The State v Michael Greene And Walter Alleyne

COURT OF APPEAL OF GUYANA
HAYNES C, MASSIAH AND GEORGE JJA
14TH, 16TH, 17TH, 18TH, 24TH MAY 1979

Criminal evidence – Robbery with aggravation – Identification – Weakness in identification evidence not put together for jury in summing-up – Victim's failure to disclose either orally or in written statement the fact that she knew man whom she later identified – Necessity for trial judge to direct jury on weight to be given identification in such circumstances.

Criminal evidence – Witness for the prosecution – Statement to the police favourable to defence – Duty of prosecuting counsel to make statement available to defence – Failure to do so – Miscarriage of justice – Ground for allowing appeal.

The appellants were convicted by a jury of the offences of burglary, robbery with aggravation and rape. The prosecution alleged that in the early hours of the morning of 14th April 1977 three men entered the bedroom of the complainant, Clara Sankar where she had retired the previous night. There, they aroused her from slumber and covered her mouth while some pieces of jewellery were removed from her person. Other pieces and cash were taken from a bag in the room. All three men then raped her. On the men's departure, Sankar went and spoke to Kemrajie Persaud her next-door neighbour, and then to the police station where she made a report followed later by a written statement. Kemrajie, however, did not say that Sankar said she knew the man whom she later identified as the appellant Alleyne, nor did Sankar give her any description of him, although Sankar did reveal to her that she knew one of the men as 'Green Boy'. Again, in her statement in writing to the police Sankar mentioned that if she should happen to see the other men she would be able to identify them, because she saw there faces by the aid of a lighted wall-lamp. Sankar, however, told the jury that as soon as she saw Alleyne in her house she recognised him as a man known to her and knew where he was working; although she did not know his name. The appellant Greene was arrested on the evening of the day of the incident and Alleyne early on the morning of 16th April. Greene was identified by Sankar and her son Jairam Jaipaul, whereas Alleyne was identified by Sankar alone as two of the three men in question, but there was no other evidence to support these identifications. Each appellant raised an alibi as his defence and each called one witness in support of it but they were convicted on all three counts of the indictment. On appeal to the Guyana Court of Appeal, counsel on their behalf argued at some length that the summing-up was insufficient and unsatisfactory on the question of identification.

Held – (i) (per Haynes C) Sankar's failure to disclose in her complaint to her neighbour the fact that she knew the man she later identified as the appellant Alleyne was a notable weakness in her identification to the extent of the weight the jury gave it. The trial judge should have dealt with this matter but failed to do so.

(ii) The written statement given by Sankar to the police, if it did not impliedly assert that the man she later identified as the appellant Alleyne was unknown to her then it, at least, tended strongly to suggest so and the jury should have known about it. It would have been reasonable for the jury tro imply Sankar did not know the appellant in the absence of an acceptable explanation. If she were unable to give one,

her credibility might have been reduced and the jury might not have been convinced that Alleyne was one of the robbers.

(iii) It was the duty of prosecuting counsel to show Sankar's police statement to the defence directly, or to the trial judge in the first place, who, in turn, would have had to make it available to the defence.

(iv) The trial was unfair because of the flaws in the summing-up and the irregularity of withholding the information from the jury. A miscarriage of justice might have occurred and the conviction of Alleyne cannot stand.

(v) (per KS Massiah JA) The trial judge approached the case as if the only consideration was Sankar's credibility without paying due regard to the notable element of possible mistake on her part and Jaipaul's and the consequent requirement for caution and the need to be sure that no mistake was made.

(vi) The evidence concerning the appellant Green's identification was so cogent and compelling that a reasonable jury properly directed would inevitably have convicted him.

(vii) There was no miscarriage of justice in the respects in which the trial judge's summation was flawed in relation to the appellant Michael Greene and his appeal must be dismissed.

Guidelines for satisfactory identification in *R v Tumbull* ([1976] 3 All ER 549, [1977] QB 224, [1976] WLR 445, 63 CrAppRep 132, CA) considered and applied.

Cases referred to
R v Tumbull and Others [1976] 3 All ER 549, [1977] QB 224, [1976] WLR 445, 63 CrAppRep 132, CA

Arthurs v A-G for Northern Ireland (1971) 55 CrAppRep 161, HL, (1970) 114 SolJo 824
R v Long (1973) 57 CrAppRep 871, 117 SolJo 728
R v Janaway and Croft Times 27th August 1976
R v Leeman Times, 8th October 1976
R v Evans Times, 8th December 1976
R v Gibson Times, 20th December 1976
R v Pollard Times, 13th January 1977
R v Samail Belaid Times, 21st March 1977
R v Keanne (1977) 65 CrAppRep 247
R v Hewett Times, 16th June 1977
R v Oakwell [1978] 1 WLR 33, [1978] 1 All ER 1223
R v Hunjan Times, 12th June 1978
R v Raphael Times, 12th October 1978
Ferguson v R [1979] 1 WLR 94
Eric James v R (1970) 16 WIR 272
R v Campbell [1956] 2 All ER 272, [1956] 2 QB 432, [1956] 3 WLR 219, 120 JP 359, 100 SolJo 454, 40 CrAppRep 95, 73 LQR 161, CCA
State v Alfred Kellman (1975) WIR 438
R v Summers [1952] 1 All ER 1059, [1952] WN 185, [1952] 1 TLR 164, 116 JP 240, 96 SolJo 281, 36 CrAppRep 14, 116 JPJ 388, 68 LQR 314
Kirpaul Sookdeo and Others v State (1972) 19 WIR 407
State v Lloyd Harris (1974) 22 WIR 41
State v Mohamed Khalil (1975) 23 WIR 50
State v Ken Barrow (1976) 22 WIR 267
State v Vibert Hodge (1976) 22 WIR 303
State v Kowshall Persaud (1974) Appeal No 84 of 1974, unreported

Appeals

Appeals from convictions and sentences for the offences of burglary, robbery with aggravation and rape at the Berbice Assizes.

396

WG Edwards Assistant Director of Public Prosecutions (Ag) for the State
B De Santos for the first appellant
Stanley Moore for the second appellant

HAYNES C. These two appellants Michael Greene and Walter Alleyne, after a trial before a judge and a jury, were convicted at the Berbice Assizes on 21st March 1978 of burglary, robbery with aggravation and rape. Each was sentenced to seven years' imprisonment and ten lashes. Each appealed to this court against his conviction. Several grounds of appeal were argued. But at the end of the hearing, we reserved decision only on the question of identification which was the critical issue at the trial.

It was a short one. The victim Clara Sankar and her fourteen year-old son Jairam Jaipaul identified Greene, who was the first accused, and Sankar alone identified Alleyne who was the second accused, as two of the three men involved in the offences. But there was no other evidence in the case to support these identifications. The defence was an alibi. Each appellant made an unsworn statement from the dock and called a witness in support of it. After a deliberation of only 22 minutes, the jury reached a unanimous verdict of guilt on every count of the three-counts indictment.

