JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 41 of 1991

BEFORE: THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MISS JUSTICE MORGAN, J.A.

REGINA vs. LEBURN CHAMNER

Arthur Kitchan for the appellant

Lancelot Clarke, Jnr. for the Crown

February 24 and March 25, 1992

MORGAN, J.A.:

The applicant was convicted before Patterson, J. and a jury in the Home Circuit Court for the offence of rape. At the conclusion of the hearing of the application for leave to appeal, it was treated as the hearing of the appeal. We allowed the appeal, quashed the conviction, set aside the sentence and entered a verdict and judgment of acquittal and promised to put our reasons for so doing in writing, which we now do.

The victim in this case was one C.B. just past nine years old at the date of the offence, the 11th July, 1990. At the date of trial, she was approaching eleven years of age, was examined on the voire dire and gave sworn evidence. She said she had attended Summer School that morning quite unaware that school was not in session on that day, and so decided to return home. She was standing at a bus stop at Washington Boulevard, Kingston, awaiting a bus at about 10:00 a.m. While there, she saw a man whom she did not know before. This man took her far away in some bushes, undressed her, put her to lie on her back on some newspaper and had sexual intercourse with her.

In the course of this evidence, she pointed to the appellant in the dock and said "but it don't look like him." She further said that when this man was finished this assault, she dressed herself. He took her Bible from her bag. At this point in her evidence, she interjected, "But the man don't look like the accused." Continuing her narrative, she said that she started to walk away hurriedly while he walked behind her reading her Bible, but when she came upon two ladies, whom she joined, she discovered he was no longer behind her. She reported to them what had happened and as she continued walking she met the appellant and told the ladies that he was her assailant. She paused in her narrative to interpose that she "did not know if it was him." She further said that he then denied having sexual intercourse with her, and that he had her missing Bible which she took away. One of the ladies then decided to take him to the bus stop but he ran away, and, at this stage she remarked, "She never saw the man again." She went to Rock Hall. It was then sometime in the afternoon and she made a report to the police at that station. She spoke of going in a taxi with the police to "the man that the man caught" but looking in the court room and here she again interposed, "I don't see that man here today."

Curiously, she said she was with the man all day, she got to the station in the night, but she did not recall anything special about the man "but the man in Court don't look like the man that took me away, he looks different. The other man had the same colour but the accused look different." She had seen the body and face of the man that took her away "but the accused just look different."

Detective Walters said that C.B. arrived at the station with the appellant at about 8:30 p.m., both were brought there by a District Constable Stewart who told him that a lady had taken C.B. to him and made a report in the presence of the appellant. He spoke to C.B. who told him that the appellant

had sexual intercourse with her. He arrested and charged him with the offence of rape, and when cautioned he said, "A she gi mi, a she spread the paper and give me."

The Crown closed its case. Obvious doubt, confusion and uncertainty on the child's part as to the identity of her assailant had emerged but there was an admission to the arresting officer by the appellant. The learned trial judge did not accede to a submission from the defence, of no case to answer.

In his defence, the applicant, in an unsworn statement, denied the charge and said he did not know C.B. until a group of people removed him from a bus stop where he stood talking to a constable and accused him of interfering with the child, which he denied. He also denied making a statement to the police. In effect, his defence was that C.B. was mistaken as to the identity of the person who interfered with her.

Putting grounds of appeal 1 and 2 together as filed, the appellant's main thrust was that the learned trial judge erred when he failed to uphold the submission of defence counsel that no prima facie case had been established and that he ought to have withdrawn the case from consideration by the jury.

In **R. v. Turnbull** (1976) 3 All E.R. 549 at 553, Lord Widgery, C.J., in elaborating on the duties of a trial judge in cases of visual identification, had this to say:

> "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. This may be corroboration in the sense lawyers use that word; but it need not be so if its effect is to make the jury sure that there has been no mistaken identification."

