JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 8/81

BEFORE: THE HON. MR. JUSTICE CARBERRY, J.A.
THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MR. JUSTICE WHITE, J.A.

JUNIOR REID V. REGINAM

Mr. Dennis Daley and Mr. J. Samuels-Brown for the Appellant.

Mr. Patrick Brooks for the Crown.

January 24, 25, 26, 26; July 29, 1983

CARBERRY, J.A.:

The appellant was convicted of the murder of one Norma Chung in the Home Circuit Court, Kingston, before Morgan, J. and a jury and sentenced to death on 26th January, 1981. This is an application for leave to appeal from that conviction, which we have treated as the hearing of the appeal.

At about 8:30 a.m. on Thursday the 23rd of August, 1979, Mrs. Chung was driving to her work-place at Seprod (Soap and Edible Products Ltd.) in a white Ford Capri motor car (NB 5905). Apparently to avoid the traffic lights at the intersection of Maxfield Avenue and Spanish Town Road, she used as a by-pass road an "L" shaped road, Tewari Crescent, which runs from Maxfield Avenue and enters on the Spanish Town Road. This appears to have been her customary route to her work-place which lay a mile away to the south of the Spanish Town Road. As Mrs. Chung was turning in the corner of the "L" on Tewari Crescent her car was ambushed, and she was shot dead. The car went out of control, mounted the sidewalk to her right (it was a right hand corner and the car was a right hand drive car), and came to rest against a fence on that side of the road at an angle to the fence and road. Her body was found

slumped over the steering wheel. The glass of the right door was broken (it was a one door car) - and so was the front windshield. There was also an indentation or bullet mark just above the right door.

It is of interest to note that the investigating officer, Detective Inspector Reynolds, puts the bullet mark as being just above the right front door, though he had just before correctly observed that the glass of the right door was broken; in fact the car had only one door on each side, with a large side window behind the glass in the door.

The evidence of the pathologist, Dr. Ramesh Bhatt, who performed a post-mortem examination on the body of Mrs. Chung next day, the 24th August, 1979, showed that she had been shot twice - once through the right shoulder and again at the right side of the neck; that that bullet left an exit wound on the left side of the neck, and as often happens, that the exit wound was appreciably bigger than the corresponding entry wound. The bullet that struck on the right shoulder was recovered: it was found embedded in the left breast. The bullet through the neck had fractured the 5th and 6th cervical vertebrae. Death was due to shock and haemorrhage as a result of the injuries to the chest and neck caused by projectiles of a firearm or firearms. Another bullet was later recovered by the police: it was found lodged in her hair while the body was at the undertakers. The wounds to the right neck and shoulder did not show any blackening of tatooing: the pathologist stated that this showed they had been fired from a distance greater than eighteen inches.

Mrs. Chung then had been shot from the right, as the car had slowed to take a right hand bend, from which it never straightened up, and came to rest on the right hand sidewalk touching a zinc fence on that side of the road.

Though the police were early on the scene and this was in broad daylight, only one eye witness offered to give evidence. This was a lady called Mrs. Lillian Campbell, an ex waitress in a restaurant on the Spanish Town Road, now a housewife. Her evidence was that she was in her apartment which is in the corner of the "L" and looks down Tewari Crescent towards Spanish Town Road. It lies on the left hand side of the road going towards Spanish Town Road, and further down on the same side but on the other leg of the "L" was an abandoned house, She heard three gun shots and came out on to her verandah to see: she then saw that a white car had mounted the curb and sidewalk and crashed into a fence on its right, and heard the car horn blowing. This was about the length of the court room from her. There was one person in the car (the deceased Mrs. Chung) at the steering wheel. She saw two persons, one the appellant whom she knew as "Junior Godfather", and the other whose face she did not see, run from the abandoned old house across the street and look into the car. She saw the appellant with a gun in hand, with his left hand resting on the top of the car, pointing inside the car with the hand that held the gun. He was on the "passenger" side of the car (i.e. the left). She then heard three further "explosions" or gun shots, in the car. The other man had gone to "the back door" on the other side, the driver's side, (i.e. the right) and she did not get to see his face. After these three shots were fired the appellant and the other man returned back to the abandoned old house. Waiting for some little time, until a crowd gathered, she came off the verandah, looked inside the car, saw the deceased, and returned to her apartment where she phoned the Denham Town Police and made a report. She spoke to the police on arrival. Told them that she recognized the appellant whom she knew as "Junior Godfather." He had been a regular daily customer at the restaurant at which she had worked, and she had known him over a period of eight years. She had picked

him out at an identification parade that was held on the 20th September, 1979, following the arrest of the appellant on the 4th September.

It should be added that a police photographer came on the scene and photographed the deceased's car in situ, some time after.

The evidence against the accused depended solely upon the evidence of recognition or identification given by this single eye-witness, and the argument turned in this appeal principally upon the directions given to the jury as to how to assess such evidence, and as to the circumstances attendant on the identification parade that was held for the appellant. A third point was also canvassed. Naturally enough the witness was closely cross-examined as to how long she had known the accused and what opportunities she had had of seeing him over the years that she had known him.

It appears that she had retired from her job as a waitress some few years before the trial, but she said she had seen the accused and other persons for some weeks before this incident, congregating around the abandoned house. It appears that this struck a responsive chord. Junior counsel, who conducted the defence of the accused, after the adjournment later asked for the witness to be recalled and pressed her as to whether the witness had seen the accused in that area between the period January to August 1979. The witness responded that she had seen the appellant at Tewari Crescent up to the Tuesday evening before the incident. Pressed as to when last before that, the witness responded "Saw him all along, all on the Spanish Town Road, please." On the period from the beginning of the year to August being specifically put, despite the witnesses previous observations that she couldn't put specific time periods for seeing him, the witness responded to the effect that she had seen him very

often, all three times for the day. The matter was left in this general way. At no time was it specifically put to the eye-witness that she could not have seen the accused in the period April, 1978 to 18th July, 1979, because the accused was in jail.

The defence however, when its turn came, offered evidence in the shape of the Superintendant of the St. Catherine District Prison to the effect that the prison records showed that a prisoner who answered to the name of Junior Reid had been received into the prison on the 1st April, 1978 and discharged on the 18th July, 1979. He had nothing to indicate that that person had escaped at any time in that period. Cross-examined by Crown Counsel, he said that he was unable to say whether the appellant was in fact the same person whose name appeared in the records, as he, dealing with some eight hundred or more prisoners, could not recognize him, unless he had had some specific reason to do so. The accused himself, in an unsworn statement, alleged that he was in jail from the 17th December 1976 (or 1977?) and did not come out till 18th July, 1979. This would have been some five weeks before the shooting.

