JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 84/77

BEFORE: THE HON. MR. JUSTICE KERR, J.A.
THE HON. MR. JUSTICE ROBOTHAM, J.A.
THE HON. MR. JUSTICE CARBERRY, J.A.

REGINA

v.

ANTHONY HEWITT

March 15, 16, & 17; December 18, 1978

Mr. Dennis Daley and Mr. K. Morrison for applicant.

Mr. Smith for the Crown.

CARBERRY, J.A.

The applicant Anthony Hewitt after a trial that commenced before Carey, J., and a jury on the 16th March, 1977, and continued through on the 17th and 18th was convicted on the 21st March, 1977, in the Home Circuit Court, Kingston, for the murder of Lee McKenzie on the 6th day of March, 1976, and sentenced to death. He sought leave to appeal against that conviction before us and this application was heard on the 15th, 16th and 17th March, 1978.

On the 17th March having treated this application as an appeal we dismissed the appeal. We promised to put our reasons in writing and do so now.

On Saturday the 6th of March, 1976 at about 7:50 p.m., in the evening, the deceased Lee McKenzie returned to 4A Camden Road with his Ford transit van, called locally a mini-van (a small bus), after a day's work in the country. He was accompanied by his sideman or assistant the witness Earl Francis. Camden Road is a small cul-de-sac off Camperdown Road in the Franklyn Town area of Kingston and

it appears that in order to get the vehicle into the yard the driver had to reverse his vehicle up this road, pass his gate and then come forward and make the turn to go in. The effect of this manoeuvre was that at the material time the area by the gate was lit by the head-lamps of the mini-van, plus the adjoining street light and lights on the verandah of the premises.

The witness Earl Francis had come out of the van and opened the gates for the deceased to drive in, when he saw two men jump over an adjoining fence and run towards them. The one in front approached the witness who was standing at the gate column and came within touching distance of him. The other approached the driver of the van.

The man who approached Francis said to him, "Give me the money, boy, give me the money". He had a gun in his left hand and pointed it at the witness. The witness took the money out of his pocket, some sixty to seventy dollars and made to hand it to the gunman. He then noticed that the gunman seemed unable to stretch out his right hand to receive the money and the witness had to "tip over" to put the money into the gunman's right hand. He had had the opportunity to see his robber's face in the light already described and he subsequently identified the applicant at an identification parade as the man who had held him up, and, as will be related later shot at him.

In the meantime the second man who had gone to the driver's side of the van told the driver, "Don't move the van boy, don't move the van". Francis did not see this man's face nor was he able to see what he had in his hand, but he heard the engine of the van race

and heard a shot fired by the second man at the driver of the van. Francis states that when that shot was fired, the man who had just held him up and robbed him raised his own gun to fire at him. Francis says he ducked behind the concrete column and the accused's shot missed him. He then ran into the house while his assailant ran away; but the second man who had fired at the driver fired a second shot before he too ran away. The witness had reached the safety of the house when the second shot was fired.

A minute or two after the robbers had fled, Francis ventured outside of the house to see what had happened to his employer, the driver Lee McKenzie. The witness found him lying in the driver's seat with blood all over him. The medical evidence shows that the deceased had been shot at close range through the head, the bullet entering by the right side of his nose, going through the brain and lodging at the back of the skull. There were powder burns on the deceased's face. (A second bullet seems to have been found inside the van next day).

The witness Francis stated he had never seen either gunman before the night in question, and he never got a good look at the second man who fired the fatal shot. He therefore could not recognize him but he claimed to have had a good look at the applicant and he perceived, remembered and told the investigating police officer of the gunman's inability to move his right hand, and also described him by height, colour and clothing.

On either the 24th or the 31st of March, 1976, some eighteen or twenty-five days later Francis attended an identification parade at the Central Police Station in Kingston to see if he could

identify the man that had shot at him. After seeing the men on the parade he asked the officer in charge to ask the men in the line-up to raise their right hands. The applicant had some difficulty in doing this. The witness then pointed out the applicant as the man who had shot at him. The applicant's response was, "You wrong, boy, you wrong".

Under cross-examination the witness admitted that he had walked up and down the line looking at the faces of the men in the line-up before he asked the men to raise their right hands, but he claimed that he had recognized the face of the applicant, "From I enter the room I saw him" i.e. that he had recognized the accused before the demonstration was staged, and he denied that he merely picked out the accused because the accused had had to use his left hand in an attempt to raise his right arm up.

