IN THE COURT OF APPEAL OF BELIZE AD 2008

CRIMINAL APPEAL NO 18 OF 2007

DEAN HYDE Appellant

v

THE QUEEN Respondent

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Before

The Hon Mr Justice Elliott Mottley	President
The Hon Mr Justice Manuel Sosa	Justice of Appeal
The Hon Mr Justice Dennis Morrison	Justice of Appeal

B S Sampson SC for the appellant.
C Branker Taitt, Director of Public Prosecutions (Acting), for the respondent.

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2008: 6 and 8 October
2009: 27 March

SOSA JA

[1] In the early hours of 9 October 2004, 16-year-old Dual Wagner junior ('the deceased') sustained a single firearm injury to the forehead whilst stepping out of a bathroom at the Bismark Club in Belize City and died at the Karl Heusner Memorial Hospital. On 6 August 2007, following a trial before González J and a jury, Dean Hyde ('the appellant') was convicted of the murder of the deceased and, on 17 August, he was sentenced to imprisonment for life.

[2] The Crown relied at trial on evidence of visual identification given by a single eyewitness, Carlton Lord.

[3] There had, according to Mr Lord, been a previous acquaintanceship between him and the appellant whom he knew by his name, Dean Hyde, as well as by his nickname, Bam. The acquaintanceship spanned a period of about ten years during which, according to Mr Lord, he would see the appellant every day and exchange greetings with him. He had seen the appellant on the previous Thursday night, that is to say, the night before the fateful one of 9-10 October.

[4] Mr Lord further testified that, on the latter night, he saw the appellant at or near the Bismark Club at five different times.

[5] First, he met, and exchanged greetings with, the appellant as he (Mr Lord) was leaving the bathroom. This was obviously a very close encounter. The appellant actually touched Mr Lord on the chest whilst greeting him; and, when Mr Lord pointed out in court the distance between them at the time, Mr Sampson SC (counsel for the appellant at trial as well as on appeal) estimated it at between two and three feet only.

[6] Mr Lord had an unobstructed view of the appellant for a second time that night sometime later when the latter went by from one part of the building to another as he (Mr Lord) sat in a chair smoking a 'stick' of marijuana. The distance between Mr Lord and the appellant on this occasion was pointed out in court and estimated by the judge at 12 feet.

[7] Mr Lord saw the appellant for a third time, from the side on this occasion, whilst still sitting in the chair smoking the 'stick' of marijuana. On this occasion he turned his head to the left in time to see the appellant raise his right hand and fire a single shot from a black gun. This occurred at the same time that a young man, who turned out to be the deceased, began stepping out of the bathroom. The deceased thereupon fell to the ground in front of the bathroom. Mr Lord pointed out the distance separating him from the appellant at this time. This was estimated at 7 and 12 feet, respectively, by the judge and Mr Sampson.

[8] The appellant was seen by Mr Lord for the fourth time that night a little later when the former, whilst still in the club, directed certain words and gestures at a crowd of onlookers in which Mr Lord found himself. The distance between the two men, when pointed out by Mr Lord, was estimated at 30 feet by Mr Sampson. On this occasion Mr Lord again had a view of the whole of the appellant's face and, again, it was unobstructed.

[9] The fifth and final view of the appellant was had shortly thereafter, outside of the club. At this time Mr Lord was in a crowd of people across the street that runs in front of the club. He saw the appellant, with two companions, come out of the compound of the Bismark, turn left and leave the area. He did not indicate whether this, too, was an unobstructed view.

[10] It should also be pointed out that it was the testimony of Mr Lord that the appellant was in brightly-lit areas at all material times.

[11] Mr Lord testified to the effect that, all told, it was for a total of five minutes that he saw the appellant on the night of the shooting.

[12] Thereafter Mr Lord was led to make a dock identification of the appellant notwithstanding the absence of any suggestion, let alone evidence to show, that the police had held an identification parade at any stage of their investigations.

[13] It should be borne in mind that, consistently with the defence of alibi which he was to run, the appellant did not dispute any of the finer details, for example those as to lighting, of Mr Lord's evidence in respect to the different viewings. What is more, although in no wise prevented from so doing by the nature of his defence, the appellant did not, through counsel during cross-examination, touch on the issue of the alleged acquaintanceship between Mr Lord and him. The topic was, remarkably, also completely avoided in the course of the appellant's examination-in-chief. Indeed, the sole mention of Mr Lord's name during that examination occurred when Mr Sampson asked the appellant whether he had listened to his (Mr Lord's) evidence.

