IN THE COURT OF APPEAL OF BELIZE AD 2008

CRIMINAL APPEAL NO 9 OF 2007

WAYNE MARTINEZ **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 Boyd Carey Justice of Appeal

H E Elrington for the appellant.
C M Ramirez for the respondent.

2008: 29 February and 20 June

SOSA JA

[1] Wayne Martinez ("the appellant") and his brother Norris Martinez ("Norris") went on trial on 14 May 2007, before Lucas J and a jury, on an indictment jointly charging them for the murder of Reno . Castillo ("the deceased") in Belize City on 10 October 2005. The trial ended on 24 May with the conviction of the appellant, on the charge of murder, and the acquittal of Norris; and the former was sentenced to life imprisonment on 7 June 2007. An appeal by him from his conviction was heard and dismissed by this Court on 29 February 2008, when the conviction and sentence were affirmed. As it had

promised, at that time, to do, the Court now provides its reasons for judgment in writing.

[2] It was the Crown case that, shortly after midnight on the night of 9-10 October, the appellant, aged 26 at the time of trial, stabbed the deceased at least four times with a knife not long after the latter had become engaged in a struggle with Norris in an ill-advised effort to retrieve a cap and sunglasses of which he (the deceased) had been relieved by Norris moments earlier. The undisputed medical evidence was that the deceased died between 9 and 10 am on 10 October 2005 and that the cause of death was traumatic asphyxia as a direct consequence of a stab wound to the nasion.

[3] Among the Crown witnesses at trial were three eyewitnesses, two of whom had attended identification parades in which the appellant and Norris had participated. The third eyewitness had attended no identification parade.

[4] Zoila Chacon, the first of these eyewitnesses to be called by the Crown, accepted during cross-examination by defence counsel and questioning by the trial judge that, on the very morning of 10 October (and after the stabbing) she was at the police station on Queen Street, Belize City, giving a statement to Sgt Hilberto Romero when the latter pointed out the appellant and Norris to her and asked her whether she was sure that they were the two persons who were "involved in the incident with [the deceased]", which question she answered in

the affirmative. At an identification parade held the next day, she pointed out the appellant as the assailant, white-shirted according to her evidence, who had stabbed the deceased.

[5] Rosa Reyes, the second of the Crown's eyewitnesses and the deceased's common-law widow, also gave evidence that on 10 October, after the stabbing, she saw, while at the police station, "the two persons who were involved in the incident", one being the appellant. But she rejected defence counsel's suggestion that the police told her that the persons she was then seeing were those two persons, her rejection being in the terms following:

> "No. When I was giving my statement they passed by and I told the police those were the persons."

(In reproducing this passage, the Court has corrected the punctuation of the transcript.) Later in her cross-examination, having stated that she knew a police officer surnamed Suazo who had attended at the scene of the stabbing, she said that she showed the appellant to him at the police station. The core of these assertions of Ms Reyes, namely that she had shown the appellant and Norris to the police and told the police that the appellant and Norris were the deceased's assailants, was not challenged by defence counsel. Indeed, defence counsel did not even seek clarification as to whether PC Suazo was the only officer to whom Ms Reyes showed the appellant and Norris while at the

police station. Nor was PC Suazo, who later testified for the Crown, crossexamined by defence counsel on this matter. Like Ms Chacon, Ms Reyes, at an identification parade conducted on the next day, pointed out the appellant as the assailant, white-shirted according to her evidence, who had stabbed the deceased.

[6] It is not an uninteresting fact that on the same day, 11 October, Ms Reyes, notwithstanding the admitted sighting of the day before, failed to identify Norris as one of the deceased's assailants at an identification parade in which he participated.

[7] For her part, Julia Young, the Crown's third eyewitness, stated in evidence that, in the course of what, to her, was a fight between a "Hispanic" man and no more than two men of "Creole descent", she, as she put it, "saw like a silver object in a male person hand" and further, again in her words, "saw the knife went down twice", in a stabbing motion. The "Hispanic" man was now injured and "bleeding profusely from around the nose". The person with the knife was wearing a white T- shirt and his hair was braided. Walking away from the scene, after seeing the "Hispanic" man placed by police officers in a motor vehicle, Ms Young saw two male persons "sitting down in an arrested position with their hands on their heads, with an officer beside them". These persons, she made absolutely clear, were "the same ones that were in the fight", an important evidential link supplied by no other Crown witness.

