# David (Frank) v The State

COURT OF APPEAL OF GUYANA
MASSIAH C, FUNG-A-FATT AND BISHOP JJA
6, 18 MAY 1987

*Criminal evidence –Identification –Direction by judge –Failure to criticise 'one-man identification parade' or to draw attention to other weaknesses in evidence –Importance of holding identification parade*

*Criminal evidence – Prosecution evidence – Disclosure to trial judge – Statement by crucial witness not disclosed –Significant discrepancies between evidence in court and statement – Duty of prosecutor*

Following an incident on 3 June 1984, the appellant was charged with burglary, robbery and rape. The prosecution case depended entirely on the evidence of identification by the complainant. The complainant had reported the matter promptly to the police on 3 June, but did not make a statement until 6 June, some hours after she had identified the appellant who had been sitting in an office at the police station. She then for the first time stated that she recognised her assailant as someone called 'Frankie'. At his trial the appellant was not represented and, although he challenged the complainant's evidence that she recognised him, the allegation of recognition was virtually unexplored. In his summing-up the trial judge did not criticise the identification at the police station, nor did he deal with weaknesses of the identification in the complainant's bedroom. The appellant appealed to the Court of Appeal.

**Held,** allowing the appeal and quashing his conviction, that the identification at the police station ought to have been strongly criticised by the trial judge and stigmatised as worthless; the jury should have been told that the failure to hold an identification parade tended to lessen the force of the prosecution case; further, the trial judge's failure to deal with the weaknesses of the evidence of identification in the bedroom was a serious non-direction.

*R v Smith and Evans* (1908) 1 Cr App Rep 203, *R v Williams* (1912) 8 Cr App Rep 84, *The State v Mohamed Khalil* (1975) 23 WIR 50, *The State v Barrow* (1976) 22 WIR 267, *The State v Adams and Poole* (1976) 23 WIR 252, *R v Keane* (1977) 65 Cr App Rep 247, and *The State v Greene and Alleyne* (1979) 26 WIR 395 applied.

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*Per curiam.* An identification parade provides an excellent opportunity for riveting observation and provides (or otherwise) some proof of the guilt of an accused. It is a safeguard valued and relied on by the courts in cases based wholly on visual identification of strangers.

*Per Bishop JA.* The State prosecutor would have known that the witness, in testifying, had varied fundamentally from her statement to the police on a point that was directly related to her claim to have recognised her assailant, in a case where visual identification was the crucial issue, and she the only witness. In the circumstances, it was the duty of the prosecutor, as a minister of justice, to submit the relevant part of the statement to the trial judge for his consideration and action, on behalf of the unrepresented appellant.

**Cases referred to in the judgments**
*Davies v R* (1937) 57 CLR 170, Australia High Court.
*Dockery and Brown v R* (1963) 5 WIR 369, Jamaica CA.
*Lejzor Teper v R*; see *Teper v R*, infra.
*Mohamed v Gowkarran Dabichan* (1976) unreported (appeal 184 of 1976), 29 October, Guyana Full Court.
*Narine Ramroop v R* (1960) 2 WIR 259, Federal Supreme Court.
*R v Barker* (1927) 20 Cr App Rep 70, England CCA.
*R v Cartwright* (1914) 10 Cr App Rep 219, England CCA.
*R v Chapman* (1911) 7 Cr App Rep 53, England CCA.
*R v Clynes* (1960) 44 Cr App Rep 158, England CCA.
*R v Dickman* (1910) 5 Cr App Rep 135, England CCA.
*R v Doubleday* (1917) 12 Cr App Rep 24, England CCA.
*R v Hamilton* (1961) 3 WIR 530, Federal Supreme Court.
*R v Keane* (1977) 65 Cr App Rep 247, England CA.
*R v Midwinter* (1971) 55 Cr App Rep 523, England CA.
*R v Sawyer* (1959) 43 Cr App Rep 187, England CA.
*R v Smith and Evans* (1908) 1 Cr App Rep 203, England CCA.
*R v Trigg* [1963] 1 All ER 490, [1963] 1 WLR 305, 47 Cr App Rep 94, England CCA.
*R v Walker* (1969) 15 WIR 355, Jamaica CA.
*R v Williams* (1912) 8 Cr App Rep 84, England CCA.
*State (The) v Adams and Poole* (1976) 23 WIR 252, Guyana CA
*State (The) v Barrow* (1976) 22 WIR 267, Guyana CA.
*State (The) v Greene and Alleyne* (1979) 26 WIR 395, Guyana CA.
*State (The) v Harris* (1974) 22 WIR 41, Guyana CA.