On the face of it this would have provided some leverage for attacking the evidence of the eye-witness: it would have shown that in terms of keeping visually in touch so to speak with the accused, that there was a period in which he would have been "out of circulation" and that she had not noticed this; or alternatively had exaggerated her claim to have been seeing him "all the while" or possibly to have lied in this respect. Unfortunately there were some "loopholes": possibly due to the inexperience of counsel the witness had not really been satisfactorily pinned down as to seeing the accused in the period of his incarceration; nor had that really been satisfactorily established. More experienced counsel might have called in addition a witness from the Criminal Records Department to establish

identity between the accused and the man shown in the prison records. Complaint was made before us that Crown Counsel should not have cross-examined the Superintendent of Prisons in the manner indicated above, as he could have, virtute officii, have himself launched an enquiry during the course of the trial to see if the accused had been in jail in that period or not.

We don't think that this criticism is justified. Two factors were unknown: it was not realized that the accused had been in jail before the shooting, nor was the significance of the attempt to trap the identifying witness into saying that she saw the accused at large in that period recognized. There was some evidence offered on the matter by the defence, though not as conclusive as it might have been, and in any event the eye-witness was not really "trapped" for the reasons indicated earlier. Whether she had harmlessly exaggerated the extent of her opportunities for recognizing the accused by seeing him over a period of time, or had gone further and deliberately lied about it was and would remain a matter for a jury to decide. The trial judge left the issue to the jury at some length, first when she dealt with the witnesses' knowledge of the accused and how long she had known him, see pages 170 to 171, and again at page 176 where the judge remarked to the jury:

> "You will refer to this aspect of identification again where she said she saw him from January '79 to August '79, for evidence has been led that a part of this period he was incarcerated elsewhere and if that is so, then she could not really have been seeing him for that period; but that is going to be a matter for you to decide whether or not she is telling a lie or she is as we say "painting the lily."

The trial judge returned to this aspect of the case when dealing with the evidence of the defence: see page 201 (dealing with the unsworn statement of the accused) and at pages 204 et seq. dealing with the evidence of the Superintendant of Prisons, and again at page 211. The complaint of the appellant is really in effect that the Crown and the learned trial judge

should have fully accepted this evidence of his incarceration, and in effect should have invited the jury to do so also, rather than just leave it to them as something not fully established, but which might or might not be so. However even if this had been done, it would still be left to the jury to weigh the evidence as to whether or not and to what extent the witness was familiar with the appearance of the accused, and the attack would be as to the period of time during which she had had the chance of seeing him. It is significant that nowhere, from start to finish, did the accused or his counsel ever challenge that the witness knew him and he the witness, and his reported comment when the witness identified him at the parade is to say the least enigmatic.

Certainly the appellant could not have put his case any higher than the way it was put by the judge at page 211:

> "And what he (the accused) is saying, he is saying that it was not his act, that he was not by Tewari Crescent at the time but that he was at 27 Fourth Street. He is saying that the witness could not have known him for eight years or for four years as for two and a half years he was in jail and was released about five weeks before the incident. He is suggesting that her identification of him was aided by the police and he says she could not have seen him and she is making up her story and she is lying. That is what the defence has given for you to consider."

On this aspect of the case it remains to be noted that the appellant by his counsel made an application to this Court to call further evidence from an officer of the finger print bureau to establish that the appellant was convicted on the 19th April 1977 and sentenced to three years imprisonment, entered the General Penitentiary on the 27th April 1977 and was released on the 18th July 1979. That application was heard before a different panel of the Court on the 16th December, 1982, and it was refused. We do not know why but it is clear that it could not be said that this evidence was not available at the trial below. That evidence might have strengthened the appellants

evidence below, but it would have raised no new matter, and it would still have left basically the same issue to the jury, how well did the witness know the accused at the time of the incident?

We turn now to the second main issue or complaint: it concerns the identification parade and what happened at it. The first point taken on this issue was, in our experience, somewhat novel. It will be remembered that the witness told the police that the gunman that she saw was known to her as "Junior Godfather." Neither portion of this combination is unusual, though the linkage is a little out of the ordinary. Nor is there any dispute that the appellant was so known amongst his family and circle of friends. However as a lead to a speedy arrest it seems not particularly helpful. Be that as it may, an arrest having been made it does not seem to us either unusual or remarkable that the police should wish to know that they had indeed captured the person whom the witness knew by this nickname. It would have been possible to arrange a simple confrontation: the police however prudently decided to arrange an identification parade, as judges have on occasion adversely reflected on identification by confrontation, save where it cannot be helped.

Counsel for the appellant, seldom averse to having it both ways, seems to have seized on this as indicating that the holding of a parade showed that the police themselves were doubtful of the witness's identification. It is of course true that when a witness has identified an alleged wrongdoer to the police by name, indicating the extent to which he was previously known, the police seldom bother to stage an identification parade. Here however the identification was by nickname only, and not an uncommon one at that. The argument appears to have been advanced below, and the trial judge dealt with it at page 175 in the summing up. The judge observed to the jury:

> "..... counsel has been asking how is it that she knows him and yet she still had to go to identify him on a parade? As I said, this man is charged before you as Junior Reid. She knows him as "Junior Godfather" and that, is, members of the jury, obviously a pet name and as we all know a pet name is a thing that more than one person can have. Two, three or four persons can be called by the same pet name, so in order to ascertain that you have picked up a person with a pet name who is the correct person --- in other words, to determine whether it is the correct person that they have detained, an identification parade is held. You see, they couldn't just pick him up even though he has the name which she tells us is "Junior Godfather" --- the pet name --- put him in the C.I.D. room and call her and say is this the "Junior Godfather" which you have been talking about. That would be what is called "confrontation" and our law rejects any such identification as being improper. The police knows it is improper so what they do instead of doing it that way, they hold an identification parade, which is the proper thing to be done."

Complaint was made as to the last two sentences. The appellant's counsel, Mr. Daley, who did not appear below, complained that while he wished that this was indeed the law, it was not in fact so and the jury had been thereby misled. He put the complaint in another way: that the judge in fact should have told the jury that it was "most unusual" to have a parade in such circumstances, and that it cast serious douht as to whether the witness had told the investigating officer that she knew the person who shot the deceased, and recognized him as "Junior Godfather." The deduction or inference sought to be drawn seems rather far fetched, and to be a non sequitur. The judge may have put the obligation of the police higher than it is, but we cannot see that that in any way adversely affected the accused. We don't agree that the holding of the parade was "most unusual" and while a judge must put the defence case to the jury adequately and fairly, the judge is not obliged to put every possible point that may be urged, particularly when it is as strained as this one was. It is perhaps not a little ironic that the police who are often blamed for not having arranged an

identification parade should be here attacked for having held one.

