judge is required to so direct the jury. Supporting evidence may support the identification fully or only in a limited way. The learned judge having identified the limited way in which Kevin Gill's evidence supported the identification evidence of Thomas and identified the aspects in which his evidence did not amount to supporting evidence, the criticism of the learned judge's direction on this issue is not well founded.

Section 112(1) of the **British Virgin Islands Evidence Act** No. 15 of 2006, Laws of the Virgin Islands applied; **R v Adejojo and another** [2013] EWCA 41 applied; **R v Gray** [2018] EWCA Crim 2083 applied.

3. Where the primary or sole challenge by a defendant to the identification evidence is the veracity of the identifying witness, and the issue of mistaken identity is not raised, the approach to be adopted is the learned judge is required to first direct the jury on the credibility of the accused and secondly on the reliability of the evidence. It is only in exceptional cases the warning should be entirely displaced with. The learned judge adopted the correct approach and directed the jury on the credibility of Thomas' evidence and on its reliability. In doing so the learned judge pointed out the various areas of weakness in the identification evidence.

Beckford and Shaw v R [1993] 42 WIR 291 applied; **Arthur Mills and Others v The Queen** [1995] 1 WLR 511 applied; **Capron v The Queen** [2006] UKPC 34 applied.

4. Section 112 (1) of the **Evidence Act** requires a judge to give the warning in relation to the evidence that identifies the accused as the person who committed the crime. Thomas' evidence that he saw the appellant driving the bus earlier in the evening was not evidence by which he identified the appellant as the gunman who shot the deceased and who shot at him. The learned judge was therefore not required to give an identification direction as outlined in section 112 or in accordance with the Turnbull guidelines in relation to the evidence of Thomas that he had seen the appellant driving the minibus earlier in the evening on the day of the shooting.

Section 112 (1) of the **BVI Evidence Act** No. 15 of 2006, Laws of the Virgin Islands applied.

5. Neither Section 112 of the Evidence Act nor a Turnbull direction is required in relation to an inanimate object which supports identification evidence. The learned judge therefore did not err when she omitted to give a section 112 warning in relation to the identification of the grey minibus in the CCTV images. However, it may be necessary in some cases for a judge to exercise his discretion and remind a jury of the circumstances in which the identification of the object was made.

Hampton and another v R [2004] EWCA Crim 2139 applied.

6. Evidence of identification based on CCTV images is admissible provided the person conducting the analysis is an expert in the field or has acquired special knowledge of the images by viewing them several times and has taken measures to safeguard the reliability of the evidence such as making contemporaneous notes of viewing, outline the methodology used and software used to enhance the images. The images must also be of good quality

R v Yaryare and others [2020] EWCA Crim 1314 followed.

7. It is well settled that a judge has a duty to ensure that a trial is conducted fairly and that duty includes preventing inadmissible evidence going before a jury. The omission of trial counsel's objection to admission of such evidence may impact whether the defendant was really prejudiced or the extent of the prejudice. Trial counsel did not object to the evidence of DS Shortte and DC Bakker in relation to the CCTV images. Further, it was not open on appeal to raise the issue of admissibility of the evidence as counsel cross-examined the witnesses on the evidence and urged the jury to consider the evidence carefully. Counsel also invited the jury to find that certain aspects of the evidence weakened the reliability of the identification evidence.

Phipson on Evidence; R v Hooks [1994] Lexis Citation 2034 considered.

8. The trial judge, in summarising DC Bakker's evidence in relation to the timings when the bus was seen in the CCTV images, misstated the evidence in the way she expressed it. However, the jury having heard the evidence, seen the CCTV footages and they were given the CCTV images to review whilst they deliberated on their verdict, could not have been misled as to what was the evidence. Consequently, the error on the part of the judge was not sufficient to render the conviction unsafe or unsatisfactory.
9. The duty of the trial judge is to put the case, including the defence, fairly before the jury; the judge is not obliged to reiterate all the points made by the prosecution or defence during the trial. The learned judge clearly outlined to the jury in the summation that the appellant's defence was alibi. The judge reminded the jury that

there was no burden on the appellant to prove the alibi but rather the burden was on the prosecution to disprove the alibi. The judge also urged the jury to carefully examine the interview of the appellant in which he raised the defence of alibi, the transcript of which was provided to the jury for them to consider during deliberation. The appellant's defence was there not undermined.

JUDGMENT

- [1] **THOM JA:** During the early evening of Sunday 14th December 2014, Paul Prentice ("Prentice") was shot dead in Road Town, Tortola. Cadeem Thomas ("Thomas") who was with him escaped unhurt. At the time of the shooting, they were at Aaron's Car Rental.
- [2] The appellant, Kenyatta Boynes, was charged with the murder of Prentice and attempted murder of Thomas. He pleaded not guilty to both charges. A jury unanimously convicted him of both offences. After a sentencing hearing, the appellant was sentenced to life imprisonment with eligibility for parole after 30 years imprisonment for the offence of murder and 10 years for the offence of attempted murder. Both sentences were to run concurrently.
- [3] The appellant appeals his conviction only.

The case for the Crown

- [4] The prosecution relied primarily on the testimony of the eyewitness Cadeem Thomas; Kevin Gill who at the time of the shooting was a patron of the Ice Cream parlor "La Dolce Vita" which is next door to Aaron's Car Rental; recordings from CCTV in the area; telephone data from the appellant's phone; and the appellant's interview with the police.
- [5] The prosecution's case was that the appellant, Thomas and Prentice were friends. Thomas had known the appellant for about two to three months prior to the shooting. Thomas saw the appellant daily. They socialized with others. The appellant often drove a maroon jeep and sometimes a grey minibus.

- [6] On 10th December 2014, the appellant met with Thomas at Aaron's Car Rental. At the time the appellant was driving the grey minibus. The appellant requested Thomas to keep a package for him. Thomas agreed and after the appellant left, Thomas partially opened the package and removed some of its contents which was marijuana. The amount Thomas removed was estimated at approximately US\$100.00.
- [7] The following day, 11th December 2014, the appellant collected the package from Thomas.
- [8] Thomas did not disclose to the appellant that he had taken some of the marijuana.
- [9] On 13th December 2014, the appellant informed Thomas that he knew what he had done and that he (Thomas) had to pay \$600. Further, if he did not comply, he would have to "pay twice".
- [10] On 14th December 2014, Thomas and Prentice were on the porch of Aaron's Car Rental. Prentice was closer to the steps. At around 6:30 p.m., they saw the appellant driving the grey minibus past the car rental from the direction of the Riteway Store. The appellant looked at Thomas and Prentice for about three to five seconds. The appellant was wearing a black hat and a white T-shirt with his hair (which was in the style of locks) hanging down his back. A few minutes after the minibus passed, while Thomas and Prentice were still on the porch of Aaron's Car Rental, Thomas heard several gunshots. After Thomas heard the first gunshot he looked to his left and saw a gunman who was in front of Aaron's Car Rental. The gunman was about 10 feet from Thomas. Thomas described the gunman as being about 5'6" to 5'8", skinny, with his hair hanging down his back. Thomas could not see the full face of the gunman, which was covered with a white T-shirt, but Thomas was able to see his eyes through the opening at the neck of the T-shirt. He

recognised the gunman to be the appellant. Thomas was however unable to give any specific feature of the gunman's eyes which caused him to recognize the gunman to be the appellant.