The case for the prosecution was uncomplicated. Sankar told the jury that on Wednesday, 13th April 1977 at her home at Lot 10 Church Street, New Amsterdam, she and her three children (Jaipaul Jairam, Petula, six years old and Cecelina, four) retired to their bedroom around 7.30 pm, she on one bed, and they on another, two feet off. Around 2.30 to 3.00 am on 14th April, she was aroused by the feel of a hand covering her mouth. Thereafter, for a half to three quarters of an hour (her estimate of the time) she had a frightening and humiliating experience. Some pieces of jewellery were taken from her person, others and cash from a bag behind the bedroom door, and everyone raped her. During all or most of this time, there was a knife at her throat, held there by one or the other of the three men. Immediately after they left, Sankar went over to her next door neighbour Kemrajie Persaud called Sheila and had a conversation with her. Then she went to the Central Police Station and made an oral report to Detective Constable Granger around 3.20 am. Later the same day between 9.00 and 10.00 am she gave a written statement to him. The appellant Greene was arrested about 7.50 pm on the said 14th April and Alleyne around 7 am on the 16th. I shall return to the facts later.

On appeal before us, counsel for each appellant argued at some length, that the summing-up on the question of identification was insufficient and unsatisfactory, mainly because it did not follow the directions laid down in *R v Tumbull and Others* ([1976] 3 All ER 549, [1977] QB 224, [1976] WLR 445, 63 CrAppRep 132, CA), now usually referred to as the *Tumbull* Rules, and because, that apart, they were not fair enough and in some respects misleading. Because in the majority of jury cases here identification is the critical issue and this is often so in summary trials also, it could be of possible assistance to judges (and magistrates also), to put together and summarise how the law on the question of directions on identification stands today, before considering its application to the evidence in this appeal.

At criminal trials the common sense and the common experience of men and women on a jury must guide them when they have to decide what measure of credence and dependence they should accord to evidence that they have heard. All the rules which have been evolved are in accord with the central principle of our criminal law that a person should only be convicted of a crime if those in whose hands the decision rests are sure that guilt has been established. It has been recognised, however, that the risk or danger of a wrong decision being reached is greater in certain circumstances than in others. It is where those circumstances exist, that rules aimed at reducing to a minimum as far as humanly possible, the likelihood of error resulting in a miscarriage of justice, have been introduced into the practice of the courts from time to time. The problems of identification generally and in special circumstances fall within this category.

In those cases where identification is in issue, a witness will say, either, 'I knew the accused (before the day or night in question) and his name'; or 'I knew him by sight

397

only'; or 'I had never seen him before'. As regards the first two positions, the problem mostly would be one of 'recognition' rather than 'identification' strictly as in the third class. But the term 'identification' is used generally to describe all three situations. And in every case the question would be whether the witness made a real and true identification.

Turnbull's case ([1976] 3 All ER 549, [1977] QB 224, [1976] WLR 445, 63 CrAppRep 132, CA) was decided in July 1976. Prior to this, the accepted judicial approach to the problems of identification was fairly reflected in two judgments. One was *Arthurs v A-G for Northern Ireland* ((1971) 55 CrAppRep 161, HL, (1970) 114 SolJo 824). This was a judgment of the House of Lords. The detailed facts do not matter. It suffices to mention that the appellant was convicted on evidence of identification of a single police constable who claimed he knew him before by sight only. In his speech, with which the rest of the House entirely agreed, Lord Morris had this to say (1971) 55 CrAppRep 161 at 169:

> 'Where conviction will involve the acceptance of the challenged evidence of one or more witnesses in regard to identification, a summing-up would be deficient if it did not give suitable guidance in regard to identification. The circumstances of individual cases will, however, greatly differ. Thus there may be cases in which a witness can say that at a certain place and time he saw and clearly recognised the accused person. If the accused person was someone who was well-known to him or at least was well-known to him by sight and if the conditions at the relevant time were such that there was nothing to impede or to prevent recognition or to make recognition difficult, then a jury would mainly have to consider whether the witness was both truthful and dependable. It was for the jury to decide not only whether the police constable was a truthful witness, but also whether the conditions which existed at the time when the police constable claimed to have seen and recognised the accused were such that a mistake *might* have been made.'

And later ibid at 169, 170:

> 'I refer to cases where a witness has been someone whom he does not in any way know and has had over a period of time to carry in his mind's eye a recollection of the person and then is at some later date asked (either at an identification parade or at some place) to say whether he can recognise the person whom he previously saw. In such a situation it is manifest that dangers may result from human fallibility. I would leave for future consideration the question whether there is need to lay down any rule for the guidance of courts in such cases. A summing-up that fails to give adequate instruction to the jury, or which in the circumstances and in relation to the facts of a particular case fails carefully to alert them to the risks of convicting an innocent person, might in any event to be held to be defective...'

The other case was *R v Long* ((1973) 57 CrAppRep 871, 117 SolJo 728). There the court dealt to some extent with the question which the House of Lords left for future consideration, as to the need to lay down any rules of guidance for the courts in cases where the issue at the trial is whether one or more witnesses, who did not know the accused before the incident out of which the trial arose, has or have made correct identification. Again the detailed facts do not matter save that it was that type of case. There were weaknesses in the evidence of all three identifying witnesses. These were fully probed in cross-examination and discussed in the summing-up. On appeal, counsel asked the court to adjudge that in all such cases where guilt depends upon visual identification evidence the judge should warn the jury of the dangers of such evidence and alert them to the need for caution.

In the judgment of the court dismissing the appeal Lawton LJ said (1973) 57 CrAppRep 871 at 877-878:

> 'In our judgment, the law does not require a judge in this kind of case to give a specific warning about the dangers of convicting on visual identification; still less

398

> does it require him to use any particular form of words. In these cases, as in all, a judge should sum up in a manner which will make clear to the jury what the issues are and what is the evidence relevant to these issues. Above all he must be fair; and in cases in which guilt turns upon visual identification by one or more witnesses it is likely that the summing-up would not be fair if it failed to point out the circumstances in which such identification was made and the weaknesses in it. Reference to the circumstances will usually require the judge to deal with such important matters as the length of time the witness had for seeing who was doing what is alleged, the position he was in, his distance from the accused and the quality of the light. If the witness had made mistakes on the identification parade or at any other relevant time, fairness probably requires that the jury should be reminded of them. Above all the jury must be left in no doubt that before convicting they must be sure that the visual identification is correct. This can be done in many ways.'

So no such general rule was laid down then.

But in *Turnbull's* case ([1976] 3 All ER 549, [1977] QB 224, [1976] WLR 445, 63 CrAppRep 132, CA) a full court (of five judges) essayed to lay down rules of guidance for the judges. In their judgment, Widgery LCJ explained the reason why (1976) 63 CrAppRep 132 at 137:

> 'Each of these appeals raises problems relating to evidence of visual identification in criminal cases. Such evidence can bring about miscarriages of justice and has done so in a few cases in recent years. The number of such cases, although small compared with the number in which evidence of visual identification is known to be satisfactory, necessitates steps being taken by the courts, including this court, to reduce that number as far as is possible. In our judgement the danger of miscarriages of justice occurring can be much reduced if trial judges sum up to juries in the way indicated in this judgment.'

The Lord Chief Justice emphasised *first* the requirement that the judge should warn the jury of a special need for caution before convicting the accused in reliance on the identification evidence of one witness, and even where more than one witness identifies him; and he should go on to explain the reason why such caution is needed. He should also refer to the possibility that a witness might be positive and sure of his identification and still be honestly mistaken. This special need for caution must be directed in fit cases even when the identification was made after a long period of observation or in satisfactory conditions by a relative or a neighbour or a close friend or a workmate or the like. For mistakes in identification have been known to occur even in such cases. *Secondly*, the jury must be told to examine closely the conditions under which the witnesses or witnesses saw the person identified as the accused at the trial.

Thirdly, he must discuss as such any specific weaknesses in the identification evidence, meaning any circumstances which might tend to weaken its value. *Fourthly*, even when a witness is purporting to recognise someone whom he knows, the jury should be reminded that in human experience mistakes in recognition of relatives and friends have been made.

