CRIMINAL LAW ① Rape ② Robbing with aggravation on — Identification poor — duty of trial judge to withdraw case from jury — Legal profession — Duty of prosecuting counsel to prepare case with reasonable degree of care — Miscarriage of justice — Duty of trial judge, prosecuting counsel and defence counsel when miscarriage of justice apprehended — Motion for arrest of judgment or reservation of question of law for consideration of Court of Appeal — Judicature (Appellate Jurisdiction) Act — APPEAL ALLOWED, conviction quashed, sentence set aside

IN THE COURT OF APPEAL

JAMAICA

Case referred to: R v Waddington 1 East 143, 146

SUPREME COURT CRIMINAL APPEAL NO. 49/92

STATUTES

CRIMINAL PROCEDURE

COR: THE HON. MR. JSUTICE CAREY, J.A.
THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MISS JUSTICE MORGAN, J.A.

R. V. CECIL NUGENT

Delroy Chuck for applicant

Michael Palmer for Crown

20th, 21st & 31st July, 1992

CAREY, J.A.

On 21st July, we treated this application for leave to appeal conviction and sentence, as the appeal which we thereupon allowed, quashing the conviction and setting aside the sentence. At the same time, we directed that a judgment and verdict of acquittal be entered and intimated that we would furnish our reasons at a later date. These are they.

On 10th April, 1992 the appellant was convicted in the St. James Circuit Court on counts charging rape and robbery with aggravation on a young woman who we will hereafter refer to as MS. He was sentenced to concurrent terms of 4 years imprisonment at hard labour. Having regard to the conclusion at which we have arrived, the facts need only be stated in outline. On 2nd February, 1991, MS took a taxi at Flankers in St. James intending to go to Mt Salem. The taxi also picked up a man whom MS later identified as this appellant. At a stop along the road, that man pulled her from the car, flung her over a gully, threatened to kill her with an object he removed from his waist and tore off her clothes. Not only was he intimate with her, he robbed her of jewellery and cash. The conditions for identification were poor. Where these crimes occurred was in bushes and the light was that of the moon. She noticed that her

assailant had a mole. Two weeks later MS purported to recognize this appellant as her abductor and ravisher. She pointed him out to the police.

The appellant denied the charge and called a police officer to support his alibi that he was in Bethel Town where he resides and that both men enjoyed a beer together at the material time. Evidence of good character was given by a police inspector and then the investigating officer Constable Delton Francis was recalled to give evidence on behalf of the defence. He testified that in the course of his investigation in another rape incident, he arrested a man who bore a marked resemblance to the appellant. We are not to be taken as quoting his evidence. We rely on the judge's directions to the jury in this regard. The jury, as we have indicated, returned a verdict of guilty.

A comment which we think can be justifiably made is this. If the arresting officer had given in his evidence in chief the same evidence which cast doubt on the identification of the appellant, we would be more than surprised if the trial judge did not withdraw the case from the jury. We are quite unable to appreciate what difference it made when the same evidence, entitled to the same weight, was adduced on behalf of the defence. The trial judge gave the following directions in this regard at p. 13:

> "... What Francis is saying is that it is likely that a mistake was made because there is a man existing at the time which bears a close resemblance to this accused man. You must bear that in mind when you come to consider the evidence."

We cannot think that bland statement met the seriousness of the matter. That evidence raised the gravest doubt about the quality of the identification and whether the burden of proof which rested on the prosecution had been satisfied. The judge ought, in justice, to have withdrawn the case from the jury and directed a verdict of not guilty. The occasion called for boldness. Mistaken identity is a notorious cause of miscarriages of justice. The victim may have been convincing but the police evidence wholly neutralized her evidence.

Mr. Chuck made an application in this Court to adduce further evidence which revealed a most disturbing state of affairs which led to an appalling miscarriage of justice. We granted that application.

The fresh evidence which we allowed into evidence, showed some curious features with regard to the conduct both of prosecuting attorney Mr. Samuel Bulgin and the defence counsel Mr. Canute Brown himself, who filed an affidavit. Paragraphs 9 - 10 are relevant for these purposes. Counsel deposed as follows:

> "9. That following the verdict, Counsel for the Crown inquired of me whether the Applicant was 'wearing dentures.' I was put on inquiry and considered the query of some significance and conferred with the Applicant who informed me and I verily believed that he was not 'wearing dentures' but had no 'missing teeth' or 'tooth.'
>
> 10. That I requested and was handed a statement said by Counsel for the Crown to have been made by MS a copy of which I now exhibit marked 'CAB111.' "

In that statement the victim had stated as part of the description of her assailant that "a tooth was missing from his mouth." The fresh evidence from a dentist confirmed that the appellant has all his thirty-two permanent teeth in place. In paragraph 11 defence counsel concluded his affidavit as follows:

> "11. ... and that inconsistencies were not brought to my attention by Counsel for the Crown neither was the statement shown to me."

