NMLP

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS. 152, 155, 156, 157 AND 158 OF 1999

BEFORE: **THE HON. MR. JUSTICE DOWNER, J.A.**
THE HON. MR. JUSTICE PANTON, J.A.
THE HON. MR. JUSTICE SMITH, J.A.(Ag.)

R. v. Lynden Levy
Anthony Wallace
Winston Ferguson
Gairy Hylton
Patrick Evans

Dwight Reece for Levy, Ferguson and Hylton

Earl DeLisser for Wallace

C.J. Mitchell for Evans

Paula Llewellyn Senior Deputy Director of Public Prosecutions (Ag.) and Rochell Cameron for the Crown

November 19, 20, 21, 2001 and May 16, 2002

SMITH, J.A. (Ag.)

The appellants were convicted in the High Court Division of the Gun Court for illegal possession of firearm and rape. They were jointly charged with four (4) others on an indictment containing three (3) counts. Count 1 charges illegal possession of firearm, and counts II and III charge rape.

The trial began before Donald McIntosh, J. on the 10th August 1999 and lasted thirteen days. On arraignment Livingston Bent, one of the nine on trial,

pleaded guilty. At the end of the Crown's case Nelson Cummings, was discharged in respect of count 1 and no verdicts were entered in respect of counts 2 and 3. These charges (counts 2 & 3) were referred to the Home Circuit Court. During his summing-up the learned trial judge dealt with two of the accused persons, Dennis Rose and Andy Christian in the same way as he had dealt with Cummings. The five appellants were convicted and sentenced as follows:

Levy

> 50 years imprisonment at hard labour on each count- sentences to run concurrently;

Wallace, Ferguson, Hylton and Evans

> 20 years imprisonment at hard labour on each count with count 1 to run consecutively with counts 11 and 111 and counts 11 and 111 to run concurrently

The appellants were granted leave by a single judge of the Court to appeal against both convictions and sentences.

The Prosecution's case

Five witnesses gave evidence for the prosecution. The virtual complainants were two sisters, T. and N. aged 15 and 16 years.

On the 11th January 1999, about 10:00 p.m. both complainants were at Compound a volatile area in Olympic Gardens. Their father had sent them to "Rexo", the accused Nelson Cummings. When they got there "Rexo" was sitting on a wall; two men were beside them. N. said that one of those men was the

appellant Gairy Hylton. They spoke to Rexo. The witnesses said that Rexo offered to take them to Kentucky Fried Chicken and they accepted the offer. They waited by a taxi stand for hours while Rexo left and returned on several occasions. Eventually, Rexo told N. that a youth wanted to talk to her. Someone who was with Rexo held N. by the arm and pulled her through a zinc gate into a yard.

T. went through the gate to see what was going on. She saw three men coming towards her. She rushed back out. It is not in dispute that the place was well lit by street lights.

N. was in the yard with four men. She identified three of them as the appellants Levy, Hylton and Wallace. According to N. the appellant Levy had a gun pointed at her. The man who dragged her into the yard had a ratchet knife. Wallace and Hylton also had ratchet knives. These knives she said were open. Levy said "Gal you ever get battery yet?" He had the gun pointed at her. One of them held unto her hands. Then Levy told Wallace to take off N's. clothes. He did as he was told. Wallace tied her hands behind her with her blouse. He took off her panty. Then one of them who was not before the court, placed the knife at her neck and put his penis in her mouth. Whilst he was doing this Levy had the gun directed at her. Wallace and Hylton still had open knives.

After that the first of many demeaning acts to which these young girls were subjected to, Levy said to N. "Gal me a go kill you, you know". He then

also subjected her to oral sex. At the same time "the other man" raped her from behind. She was afterwards taken to an open yard. Electric light was in this yard. Levy "carried" her to a bathroom and again raped her at gun point. He left her in the bathroom to "wash off". When she came out she saw Levy, Wallace and Hylton in the yard. The other man was not there. Levy went for a piece of carpet gave it to Wallace and told him "Mek the gal go do her duty". Thereupon, Wallace spread the carpet on the ground and forced her to engage in oral and vaginal sex. Thereafter, Levy told Hylton to do the same. Hylton placed a knife at her neck and abused her in like manner. Levy then sent Wallace to call Ferguson and Evans. Wallace left and returned with Ferguson and Evans.

