IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

CRIMINAL APPEAL CAUSE No. 12 of 2019
IND 101 of 2017
SC# 6603 of 2017

BETWEEN

MARVIN GREGORY GRANT

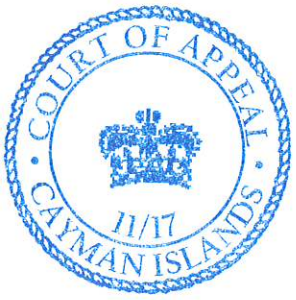
APPLICANT

-AND-

HER MAJESTY THE QUEEN

RESPONDENT

Before:	**The Rt. Hon Sir John Goldring, President** **The Hon Sir Richard Field, JA** **The Hon Sir Michael Birt, JA**
Appearances:	Mr Keith Myers for the Applicant Mr Patrick Moran for the Respondent
Application Heard and Decision Announced:	Monday 7th September 2020
Reasons for Decision Delivered:	Thursday 17th September 2020



JUDGMENT

Sir Michael Birt, JA

1. On 30th October 2018, the Applicant was convicted in the Grand Court of one count of robbery before Chapple J sitting with a jury. He now seeks leave to appeal against that conviction. At the conclusion of the hearing, we refused leave to appeal and now give our reasons.

Background

2. On 24th December 2015, a bag was washed up on the beach at Morritt's Hotel. Mr Scotchman, the acting assistant manager, was called to the beach. He met the security guard, Mr Fearon, who had taken possession of the bag, which was placed under a chair upon which Mr Fearon was sitting.

Inside the bag were, Mr Scotchman estimated, some twenty to thirty black packages with green tape across them. A decision was taken to call the police. In the meantime, Mr Fearon continued to sit on the chair with the bag underneath and Mr Scotchman remained with him. Other members of the hotel staff came and had a look at what was going on.

3. Whilst they were waiting for the police, a man wearing a mask and brandishing a machete came from the side of the hotel and pulled the bag from under the chair, at which point one of the packages fell out of the bag. There was a minor tussle with Mr Fearon, but when the man raised the machete, Mr Fearon let go and the man ran off with the bag back in the direction from which he had come. The package which fell out was subsequently analysed and found to contain approximately two kilos of cocaine. The clear inference was that all the other packages also contained cocaine.

4. Mr Fearon and Mr Scotchman followed the masked man, although they were obstructed at one point by a red truck which moved so as to close off their path; but Mr Fearon, followed by Mr Scotchman, managed to get round the truck and continued to follow the masked man. Mr Scotchman saw him get into a silver grey BMW which was parked facing the main road. The masked man put the bag into the BMW and drove off in the direction of East End. The red truck reversed up to the main road and went off in the same direction.

5. The police arrived about fifteen minutes later and shortly afterwards they asked Mr Kirchman, the general manager of the hotel, if they could watch the CCTV to see if any assistance could be obtained as to the identity of the robber. The CCTV was watched by Mr Kirchman, Mr Scotchman, Mr Fearon and two police officers, PC Brown and PC Coleman as well as the IT manager of the hotel. The CCTV showed the masked man with the machete, but of course he could not be identified from that footage.

6. The CCTV was then played back to an earlier point, which showed a man getting out of a BMW and walking from the car to the road that ran down the side of the hotel. The man looked up at the CCTV camera at one point and both Mr Kirchman and PC Brown recognised him as the Applicant, who was well known to each of them.

7. When interviewed following arrest, the Applicant denied that he was the man in the CCTV footage. He said that at the material time he was out fishing. He had left his car with the keys in it and had

gone off fishing alone. He left from East End and when he came back from fishing it was getting dark. He thought that someone had used his car as it was parked in a slightly different position.

