IN THE SENIOR COURTS OF BELIZE

CENTRAL SESSION-BELIZE DISTRICT

IN THE HIGH COURT OF JUSTICE

INFERIOR APPEAL (CRIMINAL) NO.: IC20230002

BETWEEN

ABRAHAM MENDEZ

Appellant

and

THE POLICE

Respondent

Before: The Honourable Mr. Justice Nigel Pilgrim

Appearances:

Mr. Orson J. Elrington for the Appellant.

Mrs. Romey Cunningham, Crown Counsel, for the Respondent.

2024: September 27th
October 21st

JUDGMENT

INFERIOR APPEAL- BREACH OF PROTECTION ORDER-BURGLARY- CIRCUMSTANTIAL EVIDENCE-CORROBORATION- STANDARD OF PROOF- REASONS- UNREPRESENTED DEFENDANT- DUTY TO ASSIST

1. Abraham Mendez, ("the appellant"), was convicted and sentenced by the learned Magistrate ("TLM") in the Orange Walk Judicial District on 10th January 2023 for 2021 offences of burglary and breach of protection order after a full trial. He was sentenced to 7 years imprisonment for the former and 2 years imprisonment for the latter, both sentences to run concurrently. The appellant would have filed the notice of appeal on 13th January 2023, well within the 21-day limit to lodge his appeal pursuant to **Order LXXIII Inferior Courts (Appeals)**[1] ("the Rules"). TLM has quite properly provided her reasons for decision as required by law.

The facts

2. The evidence in support of the conviction was primarily that of Ms. Leslie Pineda. Her testimony was that on the morning of 6th December 2021 at around 6:30am she heard a knocking on her front door and heard someone 'hailing' asking for her to open the door. She responded that she would not open the door and heard the person, whom she identified as the appellant. Ms. Pineda went on to testify that about 5 to 10 minutes later the appellant came back and after refusing to open the door again, she proceeded to look through her window where she allegedly saw the appellant wearing "a khaki short pants and a white shirt with a skull on the upper left front chest of the shirt" with apparent blood stains on his clothes. Ms. Pineda asked the appellant once again to leave, which he eventually did.

3. After going downstairs half an hour later to sweep Ms. Pineda saw the door of her neighbour's home, Ms. Burden, open. Upon looking inside there was apparent blood by a window, a knife on the floor, a ransacked room, and a broken piggy bank. This prompted Ms. Pineda to call her neighbour and the police, where upon the police arrival she informed them that she previously made a report against the accused and was granted a protection order. Thereafter she made her way to the police station to make her report. That protection order was admitted in evidence without objection, and it contained the condition that the appellant was not to be on Ms. Pineda's premises.

4. TLM indicated that she was "satisfied"[2] that there was an effective protection order barring the appellant from the premises and she "finds no issue in the identification of the [appellant] at Ms.

[1] Rule 2(1)(b) made under the **Supreme Court of Judicature Act** Chapter 91 of the Substantive Laws of Belize, Revised Edition 2020 ("SCOJA").
[2] Para 26 of TLM's reasons.

Pineda's residence[3]". The evidence of the witness was that she knew the appellant for 10 years and observed him in the light of a clear day with no obstruction from 3 feet away for 1 minute. TLM was "satisfied" that the appellant was positively identified[4] owing to the conditions at the time of the sighting as well as her familiarity with him. She also found that Ms. Pineda was an unshaken witness.

5. TLM reasoned that there was circumstantial evidence which supported that the person who broke into Ms. Burden's home was the appellant because apparent blood stains were seen on him and apparent blood was found in Ms. Burden's apartment where items were found missing. Another witness saw the appellant with apparent blood stains the day he was arrested, which was the day the report was made, and he saw the appellant with an injury to his hand. TLM also drew a negative inference from the appellant's refusal to have his hand photographed while he allowed his clothes to be photographed, reasoning that the appellant did not want his hand photographed to show he was bleeding, inferentially establishing that he burgled Ms. Burden's property. The appellant was photographed with stains on his clothes and the stains in Ms. Burden's property were photographed.

