JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEALS NOS. 107 & 108 of 1990

BEFORE: THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MISS JUSTICE MORGAN, J.A.
THE HON. MR. JUSTICE GORDON, J.A.

REGINA
vs.
ROY WILLIAMS
OSWALD GRAY

Arthur Kitchin for the applicants

Terrence Williams for the Crown

October 7, 8 and December 20, 1991

MORGAN, J.A.:

The applicants, Roy Williams and Oswald Gray, were convicted in the St. Mary Circuit Court on the 4th day of July, 1990, on a charge of rape. Each was sentenced to a term of eight years at hard labour. They now apply for leave to appeal that conviction and the sentence imposed. The facts are as follows:

I. G., a girl of fourteen years, left school by bus and set out for home at about 5:00 p.m. on March 13, 1989. She arrived at Mount Ross bridge, St. Mary about 5:30 p.m. where she saw two men whom she identified as the accused men, sitting on a wall beside the bridge. One of the men whom she claimed was the applicant Williams said she should come and wash his back. He intended, it seemed, to bathe in the river flowing underneath the bridge. She ran off but he chased, held her, took her under the bridge with Gray who followed behind. There Gray had sexual intercourse with her for fifteen minutes then

Williams for another fifteen minutes. She put her panties on, went home, had a bath, ate dinner, went to bed, but said nothing to anyone. Her uncles and brothers were home but her mother was in the hospital and it was on her return twelve (12) days later that her daughter made a report to her. Following this report, the next morning both mother and daughter went to a spot where passengers take the bus with their baggage. Williams, the baggage-man, was putting the baggage on the bus and Gray, the conductor, was by the bus door. I. G. pointed out both men as her assailants. Her mother confronted Gray who fired a volley of indecent language at her. She was not able to speak with Williams as he was working and had indicated that he would speak with her as soon as he was finished. However, Grant sent off the bus before Williams had the opportunity to speak and as the bus moved off Gray said, "Is three weeks now since we draw weh the gal and f... her off."

I. G. said she was able to identify the men, as, in the words of the learned trial judge, "She knew the men before because she had travelled on the bus to Kingston on two occasions and had seen the applicants working on the bus - so she had seen them four times". The incident, she said, occurred at "twilight". She also said "8 o'clock" also "not dark". The learned trial judge resolved this as follows:

> "Twilight couldn't be 8 o'clock in March, so it means, as to the time, from what she said, it was twilight - and 8 o'clock cannot be twilight in Jamaica."

She did not look at them for a long time but during the act her face was turned to them.

I. G. and her mother went to the Richmond Police Station and made a report.

The applicant Williams gave evidence on oath. He denied having held her or having sex with her. He said he was on the bus and never left the bus that day. The applicant Gray worked with him on the bus that day also another baggage-man named "Sala" and it was "Sala" and Gray who got off the

bus at the bridge. He went with the bus to Rock River to help passengers with their baggage and when the bus returned it picked up "Sala" and Gray but he did not come off the bus. He did, however, see the driver push his head through a window and speak to a girl being held by a man at the time when the others alighted at the bridge. The first time he saw the girl was when she was with the police.

He called as a witness the driver and owner of the bus who said that when they came to the spot he slowed down and Gray and "Sala" came off the bus (to bathe in the river) and Williams and himself continued the journey to Rock River. They went to Rock River, let off passengers and on the way back he picked up Gray and "Sala" who were on the bridge. He had on the first occasion seen the girl being held by a fellow, to whom he spoke chidingly and on his return he saw the girl walking alone.

A Miss Coldspring, described by the learned trial judge as "a lady advanced in years", was called. As a higgler, she travels weekly on the bus to Kingston to sell goods and returns on a Friday. She supported the evidence of Williams and the driver that Williams did not come off the bus at that spot at any time on that day. It was the applicant Gray and "Sala" who alighted from the bus at the bridge and Williams drove with them to Rock River where they let off passengers, returned and picked up Gray and "Sala" at the bridge. None of these witnesses appear to have been discredited, at the least, with regard to the issue as to who alighted from the bus.

"Sala", whose real name is Alexander Forbes, while denying that he interfered with the girl, gave evidence that it was the applicant Gray and himself who alighted from the bus at the bridge, had a bath in the river under the bridge, and re-boarded it when it returned from Rock River. Williams was not there with them, he asserted; he went with the bus.

The applicant Gray gave evidence on oath on his own behalf and said "Sala" and himself left the bus by the bridge

that evening and the bus continued with Williams to Rock River. Williams was not there and never held nor chased the complainant. He denied that he had anything to do with the complainant or that he used the words alleged by the mother, or that he held or chased her as he did not see her.

