JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 89/1999

BEFORE: **THE HON MR. JUSTICE DOWNER, J.A.**
THE HON MR. JUSTICE BINGHAM, J.A.
THE HON MR. JUSTICE HARRISON, J.A.

REGINA v OMAR NELSON

George Traille for Appellant

Miss Paula Tyndale for Crown

July 5, 2000 and December 20, 2001

HARRISON, J.A:

The appellant was convicted in the High Court Division of the Gun Court in the parish of St James on the 28th day of April 1999, for the offences of illegal possession of firearm, robbery with aggravation (two counts) and rape and sentenced to serve twenty years imprisonment on each count, to run concurrently.

We heard the arguments in this appeal on July 5, 2000, on which date we allowed the appeal, quashed the conviction, set aside the sentence and entered a verdict of acquittal. We promised to put our reasons in writing. These are our reasons.

The facts are that on August 8, 1998, at about 3:30 a.m. the complainant was asleep at home, when she was awakened by the voice of her cousin, Steven

Coke who also lived there, calling to her. She got out of bed and unlocked a back door to let him in, while remonstrating with him about coming home at that late hour. As he came in and ran into a room, another man rushed in as she was attempting to close the door against him. He also entered quickly. This man, who she later identified as the appellant held her at her neck, placed a gun at her head and pushed her into the living room where he released her neck and held her by her hair. Another man, shorter than the first, also came into the house. Both men were wearing masks. The appellant pushed her to sit on a settee and told her not to scream or else he would shoot her and if she told anyone he would shoot her family. He struck her twice in her face. Her cousin Steven Coke returned to the living room where the complainant, the appellant and the other man were, and was placed to lie on the floor. He was next taken out of the room to another room. The appellant took the complainant, at gunpoint to a bedroom and raped her, while she unsuccessfully resisted him. It was then about 4:00 a.m. He called to the other man to hurry as it would soon be 5:00 o'clock. Hearing a sound outside the house, the appellant went to a window and looked outside through the curtains. Having the gun in his left hand pointing at her, the appellant used his right hand to lift the mask on his face and to move aside the curtains. She was then able, at an angle, to see a portion of one-half of his face, on the left side, for a period of five seconds, from mid-forehead to his nose and mouth. She then saw a bump near to the elbow of his left hand holding the gun and recognized him as someone she knew for over five

years and used to see in the community almost every week. In the meantime, Coke, her cousin having been taken into another bedroom by the other man, who was armed with a knife, was ordered to search for money and jewellery. The appellant also encouraged the other man to have unlawful sexual intercourse with the complainant; he did. Both men took a stereo and placed in a bag, with other articles, namely, a camera, a necklace, a handbag, a flashlight and pencils, all of which they stole from the house. Earlier Coke had been on his way home at about 3:30 a.m. when the appellant with the gun and the other man with the knife held him up on the road, searched him and took from him money and a gold ring. They were then wearing masks. They ordered him to take them to his house. He did so and on arrival, he called to the complainant who had opened the back door of the house, causing the appellant and the other man to gain entrance. The witness Coke also stated that in the house he was able to see because the man with the knife had a small flashlight "... in the living room and in the room ... other than using the flashlight when I was coming out, that is the only way I could see."

Supt. Aston Hamilton conducted an identification parade on February 2, 1998. The complainant identified the appellant as one of her assailants. She had walked along the line of men then asked the police officer to ask the men on the parade to turn their backs. They did. She again walked along the line. She then asked that the men be ordered to turn to their original position and when they did she pointed at the appellant, who said "I know this lady."

Det. Cpl. Evelena Salmon-Johnson, the investigating officer, received the report on August 15, 1998, and went and spoke to the complainant and Steven Coke, both of whom made reports to her. After the identification parade, she arrested the appellant for the offence of illegal possession of firearm, rape and robbery with aggravation. He was cautioned and he said "Miss how mi fi rape her and mi know her long time from over Golf." Golf was the name of the area where the complainant lived.

