(1976) 22 WIR 267

The State v Ken Barrow

COURT OF APPEAL OF GUYANA
HAYNES C, CRANE AND R H LUCKHOO JJA
17, 18 DECEMBER 1975, 28 JANUARY, 13 FEBRUARY, 1 MARCH, 22 APRIL 1976

Criminal Law – Evidence – Identification parade – Suspect described to police as man with scar on left side of face – Parade mounted with accused as only person with a scar on left side of face – Whether parade fairly conducted.

Criminal Law – Conduct of identity parade – Instructions to identifying witnesses by officer-in-charge of parade – Necessity to add a savings clause –That suspect should be identified only if he is on parade.

The accused in company with other men entered the yard of the complainant, Richard Beharry, and robbed his wife Edna of several pieces of gold jewellery. While three of the men were engaged in robbing Edna inside the house, the accused was aiding and abetting them by holding on to Richard, violently assaulting him outside, and at the same time keeping a look out to facilitate the crime.

After the robbers had departed with their booty, Beharry reported to the police giving a statement in which he described his attacker as a short, dark negro man with a scar on the left side of the face. This information led to the arrest of the accused and when the police came to stage an identity parade they did so with the accused as the only person with a scar on the left side of his face.

In the Guyana Court of Appeal, counsel for the accused complained that at the close of the case for the prosecution at the Assizes, he sought leave of the judge to make submissions in the presence of the jury, but the judge overruled the submissions and said they had to be made in the jury's absence. This was a grave irregularity counsel contended, since there was no jurisdiction in the trial judge to conduct any part of criminal proceedings in the absence of the jury.

Complaint was also made that the identification parade was unfairly conducted for two reasons–that it was highly prejudicial to the accused to place him on parade with other persons who did not have scars on their faces; that it was not made clear to Beharry that the suspect was not necessarily on the identification parade. Yet another complaint was that inadmissible prejudicial evidence was let in during the course of the trial without any warning to the jury to disregard it.

Held: (*per* HAYNES C): (i) that in the light of very recent authority on what is the correct rule of practice, it cannot be said in the instant case, that the trial judge erred in ruling that the submissions should be made in the jury's absence. In any event, no injustice resulted from the judge's decision to hear the submission in their absence;

(ii) that the identification parade with the accused as the only man with a scar on the left side of his face was a farce. It was no test at all, since Beharry could have picked out no other person than the accused;

(iii) that the trial judge has a discretion as to whether he should or should not draw to the jury's attention the presence of inadmissible prejudicial evidence that has been inadvertently let in in the course of the trial.

(iv) (*per* CRANE JA) that the summing-up was of little or no help to the jury in that it did not highlight the vacillating nature of Beharry's testimony on the matter of the scar as his means of identification;

(v) that it was unfair to mount a parade with the accused as the only suspect with a scar on the left side of his face. Moreover for the officer-in-charge of it to fail to

add a savings clause to the effect that the suspect should be identified only if he is on parade vitiated the conviction and sentence;

(vi) (*per* R H LUCKHOO JA) that the identification was unreliable. It was incumbent on the trial judge to draw the jury's attention to all relevant factors as tended to diminish the cogency of the identification.

Appeal allowed. Conviction and sentence set aside.

Cases referred to
R v Anderson (1930), 21 Cr App Rep 178
R v Falconer-Atlee (1974), 58 Cr App Rep 348

R v John [1975] Crim LR 456
R v Norton (1910), 5 Cr App Rep 197
DPP v Christie [1914] AC 545, 10 Cr App Rep 141, 83 LJKB 1097
R v Watson [1814-23] All ER Rep 334, (1817), 2 Stark 116, 32 State Tr 1, NP
R v Osborne and Virtue [1973] 1 All ER 649, [1973] 2 WLR 209
United States v Wade (1967), 388 US 218
Kirpaul Sookdeo and Others v The State (1972), 19 WLR 407
Craig v R (1933), 49 CLR 429
Budhsen v The State of UP [1970] 1 SCR 564
R v Roads [1967] 2 All ER 84, [1967] 2 QB 108, [1967] 2 WLR 1014, 51 Cr App Rep 297, 131 JP 324, 111 Sol Jo 212
R v Hunter [1966] Crim LR 262
R v Howick [1970] Crim LR 403
Slinger v R (1965), 9 WIR 271
Herrera and Dookeran v R (1967), 11 WIR 1
R v Weaver [1967] 1 All ER 277, [1967] 2 WLR 1244, [1968] 1 QB 353, 131 JP 173, 111 Sol Jo 174, 51 Cr App Rep 77
R v Michael Morrissey (1932), 23 Cr App Rep 188
Maxwell v DPP [1935] AC 309, 24 Cr App Rep 152, 103 LJKB 501
Eric James v R (1970), 16 WIR 272
R v Dwyer [1925] 2 KB 799
R v Jones (1961) *Times*, 16 March
The State v Lloyd Harris (1974), 22 WIR 41

The State v Mohamed Khalil (1974), Guyana Court of Appeal, Crim App No 69/1974, d/d 9th April 1975
Arthurs v AG for Northern Ireland (1970), 55 Cr App Rep 161, 114 Sol Jo 824, HL
DPP v Christie [1914] AC 545
R v Osborne [1973] 1 All ER 649
Dallison v Caffery [1964] 2 All ER 610

Appeal
Appeal against conviction and sentence in the Guyana High Court.

J A Patterson for the appellant
L Ganpatsingh Senior State Counsel for the State

HAYNES C. Around 9 o'clock on the night of 28 January 1974, Richard Beharry was in the yard of his home in the lower flat of a two-storeyed building at lot 339, Cummings Street, Georgetown. His wife, Edna Beharry, was in a bedroom inside. He was a goldsmith and kept a quantity of finished and unfinished gold jewellery resting on a dressing-case in it. A gang of four or five men raided the house. Beharry was wounded on the head with a weapon, and the jewellery was stolen. Mrs Beharry could not identify anyone. Richard Beharry, in a statement to the police shortly after, said: "I can only identify one of the men. This man has a scar on the left side face." He described the man otherwise orally then, as a "short dark negro man". On 14 February following–17 days later–Beharry attended an indentification parade at Alberttown Police Station. Seven men were in the line-up, including the appellant (the suspect). All were said to be of similar age, height, general appearance and class of life; but the suspect alone had a scar on the left side of the face. Beharry without difficulty identified him as the man who held on to him during a brief struggle just in front of the door to the flat, under a lit 60-watt bulb, while another wounded him and two or three others made their felonious entry into the flat. The appellant was convicted for feloniously wounding Richard Beharry and for robbery under arms. He was sentenced to serve five years' imprisonment on each count, concurrently. He appealed to this court.

