IN THE COURT OF APPEAL
TURKS & CAICOS ISLAND

CR-AP 2/20
(Appeal from CR 43/18)

BETWEEN

KENDELL DEAN

Appellant

v

REGINA

Respondent

BEFORE: **The Hon. Mr. Justice C. Dennis Morrison P**
The Hon. Mr. Justice Stanley John JA
The Hon. Mr. Justice Ian Winder JA

APPEARANCES: **Mr. Keith James for the Appellant**
Ms. Mickia Mills for the Respondent

DATE HEARD: **5 May 2021**

DATE DELIVERED: **22 June 2021**

JUDGMENT

JOHN JA

1. On 2nd March 2020, the Appellant was found guilty of murder after a trial before Aziz J and a jury, following the shooting death of Judah Gail ("Judah"). He appealed his conviction. On Wednesday 5th May, 2021 after having carefully considered the written submissions and having had the benefit of oral submissions the Court allowed the appeal, quashed the conviction and directed

that a verdict of acquittal be entered. We indicated then that written reasons would be provided at a later date. This we do now.

Background

2. On Friday the 3rd August, 2018 Judah Gail was at the Five Dollar Bar situate at Lamont's parking lot, Providenciales. Also at the bar were several other patrons including Jessica Cooper ("JC") who was in company of some friends. During the course of the night and before the fatal shooting there was an altercation between a person known as "Madmax" and one "Sparky" on the corner of the food court at Lamont's parking lot. Gunshots were fired and the patrons hurriedly dispersed, whilst some ran into the bar and laid low.

3. The case for the Crown depended to a large extent on the evidence of JC who testified under the cloak of anonymity and the pseudonym Jessica Cooper.

4. JC testified that shortly after the gunshots and the verbal altercation between Madmax and Sparky, a red Mustang entered the parking lot to the Five Dollar Bar. It was then about 2:00am. She further testified that the appellant alighted from the red Mustang, raised his shirt revealing a gun. The appellant then approached Judah and asked him whether he thought his gun was a trophy and Judah laughed. At the time, Judah was sitting on a vehicle close by.

5. The appellant's vehicle was a distance of approximately 2-3 feet in front of JC's vehicle and she said that she was about 10-15 feet away from the shooting incident. The appellant told Judah, "*I will kill yuh fucking ass tonight*" and shot him once in his chest. He then fired two more shots into Judah's chest. The appellant then got into the red Mustang and sped away from the scene. Judah collapsed onto a vehicle belonging to one Thea Musgrove and succumbed to his injuries at the scene.

6. JC further testified that one Colton also exited the passenger side of the red Mustang and shot Judah in the area of his feet. When arrested, Colton denied

being at the scene of the shooting or that he shot Judah. He told the police that he was elsewhere. As a consequence of investigations by the police into Colton's alibi, no charges were preferred against him. Throughout her evidence, JC referred to the appellant as Madmax.

7. The appellant did not give evidence at the trial nor did he call any witnesses. Through Counsel in cross-examination, he denied shooting Judah.

The Grounds of Appeal

8. Counsel for the appellant filed five (5) grounds of appeal. At the hearing of the appeal he condensed his grounds of appeal to say:
   i. There was no evidence linking the appellant with Madmax and accordingly the Court ought to have withdrawn the case from the jury;
   ii. The trial judge had no statutory or inherent jurisdiction to grant witness anonymity to JC;
   iii. The trial was unfair and resulted in a miscarriage of justice;
   iv. The trial judge ought to have given the jury "an axe to grind" or "interest to serve" direction.

9. In order to fully appreciate the first submission it is necessary to set out some salient aspects of the evidence of JC.

10. During examination-in-chief the following questions were asked of her by Counsel for the Crown, Mr. Leonard Franklyn:

    Q: From where you were to where the shooting took place, what was the distance?

    A: Ten (10) to fifteen (15) feet.

    Q: How well you know Colton?

    A: I don't know him. I see him around.

Under Cross-Examination by Counsel Mr. Keith James

Q: Thea Musgrove's car was closer to the incident?

A: Yes.

Q: And she was sitting in her car at the time of the shooting?

A: She was in the car, yes.

Q: And if anyone were to say that Thea Musgrove was not sitting in her car at the time of the incident, would that person be lying?

A: Yes.

Q: You saw Thea Musgrove in her car?

A: She was getting ready to reverse out her car.

Q: So she was sitting inside the car?

A: Inside, yes.