*State (The) v Mohamed Khalil* (1975) 23 WIR 50, Guyana CA.
*Teper v R* [1952] AC 480, [1952] 2 All ER 447, PC.

**Appeal**

Frank David appealed to the Court of Appeal of Guyana (criminal appeal 17 of 1986) against convictions on charges of burglary, robbery and rape in ⇘155⇙ June 1986. The facts are set out in the judgment of Massiah C.

*Stanley Moore* for the appellant.
*W Henry, senior SC*, for the State.

18 May 1987. The following judgments were delivered.

**Massiah C.** In recent years there has been built up both locally and abroad such a massive body of legal literature on the question of visual identification that I had come to believe that the problems relating to that question had been securely interred and could therefore no longer beget any serious judicial difficulties. The present case illustrates that I was guilty of wishful thinking, for a measured non-conformity to the principles embodied in the literature has caused the problems to arise from their grave like resurrected fiends complete with cerement, ready to haunt us all over again.

When a young woman retired to bed on 2 June 1985, at her home in Thomas Street, in suburban Kitty, little did she imagine that in the early hours of the next day she would be visited by an unwelcome intruder whose immanity permitted him not only to burglarise her home and rob her at knife point of her jewels and other possessions, but to rape her as well. That unfortunate woman related her harrowing experience to a judge and jury when the appellant, Frank David, was arraigned at the criminal assizes in Georgetown, Demerara, in June 1986 to answer charges of burglary, robbery and rape. He was found guilty on all three counts and in the result was sentenced to a term of imprisonment of ten years for each of the offences of burglary and robbery, and to a term of fifteen years for rape, the sentences to run concurrently. The appellant has appealed against his convictions and sentences. The crucial point at issue is whether or not his trial was fair.

The story told by the virtual complainant was that while she was in bed on the morning in question she saw 'the outlines of a man' over her. Her narration follows:

> 'When I turned around and saw the man I saw his face. The building was well lit. I had a screw bulb burning. It was a 60-watt bulb. I recognised the man to be the [appellant]. Before this incident I knew the [appellant] about one and a half years.'

She then explained that the appellant raped her, took off her earrings and other rings, picked up two tape recorders and forced her to give him $200 from a wardrobe. She said:

> 'He took me to the wardrobe and told me to open it. Before I opened it I glanced into the mirror of the said wardrobe and I saw the left side of his face and his right shoulder ... During the eighteen months that I knew the [appellant] I have heard his voice. I looked at the [appellant] for about one second in the wardrobe mirror. All this time the light was still on in the bedroom and bright.'

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According to the victim the appellant then pushed her back on the bed and told her to lie down. He then left the house. Her husband arrived home almost immediately afterwards, and sometime about 6.30 am that day, 3 June 1984, they reported the matter to Police Cons 8627 Carlton Sutton at Kitty police station.

It does not appear from the evidence of the virtual complainant or of Police Cons Sutton that the virtual complainant told the police when reporting the matter on 3 June 1984 that she knew who her assailant was, or that she gave them his name, although she said in evidence that she knew him by the name 'Frankie' before the day in question, and used to see him near the Hollywood cinema almost every day. It is instructive and significant that Police Cons Sutton said in evidence that he recalled –

> 'the virtual complainant and her husband coming to the station. They reported that thief broke into the house and stole a quantity of articles valued at about $8,000.'

There is no mention in that report of 'Frankie' who loiters by the Hollywood cinema (which would have been useful information for the police), but merely an indeterminate reference to the 'thief'.

Nevertheless, it must be remembered that the virtual complainant claimed that she mentioned the name 'Frankie' to the police, but she did not say when she did so. If she knew her assailant's name it would be expected that she would have given it to the police when making her report, not at some later time, because she would have been understandably anxious to give the police as much assistance as she could. If the name was not given at the earliest opportunity, the question arises: 'Why was it not done?' And it is not unreasonable to answer: 'Perhaps because it was not then known'. If it was not known, the value of the virtual complainant's evidence

would be considerably diminished.

I called for and perused the statement which the virtual complainant made to the police. Significantly, that statement was made, not on 3 June 1984 (when the virtual complainant reported the matter to the police), but on 6 June 1984 and, surprisingly, some hours after she had identified the appellant at the police station. Nevertheless, in that statement she said that her assailant was someone she knew as 'Frankie'. She knew him, she said, 'by seeing him passing through the street' and 'walking around the area'. The appellant was unrepresented and lacked the skill to probe those matters and bring them to the jury's attention. He made a short unsworn statement protesting his innocence when called upon to lead his defence. He did not address the jury.

