IN THE COURT OF APPEAL OF BELIZE, A.D. 2009

CRIMINAL APPEAL NO. 24 of 2007

BETWEEN:

ELVIS MYERS **Appellant**

AND

THE QUEEN **Respondent**

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BEFORE:

The Hon. Mr. Justice Mottley	**-**	**President**
The Hon. Mr. Justice Sosa	**-**	**Justice of Appeal**
The Hon. Mr. Justice Carey	**-**	**Justice of Appeal**

Hubert Elrington for the appellant.
Ms. Cheryl-Lynn Branker-Taitt, Director of Public Prosecutions (Ag.) for the respondent.
Denys Barrow SC and Ms. Priscilla Banner for the Attorney General, Amici Curia.

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12, 19 June; 30 October 2009.

MOTTLEY P

[1] On 12 November 2007 the appellant was convicted of murder following a trial before Gonzalez J and a jury. He was also convicted on two counts of wounding. He was sentenced to life imprisonment on the count of murder and a term of imprisonment of one year on each count of wounding.

[2] On 29 November 2007 the appellant appealed his conviction. The Notice of Appeal contained two grounds but counsel for the appellant sought and obtained from the Court leave to withdraw those grounds and to substitute a single ground. In that new ground, it was alleged that the trial of the appellant was a nullity on the ground that it was conducted in violation of sections 4, 5, and 98(1) of the Constitution.

[3] The appellant asserted that the trial was a nullity because the trial judge Gonzalez J was over the age of 65 when he presided over the trial and, consequently, it was further alleged, that the appellant had been deprived of his liberty in breach of the provisions of the Constitution. It was the contention of the appellant that, having reached the age of 65, Gonzalez J had no authority to conduct the trial as he had passed the age which is set out in the Constitution for judges to demit office.

[4] It is common ground that the judge, who was appointed with effect from 1 April 1993, was born on 28 December 1941 and that he thus attained the age of 65 years on 28 December 2006. It was also agreed that on attaining the age of 65, the Constitution mandated that he must retire. However, the judge did not in fact retire, but continued to sit and preside over trials including the appellant's. It is also common ground that Gonzalez J was assigned other cases by the Chief Justice. It was pointed out by the respondent, that since he attained the age of 65, the judge had presided over some 38 cases during the period 28 December 2006 and 28 December 2007. In his skeleton argument, the appellant stated that the judge was discharging his function as a judge of the Supreme Court of Belize. This is confirmed by the record of appeal. The judge has subsequently been formally appointed a temporary judge by the Governor-General for the period September 2008 to August 2009.

[5] Counsel for the appellant relied, inter alia, on provisions of sections 4, 5 6(2), 97 and 98(1) of the Constitution. Sections 4 and 5 provide as follows:

"4(1) A person shall not be deprived of his life intentionally save in execution of the sentence of a court in respect of a criminal offence under any law of which he has been convicted.

(2) A person shall not be regarded as having been deprived of his life in contravention of this section if he dies as the result of the use, to such extent and in such circumstances as are permitted by law, of such force as is reasonably justifiable-

a. for the defence of any person from violence or for the defence of property;
b. in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
c. for the purpose of suppressing a riot, insurrection or mutiny; or
d. in order to prevent the commission by that person of a criminal offence,

or if he dies as the result of a lawful act of war.

5(1) A person shall not be deprived of his personal liberty save as may be authorised by law in any of the following cases, that is to say:-

a. in consequence of his unfitness to plead to a criminal charge or in execution of the sentence or order of a court, whether established for Belize or some other country, in respect of a criminal offence of which he has been convicted;
b. in execution of the order of the Supreme Court or the Court of Appeal punishing him for contempt of the Supreme Court or the Court of Appeal or of another court or tribunal;

c. in execution of the order of a court made to secure the fulfillment of any obligation imposed on him by law;

d. for the purpose of bringing him before a court in execution of the order of a court;

e. upon a reasonable suspicion of his having committed, or being about to commit, a criminal offence under any law;

f. under the order of a court or with the consent of his parent or guardian, for his education or welfare during any period ending not later than the date when he attains the age of eighteen years;

g. for the purpose of preventing the spread of an infectious or contagious disease;

h. in the case of a person who is, or is reasonably suspected to be, of unsound mind, addicted to drugs or alcohol, or a vagrant, for the purpose of his care or treatment or the protection of the community;

i. for the purpose of preventing his unlawful entry into Belize, or for the purpose of effecting his expulsion, extradition or other lawful removal from Belize or for the purpose of restraining him while he is being conveyed through Belize in the course of his extradition or removal as a convicted prisoner from one country to another, or

j. to such extent as may be necessary in the execution of a lawful order requiring him to remain within a specified area within Belize, or prohibiting him from being within such an area, or to such extent as may be reasonably justifiable for the taking of proceedings against him with a view to the making of any such order or relating to such an order after it his been made, or to such extent as may be reasonably justifiable for restraining him during any visit that he is permitted to make to any part of Belize in which, in

consequence of any such order. his presence would otherwise be unlawful."

