

**IN THE COURT OF APPEAL OF BELIZE, A.D. 2026
CRIMINAL APPEAL NO. 06 OF 2022**

BETWEEN:

DAVID CRUZ

Appellant

And

THE KING

Respondent

Before:

The Hon Mde. Justice Marguerite Woodstock Riley KC

Justice of Appeal

The Hon Mde. Justice Sandra Minott-Phillips KC

Justice of Appeal

The Hon Mr. Justice Peter I Foster KC

Justice of Appeal

Appearances:

Mr. Leeroy Banner for the appellant

Mrs. Cheryl Lynn Vidal SC, Director of Public Prosecutions and Ms Natasha Mohamed,
Senior Crown Counsel, for the Crown

2025: October, 22
2026: June 4

JUDGMENT

[1] FOSTER JA: This is an appeal against conviction by David Cruz (“the appellant”). The appellant was convicted of murder on 5th July 2022 following a trial before Cumberbatch J (“the learned judge”) without a jury. Subsequently, on 23rd May 2023, the learned judge sentenced the appellant to life imprisonment with the possibility of parole after serving 30 years.

[2] The appellant has not filed a notice of application for leave to appeal/notice of appeal challenging the sentence imposed by the learned judge. In any event, counsel for the appellant, Mr Leeroy Banner, has not sought to advance any grounds or arguments in

challenge to the sentence, and has conceded in his submissions that the sentence imposed by the learned judge is not unduly harsh when all the aggravating and mitigating features of the offender and offence are considered.

[3] The appeal against conviction is advanced on two grounds:

“i) The learned trial judge wrongly permitted a dock identification of the appellant by PC Shaun Williams and failed to warn himself of the dangers of a dock identification.

ii) The learned trial judge failed to deal adequately with the weaknesses in the identification evidence resulting in an unfair trial.”

[4] On these grounds, the appellant contends that his conviction is unsafe and should be quashed, along with his sentence, without an order being made for a retrial.

The evidence at trial

[5] The Crown’s case was that, on the night of Thursday 12th December 2019, the appellant shot and killed Timroy Neal (“the deceased”) outside Lucky Entertainment, a gaming and entertainment establishment in Roaring Creek Village. The Crown’s case depended on the identification of the appellant as the assailant by Constable Shaun Williams (“PC Williams”), who claimed to have recognised the appellant as someone previously known to him as the assailant at the scene of the killing.

[6] PC Williams’ evidence was that, on the night of 12th December 2019, he and Corporal Marcelino Rash (“Cpl Rash”) had attended to a domestic dispute in the Young Bank area of Camalote Village and were returning to the Roaring Creek Police Station on a police motorcycle driven by PC Williams. As they made their way back to the police station, in the vicinity of Hyde’s Meat Shop, they heard what sounded like gunshots coming from the direction of Lucky Entertainment.

[7] PC Williams testified that his attention became focused on Lucky Entertainment, where, in lighting that he described as clear and bright, he saw a man dressed in a green jacket and blue three-quarter-length jeans, and wearing a yellow and white helmet, firing shots at a man

on the ground. The assailant then ran to a motorcycle and rode off along the highway towards the Puma Gas Station. PC Williams discharged five shots at the assailant, who lost control of the motorcycle and fell to the road just after the pedestrian ramp in front of the Puma Gas Station.

[8] PC Williams made a U-turn on the police motorcycle and went towards the fallen man. As he did so, the yellow and white helmet rolled from the man's head. PC Williams shouted "police, stop" and, from a distance of about 20 feet, the man, who had sat up, looked at him. PC Williams' evidence was that the man looked at him for about 12 seconds, in lighting that was clear and bright from the Puma Gas Station and a lamp post about 15 feet away, with nothing obstructing his view, and that he then recognised the man to be the appellant, David Cruz, whom he knew by the nickname "Deucy". The man retrieved his helmet, ran down a dirt road, and escaped. PC Williams testified that the appellant was known to him before the night of the killing, having been seen by him over about a year while PC Williams was stationed at Roaring Creek.

[9] The Crown also called Brian Lopez and Cpl Rash as witnesses. Mr Lopez had been outside Lucky Entertainment in the company of the deceased and others when a man arrived on a motorcycle and drew and fired what appeared to be a pistol, whereupon Mr Lopez ran from the scene. He stopped a lone police officer who was travelling on a motorcycle to report the shooting and, while speaking to that officer, saw the assailant ride past, heading towards the gas station. Cpl Rash testified that, having alighted from the police motorcycle, he saw a man wearing a helmet ride past at speed and fall after passing the speed bump. However, he was unable to identify or describe that person and said that he had heard only a single gunshot that night.

[10] Sergeant Kareem Fuller ("Sgt Fuller") was among the police officers who attended the scene shortly after the shooting. He spoke to Cpl Rash, who was already present, and assisted in cordoning off the area, before the scene was handed over to Corporal Leon Ferguson ("Cpl Ferguson") as the investigating officer. The body of the deceased was removed from the scene and was pronounced dead on arrival at the hospital.

- [11] Eleven spent shells were retrieved from the scene, as well as video footage from Lucky Entertainment. The unchallenged forensic evidence was that the death of the deceased was caused by serious bodily injuries resulting from multiple gunshot wounds fired at close range.
- [12] Cpl Ferguson gave evidence that, on 19th December 2019, after having commenced his investigation into the killing, he put out a wanted poster for the detention of David Cruz. The appellant attended the Belmopan Police Station on 14th January 2020, where he was detained, and subsequently charged for murder.

