IN THE COURT OF APPEAL OF BELIZE AD 2020

CRIMINAL APPEAL NO 24 OF 2011

SOLOMON MARIN JR **Appellant**

v

THE QUEEN **Respondent**

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BEFORE

The Hon Sir Manuel Sosa	**President**
The Hon Madam Justice Minnet Hafiz Bertram	**Justice of Appeal**
The Hon Mr Justice Murrio Ducille	**Justice of Appeal**

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

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20 June 2019 and 2 November 2020.

SIR MANUEL SOSA P

Introduction

[1] This is an appeal by Solomon Marín junior ('the appellant'), who, on 5 July 2011, filed at the Registry of this Court a notice of appeal ('the notice') according to which he was convicted of the crimes of kidnapping and robbery in the court below sitting in Belmopan on 29 June 2011. It further appears from the notice that, on 30 June 2011, he was sentenced to a term of imprisonment of ten years in respect of each offence, such sentences to be served concurrently. By his notice of appeal, he evinced a desire to appeal against his convictions and sentences. Five questions set out in a standard form questionnaire appended to the notice were required to be answered by him. He answered the second of these questions, which was whether he desired this Court to assign him legal aid, in the negative and the third, which was whether any solicitor was then acting for him, in the affirmative. The appellant also chose to answer a subsidiary

question which he was only supposed to answer if his answer to the second question was in the affirmative. That question was as to whether he had any means to enable him to obtain legal aid for himself; and he answered it in the negative. For the reason that this question should not have been answered by him at all, this Court considers that his answer thereto ought properly to be disregarded and shall disregard it. Given his affirmative answer to the third question, the appellant was required to comply with a consequential request to give the name and address of the solicitor then acting for him. The names 'Simeon Sampson, Belize City' appear in the corresponding space provided in the questionnaire. Mr Sampson is a well-experienced Senior Counsel of the Belize Bar who has frequently appeared for appellants before this Court over the years, going back well beyond 2011.

A preliminary objection in all but name

[2] The Court finds itself unable, without more, now to proceed to describe the facts of the case under appeal. The reason for this is that use of the document produced in the registry of the court below, self-styled **Record of Proceedings**, is strenuously objected to by Mr Arthurs, for the appellant, through one of the grounds of appeal, ie ground 2. Mr Arthurs has thus confronted the Court with what is, in all but name, a preliminary objection (hereinafter variously to be called the 'preliminary objection', the 'virtual preliminary objection', the '*de facto* preliminary objection' and the 'so-called preliminary objection'). In essence, the ground of the objection is that the document in question is not a record of appeal (hereinafter, for convenience, 'record') as such in that it is made up only of the trial notes of prosecuting counsel provided by him pursuant to case management directions. At the heart of this ground is the proposition that the appellant is entitled to be furnished with a record, whatever may be the proper definition of that term, before he can be heard on his appeal. Unless this objection is found to be lacking in merit, the Court will be left with no means of ascertaining, *inter alia*, the bulk, if not all, of the pertinent factual background. The appellant's position is that, in the absence of a record, there can be no hearing by this Court, let alone a fair one. In those

circumstances, says the appellant, his appeal should simply be allowed, his convictions quashed and judgments and verdicts of acquittal ordered to be entered.

Relevant and potentially relevant statutory provisions

1. The Court of Appeal Act ('the CA Act')

[3] The objection of counsel, which received strong support from a member of the Court at the hearing, relied in part on provisions of the CA Act and Court of Appeal Rules ('the CA Rules'). It is convenient at this stage to set out the relevant and potentially relevant provisions, starting with those found in the CA Act.

[4] Part IV of the CA Act comprises sections 23 to 49, inclusive, thereof and is headed **Criminal Appeals**.

[5] Before setting out provisions of Part IV which are of relevance or potential relevance to the discussion of records and other documents in the present appeal, the Court will remind itself of those provisions under which it, a creature of statute, is empowered to quash a conviction and direct the entry of a judgment and verdict of acquittal. The Court will, in a sense, here set the cart before the horse and go direct to the provisions in point. They are to be found in subsection (2) of section 30 of the CA Act, which reads:

> '(2) Subject to the special provisions of this Part, the Court shall, if it allows an appeal against conviction, quash the conviction and direct a verdict of acquittal to be entered …'

Now to the horse. When is this Court empowered to allow such an appeal? The answer lies in the preceding sub-section of section 30, which provides as follows:

> '(1) The Court on any such appeal against conviction shall allow the appeal if it thinks that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or that the judgment of the court before which the appellant was convicted should be set

aside on the ground of a wrong decision of any question of law or that on any ground there was a miscarriage of justice and in any other case shall dismiss the appeal.'

If the appellant's objection is to prevail, his case must be shown to fall under one of the three categories of case specified in subsection (1).

[6] The Court now turns to deal with identification of any provision of the Act in which the word 'record' is found. The goal must be to find an applicable definition of that word. Section 28(1) of the CA Act, which imposes a duty on no one but the intending appellant and is the only section in Part IV in which such word occurs, states, in material part, as follows:

'28.-(1) On every appeal or application for leave to appeal to the Court notice of the grounds of appeal shall be filed within twenty-one days after receipt by the intending appellant from the Registrar-

(a) in the case of an appeal against conviction by the Supreme Court on indictment … , of a copy of the record which shall include a copy of the judge's summing up,

(b) …

(c) in all other cases, of a copy of the order against which he desires to appeal and the judgment on which it was based and the judge's notes of evidence, if any.' (underlines added)

As has already been noted at para **[1]**, above, in the present case, the appellant originally indicated that he was desirous of appealing against his convictions as well as his sentences. At the hearing, however, he refrained from seeking leave to appeal his sentences. The question of possible application of section 28(1) (c), relating to notes of evidence, does not therefore arise.

[7] It is to be noted that the term 'record', used, as has just been seen, in section 28(1)(a), is not defined anywhere in the CA Act.

[8] Section 38 of the CA Act, concerned with the duty of a judge to provide 'notes of trial' and a 'report' to the Registrar and no one else, reads as follows:

> 'The judge of any court before whom a person is convicted shall, in the case of an appeal under this part against the conviction or against the sentence … furnish to the Registrar, in accordance with rules of court, his notes of the trial, and he shall also furnish to the Registrar in accordance with rules of court a report giving his opinion upon the case or upon any point arising in the case.' (underlines added)

As the underlined words, which might easily have been left out of this section, clearly indicate, the discharge of this judicial duty presupposes the existence of applicable rules of court. It would be of academic interest (if nothing else), after identifying those provisions of the CA Rules relevant to this part of the present appeal, to consider whether the applicable rules contemplated by this section were, in fact, included in the CA Rules which were made by the legislature itself and promulgated in the schedule to the CA Act. (It is clear from section 11(3) of the CA Act that the CA Rules are merely deemed to have been made by the first President of the Court.) Such a question can hardly be of practical importance for present purposes given that this section does not provide for a right on the part of an appellant to be furnished either with the notes of trial or the report.

[9] The duty of the Registrar to lay documents and other items before the Court in connection with the hearing of criminal appeals and applications is the subject of section 42(1) of the CA Act, which provides:

> 'The Registrar shall take all necessary steps for obtaining a hearing under this Part of any appeal or application notice of which is given to him under this Part, and shall obtain and lay before the Court in proper form all documents, exhibits and other things relating to the proceedings in the Court before which the

appellant or applicant was tried which appear necessary for the proper determination of the appeal or application.'