Section 6(2) states:

"6(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."

[6] Under section 97(2) of the Constitution, a judge of the Supreme Court is appointed by the Governor General "acting in accordance with the advice of the Judicial and Legal Service Section of the Public Services Commission and with the concurrence of the Prime Minister given after consultation with the Leader of the Opposition."

[7] Section 98.-(1) of the Constitution provides:

"98(1) Subject to the following provisions of this section, a justice of the Supreme Court shall hold office until he attains the age of sixty-five years."

The proviso to this subsection enables the Governor-General inter alia to permit a person who has attained the age of sixty five years, to continue until he attains an age not exceeding the age of 75. The Governor-General must act in accordance with the advice of the Judicial and Legal Services Commission and the concurrence of the Prime Minister who must first consult the Leader of the Opposition.

[8] Counsel for the appellant submitted that the trial of the appellant was a nullity in that it was conducted in violation of sections 4, 5, 98(1) of the Constitution. He argued that these sections taken together provide that an accused who is charged with murder shall not be deprived of his life or liberty except in the manner provided in these sections. Counsel further submitted that

these sections require that a sentence which a court passes on an individual which deprives him of his liberty can only be imposed after a fair trial in a court of law which is independent and impartial and as such has been established in accordance with the Constitution. He urged that, in order to fulfill this requirement, the judge who presided over the trial must have been competent to preside at such a trial. Having passed the age at which he should have demitted office, it meant that he continued in office in breach of the Constitution and that such continuation in office was illegal and therefore he was incompetent to preside over the trial. The result of this was that the appellant was deprived of his liberty in breach of a right guaranteed to him by the Constitution.

[9] In support of his written submissions that the trial was a nullity, Mr. Elrington relied on **Sookoo and Another v Attorney General (1985) 33 WIR 338 and Whitfield v Attorney General (1989) 44 WIR 1**. The Director of Public Prosecutions on the other hand submitted that these cases do not support the appellant's submission that the trial is a nullity.

[10] In **Sookoo**, the Chief Justice of Trinidad and Tobago had reached the age of retirement as set out in the Constitution. The Chief Justice wrote to the President and formally requested that he be granted permission in accordance with section 136(2) to continue in office for a short time so as to enable him to deliver judgments and to do other things in relation to proceedings that had commenced before he reached the retiring age. Permission was granted. However, on the day following that on which the Chief Justice attained the age of 65, the plaintiff filed an Originating Summons in the High Court to determine the validity of a Writ which was witnessed by the Chief Justice.

[11] Section 136(2) of the Constitution of Trinidad and Tobago provided that, notwithstanding that a judge has attained the age at which he is required to vacate office, he may with the permission of the President acting in accordance with the advice of the Chief Justice, continue in office for such period of time as

may be necessary to enable him to deliver judgments or to do any other thing in relation to proceedings that were commenced before he reached that age.

[13] In delivering the judgment of the Privy Council, Lord Scarman said at page 374:

> "The second question of construction is as to the functions permissible to a judge continued in office under the Section 136(2). Is he limited to the completion of unfinished business? Or is such completion the purpose of the continuation but not a limitation of the functions of the judge during the extended period? The wording, in their Lordships' view, is (as the Court of Appeal also thought) plain and unambiguous. The judge in the instant case the Chief Justice, is continued "in office". He is not permitted merely to sit as a judge to complete unfinished business; he is continued in office for that purpose."

[14] The Director of Public Prosecutions pointed out that under the provisions of section 98 of the Constitution of Belize, the Governor General is empowered to extend the time at which a judge must retire to 75 years. We do not consider **Sookoo**'s case to be of any assistance in this matter.

