IN THE SUPREME COURT OF BELIZE, AD 2014

INFERIOR COURT APPEAL NO. 104 OF 2013

BETWEEN:

RICHARD TRAPP, JR.	**Appellant**
AND	
D.C. 1214 JOSE UH	**Respondent**

In Court.

BEFORE: Hon. Chief Justice Kenneth Benjamin.

May 23 and 30, 2014.

Appearances: Mr. Anthony Sylvestre for the Appellant.
Ms. Shenice Lovell, Crown Counsel, for the Respondent.

JUDGMENT

[1] This is an appeal brought by the Appellant, Richard Trapp, Jr., against the conviction and sentence imposed by the learned Magistrate sitting in Belmopan in the Cayo Judicial District on November 29, 2013 for the offence of robbery, contrary to section 147(1) of the Criminal Code, Chapter 101 of the Revised Laws of Belize, 2000 – 2003. The Appellant was sentenced to five years' imprisonment.

[2] The grounds of appeal were as follows:

> "(i) The decision was erroneous in point of law in that the learned Magistrate misdirected herself vis-à-vis assessment of the prosecution evidence.

(ii) The decision was unreasonable or could not be supported having regard to the evidence.

(iii) The decision was based on a wrong principle.

(iv) The sentence was unduly severe."

The Appeal was argued on the basis that the second and third grounds were subsumed in the first ground and that the fourth ground would only be addressed if the first three grounds did not succeed. At the outset, it was stated without demur that the principal issue was the correctness or not of the identification of the Appellant by the sole eye witness evidence of the Complainant, Everaldo Oliva Batres.

THE EVIDENCE

[3] The testimony of the Complainant can be taken fairly shortly. He told the Court that he was at that time a 58 year old farmer residing at St. Matthew's Village. On Sunday, March 10, 2013, at about 7.00 p.m., he was on his way home from the store in St. Matthew's Village passing the school in front of the football field. He was approached by a man from the football field on the right side of him. The person grabbed him by the neck from behind and threw him to the ground. He stated that while on the ground the person was on top of him choking him. The incident lasted in his estimation about 25 minutes and he was relieved of $250.00 in cash, a watch and other items he had in his blue school bag to the total value of $180.00. The cash was taken from his pocket. No one was present during the incident and he saw when the perpetrator went towards the highway that leads to Belize City.

[4] The Complainant said he made a report to the Police about the matter on the Monday following, which would be March 11, 2013. However, the investigating officer, Detective Constable Jose Uh, spoke about being present at the Criminal Investigations Branch office at the Belmopan Police Station on March 12, 2013 at around 11.00 a.m.

when the report was made. D.C. Uh recorded a statement in Spanish from the Complainant. The Appellant was detained after being located at his house at St. Matthew's Village on July 23, 2013. He was arrested and charged for the offence of robbery on July 24, 2013.

[5] The Complainant said that he knew his assailant for about 20 years and gave his name as Ricardo, Jr. and his nickname as "Cheebo". In examination-in-chief, he furnished details as to the circumstances under which he was able to observe the person who robbed him. He told the Court that there was a light on a lamp post about 10 feet away from where the incident took place and from the reflection of the light he was able to see the person's face. The person was on top of him and he was looking at the person while being choked on the ground. The Complainant gave a description of the person as being about 5 feet 6 inches in height, of medium built and about 26 years of age.

[6] The Appellant was unrepresented. In his cross-examination of the Complainant, he challenged the identification in this exchange:

> "Q. I suggest to you that this is not the first time you are blaming me unlawfully, about 5 years ago you blamed me wrongfully?
>
> A. I am not wrongfully accusing you because you are the one."

After describing his attacker to the Court, the Complainant identified the person by pointing to the Appellant in Court. At the close of the case for the prosecution, the Appellant elected to remain silent and did not call any witnesses.

MAGISTRATE'S REASONS FOR DECISION

[7] The learned Magistrate recited the evidence as led by the prosecution through the Complainant and the investigating officer. Having referred to the definition of robbery as set out in section 147(1) of the Criminal Code, she went on to state that on

the evidence of the Complainant a case was made out for the Appellant to answer. There being no defence proffered, the Appellant was found guilty of robbery as charged and accordingly sentenced.

[8] It is fair to say that no findings of fact were clearly made on the evidence and no reasons were given for the finding of guilt. However, it is inescapable to presume that the learned Magistrate, by virtue of the testimony of the Complainant recited in paragraph 5 of her written reasons, accepted the evidence of identification and concluded that it was adequate to ground a conviction.

APPELLANT'S SUBMISSIONS

[9] Learned Counsel for the Appellant made his submissions on the basis that the issue of identification was raised by the Appellant in his cross-examination of the Complainant. He went on to highlight that upon arrest, the Appellant was never placed on an identification parade, the first identification of the Appellant being by way of what amounted to a dock identification in Court.

