

Nicolas Antonio Guevara

Appellant

v.

The Queen

Respondent

FROM

COURT OF APPEAL OF BELIZE

JUDGMENT OF THE LORDS OF THE JUDICIAL
COMMITTEE OF THE PRIVY COUNCIL,
Delivered the 21st February 1996

Present at the hearing:-

Lord Keith of Kinkel
Lord Browne-Wilkinson
Lord Mustill
Lord Steyn
Sir Brian Hutton

[Delivered by Lord Keith of Kinkel]

On 16th December 1993 the appellant was convicted in the Supreme Court of Belize, before Singh J. and a jury, of the murder on 4th November 1992 of Marcos Antonio Tzul and was sentenced to death. An appeal against conviction was dismissed by the Court of Appeal of Belize (Henry P., Robotham and Telford Georges JJ.A.) on 9th May 1994. The appellant now appeals as a poor person, with special leave granted on 8th February 1995, to Her Majesty in Council.

At the trial the principal witness for the prosecution was Modesta Polanco ("Modesta"). She was a secretary to the deceased man, Tzul, who was manager of the Gold Button Ranch. According to her evidence she and Tzul on 4th November 1992 drove in her car from Orange Walk Town to the ranch, arriving at the gate at about 6.45 p.m. Tzul got out of the car to open the gate and was approached by three men wearing camouflage suiting and all carrying rifles with bayonets fixed to them. They shot Tzul several times and he fell down. The men then came to the car and put her in one of the back seats. All three got in the

car and it was driven away to a point which turned out to be close to where the borders of Belize, Guatemala and Mexico meet. During the course of the journey the men conversed in Spanish and one of the things said was that Tzul was minding the ranch which did not belong to him and he was "the fourth person that they killed for the week". After the car had stopped her clothes were taken off her and all three men raped her. They also stole her jewellery. The men then left on foot, taking the car keys with them. Modesta put her clothes on again and walked some distance till she met some custom officers in a vehicle, who took her home.

On 17th November 1992 police officers came to Modesta's house and showed her an album containing twelve photographs. She at once identified one of the photographs as being that of a man involved in the events of 4th November, and which turned out to be a photograph of the appellant, who was arrested on 20th November 1992. Modesta did not attend an identification parade, but identified the appellant in the dock.

The only other evidence of significance led for the prosecution consisted in police evidence of the finding of the body of Tzul with seven spent cartridges and one live round nearby, evidence of identification of the body and of the post mortem examination, and the evidence of one Rigoberto Lima. Lima deponed that the appellant had been living in his home for about one and a half years prior to 4th November 1992. On that date he was not in the house when Lima returned from work at about 6.30 p.m. and did not reappear until four days later, when Lima told him to get out of his house.

At the close of the case for the prosecution counsel for the appellant made a submission of no case to answer, based principally on the circumstances of Modesta's identification of the appellant by a photograph without any following identification parade. However, apparently counsel admitted that the correctness of the identification of the appellant was not in issue, and the trial judge rejected the submission of no case to answer.

The reason why identification was not in issue appears to have been that the appellant had on 21st November 1992 made a statement under caution to police officers. In this he admitted being present throughout the events of 4th November but maintained that his presence resulted from duress exercised by two other men and that he had taken no part in the shooting of Tzul or the rape of Modesta. The prosecution did not tender this statement as part of their case, but it was put in on behalf of the defence, and the appellant gave sworn evidence substantially in accordance with the caution statement. He said that he was going to a friend's house in search of work when he met two armed men

about 500 yards from the Gold Button Ranch. They forced him to go with them to the gate where they waited for some time until a car arrived and Tzul, whom he knew, got out. One of the men held him while the other shot Tzul. The car was then driven away with the two men, Modesta and himself in it. The car stopped at the end of the road, where each of the men raped Modesta while the other held the appellant. According to the appellant, one of the men said of Modesta, "should I shoot her?" and the appellant shouted to him "don't be a coward, do not kill a lady". The two men placed him between them and they walked to a point which they said was the line between Mexico and Belize. One of the men said, "I wonder if Met will pay us the money". Then they said "Here you stay, we will meet in hell", and departed. In cross-examination, the appellant said that he did not report what had happened to the police because he feared that if he did he would be killed. He also said that he knew one of the men involved as Dean Lindo Novelo, though he was not a friend. The assistant manager of the Gold Button Ranch was Emeterio Cruz, also known as "Met". He was now the manager.

