[2023] JMCA Crim 62

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MRS JUSTICE FOSTER-PUSEY JA
THE HON MR JUSTICE D FRASER JA
THE HON MR JUSTICE BROWN JA

PARISH COURT CRIMINAL APPEAL NO COA2023PCCR00001

ROHAN MURRAY v R

Walter Melbourne for the appellant

Miss Channa Ormsby and Miss Carolyn Wright for the Crown

4 and 20 December 2023

Criminal Law – Robbery with Aggravation – Identification Evidence – Turnbull Guidelines

BROWN JA

[1] The appellant was convicted on an indictment charging him with robbery with aggravation before Her Hon Mrs N Ebanks-Miller ('the learned Parish Court Judge') in the Kingston and Saint Andrew Parish Court, on 15 September 2022, at the end of a trial conducted over four days. On 3 February 2023, the learned Parish Court Judge sentenced the appellant to a term of 14 months' imprisonment at hard labour. The learned Parish Court Judge also ordered that the appellant make restitution in the sum of $50,000.00. The latter order was suspended until 2 May 2023.

[2] On the day that he was sentenced, the appellant gave verbal notice of appeal. The appellant listed two original grounds of appeal. Those grounds are reproduced immediately below:

> "(a). The trial Judge erred in not upholding a no case submission by my counsel."

(b). The verdict is unreasonable having regard to the evidence."

[3] In addition to the above grounds of appeal, the appellant's attorney-at-law filed four supplemental grounds. The first of which is a nigh verbatim repetition of original ground (a), while the fourth supplemental ground is identical to original ground (b). The other two supplemental grounds are:

> "ii. The Judge erred in failing to interpret and apply the law of identification.
>
> iii. The Learned Judge descended into the arena by recalling the witness to identify the Appellant after the no case submission."

Background

[4] On 25 August 2021, at about 12:25 pm, Mrs Julie Blair-Johnson ('Mrs Blair-Johnson'), a sergeant in the Jamaica Constabulary Force, was walking along King Street in the parish of Kingston. Mrs Blair-Johnson was dressed in civilian clothes and armed with her service pistol. The service pistol was concealed beneath the polo shirt she wore. She sported an 18-karat gold bracelet, valued at $100,000.00, on her right arm. This day was the end of a lockdown, occasioned by the Covid-19 pandemic and King Street was abuzz with pedestrians.

[5] Mrs Blair-Johnson's walk was interrupted by someone holding her right hand from behind and a soft male voice saying, "woman don't move". Mrs Blair-Johnson looked to her right and noticed the person holding onto her was a man, who wore no face covering. She looked at his face for about one minute. She did not know this man before. She said to the man holding onto her hand, "weh yuh say?". The assailant repeated, in the same soft voice, "woman don't move". The man held a black handle knife to her chest as he spoke, with his right hand.

[6] When the man repeated his command, Mrs Blair-Johnson got into what she described as a fight position. She positioned her left foot to the rear and her right foot

forward. She began wrestling with her attacker. She was able to forcefully take the man's hand down to her waist. Having done that she lifted her polo shirt, removed her service pistol and pointed it at the man. The man then crouched, or "ducked down", in her words, and ran into the crowd on King Street. She gave chase but the man eluded her. The wrestling, she said, lasted approximately five minutes.

[7] After the man escaped, Mrs Blair-Johnson noticed that her bracelet was missing. Consequently, she made a report of the robbery at the Central Police Station, to Corporal Brown. Apparently, that is where the matter was left until November 2021.

[8] On 13 November 2021, Mrs Blair-Johnson was on shift command duty at the Half Way Tree Police Station between 8:00 am and 6:00 pm. At about 4:20 pm that day, she was in the reception area, better known as the guardroom, when the appellant and another man were brought there as suspects in another crime, by Constable Bonnick. Upon seeing the appellant, Mrs Blair-Johnson, recognised him, and said to him, "[a] you rob mi down town di adda day". To that accusation, the appellant allegedly responded, "are you sure it's me?" It was suggested that what the appellant said was, "Him no rob nobody and him don't know you", which she denied. Two days later, on 15 November 2021, Mrs Blair-Johnson gave a written statement in the matter, for the first time.

