IN THE COURT OF APPEAL OF BELIZE AD 2024
CRIMINAL APPEAL NO 8. OF 2019

BETWEEN:

TEVIN ANDREWIN

Appellant

and

THE KING

Respondent

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Before:

The Hon. Madam Justice Woodstock Riley — Justice of Appeal
The Hon. Madam Justice Minott-Phillips — Justice of Appeal
The Hon. Mr Justice Foster — Justice of Appeal

Appearances:

Peta-Gay Bradley for the Appellant
Sheiniza S. Smith for the Respondent

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2023: 21st June

20224: 22 March

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MAJORITY JUDGMENT

INTRODUCTION

[1] **WOODSTOCK-RILEY, J.A.:** The Appellant, Tevin Andrewin, was charged with murdering Myrick Gladden on the 24th day of June 2012 contrary to **s.117 of the Criminal Code, Chapter 101 of the Laws of Belize, Revised Edition 2003** and was

committed to stand trial before the Honourable Madam Justice Marilyn Williams sitting without a jury.

[2] The trial commenced on 25th February 2019 and on 23rd January 2020, the Appellant was found guilty. He was sentenced on 8th February 2021 to life imprisonment to serve 25 years before eligibility for parole. By notice of appeal dated 9th February 2021, the Appellant seeks to have his conviction quashed.

CASE FOR THE PROSECUTION

[3] The Crown was required to prove the five elements that (1) Myrick Gladden is dead, (2) that he died of harm, (3) that the harm that resulted in his death was inflicted by the accused, Tevin Andrewin, (4) that when the accused inflicted the harm, he did so with the intention to kill Myrick Gladden, and (5) that when the accused inflicted the harm on Myrick Gladden, he did so without lawful justification. The Crown relied on the evidence of ten witnesses to prove its case: the two Scene of Crime technicians on the case, the Crime Scene Technician, four police officers, Dr. Mario Estradabran who performed the autopsy, Justice of the Peace Ann Lind who was present for the identification parade, and the deceased's common law wife, Shyiana Allen.

[4] The evidence advanced by the crown was that around midnight on the 24th day of June 2012, the deceased Myrick Gladden, Ms. Shyiana Allen, and Ms. Allen's brother were walking down Complex Street, Belize City, otherwise called Administration Drive when Shyiana Allen and Myrick Gladden were shot, Ms. Allens' brother ran off. Shyiana Allen, was the only eye-witness to testify that the Appellant was the individual that inflicted the harm on the deceased. The Crown also relied on the statement of the deceased in which he identified the Appellant as his shooter.

[5] Ms. Allen was reluctant to testify, intimating to the court that she was afraid for her life having been threatened more than once against giving evidence. She ultimately testified before the court, stating that she recalled hearing what she thought were gunshots, felt

pain in her calf and saw the deceased fall to the ground. She indicated that at the time of the shooting, she was two (2) to three (3) feet away from Mr. Gladden and the assailant was standing no more than 25 feet away from her. She further stated that there was a lamp post no less than 16 feet from the shooter and that she saw the individual's face as he pulled off his hoodie, noticing distinctively an ice earring in his ear. She stared at the assailant, looked at the deceased and then looked back at the shooter when he addressed her, asking her what she was looking at. She did not answer and the shooter told her to leave. When she did not move, which the witness attributed to shock, he began shooting again at which point she ran. The shooter, standing over the deceased, fired several shots at Mr. Gladden before leaving the scene. The witness indicated that she had not seen the shooter prior to that night.

[6] The police along with the witness' brother subsequently picked up Mr. Gladden and the witness from the scene and took them to KHMH, said to be only a short distance, in the back of a police truck. Mr. Gladden was still fighting for his life on the way to the hospital. On the evidence of Police Constable Bodden, upon entering the trauma room, he saw Mr. Gladden and Ms. Allen who both were suffering from gunshot wounds. He thereafter conducted an interview with Ms. Allen, asking her if she knew who shot Mr. Gladden, to which she responded that she knows the nickname but not his real name, and indicated that the witness was trying hard to remember. He continued that about thirty (30) seconds later, he heard Mr. Gladden say "*Babboo*", with which Ms. Allen concurred. Officer Bodden asked Mr. Gladden the real name of the shooter, to which he replied "*Tevin Andrewin*". He further testified that Mr. Gladden said the name of the accused three times to him. Myrick Gladden eventually succumbed to his injuries.

[7] Dr. Mario Estradabran who conducted the post-mortem examination on the deceased gave evidence that the cause of death was exsanguination due to internal and external bleeding due to multiple gunshot wounds to the chest and abdomen. He testified that there were six orifices coming from a projectile firearm with three exit wounds. With respect to entry wound #1, the deceased was facing the assailant and with respect to

wounds #2 and #3, the path was from back to front which the Crown submitted corroborates Ms. Allen's account.

The Identification Parade

[8] The witness, Ms. Allen, gave evidence pertaining to an identification parade which she agreed to attend on 25th June 2012. Present in the room where the witness would carry out the identification were Officer Ciau, Justice of Peace Ann Lind, and the accused's mother, Idolly Westby. The eyewitness was asked if she saw the shooter in the lineup and was asked to call out the number held by that person if so. She said number 6.

[9] She was excused from the room at which point the Accused was brought into the room exited by the witness. He was advised that he had not been identified and when asked if he was satisfied with the manner in which the parade was conducted, he affirmed that he was. He then signed the ID Parade form along with his mother and JP Ann Lind.

[10] However, following its conclusion, the statement of the justice of the peace says immediately after the parade the witness requested to see her and Inspector Ciau. Ms. Allen informed Inspector Ciau and the Justice of the Peace in a separate room that the actual shooter in the line-up was number 7 and not number 6 as she had called. That she had called number 6 because she was in fear of her life as the suspect's mother was also in the room with her and she was uncomfortable and afraid that she could be further harmed. That she was positively sure that it was number 7 that had shot her and killed her boyfriend. Inspector Ciau testified that he immediately recorded a statement from the witness reflecting what she had just said.

CASE FOR THE DEFENCE

[11] The accused pleaded not guilty and no Defence witnesses were called. A No Case submission was made on the grounds that the identification evidence was tenuous and on the authority of ***Juan Pop v R***[1], the Judge should withdraw the case.

[1] CA No. 4 of 2009

[12] The Defence submitted that the witness did not reliably identify the Accused in the ID Parade which is intended to test the witness' veracity, coupled with the fact that the only other victim was unavailable for cross examination. Counsel maintained that the evidence was insufficient to sustain a conviction beyond a reasonable doubt.

[13] The Accused, within his dock statement maintained his innocence, stating that,

"*I have never before, never ever, have I caused the death of anyone. Never killed anyone before, never ever. I would like to say that I was never, I am not, and I will never be a threat to the witness nor to the life of the witness's family, family members. I would like to say that I am not a person of a barbaric nature…. I never threatened the witness. I did not give anyone the authority to do so. Finally, I maintain my innocence on the matter of this murder and the matter of the witness being threatened*."

THE DECISION

[14] The Learned Trial Judge upon hearing the evidence concluded that the Crown had discharged its burden beyond a reasonable doubt and that all the elements required for a conviction of the offence had been satisfied. The Judge observed that the case turned on the identification of the Accused and accepted the eyewitness testimony of Shiyana Allen along with the deceased's statement. She considered that there was no suggestion by the Defence that the eyewitness was biased or had any reason to lie about seeing the accused shoot the deceased. She further opined that she believed the witness to be credible, and that there was no basis for a finding that the witness' recollection was impacted by alcohol consumption.

[15] The Judge said she accepted ''beyond a reasonable doubt' that the deceased had identified the assailant, that the statement of the deceased given within twenty (20) minutes after the incident in which the Accused's name was uttered three times provided no issue of a misunderstanding, no opportunity for concoction, and no evidence that

there was any bias against the Accused which would cause Myrick Gladden to maliciously implicate the Defendant. She further accepted that the statement was contemporaneous with the incident and was spontaneous contrary to the Defence's submission.

[16] On the Defence's challenge of the Identification Parade, the Judge accepted that while the form was not properly completed, the lapse did not serve to invalidate the Parade and the conduct of a new parade would have been an exercise in futility. As the witness was intimidated by the presence of the accused's mother in the room, the outcome would likely have been the same as the first. It sufficed that the Inspecting Officer took a statement reflecting the Witness' subsequent indication which was signed by the Justice of Peace who was present at the time of the statement.

[17] The Judge examined the conditions related to lighting, distance and duration to test the witness' account. She thereafter concluded that on this evidence, based on the distance the argument cannot be made that the deceased could not have possibly seen his assailant and that any of the discrepancies pointed out by the Defence did not invalidate the identification of the accused by Ms. Allen.

