[2011] JMCA Crim 23

**JAMAICA**

**IN THE COURT OF APPEAL**

**SUPREME COURT CRIMINAL APPEAL NO. 71/2009**

**BEFORE: THE HON. MR JUSTICE HARRISON JA**
**THE HON. MR JUSTICE MORRISON JA**
**THE HON. MISS JUSTICE PHILLIPS JA**

**EVAN MORRISON v R**

**Dr Randolph Williams for the appellant**

**Miss Kathy - Ann Pyke and Mrs Paula-Rosanne Archer-Hall for the Crown**

**1, 2 November 2010 and 3 June 2011**

**MORRISON JA**

**Introduction**

[1] This is an appeal from conviction and sentence for the offence of rape in the St Ann Circuit Court, before Donald McIntosh J and a jury, on 5 June 2009. The appellant was sentenced to imprisonment for 15 years at hard labour. The appeal comes before us pursuant to leave granted by the learned single judge of appeal on 17 August 2010.

[2] When the appeal was called on for hearing on 1 November 2010, Dr Randolph Williams for the appellant sought and was granted permission to argue three supplemental grounds of appeal in substitution for the grounds originally filed by the

appellant himself. The supplemental grounds give rise to two issues, having to do, firstly, with the adequacy of the trial judge's directions as to the appellant's good character and, secondly, the adequacy and accuracy of his directions on the evidence of identification (including the conduct of the identification parade).

**The case for the prosecution**

[3] The appellant pleaded not guilty to an indictment charging him with rape, the particulars of which were that, on 1 July 2002, he had sexual intercourse with the complainant without her consent. The complainant, who was 19 years of age at the time of the alleged offence, was a deaf-mute and had been so from birth. Her evidence at the trial was facilitated by Mr Joseph Edwards, a vocational instructor and interpreter, with specialised training in and over 20 years experience as a sign language interpreter. The complainant lived with her parents and her brother at Eltham in the parish of St Ann and in 2002 she was on the verge of graduating from a special school for the deaf and dumb. The appellant, who resided in Ocho Rios, is a tailor.

[4] The complainant's evidence was that on 1 July 2002, at about 6:30 p.m., she was on her way home, after having visited her sister, who lived within walking distance of her home in Eltham. On the way, she became aware that she was being followed by a man, who quickly caught up with her, grabbed her by the hand and forced her into a nearby house, the door to which he closed and locked with a key. Once inside the house, the man indicated that he wanted to have sex with her and ordered her to take off her clothes. She refused and, after a struggle, he forced her onto a small bed that

was in the room in which they were, somehow got her clothes off her, put on a condom and had sexual intercourse with her without her consent. Afterwards, the complainant testified, "Blood was on the bed sheet, blood was on the bed and on my panty, also on my jeans and my pants", and the appellant laughingly commented to her that her "vagina was tight". The complainant said that, while the man was having sex with her, she had been able to observe his face. "Maybe", she said, "it could be more than 10 minutes, but I saw his face for a long time". Inside the house itself it was dark, she said, but there was a light on the road outside that shone inside the house. Her recollection was that, in addition to a small bed, there were a sewing machine and a refrigerator in the room to which she had been taken.

[5] Asked in examination in chief whether she had ever seen her attacker before that day, the complainant's first answer was, "No, first time I see him". She later said, however, also in examination in chief, that she knew his face from having seen him on the road many times and that he had talked to her before, indicating a wish to marry her. Later still in her examination in chief, the complainant qualified this last answer by saying that she had in fact seen the man only once before 1 July 2002 and that on that occasion he had wanted to talk to her, but that she "just ignore him".

[6] Hardly surprisingly, this matter was further explored by Dr Williams (who had also appeared for the appellant at the trial) in his cross examination of the complainant, when her attention was drawn to the statement that she had given to the police, also through an interpreter (Miss Millburn Simpson), on 8 July 2002. Having identified the

statement as hers, the following exchange then took place between counsel and the complainant:

> "Q. Did you tell Miss Simpson, I saw a man in a yard wearing a white shirt and black jeans. It was the first time I was seeing this man. Did you tell Miss Simpson that?
>
> A. Yes, I remember that.
>
> Q. And when you told her that, that was true?
>
> A. First time."

[7] Counsel for the Crown, for her part, naturally felt obliged to return to the matter in re-examination, asking the complainant whether she had seen the man before, "yes or no?", to which her reply was, "Yes, I have seen him before".

[8] After her ordeal was over and she had been let out of the house by her attacker, the complainant went directly to her aunt's house and reported to her what had happened. Her aunt then took her home, where a report was made to the complainant's father. Taking the complainant with him, the complainant's father immediately went by car in search of her attacker and was directed by her to a house, "a couple minutes drive" away, where she pointed out the appellant sitting on a stone. Confronted by the complainant's father with the question, "What dat yuh do man?", the appellant's reply was "Weh mi do, weh mi do, weh mi do?", and then he ran away. The complainant's father then took the complainant to her sister's home, left her and, when he returned to the spot where he had seen the appellant earlier, he was nowhere to be

seen. Later that same evening, the complainant was taken by her aunt to the Ocho Rios Police Station, then to the St Ann's Bay Police Station and finally to the St Ann's Bay Hospital, where she was seen by a doctor and examined.

