IN THE COURT OF APPEAL OF BELIZE AD 2018

CRIMINAL APPEAL NO 8 OF 2012

LIONEL DALEY Appellant

v

THE QUEEN Respondent

BEFORE

The Hon Mr Justice Samuel Awich	Justice of Appeal
The Hon Madam Justice Minnet Hafiz-Bertram	Justice of Appeal
The Hon Mr Justice Murrio Ducille	Justice of Appeal

K Arthurs for the appellant.
J Chan, Crown Counsel for the Crown.

8 March 2018 and 2 November 2018.

HAFIZ-BERTRAM JA

Introduction

[1] On 4 April 2012, Lionel Daley ('the appellant') was convicted for attempted murder and robbery following a jury trial before Gonzalez J. He was sentenced to a term of imprisonment of 12 years for attempted murder and ten years for robbery, to run

concurrently, effective 11 April 2012. The appellant appealed to this Court and the appeal was heard on 8 March 2018. The Court reserved its judgment.

[2] The appellant and Abelino Briceno Jr. were indicted on 5 January 2012, for attempted murder and robbery of Leonardo Velasquez which occurred between the 20 and 21 of September 2010, in San Ignacio Town. The evidence of the doctor who treated Velasquez was that he was stabbed twice to the chest and his left lung had collapsed. The other lung was also damaged but was repaired.

[3] The appellant was unrepresented at trial. The transcript of the proceedings was deficient as it does not have the summing up of the trial judge. Further, the evidence of the witnesses from both sides were prepared using the notes from the trial judge.

[4] The appellant was remanded on 27 September 2010 at the Kolbe Prison for this incident. He was convicted on the 4 April 2012 and remanded to prison until sentencing on 11 April 2012. He was granted bail by this Court pending the appeal on 24 March 2017. At the hearing of the appeal, the appellant was not present. He was also granted leave to amend his grounds of appeal.

The amended grounds of appeal

[5] There were four grounds of appeal as follows:

(1) The appellant had been denied the right to a fair trial in a reasonable time;

(2) The absence of a complete transcript and the appellant being an unrepresented youth with a standard VI education, in which issues of identification, dock identification, joint enterprise, good character and alibi were raised, particularly the summing up and the absence of proper procedure to rebuild the record, have further denied the appellant the right to a fair trial;

(3) Owing to the delay in the trial and the deprivation of his right to a fair trial within a reasonable time, the appellant had not been afforded the right and application of the principles of remission;

(4) In the alternative, the sentence is harsh and excessive, in that the mandatory minimum in respect to a minor of good character is disproportionate and excessive.

An unrepresented defendant and the right to a fair trial

[6] Learned counsel, Mr. Arthurs submitted that when the appellant was charged he was a minor with a standard six graduate. He had just turned 18 years old when he was committed for this matter.

[7] Mr. Arthurs argued that accused persons have a right to be represented by counsel of their choosing. He relied on **McInnis v The Queen** [1979] HCA 65, where Barwick CJ said that, "*it is in the best interests not only of the accused but also of the administration of justice that an accused be so represented, particularly when the offence charged is serious.*" He also relied on Murphy J in the same judgment where he said that:

> "*An unrepresented accused is disadvantaged, not merely because almost always he or she has insufficient legal knowledge and skills, but also because an accused in such a position is unable dispassionately to assess and present his or her case in the same manner as counsel for the Crown."*

[8] Counsel submitted that the charges of attempted murder and robbery are considered serious and further, the insubstantial transcript based on the handwritten notes of the trial judge showed a limited understanding of the proceedings. As such, he contended that this called for judicial speculation as to whether the appellant had a fair trial. Counsel also relied on the case of **R v Rushlow** [2009] ONCA 461 which addressed the issue of unrepresented accused and fair trial.

[9] Mr. Arthurs contended that the appellant had a standard VI education and as such he was unable to defend himself. Counsel relied on the case of **Condon v R** [2006] NZSC 62, where the adequacy of self-representation was in question before the court.