A more arguable point arose out of the incidents which occurred at the parade itself. In cross-examination, see pages 32 et seq, of the transcript, the witness stated that she walked up and down the line twice, and put the length of time taken by her to identify the accused at fifteen minutes (the police put the time at two minutes). She added however "It was a short time. .... Me never spend no long time, no walking ups and down." Now comes the passage on which argument was raised:

"Q: Now, after you did this, you asked the police officer in charge of the parade to let the men show you their teeth, is that true?

A: Yes, ma'am.

Q: And, after you look at the teeth, you pointed out the accused man?

A: Yes, ma'am.

Q: Right. And it is when you saw the number six man's teeth that you point him out. It is when you saw the number six man's teeth that you pointed him out?

A: Yes, ma'am, which I could do without.

Q: Did anybody else on that parade ....

HER LADYSHIP: What you said?

WITNESS: Which I could do without, tell him to show his teeth.

Q: Anybody else at that ..

HER LADYSHIP: Just a minute, please .. Yes?

Q: Anybody else on that parade had teeth like this man you see sitting there?

A: Didn't see anyone else.

Q: Didn't see anybody else?

A: Have a gold teeth?

Q: That's right. You were looking for that gold teeth?

"A: Yes, ma'am.

Q: You see, I am going to suggest to you again, that you pointed out the accused because of his teeth.

A: Not of his teeth alone, and I know him, but them say you are to ask to point f[illegible]im.

Q: Them say what?

A: Them say you are to ask some question, said show them teeth, or such a like.

Q: The police tell you to ask to show them teeth right? The Police told you that. We are here to speak the truth Mrs. Campbell, speak up and tell the truth, police tell you to ask him to show his teeth?

A: I asked the question, said ...

MRS. GAYLE: M'Lady ....

HER LADYSHIP: Just a minute. Repeat that.

WITNESS: I went in and when a walk up and down the line I saw him before, but I asked the police to allow me to tell him to show his teeth, to skin his teeth.

HER LADYSHIP: Just a minute. You say you asked the police to let him skin his teeth?

WITNESS: Everybody ma'am.

HER LADYSHIP: Oh. Yes?

Q: Who told you you could ask questions on the parade?

A: No one.

Q: So when you told this court a while ago, "Them" say I must ask - "Them" say I must ask him something - who is the "Them" you were talking about, who is the "Them" you were taking about? You say "Them" say a must ask him something?

A: Yes.

Q: You said that. Did you say that?

A: Yes, Ma'am, yes.

Q: And them say to you, the police tell you to ask hi[illegible]omething and you say yes, did you not, did you not say yes, madam?

A: Yes.

"Q: And you heard my question, you heard me clearly?

A: Yes.

Q: You see, I am suggesting to you ...

HER LADYSHIP: What did she just answer?

MRS. WILSON : She said, she did say, "them" say I must ask him something.

Q: And when I said to you, the police told you to ask him something, and you said yes to that question - she said yes - she did answer yes?

HER LADYSHIP: Yes.

Q: You see, I am suggesting to you that the police told you to look for gold teeth.

A: Police didn't tell me to look for gold teeth ma'am because I first ask the question.

Q: I am suggesting to you that when you went into that room, that I.D. Parade, and you walk up, and you walk down, you couldn't recognise anybody.

A: I recognise him because I know him.

Q: I am suggesting to you. You answer them. Answer my questions. I am suggesting to you that being unable to recognise anybody, you asked for the men to show their teeth, as you had been instructed to do.

HER LADYSHIP: You agree with that?

WITNESS: No, ma'am, because I know him and I cannot know him teeth and go to no other person, I know him.

Q: I am suggesting to you further, that having followed those instructions and seen the man's teeth, he being the only man with teeth of that kind in that line, you pointed him out.

HER LADYSHIP: You agree with that?

WITNESS: No ma'am. Is not him teeth I tek and know him.

HER LADYSHIP: If you are saying anything, say it out.

WITNESS: I say is not him teeth I tek and know him, I know him without his teeth.

Q: So, tell me something, you told the police that you knew that man well?

A: Yes, ma'am.

Q: Told them you know him for eight years?

A: Yes, ma'am.

Q: Tell me something, you told the police his name?

A: Yes, ma'am."

In re-examination by Mrs. Gayle for the Crown, further clarification was sought. The passage below appears at page 41 of the transcript:-

Q: Now, you were asked some questions now, about what you asked to be done on the parade. You remember that counsel asked you if on the parade you asked for something to be done, asked for somebody, you used the words to skin them teeth you remember that?

A: Yes, ma'am.

Q: Now, see if you can understand me and follow me carefully. It is that you asked the police officer to ask them to show their teeth, or, is it that you were told by somebody, to ask for the men to show their teeth?

A: I asked the police to let them show them teeth, ma'am.

HER LADYSHIP: Just a minute. Yes?

Q: And when you asked the police to let them show them teeth, what did the police do?

A: The police turn to them and say, everybody skin them teeth.

Q: Can you explain to the court, the judge and jury, why it is that on the parade you asked the police this question?

A: Well, I know the person, I know him in person, but to have the stronger approve that him know that I know is him, I know him has in a teeth, gold teeth I asked to let him show his teeth, because I know that him have in gold.

Q: What was the word she used, have a stronger ...

HER LADYSHIP: Stronger approve.

MRS. GAYLE: I have no further questions."

These passages by the eye-witness Campbell are to be compared with the evidence given by Police Inspector Austin Case who conducted the identification parade. His evidence was to the effect that the usual preliminary advice was given to the accused, and that at the parade the accused was represented by his attorney at law, Mr. Playfair. There was also present a justice of the peace, one Mr. C. Rerrie. Neither gentlemen was called by the defence. The parade was conducted by using a system only recently introduced in Jamaica, viz. the use of a one way mirror or glass between the witness and the suspect and "line up". This allows the witness to see the suspect and the line up without the witness herself being seen. The witness then identifies the suspect by pointing to or calling out the number indicating his position in the line, and which numbers appear in large figures above the respective positions of the persons in the "line up".

In his examination in chief Inspector Case, at page 50-51 said as follows:-

"A: The witness walked along the mirror twice, stood in front of where the suspect was standing; then. she requested me to asked them to open their mouth.

