IN THE COURT OF APPEAL OF BELIZE AD 2008

CRIMINAL APPEAL NO 4 OF 2008

RAUL RIVERO Appellant

v

THE QUEEN Respondent

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BEFORE

The Hon Mr Justice Manuel Sosa	Justice of Appeal
The Hon Mr Justice Boyd Carey	Justice of Appeal
The Hon Mr Justice Dennis Morrison	Justice of Appeal

Appellant in person.
Ms C Branker-Taitt, Director of Public Prosecutions (Acting), for the respondent.

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2008: 6 October
2009: 27 March

SOSA JA

Introduction

[1] On 18 February 2008, before Lord J and a jury, Raúl Rivero ('the appellant') was convicted of having carnally known IP, a female child under the age of 14 years, on 7 August 2005. On 29 February 2008, the appellant was sentenced to a term of twenty years' imprisonment. On 6 October 2008, this Court allowed his appeal, set aside his conviction and sentence and ordered a retrial. An application by the appellant for bail was refused. There was, however, an undertaking from the Acting Director of Public Prosecutions ('the Director') to seek to have the appellant retried at an early stage of the October

2008 sitting of the court below (Central District) in its criminal jurisdiction. The Court now gives the reasons for its decision.

The prosecution evidence

[2] It is important to note at the outset that IP testified at trial on 13 February 2008, that is to say some **two years and a half** after the date of the alleged offence. Her evidence was that, at about 6.00 am on that date, in the 'New Area' of Benque Viejo del Carmen, Cayo District, she got out of bed, emerged from her house and headed for the outdoor toilet. She saw no one whilst on her way to the toilet but, upon opening its door, felt someone cover her mouth. She 'realised' that it was a man named Raúl Ivarez (a name not called by any other witness and obviously quite distinct from that of the appellant). Raúl Ivarez proceeded to push her into the toilet, tie her hands together, tape her mouth and have sexual intercourse with her on the toilet seat.

[3] Later on in her evidence-in-chief, IP referred to Raúl Ivarez as 'that man' and, when asked by the judge 'Which man?', she replied 'The one that we called Cobra.' Prompted, self-evidently, by the introduction of this soubriquet into the evidence, prosecuting counsel asked IP what was the relationship between Raúl Ivarez and Cobra. When IP gave a less than direct answer, the judge, no doubt only trying to help but nonetheless regrettably, posed the wholly different and ill-timed question: 'Who is Cobra?' Entirely unsurprisingly to this Court, the answer of IP was: 'The man over there.' Whilst the record does not indicate whether IP

pointed to the appellant in giving that reply, the Court cannot imagine that the jury would have failed to realise that IP was referring to the appellant. Prosecuting counsel can hardly have welcomed this interruption by the judge. Plainly, counsel had yet to start laying the essential groundwork for the dock identification which, in the circumstances to be identified at para 8 *infra*, was indispensable to the Crown case. The well-meaning intervention of the judge had resulted in an unalterably premature dock identification which, although undesirable and objectionable, had not been objected to by the unrepresented appellant. Meaninglessly, prosecuting counsel went on to attempt to lay the pertinent foundation and, only upon the completion of that attempt, to invite IP to point out the man she had referred to as Raúl Ivarez and Cobra, (but not as Raúl Rivero).

[4] The foundation-laying attempt commenced with the topic of IP's previous knowledge of the appellant, prosecuting counsel engaging IP in the following exchange:

> 'Q: You referred to a person named Cobra, how long have you known this person?
>
> A: **About two years**.
>
> Q: From where do you know him?
>
> A: From when I was **around eleven years old**. I can't recall good. My mother had known him.' [Emphasis added.]

[5] The Court notes at this point that, testifying after IP, her mother, MG, stated that IP was born on 17 November 1994. It followed from that evidence, which the jury must have accepted, that IP would have been **10 years old** on the date of the alleged offence.

[6] Later on in her evidence-in-chief IP said that she had never spoken to the appellant before the day of the alleged offence. She also stated in evidence-in-chief that, before the day in question, she would see the appellant at about 5.00 pm when 'it was getting dark'. As to the lighting inside the toilet whilst the offence was allegedly being perpetrated, IP initially said: 'It was a bit dark.' This reply having led prosecuting counsel improperly further to ask whether there was any light inside the toilet, IP responded:

> 'No, but up on the door there is space and the light comes through there, it is clear.'