In cases where there is more than one accused person, the material evidence against them may be substantially the same making the credit of the witness indivisible. In this case, however, the credit of the witness in respect of the identification of her assailants must be divisible as the case against each applicant must be treated separately and it is accepted that in the identification of persons honest witnesses can make genuine mistakes. Identification evidence is such that the fact of mistaken identity in respect of one does not necessarily mean a mistaken identity of all others jointly charged.

The identification of Gray, therefore, does not rest upon the identification of Williams. The victim identified Gray as one of the men she saw at the bridge. Gray has admitted on oath, with strong corroboration, that he was on the bridge. So the prosecution and the defence are ad idem there. The other issue that flows from that is, did he have sexual intercourse with her without her consent? The jurors had for consideration the words he is alleged to have used before sending off the bus which, if they accepted that he used them, would amount to an admission. We are of the view that the jurors were properly directed and their verdict cannot be disturbed.

However, with respect to Williams, other considerations arise. All his witnesses supported his alibi. No reason is apparent for assisting him instead of Gray. A significant thing is that the applicant Gray and "Gala" not only supported his alibi but both admitted leaving the bus at the same point of the incident at the same time and occasion. Now, as to

"Sala", the learned trial judge, who saw and heard the witnesses, had this to say in his directions:

> "...And this is a comment I am making but for what it is worth, I don't know, I took a keen look at Mr. Sala when he gave evidence and it is my view that there is a slight resemblance between him and the man, Williams, in the eyes. I paid particular attention to his features and there is a slight resemblance between Williams and Sala, but this is a view which I am putting forward. You don't have to accept it. In the eyes, from here down to about here, you look at them. There is that resemblance between the two of them, so is she mistaken when she said that the man whom she saw was the man, Williams, or could it have been another man? That is entirely a matter for you."

From this comment it is understood that there is a facial resemblance between the witness "Sala", who was at the bridge, and the applicant Williams.

The learned trial judge thereafter adverted and did not fail to stress to the jurors the importance of the issue of mistaken identity in visual identification. Although counsel sought to impugn the summing-up, we found his attempt was without merit and he relied on the ground that the verdict was unreasonable or against the weight of the evidence. Indeed, we see the summing-up as not only impeccable but very favourable to the applicant Williams.

The power of the court lies in section 14 of the Judicature (Appellate Jurisdiction) Act:

> "The court on any such appeal against conviction shall allow the appeal if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or that the judgment of the court before which the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a miscarriage of justice..."

The case of **Phillips and Lutchman v. R.** (1969) 14 W.I.R. T. 460 illustrates a thinking on the application of the section.

Section 44(1) of the Supreme Court of Judicature Act,

1962, Trinidad, is similar in words to section 14 of the Judicature (Appellant Jurisdiction) Act. It provides as follows:

> "The court shall allow an appeal if it thinks that the verdict of the jury ought to be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence."

The question arose whether the section had the same effect as section 2(1)(a) of the English Criminal Appeal Act, 1968, which replaced section 4 of the Criminal Appeal Act, 1907 - which contained similar provisions to our section 14 (supra). The Act of 1968 states:

> "The court shall allow an appeal against conviction if they think that -
>
> (a) the verdict of the jury should be set aside on the ground that in all the circumstances of the case it is unsafe or unsatisfactory."

The Court of Appeal of Trinidad and Tobago considered the case of **R. v. Cooper** (1969) 1 All E.R. 32, a case in which the issue was the identification of the accused. Evidence arose in the defence of a conversation with a witness and a man who admitted perpetrating the offence for which the appellant **Cooper** was convicted in circumstances which created a lacuna. Lord Wiggery said:

> "...It has been said over and over again throughout the years that this court must recognise the advantage which a jury has in seeing and hearing the witnesses, and if all the material was before the jury and the summing-up was impeccable, this court should not lightly interfere. Indeed, until the passing of the Criminal Appeal Act 1966 - provisions which are now to be found in s.2 of the Criminal Appeal Act 1968 - it was almost unheard of for this court to interfere in such a case. However, now our powers are somewhat different, and we are indeed charged to allow an appeal against conviction if we think that the verdict of the jury should be set aside on the ground that under all the circumstances of the case it is unsafe or unsatisfactory. That means that in cases of this kind the court must in the end ask itself a

> "subjective question whether we are content to let the matter stand as it is, or whether there is not some lurking doubt in our minds which makes us wonder whether an injustice has been done. This is a reaction which may not be based strictly on the evidence as such; it is a reaction which can be produced by the general feel of the case as the court experiences it."

