BARBADOS

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Criminal Appeal No. 7 of 2014

BETWEEN:

DWAYNE OMAR SEVERIN **Appellant**

AND

THE QUEEN **Respondent**

Before: The Hon. Sir Marston C.D. Gibson, K.A., Chief Justice, The Hon. Sandra P. Mason and The Hon. Kaye C. Goodridge, Justices of Appeal.

2016: March 23, April 12
2017: May 17

Mrs. Angella Mitchell-Gittens for the Appellant.

Mr. Elwood Watts for the Respondent.

DECISION

MASON JA:

Introduction

[1] On 7 May 2014, the appellant was arraigned on a charge that he on 30 November 2009 in the parish of St. Philip murdered Virgil Barton. On 28 May 2014, after a trial by judge and jury, the appellant was found guilty and sentenced to death.

[2] This is an appeal from that conviction and sentence.

Background

[3] On Independence Day, 30 November 2009, the deceased Virgil Barton (Barton) together with some members of his family and friends attended the St. Philip carnival. Sometime in the afternoon of that day, while at Long Bay, St. Philip, they became embroiled in a fight with "some fellows from Crane" which left the combatants nursing injuries.

[4] After the parties dispersed, Barton, his family and some friends repaired first to King George V Park where the carnival was ongoing and later to Lucas Street, also in St. Philip where the Barton family lived.

[5] Later that night whilst at Lucas Street, the deceased Barton, his nephew Judd Barton and some friends were liming outside Barton's home when two persons were observed walking towards them. A number of shots were fired by these two persons in the direction of Barton and his company after which Barton lay dead.

[6] Sometime around 9 December 2009, the police executed a warrant at the appellant's girlfriend's home where the appellant then lived. A gun and some 31 rounds of ammunition were found in the far recesses of a bedroom closet. The police conducted further investigations after which the appellant was arrested and formally charged with the murder of Virgil Barton.

The Case for the Prosecution

[7] This hinged on the evidence of the deceased's nephew, Judd Barton, the oral statements made by the appellant during police investigations and the firearm retrieved from the appellant's residence.

[8] According to the pathologist, Barton's death was due to haemorrhage and shock from multiple gunshot wounds: 3 to the head, 1 to the back, 1 to the leg and 1 to the clavicle.

[9] As stated, the case for the prosecution centred principally around the evidence of Judd Barton who stated that sometime in the night of 30 November 2009, he was liming outside his uncle's house with his uncle and some friends. While there he observed two fellows walking side by side coming towards him and his group. Judd Barton said that he had been looking "down at the bottom of the gap because I heard that the guys was coming to shoot up the block". He was unable to identify one of the two men because that man had his head down. He was able however to identify the appellant because his face was "out". In Judd Barton's evidence in chief: "he had on like a hoodie, a black hoodie that just covering his tam, but his face was out. The other guy was more had his face down so I couldn't recognise the other guy but like I recognise him". (Page 169 of the record lines 13 to 16). Judd Barton indicated that he had seen "Zephrins" (the appellant) on two previous occasions before

this night. Judd Barton recounted that as the men walked towards him, they pulled guns from their waists and started shooting. Once the shooting started he ran away. When he returned to the scene, he saw his uncle lying motionless on the ground.

[10] During their investigation, the police conducted an informal identification exercise because although the appellant had initially agreed to an identification parade, he subsequently refused the parade. Judd Barton identified the appellant as one of the men who fired the shots on the night of 30 November 2009.

[11] The gun found at the appellant's home as well as the bullet shells found at the scene were forensically identified as those involved in the shooting death of Barton.

The Case for the Defence

[12] The only evidence for the defence came through the appellant's unsworn statement from the dock. He denied any knowledge of the incident for which he had been charged and denied that he had been in Lucas Street on the night in question.

