COMMONWEALTH OF THE BAHAMAS

IN THE COURT OFAPPEAL

SCCrApp No. 173 of 2019

B E T W E E N

NEIL INGRAHAM

Intended Appellant

AND

REGINA

Intended Respondent

BEFORE: **The Honourable Sir Michael Barnett, P**

The Honourable Madam Justice Crane-Scott, JA

The Honourable Mr. Justice Jones, JA

APPEARANCES: **Mr. James Thompson, Counsel for Appellant**
Mr. Terry Archer, Counsel for Respondent

DATES: **10 February 2020; 27 February 2020; 12 May 2020; 10 June 2020; 19 November 2020**

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Criminal Appeal- Application for Extension of Time- Attempted Murder- Identification Evidence-Turnbull Direction-Direction of the Jury- Verdict Unsafe

On the 29 May 2014, Brandon Duncombe was walking home alone on Washington Street when he was approached by the appellant, Neil Ingraham, who was dressed in a black hoody and armed with a handgun. A struggle ensued and the hoody fell off of the head of the appellant permitting Mr. Duncombe to see the appellant's face. Mr. Duncombe was shot a total of six (6)

times about the body. The appellant was charged and convicted of attempted murder and sentenced to thirty -four (34) years imprisonment. He now seeks an extension of time to appeal his conviction.

Held: Extension of Time application dismissed. Conviction and sentence affirmed

There is no obligation requiring the judge to point out all of the discrepancies or inconsistencies in the evidence. There appears to be a growing feeling among practitioners at the criminal bar, that a trial judge is obliged in the course of his summing-up to draw all material discrepancies to the attention of the jury and that, if he does not, such an omission constitutes some grave error on his part which may result in a conviction being quashed.

We have no doubt that the judges summing up was fair. The summation drew the jury's attention to the fact that this case turned on the credibility of Duncombe and whether after hearing his evidence, the jury was satisfied as to his identification of the appellant as the person who shot him. The jury heard the evidence and the judge gave the necessary warnings as to how to treat discrepancies and the necessary caution as to how to treat and consider identification evidence.

R v Whylie (1977) 25 WIR 430 considered
Barnes Desquottes And Johnson v R Scott And Walters v R (1989) 37 WIR 330 applied
Beckford & Shaw v R (1993) 42 WIR 291 considered
Blake v R [2017] 91 WIR 463 considered
R v Turnbull (1976) 63 Cr. App. R. 132 considered
Boodram v The State [1997] WIR 304 considered

J U D G M E N T

Judgment delivered by The Honourable Sir Michael Barnett, P:

1. This is an application for an extension of time to appeal a conviction for attempted murder. In considering this application, we considered the merits of the appeal as it was fully argued before us.

2. On the evening of 29 May 2014 sometime between 10:30-11:00 p.m., Brandon Duncombe was shot several times whilst walking home. He was taken to the hospital and survived the shooting. He testified that it was the appellant who shot him. He knew the appellant for many months as the appellant was his neighbor, living in a home belonging to his family. They had engaged in a struggle and during the struggle he testified that the hoodie that was being worn by the shooter fell off and he was able to identify the shooter.

Duncombe identified the appellant at an ID parade conducted shortly after he was released from hospital. That was the only evidence against the appellant. No gun was found in his possession, nor was there any forensic evidence connecting him to the shooting.

3. At the trial, the appellant gave evidence. He denied that he was the person who shot Mr. Duncombe. He said that he knew nothing about the incident. He testified that he knew Duncombe and confirmed that they were neighbours. He said that as far as he knew he and Duncombe were cool. The appellant called another person to testify on his behalf. Popeye who lived the neighbourhood and knew both the appellant and Duncombe. Indeed, Popeye and Duncombe had seen each other for about 15 to 20 minutes before the shooting when Duncombe went to recover a tool he had loaned Popeye. Popeye testified that he saw two persons wearing hoodies shortly before the incidents and one had a gun. Neither of those persons was the appellant, He did not see the actual shooting, although he had heard shots. He had seen the two persons with hoodies before he had seen Duncombe and before Duncombe had left him.

4. The jury convicted the appellant of attempted murder. He was sentenced to 34 years imprisonment.

5. The appellant has appealed that conviction.

6. His grounds of appeal are:

1. **The learned judge erred in fact and law when she failed to warn the jury on the danger of relying on the identification evidence since this was case of recognition and, therefore, it concerned the credibility of the virtual complainant Brandon Duncombe (also known as "Blunt"), such failure resulting in miscarriage of justice.**

2. **The learned judge erred in fact and law when she failed to highlight the discrepancies in the evidence of the virtual complainant Brandon Duncombe (also known as "Blunt"), the sole eyewitness, which would have affected his credibility, such failure resulting in fatal flaw, which led to miscarriage of justice.**

3. **The learned judge erred in fact and law when he failed to highlight the weaknesses and discrepancies in the evidence of the respondent's witnesses thus making her Turnbull directions insufficient.**

4. **That under all the circumstances of the case, the verdict is unsafe.**

7. As the appeal is a challenge to the adequacy or fairness of the summation to the jury, I will set out in full the relevant portion of the judge's direction:

> **"Now, the Crown called six witnesses in the trial, in support of the charge. And I do not propose to go through all the evidence, as in closing addresses by both Counsel for the Defence and Counsel for the Prosecution. They would have gone into details as to the evidence in this case.**
>
> **Now, before I briefly summarize the facts to you, let me just say something about the nature of testimony you hear in court.**
>
> **So, you may consider this when you come to deal with the evidence of each witness. It is your job to put all of the evidence you heard together.**
>
> **The next thing you must decide is, who the person was who committed the offence. As I would have said, there were two things you had to decide. Was the offence committed? And who committed the offence?**
>
> **And based on the evidence of the virtual complainant, the medical evidence and the forensic evidence of Javod Frazier, the crime scene photographer, there is evidence, that you can be sure, that the offence did occur, on the 29 May 2014.**
> **The second question is for you to decide, who committed the offence? In this case, the virtual complainant is saying, that the defendant, Neil Cordell Ingraham, committed the offence.**
>
> **The first factor -- before I go into further details in relation to those witnesses, let me continue to tell you, how you should look at the evidence of each witness. I don't want to go into the evidence before I actually get there. I don't want to confuse you.**
>
> **The first factor is to account for what may appear to be the differences between what witnesses say about the same incident in their ability to observe. And these are the factors, that you must look at or consider, when dealing with the evidence of each witness.**

And the first one is to consider how each witness may have observed certain things.

The second factor is that the trial, most trials, occur months, sometime years, after the event. In this particular case, this trial is taking place five years after the event.

So therefore, you must look or consider how well an individual remembers an event. Some of us have great powers of recall and some of us don't.

Whenever you have a witness come into court, you must bear in mind, that one witness' recollection, regardless of how well he or she observed the event, may not be as good, acute or as sharp as that of another witness.

And then the third factor, which you need to consider is, the ability of each witness to relate. A witness may have observed ideal circumstances -- may have had ideal circumstances, may have a perfect recollection. But when he comes to court, he or she comes to court, is intimidated or simply because of his own education or background, he's unable to tell his story.

When you consider all of these factors, which I have just mentioned, you will not be surprised, that whenever you hear testimony in court, there is bound to be discrepancies between what one witness says to you and what another witness says.

How then are you to deal with these discrepancies? As I said, there are bound to be discrepancies or inconsistencies. What you have to decide, and I can only indicate to you, what to look for, because that is your decision.

What you have to decide is this, whether the discrepancies, if you find them to be discrepancies, because you may consider, that they are not so serious, that it causes you to doubt the evidence of a particular witness.

They may be slight, serious, material or immaterial inconsistencies. If slight, you will probably think it does not affect the credit of the witness concerned.