[10] Counsel argued that there is no reference in the handwritten notes of Gonzalez J that there was any discussion on the appellant's lack of legal representation, or request for an adjournment or any advice given by the trial court to the appellant that because of his age he was at a disadvantage in representing himself. He submitted that the only reference found at page 1 of the transcript is simply "*the accused to defend themselves.*"

[11] Mr. Arthurs contended that there is no record of the questions by either of the defendants or the Crown and the handwritten notes, produced as the transcript, makes it difficult to state with any certainty that the appellant was not prejudiced because of his inability to properly participate in the trial process. He contended that the co-accused had the majority conduct of the trial.

[12] Learned Counsel for the Crown, Mr. Chan in response contended that the record as acknowledged by Mr. Arthurs does not bear out what he had advanced in his arguments. Further, the appellant had not provided any evidence to support his argument that he was not allowed to seek legal representation. Counsel relied on two authorities from this Court. In **Winston Dennison v The Queen,** Criminal Appeal No. 1 of 2013, the Court said:

> "[21] The first ground of appeal that, "the trial judge failed to grant to the appellant time to seek legal representation", raises the question of denial of a constitutional right. In our view, it must fail. There is no factual basis for it. The Constitution declares that, an accused has a right to be represented by an attorney of his choice; but it is at his own expense. Sections 5 (2) (b) and 6 (3) (d) of the Constitution declare the right as follows:
>
> 5 …

(2) Any person who is arrested or detained shall be entitled –

…

(b) to communicate without delay and in private with a legal practitioner of his choice, and in the case of a minor, with his parents or guardian, and to have adequate opportunity to give instructions to a legal practitioner of his choice.

…..

(3) Every person who is charged with a criminal offence –

…

(d) shall be permitted to defend himself before the court in person, or at his own expense, by a legal practitioner of his own choice.

[22] The responsibility of the court in ensuring the above constitutional right is simply to afford the accused adequate time, that is, reasonable time, to obtain an attorney of his choice. Reasonable time may include a realistic time to obtain attorney's fees."

[23] In the trial the appellant had more than adequate time to obtain an attorney. He was arrested on 17 March, 2011 and was informed that, his arrest was made pursuant to the complaint made against him of carnal knowledge of MC, a girl under the age of 16. On 18 March, 2011 he was formally charged in three counts, with the offence. Then the appellant would have been committed by a magistrate for trial in the Supreme Court. He was indicted. Trial in the Supreme Court commenced on 6 December, 2012. It was 1 year and over 8 months from the time the appellant was arrested. On that date (6 December, 2012) after a plea of not guilty was taken on each count, and the jury empanelled, the trial was

adjourned to 10 December, 2012. The appellant did not, on 6 or 10 December, request to adjourn the trial so that the appellant would obtain an attorney. On these facts the judge was entitled to conclude that the appellant was unable to obtain an attorney to represent him and was resigned to having the trial proceed without an attorney.

……..

[25] The record of proceedings does not indicate that the trial judge inquired of the appellant whether he wished to have an attorney, and the reason for not having one in court. It is always a good practice to do so whenever an accused person appears without an attorney. The circumstances in this case show, however, that the appellant was not denied an opportunity to obtain an attorney.

[26] To satisfy ourselves that, the fact that the appellant was not represented by counsel did not occasion prejudice to the appellant at the trial, we considered whether as a matter of fact and law, the trial proceeded in an unfair way, and whether any miscarriage of justice was otherwise occasioned, and the conviction was unreasonable or cannot be supported having regard to the evidence. We concluded that, there was no instance on which unfair trial was occasioned, or a miscarriage of justice was occasioned, because the appellant did not have an attorney representing him. The judge was alert to those possibilities. He stated many times during the proceedings that, because the appellant was not represented by counsel, the judge had a duty to explain the law and rules of practice to the appellant. We agree that the judge had a duty to explain the law and rules of practice to an accused person not represented by counsel, provided that the judge did not stray beyond remaining neutral. He had a duty to ensure a balanced trial."

[13] The other authority relied upon by counsel for the Crown, is **Marvin Cruz Reyes v The Queen**, Criminal Appeal No. 19 of 2013, where the Court, at paragraphs 16 and 17 of the judgment said:

> "[16] Ground 6 is that the Learned Trial Judge erred when he failed to advise the Appellant of the importance of obtaining legal representation for his trial and failed to adjourn the trial to enable representation to be obtained.
>
> [17] It cannot be overlooked that the particulars of the charge concerned the 26th day of August, 2007 and the trial commenced on the 6th day of November, 2013. By a simple calculation this was in excess of five years. From the time of his arrest, the Appellant would have become acquainted with his right to have counsel of his choice. It is shocking that a ground of this nature would now be advanced by counsel for the Appellant. We see no merit in this ground given these circumstances."