[13] According to the appellant on that date, 30 November 2009, he was living at his girlfriend's residence in Rices, St. Philip. He related that on that day he woke up around 6:00 a.m. did some chores and after having a shower, he went

to The Ivy, St. Michael, returning home around lunch time and remaining there until about 6:00 p.m. He later left home and went to a bar at Crane, St. Philip where he met some friends. He continued:

> "Around 7:00, 7:30, I saw Ricky return from the hospital that day with injuries. I get to find out that one or two fellows from the area had a problem at the carnival; everybody was talking about these problems.
>
> "S", Ricky brother "S" came to the Crane, St. Philip, me and he sat in front of the bar, we had drinks, we were smoking, talking about the events of the day and then Damien Craigg came home, head bandage up. I get up from by the bar, went to Damien Craigg's house, which is directly behind the bar, to find out what is going on wid him. He explained to me the situation. I then bought two, three wrappers from the shop and went back in front of the shop, drinking me and "S".
>
> At some time around 9:00, 9:30, around that time, my girlfriend call me and tell me that I got to bring home some things for the boy to carry school the next day. I then send someone to the shop to buy couple items for me to take home fuh my son for school the next day. When "S" say he was ready to leave, I ask "S" for a drop home. Me and "S" then get in the vehicle, he drop me to Rices, St. Philip".

[14] The appellant told of being at home on 9 December when around 3:00, 4:00 a.m. the police woke him from sleeping, took him out of bed, handcuffed him and removed his son and girlfriend, Stephanie, from the bedroom. According to the appellant, the police produced a firearm, called Stephanie back into the room and told the two of them that if they didn't admit to possession of the gun, they would both be charged. The appellant said that he denied

knowledge of both the gun and the ammunition and the officers then handcuffed both him and Stephanie and took them to the police station.

[15] While at the police station, the police again threatened to charge both the appellant and Stephanie for possession of the firearm. The appellant stated that because his girlfriend was "big" pregnant and because he had left his seven year old son alone at home, he agreed to "sign to the gun if they will release Stephanie".333

[16] The appellant recounted that an attorney-at-law visited him in the cells of the police station and he gave her information in order for her to apply for bail in relation to the firearm. He was taken to the Criminal Investigation Department and questioned about the murder. He stated that since he knew nothing about this, he decided to have the attorney-at-law recalled. She advised him not to sign or say anything, which he did.

The Appeal

[17] The appellant filed 4 grounds of appeal.

Ground 1

[18] This ground complained (i) that the sentence of death imposed on the appellant was in breach of the appellant's rights under **section 15** of the **Constitution** not to be subjected to torture or to inhuman or degrading punishment; (ii) that **section 26** of the **Constitution** (the savings clause) saved

only the penalty of death and not the mandatory nature of the imposition of the death penalty upon a conviction of murder; and (iii) that consequently the sentence of a mandatory death penalty is unconstitutional.

[19] At the hearing, Mrs Angella Mitchell-Gittens, counsel for the appellant, decided to adopt the submissions of the Director of Public Prosecutions, Mr. Charles Leacock, QC.

[20] Mr. Leacock QC reiterated the submissions he had recently made in the case of **Jabari Sensimania Nervais v. R Criminal Appeal No. 2 of 2012 (Nervais).** There Mr. Leacock QC recounted the history of the death penalty, spoke to the judgments of the Inter-American Human Rights Court in the Barbadian case of **Boyce et al v. Barbados Inter American Court of Human Rights – Judgment of 20 November 2007** and **Tyrone Cadogan v R [2006] CCJ 4 (AJ)** in which that court determined that Barbados was in breach of international law in imposing the death penalty and referred to the "striking down" of the death penalty in other Commonwealth Caribbean jurisdictions. Mr. Leacock QC mentioned a number of cases but highlighted the cases of **Newton Spence v R Criminal Appeal No 20 of 1998 (Saint Vincent and the Grenadines)** and **Peter Hughes v R Criminal Appeal No. 14 of 1997 (Saint Lucia)** in which Byron CJ of the Eastern Caribbean Supreme Court as he then was, proposed a set of guidelines. Mr. Leacock QC

also highlighted the case of **Bowe and Davis v R [2006] UK PC 10** where a practice note was established by Hall CJ of the Bahamas. Both of these Chief Justices established these as procedures to be adopted for the sentencing of persons convicted of murder.