Counsel on his behalf made a number of submissions to upset the verdict of the jury. I propose, in this judgment, to adjudicate on three of them only. Each raised a question of general importance in the trial of criminal cases. The first was founded on what happened at the trial after the close of the case for the prosecution. Counsel said he wished to make, in the presence of the jury, the submissions that: (a) the ingredients of the offence of robbery under arms had not been established; and (b) there was no case to go to the jury on the indictment. The trial judge ruled that these submissions had to be made in their absence. This was done and they were overruled. Counsel submitted to us that a grave irregularity had thus taken place in that the trial judge had no jurisdiction to conduct any part of the proceedings at a criminal trial in the absence of the jury, without the consent of the defence, save, of course, under some statutory authority. Counsel cited in support of his point, a passage from the judgment of the court in *R v Anderson* ((1930), 21 Cr App Rep 178), where Lord Chief Justice HEWART said ((1930), 21 Cr App Rep at p 183):

> 'It is difficult to imagine any circumstances in which, except at the request or with the consent of the defence, a jury can possibly be asked to leave the box in order that statements may be made during their absence.'

This was the stated authority for a passage in Archbold's CRIMINAL PLEADING (38th edn) (1969), p 270 at para 519 that: "...The jury should not be asked to leave the court except at the request of or with the consent of the defence."

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In *Anderson* (*R v Anderson* (1930), 21 Cr App Rep 178) the appellant was convicted for the larceny of stamps. The sole question for the jury was whether at the time appellant took possession of the stamps he intended to deal with them honestly. At the trial appellant's character was put in issue and he was cross-examined as to whether he had not signed a statement, upon dissolving partnership with another doctor, in which he admitted dishonesty. Appellant denied this. There was no such document in court. But counsel for the prosecution held in his hand, and looked at when cross-examining, a document which the jury must have seen and might have thought was the document referred to. He did not attempt to put it in evidence. Counsel for the accused protested, and a controversy arose over it. It was suggested then that the jury should leave the box so that matters relating to this document should be discussed in their absence. This was strongly objected to by the defence. Nevertheless, the jury were requested to leave, and did leave, the box, and various statements were made in their absence. The Court of Appeal held this was irregular in that the matter "was enveloped with an air of mystery and suspicion, from which it was at any rate possible that the jury might draw the inference that they had been asked to leave the court because circumstances of a character damaging to the accused were to be discussed." On this and other grounds the appeal was allowed. And it was in this context that the Lord Chief Justice made the statement cited above and relied on by counsel for the appellant.

In contrast to what was said in *R v Anderson* ((1930), 21 Cr App Rep 178), we have the practice indicated in *R v Falconer-Atlee* ((1974), 58 Cr App Rep 348), and approved in *Allan Rex Kellett* ((1975), 61 Cr App Rep 240). Both cases involved no-case submissions heard in the presence of the jury. In *Falconer-Atlee* (*R v Falconer-Atlee* (1974), 58 Cr App Rep 348), counsel said it was on a pure question of law. The learned trial judge said ((1974), 58 Cr App Rep at p 353): "...I think it is better that the jury should know what is going on and that they should hear it." Mr Wheatley for the defence replied: "...I do not want them to be excluded from anything in this case." So it was that the jury remained in their box. The judge ruled that the case would go to the jury. ROSKILL LJ, speaking for the court said ((1974), 58 Cr App Rep at p 354):

> 'This Court has said again and again that it is very undesirable that this should happen where there is a submission of no case to go to the jury either because the evidence for the Crown is suggested to be insufficient to justify leaving the case to the jury, or because, though there may be some evidence, it is so tenuous that it would be unsafe to leave the case to the jury. It is most undesirable that that discussion should take place in the presence of the jury. Inevitably the judge may express a view on a matter of fact, which is within the province of the jury. The presence of the jury may hamper freedom of discussion between counsel and judge.'

The court was clearly of the view that the course followed at the trial should not have been adopted. It is not reported that *Anderson* (*R v Anderson* (1930), 21 Cr App Rep 178) was cited to the court.

Then in *Kellett* (*Allan Rex Kellett* (1975), 61 Cr App Rep 240), at the trial of a charge of attempt to pervert the course of justice, again, counsel for the defence said that the jury might remain, during his no-case submission, and the Lord Chief Justice, who presided, agreed and later ruled against it, holding there was *prima facie* evidence of an intention to pervert the course of justice. Counsel having submitted there was not, rested on his submission and called no evidence for the defence. It was submitted, relying on *Falconer-Atlee* (*R v Falconer-Atlee* (1974), 58 Cr App Rep 348), that this was a fatal irregularity. STEPHENSON LJ, for the court, said ((1975), 61 Cr App Rep at p 245):

> 'We agree that it is generally undesirable that discussion on a submission of no case should take place in the presence of the jury, even with the agreement of counsel making the submission, one reason being that the judge may express a view on a matter of fact which is within the province of the jury, as was pointed
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> out in *Falconer-Atlee* (*R v Falconer-Atlee* (1974), 58 Cr App Rep 348), (1974), 58 Cr App R 354. But it is important that the jury should be left out of no more of a trial than is necessary for justice, and we do not consider any injustice resulted from the jury's hearing the discussion on defence counsel's submissions in this case.'

In the light of these two very recent pronouncements on what is the correct rule of practice, it cannot be said that in such a case as this, the trial judge fell into any error in his ruling that the jury should be out; in any event I do not think that any injustice whatever resulted from it. However, I would say that judges presiding over criminal trials at the Assizes would hardly go wrong if they adhere to the general rule laid down in these recent English judgments. And so this ground of appeal fails.

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? Questions (i) and (ii) can conveniently be considered jointly. It must be recognised on all sides that no procedures can eliminate entirely the possibility of a misidentification. The fallibility of identification parades has been explored by Professor Glanville Williams in his PROOF OF GUILT and in two articles published in 1963 Crim LR at pp 479-490 and 546-555. And so it is the duty of the police to be scrupulously fair in the conduct of such a parade; fair to themselves and their own reputation; to the prisoner, lest he be innocent; to the victim of the crime; and to the general public, lest a guilty man escape through rejection by the court of the evidence of identification at the trial.