It is to be noted, in passing, that similar provisions (making, like these, no mention of the word 'record') are to be found in Part II of the CA Act, which is headed **General Provisions**, at section 9(2), as well as at Order III, rule 29(a) of the CA Rules.

[10] Provision is made for the keeping of such documents and other items by section 42(3) of the CA Act in the terms following:

'Any documents, exhibits or other things connected with the proceedings on the trial of any person on indictment who, if convicted, is entitled or may be authorised to appeal under this Part, shall be kept in the custody of the court of trial in accordance with rules of court made for this purpose for such time as may be provided by the rules, and subject to such power as may be given by the rules for the conditional release of any such documents, exhibits or things from that custody.'

[11] It is fitting to close this brief survey of pertinent provisions of the CA Act with the twofold observation that, whilst there is one solitary mention of the word 'record' therein, no definition of such word is provided thereby and that nowhere does the Act confer on an appellant (actual, intending or otherwise) the right to be furnished with a record or any other set of documents.

2. The CA Rules

[12] The CA Rules comprise four orders, viz Order I, unheaded and dealing with appeals in general; Order II, headed **CIVIL APPEALS**; Order III, headed **APPEALS AGAINST CONVICTION ON INDICTMENT**; and Order IV, headed **APPEALS FROM SUPREME COURT'S ORDER ON APPEAL FROM INFERIOR COURTS IN ANY CRIMINAL CAUSE OR MATTER**. Clearly, neither Order II nor Order IV can have any application to the present case.

[13] A definition of the word 'record' is provided in Order I, rule 2(1), which, to the extent that it is potentially pertinent for present purposes, states as follows:

> '2.-(1) In these rules, unless it is expressly provided to the contrary or the context otherwise requires:-
>
> …
>
> "record" means the aggregate of papers relating to an appeal (including the pleadings, proceedings, evidence and judgments) and required by these rules to be filed or laid before the Court on the hearing of the appeal;
>
> …'

[14] The word 'record' appears repeatedly in Order II, which of course deals only with civil appeals, most notably in that part of such order headed **The Record**, which comprises rules 8-13, inclusive. In that part of Order II, elaborate provision is made for 'settling record of appeal' (the words of the marginal note to rule 8), a topic nowhere dealt with, as will appear below, in Order III.

[15] Order III, largely modelled, significantly for present purposes, on the Criminal Appeal Rules 1908 ('the English rules'), is, as its heading, already noted above, implies, the sole order in the CA Rules which deals exclusively with criminal appeals. (The English rules were made in England under the Criminal Appeal Act 1907, which, of course, established that country's Court of Criminal Appeal.)

[16] Rule 7(1) of Order III, which imposes on the Registrar of the court below a duty to provide copies of proceedings to the Registrar of this Court, is, so far as material for present purposes, in the following terms:

> 'The Registrar of the court below when he has received a notice of appeal … shall forward to the Registrar four copies of the proceedings in the court below and if any record has been made <u>of the summing up or direction</u> of the judge of the court below, four copies thereof or if no such record has been made, a statement giving to the best of such judge's recollection the substance of the summing up or direction …' (underline added)

It will be noted that, whilst the word 'record' does appear in this rule, it does so in a special and narrow sense having to do only with the summing up or a direction of the trial judge; in other words, it does so in circumstances where the context plainly requires a definition other than the very comprehensive one provided in Order I, rule 2(1). To put it a little differently, the document referred to in Rule 7(1) is obviously not the type of document envisaged by the definition given in Order I, rule 2(1).

[17] Rule 7(3) of the same order sets out what copies of proceedings are to contain, stating, insofar as here material:

> 'For the purposes of this rule copies of proceedings shall contain-
>
> (a) the indictment or charge and the plea;
>
> (b) the verdict, any evidence given thereafter, and the sentence;
>
> (c) notes of any particular part of the evidence or cross-examination relied on as a ground of appeal; and
>
> (d) such other notes of evidence as the Registrar of the court below or the Registrar may direct to be included in the copies of proceedings …' (underline added)

This rule, providing as it does at (c) for copies of proceedings to contain notes of part of the evidence admitted at trial, ie the part actually relied upon as a ground of appeal, does not make much sense. It wrongly assumes that the Registrar of the court below will know an appellant's grounds of appeal as soon as notice of appeal is filed by an appellant. Such an assumption may be consistent with the reality that the form of notice of appeal provided in Appendix C to the CA Rules contains a blank space reserved for the statement of grounds of appeal. But that reality can hardly amount to a valid legal requirement in the face of the clear requirement found in section 28(1) of the CA Act itself, whose provisions have already been set out at para **[6]**, above. That clear requirement is for an appellant to file his/her grounds within 21 days of his receipt of a copy of the 'record', whatever that term may mean, from the Registrar. That, rather than a blank space in a form found in an appendix to the CA Rules, must be the sole binding

requirement for the filing of grounds of appeal. It is not possible to see how, in those circumstances, rule 7(3)(c), purporting to require that copies of proceedings include notes of part of the evidence adduced at trial, can be of any effect. And as regards paragraph (d), there is no indication that in the present case any relevant direction concerning 'other notes of evidence' was ever given by either Registrar.

[18] Rule 8, to be examined next, contains ten paragraphs and focuses on the discrete topics of (i) notes of the summing up; (ii) notes of the proceedings; (iii) statements of the judge's recollection of his summing up; and (iv) the judge's notes of the trial.

[19] The provisions of paragraph (1) thereof, which is concerned mainly with acceptance by the Court of a 'record', in the special and narrow sense (again) of notes of a judge's summing up or direction, as accurate, are as follows:

> 'Where any trial is had with a jury and, by direction of the judge of the court below, notes in long hand or in shorthand or typewritten or a tape recording shall have been taken <u>of the summing up or direction</u> of the judge and of such parts of the proceedings as the judge of the court below may consider expedient, such record or a transcription of such tape recording shall be accepted by the Court as accurate unless the Court has reason to doubt its accuracy.
>
> Where it is provided by the law of Belize that any notes of the summing up or directions of the judge or notes of any part of the proceedings shall be taken and the direction of the judge of the Court below is not therefore required, such notes shall be accepted by the Court as provided in paragraph (1).' (underline added)

It bears noting that it is only in this special and narrow sense that the word 'record' occurs in Order III, which, as already adumbrated above, is the sole order dealing exclusively with criminal appeals. The appellant in the instant case, in complaining of the absence of a record, is quite obviously not speaking of a record in this special and narrow sense.

[20] Paragraph (2) makes provision for the use in this Court of a statement of a judge's recollection of his summing up in the terms which follow:

> 'Where in such a trial the judge of the court below does not give any directions for recording any summing up or direction given by him and a shorthand note thereof is not taken under the provisions of any law, his statement giving his recollection of the summing up or direction shall be accepted as accurate unless the Court sees reason to the contrary.'

[21] In paragraph (3), which is reproduced below, the concern is with the signing, certification and custody of a shorthand note:

> 'The shorthand writer shall sign the shorthand note taken by him of any trial or proceedings, or of any part of such trial or proceedings, and certify it to be a complete and correct shorthand note thereof; and such shorthand note shall be kept in such custody as the Registrar of the court below shall, either specially or generally, direct.'

[22] As will be appreciated from the quotation thereof below, paragraph (4) is concerned with the duty of a shorthand writer to furnish a transcript of his/her note for use in the Court:

> 'The shorthand writer shall, on being directed by the Registrar of the court below, furnish to him for the use of the Court a transcript of the whole, or of any part, of the shorthand note taken by him of any trial or proceedings in reference to which an appellant has appealed under the Act.'