8. The indictment subsequently laid against the Applicant contained two counts. Two other individuals were also charged, namely Fred McLaughlin and Al McLaughlin. Count 1 charged the Applicant with robbery of the packages in the bag and Fred McLaughlin and Al McLaughlin with aiding and abetting him in the robbery. Count 2 charged all three defendants with conspiracy to supply controlled drugs. Fred McLaughlin admitted to being the driver of the red truck referred to earlier but said that he had arrived at the hotel for an innocent purpose and was shocked to be confronted with what looked like an armed robbery in progress. Al McLaughlin was not present at the hotel but there was evidence of many telephone calls between him and the Applicant and between him and Fred McLaughlin immediately before and after the robbery.

9. The evidence against the Applicant relied upon by the prosecution can be summarised as follows:-

(i) The evidence of Mr Kirchman and PC Brown that they recognised the Applicant, who was known to them, as the man without a mask shown in the CCTV footage some 13 minutes before the masked man emerged from his car and carried out the robbery.

(ii) As seen from the CCTV footage, the clothing worn by the masked robber was similar to the clothing worn by the man identified as the Applicant in the earlier footage.

(iii) The Applicant was the registered keeper of a BMW of similar colour and appearance as that in which the robber escaped.

(iv) The Applicant was arrested at the home of Al McLaughlin a few hours after the robbery. His BMW was there and had recently been vacuum cleaned.

(v) The home of the Applicant's girlfriend was searched not long afterwards and the police found khaki pants and black slippers which were of similar appearance to those worn by the robber and by the man identified as the Applicant in the CCTV footage.

(vi) Expert telephone evidence showed that the Applicant was in repeated telephone contact with Al McLaughlin both before and after the robbery. The evidence also

showed that the Applicant had been in telephone contact with a male member of the hotel staff shortly before the robbery and the CCTV evidence showed that this male member of staff (together with another) had approached the BMW in a golf buggy shortly before the robbery.

(vii) Cell site data was consistent with the Applicant's phone being at the hotel at the time of the robbery, although such evidence was also consistent with the phone (and therefore the Applicant) being at sea in the vicinity of the hotel.

10. Counsel for the Applicant submitted before the trial that the judge should exclude the evidence whereby Mr Kirchman and PC Brown purported to identify the Applicant. In a judgment dated 9th October 2018, the judge rejected that application as being premature and said he would consider the issue at the close of the prosecution case if necessary.

11. All the defendants made submissions of no case to answer at the close of the prosecution case but these were rejected by Chapple J in a clearly reasoned judgment. None of the defendants gave evidence. Following the judge's summing up, the jury unanimously convicted the Applicant on the count of robbery but acquitted Fred and Al McLaughlin of aiding and abetting the robbery. The jury also acquitted all three defendants of the count of conspiracy to supply controlled drugs.

The Grounds of Appeal

12. The written submissions of Mr Myers (who did not appear in the trial below) on behalf of the Applicant contained five grounds of appeal. However, during the course of the hearing before us, he abandoned Ground 3 and we accordingly say no more of that ground. We shall consider the remaining four grounds in turn.

Ground 1

13. Mr Myers submits that the judge should have discharged the jury following inclusion in the opening by prosecution counsel of reference to evidence which was not in fact adduced, as it was subsequently ruled inadmissible by the judge. The background to that submission is as follows.

14. When Al McLaughlin's property was searched, scales were found with traces of cocaine thereon. Mr Moran included a reference to this evidence in his opening, which was provided to all defence counsel in advance, with no objection being made to the inclusion of the reference to the finding of traces of cocaine on the scales.

15. However, objection to the admissibility of that evidence was subsequently taken and the judge ruled in favour of the defence. Thus, no evidence about the scales with traces of cocaine was ever in fact adduced before the jury even though Mr Moran had, in opening the case, said that they would hear evidence about this.

