IN THE COURT OF APPEAL OF BELIZE AD 2014
CRIMINAL APPEAL NO 13 OF 2007

**CHADRICK DEBRIDE** Appellant

v

**THE QUEEN** Respondent

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BEFORE

| | |
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| The Hon Mr Justice Manuel Sosa | President |
| The Hon Mr Justice Dennis Morrison | Justice of Appeal |
| The Hon Mr Justice Samuel Awich | Justice of Appeal |

A Moore SC for the appellant.
C Vidal, Director of Public Prosecutions, for the respondent.

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2 and 12 July 2012 and 14 March 2014.

**SOSA P**

*Introduction*

[1] Nedi Reymundo ('the deceased'), a young Police Constable in the Belize Police Department, was slain on notoriously narrow West Canal Street in Belize City in broad daylight on the morning of Christmas Eve 2004, when, in the full presence of passers-by, a gunman came up from behind him and shot him once in the area of the right eyebrow. In the early hours of Boxing Day 2004, the appellant (whose signature indicates that his first name is, in fact, Chadwick), then aged 23, was detained by the

police while on premises situate at 33 Ross Pen Road in Belize City. On a later date (which has not been specified in any document available to the Court), he was formally arrested and charged with the murder of the deceased. There followed in August 2006 an abortive attempt to try him ('the abortive trial') on an indictment dated 5 January 2006, which, as amended on 15 August 2006, charged him alone (under the name Chadrick DeBride) on a single count of murder. On a second attempt, which was successful, his trial ('the second trial') ran from 17 May 2007 to 5 June 2007, on which latter date the jury found him guilty of murder. On 16 July 2007, the trial judge, González J, sentenced him to imprisonment for life. Notice of Appeal was filed, out of time as it later turned out, on 27 July 2007. Because of the late filing, the appeal had to be removed from the Cause List for the March 2009 Session of this Court. Represented by Mr Sylvestre, the appellant was able to obtain, in July 2011, an order of a judge of the court below for an extension of the time within which to file Notice of Appeal. In that same month, such a notice and Grounds of Appeal were both filed on behalf of the appellant. The appeal was then called up for hearing at the October 2011 Session but had to be traversed to the March 2012 Session owing to the withdrawal of Mr Sylvestre from representation of the appellant as a result of differences between attorney and client as to 'the approach or course to be taken in this appeal'. When the appeal was again called up for hearing at the March 2012 Session, Mrs Moore SC, who was by then representing the appellant, sought and was granted a traversal to the July 2012 Session. The appeal, which was against conviction only, was heard, and decision thereon reserved, on 2 July 2012; and, on 12 July 2012, the Court announced that, for reasons to be given in writing at a later date, the appeal was being dismissed and the conviction affirmed. The Court now gives, with humble apologies for the delay in so doing, the promised reasons for judgment.

*The Crown evidence*

[2] It is a sad commentary on the times that, although the cold-blooded murder of the deceased was committed on a normally busy street on what is unquestionably the busiest shopping day of the year in Belize City, the Crown was able to call only one

eyewitness both willing and able to give evidence of visual identification on its behalf at the second trial. That eyewitness was Frank Méndez, significantly enough, an Assistant Marshal of the Court below and a former police officer of some 17 years' standing.

[3] The evidence-in-chief of Mr Méndez (testifying more than two years and four and a half months after the day of the murder) at the second trial was that, sometime after 10 o'clock on the morning in question, he was walking on Bishop Street heading towards East Canal Street, his destination being a barber shop (unnamed by him but, by irresistible inference, Dale's Barber Shop) located on West Canal Street. The day was sunny and bright. As he crossed the low bridge which spans the canal running between East and West Canal Streets, he looked towards the barber shop and saw 'a Spanish descent person' stepping out of it. At that moment, Mr Méndez was already almost at that end of the bridge which abuts on West Canal Street. From there, he looked north to see whether it was safe to cross that street. Upon looking again in front of him, he heard what sounded to him 'like a gunshot'.

[4] He looked in the direction from which the sound had come, viz the direction of King Street, and saw 'the same Spanish descent fellow' falling to the ground in the middle of West Canal Street. At the same time, he saw a male of Creole descent and dark-brown complexion start running away from the spot where the male of Spanish descent was falling and towards King Street. The height of this male of Creole descent, whose entire body he (Mr Méndez) could see, was about five feet six inches to five feet eight inches. He was wearing a shirt and pants which were both dark-coloured, the actual colour of the pants, which were of the three-quarter-length type, being dark-brown. He also had, on his head, a stocking which covered all but the back 'end' of his hair.

[5] The male of Creole descent did not, on the evidence of Mr Méndez, run far in the direction of King Street. After going a few feet past the barber shop, he turned and began running in the opposite direction instead. By this time, Mr Méndez was standing, as he put it, 'just as you get off the bridge' at the intersection of Bishop Street and West

Canal Street. The male of Creole descent, running on the sidewalk on the other side of West Canal Street, passed right in front of him, a gun in his right hand. Mr Méndez was able at that point not only to continue seeing his (the gunman's) entire body but also to observe his 'whole face' and to notice that the 'nozzle' of the gun was black and silver in colour. (The word 'nozzle' appearing at various places in the record seems to be the stenographer's mondegreen rather than a misnomer coincidentally employed instead of 'muzzle' not only by three Crown witnesses but also by both counsel.)

[6] Mr Méndez pointed out in court the distance which, in his estimation, separated the gunman from him at this time, which distance was, in his words: 'The width ah the street.' When pressed, for some reason, by prosecuting counsel for an alternative estimate in units of long measure, he ventured: '15 feet or maybe less', whereupon the judge threw in an estimate of his own, ie 20 feet. This last estimate was increased a little later to 29 ½ feet following the counting of tiles on the courtroom floor, an exercise of questionable value given the fact that members of the jury had already seen the actual distance pointed out by Mr Méndez and, more significantly, the near-certainty that all of them well-knew what a narrow street West Canal Street actually is. (Besides, at least one photograph of the street had already been admitted in evidence, as exhibit 'RG 5'.) Mr Méndez' further evidence-in-chief in this regard was that his view of the gunman was entirely unobstructed at all material times and that, all told, he had the latter under observation for some 15 to 20 seconds.

[7] Mr Méndez' evidence-in-chief as to events at the scene of the murder continued with an account of how he was able to attract the attention of a Corporal Garoy and a Special Constable Serano, who were in the vicinity of the magistrates' court building on Bishop Street at the time and who immediately rushed to such scene. He gave evidence of having shown them the deceased lying on the ground and of having himself left the scene a few minutes later.

[8] Mr Méndez also dealt in his evidence-in-chief with his attendance at an identification parade held by the police at the Queen Street Police Station in Belize City

on Boxing Day 2004. His testimony was to the effect that he attended at the back veranda of the office of the CIB, ie the Crimes Investigation Branch, at about 9 o'clock on the night of that day and waited there until a police officer came and escorted him to a room. In the identification parade room, to which he was next taken, were a Sgt Dawson, a Justice of the Peace named Modesto Madrill and a female who, as he claimed to have been informed, was the mother of 'the person'. The sergeant introduced him to the other two persons in the room and then explained that he was to look at nine persons who were on the other side of 'a glass' and see whether he could identify any one of them as the person he had seen running off on West Canal Street on Christmas Eve 2004. He proceeded to look at the line-up and picked out a person who was carrying a tag marked with the number '3'. That person, on his further testimony, was the accused sitting in the dock, ie the appellant.

[9] Under prolonged cross-examination (the transcript of which occupies no less than 50 pages of the record), Mr Méndez said that he remembered passing a man on his side of the Bishop Street bridge and that there were people on the other side of the bridge as he walked along on his way to the barber shop. He maintained, however, that there was no one between him and 'the person' running off on West Canal Street. He also accepted that a pickup truck and a minivan were parked on that street and near to 'the corner by the bridge' at the time, but he claimed that neither of the two obstructed his view. He had seen the deceased descend the steps of the barber shop and step onto the sidewalk.

[10] Mr Méndez further testified under cross-examination that he had never seen the gunman prior to the day of the murder. He repeated the claim he had made in evidence-in-chief to the effect that he had only been able to see the 'end' of the gunman's hair and went on slightly to vary his further evidence-in-chief that he was not sure whether the hair of the gunman was 'braids or dread', saying: "It looked like it was braided to me.'