Levy told Ferguson to have sex with N. She resisted and Levy boxed her and forced her to have oral sex and vaginal sex with Ferguson. When Ferguson was through, Levy ordered N. to have sex with Evans. She was not up to it and Levy, she said, "tek my head and lick it on the wall". He rested the gun on a stone, grabbed her, threw her on the carpet and told Evans to put his penis in her mouth. Evans did so and thereafter proceeded to rape her. When Evans was through, Levy ordered her to go and "wash off". She did so and dressed herself.

Levy covered her face and took her to a house. In this house N. saw her sister T. whose finger was cut and bleeding. T. who had rushed back to the road when she saw the men inside the yard, was thereafter grabbed by the

neck from behind, lifted up and taken into an "open land". She identified Levy as the man who grabbed her from behind. In that place she saw another man she later identified as Evans. The appellant Levy, she said, threatened her "hey gal a dead you a go dead because a Tower Hill yuh come from". She looked at him and he boxed her saying "Don't look into my face."

She described how Levy and Evans pulled off her skirt and blouse. She like her sister was subjected to what the learned trial judge described as "utterly disgusting, degrading and repulsive acts" whilst she was repeatedly raped. Thereafter she was taken to the house.

In the house, the appellant Levy, whom the learned trial judge described as the "ring master" was in charge. He sent for a video tape. What took place in the house was video taped. The Crown introduced as evidence the video-tape of the persons in the room and their activities. The girls were repeatedly raped by about eleven men in the house and forced to perform "unnatural and perverse acts."

They were taken to the bus stop by one of the men (Bent). Whilst there a police jeep approached. They did not make a report to the police because they said they were threatened by some of the men. They took a bus to Papine and went to a friend's home.

About one week later while at their stepfather's home in Dewdney, the police came and took them to the Rape Centre at the Hunt's Bay police station after which they were taken to the Maxfield Park Girls' Institution. They gave

statements to the police. On the 23rd January, 1999 at about 10:00 a.m. they took the police to the place and the house where they had been assaulted on the 11th January, 1999. There they saw the appellant Hylton who was at the gate of the premises. T. pointed to him and said "see the bitch de". The police grabbed him. Another of the men (Christian) was also seen there. T. held on to him and told the police he was one of the men.

They along with the police went inside one of the houses on the premises where the police carried out a search. The party next went into a yard. T. climbed through a window of a house in this yard and let in the police. In this house she found her chain in a dresser and a knife which she had in her bag. She had had the chain around her neck and the appellant Levy had removed it. In a "rubbish heap" she found her white blouse. The police took possession of these items. T. also saw a photograph of three of the men (Wallace, Bent and Rose).

One of the men (Rose) was seen in his house in the Compound area as the police and young ladies went around looking for the men who were involved in the assault.

On the 27th January, 1999 T. attended three identification parades and identified Ferguson, Levy and Wallace.

N. told the judge that T. and herself were taken to Compound to look for the men who had raped them. She saw three of them. They were held by the police. The appellant Hylton was one.

On the 6th of February, N. pointed out Wallace and on the 10th February she pointed out Levy and Evans on identification parades.

Detective Corporal Dave Daley testified that on the 16th January 1999, about 10:00 a.m he, Detective Inspector Knight and two other police officers went to 2R Rhoden Crescent in Olympic Gardens. He saw and spoke to one Mr. Barrington Rodney. The police searched the house and found a VCR cassette in a locker in this man's bedroom.

The police took the cassette and escorted Mr. Rodney to the Olympic Gardens Police Station. There the police in the presence of Mr. Rodney viewed the cassette. The fate of Mr. Rodney is not relevant to this appeal.

Corporal Daley testified that he recognized two girls on the cassette. He had seen them in December speaking to a police officer. With the assistance of this officer he was able to contact these girls at Dewdney Road. They identified themselves as N. and T. He spoke to them and they made a report to him. They were then taken to the Rape Investigating Unit.

Corporal Daley further testified that he recognized two men clearly by voices and faces as he watched the video cassette. He knew one as Don (Livingston Bent). The other was the appellant Levy. He recognized the face of Gairy Hylton. He testified that Levy was the one speaking most of the time – giving instructions.