[18] The Judge thereafter concluded that the Accused had the intention to kill Myrick Gladden when inflicting the harm, the first two shots being inflicted from behind which she determined was a way to render the victim helpless and incapable of defending himself. The Defendant then compounded the issue by stepping closer and firing the last shot which was to guarantee the deceased's death. Finally, she concluded that there was no lawful justification for the injury inflicted, therefore finding all elements satisfied and the Appellant guilty.

GROUNDS OF APPEAL

[19] The Appellant advances his appeal on the following grounds:

(1) The Learned Trial judge erred in admitting the identification done by Witness Allen and the Learned Trial Judge failed to consider the impact the procedural breaches had on the fairness of the identification parade;

(2) The Learned Trial Judge erred in admitting hearsay evidence as part of the res gestae without first assessing the reliability of the said evidence; and

(3) The Learned Trial Judge's assessment of the visual identification evidence was inadequate. Furthermore, she failed to give specific directions on the identification evidence and assess the potential impact such inconsistencies had on the reliability of the identification evidence of Witness Allen.

DISCUSSION

Ground 1: Whether the Learned Trial judge erred in admitting the identification done by Witness Allen; and whether the Learned Trial Judge failed to consider the impact the procedural breach had on the fairness of the identification parade

[20] The Appellant submitted that the conduct of the Identification Parade grossly deviated from the rules outlined in the **Police (Identification Parade) Regulations, 2006, Statutory Instrument 118 of 2006** and as a result, it was impossible to ensure there was fairness in the trial and as such the identification parade should not have been admitted by the Learned Trial Judge.

[21] The Respondent contended that the identification parade did not raise questions of admissibility, but rather questions of weight for the finder of fact to determine the degree of reliance to place on the identification. To this point, the Crown referred to the case of ***Wayne Martinez v The Queen*** wherein at paragraph 14, Sosa J.A. states, "…*the question whether an identification parade was fair is one of fact which, rather than*

deciding himself, the Trial Judge is bound to it leave to the jury." Therefore, the Learned Trial Judge did not make an error in admitting the testimony of the identification.

[22] Regulation 4 of the Statutory Instrument states, "*All police officers shall comply with these Regulations as far as practicable. Any minor deviations from, or non-observance of, these Regulations shall not invalidate an identification parade if the court is satisfied that there was substantial compliance therewith."*

[23] Notably, ***Martinez*** as the relevant authority cited precedes the operation of the Statutory Instrument and therefore does not contemplate the effect of non-compliance according to the regulation. However, fairness in and of itself remains a question to be determined on the facts. The section itself uses the terms "*as far as is practicable"* which intimates that circumstances may create contexts in which the capacity to act in accordance with all the regulations is impacted.

[24] The very wording of regulation 4 compels a weighing of any deviations, non-observance, to determine what was 'practicable' and whether there is satisfaction of "*substantial compliance*". Therefore, as the fact finder in this case, the court is entitled to consider or weigh the individual or cumulative effect of any non-compliance to determine whether the process has maintained fairness and thus whether the testimony of the identification evidence is invalid. In the lower court, if the Judge after weighing the deviations had considered the process to be sufficiently flawed, she was entitled to question the credibility of the identification evidence and attach little to no weight, satisfying the meaning of "*invalidate*" within the regulation.

[25] The importance of the Police (Identification Parade) Regulations cannot be overstated; if the conduct of the parade is significantly called into question, the evidentiary value can be considerably diminished. Therefore, it is necessary to consider in detail each purported breach to determine whether it impacted the fairness of the procedure, bearing the mandate of the aforesaid **Regulation 4** of the Statutory Instrument in mind.

(i) *Breaches of Regulations 8, 11 and 12*

[26] The Appellant submits that there were breaches of Regulations 8, 11 and 12 which respectively state:

> "8. *The parade shall consist of at least eight (8) persons (in addition to the suspect) who so far as possible resemble the suspect in age, height and general appearance..."*
>
> "11. *The police officer conducting a parade shall prepare a list of all persons in the parade including the suspect, in the order they are placed in the line-up, including the approximate height, age, tattoos (if any) and general appearance of each of them*."
>
> *"12. The police officer responsible for conducting a parade shall be the only person responsible for selecting the persons to be placed in a particular parade. Before the parade, such officer shall inform himself of the statement provided to the police by the identification witness. Where a witness has described a particular suspect in a peculiar manner, then the officer conducting the parade would need to be made aware of such description in order to ensure that when the suspect is placed in the parade that particular feature does not stand out as a distinct difference."*

[27] Concerning Regulation 8, the Appellant cites Inspector Ciau's evidence on cross examination that, *"…there is no height indicated on the form. They are all different heights*." The Inspector further mentioned that, "*only three had on long pants. Only one person has on a sleeveless undershirt..."* and that there was no height on the form, they all had different heights and there were no indications made of any tattoos.

[28] As regards Regulation 11, the Appellant averred that Inspector Ciau in evidence admitted that his forms did not properly outline the relevant characteristics of the participants in the ID parade, even though recognizing the importance of following the regulations. Counsel further submitted that there is no indication from the evidence of compliance with Regulation 12 that Inspector Ciau who had conduct of the parade

familiarized himself with the witness' statement prior to parade. Counsel referred to the Trial Judge's observation at page 205 of the Record that:

> "…*there is a contradiction, one that the Prosecution did not address but that I will address, where the police officer was asked if they choose the participants in the parade based on the description given in the statement and the police officer said "yes." But if you look at the testimony in court that could not have been so because her statement was not given until some three something in the afternoon and at twelve something, they already had the participants ready for an ID parade which she took part in*."

[29] Counsel ultimately puts forward that there was a complete disregard to a fundamental aspect of the identification parade which is the selection of the parade line coupled with the disregard of familiarizing with the description of the accused by the identification witness. That the identification parade was therefore unfair and it severely prejudiced the case of the accused.

[30] In response with respect to Regulation 8, the Respondent argued that the issue is not whether all the participants in the parade appeared the same, but whether the Appellant stood out in the parade. The Crown submitted that Regulation 8 encompasses the overall objective of an ID parade which is to provide a fair test for a witness to identify a suspect. They referred to Archbold 236th edition p. 727 para 1352 to expand on a 'fair test' as meaning that the identification parade should be conducted in such a way as to avoid the risk of the witness' attention being directed specifically to the suspect instead of equally to all the persons paraded.

[31] The Crown averred then that since the Court's concern is that the suspect should not stand out in the parade, it is fair if at least one other participant in the parade looks like the suspect. On this point, the decisions of ***Albert Guy v The Queen***[2], ***Ken Barrow v***

[2] CA No. 8 of 2004

The State[3] and ***Krismar Espinosa v The Queen***[4] were relied on. The Respondent referred to the court's acknowledgement in ***Albert*** at paragraph 9 that, "*it was in our view essential in order to ensure that the parade was fair to the Appellant that more than one person on the parade was of East Indian descent*." The Respondent emphasized that the court therein did not require all the participants to be of East Indian descent but at least one other person to be.

[32] The Crown further relied on the court's statement in ***Barrow*** that, "*it is most essential, therefore, that the parade must provide a fair and just test. And to my mind, it is impossible to hold the test fair if only the suspect in a line-up can possibly completely fit the description of the criminal given to the police and etched in the memory of the witness. In this case, the assailant was a "short dark negro man with a scar on his left side face"; the appellant alone in the line-up could have fitted this description; the others could not. This was no test at all."* They submitted that this judgment further suggests that not all of the other participants needed to have the same characteristics for the ID parade to be deemed fair, but that the accused should not stand out.

[33] Finally, the Respondent relied on **Espinosa** wherein the court found the ID parade to be fair where there was at least one other dark-skinned male person on the parade. They maintained that there was no breach of Regulation 8 similar to the instant case, the Appellant did not stand out in the identification parade from the other participants and neither did he stand out because of any specific identifying feature. Furthermore, the Appellant did not object to the other participants in the line-up when asked if he had any objections.

[34] Concerning Regulation 11, the Respondent admitted that there was a breach of this regulation but that no prejudice accrued to the Appellant as photographs were available which clearly displayed the height and general appearances of the participants, and with which the Trial Judge in her decision agreed. With respect to Regulation 12, the Crown submitted that the participants in the ID parade could not have been selected based on

[3] (1976) 22 WIR 267
[4] CA No. 8 of 2015

the written statement of the witness as it was given after the conclusion of the ID Parade. Further, that at the time of the parade, the police had a verbal statement from the witness, as well as the suspect's full name and alias as given by the deceased. The Respondent contended that Rule 12 governs the conduct of identification parades where the suspect is not known to the police and therefore there is the need for participants to be chosen based on description given by a witness. Submitting that it does not apply in circumstances where a full name and alias had been provided.

[35] As regards to Regulation 8, it is agreed as the Respondent submits that the purpose of the participants having similar physical features is so there is no outward emphasis on the suspect's appearance. Identification evidence holds such value because of the fact that the veracity of the witness' recollection is tested and considered valuable if they can identify the individual when surrounded by other similarly looking persons.

