**JAMAICA**

**IN THE COURT OF APPEAL**

**SUPREME COURT CRIMINAL APPEAL NOS. 144 & 145/96**

**BEFORE:** THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE PATTERSON, J.A.
THE HON. MR. JUSTICE WALKER, J.A. (Ag.)

**REGINA v.**
**MICHAEL CORNWALL**
**FRANCIS HALLOWAY**

**Canute Brown** and **Delford Morgan** for Cornwall

**Canute Brown** and **N. Godfrey** for Halloway

**Lloyd Hibbert, Q.C.**, Deputy Director of Public Prosecutions, and **Miss Sharon George** for Crown

**September 30, October 1 and November 4, 1996**

**PATTERSON, J.A.:**

Michael Cornwall ("the 1st appellant") and Francis Halloway ("the 2nd appellant") were convicted on October 24, 1995 in the Manchester Circuit Court before Wesley James, J. and a jury, of the murder of Hugh Lewis in the course or furtherance of robbery. Both appellants were sentenced to death. On October 1, we granted their applications for leave to appeal against their convictions. We treated the hearing of the applications as the hearing of the appeals and in each case allowed the appeal,

quashed the conviction and directed a verdict of acquittal to be entered. We now give our reasons for doing so.

The prosecution case may be stated in summary. At about 11:30 p.m. on July 27, 1994, the deceased and his wife, Hyacinth Lewis, retired to bed in their home at 5 Cotton Tree Road, Mandeville. At about 2:30 a.m. that very night, Mrs. Lewis awoke and saw two men in her bedroom. Both men attacked the deceased when he attempted to get out of bed, inflicting a wound just above the right clavicle which punctured the jugular vein. The men demanded money which was given to them by Mrs. Lewis, and after robbing her of her wedding band, engagement ring and bangles that she was wearing, they left the room. By then the deceased was bleeding profusely but, nevertheless, he got out of bed and went to the kitchen before he collapsed. The incident lasted some ten to twelve minutes, and although other persons were in the house then, Mrs. Lewis was the only witness who saw the men. She did not know either of them, but on the 20th August, 1994, just about three weeks after the incident, she pointed out the 1st appellant on an identity parade. She failed to point out the 2nd appellant on an identity parade held on that same day, but she made a dock identification at the time of the trial.

Undoubtedly, the case for the prosecution depended on the correctness of the identification of the men who entered the deceased's house on that fateful night. The prosecution embarked on their task by leading evidence from one Junious Morgan. He testified that he knew both appellants for many years, and that

for about two years prior to the night of the incident, he had seen both men together on numerous occasions, either working on the road on weekdays, or begging alms in Mandeville at weekends. He had often given them alms. On the very night of the murder at about 11:30 p.m. he had seen them walking together on Cotton Tree Road going towards Georges Valley, "maybe fifteen or twenty yards before reaching" the deceased's gate. The witness said he was driving his motor car at about ten to fifteen miles per hour and he recognised both men from about fifty yards away when the lights from his car shone on them as they approached him. He saw the police the following morning at the home of the deceased and he spoke to them. On the 20th August, 1994, he pointed out both men on separate identity parades "as the two persons I saw in July on the night that I was going home."

Assuming that the witness was correct when he said he recognised both appellants, then such evidence could only be admissible as circumstantial evidence in aid of other evidence of identity but, taken by itself, its probative value would be nil. It would be irrelevant to the issue and, therefore, inadmissible. The mere fact that the appellants were seen some three hours before the commission of the crime could not be regarded as sufficient evidence of identity connecting them to it; more was required, and the prosecution placed great reliance on the evidence of Mrs. Lewis. If she could establish the identity of the persons who committed the crime, then the testimony of Junious Morgan could be of some support to the quality of her identifying evidence.