On 5 June 1984, two days after the offence was said to have been committed, Police Cons Sutton 'received further information'. No-one knows what that information was, but as a result of it Police Cons Sutton went to 47 Delph Street, Campbellville, where he saw the appellant and told him that it was alleged that he had broken and entered a certain house, raped ⇳ 157⇲ a woman there and stolen a quantity of articles from her. The appellant denied the allegation by telling the policeman that he could search his home. This was done but nothing was found.

It seems to me that those circumstances made it obvious that it was both prudent and fair to hold an identification parade. It is all well and good to assert that you have known a person for some considerable time, that you knew his name and whereabouts, and that the opportunity and circumstances for proper observation were good (assertions that are easy to state), but an identification parade, fairly conducted, providing as it does an excellent opportunity for riveting observation, is the exercise that puts all those assertions to the test and provides (or does not provide) some proof of the guilt of the accused. 'The identification parade is a safeguard valued and relied on by the courts in cases based wholly on visual identification of strangers to the witnesses, to reduce the likelihood of misidentification', *per* Haynes C in *The State v Barrow* (1976) 22 WIR 267 at page 271.

In my opinion, the trial judge, in his summation, ought to have dealt with the failure of the police to hold an identification parade, and should have directed the jury that it tended to lessen the force of the prosecution's case. The naked assertion that he had been known to the virtual complainant was vague, but it was left virtually unexplored in cross-examination. Previous knowledge of your assailant is useful evidence; but if it is to carry much weight it must be based on something more substantial than seeing the person on the street, or loitering by a cinema, especially where the charges are as grave as burglary, robbery and rape. Admissibility of evidence is one thing, its cogency is another. It is clear, however, from the appellant's five lines of cross-examination of the victim that he was challenging her evidence that she had known him before the day of the alleged incident.

After Police Cons Sutton saw the appellant at his home on 5 June 1984, he took him to the Kitty police station and 'placed [him] in custody'. Instead of holding an identification parade, Police Cons Sutton arranged what is now called 'a confrontation', a method of 'identification' that appears to be growing in popularity and one that must be strongly deprecated. The situation should be explained in Police Cons Sutton's own words:

> 'On Wednesday 6th June 1984, at about 07.00 hours, I was on duty at the said police station [Kitty] at the Criminal Investigation Department Office when [the victim] came in to me and said something to me. As a result I went into the inquiries office with [her] where she pointed to the [appellant] and said "This is the man". I took the [appellant] into the Criminal Investigation Department Office where [she] repeated the allegation in his presence ... When she repeated the allegation the [appellant] said that [she] is telling lies on him.'

It is also interesting to refer to the virtual complainant's evidence on this aspect of the matter. She said:

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> 'On the morning of 6th June 1984, my husband spoke to me. As a result we went to Kitty police station. There I saw the [appellant] at the station. In the presence and hearing of the [appellant] I told Police Cons Sutton that the [appellant] was the person who stole my two rings, two tapes, currency $200 and sexually assaulted me. The [appellant] replied and said "Lady, me been in your house and rob you?"'

The virtual complainant's reply to the appellant's question is very significant. She said: 'I said in answer: "Yes, I saw your face in the mirror".'

That assertion appears to me to suggest that it was upon the reflection in the mirror that the virtual complainant was mainly relying for her identification of the appellant, but it must be borne in mind that in the mirror she saw the reflection of 'the left side of his face and his right shoulder.' Apparently she did not see, in the mirror, the whole of his face, but just a profile.

Instead of condemning the circumstances of the identification of the appellant at the police station, the trial judge appears to have treated that identification as a compelling factor in the proof of guilt, reminding the jury that only three days had elapsed between what he called 'the original identification' and the subsequent identification at the police station. In my opinion, the trial judge was there directing the jury to consider whether the identification at the police station, since it followed so closely after the substantive incident ought not to be regarded as reliable. The trial judge said:

> 'When she went to the station, she saw him there seated and pointed him out to the police. The incident is alleged to have taken place on the morning of 3rd June 1984. It was then that [the virtual complainant] said she saw the [appellant] and recognised him to be the person who robbed and assaulted her, and the next time she saw him was at the station on 6th June 1984. So that three days had elapsed between the original identification and the subsequent identification of the [appellant].'

