IN THE COURT OF APPEAL OF THE SUPREME COURT OF JUDICATURE

CRIMINAL APPEAL NO. 6 OF 1979.

THE STATE

against

KEITH MAYERS

BEFORE:

The Hon. Mr R. H. Luckhoo - Justice of Appeal.

The Hon. Mr C. J. E. Fung-a-Fatt - Justice of Appeal.

The Hon. Mr K. S. Massiah - Justice of Appeal.

1981: October 13, 14.
November 13.

B. De Santos for the appellant.

I. Chang, Senior State Counsel (ag), for the State.

JUDGMENT

MASSIAH, J.A.:

The facts which lie behind the issues in this case may be compendiously stated. On Holy Thursday, 23rd March, 1978, an eleven-year-old school girl, to whom I shall refer merely as 'Rhonda', underwent an unfortunate and distressing experience, her own personal Gethsemane. She had just finished shopping for the Easter holidays and was on her way to meet her mother at a rendezvous in Regent Street. She had with her a pair of pants that she had just purchased and in a small red purse the sum of $10.05.

A young man approached her in Robb Street and told her that a cousin of hers named Carol wished to see her, but as he spoke he held her hand and placed a knife to her side. When Rhonda asked the man where her cousin was, he told her that she

was ...

was in a house near St George's Cathedral, and that she should follow him there, but that she should not scream. She was understandably afraid and followed him to a yard in North Road. There he left her outside, entered the yard alone and pretended to be calling Carol. He then returned to Rhonda and told her that Carol was calling her. He and Rhonda then entered the yard together. Soon the man lifted Rhonda's jersey professedly searching for what he called "a baptism mark" (whatever that is) and in doing so touched her breast. She remonstrated with him, but her remonstrance did nothing to put him off, for he proceeded to pull down the zip-fastener attached to her pants.

Claude Ivan Low who lives in a yard next to the one where the incident occurred, raised an alarm, whereupon the man snatched Rhonda's purse and ran out of the yard. Soon after Rhonda complained to her mother, and together they went to Brickdam Police Station and reported the incident.

At an identification parade held on 29th March, 1978, Rhonda designated the appellant as the person who assaulted her and stole her purse and money. He was subsequently arrested and charged. At a trial in the High Court where he protested his innocence, he was convicted of robbery under arms and of indecent assault and sentenced to terms of imprisonment of ten years and two years, respectively. He was also ordered to receive a flogging of twelve strokes in respect of the offence of robbery under arms. He appealed to this Court against his convictions.

Several grounds of appeal were argued but I shall deal fully with three of them only, not because the others are of no moment, but because the former contain matters of the gravest importance to this case and bear directly on the whole question of the fairness of a criminal trial.

It was contended for the appellant that the trial judge

misdirected ...

misdirected the jury on the issue of corroboration which directly arose because the virtual complainant was a girl aged eleven years (twelve years at the time of the trial) who gave evidence under oath. In such a situation corroboration is not required as a matter of strict law, but it is an imperative rule of law that the trial judge must warn the jury that it is dangerous to convict on the uncorroborated evidence of a child so young. This cautionary approach is embodied in Lord Hailsham's statement at p. 447 of Director of Public Prosecutions v. Kilbourne, (1973) 1 All E.R. 440 that -

> "Side by side with the statutory exceptions is the rule of practice now under discussion by which judges have in fact warned juries in certain classes of case that it is dangerous to found a conviction on the evidence of particular witnesses or classes of witness unless that evidence is corroborated in a material particular implicating the accused, or confirming the disputed items in the case ...... By now the recognised categories also include children who give evidence under oath ......"

[See also the Guyanese case of The State v. Alfred Kellman, (1975) 26 W.I.R. 438, and Director of Public Prosecutions v. Hester, (1972) 2 All E.R. 1056.]

The issue of corroboration invited even greater attention because the indictment contained a count for indecent assault in relation to which the principles just discussed would equally apply. The cases bearing on this aspect, both local and foreign, contain principles that are deeply entrenched in the common law and possess much compulsive power, but they are legion and so well known that it becomes unnecessary to refer to them.

