IN THE SUPREME COURT OF BELIZE, A.D. 2014
(Criminal)

Inferior Appeal No. 126 of 2014

BETWEEN:

KAREEM GENTLE **Appellant**

AND

THE POLICE **Respondent**

Before: **The Honourable Madam Justice Shona Griffith**
Date of Hearing: **21st June, 2017**
Appearances: **Mr. Kileru Awich, Crown Counsel for the Director of Public Prosecutions and Mr. Leroy Banner for the Appellant.**

DECISION

Introduction

1. This is an inferior appeal against conviction and sentence for the offence of Burglary, contrary to section 148(1)(a) of the Criminal Code, Cap. 101 of the Laws of Belize. The Appellant Mr. Kareem Gentle, was convicted in the San Pedro Magistrate's Court on the 12th November, 2014 and sentenced to 10 years imprisonment. The Notice of Appeal was filed on the 21st November, 2014. However, in keeping with an unsatisfactory state of affairs whereby inferior appeals are not processed for hearing in a timely manner, this appeal was firstly not transmitted to the Supreme Court until May, 2016 and thereafter languished until March, 2017 when it was finally assigned to a judge for hearing. After oral arguments in June, 2017, the Court now delivers its decision. The brief facts giving rise to the appeal are as follows:-
2. The Appellant was charged with having entered the premises of the complainant whilst the latter was asleep. The complainant reports having awoken in the night in his 3rd floor apartment to an intruder near his bed. He confronted the intruder who responded by attacking him with a hammer, repeatedly hitting him in his head.

The complainant struggled with the intruder who eventually escaped by jumping out of the balcony of the apartment. The complainant looked over the balcony and saw according to him, the intruder lying motionless on the concrete ground. The complainant woke his neighbor who was the landlord, and the two of them went downstairs and outside to person laying on the ground. The landlord recognized the man on the ground as the appellant, someone he'd seen around before. The complainant had never known the appellant prior to that incident but determined that it was the intruder who attacked him in his apartment. Next to the person on the ground was a knife which the complainant said was his, it came from his kitchen. The complainant believed the hammer he was attacked with was also his, having been in the same drawer with the knife. Police were called to the scene and observed the appellant still lying on the ground bleeding from his nose and ears. The complainant required, and was treated, for wounds caused by the blows to his head with the hammer. The appellant also required medical attention and was airlifted to Belize City. He was subsequently arrested and charged for Burglary.

The Grounds of the Appeal

3. There were four grounds of the appeal against conviction and one against sentence as follows:-

    (i) The Magistrate failed to assist the appellant who was unrepresented, in the presentation of his defence;
    (ii) The Magistrate failed to advise the appellant of his electives when calling upon him to make his defence at the close of the case for the prosecution;
    (iii) The Magistrate failed to inform the appellant of his right to call witnesses in support of his defence;
    (iv) The Magistrate misdirected herself in law by placing a burden of proof on the appellant to disprove the allegations of the prosecution.
    (v) The Magistrate applied a minimum mandatory sentence which was unconstitutional.

    With respect to the grounds of appeal against conviction, the first through third grounds can conveniently be addressed together as they all entail the question of the

procedural fairness of the trial. In respect of grounds (i) to (iii), Counsel for the appellant submits that the occurrence of all three of these breaks in procedure rendered the trial manifestly unfair and that in the face of these procedural defects, the strength or otherwise of the prosecution's case is immaterial. It was submitted that these deficiencies arise from the face of the record of appeal - from the Magistrate's notes of evidence.

4. In support of the first ground of appeal, Counsel for the appellant relied upon **Jose Ochoa v The Queen**[1] in which reference was made to the English decision **R v Brown (Milton)**[2]. Counsel for the appellant says that according to the notes of evidence, no assistance in putting his defence was given to the appellant by the Magistrate. Counsel for the Respondent on the other hand submitted that the nature of the appellant's defence was clear from the questions asked of the prosecution witnesses during cross examination and there was therefore no need for the Magistrate to intervene. An examination of the notes of evidence shows that the appellant's questions (i) challenged the complainant's ability to identify him or see the alleged weapons given the darkness; questioned the plausibility of the complainant's account of the incident given the layout of his apartment; (iii) disputed the truth of the landlord's evidence of having known the defendant from before; (iv) tested the consistency of the police officer's account of the facts against that of the complainant and (v) put his defence that he was in the wrong place at the wrong time - meaning in effect that it was not he who had been into the complainant's apartment. Having given sworn evidence, it was in fact the appellant's defence that it was not he who had been in the apartment, but he had been beaten and chased by some assailants and in fleeing them, ended up unconscious on the ground at the scene.

5. It is found that on the face of the record the Magistrate made no intervention of the appellant's cross examination. However, the Court agrees with Counsel for the prosecution that the nature of the appellant's defence was quite clear.

