IN THE COURT OF APPEAL OF BELIZE, A.D. 2001

CRIMINAL APPEAL NO. 4 OF 2001

BETWEEN:

MARK VEGA	**Appellant**
AND	
THE QUEEN	**Respondent**

BEFORE:

The Hon. Mr. Justice Rowe	**President**
The Hon. Mr. Justice Mottley	**Justice of Appeal**
The Hon. Mr. Justice Carey	**Justice of Appeal**

Mr. Oswald Twist for Appellant.
Mr. Rory Field, Director of Public Prosecutions and
Miss Cheryl-Lyn Branker-Tait for Crown.

2001: October 10 and 2002: March 8.

CAREY, JA:

1. The appellant was convicted of manslaughter on an indictment which charged him and other men (who, in the event, were acquitted) with murder of one Robert Mosa. He was sentenced to serve twenty (20) years' imprisonment.

2. On 10 October last, after hearing submissions from Mr. Twist on behalf of the appellant and Mr. Field for the Crown, we allowed the appeal, quashed the conviction, set aside the sentence and entered a verdict and judgment of acquittal. The reasons for our decision which we promised, now follow.

3. A number of grounds of appeal were filed on behalf of the appellant, but learned counsel was invited to address the court on his ground 5, which read:-

> ". . . The learned trial judge failed to give adequate Turnbull directions with regard to Mark Vega . . ."

4. The prosecution case depended on the evidence of a sole eye witness S.N. and, as well, on a cautioned statement taken from the appellant.

5. According to S.N. (whose identity we prefer not to reveal for reasons which will emerge) at about midnight of 28 June 1998 she was with her boyfriend, the deceased, in his car which was parked along the roadway, when they were confronted by five masked men, all strangers to her, who entered the car. They were driven to a cane field where they all alighted. Robert who was relieved of his gold chain, was locked in the trunk of the car. Thereafter she was raped by the appellant and eventually by other men whom the appellant encouraged to serve in like manner.

6. There came a time when she was able to recognize him as a person she had previously seen, who sold a drink called "ideal". This took place, she said, when he flicked a cigarette-lighter some three times directly in front of his face. She identified this person not only as the person who drove the car but as one who raped her and who was armed with a machete.

7. She apparently remained in their company for some considerable time until near daybreak because she said they separated at 6:00 a.m. after walking through bushes. At some time before they parted company, she was put in the trunk with Robert. Then Robert was taken out and she heard sounds as if someone was being beaten, and felt as if the car ran over an object a few times. She heard Robert screaming. She also thought the car was being set on fire because she could overhear a

conversation among the men about setting the car alight. Eventually she was taken from the car and in reply to her query as to why he had killed Robert, he said he had killed him because Robert had done something to his sister.

8. It was clear that for the entire period she was in his company, it was dark.

9. At an identification parade held on 30 June 1998, she pointed out this appellant as her assailant.

10. On the day following her ordeal, she returned to the scene where she saw her boyfriend beneath the car. There was other evidence that the axle was resting on his chest. He had injuries all over his body including a hole in the back of his head, burns on his hand, chops on both arms and fractured bones in his leg.

11. A post-mortem examination was carried out on the body of a young male which was identified to the Mexican doctor by a person claiming to be the mother. The medical evidence was in a very sorry state indeed. No link was made between the murdered man and the dead body on which the post-mortem was carried out.

12. Nevertheless, overwhelming evidence existed that Robert Mosa was killed by unlawful harm done to him.

13. In his cautioned statement, the appellant admitted that they all violently assaulted Robert and decided to kill him. The car was driven over him and he got stuck under it.

14. The appellant made an unsworn statement in which he raised alibi as his defence.

15. There is an aspect of the evidence of the principal witness S.N. on which we desire to comment. In two statements to the police, she had said that she was not able to identify her attackers, but in a third statement to the police, she then said she could. An identification parade was held whereupon she identified the appellant.

