REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

PORT OF SPAIN

CR. APP. No. 125 of 2007

IN THE MATTER OF

DANIEL CHARLES

Appellant

AND

THE STATE

Respondent

Panel: Weekes, JA

Soo Hon, JA

Bereaux, JA

Appearances: D. Khan for Appellant

D. Seetahal S.C for Respondent

Delivered: 31st March, 2010

JUDGMENT

Delivered by: Bereaux J.A.

[1] The appellant was convicted on 18th December 2007 of two counts of wounding with intent to do grievous bodily harm to Winston Aqui and his sister, Grace Aqui. He was sentenced to eight years imprisonment with hard labour on each count, sentences to run concurrently. He has appealed his convictions on a number of grounds. The appeal has been fully argued by Mr. Khan orally and in written submissions, which reflected both preparation and thought. Having heard both counsel, we are not persuaded that we should disturb the verdicts.

Facts

[2] In the early morning of 11th November, 2004 siblings, Winston and Grace Aqui, were asleep in their home at #1 Fieldscape Drive, Four Roads, Diego Martin, when they were awakened by the sound of glass breaking. Winston looked at his watch, it was 5.15 a.m. He put on his spectacles (being *"badly short sighted"* as he put it), picked up a stick, which was at his bedside and made his way towards the kitchen area from which the sound emanated**.** When he got to the kitchen he saw a man coming through the broken glass pane of the front door of the living room. Winston was then thirty feet away from the intruder. The man was of African decent, of slim build and about 5 feet 7 inches tall. There was nothing blocking Winston's view of him. The lighting in the kitchen area was good. There were two lights from the front porch which shone through the front door glass pane into the living room. There was also lighting from several external lights which shone through the plain glass louvres of the kitchen windows, which had no curtains.

[3] The man strode towards Winston who advanced to meet him. They engaged where the living room and the kitchen meet. Winston struck the intruder with the stick from about three feet away. At that distance he had a clear view of the intruder. The man caught the blow with an upraised hand and *"jump kicked"* Winston, who fell to the ground, losing

his spectacles in the process. Some eleven to thirteen seconds had then elapsed since Winston first sighted the intruder. The intruder began to beat Winston with a metal stool saying *"stay down, stay down"*. Winston was on the ground in a crouched position kicking out at the intruder with his feet. At this point Grace intervened, armed with a cutlass and shouting *"leave my brother alone"*. She attempted to hit the intruder with the cutlass but he took it from her and dealt chops to both Grace and Winston. Winston was chopped on the back of his head and his right arm. Grace was also chopped on her head. The Aquis continued to struggle with the man. Winston hit him with the stool which he had been able to recover. Grace eventually managed to get the cutlass away from the intruder who then backed off, retraced his steps to the kitchen and fled the house.

[4] On November 30, 2004 at about 2 a.m. Constable Worrell arrested the appellant in the Four Roads area on Hillcrest Drive. A maxi taxi was intercepted by the police and the appellant was found lying on the floor. At the time the appellant bore a wound to his right buttock, he had been shot earlier by the police. He was cautioned, arrested and taken to hospital. Later that day ASP Glenda Smith saw the appellant at the West End Police Station. After introducing herself to him she cautioned him and told him of his rights and he agreed to be placed on an ID parade. He asked that his girlfriend, Denise Duke, be his representative during the parade.

[5] The parade, witnessed by Ms. Duke, began around 12:15 p.m. It comprised the appellant and 8 other persons of similar age, height, race and appearance. Winston identified the appellant on the parade as the man who had broken into his house and wounded him and his sister. Grace did not identify the appellant on the parade.

[6] Winston had seen the appellant twice before the incident. The first time was at his home about three months earlier, on a Sunday morning, about 7:30 a.m. He had heard someone calling. He walked to the porch and saw the appellant walking up the path to the porch.

Winston walked up the pathway and met the appellant there, standing about a foot away from the appellant who asked about odd jobs. The conversation lasted 1-2 minutes.

[7] The second occasion was approximately one month later. Winston had again heard someone calling at his home and on looking through the window, saw the appellant who was forty to fifty feet away, for two or three seconds.. Winston went out to speak with him but when he got there the appellant had already left.

[8] The appellant, having been identified by Winston, was charged for the offences. At the trial the appellant gave evidence but called no witnesses. His defence was one of mistaken identity and alibi. He testified that on the date of the incident he was at the home of his parents along with his siblings and his nephews. He said that on the day of his arrest, he was standing on the side of the road when he saw men in plain clothes coming towards him with guns in their hands. They did not identify themselves. He ran and was then shot by these men who turned out to be police officers. The appellant's evidence was to the effect that the identification parade was unfair. According to him, everyone else on the ID parade wore dark coloured jerseys and jeans. He, on the other hand, was dressed all in white; a white jersey and white pants.

