IN THE COURT OF APPEAL OF BELIZE AD 2013

CRIMINAL APPEAL NO 10 OF 2012

NELSON GIBSON Appellant

v

THE QUEEN Respondent

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BEFORE

The Hon Mr Justice Manuel Sosa	President
The Hon Mr Justice Douglas Mendes	Justice of Appeal
The Hon Mr Justice Samuel Awich	Justice of Appeal

S Sampson for the appellant.
C Vidal, Director of Public Prosecutions, for the respondent.

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12 March and 28 June 2013

MENDES JA

[1] On 27 February 2008, Mirna Sanabria was shot at her mother's shop in Cotton Tree Village during the course of a robbery. The bullet entered the right side of her neck and exited from her back. She was holding her baby in her arms at the time. In shock, no doubt, she uttered a plaintive "Look, Mommy". Her mother and father, Martha and Horacio Sanabria, rushed her to the Belmopan Hospital but she succumbed to her injuries.

[2] It is the prosecution's case that the appellant was the shooter. He was initially charged jointly with Sherman Anderson for Mirna's murder. Anderson was discharged when a no case submission made on his behalf was upheld by Gonzalez J. There was no evidence that he was either present or a participant in the robbery at the time when Mirna was shot, although he may have been involved in an earlier skirmish.

[3] On 5 August 2010, the appellant was convicted of Mirna's murder before Gonzalez J and a jury and sentenced to life imprisonment. Mr Sampson SC pursued four grounds of appeal before us on his behalf. He submitted, firstly, that the trial judge erred in rejecting a no case submission made on the appellant's behalf based on the alleged weakness and unreliability of the evidence identifying the appellant as the shooter. He argued, secondly, that the trial judge erred in law when he permitted the identification of the appellant in the dock, and having done so, he erred, thirdly, in failing to warn the jury adequately or at all, of the undesirability in principle and the dangers of a dock identification. He submitted finally that the conviction was unsafe and unsatisfactory and a miscarriage of justice in light of all the evidence.

The prosecution's case

[4] Mirna's mother, Martha, testified that around 9 pm on 27 February 2008, she heard the sounds of a scuffle outside at the back of her shop. She first went to open the back door to see what was going on but changed her mind and went to open the front door. As she did so, a man came through the back door, pointed a gun at her and demanded money. She at first froze in fear then gave him what money she had. He demanded more. He then went over to Mirna who was sitting in a chair and took off her jewelry. Another man entered carrying a machete and he too demanded more money, saying that what she had given them was not enough. Martha gave him a container with coins and he grabbed her purse. He emptied the coins into the purse. Martha noticed that the man with the machete had a cut on his right hand which was bleeding. The man with the gun took off the baby's chain and then ripped the chain from Martha's neck. It was at this point that he pointed the gun at Mirna and fired the fatal shot.

[5] According to Martha, the man with the gun was wearing a long sleeve green shirt, long pants and black shoes. She could not remember the colour of his pants. He had "a red rag on his head and a cap". The man with the machete was wearing a t-shirt with clear white and yellowish stripes and a short pants. When asked whether she saw the gunman's face, she replied: "I saw his eyes, his hand and I know if I would see him again, I would be able to recognise him." By contrast, in relation to the man wielding the machete, she said: "I saw him very good. The one with the machete did not have anything on his face. He was not from the village but if I see him again, I will be able to recognise him." Later she clarified that the red rag which the gunman was wearing on his head, was covering his face from his chin up to his nose, leaving only his eyes visible. In the light of this evidence, Gonzalez J did not permit the prosecution to lead evidence that Martha had identified the appellant at an ID parade and the prosecutor did not attempt to have Martha identify the appellant in the dock. As would be expected, defence counsel chose not to cross-examine Martha, there being no identification of either defendant at that point.

[6] Horacio Sarabria testified next. At around 8.45 pm that night, he was approaching the shop when, at about 15 feet from the back door, he was grabbed from behind by a man wearing a black "gorra". In the scramble which ensured, the man's cap fell off and he recognised him as Sherman Anderson, whose nickname was "Choco". Two other men then appeared, one carrying a gun and the other a machete. The man carrying the machete lunged at Horacio who managed somehow to grab the machete by the handle and, while pulling it away, cut his attacker on his right hand. The man with the gun ordered him to open the back door at which point the red rag which he was wearing on his face, covering his nose to conceal his identity, fell down to his chin. The gunman fired a shot grazing Horacio on his head. They were about three feet away from each other and Horacio was able to recognise the gunman as Nelson, who he said he had known for 10 to 15 years growing up in the village with his children. Nelson had on a long sleeve military shirt, black short pants and white tennis shoes. His shirt was green in colour with patches. He described Nelson as being "not so tall, slim and dark skin".