I think I have said enough to show, however, that the issue of corroboration formed a prominent and vital part of the case (applying as it did to both counts of the indictment) and required clear and careful directions by the trial judge. The abstract direction to which Lord Hailsham referred in Director

of ...

of Public Prosecutions v. Kilbourne (supra) and to which I earlier alluded was given in unexceptionable terms. But the learned trial judge fell into grave error when he attempted to explain what is meant by the concept of corroboration. Basically, corroboration is nothing more than evidence that strengthens or supports other evidence, rendering it more probable. As has been said so often, there is no magic in the form of words to be employed in explanation of the concept; the verbal collocation and architecture are matters for the judge himself. The watchwords must be clarity and preciseness of content, and a definition, if one is to be employed, must contain the essential elements of the concept so that its true hypostasis would manifest itself. The trial judge defined corroboration as "evidence of an independent nature which tends to make you feel more sure that the incident occurred".

Although that definition is basically sound, it was, for a criminal trial, inadequate, and its scope was too wide and imprecise, inasmuch as it did not include the restrictive requirement that the evidence must tend to implicate the accused in some material particular, that is to say, it must connect or tend to connect him with the crime. Sixty-five years ago in The King v. Baskerville, (1916) 2 K.B. 658, Lord Reading, Chief Justice, in explaining the conception, employed the classic formulation which appears at p. 667 of his judgment and which has won universal approbation. I propose now to quote it in full. He observed:

> "We held that evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it. The test applicable to determine the nature and extent of the corroboration is thus the same whether the case falls within the rule of practice at common law or within that class of offences for which corroboration is required by statute .... It would be in high degree dangerous

to ...

> to attempt to formulate the kind of evidence which would be regarded as corroboration, except to say that corroborative evidence is evidence which shows or tends to show that the story of the accomplice that the accused committed the crime is true, not merely that the crime has been committed, but that it was committed by the accused." (Underscoring mine.)

In The State v. Gowkarran Persaud & Others, (1976) 24 W.I.R. 97, Chancellor Haynes, in discussing this subject, said (p. 103):

> "What juries were exhorted or advised was not to act on such testimony unless they found some additional evidence which they believed, and which tended to fortify his credibility, or to provide some assurance, or to make it probable or reasonable to believe that the story of the accomplice was true in its implications of the accused." (Underscoring mine.)

And at p. 105 (ibid.) he observed:

> "It is important that the jury understand that corroboration had to implicate the accused; not to tell them so could be fatal." (Underscoring mine.)

Those passages are a clear expression of accepted cardinal principles.

In R. v. Mussin, (1966) Crim. L.R. 331, the Court of Criminal Appeal applied the proviso to s. 4 of the Criminal Appeal Act, 1907, and sustained a conviction because there was overwhelming evidence capable of amounting to corroboration, but the Court was of the view that the trial judge's general direction as to corroboration was incomplete and defective in that he did not explain to the jury that unless the evidence implicated the accused it could not be regarded as corroboration.

In R. v. Longstaff, (1977) Crim. L.R. 216, the appellant was convicted of attempted gross indecency. At the trial evidence was given by a police officer that the appellant through a gap in the wall in a public lavatory had made signs inviting masturbation. At the end of the summation prosecuting counsel

invited ...

invited the judge to direct the jury as to corroboration. The judge then gave a warning to the jury and explained what was meant by corroborative evidence, but he did not add that it must be evidence which implicated the accused in the offence. The accused appealed. The appeal was allowed, the Court holding that it was impossible to say that the jury had not been confused and may not have convicted on an imperfect understanding of the law and the evidence.

In the instant matter the trial judge's error was twofold, for not only was his general direction deficient in the sense just discussed, but he complicated matters by indicating as corrobative testimony for the jury's consideration certain portions of Claude Low's evidence which lacked that character. From the window of his home Low had seen a man choking Rhonda and attempting to pull down the zip-fastener attached to her pair of pants. Low was unable to identify the man, and certainly never at any stage identified the appellant as the man he had seen. Although tending to show consistency of Rhonda's story, Low's evidence in no way at all implicated the appellant. The evidence tended to confirm that a crime was committed, but not that the appellant committed it. Yet the trial judge treated Low's evidence as evidence capable of amounting to corroboration. He directed the jury thus:

> "I said there is some corroboration. Low saw when the man in the yard was trying to unzip her pants. Low saw when he choked her. Low saw her in the yard."

The learned trial judge had earlier directed the jury in almost similar terms.

