

IN THE COURT OF APPEAL OF BELIZE AD 2012  
CRIMINAL APPEALS NOS 8, 9, 10, 11 & 12 of 2011

**ESWIN ROSALES  
JOSE ISMAEL CORDOVA  
CARLOS JUAREZ  
CESAR JUNIO ALDANA  
MIGUEL MAYORGA**

Appellants

**v**

**THE QUEEN**

Respondent

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BEFORE

The Hon Mr Justice Manuel Sosa	President
The Hon Mr Justice Douglas Mendes	Justice of Appeal
The Hon Mr Justice Samuel Awich	Justice of Appeal

H E Elrington SC and L Bradley Jr for the appellants.  
C Vidal, Director of Public Prosecutions, for the respondent.

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18, 22 October 2012 and 28 March 2013.

**MENDES JA**

[1] On 1 March 2011, the appellants were all convicted of the offences of conspiracy to murder and conspiracy to rob Mr. José Shoman and others. On 10 March 2011, they were each sentenced by the trial judge, Lucas J, to 10 years imprisonment for the offence of conspiracy to rob. For the offence of conspiracy to murder, the appellants Rosales, Cordova and Juarez were sentenced to 12 years imprisonment, while the appellants Aldana and Mayorga were sentenced to 14 years. The sentences were to run

concurrently. Mayorga was also convicted of four counts of possession of firearms and ammunition without a license and sentenced to two years imprisonment for each count. These sentences were also to be served concurrently with his sentences for the conspiracy offences. There is no appeal by Mayorga against his firearms and ammunition convictions and sentences, which accordingly stand. All of the other appellants were originally charged with firearms and ammunition offences but the trial judge upheld a no case submission in relation to Rosales, Cordova and Juarez and the jury acquitted Aldana. The appellants all appeal against their convictions for the conspiracy offences.

### **The Crown's case**

[2] The case for the prosecution was led primarily through two witnesses, Mr. Eric Alexander Miranda and Mr. Hector Perez. Miranda and Perez had been employed by Shoman for approximately one year and five months, respectively, prior to the events in December 2008 which gave rise to the laying of charges against the appellants. They were both employed to tend Mr. Shoman's garden and to upkeep and maintain his property. Aldana had been employed by Mr. Shoman in the same capacity for ten years up until October 2008. He was referred to by Miranda and Perez in their evidence by his first name, Cesar. Francisco Martinez, who was referred to as Pancho, had been contracted by Shoman at the time to renovate his office. Pancho was identified by Miranda and Perez as one of the two masterminds of a plan to murder and rob Shoman, but he was not charged. Aldana was the other moving force behind the plan. The appellants Rosales, Cordova and Juarez all hailed from Guatemala and were referred to variously in the evidence as 'the Guatemalans'. At the time they gave their statements from the dock on 25 February 2011, Rosales was 19 years old, Juarez was 20 years old and Cordova 19 years old, which would have made them 16 and 17 year olds at the time of the offence in December 2008. In fact, because they were minors, the Guatemalan embassy was notified that they had been arrested.

[3] Miranda testified that on 12 December 2008 he received a call from Aldana who claimed to have money for him. His friend Perez was with him at the time and they both proceeded to Aldana's house. They eventually met up with Aldana at a shop nearby and they then proceeded to Mayorga's apartment. Miranda referred to Mayorga in his evidence as 'Miguelito'. At Mayorga's apartment, Miranda and Perez met Mayorga, Pancho and the three Guatemalans. There then ensued a conversation which, it is fair to say, was dominated by Pancho and Aldana. Miranda was told of a plan to invade the Shoman residence, tie up the Shoman family, rob them of their possessions, demand that Shoman sign a cheque in a sum which was not identified, and then kill his family members if he refused to sign the cheque. Perez gave evidence to similar effect. It was the prosecution's case that each of the appellants had agreed to the plan.

[4] Miranda and Perez immediately upon leaving Mayorga's apartment telephoned Mr Shoman and told him of the conspiracy. The police were called in and later the same night they executed search warrants at Mayorga's apartment, where they arrested Mayorga, Pancho and the three Guatemalans, and at Aldana's home where he too was arrested. They found the arms and ammunition at Mayorga's apartment. The six suspects were taken to the police station and all but Pancho was charged.

[5] The appellants each gave an unsworn statement from the dock. The Guatemalans all claimed that, although they were at Mayorga's apartment that night, they stayed outside and therefore did not participate in any discussion which might have taken place inside. Aldana and Mayorga both supported the Guatemalans on this score. For their part, they accepted that a discussion took place between Pancho, Miranda and Perez in their presence, but they denied agreeing to the plan which was being discussed.

## **Dock Identification**

[6] The appellants take issue with the admissibility of the identification evidence based on which they were convicted and complain also that the trial judge failed to give the jury a *Turnbull* direction. They claim that the trial judge was wrong to permit Miranda to identify them in the dock. There are two strands to this argument. Firstly, they say that the trial judge exercised his discretion unlawfully having regard to what they say were the less than ideal circumstances under which Miranda had the appellants under his observation, to the fact that the police did not hold an identification parade and, worse yet, that the police allowed Miranda to be in the appellants' presence at the police station before he identified them to the police. Secondly, they complain that the trial judge did not give Juarez, Cordova and Aldana, who were unrepresented at the trial, the opportunity to address him on the admissibility of Miranda's dock identification of them.

[7] Although in his written and oral submissions, Mr. Elrington SC, who along with Mr Bradley, appeared for all the appellants on the appeal, did not make a clear distinction between the Guatemalans, on the one hand, and Mayorga and Aldana, on the other, the dock identification of the latter two appellants in fact occurred under different circumstances. Miranda testified that he had known Mayorga for about two years, that he had gone to the place where Mayorga lived quite often since he paid his rent in the same place, that they were neighbours and that they saw each other in the evenings during the week and at times on the weekends. He also knew Aldana for quite some time. They had worked together for about four years, seeing each other every day. Miranda identified them both at the trial, without objection.

[8] It was never really disputed that Aldana and Mayorga were well known to Miranda. As such, to the extent that their complaint was that no identification parade had been carried out in relation to them and that the police had allowed them to be seen by Miranda at the police station before he identified them to the police, this could not by itself be a sound basis for challenging the trial judge's discretion to allow Miranda to

identify them in the dock. An identification parade should only be held where it would serve a useful purpose and no useful purpose would have been served by holding an identification parade when Miranda was very likely to have picked them out of a line-up as being the persons who he had known for a long time and who he had already identified as being part of the group he met at Mayorga's apartment the night before. In fact, holding an identification parade would have carried "the risk of adding spurious authority to the claim of recognition" – *Mark France and Rupert Vassel v R* [2012] UKPC 28, para 14.

