

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO.136/90

BEFORE: THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE DOWNER, J.A.

REGINA

VS

JUNIOR WILLIAMS

Bert Samuels for the appellant

Patrick Cole for the Crown

September 30 and November 11, 1991

WRIGHT, J.A.

On September 30 we treated this application for leave to appeal as the hearing of the appeal and allowed the appeal. We quashed the conviction, set aside the sentence, entered judgment and verdict of acquittal and promised to put our reasons in writing. We now fulfil that promise.

The appellant had been convicted at a trial in the Home Circuit Court on September 28, 1990 before Smith, J and a jury on an indictment containing three counts viz: count 1 Rape, counts 2 & 3 Robbery with Aggravation. He was sentenced to 5 years imprisonment at hard labour for the Rape and 3 years imprisonment at hard labour on each of the other two counts. The challenge to the conviction which we accepted rested on two plinths viz:

1. The verdict is unreasonable and cannot be supported having regard to the evidence;
2. The unsatisfactory nature of the evidence of identification.

A woman (S.C.) and her boyfriend Alton Blake were sitting on the wall at the waterfront not far from the Bank of

Jamaica on February 17, 1938 when at about 8:10 p.m. a man accosted them announcing he was a policeman and proceeded to frisk them. He took from Alton Blake a ratchet knife with which he promptly held them up and robbed them both. From S.C. he took one pair gold earrings, one watch, one gold ring and a silver chain of the total value of \$600 and from Alton Blake one gold ring valued at \$200. This incident took place in an area which, according to S.C., was well lit. She said there was a light post about five chains away but when asked to point out that distance she indicated about ten yards. However she said the light was sufficient to enable her to observe that their assailant wore a gold tooth and had a scar. In court she described him thus "high cheek bone, tall, dark complexion, receding eyebrows, a knob in one ear a scar over his eyebrow, dressed in black tuxedo shirt, black pants, suede shoes and a gold tooth." He then moved out of the light into a dark area where he raped her after he had ordered her boyfriend to lie on his side with his face away from them. After he had left they reported the matter at the Central Police Station. The ordeal she said lasted about 25-30 minutes.

It is significant to note that neither of the victims had ever seen their assailant before that night. Added to this is the fact that there was no evidence from any policeman of any description which she gave on the night of the incident; so there was no means of determining whether the description she gave in court was as she saw the appellant in court or not.

It was not until almost nine months later on November 3 of the same year that S.C. saw this appellant in the vicinity of the Harbour View bus stop at around 7:30 a.m. at South Parade. She reported the matter to her boyfriend who accompanied her to the bus stop the next morning where they saw the appellant. He worked at the Cement Factory and was awaiting transportation to work. S.C. went on to school while her boyfriend alerted Corporal Michael Phipps who took

the appellant into custody. When cautioned the appellant said, "mi a no robber boss. A Cement Company me work" and when he was charged he said "a the wrong man this boss, mi innocent."

In his defence, he gave sworn evidence and called three witnesses. He denied ever seeing S.C. before the preliminary examination at the Sutton Street Court. He denied being involved in the incident on February 17, 1988 and he had never seen Alton Blake until that morning at the bus stop when the police was called. He said February 17, was Ash Wednesday and he recalled working that day and would probably be at home at 65 Red Hills Road in the evening. At the trial, he was indeed wearing a gold tooth, but he testified that that was acquired in October, 1988. In support of that he called Mr. Michael Davis the Dental Technician who provided the denture and who explained that he did not usually issue receipts but that the receipt tendered by the appellant had been issued on request of the appellant's attorney. The denture had some nine teeth including one gold tooth and had in fact been supplied in November, 1988 the impression having been taken on October 7. To the question as to whether the appellant had been wearing a denture before coming to him Mr. Davis opined no because when he saw the appellant the gum was not properly shrunken.

Next he called Mr. Silvera Castro, Personnel Manager at the Caribbean Cement Company and a Justice of the Peace as well. He said he had known the appellant as a casual worker at the Cement Company for over five years. He said the appellant was a good worker and that he had confidence in him. As a result of dental problems he had had to transfer the appellant from one work area to another and allow him time-off to have extractions done. He had never noticed the appellant wearing a gold tooth prior to February, 1988 and that the extractions were subsequent to February, 1988.

Lastly, there is the evidence of Assistant Superintendent of Police, Donald Smith, who testified that he knew the appellant for approximately 14 years. He would see him fairly regularly at his work place and on the streets. The appellant is an honest person he said, and, which is of the utmost importance to the defence, he said he first noticed the appellant wearing a gold tooth in November, 1968. Further, he had never seen him wearing any jewellery such as earring or otherwise. Prior to seeing him in November he had last seen him in July or August, 1968.

In dealing with the evidence of visual identification the learned trial judge demonstrated his awareness of the fact that such evidence belongs to a special category and gave the warning required in decisions of this court too numerous to mention as well as in decisions of the Privy Council. In keeping with these decisions, he also adverted to weaknesses in the identification evidence. Indeed, he mentioned in this regard the lapse of nine months before the witness claimed to have identified her assailant as well as the fact that her purported identification was uncorroborated. Despite this we were of the opinion that there was a signal failure in his treatment of this aspect of the case. It is evident that the gold tooth was a significant feature of the identification evidence and this is the area in which the defence mounted its severest challenge to the identification of the appellant. Yet, not only is it not mentioned as the area that posed the greatest threat to the reliability of the identification as, indeed, the evidence showed, but more importantly it was not highlighted as the bulwark of the defence which had to be overcome if the prosecution were to secure a decision adverse to the appellant. It cannot be over-emphasized that the most faithful recital of the guidelines will not substitute for the proper application of those guidelines to the facts of the case and where a case presents significant features, especially

where those features weigh heavily in favour of an accused person it will be difficult to contend that there has been a fair trial unless those features have been appropriately highlighted. The issue of the gold tooth falls squarely under this heading and it was our opinion that it was not given due treatment, for if that had been done it must at least have given rise to very grave doubts on the issue of identification which would have to be resolved in favour of the appellant. The evidence was not assessed in this manner so as to give the jury the proper guidance in coming to a verdict consistent with the evidence. In the result we were of the opinion that properly assessed, the evidence could not justify a conviction. Hence the decision we took in disposing of the appeal.