The trial

- [13] At trial, the Crown sought to have PC Williams identify the appellant in the dock. Counsel for the appellant in the court below objected on the basis that the capacity in which PC Williams knew the appellant had not been established in evidence, in any prior statement and that no identification parade had been held. The learned judge acceded to the holding of a *voir dire* to determine whether PC Williams had prior knowledge of the appellant sufficient to amount to recognition, and whether, in those circumstances, the holding of an identification parade had been necessary. The matter was adjourned to give the Crown the opportunity to obtain a further statement from PC Williams, detailing his prior knowledge of the appellant.
- [14] At the *voir dire*, PC Williams gave evidence of his knowledge of the appellant dating from about 2013. He testified that, in the years before he joined the police force, he had come to know the appellant, by the nickname “Deucy”, in the Another World area of Roaring Creek Village, which he visited from his home in the neighbouring village of Camalote. As a police officer, he was posted to the Roaring Creek Police Station in 2017 and, in that capacity, encountered the appellant frequently while on patrol. In the course of those encounters he came to learn the appellant’s correct name. His evidence on the *voir dire* is examined in greater detail later in this judgment.
- [15] At the conclusion of the *voir dire*, the learned judge ruled:
- “All right the Court finds that the evidence adduced by the Crown in the *voir dire* is sufficient to reach the threshold that the witness, Officer Shaun Williams knew David Cruz for some six years prior to 2019 and he knew

him sufficiently well to be able to recognize him. I will allow the evidence to be admitted notwithstanding the fact that there was no identification parade or identification procedure which I find in the circumstances would have been otiose.”¹

[16] The learned judge was therefore of the view that the failure to hold an ID parade was not fatal to the admissibility of the Crown’s identification evidence and to the Crown’s case, generally.

[17] At the close of the Crown’s case, a no-case submission was made on the appellant’s behalf and rejected by the learned judge. The appellant did not give or call any evidence. He elected to remain silent.

The learned judge’s judgment

[18] In his judgment, the learned judge found, based on the unchallenged forensic evidence, that the deceased was dead and that he had died from unlawful harm. The learned judge also found that the firing of eight shots to the head of the deceased, at close range, unequivocally signalled an intention to kill, and that the defences of self-defence and provocation did not arise on the evidence.

[19] The central issue before the learned judge was whether he would accept the identification of the appellant as the assailant. The learned judge recognised that the case against the appellant depended wholly upon the correctness of PC Williams’ identification of him, and that no identification procedure had been held before the appellant was charged. He warned himself of the special need for caution before convicting in reliance upon visual identification evidence, reminded himself that an honest and convincing witness might nevertheless be mistaken, and directed himself in accordance with the guidelines in *R v Turnbull*.² He examined the circumstances in which the identification was made, including the distance, the lighting, the duration of the observation, and whether anything had obstructed the

¹ Pages 91-92 of the Transcript.

² [1976] 3 All ER 549.

witness's view. Having regard to the evidence given on the *voir dire*, he treated the case as one of identification by recognition.

- [20] The learned judge gave detailed reasons for finding Cpl Rash to be an unreliable witness, in particular that he claimed to have heard only a single gunshot on a night when a significant number of shots had been fired, that he gave no description of the assailant, and that he appeared to have removed himself from the scene. He rejected a criticism by the appellant that PC Williams' account was uncorroborated, observing that PC Williams' description of the assailant and of the location of the shooting was supported by the video footage and by the eleven spent shells recovered from the scene.
- [21] The learned judge concluded that the appellant was well known to PC Williams, who was quite capable of recognising him, having observed him for between five and twelve seconds, from about 20 feet away, under bright lighting. He accepted the evidence of PC Williams that the shooter on the night in question was the appellant. Having so reasoned, the learned judge found the appellant guilty of the murder of the deceased as indicted.
- [22] Having given the relevant background, I will now consider and resolve the arguments made in relation to each ground of appeal.

Ground i: The learned trial judge wrongly permitted a dock identification of the appellant by PC Shaun Williams and failed to warn himself of the dangers of a dock identification

- [23] Mr Leroy Banner, for the appellant, submitted that the learned judge should not have permitted a dock identification of the appellant by PC Williams because the appellant was not well-known to him. In those circumstances, and in the absence of an identification parade, the learned judge erred when he permitted a dock identification.
- [24] Mr Banner submitted that the appellant's position was that he was not the person who inflicted the gunshot injuries that killed the deceased, and that PC Williams did not know him at the time of the killing. The learned judge had permitted a dock identification of the appellant on the basis that PC Williams claimed to have known him about 6 years prior to

the killing of the deceased. However, the learned judge erred in law because the evidence demonstrated that PC Williams did not know the appellant. Mr Banner specifically pointed to the fact that, after giving evidence of his long knowledge of the appellant, PC Williams stated, in cross-examination, “I know of him”. Based on this statement, Mr Banner submitted that it cannot be said that PC Williams previously knew the appellant. His answer in cross-examination “destroyed” what he said previously in examination-in-chief, and the learned judge erred when he failed to so conclude.

[25] Against that background, Mr Banner submitted that an identification parade would have served a useful purpose and ought to have been held. The decision to permit a dock identification in these circumstances was so prejudicial and unfair as to render the verdict unsafe. Mr Banner submitted, in any event, that an additional warning of the dangers of dock identification was required. Based on the transcript, the learned judge did not warn himself of the dangers of dock identification and therefore erred in law by failing to do so. Reliance was placed on the decisions of *Aurelio Pop v R*³ and *Pipersburg and Robateau v R*.⁴

[26] In response, the learned Director of Public Prosecutions (“DPP”), Mrs Cheryl-Lynn Vidal SC, submitted on behalf of the Crown that this case concerned identification by recognition, no identification parade was necessary, and the learned judge advised himself in accordance with the **Turnbull** guidelines, and so there has not been a miscarriage of justice.

[27] The learned DPP submitted that PC Williams’ statement on cross-examination, “I know of him,” did not negate the evidence he previously gave of his knowledge of the appellant. The suggestion to the witness was that he had only “heard of” the appellant. His response was that he knew “of” the appellant. The DPP submitted that the learned judge was entitled to take the witness’s entire evidence into account. From his judgment, the judge accepted PC Williams as a witness to the truth regarding his assertion that he knew the appellant prior to the killing. Once that evidence was accepted, particularly in light of the fact that there was no evidence to show that the appellant at any stage suggested that the witness was unknown to him and he requested an identification parade, it was open to the judge to find as he did,

³ (2003) 62 WIR 18.

