

**IN THE SUPREME COURT OF BELIZE, A.D. 2022  
CRIMINAL JURISDICTION**

**CENTRAL DISTRICT**

**Indictment No. C2 of 2018**

**THE QUEEN**

**v.**

**MELVIN BUDNA**

**- Murder**

**BEFORE**

Honourable Justice Mr. Francis Cumberbatch

**APPEARANCES**

Ms. Natasha Mohamed – Counsel for the Crown  
Mr. Arthur Saldivar – Counsel for the Accused

**TRIAL DATES**

21<sup>st</sup>, 22<sup>nd</sup>, 23<sup>rd</sup>, 24<sup>th</sup>, 29<sup>th</sup>, and 30<sup>th</sup> of June 2021; 5<sup>th</sup> of July 2021; 27<sup>th</sup> of September 2021; 22<sup>nd</sup> of November 2021; 7<sup>th</sup> and 15<sup>th</sup> of February 2022; 15<sup>th</sup> and 31<sup>st</sup> of March 2022.

**RULING ON VOIR DIRE**

{1} The Accused was indicted by the Director of Public Prosecutions for the offence of murder for that he on the, 19<sup>th</sup> day of February 2017, in San Ignacio Town in the Cayo District, murdered Alvaro Aldana (the ‘Deceased’). To this indictment the Accused entered a plea of not guilty, hence, a judge alone trial was held pursuant to the provisions of section 65A of the *Indictable Procedure Act*.

{2} During the course of the trial, the Crown sought leave to adduce evidence of the identification of the Accused by the witness, Shelly Lemus, which was done during a covert group identification parade. This was objected to by the Defence, hence, the Court held a *voir dire* to determine the admissibility of the identification evidence of the Accused obtained during a covert group identification.

{3} The Crown called the following witnesses to prove its case.

{4} **SGT NEWTON MARTINEZ** testified that on the 12<sup>th</sup> of October 2019, that he invited the Accused to participate in an identification parade which he refused to do. On Sunday 13<sup>th</sup> of October 2019, he decided to hold a covert identification parade. He contacted Justice of the Peace Jimmy Gongora and the witness Shelly Lemus. He said he told Lemus that he intended to hold a covert identification parade which she agreed to attend. They joined a police vehicle and drove to a location in San Ignacio Town where he observed a group of 9 persons: 3 females and 6 males, standing beside a food stall. He said that upon reaching 20' from the group he reminded Lemus of the report she had made where she stated that if she was to see the person again she would be able to identify him. He asked her if that was so and she said, "yes". He said he asked her to look around and see if the person was present. He also informed her that the person may or may

not be around. He asked her if she had seen the person anywhere around and she said, “yes”. He asked her to point towards the person. She pointed to a group of persons standing beside a food stall and pointed towards **a tall slim brown skinned male** dressed in a green tee-shirt and grey short pants. That person was the Accused and the witness said she was sure he was the person.

- {5} **UNDER CROSS-EXAMINATION** the witness agreed that in her statement, Ms. Lemus, said she saw a male dark skinned person. However, she pointed towards a person whom he described as brown skinned. He said the witness said in her statement that she could identify him.
- {6} He said he did not take any pictures of the covert group parade nor was there any video recording of the group of people. From 20’ away he reminded the witness of her statement then the vehicle drove past the group. He did not make a record of the description of the persons in the group parade. He said he did tell the witness that the person may or may not be in the group. He admitted that in his statement he did not state that he told the witness the person may or may not be in the group. When he conducted the group parade he was following the request of CPL Parham.
- {7} There was no re-examination.

{8} **JIMMY GONGORA JP** testified that on the 13<sup>th</sup> of October 2019, he attended the San Ignacio Police Station and spoke to SGT Martinez who introduced him to the witness, Lemus. They joined a vehicle to San Ignacio Town. When they got to a food vendor, Martinez asked Lemus, if she could point out the person that was involved in the shooting incident of her common-law-husband. He referred her to a statement of a person who approached her and her common-law at Benque Road, San Ignacio Town, and asked her to run when she heard gunshots. They reached 20' from the food vendor and it was clear and sunny and she pointed out **A TALL SLIM** male person with green tee-shirt and grey short pants.

{9} **UNDER CROSS EXAMINATION** the witness said, the persons I saw were all standing buying food.

{10} There was no re-examination.