[9] At the end of the prosecution's case, the defence made a submission of no case to answer, which the learned Parish Court Judge rejected.

[10] The appellant made an unsworn statement. He denied robbing Mrs Blair-Johnson. He said that at the material time he was in Santa Cruz, in the parish of Saint Elizabeth, engaged in construction work. Further, that he lived in Brighton, Santa Cruz with his sister.

Issue

[11] The overarching issue in this appeal, arising from original ground (a) and supplemental ground ii, is the adequacy and reliability of the eyewitness identification evidence.

Submissions

[12] Learned counsel for the appellant complained that the learned Parish Court Judge ought to have upheld the submission of no case to answer. The pith and substance of counsel's complaint was the absence of any description of the assailant in circumstances where the robber was not previously known to Mrs Blair-Johnson and she gave no statement in the matter until after the 'confrontation' identification of the appellant, almost three months after the incident. The effect of the absence of any description, it was argued, resulted in there being absolutely no safeguards to protect the rights of the appellant.

[13] Miss Wright, who submitted on behalf of the Crown, conceded that no description was given. Counsel tried valiantly to argue that the absence of any description was not fatal to the conviction. Learned counsel for the Crown took the court through the checklist in the **Turnbull v R** [1977] 1 QB 224, in her quest to show that the conviction remained safe.

Discussion

[14] There is one golden thread running through cases where the proof of the charge against the defendant depends solely or substantially upon the uncorroborated evidence of visual identification. It is this, the courts are anxious to prevent or reduce the incidence of, miscarriage of justice, occasioned by wrongful convictions resulting from mistaken identification. This basic proposition is the substratum of the watershed decision of **Turnbull v R**, which laid down the guidelines ('**Turnbull** guidelines') judges should follow in addressing juries in cases where identification is the main issue. The express rationale of the **Turnbull** guidelines is to reduce the incidence of miscarriage of justice (see page 228 of the judgment).

[15] The **Turnbull** guidelines enjoin trial judges to perform two functions in these types of cases. First, the jury should be: (a) warned of the special need for caution before convicting the accused in reliance on the correctness of the evidence of visual

identification and (b) instructed on the reason for the warning, adverting to the possibility that one or several mistaken witnesses can be convincing. In this case, the learned Parish Court Judge, sitting alone as she was, exhaustively warned herself. That is, therefore, not an issue in this appeal. Second, the jury should be directed to examine closely the circumstances under which the identification came to be made.

[16] However, in many cases, as in the present, the trial judge is called upon to decide whether the case should be left to the jury or, as here, for consideration by the judge in her role as jury. In these circumstances, the judge is required to apply the acid test of quality to the eyewitness identification evidence. If, upon that assay, the quality of the identification evidence is good, and is undiminished at the end of the case for the defendant, the danger of a mistaken identification is reduced. It is only when the quality of the eyewitness identification is good, that it is safe to leave the case to the jury for their assessment (see **Turnbull v R**, at pages 228-229). On the other hand, if when the eyewitness identification is assayed its quality is determined to be poor, the judge is duty-bound to withdraw the case from the jury and direct an acquittal, unless the identification evidence is supported by other evidence (see **Turnbull v R**, at pages 229-230).

[17] The preponderant considerations in the judge's determination of whether to leave the case for the assessment of the jury, gleaned from the iterations of Lord Widgery in **Turnbull v R**, at pages 229-230, are: (a) was the observation made over a long period of time; or (b) was it made in satisfactory conditions by someone to whom the suspect was known; or (c) was it a fleeting glance; or (d) although the observation was made over a period longer than a fleeting glance, was it made in difficult conditions? If affirmative answers are returned to questions (a) and (b), the quality of the identification evidence is good and the case should be left to the jury. If questions (c) and (d) are answered in the affirmative, the quality of the identification evidence is poor and should not be left to the jury.