[9] In any event, Miranda's identification of Aldana and Mayorga in the dock is not properly categorised as a dock identification, which entails identification of the accused in the dock for the first time. What he was in effect saying was that the persons sitting in the dock were the persons who he had known for a long time and who he had told the police were parties to the plan to murder and rob Mr. Shoman. Such an identification is not susceptible to the same dangers inherent in a true dock identification and there is therefore no need to give the usual warning of the risks associated therewith. As Lord Kerr said in *France and Vassel* (at para 36), the warning which was needed in such a case is "not to the danger of the witness assuming that the persons in the dock, simply because of their presence there, committed the crime but to the need for careful scrutinising of the circumstances in which the purported recognition of the appellants was made."

[10] In this light, there is also nothing to the argument that Aldana was not permitted to address the trial judge on the admissibility of Miranda's 'dock identification' of him. Having established that Adana was well known to Miranda, the question of admissibility did not arise. We therefore reject the submission that the trial judge wrongly permitted Miranda to identify Aldana and Mayorga in the dock.

[11] By contrast, Miranda met the Guatemalans for the first time that night. He was in the same room with them for quite some time, judging from the conversation which he

said he had with them. He said they were all “right there united”. He claimed that the conversation lasted one hour, although this appeared to be contradicted by the statement he gave to the police in which his estimate was ten minutes, a point which was later brought out in cross-examination. The Guatemalans were within about three to four feet of him during this time. The lighting was normal, he said, similar to that in the court room. He was able to see every part of their bodies. He had received the call from Aldana at about 10 pm that night and he called Mr. Shoman at around 11.45 pm and went to his home. Shoman then called the police who came to his home. The police then left with Miranda and Perez who showed them where Mayorga and Aldana lived. Miranda was then taken to the police station.

[12] Sergeant Tyron Bradley would later testify that around 3.20 am he executed a search warrant at Mayorga’s apartment. A middle aged Hispanic man, who he later identified as Mayorga, answered his knock and when the lights were turned on he saw four other persons lying on the floor. He took them all into custody and at the police station found out from them that their names were Mayorga, Juarez, Cordova, Rosales and Francisco Martinez, also known as Pancho. He then executed a warrant at Aldana’s house and took him into custody. At the trial, he identified Mayorga, Juarez, Cordova and Rosales, as four of the five persons he had taken custody from Mayorga’s apartment. He also identified Aldana.

[13] Although the evidence is fairly sketchy, it appears that after Miranda showed the police where Mayorga and Aldana lived, they took him to the police station. About two hours later, the Guatemalans were brought to the station into a room where Miranda was. He was then asked by the police to identify them, which he did. He told the court that the persons he saw at the police station were the same three Guatemalans he spoke to that night at Mayorga's apartment. Although he was asked by Mr. Yohhahnseh Cave, Senior Crown Counsel for the Crown, whether he was placed in a room and asked to point out the Guatemalans from among other persons, and he answered ‘yes’, it is accepted that an identification parade was not in fact held.

[14] When Mr Cave asked Miranda whether he recognised any of the Guatemalans in court, Mr. Ellington, who was representing Rosales, objected, pointing out to the trial judge that it was improper for the police to put suspects in the same room as a potential witness and then later ask that witness to identify the suspects in the dock. Such conduct would seriously prejudice a fair trial, he submitted, and it was incumbent on the prosecution to bring out the circumstances under which the encounter occurred in order to determine whether it was accidental or deliberate.

[15] Mr. Cave conceded in reply that it was clear that a formal identification parade had not been held, but submitted that the crucial consideration was not whether Miranda saw the suspects at the police station, but the circumstances under which he had first observed the Guatemalans when he met them the night before. He then proceeded to rehearse the evidence in that regard which had been led up to that point. He submitted that it would be unfair and pointless to ask Miranda whether the meeting at the station was accidental or deliberate.

[16] The trial judge then revealed how he viewed the encounter at the station. He said:

"Mr. Elrington, whether it was accidental citing (sic) at the police station, that is referred to as a one man parade and that is not good, that's why I said I was going to tell the jury that. That is not a good identification, whether it's accidental or otherwise. If the police anticipate that witnesses or would be witnesses will come to the station, they should keep any accused person out of sight because there is a likelihood that these would be witnesses, will see this person. So those are not good, I have authorities on that. So I will address that to the jury, don't take that into consideration. The question was only asked if he had seen them before and he said how he saw them, so that is not good."

After a further exchange with Mr. Elrington along the same lines, he then allowed Miranda to identify the Guatemalans. The question is whether he was wrong to do so.

[17] In *Tido v R* [2012] 1 WLR 115, the deceased's mother went to bed after 12.15am leaving her daughter sitting at the dining room table reading a political manifesto that had been obtained at a rally they attended that night. When she woke the following morning, her daughter was missing. Her night dress was found on top of a freezer in the house. A cordless telephone was in the porch of the family home. The caller identification system showed that a call had been received from Mandingo's Restaurant at about 1.20 am. The prosecution's case was that at about 1.20 am the appellant telephoned the deceased from Mandingo's Restaurant and that, after that telephone call, she had left her family home and had gone to meet him. The deceased's body was found later that day in a quarry pit. She had suffered severe head injuries.

[18] One of the principal witnesses for the prosecution was Lavette Edgecombe who worked at and was part owner of Mandingo's Restaurant. She gave evidence that at about 1 am on the night in question a man entered the restaurant and asked to use the pay phone. She gave a description of him. Ms Edgecombe had kept him under close observation while he was using the phone because the lock on the telephone had been broken and she was on the alert to ensure that money was not removed from it. In the course of the telephone conversation, she heard the man say to the person to whom he was speaking to "Come outside; I coming for you". On the next day, Ms Edgecombe identified to police officers the man who had made the telephone call the day before. The identification took place at Mandingo's restaurant. Ms Edgecombe was permitted by the trial judge to make a dock identification of the appellant as the man who had made the telephone call that night. It was argued on appeal that the trial judge was wrong to have permitted the dock identification.

[19] Reaffirming what was said in *Pipersburgh and Robateau v The Queen* [2008] UKPC 11, the Privy Council (at paras 17 & 18) rejected the suggestion that because a prior identification parade had not been held, a dock identification was without more inadmissible. They also made clear (at para 21) that a dock identification is not to be regarded as permissible in only the most exceptional circumstances. "A trial judge will



always need to consider...", Lord Kerr said, "whether the admission of such testimony, particularly where it is the first occasion on which the accused is purportedly identified, should be permitted on the basis that its admission might imperil the fair trial of the accused."