Mr. Traille argued as his grounds of appeal:

> (1) The learned trial judge misdirected herself in law in not upholding the no-case submission in relation to the inadequacy of the identification evidence.
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> (2) The circumstances under which the complainant purported to identify one of her assailants as the appellant are as such that at best she could only have had a fleeting glance at her assailant and at worst she could not have seen the face of her assailant due to the poor lighting condition and the fact that he was wearing a mask.
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> (3) The learned trial judge in her summing up inadequately dealt with the contradicting accounts as to the state of the lighting in the living room given by the complainant Ms. ... and Steven Coke.
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> (4) The identification parade was conducted in a manner prejudicial to the appellant.
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> (5) The sentence was excessive in all the circumstances.

He argued that the identification, in circumstances where there was no light in the rooms, the appellant was wearing a mask, the complainant saw a portion of his face for 5 seconds and a flashlight was used to be able to see, although one of recognition, was a fleeting glance and the submission of no case to answer should have been upheld. The identification parade was unfairly conducted in that the witness should have been directed to make a provisional identification and then be allowed to confirm it by viewing the "bump on the back of the left hand" when the men were asked to turn their backs.

Miss Tyndale argued that although the opportunity to view the appellant was not extensive, the appellant while at the window, lifted the mask sufficiently. The complainant had known him for five years and he had been standing close to her during the ordeal that lasted over one hour. No provisional identification was required because the complainant stood in front of the appellant, and did not overtly say "this is the man," but needed further confirmation.

Visual identification evidence has been fully regarded in our courts as being in a special category and attracting special attention by a trial judge in his direction to the jury or in warning himself. It has been firmly established by our courts that the jury should be directed in accordance with the principles in ***R v Turnbull*** [1976] 3 All E.R. 549.

Of special significance is the directive given by Lord Widgery, C.J. to be followed by the trial judge. He said at p. 554:

> "When in the judgment of the trial judge, the quality of the identifying evidence is poor, as for example

> when it depends solely on a fleeting glance or on a longer observation made in difficult conditions, the situation is very different. The judge should then withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification."

A trial judge is therefore required himself to make an assessment of the quality of the evidence, exclusive of the jury, as a preliminary issue, and then made a further determination whether or not to leave it to the jury for them to decide the ultimate issue of guilt or otherwise of the accused. Consequently, he has to consider certain factors in order to make that determination, namely, inter alia, the lighting at the relevant time, the length of time the victim had to observe her assailant, the circumstances existing when the observation was made and whether or not the assailant was recognized as known before by the victim. A mature consideration of those factors will usually assist the trial judge in coming to a proper conclusion as to whether or not he should withdraw the case from the jury.

In the instant case, the evidence discloses that the assailants were masked. The mask was lifted by the assailant in order to look outside when he also shifted the curtains. The complainant saw a portion of the left side of his face (one-half), that is, from his mid-forehead to his nose and mouth. She saw this for a period of 5 seconds and then he replaced the mask. At no time therefore did she see his entire face. In addition, although the complainant stated that there was light on the outside of the house by which she was able to see within the house, when the assailant lifted the mask and she was able to see

his face, the light would have been behind his face. This would have been a difficult situation in which to observe someone's features. This view is moreso confirmed by the fact that the other prosecution witness, Coke, stated that the man with the knife had to use a small flashlight in order to be able to see, while searching in the house.

In the circumstances, although the assailant was known to the complainant before, and therefore this case is one of recognition, a viewing for a period of five seconds of a portion of his face before the mask was replaced was, in our view, no more than a fleeting glance. Even though this is a case of recognition of the assailant, it was undoubtedly made in difficult circumstances and therefore subject to the strictures of the Turnbull guidelines (See also ***Evans v R*** [(1991) 39 WIR 290]. We are of the view, as expressed above, that this was a case of a fleeting glance and in addition, the observation was of a portion of one side of the assailant's face only, for five seconds, made in difficult circumstances. Coupled with the fact that the lighting inside the house was inadequate, the evidence in support of identity was quite poor. We are of the firm view that, in the circumstances of this case, the no-case submission should have been upheld and the case withdrawn from the jury. The appellant therefore succeeds on grounds one and two.

Our conclusion above is sufficient to dispose of this appeal. However, we feel compelled to deal with the third ground of appeal which complains of the

conduct of the identification parade and the manner in which the appellant was pointed out by the complainant.