[9] Assistant Superintendent of Police, Glenda Smith, had conduct of the identification parade. She testified of telling the appellant of her intention to put him on an identification parade and that she advised of his rights and privileges. She explained the process by which the parade would be conducted, and told him of his entitlement to change clothing and to change to any position in the parade that he wished. She said that there had been two witnesses called at the ID parade, Winston, followed by Grace. The appellant took up position three and exchanged his jersey with the person who was originally in that position. Later, prior to Grace's viewing of the parade, he changed to position 7 again exchanging jerseys, this time with the person originally in position 7. All

nine persons were similarly dressed in dark coloured jerseys, jeans and sneakers, of similar height and complexion and were of African descent.

[10] It was never put to Winston during cross-examination, that the accused was dressed all in white at the ID parade. Moreover, in the cross-examination of ASP Smith, counsel then appearing for the appellant, suggested to her that the appellant was wearing a white T-shirt but he never put to her that the appellant was dressed all in white.

[11] As a result of the appellant's evidence, the prosecutor sought and obtained leave of the trial judge to cross-examine the appellant on his previous convictions pursuant to section 13(3) of the Evidence Act, Chap. 7:02 contending that the appellant's defence (not only on the ID parade) involved imputations on the character of the witnesses for the prosecution. The trial judge granted leave on the ground that there were imputations against ASP Smith who conducted the ID parade.

Grounds of Appeal

[12] The appellant filed the following six grounds of appeal:

> ***(i). the conviction is unreasonable and cannot be supported having regard to the poor identification evidence; and,***
>
> ***the trial judge erred in law when he refused to uphold a no case submission on behalf of the appellant in light of the poor identification evidence.***
>
> ***(ii) the trial judge erred in law by failing to give the jury a full, adequate and effective Turnbull direction.***
>
> ***(iii) the trial judge erred in law by failing to adequately direct the jury as to the consequences that would follow should they conclude that the identification parade was unfair; in particular no***

warning was given on the effect such a parade might have on the identification in court, and on the dangers in relying on a dock identification generally.

(iv) The trial judge erred in law in failing to direct the jury on how to treat the failure of defence counsel to put a material allegation to two prosecutions witnesses. This resulted in the danger that the jury may have doubted the veracity of the appellant's evidence in this regard.

(v) the trial judge deprived the appellant of a fair trial by giving an unbalanced summation to the jury; in which he bolstered the case for the prosecution by misrepresenting a vital piece of evidence; failed to remind the jury of a key piece of evidence the appellant was relying on and made an unfair comment which may have had the effect of prejudicing the minds of the jurors, particularly with reference to the credibility of the appellant.

(vi) the trial judge erred in law in ruling that the appellant, through his counsel and in his own evidence, had made imputations on the character of the prosecution witness resulting in the trial judge wrongly exercising his discretion to allow the prosecution to cross-examine the appellant on his previous convictions after state counsel made an application under section 13(3) of the Evidence Act.

We propose to examine each ground separately

Ground 1 - Conviction unreasonable/wrongful rejection of no case submission.

[13] Mr. Khan argued that the conviction was unreasonable and could not be supported on the evidence because Winston's evidence, he being the sole identifying witness, contained such inherent weaknesses that the judge should have withdrawn the case from the jury.

He pointed to the following, as being weaknesses which rendered the conviction unreasonable:

(i) the incident occurred at 5:15 a.m., at a time when there was no natural lighting to aid whatever illumination was provided by the external lighting of the house. There were no lights on, inside the house, the only illumination coming from external lighting.

(ii) there is no evidence that the external lighting shone on the face of the intruder.

(iii) the entire period of observation lasted about 8 – 10 seconds.

(iv) Winston's observation of the intruder was made in difficult circumstances at a time when he was quite suddenly awaken from his sleep and may not have been fully alert. In addition, it is right to assume he was in a state of fear on seeing the intruder.

(v) the witness originally described the intruder as tall but then in court gave his height as 5' 7".

(vi) Winston never gave evidence of having seen the appellant's face during the incident.

[14] The law on no case submissions was quite succinctly stated by Widgery C.J in **Barker v R** 1977 65 Cr. App. R 287 (cited by both sides) who opined that the trial judge has an obligation to stop a trial in those cases in which the *"necessary minimum evidence to establish the facts of the case has not been called"*.

In **Galbraith v R** [1981] 2 All E.R. 1060-1062, Lane C.J, after approving the dictum of Widgery C.J in **Barker** said, at page 92:

"How then should the judge approach a submission of no case? (1) if there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty The judge will of course stop the case. (2) The difficulty arises where there is some evidence of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence. (a) Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty upon a submission being made, to stop the case. (b) Where however the prosecution is such that its strength or weakness depends on the view to be taken of a witness' reliability or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty then the judge should allow the matter to be tried by the jury".