[11] Defence counsel drew attention in cross-examination to several instances of inconsistency between the testimony of Mr Méndez in evidence-in-chief at the second trial and his testimony at the abortive trial. One such instance concerned Mr Méndez' evidence-in-chief at the second trial, repeated in cross-examination, that he only saw the gunman when he 'ran away from the falling body' (those being Mr Méndez' words under cross-examination). Defence counsel confronted Mr Méndez with his evidence at the abortive trial to the effect that he had first seen the gunman at the corner of the barber shop 'closer' to King Street, that the gunman was walking at the time and that he (the gunman) had met the deceased in the middle of the street. Mr Méndez agreed that what defence counsel read out to him during this part of the cross-examination corresponded with what he had seen on the day of the murder.

[12] A second such instance concerned Mr Méndez' evidence-in-chief at the second trial, similarly repeated in cross-examination, that he saw the gunman for a total of some 15 to 20 seconds. Defence counsel reminded Mr Méndez that his evidence at the abortive trial had been that he had seen the very face of the gunman 'for about a minute, or little over a minute'. Mr Méndez, ever non-confrontational under cross-examination, responded that whatever had been recorded at the abortive trial was what he had said in evidence. And his final word on the point, as if to make assurance doubly sure, was: 'It would have been a minute or more.' Cross-examination had yet again proved itself a lethal weapon prone to backfire if not handled with the utmost care.

[13] Mr Méndez was further cross-examined regarding the stocking which, on his evidence-in-chief, was on the head of the gunman while he was at, and in the immediate vicinity of, the murder scene. In answer to a question as to its colour, he said it was brown. (He had not been asked about this in evidence-in-chief.) As to whether the stocking was, in fact, covering the face of the gunman, he was firm: it was not. And he was equally firm that the gunman was not wearing clothes other than those described by him in evidence-in-chief.

[14] Defence counsel valiantly assumed the evidently uphill task of raising in the collective mind of the jury the possibility that Mr Méndez, for all his many years in the police department, would have been panic-stricken had he in fact heard the sound of gunshot and seen a gunman running towards him on the morning in question. The following exchanges occurring in the cross-examination are on point:

> 'Q. When you heard [the sound you knew to be gunshot], you didn't get frighten *(sic)*?
> A. No, sir.
> Q. You never get scared? It didn't move you at all?
> A. No.'

So, too, are these:

> 'A. I stood and watched what had happened.
>
> THE COURT: Were you well composed?
> WITNESS: Sir, I was [wasn't?] shaken, I was standing there, cause I turned back, then I called the police.
>
> Q. You saw a man running towards you with a firearm in his hand …
> A. No, he wasn't running towards me, I was on the other side of the street. He was coming on the other side of the street.
> Q. You see a man running in your direction with a gun in his hand, and you never tried to move or anything, you just looked at him?
> A. Yes.
> Q. Yes?
> A. Yes.
> …
> Q. So you were so composed that you still would have observed anything that was happening around that time?

A. Yes, sir.'

The climactic point in the cross-examination, arguably, is captured in the following further exchanges which ensued after Mr Méndez' frank admission that he could not recall the precise position in which the body of the deceased was lying on the ground once the dust had settled, so to speak:

'Q. But you can tell us that the man you saw that day in 15 to 20 seconds running with a gun in his hand, shot being fired, man you never saw before, was the accused man. You can tell us that? Yes or no?

A. Yes, I can.

…

Q. You want us to believe that? Just answer my question. You want us to believe you?

A. Yes, because it is the truth.'

Decidedly dogged, notwithstanding the steadfast refusal of the witness to yield him any ground, defence counsel put to Mr Méndez the following suggestion (set out at p 195, record), which encapsulates the thrust of his cross-examination:

'Q. … I suggest to you that, you neva si no man running up coming to your direction …',

the reaction to which was a categorical rejection.

[15] Not long after this exchange in the cross-examination, a rather less drastic suggestion (to the effect that Mr Méndez did not get a good look at the gunman running on the sidewalk) elicited the following strong, if surpassingly simple, response:

'I stood and watched him so I could have identified him.'

[16] Cpl. Garoy, who was called to the witness-box by the Crown following the testimony of Mr Méndez, gave evidence that, on the morning of Christmas Eve 2004, the latter called him to a scene in front of Dale's Barber Shop on West Canal Street where he saw a male who was wearing 'a thick gold chain' lying on the ground with a hole above his right eye and bleeding profusely.

[17] The only other eyewitness to be called by the Crown to testify at the second trial was James Graham, whose evidence was, to be blunt, namby-pamby. He said that he had witnessed some of the events which unfolded on West Canal Street on the morning in question. But he gave no testimony whatever of visual identification. He and his son of an undisclosed age had, on his evidence, already crossed the 'Bishop Street bridge' as they headed towards Dale's Barber Shop. They were still on the canalside and 'opposite the barber shop' when he heard a loud sound. He decided then to, in his words, 'observe my vicinity' and saw a 'fellow', who had earlier been standing outside the barber shop, down on the ground, gasping for breath and bleeding profusely from the head. He began retracing his steps over the bridge and saw a male trotting slowly from the direction of 'Popular Fat Boy', the well-known eponym of sorts of a place of business then located near the corner of West Canal Street and King Street. This male trotted past the barber shop. Foreshadowing the disclosure as to his inability to identify this person, Mr Graham stated in evidence:

> 'Well, I am still standing and I just kept watching the person, the direction he is traveling *(sic)*, not paying attention to the person, but the direction.'

He went on to add that the male continued along West Canal Street and then turned into Bishop Street and that he (Mr Graham) finished making his way back over the bridge, at which point he met up with Mr Méndez. Thereafter, he (Mr Graham) made signals to some policemen at the magistrates' court and one or two of them went over. He and his son then crossed the bridge once more and he saw the man on the ground being picked up, placed inside a motor vehicle and carried away.

[18] Mr Graham described the trotting male as ‘a short fella’ and as ‘more of a Creole descent, not as black as I am’. He was dressed in dark clothes and his pants were of three-quarter-length ‘or something like that’. Over his head was a ‘little’ stocking ‘or some fanciest [fanciness?]’ and, in his hand, a ‘little’ gun.

[19] In cross-examination, Mr Graham said that he was still on the bridge when he saw the deceased and that the latter was then leaning up against the ‘little bungalow building’ that houses Dale’s Barber Shop. On that first crossing of the bridge, he had noticed no one else on it. He was already on the street on which the barber shop is located when he heard the loud noise. He said he ‘try to see where this sound is coming from’. He then saw the deceased falling. He pointed out in court the distance between him and the deceased once the latter had fallen, a distance estimated by the judge to be about eight feet. Once again, a tile-counting exercise ensued. At the end of it, the estimate was increased by the judge to nine feet. The witness went on to say he saw no one near to him at the time the deceased was falling and that the only thing he then did was to make sure his son was secure beside him.

[20] Mr Graham repeated under cross-examination the evidence he had given under examination-in-chief to the effect that the trotting male had come from the direction of ‘Popular Fat Boy’; but he further testified that this male had only come into his view when he (the male) was in front of the barber shop, that he went past at a slow trot and that both the firearm in his hand and the ‘fancy business’ on his head were black.

[21] In cross-examination, Mr. Graham also gave, for the first time, an indication of the distance that separated him from the trotting male, as the latter went past him, by pointing out a distance in the courtroom. He estimated that the distance so pointed out in court was four feet. He did not, however, he said, notice the trotting male’s hair or hairstyle, that not having been his priority at the time. And he added that everything, from the first appearance of the trotting male to his turning into Bishop Street, had ‘happened within seconds’. Pressed for an estimate as to the number of seconds, he replied:

> ‘I noh noh. The man passed me within two seconds timing, and just disappeared around the lane.’

When later taken to task for not being able to describe the face of the trotting male, Mr Graham fell back on words he had used earlier: ‘… that was not my priority’.

[22] Inspector of Police, Alden Dawson, who also testified for the Crown at the second trial, was at all material times a police sergeant. He gave evidence under examination-in-chief of having conducted on the night of Boxing Day 2004, at the Eastern Division Police Station in Belize City, an identification parade in which the appellant was a willing and informed participant. Present to witness the parade were Sylvia DeBride, the mother of the appellant, and Modesto Madrill, Justice of the Peace. It was the testimony of the inspector that the parade was attended by two supposed eyewitnesses, viz Mr Méndez and a Jason Reneau, the latter of whom, as it turned out, did not testify at the second trial. Called first, Mr Méndez pointed out the appellant, from among the nine men in the line-up, as ‘the person he [had] mentioned in his statement [to the police]’. The appellant, who was wearing a tag marked with the number ‘3’ when so picked out, proceeded then to switch tags with a co-participant who had up to then been wearing a tag marked with the number ‘8’. The appellant also changed his position in the line-up. Mr Reneau was then called and he proceeded to pick out the appellant not only as ‘the person he [had] mentioned in his statement [to the police]’ but also as ‘the person he saw do the shooting the day in question’.

