**IN THE SUPREME COURT OF BELIZE, A.D. 1998**

**(APPELLATE JURISDICTION)**

**INFERIOR COURT APPEAL NO. 4 OF 1998**

**APPEAL FROM THE INFERIOR COURT FOR THE CENTRAL DISTRICT**

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| | **( GREGORY MARTINEZ** | **APPELLANT** |
| | **(** | |
| **BETWEEN** | **( AND** | |
| | **(** | |
| | **( CPL. #190 ALDEN DAWSON** | **RESPONDENT** |

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**BEFORE the Honourable Abdulai Conteh, Chief Justice,**

**Mr. Kirk Anderson for the Appellant.**
**Ms. Sharon Fraser, Crown Counsel, for the Respondent.**

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**JUDGMENT**

At the conclusion of the hearing of this appeal, I quashed the conviction and set aside the sentence and promised to give reasons later. I now do so.

2. This is an appeal from the Chief Magistrate in a trial before him which was started and concluded on 13 January 1998. The Appellant was charged with the offence of robbery on 12th January 1998, and brought before the Chief Magistrate in the morning of 13th January 1998. He was convicted and sentenced to five years imprisonment in the afternoon of the same day.

3. Against both conviction and sentence, the appellant filed an appeal. On 21st October 1999, his attorney, then Mr. Kirk Anderson, filed amended grounds of appeal. These grounds are as follows:

> *"1. The Appellant was unrepresented by Counsel and was not provided with any of the statements of the prosecution's witnesses and was therefore denied his constitutional rights under Section 6(3)(c) of the Constitution of Belize to be given adequate facilities for the*

*presentation of his defence and to be afforded facilities to examine in person the witnesses called by the prosecution before the Court; and the denial of such rights to him constituted material irregularities during his trial.*

2. *The Appellant was denied adequate time for the preparation of his defence and thereby denied his right to such by virtue of Section 6(3)(c) of the Constitution of Belize; and the denial of this right to him constituted a material irregularity during his trial.*

3. *The Appellant was denied his right under Section 6(3)(e) of the Constitution of Belize to obtain the attendance and carry out the examination of witnesses to testify on his behalf before the Court on the same conditions as those applying witnesses called by the prosecution, insofar as he was never advised by the learned Magistrate of his right to call witnesses to testify on his behalf if he wished; and the denial of this right to him constituted a material irregularity during his trial.*

4. *The learned Chief Magistrate erred in law insofar as he never gave consideration to the provisions of Section 8(2) of the Crime Control Act which authorised the learned Chief Magistrate, based on the fact that the Appellant had no prior convictions, to impose a sentence of less severity than five (5) years' imprisonment; and further or alternatively, the learned Chief Magistrate erred in law insofar as he never afforded the Appellant any opportunity, prior to the imposition of sentence, to address the Court as regards the issue of possible mitigation of sentence."*

4. The first three grounds of appeal raised issues of constitutional importance and are in fact based on **section 6 of the Constitution** of Belize.

5. I believe it is appropriate to reproduce here, so far as it is material, the relevant provision of this section of the Constitution, the thrust of which is to guarantee the **protection of the law** to everyone in Belize. It provide *inter alia*:

*"6(1) All persons are equal before the law and are entitled without any discrimination to the equal protection of the law.*

*(3) Every person who is charged with a criminal offence –*

*(a) shall be presumed to be innocent until he is proved guilty or has pleaded guilty;*

*(c) shall be give adequate time and facilities for the preparation of his defence*

*(e) shall be afford facilities to examine in person or by his legal representative the witnesses called by the prosecution before the court, and to obtain the attendance and carry out the examination of witnesses to testify on his behalf before the court on the same conditions as those applying to witnesses called by the prosecution."*

6. This section, that is, **section 6** as a whole, is, in my view, central to the proper and fair administration of justice and is the lynch pin in particular, for the administration of the criminal justice system in this country.