Also cited with approval in that case was a passage from **R v Turnbull** 1976 3 All E R 549 at 552 – 553 which also bears directly on this appeal. It reads as follows:

"if the quality [of the evidence] is good and remains good at the close of the accused's case, the danger of a mistaken identification is lessened; but the poorer the quality, the greater the danger. In our judgment, when the quality is good … the jury can safely be left to assess the value of the identifying evidence even though there is no other evidence to support it; provided always, however, that an adequate warning has been given about the special need for caution … When, in the judgment of the trial judge, the quality of the indentifying evidence is poor, as for example when it depends solely on a fleeting glance or on a longer observation made in difficult conditions, the situation is very different. The judge should then withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification".

[15] Having considered the evidence before the trial judge, we do not believe that there was any necessity for the trial judge to withhold the case from the jury; neither do we find that the quality of the identifying evidence was poor. On the contrary, we find that the evidence at the close of the prosecution's case was good enough to have been left for assessment by a jury, properly directed on the issue of identification. We say so for the following reasons:

(i) While there may have been no natural lighting to aid the illumination provided by the external lighting, it does not follow that the internal lighting was poor. The evidence of Winston was that there was sufficient light inside the house. There was lighting from the front porch through the glass panes of the front door. One of those panes was broken so that light would have shone directly into the house through the broken glass. There was also lighting coming through the two kitchen windows from the external lights. While the lighting from the front porch shone towards the back of the intruder, the lights through the kitchen window fell to the front of the intruder. Moreover, Grace in her evidence in chief, testified that light in the corridor where the fight took place *"wasn't dark because it was now coming into morning so you get – not pitch dark but enough light to make out people"*.

(ii) While there was no specific evidence that light shone on the face of the intruder, Winston's evidence was that he saw the intruder coming through the broken pane in the front door and he (Winston) was about thirty feet away from him. The intruder looked in his direction. At that time Winston was still wearing his glasses and there was nothing obstructing his vision of the intruder.

(iii) Winston was within three feet of the intruder when he struck the intruder with the stick. He was still wearing his glasses and still had an unobstructed view of the intruder. He had the opportunity to observe the intruder for 11-13 seconds before his glasses fell off.

(iv) The contention that Winston's observation of the intruder was made in stressful circumstances in which he was awakened quite suddenly from sleep and may not have been fully alert, is of no moment. The submission belies the fact that Winston readily left his bedroom, armed with a stick and aggressively confronted the intruder, ultimately driving him away with the help of his sister. The evidence does not suggest that he was fearful or that his senses were dulled in any way. Indeed, the inference is quite to the contrary. In any event, this was a matter for the jury.

(v) The fact that Winston initially described the intruder as tall and later gave his height as 5'7" does not materially detract from the identification. Perceptions vary from person to person. What may be *"tall"* for one person may not be for another. It was a matter for cross-examination and ultimately for the jury to decide whether it was an inconsistency and, if so, to weigh it in the balance.

(vi) While it is accurate that Winston gave no specific evidence of having seen the appellant's face during the incident, the reasonable inference from his evidence is that he did. He had an unobstructed view of the intruder from a distance of thirty feet and an even closer one at three feet.

In our judgment, the facts and issues raised under this ground were all matters within the province of a jury possessed, no doubt, of common sense and experience. Having regard to the evidence, the verdict of the jury is permissible.

Ground 2 - Failure to give a full adequate and effective Turnbull direction

[16] This ground was divided into five sub-grounds as follows:

(a) the trial judge failed to warn the jury of the special need for caution before convicting on that evidence.

(b) the trial judge failed to instruct the jury as to the reason for such caution.

(c) the trial judge failed to remind the jury of any specific weaknesses in the identification.

(d) the trial judge failed to effectively and adequately remind the jury that mistaken recognition can occur even of close relatives and friends.

(e) the trial judge failed to identify evidence which might appear to support the identification but which does not have that quality, more specifically that -

(i) the fact that the witness pointing out the appellant at an identification parade in cases of recognition does not support the identification.

(ii) the fact that identification in court does not support the identification.

(iii) the fact of recognition does not support the identification.

(iv) the fact that the prosecution adduced evidence of recognition by relying, *inter alia* on an observation by Winston which was no more than a fleeting glance at a distance of 30 -40 feet through a grill.

[17] We shall say at the outset that the trial judge's directions of the identification evidence were fully in consonance with **Turnbull** and we can find no reasonable basis for complaint. We however propose first to set out the specific directions which are challenged by counsel for the appellant, refer to the **Turnbull** principles and then examine seriatim the various sub grounds of appeal. The relevant directions of the trial judge's summation, of which Mr. Khan complains are at page 7 lines 45 – 50, page 11 line 50, page 12 lines 1 – 20, page 14 lines 41 – 50, page 15lines 1 to 35 in these terms:

Page 7 lines 45 – 50 of the summation

> ***"The essential issue in this case is, was that person, was the intruder on that morning the accused? I believe that is what you have to decide in this case, and that is where you will focus your attention on. You will consider carefully the evidence in the case that relates to the identification of the person who entered the house that morning."***