In deciding the **Phillips and Lutchman** (supra) case, the court held that **Cooper's** case was not applicable:

> "...that the meaning of s.44(1) of the Supreme Court of Judicature Act 1962 (T) is not similar to s.2 of the Criminal Appeal Act 1968 (UK) consequently the Court of Appeal in Trinidad and Tobago will set aside a verdict on a question of fact only where the verdict is obviously and palpably wrong not because it is unsafe and unsatisfactory."

Our statute being similar, this decision is persuasive. However, if the issue was one other than that of identification no difficulty would likely arise, as the court recognises the advantage which a jury has in seeing and hearing the witness and does not usurp the jury's functions or normally interferes. In recent years, however, identification has become a special category of evidence and Judges in this jurisdiction are specifically required at trials sitting with a jury and also when sitting alone to give a clear warning as to the dangers inherent in mistaken identity in visual identification, similar to that required in some cases, e.g. sexual offences. This is to avoid conviction on the basis of a mistaken identification. See **R. v. Oliver Whylie** (1978) 25 W.I.R. 430 and in the Privy Council **R. v. Junior Reid and others** (1989) 3 W.L.R. 771. There are limits to our jurisdiction, plainly, and we have not adopted the subjective test nor the theory of the "lurking doubt". In fact the application of the subjective test no longer exists in the English Courts and no particular test is presently required. See **R. v. Pattison** (1973) 58 Cr. App. R. 92 C.A. However, notwithstanding the fact that a summing-up is impeccable, it is our view that a verdict can be

set aside not on the basis of the subjective test, as in **Cooper's** case (supra) but where, based on an examination of the evidence, it leads the court - in order to prevent a failure of justice - to conclude that the verdict is unreasonable having regard to all the circumstances of the particular case.

This Section 14 was considered by this Court in **R. v. Carlton Linton** S.C.C.A. 169/81 (unreported) delivered January 16, 1984, and speaking through Carey, J.A. said:

> "...where the ground relied on was that the verdict was unreasonable: 'we are in duty bound to examine the evidence in the case before us and to arrive at our conclusion on a consideration thereof'. "

In this case, we see the visual identification of the applicant Williams as challenged and bring to bear on this view the following factors:

(a) The sworn but uncorroborated evidence of a child;

(b) A transcript which expresses the observations and concern of the learned trial judge in a very sensitive area of the case, viz, the noticeable resemblance between the applicant and the witness "Sala" who swore that it was he, and not the applicant, who came off the bus and was by the bridge.

The gravamen of the identification falls on the question - who alighted from the bus? Was it "Sala" or Williams? -

(1) There is the sworn evidence of the driver and Miss Colospring and significantly "Sala" himself who said that it was he who alighted and not Williams.

(2) The accused man gave evidence on oath in his defence and Gray, who all agree came off the bus, gave similar evidence that Williams never alighted from the bus. There is a consistency in this assertion which even though it came from the defence may well be true.

Was it a genuine mistake on the part of this child? One looks at:

(1) the resemblance as observed by the learned trial judge.

(2) The identification by the child at the bus stop. She knew that one of the men was a baggage-man and one a conductor. When she came to the bus the conductor was at the door of the bus but the baggage-man was on the bus, busy putting up baggage on the bus top. So busy that he could not speak to her mother but told her he would do so as soon as he was finished. In that moment she pointed him out. Was he pointed out because he was the baggage-man? Did the resemblance to "Sala" cause a genuine mistake on L. G.'s part? Williams said the first time he saw her was when the police came with her to Richmond Station.

On an examination of the evidence, it is our opinion that the v- issue of identification in this matter is gravely challenged.

Where, therefore, the nature of the evidence of the identity the assailant is flawed as it is in the particular circumstances thi case by the co-existence of all the factors abovementioned, e cort would on the plain language of section 14 be enabled to onclud that the adverse verdict against the applicant represents miscariage of justice. And thus after giving very earnest onsidcation to the matter this is the conclusion to which we have ome. Here we are satisfied that in this application of the statute there is no usurpation of the function of the jury. Accordingly, we hold that the verdict in respect of Williams is unreasonable and ot nc to be allowed to stand.

A respect of the applicant Williams, the application for e to appeal is treated as the hearing of the appeal. The appeal llowed, the conviction is quashed, the sentence set aside and a let and judgment of acquittal entered.

With respect to the applicant Gray, the application for leave peal is refused, his sentence is affirmed and is to commence on 5th August, 1950.

GORDON, J.A. (DISSENTING)

The applicants were convicted of the crime of rape before Wolfe, J and a jury in the St. Mary Circuit Court held at Annotto Bay on the 4th July 1990. Each was sentenced to a term of imprisonment for eight years at hard labour. From this conviction and sentence they seek leave to appeal, their applications to a single judge having been previously refused.

