IN THE COURT OF APPEAL OF BELIZE AD 2020

CRIMINAL APPEAL NO 4 OF 2018

KEVAUGHN STAINE Appellant

v

THE QUEEN Respondent

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BEFORE

The Hon Sir Manuel Sosa	President
The Hon Madam Minnet Hafiz Bertram	Justice of Appeal
The Hon Mr Justice Lennox Campbell	Justice of Appeal

H E Elrington SC for the appellant.
S Smith, Senior Crown Counsel, for the respondent.

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28 and 29 October 2019 and 8 December 2020

MAJORITY REASONS FOR JUDGMENT

SIR MANUEL SOSA P

Introduction

[1] Sometime after 10.30 pm on 31 December 2013, as the old year drew to a close and a young woman called Taisha Staine ('Miss Staine') walked along Gladden Street, Belize City, homeward bound after a trip to a nearby store, she had a disastrous encounter with a cold-blooded gunman who repeatedly shot her in different parts of her body, causing her a total of eight gunshot injuries. (Miss Staine was 23 years old at the time of the trial to be referred to below.) That same night, the police detained and took into custody 16-year-old Kevaughn Staine ('the appellant'), who was in due course

charged with the attempted murder of Miss Staine. The appellant was tried before Colin Williams J ('the Judge'), sitting without a jury, on an indictment for attempted murder on 18 and 19 April 2018. On 4 May 2018, the Judge convicted the appellant of attempted murder and on 26 October 2018 imposed on him a sentence of ten years' imprisonment, effective from the date of his conviction. On 29 October 2019, at the end of the hearing of the appeal by the appellant from that conviction, this Court dismissed such appeal and affirmed the conviction and sentence. The reasons for judgment which were then promised shall be given below.

The Crown evidence at trial

[2] The essential narrative was provided in Miss Staine's evidence-in-chief. She had been sent out by her mother, with whom she lived at the corner of Gladden Street and MY Street, at about 10.30 that fateful night on a shopping errand. She had done her shopping on Lacroix Boulevard and returned from there to Gladden Street, when she saw the person who ended up shooting her ('the gunman') emerge into view, some 100 feet away from her. The gunman was riding on a bicycle from MY Street into Gladden Street. She kept her eyes on him. He was riding in her direction. It was her testimony that, when he was about 50 feet away from her, she realised that he was the appellant, whom she knew well. (It was to be disclosed by one witness at the sentencing hearing held several weeks after the trial that they are, in fact, blood relatives.) She testified that she recognised him as a result of having an unobstructed view of his face in the combined light of a nearby street lamp and two electric lights on the exterior of her house. It was her further testimony that she knew him by his name, viz Kevaughn Staine, as well as by his nickname, viz 'Bigga'. She knew him 'from around the area' as she put it in evidence-in-chief; and his grandmother lived one lane away from her home.

[3] When the gunman was some 3 or 4 feet way from her, he, in her words in evidence-in-chief, 'pulled something out of his waist' and opened fire on her. They were both directly under the street lamp at this time. Upon feeling the first shot hit her, Miss Staine stood in a state of shock, looking at the gunman for about 3 to 4 seconds, during which brief interval their eyes met. Immediately thereafter, she took to her heels, running into the

yard of one of her neighbours, where, unfortunately, she fell face-down to the ground. She could hear more shots being fired as well as his footsteps. She saw him firing at her. She covered her face. She felt another shot hit her, this time in her back. When she ceased hearing his footsteps, she shouted for help. Presently, she heard the voices of neighbours around her. The police then arrived on the scene. They placed her in a pickup truck and carried her away, heading no doubt to the Karl Heusner Memorial Hospital ('the KHMH'). Along the way, they met an ambulance. She was then transferred to the ambulance, which carried her the rest of the way to the KHMH.

[4] Regarding her alleged prior acquaintanceship with the appellant, Miss Staine gave evidence that she had known him 'growing up about 6 or 7 years', during which period she would see him daily and speak to him face-to-face. As to the time during which she had him under her observation on the night in question, she said, as already noted, that she had looked at his face for some 3 to 4 seconds after being shot for the first time. Having testified as to these matters, Miss Staine was allowed to point out the appellant sitting in the dock as the person called Kevaughn Staine, and also known as 'Bigga', who had shot her on the night of 31 December 2013.

[5] In response to questions from the Judge, Miss Staine gave evidence that she was shot in her neck (once), chest (twice), left hand (thrice) and back (once), as well as in a leg (once). She went on to testify that, as a result of having been shot that night, she was, up to the time of the trial, unable to move two of her fingers.