[21] In sum, Mr. Leacock QC recommended that, based on the authorities which determined that a sentence of mandatory death in murder cases is cruel and inhuman treatment, and since culpability in such cases varies widely and all killings which satisfy the definition of murder are not all heinous, this Court should consider following the example of the other Commonwealth Caribbean countries and determine that the imposition of the death penalty should be discretionary rather than mandatory. In this way Barbados would be giving effect to the decision made by the Inter-American Court that the mandatory death penalty is unconstitutional.

Discussion

[22] In the very recent case of **Nervais** this Court examined exhaustively the issue of the constitutionality of the death penalty in Barbados. The Court held that it was bound by the Privy Council's decision in **Boyce (Lennox) and Joseph (Jeffrey) v R [2004] 64 WIR 37 (Boyce and Joseph)** having regard to the pronouncement of the Caribbean Court of Justice (CCJ) in **The Attorney**

General et al v Jeffrey Joseph and Lennox Ricardo Boyce (Joseph and Boyce), CCJ Appeal No. CV2 of 2005.

[23] In **Boyce and Joseph,** the Privy Council held that the mandatory death penalty is and remains a constitutionally sanctioned punishment for murder in Barbados. The CCJ in **Joseph and Boyce** has mandated that this Court follow cases determined by the Privy Council before the establishment of the CCJ unless and until the CCJ determines otherwise. In light of these decisions, this Court is bound to apply the decision of the Privy Council in **Boyce and Joseph.**

Ground 2

[24] Here the appellant charged that the "Learned Trial Judge erred in law when he directed the jury on the evidence and issues in the case in a manner that was unbalanced to the defence".

[25] In her written submissions, Mrs. Mitchell-Gittens, alleged that at several times during the summation, the judge directed the jury in a manner that would have negatived the defence and elevated the prosecution's case.

[26] In her oral submissions, counsel stated that there might be several seemingly not important issues with respect to the treatment by the judge of the evidence of Judd Barton but given the prominent and critical role played by his evidence, when taken together, all of these factors would have worked to

neutralise the defence and would have led the jury in the direction of conviction of the appellant.

[27] In support of this contention, counsel first pointed to the judge's question to the jury at page 861 lines 2 to 5 of the trial record:

> "Madam Foreman and your members, you really think he was stale drunk? Madam Foreman and your members, you really think he was confused, Madam Foreman and your members?"

[28] It was Mrs. Mitchell-Gittens' contention that the judge asked this question which was central to the defence in a manner and which clearly suggested that the defence's position was untenable, that it would be incredulous to believe that Judd Barton, the most critical witness in the case, was either stale drunk and or confused. Counsel indicated that it was the defence's position that since Judd Barton had been participatory in the St. Phillip carnival festivities, had been partying and drinking the night before, his faculties were not as sharp as they ought to be, so for the judge to have asked this question in this manner, served to neutralise the defence.

[29] Counsel next adverted to page 900 where the judge dealt with the issue of a street light in the vicinity of the incident and the conflict between the evidence of a police officer who visited the scene and the evidence of Judd Barton. At line 3 to line 14, the judge said:

> "And you remember one of the police officers, I believe, was asked the question and I think he had indicated that he couldn't

> really to the best of his knowledge there wasn't a light. But any way Judd Barton is saying to you that there is a light. What do you make of that, Madam Foreman and your members? One of the police officers who went to the scene says, virtually words to the effect that he couldn't recall, there wasn't a light as far as he was concerned. Judd Barton is saying Virgil is saying, well, he goes there, he is someone who goes there every day and, yes, there was a streetlight in that direction."

[30] Mrs. Mitchell-Gittens stated that the presence or absence of the streetlight was also critical to the defence since it was relevant with regard to the issue of identification of the appellant by Judd Barton. Counsel stated that the gist of what the officer said was different from how it was captured by the judge. The officer said that to the best of his recollection there was no streetlight while the judge stated that the officer could not recall whether there was a streetlight. In counsel's estimation, the manner in which the judge made this statement put a different complexion on the officer's evidence.