This case is not in the nature of a fleeting glance but the facts as narrated indicate rather a long observation. There is,

we agree, an absence of "difficult conditions" in the terms of **Turnbull's** case (supra) but the clear doubts displayed by C.B. made "the quality of the identifying evidence poor." The learned trial judge appears to have been of the view that, in the words of Lord Widgery, "there was other evidence which went to support the correctness of the identification." In this respect, it seems he was influenced in his decision by the evidence of C.B. as to the missing Bible. We have come to that conclusion as he finally left that area of Crown evidence for consideration by the jury as evidence supporting the correctness of the identification. This is what he said at page 21.

> "She told you that after he had sexually assaulted her and they walked along the road, she walked away ahead and when she saw these ladies she didn't see the accused man again, but when she did see him again, he had her Bible...The Bible that he had taken from her shortly before. Learned Counsel for the defence is asking you to say that the Bible, the accused man could have picked up the Bible. Mr. Foreman and members of the jury, you will have to say what you make of that. She is telling you that the man took her Bible a few minutes before she walked and left him and shortly after that she sees the man with her Bible. Is it the same man? This accused man? Is it the same man that took her Bible or is he a different man? She kept on telling you that he looks different, he looks different."

Plainly, this aspect of the evidence could not support or corroborate such visual identification as there was, as it failed to create any nexus between the appellant in Court and the man with the Bible. This was because the evidence emanated from the mouth of C.B. alone, who denied it was the appellant and who also said that the man ran away but she could not say if he was caught. She did not know if he was the appellant as he looked different. It was clear that either her memory had faded or that the appellant was not the man. This young child was experiencing difficulty in the identification of her assailant.

We should mention, at this point, the principle that where a witness has previously picked out an accused person at an

identification parade and later is unable to identify him in Court, it is permissible to allow another witness on the parade to prove the fact of identification of the accused which was made by the witness at the identification parade. This principle applies in cases where the witness, for example, fails to remember or has since lost his sight. However, in order to keep the chain of identity alive, the witness - who has now failed to identify the accused - must be able to testify and must testify at the Court of trial that the person who was pointed out at the parade was and is the same person who committed the offence. The authority from which this principle emanated is **R. v. Christie** (1914) 10 Cr. App. R. 141. In the 43rd Edition of Archbold Criminal Pleading, Evidence and Practice at page 11-9(a) under the rubric (iv) "Identification at an identification parade proved by someone other than the identifying witness", the decisions in **Christie's** case (supra) and that of **R. v. Osbourne & Virtue** (1973) 1 Q.B. 678 were reviewed. The learned authors conclude that, provided the first witness is able to say, "The man I touched at the parade was the man who...", the evidence is admissible in proof. They noted that this element was absent in **Osbourne's** case (supra) and opined that **Osbourne & Virtue** (supra) should not be followed.

In this case, the witness having identified the appellant at the police station fell short in stating at the trial on oath that the man from whom she took the Bible was the man she pointed out at the police station. Only then a probable nexus might have been made in this case. But even if it did, it would be of little effect as the consistent repetition in her evidence at the trial as to her inability to recognise him as her assailant indicated not her failure to remember, so much as her doubts and uncertainties as to whether or not her assailant was indeed the appellant, and her persistent utterances of, "Is not him, he looks different" made it clear that she was utterly confused as to whether her identification of the appellant was correct or

not. The quality of the identification evidence was poor and she was, in fact, an unreliable witness.

Crown Counsel conceded that there was ambiguity in the identification evidence which was weak, and that the conviction was ultimately based solely on the confession which tended to corroborate her evidence. In our view, there was absolutely no credible evidence capable of corroboration.

Visual evidence of identification is a genus of evidence which, in recent years, has demanded the most careful and cautionary consideration in the Courts as "judicial experience has shown that a not insignificant number of cases of erroneous identification evidence has led to wrong convictions resulting in a substantial miscarriage of justice." It is, therefore, necessary that the nature of such evidence be cogent, the quality good and the accuracy unassailable. We are of the view that at the end of the Crown's case none of these factors existed and, on the state of the evidence given by this solitary young child, the dicta of Lord Widgery to which we have adverted should have prevailed and the defence should not have been called upon.

For these reasons, we made the order as stated.