Mr. Brown for both appellants contended that the quality of the identifying evidence was so poor that the learned trial judge should have ruled at the close of the prosecution case that there was no case for either appellant to answer, and he should have directed an acquittal. He supported his contention by referring to the weaknesses in the identifying evidence of the chief witness, Mrs. Hyacinth Lewis. She testified that the lights in her bedroom and in the adjoining bathroom were on when she awoke and so she was able to see the intruders. She did not know either appellant before that night. She referred to the 2nd appellant as "the short one" and as it seems that he played the leading role we will examine, firstly, the evidence against him. It was he to whom she gave the money. He grabbed her in her chest and told her to take off her chain. She complied and gave it to him. He took off two pairs of gold bangles from her right hand, and it was then that she noticed that: "He had something wrong with his hand, like a deformity." She indicated to the court the part of the 2nd appellant's hand that was deformed. This bit of evidence was very important, because it highlighted an additional outstanding physical condition by which the 2nd appellant could be described and identified. It was he who grabbed her by the hand to take her wedding band and engagement ring, and he it was who inflicted a wound to her finger with a knife he had in his hand. When asked what part of the 2nd appellant's body she was looking at, this is what she said: (p. 53)

> "**A.** Just his chest part, because we were facing each other very close.

> "Q. So what, you only look at his chest?
>
> A. In my kind of position, I would not have noticed his bottom part anyway.
>
> Q. Yes, I am asking you what part of his body were you looking at?
>
> A. His face, chest, the hand that took off the bangle, that I saw.
>
> Q. So, for the period of about 10 to 12 minutes, you said this incident took place for, about how long were you observing his face, that is the short one?
>
> A. Between 4 and 5 minutes."

As we have already mentioned, the witness did not identify the 2nd appellant on an identity parade held about three weeks after the incident. She said his hair was "clean cut" on the night she saw him in her bedroom. In cross-examination, she said she described the 2nd appellant in her statement to the police in this way:

> "The man with the knife is of brown complexion about five feet five inches tall."

Then she was asked this crucial question:

> "Q. And you will agree with me that that man of brown complexion, you told the police he was wearing a handkerchief over his nose and mouth.
>
> A. That he told the police.
>
> Q. You told the police that the man was wearing, that brown man was wearing a handkerchief over his nose and mouth?
>
> A. Over his mouth.
>
> Q. Nose and mouth?
>
> A. Right across."

It is clear that the defence was privy to the initial written statement given by Mrs. Lewis to the police the very day of the incident. One would have expected her to include in the description of the 2nd appellant the deformity of the hand which she said she noticed, but that was not done.

She was asked about her attendance at the identity parade: (pp. 77-78)

> "**Q.** The brown man. Were you able to point out that brown man at the ID parade?
>
> **A.** No.
>
> **Q.** So, it would be correct to say that as far as you are concerned, on that date of the parade, the brown man was not among the line of nine men?
>
> **A.** He was there.
>
> **Q.** You said he was there, but you didn't point him out, Mrs. Lewis. Why didn't you point him out then?
>
> **A.** Oh, you want me to tell you that?
>
> **Q.** Why you didn't point him out if he was there?
>
> **A.** Your honour, when I reach to the ID, I went up and down, I looked at the...
>
> **Q.** Can't hear.
>
> **A.** I looked up and down, I stood up before him for quite a long time and looked at him. His hair was grown. I am there saying to myself, but then at the time, I wasn't thinking, the ID took quite a long time to come off after the incident. Anyway, I had one more thing. I suggested to the police if they would "have their hands, they were all standing with their hands in their pockets, and I suggested to the police, if he could ask them to take their hands out their pockets. They took their hands out their pockets, but they held them to their sides. Now, I am mistaken.

> "...
>
> I was going on an ID for the first time, I wasn't told that I could ask as many questions at the ID as possible. I asked about the hands, they took it out, they held it to the side."

Counsel suggested to the witness that she did not point out the 2nd appellant because she was not sure, and this was her answer: (p. 81)

> "**A.** I did not point him out, because I did not see his hand. If I had seen his hand, I would say it was him, because I didn't know anybody else with a fin hand, or whatever you want to call it, deformed hand.
>
> **Q.** Did you tell the officer on the parade these words, 'Officer, I am not satisfied, I have seen the right person.' Did you say that on the parade to the officer?
>
> **A.** I am not satisfied?
>
> **Q.** I am not satisfied, I see right person?
>
> **A.** I am sorry, counsel, I did not say that to the officer, I said to the officer, 'who was the person?' When I heard the number I said, 'my gosh, I was ninety percent.' I didn't tell him what you are saying."

The officer who conducted the parade testified that the witness did say: "Officer, I am not satisfied that I have seen the right person."

