IN THE COURT OF APPEAL OF BELIZE AD 2010

CRIMINAL APPEAL NO 12 OF 2010

LEROY GOMEZ Appellant

v

THE QUEEN Respondent

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BEFORE
The Hon Mr Justice Elliott Mottley President (up to 31 December 2010)
The Hon Mr Justice Manuel Sosa Justice of Appeal (President as from 1 Jan 2011)
The Hon Mr Justice Dennis Morrison Justice of Appeal

Appellant unrepresented.
C Vidal, Director of Public Prosecutions, for the respondent.

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4 October 2010 and 16 May 2011.

SOSA JA

Introduction

[1] On 9 August 2010, Leroy Gómez ('the appellant') was convicted of rape, robbery and aggravated assault following his trial before Lord J and a jury in the court below. By its verdict, the jury found that the appellant had raped TO ('TO'), aged 22, robbed her of money in the sum of $10.00 and a gold ring and

committed an aggravated assault upon a friend of hers, viz MS ('MS'). The judge proceeded in due course to sentence the appellant to terms of imprisonment of nine, 11 and two years, respectively, of which the first two were consecutive.

[2] On 4 October 2010, this Court, having heard the appeal of the appellant from his conviction and sentence, announced that it was allowing such appeal, quashing the convictions, setting aside the sentences and directing the entry of judgments and verdicts of acquittal on all three counts. The Court now gives the reasons for its decision.

The Crown Evidence

[3] At trial, the case presented by the Crown against the appellant turned upon his identification by a pair of witnesses, viz MS and MM.

[4] TO testified for the Crown but gave no admissible evidence of visual identification. Summarised to the extent necessary for present purposes, her evidence was that at about twelve o'clock on the night of Friday 22-Saturday 23 August 2008, she and MS left MJ's Grand, a popular nightclub in the Newtown Barracks area of Belize City, by taxi, *en route* to the home of MS's mother at No 20 Antelope Street to collect MS's house keys. Deciding to walk from there to MS's house at No 176 Iguana Street Extension (a continuation, as the name

implies, of Iguana Street, a street situate south of, and running parallel to, Antelope Street), they proceeded down Antelope Street, crossed Central American Boulevard ('the boulevard') and went on down Antelope Street Extension, a continuation, as will have been gathered, of Antelope Street. In testimony not outstanding for its precision, TO indicated that, at some point after crossing the boulevard, she saw, on Iguana Street (undoubtedly a reference to Iguana Street Extension) a young man wearing a green T-shirt, black ¾ length pants and a hat 'over his face'. TO testified of having crossed Elston Kerr Street, the first street intersecting Antelope Street Extension that one comes upon as one proceeds westwards from the boulevard. She again saw the young man in question on what she is recorded as having called Iguana Street (but, as already indicated above, can only have been Iguana Street Extension), presumably while she was at the intersection of Antelope Street Extension and Elston Kerr Street. Given that TO and MS were bound for the latter's house on Iguana Street Extension (which, as already noted above, lies south of, and runs parallel to, Antelope Street Extension) and that the only other street to intersect Antelope Street Extension as one continues travelling along it in a westerly direction is Israel Lane, TO's further evidence that she and MS thereafter turned into 'an unknown street' can only be interpreted as meaning that they turned left into Israel Lane, a street which, apart from connecting Antelope Street and Iguana Street Extensions, also ends at its junction with the latter extension. In fact, it is to be inferred from TO's further evidence that it was at a point on Iguana Street Extension which coincides with the end of 'the unknown street' that the young

man in question finally met her and MS. (The Court shall, in the remainder of this judgment, refer to this meeting as 'the encounter on Iguana Street Extension', so long as the context shall be the evidence of TO.) TO gave evidence that she and MS continued on their way to the latter's house, which was situate, in her words, 'as you bend, about four houses away', but she refrained from expressly stating whether they were now heading west or east along Iguana Street Extension. It seems certain, nevertheless, that they were now headed east, since the young man (now being referred to by TO as 'the male person'), is said to have 'turned' and asked them their names and then ran 'behind' them. This would indicate that, when TO and MS turned east on entering Iguana Street Extension, the young man, who had been heading west all along, made an about turn and began retracing his steps behind them.