7. In an affidavit dated 15 November 2001, the Appellant, Gregory Martinez, deposes to the circumstances of his arrest for the offence, his detention and trial. He states, *inter alia*, as follows in his said Affidavit:

*"2. That I was convicted of Robbery in Belize City Magistrate's Court No. 1 on the 13th day of January, 1998, after my having first been charged with the said offence on the 12th day of January, 1998. Between the time when I was first charged with that offence on the 12th January, 1998 and the time when I was arraigned with respect to that offence on the 13th January, 1998, I was held in police custody at the Queen Street police station in Belize City.*

*3. That on the 13th January, 1998, after I had been arraigned in Belize City Magistrate's Court No. 1 with respect to the said charge of Robbery, my trial on that charge began without any time period having been afford me so as to enable me to prepare and present my defence to the Court.*

*4. That I was not afforded any opportunity to even see, much less possess any of the statements as I now believe must have been provided to the police/prosecution by the two witnesses who testified against me at my trial, namely, Nelson Rowland and Corporal Alden Dawson. I was not aware at that time that I might have been entitled to see such witness statement, or even that such would normally be prepared, since prior to that date – 13th January, 1998, I was entirely unfamiliar*

*with the Court's processes, since I had never been to Court for anything prior to that date and I had no previous convictions.*

*5. That after the prosecution witnesses had testified against me upon my trial, the Chief Magistrate, Mr. Herbert Lord, did not ask me whether I wished to call any witnesses on my behalf. If I had had sufficient time within which to prepare my defence and if I had been afforded an opportunity to see the prosecution witnesses' statements against me prior to the commencement of my trial, I do verily believe that I would have been able to call a witness or witnesses on my behalf, who would have testified that I never robbed Mr. Nelson Rowland either in the manner alleged, or at all, on the 10th day of January, 1998.*

*6. That after I was found guilty, the Chief Magistrate did not ask me whether I wished to state anything to the Court which was then about to be imposed upon me. I was sentenced to five years' imprisonment, which the Chief Magistrate told me was the minimum sentence."*

8. For some inexplicable reason, the learned Chief Magistrate, who presided at the Appellant's trial, in turn, swore to an affidavit dated the same day as the appellant's affidavit, that is, 15 November 2001. I cannot fathom quite why this was done or thought necessary. But in his Affidavit, the Chief Magistrate sought to rebut, as it were, the averments in the appellant's affidavit. This I find to be most unnecessary and undesirable. I think it is safe to say that on an appeal against a judgment or decision of a court, whether a magistrate court or a higher court, the presiding officer of the court whose decision or judgment is appealed, is not a party to that appeal. The records and or the judgment or decision should speak for themselves on the appeal. It is not necessary and in my view, it is quite undesirable that the presiding officer, be he a magistrate or judge, should on appeal against his decision be called as a witness on the hearing of that appeal. This is so, whether he is called to testify orally or by affidavit evidence.

9. In this appeal, the learned Chief Magistrate, as I have mentioned deposed to an affidavit, and at the hearing, Mr. Anderson for the appellant applied to have him cross-examined on his affidavit. I reluctantly acceded to this request emphasizing that it should not be a practice to be indulged in to call trial magistrates to testify on appeals from their decisions.

10. I must emphasize that on appeal against a magistrate's decision the notes of evidence of the trial and the viability of the grounds of appeal against that decision should be all that is relevant for the purposes of determining

the appeal and disposing of it. It is not helpful or proper to have the magistrate whose decision is appealed from give evidence in any form whatsoever on the hearing of the appeal itself.

11. In this appeal however, the learned Chief Magistrate deposed to an affidavit concerning the appellant's trial before him on which he was cross-examined at length by the appellant's attorney.