On the other hand, if the discrepancy or the discrepancies are serious, you may say, that because of that, it is unsafe to believe that witness, on that point or even to believe the witness at all.

Now, the first witness, that the prosecution called was Corporal Javod Frazier. And he was the crime scene investigator. And he was the officer, who would have -- who took photographs of the various scenes and collected certain items, on the 30 May 2014, at about 1:05 a.m.

And this would have been shortly after the offence would have been committed. And he told you, that he along with other officers, went to the scene on Washington Street. And he would have observed certain things. Namely, unfired nine millimeter cartridges, a right foot of Nike tennis, bloodstains on a septic tank. And a number of unfired cartridges.

So, in addition to fired cartridges, he found unfired cartridges. And these belonged, he said, to a nine millimeter weapon.

And I would pause here to say, that in the closing submissions of -- by the Defence, Defence Counsel is saying, that the transcript in this case would have indicated, that the virtual complainant, in his evidence had said, that the shooter had a shotgun.
This evidence by Javod Frazier, Corporal Javod Frazier, obviously then contradicts that evidence, because he did not find ammunition or -- in relation to a shotgun. Rather, he found cartridges belonging or that fit a nine millimeter pistol.

Now, members of the jury, we all sat in this courtroom. And we would have heard what the witness, the virtual complainant, would have said in his evidence.

It is a question for you whether in fact you did hear him say, a shotgun versus a short gun. Because you must take that into consideration when you consider the evidence of the virtual complainant.

And whether in fact, what he said occurred that night, could have happened, if the accused had a shotgun versus a short gun. Because remember, there was a scuffle. There was a fight.

I only wanted to draw that to your attention, because the forensic evidence is that -- or the evidence, that was found on the scene, does not show that there was a shotgun involved. But rather, there was a nine millimeter pistol.

Now, this Officer, in cross-examination, was also asked about the distance between the streetlights in the photographs. He estimated that they were some 30 to 40 feet apart.

When you come to the evidence of Brandon Duncombe, he may have given us perhaps a shorter distance.

But it is a matter for you, members of the jury. You will have the photographs. You will be able to see where the streetlights are positioned in relation to where the virtual complainant said that he first encountered the shooter.

And also, the lighting that appears on the apartment building, which is almost directly over where he fell on the septic tank.

Those are -- that then is a question for you, as to whether you find any difference in estimation of distance to be of a serious discrepancy -- to be a serious discrepancy or a slight discrepancy.

Now, on cross-examination, that witness was asked if he had requested any fingerprints or any DNA analysis in relation to the items, which he had found. He said that he requested fingerprints -- no, he said, he did not request fingerprints.

He said that DNA Analysis was requested, but he did not have any results. Remember what I had said to you, that you are not to speculate on what evidence there could have been.

You must decide the case, based only on the evidence, that the prosecution has brought to you. The prosecution is saying, that based upon the evidence of the virtual complainant, the offence has been established.

And that the person, because the virtual complainant was able to identify the shooter, that it was the defendant, who the virtual complainant is saying, shot him. But I will come to that when I come to the evidence of Brandon Duncombe. Because I

must give you some special directions, as it relates to identification.

Now, we have reached the point, where I will now go into the evidence of the main witness in this case, who is Brandon Duncombe, the virtual complainant.

And it is his evidence, members of the jury, that if you accept, that the defendant was the one who shot him, then the Crown would have satisfied you, on that second question, as to who was the shooter, if you accept the evidence of Brandon Duncombe.

Brandon Duncombe told you that he lived on Washington Street, south of Cordeaux Avenue. And that on Thursday, the 29th of May, around 10:40--now on cross-examination, he would have indicated, that perhaps it was 11:00 p.m.

But close enough. It's 10:40 close to 11:00. Center point, at 11:00 p.m., that this incident, according to Brandon Duncombe, occurred.

He told you, that he was walking --while walking home about 30 feet away from his house, a man medium built, came with a gun wearing a dark hoodie. He came right in his face and they had a scuffle for about two or three minutes.

The man shot the gun--shot the gun and he tried to push him off. And he ran through the shortcut. And you've heard a lot about the shortcut.

All witnesses have shown you on the photograph, where that shortcut was. So, you would have a fair idea as to what the virtual complainant was saying, when he had the scuffle just before going into the shortcut.

He said, the scuffle took about two to three minutes. And he was able to see the face of the person, who had the gun.

He said, he tried to push him off. He ran through the shortcut. At that time, he heard more shots and he realized he was hit in the back three times. And he fell to the ground.

And then the person came up to him and shot him again and then ran off.

He then told you, that he walked to the front road, where his friends--where his friends were, and they rushed him to the hospital. He told you, when asked, that he had seen, or he would have seen the face of the man for approximately 120 seconds. And he would have been in inches of him.

And through the scuffling-- shuffling or scuffling, the hoodie that the man was wearing came off. And he was able to see the face. And he asked him, what he was dealing with.

Now, when asked about the lighting, he said, that the lighting that night was perfect. The nearest light being approximately 10 to 15 feet away.

And here again, you will have the photographs, which will indicate to you some idea what the distances were in relation to where the light was and where the incident occurred.

He said, he recalled seeing fire from the gun after playing dead. And this was when he would have fell on the septic tank. He recognized the person, who shot him as "Turtle." The defendant, who he said, lived in one of his family's apartments.

Now, madam forelady, members of the jury, the case against the accused, in this case, rests wholly on the correctness of this identification evidence, which you have received from Brandon Duncombe.

The evidence of Brandon Duncombe, if true, would put the accused, Neil Ingraham, on the scene of the crime, and the person, who committed the offence.

I would therefore warn you then of the special need for caution before convicting the accused, on the reliance on the evidence of identification.

But I must also tell you, that you may do so, if after giving full heed to my warning, you are satisfied, that the virtual complainant, that is Brandon Duncombe, was telling the truth.

Now, the whole incident occurred in a matter of minutes. According to the evidence of Brandon Duncombe, the entire event would have lasted between 15 to 20 minutes.

The witness said, the defendant was inches apart from him. There was a scuffle, as he tried to get the gun away from him. As I indicated, he spoke to him.

You now have to ask yourself the question, was this observation long enough for Brandon Duncombe to observe the person, the shooter, as "Turtle", the defendant in this case, that's the alias, Neil Cordell Ingraham.

Members of the jury, even if the person, the witness, seems to identify someone he says he knows, the opportunity to observe must still be ample opportunity in order to make a correct identification.

It is going to be a question for you, whether you think that observation, that the virtual complainant had of the shooter that night, was long enough.

You must consider at what distance was the observation made. You would agree, that if persons are scuffling, they are very close. Was it too close for them to observe any special characteristics, which wou1d cause him to recognize him again? That is a matter for you.

Counsel for the defendant is saying, that the circumstances that night, would have been stressful for the virtual complainant, because he was fighting for his life. And that the light shining overhead would have made it very difficult for him to see the face of the shooter.

You will have the photographs. You heard the defendant tell you, this is someone he knew. It is a question for you, as to whether it is a fact.

On cross-examination by defence counsel, the virtual complainant was asked whether he wore glasses. Meaning, was he certain of what he saw or who he saw. And his response was, he had 20/20 vision.

He was asked why--by defence counsel, why he did not tell the police, that he was--that he saw the face of the person who shot him. And he told him, he did tell the police.

Now, the next consideration, which you must take into regard, when we look at the issue of identification, members of the jury, is what lighting conditions would have been in place, when the observation was made, or the identification was made.

This would have been-roughly around 11:00 p.m. The witness, the virtual complainant, would have identified or shown in the photographs the lighting on the lamp posts. He would have showed you the lighting. I think he referred to it as "dawn to dust" lighting on the apartment building directly adjacent to where he fell on the septic tank.

The lighting, based on that evidence, described by the witnesses, appeared to be good. But it is still, members of the jury, a matter for you.