[5] The young man, having run up from behind, grabbed TO around the neck and placed a knife at her side. He ordered MS, who was about to run off, to come back to him, which she did. Thereafter, he asked TO what she had in her hand, she handed him the $10.00 note that she was holding and he relieved her of a gold ring she was wearing. After asking MS whether her jewellery was 'real' and receiving a reply in the negative, he placed his arms around both their necks. With the knife in his hand now at TO's throat, he led both of his captives back into 'the unknown street' and, thence, into an 'open lot'. Once there, he forced MS to lie down and ordered TO to strip. MS, however, promptly made good her escape.

[6] TO did not testify as to whether she complied with the young man's order to strip or with his follow-up commands to, in turn, turn around, bend over, turn around again and fellate him and then turn around yet again. But she was clear that he penetrated her vaginally with his penis following the last of these commands, which she presumably obeyed, and prior to giving her permission to leave, which she was not slow to do.

[7] As already stated above, TO gave no admissible evidence of identification of her assailant at trial. Concerning the initial stage of the encounter on Iguana Street Extension, she said little. Regarding the later stage, when she was relieved of her ring, she testified that the area in which it unfolded was 'a little dark' and that it was, in fact, because of the young man's attire that she could say she knew he was the same one she had earlier seen on Iguana Street Extension. It was, however, also TO's evidence that she had, for 'a short time' (the duration of which she did not go on to estimate), had an unobstructed view of the young man, from a distance which she pointed out in court, and estimated at 5-6 feet, by the light of a street lamp shining 'directly where he was standing'. She obviously cannot have managed to command this view of the young man in the same area that was 'a little dark'. The inference must therefore be that she did so later, while they were both either on Israel Lane or in the adjacent open lot. The conditions under which this view was had are to be contrasted with those under which the earlier view was said to have been obtained (while TO, MS and the young man were all on Iguana Street Extension). The earlier view

was supposedly had during a period of five minutes (no doubt an exaggeration of the length of time taken to relieve TO of her ring) when TO was, as she put it, '[r]ight in his face, up close', with the sole impediment to a full view of the assailant's head being his ever-present hat. At the end of the day, however, despite the points of contrast, neither view resulted in a proper forensic identification by TO of her assailant On her own evidence, TO, at the time she was being robbed as well as at the time she was being raped, only knew that her assailant was the young man she and MS had encountered on Iguana Street Extension because of the clothes he was wearing rather than because of any facial features noticed by her, a point to be returned to, and expanded upon, below, when considering the evidence of MM.

[8] Clearly, then, TO at no stage in the trial claimed to have obtained a good view of the face of her assailant. It is hardly surprising that, in these circumstances, when asked in her evidence-in-chief whether she had known her assailant prior to the night in question, her answer was unambiguously in the negative. Nor can there be any food for wonder in the fact that there was no evidence of her having attended any identification parade in the course of the pertinent police investigation.

[9] The preceding summary of the evidence of TO provides a useful backdrop for the description of MS's evidence, to which the Court must now turn. MS must

be seen as the chief identifying witness in this case, if for no other reason than that, unlike the other such witness, she attended, and identified the appellant at, an identification parade held by the police.

[10] Her opportunities to view the assailant in question are clearly identified in the evidence of TO, as well as her own. Responding to prosecuting counsel's question whether she could recall '23rd August, 2008 at 3.30 a.m.' (rather than the witching hour that had been put to TO), she confirmed TO's evidence of the movement by taxi from MJ's Grand to her mother's house for the purpose of collecting her keys, but without expressly agreeing that that had occurred at 3.30 am. She likewise confirmed TO's testimony of the walk from her mother's house towards her own. She testified, however, unlike TO, of a rather early encounter with two young men, as early as when she and TO were in the initial stage of their walk, to be precise, when they were still on the boulevard. (This encounter may be called 'the encounter on the boulevard' to distinguish it from the encounter on Iguana Street Extension but is of relatively scant significance for present purposes.) The two young men had been, to quote MS, 'coming towards we', but one of them turned back on his bike and soon disappeared. The other young man, however, according to MS, directed 'courting words' at TO before they could go down Antelope Street (undoubtedly a reference to the extension, since they would have been on Antelope Street from the moment they left her mother's house). The place at which these 'courting words' were spoken is again identified by MS's further evidence that the young man who uttered them