[6] The cross-examination of Miss Staine brought out further relevant details. With respect to lighting, she said that the two lights in question on the exterior of her house were located on the veranda. In regard to the shooting, the shot to her neck had actually penetrated, rather than merely grazed, her neck. She had turned and looked back upon hearing further shots whilst fleeing. She could not say at exactly what point that night she had been shot in the left hand. The two fingers that she was unable to move were on her left hand. It was in the upper back that she was shot. She pointed out the mid-thigh area

when asked to show the part of her left leg where she had been shot. As to her running away, she testified that she had run past the gunman upon taking to her heels.

[7] As regards her evidence-in-chief that the appellant had pulled something from the area of his waist and opened fire on her, Miss Staine made it clear whilst under cross-examination that it was a gun that he had pulled out and that he had used his right hand to do so. The Court would note here, in passing, that defence counsel saw fit to devote much effort to shaking this piece of evidence. The point of that exercise is, with respect, hard to see. There is no denying that, even without this piece of evidence, the clear inference from Miss Staine's related evidence-in-chief is that, if indeed he pulled out something and opened fire, that something could only have been a gun. (It needs to be noted that Mr Hubert Elrington SC, who represented the appellant not only below but also here, later recognised the inevitability of this inference: see the fourth paragraph of his skeleton argument filed in this appeal on 25 September 2019.) Pressed for a description of the gun, Miss Staine testified that that it was small and black in colour. She further stated that the very first shot fired by the gunman had caught her and that she had experienced pain in the neck upon being so shot. She had also felt pain in the upper back whilst lying on the ground and hearing more shots being fired; but she had not looked up from that position.

[8] Concerning her alleged recognition of the appellant as her assailant, Miss Staine maintained in cross-examination that she did see the face of the appellant. She rejected out of hand defence counsel's suggestion that it was raining at the material time. His further suggestion that the street lamp in question 'pointed in somebody's yard', rather than on the street, fared no better. She repeatedly said that she had actually seen the appellant whilst he was on the street; thus resisting every effort of counsel to induce her to say that a substantial part of her observation of the gunman had occurred whilst he was in the relative darkness of the neighbour's yard. Counsel's next suggestion, that the street lamp was not functional at the time, was similarly dismissed by Miss Staine. She

readily admitted, however, that she did not take notice of how the gunman was dressed, having focused her attention on his face.

[9] Unsurprisingly, Mr Montero, prosecuting counsel, did not see fit to re-examine Miss Staine.

[10] Ms Germaine Thompson, the next witness to be called by the Crown, also gave evidence of visual identification against the appellant. She confirmed that she had sent her daughter, Miss Staine, on a shopping errand at about half past ten on the night of 31 December 2013. About half an hour later, whilst cooking, she heard popping sounds outside her house, a bungalow standing some 5 feet from 'the street'. Peeping out from inside her house, she saw someone standing at 'the gate'; but she could only see the back of this person. She realised that the popping sounds were the sounds of gunshots and that the person she was seeing was shooting at someone. She peeped from her window for some 9 to 10 seconds. Thereupon, the person who had been shooting turned around and she was able to see his face. She testified that she then recognised him and said, 'Oh my God, who did Bigga something?' She next saw this person run out through the gate and pick up a bicycle which was lying on the street. At that point, she was able to see his face even more clearly than before as he was some 3 feet nearer to her. He remained at this decreased distance from her for some 7 seconds. He then put something into the area of his trousers' waist and rode off on his bicycle into MY Street.

[11] A couple of minutes later, Ms Thompson heard her name being called from outside. She went outside and someone told her something. She proceeded to cross the street. She saw Miss Staine lying on the ground, bleeding 'from everywhere'. Miss Staine kept calling the name 'Bigga'. Her eyes kept 'rolling back'. No motor vehicle had arrived on the scene to take her to the hospital. Ms Thompson testified that, to keep Miss Staine from 'falling asleep', she (Ms Thompson) kept asking her, 'Which Bigga shoot you?' And, continued the testimony of Ms Thompson, she kept hearing the same reply, ie 'Black Bigga'.

[12] With respect to the distance from which she had observed the face of the gunman that night, Ms Thompson's evidence was that it was some 20 to 25 feet. Nothing was obstructing her view and the quality of the lighting was good. There was a street lamp emitting light some 25 feet away from the gunman. He was in her view for about 9 to 10 seconds after turning around. (It would have been for 7 of these 9 to 10 seconds that the gunman would have been at the decreased distance from her to which reference has already been made at para **[10]**, above.)

[13] On the topic of the length of her prior acquaintanceship with the appellant, Ms Thompson said that she known him for a period in excess of 10 years, during which she had spoken with him. She had known him as a child; and, as a 'kid', he even used to come to her yard to play. She used to see him 'maybe every day' as he was 'from the neighbourhood'; and she would see his face when conversing with him.

