IN THE COURT OF APPEAL OF BELIZE AD 2009

CRIMINAL APPPEAL NO 4 OF 2009

JUAN POP Appellant

v

THE QUEEN Respondent

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BEFORE
The Hon Mr Justice Elliott Mottley President
The Hon Mr Justice Manuel Sosa Justice of Appeal
The Hon Mr Justice Denys Barrow Justice of Appeal

LR Welch for the appellant.
C Branker-Taitt, Director of Public Prosecutions (Acting), for the respondent.

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2009: 14 October
2010: 19 March

SOSA JA

Introduction

[1] On 15 March 2009, before González J and a jury, Juan Pop ("the appellant") was convicted of having had carnal knowledge of a female child under the age of 14 years and was sentenced to 12 years' imprisonment. On 14 October 2009, this Court heard and, for the reasons which it now gives, allowed the appellant's appeal, quashed his conviction and directed the entry of a judgment and verdict of acquittal.

The identifying evidence

[2] The prosecution case featured evidence which, from the vantage point of this Court, amply substantiated the allegations that, between 23 and 24 May 2007, the complainant (who shall be referred to in this judgment as "CM") was carnally known by someone, she then being under the age of 14 years. But the prosecution case was not without its Achilles' heel: the evidence of identification against the appellant, given by CM alone, was, on any view, other than strong. She testified merely that her assailant was a short "Spanish" policeman dressed in plain clothes who twice entered the room at the Dangriga Police Station in which she was sleeping on the night of 23-24 May 2007. To make matters worse, she could not remember for how long this policeman had remained in that room; and she was vague not only as to the lighting at the time but also as to her alleged sightings of him before that night. According to her, it was only in the police station that she had previously seen him and that had been over the period of three days immediately preceding the night in question. How often, for how long, from what distance and in what light she had seen him during those three days was never brought out in her evidence.

The judge's omission at the close of the Crown case

[3] Seeds of confusion were then planted by counsel on both sides. Prosecuting counsel prematurely asked CM whether she could see the "fat [an adjective not used by CM] short Spanish police officer" in court and experienced defence counsel, Mr Sampson SC, surprisingly refrained from complaining that

no proper groundwork had been laid for a dock identification. Instead the latter raised an objection based on the ground that the police had wrongly omitted to hold an identification parade, a ground in which the judge, rightly in the view of this Court, found no merit.

[4] Thus deprived of the assistance (in the form of a reminder) ordinarily provided by an objection made in circumstances such as these, the judge overlooked the inadequacy of prosecuting counsel's attempt to pave the way for a dock identification. Having permitted the dock identification notwithstanding defence counsel's submission that the failure of the police to hold an identification parade had been fatal, the judge now plainly became overly focused on ensuring that the jury should be directed in conformity with the guidelines laid down by the Privy Council in *Pop (Aurelio) v R* (2003) 62 WIR 18. So distracted, as it appears to this Court, he paid insufficient, if any, attention, when the Crown closed its case, to the important question of the state of the identification evidence.

The judge's view of the identifying evidence

[5] In these circumstances, it is not surprising that when he came to sum-up to the jury, the judge, in dealing with the identification evidence, chose first to emphasise the failure of the police to hold an identification parade in the course of their investigation of CM's complaint. But having done that, he found it necessary to come to grips with the fact that CM's description of her assailant as

a short Spanish policeman could have been arrived at by merely looking at the appellant in the dock. In the course of so doing, the judge, in a passage quoted before this Court by Mr Welch, for the appellant, expressed the view that "this portion of the evidence further whittles down the already weak evidence of the identification of the [appellant] to a point where the evidence of identification is almost totally worthless". Admittedly, the judge went on to say that the evidence in question was not "totally worthless" and that, for that reason, he would not withdraw the case from the jury.

The correct judicial approach

(i) *The general rule*

[6] In the opinion of this Court, however, once a trial judge reaches the point (as the trial judge in the present case patently did) where he forms the view that the Crown's identification of an accused is poor, it becomes incumbent on him to consider whether the identification is supported by any other evidence in the case. If, as in the instant case, it is not, then the duty of the judge is, as a general rule, that which was identified by the English Court of Appeal in *Turnbull v R* [1977] 1 QB 224, when Lord Widgery CJ said, at 228-230:

> "If the quality [of the identification evidence] is good and remains good at the close of the accused's case, the danger of a mistaken identification is lessened; but the poorer the quality, the greater the danger. In our judgment when the quality is good … the jury can safely be left to assess

> the value of the identifying evidence even though there is no other evidence to support it: provided always, however, that an adequate warning has been given about the special need for caution … When in the judgment of the trial judge, the quality of the identifying evidence is poor, as for example when it depends solely on a fleeting glance or on a longer observation made in difficult conditions, the situation is very different. The judge should then withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification." [Emphasis added.]