then turned back and that he did so '[b]efore we went down Antelope Street [another reference, without a doubt, to the extension]'. Her story then departs radically from the account given by TO in that she goes on to narrate that, strangely, the same young man who had used the 'courting words' somehow materialised in front of them again before they could reach 'Iguana Street' (again an undoubted allusion to the extension). (There can be no real doubt that this meeting is the same one which, in the context of the evidence of TO, is being called the encounter **on** Iguana Street Extension in this judgment; and in the remainder of this judgment, it shall be called 'the encounter **near to** Iguana Street Extension', so long as the context shall be the evidence of MS.) When, having momentarily walked ahead of TO, MS spun around to urge her to hurry, she saw the young man holding a sharp object at TO's side and threatening to stab her if MS ran off. As MS did not run, he 'rubbed' her down and asked her whether her jewellery was 'real', to which her answer was that it was not. MS also confirmed TO's evidence that the young man then held both around their necks, that of TO and the knife being, as a result, in close proximity to one another.

[11] Without having indicated precisely where the encounter near to Iguana Street Extension had started (other than that it was before they could reach Iguana Street Extension), MS went on to relate that the young man then took them to a street whose name was unknown to her and, thence, into a yard,

presumably adjacent, where (as TO had testified) he forced her to lie down and ordered TO to strip, at which point she (MS) was able to flee from the scene.

[12] MS testified of three opportunities actually to see the face of the young man in question, all arising during and after the encounter near to Iguana Street Extension (hence the scant significance, earlier referred to, of the encounter on the boulevard). These arose, first, in her words, '[w]hen we met him by Iguana', secondly, when he led them into the yard and, thirdly, when, having fled the scene in the yard, she peeped out from inside a neighbour's house. She volunteered in her testimony that there was no light at the spot where her first observation of his face, lasting some five seconds only, took place, though she claimed she was 'right in front of his face' at the time. (As pointed out above, TO herself said in evidence that the spot on Iguana Street Extension where the fateful confrontation with the young man had commenced was 'a little dark'.) As to the second observation, MS said that it was only a side-view of the young man, obtained in light that was, 'not too bright'; and she declared that she was assisted in recognising him as the young man met moments earlier near Iguana Street Extension by the clothes he was wearing, of which, however, she gave no description at trial. In relation to the third observation, MS was perhaps less helpful, saying that it was made from a distance which she pointed out (and was estimated by prosecuting counsel and the judge at 10 feet) and with the aid of illumination coming from a light at a basketball court, beside which light the

young man had allegedly stood. About the brightness, or otherwise, of that illumination, there was no evidence.

[13] MS gave evidence, as well, of her attendance at an identification parade held by the police on 26 September 2008, at which she pointed out the young man who had, as she alleged, assaulted her and robbed TO on the night in question. She then testified that that young man was in fact the accused in the dock, ie the appellant, whom she proceeded to point out.

[14] In the ensuing cross examination of MS by the appellant, unrepresented as he was, attention quickly turned to the reliability of the identification made by MS at the parade in question. The appellant's second question was as to whether or not his face had been shown on the news on local television prior to the day on which such parade was conducted. It was, of course, a question that MS might well have answered by saying that she did not know. But, surely, it was not beyond the realm of possibility that she might have replied that his face had, indeed, already been shown on television in connection with the news story of the alleged rape, robbery and assault when she attended the relevant parade. This common sense consideration, and clear law, notwithstanding, there was, alas, to be no answering of the question, thanks to a strenuous objection to it raised by prosecuting counsel (on the ground that MS had not raised the subject-matter of the question in her evidence-in-chief) and unhesitatingly upheld by the

judge. All the appellant was entitled, in the view of the judge, to do was to lead evidence in due course as to the showing of his face in the news and thereafter comment on it in his address to the jury. The cross-examination ended almost immediately thereafter.