⁴ (2008) 72 WIR 108.

that there was no need for an identification parade. The DPP accordingly submitted that no useful purpose would have been served by the conduct of an identification parade – the witness would simply have pointed out the person whom he says he knew. As a consequence, the learned judge would not have been required to warn himself on the dangers of dock identification were necessary in this case, since this was not a dock identification in its truest sense.

[28] The appellant's grievance under this ground of appeal concerns the learned judge's acceptance of PC Williams' identification evidence in the absence of an identification parade. The law which regulates the need for an identification parade and the permissibility of a dock identification is brought into focus. An outline of the legal principles is necessary.

[29] In *Mark France and Rupert Vassell v The Queen*,⁵ the Privy Council stated, at paragraph 33, that a dock identification is "in the original sense...the identification of an accused person for the first time by a witness who does not claim previous acquaintance with the person identified". The Privy Council differentiated between two types of dock identification. The first type is a dock identification in the original sense ("a true dock identification"). That is, a dock identification in which a prosecution witness identifies the defendant (unknown to the witness) as the wrongdoer, for the first time, in court, while the defendant is sitting in the dock, in circumstances where the witness did not previously identify the defendant in an identification parade or otherwise. The second occurs where the identification of the defendant in the dock confirms a previous identification made before the trial. The Privy Council explained:

"There has been a tendency to apply the term 'dock identification' to situations other than those where the witness identifies the person in the dock for the first time. This is not necessarily a misapplication of the expression but it should not be assumed that the dangers present when the identification takes place for the first time in court loom as large when what is involved is the confirmation of an identification already made before trial. Nor should it be assumed that the nature of the warning that should be given is the same in both instances. Where the so called dock identification is the confirmation of an identification previously made, the witness is not saying for the first time, 'This is the person who committed the crime'. He is saying

⁵ [2012] UKPC 28.

that 'the person whom I have identified to police as the person who committed the crime is the person who stands in the dock.'"

- [30] The case law is clear that a true dock identification is highly undesirable and risks unfairness to the defendant. It increases the risk of an incorrect identification because the Crown's witness may identify a defendant as the wrongdoer simply because the defendant is sitting in the dock.⁶ The risk is not the same with the second type of dock identification because there is an independent pre-existing identification of the wrongdoer. The witness's mind is therefore not as susceptible to influence to the same extent because the identification in court is merely a confirmation of an earlier identification. For this reason, the Privy Council has held that the second type of dock identification "is properly not regarded as a dock identification", particularly where the witness claims to have known the defendant prior to the relevant incident. In *Stubbs, Davis and Evans v R*,⁷ the Privy Council said:

"79. In the Board's view, the distinction drawn by the authorities between cases of identification and recognition is more to the point. Where an identifying witness claims previous acquaintance with the person identified, different considerations will apply. In *Stewart* [2011] UKPC 11, (2011) 79 WIR 409 the identifying witness claimed to have known the accused and his family for a long time. In that case the Board considered that the identification in court could not properly be regarded as a dock identification at all. By the time the witness came to point out the accused in the dock she had already told the police precisely who he was. The dock identification was a 'pure formality' (per Lord Brown at para 10)."

- [31] Where there is evidence that the accused was previously known to the witness and that the witness had previously identified the accused, this would provide a basis for allowing an identification in court. The identification in court would be no more than a formality.⁸ If there is no basis for challenging the witness's prior knowledge, no useful purpose would be served by holding an identification parade, and an identification by the witness in court will not be treated as a true dock identification.⁹ However, if there is a challenge to the witness's

⁶ *Holland v Her Majesty's Advocate* [2005] UKPC D1.

⁷ [2018] UKPC 30.

⁸ *Terrell Neilly v The Queen* [2012] UKPC 12 at paragraph 32.

⁹ *Peter Stewart v The Queen* [2011] UKPC 11 at paragraph 10 and *France and Vassell v The Queen* at paragraph 32.

knowledge of the defendant, it cannot be said that an identification parade would not be useful, as an identification parade might test the reliability of the witness's assertions.¹⁰

[32] A true dock identification, although undesirable, is not automatically inadmissible. The trial judge has the discretion to determine whether the dock identification should be permitted and, therefore, whether the identification evidence should be admitted. The main considerations are fairness to the defendant, including whether appropriate directions in law would be sufficient to counter any prejudice.¹¹

[33] Based on the submissions advanced by Mr Banner, the question for this court is whether PC William's identification of the appellant in court was a true dock identification which was unfair to the appellant, and whether special directions in law were required to address any unfairness. According to the authorities, the resolution of these questions will depend on whether the learned judge was correct to treat the case as one of recognition, as the learned judge found. The court must therefore examine the evidence given on the *voir dire* to determine whether the judge was entitled to find that PC Williams knew the appellant sufficiently well to recognise him, so that no useful purpose would have been served by an identification parade and so that the identification in court was no more than the formal confirmation of a prior recognition.

[34] In approaching this task, I remind myself that the learned judge's decision to permit PC Williams' identification was reached after seeing and hearing PC Williams' evidence firsthand. The learned judge's decision would have been underpinned to some extent by his assessment of the witness's credibility. I bear in mind that the judge was uniquely placed to assess credibility, having observed PC Williams' body language, demeanour, tone of voice, and other indicators. This means that this court cannot lightly disturb or disagree with the learned judge's ultimate acceptance of PC Williams' evidence, unless it was unsupported by the evidence.

¹⁰ David Ebanks v The Queen [2006] UKPC 6 at paragraph 17.

¹¹ R v Neilly [2012] UKPC 12 at paragraph 32.