Later that day Corporal Daley saw the appellant Levy at the Hunts Bay Police Station. He had known him for about five years before from Compound.

Corporal Daley told Levy that he was a suspect in an alleged case of rape at gun point involving two teenaged girls. Levy's response, he said, was "Me a heavy man, me nuh rape."

On the 21st January, 1999, Corporal Daley saw the appellant Ferguson at Hunts Bay Station. He cautioned him and told him that he was a suspect in an alleged case of rape of two young girls and that the incident was taped. Ferguson's reply was " me nuh rape them officer". Cpl. Daley said that he had known Ferguson for about two years, and that he (Ferguson) was from the Olympic Gardens area which is about six chains from Compound.

On 23rd January 1999 Corporal Daley along with several other police officers and N. and T. went to Compound, also known as McDonald Place. There, he said, the girls pointed out the appellant Hylton as one of the men who had raped them. The evidence is that when pointed out Hylton said "A nuh mi one officer". He was taken into custody.

As they walked through Compound the young ladies pointed to another man (who is not before us) and said "See one more here, officer him a one a dem that rape wi the night."

Another man (Dennis Rose) was similarly pointed out. T. and N. took the police officers to a one room house. The door was locked. Corporal Daley's evidence supports the evidence of T. as to what took place at the house.

After the search for the men in Compound was over the search party returned to the police station. There the appellant Hylton was arrested and

charged with rape, illegal possession of firearms etc. On caution, he said "a the man dem send come call me".

On the 26th January, 1999, Corporal Daley saw the appellant Anthony Wallace at the Hunts Bay police station. He cautioned him and told him that he was a suspect in an alleged case of rape etc. in Compound and that the incident was video taped. His response was "Mi nuh rape."

On the following day Corporal Daley said he saw the appellant Ferguson at the cell block at the station. He spoke to him in the same vein as he spoke to the others. After caution Ferguson said "A di man dem call me officer."

Later the same day (i.e. 27th.) he arrested and charged Wallace for illegal possession of firearm and rape. When cautioned he said "mi never rape them but me see what happen."

When Bent (not an appellant) was arrested and charged he said "Officer, mi a go a court go plead guilty because mi know what mi do."

On the 10th February, 1999, Corporal Daley arrested and charged the appellant Levy for the same offence. He was cautioned and said "Officer, yuh a pressure me wid dem deh charge deh."

On the 14th April, 1999 Corporal Daley confronted the appellant Patrick Evans with the allegations made against him. Evans' reply was "mi nuh rape dem." On the 10th May 1999 Evans was charged with the same offences. When cautioned he said "Mi nuh rape nobody, mi nuh conspire to rape nobody."

The tape was played in court. T. and N. identified themselves in the video. They also identified the appellants Levy, Evans, Wallace and Hylton. From the accounts given by the witnesses, Levy was apparently in charge. It was he who video taped what was taking place in the room.

Sergeant Vera Thomas who conducted the identification parades also gave evidence. On the 27th January 1999, she held separate parades on which the appellants Wallace and Ferguson were the suspects. They were both positively identified by the complainants.

On the 10th February, 1999, she held a parade on which the appellant Levy was the suspect and he was identified by both witnesses. On the 10th May, 1999, N. identified the appellant Evans from a line-up of men; however T. failed to identify him.

The Defence

The appellants Anthony Wallace and Gairy Hylton gave unsworn statements. The defence of each was an alibi.

The appellant Levy gave evidence on oath and called one witness. He denied the allegations made against him by the young ladies. He told the Court that on the 11th January, 1999, he went to work from 9:00 a.m. and did not leave work until 2:45 a.m. the following morning. From work he went home to his baby mother Miss Charmaine Watt. Subsequently, the police took him from his house at 2D Rhoden Crescent into custody. They also removed from the house two photographs of himself. His witness, Mr. Cornel Shepherd testified

that the appellant Levy was with him at work during the night when he was alleged to have raped the young ladies.