Fifthly, if the quality of the identifying evidence is poor, as for example, when it depends solely on a fleeting glance or even on a longer observation made under difficult conditions, the judge should withdraw the case from the jury and direct an acquittal, unless there is other evidence which goes to support the correctness of the identification. This other evidence may be corroboration in the sense lawyers use that word. But it need not be, if its effect can be to make the jury feel sure of the correctness of the identification evidence in spite of its weakness. For example, a witness got only a fleeting look at a man's face as he snatched a purse and ran off. Later at a parade he identifies the accused as the thief. If this is all the proof, it would be poor quality identification. It might require the judge to withdraw the case from the jury. But if, in addition, there is evidence that the snatcher was seen to run into a

house nearby and it turns out that the accused lived there, this could be sufficient to justify safely leaving all the evidence to the jury to assess its value.

And so *sixthly*, if there is any evidence in the case capable of supporting the identification, the judge should identify it to the jury for them to decide if it does make them feel sure no mistake was made. Similarly, if there is any evidence or circumstance which the jury might think was supporting, when it could not be, the judge should tell them so. For example, he should warn them, where the accused does not give evidence, that this by itself cannot support the identification, and also that if they felt that he told lies about where he was at the material time, this does not by itself prove that he was where the identifying witness says he was. If they believe his alibi, then clearly it would be a positive case of mistaken identity. But if they disbelieve it, then their duty is to examine closely the prosecution's evidence of identification to see whether a mistake *might (not 'must')* have been made. If so, the jury should be told, the prosecution's case would not have been proved beyond reasonable doubt.

No specific local instances of proved miscarriages through mistaken identification have been drawn to our attention. But it is impossible to believe that our juries have always been right in convicting purely on identification evidence. So, although these rules of guidance are based on the English experience, I feel (and my brothers also) we should adopt them, and indeed we believe we have already done so in previous judgments.

Plainly, these directions are aimed at guiding the jury to a just verdict in these cases. What underlies it all, is the judicial recognition of the possibilities of mistakes in identification, and of the tendency of juries to under-estimate the dangers or brush them aside altogether and to attribute too great probative value to the fact that the witness is positive and honest. Judges too often sum up in terms which contribute to this, or, at least, do not help to avert it. A direction that they may convict if they 'believe' an identifying witness or think him 'a truthful person', might be faultless if the accused is well-known to him and the conditions for recognition are so good that a mistake is a mere remote possibility and the real issue becomes one of credibility. But if it is a case of the identification of a stranger, particularly upon a fleeting glance of his face only, such a direction could result in the conviction of an innocent man and a miscarriage of justice. For then what the jury have to decide would be whether the circumstances of the identification are such that the witness was in a position to make an identification on which it would be safe for them to rely, and not merely whether *he* is 'honest' or 'truthful' or 'sure'?

So a judge should take care to warn the jury strongly about these matters in such cases. What is required is not a bare or perfunctory and passing reference while reciting the evidence, or at the beginning or ending of the summing-up like, for example, 'mistakes are sometimes made' or 'an honest witness might be mistaken', and nothing more. When viewed as a whole, the summing-up must ensure that the minds of the jurors are alerted to the practical possibilities of mistakes (if any) on the evidence of identification and to the aspects of it to be carefully considered in this respect.

In *Turnbull* ([1976] 3 All ER 549, [1977] QB 224, [1976] WLR 445, 63 CrAppRep 132, CA) the court heard together the separate appeals of Turnbull and Cameto (convicted of conspiracy to burgle), of Whitby (convicted of robbery), and of Roberts (convicted of unlawful wounding).

The critical issue in the appeals of Turnbull, Whitby and Roberts was their identification. In every case there were notable weaknesses in the evidence of it. Turnbull was identified by a detective constable who said he knew him before. He had a brief fleeting view of the side of Turnbull's face at night, albeit in a well lit street, from a moving car. But there was other evidence which went to support the identification. So his appeal was dismissed. Whitby was identified by three witnesses. Each saw him in daylight for a brief period and did not know him before. There was no satisfactory supporting evidence. His appeal was allowed. Roberts was identified at night by two persons who saw him for a few moments, by flashing lights in a dance hall. They did not know him before and

400

there was no supporting proof at all. So his appeal was allowed also. So all these cases were 'fleeting glimpse' ones.

Turnbull ([1976] 3 All ER 549, [1977] QB 224, [1976] WLR 445, 63 CrAppRep 132, CA) was followed shortly by several cases in which counsel, for one reason or another, felt they could bring those cases within the principles of that authority. In every one the directions were pre-Turnbull ones, and, on appeal from conviction, the quality of the evidence of identification was challenged and had to be considered. Quite a few are unreported, and only brief notes of them are now available. But even so, they could be helpful to trial judges, and I myself have found them so in the preparation of this judgment (see Criminal Law Review, September 1977, pp 509-514). These are some of the later decisions which emphasise and illustrate how *Turnbull* ([1976] 3 All ER 549, [1977] QB 224, [1976] WLR 445, 63 CrAppRep 132, CA) has been applied and distinguished.

Janaway and Croft (Times 27th August 1976) 27th August 1976 (unreported): daytime assault on two victims by six youths emerging from between a railway station and an adjoining hotel giving the impression of men looking for trouble; two of them spoke to the victims who were attacked, then all the assailants ran away; both identified defendants; held (Orr LJ, Park and Kilner Brown JJ), the identifying evidence was strong and rightly so treated and 'what is poor identification may turn ... not only on the objective surrounding circumstances but on the subjective element of the impression made by the identifying witness and here it seems to us there were good grounds for thinking that he was a good witness'. *Peter Elias Leeman* (Times, 8th October 1976), 8th October 1976 (unreported): charge of conspiracy to rob; defendant identified by three police officers who had followed him at comparatively close range for approximately three minutes during which, from time to time, he would turn around and threaten them with a pistol from fairly close up; held (Lord Widgery LCJ, Forbes and Slynn JJ) the appellant was a man of really unusual appearance and 'it was not a single glimpse identification but a reasonably good period and situation in which to look carefully at his description'. Both appeals were dismissed.

Frederick William Evans (Times, 8th December 1976), 8th December 1976 (unreported): an affray at night in a public house: defendant was identified by a customer who had him under observation for several minutes as he stood on a stool, head and shoulders above the crowd, throwing glasses at persons fighting and shouting aggressively; held (Lord Widgery LCJ, Talbot and Slynn JJ), it was not a fleeting glace one, and 'if the jury were satisfied that the witness was a reliable man and his opinion was to be accepted they were perfectly entitled to follow his identification based as it was on several minutes of observation'. *Raymond Charles Gibson* (Times, 20th December 1976), 20th December 1976 (unreported): burglary with intent: the identifier, a police officer, had a 'split second' look at the offender; there was no supporting evidence; held (Lawton, Waller LJJ, Wien J), appeal allowed, as there was no adequate warning about the dangers of identification and for non-direction as to the possibility of honest mistake by the policeman instead of deliberate lying. *Terrence Pollard* (Times, 13th January 1977), 13th January 1977 (unreported): assault causing bodily harm; the main identifying witness did not know defendant personally, and only by sight; there was a notable weakness in the evidence, in that he must have erred either as to man or date appeal allowed. (Stephenson, Waller LJJ and Slynn J); and *Samail Belaid* (Times, 21st March 1977), 21st March 1977: an attempted theft by an offender under police observation following earlier suspicious movements: appeal dismissed; the court (Lord Widgery LCJ, Eveleigh and Wien JJ) said *Turnbull* ([1976] 3 All ER 549, [1977] QB 224, [1976] WLR 445, 63 CrAppRep 132, CA) was a case dealing with the type of identification where, on account of the passage of time or the lack of ability to carry out a proper observation which could afford reliable recognition, there are impediments in the way of the reliability of the identification, and that 'the facts which *Turnbull* ([1976] 3 All ER 549, [1977] QB 224, [1976] WLR 445, 63 CrAppRep 132, CA) seeks to cover should carefully be borne in mind by anyone who seeks to invoke its principles ... this present case is most definitely not one such.'