There was uncontradicted evidence that there were nine men on the parade, including the suspect, and as near as possible they were similar in age, height, colour and position in life. The applicant was represented at the parade by his then attorney-at-law, Mrs. Marva McIntosh. He had exercised his right of objection to three of the men on the parade who were replaced, he had asked that the men on the parade tie their heads and had also changed his clothing with another man on the parade. After this had been done the applicant and his attorney had indicated they were satisfied to allow the parade to proceed.

The officer in charge of the parade claims not to have noticed that the suspect had difficulty in raising his right hand when this request was made. If this is so, his disability was not conspicuous

save to someone aware of and watching for it.

He was closely cross-examined as to the rules governing identification parades and stated that he did not regard the witness' request that the men on the parade raise their right hands as in breach of those rules; he thought the matter was one within his discretion and was a fair request.

There is one other matter relating to the identification parade that should be mentioned. The witness Francis stated in cross-examination that on the day of the parade a police car was sent for him by the senior police officer investigating the case, Inspector Walker and that this car returned to that officer's station at Elletson Road, apparently to report that the witness had been picked up. According to the witness Francis, Inspector Walker then accompanied the witness to Central Station but took no part in the parade or its arrangements, though he seems to have taken another statement from the witness after the parade was over. Where this statement was taken, whether at Central or at Elletson Road is not clear. Inspector Walker admitted having arranged for the witness to be picked up and taken by the police car to the parade, and says the car may have passed back by the station on its way to the parade and he may have seen the witness then, but he did not speak to him and he certainly did not accompany the witness to the parade nor did he attend the parade. He saw nothing improper in arranging for the witness' transport to the parade but was aware of and agreed that the investigating officer should not be present at the parade, or make the arrangements for the parade. He did not regard arranging a witness' transport to the parade as part of the arrangements for the parade. The arrangements for the parade had been made by the

officer in charge of it, Inspector Noel Wright and not by him.

On hearing from Inspector Wright of the results of the parade he had attended at Central Station and formally arrested the applicant on the charge of murder.

The other evidence against the applicant can be briefly indicated. He was arrested on the 13th March, 1976, along with another person and brought to the Elletson Road Police Station where he was interviewed by Detective-Inspector Walker. Detective-Inspector Walker challenged him as to his being involved in the recent killing on Camden Road, and after the customary arguments as to a admissibility and the trial within a trial, Detective-Inspector Walker stated that the applicant denied this charge with the somewhat ambiguous remark, "Who tell you say me kill anybody sir. A me and the brother (pointing to the other man brought in but who was never charged) check a spar about a bike". Detective-Inspector Walker said that he "knew" the applicant before this incident, and if not before, certainly at that interview he became aware that something was the matter with the applicant's right hand and that he was unable to use it.

The Defence in this case in some respects took a somewhat unusual turn. The applicant gave evidence denying the charge and in effect advanced an alibi to account for his movements on the afternoon and night in question. But though he claimed to have been with a companion by the name of "Bigger", a groom at Caymanas, he did not call him as a supporting witness, apparently because since his arrest he no longer knew where he find "Bigger" who had moved

from his old address. The alibi was therefore unsupported.

The applicant admitted that his right hand was practically useless, having been injured in a motor car accident in 1975, about a year or more before this incident. He claimed that he had been identified as the gunman in this case only because of this disability and that he was innocent.

The main feature of the defence, however, was that the applicant called as a witness to the original crime a lady named Jennifer Melhado who lived on Camperdown Road near to the fatal scene at Camden Road. This young lady stated that she was returning home from the supermarket on the Saturday night of the fatal shooting - that she heard two explosions from the direction of Camden Road, and then saw two men run past her with something like a gun in their hand They were darker in complexion than the applicant, one being very dark, and that the applicant whom she described as "clear - fair" was not one of these two men. She knew the applicant before this as they were members of the same Youth Club in the area, the Fr Town Youth Club. She states she had then visited the scene of murder and had seen the deceased lying dead in his van. Thou must have heard of the applicant's arrest she did not at any report what she had seen to the police. She had known sh to be a witness in this case since last month.

Finally the applicant called as a character w businessman, Mr. M. Bogle, the proprietor of a furnitu on Orange Street, who had met him when he too had had his own arm. He had tried to help the accused to le his disability by using his left hand, and had he

jobs about the business. The applicant was a regular visitor at the store, he gave him a good character and was surprised to learn he had been charged with murder.