[23] Inspector Dawson further testified in evidence-in-chief of an incident which allegedly occurred in his office immediately following the identification parade. According to the inspector, the appellant, while there waiting to be escorted back downstairs, sought, and was granted, the indulgence of a visit from his sister, Sylvia Godoy, who was elsewhere on the premises at the time. Upon Ms Godoy entering the office (in which the appellant’s mother was also present at the time), the appellant stood up, hugged her and said to her, in tears, ‘that he was sorry for what he did’. The

appellant then hugged his mother and told her 'that he did it because of the company he keep'. The appellant was escorted back to the holding cell a few minutes later.

[24] Cross-examination of the inspector revolved around the *cri de coeur* of the defence at the second trial that the identification parade was riddled with irregularities, a contention which properly gave rise to no continuing issue on the instant appeal.

*The submission of no case to answer*

[25] Defence counsel evinced a desire at the close of the Crown evidence to submit that there was no case for the appellant to answer. And he indicated to the judge that he would be relying on the authority of *R v Galbraith* (1981) 73 Cr App R 124 in this regard. What he, in fact, did was to ask that the judge withdraw the case from the jury on the ground that the quality of the identifying evidence was poor and that there was no other evidence to support the correctness of the identification. He cited, in advancing this request, *R v Turnbull* [1977] QB 224. The judge denied the request; and this Court is in no doubt whatever that he was right in so doing. His ruling, unsurprisingly, was not under challenge in the present appeal.

*The appellant's statement from the dock and the defence evidence*

*The appellant's statement from the dock*

[26] The appellant made an unsworn statement from the dock in which he presented an alibi to the effect that he was at the material time at the house of his stepfather and mother at 3052 North Creek Road in Belize City playing a video game with his younger brother, Chadwing Garoy. Having arrived at that house sometime after 6 am when his mother was leaving for work, he remained there until 3 pm, at which time he returned to his own house at 33 Ross Pen Road. He stayed at home for the rest of the day and spent the following day, Christmas Day, there, drinking with friends.

[27] The drinking continued up to shortly after 3 am on Boxing Day, when police officers arrived, handcuffed everyone and took them away, him to the Burrell Boom Police Station, initially, and to the Queen Street Police Station, later, and the others to parts unknown.

[28] The remainder of the dock statement was concerned with describing how the appellant allegedly came to give (through police brutality) a statement to the police falsely implicating another person (or other persons), but not himself, in the commission of the murder in question.

*The defence evidence*

[29] The appellant also called two witnesses, viz, Rayford Bowman and Sylvia DeBride Peters (referred to above only as Sylvia DeBride). Mr Bowman, a bicycle repairman, testified under examination-in-chief that, at about 10.45 am on Christmas Eve 2004, he was at his workplace at the corner of King Street and Plues Street when he heard what sounded like the report of gunshot. Shorty after that, a male, whom he did not 'really' look at, passed in front of him. This male was wearing something resembling a stocking 'all over' his head. It was 'over his whole face' (the phrase used by the witness in cross-examination). The male in question, whose clothes he could not describe, passed at something like a trot, a gun (which may have been black) in his hand. Having passed him (Mr Bowman) on Plues Street, the male with the gun crossed King Street, at its intersection with Plues Street and kept on trotting until he reached the next intersection (with Prince Street), where he turned right.

[30] Nothing of note for present purposes arose in the cross-examination of Mr Bowman.

[31] Mrs DeBride Peters stated under examination-in-chief that, on Christmas Eve 2004, she saw the appellant by a basketball court, on her way to work, and at her home

at 3052 North Creek Road, on her return from work at 12 noon. She left her work again at 12.45 pm, at which time the appellant was still at her home.

[32] On Boxing Day 2004, she received a telephone call from the police and proceeded to the Queen Street Police Station, where, in due course, she was taken into a dark room where, in turn, she met a Hispanic man whom she did not know. Presently, a police officer and another man, both of whom she did not know, joined them in the dark room. She went on to tell of what, from all indications, was an identification parade at which the appellant was pointed out by the man who came in, as just mentioned, with a police officer as well as by another man who was later similarly brought into the dark room by the same police officer

[33] Mrs DeBride Peters went on to narrate that she was then escorted into another room by the same police officer who had conducted the identification exercise described by her. The appellant was then brought into that room, whereupon she went up to him and hugged him and he whispered to her (as if somehow possessed of foreknowledge) that she should sign anything she might be asked to sign as he would otherwise be beaten up again, his teeth having already been kicked out in a previous beating. At some point thereafter, the police officer told her that she had to sign three papers which he had on his desk; and she, fearing for the safety of the appellant, proceeded to sign those papers, two of which may have concerned 'the ID parade [a phrase she had not previously employed] or something'. She did not read those papers before signing them. Mrs DeBride Peters was asked whether her daughter was at any time that day in the room in question and her answer was in the affirmative. (She was not asked how her daughter had managed to gain access to the room.) She went on to testify that the appellant hugged his sister but said nothing to her which she (Mrs DeBride Peters) was able to hear. She further testified that her son was not crying in that room at any time while she was in there.

[34] In the course of cross-examination by prosecuting counsel, Mrs DeBride Peters was required to provide some much-needed elaboration on the vague evidence,

purporting to support the appellant's alibi, which she had given under examination-in-chief. She had left her home at about 7.50 am on Christmas Eve and had only returned there during the lunch hour, at about 12.10 pm. On her way to work that morning, she had met the appellant by a basketball court near to her home. In short, her evidence did not support the appellant's alibi.

[35] It is of considerable interest, though of no relevance to the reasons of the Court for dismissing the present appeal, that both prosecuting and defence counsel adopted in their respective addresses to the jury the investigating officer's portrayal of the crime in question as 'a robbery gone bad'. In the view of this Court, however, there was no basis in the evidence adduced at the second trial for such a portrayal. The investigating officer, a man no longer employed in the police department at the time of such trial, was not himself an eyewitness to the crime. (Indeed, had he been one, he would have been wholly unfit to assume the role of investigating officer.) His astonishing assertion in court to the effect that the crime investigated by his team was 'a robbery gone bad' was, therefore, not based on his own direct, personal knowledge. It was, indeed, inadmissible as evidence of the true nature of the crime and the motive of its perpetrator, albeit that it was elicited by cross-examination. What is more, there was, as has already been noted above, evidence (and undisputed evidence at that) from Cpl Garoy that the deceased was wearing a thick gold chain when seen lying on the street at a point of time after the gunman had left the scene. And there was no evidence whatever of so much as an attempt by the gunman to take such chain or, indeed, any other item of property from the deceased. (It should be noted, for completeness, that the man who had been investigating officer went so far as to assert that a chain and bracelet were taken from the deceased in the course of the robbery.)

*The grounds of appeal (superseded and superseding)*

[36] A total of three sets of grounds of appeal were filed at one time or another by or on behalf of the appellant.

[37] In his 'Notice of Grounds of Appeal Against Conviction or Sentence' filed on 27 July 2007, the appellant set out the following two 'home-made' grounds of appeal:

> '1. Claims that police who was in charge of the investigation spoke to the withness *(sic)* before they *(sic)* conducted the identification parade.
>
> 2. Claims that the witness gave two different descriptions one in first statement to the police and a different description during the trial.'

[38] In a 'Notice of Amended Grounds of Appeal' dated 12 July 2011, bearing the signature of Mr Sylvestre and filed on a date unknown, the following new grounds appeared:

> 'i) The learned trial judge failed to properly direct the jury on the tenuousness of the identification evidence.
>
> ii) The appellant's right to a fair trial was vitiated by the irregular conduct of the identification parade, which was conducted in breach of the Court of Appeal's guidance in *Albert Guy v The Queen*.
>
> iii) The preponderance of leading questions by Crown Counsel in examination in chief of witness James Ingram *(sic)* vitiated the Appellant's right to a fair trial.'