[18] In this case, Mrs Blair-Johnson's estimate of the duration of her observation of the person she later identified as the appellant amounted in total to six minutes. The learned

Parish Court Judge viewed the estimate as a probable exaggeration. Notwithstanding, the learned Parish Court Judge found that the observation was not a fleeting glance. Learned counsel for the appellant did not seek to challenge this finding. Having considered the matter, we see no reason to differ.

[19] Accepting, as she did, that the observation was longer than a fleeting glance, the learned Parish Court Judge correctly went on to answer the question whether that longer observation was made in difficult conditions. She concluded that it was (see reasons on page 50 of the record). The learned Parish Court Judge did not isolate any specific reason for so concluding. It may be that since that was the submission made on behalf of the appellant before her, that she also adopted the reasons advanced by counsel. The two reasons counsel gave, repeated before us, were that Mrs Blair-Johnson had said at the material time she was (i) sleepy, as a result of her recent vaccination against the COVID-19 virus; and (ii) traumatised by the incident.

[20] As we tried to articulate above (see paras [17] - [18]) the **Turnbull** guidelines require the judge to withdraw the case from the jury where it was a longer observation made under difficult conditions and there is no other corroborative evidence. So, on the learned Parish Court Judge's assessment, she should have upheld the submission of no case to answer. However, we do not agree that the conditions in which Mrs Blair-Johnson made her observations were, adjectivally, difficult.

[21] The physical conditions in which the observation was made could not, upon any reasonable examination, be considered difficult. The incident occurred proximate to midday. That ensured that there was sufficient light. Despite the press of people along King Street, Mrs Blair-Johnson's view of her assailant was not obstructed, locked as they were, in a wrestling match, and for an appreciable length of time. Although Mrs Blair-Johnson was an active participant in the event, as opposed to a disinterested observer from afar, there is no evidence that she had to be avoiding the robber since she gave no evidence that he slashed at her with the knife. Having to take evasive action may have affected her observation, making it difficult; for example, where the witness was lying

flat on his stomach, in fear for his life and hiding from the men, running past him on the roadway, as obtained in **Junior Reid, Roy Dennis, Oliver Whylie v The Queen, and Errol Reece, Robert Taylor and Delroy Quelch v The Queen** (1989) 26 JLR 336 (see also **Jermaine Plunkett v R** [2021] JMCA Crim 43, where the witness purported to identify the applicant through a haze of smoke and fire emitting from a pistol and high-powered weapon being fired a short hop from him, as he cowered in a corner of that very room, with his back to the shooters; **Dwayne Knight v R** [2017] JMCA Crim 3, is to a similar effect).

[22] On the contrary, Mrs Blair-Johnson's narrative of the events reveals a victim who was singularly focused on her attacker. Her description of the incident shows someone who gained control of the situation to the point where she was able to lift her polo shirt and draw her service weapon. Therefore, that the COVID-19 vaccine was having a somnific impact upon her, and the event itself was traumatising, seemed not to have dulled her senses. On this understanding of the law and the evidence before the learned Parish Court Judge, we think she was wrong in concluding that the observation was made in difficult conditions. Consequently, there is no substance in the argument that the submission of no case to answer should have been upheld.

[23] Mr Melbourne also contended that the procedure by which the appellant was subsequently identified was flawed. Learned counsel complained that the appellant was brought directly to the reception area and not the cells, which are housed on a separate building. Relying on **R v Leroy Hassock** (1977) 15 JLR 135, learned counsel submitted that this was an impropriety which should not have happened. Complaint was also made that the 'confrontation' took place almost three months after the incident, which made this case distinguishable from **R v Trevor Dennis** (1970) 12 JLR 249. Lastly, counsel took issue with the absence of any evidence that Mrs Blair-Johnson had given a description of the appellant before she pointed him out at the police station.