16. Following the judge's decision, nothing further was said to the jury but, shortly after they retired, they returned with a question in the following terms:-

> ***"PC Brown mentioned scales with traces of cocaine found at Al's house. Is this considered as evidence?"***

17. The judge considered with counsel the appropriate method of responding to the question. He then brought the jury back and, having read out their question, directed them as follows:-

> ***"In fact, ladies and gentlemen, that was not mentioned by Police Constable Brown. But scales with traces of cocaine were mentioned by Mr Moran when he opened the case to you four weeks ago. So to that extent, well remembered. But there is no evidence whatever from any source of anything to do with any scales being found anywhere with or without traces of cocaine or anything else. No evidence to support the suggestion made by Mr Moran.***
>
> ***As I've already directed you and as your oath, with respect, requires, you should try this case on the evidence and only on the evidence. You obviously understand that from the way in which your question is phrased. Whilst, as I say, mention was made of it by Mr Moran, it is not in evidence. No other mention has been made of it and no evidence called about it. So the short answer to your question "Is this considered as evidence?" is no. The upshot is you should please ignore completely any suggestion or thought of any scales or cocaine traces or anything of the sort. I repeat, respectfully, it's no part of the evidence in this case. So, please put that suggestion entirely from your mind."***

18. Although there had been some suggestion during the submissions to the judge that one or more of the defendants might wish to apply to discharge the jury following the jury's question, no such application was in fact made and, immediately prior to taking the verdict, each defence counsel confirmed that there was no application to discharge the jury.

19. Mr Myers submits that the jury should have been discharged once they asked the question. The issue of the scales with cocaine traces was clearly in their minds and the prejudicial effect could not be removed by a direction from the judge.

20. There are various courses open to a trial judge in such circumstances and the applicable principles in determining which course to follow when inadmissible and potentially prejudicial material is referred to in the presence of the jury, were helpfully set out in the advice of the Privy Council in *Mitcham v The Queen* [2009] UKPC 5, on appeal from the Court of Appeal of St Christopher and Nevis. Delivering the advice Lord Carswell said as follows:-

> ***"Once a matter has been referred to in the presence of the jury which could give rise to possible prejudice, the trial judge has a choice of courses open to him. He could elect to take no action, on the basis that the matter was insufficient to create a degree of prejudice which would make the trial unfair and that to refer to it again would only draw attention to it. He could at the appropriate stage or stages give the jury a warning to disregard what was said, if he considers that that would be sufficient to minimise the prejudice and prevent the trial from being unfair. Finally, he could decide to discharge the jury, if he considers that there is prejudice which would make the trial potentially unfair and that warnings would not diminish it to a sufficient extent. He should give consideration to the course which he should take, even if counsel have, for whatever reason, not asked for the jury to be discharged or even submitted that he should not do so..... It is a decision which lies within the discretion of the trial judge, and an appellate court will not interfere with a decision made by him about the proper conduct of the case, unless satisfied that it was wrong and that the trial was unfair to the defendant, in consequence of which the conviction would be unsafe.... It is always relevant for an appeal court to bear in mind that the trial judge had the advantage of knowing the atmosphere of the case and the way in which the matter later complained of appeared in court at the time."***

21. Lord Carswell went on to quote with approval the following observation of Auld LJ in *R v Lawson* [2005] EWCA Crim 84, [2007] 1 Cr App R 20 at [65]:-

> ***"Whether or not to discharge the jury is a matter for evaluation by the trial judge on the particular facts and circumstances of the case, and this court will not lightly interfere with his decision. It follows that every case depends on its own facts and circumstances, including: (1) the important issue or issues in the case; (2) the nature and impact of improperly admitted material on that issue or issues, having regard, inter alia to the respective strengths of the prosecution and defence cases; (3) the manner and circumstances of its admission and whether and to what extent it is potentially unfairly prejudicial to a defendant; (4) the extent to and manner in which it is remediable by judicial direction or otherwise,***

so as to permit the trial to proceed. We repeat, all these matters and their combined effect are very much an evaluative exercise for the trial judge in all the circumstances of the case. The starting point is not that the jury should be discharged whenever something of this nature is put in evidence through inadvertence. Equally, there is no sliding scale so as to increase the persuasive onus on a defendant seeking a discharge of a jury on this account according to the weight or length of the case or the stage it has reached when the point arises for determination. The test is always the same, whether to continue with the trial would or could, by reason of the admission of the unfairly prejudicial material, result in an unsafe conviction."