You must ask yourself also, did anything impede the witness' observation of the defendant? And as you recall, the witness said, that the person was wearing glasses.

It appears that the hoodie would have been covering a part of his face, because the virtual complainant would have said, that during the scuffle, the hoodie fell off or fell from his face. And he was able to see his face clearly.

Counsel, on cross-examination, asked the witness if during the scuffle, he was able to take the weapon from the shooter. And he said, his focus was on the gun. He asked--sorry, defence counsel asked the witness if his focus was on the gun and not the face of the shooter.

And the virtual complainant's response was and a direct quote, "my two focus was for my life, because was fighting for my life. I was looking at the shooter and I was fighting for my life."

The next question, members of the jury, you have to ask was, had the witness, that is virtual complainant, has he seen this person before?

Now, he told you in his evidence, that he had known the defendant for approximately 8 months. He said, he asked him --he had actually seen him that morning before going to work. He had given him a cigarette and he had spoken to him about two or three minutes that morning.

This evidence was confirmed by the defendant when he next gave his evidence. And we will get to his evidence shortly.

This, members of the jury, is a case where the virtual complainant, Brandon Duncombe, is telling you, that he knew the shooter very well.

However, when identification involves recognition, members of the jury, by the witness of someone he knows, mistakes in recognition are sometimes made and so care have to be taken, even when the witness says he knows the accused.

The need for this warning to you is because it is possible, members of the jury, for an honest witness to make a mistaken identification.

There have been wrongful convictions in the past as a result of such mistakes. Even an apparently convincing witness can be mistaken.

So, even if you mind that these witnesses are honest and convincing witnesses, they may yet be mistaken in identifying the accused.

You then have to make and determine, members of the jury, as I indicated, whether after heeding the warning, that I have given you, whether in fact you believe the evidence of the virtual complainant, when he said that the shooter was someone he recognized and knew as Neil Cordell Ingraham aka "Turtle." And that he was the shooter on the night in question.

Now, you also have to take into account how long it was between the original observation and the identification to the police. The virtual complainant would have told you, in his evidence, that he went to CDU and picked out the defendant from an ID parade shortly after.

Shortly after, in this case means, the incident occurred on May 29th, 2014. And according to his evidence, he was in hospital for approximately three days. And so, he identified the accused, on June 2nd , 2014, some four days after the incident.

And the police, who were conducting the identification parade, would have told you, that the virtual complainant told him, that he knew who the person was, who shot him. And we will come to the evidence of that officer shortly.

Now, all of the matters, which I have addressed, those are special directions. All of those special directions, which I have given to you on identification, go to the quality of the identification evidence. And you must consider these circumstances carefully.

And as I said, if the quality of the evidence remains good throughout, then you may convict on it.

As I have said, even if you find, that there is no other evidence to support it, you may convict on it. If you have a reasonable doubt, however, in relation to that identification evidence, then you must reject it.

In summary, on the issue of identification, once you have cautioned yourselves about the directions, that I have given you, i.e. the directions in relation to identification evidence, then you can act on it".

The virtual complainant, in cross-examination, was also asked, why he did not go home after the incident. And he said, he was in fear of his life.

It is reasonable, members of the jury, based on the fact, that someone who has been shot six times and according to the evidence of the medical doctor, that these were very serious injuries, that a person would not go home, but would rather go to hospital.

And the virtual complainant has indicated to you, that is exactly what he did.

Now, in his evidence, he would have already -- he would have also told you, and I just need to mention this briefly, that prior

to the incident happening, he would have stopped by a person, he referred to as Popeye, who lived nearby to return or to collect a tool.

And he would have told you, that Popeye at the time, would have been on his patio outside. And he would have stayed there a few minutes before the incident.

I mention that because, the witness or the person referred to as Popeye, was called as a witness by the defence in this case.

And so, I will come to his evidence in detail shortly.

Now, on cross-examination, the virtual complainant would have picked out the defendant, as I indicated, on the id parade.

And he would have also given to the police persons or the names of two witnesses, who would have been at the scene at that time.

You recall the -- he did not give any evidence that Popeye, the witness that was called by the defence, was on the scene that night.

The third witness, and I don't need to go into, much details, because I have touched on the medical evidence from time to time in my summary of the other witnesses.

But the third witness was Dr. Gilbert, who would have been the doctor, who would have attended to the virtual complainant that night.

And the purpose for this exercise, she was deemed an expert. And so, I have to give you a special direction on how you should deal with the evidence of an expert witness.

Members of the jury, it is not usual for persons to be deemed experts. They are usually brought to assist you in matters, which can go beyond your particular life experience, your training or your education.

They are persons, who through the course of study and work experience, gain a level of expertise in a particular area, which allows them to speak with authority on this particular matter.

But it is only in relation to those small bits of evidence, that they can assist, which is usually scientific or technical evidence.

Expert witnesses, like any other -- unlike other witnesses are entitled to give opinions with evidence. It is rare, that they were on the scene or saw anything. It does not mean you have to however accept the evidence.

In the same way you assess the evidence of every other witness, you must access the evidence of an expert witness.

However, you may caution yourself, that before you throw out or disregard the evidence of an expert, that you think carefully before doing so. As I said, they are the experts. And they are entitled to give their opinions.

And in this case, the -- Dr. Gilbert told you, that the virtual complainant presented at Accident and Emergency, approximately 11:45 p.m., on the 29th of May.

It would have been some 25 minutes to an hour after the incident would have occurred, according to the evidence of the virtual complainant.

She told you, that in such cases as this one, the doctor would have stabilized the patient and a determination is then made as to whether the person goes in surgery.

And her opinion was that, based on the gunshot wound, it was possible for the virtual complainant to die, if he had not received medical intervention.

And that is very important. It confirms that, the injuries received by the virtual complainant, were life threatening. Hence, the charge of attempted murder, in this case.

She was also asked, in examination-in-chief by the Crown, if a person, who has been shot six times would be immediately released. And her response was, definitely, no.

And, members of the jury, you will have exhibit NI-3, which is the Royal Bahamas Police Force Medical Form to view in the jury room. And from that form you will see, or you will be able to see, where the virtual complainant, in this case, would

have received gunshot wounds to the front and to the back. A total of some six shots about the body.

On cross-examination, the doctor was asked, by defence counsel if any bullets were recovered. She was told that it was not unreasonable to leave bullets in a person. And if bullets were recovered, they would be handed over to the police.

The virtual complainant, in his evidence would have said, that he did not have surgery and he still has bullets in him.

Now, the next witness was Inspector Taylor, who is attached to the Central Detective Unit or who was attached to the Central Detective Unit in 2014.

And he told you, that on the 3rd of June 2014, he was on duty, at 11:25 a.m. He conducted an id parade to determine, who shot Brandon Duncombe, on Washington Street, on the 29th of May 2014.

He told you, he saw the defendant. And he told him that he had an option of a line-up or confrontation. And the defendant selected the line-up.

The witness told you, that the virtual complainant said, he knew the defendant well. And an id parade of persons was constituted with persons of similar description, namely, 5'8, medium build and dark complexion.

He said, the defendant elected position number 3 and did not object to the line-up.

Members of the jury, you will have exhibit NI-4, which represents the identification parade and identification notice. The suspect -- you will see that the defendant would have agreed or that -- or was willing to attend an identification parade.

And there was nothing to indicate reasons for not wishing to be there. And you will have a list of the names of the persons, who would have formed part of that parade.

Members of the jury, the defence has challenged the fairness of the id parade. And it is a question for you, whether you are

satisfied, based on the evidence, that you have heard, that the parade was fair.

And as I've indicated, you will see the form. You will see where the defendant had an opportunity to object to the parade, at that time, but to indicate reasons why he did not wish to attend on the parade. And that would assist you in determining whether you accept the evidence of the Crown, that the id parade was a fair one. And that the virtual complainant, in this case, would have identified the defendant on that parade as number 3.

