

**IN THE COURT OF APPEAL OF BELIZE, A.D. 2007**

**CRIMINAL APPEAL NO. 12 OF 2006**

**BETWEEN:**

**JERMAINE PASCASCIO**

**Appellant**

**AND**

**THE QUEEN**

**Respondent**

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**BEFORE:**

**The Hon. Mr. Justice Mottley**

**- President**

**The Hon. Mr. Justice Sosa**

**- Justice of Appeal**

**The Hon. Mr. Justice Morrison**

**- Justice of Appeal**

**Mr. Oswald Twist for appellant.**

**Ms. Cheryl-Lynn Branker-Taitt, Deputy Director of Public  
Prosecutions, for respondent.**

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**28 February, 1, 8 March, 22 June 2007.**

**MOTTLEY P.**

1. The appellant has been convicted of murder and sentenced to life imprisonment. At the conclusion of the appeal, we allowed the appeal, quashed the conviction, set aside the sentence and in the interest of justice ordered a new trial. In view of this, we will restrict our comments on the nature and quality of the evidence.

2. On 23 September 2003, Roman Cantun a police officer, was at his home at 77 Pickstock Street in the City of Belize. He heard the sound of three gun shots which were fired in quick succession. He ran to his upstairs verandah and looked in the direction of Blankie's Store. He saw a dark male person come out of the store holding a firearm which, to him, looked like a .38 calibre revolver. This person was wearing a dark "warm cap" above his eyes. This person shouted "Let's go, bwai. Let's go bwai." Shortly after this was said a man of fair complexion came out of Blankie's Store. He went to the man with the gun and they spoke to each other. Cantun was, however, unable to hear what was being said. Both men remained on the spot for about 10 to 15 seconds before running off slowly in the direction of Frederick Lane. Cantun said that he saw "the features" of the second man. He indicated that by features he meant that he noticed that he "had his hair plait (sic) or kaan roe." When pressed for a further explanation as to what he meant by features, the witness replied "the clothes, the hair, his complexion" which he described as "fair complexion, like brownish." Not satisfied with this explanation, crown counsel sought further clarification. She again asked the witness what he meant when he said he saw "his features". The witness replied that he meant "his complexion, the clothes the person was wearing." Still not satisfied with the answer, crown counsel returned to the issue of identification and asked the witness, who had said he could see the front portion of the man, what part of the front he could see. The witness, on this occasion, said he meant the size of the person, his face and hairstyle. At an identification parade held on 2 October 2003 at the C.I.B. Office at the Queen Street Police Station, the witness identified the appellant as the man he described as brown whom he had seen running from Blankie's Store on 23 September 2003.
3. The appellant took issue with the identification of him by Cantun. In his unsworn statement from the dock, he said that on the morning of 23

September 2003 he went to his job at Raymond Gentle's Grocery which is situated at 21 Kraal Road. After going on an errand to Rene's Wholesale between 8:00 – 8:15 a.m., he returned to Gentle's Grocery where he remained until 1:00 p.m. at which time he left to go home for his lunch. In short, his defence was a denial. He called an alibi witness in the person of his employer Raymond Gentle who said that the appellant was at work at his grocery on the morning of 23 September 2003.

4. In his summation, the trial judge reminded the jury that the crucial issue with which they had to deal was the identification of the persons who the prosecution alleged were the defendant and the dark person who came out of Blankie's Store. He informed them that the prosecution case against the defendant depended wholly on the correctness of the identification of the defendant by Cantun. He told the jury:

“So in this trial, Members of the jury the case against the accused depends wholly on the correctness of the identification of him and this is by Roman Cantun which the defence alleges to be mistaken. Indeed, the defence has raised the defence of alibi on the accused's behalf ... an alibi simply means Members of the Jury, that the accused was not on the scene at the time when the alleged crime was committed,. So, this is the direct challenge on the evidence of the prosecution. So, I must therefore warn you of the special need for caution before convicting the accused on reliance of the evidence of identification of the accused by Roman Cantun. This is so, Members of the Jury, because it's possible for an honest witness to make a mistaken identity. There have been wrongful convictions in the past as a result of such mistakes, and I need to tell you that an apparently convincing witness can be mistaken, and indeed so can a number of apparently convincing witnesses. ... There is only one witness, so how long did P.C. Cantun had (sic)

the person he said was the accused person under observation? P.C. Cantun said that he had the accused under observation anywhere between ten to fifteen minutes (sic). He said the first time was five seconds when the accused walked from the store to where the dark person was and ten seconds when the accused and the dark person were talking by the door of the store. That is the length of time Cantun said he had seen this person. And then he said he had also seen this person walking along with the other person going towards Frederick Lane, but this time, he only saw his built, he didn't see his face – Now at what distance did Cantun said (sic) he see (sic) the accused? As you know from the evidence, Members of the Jury, the distance Cantun said that he had seen the accused was about 30 feet, that is, across his house on Pickstock Street, Blankie's being on one side, Cantun's residence being on the other side; and the distance between the two buildings was 30 feet. In what light? The evidence again from P.C. Cantun is that he saw the person during the daytime around 11 a.m. and that day was a clear one. Had P.C. Cantun ever seen this person before he observed him, if so, how often? If occasionally, had he any special reason for remembering him? In this regard, the evidence of P.C. Cantun is that he had never seen this person before. How long is it between the original observation and the ID parade to the police? The observation, according to P.C. Cantun took place on the 23 of September 2003 and the ID parade took place on 29 October 2003. About nine to ten days afterwards. Is there any mark differences between the description given by the witness to the police when he was first seen by him and the appearance of the accused. Members of the jury, these are the factors which you will have to consider in determining whether or not there has been a proper identification of the accused by P.C.