[9] On the following day, 2 July 2002, a report having been made to him by telephone by the complainant's father while he was on duty at the Ocho Rios Police Station, Detective Sergeant Kirk Nicholls went with other police officers to Eltham District to a house to which he had been given directions by the complainant's father. There, looking through a glass window, he saw the appellant, who had been known to him previously as 'Briggy', inside the house. He shouted out to him, "police" and asked him to open the door, whereupon the appellant immediately "bend down and went under a bed". Gaining entry to the house forcibly through a side door, Sergeant Nicholls and party then entered the room where the appellant had been seen, ordered him from under the bed, cautioned him and told him of the report which had been received against him. The appellant's response was, "My youth, mi caan inna dem thing deh. If mi woman hear bout it, mi life mash up. Let mi goh mek mi gwaan". (Asked by the judge if he had noticed anything else apart from the bed, in particular a refrigerator or a stove, in the room in which the appellant was found, Sergeant Nicholls' response was that he could not recall.) The appellant was then taken from the house and placed in a police car outside the house, at which point he was seen and pointed out by the complainant to her father, both of them having arrived on the scene just at that point, as the man who had raped her the day before.

[10] Just over two weeks later, on 18 July 2002, the complainant attended an identification parade at the Ocho Rios Police Station, where she pointed out the appellant as her attacker, eliciting from him the response, "I am no raper. I got set up". Sergeant Whitcliff Edwards, who conducted the parade, told the court that, although an interpreter was not present at the parade, by agreement between the police officers who conducted the parade and the appellant's attorney-at-law (Mr Robert Brown), questions were posed to the complainant by writing them down on a sheet of paper and they were then responded to by her in the same manner. At first, all the questions that were intended to be asked were written down on a single sheet of paper but, after consultation with Mr Brown, this method was abandoned in favour of each question being posed to the complainant in writing and answered by her in writing, before the next question was asked and answered in the same way. Woman Corporal Haley assisted the sergeant in this process. According to Sergeant Edwards, neither the appellant nor Mr Brown raised any objections to the conduct of the parade and the appellant in due course signed the identification parade form when requested to do so. Asked specifically in cross examination whether he had heard Mr Brown say "that Miss Haley had shown the witness the accused man", Sergeant Edwards answer was that he did not recall.

[11] Later that same day, the appellant was formally charged with the offence of rape and cautioned, to which his response was, "Mi nuh rape her".

**The defence**

[12] An unsuccessful submission of no case to answer having been made on his behalf, the appellant opted to give sworn evidence, in which he denied pulling the complainant off the road in Eltham into his house on 1 July 2002 and there forcing her to have sexual intercourse with him. He denied that the bed in his house was small, describing his bed as a "queen size" bed, or that he had either a sewing machine or a refrigerator in the room which he occupied. While he admitted that he had known Sergeant Nicholls "for years" and that he was known by the name "Briggy", he denied that when the police came to his house on 2 July 2002, he had hidden under his bed. On the appellant's account, after Sergeant Nicholls had identified himself as a police officer from outside the house and he had satisfied himself that there were indeed police officers outside, he had opened his door himself and met Sergeant Nicholls at the doorway. His evidence was that, Sergeant Nicholls having informed him of the report that had been made against him, handcuffed him and, while he was being led to the police radio car outside his house, the complainant's father had come up to the side of the car and, in the presence of three police officers, pointed him out to the complainant, who was with him (though at that time, the appellant testified, he did not know who she was), saying "seh a him, seh a him". The appellant denied having had any contact or conversation with either the complainant or her father on the day before and insisted that the first time he was seeing the complainant was when he saw her outside his house in the presence of her father on 2 July 2002.

[13] The appellant is a tailor, who also sells clothes in the Ocho Rios market. He told the court that he was himself the father of five children, three boys and two girls, and that he had lived with his girlfriend for over 19 years. His answer to his counsel's questions, in examination in chief, whether he had ever "had any trouble with the police" or "ever been convicted before", was that he had not and, in answer to Crown counsel under cross examination, he declared that, "Ma'am, I'm not a rapist. I'm not a careless boy. I have no reason to do that. I love my family and my mother. I respect myself". He did however speak to an incident some time in 2002, on a date which he could not recall, when he and the complainant's father had had a disagreement over whether he (the appellant) should allow his own daughter to travel to school in the complainant's father's taxi, at the end of which the complainant's father had told him, "gwaan, mi must fuck you up". The appellant confirmed that he had been represented by Mr Robert Brown at the identification parade and that he had seen the complainant there, but insisted that he had not been pointed out by her on the parade.