Before their Lordships' Board complaint was made, in the first place, of the admission in evidence (and repeated by the trial judge in the course of his summing up) of Modesta's statement that in the course of the car journey mention was made of Tzul being "the fourth person that they killed for the week". It was maintained that this piece of evidence was inadmissible as hearsay and calculated to prejudice the jury against the appellant in their deliberations. The remark, however, is capable of being regarded as part of the *res gestae*, and in any event had no bearing on the question whether the appellant was party to a common enterprise with the other two men or whether, as he maintained, he was merely an unwilling spectator forced against his will to be present. The two men, at least, were killers and may well have been contract killers, as indeed the appellant was maintaining in his evidence regarding Emeterio Cruz. There is no reason to suppose that the evidence of the remark in question might have had any effect upon the jury in their consideration of whether Modesta or the appellant was to be believed as regards the appellant's involvement in the killing.

Then it was submitted that evidence should not have been allowed of Modesta's identification of the appellant from a photograph. Although identification was not in the end in issue, since the appellant admitted his presence during the material events, the jury was likely to infer, from the appellant's photograph being among those in the possession of the police, that he had a criminal record and to be prejudiced against him accordingly. Their Lordships consider that there is some substance

in this point, particularly as it is tied up with the further point made by the appellant's counsel, namely that the trial judge did not direct the jury that the appellant was of good character, and that this should be taken into account in assessing the truthfulness of his account of events and whether he was likely to have committed the offence with which he was charged. Reference was made to *Regina v. Vye* [1993] 1 W.L.R. 471. The importance of the matter is further emphasised by the obtaining and placing before the Board of a police document indicating that the appellant had at the time of the trial no previous convictions. This indicates that whatever may have been the provenance of the album of twelve photographs placed before Modesta the photograph of the appellant which it contained cannot have been that of a convicted criminal.

Their Lordships have given very careful consideration to this aspect of the case. The crucial evidence in the case was that of Modesta. There can be no question of her evidence being mistaken as to the appellant's participation in the events she described. She most positively asserted, and stuck to it in the course of cross-examination, that the appellant was armed with a rifle and was one of those who shot Tzul and that he raped her along with the others. The question was whether she was to be believed. There was no apparent reason why she should seek untruly and wrongfully to implicate the appellant. The jury plainly believed her evidence and they were entitled to do so. Their Lordships see no grounds for supposing that the jury, had they not had the evidence of the photographic identification and had they been directed about the significance of the appellant's good character, would have concluded that Modesta was not to be believed. They therefore do not accept that any miscarriage of justice may have arisen as a result of these matters.

Complaint was also made regarding the admission of Lima's evidence that when the appellant reappeared four days after the murder Lima told him to get out of his house, it being suggested that the jury might have thought he did this because he knew or believed that the appellant was involved in the murder. There is no substance in this point. It was further maintained that the trial judge wrongly failed to secure that Emeterio Cruz was called as a witness. The appellant gave certain evidence which suggested that the murder of Tzul may have been instigated by Cruz. If Cruz had been called as a witness he could not have been required to answer any question tending to incriminate himself, and there would have been no possibility of his giving any evidence tending to exculpate the appellant of having been one of those instigated to commit the murder. This point also lacks any substance.

Finally, criticism was made of the conduct of the appellant's defence at the trial, and of the appeal to the Court of Appeal of Belize by his counsel, a Mr. Gaznabbi. Perhaps the most telling of these criticisms are (1) that although he objected to the evidence of photographic identification, he withdrew the objection when it was agreed the album of photographs should not be put in, and (2) that, instead of leaving matters as they stood at the close of the prosecution case, he led the evidence of the appellant and put in the caution statement, which had not been relied on by the prosecution. It may be that from a tactical point of view it would have been preferable to adopt a different course from that actually followed, but the fact remains that the appellant's defence was that he was present at the events described by Modesta, but that his presence was due to coercion and that he was not a participant. There is no question of the appellant having been deprived of the opportunity to put his real defence before the jury, as occurred in *Sankar v. The State of Trinidad and Tobago* [1995] 1 W.L.R. 194, nor is it suggested that Mr. Gaznabbi's conduct of the defence was otherwise than in accordance with his instructions.

In all the circumstances their Lordships are satisfied that no miscarriage of justice has occurred in this case and they will therefore humbly advise Her Majesty that the appeal should be dismissed.