[1] Belize Criminal Appeal No. 1 of 2007
[2] [1998] Cr. App. R 364

The cross examination may not have been the most articulate, but in the Court's view, the thrust of the appellant's cross examination in respect of each witness, was definitive and clear – within the capabilities expected of an unrepresented defendant. In ***Ochoa***, the duty to provide assistance to the unrepresented defendant was framed by Carey JA in the following context and terms[3] (emphasis mine) –

> *"We begin by pointing out that the English Court of Appeal was not presuming to lay down inflexible rules of general application, but did no more than provide useful guidance in certain cases…<u>There is no question that the judge's clear duty is to give such assistance to an unrepresented defendant as is appropriate in the circumstances</u>. That, we apprehend does not mean that the judge must bend over backwards or to use the words of Lord Bingham CJ 'give the defendant his head, to ask whatever questions, at whatever length, he wishes."*

The Court thereafter proceeded to extract from the record of the evidence of the trial, the several instances in which the trial judge provided what was deemed appropriate assistance by ascertaining the defendant's question and rephrasing it for the witness to answer. This examination by the Court of Appeal was possible due to the existence of a transcript of the proceedings, as distinct from what exists at the summary level – the Magistrate's own notes of the proceedings.

6. With respect to the Court of Appeal's words that the clear duty of the judge is to give such assistance to the unrepresented defendant as is appropriate, it is considered that certain realities must be acknowledged in determining inferior appeals. In proceedings not supported by any means of contemporaneous recording, it is impossible for every spoken word or interaction between the Magistrate and defendant to be recorded by the hand of the Magistrate or even the clerk. It must be accepted that in any given unrecorded summary proceeding, there very well may be numerous communications between the magistrate and defendant that are not reduced into writing. The fact and consequences of the absence of a verbatim transcript must be properly taken into account and balanced against factors relevant to the review process, such as the nature or importance of the evidence or aspect of procedure in question.

[3] Ochoa, supra paras 6 and

In this case, in light of the fact that the appellant adequately if not articulately was able to make his defence clear on the face of his cross examination, it is not found that the absence of any obvious interventions by the Magistrate can give rise to a conclusion that there was any unfairness to the appellant by means of a lack of assistance in having his defence put before the Court. Ground (i) of the appeal is therefore dismissed. That being said, magistrates would be well advised, if and when considered necessary to provide appropriate assistance to a defendant, to make a simple note of the *fact*, that such assistance has been provided.

7. In respect of ground (ii) – the failure of the Magistrate to put the appellant to his electives – the submission was that this failure deprived the appellant of his right to a fair trial as guaranteed by the Constitution. It is agreed that a failure to inform an unrepresented defendant of his respective rights upon being called to answer a case against him, may jeopardise the fairness of a trial, the safeguards to which are enshrined in section 6(3) of the Constitution. A defendant is entitled to remain silent as a consequence of a person's right to the presumption of innocence until proven guilty (section 6(3)(a)). Additionally, as provided in section 6(6) of the Constitution, no defendant can be compelled to give evidence at his trial. In the face of these safeguards, the failure to properly advise a defendant of his electives, upon his being called upon to answer a case made against him could therefore be fatal.
8. Counsel for the appellant cited **Santiago Estrada v The Queen[4],** in support of the unquestioned duty and responsibility of the trial judge to properly advise a defendant of his electives. Further reference in that case was made by the Court of Appeal to their earlier judgment of **David McKoy v The Queen[5]**, in which trial judges were urged to restrict themselves to the simplest and most straightforward communication in discharging this duty.

[44] Belize Criminal Appeal No. 1 of 2008
[5] Belize Criminal Appeal No. 30 of 2006

It is noted by the Court herein, that these cases concern the Court of Appeal addressing findings of unsatisfactory notification of electives by a trial judge, as opposed to a failure to notify, as is suggested by Counsel for the appellant to have occurred in this case. In the instant case, Counsel for the appellant states that the record reflects only that the appellant 'elected' to give sworn evidence and that the use of that singular word cannot give rise to the presumption that the accused was properly advised of his options. On the other hand, Counsel for the Respondent suggested that the use of the word reflected exactly that the Magistrate did so advise.

9. We are again in the situation where it has to be acknowledged that it is impossible for a Magistrate to record everything that is said or done during the course of all aspects of proceedings. In respect of ground (i) there was acceptable evidence on the face of the record which was sufficient to enable the Court to assess the complaint of the appellant. In this instance however the Court is being asked to make an assumption that a fundamental aspect of procedure was complied with based upon the existence of a single word. Counsel for the appellant suggested that the benefit of any doubt in the absence of a clear indication from the record should be given to the appellant. It is not considered that an award of the benefit of assumption (whether in favour of the appellant or the Crown), is a satisfactory basis upon which to dispose of a ground of appeal. The first recourse must be to the law and the relevant law is considered as that regulating the Magistrate's obligation (or not) to take notes of the proceedings.