The complainant a school girl was fourteen years old at the date of offence and fifteen years old at the time of trial. Her evidence was that she travelled from school to Richmond in St. Mary on 3rd March 1989 on her way home. She stopped in Richmond at her aunt's business-place for two minutes and continued the journey walking towards her home. She said that at about 5.30 p.m. she arrived at Mount Rose bridge and she saw the applicants whom she had known before, sitting on a wall beside the bridge. The applicants, she said, worked on the bus on which she had travelled to Richmond. This bus, "Super Gray" plied between Rock River and Kingston and she had travelled on it twice before to Kingston and return and had seen the applicants at work. She identified Gray as the conductor and Williams as the baggage-man. As she was passing them, the applicant Williams called to her and invited her to "wash his back". On hearing this she ran off. Williams chased her, held her and took her back to the bridge and under it. Gray joined him and each in turn sexually assaulted her; one holding her subdued while the other raped her. Each act she said lasted fifteen minutes. After the ordeal she went home, but she told no one of what had happened. Her mother was then a patient in hospital in Kingston so she waited until her mother came home on the 15th March and then she reported the incident to her. The following morning she went with her mother to the bus stop, she saw both applicants and pointed them out to her mother. Her mother called them. Gray went to her, Williams was then putting

baggage on the bus and he said he would speak with her when he had completed his assignment. Her mother asked Gray if he knew the complainant and he said no. Gray wanted to know why she called him and she said she wanted to speak to both of them at the same time. Gray began to curse her mother using indecent language and then he signalled the driver to drive the bus away. At that stage, Gray said to her mother: "Is three weeks now since we draw weh the gal and f... her off." After the bus left she went with her mother to the police and made a report. She was examined by a doctor.

The defence of Williams was that he travelled on the bus that day but he never left the bus at any time. He saw the complainant for the first time at the police station. He denied the Crown's case. The learned trial judge commented on a serious contradiction in the evidence of this applicant in very favourable terms. This is what he said:

> "... At first he said that he didn't see anyone come off the bus that day and he didn't see anyone take a bath, but when he was cross-examined, he did say, and it seems to have been a misunderstanding on his part, I don't think he was deliberately lying, it seems to have been a misunderstanding on his part, because he said yes, eventually he said that Sala and the other man did get off the bus and the bus went to the Rock River to let off passengers and when it came back, it picked them up and they went away, but he didn't come off the bus."

Mr. Campbell the owner/driver of the bus said he slowed down at the bridge and the conductor and one Sala who worked on the bus came off. He saw complainant being held by a man and he called a warning to the man. He continued to Rock River and on the return journey he saw the complainant walking towards Richmond and he collected Gray and Sala. The learned trial judge commented on the disparity between the evidence of this witness and the applicant Williams and the fact that he was the only defence witness who claimed he saw the complainant

that day. Miss Coldspring a Higgler who travelled frequently on the bus supported Williams' evidence saying he never left the bus and Alexander Forbes o/c Sala who said he was another handyman on the bus said he and Gray left the bus at the bridge and had a bath. He never saw the complainant that day. He had never seen her before and neither himself nor Gray was involved in any incident with a girl. When he came off the bus Williams remained on it.

The applicant Gray said he came off the bus at the bridge about 5.00 p.m. had a bath in the river and returned to the bus on its return journey 20 minutes later. He denied any contact with the complainant. Concerning the visit of the mother, he said she would not say why she wanted to speak with him and he got vexed, cursed her off and knocked off the bus. He said when the complainant came with her mother to the bus that was the first time he was seeing her.

The applicants denied the prosecution's allegations. Neither saw the complainant that day, they had no contact with her. They said her identification of them as her assailants was mistaken.

Identification of the applicants was the issue the jury had to resolve. The evidence of the complainant stood alone, her mother was again hospitalized at the time of trial.

Mr. Kitchin submitted that the verdict was unreasonable and cannot be supported having regard to the evidence. Although this ground was not formalised, the submissions were to this end. He argued that the evidence of the complainant was questionable in that the circumstances attendant upon the alleged rape did not ring true and were inconsistent with reality.

This was a question of fact for the determination of the jury. It was however not the applicants' contention that the complainant was not raped. They contended they were not involved.

The further submission of Mr. Kitchin was that the complainant a 14 year old virgin at the time of the incident did not report it until twelve days after.