[39] These five grounds were superseded, and effectively abandoned, at the hearing when Mrs Moore successfully sought leave to argue, and proceeded only to argue, the following three grounds, viz that the judge:

‘1. … erred by not properly directing the jury on how to handle the inaccuracies and inconsistencies in the evidence of the prosecution’s witnesses.

2. … erred in not directing the jury on the specific weaknesses in this case where the identification was based upon a “fleeting glance”.

3. … erred in his summation by repeatedly referring to the identification of the appellant by Jason Reneau, a person who did not testify at trial.’

These three superseding grounds may conveniently be dealt with in the order in which they were argued at the hearing.

*References to the identification by Mr Reneau*

[40] Before setting out and considering the submissions of Mrs Moore in support of the third ground of appeal, it should be noted that the learned Director of Public Prosecutions did not, although she opposed the present appeal at the hearing, seek in any way to impugn this ground. But her position as regards Inspector Dawson’s statement from the witness-box to the effect that Mr Reneau had picked out the appellant at the identification parade was that it was wholly inadmissible in evidence on the ground that it was hearsay. Mrs Moore, on the other hand, did not, either in her skeleton argument or in oral argument, adopt that drastic position, notwithstanding that the Director had set it out well in advance of the hearing in a letter dated 9 June 2012 addressed to the Deputy Registrar of this Court and copied to her, Mrs Moore. (In fact, the Director went so far in that letter as to announce that the respondent would, in view of her relevant position, ‘not be opposing the appeal’ at all.) Mrs Moore was content to limit her attack to the judge’s references to the words impliedly attributed to Mr Reneau by the inspector in circumstances where Mr Reneau had not testified at the second trial. She complained that the judge was referring thus to a supposed statement by Mr

Reneau which it had not been possible to test by cross-examination (of Mr Reneau) and which had allegedly been made by someone (Mr Reneau) whose demeanour the jury had not been able to observe for themselves. In the result, this is an appeal in which not only is there no ground, but neither is there any argument, to the effect that the admission of Inspector Dawson's statement that Mr Reneau had pointed out the appellant at the identification parade was wrong in law. The Court is, therefore, of the view that it would not be appropriate to pronounce upon the merits or otherwise of the Director's position on the admissibility of the inspector's pertinent statement.

[41] The principal submission of Mrs Moore with respect to her actual third ground of appeal was, as the Court understood it, that, whereas no difficulty might have arisen from proper reference by the judge to Inspector Dawson's statement that Mr Reneau had pointed out the appellant at the identification parade, difficulty did arise where, as had (so ran the argument) occurred in the instant case, the judge confused the jury as to the significance of such alleged identification of the appellant by Mr Reneau. The judge had caused such confusion, contended counsel, by referring to the supposed identification at different points in the summing-up as if it had been the subject of evidence actually given by Mr Reneau from the witness-box while, at another point, directing that it was an identification to be taken with 'a grain of salt'. (As shall be later demonstrated, there were in fact two different points at which this 'grain of salt' warning was given; and this was eventually recognised by Mrs Moore.)

[42] It is convenient at this point to set out in proper sequence the judge's directions to the jury which bore, directly or otherwise, on the supposed identification of the appellant by Mr Reneau at the identification parade.

[43] The Court will note, by way of introduction to this exercise, that it is far from convinced that the judge was under any duty specifically to make to the jury the extremely elementary point that the witnesses in the trial were those persons who had gone to the courtroom and given testimony from the witness-box. (He evidently assumed that they possessed some general knowledge of criminal trials from watching

American television (see, eg, the remarks with which he opened the summing-up, at p 438, record); and this Court does not consider that he was wrong so to do.) Be that as it may, however, the judge did make that very point with abundant clarity when, in the course of giving the jury general directions in the first part of his summation, he observed that they had seen and heard the witnesses give their evidence from the 'witness stand': p 439, record.

[44] Having thus clearly made the point in question, the judge went on to tell the jury a little later (p 442, record):

> '… you must decide this case only on the evidence which has been adduced in this court.'

The Court does not regard this as an impenetrable direction. The jury can have been in no doubt, upon hearing it, that they were not to decide the fate of the appellant on what Mr Reneau had supposedly said to the inspector since that was not evidence which had been adduced in court. And the judge later on added to this the following apposite general warning.

> '… in this case you are not allowed to speculate about what evidence there might have been'.

The utility of giving such a direction, in a case in which a supposed key eyewitness had been mentioned by two witnesses, viz Inspector Dawson and Mrs DeBride Peters, but neither seen nor heard by the jury, is self-evident. It was a direction eminently suited to discourage speculation as to all that Mr Reneau might have added to the Crown case had he actually testified as a witness.

[45] Still later in the part of his summing-up devoted to general directions, the judge laid emphasis on the necessity of determining whether each of the witnesses was a witness of truth, making it pellucid that he was talking here of persons 'who testified in

court'. It would be absurd, in the opinion of this Court, at the present stage in the development of Belize when formal education is available as never before, to consider such a direction capable of misleading a Belizean jury into thinking that other persons (ie persons other than those who had testified in court) could somehow fall to be treated by them, the jury, not only as witnesses but as witnesses of such a special order that they were to be believed regardless of whether they were witnesses of truth. Any suggestion along such lines is hopelessly undone by its very formulation.

[46] The Court therefore finds no reason to believe that anything said by the judge in the course of his general directions to the jury would have encouraged a reasonable jury (a) to regard Mr Reneau as a witness at the second trial, or as someone who had nonetheless given evidence which they were now either bound or entitled to take into account or (b) to consider that the evidence which he might have given, had he been called as a witness at the second trial, was a fit subject for speculation.

[47] It was in the second part of his summing-up that the judge gave special directions to the jury. Insofar as they related to the supposed identification of the appellant by Mr Reneau at the identification parade, the first of those directions appears at p 481, record. The judge is there recorded as having (a) told the jury that Mr Reneau pointed out the appellant as the person whom he saw do the shooting and (b) gone on to add:

> 'Unfortunately, Members of the Jury, that witness [Mr Reneau] was never called to testify, and no explanation from the prosecution has come forward to say why [Mr Reneau] did not come to testify if he is the person who is saying "I saw the accused did the shooting." '

Since Inspector Dawson had in fact said in the witness-box that Mr Reneau had claimed to have witnessed the shooting in question, the judge's description of him as a witness is, in the view of the Court, understandable and, indeed, defensible up to a point. (It is noted, in this connection, that Mr Morales himself – defence counsel at both the abortive

trial and the second trial – called Mr Reneau a witness: p 71, record.) But in keeping with the reality that this was a judge summing up at a trial, rather than, say, a journalist reporting a crime on television, it would have been better, for the purpose of avoiding even the slightest ambiguity, for the judge to have employed a phrase such as 'supposed witness' in speaking of Mr Reneau. That said, however, the Court considers that, in the final analysis, there can be no serious suggestion that the passage is other than innocuous given that the fact there being stressed by the judge was precisely that, for reasons unknown, Mr Reneau had not testified in court. A reasonable jury could not, as this Court sees it, have been thrown into confusion by being told that, while Mr Reneau might have witnessed the shooting, he was certainly not a witness at the trial - which was all that the judge was saying.

[48] Shortly after having directed the jury in those terms, the judge paused effectively to instruct them to treat the pertinent statement <u>of the inspector</u> with a strong dose of healthy skepticism. This unambiguous warning, his first 'grain of salt' warning, is recorded as follows (p 482, record):

> 'Now, Members of the Jury, before I go on, and let's not forget. I need to tell you that <u>this piece of evidence from [Inspector Dawson]</u> that [Mr Reneau] identified [the appellant] as the person whom he saw shot *(sic)* [the deceased] must be taken with a grain of salt. Despite the exhibit ID parade form which [the appellant] signed. And I say this to you, Members of the Jury, because [Mr Reneau] was never called to testify, as I said before. And no reason was given why he did not come. So, Members of the Jury, you do not have the opportunity to see him testify, from the witness stand nor, most importantly, see him under cross-examination. His evidence – he did not testify in court – his evidence is there that in his presence he was selected by [Mr Reneau] and he was told of it, and he signed the ID parade from to that effect.' [emphasis added]

[The Court has improved on the punctuation of this passage.] It is not clear whether the reference in the final sentence to '[h]is evidence' is a reference to the evidence of the inspector or to the non-existent 'evidence' of Mr. Reneau. But, even assuming, without accepting, that it is a reference to the latter, the judge would patently have been using the term 'evidence' to refer to a supposed statement upon which, in the same breath, he was heaping scorn for the reasons that (i) Mr Reneau's demeanour had not been observed by the jury and (ii) he had not been cross-examined. No reasonable jury could have thought for a moment that the judge was here using the term 'evidence' other than very loosely indeed.

