IN THE COURT OF APPEAL OF BELIZE AD 2014

CRIMINAL APPEAL NO 22 OF 2012

GREGORY AUGUST Appellant

v

THE QUEEN Respondent

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BEFORE

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

A Sylvestre for the appellant.
C Vidal SC, Director of Public Prosecutions, for the respondent.

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2014: 13 March and 5 February 2015.

SIR MANUEL SOSA P

I - *Introduction*

[1] This appeal concerns the incredibly cowardly murder of Alvin Alpheus Robinson senior ('the deceased'), aged 73, who stood a mere 5 feet 5 inches, weighed only about 130 pounds, had but one eye and was, besides, physically challenged. Sometime between 9 and 10 pm on Saturday 23 May 2009, in an area not far from milepost 8 on the highway known then as the Western Highway but now as the George Price Highway

('the highway'), the supposed sanctity of the humble 'primenta'-walled shack that he called home ('the shack') was rudely violated and he found himself the subject of a savage attack by knife. (A 'primenta' wall is one made of trunks of the Silver Saw palmetto.) Later on that night, he was found sitting in his bed, stabbed, speechless and bleeding, and transported to the Karl Heusner Memorial Hospital ('KHMH') in Belize City, where, unfortunately, he was pronounced dead. Gregory August ('the appellant') and Dwayne Almendárez were detained by the police on 24 May 2009 and charged on 26 May 2009 with the murder of the deceased. The charge against Almendárez was not proceeded with; but the appellant subsequently stood trial before Lucas J and a jury under an indictment alleging that he 'and another' murdered the deceased. On 21 November 2012, the jury, having deliberated for almost 4 ½ hours, found him guilty of murder; and, on 26 November 2012, the judge sentenced him (by then aged 24) to imprisonment for life. The appeal of the appellant was heard by this Court on 13 March 2014.

II - *The key reference in the opening statement to circumstantial evidence*

[2] At the commencement of the trial, prosecuting counsel, Miss Duncan, commendably demonstrated full awareness of a most salient feature of any cogent Crown case based on circumstantial evidence when, according to the record, she said in the course of her opening statement:

> 'This is what you will call a circumstantial type case where there is no one piece of evidence that will conclusively will (*sic*) tell you [the appellant] is the one who did it; but rather all the evidence combine (*sic*), all the bits and pieces together, making up the whole is what will tell you that.'

III - *The Crown's circumstantial evidence*

(a) <u>Of the appellant's earlier presence and conduct at (and departure from) the relevant premises</u>

[3] The Crown proceeded, following the opening statement, to adduce evidence of the appellant's presence and conduct at, and of the circumstances of his subsequent departure from, the premises ('the Majil premises') at which, on 23 May 2009, Michelle

Majil lived together with eight of her children (including Tyrone and Marlon Robinson and Viannie, Shalissa and Jasmine Majil), two grandchildren, a brother (viz Lindy Robinson) and her father (viz the deceased). (In this judgment, for reasons of convenience, the Court shall refer to any of these persons to whom it finds it necessary to refer by his or her first name.)

- From Viannie

[4] In this regard, Viannie gave evidence that the appellant (a friend of Michelle) and another young man, known to her only as Tunks, arrived at the Majil premises, which comprise three 'houses' standing on a parcel of land, sometime after 7 pm. The appellant went to one of these three houses, referred to by her as 'the middle house' to distinguish it from 'the first house' (viz the one nearest the highway) and the back house (viz the shack), between which it stood. (In this judgment, again for reasons of convenience, the house referred to by Viannie as the middle house shall be referred to in those same terms.) A 'drink up' was in progress in the veranda of the middle house at the time.

[5] Present, amongst others, at this drink up was one Andrew Smith, also known as Duck, a friend of Marlon. Viannie testified that there was, at some unspecified point of time during the drink up, a misunderstanding involving the appellant and Andrew, in the course of which the appellant told the latter, 'whenever I talk to you, you must respond to me as, "Yes boss" '. As Viannie had been in the kitchen preparing supper at the time the misunderstanding started, she did not witness the whole of it.

[6] But she did witness the whole of a second misunderstanding which occurred later that night just as the appellant and Tunks were about to leave the Majil premises. This was a misunderstanding involving the appellant, again, and Tyrone, which, on her evidence, occurred near the side of the highway. (On a visit to the *locus in quo* later on in the trial, Viannie pointed out a spot near to a coconut tree standing at the entrance of the Majil premises as the spot where the second misunderstanding occurred.) Viannie saw the appellant slap Tyrone on the cheek, causing the latter to stumble.

[7] The appellant and Tunks (the latter of whom was not, on Viannie's evidence, involved in either misunderstanding) then rode off on bicycles, one of them, whom Viannie could not pinpoint, saying, according to her, that they would 'come back right now'. This departure may have taken place at about 8.15–8.30 pm, which would have been about half an hour after the first misunderstanding.

[8] Defence counsel, Mr Lionel Welch (who, sadly, has since passed away), did not dispute in his cross-examination of Viannie that the two slapping incidents had, in fact, occurred.

- From Shalissa

[9] Evidence was also given by Shalissa, a Crown witness as well, as to the appellant's slapping of Tyrone in the face. She claimed to have been on the side of the highway at the time. (She pointed out on the visit to the *locus* a spot in front of an oak tree on the Majil premises as the spot where such slapping had taken place.) She further testified to having heard one of the two who rode off saying that they would return later, and, ominously, that, on their return, 'uno wa see wa happen'.

[10] The cross-examination of Shalissa was conducted on the basis that the appellant had, indeed, slapped Tyrone. And it was not disputed during the course of such cross-examination that either the appellant or his companion had uttered the ominous words in question on riding off.

- From Marlon

[11] Marlon, a Crown witness himself, gave evidence of both of these slapping incidents. He referred to Andrew as a friend of his of long standing ('nearly eight, nine years'). According to Marlon, the appellant, together with Tunks and a George McFadzean, arrived at the Majil premises 'sometime around 8 [pm] or after'. The appellant helped himself to a drink of aqua vitae and, having consumed it, proceeded from the veranda of the middle house to an area just behind it (ie the middle house). It was there, on Marlon's evidence, that the appellant slapped Andrew, who, as far as Marlon could see, had done him (the appellant) nothing and was only 'getting ready to

go home'. The slap, which was to the face, had provoked no retaliation whatever from Andrew, who merely walked away. For his part, the appellant angrily reminded Andrew that he (the appellant) was 'the boss'.

[12] The slapping up of Tyrone occurred later on on the Majil premises, as the appellant and Tunks, about to depart, 'walked' towards the side of the highway. As far as Marlon was concerned, Tyrone, too, had done nothing to the appellant, who 'just rode up to [him] and slapped him up', ie twice. (The question whether the appellant and Tunks not only 'walked' but also 'rode' on their way from the middle house to the highway was not sought to be highlighted in cross-examination.) Marlon's further testimony was that it was, in fact, the appellant who said that they would be returning and that he said so whilst on the side of the highway.

[13] Puzzlingly, the cross-examination of Marlon did not proceed, like that of Shalissa, on the basis that the appellant had in truth slapped Tyrone. Defence counsel referred to the slapping as having been alleged. On the other hand, however, Marlon's claim that the appellant himself had said that he and his companion would be returning was allowed by counsel to go unchallenged.

- From Tyrone

[14] Although there was Crown evidence indicating that, on the night of the murder, he had consumed alcohol to the point where he was slightly staggering and had to be ordered by his mother to stop drinking, Tyrone also testified for the Crown, admitting in the course of so doing that he 'had a lee high' as a result of the intake of alcohol.

[15] As to the incident involving the appellant and Andrew, Tyrone's testimony was that he witnessed it himself, though he spoke of the former having knocked (not slapped) the latter. And he said, further, that Andrew, Marlon and he usually drank on the veranda of the middle house at weekends.

[16] As regards the appellant's slapping of him, his evidence was that he had returned to the Majil premises from the side of the highway when he met the appellant, who was on his way out, and asked him (the appellant) why he had slapped Andrew

earlier on. In reply, the appellant asked him whether he wanted 'to get the same thing' and, without waiting for an answer, slapped him thrice on the left side of the face. He (Tyrone) did not retaliate.

[17] Puzzlingly, again, the cross-examination of Tyrone did not proceed, like that of Shalissa, on the basis that the appellant had, in fact, slapped him. Defence counsel referred more than once to the witness having been 'allegedly slapped'. On the other hand, defence counsel did not go so far as expressly to put it to Tyrone that he had not been slapped.

