IN THE COURT OF APPEAL OF BELIZE AD 2010

CRIMINAL APPEAL NO 8 OF 2009

MIGUEL MATUS Appellant

v

THE QUEEN Respondent

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

O Twist and E Kaseke for the appellant.
C Ramírez, Senior Crown Counsel, for the respondent.

2010: 7, 8, 9 and 14 June and 20 October.

SOSA JA

Introduction

[1] The village of Cristo Rey ("the village") lies no more than some four miles of unpaved road away from the centre of San Ignacio, which joins with Santa Elena to form the only twin towns of Belize. On the evening of 3 October 2006, the birthday of Mrs Teresa Tzib, her 17-year-old daughter, Pricila Tzib ("the deceased"), was slain in cold blood in the family yard in the village when one of two home invaders put a gun to her head and fired once. On 18 November 2008, after having been detained and released more than two years earlier in

October 2006, Miguel Matus ("the appellant") was arrested and charged with the murder of the deceased. No other pertinent arrest having been made, the appellant went on trial alone before González J and a jury on 8 June 2009; and, on 18 June 2009, at the end of a trial which occupied seven working days, he was found guilty of murder by the jury after less than two hours of deliberations and sentenced by the judge to life imprisonment. In the present appeal, the appellant challenges his conviction.

The Crown evidence

[2] The principal Crown witnesses at trial were Mrs Teresa Tzib, Mr Richard Aguirre and Mrs Consuelo Tzib, the mother (as already stated above), brother-in-law and sister-in-law, respectively, of the deceased. (For the sake only of convenience, and meaning no disrespect, the Court shall, in the remainder of this judgment, refer to these witnesses as Teresa, Richard and Consuelo, respectively.)

[3] Teresa's evidence demands to be described before that of Richard and Consuelo since, although she testified after they did, she, unlike them, claimed, albeit only during cross-examination, actually to have seen the appellant shoot the deceased.

[4] It was the evidence-in-chief of Teresa that, at half past seven on the evening in question, she was washing the dishes in her kitchen (lit by electric

light) when, alerted by the barking of the dogs, she saw two persons approaching the nearby house of Consuelo (situate in the same yard as the kitchen). When she asked them what they were looking for, one of them, who was carrying a gun, told her she would be shot if she went "there", whereupon she returned to her kitchen. The "guy" with the gun, having presumably followed her into the kitchen, then grabbed her. In the meantime, the deceased had emerged from another house in the yard, the sleeping quarters of some family members ("the big house"), but, heeding Teresa's instructions, had quickly gone back in. Richard then went from the big house into the kitchen but, as soon as he arrived there, the "next man" placed a machete at his neck or throat. After having asked for one Angel and been told by Teresa that no Angel lived there, the man with the gun took her to the big house (lit also by electric light), where her daughters (Antonina and the deceased) and Consuelo happened to be, and ordered them to step outside. When that order was obeyed, the man with the gun grabbed the deceased and took her "behind the bathroom". (It was to become clear in her cross-examination that the "bathroom" in question was an outdoor toilet.) Teresa followed them, protesting the taking of the deceased, until "they" threatened to kill her if she continued following them. She heard them questioning the deceased, whose answer was "I don't know", and then heard a gunshot. At this point, in Teresa's words: "I went running to see her but she was already dead." Richard picked up the body and Teresa's other son-in-law, Santos, arrived to transport it to the hospital.

[5] Teresa further stated in evidence-in-chief that she knew the man who had the gun on the night in question and that his name was Mikey Matus. She went on to give evidence as to her acquaintanceship with him. He used to visit her nieces, who lived "not so far" from her house, during the week and on Saturdays over the course of the previous two years.

[6] It was the estimate of Teresa that the total period of time during which she had the man with the gun under observation on the evening in question was around 5 minutes. Her view of him was, furthermore, unobstructed at all times.

[7] The judge having earlier ruled that dock identification of the appellant by Richard was admissible, defence counsel refrained from objecting to the like identification of the appellant by Teresa.

[8] While Teresa in her evidence-in-chief had admittedly placed both intruders at the spot where the deceased was shot, there is no gainsaying that she was clear that it was the appellant alone who actually "took" her there (p 179, line 14, record). Mr Twist's plan, as revealed on pages 189-190 of the record, was to procure the variation of that testimony as early as possible in cross-examination. The successful execution of this plan, however, proved costly, a classic pyrrhic victory. Teresa somehow agreed with Mr Twist that it was "two men" who carried the deceased towards the "toilet"; but, when he sought to capitalise on this success by suggesting to her that she could not, in the circumstances, tell the

court who shot the deceased, the obviously discomfiting reply was that she certainly could. The exchange, which cannot have been less than dramatic, was recorded as follows:

> "Q. And then when the two men took [the deceased] by the toilet, you heard a single shot?
>
> A. Yes.
>
> Q. You cannot tell this Court, Mrs Tzib who it was that fired that shot?
>
> A. Yes.
>
> Q. You can tell who or you can't tell who?
>
> A. Yes.
>
> Q. I want to get that clear because I don't know what she is saying if she can tell or if she can't tell. Let me ask her again. You can't tell this Court who fired the shot?
>
> A. I can say it.

Q. You can say who fired the shot? With your own eyes you saw somebody put the gun and fire the shot? Is that what you are saying?

A. Yes."

[9] Mr Twist understandably, if inappropriately, indicated to the judge at that point that he thought the witness was confused; but the judge quite rightly reminded him that he was in the middle of his own cross-examination (apparently in tangential allusion to the fact that advocacy is not without its occupational hazards). Mr Twist proceeded to refer the witness to a statement, said to have been recorded from her by the police, in which there was no mention of her having seen who shot the deceased. This, however, only served to introduce a new twist into matters since the statement produced in court was written in English while Teresa claimed to have spoken to the police in Spanish, the only language she spoke. Teresa's position in cross-examination, even when confronted with this dubious purported statement, was that, while that document did not reflect her evidence that she saw the appellant shoot the deceased, she did witness the shooting and that her omission to say so in evidence-in-chief the day before was essentially the result of her not having been feeling well on that day. The relevant portion of the evidence-in-chief, as shown in the record, is as follows:

"Q. What happened?

