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

CRIMINAL APPEAL NO. 16 OF 2006

BETWEEN:

MICKA LEE WILLIAMS **Appellant**

AND

THE QUEEN **Respondent**

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BEFORE:

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

Mr. Anthony Sylvestre for appellant.
Ms. Merlene Moody for respondent.

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20 February, 8 March, 22 June 2007

MOTTLEY P.

1. On 15 June 2006, the appellant was convicted before a judge and jury of the offence of unlawfully causing dangerous harm to Andre Douze on 16 February 2004. He was sentenced to a term of imprisonment of seven years.

2. The prosecution's case was that Andre Douze, a security guard, was on duty around 8:30 p.m. at Vin Hong Wholesale and Retail Store on Euphrates Avenue in Belize City. While standing on the top stairs of Vin Hong's Building, Douze saw two men walking up and down Euphrates Avenue in front of the store. Douze gave a description of one of the men who was wearing a red shirt. We will return to this later in the judgment. This person in the red shirt walked up to about 12 feet away from him. After hearing a loud noise, Douze felt a burning on his left elbow where he saw blood. He looked at the man in the red shirt and saw that he had a gun in his hand. A second shot was fired which hit Douze in his chest. The police arrived at the scene and took Douze to the hospital where he underwent surgery. While he was in hospital, he purported to identify the appellant as the person who shot him. After his discharge from hospital, he left Belize with the intention of returning to the country of his birth, Haiti.

3. At the time of the incident, Orton Clarke, a retired public officer, was in Hong's store. His attention was drawn to the presence of the security guard. On looking in his direction, he saw a man with a gun pointing it towards the security guard who was standing to the left of Clarke. He then saw blood coming from the shoulder of the security guard. The man with the gun was wearing a red shirt with a hood: Clarke described it as a parker. The hood did not cover his face. The gunman was six feet away standing three steps below where Clarke and the guard were. It was at this stage that Clarke stated that he saw the face of the gunman for not less than 10 seconds. Clarke again saw the man in the red shirt on this occasion but the man's back was turned to him as he was then running along Euphrates Ave. in a southerly direction. On 2 March 2004 Clarke attended an identification parade at the Queen Street Police Station where he identified the appellant as the person whom he alleged that he had seen in the red parker and who shot the security guard.

4. The appellant made an unsworn statement from the dock in which he denied that he shot Douze. He said that he and his girl friend went home at about 6 p.m. and he remained home for the remainder of the night. He called two witnesses on his behalf. Kimberley Rivers said that she was having her hair plaited by Karen Adolphus, the sister of the appellant. On leaving Adolphus' home she and the appellant went to her home reaching there before it was dark. The appellant remained at her house until 12 a.m. when he left. Karen Adolphus confirmed that she was plaiting River's hair at her home after which she and the appellant left together.

5. The appellant filed six grounds of appeal. Because of the decision reached by the Court, we propose to deal with grounds one and six. In so doing, we mean no disrespect to counsel.

6. In ground 1, the appellant complained that the admission by the trial judge of the statement made by Andre Douze into evidence, pursuant to section 105 of the Evidence Act, Cap 95, was in violation of the appellant's right to a fair trial as guaranteed under section 6(3)(e) of the Constitution of Belize. The gravamen of the appellant's contention was that section 105 of the Evidence Act does not provide any safeguards to ensure that the appellant has a fair trial if the statement is admitted into evidence. The appellant stated that when section 105 of the Evidence Act is compared to section 123 of the Indictable Procedure Act, to the provision of section 31 of the Evidence (Amendment) Act 1995 of Jamaica and section 23 of the Criminal Justice Act 1988 of the United Kingdom, the safeguards against the admission of evidence, which may or might be unfair to an accused, in the sense that the prejudicial effect outweighs the probative value, are non-existent. The appellant submitted that the trial judge did not have any discretion to refuse to admit such evidence once the preconditions set out in section 105 are satisfied. It was argued that, as the trial judge had no discretion, it meant that prejudicial evidence would be admitted and, in

those circumstances the trial of the appellant would be unfair. The right of a defendant to a fair trial, as guaranteed by section 6(3)(e) of the Constitution, would be vitiated.