11. At the end of the cross-examination of the witness JC, and there being no re-examination, the trial judge invited the jury to be out of Court for a short while. The trial judge then had a discussion with both Counsel and one of the things he said was: "*…. **up to now, this moment, nobody knows who Madmax is***."

12. Mr. James responded; "*M'Lord that's the Crown's problem*." His Lordship continued: "*No, no, no. Nobody knows who Madmax is. I have been reviewing the evidence…".*

Mr. James again responded, "*M'Lord I have reviewed it. It's the Crown's problem.*

13. Mr. Franklyn submitted that there was evidence from the witness JC linking Madmax to the appellant. Realising that he was on slippery ground, he then shifted his position to say that the evidence of Detective Constable Taffe ("DC

Taffe") is supportive that Madmax and the defendant is one and the same person. His Lordship pointed out to Mr. Franklyn that DC Taffe has to say how he knows that Madmax is the defendant.

14. The following statements by his Lordship in his discourse with Counsel are instructive in reference to DC Taffe:

> "*But where is he? Is he here? Let's bring him on if we are finished. And I have been reviewing every minute… I have been looking at it, and looking at it, because all there is, is Madmax Madmax, and the witness at one point said to Mr. James talk-speak to your client Madmax. But there is nothing to support at the moment who Madmax is. It's a nickname."*

15. His Lordship continued: "*There is no evidence before me to support who Madmax is. That's why I am raising it now, which is why I said to the witness, your evidence is completed for now*."

16. Mr. Franklyn then sought and was granted leave by the Court to have the witness JC recalled. However, prior to the recall Mr. Franklyn submitted that DC Taffe used the words '*Kendell Dean aka Madmax'*. The trial judge responded:

> "*He hasn't said how he knows him. How long he has known him, which is why I thought when the cross-examination came there would be questions about it… suppose he says no, no, I made a mistake, or that's not Madmax, or there is another Madmax or he accepts that there is no Madmax in Provo… there is nothing to support at all that Madmax is Kendell Dean*."

17. JC was then recalled and the trial judge made it clear that the sole purpose of her recall was to deal with the issue of the identity of Madmax.

18. Upon the recall of JC the following exchange took place;

Q: Can you describe this "Madmax you're speaking about?

A: Madmax he is thick...meaning not too fat not too skinny… he is dark in colour with dreadlocks.

Q: Have you ever seen him before the shooting?

A: Yes.

Q: How many times and where?

A: I saw him two times …three times…the shooting incident and they had a little heated argument before the shooting.

Q: And since the shooting, have you seen him after the date?

A: No.

19. The witness was further cross-examined by Mr. James. Thereafter the judge asked JC this question:

Q: <u>Other than the night of the incident, have you seen Madmax before?</u>

A: <u>No…. I heard of him.</u> (emphasis added)

20. The Crown relied on the evidence of DC Taffe who was the lead investigator to buttress the evidence of JC. He preferred the charge of murder against Kendell Dean a/c 'Madmax', a/c 'Dre'. DC Taffe pointed to the appellant Kendell Dean as the person he charged. Under cross-examination he admitted that he never swabbed the hands of the appellant for gunshot residue and further that there was no DNA evidence that linked the appellant to the shooting of Judah.

21. DC Taffe arrived on the scene about twenty (20) minutes after the shooting. He said he viewed CCTV footage from the night of the shooting but did not see the appellant in the footage, nor did he see him getting in or out of a red Mustang.

22. A submission of no case was made to the trial judge at the end of the prosecution evidence on behalf of the appellant. Counsel applied to the judge to have the case against the appellant withdrawn from the jury. The judge rejected the submission.

23. The judge gave detailed reasons for rejecting the no case submission. He highlighted the evidence of JC and DC Taffe. He concluded his ruling in these words:

> "The Court has sifted through the evidence and as it stands:
>
> i. DC Taffe arrested and charged Kendell Dean who was also known as Madmax. How the officer came to know this, may well be the subject of hearsay evidence. The Court had been told that there was a document which had been disclosed to the defence in which the document named Kendell Dean, also using the term Madmax. DC Taffe identified the defendant as Madmax.
>
> ii. It was in the early hours of the morning, but there was lighting. DC Taffe and JC both indicated that the lighting was sufficient to see, and also there was evidence that there were other lights from cars and no obstruction.
>
> iii. Miss Cooper was very close to Madmax and Sparky during the altercation and heard what was being said referencing, '*boy you don't know me and I don't play.*' And also stated that she was in the middle of Madmax and Sparky. She was able to hear the same person known as Madmax say to Judah, '*boy you think this gun is a trophy.*'
>
> iv. Miss Cooper said that the same person Madmax shot once to Judah's chest when he slumped.