[14] Ms Thompson was permitted by the Judge to point out the appellant in the dock as the gunman she had seen, and referred to as Bigga, on the night of 31 December 2013. She was so permitted over the objection of defence counsel, who contended that, in the absence of evidence that Ms Thompson had previously pointed out the appellant at an identification parade, she ought not to be allowed to point him out at trial as that would amount to a dock identification.

[15] Ms Thompson was subjected to lengthy and intensely zealous cross-examination by Mr Elrington. It very prominently featured an original line of attack which had not been deployed against Miss Staine, an indication that it may well have been the product of planning on the hoof, as it were. This unusual feature of the cross-examination is to be found at pages 99 to 110 of the record. The Court considers it unnecessary to set it out *in extenso* in this judgment, being of the view that the following five excerpts therefrom sufficiently capture its flavour.

[16] The first excerpt is from p 99 of the record and reads as follows:

‘Q. Have a look at the [appellant]. You would agree with me that [he] is so dark that even in the light of day and in our light it’s hard to identify him from where you are. You don’t agree with me?

A. (Inaudible)

…

MR ELRINGTON: With all the light and with the nearness seeing him is difficult.

Q. What do you say to that?

A. (Inaudible.) (Taken from the Judge’s notes. Answer = My vision is good and I could see him clearly.)

[17] The second excerpt, which is from p 100, reads:

‘Q. You don’t agree with me that at night that would be an impossibility? You don’t agree with me that seeing him 50 feet away or 22 feet away, at night, would be an impossibility to see him?

A. (Inaudible)

Q. Or 22 feet away?

A. (Inaudible) (Taken from the judge’s notes. Answer = 22 feet away I could see him clearly in the night.)’

[18] The third excerpt is from p 105 and reads:

‘Q. So you can’t describe clothes?

A. He had on full black. I can’t get into details with the clothes.

Q. Being in full black would make it harder to see him in the night, do you agree with that or you don’t agree? Looking at him, putting him in full black.

A. I would see him, yes.’

[19] The fourth excerpt is taken from p 106 and reads:

‘Q. I am suggesting to you, witness, that the colour of a black person can be such that it becomes impossible to see him in the dark.

THE COURT: Let me understand that? I am just trying to understand that.

MR ELRINGTON: I am saying to the witness, My Lord, that the colour of a black person could be such that it is impossible to see the person in the dark. In other words he is dark as night.

THE COURT: You can’t see a black person in the night [?]

MR ELRINGTON: I am saying to her that there are some black people that you can’t see in the night. My friend, only when smiling you saw his gold teeth but apart from that I don’t even know he’s beside me. He just had that wonderfully black colour.

THE COURT: But we are not talking about your friend …'

[20] The fifth excerpt is from p 109. It reads:

'Q. His features. Would you have seen his features without the light?

A (Low recording) (Taken from the judge's notes. Answer = Maybe if there was no light at all being in full black will make it more difficult to see him.)

Q. If there is no light would you have been able to see his features?

A. I think you would be able to see nobody.' (underline added)

[21] The record shows, at pp 111 to 112, that no response was heard by the court reporter in respect of a number of questions asked by defence counsel during the remainder of the cross-examination of Ms Thompson.

[22] The Court is not surprised that prosecuting counsel chose not to re-examine Ms Thompson.

[23] The only other witness for the Crown was a Cpl Chun of the Police Department, who gave evidence of having responded to a call made to the Raccoon Street Police Station, Belize City at 10.57 pm on 31 December 2013 by attending at Gladden Street, where he preserved a scene before leaving for the emergency section of the KHMH. He stated in evidence that, at the KHMH, he observed a female called Taisha Staine with gunshot injuries to the left hand, left leg and right side of the chest. Later that same night, he attended at the home of the appellant, where an Assistant Superintendent of Police Grinage handed over the appellant to him. He testified that he thereupon proceeded to arrest the appellant for the crime of attempted murder. He was allowed by the Judge to point out the appellant as the person who was so handed over to him on the night of 31 December 2013.

[24] Under cross-examination, this witness, treated by Mr Elrington as an expert in some unspecified area, admitted that he could not, from the witness box, tell the colour of the appellant's eyes. But he did not agree with Mr Elrington's suggestion that the reason for that was the colour of the appellant's skin. The following exchange between them is instructive:

> 'Q. Would you agree with me that seeing him in the night it would give you some problems to identify his feature (*sic*) because of his colour, you agree with me?
>
> A. No.'

The Judge, demonstrating how totally unimpressed he was by this line of questioning, quipped:

> 'I don't know how many other persons' colour of eyes [the witness] can see from there.'

And when Mr Elrington replied saying that he was straining his own eyes to see the appellant in the courtroom, the Judge admonished him in the following terms:

> 'I am sorry, let's get back to the seriousness of this trial.'