7. Section 105 of the Evidence Act states:

> 105.- (1) Notwithstanding anything to the contrary contained in this Act or any other law, but subject to subsections (4) and (5), a statement made by a person in a document shall be admissible in criminal proceedings (including a preliminary inquiry) as evidence of any fact of which direct or oral evidence by him would be admissible if-
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> *(a)* the requirements of one of the paragraphs of subsection (2) are satisfied; and
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> *(b)* the requirements of subsection (3) are satisfied.
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> (2) The requirements mentioned in subsection (1)*(a)* are -
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> (a) that the person who made the statement is dead or by reason of his bodily or mental condition unfit to attend as a witness;
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> *(b)* that -
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> (i) the person who made the statement is outside Belize; and
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> (ii) it is not reasonably practicable to secure his attendance; or
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> *(c)* that all reasonable steps have been taken to find the person who made the statement but that he cannot be found.
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> (3) The requirements mentioned in subsection (1)*(b)* are that the statement to be tendered in evidence contains a declaration by the maker and signed before a magistrate or a justice of the peace to the effect that it is true to the best of his knowledge and belief and that he made the statement knowing that if it were tendered in evidence he would be liable to prosecution if he willfully stated in it anything which he knew to be false or did not believe to be true.

(4) Subsection (1) above does not render admissible an admission or confession made by an accused person that would not be admissible except in accordance with section 90(2).

(5) Section 85 of this Act shall apply as to the weight to be attached to any statement rendered admissible as evidence by virtue of this section.

This section does not contain any express provision giving the Court a discretion to refuse to admit into evidence the statement if it contains evidence which is prejudicial to a defendant.

8. Section 6(1) and subsection 3(e) of the Constitution states:

> 6.- (1) All persons are equal before the law and are entitled without any discrimination to the equal protection of the law.
>
> (2) …
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> (3) Every person who is charged with a criminal offence -
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> (a) …;
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> (b) ...;
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> (c) …;
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> (d) …;
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> (e) shall be afforded facilities to examine in person or by his legal representative the witnesses called by the prosecution before the court, and to obtain the attendance and carry out the examination of witnesses to testify on his behalf before the court on the same conditions as those applying to witnesses called by the prosecution.

In our opinion, these provisions give a defendant the equal protection of the law and affords him the opportunity to cross examine those persons who gives evidence against him and to call witnesses in support of his case should he so desire.

9. Section 123 of the Indictable Procedure Act states:

> 123.- (1) Where any person has been committed for trial for any crime, the deposition of any person may, if the conditions set out in subsection (2) are satisfied, without further proof be read as evidence at the trial of that person, whether for that crime or for any other crime arising out of the same transaction or set of circumstances as that crime, provided that the court is satisfied that the accused will not be materially prejudiced by the reception of such evidence.
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> (2) The conditions hereinbefore referred to are that the deposition must be the deposition either of a witness whose attendance at the trial is stated by or on behalf of the Director of Public Prosecutions to be unnecessary in accordance with section 55, or of a witness who is proved at the trial by the oath of a credible witness to be dead or insane, or so ill as not to be able to travel or is absent from Belize.
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> (3) This section shall not have effect in any case in which it is proved that the deposition is the deposition of a witness whose attendance at the trial is stated to be unnecessary as provided by section 55 and the witness has been duly notified that he is not required to attend the trial.
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> (4) It shall be sufficient evidence of absence from Belize, within the meaning of this section, to prove that the deponent was seen boarding a vessel or aircraft bound for some port or place beyond Belize, and that on inquiry being made for the deponent before the trial at his last or most usual place of abode or business he could not be found.
>
> (5) If it is made to appear to the court that the witness who made any deposition aforesaid, may within a reasonable time, be capable of attending to give evidence or that the ends of justice require that the witness should be examined personally before the jury, the court may postpone the trial on any terms it thinks fit.