- [11] Mr. Gill who was a patron at the Ice cream parlor opposite Aaron's Car Rental did not recognize nor could he identify the gunman who he had looked at for 3 seconds, but he described the gunman to be about 6 feet tall, slim built, he was wearing a white T-shirt which covered his head, and he was wearing a black shirt and a black hat.
- [12] The prosecution also led evidence about a WhatsApp conversation between the appellant and an unknown (unidentified) person referred to as "Rev". In a conversation on 12th December 2014, Rev appeared to be upset that some of the marijuana was missing from the package which Thomas had kept and required the appellant to deal with the matter.
- [13] The prosecution also relied on CCTV footage from the neighbouring buildings such as Good Fellas clothing store, Bamboushay and the VP Bank during the period 6 p.m. to 12 p.m. on 14th December 2014. The grey minibus was seen in footage from all the CCTV cameras. The bus was seen passing Aaron's Car Rental at 6:52:30-6:54:22. It was seen passing Bamboushay at about 7:09:31 and from the Good Fellas Camera at about 7:09:59.
- [14] The transcript of the appellant's interview with the police was also tendered into evidence. In the interview, the appellant acknowledged that he had known Thomas for about six months prior to the incident. He knew him by the name "London". They socialized with others. Sometimes they met at Aaron's Car Rental. He also acknowledged that he occasionally drove the Motions bus and that he was the only person who had a key for the bus. He drove the bus on that day but at the time of the incident the bus was parked at Boynes' Welding. On the day of the incident, he was wearing a white T-shirt and a black fitted cap.

- [15] Telephone records of the appellant were also adduced in evidence. The records showed that the appellant's telephone was inactive during the period 6:59 p.m. to 7:24 p.m. on the evening of the incident. It also showed that at 7:33 p.m. the telephone was active in the Road Town area and the phone was not at Cane Garden as stated by the appellant in his interview.

The appellant's case at trial

- [16] The appellant did not give evidence at the trial. His defence was a complete denial and that the Crown's witness, Thomas, was not a witness of truth. The area of Aaron's Car Rental was not well lit on the evening of the incident. In his interview with the police, the appellant raised the issue of alibi. He stated that he was at Sea Cows Bay at his girlfriend at the time of the incident. While he acknowledged that he occasionally drives the Motions bus, he gave an account of the places he visited with the bus on the day of the incident and stated that he parked the bus at Boynes' Welding.

The appeal

- [17] The appellant identified several grounds of appeal in which he contends that the learned judge erred and misdirected the jury in relation to the identification evidence and the CCTV evidence and as a result of these errors, the conviction was unsafe. I will deal with each ground separately.

Ground 1 – Misstatement of the evidence by the prosecution

- [18] The appellant contends that learned counsel for the Crown in her closing address to the jury, misstated the identification evidence in three respects and the learned judge failed to stop learned counsel and further failed to correct the errors during the summation. The errors identified relate to (a) the black hat; (b) the basis of Mr. Thomas' purported identification of the gunman; and (c) the appellant's locks.

The “black hat”

- [19] In relation to the “black hat”, learned Queen’s Counsel, Mr. Taylor, who represents the appellant submits that learned counsel for the Crown in addressing the jury on the reliability of Thomas’ evidence on the description of the driver of the grey minibus on the 14th December 2014 reminded the jury that the appellant in the interview with the police stated that “Mr. Boynes (the appellant) told the Police that he was wearing a ‘black fitted hat’.... No coincidence that Thomas also described the defendant...as wearing a black fitted cap because he did see him.”
- [20] Mr. Taylor, QC contends that while Thomas stated, “black fitted hat” in his statement to the police, however, in his evidence at the trial he stated, “black hat” and therefore learned counsel for the Crown erred in misstating the evidence of Thomas in her address to the jury and it was the responsibility of the learned judge to correct learned counsel for the Crown. He submits that the failure of the learned judge to do so resulted in strengthening the Crown’s identification evidence from being a generic one of a “black hat” to being a more specific “black fitted hat”.
- [21] Mr. Black, QC in response accepted that the prosecution erred in stating “black fitted hat”. He contends however, that it was a minor mistake and was not misleading and did not strengthen the prosecution’s case. Further, the learned judge in her summation to the jury correctly stated what was Mr. Thomas’ evidence on the issue.
- [22] Indeed, the evidence of Mr. Thomas was that when he saw the appellant on the evening of December 14, driving the grey minibus he was wearing a “black hat.” While the learned judge did not correct learned counsel for the Crown when learned counsel incorrectly stated the evidence that was led in court, the learned judge in directing the jury accurately directed the jury on what Thomas said in his evidence. The learned judge told the jury:

“when he saw the Accused drive past the rental coming from the direction of Riteway. He said that the Accused was driving the grey minibus and he looked at them for 3 to 5 seconds, reverse into the car park and then left driving back in the direction of Riteway... He said that the Accused was wearing [a] black hat and a white T-shirt, and his locks were hanging down...”

The learned judge having correctly stated the evidence, in my view any prejudice which the appellant may have suffered because of the misstatement of the evidence by learned counsel for the Crown would have been corrected by the clarification of the evidence by the learned judge. There is therefore no merit in the appellant’s submission.

The basis of Thomas’ identification evidence

[23] The passage which learned Queen’s Counsel Mr. Taylor complains reads as follows:

“you may think from your own experience of being in the company of your friends, that when you are together or elsewhere you are able to instantaneously recognize them, their facial structure the way they move, their little gestures, you know who your friend is when you see your friend.” between the 11th December and the time of the shooting Mr. Thomas saw the defendant, he tells you a total of four times that week before he looked the gunman, in the eyes on that Sunday evening. Cadeem looked up and saw the face of the gunman despite the attempt to cover his identity. You may think that when you have been threatened as he was and you look into the eyes of the person who has threatened you, you won’t forget them easily...”

Mr. Taylor, QC submits that the prosecution misstated the basis upon which Mr. Thomas identified the appellant as the gunman. He contends that the basis of Mr. Thomas’ identification was solely the eyes of the gunman. This evidence he contends was weak as Thomas could not say anything specific about the eyes of the appellant that caused him to recognize his eyes other than that he knew the appellant’s eyes. The learned judge, he submits, erred in failing to correct learned counsel for the Crown when the statement was made, and the judge erred further in repeating the errors in the summation thereby giving unjustified weight to Mr. Thomas’ identification evidence. He

submits further that the learned judge was required to state clearly to the jury the limited basis on which the identification of the appellant being the gunman was made. The learned judge failed to do so, and her direction wrongly bolstered the Crown's case.

[24] Mr. Black, QC acknowledges that the identification evidence by Thomas was based only on recognition of the appellant's eyes and not on other features of the appellant. However, he submits that the comments of learned counsel for the Crown were appropriate since the fundamental issue was whether Thomas was telling the truth.

[25] I agree that having regard to the cross-examination of the eye-witness Thomas and the statement under caution of the appellant, the appellant not giving sworn testimony, the fundamental issue was whether Thomas was speaking the truth when he testified that he recognised the appellant by his eyes. The additional evidence referred to by the prosecution was evidence relating to Thomas' credibility, that not only did Thomas know and could recognize his eyes, but Thomas also knew the appellant very well.

[26] On a careful reading of the summation, the learned judge did not direct the jury to consider the additional evidence as features by which Thomas identified the appellant. The learned judge repeatedly throughout the summation reminded the jury that Thomas recognised the appellant by the appellant's eyes. The learned judge gave the jury comprehensive directions on the identification evidence of Thomas. While indeed the learned judge in her summation referred to the other aspects of Thomas' evidence relating to the appellant's features when she stated:

"He again said that he saw the gunman's eyes. He told you that they were the only part of the gunman he recognised. He told you however, he could not tell you what about the eyes he recognised in particular. But you will also recall that he told you that he knew the Accused, he had hang out with him and he knew everything about him; how he

walked, his body. And so when he looked in the eyes, he knew the eyes straight away.”

The statement was in the context of the appellant being a person known to Thomas, but not the basis on which Thomas recognised the appellant on the evening of the murder.

The appellant’s locks

- [27] Mr. Taylor, QC also contends that the following statement by learned counsel for the Crown was also a misstatement of the evidence:

“Another matter you may think is almost beyond dispute is the Defendant’s appearance at the time. Of course, I accept that many gentlemen in the BVI wear locks but Kadeem you may think had the advantage of recently seeing Kenyatta Boynes and he knew what his locks looked like, their length and shape. He described them as fat ones, quite long down his back above his waist.”

Mr. Taylor, QC submits that the statement was misleading in that at no time did Thomas state he was able to identify the appellant as the gunman by his locks. Also, the statement by learned counsel for the Crown in effect suggested to the jury that the identification of the appellant was strengthened by Thomas’ previous knowledge of the appellant’s locks. Mr. Taylor, QC acknowledged that the learned judge’s summation on the issue cannot be faulted but contends that the learned judge should have corrected the error of learned counsel.

