**JAMAICA**

**IN THE COURT OF APPEAL**

**SUPREME COURT CRIMINAL APPEAL NO. 62/96**

**BEFORE:** **THE HON. MR. JUSTICE FORTE, J.A.**
**THE HON. MR. JUSTICE GORDON, J.A.**
**THE HON. MR. JUSTICE PATTERSON, J.A.**

**REGINA vs. NORMAN GRIFFITHS**

**A. G. Kitchen for appellant**

**Kent Pantry, Q.C., Senior Deputy Director of Public Prosecutions, and Miss Dawn Eaton for the Crown**

**November 25 and December 20, 1996**

**PATTERSON , J.A.:**

Norman Griffiths ("the appellant") was convicted in the St. Catherine Circuit Court on the 18th July, 1996, of the offence of carnal abuse and sentenced to imprisonment for ten years. On the 25th November, 1996, we granted his application for leave to appeal against his conviction and sentence. We treated the hearing of the application as the hearing of the appeal and allowed the appeal, quashed his conviction, set aside the sentence of imprisonment and directed a judgment and verdict of acquittal to be entered. These are our reasons for so doing.

Shortly, what happened in this case was as follows: On the 10th March, 1994, at about 12:30 p.m. Janique Campbell, a student attending the

Portsmouth Primary School in St. Catherine, was carnally abused on the bank of a canal which runs by the school compound. Her assailant had dragged her from the school compound to that spot, and there he ravished this very young girl; she was than only nine years and ten months old. Her assailant made good his escape after two school boys, on seeing what was happening, flung stones at him. The boys took the girl to the headmistress of the school and she reported what had been done to her. She was taken to the Waterford Police Station and after that to the Spanish Town Hospital where she was admitted for three days and treated. A doctor at the hospital examined her and found two lacerations, each about 2 1/2 inches long at the neck of her vagina and small lacerations on the perineum. She was bleeding profusely from the injuries, but the doctor opined that she was not in shock. She was coherent, alert and able to answer questions. The lacerations were sutured.

There was no doubt that this young girl had been the victim of a brutal sexual assault. The crucial issue in the case was the identity of her assailant. The prosecution adduced evidence to prove that the appellant was the culprit, but at the close of their case, the defence submitted that there was "no case" for the appellant to answer. The submission was over-ruled, and that ruling formed the basis for the chief ground of appeal argued before us. That ground was framed as follows:

> "The Learned Trial Judge erred in law when he failed to uphold the submission of no case to answer at the close of the prosecution's case."

It is well established that there is a special need for caution when the crucial issue turns on the visual identification of the culprit. Accordingly, the trial judge must examine closely the quality of the identifying evidence at the close of the prosecution case. When the quality of such evidence is poor in his judgment, then the judge should withdraw the case from the jury and direct an acquittal unless there is other evidence which goes in support of the correctness of the identification (see ***R. v. Breslin*** [1985] 80 Cr. App. R. 226). It was necessary, therefore, to examine the identity evidence and assess its quality.

The prosecution case rested on the visual identification of the appellant by the victim and a twelve year old school boy. Janique Campbell did not see who it was that held her in the school yard. She thought it was her brother Cory who was holding her from behind and dragging her towards the canal. The first opportunity she said she had of seeing who it was came when the person was pulling down her panties. She said she saw the person's face then. She recognised him to be a person that she had seen before selling candy at the school gate to her friends. She had seen him that very day at about eight-thirty to nine o'clock. She said she saw his face when she was praying just before he assaulted her sexually. The next time she saw the man's face was when the boys were stoning him and he was also stoning the boys. He was then just about two feet from her. Finally, she saw his face when he was running away. That was the sum total of the opportunity that she had of seeing her assailant. But there were palpable weaknesses in her identifying evidence. It is always difficult for any person who is subjected to an attack similar in nature to that suffered by

the witness to judge accurately the time the incident lasted. Janique said at one stage that she saw his face for a second and at another stage, for a minute. Those estimations of time may not be accurate, but she did say that it was not for a very long time that she saw his face. One would have thought, however, that she had enough view of her assailant so as to be able to identify him, especially since she said she knew him to be the candy-man. However, despite several opportunities of at least describing who it was that had assaulted her, she said nothing. She did not tell her teacher that it was the candy-man, nor did she tell the police at the station who it was. But what is more, she did not describe her assailant to the doctor who attended her, and when two policemen took the appellant to the hospital for a confrontation on the very day of the incident, she testified that they asked her if the appellant was the man and she told them no.

That, in our view, created an irreversible blemish in the quality of her identifying evidence. Her subsequent dock identification and the explanation as to why she had failed to identify the appellant at such an early opportunity did not improve the very poor quality of her identifying evidence. She had testified that when the person held her, she tried to scream but he covered her mouth and told her that if she screamed, he would throw her in the canal where alligators would bite her. That was the explanation she gave why she did not identify the appellant to the police. But that was hardly a reasonable explanation, having regard to the fact that she was then far removed from the canal, and the appellant was escorted by two policemen. Further, the doctor

said she was alert and able to answer questions. Taking all the circumstances into consideration, in our judgment, the quality of the identifying evidence of this witness was very poor indeed, and could not be relied on.

The other witness was Fernando Robinson, a twelve year old student. He testified that he saw a man "get up off the girl" on the bank of the canal. He and another boy threw stones at the man and the man also stoned them. He said he was able to see the man's face, and he realised it was a man he had seen for the first time that morning, selling candies to children at the school. The weaknesses in his identifying evidence became apparent when he was cross-examined. He said he had seen the appellant three or four times, but he was not the man he had seen with the girl. He was re-examined and said he had seen the appellant selling candies at the school gate on the sports day. On the face of it, it could be thought that the young boy was giving "two different versions", but in our view there was no inconsistency in his evidence. We understood him to be saying that he saw the appellant selling candy by the school gate the morning of the incident, and that he is the man in court, but he was not the one he saw interfering with the girl. The headmistress at the school testified that on the day in question "a whole lot of vendors were there that day milling around on the compound of the school." She described the day as "mixed up". What is more, the appellant was never placed on an identity parade, and so this witness was asked to make a dock identification of someone whom he had seen once or twice on the day of the incident. It was not evident how far away he was from the man he said he saw interfering with the girl, and

so it was impossible to say if he had a good enough view of him. There is no evidence that he described the man he saw to the police. It is quite clear that his identifying evidence was quite worthless, and did nothing to assist the poor quality of that of the complainant. There was no other evidence which went in support of the correctness of the identification by the complainant and her evidence stood along at the close of the prosecution case.

In our judgment, the quality of the identifying evidence was so poor that the learned trial judge should have upheld the no-case submission and take away the case from the jury. His failure to do so resulted in a miscarriage of justice and accordingly the conviction could not stand. This ground was sufficient to dispose of the appeal.