[31] In her written submissions, Mrs. Mitchell-Gittens referred to page 954 lines 8 to 19 where according to her, the judge "addresses this discrepancy and once again speaks to the fact that Judd Barton goes to the scene on a daily basis, thereby indicating to the jury that the evidence of Judd Barton is a more acceptable version".

[32] Counsel also queried the judge's analysis of the time factor with respect to Judd Barton's evidence about making a report to the police about the incident

and his identification of the appellant. At page 914 lines 9 to 16, the judge stated:

> "So is there any lapse in time? How does that make you feel about what he is saying, Madam Foreman and your members? Basically within a 24-hour period he is in a position to tell the police, yes, he gives his statement, et cetera, and within 11 days, he is at the police station again. And he tells the police that he is able to identify as early as the 1st and he also tells them on the 30th what he would have seen".

[33] Mrs. Mitchell-Gittens is suggesting that the question "so is there any lapse in time?", not being a statement of the Crown's position but the judge's analysis of the time factor, was essentially a direction to the jury to draw an inference unfavourable to the appellant because the obvious answer to the question was in the negative. Mrs. Mitchell-Gittens submitted that given that the appellant's defence was mistaken identity, the judge's address to the jury effectively neutralised that defence.

[34] The manner in which the judge handled the charge by the defence that the police had planted the firearm at the appellant's residence was another cause for concern by Mrs. Mitchell-Gittens who referred to page 999 lines 8 to 13 of the record:

> "He is saying to you again, beware of what is being said. That this is something that now at the eleventh hour and that is to side-track you to make you believe that it is the evidence, that you are dealing with the evidence of the police in this case and their behaviour".

[35] Mrs. Mitchell-Gittens maintained that it was incumbent upon the judge to alert the jury that there had been only one trial and that questions asked or not asked at the preliminary enquiry in the Magistrate's Court were not relevant to the trial in the High Court and that it was only the evidence led in the High Court that was for their consideration.

[36] In support of her submissions on ground 2, counsel placed reliance on the Privy Council decision of **Mears v R (1993) 97 Cr. App 239 (Mears)** where their Lordships considered that the judge's comments went beyond the proper bounds of judicial comment making it difficult if not practically impossible for the jury to do other than that which the judge was plainly suggesting.

Discussion

[37] It must be accepted that there is no such occurrence as a perfect summation. There will always be occasions where the trial judge could have expressed himself differently. However in the final analysis, this Court as the reviewing court, must determine whether what is complained of can be elevated to such an extent that the conclusion reached by the jury ought to be disturbed.

[38] This Court as the reviewing court must therefore give due weight to the advantage of the jury as triers of fact and to the advantage of the jury being present and hearing and observing the witnesses while the evidence is being

led. This Court can only review the case based on the written record, analysing it through the prism of judicial experience.

[39] In other words, this Court must decide whether the verdict is one which the jury having been properly directed were fully entitled to reach.

[40] The complaint by defence counsel of the unbalanced nature of a summation is as perennial as it is nearly always unjustified. The reason for this is that the stance of counsel on such a ground all too often tends to be isolationist. Counsel separates out a particular statement or paragraph of the judge's summation and seeks to impugn it in order to justify that particular complaint. We can only restate that a summing-up must be read as a whole and statements must not be taken out of context.

[41] Recognising that the case for the defence ultimately depended on the jury's appraisal of the evidence of the critical witness, Judd Barton, and that the real issue between the prosecution and the defence was that of credibility, the judge in a thorough, detailed and analytical summation, recounted that evidence while explaining the law and marshalling the facts for the jury. This he did over numerous pages throughout the summing-up including from page 890 to 940, 962 to 965, 1017, 1019, 1025 to indicate a few.