On the face of this evidence in this case the jury had a clear choice of competing versions of who were the gunmen responsible for the murder, and as to whether or not the Crown had proved its case beyond a reasonable doubt.

It is also clear that in this trial the prosecution's case rested "wholly or substantially" upon the evidence of the witness Earl Francis as to his visual identification of the applicant as the man who robbed and fired at him.

It was not suggested that this applicant had shot the deceased; his guilt in respect to that offence rested upon the doctrine of "common design" and in this Court no challenge has been made of the learned Trial Judge's summing-up on this aspect of the case.

The real burden of the applicant's case on his appeal related to the quality of the identification evidence and more specifically as to the identification parade that was held.

The original grounds of appeal as filed by the applicant consisted of two words: "False evidence". No argument on this was addressed to us.

At the hearing of the appeal four supplementary grounds of appeal prepared by the applicant's counsel were filed, and he sought and obtained leave to argue them.

Ground 3 listed a number of complaints of minor discrepancies in the evidence which it was argued had been inadequately dealt with by the learned Trial Judge in his summing-up; there was no

Ground 2

That the learned trial judge failed to direct the jury as to the prejudicial effect on the fairness of the identification parade which was likely to result from the investigating officer taking the witness to the parade, if they believed the evidence of the witness Earl Francis, and that in doing so the investigating officer was acting in breach of the rules established to ensure that the witness' ability to recongise the accused was fairly and adequately tested".

The rules governing the holding of identification parades in Jamaica were last published in the Jamaica Gazette of the 29th July, 1939. As they relate to both grounds of appeal; it may be useful to set them out in full. They read as follows:-

"552 - Identification Parades
In arranging for personal identification, every precaution shall be taken (a) to exclude any suspicion of unfairness or risk of erroneous identification through the witnesses' attention being directed to the suspected person in particular instead of indifferently to all the prisoners paraded, and (b) to make sure that the witnesses' ability to recognise the accused has been fairly and adequately tested.

553 - It is desirable therefore that:-

(i) That arrangements for an "Identification Parade" shall not be made by the Member of the Force in charge of the case against the prisoner.

(ii) The witness shall be prevented from seeing the prisoner before he is paraded with other persons and shall have no assistance from photograhps or descriptions.

(iii) The accused shall be placed among not less than eight persons who are as far as possible of the same age, height, general appearance and position in life.

(iv) The accused shall be allowed to select his own position in the line, and shall be expressly asked if he has any objection to the persons present with him or the arrangements made. If he desires to have his Solicitor or a friend present at the Identification, this shall be allowed and he shall be informed of this privilege.

(v) The witnesses shall be introduced one by one and on leaving shall not be allowed to communicate with the witnesses still waiting to see the persons paraded, and the accused shall be allowed, if he so, desires, on being informed of his right to change his position after each witness has left. A witness shall be required to touch any person whom he purports to identify.

(vi) All unauthorised persons shall be strictly excluded from the place where the "identification Parade" is held.

(vii) Whenever possible, an Officer or Sergeant Major shall conduct the Identification Parade, and a Justice of the Peace shall be present if practicable.

(viii) Every circumstance connected with the identification shall be carefully recorded by the Officer conducting it, whether the accused or any other person is identified or not.

554 - It may sometimes happen that a witness desires to see the prisoner with his hat on or with his hat off, and there is no objection to all the persons paraded being thereupon asked to wear or remove their hats. Sometimes again there may be something peculiar in the prisoner's gait or tone of voice; and if the witness desires to see the prisoner walk or hear him speak, there is no objection to the persons paraded being asked to walk, individually, or to speak. When any such request is made by a witness, the incident shall be recorded."

The Jamaica Rules set out above are virtually identical in wording to the United Kingdom Home Office circular on Identification Parades, as published in the Law Journal of 16th June, 1966, but they do not contain the amendments that have since been made and appear in the 1969 version of the Home Office circular which forms Appendix A of the Devlin Report on Evidence of Identification in Criminal Cases, (hereinafter referred to shortly as the Devlin Report).

We deal first with the second ground of appeal relating to the investigating officer having accompanied the witness to the identification parade. The Jamaica Rules as we have seen state in effect that the member of the force in charge of the case against

the accused shall not make the arrangements for the identification parade. (It is silent on his attendance at the parade).

The United Kingdom 1966 Rules are to the same effect, but add "There is no objection, however to the officer in charge of the case being present".

The United Kingdom 1969 Rules merely say:-

> "3 - If an officer concerned with the case against the suspect is present, he should take no part in conducting the parade".