v. Miss Cooper also stated that she saw, without any obstruction, Madmax shoot twice thereafter and Judah slumped and fell.

vi. Miss Cooper, in response to defence Counsel, stated that she was not mistaken between Sheen Dean and the defendant who is also a 'Dean'. She was very confident that there was no striking resemblance between Sheen Dean and the defendant, who she knew as Madmax.

vii. Miss Cooper stated that she was in between Madmax and Akeem. She knew that Madmax's surname was Dean but didn't know his other name.

viii. Miss Cooper was sure that Madmax had a brother who had dated her cousin and that she could tell the difference between the two of them.

24. Finally, the judge said that the cross examination of the prosecution witnesses highlighting inconsistencies went to the credibility and reliability of the witnesses which all fell within the province of the jury. It was for them to determine what weight, if any, to place on the evidence of the prosecution witnesses, and if they clearly rejected various parts of the evidence of Ms. Cooper, then it would certainly affect how they dealt with her reliability of the evidence

25. This is a convenient stage to address the issue of the no case submission, which was based on the premise that there was no identification of the appellant to the shooting by any of the Crown's witnesses particularly JC and DC Taffe and accordingly it was incumbent upon the trial judge to withdraw the case from the jury and direct an acquittal.

Was the trial judge right to reject the no case submission

26. A good starting point is the classic statement of the Court in ***R v Galbraith [1981] 2 All ER 1066***. In that case, Lord Lane reviewed several earlier authorities including *R v Barker (1976) 65 Cr. App R 287, R v Mansfield [1978]*

1 All ER 134 and *R v Falconer-Atlee (1973) 58 Cr. App Rep. 348* where Roskill LJ emphasized;

> *"….if a judge thinks that a case is tenuous, then, even though there is some evidence against the accused person, the judge, if he thinks it would be unsafe or unsatisfactory to allow the case to go to the jury even with a proper direction, would take upon himself the responsibility of stopping it there and then.* ***If the judge is not prepared to stop the case of his own responsibility, it is wrong for him to try and cast the responsibility of stopping it on the jury."*** (emphasis added)

27. The essential statement comes from the judgment of Lord Lane:

> "*How then should the judge approach a submission of no case?*
>
> *i. 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.*
>
> *ii. The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence:*
>
> *(a) <u>where the judge comes to the conclusion that the Crown's evidence, taken at its highest, is such that a jury properly directed, could not properly convict on it, it is his duty, on a submission being made, to stop the case,</u> (emphasis added).*
>
> *(b) where however the Crown's evidence is such that its strength or weakness depends on the view to be taken of a witness's 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 on 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."*

28. The case of ***R v Shippey 1988 Cr L.R. 767*** is equally instructive. There, it was held that taking the prosecution's case at its highest does not mean that regardless of the state of the evidence if there is some evidence to support the charge, then it is enough to leave the matter to the jury. Shippey was charged with rape. The evidence given by the complainant was fraught with inherent weaknesses. There was "significant inherent inconsistencies" in her evidence which were "striking" and "wholly inconsistent with the allegation of rape." The trial judge upheld a submission of "no case".

29. In delivering his ruling the Judge stated *inter alia*;

> "*the requirement to take the prosecution evidence at its highest did not mean picking out the plums and leaving the duff behind it. It is necessary to look at the evidence as a whole, not merely part of it, and assess whether a reasonable jury could come to the conclusion on that evidence that the defendant is guilty. In this case the court has concluded that a jury properly directed could not properly convict.* ***Galbraith did not say that the prosecution need only include those parts of its case which pointed to guilt when resisting such an application****."* (emphasis added)

Identification

30. In this case, as stated earlier, no identification parade was held. As a basic rule, an identification parade should be held wherever it would serve a useful purpose. This principle was well settled by Hobhouse LJ in ***R v Popat [1998] 2 Cr. App 208 at 215*** and endorsed by Lord Hoffman in the Privy Council decision of ***Goldson McGlasham v R (2006) 56 WIR 444***.