This section expressly gives the Court a discretion to refuse to admit into evidence at a criminal trial in the Supreme Court any deposition if the admission of the evidence will, in the opinion of the Court, materially prejudice a defendant.

10. Counsel for the appellant submitted that there are two important common threads running through s. 26 of Criminal Justice Act 1988 of United Kingdom, section 31 of the Evidence (Amendment) Act 1995 of Jamaica and section 123 of the Indictable Procedure Act. The first strand of this, he urged, was that these Acts set out preconditions to the admissibility of the statement, and include situations where the witness is dead, out of the country, mentally or physically unfit to attend trial, or it is not reasonably practicable to secure his attendance and the statement may be admitted. The second strand, he argued, was that the court has a discretion to prevent the admission of the witness statement into evidence even if the conditions are satisfied, and if the admission of the statement would be "more disadvantageous" to a defendant.

11. In support of his proposition, counsel relied on the Privy Council judgment from Jamaica, **Steve Grant v. The Queen**, Privy Council Appeal No. 30 of 2005, which was delivered on 16 January 2006. In that case, the Privy Council considered the constitutionality of section 31D of the Evidence (Amendment) Act of Jamaica. Grant had been charged with murder. At his trial, despite objections by his counsel, the unsworn evidence of an absent witness was admitted into evidence pursuant to the provision of section 31D of the Evidence (Amendment) Act 1995. This section provides:

> "31D. Subject to section 31G, a statement made by a person in a document shall be admissible in criminal proceedings as evidence of any fact of which direct oral evidence by him would be admissible if it is proved to the satisfaction of the court that such person-
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> (a) is dead;
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> (b) is unfit, by reason of his bodily or mental condition, to attend as a witness;

(c) is outside of Jamaica and it is not reasonably practicable to secure his attendance;

(d) cannot be found after all reasonable steps have been taken to find him; or

(e) is kept away from the proceedings by threats of bodily harm and no reasonable steps can be taken to protect the person."

12. The appellant submitted that section 31L of the Evidence Amendment Act 1995 of Jamaica empowers the court to exclude evidence if the court considers that the prejudicial effect outweighs the probative value. Counsel pointed out that no equivalent provision is contained in the Evidence Act of Belize, and submitted that the absence of such provision, or any like provision, makes section 105 of the Evidence Act of Belize unconstitutional. He argued that the failure to provide such a discretion in the Evidence Act of Belize meant that prejudicial evidence would be admitted into evidence, thus affecting the defendant's right to a fair trial.

13. Lord Bingham of Cornhill, in pointing out the difficult task faced by an appellant who alleges that an Act of Parliament is unconstitutional said, at paragraph 1, of the judgment in Grant's case:

> "It is, first of all, clear that the constitutionality of a parliamentary enactment is presumed unless it is shown to be unconstitutional, and the burden on a party seeking to prove invalidity is a heavy one: **Mootoo v. Attorney-General of Trinidad and Tobago [1979] 1 WLR 1334, 1338-1339**. Thus the appellant has a difficult task."

14. The provisions of section 123 of the Indictable Procedure Act create a statutory exception to the rule against the admission of hearsay. As stated earlier, this section allowed the evidence of a person who had given

a deposition in the preliminary hearing before a Magistrate to be read into evidence at the trial in the Supreme Court. Subsection 2 of section 123 sets out the conditions which must be satisfied before the deposition may be read. However, as earlier stated, this section expressly provides that the court has to be satisfied that the defendant will not be materially prejudiced by the deposition being read into evidence. The court has a discretion therefore, to reject the evidence, even though the conditions necessary for its reception have been satisfied, if the court considers that prejudicial effect outweighs the probative value.

