[2011] JMCA Crim 55

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 150/2008

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MRS JUSTICE HARRIS JA
THE HON MISS JUSTICE PHILLIPS JA

COURTNEY LAWES v R

Gayle Nelson for the applicant

The Crown was not represented

14 March and 10 November 2011

PHILLIPS JA

[1] At a trial in the Circuit Court held in Kingston before Straw J and a jury, between 13 and 21 November 2008, the applicant was convicted of the offences of abduction (count 1) and rape (count 2) of the complainant. He was sentenced to six years imprisonment at hard labour on count one and 10 years imprisonment at hard labour on count two. Both sentences were ordered to run concurrently.

[2] On 16 August 2010, the applicant's application for leave to appeal against conviction and sentence was refused by a single judge of this court, and the application was therefore renewed before us. On 14 March 2011, having heard arguments, we

granted the application. The hearing of the application was treated as the hearing of the appeal which was allowed. We quashed the convictions, set aside the sentences, and entered a judgment and verdict of acquittal. We promised to give our reasons for that decision and do so now.

The case for the prosecution

[3] The prosecution called six witnesses namely the complainant, the complainant's boyfriend, Nathan Thompson, Sergeant Lorenzo Morant, Constable Cheydene Longmore and Corporal Peter Lewis.

[4] The charges arose out of an incident which is said to have occurred on 1 March 2006 at about 10:40 pm when the complainant boarded a white Hiace bus, supposedly driven by the applicant, at Three Miles in Kingston which was en route to Spanish Town. The complainant looked at the driver of the bus as he was facing her and talking to a man who was standing at the bus stop with her. When she boarded the bus she was the only passenger and she sat in the front passenger seat. She was able to and did observe the applicant for about 20 seconds. It was the first time that she was seeing him. On the journey, the driver stopped at a stall across from the Ferry Police Station for about two minutes and the complainant put her head outside the bus and while the right side of the driver was facing her, she disclosed that she scanned him from head to toe for approximately 35 seconds. She had already become fearful at that point, and wanted to get a good look at the driver in case anything happened to her, which she declared she told him, when he asked her why she was looking at him so

intently. It was her evidence that in addition to the street lights, there was a light in the stall and a light just outside the stall.

[5] After the driver re-entered the bus he continued driving until he came to the Portmore stoplight but, instead of heading straight to Spanish Town, he turned left onto a back road from which one could access Lakes Pen and Spanish Town Road, went into a bushy area and drove for about half a mile. He then disembarked from the bus, locked the door with the key from outside the bus, went to the complainant's side and managed to pull her from the bus by her legs and, while she struggled, he climbed up on top of her, put his mouth on her neck as if he was going to bite her. Having pulled her from the bus he had sexual intercourse with her. She recalled that during the struggle she could see the driver's face as it was about seven inches from her and there was some glare from the lights of the bus.

[6] After he had sexual intercourse with her, he released her and she walked from Burke Road to Young Street, where she boarded a taxi, and then called her boyfriend. He testified that he had been with the complainant earlier that night and had followed her to the bus stop and left her there. An hour later she called him on the phone crying telling him that she had been raped. He later met her at the Spanish Town Police Station and comforted her there.

[7] On 10 April 2006, an identification parade was conducted at the Hunts Bay Police Station by Sergeant Lorenzo Morant. The applicant was placed in the line of men on the parade and in her testimony, she stated that there were eight men on the identification

parade and she was instructed to walk along the line of men to see if she could identify her assailant. There was one man at number seven who was holding down his head and when she requested the officers to ask him to hold his head up, she immediately identified the applicant as the man who she asserted had raped her.

[8] Sergeant Morant gave evidence about the conduct of the parade. He indicated that the applicant had an attorney Mr Hamilton representing him. Although he stated that there were nine men on the parade, his evidence was otherwise consistent with that of the complainant. He maintained that the complainant had been kept out of sight and hearing of the parade, on the day of the parade, before it was held, and he gave instructions for the applicant to be taken from the Portmore Police Station to the Hunt's Bay Police Station in the early morning at about 4:00 a.m., to minimize any risk of him being exposed.