[7] Horacio began to bleed from his head and managed to break free and run to his brother's house for help. He went to borrow his brother's shotgun which he took with him back to the shop. When he got there, he heard two gunshots from inside the shop. He then saw the man he knew as Nelson and the man with the machete, who he did not know, exiting the shop. He fired a shot at them and then another, but they ran towards the street and made good their escape. When Horacio got into the shop, he saw his daughter lying on the floor with her baby in her arms. She was still alive but the doctors were unable to save her at the hospital.

[8] As to the conditions under which he claimed to have recognized the person he knew as Nelson, Horacio testified that there was a fluorescent, 20 watt bulb over the back door of the shop, near to which the altercation with the three men had taken place. The bulb cast light up to 30 feet from the door. In cross-examination, he said that there was also light coming from his neighbour's property. In this light, he had Nelson's face under observation for about five minutes at a distance of "about 1 yard, about 30 inches" and there was nothing to block his view.

[9] On the day after his daughter was shot, Horacio gave a written statement to the police, but he did not tell them at that time that he had recognised the appellant as the gunman, or Anderson as the third assailant outside the shop. It was not until two months later on 24 April 2008 that he told the police that he had in fact recognised both defendants that night and he gave a further written statement to that effect. He explained that he decided not to tell the police right away who the shooter was, or that Anderson was on the scene, because he preferred to put the whole matter in the hands of God and that he was afraid of the consequences of his fingering the defendants.

[10] On 24 April 2008, as well, while at the police station giving his second statement, Horacio was asked to point out from a lineup of nine men the gunman he said he had recognised the night his daughter was killed. He did so, and in his testimony before the jury, he identified the appellant sitting in the dock as the person he singled out from the line up.

[11] Horacio testified further that on 10 November 2009 he was asked to attend the Belmopan police station, but as he was on the verge of giving evidence about an identification parade which Sherman Anderson attended, Mr Sampson, who was then appearing for Anderson, successfully objected to the admission of such evidence on the grounds that, contrary to Regulation 118 of 2006 providing for the conduct of ID parades, i) Anderson was not asked whether he consented to his participation in the parade, ii) a Justice of the Peace was not present, iii) the parade was held neither in an enclosed room, where there could be a face to face confrontation, as it were, between the witness and the men joining the parade, nor in a room equipped with a screen or a one-way mirror, but in an open garage, iv) Anderson was not given any opportunity to have an Attorney or friend present, v) no statement was recorded from Horacio regarding the conduct of the parade, and vi) no report was prepared by the officer conducting the parade. As a result, Gonzalez J did not permit Horacio to give evidence of the ID parade which Anderson attended and then ruled retroactively that the ID parade at which the appellant was pointed out was improperly held and could not be relied on.

[12] In those circumstances, Horacio was then asked whether the gunman who attacked him on the night of 27 February 2008 and who he saw fleeing the scene was present in court and he identified the appellant in the dock as that person.

[13] By the end of the cross-examination, a number of other blemishes on Horacio's testimony had emerged. Thus: i) in his second statement to the police, he said that he had pulled the rag down from the gunman’s face thereby enabling him to recognise the appellant, whereas in his evidence before the jury he testified that the rag had slipped from the gunman’s nose to his chin all on its own; ii) in his first statement to the police, he is recorded as saying that the gunman had a beard but in cross-examination he insisted that he told the police he had a moustache and that the police had recorded what he said inaccurately; iii) he at first agreed that he had in fact told the police that three men entered the shop, as was recorded in his first statement, and that he corrected this in his second statement when he said that only two men entered the

shop. But when asked to explain why he told the police the day after the attack that three men entered the shop when he knew it was two, he insisted that he told the police on the first occasion that three persons were outside the shop and only two went in, but it was the police who recorded three men as going in; iv) he said he told the police that the man who grabbed him from behind, who he recognised as Anderson, was wearing a cap but this was not recorded in the first statement; v) he said he told the police that the man who grabbed him from behind had long hair with plaits and braids but the police recorded in the first statement that he said that the man had a low haircut; vi) he said he told the police that there was a light from his neighbour's house illuminating the back of the shop, but the police did not record this in either statement; and vii) when asked to explain why he signed the first statement with errors in it and if it was read back to him, he first said he did not pay close attention to what was being read, then he changed this to say that the statement was given to him to read but he did not read it carefully.