[14] The Crown, for its part, did not bring up the point in cross-examination and was, in the view of this Court, under no obligation whatever so to do.

[15] Prosecuting counsel's remark to the jury in the course of her closing speech that '[t]he identification evidence in this case is ideal' was hyperbolic, but certainly not in any large degree.

[16] Arguing his first ground of appeal, Mr Sampson complained as follows:

> '1. The judge failed to warn the jury of the dangers of identification without a parade.
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> 2. He did not explain to the jury the potential advantage of an inconclusive parade To (sic) the appellant.
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> 3. He did not state that dock identification was undesirable in principle.
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> 4. he failed to direct the jury that they were required to approach dock identification evidence without a prior parade with great care.'

It is true to say that the judge did none of the things which, in terms of counsel's complaint, he either failed to do or simply did not do. Counsel for the respondent rightly refrained from suggesting that the judge did any of them. It is also true that in *Aurelio Pop v The Queen* [2003] UKPC 40, the Privy Council held, on an appeal from this Court, that González J had, in summing-up to the jury, wrongly

omitted to do each of the very four things that Mr Sampson, in the instant case, says that the same trial judge ought to have done. Does that mean that Mr Sampson's fourfold complaint is valid in the circumstances of this case? The Court considers that this question admits only of an answer in the negative.

[17] A good starting point is the relatively recent Privy Council case of *Francis Young v The State* [2008] UKPC 27, in which judgment was delivered on 23 June 2008. In that case, Lord Carswell, delivering that judgment, and having referred to both *Pop* and *Pipersburgh v The Queen* [2008] UKPC 11, said, at para 17:

> 'The trial judge must give sufficient warnings about the dangers of identification without a parade and the potential advantage of an inconclusive parade to a defendant, and direct the jury with care about the weakness of a dock identification. Much may depend on the circumstances of the case, the other evidence given and the run of the trial, so that it is not possible to lay down a universal direction applicable to all cases.' [Emphasis added.]

In the view of this Court, whilst the first sentence of this quotation reflects what had been clearly stated in *Pop* and *Pipersburgh*, the second sentence simply says that which was taken as understood in the judgments in both of those cases. The underscored sentence is, in short, not inconsistent with anything said by the Board in *Pop* and *Pipersburgh*. (It is, in fact, the case that Lord Hope of

Craighead, who was on the panel in *Pop*, and Lord Rodger of Earlsferry, who delivered the judgments of the Board in both *Pop* and *Pipersburgh*, were both also on the panel in *Young's* case.)

[18] The even more recent Privy Council appeal of *Nyron Smith v The Queen* [2008] UKPC 34, in which judgment was delivered on 23 June 2008, is also of assistance. Delivering that judgment also, Lord Carswell said, at para 27:

> 'If a parade is not held, the court may have to consider the effect of its absence on the fairness of the trial and the safety of the conviction. In doing so it will have regard to the strength of the prosecution case on the evidence adduced, including the quality of the identification of the suspect by the witness. Their Lordships have given consideration to this issue and have reached the conclusion on the facts of the present case that the absence of a parade was not sufficient to render the trial unfair or the conviction unsafe.' [Emphasis added.]

In this case, again, the judgment of the Board cites with unqualified approval its earlier judgments in both *Pop* and *Pipersburgh*. It is also to be noted that Lord Hope of Craighead and Lord Rodger of Earlsferry were both on the panel in *Smith's* case.

[19] The Court now turns from broad and general statements of principle to one both narrow and particular. In *R v Forbes* [2000] UKHL 66 (14 December 2000), Lord Bingham of Cornhill, giving the considered opinion of the Appellate Committee of the House of Lords, cited a report issued in England in 1976 by a Departmental Committee working under the distinguished chairmanship of Lord Devlin. Lord Bingham quoted as follows from para 8.7 of the report (*Report to the Secretary of State for the Home Department of the Departmental Committee on Evidence of Identification in Criminal Cases*, HC 338, 1976):

> 'Identification on parade or in some other similar way in which the witness takes the initiative in picking out the accused should be made a condition precedent to identification in court, the fulfilment of the condition to be dispensed with only when the holding of a parade would have been impracticable or unnecessary. An example of its being impracticable is when the accused refuses to attend. An example of its being unnecessary is when the accused is already well-known to the witness …' [Emphasis added.]