[10] It was argued that the practice of employing a dock identification was highly undesirable. Further, the learned Magistrate ought to have directed her mind to the guidelines prescribed in the case of **R v Turnbull [1977] Q.B. 224**. The reasons for decision being a mere recital of the evidence, learned Counsel concluded that there was nothing to suggest that the **Turnbull** guidelines were considered. The following passage from the judgment of Lord Widgery, CJ was commended to the Court (at p. 228):-

> "First, whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition, he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a

> mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Provided this is done in clear terms the judge need not use any particular form of words.
>
> Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in anyway, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? If in any case, whether it is being dealt with summarily or on indictment, the prosecution have reason to believe that there is such a material discrepancy they should supply the accused or his legal advisers with particulars of the description the police were first given. In all cases if the accused ask to be given particulars of such descriptions, the prosecution should supply them. Finally, he should remind the jury of any specific weaknesses which had appeared in the identification evidence.
>
> Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."

It was urged that the learned Magistrate having failed to follow these guidelines, the conviction ought to be quashed and the appeal allowed as the conviction would be in the circumstances unsafe.

[11] The perceived weaknesses in the evidence were identified by learned Counsel. The observations were made that: the report was not made until March 12, 2013; the Appellant was not detained until July 23, 2013 (over four months after the alleged incident); and the first identification of the Appellant by the Complainant was on November 29, 2013 in Court at the trial. It was contended that although the Complainant said he knew the Appellant for twenty years "since he was small", the incident took place at night, there was no evidence as to how long the Complainant had his attacker's face under observation, while the Complainant was being choked and

there was a scuffle going on. These matters were commended to the Court as rendering it difficult to support a conviction in the absence of independent evidence. The Court was invited to consider that the evidence suggested that the Complainant was thrown to the ground and there being continuous movement the Complainant would not have a clear view of his attacker.

[12] The credibility of the Complainant was also impugned on the basis that the report was not made until two days later and the Complainant made no complaint at the shop that was in the vicinity. Also, the shop was open yet no one came up or passed during the incident.

RESPONDENT'S SUBMISSIONS

[13] The essence of learned Crown Counsel's submissions was that this was a case of identification by recognition and that the evidence met the requirements of the **Turnbull** guidelines. By reference to the evidence, it was emphasized that the Complainant said he knew the Appellant for twenty years and the Court Book reflected that the Appellant was then 29 years old, as was also observed by the Magistrate in her reasons. Attention was drawn to the testimony of the Complainant as to the state of the lighting, the proximity of his attacker and the duration of the attack. More specifically, there was a lamp post with a light 10 feet away, the incident lasted 25 minutes and the perpetrator was on top of the Complainant choking him thus putting them face to face. The Complainant specifically stated that he saw the face of the Appellant.

[14] It was further pointed out by learned Crown Counsel that although it was not so reflected in the written reasons, the Magistrate would have had to address her mind to the possibility that the Complainant may have been mistaken in purporting to recognise his assailant. In this regard, she drew the Court's attention to the suggestion put by the Appellant to the Complainant in cross-examination in this way:

"Q. I suggest to you that this is not the first time you are blaming me unlawfully, about 5 years ago you blamed me wrongfully.

A I am not wrongfully accusing you because you are the one."

It was thus argued that the issue of recognition was not disputed at trial, but rather the Appellant suggested that the Complainant had made a wrongful accusation against him five years prior.

[15] On behalf of the Respondent, the argument was made that having regard to the portions of the evidence outlined by the learned Magistrate, the **Turnbull** guidelines would have been satisfied on the whole of the evidence, thus leaving it open to the Magistrate to return a verdict of guilty.

[16] In relation to the dock identification of the Appellant by the Defendant, learned Crown Counsel referred to the Court of Appeal judgment in the case of **Nelson Gibson v R**, Criminal Appeal No. 10 of 2012. In that case, the Crown conceded that the trial judge had omitted 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 properly conducted identification parade. However, the learned DPP argued successfully 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" (per Mendes, JA at paragraph 34). The following passage is explanatory of the Court of Appeal's acceptance of the DPP's submission in **Nelson Gibson** (at paragraph 35):

"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."

In his reply, learned Counsel for the Appellant, countered that the dicta in **Nelson Gibson** must be read along with the passage in Archbold para 14-15 in that there is no evidence that the learned Magistrate accepted the Complainant's evidence as honest and therefore there ought to have been a general **Turnbull** warning as to even a witness being possibly mistaken in cases of recognition. This was urged on the basis of the Appellant having challenged the credibility of the Complainant in cross-examination.

CONCLUSIONS

[17] There is no denial that no identification parade was held and that the learned Magistrate permitted the Complainant to make a dock identification of the Appellant. Equally, there is nothing in the Magistrate's reasons to indicate what warnings were taken into account in arriving at her verdict. However, this was a case of recognition, a fact which was tacitly accepted by the Appellant in the last question posed in his cross-examination of the Complainant. It was therein implicitly revealed that the Appellant was known to the Complainant for at least five years. The evidence available to the Court from the record informed that both the Appellant and the Respondent are resident at St. Matthew's Village. No attempt was made to dispute the Complainant's assertion that he knew the Appellant from childhood for some twenty years. Given the Appellant's age at the time of the charge, the Complainant would be saying that he knew the Appellant from about the age of 9 years.