6. The appellant called no witnesses and gave no evidence.

The grounds of appeal

7. The appellant appeals his conviction on 4 grounds:

   i. The decision was unreasonable or could not be supported having regard to the evidence.

   ii. The Court did not assist the appellant appropriately in the conduct of his trial.

   iii. "There was an error in law in that the learned trial Judge failed to make clear that she took in mind that it was dangerous in the circumstances to convict in the absence of corroboration, and that she bore that principle well in mind before being able to decide, as she was entitled to do, and that she would nevertheless convict in the absence of corroboration, being sure that the prosecutrix was telling the truth."

   iv. "The learned trial judge (sic) failed to put her mind to the fact that she needed to be convinced Beyond (sic) a reasonable doubt."

[3] Para 28 of TLM's reasons.
[4] Para 24 of TLM's reasons.

8. The contention in support of Ground 1, and 3 which can be taken together, is that TLM did not appropriately take care in finding guilt on the burglary charge, which was based entirely on circumstantial evidence, and that there was a need for TLM to give herself a corroboration warning before being satisfied of the truthfulness of Ms. Pineda. On Ground 2 the appellant contends that TLM ought to have assisted him more in his cross-examination of the main witnesses. Ground 4 acknowledges the fact that in the reasons of TLM nowhere was it said that she was satisfied so that she was sure of the guilt of the appellant. There is absolutely no reference to the standard of proof. TLM analyzed the evidence of the various witnesses and simply indicated that she found the appellant guilty of both offences.

9. The respondent has conceded the appeal on Ground 4 and offered no written submissions on the remaining grounds. The appellant and the respondent both agree that the failure of TLM to indicate that she was satisfied so that she was sure of the guilt of the appellant is fatal to the conviction as there are, as the respondent put it, "various levels of satisfaction" and proper decision making requires the judicial officer in a criminal case to not leave for inference whether she was satisfied to the criminal standard.

10. The Court is not bound by a party's concession and will consider that and the other grounds of appeal.

Grounds 1, 3 and 4

Analysis

11. It is convenient to take grounds 1, 3 and 4 together.

Sufficiency and handling of evidence

12. The appellant's submissions blur the lines between the convictions on the two charges and the evidence that was necessary to establish both. The breach of protection order charge was based on the direct evidence of Ms. Pineda that (i) the appellant had notice of the order; and (ii) the appellant

contravened it by being on her premises, knocking at her door. The burglary charge was completely circumstantial and was tied to the presence of suspected blood on the appellant and suspected blood being found in the burgled premises which along with the positive identification of the appellant there that morning.

13. In evaluating TLM's reasons for conviction the Court reminds itself of the standard of review that it cannot disturb the findings of fact by her unless she is plainly wrong, which includes a material error of law. The Court of Appeal helpfully considered that issue in **Nevis Betancourt v R**[5], per Foster JA:

> *"[47] …The general appellate approach in relation to the findings of a trier of fact is so well established as to merit only brief recitation. Where a lower court, whose function it is to make findings of fact has done so and there is evidence which shows that these findings may be justified, it is not the function of an appellate court to interfere by substituting its own view of the facts…*
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> *[48] As stated in Henderson v Foxworth Investments Ltd and Another:*
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> *"…. the duty of the appellate court was to ask itself whether it was in a position to come to a clear conclusion that the trial judge had been 'plainly wrong'… . The phrase 'plainly wrong' can be understood as signifying that the decision of the trial judge could not reasonably be explained or justified. An appellate court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration. It follows that, in the absence of some other identifiable error, such as a material error of law, the making of a critical finding of fact which has no basis in the evidence, a demonstrable misunderstanding of relevant evidence or a demonstrable failure to consider relevant evidence, an appellate court would interfere with the findings of fact made by the trial judge only if it was satisfied that his decision cannot reasonably be explained or justified."*
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> *[49] Given the constraints attendant upon challenging factual findings, the appellant must satisfy this Court that the findings of fact made by the learned judge cannot reasonably be explained or justified and that the learned judge was plainly wrong."*

[5] Criminal Appeal No. 6 of 2019.

14. In relation to the breach of protection charge TLM reasoned essentially that the circumstances of the identification were good enough for a proper identification of the appellant at her premises that morning. If a **R v Turnbull**[6] analysis is applied to the evidence it is clear that the conclusion of TLM is not plainly wrong, indeed it is submitted that it is perfectly reasonable. The witness was close to the appellant whom she knew well, with no obstruction and saw him in daylight. The period of observation is also not so short as to make TLM's finding of a correct identification unreasonable. TLM also conducted the credit analysis to determine if Ms. Pineda was a truthful witness to be able to accept the reliability of her identification as is the process outlined in the Privy Council decision in **Beckford et al v R**[7]. TLM found no material inconsistencies and found her credit unshaken, there is nothing on the record that makes that finding Wednesbury unreasonable.

