IN THE COURT OF APPEAL.
S.C.CR. A. 17/72.

BEFORE: The Hon. Mr. Justice Fox, J.A.
The Hon. Mr. Justice Smith, J.A.
The Hon. Mr. Justice Robinson, J.A.

DENNIS GAYLE v. R.

Eugene Fitz-Ritson for the appellant.
Velma Hylton for the Crown.

March 27, 1973.

SMITH, J.A.:

The appellant, Dennis Gayle, was convicted on the 28th of January, 1972, in the Home Circuit Court on two counts of an indictment which charged him in each count with robbery with aggravation. He was sentenced to a term of imprisonment with hard labour for five years on each count' and in addition he was ordered to receive six lashes on Count 1 and three lashes on Count 2. The sentences were ordered to run concurrently.

The appellant was given leave by the single judge to appeal against his conviction on the first count, and he has applied to the court for leave to appeal against his conviction on Count 2. Mr. Fitz-Ritson, who appears for the appellant, has not supported the application for leave to appeal. There is no merit in the application, which is accordingly refused.

The ground argued in relation to the appeal on Count 1 concerns the question of the identification of the appellant. It was submitted that the trial judge never dealt adequately or at all with the manner in which the prisoner was identified in respect of Count 1. In Arthurs v. the Attorney General for Northern Ireland (1971) 55 Cr. App. R. 161 at p. 168, it was said by Lord Morris of Borth-y-Gest, who delivered the leading judgment in the House of Lords, with which all the other learned Lords concurred, that: "It is manifest that in cases where the vital issue is whether the identification of the accused person is certain and reliable the judge must direct

the jury with great care. However careful is his general direction as to the onus of proof the judge will feel it necessary to deal specifically with all the matters relating to identification." This is an oft cited passage in judgments delivered in this court.

In this case the vital issue was whether or not the appellant had been properly identified in respect of the charge in Count 1. The witnesses as to identification on this count were a shopkeeper, Mr. Jonathan Swaby, and his assistant, neither of whom knew the appellant before the time when the offence is alleged to have been committed. The next occasion when each said that he saw the appellant was at the Central Police Station in Kingston when the appellant was pointed out by them while being escorted by one of the investigating officers through the station compound. These two witnesses gave different accounts as to how they came to be at the police station at that time, as to how they reached the police station and the purpose for which they were there. There was evidence elicited in cross-examination that the officer who was escorting the appellant through the police station compound had been in constant communication with Mr. Swaby between the time when the offence was committed and five months later when the appellant was identified at the police station. Mr. Swaby denied this. He claimed that he was at the police station to attend an identification parade in relation to other cases and that his presence there was unrelated to the incident in relation to which the appellant was subsequently charged. The shop assistant, Neville Lewis, on the other hand, admitted that he was instructed by a police officer from the same police station as the officer escorting the appellant to attend at the Central Police Station for the purpose of identifying the two men who he had said that he saw rob Mr. Swaby. Lewis said that he told this to Mr. Swaby at the police station at a time prior to the appellant being brought there. This Mr. Swaby denied.

Miss Hylton frankly conceded that the circumstances under which the appellant was identified at the police station seemed a little suspect. The

question which the jury would have had to ask themselves was whether it was mere coincidence that these two witnesses were at the police station when the appellant was brought there and were at a place in the police station compound where they could see him being escorted by the police. The officer escorting the appellant said in evidence that he was charged that day at the Rockfort Police Station for the offence on Count 2 and was being taken to the Central Police Station to be left in custody there as the facilities at the Rockfort Police Station in this respect were inadequate. He said that he was not being taken there for the purposes of an identification parade. In spite of the fact that the witness Lewis said he was told to attend at the police station for the purposes of an identification parade in connection with this charge, the officer escorting the appellant said he knew of no arrangement for any such parade.

The defence of the appellant on this count was an alibi and he brought evidence in support of it. It was therefore necessary for a proper consideration of the issues which arose that the jury should have the utmost assistance from the learned trial judge. In his summing up he dealt at great length in a general way with the question of identity when it arises in any case. This general direction was unrelated to any of the issues which arose on the evidence. We wish to point out that this is not what the House of Lords had in mind when Lord Morris made the statement which has been cited. Immediately following the passage cited above Lord Morris continued: "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 only other reference to identification in the summing-up was a brief reference to part of what transpired at the Central Police Station on the occasion when the appellant was pointed out, and this was done in a roundabout way after reference had been made to what the appellant had said in his evidence in order for the jury to decide whether what the appellant said had been negatived by the prosecution witnesses.

We consider that the summing-up was entirely deficient. It certainly cannot be said that the issues relating to identification were fairly and adequately dealt with. It is clear that in those circumstances the conviction cannot stand. We have considered the question whether or not the justice of the case warrants an order being made for a retrial of the appellant on this count. Miss Hylton, with her usual frankness, has said that in all the circumstances she does not feel comfortable in applying for a new trial. We are in entire accord with this sentiment. The appeal is allowed, the conviction is quashed and the sentence set aside.

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