- [35] A perusal of the transcript of the *voir dire* leads me to conclude that the learned judge cannot be faulted for accepting PC Williams' evidence and treating the matter as a case of recognition. In PC Williams' evidence-in-chief, he stated that he knew the appellant over separate periods. The first period was from 2013 to 2017, before he joined the police force. The second period was from 2017 to 2019, while he was attached to the Roaring Creek Police Station. The two time periods together demonstrated his acquaintance with the appellant for approximately six years.
- [36] As to the first time period, PC Williams testified that he had lived in Camalote Village for 30 years and that he had been about 19 years of age in 2013. He gave evidence that he travelled from Camalote to Roaring Creek to buy food at Chun's Shop, which was located in the Another World area, and that, in the course of doing so, he came to know two men whom people in the area would talk about, known by the nicknames "Deucy" and "Beasty". He saw the man he knew as "Deucy" in that area one or two times per month between 2013 and 2017, in the evenings, at a distance of two to three feet, under bright light from the line posts, with a clear and unobstructed view of his face and the upper part of his body.
- [37] As to the second time period, PC Williams testified that, upon being posted to Roaring Creek in 2017, his duties included foot, motorcycle, mobile, and operational patrols in Camalote, Cotton Tree, Roaring Creek, and Teakettle. From 2017 to December 2019, he encountered the appellant two to three times per week, mostly in the evenings, in the same Another World area. Each encounter was at a distance of two to three feet, with clear, bright lighting from the line posts. The encounters were stop-and-search interactions which typically lasted two to three minutes, during which the appellant gave his name, conducted himself in a friendly manner and offered no resistance. It was during this period that PC Williams learned the appellant's correct name was David Cruz. The evidence in relation to both time periods demonstrated several encounters, including conversations in good light, with an unobstructed view of the appellant's face.
- [38] The appellant did not give or call any evidence at the *voir dire*. This means that he never positively asserted that PC Williams did not know him. Although suggestions were put to PC Williams in cross-examination to that effect, those suggestions were rejected by PC Williams

and did not constitute evidence from the appellant on which the learned judge could, or this court can, rely. Furthermore, counsel for the appellant in the court below did not challenge PC Williams' evidence that he had lived in Camalote for 30 years; that he had gone to Chun's Shop in the Another World area of Roaring Creek; the frequency of the encounters between 2013 and 2017, or between 2017 and December 2019 (including on 6th December 2019, days before the shooting); the distance, the lighting, the duration of the encounters, the PC Williams' view of the appellant's face, or the friendly character of the encounters; or, that PC Williams had learnt of the appellant's correct name in 2017. Therefore, the Crown's evidence that PC Williams knew the appellant stood substantially unchallenged.

[39] I agree with the learned DPP's submission that PC Williams' answer: "I know of him" under cross-examination, does not overpower the weight of his evidence in chief. Firstly, a literal reading of PC Williams' answer does not lead to the conclusion that he was not familiar with the appellant through frequent interactions. "I know of him" is not an unequivocal indication that PC Williams did not see the appellant frequently, did not know his name or did not interact with him on several occasions.

[40] Secondly, the answer was given to the suggestion by the appellant's counsel: "My suggestion is that you never really know him and you never had encounters with him before. You only heard of him. That is my suggestion to you." PC Williams' answer appears to have been a denial of the suggestion that he only "heard of" the appellant. That was evidently PC Williams' own way of drawing a distinction between merely hearing about the appellant and knowing the appellant. In my view, whether taken alone, or in the context within which it was said, that answer could not have the effect Mr Banner contends that it did.

[41] The learned judge saw and heard PC Williams give his evidence, and was best placed to assess his demeanour, his consistency, and the weight to be attached to each of his answers. Having considered the evidence, the learned judge found that PC Williams "knew David Cruz for some six years prior to 2019 and he knew him sufficiently well to be able to recognise him." Given the totality of the evidence, that finding was open to the learned judge. This court cannot properly disturb by isolating a single answer from the transcript and

ascribing to it a meaning inconsistent with the entirety of the evidence, in circumstances where the context in which that answer does not require that result.

[42] In the face of the unchallenged evidence by PC Williams, the learned judge did not err in treating the case as one of recognition. Therefore, as the learned DPP submitted, this case would not have fallen into the category of a true dock identification. The identification of the appellant in court would not have been a first-time identification. It was, instead, the formal confirmation in court of a recognition that would have crystallised in PC Williams' mind over several years of interactions with the appellant.

[43] In keeping with the legal principles set out above, the learned judge would have been correct to conclude that the failure to conduct an identification parade was of no moment, as it would have served no useful purpose in the circumstances of this trial. As such, the learned judge cannot be faulted for permitting PC Williams to identify the appellant in court. It also follows that because this was not a true dock identification, no obligation arose in law for the learned judge to give special directions to compensate for any potential unfairness to the appellant that would loom had there been a true dock identification.

[44] In summary, I am satisfied that the learned judge's ruling on the *voir dire* was supported by the evidence. The absence of an identification parade did not render the in-court identification inadmissible or unfair because the identification by PC Williams in court was not a true dock identification in the sense identified in the authorities. As such, no separate or additional warning or direction was required. I would accordingly dismiss ground of appeal i.

Ground ii: The learned trial judge failed to deal adequately with the weaknesses in the identification evidence, resulting in an unfair trial

[45] In relation to ground ii, Mr Banner makes several arguments concerning the learned judge's treatment and acceptance of the identification evidence of PC Williams. He points to several "weaknesses" in the evidence which the judge did not properly analyse or take into account. Each of these arguments will be addressed in turn under separate headings.