15. The Court would then consider the burglary charge. There is firstly no legal requirement for any special self-direction when a judicial officer is trying a case wholly reliant on circumstantial evidence. The judicial officer must consider all the evidence and be satisfied so that she is sure of guilt as noted by the House of Lords in **McGreevy v Director of Public Prosecutions**[8]. The judicial officer is required to look at the whole circumstantial rope, not a minute analysis of each strand, and determine whether there is proof beyond reasonable doubt as noted by the apex court, the Caribbean Court of Justice ("CCJ") in the Belizean decision of **August et al v R**[9], per Byron PCCJ and Rajnauth-Lee JCCJ:

> *"[38] A case built on circumstantial evidence often amounts to an accumulation of what might otherwise be dismissed as happenstance. The nature of circumstantial evidence is such that while no single strand of evidence would be sufficient to prove the defendant's guilt beyond reasonable doubt, when the strands are woven together, they all lead to the inexorable view that the defendant's guilt is proved beyond reasonable doubt. There was therefore a serious misdirection wholly in August's favour when the trial judge directed the jury that each strand of the circumstantial evidence required its own proof of August's guilt beyond reasonable doubt. It is not the individual strand that required proof beyond reasonable doubt, but the*

[6] [1977] QB 224.
[7] (1993) 42 WIR 291 at 298.
[8] **[**1973] 1 All ER 503.
[9] [2018] 3 LRC 552 (CCJ).

whole. The cogency of the inference of guilt therefore was built not on any particular strand of evidence but on the cumulative strength of the strands of circumstantial evidence."

16. Nor is there any mandatory requirement for corroboration. The need for corroboration is a fact sensitive matter grounding itself in some evidential basis to approach the testimony of a particular witness with care, such as admitted lies, for instance, as noted by the Court of Appeal in **Elmer Ax v R**[10]. There was nothing in the evidence of Ms. Pineda that required a self-direction on corroboration, or to put it alternatively, the decision not to give a corroboration warning was not Wednesbury unreasonable.

17. TLM convicted the appellant on the burglary charge adding up the strands (i) the appellant was positively identified at the premises when by the protection order he ought not to have been there; (ii) the appellant was seen with a cut on his hand; (iii) the appellant was seen by Ms. Pineda with reddish stains resembling blood and in his photograph stains appear on his clothes; (iv) broken louvres were found on the premises with red stains resembling blood on the window pane in Ms. Burden's property; and (v) Ms. Pineda discovered the place burgled shortly after the appellant's departure. These are all facts when tied together this Court cannot readily say that no reasonable magistrate could come to a conclusion of guilt.

18. There was also the issue of the negative inference drawn by TLM by the defendant refusing to have his hand photographed. In the Court's view TLM was entitled to draw an adverse inference in these circumstances. The drawing of an adverse inference presupposes a legal obligation on the appellant to do something and his failure to do it. For instance, when a defendant wants to advance an alibi at trial and he has either not filed an alibi notice at all or filed one outside of the statutory period required, adverse comments are permitted[11] because of his requirement to do so pursuant to the **Indictable Procedure Act**[12].There is an implicit requirement that the appellant allow himself to be photographed in lawful custody, as the appellant was at the time of the photograph, pursuant to section 19(1) of the **Police Act**[13] which provides:

[10] Criminal Appeal No 5 of 2017.
[11] **Anderson Mapp et al v The State,** Cr. App. Nos. 13 & 14 of 2012 paras 35-39 (T&TCA).
[12] Chapter 96 of the Substantive Laws of Belize, Revised Edition 2020.
[13] Chapter 138 of the Substantive Laws of Belize, Revised Edition 2020.

"19(1) It shall be lawful for the competent police authority to take or cause to be taken and to record for the purposes of identification the measurements, weight, photographs, and prints of all persons who may from time to time be in lawful custody."