Page 11 lines 50 to page 12 lines 1-20 of the summation

> ***"Now, as I mentioned to you earlier, the issue in this case is not so much whether or not Winston Aqui and Grace Aqui were attacked in their home and chopped, I suggest to you on the other evidence you should have no difficulty in coming to those findings. The question really is whether or not it was the accused who entered that house on that night and inflicted these injuries on Winston and Grace Aqui.***

Now, it has happened in the past that innocent persons have been convicted in reliance on the evidence of witnesses who turned out to be mistaken. I am sure you are well aware that people do make mistakes in identifying other persons. Sometimes people make mistakes even in recognizing persons that they know well. This is why you must be extremely careful in examining and considering the identification evidence in this case. It is usual to give you the warning. members of the jury, that an honest witness may be a mistaken witness, but may be a convincing witness. So what you have to do in every case is to consider carefully the circumstances under which an identification is made, and I will go through those circumstances with you in some detail".

Page 14 line 41 – 50 and page 15 lines 1-35.

"Now, as I had just suggested to you, after this witness loses his glasses when he is thrown on the floor, he would not have been in a position to make any proper observation of this intruder for a variety of reasons. One of them, the most important one being that he has lost his glasses. He is in a moving situation being beaten. According to his sister, Grace Aqui, he is trying to fend off the blows as well, so that would obstruct his view. And remember that shortly after that initial encounter in the area of the living room, the scene shifts to the struggle in the corridor, which according to the evidence, *was dark.* ***So that evidence of identification in this case, I am suggesting to you, which you ought to consider, is the opportunity to observe this intruder as he enters the front door, approaches Winston Aqui and then knocks him to the ground. From the time he is knocked to the ground and loses his glasses it seems to me there would be no reliable evidence of identification, and I direct you accordingly.***

Now, Winston Aqui also told you, and you must consider this, that nothing obstructed the accused face. He says he was wearing nothing on his face so he could observe him, nothing was blocking him. Winston Aqui is also saying that this is not a case of seeing someone for the first time and subsequently having to identify him. He is saying this is a case of recognition. So the suggestion here, according to the State's case, is that it is easier to recognize someone that you have seen before than to identify someone that you are seeing for the first time. According to Winston Aqui, he saw the accused some three to four months before, that was in July or August, the incident was in November. He says it was around 7:30 a.m. in the morning. He says this accused came to his home, the accused was looking for work. He met the accused on the pathway. They came up to a distance of about a foot or two apart. He says he spoke with him. No, he said a foot or two apart and in cross-examination, I am sorry, he says 2 to 3 feet apart. So that makes it a little bit longer. He says he spoke with him for one and a half to two minutes on that first occasion. He says after – about two to three weeks after that occasion he heard someone calling outside.

He peeped through the grill of the living room and he saw someone from a distance of about 40 to 50 feet away. He says it was the person same person and he caught a glimpse of him for some two to three seconds, but by the time he go outside, that person had left.

[18] We find it unnecessary to reproduce the now familiar dictum of Widgery CJ in **Turnbull.** That dictum has been succinctly summarized in **Archbold** 2007 edition at paragraph 14 – 17 as follows:

"Where the case depends wholly or substantially upon the correctness of identification evidence … a judge should:

(a) warn the jury of the special need for caution before convicting on that 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.

(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.

(h) identify evidence which might appear to support the identification but which does not have that quality".

The question is whether there is substance to the complaints made in the sub-grounds of appeal in respect of these principles. We shall examine each of them.

[19] Sub-ground (a) - *special need for caution*

Mr. Khan submitted that the judge ought specifically to have told the jury that it was required to approach the Winston's identification evidence with *"caution"*. Instead, the judge advised the jury to consider the evidence "*carefully"* and that they must be

"extremely careful" in examining and considering that evidence. He relied on **Fuller v. The State** 52 WIR 424. In that case, it was held that the judge's direction to the jury *"to examine with care the evidence given in relation to the identity of this accused",* was not sufficient to convey to the jury the essential elements of the **Turnbull** warning. The Court of Appeal applied the dictum of Davis JA in **Nandlal Gopee v The State** Cr. App. #32 of 1989 that a direction *"to examine with care before convicting is not the same thing as to exercise caution before deciding to convict"*. It is difficult to appreciate the distinctions attempted in either decision but a closer reading of both cases reveals that in neither case did the trial judge properly convey the essential elements of the **Turnbull** warning to the jury and it was for that reason that each appeal was allowed.

[20] In our judgment, it will be sufficient that a trial judge conveys, by clear language, the need for the utmost care in the examination of identification evidence, given the risks of a mistaken identification. (See **Leroy Mohammed v The State** Cr. App. #23 of 2008 at page 6.) It would offend common sense that a judge who conveyed by his words the need for a jury to be *"extremely careful"* and, that it should consider the evidence *"carefully",* could be faulted because the word *"caution"* had not been specifically used. Indeed, there is no difference in meaning between *caution and care.* **Collins English Dictionary** (reprinted 1999) defines caution as *"care, forethought or prudence, especially in the face of danger, wariness"*.