12. In his affidavit, the Chief Magistrate stated *inter alia*:

> *"3. On January 13th, 1998 I was the presiding Magistrate in number one Magistrate Court.*
>
> *4. The Appellant Gregory Martinez was brought before me by the police in the morning charge (sic) with the offence of Robbery. The said offence being alleged to have been committed on January 10th, 1998 and the Appellant said to have been arrested on January 12th, 1998.*
>
> *5. I read the charge to the Appellant and asked him how he pleaded. He said he pleaded not guilty.*
>
> *6. The Police Prosecutor AIP Huelett then made an application for the court to consider a quick trial of the alleged offence on the ground that the appellant had before the said Magistrate Court a substantial number of charges pending trial.*
>
> *7. I was aware this was correct because the appellant had several charges pending trial before me, these included both offences of violence and dishonesty.*
>
> *8. I asked the Appellant if he had an attorney to which he replied NO and that he did not have any money to pay any attorney.*
>
> *9. I informed the appellant that the Prosecution was requesting that his case be dealt with in a Quick Trial. The Appellant said nothing.*
>
> *10. After I gave due consideration to the application made by the Prosecution and the Appellant non-response, I order that the Appellant should be tried for the offence of Robbery the afternoon of the said date January 13th, 1998."*

13. There is evidently a conflict in the affidavits of the Appellant and that of the Chief Magistrate regarding the sequence of events at the trial. A perusal

of the notes of evidence does not dispel or settle this conflict either way. Unfortunately, the notes of evidence do not show or disclose, or have recorded anywhere the fact that the learned Chief Magistrate asked the appellant whether he had an attorney, nor the fact that the appellant requested time to get an attorney or that he had witnesses to call.

14. What is clear from the notes of evidence is that the appellant did cross-examine a witness for the prosecution. What is also clear from the affidavit of the learned Chief Magistrate was that the appellant's trial was called a "Quick Trial", whatever this may mean. The fact stands out however that the appellant was first brought before the learned Chief Magistrate in the morning of 13th January 1998 and his trial was underway in the afternoon of the same day at 2:00 p.m. on the application for a "Quick Trial" by the prosecution (see paragraphs 9, 10, 12, 13 et seq. of Chief Magistrate's affidavit). The accused was being prosecuted for the offence of robbery, which on summary trial, carried on conviction, a term of imprisonment of not less than five years but which may extend to ten years; with the proviso for not imposing this minimum mandatory sentence in the case of a first time offender. It was therefore by any account, a serious offence, whether tried summarily or on indictment.

15. The "quick trial" procedure adopted in the circumstances of the appellant's trial, in my view, denied him the opportunity to have the time and adequate facilities for the presentation of his defence as stipulated in **section 6(3)(c)** of the Constitution of Belize. Summary trial does not, I think, mean summary justice of quick trial, oblivious to the Constitution's guarantee of a fair trial and the rights of a person charged with a criminal offence. **Section 6(3)** and all the paragraphs thereto (a – f) are designed and intended to ensure that when a person is charged with a criminal offence, he is accorded proper protection by the law. This is so, whether the trial is by way of summary process before magistrate or on indictment before the Supreme Court. Summary trial is intended to ensure and achieve expedition in the criminal justice system, but this does not mean and it is certainly not intended to be secured at the expense of the Constitution's provisions to secure the protection of the law for persons charged with a criminal offence.

16. There is of course, the need to assess the situation in each case individually where there is a claim that the Constitution's provisions guaranteeing the protection of the law within the administration of the criminal justice system have been violated or not observed – see

**Franklin and Vincent v R (1993) 42 WIR 263**, a case concerned with the disclosure to accused persons of copies of statements of prosecution witnesses.

17. Given that the appellant was on trial, albeit summarily, for an offence, robbery, that was evidently serious, I think that the so-called "Quick Trial" procedure adopted in his case was inappropriate. This had the effect, and he has complained in his appeal, that he was denied adequate time and facilities for the preparation of his defence. He was brought from police custody before the Chief Magistrate in the morning of 13th January 1998 and was tried on a "quick trial" application at 2 p.m. the same day and convicted and sentenced. The circumstances of his trial were such, in my view, as not to accord with the Constitution's provisions in **section 6(3)**. An adjournment to facilitate the appellant to get an attorney or witnesses to testify for him, if he had any, would have been, in all the circumstances, preferable and the proper way to proceed; as Field CJ said in **Allette v Chief of Police (1965) 10 WIR 243** at p. 245:

> *"When a person is arrested and brought before a court within hours after his arrest, the ends of justice would best be met by an adjournment for such time as the magistrate considers reasonable to enable him to retain counsel having regard to the nature of the charge and the time needed to retain counsel to prepare the defence."*