HER LADYSHIP: Yes?

WITNESS: I went to the communication vent ...

HER LADYSHIP: Yes?

WITNESS: And told them that everybody should open their mouth- which they did.

Q: Yes?

A: The witness then said it is number six.

Q: Now let me pause here Officer. Did you just say the witness stood in front of where the suspect was standing, then asked you to ask them to open their mouth?

A: To open their mouth.

Q: When she made that request, she was already standing in front of the suspect?

A: She was so doing.

Q: About how much time did that lady, Mrs. Campbell take in walking up and down before she took up her

position in front of number six?

A: I would say about two minutes.

Q: What next happened?

A: I went to the communication vent ...

Q: Yes?

A: And in a loud voice I said: "Number six, you are identified".

Q: Did number six, the suspect, say anything?

A: Not at that time - no.

Q: I see. What next happened?

A: I told the detectives to bring him to the communication vent.

Q: Did they comply?

A: They did so.

Q: What happened?

A: In a loud tone of voice, the witness Campbell ...

Q: Yes?

A: Told him that - you are the man, who, on the 23rd of August, 1979, at Tewari Crescent, fired three shots in a car and killed Mrs. Chung.

Q: Continue?

A: The suspect, at that stage said something, but we on the other side of the parade room could not hear."

Inspector Case was asked no question in cross examination as to what he said in chief about the witness standing in front of the the suspect and requesting "them to open their mouth". It appears that what the suspect said that he did not hear was written down on the Report of the I. D. Parade by some other officer, and was

> "Mi a the only man here in false teeth? Mi a go see mi lawyer."

His lawyer, Mr. Playfair, was present and it does not appear that he lodged any protest, and he was not called as a witness. It should be added that according to the accused, in his unsworn statement, Mr. Playfair told him that he had been sent by the legal aid clinic and that he asked the accused if he wanted him to represent him at the parade and the accused said yes, and asked him to "sit on the parade" for him. According to the accused, in his unsworn statement, he complained at the parade,

> "Somebody that a person know for so long.. could only identify by them teeth, and this teeth that I have in ... (Accused takes out his denture) is the same teeth that she identify."

He also seems to have suggested that he had put in his teeth in June 1976 and says this was shortly before his incarceration, which he had earlier put as being from 17th December 1976. Incidentally it will be remembered that the defence has put the accused's imprisonment as commencing in April 1978 at the St. Catherine District Prison. Before he left the witness box (page 58 of the transcript) the learned trial judge asked Inspector Case:

> "Q: Just for my information, was he the only man there with false teeth?
>
> A: I really don't know, M'Lady."

The learned trial judge summed up the evidence as to the events of the identification parade at pages 172-174 of the transcript, thus:-

> "She says she walked up and down the line and it was in all about fifteen minutes, but she didn't have a watch, but she put it at about fifteen minutes. When she was asked how long she had been in the witness box she said about ten minutes and you will recall she was there about thirty-five minutes. So it is quite evident that she is a witness who is unable to judge the time. So she goes on and this is the way she puts it: "I never spend a long time walking up and down. I walked up and down slowly", and then she conceded, "Yes, it can be less than ten minutes." She says, "I asked to let the men show me their teeth. After I look.d at their teeth I pointed out accused. It was when I saw the number six teeth that I pointed him out. I could do without asking him to show his teeth. Accused has a gold teeth. I was looking for it"; and Mr. Foreman and members of the jury, you will recall the accused man in his own evidence he took out his teeth and he has shown it to you and he says it is a crown, but she says it is gold teeth. She says, "It is not because of his teeth why I pick him out. Dem told me I could ask him something. I asked the police to let him skin him teeth, everybody to skin teeth. I was not told I could ask questions by anyone. The police told me I could ask him something. The police never told me to look for gold teeth. Not true I never recognised him when I walked up and down. I did for I knew him." She said it isn't true that she asked him to show his teeth because she did not recognise him. She says it is not true the police told her to ask and look for a gold teeth, neither was it because he was the only man there with the gold teeth why she pointed him out. She says, "I knew him without his teeth."
>
> She said later on when she was re-examined, "I asked the police to let them show their teeth and the police said everybody show dem teeth. I asked as I know the person, but to have it stronger a proof, I asked him to let him show his teeth because I knew he had in gold."

> "Now Mr. Foreman and members of the jury, I must first tell you that to make such a request is a normal thing in the identification parade. The rules provide for it, and there is nothing wrong with her asking the officer on parade to ask the witness to show his teeth, or there is nothing wrong even in being informed by a police officer about the rules of a parade. It was suggested to her that this man has a gold teeth and that a policeman told her that she was to ask for gold teeth; but when you come to the evidence of Inspector Case you will remember Inspector Case says that she stood up before the man and then after standing before the man she asked that he show his teeth. What she had done is, she had been standing before him, she has made what I would say is a positive identification, but she wants to confirm the identification. She calls it 'stronger a proof', she wants to confirm the identification, so she says show your teeth because she knows he had a gold teeth. In other words, as we would say, 'make assurance doubly sure'. Of course, she denies that the police told her to look for gold teeth. Of course, if they did that it would be improper; but then, would you say that the manner in which she identified him affected her or affected the identification, because she stood up before the man before she asked that the gold teeth be shown; but if they did tell her to do it, all the same, it is improper, because it would be what we call an aid in the process of identification and the entire concept of an identification parade is to exclude any suspicion of unfairness. So it is a matter for you Mr. Foreman and members of the jury, taking into account the evidence which you have heard from the witness and which is even supported in greater measure by Inspector Case."
>
> (Emphasis supplied).

So far as summarizing the evidence goes, it appears to us that no valid complaint can be made about this passage, though it is pointed out that there is one minor inaccuracy; the witness said that she asked for the accused to show his teeth, and later that she asked them to show their teeth; Inspector Case in his evidence refers to the latter request only, so that he was incorrectly quoted above by the Trial judge as saying that the witness "after standing before the man she asked that he show his teeth"; though it is clear enough that that was what she meant.

Counsel for the appellant, who did not appear in the case below, made several complaints about the passage cited above from the summing up.

First, he complained "that the learned trial judge misdirected the jury and usurped their function in directing them

that "she (the eye witness) has made what I would say is a positive identification, but she wants to confirm the identification... In other words, as we would say, 'make assurance doubly sure'."