[8] At no stage in the trial was it suggested by defence counsel that the two persons (one of whom was, of course, the white-shirted knife wielder) said by Ms Young to have been apprehended by the police at the scene of the stabbing were not the same two male persons further said by her to have been fighting with the "Hispanic" man. But these persons were, on the Crown evidence, the same two who were (a) subsequently escorted by the police to the police station (where each gave his name to a Cpl August, another Crown witness), (b) pointed out at identification parades already referred to above by Ms Chacon (subject to what is said concerning this at paras 15 and 16 below) and (in the case of the appellant) Ms Reyes and (c) eventually brought to trial, in short, the appellant and Norris. In this regard, it should be noted that PC Suazo gave evidence to the effect that he personally initiated one of the two detentions near the alleged scene of the incident, namely that of Norris, while a PC Muslar "went after the next male person". Both of these male persons were, according to PC Suazo, taken away in a police pickup. While he did not attempt to point out these two male persons in court (prosecuting counsel having strangely omitted to ask him, as he subsequently omitted to ask Cpl August, the appropriate questions), it is also true that there was no suggestion by defence counsel to him (or, for that matter, to Cpl August) that any other person was detained at, or near, the scene on the night in question, although it is patent from the cross-examination of Ms Chacon and Ms Reyes that defence counsel was acutely aware of the importance of the point.

[9] The appellant and Norris both gave sworn evidence at trial. Norris, testifying first, accepted that he was involved in a fight with a "Spanish" man but said that so, too, were four others, including the appellant, who was wearing a blue shirt and had no knife. He did not see who stabbed the "Spanish" man. In his testimony, the appellant, echoing Norris, said that they were both fighting with the "Spanish" man but that he (the appellant) was wearing a blue shirt and had no knife. Two to three "young boys" joined them in the fight against the "Spanish" man but when one of these "young boys", who was wearing a white T-shirt, brandished a knife and began stabbing the "Spanish" man, he (the appellant) "backed off'. Norris and the appellant each admitted the undeniable, namely his respective detention by the police, Norris saying that he was detained at the scene while the appellant said that he was detained near the scene. The appellant added that, while in detention at the police station, he saw some "Spanish" people upstairs but could not say whether Ms Chacon or Ms Reyes was among them_

[10] The verdict of the jury, itself unchallenged before this Court for unreasonableness or lack of support from the evidence, necessarily implies that they rejected the appellant's story of the stabbing of the deceased by a stranger wearing a white shirt.

[11] With the leave of the Court, the grounds of appeal were, at the outset of the hearing, amended to read as follows:

"1. The Learned Trial Judge erred and was wrong in law, when he failed to give the Jury a dock identification warning, and to tell them of the safe guards (sic) offered by an identification parade and the disadvantages to the accused present in a dock identification without a prior identification parade.

2. The Learned Trial Judge erred and was wrong in law in leaving the case to the jury when there was no admissible evidence that it was the appellant who had stabbed the deceased."

[12] These grounds plainly seek only to impugn the conduct of the trial by the judge, alleging as they do specific judicial errors of omission and commission which, though argued in the order in which they are set out above, should logically be considered in the reverse order: if the judge erred in leaving the case to the jury (ground 2), then he ought never to have reached the stage of directing the jury (the subject of ground 1). Dealing, then, with ground 2 first, this Court is unable to agree with Mr Hubert Elrington, counsel for the appellant, that the trial judge erred in leaving the case to the jury and that there was no admissible evidence before him that it was the appellant who had stabbed the deceased. In this regard, it is to be observed in passing that it was only on behalf of Norris that a submission of no case to answer was made at trial and that that submission was rejected by the trial judge. Mr. Elrington's argument before this Court was founded on a direction given by the judge to the jury in

the course of his summing up, and it is to this direction that attention now needs to be directed. Having earlier unreservedly admitted evidence from both Ms Chacon and Ms Reyes with regard to the conduct and outcome of the identification parades which each had attended, the judge told the jury:

> "So the identification parade you will not rely on it. The only thing that you will rely on, if you believe the accused that they were there, they were fighting and then the Policeman came Akbar Suazo. He apprehended one of the person's *(sic)* who had called out his name, his name was Norris Martinez and one of the accused said in Court that his name was Norris Martinez when he went into the witness box. That's a matter for you to show that they were at the scene at the time."