[9] In cross-examination, the complainant admitted that on or about 17 March 2006, before she attended the identification parade, she accompanied her aunt and mother to the Spanish Town Police Station. The purpose of her visit to the station was not disclosed and, she denied seeing the applicant there. Additionally, she also went to the Portmore Police Station also with her aunt and mother, and saw the police bring a man dressed in a bus driver's uniform into the station. She agreed that this man was the applicant. She made no report to the police at the Portmore Police Station that she had seen the man who she said had abducted and raped her.

[10] The complainant had been challenged with regard to certain evidence given at the trial which the defence endeavoured to point out was inconsistent with positions adopted by her previously. The conflicts to which complaints were directed are as follows:

(1) that the driver did not turn off the lights of the vehicle when he drove the bus into the bushy area; in her statement to the police she had said that he had turned off the light, and as she denied this, the relevant portion of her statement was put in evidence as exhibit 1;

(2) that after she was let off the bus she went to the back of the bus and wrote off the licence number and remembered it readily; in her earlier statement at the preliminary inquiry in Spanish Town she had indicated that although she "took it off" she did not remember it, as it had been some time ago - she denied this at trial and that aspect of her deposition was tendered in evidence as exhibit 2;

(3) that the bus which had picked her up on that day was "not tinted"; in her statement at the preliminary inquiry, she had said that the bus was tinted, and as this too was denied at trial that aspect of the deposition was also put in evidence as exhibit 3.

[11] The owner of the bus Mr Nathan Thompson gave evidence that the bus was tinted and, that the bus' route was between Spanish Town and Mandeville. He told the court that he did not know of the bus being driven by the applicant "to town". The system was that the applicant would bring the bus to his home each night, at the latest 10:00 p.m. and then the applicant would be dropped off at the bus park to make his way home. The bus would then be taken to the bus park the next morning and handed over to the applicant. It was his evidence that the bus came in on 1 March but he could not say when, although he did say that he had seen it on 2 March 2006 parked at his home.

The case for the defence

[12] At the trial, the applicant's defence was an alibi. He gave an unsworn statement saying that he was not the driver of the bus which picked up the complainant and even if that bus picked up the complainant, he was not the driver as he had been elsewhere.

[13] His position was consistent with that of Mr Thompson, that he had been employed to operate a Hiace bus between Spanish Town and Mandeville, and he confirmed the arrangements for the daily operation of the bus. He was paid a weekly salary by Mr Thompson to operate the bus. It was his evidence that he "never drive that bus on any occasion at all to town", and that Mr Thompson was a very strict boss.

[14] The applicant admitted that on the night of 1 March 2006, he drove the bus, however, in support of his alibi, he stated that on that night he finished driving at 8:30

p.m. and he had driven to a gas station to get the bus washed. After that he had returned the bus to Mr Thompson's house and taken a taxi so that he could spend the night at the house of his "baby mother" in Bog Walk. He indicated that he particularly remembered the events of the 1 March 2006 as the following day was his wife's birthday.

[15] On the morning of 2 March 2006, the applicant met Mr Thompson at the bus park and received the bus in keeping with their arrangement. However, after he entered the bus a police officer approached him and asked if he was the driver of the bus and requested that he report to the Spanish Town Police Station. At the station, he spoke to an officer who remembered him as a "country man" (who drove the Spanish Town to Mandeville route) and who remarked "Is caan yu is not yu".

[16] While at the Spanish Town Police Station, the applicant said that he saw three women "two elderly ladies with big body and one slim body". He was asked if he was the driver that had just entered the police station and when he identified himself as such, he noticed that the three women were staring at him. Ten minutes later he was handcuffed, placed in a police car and taken to the Hundred Man Police Station in Portmore, where he once again saw the three women staring at him. He identified one of these women as the complainant when he saw her at the trial.

[17] The applicant also complained that while at the Hundred Man Police Station, Constable Longmore took him out of his cell on four different occasions, before the

identification parade was held, to question him, which he contended may have exposed him to the complainant before the parade was conducted.