As to this complaint it is clear that the interpretation advanced by the learned trial judge was an inference that could be drawn from the evidence. Further that it was the inference that the Judge herself drew. The jury were not however directed that it was the only inference, and ultimately the matter was left to the jury for them to draw their own conclusions in the concluding sentence in this part of the summing up. The Judge had earlier told the jury that they were the sole judges of fact, and that her own comments on them could be accepted, or discarded as they pleased. (See page 158 of the transcript).

A trial judge is not precluded from expressing to the jury an opinion as to the inference that he drew from the facts, provided always that he does not "preempt" the situation, and that the matter is left to them.

The complaint however goes further than this. Mr. Daley pointed out that the witness had not in her evidence of what happened at the scene of the shooting said anything about the gun-man having a gold tooth, or of having seen a gold tooth on that occasion. Therefore it is argued that what happened at the parade was in effect that she was seeking to identify not the gun man that she had seen, but a man that she knew before that day, who had a gold tooth, and who she had in her own mind identified as being the gunman that she saw that morning. This is a fair inference, but does it weaken the identification? In any event it seems over sophisticated. The witness had said she recognized the gun-man as some one she knew before, and knew by his nick-name. When she attended the parade it was inevitable that she would be looking for that person. This is what will happen at any parade held in a case in which the witness has recognized the culprit, or says that she has recognized the culprit, as someone she knew before: she is bound to be engaged in identifying the person that she knew before,

though at the same time she will in her own mind be also identifying the person whom she saw commit the act of which she gives evidence. For such a witness the two processes are one and the the same, and it seems pointless to try and separate them. The parade in these cases can't really test the identification of the accused as the person that the witness saw commit the crime, though it may test the witness' ability to pick out someone whom she says she knew before. This is one reason why such parades are seldom held where the witness knew the suspect before: in such cases, depending on the length and strength of the previous acquaintance with the suspect, the parade will be unnecessary, though it will be some test of the witness' previous acquaintance with and ability to recognize in strange surroundings a person whom she claims to know and to be able to recognize. If the witness fails to recognize and identify the person that she claims to have known before when he is in the line-up or parade, then it will show two things: first that her ability to recognize the person at all is poor, and that her knowledge and acquaintance with him is minimal; and secondly that because of this her purported identification of that person as being the culprit whom she saw commit the crime is likely to be very unreliable and that it would be dangerous to act upon it at all. In such a case the identification parade will still have proved a useful aid to testing the witness' ability to identify a suspect, though it will have tested not so much the witness' ability to recognize the suspect, but her ability to recognize a person whom she claimed to have known before.

The argument advanced by defence counsel went however still further and convassed the proper mode of conducting an identification parade in which the suspect has some mark or characteristic which may be said to be peculiar to himself, whether it be a scar, or burn, or other defect, or perhaps a gold tooth. It was argued here that because the witness demanded to see the open mouths of the persons on parade, and particularly that of the accused, her identification was valueless and that the Jury should

have been told this. Reliance was placed for this proposition on the reasoning set out in the judgments of the Court of Appeal of Guyana in the case of The State v. Vibert Hodge (1976) 22 W.I.R. 303 (the gold teeth case). Reference might also have been made to an earlier and somewhat similar case from the same court, The State v. Ken Barrow (1976) 22 W.I.R. 267 (the case of the man with the scar), and to our case of Anthony Hewitt v. Regina S.C. Criminal Appeal 84/1977, Judgment Dec. 18, 1978, where this court considered those cases and dealt with a somewhat similar problem, (a left handed gun-man with a marked disability in his right hand).

The extent of the problem varies naturally with the nature of the mark or characteristic, and with the extent to which it can be properly regarded as unique. The problem is considered at some depth in the Devlin Report on Evidence of identification in Criminal Cases (1976). At page 69, para. 4.7, after drawing a sharp distinction between evidence of recognition, and evidence of resemblance, the report observes:

> "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."

Professor Glanville Williams in an article published in the Criminal Law Review, July 1976, pages 407 et seq. entitled "Evidence of Identification: The Devlin Report", at pages 416-417 under the caption "identification parades" deals with the problem posed, observing that the rules as to such parades do not say what is to be done when the offender was seen by the witness to have some marked physical peculiarity like a hunch back or a club foot. He observes that if the person suspected by the police has such a defect (which may be why he was picked up in the first place) and is put on the parade with others who do not have this defect, the witness is very likely to pick him out, whether he is in truth and fact the person that he saw or not. He suggests that one solution

may be to endeavour to conceal the defect, and that this may be the only way in which a fair identification parade can be held. He observed:

> "Of course the fact that the defendant has some marked peculiarity possessed by the offender will be strong evidence against him if it is coupled with other evidence associating the defendant with the circumstances of the offence; this has nothing to do with the holding of a parade. The greatest danger to innocence arises where the peculiarity is not so great. A witness may describe the offender, for example, as having black curly hair. It may easily happen that the police then compose a parade in which the suspect is the only person having hair of that description; and the suspect, not knowing the description that has been given, will not know that he alone fits it. In these circumstances the suspect is very likely to be picked out."

The problem is a very real one, depending upon the nature of the peculiarity and the extent to which it is common. It was discussed in The State v. Ken Barrow referred to above, a case where the accused had been described as having a scar on the left side of his face and was the only person on the parade with such a scar! The judgments discuss the possibility of concealing the scar, or ideally of finding other persons for the parade who also have scars. In Anthony Hewitt this court specifically left the question open, and observed that while the parade must be fair to the accused or suspect, it must also be fair to the witness. The scar or other distinctive feature is often a significant part or feature of the appearance of the offender, and one for which the witness will look. What is the witness to do when he goes on the parade and finds every man wearing a sticking plaster over the site of the scar? If he recognizes the accused despite it, may it not be that the identification in these circumstances is similarly suspect because it was made with the most significant feature concealed? If it had been exposed, the defence may argue, perhaps the suspect would not have been picked out because the scar of the real offender differed from his! While it may not be practicable to find or compose a parade in which every member has a scar similar to that of the suspect, it should not be impossible to find at

least two others who also have scars even if they are not similar. Such a test might ultimately be much fairer to both accused and the witness. What I think must be avoided is having a situation in which a suspect with some unique feature is to escape altogether because an identification parade is unable to be "fair" in concealing this feature. This would be to make such an offender into an "untouchable"!

The Devlin Report at para 5.65 (page 122) does make a practicable suggestion that will help in this type of situation, and though cited in Anthony Hewitt it is worth repeating here:

> "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 only by 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".

Shortly put, such requests are recognized as allowable and reasonable, but are best dealt with by being used to confirm an identification already made.