[20] In that case, their Lordships were satisfied that the trial judge was not bound to find that the fairness of the trial would be imperilled by the admission of the dock identification. But they were concerned to point out (at para 22) that "the discretion to admit the evidence must be exercised in light of the particular circumstances of the individual case." The circumstances which were relevant to the exercise of the trial judge's discretion would always include the reason why an identification parade was not held.

"If there was no good reason not to hold the parade this will militate against the admission of the evidence. Conversely, if the defendant resolutely resists participation in an identification parade, this may be a good reason for admitting the evidence."

[21] It was conceded that the prosecution had not offered any explanation for the failure to hold an identification parade and the trial judge had not made any reference to and therefore did not consider the absence of a reason in ruling that the dock identification was admissible. Thus, even though there were circumstances "which might well have favoured the admission of the dock identification evidence", their Lordships held that "the failure of the trial judge to address – much less consider – the reasons that an identification parade was not held means that there was not a proper exercise of her discretion" - para 23. As a result, the admission of the dock identification could not be upheld.

[22] In *Neilly v R* [2012] UKPC 12, an armed robbery had been committed by two men at the Comfort Zone Restaurant, in the Bahamas. It was the prosecution's case that the appellant was one of the two men involved. Two days later, the police arrested the

appellant and two other men for the robbery. During the course of the arrest, the appellant sustained a gunshot wound which required hospital treatment. Upon arrest, the appellant was found in possession of two items of jewellery, which were later identified as items stolen during the robbery. An identification parade was held that day in which the two other suspects participated. The appellant was then in hospital. Only one of the men were identified in the parade as being involved in the robbery. Upon being discharged from the hospital, the appellant did not participate in an identification parade.

[23] At the trial, the appellant was identified by one of the witnesses who had not been invited to attend any identification parade. Counsel for the prosecution was unable to say why he had not been given the opportunity to attend an identification parade and his submissions focused on the opportunity which the witness had had to observe the robbers. In allowing the dock identification, the trial judge said that she was "satisfied that the parameters which are set in the case of *R v Turnbull* have been laid" but she did not refer to the absence of any reason for not holding an identification parade. Moreover, in the course of rejecting a no case submission on behalf of the appellant, the trial judge said that she was satisfied that "in the circumstances that there was a good reason for not holding the ID parade for (the appellant)."

[24] Although their Lordships accepted (at para 29) that "issues as to the quality of a witness's observation of an offender, of the kind addressed in *Turnbull*, are relevant to dock identifications", they returned to the importance of the trial judge taking into account all relevant considerations in exercising her discretion. Delivery the opinion of the Board, Sir Stanley Burnton said (at para 32):

"The decision whether to admit dock identification evidence is one for the trial judge, to be exercised in the light of all the relevant circumstances. Ultimately the question is one of fairness, bearing in mind the judge's ability and duty to give appropriate directions in summing up, as indicated in the authorities referred to in the previous paragraph. Where there has been no identification parade, then whether there is any and if so what

good reason for that is a material circumstance. Where, for example, the uncontroversial evidence is that the defendant was well known to the witness before the offence, and the witness has previously identified him, a dock identification may also be no more than a formality."

[25] No doubt a partial explanation for the failure to hold an identification parade in relation to the appellant was the fact that he was in hospital when the identification parade in relation to the other two suspects was held. But this, in their Lordships view, did not explain why no parade was held at any time after the appellant was discharged from the hospital. In the circumstances, their Lordships held that the judge erred materially in exercising her discretion to admit the dock identification because, inter alia, she "erred in considering that there was a good reason for not holding an ID parade for the Appellant" (para 34).

[26] It is clear, in this case, that Mr Cave did not offer and the trial judge did not ask for an explanation as to why an identification parade had not been held. The reason may very well have been that the Guatemalans were accidentally (or deliberately) put in the same room as Miranda thereby compromising the integrity of any possible parade. But this explanation was not offered. It may be that the trial judge was distracted by Mr Elrington's focus on the fact that Miranda was allowed to see the Guatemalans when they arrived at the police station. It is also certainly a fact that **Tido** and **Neilly** were decided after the trial in this case and the trial judge therefore did not have the benefit of the guidance given by their Lordships. These factors may all explain why the reason for not holding an identification parade was not a consideration which was present in the trial judge's mind. But the fact is that it was not. As a consequence, even though there may very well have been circumstances which otherwise justified admitting the dock identification, we are bound by **Tido** and **Neilly** to find that the trial judge erred in the exercise of his discretion to permit Miranda to identify the Guatemalans in the dock.

[27] Given this finding, Mr. Elrington's point that Juarez and Cordova were not given the opportunity to be heard on the question whether Miranda should have been allowed

to identify them in the dock is academic. But it is a point which is nevertheless misconceived given that Mr. Elrington's submissions to the trial judge, while formally made on behalf of Rosales, were actually directed to the admissibility of the dock identification of all of them. The failure to formally ask Juarez and Cordova for their input did not accordingly make the trial unfair.

### **Absence of a *Turnbull* Direction**

[28] Ms. Vidal, who appeared for the Crown on the appeal, quite correctly conceded that the trial judge did not give the jury a *Turnbull* direction. But as she also correctly submitted, given that the appellants all admitted from the dock that they were present at the time the plan was discussed, but did not agree to the plan, a *Turnbull* direction was not necessary. Put shortly, this was not a case where there was a possibility of mistaken identification, requiring a *Turnbull* warning.

[29] In *Slater* [1995] 1 Cr.App.R. 584, the appellant, who was of an unusually large size, was identified as the man who had inflicted grievous bodily harm on the virtual complainant. In directing the jury, the trial judge failed to tell the jury of the possibility that an honest witness might be mistaken and that a mistaken witness might appear to be a convincing one. The prosecution accepted that in this respect a full *Turnbull* direction had not been given but argued that once the appellant had accepted in evidence that he was present at the scene of the assault, the identification issue ceased to exist and a *Turnbull* direction was not necessary. The Court of Appeal agreed. Rose LJ said (at p. 589):

"In the judgment of this Court, the need for a *Turnbull* direction arises where there is the possibility of mistaken identification. Such a possibility will generally arise when the issue is whether the defendant was present and a witness claims to identify him on the basis of a previous sighting or sightings. In such a case, it is essential that the jury examine each of the relevant sightings with care and that they be directed to do so in

accordance with *Turnbull*. Where, however, there is no issue as to the defendant's presence at or near the scene of the offence, but the issue is as to what he was doing, it does not automatically follow, in the judgment of this Court, that a *Turnbull* direction must be given. Whether such a direction is necessary will depend on the circumstances of the particular case. It will be necessary where, on the evidence, the possibility exists that a witness may have mistaken one person for another, for example, because of similarities in face, build, or clothing between two or more people present."