A. Then I heard they were asking her questions.

Q. Were you able to hear what they were asking her?

A. No. I heard she said, 'I don't know.' And then I heard the gunshot.

Q. Who did she hear saying 'I don't know'?

A. Pricilla (*sic*).

Q. What did you do when you heard the gunshot?

A. I went running to see her but she was already dead."

On a careful reading of these questions (put through an interpreter), the Court considers that counsel's suggestion to Teresa that she had had an opportunity in evidence-in-chief to say she saw the deceased shot was without foundation. (It is noteworthy that, later in the trial, following the visit to the *locus in quo*, Mr Twist would, unusually, resume his cross-examination on this topic.)

[10] Teresa was also cross-examined as to the fact that she had identified one of the two intruders in question as Mikey Matus in the statement purportedly recorded from her by the police on 10 January 2008 but not in that purportedly recorded from her on 3 October 2006. Her explanation of her conduct was that her fear of naming the man who shot the deceased, which had yet to go away at the time of trial, had been too great on 3 October 2006.

[11] Counsel's suggestions to Teresa that she was mistaken in her identification of the appellant as one of the two intruders in question and that he was nowhere near her premises on 3 October 2006 were firmly rejected by her.

[12] It is convenient to note at this point that during the visit to the *locus in quo* already referred to, Teresa pointed out the spot from which she claimed to have seen the shooting of the deceased as well as the "bathroom" in question and the residence next-door which the appellant used, according to her, to visit.

[13] Richard stated in his evidence-in-chief that he was inside what he called the living room (evidently the big house) at around 7.30 pm on 3 October 2006 in the company of his wife, Antonina, and her sister, the deceased. They were engaged in making church decorations when Consuelo ran in and reported that two "guys" had entered one of the other buildings. He went into the brightly-lit building called the kitchen, situated some 5 to 7 feet away from the big house, where he found a man pointing a gun at Teresa's head. He had stood there still

for a minute before another “guy” entered and walked up to him. This “guy” grabbed him and, placing a machete against the back of his neck, forced him to face one of the kitchen doors. Despite being so held, Richard was able to see the gunman escorting Teresa to the big house. Then he heard the gunman order everyone to step out of the big house and he saw Teresa, Antonina, Consuelo and the deceased all step out. Following a plea by Teresa, the gunman told Antonina she could go back into the big house (which she did) but grabbed the deceased and told her she would have to go with him. Both intruders then, as he put it, “gone with [the deceased]” to the “bathroom”, which he estimated to lie some 20 to 25 feet from the kitchen. He then heard a gunshot. Seeing the intruders run off, he went to the spot where he had seen them go with the deceased. There, near to the “bathroom”, he found her body lying motionless on the ground, from whence it was soon transported to hospital.

[14] Richard testified that he had the gunman, whom he knew, under observation for some 2 minutes in the electric light of the kitchen and that the gunman and Teresa were at one stage only about 4 to 5 feet from him. While he referred at trial to the gunman as Mikey Matus, he did not say in evidence-in-chief for how long he had known him to go by that name. (He was to expand on this in cross-examination.) But he stated that he had known the gunman ever since the latter started paying almost nightly visits to Antonina’s cousin, Melissa, in the adjoining lot, about a year and a half before the slaying.

[15] As already indicated above, the judge allowed Richard to identify the appellant in the dock, over the objection of counsel, taking the position that the authorities, including *Goldson and McGlashan v R* (2000) 56 WIR 444, *Aurelio Pop v The Queen* [2003] UKPC 40, *Pipersburgh and Robateau v The Queen* [2008] UKPC 11 and *Ronald John v The State* [2009] UKPC 12, allowed him so to do and that two of these, viz *Pop* and *Pipersburgh*, provided the guidance he would need in directing the jury on the matter later.

[16] Richard went on, following his dock identification of the appellant, to testify that, out of fear for the safety of his wife, he did not provide the name Mikey Matus to the police when first he spoke to them.

[17] In cross-examination, counsel chose to assail Richard's delayed calling of the supposed name of the gunman on the basis of the forensically popular (if oft misused) generalization that one's memory of the details of an event only fades with time. Counsel therefore stressed the fact that Richard did not call the name Mikey Matus in either of the statements recorded from him by the police on 3 October 2006, the date of the slaying, and 13 January 2008 but did so in the statement so recorded on 1 March 2008. Pressed for an explanation, Richard basically repeated what he had said in evidence-in-chief: the reason had been fear of reprisal against his family, a fear which, he explained, had diminished, but certainly not completely disappeared, by the time of trial.

[18] Counsel also sought to ridicule Richard's testimony as to what he saw even while being held with a machete to his neck; but, as the judge pointed out during the cross-examination, Richard had, by way of a gesture and accompanying words, indicated that he had turned his head sideways for a moment even while being threatened as described. Richard was polite in rejecting counsel's further dogged suggestion that, had he in fact turned his head as he claimed, he would have been killed.

[19] Regarding his acquaintanceship with the appellant, Richard, adding to what he had said in evidence-in-chief, testified that he already knew the appellant as Mikey Matus when he used to see him visiting the house next-door.

[20] Moreover, like Teresa, he repudiated the suggestion that he could have been mistaken in identifying the gunman on the night in question.

[21] In the course of the cross-examination of Richard, counsel displayed knowledge of the existence of a "Melissa Matus (*sic*)" who had allegedly been stabbed by Consuelo sometime before 3 October 2006, a matter to which it will be necessary to return below (see para [46]).

[22] Lest it be thought that there has been an oversight on the part of this Court in its consideration of the cross-examination of Richard, it is expressly noted that the record states at p 98, lines 1-3:

"Q. And again I ask the question, did you see who fired the gun?

A. Yes."

The Court cannot imagine that the witness's answer is correctly recorded since (a) counsel chose immediately thereafter to end the cross-examination and (b) Richard had agreed earlier in the cross-examination that he could not say with certainty who had fired the shot (p 92, line 15, record).