[15] In **Whitfield v Attorney General**, supra, the Chief Justice of the Bahamas was due to attain the age of 65 on 5 January 1988. Before that date, he reached an agreement with the Prime Minister that he would continue until the age of 67. Through inadvertence, the Prime Minister did not mention the agreement to the Leader of the Opposition until 12 January 1988. The plaintiff considered this failure to consult as a breach of the constitutional proprieties and declined to consent to the agreement. Even though he was aware that the Leader of the Opposition did not agree, the Governor General nevertheless, acting on the advice of the Prime Minister, issued an instrument on 28 January 1988 permitting the Chief Justice to continue until he reached the age of 67. In September, 1988

an election petition which had been issued by the plaintiff was listed for hearing in the Election Court which comprised the Chief Justice and another judge. The plaintiff filed an Originating Summons in which he sought a declaration that the Chief Justice had not been validly permitted to continue in office after attaining the age of 65.

[16] Article 96(1) of the Constitution of Bahamas requires a justice of the Supreme Court to retire at the age of 65 years. A proviso to Article 96(1) enables the Governor General acting on the recommendation of the Prime Minister after consultation with the Leader of the Opposition to allow the justice to continue in office until he attains the age of 67.

[17] Both at first instance and in the Court of Appeal, the matter was disposed of, on the basis that the appellant did not have *locus standi* to seek the declarations prayed in the Summons. Before the Court of Appeal, it was submitted on behalf of the appellant that "the common law de facto doctrine can have no application to offices created by the Constitution and cannot be used to circumvent the specific provision of the Constitution relating to appointment to such offices." Henry P said that

> "In so far as the second argument is concerned, it seems to me on balance, and particularly having regard to the provision of article 79(4) of the Constitution that the application of the de facto principle would not be inconsistent with the Constitution, insofar as it relates to the appointment and continuation in office of the Chief Justice."

[18] Melville JA dealt with the submission in this way. He said:

> "Turning to the de facto doctrine, what is being challenged, it was said, was not the validity of the acts of the Chief Justice but the validity of the appointment. The cases do not seem to support that

submission. A part of the judgment of Lord Denning MR in **Re James** [1977] 1 All ER 364 at page 373 was cited by the trial judge. I need only emphasize a few of those words:

> "He sits in the seat of a judge. He wears the robes of a judge. The holds the office of a judge. Maybe he was not validly appointed. But still he hold the office of a judge. It is the office that matters, not the incumbent … so long as the man holds the office, and exercises it duly and in accordance with the law, his orders are not a nullity … such is the theme that runs through the important case in the Supreme Court of Connecticut: State of Connecticut v Carroll, 38 Conn 449 (1871) and the Court of Appeal in New Zealand in Re Aldridge (1893) 15 NZLR 361."

The point was well put according to Lord Denning MR in Norton v Shelby County 118 US 425. There it was said (at paras. 444, 445):

> "Where an office exist under the law, it matters not how the appointment of the incumbent is made, so far as the validity of his acts are concerned. It is enough that he is clothed with the insignia of the office, and exercises its powers and functions … the official acts of such persons are recognized as valid on grounds of public policy, and for the protection of those having official business to transact."

[19] This case is clearly relevant to the issue in this case as it applied the *de facto* doctrine to the office of the Chief Justice whose continuation in office had not met all the constitutional requirements.

[20] The *de facto* doctrine engaged the attention of the Court of Appeal in England in three recent cases viz **Fawdry & Co. (a firm) v Murfitt (Lord Chancellor intervening) [2003] QB 104, [2002] EWCA 643; Coppard v Customs and Excise Commissioner (Lord Chancellor intervening) [2003]**

QB 1428 [2003] EWCA 511 and Balcock v Webster et al [2006] QB 315 [2004] EWCA 1869.

[21] In **Fawdry**'s case, a claim was brought in the Queen's Bench Division of the High Court. It was heard by a judge of the Family Division of the High Court who was authorized to sit in the Technology and Construction Court but not in the Queen's Bench Division. The issue on appeal was whether the judge had jurisdiction to hear the case.

[22] The Court of Appeal held that the judge had jurisdiction to hear the case. In giving her judgment, Hale L.J. as she then was, dealt with the issue that even if the judge had not been validity transferred, the order she made was valid as the act of a de facto officer. The Lord Justice said at p. 112:

> "The long standing doctrine of the Common Law is summarized in Wade & Forsyth, Administrative Law, 8th Ed. (2002) p. 291 – 292:
>
> > The acts of [an] officer or judge may be held to be valid in law even though his own appointment is invalid and in truth he has no legal power at all. The logic of annulling all his acts has to yield to the desirability of upholding them where he has acted in the office under a general supposition of his competence to do so."