(b) Of the finding of blood on items belonging to the appellant

[18] Secondly, the Crown led evidence (some of it, forensic) relating to the finding of blood on two items belonging to the appellant, viz a white T-shirt and a Nike Tennis shoe. The evidence led on these matters may be described in turn.

- **The blood on the white T-shirt**

[19] Two grand-children of the deceased, viz Shalissa and Marlon gave testimony connecting the appellant with a white shirt of some kind.

Shalissa's evidence

[20] Shalissa's evidence was that he was wearing a white T-shirt but also had a grey shirt slung over his shoulder whilst on the Majil premises during the drink up. Under cross-examination, she further described the white T-shirt as 'plain'. No suggestion was made to her by defence counsel in cross-examination that her description of the shirt the appellant was wearing at the drink up was inaccurate.

Marlon's evidence

[21] Marlon's pertinent testimony was (i) that the appellant arrived at the Majil premises during the drink up wearing a grey shirt but (ii) that he also had a 'white shirt' with him ('around his hand'). Defence counsel did not dispute either of these composite assertions in cross-examination.

Terrick Garbutt's evidence

[22] Then there was the evidence of one of the more critically important Crown witnesses, viz Terrick Garbutt, who testified that he lived at milepost 8 on the highway and was a cousin of Marlon, who, according to him, lived about a half mile further up the highway (as one travels west). He gave further evidence that, at about 9.15 on the Saturday night in question, he saw, from his veranda, the appellant and a second person ride on bicycles through a portion of the 25-acre parcel of land on which he then lived ('the Garbutt land') and disappear into the night. These two persons were approaching from the general direction of the highway and proceeding in that of the back of the Garbutt land, just beyond which (from his and other Crown evidence) lies an area in which there are several bodies of water of varying sizes, near to one of which, as shall be explained below, a shoeprint was later to be found and lifted. At about ten o'clock that same night, Mr Garbutt saw, from his veranda, again, the same two persons he had seen at about 9.15. They were now riding from the general direction of the back of the Garbutt land and proceeding in that of the highway. The appellant was carrying in his hand something white, which Mr Garbutt, understandably, was prepared to describe only as a 'white cloth'.

[23] This bit of evidence of a white cloth was obviously regarded as of some significance by defence counsel, for he saw fit specifically to challenge it at the end of his cross-examination, notwithstanding that he had already put to Mr Garbutt the ample blanket suggestion that, in fact, he had not seen anyone riding a bicycle on the Garbutt land on the night in question. But Mr Garbutt stood his ground under such challenge, adding to the evidence he had already given the further detail (evocative of the latter of Marlon's composite assertions adverted to at para [21], above) that the appellant was holding the cloth in his right hand.

Cpl Everon Teck's evidence

[24] Cpl Everon Teck gave evidence for the Crown concerning his taking possession of a white T-shirt found at the home of the appellant. His testimony was that, as already indicated above, the appellant was detained by the police on 24 May 2009. Later that

same day, Cpl Teck escorted the appellant back to his house in order to conduct a search of it in his presence. The corporal further testified that he found, in the course of such search, a white T-shirt which was stained in front with what seemed to him to be blood and which the appellant admitted to be his. This T-shirt was, on the evidence of Cpl Teck, found on top of other unlaundered clothes lying on the floor of a room. He took possession of this T-shirt and later handed it to Robert Henry, Scenes of Crime Technician. Shown a white T-shirt which had been admitted in evidence earlier in the trial, Cpl Teck identified it as the T-shirt in respect of which he had testified.

[25] Under cross-examination, Cpl Teck admitted that he had, on finding the T-shirt, noticed no spots resembling blood spots on the back of it. The record does not indicate whether defence counsel took the further step of pointing out to the corporal that the T-shirt admitted into evidence at trial had such spots at the back; but there was evidence from Eugenio Gómez, a Forensic Analyst employed at the forensic laboratory of the National Forensic Science Service ('the forensic laboratory') and called by the Crown, that there were, in fact, blood spots not only on the front of the T-shirt but also elsewhere on it.

[26] Defence counsel then directed his efforts to raising doubts in the minds of jurors as to whether the T-shirt had been handled with propriety by Cpl Teck. Under the pertinent cross-examination, the corporal stated that he handed over the white T-shirt to Mr Henry on the very day he took possession of it, ie 24 May. Pressed further, he said that it was sometime in the evening, after he and Mr Henry had been to the alleged crime scene, ie the shack, and it had been processed, that such handing over had taken place. Later still in the cross-examination (pp 320–321, record), Cpl Teck testified that the overall sequence of relevant events on 24 May was (i) the visit to the alleged crime scene; (ii) the visit to the appellant's house and (iii) the handing over of the T-shirt to Mr Henry (at 'the police station' – presumably that in Hattieville).

[27] It was the further evidence of Cpl Teck under cross-examination that he had shown the red stains on the T-shirt to the appellant before the latter admitted that such shirt was his. This further evidence elicited from defence counsel a suggestion that the corporal had done no such thing.

Robert Henry's evidence

[28] Mr Henry, the Crime Scene Technician already mentioned above, said in testifying for the Crown, that sometime after 10 am on 24 May 2009, Cpl Teck showed him a white T-shirt. It is not clear from the record whether he indicated in evidence-in-chief how long after 10 am, and where, he was shown this item. He saw a dark 'mark' on the front of it which seemed to him to be a blood stain. He gave further evidence of having been present at the KHMH morgue on 29 May 2009 and of having there seen an autopsy performed on a body identified as that of the deceased. Dr Estrada, who performed the autopsy, collected a sample of blood from the body of the deceased and gave it to him in a test tube. He said that these and other items were taken by him to the forensic laboratory in May 2009.

[29] In the course of cross-examination, Mr Henry said that it was in 'the area where [the shack] was' that the T-shirt was shown to him. And, in answer to a question from the judge, he made it clear that he was not inside the shack itself (where, from other evidence, there was blood) when the T-shirt was shown to him.

Eugenio Gómez's evidence

[30] Mr Gómez, as already mentioned above, is a Forensic Analyst at the forensic laboratory who testified for the Crown at trial. He said in evidence that the white T-shirt in question was received at the forensic laboratory on 26 May 2009. On 29 May 2009, there was further received what purported to be a sample of the blood of the deceased, taken *post mortem*. After conducting different analyses of certain spots found on the T-shirt and of the blood sample, he concluded that the T-shirt was stained with human blood of the blood group O and that the blood sample was also of that blood group.

[31] Under cross-examination, Mr Gómez admitted that he could not say, for a fact, that the blood found on the white T-shirt was that of the deceased. The reason for that, he explained, was that such a determination could only be made after DNA analysis, which could not be conducted in the forensic laboratory for want of the required technology. He further admitted that blood group O consists of two blood types, viz O positive and O negative and that the tests he had conducted did not enable him to say

whether the blood making up the sample in question was O positive or O negative. (Although the record does not indicate that he was similarly questioned as to the blood on the T-shirt, it would follow that Mr Gómez was in no position to say whether such blood was of the O positive or O negative type either.) Responding to a question from the judge following re-examination, Mr Gómez said that blood group O is the most common blood group in Belize.

- **The blood on the Nike tennis shoe**

[32] The Crown further adduced evidence of the finding of blood on one of the Nike tennis shoes being worn by the appellant at the time of his detention.

Shalissa's evidence

[33] Those tennis shoes were grey and red in colour. And Shalissa's evidence in examination-in-chief was unambiguous: the appellant was wearing 'a grey and red tennis with a Nike sign on it' during his visit to the Majil premises earlier on on the night of 23 May. Defence counsel refrained from challenging this evidence in cross-examination, when it was essentially repeated by Shalissa.

PC Gregory Witty's evidence

[34] PC Gregory Witty, a Crown witness at trial, thereafter testified that, at about 7.30 am on 24 May 2009, whilst at the Hattieville Police Station, he received a call from someone identifying himself as Gregory August. Shortly thereafter, at about 7.55 am, he picked up both the appellant and one Dwayne Almendárez at a house in the vicinity of milepost 8 on the highway and drove them to the Hattieville Police Station. There he took possession of, and examined, the footwear then being worn by the appellant, viz a pair of grey and red tennis shoes of the Nike brand. His examination revealed that there was on the tongue of one of the tennis shoes a red spot which appeared to him to be blood. PC Witty's further evidence was that he handed the tennis shoes to Cpl Teck.

Cpl Teck's evidence

[35] Cpl Teck gave evidence of PC Witty's taking possession of the tennis shoes of the appellant on the morning of 24 May and of his (PC Witty's) handing of them to him that same morning.