[23] Consuelo, the wife of a brother of the deceased, gave evidence to the effect that she had been in the big house, in the company of Richard, Antonina, the deceased and three babies, and was leaving, alone, for the store when Teresa, who was in the kitchen, told her something which caused her and other persons with her in the big house at the time to lock themselves inside it. There was then a knock on the door, after which Richard opened it and stepped out. Two men who were by the door immediately "took" him. Antonina, she (Consuelo) and the deceased thereupon also stepped outside. The man who was holding Richard then said the deceased was the one he wanted and grabbed her. This man was, according to Consuelo, Mikey Matus. (Her evidence, in this regard was, of course, in conflict, up to this point, with that of Richard, which was to the effect that he was held by the man with the machete.) Mikey Matus then put a gun to the area of the deceased's temple and took her away, but not before ordering Consuelo and the other members of her family to

lock themselves up, failing which all would be killed. After this order was obeyed, she heard a gunshot.

[24] Opening the door and running out, she came upon the deceased, lying on the ground near the bathroom. Thereafter, the body was carried away.

[25] Consuelo's further testimony was that she recognised Mikey Matus, whom she had known for two years, owing to, as the record has it, "the clear of the light". He used to visit (every weekend) her husband's cousins, who were her next-door neighbours in the village. (One of these cousins was known to her as Melissa ("Melissa")). She pointed out the distance between her and Mikey Matus on the night in question, a distance estimated by the judge at 3 feet, and said that she had an unobstructed view of him for about 5 minutes, an estimate she was to vary under cross-examination.

[26] Consuelo proceeded to point out the appellant in the dock as the gunman whom she had recognised as Mikey Matus, no objection to the dock identification being raised by defence counsel.

[27] Prosecuting counsel led brief testimony on the part of Consuelo concerning an incident prior to 3 October 2006 when Melissa had been wounded with a knife.

[28] In cross-examination, defence counsel drew attention to the fact that, although the slaying had been carried out on 3 October 2006, Consuelo gave no statement to the police until 30 January 2007. Like Richard, Consuelo explained her delay as being the result of fear, while pointing out that this was not to say that all her fears had left her by the time of trial. Counsel sought to heap scorn upon Consuelo's explanation of her conduct, suggesting that the admitted continuing presence of fear was reason enough for doubting that fear had played the part that was being attributed to it. But Consuelo's retort, viz "But the justice has to do something" is not to be brushed aside, conveying, as it does the idea that the witness had come, with time, to realise that, unless fear was consciously overcome, there could be no opportunity for justice to be served.

[29] It is worthy of note that Consuelo, of her own accord, varied, under cross-examination, the evidence she had given in chief to the extent of saying that, on opening the door of the big house, Richard was grabbed by the man with the machete rather than by the gunman, ie Mikey Matus.

[30] Consuelo further varied, as indicated above, her estimate of the time during which she had the gunman, Mikey Matus, in her sight, the varied estimate being 2 to 5 minutes. And when she again pointed out, during cross-examination, the distance between her and Mikey Matus at that time, the judge estimated the distance to be 2½ to 3 feet. (He had, as noted above, estimated the distance pointed out in evidence-in-chief at 3 feet.)

[31] It is further to be noted that the main difference between the evidence of Consuelo, on the one hand, and that of Teresa and Richard, on the other, is that Consuelo, unlike Teresa and Richard, placed the man with the machete in the kitchen (still restraining Richard) when Mikey Matus led the deceased to the place of her execution. From a prosecution standpoint, her evidence was thus of much greater potential value, as circumstantial evidence implicating the appellant in the actual firing of the gun, than that of Richard. Therefore, if accepted by the jury, it would provide a degree of reinforcement of Teresa's evidence which was patently unattainable by Richard's testimony and which would lessen the Crown's dependence on a joint enterprise theory.

[32] Defence counsel suggested to Consuelo that she, too, was mistaken in her identification of the gunman on the night in question; but he further suggested that there was deliberate deception in her testimony that the appellant was the gunman (p 168, record). In either case, suggested counsel, there was consistency with her delay up until 30 January 2007 in calling the name Mikey Matus. These suggestions were all rejected by Consuelo.

[33] In response to a question from the judge following re-examination, Consuelo said that Mikey Matus actually passed beside her in order to grab the deceased.

[34] Rather detailed reference requires to be made to the evidence (which occupies 63 pages of the record) of Sgt Enrique Aldana, the officer in charge of the police investigation into the death of the deceased ("the sergeant"). He testified of the receipt of certain information at the police station, in the centre of San Ignacio, at about 7.50 pm on 3 October 2006. Leading a team of investigators, he headed that same night to the home of Teresa in the village. The body of the deceased was not there on his arrival; but he saw certain stains on the grass which he directed Filiberto Pot, a Scenes of Crime Technician who testified at trial, to photograph. Regarding action taken by the police that night, the sergeant said that, while none of the witnesses spoken to could identify the person who actually did the shooting, he, following his return to San Ignacio and acting on information obtained through an anonymous telephone call, detained three persons, viz the appellant, a Renan Matus ("Renan") and a José Martínez ("Martínez"), "pending investigations". Having regard to the content of two statements, one obtained from Antonina, the police conducted an identification parade, following which they released the appellant and Martínez. Thereafter, another parade was held and Renan was likewise released.

[35] In September 2008 the police were directed by the Director of Public Prosecutions, following the recording of statements from Consuelo, Richard, Teresa and Antonina, to arrest the appellant and charge him with the murder of the deceased. The sergeant stated in evidence that the appellant, during his

initial detention, had informed the police that Mikey was his nickname. The appellant thus came to be arrested and charged as already indicated above.

[36] In lengthy and searching cross-examination which takes up some 40 pages of the record, Mr Twist rightly emphasised the fact that the witnesses interviewed by the police on 3 and 4 October 2006, viz Consuelo, Antonina, Teresa and Richard could not, according to the sergeant, say who did the shooting, or even that Mikey Matus was present on the scene of the execution.

[37] Responding to counsel's questions, the sergeant testified that all three persons detained on the night of the slaying were found either at, or in the vicinity of, the appellant's home in Santa Elena, the appellant's detention having been effected at about 8 pm. Considering the indication that the pertinent call was received at the station at about 7.50 pm, the clear inference here is that it was possible to travel from San Ignacio to the village and back (and do a few other things as well) in a space of approximately 10 minutes. Defence counsel did not suggest to the sergeant that this was an unrealistic claim. (More importantly, the jury, having visited the *locus in quo* via San Ignacio (p 278, record), would have been in an excellent position to form their own opinion on the matter.)