In fact, judging from the evidence of Inspector Case, to the effect that the witness stood in front of the suspect and then made her request for the persons on the parade to "skin their

teeth", what happened here is very close to the solution suggested by the Devlin Report, above, save that the witness was made to ask for all persons on the parade to open their mouths. Be that as it may, in all of these cases it is for the jury to weigh and evaluate the strength or weakness of the parade as a test of identification, the trial judge reviewing with them its strength and weaknesses. This should be done as part of the larger review of the identification evidence as a whole.

In The State v. Barrow (supra) the Court of Appeal of Guyana came to the conclusion that the identification parade was unfair, only the suspect answered to the description, scar and all. But they indicated that had the trial judge discussed its weaknesses with the jury before leaving the evidence to them for what it was worth, they might not have interfered with the verdict: See Haynes C. at pages 276-277. As it was they quashed the conviction and did not order a new trial. In The State v. Vibert Hodge (supra) the Court of Appeal of Guyana followed its previous decision in Barrow's case. In this case the identifying factor was, as in this one, the presence of gold teeth in the mouth of the suspect. Not unnaturally it was strongly pressed upon us, and also in the court below. Here however there were three versions of what happened at the identification parade: that of the witness, who swore that she had already identified the accused in her own mind, and asked the accused to open his mouth to be doubly sure. The second version was that of the officer conducting the parade who said that the witness looked at the parade, and then asked that all the men open their mouths, and then identified the accused. The accused's version was similar to that of the officer conducting the parade, save that he added that he was the only man who had gold teeth, but this was denied by the officer who conducted the parade. The Court of Appeal of Guyana regarded this as a case in which on two versions, that of the accused and that of the officer who conducted the parade, the witness had identified the accused by his teeth alone, and nothing else, and that this made her identification bad, especially as there was not

shown to be anything peculiar in the teeth themselves. If that be so it is, with respect, a little difficult to understand why the view should have been expressed that the witness identified the accused by his teeth alone, unless perhaps what was meant was that she would have identified any person whom she saw wearing gold teeth on that parade. There were however other factors affecting the identification: the witness had described the accused to the police as "fair skinned" whereas he was very dark. The real cause for intervention however seems to have been the failure of the trial judge to adequately review the difficulties of the identification evidence as offered. The trial judge had also failed to put to the jury a significant part of the defence, i.e. that the accused alleged that the arresting constable and himself had had a previous quarrel over a girl, and so he alleged malice or spite. In the circumstances the Court of Appeal of Guyana quashed the conviction and did not order a new trial. It should be noted that in the Hodge case the witness purported to be identifying someone whom she had never seen before, who held her up and robbed her. It was a "fleeting glimpse" type of case, as in R. v. Turnbull (1976) 63 Cr. App. R. 137; (1976) 3 All E.R. 549. Further, had the witness specifically asked for the suspect to open his mouth, then it would have been clearer that the gold teeth were used merely to confirm an identification already made. We are of the view that Hodge's case is clearly distinguishable.

In R. v. Anthony Hewitt we reviewed these two cases and also the suggestion made in the Devlin Report. We expressed reservations on the practice of covering up identifying scars and similar marks. We appreciate the desire to be fair to the suspect, but it is also necessary to be fair to the witness: neither result is necessarily achieved by the masking process, and it introduces into the parade something akin to a "missing ball" competition where persons are asked to place correctly a missing football in a picture taken while the game is in process. It should not in

practice prove too difficult to have on the parade one or two persons with similar marks, not necessarily identical: e.g. facial scars not necessarily of the same shape or location. We also think that the use of the witnesses' additional requests as something confirmatory after an identification has already been made, even if it be tentative, has much to recommend it. This requirement is not however yet a part of the Identification Parade rules in Jamaica, and we can not therefore say that not to have adopted it was something that made the parade in this case unfair: and in point of fact what in fact happened here was very close to compliance with the suggested rule.

To quote again from Anthony Hewitt:

> "The basic point really is, did the witness identify this applicant to the satisfaction of the jury so that they felt sure that 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 is the type of question which must be answered by a jury, and what it is necessary to see in each and every case is was the problem posed in it fairly left to the jury to decide, with proper assistance from the trial judge. It may be worth remembering also that Anthony Hewitt's case was not a case of recognition of a person previously known to the witness.

We think that that question as to the fairness of the parade was left to the jury here, but of course whether it was fairly and adequately left relates not to the particular problem posed in the particular case, but also to such general directions as are given to the jury on the question of identification; put another way, the particular problems posed have to be considered not only in the context of the case but also in the overall advice given by the trial judge as to identification evidence.

This brings us to a consideration of the directions given with regard to identification evidence generally. This was the third main area canvassed in this appeal.

In this connection three cases were cited to us:

R. v. Turnbull (1976) 63 Cr. App. R. 132; (1976) 3 All E.R. 549; R. v Oliver Whylie (1978) 25 W.I.R. 430; (1978) 15 J.L.R. 163; and Peter Paul Keane (1977) 65 Cr. App. R. 247. The first and the last are decisions of the English Court of Appeal; Whylie's case is a decision of this court.

All three cases deal with the risks inherent in cases where the jury's verdict or the case for the prosecution rests solely upon evidence of visual identification of the accused as the person who committed the offence charged. Turnbull's case followed closely on the publication of the Devlin Report, referred to earlier. For present purposes it is sufficient to quote a few passages the headnote (All E.R.) which accurately reproduces the judgement of Widgery C.J.

> "Whenever the case of an accused person depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting in reliance on the correctness of the identification. (In addition) he should instruct them as to the reason for the warning and should make some reference to the possibility that a mistaken witness could be a convincing one and that a number of witnesses could all be mistaken. Provided that the warning is in clear terms, no particular words need be used.....

The headnote then reflects the judgment in discussing the need for the judge to review with the jury the circumstances of each identification: time, distance, light, previous knowledge of the accused by the witness, discrepancies between descriptions given to the police and the actual appearance of the accused. (Even in cases of recognition, mistakes can be made).

The headnote then goes on to observe that:

> "However, where in the opinion of the judge the quality of the identification evidence is poor, he should withdraw the case from the jury and direct an acquittal unless there is other evidence which supports the correctness of the identification.

The headnote finally concludes:

> "A failure to follow these guidelines is likely to result in a conviction being quashed, and will so result if, in the judgment of the Court of Appeal, on all the evidence, the verdict is either unsatisfactory or unsafe."