19. Therefore, the argument can be made that a refusal by the appellant to submit to having his hand photographed was a breach which TLM could legitimately comment on and combined with the other circumstantial evidence draw an inference of guilt. However, even if the Court is wrong on this issue and this was an impermissible train of reasoning, there was sufficient other evidence to sustain the conviction. The Court does not have the express proviso power as in section 216(1) of the **Senior Courts Act 2022** ("SCA") in relation to indictable appeals. However, it has the power in inferior appeals to "make any other order for disposal of the cause which justice requires" which gives it the power to affirm a conviction despite the finding of an error by TLM. In this regard the Court finds instructive the holding of the Court of Final Appeal of Hong Kong in **HKSAR v Kong Ho Wing et al**[14] in similar legal terrain, per Ribeiro PJ:

"12.Mr So, appearing for the applicants, submitted that if admission of evidence as to the conversation between PW1 and Kwok Bung was erroneous, it was an irregularity that could not be dealt with as if by application of the proviso since there is no equivalent to section 83 of the Criminal Procedure Ordinance in relation to magistrates' appeals. He submitted that leave to appeal ought therefore to be granted at least to enable a retrial to be ordered.

*13.Whilst counsel is right in asserting that no equivalent to the section 83(1) proviso exists in relation to magistracy appeals**, it does not follow that any irregularity must lead to a quashing of the conviction or at least to a retrial.** As the Court held in Ching Kwok Yin v HKSAR, the position is governed by section 119(1)(d) of the Magistrates Ordinance which gives the Judge a wide discretion as to what the interests of justice require in disposing of the appeal:*

"... the Judge may by his order confirm, reverse or vary the magistrate's decision or may direct that the case shall be heard de novo by a magistrate or may remit the matter with his opinion thereon to the magistrate, or may make such order in the matter as he thinks just, ..."

[14] [2021] HKCFA 9.

*14.It was evidently Yau J's view that**, given the ample evidence supporting convictions, the magistrate would undoubtedly have entered the same verdict if she had ignored the irrelevant evidence of the conversation. The Judge was thus entitled to confirm the convictions as the order justly to be made on the appeal**." (emphasis added)*

The Standard of Proof

20. It has been observed that the Court in its appellate capacity is to take a functional approach to reviewing TLM's reasons and not seek perfection or prescribed words but whether the reasons give a sufficiently clear understanding of why she came to the decision she came to[15]. It is true that TLM did not expressly reference the standard of proof, and that she had to be satisfied so that she was sure. However, TLM is an experienced Senior Magistrate who this Court is prepared to infer that she would have applied the standard of proof of beyond reasonable doubt. The Court considers two authorities in this regard.

21. The Belizean CCJ decision of **Betancourt v R[16]**, considered the principles of a bench trial which would be applicable to judges and magistrates, per Anderson JCCJ

*"[38] **It must be remembered that in a judge-alone trial, the judge has some leeway regarding how directions and reminders are given to himself or herself, as opposed to where the judge is giving directions on the law to a jury. In the latter case, the judge must expressly direct the jury on all reasonably possible variations and permutations of possible findings of fact and must state the law applicable to those alternative 'facts' since no one can anticipate what facts the jury will accept. This is not so in a judge alone trial. Here it is sufficient for the judge to demonstrate a grasp of the essential and salient legal and factual issues at stake**. It is not necessary for the judge to expressly direct or remind himself or herself on every possible variation or permutation of facts contrary to those which have been found to be true. The proper approach to be taken*

[15] **R v DPT** 2024 ABCA 299 at para 12-14 (Can).
[16] [2024] CCJ 6 (AJ) BZ.

in a judge-alone trial was captured by this Court in Salazar v R where we stated the following in relation to the issue of directions to the tribunal of fact:

'Equally, a judge sitting alone and without a jury is under no duty to "instruct", "direct" or "remind" him or herself concerning every legal principle *or the handling of evidence. This is in fact language that belongs to a jury trial (with lay jurors) and not to a bench trial before a professional judge where the procedural dynamics are quite different … As long as it is clear that in such a trial the essential issues of the case have been correctly addressed in a guilty verdict, leaving no room for serious doubts to emerge, the judgment will stand.'*

[39] This Court also referred to the following which was stated in R v Thain:

Where the trial is conducted and the factual conclusions are reached by the same person, one need not expect every step in the reasoning to be spelled out expressly, … even as the need to arrange a judgment in a logical order may give that impression…when deliberating on a question of fact with many aspects, even more certainly than when tackling a series of connected legal points, a judge who is himself the tribunal of fact will (a) recognize the issues and (b) view in its entirety a case where one issue is interwoven with another." (emphasis added)

22. The Court takes from this statement of principle that the law is prepared to make certain presumptions about the state of knowledge of judicial officers giving reasons in a bench trial. The Court submits that one such presumption is that a Senior Magistrate would know the criminal standard of proof. It would, however, be best practice for magistrates to state this in their reasons for the clarity of the parties who must abide by their decisions.

