IN THE COURT OF APPEAL OF BELIZE AD 2018

CRIMINAL APPEAL NO 6 OF 2017

ROBERT TAYLOR Appellant

v

THE QUEEN Respondent

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BEFORE

The Hon Mr Justice Sir Manuel Sosa	President
The Hon Mr Justice Samuel Awich	Justice of Appeal
The Hon Mr Justice Murrio Ducille	Justice of Appeal

H E Elrington SC for the appellant.
C Ramírez, Senior Crown Counsel, and J Willoughby, Crown Counsel, for the respondent.

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15 June and 3 August 2018

MAJORITY REASONS FOR JUDGMENT

SIR MANUEL SOSA P

Introduction

[1] On 10 April 2017, Robert Taylor ('the appellant') was convicted of the offences of abduction and rape before Hanomansingh J ('the judge') and a jury in the court below, sitting in Dangriga. On 26 April 2017, the judge imposed on the appellant a sentence of 12 years' imprisonment in respect of each conviction, ordering that the two sentences run concurrently. From those convictions the appellant appealed and in respect of those sentences he sought leave to appeal. At the close of the hearing on 15 June 2018, this Court intimated that, for reasons which it proposed to give at a later date, it was allowing the appeal, quashing the convictions and directing the entry of judgments and verdicts of acquittal. The Court now gives its reasons for judgment.

[2] It is appropriate to preface the narrative of the relevant evidence with a few general observations as to the trial, at which the appellant was unrepresented and which, relatively speaking, was medium-length. Evidence was received over a four-day

period running from Tuesday 4 April to Friday 7 April from a total of seven Crown witnesses, including the complainant JM, and two defence witnesses, including the appellant. On Monday 10 April, the appellant addressed the jury. There followed a summing-up on the part of the judge which is not so much as mentioned, let alone reproduced, anywhere in the record of appeal. Still speaking relatively, this was a decidedly abbreviated summation. According to notes made at the trial, at which he was prosecuting counsel, by Mr Ramírez, Senior Crown Counsel, the summing-up started at 9.30 am and the jury was already retiring to deliberate by 9.53 am, that is to say a scant 23 minutes later.

The factual background

[3] The Crown evidence indicated that the relevant events commenced swiftly to unfold a little after about 7.45 on the night of 25 January 2015, when a motor vehicle in which JM was travelling as a passenger made an unplanned stop on an unidentified street in Dangriga ('the unidentified street'). JM had heard a loud bang immediately before the vehicle was so brought to a halt. The driver, Marion Nicasio, alighted and began checking the vehicle. JM, too, alighted. Two masked men promptly materialised before them. One ('the gunman') was armed with a gun, the other ('the knifeman') with a knife. The gunman went straight to Nicasio, the knifeman to JM. Nicasio and JM were ordered back into the vehicle and the two assailants entered it as well. Nicasio was then ordered to drive to the former premises of the Putt Putt Bar ('the Putt Putt premises').

[4] Once there, Nicasio managed to break loose from the gunman and was well on his way to making good his escape. But, altogether heroically, upon one of the assailants shouting out to him that JM would be killed if he did not return and upon JM pleading to him to return, he retraced his steps and submitted himself to the assailants. He was thereupon administered a severe beating. Thereafter, he was led by the gunman into a nearby mangrove-covered area ('the shrubbery'). Re-emerging alone from the shrubbery, the gunman next led JM to a spot some distance away, where he proceeded twice to have non-consensual, anal sexual intercourse with her. The gunman then led JM back to the spot whence he had taken her, at which the knifeman had remained awaiting their return. He left her there with the knifeman and headed for the shrubbery again. Sometime thereafter, the knifeman, too, had non-consensual anal sexual intercourse with JM, once. Both before and after he so had intercourse with JM, the latter had heard him speaking. When, after the passage of some more time, the gunman failed to rejoin him, the knifeman, with the assistance of JM, left the Putt Putt premises in the vehicle but not before first ordering JM to tell no one of her ordeal as he knew who she was and would kill her if she did.

[5] A critical point in the testimony of JM is reached during her account, in evidence-in-chief, of the way in which she assisted the knifeman to leave the Putt Putt premises in the vehicle. It is her evidence that, having failed in his efforts to turn on the vehicle's

ignition, he accepted an offer of help from her. To avail himself of her assistance, he permitted her to sit in the front passenger seat and he himself then took the driver's seat. When she succeeded in turning on the ignition, the interior dome light of the vehicle came on and, despite the fact that the knifeman was still wearing a stocking over his head, she was able immediately to recognise him as the appellant. This was possible, she testified, because of openings in the stocking which allowed her to see his eyes, nose and mouth. She did not, however, elaborate on what about his eyes, nose or mouth enabled her to recognise him.