[23] Hale L.J. explained that "the authorities show that the de facto officer must have some basis for his assumption of office, variously expressed as "colourable title" or "colourable authority". The Lord Justice referred to the judgment of Butler C.J. in State of Connecticut v Carroll 38 Conn. 449 where the Chief Justice summarized the circumstances in which the de facto doctrine would apply. At p. 471 – 472 the Chief Justice stated:

> "An Officer de facto is one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid so far as they involve the interest of the public and third persons, where the duties of the officer were exercised. First, without a known appointment or election, but

> under such circumstances of reputation or acquiescence as were calculated to induce people, without inquiry, to submit to or invoke his action, supposing him to be the officer he assumed to be. Second, under color of a known and valid appointment or election, but where the officer had failed to conform to some precedent requirement or condition, as take an oath, give a bond, or the like. Third, under color of a known election or appointment, void because the officer was not eligible, or because there was a want of power in the electing or appointing, or by reason of some defect or irregularity in its exercise, such in eligibility, want of power, or defect being unknown to the public….."

[24] Hale L.J. concluded that "the judge must not be a mere usurper who is known to have no colourable authority. The doctrine depends upon his having been generally thought to be competent to act and treated as such by those coming before him".

[25] In **Coppard v Customs and Excise Commissioners** (Lord Chancellor intervening) supra, the claim was brought in the Queen's Bench Division of the High Court claiming damages against the defendant for breach of contract. Liability was admitted and the case went to trial for damages to be assessed. The assessment was heard by a circuit judge who was aware that he was not authorized to sit as a judge of the High Court but who wrongly believed that he had authority to sit in the Queen's Bench Division by virtue of his appointment to sit in the Technology and Constriction Court. One of the issues before the Court of Appeal was whether the judge sat and gave judgment as a judge-in-fact of the High Court.

[26] Sedley L.J. in his judgment accepted at p. 1433 that as far as the *de facto* doctrine is concerned:

> "The central requirement for the operations of the doctrine is that the person exercising the office must have been reputed to hold it."

The Lord Justice went on to:

> "..hold that the de facto doctrine cannot validate the acts; nor therefore ratify the authority of a person who, though believed by the world to be a judge of the court in which he sits, knows that he is not. We accept, on well known principles, that a person who knows he lack authority includes person who has shut his eyes to that fact when it is obvious; but not a person who simply neglected to find out. We call such a person a usurper."

[27] In **Baldock v Webster**, supra, the claimant brought an action against the defendant, his former solicitor, to recover damages for professional negligence. The recorder who dealt with the trial of a preliminary issue believed that he was hearing a county court case. He knew that he had not been authorized to sit as a judge in the High Court. A month after the hearing, the recorder informed the parties that he had not been authorized to hear and determine the preliminary issue. On appeal the issue was whether the order be set aside as being made without jurisdiction, or whether it can be saved by the application of the doctrine of de facto office.

[28] Laws L.J., who referred to Wade and Forsyth on Administrative Law 9th Ed. (2004) p. 285 – 286 which is set out in the judgment of Hale LJ in **Fawdry's** case, supra, observed:

> "No doubt the general reputation of the law and the public's confidence in it must be protected as surely as the interests of individual parties who have proceeded on the assumption that a judgment in their case is perfectly valid, where that is what it seems to all the world. Public confidence as well as individual parties are, in my judgment, protected by the requirement that there be a court of competent jurisdiction convened to hear the case, that the judicial officer be not a usurper and that he has colourable title to sit where he does sit."

[29] In the **Director of Public Prosecutions of the Virgin Islands v William Penn, [2008] UK PC 29**, Lord Mance had occasion to make observations about *de facto* judges at paragraph 23 of the judgment. His Lordship stated:

> "The qualification recognized in the de facto cases – that the *de facto* judge must act in good faith and believed by himself and all concerned to be acting with authority – matches the qualification regarding in peroration identified in the jury cases which the Board has already discussed."