[36] The conducting officer should ensure that the lineup as far as is possible reflects a fair constitution of similarly-featured individuals to satisfy the overriding objective of a fair test as mandated by Regulation 8. The court had the opportunity to regard the Respondent's photographic evidence of the identification parade and cannot say that the Appellant was prejudiced. All the participants of the parade were of similar complexion and height but more importantly, the accused did not stand out amongst the other participants.

[37] Concerning Regulation 11, the Learned Trial Judge's assessment was reasonable that the breach did not go to the heart of the process meriting it to be considered invalid, and that the purpose of the forms was satisfied by the photographs provided. The photographs show that the participants were of similar appearance and the majority were of similar height.

[38] With regards to Regulation 12, the witness had not given her statement at the time of the selection of the participants. The ID parade was compiled on the identification of the Appellant by name, not by a physical description. At that time of the parade being the day following the incident, the police had only one suspect- Tevin Andrewin who was

the individual whose name was provided by the deceased. The purpose of that ID parade then was to determine whether the individual whose name they were given by the deceased was in fact the assailant and recognizable by the witness.

[39] The Appellant had none of the characteristics that the witness described in her statement to the police taken after the ID parade. The court was concerned by the vast distinction between the witness' physical description of the assailant in the statement and the accused's characteristics. At the time of the compilation of the parade there was no statement for the officer to familarise himself with. He did have the oral statement of the name and identity of the suspect and the parade was compiled based on that statement. The Trial Judge's assessment could not be considered unreasonable in the circumstances of the statement available of the name of the deceased and the photographic evidence of the participants in the parade.

(ii) Breach of Regulations 9 and 17(2)

[40] The Appellant submitted that there were breaches of the following respective regulations:

> "9. *Once the parade has been formed, everything afterwards in respect of it shall take place in the presence and hearing of the suspect and of any interpreter, attorney, friend or appropriate adult who is present, except where the parade is by one-way mirror in which case everything said to or by any witness at the place where the parade is held must be said in the hearing and presence of the suspect's attorney, friend or appropriate adult, as the case may be*."

> "17(2). *Where a witness who is afraid or reluctant to point out a suspect by means of a normal face-to-face identification parade shall, after attending the parade, provide the police a detailed statement mentioning that fact and describing what occurred during the conduct of the parade."*

[41] The Appellant submitted that from Inspector Ciau's evidence, it was learned shortly after the Identification Parade that the Witness was taken into a separate room where only herself, the Justice of the Peace and Inspector Ciau were present. Inside this room she retracted her initial identification, instead identifying number 7 as the alleged assailant she had seen on the night in question instead of number 6 whom she had previously selected. Counsel therefore submitted that the safe guards set in place for the accused were not protected when Inspector Ciou mishandled the conduct of the ID parade.

[42] The Respondent argued that there was no violation of the rules as everything said to or by the witness was said in the presence and hearing of the suspect's mother and the events which transpired outside of the ID parade room after its conclusion is governed by Regulation 14(2) which speaks to the suspect or their representative being informed after.

(iii) Breach of Regulation 14(2)

[43] The Appellant cited a breach of Regulation 14(2) which stipulates:

> *"If the witness makes an identification after the parade has ended, the suspect and, if present, his attorney, interpreter or friend shall be informed. When this occurs, consideration should be given to allowing the witness a second opportunity to identify the suspect."*

[44] The Appellant submitted that in light of the conducting officer being made aware that the Witness changed her identification, she should have been made to do a second identification. Counsel averred that the mere fact that the witness openly admitted to selecting the wrong person on the parade should have prompted the officer to ensure fairness and with an uncertain witness, it was more than reasonable to conduct a second parade. Counsel further brought to this court's consideration the Learned Trial Judge's reliance on the case of ***R v Willoughby***[5] as the basis for her conclusion that the identification by the witness in a separate room after the identification parade was

[5] [1999] 2 Cr. App.R. 82, CA

admissible. The Appellant referred to the Judge's statement on the matter at pages 246 and 247 of the Record:

> *"I now refer to Archbold at paragraph 14-35 which states, and this comes from a case which I will cite further, "The identification of a suspect by a witness after the parade has ended is admissible providing the witness can satisfy the Court that he genuinely recognized the accused and had refrained from showing it for no improper motive. A suspect or his solicitor should be informed as soon as practicable where a witness modifies in any significant way an identification made on or after the parade." And the case for this is R v. Willoughby [1999] 2 Cr.App.R. 82, CA.*
>
> *The witness immediately notified the police officer and Justice of the Peace that the shooter was holding number seven, but she deliberately said number six because she had been put in fear by the mother's behaviour. It is irrelevant that the police officer, who when asked on cross-examination, if he had heard the mother threatened the witness said, "No." The witness's state of mind is a matter to be determined subjectively. The officer was never asked whether the mother spoke any words. This is an example of what can be referred to as an eggshell witness. She was already traumatized and scared as a result of what had happened some fourteen hours before and it surely would not and clearly did not take much to put her in fear. I've said earlier, even in court, she was still displaying fear with respect to this matter. I therefore find that there was a positive identification of the Accused, and the identification is admissible."*

[45] The Appellant submitted that the position concerning any proper identification is governed by the Statutory Instrument which takes precedence over any procedure set out at common law. Counsel maintained that there were several breaches which constitute substantial non-compliance with the statutory instrument which strike at the very reason for which an identification parade is held. The Appellant asks that this court find that in light of the foregoing, the ID Parade be deemed invalid. Counsel averred that the Learned Trial Judge failed to conduct a proper assessment to ensure compliance with the statutory requirements prior to admitting the identification as valid. The Appellant asks however, that should the court find that there was no issue in admitting the evidence, that the judge in her role as fact finder should have considered the extent to which the breaches collectively had rendered the parade unfair to the Appellant. It was contended that with the disregard to the importance of procedure in identification parades, the Appellant was flagrantly denied his right to a fair trial.

[46] The Respondent argued that identifications can occur after the ID parade has been concluded, and this was clearly contemplated by the drafters from the text. Moreover, evidence of such identification is admissible provided the witness did not refrain from identifying the suspect on the parade for an improper motive. In the instant case, the witness explained immediately after the parade that she had deliberately selected the wrong person and that the reason for subsequent correct identification was fear from the presence of the suspect's mother in the room.

[47] The Respondent referred to the decision of ***Regina v Shammai Jahelle Walters***[6] in support of their submission. In that case, the witness realized after the conclusion of the ID parade that she failed to pick out the correct individual but upon reflection, had recollected their identity. The court therein stated in respect to Clauses 7 and 16 of Annex A of the Code which are identical to Regulations 9 and 14(2) of Belize's Statutory Instrument 118 of 2006 at paragraphs 37 and 41:

> "*It seems clear to us that, in the drawing of the code, it was recognized that identifications might occur once the parade was over. That is abundantly clear from annex A Clause 16, which makes provision for such an eventuality. Clearly that may happen at any time after the conclusion of the actual parade. What happened here was that there was a purported positive identification within a very short time of the end of the parade….*
>
> *Equally, we do not see that anyone can properly suggest that that which has occurred on this case, ought to have occurred in the presence of the Appellant and his solicitor…There has to come a time when the witness leaves the room or once the witness has left the room, having completed all the formalities, it is always possible that the witness may then say something about the identification parade. But it would be wrong to suggest that in some way that amounted to a breach of the Code…"*

[48] Further reliance was placed on the decision of ***R v Creamer***[7] where similar circumstances relevant to the state of mind of the witness at the identification parade occurred as in the instant case. The court therein stated at paragraph 253 that:

[6] [2001] EWCA Crim 1261
[7] (1985) 80 Cr. App.R. 248

"The only matter that has taxed this Court is whether it would be unsatisfactory from the point of view of public policy, to admit evidence of events at an identification parade which have not occurred in the presence of the suspect. Upon further consideration… if any such rule of practice were allowed to prevail, the effect of it would soon become known and this would give a wholly undesirable advantage to anyone invited to stand on an identification parade, who was ready and able, by intimidatory or menacing appearance or stare, to render the witness dumb so long as he or she was present at the identification parade…. It appears to us that provided the opportunity for identification of a suspect was not so poor that the case has, on that account, to be withdrawn from the jury, there is no reason why the jury should not be invited to consider whether the defendant was in fact identified by the witness following the identification parade."

[49] The Respondent further maintained that the Trial Judge's application of the principles in ***Willoughby*** as a basis for admitting the evidence was apt, considering that the decision concerned the interpretation of the English counterpart of the Regulation 14(2) in question. The Crown acknowledges that section 14(2) was not complied with, as there is no evidence that the Appellant's mother was informed that the witness identified her son after the conclusion of the parade. However, it was maintained that no prejudice accrued to the Appellant because of it.