R v Keane ((1977) 65 CrAppRep 247) was a case where the coloured victim of a racial night assault identified the appellant as one of a group of five white youths who attacked him. He claimed he recognised the appellant as someone he knew well by sight on the streets where they lived. There was no supporting evidence. And there were several

401

weaknesses in the identification. Counsel for the appellant relied on *Turnbull* ([1976] 3 All ER 549, [1977] QB 224, [1976] WLR 445, 63 CrAppRep 132, CA). The appeal was allowed on the ground, inter alia, that there was no proper warning about identification evidence and exposure of the weaknesses of it in the case, although it possessed a degree of strength. About *Turnbull* ([1976] 3 All ER 549, [1977] QB 224, [1976] WLR 445, 63 CrAppRep 132, CA) Scarman LJ (as he then was) for the court said (1977) 65 CrAppRep 247 at 248:

> 'It would be wrong to interpret or apply *Turnbull* ([1976] 3 All ER 549, [1977] QB 224, [1976] WLR 445, 63 CrAppRep 132, CA) inflexibly. It imposes no rigid pattern, establishes no catechism, which a judge in his summing-up must answer if a verdict of guilt is to stand. But it does formulate a basic principle and sound practice. The principle is the special need for caution when the issue turns on evidence of visual identification: the practice has to be a careful summing-up, which not only contains a warning but also exposes to the jury the weaknesses and dangers of identification evidence both in general and in the circumstances of the particular case.'

In *R v Hewett* (Times, 16th June 1977), 16th June 1977 (unreported, but see [1977] Crim LR 510) the Lord Chief Justice spoke again and explained that '*Turnbull* was the product of considerable public anxiety about an identification case where the identifier had only a brief moment

in which to identify his subject'. He followed this up in *R v Oakwell* ([1978] 1 WLR 33, [1978] 1 All ER 1223), where he himself had this to say [1978] 1 WLR 33 at 37: '*Turnbull* is intended primarily to deal with the ghastly risk run in cases of fleeting encounters.' However, in two more recent cases, *R v Hunjan* (Times, 12th June 1978) 12th June 1978 and *R v Raphael* (Times, 12th October 1978) 12th October 1978 (both unreported) *Turnbull* was applied in cases which, even though the transcripts are unavailable, could hardly have been cases of 'fleeting glimpses' or 'fleeting encounters'.

In *Hunjan* (Times, 12th June 1978) (see [1979] Crim LR 110 and Halsbury's Review, June 1978, para 297, and The Times, 12th June 1978), the defendant was convicted of conspiracy to possess and supply morphine on the identification evidence of two police officers who had posed as potential buyers and claimed to have met the defendant in a public house together with his co-defendants, who were also convicted, and of two others waiting outside the public house in which the negotiations for sale were going on, one of whom said he had actually walked over to within 5 yards of the appellant. On appeal, the trial judge's failure to direct the jury in accordance with the guidelines in *Turnbull* ([1976] 3 All ER 549, [1977] QB 224, [1976] WLR 445, 63 CrAppRep 132, CA) was held to be a misdirection and one of the grounds for allowing the appeal.

In *R v Raphael* (Times, 12th October 1978) (see the Law Society's Gazette, 25th October 1978) the appellant's car broke down, and he left it in a street near the house where he lived with his mother. The next day, police, to whom the appellant was unknown, kept observation on it from about 100 yards away. They saw three coloured youths standing by it. Another car, which had been taken without authority, was driven up by a friend of his. The three youths entered it and were driven away. The appellant was tried and convicted on a count for allowing himself to be carried in a car taken without authority. All the officers testified that he was one of the coloured men in the car taken without authority. His defence was an alibi. The jury were given no general or particular warning about the need for caution in regard to identification evidence. On appeal the court (Lord Widgery CJ, Eveleigh LJ and Smith J) held that, as the appellant was unknown to the officers, a direction in accordance with *Turnbull* ([1976] 3 All ER 549, [1977] QB 224, [1976] WLR 445, 63 CrAppRep 132, CA) should have been given. His appeal was allowed.

In the light of these authorities, it would appear safe to say this. The typical *Turnbull* ([1976] 3 All ER 549, [1977] QB 224, [1976] WLR 445, 63 CrAppRep 132, CA) case is one where the identification is based upon a 'fleeting glimpse' of or a 'fleeting encounter' with a person unknown to the identifier. But it's guidelines have not been restricted to such cases as we have seen. It has been applied where the identifier had more than a fleeting glance at the face of the person later identified as the accused, but then unknown to him. It is clear that it is intended to be applied in fit cases even where the identifier claims prior knowledge of the person he identified later, but where the conditions for identification were poor or difficult. He might have had only a brief glimpse, or a longer observation from a distance, or in very poor lighting conditions or the like. It may well be that the general approach should be to

apply the *Turnbull* ([1976] 3 All ER 549, [1977] QB 224, [1976] WLR 445, 63 CrAppRep 132, CA) rules wherever the conditions of identification are difficult or poor or otherwise such that the possibility of mistake is real, whether the person identified was known to the identifier or not. For then the special need for caution is obvious. The summing-up must be careful. The jury must be warned strongly about the possibilities of mistake and all the weaknesses of the identification must be stressed.

But Scarman LJ (as he then was) said in *R v Keane* ((1977) 65 CrAppRep 247), Turnbull 'imposes no rigid pattern, establishes no catechism, which a judge in his summing-up must answer if a verdict of guilty is to stand.' Every summing-up in a case involving the question of visual identification cannot follow the identical pattern. Every such case has its own features and the summing-up must relate to the problems of it. In it the judge must stress the appropriate considerations. As Lord Morris said in *Arthurs v A-G of Northern Ireland* ((1971) 55 CrAppRep 161, HL, (1970) 114 Solic 824) (1971) 55 CrAppRep 161 at 170), 'He will be guided by his duty as well as by his desire to ensure, as far as he can ensure, that no innocent man is convicted.' In some cases this could oblige him to follow the *Turnbull* ([1976] 3 All ER 549, [1977] QB 224, [1976] WLR 445, 63 CrAppRep 132, CA) guidelines fully; in others, may be only in some respects; and in others again, may be not at all. And even in cases where the guidelines apply, it would not follow always that, if they are not followed, a conviction would be set aside. For in his judgment the Lord Chief Justice said only that 'it would be *likely* to be set aside', not that it will be. If the court is convinced that, had the jury been directed correctly they would inevitably have come to the same conclusion, the conviction would stand.

It is necessary now to examine the particular circumstances of the identification of the appellant in each appeal in relation to the grounds of it and the law and the authorities just discussed. In his judgment, Massiah JA will deal with the appeal of Michael Greene. I have had the advantage of reading it beforehand. I entirely agree with the conclusion he has reached. I agree also with the reasons given therefor. In mine, I propose from this point to deal only with the appeal of Walter Alleyne, although for that purpose, I may have to refer to evidence affecting both appellants.