The appellant Winston Ferguson gave sworn evidence. His defence was also an alibi. He lives at 9 Riley Avenue, Kingston 20. He buys and sells ackee and washes car for a living. He told the Court that on the 11th January 1999, he started washing cars at about 8:00 p.m. and finished around midnight. Thereafter he went home. He remained at home until about 8:00 o'clock the following morning. He was subsequently taken from his house by the police. He said he was identified on an identification parade on which he was the only one with "locks".

He also told the Court that he knew the appellant Evans otherwise called "Cooper" and that he would see him at the car wash place "every day".

The appellant Patrick Evans also gave sworn evidence and called a witness. He lives at 33 Lyndhurst Court Villa, Kingston 11. He told the Court that the night in question he and his friend Michael McIntosh were together washing cars. His witness, Mr. Michael McIntosh supported his alibi. He told the Court that at the material time he and the appellant Evans were washing cars at the intersection of Olympic and Bay Farm Roads.

Grounds of Appeal

Videotape Evidence

A ground common to all the appeals concerns the video tape. It is formulated as follows:

> "The learned trial judge erred in allowing into evidence portions of a video cassette which said video cassette sought to strengthen the Crown's case in establishing the identity of the applicant."

Mr. Reece submitted that the learned trial judge erred in receiving into evidence the video cassette "since the original was not in Court and could not be accounted for".

Miss Llewellyn for the Crown, referred to the evidence of Corporal Daley where he said he kept the tape in his custody and that no alteration was made to the tape after it came into his custody. She also referred to the evidence of the two young ladies who by their answers to questions addressed to them by the Court and Counsel, attested to the authenticity and accuracy of the video tape. She submitted that there could be no doubt that the tape was relevant. Miss Llewellyn cited and relied on the Canadian case of **The Queen v. Alexander Nikolovski** (1996) 3 SCR.

Mr. DeLisser and Mr. Reece conceded that the video tape was relevant. Generally what is relevant is, subject to any rule of exclusion, prima facie admissible.

Mr. Reece's submission that the learned trial judge erred in receiving the tape recording in evidence since there was no evidence that it was the original or an authentic copy of the original, is not supported by authority. In **Kajala v. Noble** (1982) 75 Cr.App.R. 149 the defendant was charged with threatening behaviour whereby a breach of the peace was likely to be occasioned. The B.B.C. had filmed the disturbances in the streets of Southall, and a footage of

the film was shown on a number of their news programmes. A viewer recognised one of the participants and informed the police. The B.B.C. declined to part with their film but provided a video recording of it which was put in evidence. The Court was satisfied that the recording was an authentic copy of the original. The defendant was convicted. The point raised on appeal was that the "best evidence" rule had been contravened and that the video recording was no substitute for the original film and proper proof of that.

The Divisional Court held, that the old rule that a party must produce the best evidence as the nature of the case would allow, and that any less good evidence was to be excluded, no longer pertained, for the court did not confine itself to the best evidence but admitted all relevant evidence. The best evidence rule is limited and confined to written documents in the strict sense of the term, and has no relevance to tapes or films.

The evidence of Corporal Daley that he recognized two of the appellants on the video recording is also relevant and admissible. In **Taylor v. Chief Constable of Cheshire** (1987) Cr. App. R. 191 a video recording was made of an incident at a stationer's shop in which a man was seen to put a packet of batteries in his pocket. He then turned full face to the video camera. The recording was seen by three police officers each of whom identified the man as the defendant. Shortly before the defendant's trial for theft, it was discovered that the recording had accidentally been erased from the cassette. At the trial it was argued that the evidence which the prosecution proposed to adduce, of

what the witnesses had seen in the video recording, was not admissible. The submission was overruled and the defendant was convicted. On appeal the Queens Bench (Divisional Court) held, dismissing the appeal, that the evidence tendered was not inadmissible in law, whether by reference to the hearsay rule or any other principle of law. So far as admissibility was concerned there was no distinction between a direct view of the actions of an alleged shop lifter and a view of those actions on the video displaying unit of a camera or on a recording. The weight and reliability of the evidence of a witness who has viewed a display or recording, just as a witness who had seen directly, would depend on an assessment of all the relevant considerations in accordance with well established principles.

Mr. Reece further complained that the learned trial judge relied on "his own recognition of the appellant Levy's voice in court having heard a voice on the tape which to him match (sic) that of Levy's".