[38] The sergeant agreed in cross-examination that he knew of two identification parades held by the police on 5 October 2006, in the course of the pertinent investigation. The first, held at his direction, was to have been held in

respect not of the appellant but of Renan. On reading the identification parade form after the holding of the parade, the sergeant learned that, as a matter of fact, both Renan and the appellant had participated in that parade. There was, however, no evidence as to how the appellant had come to participate in a parade directed to be held in respect only of Renan. The fact stressed by Mr Twist in cross-examination was that the appellant was not pointed out by the potential trial witness who attended this parade, ie Antonina. In the view of this Court, however, what significance, if any, should be attached to that fact must depend on what information Antonina gave to the police and what, in consequence, the police invited her to do at the parade. Thus, if she had told the police that the only one of the two intruders she would be able to identify, if she were to see him again, was the man with the machete, and the police had then invited her to point out that man, if she saw him in the line-up, no significance at all could be attached, without more, to the fact that she did not point out the appellant. Regrettably, there was no evidence as to what information Antonina gave to the police or as to what the police invited her to do at the parade.

[39] At the second parade, the potential trial witness in attendance was an Alvin Tzib, who was nowhere in the evidence said to have been present at the Tzib family yard at the time of the events under consideration and who was not, in fact, called to testify at trial. Both Renan and the appellant participated in that parade and, again, neither was pointed out by the potential trial witness.

[40] Towards the end of his cross-examination of the sergeant, Mr Twist touched upon the assertion of the former in evidence-in-chief that the appellant had told the police his nickname was Mikey Matus. He evinced concern over the failure of the sergeant to include that detail in his "statement" but did not suggest that the assertion was untruthful.

[41] It is important to mention at this juncture that, on the subsequent visit to the *locus in quo*, the sergeant pointed out the spot where he had seen what he was now calling a "substance" (rather than "stains") photographed, at his request, by Mr Pot.

[42] Briefer treatment may be accorded to the evidence of Mr Pot, who testified to having been shown on the night of 3 October 2006 "a pool of red substance, suspected to be blood about two feet from the bathroom" and to having photographed the "suspected blood" on the next day. The photograph in question was admitted in evidence by the judge as one showing "a red substance" rather than "a red substance suspected to be blood".

The defence evidence

[43] The appellant testified on his own behalf and also called witnesses. He raised in evidence-in-chief the issue of alibi, stating that he was in Santa Elena at all material times on 3 October 2006. He said that at 7 pm he was at home with his mother and that, shortly thereafter, Martínez (who was his friend but whose

first name he knew to be Gabriel) arrived and all three of them went to a "Chinese shop" nearby. They were all in front of this shop at 8.10 pm when the police arrived and picked up Martínez and him. He did not, in his brief evidence-in-chief, deny or even mention the acquaintanceships with him which had been alleged by Teresa, Richard and Consuelo in their respective testimonies.

[44] In the course of cross-examination, the appellant said that the shop in question was situated in front of his house and belonged to a Mr Wu, whom (in 2006) he had already known for some eight years. His mother was still with him and Martínez when they were taken into custody by the police. The three of them had gone to the shop at about 7.05 pm. A man who sold the Boledo lottery was also in front of the shop that night but had since died.

[45] The appellant recoiled from what strikes this Court as a wholly innocuous suggestion by prosecuting counsel that he had in due course left the Chinese shop and gone into the street. He was emphatic that he had at no time before the arrival of the police left the property of which the shop formed part. (He was to be contradicted in this regard by his own witness: see para [50] below.)

[46] He accepted that he was married to a Thelma Tzib and that Renan, his brother, was married to her sister, the marriages having been solemnised on one and the same day in November 2006. But he said that the name of Renan's wife was Adelma and insisted that she was neither named nor known as Melissa Tzib,

an entirely startling assertion considering that his counsel had pointedly asked Richard in cross-examination (on the first day of the trial) whether he knew that Consuelo had once stabbed "Melissa Matus" (p 95, record). (This cannot be a case of defence counsel being unconsciously influenced by prosecuting counsel's use, during the evidence-in-chief of Consuelo, of the name "Melissa" since that did not occur until the second day of the trial.)

[47] It was on 21 September 2005 that he first spoke with the young woman who was to become his wife; and his visits to her house (next-door to that of her cousins, whom he did not know) commenced at some unspecified time thereafter and were not more frequent than once a week. He had heard that Consuelo, whom, again, he did not know, had stabbed Adelma, now his sister-in-law.

[48] As to reasons why Teresa, Richard and Consuelo would make up a story that he was implicated in the slaying of the deceased, he said that he could think of none, a statement hardly consistent with the firm suggestion of his counsel to Richard in cross-examination that bad blood was behind the allegation against the appellant. The Court observes in this regard that defence counsel did not seek to have this matter clarified through re-examination of the appellant, which was, in the event, entirely dispensed with.

[49] The first alibi witness called by the appellant was Martínez, who said in evidence that, on 3 October 2006, he (then a high school student) left his home

at about 7 pm and went to the appellant's house where he met the appellant and his mother, who then left, with him, for the "Chinese store" at about 7.05. All three were sitting in front of this store at about 8.10 pm when the police arrived, took the appellant and him into custody and transported them to the San Ignacio Police Station.

[50] Under cross-examination, Martínez said that he had never been known by the name José. The place where the three were sitting when the police arrived was, he testified, in front of a restaurant situated across the street from the "Chinese store".

[51] Martínez further stated that he paid visits with the appellant to the house in the village of the young woman whom the appellant was later to marry and that those visits would be paid during the week as well as at weekends, as many as four visits being sometimes made in a single week.

[52] Like Martínez, Guo Xiu Wu ("Guo") was an alibi witness. His testimony was that he opened his shop at about 6.30 pm on 3 October 2006 and conversed for a little while with one John, an old man, after which the appellant arrived. At about 7.30 pm conversation was going on among the three of them and the appellant's mother; and at about 8 pm the police arrived and carried away the appellant. He made no mention of the continuous presence of any young friend

of the appellant in front of his shop that night or of the police carrying away anyone beside the appellant.