The evidence which the jury must have accepted was that this appellant was known to Clara Sankar for about four to five months before. She had seen him selling ice for one Salim outside of the New Amsterdam market, where she herself had a stall for a year previously. She did not know his name but she had last seen him a week before that night. She recognised him at once by the aid of a lit wall lamp which the appellant Michael Greene had in his hand, as soon as she opened her eyes. Then, both of them were standing just by her bed. His face was uncovered. Both she recognised then. He went 'on top' of her and had intercourse with her for a few minutes. After this, he actually sat near to her with a knife at her throat while the other two men raped her one after the other. In addition, he spoke to her. He asked her if she knew them. In fear, she said 'no'. He asked her also if she would make any noise, and she said 'no', again from fear. The appellant was in the bedroom near her for a substantial length of time. She averaged this at half an hour to three-quarters of an hour. During all this time she was watching at his face, so she said. But she was also watching the faces of the other two men. So she said also. And the appellant Michael Greene, for most of this time, was searching other parts of the bedroom for money and jewellery, with the lamp in his hand, except that he placed it on the other bed when he went on her and raped her.

It cannot be disputed that the summing-up did not at all follow the *Tumbull* ([1976] 3 All ER 549, [1977] QB 224, [1976] WLR 445, 63 CrAppRep 132, CA) directions. Counsel for the appellant submitted it should have done so and would like us to apply the statement in that case (1976) 63 CrAppRep 132 at 139 that 'A failure to follow these guidelines is likely to result in a conviction being quashed.' On the other side, counsel for the State contended that this was not 'a *Tumbull* case' at all. He relied much on *Ferguson v R* ([1979] 1 WLR 94). In that case, an armed robber stopped a lorry one night on a public road in the island of Grenada, and demanded money from its passengers. One of them, Louise Donald, identified him later as the accused. He advanced towards the vehicle where she was. He pointed a gun at her. He told her to remain where she was and to give him 'all the money made today'. She handed him

403

the bag, saying, 'Here it is.' He replied, 'This is not all, it has more.' She then said, 'Take the money and leave us alone.' At this moment her husband came running up towards her. He was shot at a range of about six feet and killed. At the trial of the appellant for murder, she identified him as a man she had known for some five or six years. She admitted she had told no one that night that she had recognised the killer, but she did not recall being asked by anyone whether she had done so.

In his summing-up the trial judge did not give *Tumbull* ([1976] 3 All ER 549, [1977] QB 224, [1976] WLR 445, 63 CrAppRep 132, CA) directions. 'Although the trial judge did not direct the jury in the terms approved in *R v Tumbull* ([1976] 3 All ER 549, [1977] QB 224, [1976] WLR 445, 63 CrAppRep 132, CA),' Lord Scarman said 'the summing-up was as favourable to the defendants as it could be.' He had dealt fully and fairly with all the possible weaknesses in the identification; and 'there was nothing in the way in which the judge dealt with the issue of identity, to suggest that the jury were not fully alerted to the difficulties in this part of the Crown's case.' 'The question,' His Lordship said, 'is as to the inherent strength of Louise Donald's identification. She must have been accepted as *truthful*. But was she *reliable*, or was there the possibility that she was mistaken?' After referring to her evidence, he concluded 'Their Lordships are in no doubt that the jury reached a true verdict.'

Without doubt, the summing-up in this case, unlike that in *Ferguson v R* ([1979] 1 WLR 94) did not alert the minds of the jury fully or at all to the dangers of visual identification and to any possible difficulties in the way of the prosecution in this part of their case. The two passing directions, namely 'if you feel it is a case of mistaken identity, you accept the alibi ... and acquit them' and later, 'if you are not satisfied; you feel that it may be a case of mistaken identity ... acquit', in the context of the whole charge certainly did not do so. The reason for this is the way the case was put to the jury. It was put as wholly a case of identification based on prior knowledge, that is, a simple question of recognition of a known person. Counsel for the prosecution told them no question of a 'guess or mistake' was involved. The trial judge himself told them, 'you only convict them (this appellant and his co-accused) if you are satisfied so that you feel sure that Clara knew those men who went into her house that night...'

The possibility of a mistake by the prosecution's witness in her identification of the accused on her own evidence, in the circumstances of it, was never really left to the jury for them to bear in mind. The issue was put as one solely of credibility rather than of identification. The question of mistake was related only to the acceptance of the alibi or to doubts raised by it. Both prosecutor and trial judge appeared to reason that, as the witness claimed to recognise the man she later identified as the appellant, as one she knew by sight for four to five months before, the crucial issue was whether she was lying or not as to such knowledge; so that if the jury believed her truthful, the identification was established to justify a conviction. *R v Keane* ((1977) 65 CrAppRep 247) shows this is not so. For, even in such a case, a cautious jury still had to bear in mind that it was not a personal acquaintance and that an honest mistake could be made even in such a case by a truthful witness, in identifying the appellant as the criminal. In this case, this was not put at all. The jury should have been reminded to do so.

If the witness knew the appellant as she said she did, if she saw his face for as long as she said she did, and had conversation with him, the possibility of a mistake might be as difficult to contemplate as the Privy Council found it to be in *Ferguson v R* ([1979] 1 WLR 94). But, in that case, all the possible weaknesses of identification were fully exposed to the jury as such. This was not so here. In his judgment Massiah JA has dealt briefly with possible weaknesses in Clara Sankar's evidence of identification of the appellant Michael Greene as submitted by counsel on his behalf. I agree with what he has said on this submission and adopt his criticisms of the summing-up on those matters as far as they are relevant to the case of this appellant. I would add Sankar's failure to disclose in her complaint to her neighbour just after the criminals left, the fact that she knew the man who she later identified as the appellant, if she did know him. Such an omission could be a notable weakness in her identification to the extent of the weight the jury gave it. The trial judge reminded them of the evidence briefly, and said 'that, you will have to consider, I shall refer to it later on.' But he did not do so.

404

His Honour should have directed the jury on these matters as potential weaknesses in the evidence of identification of this appellant. It was for the jury to give them the weight (if any) they thought fit, and, having done so, to decide whether the quality of the identification was affected. They may have considered notwithstanding that it had inherent strength of a degree sufficient to convince them that they could rely on it for a conviction. On the other hand they may have thought it did not, in the absence of any supporting evidence. These were flaws in the summing-up which make it necessary to consider whether any miscarriage of justice may have resulted. But in the determination of this question there is another matter to be considered. It related possibly both to the credibility of Clara Sankar and to the reliability of her identification of this appellant.

According to her evidence, when after the three men left her home, she went over to her neighbour's (Sheila's) house and talked to her. Sheila was called for the prosecution. She said, 'I asked her (Sankar) if she knew the persons. She said she knew one of the men as Green Boy. She did not say whether she knew any of the other two men.' Counsel for this appellant submitted that the failure to do so was an admission that she did not know him before at all. Counsel for the State disputed this inference. There is much force in the former's contention particularly having regard to the specific question asked her by her neighbour and friend. Why did she not say 'I know one of them

as Green Boy and another one selling ice with Salim outside the market; but I don't know his name' or words to the same effect. Sankar was not re-called and asked whether she did give the answer Sheila said she gave, and, if so, to explain why she did not mention that she recognised another man. In his summing-up, the trial judge referred to this evidence briefly. He told the jury 'that, you will have to consider, but I shall refer to it later on.' However, he did not.