The learned trial judge in his summation referred to the appellant Levy giving evidence in court and said that in his view "the voice which was heard in this court is the same voice which was heard on that tape, giving the interview, telling persons what to do, and that voice is none other than the voice of No. 2, Linden Levy."

In the **Nikolovski** case (supra) the Supreme Court of Canada by a majority held that:

> "Courts have recognized the importance and usefulness of videotapes in the search for truth in

> criminal trials as this type of evidence can serve to establish innocence just as surely and effectively as it may establish guilt. A video camera records accurately all that it perceives and it is precisely because videotape evidence can present such very clear and convincing evidence of identification that triers of fact can use it as the sole basis for the identification of the accused before them as the perpetrator of the crime.
>
> Once it is established that a videotape has not been altered or changed, and that it depicts the scene of a crime, then it becomes admissible and relevant evidence. Not only is the tape (or photograph) real evidence in the sense that that term has been used in earlier cases, but it is to a certain extent testimonial evidence as well. It can and should be used by a trier of fact in determining whether a crime has been committed, and whether the accused before the court committed the crime. It may indeed be a silent, trustworthy, unemotional unbiased and accurate witness who has complete and instant recall of events. It may provide such strong and convincing evidence that of itself it will demonstrate clearly either the "innocence or guilt of the accused."

In support of the above, reference was made to **R. v. Dodson** (1984) 1 W.L.R. 971 at pp 978-79 and to **R v Downey** (1995) 1 Cr. App. R. 547.

We are firmly of the view that the learned trial judge did nothing wrong in comparing the voice of the appellant Levy in Court with the voice heard on the video recording and thereby conclude that it was Levy's voice on the latter.

On behalf of appellant Hylton, Mr. Reece submitted that the learned trial judge did not take into consideration the fact that the observations of the complainants were made in difficult circumstances. The learned judge carefully

considered the credibility and reliability of the complainants. He examined the opportunity each had to observe her assailant. Hylton was recognized on tape by T. The judge sitting without a jury viewed the tape. He asked questions of the complainants during the viewing of the videotape as to the identity of persons appearing thereon. He concluded that the tape provided "evidence against the accused persons here in court." This court is not in a position to comment on that conclusion since the Court did not have the opportunity to make the comparison.

The learned judge clearly demonstrated that he addressed his mind to the need for caution when dealing with visual identification. At p. 738 of the record he said:

> "Now the defence has emphasized the question of identification and although I have said that this court finds the witnesses reliable, I must mention that I am aware of the law that where the case against an accused depends wholly or to a large extent on the correctness of one or more identification which the defence alleges to be mistaken, the court must be warned of the special need for caution before convicting the accused in reliance on that evidence of identification..."

We find no merit in this ground of appeal.

Of the six grounds filed by the appellant Ferguson, Mr. Reece only pursued the fifth ground, viz. "Wrong identity". He contends that the parade was not conducted fairly, in that Ferguson was the only person with "locks" on the parade. He further submitted that the learned trial judge did not address the discrepancy between the officer's evidence that none of the men had covering on

covering on his head and that of the identifying witness who said the men had their heads covered.

This appellant went on two parades. N. failed to identify him. He was however identified by T. T's evidence is that Ferguson was the only "dread" on the parade. But Sargeant Vera Thomas who conducted the parade did not agree that he was the only "locks man" on parade.

The learned trial judge in dealing with the complaints made concerning the parade took the following facts into account. The appellant chose the men for the parade; one witness identified him, the other did not; the appellant's lawyer who was present made no complaint then and there; the witness T. who identified him had much more opportunity than N. to observe him on the 11th January.

The learned judge concluded that he was satisfied that there was no attempt to assist the witnesses in identifying Ferguson, that he was not conspicuous and that the parade was conducted fairly. We find no fault with the judge's approach. Accordingly, this ground also fails.

Mr. C. J. Mitchell for the appellant, Evans, abandoned the appeal against conviction and proceeded with the appeal against sentence. We will return to that later.

Mr. DeLisser, for the appellant Wallace, filed five additional grounds of appeal and was given leave to argue them. He did not pursue ground 3 which concerns the admissibility of the videotape.