[53] Guo said in cross-examination that he had known the appellant only since 2003 and that the latter and his mother were both customers of his.

[54] It is manifest from the verdict of the jury that they wholly rejected the alibi evidence of the appellant and his witnesses, whom, unlike this Court, they both heard and saw.

Consideration of the grounds and arguments

[55] The first of the five grounds of appeal was that the trial judge:

> "i) … failed to warn the Jury of the distinct and positive danger of identification without [an identification parade].
>
> ii) … did not explain to the Jury that the Appellant had lost the potential advantage of an inconclusive parade.
>
> iii) … did not explain that Dock Identification was undesirable in principle.
>
> iv) ... failed to direct the Jury that they were required to approach Dock Identification evidence without a prior parade with great care.

v) … did not draw the Jury's attention to the risk that the witnesses might have been influence (*sic*) to make their identification by seeing the Appellant in the Dock."

[56] The Court will not unnecessarily lengthen this judgment by considering whether the judge failed to do or did not do, as the case may be, the various things referred to at i) to v) above.

[57] The important question for the Court is whether the judge was in the circumstances of this case under a duty to direct the jury in the manner suggested by counsel for the appellant.

[58] In this connection, the case of *Dean Hyde v The Queen*, Criminal Appeal No 18 of 2007, in which this Court delivered judgment on 27 March 2009, is of particular relevance. The first ground of appeal in that case bears a striking resemblance to that in the instant case. Its four-fold complaint was as follows:

"1. The judge failed to warn the jury of the danger of identification without [an identification parade].

2. He did not explain to the jury the potential advantage of an inconclusive parade To (sic) the appellant.

3. He did not state that dock identification was undesirable in principle.

4. He failed to direct the jury that they were required to approach dock identification evidence without a prior parade with great care."

[59] Having acknowledged that, in *Aurelio Pop v The Queen* [2003] UKPC 40, the Privy Council, in a judgment delivered by Lord Rodger of Earlsferry, held that the trial judge had wrongly omitted to do the very four things enumerated in Dean Hyde's first ground of appeal, this Court quoted from the judgment in the later case of *Francis Young v The State* [2008] UKPC 27, where Lord Carswell, writing for the Board, said, at para 17:

> "'The trial judge must give sufficient warnings about the dangers of identification without a parade and the potential advantage of an inconclusive parade to a defendant, and direct the jury with care about the weakness of a dock identification. Much may depend on the circumstances of the case, the other evidence given and the run of the trial, so that it is not possible to lay down a universal direction applicable to all cases.'" [Emphasis added by this Court in its judgment in *Hyde*.]

[60] Later in the judgment (at para 19), this Court referred to the considered opinion of the Appellate Committee of the House of Lords in *R v Forbes* [2000]

UKHL 66 (14 December 2000) and noted that Lord Bingham of Cornhill, speaking there for the Appellate Committee, quoted as follows from para 8.7 of the *Report to the Secretary of State for the Home Department of the Departmental Committee on Evidence of Identification in Criminal Cases*, HC 338, 1976:

> "'Identification on parade or in some other similar way in which the witness takes the initiative in picking out the accused should be made a condition precedent to identification in court, the fulfillment of the condition to be dispensed with only when the holding of a parade would have been impracticable or unnecessary. An example of its being impracticable is when the accused refuses to attend. An example of its being unnecessary is when the accused is already well-known to the witness …'" [Emphasis added by this Court in its judgment in *Hyde*.]

[61] At para 20 of its judgment, this Court pointed out that in *Goldson and McGlashan v R* (2000) 56 WIR 444, Lord Hoffmann, delivering the advice of the Board, adverted with "unmistakable approbation" in the 13th paragraph (unnumbered), to a concession by counsel for the appellants that "'if the accused is well known to the witness an identification parade is unnecessary'".

[62] The Court then concluded its consideration of the relevant ground of appeal in *Hyde* as follows (paras 22-23):

"22. In the present appeal … the evidence appears to this Court amply to establish that the appellant was well-known to [the sole eyewitness]. Reference has already been made to the claim of a previous acquaintanceship; but the Court would nevertheless single out for special mention at this point the details pertaining to the frequency of encounters between [the sole eyewitness] and the appellant and the exchange of greetings whenever they saw each other. The evidential value of this, to the Crown, is enhanced beyond measure, in the view of this Court, by the striking circumstance that the alleged acquaintanceship, with all the particulars of it provided by [the sole eyewitness] was never disputed by the appellant, who testified under oath, or by his counsel, who vigorously cross-examined [the sole eyewitness] at no inconsiderable length.

23. Being of the considered view that an identification parade was entirely dispensable in this case, and, further, that the evidence of visual identification was of exceptionally good quality, this Court regards as inconsequential the fact that the trial judge gave to the jury none of the directions which, in [counsel's] submission, he ought to have given. Therefore, in the judgment of the Court, counsel's four-fold complaint is without validity and his first ground of appeal fails."

[63] No consideration was given in the judgment of this Court in *Hyde* to *Ronald John v The State* [2009] UKPC 12, an appeal to the Privy Council from

the Court of Appeal of Trinidad and Tobago in which judgment was delivered on 16 March 2009, a scant 11 days before delivery by this Court of its own judgment in *Hyde*. *John* was a case in which "the only evidence against [the appellant John]" (para 2) was given by a taxi driver whose "knowledge of him" (para 5) was the result of having seen him (a) once or twice a week over a period of some months hanging around on the streets (on only one occasion for as long as two or three hours) and (b) on the day of the relevant murder when he drove John and others to various places, including the scene of the murder, and was able to look at John's face for a total of some 20-25 minutes. The case firmly supports the Board's statement in *Young*, cited above, to the effect that, even after *Pop* and *Pipersburgh and Robateau*, there is no direction of universal application for cases in which the Crown relies on the evidence of visual identification of a witness/witnesses in circumstances where there has been no previous identification by the witness/witnesses of the accused at an identification parade. Speaking for the majority (in which Lord Rodger himself was included), Lord Brown of Eaton-Under-Heywood referred to the cases of *Pop* and *Pipersburgh and Robateau* and expressed the view that "[b]oth … in their different ways involved unsatisfactory recognition evidence …": see para 20. In the same vein, his Lordship expressed the opinion, at para 22, that "*Pop and Pipersburg* (*sic*) are really the high watermark of the appellant's case". (This Court feels sure that there is a material typographical error in this passage and that the Board in fact said "high-water mark".) Having concluded that the failure to hold a parade in *John's* case had not caused a miscarriage of justice, Lord Brown commented, by