[30] From the cases it is clear that for the *de facto* doctrine to apply, the judge must have a colourable title or authority. In addition, the judge must have acted in good faith and must have been believed by himself to have the necessary authority to act and has been treated by litigants as having such authority. The doctrine cannot be invoked by a person who knows that he has no authority to sit as a judge but nonetheless usurps the function of a judge. The rationale for the *de facto* doctrine is that the logic of annulling the decision of the de facto judge must yield to the need to protect the reputation of the law and the public confidence in it as well as the interest of the parties who acted on the assumption that the trial was being properly conducted. There is no evidence to show that at the time of the trial the appellant questioned the competency of the judge to preside over the trial. Both the prosecution and defence proceeded on the basis that the judge was qualified to preside.

[31] Two questions therefore need to be answered in the instant case (i) did the judge have colourable title or colourable authority when he presided over the trial of the appellant; (ii) if he did, did the judge act in good faith and believe that he was so acting or was he aware that he lacked authority?

[32] The judge had been appointed a judge in the Supreme Court in April 1993 and continued to perform those functions until he demitted office in December 2007. In continuing in office after 28 December 2006, there can be little doubt

that the judge had colourable title or colourable authority to perform the function of a judge.

[33] Did the judge act in good faith? The Director of Public Prosecutions sought leave to introduce into evidence an affidavit sworn by the judge. The Court refused leave. In her Skelton Argument, the Director was maintaining that the de facto doctrine applied. Any affidavit from the judge would of necessity be in support of this position and would clearly be self serving and of little assistance to the Court. In any event, the Cook took the view that there could have been no cross examination of the judge. (**see Locabail UK Ltd v Bayfield Properties Ltd [2001] QB 451**, p. 477.

[34] Whether the judge acted in good faith is clearly an issue of fact. In our view, it would be for the appellant to show that the judge was not acting in good faith. This would require clear and cogent evidence for this Court to so conclude. Such evidence would have to be produced *aliunde*. As an example an affidavit from the department of government responsible for calculating and paying the pension and gratuity, if any, of the judge, could have been tendered into evidence. This would have provided the Court with evidence from which it could infer whether the judge did not act in good faith or in other words, whether he knew or had shut his eyes to the fact that he ought to have demitted office in December 2006.

[35] It must be said that very little evidence is before this Court concerning the circumstances which led to the judge continuing in office, except the fact that he continued. Such evidence as there is however, tends to show that he acted in good faith. The Chief Justice, who is head of the judiciary, continued to assign criminal cases to him. Indeed, it is common ground that between December 2006 and December 2007 the judge presided over 38 such criminal trials. In assigning cases to the judge, the Chief Justice must have acted under the impression that the judge was indeed qualified to sit. No objection was taken at

the trial by either counsel for prosecution or the defendant. In proceeding with the trial the judge believed that he was entitled to conduct the trial.

[36] Section 98(1) of the Constitution provides that a justice of the Supreme Court holds office until he reaches the age of 65. The proviso to the section allows the Governor General acting in accordance with the advice of the Judicial Legal Services Section of the Public Services Commission, to permit a justice to continue in office until he attains any age not exceeding 75. However the Prime Minister must concur in the decision which concurrence is to be given after consultation with the Leader of the Opposition.

[37] The Constitution does not contain any sanction for a breach of this section. This is to be contrasted with the constitutional remedy provided by section 20(1) of the Constitution for breach of the provisions of sections 3 to 19 of the Constitution which deal with the Protection of Fundamental Rights and Freedoms guaranteed by these sections.

[38] In the absence of any section dealing specifically with the breach of section 98(1), it is necessary in the view of the Court to resort to the *de facto* doctrine. The Court considers that the logic of annulling the act of the judge when he presides over this trial must yield to the desirability of upholding the act of his presiding over the trial under the general understanding that he was competent to preside. The Court accepts that:

> "….the general reputation of the law and the confidence in it must be protected as surely as the interest of individual parties (per Laws LJ in Baldock's case)."

[39] However, the Court considers that the *de facto* doctrine must in no way conflict with the provision of section 6(2) which states:

> "If any person is charged with a criminal offence, then unless the charge is withdrawn, the case shall be afforded a fair hearing with a

reasonable time by an independent and impartial court established by law."

[40] This provision guarantees the appellants a fair hearing before an independent and impartial tribunal. Indeed, the doctrine must yield to the provision of section 2 of the Constitution which provides that the Constitution is the supreme law, and if any law is inconsistent with the Constitution, the other law is void to the extent of the inconsistency. The question that must be asked and answered is whether the *de facto* doctrine conflicts with the provisions of the Constitution. As the judge had passed the age of 65, could it be said that the Court was one which was established by law?