[14] There were also contradictions between Horacio's evidence and the evidence of the prosecution's other witnesses. Firstly, Horacio said that the gunman had on short pants and white shoes but Martha said he had on long pants and black shoes. He said that the gunman's shirt was a green military shirt with patches, while Martha said simply that the shirt was green. He said that he heard two gunshots coming from inside the shop while Martha spoke only of one. He said that the light was good enough for him to recognize the appellant but Mr Elvis Medina, the Crime Scene Technician, testified that the lighting conditions at the back of the shop were bad, albeit that he explained that what he meant was that compared to daylight the lighting conditions were not good. On the other hand, Horacio's evidence in this regard was corroborated to some extent by Sergeant Westby who said that from his own observations the light over the back door gave "a visible clearance of approximately about 30 feet distance" from the back door of the shop.

[15] In agreement with the appellant's then counsel, Mr Lindo, the trial judge, in his directions to the jury on inconsistencies in Horacio's evidence, also singled out what he

said were different versions given by Horacio as to where the rag was perched on the gunman's face, first on his nose, then under his mouth, then under his chin. He pointed out, somewhat derisively, that Horacio resorted to blaming the lawyers for misinterpreting what he had said. He also pointed out to the jury that Martha had said that the gunman did not have a beard, but that Horacio said otherwise, at least in his first statement to the police. However, it does not appear to us that these alleged inconsistencies are borne out by the transcript of the evidence.

[16] Dealing with the latter first, there is no record of Martha saying positively that the gunman did not have a beard. True it is that she did not say positively that he ***did not*** have a beard, but that is not surprising given that when the gunman confronted her in the shop the rag covered his face from his nose on down.

[17] With regard to the first, the transcript of Horacio's evidence records him as saying in his evidence in chief that the rag fell from the gunman's nose and came to rest 'on' his chin. Under cross-examination, it was put to him that he had said in chief that the rag had slipped to "somewhere under his chin". He initially insisted that he had said 'on' the chin, but when pressed he agreed that he had said "underneath" the chin. But this was in fact not so. It was then put to him that in his first statement he told the police that the rag was above the gunman's mouth, that in the second statement he said it was under his mouth and then in chief that it was under his chin, to which Horacio agreed. He then offered an explanation that what he meant to say in chief was "underneath the mouth" and that maybe what he said was misinterpreted by the lawyers. In fact, he was correct. He said 'on' the chin, but counsel for the appellant insisted he had said 'under' the chin.

[18] There is no gainsaying that at some point the rag was over the gunman's nose and no criticism can be made of Horacio's evidence if he told the police so in his first statement. We have not had the benefit of examining that statement to ascertain whether Horacio told the police that the rag stayed hanging on the gunman's nose throughout, or whether he said that it eventually fell to below his nose. But Mr Lindo did suggest to Horacio at one point that he said in his first statement that after the gunman

fired a shot, the rag fell below his nose. If he had said that it stayed on his nose throughout, his credibility could quite be properly called into question. It would however be unfair to criticize him for saying in his second statement that the rag fell to below the gunman's mouth and in his oral evidence that it came to rest on his chin, when the difference between the two positions at the extreme ends of the spectrum may be a matter of centimeters, and the one may be just another way of describing the other. A rag resting on the gunman's chin, after all, is in fact under his mouth.

The No Case Submission

[19] Given the state of the evidence, it was perhaps inevitable that a no case submission would be made on the ground that the identification evidence was weak and unreliable. The trial judge disposed of it in this way:

> "I find, having gone over the evidence and Counsel's submissions and the authorities cited to me by them, that although the evidence of the witness Horacio Sanabria has been discredited by the discrepancies, inconsistencies and contradictions apparent in his evidence together with the poor lighting conditions existing in the yard at the time of the alleged incident, his evidence and by extension the case should be left to go to the jury for their consideration and determination. It is my view that when this evidence is considered together with that of the witness Martha Sanabria, the combination of their evidence, constitutes some evidence and I must emphasize the words "some evidence" which the jury, if properly directed, may convict. In my opinion, it is not unsafe to leave the case to go to the jury on the state of the evidence for their consideration and determination of the guilt or innocence of the two accused persons. Ruling accordingly."

