IN THE SUPREME COURT OF BELIZE, A.D. 2013

(APPELLATE JURISDICTION)

APPEAL FROM THE INFERIOR COURT FOR THE CAYO JUDICIAL DISTRICT

Inferior Appeal No. 99 of 2013

BETWEEN:

(LINDON MAI	**APPELLANT**
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(AND	
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(P.C. NO. 537 J. ZETINA	**RESPONDENT**

BEFORE the Hon. Mr. Justice Adolph D. Lucas

Appearances: **Mr. Byran A. Neal for the Appellant**

Ms. Kaysha T. Grant, Crown Counsel for the Respondent

JUDGMENT

[1] On 21 October 2012 Mr. Norbert Rejon a Special Constable and his wife Alicia left their home seeking to enjoy themselves. They did not anticipate that their desires of having a good time together would end in a distressful situation.

[2] They stopped and entered in Sunset Bar in San Ignacio. It was karaoke night. Mr. Rejon wanted to sing a song. According to him the place was full (with customers) so he decided to sing one song. Apart from the place being crowded

the view of Mr. And Mrs. Rejon of the karaoke screen was obstructed by a male person who was seated beside a table just infront of them. Mr. Rejon told the person, "bwoy you deh block my screen." Shortly thereafter the couple left Sunset Bar and headed towards their motor vehicle.

[3] While Mr. Rejon was opening the door of their vehicle his wife went to the passenger side. Suddenly Mrs. Rejon shouted, "watch out!" Upon Mr. Rejon turning, "he lick a pint in my head to the left side". Mr. Rejon deposed to that he felt weak and he dropped on the ground. He said while on the ground he got hit all over his body. When Mr. Rejon was on the ground he saw the said male person approach his wife "and grab her phone and push her. I couldn't move I was weak. The last I remember is when the police came."

[4] Mrs. Rejon confirmed the testimony of her husband of their being at the karaoke place and of their view being obstructed by a male person. Her husband told the male person that he was blocking their view. She said that the person turned around sideways and when he turned around I looked at him for three to five minutes". They came out of the karaoke place. This is Mrs. Rejon's testimony on the attack on them:

"We were walking, my husband had the key. I saw a man. I say, babe watch out, he hit my husband with a belikin and he drop and my husband drop and he kept kicking him viciously. I tried to pull him from my husband. I hold my phone and decide to call police. He chased after me. I said, look like you like beat woman." Mrs. Rejon ended her examination-in-chief that during the struggle she suffered "*scratches on the left hand and had pain in my back*".

[5] When Mr and Mrs. Rejon were in Sunset Bar incidentally Mr. Oscar Quiroz – Scenes of Crime Technician - was also there socializing. He saw the Rejons there who were seated at the entrance of the place. He saw the appellant who he knew by name for twenty years, "came over to the table where the Rejons were seated and he sat down". Mr. Quiroz further deposed to that twenty minutes later "after I looked back to the direction of where the Rejons were seated and observed they got up and left." Shortly thereafter Mrs. Rejon, in the company of police constable Pratt, approached witness Quiroz and asked him whether he knew the dark skin male person who was seated in front of them in Sunset Bar. Mr. Quiroz told her the name of the appellant. Mr. Quiroz added that when Mrs. Rejon asked him about the identity of the appellant he had no idea what had happened.

[6] As to the position of the appellant in Sunset Bar Mr. Quiroz testified that the appellant was seated behind him between tables and the entrance. He (the appellant) was seated with a group of men. After the Rejons left, he said, he did not see the appellant.

[7] The appellant gave sworn testimony. His examination-in-chief was very short. I reproduce it as follows:

"They do not know who do anything to them, they just assuming. One say I wear black, one say black and white striped. I never saw them before until day in Court. She say she saw me two weeks before they looking for alibi to accuse someone wrongfully. That in mind I have nothing else to say. I was accused wrongfully."

[8] On 17 October 2013 the appellant was convicted for two counts of wounding with respect to the injuries suffered by Mr. Norberto Rejon and Mrs. Alicia Rejon. He was sentenced to four months imprisonment and three months imprisonment respectively; sentences to run concurrently.

[9] The appellant filed four grounds of appeal, namely:

1. The sentence was unduly severe;
2. The decision was unreasonable or could not be supported having regard to the evidence;
3. The decision was erroneous in point of law;
4. The evidence was wrongly rejected, or inadmissible evidence was wrongly admitted by the inferior court, and in the latter case there was not sufficient evidence to sustain the decision.