15. In reaching the conclusion that the provision of s. 31 of the Evidence (Amendment) Act was not unconstitutional, Lord Bingham placed great emphasis on the provision in the law of Jamaica on the "adequate safeguards for the rights of the defence when it is sought to admit hearsay statements. Lord Bingham continued:

> (1) Section 31D prescribes with clarity the conditions to be met before application may be made. Relevant to this case is the requirement that all reasonable steps must have been taken to secure the attendance of the witness. The Court of Appeal was right to stress in **R v Michael Barrett** (Appeal No. 76/97, unreported, 31 July 1998*)* that the section refers to all reasonable steps.
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> (2) Section 31J gives the defence an enhanced power to challenge the credibility of the author of a hearsay statement.
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> (3) Section 31L acknowledges the discretion of the court to exclude evidence if it judges that the prejudicial effect of the evidence outweighs its probative value. In **R v Sang [1980] AC 402**, some members of the House of Lords (notably Lord Diplock at pp 434, 437 and Viscount Dilhorne (pp 441-442)) interpreted this discretion narrowly, and in **Scott v The Queen** [1989] AC 1242, 1256-1257, the Board appears to have accepted that reading. It is not, however, clear that the majority in **R v Sang** favoured a similarly narrow interpretation (see Lord Salmon at pp 444-445, Lord Fraser of Tullybelton at p 449 and Lord Scarman at pp 453, 454, 457). In any event, it is, in the opinion of the Board, clear that the judge presiding at a criminal trial has an overriding discretion to

> exclude evidence which is judged to be unfair to the defendant in the sense that it will put him at an unfair disadvantage or deprive him unfairly of the ability to defend himself. Such a discretion has been recognised by the Court of Appeal in **R v Donald White** (1975) 24 WIR 305, 309, and R v Michael Barrett, above. It has been recognised by the Board in **Scott v The Queen**, above, pp 1258-1259 and **Henriques v The Queen** [1991] 1 WLR 242, 247: both these appeals concerned the admission of depositions, but the need for a judicial discretion to exclude is even greater when the evidence in question has never been given on oath at all. In England and Wales, the discretion has been given statutory force: see section 25(1) of the Criminal Justice Act 1988; **R v Lockley** [1995] 2 Cr App R 554, 559-560; **R v Gokal** [1997] 2 Cr App R 266, 273; **R v Arnold** [2004] EWCA Crim 1293, para 30. Conscientiously exercised, this discretion affords the defendant an important safeguard.

16. The appellant contended that s. 105 of the Evidence Act does not contain any safeguard in the sense as set out in s. 123(1) of the Indictable Procedure Act of Belize which gives the Court the power to reject the evidence sought to be admitted if the prejudicial effect outweighs the probative value. Counsel for the appellant contended that it was clearly the intention of Parliament in enacting section 105 to abolish the discretion of the courts to exclude statements (save for confessions) which satisfy the preconditions set out in the section. As stated earlier, section 105 does not contain any express provision reserving to the trial judge the discretion to exclude the admission of the evidence if he considered that the prejudicial effect outweighs the probative value. It is therefore necessary to examine the provision of section 105 in order to ascertain whether it has expressly, or by necessary implication, abolished the power of a judge presiding at a criminal trial at common law, to exclude such evidence in the circumstance recognized by the Judicial Committee in **Grant's** case.

17. Section 105(1) of the Evidence Act states:

> 105.-(1) Notwithstanding anything to the contrary contained in this Act or any other law, but subject to subsections (4) and (5), a

statement made by a person in a document shall be admissible in criminal proceedings (including a preliminary inquiry) as evidence of any fact of which direct or oral evidence by him would be admissible if -

(a) the requirements of one of the paragraphs of subsection (2) are satisfied; and

(b) the requirements of subsection (3) are satisfied.

18. As regards the opening words of subsection (i), this court stated in **Director of Public Prosecution v. Avondale Trumbach** Criminal Appeal No. 17 of 2004:

> "Given that section 105 of the Evidence 21 Act, as amended, sought to introduce a new departure from the venerable rule against hearsay of general application in criminal cases, we do not regard the opening words of the section "Notwithstanding anything to the contrary contained in this Act (or any other law) …" as having been intended to convey anything more than the scope of the new exception."