[23] Paragraph (5), whose terms are set out below, has as its main subject the duty of a transcriber to verify his/her transcript of a shorthand note of a trial:

> 'A transcript of the whole or any part of the shorthand note relating to the case of any appellant which may be required for the use of the Court shall be typewritten and verified by the person making the same by a statutory declaration in Form 4 in Appendix C that it is a correct and complete transcript of the whole, or of such

part, as the case may be, of the shorthand note purporting to have been taken, signed and certified by the shorthand writer who took it.'

[24] Paragraph (6), requires a judge to furnish trial notes to the Registrar of the court below in the following less-than-crystal clear language:

> 'Where no notes in long hand or in shorthand have been taken by direction of the judge of the court below of any other parts of the proceedings required for the purpose of an appeal, the judge of the court below shall furnish to the Registrar of the court below his notes of the trial or such part thereof as may be required for such purpose.' (underline added)

Exactly what the underlined word 'other' is meant to refer to is unclear given that the preceding rules do not identify parts of 'the proceedings' to be set apart from those being referred to in paragraph (6). Since this paragraph imposes a duty on trial judges to furnish 'notes of the trial', it will be necessary to return to it, in keeping with the promise impliedly made at para **[8]**, above, a little later in this judgment.

[25] The provisions of paragraph (7), which impose on the Registrar of the court below the duty to cause an interested party to be furnished with a relevant transcript, are these:

> 'On the application of a party interested in a trial or other proceedings in relation to which a person may appeal the Registrar of the court below shall direct the shorthand writer to furnish to such party, and to no other person, a transcript of the whole, or of any part of the shorthand note of any such trial or other proceedings, on payment to the proper officer of the court below of such fees as may be prescribed for copies of proceedings required on appeal in any criminal cause or matter.'

There is no indication that in the present case such an application (for the supply of a transcript of a shorthand note to be paid for by the appellant) was ever made by the appellant.

[26] The following quotation is of paragraph (8), which deals with how an interested party 'may obtain' a relevant copy transcript:

> 'A party interested in an appeal under the Act may obtain from the Registrar of the Court below a copy of the transcript of the whole or any part of such shorthand note as relates to the appeal on payment to the proper officer of the court below of such fees as may be prescribed for copies of proceedings required on appeal in any criminal cause or matter.'

[27] Paragraph (9), which describes the scope of the term 'a party interested', is next reproduced:

> 'For the purpose of this rule, 'a party interested' shall mean the prosecutor or the person convicted, or any other person named in, or immediately affected by, any order made by the judge of the court below, or other person authorized to act on behalf of a party interested, as herein defined; but shall not include the Director of Public Prosecutions, to whom a copy of such transcript shall be furnished free of charge.'

[28] It only remains to quote paragraph (10), the last of the paragraphs of Rule 8, which prohibits the supply free of charge of a relevant transcript save by order of this Court or a judge thereof:

> 'A transcript of the shorthand notes taken of the proceedings at the trial (or a copy of the judge's notes of the trial) of any appellant shall not be supplied free of charge except by an order of the Court or a judge thereof, upon an application made by an appellant or by his attorney-at-law assigned to him under the Act.'

The present case was obviously not one involving either shorthand notes or an assignment under the CA Act; but it is noteworthy that the appellant was supplied free of charge with such notes of counsel as were secured by this Court's registry.

[29] Of rules 9 and 10 of Order III, which appear under the heading **Judge's Report**, only the former is relevant for present purposes. Paragraphs (1) and (2) thereof, respectively, read:

> 'The Registrar of the Court below shall, if in relation to any appeal the Court directs him so to do, request the judge of the court below to furnish him with a report in writing, giving his opinion upon the case generally or upon any point arising upon the case of the appellant, and such judge shall furnish it to the Registrar.
>
> The report of the judge shall be made to the Court, and, the Registrar shall on request, furnish a copy thereof to the appellant and respondent.'

[30] Under the heading **Copies of documents for use of Appellant or Respondent**, there appears rule 11(1), which deals, in the terms following, with how a party may obtain copies of documents:

> 'At any time after notice of appeal or notice of application for leave to appeal has been given under the Act or these rules, an appellant or respondent, or the attorney-at-law or other person representing either of them, may obtain from the Registrar of the court below copies of any documents (other than notes of proceedings) or exhibits in his possession under the Act or these rules for the purposes of such appeals. Such copies shall be supplied by the Registrar on payment to the proper officer of the court below of such fee as may be prescribed for copies of proceedings required on appeal in any criminal cause or matter.'

At para **[8]** above, reference was made to the presupposing by section 38 of the CA Act of the existence of rules of court in accordance with which a judge might discharge his/her rather striking duty under that section to provide notes of trial direct to the Registrar of this Court. The adjective 'striking' is thought appropriate here in the light of the fact that such notes are ordinarily of use in the preparation of a record, a process which is, *de facto*, the responsibility not of the Registry of this Court but of the Registry of the court below.

[31] It is appropriate to observe at the end of this short presentation of relevant provisions of the CA Rules that, whilst the same do contain a definition of the term 'record', such definition clearly does not apply to that term as used in those rules relating to criminal appeals which are to be found in the CA Rules. Nor, as already observed above, did the Court understand the complaint of the appellant in the instant case to be about the absence of a record in the special and narrow sense of that term as used in the rules relating to criminal appeals found in Order III. Mr Arthurs himself indicated during the give and take of the hearing that he had thitherto assumed that the definition of the word 'record' in Order I was applicable to civil appeals only: see transcript of appeal hearing, p 50, ll 11-14.

3.The Indictable Procedure Act ('the IP Act')

[32] The unsatisfactory want of specifics found in both the CA Act and the CA Rules with respect to the items which should make up a 'record', for the purposes of section 28(1)(a) of the CA Act, in the case of a criminal appeal to this Court compels recourse, in the quest for much-needed additional enlightenment, to the provisions of the IP Act concerning 'the record of the proceedings' relating to a criminal trial in the court below.

[33] In the part thereof headed **Trial**, the IP Act, which was enacted in 1953, ie some 15 years before the establishment of this Court, are to be found sections 98 and 99, which, to the extent that they are material for present purposes, respectively provide as follows:

> '98.-(1) It shall not in any case be necessary to draw up a formal record of the proceedings on any trial for a crime, but the Registrar shall cause to be preserved all indictments, pleas and decisions filed with or delivered to him, and he shall keep a book, to be called "the Crown Book', which shall be the property of the court and shall be deemed a record thereof.
>
> (2) There shall be entered in the Crown Book the name of the judge, and a memorandum of the substance of all proceedings at every trial and the result of every trial.

(3) Any certificate of any indictment, trial, conviction or acquittal, or of the substance thereof, shall be made up from the memorandum in the book, and shall be receivable in evidence for the same purpose and to the same extent as certificates of records, or the substantial parts thereof, are by law receivable.

Provided that nothing herein contained shall dispense with the taking of notes by the judge presiding at the trial, or *in lieu* thereof the taking of notes by an officer of the court appointed by the judge for that purpose.

…

99. The indictment, the plea or pleas thereto, the names of the jurors, the verdict and the judgment and sentence of the court shall form and be the record of the proceedings in each cause and shall be kept and preserved as of record in the registry.' (original italics – underline added)

It is important to note that notes of evidence, judge's notes of trial and shorthand notes are not to be found amongst the items enumerated in section 99, which, as part of an Act, would necessarily override any conflicting or inconsistent provision, if there were any, of subsidiary legislation. In the view of this Court, this is the clearest statement to be found in local statute law as to that which must form, and be regarded as constituting, the record of a criminal trial.