[10] Mr. Bryan Neal learned Counsel on behalf of the appellant asked, and was granted permission, to argue the second ground first. Mr. Neal contended that the conviction of the appellant for the wounding caused to Mr. Rejon cannot be sustained. Mr. Rejon in terms of the injury said, "I had a burst over my eye, my whole face beat up, my belly bruise up, my eye was full of blood." He deposed to that he received medical treatment at hospital. The learned defence Counsel complained that no medical certificate was attached to the notes of evidence.

[11] Pertaining to the injury suffered by Mrs. Rejon she testified that "during the struggle I get scratches on the left hand and bad pain in my back." Mr. Neal contended that there is no description of the scratches unlike the injuries on Mr.

Rejon. There was no evidence, argued learned defence Counsel, that blood was coming from the scratches. The charge ought to have been harm and not wounding concluded Mr. Neal.

[12] Learned defence Counsel was allowed to argue grounds 3 and 4 together. Mr. Neal assertion with respect to the two grounds was poor identification of the appellant and that inspite of the shortcoming the learned magistrate allowed a dock identification of the appellant.

[13] The evidence of Mr. Rejon touched on the inadequate lighting in the Sunset Bar. He said, "there was not too much light". He did not know the name of the appellant. In terms of the clothing of the appellant was wearing that night Mr. Rejon observed that he had on "black and white striped shirt". The learned defence Counsel contrasted this evidence with that of his wife who said that the appellant had on a black shirt. She too did not know the name of the appellant before the incident.

[14] About a month after the incident the police were looking for the appellant he handed himself at the San Ignacio Police Station on 8 November 2012.

[15] Clearly, no identification parade was held. Mr. Neal submitted in the circumstances, one ought to have been held and that therefore the appellant was not properly identified.

[16] The learned defence Counsel then made submission with regard to the first ground: the sentence was unduly severe. I heard the submissions of Mr. Neal on this ground. I did not ask the learned Crown Counsel to reply on this ground. So in my ruling I will not address this ground.

[17] At the end of the arguments of the learned defence Counsel, I asked learned Crown Counsel Ms. Kaysha Grant to address me on two issues:

1. Whether there is sufficient evidence to support the conviction of the appellant of wounding in respect of the injury sustained by Mrs. Alicia Rejon.
2. Whether it was unnecessary to hold an identification parade involving the appellant and whether there is any explanation which the learned magistrate took into consideration for the police not conducting an identification parade.

[18] The learned Crown Counsel conceded that by virtue of the definition of wounding as provided by section 96 of the Criminal Code the conviction of the appellant for the crime of wounding caused to Mrs. Rejon cannot be sustained.

[19] I agree with Ms. Grant's concession in relation to the injury to Mr. Rejon the burst over his eye and was full of blood is caught by the definition of wounding as contained in section 96 of the Criminal Code of the Substantive Laws of Belize, Revised Edition 2003. It defines:

"Wound means any incision or puncture which divides or pieces any exterior membrane of the body, and any membrane is exterior for the purposes of this definition which can be touched without dividing or piercing any other membrane."

[20] In terms of the second question Ms. Grant referred to the judgment of **Maxo Tido v The Queen [2011] UKPC 16** delivered on 15 June 2011. The learned Crown Counsel relied on paragraph 17 of the judgment, which reads:

"Dock identifications are not, of themselves and automatically, inadmissible. In Aurelio Pop v The Queen [2003] UKPC 40 the Board held that, even in the absence of a prior identification parade, a dock identification was admissible evidence....."

[21] Maxo Tido was convicted for murder of a 16 year old young woman. One of the principal prosecution witnesses Lavette Edgecombe who was a partner – owner of and worked at Mandingo's Restaurant gave evidence that a man had entered her establishment and asked to use the pay phone. She gave a description of the appellant. He was allowed to use the pay phone. Ms. Edgecombe kept him under observation the reason being the lock on the telephone had been broken and she was on the alert to ensure that money was not stolen therefrom. Ms. Edgecombe overheard part of conversation and he identified himself to the other person by the nickname 'Scum'. The man also told the other person on the line to the effect, "come outside, I am coming for you." He also informed the person that he would be driving a white truck.

[22] Ms. Edgecombe seemingly was true to her concern of avoiding theft of money from the telephone. She observed the telephone caller throughout his conversation for the duration of two to three minutes. He was about five feet away from her. The lighting conditions were described as pretty bright. After the man finished his telephone call Ms. Edgecombe observed him go into a "white Chevy truck". The following day Ms. Edgecombe identified the male telephone caller to the police while he was in Mandingo's Restaurant. It was not the first time Ms. Edgecombe had seen the caller in that early morning of 1 May 2002 in the restaurant. She had seen him there prior to that date. On each of those sightings she observed him "for some ten to twenty seconds".