[7] The principle expressed in the final two sentences of the passage just quoted has been applied by this Court more than once before. Mr Welch sought to rely on the decision of this Court (Mottley P and Sosa and Carey JJA) of 14 June 2007 in *Barona v The Queen*, Criminal Appeal No 2 of 2007; but no written judgment was given in that case and counsel could produce nothing more than a purported transcript of the hearing. There are, however, the cases of *Wade et al v R*, Criminal Appeals Nos 28, 29 and 30 of 2001 (judgment delivered on 28 June 2001) and *Williams v R*, Criminal Appeal No 16 of 2006 (judgment delivered on 22 June 2007), in each of which this Court quoted the last two sentences contained in the passage from *Turnbull* set out above and applied the principle there enunciated.

[8] The instant case is obviously not a fleeting glance case. And, whilst it is undeniably a case of two longer observations, the conditions under which such observations were made were not necessarily difficult. The paucity of evidence does not enable one so to assert. But Lord Widgery CJ was unambiguous in the passage under consideration: those were but two examples of cases in which the quality of the identifying evidence might properly be considered poor by a judge. This Court is in no doubt whatever that the evidence of identification was not only considered poor by the judge but was, in fact, poor.

(ii) *The variation where there has been no relevant application*

[9] In the present case, defence counsel at trial made no application to the judge for the withdrawal of the case from the jury at the end of the prosecution evidence. This was also the position in *Williams*, *supra*. It is no criticism of the judgment in *Turnbull* to observe that it does not deal with the fact that such cases will often arise in practice. Abundant illumination for the trial judge in such a case is, however, to be found in *Fergus* [1994] 98 Cr App R 313. In that case, Steyn LJ, having enumerated the specific weaknesses in the identification evidence which ought to have been considered at the end of the prosecution case, said, at 320:

> "If the specific weaknesses had been properly analysed the judge would have been bound to withdraw the case from the jury. But counsel for [Fergus] did not invite the judge to do this. That was a serious omission

on the part of counsel. It resulted in his client wrongly remaining in jeopardy. This failure on the part of counsel goes some way to explaining why the judge did not withdraw the case from the jury. Nevertheless, even in the absence of a submission, the judge is still under a duty to invite submissions when, in his view, the identification evidence is poor and unsupported, and if appropriate to withdraw the case from the jury. In our judgment the judge ought undoubtedly to have withdrawn the case from the jury. It follows that on this ground the conviction must be quashed." [Emphasis added.]

[10] It is noted that, since the hearing of the instant appeal, the Judicial Committee of the Privy Council has, in *Eiley et al v R* [2009] UKPC 40, invaluably commented on the analogous case in which defence counsel omits to make a submission of no case in accordance with the principles set out in *R v Galbraith* [1981] 1 WLR 1039. Giving the advice of the Board, Lord Phillips said, at para 50:

"None of the defence counsel applied to have the trial stopped at the end of the prosecution case under the principle in [*Galbraith*]. Had such an application been made the Board considers that it would have had merit. It would, however, have been an unusual and extreme step for the judge to have ruled that there was no case upon which the jury could safely

convict in the absence of any submission to this effect from any defendant."

The Court considers that there is no conflict between the remarks of Steyn LJ in *Fergus* and those of Lord Phillips in *Eiley*. *Fergus* does not endorse the withdrawal of a case by a judge from the jury without the benefit of prior submissions from counsel. *Au contraire*, it emphasises the importance of such submissions to the extent of saying that, where none have been made, the judge should invite them. But, manifestly, the failure of the trial judge to invite such submissions does not handcuff the appellate court.

[11] It is important to add, before concluding this judgment, that, when called upon to respond to the submissions of Mr Welch, the Acting Director of Public Prosecutions very properly indicated that she could not, in fact, support the conviction.

Concluding remarks

[12] In conclusion then, and borrowing the language of the Board in *Eiley*, the Court is of the view that an application to the trial judge to withdraw the case from the jury would, if made, have had merit. For all the above reasons, the Court

was entirely persuaded that the appeal had to be allowed, with the consequences already stated above.

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MOTTLEY JA

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SOSA JA

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BARROW JA