The rival contentions on the question whether a record is a prerequisite for a hearing

[34] By way of a preface to this part of its judgment, the Court would point out that this question did not in strictness arise under ground 2, or any other ground for that matter. Ground 2 reads as follows:

'The absence of any transcript or copy of proceedings whatsoever, in a case where 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 and causing his conviction to be unsafe producing a prejudice to the appellant.'

There is no suggestion in that ground that a record of appeal is a prerequisite to the very hearing of the appeal. Furthermore, such suggestions as were (subsequently to the formulation of the grounds) made in that regard by Mr Arthurs in his **Skeleton Arguments** were not free of ambivalence. (In those **Skeleton Arguments**, he dealt, appropriately, with the sub-heading '**NO COPY OF THE PROCEEDINGS**' under ground 2 and, inappropriately, with the sub-heading '**Incomplete Record of Trial**' under ground 1.) It was therefore, in exercise of no small measure of indulgence that counsel was permitted orally to argue this point at the hearing, indulgence extended not least because of the discomfiting circumstance that the argument elicited immediate and strong support from a member of the Court.

1. Mr Arthurs' oral submissions

[35] The principal oral submissions of Mr Arthurs on this virtual preliminary objection, together with such supporting views as were expressed from the bench during the course of the hearing, must now be clearly identified, with, where applicable, correction of manifest inaccuracy. (In Mr Arthurs' **Skeleton Arguments**, the corresponding written argument is found under the sub-heading **Incomplete Record of Trial** (paras 18-28), which has already been mentioned in the immediately preceding paragraph of this judgment; and such written argument is summarised at paras **[43]** to **[47]**, below.) Mr Arthurs got the ball rolling, so to speak, with an instantaneously arresting supposed quotation of a respected former member of this Court, Blackman JA: transcript of appeal hearing, p 4. Mr Arthurs told this Court that 'in Daley' (presumably meaning at the hearing of ***Daley (Lionel) v R***, Criminal Appeal No 8 of 2012, in which he (Mr Arthurs) appeared for Mr Daley) Blackman JA, in a state of some annoyance, rhetorically asked, 'How can I hear an appeal if there is no record?' As is revealed by the judgment delivered on 2 November 2018 in that appeal, however, Blackman JA was not a member of the panel in question.

[36] Mr Arthurs went on to submit that the CA Act provides that in order to prosecute an appeal an appellant must have 'the record', a term for which he did not trouble himself to provide a definition until a much later stage of the hearing, when he was

pointedly asked from the bench whether there was no assistance to be had from the definition sections of the CA Act and the CA Rules. He further contended that the CA Act sets out in mandatory terms that 'the transcript' is to form part of the record. These arguments have no basis in any of the relevant provisions of the CA Act, all of which have already been identified by this Court above. Not only is it the case that the CA Act contains no provision imposing a duty on the Registrar to provide an appellant with 'the record' and nowhere provides for all that should be contained in a record: the IP Act actually lists the different items that should be contained in a record and 'the transcript' is not among them. See paras **[6]**, **[11]** and **[33]**, above.

[37] Leaving no stone unturned in his search for support, Mr Arthurs told the Court that 'at the last occasion', whenever exactly that may have been, Ducille JA had asked him, as he (Mr Arthurs) put it in reported speech, 'whether or not this appeal was ready to be heard' and, moreover, drawn his (Mr Arthur's) attention to the provisions of Order III, rule 7(1), already set out at para **[14]**, above. Quite apart from what Ducille JA may have said 'at the last occasion', he is recorded as having said the following to Mr Arthurs at the hearing of the present appeal (transcript of appeal hearing, pp 27 to 29):

> 'The only thing I can say is this that you have done well as an attorney. I think Mr Ramirez has done well he has tried to assist in the construction of something. It's not a record because there is no input on the part of the other side bearing in mind the DPP was just another party. The record cannot come from one party even to try our best what the rules say is that there has to be an input from the Judge. There has been no input and what's been left to suffer is the Appellant. It is good that - - the reason I asked you when did you get involved and if not been with your intervention we would not have been here right now. We would have hoped that it should have come up earlier in the March session but been [be?] that as it may it has come up. We cannot get any better, we cannot get blood out of stone. There is no record and all the other cases the judges before as referred to by Sir Staine [a reference to Sir Albert Staine JA, who had earlier been mentioned by the President in the context of a case heard by this court shortly after its establishment] he tried his best notwithstanding all of that he was outside

of the rules. But in order to allow justice to prevail, I would manage [imagine?], he tried to set certain precedent. The rules are what governs. What needs to be done right now is to secure the freedom of this young man who is sitting here based on everything he ought not to be here. That's my observation right now.'

Mr Arthurs was at pains expressly to incorporate into his own oral submissions Ducille JA's point that the record cannot come from one party: transcript of appeal hearing, p 10. The Court respectfully considers that this argument does not find support in an accurate statement of the relevant law. For all the reasons pertaining to events, jurisdiction and authorities respectively given at paras **[54]**-**[60]**, **[61]**-**[66]** and **[67]**-**[75]**, below, this argument must firmly be, and is, rejected.

[38] Also arguing in the alternative, however, Mr Arthurs contended that, in any event, the notes of prosecuting counsel show, crucially, that identification was an issue at trial. What made this supposed revelation crucial, he suggested, were the circumstances (i) that the notes were not necessarily notes of the entire summing up and thus inadequate and (ii), that, if they were notes of the entire summing up, the absence of reference therein to directions on identification pointed uncompromisingly to non-direction on 'a central issue' in the trial. He poured scorn on the written submission of Mr Chan, for the respondent, that the appellant can show no prejudice at his trial if there is no acceptable record in respect thereof.

[39] Mr Arthurs purported to rely on the contents of an affidavit sworn by the appellant and filed at this Court's registry on 12 June 2019. He was allowed to do so on the usual *de bene esse* basis. This topic shall be returned to when the third ground of appeal is discussed.

[40] Not wanting, it seems, to have his argument pigeon-holed to his client's disadvantage as a result of an overemphasis on the term 'record', Mr Arthurs complained of the absence of even so much as a copy of proceedings, which, he said, is a phrase defined by statute law. In all likelihood, the statutory provision he had in mind in so saying is Order III, rule 7(3), already set out at para **[15]** above. (This topic

was dealt with in Mr Arthurs' **Skeleton Arguments** under the sub-heading **NO COPY OF THE PROCEEDINGS**, which has already been mentioned at para **[34]**, above.)

[41] Mr Arthurs looked for support for his argument in what he referred to as 'section 9', presumably of the CA Act, which, he said, requires a trial judge to furnish the Registrar of the court below with a report. Alas, section 9 of the CA concerns the topic 'Registrar and other officers' and is wholly irrelevant for present purposes. The provision which requires a judge so to do is in fact to be found in Order III, rule 9(1) of the CA Rules, which is set out at para **[29]**, above. Although, Mr Arthurs did not develop his argument on this supposed section as far as he might have, there is an obvious limit to such development, viz that whereas rule 9(1) does provide for the supply of a copy a trial judge's report to an appellant, it predicates the prior furnishing of such report by the judge – an event which, in the instant case, never occurred. As Mr Arthurs had to accept at the hearing, a trial judge cannot be compelled under the rules to comply with a registrar's request: transcript of hearing, p 46.