19. The subsection provides that a statement made by a person in a document shall be admissible. Section 58 of the Interpretation Act Cap. 1 states:

> 58. In an enactment "shall" shall be construed as imperative and the expression "may" as permissive and empowering.

20. It is significant that the subsection states that the statement shall be "admissible". It does not state that the statement shall be "admitted". It is necessary to interpret what is meant by the word "admissible". Under the golden rule of interpretation the words of a statute must prima facie be given the ordinary meaning. See Viscount Simon in **Nokes v Doncaster**

Amalgamated and Others [1940] AC 1014, 1022. Admissible, in this context, means that the document shall be allowable as evidence. It does not mean that the document shall be admitted into evidence.

21. In the opinion of this Court subsection (i) does not make the admission of the statement mandatory even if the preconditions set out in subsection 2 are satisfied. All the subsection does is to make it admissible if the preconditions are satisfied. The subsection says notwithstanding "any other law". In Section 3 of the Interpretation Act the word "laws" is defined as:

> "laws includes any legislative enactment and any proclamation, rule, regulation, by-law, order in council, order, statutory instrument or rule of court made under the authority of any law, and any command, enjoinment or prohibition by any authority, superior or subordinate, having power to give or make the same."

The definition which is not exhaustive does not include common law. Any rights existing at common law are not abolished and in the opinion of the Court, are preserved. This is of considerable importance. At common law, a judge in a criminal trial had an overriding discretion to exclude evidence if the prejudicial effect outweighs the probative value. As stated earlier, Lord Bingham, after referring to the decision of the House of Lords in **R v. Sang** held that a judge presiding at a criminal trial has such an overriding discretion. His Lordship said this at paragraph 21(3):

> "In any event, it is, in the opinion of the Board, clear that the judge presiding at a criminal trial has an overriding discretion to exclude evidence which is judged to be unfair to the defendant in the sense that it will put him at an unfair disadvantage or deprive him unfairly of the ability to defend himself."

Lord Bingham pointed out that this discretion has been recognized by the Judicial Committee of the Privy Council in **Scott v. The Queen** [1989] AC 1242, 1256-1257 and **Henriques v The Queen** [1991] 1 W.L.R. 242, 247.

22. It is clear that a judge who is presiding over a criminal trial has, at common law, an overriding discretion to exclude evidence where the prejudicial effect outweighs the probative value. Nothing in section 105 of the Evidence Act abrogates that common law power. The Evidence Act of Belize does not contain a provision similar to that of section 31 L of the Evidence (Amendment) Act 1995 of Jamaica. Lord Bingham, in **Grant's** case, was of the view that "section 31L declares that in proceedings the court may exclude evidence if in the opinion of the court, the prejudicial effect of the evidence outweighs its probative value." Clearly the learned Law Lord was of the view that the section 31 L was merely acknowledging the power which the judge had at common law. Even though the Evidence Act of Belize did not contain a section similar section 31L, nonetheless, this Court is of the opinion that the common law right of the trial judge to exclude such evidence was not abolished. The existence therefore of that discretion when "conscientiously exercised … affords the defendant an important safeguard" per Lord Bingham in **Grant's** case.

23. The opening words of section 105 do not exclude the common law right of the judge in a criminal trial to exclude evidence where the prejudicial effect outweighs the probative value in the sense that it will put him at an unfair disadvantage or deprive him unfairly of the ability to defend himself. As this discretion still exists, we consider that the right of a defendant to a fair trial where a statement is to be read into evidence is adequately protected by the existence of the overriding discretion at common law. In the circumstances, we do not consider that section 105 of the Evidence Act offends the constitutional guarantee to a fair trial as provided by s. 6(b)

and 3(e) of the Constitution. Accordingly section 105 of the Evidence Act, in our view, does not offend the Constitution.