This was also a matter for the jury and the learned trial judge presented it to the jury in this form on page 15 of the transcript:

> "One of the pillars on which the defence asked you to discredit the complainant, is her failure to make any report until the mother comes out of hospital. Defence says no report to the uncle, no report to the brothers, no report to the aunt, no report to the Guidance Counsellor, no report to the school teacher, this is to say the least, passing strange, how can a thing like this happen to a person, a virgin who is seized upon and raped by two men and she keeps it to herself and says not a word to anybody. That is indeed a valid comment, a valid comment, but I am going to, in an effort to assist you, to offer some reasons why she might not have said anything to anybody. The views I am expressing, and if you agree with them you can adopt them and use them as your own, if you don't reject them and substitute your own views for the views which I express.
> One, when it comes to a thing like where a woman's privacy is violated, especially a girl of fourteen, you think she would be comfortable making that report to men, her young brother who is something, probably thirteen at the time and the brother at eighteen? Say she is not comfortable making it with them, but what about her uncle, a big man, you think she would be comfortable now to go and explain to the uncle what happen and the uncle's reaction might be yes, that would happen to you because you stay out too late and that sort of thing? This is the very thing which the Government appreciates in relation to reports into rape why the Government have to set up a special unit consisting of policewomen to deal with rape, because they know how inhibited people are when it comes to making reports as to rape. So consider it."

Later in his summing-up he reminded them thus at page 36:

> "The weakness or what would be considered a weakness, in the whole story is that the girl did not report the matter until some twelve days after, and the defence says - and, I repeat, it is a valid observation - if this thing had happened to a young girl would you not expect her to have made some report? Is there any explanation which has been offered by the girl as to why she delayed in reporting the matter? Remember when I recounted the evidence, she said, 'I was afraid and ashamed and that is why I waited until my mother came from the hospital to report it to my mother."

The learned trial judge in these passages, and others, placed the conduct of the complainant and the tardiness of her report in perspective. His presentation was scrupulously fair and he did not attempt to usurp the functions of the jury. The decision was theirs to make.

In his challenge of the identification evidence, Mr. Kitchin pointed to the evidence of the complainant as to the time of the incident and the similarity in appearance between the applicant Williams and his witness Sala.

The complainant said that when she reached the bridge it was about 5.30 p.m. Then the incident occurred. It was not dark, it was twilight she said. It was 6.00 o'clock and twilight. She claimed she saw her assailant's face. The term "twilight" posed some difficulty for the learned trial judge but he left the interpretation thereof to be decided by the jury. The evidence from the defence is that the men left the bus about 5.00 p.m. at the bridge and returned to the bus some 20 minutes later. The incident on the complainant's evidence occurred in this interval of time. The jurors were all persons of the parish of St. Mary, familiar with the language of the people of their parish and best equipped to interpret it. Another factor in the identification evidence is the evidence that the complainant had travelled on the bus from her

home near Richmond to Kingston and returned twice before. She had also travelled on the same bus from school to Richmond that very afternoon. She knew the applicants and the jobs assigned to each on that bus.

Mr. Kitchin placed much emphasis on the likelihood of a mistake in identification made by the complainant. He based his submissions on a comment which the learned trial judge made in his summation. This is how it is presented at page 23 of the transcript:

> "That's why I am telling you that there is no collective defence. You have to look at each man and say, has her testimony made us feel sure as to the identity of the men? And this is a comment I am making but for what it is worth, I don't know, I took a keen look at Mr. Sala when he gave evidence and it is my view that there is a slight resemblance between him and the man, Williams, in the eyes, I paid particular attention to his features and there is a slight resemblance between Williams and Sala, but this is a view which I am putting forward. You don't have to accept it. In the eyes, from here down to about here. You look at them. There is that resemblance between the two of them, so is she mistaken when she said that the man whom she saw was the man, Williams, or could it have been another man? That is entirely a matter for you."

Having said that he went on to say at page 29:

> "... then you have Mr. Alexander Forbes, the man, Sala, who I told you in my view bears some resemblance to Williams, ... ".

The learned trial judge had, it seems, taken a view of the evidence favourable to the applicant Williams. He saw a "slight resemblance" between him and the defence witness Forbes "in the eyes". It cannot be said that the judgment of the learned trial judge in this regard is superior to that of the jurors. He, in expressing his view, did what he was permitted to do but he acknowledged their right to determine the virtue of his observation.

They in their collective wisdom did not find any merit in his views. There is no basis on which their decision can be assailed.

In my view the arguments advanced so far by Mr. Kitchin failed.

The final ground of appeal urged was that:

> "5. The comments of the Learned Trial Judge in respect of Defence Counsel and other aspects of the case amounted to misdirections and/or operated to the prejudice of the Applicants."