As the then Lord Chief Justice himself warned in *Parks* (*R v Parks* [1961] 1 WLR 1484, [1961] 3 All ER 633, 105 Sol Jo 868, 46 Cr App

Rep 29, 78 LQR 19, 21, CCA), cases of identification can be difficult and could lead to miscarriages of justice. 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 a misidentification. And that is why in *R v Williams* ((1912), 8 Cr App Rep 84) ((1912), 8 Cr App Rep at p 88) ALVERSTONE LCJ, said: "...this identification was not properly carried out; Fulcher" (the witness) "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,..." It is most essential, therefore, that the parade must provide a fair and just test. And, 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. In this case the assailant was "a short dark negro man with a scar on his left side face"; the appellant alone in the line-up could have fitted this description; the others could not. This was no test at all. As a test it was a farce. Richard Beharry could have picked out no one else. I would not criticise the police over it. It was probably impracticable to find seven men with similar scars. But it was a farce nonetheless.

During the hearing of the appeal the court referred counsel to a report of a case in *The Times* of 22 July 1969, at p 2, in the appeal of *R v Gerard Frederick Jones* ((1969), *Times*, 22 July) from a conviction for an offence against a youth of eighteen. I cite the full report:

> 'LORD PARKER of Waddington, Lord Chief Justice, said in the Court of Appeal yesterday that an identity parade 'really was a complete farce'. But no one could be blamed.
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> At the start, he said the accused man Gerard Frederick Jones, a motor mechanic, was dressed in his working clothes, which were covered in oil. The other eight men on the parade were well groomed in lounge suits.
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> It was so obvious that the police suggested to Mr Jones that he changed into a suit. But he replied: 'I have nothing to fear. Let's go ahead.'
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> LORD PARKER went on: 'Again the police were not satisfied because they then borrowed a coat for him to wear. Unfortunately, this added to the farce because it was about two sizes too big and the sleeves hung below his hands.
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> 'The police then erected a barricade of benches in front of the nine men and draped blankets over them, the idea being that their legs should not be seen and Mr Jones's trousers would not stand out.
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> The moment the youth who was to do the identifying came into the room, he spotted a man standing there whose dirty trousers showed under the benches and whose big coat stuck out like a sore thumb. He had his eyes on this man from the word go.'
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> The Court held that the identification parade had been such a complete farce that it would be unsafe to allow Mr Jones's conviction to stand.
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> The Court accordingly quashed his conviction at Chester Assizes on 17 December of an offence against a youth aged 18. Mr Jones, aged 43, of Heol Islwyn, Adwy, Coed Poeth, near Wrexham, Denbighshire, had been sentenced to three years' imprisonment.'

To offset this decision, counsel for the State referred to *R v John* ([1975] Crim LR 456). John was convicted of wounding with intent and assault, on the evidence of three witnesses who said the assailant wore a leather jacket. At the identification parade three days later, he alone wore a leather jacket. The appeal was dismissed, the court pointing out that the witnesses had in fact based their identification on what they recalled of the features of the assailant, and dress played no part in it; and, further, they all had excellent opportunity of seeing him and the conditions were good. If, in the present case, the evidence established that the identification was not based on the scar but on the features, *R v John* ([1975] Crim LR 456) would support the State's position; but there is no such evidence. At no time, either in his written statement to the police or in his evidence at the trial, did Beharry say he had a good look at the appellant face to face; in fact, at all times he spoke only of seeing the scar on the left side of the face. I do not think *R v John* ([1975] Crim LR 456) helps the prosecution in this case.

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 inter-relate. 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 sometime after the crime, the witness picked him 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. Time was when there was never any identification parade, as the modern practice of identify parades did not then exist. The accused, after his arrest was not put among other persons to see if any witness to the crime would identify him. No doubt before a trial there might be an arranged or accidental confrontation of witness

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with suspect and an act of identification might follow. In such cases the evidence was admitted or rejected as substantive evidence on principles laid down in cases such as: *R v Norton* ((1910), 5 Cr App Rep 197) and *DPP v Christie* ([1914] AC 545, 10 Cr App Rep 141, 83 LJKB 1097). If the prisoner by word, or conduct admitted the identification, it was direct or circumstantial proof of that fact; if, in like manner, he denied it was not. Further, in *Christie* (*DPP v Christie* [1914] AC 545, 10 Cr App Rep 141, 83 LJKB 1097), where, on a charge for an offence against a boy, he testified only of the incident itself and identified the prisoner as his assailant, but his mother told the court of a pre-trial identification by him a few minutes later, although there was a difference of opinion among their Lordships as to whether the mother was the proper witness to testify about it, all of them appeared to accept the admissibility of the fact as evidence of identification independently of any

admission. But the House had no cause to and did not discuss its own probative value as such.

But cases of mistaken identity occurred with increasing frequency, and so it was thought to be undesirable that the police should do nothing about the question of identification until the accused was brought before the magistrates, and then asked a witness for the prosecution some such question as: "Is that the man?", a form of trial identification held to be quite permissible in *R v Watson* ([1814-23] All ER Rep 334, (1817), 2 Stark 116, 32 State Tr 1, NP) a Trial at Bar, before a Court of King's Bench (LORD ELLENBOROUGH CJ, BAYLEY, ABBOTT and HOLROYD JJ). Hence, the identification parade became an established pre-trial procedure. Indeed, apparently it became the practice thereafter, that at the trial, the identification from the witness-box would be related to the identification at the parade. For in *R v Osborne and Virtue* ([1973] 1 All ER 649, [1973] 2 WLR 209) we find LAWTON LJ ([1973] 2 WLR at p 214) referring to the fact that at trials "identifying witnesses are always asked" to "pick out the man in the dock whom" (they) "had identified at the identification parade..." Clearly then, it developed that what happened at the parade directly affected the proof in court. And so often, if a witness did not attend a parade, or did not pick out the accused at one, he was not, at the trial, examined on identity.

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. I think that the position is well expressed in one of the leading judgments of the Supreme Court of the United States of America: *United States v Wade* ((1967), 388 US 218) ((1967), 388 US at pp 235-236), cited in Crim LR (1974) (December) at p 682 thus:

> 'The trial which might determine the accused's fate may well not be that in the courtroom but that the pre-trial confrontation, with the State aligned against the accused, the witness the sole jury and the accused unprotected against the overreaching, intentional or unintentional and with little or no effective appeal from the judgment there rendered by the witness-'that's the man'.'