then unsurprisingly, that "… their Lordships do not see this case as comparable to *Pop* or *Pipersburg* (*sic*). Realistically, there was not the same possibility of mistaken recognition in this case as in each of those …" The message is clear: *Pop* and *Pipersburgh and Robateau* are special cases which called for a potent prescription by the Board which it would be a mistake to seek to use for every case in which the prosecution relies on the evidence of visual identification of a witness or witnesses who did not attend an identification parade. *John's* case thus constitutes a strong indorsement of the dictum from para 17 of the judgment in *Young* which was underscored by this Court in the quotation at para [59] above.

[64] In the instant case, the Court is, as it was in *Hyde*, satisfied that an identification parade could safely be dispensed with. The claim made by each of the three identifying witnesses (which the jury must have, on the whole, accepted) of a previous acquaintanceship was never questioned, whether by the appellant or by his two experienced counsel who, as adumbrated above, cross-examined these witnesses with evident zest. The appellant went no farther than to testify, under cross-examination, that he did not know Consuelo and was even unaware that she lived next door to Thelma whom he used to visit. Consuelo (and, of course, Teresa and Richard) knew him and, to borrow, and adapt, the expression of the Board in *John*, "what he looked like": see para 23 of the Board's judgment. (His additional denial that he knew the cousins of Thelma who occupied the house next-door is beside the point since Teresa, Richard and

Consuelo were not cousins of Thelma.) Insofar as the evidence of acquaintanceship was not pointedly disputed, this case is similar to *Hyde*, though the acquaintanceship periods are not as long. On the other hand, in *John*, the alleged acquaintanceship was much shorter in duration, as noted above, and was also denied by the appellant John.

[65] Nor is there, in the opinion of the Court, dissimilarity from *Hyde* as regards the other main source of strength of the Crown case, ie the evidence of visual identification itself. None of the three witnesses who gave such evidence can fairly be said to have been restricted to a mere "fleeting glance". Each was physically in a position to command a view of the appellant free of any obstruction to speak of. As to the lighting, that, at all material times, was, to borrow the helpful phrase of the Board in *Brown and Isaac v The State*, Privy Council Appeal No 9 of 2002 (29 January 2003), "good electric light".

[66] It is useful to recall that in *Goldson*, Lord Hoffmann, referring to the concession of the appellant's counsel to which the Court has already adverted above, said (11th para – unnumbered):

> "On appeal to their Lordships' Board, [counsel] dealing first with the appeals against conviction, placed in the forefront of his argument, the fact that there had been no identification parade. He accepted that if the accused is accepted to be a person well known to the identifying witness,

> no parade need be held. The witness will naturally pick out the person whom he believes that he saw commit the crime."

As Lord Hoffmann went on to point out (12th para) in *Goldson*, appellants' counsel before the Board did not fail to make the point that there was dispute there as to whether the sole identifying witness knew the appellants.

[67] Lord Hoffmann recognised that, if there was indeed such a dispute, an identification parade in that case would not have served the proper purpose, viz "to test the accuracy of the witness's recollection of the person whom he says he saw commit the offence" (14th para). As he put it, in that same paragraph:

> "It would have been to test the honesty of [the witness's] assertion that she knew the accused. It is of course true that even if her evidence about knowing them had been truthful, she might still have been mistaken in identifying them as the gunmen."

The claim that a witness is mistaken in his/her identification is, as Lord Hoffmann went on immediately to note, not one that can be tested by an identification parade.

[68] In the present case, there being no dispute that the three identifying witnesses knew the appellant, a parade would not even have served the lesser

purpose which one would have served in *Goldson*. Nor, of course, would it have been capable of testing the appellant's claim of three mistaken identifications (a claim alternative to the one that they were lying). In these circumstances, this Court is firmly of the view that the fact that no parade was held cannot have led to the loss of anything of significance. To give the directions set out at para [55] above would, therefore, in the view of this Court, have been altogether inappropriate.

[69] Counsel in the instant case alluded to a number of "facts" which, in their submission, made it particularly important for the directions in question to have been given to the jury. But the Court sees no cause for considering any of these "facts", none of which is free-standing *vis-à-vis* the main complaint. In the absence of the relevant basic prerequisites for the giving of the directions, there can be no further debate along the lines indicated by counsel.

[70] The second ground of appeal was that the judge failed, in four different respects to be dealt with seriatim below, to give a *Turnbull* direction (*R v Turnbull* [1977] QB 224).

[71] First , counsel complained that the judge failed to tell the jury that it was a weakness of the identification evidence that none of the witnesses "made any connection" between Mikey Matus who was, according to them, the gunman and the appellant whose name was Miguel Matus except when they pointed him out

in the dock at trial. Counsel further complained that the judge actually said to the jury at times that the appellant was Mikey Matus. It is a fact that the judge so said.

[72] It is to be noted that defence counsel did not, in the cross-examination of any of the Crown's three identifying witnesses, suggest that the appellant was not, in fact, known as Mikey Matus. Nor was it put to the sergeant in cross-examination, when he testified at a later stage in the trial, that the appellant (a) had never told him that his nickname was Mikey or (b) was not, in fact, known as Mikey. And, when the appellant testified on his own behalf, he was notably silent on the topic. Moreover, as the judge, properly in the view of this Court, commented in the course of his summing-up, "Mikey comes from the name Michael" (which is, of course, Miguel in Spanish). Taking all of this into account, the Court sees no basis for counsel's complaint and would point out that (if the record be accurate) even counsel for the appellant indirectly referred to him as Mikey at one point: see p 68, line 14 to p 69, line 3.