The appeal

[18] The applicant applied for leave to appeal his conviction and sentence on five grounds as outlined below:

> "(a) **Mis-identity by the witness**- That the prosecution witnesses wrongfully identified me as the person or among any other persons who committed the alleged crime.
>
> (b) **Unfair Trial** -That the evidence upon which the learned trial judge relied on for the purpose to convict lack facts and credibility, thus rendering the verdict unsafe in the circumstances.
>
> (c) **Lack of Evidence** - That the prosecution failed to produce any form of evidence such as medical, scientific or DNA test result to justify the charges and eventual conviction and sentence.
>
> (d) **Improper Police Procedures**- That the arresting officers caused my identity to be exposed to the witnesses before the official ID parade, thus compromising my innocence.
>
> (e) **Miscarriage of Justice** – That I was wrongfully convicted for a crime I knew nothing about."

[19] The appellant re-crafted the grounds and sought and was granted leave to argue the same inclusive of those set out above but in the following grouping:

> "(a) **IDENTIFICATION:**
>
> The identification of the Applicant by the Complainant was not independently obtained.
>
> (b) **MISDIRECTION:**

The Judge failed to properly direct the jury on the manner of the identification by the Complainant of the Appellant [sic].

(c) That the Learned Trial Judge erred in law when she failed to rule that there was no case to answer or to withdraw the case from the jury or to give a directed verdict on the basis of her recognition that the Complainant had seen the Applicant while he was in custody before the Identification Parade."

(d) The verdict is unreasonable and cannot be supported according to the evidence."

Although the Crown did not appear at the hearing of the application for leave to appeal it had filed its skeleton arguments on 14 January 2011, when the matter was originally scheduled to be heard. The application was then adjourned as the applicant was not ready to proceed. The application proceeded on 14 March 2011, with the court having access to and referring to the skeleton arguments as filed.

Submissions

Ground (a) Identification

[20] Counsel for the applicant, Mr Nelson, contends that the identification of the applicant by the complainant was not independently obtained as he was exposed to the complainant on two occasions before the identification parade was held, in circumstances where prior to the incident she had not known the applicant. The prosecution proffered no explanation for the complainant's presence at the Spanish Town and Portmore Police Stations, and on her own evidence she saw the applicant in the latter station in a bus driver's uniform, yet she did not point out to anyone that this was the man that had raped her. Three weeks later however she pointed out the

applicant on the identification parade. In the light, of this the applicant asserts that there was an assisted identification. Counsel also commented that if the applicant was taken out of his cell as often as alleged by him it would seem to have been for some ulterior motive, particularly as the judge did point out in her summing up, that the complainant was allowed to see the applicant before the parade. This, he submitted, went to the reliability of the parade and potential risk of the correctness of the identification. Counsel argued further that this must be coupled with the question as to whether the parade was conducted in compliance with the rules due to the variance of the testimony of the complainant and Constable Morant with regard to the amount of persons in the line-up.

[21] In response, the Crown by way of written submissions argued that the trial judge had given a thorough and comprehensive warning to the jury as to their duty in assessing the evidence of the identification parade in relation to the prior sighting of the applicant by the complainant. This she had done by outlining the events surrounding the identification parade and telling the jury that they had to determine whether the parade was fairly conducted.

Ground (b) – Misdirection

[22] The Crown's response to the applicant's contention that the learned trial judge did not properly direct the jury on the gravity of the confrontation and its effect on the identification of the applicant by the complainant, was that the learned trial judge dealt adequately with the identification evidence as she directed the jury in respect of the law

to be applied. The learned trial judge, it was submitted, gave a detailed and comprehensive **Turnbull** warning and directed the jury to consider the circumstances under which the complainant saw the driver of the bus, including the time of day, the lighting and facial obstructions. Counsel also submitted that inconsistencies between the complainant's testimony given at the preliminary inquiry and that given at the trial, as also with her statement given to the police, were clearly outlined to the jury.