[14] The appellant's sole witness was Mr Robert Brown, the attorney-at-law who had represented him at the identification parade (the date of which he could not remember, though he believed that "it was in 2002"). He recalled that the complainant was a witness on the parade and that "a number of questions that she would be asked to respond in writing to" had been agreed by him with the officer in charge of the parade, and that these questions were in fact put to the witness, who had replied in writing to them in due course.

[15] Asked whether during this exercise the complainant had indicated that she saw the person who had raped her, Mr Brown's answer was "not initially". He went on to explain that, after the witness had been given three typewritten questions, "When we looked at her responses, it was not clear what she was saying" and that this led the detective on the parade to suggest "that a further question be written out in pen and that the witness be asked again to respond to that question". This having been done, Mr Brown looked at what had been written and satisfied himself that it was in order. He then gave the court this account of what happened next:

> "A. The detective on the parade then took up the sheet of paper with the question that she had written and was in the process of handing it to the suspect.
>
> Q. How far was she, Detective Haley, how far was she from the suspect?
>
> A. Within touching distance.
>
> Q. Within touching distance. Did she hand it to the suspect?
>
> A. Did not get into his hand, I took possession of it.
>
> Q. Why did you do that?
>
> A. I told the sergeant on the parade that in my view, her action...
>
> HIS LORDSHIP: You told the sergeant then and there?
>
> THE WITNESS: Then and there on the parade, that her action in handing the sheet of paper to the suspect, would have had the effect of identifying him to the witness. And I gave as my opinion...
>
> HIS LORDSHIP: Just a minute, please. I need to write that. Yes, go ahead please.

A. I told him that any of the identification of the witness, in those circumstances, would be bad. I must also say, sir, that in my view...

HIS LORDSHIP: What question are you answering?

WITNESS: Itself, really a comment, my Lord.

HIS LORDSHIP: You are not entitled to make a comment.

Q. Did you do anything after that statement?

A. The sergeant really didn't agree with me?

Q. And then?

A. The paper was handed to the witness, whereupon she purported to identify the suspect."

[16] During a brief cross examination by Crown counsel, in which he was not challenged on his account of what had happened on the parade, Mr Brown expressed the view that the parade "was flawed". Further questioned by the trial judge, however, he said that he had neither complained to the police in writing about what he had observed, nor had he indicated anything of it on the identification parade form. Although he had not given a statement to counsel, he said, "I gave evidence".

**The judge's summation**

[17] In his summing up to the jury, McIntosh J gave standard directions on the respective roles of judge and jury, the burden and standard of proof, the need to disabuse their minds of anything heard or read about the case outside of the court room, as well as of feelings of sympathy for the complainant or feelings of sympathy for or prejudice against the appellant. On inconsistencies and discrepancies in the

evidence, the judge also gave a standard direction, reminding the jury that the incident had taken place in July 2002, almost seven years before the date of trial, and that they should bear this in mind when considering the evidence given by the witnesses. The judge told the jury how rape was defined in law and warned them that it was "dangerous and unsafe to convict [the] accused on the evidence of the complainant which is uncorroborated". He also pointed out to them that, "In this case, there was no evidence that could amount to corroboration", with the result that, "the prosecution can only prove its case if you are satisfied, so that you feel sure, that [the complainant] is speaking the truth". These directions were all completely unexceptionable and no complaint has been made in this appeal with regard to any of them.

[18] The judge then turned his attention to the issue of identification, telling the jury that "the lawyers there will tell you that the real issue in the case is one of identification and the identification of her assailant is what is known as visual identification". In these circumstances, the judge went on to say –

> "...you must be warned of the special need for caution before convicting the accused in reliance on the evidence of identification. That is because it is possible for an honest witness to make a mistaken identification because there have been wrongful convictions in the past as a result of such mistakes and even an apparently convincing witness can be mistaken.
>
> You must, therefore examine carefully the circumstances in which the identification by the witness was made. You should, of course, take into account how long the witness says she had the person, who was the accused, under observation, at what distance, in what light, whether anything did interfere with the observation, whether the

> witness had ever seen the person who the witness says was the accused before; if so, how often, and if there was any special reason for remembering that person and so on. In other words, you look at all the evidence involved in the visual identification of the accused, you take careful note and only if you are sure, only if you are sure, do you find the accused man guilty."

[19] The learned judge then went on to remind the jury of the evidence which had been given in the case, after reiterating his directions to them on the fact that the Crown bore the burden of proving the case to them to their satisfaction and that the appellant had nothing to prove. Dealing firstly with the appellant's evidence (as he was, of course, fully entitled to do), the judge, after reminding the jury of his evidence that he had never seen or spoken to the complainant before 1 July 2002, then said this:

> "...and then he told you that he has never been in trouble with the law before in his life. He told you that he is a good, honest, upright citizen who has never had any trouble with the law. And he told you that he has a young daughter and he respects women. He respects his mother and he respects his daughters and he respects women.
>
> And I will tell you here and now, that when he tells you that, he is doing what is called, putting his character before you, his good character before you. He is saying, I am such a good man, such a good person that I have such a good record, that when you think about what it is alleged that I did, that the allegation that I raped a female, really is not within the scope of my character. He is saying to you, that I am not the type of person who would commit an offence of this nature and he is saying to you, look, you should take my good character into consideration, and if you do, if you accept that I am this good man, then you should find that I could not have raped Loni Boswell."

