JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 187/04

BEFORE: **THE HON MR JUSTICE SMITH, J.A.**
THE HON MR JUSTICE K. HARRISON, J.A.
THE HON MRS JUSTICE HARRIS, J.A. (Ag.)

R. v Vincent Jones

Miss Carolyn Reid & Mr. Peter Champagnie for the Appellant

Mrs. Caroline Williamson-Hay & Mr. Jeremy Taylor for the Crown

March 20 & 21, April 3 & 7, 2006

HARRIS, J.A. (Ag.):

The appellant was convicted on October 6, 2004 in the High Court Division of the Gun Court in Montego Bay, St. James. He was charged on an indictment containing 3 counts. The first count charged him with the offence of illegal possession of firearm, the second charged him with burglary and the third with rape. He was sentenced to a term of imprisonment of 15 years hard labour on count 1, 20

years hard labour on count 2, and 25 years hard labour on count 3. The sentences are to run concurrently.

The evidence of the complainant is that on the morning of April 24, 2004, she was at her home with her two nieces. She was asleep in her bedroom when she was awakened by the sound of the door being opened. A man armed with a gun entered the room and covered her head with a sheet.

He asked her for money. She told him she had none. The appellant entered the room shortly thereafter. Both men carried out a search of drawers in the room. The appellant left the room and then returned . On his return, with the sheet still covering her head, he pulled her to the edge of the bed and had sexual intercourse with her without her consent.

When the men entered the room, a television set which was on a what-not above her head, was on, the light from which aided her to view the face of the appellant. The sheet which covered her head was not thick. Prior to the day of the incident, she had seen the appellant briefly, on two separate occasions at a market where her mother works. He would greet her mother while passing the market.

On June 28, 2004 she saw him. She spoke to her mother and then called the police. On the arrival of the police, she pointed him out to them after making a report. The appellant was taken into custody,

arrested and charged with the offences for which he had been convicted.

In an unsworn statement the appellant denied knowledge of the matter. He asserted that he first learnt about it at the time of his arrest. This the learned trial judge rejected.

At the end of the crown's case, counsel for the appellant made a no case submission which the learned trial judge did not uphold.

The grounds on which the appellant relies are as follows:

Ground 1

> "1. The learned Trial Judge erred in law. In that he failed to uphold a submission of no case to answer in circumstances where the quality of the identification evidence was weak and manifestly unreliable."

Ground 2

> "The sentence of twenty five years (25) was manifestly excessive having regard to all the circumstances."

Ground C (of the original grounds)

> "The verdict is unreasonable having regard to the evidence."

Before giving consideration to the grounds it is apt to make reference to the law touching a no case submission as well as the issue of evidence of identification.

On a submission of no case to answer, the approach which ought to be adopted by a trial Judge, was enunciated by Lord Lane C. J., in ***R v Galbraith*** [1981] 2 ALL ER 1060, at page 1062 he said:

> "Where the judge comes to the conclusion that the Crown's evidence, taken at its highest, is such that a jury properly directed could not properly convict on it, it is his duty, on a submission being made, to stop the case. Where however the Crown's evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence on which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury."

Evidence of visual identification creates an inherent danger of wrongful conviction. Consequently, the correctness of the identification of an accused is of manifest importance. Visual identification carries with it a distinct possibility that a witness might be mistaken. This is also true of an apparently honest witness.

In dealing with cases relating to visual identification, the principles by which a trial judge should be guided were propounded by Lord Widgery C.J. in ***R v Turnbull*** [1976] 3 All ER 549, at page 553 he said:

> "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."

In a case of disputed identity, the reliability of the evidence is essentially within the province of the jury while it's adequacy is primarily the function of the trial judge. This principle was re-affirmed in ***R v Daley*** (1993) 43 WIR 325.

The Privy Council, in ***R v Daley*** (supra) re-stated the law with respect to evidence of visual identification. The re-statement of the law was promulgated within the context of the principles formulated in ***Galbraith v R*** (supra) and ***Turnbull v R*** (supra). On the issue of the withdrawal of a case from a jury , Lord Mustill, in delivering the advice of the Board, at page 334 stated:

> ". . . in the kind of identification case dealt with by *R v Turnbull* the case is withdrawn from the jury not because the judge considers the witness is lying but because the evidence even if taken to be honest has a base which is so slender that it is unreliable and therefore not sufficient to found a conviction: and indeed, as *R v Turnbull* itself emphasized, the fact that an honest witness may be mistaken on identification is a particular source of risk. When assessing the 'quality' of the evidence under the *Turnbull* doctrine, the jury is protected from acting upon the type of evidence which, even if believed, experience has shown to be a possible source of injustice."

