IN THE COURT OF APPEAL OF BELIZE, A.D. 2008

CRIMINAL APPEAL NO. 31 OF 2006

BETWEEN:

DONICIO SALAZAR **Appellant**

AND

THE QUEEN **Respondent**

BEFORE:

The Hon. Mr. Justice Mottley	**-**	**President**
The Hon. Mr. Justice Sosa	**-**	**Justice of Appeal**
The Hon. Mr. Justice Morrison	**-**	**Justice of Appeal**

Mr. Hubert Elrington for the appellant.
Ms. Merlene Moody for the respondent.

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6, 16 March, 20 June 2008.

MORRISON, JA

1. This is an appeal against conviction and sentence for murder after a trial before Lucas J and a jury in the Supreme Court at Belize City, on 20 December 2006. At the conclusion of the hearing in this court on 16 March 2008, the appeal was allowed, the conviction and sentence set aside and a new trial ordered in the interests of justice. These are the promised reasons for that decision.

2. In the light of the disposition of the appeal, a brief outline of the facts of the case will suffice. The appellant was charged with the murder of the deceased, Mr. Rodney August, on 20 June 2004. Sometime in mid-afternoon on that day, the deceased and his girlfriend, Miss Janelle Longsworth, were enjoying a quiet drink together by the riverside behind the Midas Resort in the Macal Park area of San Ignacio Town. According to the evidence of Miss Longsworth, the tranquility of this scene was suddenly disturbed by a man, armed with a machete, which he used to chop the deceased from behind. Mr. August immediately jumped into the water, while Miss Longsworth was able to elude the assailant and run away to raise an alarm. She recognized the assailant as a person known to her before as "Life" or "Vida", and in due course, Mr. August having succumbed to his injuries, the appellant was arrested as that person and charged with murder. No identification parade was held in respect of Miss Longsworth's purported identification of the appellant.

3. The prosecution also relied on statements attributed by Miss Longsworth and other witnesses to the deceased before he died as to the identity of his assailant. These statements gave rise at the trial to two *voir dire* exercises to determine their admissibility as part of the res gestae and as a dying declaration, at the end of which they were ruled admissible by the learned trial judge.

4. In his defence, the appellant made an unsworn statement from the dock which amounted to a denial of any involvement in the attack on the deceased. According to the appellant, he had been in hospital, where he had undergone surgery and he had only been discharged from hospital less than two weeks before the attack on the deceased, at which time he was still at home recuperating. Two witnesses were called on his behalf, one of whom supported the appellant's statement that he had actually

been in hospital a short while before the murder. The issue of identification was therefore squarely joined.

5. The jury in due course accepted the case for the prosecution by finding the appellant guilty of murder, whereupon he was sentenced to life imprisonment by the learned trial judge.

6. Mr. Hubert Elrington, who appeared for the appellant in this court, as he had at the trial, filed originally four grounds of appeal, raising primarily issues of identification and of the admissibility of the evidence of the statements allegedly made by the deceased after the attack on him. Again, given the disposition of the appeal, it is only necessary to refer to ground 3 (substituted for the original ground 3 by leave of the court at the outset of the appeal):

> "The learned Trial Judge erred and was wrong in law when he failed to give to the jury the directions which the Privy Council stated must be given in all Dock Identification cases (**Pop v The Queen) [2003] UKPC 40**)".

7. Mr. Elrington submitted that the directions of the learned trial judge on the dock identification of the appellant were inadequate, stressing in particular the need for the trial judge in such a case to deal with this issue in addition to and distinctly from a general warning as to the need for caution with regard to identification evidence. In addition to **Pop v The Queen**, he also relied heavily on the most recent decision of the Judicial Committee on the subject in **Pipersburgh & Robateau v R [2008] UKPC 11** (judgment delivered 21 February 2008). (Both appeals from judgments of this court). Miss Moody for the prosecution, on the other hand, submitted that the learned judge had in fact given directions in keeping with the authorities.

8. It is, we think, fair to Lucas J to observe that he clearly appreciated that identification was the critical issue in the case and that the fact of the dock identification was a matter that required special attention in his summing up to the jury. The issue on the appeal is whether what he told the jury was adequate in the circumstances of the case.

9. The learned judge started out on this point by telling the jury that no identification parade had been held to test Miss Longsworth's ability to identify the appellant as the person who attacked and mortally wounded the deceased. Lucas J was critical of the decision of the police not to conduct a parade and told the jury plainly that "in a situation like this an identification parade ought to have been held" and that in these circumstances "failure to hold an identification parade is contrary to the practice in Belize". The result was that Miss Longsworth had made a dock identification, which, the learned judge said, equally plainly, "is unsatisfactory". He then concluded his directions on this aspect of the case in the following terms:

> "So Madam Forelady, members of the jury, you are to approach the identification of the accused in the dock by Ms. Longsworth with extreme care. Because of that you need to approach Ms. Longsworth's evidence about the identification of the accused with extreme care. You see, Madam Forelady, members of the jury, it seems from the evidence the accused is known by the alias or nickname "Life". The witness knew him as "Life". But she did not give you any other information about him to satisfy that the accused is well known to her. And I told you this already, sorry to repeat it, for example his address, work place or the name of his mother, father or his girlfriend so as to obviate the need for an identification parade. That means so as to render it

> unnecessary for an identification parade. So the accused is short changed of a proper identification. His identification by Ms. Longsworth is a dock identification. It is easy for her to identify the accused in the dock. He is sitting there alone."

10. The learned judge then went on to give the now traditional **Turnbull** warning, in terms of which no complaint is made, at the end of which he specifically adverted again to the absence of an identification parade as a weakness in the identification evidence in the case.