[50] Finally, the Respondent averred that it was not mandatory that another ID parade be held, as this decision is committed to the discretion of the investigating officer and in light of the witness' reason for deliberately selecting the wrong person balanced against the suspect's right to have a representative present during the parade, a second parade would not have been prudent. Ultimately, it is the Respondent's submission that notwithstanding any breaches of the Statutory Instrument, there was no unfairness accrued to the Appellant in the admission of the identification evidence.

[51] The question then is whether this breach manifested any prejudice in the Appellant's case. It is important to uphold the integrity of the process. However, the Respondent makes the point that the right of the suspect must be balanced with the right of the witness to feel safe in being truthful when giving evidence.

[52] The Trial Judge considered the case law defining the parameters of the regulations' application. She saw and heard the witness and made an assessment of her credibility notably in relation to the reason given for the identification after the parade. It is also noted that the Appellant accepted the statement of the Justice of the Peace and did not seek to cross examine her. The Justice of the Peace was in the room and saw and heard the witness express her fear, reason for and certainty of her identification .

[53] The Trial Judge accepted that the view of whether the witness was intimidated must be taken through a subjective lens as opposed to objective, and believed Ms. Allen's to be credible in her account of being fearful for her life at the time. Therefore, it was not unreasonable that the Learned Trial Judge determined that had another parade been conducted, the result would have likely been the same and an exercise in futility.

CONCLUSION

[54] The process of the parade in which the Appellant was selected did not strictly adhere to the statutory regulations, as is admitted by the Respondent in certain instances. However, against the background of Regulation 4 which asks that officers follow the Regulations as far as is practicable, with the court being tasked with assessing whether the breaches individually or collectively impacted the Appellant unfairly, the deviation from precise procedure on the facts as found by the Trial Judge did not frustrate the purpose of the parade or the Trial Judge's consideration thereof. There was photographic evidence of the composition of the parade and the parade was compiled based on the description by name of the assailant. It is also vital to consider that the Trial Judge did not rely on the identification parade alone but considered the deceased's statement naming the accused as the assailant. The police officer and the Justice of the Peace gave evidence of the eyewitness' indication that she had deliberately called the wrong number because of fear. The Trial Judge saw and heard the eyewitness and made a determination on her credibility. In all the circumstances this ground of appeal must therefore necessarily fail.

Ground 2: Whether the Learned Trial Judge erred in admitting hearsay evidence as part of the res gestae without first assessing the reliability of the said evidence

[55] The Appellant challenges the Trial Judge's admission of the statement given to Officer Bodden by Myrick Gladden in which he named the Appellant as constituting hearsay evidence and the judge's acceptance of the statement as part of the res gestae. Counsel argued that it was not sufficiently spontaneous as the deceased failed to disclose immediately after in the transport to the hospital and only when he was at the hospital, it being in response to a question posed by Officer Bodden.

[56] Counsel further argued that the actual statement uttered by the deceased was in doubt, there being inconsistencies in the evidence of the witness Ms. Allen and Officer Bodden as to what exactly was said, and which the Trial Judge failed to resolve. In addition, the Appellant averred that the Learned Trial Judge embarked on speculation and put words into the mouth of the deceased in an attempt to fill in the gap in the evidence, as it was never established how the eyewitness was able to say that Tevin Andrewin shot her boyfriend since she had earlier said the shooter was unknown to her. The Appellant cited the Trial Judge's statement at para 184 of the judgment which follows:

> *"Given that the witness was never asked, either by the Crown or Defence, what was being said by Myrick Gladden while in the back of the police pickup truck, combined with the fact that I accept that the witness had never seen the shooter before that night, I can only conclude and accept the Defence's position that Myrick Gladden must have said the name during the ride to the hospital, because, having been the recipient of three (3) gunshot wounds, and, from the evidence at that time, he was gasping for air, it would only seem logical that under those conditions, his first utterance would be the identity of his assailant, probably only referring to him by the nickname "Babboo" which is then supported by the evidence of Police Officer Bodden (who was not as anxious a witness as Ms. Allen) who testified that when he asked the witness who the shooter was her response was "I know the nickname but not his real name" and it was at this point Myrick Gladden interrupted giving the nickname as well as the proper name of his shooter."*

[57] The Appellant submitted that the Trial Judge erred further in her failure to consider evidence which suggested that both the Witness and the deceased were drinking

alcohol on the night in question which could have constituted a special feature which had a bearing on the possibility of error. Counsel called the court's attention to the case of ***Michael Faux v R***[8] wherein this court considered the issue of res gestae as an exception to the hearsay rule. Counsel referred to paragraph 18 where Morrison J.A. states:

> *"The modern test of admissibility of statements said to form part of the res gestae was recently considered in Trevor Gill v. R, (supra) in a judgment in which this court accepted that the correct approach to the question was that summarised by Lord Ackner in Andrews (supra) (at pages 300 –301; see Trevor Gill (supra) at pages 12–14):*
>
> > *"1. The primary question which the judge must ask himself is — can the possibility of concoction or distortion be disregarded?*
> >
> > *2. To answer that question the judge must first consider the circumstances in which the particular statement was made, in order to satisfy himself that the event was so unusual or startling or dramatic as to dominate the thoughts of the victim, so that his utterance was an instinctive reaction to that event, thus giving no real opportunity for reasoned reflection. In such a situation the judge would be entitled to conclude that the involvement or the pressure of the event would exclude the possibility of concoction or distortion, providing that the statement was made in conditions of approximate but not exact contemporaneity.*
> >
> > *3. In order for the statement to be sufficiently "spontaneous" it must be so closely associated with the event which has excited the statement, that it can be fairly stated that the mind of the declarant was still dominated by the event. Thus the judge must be satisfied that the event, which provided the trigger mechanism for the statement, was still operative. The fact that the statement was made in answer to a question is but one factor to consider under this heading.*
> >
> > *4. Quite apart from the time factor, there may be special features in the case, which relate to the possibility of concoction or distortion. In the instant appeal the defence relied upon evidence to support the contention that the deceased had a motive of his own to fabricate or concoct, namely, a malice which resided in him against O'Neill and the appellant because, so he believed, O'Neill had attacked and damaged his house and was accompanied by the appellant, who ran away on a previous occasion. The judge must be satisfied that the circumstances were such that having regard to the special feature of malice, there was no possibility of any concoction*

[8] BZ 2008 CA 4

or distortion to the advantage of the maker or the disadvantage of the accused.

5. As to the possibility of error in the facts narrated in the statement, if only the ordinary fallibility of human recollection is relied upon, this goes to the weight to be attached to and not to the admissibility of the statement and is therefore a matter for the jury. However, here again there may be special features that may give rise to the possibility of error. In the instant case there was evidence that the deceased had drunk to excess, well over double the permitted limit for driving a motor car. Another example would be where the identification was made in circumstances of particular difficulty or where the declarant suffered from defective eyesight. In such circumstances the trial judge must consider whether he can exclude the possibility of error."

[58] The Respondent submitted that the evidence of the deceased's statement was properly accepted as part of the res gestae by the Trial Judge who, in accordance with the relevant principles, considered (1) the possibility of concoction or distortion and (2) the possibility of error in transmitting what the deceased said. Reference was made to the Judge's considerations at pages 203 and 204 of the Record that:

"*There is no evidence before this court that there was any confusion as to the words that were uttered which was heard by both the witnesses that came to court and testified as well as the police officer. So, on that ground, that test is met. In terms of the risk for concoction, again there is no evidence before this court that there was any chance for concoction. If you look at the time frame, this incident occurred on the 24th of June and the arrest was made sometime in the morning of the 25th. The statement was given at the hospital in the emergency room shortly after the incident had occurred. So, that there can be no representation that there was any chance for concoction. I therefore rule that the res gestae statement is admitted."*

[59] The Respondent further referred to the Judge's reasoning within her written judgement at paragraphs 197 and 199 that:

"*…at the end of the day, the speaker was in fact dying and given the(sic) that he was having great difficulty breathing, one can only conclude that he must have had a premonition as to his impending death…" (para 188)* and *"with respect to the issue of concoction, the evidence does not support a finding that there was any time for*

anyone to concoct a story as to the identity of the shooter…. I therefore conclude that taking all of the above into consideration, when Myrick Gladden gave the oral statement to Officer Bodden as to the identity of the assailant, he did so with the sole intent of ensuring that the person who shot both the(sic) and Shiyana Allen would be brought to justice and punished accordingly."

[60] In response to the Appellant raising the issue of the statement's spontaneity, the Crown asks that the court consider the principle in ***R v Andrews***[9], wherein Lord Ackner states:

"In order for the statement to be sufficiently "spontaneous" it must be so closely associated with the event which has excited the statement that it can be fairly stated that the mind of the declarant was still dominated by the event. Thus, the judge must be satisfied that the event, which provided the trigger mechanism for the statement, was still operative. The fact that the statement was made in answer to a question is but one factor to consider under the heading."