Identification parades are held to allow a witness the opportunity to substantiate the accuracy of a prior description of an alleged offender. In that regard, the identification parade must be fairly conducted, affording no assistance nor advantage to the witness attending, nor creating any prejudice to the suspect on the said parade: (***R v Gibson*** (1975) 13 J.L.R. 207). Accordingly, rules governing the conduct of identification parades were published in the Jamaica Gazette Extraordinary dated July 29, 1939, Rules and Regulations relative to the Jamaica Constabulary Force. Paragraphs 552 and 554 at page 1155 read:

> **"552.** Identification Parades – In arranging for personal identification, every preparation shall be taken (a) to exclude any suspicion of unfairness or risk of erroneous identification through the witnesses' attention being directed to the suspected person in particular instead of indifferently to all the prisoners paraded, and (b) to make sure that the witnesses' ability to recognize the accused has been fairly and adequately tested.
>
> **553 ...**
>
> **554.** It may sometimes happen that a witness desires to see the prisoner with his hat on or with his hat off, and there is no objection to all the persons paraded being thereupon asked to wear or remove their hats. Sometimes again there may be something peculiar in the prisoner's gait or tone of voice, and if the witness desires to see the prisoner walk or hear him speak, there is no objection to the persons paraded being asked to walk, individually, or to

> speak. When any such request is made by a witness, the incident shall be recorded."

In order to maintain that element of fairness to the suspect on the parade, any peculiarity or other outstanding physical features should not be allowed to be so clearly evident nor distinctly outstanding, to the disadvantage of the suspect.

In the instant case the complainant had said that she saw a bump on the back of the left elbow of the appellant "... the hand that he used to point the gun at me," when he had lifted his mask, moved the curtain and looked outside. She said also. At the identification parade:

> "I walk in front of them, I take a step or two and I looked at all nine of them faces. When I came back and I looked at the accused face I ask the Sergeant if I could ask them to turn around. ... He told them to turn around ... And then the same accused I look at his hand the back of his left hand and the bump was still there. ... I said to the Sergeant I have seen him, he told them to turn around and I pointed at him and said this is the man."

She stated that she recognized the appellant "by face" before she had asked that they turn around. She looked also at the hands of the other men. She said, in cross-examination that she had told the police about the bump at the back of the appellant's hand when she gave a description of him. She had recognized the appellant's face but she did not know his name. Det. Cpl. Salmon-Johnson said that the complainant told her about the bump at the back of one of the appellant's hand when she gave the description of him, but she, Det. Cpl. Solomon-Johnson, did not tell this to Sgt. Hamilton.

The learned trial judge dealt with that aspect of the conduct of the identification parade in this way, on page 242:

> "Counsel for the defence has criticized the conduct of the identification parade which took place on the 22nd of September, 1998, and has asked the court to place a reliance on it as it was in effect farcical. The bump on the hand of her assailant – sorry, the complainant had told the police about the bump on the hand of her assailant and no effort had been made to conceal it and that was certain to result in the identification of the accused by the complainant as he would be the only man with a bump on the back of his hand."

And on page 243:

> "There is no challenge to the complainant's evidence that she knows the accused. He also says he knows her. Perhaps the police in true Shakespearean style, to make assurances doubly sure, felt the parade should be held. In the circumstances, the complainant would have had no difficulty spotting a man she knew. So a parade really was not necessary.
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> Here, again, Ms. ... evidence is quite detailed. When she went on the parade she stood afar off and 'the officer conducting the parade said I can go in there, they won't hurt me. Then I went closer and looked at the men. I looked at all their faces, all nine of their faces and I came back and looked at the accused's face.' Then she said she asked the Sergeant to have them turned around and this was done. She continued: 'Then the same accused, I looked at the back of his left hand and the bump was still there.' She was looking to see if the bump was still there. She too, was making assurances doubly sure. She said she then told the Sergeant that she had seen the man. He told them to turn around and she pointed to him and said 'This is the man.'
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> In cross-examination she says that after walking along the line she had returned to stand not directly

> in front of the accused but at a position between the accused and one man standing next to him. As regards her request for the men to turn around she said, 'I just wanted to see the bump on his hand also'."

And also on page 245:

> "She asked that the men return to the original position facing her and she then went in front of the accused and looked him in the face again for a few seconds more. She looked him in the eyes. She said: 'I recognized his face. I was sure before I asked the Sergeant for them to turn around.' When she looked at the back of his hand she had also seen the back of the hand of the person standing on either side of him because they were there. They had no bump. She did not look at the back of the hand of the other men on the parade. She did not agree with the suggestion that but for the bump she would not have been able to identify him. She maintained her position throughout. 'Yes, I am saying that I would have been able to point him out without the bump'."