Fleeting glance

- [46] Mr Banner submitted that when the evidence of PC Williams is examined closely, his observation of the assailant amounted to no more than a fleeting glance under artificial lighting. He drew the court's attention to the fact that, although PC Williams testified in examination-in-chief that the man who fell from the motorcycle looked at him for about 12 seconds, the witness, later in the same examination-in-chief, gave an answer which, it was said, destroyed that earlier evidence. When PC Williams was asked by Crown Counsel, "how long would you say you had the person whom you saw at Lucky Entertainment, who then got onto that motorcycle, who fell by the pedestrian crossing, what was the total amount of time that elapsed there?", his answer was "I would say seconds", and, when pressed for an average number of seconds, he said "It was fast".¹²
- [47] Mr Banner submitted that the same pattern emerged in cross-examination. PC Williams there said that the assailant, having fallen and sat up, looked at him "for like 5 seconds"; and, when it was put to him that "all of this took place within seconds", he answered, "just fast, this happened fast". Accordingly, Mr Banner submitted that the witness's evidence as to the duration of his observation was that the incident "happened fast" and lasted only "seconds", and that the learned judge erred in failing to address his mind to that weakness. He submitted that the learned judge's statement that PC Williams observed the assailant for "about 5 to 12 seconds" was "not evidence", and that the judge nowhere grappled with the inconsistency between the period of 12 seconds spoken to in chief and the shorter periods spoken to in cross-examination. Had the judge done so, the Crown's case would at least have been severely undermined.
- [48] In response, the learned DPP submitted on behalf of the Crown that this was a case of identification by recognition. A face-to-face observation of five seconds' duration, of a man already well known to the witness, at close quarters and in good light, was not a fleeting glance. The learned DPP submitted that the judge expressly recorded both the period of 12 seconds given in chief and the period of 5 seconds given in cross-examination, directed

¹² Transcript at page 63.

himself fully in accordance with the **Turnbull** guidelines, and made a finding that was reasonably open to him on the evidence.

[49] I am unable to accept the appellant's submission that PC Williams' evidence amounted to a fleeting glance for several reasons. When PC Williams was asked how long the assailant looked at him, he gave a consistent account. In examination-in-chief, he said that the man, on looking at him, "Looked at me for about 12 seconds".¹³ He reiterated the estimated time when the matter was revisited, and he agreed that he was "able to see him for about 12 seconds", that the part of the body he saw was "his face", and that nothing obstructed his view in those 12 seconds.¹⁴ In cross-examination, when the question of time was put to him directly by counsel for the appellant in the court below, he answered, "For like 5 seconds".¹⁵ When defence counsel asked, "So, he sat up, looked at you for about five or 12 seconds, and then he retrieved his helmet off the side of the road and ran", PC Williams agreed.¹⁶ The evidence was, therefore, that PC Williams observed the assailant's face for around 5 to 12 seconds.

[50] PC Williams' evidence (relied on by Mr Banner) that he observed the appellant for "seconds" and that "it was fast", was given in a specific context. Crown Counsel in the court below had asked the witness "what was the total amount of time that elapsed" in respect of "the person whom you saw at Lucky Entertainment, who then got onto that motorcycle, who fell by the pedestrian crossing".¹⁷ That question prompted PC Williams to estimate the total duration of the observation of the assailant. It does not appear to be a question directed at the period during which PC Williams saw and recognised the assailant's face. The answers were general in nature and did not, in my view, destroy the evidence PC Williams had earlier given as to that act. The same is true of the exchange in cross-examination upon which Mr Banner relies. Defence counsel asked, "you said that all of this took place within seconds" and PC

¹³ Transcript at page 60.

¹⁴ Transcript at page 61.

¹⁵ Transcript at page 103.

¹⁶ Transcript at page 104.

¹⁷ Transcript at page 63.

Williams answered, “just fast, this happened fast”.¹⁸ This question was plainly directed to the entire incident, and not to the length of time PC Williams observed the assailant’s face.

[51] Based on the foregoing, I reject the complaint that the learned judge's reference to a period of “about 5 to 12 seconds” was not evidence. That range was established on the evidence. The upper limit was given in examination-in-chief, while the lower limit was given in cross-examination. Critically, the range of “five or 12 seconds” was expressly put to the witness by the appellant's own counsel.¹⁹

[52] Against that background, the learned judge had to contend with PC Williams’ statements that he saw the assailant’s face, in good lighting conditions, for between 5 to 12 seconds and that the aspects of the incident he observed were fast and took place over a few seconds. In my view, there is no inconsistency in the evidence, as the description of the identification as “fast” and taking “a few seconds” is entirely consistent with the estimated range of seconds in which the identification occurred. There was, therefore, no discrepancy or inconsistency for the learned judge to reconcile on the face of the evidence, or which should have caused the judge to give himself special directions or warnings in keeping with the **Turnbull** guidelines.

[53] In treating with the identification evidence, the learned judge directed himself in accordance with the guidance in *R v Turnbull*. He warned himself of the special need for caution before convicting in reliance on visual identification; he reminded himself that an honest and convincing witness may nevertheless be mistaken, and that mistakes can be made even in the recognition of a person well known to the witness. The judge identified, as the very first of the matters he was bound to examine, “how long did he have the person he says was the Accused under observation?” The duration of observation was therefore not a matter the learned judge overlooked.

¹⁸ Transcript at page 107.

¹⁹ Transcript at page 104.

- [54] The remaining question is, therefore, whether an observation of 5 to 12 seconds was, in the circumstances of this case, a fleeting glance that would render the identification evidence unsafe. In my view, it was not a fleeting glance, and the learned judge did not err in failing to treat it as such.
- [55] As earlier established, this was a case of identification by recognition. Where an eyewitness does not know an assailant, a five-second identification may, depending on the circumstances, qualify as a fleeting glance. However, in a case of recognition identification, it is accepted that the identification of an assailant need not be lengthy. For example, in *Jerome Tucker and Linton Thompson v R*,²⁰ *Ian Gordon v R*²¹ and *Separue Lee v R*,²² the Jamaican Court of Appeal accepted that periods of observation lasting 2 and 3 seconds were sufficient, in the circumstances of those cases, to ground a conviction, on the basis that the appellants were known to the identifying witnesses. Those cases demonstrate that the quality of the identification evidence must be examined to determine whether a brief opportunity for identification amounts to a fleeting glance in a recognition case.
- [56] The evidence before the learned judge suggested that PC Williams' observation was reliable. PC Williams testified that the assailant had fallen from the motorcycle, sat up, and looked directly at him. PC Williams was then face-to-face with the assailant at a distance of about 20 feet. The lighting was bright, with light from the Puma Gas Station and a line post about 15 feet away, and nothing obstructed PC Williams' view. With that being the state of the evidence, the judge concluded:

"I find at the end of the day, that the Accused was well known to PC Williams who was quite capable of recognizing him having seen him for between five to twelve seconds from about 20 feet away under bright lights from the Puma gas station and the streetlamp the presence of which was not challenged under cross-examination. I also believe and accept the evidence that Williams was focused on the gunman whom he saw dressed in a green jacket, and blue $\frac{3}{4}$ pants wearing a yellow and white helmet as is evidenced by the video footage from in front of Lucky's. Accordingly in the circumstances, after carefully and cautiously considering all the

²⁰ Jamaica Court of Appeal, SCCA Nos 77 and 78/1995.

²¹ [2012] JMCA Crim 11.

²² [2014] JMCA Crim 12.

evidence and having applied the Turnbull directions on visual identification I believe and accept the evidence of PC Williams that the shooter on that fateful night was the Accused.”

[57] In light of the evidence, this conclusion by the learned judge cannot be faulted. PC Williams’ unobstructed, face-to-face observation of the assailant, who was stationary for some time, for a period of five seconds or more, in good lighting conditions, in circumstances where he knew the appellant, was not a fleeting glance.

[58] Having properly directed himself in accordance with the **Turnbull** guidelines and analysed the evidence before him, I find no basis for concluding that the learned judge ought to have come to a different conclusion than he did, having regard to the quality and duration of PC Williams’ observation of the assailant. This argument fails.

Issues concerning the dock identification

[59] Mr Banner’s arguments in relation to the dock identification were advanced under two limbs. The first is that the appellant was not well known to PC Williams; accordingly, this was not a case of identification by recognition, and PC Williams’s identification of the appellant in court was therefore an unfair dock identification. I have already fully considered and rejected that submission. Accordingly, I will not repeat that reasoning, which applies with equal force here.

[60] The second limb of Mr Banner’s argument is that there was a further and distinct weakness in that PC Williams gave his account of his prior knowledge and familiarity with the appellant only during the appellant’s trial, more than two years after the killing, and while the witness was in the course of giving his evidence from the witness box.

[61] Mr Banner contended that it was only just before PC Williams was to identify the appellant in the dock that defence counsel objected to the dock identification. Upon that objection, the learned judge decided to hold a *voir dire* to determine whether PC Williams had prior knowledge of the appellant and was in a position to recognise him. At that juncture, the learned judge indicated the kind of evidence that would be required at the *voir dire*. In the ensuing exchange between bench and bar, counsel for the Crown informed the learned

judge that the Crown “would require another statement” from PC Williams. The learned judge adjourned the trial for PC Williams to give a further statement.

[62] Mr Banner submitted that PC Williams gave a fresh statement detailing his prior knowledge of the appellant only at that late stage, after he had already seen the appellant in the dock. He submitted that the lateness of that account was a significant weakness which the learned judge ought to have addressed. If the appellant had truly been well known to the witness, that knowledge would have been at the forefront of the witness's mind when he gave his original statement to the police, and it would have been recorded in that statement. Because PC Williams was a member of the Belize Police Department, a higher standard of completeness was to be expected of his statement.

[63] In response, the learned DPP submitted that the suggestion of a late or fresh statement was inaccurate. She disputed the propositions advanced by Mr Banner in that regard. The learned DPP submitted that it is apparent from the transcript that PC Williams' account set out not only that he had known the appellant but also the circumstances in which he had come to know him. She submitted that the prosecution's reference to requiring “another statement” was made only after, and in response to, the learned judge's having set out the detail that the *voir dire* would require. The DPP submitted that it was inaccurate to suggest that it was only during the trial that the appellant came to learn that the Crown's case was based on recognition by PC Williams, the relevant prior knowledge having been acquired by the witness in his capacity as a police officer assigned to the Roaring Creek sub-station.

[64] In resolving these arguments, I state at the outset that neither PC Williams' earlier or belated statements were ever admitted into evidence, and were never put to PC Williams in cross-examination. Their contents were never part of the evidence before the learned judge, aside from what counsel would have suggested prior to the *voir dire*. Therefore, it is difficult to accept Mr Banner's argument that the learned judge should have taken the statements into account as constituting a weakness in the appellant's case. The statements were never part of the evidence at trial. As such, the learned judge was entirely correct when he decided at paragraph [51] of his judgment that the statements were “hearsay” and he would “not address [his] mind” to their contents.

- [65] In my opinion, the only real issue arising in the circumstances is whether the delayed production of the second statement caused any unfairness to the appellant. I have found the decision of ***R (on the application of Ebrahim) v Feltham Magistrates' Court and another; Mouat v Director of Public Prosecutions***²³ to be helpful in determining the impact of a failure by the prosecution (including the police) to collect relevant evidence in advance of the trial. Based on the pronouncements in that case, the central question for the court to determine in such a case is whether there could have been a fair trial, bearing in mind that the trial process compensates for many such defects in the Crown's evidence leading up to and at trial. The relevant question for this court, therefore, is whether the prosecution's failure to obtain a statement from PC Williams before trial rendered the trial unfair.
- [66] When the learned judge indicated that a *voir dire* would be held, he stated the matters that the *voir dire* would be required to address: whether the witness had prior knowledge of the appellant, whether that knowledge reached the threshold of recognition, and the circumstances of observation, including "lighting, distance, and so on".²⁴ It was at that stage that counsel for the Crown sought permission of the court to obtain a further statement from PC Williams. The Crown requested permission to obtain a further statement thereafter.
- [67] In the end, PC Williams's belated production of a statement was undesirable. I agree with Mr Banner that a higher standard of preparation is expected of the Crown prosecuting a matter involving recognition identification. The Crown should have been aware at an earlier stage that evidence to ground the claim of recognition would have been required, and that such evidence would need to be disclosed to the appellant in advance of the trial. However, I find that, in all the circumstances, the production of a further statement did not render the trial unfair.
- [68] On my reading of the transcript, the Crown's indication that it would obtain a further statement was not an indication that PC Williams did not know the appellant. Instead, it appeared to be the Crown's attempt to comply with its obligation to fully disclose the factual