The fifth witness was Detective Corporal 2694 Hepburn, who was attached to the Central Detective Unit in 2014.

And he told you, that at approximately 1:00 a.m., on June 2nd, he was on Clifton Street, looking for suspects. And then he went to an abandoned body workshop and found the defendant sleeping in a car.

He gave his name. He cautioned him and he took him into custody.

When you come to the evidence of the defendant, he would have told you, that the place, where he was arrested was not an abandoned place. And that, he was employed by the owner of that premises to watch for persons coming in to steal car batteries.

That, members of the jury, is a question of fact for you to determine.

Now, that would have been the day before the id parade, June 2nd , 2014.

The final prosecution witness was Detective Corporal 957 Taylor, who was attached to the Central Detective Unit, on the 2nd of June 2014. The same day that the defendant, in this case, was arrested.

And he told you, how he came into contact with the defendant at CDU. He was asked by the Crown if the defendant had any complaints. And he indicated, no.

This would have been the prosecution witness, who would have conducted a Record of Interview. And you will have a copy of that Record of Interview to take with you in the jury room.

The officer said, he would have put a number of a questions -- a series of questions to the defendant. And he told him, that he knew the virtual complainant, Brandon. And that they lived in the same yard.

He said, he was not aware, that he would have been shot. But he had given him a cigarette and some Chinese food that day.

He admitted that his alias was "Ninja Turtle." And he said, in the Record of Interview, that he did not recall, where -- exactly where he was on the 29th of May 2014. He said, he had been at a bar and by his aunt's house.

He was asked if he had shot Brandon. He said, he did not shoot him. And no one had paid him to shoot him.

He told the Officer, that he did not know that Brandon was in the Witness Protection Program. He said, he never -- he was never threatened or forced to give a statement, in this case.

On cross-examination, this witness confirmed to the -- confirmed, that the defendant had denied the offence. He was asked whether -- specifically about any forensic evidence, that was conducted or received in relation to this offence.

Specifically, about DNA evidence on the spent cartridges. And he indicated that his experience was that they did not get DNA results from spent cartridges.

And defence counsel -- I must at least caution you and that point. And I think defence counsel would have put to the witness, that he is not able to say that, because he is not a DNA expert.

However again, I must also warn you not to speculate on any evidence, which could or should have been brought. But rather to focus on the evidence, which is before this court.

Now, at the close of the prosecution's case, the Defendant was given his options. And he had the option of remaining silent. That is his constitutional right, members of the jury.

You would recall, I told you, that the defendant need not prove anything. It is the prosecution, who brought the defendant here. And it is the prosecution, who must prove, that he committed the offences.

He opted to give sworn testimony and he called one witness.

Now, as an accused person, you do not weigh his evidence by any different measure. In other words, do not use any different standard in judging that evidence and his witness' evidence.

Therefore, when you come to the evidence of the witness called by the defence, Devaughn Woodside, you must give heed to the directions, I would have given you in relation to identification.

And I think I would have gone into very -- a great detail as to what those directions are, that you must consider before accepting the evidence of Devaughn Woodside, as to who he would have seen that night as the shooter.

In this trial, the accused's defence is mistaken identity. He testified in his defence, that he cannot remember exactly where he was, on the 29th of May 2014, at around 11:00 p.m.

And he would have told the police, he said, exactly that, when he responded in his Record of Interview.

He testified, that he knew the virtual complainant. But he did not shoot him. And he did not own a gun.

In cross-examination, by the Crown, he admitted that his nickname was "Turtle." There's no dispute there.

He agreed that he lived on the front road. And the virtual complainant lived on the back road. And he estimated that they lived some 30 feet apart.

There was some issue as to whether the defendant lived alone or whether he lived with another person, referred to as Bread Man. He said, I did not live with anyone else.

However, you would recall, that at no time, the evidence -- sorry, you would recall that the evidence of the virtual complainant was that in fact he did live with somebody else. Somebody he referred to as Bread Man. And at no time did the defence cross-examine him in relation to that point.

Now, the defendant would have told you, that he lived there. That is, as a tenant, since around November or December 2013, which is consistent with the evidence of the virtual complainant, that he had moved in around that time.

He would have also confirmed that he was given a cigarette. And he added that he was also given some food, on the morning of the incident.

Now, in cross-examination, the defendant said, that he would have seen, or he would see the virtual complainant about four times per week.

The virtual complainant, in his cross-examination said, that he would have seen the defendant six or eight times per day. He would see him in the apartment yard and in front of his yard.

It appears, from that evidence, members of the jury, that the -- both persons were very familiar with each other. In other words, they were not strangers. But it is still a matter for you, as to whether you believe the evidence of the virtual complainant, that it was in fact the fefendant, who shot him that night.

The defendant would have agreed -- he agreed that he was arrested, on June 2nd, Clifton Street. There's no dispute there. However, he did disagree, that the business was closed down.

He said, he slept home during the night of the incident. He was asked about where he was. And he denied that he would have left Washington Street after the shooting.

He said, he did not know anything about any shooting. And he did not hear any shots that night. He told you, that he was at a bar called Double 07, in Lincoln Boulevard.

And testified that approximately 11:35, he would have been traveling south of Cordeaux Avenue going to another club.

And then after that, he said, he would have gone to his aunt's house.

Now, the defendant's evidence is that at 11:15 that evening, he was in Washington Street. And, members of the jury, there is nothing odd with that. He lived in the area.

So, he is saying, that he lived there. And so, he could have been there at 11:15.

He said that, when questioned whether he would have seen any police taping or anyone in the street, he said, that he did not see any of that.

He said, he did not see the virtual complainant that night at all.

He said, he only learned of the shooting of the virtual complainant, the evening he was arrested, on June 2nd.

You, members of the jury, asked the following questions to the witness. And he was asked if he slept home after the shooting. And he would have told you, yes.

He was asked if there -- if he heard any commotion after the shooting. He said, he did not see or hear any commotion. He was asked, why he did not tell the police about his job with Mr. McCartney. That is, the job that he had sleeping in the cars. And he said that he did not -- he said, he did, or he attempted, when they locked him up. But they started beating him.

And then on re-examination, you would have heard, counsel for the Crown, question him further on any beating, that he said, that he received. And he would have said that he received a couple of kicks and no major beating. And he did not tell anybody about the beating.

It's a matter for you, members of the jury. As you recall the evidence from the police officer, who would have seen him and indicated that he made no complaints, when he was seen at CDU.

Now, the defendant called one witness, namely, Devaughn Woodside. And Devaughn Woodside's nickname is Popeye. Popeye testified, that he knew the virtual complainant.

And that his recollection of what occurred, and he would not, members of the jury, have given any witness statement in this regard, but his recollection, he says, was that around 10:00 to 11:00 p.m., on May 29th, he was coming from Podoleo Street by his girlfriend, which he said was a normal occurrence.

And as he was walking, he saw two men coming from across by the church. And one had on a gray hoodie and the next one was wearing a black hoodie.

This witness' evidence is, that he did not see the Defendant. That is, he did not see Neil Ingraham that night. But he did see two other men he recognized. One with a black hoodie and a gun going into the shortcut, as he exited that same shortcut.

Now, according to his evidence, this would have been prior to Brandon Duncombe coming to his house to collect the tool.

When you consider the time, this would have had to have been long before 11:00 p.m. Not long before, but sometime before 11:00 p.m. Because according to the evidence of the virtual complainant, the incident would have occurred 10:45 to 11:00 p.m.

Now, this witness says, that the person wearing the black hoodie was somebody by the name of Par-gay-lar. And the other person, he referred to as J.

And he said, they came through the shortcut and then -- they came through the shortcut. And then he went home, just as he saw the two men entering the shortcut, just as he exited the shortcut.