[42] The judge laid the foundation for the jury's consideration by directing them on the general principles of law but more particularly the principles of

mistaken identity all the while highlighting the particular bits of evidence and analysing Judd Barton's evidence since he was the witness who claimed to have seen the appellant on the night in question. The judge directed the jury with respect to the principles of identification, taking the jury through the *Turnbull* guidelines and **section 102** of the **Evidence Act Cap. 121 (Cap. 121)**. In reminding the jury of their role and function when dealing with Judd Barton's evidence, the judge alerted them at every turn to the kinds of questions which they needed to ask themselves in order to determine the appellant's guilt or innocence.

[43] The judge's recitation of the evidence was in our opinion balanced and we are satisfied that he made no error in this respect.

[44] However, speaking specifically to the criticism raised by Mrs. Mitchell-Gittens with respect to the judge's query at page 861(see para 22 above), we are not convinced that it is valid. It failed to take into account the fact that prior to making that statement, the judge had told the jury to consider Judd Barton's evidence in the context of Mrs. Mitchell-Gittens' suggestion that Judd Barton had gone partying and could have been somewhat inebriated. The judge reminded the jury that the function of defence counsel was to attack the credibility of the witness and so when she had cross examined Judd Barton about his partying and drinking, it was for them to determine whether this

partying and drinking and possible stale drunkenness had indeed affected his evidence.

[45] The judge was plainly exhorting the jury to consider what possibilities existed: whether in their opinion as defence counsel was arguing, there was the possibility of Judd Barton being confused as to what he saw on the night in question, whether as the defence was suggesting, that after a bout of carousing and drinking the night before, Judd Barton could possibly have been mistaken or confused about what he said he had seen.

[46] We are not convinced that for the judge to have used the term "stale drunk" did distract in anyway from the explanation of Judd Barton's possible state of mind on the night in question but rather described it for the jury in Bajan parlance, in terms which they would understand and which they needed to determine.

[47] Contrary to Mrs. Mitchell-Gittens' submission, we cannot accept that there was anything in the use of the term "stale drunk" which could have served to neutralise the defence or to prejudice the minds of the jury in anyway.

[48] We consider counsel's concern about the presence or absence of the street light and the manner in which the judge recounted the issue at page 900 to be unsustainable.

[49] According to the evidence, Judd Barton spoke of there being a street light in the vicinity on the night in question in 2009. Some 5 years later, when the case came on for trial, the court visited the locus in order for the police witnesses to point out certain areas of which they had spoken during their evidence as having been visited during their investigation. One police officer during cross-examination stated "As far as I recall there was no streetlight there at the time".

[50] Mrs. Mitchell-Gittens took issue with the judge's statement that the police officer "had indicated that he couldn't really to the best of his knowledge there wasn't a light. But anyway Judd Barton is saying to you there is a light". It is to be noted that almost immediately after making that statement, the judge repeats that the police officer said "words to the effect that he couldn't recall".

[51] Then at page 954 line 15 to page 955 line 9, the judge alerted the jury to the discrepancy between the two witnesses, reminding them it was for their determination as to which of the two could have been mistaken while taking into account that this determination would have implications for the question of the identification of the shooter. The judge was doing no more than reminding the jury of their duty to consider both sides – the prosecution and defence – regarding the discrepancy when he went on to remind the jury of

the Crown's position that Judd Barton went to the area on a daily basis and would know whether there was a streetlight.

[52] We can see no harm in the manner in which the judge drew the discrepancy to the attention of the jury. We are of the view that the judge was merely highlighting one of the issues which the jury had to determine. It was a question of whom would they believe.

[53] Mrs. Mitchell-Gittens placed much reliance on the judge's neglect to remind the jury that the only trial which mattered was the trial being conducted in their presence and so even if the defence of the planting of the firearm by the police had not been raised in the appellant's defence in the Magistrate's Court, that ought not to operate against the appellant.

[54] Not much need be said with respect to this complaint except to remember that the impugned paragraph at page 999 lines 4 to 13 must be read in context. Regard must be had to the fact that, in order to properly understand the backdrop to this paragraph, the record has to be read from page 997 line 17 where the judge was recounting defence counsel's cross-examination of the police officer who she had accused of never having spoken about the firearm when he gave his evidence in the Magistrate's Court and to which the officer had retorted that his evidence had been tendered in the Magistrate's Court. The upshot of this is that if his evidence had been tendered and he had not

been cross-examined, then, it would be correct to say that the evidence from that particular officer would be heard for the first time and the judge's comment could not then be called into question.