[21] Any form of words will suffice provided they impart to the jury the dangers inherent in identification evidence and the necessity to consider it with care and circumspection before convicting an accused. The judge's direction, especially when his summation is considered in its entirety, was adequate enough to do so.

[22] Sub-Ground b - *Judge did not explain why caution is necessary.*

It is incorrect to say that the judge did not instruct the jury of the reason for proceeding with caution. The judge quite specifically told the jury that innocent persons have been

convicted in reliance on evidence of honest but mistaken witnesses and this is the precise reason for caution – the previous occurrence of convictions based on mistaken identification.

[23] Sub-ground c - *no direction given on two specific weaknesses.*

Mr. Khan accepted that the judge did highlight specific weaknesses in the identification, but contended that he ought to have directed on two specific weaknesses in the identification evidence:

(1) the fact that there was no evidence that Winston saw the intruder's face.

(2) the fact that Grace failed to identify the appellant.

Both contentions are misplaced. Firstly, as we have already stated at paragraph 15(ii) and 15(vi) there was a clear inference from Winston's evidence that he saw the intruder's face. Secondly, (as Ms. Seetahal pointed out), the judge did tell to the jury that Grace did not identify the accused. But Grace's failure to identify the accused is not a weakness in the evidence. Every witness has his/her own powers of observation and recall. Grace's failure to identify the accused cannot form the basis of a weakness in the identification evidence of Winston, and moreso since his circumstances of and opportunity for observation were distinct from hers. He had a clear and unobstructed view of the intruder and unlike his sister, he had seen the accused on two previous occasions, one from as close as six feet, in clear light.

[24] Mr. Khan also pointed out that the judge's direction at page 14 that *"the corridor ….was dark"* was inconsistent in the evidence of Grace who said in evidence in chief that the light in the corridor "*wasn't dark because it was now coming into morning, so you get – not pitch dark but enough light to make people out"*. In contrast, Winston stated in cross-examination that *"the corridor was significantly darker than the kitchen area"*. To the extent that the judge erred in describing the corridor as *"dark"* and that this was

inconsistent with Grace's and even Winston's evidence, it would have inured to the appellant's benefit and cannot found a basis of complaint.

[25] Sub-ground d - *failure to direct in a timely manner that close friends and relatives do not always recognise each other.*

Counsel's complaint relates to two areas of the summation. The first, at page 12 lines 10 – 13 was as follows:

> ***"I am sure you are well aware that people do make mistakes even in recognizing persons that they know well".***

The second direction at page 15 lines 12 – 18 as follows:

> ***"Winston Aqui is also saying that this is not a case of seeing someone for the first time and subsequently having to identify him. He is saying this is a case of recognition. So the suggestion here, according to the State's case, is that it is easier to recognize someone that you have seen before than to identify someone that you are seeing for the first time".***

He submitted that the latter direction coming after the former, the judge ought, at that point, to have repeated the earlier direction, moreso because the accused was not someone well known to Winston. The submission is misconceived. The latter direction was not so remote from the former as to require any repetition. Further, it is not to be assumed that our juries are so lacking in common sense that they are to be repeatedly directed on legal principles. Indeed too much repetition may be interpreted by them as a mandatory direction to acquit or convict as the case may be.

[26] Moreover, kinship per se does not determine how well you may know someone. It is the association that comes with it which does. Friendship is an even greater facilitator of such association and knowledge. Thus, the initial direction of the judge *"that people do make mistakes even in recognizing persons that they know well"* captured well enough

the spirit of the classic **Turnbull** direction and it was not necessary to spell out that *"close friends and relations do not always recognise each other"*.

[27] Sub-ground (e) – *failure to point out evidence which though supporting identification was lacking in quality*

The sub ground is itself divided into four parts. We mean no disrespect to counsel when we say that we found great difficulty in apprehending its purport. Much of the submission is speculative and appears to emanate from an over enthusiastic application of the decided cases such as **Nigel Brown v. The State**, C. App. No. 8 of 2007, the facts of which are entirely distinguishable from the present appeal. Further, it is incorrect that the evidence of recognition adduced by the prosecution was based on an observation by Winston that was no more than a fleeting glance at a distance of 30 – 40 feet through a burglar proofing grill of his window. Winston's sighting of the accused on that occasion was subsequent to a previous encounter with the accused, some two weeks prior, in which he spoke face to face with the accused from a distance of six feet, on a pathway of his residence.

In our judgment the trial judge's summation on the **Turnbull** principles cannot be faulted.

Ground 3 – failure to direct on the effect of an unfair identification parade on a dock identification and on the dangers of relying on a dock identification generally.