This is the passage on page 12 to which Mr. Kitchin referred:

> "... And, then, Miss Haughton in her address to you on that matter, and I wish and pray that I will never hear such a degenerate submission like that again, is that what happened, what is so strange if a man, a big man, inviting a fourteen year old to come and wash his back? And that is being equated with a man driving and seeing a girl and saying, 'You are a pretty girl.' Is there any comparison between the two things? to acknowledge someone that man you are a pretty person, whereas a big man calls a little fourteen year old girl to come and wash his back? She said what is so strange about a big man calling a fourteen year old to come and wash his back? I hope I will never hear from another counsel as degenerate a submission, but it is a matter for you."

Mr. Kitchin submitted that he disapproved of the suggestion made by counsel for the applicants which attracted the comments of the judge but he expressed the view that the comments were impermissible. He also challenged the propriety of the comments made by the judge on page 15 (supra,) and on pages 23 and 30 when he was dealing with the tardiness of the complainant.

A trial judge has a duty to assist a jury to approach the assessment of the evidence intelligently and as responsible

persons. In this function he invited them to draw on their experience as parents and as adults to ascertain if they could understand the explanation given by the complainant for the delay in reporting the incident. A trial judge is entitled to comment, and strongly too, on aspects of the evidence provided he makes it clear to the jury that they are not obliged to accept any of the views he expresses. The learned trial judge made this point early in his summing-up when he told them:

> "Now, it is also my function to review the evidence for you and to make such comments as I consider necessary. If during the course of my review of the evidence I make any comments on any aspect of the evidence, please understand that those are only my views of the evidence; that is how I see it in my mind's eye. If I make any comments and you do not agree with them, please do not hesitate to reject them and to substitute your own views of the evidence for any comments which I might make and with which you disagree. You see, it is your verdict alone that is asked for. If I make any comments and you agree with them you can adopt them and use them as your own. Now, the same thing applies to any comments which were made by counsel appearing in the case."

He reminded them of this function at pages 12, 15 and 23. The Judicial comments which would urge this court to act are described in **R. v. Anthony Sterling** (unreported) S.C.C.A. 78/86 delivered on 25th March, 1988 as: "such comments as would inordinately affect the independent assessment by the jury of the evidence which they heard" per White, J.A. at page 51. The comments made by the learned trial judge in this case have not crossed the "line of proper judicial comment." **R. v. Sterling** (supra). The learned trial judge did not attempt to make findings of fact for the jury.

In his final salvo Mr. Kitchin asked us to say that the conviction of Williams in the light of the comments of the learned trial judge was unsafe and if we so found then that of Gray was likewise unsafe and the convictions of the applicants should be quashed as the verdict was unreasonable.

The jury had a simple task of deciding between the evidence of the complainant which was uncorroborated and that of the applicants. They saw and heard all the witnesses testify, they had the addresses of counsel and the impeccable summing-up of the learned trial judge. If it can be said that the judge erred at all it can only be that he expressed comments on Williams' behalf. They accepted the evidence of the complainant. The language of witnesses in these courts is the Jamaican dialect interspersed with English and broken English. The witnesses in this case were ordinary persons who spoke the common language. The language of a summing-up is a paraphrase of the common language reduced to standard English with, at times, quotations in the vernacular used in court where the learned trial judge thinks it desirable and more meaningful to the jury to use the language as the evidence was given. The idioms and nuances are best understood and interpreted by the people of the parish familiar with their usage and meaning.

What then is the role which the appellate court plays? How does it deal with the jury's findings. In **Montgomerie & Co vs. Wallace-James** [1904] A.C. p. 73 at page 75 Lord Halsbury, L.C. said:

> "... It is simply a question of fact, and doubtless, where a question of fact has been decided by a tribunal which has seen and heard the witnesses, the greatest weight ought to be attached to the finding of such a tribunal. It has had the opportunity of observing the demeanour of the witnesses and judging of their veracity and accuracy in a way that no appellate tribunal can have. But where no question arises as to truthfulness, and where the question is as to the proper inferences to be drawn from truthful evidence, then the original tribunal is in no better position to decide than the judges of an Appellate Court."

In **R. v. McMahon** [1975] 13 Cox 1275 - the prisoner was indicted for larceny and receiving. The stolen property was found concealed on her person. The judge directed the jury to acquit the prisoner on the count for receiving but the jury acquitted the prisoner on the count for larceny and convicted her for receiving and the judge did not insist on the direction he had previously given but reserved for the Court for Crown Cases Reserved the question as to whether the evidence was sufficient in law to sustain the conviction.

Held: the evidence being sufficient in law to sustain the conviction, the conviction must stand.

The case illustrates the primacy of the jury's function as judges of fact.

The power of this court is expressed in section 14 (1) of the Judicature (Appellate Jurisdiction) Act thus:

> "14. (1) The Court on any such appeal against conviction shall allow the appeal if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or that the judgment of the court before which the appellant was convicted should be set aside on the ground of a wrong decision of any question of law, or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal:
> Provided that the Court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred."