This was said almost at the end of the summation, but that was mere repetition, for the trial judge had earlier told the jury:

> 'You will have to consider how long elapsed between the original identification on 3rd June 1984 and the subsequent identification, that is when next she saw him on 6th June 1984.'

This matter seems to have been firmly fixed on the trial judge's mind and the jury could not have failed to notice it. He had referred to the identification at the police station and at other places in his summation, and had done so as if that evidence were beyond reproach, and as if it deserved the jury's proper consideration as a factor in the proof of guilt.

This entire approach was wholly and catastrophically wrong. In the course that he took the trial judge acted beyond the limits of legal principle. The identification at the police station ought to have been strongly criticised ⇘ 159 ⇙ and stigmatised as worthless. The jury ought to have been told in plain terms to disregard it. The reason for this is obvious. The appellant was identified at 'a one-man identification parade' while sitting by himself in the inquiries office. It does not take much imagination to realise that the virtual complainant must have been invited to the police station on 6 June 1984 for the sole purpose of seeing whether she could have identified the appellant. There is no evidence that she went there for any other purpose. Her evidence was: 'On the morning of 6th June 1984, my husband spoke to me. As a result we went to Kitty police station'. The identification, so-called, followed. Its result was predictable. It is not surprising that the virtual complainant immediately declared that the appellant was her assailant when they came face to face in the inquiries office. It would have been strange if she did not say so. The appellant's mere presence in the police station in obvious custody was sufficiently compulsive by itself to suggest to her mind when Police Cons Sutton led her to him that the police had arrested the right person. And when there is the added circumstance that there was no-one else with him to cause the identification process to be a worthy exercise, the farcical *denouement* was a foregone conclusion. The whole exercise was so unfair that it is surprising that its potential danger escaped judicial perception and was preferred instead by the trial judge as an auxiliary element of logically probative significance in relation to the appellant's guilt.

Let us see what the cases say about all of this. I turn first to Guyana and to *The State v Mohamed Khalil* (1975) 23 WIR 50, heard by Luckhoo C, Persaud and Crane JJA. In that case the appellant and another man were alleged to have robbed one Badrie of his money. The appellant was said to have been seen running away from the scene by one Mungia, who claimed that she had known him before, but not his name, and she described him to the police. Four days later the appellant was arrested, but no identification parade was held. Instead, he was shown to the woman Mungia who identified him at the Providence police station as 'the boy I saw running out of Badrie's yard'. The policeman to whom she spoke explained that he did not think it wise to hold an identification parade because Mungia had mentioned the robber's name to him. Of these matters, Luckhoo C, who delivered the court's opinion, observed (at page 51):

> 'In these circumstances, there was every reason why an identification parade should have been held. By the very token that Mungia was taken to the station to see whether the person at the station was the one she had seen running away, the desirability and, indeed, necessity of having a parade should commended itself to the police. The attempt at an excuse hazarded by Cpl Howard – that he did not think it was "wise" to do so because the "name" was given to him – should have been rejected out of hand. How could it be "wise" to have a "one-man parade" and not a "proper" parade to test the witness in a fair way? If a potential witness is shown the person to be identified singly in circumstances to indicate, as in this case, that the police suspected that person, the witness would be ⇘ 160 ⇙ much more likely, however fair and careful he might be, to assent to the view that the man he was shown corresponded to his recollection, and when this happens courts will, in the absence of other evidence, be inclined to set aside a conviction as being unjust and unsafe. It is essential that a witness's recollection of the physical appearance of the person previously observed under incriminating circumstances should, as far as possible, be unaided. The very object of a parade is to make sure that the ability of the witness to recognise the suspect has been fairly and adequately tested, and every precaution should be taken to exclude any suspicion of unfairness or risk of erroneous identification through the witness's attention being directed specifically to one "suspected person" instead of equally to all persons on parade. It is quite wrong to suggest to the witness that the prisoner was believed by the authorities to be the offender. Nothing should be done to influence or affect the recollection of the witness and thus destroy the value of his or her evidence of identity.
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> 'In the circumstances of this case, the only satisfactory method of identification would have been to place the appellant among a sufficiently large number of persons of similar age and build and condition of life. As it was not unfashionable for long hair to be worn in those days, as the appellant was wearing his hair, it could hardly have posed a problem to secure such like persons.'

Later, on the same page, it was said that the trial judge ought to have condemned the method of identification instead of glossing over the omissions of the police.