[55] It is clear that the defence with respect to the planting of the firearm by the police did not sit well with the jury and that in fact they plainly disbelieved it.

[56] We conclude this ground by determining that there can be no comparison between the case at bar and that of **Mears**. We are satisfied that, unlike **Mears**, there were here no injudicious or incendiary comments made by the judge in this case.

[57] This ground cannot therefore be sustained.

Ground 3

[58] On this ground, it is alleged that the judge erred in law when he failed to adequately analyse the evidence with respect to identification.

[59] Mrs. Mitchell-Gittens indicated that her complaint was generally in respect of the judge's treatment of the identification evidence but more particularly with respect to the directions given by the judge on "special circumstances".

[60] Counsel argued that the "special circumstances" direction referred to in **section 102** of **Cap. 121** ought not to have been given because the appellant was not known to Judd Barton. According to counsel, Judd Barton's evidence

was that he had seen the appellant on only two previous occasions and he did not know the appellant's name, he knew him as "Zephrins".

[61] Mrs. Mitchell-Gittens submitted that that sort of cursory observation of a person is not what is contemplated by **section 102** as special circumstances.

[62] Counsel also took issue with the manner in which the informal exercise had been carried out, arguing that the process did not follow the acceptable procedure for such exercises. She contended that since the appellant was not known to the witness, it was necessary to conduct an identification parade. Thus for the judge to have said that the appellant was known to Judd Barton was a significant misdirection which this Court in the case of **Oliver et al v R Criminal Appeal No. 21, 22** and **23** of **2006,** held to be fatal to the conviction.

[63] Counsel for the respondent, Mr. Elwood Watts, referred the Court to **DPP's Reference No. 1 of 2001** which in his estimation succinctly responded to the appellant's contentions on this ground.

[64] In that case, the complainant saw the assailant on two occasions only. She had seen him following her and when he got to about 4 feet from her he attempted to grab her chain. A physical altercation which lasted between 2 to 5 minutes ensued. She recognised him two days later and was able to point him out to the police. No identification parade was conducted. The trial judge

was of the opinion that the "special circumstances" requirement of **section 102** of **Cap. 121** had not been fulfilled. The Court of Appeal disagreed.

[65] The Court stated at paragraphs 29, 30 and 38 of that case:

> "[29] The statutory framework for warning and directions to the jury has gaps. Those gaps must be filled by the application of common law principles. The **Act** is therefore not exhaustive of the law and in our opinion, is not a codification of the law of evidence in Barbados.
>
> [30] The real issue in this Reference then is whether **section 102** of the **Act** totally excludes the operation of the *Turnbull* guidelines or whether, conversely, that section is to be read in conjunction with those guidelines".
>
> [38] ... We do not construe **section 102** as excluding the *Turnbull* principles. It enacts some of them. But where it is silent and a *Turnbull* principle exists it should be applied".

Discussion

[66] **Section 102** of **Cap 121** provides:

> "102. (1) Where identification evidence has been admitted, the Judge shall inform the jury that there is a special need for caution before accepting identification evidence and of the reasons for the need for caution, both generally and in the circumstances of the case.
>
> (2) In particular, the Judge shall warn the jury that it should not find, on the basis of the identification evidence, that the accused was a person by whom the relevant offence was committed unless

(a) there are, in relation to the identification, special circumstances that tend to support the identification; or

(b) there is substantial evidence, not being identification evidence that tends to prove the guilt of the accused and the jury accepts that evidence.

(3) Special circumstances include

(a) the accused being known to the person who made the identification; and

(b) the identification having been made on the basis of a characteristic that is unusal.

(4) Where

(a) it is not reasonably open to find the accused guilty except on the basis of identification evidence;

(b) there are no special circumstances of the kind mentioned in paragraph (2) (a); and

(c) there is no evidence of the kind mentioned in paragraph (2)(b),

the Judge shall direct that the accused be acquitted.