[15] MS at no point described any item of the relevant young man's attire, as has been noted above, and, more significantly, she made no mention whatever of his wearing of a hat, whether 'over his face' (to quote TO) or otherwise .

[16] The evidence of MM, the other identifying witness for the Crown at trial, needs also to be described. In examination-in-chief, he replied affirmatively to the question whether he could recall 'the 23rd August, 2008, at about 3.30 a.m. to 3.45 a.m.' What he could recall, he said, was that he was walking on Antelope Street Extension, headed for home, when, near to what he called 'Horse and Carriage Area', he saw a male person coming out of a 'yard' (his word, according to the p 42 of the record) about 40-45 feet away from him. 'Horse and Carriage Area' refers, as the appellation implies, to the well-known place of business of a certain enterprise rendering horse and carriage services in Belize City.

[17] MM further stated in evidence that this male person was putting on a green T-shirt over the white undershirt he was already wearing. (It is to be

recalled that TO's evidence, alluded to at para [7] above, was that it was partly because of clothes he was wearing from the outset (while he was on Iguana Street Extension), viz. the green T-shirt and black pants, that she felt able to say she knew that he was also her assailant in the open lot.) He recognised this male person as one he then knew 'only as Gomez (*sic*)' and did not see regularly but whom he had known for some seven years, and with whom he had even played football in summer school days. Looking at him in the face, in the light of a street lamp located on the other side of the street, he asked him for a cigarette. In reply, the male person told him that he had not any. At this time, they were less than two feet apart.

[18] As he continued on his way, MM met one C, who told him something, whereupon he (MM) turned back and started walking with C. Presently, he saw the male person in question again, this time sitting in a nearby park. C then told MM something and headed for the front of the park, while MM took up a position in an alley (behind the park) which leads to Antelope Street Extension. In due course, C entered the park, at which time the male person in question took to his heels through the alley. MM, seeing this, sought to block his path but desisted when the fleeing individual pulled out an object resembling a knife and 'fired a stab' at him. A chase through several streets ensued but ended, without success, when its object entered a yard on a street described by MM as one leading to a place called Third World Court, evidently Vernon Street.

[19] It is noteworthy that MM said in his evidence-in-chief that he had the male person in question under observation for less than a minute when he asked him for a cigarette. That was undoubtedly truthful evidence; but, considering how little was said in the exchange, is it not likely also to have been a rather liberal estimate?

[20] Although there was no evidence that MM ever attended an identification parade in connection with the instant case, he pointed out the appellant in the dock as the male person known to him as Gómez and mentioned by him in his testimony.

[21] In his brief cross-examination of MM, the appellant concentrated on the suggestion that MM was a lying witness, particularly in his claim of knowing the appellant, rather than on the allegation that he (the appellant) had been on, and in the vicinity of, Antelope Street Extension on the night in question.

[22] This witness, apart from being a cousin of TO, was on the date in question the live-in boyfriend of MS. No one thought of asking him while he was in the witness-box whether he had shared with MS, and/or TO for that matter, prior to the holding of the identification parade, his conviction that the male person he

met on Antelope Street Extension and chased through several streets that night was the appellant, and that he knew him as Gómez.

[23] Amongst the other witnesses giving evidence of relevance for purposes of the instant appeal was Sgt Palomo, who conducted the pertinent identification parade on 26 September 2008. It was his testimony that, while the appellant agreed beforehand to be in the line-up during the parade, he expressed, once it had ended, dissatisfaction with it on the ground that his picture had previously been shown on local television.

[24] The re-examination of Sgt Palomo produced the following noteworthy exchange:

> 'Q. Sgt Palomo, did you[,] like the accused is alleging[,] put his face on the news.?
>
> A. I know his face was on the news. I don't know how it reach the news!'

[25] Another Crown witness, Eleanor Enríquez, Justice of the Peace, gave evidence as to the conduct of the identification parade, repeating what Sgt

Palomo had already said with respect to the appellant's dissatisfaction with the result of the parade and his reason for such dissatisfaction.

[26] The only other Crown witness whose testimony requires mention in this judgment is Cpl Martha Rhys, who said in evidence that the appellant was detained by the police on 25 September 2008 and formally charged with the crimes of rape, robbery and aggravated assault on the next day.