[28] The submissions of Mr. Khan on this ground relate to page 15 lines 36 – 50, page 16 line 1 – 3 and 45 – 50 and page 17 lines 1 – 26 of the summation which were as follows:

> ***"Now the other matter you must consider as well is that Winston Aqui pointed out the accused at an identification parade about, just about 19 days after the incident, about two and a half weeks, about three weeks***

after the incident. Now if an ID parade is conducted, it would be a test of the ability of someone to pick out a person from persons of similar description. If it is fairly conducted, and the persons are of similar height, and similar appearance, similar clothing and so on, it is a test of the identification, of the ability of someone to identify someone from persons who are similar in appearance.

If it is not properly conducted, of course it would be unreliable. If it is unfairly done so that an accused person stands out in a parade, it would be of no use whatsoever. It would be worthless in terms of, you know, the evidence of identification. So that is a matter for you to consider."

(page 15 lines 36 – 50, page 16 lines 1 – 3 of the summation).

"Now, the accused suggested to you, well through his evidence, that the ID parade was really a farce, because he says he was dressed all in white. Someone brought clothes for him and he put on the clothes, and the clothes were white and the rest of them were in dark-coloured clothing. Now, if that is true, Members of the Jury, if you accept that that is true, or if you are in doubt as to whether that is true, then the i.d. parade would indeed be a farce, because if you put someone all in white, you know with other persons in dark clothing, well, obviously you know, anybody would be able to pick out the person in white you know. <u>And</u> you would bear in mind that that was not put to Winston Aqui when he gave his evidence that the accused was dressed all in white. It was put to ASP Smith that the accused had on a white jersey and nothing was said bout white pants.

You would bear in mind as well that at the ID Parade the accused had a representative; I believe it was his girlfriend, if I am not mistaken. Would the attorneys assist me, what is her name?

Mr. Fulchan: Denise Duke

THE COURT: Denise Duke. She was his representative and the accused was also there. Nothing is said about any complaint being made to ASP Smith or to any person there that the accused stood out, you know, that he was quite obviously in white among persons dressed in dark clothing. And it may have occurred to you, you would have assessed the accused as well, does he strike you as the type of person who would fail to comment on it at the ID parade? This is a matter for you. Consider the evidence.

As I told you, if the ID parade is unfair, you must not rely on it as being any assistance to the State in terms of supporting this identification".

Mr. Khan submitted that the judge had a duty to go further and warn the jury that if they found the identification parade to have been unfair, such parade could have adverse effects on other identification evidence of the witness, in particular his identification in court of the appellant. He submitted that at no point did the judge make the link between the identification parade and the identification at trial. The judge should also have warned the jury that in the absence of the identification parade, the dock identification parade was of no value.

[29] He relied on three authorities, **The State v. Vibert Hodge** (1976) 22 WIR 303, 309; The **State v. Ken Barrow** 1976 22 WIR 267, 274, and **Steve Williams v The State** Cr. App. #54 of 2000. **In Hodge,** Messiah J.A at page 309 paras. E-I said.

There is, however, another aspect of this matter that caused me much disquiet. Nowhere in his summing-up did the judge direct the jury, as he should have done, that if they found that the identification parade was unfairly conducted then they could attach little weight, if any, to (the victim's) identification in court. The two things are inseparably bound

up. Identification at the parade is not proof that an accused person committed the offence if there is no identification of the accused in court, but identification at the parade may lend strength and weight to the identification in court. If the parade is fairly and properly conducted its probative value must be high; if, on the other hand, it is unfairly conducted, then little weight, if any, can be given to the identification in court… The trial judge should therefore have directed the jury's attention to the relevance of the unfairness of a parade to the identification from the witness-box, and impressed on them that if they believed that the identification at the parade was not fair, then, they could hardly rely on the identification at the trial. The jury, not having been thus directed, might well have felt quite wrongly, that although the identification parade was unfair, nevertheless (the victim) had identified the appellant in court, and that was sufficient proof that he had committed the offence, without realizing the importance and significance of the relationship between the identification parade and identification from the witness-box. Had they been told of the relationship, they might well have decided the matter differently, or they might have found the appellant guilty in any case, but this is not for me to say. Suffice it to say that the failure of the trial judge to afford the jury adequate guidance on the issue of identification was a fatal flaw."

The dictum of de la Bastide C.J (as he then was) in **Steve Williams** at pages 3-4 is also relevant.

"The nub of the complaint made on behalf of the appellant is that the judge did not direct the jury as to the consequences which would flow if they discounted either totally or even partially, the value of the identification made in September, 1997, by the victim. It was submitted that he should have pointed out to them that, certainly, if the parade was

a farce because the appellant had been handcuffed, then the prosecution would have been left with nothing else but the identification made by the victim in court. In fact, it was submitted that the identification in court would have been even more unreliable than if there had been no parade at all, because all that the victim would have done in court was to identify the accused as the same man she had previously identified under unfair conditions.