There could be no doubt in the jury's mind that some occurrence had taken place. This is indisputable. The crucial questions were: Exactly what had happened, and who was the man involved? Was it the man in the dock? The danger that

eventuated ...

eventuated from the direction just cited was that in obedience to the judge's injunction the jury may have warned themselves of the danger of acting on uncorroborated testimony, and therefore embarked on a quest for corroboration; and they may have considered that they had found it in the evidence which the trial judge wrongly told them could be treated as "some corroboration". And if they found such evidence to be credible it may have led them to regard Rhonda's evidence as more probable, to accept the State's case, and therefore to convict the appellant. In those circumstances a palpable injustice would have been perpetrated unknowingly, since testimony that was not corroborative in character would have been accepted and acted upon as if it were, the jury not realising (since they were not so directed) that they could only so act if the evidence, either intrinsically or inferentially, implicated the appellant. Clearly it did not. /See R. v. Thomas, (1959) 3 All E.R. 522, R. v. Sailsman (No. 2), (1963) 6 W.I.R. 46, Eric James v. R., (1970) 16 W.I.R. 272 and R. v. Neville Stora, (1975) 24 W.I.R. 300./

Sometimes difficult and challenging questions arise in relation to the conception of corroboration, as in The State v. Kowshall Persaud, (1975) 27 W.I.R. 82, R. v. Sims, (1946) 1 All E.R. 697, R. v. Campbell, (1956) 2 All E.R. 272, Director of Public Prosecutions v. Hester (supra), Director of Public Prosecutions v. Kilbourne (supra), The State v. Gowkarran Persaud and Others (supra), Boardman v. Director of Public Prosecutions, (1974) 3 All E.R. 887, R. v. Codrington, (1974) 27 W.I.R. 279. The instant case presented no perplexing problems and should not have produced the erosion of the fundamental principles to which I have referred.

Another feature of the summation that fell for consideration was the failure of the learned trial judge to direct the jury in relation to a complaint which Rhonda had made to her

mother ...

mother soon after the incident. It is clear law that evidence of such complaint, although legally admissible, is relevant only to the extent that it may serve to demonstrate consistency of the conduct of the complainant with her evidence in court, but it does not amount to corroboration. Some of the cases which constitute the authority for that proposition are R. v. Wood, (1877) 14 Cox 46, R. v. Lillyman, (1896) 2 Q.B. 167, R. v. Kiddle, (1898) 19 Cox 77, R. v. Osborne, (1905) 1 K.B. 551. But the concept appears to have much older roots, going back as far as Bracton who wrote in the reign of Henry III. /See also Hale's Pleas of the Crown, Vol. i, 633 and Hawkins' Pleas of the Crown, Book i, c. 41, s. 9./ The provenance of that ancient principle appears to have been the essential requirement in the distant past that the prosecutrix in a sexual case should have raised a "hue and cry". Evidence of that hue and cry, which was nothing if not a complaint, was always admissible.

The logical basis of the principle that a complaint cannot be corroborative evidence is that such evidence must derive from an independent source, so that one cannot corroborate oneself. /See R. v. Christie, (1914) A.C. 545, at p. 557. See also R. v. Gloumeau, (1974) 22 W.I.R. 28./ I venture to think, however, that the jury, composed as it was of laymen, would have had an overpowering impulsion (as the judge in Christie had) to treat the evidence of the complaint, adduced by Rhonda's mother, as corroborative evidence, perhaps because - "In ordinary affairs we are often influenced by the fact that the maker of the doubted statement has consistently said the same thing ever since the event described happened." /Per Lord Reid in Director of Public Prosecutions v. Kilbourne (supra), at p. 456./ A duty therefore devolved on the trial judge to see that this danger was obviated.

It was in this light that Lord Parker, C.J., in R. v. Goddard, (1962) 3 All E.R. 582, observed (at p. 586):

"Equally ...

> "Equally, in a case, as in many sexual cases, where there is danger that a jury will treat as corroboration something which is incapable of being corroboration, there must be a duty on the judge to explain to the jury what is not corroboration, as for example, a complaint made by the complainant."

And in Lillyman (supra), Hawkins, J., speaking for the Court For Crown Cases Reserved, said (p. 178):

> "We think it is the duty of the judge to impress upon the jury in every case that they are not entitled to make use of the complaint as any evidence whatever of those facts, or for any other purpose than that we have stated." (Underscoring mine.)