And as STOBY J (Ag) did in *Kirpaul Sookdeo and Others v The State* ((1972), 19 WLR 407), I agree with the following passage from Professor Glanville Williams's article on "Identification Parades", (1963) Crim LR (1963) pp 479-480:

> '*Evidence of identity is opinion evidence* par excellence, a form of proof against which English law has always guarded with particular care. As EVATT and MCTIERNAN JJ remarked in the Australian case of *Craig* (*Craig v R* (1933), 49 CLR 429), 'An honest witness who says "The prisoner is the man who drove the car", whilst appearing to affirm a simple, clear and impressive proposition, is really asserting: (1) that he observed the driver, (2) that the observation became impressed upon his mind, (3) that he still retains the original impression, (4) that such impression has not been affected, altered or replaced, by published portraits of the prisoner, and (5) that the resemblance between the original impression and the prisoner is sufficient to base a judgment not of resemblance but of identity.' The
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> complexity of this issue is obscured when a witness is asked, as he commonly is, either by prosecuting counsel or by the judge: 'And do you see the man you speak of in the court today?' The answer to this question, by a gesture in the direction of the dock, is a forgone conclusion: it looks disarmingly plausible and impresses the jury, and yet the question whether the witness *now* recognises the defendant as the criminal is of such trifling probative force that it ought not to be asked, except in the context of three other questions: when and in what circumstances did the witness first recognise the defendant as the man; did he have any difficulty in recognising him; and by what marks did he recognise him? Even these further questions might not save this kind of evidence from the danger of misleading juries, but at least they would furnish some opportunity of revealing flaws in the identification.'

(Italics mine.)

I agree also with that writer's later comment (*op cit* p 482) that:

> 'It is a matter of common experience that, once a witness has picked out the accused at the line-up, he is not likely to go back on his word later on, so that *in practice the issue of identity may (in the absence of other relevant evidence) for all practical purposes be determined there and then, before the trial.* When the result of an identification parade may quite conceivably decide the fate of the man picked out, it becomes of the utmost importance to ascertain exactly how it has been obtained.'

(Italics mine.)

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 the 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. Where a parade is held and there has been a positive identification, the evidence is likely to be given considerable weight. And that is why every effort must be made to make the exercise a completely fair test. If the test is not completely fair then as a result the identification at the trial might not be as completely reliable, as it should be, for a conviction. As LAWTON LJ, said in *Osborne and Virtue* (*R v Osborne and Virtue* [1973] 1 All ER 649, [1973] 2 WLR 209) ([1973] 2 WLR at p 218): "The whole object of identification parades is for the protection of the suspect, and what happens at those parades is highly relevant to the establishment of the truth."

In *Budhsen v The State of UP* ([1970] 1 SCR 564), a Criminal Appellate Division of the Supreme Court of India (A N RAY and I D DUA JJ)

allowed an appeal from a conviction in the High Court for murder, on two grounds: (i) because the evidence disclosed that at the identification parade some necessary precautions had not been taken to eliminate unfairness; and (ii) because the High Court had treated the identification there as by itself a substantive piece of evidence sufficient to establish the case for the prosecution. I am concerned in this judgment only with the first ground. In this relation, DUA J, said ([1970] 1 SCR at pp 570-571):

> 'As a general rule, the substantive evidence of a witness is a statement made in court. The evidence of mere identification of the accused person at the trial for the first time is from its very nature inherently of a weak character. The evidence in order to carry conviction should ordinarily clarify as to how and under what circumstances he came to pick out the particular accused person... *The purpose of a prior test identification, therefore, seems to be to test and strengthen the*
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> *trustworthiness of that evidence*. It is accordingly considered a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in court as to the identity of the accused who are strangers to them, in the form of earlier identification proceeding.'

(Italics mine.)
And (also at p 571):

> 'The identification parades belong to the investigation stage. They are generally held during the course of investigation with the primary object of enabling the witnesses to identify persons concerned in the offence, who were not previously known to them. This serves to satisfy the investigating officers of the *bona fides* of the prosecution witnesses and also to furnish evidence to corroborate their testimony in court.'

I would read the court as using "to corroborate" in these two passages as meaning "to strengthen" what the court felt would otherwise be weak identification. DUA J, concluded (*ibid* at p 572) that: "The identification to be of value should also be held without much delay. The number of persons mixed up with the accused should be reasonably large and their bearing and general appearance not glaringly dissimilar. The evidence as to identification deserves, therefore, to be subjected to a close and careful scrutiny by the court." Here, there was this glaring dissimilarity: he (the appellant) had a scar on the left side of the face; no one else had any.

But counsel for the State submitted that there was good opportunity and excellent lighting for a reliable identification, and that, because of this, even if the parade was not a fair test it would be wrong and a miscarriage of justice to interfere with a conviction based on a positive identification from the witness-box. One way to test the force of this submission is to ask: Would the identification have been regarded as reliable if no parade had been held? In such a case this would have been what is called a "dock identification". Both academic writers and judges view this with disfavour. Admittedly, it could be a correct identification by an honest and fair witness with alert powers of observation and a good memory for faces. But it has recognised dangers.

Professor Cross in his publication on EVIDENCE (4th edn), (1974) at p 49 wrote:

> 'It might be thought that in criminal cases there could not be better identification of the accused than that of a witness who goes into the box and swears that a man in the dock is the one he saw coming out of a house at a particular time, or the man who assaulted him. Nevertheless, such evidence is suspect where there has been no previous identification of the accused by the witness, and this is because its weight is reduced by the reflection that, if there is any degree of resemblance between the man in the dock and the person previously seen by the witness, the witness may very well think to himself that the police must have got hold of the right person, particularly if he has already described the latter to them, with the result that he will be inclined to swear positively to a fact of which he is by no means certain.'

And Professor Glanville Williams in the article on "Identification Parades" cited earlier in this judgment (p 480) said: "...identification in the dock is patently unsatisfactory..." Some judges have expressed this same opinion. (See EVATT and MCTIERNAN JJ, in *Craig v R* ((1933), 49 CLR 429) ((1933), 49 CLR at p 448); and STOBY J (Ag) in *Kirpaul Sookdeo and Others v The State* ((1972), 19 WLR 407) ("most unsatisfactory").) Others have taken a less condemnatory approach: In *Roads* (*R v Roads* [1967] 2 All ER 84, [1967] 2 QB 108, [1967] 2 WLR 1014, 51 Cr App Rep 297, 131 JP 324, 111 Sol Jo 212) Lord Chief Justice PARKER said ((1967), 51 Cr App Rep at p 299): "The jury were rightly told that they might not think that (Kirby's) identification in those circumstances amounted to very much"; in *R v Hunter* ([1966] Crim LR 262), *per* DAVIES LJ: "...such a method of identification should be avoided if possible"; in *R v Howick* ([1970] Crim LR 403), *per* SALMON

