Privy Council Appeal No. 31 of 2002

Aurelio Pop *Appellant*

v.

The Queen *Respondent*

FROM

THE COURT OF APPEAL OF BELIZE

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL,

Delivered the 22nd May 2003

Present at the hearing:-

Lord Hope of Craighead
Lord Lloyd of Berwick
Lord Rodger of Earlsferry
Sir Andrew Leggatt
Sir Swinton Thomas

*[Delivered by **Lord Rodger of Earlsferry**]*

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1. On the evening of 7 July 1995 George Chavez was shot and killed in the village of Guinea Grass in the Northern District of Belize. On 31 March 2000 in the Northern Session of the Supreme Court of Belize the appellant, Aurelio Pop, was convicted of his murder. As was required by section 102 of the Criminal Code in the case of murder by shooting, the appellant was sentenced to death. On 19 October 2000 the Court of Appeal of Belize dismissed his appeal. The appellant appeals, by special leave, to this Board. Their Lordships recall that, in *Reyes v The Queen* [2002] 2 AC 235, the Board held that the mandatory death sentence in cases of murder by shooting was unconstitutional. In the event of the appellant's appeal being dismissed, the case would therefore have to be remitted to the Supreme Court to determine the appropriate sentence.

2. Although the murder took place on 7 July 1995, the man who was to be the principal Crown witness, Martin Adolphus, was not interviewed by the police until 12 December 1995, some five months later. A warrant for the appellant's arrest was issued the day after Adolphus was interviewed but the police did not trace the appellant until he was taken into custody, apparently in relation to another matter, on 13 August 1998. For some reason the police did not then hold an identification parade. On 14 August the appellant was cautioned and charged with the murder.

3. The only issue at the trial was whether it had been the appellant who shot the deceased. According to the appellant, at the time of the shooting he had been drinking in a bar. On the way home he had heard people saying that he had shot the deceased. A member of the deceased's family had previously killed the appellant's brother and he was afraid that they would kill him too. Therefore, on reaching home, he told his family that he was leaving. He crossed the New River and eventually made his way to Kendal in another part of the country where he lived until he was arrested in 1998.

4. In his evidence Adolphus said that, on the evening in question, he was riding his bicycle at about 6.00 pm when the deceased and another man Sifredo called out to him. He stopped to talk to them. The sun had gone down and night was setting in. There was no moon and the available light came from a lamp post across the road and another light beside the Roman Catholic church. While he was talking to the deceased and Sifredo, Adolphus saw a man whom he said he had known for about ten years. He did not know his full name and just knew him as R. The man walked towards and then past the group. Adolphus was able to see his face as he came towards them and then his side, as he walked past about 40 feet away. Adolphus gave two versions of what happened next.

5. On the version which he gave in examination in chief Adolphus next saw R standing in the centre of the road about 18 to 20 feet away. He had something in his

hand and was watching the group. He then "cranked" and loaded a shotgun and shot the deceased. The deceased had turned to run away and the shot caught him in the back. Sifredo rode off on his bicycle and Adolphus dashed himself to the ground. He saw R reload the gun and walk towards the deceased, who was lying on the ground, aim at his head and fire another shot at him. Adolphus ran behind a house from where he saw R load the gun again and make off.

6. As the judge pointed out to Adolphus at the end of his evidence, his account in his evidence differed in certain respects from what he had said in the statement which he made to the police on 13 December 1995. In that statement he had made no mention of dashing himself to the ground. Also in the statement Adolphus was recorded as saying that the man in question approached on a mountain climber bike, jumped off, and broke and loaded his shotgun. Adolphus ran off in one direction and the deceased in another. He heard a shot and looked back to see the deceased fall to the ground. He saw the man walk up to the deceased and shoot him again, before getting on his bike once more and riding off. When asked about the difference in the sequence of events Adolphus said that the police had not written down what he had said to them in 1995.