31. The authorities on identification parades all emphasize that the whole object of the identification parade is for the protection of the suspect and that what happens at those parades are highly relevant to the establishment of the truth. **(See R v Osbourne [1973] 1 AC 649).**

32. In the case of ***R v Forbes [2001] 1 AC*** *473* at 488, a case in which no identification parade was held, Lord Bingham of Cornhill stressed the importance of an identification parade when he said:

> "*The jury should ordinarily be told that an identification parade enables a suspect to put the reliability of an eye witness's identification to the test, that the suspect has lost the benefit of that safeguard and that the jury should take account of that fact in its assessment of the whole case, giving it such weight as it thinks fair."*

33. The identification of the appellant in the instant case was critical. ***R v Turnbull (1976) 3 All ER*** continues to be the leading authority in which guidance was given for judges when the case against an accused person depends wholly or substantially on the identification of the accused.

34. Lord Widgery in delivering the judgment of the court said;

> *"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 on reliance of 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 advisors 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 weakness 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 recognize 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."

35. In ***Wilbert Daley v R [1993] 4 All ER 86***, a decision of the Privy Council from the Court of Appeal of Jamaica, the Board restated the principles of *Galbraith* and *Turnbull* (supra). The circumstances in which Mrs. S met her death were not in dispute. At the trial the only issue was whether the appellant was in fact correctly identified by Mr. S whose evidence was uncorroborated. The appellant did not give evidence. He made an unsworn statement from the dock concerned entirely with the identification parade. He was convicted and appealed his conviction. The Court of Appeal dismissed his appeal.

36. The crucial question was whether Mr. S had a sufficient opportunity to identify and recognise the appellant on the night of the crime. According to the evidence, the appellant and another man entered the premises of Mr. and Mrs. S. Mrs. S was shot by the other man. Mr. S was taken by the appellant out of the house to his shop and he managed to escape and hid in a place from which he could see the house.

37. Mr. S saw the appellant on three occasions. First while he and the other man were approaching the house. Second, during the episode in the hall when Mrs. S was shot. Third, whilst Mr. S was hiding outside the house. No evidence was led to found any identification at the first stage. As regards the third stage, which Mr. S testified to have lasted half an hour, he said that the appellant ransacked the house, but not that he saw the ransacking being carried out. All that emerged from his evidence was that there was an illuminated street light outside his house, and that the light in the room itself through which the appellant and the other man entered was still lit when he escaped. No attempt was made to establish for how much of the half hour the appellant could be seen from where Mr. S was hiding; which parts of the interior of the house were in Mr. S's view; whether during the half hour any of the interior lights were switched on or off; how much of the interior of the house was illuminated by the street lamp; whether the appellant was seen by the light of the street lamp or an interior light.

38. The case was presented to the jury as one of recognition. Mr. S said in evidence that he knew the appellant's face. – "*I always see them some a di time…know the man's name*." Counsel made a no case submission that there was no sufficient case to go to the jury. The trial judge rejected the submission without giving reasons.

39. In the course of his summation to the jury, the trial judge said;

> "*You have to ask yourself, in this particular case, did he have opportunity, was he there observing him long enough to recognise him?*

Identification is very necessary here…unfortunately there are some serious weaknesses in the prosecution case from the point of view of identification, but it is a matter for you Mr. Foreman and members of the jury."

40. Then after commenting at length on the weaknesses in the evidence of Mr. S, the trial judge said:

"*…I must warn you that the identification has not been a very good one. There is much left to be desired as far as the identification of this accused man is concerned."*

Finally he said, *"…the prosecution's case has not made the identification clear enough. That is my opinion."*.

41. As Lord Muskill said in giving the opinion of the Board, "*…on more than one occasion appellate courts have intervened to circumscribe the exercise of the power to stop a trial at the end of the evidence from the prosecution."* He went on to reiterate the principles in **R v Barker, *Turnbull* and *Galbraith*** (supra). In allowing the appeal, Lord Muskill explained how the principles of ***Turnbull*** and ***Galbraith*** are able to live together and referred to ***R v Weeder [1980] 71 Cr. App R 228*** where Lord Lane reiterated the duty of the judge to withdraw the case from the jury when the quality of the evidence is poor.

Anonymity

42. The third ground of appeal was that a fair trial was violated due to the trial judge granting anonymity to the sole and decisive witness for the Crown and by making such orders as to inhibit defence Counsel to take full and proper instructions from the appellant.

43. At the time the judge made the Order, there was no legislative provision in the Turks and Caicos Islands, as now exists, for a witness to give evidence anonymously. Counsel submitted that the procedure adopted by the trial judge was contrary to the long established principle of English common law, that

subject to certain exceptions and statutory qualifications, the defendant in a criminal trial should be confronted by his accusers in order that he may cross-examine them and challenge their evidence.