[61] The Respondent asks the court to consider the question of spontaneity to have much less to do with time than it does whether the declarant was still dominated by the event and in the instant case to find it unwise that at the time the statement was made, the declarant's mind was dominated by anything other than the event in which he had just been shot. On the issue of whether the Judge considered the effect of the alcohol consumption in the reliability of the witness' ability to accurately represent the deceased's statement, the Respondent submitted that there was no evidence as to such excessive consumption of alcohol to warrant the Trial Judge directing her mind to any effect on the accurate transmission of the statement. Lastly, the Respondent contended that both Ms. Allen and Officer Bodden testified to the deceased uttering the accused's name, whether that be the nickname or his actual name, and any uncertainty as to the exact words goes to the weight to be attached to the evidence rather than its admissibility.

[9] (1987) AC 281

[62] In the court's view, the Learned Trial Judge's approach encompassed all the appropriate considerations that must be made when admitting a hearsay statement as res gestae. The Respondent makes a sufficient point about spontaneity having less to do with time and more to do with whether the deceased at the time of giving the statement would have still been dominated by the effect. In any event, the time in the instant case was a very short period between being shot and being at the hospital and being interviewed. There also was no evidence of excessive drinking.

[63] It would be unfathomable to think that the statements made by Myrick Gladden after being shot would constitute anything but "*an instinctive reaction to that event, thus giving no real opportunity for reasoned reflection*" as this court considered in ***Faux*** by referencing ***Andrews***. The fact that it was in response to a question is surely a factor to be taken into consideration holistically, however, it does not remove the statement from the sphere of spontaneity. Considering that the spontaneity requirement is met, the court can be *"…entitled to conclude that the involvement or the pressure of the event would exclude the possibility of concoction or distortion, providing that the statement was made in conditions of approximate but not exact contemporaneity."*

[64] Furthermore, the court cannot find, and nor has the Appellant been able to establish any evidence demonstrating any reason why the deceased and the witness would call any other name apart from the individual responsible. Therefore, the Trial Judge adequately considered the law and applied it properly to the circumstances of the instance case. This ground must therefore fail.

Ground 3: Whether the Learned Trial Judge's assessment of the visual identification evidence was inadequate; and whether the Learned Trial Judge failed to give specific directions on the identification evidence and assess the potential impact such inconsistencies had on the reliability of the identification evidence of Witness Allen

[65] By this ground, the Appellant challenges the Learned Trial Judge's consideration of the requirements laid down in ***R v Turnbull***[10] with regard to her treatment of the inconsistencies in the identification evidence prior to her conviction of the Appellant. The Appellant contends that the Judge merely restated the evidence of the witness without ensuring that the evidence complied with the requirements. They cite the case of ***Jermaine Pascascio***[11] wherein this Court discussed the ***Turnbull*** guidelines which state as follows:

"First, whenever the case against an accused depends wholly or substantially on the correctness of more or one identification of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition, he should instruct them as to the reason for the need for such a warning and should make some possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Provided this is done in clear terms the judge need not use any particular form of words.

Secondly, the judge should direct the jury to examine closely the circumstances in which identification by each witness came to be made. How long did the witness have accused under observation? At what distance? In what light? Had the witness ever seen the accused before? How often? If occasionally, had he any special identification to the Police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?

Finally, he should remind the jury of any specific weaknesses which appeared in the identification evidence."

[66] The Appellant acknowledged that while the Judge considered the distance between the assailant and the witness, it is contended that she failed to determine the time period for which the witness said she had the Appellant under observation and simply accepted that the witness was in a good position to see the witness for a significant period of time. Counsel raised that the witness gave conflicting evidence under cross examination, by stating first that she had the shooter under observation for 20 minutes and then claiming

[10] [1977] QB 224
[11] Criminal Appeal No. 12 of 2006

that it was not for long that she had the shooter under observation. Counsel submitted that there is nothing in the reasoning of the Trial Judge as to the manner in which this inconsistency was resolved. Ultimately arguing that this failure meant that the Learned Trial Judge could not have been certain that the witness had the shooter under observation for sufficiently long to be able to make a positive identification.

[67] The Appellant in submissions identified other such instances of inconsistencies and weaknesses in the Crown's evidence which the Learned Trial Judge failed to consider;

(1) The witness on her formal statement given to the police described the assailant as being red skinned with a moustache and thick eyebrows. The persons she pointed out in the Identification Parade was not red skinned and did not match the appearance of the assailant as he was described to Police.

(2) In the Supreme Court Hearing, the witness had made no mention of the assailant having or taking off the hood of the hoodie while she made eye contact with the alleged assailant in her statement to the Police. The contemporaneous notes of the event would have been the freshest on the first recording thus bringing a wave of uncertainty as to the reliability of the witness' evidence in court.

(3) The Trial Judge misquoted the evidence in respect to the lighting condition. The learned Judge said that the witness stated in evidence that the lamp post was shining right on the shooter's face which does not reflect the witness' statement in her evidence that the light could have shine that I could have seen his face because he hauled off the grey hoodie.

(4) The witness gave varying accounts in respect to the position of the lamp post and the shooter. First, she said that the light was nowhere far from the shooter. Later in her evidence she said that the lamp post was good ways from him and was behind the shooter.

(5) The Trial Judge gave very little consideration to the fact that this was the witness' alleged first encounter with the shooter.

[68] The Respondent maintained that the Learned Trial Judge carefully examined the circumstances under which the identification came to be made in accordance with the Turnbull guidelines. On the issue of the time period which the witness observed the assailant, the Respondent argues that where a witness fails to mention the length of observation of an accused, the fact finder is entitled to examine the circumstances of the identification and infer whether the period of observation would have been long or short. The Crown referred to the Judge's consideration of the issue at paragraph 163 of the judgment, that, "*…As the trier of fact, I conclude that I accept the witness' account of what transpired and having accepted that account; I conclude that the interaction between the shooter and the witness was long enough for her to commit his appearance to memory."*

[69] The Respondent accepts that the Trial Judge misquoted the evidence on the distance between the shooter and the witness at the time the shooter spoke to her; however, they contended that this was the sole instance in which the error was made and at all material times, the Judge correctly stated the distance. The Crown further submitted that the Trial Judge addressed all the relevant considerations cited by the Appellant as weaknesses in the evidence within her judgement and cite the relevant instances within their submissions.

[70] Finally, they refer the court to the Caribbean Court of Justice's observation in the decision of ***Dionicio Salazar v The Queen***[12] at paragraphs 28 and 29 that in a judge alone trial, a Judge is not required to direct herself on every issue. The Respondent ultimately submitted that there was sufficient evidence in the case implicating the Appellant in the murder of the deceased and the Learned Trial Judge did properly assess and consider the identification evidence of Ms. Allen before relying on it.

[12] [2019] CCJ 15 (AJ)

[71] The court has had the opportunity to read the trial judge's judgment in full. In our view, the Trial Judge was aware of the weaknesses of the case and made that evident in her assessment.

[72] The Learned Trial Judge addressed and subsequently accepted the witness' account that she did in fact see the shooter and she continued within the judgment to assess the evidence in detail, examining the condition related to the lighting, distance and duration at the time of the incident. She accepted the witness' identification of the shooter and considered little weight to be placed on the inconsistencies, those being creatures of a traumatic event and the passage of time between the event and the trial.

[73] At the outset, the Trial Judge assessed the reliability of Ms. Allen as an eyewitness and victim. I find it necessary to reproduce the Judge's statements in full at paragraphs 144 to 147:

> "…*This witness, at the beginning of the trial was begging the Court not to let her testify as she had been threatened, and she has a young son, whose safety she was concerned about. Somehow the Crown was able to convince her to testify, and she impressed me as someone, who went through great pains to tell the truth; if she could not remember, she would say so, and painstakingly took her time answering and asked for elaborations when she did not understand a question When she was asked questions relative to distance she stepped outside the witness box (without being asked to do so) to demonstrate points of reference to assure accuracy.*
>
> *I also need to bear in mind the lapse of seven (7) years since the occurrence of this shooting and the fact that recollection of some details may at times be hazy. Taking all this into consideration, I found this witness to be quite truthful, although sometimes confused, which I believe was due to the combination of the lapse of time and to her high level of anxiety which was persistently evident.*
>
> *Applying the recognized principle relative to identification, first, as trier of fact, I warn myself and keep uppermost in my mind the special need for caution before convicting the Accused on reliance of the identification evidence of Ms. Allen. I remind myself that a convincing witness may be a mistaken witness. Mistakes may be made in the recognition of someone known to a witness, even a close friend or relative.*
>
> *Secondly, I must determine if the witness, Ms. Allen had the opportunity to see what she claims to have witnessed. By examining the circumstances of the identification,*

including, the length of time she observed the Accused, the lighting conditions, the distance from which she observed, was anything impeding the witness' view; did she know the Accused previously and if so, for how long and under what circumstances."