[18] The futility of an identification in those circumstance was therefore palpable as pointed out by the Court of Appeal in cases of **Nelson Gibson v R** (supra) and **Rosales v R** (supra). The issue that arose from the evidence was one of the credibility of the Complainant or, put another way, the correctness of his asserted recognition of the Appellant as his assailant.

[19] The Complainant's identification of his assailant was chronicled in his examination-in-chief. He provided details of the circumstances under which he was able to observe and view his attacker. Although he began by saying he was approached from the right side from behind, he went on to state that after falling to the ground, while he was being choked he was face to face with his attacker. It is fair to say that to be within reach to be choked, the assailant had to be within arm's reach of the Complainant. The incident was stated to have lasted 25 minutes. This was not disputed and even if it was somewhat of an over-estimation, the events taking place suggest enough time for an observation that was much better than a fleeting glance to

be made. In the words of the Complainant: "I was on the ground, he was on top of me choking me. I was looking at him choking me. I saw him with my eyes."

[20] The Complainant addressed the lighting conditions as the incident occurred at 7 p.m. He spoke of a light from a lamp post that was about 10 feet away from where he was. The light provided would have assisted in allowing the Complainant to observe his assailant. Again, the presence of the light or for that matter the state of the lighting was never challenged by the Appellant.

[21] The name Ricardo, Jr. and the nickname 'Cheebo' were given in evidence by the Complainant as to the identity of the robber. It can be judicially noticed that the Complainant speaks Spanish and did so while giving his statement as well as his testimony at trial. The English equivalent of Ricardo, Jr. is Richard, Jr. which is the Appellant's first name. It is to be noted that a similar observation was made by Sosa, JA (as he then was) in the case of **Miguel Matus v The Queen** – Criminal Appeal No. 8 of 2009 at paragraph 72. His Lordship followed and approved the Court of Appeal's judgment and reasoning in **Dean Hyde v The Queen** – Criminal Appeal No. 18 of 2007. In both cases, the Court adopted the approach that an identification parade could safely be dispensed with in the face of identification by virtue of "previous acquaintanceship".

[22] In my view, in the present case, the holding of an identification parade by the investigating officer would not have benefitted the Appellant. (See: **Goldson and McGlashan v R (2000) 56 WIR 444** per Lord Hoffman). Indeed it would have opened the possibility of exposing him to being identified by a mistaken witness who claimed to recognise him. Further, there being the assertion by the Complainant that he knew the Appellant for a long time before the incident rendered the dock identification innocuous and not liable to lead to the dangers inherent in a true dock identification.

[23] For the reasons detailed above, there was ample evidence to support a finding that the identification of the Appellant by the Complainant was cogent and accordingly

the first ground of appeal is rejected. Given the amalgamation of the first three grounds, the Court disallows the appeal against conviction.

[24] The fourth ground of appeal was that the sentence was unduly severe. The Appellant was sentenced to 5 years imprisonment. Learned Counsel contended that since the Appellant had no prior conviction and told the Court in mitigation that he had three children the sentence ought to be reduced. In her response, learned Crown Counsel made reference to the specific provisions of section 147(2) of the Criminal Code (as amended) which enacts as follows:

> 147."(2) A person guilty of robbery, or of attempted robbery, or of assault with intent to rob, shall be punished as follows:-
>
> (a) …
>
> (b) on summary conviction to a term of imprisonment which shall not be less than five years but which may extend to twenty years.
>
> Provided that (whether the case is tried summarily or on indictment) the court may, in the case of a first time offender who has no previous conviction for any offence involving dishonesty or violence, refrain from imposing the minimum mandatory sentence prescribed above if there be special extenuating circumstances which the court shall record in writing and in lieu thereof, pass such other sentence (whether custodial or non-custodial) as the court shall deem just having regard to the prevalence of the crime and other relevant factors."

On behalf of the Respondent, it was pointed out that the notes of evidence do not present any extenuating circumstances. In his reply, Learned Counsel asserted that the Appellant was not represented at the trial and that the Magistrate did not consider

whether what was stated in mitigation prior to sentence amounted to special extenuating circumstances.

[25] The Appellant was a first offender. He was therefore entitled to avail himself of the proviso to section 147(2) and present special extenuating circumstances. The power of the Magistrate to depart from the statutory minimum sentence is discretionary. The burden of establishing special extenuating circumstances rests on the defendant and the standard of proof is to the civil standard (see: **Pugsley v Hunter [1973] 1 WLR 578**). The Court must first determine whether special extenuating circumstances exist before embarking on a finding of whether the discretion ought to be exercised in favour of the defendant.

[26] The Appellant did not present any material to suggest that there existed any special extenuating circumstances. Indeed, there was nothing for the Magistrate to consider since the circumstance of the Appellant having three children, whom he said would suffer if he went to prison, plainly did not qualify as a special extenuating circumstance.

[27] Accordingly, the Magistrate was correct in imposing the minimum mandatory sentence of five years imprisonment.

[28] It is ordered that the appeal shall stand dismissed and the conviction and sentence affirmed.

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KENNETH A. BENJAMIN
Chief Justice