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LJ; "...it is usually unfair to ask a witness to make an identification for the first time in court because it is so easy for the witness to point to the defendant in the dock"; and most recently in *R v John* ([1975] Crim LR 456), *per* BROWNE LJ: "...it was an unsatisfactory method of identification which ought to be avoided if possible." But such identification would not be nugatory. (See *Slinger v R* ((1965), 9 WIR 271); and *Herrera and Dookeran v R* ((1967), 11 WIR 1).) Looking as a whole at what has been said about dock identifications, if this case was to be notionally treated as one such, in my opinion it would have been at least desirable to have drawn the attention of the jury to the possible danger in, and weakness of, that method of identification and to warn them to give careful attention to those considerations in assessing the reliability of the proof. But I doubt that it is permissible or practicable for a Court of Appeal to adjudicate here as if this was a case where no identification parade was in fact held, having regard to what has been said in another part of this judgment about the probative link between the parade and the trial identification, and to the additional circumstance that the case was not put to the jury and considered by them on this basis; it is not

possible to say what their verdict would have been if it had been so put. Furthermore, it is to be noted that in spite of the conditions for safe identification as suggested by counsel for the State, Beharry could identify only the man with the scar.

As in *Gerard Frederick Jones* (*R v Gerard Frederick Jones* (1969), *Times*, 22 July), 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 the relevance of any proved unfairness to the reliability of the trial identification. He should have pointed out to them that there was an element of unfairness disclosed in the evidence, and that it was for them to consider and decide how far-if at all-it affected the weight of the trial identification. But nowhere in his summation did the trial judge deal even briefly with this matter. All he did was to read out from his notes the relevant evidence about the parade and the scar. He did not direct on the relation of these matters to the crucial issue of identity. After referring to the evidence, he gave this direction (at pp 38-39):

> 'The important issue in this case is the identity of the person who held on to Beharry. Beharry says that it was the accused. The accused says he was at home with his nephew. I must tell you that identity, members of the jury, is often a matter of considerable doubt. An honest witness can make mistakes about identity. This is particularly so when the defence, as it is in this case, is one of alibi. It might well be a case of mistaken identity. But, members of the jury, you have seen the witnesses and you have heard the evidence. If you are disposed to convict on the evidence, well you are perfectly free to do so.
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> ...
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> Beharry is the only witness who has given evidence of the identity of the accused as the man who held on to him while that other man was hitting him on the head. If you have any reasonable doubt of the identity by Beharry, then you must acquit the accused.'

That was all the help and guidance given to the jury. In this case, it was inadequate. A jury is entitled to more assistance than this, where the proof of identification rests wholly on a brief visual observation at night by the victim of a crime of violence during a brief encounter, and an identification parade held 17 days later was manifestly unfair.

Sir James Fitz-James Stephen in his HISTORY OF THE CRIMINAL LAW OF ENGLAND, Vol 1, published in 1883, wrote, at p 455: "...a judge who merely states to the jury certain propositions of law and then reads over his notes does not discharge his

duty." This is as true today as it was then. In the eyes of the jury, counsel on each side might appear biased so they would look and are entitled to look to the judge for a full and clear analysis of the material evidence and an impartial and helpful summation on the crucial issues of fact on which the verdict depends. If the trial judge had given adequate directions a court might not have interfered even though the identification parade was not a fair and reliable test. But the jury were left free to approach the issue of identity as if it was. In my judgment, the summing-up was defective in the respects indicated, and this would be sufficient ground to quash this conviction, subject as always, to the application of the proviso.

There is, however, a third ground to be considered briefly. It arose in this way: Detective Corporal 7918 Eric Hubbard was a witness for the prosecution. In his examination-in-chief he said (p 12):

> 'On Wednesday, 13th February 1974, I was on duty at Middle Road, La Penitence, where I saw the accused. I told him it was alleged that he in company with others beat and robbed Richard Beharry of a quantity of gold jewellery at his home, Lot 339 Cummings Street, Georgetown. I arrested and cautioned the accused. He said, 'I don't know anything about that.' On 14th February 1974, the accused was placed on an identification parade. On the 15th February 1974, I again cautioned him. He said, 'I do not know what that man is talking about. I do not want to make any statement.' I conducted investigations into the matter and later charged the accused. The first time I knew of the beating of Richard Beharry was about the 31st January 1974, I know of another against the accused from information received.'

Counsel complained that the last statement was evidence of another and similar criminal offence; that it was wrongly received and highly prejudicial, and that the trial judge did not warn the jury to disregard it. I have found some difficulty in accepting that prosecuting counsel of some experience would put any question in chief in this case to lead to an answer of another charge. And I wondered at one time whether it might not be a case of a typographical error. But counsel for the State did not raise this question, so the court has to take the record as accurate. If so, then it has to consider whether the jury might reasonably have understood the witness to be saying so.

In my judgment, it is impossible to be sure that a reasonable body of jurymen might not have understood Detective Corporal Hubbard to be saying that the appellant then had a similar or some other criminal charge pending against him. What he said could mean that. The evidence was clearly inadmissible and could have been prejudicial. The trial judge did not refer to it at all in his summing-up. This, submitted counsel for the appellant, was an error, while counsel for the State contended it was the wise exercise of a judicial discretion. In *R v Weaver* ([1967] 1 All ER 277, [1967] 2 WLR 1244, [1968] 1 QB 353, 131 JP 173, 111 Sol Jo 174, 51 Cr App Rep 77), where evidence was let in inadvertently that the address of the accused "was known to the police and has been circulated", the trial judge in his charge did not mention it at all. The Court of Appeal held he was "quite right to omit mentioning it". In his judgment SACHS LJ, described the position of the judge in these words ([1967] 2 WLR at p 1248): "...this is completely a question of discretion and one knows from experience the difficulties which persist for judges who deal with such situations. Whatever he does is submitted to be wrong. If he mentions the matter again he is accused of error in referring to it again; if he has not mentioned it again, he is accused of not having directed the jury properly." On the other side of the line are cases like *Michael Morrissey* (*R v Michael Morrissey* (1932), 23 Cr App Rep 188) and *Maxwell v DPP* ([1935] AC 309, 24 Cr App Rep 152, 103 LJKB 501). In each the jury were expressly warned to disregard inadmissible prejudicial evidence. In *Morrissey* (*R v Michael*

Morrissey (1932), 23 Cr App Rep 188) it was evidence of another offence; in *Maxwell* (*Maxwell v DPP* [1935] AC 309, 24 Cr App Rep 152, 103 LJKB 501) it was evidence of an acquittal on a charge for a similar offence.