[6] Another key point in JM's evidence is reached when, under cross-examination by the appellant, she states that apart from identifying him by his eyes, nose and mouth, 'I could still remember your voice'. This latter supposed aide to identification must be regarded against the larger picture painted by the entirety of JM's evidence up to that moment in the trial. She had said in evidence-in-chief that she heard the voice of the knifeman at no less than 16 different points during her ordeal, viz:

(i) when both assailants ordered her and Nicasio to alight on arriving at the Putt Putt premises;

(ii) when the knifeman ordered her to remove the lacings from a pair of tennis shoes;

(iii) when both assailants shouted out to a fleeing Nicasio;

(iv) when the knifeman ordered her to go behind the vehicle with him;

(v) when he told her he would have to have intercourse with her and ordered her to bend over;

(vi) when he ordered her to pull her slacks back up;

(vii) when he went on to order her to enter the vehicle and said they would have to await the return of the gunman;

(viii) when he told her they would have to go and try to find the gunman;

(ix) when he rejected her suggestion that he leave the Putt Putt premises without the gunman;

(x) when he ordered her to sit on a log;

(xi) when he first ordered her to tell no one what she had been through;

(xii) when he ordered her not leave until a mobile phone he gave her showed the time to be 1.30;

(xiii) when he ordered her for the second time to tell no one what she had been through;

(xiv) when he reported to her that he could not turn on the vehicle's ignition;

(xv) when he accepted her offer to start the vehicle's engine; and

(xvi) when he told her to sit in the front passenger seat in order to be able to assist him.

It was not JM's evidence that she, at any of those not less than 16 points during her ordeal, recognised the knifeman's voice to be that of the appellant. Rather it was her distinct testimony that the moment of first recognition was when, under the illumination of the interior dome light of the vehicle, she saw the appellant's stocking-covered head. But, as previously noted, the only parts of the knifeman's face exposed by virtue of holes in the stocking were his eyes, nose and ears, none of which facial parts was said by her to be marked by a distinguishing feature.

[7] It must be mentioned, as well, that there was evidence from Aaron Ferguson, a police corporal, concerning the apprehension of the appellant on the very night of JM's ordeal. He testified to having gone by police motor vehicle in the company of another police officer to a location which he called the Guilisi Monument sometime after 8.30 that night. Finding parked at that location a maroon Nissan Rogue motor vehicle which he suspected (rightly as it later turned out) to be Nicasio's vehicle, he and his companion conducted a search of the immediate surroundings but found no one there. Presently, however, they heard the sound of an approaching vehicle and took cover. Sure enough, a motor vehicle soon drove up and parked some 10 feet from the Nissan Rogue. Three male persons alighted. One of these he soon recognised, thanks to the light of a nearby street lamp, as the appellant. Upon the two officers emerging from their hiding places and identifying themselves as police officers, the three male persons hastened back into the vehicle in which they had arrived and sped away. There ensued a chase by the two police officers which resulted in the apprehension of one of the three men, a Shane Bennett, by Cpl Ferguson himself.

[8] Cpl Ferguson stated under cross-examination that the appellant was apprehended, but not by him personally, that same night. It was put to him that, in fact, the apprehension took place at 6.45 the following morning at a place identified only as Ecumenical Extension and that he (the corporal) took the appellant to the office of Sergeant Ferufino on that same day, ie 26 January. It was further put to the corporal that the appellant was only detained because one of the three men called his (the

appellant's) name. Sergeant Ferufino, for his part, testified that the appellant was detained at about 2.30 am on 26 January 2015 at his home in what he (the sergeant) called the Monument Site Area. Plainly, the seeming difference between the respective testimonies of these two witnesses is but a matter of semantics. According to both, the appellant was apprehended on the same night, that of 25-26 January.