I would refer also to *R v Williams* (1912) 8 Cr App Rep 84 where a conviction for house-breaking was quashed in view of fresh evidence and of proof that the identification of the appellant was not satisfactory. In relation to the latter point, that very experienced and distinguished judge, Lord Alverstone CJ speaking for the Court of Criminal Appeal, observed (at page 88):

> 'There are several points to be noticed. The case for the prosecution at the trial evidently rested on the identification by Fulcher; this identification was not properly carried out; Fulcher saw the appellant alone in the police station, and did not pick him out from

among other men. In the opinion of the court, the mode adopted was not a proper one, and therefore the identification cannot be said to have been satisfactory.'

Next I go further back to *R v Smith and Evans* (1908) 1 Cr App Rep 203. The appellants were convicted at quarter sessions of breaking and entering a shop with intent to steal, and sentenced to three years' penal servitude. At the trial a number of witnesses were called to prove that they saw both appellants on the premises in question at one time or another. In the Court of Criminal Appeal counsel for the appellants called in question the method by which they were identified. He contended that it was unsatisfactory, ☜ 161☟ inasmuch as the appellants were kept at the police station and were there identified by certain witnesses whom the police called in for that purpose. Further, no other men were put with the appellants at the time of the identification. Leave to appeal was refused because there was, apart from the impugned evidence, ample evidence of identification. I have referred to this case principally because of what was said by Phillimore J when delivering the judgment of the court. He declared (at page 204):

'Without doubt there was a good deal that was unsatisfactory about the identification at the police station, and the chairman was right in saying that the wrong procedure with regard to this had been adopted. Such methods as were resorted to in this case make this particular identification nearly valueless, and police authorities ought to know that this is not the right way to identify.'

See also *The State v Adams and Poole* (1976) 23 WIR 252 (Haynes C, Crane and R H Luckhoo JJA; a court that may properly be described as 'mature and strong').

In *R v Keane* (1977) 65 Cr App Rep 247 it was said (at page 249) that two serious weaknesses of the identification were that no identification parade was held and that the identification was achieved at a confrontation organised by the police at the police station. Scarman LJ, who read the court's opinion, expressed the view that these matters ought to have been dealt with by the trial judge in his summation.

I see no reason to attempt to repudiate the view of the law authoritatively explained and accepted in that continuous and consistent series of cases of long standing stretching back to the beginning of this century. I think that I have said enough to show that I respectfully agree with the basic common law principles there expounded. Ultimately the view may be compendiously stated as an appreciation of the fundamental virtues of fair play, justice and logic.

When the entire case is properly analysed and divided into its component parts, and the evidence of the identification at the police station is accordingly extirpated, there remains, strictly speaking, little more than a 'dock identification' to sustain the prosecution's case. This is the dissective approach that the trial judge should have pursued in his summation, and the jury ought therefore to have been directed on the question of a 'dock identification' based on the principles stated in the *Barrow* case at pages 275, 276, where the cases have been carefully reviewed. I am of the respectful opinion that the exposition on that point in *Barrow* is correct in principle.

All of this was unfortunately overlooked by the trial judge. His omissions were the more egregious because the prosecution's case depended entirely on the evidence of identification given by the virtual complainant, so that the appellant's guilt could not have been proved *aliunde*. The situation therefore demanded scrupulous care and attention.

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The matters to which I have referred are sufficient ground by themselves to cause the convictions to be quashed; but I must call attention to the failure of the trial judge to deal with the weaknesses of the identification said to have been made in the victim's boudoir. I do not propose to refer to those many weaknesses: I would content myself with saying that they deserved to have been brought to the attention of the jury clearly and simply and their importance emphasised, to enable the jury to appreciate fully every aspect of the question of identification dictated by the circumstances of the case. It was only by that approach that the methodology prescribed and principles formulated in *The State v Greene and Alleyne* (1979) 26 WIR 395 could have been fulfilled. This was the essence of Mr Moore's contention and I agree with it.

An abstract disquisition emphasising the employment of caution and the possibility of error in visual identification even of those well known to the witness is worthy of approbation, but it becomes impoverished if it stands alone, without the added judicial analysis of the material evidence to which the formal, abstract, jurisprudential thesis ought to be connected.

The failure of the trial judge to treat with those matters was a serious non-direction. The view of Sir James Fitz-James Stephen in his *History of the Criminal Law of England* (1883), Vol 1, page 455, that ' ... a judge who merely states to the jury certain propositions of law and then reads over his notes does not discharge his duty' is an axiom that judges would do well to remember at all times. The function of the trial judge is not to exacerbate the normal spinosity of the lay jury's task but to assist in its performance. There has been a grave miscarriage of justice in this case and the convictions cannot stand.