[49] The judge then continued, adopting language reminiscent of that of the standard direction given to a jury in respect of the unsworn statement from the dock of an accused person. He said (pp 482 – 483, record):

> 'So, although, Members of the Jury, this is the state of the evidence, it is now for you to give this portion of the evidence of [Inspector Dawson] <u>what weight you think it deserves</u>. [Emphasis added]

It should be borne in mind that in this passage, which was the subject of particularly strenuous complaint on the part of Mrs Moore, the direct (and only) reference was to the evidence of the inspector himself, evidence whose admission at the second trial was, as already noted above, unchallenged in any of the grounds of the instant appeal. There was no express reference here (as there was elsewhere in the summing-up) to the so-called evidence of Mr Reneau. This piece of evidence to which the jury were being directed to give such weight as they might consider it to deserve was, besides, a piece of evidence admitted entirely without objection on the part of defence counsel at the second trial. In any event, the Court is not required, in determining the success or otherwise of a ground of appeal which, as framed, is complaining only of references in a summing-up to 'the identification of the appellant by [Mr Reneau]', to consider the merits of a direction expressly aimed at the evidence of someone else altogether.

[50] It may, nevertheless, be mentioned in passing that the judge went on to explain to the jury the legal basis, as he understood it, for the admission of the inspector's evidence as to the supposed identification of the appellant by Mr Reneau at the identification parade. As has already been pointed out above, the Director has volunteered the view that such basis is unsound; but counsel for the appellant has, with commendable frankness, stated that she does not, as a matter of fact, share that view.

[51] It was not until the judge had passed the half-way point in his summing-up, and after he had said to the jury all that has so far been singled out in the present judgment, that he made the first of the slips on which counsel for the appellant focused the spotlight, so to speak, at the hearing. That slip is recorded at p 485 of the record, where the judge, prefacing his *Turnbull* warning to the jury, said:

> 'Members of the Jury, this is a trial where the case against [the appellant] depends wholly on the correctness of the identification of him – or two identifications of him – which the defence alleges to be mistaken.'

[The punctuation of the sentence here quoted has also been improved upon by the Court.] Though the mistake (of referring to a second identification) was avoidable, it is not difficult to empathise with the trial judge. He may well have been inclined, initially, to restrict his *Turnbull* warning to the identification by Mr Méndez only (the latter having, unlike Mr Reneau, testified from the witness-box); but, presumably on immediate second thoughts, it evidently then occurred to him that such a restriction might open him to criticism on appeal, in the event of a conviction, and he referred instead to two identifications. The idea may well have been to err on the side of caution. Of course, by this point in the summation, he had already, as has been demonstrated at para [48], above, made it quite clear to the jury that any supposed identification by Mr Reneau would have its own inherent weaknesses.

[52] The Court does not consider that, in these circumstances, the judge can properly be criticised, or the fairness of the trial questioned, because he did not repeat what he

had carefully explained earlier about the absence of identification evidence *per se* from Mr Reneau himself and the resulting absence of an opportunity for (a) observation of his demeanour while standing before them in the witness-box and (b) testing by means of cross-examination of him. Judging from the number of pages separating this undeniably erroneous remark from the last of the proper directions already referred to at para [48], above, ie two, the interval of time between that remark and that proper direction was short. The absence of a repetition of that which had so explicitly been stated only a minute or two earlier cannot have been crucial, given twelve jurors possessed of reasonably attentive minds and reasonably retentive memories.

[53] Moreover, it is a fact that, a few moments later, the judge took the trouble of returning to his earlier warning that the inspector's evidence of an identification allegedly made by Mr Reneau had to be taken with 'a grain of salt'. (Counsel for the appellant said, as already noted at para [41], above, that the judge gave such a warning once only; but counsel was obviously in error in so saying.) The judge, on this second occasion, expressed himself as follows (p 486, record):

> 'The other witness who identified [the appellant] as being the person who did the shooting never testified, but according to [Inspector Dawson] in the presence of [the appellant] the witness – that witness – that person [Mr Reneau] said that is the person who I saw did the shooting. And [the appellant] signed the ID [parade] form to that effect. So you will take that evidence as I said with a grain of salt, and give it what weight you think it deserves. I have to repeat this because in my view it was crucial that that witness should have come to testify in this case.'

As is clear from the final sentence of this passage, the purpose of the judge here was to repeat his earlier 'grain of salt' warning, set out at para [48], above. That, however, it is to be recalled, was a warning with respect to the evidence of Inspector Dawson. Undoubtedly, then, in the penultimate sentence of this last-quoted passage, the phrase 'that evidence' refers to the evidence of Inspector Dawson. As the Court sees it,

therefore, it was not the supposed evidence of Mr Reneau that the jury were here being told that they could take, but only with a grain of salt. At the same time, however, favourably to the appellant, the jury were being emphatically reminded in this passage of the seriousness of the Crown's failure to bring Mr Reneau to court as a witness.

[54] It is also the case that, in his next sentence, the judge, continuing with his *Turnbull* direction, told the jury that they were required carefully to examine the circumstances under which 'the identification of each witness was made'. That would have suggested that there was more than one identifying witness. But, importantly in the view of the Court, the judge thereafter proceeded to focus on a single topic, ie the circumstances of the supposed identification by Mr Méndez, and Mr Méndez only. (The circumstances of the supposed identification by Mr. Reneau were not, of course, the subject of any evidence at the second trial.) The directions of the judge in this regard culminated with the following reminder (p 489, record):

> 'Members of the Jury, I will enjoin you once more to exercise caution before convicting [the appellant] on the evidence of [Mr Méndez] unless on the evidence you are sure the identification of [the appellant] is correct.'

The focus, in other words, remained where it needed to remain: on the supposed identification by Mr Méndez.

[55] Very shortly after giving that direction, the judge again spoke in terms of a single identification, viz that made by Mr Méndez, when he said (p 489, record):

> '… to assist you as to whether or not the identification of [Mr Méndez] is correct there is evidence coming from … [Inspector Dawson] …'

(The judge adverted in the remainder of this passage to the inspector's evidence of the supposed meeting – already mentioned above – among the appellant, Ms Godoy and Mrs DeBride Peters immediately following the identification parade.) Then the judge

went on to direct the jury that, if they accepted the evidence of the inspector that the appellant said certain things to Ms Godoy and Mrs DeBride Peters during such meeting, the words of the appellant would 'corroborate the evidence of [Mr Méndez] that it was [the appellant] who shot and killed [the deceased]'. (It was in fact an error to say that this was the evidence of Mr Méndez since he had not claimed to have seen the appellant shoot the deceased; and, happily, the judge was to correct himself shortly afterwards: see p 493, record.) The point to be underscored, however, is that the focus had not changed.

[56] It was only after this point in the summation that the judge made the remainder of the slips of which the appellant complained in his third ground of appeal. The slips in question occurred at no more than three different stages in what was left of the summing-up. On the first of these occasions (pp 493 – 494, record), the judge alluded, first, to

> '… the evidence of [Mr Reneau] who said he saw [the appellant] did *(sic)* the shooting …'

and, secondly, to

> '… the evidence of that *(sic)* where he [Inspector Dawson] said that [the appellant] was identified as the person who did the shooting by [Mr Reneau) …'

Of course, as has already been noted at para [45], above, the judge had as early as the first part of his summation, in which he had given general directions, said to the jury, in the context of the topic of witnesses of truth, that he was talking of persons 'who testified in court'. This he had said following his earlier observation that the jury had seen and heard the witnesses giving their evidence from the 'witness stand' and his instructions that (a) the case was to be decided only on the evidence adduced in court and (b) speculation as to what evidence there might have been was impermissible.

That the judge was using the word ‘evidence’, in the context of what Mr Reneau had supposedly said to the inspector, extremely loosely could not have been less than crystal clear to the jury at this stage. After all, it had already been emphasised to them (as recorded at, eg, p 482, record, previously referred to at para [48], above) that, Mr Reneau not having gone to court to testify, there had been no opportunity either for the jury to observe his demeanour or for his supposed claim (to have witnessed the shooting) to be tested by cross-examination of him.