Counsel's dogged determination to secure a general admission, regardless of its objective value, from Cpl Chun eventually paid off, as the following exchange reveals:

> 'A. I am saying that <u>some people</u> are so dark when they see them in the night it's hard to distinguish the features. You don't find that is a reality?

Q. Yes, I do.' (underline added)

[25] At the close of the Crown case, Mr Elrington submitted to the Judge that there was no case for the appellant to answer. He argued mainly that there was either no evidence or only tenuous evidence before the Judge that harm endangering life had been inflicted on Miss Staine and that, accordingly, there was no evidence of an intention, on the part of the appellant, to kill. Prosecuting counsel's submissions to the contrary found favour with the Judge, who unhesitatingly ruled that there was a case for the appellant to answer.

The appellant's defence at trial

[26] Having been duly informed by the Judge of his options, the appellant elected not to give sworn evidence but rather to give an unsworn statement from the shelter of the dock. He proceeded to say that he was wrongly accused. He had neither shot Miss Staine nor otherwise committed a crime. Having so said, he chose not to call any witnesses of his own.

[27] Defence counsel freely chose not orally to deliver a closing speech on behalf of the appellant in reply to that of prosecuting counsel. He relied instead on the contents of his written submission of no case to answer, reminding the Judge of the applicable standard of proof, ie beyond reasonable doubt.

The judgment of the Judge as relevant in the present appeal

[28] The Judge delivered judgment in the trial on 4 May 2018. The Court grasps this opportunity to pay tribute to him for his efficiency not only in preparing his judgment but also in conducting a trial rendered highly challenging by what is perhaps best referred to, for present purposes, as the human factor.

[29] Importantly, the Judge recognised from the outset that, by his statement from the dock, the appellant was impugning the correctness of his identification by Miss Staine and Ms Thompson: see p 228, record. Having identified the issue of identification, he

directed his own attention to the further question of proof of an intention to kill: see p 229, record.

[30] Dealing first with the latter issue, the Judge considered the pertinent evidence, noting the propriety of drawing inferences therefrom, and reached the conclusion that the gunman had the intention to kill Miss Staine.

[31] Later in his judgment, the Judge noted the absence of any item of physical evidence to connect the appellant to the crime charged. He then turned to consider the issue of identification. Although he refrained from citing *R v Turnbull* (1977) QB 224, it is manifest that he had the practice guidelines laid down in that seminal judgment very much in mind in assessing the reliability of the evidence of visual identification adduced at trial. He dealt painstakingly with the evidence in the light of those guidelines in two different parts of his judgment, first at pp 234 to 247, record and then at pp 249 to 251, record. He first scrutinised Miss Staine's evidence and then went on equally searchingly to examine that of Ms Thompson. He arrived at the finding that the testimonies of Miss Staine and Ms Thompson 'were sufficient for both … to recognise [the appellant] and correctly identify him as the [gunman]'

[32] As already indicated at para **[1]**, above, the judge's verdict was that the appellant was guilty as charged.

The grounds of appeal

[33] The appellant's grounds of appeal, were originally set out, shown as three rather than two but unnumbered, in a notice filed on 24 May 2018, which read:

> 'The … Judge erred and was wrong in law in holding that the prosecution had discharge (*sic*) its evidential burden of proof with respect to the element of the offence of Attempt (*sic*) Murder namely that he the [appellant] intended to kill [Miss Staine] at the time the incident occurred.

> The … Judge erred and was wrong in law in holding on the close of the whole case that the prosecution had proved beyond a reasonable doubt or so that the jury could feel sure at the time the incident occurred the appellant had intended to kill [Miss Staine].
>
> The verdict was against the weight of the evidence.'

It is apparent that there are here only two grounds, the supposed first and second grounds, as worded, being in truth one only.

[34] A further notice filed by Mr Elrington more than 15 months later on 6 September 2019, stated an additional ground, viz that:

> 'The prosecution failed to prove at the trial that it was the appellant … who at the time and place in question fired the shots at [Miss Staine].'

The broad issue of identification was thus thrown into the mix. A four-page skeleton argument filed on 25 September 2019 predicated not only that the new ground remained intact and unaltered but also that it was the sole remaining ground. The silence of those submissions as to the ground concerning intention to kill was deafening, misleadingly as it was later to turn out. The gravamen of the argued case was that evidence given by Cpl Chun under cross-examination raised a reasonable doubt as to whether the gunman was indeed the appellant. In consequence, so it was said, the latter's conviction constituted a grave miscarriage of justice. In the last 15 lines of this skeleton argument, Mr Elrington threw in a list of 'facts' and points which he invited the Court to take into account as supportive of that ground. Conspicuous in its absence from that list is any point having to do with an allegation of improper dock identification.