In ***R v. Fergus*** (1994) 98 Cr. APP R 325 Steyn L. J, in addressing the issue of evidence of identification, he referred to Lord Widgery's statement in ***R v Turnbull*** as regards the duty of a trial judge where the quality of the identification is poor, then, at page 316 he continued:

> ". . . but it is important to note that the trial judge's duty to withdraw the case from the jury in an identification case is wider than the general duty of a trial judge in respect of a submission of no case to answer as enunciated in ***Galbraith*** (1981) 73 Cr. App. R. 124, [1981] 1 W.L.R. 1039. Moreover ***Turnbull*** plainly contemplates that the position must be assessed not only at the end of the prosecution case but also at the close of the accused's case at pp. 137, 138 and 228H-229A. Secondly, Turnbull requires the judge to warn the jury of the special need for caution before convicting the accused in reliance on visual identification and to explain that a mistaken witness may be a convincing one. That means that the jury ought to be told that honesty as such is no guarantee against a false impression being so indelibly imprinted on the mind as to convince an honest witness that it was wholly reliable. ***Reid v R*** (1990) 90 Cr. App. R. 121, [1990] 1 AC.363, 380F-381C. We do not, of course, say that these particular words must be used but the risk must be clearly conveyed to the jury. Thirdly, *Turnbull* requires the judge to direct the jury to examine the circumstances in which the identification was made".

He went on to say:

> "Finally, he should remind the jury of any specific weaknesses which had appeared in the identification evidence."

He further said:

> "Needless to say, the judge must deal with the specific weaknesses in a coherent manner so that the cumulative impact of those specific weaknesses is fairly placed on the jury."

The principles governing evidence of visual identification, are not limited to cases of "fleeting glance" of persons unknown or previously known to the victim or an identifying person. They are equally applicable to cases where the person carrying out the identification had prior knowledge of persons being identified but the conditions under which the identification was made, were poor or difficult.

An honest and convincing witness may be mistaken. Honesty in itself does not operate as a safeguard against the impeachment of the reliability of a witness. Specific weaknesses in the evidence must be specifically addressed so that the "cumulative impact of these weaknesses is fairly placed before the jury". See ***R v Fergus*** (supra).

In cases in which guilt rests on visual identification, it is incumbent on a trial judge, on the evidence before him, to address and scrupulously examine the weaknesses and if the identification is poor and unsupported, an accused ought not to be called upon to answer a case.

We now turn to the grounds.

Ground 1- No case submission.

Miss Reid argued that the evidence of identification was weak, in that, it had been made under difficult conditions. She submitted that the identification was made through a sheet which is an obstruction and by light from a television set. She maintained that in these circumstances the learned trial judge should have upheld a no case submission.

The prosecution's case was wholly dependent on the visual identification of that person who the complainant said was present at her house on the morning of the incident and committed the offences for which the appellant has been convicted. She testified that the appellant was that person. No other evidence in support of the identification exists.

At the end of the crown's case, two fundamental weaknesses arose. Firstly, the matter of the complainant's head being covered with the sheet. Secondly, the insufficiency of the lighting available to her in viewing the assailant. These the learned trial judge ought to have carefully considered.

When the first man entered the room, he covered the head of the complainant with a sheet. Her head remained covered throughout the ordeal and up to the time the assailant left. The complainant described the sheet as being "not so thick". This sheet was not

tendered in evidence as an exhibit. It cannot be refuted that sheets carry varying degrees of thickness. The absence of the sheet in evidence would have clearly placed the Crown at a disadvantage in proving that the complainant would have had the ability to observe the face of her assailant. The correctness of the identification of the appellant, by the complainant could be dubious notwithstanding the complainant was an honest witness.

The television was placed on an item of furniture above the bed. This gives rise to the question whether the light from the television set could have assisted the complainant in viewing her attacker. The incident occurred after 5:00 o'clock in the morning, not yet daylight. The complainant's head was covered by the sheet. This could very well raise some doubt as to whether, in the circumstances, she could have discerned the face of her assailant aided by the light from a television set.

At the end of the crown's case, in assessing the quality of the identification evidence, the learned trial judge was obliged to have given special, careful and meticulous consideration to the foregoing weaknesses in the case. In exercising his role as judge of the law, he would have been bound to conclude that the appellant ought not to have been called upon to answer the charges. It follows therefore that the verdict cannot stand.

Our decision renders it unnecessary to give consideration to grounds 2 and (c).

The appeal is allowed. The convictions are quashed, the sentences set aside and verdicts of acquittal entered.