²³ [2001] 1 All ER 83

²⁴ Transcript at pages 65 to 69.

basis of its case to the appellant, although it came late in the proceedings. PC Williams' further statement was not placed before us. However, based on counsel's indications, the further statement included details of the witness's claim that he knew the appellant. It provided the appellant with advance notice of the evidence PC Williams would give in support of his claim of prior knowledge and thus afforded the appellant the opportunity to more fully prepare his defence to that claim. The further statement, therefore, afforded the appellant an additional opportunity to cross-examine PC Williams and to undermine the genuineness of his claim to knowing the appellant.

[69] The appellant, however, did not take that opportunity and failed to confront the witness about his omission of details of his prior knowledge in his earlier statement. This is made evident in paragraph [51] of the learned judge's judgment, where he stated that "At no time during his testimony was PC Williams challenged on inconsistencies, discrepancies or lacunae in his testimony as compared and contrasted with his written statement". It was never put to PC Williams that his later statement was untrue to bolster the Crown's case. Therefore, the truthfulness of the assertions was never properly challenged before the learned judge, having regard to the omission of the same details in the first statement. Nor is there anything in the record of appeal, or any fresh evidence, to suggest that PC Williams fabricated his assertions that he knew the appellant.

[70] In my view, no prejudice or unfairness arose from the production of the belated statement, given the ample, albeit unused, opportunities the appellant had to utilise the belated production to his advantage. Consequently, I would reject these arguments by the appellant.

Inconsistencies

[71] Mr Banner submitted that there were material inconsistencies between the evidence of PC Williams, Cpl Rash and Brian Lopez, and that the learned judge erred in failing to address them. He pointed to similarities between the accounts of Mr Lopez and Cpl Rash. The learned judge had found Cpl Rash to be unreliable and PC Williams to be credible, but did not address his mind to Mr Lopez's evidence at all.

- [72] Mr Banner submitted that the differences between the accounts ought to have been considered as bearing upon the reliability and credibility of PC Williams' identification. Mr Banner further submitted that the narrative given by PC Williams was incredible. It was unbelievable that an assailant fleeing at speed, having lost control of his motorcycle and fallen, would sit up, look at the pursuing officer and retrieve his helmet, rather than flee at once into the dark area off the highway.
- [73] In response, the learned Director of Public Prosecutions submitted that the points advanced under this head were not borne out by the evidence. The supposed discrepancies between the accounts of Mr Lopez and PC Williams depended upon a conclusion which the appellant invited the court to draw, rather than upon the evidence itself: Mr Lopez's evidence was that he last saw the assailant heading towards the gas station, after which he returned to his vehicle, and the fact that he did not see what then transpired did not mean that nothing transpired.
- [74] As to the suggestion that PC Williams' narrative was incredible, the learned DPP submitted that questions of credibility are for the tribunal of fact; that the learned judge was entitled to reject the evidence of CPL Rash; and that there was nothing incredible in the account of a shooter who, having lost control of his motorcycle and fallen, sees an armed officer before him, looks at that officer while contemplating whether to surrender, and, on realising that the officer's weapon is empty, makes good his escape.
- [75] The submissions on both sides bring into focus the established principle that, as a matter of law, the assessment of the credibility and reliability of witnesses, and the reconciliation of their several accounts, is the learned judge's function sitting as a tribunal of fact. This Court will not interfere with his findings as to credibility, or with the verdict founded upon them, except where those findings are shown to be such as no reasonable tribunal could have reached, or the verdict is otherwise shown to be plainly wrong.
- [76] The crux of the appellant's submissions under this heading, is that the discrepancies in the evidence should have affected the judge's assessment of the credibility and reliability of PC

Williams' evidence. I do not find it necessary to go combing through all the inconsistencies which arose and may have arisen on the evidence given by these three witnesses.

[77] In my view, it suffices to say that the differences upon which Mr Banner relies are the natural consequence of three witnesses observing different portions of a fast-moving event from different places. I do not accept Mr Banner's submission that the learned judge did not treat with Mr Lopez's evidence. In the course of his judgment, the learned judge expressly recited the evidence of Mr Lopez, both in examination-in-chief and in cross-examination. As to Cpl Rash, the learned judge expressly considered his evidence and gave detailed and cogent reasons for finding him to be an unreliable witness. Specifically, the learned judge said that Cpl Rash claimed to have heard only a single gunshot, on a night when PC Williams spoke of hearing many, when PC Williams himself fired five shots, some eleven spent shells were recovered from the scene by the Crime Scene Technician, and when the video footage showed a number of shots being discharged. The learned judge's rejection of Cpl Rash's evidence was a conclusion plainly open to him.

[78] Finally, the submission that PC Williams' narrative was inherently incredible is an invitation to this Court to substitute its own view of the facts for that of the judge. That is not the function of this Court. Questions of credibility were for the learned judge, who saw and heard the witness give his evidence. In any event, there is nothing inherently incredible in PC Williams' account. The fact that a different account of events might have appeared more realistic does not render the account which the learned judge accepted incredible. The choice between competing accounts and the assessment of what is and is not believable was for the judge to make. His decision after weighing all the evidence cannot be characterised as irrational or as plainly wrong.

[79] For these reasons, I would also reject these arguments.

