SAINT LUCIA

IN THE COURT OF APPEAL

HCRAP 2006/012

BETWEEN:

EARL HUNTE

Appellant

and

THE QUEEN

Respondent

Before:

The Hon. Mde. Ola Mae Edwards	Justice of Appeal
The Hon. Mde. Janice George-Creque	Justice of Appeal
The Hon. Mr. Davidson Kelvin Baptiste	Justice of Appeal

Appearances:

Mr. Shawn Innocent for the appellant
Mrs. Victoria Charles-Clarke, Director of Public Prosecutions
with Ms. Tina Mensah for the respondent

2010: October 2;
2011: January 19.

Criminal appeal – Appeal against conviction and sentence – Robbery – Inadmissible identification evidence – No direction or no proper direction given to jury in relation to evidence of recognition and or identification – Failure to raise issue of defendant's good character – Lurking doubt about the correctness and safety of conviction – Admissibility of identification evidence – Sections 100, 102 and 136 of the Evidence Act No. 5 of 2002 of Saint Lucia – Meaning of section 100 of Act No. 5 of 2002 – Necessity for voir dire under section 100 – Circumstances under which it would be reasonable or unreasonable to hold an identification parade. Section 114 of the Australia Evidence Act 1995 – Police and Criminal Evidence Act 1984 ("PACE") – PACE Code D

On 1st November 2006 the appellant, Mr. Earl Hunte was convicted and sentenced to eight years imprisonment for robbery. He appealed his conviction and sentence on the grounds that: (1) the learned judge erred in law when he allowed inadmissible identification evidence to be adduced; (2) the learned judge failed to give the jury any or any proper direction and/or warning in relation to evidence led from the prosecution witnesses; (3) the issue of the appellant's good character was not raised at trial when his credibility and

reliability were in issue; (4) the verdict is unsafe and unsatisfactory having regard to all the circumstances of the case. On the morning of 7th June 2004, Mr. Luther Thomas, the Chief Executive Officer of Capital Management Ltd., prepared a deposit containing approximately $31,200.00 in cash and $10,900.00 in cheques. This deposit was to be taken to the bank by Mr. Paul Mondesir. After Mr. Mondesir had collected the deposit and brought it to his car, he was approached by a man whom the three eye witnesses to the robbery testified, was the appellant. The appellant wrestled with Mr. Mondesir in his car for the deposit, and when Mr. Mondesir alighted from his car with the deposit, the appellant ran after him, threw a drink bottle at him, grabbed the deposit and ran in the opposite direction. The appellant who was previously known to one of the eye witnesses as 'Monster' was arrested on 26th June 2004 while walking along the road near the area in which he lived. The learned trial judge overruled an objection by appellant's counsel that the identification evidence of the eye witnesses was inadmissible under section 100 of the Evidence Act of Saint Lucia No. 5 of 2002. No identification parade was held by the police for the appellant and no reasons were given by the police in their evidence for not holding an identification parade.

Held: allowing the appeal, setting aside the appellant's conviction and sentence, and ordering a new trial, that:

1. The Evidence Act of Saint Lucia No. 5 of 2002 ("Saint Lucia Act") imposes special requirements to be met before all identification evidence falling within the definition of "identification evidence" in section 2 of the Act can be adduced, regardless of whether the identification of a defendant takes place in court or out of court. The effect of section 100(1)(a)(i) and (b) of the Saint Lucia Act is that there now exists the cardinal rule that before identification evidence can be admissible the following should be done: (i) an identification parade (of which the accused should be a part) as defined by PACE Code D paragraph 3.7 should be held; (ii) the identification of the accused as the offender should be made in the course of and as a result of an identification parade; (iii) an identification parade should be held before the identification is made; and (iv) the identification should be made without the person who made the identification being intentionally influenced to identify the accused.

2. Where identification evidence is captured by section 100 of the Saint Lucia Act the prosecutor is prohibited from leading such evidence unless the court rules that the evidence is admissible, upon being satisfied that an identification parade was held, or that it would not have been reasonable to have held an identification parade, and that any identification that was made of the defendant by a witness was not intentionally influenced.

3. The learned trial judge did not turn his mind to the issues arising from section 100 of the Saint Lucia Act which had to be resolved before he could admit the witnesses' in court identification of the appellant, the out of court confrontation evidence in relation to the police confrontation held between the appellant and the witness who previously knew the appellant, evidence of the informal identification procedure carried out in relation to another witness, and the

police officers' evidence which was a report of the assertions of two prosecution witnesses that the appellant was the robber.

4. The trial judge did not give sufficient warning to the jury under section 136 of the Saint Lucia Act. His directions fell short of explaining to the jury why the identification evidence was unreliable and why there was a special need for caution. His directions did not convey that he pointed out all of the matters in the case which may cause it to be unreliable, neither did he direct the jury that they were bound to take these matters into consideration in determining whether they would or would not have relied on that identification evidence.

5. The trial judge failed to give directions to the jury as section 102 of the Saint Lucia Act required.

6. The power to grant a new trial is a discretionary one and in deciding whether to exercise it the court must decide whether the interests of justice require that a new trial be had. The cumulative effect of the identification evidence is such that were it to be ruled admissible by a court under section 100 of the Saint Lucia Act it could be accepted by a properly directed jury to establish beyond a reasonable doubt the guilt of the appellant.

JUDGMENT

[1] EDWARDS, J.A.: On 1st November 2006, the appellant was convicted and sentenced to 8 years imprisonment for robbery, committed on 7th June 2004. He has appealed against his conviction and sentence on grounds which essentially complain that:

(1) The learned judge erred in law when he permitted the prosecution to adduce inadmissible identification evidence in the course of the trial in a manner that was contrary to the dictates of section 100 of the Evidence Act of Saint Lucia No. 5 of 2002 with the result that the appellant did not receive a fair trial.

(2) The learned judge failed to give to the jury any or any proper direction and or warning in accordance with the terms and or provisions of sections 102 and 136 of the Evidence Act in particular as it related to

the evidence of recognition and or identification led from the prosecution witnesses.

(3) The defence counsel at the trial inadvertently or otherwise failed to raise the issue of the appellant's good character when the credibility and or reliability of the appellant was in issue (either because he gave evidence or because he made an exculpatory statement); and the trial judge failed to give the jury any or any proper direction on the relevance of the appellant's good character in considering whether he is to be believed or that he is likely to have committed the offence.

(4) The verdict is unsafe and unsatisfactory having regard to all the circumstances of the case and the grounds of appeal advanced; and one is left with a lurking doubt as to the correctness and safety of the conviction.

[2] Before considering these grounds it is necessary to narrate the essential aspects of the evidence which were adduced at the trial, and which concern the grounds of appeal. Thereafter, I will review the applicable law and then go on to consider the submissions of counsel and the grounds of appeal.

Evidential Background

[3] Three eye witnesses to the robbery testified at the trial of the appellant. They were: Mr. Luther Thomas who was the Chief Executive Officer at Capital Management in Ciceron; Mr. Paul Mondesir who was robbed of the Capital Management bank deposit; and another employee Mr. Sylvanus Alexander, who knew the appellant for quite a while from school, as they grew up in the same Babonneau community. Mr. Alexander never conversed with the appellant, but he knew the appellant's nickname was "Monster".

[4] Mr. Thomas saw two men wearing tams on the premises on the morning of 7th June 2004 and observed them for about one and a half hours from his office glass window next to his warehouse. He had previously seen one of these men at the

premises on 3rd June 2004, had then observed this man for about ninety minutes, and had also spoken to this man whom he did not know before. On 7th June 2004, the man who Mr. Thomas had previously seen and spoken to on 3rd June 2004 was about twenty feet away from the warehouse on the premises. After observing this man for about fifteen to twenty minutes, Mr. Thomas went to the man whom he identified as the accused Earl Hunte and asked Mr. Hunte if he could help him. Mr. Thomas admitted that he only got to know the name of the accused after he came to court before the magistrate. The accused replied that he came to purchase some plywood and he was waiting for his transport. Mr. Thomas went back to his office to resume preparing a revenue deposit for Mr. Paul Mondesir to take to the bank. Mr. Thomas noticed that the accused left his premises, and went across the road to a shop opposite the Capital Management premises, got a drink (in a bottle), and was drinking something from it. At about 8:35 a.m. Mr. Thomas placed the deposit (consisting of approximately $31,200.00 in cash and $10,900.00 in cheques) in a manilla envelope, and gave it to an employee named Ms. Andrew who delivered it to Mr. Mondesir.