[24] We will take first the argument that the appellant was subsequently identified by way of confrontation. Confrontation is one of the procedures by which the reliability of a

witness' prior or initial identification of a suspect is tested before the witness goes to court. According to the dictates of the Supreme Court of Judicature of Jamaica Criminal Bench Book, at page 210, this is a procedure of last resort when all the others have proved to be impractical. Implicit in that statement is the undesirability of confrontation as a means of confirming a witness' original identification of a suspect. The relevant section of 15-1, item 25, is in the following terms:

> "This is the last resort, and should only be used if all other options are impracticable. Their Lordships of the Privy Council have held in Garnett Edwards v R [(2006) 69 WIR 360] that confrontation between an identifying witness and a suspect is in general undesirable and should be avoided, lest they undermine the value of the identification evidence."

[25] In **R v Leroy Hassock**, upon which the Mr Melbourne relies, the applicant was found bleeding from a wound on his back and lying on a truck seat at an engineering works, at about 5:00 o'clock, on the morning after a robbery of two motor vehicles on separate occasions hours before. After the second robbery, the police gave chase but the stolen vehicle was abandoned by its lone occupant, who escaped, after a brief exchange of gunfire with the police. The detective who took the applicant to the police station testified that by 5:30 am he had been processed and taken to the cells. One of the policemen who was engaged in the shootout, and whose opportunity to identify the shooter was described as minimal, went to the police station, in response to a radio message to contact the station. At about 6:00 am, he purported to identify the applicant, as he the applicant was "going into the C.I.D. office". Later that morning, one of the two civilian witnesses went to the guard room of the station. He too claimed to identify the applicant, upon the latter's entry into the guardroom. Melville JA (Ag) was of the opinion that the applicant had been taken into the guard room, while the civilian was present and made to turn around so that the civilian witness could see his face (see page 137).

[26] It was against that background that Melville JA (Ag), at page 138, described confrontation as a "pernicious practice". The learned judge of appeal, like Their Lordships

in **Garnett Edwards v R**, also advocated for the restricted use of confrontation. At page 138, Melville JA (Ag) said:

> "Confrontation should be confined to rare and exceptional circumstances, such as those in R v Trevor Dennis [(1970) 12 JLR 249], where the court would perhaps not be too inclined to frown too unkindly on the procedure adopted there."

While acknowledging the difficulty in formulating universal rules in these circumstances, on account of the disparate fact situations, Melville JA (Ag) went on to say confrontation may be employed where the suspect was well known to the witness. However, where both are strangers, an identification parade is the safe course to adopt, barring exceptional circumstances.

[27] In **R v Trevor Dennis**, to which Melville JA (Ag) referred, the defendant was held approximately 20-25 chains from the scene of a robbery, and within 30 minutes of its commission. The complainant, a minister of religion, thought he had seen one of the robbers while discharging his pastoral duties. He gave the police a description. When the police apprehended the defendant, they took him to the minister of religion at his gate. Expressing his belief that the defendant was one of the robbers, the complainant asked for the defendant to be taken inside so that he could get a better look at him. That was done, after which the complainant said he was sure it was the defendant.

[28] The facts in **R v Trevor Dennis** are clearly distinguishable from those in **R v Leroy Hassock**, as well as the present case, as Mr Melbourne correctly submitted. The facts of **R v Leroy Hassock** are similar to what took place in **R v Gilbert** (1964) 7 WIR on which the applicant relied in **R v Trevor Dennis**. In **R v Gilbert**, the complainant purported to identify the applicant as he, the complainant, was ascending a flight of stairs at the Central Police Station while the applicant was sitting on a chair in such a position that the complainant could see him. According to Lewis JA, this was a contrived happenstance. At page 56, Lewis JA said:

> "… The court feels strongly that this method of identification is a most improper one. This case does not stand alone in that respect. In several cases within the last few months the court has observed that there is a tendency for the police to confront a suspected person with the person who is required to identify him in circumstances in which it is possible for the identifying witness to say that he merely came upon him ..."

So that, although the witness' attention was not drawn to the suspect, giving the identification the veneer of it being independent and unaided, the contrived happenstance is a practice to be deprecated in the strongest terms.