22. In our judgment, Chapple J dealt with the question from the jury in an entirely appropriate manner. He invited submissions from counsel as to the appropriate course and, following consideration of those submissions, determined that the matter should be dealt with by way of a firm direction to the jury to ignore the matter, which he delivered in impeccable terms. This was a decision well within his discretion and indeed, in our judgment, was the correct decision. It is hard to see how the suggestion that traces of cocaine were found on scales in the home of Al McLaughlin could have affected the jury's consideration of the key issue in relation to Count 1, namely whether or not the Applicant was the masked robber.

23. Furthermore, it is clear that the jury loyally followed the judge's direction. The strongest significance of the material was in relation to Count 2, namely conspiracy to supply controlled drugs and in relation to whether Al McLaughlin aided and abetted the robbery in Count 1; yet the jury acquitted all the defendants of Count 2 and acquitted both McLaughlins of aiding and abetting the robbery in Count 1.

24. No application was made to discharge the jury at the time. Whilst, as Lord Carswell states in the passage referred to earlier, this is not determinative, it is certainly an indication of the way in which the matter appeared in court at the time and makes it much harder for Mr Myers to suggest that it was outside the reasonable discretion of the judge to decide not to discharge the jury.

25. In our judgment, it cannot be said that the reference to the scales in prosecuting counsel's opening speech has led to an unfair trial or to the conviction on Count 1 being unsafe and we reject this ground of appeal as being without merit.

Ground 2

26. In his written submission, Mr Myers contended that the *Turnbull* direction which the judge gave should have looked further at the quality of the identification of the Applicant by Mr Kirchman and PC Brown and at whether the unmasked man was the same individual as the masked robber because the viewing was no more than a fleeting glance of the robber's face, bearing in mind that he had his face covered. He did not elaborate in his written submission on what further directions the judge should have given and he did not develop the point orally at the hearing, being content to rest on his written submission.

27. In our judgment, this was not a fleeting glance case. On the contrary, Mr Kirchman and PC Brown had the opportunity of viewing the CCTV footage *'umpteen'* times, as Mr Kirchman put it. They therefore had ample opportunity to consider whether the unmasked man in the footage was the Applicant, as did the jury who were also able to view that CCTV footage many times.

28. As the judge made plain to the jury in his summing up by means of his Route to Verdict, the first question which the jury had to consider was whether they were sure that the unmasked man in the footage was the same man as the masked robber who was seen on CCTV some 13 minutes later. The second question was whether they were sure that Mr Kirchman and PC Brown had correctly identified the unmasked man as the Applicant.

29. Neither of these was a fleeting glance case because of the repeated opportunity to watch the CCTV footage and we do not consider that there was any additional direction which the judge should have given. He gave an exemplary *Turnbull* direction emphasising the fact that honest witnesses can be mistaken as to identification even in relation to people they know and that more than one witness can be so mistaken. In relation to whether they were sure that the man in the two footages was the same individual, he directed them to consider the appearance, position and clothing of the man in the earlier footage as compared with the masked man in the later footage and the likelihood that there were two men of similar build wearing similar clothing at Morritt's Hotel that afternoon.

30. We do not consider there was any further direction which the judge should have given and we reject this ground of appeal.