Counsel submitted that his features would have been etched in her mind as from the date when that parade was held. Moreover, it was pointed out that the jury would not appreciate the dangers of an identification which is made in court without the confirmation provided by a properly held identification parade.

We think that there is substance in these submissions. Nowhere in the summing-up did the learned judge point out to the jury the impact of their entertaining doubts as to the fairness of the identification parade on the reliability of the identification in court. Nor did the court point out to the jury the frailty and unreliability of an identification made in court, particularly in circumstances like these, when the victim had never seen the appellant before, and had not set eyes on him until several months after the event."

[30] These authorities are distinguishable however. In all three cases, the identification parades were found on appeal to have been unfairly conducted. As such a direction on the effect of an unfair identification parade on a dock identification was important, since all that would have been left on the prosecution's case would have been the dock identification. In **Hodge** there was conflict in the evidence of the victim and the police complainant as to how the identification of the accused came about during the parade.

This required a direction from the judge about the reliability of the victim's dock identification which was not given. In **Barrow** the Court of Appeal found the identification parade to have been not just unfair but a farce. In **Williams**, the victim *"had never seen the appellant before and had not set eyes on him until several months after the event.*

[31] In the present appeal however, Winston testified to having twice seen the appellant before the incident at his home. Unlike **Williams** his identification of the appellant was made nineteen days after the incident at his home, and, unlike **Hodge**, his evidence and that of ASP Smith on the ID parade, were consistent. Thus, while the trial judge did not specifically warn the jury of the relevance of the unfairness of the identification parade to a dock identification, his direction that *"if the ID parade is unfair, you must not rely on it as being any assistance to the State in terms of supporting this identification"* was adequate, as it was clearly referring to the identification of the appellant in court. Moreover, it would have been obvious to the jury, had they found the ID parade to have been unfair, that any benefit to the prosecution from such a parade would have been negated and they would have been left with Winston's recognition evidence, that is to say; those two prior occasions when the appellant came to his home, his observations made at the time of the incident and his dock identification. This ground also fails.

Ground 4 – Improper direction on the inconsistencies between counsel's instructions as put to the prosecution's witnesses and the evidence of the appellant.

[32] This ground of appeal was directed at page 16 lines 45 – 50 and page 17 lines 1 – 9 of the already set out at paragraph 26 page 24. Mr. Khan submitted in effect that the judge ought to have gone on to direct the jury on the possible reasons for the inconsistencies between what was put to the prosecution witnesses by his attorney at law and what was said by the accused in his testimony. Those inconsistencies may not have been due to a lack of credibility on the part of the appellant but instead may simply have been an

omission by his attorney at law. The judge ought to have explained to the jury the various reasons why counsel for the appellant may have omitted to put his client's instructions fully to the prosecution's witnesses.

[33] He cited in support the decisions of the Court of Appeal in **Fournellier v Henry** Mag. App. No. 146 of 2005 and **Reed Richards v The State** Cr. App. No. 12 of 2008 as well as the Privy Council decision in **Jackson v The State** P.C. App. No. 50 of 1997 [1998] UKPC 44 and contended that the judge's failure was prejudicial to the appellant because the jury may have concluded that the inconsistencies between his evidence and the instructions put to the prosecution witnesses were due to the fact that the appellant was lying or that his defence was recently fabricated. A similar argument, though directed at the address of prosecuting counsel was made in **Reed Richards v The State** Cr. App. No. 12 of 2008**.** Weekes J A said at pg. 31 para 68:

> ***"It is the court's view that despite the direction given by the judge there was a grave danger that the jury would have ascribed the failure to put evidence to witnesses to doubtful veracity in the appellant's evidence. The failure of the trial judge to direct the jury on the different reasons why certain evidence would not be put was prejudicial to the appellant".***

[34] While we accept that the judge did not give the direction, we do not find that there was any real prejudice to the accused. The divergence in instructions put to ASP Smith and the evidence of the accused was de minimis. Counsel *did* put to her that the appellant wore a white jersey on the parade, he simply omitted to put that the trousers were also white. Therefore, there was no inconsistency when the appellant said that he was all in white. It was sufficiently conveyed to the jury that the appellant was made to be conspicuous and that the parade may have been unfair. The appellant's counsel also omitted to put anything about the clothing to Winston, it would have been a different

matter had he put something which was materially inconsistent with the appellant's evidence. The authorities cited may then have been of assistance to the appellant but this was not the situation in this case. We find no merit in this ground as well.

Ground 5 - Appellant deprived of a fair trial by an unbalanced summation.

[35] Mr. Khan contended that the trial judge gave an unbalanced summation to the jury;

(i) by misrepresenting to the jury that the sole eye witness said nothing was obstructing the face of the accused. (page 15 of the summation lines 9-12.

(ii) by unfairly commenting on the appellant's failure to remark on the alleged unfairness of the identification parade.(page 16 lines 45 – 50 and page 17 lines 1 - 26.