The Devlin Report deals with this rule at page 124 para. 5.73. The report reviews the position and is content to say:-

> "If the suspect's solicitor is present, we can see no ground for excluding the investigating officer; but otherwise we think he should not be present".

(It should be noted that in the instant case the suspect's attorney-at-law was present at this parade). We were also referred to an article "Identification Parades", by Christopher Williams, in 1955 Criminal Law Review p. 524 which deals with this aspect of identification parades at p. 527: "Officer to conduct the parade".

So far as we know, there is only one recorded case in which breach of this Rule has been successfully canvassed and that was the case cited by defence counsel, R. v. Cecil Gibson, before our own Court of Appeal, reported at (1975) 13 J.L.R. 207, where the investigating officer had not only been present at the parade but had himself chosen all the persons paraded with the suspect and had not given evidence nor was any explanation offered as to why this startling breach of the rule had taken place. In that case this Court ordered a new trial saying that there was a clear right to have this breach of the Rules drawn to the Jury's attention in the summing-up

and its possible effect on the fairness of the parade considered, and that the Trial Judge having glossed the matter over as "unwise" in his summing-up, the jury (and the accused) had been deprived of having this aspect of the identification parade properly considered.

The rule is clearly aimed at two things - preventing the investigating officer from "weighing" the pannel or personnel of the parade against the suspect and secondly against having him prompt or assist the witness to select the officer's suspect as the guilty man. What is desired is for the witness himself to select and identify the guilty man, if in fact he is on the parade; in short making an identification based on his own unaided personal recollection of the man, rather than for him to pick out the man whom the investigating officer suspects to be the guilty man and whom the witness may identify as such because he believes the police know best and must have good reason for having suspected and caught that man; see for example R. v. Bundy (1910) 5 Cr. A.R. 270.

In the instant case, as we have seen, the investigating officer did not make the arrangements for the parade, nor was he present at it. Accepting for the moment the eye witness' evidence (denied by the officer) that he accompanied him from the Elletson Road Police Station to the Central Police Station, there is no suggestion that on this journey he in any way "coached" or "prompted" the witness as to the identification. It should in any event be remembered that it was the witness who first directed the attention of the police to the handicap or disability of the man who robbed him.

This whole matter was the subject of a careful and

impartial examination by the learned Trial Judge at some length in his summing-up, (at page 159 of the transcript). The relevant rule was drawn to their attention and the whole matter was clearly and explicitly left to the Jury - unlike the situation in R. v. Cecil Gibson - (ante). As regards this case we would summarize the position here as follows:-

(i) There is nothing wrong in the investigating officer checking to see that the witness(es) he interviewed is (are) in fact the person(s) who attend(s) the identification parade; this seems a wise and necessary precaution.

(ii) He should take no part in the conduct of the parade or in the arrangements for the parade.

(iii) It may on occasion be necessary for the investigating officer to accompany the witness(es) to the Police Station or the place where the parade is to be held to see that they are indeed the witness(es) and possibly to afford them some protection.

(iv) The investigating officer should not take advantage of this opportunity, or any other, to coach or prompt a witness with a view to identifying a suspect.

For the investigating officer to arrange to take and personally escort a witness to an identification parade does not in our view amount to "arranging or conducting the Parade". In this case there is no evidence that the investigating officer did so, and this ground of appeal fails.

The only other substantial ground argued was the first which amounted to a submission that the identification of the accused at the parade was unfair because the witness having walked up and down the line and before identifying the accused had asked that all the persons on the parade raise their right hand and when the accused had some difficulty in doing this, he identified him. The suggestion is that the witness identified the accused because of this disability and not otherwise.

our own case of R. v. Oliver Whylie (S.C. Cr. App. 140/76) decided in July 1977. Firstly, there was a need to warn the jury of the dangers of evidence of visual identification and of the reasons for the warning and the need for the utmost caution in accepting such evidence and the possibility of error in it. Secondly, there was a need for a careful examination of the circumstances of the identification both originally and later at the identification parade; and thirdly; in conducting this review for the Judge to examine with the jury the basic weaknesses and strengths of that evidence.

There is no doubt that in this case the learned Trial Judge directed the jury as to the various factors stressed in these three cases, and that he duly cautioned them as required on the nature and dangers of identification evidence and no complaint has been made of his directions on that score.

What is said however, is that in his review of the evidence relating to the identification parade he should have advised the jury that it was patently unfair.