[74] Notably, the Trial Judge also states at paragraph 167 that, "*I do not accept that this witness is lying about her recollection*", and at paragraph 191, "*As I have already stated, I found this witness to be honest and straightforward and was able to stand up to cross-examination."*

[75] The judge notes at paragraph 179 that "*I remind myself throughout this trial that as the trier of fact, that I don't have to decide every point that has been raised, only such matters as will enable me to say whether the charge laid against the accused has been made*." This is consistent with the Caribbean Court of Justice's opinion in ***Salazar*** as referred to by the Respondent that the Judge is not required to direct herself on every issue. However, the Trial Judge in this case went as far as possible to address the issues that went to the heart of the identification evidence and prior to conviction, made sure she was satisfied that upon a holistic consideration that the witness' account was accepted.

[76] The court is convinced that the Trial Judge considered all the evidence on the foundation of the ***Turnbull*** requirements and concluded that there was sufficient evidence implicating the Appellant. The court therefore cannot find sufficient reasons to overturn the court's decision.

DISPOSITION

[77] It is for the foregoing reasons that the appeal is dismissed and the Appellant's conviction and sentence affirmed.

Woodstock Riley
Justice of Appeal

I concur

Peter Foster
Justice of Appeal

DISSENTING JUDGMENT OF MINOTT-PHILLIPS JA

[78] In my view this conviction is unsafe. For that reason I am of the opinion that the appeal against conviction ought to be allowed, the verdict set aside, the conviction quashed, and a judgment and a verdict of acquittal entered.

[79] I find this conviction to be unsafe because I consider the judge below erred in law in:

a. Not taking any, or sufficient, account of the material discrepancy between the description of the assailant given to the police by the sole eyewitness and the physical characteristics of the accused;
b. Not taking any, or sufficient, account of the fact that the sole eyewitness, at the identification parade, pointed out someone other than the accused as the assailant;
c. Regarding the subsequent identification by the sole eyewitness as having occurred at the identification parade when, in fact, it occurred after the conclusion (and sign off by all present on the result) of the identification parade;

d. Allowing the dock identification of the accused in court by the sole eyewitness and in disregarding her evidence that the accused was unknown to her and that she had never seen him before the incident;[13]

e. Overruling, on the ground that it was not a first-time identification[14], the objection by defence counsel to the dock identification of the accused and, in so doing, failing to appreciate that, even if that were so, the need for a *Turnbull* direction was not diminished;

f. Admitting the hearsay identification by the deceased[15] in the particular circumstances of this case where its prejudicial effect outweighed its probative value and, having admitted it, according full weight to it, and also in finding the accused not materially prejudiced by the admission of the statement;[16] and

g. Not only failing to instruct herself to disregard the prejudicial hearsay evidence of the eyewitness Allen given at the outset of her testimony that she was threatened by the accused causing her to not want to testify for being in fear of her life[17], but also in acting throughout on that premise in making various findings adverse to the accused.

[80] The question of whether there is evidence on which the court could arrive at its findings is a question of law.[18] If there isn't, then the Judge making the findings is considered to have made errors of law.

[81] In looking at the several errors I've identified above, I start with the errors made by the judge in relation to the identification parade.

[82] I accept the submission of counsel for the Appellant that, in Belize, the basis upon which an identification parade is to be conducted is a part of its statutory law set out in the ***Police (Identification Parades) Regulations, 2006***.

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[13] Paragraphs 43 & 44 of the Judge's written reasons.
[14] Paragraph 176 of the Judge's written reasons.
[15] Paragraphs 202 & 297 of the written reasons.
[16] Paragraph 295 of the judge's written reasons.
[17] Recited at paragraph 19 of the written reasons.
[18] ***Devi v Roy*** [1946] AC 508 at 521 per Lord Thankerton (item 4)

[83] The Privy Council in ***Pop (Aurelio) v R***[19] cited the decision of this court in ***Myvett and Santos v R***[20] as follows:

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

[84] The ***Police (Identification Parades) Regulations, 2006*** are set out in Statutory Instrument 118 of 2006 (enacted on 9 December 2006) issued by the Minister responsible for the Police Department pursuant to his power to make regulations contained in section 53(1) of the Police Act.

[85] It is clear from the regulations, that the identification parade ends once the witness picks out an individual from the lineup of at least 9 persons.

[86] Some of the regulations relevant to the identification parade held in the instant case are:

PART A

Regulation 2 The purpose of these Regulations is to ensure that the evidence of identification is obtained in a fair and transparent manner so as to eliminate any risk of misidentification and the consequent miscarriage of justice.

Regulation 4 All police officers shall comply with these Regulations as far as practicable. Any minor deviations from, or non-observance of, these Regulations

[19] (2003) 62 WIR 18 at 22, letter i – 23, letter a
[20] (1994) unreported

shall not invalidate an identification parade if the court is satisfied that there was substantial compliance therewith.

PART B

Regulation 8 The parade shall consist of at least eight persons (in addition to the suspect) who so far as possible resemble the suspect in age, height and general appearance.

Regulation 9 Once the parade has been formed, everything after-wards in respect of it shall take place in the presence and hearing of the suspect and of any interpreter, attorney, friend or appropriate adult who is present, except where the parade is by one-way mirror in which case everything said to or by any witness at the place where the parade is held must be said in the hearing and presence of the suspect's attorney, friend or appropriate adult, as the case may be.

Regulation 11 The police officer conducting a parade shall prepare a list of all persons in the parade, including the suspect, in the order they are placed in the line-up, including the approximate height, age, tattoos (if any) and general appearance of each of them.

Regulation 12 (1) The police officer responsible for conducting a parade shall be the only person responsible for selecting the persons to be placed in a particular parade. Before the parade, such officer shall inform himself of the statement provided to the police by the identification witness. Where a witness has described a particular suspect in a peculiar manner, then the officer conducting the parade would need to be aware of such description in order to ensure that when the suspect is placed in the parade that particular feature does not stand out as a distinct difference.

(2)…

(3) The officer conducting a parade must be as detailed as possible when preparing his report.

Regulation 13 Witnesses shall be brought in one at a time. Immediately before the witness inspects the parade, the identification police officer shall inform him that the person he saw on the previous occasion may or may not be on the parade and that if he cannot make a positive identification he should say so but that he should not make a decision before looking at each member of the parade at least twice. The officer shall then ask him to look at each member of the parade at least twice, taking as much care and time as he wishes. When the officer is satisfied that the witness has properly looked at each member of the parade he shall ask him whether the person he himself saw on an earlier relevant occasion is on the parade.

Regulation 14 (1) The witness should make an identification by indicating the number of the person concerned.

(2) If the witness makes an identification after the parade has ended, the suspect and, if present, his attorney, interpreter or friend shall be informed. When this occurs consideration should be given to allowing the witness a second opportunity to identify the suspect.

(3) …

(4) When the last witness has left, the identification officer shall ask the suspect whether he wishes to make any comments on the conduct of the parade and whatever he says will be taken down in writing.

Regulation 15 (1) A colour photograph of the parade shall be taken once the suspect has been placed in the line-up. The photograph should contain on the back the name of the suspect, the name of the photographer, the date when the parade was held and a brief description of what is shown on the photograph, and the signature of the photographer….

Regulation 16 (1) The police officer conducting an identification parade shall not be below the rank of Sergeant.

(2) At the end of the identification parade, the identification officer shall submit a detailed report on Form A annexed to these regulations.

PART C

Regulation 17 (1) This Part will apply where a police officer conducting an investigation is satisfied that an identification witness is afraid or reluctant to attend a normal face-to-face identification parade. Where such a parade is held, all the existing rules for governing the conduct of normal identification parades set out in Part B shall continue to apply but they shall be subject to the Special Rules contained in this Part.

(2) Where a witness who is afraid or reluctant to point out a suspect by means of normal face-to-face identification parade shall, after attending the parade, provide the police a detailed statement mentioning that fact and describing what occurred during the conduct of the parade.

Regulation 18 Before the parade takes place, the suspect should be told specifically that the parade will be held by means of a one-way mirror and what it would entail. He should also be told that he can have his attorney, friend or other appropriate adult present at the parade.

Regulation 19 (1) …

(2) …

(3) Where for any legitimate cause, some person other than the specified persons has to be present at the identification parade (e.g., when a witness is so traumatized that he or she refuses to attend the parade without a friend or relative), the reason for the person's presence must be clearly stated in the report of the police officer conducting the parade….

Regulation 20 Where a parade is held by means of a one-way mirror, the identification officer shall mention that fact in the report to be submitted pursuant to Regulation 16 above and highlight any particular matters relevant to the conduct of the parade.