7. In his statement as recorded by the police Adolphus refers to the man who shot the deceased as Aurelio Pop. In evidence, however, as their Lordships have noted, Adolphus said that he only knew the man as R. The fact that he was referring to the appellant came out as a result of a question put by prosecuting counsel: "Now, when you saw Aurelio Pop, did you speak to him or did he speak to anybody or any one of you? When you saw Pop, R, was he saying anything, did you talk to him or what?" Adolphus replied, "No, at that moment he did not have anything" – thereby impliedly acknowledging that R and Pop were one and the same. It may well be that prosecuting counsel simply made an unfortunate slip, but the question was, of course, improper, especially in a case where identification was the critical issue. Defence counsel did not, however, object to the question or raise the matter in any other

way. Indeed, rather strangely, he made matters worse from the point of view of the appellant when, in the course of cross-examination, he asked Adolphus a question that is recorded in these terms: "So, since that evening of the 7th of July 1995 your first occasion of the person who you are saying you saw there, who you are saying that is Aurelio Pop right now in this court?" To this question Adolphus answered "Yes". In re-examination Adolphus was asked about this answer and then explained that in fact he had also seen the appellant at the committal hearing before the magistrate at Orange Walk.

8. Before turning to the principal argument which Miss Montgomery QC advanced on behalf of the appellant, their Lordships note that the narrative which they have given so far reveals two important and interrelated features.

9. First, the police held no identification parade and in consequence the identification of the appellant was a dock identification. The failure to hold an identification parade was contrary to the practice in Belize as explained by the Court of Appeal in *Myvett and Santos v The Queen* (unreported) (9 May 1994, Criminal Appeals Nos 3 and 4 of 1994):

> "The detailed code adopted in England for the holding of identification parades to have suspects identified is intended to ensure that the identification of a suspect by a witness takes place in circumstances where the recollection of the identifying witness is tested objectively under safeguards by placing the suspect in a line made up of like looking suspects, the English procedure is in practice followed here in Belize."

The facts that no identification parade had been held and that Adolphus identified the appellant when he was in the dock did not make his evidence on the point inadmissible. It did mean, however, that in his directions to the jury the judge should have made it plain that the normal and proper practice was to hold an identification parade. He should have gone on to warn the jury of the dangers of identification without a parade and should have explained to them the potential

advantage of an inconclusive parade to a defendant such as the appellant. For these reasons, he should have explained, this kind of evidence was undesirable in principle and the jury would require to approach it with great care: *R v Graham* [1994] Crim LR 212 and *Williams (Noel) v The Queen* [1997] 1 WLR 548.

10. In this particular case there was a second important feature. The evidence identifying the appellant as the gunman had emerged as the result of the leading question by prosecuting counsel, to which their Lordships have already drawn attention. The judge should accordingly have pointed out to the jury that for this reason they required to take even greater care in assessing Adolphus's evidence that it was the appellant who had shot the deceased.

11. In fact, however, the judge gave the jury no directions whatever on either of the two features which their Lordships have identified. Despite the fact that the first ground of appeal in the Court of Appeal criticised the lack of any direction on the issue of the failure of the police to hold an identification parade, in their judgment the court did not deal with the point. Their Lordships need not decide whether, taken by itself, the lack of any direction on these points would have justified allowing the appeal. It does, however, form an important part of the context in which the main ground of appeal falls to be considered.

12. The entire case turned on the issue of identification. It was therefore of the utmost importance that the jury should receive proper directions on how to approach the evidence of Adolphus identifying the appellant as the person who shot the deceased. The general requirements for such directions have not been in doubt since the judgment of Lord Widgery LCJ in *R v Turnbull* [1977] QB 224, 228–229:

> "First, whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications 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, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent 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? If in any case, whether it is being dealt with summarily or on indictment, the prosecution have reason to believe that there is such a material discrepancy they should supply the accused or his legal advisers with particulars of the description the police were first given. In all cases if the accused asks to be given particulars of such descriptions, the prosecution should supply them. Finally, he should remind the jury of any specific weaknesses which had appeared in the identification evidence.

Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made. All these

> matters go to the quality of the identification evidence. If the quality is good and remains good at the close of the accused's case, the danger of a mistaken identification is lessened; but the poorer the quality, the greater the danger."

The Board has had occasion to endorse and apply Lord Widgery's guidance in a number of cases. Their Lordships need only draw attention to some of the more significant passages for present purposes. In the judgment given by Lord Ackner in *Reid (Junior) v The Queen* [1990] 1 AC 363 the Board surveyed the relevant case law and underlined the importance of the various factors highlighted in *Turnbull*. In particular they referred to the judgment of Lord Griffiths in *Scott v The Queen* [1989] AC 1242, 1261 where his Lordship said:

> "… if convictions are to be allowed upon uncorroborated identification evidence there must be a strict insistence upon a judge giving a clear warning of the danger of a mistaken identification which the jury must consider before arriving at their verdict and that it would only be in the most exceptional circumstances that a conviction based on uncorrroborated identification evidence should be sustained in the absence of such a warning."