[5] Mr. Thomas testified that Mr. Mondesir went to his car and took a black bag from it, returned to the office, placed the deposit in the black bag and walked back to his car which was about thirty feet away from where Mr. Thomas was. He subsequently saw Mr. Hunte attempting to open the car door of Mr. Mondesir who began running back towards the office with the black bag while shouting for help. Mr. Mondesir fell in a drain and the bag flew from his hand. Mr. Hunte threw the drink bottle at Mr. Mondesir, picked up the bag and ran in the opposite direction. Mr. Mondesir got in his car, gave chase, and then returned later. Mr. Thomas testified that he did not remember what either of the two men was wearing except for the tam; and he told the police investigator Officer Obeius that he would have been able to identify the person who took the bag from Mr. Mondesir. The police never invited Mr. Thomas to participate in identifying the person who robbed Mr. Mondesir.

[6] Mr. Mondesir's evidence was that before he got the deposit, for about twenty to thirty minutes, he was seated in his car, reading a newspaper, and looked up intermittently on several occasions for about four to five seconds each time. On each occasion he observed a man whom he did not know before, nearby a wooden shop eight to nine feet away, slightly ahead of his car. On occasions that he looked up from his newspaper to observe the man, he made eye contact with this man. Upon receiving the deposit in the Capital Management Office, Mr. Mondesir placed it in a black bag that he got from his car, returned to his car, placed the bag on the floor on the passenger side of the vehicle, and continued to read his newspaper whilst waiting on another employee Ms. Henry to join him.

[7] Mr. Mondesir's evidence was: "…while reading the newspaper, the door on the driver's side was suddenly opened and I saw a flash as someone was reaching across my body to take… to take the bag off the floor… At the same instance, I pulled back my head and … attempted to close the door on the person's hand, this resulted in a tussle … the individual was pulling on the bag, trying to keep the door open and I was holding … I was holding onto the bag … and trying to close the door on the person's hand. Q. Now about how far away was this person from you? A. About a foot and a half, two feet… Q. And, did you realize who it was? A. I then recognized that it was the Accused. After about 20 to 30 seconds, while shouting for assistance, I managed to regain control of the bag. At that point, I left my vehicle and ran towards the office. While doing so, shouting for help, I constantly looked back at the Accused. At one point, he threw a Guinness bottle at me. In attempting to evade, I fell in a nearby ditch, gutter… Lost control of the bag and sprawled on the ground. At that point, the Accused ran and took the bag from off the ground. He then ran in a northerly direction, up the side road, in front of the office building." The tussle lasted for about thirty seconds and the accused had on full long pants jeans.

[8] Mr. Mondesir got in his car and, accompanied by another man, went in search of the accused but did not find him. He was asked and answered: Q. "Now, do you remember what the Accused looked like on the day?" A. "Yes, I do. He had a grey

knitted tam… had a light blue or light grey T-shirt… jeans and sneakers." Someone spoke to Mr. Mondesir on 28th June 2004 about 10:30 a.m. and he went to the Criminal Investigation Department ("CID") to see Inspector Mason. Mr. Mondesir testified: "Upon entering, the general CID Office, I saw the accused sitting there. I was then redirected to where Inspector Mason's Office is. I then spoke to the Inspector… Q. "Did you go anywhere with the Inspector? Did you do anything?" A. "I went back to the general office and pointed out the accused. [Objection by Mr. Wilson Attorney at law for the Accused. Court ruled the evidence is admissible] Yes. I pointed out the Accused to Inspector Mason…" Mr. Mondesir said under cross-examination that he was not told what he was required to do at CID; there were several police officers in the general office; and the accused was sitting on a bench, where other persons were sitting, but the accused alone was sitting in the corner.

[9] Mr. Alexander's testimony was that at about 8:30 a.m. on 7th June 2004, he left the office at Capital Management where Mr. Mondesir and Ms. Andrews were putting the cash deposit together, while Mr. Thomas was sitting at his desk. Mr. Alexander went to the lumber section which was next to the office; and whilst checking on what had to be delivered, he heard a shout which led him to go out and look. He saw Mr. Mondesir being attacked by the appellant. Mr. Alexander was about twelve feet away from the appellant when he observed that the appellant had a Heineken beer bottle which he threw at Mr. Mondesir. He observed that whilst Mr. Mondesir was trying to shield himself he fell into the gutter next to the car that was parked right outside the entrance of the building outside of the fence. There was nothing blocking Mr. Alexander's view when he saw the appellant grab the bag from Mr. Mondesir and ran up the concrete road towards Mr. Thomas' house. The appellant, he said, was wearing three-quarter jeans and a tam on his head. He described the appellant as a couple inches taller than him, about six feet tall. No evidence was adduced from Mr. Alexander as to whether he gave the name that he knew the appellant by to the police.

[10] On 28th June 2004, Mr. Alexander went to an office at Police Headquarters and whilst he was entering the office he saw the appellant. His evidence was as follows: "I was asked to, you know sit in the office, while Officer Clercin… he went for the Defendant and had him to sit, like next to me... and he asked me if I know him and what transpired. …I, I let Mr. … I let Officer Clercin know that, yeah that's the Defendant and I told him exactly what happened that day. So I… [told him] exactly what I said just now." Before 28th June 2004, Mr. Alexander had told the police that he knew the appellant and he described the appellant as six feet tall, medium built, had sideburns but was clean shaven, was wearing a tam on his head and three quarter pants.

[11] Inspector Raymond Clercin gave evidence about the confrontation he held with the appellant and Mr. Alexander at Police Headquarters in the presence of Inspector Mason on 28th June 2004. Inspector Clercin said: "… about 2 p.m. ...I proceeded to his [Inspector Mason's] office at Police Headquarters, where I met the Accused informed them of my intention to hold a confrontation, between he and a witness. I also informed him of his right to have a solicitor or a friend present. He told me that his solicitor is in the person of Sylvester Anthony, in fact, Mr. Sylvester Anthony, and he would like him to be present. At the time I served him with a Notice of Description, which was signed by me, the …Confrontation Officer, himself, the Accused, and Inspector Mason." This notice which was served on the appellant on 28th June 2004 contained the descriptions of the robber as given by Mr. Alexander and Mr. Mondesir. Inspector Clercin did not complete his examination in chief following an objection by counsel for the appellant, and the ruling of the learned trial judge which I will consider later on.

[12] Inspector Mason testified about how Mr. Mondesir came to identify the appellant on 29th June 2004, whilst the appellant was seated on the bench in the general office of CID. He admitted that he had made no note in the diary as to what Mr. Mondesir said at the time he pointed out the appellant on the bench and explained that this was due to an oversight. He also gave evidence about requesting

Inspector Clercin to hold a confrontation for the appellant and the witness Mr. Alexander.

[13] Corporal Junior Obeius was the investigating officer. He testified that on 26th June 2004 he went to Cacao, Babonneau accompanied by an individual who knew the appellant. Corporal Obeius apprehended the appellant who was then "not clean shaven, with slight beard like growing back", while the appellant was walking along the road. Upon being informed of the report and cautioned, the appellant said "I do not know anything about that." Corporal Obeius gave the description of the appellant which the witnesses Mr. Alexander and Mr. Mondesir had given. Mr. Mondesir's description of the robber was: "Six feet tall, dark skin, average built, sideburn running… into his beard, wearing long stone-washed blue jeans, light grey T-shirt, grey tam." Corporal Obeius said under cross-examination that the name he had for the appellant was "Monster". He was not asked to explain how he came to have that name or who gave him that name.

[14] The appellant testified that he had seen Mr. Alexander for four years as he was from Laborie, but it is 4 years since he was living up Cacao with his father, "and whilst going to Babonneau off and on and see my uncle I does see him [Sylvanus Alexander]." He said it was not true that he and Mr. Alexander grew up together in the community as he went to school in Laborie where he did all his schooling. His evidence was that on Monday 7th June 2004, at the time of the robbery at Ciceron: "I was home. I do not know anything, whole day I was home and I could get people to make them know where I was on that day. I were… never there, I ain't know nothing about that …I was home on that day doing my work."

The Law Governing Identification Evidence in Saint Lucia

[15] The Evidence Act No. 5 of 2002 of Saint Lucia ("Saint Lucia Act") came into force on the 1st day of November, 2005. Most of the provisions of the Act model some of the provisions in the Australia Evidence Act 1995 as amended [1] and the

[1] The amendments to the Australia Evidence Act 1995 are Acts No. 140 of 1995; No. 43 of 1996; No. 34 of 1997; No. 125 of 1999; No. 156 of 1999; No. 9 of 2000; No. 24 of 2001; No. 55 of 2001; No. 100 of 2005;

Barbados Evidence Act Cap. 121. The preamble to the Saint Lucia Act states that it is "An Act to reform the law relating to evidence in proceedings in courts in Saint Lucia and to provide for related matters." Sections 100, 102, and 136 of the Saint Lucia Act govern identification evidence. A look at the equivalent provisions in the Australia Evidence Act and decided cases on these provisions should prove helpful in interpreting the provisions in the Saint Lucia Act.