18. Where an adjournment would facilitate a defendant to retain an attorney to conduct his defence, justice would require that this be granted, otherwise any trial and resulting conviction would be likely to be set aside – **Galos Hired and Another v The King (1944) A.C. 149**, where Lord Maugham, delivering the judgment of the Privy Council setting aside a conviction for murder following a trial at which the appellant's attorney, due to wartime restrictions on sailing, could not make in it in time for the trial said:

> *"The importance of persons accused of a serious crime having the advantage of counsel to assist them before the courts cannot be doubted by anybody who remembers the long struggle which took place in this country and which ultimately resulted in such persons having the right to be represented by counsel: see* ***Holdsworth, History of English Law, Vol. IX*** *pp*

*228 et seq."* See also ***R v Mary Kingston* (1948) 32 Cr. App. Rep. 183** in the same vein.

Today, in Belize, the right of an arrested or detained person to communicate with or have adequate opportunity to give instructions to a legal practitioner of his choice and the right of any person charged with a criminal offence to be given adequate time and facilities for the preparation of his defence and to be permitted to defend himself before the court in person or by an attorney of his own choice, albeit it at his own expense, are rights recognized and expressly provided for in the Constitution. Whatever the level of the trial within the criminal justice system, whether summarily or on indictment, it is important that these rights are observed and safeguarded. Therefore in my view, the notion or concept of so-called "Quick trial" as seemed to have been adopted in this case, would sit uneasily with these constitutional rights intended to ensure fair trials and the integrity of the system of the administration of criminal justice.

*19.* It is for all these reasons that I quashed the conviction of the appellant by the learned Chief Magistrate. Admittedly, the appellant was something of an awkward customer, for as the Chief Magistrate stated in his reasons for decision: *"The (appellant's) attitude in court left a lot to be desired as he had to be told several times by the court about his attitude. He on more than one occasion threatened the complainant in court and had to be warned about is attitude. He appeared in court to be a very angry person one who had very little control of his temper and conduct; one who could not care less where he was and also one who had little or no respect for the courts and the laws of Belize."*

20. I feel however, an adjournment and a remand possibly in custody might have induced the right attitude in the appellant and would have facilitated his preparation of his defence by possibly getting an attorney to defend him later and to call his witnesses, if any. This did not happen, instead a "quick trial" was applied for by the prosecution and granted by the learned Chief Magistrate. In the circumstances, for the reasons stated, the appellant's conviction could not stand.

21. I need not, in view of this conclusion, address the issue relating to discovery of prosecution's witnesses' statements raised by the appellant; suffice it to say that as Lord Woolf (as he then was) succinctly stated the

position on this thus in **Franklin and Vincent v R (1993) 42 WIR 263** at p. 268:

> *"Undoubtedly a defendant will be assisted in preparing his defence if he is provided with copies of statements on which the prosecution proposed to rely prior to the commencement of his trial. It is therefore desirable, where this is practicable, for statements to be provided. Clearly, the more serious and more complex the proceedings the greater the desirability that statements should be provided and the more likely that it will be practicable to provide the statements. In the converse situation, where the offence is trivial, to be dealt with summarily, where issues are simple, the provision of statements before trial is less important."*

See also ***R v Ward (1993) 96 Cr. App. R. 1*** on the common duty of fair disclosure by the prosecution generally.

*22.* Also, the rather summary way, in the literal sense of the word, that the appellant was proceeded with overshadowed certain fundamental considerations that a court should always bear in mind when an **undefended** accused comes up before it for trial. It is the fundamental right of such an accused to be informed by the presiding judge, be he a magistrate or a judge of the Supreme Court, that he is entitled to call witnesses on his own behalf.