Ground 4

31. This ground lies at the heart of this application. Clearly the identification of the Applicant as the unmasked man in the earlier CCTV footage was a critical element of the case against the Applicant. Mr Myers submits that that identification was unsafe and should have been excluded from the evidence placed before the jury. The resulting conviction is therefore unsafe. He so submits for two reasons:-

(i) Mr Kirchman and PC Brown viewed the footage in uncontrolled circumstances in that they watched it together and in the company of others. There was therefore a real risk that one or other of them had been unconsciously influenced in their purported recognition of the Applicant.

(ii) The police should have held an identification parade after Mr Kirchman and PC Brown purported to recognise the Applicant on the CCTV footage so as to test that recognition.

We take these two points in turn.

(i) Uncontrolled viewing

32. In *R v Smith (Dean Martin)* [2009] 1 Cr App R 36; [2008] EWCA Crim 1342, the English Court of Appeal recommended that a record should be kept where a police officer purports to recognise a person viewed on CCTV footage in order to safeguard against the possibility that the officer might merely be assenting to a wish or subconscious desire to recognise a guilty participant. Following this recommendation (recording initial reaction, any failure to recognise at first viewing, what was said, any doubts expressed, other persons recognised, what triggered the recognition) would assist in gauging the reliability of the recognition.

33. Following the decision in *Smith,* Code D issued under the Police and Criminal Evidence Act 1984 was amended to include paragraphs 3.35 and 3.36. They apply when, for the purposes of obtaining evidence of recognition, any person, including a police officer:

(a) views the image of an individual in a film, photograph or other visual medium; and
(b) is asked whether they recognise that individual as someone who is known to them.

34. Paragraphs 3.35 and 3.36 were set out in full in the judgment of this Court in *Oliver v R* [2018] (2) CILR 308 at [21] but for our purposes it is sufficient to quote only the following extracts:-

"3.35 The films, photographs and other images shall be shown on an individual basis to avoid any possibility of collusion and to provide safeguards against mistaken recognition....

3.36 A record of the circumstances and conditions under which the person is given an opportunity to recognise the individual must be made and the record must include:

(a) whether the person knew or was given information concerning the name or identity of any suspect.

.....

(d) whether the viewing was alone or with others and if with others, the reason for it

....

(k) whether or not on this occasion, the person claims to recognise any image shown, or any individual seen, as being someone known to them, and if they do:

(i) the reason

(ii) the words of recognition

(iii) any expressions of doubt

(iv) what features of the image or the individual triggered the recognition."

35. In *Oliver,* Field JA, delivering the judgment of this Court, said at [26]:-

"It is true that Code D has no direct application in the Cayman Islands but nonetheless the requirement of basic fairness in the identification of persons by police officers from CCTV footage is a matter of the common law and those requirements were, in our judgment, not met in this case where the identification evidence was weak. We note the following: (1) no attempt was made to ensure that DC Mendez had no communication with other officers about the case that might influence his identification; on the contrary, the CCTV footage had been circulated generally and in particular to the Intelligence Unit and DC Mendez made the identification in the presence of his colleague, DC Hayden; (2)(a) no note was made of what footage DC Mendez examined in making his identification and for how long he examined it or where he examined it; and (b) no note was made immediately after DC Mendez had made the identification as to his reasons for doing so. As a result, it was impossible effectively to examine the reliability of the officer's recognition of the appellant."

The Court of Appeal went on to hold that in those circumstances the judge should have excluded the identification evidence and the appeal was therefore allowed.

36. In the present case, it is clear from the judgment of Chapple J on the application to exclude the identification evidence that PC Brown and PC Coleman both made notes about the viewing of the footage either contemporaneously or immediately afterwards. We have not seen those notes but no submission has been made to us to the effect that they were inadequate or otherwise did not comply with the requirements of paragraph 3.36 of Code D.

37. The sole criticism made by Mr Myers in this respect is that, contrary to paragraph 3.35 of Code D, the footage was not viewed individually by Mr Kirchman and PC Brown; rather they watched it together. Mr Myers submits that that renders their purported recognition of the Applicant unsafe.