[16] Section 168(b) of the Saint Lucia Act provides that "The Minister [responsible for justice] may make codes of practice respecting – the detention, treatment, questioning and identification of persons by police officers." It appears from research, that the Minister of Justice has made no such codes of practice. The legislative antecedent to the Saint Lucia Evidence Act is section 948 of the repealed Criminal Code 1992 which provided:

> "Subject to the provisions of this Code or of any other Statute; the law of evidence administered in the Court shall be the same as the law of evidence in criminal causes and matters administered for the time being in the High Court of Justice, and the Courts of Assizes created by Commission of Oyer and Terminer and of Gaol Delivery, in England, so far as such practice and procedure are applicable to the circumstance of this State."

Consequently, the Police Criminal Evidence Act 1984 (U.K.) ("PACE") which governs the major part of police powers of investigation including arrest detention, and interrogation, and the keeping of accurate and reliable records, was being applied in Saint Lucia up to 1st November 2005 when the Saint Lucia Evidence Act came into force. The PACE Codes of Practice – Code D which is a part of the PACE legislation, would be taken into consideration and referred to by police officers when carrying out their various procedures for the identification of suspects in relation to the commission of criminal offences. The fundamental purposes of the procedures in Code D for the identification by eye witnesses are set out in paragraph D1.2 of the introduction; which states that the formal procedures "are designed to test the witness' ability to identify the person they saw on a previous occasion [and to] provide safeguards against mistaken

identification." The expressed procedures of identification mentioned in section 100(4) and (5)[2] of the Saint Lucia Act, which are similar to the procedures of identification under PACE Code D suggest, in my view, an obvious and proper implication that the legislature gave its blessing to the PACE Codes of Practice – Code D continuing so far as practicable, subject to or until displaced by any existing codes of practice made pursuant to section 168(b) of the Saint Lucia Evidence Act.[3] It must be noted that neither Barbados nor Australia applies the PACE Codes of Practice.

The Saint Lucia Evidence Act

[17] "Identification evidence" in criminal proceedings is defined in section 2 of the Saint Lucia Act to mean:

> "evidence that is –
> (a) an assertion by a person to the effect that a defendant was, or resembles a person who was, present at or near a place where –
> (i) the offence for which the defendant is being prosecuted was committed; or
> (ii) an act that is connected with that offence was done, or about the time at which the offence was committed or the act was done, being an assertion that is based wholly or partly on what the first-mentioned person saw, heard or otherwise noticed at that place and time; or
> (b) a report, whether oral or in writing, of an assertion as mentioned in paragraph (a)."[4]

[2] See paragraph 17 of this judgment

[3] "The question of whether an implication should be found within the express words of an enactment depends on whether it is proper or legitimate to find the implication in arriving at the legal meaning of the enactment, having regard to the accepted guides to legislative intention. It is for the court to decide whether a suggested implication is 'proper'. This may involve a consideration of the rules of language or the principles of law, or both together." Francis Bennion: STATUTORY INTERPRETATION (Fourth edition at page 428 Section 174. "It is a rule of law that the legislator intends the interpreter of an enactment to observe the maxim *ut magis quam pereat* (it is better for a thing to have effect than to be made void); so that he must construe the enactment in such a way as to implement, rather than defeat, the legislative purpose:" Op cit. at page 477, Section 198.

[4] See the Australia equivalent definition: "identification evidence means evidence that is: (a) an assertion by a person to the effect that a defendant was, or resembles (visually, aurally or otherwise) a person who was, present at or near a place where: (i) the offence for which the defendant is being prosecuted was committed; or (ii) an act connected to that offence was done; at or about the time at which the offence was committed or the act was done, being an assertion that is based wholly or partly on what the person making the assertion saw, heard or otherwise perceived at that place and time; or (b) a report (whether oral or in writing) of such an assertion."

[18] Section 100 of the Saint Lucia Act promotes the holding of identification parades where it is reasonable and practicable to hold one for the purpose of having a witness to a crime identify the person suspected of committing the crime. It identifies the several matters to be taken into account by a court in determining whether it was reasonable and practicable to hold an identification parade. It sanctions the identification procedure of "confrontation" only where holding an identification parade would not have been reasonable; and a group identification or video film identification was not practicable. It also provides for the management of evidence relating to the issue of identification at trial. Section 100 states:

> "100. – (1) Identification evidence adduced by the prosecution is not admissible evidence unless –
>
> (a) either –
>
> (i) an identification parade that included the defendant was held before the identification was made; or
>
> (ii) it would not have been reasonable to have held an identification parade and subsection (5) applies; and
>
> (b) the identification was made without the person who made it having been intentionally influenced to make it.
>
> (2) Without limiting subsection (1), the matters to be taken into account in determining whether it was reasonable to hold an identification parade [my emphasis] as mentioned in that subsection include –
>
> (a) the kind of offence and the gravity of the offence concerned;
>
> (b) the importance of the evidence;
>
> (c) the practicality of holding such an identification parade having regard, among other things –
>
> (i) to whether the defendant refused to co-operate in the conduct of the parade, and to the manner and extent of, and the reason, if any, for, the refusal; and
>
> (ii) in any case, to whether the identification was made at or about the time of the commission of the relevant offence; and
>
> (d) the appropriateness of holding such an identification parade having regard, among other things, to the relationship, if any, between the defendant and the other person who made the identification.

(3) Where –
(a) the defendant refused to co-operate in the conduct of an identification parade unless an attorney- at- law acting for him or her was present while it was being held; and
(b) there were, at the time when the identification parade was to have been conducted, reasonable grounds to believe that it was not reasonably practicable for such attorney-at-law to be present; it shall be presumed that it would not have been reasonable to have held an identification parade at that time.

(4) In determining whether it was reasonable to have held an identification parade [my emphasis] the court shall not take into account the availability of pictures that could be used in making identifications.

(5) Where it would not have been reasonable for an identification parade to be held and a group identification, video film identification or in the case when neither was practicable, a confrontation was held, the identification evidence is admissible."

The Australian Approach

[19] The Australia equivalent is section 114 of the Australia Evidence Act 1995; which excludes "visual identification" evidence from being admissible unless an identification parade was held, or one of the exceptions under section 114(2) (which is similar to section 100(2) of the Saint Lucia Act) applies. The section 100(5) provision in the Saint Lucia Act is missing from section 114 of the Australia Act. It must be noted that whereas in Saint Lucia under section 100 it is all "identification evidence" that falls within the definition of those words under the Act that is excluded; for Australia, it is only "visual identification evidence" that is excluded under section 114. "Visual identification evidence" bears a different meaning from the meaning of "identification evidence" under the Australia Evidence Act and the Saint Lucia Act. Sections 114(1) and (2) of the Australia Act state:

> "visual identification evidence means identification evidence relating to an identification based wholly or partly on what a person saw but does not include picture identification evidence. (2) Visual identification evidence adduced by the prosecutor is not admissible unless: (a) an identification parade that included the defendant was held before the identification was made; or (b) it would not have been reasonable to have held such a

parade; or (c) the defendant refused to take part in such a parade; and the identification was made without the person who made it having been intentionally influenced to identify the defendant."

[20] It has been held by the New South Wales Court of Criminal Appeal in R v Taufua[5] that section 114 applies to in court identification. In R v Tahere[6] it was stated that in court identification (known to us as 'dock identification') is visual identification evidence within section 114, and is therefore inadmissible unless a prior identification parade is held first or one of the exceptions applies. In Australia, the Judicial Commission of New South Wales Trial Instructions (which is comparable to the Judicial Studies Board Bench Book) states at paragraph 3-005 that: "Where an identification is made of the accused in court, if the trial is to proceed, a direction should be immediately given at the time – and repeated, if appropriate, in the summing up that such evidence is of no value to the identification issue as the witness must inevitably point out the person who is on trial (Aslett v R[7]) and that the evidence is given only in order to complete the picture and to avoid any speculation as to why it was not given. In cases where the identification of the perpetrator is at the "heart of the matter in contest," a direction may not be enough to cure the prejudice of an inadmissible in court identification and the judge may need to discharge the jury: Aslett v R above[8]."