It is unfortunate that the learned trial judge overlooked this important aspect of the case. In reference thereto he made only this adventitious comment:

> "She" (Rhonda's mother) "also repeated, under cross-examination, what her daughter Rhonda had spoken to her. I do not propose to repeat what she said Rhonda told her."

This approach was wrong. The peril to be avoided was that in the whole process of assessment and evaluation the jury may, with catastrophic consequences, have unwittingly treated the complaint as corroborative evidence, perhaps for the reasons suggested by Lord Reid in Director of Public Prosecutions v. Kilbourne (supra). They ought to have been told in the clearest terms that it could never serve that purpose.

As Luckhoo, C. pointed out in R. v. Samad & Others, (1969) 15 W.I.R. 35, at p. 37:

> "One of the functions of an appellate court is to ensure not only that what is stated by the learned trial judge has been fairly stated, but that what it was necessary and fair to state was not omitted, lest the result of the jury's verdict might be affected thereby."

For the reasons which I have endeavoured to express, I

would ...

would hold on the evidence, the directions and the state of the authorities that the jury were not guided on the issue of corroboration as they ought to have been. This, by itself, would be fatal to the conviction, but there are other important questions that require to be determined.

The first relates to the identification parade at which Rhonda pointed out the appellant as the man who assaulted her and stole her money. When Rhonda complained to the police on the day of the alleged incident she told them that her assailant was "a Negro man with an Afro hair-style and wearing a little beard." The identification parade was held six days later. In my judgment, there was sufficient time for the police to secure for service on the parade other men wearing a similar hair-style.

Detective-Inspector Afzal Qualander who conducted the parade and Claude Ivan Low who was there to see if he could identify the man he had seen, both testified that on the parade there were other persons besides the appellant wearing the Afro hair-style. The appellant controverted this evidence, claiming that he was the only such person on the parade. Significantly, Rhonda agreed that that was so.

The paramount importance of this aspect is thus patent, more especially since Rhonda said that the appellant's hair-style was one of the physiognomical features that aided her identification. The problem which is directly raised by the state of the evidence is that the jury may have accepted Rhonda's evidence on this issue rather than that of Low and Qualander. The situation therefore demanded careful directions of a particular character to which I shall presently refer. If the jury accepted the evidence of Low and Qualander instead, then those directions would not apply, there being no danger to be avoided. The duty of the learned trial judge was to approach the issue from both standpoints (since

he ...

he could not know whom the jury would believe) and to give the respective appropriate directions, leaving the eventual resolution of the problem to the jury.

If, indeed, the appellant was the only man on the parade with an Afro hair-style, then the parade was self-evidently undesirable and manifestly unfair. Rhonda had mentioned to the police that the appellant had an Afro hair-style and "a little beard". At the parade Detective-Inspector Qualander made it clear to her that she was there to see if any of the men on the parade was the one that assaulted her. If the appellant was the only man with an Afro hair-style, then Rhonda's attention would immediately have been directed to him. And if, as Rhonda said, he had a beard as well (apparently there were others with beards), then it does not require much imagination to realise that the man with the Afro hair-style and the beard must have stood out "like a sore thumb" as Lord Parker, C.J. phrased it in R. v. Gerard Frederick Jones, (1969) Times, July 22. I do not think it is unfair to suggest that she must have had her eyes on him from the very outset, for here was a man fitting the very description that she had given to the police. It is no wonder that in answer to the appellant she testified as follows: "I identified you by the hair, long face, long nails and beard."

In a criminal trial, if justice is not to miscarry, it is essential that the identification parade shall have been properly conducted. As long ago as 1925, in Thomas Dwyer, Allen Ferguson, (1925) 18 Cr. App. R. 145, in which the appeals were allowed, Lord Hewart, C.J., in a different context, drew attention to the necessity for fair and proper identification. He said (p. 147):

> "The trial was perfectly satisfactory except in two respects, each of which was crucial. In the first place it was made plain that the witnesses who were to identify the defendants, witnesses who had seen them

in ...

> in the dusk or in the dark, had been shown extremely good photographs of them before they were invited to enter on the task of identification."