10. Section 44 of the Summary Jurisdiction (Procedure) Act, Cap. 99 makes provision for the matters concerned with the hearing of a summary criminal complaint. Section 44(5) in particular prescribes that:-

> *"The magistrate shall in every case take notes in writing of the evidence, or of so much thereof as is material, in a book to be kept for that purpose, and the book shall be signed by the magistrate at the conclusion of each day's proceeding,…"*

In **Abiram v Ramjohn**[6], the Trinidad and Tobago Court of Appeal considered the identical provision in the then Summary Courts Act of Trinidad and Tobago.

On appeal was the committal of a defendant by a magistrate for failure to pay arrears of maintenance. Before making a committal order, the magistrate was required by law to make enquiries of the defendant to ascertain whether he was willfully refusing to pay the arrears or genuinely lacked the means to do so. The record of the proceeding in court, reflected only that the defendant admitted the arrears and the ensuing order for committal. There was no evidence that the magistrate conducted any inquiry as to the defendant's reasons for failure to pay.

11. The Court of Appeal held that the magistrate's duty to take notes of the evidence being a statutory one (emphasis mine): -

> *"The failure to take notes in writing of the evidence given precluded the court from assuming that evidence was given in the proper way before the magistrate and the appeal had to be decided on the footing that no evidence was given before him which was considered material."*

In that case, the magistrate had reported that a lot of evidence had been taken and that indeed he had averted his mind to whether the appellant had willfully refused to pay the arrears of maintenance. The Trinidad and Tobago Court of Appeal however (per Wooding CJ), considered that given the statutory duty to take notes of the evidence of the proceedings, it would be a dangerous precedent for them to set, of making an assumption that evidence was given and properly taken into account in the absence of any indication of such from the magistrate's notes. A similar approach in Grenada, to the interpretation of identical sections prescribing a magistrate's duty to take notes can also be found in **Canterbury v Joseph**[7] per Crane JA (emphasis mine) –

> *"Magistrates are statutorily enjoined to take notes of evidence in all cases before them, for it is only by the taking of proper notes of the evidence can the cause of justice be served on a review of their decisions in the court of appeal…"*

[6] (1964) 7 WIR 208

[7] (1964) 6 WIR 205. See further **Sam v Chief of Police** (1965) 10 WIR 245.

The reference to 'evidence' was stated by the Court of Appeal to include all the facts and circumstances of the case, on oath or not on oath, including any facts narrated by the prosecutor and the defendant's responses.

12. In the instant case, albeit not evidence in the sense of facts forming the basis of the Court's decision, the appellant had an entitlement to a fair trial and there are safeguards of this right enshrined in section 6(3) of the Constitution. As stated above, such safeguards include an accused person's innocence until proven guilty and correspondingly, the right to remain silent; as well as protection from being compelled to given evidence. It is therefore extremely important that a magistrate's responsibility to properly advise the defendant of his right to remain silent, give sworn evidence or give an unsworn statement upon there being a case found for him to answer, be reflected on the record. In respect of such an important aspect of the proceedings the Court considers that it cannot be asked to act upon an assumption that the magistrate discharged that responsibility.
13. It so happens that the Court considers that the prosecution's case was a strong one, however the relative strength or not of the case for the prosecution is not a factor which can be successfully balanced against the absence of such a fundamental aspect of due process in a criminal trial. In the circumstances, on the face of the record, the appropriate safeguards for a fair trial were not complied with by the magistrate and this is found to be fatal. The Court concludes by saying that this particular decision must not be taken to mean that every single omission from a transcript in relation to procedure or evidence will be fatal. The facts and circumstances of each case will determine the outcome of an appeal. It is considered that a note which says as little as 'defendant told of options'; or 'defendant put to his electives' would have sufficed as evidence on the record that the magistrate discharged this important responsibility.

Disposition

14. With careful thought as to the Court's powers on determination of an appeal pursuant to section 120(1) of the Supreme Court of Judicature Act, Cap. 91, the appeal against conviction is allowed on the basis of the apparent failure of the magistrate to advise the appellant of his rights upon being called upon to answer the case of the prosecution. The prosecution's case was a strong case, however it is considered that there was an inordinate delay on the part of the Court in securing the processing and hearing of an appeal of an unrepresented litigant serving a sentence of imprisonment. In these circumstances, it is considered that the just option in disposing this appeal is a reversal of the conviction and quashing of the sentence of imprisonment. This is so done pursuant to section 120(1)(c) of Cap. 91. There is no need to consider the remaining grounds of appeal.

Dated this 21st day of August, 2017.

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Shona O. Griffith
Supreme Court Judge.