He said, a minute later, the virtual complainant, Brandon, would have come to collect the tool. And two minutes after that, he left.

After he left, two minutes after Brandon left, he heard shots.

Now, he did not say how long Brandon Duncombe would have stayed. The evidence of Brandon Duncombe, I don't -- I recall, he would have stayed for a short -- I think it was 15 to 20 minutes, he would have stayed.

And so, when he said, that two minutes after he left, he heard shots and then he saw a man running, the person who got shot ran back through the shortcut, he said. And the person with the black hoodie ran the other way. That is, Washington Street, out of Balfour Avenue.

He told you, that the man, the person with the gun, as I said was, Par-gay-lar. And the person, who got shot was "Blunt." And "Blunt" he said was the nickname for the virtual complainant, Brandon Duncombe.

He said that he was very sure or not sure. He's very familiar with the shooter, Par-gay-lar, as he had grown up with him and he saw him every day.

He said, he did not -- the police did not question him about the incident. And all he saw was the virtual complainant running one way and Par-gay-lar running with a gun in his hand running the other way.

As I indicated to you, members of the jury, you are to -- you must apply the same directions regarding identification, that I gave to you, when you look at the evidence of Brandon Duncombe.

So, you consider under what circumstances he was able to identify the shooter as Par-gay-lar. The lighting conditions. Was there anything that impeded him? How long did he view him? He said, it was a few seconds.

Now, on cross-examination, this witness was asked whether he saw, when the person in the black hoodie, encountered Brandon, when they would have had the scuffle. In other words, he was asked whether he saw the fight. And he said, no.

The Crown asked him whether he saw the man shoot Brandon. And his response was no. He was asked, why he did not go to the police. And he said, he was not concerned about problems.

He was also asked how long he saw the person. He would have said, it was seconds.

It is -- at the end of the day, members of the jury, it is a matter for you to consider these facts, as they are, and the accuracy of

the identification by this witness and determine whether his identification is reliable or questionable.

Now, this witness would have said, that he knew that the virtual complainant was shot. But he did not know who would have shot him.

He said, he became ...only became aware of the matter, when his neighbour called and told him. And it was his cousin, who encouraged him to come and to give evidence in this case. He says, he does not get into people's business.

He was asked if he was paid to come to court. He said, no. His cousin had spoken to him the day before he came to court and asked him to come.

And he had never given a statement to the police.

He was asked if he had spoken to the defendant before coming to court. And he said, he never spoke to the defendant at any time.

Now, during the cross-examination of witness Woodside aka Popeye in this case, the Crown would have asked the witness if he had ever gone to prison. And he said, yes. He admitted he went to prison around -- he went to prison.

Members of the jury, as judges of the facts, notwithstanding that a witness has said, that he went to prison, does not mean that he is not a credible witness in relation to the evidence, that he has given in this matter.

And so, it remains a question for you, as to whether, notwithstanding that he has been to prison, that he was not being truthful, when he gave his evidence.

Now, counsel for the Crown would have also asked this witness about his memory and how he was able to recount events, that would have occurred some five years ago.

And he would have told you, that you can't forget something like that.

Members of the jury, that is a matter for you, as judges of the facts. There may be times when you remember a particular

thing happening. But as to the amount of detail, those things or those details would fade as the years pass.

But as judges of the facts, that is a question for you, as to whether you believe the witness would have been able to recount in detail, what he said, that he would have seen five years ago, not having written it down or having given a statement to the police.

Now, members of the jury, you asked this witness a very important question. And that was, whether the defendant had similar characteristics to the man in the black hoodie. And he said, yes. They were both short and ugly.

When you come to consider the directions, I have given you on identification, based on his response, you may ask a question then, what if perhaps this witness is mistaken, as to who he would have seen that night, as the shooter?

Now, in relation to his evidence, that is the evidence of Devaughn Woodside aka Popeye, of what occurred that night, you, members of the jury, have to consider whether fair inferences can be drawn from all of the circumstances this witness has told you. And whether you could believe the account given by him was reasonable and probable.

In other words, you must consider whether the evidence, given by this witness, from whom inferences can be drawn, are sufficient to satisfy you, beyond a reasonable doubt, so that you feel sure, that the accused was not the person, who committed the offence. And that the offence was committed by someone else.

In other words, is it a reasonable inference, that the same two men, going through the shortcut, one with a gray hoodie and one with a black hoodie, one with a gun, one without a gun, were responsible for the shooting?

You recall the evidence of the virtual complainant, that there was only one man -- there was one man. Only one man, who wore a black hoodie. In other words, there was no evidence, by the virtual complainant, that there may have been a second man present.

Also, the witness has admitted, that in fact, he did not see -- he did not see the incident. He did not see who shot the virtual complainant. And he did not see a fight or scuffle between the virtual complainant and the defendant or -- and the person, the other person, who may have been the shooter.

In this case, he is saying, that the other person, the person was not the defendant, but was a person called Par-gay-lar.

It is a matter for you, having heard the evidence of the virtual complainant and the evidence of the Devaughn Woodside, as to what evidence, members of the jury, you accept in this case.

The defence is relying on the evidence, the circumstantial evidence, given to disprove, that the accused committed this offence.

And they say, that the evidence, that Popeye saw two men that night, around 10:00 to 11:00 p.m., going into the same shortcut, one wearing a black hoodie with a gun and the witness hearing shots minutes later, and seeing them running together, proved that the same person, with the black hoodie and that gun, that he would have seen, was the shooter and not the defendant.

It is a matter for you.

Now, the Crown in the closing submissions or its closing submission, raised the issue of alibi, which I will just address you briefly, at this point.

Let me just say this about an alibi. When lawyers use the term "alibi," it means that the person is saying, that they could not have committed the offence, because they would have been somewhere else in another place. And so, it was impossible for them to have committed the offence.

An alibi is a perfect defence. And that is why the law provides, that an accused person, should give notice of an alibi at a certain stage, so that a proper investigation could be made.

Because if the investigation turns out, that the evidence is in support of the alibi, then the trial need not go forward. And it

is that failure of the defendant to take advantage of that opportunity, that the prosecution wishes you to rely on.

The evidence, as I remind you again, of the defendant, was that he was elsewhere, when the shooting occurred. In such cases, he is able to produce witnesses to come to court to confirm where he was.

You may ask the question then, why he did not? The answer may be, that the defence is saying, that they are relying on a witness. The witness whom I just summarized -- whose evidence I just summarized, Devaughn Woodside aka Popeye, who would have seen certain things that night, which could mean, that the defendant was not the shooter.

In this case, the defendant is saying, as I said, they're not relying on an alibi, but they're relying on the evidence of Popeye, who, according to Popeye's evidence, I remind you, members of the jury, was that he was only notified the day before to come to court to give the evidence, as to what he said, he would have seen, on the 29th of May, 2014."

8. That was the direction to the jury.

9. I now proceed to consider each ground.

The learned judge erred in fact and law when she failed to warn the jury on the danger of relying on the identification evidence since this was case of recognition and, therefore, it concerned the credibility of the virtual complainant Brandon Duncombe (also known as "Blunt"), such failure resulting in miscarriage of justice.

10. The law with respect to the judge's obligation in directing the jury was set out by the Privy Council in **Barnes Desquottes And Johnson v R Scott And Walters v R** (1989) 37 WIR 330. In that case the appellants were convicted of murder. The only evidence of identification of the appellants was that contained in the deposition of Cecil Gordon who died before the trial. In dealing with the evidence of Gordon, the judge never warned the jury that, although Gordon might have been an honest witness, his identification of the two accused might nevertheless be mistaken. On the contrary, the emphasis throughout is upon the question of the adequacy of the opportunity that Gordon had for observing the two appellants. These passages in the summing-up, so far from conveying any warning of the danger of mistake, carry the clear implication that, provided that the identifying witness had a sufficient opportunity to observe the appellants the identification evidence may be safely relied upon. The concluding paragraph in the passage dealing with the

identification evidence again, so far from hinting at any danger in reliance on the identification evidence, suggests by implication that the confidence with which Gordon picked out the two appellants when they were found amongst others at the bingo game in some way authenticates the identification itself.