[41] "Law" is defined in section 131 of the Constitution as meaning "any law in force in Belize or any part thereof, including any instrument having the force of law and any unwritten rule of law…."

The common law is included in this definition. The common law including the *de facto* doctrine, must therefore not be inconsistent with the provisions particularly the provisions of section 6(2). The de facto doctrine must therefore not be inconsistent to the requirement that the court before which the appellant's case was tried was an independent and impartial tribunal "established by law". For the *de facto* doctrine to operate, it must therefore be shown that the Court was established by law. No issue is raised as to the independence and impartiality of the Court.

[42] In **Fawdry & Co. v Murfitt**, supra, Hale LJ had to deal with the issue of whether the *de facto* doctrine could operate to properly authorize the judge in that case, in the sense that it could be said that court was established by law in accordance with provisions of Article 6(1) of the **European Convention for the Protection of Human Rights and Fundamental Freedoms** ("the Convention")

which is scheduled to the Human Rights Act 1988 of the United Kingdom. Article 6(1) provides inter alia:

> "In the determination of civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

In article 6(1) of the Convention, as in section 6(2) of the Belize Constitution, the requirement is that the trial take place before an independent and impartial tribunal established by law.

[43] In **Fawdry**'s case it had been submitted on behalf of the appellant that the *de facto* doctrine was "designed to validate the acts of someone who by definition was not legally entitled to perform them rather than to validate the appointment itself." Counsel for the Lord Chancellor submitted that, being part of the Common Law was sufficient to fulfill the requirement that the tribunal was impartial and independent and established by law.

[44] Hale LJ, with some hesitation concluded at para. 36 of the judgment:

> "….the rule can be regarded as validating the establishment of the tribunal as well as the acts it performs."

[45] The issue of what effect, if any, the *de facto* doctrine has on the provision of Article 6(1) of the Convention also engaged the attention of the Court of Appeal in **Coppard v Custom and Excise Commissioners**. Sedley LJ, who was a member of the Court in Fawdry's case identified two questions which he stated, need to be answered: "(i) Does the *de facto* doctrine validate the act or the office" (ii) if it is the latter, is this sufficient compliance with the requirement of article 6 that a person's civil rights are to be determined by a tribunal established by law".

[46] In answering the first question, the Lord Justice pointed out this question was left open by the Court in **Fawdry**'s case but nonetheless concluded that the rationale for the doctrine was that:

> "…in the interest of certainty and finality, that a person who is believed and believes himself to have the necessary judicial authority will be regarded in law as possessing such authority. If this is the true meaning of the de facto doctrine of jurisdiction, as we would hold it is, then the first question of compatibility with article 6 is answered. The judge-in-fact is a tribunal whose authority is established as common law."

[47] In so far as the second question is concerned, the judge pointed out that there was no decision of the European Court of Human Rights which dealt in any comprehensive way with the meaning of the expression "established by law". She concluded that the purpose of having a tribunal established by law "is to ensure that justice is administered by, and only by, the prescribed exercise of the judicial power of the state, and not by ad hoc people's court and the take of such a principle must be fundamental to any concept of the rule of law".

[48] The application of *de facto* doctrine, in the view of the Court, is not incompatible with the provisions of the Constitution. The tribunal over which the judge presided would have been a tribunal established by the common law *de facto* doctrine. It was not a tribunal which was arbitrarily established. It was established by the operation of an established common law principle. Nothing in the Constitution requires that a court must be created by statute. As pointed out earlier, "law" means the common law. The common law was and is an established part of the laws of Belize.

[49] It was for these reasons that the Court dismissed this appeal and affirmed the Conviction.

[50] The appellant did not pursue the grounds of appeal which related to his conviction on counts two and three of the indictment. In count two, the appellant was convicted of intentionally and unlawfully wounding Ionie Slusher on 26 December 2005. In respect of count three, he was convicted of intentionally and unlawfully wounding Keith Cruz on the same day.

[51] While the appellant abandoned his appeal in respect of these convictions, this Court had earlier stated that, on a charge of murder, the defendant ought not to be charged on a count of wounding, as section 21 of the Juries Act Cap 128 makes provisions for such trial to be tried with a jury of nine persons and not twelve, unless the procedure set out in that section was followed. See **Rene Lopez Morentes v The Queen, Criminal Appeal Number 8 of 2007**. The trial on counts two and three of the indictment was a nullity and those convictions cannot stand.

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MOTTLEY P

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SOSA JA

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CAREY JA