

**IN THE COURT OF APPEAL OF BELIZE, A.D. 2010**  
**CRIMINAL APPEAL NO. 17 OF 2009**

**BETWEEN:**

**KEVIN SANTOS**

**Appellant**

**AND**

**THE QUEEN**

**Respondent**

**BEFORE:**

**The Hon. Mr. Justice Mottley**

**- President**

**The Hon. Mr. Justice Sosa**

**- Justice of Appeal**

**The Hon. Mr. Justice Carey**

**- Justice of Appeal**

**Mr. Dean Lindo SC for the appellant.**

**Mr. Cecil Ramirez for the Crown.**

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**3 and 19 March 2010.**

**CAREY JA:**

1. The appellant stood his trial before Gonzalez J and a jury on an indictment which charged him with the murder of one Chris Rosalez. Upon conviction, he was sentenced to imprisonment for life. He now appeals to this Court.

2. Counsel for the Crown candidly and as we think, properly, conceded that he could not support the conviction on the basis of a material non-direction of law. In the result, the appeal was allowed, the conviction quashed and the sentence set aside. We directed that a new trial should be held.
3. It becomes entirely unnecessary therefore, to rehearse the evidence in any detail. The prosecution case was as follows: On 24 December 2006, as the principal witness for the prosecution, Justin Rodriguez, related, he and two friends, Chris Rosalez and Floya Moro went walking into the town of Santa Elena at about midnight. There were many persons about on the street. He met his brother and they engaged each other in conversation. While thus engaged, he saw a man whom he knew by his pseudonym, as “Magga Man” pull at his friend’s Chris Rosalez’s shirt. He remonstrated with “Magga Man”. But Magga Man punched Chris Rosalez who responded in kind and ran off but fell on the roadway. There “Magga Man” caught up with him and appeared to be stabbing him several times. Rodriguez went to his friend’s assistance but received a stab in his arm for his pains.
4. Thereafter a crowd of people jumped on Chris Rosalez. The police arrival caused the crowd to disperse. His friend in the meantime was ‘laying’ on the ground bleeding. He was placed in a truck which came by and he was taken to the hospital.
5. The witness identified the appellant as “Magga Man”, in court. In cross examination, he acknowledged that he did not disclose that “Magga Man was the man making the stabbing motions.”
6. The medical evidence confirmed that the victim had received several stab wounds to different areas of his body, viz, chin, abdomen, left arm and back. The significant injury was one to his back which penetrated the

chest cavity and wounded the middle lobe of the right lung. The direct cause of death was given as “bronchial aspiration asphyxia due to stab wound to the right lung.”

7. Although the eye witness gave no evidence that he attended an identification parade, evidence was led as to the holding of such a parade and that Rodriguez attended and identified the appellant.
8. In an unsworn statement, the appellant denied the charge. He was not known as “Magga Man”. At about 7:00 p.m. on 24 December he was attacked by three men, two of whom inflicted stab wounds but he was able to escape and to reach home where his father dressed his wound. He went to sleep. Subsequently he was arrested on this charge.
9. There were a number of grounds of appeal filed on behalf of the appellant. We are not to be taken as critical of these grounds but we did not consider that they would have enured to the benefit of the appellant and will not therefore deal with them.
10. One of the oddities in this trial, was the fact that no evidence was adduced that the sole eye witness had attended an identification parade. Seeing that it is that witness who is called to prove the link between the alleged assailant and the person in the dock, the omission to do so is remarkable. Although the witness referred to the appellant as “Magga Man” a person whom he had known for a number of years as they attended the same church, he never gave that name to the police. It did not appear in his statement.
11. Counsel for the Crown whom we called upon, in respect of this aspect of the appeal, correctly accepted that in the circumstances noticed above, the witness’ identification of the appellant amounted to a dock

identification which called for a direction from the trial judge in terms of **Pop v R [2003] 62 WIR 18**. See also **R v Pipersburgh [2008] UKPC 11**, both decisions of the Privy Council, by which we are bound. The evidence that an identification parade had been held served no useful purpose because the witness who should have been called to establish the link between the alleged assailant and the appellant, was not. We are not unmindful that there have been cases where, the eye witness has been called but forgets that he attended and other witnesses are called to testify as to what he did on the parade. See **R v McCay 91 Cr. App. R: R v Osbourne and Virtue 57 Cr. App. R. 297**. But this is not such a case.

12. The result of the failure to give the Pop direction as we have indicated, was that the Board set aside the verdict and remitted the case to this Court for disposition. That non-direction is sufficient to dispose of the appeal. It is right to observe that the judge himself recognized the case to be one based on a dock identification. He said so at p. 202:

“Now you would recall, Members of the Jury, that the witness, Justin Rodriguez, in Court testified and identified the accused person whom he had recognized made stabbing motions at Chris Rosalez or stabbed him.”

He was however content to give a *Turnbull* direction but that is not adequate as has been pointed out in the decisions alluded to above.

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**MOTTLEY P**

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**SOSA JA**

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**CAREY JA**