[See also the Jamaican case of R. v. Gibson, (1975) 24 W.I.R. 296.] But a problem somewhat similar to the one in the instant case arose in The State v. Vibert Hodge, (1976) 22 W.I.R. 303 where the complainant appeared to have identified the appellant by his gold teeth. The appellant, who was indicted with robbery under arms, was the only person on the identification parade with gold teeth, and Inspector Troyer who conducted the parade testified that the appellant was identified only after all the men on the parade had opened their mouths. The complainant admitted that she asked the appellant to open his mouth because she wanted to be "doubly sure" and that "the gold teeth made (her) doubly sure." In this climate of unfairness, careful and adequate directions on this issue were imperative; failure to give them was one of the reasons why the appeal was allowed and the conviction quashed.

The approach that the trial judge should take when faced with this situation was clearly explained by Haynes, C. in The State v. Ken Barrow, (1976) 22 W.I.R. 267, where the appellant on an identification parade was the only person with a scar on the left side of his face. The complainant, who had been robbed of his jewellery by a number of men, told the police that he could identify only one of them, and he described that man as a "short, dark Negro man" with "a scar on the left side face." At the parade the complainant picked out the appellant as that man. It must have been very easy for him to have done so. The appellant was duly convicted. On appeal, one of the contentions advanced on the appellant's behalf was that the identification parade was unfairly conducted.

To understand fully the principles which apply to this

situation ...

situation I would refer to certain passages in the judgment of the learned Chancellor wherein are stated certain basic propositions that underlie his conclusion that the jury had not been properly directed. With his juridical reasoning I respectfully and entirely agree. At p. 271 he observed:

> "The next objection considered is the submission, in effect, that the identification parade was unfair; that this unfairness rendered its evidential value nugatory; and that the trial judge should have so directed the jury. It raises three questions: (i) Was the parade unfair? (ii) If it was, what effect, if any, would this have on the probative value of the identification on oath at the trial? And (iii) What directions were necessary?"

Later, he continued (on the same page) thus:

> "To my mind, it is impossible to hold a test fair if only the suspect in a line-up can possibly completely fit the description of the criminal given to the police and etched in the memory of the witness."

At p. 272, the learned Chancellor said:

> "What then was the effect, if any, of the identification of the appellant at such a parade on the proof of identification on oath at his trial? This depends on the true evidential relevance and value of an identification at a parade. If the two things are separate and unrelated, then the jury, and this court on appeal, might legitimately limit its consideration to the identification at the trial. If they bear upon each other, then the probative strength and reliability of the identification at the trial might depend on what happened at the parade. I think that as a matter of logic and commonsense this latter is the correct position: they interrelate. I proceed to demonstrate this proposition:
>
> First of all, I take the view that the identification at the parade is not, at the trial, substantive proof or evidence on which guilt can be solely rested. An accused cannot be, at his trial, linked with a crime only by the evidence that at a parade he was picked out as the offender. He must be identified by a witness on oath at his trial. And the evidence that, shortly, or at some time after the crime, the witness picked him

out ...

> out in a line-up fairly held is admissible as relevant to the reliability of his identification at the trial in that it tests, or strengthens, the trustworthiness of that evidence."

At p. 273, he declared:

> "In my opinion, it is the identification at the parade which gives probative value, weight and reliability - if any - to the subsequent identification from the witness-box, in the estimate of the jury."

And at p. 274, he continued in the same vein thus:

> "The identification at the parade is to my mind the crucial test and not the identification in court. What the witness does in court is just to identify under oath the person he identified not under oath, at the parade. He does not then scan the features of the accused in the dock to decide then if he is the guilty man. He did this at the parade. At the preliminary inquiry he just picks out the man he identified at the parade, and who, he knows by then, has been charged with the offence; and at the trial he points out the person he identified in the magistrate's court. So that reliability of the identification in courts truly rests on the reliability of the identification at the parade; and this, in turn, depends in substantial measure on the fairness of the parade itself."

Having stated those propositions, the learned Chancellor next addressed the question of the directions that the issue required. At p. 276 he asserted:

> "The identification parade was not fair, and the trial judge, in his summing-up should have discussed this aspect. In the circumstances of this case, he should have directed the jury specifically on the need for a parade to be a fair test and on <u>the relevance of any proved unfairness to the reliability of the trial identification</u>. He should have pointed <u>out to them that there</u> was an element of unfairness disclosed in the evidence, and that it was for them to consider and decide <u>how far - if at all - it affected the weight of the trial identification</u>." (Underscoring mine.)