{11} **SHELLEY LEMUS** testified. On Sunday 13<sup>th</sup> of October 2019, she went to the San Ignacio Police Station. She went in a vehicle and there were some officers and a Justice of the Peace and they asked her to identify the person she saw on the **Friday 17<sup>th</sup> of February 2017**. She said she spotted him and saw him between a crowd of people. He was standing between a taco stand in front of a store in downtown San Ignacio. That was the person she saw on the 17<sup>th</sup> of February 2017. She has seen him before talking to her ex-

common-law twice and his face is familiar. She was at her mother-in-law when she heard someone call so she looked and saw a slim male person standing at the entrance of the gate so she told Alvaro something. This happened on a Friday, 2 days before he died. When she spotted the person in the crowd of people she pointed at him. She was showing him to the Justice of the Peace and the officer next to her. She identified the Accused as the person she pointed out.

{12} **UNDER CROSS-EXAMINATION** this witness said after the shooting incident she gave a sworn statement to the police on the 20<sup>th</sup> of February 2017. She admitted that she did say in that statement **‘the park was kind of dark. I saw a tall slim dark complexion person. I told the police I did not see what kind of clothing the person was wearing. Male person was 30’ away from me to my left. I did not see his face clearly because everything happened so fast. I had him under observation for a second.** I heard Alvaro tell me run and began to run quickly and I did not look back because I thought the male person was following me. I told the police I believe I could identify the person. In my statement of 14<sup>th</sup> of June 2017, I told the police I do not know his name.

{13} That was the case for the Crown in the *voir dire*.

{14} The Accused was given his rights and he elected to make an unsworn statement.

{15} **ACCUSED UNSWORN.** After I refused the identification parade I was taken to the Savannah Street where the food stall was. At that time, I was the only tall person at the food stall. Other persons were Hispanic food vendors beside the police officers.

{16} The Accused called no witnesses and that was the case for the Defence.

### **The Law**

{17} The relevant law on visual identification procedures is to be found in the provisions of the *Belize Police Force Standing Orders* of 1992 and *Statutory Instrument* No. 118 of 2006. The jurisprudence of Police and Criminal Evidence Act on covert group identification parades has been adopted and applied within this jurisdiction notwithstanding the fact that the provisions of Police and Criminal Evidence Act do not form a part of the substantive laws of this jurisdiction by an Act of Parliament. Common law principles on identification are also a part of the laws of Belize.

### **Analysis of The Facts**

{18} The witnesses who participated in the covert group identification testified of their extent thereof. SGT Martinez testified that he reminded the witness Shelley Lemus of the report she made to the police that if she saw the person

again she would be able to identify him. He said he asked her if that was so and she said, “yes”. He said he asked her to look around and see if the person was present. He said he also informed her that the person may or may not be around. He asked her if she had seen the person anywhere around and she said, “yes”. He asked her if she was sure and she replied in the affirmative. He went on to say that the witness pointed out the Accused as the man she saw.

{19} However, under cross-examination SGT Martinez admitted that he did not say in his statement that he told Shelley Lemus that the man may or may not be around but in-chief he said he had told that to the witness. That statement was written on the same day of the 13<sup>th</sup> of October 2019, at a time when the particulars of the parade would have been fresh in the mind of this officer. However, no mention is made in his statement thereof. On this subject, neither Lemus nor the Justice of the Peace who were present during the group identification parade made mention of Martinez telling the witness that the man may or may not be around. It follows therefore, that the first time he is recorded as saying those words to Lemus was on the 29<sup>th</sup> of September 2022, when he gave his evidence in this Court. Moreover, neither SGT Martinez nor the witnesses stated **that he told Ms. Lemus that if she cannot make a positive identification she should say so.**

{20} In the circumstances, I am not satisfied to the extent that I feel sure that section 141 of the Belize Police Force Standing Orders was complied with.

Section 141 states thus:

*“Witnesses should be brought in one at a time. Immediately before the witness inspects the parade the officer conducting the parade shall tell him that the person he saw may or may not be on the parade and if he cannot make a positive identification he should say so. The officer should then ask him to walk along the parade at least twice taking as much care and time as he wishes. When he has done so the officer will ask him whether the person he saw on an earlier relevant occasion is on the parade”.*

{21} SGT Martinez admitted, that no photographs or video recording of the parade was taken, nor did he make a description of the persons on the parade. No reason was proffered for these omissions. This contravenes section 148 of the Belize Police Force Standing Orders which provides thus:

*“If the parade is held without a solicitor or friend of the suspect present a colour photograph of the parade should be taken. A copy of the photograph shall be supplied on request to the suspect or his solicitor within a reasonable time. A copy will be attached to the case file as in the case of other photographs but separately bound. The*

*photograph or film will be destroyed or wiped clean at the end of the court proceedings unless the person is convicted or admits the offence and is dealt with other than by conviction in which case it will remain with the case papers”.*

{22} It is common ground that at the time of the conduct of the covert group identification parade the Accused was unrepresented by Counsel nor did he have a friend present.

