JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 163/89

BEFORE: THE HON. MR. JUSTICE ROWE - PRESIDENT
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE DOWNER, J.A.

REGINA

VS.

DONALD BAILEY

A.J. Nicholson and George Soutar for Appellant

Miss Carol Malcolm for Crown

October 16 and December 17, 1990

ROWE P.:

We treated the hearing of the application for leave to appeal herein as the hearing of the appeal which we allowed, quashed the conviction, set aside the sentence and entered a verdict of acquittal for the following reasons.

Bailey was convicted of rape on the evidence of a young woman who did not know him prior to May 19, 1988 and whose evidence did not receive support from any source whatsoever. Counsel for the appellant submitted initially that he had no complaint about the learned trial judge's summing-up on the issue of identification but during the course of the argument retracted that admission and urged the Court to find that the jury were not assisted by the trial judge on a crucial issue in the case associated with the appellant's gold-capped tooth.

Three base men, in relay, had sexual intercourse with a young woman three months pregnant in a room in down-town Kingston after she had been lured thereto with the promise of facilitating her employment. She identified the appellant, as the third of the men who had sexual intercourse with her twice that day, at an Identification Parade held on July 20, 1988, two months on a day after the offence. Her trauma at the time of the rape was such that she jumped naked from the upstairs room to the ground below and was hospitalized for some three weeks. Four days after the incident she was interviewed by the police and gave general descriptions of her three attackers. Of the third man she said, he was "black and not that tall."

It is well to re-count the evidence of the events which occurred on the Identification Parade. The complainant said that when she came on the Parade she saw the appellant standing at No. 5. She asked the Police Officer in charge of the Parade to let the men laugh so that she could see their teeth. When that directive was given, the men complied and then she pointed out the appellant. The woman said she was not only looking at the teeth of the men to make sure of the man, she needed them to laugh to help her to identify the man. She did not know if he was the only person who had a gold-crowned tooth but the appellant was the one into whose mouth she definitely wanted to look. She concluded:

> "I was definitely looking at him personally".

Sergeant Mighty who conducted the Parade instructed the complainant to look carefully at the paraded men through the one-way mirror to see if she could identify

any of her assailants. The witness returned and asked her to cause the men to laugh. All did so except the one standing in position No. 7. Witness went back towards the Parade, returned and identified the appellant. We observed that on the Sergeant's evidence, the witness did not pay concentrated attention to the appellant alone.

In defence the appellant made an unsworn statement. He denied participating in the rape of the complainant and alleged that his purported identification was a mistaken one inasmuch as he had gold-crowned his tooth on July 2, 1988. Defence witness Henry Perkins, dental technician testified that he grafted the gold-crown on the appellant's tooth on July 2, 1988.

The learned trial judge was anxious that the jury should have precise directions on the troubled issue of visual identification and he proceeded to give exhaustive and accurate general directions. A principal feature of the identification was the presence of the "gold-crowned tooth". This is how the learned trial judge directed on that issue:

> "Mr. Foreman and members of the jury, you have been addresssed by both counsel for the defence and the prosecution with respect to the question of this gold tooth, and you have been asked by the defence to say that the fact that the witness did not mention a gold tooth at the time of the incident, would leave you to be suspicious about her evidence, about the question of the gold tooth. And of course, the matter that you have to consider, is whether or not this witness identified this man only as a result of this gold tooth".

> "Having regard to the description which she had given, I would urge you and ask you, and perhaps you would express the view and come to the conclusion that if this was the only way in which she identified the man, that you perhaps would not be satisfied about the identity of this accused."

Immediately before this direction the learned trial judge had dealt with the prosecution evidence both from the complainant and the Police Officer in charge of the Identification Parade.

There was another dimension to this question of the gold tooth apart from the failure of the witness to include its presence in the early description to the police. Both the accused and his witness said the gold tooth was only inserted on July 2, some six weeks after the assault. In determining the credibility of the main Crown witness the jury ought to have been reminded of this evidence in juxtaposition with the evidence from the prosecution. Then, they would first have to reject the defence on this issue before they could begin to determine whether there were features in the case, apart from the gold tooth, which could have caused the complainant to make an accurate identification. Clearly if the appellant acquired his gold tooth in July, the witness in seeking for "gold" in his mouth could not be a credible witness.

In our view the jury required the most precise directions as to how to approach the glaring weakness in the Crown's case where the witness who could originally manage only a general description of a most unhelpful character, could at the Identification Parade and again at trial, rely upon a significant distinguishing feature then possessed by the appellant. As this weakness could

irredeemably undermine the veracity of the witness and as they received no guidance thereon, we concluded that the verdict was unreasonable as unsupported by the evidence.

Mr. Nicholson argued an additional ground which arose out of questions asked of the Court by the jury after they had retired for nearly one hour and had failed to arrive at a unanimous verdict. The questions were of a peripheral nature as the first related to the absence of a witness who clothed the naked woman in her flight of terror and the second to the absence of medical evidence in support of the charge. On both matters the trial judge had given careful directions to the effect that having regard to the defence the only live issue was identification. That the jury wanted to have corroboration of all the incidents subsequent to the offence can be put down to curiosity rather than on a failure to address the real issues in the case. There was no merit in this ground of appeal.

For the reasons contained herein we allowed the appeal and made the consequential orders already referred to.