[35] However, towards the end of the first day of the hearing of the present appeal, Mr Elrington sought and was granted leave to give necessary specificity to what, in truth, was his second, rather than third, ground, ie that the verdict was against the weight of the

evidence. Mr Elrington's attempt to set out his relevant ground is contained in a written submission produced in court on the second day of the hearing and reads as follows:

> 'The specific ground … is that under Belize law there is a requirement that evidence of identification admitted by way of Dock Identification be supported by prior evidence of an identification parade, and if no identification parade evidence is provided the Judge is to give the jury a specific warning on the dangers of having the Dock Identification evidence, unsupported by evidence obtained from an identification parade and where evidence of identification parade is not forthcoming – there is a need under Belize law for the Learned Trial Judge to give the jury a specific and detailed warning and direction along the line (*sic*) set out in *Max Tido v The Queen* and *Aurelio Pop v The Queen* as to why evidence of identification parade is important and advantageous to the Defendant and why it is dangerous to convict on the Dock Identification evidence alone.'

Without a claim that the Judge failed to give such a direction, this statement obviously did not rise to the level of a ground of appeal. The desideratum having being pointed out to Mr Elrington from the bench, he resolved, after two further attempts, to reformulate the ground to read simply that –

> 'The [Judge] failed to give himself the warning that had to be given in cases of dock identification.'

The ground centred on identification was thus materially narrowed down.

[36] As just indicated above, however, on the second and final day of the hearing before this Court, counsel surprisingly proceeded ever so matter-of-factly to resuscitate the ground concerning intention to kill upon which his skeleton argument of 25 September 2019 had been thunderously, and hence meaningfully, silent.

The material submissions made at the hearing and discussion thereof

1. Submissions – ‘dock identification’

[37] In determining the relative materiality of the submissions of Mr Elrington, it is important to note the structural features of that which, at the close of the oral argument, was the principal ground being relied upon by him. Those features are essentially as follows: at the base is the underlying contention that the identifications made in court by Miss Staine and Ms Thompson are dock identifications in the true sense of that term whilst, above that base, and supported thereby, is a warning which, according to counsel, ought to be given to a jury, in a trial by judge and jury, in keeping with the legal principles enunciated in cases such as *Aurelio Pop v The Queen*, Privy Council Appeal No 31 of 2002, *Pipersburgh v The Queen* [2008] UKPC 11 and *Max Tido v The Queen*, [2011] UKPC16. Given that structure, the crucial submissions of Mr Elrington are those, if any, tending to support his view that the identifications in question were indeed dock identifications. Only if that view is correct, will it become necessary to enter into the matter of the warning said to be required by the decisions in cases such as *Pop, Pipersburgh* and *Tido*.

[38] What, then, is there in Mr Elrington’s submissions tending to support his view that the identifications made by the two witnesses in question were dock identifications? It is only in the last paragraph of his two-page submission filed on the second day of the hearing of this appeal that Mr Elrington dealt with the reason why he regarded these identifications as dock identifications. He there wrote:

> ‘The evidence of identification of the mother was admitted without following the strict Turn Bull (*sic*) directions and is further compromised by absence of any identification parade and it is also further compromised by her repeated asking of her daughter when she arrived on the scene shortly after the incident “dah which bigga (*sic*) shot you?” this is clearly inconsistent with her evidence that she saw the [appellant] shooting her daughter.’

[39] In the circumstances, the Court need only point out that, in response to this crucial aspect of Mr Elrington's submissions, Ms S Smith, for the Crown, helpfully provided it with a copy of the decision of the Privy Council in *Mark France and Rupert Vassell v The Queen* [2012] UKPC 28.

2. Discussion – dock identification

[40] The Court has been quite unable to find any merit in this ground. In its view, the submissions of Mr Elrington rest on a crumbling foundation consisting of a fatal misconception of the term dock identification. The misconception should have been finally laid to rest following the judgment of the Board in *France and Vassel* some eight years ago.

[41] The Board had before it in that case a broad-based ground of appeal attacking the identification evidence upon which both appellants had been convicted. Not only was it argued, as in the instant case, both that the appellants had been subjected to impermissible dock identifications and that there was insufficient allusion by the trial judge to the fact that no identification parades had been held: it was further complained that the summing up was generally inadequate. (In the present appeal, in contrast, whilst, in a previous incarnation, the ground of appeal in question had been quite general, by the time when all had been said and done, Mr Elrington had substantially narrowed it down: see the final sentence of para **[35]**, above.) In *France and Vassel*, the crucial evidence of visual identification was given by a Crown witness called Hubert Sutherland who claimed to have had a previous acquaintanceship with Mr Vassel, known to him, as he testified, only as Legamore. Lord Kerr, delivering the advice of the Board, having previously briefly touched upon the evidence of Mr Sutherland, further referred to it in the terms following, at para 6:

> 'Hubert Sutherland gave in evidence the account set out above. He also testified that, although it was a dark night, there were two street lights outside the house

and that the minibus had stopped directly under one of these. He observed the face of France for some four seconds and that of Legamore for about six seconds. He had known both for about eight to ten years before the murder. Although he did not know Legamore's real name, he pointed to the appellant, Vassell, when asked to identify him during the trial. He had known him through playing football with him on a regular basis. He had also seen him in a betting shop, although, as he accepted under cross-examination, he did not speak to him then. It was put to him that he was mistaken about his identification but he rejected this suggestion.'