The defence

[20] The defence was based on an *alibi*. The appellant elected to give a statement from the dock. He said:

> "I lived with my mother Princess Blancaneaux and my late grandfather Frank Blancaneaux at Cotton Tree Village, Cayo District on the 26th of April, 2008. On the 27th of February, 2008, I remained at home during the day. I was not employed at the time. I was keeping an eye on my late grandfather who was a very sick man, really asthmatic. His sickness

> required him to see a doctor very often. He got medical attention changing oxygen masks and other necessities like medicines.
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> On that same day, the 27th of February, 2008, my grandfather's friend John Henry spent the evening with us... He arrived approximately 6:30 p.m. and left 10:00 p.m. My mom arrived from work 7:30 p.m. I did not leave home any time after my mother came home. Me, my mother and my late grandfather slept there until the next morning.
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> All I could say is I did not participate in anyway in Ms. Mirna Sanabria's death. It could not have been possible because me, my mother and my grandfather slept there until the next morning. I was nowhere near the Sanabria's vicinity on the 27th of February, 2008. The allegation that I participate in Ms. Mirna Sanabria's death, I totally deny it. This is untrue."

[21] Noticeably, the appellant did not contradict Horacio's claim that the appellant was well know to him.

[22] A written, sworn statement made by the appellant's grandfather, Frank Blancaneaux, was admitted into evidence. The appellant's grandfather had since died. He swore before a Commissioner of Affidavits that on 27 February 2008 he spent the entire day at home and the appellant spent the entire day with him helping with household duties and with the children. He said that his friend John Henry spent the evening with him watching television and that John Henry left at about 10 pm. The appellant spent the day mostly in his room listening to music. The appellant's mother came home from work at 8 pm and after that the appellant did not leave the house. He slept at home that night. He thought that it was impossible for the appellant to have killed Mirna because he was at home with him during the day and night on 27 February 2008. He said that his grandson did not have a beard on 27 February 2008 and his hair was not braided.

[23] John Henry in turn testified that on 27 February 2008 he got to Mr Blancaneaux's house at about 6.30 pm and left at 10 pm. When he got there the appellant was at home and he did not see him leave. In answer to the trial judge, he said that during this period the appellant was in his room listening to music. He said he went to the kitchen twice to drink water and he saw the appellant come out and go back into his room. This

was at about 7.30 to 9.00 pm. He said that when he left at 10 pm he told the appellant he was leaving and the appellant answered him.

The Grounds of Appeal

Wrongful rejection of the no case submission

[24] Mr Sampson submitted that having found that Horacio's evidence had been discredited by discrepancies, inconsistencies and contradictions and that the lighting in the yard was poor, the trial judge ought to have discharged the appellant. He relied primarily on the decisions of this court in ***Juan Pop v R*** (Criminal Appeal No 4 of 2009, 19 March 2010), ***Wade v R*** (Criminal Appeals Nos 28, 29 and 30 of 2001, 28 June 2002), ***Barona v R*** (Criminal Appeal No 2 of 2007, 14 June 2007), and ***Williams v R*** (Criminal Appeal No 16 of 2006, 22 June 2007).

[25] In ***Pop***, this court held that "once a trial judge reaches the point … where he forms the view that the Crown's identification of an accused is poor, it becomes incumbent on him to consider whether the identification is supported by any other evidence in the case." If the identification evidence is poor and is not so supported, the judge should withdraw the case from the jury and direct an acquittal. In that case, not only was the identification evidence considered by the trial judge to be poor, but it was in fact poor. There was scant or vague evidence as to how long, how often and when the accused was under observation and as to the quality of the lighting.

[26] In ***Wade***, the eye-witness conceded that he could not positively say who were the persons he had seen at the relevant time. In this light, Carey JA was satisfied that "it was a profound understatement to say that the evidence was weak; in reality, it was non-existent".

[27] We have not been able to derive much assistance from ***Barona***. We have had access only to a transcript of the exchange between counsel and the court. It is difficult to derive any guidance from Mottley P's statement that the trial judge should have

withdrawn the case from the jury where the evidence of the sole eye-witness was found to be confusing or contradictory, in the absence of the factual context in which this statement was made.

[28] In ***Williams***, neither of the two identification witnesses had seen the gunman prior to the night of the attack. One of them gave no indication of how long he was able to observe the assailant's face. The other witness saw his face for only ten seconds during which time the assailant was pointing a gun at him. This court described the case as involving no more than a fleeting glance occurring in difficult circumstances. There being no other evidence which supported the correctness of the identification, it was incumbent on the trial judge to withdraw the case from the jury.