[36] The corporal said that he observed the presence on the tongue of one shoe of a substance which appeared to him to be blood and which he showed to the appellant. The latter, having been warned of his right to remain silent, said nothing. Cpl Teck later handed the pair of shoes to Mr Henry in order for the latter to forward it to the forensic laboratory. The tennis shoes were returned to him by the forensic laboratory in due course, whereupon he sent them on to the exhibit keeper at the police station. He identified a pair of Nike tennis shoes shown to him at trial as the tennis shoes in question.

[37] Defence counsel, in his cross-examination of Cpl Teck, plainly sought to raise in the collective mind of the jury doubts as to the propriety of the manner in which the tennis shoe with the supposedly blood-stained tongue was handled by the police. (As has been seen above, he adopted a similar approach in cross-examining this witness in respect of the white T-shirt.) He succeeded in eliciting from the corporal several admissions, viz:

(i) that whilst the pair of tennis shoes in question was taken by the latter to the Majil premises on 24 May 2009, the appellant himself was not;

(ii) that the pair of tennis shoes was taken by him to the Majil premises on that day in order to see whether it would 'match the prints [he must have meant to say 'print'] that we found' [emphasis added], which illogically suggests that a 'footprint' had been found by him and another or others, before his sole visit of 24 May to the Majil premises;

(iii) (contradictorily, it would seem) that he himself only saw the 'footprint' on the sole visit of 24 May but nevertheless, for some elusive reason, had the tennis shoes inside the police motor vehicle in which he had travelled to the Majil premises to make such visit; and

(iv) that he visited the shack (in which, on the evidence of himself and others, there would have been blood) before handing the tennis shoes to Mr Henry and that the handing over took place in 'the yard' at the time the 'footprint' was found by them

[38] It is also the case that Cpl Teck contradicted his evidence-in-chief to the effect that he had seen what he believed to be a blood stain on the tongue of one of the tennis shoes. He said in cross-examination that he saw stains which appeared to him to be blood stains on the tongues of both shoes. There was such a stain on the upper end of the tongue of each shoe. Having inspected the shoes at trial, he stated that such stains were no longer visible to him.

Mr Henry's evidence

[39] In his testimony, Mr Henry also dealt with the pair of Nike tennis shoes in question. In evidence-in-chief, he, too, testified that the shoes were both shown and handed over to him by Cpl. Teck. But his evidence was that he saw a 'mark' which appeared to him to be blood on one shoe only – which of the two he could not recall. At some point thereafter which he did not attempt to specify in evidence-in-chief, he swabbed the mark with a cotton swab. Both the pair of tennis shoes and cotton swab in question were amongst the items which, as already indicated above, were taken by him to the forensic laboratory in May 2009. He was shown a pair of tennis shoes which he identified as the pair in question.

[40] In the course of his cross-examination, Mr Henry said that, sometime before 12 noon on 24 May 2009, Cpl Teck showed him the pair of tennis shoes at the alleged crime scene, ie the shack. Mr Henry had, by then, already processed that scene. The tennis shoes were inside a bag which Cpl Teck took out of a police motor vehicle which

was parked in front of a house on the Majil premises some 10 - 15 feet from the shack. It was in an area near to the shack that the corporal showed them to him.

Mr Gómez's evidence

[41] The evidence of Mr Gómez of the forensic laboratory pertaining to the blood found on the white T-shirt and the blood sample taken from the lifeless body of the deceased has already been described above. He further testified that he conducted tests on a cotton swab received at the forensic laboratory on 26 May 2009. These tests revealed the presence on the swab of human blood of the blood group O. It was also the testimony of Mr Gómez that he carried out an examination of a pair of grey and red tennis shoes of the Nike brand received at the forensic laboratory on 27 May 2009. His examination did not reveal the presence of human blood on these shoes. He explained, in this regard, that swabbing of the blood on an item can cause a subsequent test of what remains of that blood to yield a negative result. As in the case of the blood found on the white T-shirt and the blood sample already referred to above, the test conducted did not enable Mr Gómez to determine the blood type, as distinct from the blood group. Upon being shown, at trial, the pair of tennis shoes in question, he identified it as the pair that he had examined.

[42] It was pointed out by Mr Gómez in re-examination that the parts of the tennis shoes which he swabbed were chosen at random, which would suggest that, inexplicably, the specific part of the particular shoe which had been previously swabbed by Mr Henry was not identified by him to Mr Gómez in order that the latter might himself test it for human blood.

- **The shoeprint**

[43] Thirdly, the Crown called two witnesses, viz Cpl Teck and Mr Henry who gave evidence of one of many shoeprints found in an area not far from the shack. Before describing the evidence of these and other witnesses relating to this particular shoeprint, however, note may usefully to be taken of the testimony adduced by the Crown of other prints found on the ground in the same general area.

PC Evelio Itza's testimony

[44] The first witness through whom such testimony was adduced was Police Constable Evelio Itza, who said in evidence that, at about ten o'clock on the night of 23 May 2009, he received a report at a police booth located near milepost 8 on the highway, as a consequence of which he and two other police officers, viz Cpl Teck and PC Witty proceeded to the Majil premises. On arriving at those premises, he spoke with Michelle and then walked to 'a small house' behind the home of Michelle, where, as he put it, 'I observed some tennis [shoe]prints on (*sic*) the sand', which shoeprints led to what he called a 'feeder road' but which, from all accounts, could only have been a path. As he and his fellow officers had to go to the KHMH and the darkness of the alleged crime scene rendered the conduct of investigations there impossible, their visit to the Majil premises lasted only about five minutes.

[45] In cross-examination, PC Itza testified that he and his fellow officers saw, with the aid of a torch, many shoeprints, in his words, 'all of the same kind', [emphasis added] and all coming and going towards a pond', all the way into the bushes, some of which were broken.

PC Witty's testimony

[46] The next such witness was PC Witty, whose evidence as it related to the red spot on the tennis shoe has already been described above, and who, as regards the present context, testified of having seen what he called 'footprints'. He said that, on the night of the murder, he and PC Itza visited the area behind the shack, where he saw a 'pond' and noticed 'footprints', all of the same size, on both sides of it, some leading towards, and others away from, it.

[47] Whilst under cross-examination, PC Witty admitted that his original statement, recorded on 1 July 2009, had contained no mention of any pond or footprints and had only recently (within the previous two weeks) been amended to do so. He also stated that he had checked the tennis shoes of both the appellant and Almendárez. But he could not say whether he had asked the latter to take off his.

[48] The respective evidence of Cpl Teck and Mr Henry relating to one particular shoeprint may now conveniently be described in turn.

Cpl Teck's evidence

[49] Testifying as to his second visit to the Majil premises, that of 24 May commencing at about 9 am (his sole visit, as already indicated above, of the latter date), Cpl Teck said that he came upon 'what appeared to be a footprint' approximately 60 feet away from the shack and 'beside a pool of water'. This 'footprint' was, according to the corporal, lifted by Mr. Henry.

Mr Henry's evidence

[50] Such of the evidence of Mr Henry as relates to the blood found on the white T-shirt and tennis shoe has been described above. As regards the particular shoeprint in question, Mr Henry's testimony was to the effect that he visited the Majil premises and entered the shack sometime after 10.45 pm or thereabouts on 23 May 2009. Unlike constables Itza and Witty, he did not testify to having seen any shoeprints or 'footprints' on the night of 23 May.

[51] But Mr Henry further testified of a second visit to the Majil premises on the next day, commencing at about 10 am, during which visit he processed what he first called the 'alleged crime scene' and then went on to identify as the shack. He said that Cpl Teck escorted him to a 'man-made pool' some 60 feet beyond the shack. (Following the visit to the *locus*, Mr Henry agreed that this distance was more like some 250 feet.) '[N]ext to the pool' he noticed a shoeprint, of which he proceeded to make a plaster cast impression.

[52] Mr Henry went on to give evidence of his having taken ink impressions of the soles of the tennis shoes which as has already been indicated above, had been both shown and handed to him by Cpl Teck on 24 May. He took those impressions in the presence, and with the help, of the appellant at the Queen Street Police Station in Belize City on the next day. They were amongst the items which, as also already indicated above, he took to the forensic laboratory in May 2009.