[14] Mr. Chan contended that in light of the facts of the instant matter and the two authorities relied upon, **Winston Dennison** and **Marvin Cruz**, the appellant had not advanced any evidence to support the allegation of unfair trial of an unrepresented defendant so as to enable the court to properly consider the issue. Further, the absence of legal representation does not of itself, means that the accused was denied a fair trial. Mr. Chan contended that the appellant failed to demonstrate that there was a miscarriage of justice occasioned by lack of representation.

Discussion

[15] In the instant matter, the notes of the judge showed that (a) "The Accused to defend themselves"; (b) the appellant was indicted on 5 January 2012 for an attempted murder and robbery which occurred between 20 and 21 September 2010; (c) the trial commenced on 27 March 2012; (d) On 30 March 2012, the trial was adjourned to 2

April 2012 for the appellant to call three witnesses; (e) On 2 April 2012, the appellant elected to testify.

[16] The above notes of the trial judge showed that the appellant had sufficient time to obtain an attorney to represent him at the trial. In the view of the Court, there is no evidence that the appellant was treated unfairly. There was an adjournment so that the witnesses for the appellant could testify. Further, the fact that the judge wrote, "The accused to defend themselves" show that there was an enquiry made as to representation. Further, since the appellant elected to testify, he had to be given his options by the trial judge.

[17] The Court agreed with the prosecution that the absence of legal representation does not of itself means that the appellant had an unfair trial. There must be evidence to support the allegation of unfair trial and in the instant matter there is no such evidence. In the opinion of the Court, there was no miscarriage of justice as a result of the appellant being unrepresented. See **Winston Dennison** and **Marvin Cruz**.

Delay and the right to a fair trial within a reasonable time

[18] Mr. Arthurs argued that the right to a fair hearing within a reasonable time is enshrined in the Belize Constitution at section 6(2) which provides:

> "If any person is charged with a criminal offence, then unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time…."

[19] Counsel contended that this equally applies to the appellate process. He argued that the appellant had filed for leave to appeal his conviction in a timely manner and has served five years out of his twelve year sentence before his appeal was heard. As a result, the appellant had not been afforded the effective right to appeal without undue delay. He argued that the delay of five years to hear an appeal is in violation of the appellant's constitutional rights.

[20] Mr. Arthurs contended that efficiency of justice is an essential element of a fair trial, as shown in the Zimbabwean case of **S v Taenda** [2002] (2) ZLR 394 (H) at 396-7 where it is stated that:

> "… an unreasonable delay to the finalization of criminal proceedings causes prejudice to the accused. He suffers social prejudice arising from doubt as to his integrity or conduct. The presumption of innocence does not, in the eyes of the public, family and friends, continue to operate as long he is on remand or his case remains uncompleted."

[21] Learned Counsel further supported his arguments by relying on the authorities of **Masuku v Attorney General Zimbabwe** [2003] ZWBHC 97 and the Jamaican case of **Melanie Tapper v Director of Public Prosecutions** [2012] UKPC 26. Mr. Arthurs argued that **Tapper** is useful since section 20 of the Jamaican Constitution mirrors section 6(2) of the Belize Constitution. In that case, the court relied on **Boolell v The State** [2006] UKPC 46, in which it was stated at paragraph 27, by Lord Carswell that:

> "(i) If a criminal case is not heard and completed within a reasonable time, that will itself constitute a breach of section 10(1) of the Constitution, whether or not the defendant has been prejudiced by the delay.
>
> (ii) An appropriate remedy should be afforded for such breach, but the hearing should not be stayed or a conviction quashed on account of the delay alone, unless (a) the hearing was unfair or (b) it was unfair to try the defendant at all."

[22] In response to this argument, Mr. Chan contended that the issue before this Court is whether the conviction of the appellant is sound. Further, the remedy of quashing a conviction on the ground of delay by itself, even delay as long as 5 years, should only be considered if the delay caused prejudice to the appeal. An example stated by counsel is if there would be an application to call fresh evidence which was affected by the delay.