- [28] Mr. Black, QC in response submits that there was no need for the learned judge to give any further directions since the reference by counsel to the appellant’s locks was simply to illustrate that the man known to Thomas who he identified as the appellant also had locks.

- [29] In my view, having regard to the impeccable direction given by the learned judge on the identification evidence as acknowledged by Mr. Taylor, QC any possible prejudice which could have resulted from the misstatement of counsel for the Crown, would have been cured by the direction given by the judge. The learned

judge adequately dealt with the evidence relating to the appellant's locks.

- [30] The errors identified by Mr. Taylor, QC under this ground neither individually nor collectively were of such significance as to undermine the safety of the appellant's conviction.

Ground 2 - Misstatement of evidence in relation to time

- [31] Mr. Taylor, QC makes three complaints under this ground; firstly, that the learned counsel for the Crown misstated the evidence; secondly, learned counsel wrongly asserted that Thomas' evidence of time in relation to the incident was consistent with the timing of the CCTV evidence; and thirdly, the learned judge failed to adequately direct the jury on the weakness of the Crown's evidence as it relates to timing.

- [32] In relation to his first complaint, Mr. Taylor, QC submits that learned counsel for the Crown misstated the evidence of Thomas when she told the jury "...Kadeem tells you that he asked Prentice the time, who told him it was 6:38"¹ when the evidence of Thomas was "...just after 6:30". Mr. Black, QC for the respondent readily agreed that learned counsel for the Crown misstated the evidence, but he submits that it could not have resulted in misleading the jury in any significant way. I agree.

- [33] In relation to the second complaint, Mr. Taylor, QC referred to the following statement by learned counsel for the Crown:

"...It was after this, says [C]adeem, that the Defendant drives up in the motions bus...[C]adeem saw him that night and you may think that after what he said to you about the night before and the way he felt about the aggressive threatening manner in which it was said he has recalled this visit minutes before the shooting accurately".²

He submits that the evidence shows the bus driving into view of the Bamboushay

¹ See Transcript of Proceedings, p. 27 paras 18-20 (T27/1201/18-20).

² See Transcript of Proceedings, p. 19 paras 19-20 (T19/1201/20-23).

and Good Fellas cameras at 6:52 p.m. and into the view of the VP Bank at 6:54 p.m., further, at 7:09 p.m. the bus drives into view of Bamboushay and Good Fellas cameras and at 7:11 p.m. the bus drives into the view of the VP Bank camera. Mr. Taylor, QC submits that in contrast to these specific times, the evidence of Thomas was vague. Thomas only made mention of three specific times on 14th December, being, 10:00 a.m. when he arrived at the car rental, 3:00 p.m. and when he went to Sea Cow's Bay. He did not give any specific time when he returned to the car rental, when the car rental was closed, when the bus drove past the rental while he was on the porch with Prentice, when he heard the gunshots and how long after he had seen the appellant in the bus, he heard the gunshots. Learned Queen's Counsel contends that, in view of the vagueness of Thomas' evidence, the shooting incident would have occurred between just after 6:30 p.m. and 7:15pm and this evidence did not necessarily fit with the timings of the CCTV images. The CCTV evidence did not support the Crown's case but rather it undermined the Crown's case. The evidence of timing was critical. The learned judge therefore erred in failing to identify and caution the jury as to the weaknesses in the Crown's assertion that the CCTV evidence supported the Crown's case when it in fact undermined the Crown's case.

- [34] The Crown's case was that the shooting occurred between just after 6:30 p.m. and 7:15 p.m. when the police received the report. In my view, on a careful examination of the evidence of Thomas that the bus passed the rental just after 6:30 p.m. while indeed the evidence shows that this was an estimate of Prentice, it was not in any way inconsistent with the CCTV evidence which showed the time of the various movements of the bus, nor was the Crown's case undermined by the CCTV evidence. The movement of the bus as shown in the CCTV evidence was in an area within the vicinity of the car rental and the alleyway by Main Street. The jury had before them photographs of the area showing the streets and the images of the bus on the streets, the alleyway and the car rental. The learned judge accurately summed up the evidence led by the Crown in relation to the CCTV footage as it relates to timing to the jury. There was no need for there to be any

additional direction to be given to the jury on this issue.

Ground 3 – Misdirection in summation of recognition evidence

[35] This ground concerns the application of section 112 (1) of the **Evidence Act of the British Virgin Islands** (“the Evidence Act”).³ It reads as follows:

“Where identification evidence has been admitted, the court shall:

- (a) Warn the jury of the special need for caution before convicting on the evidence;
- (b) Instruct the jury as to the reason for such need;
- (c) Refer the jury to the fact that a mistaken witness can be a convincing witness, and that a number of witnesses can be mistaken;
- (d) Direct the jury to examine closely the circumstances in which each identification was made;
- (e) Remind the jury of any specific weaknesses in the identification evidence;
- (f) Where appropriate, remind the jury that mistaken recognition can occur even of close relatives and friends;
- (g) Identify to the jury the evidence capable of supporting the identification; and
- (h) Identify evidence which might appear to support the identification but which does not in fact have that quality.”

In directing the jury on the issue of identification, the learned judge stated:

“.... Approach the task of assessing the reliability of Mr. Thomas’ evidence because there is a possibility that a witness may be mistaken in their identification of a person accused of a crime even though that witness says he knows the person well and says that he recognised that person. The witness can still be mistaken. The experience of the criminal courts over the years has demonstrated that identification evidence may turn out to be unreliable. There has been notorious case over the years in which evidence of identification has been demonstrated to be wrong after innocent people have been convicted.”

[36] Mr. Taylor, QC submits that this direction to the jury was not in full compliance with section 112 of the Evidence Act or with the **Turnbull Directions**⁴ since the learned judge failed to specifically direct the jury that miscarriages of justice have occurred even in cases of recognition and that mistakes are sometimes made in purported recognition of close relatives and friends. Further, he contends that the direction

³ Act No. 15 of 2006, Laws of the Virgin Islands.

⁴ R v Turnbull [1976] 3 All ER 549

amounted to a diluted form of what was required, when the learned judge warned the jury that there was a “possibility” of mistaken identity in purported recognition cases, also that the “notorious cases” related to “evidence of identification”. He submits that in the absence of a specific warning embracing fully the provisions of section 112 and the Turnbull guidelines, the jury may have considered that the warning did not apply to recognition cases.

[37] Mr. Black, QC in response, accepted that the authorities have made it clear that in recognition cases the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made. He accepted that the learned judge’s direction did not embrace both close relatives and friends. He submits however, that the learned judge gave an appropriate direction in relation to close friends and this case related to recognition of a close friend. The learned judge therefore correctly adapted her direction to the particular facts of the case.

[38] I agree with Mr. Taylor, QC that pursuant to section 112(1)(f) of the Evidence Act in recognition cases, as was this case, the judge is required to direct the jury specifically on the issue of recognition, identifying not only the weaknesses in the evidence but also to direct the jury that mistakes could be made in recognition cases even of close relatives and friends. While the judge is not required to use a specific form of words, section 112(1)(f) requires the direction to encompass both close relatives and friends. The learned judge’s direction only makes mention of close friends. Also, in dealing with notorious cases of mistaken identity, the learned judge did not specifically stress that it occurred also in recognition cases. In my view, the omission was not fatal.

[39] This Court has considered the application of section 112(1) of the Evidence Act on numerous occasions and has expressed the opinion that a failure to fully comply with the provisions would not automatically result in a conviction being quashed. The direction must be considered as a whole. The Court is required to consider whether the safety of the conviction has been impacted. This was a case of

recognition of a close friend. The learned judge gave a very detailed summary of the identification evidence of Thomas. The jury would not have been left in any doubt that Thomas' evidence was that he knew the appellant before and that he knew the gunman was the appellant because he knew him before that evening and that when he saw the eyes, he recognised that the gunman was the appellant. The learned judge directed the jury to the weaknesses in relation to the recognition evidence which includes that he could not state any features of the appellant's eyes that caused him to recognize the appellant was the gunman. The learned judge stressed to the jury that the eyes were the only part of the gunman which Thomas recognised that night. When the passage is read in context of the direction given to the jury, the judge also having directed the jury that mistakes could be made when a witness says that he recognised that person, it would have been clear to the jury that the warning applied also to cases where the witness testified that he knew the accused prior to the incident and recognised him. The learned judge further specifically directed the jury that "You cannot convict the accused unless you are sure that Mr. Thomas' identification was accurate."