11. In **Pop v The Queen**, the Board said this (at paragraph 9):

> "The fact that no identification parade had been held and that Adolphus identified the appellant when he was in the dock did not make his evidence on the point inadmissible. It did mean, however, that in his directions to the jury the judge should have made it plain that the normal and proper practice was to hold an identification parade. He should have gone on to warn the jury of the dangers of identification without a parade and should have explained to them the potential advantage of an inconclusive parade to a defendant such as the appellant. For these reasons, he should have explained, this kind of evidence was undesirable in principle and the jury would require to approach it with great care: R v Graham [1994] Crim LR 212 and Williams (Noel) v The Queen [1997] 1 WLR 548."

12. In **Pipersburgh & Robateau**, the Board referred with approval to its earlier decision in **Holland v HM Advocate [2005] UKPC D1**; **2005 1 SC (PC) 3**, and stated as follows (at paragraph 15):

> "In other words, a judge does not discharge his duty, to give proper directions on the special dangers of a dock identification without a prior identification parade, by giving appropriate directions on the approach to be adopted to eyewitness identification evidence in general. Though related, the issues are different and, where they both arise, the judge must address both of them. So, in the present case, even assuming that the judge gave adequate Turnbull directions on the difficulties inherent in all identification evidence, this does not mean that, taken as a whole, his directions were adequate where the identifications were dock identifications without a previous identification parade."

13. Lord Rodger of Earlsferry, who delivered the judgment of the Board, then went on to summarize the problems posed by dock identifications as opposed to identifications carried out at an identification parade by referring again to the previous judgment in **Holland 2005 SC (PC) 1, 17**, at paragraph 47 (also delivered by Lord Rodger):

> "In the hearing before the Board the Advocate-depute, Mr. Armstrong QC, who dealt with this aspect of the appeal, accepted that identification parades offer safeguards which are not available when the witness is asked to identify the accused in the dock at his trial. An identification parade is usually held much nearer the time of the offence when the witness's recollection is refresher. Moreover, placing the accused among a number of stand-ins of generally similar appearance provides a check on the accuracy of the witness's identification by reducing the risk that the witness is simply picking out someone who resembles the perpetrator. Similarly, the Advocate-depute did not gainsay

> the positive disadvantages of an identification carried out when the accused is sitting in the dock between security guards: the implication that the prosecution is asserting that he is the perpetrator is plain for all to see. When a witness is invited to identify the perpetrator in court, there must be a considerable risk that his evidence will be influenced by seeing the accused sitting in the dock in this way. So a dock identification can be criticised in two complementary respects: not only does it lack the safeguards that are offered by an identification parade, but the accused's position in the dock positively increased the risk of a wrong identification."

14. Since the conclusion of the hearing in this matter, the decision of the Board, in **Young v The State**, Privy Council Appeal No. 66 of 2006, in which judgment was delivered on 6 May 2008 (an appeal from the Court of Appeal of Trinidad & Tobago) has come to the court's attention. In that case (at paragraph 17), Lord Carswell, after referring to **Pop v The Queen** and **Pipersburgh & Robateau**, summarized their effect as follows:

> "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"

15. While bearing in mind always Lord Carswell's cautionary note in **Young v The State** with regard to the circumstances of each case, it appears to us that the "warnings" required of the trial judge in a case such as the instant case, to be regarded as sufficient, should point out to the jury at least the following:

(i) The normal and proper practice in Belize is to hold an identification parade in these circumstances, with some outline indication of the purpose and advantages to the accused of an identification parade.

(ii) The dangers and weaknesses inherent in identification without a parade (as a separate matter, distinct from the general **Turnbull** directions on the difficulties inherent in all identification evidence).

(iii) In particular, the natural and undesirable implication that the sight of the accused sitting in the dock guarded by police officers is apt to convey to the jury.

(iv) The loss to the accused of the potential advantage of an inconclusive parade.

(v) The undesirability of this kind of evidence and the need to approach it with great care.

16. There can be no question that Lucas J had **Pop v The Queen** in mind in that part of his summing up set out at paragraph 9 above. So he did tell the jury, for instance, of the need to approach the identification of the appellant in the dock by Miss Longsworth "with extreme care", and he did

tell them that it "is easy for her to identify the accused in the dock. He is sitting there alone."

17. But the disadvantage of having the accused identified in the dock does not, in our view, derive solely from the fact that he is sitting there alone, though that is obviously a relevant factor, but also from the fact that he is sitting there surrounded by police officers, therefore deepening the implication that he has been correctly identified. Thus the danger of a dock identification in this regard was required to be explained in greater detail to the jury in the instant case.

18. Nor did the learned trial judge explain to the jury, as **Pop v The Queen** mandates him to do, "the potential advantage of an inconclusive parade to a defendant such as the appellant" (see paragraph 11 above), which is among the deficiencies in the summing-up in **Pipersburgh & Robateau** specifically referred to by Lord Rodger (see paragraph 12 above). While it may be that this is what Lucas J had in mind when he told the jury that the appellant was "short changed a proper identification" by the failure to hold an identification parade, that statement in our view, though graphic enough, in fact misstates the emphasis required of such a direction. The identification parade is not a ritual. Rather, it is an important stage in the process, not only to test the witness, but also to provide an additional safeguard, with a potential real benefit, to an accused person such as the appellant in the circumstances of this case.

19. In these circumstances, the learned trial judge's directions on the issue of dock identification fell short in our view of what was required by the authorities and it is for these reasons that we came to the conclusion that this appeal should be allowed and a new trial ordered in the interests of justice.

MOTTLEY, P

SOSA, JA

MORRISON, JA