But counsel for the State made available to this court the written statement Sankar gave to the police later that morning. It was of some length and detail. It was taken by the detective constable to whom the first oral report was made and who apparently investigated it. At the close of her account of the incident, it reads, 'I recognised one of the men to be Green Boy who lives in the said Church Street, New Amsterdam whom I know for about nine months. If I see the other two men I be able to identify them because at the time of the incident they had carried my wall lamp (lighted) in the bedroom and I had a good look at their faces.' At the trial, this statement was not made available to the defence at all. It should have been. If it did not impliedly assert that the man she later identified as this appellant (Alleyne) was unknown to her then, it, at least, tended strongly to suggest so. And the jury should have known about this.

It is not inconceivable that Sankar may have been able at the trial to give reasonably acceptable denials or explanations of Sheila's evidence about the strange omission in her (Sankar's) answer to Sheila's very pointed question. But if, added to this, there is a similar omission in her written statement to the police whose duty it was to investigate the crime, and who would need all the assistance she could give them as to the identity of the criminals to mention her recognition of this appellant and her knowledge as to where he might be found, this aspect becomes grave. If all this had come out at the trial, in the absence of reasonable explanations by Sankar, the jury would have been entitled to discredit her evidence that she recognised any of the men in her home that night then as this appellant and to conclude that at least two (not one only) of the men were then unknown to her.

If so, then the jury would have had to examine even more closely the conditions which existed that night for identifying an unknown person reliably. How long did she actually have this appellant's face clearly under observation? How much illumination did the lamp provide during this time, and particularly while it was being used away from close to the bed by another man whose activities she was also watching? To what extent (if any) might her observation have been impeded by emotional stress and deep fear? The trial judge would have been required to direct the jury's attention to this approach and to give directions he did not give. For in such a case, where, either in the prosecution's case or in the defence, there is evidence which if believed, disproves the

alleged prior knowledge or can reasonably raise a doubt on it, the trial judge should give alternative directions to guide the jury.

Counsel for the appellant sought to get assistance from the case of *Eric James v R* ((1970) 16 WIR 272), also a judgment of the Privy Council on appeal from the dismissal by the Court of Appeal of Jamaica of James' appeal against his conviction for rape. There the victim's evidence was that her attacker, whom she (a Miss Hall) identified as the appellant (a stranger to her before) later the very same day, was in her bedroom from 10.30 pm on the night in question to 5.10 the next morning. But she said she only got 'a slight glance at his face' during the night when he turned on the light briefly and turned it off. Although, when he left, it had begun to get light, she never said she saw his face better then. The Privy Council held there was fault in the summing-up with regard to identification. The trial judge had failed to stress the need for care on questions of identity and to put the evidence in relation to that together in one part of his summing-up for the consideration of the jury. What this pre-Turnbull judge set did was to emphasise the special need for caution in cases where the offender was observed in circumstances which might make a correct identification difficult. And if the relevant contents of the written statement to the police had been disclosed to the jury and rigidly gone into, it could have been more applicable to his case.

It was the duty of counsel for the prosecution to show this statement to the defence directly, or to the trial judge in the first place, who, in turn, would have had to make it available to the defence. As I said earlier, if it did not literally say that the man she later identified to be the appellant (Alleyne) was then unknown to her, it tended strongly to suggest so. The jury should have known she had signed such a statement as true and correct; she should have been given an opportunity to give a denial or an explanation, for them to accept or reject. Unless this is done in such cases the jury may get a wrong picture of a case. They may give credibility to a witness who does not deserve it. They may believe evidence not entitled to credence. And a miscarriage of justice might ensue.

Here, it was alleged that this man, with two others, looted and raped a woman in her home at night. She told the jury that, as soon as she saw him in her house she recognised him as a man she knew and knew where he was working, although she did not know his name. Yet in her written statement to the police hours later when she must have been asked if she knew or recognised any of the men, she gave an answer which clearly and strongly suggests that she did not then recognise any of the men as this appellant. I myself read it to imply this and it would have been reasonable for the jury to do so in the absence of an acceptable explanation. She might have given one. But if she was unable to do so, her credibility might have been reduced and the jury might not have been convinced that this appellant was one of the criminals. Perhaps he is. Perhaps he is not. But because of the flaws in the summing-up and of the irregularity of withholding this information from the jury, this trial was not fair, and a miscarriage might have occurred. So his conviction cannot stand. Errors of this kind can subject the State to the expense and the accused to the expense and anxiety of a new trial or cause a guilty man to go free. They oblige an appellate tribunal to steer between the Scylla of releasing to the world unpunished an adjudged guilty man and the Charybdis of upholding the conviction of a possibly innocent one. In such a case the court must lean to the more just course, since it is better to release the guilty than to run the risk of convicting the innocent.

I would allow the appeal of the appellant Walter Alleyne, set aside his conviction and enter a judgment of acquittal. I agree also with the order of Massiah JA in the appeal of Michael Greene.

MASSIAH JA. The appellants were indicted with and convicted of the offences of burglary, robbery with aggravation and rape at the Berbice Assizes in March 1978. They were each sentenced to imprisonment for a term of seven years in respect of each offence, the sentences to run

concurrently. In addition each appellant was ordered to receive a whipping of ten strokes in respect of the offence of robbery with aggravation.

406

They have appealed against their convictions. This judgment, however, relates only to the appeal of the first named appellant Michael Green, to whom I shall refer hereafter as 'the appellant'.

The facts of this case have been fully set out in the learned Chancellor's judgment which I have had the advantage of reading in draft. I would wish, with respect, to take the benefit of the Chancellor's summary, and would not myself essay a recapitulation of the facts.

Mr De Santos who appeared for the appellant advanced a number of interesting contentions on his behalf, but his propositions in relation to the issue of identification, which was the only crucial one, provoked the most serious consideration, and I propose to deal only with that question.

The essence of the appellant's complaint was that the evidence disclosed certain circumstances which tended to dilute the quality of Clara Sankar's testimony in relation to the identification of the appellant, and for this reason the trial judge in his summation ought to have followed the well known guidelines set out in *R v Turnbull and Others* ([1976] 3 All ER 549, [1977] QB 224, [1976] WLR 445, 63 CrAppRep 132, CA). The trial judge omitted to do so. What was the evidence on which reliance was placed in justification of those comments? Attention was drawn, first of all, to the evidence that the three men were present in Sankar's bedroom at the same time, so that she could not have given each one of them her concentrated and undivided attention for the entire duration of their visit. Since her attention was divided, it was argued, her opportunity for identifying the appellant would have been less, and her reliability would correspondingly be diminished.

Attention was also directed to the evidence that all three men had sexual intercourse with Sankar. It was contended that during intercourse she would have been concerned only with the man then assaulting her, and could not have concentrated at that time on the other men. This point bears some kinship to the first contention, inasmuch as they both underline the central theme that the circumstances suggest that Sankar's attention was divided. It was not as if there was only one man in the room so that she could have directed all her attention to him alone.

Furthermore, it was urged that one of the men held a knife at Sankar's throat, and that this must have been so frightening and upsetting an experience as to constitute almost an impediment to proper identification.