16. This was a matter of some concern to the trial judge. Having brought her inconsistent stance to the jury, he then remarked (at p. 1416):-

> ***"…Surely, madam forelady and members of the jury, if on two occasions you say man I can't recognize them, I can't recognize this person, you might want to say why on the third occasion then, why is it that there was a third occasion? And why on that third occasion this witness is now able to say I can recognize these persons. You see members of the jury? But, members of the jury, with respect to Vega also, members of the jury, you will recall – you know how she identified Vega? She was giving a statement to WPC Pook and while giving that statement an ID parade was being prepared and before she could conclude giving her state she was taken to the ID parade and it was then that she identified Mark Vega, came back, said so to the officer and it became part of a statement. A very unusual thing and a very improper thing to do, but nevertheless, that is the state of the evidence. You see members of the jury? You may want to conclude that perhaps something fishy went on for why else would a person be giving a statement, suspend the giving of the statement, go and identify, come back and include now, yes I have now identified Mark Vega, he was the person. You see members of the jury? You will have to consider that portion of the evidence…"***

It is right to note that the witness endeavoured to explain these discrepancies by saying that she had been threatened. And the trial judge did leave them to the jury for its consideration.

17. There is little room for doubt that the identification of the appellant by the witness, took place in extraordinarily difficult circumstances. For all practical purposes, there was no light but for the flickering flame of a

cigarette lighter which had to be flicked three times. That was enough it was said to enable her to recognize her assailant. Additionally, there was the element of terror and fear and fright.

18. These circumstances beyond a peradventure, required the most careful and correct directions for identification evidence belongs to a category of evidence that is potentially unreliable. In the instant case, the trial judge in dealing with the evidence described it as "dicey" and "fishy".

19. In this case, we are satisfied that the trial judge was very much alive to the importance of the Turnbull guidelines *(R. v. Turnbull [1976] 3 ALL ER 549):* But he fell into error in explaining the guidelines to the jury.

20. At p. 1426 of the record, he is recorded as saying this to the jury:

> ***"…you have to be careful in looking at the evidence of identification where it does not involve recognition as in the case of Mark Vega…"***

21. This is, with respect, a flawed appreciation of the law in this regard. The same warning is required to be given to a jury whether the case involves identification of a perfect stranger or of a person known to the witness before the incident. It is plain that the jury were being told that while there was a special need for caution in the case of identification of a stranger (a reference to Troy D. Hyde [the co-accused]), there is no need for caution in a recognition case (the reference to Mark Vega).

22. The law is correctly encapsulated in the headnote of the Privy Council decision *Beckford and Others v. Reginam [1993] 97 Cr. App. R. 409:*

> *". . .**A general warning on Turnbull lines is required in all identification cases whether the witness identifies a person he***

recognizes or a stranger. Even if the sole or main issue raised by the defence is the credibility of the identifying witness, that is, whether his evidence is true or false as distinct from accurate or mistaken, a general warning is none the less required…"

Therefore the fact that recognition may be more reliable than identification of a stranger does not preclude the possibility of mistakes being made. The requirement for the warning of the special need for caution is thus perfectly obvious. The direction given in the above extract, was tantamount to a failure to give a warning which the Privy Council held in *Reid etc v. Reginam [1990] 90 Cr. App. R. 121* will cause a conviction to be quashed because it will have resulted in a miscarriage of justice.

23. It is also true to say that the trial judge's directions in this regard, amounted to a material misdirection, and this also justifies our interference with the verdict which cannot then be allowed to stand.

24. The Crown's case depended also on a confession in a cautioned statement made by the appellant. Section 91(1) of the Evidence Act makes it permissible where the voluntary nature of an accused person's confession of guilt has been established beyond reasonable doubt for such confession to be accepted as sufficient to warrant a conviction without any confirmatory or corroborative evidence.

25. The cautioned statement, which was admitted undoubtedly after a voir dire, provided powerful evidence of the involvement of the appellant. In it, the appellant described in graphic detail the brutal acts of the other participants and his own acts of violence to Robert Mosa.

26. We felt a deal of unease from the fact that this cautioned statement was taken in the absence of any other person. There was, for example, no

Justice of the Peace in attendance. The police officer who took the statement, constable Tapia, said that the appellant declined his offer to have any person present to witness the exercise. In that context of "any person", he was to be taken as including a Justice of the Peace. We did not think that we could be satisfied in allowing the conviction to rest entirely on a confession obtained in such unsatisfactory circumstances.

27. There is no rule requiring the presence of a Justice of the Peace at the taking of a cautioned statement. But in this case it is at the very least curious, that while a co-accused had a Justice of the Peace provided by the police, none was provided for the appellant. We have not the least doubt that if one had been present, the appellant would not have objected to his presence.

28. No explanation was forthcoming in relation to this apparent discrimination in treatment of the accused, each of whom gave a statement to police officers. Its effect, in our opinion, rendered the verdict unsatisfactory.

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ROWE, P.

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MOTTLEY, J.A.

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CAREY, J.A.