11. In allowing an appeal against conviction, the Privy Council said:

> **Their Lordships turn now to consider the additional grounds of appeal. In Scott and Walters, it is submitted that the judge failed to give an adequate direction on the issue of identification. Experience has taught judges that, no matter how honest a witness and no matter how convinced he may be of the rightness of his opinion, his evidence of identity may be wrong and that it is at least highly desirable that such evidence should be corroborated. It has, however, also been recognised that to require identification evidence in all cases to be corroborated as a matter of law would tilt the balance too far against the prosecution. The compromise of this dilemma arrived at in R v Turnbull [1977] QB 224 is the requirement that a judge must warn the jury in the clearest terms of the risk of a mistaken identification. Lord Widgery CJ giving the judgment of the five-judge court said:**
>
> **'First, whenever the case against an accused depends wholly or substantially on the correct-ness of one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition, he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Provided this is done in clear terms the judge need not use any particular form of words.'**
>
> **In R v Whylie (1977) 25 WIR 430 the Court of Appeal in Jamaica, following R v Turnbull, said:**
>
> **'Where, therefore, in a criminal case the evidence for the prosecution connecting the accused to the crime rests wholly or substantially on the visual identification of one or more**

> **witnesses and the defence challenges the correctness of that identification, the trial judge should alert the jury to approach the evidence of identification with the utmost caution as there is always the possibility that a single witness or several witnesses might be mistaken.**

12. The Board continued**:**

> **Their Lordships have nevertheless concluded that if convictions are to be allowed upon uncorroborated identification evidence there must be a strict insistence upon a judge giving a clear warning of the danger of a mistaken identification which the jury must consider before arriving at their verdict and that it would only be in the most exceptional circumstances that a conviction based on uncorroborated identification evidence should be sustained in the absence of such a warning.**

13. The issue was again canvassed by the Privy Council in **Beckford & Shaw v R** where the question was whether, in a case where the substantial issue raised is the credibility of an identifying witness, a general warning by the trial judge concerning the danger of relying on identification evidence is required.

14. In that case the trial judge "admittedly did not give any general or specific warning, nor did he state in abstract general terms the principle of law relative to the issue of visual identification."

15. The judgment of the Board was summarized in the headnote:

> **"Where the substantial issue in a case is the credibility of an identifying witness, a general warning must be given by the trial judge to the jury concerning the danger of relying on identification evidence; such warning is as important where the case is one concerning recognition as it is in cases concerning the identification of a stranger. The failure to give any such warning will nearly always by itself be fatal to a conviction based on identification evidence."**

16. The appellant relies upon this jurisprudence in challenging the adequacy of the summation to the jury. With respect, this reliance is misplaced. In the summation to the jury, the trial judge clearly gave the warnings about the reliability of identification evidence and the need for caution even in the case of recognition as was this case.

17. At the very beginning of her summation of the evidence of the virtual complainant the judge told the jury:

> **Now, Madam Forelady, Members of The Jury, the case against the Accused, in this case, rests wholly on the correctness of this identification evidence, which you have received from Brandon Duncombe.**
>
> **The evidence of Brandon Duncombe, if true, would put the Accused, Neil Ingraham, on the scene of the crime, and the person, who committed the offence.**
>
> **<u>I would therefore warn you then of the special need for caution before convicting the Accused, on the reliance on the evidence of identification.</u>**
>
> **But I must also tell you, that you may do so, if after giving full heed to my warning, you are satisfied, that the Virtual Complainant, that is Brandon Duncombe, was telling the truth. [Emphasis Added]**

18. The judge later said:

> **This, Members of The Jury, is a case where the Virtual Complainant, Brandon Duncombe, is telling you, that he knew the shooter very well.**
>
> **However, when identification involves recognition, Members of The Jury, by the witness of someone he knows, mistakes in recognition are sometimes made and so care have to be taken, even when the witness says he knows the Accused.**
>
> **The need for this warning to you is because it is possible, Members of the Jury, for an honest witness to make a mistaken identification.**
>
> **There have been wrongful convictions in the past as a result of such mistakes. Even an apparently convincing witness can be mistaken.**
>
> **So, even if you mind that these witnesses are honest and convincing witnesses, they may yet be mistaken in identifying the Accused.**

> **You then have to make and determine, Members of The Jury, as I indicated, whether after heeding the warning, that I have given you, whether in fact you believe the evidence of the Virtual Complainant, when he said that the shooter was someone he recognized and knew as Neil Cordell Ingraham aka "Turtle." And that he was the shooter on the night in question.**

19. The law requires that the judge give clear directions as to the risk of mistaken identity even in the case of recognition. As Lord Widgery said: *"Provided this is done in clear terms the judge need not use any particular form of words.*" The law does not require that the judge specifically mention the fact that the identification evidence is not corroborated by any other evidence and that there is a danger of relying upon uncorroborated evidence. The law does say that where the identification evidence is not corroborated there is a heightened need for the requirement that the general warnings on identification evidence and the specific warning that even in recognition cases an honest witness may be mistaken.

20. That warning was given in this case and in my judgment this ground of appeal must fail.

The learned judge erred in fact and law when she failed to highlight the discrepancies in the evidence of the virtual complainant Brandon Duncombe (also known as "Blunt"), the sole eyewitness, which would have affected his credibility, such failure resulting in fatal flaw, which led to miscarriage of justice.

21. The appellant highlights three discrepancies which he asserts was fundamental to the credibility of Mr. Duncombe and which he said the judge in error failed to highlight to the jury and which undermined his credibility.

22. The first relates to Duncombe evidence that he was shot with a shot gun whereas the evidence of Corporal Frazier would suggest that the shooter had a pistol. The second relates to whether in fact he saw the shooters face. In his testimony he said that hoodie fell off during the struggle and he saw the shooters face but in his statements to the police he did not say that the hoodie fell off and that he saw his face. Thirdly they say that Duncombe's credibility on this issue was undermined when he said that he played dead which meant that he kept his eyes closed but on the other hand claimed that during the struggle the hoodie fell off and he saw the shooters face.

23. In her directions to the jury the trial judge said:

"When you consider all of these factors, which I have just mentioned, you will not be surprised, that whenever you hear testimony in court, there is bound to be discrepancies between what one witness says to you and what another witness says.

How then are you to deal with these discrepancies? As I said, there are bound to be discrepancies or inconsistencies. What you have to decide, and I can only indicate to you, what to look for, because that is your decision.

What you have to decide is this, whether the discrepancies, if you find them to be discrepancies, because you may consider, that they are not so serious, that it causes you to doubt the evidence of a particular witness.

They may be slight, serious, material or immaterial inconsistencies. If slight, you will probably think it does not affect the credit of the witness concerned.

On the other hand, if the discrepancy or the discrepancies are serious, you may say, that because of that, it is unsafe to believe that witness, on that point or even to believe the witness at all."

24. As to the shotgun /pistol issue, the judge said to the jury the following:

And I would pause here to say, that in the Closing Submissions of -- by the Defence, Defence Counsel is saying, that the transcript in this case would have indicated, that the Virtual Complainant, in his evidence had said, that the shooter had a shotgun.

This evidence by Javod Frazier, Corporal Javod Frazier, obviously then contradicts that evidence, because he did not find ammunition or -- in relation to a shotgun. Rather, he found cartridges belonging or that fit a nine millimeter pistol.

Now, Members of The Jury, we all sat in this courtroom. And we would have heard what the witness, the Virtual Complainant, would have said in his evidence.