[20] Later in the summing up, the judge turned to the evidence of Mr Robert Brown concerning the identification parade. Referring to Mr Brown as someone who he did not think was "trying to deliberately mislead you", the judge came in due course to the mode of communication between the police and the complainant which Sergeant Edwards had earlier said had been devised in consultation with Mr Brown (and, the judge said, in our view not unfairly, "at the instigation of Mr Brown"). The judge then said this:

> "He tells you that at first she didn't identify the accused, but she subsequently did, and, in fact, when the question was written by the woman constable, the woman constable was taking the written question to the witness to show her and he intercepted it. Now, clearly, this is an expression of his opinion because, clearly, the officer never handed anything to anybody, but if you think that it is of importance – if you think, as he says, that it completely destroys the credibility of the identification parade, it is a matter for you. You are the judges of the facts. The one thing he has admitted in this court, as reluctantly as he might have been, is that the complainant identified the accused on the parade as being the person at number eight; about that there is no doubt."

**The verdict**

[21] After McIntosh J had summed up the case to them, the jury retired for 16 minutes, before returning a unanimous verdict of guilty. In due course, after evidence of the appellant's antecedents had been given and submissions in mitigation made on his behalf, he was sentenced to 15 years imprisonment at hard labour.

**The grounds of appeal**

[22] The appellant's supplemental grounds of appeal are as follows:

> "1. The appellant having testified at his trial putting his character in issue, the good character direction by the learned trial judge was inadequate.
>
> 2. The directions of the learned trial judge on the evidence of identification of the appellant were inadequate.
>
> 3. The learned trial judge misdirected the jury on the circumstances in which the appellant was pointed out at the identification parade."

**The submissions**

[23] As we have already indicated, these grounds take issue with the trial judge's directions to the jury, firstly, as regards evidence of the appellant's good character and, secondly, the question of identification. On ground one, Dr Williams pointed out that the appellant had no previous convictions and had a good reputation as a tailor, having practised his trade for several years. He submitted that in these circumstances, the appellant, who gave sworn evidence, was entitled to a full good character direction, but that what the judge had given was limited to the propensity aspect of that direction. The omission of the "credibility component" was, Dr Williams submitted, in reliance on the decision of the Privy Council in ***Jagdeo Singh v The State*** (2005) 68 WIR 424, a material defect in the summing up. While acknowledging that an inadequate good character direction is not always fatal to a conviction, Dr Williams submitted that in the instant case the evidence was such that it could not be said that a reasonable jury

properly directed would without doubt have come to the same conclusion, bearing in mind that the evidence implicating the appellant was uncorroborated and that there were many "inconsistencies and improprieties" in the identification evidence, including the evidence of what had taken place at the identification parade.

[24] As regards ground two, Dr Williams complained that, notwithstanding the ***Turnbull*** warning which the judge gave to the jury, the directions on identification were inadequate in that the jury was not assisted to analyse and assess the strengths and weaknesses of that evidence. Among these weaknesses, he identified (a) the judge's failure to make it clear to the jury that the complainant having seen the appellant before he was taken into police custody and thereafter pointing him out on the identification parade was not a "fair test" of her ability to independently recognise her assailant; (b) the fact that in her first statement to the police after the offence had been committed, the complainant had said that day of the incident "was the first time [she] was seeing this man"; (c) the fact that the complainant's father had prompted her on 2 July 2002, by telling her that she must say that the appellant was the man who had raped her; and (d) the fact that on 1 July 2002 when the complainant returned to the vicinity of the crime and saw a man to whom her father had spoken and who then ran away, "it was night" and "it was dark".

[25] And finally, on ground three, Dr Williams submitted that the judge had misdirected the jury as to the evidence of Mr Robert Brown, the appellant's single

witness, with the result that Mr Brown had been discredited and "the quality and the fairness of the identification parade enhanced".

[26] Responding for the Crown, Mrs Archer-Hall, as had Dr Williams, provided the court with very helpful written submissions. On ground one, acknowledging that in this case the appellant was entitled to a good character direction from the judge, Mrs Archer-Hall submitted that the direction which the judge gave had in substance ("in his particular style") sufficiently covered both the credibility and the propensity limbs of the standard direction. In the circumstances, the jury would have been left with "the distinct impression" that, if they accepted that the appellant was of good character, then his evidence should be accepted.