[29] It should be noted, first of all, that other than his reference to "the poor lighting conditions existing in the yard at the time of the alleged incident", the trial judge did not make an overall finding that the identification evidence was poor. Nor in our view was it open to him to make such a finding. If believed, Horacio had an unobstructed look at the gunman's face (except for that part from his chin downwards which was obscured by the rag) for a period of five minutes, 15 feet away from a fluorescent light above the back door of the shop, in an area which was illuminated to some extent by a light in a neighbour's yard. If believed, as well, he was looking upon the face of someone who had grown up with his children and who he had known for 10 – 15 years. True it is that there was concern that he may not have recognised the appellant at all, which would have explained why he did not finger the appellant in the first statement he gave to the police. True it is, as well, that his description of the clothes the gunman was wearing was different from the description given by his wife of the man who shot their daughter. His evidence that the lighting conditions were good enough, on one view of the evidence, was contradicted by the Crime Scene Technician, but to be fair, corroborated by Sergeant Westby at least in part. And he gave an inconsistent account of the existence of the facial hair he saw on the gunman's face. There were also instances where he gave inconsistent evidence not directly relating to the conditions under which he was able to identify the appellant. But it appears to us that these were matters for

the jury to resolve. The fact that it might have appeared that his evidence had been discredited did not gainsay that, on one view of the evidence, the conditions under which the appellant was identified could not be described as poor, thereby warranting the withdrawal of the case from the jury.

[30] The no case submission made on behalf of the appellant required the trial judge to straddle two complementary principles relevant to the consideration of a case which is said not to be fit to be put before a jury. The first is that represented by cases such as ***Pop***, endorsing the approach suggested by the English Court of Appeal in ***R v Turnbull*** [1977] Q.B. 224. It involves an assessment of the strength of the identification evidence taken at its highest. The second is that originating from the decision of the English Court of Appeal in ***R v Galbraith*** (1981) 1 WLR 1039, and adopted and applied by this Court in cases too numerous to mention. The well-known passage from the judgment of Lord Lane CJ (at p 1042) is one again deserving of quotation in full:

> "How then should the judge approach a submission of 'no case'? (1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case. (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence. (a) Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case. (b) Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there *is* evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury. . . . There will of course, as always in this branch of the law, be borderline cases. They can safely be left to the discretion of the judge."

[31] The ***Turnbull*** approach to identification evidence is an example of the category 2(a) type case referred to by Lord Lane.

[32] In this case, however, the strength or weakness of the identification evidence tendered depended largely upon the reliability of Horacio's account of the

circumstances in which he said he recognised the appellant as the gunman wearing the red rag which slipped down enough for him to be recognised, who shot at him outside the back door of the shop and who he later saw fleeing the scene after he heard gunshot from within. If the jury believed that he knew the appellant for 10 – 15 years, that the rag slipped down his face far enough for him to be recognised, that the light was 'good enough' and that Horacio had him under observation for five minutes, they could properly come to the view that the appellant was the shooter. Even though the trial judge may have had concerns about Horacio's credibility, it was for the jury to assess the reliability of his evidence and, having done so, to then determine, properly directed, whether the identification evidence was such that they were sure that it was the appellant who shot Mirna. This being a case which ultimately turned on Horacio's creditworthiness in relation to the strength of the identification evidence, the judge was correct not to take it away from the jury. It would have been different if, taken at its highest, the identification evidence was poor and not supported by other evidence led by the prosecution. That is the classic ***Turnbull*** type case. As Lord Mustill pointed out in ***Daley v R*** [1994] 1 AC 117, 129:

> "... in the kind of identification case dealt with by *Reg. v. Turnbull* [1977] Q.B. 224 the case is withdrawn from the jury not because the judge considers that the witness is lying, but because the evidence even if taken to be honest has a base which is so slender that it is unreliable and therefore not sufficient to found a conviction: and indeed, as *Reg. v. Turnbull* itself emphasised, the fact that an honest witness may be mistaken on identification is a particular source of risk. When assessing the "quality" of the evidence, under the *Turnbull* doctrine, the jury is protected from acting upon the type of evidence which, even if believed, experience has shown to be a possible source of injustice."

[33] We would accordingly reject this ground of appeal.