23. The second case the Court would wish to consider is that of **R v Simpson et al**[17] in which the Jamaican Court of Appeal held that though a judge sitting alone had not warned himself of the dangers of mistaken identification but the care and depth of his analysis of the evidence demonstrated that it could be inferred he did. That court observed that:

[17] [1993] 3 LRC 631 at 637.

"It is manifest that it must be inferred from the way the evidence emerged and from the thorough reasons of the judge, especially with regard to the special circumstances, that the judge had warned himself of the risks of mistaken identity:

'In instances of special categories of evidence, are there decisions in criminal cases which demonstrate that the warning by trial judge can be inferred from his reasons?' That it is fitting and proper to infer rules of law from a judge's reasons is illustrated in B(D) v B(W)*…" (emphasis added)*

24. Though it would be infinitely better that an issue such as the standard of proof is expressly canvassed, the detailed way in which TLM analyzed the evidence she relied on and rejected other probative evidence like an alleged admission to one of the police officers which she did not accept because it lacked corroboration[18] ably demonstrated that she was acutely aware that she was deciding the case to the criminal standard.

25. Consequently, the Court rejects Grounds 1, 3 and 4 as being without merit.

Ground 2

Analysis

Assistance in putting forward the appellant's defence

26. The appellant complains that TLM did not assist him in putting forward his defence. He extracts from the evidence two examples where he tested Ms. Pineda on the burglary charge and got from her that she did not see him go into Ms. Burden's home. Also, he cross-examined Ms. Burden about when she left her home. On neither occasion did he suggest an alibi to either witness.

27. It is unclear what further assistance TLM could have offered in the context of this case. The appellant was told of his rights to give evidence and make an unsworn statement in TLM's reasons which

[18] Para 31 of TLM's reasons.

appears to have been contemporaneously recorded as giving the appellant his "warnings". The appellant chose, as was his right to remain silent, and put forward no defence. In that regard there was no duty on TLM unless assistance was sought. The Court relies on the decision of the Court of Appeal in **Alex Guzman v R**[19] where they dealt with a very similar claim of a failure to assist, per Awich JA:

> *"[55] Regarding the submission that, the judge did not elicit from the accused, in the absence of the jury, what his defence would be, we would like to observe that, it is a fine line between merely assisting the accused in order to ensure a fair trial, and acting as a defence counsel. A judge is an umpire, he must be careful not to descend onto the arena. How far a judge can assist an accused depends on the particular circumstances in the proceedings. In this case, the accused did not intimate at all, what his defence might be. The judge would be crossing the line by initiating a defence for the accused. The trial judge in this case did not err.*
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> *[56] We also concluded that, given that the accused preferred to remain silent about any defence, the trial judge, if he initiated questions and possible defence, would have been exerting undue pressure to get the accused to abandon his right to silence. That would be improper. The judge did not err in not pointing out to the accused that the evidence for the prosecution remain uncontradicted."*

28. TLM provided assistance otherwise in the trial by explaining to him what expert evidence was[20] as well as with the tendering of photographs[21].

29. This ground of appeal is without merit.

30. There was no appeal against sentence, and in any event the sentences imposed are not in the Court's view manifestly excessive, nor do they seem wrong in principle.

[19] Criminal Appeal No. 10 of 2015.
[20] P. 71 of the Record of Appeal.
[21] P. 66 of the Record of Appeal.

DISPOSITION

31. The appeal is dismissed, and the convictions and sentences of the learned Magistrate are affirmed. The appellant is to be remanded into custody to serve the remainder of his original sentence.

32. The Court orders each party to bear their own costs.

Nigel C. Pilgrim
High Court Judge
Criminal Division
Central District
Dated 21st October 2024