[27] In the alternative, Mrs Archer-Hall submitted, in reliance also on ***Jagdeo Singh v The State*** that, even if this court were to take the view that the judge had not given the "full" good character direction, it did not "inexorably follow" that the appellant's conviction was unsafe. The test is ultimately whether the jury would inevitably have convicted even if the full direction had been given, bearing in mind the nature of the issues in the case and the other available evidence. On this point, we were also referred by Mrs Archer-Hall to ***Gilbert v R*** [2006] 1 WLR 210. Finally on this ground, as regards Dr Williams' comment that the evidence implicating the appellant was uncorroborated and marked by inconsistencies, Mrs Archer-Hall pointed out that there was no requirement of corroboration in cases of sexual offences. Further, in the light of the complainant's evidence that she had seen the appellant in Eltham District on

several occasions before, this was in any event a recognition case and thus the holding of an identification parade had been "an extra precautionary measure".

[28] With regard to ground two, Mrs Archer-Hall characterised McIntosh J's summing up as "comprehensive and fair enabling the jury to understand the need for caution before relying on the evidence of the witness". In respect of any weaknesses in the identification evidence, Mrs Archer-Hall's submission was that there is no mandatory requirement that the judge should list the weaknesses and that it was sufficient for the jury to be reminded of any specific weaknesses, accompanied by critical analysis of those weaknesses from the judge "as deemed appropriate" (citing in support ***Michael Rose v R*** (1994) 46 WIR 213 and ***R v Weeder*** (1980) 71 Cr App R 228). All these things had been done by the judge in this case and the fact that the complainant had seen the appellant being taken into custody was not a weakness which detracted from her reliability in identifying him on the parade, this being a recognition case. In these circumstances, the identification parade was a "mere formality", the substantial question having been whether the complainant had sufficient opportunity to identify her assailant, the evidence of which in this case was "overwhelming".

[29] As regards ground three, Mrs Archer-Hall accepted that the judge's direction to the jury that "the woman constable was taking the written question to the witness" to show it to her was not supported by the evidence. However, she submitted that this was not a material misdirection and that at the end of the day it was open to the jury to decide whether the identification parade was "flawed", as the appellant contended.

**Discussion and analysis**

[30] We propose to deal with ground one under the heading, "The good character directions", and to take grounds two and three together, under the heading "Identification".

The good character directions

[31] In ***Michael Reid v R*** (SCCA No. 113/2007, judgment delivered 3 April 2009), this court adopted and applied the decision of the Court of Appeal of England and Wales in ***R v Vye and others*** [1993] 3 All ER 241, in which it was held that, in every case in which a defendant puts his character in issue, the trial judge should direct the jury, firstly, as to the relevance of a defendant's good character to his credibility (where he has testified or given pre-trial answers or statements) and, secondly, as to the relevance of his good character to the likelihood of his having committed the offence charged (whether or not he has testified or given pre-trial answers or statements). The reason for this requirement is that "[f]airness requires that the judge should direct the jury about good character because it is evidence of probative significance" (per Lord Steyn in ***R v Aziz*** [1995] 3 All ER 149; 156).

[32] There is no question that the appellant in the instant case, who gave sworn evidence, put his character in issue and that, in accordance with what may now be treated as settled doctrine, he was therefore entitled to both limbs of the standard good character direction, that is, a direction as to the relevance of the appellant's good

character to both his credibility and his propensity to commit the offence of rape. The Crown accepts this, as indeed did the judge, and the first issue which therefore arises is whether the actual direction given by the judge was appropriate and adequate in the circumstances.

[33] We have already set out the terms of the judge's directions on this point and it appears to us to be clear from the passage quoted (at para. [19] above), that the judge gave the jury a perfectly acceptable direction as to the relevance of the appellant's character to his propensity to commit the offence for which he was charged. Thus, he told the jury that what the appellant was saying was that, "I am such a good man, such a good person that I have such a good record, that when you think about what it is alleged that I did, that the allegation that I raped a female, really is not within the scope of my character"; and further, "that I am not the type of person who would commit an offence of this nature". But that is where the direction ended, and it accordingly appears to us to be equally clear that the judge failed entirely to direct the jury's mind to the impact of the appellant's good character on his credibility, as he was required to do in this case, the appellant having testified on oath. While we fully accept that, as Mrs Archer-Hall submitted, it is the substance of a direction and not its form that is important, we are quite unable to discern even the thread of the credibility limb of the standard good character direction in what the judge told the jury in this case. We therefore consider that in this respect the trial judge plainly fell into error.

[34] The question which next arises is whether this omission is fatal to the appellant's conviction. In ***Jagdeo Singh***, which was also a case in which the judge omitted to give the credibility limb of the good character direction, the Board quoted (at para. [25]) the following statement from the judgment of the Court of Appeal of Trinidad & Tobago in that case:

> "The question is, however, whether the omission by the trial judge to give the full good character direction resulted in a miscarriage of justice. Although the need to give a full good character direction has been emphasized in all the reported cases it has always been recognised that there may be some cases in which the omission of a good character direction does not render a conviction unsafe. Is this one such case? [Counsel for the appellant] submits that it is not; counsel for the State says that it is. The answer turns on a critical analysis of the evidence."