[29] It is unsurprising that, with their contrasting facts the court in **R v Trevor Dennis** declined to apply **R v Gilbert**. In refusing permission to appeal against the conviction, Shelley JA highlighted the proximity of time and distance, relative to when and where the offence was committed, and that a description had been given, among other things. In distinguishing the case before him from **R v Gilbert** in which Lewis JA, had criticized the failure to hold an identification parade, Shelley JA said, at page 250:

> "In the circumstances of that case we think, with respect, that those remarks were justified, but in the instant case the elements of time and distance between offence, description to the police, apprehension and identification and indeed the whole circumstances are so different as to make the … remarks inapplicable ..."

What then, of the present case?

[30] The circumstances in which Mrs Blair-Johnson pointed out the appellant in this case have the air of happenstance, and therefore, as the learned Parish Court Judge found, cannot fairly be described as contrived, like they were in **R v Leroy Hassock** and **R v Gilbert**. In the learned Parish Court Judge's view, the identification was "spontaneous". Mr Melbourne submitted that the appellant should have been taken to the cells. However, the evidence was that the reception area (guard room) is where persons are processed before being taken to the cells. There was no evidence before the court that internal procedures or protocols dictated that an arrested person ought

properly to be first taken to the cells. The reception area was where Mrs Blair-Johnson was legitimately performing her duties at the time the appellant was taken there. There is no evidence to suggest that her simultaneous presence there with the arrival of the appellant was anything more than coincidence. So, although the learned Parish Court Judge incorrectly characterised this subsequent identification as 'confrontation' (see page 46 of the record), it was not confrontation in either the vein of the emblematic example of **R v Trevor Dennis**, where the suspect was taken to the witness, or where the circumstances were staged as in **R v Leroy Hassock** an **R v Gilbert**. In our judgment, the evidence reveals pure happenstance.

[31] Without seeking to elevate what took place in the reception area to a group identification, it is of some significance that at the time the appellant was in the company of another male civilian. That fact, together with the removal in time and space from the date and place where the incident occurred, served to mitigate the peril of the appellant being pointed out on the basis of being in the custody of the police. In short, the evidence does not reveal any apparent reason for pointing out the appellant other than the witness' recollection that he, and not the other man, was her assailant. While the manner in which the appellant was identified was less than ideal, in as much as it could be described as spontaneous, it met the bar of independent and unaided. As Shelley JA opined, in **R v Trevor Dennis**, at page 250, "[p]erhaps identification on a parade is the ideal way of identifying a suspect but it is not the only satisfactory way".

[32] So then, the original identification of the appellant is adjudged to have been of good quality and his subsequent identification at the police station satisfactory. It is against this backdrop that we turn to consider the complaint that Mrs Blair-Johnson gave neither gave a written statement until after the appellant's arrest nor a description of her assailant. Of the several circumstances enumerated by Lord Widgery in **R v Turnbull**, at page 228, one is of particular relevance to this appeal:

> "… Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? If in any

> case, whether it is being dealt with summarily or on indictment, the prosecution have reason to believe that there is such a material discrepancy they should supply the accused or his legal advisers with particulars of the description the police were first given. In all cases if the accused asks to be given particulars of such descriptions, the prosecution should supply them ..."

The inclusion of a material discrepancy between the description given and the accused's actual appearance by Lord Widgery, presupposes, at its lowest an expectation, and at its highest a duty, to describe the assailant when the witness gives his statement, especially when it the identification of a stranger that is in issue.

[33] The giving of a description of a suspect has been made the subject of legislation in the English jurisdiction. Under Code D of the English Police and Criminal Evidence Act ('PACE'), a record of the description of a suspect must be made before the eyewitness participates in any identification procedure. The relevant part of Code D is extracted below:

> "3.1 A record shall be made of the description of the suspect as first given by the eye-witness. This record must:
>
> a) be made and kept in a form which enables details of that description to be accurately produced from it, in a visible and legible form, which can be given to the suspect or the suspect's solicitor in accordance with this Code; and
>
> b) unless otherwise specified, be made before the witness takes part in any identification procedure …"

It is worthwhile to quote 3.2 (a) as well:

> "where it is practicable to do so, a record should be made of the eye-witness' description of the person they saw on the previous occasion, as in paragraph 3.1 (a), before asking the eye-witness to make an identification."