38. We do not agree. In the first place, the judge specifically directed the jury on this point. Thus at page 27 he said:-

> ***"Both Mr Kirchman and Mr Brown were, of course, present at the same time in the same room watching that footage. There's no evidence one way or the other, since no one asked any questions about it, as to whether either said anything at the time to indicate that they recognised the man in the footage or otherwise indicated recognition. Nevertheless, if you think either identifying witness might have been influenced by the other, you should, of course, bear that firmly in mind."***

It appears therefore that there was no evidence before the jury to suggest that one witness might have been influenced by the other because of something said at the time, because no questions were asked about it. In those circumstances, it would be a matter of pure speculation that this had occurred.

39. Secondly, each witness gave evidence as to how well they knew the Applicant which was an important factor for the jury in assessing the reliability of their recognition of the Applicant in the CCTV footage. Thus Mr Kirchman said that he knew the Applicant from growing up in the same district, the East End. His sister was best friends with the Applicant's wife's sister. He and the Applicant were not friends but were acquaintances. He had known the Applicant for some eight to ten years. He would see him on and off particularly at the dock; he had seen him about six times in the last year. They were also friends on Facebook which allowed him to see the Applicant's Facebook image. He was adamant that it was the Applicant that he had seen in the CCTV footage, which he had watched umpteen times.

40. PC Brown – although he was no longer a police constable at the time of the trial – said that he knew the Applicant from football. PC Brown was a senior referee and had been a referee for ten years. This involved checking players against their number and names so he would call the person on the list to check that they were wearing the right number. The Applicant played for East End Football Club, North Side and Roma. PC Brown had known the Applicant for about five years and had refereed games in which the Applicant was playing some five or ten times. PC Brown had also seen the Applicant playing when he was not refereeing. The Applicant would call him Manny or referee and indeed the evidence was that when PC Brown attended at Al McLaughlin's premises on the day of the robbery, the Applicant was there and had said to PC Brown *"Manny, Manny, how are you doing?"*.

41. Whilst it would have been preferable for Mr Kirchman and PC Brown to view the footage separately, as Chapple J said, one can understand why that did not occur, given that the viewing took place in the immediate aftermath of a serious robbery and the first priority was to see if any lead could be obtained in order to advance the investigation. Given the fact that notes were made, that this was a case of recognition of someone well-known to each witness and the fact that there was no evidence that one witness might have influenced the other, we have no hesitation in rejecting this aspect of ground 4.

(ii) No identification parade

42. Mr Myers repeats a submission made by counsel for the Applicant at trial, namely that an identification parade (or a video identification procedure as an alternative) should have been held after the CCTV footage identification in order to test the reliability of the identifications by Mr Kirchman and PC Brown. In his evidence, the officer in charge said that he had not arranged for an identification parade to be held because he did not think it would serve any useful purpose following the recognitions from the CCTV footage.

43. The judge dealt with this in his summing up in the following terms:-

> ***"In those circumstances, Acting Sergeant Bryant, who was leading the investigation, didn't think that an identification parade would serve any useful purpose. At least with the benefit of hindsight, Mr Moran concedes that such a procedure would have been useful since it would have tested the ability of Mr Kirchman and Mr Brown to recognise Mr Grant. If you feel that Mr Grant has***

or may have been disadvantaged by the fact that no identification parade was held, bear that in mind as well when you're considering the identification evidence."

44. Mr Myers was unable to point to any provision of Code D which requires the holding of an identification parade in circumstances such as the present, but we accept that the prosecution conceded at trial that such a procedure would have been useful.

45. Nevertheless, in our judgment, the fact that it was not held does not, in the particular circumstances of this case, render the identification of the Applicant unsafe. The judge directed the jury in an entirely appropriate manner. Importantly, this was a case of recognition of the Applicant by two persons to whom he was well known rather than identification of a stranger. In those circumstances, we can understand the police officer's view that an identification parade would not serve any useful purpose, as it would be almost inevitable that the witnesses would pick out the person they knew.