It should be observed that the formula in the last passage, that "the verdict is either unsafe or unsatisfactory" does not apply to the scene in Jamaica, where the Court of Appeal is still subject (to use the words of Widgery C.J.) to "the limitations which the Criminal Appeal Act 1907 and the case law based on it had put on the old Court of Criminal Appeal." As he remarks, "The jurisdiction of this court (under the U.K. Act of 1966...) is wider". In Turnbull's case the English Court of Appeal adopted some of the suggestions in the Devlin Report, notably that there should be a warning as to the dangers of identification evidence, and that the jury should be told the reason for the warning. It added the need for a careful review of the weaknesses and strength of the identification evidence. R. v. Oliver Whylie (supra) marks the reaction in Jamaica to the Turnbull case. Though the judgment has been usually cited and faithfully followed in most summing-ups since, it is worth while for the purposes of this case, repeating two passages from it. At page 432 Rowe J.A. said:

> "Where, therefore, in a criminal case the evidence for the prosecution connecting the accused to the crime rests wholly or substantially on the visual identification of one or more witnesses and the defence challenges the correctness of that identification, the trial judge should alert the jury to approach the evidence of identification with the utmost caution as there is always the possibility that a single witness or several witnesses might be mistaken. A mistake is no less a mistake if it is made honestly. Although it is the experience of human beings that many honest people are quick to admit their mistakes as soon as they become aware of them, it is also possible that a perfectly honest witness who makes a positive identification might be mistaken and not be aware of his mistake. In every such case what matters is the quality of the identification evidence...."

The judgment continued by indicating that the judge should explore with the jury all the various circumstances affecting the identifi-

cation... time, distance, lighting et cetera, and should not be content with merely reproducing the evidence given. Rowe J.A. then observed; after citing a number of cases including that of Turnbull:

> "... from these cases we extract the principle that a summing-up which does not deal specifically, having regard to the facts of the particular case, with all matters relating to the strength and the weaknesses of the identification evidence is unlikely to be fair and adequate. Whether or not a specific warning was given to the jury on the dangers of visual identification is one of the factors to be taken into consideration in determing the fairness and adequacy of a summing-up...."

Pausing here, the likely result of breach of the guidelines in Jamaica - because we are still governed by the wording of the 1907 Act - could not be in identical terms to that in Turnbull. Further Turnbull does, I think, make it clear that failure to follow the guidelines, including the warning and the reasons for it, is likely to result in the conviction being quashed. In Oliver Whylie's case, however, failure to give the warning is merely "one of the factors to be taken into consideration in determining the fairness and adequacy of the summing up." There is a difference in emphasis, though the results of both cases are so similar that the Privy Council, by whose decisions we are bound, observed in Dennis Reid v. The Queen (1979) 2 W.L.R. 221; 27 W.I.R. 254; (1979) 2 All.E.R. 904;

> "but in the light of what they had already held and of the guidelines as to the way in which evidence as to identification should be treated as laid down by the English Court of Appeal in R. v. Turnbull (1976) 3 All E.R. 549, which is followed by the courts in Jamaica, the only direction that the Judge could properly have given to the jury was that on the state of the evidence before them the accused was entitled to be acquitted."
>
> (emphasis supplied)

In Turnbull's case the judgment indicated that where the quality of the evidence of identification was poor, the judge should withdraw the case from the jury, unless there was other evidence, aliunde, that supported the identification. (See the passage cited above.) In Oliver Whylie's case there is no such observation, and it may be said that that judgment left the matter open, as one to be

dealt with in the ordinary way. The passage read from Dennis Reid (supra) does indicate, if there was doubt on it before, that where the identification evidence is poor all that a trial judge can properly do is to direct the jury that "on the state of the evidence before them the accused was entitled to be acquitted."

In the result then, the effect of the Privy Council decision in Dennis Reid is to move the law in Jamaica closer to the law as indicated in England, in Turnbull's case. Though it is still necessary to remember that while in England the Court of Appeal may quash a conviction as "unsatisfactory or unsafe" in Jamaica it can only be quashed if "it is unreasonable or cannot be supported having regard to the evidence."

We were also referred to Peter Paul Keane (supra) a case in which the English Court of Appeal reviewed Turnbull's case. The trial below had been conducted without the assistance of the guidelines in Turnbull's case. The trial judge had correctly pointed to the issue of identification as being crucial. He had not however given the warning on identification evidence, nor had he fully discussed the weaknesses in that evidence, and in addition some of his comments were misleading.

Scarman L.J. (as he then was) in that case analysed the effect of Turnbull's case, and said (at page 248):

> "It would be wrong to interpret or apply Turnbull inflexibly. It imposes no rigid pattern, establishes no catechism, which a judge in his summing-up must answer if a verdict of guilty is to stand. But it does formulate a basic principle and sound practice. The principle is the special need for caution when the evidence turns on evidence of visual identification: the practice has to be a careful summing-up, which not only contains a warning but also expose to the jury the weaknesses and dangers of identification evidence both in general and in the circumstances of the particular case." (emphasis supplied).

Keane's case then retains the principle of the need for a warning and the need to expose the jury to the weaknesses and dangers of identification evidence in general as well as in the particular case.

The accumulation of the defects, no warning, failure to discuss all the weaknesses of the identification evidence (there had been no identification parade - identification had been by confrontation only, and the witness had at first identified the accused's twin brother)- together with misleading comments on the evidence induced the court to quash the conviction. One further comment may be added, and that is that subsequent English cases have indicated Turnbull's case as peculiarly apt in what may be called "fleeting glimpse" cases, where the crime or action has been fast. (See for example an article: "Identifying Turnbull" by Edward Grayson, 1977 Criminal Law Review, 510)

In Jamaica Oliver Whylie's case has been carefully followed for at least the last five years, and the earlier passage cited supra from the judgment of Rowe J.A. has become common form. In most appeals the argument has therefore centered upon whether the identification evidence was adequately explored, whether its weaknesses had been adequately brought home, whether the identification parade had been fairly conducted, and whether the identification evidence was adequate. Regretably we have noticed a failure on the part of the police force to make any real effort to gather evidence that will support the identification evidence, and there has been a tendency to relax all such efforts once they had a witness who identifies the suspect: this sadly weakens the strength of the prosecution's case, it puts an undue burden on the eye-witness and more dangerously, where he is the only witness, it may put his life at serious risk.

It seems clear that in most respects, save one, this was a Turnbull type situation: the action involved, running from a nearby house, looking into the crashed car, firing three shots and then running away again, all this could not have taken more than a minute all told. The respect in which it differed was that the witness alleged that she recognized the gun man as a person she

knew before. Even so it is clear that it called for a general direction in terms at least of the Oliver Whylie direction: a warning of the need for caution, and the reason for it -- the possibility of an honest mistake on the part of the witness --, and of course the fact that there was no other evidence that connected this appellant with the particular crime.