Mrs Diana Bol Noble's evidence

[53] Further evidence in respect of the shoeprint in question was adduced by the Crown through Diane Bol Noble, another Forensic Analyst employed at the forensic laboratory. She testified to having carried out a comparison of three items received at the forensic laboratory on 27 May 2009, viz a plaster cast impression of a shoeprint, a pair of grey and red Nike tennis shoes and a set of six ink impressions of a pair of shoe soles, of which ink impressions she had made transparencies to facilitate comparison. (Mrs Bol Noble made the very disturbing disclosure in the course of her evidence-in-chief that the cast impression was in fact broken; but, most unsatisfactorily, neither she nor anyone else gave any indication whatever as to whether it was already broken when received at the forensic laboratory or was broken only after such receipt.) As best the Court can understand what she is recorded to have said in evidence in regard to the effect of the breakage of the cast impression on her examination of it, she was left able only to compare dimensions in the areas of the heel and toe. It was her finding, limited by this circumstance, that (a) the sole pattern of the shoe that made the shoeprint in question, so far as revealed by the heel and toe portions of the cast impression, and (b) the pattern of the corresponding portions of the sole of the left tennis shoe were one and the same. She further found that every feature of the sole pattern on the heel and toe portions of the cast impression was of the same dimensions as the corresponding feature of the sole pattern of the left tennis shoe.

[54] Pieces of a broken cast impression of a shoeprint, a pair of tennis shoes and a set of six ink impressions of a pair of shoe soles were all shown to Mrs Bol Noble at trial and identified by her as the items she had compared to one another. She was also shown certain transparencies which she identified as the ones she had made and used to facilitate comparison. Mrs Bol Noble pointed out as well that, whereas the heel of the left tennis shoe was, to some extent, worn out, the plaster cast impression gave no 'clearly visible' indication that the shoeprint in question was made by a shoe which was worn out at the heel.

[55] In cross-examination, Mrs Bol Noble summarised her main overall conclusion as follows:

> ‘Because of the quality of the cast I cannot say that the cast was made by this tennis shoe but based on the dimensions and pattern, [it] may have been made by this tennis shoe.’

[56] Upon the Crown closing its case on Friday 16 November 2012, there was no submission on the part of counsel for the defence to the effect that there was no case to answer. Rather, he sought an adjournment; and the trial was adjourned to Tuesday 20 November 2012.

IV - *The case for the defence*

[57] Noteworthily, for reasons which shall become manifest later in this judgment, the appellant gave no evidence on oath.

[58] In an unsworn statement from the dock, he admitted having visited the Majil premises on the night of Saturday 23 May 2009. He had gone there with two friends to buy marijuana at about 8.30 and they had remained there only about 10 minutes. From there, he had gone, to use his words, ‘straight home’ (‘home’ being at ‘8 Miles, George Price Highway’, to quote him again), where, at about nine o’clock, he had received his mother’s nightly nine o’clock telephone call from New York. He had not ventured out from home for the rest of the night. (He said, on another note, that, on the following day, the police had, indeed, taken possession of a white T-shirt – unstained by blood, according to him – at his home and that he had, in fact, given up possession of his footwear to the police at the Hattieville Police Station.)

[59] Having raised the defence of alibi by his unsworn statement, the appellant, noteworthily again, called no evidence in its support.

V - *The first and second grounds of appeal – evidence of blood group and shoeprint*

[60] The first and second grounds of appeal related, respectively, to the evidence adduced by the Crown in regard to (i) the grouping of the blood found on the white T-shirt and the tennis shoe, on the one hand, and that taken from the lifeless body of the deceased, on the other, and (ii) the shoeprint found near the scene of the murder (ie

that shoeprint which was the subject of Mr Henry's evidence), on the one hand, and the ink impressions of the appellant's tennis shoe soles, on the other. It was the primary and common complaint of Mr Sylvestre, for the appellant, in regard to these grounds that the judge was in error in failing to withdraw all such evidence from the jury. A little less drastically, counsel maintained, in the alternative, that the judge erred by failing to direct the jury completely to disregard such evidence as valueless. Referring, for the purposes of the former ground, to such portions of the testimony of Mr Gómez as have already been isolated above, counsel submitted that the effect of the evidence of Mr Gómez was that no conclusions could be drawn from the facts that (a) human blood of group O had been found on the white T-shirt and the cotton swab with which the tennis shoe had been swabbed and (b) the blood sample taken from the body of the deceased was also of that blood group. In addition, adverting, for the purposes of ground two, to such portions of the respective testimonies of Mr Henry, Cpl Teck and Mrs Bol Noble as have already been identified above, Mr Sylvestre contended that the same did not constitute conclusive evidence that the shoeprint used by Mr Henry to make the plaster cast impression, on the one hand, and the ink impressions taken by him (Mr Henry) at the Queen Street Police Station, on the other, had been made by one and the same tennis shoe. Whilst Mr Sylvestre advanced these contentions in writing as well as orally, it must be noted in fairness to him that he did not long persist in urging them on the Court at the hearing. That he refrained from unduly taxing the Court with these patently unsound submissions was altogether appropriate.

[61] To argue that the relevant portions of the evidence were deserving of withdrawal or, alternatively, of condemnation as devoid of value and unworthy of consideration is to be heedless of prosecuting counsel's timely and unassailable indication of the jury in opening her case, to which passing allusion has already been made above. A sound and sufficient Crown case based on circumstantial evidence is, by its very nature, one founded on more than one piece of evidence, each of which, although acceptable to the jury, is, nevertheless, when taken by itself, incapable of establishing the guilt of the accused person. The Privy Council said as much in the antepenultimate paragraph of its advice in *Taibo v The Queen*, Privy Council Appeal No 26 of 1995 (26 March 1996),

delivered by Lord Mustill (to which advice this Court was referred by the learned Director of Public Prosecutions). The pertinent passage reads:

> 'The learned judge correctly explained in accordance with long established law that a series of facts, none of which in isolation directly connects an accused person with an offence may nevertheless when taken together justify an inference of guilt.'

[62] Prosecuting counsel in the instant case was making the important and valid point in her opening to the jury that the Crown would be placing before them different pieces of evidence which, if and when accepted by them (the jury), would constitute just such a 'series of facts' as the Board was speaking of in *Taibo*. But more than that, she was correctly pointing out that none of those individual pieces of evidence was required, by itself, to connect the appellant with the murder of the deceased. Circumstantial evidence is, after all, a thing very much akin to the rope of which Lord Devlin spoke (albeit in another context) in his famous lecture *Trial by Jury* (The Hamlyn Lectures) (1956, republished in 1988). (This citation is gratefully taken from the judgment of the Board in *Crosdale (Rupert) v R* (1995) 46 WIR 278, 285.) The finished product, ie the rope, is able to sustain a weight which none of its constituent strands is able to.

[63] Such being the state of the law, the question whether or not the pieces of evidence under discussion should be left to the jury simply did not arise. The groundlessness of the complaint that the judge erred in failing to withdraw them from the jury is manifest.

[64] If, however, the pertinent evidence was rightly left to the jury, did the directions given to them fall short as claimed by the appellant? The trial judge, in the course of giving to the jury directions on circumstantial evidence which were, on the whole, unduly favourable to the appellant, omitted entirely to explain the critical matters which had thus been broached by prosecuting counsel in opening. Consistently with such omission, he proceeded to direct at the key pieces of the Crown's circumstantial evidence more than a few highly disparaging remarks of the same general tenor (although not as insistent and concentrated) as the written, and the initial oral,

submissions of Mr Sylvestre in support of the first and second grounds. (The relevant directions were described as 'tepid and lacking' by Mr Sylvestre.) Thus, dealing simultaneously with the analysis of the blood taken from the lifeless body of the deceased and the blood found on the white T-shirt, the judge bluntly directed the jury that:

> '… the blood analysis does not assist the Crown … so too the blood on the white T-shirt …'

and, coming thereafter to the evidence of the shoeprint, he no less trenchantly asked the jury, rhetorically:

> '… can you say that you can rely on it when the expert herself is [only] telling you that it <u>may</u> [have been] made by the tennis shoe? [Emphasis and question marked added.]

[65] Hardly surprisingly, therefore, the passage in the summing-up which contains the judge's main exposition of the law relating to circumstantial evidence suffered from a gaping lacuna. That passage, as material for present purposes, reads:

> 'This is the point about circumstantial evidence, the pieces of evidence must be reliable and I've said, it must point to one direction. The only direction would be towards the accused. If it is not pointing to that direction, the pieces of circumstantial evidence fall [short?]. Circumstantial evidence consists of this: that when you look at all the surrounding circumstances you find that such a series of undersigned (*sic*) unexpected coincidences that as reasonable person (*sic*) you find in your judgement is compelled (*sic*) to one conclusion. That means from all the evidence your judgement comes to one conclusion, all the circumstances relying (*sic*) on must point in one direction only. If the circumstantial evidence falls shorts (*sic*) of that standard, if it does not satisfy that test, if it leaves gaps, then it is no use at all.'