[42] Not without noting that Ducille JA had referred him to it before, Mr Arthurs further drew the attention of the other members of the panel to the provisions of section 28(1) of the CA Act, which has already been set out at para **[6]**, above. This section, in the submission of counsel, provides a measuring stick to determine whether a conviction is safe and whether there has been prejudice to an appellant. As has already been broadly hinted at para **[6]**, the only duty arising under section 28(1) is that of an appellant to file notice of grounds of appeal. From whatever angle viewed, this subsection imposes no duty whatever on the Registrar to deliver a copy of any record to an appellant. The Court is unable to see how it can lend any support to the appellant's objection in the present case.

[43] Save as otherwise indicated at para **[37]**, above, the Court considers that it need say no more in rejecting the oral contentions deployed by Mr Arthurs at the hearing; and accordingly shall not further deal with them in the part of this judgment headed *Discussion of the Virtual Preliminary Objection* at para **[53]** and ff, below. In that part of

the present judgment, the Court shall deal with Mr Arthurs' two sets of written arguments in support of the 'preliminary objection', which the Court shall now separately summarise.

2. Mr Arthurs' written submissions under ground 1 (sub-heading **Incomplete Record of Trial)**

[44] As has already been observed above, there was no clear suggestion in the **Skeleton Arguments** of the appellant that he was adopting the extreme position that (a) a record of appeal was an absolute prerequisite to the hearing of his appeal; (b) there was no such record in the present case; and (c) in those circumstances his appeal should be allowed, obviously without a hearing, and his conviction quashed. As already adumbrated at para **[34]**, above, his approach therein was in fact characterised by ambivalence.

[45] Thus, on the one hand, counsel seemed to be content to venture no farther in his **Skeleton Arguments** than submitting that the absence of a record would greatly diminish the prospect of a just hearing of the appeal: **Skeleton Arguments**, para 18.

[46] On the other hand, he later referred to textbook commentary, viz Seetahal, *Commonwealth Caribbean Criminal Practice and Procedure*, p 305, at which the author expressed the view that it will be highly impossible to ground an appeal absent the judge's summing up and cited *Williams* [1994] 99 Cr App R 163, p 165 as an example of a case in which an English appellate court expressed concern for 'the absence of transcripts'. This was, in effect, the first plank of a three-plank argument.

[47] Counsel's second plank took the form of reference to a number of cases from jurisdictions within the African continent in which statements consistent with the view of Seetahal may be found. First, he cited *Chabedi v The State*, Case No 497/04 (judgment delivered on 3 March 2005), an appeal case, in which a judge of the Supreme Court of Appeal of South Africa said that the answer to the question whether such proper

consideration was impossible depends on the nature of the defects in the particular record and on the nature of the issues to be decided in the appeal. Secondly, he referred to *The State v Maphanga*, Case No 63/15/2005, a review case, in which "the practice in the Cape" was stated by the High Court of South Africa – Transvaal Provincial Division to be that, where it is impossible to reconstruct a totally lost record, and the missing portion contained evidence of material importance to the adjudication by the appellate court, the appeal ought to succeed and the conviction and sentence ought to be set aside. Thirdly, counsel adverted to *Modika v The State*, Case No A628/2010 (judgment delivered on 8 November 2012), another appeal case, where a judge of the North Guateng High Court, Pretoria, South Africa cited with approval an earlier decision, *S v Collier* (1976) (2) SA 378 (CPD), in which it was held that, where material evidence is not on record and the defect cannot be cured, the appeal should succeed. Fourthly, the attention of this Court was drawn to *Tshabang v The State*, [2002] (1) BLR 102, which, according to counsel, is a decision of the Court of Appeal of Botswana, and in which the views of the court were that –

> '… where a record cannot be sufficiently reconstructed to make "a just hearing" of an appeal possible … the effect would be to prejudice the appellant and may result in a failure of justice'

and that –

> 'If an appellant, through no fault of his, cannot have his appeal properly heard and adjudicated upon, there may be a failure of justice. His conviction should therefore not be allowed to stand.'

Fifthly, reliance was placed upon *Davids v the State*, Case No A571/12, also an appeal case, in which the High Court of South Africa held that the record was 'so patently defective that [Mr Davids'] conviction cannot be sustained in the face of a proposed appeal', adding that –

> 'The inability to exercise a right of appeal because of a missing record is a breach of the constitutional right to a fair trial and in such circumstances will

generally lead to the conclusion that the proceedings have not been in accordance with justice and must be set aside.'

Sixthly, Mr Arthurs made reference to *Neube v The State* [2008] (1) BLR 326, in which the conviction was quashed and the sentence set aside after the court arrived at the conclusion that, absent a record of the evidence before the trial judge, whose judgment in the case was 'full and comprehensive', it was unable to evaluate his findings.

[48] Counsel's third plank under the sub-heading **Incomplete Record of Trial** was a quotation from the headnote to the report of *R v Parker* (1966) 9 JLR 498, a decision of the Court of Appeal of Jamaica, according to which headnote, '[Mr Parker, an unrepresented appellant] was entitled to have his application [for leave to appeal] considered by the court on the basis of the full transcript of the evidence, if the court required it, and of the full summing-up by the trial judge.'

3. Mr Arthurs' written submissions under ground 2 (sub-heading **NO COPY OF PROCEEDINGS**)

[49] Mr Arthurs' central point in his written argument was that, as he discovered in 2019, 'what appeared to be 'notes of proceedings' was actually the prosecutor's notes'. The Court has already clearly indicated at para **[37]**, above that it finds no merit in this point and has further identified in that same paragraph the paragraphs of this judgment at which its reasons for so concluding shall be given.

[50] Mr Arthurs proceeded to make passing mention of that which this Court has already singled out for special attention at para **[14]**, above, viz the conspicuous absence from Order III, relating to criminal appeals, of the somewhat elaborate machinery for settlement of a record of appeal which is found in Order II, dealing with civil appeals. Then he reproduced, with presumably inadvertent omissions, the provisions of Order III, rule 7(1), already set out at para **[16]**, above, in order to show what documents are supposed to make up 'copies of proceedings'. Mr Arthurs

thereafter confusingly submitted that rule 7 provides for the securing by an appellant of a copy of proceedings where there is no record of the summing up, adding that the copy proceedings in such a case takes the form of a statement from the trial judge. This, as shall be demonstrated below, is, at two levels, a glaringly incorrect reading of the rule. Counsel directed attention to the fact that rule 7 provides for 'notes of any particular part of the evidence or cross examination' to be included in 'copies of proceedings'. He said further that both the CA Act and the CA Rules indicate that notes must come from the trial judge and the shorthand writer alone, and that the notes of prosecuting counsel were thus wholly unacceptable.

4. Mr Chan's oral submissions

[51] It is important that the Court unequivocally acknowledge that the Crown were not permitted as fair an opportunity as they deserved to argue the question here under consideration. Very shortly after commencing his oral submissions Mr Chan, Crown Counsel, was driven into a tight corner from which escape, without placing the Court, in an invidious position, was well-nigh impossible. This emerges clearly from a passage of the transcript of the appeal hearing, pp 30-32, which begins where an incipient exchange between the President and Mr Chan regarding the topic of the evidence of the identification parade (underground 4) is abruptly cut short by a round of rigorous interrogation as to the unrelated topic of the existence of a record:

'SOSA P: But did he allow that evidence of the identification parade to go to the jury in regard to this [appellant]?

MR CHAN: Yes.

DUCILLE JA: What are you saying, Mr Chan? At the end of the day forget all the running, let's get to the finish line, what are you really saying?