In this case there was no such warning by the learned trial judge. In a sense this omission is understandable. The summing up commenced on the afternoon of the second day of the trial a Friday and was completed next Monday: a week-end intervening. On that first afternoon the learned trial judge dealt largely with such questions as the onus and standard of proof, discrepancies and their significance, the matters necessary to establish a charge of murder, and she correctly pointed out that the real issue in the case was one of identification. She said, at page 161:

> "The issue, as I told you, is one of identification and you are going to have to decide from all the circumstances whether the identification satisfies you. As you go through the evidence we will look at various things, like in what sort of light, how long did she have him under observation, things like at what distance did she see him, was her observation impeded in any way, the fact of whether or not she had known the accused before, when did she last see him, how often she saw him, any reason to remember him and how much time elapsed between the last time she saw him and the time she identified him. I will assist you when I have completed the evidence in identifying some of these particular aspects, but I tell it to you now (so) that as I go through the evidence you can look for them yourselves to satisfy yourselves as to the identification....." (emphasis supplied)

The Judge then entered upon a review of the evidence of the eye-witness Campbell as given in chief and under cross-examination. Amongst other matters she dealt with the questions of the length of time that the witness had known the appellant, the circumstances of the identification parade, the appellant's incarceration for part of that period and the effect of that on the credibility of the eye-witness, as to which she said: at page 177;

> "You have seen her, you have heard her. How did she impress you? Did she impress you as a witness of truth? Do you think she is lying? Do you think she is mistaken? Do you think she has made it up? Is there any reason for her to be lying on a man she has known for eight years? All these are matters for you to consider when you come to examine the evidence, and, as I said, you must examine the circumstances very closely and be sure in your minds about it."
> (emphasis supplied)

Shortly after, following on a review of the medical evidence, the adjournment was taken.

On the resumption on Monday, the Judge dealt with the police evidence as to the Identification Parade and the police evidence of what they found at the scene and their enquiries and the arrest. The judge then reviewed the accused's unsworn statement, and the evidence called by the defence: the Superintendant of the St. Catherine District Prison, and the sister of the accused. The learned judge ended her charge by once again contrasting the outlines of the case for the prosecution and defence.

The appellant complains in ground 10 of his Grounds of Appeal:

> "That the learned trial judge failed to give any or adequate directions as to the peculiar problems relating to identification evidence and the dangers inherent in this type of evidence, especially when the Crown's case depended upon the uncorroborated evidence of a single witness."

In fact there was no general warning on the dangers of identification evidence given to the jury as indicated in Oliver Whylie, or in Turnbull. There was however an examination of the circumstances of the identification evidence, some of which took the form of a narration of the evidence and was not related to the overall warning, nor did the judge do what she had promised to do in the first part of the summing up, viz "I will assist you when I have completed the evidence in identifying some of these particular aspects..."

At page 433, Rowe J.A. said in Oliver Whylie:

> "It is of importance that the trial judge should not consider his duty fulfilled, merely by a faithful narration of the evidence on these matters, He should explain to the jury the significance of these matters, enlightening with his wisdom and experience what might otherwise be dark and impenetrable."

He added:

> "In the instant case the learned trial judge did not warn the jury in general terms that there was the danger of a mistake in visual identification, he did not tell the jury of any of the reasons why such danger can arise and most important of all he did not tell the jury how to approach the identification evidence of the witness Rose..... Due to this non direction we do not consider the summing-up to be fair and adequate."

Some of the same things can be said of the summing up here. It did discuss the details of the evidence and for the reasons given earlier we do not think that complaints made on that score can be sustained, but some of the strictures expressed in Oliver Whylie apply here. It may be that the intervention of the week end broke the thread of the Judge's concentration, and that the learned judge so to speak forgot exactly where she had reached, and what remained to be done. Mr. Brooks for the Crown argued that having regard to the way in which the judge had dealt with the details of the evidence the larger duty had been discharged, and that no particular form of warning was required, praying in aid Keane's case (supra). Mr. Brooks argued that the summing up, taken as a whole, had sufficiently alerted the jury to all the relevant considerations involved in this case.

After the most anxious review of the case as a whole, we have come to agree with him.

But we are mindful of the observations of Lord Hailsham in R. v. Lawrence (1991) 2 W.L.R. 524 at page 529, where he remarked:

> "A direction to a jury should be custom built to make the jury understand their task in relation to a particular case."

The factors that have led us to this view of this case are as follows: There is no doubt that the eye-witness knew the appellant

before the incident with which we are concerned, and that she knew him well. This was not a fleeting glimpse or glance at a person previously unknown to the witness, but of a person whom she knew well and whom she had seen in the area of the crime for several days before it actually occurred.

Then there is the way in which the case was fought. It appears to have been fought on the basis that the eye witness was lying. It may be that emboldened by what the defence counsel below considered was cogent evidence showing that the eye witness was saying she had seen the accused at large at a time when he was in fact in prison, the defence put their case too high: The jury clearly rejected the defence, and the unsworn statement by the accused, and clearly accepted the credibility of the eye witness and her familiarity with the appearance of the accused, and that he was one of the men she saw on that fatal morning, gun in hand, running from the abandoned house to the car and running back again from it. Further, the trial judge did in fact, albeit on one occasion, put to the jury the possibility of mistaken identification as mentioned before and appearing at page 177 of the transcript. She put it to the jury thus, speaking about the eye witness:

> "How did she impress you? Did she impress you as a witness of truth? Do you think she is lying? Do you think she is mistaken?..."

Though the jury were being principally addressed on the issue of whether the eye witness was lying, the possibility that she may have been mistaken was put to them, and would inevitably have been a matter that they had to and did consider. If the eye witness appeared to be saying that she had seen the accused in the area at a time when he was supposed to be in prison the possibility of mistake when she asserts she saw him at the scene of the crime must obviously arise, whether the mistake be honest or otherwise. The jury however rejected it. Finally, this Court, under the terms of the Judicature (Appellate Jurisdiction) Act is still in the position of the English Court of Appeal under the 1907 Act.

We are to allow the appeal if we 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 on any ground there was a miscarriage of justice."

We find ourselves unable to say that this case, despite the shortcoming in the summing up, falls under any of those heads. In the result, the appeal will stand dismissed, and the conviction and sentence will be affirmed.