Two other matters were commented on by counsel for the appellant, but they related to the evidence of Jairam Jaipaul, Clara Sankar's thirteen year-old son. Jaipaul also claimed to have recognised the appellant as one of the men who were in the room on the night in question. He testified that he had known the appellant before that night. Of his evidence it was said, first of all, that the trial judge ought to have warned the jury of the need to examine it with care, because it was the evidence of a young child. There can be no doubt that it is important to give this warning. (See *R v Campbell* ([1956] 2 All ER 272, [1956] 2 QB 432, [1956] 3 WLR 219, 120 JP 359, 100 SolJo 454, 40 CrAppRep 95, 73 LQR 161, CCA) and *State v Alfred Kellman* ((1975) WIR 438).) Counsel contended also that the jury should have been reminded that Jaipaul had only a fleeting glance of the men, having fled in understandable fear when he noticed that one of the men was holding a knife at his mother's throat. Thereafter Jaipaul kept his face averted from the men until they left. It was stressed that since he appeared to have had only a brief moment in which to observe the men, his evidence in relation to identification could have had little weight, and the trial judge ought to have warned the jury to be cautious about accepting it.

It was the combination of the foregoing circumstances both in relation to Clara Sankar's testimony and that of Jairam Jaipaul that prompted the submission that the trial judge ought to have been aware of the risk of unreliability inherent in the evidence on this issue, and should, for that reason, have followed the guidelines in *Turnbull* ([1976] 3 All ER 549, [1977] QB 224, [1976] WLR 445, 63 CrAppRep 132, CA). It was counsel's complaint that the trial judge, far from directing the jury's attention to any of those circumstances, dealt only with, and appeared to emphasise, such circumstances as seemed to lend strength to the prosecution's case.

The directions which the trial judge gave the jury on the question of identification are what I would call traditional; these were an eschewal of the content of *Turnbull*

407

([1976] 3 All ER 549, [1977] QB 224, [1976] WLR 445, 63 CrAppRep 132, CA). They were, without a doubt, general directions. In essence the jury were enjoined that they must be sure that the appellant was one of the men that entered Sankar's house and raped her before they could convict him. This, however, was a mere affirmation of the central principle of the criminal law that a person cannot be convicted unless there is proof of guilt beyond reasonable doubt, or to employ the mode of expression suggested in *R v Summers* ([1952] 1 All ER 1059, [1952] WN 185, [1952] 1 TLR 1354, 116 JP 249, 96 SolJo 281, 36 CrAppRep 14, 116 JPJ 388, 68 LQR 314), unless the jury 'feel sure' that the prosecution has established the guilt of the accused.

What caused disquiet not only in Guyana but also in courts in other Commonwealth jurisdictions, and finally led to the guidelines suggested by the Court of Appeal in *Turnbull* ([1976] 3 All ER 549, [1977] QB 224, [1976] WLR 445, 63 CrAppRep 132, CA), was the fact that despite, or perhaps because of, directions such as were given to the jury in the instant matter, miscarriages of justice had occurred because witnesses had been mistaken about the identity of those against whom they had testified and because juries had not been alerted to circumstances which might tend to debilitate the cogency of such witnesses' testimony. And what was most lamentable and alarming was that these miscarriages had happened even in some cases where witnesses professed to have known the accused for some time before the occurrence of the events of which they testified. The need to obviate this injustice, as far as possible, was considered to be urgently necessary, and it is in this spirit that the guidelines in *Turnbull* ([1976] 3 All ER 549, [1977] QB 224, [1976] WLR 445, 63 CrAppRep 132, CA) were fashioned.

The trial judge, however, in the instant matter, approached the case as if the only consideration was Sankar's credibility without paying due regard to the notable element of possible mistake on the part of Sankar and Jaipaul, and the consequent requirement for caution and the need

to be sure that no mistake was made. To my mind, this was the dimension underscored in cases like *Kirpaul Sookdeo and Others v State* ((1972) 19 WIR 407), *State v Lloyd Harris* ((1974) 22 WIR 41), *State v Mohamed Khalil* ((1975) 23 WIR 50), *State v Ken Barrow* ((1976) 22 WIR 267), *State v Vibert Hodge* ((1976) 22 WIR 306), *Arthurs v A-G for Northern Ireland* ((1971) 55 CrAppRep 161, HL, (1970) 114 SolJo 824), *Eric James v R* ((1970) 16 WIR 272), and other cases, and finally elaborated and crystallized in *Turnbull* ([1976] 3 All ER 549, [1977] QB 224, [1976] WLR 445, 63 CrAppRep 132, CA).

In my judgment, such directions as the trial judge gave, were wholly inadequate. It is true that he twice referred to the question of mistaken identity, once when he was giving directions on the burden of proof, and also when he was dealing with the defence of *alibi* raised by the appellant. But this was done in a perfunctory manner, the statement being merely made that if the jury felt that it was a case of mistaken identity or if there was reasonable doubt about it, they must acquit the appellant.

In *R v Oakwell* ([1978] 1 WLR 33, [1978] 1 All ER 1223) the Court of Appeal in England said [1978] 1 All ER 1223 at 1227 that '*R v Turnbull* ([1976] 3 All ER 549, [1977] QB 224, [1976] WLR 445, 63 CrAppRep 132, CA) is intended *primarily* to deal with the ghastly risk run in cases of fleeting encounters.' Counsel for the State referred to this statement, with which he agreed, and urged that since it was clear that Clara Sankar did not have a mere fleeting glance at the men in the room there was no need for the directions in *Turnbull* ([1976] 3 All ER 549, [1977] QB 224, [1976] WLR 445, 63 CrAppRep 132, CA). I do not myself apprehend that the guidelines in *Turnbull* ([1976] 3 All ER 549, [1977] QB 224, [1976] WLR 445, 63 CrAppRep 132, CA), where a variety of situations and circumstances was considered, were meant to be followed only in cases of fleeting encounters. Nor did the Court of Appeal in *Oakwell* ([1978] 1 WLR 33, [1978] 1 All ER 1223) say so. They merely expressed the view that *Turnbull* ([1976] 3 All ER 549, [1977] QB 224, [1976] WLR 445, 63 CrAppRep 132, CA) was 'intended *primarily*' for cases of fleeting encounters. I stress the use of the word 'primarily' which bears no suggestion of exclusiveness but emphasises importance and suggests pre-eminence. It certainly does not limit the range of a conception. Its use in *Oakwell* ([1978] 1 WLR 33, [1978] 1 All ER 1223), in my view, merely indicates that in the court's opinion *Turnbull* ([1976] 3 All ER 549, [1977] QB 224, [1976] WLR 445, 63 CrAppRep 132, CA) was of the first importance in cases of fleeting encounters which obviously provoke the greatest anxiety. But the use of the word 'primarily' implies, in my opinion, that there may be other cases which although not on the same level as that of the fleeting glance, nevertheless require the employment of the guidelines laid down in *Turnbull* ([1976] 3 All ER 549, [1977] QB 224, [1976] WLR 445, 63 CrAppRep 132, CA), the necessity for their use being dictated, of course, by the circumstances and issues which each case presents. In my view, *R v Oakwell* ([1978] 1 WLR 33, [1978] 1 All ER 1223), which was not a case of a fleeting encounter, and where the quality of the identification evidence appeared to be particularly good, must be understood in its own special setting, and cannot be regarded as 'authority for the proposition that *Turnbull* ([1976] 3 All ER 549, [1977] QB 224, [1976] WLR 445, 63 CrAppRep 132, CA) is relevant only in cases of fleeting encounters. To do so

would be to imply that the word 'primarily' is synonymous with the word 'only'. This would clearly be wrong, as would be the assumption that by the use of the word 'primarily' the Court of Appeal intended the connotation of exclusiveness which the word 'only' suggests.