[21] It has also been held in R v Taufua[9] that evidence by a witness or victim of a crime merely describing the assailant whom the witness saw at the time of the incident, is not "identification evidence" within the statutory definition of "identification evidence" in the Australian Act. It would become "identification evidence" only where the witness or victim links the assailant to the accused.[10] It is of interest to note further that in R v Anh Tuan Le[11] evidence of in court

[5] NSWCCA 11/11/96 (unreported)
[6] [1999] NSWCCA 170 at paragraphs 27 and 32
[7] [2009] NSWCCA 188 at paragraph 56
[8] At paragraph 57
[9] NSWCCA 12 August 1996 (unreported)
[10] Judicial Commission of New South Wales Trial Instructions paragraph [3-005]; Collins v R [2006] NSWCCA 162; Colin Ying Book Publication – Australian Essential Evidence at page 108
[11] (2002) 130 A Crim R 256; [2002] NSWCCA 193

identification was led by the accused's counsel cross-examining a prosecution witness (it seems that that was achieved through an unexpected answer from the witness). The trial judge refused to discharge the jury. This was held to be correct on appeal. As the evidence was led by the defence and not by the prosecutor the provisions of section 114 of the Evidence Act did not apply as those provisions refer to evidence led by the prosecution.

[22] It has been said that section 114 of the Australian Act gives legislative force to the inclination of the justices in Alexander v R[12] who favored an identification parade as the fairest and best method of obtaining visual identification evidence and canvassed the view that the admission and reception of photo - identification evidence and in court identification evidence should be governed by special rules. Stephen J in Alexander v R observed that:

> "[20] …Traditionally it has been accepted that a witness identifies the accused at the trial as the person whom he observed at the scene of, or in… [connection] with, the crime. This "in court" identification, sometimes described as primary evidence, is of little probative value when made by a witness who has no prior knowledge of the accused, because at the trial circumstances conspire to compel the witness to identify the accused in the dock. It has been the practice to reinforce this 'in court' identification by proving that the witness had earlier identified the accused out of court in a line-up or by selecting his photograph from a collection of photographs…"

Murphy J in Alexander opined that:

> "Evidence of previous identification or recognition of the accused is admissible as evidence of facts tending to prove what had become an issue, that is the reliability of the in court identifications of the accused, or else as tending to complete what is an incomplete in court identification."

[23] It is worth mentioning also the decision of the court in R v Neil James Thomason[13] which we brought to the attention of the DPP, Mrs. Charles Clarke during the hearing. This case concerned an allegation that the accused had assaulted a hotel patron with a glass to the face. Within minutes of the alleged

[12] [1981] HCA 17; (1981) 145 CLR 395 (8th April 1981); Stephen J at paragraphs 29, 20; Murphy J at paragraphs 2, 4

[13] [1999] ACTSC 112

assault (and before the police arrived), the accused was identified by a witness to hotel staff as the perpetrator of the offence. It was held by Miles CJ on a voir dire ruling during trial, that section 114 applies on the face of it to a situation where the witness happened to encounter and recognize the defendant soon after the offence and that in those circumstances it would not be reasonable to hold an identification parade in such a situation. Also, that where the Evidence Act applies, visual identification evidence, whether of an in court identification or a prior out of court identification, is not to be admitted unless it falls within one of the three exceptions provided in section 114(2).

[24] For the Crown to establish that it was not reasonable to hold a line-up, the Crown must establish that it was unreasonable to hold a line-up at all times up until the time reasonably proximate to the time of the trial: Tahere[14]. It has also quite recently been pronounced by Spigelman CJ (Hulme and Latham JJ concurring) in Trudgett v R[15] that recognition evidence falls within the Evidence Act definition of "identification evidence, though previously it was held by other authorities not to be so."

Jury Directions

[25] The nature of the directions to be given by the trial judge to the jury where identification evidence is admitted are set out in section 102 of the Saint Lucia Act as amended by the Evidence (Amendment) Act No. 46 of 2006[16]. For Australia, it is section 116 of their Evidence Act, which is different from the Saint Lucia provision.[17] Section 102 mandates that the judge direct that the defendant be acquitted where there is no evidence of special circumstances that tend to support the identification evidence, and it is not reasonably open to find the defendant guilty except on the basis of identification evidence. Section 102 states:

[14] [1999] NSWCCA 170
[15] [2008] NSWCCA 62
[16] This amendment came into force on 27th November 2006 after the trial commenced.
[17] Section 116 states: "116 Directions to jury (1) If identification evidence has been admitted, the judge is to inform the jury: (a) that there is a special need for caution before accepting identification evidence; and (b) of the reasons for that need for caution, both generally and in the circumstances of the case. (2) It is not necessary that a particular form of words be used in so informing the jury.

"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 defendant 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 defendant and the jury accepts that evidence.

(3) Special circumstances referred to in subsection (2) include-

(a) the defendant being known to the person who made the identification; and[18]

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

(4) Where –

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

(b) there are no special circumstances of the kind mentioned in subsection (2)(a); and (c) there is no evidence of the kind mentioned in subsection (2)(b); the Judge shall direct that the defendant be acquitted."

[26] Section 136(1)(b) and (2) to (4) of the Saint Lucia Act treats evidence of identification as evidence of a kind that may be unreliable; and consequently, if there is a jury, the trial judge must decide whether or not to warn the jury in accordance with the statute, unless there are good reasons for not doing so. The Australian counterpart which is section 165(1)(b) and (2) to (5) requires the judge to consider giving the unreliable evidence warning only where there is a jury and a

[18] The amendment which came into force on 27th November 2006 has deleted the word "and" in section 102(3)(a) and substituted the word "or". See DPP's Reference No.1 of 2001: Barbados unreported judgment delivered on 26th February 2002. It was held that an identical provision: section 102(3) of the Barbados Evidence Act signifies that what is included in section 102(3)(a) and (b) is an addition to other things not stated to be included and the trial judge's evaluation of the identification evidence was not limited to the two situations enacted in section 102(3)(a) and (b). That the judge was permitted to have regard to other matters including the fact that the visual identification evidence of one witness can constitute support for the identification by another provided he warns the jury in clear terms that even a number of honest witnesses can all be mistaken.

party requests that it be given; and the judge may refuse where there are good reasons for doing so.

Section 136 states –

> "136. - (1) This section applies in relation to the following kinds of evidence-
>
> (a) …
>
> (b) identification evidence;
>
> (c) – (d) …
>
> (2) Where there is a jury the Judge shall, unless there are good reasons for not doing so –
>
> (a) warn the jury that the evidence may be unreliable;
>
> (b) inform the jury of matters that may cause it to be unreliable; and
>
> (c) warn the jury of the need for caution in determining whether to accept the evidence and the weight to be given to it.
>
> (3) It is not necessary that a particular form of words be used in giving the warning or information.
>
> (4) This section does not affect any other power of the Judge to give a warning to, or to inform, the jury."

PACE Code of Practice – Code D

[27] There are two categories of rules in Code D scheme: those governing where a suspect is not known and those where the suspect is known. A suspect is defined in section 3 of the Code as "being known" where "there is sufficient information known to the police to justify the arrest of a particular person for suspected involvement in the offence."

[28] Code D Part 3(b) requires that where the identity of the suspect is known, the police where appropriate should employ one of the methods prescribed by paragraphs 3.5 to 3.10 namely: (i) video identification; or (ii) identification parade; or (iii) group identification. An identification parade is "when the witness sees the suspect in a line of others who resemble the suspect" (paragraph 3.7) and it must be carried out in accordance with Annex B.[19] A video identification is defined by

[19] Annex B mandates: 1. That the identification parade shall consist of at least eight people (in addition to the suspect) who, so far as possible resemble the suspect in age, height, general appearance and position in life. 2. The suspect is entitled to have his solicitor, friend or an appropriate adult present at the

paragraph 3.5 to be "when the witness is shown moving images of a known suspect, together with similar images of others who resemble the suspect". Code D paragraph 3.21 prescribes the circumstances in which still images may be used. Group identification "is when the witness sees the suspect in an informal group of people" (paragraph 3.9) and it must be carried out in accordance with Annex C.

[29] Where none of these methods is practicable in the particular circumstances of each case, the police may resort to the method of confrontation which is defined as when "the suspect is directly confronted by the witness" (paragraph 3.23). Annex D specifies the procedure to be adopted involving confrontation. Confrontation must take place in the presence of the suspect's solicitor, interpreter or friend, unless this would cause unreasonable delay.

The Objections Taken at the Trial

[30] At the trial the witness Mr. Thomas was asked if he knew Earl Hunte and he answered "Yes I do." Later on he testified that on 7th June 2004 he proceeded to his office to prepare the days deposit and fifteen to thirty minutes in the exercise he went outside and asked two gentlemen if he could have assisted them. He was asked further questions and answered. It was then that defence Counsel Mr. Marius Wilson made objections to the evidence of identification being adduced. The events as they unfurled are at pages 19 to 28 of the transcript of the trial proceedings and I reproduce the relevant portions below:

"Ms. Gardener: Q. And which two gentlemen were they?
A. One was Mr. Earl Hunte - -

identification parade. 3. If the suspect has an unusual physical feature, e.g. a facial scar, tattoo, cut or other distinguishing feature, with the consent of the suspect, his solicitor or adult representative, steps must be taken to conceal the location of that feature on the suspect and the other members of the identification parade by for example use of a plaster, hat etc. so that all members of the identification parade resemble each other in general appearance. 4. The suspect must be allowed to object (with the advice of his solicitor, friend or adult representative) to the arrangements for the identification and steps must be taken to remove any reasonable grounds for such objection; and where it is not practicable to do so, the suspect must be told why it cannot be met and that reason must be recorded on forms provided for that purpose. 5. The suspect may select his own position in the line but may not otherwise interfere with the order of the people forming the line; and each position in the line must be numbered by means of a number laid on the floor in front of each identification parade member. or by other means. See paragraphs 14 to 20 of Annex B for the rules governing WITNESSES AND THEIR CONDUCT AT THE IDENTIFICATION PARADE.