[87] The first of the general provisions of the subsidiary legislation (regulation 2) states that the *"purpose of these Regulations is to ensure that the evidence of identification is*

obtained in a fair and transparent manner so as to eliminate any risk of misidentification and the consequent miscarriage of justice[21]".

[88] Regulation 4 mandates all police officers to comply with them as far as practicable and goes on to say that *"any minor deviations from, or non-observance of, these Regulations shall not invalidate an identification parade if the court is satisfied that there was substantial compliance therewith[22]"*. Those words are not an invitation to a court to find substantial compliance where there is anything greater than a minor deviation from, or non-observance of, the Regulations.

The Identification Parade

[89] The first ground of this appeal was that the Judge erred in admitting the identification done by witness Allen and by failing to consider the impact the procedural breaches had on the fairness of the identification parade. More particularly on behalf of the Appellant, it was submitted that the conduct of the identification parade grossly deviated from the rules outlined in the Statutory Instrument such that it was impossible to ensure that there was a fair trial. I am of the view that there is merit in the complaint that the Judge erred in admitting the identification done by witness Allen.

[90] The Appellant complained of breaches of Regulations 8, 9, 11, 12, 14(2), & 17 (2). The Crown, in response, submitted there was no breach of regulations 8, 9 and 12, but admitted there was a breach of regulation 11 and a breach of regulation 14(2) in that the suspect's representative was not informed about what transpired after the conclusion of the ID parade. The Crown went on to submit that those breaches did not lead to any unfairness.

[91] I am unable to accept the Crown's contention that the breaches were restricted to regulations 11 & 14(2) or that, in the factual circumstances of this case, the uncontested breaches of regulations 11 & 14(2) did not result in any prejudice to the accused. I have

[21] Regulation 2
[22] Regulation 4

less difficulty accepting the Crown's submission that the trial judge properly took into account the various relevant regulations and the impact any breach might have had on the fairness of the ID parade, but only up to the point where an identification of the person holding #6 was made pursuant to regulation 14(1). I don't think regulation 14(2) applied to the ID parade conducted and address that issue subsequently in this judgment.

[92] In her written reasons, the Judge states[23],

> *"I accept the form was not properly completed, however, because we have the photographs taken of the participants, this lapse does not serve to invalidate the ID parade.*
> *The Defence also suggested that a new ID parade should have been conducted. It is my belief that a new ID parade would have been an exercise in futility. The Accused wanted his mother there. The witness was intimidated by the mother, therefore to repeat the process would have more than likely ended in the same result. Further, as previously stated, I do not believe there was anything wrong with the ID parade as conducted."*

[93] Leaving for the moment the fact that the court found the required form was not properly completed (which would have been a breach of regulations 12(3) and 16(2)), the evidence is that the eyewitness identified the person holding #6 at the identification parade, and that the accused was holding #7. The ID parade as conducted therefore resulted in the witness identifying someone other than the accused.

[94] The judge felt able to ignore that fact by attributing the witness's identification of person #6 at the ID parade to her feeling intimidated[24] in spite of the evidence of the identifying police officer present that he never heard the accused's mother threaten anyone at the

[23] In paragraphs 283 and 284
[24] See paragraphs 151, 152 & 154 of the account set out in the Judge's written reasons

ID parade, and also that the witness appeared calm at the ID parade[25]. I also note that there is no evidence of the eyewitness having invoked her right to have a support person with her at the ID parade (on account of her being traumatized), as was her entitlement under Regulation 19(3) if considered by the identification officer to have been traumatized, or if she so claimed.

[95] Respectfully, in the circumstances of this case where an identification by the witness of someone other than the accused occurred at the ID parade in accordance with regulation 14(1), the correct starting point was not, *"whether it was reasonable for Shiyana Allen to feel intimidated[26]"*. The judge's starting point ought to have been, ***can Ms. Allen be regarded as having identified the accused at the ID parade?*** There is, on the facts, no possible answer to that other than *"no"* as she, in fact, identified someone else in the ID parade line up as being the assailant.

[96] It was proper procedure for a representative of the accused to be in the room with the witness at the ID parade[27]. In her written reasons[28] the Judge made it appear as if this was something remarkable. It was not.

[97] The trial judge[29] downplayed (by attributing it to her being traumatized) the evidence of the eyewitness Allen, elicited in cross-examination, that in the statement she gave to the police following the incident she said the shooter was *"red skinned with thick eyebrows and a mustache"* – a description she admitted (and all were agreed) did not fit the appellant.

[98] The Judge found the ID parade was properly conducted[30]. The ID parade in fact resulted in the identification by the sole eyewitness of someone other than the accused (#6) as the assailant[31] following which the accused and his representative were informed that

[25]See paragraph 150 of the Judge's account of the facts.
[26] Paragraph 152 of the written reasons
[27] Regulation 9
[28] Paragraph 153
[29]At paragraph 162 of her written reasons
[30] Paragraph 168 of her written reasons.
[31] Paragraph 169 of her written reasons.

he had not been identified as the assailant, which outcome him, and all present, accepted and signed off on. The accused was #7 on the ID parade.

[99] The evidence as recited by the Judge[32] is:

> *"Officer Ciau asked the witness to look at the lineup and, if she saw the person who was the shooter in the lineup, she should call out the number held by that person.*
>
> ***The witness looked and then called out #6**. She was asked if she was sure, replied **"Yes"** and was excused from the room. The Accused was immediately brought into the room recently exited by the witness; advised he was not identified, and asked if he was satisfied with the manner in which the parade was conducted. He said **"Yes" and signed the ID parade form which was also signed by Idolly Westby** [his mother] **and JP Lind**. The Accused was then handed over to CIB." [my emphasis].*

[100] The facts do not establish a breach of regulation 9 because everything said to, or by, the eyewitness at the ID parade was said in the hearing and presence of the suspect's friend (his mother), Idolly Westby; and the result of the parade (the selection of #6 by the eyewitness) was signed off on by all relevant personnel present. Up to that point (but not beyond) it could be said that there was substantial compliance with the Police (Identification Parades) Regulations.

[101] Regulation 17(2) applies to a witness who does not make an identification under regulation 14(1). In this case, the witness Allen made an identification under regulation 14(1) of someone other than the accused. It was not open to her to then make a different identification under regulation 14(2) after the parade was ended. That sub-section must apply where a witness does not make an identification at the ID parade but does so only after the ID parade has ended. To my mind, it is precisely because no prior identification

[32] At paragraphs 82-84 of her written reasons

would have been made by that witness at the ID parade that the sub-section says, in those circumstances, consideration should be given to allowing the witness a second opportunity to identify **the suspect** (not some person additional to the person already picked out by her at the ID parade as being the assailant). The holding of a second identification parade could only make sense where there was no outcome from the ID parade that was held. That was not what transpired in this case.

[102] The evidence of the facts in this case as recited by the Judge in her written reasons indicates a breach of regulations 11, 12(3), 14(2) if it applies, and 16(2). It was for the judge, pursuant to regulation 4, to decide whether these were minor deviations from, or non-observances of, the regulations that did not affect her satisfaction that there was substantial compliance such as did not defeat the regulations' stated purpose[33] of

> *"ensuring that the evidence of identification is obtained in a fair and transparent manner so as to eliminate any risk of misidentification and the consequent miscarriage of justice."*

Having pronounced her acceptance that the ID parade was properly conducted[34], her satisfaction with the ID parade process is to be extrapolated from that. That process ended when the eyewitness picked out person #6 from the line-up. As the accused (#7) was not identified at the ID parade, an acceptance that it was properly conducted could not but produce an exculpatory finding by the Judge. The fact that she went on to find the accused guilty of the crime was at variance with that and rested, to a significant degree, on her finding (wrongly as a fact) that he was identified as the assailant by the eyewitness at the ID parade[35]. That finding is demonstrably devoid of a factual substratum, as the eyewitness' identification of #7 only occurred after the ID parade had ended. That finding by the Judge is, therefore, an error of law that allows this court to substitute (in place of her's) its view of the correct conclusion to be derived from the

[33] Set out in Regulation 2
[34] Paragraph 168
[35] Paragraphs 175, 288 & 289 of the Judge's written reasons.

facts established in evidence. As previously stated, that conclusion is that someone other than the appellant was identified by the eyewitness at the ID parade.

Events occurring after the ID Parade Ended

[103] The events that immediately followed the identification of the accused (#7) by the eyewitness occurred **after the ID parade had ended** and:

a. were regarded by the court as being a part of the ID parade,
b. eroded completely the favourable result to the accused of the ID parade,
c. undermined the fairness and transparent conduct of the ID parade,
d. increased the risk of misidentification, and
e. (in my view) resulted, within the remainder of the factual milieu of this case, in a consequential miscarriage of justice.