[7] The following exchange occurred during the cross-examination of IP by the appellant:

> 'Q: In her statement she said she knew me to be Cobra, how long have you known me by that nickname?
>
> A: **About two years**, as I recall he pass by my house.' [Emphasis added.]

[8] Another Crown witness, a WPC Castellanos, gave evidence that the appellant was taken into custody by the police on 8 August 2005 but no evidence was adduced to show that the police then held an identification parade (apparently because none was held).

The defence evidence

[9] The defence of the appellant was alibi. His sworn evidence was that he slept at the house of a friend, Carlos, in Benque Viejo del Carmen on the night of 6-7 August 2005. He got up at about 6.00 am on 7 August. He, Carlos and another friend, George, then went to a nearby basketball court where they played basketball for about three to four hours before returning to Carlos's house. Under cross-examination he repeatedly stated that at the time of the alleged commission of the offence he was not at the scene in question.

[10] The alibi of the appellant was supported by Erty Carlos Martínez, whose evidence was that a friend of his and the appellant both spent the night of 6-7 August 2005 at his home in Benque Viejo del Carmen. They all got up at about 6.00 am on the next day and decided to go and play basketball. They played basketball until 10.00 am.

The concerns of the Court

(a) Preliminary observation: The Director's concession

[11] This Court did not consider it necessary to hear the unrepresented appellant argue his grounds of appeal. Instead, having regard to concerns arising amongst the members of the Court independently of the appellant's grounds, the Director was asked whether she felt able to support the conviction; and she, in the highest traditions of prosecuting counsel, indicated that, notwithstanding her opinion that the prosecution evidence was strong, she did not, in view of the manner in which the trial had been conducted, feel herself so able.

(b) Turnbull, absence of identification parade and reliance on dock identification

[12] As this Court made clear at the hearing, the approach of the trial judge to the central issue at trial was a major cause of concern. That issue was whether, if (as was not disputed by the appellant) IP had indeed been carnally known on 7 August 2005, it was the appellant who had so known her. There was before the jury a clear-cut conflict, of the nature already described, between the evidence of visual identification of IP, on the one hand, and the alibi evidence of the appellant and his witness, on the other. The proper approach of the judge to an issue such as this one ought no longer to be in doubt. It falls to be determined by the guidelines laid down by the English Court of Appeal in the judgment delivered by Lord Widgery CJ in *R v Turnbull* [1977] QB 224. The Court sees no need to quote the relevant passages of this judgment. They are, after all, oft-quoted passages which the Court was at pains to set out in full in its judgment in *Stanley Lewis v The Queen* (26 October 2003, Criminal Appeal No 14 of 2002), at

paragraph 20. A few months earlier those same passages had been reproduced by the Privy Council at paragraph 12 of the judgment delivered by Lord Rodger of Earlsferry in *Aurelio Pop v The Queen* [2003] UKPC 40, an appeal from this Court. Whilst *Stanley Lewis* requires no further comment, the same cannot be said of *Pop*, which is indeed doubly relevant having involved consideration by the Board not only of the circumstances requiring the giving to a jury of the full *Turnbull* direction but also of the directions called for in cases where no identification parade has been held by the police but the prosecution nevertheless depends on evidence of visual identification.

[13] Regarding the *Turnbull* direction, Lord Rodger, having quoted the familiar passages from *Turnbull* to which this Court has just adverted, said, at para 12:

> '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 uncorroborated 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." '

[14] With respect to the directions rendered necessary by the failure of the police to hold an identification parade and the reliance of the Crown on a dock identification of Pop by the sole eyewitness (a Mr Adolphus), Lord Rodger said, at para 9:

'First, the police held no identification parade and in consequence the identification of [Pop] 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 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 [Pop] 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 [Pop]. 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 L R 212 and *Williams (Noel) v The Queen* [1997] 1 WLR 548.'