[23] There was no identification parade arranged for Ms. Edgecombe to attend to identify the appellant as the man whom she had seen on those previous occasions. During the trial Ms. Edgecombe was allowed to make a dock identification of the appellant.

[24] Lord Kerr, who delivered the judgment of the Board, in terms of admission of the dock identification of appellant Maxo Tido, had this to say at paragraph 22:

> *"The Board does not consider that this was a case where the judge was bound to have concluded that the admission of the dock identification of the appellant by Ms Edgecombe would result in an unfair trial to the accused. But the discretion to admit the evidence must be exercised in light of the particular circumstances of the individual case. Relevant circumstances will*

always include consideration of why an identification parade was not held. If there was no good reason not to hold the parade this will militate against the admission of the evidence. Conversely, if the defendant resolutely resists participation in an identification parade, this may be a good reason for admitting the evidence. In this case, however, counsel for the appellant had pointed out that the prosecution had not offered any explanation for the failure to hold such a parade but the judge in giving her ruling that the evidence was inadmissible made no reference to this. "

At paragraph 23:

"There were circumstances which might well have favoured the admission of the dock identification evidence. For instance, the judge would have been entitled to decide that the following factors supported that approach: the opportunity that the witness had to observe the man that she identified as the person who made the telephone call; her claim to have seen him on a couple of previous occasions in the restaurant; her having heard him identify himself during the telephone conversation as 'Scum'; her evidence that she saw him enter a Chevy truck especially since other evidence tended to establish that he had used a Chevrolet truck on that night; and, finally, Ms Edgecombe's having pointed him out to police the day after he had made the telephone call. Arguably, these were all factors favouring the admission of the evidence. The Board considers, however, that the failure of the trial judge to address – much less consider – the reasons that an identification parade was not held means that there was not a proper

exercise of her discretion. If those issues had been addressed, it is possible that the dock identification could have been properly allowed. Since they were not, its admission in evidence cannot be upheld."

[25] For completion, the Maxo Tido's appeal against conviction was dismissed. Apart from the dock identification the evidence against him was overwhelming. In the appeal at hand the evidence of Mr. and Mrs Rejon clearly informed that they did not know the name of the appellant. They had seen him before. In the case of Mr. Norberto Rejon, in cross-examination he had seen the appellant in Three Flags in Santa Elena; but there is no mention of the duration of the sighting. Mrs. Rejon stated that she had seen the appellant two weeks before the incident. She did not say the length of time she saw him.

[26] The learned magistrate was abreast of the importance of holding an identification parade. In her reasons for decision at the third sentence of paragraph 13 she said:

"It follows then that in cases where the accused is not well known to the witness or where previous identification either by way of physical description or name was not given to the police a dock identification is undesirable and should not be allowed unless good reasons are given as to why none was held."

[27] The learned magistrate also addressed her discretion in allowing the dock identification of the appellant. At paragraph 14 she reasoned as follows:

"In the present case, I used my discretion and allowed the dock identification because a physical description of the defendant was given to the police by Mrs. Rejon. The police was also given the name of the defendant which enabled them as given in evidence the opportunity to launch a search for him. In my view, this was the first identification made of the defendant and not the dock identification and consequently no miscarriage of justice was done by allowing the dock identification."

[28] The reasons given by the learned magistrate to exercise her discretion in allowing the dock identification fall short. Those reasons are ideal for the police to have a reasonable suspicion to search for and to arrest the appellant. But a trial must be fair. The circumstances of this case cry out for holding an identification parade. There is no <u>good reason</u> for not holding an identification parade to test the ability of Mr. and Mrs. Rejon to pick out of eight other persons the person whom they say is the appellant who had attacked them. The appellant was therefore denied the opportunity of an inconclusive parade in that if the Rejons had attended an identification parade they might not have identified the accused as the person who had attacked them.

[29] There is no independent evidence, whether direct or circumstantial, to support the evidence of the Rejons in terms of the identity of the appellant. I find that in the circumstances the magistrate, with respect, did not properly exercised her discretion in allowing a dock identification of the accused. As there is no

other supporting evidence I allow the appeal, quash the conviction and an acquittal is entered.

[30] The appellant is presently on bail which was granted to him on the hearing of the appeal on 22 November 2013. He was ordered to appear in Court on 17 January 2014 for delivery of this judgment.

Dated: **15 January 2014.**

(ADOLPH D. LUCAS)
Justice of the Supreme Court