It is clear that the witness was quite unable to identify the 2nd appellant on the identity parade. Her view of his facial features on the night of the incident was severely handicapped by the handkerchief which she admitted was tied across his face. Her evidence of seeing his deformed hand at the time he took her

bangles was seriously shaken, if not hopelessly weakened, by the fact that she did not mention it in her early statement to the police. Her dock identification of the 2nd appellant at the trial was of no value whatsoever. It was not a first-time identification in court, since she would have seen him at the time of the preliminary examination which she attended and, in any event, she did not know him before. Although the dock identification evidence was admissible for the purpose of committal proceedings, and could not have been rejected by the magistrate, the learned trial judge had a discretion to reject it and, in the circumstances of this case, he ought to have done so.

Mr. Hibbert readily conceded that the quality of the identifying evidence of the 2nd appellant was so poor that the learned trial judge should have upheld the no-case submission at the close of the prosecution case, withdrawn the case from the jury and directed an acquittal. We were in full agreement and, accordingly, the 2nd appellant's conviction could not stand.

Turning now to the evidence against the 1st appellant, it is evident that the witness' attention was focused on the "short one" who played the leading role in the incident. Her observation of the other man could only have been made in difficult conditions. She said that she saw both men attack the deceased just as he awoke and spoke, and then she saw blood coming "from the whole of the front" of the deceased. Thereafter, it was the short one who engaged most of her attention. She referred to the other man as "the tall one", and she said she saw him with a crook lock which she recognised to be

one kept in her kitchen. She heard her husband tell the men to look in the bathroom where he had his pants with two hundred dollars, and "the tall one turned right into the bathroom and took down the pants." He came back and said: "Come, mek we go" and both men left the room. She was asked about the view she had of the tall one: (pp. 53-54)

> "**Q.** Now, the tall one, what part of his body were you looking at?
>
> **A.** Head.
>
> **Q.** Back, head, side head?
>
> **A.** The back of his head would have been at the bathroom door.
>
> **Q.** So what part were you looking at?
>
> **A.** The front of his face.
>
> **Q.** And out of that 10 to 12 minutes that they spent in the room, about how much of that time you observed his face for?
>
> **A.** It's kind of hard for me to say, the minutes I observed his face for, because I would have to have a watch or something looking at.
>
> **Q.** About?
>
> **HIS LORDSHIP:** Is it a short while or long time or the same?
>
> **A.** Maybe about the same, because I was wondering, looking from one to the other, because he had the crook stick held up, so I was wondering, if he was going to use it to hit me."

In cross-examination, she said the 1st appellant was not wearing a mask that night. The cross-examination continued thus: (pp. 63-64)

> "**Q.** Did you tell the police the following thing, Mrs. Lewis, 'The one with the crook

> "lock' - I'll omit something for the time being - 'He was wearing a handkerchief over his nose and mouth'?
>
> **A.** No.
>
> **Q.** You did not tell that to the police?
>
> **A.** The one with...
>
> **Q.** You did not tell that to the police?
>
> **A.** No. I know I said about the short one, not the long one."

She was shown that portion of her written statement to the police, which she agreed she had read over and signed, but she still insisted that she did not say that to the police.

It was further put to her that she told the police that the man who had the crook lock was of black complexion and her answer was:

> "**A.** No, I am sure I said dark, not black. Well I see black there but I said dark"

Those sections of the statement were admitted in evidence, and read as follows:

> "The one with crooked lock is of a black complexion about 5 feet 10 inches tall. He was wearing a handkerchief over his nose and mouth."

The description of the "tall one" was extremely vague, and could not have been of any assistance to the police in identifying the intruder. Furthermore, her evidence at the trial of having seen the face of the tall man must have been terribly weakened by what was recorded in her written statement to the police. A handkerchief placed over the nose and mouth of a person disturbs the harmony of his facial features and greatly

inhibits the proper identification of that person by facial features. The witness, however, pointed out the 1st appellant by his facial features on an identity parade as the tall man who she saw in her bedroom some three weeks before. The parade was held in Black River, in the parish of St. Elizabeth, in the presence of both Mr. Eric Sanderman and Mr. Skein, justices of the peace for Manchester, and Wayne Hamilton, a brother of the 1st appellant, watching the proceedings. There was no attorney-at-law in attendance.