In this connection the learned Trial Judge referred the jury to the existing guide lines or Rules with respect to Identification Parades cited earlier: he directed them to the preamble (para. 552) setting out the objectives of the Parade and to the particular paragraph (554) dealing with the witness who desires to see the persons on the parade walk or raise their hands etcetera. This paragraph is identical with Rule 15 of the United Kingdom Home Office circular on Identification Parades. It is clear that there was in this instance no breach of that Rule as it at present exists.

The burden of Mr. Daley's submission really rested not on the Rule, but on the variation proposed to it by the Devlin Report in para. 5.65 at page 124. The Report there stated:-

> "5.65 - It occasionally happens that a witness before he makes an identification asks to hear one or more members of the parade speak or see them move. This creates a difficult situation. The parade is a fair test of appearance only; the participants are not selected for similarity in speech or gait. Obviously it would be wrong to have all the members speaking or walking before any selection was made at all, since it would then be the singularity of speech or of movement which would determine the result. There is a case for saying that if a witness was hesitating between two or more persons, he should be allowed to hear them speak or see them walk before making up his mind..... On the other hand, there is no reason why a witness should not check his recollection of appearance by reference to voice or movement. Maybe the further test would show him that his recollection was wrong and, if so, the sooner that is known the better. We think that if a witness asks for speech or movement, he should be told that it can be permitted by only one person. He should be asked whether there is any one person whom he can pick out because of his appearance and whom he is prepared to identify subject to confirmation. If he is, then what is in effect a voice or movement confrontation can be held and the identification either confirmed or withdrawn. We recommend that a regulation to the above effect should be introduced into the Parade Rules, thereby modifying the existing Rule 15. The procedure, if it takes place, should be recorded in the superintending officer's report".

In short the report suggested that before the demonstration which the witness desires to have made is carried out, the witness should be asked to make a preliminary selection of the person whom he wishes to see carry out the demonstration.

This, if done, and followed by the identification would make it perhaps clearer that the demonstration was confirmatory only; and that the witness had already identified the suspect and was merely confirming his identification to his satisfaction.

This change in the Rules has much to recommend it but there are some comments that should be made:-

(a) It will not necessarily resolve the question of whether the witness identified the suspect only because of the result of the demonstration. The Defence will still be able to argue that the identification is unsatisfactory on much the same grounds as are now urged.

(b) Further, with the greatest deference to the Devlin Report and to some dicta in the two Guyana Cases it seems to us that the objective of the parade is not merely to test the witness' recollection of the facial appearance of the accused - the objective of the parade surely is to test whether the witness can recognize and identify the whole man - the person whom he saw commit the offence. We would wish to reserve for further consideration the problem of identifying persons with distinctive scars and the like. We are not at the moment altogether convinced that the solution is to conceal the scar by putting on a plaster on the faces of all the persons in the parade. This in itself might possibly lead one to doubt whether the witness was really identifying the right man who had a visible and peculiar scar, or other distinguishing feature which has been concealed at the parade; perhaps the man who should be charged had no such scar? Is a test which conceals or disguises this peculiar mark fair to the witness? Should the correct solution be to put on the parade other persons having scars on their faces: in any event the possibility may have to be faced that the accused may be so distinctive in appearance that it is impossible to arrange a parade of persons having the same general appearance. This surely does not mean that because of their appearance such persons have earned an immunity from identification parades or from identification at all, if a meaningful parade cannot be carried out.

(c) The final point to be made is that though the recommendation of the Devlin Report on this aspect has much to commend it, the Rules have not in fact been altered to incorporate the refinement suggested. The conduct of this parade was not in breach of the Rules as they now exist. The fact that the Rule could be better designed does not convert what was done into a breach of the rules, nor does it prevent it from being a fair test of the witness because perhaps an even fairer test could have been designed.

Questions of identity and whether the identification evidence offered by the witness is accepted (save in cases where there is no evidence to establish a prima facie case) are for the jury. We are assured that the points canvassed by Defence Counsel here were put before the jury in his speech to them and they were reviewed by the learned Trial Judge in his summing-up. The basic point really

is, did the witness identify this applicant to the satisfaction of the jury so that they felt sure he was the person who robbed and shot at him, or did he merely pick him out at the parade because he had a disabled right hand.