[9] There is, in the record, nothing to indicate on what date JM first called the name of the appellant as one of her two assailants on that fateful night. As the President pointed out to Mr Ramírez at the hearing, there is no indication that she named him to her friend, Yusef Wilson, the first person from whom she sought help after leaving the Putt Putt premises that night; or to WPC Marlene González, who went to collect her at the home of Ms Dionne Enríquez that night; or to WPC Stephanie Lino, the officer in charge of the Domestic Violence Unit at the Dangriga Police Station that night; or to Dr Aimee Hunter, who medically examined her at the Southern Regional Hospital in Dangriga that night. Significantly, WPC Lino, the investigating officer by her own admission under cross-examination, gave evidence (a) that it was only until 27 January 2015 that she recorded a statement from JM and (b) that it was only until 28 January 2015 that she charged the appellant with the crime of rape. (To this it must be added that, also in cross-examination, WPC Lino testified not only that she – the investigating officer as already noted – never gave any instructions to any police officer to go and arrest the appellant but also that she still – ie while testifying – did not know who gave the instructions for the appellant to be detained.) It is necessary and helpful to juxtapose these last two dates with the night of 25-26 January 2018, when, on the evidence of Cpl Ferguson, the appellant was among the three male persons who showed up at the spot near the Guilisi Monument where the Nissan Rogue was parked. Clearly, the appellant's having been charged on 28 January may be explained by his having been identified by Cpl Ferguson on the night of 25-26 January. To explain it on the basis of an identification by JM of the appellant would be to ignore the total absence just highlighted above of relevant evidence as to the calling of the appellant's name by JM on the night in question, an absence, which, indeed, raises the burning question whether her (presumed) calling of the name of the appellant, whenever that may have been, was independent of Cpl Ferguson's calling of it.

Relevant law

[10] Regarding the absence on appeal of any record of the summing-up in a criminal trial, the decision of the Judicial Committee in *Roberts and anor v The State*, Privy Council Appeal No 12 of 2002 (judgment delivered on 15 January 2003) is instructive. Giving the judgment of the Board there, Lord Rodger of Earlsferry, having referred to the clear need arising on the facts of that case for an appropriate direction on visual identification, said, at para 7:

‘At this point a difficulty emerges. At some time during the many years of delay before the Court of Appeal heard the appeal, the shorthand notes of the judge’s summing up were lost. How this came about remains a mystery: there was some suggestion that it might have happened when the court moved premises, but that is just speculation. The result is that it is now impossible to tell what directions the judge did in fact give on identification. That does not in itself mean that the appellants’ convictions should be set aside. On the contrary, it is well established that the loss of the transcript of a summing-up is not, without more, a ground for setting aside a conviction.’

[11] But, having made that general statement, Lord Rodger went on immediately to address the significance in such cases, having regard to two authorities, of a reasonable suspicion that something went amiss at the trial. He said, *ibid*:

‘Speaking of the shorthand note of the proceedings at a trial, Channell J said in *R v Elliott* (1909) 2 Cr App R 171, 172:

“The absence or sufficiency of a shorthand note is not of itself a ground upon which a prisoner can succeed upon appeal, nor the existence of a proper note a condition precedent to a good trial. Where, however, there is reason to suspect that there is something wrong in connection with the hearing of a case, the absence or insufficiency of a proper shorthand note may be material.”

In *R v Le Caer* (1972) 56 Cr App R 727, 730-731, Lord Widgery CJ quoted this passage and continued:

“The court would adopt those words as being entirely appropriate to the present facts and to the present case; in other words, the simple fact that there is no shorthand note is not of itself a ground for saying that the conviction is unsafe or unsatisfactory. In order that the appellant may claim that conclusion, he must be able to show something to suggest that there was an irregularity at the trial or a misdirection in the summing-up. Unless there is something to suggest that an error of that kind took place, the absence of a shorthand note simpliciter cannot cause the court to say that the verdict of the jury was unsafe or unsatisfactory.”

These passages show that the lack of a transcript of the judge’s summing-up is significant only if the appellants can point to something to suggest that it contained a misdirection.’

[12] *Roberts'* case had to do only with evidence of visual identification as distinct from evidence of voice identification. On the subject of voice identification, relevant guidance is to be found in the decision of the Judicial Committee in *Phipps v Director of Public Prosecutions* [2012] UKPC 24 (judgment delivered on 27 June 2012). That was a case in which, according to the judgment of the Board, at para 21, part of the trial judge's pertinent direction to the jury had been as follows:

> 'Now, in order for the evidence of a witness to be accepted who said that he recognized an accused person by voice, to be cogent there must be evidence of the degree of familiarity the witness have (*sic*) had with the accused and his voice including the time the witnesses may have had to listen [to] the voice of the accused and the occasion when the recognition of the voice occurred must be such that such words used to make a recognition of that voice is (*sic*) safe to act on.'