Mr. Brown contended that the identity parade was not fair with the result that there had been a substantial miscarriage of justice. This is how he particularised the ground:

> "That the evidence of the conduct of the identification parade upon which the applicant was identified was wholly unreliable for the following reasons:
>
> The presence of a person in his capacity of a justice of the peace from the parish which the case arose, who travelled to the parish of St. Elizabeth who knew the applicant before and was a close friend of the deceased and who communicated with the witness Lewis during the parade."

The evidence disclosed that Mrs. Lewis viewed two different parades the same day. The suspect on the first parade was the 2nd appellant, and she failed to identify him. Both justices of the peace were present then, and they were also present when Mrs. Lewis viewed the second parade on which the 1st appellant was the suspect. The officer who conducted this parade testified that Mrs. Lewis was in the room for about 10 to 15 minutes before identifying the 1st appellant. Mr. Sanderman did not recall the time that elapsed, but said she walked "to and forth" along the

line prior to pointing out the 1st appellant, and concluded that "a short walk like that, m'Lord, could have taken a minute or so" and that she spent "about the same time frame." Mrs. Lewis said that when she entered the room, she saw Mr. Sanderman, Mr. Skein and a third man whom she described firstly as a policeman, but whom she later discovered to be the brother of the 1st appellant. She was not sure about walking several times up and down the line, but said, "I came up and down, is that several times?" Counsel suggested to the witness that while she was walking along the line, Mr. Sanderman told her to point at number four, the position where the 1st appellant was standing, and it was only then that she pointed out the 1st appellant. She strongly denied that and so did Mr. Sanderman when he gave evidence. But counsel did not accept Mrs. Lewis' answer, and this was how the cross-examination continued: (pp. 71-72)

> "**Q.** Just as you pointed at the man at number four, Mrs. Lewis, do you recall the man or the little fellow, Wayne Hamilton, calling out to the police officer and went to the door, a door, met the police sergeant and they had a conversation? Do you recall that?
>
> **A.** I didn't see him and the police talk. I never spoke to anybody. When you go on an I.D., you don't speak to people, as far as I am concerned.
>
> **Q.** That is what is supposed to happen. That is what is supposed to happen.
>
> **A.** And I didn't speak to anyone.
>
> **Q.** I am suggesting to you that someone spoke to you.
>
> **A.** I don't know of that, Counsel.
>
> **Q.** Mr. Sanderman...

"**A.** What do you say?

**Q.** I say Mr. Sanderman spoke to you.

**A.** You want to know what he spoke to me about?

**Q.** Yes.

**A.** The mirror in the place was getting foggy and I said, 'Can I ask the police to come a little nearer to the glass?' Because the place was hot.

**Q.** Mr. Sanderman said that to you.

**A.** I asked him if I could ask the sergeant. I am going to an I.D. for the first time.

**Q.** So you did speak to Mr. Sanderman?

**A.** About that. But you are talking about something else. That is what I asked Mr. Sanderman.

**Q.** I suggest to you that after Mr. Sanderman spoke to you and the young man went to the door and spoke to the sergeant...?

**HIS LORDSHIP:** Where is the door in relation to the...?

**MR. MORGAN:** She is in the room.

**HIS LORDSHIP:** She is facing the mirror.

**MR. MORGAN:** He was with her.

**HIS LORDSHIP:** You said that this little fellow went to the door and spoke to the sergeant. All I am asking you, where would the door be in relation to her? The side or behind or where?

**MR. MORGAN:** Crave your indulgence. My friend who lives in Black River knows the place.

**Q.** The door was to the side of you?

> " **HIS LORDSHIP:** Anyhow she said she didn't see it.
>
> **Q.** And after you pointed at number four, Wayne Hamilton, the little fellow, became boisterous and was saying that it wasn't fair?
>
> **A.** Became boisterous?"