[15] Before turning its attention to the directions in fact given by the trial judge in the instant case, the Court will, for ease of exposition, allude to the discrete matter of the warning provided for under what is currently section 92 (3) (a) of the

Evidence Act ('the Act'). The provisions in question, as presently pertinent, read as follows:

> 'Where at a trial on indictment:-
>
> (a) a person is prosecuted for rape, attempted rape, carnal knowledge or any other sexual offence, and the only evidence for the prosecution is that of the person upon whom the offence is alleged to have been committed or attempted; or
>
> (b) …
>
> the judge shall where he considers it appropriate to do so, warn the jury of **the special need for caution before acting on the evidence of** such person and he shall also explain the reasons for the need for such caution.' [Emphasis added.]

These provisions came into force on 1 August 1998, over a decade after the decision of this Court in *Salomé De la Rosa Díaz and anr v The Queen* (27 November 1987, Criminal Appeals Nos 8 and 9 of 1987), which appears to be one of the earliest cases in which this Court applied the *Turnbull* guidelines. The provisions so came into force in substitution for those of the former section 90 (3), under which no one could be convicted of rape or carnal knowledge on the evidence of a single witness unless such evidence was corroborated in the manner spelled out therein. Also repealed together with the former subsection (3) was subsection (4), which had previously made similar provision in cases

involving the evidence of accomplices. Since 1 August 1998, the provisions now found in section 92 (3) have applied to all cases involving sexual offences (not only rape and carnal knowledge) where 'the only evidence for the prosecution is that of the person upon whom the offence is alleged to have been committed or attempted'. [Section 92 (3) (b), deliberately omitted from the above quotation, applies to all cases where 'an alleged accomplice … gives evidence for the prosecution'.] Nowhere in the subsection is there mention of evidence of visual identification, the clear focus of *Turnbull*. It is quite plain, in the view of this Court, that section 92 (3) (a) is concerned with evidence in general and, unlike the *Turnbull* warning, not with evidence of visual identification in particular.

[16] It is therefore correct to say that, whilst there is some similarity between the *Turnbull* warning, which of course only forms part of the *Turnbull* direction, and the section 92 (3) (a) warning, the two are by no means identical. However, the judge, in giving either warning, must state the reason/s why it is required to be given. In the case of the section 92(3) warning, he/she must state those reasons because the section imposes that duty on him/her: see the final twelve words of the subsection. In the case of the *Turnbull* warning, he/she must give those reasons because Lord Widgery CJ, delivering the judgment in *Turnbull*, was clear that a trial judge is under such a duty: see p 228.

[17] The Court can now conveniently turn to consider the summing-up of the trial judge so far as relevant on this part of the instant appeal. He is recorded as having told the jury (p 165, Record):

> 'Members of the jury, I must warn you **the special need for caution before acting on the evidence of** [IP], before convicting [the appellant] of carnal knowledge based on her evidence alone, and remember I went into the whole of [IP's] evidence for you. So I am warning you now the special need for caution, the reason you must be careful is because there is a danger that a witness could be lying or maybe could be deluded, but if you feel sure [IP] is telling the truth then you can find the [appellant] guilty of carnal knowledge, if you do not feel sure your verdict must be not guilty, you will bear in mind also the warning that the complainant and the witnesses are lying for their own processes (*sic*) also that the person they claim are (*sic*) [the appellant] may not be the person who carnally knew [IP], remember mistakes are often made of close relations, relatives and friends, it is a matter for you if you believe the prosecution has proven that it was [the appellant] who committed the carnal knowledge of [IP].' [Emphasis added.]

[18] The Court, after due, contextual consideration of this passage, could reach no conclusion other than that the warning contained in it was neither intended to be, nor capable of amounting to, a *Turnbull* warning. The words 'the

special need for caution before acting on the evidence of …', occurring in the opening sentence are the *ipsissima verba* of section 92 (3). And, whilst the Court respectfully accepts the hardy dictum that '*Turnbull* is not a statute' (attributable to Lord Steyn, delivering the judgment of the Board in *Mills, Mills, Mills and Mills v R* (1995) 46 WIR 240, 246), it has to regard as significant the absence from the passage quoted above of words clearly conveying that the caution for which the special need exists should be exercised by the jury not merely before acting on the evidence in question but before 'convicting the accused in reliance on the correctness of the identification'. Putting it slightly differently, the failure to emphasise that the evidence of IP was not just evidence but, in large part, evidence of identification prevents the warning from qualifying as anything more than a section 92 (3) warning. There are, in addition, the reasons for the warning in fact given, as expressed by the trial judge. Whatever the merits or demerits of those reasons as reasons for a section 92 (3) warning, they simply do not amount, howsoever combined or arranged, to the reason for a *Turnbull* warning, which, in the general terms employed by the Court in *Turnbull*, at p 228, is that:

> '[Evidence of visual identification in criminal cases] can bring about miscarriages of justice and has done so in a few cases in recent years ...'

which risk of miscarriages of justice exists because of what is described, again in the general terms of the judgment in *Turnbull*, as 'the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be

mistaken': see p 228. For these reasons, the Court is satisfied that the intention of the trial judge in the instant case was to give the jury a warning pursuant to section 92 (3). And it is not surprising that, with that intention in mind, he, having warned the jury in the terms of his choice, said nothing further that can properly be construed as in fact meeting those requirements of the *Turnbull* guidelines which go beyond the mere giving of the warning and the reason therefor. Foremost amongst these, of course, is the requirement for a direction that the jury closely examine the circumstances in which the identification was made, guided, in so doing, by the well-known set of questions provided in the *Turnbull* judgment (at p 228). Admittedly, the judge did, oddly enough, throw into the mix, so to speak, a reference to one portion of the *Turnbull* direction when, in the passage set out above, he told the jury that mistakes are often made 'of close relations, relatives and friends'. But a single allusion to one, isolated portion of a direction as composite as the *Turnbull* one, puts the summing-up no higher than that in *Pop* itself, where the Board was absolutely clear in its view that the failure of the judge to give a full *Turnbull* direction had been a significant one. (It is recalled that in *Pop* the Board took fully into account that González J, in his summing-up, 'drew attention to the possibility of mistakes being made and emphasised that the jury must be absolutely sure there was no mistake'.)

[19] It is clear from the judgments in *Reid (Junior)* and *Pop* that, where there has been a significant failure to adhere to the *Turnbull* guidelines, a conviction will have to be quashed, save in a case involving exceptional circumstances. In

Pop the Board expressed the view that a case in which 'the evidence of visual identification is of exceptionally good quality' will fall under that general description. The Board did not consider that there was such evidence in *Pop* and they enumerated their reasons for so concluding. This Court, for its part, is of the opinion that the visual identification evidence in the present case is not of exceptionally good quality. At the same time, the Court is unable to dismiss such evidence as being of bad quality and has, consistently with that fact, ordered a retrial. Having adopted that course, the Court will, for obvious reasons, not elaborate on its opinion as to the quality of the visual identification evidence, which, however, is to some extent revealed by the references to the prosecution evidence made *supra*. In *Pop*, the Board, not having ordered a retrial, was not in the same position.

[20] As was made clear by the Board in *Reid (Junior)*, the result of any significant failure to follow the *Turnbull* guidelines will be a substantial miscarriage of justice. The miscarriage of justice in the instant case is, of course, added to by the fact that the trial judge completely omitted from his summing-up the directions held by the Board in *Pop* to be requisite in cases where the police fail to hold an identification parade but the prosecution nonetheless place reliance at trial on evidence of visual identification featuring a dock identification.

[21] The Court now pauses parenthetically to point out that it is unnecessary in this appeal, in which it has not had the benefit of legal argument, to enter into the

question whether in a trial on a sexual offence where there has been no dispute as to whether, for instance, the complainant has been carnally known (and no relevant formal admission by the defence), but the judge is satisfied as to the need for a *Turnbull* direction, he/she may properly content himself/herself with giving the jury such a direction and refrain from giving them a warning under section 92(3)(a). Trial judges confronted in the future with that situation, which is not under contemplation in para 16, *supra*, may well, subject to such changes in the law as may occur in the interim, find assistance in the decision of the Privy Council (on an appeal from Grenada) in the case of *R v Rennie Gilbert* (2002) 61 WIR 174. The Court will say no more than that in this judgment, bearing in mind, *inter alia*, that the case of *R v Makanjuola* [1995] 1 WLR 1348, which was, to all intents and purposes, applied in *Gilbert*, concerned English statutory provisions similar, but not identical, to those of section 92(3) of the Act, a section having no counterpart in the law of Grenada at the time. The specific question being referred to in this paragraph is not one that was dealt with by this Court (Rowe P and Mottley and Sosa JJA) in its oft-cited decision in *Mark Thompson v The Queen* (28 June 2002, Criminal Appeal No 18 of 2001, in which identification was not an issue, whether at trial or on appeal, but in which some guidance was taken from *Makanjuola*) and the not-so-short line of subsequent decisions, for example *Olegario Cárcamo v The Queen* (24 June 2005, Criminal Appeal No 16 of 2004), in which *Thompson* has been followed.