[35] Expressly approving this statement of the legal position, Lord Bingham of Cornhill went on to observe (at para. [26]) that, "[t]he omission of a good character direction on credibility is not necessarily fatal to the fairness of the trial or to the safety of a conviction. Much may turn on the nature of and issues in a case, and on the other available evidence". These very considerations were quite recently applied by this court in its decision in ***Patricia Henry v R*** [2011] JMCA 16, which was a case in which no good character directions had been given in circumstances in which the court took the view that they were clearly called for by the evidence. The court nevertheless concluded (at para. [51]) that, in the light of the other available evidence in the case, including a confession by the appellant and other items of strong circumstantial

evidence, this was a case in which the potential benefit of a good character direction to the appellant was "wholly outweighed by the nature and coherence" of the other evidence in the case (applying a statement by Lord Hope of Craighead in ***Balson v The State*** (2005) 65 WIR 128, at para. [38]; see also ***Gilbert v R***, per Lord Woolf, at para. [19]).

[36] Apart from the vital issue of whether the circumstances were such that the complainant was able to make an accurate identification of the appellant, the jury's view of her credibility was obviously the critical issue in the case. Indeed, McIntosh J said as much to the jury more than once, when he told them that, in considering the complainant's evidence, they would have to decide "whether or not this is a truthful witness, whether or not this is a reliable witness, because at the end of the day, you cannot convict the accused unless you accept her as a witness of truth"; and again, right at the end of the summing up, when he said that "...if you have a doubt about her veracity, if you have a doubt about her honesty, if you have a doubt about her evidence, then you must acquit". It seems to us that the credibility ingredient of the good character direction was therefore of particular importance in this case, given that, in the absence of any corroboration of the complainant's evidence, the crucial question for the jury was whether her evidence was to be preferred to that of the appellant. Her evidence was not itself without its difficulties, particularly with regard to the question whether she had ever seen the appellant before 1 July 2002 (see paras [5] – [7] above). On this point, it will be recalled that the complainant gave three conflicting answers in examination in chief, saying at first that she was seeing the appellant for the

first time that afternoon, then saying that she had seen him on the road many times before and that he had talked to her before, indicating a wish to marry her, then saying finally that she had in fact seen him only once before 1 July 2002. When she was cross examined, the complainant confirmed that she had said in her statement to the police that she had never seen the appellant before the date on which the offence had been committed and, finally in re-examination, in answer to Crown counsel's direct question whether she had seen the man before "yes or no?", she ended up saying, "Yes, I have seen him before".

[37] On the other side of the equation, save for the fact that the appellant was said to have run away when he was confronted by the complainant's father in the complainant's presence on the evening of 1 July 2002 (which was, in our view, equivocal in the circumstances and was, in any event, denied by the appellant), there seems to us to be no other evidence in the case that could tilt the jury towards acceptance of the complainant's account in preference to his. In these circumstances, it appears to us that a credibility direction might plainly have been of benefit to the appellant and that it cannot be said that this is a case in which that potential benefit was "wholly outweighed" by the other evidence in the case. We therefore consider that the appellant is entitled to succeed on ground one.

Identification

[38] We have already set out (at para. [18] above) the terms of the direction given to the jury by the judge in this case. Taken by itself, the direction is in orthodox ***Turnbull*** terms, adverting as it did to the special need for caution before convicting in reliance on identification evidence, to the possibility of even an honest witness being mistaken, to the fact that there have been wrongful convictions in the past as a result of mistaken identification and to the need to examine carefully all the circumstances in which the identification was made by the witness, including the period of observation, the light, the distance, the presence of any obstruction, whether the accused was known to or had ever been seen by the complainant before, and so on. Subsequently, after reminding the jury in some detail of the complainant's evidence, the judge again invited them "to examine the circumstances under which she had the ability to have seen the person to see whether you accept the evidence of visual identification".

[39] However, Dr Williams' real complaint as regards the judge's summing up on the question of identification was that he did not remind the jury of any specific weaknesses in that evidence, as the ***Turnbull*** guidelines enjoined him to do (see ***R v Turnbull and others*** (1976) 63 Cr App R 132; 137 – 140). In this regard, Dr Williams pointed out four weaknesses in particular (not in this order - see para. [24] above), which were, (i) the fact that the complainant had seen the appellant being placed in a police radio car outside his home on 2 July 2002, two weeks before she was asked to point him out on the identification parade; (ii) the fact that the complainant's father had

prompted her on 2 July 2002 by telling her that she must say that the appellant was the man who had raped her; (iii) the fact that when the complainant returned to the vicinity of the crime that same evening (1 July 2002) and saw a man to whom her father had spoken and who then ran away, "it was night" and "it was dark"; and (iv) the fact that in her first statement to the police after the offence had been committed, the complainant had said that day of the incident "was the first time [she] was seeing this man".