*23.* These considerations stem from the need to ensure as well the fairness and integrity of the criminal justice system and are today reflected in **section 6(2) and (3) of the Constitution of Belize** which provide:

> *"(2) If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.*
>
> *(3) Every person who is charged with a criminal offence –*
>
> *(c) shall be given adequate time and facilities for the preparation of his defence;*
>
> *(e) shall be afforded facilities to examine in person or by his legal representative the witnesses called by the*

*prosecution before the court, and to obtain the attendance and carry out the examination of witnesses to testify on his behalf before the court on the same conditions as those applying to witnesses called by the prosecution."*

The word **afforded** in paragraph (e) of subsection (3) has been interpreted to mean that a trial court must inform an unrepresented accused of his constitutional entitlement to the facilities both to examine witnesses for the prosecution and to call his own witnesses and to facilitate the process in that behalf – See **R v Carter (1960) 44 Cr. App. Rep. 225**; and **The State v Cleveland Clarke (1976) 22 WIR 249**, where the Guyana Court of Appeal interpreted a similar constitutional provision as **section 6(3)(e)** of the Constitution of Belize, as importing a clear duty on any presiding judge in a criminal trial to inform an unrepresented accused of his right to call witnesses and provide him with the facilities to do so; and that no attempt to whittle down this duty would be entertained.

24. See however, the case of **The State v Dennis Pryce**, again from the Guyana Court of Appeal, reported in (1976) **22 WIR 298**, where that court dismissed an appeal against conviction and sentence because the appellant who was unrepresented at his trial, had failed to prove that the trial judge omitted or failed to inform him or ask him if he had witnesses to call in his defence; and that the record of the trial showed that the appellant was in fact informed of his right to call witnesses.

25. I can only therefore say that when unrepresented accused persons appear before magistrates, care should be taken to inform them of their right as to their defence. In this case, there is nothing in the notes of evidence that this right was afforded to the appellant who was undefended. Instead, the learned Chief Magistrate deposes in paragraphs 18 and 19 as follows:

*"18. The Prosecution close its case after the presentation of its two witnesses and I then informed the appellant that from the evidence of the two witnesses I found he had a case to answer and it was his turn to present his case.*

*19. I then told the appellant that he had three choices. Firstly he could give sworn evidence in which case the prosecutor can cross examined him if he wishes to, and I may ask him some questions. Secondly he can make unsworn statement in which case the prosecution cannot cross examine him and I can only asked (sic) question to be clear as to what he is saying but that such statement is not the same as if he gave*

> *sworn evidence and that I will be allowed to give it what weight I think it deserved having regard to all the evidence. And thirdly he did not have to say anything since it is the duty of the Prosecutor to prove the case against him. The appellant elected to give sworn evidence."*

It is clear from all this that the appellant was not told that he could have witnesses called on his own behalf, if he had any. It is additionally for this reason I quashed the appellant's conviction.

26. Again, see the decision of the English Criminal Court of Appeal in **R v Andrews (1940) 27 Cr. App. Rep. 12**, and **R v Carter (1960) 44 Cr. App. Rep. 225** where the *ratio* of the decision is to the effect that whenever an accused is *unrepresented* by an attorney at his trial, it is essential he should be asked by the judge, (in this case the trial magistrate) whether he wishes to call any witnesses in his defence; and a conviction may be quashed where an unrepresented accused is not so asked, as the accused (defendant) would not, unrepresented as he was, be regarded in the result, as having had a fair trial.

27. Finally, with regard to the mandatory minimum sentence of five years imprisonment handed down against the appellant, it is clear that this was not in line with the *proviso* to what was then **section 8(2)(b) of Act No. 28 of 1994** (now section 148(4)(b) of the **Criminal Code – Chapter 101 of the Laws of Belize – Revised Edition 2000)**. This is so because the appellant had no previous conviction, and as he deposed, he had never been to court for anything prior to his trial. The proviso however, empowered the Chief Magistrate to have refrained from imposing the minimum mandatory sentence if there were special circumstances which he should have recorded in writing, and passed instead some other sentence. He however imposed a sentence of five years imprisonment on the appellant.

I however agree with Ms. Fraser for the Respondent that the *proviso* is discretionary. But in all the circumstances of this case, the sentence of five years would have been modified. However in view of my findings on the conviction of the appellant, I need not address the sentence on him as this could not in the circumstances stand, his conviction having been quashed.

For all these reasons, I quashed the conviction and set aside the sentence of the appellant at the conclusion of hearing his appeal on 23 November 2001.

A. O. CONTEH
Chief Justice

**DATED: 28th June, 2002.**