It is a question for you whether in fact you did hear him say, a shotgun versus a short gun. Because you must take that into consideration when you consider the evidence of the Virtual Complainant.

> **And whether in fact, what he said occurred that night, could have happened, if the Accused had a shotgun versus a short gun. Because remember, there was a scuffle. There was a fight.**
>
> **I only wanted to draw that to your attention, because the forensic evidence is that -- or the evidence, that was found on the scene, does not show that there was a shotgun involved. But rather, there was a nine millimeter pistol.**

25. Clearly, she brought this issue to the jury's attention.

26. As to the hoodie and playing dead the judge said:

> **"He said, he recalled seeing fire from the gun after playing dead. And this was when he would have fell on the septic tank. He recognized the person, who shot him as "Turtle." The Defendant, who he said, lived in one of his family's apartments."**

27. The judge did not bring to the attention of the jury that playing dead may mean that his eyes were closed and therefore Mr. Duncombe would not have seen the face when the hoodie fell off his face. This point however was made forcefully to Mr. Duncombe during his cross examination at the trial.

28. The fact that he did not tell the police in his statement to them that he saw the face when the hoodie fell off was not mentioned by the judge in her summation.

29. The law with respect the obligation of a trial judge to point out discrepancies to the jury was summarized in the decision in **Blake v R** [2017] 91 WIR 463, the Court of Appeal of Jamaica discussed the nature of a trial judges obligation to give directions to the jury on discrepancies. It said:

> **[114] In Diedrick, considering the trial judge's duty in relation to inconsistencies and discrepancies in the evidence at the trial, Carey JA said this:**
>
> **'The trial judge in his summation is expected to give directions on discrepancies and conflicts which arise in the case before him. <u>There is no requirement that he should comb the evidence to identify all the conflicts and discrepancies which have occurred in the trial.</u> It is expected that he will give some examples of the conflicts of evidence which have occurred in**

the trial, whether they be internal conflicts in the witness' evidence or as between different witnesses.'

[115] And in Greaves, making an essentially similar point, K Harrison JA (Ag), as he then was, quoted with approval the following passage from the judgment of Sharma JA, as he then was, in Boodram v State (a decision of the Court of Appeal of Trinidad and Tobago):68

'Our criminal jurisprudence is replete with cases which are intended to guide trial judges; we think, however, that it would be unrealistic and impractical to ask a judge to point out all material discrepancies to the jury. After all, appellate courts have repeatedly said that jurors today are intelligent and enlightened; and by the same token the same appellate courts must not seem ready to erode that approach. It all depends on how a case is con-ducted, what are the salient issues; and the judge has to be very astute to ensure that the juror's attention is not diverted from the live issues by exhaustive and copious directions.'

[116] The trial judge is therefore obliged to discuss the question of inconsistencies and discrepancies with the jury, explaining to them their potential impact on the credibility of the witnesses, while providing them with assistance, suitable to the circumstances of the particular case, on how to approach them. While it will usually be helpful to the jury for the trial judge to give some examples of the material inconsistencies and discrepancies which have arisen in the particular case, there is no obligation on a judge to identify every single instance of them to the jury. [Emphasis Added]

30. There is no issue that this case rested on the credibility of the virtual complainant and the judge made this clear to the jury. The evidence in this case was taken over a short period of time. The material witnesses were the virtual complainant and the appellant. The evidence would have been fresh in the minds of the jury.

31. We are satisfied that the jury was made aware of how they were to treat discrepancies and inconsistencies. There was no fatal flaw which led to a miscarriage of justice. This ground also fails.

The learned judge erred in fact and law when he failed to highlight the weaknesses and discrepancies in the evidence of the Respondent's witnesses thus making her Turnbull directions insufficient.

32. In this regards the appellant makes the following criticisms:

(a) **The judge failed to tell the Jury that Brandon Duncombe never showed the court where he said in his statement to the police that he saw the shooter's face; nor did the Judge tell the Jury that Brandon Duncombe stated that he saw the shooter's face at the Identification Parade.**

(b) **The judge never told the Jury in her summing up that, according to Brandon Duncombe, he did not see the shooter's face until he attended the Identification Parade. She should have suggested to the jury that Brandon Duncombe may have been lying when he told the court that during the scuffle with the shooter, he may have lying about the Appellant being the shooter, especially when it was suggested by defense counsel to Brandon Duncombe that in none of his statements to the police did he ever say that the saw the shooter's face. The Judge could have gone one step further and said, cumulatively, Brandon Duncombe should be considered dishonest person not worthy of belief.**

(c) **The Judge gave no specific directions and advice to the jury relative to the evidence of Brandon Duncombe as it relates to whether he was "playing dead" as opposed to whether he "blacked out." The Judge never directed the jury's attention to the fact that Brandon Duncombe was saying two different things which suggests that he is not credible witness and should not be deemed an honest witness.**

(d) **The judge never referred to the part of the evidence of Brandon Duncombe which suggests that he may not have seen the shooter's face since he was "playing dead" and especially since he said that he saw the shooter's face at the**

Identification Parade. Moreover, the Judge should have told the Jury that Brandon Duncombe could not show the court where he said in his statement to the police that he saw the shooter's face.

(e) **The judge should have told the Jury that any lighting described as "perfect" did not strengthen the case for the Respondent since the effects of the lighting were never described other than it being "perfect." One should note that there was no evidence that the streetlights or the "dusk till dawn" light illuminated the area, and the Judge should have given more specific direction relative to the lighting that night. The Judge should have told the Jury that there was no evidence that any of the lighting identified by Brandon Duncombe shone on the face of the shooter.**

(f) **In her summing-up the Judge never brought to the jury's attention the fact that the black hoodie covered the face of the shooter at the initial stage of the attack on Brandon Duncombe. Also, there was no evidence before the court that the black hoodie fell off or fell from the face of the shooter and, therefore, this was misdirection on the part of the judge. Moreover, Brandon Duncombe, when cross-examined by defense counsel, even though he alleged telling the police he saw the shooter's face, could not show the court below where he stated in his statement to the police the fact that he saw the shooter's face.**

(g) **The Judge never referred to the fact that defense counsel challenged Brandon Duncombe with regard to the fact that he never stated in his statement to the police that he saw the shooter's face.**

(h) **The Judge should have highlighted this evidence of Brandon Duncombe which would have discredited him as an honest witness. According to his own evidence, all he stated in his statement to the police was the fact that the person who attacked him was someone he knew as "Turtle."**

He never said in that statement that he saw the shooter's face, nor did he give the police physical description of the shooter. The Judge never highlighted these discrepancies in her summing-up to the Jury.

(i) The learned Judge never highlighted the fact that Brandon Duncombe never stated in his statements to the police that he saw the shooter's face. She failed to point out to the Jury the fact that the only time he told the police that he saw the shooter's face was at the Identification Parade which meant that he never made that claim in any statement to the police- that his claim of identifying the shooter's face during the incident on the 29th. day of May 2014 was total fabrication. The judge should have reminded the Jury that Brandon Duncombe only told the police that person he knew as "Turtle" shot him, but he could not say where in his statements to the police he said that he saw the shooter's face. In other words, Brandon Duncombe was simply telling lie on the Appellant as alleged by defense counsel and that he conjured up this case against him.

33. I have set out these complaints in full to demonstrate that stripped from its prolixity, it is a complaint that the judge did not properly draw to the attention of the jury the purported conflicting or unreliable evidence as to if and when Mr. Duncombe saw the appellants face and whether he told the police that he saw the shooters face as it was not in his statement to the police. The identification of the appellant by Duncombe is the core of this case.