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In the former the Court of Criminal Appeal, and in the latter the House of Lords, held the conviction bad, in spite of those warnings.

In *Maxwell* (*Maxwell v DPP* [1935] AC 309, 24 Cr App Rep 152, 103 LJKB 501) the appellant was charged with manslaughter and with using an instrument with intent to procure a miscarriage on the deceased woman. He testified that she had consulted him for relief and treatment following an abortion already suffered elsewhere. He admitted under cross-examination that six years earlier a similar incident had occurred involving him and that he was charged and acquitted. The House of Lords held that although the case was strong against him, it might well have been that the fact that he was charged some years earlier with a similar offence although he was acquitted, may have been "the last ounce which turned the scale against him" (*per* the Lord Chancellor ((1935), 24 Cr App Rep at p 176) speaking for the entire House). In the light of all this, it could be that the evidence in the present case of a similar pending charge might have influenced the verdict. But, having regard to the conclusion reached that the second ground of objection discussed above is sufficient to upset this conviction, it is not necessary to reach a concluded opinion on this point.

I would allow the appeal and discharge the appellant.

CRANE JA. Of the several grounds of appeal argued, I think that dealing with the complaint that the identification parade was irregularly conducted is a sound one, and is sufficient to dispose of this appeal in favour of the appellant.

Richard Beharry, the virtual complainant, told the jury that he made no mistake of the fact that it was the accused who held on to him while another man attacked him by repeatedly hitting him on the head with a revolver when he shouted "Thief!" to attract the attention of his wife.

The case for the prosecution was that the accused in company with some other men entered Beharry's premises and robbed his wife Edna of certain pieces of gold jewellery, and that while three of the men were thus engaged, the accused aided and abetted them by holding on to Beharry and keeping a look-out in the yard outside so as to facilitate the crime.

When the robbers had departed with their booty, Beharry reported what had occurred to the police. He gave a statement in writing in which he described the man who was holding him as a short, dark negro man having a scar on the left side of the face. This information led to the arrest of the accused as the man who answered the description Beharry gave. The accused indeed has a scar on the left side of his face, but when the police came to stage an identification parade, they did so with the accused as the only person with a scar on the left side of his face. The question which arises is: Was that a fair way to hold a parade? It was this aspect that gave rise to the following ground of complaint:

> 'The identification parade was irregular in that–
> (a) it was not made pellucidly clear that the suspect need not be on parade;
> (b) having regard to the fact that the one identifying feature of the assailant was a scar on the left side of the face, it was unfair, improper and highly prejudicial to place only one person so described, *ie*, the accused.'

It is not difficult to see there is merit in the above complaint once it is established as a fact that, (i) Beharry had indeed described the accused to the police as scarred on the left side of his face, and (ii) the accused was the only person on parade with that facial characteristic.

As to (i) above, there can be no doubt the accused was so described in Beharry's statement to the police, although it was necessary to refer to it so as to remind

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him of this fact. It seems to me, judging from the vacillating testimony he gave in the witness-box, Beharry must have been a very evasive witness as he sought to deny that he had seen the scar on the face at the parade. He appeared to be intent on concealing the fact that it played an important part in his identification of the appellant. This is revealed from the following extract of his evidence on record:

> 'I gave the police one statement. I can't remember if I told the police about the scar. I now say I did not mention the scar in the statement." [Prosecutor shows statement to defence counsel.] "I told police the man was a short, dark negro man. I gave a statement to the police. The man who hit me with a revolver is a negro man. At the identification parade, seven men were on parade. I did not check on the others to see if they had scars. I don't know if the accused was the only man on parade with a scar. I can't remember telling the magistrate: 'Of the seven on parade only one had a scar. That was the accused.' I now say I did tell the magistrate so. I had no problem picking out the accused.'

Yet in spite of the above, the trial judge made absolutely no effort, as he is required to do, to put together in one part in his summing-up for the information of the jury, all relevant points and "to summarise for the benefit of the jury all facts which had emerged during the trial such as would cast or tend to cast doubts on whether identification of an accused had been established to their satisfaction." (See *Kirpaul Sookdeo et al v The State* ((1972), 19 WLR 407); also *Eric James v R* ((1970), 16 WIR 272).) All he did was to draw the jury's attention to what Beharry told them in relation to the scar, compared it with what he said in the magistrate's court about the scar, and told them that any inconsistency was a matter for their attention. In other respects he gave them no assistance, for he positively made no mention that there was anything wrong or could be wrong with a parade comprising of only one person with a scar; nor did he indicate what effect he thought that fact would have on its value or reliability in proving the identity of the accused.

The mounting of an identity parade is a necessary exercise in proof of the very next question that arises after proof of the *corpus delecti,*

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. Once a suspect has been identified by the complainant or a witness with the commission of the crime, then, for all practical purposes, the prosecution has gone a long way in establishing its case against the accused. In *R v Dwyer* ([1925] 2 KB 799) LORD HEWART CJ, said that identity parades should be conducted "with exemplary fairness, remembering always that the Crown has no interest in securing a conviction, but has an interest only in securing the conviction of the right person."

In conducting identity parades the police should always see to it that the composition of the parade should be such as not to point in some way or other, however slight, to any particular person. Care must always be taken to select participants who possess the same combination of characteristics and to select a parade comprising of those persons who are, as far as possible, similar to the suspect in age, race, height, general appearance and position in life. If it turns out that a complainant had personally known the suspect before the incident, and satisfactorily establishes that fact to the police, he cannot really be called a suspect at all, since he is known. In that case there will be no need to hold an identity parade. The problem, however, arises when the virtual complainant or witness has never seen the suspect before, and can only give the police a description of him. If, however, a general description is given of the suspect, there is generally no difficulty in staging a parade comprising of persons who bear resemblance to him. But sometimes a difficulty will appear to arise when the suspect is described as

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having a special characteristic like a mole on the cheek, a cleft chin or, as in the instant case, a scar on the side of the face. In such circumstances, are the police compelled to convene a parade of at least seven persons each of whom is possessed of that special characteristic? The answer would appear to be Yes if they are to conduct a parade which is fair to the accused. But what if no person with the special characteristic can be found? Must the parade be held regardless? If the person identifying has previously told the police that his attacker had a cleft chin and only one person is paraded with that peculiarity, all other things being equal, I think it stands to reason that an adverse result to the suspect will be a foregone conclusion. Such a parade can hardly be said to be fair in the ordinary acceptance of the word. But are the difficulties of the police really insurmountable in cases such as those mentioned above? It seems to me their difficulties, if so they may be called, are sometimes more apparent than real.