Ground 4 - Failure to comply with section 112(g)

- [40] Mr. Taylor, QC submits that pursuant to section 112(1)(g) of the Evidence Act, the learned judge was required to direct the jury that Mr. Gill's evidence where he testified that the gunman was wearing a white T-shirt was not supporting evidence of the identification evidence on which the jury could rely in finding that there was no mistaken identification of the accused as the gunman. The learned judge erred in failing to do so.
- [41] Mr. Black, QC in response submits that the evidence of Mr. Gill was supporting evidence limited to confirming that the gunman was wearing a white T-shirt covering his head. He states that this evidence of the attire of the gunman, and the gunman's attempt to disguise himself by placing the T-shirt over his head supported the identification evidence of Thomas.

[42] Sections 112(1)(g) and (h) of the Evidence Act require a judge to identify to the jury evidence which supports the identification of the accused, and also where there is evidence which appears to support the evidence of identification of the accused but it does not in fact possess the quality of supporting evidence the learned judge is required to so direct the jury.

[43] The principle emanating from the authorities show that supporting evidence may support the identification fully or only in a limited way. In **R v Adejo and another**⁵ the English Court of Appeal determined that a recorded conversation between the appellant and another prisoner concerning the recovery of a gun from a garden where the incident occurred, and a fresh cut on the appellant's hand were capable of providing support for evidence that the appellant brought the gun to the scene and that he fought with the complainant before making his escape. Also in **R v Gray**⁶ where the identification evidence was such that it was not a recognition case and the identification was made in circumstances where the event was sudden and quick, the time for observation was approximately fifteen to twenty seconds, and the witness had had no reason to pay any particular attention to the appellant, no details of any distinctive feature of the appellant was given, the court found that evidence of change in usage of the appellant's mobile telephone shortly after receiving a call from a co-defendant where there was no explanation for the action and the co-defendant had also ceased to use his previous phone, it could be inferred that the appellant was seeking to distance himself from the crime.

[44] The learned judge directed the jury in relation to Mr. Gill's evidence as follows:

"His evidence was essentially led to give you a description of the gunman he saw the night".

[45] The learned judge then proceeds to summarize Mr. Gill's description of the gunman. The learned judge also further directed the jury as follows:

⁵ [2013] EWCA 41.

⁶ [2018] EWCA Crim 2083

“You should also think about whether there is any evidence which if you accept it might support the identification. There is the evidence of Kevin Gill, the only other person to see the gunman who supported the evidence of Kadeem Thomas as to the white T-shirt covering his head and the build, if you consider skinny and slim similar. In addition, consider that in other respects, the evidence of Kevin Gill cannot support the identification because remember, he told you that although he saw the person, his description was entirely different as to height. He indicated a tall man and hair which was completely covered by the T-shirt, and he could not see the face of the person and made no indication as to who he was.”

- [46] When the entire summation of the learned judge on this issue is read, it shows that the learned judge did direct the jury as submitted by Mr. Black, QC, of the very limited way in which Mr. Gill's evidence supported the evidence of identification of Thomas. The learned judge further gave the jury a detailed direction explaining the other aspects of Mr. Gill's evidence which does not amount to supporting evidence. The criticism of the learned judge's direction is not well founded.

Ground 5 – Assessing Thomas' credibility

- [47] Under this ground, Mr. Taylor, QC made the following criticisms of the learned judge's direction to the jury:
- (a) The learned judge did not direct the jury on the proper approach to assessing the credibility of Thomas' evidence.
 - (b) The learned judge wrongly placed the burden on the appellant to prove that Thomas was lying.
 - (c) The learned judge failed to clearly direct the jury on the weaknesses in the reliability of Thomas' evidence.
- [48] The credibility of a witness is always an important issue in every case. In identification cases, witnesses who identify an accused person must not only be credible, but the identification evidence of the accused as the person who

committed the crime must be reliable. The judge is therefore required to direct the jury in clear terms of the need for them to determine first whether the witness was a credible witness, and if they so find to then consider whether the evidence of identification was reliable and in so doing the learned judge is required to draw the jury's attention to any weakness in the identification evidence.

[49] It is well settled that in identification cases the learned judge must direct the jury that they must determine first whether the witness was telling the truth and if the witness was not honest in his identification evidence the accused would not be guilty. If the jury find the witness to be credible the jury must go on to consider whether his evidence was reliable, or he was or might be mistaken. These principles are outlined in numerous cases including **Beckford and Shaw v R**,⁷ **Arthur Mills and Others v The Queen**⁸ and **Capron v The Queen**.⁹

[50] Mr. Taylor, QC submits that the learned judge in her summation failed to identify clearly to the jury the two-step approach outlined in **Beckford** and gave confusing directions to the jury on the issue of credibility and reliability. Rather, the learned judge conflated the issues of credibility and reliability. In support of his contention, Mr. Taylor, QC referred the Court to the following passages in the judge's summation:

"So, you must assess the evidence from Mr. Thomas carefully in view of the warnings I have given you, and in the end, it is purely for you what you believe from his evidence.

So, if you are to believe that the Accused acted in the manner that the Prosecution alleged, that he was in Road Town on the night of the 14th of December at between 7pm-7:30pm, and committed this murder, then you can only do so if you have accepted that Cadeem is a credible witness. As I have said to you, that is a matter for you to determine."

"They tell you that Cadeem Thomas can be believed when he told you that he in fact saw the Accused that evening of the shooting when he described his

⁷ [1993] 42 WIR 291.

⁸ [1995] 1 WLR 511.

⁹ [2006] UKPC 34.

attire...”

“They tell you that Cadeem Thomas can be believed when he said that he saw the gunman...”

And further:

“As I told you, when you are looking at the evidence of Cadeem Thomas and the special caution with which you must approach it, I remind you here that you should first examine the possibility that Cadeem Thomas may have been genuine but mistaken in his identification of the Accused. If you think that is so or may be so, then you should find the Accused not guilty. If on the other hand, you conclude that there’s no room for mistake, then common sense dictates that either Cadeem Thomas or the Accused in his interview is not telling the truth. Only if you’re sure that Cadeem Thomas has given truthful and accurate evidence, should you find the Accused guilty as charged.”

- [51] Learned Queen’s Counsel Mr. Taylor contends that the above directions did not clearly direct the jury to consider credibility and reliability as two separate steps. He submits that in directing the jury, the learned judge conflated the issues of credibility and reliability and on occasions reversed the approach so that the jury was directed to consider reliability then credibility. In directing the jury on the issue of credibility, the learned judge was also required to direct the jury to consider the matters undermining Thomas’ credibility. This the learned judge failed to do. Learned Queen’s Counsel argues that the learned judge also failed to direct the jury that a mistaken witness can be a convincing witness. The learned judge was required to do so pursuant to section 112(1)(c) of the Evidence Act. Rather, the learned judge’s directions were focused mainly on credibility and not sufficient emphasis placed on reliability. Learned Queen’s Counsel also referred to the following passage at the end of the summation:

“... it is for you to determine whether the prosecution has proven (the elements of each offence) to you. But bear in mind very clearly if you consider and believe the defense... and agree that the version of events by Cadeem Thomas is a complete fabrication then you must free this man. If you are not sure or in some doubt as to whether the Defense given is true, then you must free this man. If you are not sure or in some doubt as to whether the Defense given is true, then you must also free this man. If you are not sure or in some doubt as to whether the Defense given is true, then

you must also free this man. However, even if you reject his defense, you must fall back on the Prosecution's case and determine whether they have satisfied you so that you feel sure of his guilt..."