[57] But the judge was by no means through with his efforts to hammer home the fundamental point that the witnesses at the second trial were those persons whom the jury had seen and heard. Thus, having moved on to the topic of inconsistencies in the evidence, he saw fit to make the observation (set out at p 501, record) that

> ‘[y]ou have seen and heard the witnesses …’

This observation, made to a jury of reasonable collective intelligence, could only have served as an unequivocal, if unnecessary, reminder that Mr Reneau, having been neither seen nor heard by them, was not a witness at the second trial.

[58] And, having dealt with the topic of inconsistencies in the evidence and turned to that of the appellant’s unsworn statement from the dock, the judge effectively pointed out again that the prosecution witnesses in the second trial were those persons who had actually testified (p 511, record). He then further remarked (p 512, record):

> ‘… evidence is only what is said from the witness stand …’

The jury could not have needed explicitly to be told at any, let alone this late, stage in the summation that Mr Reneau had said absolutely nothing from the witness-box in the second trial.

[59] For this reason, the Court considers that no prejudice whatever could possibly have been caused to the appellant on the second of the three occasions in question, when the judge somehow slipped once again and said (p 514, record):

> '[The prosecution] are seeking to disprove the alibi by bringing their witnesses, James Graham, [Mr Méndez] and [Mr Reneau]. That is how they are seeking to disprove the alibi …'

[This is another passage on the punctuation of which the Court has improved.] The Court finds it impossible to suppose that any reasonable juror would have been confused by so flagrant an error, notwithstanding the fact that, incredibly, it was repeated, albeit in attenuated form, a moment or two later, when the judge said (p 514, record):

> '… [the appellant] is also saying that those persons who identified him, i.e. [Mr Méndez] and [Mr Reneau] were mistaken … The question is whether you believe the evidence of [Mr Méndez] and that of [Mr Reneau].'

[Although these last two passages are here set out separately, they occur, as will have been appreciated, on one and the same page of the record.] At the risk of waxing tedious through repetition, the Court is unable to imagine a jury of twelve intelligent Belizeans treating these two errors as other than so glaring as to merit not even a moment's discussion. Obviously, Mr Reneau had not been brought to court as a witness and had given no evidence; and the judge had not intended to say otherwise.

[60] The third and final occasion on which the judge slipped arose a few moments later and quite near the end of the summation, when he spoke of the 'identification of [the appellant] by [Mr Méndez] and [Mr Reneau]': p 524, record. Again the error was, in the view of the Court, so patent that no reasonable jury could have failed straight away to recognise it as such and, accordingly, to give it no further thought.

[61] Seeking to develop her main submission in oral argument, Mrs Moore said that the matters of which she complained were to be found 'throughout the summation'. The Court does not agree. Her skeleton argument had realistically complained of passages occurring only on pages 485, 493, 494, 514 and 524 of the record. The summing-up was, however, fairly long, occupying 88 pages of the record. She also underlined the fact that the erroneous reference by the judge to an identification by Mr Reneau captured at p 524 of the record was 'one of the last things the jury would have heard'. While there is no denying that fact, however, the Court has rightly pointed out from time to time in the past (as, eg, in the penultimate paragraph of its judgment in *Orceneo Flores v The Queen*, Criminal Appeal No 16 of 1980) that a summing-up must be looked at as a whole.

[62] Mrs Moore further contended that, for lack of adequate judicial guidance, the jury may have failed to grasp the full significance of Mr Reneau's not having testified at the second trial. The Court disagrees. The judge made it sufficiently clear to the jury by his directions that Mr Reneau should not be regarded by them as a witness at the second trial and that anything that he may have said was not to be treated as evidence at such trial. They were further directed in language which was clear enough to be understood by a reasonable jury that they were not entitled to speculate as to what he might have testified had he been called to do so. Furthermore, all directions indicating that certain pieces of evidence were to be given the weight they deserved were specifically aimed by the judge at the evidence of Inspector Dawson only. That was evidence according to which Mr Reneau identified the appellant at the identification parade as the person he saw do the shooting. Not only was that evidence of the inspector admitted without objection whatever by defence counsel (as noted at para [49], above), it was never challenged in cross-examination, counsel restricting himself to the non-issue whether Mr Reneau had made such a disclosure to the inspector himself prior to the holding of the parade. What is more, Mrs DeBride Peters, as already pointed out at para [32], above, herself testified that there was a second man who picked out the appellant at the identification parade.

[63] Having rejected for the various reasons given above the appellant's main and subsidiary submissions, the Court held that the third ground of appeal failed.

*Specific weaknesses of a fleeting glance identification*

[64] The Court sees as a fit and proper preface to its consideration of the appellant's second ground of appeal the entirety of para 14 of the advice of the Judicial Committee of the Privy Council (delivered by Lord Kerr) in *France (Mark) and Vassell (Rupert) v The Queen* [2012] UKPC 28. That paragraph reads:

> 'Mr Bishop QC, who appeared with Ms Fawcett for the appellants, submitted that the directions of a trial judge, in order to sufficiently alert the jury to the possible frailties of identification evidence, must scrupulously, indeed meticulously, follow the various elements required of a summing up which had been identified in *R v Turnbull* [1977] WB 224. He took the Board through the judgment of Lord Widgery CJ in that case, identifying what he claimed were indispensable components of every judge's charge to a jury about identification evidence. As a preliminary and general comment, the Board would observe that a formulaic recital of possible dangers of relying on identification evidence, if pitched at a hypothetical rather than a practical (in the sense of being directly related to the circumstances of the actual case that the jury has to consider) level may do more to mislead than to lighten. The purpose of what has become known as a *Turnbull* direction is to bring to the jury's attention possible dangers associated with identification evidence but that purpose is not achieved by rehearsing before the jury difficulties that might attend that evidence on a purely theoretical basis. A trial judge should always be conscious of the need to relate conceivable difficulties in relying on this type of evidence to the actual circumstances of the case on which they have to reach a verdict. As the Board said in *Mills v The Queen* [1995] 1 WLR 511, 518 the *Turnbull* principles do not impose a fixed formula for

> adoption in every case. It will suffice if the trial judge's directions comply with the sense and spirit of the guidelines.' [emphasis added]

[65] The Court is convinced that a trial judge directing a jury on the weaknesses in identification evidence adduced by the Crown in a particular case will incur the same risk of misleading more than enlightening by pitching his or her directions at a hypothetical rather than a practical level. And it is in full appreciation of this that the Court would adopt the approach held out as the proper one in *Grieves (Omar) and ors v The Queen* [2011] UKPC 39, a decision to which the President referred counsel for the appellant in the course of oral argument. Delivering the advice of the Board in that case, Sir Roger Toulson said, at para 29:

> 'An important part of the guidelines laid down in *Turnbull* [1977] QB 224 is that the judge should remind the jury of any specific weaknesses in the identification evidence. Later authorities establish that this duty entails explaining why something is a weakness which may cast doubt on the reliability of the identification unless to do so would be to state the obvious.'

The guidance to be derived from these two passages in *France* and *Vassell* and *Grieves*, for purposes of the present case, is, in the opinion of this Court, that the trial judge should confine himself or herself to what he or she sees as the practical, as opposed to theoretical, weaknesses in the identification evidence which has been adduced, such weaknesses being made up of matters which actually cast doubt, as he or she sees it, on the reliability of the identification concerned. The appellate court, able only to peruse a printed record of the trial, should be ever-ready to concede the advantage naturally enjoyed over it by the trial judge when it comes to identifying the real weaknesses of the identification evidence placed before the jury in a trial.

[66] It was with these considerations in mind that the Court approached the litany of alleged specific weaknesses in the identification evidence of Mr Méndez ('the alleged weaknesses') presented by the appellant under his second ground of appeal.

[67] The first of the alleged weaknesses was that, on the evidence, the male of Creole descent seen by Mr Méndez starting to run away from the deceased as the latter fell to the ground on Christmas Eve 2004 was someone he (Mr Méndez) had never seen before. The judge did not in his direction see fit to treat this as a weakness in the identification evidence of Mr Méndez. But he certainly referred to it in dealing with the circumstances under which Mr Méndez observed the gunman on the morning in question (p 488, record). This Court was not of the view that the judge needed to do any more than he actually did in the circumstances of the present case. The fact is that he did remind the jury that Mr Méndez had never seen the gunman in question before he saw him running off on West Canal Street at the time of the pertinent incident. Refer to it as a 'weakness' he certainly did not; but neither did the trial judge in the Gun Court of Jamaica employ that term in *Rose (Michael) v R* (1991) 46 WIR 213, a case in which Lord Lloyd of Berwick, speaking for their Lordships' Board, said with reference to this particular language imperfection (at p 217):

> '… nor did [the trial judge] use the word "weakness" … But nothing in *Turnbull*, or in the subsequent cases to which their lordships were referred, requires the judge … to use a particular form of words, when referring to those weaknesses.'