Counsel for the State conceded that the case was not a fit one for the application of the proviso to section 13(1) of the Court of Appeal Act nor was it (he said) the kind of case in which he could argue for a new trial. I agree with those views. I cannot say with any conviction that even if there were an unblemished summation the jury would still have found the appellant guilty, and the facts of the case do not compel the view that a new trial should be ordered. For the reasons that I have attempted to express I would propose that the appeal be allowed, the convictions quashed and the sentences set aside.

**Fung-a-Fatt JA.** I have had the advantage of reading in draft the opinion of Massiah C. I agree with it and have nothing further to add.

**Bishop JA.** I have had the opportunity of reading the judgment of Massiah C and I agree with both his reasoning, and his conclusions.

He has treated the main areas governing this appeal; and, if the didactic element is prominent in his presentation, it should be appreciated, in the light of the recurring problems which seem to characterise summings-up to juries, on the question of visual identification, and of the popular but wrong practice of the police in arranging 'one-man identification parades' at police ¶ 163 stations. My effort will be devoted to matters of less importance, in this appeal, but nonetheless relevant to the fairness or otherwise of the appellant's trial, in the High Court.

It has already been shown that the manner in which the appellant was identified, at the police station, was highly unsatisfactory, and is discountenanced by settled law: *R v Smith and Evans* (1908) 1 Cr App Rep 208, *R v Dickman* (1910) 5 Cr App Rep 135, *R v Chapman* (1911) 7 Cr App Rep 53, *R v Cartwright* (1914) 10 Cr App Rep 219, *Davies v R* (1937) 57 CLR 170, *Narine Ramroop v R* (1960) 2 WIR 259, *The State v Mohamed Khalil* (1975) 23 WIR 50 and *The State v Adams and Poole* (1976) 23 WIR 252 are among the many decisions on the point.

The 'one-man identification parade' at the police station was useless, and so were other aspects of the claim concerning identification. To commence with the virtual complainant was unable to give the name of her assailant when she made her report to the police on 3 June 1984; nor did she assert that she knew him. However, three days later, after she had spoken with the police, and had been made to confront the appellant, at the police station, she seemed able to say that his first name was 'Frankie'. It meant that the process by which she acquired her information about the appellant vitiated her claim that she had known him prior to the incident.

In her statement to the police, dated 6 June 1984, and made after the confrontation, the virtual complainant attempted to give particulars, aimed at establishing her familiarity with the physical features of her assailant before the commission of the offences. She failed dismally. In one passage she described him as 'the boy named "Frankie" walking around the area'; and, in another, as 'Frankie who lives *somewhere* on the line'. Those descriptions were hollow and were inconsistent with her evidence at the trial. There, she gave details that were not contained in her statement at all: that she had known the appellant for one and a half years preceding the incident; that she had described the man as being tall and thin; that he was regularly in the vicinity of the Hollywood cinemas, at Thomas and Alexander Streets, Kitty, near her residence; that she had seen him there 'actually every day'. Except for the last assertion, the other answers were given in her evidence-in-chief.

When, therefore, the virtual complainant's claims, in her statement, are compared with those given in her evidence, it is to be noted that she gave 'Frankie' a non-descript address in Kitty, as well as one *somewhere* along the line, presumably the old train line. Above all, it is remarkable that she did not tell the police, she professed two years later at the trial, that one of the appellant's addresses or haunts, known to her, was the Hollywood cinema area or its environs at Thomas and Alexander Streets, Kitty.

The trial judge had no knowledge of the contents of the virtual complainant's statement to the police, nor did the appellant, who was unrepresented. But the State prosecutor would have known that the witness, in testifying, had varied fundamentally from her statement. It was on a point that was directly related to her claim of recognition of her ¶ 164 assailant, in a case where visual identification was the crucial issue, and she the only witness.

It was therefore the duty of the prosecutor, as a minister of justice, to submit the relevant part of the statement to the trial judge for his consideration and action, on behalf of the unrepresented appellant. I would have expected the trial judge to intervene, at some convenient juncture to elicit answers from the witness, with respect to her variations. But first and foremost the prosecutor was obliged to discharge his office with a keen sense of fairness and fair play. Concealment or suppression of facts or material that may be beneficially exploited by the defence, or, on behalf of an unrepresented prisoner, is not a commendable function of a prosecutor: *The State v Harris* (1974) 22 WIR 41 and *Mohamed v Gowkarran Dabichan* (1976) unreported (Bollers CJ and Bishop J).