[73] Nor is the Court able to find fault with the judge's further directions, also the subject of this first complaint, that the jury could convict on the evidence of Teresa and that such evidence could be shored up by that of Richard and Consuelo. The Court considers that *The State v Lloyds Harris* (1974) 22 WIR 41, upon which Mr Twist sought to rely in this regard, is of no assistance to the appellant. The evidence of Teresa in the instant case was strong, unlike that of

Miss McCalman in *Harris*; and that of Richard and Consuelo was circumstantial evidence implicating the appellant, albeit in differing degrees (para [31] above), in the execution of the deceased. Neither of their testimonies could fairly be regarded, as that of Bobb in *Harris* properly was, as revealing no more than "circumstances of suspicion" (per Crane JA, at p 47). The Court would add that, in its view, the comment of the judge in the present case that, "… the evidence of these two witnesses sures (*sic*) up the evidence of [Teresa] as to who did the shooting" would not have been understood by a reasonable jury to mean that the testimonies of Richard and Consuelo were both specific as to who shot the deceased. Having regard to the later direction of the judge on joint enterprise, a reasonable jury would, in the view of this Court, have (at the end of the summing-up) understood the judge to have been saying that the circumstantial evidence of Richard and Consuelo would support Teresa's evidence in the general sense of implicating the appellant (and, of course, his confederate) in the shooting, regardless of who pulled the trigger. This complaint lacks substance.

[74] Secondly, counsel complained that the judge failed to tell the jury that none of the witnesses in question revealed in evidence the circumstances in which they had come to know the name Mikey Matus, which was a serious omission since Mikey might have been a "real " name or a nickname. In the view of the Court, however, it would have been quite wrong for the judge to say such a thing to the jury since, the evidence of these witnesses being that they had never spoken to Mikey Matus himself, there was a strong likelihood that they had

learned his name from some third party who was not a witness at trial. To criticise them for failing to disclose something, when doing so might have required them to give hearsay evidence, would hardly be the conduct of a responsible trial judge. Moreover, as already stated above, there was no dispute whatever at trial as to whether the appellant was known as Mikey Matus. That being so, what could possibly have been the significance of the question whether the name Mikey was a "real" name or a nickname? There is nothing in this complaint.

[75] Thirdly, counsel submitted that the judge failed to give the jury a full *Turnbull* direction with respect to the evidence of Richard and Consuelo. By this submission, counsel seems implicitly to recognise that the *Turnbull* direction given with respect to the evidence of Teresa was a full one. He further contended that the judge asked the jury to remember his directions with respect to Teresa's evidence when considering the evidence of Richard and Consuelo and also promised to repeat such directions but never did.

[76] The record indicates that the judge told the jury that his directions on the identification of the gunman would "apply to the three witnesses". He then proceeded to give the jury a *Turnbull* direction in respect of the identification evidence of Teresa, telling the jury quite early on:

> "To avoid the risk of any injustice in this case, which has occurred in some cases in the past, it is my duty to warn you of the special need for caution before convicting the accused in reliance on the evidence of identification as it stands. A witness who is convinced in his or her own mind, in this case Pricilla Tzib [obviously meaning to refer to Teresa], may as a result be a convincing witness but may nevertheless be mistaken. The same thing applies to a number of witnesses. A number of witnesses may be mistaken as to identity of particular question [person?] on the day of a particular crime. Mistakes, members of the jury, can also be made in the recognition of someone known to a witness, even to a close friend or relative and it may have happened to you in your everyday experience that you have mistaken someone for another person. You should therefore, members of the jury, examine carefully the circumstances in which the identification was made by each witness."

[77] The judge then went on to examine the circumstances in which, according to the evidence of Teresa, she had identified the gunman as Mikey Matus.

[78] Later in his summing-up, without repeating the direction contained in the passage just quoted, he separately examined the circumstances in which Richard had similarly identified the gunman. The judge did, however, before carrying out this further examination, take the trouble of saying to the jury:

> "And here again, members of the jury, I need to remind you of my directions I gave to you on the issue of identity just a short while ago because what applies in the instance of [Teresa] also applies in the instance of these two witnesses, [Richard] and [Consuelo]. Those directions you will have to follow them in respect of identification of [the appellant] by these two witnesses. So try to remember it as best you can. Now with respect, members of the jury, to the evidence of these would [two?] witnesses having considered my directions on identification again you will have to ask yourselves the following questions."

[79] Having carried out the examination in question with respect to the evidence of Richard and before embarking on a similar exercise with regard to the evidence of Consuelo, the judge said to the jury:

> "And , members of the jury, in respect to [Consuelo] again I will ask you to take key [heed?] to my directions to the lack of identification regarding [the appellant]."

[80] A little later, immediately before starting the examination, he added:

> "Now with respect to the directions I gave you in respect to identification by first observation and by recognition, that which I gave you in respect to [Teresa] and which I remind you to recall in the instance of [Richard], I will

ask you to also focus on that direction in the instance of Carmela Tzib [undoubtedly meaning to refer to Consuelo]."

[81] The Court considers that these reminders to the jury to keep in mind the relatively small portion of the *Turnbull* direction that was pronounced only before the examination of Teresa's evidence of identification were adequate in the circumstances. The Court therefore finds no merit in this third complaint.

[82] Fourthly, counsel contended that the judge failed to direct the jury in accordance with Archbold, Criminal Evidence Pleading and Practice 2001, p 1320, para 14-9. He said, as the Court understood him, that the content of this passage ought to have been put before the jury in the form of a direction in the light of the identification evidence of Teresa, Richard and Consuelo. The passage reads:

> ''Care should be taken by the judge when directing the jury about the support for an identification which may be derived from the fact they have rejected an alibi. False alibis may be put forward for many reasons: an accused, for example, who has only his own truthful evidence to rely on may stupidly fabricate an alibi and get lying witnesses to support it out of fear that his own evidence will not be enough. Further, alibi witnesses can make genuine mistakes about dates and occasions like any other witnesses can. It is only when the jury is satisfied that the sole reason for

the fabrication was to deceive them and there is no other explanation for its being put forward can fabrication provide any support for identification evidence. The jury should be reminded that proving the accused has told lies about where he was at the material time does not by itself prove that he was where the identifying witness says he was …"

(Counsel supplied the Court with no more than the page of the pertinent edition of Archbold on which this passage occurs but it is obvious to the Court that the passage is taken from the judgment in *Turnbull* (p 230).)