I have quoted at some length from the Chancellor's judgment because it offers invaluable guidance in relation to certain basic principles that are quite often misunderstood and

sometimes ...

sometimes overlooked. The trial judge in Ken Barrow overlooked them and gave no such directions. Indeed, he did not deal with this matter at all. It was a fatal flaw.

It was no less a flaw in the instant case where the learned trial judge never addressed himself to the question either, although the appellant specifically raised it in his defence. Nothing must ever deflect a trial judge from his overriding duty to ensure that the prisoner receives a fair trial. The trial cannot be fair if the identification parade was unfair, and if the trial judge omitted to deal with the problem. As Lawton, L.J. said in R. v. Osborne and Virtue, (1973) 1 All E.R. 649, at p. 657:

> "The whole object of identity parades is for the protection of the suspect, and what happens at those parades is highly relevant to the establishment of the truth."

And as Crane, J.A. (as he then was) said in Ken Barrow (at p. 279):

> "The mounting of an identity parade is a necessary exercise in proof of the very next question that arises after proof of the corpus delicti, viz., proving the identity of the accused. It is the initial step in the procedure by which the prosecution brings offenders to justice, and it is for the reason that courts cannot supervise the staging of it, that it is of importance that its conduct should be scrupulously fair."

The basic principle must be that in a case where the suspect possesses some strikingly outstanding physical feature to which reference has been made by the complainant anterior to the identification parade, some persons similarly endowed by nature or marked by misfortune should be placed on the parade as well. I do not myself believe that it requires much ingenuity to do this, but there may be cases where it is extremely difficult to achieve it, although it is impossible and indeed undesirable to attempt to assign such cases to tight, definitive categories. They must be dealt with as they arise. A few examples may be given. It may not be easy to assemble a number of men each bereft of one ear, or with an index finger missing, or an eye completely closed,

or ...

or a cleft nose. (Luckhoo, J.A. adverted to this problem in Ken Barrow, at p. 283.) In my opinion, in such unusual circumstances, an identification parade should not be held at all, for although an identification parade is generally desirable it should never be farcical. If farcical, it serves only to dilute the quality of the State's case and does not advance the cause of justice.

The third matter to which I would refer concerns the non-directions of the trial judge in relation to certain statements which Rhonda and her mother made to the police. In her statement Rhonda did not mention that the appellant had touched her breast. Her mother, in her statement, did not mention that Rhonda had complained to her that the appellant had touched her breast. At the preliminary inquiry Rhonda mentioned no such thing; there is no evidence as to what her mother said there. I find it rather astonishing therefore that at the trial Rhonda testified that the appellant had lifted her jersey and touched her breast. Her mother testified that Rhonda had complained to her that the man had done so. I should have thought myself that Rhonda would have reported this to the police, or, at least, have mentioned it to her mother who in turn would have referred to it when she gave the police her statement. But, as I said earlier, it is to be found in neither statement. It would not be commonsensical to think that the police, if they had been so informed, would have omitted so vital a matter from both statements.

Bearing in mind that the appellant was indicted with indecent assault, this portion of Rhonda's evidence was of paramount importance. It appears to have been the prosecution's focal point at the trial, although there was evidence as well that the appellant had lifted Rhonda's jersey and had pulled down the zip-fastener on her pants, conduct which, in my view, would constitute indecent assault. (I am thinking only of the *actus reus*.) But if there was any doubt about that conclusion, there could be

none ...

none in relation to the touching of the breast; that was clearly an indecent assault.

In this matter I rather doubt that it could properly be said as a matter of law that a contradiction or inconsistency arose of the kind that necessitated the directions agitated in the local case of The State v. Balram Gobin & Others (Criminal Appeals Nos 26, 27, 28 and 29 of 1975) and in the Trinidadian cases of Daken v. R., (1964) 7 W.I.R. 442 and Slinger v. R., (1965) 9 W.I.R. 271, both of which were cited with approval in Gobin. In the instant matter, Rhonda had not contradicted herself as witnesses in those cases had done, but had merely, at the eleventh hour, and for the first time, made a damaging allegation against the appellant. She had omitted to do so earlier. If she was guilty of anything it was of an omission rather than a contradiction or inconsistency.