Cantun on the day in question. And this is a very crucial exercise, Members of the Jury, which you must undertake.

5. The judge was in fact directing the jury in accordance with the guidelines set out in **R v Turnbull [1977] Q.B. 224** and approved by the Judicial Committee of the Privy Council in **Reid, Dennis and Whyllie v R (1989) 37 WIR 346**. In **Turnbull**, Lord Widgery CJ said at p. 228:

“First, whenever the case against an accused depends wholly or substantially on the correctness of more or one identification of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Provided this is done in clear terms the judge need not use any particular form of words.

Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, has he any special identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? ...

Finally, he should remind the jury of any specific weakness which had appeared in the identification evidence.”

6. From the above summation it is clear that the judge did not remind the jury of any specific weaknesses in the evidence of Cantun insofar as it related to the identification of the appellant. Later in his summation the judge dealt with the issue of discrepancies and inconsistencies. He told the jury:

“Another such discrepancy, Members of the jury, is found in the evidence of PC Cantun where he described the accused in his statement to the police as being fair skin person, and in court he first described the person as being of fair complexion and then described him as a person of brown-ish complexion, and then in examination in chief he said the person was a light skin person. But, naturally, Mr. Foreman and Members of the Jury, when the witness now turns around and says that the person is a person of brown-ish complexion, that person sits before him.”

7. This direction would not have satisfied the duty which **Turnbull’s** case places on the trial judge. The judge was required when directing the jury on the issue of identification at that time to remind the jury of the specific weaknesses in the evidence in so far as the identification of the appellant by Cantun was concerned. It is not sufficient for him to do it at some other stage.
8. In **Leroy Langford and Mwangi Freeman Privy Council Appeal No. 42 of 2004**, Lord Carswell in delivering the judgment of the Board commended to judges as being sound the advice given by Ibrahim JA in the Court of Appeal of Trinidad & Tobago in **Fuller v State (1995) 52 WIR 424** at page 433:

“We are concerned about the repeated failures of trial judges to instruct juries properly on the *Turnbull* principles when they deal with the issue of identification. Great care should be taken in identifying to the jury all the relevant criteria. Each factor or question should be separately identified and when a factor is identified all the evidence in relation thereto should be drawn to the jury’s attention to enable them not only to understand the evidence properly but also to make a true and proper determination of the issues in question. This must be done before the trial judge goes on to deal with another factor. ... what they require from the judge in the final round is his assistance in identifying, applying and assessing the evidence in relation to each direction of law which the trial judge is required to give them and also in relation to the issues that arise for their determination.

9. Under the guideline set out in **Turnbull** the judge was required to remind the jury of the specific weaknesses in the evidence of Cantun in so far as it related to the identification of the appellant. In dealing with these weaknesses the judge ought to have pointed out to the jury that Cantun did not know the appellant and had never seen him before that morning. It was necessary when dealing with the issue of identification for the judge to have indicated to the jury that another weakness of the identification was the length of time which Cantun said that he had the appellant under observation. Cantun stated that he had seen the appellant for about five seconds after he came out of the shop, and before he had the conversation with the man who had the gun and who had previously come out of the shop. The appellant and the other man spoke to each other for about ten to fifteen seconds during which time Cantun had him under observation. However, the jury should have been reminded that while he Cantun said he saw “the feature” of the appellant, he nonetheless said that by feature he meant that he noticed that the appellant had “his hair”

plait or kaan roe”. Later he said by feature he meant his complexion. He later amplified this by saying that feature included the clothes and hair. Unfortunately on two occasions during the summation the judge erroneously told the jury that the period of time that he was able to observe the appellant was between ten to fifteen minutes and not seconds as Cantun had said. However the judge attempted to correct these statements immediately before the jury retired. It was also essential for the judge to have dealt with the description given to police by Cantun. In that statement Cantun described the person as being a fair skin person while in court he first said that the person was of fair complexion and then that he was of “brownish” complexion. He also described the person as being a light skin person.

10. While the judge may have dealt with all these issues at different places of his summation it is no substitute for what was required. He was required to identify the specific weaknesses in the identification of the appellant and bring them to the attention of the jury. His failure to do this, in our view, was a significant failure in following the **Turnbull** guidelines and as such fell below the standard required to ensure that he had a fair trial. However we are of the view that the interest of justice would require that the appellant be granted a new trial.

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**MOTTLEY P**

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**SOSA JA**

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**MORRISON JA**