44. Counsel placed strong reliance on the case of ***R v Davis [2008] UKHL 36*** which dealt in detail with the issue of witness anonymity. *Davis* was a case of murder. The trial judge made an Order to the following effect for three of the witnesses:

    1) *The witnesses were to give evidence under pseudonym;*
    2) *The addresses and personal details, and any particulars which might identify the witnesses, were to be withheld from the appellant and his legal advisors;*
    3) *The witnesses were to give evidence behind screens so that they could be seen by the judge and jury but not the appellant;*
    4) *The appellant's Counsel was permitted to ask the witnesses no question which might enable any of them to be identified; and*
    5) *The witnesses' natural voices were to be heard by the judge and the jury but were to be heard by the appellant and his Counsel subject to mechanical distortion so as to prevent recognition by the appellant.*

45. Lord Bingham in delivering his judgment reviewed extensively the history of the principle of anonymity and referred to the practice in several other countries. At paragraph 7 he opined;

> "*The practical significance of the right was explained in a majority opinion of the supreme court in Smith v Illinois 390 US 129 130. In the present case there was not, to be sure, a complete denial of all right of cross examination. The petitioner was denied the right to ask the principal prosecution witness either his name or where he lived although the witness admitted that the name he had first given was false. Yet when the credibility of a witness is in issue, the very starting point in exposing falsehood and bringing out the truth through cross-*

examination must necessarily be to ask the witness who he is and where he lives. This witness' name and address open countless avenues of in-court examination and out-of-court investigation. To forbid this rudimentary inquiry at the threshold is effectively to emasculate the right of cross-examination itself."

46. Further, at paragraph 8 he continued;

In other countries influenced by the common law tradition, the right to confrontation has not achieved constitutional protection but has been treated as an important right.

In a majority decision of the Court of Appeal of New Zealand in R v Hughes (1968) 2NZLR 29 Richardson J, having cited Smith v Illinois (supra) observed;

"clearly the accused cannot be assured of a true and full defence to the charge unless he is supplied with sufficient information about his accuser in order to decide on investigation whether his credibility should be challenged."

47. Then, in a passage which has frequently been quoted Lord Bingham continued;

" We would be on a slippery slope as a society if on a supposed balancing of the interests of the state against those of the individual accused the courts were by judicial rule to allow limitations on the defence in raising matters properly relevant to an issue in the trial. Today the claim is that the name of the witness need not be given; tomorrow, and by the same logic it will be that the risk of physical identification of the witness must be eliminated in the interests of justice in the detection and prosecution of crime, either by allowing the witness to testify with anonymity for example from behind a screen, in which case his demeanour cannot be observed, or by removing the accused from the Court, or both. The right to confront an adverse witness is basic to any civilized notion of a fair trial. That must include the right for the defence to ascertain the

true identity of an accuser where the questions of credibility are in issue".

48. Lord Rodger of Earlsferry said at paragraph 45

"*It is for the Government and Parliament to take notice if there are indeed areas of the country where intimidation of witnesses is rife and to decide what should be done to deal with the conditions which allow it to flourish. Tackling those conditions would be the best way of tackling the problem which lies behind this appeal. Any change in the law on the way that witnesses give their evidence to allow for those conditions would only be second best. But Parliament is the proper body both to decide whether such a change is now required, and, if so, to devise an appropriate system which still ensures a fair trial.* "

49. In conclusion the court said at paragraph 96;

"*Whatever may be the position in that regard, I do not believe that the Strasbourg Court would accept that the use of anonymous evidence in the present case satisfied the requirements of article 6. Not only was the evidence on any view the sole or decisive basis on which alone the defendant could have been convicted, but effective cross-examination in the present case depended upon investigating the potential motives for the three witnesses giving what the defence maintained was a lying and presumably conspiratorial account. Cross-examination was hampered by the witnesses' anonymity, by the mechanical distortion of their voices and by their giving evidence behind the screens, so that the appellant (and, since he was not prepared to put himself in a position where he had information that his client did not, his counsel) could not see the witnesses. Assuming that the sole or decisive nature of the evidence is not itself fatal, it is on any view an important factor which would require to be very clearly counter-balanced by other factors. Here there are none. The other factors are here very prejudicial in their impact on effective cross-examination."*

50. The final ground of appeal was the Judge's failure to give an "*axe to grind*" or "*interest to serve*" direction to the jury. Counsel did not belabour this ground of appeal and in our view rightly so. There was hardly any question of JC who was anonymous, having an "axe to grind" or "interest to serve". Counsel suggested that owing to the friendship between Judah and JC, JC may have had improper motives. We found no merit in that submission.