34. In making this complaint the appellant is relying on the observations of Lord Widgery in **R v Turnbull [1976]** In that case Lord Widgery said:

> **"Each of these appeals raises problems relating to evidence of visual identification in criminal cases. Such evidence can bring about miscarriages of justice and has done so in a few cases in recent years. The number of such cases, although small compared with the number in which evidence of visual identification is known to be satisfactory, necessitates steps being taken by the courts, including this court, to reduce that number as far as is possible. In our judgment the danger of**

miscarriages of justice occurring can be much reduced if trial judges sum up to juries in the way indicated in this judgment.

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

Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? If in any case, whether it is being dealt with summarily or on indictment, the prosecution have reason to believe that there is such a material discrepancy they should supply the accused or his legal advisers with particulars of the description the police were first given. In all cases if the accused asks to be given particulars of such descriptions, the prosecution should supply them. Finally, he should remind the jury of any specific weaknesses which had appeared in the identification evidence.

Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that

mistakes in recognition of close relatives and friends are sometimes made.

All these matters go to the quality of the identification evidence. If the quality is good and remains good at the close of the accused's case the danger of a mistaken identification is lessened, but the poorer the quality, the greater the danger.

In our judgment when the quality is good, as for example when the identification is made after a long period of observation, or in satisfactory conditions by a relative, a neighbour, a close friend, a workmate and the like, the jury can safely be left to assess the value of the identifying evidence even though there is no other evidence to support it: provided always, however, that an adequate warning has been given about the special need for caution. Were the courts to adjudge otherwise, affronts to justice would frequently occur. A few examples, taken over the whole spectrum of criminal activity, will illustrate what the effects upon the maintenance of law and order would be if any law were enacted that no person could be convicted on evidence of visual identification alone.

……

When, in the judgment of the trial judge, the quality of the identifying 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. This may be corroboration in the sense lawyers use that word; but it need not be so if its effect is to make the jury sure that there has been no mistaken identification: for example, X sees the accused snatch a woman's handbag; he gets only a fleeting glance of the thief's face as he runs off but he does see him entering a nearby house. Later he picks out the accused on an identity parade. If there was no more evidence than this, the poor quality of the identification would require the judge to withdraw the case from the jury; but this would not be so if there was evidence that the house into which the accused was alleged by X to have run was his father's. Another example of supporting evidence

not amounting to corroboration in a technical sense is to be found in Reg. v. Long (1973) 57 Cr.App.R. 871. The accused, who was charged with robbery, had been identified by three witnesses in different places on different occasions but each had only a momentary opportunity for observation. Immediately after the robbery the accused had left his home and could not be found by the police. When later he was seen by them, he claimed to know who had done the robbery and offered to help to find the robbers. At his trial he put forward an alibi which the jury rejected. It was an odd coincidence that the witnesses should have identified a man who had behaved in this way. In our judgment odd coincidences can, if unexplained, be supporting evidence.

The trial judge should identify to the jury the evidence which he adjudges is capable of supporting the evidence of identification. If there is any evidence or circumstances which the jury might think was supporting when it did not have this quality, the judge should say so. A jury, for example, might think that support for identification evidence could be found in the fact that the accused had not given evidence before them. An accused's absence from the witness box cannot provide evidence of anything and the judge should tell the jury so. But he would be entitled to tell them that when assessing the quality of the identification evidence they could take into consideration the fact that it was uncontradicted by any evidence coming from the accused himself.

Care should be taken by the judge when directing the jury about the support for an identification which may be derived from the fact that they have rejected an alibi. False alibis may be put forward for many reasons: an accused, for example, who has only his own truthful evidence to rely on may stupidly fabricate an alibi and get lying witnesses to support it out of fear that his own evidence will not be enough. Further, alibi witnesses can make genuine mistakes about dates and occasions like any other witnesses can.

> **It is only when the jury is satisfied that the sole reason for the fabrication was to deceive them and there is no other explanation for its being put forward can fabrication provide any support for identification evidence. The jury should be reminded that proving the accused has told lies about where he was at the material time does not by itself prove that he was where the identifying witness says he was. [Emphasis Added]**

35. In my judgment this ground has no merit. As pointed out earlier there is no obligation to point out all of the discrepancies or inconsistencies in the evidence. But the judge did point out the evidence as to the circumstances under which Duncombe claims to have seen the shooters face and the evidence of Duncombe and the police officer Taylor that he told the police that he recognized the shooter.

36. We agree with the observation of the Court of Appeal of Trinidad and Tobago in **Boodram v The State** [1997] WIR 304 where after a complaint that the trial judge in his directions to the jury as to how they should treat inconsistencies and/or contradictions and/or lies in the sworn evidence of the witnesses was himself inconsistent and unfair.

37. Before leaving this ground we wish to say that there appears to be a growing feeling among practitioners at the criminal bar, that a trial judge is obliged in the course of his summing-up to draw all material discrepancies to the attention of the jury and that, if he does not, such an omission constitutes some grave error on his part which may result in a conviction being quashed.

38. We take this opportunity to dispel that notion. Our criminal jurisprudence is replete with cases which are intended to guide trial judges; we think, however, that it would be unrealistic and impractical to ask a judge to point out all material discrepancies to the jury. After all, appellate courts have repeatedly said that jurors today are intelligent and enlightened; and by the same token the same appellate courts must not seem ready to erode that approach. It all depends on how a case is conducted, what are the salient issues; and the judge has to be very astute to ensure that the jurors' attention is not diverted from the live issues by exhaustive and copious directions.

39. We have no doubt that the judges summing up was fair. It drew the jury attention that this case turned on the credibility of Duncombe and whether they were satisfied after hearing his evidence they were satisfied as to his identification of the appellant as the person who shot him. The judge said:

> **And as I said, if the quality of the evidence remains good throughout, then you may convict on it.**
>
> **As I have said, even if you find, that there is no other evidence to support it, you may convict on it. If you have a reasonable**

> **doubt, however, in relation to that identification evidence, then you must reject it.**
>
> **In summary, on the issue of identification, once you have cautioned yourselves about the directions, that I have given you, i.e. the directions in relation to identification evidence, then you can act on it".**

40. Credibility is an issue for the jury. They heard the evidence. They were given the requisite warnings in relation to identification evidence. The resolution of the discrepancies complained about were a matter for them. This ground has no merit.

That under all the circumstances of the case, the verdict is unsafe.

41. This ground does not advance this appeal any further. It is a reformulation of the three grounds advanced earlier. Indeed, the appellant states at the beginning of his written submissions on this ground "*The appellant adopts all of the submissions above in support of this ground of appeal. The following facts taken from the evidence of the virtual complainant, Brandon Duncombe, and other witnesses for the Respondent, disclose the weaknesses and discrepancies in the case for the Respondent, along with misdirections by the trial judge, which make the verdict unsafe"*.

42. The appellant proceeded to list 29 matters of which he complains. They relate to alleged discrepancies, weaknesses or failure by the judge to highlight them to the jury. They do not allege any misdirection by the judge to the jury save the allegation that "the learned judge erred in law when she failed to consider in her summing-up to the jury the legal definition of "attempted" murder as provided in section 83 of the Penal Code". There is simply no merit in this ground.

43. In dismissing this appeal, it is important to note that an appellate court is not a jury. Its responsibility is to consider errors of law and determine whether the accused had a fair trial.

44. Discrepancies in evidence and credibility of witnesses are matters for the jury. The jury has heard the evidence and once the judge gives the necessary warnings as to how to treat discrepancies and when the case involves identification evidence the necessary caution as to how to treat and consider identification evidence, it is then for the jury to assess the evidence and determine whether it is satisfied as to the guilt of the accused.

45. This was done in this case and the jury was clearly satisfied on the evidence.

46. In the circumstances we dismiss this appeal and affirm the conviction and sentence.

The Honourable Sir Michael Barnett, P

47. I agree.

The Honourable Madam Justice Crane-Scott, JA

48. I also agree.

The Honourable Mr. Justice Jones, JA