The learned trial judge appears to have treated this issue as if it were a case of a manifest inconsistency or contradiction; this would have been beyond reproach if his directions thereon were adequate and had embraced all the relevant evidence. Unfortunately, this was not so.

The learned trial judge dealt only with Rhonda's omission at the preliminary inquiry. There was a complete failure to deal with the statements to the police. To my mind, these statements were of the utmost importance since they were made at the police station on the same day of the incident, within an hour of its occurrence. With only such a short temporal interval the matter must then have been very fresh in the minds of both Rhonda and her mother. At the trial Rhonda said that in the Magistrate's Court she said nothing about her breast because she was asked nothing about that. That she was not asked is not surprising. How could she have been asked about it when there was nothing of it in her statement to the police? If the prosecutor at the preliminary inquiry had asked her about it, he would have been

speculating ...

speculating and perhaps, wittingly or unwittingly, have been inviting her to embellish her story. Quite properly he did no such thing. It is perplexing that Rhonda gave the impugned evidence at the trial. If the prosecutor asked her about it, one wonders on what basis he did so, since there was nothing in Rhonda's deposition or in her statement to the police to justify it. If Rhonda proffered the evidence at the trial, then why did she not do so in the Magistrate's Court as well? Did someone prompt her to volunteer it? Did the event occur at all? Was it an attempt to gild the lily or to make assurance doubly sure? Did her early reticence derive from an understandable delicacy about the subject and a sense of shame at such intimate self-disclosure?

All of these matters should have been discussed with the jury making it clear to them, however, that in the final analysis the acceptance and the weight of the evidence were essentially matters for them, due attention being given to the explanation Rhonda offered. These were decisive matters which may well have adversely affected the jury's estimate of Rhonda's credibility. And having regard also to her age, to the unfairness of the identification parade, the rather curious circumstances of the robbery, and to the evidence as a whole, the jury, if they had been properly directed, may not have considered Rhonda's evidence to be credible. On the other hand, these matters may have generated no doubts in the minds of the jury and may have made no difference whatever to their verdict. But the matter should have been left with them for their cogitation and resolution, for no one can say what the exact mental processes of the jury would have been if they had been properly directed on this issue.

It was incumbent on the trial judge, after dealing with all those matters to which attention has been directed, to direct the jury that if they did not consider Rhonda's evidence to be credible, no question of corroboration could arise, and

that ...

that it was their clear duty in those circumstances to acquit the appellant. Lord Hailsham adverted to this proposition in Director of Public Prosecutions v. Kilbourne (supra). At p. 452 he said:

> "Corroboration is only required or afforded if the witness requiring corroboration or giving it is otherwise credible. If his evidence is not credible a witness's testimony should be rejected and the accused acquitted, even if there could be found evidence capable of being corroboration. Corroboration can only be afforded to or by a witness who is otherwise to be believed. If a witness's testimony falls of its own inanition the question of his needing, or being capable of giving, corroboration does not arise .... Corroboration is a doctrine applying to otherwise credible testimony and not to testimony incredible in itself." (Underscoring mine.)

Those observations, with which I agree, express the true view of the law. In R. v. Kilbourne, (1972) 1 W.L.R. 1365, the Court of Appeal quashed the conviction in respect of the offence of attempted buggery because the evidence of the complainant, a boy named Mark aged nine years, was considered to be unsatisfactory and unreliable. (See p. 1368.) The House of Lords approved of the Court's decision in relation to that specific charge. At p. 452 of Director of Public Prosecutions v. Kilbourne (supra) Lord Hailsham said: "In the present case Mark's evidence was corroborated. But it was not credible and the conviction founded on it was rightly quashed." [See also The State v. Lloyd Harris, (1974) 22 W.I.R. 41, at pp. 65-67, and the judgment of Crane, J.A. (as he then was) in Kirpaul Sookdeo & Others v. The State, (1972) 19 W.I.R. 407, at p. 427.]

Of course, this does not mean, as was argued and decisively rejected in Boardman (supra), that evidence must be accepted without a doubt before it could afford or require corroboration. That assertion extends the proposition beyond its true juristic limits. The true position is that before a witness's evidence could afford or be thought to require corroboration, it must be intrinsically credible. The two conceptions are not the same. To attempt to

equate...

equate them is to misunderstand Hester, Kilbourne and Sims, as Lord Hailsham observed in Boardman, at p. 907.