[30] **Slater** can be usefully contrasted with **Thornton** [1995] 1 Cr.App.R. 578. In that case, the appellant was charged with causing grievous bodily harm with intent. He had been a guest at a wedding reception where the bridegroom's brother was attacked by several people and seriously injured. He was identified by two witnesses as one of those involved in the attack. The evidence of one of the witnesses was questioned because she had initially said that she had seen the appellant from a position in which she could not have seen the incident. The other witness was 12 years of age. Although the appellant agreed that he had been present during part of the attack, he denied taking part in it and that he had only approached the victim at the end of the incident to help him up. The Court of Appeal held that the judge ought to have given the jury the full *Turnbull* warning. Although it was not the case of a fleeting glimpse, there were a number of people near where the attack took place and four people were involved. There were others similarly dressed to the appellant, and a mistake was clearly possible.

[31] Both Aldana and Mayorga admitted that they were in Mayorga's apartment when the plan was discussed. What they said was that it was Pancho's plan, with which they did not at any time express agreement. Rosales, Juarez and Cordova also admitted that they were at Mayorga's apartment, but they denied they were in the room when the plan was discussed. But none of the appellants suggested that there were any other persons in the apartment beside Pancho, Miranda, Perez, Aldana and Mayorga. The Guatemalans could not have been mistaken for anyone else. The issue was therefore not whether the appellants were at Mayorga's apartment, but what they were doing

while they were there. No question of mistaken identification arose and there was accordingly no need for a *Turnbull* direction. This ground of appeal is accordingly rejected.

### **The Proviso**

[32] If the admission of the dock identification of the Guatemalans was the only blemish on an otherwise fair trial, we would have been prepared to apply the proviso. Leaving aside the dock identification of the Guatemalans, the admissible evidence placing them in Mayorga's apartment when the plan was being discussed was quite strong. As noted, they all admitted that they were on the scene, albeit not in the room at the time. Miranda had a fair opportunity to observe them in good light and identified them at the police station a few hours later, albeit not from a proper line-up. About two hours after the meeting, he took the police to Mayorga's apartment and the Guatemalans were found sleeping on the floor. They were then taken to the station where they give their names and Miranda identified them. Sergeant Bradley identified them as the persons he found in Mayorga's apartment, without objection. We are therefore quite satisfied that on the properly admissible evidence the jury would inevitably have found that they were the persons who Miranda said were part of the group of eight persons in Mayorga's apartment when the plan was being discussed. The question for the jury would then have been whether they had in fact agreed to the plan to murder and rob the Shomans. The appellants say that the trial judge did not give proper directions on this issue and it is to this challenge we now turn.

### **The Conspiracy Direction**

[33] The main challenge on behalf of Mayorga and the Guatemalans, in particular, centred around the alleged paucity of evidence implicating them in the conspiracy. This was expressed in part as a complaint about the way in which Miranda and Perez were permitted to give their evidence, which was peppered with constant references to what

'they' said or what 'they' or 'we' were to do, without sufficient clarification as to which of the accused was being referred to. There was also, it was argued, a severe lack of clarity as to whether the evidence of what was actually said really amounted to agreement to participate in the plan and, if so, to which of the accused that agreement could be attributed. In this context, it was argued that the trial judge's direction on conspiracy was inadequate in that he did not give the jury sufficient assistance as to how they were to treat with such evidence. It is therefore inevitable that the evidence which was led should be set out in some detail, the result being that large tracts of it must be quoted. Those parts of the transcript in which the witnesses attribute specific statements to the accused are highlighted in bold.

[34] When Miranda first described the elements of the plan which was related to him he said this:

"Q: What if anything happened after you got there?

A: **We had a conversation. They told me they wanted to kidnap Jose Shoman.**

Q: **Who did he have a conversation with?**

A: **Pancho, Cesar and the three Guatemalans.**

Q: Where did this conversation take place?

A: In Miguelito's apartment.

Q: **Could you say exactly what was said?**

A: **Yes, they said they wanted to kidnap the family of Mr. Shoman. Pancho and Cesar said that there is plenty of money at the home or residence of Mr. Shoman. They were asking me if I could help in opening the gate. Three will come in from the riverside.**

Q: Which three were supposed to come from the riverside?

A: Pancho with another two and Cesar with another two at the front side. Well three would have already been inside the residence because the gate by the riverside it wasn't with lock.

Q: Who was supposed to open that gate?

A: First of all, I would have been the one to lock the gate for Mr. Jose, when Mr. Jose was to come out, Pancho would have grabbed him along with the other two. Then rapidly Cesar and the other two would have entered rapidly so that no one would have known. They would have tied

up Mr. Jose and then take him inside. Once inside they would have gathered all his family. They would have brought all the family and placed them in one room.

Q: Could you say what was supposed to happen after that?

A: They would have had Mr. Jose tied up and have his mouth tied as well. They would have asked him to sign a cheque and if he didn't or refused Pancho said they would have killed one of his children. **Cesar said to make everything look real then, yes, they would have to kill. That one over there.**

THE COURT: I hope he's not pointing to anybody that has not been properly identified because I won't allow that.

MR. CAVE: I didn't ask him to identify any particular person.

THE COURT: Yes but you must stop him because I don't know who he is referring to if there is no proper identification of anybody else. So I don't know who he is referring to.

MR. CAVE: I take the point, My Lord.

Q: **Without pointing to the person, could you say what was said at that time?**

A: **He said that he would be hitting Mr. Jose hard.**

Q: Yes, could you continue please?

A: **Cesar said that they have liquor valued about \$900.00. Pancho said that the safe was on the second floor. If they didn't find anything, they would ask him to sign and if he didn't then they would begin killing his family.**

Q: Could you say what was the plan discussed after that; what was supposed to happen after that?

A: **One of the Guatemalans said he would be in charge of cutting each and everyone of the family member's neck. One would be making sure they would have drove off with a pick up belonging to Mr. Shoman.**

THE COURT: **Who is saying so?**

WITNESS: **Pancho.**

THE COURT: That once everything was what?

WITNESS: Secure, they would have drove off with a pickup belonging to Mr. Shoman.

Q: Could you say what would have been done after they drove off with that pickup?