Ground (c) - No case to answer

[23] Counsel for the applicant submitted that since the identification evidence was of poor quality, the learned trial judge erred in law by failing to withdraw the case from the jury on the basis that there was no case to answer. Counsel highlighted the inconsistencies in the evidence of the complainant to underscore the weaknesses in the identification evidence, namely, the absence of the lights from the bus in the bushes, the fact that the bus was tinted, and the difficulty with regard to the recollection of the licence number of the bus, which was supposed to ply a completely different route. The Crown submitted that the identification evidence of the complainant was of sufficiently high quality and that the circumstances under which her sightings were made were of such a nature for the jury to find that the applicant was the man who abducted and raped her on the night of 1 March 2006.

[24] Counsel for the applicant relied on the fact that there was no corroboration in the case. However, counsel for the Crown submitted that although corroboration evidence is desirable, it was not required by law and in this case there was none, but

the learned trial judge had given detailed and adequate directions on the definition of corroboration, the fact that there was none in the case, the evidence of recent complaint and how the jury should treat with the same. It was submitted, there could be no legitimate complaint in that regard.

[25] Additionally, counsel for the applicant referred to the medical certificate which indicated that vaginal smears had been taken from the complainant and no semen or spermatozoa were found, to ground a submission that even the complainant's allegation that she had been raped was "extremely dubious".

Discussion and Analysis

Issue

[26] The case for the prosecution relied entirely on the visual observations of the complainant who identified the applicant as the driver of the bus and, consequently the man who abducted and raped her. The applicant's defence was an alibi, whereby he denied driving any bus at the material time and denied abducting and raping the complainant or any other person.

[27] The key issue was therefore the correctness of the complainant's identification evidence. The issue of identification was complicated by the inconsistencies in the complainant's evidence and the unfortunate unexplained prior exposure of the applicant to the complainant before the identification parade.

The Law

[28] It is well accepted that there can easily be a miscarriage of justice if the evidence of visual identification in a case depends on the testimony of a sole witness. Lord Widgery CJ in his oft-cited seminal judgment in ***R v Turnbull*** [1976] 3 All ER 549, set out certain guidelines for the use of trial judges when summing up to the jury, in an effort to reduce the danger of such miscarriages of justice. On page 551 he stated:

> "First, whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken."

He indicated that once this is done in clear terms it does not have to be stated in any specific form of words.

[29] Secondly, he instructed that the judge should direct the jury to "examine closely the circumstances in which the identification by each witness came to be made". By this he meant and went through in detail, inter alia, the opportunity, the lighting and the length of time of the observation and any obstructions if existing; the passage of time between the incident and the identification to the police, and any discrepancies in descriptions made by the witnesses. Finally, he said that the judge should remind the jury of any specific weaknesses in the identification evidence, for instance, recognition evidence may be more reliable than evidence of identification of a stranger.

[30] In our view, in summing up this case, the learned trial judge gave an identification warning which incorporated the guidelines set out in ***R v Turnbull***. She started by informing the jury of the special need for caution before convicting the defendant in reliance on the identification of the sole eye witness. She further warned that it is possible for an honest witness to make a mistaken identification (see pages 24 - 25 of the transcript). She carefully listed the circumstances under which the identification by the complainant was made, outlining the three occasions the complainant had said that she had observed the applicant; she then set out the lighting, the time and the state of mind of the complainant in each instance. The jury was informed that the applicant was previously unknown to the complainant and that the night of 1 March 2006 was the first time that she was seeing the applicant. The learned trial judge told the jury that they should consider how much time had elapsed between the complainant's original observation and her identification to the police.

[31] In relation to these observations by the complainant, the learned trial judge noted at page 34 of the transcript:

> "So you will have to examine that evidence very carefully, Mr Foreman and your members to say whether you find all those circumstances [sic] that she had sufficient time and opportunity to properly view the man who she [sic] saying is this accused man that abducted her and raped her that day. Cause [sic] remember, the defence is saying it's mistaken identification."