[13] As understood by this Court, counsel's submission, fully developed, was (a) that the judge was in that passage "withdrawing" from the jury (albeit wrongly) all evidence of the identification by Ms Chacon and Ms Reyes of the appellant and, although of no immediate relevance on this appeal, of the identification by Ms Chacon of Norris at the three identification parades in question and (b) that, if, instead, three corresponding "withdrawals" had been carried out at the appropriate times, that is to say when each of the two witnesses concerned were still in the witness-box, the proper course at the close of the prosecution case would have been for the judge to rule that there was no case for the appellant to answer.

[14] Having thus divided Mr Elrington's submission into two parts for ease of analysis, the Court will now deal with each in turn. In considering the first part, the Court will, for the sake only of argument, adopt the assumption contained in the second, namely that the "withdrawal" by the judge of the evidence relating to the three identification parades in question left the prosecution evidence in such a state that, if the defence had not yet presented its case, the only proper course for the judge would have been to rule that there was no case for the appellant to answer. The Court must, first of all, make it very clear that, in its respectful view, the trial judge was wrong to tell the jury not to rely on the evidence of the relevant identification parades. The rather mild complaint of defence counsel in his closing speech, which the trial judge pounced upon with a vengeance in his summing up, went to the fairness of the identification parades. It is, however, in the opinion of the Court, well established that the question whether an identification parade was fair is one of fact which, rather than deciding himself, the trial judge is bound to leave to the jury. This, unfortunately, was not what the trial judge did in the instant case. The passage from the summing up relied upon by Mr Elrington is in fact only the somewhat delayed parting shot of the judge on the topic of the identification parades. He had earlier roundly condemned the two parades attended by Ms Chacon as "unfair", "a joke", "not good" and "not justice". Later, adverting not only to those two parades, but also to that at which Ms Reyes had pointed out the appellant, the judge said that, if the jury believed the evidence of Ms Chacon and Ms Reyes, to the effect that they had seen the appellant and Norris at the police

station before the holding of the parades, those parades were unfair and unreliable. What is more, the judge comes across in the pertinent passages as one giving directions on the law rather than merely expressing strong opinions on the evidence.

[15] The Court is further of the view that the judge was wrong to even animadvert on the identification parade at which Ms Reyes had pointed out the appellant for there was (as Mr Elrington himself accepted, while, however, seeking to place on the police a legally unfounded onus to explain how the sighting came to occur) no evidence to suggest police impropriety in connection with Ms Reyes's admitted pre-parade sighting of the appellant and, for that matter, his co-assailant. The same cannot be said about the sighting by Ms Chacon.

[16] Secondly, the Court must address a serious ramification of counsel's submission. The question is whether an appeal ought to be allowed to succeed in circumstances where the foundation of the material ground/s of appeal is that the appellant is in danger of being deprived of some potential benefit of a trial judge's demonstrably incorrect direction or step. The question is thus framed in order to take account of the fact that the direction of the judge relied upon by Mr Elrington quite obviously conferred on the appellant the intangible benefit of reducing to some extent (though plainly not sufficiently) the chances that he would be convicted. That benefit was an irretrievable, if all too fleeting, one of

which he cannot be deprived by this Court. The additional potential benefit of which the appellant now effectively asks not to be deprived is the use of the direction in question to sustain this ground of appeal and, as shall be seen below, ground 1 as well. What is in reality at stake here, then, is not a potential miscarriage of justice (the Court having heard of none) but a potential "cheating" of the appellant out of a yet-to-be-enjoyed fruit of the trial judge's unwarranted direction. Had the judge not misled himself into "withdrawing" the evidence of the three parades under consideration from the jury, there would unquestionably have been evidence (no doubt differing in weight by reason of the particular circumstances of each sighting) from both Ms Chacon and Ms Reyes as to the identity of the deceased's two assailants and the question of the ruling of no case for the appellant to answer could hardly have arisen. As already indicated above, defence counsel at trial advanced no submission of no case on behalf of the appellant and Mr Elrington has given no indication that, absent the "withdrawal", such a submission would have been in order. His ground of appeal depends solely on the fact that the judge gave to the jury the direction in question, not on the actual state of the evidence at the close of the Crown case. The Court will, later in this judgment, return to this ramification of counsel's submission, which, as adumbrated above, is germane to both grounds of appeal.

[17] This brings the Court to the second of the two parts into which Mr Elrington's submission has been divided above for purposes of convenience.