The Court considers that this passage, in which the jury were being told what circumstantial evidence is, marks a convenient part of the summing-up for the giving of a direction as to what circumstantial evidence is not. Absent such a direction, the Court fears that this is yet another part of the summing-up in which the judge was overly generous to the appellant.

[66] The kindness of the judge toward the appellant was not, however, unbounded. He did not go so far as to direct the jury completely to disregard the pieces of evidence in question as valueless, as counsel contended that he should have. For the reasons already given above, the judge could not properly have so directed the jury. To have done so would have been to fly in the face of firmly established law. The alternative contention of counsel in support of the first and second grounds is no more acceptable than the primary one and, accordingly, both grounds are rejected.

VI - *The third ground of appeal: prosecuting counsel's remark on the appellant's tennis shoes*

[67] Not far from the end of a closing speech which might have been shorter and which she herself characterised as 'a fairly lengthy, closing address', prosecuting counsel remarked to the jury as follows:

> 'What is a print of a Nike tennis [shoe] doing behind [the deceased's] house? A print clearly enough defined that it would (*sic*) be collected in a sample and taken to the lab; the Forensic (*sic*) said so herself, it was clear enough, it was distinct enough. She said that, I asked her if the improper mixing affected her findings, no, the patters (*sic*) and dimension (*sic*) she could still observe. Did the broken piece in the middle affect her analysis, no, it was still usable, it was still workable. So why is a print of a Nike tennis [shoe] behind [the deceased's] house, not too far from his house? If you even look now, the Nike brand seems to be a favoured brand by the [appellant] himself. He admitted to owing that one and if you look, is wearing one on his feet now.'

[68] Mr Sylvestre complained that the final two sentences in this quotation were improper and prejudicial and contributed to deprive the appellant of a fair trial. It was his contention that the making of this remark, when coupled with the judge's failure to withdraw from the jury the expert evidence of the comparisons made of the shoe print and the Nike tennis shoe which was an exhibit at the trial, constituted a miscarriage of justice.

[69] The Court, however, has already rejected the submission that the evidence of the comparisons in question ought to have been withdrawn by the trial judge. There can be no question, therefore, of coupling the remark with such non-withdrawal.

[70] What is more, however, the Court finds itself unable to agree with the contention that the remark was prejudicial, even if it was, perhaps, not entirely proper. There was no dispute whatever at trial as to the ownership of the only Nike shoes in question. The Crown evidence, adduced through PC Witty, was that those Nike shoes, ie the ones put before the jury as exhibits at the trial were taken off the very feet of the appellant at the Hattieville Police Station on the morning after the murder. Moreover, the appellant admitted in his unsworn statement from the dock at trial that this had in fact occurred. This is to be gathered from the following passage taken from page 391 of the record (where the judge, having sought some clarification from the appellant, briefly assisted him to bring out his narrative, without demur from his counsel):

> 'THE COURT: Did you hand [your footwear] over?
> [APPELLANT]: Yes sir, we hand over the same green (*sic*) and red Nike tennis [shoes].
> THE COURT: Almendarez (*sic*) too?
> [APPELLANT]: Yes, he hand over one too …'

Gratuitous the remark of prosecuting counsel undoubtedly was. But the Court fails to see how it could have prejudiced the appellant in the collective mind of a reasonable jury when the appellant had already unreservedly admitted that the exhibited Nike tennis shoes were his. Prosecuting counsel, obviously mindful of this admission as she

addressed the jury, rightly drew their attention to it in the very sentence in which she referred to the footwear being worn by the appellant on the final day of the trial.

[71] Accordingly, the Court finds no substance whatever in the third ground of appeal.

VII - *The fourth ground of appeal: the question of the conviction's safety*

[72] The fourth ground of appeal argued by Mr Sylvestre was that the conviction of the appellant is unsafe having regard to the circumstantial evidence of the Crown.

[73] In his Skeleton Argument, Mr. Sylvestre's initial complaint in respect of this ground centred around the following passage in the summing-up:

> 'What circumstantial evidence mean? That simply means that the Crown is depending upon evidence of various circumstances relating to the crime and the [appellant], which they say, that mean the Crowns (*sic*), when taken together, will lead to the sure conclusion that it was the [appellant] who committed the crime. These are the pieces of evidence, which I gather from the evidence of the witnesses, but again, that is a matter for you. You may subtract it (*sic*) or you may add to it, on which the Crown is relying on: the tennis [shoe] foot (*sic*) print.'

Counsel's complaint was that the judge was here wrongly directing the jury that they were free to 'add to the evidence the Crown [had] marshaled'. The Court sees no basis for such a complaint. Counsel is, in fact, adding to the directions of the trial judge one which he did not give. In the quoted passage, the judge was simply telling the jury that he would be identifying for them what he considered to be the different pieces of circumstantial evidence adduced by the Crown but that they, the jury, might well think the Crown evidence contained more, or fewer, pieces of circumstantial evidence than he would be so identifying. In other words, he was merely telling them that they were not bound to adopt the list of pieces of circumstantial evidence he would be setting out for them. And it was, in the judgment of this Court, entirely right and proper for him to do so.

[74] Mr Sylvestre further made an issue in his Skeleton Argument of what he evidently regarded as the impropriety of including in the list of pieces of circumstantial evidence the tennis shoeprint, the blood stain on the appellant's tennis shoe and Mr Garbutt's identification of the appellant. (He omitted, for some reason, to complain in this part of his Skeleton Argument of the inclusion by the judge of the blood stain on the T-shirt and the sample of blood taken from the deceased's body.) In oral argument at the hearing, Mr Sylvestre materially varied the tenor of his relevant submissions as summarised in his Skeleton Argument. He proceeded, at that later stage, on the basis that the judge was correct in refraining from withdrawing from the jury the pieces of circumstantial evidence relating to the blood on the tennis shoe and T-shirt, the tennis shoeprint and the blood of the deceased, such concession being an obvious reaction to the less-than-lukewarm reception accorded by the Court to his principal argument in support of the first and second grounds of appeal. But he adhered to his alternative argument in support of those two grounds, the premise of which argument was, plainly, that the pertinent pieces of evidence were so inconclusive and weak that the jury needed to be directed that they were fit only to be ignored. Given, however, the categorical rejection of that alternative argument earlier in this judgment, there can be no question of its being prayed in aid by counsel in arguing this fourth ground of appeal. The consequence of this for the main contention advanced in support of this ground is necessarily fatal, for, as Mr Sylvestre acknowledged in his Skeleton Argument, that contention proceeded on the assumption that the first and second grounds inevitably succeed (which, as has already been determined, they do not). As counsel put it at paras 34 and 35 of his Skeleton Argument:

> 'When the evidence of the blood stains and the evidence of the shoe print are excised from the jury's consideration, as they must … the only evidence which remains would be identification … by [Mr Garbutt] … The question is whether such evidence would be sufficient to ground a conviction. The answer is no.'

[75] Mr Sylvestre, seeking otherwise to buttress this ground, directed the attention of the Court to two passages of the summing-up in which the judge highlighted the

requirement that all pieces of circumstantial evidence adduced in a trial should, when put together, point to one conclusion only, viz that the accused is guilty. In those two passages, the judge respectively said:

> 'There might be a tendency to speculate in this case here because the Counsel for the Crown relying on what we refer to as circumstantial evidence. I'm going to tell you about that but in the meantime, to use circumstantial evidence, you must accept certain pieces of evidence and when you combine them together it must point to one conclusion. If there is an alternative conclusion, it is not good. The circumstantial evidence will not be good. But I will go to that, I, just hinting that to you in the meantime.'

and

> 'Now, Mr Foreman, ladies and gentlemen of the jury, when dealing with the pieces of evidence, including the identification evidence, it is important that you examine it with care, and consider whether the evidence upon which the prosecution relies in proof of its case is reliable and whether it does prove guilt beyond a reasonable doubt. In other words you must be sure from all those pieces of evidence that the [appellant] is guilty. However, to do so, the pieces of evidence on which the Crown is depending on (*sic*) to prove the [appellant's] guilt is reliable. This is the point about circumstantial evidence, the piece (*sic*) of evidence must be reliable and I've said, it must point to one direction, the only direction would be towards the [appellant]. If it is not pointing to that direction, the pieces of circumstantial evidence fall (*sic*). Circumstantial evidence consists of this: that when you look at all the surrounding circumstances you find that such a series of undersigned (*sic*) unexpected coincidences that as reasonable person (*sic*) you find in your judgment comes to one conclusion (*sic*). That means from all the evidence your judgment (*sic*) comes to one conclusion, all the circumstances relying (*sic*) on must point in one direction and one direction only. If the circumstantial evidence falls

short of that standard, if it does not satisfy that test, if it leaves gaps, then it is (*sic*) no use at all."