Nor did the trial judge in the instant case explain why the relevant fact was a matter which might cast doubt on the reliability of the identification. But this Court considered that for him to have done so would have been, in the language of the passage from *Grieves* already quoted above, 'to state the obvious.'

[68] The second of the alleged weaknesses was Mr Méndez' testimony that the running male of Creole descent had a gun in his hand. The trial judge, however, cannot

fairly be said not to have repeatedly mentioned this piece of evidence in the course of his summation. He first referred to it even before coming to direct them on the element of the pertinent offence concerned with the identity of the deceased's killer (p 465, record, where the element of intention to kill was being considered). Then, dealing with the former element, the judge referred several times to the fact that Mr Méndez saw the running male of Creole descent carrying a gun (pp 476, 477, 493 and 494, record). As in the case of the first alleged weakness, and for the same reasons, the Court does not consider material the twofold fact that the judge did not use the word 'weakness' and gave no pertinent explanation to the jury. As has been noted above, Mr Méndez is recorded as having stated in answer to a question from the judge that he <u>was</u> shaken when he saw the male of Creole descent running away from the deceased as the latter fell to the ground. On the other hand, the tenor of the questions of defence counsel which immediately followed (reproduced at para [14], above) strongly indicates that what Mr Méndez had actually said in reply to the judge was that he 'wasn't' (rather than 'was') shaken. This Court is persuaded that the judge, having not only seen and heard, but also participated in, these exchanges, was in the best position to determine whether or not the fact that the evidence indicated that the fleeing man was armed with a gun would have constituted a weakness in Mr Méndez' evidence.

[69] The third of the alleged weaknesses was that the gunman was said to have been running and to have ran past Mr Méndez. It is true that Mr Méndez himself repeatedly said in evidence that the gunman was running, never once using the word 'trotting' to describe the actions by which the latter was leaving the murder scene. This Court cannot, however, sit in an ivory tower and ignore the often-very-loose habits of speech of Belizeans in the streets of our cities and towns, particularly in a case, such as the present one, in which two other witnesses spoke of having seen a gunman trotting (in one case) away from the scene in question and (in the other) on a nearby street in the same neighbourhood, on the same morning. The evidence of Mr Graham was that the gunman he saw was trotting, and slowly at that, throughout. And, consistently with this evidence, that of the defence witness, Mr Bowman, was that the gunman that (admittedly perplexingly) 'I noh really mi di look pahn' passed his workplace at a trot. To

put it shortly and with the aid of a colloquialism, this Court is not prepared to 'second-guess' the trial judge's approach, in the heat of the moment, to the evidence which indicated that the gunman may have been running when seen by Mr Méndez. But even if the judge did not treat such evidence as a relevant weakness, there is no denying that he did the defence a favour by repeatedly telling the jury that both Mr Graham and Mr Méndez saw the gunman running (pp 472, 475, 477, 493 and 503, record). The appellant has not gone so far as to contend that the identification evidence should be regarded as nonetheless affected by a specific weakness even if (as was the case, in fact) the majority of the witnesses claimed that the gunman they saw was only trotting. The case that there was here a third weakness in the identification evidence is not made out.

[70] The fourth of the alleged weaknesses was that Mr Méndez supposedly heard what sounded like a gunshot and saw the deceased collapse before he observed the gunman leaving the scene. The contention is, similarly to that advanced with respect to the third of the alleged weaknesses, not based on the actual evidence. The testimony of Mr Méndez was that he heard the sound of gunshot and, turning his head, saw (a) the deceased falling and (b) the gunman start running off from the spot where the deceased was falling (p 162, record). The twofold circumstance that the deceased had not yet hit the ground and that the appellant was so near to him, coupled with the medical evidence that the deceased was shot from point-blank range, renders this, in the Court's respectful opinion, a veritable strength, rather than a weakness, in the identification evidence. Putting aside the decidedly puzzling indication in the record, already referred to above, that Mr Méndez told the judge that he was shaken, and concentrating instead on the manner in which, on his evidence, Mr Méndez reacted to the awful emergency, the only logical conclusion here is that he remained remarkably calm and in control of himself throughout, for all the sound of gunshot and the sight of a falling victim.

[71] The fifth of the alleged weaknesses was that everything was said to have taken place in a matter of 15 – 20 seconds or a minute. The Court does not accept the

suggestion that a time estimate in this range automatically gives rise to a weakness in the evidence of identification. Furthermore, the Court considers it helpful to recall its own words in *The Queen v Donicio Salazar Jr*, Criminal Appeal No 1 of 2009, in which judgment was delivered on 28 October 2011, which words were as follows (see para [24]):

> 'What may seem like thirty seconds to one person may well seem like as few as ten seconds to another and as much as a minute to yet another.'

Mr Méndez, like the witness Douglas in *Grieves*, cited above, 'was being asked for a time estimate several years after the event', to quote from the judgment of the Board, at para 41. And as their Lordships went on to add, in that same paragraph:

> 'Time estimates by someone who is not looking at a watch are notoriously difficult.'

The courts must, however, continue to work with time estimates and it is therefore worth noting that in *Jones*, cited above, where the Privy Council upheld the ruling of the trial judge that there was a case to answer, the sole eyewitness's evidence was that she was able to observe the face of her husband's killer for some fifteen seconds only. Similarly noteworthy is the fact that in *Salazar*, also cited above, Miss Longsworth, the sole eyewitness to the fatal machete attack on her boyfriend, claimed to have seen the assailant for some thirty seconds only. There, the decision of this Court was that a ruling of no case to answer was wrong. In the view of this Court, the mere fact that, on the evidence, Mr Méndez claimed to have observed the gunman for up to a minute or more does not, in and of itself, result in evidential weakness.

[72] The sixth of the alleged weaknesses was that Mr Méndez observed the gunman from 'about 30 feet' away. As has been seen above, the actual evidence of Mr Méndez was that the distance between him and the gunman at the time he observed the latter's face was the width of the street, It is unfortunate, in the view of the Court, that

prosecuting counsel did not leave matters at that and move on to another point. It is, after all, unlikely in the extreme that any member of the jury would have been unfamiliar with such a well-known and much-used (and, yes, narrow) street as West Canal Street. The Court considers that, in the circumstances, the interests of justice were served when the judge refrained from, as it were, pouring fuel on a fire which ought never to have been lit in the first place.

[73] The seventh of the alleged weaknesses was that Mr Méndez gave no description of the gunman to the police. Though it is no answer to the complaint of counsel, the Court will observe that this, curiously, is a situation more often than not encountered in criminal cases in this jurisdiction. In dealing with the appellant's complaint on this particular score, the Court finds itself unable to differ from the approach of the Judicial Committee in *Rose*, cited above, where six alleged weaknesses in the identification evidence of the sole eyewitness, a brother of the murdered man, included the following (see p 215):

> '(5) The witness does not appear to have given a description of [the gunman in question there] in his statement to the police, if indeed he gave a statement.'

In the course of dismissing the appeal of Mr Rose, the Board pithily stated, as regards the alleged weaknesses numbered (4) and (5) (at p 217):

> 'Their lordships do not regard the omission of any reference to (4) and (5) as crucial.'

In the instant appeal, this Court concluded that, similarly, it was not a crucial omission on the part of the judge not to have gone beyond mentioning, at p 489, record, the fact that there was no evidence of Mr Méndez having given the police a description of the gunman. It is clear that Mr Méndez was not the only eyewitness spoken to by the police in the course of their investigations.

[74] The eighth of the alleged weaknesses was that the other persons in the identification parade in question did not 'have braids or their hair in the style of the appellant or in the style of the person [Mr] Mendez saw' running away at the murder scene. The Court was unable to follow the reasoning of appellant's counsel in advancing this point. The evidence of Mr Méndez was that the stocking on the gunman's head prevented him from seeing all but the 'end' of the latter's hair. The hair of the appellant can hardly have played any part, in those circumstances, in Mr Méndez' determination at the parade that the appellant was the gunman whom he had seen on West Canal Street on Christmas Eve 2004. The Court concluded that there was nothing in this point.