[13] It was further noted in the Board's judgment that the trial judge there had reminded the jury that only one of the three witnesses giving evidence of voice identification had claimed to be familiar with the so-called 'telephone voice' of Mr Phipps. The topic had been returned to later in the summation when the directions given earlier had been made the subject of a reminder and the jury had been warned of the need to exercise 'very special caution' before accepting that the voice said to have been heard was indeed the voice of Mr Phipps. The Board also pointed out in its judgment that the trial judge had, at the request of the Crown, directed the jury that the witnesses who had given evidence of voice identification might, even if they were honest, be mistaken. Indeed, the Board saw fit to reproduce, at para 22 of its judgment, the relevant further direction of the trial judge, which was as follows:

> '… I omitted to indicate to you that sometimes people can be very convincing although they are mistaken when they say that they identify somebody by their voice on the telephone. And you are going to be very careful in your assessment of the evidence because an honest witness can also be a mistaken witness. The witness may honestly feel that the person they heard on the phone was John Brown, but in fact it turns out to be otherwise. So you look on the evidence, the circumstances under which the identification of the voice was made. You look at the previous history of the person who heard the particular voice. The person who seeks to identify the person by voice, what opportunity that other person would have had to have heard the voice. I told you that of the three person (*sic*) who said they heard the accused, only one had given evidence that he had spoken to and heard the accused on a telephone. So please remember that.'

[14] While criticisms were levelled by counsel for Mr Phipps at the obvious plenitude of directions given by the trial judge on voice identification, they (the criticisms) were all rejected as unfounded by the Board. But Lord Carnwath, who wrote the judgment in that case, made observations pertinent in the instant case when he said, at para 27 thereof:

> 'There is no doubt as to the importance of the guidance in *Turnbull* [[1977] QB 224] nor as to its application in principle to identification by voice recognition. In that context more detailed guidance has been given more recently by the English Court of Appeal in *R v Flynn and St John* [2008] 2 Cr App R 20. However, as has been emphasised on many occasions, and as the Court of Appeal recognised in this case, "no precise form of words need be used so long as the essential elements of the warning are given to the jury": *Shand v The Queen* [1996] 1 WLR 67, 72. The judge could hardly have done more to bring to the attention (*sic*) [of the jury?] the need for caution in considering this part of the evidence, and the reasons for it ..."'

[15] Among the subjects of the criticisms launched on behalf of Mr Phipps at the conduct of the police investigation had been the failure to hold a 'controlled identification procedure' to test the accuracy of the identifying witnesses, in the context of which subject reliance had been placed on *Aurelio Pop v R* [2003] UKPC 40. The Board was not impressed by the criticism of that failure – but only because of the fact that it (the Board) regarded *Pop* as clearly distinguishable from *Phipps*. The Board said, at para 28 of its judgment:

> 'Nor was [counsel for Mr Phipps] able to indicate with any clarity what form of "identification procedure" should have been adopted. *Aurelio Pop v R* was a very different case. No full *Turnbull* direction had been given, and the identification evidence was "more than usually open to criticism" being a sighting in a dark street, by a single eyewitness who had given divergent accounts to the police and to the court (para 17).'

In the instant case, as already noted above, JM's visual identification was of a man at all times wearing a stocking over his head with holes in it only for his eyes, nose and mouth; and her claimed voice recognition of that man cannot properly be described as free-standing for the reason that, on her own showing, it only came, allegedly, upon her first seeing the appellant in the light of the vehicle's interior dome lamp, despite his having spoken to her umpteen times in dimmer light at various earlier stages of her ordeal. Was this evidence of visual and voice identification, like that in *Pop*, 'more than usually open to criticism'?

The request made of the Crown at the hearing

[16] Mindful of the guidance contained in *Roberts* and *Phipps* and already set out above, as well as of the fact that the appellant was unrepresented below, this Court, on the first day of the hearing, in an effort to put itself in a position to see whether there was reason to suspect that something had gone wrong in the court below, asked Mr Ramírez whether he had taken notes at the trial and, on learning that he had, asked him to produce the part thereof taken during the summing-up and also to consult the reports of the two cases in question. In response to this request, Mr Ramírez, on the second day of the hearing, produced his notes of the entire trial together with photocopies of the specified part. (He also provided the Court with photocopies of the reports of *Roberts* and *Phipps*.) His notes, which were fairly detailed insofar as they related to the summing-up, contained no mention of any direction at all from judge to jury on the evidence of voice identification given by JM. What is more, when this reality was pointed out by the Court, Mr Ramírez explained, with the frankness which is befitting of a minister of justice, that the judge had, in fact, not directed on voice identification.

