JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 160/88

BEFORE: THE HON. MR. JUSTICE ROWE, PRESIDENT
THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE GORDON, J.A. (Ag.)

REGINA

VS.

CASWELL GALLIMORE

No appearance for the appellant

Miss C. Reid for the Crown

July 24, 1989

ROWE, P.:

The appellant, Caswell Gallimore, was convicted in the Gun Court Division of the St. Thomas Circuit Court on the 13th of July, 1988 for illegal possession of a firearm and rape and he was sentenced on the first count to serve a term of four years imprisonment at hard labour and on the second count to six years imprisonment at hard labour, the sentences to run concurrently. He applied for leave to appeal against his convictions and in those applications he said that the evidence was conflicting and insufficient to support the convictions.

The single judge who considered these applications commented that the learned trial judge warned himself of the danger of convicting on the uncorroborated evidence of the complainant, so far as the count of rape was concerned, but he failed to warn himself or to direct his mind to the danger of mistaken identification, even though this was really the live issue in the case and he granted leave to appeal.

Unfortunately, the single judge did not grant legal aid and so the matter has come before us this morning without the appellant having the services of an attorney-at-law.

We have had the benefit of the submissions of Miss Carolyn Reid, who appears for the Crown, and we are of the view that this appeal ought to be allowed.

On the 24th of May, 1988, a young woman, who had travelled from the corporate area to Yallahs, was walking from Yallahs towards a place called Logwood. It was just about the break of day - between 5:00 a.m. and 6 a.m. - and as she walked along this lonely road she found that she was being trailed by a man. This man eventually caught up with her as she was trying to cross through some bushy ground on her ordinary way to work and he held her at the point of a gun, stripped her partly of her clothes, raped her, and after he had so done, as is usual in these cases, armed with his firearm, he went away. On that same day the young lady went along to the police station and made a report. Some two days later, the appellant was taken into custody by the police.

The complainant was travelling in a motor car on the Logwood main road when she saw the appellant in the company of some men walking along that road. She then went to the police station and made a further report which led to the apprehension of the appellant.

In the course of cross-examination, however, it came to light that on the day after the complainant was raped she had passed by a domino club and there she had seen the appellant, although she said she did not speak with him. On that occasion, she was in the company of a gentleman, who was not called to give evidence. It appears from the evidence that the complainant prevaricated as to whether or not she had met this man who went with her to the club on the very day of the incident or she had known him previously and was friendly with him to the extent of calling him her "boyfriend." That prevarication, however, although not of any great importance to the veracity of the complainant, as to whether or not she was in fact raped, had a bearing upon whether or not the person who was

pointed out, was properly identified as the perpetrator of the crime. Was he, in fact, recognised by her on her own or she was assisted by some other person in coming to a conclusion that it was the appellant who had done the deed.

The defence was an alibi and the appellant called a number of witnesses from his household to say that he was at home at the material time and could not have gone to the place several miles away where the rape took place.

The learned trial judge, in giving his reasons for convicting, summed up on the question of corroboration, first incorrectly, thereafter quite correctly, but in both circumstances, in a manner favourable to the appellant and then he analysed the evidence dealing with the alibi. He came to the conclusion that he did not believe a word of the alibi and then he went on to find the appellant guilty as charged.

As the single judge correctly pointed out, this was a case in which the real issue was that of identification and the only evidence of identification was that which came from the complainant who did not know the appellant before and there was no other evidence corroborating that evidence of identification. Therefore, it was the plain duty of the learned trial judge to direct his mind to the issue of identification, to warn himself of the dangers of identification and after that warning to consider the evidence which the complainant had given against the background of that situation.

In this case he did not say one single word about the dangers of visual identification and we think that that is a fatal flaw in his summation of this particular case. We note that it was not a case in which the evidence of the complainant was so overwhelming and consistent throughout that the Court could consider applying the proviso. In the circumstances, therefore, the appeal must be allowed, the convictions quashed, the sentences set aside and verdicts of acquittal entered.