- [52] Mr. Taylor, QC contends that this was a serious misdirection in that it placed a burden on the defence to prove that Thomas' account was a complete fabrication. This coupled with the misdirection of conflating credibility and reliability, resulted in a significant risk that the jury may have concluded that Thomas was credible in the sense of being believable and that this would have been sufficient to rely upon without triggering the need for caution when considering the evidence. Learned Queen's Counsel relied on the cases of **Junior Reid v R**¹⁰ and **R v Pedro Vasco**.¹¹
- [53] On the issue of the weakness as to reliability, Mr. Taylor referred to the following circumstances which undermined the reliability of Thomas' identification evidence: (a) Thomas only identified the appellant's eyes; (b) the circumstances were frightening; (c) after the shooting began, he only saw the gunman for around five seconds; (d) he described the gunman as being 5'6"-5'8", while Mr. Gill described the gunman as being 6'; (e) P.C. Etienne testified that a flash was used in taking the pictures, so the area was not as bright as it appears in the picture; and (f) Thomas did not give any evidence of the lighting that evening, but Mr. Gill testified that there were no lights at Aaron's Car Rental that evening.
- [54] Mr. Taylor, QC also submits that Thomas' credibility was also undermined by the several inconsistencies in his testimony including his admission that he told the police he knew of a group called SOB and that he was a member, but he subsequently denied that he knew of such group and was therefore not a member.
- [55] Mr. Black, QC in his response submits that the learned judge applied the correct approach in keeping with the principles of **Beckford** and gave clear directions on the issues of credibility and reliability. The issues were not conflated and the jury

¹⁰ [1990] AC 353.

¹¹ [2012] EWCA Crim. 3004.

could not have been confused by the directions.

Discussion

[56] It is accepted by Mr. Taylor, QC that the appellant's primary defence at trial was that Thomas' evidence identifying the appellant as the gunman was a fabrication. He contends however, that the issue of reliability of Thomas' evidence was also raised. I agree that the issue of reliability was raised, but it was not raised during the testimony of Thomas, rather it was raised during the testimony of DC Bakker when the quality of the lighting in front of the car rental was raised.

[57] It is also not disputed that the approach to be followed where the primary or sole defence challenges the veracity of the identifying witness, is the approach by the Privy Council in **Beckford** which requires a judge to give a section 112 or **Turnbull** warning to the jury in both identification and recognition cases. This approach has been confirmed in **Capron** where the appellant who was charged with the offence of murder did not dispute that he was well-known to the prosecution witnesses who had known him for 16 years and the other witness for eight to nine years. Rather, his defence was that they were lying when they identified him as the person who had carried out the shooting. His trial was conducted on that basis. No **Turnbull** direction was given as the judge was of the view that the case was not one of mistaken identity, but purely whether the witnesses were credible. The judge in her summation when dealing with the eyewitnesses reminded the jury that the prosecution case stood or fell by their evidence. She continued:

"The defence does not allege that they are mistaken about the accused's identity, but rather that they are lying. The defence alleges that someone else did the shooting and that the witnesses came here and have concocted the story to put it on Mark to protect someone else. Notwithstanding that the defence is not suggesting they are mistaken about his identity, but that they are lying, you have to be sure, firstly, that they are telling the truth and secondly, that they are not mistaken about the identity of the person "they say shot the deceased."

[58] The Board was of the opinion that in directing the jury as she did, the learned judge

was in effect pointing out to the jury that they had to be sure that the witnesses were telling the truth and that they were not mistaken about the identity of the person who shot the deceased, notwithstanding the defence's assertions that the witnesses were not telling the truth and they made no suggestions that the witnesses were mistaken about the identity of the person who shot the deceased. The learned judge having so directed the jury, the Board was of the view that having regard to the circumstances of the case, it was not necessary for the judge to further and direct the jury that persons can make mistakes in recognizing close relatives or friends since it would not have significantly impacted the direction of the way the jury would have approached the evidence. The Board reiterated that the cases where the warning can be entirely dispensed with must be wholly exceptional and even in those cases a judge would be wise to direct the jury to consider whether they are satisfied that the witness was not mistaken in view of the serious consequences of mistaken identity. This was also the approach adopted in the case of **Vasco v R** on which the appellant relied. The court at para 19 stated:

"There are cases in which an identifying witness' veracity may be challenged. It is then essential for the judge to give proper direction in relation both to the approach to the witness truthfulness and also to the reliability, emphasizing that the jury must not jump from a favourable conclusion on the first issue to a favourable conclusion on the second. They are separate issues."

- [59] While indeed the learned judge placed much emphasis in directing the jury on the need for them to be satisfied that Thomas was a credible witness as can be seen in the passages referred to by Mr. Taylor, QC, that was not the entirety of the judge's direction on the issue. At page 1305 of the record the learned judge reminded the jury that under cross-examination, Thomas had denied that he was lying; he reiterated that the appellant had passed by Aaron's Car Rental the evening; that the appellant was the gunman; and that he had a conversation with the appellant about Thomas having to pay twice. The learned judge then directed the jury as follows:

"This evidence is the only evidence which the Prosecution has presented

to you where someone said they saw the act. This is therefore central to the issue in this case. It is a very important issue for your consideration, because experience in the courts have shown that there are certain categories of evidence which are by their very nature potentially unreliable and evidence of identification is one such.”

The learned judge then proceeded to outline all of the factors which could impact the reliability of the identification evidence.

[60] The jury therefore, could not have been left in doubt as to the approach they were required to take in deciding whether the appellant was guilty.

[61] In relation to the submissions relating to the burden of proof, while undoubtedly the learned judge could have worded the direction differently to provide clarity, it is important to put the passage referred to by learned Queen’s Counsel Mr. Taylor in context. The learned judge was at the time directing the jury that it was the duty of the prosecution to disprove the alibi. The learned judge then proceeded to direct the jury on the evidence that the prosecution was relying on to disprove the alibi. The learned judge stated:

“In disproving his alibi, the Prosecution in attempting to do so, they have commended to you the evidence of Kadeem Thomas, the telephone analysis of DC Bakker and the CCTV footage. Members of the jury, you must look at this evidence critically and determine where the truth lies. As I told you...”

[62] The learned judge also told the jury that:

“I must further tell you that the mere rejection of an Accused’s alibi does not automatically mean that the accused is guilty. So, if you disbelieve the Accused when he said he was with his girlfriend, that cannot automatically mean that he’s guilty of the charges brought against him by the Prosecution. Because remember, he does not have to prove anything to you.”

[63] In view of the direction given to the jury, the jury could not have been left in any doubt that the burden was on the prosecution to prove the appellant was guilty and that the appellant had no burden to prove anything.

[64] In relation to the submissions that the judge failed to direct the jury on the weaknesses of the reliability of the evidence, there is no merit in this submission. The learned judge directed the jury on the circumstances which could have made the identification unreliable. All the factors referred to by learned Queen's Counsel Mr. Taylor were put to the jury. The learned judge reminded the jury that all those factors were relevant in assessing the reliability of Thomas' evidence. While a judge is not required to repeat in the summation to the jury all of the evidence that was adduced at the trial, the learned judge repeated a large portion of the evidence relating to the reliability of Thomas' evidence. Also, the learned judge reminded the jury of the various inconsistencies in Thomas' evidence including those emanating from his evidence during cross-examination.

Ground 6 – Failure to give a section 112 direction in relation to identification of appellant while driving Motions bus

[65] The issue raised under this ground is whether the learned judge erred when she omitted to give a warning as outlined in section 112 or in accordance with the **Turnbull** guidelines in relation to the evidence of Thomas that while he was at Aaron's Car Rental with Prentice, he saw the appellant driving a bus in front of Aaron's Car Rental shortly before the incident and the appellant looked at him.

[66] Mr. Taylor, QC submits that the prosecution having relied on Thomas' identification of the appellant both as the person driving the minibus earlier in the evening (the first identification) and as the gunman, the learned judge was therefore required to give a direction pursuant to section 112 of the **Evidence Act** in relation to the first identification since the first identification was inextricably linked to the second identification. The second identification by itself was very weak and a conviction could not be based on that evidence alone. The recognition was only of the eyes of the appellant, and Thomas was unable to describe any distinctive features of the appellant's eyes. The learned judge's failure to give the identification warning to the jury in relation to the first identification was a material misdirection.