[42] Later in its judgment, the Board briefly discussed the well-established principle that an identification parade should be held where it would serve a useful purpose and proceeded to examine the challenge of the defence to Mr Sutherland's claimed knowledge of Mr Vassel. Having previously described such challenge as less than forthright, the Board went on to conclude as follows, at para 32:

'It is difficult to resist the conclusion that, against this background, it is extremely likely that [had an identification parade been held] Mr Sutherland would have picked out the man that he claimed to have known as "Legamore" for eight years and more and whom he had already identified to the police as one of the occupants of the minibus. It is, therefore, at least very doubtful that any useful purpose would have been served by holding an identification parade. In any event it cannot be plausibly suggested that the failure to hold an identification parade caused a serious miscarriage of justice. The appellants' arguments on this aspect of the appeal must be rejected.'

[43] As regards the dual contention of counsel for the appellants in *France and Vassel* that they had been impermissibly subjected to dock identifications and that the dangers of such identifications were inadequately dealt with by the trial judge, Lord Kerr, speaking as already indicated above for the Judicial Committee, in a passage appropriately highlighted in part for this Court by Ms Smith, said, at paras 33 to 34:

‘33. The argument that the trial judge should not have permitted a dock identification of the appellants and that he failed to deal adequately with the dangers of such an identification can be taken together and dealt with briefly. A dock identification in the original sense of the expression entails the identification of an accused person for the first time by a witness who does not claim previous acquaintance with the person identified. The dangers inherent in such an identification are clear and have been the occasion of repeated judicial warnings – see, for instance, *Pop (Aurelio) v The Queen* [2003] UKPC 40; 147 SJLB 692, *Pipersburgh v The Queen* [2008] UKPC 11, 72 WIR 108; *Edwards v The Queen* UKPC 23, 69 WIR 360 and *Tido v The Queen* [2012] UKPC 16, [2012] 1 WLR 115. The inclination to assume that the accused in the dock is the person who committed the crime is obvious.

34. 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 that “the person whom I have identified to police as the person who committed the crime is the person who stands in the dock.” ‘

[44] The Board went on to cite its then relatively recent important earlier decision in *Stewart v The Queen* [2011] UKPC 11, 79 WIR 409, as follows, at para 35:

‘In *Stewart v The Queen* … the identifying witness, Ms Minnott, claimed to have known the appellant and his family for a long time. Although the defence attacked Ms Minnott’s evidence on this, the Board held that that there was no real challenge

to her in fact knowing the appellant and his family in the way she described and accordingly being in a position to have recognised them on the day of the killing as she did. At para 10, Lord Brown, delivering the judgment of the Board said:

> "It is the Board's clear view that this cannot properly be regarded as a dock identification case at all. As already indicated, Ms Minnott knew not only the appellant but also his mother and his brother as well and it can hardly be thought that she was mistaken in her recognition of all three of them as having been present on the day in question. By the time she came to point out the appellant in the dock at trial (the 'dock identification' as Mr Aspinall seeks to characterise it) she had already told the police precisely who he was … It was in answer to the question 'and you see Peter Stewart here today?' that she pointed to the appellant in the dock. It was a pure formality."

[45] Concluding its relevant discussion, the Board in *France and Vassel* said, at para 36:

> 'The same considerations apply here. This was not in any real sense a dock identification. It was, as Lord Brown said in *Stewart*, a pure formality. The warning in the present case needed to be directed, therefore, not to the danger of the witness assuming that the persons in the dock, simply because of their presence there, committed the crime but to the need for careful scrutiny of the circumstances in which the purported recognition of the appellants was made. For the reasons given earlier in this judgment, the Board considers that the necessary directions to deal with those circumstances were contained in the judge's charge.'

[46] It is now necessary to return to the instant appeal. Both Miss Staine and Ms Thompson were witnesses comparable to Hubert Sutherland in an important respect. They both claimed, as he had done, previous acquaintance with the person they identified. And they were quite clearly not identifying the appellant for the first time when they pointed him out in the courtroom at trial. Moreover, there was no real challenge from

the defence to their knowing the appellant and therefore being in a position to identify him on the night of the shooting. It is very likely, in the view of this Court, that, had an identification parade been held, both of these identifying witnesses would have picked out the appellant as the person they used to see on a daily basis and had previously known, in the case of Miss Staine, as Kevaughn Staine and 'Bigga' over a period of six or seven years and, in the case of Ms Thompson, as 'Bigga' over a period of upwards of ten years. Accordingly, the Court regards it as, at least, very doubtful that the holding of an identification parade would have served any useful purpose in the present case. Furthermore, the pointing out by these witnesses of the appellant sitting in the dock at trial did not at all constitute dock identification. It was a mere formality in each case.