[34] According to Phipson on Evidence 12th ed, at para 15-09, the import of an antecedent record of a short description of a suspect, before seeking to conduct a street

identification lies in the reduction of the possibility of carrying out a more formal procedure. The learned editors of Phipson on Evidence cite **R v Vaughn**, 30 April 1997 CA, in which they purport to quote Sedley LJ as saying, in relation to 3.2(a):

> "This provision of the Code is not mere bureaucracy: it affords the best safeguard that so far has been devised against the possibility of auto-suggestion when officers on the spot reasonably judge a confrontation to be needed in order to firm up suspicion to the point required for an arrest."

This safeguard benefits both the witness and the suspect.

[35] As we intimated above (see paras [33] – [34]), it is not a legislative requirement for a witness to give a description of a suspect in this jurisdiction. However, common sense and practicalities have made the giving of a description customary. Although Sedley LJ was pronouncing on a confrontation (described in Code D as street identification), the circumstances under which the appellant was identified make his comments relevant to the present case.

[36] Specifically, while Mrs Blair-Johnson lodged a report of the incident on the date of its occurrence, she never deigned to give a statement until two days after the appellant's arrest. That was after she pointed him out at the police station. The result of this lax approach was the absence of any prior description of her assailant in a written statement by which her subsequent identification could be tested. Therefore, unlike in **R v Trevor Dennis** where the giving of a description strengthened the prosecution's case, or **R v Gilbert**, where the description could be matched with the suspect's actual appearance (there one given feature was missing), the trial court, in this case, did not have the benefit of making that assessment.

[37] A reading of the **Turnbull** guidelines shows that the assumed antecedent description of a suspect is a subset of the global circumstances the jury are to take into their consideration when assessing the evidence of identification. In this respect, it is part and parcel of assessing the reliability and veracity of the eyewitness' evidence.

Consequently, a duty of disclosure is cast upon the prosecution to disclose any material discrepancy between the description given and his actual appearance. From the language of Lord Widgery (see page 228 F-G), this duty of disclosure appears to be independent of any request from the suspect or his attorneys-at-law, which, must itself be complied with.

[38] The assessment of the reliability and veracity of the eyewitness in this area of the evidence is facilitated by the searchlight of cross-examination. According to Phipson on Evidence, at para 15-09, where there are discrepancies between the description provided and the actual appearance of the defendant (as contemplated by the **Turnbull** guidelines), the eyewitness may be cross-examined upon the description as a previous inconsistent statement. Where there is substantial similarity between the description and the actual appearance of the defendant, this may strengthen the prosecution's case. On the other hand, the presence of material discrepancies between the description and the defendant's appearance may weaken the reliability of the identification evidence and erode the veracity of the eyewitness, thereby assisting in protecting the defendant from the risk of mistaken identification.

[39] The gravamen of Mr Melbourne's complaint is that without this opportunity to test Mrs Blair-Johnson's evidence there is no yardstick by which her reliability and veracity could have been tested. How, then, may it be said that the absence of a description affected the trial of the appellant? Although the description was not available for cross-examination on any possible material variance between it and the appellant's appearance, there was the opportunity to cross-examine on the fact of the absence of the description given prior to the appellant's arrest and charge. The record of evidence does not reveal that Mrs Blair-Johnson was asked a single question about whether she had given a description of her assailant. The absence of a description was raised for the first time by counsel while submitting that there was no case to answer.