That Lord Bingham, speaking for the Appellate Committee, approved of the last sentence in the above quotation is clear from para 21 of the opinion, where he said:

> 'If a case is one of pure recognition of someone well-known to the eye-witness, it may … be futile to hold an identification parade.'

There is no reason to believe that what Lord Bingham said in the above quotation conflicts with the decisions of the Board in *Pop* and *Pipersburgh*. On the contrary, there is every reason to treat the pertinent view of the Appellate Committee as entirely consistent with the current jurisprudence of the Board for in the post-*Pop* and *Pipersburgh* case of *Smith*, *supra*, Lord Carswell quoted, with obvious approval, amongst other parts of para 21 of the opinion of the Appellate Committee in *Forbes*, the single sentence just quoted from that opinion by this Court: see para 26 of the judgment.

[20] Mr Sampson sought to find support for his argument in the judgment of the Privy Council in *Goldson and McGlashan v R* (2000) 56 WIR 444. His quest was, in the view of this Court, entirely fruitless. Lord Hoffman, delivering the advice of the Board in that case on 23 March 2000, referred with unmistakeable approbation, in the 13th paragraph (unnumbered), to the concession on the part of the appellants' counsel that 'if the accused is well known to the witness an identification parade is unnecessary'.

[21] There is, of course, a world of difference between a suspect being, on the evidence, clearly well-known to an eyewitness and a suspect being merely said by an eyewitness to be well-known to him. In the recent appeals of *Emory Felix*

and Maurice Felix v The Queen (Criminal Appeals Nos 20 and 21 of 2007), in which this Court delivered judgment on 17 October 2008, the sole eyewitness, a Mr Palacio, said in evidence-in-chief that he had known Emory Felix and Maurice Felix ('the Felix brothers') for a period of about 10 years but claimed to see them no more than twice or thrice a week, and only 'sometimes' at that. Under cross-examination, he remarked that he knew the Felix brothers only too well. As is clear from its decision in that case, the Court was in no doubt that an identification parade ought to have been held by the police in the course of their investigations. The implication is pellucid: the Court did not consider that Mr Palacio's claim to know the Felix brothers only too well was borne out by the evidence. In *Felix*, as in the instant appeal, the acquaintanceship claimed by the sole eyewitness to exist went unchallenged throughout his cross-examination and, as well, the evidence-in-chief of the accused. However, when prosecuting counsel raised the matter in cross-examination, both Felix brothers denied the existence of the acquaintanceship. [Before turning from *Felix*, the Court would avail itself of the opportunity to point out two regretted editorial errors in its judgment in that case, namely, (a) that in the last sentence of para 12 reference was made to 'para [10] *infra*' rather than to 'para [24] *infra*' and (b) that in para [26], on the 15th line of p 24, the punctuation mark ')' was accidentally inserted immediately after the phrase 'of this paragraph'.]

[22] In the present appeal, in contrast, the evidence appears to this Court amply to establish that the appellant was well-known to Mr Lord. Reference has

already been made to the claim of a previous acquaintanceship; but the Court would nevertheless single out for special mention at this point the details pertaining to the frequency of encounters between Mr Lord and the appellant and the exchange of greetings whenever they saw each other. The evidential value of this, to the Crown, is enhanced beyond measure, in the view of the Court, by the striking circumstance that the alleged acquaintance, with all the particulars of it provided by Mr Lord, was never disputed by the appellant, who testified under oath, or by his counsel, who vigorously cross-examined Mr Lord and addressed the jury at no inconsiderable length.

[23] Being of the considered view that an identification parade was entirely dispensable in this case, and, further, that the evidence of visual identification was of exceptionally good quality, this Court regards as inconsequential the fact that the trial judge gave to the jury none of the directions which, in Mr Sampson's submission, he ought to have given. Therefore, in the judgment of this Court, counsel's fourfold complaint is without validity and his first ground of appeal fails.

[24] The second ground of appeal argued by Mr Sampson was in the terms following:

> 'The learned trial judge erred in law in that he misdirected the jury on the proper Application (*sic*) of Section 9 of the Criminal Code; (*sic*) i.e. Specific (*sic*) intent to establish The (*sic*) crime of Murder, thereby

depriving the appellant of the opportunity of Conviction (*sic*) on the lesser charge of Manslaughter.'

