IN THE COURT OF APPEAL OF BELIZE, A.D. 2010

CRIMINAL APPEALS NOS. 26 and 27 of 2009

BETWEEN:

HERSON CHAVEZ
and
GEORGE GALINDO — **Appellants**

AND

THE QUEEN — **Respondent**

BEFORE:

The Hon. Mr. Justice Mottley	**-**	**President**
The Hon. Mr. Justice Morrison	**-**	**Justice of Appeal**
The Hon. Mr. Justice Barrow	**-**	**Justice of Appeal**

Mr. Anthony Sylvester for the appellants
Ms. Cheryl-Lynn Vidal, Director of Public Prosecutions for the Crown.

—

24 June 2011.

BARROW JA:

Reasons for Decision

[1] After hearing the arguments of counsel for the appellants this court dismissed these appeals against conviction for attempted murder for which the

appellants were sentenced to 9 years imprisonment. These are the reasons for decision.

[2] On a Saturday evening in February 2007 the victim, Greg Garcia, then about 18 years old, set out from his home in Santa Elena, Cayo District and visited a friend up the street. The two friends were joined by another friend and they went to the home of the latter. A fourth friend joined them and they went to the home of the fourth friend. Not long after they went to the home of yet another friend where they remained, drinking rum, until around 9 o'clock that evening. Mr. Garcia and one friend then left, riding bicycles, to go to San Ignacio. On the way they bought Chinese food and also stopped to talk with a friend. They rode around San Ignacio until around 9:40 and then headed back to Santa Elena.

[3] While the two friends were riding along Perez Street in Santa Elena Mr. Garcia felt a blow to his head and he fell. He saw a group of young men coming from the home of George Galindo. Herson Chavez came up to Mr Garcia and the two had an argument. Mr Chavez stabbed Mr Garcia in the abdomen. Then Mr Garcia felt two stabs in his back and when he turned around he saw Mr George Galindo with a knife in his left hand. Mr Garcia then felt a blow to the head. Mr Garcia turned back to Mr Chavez and got into a struggle with Mr Chavez and felt another stab to the back. He turned around quickly and the blade slipped out of Mr George Galindo's hand and remained in Mr Garcia's back. Other persons from the group started hitting Mr Garcia and he ran off and fell, losing consciousness. He was taken to the hospital and treated for injuries that the attending doctor testified were life threatening.

[4] Mr Garcia described the lighting at the scene as coming from a street light and being adequate for him to see his attackers. He said when he and Mr Chavez were arguing they were 5 feet apart and when Mr Chavez stabbed him they were 2 ½ feet apart. Mr Garcia testified he and Mr Chavez had attended the same school, they had been friendly and talked with each other and hung out

together. They had known each other for about 8 years. Mr Garcia identified Mr Chavez in the dock.

[5] Mr Garcia said when he felt the stab to the back and turned around and saw Mr George Galindo with a knife in his left hand Mr Galindo was 2 feet away. Mr Galindo was facing him even as Mr Galindo was moving backwards. Mr Garcia said he also knew Mr Galindo for 8 years, they had attended the same school and were in the same class for a year and they used to talk a little. Mr Garcia also identified Mr Galindo in the dock.

[6] Counsel who appeared in the court below for Mr Galindo cross examined Mr Garcia as to the lighting and suggested Mr Garcia's ability to identify his attackers was unreliable by reason of drink and the blows to the head. Mr Garcia disagreed.

[7] Mr Chavez gave a statement from the dock. He told of encountering Mr Garcia that evening, of Mr Garcia attacking him, of an unarmed struggle, of their being separated and going their separate ways. Mr Chavez said he had no knowledge of how Mr Garcia was wounded.

[8] Mr Galindo gave sworn testimony and denied being in any fight or altercation with Mr Garcia. He claimed he was at home at the material time; he was not on the scene. He claimed Mr Garcia was mistaken in identifying him as an attacker.

[9] The first of the three grounds of appeal was that the trial judge misdirected the jury as to the sequence or order of the consideration they were to give to the cases for the prosecution and the defence. Complaint was made of the following passage:

> "With that, members of the jury I will ask you to retire and consider your verdict but to remind you that in considering your verdict, you must always look to the prosecution case, of course after considering the case for the defence; what they have told you. You will consider it, but if you find that you don't agree with them, then you go to the prosecution's case, look at that case and say whether or not they have adduced evidence of a kind and quality for which you could say definitively these are the two persons who committed either of these two offences." (Record lines 5 – 13; page 45).

[10] If one looks at what the judge had told the jury immediately before uttering these words it becomes clear that the judge was not telling the jury to first consider the case for the defence and then consider the case for the prosecution. Had that been the case (which it was not) the jury may well have been confused into thinking the defence had to prove something.