[32] This direction in the summing up may have been adequate, provided the identification evidence was of a good quality and remained of a good quality until the

end of the prosecution's case, but that was not the situation in this case. Counsel for the applicant contended as indicated previously that the identification evidence was poor and did not pass the necessary threshold to be left to the jury, and the learned trial judge therefore erred in law in not withdrawing the case from them. This was due to the fact that the complainant had seen the applicant while he was in custody before the identification parade.

[33] At page 553 Lord Widgery in ***R v Turnbull*** stated that poor identification should be dealt with in the following manner:

> "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."

Later in his judgment he pointed out that, "In our judgment odd coincidences can, if unexplained, be supporting evidence". He also made it clear that "Quality is what matters in the end" and in conclusion that". A failure to follow these guidelines is likely to result in a conviction being quashed and will do so if in the judgment of this court on all the evidence the verdict is either unsatisfactory or unsafe".

[34] It is necessary therefore to deal with the contention of the applicant, namely, whether the assisted identification in this case ought to have resulted in the case being withdrawn from the jury. The issue was whether the identification of the applicant

was fair; also was it independently and fairly obtained based on the evidence adduced and if not, what would be the just result as a consequence thereof.

[35] The Jamaica Constabulary Force Rules, 1939 which were made under the Jamaica Constabulary Force Act and published in the Jamaica Gazette on 29 July 1939 and amended by the Jamaica Constabulary Force (Amendment) Rules, 1977 and which govern the conduct of identification parades, (inter alia) state:

> "552. Identification Parades ---
>
> > In arranging for personal identification, every precaution shall be taken to exclude any suspicion of unfairness or risk of erroneous identification through the witnesses' attention being directed to the suspected person in particular instead of indifferently to all the prisoners paraded, and
> > To make sure that the witnesses' ability to recognize the accused has been fairly and adequately tested.
>
> 553. It is desirable therefore that:--
> ...
>
> > (ii) The witness shall be prevented from seeing the prisoner before he is paraded with other persons and shall have no assistance from photographs or descriptions."

[36] In ***R v Bradley Graham and Randy Lewis*** (1986) 23 JLR 230 this court has held that the Constabulary Force (Amendment) Rules are not mandatory, but "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". However, in that case the issue related to the fact that the applicant was unrepresented. The question was, did the absence of the attorney-at-law lead to the possibility of a miscarriage of justice. The

court was of the view that this was a legitimate concern, but that the presence of the two justices of the peace at the parade made the complaint one of form rather than substance, and it could not avail the applicant. The view taken by this court, with regard to the procedural effect of the rules, was also later confirmed in ***R v Michael McIntosh and Anthony Brown*** SCCA Nos 229 and 241/80 (unreported) delivered on 22 October 1991 by Forte JA (as he then was) who noted that:

> "The case of Graham and Lewis made it very clear that the Rules are not mandatory, but procedural and that any failure to adhere to any of the rules, would go to the weight of the evidence and not to the validity of the parade. What must be the important consideration for the jury is whether in all the circumstances the identification was fair and gave the witness the opportunity to independently and fairly and without any assistance identify his assailant."

[37] Notwithstanding these decisions indicating that the rules are not mandatory, from as far back as the early twentieth century the court has frowned upon a witness being allowed a view of a suspect before attending an identification parade and in ***R v Dickman*** (1910) 5 Crim App. Rep 143 at 135, it was said that". The police ought not, either directly or indirectly, to do anything which might prevent the identification from being absolutely independent, and they should be most scrupulous in seeing that it is so." In ***The State v Mohamed Khalil*** (1975) 23 WIR 50. Luckhoo C in the Court of Appeal of Guyana highlighted the danger of exposure of the accused person before the identification parade. At page 51 – 52, he stated:

> "If a potential witness is shown the person to be identified singly in circumstances to *indicate,* as in this case, that the police suspected that person, the witness would be much more likely, however fair and careful he might be, to assent

> to the view that the man he was shown corresponded to his recollection, and when this happens courts will, in the absence of other evidence, be inclined to set aside a conviction as being unjust and unsafe. It is essential that a witness' recollection of the physical appearance of the person previously observed under incriminating circumstances should, as far as possible, be unaided. The very object of a parade is to make sure that the ability of the witness to recognize the suspect has been fairly and adequately tested, and every precaution should be taken to exclude any suspicion of unfairness or risk of erroneous identification through the witness's attention being directed specifically to one "suspected person" instead of equally to all persons on parade… Nothing should be done to influence or affect the recollection of the witness and thus destroy the value of his or her evidence of identity."