[25] The relevant passage of the summing-up (Record, p 162) is as follows:

'Now, so where from this evidence in this case you can come to a conclusion, you can draw inference to conclude that the accused had intention to kill Dual Wagner? The evidence of Carlton Lord, Members of the Jury, is that the accused fired one single shot to Dual Wagner's person and post mortem report indicates, or discloses that that shot caught Wagner on the forehead. And, indeed, as you recall Sgt. Chun said he did saw (*sic*) Wagner lying on the ground bleeding from the forehead. And the doctor when (*sic*) on to say that this was the caused (*sic*) of death. So, can you from that act conclude that the accused had the intention to kill at the time. Well, Members of the Jury, this sort of goes back to what I told you before, if a person shoots another person in the foot, or in the leg, and that person dies, one would hardly conclude that in the circumstances of the shooting the person had intention to kill that other person. But where, Members of the Jury, a person shoots another person in the area of the forehead where a vital organ is found, the brain or when a person shoots another near the stomach where you have vital organs like the heart the kidney, all those vital organs, Members of the Jury, the prosecution is saying that you can come to the conclusion that the

intention must be to kill, in this case Dual Wagner. What else would be the intention? You must have realize (*sic*) that if you shoot someone in the head, in the forehead, the area of the heart, the area of the stomach the person will die. Why will you shoot him there unless you had the intention to kill him. That is how the prosecution is saying, Members of the Jury, and that is how the law (*sic*) saying, you may come to a conclusion that an accused person had the specific intent to kill at the critical time when he did the act. It is for you, Members of the Jury, to decide on this evidence whether at the time of the shooting the accused had the intention to kill.'

[26] Mr Sampson referred the Court to its judgment in *Francisco Conorquie v The Queen* (12 February 1993, Criminal Appeal No 7 of 1992), from which he drew the following lengthy but entirely apposite passage:

'The most important ground of appeal argued was that relating to the learned judge's directions in respect of the question of intention, and in particular to the following passage in his summing up:

"Now the law presumes a person to intend the natural probable consequences of his act. So you may feel that the natural and probable consequences of a stab wound on the left upper region part of the chest where vital organs are encased with some degree

of moderate force and with a broken quart bottle with jagged edges or uneven branches is that the person becomes seriously injured and dies.

You have the evidence that the deceased, Robert Tucker, received two stabbed wounds to the upper part of his left chest with moderate force and without any other evidence, you may presume that the accused, Conorquie, intended to kill when he delivered the blow if you find he delivered the blow."

Unfortunately this passage contains the errors in respect of which in C.A. 2/92 Winswell Williams v. The Queen we made the following observation:

"There was, however, in our opinion a real danger that the jury may have been led to believe, particularly by the second passage quoted above from the learned trial judge's summing up and the words "without any other evidence" that, without considering any other evidence they could presume an intention to kill from the act itself and its probable consequences. This in our view is contrary to the provisions of section 9. Certainly, unlike other jurisdictions, there is no provision to this effect in the Criminal Code of Belize. It is true that, as counsel for the Crown pointed out, the passages about which complaint was made appeared in a part of the

summing up in which the learned trial judge was directing the jury – correctly – that they had to take all the circumstances into consideration in deciding the question of intention. It may also be that when he used the words "without any other evidence" he intended to say "in the absence of any other evidence to the contrary". However this may be, it was in our view preferable for him, consonant with section 9, to have told the jury that they were not bound to infer an intention to kill from the mere fact that death was in their opinion a natural and probable result of the appellant's act, but that that fact was relevant to the question of intent and they would have to take it into account when considering all the evidence and the proper inferences to be drawn from that evidence. If, having considered all the evidence, including the medical evidence that a moderate degree of force only was required to inflict the fatal injury, the jury either considered that the proper inference to be drawn was that the appellant did not intend to kill, or were in doubt as to whether this was the proper inference to draw, they would have been obliged to convict not of murder but of manslaughter. The effect of this error by the learned trial judge was therefore to deprive the appellant of the opportunity of such a conviction." '

[27] A proper direction, as can be gathered from the passage from the judgment of the Court in *Williams* which was quoted in the judgment in *Conorquie*, should not fail to take into account the possibility that the jury may, in the course of their deliberations, form the opinion that the death with which they are concerned was a natural and probable result of the accused's relevant act. It is the function of the judge presiding at a murder trial in this jurisdiction to ensure that the jury does not allow such an opinion *per se* to determine their finding as to the intention of the accused in the context of the charge of murder. For this reason, the jury must be told that, even if they should form the opinion that the death under consideration was a natural and probable result of the accused's act, they should not reach a finding on whether he/she intended to kill without considering all of the evidence and the proper inferences to be drawn therefrom, The effect of section 9 of the Code is to render such evidence and inferences just as relevant to the exercise of determining whether the accused intended to kill as an opinion to the effect already mentioned above.