[23] Mr. Chan relied on the Jamaican case of **Tapper** (which was also cited by Mr Arthurs), where Lord Carnwath, delivering the judgment of the Board, said at paragraph 28:

> "28. In the light of these cases the significance of *Darmalingum* as authority has been reduced almost to vanishing-point. At most it is a case on its own facts, explicable, as Lord Bingham suggested, on the basis that, in a straightforward case, the unexplained passage of seven years without any contact with the defendant, made it unfair even to embark on trial. The board would affirm that the law as stated in the case, *Attorney General's Reference [2004] AC 72* and as summarized in *Boolell,* represents also the law of Jamaica. Although those judgments were not directed specifically at the effect of delay pending appeal, the same approach applies. **It follows that even extreme delay between conviction and appeal, in itself, will not justify the quashing of a conviction which is otherwise sound.** Such a remedy should only be considered in a case where the delay might cause substantive prejudice, for example in an appeal involving fresh evidence whose probative value might be affected by the passage of time."

[24] Mr. Chan accepted that section 20 of the Constitution of Jamaica which was under consideration in **Tapper**, is equivalent to section 6(2) of the Belize Constitution. Further, in that case, the Board drew reference to its previous judgment **Boolell** and applied the same approach taken there. Counsel argued that in the absence of any indication of the manner in which the delay in the hearing of the appeal had prejudiced the hearing, the conviction of the appellant should not be quashed by reason of delay.

Discussion

[25] The appeal for the appellant, in the instant matter, was heard after he had served 5 years out of his 12 year sentence. In **Tapper,** the Board confirmed that the judgments discussed in that case were not directed specifically at the effect of delay pending appeal

but, the same approach applies. That is, extreme delay between conviction and appeal will not justify the quashing of a conviction which is sound. This Court accepts that position.

[26] The Court has to firstly examine the issue of infringement of the reasonable time guarantee to a fair trial which is the ground of appeal. In the recent judgment of **The Queen v Gilbert Henry [2018] CCJ 21 (AJ)**, (which was handed down after the hearing of this appeal) the issue of fair trial was discussed by that Court. As such, the parties did not have the benefit of that judgment. In that case, there were four years delay between the charge and trial and a delay of five years in the hearing of the appeal. The transcript was also incomplete on significant aspects of the case and there was no record of the summing up of the trial judge to show his treatment of the issues raised.

[27]The Court at paragraph 37 of that judgment said the following about the delay pending appeal:

> "[37] ….. The delay of five years in the hearing of the appeal was entirely unsatisfactory. It must be unsatisfactory for a convict to serve his entire sentence before his appeal is heard and decided. Such delay renders the right of appeal more an illusion than a right. As the appellate process is undoubtedly part of the trial, such a delay constitutes an infringement of the constitutional right to a fair trial within a reasonable time.

[28] However, Gilbert Henry was not granted any relief by the CCJ, although there was an infringement of his constitutional right to a fair trial. The Court at paragraph 41 of the judgment said that since Henry had not made a claim for constitutional relief at the trial, the claim should not have been entertained at the Court of Appeal for the first time. Further, "*Strictly speaking, therefore, the issue of remedy for any breach of the reasonable time guarantee does not arise*."

[29] In the instant matter, the appellant was charged on 28 September 2010 and indicted on 5 January 2012 (approximately 1 year and 3 months after) for attempted murder and robbery. The trial commenced on 27 March 2012 (not more than 3 months after indicted) and he was convicted on 5 April 2012. He was sentenced to 12 years for attempted murder and 10 years for the crime of robbery. The appeal was heard on 8 March 2018. The sentences ran concurrently with effect from 11 April 2012. In considering whether there had been a breach of the reasonable time guarantee, the Court will look at the entire period that had elapsed since the conviction of the appellant and when his appeal was heard. This Court is guided by the judgment of **Vishnu Bridgelall v Hardat Harisprashad** [2017] 8 CCJ (AJ), at paragraph 38, where the Court agreed with the view expressed in **Dyer v Watson** [2004] 1 AC 379, [2002] UKPC D1, 3 WLR 1488, "that in considering whether there has been a breach of the reasonable time guarantee it is appropriate first to consider the overall period of time that has elapsed. If, on its face, the period appears to be overly lengthy, then it would be appropriate for the court to interrogate all the relevant facts and circumstances with a view to determining whether the State has provided a satisfactory explanation or justification for any lapse of time which appears to be excessive."