[83] The direction given by the judge to the jury in the instant case was as follows:

"From this evidence, members of the jury, the accused is clearly raising the defence of alibi. He was not at the scene of the crime which was committed. And I have told you this before, and as the Prosecution has to prove the guilt of the accused person so that you are sure of it, the accused does not have to prove that he was elsewhere at the time of the alleged crime. Why is this so? Because he has no duty to prove anything. That duty, members of the jury, is squarely on the shoulders of the Prosecution. It is the duty of the Prosecution to disprove the alibi; that is, that he was not in front of Mr Wu's store at the time when the crime was committed in the village of Cristo Rey. Members of the jury, if you

were to conclude that the alibi was false or is false, that does not of itself entitle you to convict the accused."

He went on, a little later, to add:

"And if on the Prosecution's case you come to the conclusion that he is guilty and you are sure of it, then, of course you will return a verdict of guilty."

In these two passages, the judge was effectively directing the jury in accordance with the specimen direction issued by the Judicial Studies Board in England and indorsed by this Court in *Stanley Lewis v The Queen*, Criminal Appeal No 14 of 2002 (27 March 2009), at para 18. In the view of the Court, the last sentence of the passage just quoted from Archbold contains the gist of this specimen direction, while the rest of the passage contains explanatory matter directed by Widgery LCJ at the reader (of the passage). As the Court understands this passage, the whole of it, except for the closing sentence, is concerned with explaining to the reader why care should be taken by the judge when directing the jury on the topic identified in the opening sentence. It is only in the closing sentence that there appears something which is meant to be said by judge to jury. But nothing appearing in that sentence was omitted from the direction which the judge in fact gave. The Court therefore finds this complaint to be without merit.

[84] In the circumstances, there being no validity to any of the four discrete complaints brought by the appellant under this ground, it can only fail.

[85] As material for present purposes, the appellant's third ground was in the terms following:

> "The … Judge failed to discharge his duty to ensure a fair trial in relation to the Appellant in that he allowed the … prosecutor to exercise her discretion improperly in calling witnesses in a manner prejudicial to the Appellant in the following respect:
>
> i) failed to call [Antonina] a witness of primary facts or tender the ID parade evidence of this witness.
> ii) failed to call [Guo] a witness of primary facts and instead cross examined him as an untruthful witness."

[86] The Court has, without difficulty, come to the conclusion that there can be no substance in this ground. The discussion of the principles governing this area of criminal practice proceeds, and has always proceeded, on the sound basis that the relevant discretion of the prosecution, and the power of the trial judge to interfere with its exercise, exists only as regards witnesses whose names appear on the back of the indictment or on some broadly comparable document. In *Steven Grant v The Queen*, Privy Council Appeal No 30 of 2005, in which

judgment was delivered on 16 January 2006, the trial judge admitted the unsworn written statement of an absent witness, Newton-Bryant, upon the application of the Crown. No application was, however, made by the Crown with respect to a statement made by another absent witness, Kinglock, which, according to defence counsel at trial, supported the defence. The names of the two witnesses did not appear on the back of the indictment. But both statements were the subjects of notices of intention to put in evidence or adduce, as the case may be, issued by the Crown before the preliminary inquiry and trial, respectively. The Board acknowledged the fact that the names of Newton-Bryant and Kinglock did not appear on the back of the indictment but considered that that could be of no consequence in circumstances where both names were included in notices which "made clear the Crown's intention to rely on their evidence". Therefore, the Board was prepared to hold that, since fairness required the admission of Kinglock's statement, the trial judge could and should have intervened in any one of three ways. In the instant case, neither persons's name appeared on the back of the indictment and the Crown is not said by counsel for the appellant to have at any time issued corresponding notices signifying an intention to rely on the evidence of either of them, viz Antonina or Guo. The judge was therefore in no position to interfere with prosecuting counsel's exercise of her discretion in the matter. Counsel's criticism of him is unjustified and this ground must also, as it were, fall to the ground.

[87] The fourth and fifth grounds of appeal were treated as one at the hearing and, taken together, complained that the "decision" was unreasonable and cannot be supported having regard to the evidence.

[88] Counsel submitted that there was no proper identification evidence before the jury. The evidence has already been reviewed *in extenso* above and the Court sees no need for repetition. The failure of the first ground is partly the result of this Court's conclusion, for reasons already made known, that the evidence of visual identification in this case was strong, or put a little differently, of good quality. And it seems clear enough that, most crucially, the jury fully accepted, as they were entitled to do, the explanations of Teresa, Richard and Consuelo for their delay in naming the gunman to the police.

[89] Counsel further submitted that the alibi evidence was uncontroverted. However, whether uncontroverted or not, such evidence was unquestionably rejected, in its entirety, by the jury. It is quite impossible to suppose that any reasonable jury could have failed to grasp the unequivocal direction of the judge that if the jury believed the alibi they would be left with no alternative but to acquit. In the face of the absolute clarity as to the fate of the appellant's alibi, this Court, left by counsel with a harangue which amounted to little more than a rehash of his co-counsel's earlier attack against the evidence of identification, finds itself quite unable to do any better than to quote the timeless words of

wisdom of Wooding CJ, delivering the judgment of the court in *Belcon v R* (1963) 5 WIR 526, at 529:

> "In the view of this court, it is impossible to hold in this case that the jury's verdict was unreasonable or cannot be supported having regard to the evidence. Proper though the arguments addressed to us may have been to submit to the jury, once their verdict was given, it became useless to repeat them here. As we said in *Sinanan v R* [(1963) 5 WIR 459] the credibility of witnesses and the acceptability of their testimony are essentially matters for the jury, and this court will not interfere with their verdict on the facts unless it is obviously and palpably wrong. In this case, far from its being so, we think that it was fully justified by the evidence"

This Court, being satisfied that the verdict in the instant case was correct in the light of all the evidence, and by no stretch of the imagination wrong, much less "obviously and palpably" so, is of the opinion that this ground, too, is incapable of advancing the appellant's cause.

Disposition

[90] For the reasons stated above, the Court dismisses the appeal and affirms the conviction and sentence of the appellant.

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MOTTLEY P

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SOSA JA

_____
BARROW JA