This was clearly put to the jury in several passages of which we select two:-

At page 160 - where after reading 554 (U.K. Rule 15), the judge said:-

> "So that on a parade in keeping with the aim of the parade, namely, to make sure that the witness' ability to recognise the accused has been fairly and adequately tested, these are allowed, namely, if you want the man to talk or to walk, in this case whether he could stretch his hand out or not. So there is nothing improper nor was it suggested that there was in the man being asked to demonstrate. What is being said about this demonstration is that it was the demonstration per se, the demonstration by itself by which Mr. Francis was able to identify this accused man. Well, this is a question of fact you have to determine and this is going to depend on your view of Mr. Francis as a witness of truth and reliability. You saw him in the witness box. How did he strike you? What is the level of his intelligence, his ability, first of all to recall what took place last year accurately and precisely, to articulate that for your benefit? Was he a reliable witness? What weight can you accord to his evidence? These are questions for your consideration".

and again at p. 164:-

> "It is only if you are satisfied to the extent that you feel sure that Mr. Francis, you believe on his oath when he said that this was the man who held him up and robbed him and fired a shot at him, and it is only if you are satisfied to the extent that you feel sure that all the circumstances: the parade held by the police on that day was fair and excluded all possibilities of unfairness including any suspicion of unfairness or any risk of the witness knowing before hand the identity of the person suspected".

Finally, it is obvious that in this case the jury rejected the evidence of the Defence witness Jennifer Melhado as to seeing two gunmen running away from the scene and that they also rejected the applicant's alibi.

There was evidence on which the jury could have found this applicant guilty as charged.

In the circumstances we felt unable to interfere with this conviction and treating the application for leave to appeal as the hearing of the appeal, we dismissed the appeal and affirmed the conviction and sentence.

merit in these complaints and they need not detain us. Ground 4 consisted of the usual blanket assertion that the verdict was unreasonable having regard to the evidence adduced at the trial. We do not agree.

The two main points argued related:-

(a) to the alleged unfairness of the identification parade, and

(b) to the allegation that the investigating officer accompanied the witness to the parade though he did not himself attend it.

The grounds of appeal in these two respects read as follows:-

Ground 1

"(a) That the manner in which the identification parade was held was unsatisfactory and unfair to the accused in that the witness' attention was directed towards the accused in particular instead of indifferently to all the prisoners paraded, by having all the persons paraded raise their arms and thus displaying that the accused was the only person in the line who could not independently and freely raise his right arm.

(b) That the learned trial judge failed to assist the jury's appreciation as to the likely effect of the above procedure adopted at the parade upon the identification of the accused, in particular, by failing to point out to them the elements of unfairness of the procedure as disclosed in the evidence and to instruct them that such factors must affect the reliability of the parade and diminish the cogency of the identification in those circumstances.

(c) That the learned trial judge far from assisting the jury as complained of in (b) above, misdirected the jury that there was nothing improper in the procedure adopted and that they should resolve the question of its unfairness by their view of Earl Frances as a witness of reliability and truth (p. 161). Further that he indicated by his comments (pp. 72 and 73 of the transcript) that he was opposed to related procedures recognised as necessary to ensure that the ability of witnesses at identification parades have been fairly and adequately tested as required by the rules governing identification parades.

In the argument it was sought to bolster the submission by reference to the judge's remarks on the identification of persons who have facial scars or some such identifiable peculiarity, and reference was made to two recent decisions of the Guyana Court of Appeal, The State v. Ken Barrow (1976) 22 W.I.R. 267 (The scar-faced accused) and The State v. Vibert Hodge (1976) 22 W.I.R. 303 (The accused with gold teeth). Extensive reference was also made to the Devlin Committee Report.

It may perhaps be convenient to begin consideration of this problem by referring to the Devlin Report; it points out evidence of identification may be by recognition, and that in some cases this is also accompanied by identification by means of some distinctive feature, a tatoo mark, a scar or a limp etcetera. As the Report states "Evidence of a distinctive feature leads at once into an assessment of the possibility of another man with a similar feature being present at the place and time in question; if the feature is not uncommon, the evidence may be worth little; if rare, it may be worth much; if unique, it would be conclusive".

In the instant case we have evidence of recognition coupled with a distinctive feature, which while it was not unique, was certainly not common, a left handed gunman with a marked disability in his right hand.

This was a case based wholly or substantially on the visual identification of the accused where the witness not having known the gunman before, the situation called for the type of direction indicated in the United Kingdom cases of R. v. Turnbull (1976) 3 A.E.R. 549, and R. v. Peter Paul Keane (1977) 65 Cr. A.R. 247 and