[38] In the instant case the learned trial judge reminded the jury that the identification parade was to be conducted with the utmost fairness to the accused and that the police have a duty to prevent witnesses from viewing the suspect before the parade is held. She directed the jury that, in evaluating the evidence in relation to the identification parade, it was their duty to determine whether it was fair or if there was anything which impinged upon the fairness of the parade. She was impelled however to inform them of the unusual circumstances of this case. This is what she said at pages 39-41 of the transcript:

> "Now, she also told you, she is not sure it was the 17th of March, but she went with two ladies to the Spanish Town Police Station, but what she told you is when she go (sic) to the cell block she didn't go to the yard near the cell block. She didn't see Mr Laws [sic] at the Spanish Town Police Station. She didn't hear the police go to the cell and ask for any prisoner in the cell that the police just brought in. This is what she told you and she did not hear any officer ask Mr Laws if he knows her aunt or her mother. But she did tell you that the same day she had gone to this Spanish Town Police Station.

> She also went to Portmore Police Station with her aunt and her mother and she said there that she did see the police bring a man in, a bus driver in uniform to that station. And she said that she agreed she said this was the accused man. What she told you she was standing with her back to him somebody said something to her and she turned and look and she saw the side and then she turned away. This is what she told you. And she said it was him.
>
> But bear in mind, Mr Foreman and your members, she made no report to anybody at that time that she had seen the man who raped her or abducted her. She made no report to anyone that she saw the man at the Portmore Police Station. We don't know why she was there. None of the officers, neither Miss Morant nor Longmore knew at any time he being other than the 2nd of March, [sic] so we really don't know why she was there, but the fact is that, she was there and what she is saying she saw him. What I want you to bear in mind she made no report to anyone that she saw the man, except when he [sic] to the ID parade on the 10th April, when she said it is this man. And I instruct you further in relation to that you have to assess the reliability of her identification of this man on the parade."

[39] There is no question that the learned trial judge recognized that there was a serious difficulty with regard to this aspect of the identification of the applicant, especially as the applicant was not known to the witness before. Indeed this is compounded by the law as it has developed in relation to the effect of a confrontation between a witness and an accused, particularly as in this case at a police station. The facts surrounding how the complainant came to observe the applicant in uniform on two occasions or at least one, at the Portmore and/or Spanish Town Police Stations before the identification parade had been conducted, as the learned judge said, are not known and, the reasons for her presence there could not therefore be explained to the

jury, in spite of the fact that Constable Longmore denied having taken the applicant out of his cell.

[40] In ***R v Hassock*** (1977) 15 J.L.R. 135, (endorsing ***R v Dickman***) this court held that an identification parade should be held in circumstances where an accused person is unknown to the witnesses before an alleged incident and where the guilt of the accused rests solely on the visual identification by those witnesses and, that the practice of confrontation with a view to identification in those circumstances was to be condemned. In ***Ramesh Ramdat v The State*** (1991) 46 WIR 201 at 211 and 212, George C in the Court of Appeal of Guyana, where there had been a confrontation at a police station, remarked:

> "As I have noted the whole body of judicial wisdom frowns on an identification that is made as a result of a confrontation between the witness and the alleged assailant, especially where the latter was hitherto unknown to the former. The proper course in such "circumstance is to hold an identification parade with all the attendant safeguards which such a parade requires in order to give it authenticity by avoiding any premature meeting between the witness and suspect prior to the parade. This was not done, nor were the dangers endemic in confrontation highlighted to the jury. For example, it was not pointed out to them that the tendency in such situations would be for the witness to assume that the person in police custody, or, if the identification is first made in court, in the dock, must be the person who was involved in the offence, as it is unlikely that the police would deliberately arrest someone other than the person whose description had been given to them… . In my view, these were serious omissions."