…
Mr. Wilson: My Lord, I'm going to object to this line of evidence, because what, in effect, the Prosecutor is doing is seeking to adduce identification evidence here.
…
[The Jury left the room and the witness stood down]
Mr. Wilson: The line of questioning as pursued by the Prosecutor seeks to adduce identification evidence by seeking to illicit from the witness who one of these two men were. My Lord, we are submitting that, that is improper, because under the Evidence Act, Section 100, identification evidence adduced by the Prosecutor is not admissible, unless, and it details that there must be identification procedure. I speak of the entire section in, including subsection five, which, My Lord, if the identification parade cannot be held and it is shown not to be practicable, it ought to be group identification, video or, in fact, confrontation, that is not - - any of the others, other possible procedures are not practicable. My Lord, this witness never participated in any identification procedure, and, indeed, My Lord, two identification procedures were, in fact, held which did not include this witness. So that the Prosecution cannot say that the holding of any of the identification procedure[s] was not practicable, because they did, in fact, cause two to take place. Consequently, My Lord, to seek at this trial to have this witness identify one of the persons as the Accused, would, indeed, be tantamount to a dock identification, and in contravention of precisely Section 100 of The Evidence Act. Therefore, we, we submit that it ought not to be admitted as is clear from the, the relevant section... There is nothing before the Court as to the length of time or anything, whether is [*sic* it] was a fleeting observation or otherwise and that is precisely the mischief that is intended to be dealt with by Section 100, that when you have situations arising where identity may be in issue, it would be necessary to conduct and have the relevant witnesses, party to identification procedures as provided for under Section 100…. We're saying, My Lord, that this is - - very prejudicial, My Lord, and ought not to be admitted.
…
Ms. Gardner: "My Lord, I refer you to Blackstone's 2005, rubric F 18(3), and… the gist of my argument is that we are not relying on the evidence given by Mr. Thomas as identification evidence, but the fact that he could come and talk about what occurred, where such evidence is relative and it is probative, My Lord. …R v George… the facts in the particular case are… different in that the person who is brought for an identification parade and could not identify the…Accused in the identification parade. However, the Court held that the inability to make an identification need not prevent the witness giving other evidence that might incriminate the Accused, such as, description of the offence or the offender…[T]he principle that has emerged is that…it does not preclude a witness, in this particular case, from indicating a spontaneous remark that was made at the identification parade…. [W]e are not seeking to rely on the evidence

of Mr. Thomas with respect to identification, we have other witnesses for that. However, My Lord, the witness can indicate - - the Crown is seeking to… suggest, My Lord, and to persuade you that the witness can indicate, based from… Section 52(b) [of the Evidence Act] …In the case of R v George …where it says …[i]n each case it was for the judge to decide whether the evidence was more prejudicial than relative and probative, bearing in mind the importance of protecting the position of the Defendant against unfairness. When the identification… evidence in this case was looked at as a whole, it provided compelling evidence that the Appellant had been at the scene of crime at the relevant time. So, My Lord, it is not just to take this witness' evidence in isolation, but also look at the evidence of Mr. Paul Mondesir and Mr. Sylvanus Alexander, who identified the Accused, My Lord, and merely for unity, allowing… Mr. Thomas to give the evidence of the conversation that was before, because it was a conversation made shortly at the time of the particular offence, and just because a witness has not …identified a person, it does nor preclude him from giving the particulars of the offender or the offence, My Lord. …

Mr. Wilson: Reference by my learned friend to Section 52, which speaks of the Hearsay Rule is unhelpful...what we are here focus[ing]…[on] is identification evidence, not hearsay…Quite interestingly, in reference to Blackstone's Criminal Practice 2000, the very same paragraph that she referred to, my learned friend omitted, I would rather believe, inadvertently, to read what…precedes…it states thus: "A witness who has had a proper sight of the culprit's face and who may be able to make an identification, should be invited to attend an identification parade if the police have a suspect," and then it continues, "but inability to make an identification need not prevent the witness giving other evidence." So, My Lord, it is clear that if he is saying that I know Earl Hunte, and one of the persons I spoke to is Earl Hunte, if he seeks to adduce that kind of evidence, it means that he was in a position positively to, not only participate, but to make an identification when the identification procedure was being held…

THE COURT: Yes, but, it is a case where he was seeing Earl Hunte for the first time?

…

Mr. Wilson: He says he knows him - - … - - but he says that the only evidence of 'know', in the circumstances, is that I had seen him three days prior… We have absolutely no evidence as to - - for how long, whether it is a fleeting glance, whether it is for 25 minutes, whether it's for, for an extended period of time.

THE COURT: So, if I say I know you, for instance let's say I know you, would there be any need for an identification parade?

…

Mr. Wilson: My Lord, …the Court, - - the investigator must inquire into the circumstances of, of the knowledge of the person to determine whether, in fact, there should be an identification parade, because the local

parlance, "I know you" can mean I have seen you.
THE COURT: But to say that I had seen him three days before does not that confirm that he knows him?
Mr. Wilson: No My Lord, it does not.
THE COURT: Yes, because he says, I know him, I had seen him three days before
…
Is not some - - this is not someone he is seeing for the first time, and it's not someone, say, for instance, who snatches the bag and runs and he just sees him - - his face while he was doing that for the first time, he knows him.
Mr. Wilson: My Lord,… what I'm submitting…is that there ought to be an inquiry in - - as to the first time you saw him three days prior - - … - - for how long….
THE COURT … So, even if there is not an inquiry by the investigator, are you saying that, that evidence is not admissible merely because there is not an inquiry?
Mr. Wilson: I am saying, My Lord that given the statutory provisions of Section 100 of the Evidence Act, that it is not.
THE COURT: Very well. I wish, I - - we shall have to overrule your submission.
Mr. Wilson: Very well.
THE COURT: When Mr. - - this witness gives his evidence, perhaps it can be established and may be able to establish in what circumstances he knows the Accused."

[31] Thereafter, Mr. Thomas described how he knew Mr. Hunte and how Mr. Hunte robbed Mr. Paul Mondesir. Defence counsel made no further objections concerning the identification evidence of Mr. Sylvanus Alexander.

[32] Another objection was taken by defence counsel during the course of Inspector Clercin's testimony when the prosecution sought to tender the Notice of Description given to the police by the witnesses Mr. Alexander and Mr. Mondesir; which notice was served on the appellant prior to the confrontation between Mr. Alexander and the appellant on 28th June 2004. Mr. Wilson objected on grounds that the descriptions in the notice were inconsistent, and the confrontation was not done in accordance with Code D, Annex C. At pages 75 to 78 of the transcript of proceedings the following exchange occurred:

"THE COURT: I refer you to Archbold, I refer - - make reference to Archbold 14, Paragraph 14-35, 14-35 D12 - - D213. If neither a parade, a group identification, nor a video identification procedure is arranged, a

> suspect may be confronted by a witness, such a confrontation does not require the suspect's consent, but may not take place unless none of the other procedures are practicable. I read this to say, identification parade, in this case, the first is identification parade, second, group identification, a video confrontation and confron - - video and then confrontation. An identification parade is only necessary when the witness does not know the Accused.
> Mr. Wilson: …
> THE COURT: Confrontation in this case was never necessary.
> …
> In here it is, this witness says, "I know the man, we grew up together" Why confrontation, confrontation about what?
> Mr. Wilson: Precisely
> …
> Ms. Gardner: My Lord, I have accepted what you have said, and I had noted time and time before, My Lord, but in this particular instance, the only reason why I was seeking to adduce the confrontation evidence, was not merely as a confrontation, My Lord, but to establish that the police had in custody the right person.
> THE COURT: But you don't do that. Why you say, have in custody the right person? The witness comes and says I know him.
> Ms. Gardner: Yes , My Lord, that's correct, but in, in Saint Lucia, My Lord, we do have person[s] who have the same name or the same nickname, My Lord, and that was only the - - merely the basis.
> THE COURT: That is not peculiar to Saint Lucia.
> …
> And in a, country as vast as England with so many different persons, that is the law and that is the law which you follow."