The fairness of the identity parade was a live issue in the case. Sergeant Osbourne Whitlon, the officer who conducted the parade, confirmed that Mrs. Lewis did call to him and request that the men come forward as the mirror was frosty. The men did so and after returning to their position, the witness said, "Yes sir, the person is under number four." He then requested the witness to sign the parade forms, but he could not see her sign, as she was on the other side of the mirror from where he was. He continued: (p. 119)

> "**A.** After I was advised that she was taken from the room, Wayne Hamilton called to me and told me that he wanted to speak with me confidentially. I asked him to come around and meet me at the door to the opposite side and he came around and told me something.
>
> **HIS LORDSHIP:** Which will remain confidential.
>
> **A.** I asked him why he didn't tell me when the witness was there and he told me he didn't want to do so.
>
> **HIS LORDSHIP:** No. Any conversation between you and him is not evidence."

The officer said that the parade concluded after another witness had been brought on. He then asked the 1st appellant if he had any comments as to how the parade was conducted and he replied,

"Yes sir, the parade wasn't held fairly", and he recorded it on the identification form.

The learned trial judge did not allow the officer to testify as to what Hamilton told him. Hamilton said in evidence that he heard Mr. Sanderman whispering to Mrs. Lewis after she had walked along the line of men for about seven times, but, again, he was not allowed to say what he heard. This must be viewed in the light of Mrs. Lewis' evidence of what transpired between Mr. Sanderman and herself on the parade. Mr. Sanderman admitted that he was a very good friend of the deceased since 1944, and that he knew Mrs. Lewis since 1959. The deceased's death was traumatic for him. He knew the 1st appellant "for years". When asked who it was who invited him to Black River on the parade, this is what followed: (p. 178)

> "**A.** The police, of course.
>
> **Q.** Which police officers?
>
> **A.** First, it was Inspector Pinnock, and then I was accompanied by Sergeant Whitlon.
>
> **Q.** Mr. Whitlon did not himself ask you to come?
>
> **A.** He was told in my presence that I was going with him.
>
> **Q.** He did not tell you, you are coming with him?
>
> **A.** I can't recall sir, but he accepted it."

The Jamaica Constabulary Force Rules, 1939, (Jamaica Gazette Extraordinary - July 29, 1939) sets out the procedure to be

adopted in arranging for and conducting an identity parade. Section 552 clearly states that:

> "552. In arranging for personal identification, every precaution shall be taken (a) to exclude any suspicion of unfairness ... and (b) to make sure that the witnesses' ability to recognize the accused has been fairly and adequately tested." [Emphasis supplied]

Rule 554A, which was inserted by an amendment to the principal rules in 1977 (The Jamaica Constabulary Force (Amendment) Rules 1977 - Jamaica Gazette Supplement Proclamations, Rules and Regulations - December 23, 1977), makes provisions for the use of one-way mirrors on identity parades, and specifically states that "the following provisions shall apply whenever a one-way mirror is used for the purpose of an identification parade":

> "(i) An Attorney-at-Law subject to subparagraph (iii) hereof, and a Justice of the Peace shall be present and both shall be placed in a position to be decided by the officer conducting the parade.
>
> (ii) The Attorney-at-Law shall be one chosen by the prisoner so, however, that if the prisoner chooses no particular Attorney-at-Law, or if the Attorney-at-Law of the prisoner's choice is not available for the parade, the Attorney-at-Law shall be either drawn from a Legal Aid Clinic or "selected by the officer conducting the parade from among Attorneys-at-Law willing to undertake the assignment.
>
> (iii) When an Attorney-at-Law fails or is unable to attend for an identification parade the identification parade may be postponed once and if on the date set for the postponed parade an Attorney-at-Law does not attend but a Justice of the Peace is present the identification parade may be held in the absence of the Attorney-at-Law.
>
> (iv) Neither an Attorney-at-Law nor a Justice of the Peace when present at the parade shall speak to any witness or to any

> "person, other than the accused, being paraded."

In considering complaints of unfairness in the conduct of an identity parade, we have to consider not only what actually transpired at the time of the line up, but also all circumstances leading up to the holding of the parade. The jury must be given a fair and balanced view of all the issues that may impinge on the fairness of the parade. This court has made it very plain that the regulations must be strictly adhered to. In ***R. v. Gibson*** [1975] 13 J.L.R. 207, Graham-Perkins JA, in delivering the judgment of the court, said: (at p. 209)

> "It is fundamental to the administration of our criminal justice that where the prosecution relies solely on the identification of an accused person at an identity parade nothing should be done, or left undone, to impinge on the absolute fairness of that parade. An accused is entitled to no less. This is the clear duty of those charged with the responsibility of conducting, or arranging for, identification parades. Of paramount importance, too, is the right of a jury in a criminal trial to have placed before them the fullest disclosure of every material fact that might conceivably affect their deliberations; more particularly, they are entitled to be informed of any impropriety, and the reason therefor, that may have occurred in or about the conduct of an identification parade."