[76] Mr Sylvestre, having quoted the above passages of the summing-up, leveled no explicit criticism at them or either of them. Instead, he juxtaposed them with passages from the minority judgment of Lord Hutton and Lord Slynn of Hadley in *Baughman v R* [2000] UKPC 20 (25 May 2000), an appeal to the Judicial Committee from the Court of Appeal of Antigua and Barbuda. Those passages read as follows:

> '46. The case made by the Crown against the appellant was a case based on circumstantial evidence and we are of opinion, with great respect to the Court of Appeal, that the approach which that court took to the assessment of the circumstantial evidence was flawed and erroneous so that its decision to apply the proviso was taken on an erroneous basis. In *McGreevy v Director of Public Prosecutions* [1973] 1 WLR 277 the House of Lords, whilst holding that a trial judge was under no duty to give a special direction to a jury in respect of circumstantial evidence, recognised at page 284 that there were a number of judgments and textbooks which gave guidance as to the proper approach to the assessment of circumstantial evidence. One such judgment was that of Lord Goddard CJ in *Reg v Onufrejczyk* [1955] 1 QB 388 when, in dealing with the situation where in a murder case no corpse had been found, he said at page 394:-
>
> > "… it is equally clear that the fact of death, like any other fact, can be proved by circumstantial evidence, that is to say, evidence of facts which lead to one conclusion, provided that the jury are satisfied and warned that it must lead to one conclusion only."
>
> 47. To the same effect was a statement in *Taylor on Evidence*, 12th ed (1931) vol 1, pp 67–67, para 69 where referring to circumstantial evidence it is said that after the facts sworn to are proved a further and highly difficult duty remains for the jury to perform:-

> "They must decide, not whether these facts are consistent with the prisoner's guilt, but whether they are inconsistent with any other rational conclusion; for it is only on this last hypothesis that they can safely convict the accused."
>
> 48. We consider that the error in the approach of the Court of Appeal was that whilst there was evidence which could lead to the conclusion that the appellant had deliberately pushed his wife off the roof, there were other possible explanations for some of the evidence relied on by the Crown which could lead to the conclusion that the appellant had not formed the plan to kill her and that the fall was an accident.'

[77] The Court does not on its own reading of these passages find anything in them to suggest that Lucas J erred by omission in his directions to the jury. He emphasised to them, as Mr Sylvestre himself accepted, that the circumstantial evidence needed to 'point' to one direction' and that 'the only direction would be towards the [appellant]'. [Emphasis added.] Whilst the judge may not have told the jury, adopting the language of *Taylor on Evidence* quoted by Lord Slynn of Hadley and Lord Hutton in *Baughman*, that they had to decide whether the facts proved were 'inconsistent with any other rational conclusion [than that the accused was guilty]', this Court considers that there was no need for him to do so, given his use of the adjective 'only' to qualify the noun 'direction'. And the Court respectfully suggests that, in the pertinent quotation from *Taylor on Evidence*, the contrast drawn is one, not between telling a jury to decide whether the proven facts are consistent only with the prisoner's guilt and telling them to decide whether those facts are inconsistent with any other rational conclusion, but, rather, between telling a jury to decide whether the facts are consistent with the prisoner's guilt and telling them to decide whether those facts are inconsistent with any other rational conclusion. To put it a little simpler, the judge having told the jury that the circumstantial evidence needed to point in 'one direction' only, ie towards the guilt of the accused was not required further to tell them that the facts proved by such circumstantial evidence should be 'inconsistent with any other rational conclusion'.

[78] Counsel not having been able to make good his main contention or otherwise to buttress this ground of appeal, the Court concludes that it fails completely.

VIII - *The fifth ground of appeal: the identification evidence*

[79] It was the appellant's fifth ground of appeal that, having regard to weaknesses in the identification evidence, the judge ought to have withdrawn the case from the jury.

[80] This Court (Mottley P and Sosa and Barrow JJA), in its judgment in *Pop (Juan) v R*, Criminal Appeal No 4 of 2009 (19 March 2010), gave detailed guidance on the correct judicial approach in cases where the identification of an accused is poor. In that case, in which the appeal was allowed, counsel for the appellant was the selfsame now deceased counsel who defended the appellant at trial in the instant case. The Court unhesitatingly prefaces its consideration of this ground of appeal with the observation that it would be truly astonishing if, with the ability displayed by him in the *Pop* appeal (decided considerably less than three years earlier), that experienced defence counsel would have, at the appellant's trial, culpably omitted to move the withdrawal of the case from the jury at the close of the Crown evidence. If, of course, there were proof of such a culpable omission, this Court could not possibly shrink from its duty so to hold.

[81] In suggesting that there was ample reason in the instant case for the withdrawal of the Crown case from the jury, the appellant's counsel focused his attention on the following passage from the summing-up:

> 'But I must draw (*sic*) your attention the weaknesses of this identification. The duration of the sighting, even though he say (*sic*) one minute or two minutes, they were riding bicycles, they were riding in a yard that has two houses away from [Mr] Garbutt's house, the witness (*sic*) house. Then he say (*sic*) that when they passed his uncle's house, he could not see them anymore. Is that sufficient time for him to identify the [appellant]. That is a matter for you. My task is to draw your attention to the weaknesses of the identification evidence. Then he said that he was half face (*sic*) or side view of the [appellant]. The (*sic*) how was the lighting? Was there sufficient lighting for him to be able to see the [appellant]. I have told you

about the lighting. There is no mention from the witness nor was he asked so we could know. If a person is riding slowing and has his face up, you may say that that is sufficient time for a person like [Mr] Garbutt at that distance would (*sic*) be able to recognize the [appellant]. Pardon me, I don't hear [Mr] Garbutt saying the speed, speed means, whether he (*sic*) going slowly or were they (*sic*) going fast; but when he used the word vanish, you might interpret, they were riding fast. But that's a matter for you but what I want to tell you members of the jury, I did not head (*sic)* [Mr] Garbutt saying what speed the [appellant] and his companion, if he had a companion, if you believe it was the [appellant] riding, so those are the weaknesses I want to draw you (*sic*) attention.'

[82] Unquestionably, *R v Turnbull* [1977] QB 224 places the trial judge in an unenviable position, one calling for a balancing act not dissimilar to that required of the man/woman on the tightrope. The trial judge is required by the guidelines handed down in that famous case to 'remind the jury of any specific weaknesses which [have] appeared in the identification evidence'. But those same guidelines lay down the further requirement that, 'when … the quality of the identifying evidence is poor', the judge should 'withdraw the case from the jury and direct an acquittal' save in a case where 'there is other evidence which goes to support the correctness of the identification'. The trial judge, in a case in which he/she seeks to comply with the former requirement, must tread warily in reminding the jury of specific weaknesses, for there is always the danger of getting carried away in the desire to be seen to have done justice, so to speak, to such weaknesses. A trial judge who allows himself/herself to be so carried away runs the serious risk of creating the impression in the mind of an appellant's counsel, and even in the minds of the members of an appellate court, that, by reason of those weaknesses, the identification evidence was of such poor quality that the case ought to have, in fact, been withdrawn from the jury. In view of this, it is very much in the interests of justice that a court of appeal should subject to the closest scrutiny such features of the prosecution's identification evidence as have been characterised by a trial judge as weak. In making these observations, the Court bears in mind, and does

not intend to detract from, its statement of principle in *Debride (Chadrick) v R*, Criminal Appeal No 13 of 2007 (14 March 2014), viz that:

> 'The appellate court, able only to peruse a printed record of the trial, should be ever-ready to concede the advantage naturally enjoyed over it by the trial judge when it comes to identifying the real weaknesses of the identification evidence placed before the jury in a trial.'

[83] In the passage from the summing-up reproduced at para [81] above, the judge identified as weaknesses in Mr Garbutt's identification evidence the length of the observation, the angle from which it was made, the light available at the time and the speed at which the two subjects of the observation were riding.