The Unsworn Statement of the Appellant and the Defence Evidence

[27] The appellant gave an unsworn statement from the dock and called three witnesses, all surnamed Welch. Given his limitations as a layman conducting his own defence, it is only fair to treat what he said in his unsworn statement as raising a defence of denial on all three counts.

[28] The first of his three witnesses to be called was Julia Welch. Responding to questions from him which were, admittedly, largely leading in nature, she testified to his having lived with her for some six years and been at home with her on 23 August 2008, thus raising the issue of alibi. Additionally, she alertly grasped an opportunity extended to her in cross-examination to say not only that she was, in fact, even at the time of trial, the girlfriend of the appellant but also, and more importantly, that he had been 'place (*sic*) on the news and they had a

search (*sic*) warrant for him', a topic somehow not touched upon by the appellant in examination-in-chief. That, she explained, was how she had come to know that he was being 'charged' with rape though she could not recall the month and year when these developments had occurred. (As has already been noted above, the appellant was not formally charged with any pertinent crime until 26 September 2008 but the Court reminds itself that witnesses' familiarity with legal terms will vary.) She freely admitted that she was not generally with the appellant 24 hours a day and could not account for him at the time of the alleged commission of the crimes in question.

[29] Sofia Welch, the second witness called by the appellant, said in evidence that she remembered the appellant's face having been shown on television and that, sometime before it was shown, and during the month of August, he had been in Gardenia, a village situate at about milepost 24 on the Northern Highway. Precisely what she meant to convey by this reference to the showing of the appellant's face on television is not clear, especially since, in cross-examination, she further said that she saw the appellant on the news on the night when 'he handed in himself'. Could that have been the occasion to which she was referring in her evidence-in-chief? She was also prepared to admit in cross-examination that she could not recall exactly what part of August he had spent in Gardenia with her and her sister.

[30] The appellant's final witness was Arita Welch, who gave to the court of trial the same home address as had been given to it by Julia Welch and further stated that she could not remember the whereabouts of the appellant on 23 August 2008 but, on the other hand, could not recall him ever having left the house at 3.00 am.

The Appeal

[31] The appellant filed, as his grounds of appeal, the following:

> '1) The I.D. parade was done after I was publicized in the news
>
> 2) Witness(s) name was called that was not written on the indictment
>
> 3) Two of the witnesses was giving statement from the stand that was contrary to what was written in the disclouser (*sic*).'

but, when called upon to argue them, did little more than repeat the assertion he had made at trial to the effect that he is no rapist.

[32] Invited by the Court to support the conviction, if minded so to do, the Director of Public Prosecutions rightly drew attention to the ruling of the trial

judge on the objection of prosecuting counsel to the appellant's question to MS as to whether his face had been shown on television before the holding of the relevant identification parade. As the Court understood her, that was not a ruling she could support if the record was accurate; and while she indicated that she had hoped to be able to verify a claim made by prosecuting counsel (in conversation with her, the Director) that the record was in fact inaccurate, she had no ready explanation for the fact that the trial judge's remarks at pp 39, 40 and 41 of the record were inconsistent with the particulars of the claim. In the result, and commendably, she did not, in fact, seek, having acknowledged the inconsistency, to lend support to the ruling.

[33] As was indicated by the ensuing comments of two members of this Court, the ruling of the judge was indeed wholly untenable. The objection of inexperienced prosecuting counsel, the terms of which are set out at para [14] above, ought to have been overruled so soon as she had completed its formulation. MS was, after all, under cross-examination, as to which section 66(1) of the Evidence Act pertinently states:

> 'The … cross-examination must relate to facts in issue or relevant thereto, or which may be proved, but the cross-examination need not be confined to the facts to which the witness has testified on his examination-in-chief.'