There can be no doubt that in the instant case, the relevant rules were not adhered to. We did not attach much importance to the venue of the parade. However, in our view, the fact that Mr. Sanderman, a close friend of the deceased and Mrs. Lewis, and a justice of the peace for Manchester, was invited to attend the parade in St. Elizabeth, could give rise to a suspicion of

unfairness. There was no evidence to support any deliberate act of impropriety on the part of Mr. Sanderman, but the admitted fact that he and the witness Mrs. Lewis spoke during the course of the parade is unfortunate, and in breach of rule 554A(iv) above. There was no evidence to explain the absence of an attorney-at-law on the parade. In fact, it is evident that no attempt was made to secure the presence of an attorney-at-law in compliance with the provisions of rule 554A. The officer said he told the 1st appellant that he would be conducting an identification parade for him "and if he so desires he could have his attorney, a relative or a friend present to witness the parade on his behalf." This may be sufficient when it is not intended to use the one-way mirror for the purpose of the identity parade. However, whenever the one-way mirror system is employed, the provisions of rule 554A ought to be adhered to. Breaches of these provisions may give rise to a suspicion of unfairness in the conduct of the parade, unless the reasons for such breaches are satisfactorily explained. There were no such explanations in the instant case. Counsel who appeared in the court below for the 1st appellant, it seems, realised the irregularity in the arrangements for the parade. However, it appears that his efforts to establish it through cross-examination of the officer were hampered somewhat by the objection of the prosecution counsel and the ruling of the learned trial judge. This is how it is recorded: (pp. 129-131)

> "Q. Now sergeant, are you familiar with the rule which says that an attorney ought to be present on an identification parade that is being held with the use of a one-way mirror, rule 554?

"A. If and when it is possible, sir.

Q. Are you familiar with the rule which requires, rule 554 which requires that an attorney ought to be present at an ID parade whenever the use of the one-way mirror is being used?

A. Yes, m'Lord sir, I am.

**MR. MCDONALD:** M'Lord, I am objecting, because there is no such rule. Because, to ask a question framed in that way, no rule like that exists.

**MR. MORGAN:** I refer specifically, m'Lord, to the Queen against Desmond Williams, decided by the Supreme Court of the Court of Appeal, m'Lord, Appeal number one eight three of 88, decided June of 1988.

**HIS LORDSHIP:** Which Williams?

**MR. MORGAN:** Desmond Williams, sir, the decision of Messrs Justice Rowe, Campbell and Whyte. It specifically states, m'Lord, that the rule is framed in such a way as to make and I quote...

**HIS LORDSHIP:** You reading from a judgement?

**HIS LORDSHIP:** I have to deal with the rule first.

**MR. MORGAN:** Well, the rule requires, m'Lord, the presence of an Attorney-at-law. The matter then, specifically, in a case where a one-way mirror is being used. The court, m'Lord, in its decision alluded to the fact that the nature of the regulations makes it imperative that that be so, although, the court decline to interpret that imperative necessary to suggest that the parade...

**HIS LORDSHIP:** Cannot be held without one. That is how I understand it.

**MR. MORGAN:** Yes, sir, but I need to...

" **HIS LORDSHIP:** Counsel, we are not going into the matter now. You, see in our jurisdiction, in our jurisdiction, things don't work the same, you know, because, where, take a person who cannot of his own means afford a lawyer...

**MR. MORGAN:** Indeed.

**HIS LORDSHIP:** The stage is not reached until it comes before the court. There is nothing in place, in our system, he has to be charged.

**MR. MORGAN:** You see, m'Lord, counsel on this side, has a duty, because not only is...

**HIS LORDSHIP:** You might not have to address me or the jury.

**MR. MORGAN:** The law is very clear. I simply ask the question.

**HIS LORDSHIP:** Are you familiar with the rules that an attorney ought to be...

**MR. MCDONALD:** Ought is mandatory, m'Lord, there is no such rule. The rule is in - the Amendment Act states specifically how identification parade ought to be conducted. There is no such rule, there is no interpretation of Desmond Williams, that my friend can formulate.