In *R v Jones* ((1961) *Times*, 16 March) the trial judge, in apparent apology for the failure of the police to hold an identity parade, told the jury that it had not been possible for one to be held because they could not be expected to find ten or twelve men who looked like the accused, who were about his height and build with black hair and thin lips and each with a scar on his face. But one wonders whether such a comment was really justified, and was a plausible excuse for failure on the part of the police to mount an identity parade. Admittedly, the scar on Jones's face was an unnatural feature and, in fact, the most striking of all his characteristics, and I think it is true to say that were it not for the scar there could have been no excuse for not holding a parade. But I would enquire: Was the difficulty in holding one really insurmountable in the circumstances? When one considers that the police could have resorted to the simple expedient of putting pieces of plaster on the faces of all those on parade, including Jones's, so as to eliminate the one and the only unnatural characteristic, namely, the scar, I am a little doubtful whether I can agree with the learned trial judge's reasons that it had not been possible for the police to conduct a parade because of the impossibility of finding people resembling Jones. It is all a question of the experience, common sense and fair-mindedness of the particular officer conducting the identity parade. For example, in one case the suspect had a club-foot. It would not have been possible to gather together seven or eight men with club-feet; at least not within a short space of time. So the officer conducting the parade had the presence of mind to order that all the participants' feet and ankles should be covered with rugs, and the difficulty was overcome in that way. At another parade, a one-eyed girl was the suspect. There, the officer bandaged her damaged eye, and similarly bandaged one eye of all the other women on parade. The difficulty was again only apparent and easily overcome. But supposing an identifier can recognise the suspect on parade only by the mole on his cheek, his cleft chin, or by the scar on his face, would it be proper to conceal that special feature in the manner suggested if it be obligatory that a parade be held? It seems to me the answer must be Yes, because, as we have already noted, the identification of a suspect who is paraded with a peculiarity not common to all participants, but known beforehand to an identifier, is unfair. If a parade must be held at all, it seems to me it is far better that one should be held in circumstances where identification though a remote possibility is fair, than in circumstances where it is both a certainty and unfair. Speaking for myself, I can well understand what Beharry meant by saying he "had no problem picking out the accused", for it was made all too easy for him to do so.

In the present case the police could, in like manner, with a bit of thought and imagination, have solved the problem if they were imbued with a spirit of fairness. But, as it turned out, they could not bring themselves to feel there was anything amiss in staging the parade with only one man with a scar on his face. The learned

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trial judge evidently thought so too, for he did not perceive this glaring impropriety, nor, as I have observed, did he even put together the evidence in his summing-up with a view to showing that the evasive nature of Beharry's evidence on the matter of the scar was deserving of and invited some critical comment by him. Here, I would respectfully concur with the observation of VISCOUNT DILHORNE in *Eric James v R* ((1970), 16 WIR 272), in a case concerning the identification of an accused to the effect that "if the summing-up had focused attention on the evidence, it is most improbable that the jury would have been satisfied that the appellant was the man and would have found him guilty" ((1970), 16 WIR at p 276).

Another matter of some importance is the failure of the officer conducting the parade to give Beharry, in the circumstances, an adequate caution in the nature of a "savings clause" so as to ensure he understood that it was not absolutely necessary for him to identify anyone, only if he was positive the person was on parade. This objection was part (a) of the ground of complaint with which we are dealing. In Crane's LAW OF UNLAWFUL POSSESSION (2nd edn) it is stated at note (10), p 156, as follows:

'The police officer in charge should add a 'savings clause' prior to what he tells the identifying witness, *ie*, he should indicate to him that he should identify only 'if the suspect is on parade' or words to that effect. This, it is thought, would allay the fears of the witness that the suspect is on the parade and that the witness has got to pick him out because he is on the parade.'

At p 14 of the record, it will be seen that Beharry was told by Detective Assistant Superintendent of Police Peters, just before identifying the accused by touching him, "that he should look at the parade and should he recognise any of the persons who visited his house on Monday he must touch the person... immediately went up to the accused and touched him." In my opinion that was not a sufficient intimation to Beharry, in the particular circumstances of this case, that he was expected to identify the suspect *only* if he considered he was on parade. A direction that "should he recognise any of the persons" must, it seems to me, mean any *one* of the persons on parade resembling his attacker.

With the parade composed as it was of seven short, dark negro men, only one of whom had a scar on the left side of his face, the balance of identification was heavily weighted against the accused. It is difficult to see who else could have been identified other than him of whom the police had received a description as aforesaid! There were not even two such persons on parade, a fact which, I think, made it all the more compelling that Beharry should understand that the suspected person was not necessarily on parade so that it was not obligatory on him to pick out someone from among those paraded before him. In my view, the intimation that should Beharry recognise any of the persons who visited his home was only a precautionary measure. I think the situation needed a savings clause in the nature of a caution of a much stronger kind, *viz*, that Beharry should identify the suspect *only if he is on the parade*. In my opinion, the fact that the accused was paraded as the only man with a scar on the left side of his face, coupled with the fact that there was no adequate savings clause, rendered his conviction void.

I agree that this appeal must be allowed and that the conviction and sentence be set aside.

R H LUCKHOO JA. Despite the safeguards taken over the years with a view to reducing to a minimum the tragedy of a miscarriage of justice due to mistaken identification, the situation is as grave today as it has ever been. In June 1972, the Criminal Law Revision Committee in England in its report on the subject of identification had this to say:

'We have been much concerned by the danger of wrong convictions on account of mistaken identification of the accused and as to whether to make any recommendations with a view to lessening this danger. We regard mistaken identification as by far the greatest cause of actual or possible wrong convictions.'

Various bodies and organisations have also expressed concern and have advocated a need for corroboration before a conviction can be sustained, or a requirement for a general warning of the dangers involved in identification evidence. These can certainly help but there will always remain that risk of error because no matter how honest a witness may be mistakes will continue to be made due to human limitations and imperfections.