A: They wanted me to go along and then kill me.

...



**Q: Could you say during this conversation if anything was said by Miguelito?**

**A: Yes, he said, yes.**

**Q: Could you say what he said yes in relation to?**

**A: When they said that they would kill Mr. Shoman's family, he said, yes, yes."**

After identifying the three Guatemalans in the dock, he was then asked specific questions in relation to them.

**"Q: You refer to them as Guatemalans, how did you know they were Guatemalans?**

**A: From the plans we made, they said that they were Guatemalans.**

**Q: Did any of them ever indicate to you why they were in Belize?**

**A: They just mention that they were here to kidnap the Shoman family.**

Q: Where were these three persons, the Guatemalan persons who you pointed out a moment ago, where were they when you left Miguelito's house?

A: They stayed at Miguelito's apartment.

Q: You said there was a plan, you told us about the plan yesterday when you testified. Do you recall whether during the conversation about the plan there was any discussion about whether or not weapons would be used?

A: Yes, they were going to use weapons.

...

Q: Could you explain how you knew weapons would be used?

A: Because when I reach the apartment they showed me the weaponry, a .38, a .22 and a mask.

**Q: Could you say who showed you, you said they, could you say specifically who showed you those things?**

**A: Cesar and Miguelito."**

[35] After the conversation ended, Aldana and Pancho expressed the desire that one of them should accompany Miranda back to his apartment, the reason being that they did not trust him not to go directly to Mr. Shoman's house to warn him. But Miranda managed successfully to throw them off that track by telling them that his pregnant

partner was at home. He and Perez then promptly telephoned Shoman and the police were informed.

[36] At the end of his examination in chief, this exchange is recorded:

"Q: When you testified yesterday, you testified that they plan, they said they would kill Mr. Shoman's family. Could you say specifically who did they plan to kill?

A: Yes, I can. They said they would have started with the child and if he didn't agree they would continue killing.

Q: Do you recall if at any point during this plan they discussed leaving anyone or not killing one of those persons or one of the members of Mr. Shoman's family or Mr. Shoman himself. Did they ever discuss at any point leaving anyone alive?

A: They said that maybe they would left one but eventually they would have killed them."

[37] This was followed immediately by this exchange in cross-examination:

**"Q: Now you said in relation to a question that learned counsel asked you, did they plan to leave anyone alive, who are the "they" in that question?**

**A: Pancho and Cesar.**

**Q: Pancho and Cesar told you?**

**A: Yes.**

Q: Did they tell you together or did they tell you one by one, how did they tell you?

A: Together.

Q: They spoke together?

A: Yes.

Q: What did they tell you together?

A: Once the Guatemalans say they came here.

THE COURT: Listen to the question, that's not the question of the counsel. He's talking about they Pancho and Cesar, am I correct counsel?

MR. ELRINGTON: Much obliged, My Lord.

**Q: What did Pancho and Cesar tell you together?**

**A: Pancho said that they would tie up the entire family and cover or tie up their mouths.**

...

**Q: So tell us what else did Cesar and Pancho told you together, what else?**

**A: Cesar and Pancho told me that they wanted a watch that Mr. Jose had valued approximately \$10,000.00.**

Q: What else?

A: And other jewelry.

Q: Good, that is all that Cesar and Pancho told you?

A: Yes.

**Q: What did the three Guatemalans tell you, try and remember everything that they told you that night?**

**A: They told me that they came here to kidnap the Shoman family because Cesar and Pancho told them that there was plenty of money in that home.**

**Q: What else did the three Guatemalans tell you?**

**A: They told me not to say anything otherwise they would kill me."**

And later on, this:

**"Q: Who was the one doing the talking, was it Pancho or was it Cesar?**

**A: Both of them.**

**Q: Was any mention made by Pancho or Cesar that they were going to give you part of what they got?**

**A: They both told me that whatever money was gotten that it would be shared.**

Q: Did you tell them that no money was kept in the house?

A: I told them I don't know but they told me they knew that there was a safe.

Q: You know that too?

A: I don't know anything about it."

[38] The police then gave evidence of having found Pancho, Mayorga and the three Guatemalans at Mayorga's apartment and having discovered the firearms and ammunition of which Miranda had spoken.

[39] When Perez testified, he recounted the events leading up to his arrival at Mayorga's apartment in similar fashion to Miranda. He said he first met the three Guatemalans outside Mayorga's apartment. Upon his first mention of the plan that 'they' spoke about and that 'they' had, Mr. Elrington intervened to ask that the witness be directed to be very specific as to who said what to him. This prompted the trial judge to address the prosecution directly and to ask that clarification be sought "because it is difficult for two persons to be speaking at the same time." The examination in chief then continued:

**"Q: Could you say who spoke about this plan, when you say they, who do you mean?"**

**A: Pancho and Cesar.**

Q: Could you say what was discussed, what was this plan?

A: The plan was to help them get in.

Q: Help them get in where?

A: There at Mr. Jose's.

Q: What were you suppose to do to help them?

A: Open the gate which was by the river.

Q: Could you say what else?

A: Once they were in, I would have gone to knock at the door. Mr. Jose would have come out and as soon as Mr. Jose would have opened the door and come out, Pancho would have been placed the gun at Mr. Jose's head.

Q: What was the plan, what was supposed to have happened after that according to the plan, if anything?

A: Open the gate with the remote.

Q: Who would have opened it?

A: Mr. Jose would have opened the gate with the remote.

Q: Which gate would he have opened with the remote?

A: The front gate by the street. Once they would have gain entry, they would have tied him up, gather all the family members.

Q: Could you say what was the plan after that?

A: We would have tied them up and start killing the children."

[40] The continued lack of specificity in the identification of who said what and who was to do what, forced Mr Elrington to his feet again to protest even more vigorously. He said:

"They were eight people including themselves in this house and I am trying to, in order to defend my clients, I am trying to find what it is that my clients did. I am going to be in a very difficult position to defend my clients if they continue using the word, they, they and they. We want to know who said what and when they said what, so that I can know, the jury can know, they can know."

Which elicited an even more telling intervention from the trial judge. He said:

"All that I am saying is that, if he use they, counsel, I will tell the jury we don't know who are the they, when we get to that point."

[41] Nevertheless, the examination in chief continued with only occasional clarification as to who 'they' or 'we' were:

Q: Yes, you were saying that they would have tied them up and started killing the children. Could you say what was the plan after that?

A: After killing one of the children it would have shown that it was something serious. Afterwards they would have gathered all the jewelry, then hit or beat Mr. Jose to sign a cheque. After stealing everything, they would have began killing everyone.