[75] The ninth of the alleged weaknesses was that, as a result of Mr Méndez having sought help from the police, he deprived himself of time to 'meditate' on the face of the gunman. The Court's short answer to this is that it is not convinced that such meditation time was necessary in the circumstances of this case. If, as they obviously did, the jury gave credence to Mr Méndez' testimony, the facts were that, by virtue of his extraordinary courage, this former law enforcement officer stood his ground and looked at the face of the departing gunman from across a narrow street with one dominant purpose in mind, viz 'so I could have identified him'. This Court did not consider that any valid purpose would have been served by suggesting to a reasonable jury that, after taking such deliberate action and demonstrating such presence of mind, the witness was in need of such a thing as meditation time.

[76] The tenth, and last, of the alleged weaknesses was pinpointed by Mrs Moore as follows:

> 'Another witness said the person he saw running with a gun in hand had his face covered fully with a stocking, unlike what [Mr Méndez] said about the stocking being on the person's head only.'

This contention calls to mind that attributed by the Board to Mr Birnbaum QC in *Grieves*, viz 'that a weakness [in cases of this kind] includes anything capable of being regarded as a weakness'. Their Lordships went on instructively to say in this connection (at para 34):

> 'On this argument, anything which could be regarded by the jury as a reason for suspecting that an identifying witness had lied requires to be identified as such by the judge. That comes close to saying that the judge must put to the jury every potential argument for questioning the credibility of a witness. Such a proposition goes beyond the authorities and is unsound. *Turnbull* requires the judge to remind the jury if any specific weaknesses which have appeared in the identification evidence. It does not require the judge to remind the jury more generally <u>of every argument which there may be for not believing a witness</u>.' [emphasis added]

[77] In the opinion of this Court, this last alleged weakness falls not into the narrow category of 'weaknesses which have appeared in the identification evidence' (given here, of course, by Mr Méndez) but into the broad one of 'every argument which there may be for not believing a witness', in this case Mr Méndez. That being the position, there is no real need to examine the argument. The Court would, however, repeat the point made by the President in oral argument, viz that the attractiveness of the argument turns out to be no more than superficial when due account is taken of the stark reality that the observation recounted by Mr Bowman related to both (a) a different point of time and (b) a different location from those testified to by Mr Méndez.

[78] For the reasons given above, the Court concluded that the second ground of appeal failed.

*Directions on evidential inaccuracies and inconsistencies*

[79] Despite the language in which it was couched, the first ground of appeal, as argued, was concerned only with what, in the submission of Mrs Moore, were inconsistencies in the evidence of the Crown's eyewitnesses, and rightly so. The inaccuracies in the evidence were to be determined, so far as necessary, by the jury themselves and were, hence, not a fit subject for judicial comment.

[80] Counsel also seemed inclined not to devote more than a few minutes to oral argument on this ground; but, following a hint from the President that she ought to amplify on the little she had so far advanced, she proceeded to better round out her treatment of it.

[81] There were four main planks to the argument of Mrs Moore that the judge's directions on inconsistencies were less than adequate.

[82] The first of these planks had to do with Mr Méndez' evidence regarding the time factor as it related to his observation of the gunman on Christmas Eve 2004. The Court does not agree with Mrs Moore's description of the pertinent pieces of evidence in her skeleton argument. She said that 'originally' (undoubtedly a reference to the abortive trial) Mr Méndez had testified that he observed the gunman near the shooting scene for one minute or less. And she went on to say that, at trial (no doubt intending thereby to refer to the second trial), his evidence was that he observed the gunman for 15 to 20 seconds. What the Court has gathered from the record, however, is that defence counsel himself, reading from what he referred to as notes of evidence (p 169), put it to Mr Méndez at the second trial that his testimony at the abortive trial had been that he had seen <u>the face</u> of the gunman for about a minute or a little more than a minute *(ibid)*, a suggestion which Mr Méndez accepted. And the Court further gleans from the record that the evidence-in-chief of Mr Méndez at the second trial was that the time interval between his supposed first sighting of the gunman ('when the Spanish man fell to the street') and the passing by of the gunman ('at the corner of Bishop and West Canal

[Streets]') was 'about 15 to 20 seconds' (p 144, record). The thing about this so-called inconsistency is that it was in fact nipped in the bud, so to speak, when Mr Méndez unhesitatingly accepted that what had now been read to him from the notes of evidence of the abortive trial was, in truth, what he had said. Thus his evidence, after all had been said and done, was that he had seen the face of the gunman for about a minute or a little more than a minute. The two conflicting pieces of evidence were not, as it were, left sticking out like sore thumbs.

[83] As the Court understood the evidence of Mr Méndez, he could see the whole face of the departing gunman when the latter changed direction and headed away from, rather than towards, King Street; and he was still able to see the gunman's face when the latter went past him.

[84] The second plank of counsel's argument concerned the evidence of Mr Méndez as to the distance from which he had observed the gunman. Mrs Moore pointed out that Mr Méndez stated in evidence at the second trial that he saw the gunman from across West Canal Street and estimated that that was a distance of 15 feet or less. But, said Mrs Moore, when Mr Méndez proceeded to point out the relevant distance in court, it turned out to be 29 ½ feet, which was twice the estimate of 15 feet. In the view of the Court, the only material part of this evidence was that which indicated that the width of the street represented the distance in question. Quite plainly, it was not the forte of Mr Méndez accurately to point out distances on the basis of pure recollection. He amply demonstrated this by pointing out a distance of 29 ½ feet when asked to point out one of 15 feet. Having regard to all that has already been said above with regard to West Canal Street, this was a case of the less said of this inconsistency the better. Anyone having a reasonable ability to estimate distances and a nodding acquaintance with the street, especially the portion running in front of Dale's Barber shop, would scoff at the suggestion that it was anywhere near to 29 ½ feet wide. (Defence counsel himself did so: see p 195, record.)

[85] The third plank of the argument in support of the first ground of appeal related to the point at which, on his evidence, Mr Méndez first caught sight of the gunman. Mrs Moore said that testimony given by Mr Méndez at the second trial was rightly regarded by the judge as inconsistent with that which he had given at the abortive trial. But she contended that the judge had nonetheless failed properly to direct the jury on how to deal with the inconsistency. The inconsistency, she maintained, was that, while testifying at the second trial that he first saw the gunman running away from the 'body' of the deceased, he had given evidence at the abortive trial that he first saw the gunman approaching the deceased. Once again, however, the Court fails to see a clear-cut inconsistency here. When defence counsel sought at the second trial to contradict Mr Méndez in this regard (asking the latter whether he had testified at the abortive trial to having seen the gunman starting to walk towards the deceased), Mr Méndez replied only that he did not remember: see, eg, p 143, record. And, when confronted with the notes of evidence of the abortive trial, he had no qualms about admitting that, his memory having been thus refreshed, he could now remember having seen exactly what he had described in his testimony at the abortive trial. Counsel thereupon moved on to another subject. Mr Méndez thus accepted having seen the gunman even before hearing what sounded like gunshot and also having seen him start running off at the same time that the deceased was falling to the ground. He was not going back on his evidence that he had seen the gunman start running off even as the deceased was falling down – only on his earlier claim that that was what the gunman was doing when he (Mr Méndez) first saw him.

[86] The fourth plank of the argument under the first ground was that Mr Méndez' testimony that the stocking was not covering the face of the gunman was contradicted by that of the defence witness, Mr Bowman. The Court does not agree with counsel that there was such a contradiction and does not consider that there is room here for lengthy argument. As has been adumbrated above, Mr Méndez said he saw a gunman on West Canal Street (both before and immediately after hearing what seemed to him to be the sound of gunshot), as well as on Bishop Street, while Mr Bowman said he saw a gunman on Plues Street a short while after hearing the sound of gunshot. Assuming

that they both saw the same gunman, it is entirely within the realm of possibility that the stocking was not covering his face when Mr Méndez saw him but was covering it when Mr Bowman did. There were no irreconcilable differences here demanding particular attention from the judge; and, if his treatment of the differences in the testimonies of Mr Méndez and Mr Bowman is to be criticised, it should be for its undue length rather than for its brevity.

[87] The Court was firmly of the view that it was no criticism of the judge to say he omitted to highlight the cumulative weight of that which counsel labelled inconsistencies of the identification since, in the circumstances, the matters in question were, for the reasons just given, largely mis-labelled by counsel and there was, in truth, no cumulative weight to speak of.

[88] For these reasons, the Court concluded that the judge's directions on inconsistencies in the Crown evidence were adequate and that the first ground of appeal was lacking in substance.

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SOSA P

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MORRISON JA

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AWICH JA