MR CHAN: I am saying on the fourth ground, My Lord, is that the learned trial judge misdirected the jury or did not make proper directions on identification. The respondent is humbly saying that he made proper directions because - -

DUCILLE JA: Based on what record?

MR CHAN: My Lord, this can be found from Mr Ramirez's notes.

DUCILLE JA: Are you serious?

MR CHAN: My Lord, there were two accused.

DUCILLE JA Where is the record, sir?

MR CHAN: Well from the notes, My Lord.

DUCILLE JA: I'm not asking you about the notes. I'm asking you about the court's record.

MR CHAN: My Lord, well that has been established there is none apart from his notes.

DUCILLE JA: So what are you arguing about? Based on what? Nothing from nothing leaves nothing.

MR CHAN: My Lord, what the Crown is saying is that only Mr Marin matter went to the jury.'

At this point, matters took a sharp ethics-oriented turn:

'DUCILLE JA: Always remember that first your role is a minister of justice. That's the first thing nothing more nothing less. You can only do your best. There are no notes from what you are arguing?

Very appropriately, if perhaps belatedly, at this point the learned judge made the important acknowledgment that-

'I'm just speaking for myself anyway.'

Understandably, Mr Chan thereupon saw fit to offer the following gentle reminder, perhaps in the hope, vain as it turned out, that this would have delivered something of a quietus:

'My lord, we have the notes which was agreed by this Court to be used.'

(It will, of course, be paramount to discuss, later in this judgment, the circumstances in which the purported record of appeal came to be filed, made available to the parties and relied upon by the Crown.) The exchange which followed, and seemed capable of

leading to further embarrassment for the Court if persisted in, ended with an abrupt adjournment. The transcript of the appeal hearing shows the following:

> 'DUCILLE JA:Agreed by which court?
>
> MR CHAN: That is why we have this. We were given this. That is why the Crown is relying on this.'
>
> SOSA P: Mr Chan, Mr Arthurs, we are going to take a short adjournment and come back.'

On the resumption some 23 minutes later, the Court informed Mr Chan that he would be further heard in response to the submissions of Mr Arthurs following the luncheon adjournment, which was then taken.

[52] But it would seem that the wind had been knocked out of the Crown's sails in the course of the morning sitting. When called upon in the afternoon, Mr Chan limited himself to making one further point in relation to ground 4. That further point assumed, without expressly accepting, the correctness of the view of Ducille JA that there was no record before the Court. It was to the effect that, in the absence of a record, it could not rightly be said that the appellant had shown that the judge had misdirected the jury. Mr Chan invoked in this regard the decision of this Court in *Daley*, cited above. That done, he turned his attention to ground 1, perhaps thinking that he was by then finally through with grappling with the question of record *vel non*. But, if so, he was wrong. For upon referring to the decision of the CCJ in *The Queen v Henry***,** CCJ Appeal No BZCR 2017/004 [2018] CCJ 21 (AJ), and submitting that delay alone, without proof of prejudice to an appellant, would not suffice to warrant the quashing of a conviction, he was reminded from the bench that he had not yet shown the Court that, as in *Henry*, there had been overwhelming evidence of guilt adduced at trial by the Crown. When he asked his interlocutor whether he could refer to the notes of prosecuting counsel for his answer, he was effectively told that those notes were not a record of appeal. He was back at square one, so to speak. At that point, the President again intervened, beseeching the assistance of counsel in the search for a working definition of the term 'record of appeal', making the basic point that, 'we can't be speaking of the record if …

we have not agreed what that is': transcript of appeal hearing, pp 37 to 28. As that transcript will show, the ensuing discussion ranged far and wide. Eventually, the definition found in the CA Rules (noted at para **[13],** above) was diffidently thrown out by Mr Arthurs. (He said that he had thought the relevant Order 'only dealt with civil appeals': transcript of appeal hearing, p 50.) But, after all was said and done, the final position of the Crown on the burning question remained decidedly understated. The Crown appeared to have been cowed into submission. They simply told the Court they would rely on their written argument.

5. Mr Chan's written submissions

[53] Mr Chan's written submissions on the specific preliminary question under discussion are all to be found in one part of his **Submissions on Behalf of the Respondent**, *viz* that headed **Ground 2**.

[54] The gravamen of those written submissions was that, under the law as stated by the Judicial Committee of the Privy Council in *Roberts and Anor v The State* [2003] UKPC 1, in which *R v Elliott* (1909) 2 Cr App R 171 and *R v Le Caer* (1972) 56 Cr App R 727 were cited with approval, the absence of notes of evidence, whether of the trial judge or the shorthand writer, or notes of the summing up will not, without more, be a ground for quashing a conviction; and that in the present case there is such an absence and nothing more. It followed that the appeal should be heard on the basis of such notes of counsel as had been obtained and made available to the parties by the Court in the form of the misnamed **Record of Proceedings**.

Discussion of the virtual preliminary objection

[55] The matters raised by the submissions and judicial intervention already referred to above call for the consideration of a series of questions. Taking them in the order dictated by logic, the Court begins with the question whether it did, in fact, authorise the use by the parties at the hearing of the document mistakenly styled **Record of Proceedings.**

[56] What, then, were the circumstances in which the notes of Mr Ramírez came to be obtained by the court below and made available to the parties for use in the present appeal? As has been seen above, this matter was the subject of an increasingly embarrassing exchange between Ducille JA and Mr Chan which only ended when the hearing was abruptly adjourned for a few minutes.

[57] There are events of significance which need to be taken into account. Foremost, perhaps, amongst these is the case management of the appellant's appeal. It must emphatically be stated by way of introduction to this topic that this intractable appeal was not laid at the doorstep of the Court all by itself. Rather, it came as but one appeal in a sizeable group of problematic appeals arising from several trials presided over by one and the same judge. The magnitude of the overall predicament was described at some length in the judgment of this Court in *Pérez (Harrim) v R*, Criminal Appeal No 18 of 2012 (judgment delivered on 9 October 2018), at paras **[2]** to **[10]** under the sub-heading *The delay in hearing the appeal*. The Court will not burden the present judgment with a reproduction of all those paragraphs. But it considers that there ought at least to be a full quotation here of paras **[2]** and **[3]**, which read as follows:

> '**[2]** It appears, most regrettably and inexcusably, that there was no stenographer present at the appellant's trial and, even worse, that no proper steps were taken, in the light of the absence of a stenographer, for the making of an audio recording of what was said during the course of the trial. This inexplicable departure from the norm was, disgracefully, not an isolated occurrence. The bigger picture shows that there were no less than 11 other such appeals, all filed in 2011 and 2012, from convictions or acquittals in criminal trials presided over by the judge. After a long period of difficult and painstaking work to try to gather material, such as judge's notes, full or otherwise, with which to endeavour to put together some semblance of a record of appeal in each such case, this Court was finally able in early 2016 to bring these appeals into the

improved case management system which had been introduced under the JURIST Project in May 2015.

[3] Accordingly, it was decided to hold a series of extraordinary case management conferences to address the special problems arising in all cases where no stenographer had been present at the trial and no audio recording had been made of anything said during its course.'

In the present case, of course, as already pointed out above, no judge's notes, whether full or otherwise, ever surfaced. The Court was faced with a worst case scenario.

