IN THE COURT OF APPEAL OF BELIZE, A.D. 2007

CRIMINAL APPEAL NO. 16 OF 2005

BETWEEN:

SECUNDINO GARCIA	**Appellant**
AND	
THE QUEEN	**Respondent**

—

BEFORE:

The Hon. Mr. Justice Mottley	-	President
The Hon. Mr. Justice Carey	-	Justice of Appeal
The Hon. Mr. Justice Morrison	-	Justice of Appeal

Mr. Oswald Twist for appellant.
Ms. Cheryl-Lynn Branker-Taitt for respondent.

—

2, 6 March & June 22, 2007.

CAREY, JA

1. On 6 March, after we had concluded hearing submissions in this appeal against conviction for murder and sentence of death, we allowed the appeal, quashed the conviction, set aside the sentence, ordered a new trial and intimated that we would give our reasons. This we now do.

2. The appellant was charged on an indictment with his son Jerry Garcia for the murder of Juan Chiac, but, in the event, the jury were, unable to agree as to Jerry and his retrial was ordered. In the light of the conclusion at which we arrived regarding the disposition of the appeal, we will refrain from commenting on the facts save as is absolutely necessary for purposes of this appeal.

3. A short summary of the prosecution case will, we think, suffice. In the early morning of 26 November 2003, these accused both armed with guns, entered the hut in which Mr. Marcos Chiac, his wife, his son Juan Chiac, the victim and his two daughters lived by kicking in the wall and door, the entirety of the dwelling being constructed of sticks tied with string. These men were known to the family members for a number of years; the father was a preacher and the son did singing. On entry, they proceeded to assault and beat Juan Chiac, handcuffed him and took him away. The appellant also beat Mrs. Chiac. Mr. Chiac mistakenly thought they were in the Police Force because they were dressed in camouflage clothes. These men took Juan Chiac away in a red coloured pick-up truck. His family never saw him alive again. His body was found the following morning in the same area where the police located the pick-up truck in which he was abducted. That truck was traced to the appellant and his son who were seen by the police driving in it on the day following the invasion of the house. Blood stains were found in the back of this pick-up. Juan Chiac had been shot at close range in his chest by a shot gun which was subsequently found in the house where the appellant and his son lived. The shot gun was found to have blood stains on the muzzle. A shell casing found near the body had in the opinion of the expert been fired from that shot gun. To complete this sad and violent tale, the suggested motive is the belief by the appellant that Marcos Chiac was responsible for the death of the appellant's son, Arsenio, one year before these events.

4. The appellant in an unsworn statement denied the charge. He was at home and never left it.

5. On behalf of the appellant Mr. Twist deployed a range of arguments covering some seven grounds of appeal. We mean no disrespect either to counsel's commendable energy or to his hard work, but we regret that, save for one ground, there was an insufficiency of substance in the matters raised. There was a laconic ground – "The verdict was inconsistent". It opened up a larger enquiry:

6. The court in examining the case on a broader front, was struck by the fact that the evidence adduced by the prosecution was precisely the same in respect of each accused but the jury convicted the one and were unable to agree as to the other. Although the prosecution evidence was the same, with respect to each, the evidence left to the jury by the learned judge was not. That unfortunate lapse on the part of the judge, we are satisfied, induced the jury to return the verdicts they did.

7. At p. 688 the judge, in reviewing the evidence said this:-

> "…The other piece of evidence which the prosecution is saying helps to link the accused to this crime is the evidence of the shot gun and the cartridges found in the possession of Secundino Garcia (emphasis supplied) the day after the incident. The prosecution brought Cpl. Cocom who testified to you that on the 27th November, 2003, at about 7:30 a.m. he went to the home of Secundino Garcia and upon searching the living room, he discovered a single action shotgun and six 16 gauge cartridges. He said that both Jerry and Secundino Garcia were present when he retrieved the shotgun from their home but under cross-examination he admitted that only Secundino was present since Jerry had already been taken by other officer to the station."

It should be noticed that the gloss on the evidence as to possession was inaccurate and would have led the jury to think that the shotgun, the murder weapon, had been found in the sole possession of the appellant when the facts

were that the gun was found in a house in which the appellant and Jerry Garcia lived or which they occupied. This unfortunate slip was pointed out to the trial judge who, at the conclusion of the summing up had invited Crown Counsel to address her on any matter needing attention. The trial judge as a corrective expressed herself in this way at p. 707:-

> "…The Prosecution and the defence counsel have helpfully pointed out certain aspects that they wish me to address you on further, the first one being, that the prosecution is saying that the evidence of the shotgun found by the police at the home of Secundino also links Jerry to the crime, not only Secundino even though Secundino was the only one present, the evidence from the prosecution is that Jerry lived at the address so that the prosecution is putting to you the jury, that the gun links not only Secundino but also Jerry Garcia, to the commission of this offence…"

The trial judge then went on to deal with the other matters before inviting the jury to withdraw and consider their verdict.

8. The essential question is whether this corrective action was effective. This point arose in *R. v. Moon [1969], WLR 1705* where at the end of the summing-up, counsel drew the judge's attention to a slip in his directions and an attempt was made to correct it. Salmon, LJ (as he then was) said this at p. 1707:-

> "… on the assumption that (the fault) can be put right, … it can only be put right in the plainest possible terms. It would be necessary to repeat the direction which he had given, to acknowledge that that direction was quite wrong, to tell the jury to put out of their minds all that they had heard from him, then in clear terms, which would be incapable of being misunderstood, tell them very plainly and simply what the law is…"

We think these words are applicable to the circumstances of this case, and, in our view, correctly represent the legal position. A judge who makes a misdirection of law or misstates the facts, in order to put right the error made, he must:-

(a) repeat the wrong direction,
(b) acknowledge that it was an error,
(c) instruct the jury to put it out of their minds altogether,
(d) direct the jury correctly.

These are the conditionalities to be satisfied.

9. In our opinion, the verdict of guilty of murder and the inability of the jury to agree are proof positive that the correction attempted by the judge was not effective. It fell short of what was required. The judge never told the jury that what she had said earlier was wrong, rather it was glossed over as if she were merely including some factor required by the prosecution. There was no *mea culpa* as there should have been. The jury was not asked to put of their minds the error made, for the reason that what was said never conveyed any admission of a slip.

10. In our judgment that misdirection was of sufficient materiality to compel our interference in the manner of the disposition of the appeal.

MOTTLEY P

CAREY JA

MORRISON JA