[67] Mrs. Mitchell-Gittens in arguing that the identification exercise was untrustworthy stressed the number of times Judd Barton had seen the appellant and the fact that Judd Barton did not know the appellant's proper name, that he knew him only as "Zephrins".

[68] In his testimony, Judd Barton stated and in cross examination he reiterated that he had first seen the appellant about a week earlier at a fete in St. Philip where the appellant had been involved in a fight. He heard someone call the appellant "Zephrins". The second occasion was the night before the incident at a "street jam" in Christ Church. The next time he saw the appellant was the night of the incident when he passed the streetlight wearing a black hoodie just covering his tam with his face "out". Judd Barton also testified that "Zephrins" was the only name by which he knew the appellant and that was the name he gave to the police at the police station the day after the shooting. On his next trip to the police station about two weeks later, he pointed out "Zephrins" in the line up as the guy he had seen shooting on the night in question.

[69] Courts have long recognised the frailties of witness identification, noting that the issue is not credibility alone but rather the reliability of the identification.

[70] The judge, being acutely aware of the dangers inherent in identification evidence, was careful to recall exhaustively for the jury Judd Barton's evidence in chief as well as the cross-examination of his evidence relating to the identification of the appellant. His directions fully canvassed the frailties of the evidence and fully addressed the requirements of the identification process.

[71] Following the *Turnbull* guidelines and highlighting the relevant provision of **section 102** of **Cap. 121,** namely **subsection 3,** the judge was at pains to intersperse the recitation of Judd Barton's evidence with the appropriate questions which were crucial for the jury to ponder in order to satisfy themselves whether the identification fitted within the required parameters of the guidelines and the Act.

[72] The informal identification exercise was just that. The evidence disclosed that after initially agreeing to a formal identification parade, the appellant refused to stand on a parade. As they are wont to do in such instances, the police officers sought out eight persons willing to participate in an informal line-up. There was no suggestion by counsel that Judd Barton had been encouraged to pick out the appellant in the line-up. Her only complaint and concern were about the persons who participated in the exercise. This complaint when suggested to the jury, appeared not to be enough to nullify the exercise in the eyes of the jury.

[73] In our opinion, the judge quite correctly did not confine himself to the two situations enacted as "special circumstances" in the Act but as determined by this Court in **DPP's Reference,** sought to fill any lacunae by reciting for the jury the requirements of the *Turnbull* guidelines.

[74] It is an unconvincing argument to suggest that because Judd Barton did not know the appellant's proper name, that he did not know him. It is our view that it is appropriate for this Court to take judicial notice of the fact that in the Barbadian context of some relationships, it is quite usual for persons to congregate and interact with others on a daily basis and sometimes never be aware of those persons' proper names.

[75] We are convinced that the unchallenged threads of evidence, namely Judd Barton's having seen the appellant on two occasions prior to the shooting, the appellant's face being "out" on that night as he passed the streetlight on the night of the shooting and Judd Barton unhesitatingly picking out of the appellant in the line-up, satisfied the jury on the question of identification.

[76] This ground also fails.

Ground 4

[77] This ground states that the verdict is unsafe and unsatisfactory.

[78] Having carefully reviewed the case, and since we reject counsel's submissions on the two previous grounds, it follows that we consider the verdict to be safe and satisfactory.

[79] As stated before, the case depended principally on the credibility of Judd Barton. Whether a witness is credible is a question of fact for the jury. It is plain that the jury accepted and believed Judd Barton to be a credible witness

when he said that it was the appellant whom he saw on the night of 30 November 2009 shoot and kill Virgil Barton. This Court cannot therefore interfere with the jury's determination of credibility unless it cannot be supported on any reasonable view of the evidence.

[80] Thus looking at the matter overall, we are satisfied that the jury having been properly instructed, were fully entitled to conclude as they did. They were not materially misdirected as suggested by counsel.

Disposal

[81] In the result, this appeal is dismissed.

Chief Justice

Justice of Appeal **Justice of Appeal**