COURT OF APPEAL FOR BRITISH COLUMBIA ORAL REASONS FOR JUDGMENT: Before: THE HONOURABLE MR. JUSTICE GOLDIE THE HONOURABLE MR. JUSTICE FINCH THE HONOURABLE MADAM JUSTICE NEWBURY

Date and Place: December 15, 1998 Vancouver, B.C.

BETWEEN: REGINA RESPONDENT AND: BRADLEY LANCE JORGENSEN APPELLANT

G. Botting (not appearing) for the Appellant
R.A. Mulligan appearing for the Respondent

[1] NEWBURY, J.A.: Mr. Jorgensen was convicted of the aggravated assault of Ms. Darlene Baker by a judge sitting with a jury in September 1997.

[2] The primary issue in the trial was the identity of Ms. Baker's attacker or attackers. She had been picked up by a limousine containing a driver and three or four passengers, all male, during the early morning hours of June 19, 1996. Ms. Baker knew two of the males þ the appellant Mr. Jorgensen and Mr. Blu Jones, his co-accused at trial. Ms. Baker said there was also an "Indian gentleman" whom she did not know and whom she had not remembered until after the preliminary, and whose features she could not remember at all. In response to questioning, she was adamant that there had not been a fourth man, a Caucasian named "Jim", in the limousine as claimed by Mr. Jones in his testimony at trial.

[3] The assault took place when the limousine stopped to enable Mr. Jones to urinate in the bushes near a hotel in James Bay. According to Ms. Baker, she accompanied Mr. Jones so that they could carry on a conversation outside the car because they were having difficulty hearing each other about the loud music that was playing. After a few moments' conversation, she turned to return to the limousine through a walkway with hedges on both sides. When she was about ten feet away from the car, she testified that she saw a "white or a light blur of an object" moving towards her and then felt a blow to the back. She said the blur which she saw with her peripheral vision came "from in front of me, I guess, off to the side. More just kiddy corner to me, I guess". She said Mr. Jones had been just behind her on her left side when she felt the blow to the back of her head. She felt a blow to her jaw which she "believed" was delivered by the appellant. She next remembered receiving three or four punches and several kicks to the face which she said had been administered by both Jones and Jorgensen. There was no doubt that the injuries she suffered were serious and that this was a vicious attack. Fortunately, after the limousine had left, she dragged herself to the street and was able to attract attention and receive medical aid.

[4] In cross-examination, Ms. Baker said she assumed Mr. Jones had struck her from the left rear because "he was the only one behind me". She did not see him strike the blow. On further questioning, she also said she had "no idea who the blur was" and that she had assumed that it was Mr. Jorgensen because the blur she saw had been white and Mr. Jorgensen had been wearing a white or light shirt. Her testimony was as follows:

Q You never phrased it as an assumption to the authorities, did you?
A No, maybe I didn't.
Q You made it clear to them that you thought it was Lance and Blu who committed the offence; is that right?
A Well, yes, I assumed, yes, it was.
Q It was an assumption that both of them participated in this?
A No, I know Mr. Jones participated, I know where the blow came from, I just know.
Q Because he was behind you; you've already said that?
A Yes, he was behind me, but he's the only one -- where else would the strike come from?
Q Well, he was the only one, to your knowledge?
A He was the only one in the whole area, the whole walkway.
Q To your knowledge?
A No, there is no way anybody could have jumped even the hedge. I mean, it's impossible.
Q The hedge?
A It's too high and it was too full.
Q The hedging that you've described --
A Yes.
Q -- it was only on one side of the walkway?
A Oh.
Q Is that not true?

A I don't know. I believed it was on both sides. I thought it was outlining both of them, but you could be right there. I haven't returned to the scene of the incident.

[5] Mr. Jones testified that he had asked to talk to Ms. Baker outside because he had wanted to "get closure to a problem that I know she might know", an apparent reference to his suspicion that she might have stolen some of his belongings a few years earlier. He testified that he accepted her denial and was still urinating when he heard someone yell "Bye, see you" and looked around to the sidewalk where the limousine was parked and saw the Indian person who had been in the limousine walking along the sidewalk. Mr. Jones waved back "bye". Then, he testified:

A I had finished and then I was, you know, shaking in a certain way, and then realized I wasn't quite finished, had a bit more to go, so I proceeded to urinate a bit more, and then I heard a noise behind me, turn my head to see the Native guy run at her, and he clothes-lined her like this, because at that point when I was shaking off, she turned to go towards the limo like that, and then I proceeded to urinate a bit more, so she had turned a bit as -- and when she turned, I don't know, because at that point I started to look down again, and I heard noise. I turned my head, you know, because I could hear something coming towards me, and I saw the guy running. He must have been going pretty fast because by the time I turned he was already caught up to us and he had clothes-lined her like this, and --
Q Your arms, for the record --
A This was the arm he used.
Q His right arm?
A Yeah, I guess so.
Q And it was extended outwards?
A He clothes-lined her like that.