The following grounds were argued:

1. That the learned trial judge did not properly consider discrepancies between the evidence given by the two complainants and the statements which they gave to the police which may have alerted him to the fact that they might not be witnesses of truth.

2. That the learned trial judge misdirected himself in his summing up when he failed to consider that the two complainants had already seen a photograph of the appellant before they went on an identification parade to point him out and furthermore failed to consider the implication of the appellant being in a photograph with an accused who openly admitted his guilt and pleaded guilty at the trial.

3. ...

4. That the conduct of the learned trial judge throughout the trial demonstrated his bias in favour of the complainants to the extent that he effectively prevented Counsel from effectively cross-examining the complainants.

5. The sentence is manifestly excessive.

Ground 1 – Discrepancies

Mr. DeLisser pointed out several discrepancies between the evidence of the complainants and statements they gave to the police. He also pointed out inconsistencies in the evidence of the complainants. For example, in evidence in Court they said that in the morning whilst they were in the house two men came in and raped them, whereas, the statements indicate that they told the police that at that time one man came in and had oral sex with one of them. That he said, was indicative of collusion.

Mr. DeLisser with much diligence went through the voluminous transcript of evidence pointing out other discrepancies in the complainants' description of some of the men charged (three of whom were sent to the Circuit Court) and their respective conduct. He submitted that the evidence of the complainants as regards those men was so impaired that their credibility and reliability were completely destroyed. The learned trial judge, he complained, failed, to take that fact into consideration when assessing their evidence in relation to the appellant, Wallace.

What was the approach of the learned trial judge?

At page 718 of the record, the judge revealed his mind. He acknowledged the fact of discrepancies and inconsistencies in the evidence of the witnesses and went on to say:

> "Such inconsistencies or contradictions are matters which this Court will take into consideration. This Court will consider whether or not they are slight or serious, material or immaterial and will have to decide whether or not it affects the consideration of the witnesses concerned and completely erode their credibility."

He intimated that in considering the case against the two who were later sent to the Circuit Court, he did "a complete review of the evidence" assisted by arguments of counsel. He considered explanations given for such discrepancies. In this regard he repeated the observation of one counsel (p. 734):

> "Mr. Bird did tell this Court that he understood that this could be caused by the fact that because of

> feelings of shame, remorse, degradation that the witness having been so completely degraded and dehumanized might have blocked out this incident "out of her mind because to recall would be to recall this subjugation which she suffered; the mental torment which she suffered, and her subconsciousness would want to block."

The judge accepted this and added :

> "It seems that with the multiple rape that was perpetrated on N. she was completely blocked on seeing what was being done to her sister."

The learned judge was of the view that some of the discrepancies indicated to him the absence of concoction and spoke to the honesty and integrity of the witnesses. The learned judge considered the discrepancies in the accounts given by the complainants as to what took place in the house in light of the video recording. At p. 737 of the record he said:

> "Again this time, it is significant that there is an omission of evidence from one of the witnesses. In the first instance it was the witness N. in the second instance it was the witness T. and the court is fortified in its view again that there is no deliberate concoctions of the evidence because one witness says something which takes place in the presence of the other witness who does not say the same thing and that is because that episode was clearly seen on tape, because T. was told to do certain acts which were utterly disgusting, degrading and repulsive and she did them. Yet in her evidence she did not mention it. The other witness, N. spoke of them perhaps because she was not the one who was actively doing them, and as I said before and I repeat, it fortifies this Court's view that there was no attempt on the part of the two complainants to concoct evidence, to manufacture evidence to falsely accuse anybody or to taint anybody because others were tainted. This court is of the view that they were and are honest

> witnesses, brave witnesses, witnesses of integrity and witnesses on whom this court can rely, on whose evidence this court can place confidence and that they are witnesses of truth; that the discrepancies are not such that it discredit their evidence, and this court accepts their evidence when they say that these men, 1, 2, 3,, 4, and 5 were present, actively aiding and abetting each other in the commission of the acts for which they are charged..."

We think the approach of the judge was correct. Discrepancies are bound to occur, especially in the circumstances of this case. There was a preponderance of relevant and cogent evidence which convinced the judge of guilt. This ground fails.