The witness was not undergoing re-examination, in relation to which relatively severe limits are imposed on examining counsel by the language of subsection (2) of the same section, which is as follows:

> 'The re-examination must be directed to the explanation of matters referred to in the cross-examination …'

It was pre-eminently a matter fit to be proved by the defence in the trial of the appellant (and hence covered by the statutory expression 'facts … which may be proved') that MS had, before attending the parade at which she pointed him out as having been the assailant of her and TO on the night in question, seen his face on television in the context of a story concerning the very crimes with which he was now charged. It must therefore follow as the night the day that the question whether his face had, to begin with, in fact been shown on television in such a context was entirely permissible in the cross-examination of MS. An accused person on trial puts his/her case not only through the calling of witnesses to give evidence on his/her behalf but also through the due exercise of his right to cross-examine his/her accusers. The appellant, had he been permitted to ask the question under discussion and received from MS a reply in the affirmative, would have been well within his legal rights further to ask whether she herself had seen his face when it was shown on television.

[34] The relevance of cross-examination along lines such as these is strikingly illustrated in the judgment of the Privy Council in *Dennis Reid v The Queen* [1980] AC 343, in which it was held that the Court of Appeal of Jamaica had erred in principle in ordering the retrial of Reid upon properly allowing his appeal against a conviction for murder. That was a case in which the Crown's sole-eye-witness, a Miss Samuels, was allowed by the trial judge to be recalled for further cross-examination, following disclosures by another witness as to the publication of Reid's description in the press, as well as on radio and television, and of his photograph in at least one newspaper. Miss Samuels, who had picked out Reid at an identification parade held following the publications in question, said on her recall that, while she had never seen any photograph of Reid in the press or on television, she had heard an oral description of him in her neighbourhood between the date of the murder and that of the parade. She was not, however, asked 'what part, if any, the [oral] description had played in enabling her to pick out the defendant from the other participants': see p 347 of the report. The Court of Appeal of Jamaica, lamenting the state in which the Crown evidence was left to the jury, was nevertheless not prepared to venture the opinion that the submission of 'no case' made at the close of the Crown case should have been accepted. The Board, however, was prepared to go farther than the appellate court below it, saying, on the same page:

> '… in the light of what [the Court of Appeal of Jamaica] had already held and of the guidelines as to the way in which evidence as to identification

should be treated as laid down by the English Court of Appeal in *Reg v Turnbull* [1977] QB 224, which is followed by the court in Jamaica, the only direction that the judge could properly have given to the jury was that on the state of the evidence before them [Reid] was entitled to be acquitted.'

[35] The Court is in no doubt, in these circumstances, that there was a serious irregularity in the trial of the appellant. Was it serious enough, however, to justify the allowing of the appeal? In the judgment of this Court, the error of the trial judge is, on any view, at least as grave of that of the trial judge in *Leon Hinds v The Queen*, Criminal Appeal No 6 of 2002, in which judgment was delivered by this Court (Rowe P and Mottley and Sosa JJA) on 27 March 2002. That was a case involving the trial of Hinds and a co-accused (both unrepresented) on an indictment charging them jointly with manslaughter. The Crown case against Hinds was that he had struck the deceased in the back of the head with a bottle, thus contributing to cause his death. During the Crown's presentation of its case, the trial judge, Awich J, directed a police corporal testifying for the Crown to stand down once he had completed his evidence-in-chief. Through the corporal, the Crown had, by then, already tendered in evidence certain photographs of the alleged crime scene. The judge made it clear that it was his wish that the *locus in quo* should be visited before the witness continued testifying. Other witnesses then testified. One of them, however, a police sergeant, was, like the corporal before him, directed to stand down as soon as he finished giving his evidence-in-

chief, of which the alleged crime scene had also been a subject. During the visit to the *locus* which then followed, the corporal identified a phone booth which was shown in one or more photographs of some bottles lying on the ground. He further pointed out a house and different spots at which the deceased, a machete and a stick, respectively, had been lying at the time when he photographed them. Following the return to the courtroom, the trial continued with the judge asking prosecuting counsel (evidently as a result of a memory lapse) whether she had closed her case and she replying that she had, indeed, done so. When called upon to present their respective cases, both accused chose to remain silent and called no witnesses. Hinds was convicted but his co-accused was acquitted. Writing for the Court, Rowe P stated at para 5 of the judgment:

> 'There were irregularities in the trial [word 'in' apparently omitted here] that the Court quite properly stated on two occasions that the appellant would be given an opportunity to cross-examine [the corporal] but in the end the appellant was not afforded the opportunity to exercise that right. [The sergeant] had been examined by the prosecution and the Court had reserved to the appellant the right to cross-examine the [s]ergeant, a right that was not subsequently afforded to the appellant. The trial judge of his own motion directed a visit to the locus and he did so at the time when the photographic evidence was being tendered by the prosecution indicating that a clear understanding of the locus was material for the proper conduct of the trial. There is no appropriate record of what transpired at the locus

and certainly the appellant was given no opportunity to challenge [the sergeant] or [the corporal] as to what they said or pointed out to the jury on the visit to the locus.'