Analysis of Submission, Summation and the Evidence

51. It is clear from the exchanges between Bench and Bar that the lack of nexus between Madmax and the appellant was the cause for disquiet for the trial judge. This is borne out in his summation where, on several occasions, he warned the jury of the paucity of the identification but fell short of withdrawing the case from the jury. That situation is exactly what Roskill LJ was referencing in *Falconer-Atlee* (supra).

52. The trial judge gave the directions on identification with utmost clarity. However, simply stating the principle and not applying it to the evidence to assist the jury was the judge's failure. Especially, as the evidence of JC was the sole or decisive basis on which the appellant could have been convicted.

53. Thea Musgrove testified that she was not in her vehicle at the time of the shooting. JC testified that Thea Musgrove was sitting in her vehicle at the material time and was about to reverse. The trial judge told the jury that JC was very clear and adamant that Thea Musgrove was inside her car when the shooting of Judah took place; on the other hand Thea Musgrove testified that she saw people gathering and then saw someone on the ground and then she looked at her car, saw no damage and got into it. Thea Musgrove would have been a more credible witness on that issue than JC and the judge ought to have so emphasized to the jury.

54. Very early in the summation the judge directed the jury that they must be sure that Kendell Dean is "Madmax" before they can convict and if they were not

sure that would be the end of the case; but a little later the Judge said that JC never said that Kendell Dean was also known as "Madmax". That later statement may have caused some confusion in the minds of the jurors. The Judge further said in relation to DC Taffe whilst he charged the defendant Kendell Dean aka "Madmax" he never said how he came to know him or to be sure that Kendell Dean is "Madmax". So neither from JC nor DC Taffe was there any evidence from which a reasonable jury properly directed could have come to the conclusion that the appellant Kendell Dean was "Madmax".

55. On the identification of Colton, JC was either genuinely mistaken or it was a deliberate falsehood having regard to the police investigations. That was another serious weakness in the Prosecution evidence and not sufficiently emphasized to the jury by the Judge.

56. The evidence of the lighting to say the least was not of the best. Officer Garrick, under cross-examination said he got there three (3) minutes to 2:00am or shortly thereafter. He had to return a second time as the lighting was not good on his first visit. On the other hand JC said that at 2:00am the lighting was good and there were cars and there were lights. But, there was no evidence that the lights were focused on the incident.

57. DC Winter a crime scene expert said that not only was there no evidence linking the appellant to the red Mustang but under cross-examination said that if someone had handled a firearm or shot a firearm, one may have expected to find GSR and DNA. There was no DNA evidence nor GSR evidence in the red mustang and if someone came out of a vehicle and discharged a firearm one would expect to at least find GSR on the steering wheel.

58. The judge further reminded the jury that DC Taffe confirmed that he viewed CCTV footage from the night of the incident and did not see the appellant coming in or out of the red Mustang.

59. While the judge told the jury that the appellant was disadvantaged by the witness's condition of anonymity he ought to have gone further and told them that it was a factor to take into account in assessing the whole of the evidence. In any event, as enunciated by *R v Davis* (supra) a judge has no statutory or common law power to do so especially having regard to the circumstances in this case.

60. The Judge in his summation told the jury that JC said that she recognized the voice of Madmax and went on to say that she never said she knew the voice of Kendell Dean. The trial judge was at pains in his summation to let the jurors know that there was a lacuna in the evidence of the Prosecution between Madmax and the appellant, yet the trial judge cast that onerous responsibility upon the jurors.

61. The Judge addressed the law applicable to the issues in the case with a degree of clarity. However, notwithstanding his several exhortations to the jury, they must have had a level of confusion in their minds which resulted in a miscarriage of justice and an unfair trial for the appellant.

CONCLUSION

62. In allowing the appeal the following factors were taken into consideration:

    i) The judge ought to have upheld the no case submission in light of the evidence of DC Taffe in relation to the identification parade of the appellant;

    ii) The judge fell into error in allowing JC to give evidence under the cloak of anonymity; and we are of the opinion that the appellant, through the failure to hold an identification parade lost the benefit of that safeguard to which he was legally entitled.

    iii) The appellant suffered a miscarriage of justice and had an unfair trial as a result of the inadequacies in the summation.

Accordingly, at the close of the arguments we allowed the appeal, quashed the conviction and directed a verdict of acquittal be entered.

Stanley John, JA

I agree.

C. Dennis Morrison, P

I also agree.

Ian Winder, JA