The final submission was that the verdict was unreasonable. Perhaps this was a concession that it could not be argued that it cannot be supported by the evidence. In considering whether the verdict is unreasonable recourse may be had to decisions of the courts

in jurisdictions where the statutory provisions are in pari materia with ours. In this regard we find that the English Criminal Appeal Act, 1907 section 4 (1) and the Supreme Court of Judicature Act section 44 (1) of Trinidad and Tobago are similar to section 14 (1) supra. The Criminal Appeal Act of 1907 section 4 (1) was amended by the Criminal Appeal Act of 1966 section 4 as re-enacted in section 2 of the Criminal Appeal Act 1968. The relevant portion of this latter Act now provides:

> "The Court shall allow an appeal against conviction if they think (a) the verdict of the jury should be set aside on the ground that in all the circumstances of the case it is unsafe or unsatisfactory."

Long before this amendment, in the case of **R. v. Shefsky (1922) 17 Cr. App. R. 28** at page 29 Hewart L.C.J. said:

> "In the circumstances it appears to the court that the evidence is insufficient and the conviction unsafe and unsatisfactory."

It is instructive to examine the facts:

Three men were identified by a witness as having participated in breaking the window of a Jewellery shop and stealing therefrom. This witness subsequently said she was mistaken about one of them and he was discharged. The jury acquitted another and convicted the third man. His appeal was allowed. The evidential base on the conviction was severely undermined by the witness' admission of a mistake in identity of one accused and the rejection of her evidence in respect of the other.

The meaning to be attached to the words "unsafe or unsatisfactory" as they appear in the English statute is clearly defined in **R. v. Cooper** 1968 3 W.L.R. 1225 at page 1228D.

> "... It has been said over and over again throughout the years that this court must recognise the advantage which a jury has in seeing and hearing the witnesses, and if all the material was before the jury and the summing-up was impeccable, this court should not lightly interfere. Indeed, until the passing of the Criminal Appeal Act, 1966 - provisions which are now to be found in section 2 of the Criminal Appeal Act, 1968 - it was almost unheard of for this court to interfere in such a case. However, now our powers are somewhat different, and we are indeed charged to allow an appeal against conviction if we think that the verdict of the jury should be set aside on the ground that under all the circumstances of the case it is unsafe or unsatisfactory. That means that in cases of this kind the court must in the end ask itself a subjective question, whether we are content to let the matter stand as it is, or whether there is not some lurking doubt in our minds which makes us wonder whether an injustice has been done. This is a reaction which may not be based strictly on the evidence as such; it is a reaction which can be produced by the general feel of the case as the court experiences it."

The first paragraph supports the dicta of Lord Halsbury in **Montgomerie & Co v. Wallace-James** (supra). The latter paragraph is the law in England.

The English and Trinidadian Legislation (supra) were examined and relevant cases discussed and distinguished by Fraser J.A. in **Phillips and Lutchman v. R.** 14 W.I.R. 460, that Court held:

> "(iii) that meaning of s. 44 (1) of the Supreme Court of Judicature Act (1962) [T] is not similar to s. 2 of the Criminal Appeal Act 1968 [U.K.]; consequently the Court of Appeal in Trinidad and Tobago will set aside a verdict on a question of fact only where the verdict is obviously and palpably wrong and not because the verdict is unsafe or unsatisfactory."

The English Legislation, by the amendment of 1966 and 1968, is no longer in pari materia with our provisions but we continue on the same base with the legislation in our Sister Caribbean twin islands. I will therefore quote with approval from the judgment of Fraser, J.A. in **Phillips v. Lutchman** (supra) at page 485:

> "... For our own purposes it is helpful to look at Archbold's Criminal Pleading, Evidence and Practice (36th Edn.) because what is said there with regard to s. 4 (1) of the Criminal Appeal Act 1907 will be applicable to this court because of the similar wording appearing in s. 44 (1) of the Supreme Court of Judicature Act 1962. The criteria to be considered when the court is dealing with an appeal on the ground that the verdict of the jury is unreasonable or cannot be supported having regard to the evidence are set out in para. 934 as follows:
>
> 'In order to succeed an appellant must show, in the words of the statute (s. 4 (1), that the verdict is unreasonable or cannot be supported having regard to the evidence. It is not a sufficient ground of appeal to allege that the verdict is against the weight of evidence. Aladesuru v. R. [1956] A.C. 49; [1955] 3 W.L.R. 515; 99 Sol. Jo. 760; 39 Cr. App. Rep. 82. Nor is it sufficient merely to show that the case against the appellant was a very weak one: R. v. McNair [1909], 25 T.L.R. 228; 2 Cr. App. Rep. 2; 14 Digest (Repl.) 325, 3139. Nor is it enough that the members of the Court of Criminal Appeal feel some doubt as to the correctness of the verdict: R. v. Simpson, [1909] 2 Cr. App. Rep. 128; 14 Digest (Repl.) 619, 6190, nor that the judge of the court of trial has given a certificate on that ground: R. v. Perfect [1917], 117 L.T. 416; 25 Cox, C.C. 780; 12 Cr. App. Rep. 273, C.C.A.; 14 Digest (Repl.) 634, 6340. The court will set aside a verdict on a question of fact alone only where the verdict was obviously and palpably wrong. R. v. Hancox [1913], 29 T.L.R. 331; 8 Cr. App. Rep. 193; 14 Digest (Repl.) 628, 6344.'