[67] The Crown accepts that the learned judge did not give a **direction as outlined in section 112 or in accordance with the Turnbull guidelines** in relation to the first identification. Mr. Black, QC contends that none was necessary for two reasons. Firstly, it was not the appellant's case at any stage of the trial that Thomas had mistakenly identified the appellant as the driver of the bus. There was no challenge to Thomas' evidence that the appellant was the driver of the bus. The challenge was in relation to Thomas' veracity. The learned judge therefore correctly focused her direction on the second identification for the jury to determine who was the gunman. Secondly, at no time did Thomas testify that the first identification influenced the second identification.

Discussion

[68] Section 112 of the **Evidence Act** in large measure replicates the guidelines in Turnbull which are to be observed by a judge in identification cases. It must be noted that the section is neither exhaustive nor prescriptive of all the issues that may arise in identification cases.

[69] It is common ground that the learned judge did not give a direction in relation to the first identification. In my view, on a careful reading of section 112, the section requires a judge to give the warning in relation to the evidence that identifies the accused as the person who committed the crime.

[70] The identification of the appellant as the person who drove the bus the evening of the incident was not the means by which Thomas identified the appellant as the gunman. Thomas' identification evidence of the appellant as the gunman was limited to him recognizing the eyes of the gunman. It is in relation to this evidence which identifies the appellant as the person who committed the offence that Section 112 requires a warning to be given. While section 112 (g) and (h) require a judge in warning the jury to identify to them evidence that supports the identification of the accused and also any evidence which appears to support the evidence, but which does not. These subsections however, do not require a

judge to give a warning as outlined in section 112 or in accordance with the **Turnbull** guidelines in relation to supporting evidence.

- [71] The evidence of Thomas when he testified that he saw the appellant driving the bus earlier the evening was not evidence by which he identified the appellant as the gunman who shot the deceased and shot at him. The learned judge was therefore not required to give an identification direction as outlined in section 112 or in accordance with the **Turnbull** guidelines in relation to the identification of the appellant as being the person who drove the bus. In my view, section 112 was not engaged.

Ground 7 – Misdirection in relation to Thomas’ credibility

- [72] At the trial DC Bakker in his testimony stated:

“I carried out further investigation... by interviewing Mr. Cadeem Thomas in relation these allegations made by the Defendant. He told me certain things in which I have no reason to doubt or question his credibility....”

- [73] Mr. Taylor, QC submitted that the learned judge in her directions to the jury in relation to this evidence, misdirected the jury when she stated:

“he said he told you the extent of the investigations he undertook in that regard which he said included an interview with Cadeem Thomas whose credibility he told you he did not doubt.”

- [74] Learned Queen’s Counsel Mr. Taylor complains that the direction to the jury was a misdirection on three bases. Firstly, DC Bakker’s testimony of his view of the credibility of Thomas was opinion evidence and was therefore inadmissible and should have been excluded more so since the credibility of Thomas was a central issue in the case.

- [75] Secondly, D.C. Bakker’s statement was in relation to the interview only, but the judge’s direction could have led the jury to believe the statement applied to the entire testimony of Thomas including the central issue of Thomas’ credibility.

- [76] Mr. Black, QC in response submits that the learned judge merely placed the evidence in context and summarized it. She did not express any views as to Thomas' credibility, nor was it necessary for the learned judge to treat the evidence in any other way. Also, the evidence was not opinion evidence. It was evidence of his investigation of the offence and the evidence was adduced in re-examination as a result of matters arising during the cross-examination of Thomas.

Discussion

- [77] As submitted by Mr. Black , QC the statements must be read in context. D.C. Bakker was being cross-examined about the "Baughers Bay Crew" who the appellant referred to in his interview. DC Bakker said he was not aware of the group. DCBakker stated further that he had no reason to doubt the information provided by Thomas. Bakker was not there giving evidence about the identification of the gunman which was the critical issue in this case. D.C. Bakker at no time sought to testify that Thomas was a truthful and credible person. His comment in cross-examination was specifically to certain information which was provided which he simply said he had reason to disbelieve.

- [78] I agree with learned Queen's Counsel Mr. Taylor that the credibility of a witness is a matter for the jury, and opinion evidence from a witness on the credibility of another witness is inadmissible. However, in the context in which the evidence arose in cross-examination, DC Bakker was not giving opinion evidence on the credibility of Thomas. He was simply stating he did not have a reason to discredit the information provided by Thomas. He was in no way saying that Thomas was a credible witness. The learned judge therefore did not err in the manner in which she treated with the evidence. There is no merit in the ground of appeal.

Ground 8 – Admissibility of CCTV evidence of ADS Shortte

- [79] It was a part of the Crown's case that the witness Thomas saw the appellant driving the Motions bus in front of Aaron's Car Rental shortly before the incident. ADS Shortte testified that he viewed the CCTV recordings from three cameras in

the vicinity of the Car Rental and he saw the picture of the Motions bus in all three recordings. First on the Bamboushay camera, then the Good Fellas camera at 6:52pm, and on the VP Bank camera at 6:54pm. The Crown relied on these sightings of the Motions bus to support the evidence of Thomas.

- [80] Mr. Taylor, QC submits that this evidence of ADS Shortte was inadmissible, and even if this court finds it to be admissible, the learned judge was required to give the jury appropriate directions on the evidence. The learned judge failed to do so.

Admissibility of ADS Shortte's evidence

- [81] Mr. Taylor, QC contends that ADS Shortte was not an expert in CCTV analysis, he had no specialist training, nor did he acquire any special knowledge. His evidence being opinion evidence was inadmissible and should have been excluded in accordance with sections 123 and 124 of the Evidence Act. Even though the issue was not raised by counsel at the trial, the role of the learned judge was to ensure that the trial was fair and therefore it was the duty of the learned judge to raise the matter of admissibility on her own volition and to exclude the evidence. Counsel submitted that this case is distinguishable from cases where police officers spent a great deal of time viewing and analyzing a video film as illustrated in **Attorney General's Reference No. 2 of 2002**¹². ADS Shortte had not used or had access to any specialist software that would have enabled him to be able to view enhanced images; he did not explain the methodology he used in seeking to identify the Motions Bus other than he knew the bus he was looking for was a Mitsubishi silver grey bus, registration number PE365, and he had a still photograph of the bus. He did not state how many times he viewed the recordings, nor whether he viewed them more than once. He provided no detail logs or record of the method of viewing. Such conduct Queen's Counsel urged was contrary to law and was a strong basis on which to exclude the evidence. Learned Queen's Counsel relied on the decision of the

¹² [2003] 1 Cr App Rep 21.

- [82] Mr. Black, QC in response accepted that the evidence of ADS Shortte was not expert evidence. He submitted that ADS Shortte merely stated that as part of his investigation he looked at recordings and at specified times he saw a vehicle which matched the vehicle in the still photograph. Further the identity of the bus in the CCTV image was never challenged. The jury had the CCTV images before them to make a finding of their own. There was therefore no lawful basis for the learned judge to exclude the evidence

Discussion

- [83] It is well settled that a judge has a duty to ensure that a trial is conducted fairly and that duty includes preventing inadmissible evidence going before a jury. However, in some circumstances the omission of trial counsel's objection may affect the question whether the defendant was really prejudiced by the admission of such evidence as explained in **Phipson on Evidence**¹⁴ and **R v Hooks** ¹⁵.
- [84] It is common ground that CCTV evidence is admissible provided that the witness is an expert in the field or has acquired special knowledge of the images and certain measures are taken to gauge the reliability of the evidence such as the procedures set out in Code D which include contemporaneous notes of viewing and the methodology used. This is illustrated in the case of **Yaryare**. In **Yaryare**, it was contended that although the police officer's testimony of CCTV footage was admissible as a matter of law, the officer having acquired special knowledge of the CCTV images by viewing them for several hundred hours, it should have been excluded since the officer did not comply with the guidelines in UK Code D in that she failed to among other things, maintain proper logs and her notes were not

¹³ [2020] EWCA Crim 1314

¹⁴ Phipson on Evidence (19th edn) Para 39.28: Judicial discretion to exclude

¹⁵ [1994] Lexis Citation 2034

contemporaneous with her viewings. The court in dismissing the appeal opined at paragraph 91 that:

“For each of the appellants, DC Bee explained the reasons for her recognition of them by reference to the relevant features of their appearance, and the jury, ... were able, from the footage and the stills, to see exactly what the witness saw from these permanent images. Moreover, given the relative good quality of the images, they were able to assess whether a recognition made from them was one on which they could rely even though they were not making an identification of their own.”