At para 7 the learned President stated the conclusion of the Court as follows:

'It is abundantly clear that the trial judge contemplated adopting the correct course in permitting the appellant an opportunity to cross-examine the two police witnesses whose testimony had been interrupted but this was not done. [The Director of Public Prosecutions] asked us to say that the matters on which these witnesses testified were of a technical nature and did not go to the heart of the case for the prosecution. We did not agree. From the perception of the trial judge a visit to the locus was important. We cannot speculate as to what, in the perception of the jury, was considered important, but if there has been an irregularity where all the evidence was not placed before the jury, the verdict cannot be allowed to stand.'

[36] The instant case is not dissimilar, in the view of this Court. Material which should have been placed before the jury as evidence was not. There is, furthermore, no telling what response the appellant would have elicited from MS

had the judge done the right thing and allowed his question. The Court has already indicated above what the follow-up question stood to be in the event of an affirmative reply by MS. It matters not that the appellant may, conceivably, not have had the acuity to follow through in the manner of experienced defence counsel. Considering his lack of legal representation, this Court considers that any duty-conscious trial judge would have seen fit to pose the next logical question on his behalf.

[37] There was another cause for much concern amongst members of the Court at the hearing. It persists. The state of the identification evidence taken as a whole was such, in the judgment of the Court, that a reasonably alert and appropriately well-informed judicial mind would have directed itself to, and taken guidance from, the following important advice given in the judgment of the Judicial Committee in *Langford and Freeman v The State* [2005] UKPC 20, at para 23 of the advance copy:

> 'It is of some importance that the judge should not only identify the evidence capable of supporting the identification, as Lord Widgery said [in *Reg v Turnbull* [1977] QB 224] but should relate each of the factors material to the particular case to the evidence given at the trial. Without seeking to specify a minimum standard, their Lordships commend to

judges the sound advice given by Ibrahim JA in [the] Court of Appeal of Trinidad and Tobago in *Fuller v [The] State* (1995) 52 WIR 424 at 433:

> "We are concerned about the repeated failures of trial judges to instruct juries properly on the *Turnbull* principles when they deal with the issue of identification. Great care should be taken in identifying to the jury all the relevant criteria. Each factor or question should be separately identified and when a factor is identified all the evidence in relation thereto should be drawn to the jury's attention to enable them not only to understand the evidence properly but also to make a true and proper determination of the issues in question. This must be done before the trial judge goes on to deal with another factor. It is not sufficient merely to read to them the factors set out in *Turnbull's* case and at a later time to read to them the evidence of the witnesses. That is not a proper summing-up. The jury have heard all the evidence in the case when the witnesses testified. It will not assist them if the evidence is merely repeated to them. What they require from the judge in the final round is his assistance in identifying, applying and assessing the evidence in relation to each direction of law which the trial judge is required to give to them and also in relation to the issues that arise for their determination."'

This Court, after all, was at pains to direct the attention of trial judges in this jurisdiction to the passage just reproduced in its judgment in *Marvin Palacio v The Queen*, Criminal Appeal No 29 of 2004, delivered on 24 March 2005, in which Sosa JA, writing for the Court, quoted that passage and went on to state, at para 6:

> 'We do not downplay the Board's qualification in the passage just quoted to the effect that its purpose in *Langford* is not the setting of a minimum criterion. There will undoubtedly continue to be cases in which, in the light of their own particular circumstances, directions given by a trial judge to a jury, although falling short of the rightly lofty standards recommended by the majority in *Fuller* will, on review by this Court, prove adequate. Where, however, as in *Langford*, the prosecution case exhibits obvious difficulties in the making of a reliable identification, whether of a stranger or on recognition, it is certain that the sage counsel of Ibrahim and Hosein JJA which the Board has seen fit to espouse and commend will be ignored at considerable peril.'