Sgt Fuller was not informed that the appellant was a suspect

[80] Mr Banner submitted that a further weakness lay in the evidence of Sgt Fuller. Sgt Fuller, who attended the scene shortly after the shooting, testified that he spoke to PC Rash, who was already present, and that Cpl Rash "told me certain information". Mr Banner submitted

that no one informed Sgt Fuller that the appellant was the suspect. Mr Banner contended that had PC Williams seen the appellant commit the killing, he would have informed Sgt Fuller and PC Rash. The absence of any such evidence was a weakness undermining the reliability and credibility of PC Williams' identification, which the learned judge ought to have considered.

- [81] The learned DPP submitted that the argument was built upon speculation rather than evidence. Sgt Fuller's evidence went no further than that PC Rash "told [him] certain information". No details of what was said were given. The DPP submitted that the appellant had impermissibly concluded, and had invited the Court to treat as fact, both that Sgt Fuller was not made aware of the suspect's identity, and PC Williams must have told PC Rash whom he had identified.
- [82] In my view, the appellant's arguments are without merit. Fundamentally, whether the identification of the appellant was communicated on the scene was not required in the circumstances of this trial. The reliability of PC Williams' recognition evidence was tested directly in the *voir dire* and in cross-examination. What PC Rash may or may not have said to Sgt Fuller after the shooting, or what PC Williams may or may not have said to any other officer, has no bearing upon whether PC Williams reliably recognised the appellant.
- [83] In any event, I agree with the learned DPP that Mr Banner's argument rests on an inference drawn essentially from silence. Sgt Fuller said only that PC Rash "told [him] certain information". The contents of that information were never put into evidence before the learned judge. The court is therefore unable to conclude that the appellant's identification had not been communicated to Sgt Fuller or PC Rash.
- [84] Counsel for the appellant in the court below had the opportunity to ask him about his knowledge of PC William's identification of the appellant. However, Sgt Fuller was not cross-examined. This was therefore not an issue which was raised concretely at the trial. In my view, the learned judge would not have been under any obligation to address this supposed weakness, as it was not borne out by the evidence. Therefore, I reject the invitation to

speculate that there was no communication of the appellant's identification as the assailant, and reject the arguments made in this regard.

The timing of the wanted poster

- [85] Mr Banner submitted that a further weakness in the Crown's case lay in the timing of the wanted poster issued in respect of the appellant. He relied on the evidence of Cpl Ferguson, the investigating officer, to the effect that on 19th December 2019, he commenced an investigation into the matter and, based on that investigation, issued a wanted person poster for the detention of David Cruz. Mr Banner submitted that, the incident having occurred on 12th December 2019, one would have expected the wanted poster to have been prepared on the day of the incident, or at the latest on the day following, given the Crown's position that PC Williams recognised the assailant. The delay of seven days, he submitted, was a weakness in the Crown's case which had the potential to significantly weaken it, and which the learned judge ought to have addressed. He submitted that if the police knew, at the time of the incident, who the killer was, there was no reason to wait seven days to prepare the poster.
- [86] In response, the learned DPP submitted that the appellant's argument rested on an assumption regarding police procedure, namely that the police issue a wanted poster as soon as they know the identity of a suspect, rather than when they have identified a suspect who cannot be located. She submitted that the latter inference was more appropriate to draw from the delay in posting the wanted poster. She contended that the poster was issued on 19th December 2019, yet the appellant was not taken into custody until 14th January 2020, when he himself presented at the Belmopan Police Station. The timing of the poster, she submitted, could not constitute a weakness in the identification evidence.
- [87] I accept the learned DPP's submission that the timing of the wanted poster was not a weakness in the identification evidence in the case. Mr Banner's submissions require the court to treat the timing of the wanted poster as a weakness in the Crown's identification, based on assumptions about police practice that were never established in evidence. No evidence was led at the trial as to the procedure governing the preparation or issue of wanted

posters, as to the circumstances in which such a poster comes to be issued, the stage of an investigation at which it is ordinarily prepared, or the purpose it is intended to serve. In the absence of any such evidence, the appellant is hard pressed to establish that the interval between the incident and the issuance of the poster was a departure from proper practice, which is capable of being understood as a weakness in the Crown's case. In the circumstances, I decline the invitation to make any assumptions concerning police procedure in issuing the wanted poster.

- [88] Even more importantly, the identification of the appellant as the assailant rested upon the recognition evidence of PC Williams, which I have examined at length earlier in this judgment. Cpl Ferguson was the investigating officer. He was not a witness who claimed to identify the appellant. The date on which Cpl Ferguson caused the poster to be prepared has no bearing on the cogency, credibility and reliability of PC Williams' recognition of the appellant on the night of the incident. In my view, it would have been irrational for the learned judge to have utilised the timing of the wanted poster to undermine PC Williams' cogent and unchallenged identification evidence. I therefore reject the appellant's arguments related to the wanted poster.

Conclusion on ground ii

- [89] Having rejected all the arguments advanced under this ground, I am of the view that the appellant has not demonstrated any error in the learned judge's treatment of the identification evidence. I would accordingly dismiss ground ii in its entirety.

Conclusion

- [90] Section 216 (1) of the **Senior Courts Act, 2022** permits this court to allow an appeal and set aside a conviction if it thinks that- (i) the verdict of the judge is unreasonable or cannot be supported having regard to the evidence; (ii) the judge's decision was wrong on a question of law; or that (iii) there was a miscarriage of justice.
- [91] For all the reasons given above, I conclude that the appellant has not demonstrated any ground upon which the appeal may be allowed on any of the bases prescribed in section

216. In summary, the learned judge did not err in permitting a dock identification in this trial, and the learned judge's treatment of the identification evidence at trial cannot be faulted.

[92] Consequently, I would make the following orders:

1. The appeal against conviction is dismissed, and the conviction is affirmed.
2. The sentence shall be deemed to commence on 23rd May 2023, the date it was imposed.

Peter I Foster KC
Justice of Appeal

Marguerite Woodstock Riley KC
Justice of Appeal

Sandra Minott-Phillips KC
Justice of Appeal