The questions in relation to corroboration, the conduct of the identification parade and the evidence concerning the touching of the breast were the main ones propounded for resolution in this matter. But the complaint was also made that the defence had not been adequately dealt with. That contention succeeds, in my view, although I do not propose to essay a critical analysis of the position. I will content myself in this appeal only with referring to some of the important cases bearing on this question in order that some guidance may be provided generally. In Samaroo & Ezaz v. R., (1953) L.R.B.G. 150, Sir Peter Bell, C.J. read the judgment of the Court of Criminal Appeal, and made these hortatory observations (p. 150):

> "Now it is clearly settled law that it is of paramount importance that the summing-up must fairly put the case for the defence, whatever it may be. No matter how trivial or stupid, or unlikely the defence may be, it is of paramount importance that the judge in his summing-up must fairly put that defence to the jury." (Underscoring mine.)

See also Benjamin Henry Dinnick, (1910) 3 Cr. App. R. 77, R. v. Hill, (1911) 22 Cox 625, R. v. Henry Mills & Edith Mills, (1936) 25 Cr. App. R. 138, David & Watkins v. R., (1966) 11 W.I.R. 37, Julian v. R., (1969) 13 W.I.R. 66, The State v. Gowkarran Persaud and Others (supra). I pass to another matter.

I confess that it would be disingenuous if I attempted to say that it has not caused me some perturbation to discover that the learned trial judge on the issue of identification made no use of the important guidelines specifically prescribed for that question in The State v. Michael Greene & Walter Alleyne, (1979) 26 W.I.R. 395. It is regrettable that he found himself unable, on this issue, even to warn the jury of the special need for caution in accepting evidence in relation to visual identification.

I ...

I would allow the appeal. What has caused me very anxious concern is whether a new trial should be ordered. The principles which are germane to this question are well-known and do not require expatiation or even restatement. I have no wish to be thought pedantic but I would point out, nevertheless, that in The State v. Lloyd Harris (supra) Haynes, J.A. (as he then was) put together (pp. 69-72) a collectanea from cases in various common law jurisdictions bearing on this question. I would add the instructive Jamaican case, Reid v. R., (1978) 27 W.I.R. 254, which was decided by the Privy Council. On a full consideration of the principles emanating therefrom, I am of the opinion that the interests of justice dictate that a new trial be ordered.

K. S. MASSIAH,
Justice of Appeal.

Dated this 13th day of November, 1981.

FUNG-A-FATT, J.A.:

I, too, agree that the appeal should be allowed and a new trial ordered.

C. J. E. FUNG-A-FATT,
Justice of Appeal.
13. 11. 81.

IN THE COURT OF APPEAL OF THE SUPREME COURT OF JUDICATURE

CRIMINAL APPEAL NO. 6 OF 1979.

THE STATE

against

KEITH MAYERS

BEFORE:

The Hon. Mr R. H. Luckhoo	-	Justice of Appeal.
The Hon. Mr C. J. E. Fung-a-Fatt	-	Justice of Appeal.
The Hon. Mr K. S. Massiah	-	Justice of Appeal.

1981: October 13, 14.
November 13.

B. De Santos for the appellant.

I. Chang, Senior State Counsel (ag), for the State.

JUDGMENT

R. H. LUCKHOO, J.A.:

Without stating reasons, I agree that the appeal be allowed. Having regard to the principles reiterated by this Court in The State v. Ashraf Haniff (Criminal Appeal No. 23 of 1980 - judgment delivered 6th March, 1981), by which the Court should be guided in the exercise of its discretion on the ordering of a new trial, I would agree that, on a consideration of the relevant factors to be borne in mind, there should be a new trial. See also Dennis Reid v. The Queen, (1979) 2 All E.R. 904, also reported in 27 W.I.R. 254, State v. Chandrica Persaud Sanichara (Criminal Appeal No. 30 of 1979 - judgment delivered on 27th April, 1981) and State v. Lloyd Harris, (1974) 22 W.I.R. 41.

R. H. LUCKHOO,
Justice of Appeal.

Dated this 13th day of November, 1981.