**MR. MORGAN:** Apparently, my friend doesn't know, the court, the weight ought to be attached to the identification parade.

**HIS LORDSHIP:** Yes? Anyway, he is aware of the rule, but he is not aware that an attorney, was to be there."

The court examined the provisions of rule 554A (supra) in ***R. v. Bradley Graham & Randy Lewis*** (unreported) S.C.C.A. 158 & 159/81 - delivered 26/6/86: Rowe P., in delivering the judgment of the court said:

> "Notwithstanding the imperative nature of the language used in Regulation 554A that an attorney-at-law... 'shall be present', we

> "decline to interpret this provision to mean that his absence will, in all circumstances, except those provided for in 554A(iii), invalidate the parade and render an identification made thereat a nullity. We think that the Regulations are procedural only and any positive breach will have the effect of weakening the weight to be given to an identification made at such a parade."

In light of the above principle, a pertinent question was whether, in the circumstances of this case, the irregularity created by the absence of an attorney-at-law invalidated the parade and rendered the identification a nullity. The 1st appellant requested the officer to contact his mother for her to retain an attorney-at-law on his behalf, to be present at the parade scheduled for the 11th August, 1994. The officer said he carried out the request. The parade was postponed from the 11th August to the 20th August. On that day, the officer said he informed the 1st appellant that he was ready to conduct the parade whereupon the 1st appellant told him that his brother, Wayne Hamilton, was supposed to be outside and requested that he be allowed to attend the parade. Wayne Hamilton attended and along with two justices of the peace, they observed the parade from the reverse side of the mirror. It was Hamilton who raised the question of the unfairness of the parade and, in our view, the absence of an attorney-at-law on the parade did not render it invalid.

However, we were obliged to consider all the circumstances surrounding the visual identification of the 1st appellant by the witness Mrs. Lewis. There were many weaknesses in her identification evidence. In a case such as this, a description

of the assailant would have been of paramount importance, but the description given to the police shortly after the incident went no further than saying he was "of a black complexion about 5'10" tall." At the trial she said she used the word "dark" not "black". Possibly her description could go no further, because in her statement to the police she said "he was wearing a handkerchief over his nose and mouth." At the trial she denied that to be so. Such a discrepancy weakened the identification evidence. The various irregularities in the preparation and conduct of the identity parade which we have already pointed out as casting suspicion on the fairness of the parade also weakened the weight to be attached to the identification of the 1st appellant by Mrs. Lewis.

A most important issue was whether Mrs. Lewis was assisted in her identification of the 1st appellant by Mr. Sanderman, one of the justices of the peace in attendance on the parade. In our view, the jury were deprived of hearing evidence relevant to the issue because of the rulings of the learned trial judge. The whole purpose of having the brother of the 1st appellant in attendance on the parade was to observe its fairness. If, as in this case, the person observing or the suspect challenges the fairness of the conduct of the parade, then, in our view, such evidence in that regard is relevant. Accordingly, we agreed with counsel that the learned trial judge was in error when he refused to allow the officer conducting the parade to state the particulars of the objection raised by the brother of the 1st appellant and, again, when the said witness was not allowed to

testify as to what he said he heard Mr. Sanderman whisper to Mrs. Lewis just before she identified the 1st appellant. The jury were entitled to hear not only allegations of unfairness in the conduct of the parade, but also the reason for such allegations, since, in the final analysis, it was their responsibility to say whether or not the identification was fairly made. Full disclosure of all the circumstances leading up to, and connected with, the identification of the suspect should have been made to the jury, and evidence of any fact that may have impinged on the fairness of the parade was relevant and admissible and ought not to have been excluded.

Mr. Hibbert quite frankly conceded that having regard to all the circumstances surrounding the visual identification of the 1st appellant by Mrs. Lewis, the conviction could not stand. We agreed with counsel for the appellant that the quality of the evidence was so poor that the case should not have been left to the jury. In our judgment, there was a substantial miscarriage of justice and, accordingly, we also allowed the appeal of the 1st appellant.