...

Q: You mentioned earlier that during the discussion of the plan it was mentioned that they would put a gun to Mr. Shoman's head after he came out of the door, do you recall whether they said to you at any point or whether they spoke to you about having or possessing a gun?

A: **Yes they told us they had weaponry and they only showed us the gun handle.**

Q: **Who mentioned they had weaponry?**

A: **Pancho.**

Q: Where were the other persons when Pancho mentioned he had weaponry; how far were they from where Pancho was saying this?

A: They were together on a circle.

Q: You said Cesar and Pancho, you said there was a plan being discussed and Cesar and Pancho spoke about what the plan was. Could you say where were the other persons at the time when this plan was being discussed?

A: They were right there."

Then after the luncheon break:

**Q: You spoke this morning of a conversation of which the plan was discussed involving Mr. Shoman and his family. Now you earlier told us that when I asked you about who was talking about this plan you said Pancho and Cesar, do you recall or do you remember if at any point during the conversation when this plan was being discussed, whether any of the other persons spoke?**

**A: Yes, they spoke.**

**Q: Could you say who spoke and what was said?**

**A: Some of the Guatemalans spoke and Pancho and Cesar spoke.**

...

**Q: Do you recall what you said earlier, a few moments ago, you heard two of them say something, what did the two Guatemalans say?**

**A: They came from Guatemala to commit robbery.**

Q: When the Guatemalans said this, could you say where were the other persons in the group?

A: They were all there except Miguelito.

Q: Where were Miguelito at that point when the Guatemalans said that?

A: He was standing by the door.

**Q: The person you refer to as Miguelito, could you say whether or not you recall or you remember that person saying anything during that conversation or discussion?**

**A: No, I didn't hear anything Miguelito said.**

Q: You said the person you know as Cesar, earlier you had said in your testimony that when you were asked who were talking about the plan you mentioned two persons Pancho and Cesar, do you remember exactly what was said by Cesar during this conversation?

A: Yes, I do remember.

Q: Do you recall what was said by him?

**A: Cesar said that he would rob and kill and take everything of value."**

And on that note, the examination in chief was brought to an end.

[42] The cross-examination of Perez confirmed the active participation of Pancho and Aldana but added no clarity on what part Mayorga and the three Guatemalans may have played in the conspiracy. There were these exchanges:

"Q: Apart from you three (referring to Cesar, Miranda and Perez), how many other people were inside?

A: They were three outside by the door.

Q: Three others?

A: Yes.

Q: Was there any others inside?

A: Miguelito and Pancho.

Q: Who is Miguelito?

A: The first one.

Q: Whom did you go to the house to see?

A: We went to see everyone with regards to the plan.

**Q: When did you know of the plan?**

**A: When we saw Cesar. Cesar said they were going to plan something.**

**Q: He told you and Alex (referring to Miranda) that?**

**A: Yes.**

**Q: Did you ask him what were you all going to plan, what is it you have in mind?**

**A: Yes, I did ask but he said we will speak over there.**

...

**Q: You said that when you reach the apartment there were three people by the door, outside the door, inside the door or what?**

**A: Outside the door and we were inside.**

**Q: Would you be kind enough to tell us the names of these three people who were outside?**

**A: I don't know their names.**

**Q: You said that inside there was Pancho and Miguelito?**

**A: Pancho, Miguelito and Cesar, the others were by the door.**

**Q: And then Pancho began to tell you of a plan?**

A: Yes.

Q: And you and Alex listened to what he said?

A: Yes, we did listen.

Q: That was the first time you heard of this plan?

A: Yes, it was the first time I heard of it.

...

Q: I want to suggest to you that Cesar was also surprise by this plan? ...  
Did you see a look of surprise on Cesar's face?

A: No because he had already planned it.

Q: When did he plan it?

A: 13 November 2008.

Q: A month before?

A: 13 December.

Q: How do you know that?

A: Because they said so.

Q: **What did Cesar say?**

A: **Cesar said to help them because they were going to rob.**

Q: When did he say that?

A: He said it on the 12<sup>th</sup> of December.

Q: Before he reach the house, after he reach the house, when?

MR. CAVE: Which house?

Q: The apartment, the room, Miguelito's room?

A: At Miguelito's apartment they told us.

Q: **I don't want what they said I want what Cesar said.**

A: **Cesar said that they were going to rob Mr. Shoman's home.**

Q: **Was it Cesar that said that or Pancho?**

A: **Both of them.**

...

Q: I want to suggest to you that what you told the police is that it was Pancho that told you all, that is you and Alex, what they were going to do?

A: Yes, I did.

Q: **I want to suggest to you that the man with the plan was Pancho and that you, Alex, Cesar were listening to Pancho's plan?**

A: **Cesar and Pancho were the ones with the plan.**



Q: Cesar said Pancho had a plan, no more than that. All Cesar said was that Pancho had a plan, he never told you that I know what Pancho plan is?

A: Cesar didn't tell us Pancho's plan, when we reach they told us about the plan.

Q: **All that Cesar told you is that Pancho has a plan, listen to Pancho?**

A: **Cesar also said he was in agreement with everything.**

...

Q: **I want to suggest to you that the only person that told you of the plan about Mr. Shoman was Pancho?**

A: **Pancho and Cesar.'**

## **Summary**

[43] It is clear that there was an abundance of evidence that Pancho and Aldana (referred to throughout as Cesar) were the two ringleaders of the conspiracy. There were repeated references to direct statements from them about a plan to rob Mr Shoman of his possessions, to attempt to extort a cheque from him and to kill his children if he refused to write the cheque. As Perez said, "Cesar and Pancho were the ones with the plan".

[44] In relation to Mayorga, the only references to expressions of agreement on his part to any aspect of this plan were when, according to Miranda, he blurted out "yes, yes", when 'they' said 'they' would kill Mr Shoman's family. Against that is Perez's evidence that he did not hear anything Mayorga's said. Miranda also testified that it was Aldana and Mayorga who showed him the weapons which were to be used in the escapade. But Perez said that it was Pancho who mentioned that 'they' had weapons.

[45] In relation to the Guatemalans, Miranda said that one of them said that he "would be in charge of cutting each and every one of the family member's neck" and that all of them said that they had come to Belize to kidnap the Shoman family "because Cesar

and Pancho told them that there was plenty of money in that home". They also told him that they would kill him if he said anything. Perez, on the other hand, said that he heard only two of them say that they came from Guatemala to commit robbery.