In *The State v Greene and Alleyne* (1979) 26 WIR 395, Haynes C dealing with the prosecutor's duty, in a situation somewhat similar to the one now under discussion, commented (at page 405):

> 'At the trial, this statement was not made available to the defence at all. It should have been. If it did not impliedly assert that the man she later identified as this appellant (Alleyne) was unknown to her then, it, at least, tended strongly to suggest so. And the jury should have known about this.'

In short, the jury here was denied the opportunity of learning of a fact that was salient to the issue of identification and the witness's credit-worthiness. As said in *McCormick on Evidence* (2 Edn) (1972) page 66, regarding the five main lines of attack upon the credibility of a witness:

> 'The *first* and probably the most effective and most frequently employed is an attack by proof that the witness on a previous occasion had made statements inconsistent with his present testimony. The *second* is an attack by a showing that the witness is biased on account of emotional influences such as kinship for one party or hostility to another, or motives of pecuniary interest whether legitimate or corrupt. The *third* is an attack upon the character of the witness. The *fourth* is an attack by showing a defect of capacity in the witness to observe, remember or recount the matters testified about. The *fifth* is proof by other witnesses that material facts are otherwise than is testified to by the witness under attack.'

Here, the first line of attack, as listed by *McCormick*, was applicable, and (to a lesser extent) the fifth, had the virtual complainant denied authorship of the descriptions, appearing in her statement. Her denial would have necessitated the calling of the policeman who took her statement, to verify that it was her dictation which he took, and that it was she who affixed her signature to the text. And so, the State prosecutor having failed to subscribe to the high ethical standard required of him, I hold that the appellant did not have the benefit of

a fair trial.

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It follows that the prosecutrix's claim that she knew 'Frankie', before the occurrence, was therefore pregnant with profound difficulties, which could have made a substantial difference in the evaluation of her evidence and the outcome of the case, had the State prosecutor acted with professional propriety.

Yet there is more. This time it is a passage which the trial judge, perhaps already under the disadvantage of not having a legally-represented prisoner before him, coupled with the tension of a serious criminal trial, allowed in evidence. It was eminently hearsay and not within the exceptions which permitted its reception. The mischief was that she had 'heard people calling' the appellant 'Frankie'. It is true that the answer was in response to a question from the untutored appellant, but that was not a sufficient basis for admitting the response. Simply put, the virtual complainant had not disclosed circumstances of *long association or familiarity* with the street-corner group or with the man, called 'Frankie', thereby showing that the name had been tested and verified by the very man's responses and no-one else's. Evidence of such particulars, as would have enabled the trial judge to rule that there was a legal basis for admission of the answer, had not been laid. I believe that the rule rests on foundations of knowledge, proved at the trial, by the identifying witness, as respects the prisoner, and so permits the testimony of relatives, friends, colleagues and co-workers to be received, on the subject of the prisoner's name.

What would have been an adequate period for the testing and verification, to which I have alluded, would vary with the particular context under examination. As was said by Lord Normand in *Teper v R* [1952] 2 All ER 447 at page 449:

> '*The rule against the admission of hearsay evidence is fundamental. It is not the best evidence and it is not delivered on oath. The truthfulness and accuracy of the person whose words are spoken to by another witness cannot be tested by cross-examination, and the light which demeanour would throw on his testimony is lost.* Nevertheless, the rule admits of certain carefully safeguarded and limited exceptions, one of which is that words may be proved when they form part of the *res gestae*.' [*emphasis supplied*]

In my opinion the damning piece of evidence must have proved prejudicial to the appellant, in view of the fact that his first name, as given, in the indictment, is 'Frank'. An interesting case is *R v Hamilton* (1961) 3 WIR 530, where the appellant, having committed an act of larceny from the person, ran through a schoolyard amidst shouts from some school children: 'Is Niter! Is Niter!' Before the Federal Supreme Court (Gomes CJ, Wylie and Sewis JJ), counsel for the Crown was forthright in conceding that the evidence was inadmissible on the ground that it was hearsay. In his summation, the trial judge had described the chorus of the school children as 'words of wisdom', but the Federal Supreme Court held that the words were 'not proximate enough to the act to make it part of the *res gestae*'. 166 That that was so cannot be disputed; but another dimension of the chorus remained, albeit it was not material to the conclusion of the court. It was that the evidence must have been led for the reason of establishing that the school children knew the appellant's nickname; that they were therefore asserting that they *saw* the act and *knew* the name of its perpetrator.