[85] This is an appropriate time to deal with the evidence of DS Shortte. He testified that he had viewed the images from all three of the locations. He made notes during the viewing of each portion of video. He viewed about 30 to 40 hours of images, however he did not state how many times he viewed the images. He acknowledged he had no software to enhance the images. Learned Counsel for the appellant at the trial who is different from Counsel who appeared before us, was shown the notes and he made no objection to the admission of the evidence. During the testimony of DS Shortte he played images of the CCTV from Bamboushay, Good Fellas, and VP Bank for the jury. In the images, two Mitsubishi buses could be seen one with a yellow taxi light and one with a bumble bee and the Motions sticker, which DS Shortte testified is the unique sign of the appellant's sister after school program Motions. The jury was able to see the video images for themselves of the bus with the Motions sticker passing through the streets at specific times. DS Shortte was cross examined on the movement of the bus, the connectivity of the various streets in Road Town, and the absence of evidence of the registration number of the bus in the images. As acknowledged by Mr. Taylor, QC at no time did learned counsel make any objection to the admission of the evidence.

[86] In my view, in the circumstances, where there was no objection to the admission of the evidence at the trial and learned counsel cross-examined the witness on the evidence and at no time it was put to the witness that the identification of the bus was mistaken, also learned counsel in his closing address to the jury urged the jury to look carefully at the CCTV footage, he drew to their attention that the images

from the Bamboushay and VP Bank cameras were not in color, the licence plate could not be seen nor the driver. In my opinion, it is not now open for the appellant to raise the issue of admissibility of the evidence.

Direction

[87] Mr. Taylor, QC acknowledged that a **Turnbull** direction was not necessary. He however relied on the decision of the English Court of Appeal in **Hampton & Another v The Crown**¹⁶ in support of the proposition that whilst the need for a full **Turnbull** direction does not extend to identification evidence of an inanimate object, such as vehicle, the learned judge was still required to remind the jury of the circumstances in which the observation was made. Moreover, the judge was required to set out all of the factors that might render the testimony less reliable than otherwise would have been the case. Mr. Taylor, QC contends that the danger in this case was that the jury may have attributed expert status to DS Shortte's evidence when in fact he was not an expert. This was a factor that rendered DS Shortte's evidence less reliable than the jury may otherwise have concluded. The learned judge therefore erred in failing to direct the jury that ADS Shortte was not an expert witness.

[88] Mr. Taylor, QC submits further that the learned judge was required to identify and direct the jury as to the limits of DS Shortte's evidence being, (a) the purpose of the evidence was limited to adducing the CCTV recordings and (b) the evidence had to be approached with caution because, (i) DS Shortte was not an expert since he had no training or specialist software and failed to set out how many times he viewed the recordings, whether he downloaded it and on what screen he viewed it; (ii) there was no evidence that he had used any software or equipment that would have allowed him to be in a more advantageous position than the jury in determining what could be seen on the recordings; and (iii) DS Shortte's views were of no more weight than their own, his opinion as to what

¹⁶ [2004] EWCA Crim 2139 at para. 5.

could be seen was no more valuable than their own observations and consideration of the recordings, and that it was open to them to reject his evidence if it did not concur with their own conclusion.

- [89] Mr. Black, QC in response submits that the identity of the minibus was not challenged and therefore there was no issue of a wrong identification or a mistake for the court or jury to consider. He submits further that the learned judge's direction to the jury was adequate. He referred to the following passage in the summation:

"Now members of the jury you must decide what weight, if any you wish to ascribe to this evidence. The Prosecution has not advanced this evidence for the purpose of identifying the Accused, but for the purpose of identifying the vehicle. They ask you to consider this evidence considering and together with all the evidence you have heard, and the information contained in the police interview of the Accused of his whereabouts and movements the night of the incident. Once you have done this, they ask you to infer and conclude that the grey bus that was seen in the CCTV footage was in fact, that which was driven by the Accused. They did not invite you to attempt to identify the Accused from the footage, however you may wish to consider that the Accused does not deny that he drove the grey bus that day. This evidence was not delivered under oath, and I have already directed you how you are to approach the evidence from the Accused in the police interview."

- [90] Mr. Black, QC submits that having regard to the nature of the evidence of DS Shortte on this issue, there was no need for an expert direction. It was for the jury to decide what inference was to be drawn from the findings of fact they made. The learned judge was therefore not required to give the jury any further directions on the issue.

Discussion

- [91] It is common ground that there was no need for a direction as outlined in section 112 or in accordance with the **Turnbull** guidelines in relation to the identification of the bus. It was also common ground that DS Shortte was not an expert witness. The issue is whether the judge was required to warn the jury that DS Shortte was

not an expert witness, and in the manner suggested by Mr. Taylor, QC.

- [92] I find the judgment of the court in **Hampton** provides useful guidance when identification is made of inanimate objects. In **Hampton**, a prosecution witness described the vehicle he saw four assailants escaped the murder scene as a VW Golf either number C251 CVM or L251 CVM. It turned out that C251CVM was a silver BMW, while the number of the appellant's vehicle was L521 CVM. The appellants contended, that the judge was required to give the jury a special warning since among other things, there is a danger that visual identification of this type of evidence of motor cars and licence plates may be unreliable; also due to the particular facts of the case, being – amount of alcohol the witness had consumed prior to the identification approximately seven pints of beer; the vehicle was travelling at approximately fifty miles per hour, the witness only got a fleeting glance in dim conditions, the witness made an error in relation to both the model and the color of the car. In dismissing the appeal, the court found that there was no need for a special caution in relation to his evidence and stated at para. 51 as follows:

“However, we stress it will usually be necessary with evidence such as this for the judge to remind the jury of the circumstances in which the observation was made. Moreover, he should set out any factors that might render the testimony less reliable than otherwise would have been the case. Further, we are not in anyway seeking to restrict either the circumstances in which a judge may as a matter of discretion, urge caution in regard to any particular witness when summing up to a jury, or the terms to be used when doing so. We fully recognize that in particular cases judges may consider that the facts merit giving a special warning, tailored to the requirements of the trial in question. It is for the trial judge to decide, as an exercise of discretion.”

- [93] DS Shortte's testimony was in short that the CCTV images showed a Mitsubishi grey bus with a bumble bee sign and a motions sticker driving pass the car rental between 6:52 pm and 6:58pm and the route of the bus. The bumble bee and Motions sticker were unique to the appellant's sister and his brother-in-law business. The appellant agreed in his interview that he drove the Motions bus on

the day of the incident but at the time of the incident the bus was at Boynes' welding which he operated. The learned judge at the commencement of the passage in her summation referred to by Mr. Taylor, QC, directed the jury to give whatever weight if any they wish to give to DS Shortte evidence. DS Shortte not having been deemed an expert witness, there is no basis to find that the jury could have been misled to believe that DS Shortte was an expert witness. Further, there were other witnesses who were deemed experts such as, Mr. Cooper, and Ms. Rees. The learned judge reminded the jury that they were expert witnesses and gave the directions on how to deal with expert witnesses. In my view there was no danger that the jury could have treated DS Shortte as an expert witness.

Ground 9 – Admissibility of DC Bakker's evidence on CCTV recordings

[94] Mr. Taylor QC advanced the same argument of admissibility of DC Bakker's evidence in relation to the CCTV recordings and misdirection by the learned judge on how the jury should approach his evidence.

[95] DC Bakker is a call data analyst and he gave evidence in relation to call data. During his testimony he also gave evidence in relation to the CCTV images as follows:

"Q. My question to you is given the sequence of events that the defendant would have said in the interview, are you aware of any other investigation carried out so to speak as relates to what the police would have done on Main Street?