The Crown concession

[17] Mr Ramírez went on commendably to concede that he could not support the conviction of the appellant on either count.

Concluding remarks

[18] As foreshadowed by the paragraph immediately preceding, the Court considers that the concession on the part of the Crown was entirely proper. There is, at the end of the day, reason to conclude that something not only went wrong, but went seriously wrong, at the trial – specifically, that the jury was given no direction at all as to how it was to deal with the evidence of voice recognition given by JM. (The notes of Mr Ramírez do not reflect much of a direction on visual identification either; but it is unnecessary to enter into a discussion of that.) It is sufficiently grave that the jury were left to deal with the evidence of voice recognition in whichever way they wished. It is impossible in the circumstances to rule out, for one, the possibility that the jury rejected the patently weak evidence of visual identification but accepted, and convicted the appellant upon, that of voice recognition. It seems doubtful in the extreme to this Court that a reasonable jury, properly directed as to the latter evidence, would have convicted the appellant of either of the two counts in question.

[19] As to the question posed at the end of para **[15]**, above, the Court can only answer it in the affirmative. Not only was the evidence of identification here, both visual and voice, more than usually open to criticism, as the identification evidence in *Phipps* (in contradistinction to that in *Pop*) was not, it was also the case here that no direction at all was given on voice identification. (In *Pop*, which turned only on visual identification,

there had at least been some attempt – admittedly inadequate – by the judge at giving a *Turnbull* direction.) It follows that, in the opinion of this Court, some sort of controlled identification procedure was required in this case. In *Phipps*, the Board pointed out that Mr Phipps' counsel had not been very clear as to the form of procedure that, in his submission, ought to have been adopted. In the view of this Court, an identification parade (had one been held in the present case) for the testing of the visual identification could have stood no chance of being deemed adequate at trial unless all men in the lineup wore over their heads stockings having in them holes only for their eyes, nose and mouth. By the same token, a parade held for the testing of voice identification could have stood no chance of being accepted as adequate at trial unless it only enabled JM to hear the voices of the appellant and eight other men, all nine of them wearing stockings, with holes as previously described, over their heads throughout. The failure of the police to hold such a controlled identification procedure to test JM's ability to identify the appellant by the sound of his voice was a fit subject for animadversion by the judge in directing the jury on the topic.

[20] The omission of the judge to direct the jury on the matters mentioned in the two paragraphs immediately preceding amounted to grave misdirections. That the summing-up was, on the solemn assurance of Mr Ramírez, tainted by such an omission means that the Court cannot feel satisfied that there has been no miscarriage of justice in the instant case. In the final analysis, the possibility that the appellant was not only charged but also convicted simply because he was identified as one of three men who arrived at the scene near the Guilisi Monument where the Nissan Rogue was parked on the night of JM's ordeal is too real to be disregarded. One of those three men, it cannot be overemphasised, was most definitely neither on the unidentified street nor at the Putt Putt premises when the events in question unfolded that night. Manifestly, neither the evidence of identification adduced by the Crown against the appellant nor the directions of the judge on identification were capable of passing muster. The case that the appellant was on that street and on those premises at the material times cannot, in short, be taken to have been established to the requisite standard by the Crown.

The judgments and verdicts of acquittal

[21] Bearing in mind the relevant principles enunciated by the Judicial Committee in the leading case of *Dennis Reid v R* [1980] AC 343, the Court did not consider that it would be in the interests of justice to order a retrial. The last two sentences of the paragraph immediately preceding freely flow into the following passage from the judgment of the Board appearing at page 348 of the report:

> 'It would conflict with the basic principle that in every criminal trial it is for the prosecution to prove its case against the defendant, if a new trial were ordered in cases where at the original trial the evidence which the prosecution had chosen to adduce was insufficient to justify a conviction by any jury which had been

> properly directed. In such a case whether or not the jury's verdict of guilty was induced by some misdirection of the judge at the trial is immaterial; the governing reason why the verdict must be set aside is because the prosecution having chosen to bring the defendant to trial had failed to adduce sufficient evidence to justify convicting him of the offence with which he has been charged. To order a retrial would be to give the prosecution a second chance to make good the evidential deficiencies in its case – and, if a second chance, why not a third?'

There were, as already pointed out at para **[9]**, above, glaring evidential gaps in the Crown case at trial, for the filling of which gaps the Crown should have no opportunity. Hence, the decision to direct the entry of judgments and verdicts of acquittal.

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SIR MANUEL SOSA P

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DUCILLE JA