### **The Trial Judge's Summation**

[46] The trial judge began his summation to the jury in the usual way, directing them on the burden and standard of proof, concluding with the exhortation that they had to be sure that each of the appellants had agreed to commit murder and robbery. He put it this way:

"If you notice I speak about each of them, even though there are five. I say five or I say each of them, why, because you must consider each of the accused individually. The word individually is emphasis because each is one. Why, because you may find none of the accused guilty, or you may find all of them guilty, or you may find one guilty, or two guilty, or three guilty and same way with not guilty. So that's why I am telling you, you must consider each accused, what did he do, what did he say, if you accept the evidence and same way with counts, you are to consider each count against each accused. So don't bulge it together. You need to consider the counts individually."

He then gave them specific directions on the elements of the offence of conspiracy to murder. He said that there had to be an agreement between two or more persons to murder José Shoman and others, that each of the appellants was a party to that agreement and that at the time of agreeing they should intend to carry out the agreement.

[47] Nearing the end of his summation he returned to the theme that the jury had to be sure that each of the appellants had signed on to the plan. He said:

"So to convict each accused of conspiracy to commit murder, you must be sure that there was plan. That each of them got involve with the plan. That they are going to execute the plan. If you are in doubt that there was a plan or there was a plan but the plan was only made by Martinez, Pancho. If you found that to be so and Martinez was just speaking out like

that, each cannot be guilty of conspiracy because they would not be involve with the plan. If you have a reasonable doubt about whether or not Pancho was the one who is the creator of the plan and he was just the one speaking out with each of the accused involved in it, to be involved in it, they are not contributing to the plan or they are not agreeing to the plan, you must find the accused persons not guilty, each of the accused persons."

[48] However, though the trial judge was careful to direct the jury to consider the case of each appellant individually, the structure of his summation of the evidence was not to gather such evidence of agreement as there may have been in relation to each appellant and then to leave it to the jury to decide whether they were sure each appellant had agreed to the plan to kill and rob the Shomans. Rather, he trawled through the evidence of Miranda and Perez, stopping at some points along the way to intersperse some comments of his own. Thus, after referring to Miranda's statement that upon arriving at Mayorga's apartment "we had a conversation", the trial judge commented: "But who are we? Pancho, Cesar and the three Guatemalans." He then recounted Miranda's evidence of what the plan was to consist of, replete with Miranda's references to what "they" were to do, that "They said they wanted to kidnap the family of Mr. Shoman" and "They were asking if I could help by opening the gate", and that Pancho and Cesar and four others would be let into the Shoman residence. He then commented:

"Now let me pause here, if I understood the evidence, that's a matter for you, remember I am saying that my comment on the evidence you may accept or reject. That is what Pancho and Cesar was telling Miranda."

[49] It is not at all clear why the trial judge was suggesting that this was evidence which the jury might accept or reject. The fact is that Miranda had made clear that the details of the plan had been presented to him by Aldana and Pancho only, with the Guatemalans making cameo interventions only to say that they were there to kidnap, with one unidentified Guatemalan saying he would cut the throats of the family members.

[50] He then recounted that part of Miranda's evidence relating to the plan to gather the family in one room, to make the demand for the cheque and, if Mr Shoman refused, to kill one of the children. He also quoted Miranda as saying that "One of the persons who was there said that he would be hitting Mr. Jose hard." But he did not point out that Miranda had made clear that it was Aldana who had said this. He then paused to make this comment:

"So from the evidence, Mr. Foreman, ladies and gentlemen of the jury, if you accept Miranda's evidence, here is this plan, this plan is being divulged, if you accept it that way, or revealed to Miranda what would have happened or how it would have been carried out."

[51] After referring again to the evidence that "they" would begin killing Mr. Shoman's family if he did not sign the cheque, he quoted Miranda's reference to one of the Guatemalans saying that "he would be in charge of cutting each and every one of the family members neck." He then commented:

"There is no evidence which one but it would appear, that's a matter for you, that Pancho and Cesar had said what they would do. One of them then, he's saying what's he going to do. That's part of the discussion, if you accept it that way or part of the plan, or part of how to execute the plan."

[52] What the trial judge should have made clear at this point was that the failure to identify which of the three Guatemalans had made this declaration meant that the reported declaration could not be held to implicate any of them in the conspiracy. Rather, the trial judge seems to have signified to the jury that the importance of this bit of evidence was that it might assist in a determination of whether the part this unidentified Guatemalan was to play was part of how the plan was to be executed.

[53] The one bit of evidence from Miranda which would have implicated all of the Guatemalans was his answer to the question whether any of the Guatemalans indicated why he was in Belize. Miranda said, it would be recalled, that they said that they came

from Guatemala to kidnap the Shoman family because Aldana and Pancho told them that there was plenty of money in the Shoman house. In relation to this evidence, the trial judge proceeded to instruct the jury on what the definition of kidnapping was in the Criminal Code. He then made these comments:

"So kidnapping connotes taking a person from where he was or the person was at a particular place and kept him there so that nobody except the kidnapers would know where he is. If I understand the Crown Counsel, he is saying that probably they were using the word kidnapping loosely. It's a matter for you, why would they be saying that jewelry is there, that's what Cesar told him and Pancho, plenty of money in that house and if you accept Miranda's evidence, the discussion was or the plan was, to go to Shoman's house. Hence, they solicited, Cesar and Pancho were soliciting the help of Miranda and Perez who had worked there or who was working there at the time to make their entry to the house where according to Pancho a safe was there. So usually kidnapping would be taking a person and then after that, if it is a ransom, then they ask his relatives to bring money or to pay them money. You call that ransom. So it's a matter for you. Would that make sense for the definition of kidnapping that I told you? They would take Shoman from where he lived and then ask, if that is so, ask for money, when they would be going to his house. That's a matter for you. Probably as I said, they use the word kidnapping, not from a legal sense. So that is for you to unravel."

[54] We are satisfied that the trial judge was wrong to simply leave to the jury the task of 'unravelling' whether the Guatemalans were using the term kidnapping loosely. First of all, he ought to have drawn the attention to the almost non-committal way in which Miranda said they expressed their purpose. Miranda first said that the Guatemalans "mentioned" that they were there to kidnap. What was the significance of this? Was this some 'by the way' statement by the Guatemalans? Secondly, he ought to have pointed out to the jury the absence of the context in which the words attributed to the Guatemalans was said. Were they saying, for example, that they were only in Belize to kidnap, and not to kill anyone? Were they answering a direct question put to them as to the purpose of their journey from Guatemala? Did they just butt in in the middle of the conversation to casually state their intentions? Thirdly, he ought to have pointed out the

unsatisfactory nature of the evidence. Miranda did not say what each of the Guatemalans said. He reported a collective statement which by itself is an unsatisfactory basis upon which to determine the state of mind of each of them. The actual terms of what each said might have conveyed a different meaning, and the jury should have been told that.