{23} I find the general principles on fairness as stated in Police and Criminal Evidence Act to be relevant and applicable to the proceedings herein to wit reads Annex C Section (A)(1):

*“the purpose of this Annex is to make sure, as far as possible, group identification follows the principles and procedures for identification parades so the conditions are fair to the suspect in the way they test the witness’ ability to make an identification”.*

{24} It stands to reason therefore that fairness is the overriding principle to be considered by the Court in its assessment of the conduct of an identification procedure in a criminal trial. Moreover, fairness is deeply entrenched in the Constitution of this country which is the Supreme Law.

{25} Section (A)(6) of Annex C provides thus:

*“although the number, age, sex, race, and general description and style of clothing of other people present at the location, cannot be controlled by the identification officer, in selecting the location the officer must consider the general appearance and numbers of people likely to be present. In particular, the officer must reasonably expect that over the period the witness observes the group, they will probably expect that over the period the witness observes the group, they will be able to see, from time to time, a number of others whose appearance is broadly similar to that of the suspect”.*

{26} Section 132 of the Police Standing Orders set out general principles for the conduct of an Identification parade:

*“The officer conducting the parade will assemble at least eight willing persons who are if possible not known to the suspect and as far as possible resemble the suspect in age, height, general appearance, race, and position in life. One suspect only shall be included in a parade unless there are two suspects of more or less similar appearance in which case they may be paraded together with at least twelve other persons. In no circumstances, shall more than two suspects be included in one parade and where there are separate parades they shall be made up of different persons. Where police*

*officers in uniform form an identification parade any numerals or other identifying badges will be covered”.*

{27} Section 157 of the Police Standing Orders states:

*“The general principles for identification parades set out above will as far as possible be adhered to in respect of group identification. Such parades should not be held in police stations if alternative arrangements can be made unless for security or other reasons it would not be practicable to hold it elsewhere”.*

{28} Emerging from these two sections is the principle that notwithstanding the type of identification procedure adopted there must be adherence to the rules of fairness for the protection of the rights of the suspect and compliance with section 6 (1)(2) of the Constitution,

*“1. All persons are equal before the law and are entitled without any discrimination to the equal protection of the law.*

*2. if any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law”.*

Thus without a description, a photograph or a video of the composition of this covert group identification parade the Court is unable to make an assessment of the participants as compared with the suspect on the parade.

{29} The Accused in his statement from the dock asserts that he was the only tall person there and the other persons were Hispanic food vendors. In his testimony, SGT Martinez gave no descriptions of the persons on the parade save and except to say that there were 9 persons: 6 males and 3 females.

{30} In the Court of Appeal decision of *Krismar Espinosa v Regina* the C/A adopted the *dictum* of Mottley P in *Albert Guy v R* to wit:

*“Whether an identification parade has been held in a fair and transparent manner and in fair and transparent circumstances depends, largely on the facts of the case, and taking into account The Police (Identification Parades) Regulations 2006. In Albert Guy v R, the complainant had described her assailant as, “a Coolie descent man, like East Indian”. She picked out the appellant out of an identification parade. He was convicted. This Court allowed his appeal. The Court observed that: “SGT. Florentine Salam, who conducted the parade said that, he went out and located eight male persons of similar features and heights to Albert Guy who is of East Indian*

*descent, “It is clear that SGT Salam appreciated the importance of having persons of East Indian descent on the parade.” The Court then reviewed answers given by SGT Salam to questions in cross-examination. It concluded that, SGT Salam, “was uncertain as to whether the eight persons placed on the parade were of East Indian descent”, and that, he was clearly unwilling to state that the participants on the parade were of East Indian descent. The Court held that, “the evidence relating to the conduct of the identification parade was in our view unsatisfactory. It is uncertain whether any of the eight were in fact of East Indian descent. To have an identification parade in circumstances where the appellant was the only person of East Indian descent is to ignore the basic principle that the parade must be conducted in a manner that is fair to the suspect. It may well be that the purported identification of the appellant at the parade led to his conviction. If the appellant was the only person on the parade who was of East Indian descent, then the parade was unfair to the appellant. We cannot be satisfied in the circumstances that there were more persons of East Indian descent on parade...”*

{31} To support its decision, the Court cited a Guyanese case, *The State v Ken Barrow*, 22 WIR 267, in which the appellant was the only person on the identification parade who had a scar on the left side of his face. The Court of Appeal of Guyana held that, the identification parade was not fair, “*it was a farce*”. The reason for the decision of the Court of Appeal of Guyana in the case (*The State v Ken Barrow*) was stated as follows:

*“It is most essential therefore, that the parade must provide a fair and just test. And to my mind, it is impossible to hold a test fair if only the suspect in a line can possibly completely fit the description of the criminal given to the police and elected in the memory of the witness.”*

{32} It is common ground that the Accused is not of average height and can be considered to be tall and slim. There is another issue as to whether or not he is brown skinned or dark. Besides he has been described by Defence Counsel as being a tall slim creole person. There is no evidence that any of the nine persons was tall and slim. However, it is abundantly clear that he is not Hispanic. As is hereinbefore stated, SGT Martinez, was of no assistance to the Court as to the description of the composition of the persons on the parade save and except to say there were 9 persons: 6 of whom were male and 3 females.

{33} I turn to the evidence of the witness, Shelley Lemus, on her identification of the Accused. This witness testified aforesaid that she was asked by the officers in the vehicle if she could identify the person she saw on the 17<sup>th</sup> of February 2017. After having pointed out the Accused to the police she went on to say that she had seen him on the, 17<sup>th</sup> of February 2019, and had seen him before talking to her ex-common-law husband twice and his face is familiar to her. That was on Friday 17<sup>th</sup> of February, 2 days before her husband died. The Justice of the Peace, however, in his testimony stated that,

*‘When they got to a food vendor Martinez asked Lemus if she could point out the person that was involved in the shooting incident of her common-law-husband. He referred her to a statement of a person who approached her and her common-law at Benque Road, San Ignacio Town, and asked her to run when she heard gunshots’.*

{34} It is my understanding, however, that the whole purpose of holding an identification procedure was to provide admissible evidence of the identification of the Accused as the person who killed the Deceased on the 19<sup>th</sup> of February 2017.

{35} As regards the incident on the 19<sup>th</sup> of February 2017, Ms. Lemus, admitted telling the police the following words in her statement made on the 20<sup>th</sup> of February 2017,

“the park was kind of dark but not extremely dark because there are some lights from lamps of the electricity posts that shine through the park. I did not see anybody in the park. The park is a big park and there is a lot of trees in the park..... I was walking with Alvaro (‘the Deceased’) through the park and he was walking to my left in front of me about 6 feet because I was afraid for snakes... .. I then heard a loud noise that sound like a gunshot and I saw a tall slim male person of dark complexion with something over his head but I cannot say what it was and I also did not see what kind of clothing he was wearing. The same male person was about 30 feet away from me to my left and there was nothing obstructing me when I saw him but I did not see his face clearly because everything happened so fast. I had him under observation for about a second and I heard Álvaro said run, so I run quickly to my left”.

{36} This witness has admitted telling the police that when the incident occurred she did not see the face of the person clearly because the place was dark and

she only saw him for a second. However, in her testimony at the *voir dire* she said she was asked by the police if she could identify the person she said she saw on the 17<sup>th</sup> of February 2017, which was 2 days before the alleged incident. This is inconsistent with the evidence of Jimmy Gongora, Justice of the Peace.

{37} It seems therefore, that the witness and the Crown have concluded that the person she saw on the 17<sup>th</sup> of February 2017, is and was the same person whose face she did not see clearly in dark surroundings for a second.

Therefore, the extent of Ms. Lemus's testimony is that the man she pointed out to the police at the parade is the man she saw speaking to the Deceased on the 17<sup>th</sup> of February 2017. That, however, is not the issue before this Court.

{38} In any event, I find on Ms. Lemus's testimony that the quality of identification of the person she said she saw at the park on the 19<sup>th</sup> of February is poor. It was held in *R v Turnbull* thus:

*“where in the opinion of the judge the quality of identifying evidence is poor he should withdraw the case from the jury and direct an acquittal unless there is evidence which supports the correctness of the identification”.*

{39} This being a judge alone trial this Court will not make any such direction aforesaid. However, I am concerned about the fairness of the identification procedure aforesaid. It is clear that the provisions of the Standing Orders and Statutory Instrument 118 of 2006 aforesaid, have not been complied with, hence, the rights of the Accused to fairness and a fair hearing have been compromised. No explanation has been proffered by the Crown for those breaches of the rules aforesaid.

{40} Accordingly, in the circumstances the application by the Crown to have the evidence of the covert identification parade deemed admissible fails.

Dated this **31<sup>st</sup> day of March 2022**.

---

Honourable Justice Mr. F M Cumberbatch  
Justice of the Supreme Court  
Central Jurisdiction  
Belize C.A.