The report suggests that none of the school children gave evidence and, in my view, there could have been no proper basis for receiving the words of the chorus from a third person. It was for the school children (as many as the prosecutor was able to present) to have given evidence on what they claimed they saw, thus permitting the cogency of their evidence to be ascertained. They would have been tested, *inter alia*, on the accuracy of their identification *and* their source of information that the appellant's name was 'Niter'. Therefore I think that it may reasonably be said that the evidence of the school children could have been held as improperly admitted for two reasons under the hearsay rule: *first*, that it was not part of the *res gestae; secondly*, that the foundation for their knowing the name, 'Niter' which could only have been supplied by the children themselves, had not been constructed. Of course, if they had been true eye-witnesses, they should have been able to give the appropriate evidence of seeing the prisoner take the money, whereupon they pursued him into the hands of his captor, or later identified him at a properly drawn-up identification parade.

There is still more. The virtual complainant also varied from her statement to the police, when she testified: 'I told the police that the man is tall and thin. I do not recall if I told the police his complexion'. The result was, for the reasons I have given, that the virtual complainant's claim of identity was unreliable, and a conviction on that evidence rendered unsafe and unsatisfactory. Indeed, had the prosecutor done his part, and the trial judge had ruled the evidence of the name 'Frankie' inadmissible, acceptance of a submission of 'no case to answer', on the ground that the proffered identification had hopelessly failed, could not have been justifiedly criticised.

If such a submission had not been accepted, it would have been reasonable to rule that the evidence of the virtual complainant was really premised on description only. That would have introduced the need for the trial judge to have directed the jury that in any sexual offence, even where the commission of the act is not disputed, and the only issue is one of identity, corroboration should be looked for: *R v Clynes* (1960) 44 Cr App Rep 158 and *R v Sawyer* (1959) 43 Cr App Rep 187. In *R v Midwinter* (1971) 55 Cr App Rep 523, there had been no visual identification by the prosecutrix of her assailant, but only a description of him: eighteen or nineteen years of age, 5 feet 7 inches in height, slim and with greasy hair that fell across his eyes. About that Cairns LJ said (at page 528):

> 'The position, therefore, was that the girl had given a description of her assailant and no doubt one question to which the jury would direct their minds was: Does the accused man fit that description? It is only on that point that it seems to this court that it is vital that there should have been 167 added the warning that *corroboration of the girl's evidence of the description that she had given was required*. If indeed it were the fact that nothing that the girl had said could be regarded as evidence of identification, then no doubt the warning would have to be in a different form and the word "corroboration" would not be appropriate ... Whether that actual word was used or not, it was essential that the jury should be directed that the girl's evidence must be *supported* or

*confirmed,* whatever word one likes to choose, by evidence which the jury accepted.' [*emphasis supplied]*

Here, the jury did not have the benefit of a warning along the lines, suggested in the *Midwinter* case, no doubt because the trial judge had not seen the virtual complainant's statement. Nonetheless, it was the appellant who must have suffered, as a result of that omission. The rule remains: that corroboration of the evidence of the complainant is looked for in sexual cases, and the jury should be warned of the danger of acting without it. That is the position, irrespective of the age or sex of the complainant or other party involved, and even if the only issue is that of the *identity* of the person alleged to have committed it: *R v Trigg* (1963) 47 Cr App Rep 94, *Heydon on Evidence* (1975) pages 67 to 70 and *Archbold, Criminal Pleading, Evidence and Practice* (41 Edn) page 1575.

The position is that, for reasons additional to those adduced by Massiah C, I would allow the appeal, and set aside the conviction and sentence. I should also say that this was a fit case in which an unrepresented prisoner needed the assistance of the trial judge. There were several questions, pertinent to the issue of identification, which the trial judge could have asked the virtual complainant, without his running the risk of descending into the arena of the adversary system, but *solely* with a view to serving the ends of justice. In *appropriate* cases, the omission of the trial judge to help the prisoner formulate questions, or to elicit certain answers from witnesses, *might* cause, or contribute to, a miscarriage of justice. Lewis JA was right when he declared in *Dockery and Brown v R* (1963) 5 WIR 369 at page 375:

> 'It is the *duty* of a trial judge to protect the interest of an undefended prisoner and to give such assistance as is necessary for the proper conduct of his defence . . .' [emphasis supplied]

See also *R v Doubleday* (1917) 12 Cr App Rep 24, *R v Barker* (1927) 20 Cr App Rep 70 and *R v Walker* (1969) 15 WIR 355.

*Appeal allowed: conviction quashed.*