[40] It is clear that in the summing up McIntosh J did not make specific mention at any stage of any "weaknesses" in the identification evidence. However, as the Privy Council said emphatically in ***Rose v R*** (at page 217), to which we were very helpfully referred by Mrs Archer-Hall, there is "nothing in *Turnbull*, or in any of the subsequent cases to which [the Board was] referred, requires the judge to make a 'list' of the weaknesses in the identification evidence, or to use any particular form of words, when referring to those weaknesses". The important point which Lord Lloyd of Berwick, who delivered the judgment of the Board, went on to make was that "[t]he essential requirement is that all the weaknesses should be properly drawn to the attention of the jury, and critically analysed where this is appropriate".

[41] It is accordingly necessary to look at each of the matters of which Dr Williams complained in turn. Firstly, as regards, (i) the fact that the appellant was 'exposed' to the complainant while being ushered into the police radio car on the day after the

offence was committed and (ii) that the complainant's father was alleged to have urged her to "sey dat a di man", in reference to the appellant, the judge said this:

> "But, then again, when you come to the identification parade, although the Defence are saying that parade is flawed, they are also saying that there is no doubt that by this time she would have known the man because the identification parade was held on the 17th of July – the 18th of July, 2002, but she had seen the man, certainly seen the man, they say, on the 2nd of July which would have been 16 days before, a matter of two weeks two days before, that she would have seen him in broad daylight as he was being put in a police car and they are saying that the father, ... was telling her say, 'Sey dat a di man. Sey dat a di man.' So, they say, well, the identification parade, even though you are going to say it is flawed, because they are still arguing that it is flawed, you know, but they are saying that she had that opportunity to have been able to see him and identify him. So, it is a matter for you what you make of it because they are giving you this and they are giving you that, but you are the judges of the facts, so you are the ones who decide what evidence you accept and what evidence you reject. And, as I said before, the accused man has nothing to prove."

[42] While we do not think that this can be said by any means to have been a particularly generous way of reminding the jury of the points being made by the defence on this aspect of the matter ("they are giving you this and they are giving you that..."), we doubt that the jury would have failed to grasp the point itself, which was they needed to approach the evidence that the complainant had pointed out the appellant at the identification parade with reservations, bearing in mind that she had not only been strongly encouraged by her father to confirm that he was the person who had raped her, but had also been aware from some two weeks before that the

appellant was the person who had been taken into custody by the police as the offender.

[43] As regards Dr Williams' third 'weakness', which had to do with the complainant's evidence that when she returned to the scene with her father on the evening of 1 July 2002, "it was night" and "it was dark", it is true that the judge did not point this out to the jury (what he did tell them was "she spoke to the father, father jump in car and take her up to this house, there was the man"), we do not consider that anything in particular turns on this, since the point in time at which it would have been most relevant for the jury to have in mind the state of the light would have been when the offence itself was actually committed.

[44] However, Dr Williams' fourth 'weakness', that is the issue of whether the appellant was known to the complainant before the date of the incident (to which we have already made reference in the context of the complainant's credibility – see para. [36] above), causes us far greater concern. This is what the judge said to the jury about the complainant's evidence on this point:

> "Because it seems that at one time, Loni was saying she had never seen the man before, you mustn't equate that, I don't know the man or don't know the man with, I don't see somebody but in any case she don't [sic] know him, she see him. And she is saying that the accused man is a man she has seen in the district of Eltham on several occasions. She said he tried to chat to her, she would have none of it."

[45] It seems to us that what appears, on the face of it, to be the ultimately inconclusive nature of the complainant's evidence on the question of whether she knew the appellant before 1 July 2002, was a matter which was plainly relevant to her ability to make a reliable identification of him as her assailant. It could well be that it was the judge's 'sense' of the complainant's evidence that what she was in fact saying was that the appellant was someone whom she had "seen in the district of Eltham on several occasions", although this was obviously not clear to Crown counsel at the time, as can be seen from the fact that she felt it necessary to clarify the matter in re-examination, and neither is it all clear to us from a reading of the transcript of her evidence.

[46] But even putting that on one side, we are of the view that Dr Williams was plainly correct in his submission that the fact that the complainant had, by her own admission, said in her statement to the police that 1 July 2002 "was the first time I was seeing this man", was a clear weakness in the identification evidence. This was particularly so, given the fact that, on one view of (or at one point in) her evidence at trial, she appeared to be asserting the opposite. It seems to us that this admitted discrepancy in the complainant's evidence had an obvious bearing on whether this was a recognition case (as Mrs Archer-Hall felt able to submit to us that it was) or not. It accordingly appears to us that the judge's failure to make any mention whatsoever of this critically important factor in his summing up seriously impaired the adequacy of his treatment of the identification evidence.