46. Viewing the matter in the round, this was a case where, on the judge's finding, this was good-quality CCTV footage; the Applicant was identified by two witnesses both of whom knew him reasonably well; the jury had ample opportunity to compare for themselves the man in the footage with the man who they saw in the dock; and there was the supporting circumstantial evidence which we have referred to earlier. Putting these matters together and given the impeccable *Turnbull* direction from Chapple J pointing out the difficulties in connection with identification evidence, we are satisfied that there was ample evidence upon which the jury could properly conclude that the unmasked man in the footage was the Applicant and the judge was right not to exclude the identification evidence. We therefore reject Ground 4 in its entirety.

Ground 5

47. The final ground relied upon by Mr Myers is that the conviction of the Appellant on Count 1 was inconsistent with the acquittal of his co-defendants.

48. The approach of an appellate court where inconsistency between verdicts is relied upon as a ground of appeal was considered in detail and authoritatively confirmed by the English Court of Appeal in *R v Fanning and Others* [2016] 1 WLR 4175; [2016] EWCA Crim 550. The judgment is accurately summarised in the headnote as follows:-

> ***"...that, where inconsistency between verdicts was advanced as a ground of appeal against conviction, the burden was upon the defendant to satisfy the court that the two verdicts could not stand together, meaning thereby that no reasonable jury who had applied their minds properly to the facts in the case could have arrived at the conclusion; that, if the jury could not have reasonably come to the conclusion, the convictions could not stand; that the test did not require elaboration and the verdicts of a jury were not to be treated as inconsistent simply because the jury had been sure about some parts of the evidence given by a witness but unable to be sure to the requisite standard about others...."***

49. Mr Myers did not elaborate on why the Applicant's conviction was inconsistent with the acquittal of his co-defendants, but we have no hesitation in rejecting this ground. The evidence against each defendant was wholly different. We have summarised that against the Applicant. The key evidence was that he was the masked man who carried out the robbery and once the jury was sure that the person in both pieces of CCTV footage was him, a conviction was almost inevitable.

50. Fred McLaughlin admitted being present and driving the red truck, but his case, as put forward in interview, was that he was there by chance and that he panicked when he saw an armed robbery unfolding before his eyes, so he reversed out of the car park on to the road and away. Al McLaughlin was not at the scene of the robbery and the evidence against him really consisted of the existence of the telephone calls between him and the Applicant and him and Fred McLaughlin at the material time.

51. The judge correctly directed the jury that the cases of the three defendants did not stand or fall together. The jury must consider the case against and for each defendant separately, the evidence was different and their verdicts need not be the same.

52. In our judgment, given the very different nature of the evidence against each defendant, it was entirely open to the jury to be sure of the Applicant's guilt without being sure of the guilt of Fred McLaughlin or Al McLaughlin and we reject this ground of appeal.

53. We should add that we do not read paragraph 37 of Mr Myer's written submissions as contending that the acquittal of all three defendants on Count 2 was in any way inconsistent with the

Applicant's conviction on Count 1, but if that is his submission, we also reject it. The evidence against all three defendants that they conspired to supply controlled drugs was clearly very different from the evidence that the Applicant had carried out the robbery.

Conclusion

54. This was a case where the Applicant was identified by two persons, who knew him reasonably well, as the unmasked individual in the CCTV footage in circumstances where the jury could clearly reasonably conclude that the unmasked individual and the masked robber were the same man. The quality of the footage was good and the jury were also able to compare the person in the footage with the Applicant who was in the dock before them. There was telephone evidence which placed the Applicant at the time of the robbery in an area which included the hotel, and there was the other circumstantial evidence to which we have referred earlier. Putting these matters together there were in our judgment ample grounds upon which the jury could properly convict and there are no grounds upon which properly to challenge the conviction. We accordingly refused leave to appeal.