(c) Misportrayal of evidence of MG

[21] As if the omission of these two important directions, namely the *Turnbull* direction and the direction relating to identification parades, were not grave enough, the judge also erred by commission with respect to the issue of the identity of the perpetrator of the alleged offence. This issue was the subject of what the judge presented to the jury as the fourth element of the charge against the appellant. That element was, in his words, 'that [the appellant] had sexual intercourse with [IP] and he is the person who had it'. Early on in the course of giving directions on this element, the judge rightly focussed attention on the evidence of IP. But then, inexplicably, immediately before turning to the warning pursuant to section 92 (3) of the Act, he saw fit further to refer the jury to the evidence of MG (IP's mother as already noted) which, with respect, could not possibly have been of any assistance to them in their deliberations on the element under consideration. In the view of the Court, the judge wrongly made certain remarks regarding the evidence of this witness which would have been appropriate only if she had been an identifying eyewitness. To give but one example, he highlighted to the jury her evidence as to the frequency of her sightings of the appellant before 7 August 2005 and as to the parts of him that she would see during those sightings. The Court considers that, by these remarks, the judge may well have succeeded in causing serious confusion in the minds of the jurors as to the value of MG's evidence, to the prejudice of the appellant.

(d) Misquotation of the appellant

[22] The other error of commission on the part of the judge to which reference is necessary also had to do with what has been identified *supra* as the central issue at trial. This error was committed whilst the judge was reviewing the appellant's cross-examination of IP. He wrongly indicated to the jury that one of the appellant's questions had been, quite simply: 'What I did with the rope you were tied up with?' Had the appellant indeed posed such a question in an absolute vacuum, he would have effectively been admitting that he was with IP at the time and place of the alleged outrage. In fact, however, the appellant is recorded as having asked a prefaced question as follows: 'I want to ask you right; you said that I took off the rope, what did I do with the rope? Couched in that way, the question was not predicated upon an admission by the appellant that he was at the scene at the material time. This Court cannot assume that the jury was not sufficiently alert to realise what the judge's misquotation of the appellant was suggesting, whether or not intentionally. This is the type of situation in which a jury, without the benefit of full notes, will readily accept that the judge's version will be more accurate than their own (based on little or no more than their recollection).

A final admonitory remark

[23] The Court must now record its dissatisfaction with certain aspects of the summing-up as it related to the other three elements of the charge of carnal knowledge, namely the sex of the complainant, the age of the complainant and the act of sexual intercourse. On no less than three occasions, the judge is recorded as having unambiguously told the jury that that one or all of those

elements had been proven. First, referring to the element of age, he told them, 'You must therefore find that the prosecution has proven [the element] to you (p 160, Record). On the second occasion, concerning the element of sexual intercourse, he remarked: 'I go to the third element that he has proven …' (p 160, Record). The judge made this point again towards the end of the summing-up, saying, 'penetration of the girl … has been proven to be so …' (p 177, Record). Finally, speaking of all three elements already identified, he is recorded as having gone so far as to step into the shoes of prosecuting counsel and say: 'I have proven to you the first three [elements] ..' (p 168, Record). In the result, the only element left without equivocation to the jury was the fourth and final one, that is to say the identity of the alleged violator. The Court, whilst stopping short of suggesting that this judicial usurpation of the jury's function may have contributed to the miscarriage of justice in the instant case, feels obliged to state in no uncertain terms that there are here signs of an incipient tendency which must be strongly deprecated and would best be nipped in the bud at once.

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SOSA JA

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CAREY JA

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MORRISON JA