[41] Indeed Lord Hope of Criaghead in delivering the judgment of the Board in ***Williams (Noel) v R*** (1997) 51 WIR 202 (approving ***R v Hassock***) made it clear that

if the suspect is known to the witness he may be confronted by the witness so that the latter may confirm that the suspect is the proper person to be held in connection with the alleged incident, but where the witness does not know the suspect well, an identification parade is the proper means of identifying the suspect and confrontation should be confined to rare and exceptional circumstances. In our opinion it would obviously be even moreso where the suspect, before the incident, was completely unknown to the witness. In this case no rare and/or exceptional circumstances have been shown. In fact the basis for the confrontation, as indicated, was not known or explained. Kennard C opined in ***Matthews (Wilfred) v The State*** (1998) 58 WIR 246 that the evidence of the confrontation at the police station should be criticized by the trial judge. Indeed, in that case, where the appellant was seen by the witness coming out of the lock up, he said that the learned trial judge ought to have condemned that type of identification.

[42] On page 47 of the transcript, the learned trial judge erroneously directed the jury that there was no evidence that the police had exposed the applicant to the complainant, but she recognized and was constrained to indicate that there had been exposure of the applicant, by admission on the evidence of the complainant, and so she warned the jury about the reliability of the identification on the parade in light of the prior sightings, and directed them to be cautious and careful in assessing the reliability of the identification of the applicant.

[43] The learned trial judge also warned the jury that the prior exposure of the applicant to the complainant gave rise to the question of whether the complainant was identifying the man she saw in the bus driver's uniform at the police station, or identifying the man she saw on the night of 1 March 2006 driving in uniform and, who abducted and raped her. This, in circumstances where she had made no report to any police officer at the station at the time that she had seen the applicant prior to the parade. In our view, this was the crucial aspect of the case, and the basis for the disposal of the appeal. The learned trial judge in her summation pointed out that the assisted identification was to be viewed cautiously in order to determine the reliability of the parade, but not in respect of the complete undesirability of the confrontation, and the resultant completely flawed identification in the circumstances of this case. The identification was clearly assisted, in breach of the Constabulary Force Rules, and the principles enunciated in the relevant cases. It could never be considered independent, and was therefore devoid of all value. The case should have been withdrawn from the jury on the basis that there was no case to answer or a directed verdict of not guilty ought to have been given.

[44] One must recall also the inconsistencies in the evidence of the complainant with regard to the lighting in the dark bushy area where the incident took place, whether the bus was tinted, and the information given with regard to the licence plate on the bus. There was too, the evidence given in the case for the prosecution pertaining to the route of this "country" bus namely that it was plying from Spanish Town to Mandeville, and so may not have been the bus involved in the incident at all. Finally, there was the

unsworn statement of the applicant which indicated that he had seen the complainant, with two ladies, at both the Spanish Town Police Station and the Portmore Police Station, and they had stared at him. Although the complainant denied seeing him at the Spanish Town police Station she had admitted that she, her aunt and her mother had been there.

[45] In ***R v Ivan Fergus*** [1994] 98 Cr App R 313, Lord Steyn observed (at page 318):

> "... 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 no case to answer 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."

Conclusion

[46] Thus, as stated by Lord Widgery, CJ in ***R v Turnbull,*** which is confirmed by Lord Steyn above, what is of importance, is the state of the quality of the identification at the end of the prosecution's case and at the end of the applicant's case. In our view, the exposure of the applicant to the complainant prior to the identification parade severely tainted the identification of the applicant, made the quality of the identification evidence poor, and the case ought to have been withdrawn from the jury. This did not occur, and any conviction on the evidence as adduced was unsafe and must be quashed and set aside, which we did on 14 March 2011, and entered a judgment and verdict of acquittal as set out in paragraph [2] herein.