[6] He said that he froze while the beating proceeded. He kept screaming at the "native guy" to ask what he was doing or what was going on. Then the native man left. Jones heard someone call him from the limousine, and he returned to the vehicle where he saw Mr. Jorgensen, the Caucasian "Jim", and the native man whom he identified as "Tony". They all got back into the car, which was ordered to drive downtown.

[7] Having consumed quite a bit of beer, Mr. Jones was feeling sick and panicking. He ordered the driver to find a place to stop and he, "Jim", and the limousine driver got out of the vehicle while Mr. Jones continued to panic. The limousine driver told him that the police wanted to know the whereabouts of the vehicle and he told the driver to return to the gas station so he could buy some cigarettes and meet the police there. At about Fifth and King Streets, Mr. Jones got out of the car again to throw up. He testified that Tony got out the other door and left, and then the car went back along Quadra to the gas station, where the police arrived shortly thereafter.

[8] The driver was not able to identify who exactly had remained inside the limousine at the James Bay Hotel but said that the person "could have been Mr. Jorgensen". He could not be sure exactly how many people had been in the car whether there were three or four men þ nor how many had re-entered the limousine after a stop of approximately five minutes at James Bay. Nor could he remember specifically stopping the car between the James Bay location and the gas station, nor whether anyone had left the vehicle before it stopped at the station. When he did stop, however, at the gas station there were three people plus himself in the limousine.

[9] It is obvious that even if Ms. Baker's testimony was accepted by the jury, her evidence identifying Mr. Jorgensen as one of the attackers was very weak. In her charge to the jury, the trial judge said this about identity:

> In considering whether you are satisfied beyond a reasonable doubt of the identity of Mr. Jorgensen as the second attacker, you should keep in mind that all of the evidence going to the identity of Mr. Jorgensen as the second attacker is circumstantial. Ms. Baker's identification of Mr. Jorgensen as the second attacker is based on her observation that he was wearing a white or light coloured shirt that evening, that he had been in the limousine, and that the second attacker was seen by her as a light or white blur.

[10] Mr. Botting on behalf of the appellant submits that the trial judge failed to adequately instruct the jury as to the frailty of identification evidence and submits that the judge ought to have gone further and instructed the jury that it would be unsafe to convict upon Ms. Baker's evidence alone. In *R. v. Edwardson* (1993) 79 C.C.C. (3d) 508, this court stated that there is no absolute rule that a special instruction must be given whenever proof of the Crown's case depends on eye-witness identification. But at the same time, the Court noted there could be no doubt that a special instruction is necessary in some cases and that failure to give it in such cases will require a new

trial. The Court adopted the rule found in the English case of *R. v. Turnbull* (1976) 63 Cr. App. R. 132, which Wood J.A. formulated as follows:

> . . . that whenever the case against an accused depends wholly or substantially on the correctness of one or more eyewitness identifications of the accused which the defence allege to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on such identifications. The form that caution should take will depend on the circumstances of each case.

[11] Mr. Botting also submits that where, as here, the complainant's identification of Mr. Jorgensen as one of her attackers was uncorroborated, a specific warning to the jury becomes all the more necessary. He notes the following passage from the judgment of the Supreme Court of Canada in *Vetrovec v. the Queen* (1982) 67 C.C.C. (2d) 1, at 17:

> I would only like to add one or two observations concerning the proper practice to be followed in the trial court where as a matter common sense something in the nature of confirmatory evidence should be found before the finder of fact relies upon the evidence of a witness whose testimony occupies the central position in the purported demonstration of guilt and yet may be suspect by reason of the witness being an accomplice or complainant or of disreputable character. . . . What may be appropriate . . . in some circumstances, is a clear and sharp warning to attract the attention of the juror to the risks of adopting, without more, the evidence of the witness. There is no magic in the word corroboration, or indeed in any other comparable expression such as confirmation and support. The idea implied in these words may, however, in an appropriate case be effectively and efficiently transmitted to the mind of the trier of fact. . . . All this takes one back to the beginning and that is the search for the impossible: a rule which embodies and codifies common sense in the realm of the process of determining guilt or innocence of an accused on the basis of a record which includes evidence from potentially unreliable sources such as an accomplice.

[12] Mr. Mulligan for the Crown does not oppose the allowing of this appeal and, indeed, says that if the trial judge had been correct in dismissing Mr. Jorgensen's motion for a directed verdict, there should have been a stronger warning about the danger of relying on the complainant.

[13] In these circumstances, it seems to me clear that a much stronger warning concerning the frailty of identification evidence and the danger of relying solely on the complainant's very weak testimony should have been given to the jury. I would not order an acquittal, because I am not persuaded it can be said no reasonable jury could have convicted the appellant. I would, however, allow the appeal and direct a new trial.

[14] GOLDIE, J.A.: I agree.

[15] FINCH, J.A.: I agree.

[16] GOLDIE, J.A.: The appeal is allowed, and a new trial is directed.

"The Honourable Madam Justice Newbury"