[30] In the instant matter, the period elapsed from the date of conviction to the date of the appeal was over 5 years. (The period elapsed from the date of the charge to the date of the appeal is over 7 years 5 months). (28 September 2010 to 8 March 2018). The appellant was granted bail on 24 March 2017, pending the appeal. He served 5 years of his 12 year sentence before bail was granted. (The appellant was on bail one year prior to the appeal). This Court therefore, accepts that the delay of five years from conviction to the hearing of the appeal was unsatisfactory (as in the case of **Gilbert Henry**). The appellant cannot be blamed for the obvious poor administrative practices of the judicial system. The summing up of the trial judge is missing from the transcript and there is no explanation as to why this is so. The delay caused by the efforts to obtain the missing summation is inexcusable and is no fault of the appellant. It follows that there was an infringement of the constitutional right of the appellant to a fair hearing within a reasonable

time as provided by section 6(2) of the Belize Constitution that *"If any person is charged with a criminal offence, then unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time…").*

[31] The question for this Court is whether the appellant is entitled to a remedy and if so, what remedy should be given to him for the breach of his constitutional right to a fair trial within a reasonable time. As in the **Gilbert Henry** case, no claim for constitutional relief was made at the court below and as such, this Court is unable to entertain such claim for the first time and grant a remedy to the appellant.

[32] Before leaving this issue, it is useful to point out that the CCJ judgments of **Gibson** and **Vishnu Bridgelall,** which the Court relied upon in **Gilbert Henry**, adequately addressed the issue of remedies for breach of constitutional right to a fair trial. At paragraph 41 of **Gilbert Henry**, the CCJ relying on the aforementioned authorities said:

> "[41] It follows from these pronouncements that not all infringements of the constitutional right to a fair trial within a reasonable must necessarily result in the allowing of the appeal and the quashing of the conviction. Indeed, this remedy is, as we have said, "exceptional"; the emphasis is on fashioning a remedy, "that is effective given the unique features of the particular case". Remedies for breach may be a declaration, an award of damages, stay of prosecution, quashing of conviction, or a combination of these or some other or others. Everything depends upon the circumstances. In this case, a most pertinent circumstance is compelling evidence against Mr. Henry. There was overwhelming evidence that he had stabbed Mr Taibo. He admitted his actions and handed over the instrument with which he had inflicted the stabbing. His caution statement was taken by police officers and witnessed by a Justice of the Peace. There was no credible evidence that he had not given the statement of his own free will. Indeed, the evidence was that he had done just that. The directions from the judge on the issue of self-defence and the delay in the hearing of his appeal could in no way detract from his actions, and his guilt as found by the jury. Mr. Henry served the

five-year sentence imposed for the offence. Indeed, having not made a claim for constitutional relief at the trial, the claim should not have been entertained at the Court of Appeal for the first time. Strictly speaking, therefore, the issue of remedy for any breach of the reasonable time guarantee does not arise."

In the instant matter, the Court is of the opinion, that the evidence against the appellant was also overwhelming.

Absence of transcript

[33] Learned counsel, Mr. Arthurs submitted that there is no summation at all in this case and without such record it cannot be concluded that "*even if there was some error on the part of the judge, in the summation, a jury properly directed would have inevitable convicted and consequently there was no miscarriage of justice."* He contended that an integral part of the appeal process is the record of proceedings and without that, the Court is severely impeded from carrying out its function and the prospect of having a just hearing of an appeal is greatly diminished. He argued that the notes of evidence and in particular the summing up is of material importance. Counsel relied on numerous authorities to support his argument, including, **R v Parker (1966) 9 JLR 498; Roberts & Anor v The State (Trinidad & Tobago)** [2003] UKPC 1**; R v Elliot** (1909) 2 Cr. App. R 171; **R v Le Caer** (1972) 56 Cr. App**.** R 727**; Sylvester Stewart v R** [2017] JMCA Crim 4.

[34] Counsel referred the Court to several instances where the trial judge in the instant matter, had difficulties with directions on identification, which are noted by the reversal of several decisions of this Court and the Privy Council. He referred to two such cases, namely, **Aurelio Pop v The Queen,** UKPC 31 of 2002 and **Leslie Pipersburgh and Patrick Robateau v The Queen,** UKPC 96 of 2006. Further, counsel argued that in the instant case, the appellant had requested an identification parade to be conducted but was refused.