Nor must it be forgotten that Lord Widgery CJ delivered the respective judgments of the court in both *Turnbull* ([1976] 3 All ER 549, [1977] QB 224, [1976] WLR 445, 63 CrAppRep 132, CA) and *Oakwell* ([1978] 1 WLR 33, [1978] 1 All ER 1223), and it is reasonable to assume that if it were intended in *Oakwell* ([1978] 1 WLR 33, [1978] 1 All ER 1223) to water down or qualify the views expressed in *Turnbull* ([1976] 3 All ER 549, [1977] QB 224, [1976] WLR 445, 63 CrAppRep 132, CA) it would have been done in clear and distinctly formulated terms.

There is no doubt that the instant case cannot be classified as that of a fleeting encounter, at least not so far as the evidence of Clara Sankar is concerned. In my view, however, the trial judge ought to have impressed on the jury the fact that mistakes are sometimes made even when persons know each other well, and the warning about the special need for caution which the court in *Turnbull* ([1976] 3 All ER 549, [1977] QB 224, [1976] WLR 445, 63 CrAppRep 132, CA) appeared to think should be given in all cases should definitely have been given in this case (see [1976] 3 All ER 549 at 552). The matters which Mr De Santos considered to be impediments to concentrated observation are of some moment, and the jury's attention ought to have been drawn to them. I agree with the observations of Lord Morris of Borth-y-Gest in *Arthurs v A-G for Northern Ireland*. He said (1971) 55 CrAppRep 161 at 169:

> 'If the accused person was someone who was well known to him by sight and if the conditions at the relevant time were such that *there was nothing to impede or to prevent recognition or to make recognition difficult*, then a jury would mainly have to consider whether the witness was both truthful and dependable ... it was for the jury to decide not only whether the police constable was a truthful witness, but also whether *the conditions which existed at the time when the police constable claimed to have seen and recognised the accused were such that a mistake might have been made*.' (Emphasis mine).

And [1976] 3 All ER 549 at 554 of *Turnbull* ([1976] 3 All ER 549, [1977] QB 224, [1976] WLR 445, 63 CrAppRep 132, CA) it is specifically stated that the trial judge should clearly remind the jury of any specific weaknesses which had appeared on the identification evidence'. There was a clear omission to do this in the matter under instant consideration.

I pause here to say that in my understanding it is not in every case where identification is an issue that the trial judge would be required to follow in full the guidelines offered in *Turnbull* ([1976] 3 All ER 549, [1977] QB 224, [1976] WLR 445, 63 CrAppRep 132, CA), though, in my view, in every case where the issue arises, the jury should be advised about the need for caution. But the nature of the evidence adduced in each case would determine the approach the trial judge should take, and indicate to him the range and degree of help and guidance he should afford the jury. For example, evidence of identification where the witness had only a fleeting glance of the wrongdoer would require fuller directions than would be called for where the witness professes to have known the accused for some time before the incident in question. And there is, of course, no special incantation of words which the trial judge is required to use, once the jury is clearly alerted to the besetting

dangers and weaknesses which the case presents, for each summation must, of necessity, be tailored to the particular circumstances of the case.

But the crucial question arises whether the inadequacy of directions in relation to the question of identification is fatal to the conviction, as it was in *R v Keane* ((1977) 65 CrAppRep 247). This would appear to be so unless this court is satisfied that there has been no substantial miscarriage of justice. It is for the State to satisfy this court that that is so. To be satisfied, this court must be able to say positively that if there were correct directions a reasonable jury would inevitably have arrived at the same conclusion of guilt. (See *State v Kowshall Persaud* ((1974) Appeal No 84 of 1974 (unreported)) (Criminal Appeal No 84 of 1974).

In my judgment, the evidence of identification was so cogent and compelling that a reasonable jury properly directed would inevitably have convicted the appellant. In the first place it appears to be almost incontestable that Clara Sankar knew the appellant for some time before the night in question. She said that they were immediate

neighbours, and that she had seen him on the very day of the incident. The appellant did not himself deny this; nor did he challenge it in any way. Indeed, the evidence of the defence itself is that the appellant, like Clara Sankar, lived in Church Street, New Amsterdam, and that he slept there on the night in question. And it is not without significance that in cross-examining the witness Kemrajie Sukhul Persaud, the appellant addressed her by the name of Sheila, a name by which she is also called. Sheila, for her part, said that the appellant, like herself, lived in Church Street, and that she knew him as 'Green Boy' the sobriquet by which Clara Sankar claimed to have known him also. Jairam Jaipaul testified to the same effect.

Very little, if anything, was piled against this strong accumulation of positive evidence, and a reasonable jury could not have failed to appreciate that those persons were all neighbours and knew one another well. Once the jury accepted Sankar as a witness of truth in relation to her claim that she had known the appellant before, their only problem would have been to decide (a) whether there was sufficient illumination to facilitate recognition and (b) if there was, whether there was sufficient time and opportunity generally to enable Sankar to recognise the man. In relation to the element of illumination, there was clear evidence that one of the men was holding a lighted lamp which Sankar had left on her dining-table before retiring to bed. It is true that there was no evidence as to the degree of illumination it afforded, but it was bright enough to enable one of the men to search for and find Sankar's jewellery and money. Further, Sankar said the light from the lamp when resting on the dining-table was reflecting into the bedroom. She described it as a kerosene wall lamp, an article well known to all. Clearly she kept it lighted during the night for security reasons. On the whole, a reasonable jury may well have thought that the lighting in the room was reasonably good.

But given fairly good lighting, was there sufficient time and opportunity for proper recognition? In my opinion, a reasonable jury would consider that there was. At the outset I would say that if someone is well known to another it would not require much time to recognise him. Sankar said that the appellant was her neighbour. She testified that he was in the room for about a half or three-quarters of an hour. That estimate should be reduced to about twenty minutes because of the known propensity for exaggerating estimates of time. But even so, a reasonable jury, in my view, would have thought it long enough to enable her to have recognised anyone she knew well, given the postulate of reasonably good lighting. Moreover, Sankar testified that the appellant took her jingles from her hand, and, putting each of four of her fingers to his mouth, pulled off her rings with his teeth. Although this exercise must no doubt have been executed rather quickly, it nevertheless brought the parties near to each other, and probably almost face to face, affording a good opportunity for recognition. The parties would also have been near to each other during intercourse.

Further, Sankar saw the men as he searched for her valuables, the lamp then being in his hand, and when the incident was almost over, the main events having passed. Sankar claimed to have seen the man tidying himself with one of her garments. All of this shows clearly that this was no mere fleeting encounter. Sankar's evidence approximating more to a tableau of events in which the appellant, according to her, played a strikingly important role.

On retirement, a reasonable jury would have cogitated on all these matters, some of which were particularly arresting. They would not have been difficult matters to apprehend. Their significance would have been obvious; in any case, a reasonable jury could not have failed to appreciate the importance of any of these matters if they were properly directed thereon.

I have no doubt myself that if all of this had been done, a reasonable jury, for the reasons I have attempted to explain, would inevitably have reached the same conclusion of guilt. In the result, there was no miscarriage of justice despite the respects in which the trial judge's summation was flawed. I would dismiss this appeal. I agree also with the reasoning and conclusions of the learned Chancellor and with the

order he proposes in relation to the appeal of the second named appellant, Walter Alleyne.

GEORGE JA. I entirely agree with both judgments and with the reasons therefor.

Appeal of first appellant dismissed. Appeal of second appellant allowed and judgment of acquittal entered.