The Court has up to this point tentatively adopted, entirely for the sake of argument, the assumption made by counsel in advancing his submission. The question must now be asked whether the assumption is, in fact, sound. In the view of this Court, it is not. It cannot be, in the light of what the Court has already set out in para 8 above. In that paragraph the Court has, it is true, made reference to the fact that both Ms Chacon and Ms Reyes pointed out the appellant at the two parades in which he participated. But the omission of such reference from the discussion can hardly affect the validity of the clear conclusion being pointed to in para 8, namely that the white-shirted assailant seen by Ms Young stabbing the deceased can, on the circumstantial evidence alone, only have been the appellant. It follows that, whatever view may be taken of the first part of the submission under analysis, the submission, taken as a whole must fail because the Crown had, at the close of its case, established a prima facie case against the appellant independently of the evidence of identification parades given by Ms Chacon and Ms Reyes. The Court would here emphasise that what the trial judge "withdrew" from the jury was evidence of the identification parades at which the appellant and Norris were pointed out. Such evidence would not include, inter alia, (a) the evidence of Ms Reyes that when she sighted the two assailants of the deceased at the police station, after the stabbing and before the parades, one of them was wearing a white shirt and (b) the evidence· of Cpl August that, on the night of the stabbing, one of the two detainees who identified himself to him (the corporal) as Wayne Martinez was, in the initial phase of his detention, wearing what he

(the corporal) referred to both as a white shirt and a white sleeveless undershirt. And this Court utterly fails to see how the omission of Cpl August to point out the appellant as being the white-shirted detainee could blunt the overall impact of this package of strong circumstantial evidence. The shape, evidentially, of the present case and that of *Phillip Tillett v The Queen,* Criminal Appeal No 5 of 2005, 27 October 2006, are, in this respect, not dissimilar. In *Tillett,* a case in which the Crown evidence was mostly circumstantial, this Court held that the trial judge had not erred in rejecting a submission of no case to answer. There a prison officer, Pop, from atop a prison roof, witnessed an incident on the ground below in which one inmate "punched" another who immediately collapsed. Like Ms Young in the instant case, Pop himself could not identify the culprit but saw him promptly detained by another officer who did not himself witness the "punching". There was other evidence to show that the detainee and the person brought to trial for the murder of the inmate seen by Pop to have been "punched" were one and the same person.

[18] The first ground of appeal may now be considered. At the outset, the Court notes that counsel's pursuit of this ground was commendably short-lived. In mid-battlefield, so to speak, counsel determined to exhaust his ammunition in the cause of ground 2, taking the uncompromising position that the "withdrawal" of evidence of the relevant parades had to be viewed as a step which left "no evidence" fit to go to the jury and that, accordingly, the issue before the Court was "not just a question of giving a dock identification warning".

[19] As this Court intimated during the abbreviated argument in its support, the very advancement of this ground was highly unrealistic. In actual fact, there was no dock identification on the part either of Ms Chacon or Ms Reyes. They each pointed out the appellant in the dock but only after first testifying as to what had occurred at the relevant identification parade. The evidence of each in this regard had been received by the judge without reservation whatever. Counsel, in recognition of this obvious fact, was driven to adopt the extreme measure of inviting this Court to speculate on what would, in his hyperoptimistic submission, have indubitably ensued at trial if the judge had refused to receive the evidence in question from Ms Chacon and Ms Reyes while each was still in the witness-box. In his submission, the Crown would have then been forced to resort to dock identification by both of these witnesses and the judge would thereafter inevitably have committed the egregious error of failing to direct the jury along the lines laid down in *Pop (Aurelio) v R* (2003) 62 WIR 18. This, in the view of the Court, is an invitation to engage in purely idle speculation which must be rejected without hesitation (and without elaboration either since the matter admits of none). Therefore the appeal could not possibly succeed on the strength of ground 1 either.

[20] It only remains to say that the general observations of this Court at para 16 above are all the more apposite in dealing with this ground. There is no discernible peril here of the appellant falling victim to a miscarriage of justice. He stands only to be left in no position to take further advantage of a wholly

unwarranted step regrettably taken, to his benefit, by the judge in the court of trial. Even if this Court were free to accede to the invitation of counsel to follow him into the risk-fraught world of speculation, it would, at the end of the day, find itself face-to-face with the reality that here there is no semblance of a miscarriage of justice and thus be left with no alternative but to apply the proviso to section 30 (1) of the Court of Appeal Act. This consideration only serves to fortify the conclusion already reached above that the appeal could not possibly succeed on the strength of ground 1.

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MOTTLEY P

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SOSA JA

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CAREY JA