Yes, please my Lady. I am aware that CCTV survey was done immediately after the murder the following day. I was aware that several CCTV footages have been recovered and examined by the police and viewed. In particular, Detective Shortte was tasked with that aspect of the investigation. I know that the Motions Bus was seen traveling along Main Street shortly before 7:00pm. I know this because I viewed that footage. Once Mr. Shortte made a discovery, any discover, in the CCTV section that he was tasked to deal with, he brought it to my attention. He also displayed these footages, and I was able to see the Motions Bus mentioned earlier in the Defendant's interview travelling along Main Street, passing through cameras such as Bamboo Shay, Good Fellas and VP Back... And this was in proximity timings to the murder, My Lady.

I also note that the Defendant indicated that he alone had possession of this bus up until the point when he placed it at Boyne's Welding before going to Sea Cow's Bay."

[96] Mr. Taylor, QC acknowledged that DC Bakker was an expert in call data analysis, but he contends that DC Bakker was not an expert in CCTV analysis. He criticizes the learned judge's treatment of this evidence on two bases. Firstly, his statement that "...the Motions Bus was seen travelling along Main Street shortly before 7:00pm. I know this because I viewed that footage.", was opinion evidence and was inadmissible. It was the duty of the prosecution to raise the issue of admissibility with the defence and the learned judge. The issue not having been raised, the learned judge was required to raise the issue of admissibility and exclude the evidence. Secondly, DC Bakker was not an expert, nor had he acquired any special knowledge from viewing the recordings on numerous occasions, nor did he use any specialist software that would have enhanced the images, nor did he explain the methodology he used in seeking to identify the Motions Bus. The evidence was an attempt to usurp the function of the jury whose task it was to view and consider the recordings and decide whether they were sure it was the Motion's Bus. For all the above reasons, the learned judge should have excluded the evidence.

[97] Mr. Black, QC agreed that D.C. Bakker was not an expert, nor did he acquire any special knowledge from viewing the images on several occasions. Learned Queen's Counsel however submits that DC Bakker was not put forward as an expert. The evidence of DC Bakker which was not challenged was evidence of enquires made by the Police during their investigation and was admissible. Since the evidence of DC Bakker was not challenged there was no legal basis on which the learned judge could intervene.

[98] I agree DC Bakker like DS Shortte was not an expert witness. For the reasons which I gave earlier in relation to DS Shortte, I also find that it is not open to the

appellant to raise the issue of admissibility of DC Bakker's testimony. Further in my view the evidence did not have the effect of usurping the function of the jury since the learned judge directed the jury to consider the CCTV footage along with the evidence of Thomas "critically and determine where the truth lies."

Misdirection

[99] In directing the jury in relation to this aspect of D.C. Bakker's testimony, the learned judge told the jury:

"D.C. Bakker's evidence was also that as case Officer of this case, he was aware of the information he received in this case... that he was aware of CCTV footage that had been gathered by Officer Shortte, that he saw for himself the Motion's Bus travelling twice along Main Street in front of the cameras at Bambau shay, Good Fellas and VP Bank areas immediately before and after the murder."

[100] Mr. Taylor, QC contends that this was a misdirection. He submits that the learned judge was required to direct the jury to disregard the evidence of D.C. Bakker because he was not an expert witness, he did not use any software to enhance the viewing, DC Bakker did not state the number of times he viewed the readings, and no logs were presented. Learned Queen's Counsel also submits that the learned judge failed to direct the jury to approach the evidence with caution and that they could reject his evidence if it did not accord with their own conclusions. Further, the learned judge misstated the evidence of DC Bakker when she directed the jury that his evidence was the Motions Bus was seen in the footage "immediately before and after the murder.", when in fact, DC Bakker's testimony was "...and this was in proximity to the murder." This error Counsel contends strengthened the Crown's case.

[101] Mr. Taylor, QC further contends that the learned judge erred when she failed to give the jury a similar warning as she gave in relation to Mr. Anthony Chacon where she directed the jury that "...he was not deemed an expert and you must not approach his evidence in that manner."

- [102] Mr. Black, QC submits in response that the evidence being unchallenged, the learned judge correctly directed the jury that they should give the evidence such weight as they see fit. Further in relation to the contention that the learned judge misstated the timing, Queen's Counsel Mr. Black submits that it is axiomatic that the timings are immediately before or after the murder.

Discussion

- [103] While DC Bakker was an expert in Call Data Analysis, it was not in dispute that he was not an expert in relation to CCTV analysis. In the absence of a direction by the learned judge that DC Bakker was not an expert, it was indeed possible that the jury would have viewed his evidence in relation to the CCTV images as expert evidence, therefore the learned judge should have directed the jury that his evidence in relation to the CCTV images was not expert evidence. However, I agree with Mr. Black QC that in view of the fact that DC Bakker's evidence in relation to the CCTV images was not challenged on cross-examination, it was not put to him nor raised in any question that his identification of the Motions Bus was or may have been mistaken, and the learned judge having directed the jury to give the evidence such weight as they see fit, no miscarriage of justice resulted.

- [104] In relation to the timings, I agree that the learned judge in summarizing DC Bakker's evidence misstated the evidence in the manner in which she expressed it. However, the jury heard the evidence and they saw the CCTV footages and also they were given the CCTV images to review while they deliberated on their verdict. In my opinion, having regard to these circumstances, the jury could not have been misled as to what was the evidence. This error is not of the level to render the conviction unsafe and unsatisfactory.

Ground 10 – Misdirection on CCTV footage

- [105] Mr. Taylor, QC contends that the learned judge erred and misdirected the jury in relation to the CCTV evidence when she stated that:

“... the Crown ask you to infer and to conclude that the grey bus that was seen in the CCTV footage was in fact that which was driven by the accused.”

The learned judge continued:

“The Prosecution did not invite you to attempt to identify the accused from the footage, however, you may wish to consider that the Accused does not deny that, he drove the grey bus that day.”

[106] Mr. Taylor, QC submits that in so directing the jury, the learned judge erred in omitting to put the contentions of the defence in full. The learned judge omitted to direct the jury that the appellant had also stated in his interview that he had driven the bus at various points that day but that he had parked it back at Boynes' welding at the material time. The judge's direction suggested that the appellant's evidence supported the Crown's case which was incorrect.

[107] Mr. Black, QC in response submits that the learned judge did not err. The direction was accurate. The learned judge's direction did not undermine the appellant's case, rather it was an important part of the factual matrix that the jury had to consider. The appellant had acknowledged in his interview that he had driven the bus that day.

[108] I agree that the interview of the appellant was part of the factual matrix as contended by Mr. Black, QC. However, I agree with the submission of Mr. Taylor, QC that the appellant's statement should have been put in its proper context since indeed the appellant was not accepting that he drove the bus shortly before the incident in the vicinity of the car rental. Rather, the appellant accepted that he drove the bus that day but during the time of the incident he had parked the bus by Boynes' welding. However, a judge's summation must always be looked at as a whole. The learned judge clearly outlined to the jury that the appellant's defence was alibi and it was for the Crown to dispute the alibi. She urged the jury to carefully examine the interview of the appellant, the transcript of which was provided to the jury for them to consider during their

deliberation. The jury therefore could not have been misled as to what was the appellant's statement. The appellant's defence was therefore not undermined.

- [109] Mr. Taylor QC also urged the court to find that the grounds of appeal individually and collectively showed that the appellant's conviction was unsafe and unsatisfactory. In view of the findings made in relation to the grounds of appeal, while there were some errors made by the learned judge, I am not of the view that they were of such significance as to cause the conviction to be unsafe and unsatisfactory. There was no miscarriage of justice.

Conclusion

- [110] In conclusion, for the reasons stated above, I am of the considered view that all of the grounds of appeal advanced on behalf of the appellant are unmeritorious. The appeal is therefore dismissed, and the appellant's conviction is affirmed.

I concur.
Mario Michel
Justice of Appeal

I concur.
Paul Webster
Justice of Appeal [Ag.]

By the Court

Chief Registrar