[33] Defence counsel also raised objection[20] when Inspector Anastatius Mason was testifying about what transpired on 28th June 2004 when Mr. Paul Mondesir pointed out the appellant on the bench in the general office of CID to him. Further, Mr. Wilson objected to Mr. Mondesir's evidence being adduced, concerning his identification of the appellant on 28th June 2004[21]. The following extract discloses what occurred.

> "Mr. Wilson: My Lord, the Prosecution seeks to rely on this evidence as identification evidence as a spontaneous act by the, by the witness. But the evidence of the witness himself seems to negative the issue of spontaneity in terms of the identification, because he says, that he saw the person, he did not at that point spontaneously point out to anyone. He

[20] See page 81 of the transcript (date: 1st November 2006)
[21] See pages 15 to 20 of the transcript of trial proceedings (date: 3rd November 2006)

was redirected to the office of the Inspector, he had a conversation with the Inspector, and we do not the details of that conversation - -
THE COURT: Do you want to know it?
Mr. Wilson: …My Lord, what I'm saying is that Section 100 of the… Act, speaks of where identification was made it is admissible without the person who made it having been intentionally influenced to make it. I am saying without us even knowing, the very sequence of events provides an opportunity of his rights - - give rise to speculation as to whether, in fact, there was an opportunity to influence the witness in making that identification.
…
THE COURT: I understand the point you're making.
Mr. Wilson: That there was no opportunity, there could have been an opportunity for collusion, that we do not know the nature - -
THE COURT: Well, you could ask him.
Mr. Wilson: - - of the conversation and then he comes back.
THE COURT: You can ask him in cross-examination. The evidence is that he had seen the man on the day in question for about 20, 30 minutes. Looked at him, he had a tussle with him. On the twenty-eighth he went to the general office, he saw the Accused. The Accused, that is the man who robbed him. He went to the, the Inspector's office and then he was redirected to the place, to, to a place and he pointed out…to him.
Mr. Wilson: No, he said he had a conversation with the Inspector before he went back.
THE COURT: Yes, he had a conversation.
Mr. Wilson: Before he went back, My Lord.
THE COURT: Does that negative the fact that he recognized the Accused upon entering the building.
THE COURT: My Lord, the issue is spontaneity. This is what we're addressing, spontaneity in terms of the - -
THE COURT: What section you're referring to?
Mr. Wilson: Section 100(b), 1(b), because if, My Lord, there is an opportunity for the identification - - the persons who have been intentionally influenced to make it; we said we know the nature of the conversation. The Accused has nothing to prove. He is not the one to ask under cross-examination, what was the nature of the, the cross-examination - - of the conversation, sorry, My Lord. He is not the one to ask what conversation took place between you and Inspector Mason. The conversation was taken in his absen[ce], was made in his absence. It's hearsay.
THE COURT: I understand you, I understand you, Mr. Wilson.
Mr. Wilson: Very well, My Lord. And this is, on that basis we are saying that it ought not to be admitted in fact, My Lord…
…
THE COURT: Miss Gardner
Miss Gardner: …Counsel is correct that the evidence that the conversation between Inspector Mason and the witness is hearsay and it's

> inadmissible. My Lord, he could…ask the Inspector under cross-examination on Wednesday, if by - - if he influenced him or if he indicated to him anything and that evidence would not have been inadmissible… My Lord, I am guided by your, your decision. However, My Lord, any,… any reference to any impropriety that has happened between the Inspector and the Witness, My Lord, I think should have been addressed a couple of days ago under cross-examination. And to now bring it up and suggesting that there is impropriety, when there is no evidence for [*sic* of] such impropriety, My Lord. At the end of the day the, the Court has to be satisfied on a balance of probability, not beyond a reasonable doubt, when deciding the evidence whether it should be allowed in or not.
> THE COURT: But the man said he saw the Accused on… entering the building.
> Miss Gardner: Yes, My Lord, …
> THE COURT: Very well. The Accused - - ask the jury back, your evidence is admissible."

[34] Mr. Mondesir subsequently testified under cross-examination that when he was requested to come to CID he was not told what he was supposed to do there.

Submissions of Counsel for the Appellant

[35] Learned counsel Mr. Innocent described the identification evidence as given in the form of a confrontation, an identification parade, and from evidence of recognition. However the transcript does not disclose that there was any evidence adduced which showed that an identification parade as defined by PACE Code D paragraph 3.7 was held in accordance with Annex B of Code D. Counsel was in a quandary as to how to describe the identification procedure that was utilized for Mr. Mondesir's identification of the appellant. This identification procedure in my view could be at best classified either as a failed group identification which was not carried out in accordance with PACE Code D Annex B; or an informal identification process. It certainly was not a confrontation.

[36] Mr. Innocent contended that the identification evidence was led without the trial judge observing the procedure contemplated by section 100 of the Saint Lucia Act. No voir dire was conducted to ensure that any of the safeguards and procedures encapsulated within the Saint Lucia Act were complied with; and the evidence was lead without the judge first determining the admissibility of the evidence.

Consequently, inadmissible identification evidence was adduced before the jury.

[37] He submitted further, that the identification procedures of confrontation and what counsel referred to as the identification parade were irregular and therefore rendered the evidence of those procedures inadmissible, if not highly prejudicial to the appellant. This had the tendency to render the entire trial unfair and the appellant was substantially prejudiced resulting in a total miscarriage of justice.

[38] Regarding the trial judge's directions to the jury, Mr. Innocent submitted that these directions were inadequate and or deficient to the extent that quite apart from giving the jury the standard Turnbull direction, the judge failed to give the warnings required by sections 102 and 136 of the Saint Lucia Act. The pith and gravamen of the complaint he said, was that the appellant was deprived of the protections and safeguards contemplated by the Saint Lucia Act and did not have a fair trial. It was incumbent on the judge where the only evidence implicating the appellant was identification evidence, to ensure fairness by giving the statutory warnings to the jury; and direct the jury's attention to the salient aspects of the evidence in relation to the law, and assist the jury in assessing the evidence of identification in relation to the law.

The Submissions for Respondent

[39] The learned Director of Public Prosecutions ("DPP") conceded that the trial judge failed to refer to section 102 of the Saint Lucia Act and did not direct the jury in accordance with section 102. Mrs. Charles-Clarke submitted that the judge gave a warning in accordance with section 136 of the Saint Lucia Act, at Tab H, page 72 lines 14 to 25; and page 73 lines 1 to 17 of the transcript.

[40] The learned trial judge told the jury at page 72, lines 8 to 25:

> "This case depends, as the Defence says, on identification where the Defence disputes that he was there, in other words, that he was the man. This is a case where the case against the Accused depends wholly or substantially on the correctness of one or more witnesses, that is, Luther Thomas, Paul Mondesir, Sylvanus Alexander. So, let me repeat. This is a case where the case against the, the Accused depends wholly and

> substantially on the correctness of these persons I have mentioned on identification of the Accused which the Defence allege to be mistaken. I must, therefore, warn you of a special need for caution before convicting in reliance on the correctness of the identification. The reason for this is either it is quite possible for, for an honest witness to be mistaken, identification - - sorry, to be mistaken or to make a mistaken identification and notorious miscarriages of justice have occurred as a result of mistaken identification.
>
> For this reason a mistaken witness can be a convincing one and even a number of apparently convincing witnesses can all be mistaken. You must examine, therefore, carefully the circumstances in which the identification by each witness was made. In a - - Mondesir, for instance, he said he was reading a newspaper. He was sitting in the car, reading a newspaper and he would look up and every time he looked up he saw the Accused…." [The trial judge continued with evaluating the evidence in terms of the Turnbull directions at page 73 lines 1 to 17]."

[41] In the alternative, the DPP submitted that if the court found that the section 136 warning was inadequate or was not given, and that the trial judge gave no reasons for not giving the warning, on the authority of Gerald Joseph v R[22] and Kyon Fredrick v R[23], the Court should evaluate the record of the trial proceedings and review the evidence in its totality in order to determine the strength of those aspects of the case that tend to connect the appellant to the offence. She submitted that the appellant and Mr. Sylvanus Alexander knew each other and she identified the circumstances of their acquaintance and the opportunity Mr. Alexander had to recognize the appellant as the robber at the scene of the crime. The DPP submitted that the cumulative effect of Mr. Alexander's evidence and that of Mr. Thomas who also had a good opportunity to see and speak with the appellant at his premises before the robbery, bolsters the evidence of identification. She submitted further that the failure to give the warnings under sections 102 and 136 of the Saint Lucia Act was not fatal as there was strong evidence which connected the appellant to the offence and upon which the jury could have convicted the appellant even if the warnings were given.