[35] Mr. Chan in response submitted that the general rule is that there must be a serious possibility that there was an error in the missing portion of the transcript, or that the omission deprived the appellant of a ground of appeal. Counsel contended that the appellant had not advanced any basis for a conclusion that in this case there is such a possibility. Instead, he focused on the fact that the record was incomplete and invited the Court to consider that the presiding judge, in the trial below, had a continuing string of difficulties with issues of identification directions.

[36] Mr. Chan also relied on the case of **Roberts** and submitted that in the instant case, the appellant has not sought to lay the foundation for a suggestion that there was a misdirection in the summing up of the trial judge.

Discussion

[37] The Court accepts that the record is incomplete since the summing up of the trial judge is missing. Mr. Arthurs therefore, could not have shown to this Court that there might have been a misdirection by the trial judge in relation to identification. Further, since the appellant was unrepresented, he would not have known if there was a misdirection.

[38] Mr. Arthurs also argued that the appellant had requested an identification parade to be conducted but he was refused. The transcript of the evidence shows the contrary. Reymundo Reyes, Inspector of Police testified that the appellant, Daly, refused to take part in the identification parade. Daly's co-accused, Abelino Briceno took part in the identification parade.

[39] The question that must engage the Court therefore, is whether the conviction of the appellant should be quashed because of prior errors made by the trial judge. Both counsel relied on **Roberts** which gives guidance but, not sufficient to quash the conviction of the appellant. In that case Lord Rodger of Earlsberry at paragraph 7 said:

"**[7]** At this point a difficulty emerges. At some time during the many years of delay before the Court of Appeal heard the applications for leave to appeal, the shorthand notes of the judge's summing-up were lost. How this came about remains a mystery; there was some suggestion that it might have happened when the court moved premises, but that is just speculation. The result is that it is now impossible to tell what directions the judge did in fact give on identification. That does not in itself mean that the appellants' convictions should be set aside. On the contrary, it is well established that the loss of the transcript of a summing-up is not, without more, a ground for setting aside a conviction. Speaking of the shorthand note of the proceedings at a trial, Channell J said in *R v Elliott* (1909) 2 Cr App Rep 171 at 172:

'The absence or insufficiency of a shorthand note is not of itself a ground upon which a prisoner can succeed upon appeal, nor the existence of a proper note a condition precedent to a good trial. Where, however, there is reason to suspect that there is something wrong in connection with the hearing of a case, the absence or insufficiency of a proper shorthand note may be material.'

In *R v le Caer* (1972) 56 Cr App Rep 727 at 730 and 731, Lord Widgery CJ quoted this passage and continued:

'The court would adopt those words as being entirely appropriate to the present facts and to the present case; in other words, the simple fact that there is no shorthand note is not of itself a ground for saying that the conviction is unsafe or unsatisfactory. In order that the appellant may claim that conclusion, he must be able to show something to suggest that there was an irregularity at the trial or a misdirection in the summing-up. Unless there is something to suggest that an error of that kind took place, the absence of a shorthand note simpliciter

cannot cause the court to say that the verdict of the jury was unsafe or unsatisfactory.'

These passages show that the lack of a transcript of the judge's summing-up is significant only if the appellants can point to something to suggest that it contained a misdirection."

[40] In the **Roberts** appeal, the appellants were able to point to the fact that judges in Trinidad and Tobago were failing repeatedly to give proper *Turnbull* directions and this continued about five years after the appellants trial. As such, the Board made the assumption that there was a misdirection. At paragraph 9 the Court said:

"[9] That might seem to be the end of this point. But counsel for the appellants were able to refer their lordships to passages from judgments of the Court of Appeal which showed that, even after the date of the appellants' trial, judges in Trinidad and Tobago were frequently failing to give identification directions that measured up to the requirements of *Turnbull*. In *Nandlal Gopee v The State* (1991) (unreported), the trial had taken place in February 1989. Davis JA, giving the judgment of the Court of Appeal, referred to the *Turnbull* guidelines and continued:

'Starting with *la Vende v The State (1991) 30 WIR 460*, this court accepted and adopted those guidelines stating that we regarded them as invaluable and that their observance was essential to a fair trial whenever questions involving disputed identity are raised in criminal cases. In addition, this court then warned that a failure to follow any of the guidelines which are "relevant to and acceptable in any given case may lead to a conviction being set aside".