[104] It is a fact in the case that the witness Allen's subsequent identification of the accused as the assailant was not done at the ID parade. It was done after the ID parade was over and neither the accused nor his representative was informed of this subsequent development following the conclusion of the ID parade. The failure to inform the accused of this development was, in my view, prejudicial to him. After all, both he and his representative had been informed immediately following the conclusion of the ID parade that the witness had not picked him out as the shooter. The subsequent identification of him by the very same witness as the shooter was, therefore, prejudicial to him. Furthermore, had he been informed right away (or at all) of his identification by the same witness immediately after the ID parade had ended he could have:

a. immediately protested the legitimacy of that subsequent event, and/or
b. had his protest noted in the report pursuant to regulation 14(4) for use at his trial, and/or
c. challenged that development as a breach of the Police (Identification Parades) Rules and, consequently, of his constitutional right to due process.

[105] In my view, for the reasons stated in this judgment, the facts of this case do not come within regulations 17(2) and 14(2) of the Police (Identification Parades) Regulations.

The dock identification

[106] It was a ground of appeal that the Judge's assessment of the visual identification was inadequate. The ground went on to state furthermore that the Judge failed to give specific directions on the inconsistencies of the identification evidence and to assess the potential impact such inconsistencies had on the reliability of the identification evidence of the witness Allen. I found this ground established by counsel for the appellant in her submissions.

[107] The issue of whether the dock identification of the accused by eyewitness Allen as the person she pointed out at the ID parade was fair cannot, in my view, be separated either from the description of the assailant that she gave to the police the day after the incident (red skinned with thick eyebrows and a mustache) or from her identification of someone other than the accused as the assailant at the ID parade. The statement that the accused in the dock of the courtroom was the person she identified at the ID parade[36] was not an accurate representation of the evidence. Miss Allen was not a witness to whom section 17(2) of the Regulations applied. She was not a witness who was afraid or reluctant to point out a suspect at the ID parade, because she did just that in picking out person #6 from the lineup. In this case the witness Allen made another, and quite separate, identification of the accused after the ID parade (in which an identification of someone other than the accused had been made by her) ended. The witness's subsequent identification of the accused was **not** the outcome of an ID parade. The judge ought to have been (and was not) aware of that fact.

[108] Witness Allen's dock identification of the accused in the factual circumstances of this case was undesirable and the Judge ought to have approached it with great care. In

[36] At paragraph 35 of the Judge's written reasons

failing to do so, she erred. As Lord Rodger of Earlsferry said in the Belizean case of ***Pop (Aurelio) v R***[37]***:***

> *"The facts that no identification parade had been held and that Adolphus identified the appellant when he was in the dock did not make his evidence on the point inadmissible. It meant, however, that in his directions to the jury the judge should have made it plain that the normal and proper practice was to hold an identification parade. He should have gone on to warn the jury of the dangers of identification without a parade and should have explained to them the potential advantage of an inconclusive parade to a defendant such as the appellant. For these reasons, he should have explained, this kind of evidence was undesirable in principle and the jury would require to approach it with great care."*

[109] The Defence's objection to the dock identification of the accused in court on the grounds laid out in *Turnbull v R* was overruled by the Judge on the ground that this was not a first time identification[38]. Whether it was, or was not, a first time identification, the overruling of the objection on that ground was an error. The law establishes that the need for a *Turnbull* direction is not diminished where the identification depends on recognition by the witness of a person previously known to her: ***Langford (Leroy) and Freeman (Mwanga) v The State of Dominica***[39]***.***

[110] One of the specific directions laid out in *Turnbull* that a judge is required to have the trier of fact consider is, *"Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?"* It was accepted by all in this case that there was such a material discrepancy. Fairness to the accused compels the trier of fact to give due recognition

[37](2003) 62 WIR 18 at 23 (para [9])
[38] Paragraph 176 of her written reasons
[39] (2005) 66 WIR 194

to the importance of such a material discrepancy. In this case, however, the judge downplayed its significance and, in so doing, she erred.

The Dying Declaration

[111] It was a ground of appeal that the Judge erred in admitting hearsay evidence as part of the *res gestae* without first assessing the reliability of that evidence. As with the prior ground, I found this one to also have merit.

[112] Notwithstanding the several major factual inconsistencies in this case, including those outlined above, the trial judge accepted that the accused was sufficiently identified by Ms. Allen to be the assailant and went on to admit the hearsay identification of the accused by the deceased in evidence even though it was contradicted by the description of the assailant Ms. Allen gave to the police, and by her identification of someone other than the accused at the identification parade. I disagree with the judge's finding[40] that those factors were insufficient evidence to counterbalance the *res gestae* statement.

[113] The inconsistencies in the description of the perpetrator given to the police by the sole eyewitness, taken together with the evidence that someone other than the Appellant was identified by her as the shooter at the ID parade, cast doubt on the dying declaration and its usefulness as evidence for finding the accused guilty.

[114] In my view that doubt was sufficient to make erroneous the admission into evidence by the Judge of the hearsay dying declaration as part of the *res gestae*. That is because, on the evidence adduced in this case, the statement's reliability was questionable -- a factor which contributed to its prejudicial effect outweighing its probative value. However, even if I'm wrong in deciding the dying declaration ought not to have been admitted, any weight attributable to that hearsay statement is greatly exceeded by the evidential weight of the inconsistencies in the non-hearsay identification evidence of the sole eyewitness.

[40] Paragraphs 245-248 of her written reasons.

[115] In the Bahamian case of ***Tido v R***[41], a Privy Council decision, it was held, *inter alia*, by their Lordships' Board in considering the admissibility of a dock identification of the accused, that:

> *"Where it was decided that the evidence might be admitted, it would always be necessary to give the jury careful directions as to the dangers of relying on that evidence and in particular to warn them of the disadvantages to the accused of having been denied the opportunity of participating in an identification parade, if indeed he had been deprived of that opportunity. In such circumstances the judge had to draw directly to the attention of the jury that the possibility of an inconclusive result to an identification parade, if it had materialized, could have been deployed on the accused's behalf to cast doubt on the accuracy of any subsequent identification."* [my emphasis]

The failure of the sole eyewitness to identify the accused at an ID Parade was not an inconclusive result to the ID parade. It was a conclusive result – one that favoured the accused. That result of the ID parade, taken together with the fact that the subsequent identification of the accused by the eyewitness did not occur at an ID parade, made it incumbent upon the trial judge to consider that evidence (deployed on behalf of the appellant at trial) as casting doubt on the accuracy of the identification by way of the hearsay dying declaration. The appellant was entitled to the benefit of that doubt which was generated entirely from the evidence. The judge's decision to admit the dying declaration into evidence is inconsistent with giving the appellant the benefit of that doubt. That is why I consider that decision an error. In my view the trial judge was also wrong, in these particular circumstances, in according that dying declaration *"full weight"*; and in finding that the accused would not be materially prejudiced by its admission into evidence[42]. The fact that a dying declaration is admitted in evidence as an exception to the rule against hearsay, does not make it any less hearsay. As with all other untested evidence, the weight to be attributed to the statement ought always to be very carefully considered.

[41] (2011) 79 WIR 1 at 2

[42] Paragraph 295 of her written reasons

[116] It is impossible in this case for the admission in evidence of the dying declaration not to have materially prejudiced the appellant. It was hearsay evidence contradicted by the direct (i.e. non-hearsay) evidence of the eyewitness Allen that the assailant:

a. was a person who did not resemble the accused; and
b. was the person she identified as being #6 in the lineup at the ID Parade.

The admission of the dying declaration in these circumstances was extremely prejudicial to the appellant.

[117] For clarity (and because each case turns on its own facts) I wish to make it clear that I am not saying a dying declaration, duly admitted and proved, can never be the basis of a conviction. The evidential value of a dying declaration cannot, however, be assessed in isolation from all the other evidence adduced in the matter (including, in this instance, direct evidence from the sole eyewitness that is inconsistent and irreconcilable with the dying declaration).

[118] It is to be borne in mind that the evidential inconsistency emanated solely from the case presented by the prosecution and wholly from its witnesses. The tenuous nature of the identification evidence adduced by the prosecution was the basis of the no case submission made by defence counsel at the close of the prosecution's case[43]. However, as the trial judge's decision that the accused be called upon to answer the case is not a ground of appeal, I say no more in that regard.

Reasonable doubt

[119] To my mind, the existence of reasonable doubt arising from the inconsistencies in the identification evidence of the sole eyewitness, together with the other deficiencies mentioned above, rule out the possibility of the guilty verdict arrived at in this case being safe.

[43] At paragraphs 104-116 of the Judge's written reasons.

[120] In its decision in ***Pop v R,*** their Lordships' Board, sitting in this jurisdiction, declined to uphold the Court of Appeal's application of the proviso[44] because it was of the view that the deficiency in the identification evidence in that case precluded the application of the proviso. In my view, the same would apply in this case.

[121] For these reasons I would make the order set out in the first paragraph of this dissenting judgment.

Minott-Phillips
Justice of Appeal

[44] To what is now section 216 (1) of the Senior Courts Act