[55] But more importantly, the jury should have been directed to ask themselves whether the statement that they were there to kidnap, if such could be attributed to each Guatemalan, constituted an agreement to murder or to rob. They should have been told at the very least that one of the possible options was that the Guatemalans came to Belize to kidnap only, and that if that was the conclusion they came to, they would be bound to acquit because this would be insufficient to constitute an agreement to murder or to rob. Instead, they were left to 'unravel' whether the Guatemalans were using the word 'kidnap' loosely, presumably to mean murder and robbery.

[56] In recounting Perez's evidence in relation to the conspiracy to murder charge, the trial judge correctly pointed out that Perez said that the 'plan' was laid out by Pancho and Aldana. He then referred to Perez's evidence that when the plan was being discussed Mayorga and the Guatemalans were 'right there' and that two of the Guatemalans spoke and said that "they came to commit robbery". The trial judge's only comment on this bit of evidence was:

"So we hear earlier that they came to kidnap but here he is saying, this is what he heard, were talking about Perez, that two of them said that they came from Guatemala to commit robbery."

[57] Once again he did not point out that the two Guatemalans who said this were not identified, and accordingly it could not be used as evidence against any of them. Furthermore, he did not point out that the statement that they came to commit robbery, even if attributable to any of them, was not evidence of agreement to murder.

[58] The trial judge then directed his attention to the charge of conspiracy to rob. He referred the jury to the elements of the offence of robbery and reminded them of his earlier directions on conspiracy. He then took the jury to some of the evidence given by Miranda and Perez, focussing on those aspects dealing with the property which might be found at the Shoman residence. He referred again to the plan that if Mr. Shoman refused to sign the cheque, one of his children would be killed. The trial judge then commented:

"So in robbery, this is from the law, if the person, the victims did not hand over the property, it is not stealing, so property must be handed over. But that is their plan, that he was going to sign the cheque, if not, they would have killed one of his children. I've told you this but this is appropriate under the second court."

So here we now have the trial judge himself falling into the lazy habit of using the generic 'they' and 'their', without specifying whose plan it was.

[59] He then referred to Miranda's evidence that Pancho said that their takings would be shared. The trial judge cautioned:

"So they were talking about sharing, it's a matter for you, for what they would have stolen from the house. That's a matter for you. What would they share, because they are talking about money, liquor and about a safe."

He then referred to Miranda's answer in cross-examination that it was Pancho and Cesar who had said that whatever money was obtained would be shared.

[60] In the course of his direction on the identification of the appellants, the trial judge rightly drew the jury's attention to the unsworn evidence of the Guatemalans that they had remained outside the apartment and took no part in the discussions. He then asked the jury to contrast this with what Miranda and Perez said about them:

"That's a matter for you because you might need to compare it with how they were saying, if you believe the evidence of the two witnesses, Miranda and Perez, what they came here for. What they came to Belize for. Two of them said they're going to do the hitting. According to the Crown that's a matter for you, all that is part and parcel of the plan, that's their contribution, that's what the Crown is saying but that's a matter for you."

[61] There are two difficulties with this direction. The first is, as already pointed out, there was no evidence that two of the Guatemalans said they would "do the hitting". The second is that by contrasting what the three Guatemalans said individually from the dock with what Miranda and Perez said 'the Guatemalans' said, the trial judge may have entrenched in the jury's mind that the evidence of what one or two of the Guatemalans were alleged to have said and what they said as a collective, was in fact cogent evidence against each of them individually.

[62] Each summation must be crafted to meet the circumstances of the case. The jury was correctly directed that they were not to convict unless they felt sure that each of the appellants had agreed to the plan. But what the trial judge ought to have done, consistent with this general direction, but did not do, was to assist the jury by collating the evidence bearing upon agreement in relation to each of the appellants and inviting them to decide whether that evidence met the requisite standard of proof. He should also have directed them that silence on the part of Mayorga and the Guatemalans upon hearing Pancho and Aldana relate a plan which involved their participation, was not by itself evidence that they agreed to the plan. In the absence of such a direction, the jury



may have been misled into thinking that Pancho and Aldana were speaking on their behalf and that that was itself evidence of agreement by the others. A summation which focussed on the evidence of agreement in relation to each appellant would have avoided this pitfall. The constant references to what 'they' said and what 'they' were to do without a direction that this was insufficient by itself to establish agreement, compounded the error. The failure of the trial judge to make this point to the jury is even more surprising given that he had promised to tell the jury about the lack of clarity which the constant use of the pronoun 'they' produced, in the absence of direct evidence of who 'they' were. He ought to have told them that the only evidence against Mayorga and the Guatemalans was that summarised in paragraphs 44 and 45 above and then assisted them in analysing the effect of each bit of evidence on the findings which they were required to make. He did refer to the relevant evidence in relation to the Guatemalans along the way, but not by way of focusing the jury's attention on how that evidence assisted or failed to assist them in determining what each of the Guatemalans had agreed to. And even so, he made the errors in relation to that evidence as already alluded to. As for Mayorga, he failed to refer the evidence relevant to him at all, leaving it to the jury, without guidance, to conclude that he was subsumed in the collective 'they' and 'their'.

[63] For all these reasons, we are satisfied that the trial judge erred and that there was a miscarriage of justice in relation to Mayorga, Rosales, Juarez and Cordova. With respect to Aldana, we are satisfied that the trial judge adequately drew the jury's attention to the abundant evidence of his agreement with Pancho to murder and rob Mr Shoman. His conviction for conspiracy to murder and rob and the sentences imposed on him are accordingly affirmed.

[64] It should be fairly obvious from the comments we have made about the quality of the evidence led against Mayorga, Rosales, Juarez and Cordova, that we are not satisfied that if the jury had been properly directed they would inevitably have returned the same verdict. This is therefore not a case in which the proviso should be applied. In

addition, primarily because the evidence adduced by the Crown was insufficient to justify conviction of the relevant appellants by a reasonable jury, properly directed, but also because a re-trial would only give the prosecution the opportunity to buttress its case, and because they have already served three years imprisonment, we are satisfied that a re-trial is not warranted. In the result, the appeals by the appellants Mayorga, Rosales, Juarez and Cordova against their convictions for conspiracy to murder and to rob are allowed and their convictions quashed.

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SOSA P

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MENDES JA

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AWICH JA