As to (i) above, we have already rejected with a similar complaint. For the reasons already stated at paragraph 15(ii) and 15(vi) above, we find that there was no misrepresentation by the trial judge. As to (ii) above, the summation complained of is already set out at paragraph 27 at page 21 above. Mr. Khan submitted that the comments of the trial judge exceeded permissible bounds. We do not agree. We find nothing excessive or prejudicial in the comments of the trial judge. He was entitled to comment, even robustly, on aspects of the evidence which he considered relevant to the verdict of the jury provided he left the final decision on the facts to the jury. We consider that he did. There is also no merit in this ground.

Ground 6 – wrongful exercise of judicial discretion to allow cross-examination on previous convictions.

[36] The judge granted leave to the prosecution to cross-examine the appellant on his previous convictions pursuant to section 13(3)(b) on the basis that the cross-examination on behalf of the appellant raised imputations against ASP Smith who conducted the ID parade. One of the planks of the appellant's defence was that the ID parade was unfairly conducted in that he was dressed all in white, while all other members of the ID parade

were in dark clothing and, that he was unable to stand straight up because he had had recent surgery to his abdomen. Section 13(3) provides as follows:

(**3**) **A person charged and called as a witness in pursuance of this section shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless –**

(a) the proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged; or

(b) he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his won good character, or has given evidence of his good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution or the victim who is deceased or otherwise incapable of giving evidence of the alleged crime; or

(c) he has given evidence against any other person charged with same offence.

[37] Mr. Khan submitted it had never been put to ASP Smith that she had deliberately set up the ID parade so that the appellant would stand out *"like a sore thumb"*. He added that in granting leave, the judge ought to have considered:

(i) whether an imputation was made, and

(ii) whether such an imputation warranted the admission of the appellant's previous conviction

No imputations were made on the prosecution witnesses, or, alternatively even if there were imputations made they did not warrant the admission of the appellant's convictions on the facts of this case.

[38] We find also no merit in this submission. We consider that the trial judge was right to have admitted the convictions into evidence. The decision of the House of Lords in **Selvey v Director of Public Prosecutions** 1970 AC 304 is relevant. It established the following propositions of law:

(i) the admission into evidence of the previous convictions of an accused is a matter at the discretion of the trial judge.

(ii) the section permits cross-examination of the accused on his character both when imputations on the character of the prosecution (police complainant) and his witness are cast to show their unreliability as witnesses independently of the evidence given by them and also when the casting of such imputations is necessary to enable the accused to establish his defence.

(iii) in rape cases however, the accused can allege consent without placing himself in peril of such cross-examination.

(iv) if what is said is no more than a denial of the charge, albeit expressed in emphatic language, it should not be regarded as coming within the section.

(See Viscount Dilhorne at page 339).

[39] Given that the admission of the previous convictions was a matter of discretion for the trial judge it will have to be shown that the judge *"erred in principle or there is no material on which he could properly have arrived at his decision." (*Per Devlin J in **Cook** [1959] 2QB 340,348). In this regard, the decision of the English Court of Appeal in **Tanner v R** 1978 66 Cr. App. R. 57 is helpful. In that case, the accused was indicted on two counts of theft. Police officers who gave evidence for the prosecution testified that the accused had made admissions about the transactions on which the two counts were based. This was denied by the accused at the trial. His counsel did not cross-examine the police officers but merely suggested that they were wrong in saying that the accused had committed the offences. During cross-examination, the accused, in answer to the trial judge stated that the evidence of the police was a complete invention. The trial judge then granted the prosecution's application to cross-examine the accused on his previous convictions.

[40] On appeal, it was contended that the judge was wrong, since there was a simple denial by the defendant of the evidence given by a prosecution witness and that even if the accused had said that that witness was lying, it did not involve an imputation on the character of the witness. It was held that the judge was right to have admitted the convictions because the accused was saying in effect that the officers had, together, made up a substantial and vital part of their evidence and therefore the nature of the defence did involve imputations on the character of the police officers in question.

[41] It is the same in this appeal. We consider that evidence given by the appellant as to the unfairness of the ID parade raised allegation of impropriety against ASP Smith, which was sufficient to bring him within the proviso in section 13(3) (b). It was an allegation that she, in breach of her duty to ensure that no member of the parade stood out, deliberately permitted the appellant to stand out, the only inference being that it was with a view to having him identified unfairly. It is an allegation of misconduct in the performance of her duty and is a slur on her character, moreso as a senior police officer. We find that the trial judge properly exercised his discretion to admit the appellant's previous convictions. This ground also fails.

We find no merit in the appeal. We dismiss the appeal and affirm the convictions and sentences. Sentences to run from date of conviction.

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P. WEEKES

Justice of Appeal

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A. YORKE-SOO HON

Justice of Appeal

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N. BEREAUX

Justice of Appeal