Having considered the decision of the Supreme Court of New South Wales in *R v De-Cressac* [1985] 1 NSWLR 381, in *Reid (Junior)* Lord Ackner observed, [1990] 1 AC 363, 384:

> "Their Lordships have no hesitation in concluding that a significant failure to follow the guidelines laid down in *R v Turnbull* will cause the conviction to be quashed because it will have resulted in a substantial miscarriage of justice."

Finally, in *Shand v The Queen* [1996] 1 WLR 67, 72, Lord Slynn of Hadley, giving the judgment of the Board, said:

> "The importance in identification cases of giving the *Turnbull* warning has been frequently stated and it clearly now

applies to recognition as well as to pure identification cases. It is, however, accepted that no precise form of words need be used as long as the essential elements of the warning are pointed out to the jury. The cases in which the warning can be entirely dispensed with must be wholly exceptional, even where credibility is the sole line of defence. In the latter type of case the judge should normally, and even in the exceptional case would be wise to, tell the jury in an appropriate form to consider whether they are satisfied that the witness was not mistaken in view of the danger of mistake referred to in *R v Turnbull* [1977] QB 224."

13. With these passages in mind, their Lordships turn to the relevant passage in the judge's summing-up in the present case:

"Now, members of the jury, this evidence which has come forth from the witness Adolphus is evidence of recognition. Evidence of recognition, members of the jury, is not the same as evidence of identification which can be of fleeting glance identification and there are certain procedures for that. In this case, members of the jury, the witness has testified that he knew this person, this accused person for ten years, went to school together and they lived in the same village and at the time when he saw him there was adequate light, there were two street lights and that given the time when he saw him the first time and up to the time when he fired the last shot you, members of the jury, can conclude that that cannot be a two seconds view of the accused, certainly it has to be more than a fleeting glance. In my view there was sufficient time for him to have seen and recognise the accused. But, members of the jury, I must tell you also that mistakes in recognition even of close friends and relatives are sometimes made so you must be very careful when dealing with this evidence of recognition. Mr Sampson told you that people have mistaken him for a gentleman by the name of Godfrey Ramos. I myself have been

> mistaken by other people, I have to tell them, 'No, I am better looking than he is' and I myself have mistaken one person for another where the lighting situation was far from being dark. So, I tell you all these things, members of the jury, because I want you, the same way as Mr Sampson want you, to be absolutely sure that there was no mistake when it came to the recognition of this accused person on the 7th of July 1995 when the witness said he saw when he fired two shots on the person of Chavez with the result that he died."

14. The first point which strikes their Lordships is that the trial judge began his directions by saying that evidence of recognition is not the same as evidence of identification which can be by fleeting glance. He then told the jury that this was a case where Adolphus knew the appellant. Miss Montgomery criticised the evidence about the extent of Adolphus's acquaintance with the appellant. Their Lordships do not require to investigate that matter since, at most, Adolphus and the appellant had known one another by sight for some years. As the Board held in *Shand v The Queen*, any purported recognition of a defendant based on an acquaintance of that kind does not reduce the need for the judge to give an appropriate *Turnbull* direction. Here, however, the judge failed to explain to the jury that, even though Adolphus said that he recognised the appellant, they required to be careful because a mistaken witness can nevertheless be a convincing witness. On the contrary, the judge went out of his way to tell the jury of his personal view that there had been sufficient time for Adolphus to see and recognise the appellant. The judge also failed to direct the jury that, when assessing Adolphus's evidence, they should ask themselves the various questions listed in *Turnbull*. Nor did he tell them to consider the material differences between the account of the incident which Adolphus had given to the police in December 1995 and the evidence which he gave in court. Some, at least, of those differences were material to the circumstances in which Adolphus said that he saw the appellant shoot the deceased. But

far from directing the jury to weigh up the differences between the two versions, earlier in his summing-up the judge had sought to minimise them and had expressed the view that the two versions "hardly differ in substance".