[47] It follows, then, that to adopt the language of Lord Kerr in *France and Vassel* which has already been quoted above:

> 'The warning in the present case needed to be directed … not to the danger of the witness assuming that the persons in the dock, simply because of their presence there, committed the crime but to the need for careful scrutiny of the circumstances in which the purported recognition of the appellants was made.'

However, as has already been explained above, in the present case, counsel for the appellant deliberately pruned and trimmed what had originally been a very general attack on the issue of identification to the point where it was reduced to a decidedly narrow challenge based entirely on the premise that the appellant had been wrongly subjected to dock identifications. Suffice to say, in those circumstances, that, as this Court has already suggested at para **[31]**, above, the Judge did not fall short in reminding himself of the need for careful examination of the circumstances in which the purported recognitions of the appellant were made by Miss Staine and Ms Thompson. This ground of appeal failed.

[48] Although the Court disapproves of the process of juggling which saw the remaining ground abandoned by necessary implication at an early stage, only to be revived to everyone's surprise on the last day of the hearing, it will nevertheless deal with the submissions made in support thereof.

3. Submissions – intention to kill

[49] The Court has reproduced at para **[33]**, above counsel's formulation of what he presented as the appellant's grounds of appeal on 24 May 2018. It is clear that he meant to state in his relevant notice two separate grounds of appeal, a first and a second, both centred on the holding of the Judge on the question of the evidence of intention to kill. As the Court has already opined above, the two pertinent formulations are such that the first adds nothing of significance to the second, with the result that there is, in fact, only one ground relating to intention to kill. It would seem that the formulation of the purported first ground could appreciably have been improved upon. The Court faintly senses, nevertheless, that the concern of counsel in formulating his so-called first ground was the ruling of the Judge on the submission of no case. Because of this, with due reluctance (since grounds should be clearly worded), the Court would have been prepared to consider the ruling of the Judge on the no case submission had the submissions of counsel, as opposed to the wording of the ground, so warranted. However, as already noted above, counsel's skeleton argument filed on 25 September 2019 had nothing to say on the subject of intention to kill. (The Crown understandably filed on 28 October 2019 **Submissions of the Respondent** in reply which focused on the single ground of appeal (relating to identification) dealt with by Mr Elrington in his skeleton argument filed on 25 September 2019.) And the supplemental written submission deployed by counsel on the second and last day of the hearing also avoided that subject. As to the oral submissions before this Court, they include one solitary submission (transcript of second day of hearing, p 18) on intention to kill, which is best set out in full. It reads:

> 'In terms of ground 1 and ground 2 of my grounds of appeal I would simply be saying that if you look at the evidential burden and later on if you look at the burden of proof on the whole case the Prosecution did not discharge its burden because

the evidence that was admissible and was before the court could not support a finding that there was an intention to kill since whatever evidence was there and I look at what the judge has said and he detailed the injuries, the (*sic*) detailed the weapon that was used, he detailed the circumstances of the incident. But at the end of the day it is my respectful submission that the evidence was consistent with an intention to kill. And also it was consistent with an intention to cause injury but not to kill. And that where the evidence of the prosecution – the case is primary balance between the two inferences. Then the inference that is favourable to the defendant ought to be drawn. And if that were done the court would have come to the conclusion that the prosecution had not discharge (*sic*) its burden of proof. That would be my submissions (*sic*), My Lord.'

[50] The Crown successfully sought permission to file submissions in writing on the issue of intention to kill on the morning of 28 October 2019, when Mr Elrington was granted time to narrow his ground relating to identification and to file submissions in support thereof. The core contention of the Crown in its concise written submissions was that the Judge considered all the relevant evidence before him and properly inferred therefrom that, at the time he shot Miss Staine, the appellant had a specific intention to kill. Rightly, as this Court sees it, the Crown understood the challenge to be directed to the verdict of the judge rather than to his ruling on the no case submission. Having seen those written submissions, the Court did not trouble Miss Smith orally to reply to Mr Elrington with respect to the issue of intention to kill on the second day of the hearing.

4. Discussion – intention to kill

[51] The Court must begin by deprecating the gradual manner in which the real complaint of the appellant was made known to itself and to the Crown. It was a surprise to hear only on the second day of the hearing, in the course of Mr Elrington's oral submissions, that the short point was simply that the Judge erred by inferring from the evidence an intention to kill, when it was open to him to draw a contrary inference favourable to the appellant. The material previously filed or otherwise presented in writing by Mr Elrington had given no inkling of this.