This court has in two fairly recent cases (*The State v Lloyed Harris* ((1974), 22 WIR 41); and *The State v Mohamed Khalil* ((1974), Guyana Court of Appeal, Crim App No 69/1974, d/d 9th April 1975)) adverted to the dangers inherent in identification evidence by strangers to the accused, and the need for the trial judge to deal in his summing-up not only with such important factors as the credibility of a witness but also with such relevant and vital factors relating to the setting in which the identification took place, as, for example, the length of time the witness had for seeing the accused, the positions in which the respective parties were, the distance separating them, the nature, size, etc, of any obstructive elements that might tend to impair a proper vision, the quality of the light. It is also necessary to take into account the period of time that elapsed between the incident and the identification parade, or between the incident and when the accused was pointed out to the police, as the witness would have to carry in his mind's eye during that time a visual recollection of the person. (See *Arthurs v AG for Northern Ireland* ((1970), 55 Cr App Rep 161, 114 Sol Jo 824, HL).) Identification is an act of the mind, as LORD MOULTON has truly said in *DPP v Christie* ([1914] AC 545). Nothing appears more difficult than to carry in one's mind for any length of time the image of someone, seen for the first time and for only a few seconds. No matter how truthful or dependable a witness might be, if conditions were not favourable for a real and true identification, there would always be present that element of risk of a mistake.

In his book THE PROOF OF GUILT Professor Glanville Williams, when dealing with the fragility of memory and the law of evidence, referred to Professor Bartlett's words on the subject of remembering faces thus:

'Faces seem peculiarly liable to set up attitudes and consequent reactions which are largely coloured by feeling. They are very rarely, by the ordinary person, discriminated or analysed in much detail. We rely rather upon a general impression, obtained at the first glance, and issuing in immediate attitudes of like or dislike, of confidence or suspicion, of amusement or gravity.'

With a consciousness of these dangers and with an awareness of the number of convictions of innocent persons based on errors made at identification parades, albeit honestly, I approach a consideration of the substantial ground of this appeal, that is, that having regard to the circumstances in which the identification parade was held when the appellant was picked out, the learned trial judge ought to have cautioned the jury of the element of risk of error involved. Guilt or innocence in this case depended entirely on the acceptance or rejection of the evidence of the witness Richard Beharry.

The appellant was convicted in July 1975, at the Demerara Assizes of the offence of robbery under arms, contrary to s 222 (c) of the Criminal Law (Offences) Act, Cap 8: 01 [G], in that he, on 28 January 1974, being armed with an offensive weapon, robbed Edna Beharry of

one gold chain, twelve gold earrings and three pieces of gold wire. He was also convicted of having on the said day wounded Richard Beharry with intent to cause him grievous bodily harm. He was sentenced to five years' imprisonment on each count, the sentences to run concurrently.

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Richard Beharry outlined, in his evidence, the circumstances of the attack on him by the appellant and another man, and the substance of his evidence was that the incident took place just outside his front door at lot 339, Cummings Street, Georgetown, at about 9 pm on 28 January 1974. There was a 60-watt bulb burning at his front door about one or two yards from where he was held by the appellant. He described how the appellant held him while the other man hit him on his head with what appeared to be a revolver. He tried to free himself. He looked at the face of the appellant. He first saw a scar on the left side of the appellant's face during the scuffle to free himself. He kept shouting during the attack, and he was struck several times on his head by the other man for about one minute, during which time the appellant was holding him. He suffered injuries to his head. The appellant then loosed him and both men ran away.

Beharry made a report to Alberttown Police Station the next day, and on 14 February 1974, that is, seventeen days after the incident, he attended an identification parade at Alberttown Police Station, where, according to him, he had no difficulty in identifying the appellant, from seven persons on the parade, as one of his assailants. His evidence also disclosed that when he had made his report to the police he had given a description of the appellant: a short, dark negro man.

Mr Ganpatsingh has, with his customary candour, disclosed to this court that although Beharry's evidence at the trial was that he did not mention in his statement to the police about the scar on the face, he did in fact make mention of this in his statement.

Detective Assistant Superintendent of Police James Peters, who had the conduct of the identification parade, testified to the effect that all seven persons on the parade were of similar age, height, general appearance and station in life. He said also that Beharry went immediately up to the appellant and touched him. Counsel for the State has emphasised this fact in order to show that it was not the scar on the appellant's face which led to his identification by Beharry at the parade, as it was a small and hardly noticeable scar. Counsel for the appellant, however, has stressed that Beharry's evidence revealed that the only person on the parade with a scar on his face was the appellant, and in those circumstances it was not a fair and proper identification at the parade.

One cannot criticise the police in their conduct of the parade. They had done their best in the circumstances, and one fully appreciates their difficulty in being able to obtain persons to sit in on a parade, who are similar in every respect to the appellant. I do not think that Peters' evidence that "Beharry went immediately up to the accused and touched him" should be given the interpretation that there was no pause, no reflection, on the part of Beharry, but that he entered the room and immediately walked up to the appellant and touched him. I say so, because if it had happened in the manner contended for, it would have been most unlikely for Beharry to testify: "Of the seven men on parade only one had a scar. That was the accused." The fact that he was able to discern that only the appellant on the parade of seven had a scar, bearing in mind how insignificant was the scar, shows he must have looked carefully at the faces of the six others also before picking out the appellant. It might well be that he would have been able to pick him out from others with a similar scar. But it might equally well be that there might have been some doubt in his mind, which was only resolved when he noticed the scar on the appellant's face.

As LAWTON LJ, said in *R v Osborne* ([1973] 1 All ER 649) ([1973] 1 All ER 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 LORD DENNING MR, observed in *Dallison v Caffery* ([1964] 2 All ER 610) ([1964] 2 All ER at p 617): "So long as such measures are taken reasonably, they are an important adjunct to

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the administration of justice; by which I mean, of course, justice not only to the man himself but also to the community at large." We should also bear in mind that a witness may assume from the fact that a parade is being held that the guilty person is present, and if the person who attacked him has a scar he may be influenced by the fact that the only man on the parade with a scar is in all probability the guilty man, and so feel compelled to pick him out.

This is a case which depended entirely on identification. That was the sole, vital issue. From the circumstances set out above relating to the identification parade, it became necessary for the trial judge in his summing-up to the jury to try to off-set the disadvantage at which the appellant had been placed by being the only person on the parade with a scar on his face, a factor which was likely to militate against him as the victim had mentioned in his statement to the police before the parade the fact of his attacker having a scar. It was incumbent on the learned trial judge to draw to the attention of the jury these factors, and to instruct them that such factors must affect the reliability of the parade that was held and diminish the cogency of an identification made in those circumstances. No such warning was given. The dangers inherent in an identification which had taken place in those circumstances were not pointed out to the jury. For these reasons I am unable to say that the identification of the appellant was certain and reliable, and I hold that the summing-up failed to give adequate instruction to the jury and to alert them to the attendant risks.

I would, accordingly, allow the appeal and set aside the conviction and sentence.

Appeal allowed.