[58] One notable case management conference ("CMC") was conducted by CMC Panel No 2 on 26 July 2018. This CMC is highly germane in the light of Mr Arthurs' insinuating complaint at the hearing that what appeared to be notes of proceedings turned out to be only the prosecutor's notes. The thinly-veiled insinuation here is that counsel may have been misled by one or more blameworthy but unnamed persons. On 26 July 2018, the appellant was representing himself whilst, according to him, a family member sought to retain the services of a certain named attorney ('attorney A'). At the CMC of that date, the panel, in the face of the continuing challenges to finding out what had occurred at the appellant's trial, enlisted the assistance of the appellant himself in the hope of thereby discovering some detail of significance of which the appellant might still have a memory. The notes of the President ('NOTP') show that at this CMC the appellant revealed, *inter alia*, that, at trial, which he stood at age 27, (a) he had neither called witnesses nor said anything; (b) the jury had deliberated for about 15-20 minutes only; and (c) the judge had actually told him to appeal the case. The NOTP further show that it was in that context and spirit that the panel proceeded to direct (at the said CMC and in the presence and hearing of the appellant) that Ms S Smith, Senior Crown Counsel, make contact with Mr C Ramírez, Senior Crown Counsel, who, as the panel was informed, had appeared for the Crown at trial, to see if he had notes of the trial which he could produce for the assistance of the Court. The panel, in the interest of fairness to both sides, thereupon asked the appellant if he would agree to his former counsel, Mr Arnold, sharing his own trial notes with the Court and the appellant readily

indicated that he agreed. Miss M Rowley, Assistant Registrar – Appeals, was at that point directed to seek to enlist the assistance of Mr Arnold. (It should be underlined that the panel never even remotely suggested that notes of counsel, if they materialised, would, in default so to speak, somehow become a record of appeal.) Nothing, however, could have been clearer from what the panel said and did at this CMC than that such notes, if any, as could be obtained from counsel would be made available for use by all participants at the hearing of the appeal. No one could have reasonably thought that they were to be obtained merely for the purpose of being thrown into a wastebasket. In short, the panel at this CMC of 26 July 2018, implicitly authorised the use at the hearing of the appeal of such counsel's notes as might be obtained without directing that they should be presented as a record of appeal or, for that matter, a record of proceedings.

[59] It is now necessary to pause and note that the diligent efforts of Miss Rowley to obtain trial notes from Mr Arnold proved unsuccessful. (And it is not known what, if any, contact and cooperation there ever was between him and Mr Sampson who, as already noted above, was mentioned as solicitor for the appellant in the notice of appeal.) But the efforts of Ms Smith, bore fruit. She was able to secure the trial notes of Mr Ramírez. In due course, these notes were transcribed under the title, regrettably incorrect, of **Record of Proceedings** by a Court Stenographer (Trainee) of the court below. They were then filed under that same erroneous title on 17 October 2018. A copy was also delivered to the appellant (as he was to acknowledge at the next CMC to be held).

[60] That CMC is, like that of 26 July 2018, also germane for present purposes, and for similar reasons. It was conducted by the Court itself (Sir Manuel Sosa P, Awich JA and Ducille JA himself) on 25 October 2018, ie a little more than a week after the filing of the so-called **Record of Proceedings**. (Unsurprisingly, given that title, it was erroneously referred to as the record by both the President and Ms Smith during the CMC.) At this CMC, the appellant, without so much as a further mention of attorney A, made the worrisome and ominous disclosure that his mother had, since the last CMC, made contact with another attorney ('attorney B') but had not yet been able to make a required 'down payment'. Sensing the start of a long-drawn-out quest for obviously

much desired but probably unaffordable legal services, the Court offered to enlist the assistance of its Registrar in seeking legal representation for the appellant given the exceptional circumstances of his case. This offer the appellant unhesitatingly accepted. It should be noted in this regard that it is only in capital cases that the Court can assign legal aid to an appellant: section 39, CA Act. (For the avoidance of doubt, what the Court did in this case did not purport to be an assignment under the provisions of that section.) The Court took note of the appellant's representation at this CMC that, come December 2018, he would have already served seven years and a half of his term. The Court then adjourned, announcing that, upon hearing from its Registrar that representation had been secured for the appellant, a date would be fixed for the resumption of case management. The Court must be seen as having given its tacit approval at this CMC to the use of the so-called **Record of Proceedings**, filed as already noted one week earlier, at the then forthcoming appeal hearing. (In this regard, the Court notes that two members of the panel conducting this CMC of 25 October 2018, viz Ducille JA and the President, were destined to also be on the panel which heard the appeal itself on 20 June 2019, when, as already indicated above, Mr Chan was asked by Ducille JA which court had agreed to the use at the appeal hearing of the notes of prosecuting counsel.) At this juncture, then, the Court had already twice approved the use of the notes of counsel at the trial, first on 26 July 2018 and once again on 25 October 2018.

[61] Case management was duly resumed on 5 February 2019. The CMC was conducted by CMC Panel No 1. At the start, Mr A G Sylvestre held papers for Mr Arthurs, who was by then representing the appellant through the instrumentality of the Registrar of this Court; but Mr Arthurs made his appearance and participated in the CMC later on. Directions regarding the filing and delivery of skeleton arguments and the time to be allowed for oral argument at the hearing of the appeal were duly given by the panel. Neither attorney appearing for the appellant had anything to say about the filing at the Registry and delivery to the appellant of the notes under the incorrect title of **Record of Proceedings**. There is no escaping from the conclusion that the Court was here, once again, by necessary implication authorising the use by the parties of the

notes of counsel at the hearing. The directions to file and deliver skeleton arguments can only have presupposed that counsel, in preparing such arguments, would use the notes of trial counsel previously filed at the Court's Registry and delivered to the (for the time being) unrepresented appellant.

[62] Skeleton arguments were obviously not filed nor delivered in accordance with the directions given by CMC Panel No 1 on 5 February 2019; for, on 17 April 2019, that same panel gave the parties new directions for the filing and delivery of skeleton arguments. Given that, on this date, the position continued to be that the only materials already made available to the parties by the Court's registry were the notes of prosecuting counsel, the necessary implication that the Court was, by the issuing of such directions, authorising the use of such materials by the parties at the hearing arose yet again.

[63] As already stated above, the appeal came on for hearing on 20 June 2019.

[64] The next question that arises is whether the Court could have properly authorised such use of the notes of counsel. Did it, in other words, have the jurisdiction so to do?

[65] The starting point here must be the Belize Constitution, which re-establishes the Court of Appeal (section 94) and declares it to be a superior court of record having all the powers of such a court save as otherwise provided by any law (section 100(3)). This Court knows of no law which 'otherwise' provides for the purposes of section 100(3). It proceeds, therefore, on the basis that it is possessed of an inherent power to exercise its procedural jurisdiction in such a way as to avoid injustice and ensure efficiency in all proceedings before it. This is in keeping with the view (now in every sense an *idée reçue*) expressed by Sir Jack Jacob in his oft-cited and authoritative article, 'The Inherent Jurisdiction of the Court' (1970) Current Legal Problems 23, n 1, 27, viz that-

> '… the jurisdiction which is inherent in a superior court of law is that which allows it to fulfil itself as a court of law.'

As the position (as material for present purposes) is put, with heavy reliance on Sir Jack's article, in Halsbury's Laws of England, volume 11 (2015), para 23:

> 'The jurisdiction of the court which is comprised within the term "inherent" is that which enables it to fulfill, properly and effectively, its role as a court of law. It has been said that the overriding feature of the inherent jurisdiction of the court is that it is a part of procedural law, both civil and criminal, and not a part of substantive law; it is exercisable by summary process, without a plenary trial; it may be invoked not only in relation to parties in pending proceedings, but in relation to anyone, whether a party or not, and in relation to matters not raised in the litigation between the parties; it must be distinguished from the exercise of judicial discretion; and it may be exercised even in circumstances governed by rules of court (although a claim should be dealt with in accordance with the rules of court, rather than by exercising the court's inherent jurisdiction, where the subject matter of the claim is governed by those rules). The term "inherent jurisdiction is not used in contradistinction to the jurisdiction of the court exercised at common law or conferred on it by statute or rules of court … In sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine, and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent vexation or oppression, to do justice between the parties and to secure a fair trial between them.'