[47] Turning now to the judge's treatment of the evidence of Mr Robert Brown, Mrs Archer-Hall very properly conceded that the judge's direction to the jury that "the woman constable was taking the written statement to the witness" was a misstatement of the evidence. It is clear that what Mr Brown in fact said in his evidence was that the detective on the parade "took up the sheet of paper with the question that she had written and was in the process of handing it to the suspect". However, Mr Brown went on to say, the sheet of paper never reached the suspect's hand, as he (Mr Brown) "took possession of it", and immediately advised the sergeant that he thought that the detective's action of handing the sheet of paper to the suspect "would have had the effect of identifying him to the witness" and that any identification of the suspect by the witness in those circumstances "would be bad". But after the sergeant disagreed with Mr Brown's assessment of the situation, the sheet of paper was handed back to the complainant, who then identified the appellant.

[48] There can be no doubt that, as Lord Steyn observed in ***R v Aziz*** (at page 156), a trial judge is under a clear duty to "put the defence case before the jury in a fair and balanced way". To the extent that the conduct of the identification parade was obviously a critical aspect of the appellant's contention that he had been wrongly identified by the complainant as her assailant (and was clearly the substantial reason for calling Mr Brown as a witness for the defence), it was therefore important for the trial judge in his summing up to remind the jury of the evidence on the point in a fair and balanced way.

[49] Despite the judge's misstatement of Mr Brown's evidence, he did tell the jury, correctly, that "clearly, the officer never handed anything to anybody", referring to Mr Brown's own evidence that, irrespective of whatever motive the detective might have had in attempting to hand the sheet of paper to the suspect on the parade, her plan was forestalled by his attentiveness and swift action. The judge then left it to the jury to consider "if you think that it is of importance - if you think, as [Mr Brown] says, that it completely destroys the credibility of the identification parade, it is a matter for you". In the light of these directions, it seems to us that the impact of the judge's misstatement of Mr Brown's evidence would have been considerably mitigated and that, in agreement with Mrs Archer-Hall on this point, the judge's lapse was not so material "that it would have resulted in a miscarriage of justice". It would in any event have been a relevant fact for the jury to consider that, at the end of the identification parade, Mr Brown did not indicate his difficulties with the process on the identification parade form or in any subsequent complaint to the authorities.

**Conclusion and disposal of the case**

[50] In the result, we have come to the view that the appellant is entitled to succeed on grounds one and two and that the appeal must accordingly be allowed. The only question that therefore remains is what should be the disposal of the case. In the well known decision of the Privy Council in ***Reid v R*** (1978) 27 WIR 254, the Board considered the power of this court, pursuant to section 14(2) of the Judicature (Appellate Jurisdiction) Act, to order a new trial in the interests of justice. In his

judgment in that case, Lord Diplock drew a distinction between cases in which the verdict of a jury has been set aside because "the evidence adduced at the trial was insufficient to justify a conviction by a reasonable jury properly directed" and cases in which the verdict has been set aside on other grounds, such as "some technical blunder by the judge in the conduct of the trial or in his summing-up to the jury" (page 258).

[51] In the first category of case, it would be contrary to principle and not in the interests of justice that the prosecution should be given another chance to cure "evidential deficiencies" in its case against the appellant, while, in the second category of case, it is in the interests of justice that those persons who are guilty of serious crime should be brought to justice and this court may therefore exercise its discretionary power to order a new trial, taking into account all relevant factors. Among these factors (several of which are mentioned in Lord Diplock's judgment at 258, subject to the caveat that those specifically referred to are not intended to be an exhaustive catalogue of factors that may be present in particular cases), are the seriousness and prevalence of the offence, the strength of the prosecution's case and the "length of time that will have elapsed between the offence and the new trial if one be ordered", although Lord Diplock also observed that this last factor "may vary in importance from case to case" (page 258).

[52] In our view, the instant case clearly falls within the second category of case, in that it cannot be said that there was not sufficient evidence upon which a jury, properly directed, might have convicted. The offence of rape is unquestionably among the most

serious of offences known to the criminal law and we would therefore have considered, other things being equal, that this was a case in which it was plainly in the interests of justice to order a new trial. However, it seems to us that in this case it is also clearly right that we should take into account the fact that the offence for which the appellant was indicted took place on 1 July 2002 and that, if a new trial were to be ordered by us, that trial would be unlikely to commence before the ninth anniversary of that date. Further, we consider that in this case it must also be a relevant factor that the appellant was originally tried and convicted of this offence on 17 February 2006 and that his appeal from that conviction was allowed by this court on 1 October 2007, when a new trial was ordered. That trial took place between 3 and 5 June 2009, when he was again convicted, hence the present appeal.

[53] While nothing has been urged upon us on behalf of either the appellant or the prosecution with regard to potential impact of these factors, it cannot, in our view, be in the interests of justice to order that the appellant, who was originally arrested and charged for this offence on 18 July 2002, should be ordered to stand trial for a third time in all the circumstances of this case and we therefore decline to do so. We will accordingly allow the appeal against conviction and sentence, quash the conviction and set aside the sentence and direct that a judgment and verdict of acquittal be entered.