[52] That said, the Court finds no substance at all in the point. The contention that it was open to the Judge on the evidence before him to draw an inference favourable to the appellant must be, and is, summarily rejected. The Court is entirely in agreement with the following remark made by the Judge in his judgment, to be found at page 249 of the record:

> 'Did the person who inflicted the injuries have the specific intention to kill? Again there is a mountain to (*sic)* evidence that points to the positive answer to this question.'

[53] At that point in his judgment, the Judge had already made what this Court considers ample, if less than exhaustive, reference to the abundant pertinent evidence piled up against the appellant. Specifically, he had said:

> 'Intent is not always capable of positive proof, it has to be inferred at times from the surrounding evidence. In this case, one has to look at the things such as the nature of the injuries, where they are located, the position of vital organs to those injuries, the number and type of injuries, and the instrument used to inflict the injuries to come to the finding of intent. One looks therefore at the fact first of all that a firearm was used. Multiple shots were discharged at her that even after she ran away from the assailant that more shots were fired at her and that she received gunshot injuries to critical areas, her throat and chest. It can be concluded therefore that the shooter had the requisite intent to kill.'

[54] Immediately after making the remark quoted above, the Judge returned to the salient features of the Crown evidence, saying:

> 'Look at the instrument used, the gun, look at the areas of Miss Staine's body that were targeted, her throat and chest in particular. Look at the fact that she was pursued. The attacker disembarked the bicycle and went shooting after her. Look at the number of time (*sic*) she was shot at, clearly this is no accident but a

deliberate intentional act to kill. It was not until she fell and lay on the ground that the shooting stopped. The scale and nature of the violent attack with a deadly weapon fixes and (*sic*) intent to kill in the shooter.'

[55] These two passages from the judgment of the Judge were both drawn to the attention of this Court by Ms Smith in the course of her written submissions as being demonstrative of the Judge's due consideration of the relevant evidence before inferring from it the appellant's intention to kill. The Court accepts that these passages demonstrate such consideration. And the Court considers that the fact that the Judge chose to be concise in his reference to the salient pieces of evidence is no reason for thinking that he ignored the finer associated details not specifically mentioned. The Court does not, for example, believe that because the Judge said that it was not until Miss Staine fell and lay on the ground that the shooting stopped, one can properly conclude that, in reaching his finding on intention to kill, he disregarded her clear evidence that she was shot even whilst prostrate on the ground.

[56] The Court was not assisted by Mr Elrington's point that the evidence was consistent with both an intention to kill and an intention to cause injury. Inferences are drawn not from the evidence but from the facts found proved on the evidence. In this case, the finder of fact was the judge himself. It is plain that he drew his inferences from the facts which he found to have been proved by the Crown. He inferred an intention to kill in a case far removed from, for example, *Silva (Irwin de Jesus) v R*, Criminal Appeal No 18 of 1983 (judgment delivered on 11 May 1984), in which Mr Silva was charged with and convicted of attempted murder, dangerous harm and, to complicate matters, robbery and this Court (Sir John Summerfield P and Staine and Henry JJA), allowing the appeal, said, at p 3:

'In this case the multiple stabbing in furtherance of the robbery could have been with intent to kill the victim, or to subdue him, or to harm him, dangerously or otherwise, or to force him into submission and so on.'

[57] As the Court (Mottley P and Sosa JA, as he then was, and Carey JA) opined in the later decision of *Neal (Sidney) v R*, Criminal Appeal No 6 of 2001 (judgment delivered on 25 October 2001), the decision in *Silva* is not to be regarded as an attempt to lay down any rule to the effect that a jury should be told in the form of a formula that, where it is possible for jurors to draw more than one reasonable conclusion or inference, the conclusion or inference to be drawn is invariably the one which is more favourable to the accused. It is noteworthy that, in *Neal*, the Court said at paras 13 to 14:

> '13. Their Lordships were endeavouring [in *Silva*] to point out that in the particular case before them such a direction would have been helpful where the intent could have been to kill or subdue or to harm, the allegation being of stabbing in furtherance of a robbery.
>
> 14. We think that it is enough if a jury are told that they are entitled to draw inferences from proved facts if those inferences are quite inescapable, but that they must not draw an inference unless they are quite sure it is the only inference which can reasonably be drawn.'

[58] In the instant case, there was no complicating feature, such as a charge of robbery, to provide the basis for a successful attack on the inference drawn by the Judge from the facts proved. This Court considers that he drew the only inference which he could reasonably draw in the particular circumstances of the case before him. Counsel's attack was based on an erroneous view of the law and was, therefore, from the outset, doomed to fail.

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SIR MANUEL SOSA P

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HAFIZ BERTRAM JA