Ground 2

This complaint concerns the viewing of the appellant Wallace's photograph by the witnesses. The evidence of the complainants is that along with the police they went into a particular house in Compound. In that house they saw a photograph of three men. The witnesses showed the photograph to the police and identified the persons in the photograph as three of the men who were involved in the sexual assault. These three men were later identified as Wallace, Bent and Rose.

Mr. DeLisser's complaint is that the learned trial judge, in considering the identification of Wallace on the parade, did not address his mind to the implication of the complainants seeing his picture "in company of" Bent who admitted his guilt before the parade was held. The evidence of N. is that

seeing the photograph did not assist her in pointing out Wallace on the parade.

During cross-examination by Mr. Cunningham, the following transpired (p.317):

> "Q. And when you saw the number four man on the identification parade, could it be correct in saying that you recognized him from the picture?
>
> A. No sir
>
> Q. You did not recognise him from the picture
>
> A. I did not."

T's evidence under cross-examination on this aspect was as follows (p. 170):

> "Q. Did Mr. Daley at anytime mention to you that, you know I have picked up the man in the picture?
>
> A. After
>
> Q. After what?
>
> A. After he told me that he pick up the men, one of the men that was on the picture and we were going to do an identification parade for him.
>
> Q. He told you that before you went on the identification parade?
>
> A. Yes sir.
>
> Q. So you pointed out number four at the identification parade.
>
> A. Yes sir.

Q. Would I be correct in saying that when you pointed out, you recognized the man in the picture that this police showed you?

A. And see the night in the action."

Thus both witnesses have insisted that the man they pointed out on that parade was one of the men who assaulted them during the night in question. They were not just pointing out the man whose photograph they had seen.

We emphasise the fact that Mr. DeLisser's complaint is confined to the failure of the judge to address his mind to the fact that the witnesses saw the appellant in a photograph with others. The learned trial judge gave himself the full Turnbull warning. He disclosed that he had carefully examined the circumstances under which the identification by each witness was made. He indicated that he had considered and weighed carefully the address of each counsel.

It is not for this Court to assume that the learned trial judge had failed to consider every important aspect of the evidence as it relates to identification.

Further we can see no undue prejudice to the appellant as a consequence of the police showing to the witnesses the photograph of a person whose identity was not known to the police.

This ground also fails.

Ground 4 -Bias on the part of the trial judge

Mr. DeLisser complained that the learned trial judge sought to protect N. during cross-examination by counsel for the appellant Wallace. Counsel did not argue this ground with any conviction. We have examined the transcript and we find no justification for this complaint.

Sentence

Counsel for the appellants submitted that the sentences were manifestly excessive. Mr. DeLisser submitted that the range should be between 10 and 15 years' imprisonment. Mr. Mitchell suggested a range of 15 to 18. Mr. Reece suggested a minimum of 15 and a maximum of 20.

No authorities were cited. It has been said that the vast majority of decisions on sentencing are no more than examples, with no binding effect. However, they are useful as an aid to uniformity of approach. Counsel must not think that the citation of sentencing decisions will necessarily be to no avail.

It seems on principle that the sentences on counts 2 and 3 should not be the same as that on count 1.

In all the circumstances we think the sentences imposed are manifestly excessive. We do not think that consecutive sentences are appropriate in these circumstances. In respect of the appellant Levy, we think a term of imprisonment for twenty five years on count 1 and thirty years on counts 2 and 3 to run concurrently would be appropriate.

In respect of Wallace, Ferguson Hylton and Evans, we are of the view that for each of them a sentence of fifteen years imprisonment on count 1 and twenty years imprisonment hard labour on counts 2 and 3 to run concurrently would be appropriate.

Conclusion

1. The appeals against convictions are dismissed. The convictions are affirmed.

2. The appeals against sentences are allowed. The sentences imposed by the trial judge are set aside and the following substituted therefor:

Levy:

Count 1 - 25 years imprisonment at hard labour

Counts 2 & 3- 30 years imprisonment at hard labour sentences to run concurrently

Wallace, Ferguson, Hylton and Evans

Count 1 - 15 years imprisonment at hard labour

Counts 2 & 3 - 20 years imprisonment at hard labour sentences to run concurrently

Sentences to commence on the 8th October, 1999.