[84] Mr Sylvestre submitted that, in the light of what the judge told the jury in that passage, the judge had, plainly, formed the view that the identifying evidence was poor. The Court emphatically disagrees with counsel, finding itself quite unable to comprehend why, if the judge was of the view that the identification was poor, he would have failed to say so in so many words. Advisedly, Mr Sylvestre stopped short of suggesting that, with all his extensive experience in criminal trials, the judge, having formed the view that the investigation was poor, knew not what to do next (the then relatively recent judgment in *Pop* notwithstanding).

[85] True it is that the evidence underlined by Mr Sylvestre was of an observation which may have lasted no more than a minute or two, one limited in length by virtue not only of the darkness enveloping some parts of the Garbutt land but also of the fact that the two subjects of the observation were in motion, specifically, riding on bicycles. On the other hand, the evidence of Mr Garbutt, a 28-year-old boat captain, was also that his friendship with the appellant, whom he had come to know in the village of Western Paradise at 'Mile 8' on the highway, spanned some eight years. What is more, he claimed to have spoken with the appellant, as he put it, 'countless times' and, further, that, on an average, their conversations would last about two hours. None of this having been even slightly challenged in cross-examination, Mr Garbutt's evidence of identification was clearly not without its countervailing strength, the truism that 'mistakes

in recognition of close relatives and friends are sometimes made' (*Turnbull*, p 228) notwithstanding.

[86] Again, it may not have been exactly conducive to an ideal identification that the angle from which the observation was made permitted Mr Garbutt (at about 9.15 pm) only to see one side of the face of the then arriving rider whom he identified as the appellant. On the other hand, the inference that he was, by the same token, able (at about 10 pm) to see the other side of the face of the then departing rider whom he identified as the appellant is irresistible. And, at the risk of stating the redundant, the Court would note that a responsible judge, keeping all the interests of justice in mind, would be sure not to lose track of the countervailing strength of the identification in assessing this 'weakness', if this feature of the identification may, indeed, properly be so called.

[87] As regards the available light at the time the identification was made, Mr Garbutt's testimony was that, by virtue of a nearby electric light shining from the side of the highway, the part of the Garbutt land in which he initially saw the two riders in question was 'clear'. It would appear, on his further testimony, that he continued seeing the riders even after they rode beyond the area that was so lit. The riders then vanished in the darkness. The identification can only have been made in the part of the Garbutt land where it was 'clear'. That fact is not to be obfuscated by the circumstance that, progressively, the riders proceeded thence, first, into an area where there was no direct light from the highway lamp and, then, into, so to speak, total darkness – least of all in a case where the identifying witness and the appellant were, to put it colloquially, the farthest thing from strangers.

[88] Concerning the speed at which the riders were moving, the Court is unable (consistently with its duty as stated at para [82], above) to agree with the trial judge that Mr Garbutt's use of the word 'vanished' is, in itself, an indication of speed. The instructive relevant exchange in evidence-in-chief was as follows:

> "A … the two persons rode pass (*sic*) my house and went in the dark, that's it.

THE COURT: I saw two persons riding what?

WITNESS: On bicycles, pass in front of my house and vanish in the dark.

THE COURT: They what?

WITNESS: Just vanish. They rode across.'

The trial judge's reaction to this portion of Mr Garbutt's evidence is reflected in the passage from his summing-up reproduced at para [81], above. For convenience, the material words are here set out again:

> 'Pardon me, I don't hear [Mr] Garbutt saying the speed, speed means, whether he (*sic*) going slowly or were they (*sic*) going fast; but when he used the word vanish, you might interpret, they were riding fast. But that's a matter for you …' [Emphasis added.]

Put shortly, the jury were here being misled – however innocently. As relevant, the definition of the word 'vanish' appearing in The Concise Oxford Dictionary, 8th ed is '**a** disappear suddenly. **b** disappear gradually; fade away'. Axiomatically, even a slow-moving person or thing may disappear suddenly. Moreover, the evidence of Mr Garbutt indicated that the path chosen by the two riders in traversing the Garbutt land at about 9.15 on that fateful night would have taken them, first, along that which he called a 'drive in' and, then, onto a trail. And, regarding the latter, he, having suggested that it might be negotiated by a 4 x 4 truck, emphasised the point that 'it is not a road, it is just a trail, like a trail you walk through'. A reasonable jury would hardly have been inclined to think that persons riding on such a trail at night would be travelling at any speed to speak of.

[89] In the final analysis, whilst the identification did have its weaknesses, they were not, in the judgment of this Court, such as necessarily to outweigh, in the collective mind of a reasonable jury, its significant strength. Nothing is clearer from the judgment in *Turnbull* than that the quality of identification evidence may properly be adjudged to be good even if it has its weaknesses. If the Court of Appeal of England and Wales, rendering that seminal judgment, had had in mind, in speaking of identification evidence

of good quality, only such evidence (if such there be) as is perfectly free of weaknesses, it would not have seen fit to lay down a general guideline to the effect that the jury need to be reminded of the presence of such weaknesses in the evidence. In the circumstances of the instant case, the trial judge was, as this Court sees it, entirely correct to refrain from treating Mr Garbutt's identification of the appellant as poor. Thus, it had not, to adopt the language of the Court in *Pop's* case, at para [6], '[become] incumbent on him to consider whether the identification [was] supported by any other evidence in the case'. In any event, this Court is further of the view that the identification in the present case was, indeed, supported by other evidence. It was, in the judgment of the Court, supported by the pieces of circumstantial evidence unsuccessfully sought to be impugned by Mr Sylvestre in arguing his first and second grounds of appeal. It follows from the above conclusions that there was ample evidence before the jury at the close of the Crown case to support a finding that the appellant was one of two riders seen crossing and re-crossing the Garbutt land on the night of 23 May 2009. This ground of appeal is lacking in merit.

[90] Before moving on to the next ground of appeal, the Court must deal briefly with an attempt made by Mr Sylvestre at the hearing to effect a rushed marriage of the fourth and fifth grounds. This appears to have been the result of growing doubt as to the possibility that the latter ground could succeed on its own. Citing what he described as 'the weakness and deficiency in the identification evidence', he suggested that it should be added to the pieces of circumstantial evidence he had already assailed in arguing the fourth ground. Having already decided that the identification evidence was rightly left to the jury because it was of a quality other than poor and, further, that it was supported by the various pieces of circumstances evidence unsuccessfully subjected to attack by Mr Sylvestre, the Court further considers that there is nothing in his pertinent suggestion to assist the cause of the appellant.

IX - *The sixth ground of appeal: joint enterprise*

[91] By his final ground of appeal, the appellant complained that the judge failed adequately to direct the jury on joint enterprise. Mr Sylvestre's approach to this ground at the hearing was characterised by marked ambivalence.

[92] The President put to him at the very outset a concern as to the practicality of this ground in circumstances where the evidence went as far as placing two men at some undefined point on the Garbutt land but no farther – not near to the 'man-made pool', as Mr Henry called it, let alone inside the shack. Following some exchanges between bench and bar, Mr Sylvestre indicated that he was taking the President's point and turned to another subject, viz the shoeprint: pp 51–52 of the transcript.

[93] But Mr Sylvestre abruptly returned to the sixth ground (p 60 of the transcript) after a fairly long excursus into the lay of the land in the vicinity of the crime scene, especially the Garbutt land, the purpose of which excursus was hard to find. He now described the sixth ground as an alternative to the fourth, which had questioned the safety of the conviction, and he cited as justification for the ground the fact that the indictment alleged that the appellant 'and another' murdered the deceased, seeking reinforcement for his position in the fact that the trial judge had refused an application by prosecuting counsel for leave to amend the indictment by the deletion from it of the words 'and another'. (The trial judge seems, from the record, to have refused the application on the ground that the presence of the words 'and another' did not constitute a defect in the indictment but he did not elaborate on his reason or reasons for so concluding; and his ruling has not been canvassed in this appeal.) Essentially, Mr Sylvestre's only other point in oral argument was that 'having regard to the fact that there would have been two persons who were sited (*sic*) and as the learned trial judge pointed out riding to and through the area, then in the circumstances a direction of joint enterprise would have been required'.