[38] As the description of the relevant evidence given in the first part of this judgment will have shown, the Crown case at trial exhibited its fair share of 'obvious difficulties' in the making of a sound identification fit to be relied upon. It

suffices, in the view of the Court, to pinpoint the most salient of these difficulties as follows:

i) The Crown was effectively holding out MS as having had a better opportunity than TO to identify the assailant when, on the evidence,

   a) MS spoke of her opportunities to observe his face at relatively close range as being limited to the period beginning with the second encounter with him, which took place at the junction of Iguana Street Extension and Israel Lane, and ending when she fled from the open lot;

   b) that was a period appreciably shorter than that which TO would have had to observe the assailant's face, TO having remained on the scene, and suffered a series of indignities, after MS had fled;

   c) despite the longer period of time for observation enjoyed by TO, she did not attend an identification parade and her failure so to do was never explained by the prosecution.

ii) MS made no mention of a cap as having been part of the assailant's attire whereas TO disclosed in evidence-in-chief (rather than under the pressure of cross-examination) that the assailant

was wearing a cap ‘over his face’ when first encountered and that the cap was still being worn whilst he was committing his outrage against her.

iii) To some extent, MS relied, on her own showing, on the fact that the assailant in the open lot was wearing the same clothes that the male person met earlier at the junction in question had been wearing, in concluding that this was one and the same person, when both she and TO had testified that the lighting at the junction was on the poor side and, besides, the Crown somehow omitted to lead evidence, through her, of the relevant particulars of the assailant’s clothes (to establish that she had, indeed, been keenly observant of such clothing).

iv) To the extent that MS supposedly identified the assailant in reliance on her actual observation of his face, rather than on observation of his clothes, it is to be noted that the first opportunity arose in an area of some darkness and afforded only a fleeting glance, the second permitted a mere side-view in light that was ‘not too bright’ and the third allowed a view from a distance estimated at 10 feet in light whose degree of brightness was not indicated.

v) In circumstances where there was a relatively close familial link between MM and TO and, moreover, he was the live-in boyfriend of MS, the sole Crown witness to identify the appellant at an identification parade, the Crown led no evidence to rule out the possibility that there might have been communication from MM to MS of his obvious conviction that the appellant was the assailant, when MM himself appears only to have decided to chase the person he believed to be the assailant after being told something by someone who was not himself held out as an eye-witness to the alleged commission of the relevant crimes.

vi) The only point at which MM expressly testified of having seen the face of the man he obviously believed to be the assailant of TO and MS was when (in lighting of an unknown degree of brightness) he approached that man for a cigarette and took what may well have been no more than a 'fleeting glance' at his face.

vii) There was potential conflict between the identification evidence of MS and that of MM in that both gave evidence tending to suggest that they saw the appellant shortly after the alleged commission of the pertinent crimes but, whilst the former's testimony could reasonably be interpreted as indicating that the man she saw was

leaving the scene by way of Iguana Street Extension (as she, a resident of that extension, peeped from a neighbour's house), that of the latter could similarly be interpreted as indicating that the man he believed to be the appellant was proceeding from the 'open lot' (the words of the judge at p 200, Record) into Antelope Street Extension.

viii) Last but perhaps most importantly, the evidence of identification of MS became difficult properly to be assessed by a reasonable jury once the appellant (already handicapped by his lack of legal representation) was prevented by the judge from conducting a full cross-examination of her.

[39] The Court will not burden an already relatively long judgment with instances of the trial judge's singular failure to direct the jury in accordance with the invaluable guidance provided by the Board in *Langford*. Suffice it to note that the Director very properly acknowledged, without hesitation, that the failure of the trial judge in this regard was, indeed, stark.

[40] The above concerns of the Court in this appeal having proved decisive, it was unnecessary to address the matters raised in the appellant's grounds so far as there was no overlapping with the areas of concern.

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MOTTLEY P

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SOSA JA

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MORRISON JA