We do not have any explanation from counsel for the Crown, but we can say with confidence that he could not have prepared his case with any reasonable degree of care. Had he done so, he must have discovered the inconsistency at an earlier stage of the trial. But in our view, that dereliction of duty on the part of prosecuting attorney hardly explains or justifies what subsequently occurred.

We have no evidence whether the inconsistent statement of the victim was brought to the attention of the trial judge before sentence was imposed. Prosecuting counsel was by then aware that the accused before the Court, could not have been the assailant.

Defence counsel could not fail to appreciate but that his client was innocent of the charges. In these circumstances one would have expected them to seek an audience with the judge in chambers to apprise him of the true situation and we would expect the judge to act effectively to prevent a miscarriage of justice. Prosecuting counsel could have asked for an adjournment to obtain guidance and assistance from the Director of Public Prosecutions. Defence counsel could have moved in arrest of judgment: see Archbold Criminal Pleading and Practice 37th edition paragraph 611 where the learned author states:

> "... But any want of sufficient certainty in the indictment, as the statement of time or place (where material), <u>of the person against whom the offence was committed</u>, or of the facts and circumstances constituting the offence, or otherwise, which has not been amended during the trial, and is not aided by the verdict, will be a ground for arresting the judgment." ... (emphasis supplied)

If he was unaware of this procedure, he could have requested the judge to defer sentence to enable him to take advice. But if anything was done, we have not been apprised of it. The trial continued as if nothing out of the normal had occurred. Defence counsel who knew that his client was innocent, made a plea in mitigation. The learned trial judge proceeded to sentence the appellant. Before he imposed sentence however, he expressed himself thus:

> " Cecil Nugent, the Jury have found you guilty of two of the most serious of criminal offences, which is rape and robbery. While there appears to be some doubt about your guilt, I am constrained to respect the verdict of the Jury. Now, your apparently good character has been dramatized in this Court by various witnesses and I note the evidence of Inspector Roache that you are a very good church man and you are of very good character. But you see I have a duty to protect the women in society and to punish and deter criminals, and so I have no recourse but to give you a custodial sentence, but however, I have to bear in mind all the mitigating factors advanced by your Counsel. Indeed, he has defended you very competently.

> "Nevertheless, the sentence of the Court is that you go to prison for four (4) years and that is on each Count to run concurrently. That is all I can do for you. Take him down."

The judge who was unaware of the facts which were being closely guarded by both counsel for the prosecution and the defence, was nevertheless plainly uneasy with the conviction. He regarded the investigating officer's evidence as "casting doubt on the appellant's guilt" and said as much. This was a profound tragedy. The true facts did far more than cast doubt: they showed that the appellant was entirely innocent of the charge. Having regard to the trial judge's doubt, we think that he would have been well advised at least to defer sentence. He also has the power to arrest judgment on his own motion. See Archbold Criminal Pleading Evidence and Practice 37th edition paragraph 11:

> "... Even if the prisoner himself omits to make any motion in arrest of judgment, the court, if on a review of the case it be satisfied that the prisoner has not been found guilty of any offence in law, will of itself arrest the judgment. R. v. Waddington, 1 East 143, 146."...

If he were unaware of his powers or in doubt about the situation in this regard, he was at liberty to defer sentence and take advice or do some research of his own. Seeing that he did not consider this power, he might have been minded, even after imposing sentence, to certify a point of law for the consideration of the Court of Appeal. See section 55 of the Criminal Justice (Administration) Act which ordains as follows:

> "55. When any person shall have been convicted of any treason, felony, or misdemeanour before any Circuit or Resident Magistrate's Court, the Judge or Resident Magistrate before whom the case shall have been tried, may, in his discretion reserve any questions of law which shall have arisen on the trial for the consideration of the Court of Appeal, and thereupon shall have authority to respite execution of the judgment on such conviction, or postpone the

> "judgment until such questions shall have been considered and decided as he may think fit; and in either case the Judge or Resident Magistrate in his discretion, shall commit the person convicted to prison, or shall take a recognizance of bail, with one or more sufficient sureties, and in such sum as the Judge or Resident Magistrate shall think fit, conditioned that the person convicted shall appear at such time or times as the Judge or Resident Magistrate shall direct, and receive judgment, or render himself in execution, as the case may be."

As is clear, the trial judge could then have granted bail.

We have found this a most distressing case which we have perhaps dealt with at too much length. But we make no apologies. We feel justified in this approach so as to ensure, so far as we possibly can, that nothing as such occurred ever takes place again. A miscarriage of justice or at least the real possibility of a miscarriage was discovered before it eventuated. Regrettably, the counsel involved in the case, one, as a minister of justice, the other retained to defend a client, by their inaction, allowed it to materialize.

We note that events elsewhere have revealed miscarriages brought about by evidence fabricated or altered by police officers to ensure convictions. There is presently an inquiry in train into the criminal justice system in England because of miscarriages of justice in their system. But what is revealed in the instant case is not due, in our view, to a fault in the system itself but rather, to human frailty. We have all to be reminded, sadly, - "errare est humanum."