[22] Saint Lucia Criminal Appeal No. 2 of 2006 at para 49, 56
[23] Saint Lucia Criminal Appeal No. 8 of 2006 at para 36

[42] The learned DPP submitted that section 100 does not render identification evidence automatically inadmissible as where an identification parade was conducted the evidence is admissible. A voir dire does not have to be held in every case, she contended, but she conceded that the trial judge ought to have held a voir dire where the objections of defence counsel raised issues of admissibility.

[43] Mrs. Charles-Clarke invited the Court to apply the proviso since the evidence was strong, there was no miscarriage of justice, and even if the jury had been properly directed they would have inevitably returned a verdict of guilty.

Grounds 1 and 2

The Meaning of Section 100

[44] The submissions of the learned DPP concerning the meaning of section 100 of the Saint Lucia Act must be rejected for the following reasons. The Saint Lucia Act imposes special requirements before all identification evidence falling within the definition of "identification evidence" in section 2 of the Act can be adduced, regardless of whether the identification of a defendant takes place in court or out of court. The effect of section 100(1)(a)(i) and (b) is that there now exists the cardinal rule that before identification evidence can be admissible and as such: (i) an identification parade as defined by PACE Code D paragraph 3.7 which included the accused should have been held; (ii) the identification of the accused as the offender should have been made in the course of and as a result of an identification parade; (iii) an identification parade should have been held before the identification was made; and (iv) the identification should have been made without the person who made the identification being intentionally influenced to identify the accused.

[45] In reforming the evidence law[24], Parliament has by the enactment of section

[24] Before the Saint Lucia Evidence Act the Courts applied section 78 of PACE to control the admissibility of evidence that was perceived to be unfair where defence counsel objected to such evidence. Section 78 states: "Exclusion of unfair evidence. - (1) In any proceedings the court may refuse to allow evidence on

100(1)(a)(i) frowned on the casual methods customarily employed by the police for detecting the identity of the perpetrators of crimes. This enactment demands that that custom must now change. The preference for properly controlled methods for testing a witness' ability to identify the perpetrator of a crime are reflected in section 100(1) and (5) and within the hierarchy of those controlled methods, the identification parade procedure ranks first. Lord Delvin's Committee Report on Evidence of Identification in Criminal Cases[25] which preceded the PACE Code D very aptly described the procedure of an identification parade as "a device for avoiding confrontation".

[46] Speaking of section 114 of the Australia Evidence Act ("Evidence Act"), the author of the publication Identification Alibi and the Electronic Snail Trail 2009 Edition states at page 9 that: "The section creates a rebuttable presumption that such evidence is inadmissible, when led by the prosecution unless certain criteria are met." I endorse this view and apply it to section 100 of the Saint Lucia Act. Section 100(1) in my view imposes on the prosecutor the burden of proving that the identification evidence comes within one of the exceptions in section 100(2). That burden is governed by section 134 of the Saint Lucia Act which states: "134.—(1) Subject to this Act, in any proceeding the court, shall find that the facts necessary for determining – (a) a question whether evidence should be admitted or not admitted, whether in the exercise of a discretion or not; or any other question arising under this Act; have been proved if it is satisfied that they have been proved on the balance of probabilities. (2) In determining whether it is satisfied as mentioned in subsection (1), the court shall take into account inter alia, the importance of the evidence in the proceedings."

[47] In Australia, section 4(1) and (3) and (4) of the Evidence Act requires that whenever the court is applying the laws of evidence: "(3) The court must make a

which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it. (2) Nothing in this section shall prejudice any rule of law requiring a court to exclude evidence."

[25] Report to the Secretary of State for the Home Department of the Departmental Committee on Evidence of Identification in Criminal Cases H.C. 338 26th April, 1976 at para 8.12

direction if: (a) a party to the proceeding applies for such a direction in relation to the proof of a fact; and (b) in the court's opinion, the proceeding involves proof of that fact, and that fact is or will be significant in determining a sentence to be imposed in the proceeding. (4) The court must make a direction if the court considers it appropriate to make such a direction in the interests of justice". The Saint Lucia Act does not have such a provision. Consequently, the burden of proving that identification evidence comes within one of the exceptions in section 100(2) does not depend on an application for directions from a defendant or his/her counsel or from the prosecutor, or an objection by a defendant or his/her counsel to the identification evidence being adduced. The burden of proof arises whenever the prosecutor intends to prove the case against a defendant by adducing identification evidence that falls within the definition of "identification evidence" under the Saint Lucia Act.

[48] Where identification evidence is captured by section 100 of the Saint Lucia Act; the prosecutor is prohibited from leading such evidence unless the court rules that the evidence is admissible, upon being satisfied by the prosecutor that an identification parade was held, or that it would not have been reasonable to have held an identification parade; and that any identification that was made of the defendant by a witness was not intentionally influenced. It must be remembered that the DPP who may be represented by Crown counsel, ultimately bears the responsibility of deciding how the prosecution will be conducted. Commencing the trial without a determination as to whether such identification evidence is admissible is certainly not a good practice. Section 142(1) of the Saint Lucia Act affords some guidance as to the stage at which that determination should be made by the court. Section 142 which is comparable to section 189 of the Australia Act states:

> "The voir dire
>
> 142. – (1) Where the determination of a question whether –
>
> (a) evidence should be admitted, whether in the exercise of a discretion or not; or
>
> (b) a witness is competent or compellable;
>
> depends on the judge finding that a particular fact exists,

the question whether that fact exists is, for the purposes of this section, a preliminary question.

(2) to (6) …

(7) Where there is a jury and the jury is not present at a hearing to determine a preliminary question, evidence shall not be adduced otherwise in the proceedings about evidence that a witness gave in that hearing, unless that evidence is inconsistent with evidence otherwise given by the witness in the proceedings."

[49] The trial judge also has power in pre-trial proceedings, to give directions or to conduct a voir dire for the purpose of making an advance determination as to the admissibility of evidence and it may be appropriate in some cases for the prosecution to obtain an advance ruling on the identification evidence, particularly where as in the instant case, the case against a defendant depends entirely on 'identification-evidence" as defined under the Saint Lucia Act. I consider it helpful to make some other observations for future guidance.

[50] PACE Code D 3.12 complements section 100 of the Saint Lucia Act by providing that:

> "Whenever:
>
> (i) a witness has identified a suspect or purported to have identified them prior to any identification procedure set out in paragraphs 3.5 to 3.10 [i.e. Video Identification, Identification Parade and Group Identification] having been held; or
>
> (ii) there is a witness available who expresses an ability to identify the suspect, or where there is reasonable chance of the witness being able to do so, and they have not been given an opportunity to identify the suspect in any of the procedures set out in paragraphs 3.5 to 3.10,
>
> and the suspect disputes being the person the witness claims to have seen, an identification procedure [i.e. video identification, identification parade or group identification] shall be held unless it is not practicable or it would serve no useful purpose in proving or disproving whether the suspect was involved in committing the offence. For example, when it is not disputed that the suspect is already well known to the witness who claims to have seen them commit the crime."

[51] The police would be aware of the suspect's potential dispute about identification where the suspect on his arrest in an interview raises disputes about his

identification, or where the suspect's legal representative formally notifies the police about the identification dispute. A suspect who makes a 'no comment' interview or simply denies guilt may not trigger an automatic identification procedure. The question whether a suspect or a defendant is disputing identification may not be easy to discern. The police on each occasion should carefully consider all of their acquired information in order to determine whether the suspect's account amounts to a disputed identification[26].

[52] Where a potential witness has informally identified unequivocally a suspect who was not known to the witness before the offence – say a street identification – the House of Lords in R v Forbes[27] upon reviewing the development of Code D, upheld and emphasized the principle that a previous street identification, however clear-cut, will not displace the mandatory rule for one of the formal identification procedures to be carried out by the police. The House of Lords also opined that identification procedure is as much for the benefit of protecting a suspect against mistaken identification as it is for the benefit of the prosecution. Code D paragraph 3.17 prescribes the details of the notice that should be given to a suspect before an identification parade, group identification, video identification, or confrontation is arranged. The principles and procedures for conducting an identification parade and group identification are similar.

[26] See R v Lambert [2004] EWCA Crim 154: for a discussion on the applicable principles. The Court of Appeal opined that the question whether a suspect disputes being the person the witness claims to have seen on the relevant occasion, such as to require an identification procedure to be conducted under D 3.12 falls for consideration at the time that the police are investigating the offence rather than in the light of the evidence at trial.