'Since *la Vende*, this court has had to consider repeatedly the question whether trial judges have properly carried out their obligations to direct a jury in accordance with the guidelines laid down in *Turnbull*.

…….

> As Mr Dingemans very properly accepted, these passages demonstrate that, as much as five years after the date of the appellants' trial, judges were still failing to give the necessary directions on identification. The failures were not isolated but repeated. That being so, there is no room for assuming (as might well normally be the case) that the judge in this case gave proper directions on identification in the absence of any positive indication that he did not. Having regard, therefore, to the indication from counsel at the trial that there might have been a misdirection on identification and, more particularly, to the prevalence of such misdirections at the relevant time, their lordships consider that, in the absence of a transcript of the summing-up, it is proper to proceed on the assumption that there might well have been such a misdirection."

[41] In the instant matter, the authorities relied upon by Mr. Arthurs to show that the trial judge gave misdirections in previous trials on identification, those errors were made years before the trial of the appellant. The case of **Pop** was in 2002 and the case of **Pipersburgh** was in 2006. The trial of the appellant was in 2012. Further, this Court notes that there were not **repeated misdirections on identification** in this jurisdiction, at the time of the trial of the appellant. As such, it is the opinion of the Court, that an assumption cannot be made that there was a misdirection by the trial judge in the case before us. Therefore, there is no basis for quashing of the conviction of the appellant.

Application of the principles of remission/parole

[42] Mr. Arthurs submitted that the appellant had not been afforded the right and application of the principles of remission. He would have been eligible for parole after serving one third of his sentence but there was a failure to hear the appeal as a result of the lost transcript and summing up of the trial judge. Counsel submitted that there is an unofficial practice at the Kolbe Foundation that persons who are awaiting the prosecution of their appeal are not processed for or encouraged to apply for parole. The reason being

that the Foundation expects that the appeal would be done and completed within a reasonable time.

[43] Mr. Chan in response submitted that the appellant has not given any evidence to support his position under this ground. He has not demonstrated that he fell within *Rule 42* of the *Prison Rules of the Prisons Act, Chapter 139* of the Subsidiary Laws of Belize (Revised Edition) 2003. He argued that Rule 42 does not contain any restrictions in its application, so as to be inoperable in relation to a person who has an outstanding appeal.

Discussion

[44] Rule 42 of the Prison Rules states:

> "Every prisoner sentenced to a term of imprisonment, whether by one sentence or by consecutive sentences, for a period exceeding one month, who does not qualify for parole under the parole system established under Part VI of these Rules, shall by good conduct and industry, become eligible for discharge when a portion of his sentence not exceeding one third of the whole sentence has yet to run."

[45] The Court agrees with the prosecution that Rule 42 does not contain any restrictions in relation to prisoners who have an appeal pending before the Court. Further, there is no evidence before this Court that the appellant was prejudiced as a result of his pending appeal. The ground is without merit.

Mandatory minimum sentence

[46] Mr. Arthurs contended that the sentence of the appellant is harsh and excessive because the mandatory minimum sentence in respect of a minor of good character is disproportionate and excessive.

[47] Mr. Chan in response for the prosecution submitted that the time served by the appellant is an appropriate sentence.

[48] The appellant was sentenced to a term of imprisonment of 12 years for attempted murder and ten years for robbery, to run concurrently effective 11 April 2012. It is the opinion of the Court, that the mandatory minimum sentence handed down to the appellant, who was a minor at the time of the commission of the offence and a person of good character, was harsh and excessive. The Court accepts the position of the prosecution that the time served is an appropriate sentence. The time served being 6 years and 6 months, which the Court substitutes for the sentence handed down in the court below.

Disposition

[49] It is for the above reasons that:

1. The appeal against the conviction of the appellant is dismissed and the conviction is affirmed.
2. The appeal against the sentence is allowed. The Court substitutes 6 years and 6 months as an appropriate sentence for the appellant, being time already served.

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AWICH JA

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HAFIZ- BERTRAM JA

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DUCILLE JA