24. The central issue in the trial was the identification of the assailant. It must be borne in mind that Douze did not give evidence but his statement was read into evidence. In this statement Douze stated that one of the men he saw "was of dark complexion, medium built about 5 feet 10 inches in height, narrow face, with the top part of his hair braided backwards and the hair around the sides shaved down". He indicated that the man was wearing a red shirt with sleeves without any marking. He could clearly see his face since he did not have on any mask over it. His assailant was about 12 feet from him when he was shot. Douze never saw his assailant before that night. A light post was about eight feet away from the spot where he was shot. The witness did not give any indication as to the length of time during which he was able to see the face of his assailant.

25. Orton Clarke said that, after his attention was drawn to the presence of the security guard, he turned and looked in his direction to find himself "looking down into the barrel of a firearm". He stated that the man was wearing a parker – with a hood. While the hood was over the head of the man, it did not cover his face. The gunman was standing six feet away, three steps down. It was at this time that Clarke saw the face of the assailant. When asked how long he was able to see the face of the gunman, Clarke replied that he definitely saw his face for not less than 10 seconds. He again saw the man in the red parker when he was on Euphrates Avenue running in a southerly direction. However, he was not able to see his face as the man's back was to him. At an identification parade held two weeks later, Clarke identified the appellant as the person who shot the security guard at Vin Hong's Grocery. No evidence was led that the assailant was previously known by Clarke or that he had ever seen the appellant before the night of the shooting.

26. Such was the state of the evidence at the close of the case for the prosecution relating to the identification of the appellant as the man who shot Douze. The appellant was unrepresented by counsel at the trial. A submission of no case to answer was not made in the circumstances. However, it was the duty of the trial judge having considered the state of the evidence of identification to have withdrawn the case from the jury if the quality of the evidence is poor. In **R v. Turnbull [1977] QC 224** at page 229, 230 Lord Widgery, Chief Justice reminded judges that:

> "When, in the judgment of the trial judge, the quality of the identifying evidence is poor, as for example when it depends solely on a fleeting glance or on a longer observation made in difficult conditions, the situation is very different. The judge should then withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification."

27. In considering the quality of the evidence of identification the judge has to decide not that witnesses were lying

> > "but because the evidence even if taken to be honest has a base which is so slender that it is unreliable and therefore not sufficient to found a conviction: and indeed, as R v Turnbull itself emphasized, the fact that assessing the "quality" of the evidence, under the Turnbull doctrine, the jury is protected from acting upon the type of evidence which, even if believed, experience has shown to be a possible source of injustice." Per Lord Mustill in **Daley v. The Queen** [1994] 1 AC 117, 129.

28. Neither Clarke nor Douze had seen the assailant prior to the night of the attack. Douze did not give any indication as to the length of time he was able to see his face even if he was able to see it clearly. Douze alleged that he was shot twice, once in his elbow and once in the area of the left side of his chest. The doctor stated that he found one injury, that was to the chest. According to Douze, the assailant was wearing a red shirt with sleeves. He could see the top of his head where his hair was braided backward. Clarke said the assailant was wearing a read parker with a hood on his head. Douze said the assailant was twelve feet away while Clarke said he was six feet away. Identification under these circumstances cannot be said to be ideal. Clarke saw his face for about 10 seconds during which period he said he found himself "looking down into the barrel of a fire arm" at which time he "became frozen". On any view this was no more than a fleeting glance identification. In our view this amounted to identification in difficult circumstances as indicated in **Turnbull's** case.

29. In our opinion, the quality of the evidence identifying the gunman was poor. There was no other evidence which supported the correctness of the identification. It was incumbent on the judge, in accordance with the direction set out in **Turnbull's** case, to have withdrawn the case from the jury at the conclusion of the prosecution's case and directed an acquittal. This was the clear duty of the judge even though the appellant did not make a no case submission.

30. It was for these reasons that we allowed the appeal, quashed the conviction and set aside the sentence and directed that a judgment and verdict of acquittal to be entered. In view of this conclusion reached, we did not find it necessary to express any opinion on the other grounds of appeal.

MOTTLEY P

CAREY JA

MORRISON JA