[11] In fact the quoted words follow the judge's direction to the jury on the alibi defence of Mr Galindo. The judge told the jury, in effect, that although it was Mr Galindo who raised the defence of alibi it remained the obligation of the prosecution to prove the guilt of this accused and he did not have to prove that he was elsewhere at the time. The judge further told the jury this defendant did not have to bring a witness to corroborate the defence of alibi. He reiterated that whatever defence Mr Galindo raised it was not for him to prove but for the prosecution to disprove. Having repeated the reiteration the judge then told the jury the way the prosecution had sought to defeat the defence of alibi was by reliance on the testimony of Mr Garcia who said it was this accused who had stabbed him with a knife. The judge further told the jury to consider the weaknesses in the prosecution's case to test it for accuracy or truthfulness or mistake. Further, said the judge, even if the jury concluded the alibi was false that did not of itself entitle them to convict the accused George Galindo. It was following immediately from that direction, on the defence of alibi, that the judge

told the jury that after considering the case for the defence (of alibi, and if they rejected that defence) they must go (back) to the prosecution's case to see if the prosecution had proved its case. While the expression of the judge could have been more precise this Court did not consider the judge misdirected the jury by directing them as he did.

[12] The second ground of appeal was that the conviction was unsafe having regard to the state of the identification evidence. In his written submissions counsel for the appellant carefully identified all the features of the identification evidence that he submitted made the identification weak. These included that the attack occurred at night, the state of the lighting, the victim had been drinking, the blow to the head, the victim went unconscious, the absence of any identification parade and the delay in arresting and then charging the appellant Mr Galindo.

[13] The view this Court took of this argument was that if the jury accepted the evidence of identification as truthful and accurate it was more than sufficient evidence to sustain a conviction. It was not correct that the judge said the evidence of identification was weak, as counsel submitted. What the judge said was that the evidence of identification had "some weakness" and he identified the weakness as including the fact that the victim had been drinking and, having been hit on the head, said he was not thinking straight. The judge drew these and other features to the attention of the jury and told them that it was for them to determine whether the victim would have been able to recognize his attackers.

[14] This was a perfectly proper approach for the judge to take. It is only when the quality of the identification evidence fell to be regarded as poor and raised a substantial danger of a mistaken identification that a judge should withdraw the case from the jury and direct an acquittal; see Criminal Appeal No. 4 of 2009 **Juan Pop v R** at para 6. In this case there was a considerable difference between the judge adverting to 'some weakness' in the identification evidence and concluding that the evidence was poor, so as to make a conviction based on

that evidence unsafe. Further, contrary to the submission of counsel, the judge was not mistaken in saying there was some corroboration of the victim's identifying evidence. The effect of the admission of Mr Herson Chavez in his dock statement that he got into a fight on the night in question with the victim amounted to corroboration of the material particulars that Mr Chavez had been present and engaged in a fight with the victim.

[15] In our view the evidence of identification was capable of supporting the conviction.

[16] The remaining ground of appeal was that the judge failed to properly direct the jury on the dangers of acting on a dock identification without an identification parade. This ground relies on the decision in **Pipersburgh and Robateau v R** Privy Council Appeal No 96 of 2006 where dock identifications were made by persons who had known the appellants from seeing them at their work place but had not known the appellants to the extent of knowing their names. The failure of the judge in that case to give the proper directions about dock identifications led to the quashing of the convictions. That case confirmed an earlier decision that dock identifications are not inadmissible but that proper directions need to be given to a jury both as to the failure to hold an identification parade and as to the special dangers of a dock identification. As counsel correctly submitted, that case decided that a judge may need to warn the jury that the identifying witness may have been influenced to make the identification by seeing the appellant in the dock and the judge should warn the jury to approach such evidence with great care.

[17] It is no attempt to dilute the force of the decision in **Pipersburgh and Robateau** to say that the degree to which there will be need for such directions will vary according to the facts of particular cases. To take an extreme example, if a mother reported to the police that she saw, in perfect viewing conditions, her two sons who had lived in her home with her for decades up to that point, fighting

and one chop the other with a machete it would be idle to require her to attend an identification parade and identify the accused son as the person she saw inflicting the chop. Similarly, it would be idle for the judge to warn the jury, if the mother testified and identified her son in the dock as the assailant, of the special dangers of a dock identification and that the mother may have been influenced to identify her son as the assailant from seeing him in the dock. It is emphasized that this example is not to make light of the need in all appropriate cases for the giving to the jury of the very clear directions handed down by our highest court. But it is not in every case, without exception, that such directions must be given.

[18] In this case the victim testified to the degree of his knowledge of the appellants. When the victim told the police who had stabbed him he was not describing or identifying strangers, he was giving the names of persons he recognized. Both were his former school mates – one a former class mate and the other a former hang out friend -- whom he had known for 8 years. As this court concluded in Criminal Appeal No. 7 of 2009 **Allen James v R**, in which a security guard identified a person who was his cousin and with whom he had shared a bedroom in his grandmother's home for some months as the robber of premises he was guarding, no purpose would have been served by holding a police identification parade and having the security guard pick out the cousin in the line up; (see para 12). The degree of the victim's familiarity with the appellants is at least as strong in this case as in the **Allen James** case. Therefore, it would have served no purpose to have the victim identify the appellants on an identification parade. For that reason, there was no special danger of dock identification in this case about which to warn the jury and there was no possibility that the victim may have been influenced to identify the appellants as his attackers from seeing them in the dock.

[19] It is for these reasons that we dismissed the appeals.

_____

MOTTLEY P

`

_____

MORRISON JA

_____

BARROW JA