> "While that statement is no longer applicable to appeals in England it continues to be applicable to appeals to this court."

In R. v. Carlton Linton (unreported) S.C.C.A. 169/81 delivered 16th January 1984 (Kerr, Carey, White, JJ.A.) considered the case of R. v. Nugent & Hughes [1974] 12 J.L.R. 1355 which counsel urged "as supporting the view that this court had power to allow an appeal where the verdict was not so much unreasonable as unsafe". In delivering the judgment of the court Carey, J.A. said at page 3:

> "A careful reading of the judgment of the court, does not, we think, justify the view that this court was laying down the proposition contended for by the learned counsel. This court, speaking through Edun, J.A. said this at p. 1358:
>
> "Here in Jamaica, and in many of the West Indian Territories, judges to whom we accord high respect, have in many appeals quashed convictions on the ground that they were 'unsafe' and/or 'unsatisfactory'. But in those cases it may well be said that the conclusions were based upon a consideration of the evidence and not upon the reaction produced by the general feel of the case as experienced by the court.'
>
> ... Though the words 'unsafe' and/or 'unsatisfactory' have been interpreted to mean the reaction produced by the general feel of the case in R. v. Sean Cooper [1969] 1 All E.R. 32; [1969] 1 Q.B. 267; [1968] 3 W.L.R. 1225; 53 Cr. App. Rep. 82, and though the criminal divisions of Courts of Appeal in the West Indies have, without legislative sanction, quashed convictions, and, in their conclusions, used the words 'unsafe' and/or 'unsatisfactory', it is too dangerous a precedent to allow an apeal against conviction merely by the general feel of the case as experienced by the courts. Such a precedent would in effect sub-

> "stitute a trial by three judges for a trial by jury and encourage frivolous appeals".
> (emphasis supplied)

Carey, J.A. continued:

> "The court was at pains to point out that while it was perfectly true that convictions have been quashed in other Commonwealth Caribbean countries on the basis that the verdict was unsafe or unsatisfactory, this court would not allow an appeal based on the emotional reaction of individual members of the court to the facts appearing in a transcript. So long as section 13 (1) of the Judicature (Appellate Jurisdiction) Act was extant, then the view that the verdict is unsafe or unsatisfactory, based upon the 'lurking doubt theory', cannot constitute a proper foundation for concluding that an appeal should be allowed. To put the matter beyond doubt, the court plainly indicated its role and function where the ground relied on was that the verdict was unreasonable: 'we are in duty bound to examine the evidence in the case before us and to arrive at our conclusion on a consideration thereof'. per Edun, J.A. in **R. v. Nugent & Hughes** (supra) at p. 1358."
> (emphasis supplied)

In the clearest terms possible, this is the test this court must apply.

The evidence against the applicants is in the testimony of the complainant. She had travelled on the bus from the Richmond area to Kingston and from school that day to Richmond, she knew them both. She had left the applicants a scant ½ hour or so on the bus before she came upon them at the bridge over which the bus had passed ahead of her. Williams was the aggressor. He spoke to her pursued her, held her, took her to the underside of the bridge and held her for Gray to ravish her then he did likewise.

The summing-up of the learned trial judge was full, fair, careful and clear. Nothing that could be urged in favour of the applicants was omitted. The judge who considered the application for leave to appeal in refusing leave said:

> "The issue in respect of both accused is one of visual identification. The learned trial judge dealt thoroughly with this issue and all other issues of law and fact and separately as it affected each accused and he carefully pointed out every area of weakness in the evidence in an extremely fair summing-up."

The jury accepted the evidence of the complainant and convicted both.

The credibility of the complainant was indivisible, the evidence she gave against each accused was materially indistinguishable. **R. v. Taylor** [1977] 15 J.L.R. 247.

For these reasons I would refuse the applications and order that the sentences commence on 4th October, 1990.