[28] But the Acting Director of Public Prosecutions had no difficulty with the statement of the law found in *Williams* and *Conorquie*. The nub of her submission was that, whilst the judge may not, in directing the jury, have had the relevant guidance of this Court in mind, his directions cannot have resulted in any substantial miscarriage of justice since he drew all pertinent evidence and possible inferences to the jury's attention. This, in short, was a case eminently fit for the application of the proviso. The Court respectfully, but emphatically,

rejects the Director's submission. The decidedly exiguous evidence adduced by the Crown was to the effect that the appellant, whilst moving in the general direction of the bathroom, raised his right hand (just as the deceased's foot emerged from inside the bathroom and into the view of Mr Lord) and fired a single shot. There was, then, no evidence of aiming: to raise a hand and fire is not necessarily to aim. It is, with the greatest respect, egregiously wrong to direct a jury, in a case where that is the evidence, that if A shoots B, say, in the forehead (whether or not the bullet was intended for the forehead) the jury may, without more, infer that A intended to kill B. The directions of the judge quoted above provide a classic example of the begged question, that question being whether the person doing the shooting in the different hypothetical situations posed meant to shoot his victim in the different parts of the body specified. Directions such as those would be dangerously wrong even if section 9 were not a part of the Criminal Code.

[29] Not only was there no evidence of aiming. There was none as to the position of the gunman in relation to the bathroom. Questions inevitably abound. From what angle was he approaching it? Was the deceased stepping out of it through a doorless entrance? Or did the bathroom in fact have a door? If so, was it wide open as the deceased approached it? Or did he have to open it himself? If so, to what extent was it open when his foot emerged through it? And would that foot have been visible to the gunman immediately before he fired? The point here, of course, is to try to ascertain to what extent, if any, the

gunman would have been able to look into the bathroom, or even see the emerging foot, before he fired. A visit to the *locus in quo*, strangely (indeed troublingly) foregone by the jury, might have revealed the approximate position of the gunman in relation to the bathroom and given some indication as to whether, from that position, he would have been able to see someone (a) approaching the bathroom entrance from inside and (b) beginning to step through it.

[30] *Viva voce* medical evidence as to the path of the bullet inside the head of the deceased might also have indicated the angle from which he was shot. But the jury was deprived of such evidence and left instead to grapple with a post-mortem report written in the proverbial illegible physician's scrawl. How much, if any assistance they derived from it in those circumstances is anybody's guess. The Court, for its part, notes that in setting out his findings on his internal examination of the deceased's head wound, the doctor uses the expression 'slightly right to left'.

[31] The Court considers that, in this state of the Crown's evidence, the judge was bound to point out to the jury that this was not a case where the sparse evidence could support only one inference, namely, that the gunman intended to kill the person who turned out to be the deceased. The possibility that the appellant, if the jury found that he was the gunman, had recklessly fired into an open doorway without having seen the emerging foot, or having belatedly caught sight of it, had to be drawn to their attention. The omission to do so is not

justified by the fact that there was evidence of the appellant having directed threatening words and gestures at the crowd of onlookers shortly after the shooting. The jury should have been further directed that, in the event that they concluded that the shot was, or may have been, recklessly fired into an open doorway at the wrong time, they could not find that the appellant (assuming they found him to be the gunman) had the necessary intention to kill.

[32] The jury having thus been effectively misdirected as to how to go about finding whether there had been an intention to kill, the appellant was unquestionably deprived of the opportunity of an acquittal on the charge of murder. In the light, however, of the jury's clear finding (unchallenged as unreasonable or unsupportable) that it was the appellant who, without justification, shot and killed the deceased, this Court concluded that the jury must have been satisfied of facts which proved the appellant guilty of manslaughter. Accordingly, the Court, exercising its powers under section 31(2) of the Court of Appeal Act on 8 October 2008, substituted for the verdict returned by the jury a judgment of guilty of manslaughter and passed, in substitution for the sentence passed at trial, a sentence of 25 years' imprisonment, to commence on the date of sentence.

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MOTTLEY P

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SOSA JA

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MORRISON JA