And concluded on page 246:

> "Was this parade unfair? The answer is no. It was not even necessary. I find that the complainant is speaking the truth when she says she recognized his face and merely wanted to see if the bump was still there. This was more than one month after the incident the bump may not have been there. I believe her when she said that she recognized him even without seeing the bump."

This appellant was known to the complainant having seen him in the community for over five years. She did not however, know his name, nor even a "nick name." There is no evidence that she assisted in his apprehension. In the circumstances, we disagree with the learned trial judge that an identification parade was not necessary. It was required to be held. However, the bump on

the back of the appellant's arm was a significant feature. So much so that it was referred to by the complainant in her description to the investigating officer. Sgt. Hamilton, who conducted the identification parade should have noticed this bump and taken precautions to reduce its prominence by placing a covering over it and over the corresponding area of the left arm of each man on the identification parade before the holding of the identification parade. If he had been aware of the bump and not covered it before, he should probably have done so before he ordered the men to turn their backs. Sgt. Hamilton had probably not noticed this feature on the appellant's arm. The complainant's evidence was that she had seen a part of the appellant's face for about five seconds, in the living room. She should have been required at the identification parade to indicate whether or not she had seen the face in the line up of men, before being allowed to view them with their backs turned to her. The latter should have been a mere confirmation of a prior oral indication pointing out the suspect.

This approach was considered by this court in ***R v Anthony Hewitt*** SCCA 84/77 delivered on December 18, 1978, (unreported). Carberry, J.A. at page 17 quoted from Appendix A of paragraph 5.65 at page 124 of the Report on Evidence of Identification in Criminal Cases by Lord Devlin and published in a Home Office circular in 1969 (England) which reads:

> **"5.65 -** It occasionally happens that a witness before he makes an identification asks to hear one or more members of the parade speak or see them move. This creates a difficult situation. The parade is a fair

> test of appearance only; the participants are not selected for similarity in speech or gait. Obviously it would be wrong to have all the members speaking or walking before any selection was made at all, since it would then be the singularity of speech or of movement which would determine the result.
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> We think that if a witness asks for speech or movement, he should be told that it can be permitted by only one person. He should be asked whether there is any one person whom he can pick out because of his appearance and whom he is prepared to identify subject to confirmation. If he is, then what is in effect a voice or movement confrontation can be held and the identification either confirmed or withdrawn."

And continuing at page 17 he said:

> "In short the report suggested that before the demonstration which the witness desires to have made is carried out, the witness should be asked to make a preliminary selection of the person whom he wished to see carry out the demonstration.
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> This, if done, and followed by the identification would make it perhaps clearer that the demonstration was confirmatory only; and that the witness had already identified the suspect and was merely confirming his identification to his satisfaction. This change in the rules has much to recommend it . . ."

The Court however, expressed some reservation on that approach of the Devlin report. Carberry, J.A. at page 18 further observed:

> " **(a)** It will not necessarily resolve the question of whether the witness identified the suspect only because of the result of the demonstration. The defence will still be able to argue that the identification is unsatisfactory on much the same grounds as are now urged.

> **(b)** Further, with the greatest deference to the Devlin Report and to some dicta in the two Guyana cases it seems to us that the objective of the parade is not merely to test the witness' recollection of the facial appearance of the accused ... the objective of the parade surely is to test whether the witness can recognize and identify the <u>whole</u> man – the person whom he saw commit the offence. We would wish to reserve for further consideration the problem of identifying persons with distinctive scars and the like. We are not at the moment altogether convinced that the solution is to conceal the scar by putting on a plaster on the faces of all the persons in the parade. This in itself might possibly lead one to doubt whether the witness was really identifying the right man who had a visible and peculiar scar, or other distinguishing features which has been concealed at the parade."

In the instant case, despite all the above, we do not agree that the identification parade was such that it could not be relied on. The rules which guide the conduct of the identification parade are procedural only and not mandatory (***R v Bradley Graham et al*** (1986) 23 J.L.R. 230) and therefore, it is a matter of weight to be considered by the tribunal of fact: (See also, ***The State v Hodge*** (1976) 22 W.I.R. 303).

However, for the reasons given earlier, we allowed the appeal.