[40] The learned Parish Court Judge was aware that the absence of a description was a weakness in the identification evidence, but considered that a warning was sufficiently curative. In her reasons, at page 50 of the record, she said:

> "I have to warn myself and I bear in mind that there was no description given of her assailant and there was a rather lengthy delay between her initial observation and her identification to the police. There is no special reason for remembering him …
>
> I have to warn myself of the danger in purported identification of strangers. Mr Murray and Mrs. Blair-Johnson were strangers. Persons have made mistakes with persons who there [sic] are familiar with for years, even family members, furthermore honest and convincing witnesses may be mistaken. I bear in mind that it would appear that she did not give a description of her assailant in her statement to the police (**Michael Rose v The Queen Privy Council Appeal No. 3 of 1993, delivered 10th October 1994**) the spontaneity of her subsequent identification would mean that the holding of a parade would have served no useful purpose." (Emphasis as in the original)

[41] We cannot fault the learned Parish Court Judge in her decision to resolve the issue as part of the circumstances attendant upon the identification and therefore to warn herself of the inherent danger of convicting on the uncorroborated eyewitness identification evidence. In fact, the learned Parish Court Judge exhaustively warned herself throughout the length and breadth of her reasons for this danger.

[42] In our judgment, the absence of a description of the appellant before he was pointed out was only one factor to be considered in the assessment of the evidence of identification. No case was cited to us, neither did we unearth any in our research, where a conviction was overturned on the basis of a failure by the eyewitness to provide a description of the convicted person before the identification procedure. Under the English statute, PACE, even the breach of a mandatory requirement, under Code D, to hold an identification parade was held not to be automatically fatal to a conviction. The effect of the breach on the overall fairness of the trial had to be considered (see **R v Forbes**

[2001] 1 AC 473). As we have already observed, there is no statutory requirement to provide a description in this jurisdiction. The **Turnbull** guidelines, while they presuppose that a description will be given, do not go so far as to make a failure in this regard fatal to the conviction. In light of this, an awareness of the witness' omission to provide a description before the subsequent identification, together with a warning of the danger of conviction, appear to be a reasonable way to proceed.

[43] While we are of the view that the above discussion is enough to dispose of this appeal, we will comment briefly upon another challenge Mr Melbourne mounted. Learned counsel contended that the learned Parish Court Judge descended into the arena by re-opening the case for the prosecution of her own volition and recalling Mrs Blair-Johnson to the witness box. It is a misconception to describe the act of re-opening the prosecution's case as a descent into the arena. Ms Wright, on behalf of the prosecution, submitted, in essence, that the point was without merit and cited **King v Sullivan** [1923] 1 KB 47.

[44] It was accepted in that case that a trial judge has a discretion of recalling witnesses at any stage of a trial, and putting questions to them, if the exigencies so require. That discretion may be exercised: (a) to call rebuttal evidence; and (b) to admit evidence which was omitted concerning a mere formality and not a central issue in the case (see **Gerville Williams and Others v R** [2019] JMCA Crim 1). In this case Mrs Blair-Johnson, having previously identified the appellant out of court, identified him while he was in the dock and wearing a mask. After rejecting the no case submission, the learned Parish Court Judge recalled Mrs Blair-Johnson, instructed the appellant to lower his mask, whereupon Mrs Blair-Johnson again identified him as the person who had robbed her and who she later pointed out at the Half Way Tree Police Station. In our opinion, this was a mere formality from which the appellant suffered no prejudice. The complaint is, therefore, without substance.

Conclusion

[45] The incident giving rise to this indictment occurred in 'broad daylight'. The drama which played out on a busy street in downtown Kingston transpired in a manner which, at all material times placed the assailant at no more than an arm's length away from Mrs Blair-Johnson, and was of a duration to afford her a good opportunity to observe her assailant. Her subsequent identification of the appellant as the assailant was spontaneous and independent, although without the safeguards of an identification parade. That she provided no description before pointing out the appellant, while not conforming with best practices, did not result in any manifest unfairness to the appellant. The learned Parish Court Judge was alert to all the relevant issues and duly warned herself before convicting the appellant. Accordingly, the appeal should be dismissed.

[46] In the light of the conclusions above, we make the following orders:

1. The appeal against conviction and sentence is dismissed.

2. The conviction and sentence are affirmed.

3. The sentence is to be reckoned as having commenced on 3 February 2023, the date on which it was imposed.