[27] [2001] 1 A.C. 473 at para 20. In Forbes the complainant had been driven by a friend to a cash point machine where he withdrew 10 pounds. He was then approached by a man who blocked his path, asked for the money on compassionate grounds, and then became aggressive when he was refused. The aggressor pursued the complainant threatening to cut him up and stood very close to him with something looking like the handle of a knife. The complainant evaded him and escaped by being driven away in his friend's car. Subsequently, the complainant passed the aggressor in the street whilst in the car and he made eye contact with the aggressor who spat spat at the car as it went by. The complainant called the police on his mobile phone and gave a description. A few minutes later a police car drove the complainant around in the streets where he positively identified the appellant as his assailant. The appellant denied the accusation and three times before the trial the defence asked in vain for an identification parade. The House of Lords held that the evidence of the street identification was rightly admitted in spite of the Code breach; and concurred with the Court of Appeal that "The evidence was compelling and untainted and…did not suffer from such problems or weaknesses as sometimes attend evidence of this kind; as, for example where the suspect is already visibly in the hands of the police at the moment he is identified to them by the complainant."

The Absence of an Identification Parade

[53] Identification evidence as defined, will be admissible however, even if there was no identification parade where it is established: (i) that it would not have been reasonable to have held such parade: (section 100(1)(a)(ii); or (ii) that the defendant refused to take part in such parade (section 100(3)). Among the matters at large that the court may take into account in determining whether it was reasonable to hold the identification parade, are the matters listed in section 100(2)(a) to (c). Where it is established that the defendant refused to participate because his lawyer was absent; or because it was not reasonably practicable for the lawyer to be present, then it must be presumed that it was unreasonable to have held an identification parade.

[54] Section 100(2)(a) to (d) is not exhaustive, and some of the other matters that the court may wish to take into account are matters such as: the extent, if any, to which the defendant has already been identified by the witness in the investigatory stage of the proceedings; the degree of prior familiarity (if any) between the defendant and the witness; the time of day or night that the defendant was in custody; the number of hours the defendant was in custody; whether the police made any efforts to obtain volunteers to participate in an identification parade; whether the local police station or Local Area Command had any system in place for holding identification parades and obtaining the services of such volunteers at the time; if so, how effective was the system; if not, why was no such system in place; whether there have been any recent (or long since past) efforts to have a system in place and to recruit such volunteers; and any appeal to the general public to assist in the conduct of such an identification parade. I am not aware of any case in Saint Lucia in which the police have ever conducted an identification parade as defined in PACE Code D paragraph 3.7. The casual confrontation procedure in my experience is the preferred method of identification for the police. The Saint Lucia Act may now persuade the police to put proper systems in place for conducting identification parades. The police investigator may find that he/she is now obliged to give a reasonable explanation to the court why an identification

parade was not held.

[55] The willingness of the suspect to take part in at least one of the formal identification procedures is regulated by PACE Code D paragraph 3.15 which provides that suspects who refuse the identification procedure first offered shall be asked to state their reason for refusing and may get advice from their solicitor and/or if present their appropriate adult who may make representations about why another procedure should be used. After considering any reasons given, the identification officer must, if appropriate, arrange for the suspect to be offered an alternative which the officer considers suitable and practicable. Where the officer decides it is not suitable or practicable to offer an alternative identification procedure, the reasons for the decision must be recorded. It has been held in R v Gasper[28] that the failure to offer an alternative identification procedure where there is no impediment in terms of practicability and suitability will be a breach of the Code.

[56] On the other hand, the court should disregard the availability of pictures or photographs that could be used in making the identification in determining whether it was reasonable to have held the identification parade: (section 100(4)). The refusal to take part in an identification parade, where group identification held in accordance with PACE Code D paragraph 3.9 and video film identification held in accordance with PACE Code D paragraph 3.5 was not practicable, may support the acceptance of a confrontation procedure and render the identification evidence admissible: (section 100(5)).

The Approach of the Trial Judge

[57] The trial judge did not consider whether the evidence that the prosecutor was adducing from the three eye witnesses was "identification evidence" within the meaning of the definition. The evidence from each of them contained 'an assertion that …[the] defendant was…present at or near …[the] place where the offence for which the defendant …[was] prosecuted was committed." The

[28] [2002] EWCA Crim 1764

assertion of the three eye witnesses was also that the defendant was present at the place where acts "connected with that offence was done;" and their assertion was "based wholly or partly on what …[each witness] saw, heard or otherwise noticed at that place and time." The three police witnesses gave evidence that was "a report…of an assertion" by the eye witnesses Mr. Mondesir and Mr. Alexander to the effect that the appellant was the person who was present at the scene of the robbery for which he was prosecuted. The evidence of the three eye witnesses and the three police officers was definitely trapped by the definition of "identification evidence"; and section 100(1) of the Saint Lucia Act would operate in accordance with its terms.

[58] The learned trial judge did not turn his mind to the issues arising from section 100 which had to be resolved before he could admit the in court identification of the appellant by the three eyewitnesses, the out of court confrontation evidence of Mr. Alexander, evidence of the informal identification procedure carried out for the witness Mr. Mondesir, and the police officers' evidence which was a report of the assertions of Mr. Alexander and Mr. Mondesir that the appellant was the robber. The ruling of the trial judge in response to the previously stated objections made by defence counsel reflects that the judge ignored and or failed to appreciate the provisions of sections 100 of the Saint Lucia Act. It is obvious that the judge erroneously applied the common law and section 78 of PACE, which presumes that identification evidence is admissible. That law acknowledges that relevant and admissible evidence may be excluded where the court is of the view that in all the circumstances the admission of the evidence would, have an adverse effect on the fairness of the trial.

[59] There was no evidence led that the accused declined to participate in an identification parade and his reasons for doing so. There was no evidence led which explained why the police chose not to hold an identification parade which included the appellant, so that the three eye witnesses could attend. There is no evidence of any efforts or any difficulties in organizing an identification parade. The only evidence which could have established that it probably was

unreasonable to hold an identification parade for the appellant in respect of his identification by Mr. Alexander, was the evidence that Mr. Alexander knew the appellant for several years and so recognized him at the scene of the crime. However, in light of the evidence of Corporal Obeius that the appellant said "I do not know anything about it" when he was apprehended, it would fall for the trial judge to consider whether the appellant was then disputing that he was the person the witnesses claimed they saw so as to trigger the necessity to hold an identification parade under PACE Code D paragraph 3.12[29].

[60] The DPP has conceded that the judge did not give the warning required by section 102. In my opinion the trial judge did not give sufficient warning to the jury under section 136 of the Saint Lucia Act either. His directions fell short of explaining to the jury why the identification evidence was unreliable and why there was a special need for caution. His directions do not convey that he pointed out all of the matters in the case which may cause it to be unreliable, neither did he direct the jury that they are bound to take those matters into consideration in determining whether they will or will not rely on that identification evidence. The judge could have conveyed to the jury that although Mr. Alexander recognized the appellant as someone that he knew errors may also occur even when he has previously known the appellant. The jury could have been told that since more than one witness has identified the appellant, this is a matter that they should take into account in determining how strong the evidence is, but this did not necessarily mean that there was less chance that a mistake was made as two or more honest witnesses can be just as mistaken as one. There was particularly special need for the judge to warn the jury about the identification procedure used for the witness Mr. Mondesir and the judge did not address this at all.

Conclusion

[61] The conclusions that I have arrived at have justified the contention of learned counsel Mr. Innocent in his written and oral submissions. The several errors made

[29] See paragraph 48 above

by the trial judge have in my view resulted in a substantial miscarriage of justice, and the learned DPP has relied on the proviso in the event of error. However the nature of the errors would not permit the proviso to be applied. What happened in the appellant's trial was no mere irregularity. It was a radical and fundamental error serious enough as to cause a mistrial. Having regard to what I have said in relation to grounds 1 and 2, it is unnecessary to deal with grounds 3 and 4 which are based upon the propositions that defence counsel failed to raise the issue of the appellant's good character and the trial judge failed to give the jury directions on this; and that his conviction is unsafe or unsatisfactory in the circumstances. It only remains for me to determine whether this case is not an appropriate case in which to order a new trial.

[62] The power to grant a new trial is a discretionary one and in deciding whether to exercise it the court must decide whether the interests of justice require that a new trial be had. I am of the view that the cumulative effect of the identification evidence is of such that were it to be ruled by a court to be admissible under section 100 of the Saint Lucia Act it could be accepted by a properly directed jury to establish beyond a reasonable doubt the guilt of the appellant. The appellant has served four years of the eight year sentence imposed upon his conviction. That is a matter to be taken into account also. I would allow the appeal, set aside the conviction and sentence and order a new trial. Whether or not this appellant would be tried again is of course a matter that must be left to the learned DPP.

[63] The Court therefore allows the appeal, sets aside the appellant's conviction and sentence, and orders a new trial.

Ola Mae Edwards
Justice of Appeal

I concur.

Janice George-Creque
Justice of Appeal

I concur.

Davidson Kelvin Baptiste
Justice of Appeal