15. In these circumstances the Court of Appeal inevitably concluded that in this case "no *Turnbull* warning in the fullest sense was given, although the law requires, in Belize, that the warning applies both to identification and recognition cases." The Court of Appeal went on, however, to notice that it is recognised that there are "exceptional" cases where a *Turnbull* direction is unnecessary or where it is sufficient to give it more briefly than would otherwise be required. Having referred to a number of the relevant cases, the Court of Appeal continued:

> "In our view the judge's direction was adequate in the circumstances of this case and is clearly in accordance with the general direction recommended by Lord Widgery in *Turnbull*. Further, although the full *Turnbull* warning was not given, the circumstances in which the recognition of the appellant took place do, in our view, constitute the exceptional circumstances in which it has been held that a full *Turnbull* warning need not be given.
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> The recognition was by an eye-witness who had known the appellant for years. The distance between the eye-witness and the appellant was not great. The eye-witness's observation of the appellant were not fleeting glances. The eye-witness testified that he had recognised the appellant with the aid of two bright street lamps and the eye-witness had an unobstructed view of the appellant.
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> We are therefore of the opinion that the quality of the evidence of the visual identification of the appellant by Martin Adolphus was good and that the trial judge did in effect warn the jury of the special need for caution before accepting the evidence of recognition. We are also

> satisfied after a careful scrutiny of the trial judge's directions, that those directions dealt with all the essential matters relating to the weaknesses and dangers of evidence of recognition generally, and in the particular circumstances of this case."

16. Their Lordships are unable to adopt the approach of the Court of Appeal. The starting-point is the Court of Appeal's acceptance that no full *Turnbull* direction was given. Given the nature of the omissions from the standard directions which their Lordships have already identified, the judge's failure to give the full *Turnbull* direction must be regarded as significant, even though he drew attention to the possibility of mistakes being made and emphasised that the jury must be absolutely sure that there was no mistake. As the Board pointed out in *Reid (Junior) v The Queen*, such a significant failure of this kind must result in the conviction being quashed, unless the circumstances are "exceptional". Such exceptional circumstances can include the fact that the evidence of the visual identification is of exceptionally good quality. *Freemantle v The Queen* [1994] 1 WLR 1437 was such a case. In addition, among the circumstances in that case was "an exceptional (if not unprecedented) dialogue" between the appellant and one of the eyewitnesses at the time of the incident in which the appellant had impliedly acknowledged that the witness had been correct to recognise him. In *Shand v The Queen* [1996] 1 WLR 67 also, the Board upheld a conviction, despite the judge's failure to follow the *Turnbull* guidelines, where the appellant had been identified as the gunman by two independent witnesses who had known him for four, and at least five years, respectively. The witnesses saw the appellant at close quarters and in daylight and, at the time of the incident, one of them spontaneously mentioned his name. In these circumstances the Board regarded the identification evidence as being "exceptionally good". Another factor that the Board took into account was that one of the witnesses spoke to an admission by the appellant while in custody.

17. In the present case the Court of Appeal considered that the circumstances in which the recognition of the appellant took place were "exceptional". In their Lordships' view, however, there is nothing in the circumstances of the identification evidence in the present case that marked it out as being of exceptionally good quality. If anything, it was more than usually open to criticism. At the time of the shooting it was dark and the scene was lit by street lighting. The identification of the appellant came from a single eyewitness, Adolphus, the reliability of whose account was plainly open to challenge, given the divergences between his statement to the police and his evidence in court. There was no scientific or other material evidence to corroborate his identification of the appellant. To make matters worse, no identification parade had been held to provide the usual safeguard for a defendant in the appellant's position. Worse still, the dock identification, which was already undesirable in itself, had been compromised by an improper leading question by prosecuting counsel. The judge had given the jury no directions on any of these important points.

18. For these reasons the present case cannot possibly be regarded as belonging to that "exceptional" category where a conviction can be upheld despite the judge's failure to give an appropriate *Turnbull* direction. The Court of Appeal considered, however, that the case against the appellant was very strong and that it was a most appropriate case for the application of the proviso. The Board is always reluctant to differ from a local court of appeal on the application of the proviso. In this case, however, their Lordships have in mind that, in reaching their view, the Court of Appeal did not take into account the problems caused by the failure of the police to hold an identification parade. Their Lordships therefore feel able to consider the matter afresh and, applying the approach indicated by Lord Ackner in *Reid (Junior) v The Queen*, they are satisfied that the appellant's conviction must be quashed. In view of the quality of the only evidence

available to the prosecution, they are equally satisfied that this is not a case where there can be any question of a retrial. Their Lordships will therefore humbly advise Her Majesty that the appeal should be allowed and that the appellant's conviction should simply be quashed.