Dock identification

[34] Mr Sampson submitted that the trial judge erred in permitting Horacio to identify the appellant in the dock and further erred in omitting to warn the jury of the dangers of a dock identification and the disadvantage to the appellant in having been denied the

opportunity to participate in a lawful identification parade. While Ms Vidal, who appeared for the Crown, conceded that the trial judge did not give the full recommended direction where an identification parade was not held, she was right to submit that, this being a case where Horacio's claim that he had known the appellant for a long time was not disputed by the appellant, the caution normally exercisable in permitting a dock identification, and the warning which must be given when a dock identification is permitted, did not apply.

[35] In ***Rosales et al v R*** (Criminal Appeal Nos 8 – 12 of 2011, 28 March 2013), this court disposed of a similar submission as follows (at paras 8 – 9):

> "It was never really disputed that Aldana and Mayorga were well known to Miranda. As such, to the extent that their complaint was that no identification parade had been carried out in relation to them and that the police had allowed them to be seen by Miranda at the police station before he identified them to the police, this could not by itself be a sound basis for challenging the trial judge's discretion to allow Miranda to identify them in the dock. An identification parade should only be held where it would serve a useful purpose and no useful purpose would have been served by holding an identification parade when Miranda was very likely to have picked them out of a line-up as being the persons who he had known for a long time and who he had already identified as being part of the group he met at Mayorga's apartment the night before. In fact, holding an identification parade would have carried "the risk of adding spurious authority to the claim of recognition" – ***Mark France and Rupert Vassel v R*** [2012] UKPC 28, para 14.
>
> In any event, Miranda's identification of Aldana and Mayorga in the dock is not properly categorised as a dock identification, which entails identification of the accused in the dock for the first time. What he was in effect saying was that the persons sitting in the dock were the persons who he had known for a long time and who he had told the police were parties to the plan to murder and rob Mr. Shoman. Such an identification is not susceptible to the same dangers inherent in a true dock identification and there is therefore no need to give the usual warning of the risks associated therewith. As Lord Kerr said in ***France and Vassel*** (at para 36), the warning which was needed in such a case is "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 scrutinising of the circumstances in which the purported recognition of the appellants was made."

[36] For the same reasons, we reject these grounds of appeal.

Conviction Unsafe and Unsatisfactory

[37] Mr Sampson submitted finally that, having regard to all of the evidence, the appellant's conviction was unsafe and unsatisfactory and a miscarriage of justice. We do not agree.

[38] It was open to the jury to find that the man who shot Mirna was the same man who shot at Horacio at the back of the shop and who Horacio had seen running away from the scene of the murder. Both Horacio and Martha testified that two men entered the shop, one carrying a gun and the other a machete. The man carrying the machete was not identified, but Horacio claimed that in attempting to wrestle the machete away from him, he managed to inflict a cut on his right arm. Martha noticed that the man carrying the machete had a cut on his right hand and was bleeding. Horacio was certain that the third man who grabbed him from behind was Sherman Anderson and that he did not enter the shop. Both Horacio and Martha said that the gunman wore a red rag across his face and a green shirt. They differed as to the length of his pants and the colour of his shoes but given that, of the two who entered the shop, only one had been cut on his hand, it was clearly open to the jury to find that the man who shot Mirna was the same man who shot at Horacio not long before.

[39] It was also open to the jury to find that Horacio did recognise the appellant as the gunman on the very night his daughter was shot, even though he chose not to reveal this to the police the day after. Although it was unusual that Horacio was not immediately forthcoming with the police officers who were investigating the murder of his daughter, it was open to the jury to accept as plausible, the reason which he gave for being less than candid.

[40] Likewise, it was open to the jury to believe that Horacio had known the appellant for a long time (the appellant never challenged this evidence either in cross-examination

or in his statement from the dock) and that the circumstances under which he claimed to recognise the appellant were as he described, viz that the rag had fallen to his chin, that he had a look at him for a period which could not be described as a fleeting glance and that the light was good enough to permit such recognition. Generally, it was open to the jury to find that the inconsistencies in his evidence were not of such significance as to cause them to reject his evidence out of hand.

[41] Other than in relation to the 'dock identification', Mr Sampson did not complain about the directions given to the jury in relation to Horacio's credibility or in relation to the quality of the identification evidence. In fact, there were instances where the trial judge identified inconsistencies in Horacio's evidence which, as noted, did not in fact exist, and to this extent the judge's summation was unjustifiably favourable to the appellant. It was accordingly open to the jury to find beyond a reasonable doubt that it was the appellant who shot and killed Mirna.

[42] We accordingly dismiss the appeal and affirm the appellant's conviction and sentence.

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SOSA P

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MENDES JA

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AWICH JA