[94] The Court is respectfully of the view that, in all the circumstances of the present case, nothing at all turns on the adequacy or otherwise of the judge's directions on joint enterprise. Whilst there is no denying the twofold fact that the indictment alleged that the appellant 'and another' murdered the deceased and that the Crown was forced by the judge (whether rightly or wrongly) to live with what may well have been a drafting error, the Court is unable to disagree with the Director's submission that the Crown case at trial was that the appellant was the principal player in the events that resulted in the fatal stabbing of the deceased on the night of 23 May 2009. The ill-advised addition of

two words to the indictment does not alter the shape of the case as determined by the evidence actually led by the Crown. As can readily be appreciated from the evidence already described above, it was the appellant and not his companion, Tunks, who displayed mean and aggressive behaviour at the drink up earlier on on the night in question; and, on Marlon's testimony, it was he (the appellant) who issued the poorly-veiled threat as he and Tunks departed from the Majil premises a little later. That mean and aggressive behaviour of the appellant was, notably, directed, at what can in a real sense (despite the differences in surnames) be called the Majil family. It was aimed first at Andrew, a 'drinking buddy' of Marlon and Tyrone who regularly visited the Majil premises, and, then, at Tyrone himself, a grandson of the deceased who, like the deceased, lived on the Majil premises. The issuing of the threat as the appellant and Tunks left the Majil premises demonstrated that the former's evident wrath had not been appeased. When he and an unidentified companion were seen by Mr Garbutt not long after on that same night, they were both well inside the back of the Garbutt land. There was no evidence, direct or circumstantial, to place this unknown companion outside the rear boundaries of the Garbutt land. Whilst there is no evidence that that companion was Tunks, there is evidence that tennis shoes being worn by both the appellant and Tunks on the following day were examined (on that same day) by PC Witty and that he found blood only on the tennis shoes of the appellant. What is more, blood was also found on a white T-shirt of the appellant. (It was, as will be recalled, Shalissa's evidence that the appellant was wearing a white T-shirt whilst at the drink up earlier that night; whilst there was testimony from Marlon, on the one hand, that he (the appellant) had a 'white shirt' around his hand at some stage during the drink up and from Mr Garbutt, on the other hand, that he (the appellant) was carrying a 'white cloth' in his hand whilst re-crossing the Garbutt land at about 10 pm that night.). And the blood on both these items was of the same blood group as that of the deceased. As if that were not enough, a shoeprint found near to the 'man-made pool' matched one of the two tennis shoes taken by PC Witty from the appellant on the morning of 24 May in the sense that it could, in the opinion of Mrs Bol Noble, have been made by that shoe.

[95] Thus, whilst there was no evidence that the appellant's companion went beyond the back of the Garbutt land that night of 23 May, the entirety of the Crown's

circumstantial evidence was enough to justify an inference that the appellant proceeded that night, not only as far as the 'man-made pool' in question, but all the way up to the interior of the shack and that he was present when the blood of the deceased, a frail and disabled septuagenarian, was shed, by several stabs, including one to the throat. In the absence of evidence that anyone else was so present, the inference that he, and he alone, was guilty of the murder of the deceased was the only one that a reasonable jury could possibly draw.

[96] In the circumstances, it is bordering on pedantry to submit, as Mr Sylvestre did, that by reason of the wording of the indictment, 'it must be shown that the [a]ppellant did an act in concert with the other appellant (*sic*) with the specific intention to commit (*sic*) cause death', the implication being that the jury should have been so directed. The state of the evidence being what it was, such a direction would almost certainly have introduced confusion in the collective mind of a reasonable jury, entitled as they would have been to find that there was nothing in the evidence to put the appellant's companion beyond the back of the Garbutt land on the night in question.

[97] No doubt a direction along those lines would have served a practical purpose in a case where the appellant's companion on the Garbutt land was himself on trial as a co-accused rather than merely the subject of an anonymous reference in the indictment. Whether he could properly be convicted of murder would depend very much on whether he and the appellant had acted in concert, whether there had been a pre-arranged plan and whether the killing fell outside such a plan. But that not being the case here, the judge would have been engaging in a useless academic exercise, having regard to the state of the evidence, had he directed the jury on such matters. Worse than that, as already adumbrated above, he would have very likely succeeded in introducing unnecessary confusion into the minds of the jurors, to the probable detriment of the public, in whose interest it is that 'those persons who are guilty of serious crimes should be brought to justice and not escape it': *per* Lord Diplock, delivering the advice of the Privy Council, in *Dennis Reid v The Queen* [1980] AC 343, 349.

[98] It remains only to add, for completeness, that, if this Court were of the view that the directions on joint enterprise were less than adequate, it would have had no

reservations about applying the proviso on the basis that there was no substantial miscarriage of justice.

X - *The direction on alibi*

[99] Towards the end of the hearing, a member of the Court drew to the attention of the Director the fact that the judge did not, in directing the jury on the appellant's defence of alibi, tell them that, if they concluded that the alibi was false, that would not by itself entitle them to convict the defendant.

[100] Mr Sylvestre contended, at that stage, that the trial judge ought to have given such a direction to the jury and he was allowed to incorporate that contention into his argument in support of the fourth ground of appeal, which concerned, of course, the safety of the conviction.

[101] The Director, for her part, submitted that the failure of the judge to give the direction was immaterial since he was under no duty to do so. She referred in this regard to *Mills and Others v The Queen*, Privy Council Appeal No 4 of 1993 (20 February 1995), a judgment of the Privy Council on an appeal from the Court of Appeal of Jamaica, and to *Kelly (Andrew) v R*, Criminal Appeal No 25 of 2001 (28 June 2002), a judgment of this Court (Rowe P and Sosa and Carey JJA).

[102] In *Mills*, the trial judge did not remind the jury in his summing-up that proving that the accused has told lies about where he was at the material time does not by itself prove that he was where the identifying witness says he was. The similarity between that case and the present one is therefore striking. The essence of the Board's treatment of the judge's failure so to do is captured in the judgment of this Court in *Kelly*. At paras 37–38, Sosa JA (as he then was) wrote as follows on behalf of the Court:

> '37. The Board rejected a submission that, in the absence of such a reminder, the direction of the judge had been deficient. In delivering the judgment of the Board, from which we find it necessary to quote at some length, Lord Steyn stated, at pages 247–248:

"The Court of Appeal had rejected a similar argument as misconceived. The Court of Appeal observed:

> 'Where an accused makes an unsworn statement no such directions [ie about the impact of the rejection of the alibi] can or should be given. The jury is told to accord to such statement such weight as they consider it deserves.'

The last sentence reflects the guidance given by the Privy Council in *Director of Public Prosecutions v Walker* (1974) 21 W.I.R. 406 at page 411. Counsel submitted that the Court of Appeal erred. Logically, he said that there is no reason why the Lord Chief Justice's observation about the impact of a rejection by a jury of an alibi defence raised by oral evidence should not be equally applicable to such a defence put forward in an unsworn statement … Since at first glance there appears to be some force in this appeal to the inevitable march of logic, the argument must be examined with some care. But it must be examined in the appreciation that the pursuit of logical symmetry is not the ultimate goal of the law."

38. Lord Steyn went on to discuss *Turnbull* which, according to counsel for the appellant in *Mills*, had laid down guidance which the trial judge ought to have heeded. His Lordship expressed the view of the Board in the terms following (at page 247):

> 'When *Turnbull* was decided in 1976 a defendant in a criminal trial in England still had the right to make an unsworn statement … There is nothing in the passage quoted from *Turnbull* to indicate that Lord Widgery CJ had in mind an alibi put forward in an unsworn statement.'

[103] In *Kelly*, the appellant had, like the appellants in *Mills*, elected not to give evidence at his trial and had called no witnesses. He raised an alibi whilst giving an unsworn statement from the dock. In summing-up to the jury, the trial judge did not direct them that, if they rejected the alibi, that would not amount to proof that Mr Kelly

was where the prosecution alleged he was at the time of the commission of the murder. Again, therefore, the similarity to the present case is remarkable. One of the grounds of appeal filed on behalf of Mr Kelly complained that the judge had erred in failing to give such a direction to the jury. At the hearing, however, that ground was only briefly pursued before being expressly abandoned. In its judgment, this Court, having cited the passages from the advice in *Mills* that have already been reproduced above, expressed the view that they constituted a complete answer to any contention that the judge had erred in failing to give the direction in question: para 39. The Court therefore considered that the pertinent ground had been properly abandoned: ibid.

[104] As has been noted above, the alibi of the appellant in the instant case was raised by him in his unsworn statement from the dock and no witness was called to give evidence in its support. In these circumstances, the Court accepts the submission of the Director, follows the decision of the Board in *Mills* and holds that the trial judge was not required to give the direction in question to the jury. He did not, in the opinion of this Court, err in failing to give it.

XI - *Disposal*

[105] In the result, no ground of appeal having succeeded, the appeal is dismissed and the conviction and sentence are affirmed.

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SIR MANUEL SOSA P

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AWICH JA

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MENDES JA