[66] There is no dearth of support in the decided cases for this position; but the Court will limit itself to reminding of the following familiar passage from the speech of Lord Morris of Borth-y-Gest in ***Connelly v DPP*** [1964] AC 1254, 1301:

> ‘There can be no doubt that a court which is endowed with a particular jurisdiction has powers which are necessary to enable it to act effectively within such jurisdiction. I would regard them as powers which are inherent in its jurisdiction. A court must enjoy such powers in order to enforce its rules of practice and to suppress any abuses of its process and to defeat any attempted thwarting of its process.’

[67] Which brings the Court back to the reference already made at para **[37]**, above to Sir Albert Staine JA and one of the earliest cases decided by this Court. The case is referred to by Sir Albert, the first son of the Belizean soil to sit on this Court, in a ruling on an application for bail pending the hearing of the appeal in ***Requena (Santiago) v R***, Criminal Appeal No 14 of 1984 (ruling delivered on 12 December 1984). In the seventh paragraph, unnumbered, of that ruling, Sir Albert referred to the establishment of the Court of Criminal Appeal in England at the turn of the twentieth century and to the practice developed in that court of acting where necessary on ‘agreed statements of the facts of the case … signed by counsel on both sides’. Sir Albert went on to cite a specific example of the adoption of this practice in Belize in the following passage appearing at the eighth paragraph of his ruling:

> ‘An example of the exercise of this practice can be seen in Criminal Appeal 4/1969 Dennis Frazer v The Crown. This was a case where the appellant was charged with murder but convicted of manslaughter. The conviction was appealed and the Court of Appeal sitting shortly after the conviction, found it convenient to hear the appeal, on the basis of agreed statements, prepared by counsel for the Crown and the defence. The appeal was heard and dismissed.’

Given that Sir Albert was Director of Public Prosecutions for Belize in 1969, it is almost certain that he appeared before the Court, comprised in that the first year of its existence of Sir Ronal Sinclair P, Sir Paget Bourke JA and Sir Clyde Archer JA, in that particular criminal appeal. All three of these distinguished judges came to this Court with a wealth of judicial experience no more than a handful of years after the important decision of the House of Lords in ***Connelly***.

[68] Taking all of the foregoing into consideration, this Court has no difficulty in reaching the conclusion that it is possessed of ample power under its inherent jurisdiction to authorise the parties to a criminal appeal to rely on such notes of trial counsel as it is able to obtain in any case where what has come customarily to be called the record of appeal cannot for some reason be produced. (By coincidence, the quotation from **Pérez** at para **[57]**, above shows the Court using that title as a matter of course.) In an ideal world, it would always be possible to obtain such notes from both sides. Not so in the real world, as this case has illustrated. The fact that one side or another is, or claims to be, unable to assist the Court with such notes cannot be allowed to thwart the process of the Court. And that would be the result if, in a case such as the instant one, the Court were, in the absence of the traditional record, to accept the invitation to throw up its hands and quash the conviction of the appellant without regard to established legal principles. That, with respect, would be rashly to descend to the level of palm-tree justice.

[69] The next question arising is twofold, viz (a) whether the decision to authorise the use of prosecuting counsel's notes at the hearing, in the absence of a traditional record, was correct in the sense of being supported by the authorities or (b) whether, instead, the appeal, given such absence, should have *ipso facto* been allowed and the conviction quashed. The Court will first examine the three-plank written argument advanced by Mr Arthurs in the context of ground 1 and summarised at paras [**44]**-**[48]**, above.

[70] As to the first plank, viz Mr Arthurs' reliance on the view taken by the late Ms Seetahal in her book, quoted at para **[46]**, above, the Court fails to see how it can avail the appellant in the circumstances of this case. The Court finds it convenient to treat the quotation from this book as falling into two parts. The first part, constituted by the proposition that it will be highly impossible to ground an appeal absent the trial judge's summing up, is, with respect, demonstrably untenable. (Consideration of the second part of the quotation shall be deferred, for reasons of convenience, until the Court

comes to para **[74]** of this judgment.) The perfect pertinent demonstration is to be found in the decision of their Lordships' Board in *Roberts*, to which, as already noted above, Mr Chan helpfully directed this Court. In that case, the appellant succeeded in grounding an appeal to the Board which passed all tests with flying colours, notwithstanding the absence of any notes of the summing up. But the late Lord Rodger of Earlsferry, writing for the Board, made it abundantly clear that a successful appeal in such a case will, of course, be no walk in the park. Having cited passages from the judgments in *R v Elliott* (1909) 2 Cr App R 171 and *R v Le Caer* (1972) 56 Cr App R727, that learned judge said, at para 7:

> '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.'

There, that essential 'something' was an indication from counsel at the trial that there might have been a misdirection on identification coupled with the fact that misdirection on identification were prevalent in the relevant jurisdiction at the time in question.

[71] The cases of *Elliott* and *Le Caer* repay close study.

[72] With respect to *Elliott*, it is noteworthy that it was decided in the English Court of Criminal Appeal itself, shortly after its establishment. This is clear from the headnote to the report, which records the important point that-

> 'The inadequacy of the transcript of the shorthand report of a trial is not a sufficient ground of leave to appeal, as the provisions of the Criminal Appeal Act as to these notes are merely directory.'

There can be no doubt that this is a reference to the Criminal Appeal Act 1907, on which, as already indicated above, the CA Act is modelled. That notwithstanding, it has to be acknowledged that *Elliott* concerns the absence of a transcript of the shorthand note of the summing-up only. In the instant case, however, the concern is over the

absence not only of a note of the summing-up, whether of the stenographer or of the trial judge, but also of notes of evidence.

[73] This makes *Le Caer* a decision of even greater import than *Elliott* for present purposes, for in the former there were, to all intents and purposes no notes at all, whether of the summing up or of the evidence. Thus, Lord Widgery CJ, delivering the judgment of the English Court of Appeal – Criminal Division in *Le Caer*, said, at p 729:

> '… it became apparent that the transcript both of the summing-up and of the evidence, so far as a transcript of the evidence was obtained, was hopelessly corrupt.'

Emphasising the point, the learned judge later said, *ibid*:

> 'In the result, the transcript is accepted as being hopelessly corrupt, and wholly unreliable for all purposes.'

He then went on to identify the resulting complaint of Mr Le Caer as follows, *ibid*:

> 'Complaint is therefore made … that the appellant has been deprived of the opportunity of pursuing his application for leave to appeal or making his appeal because he has been deprived of the raw material upon which an argument based on misdirection is normally founded.'

The learned judge then said, at p 730:

> 'The case is put, as it must be, under section 2(1) (a) of the Criminal Appeal Act 1968. It is said that we should allow the appeal against conviction on the grounds that the verdict of the jury should be set aside, it being in all the circumstances of the case unsafe or unsatisfactory.'

There are two important points to be noted in this connection. First, these grounds are provided for in the Criminal Appeal Act 1968, enacted some two years after the abolition

of the English Court of Criminal Appeal, but not in the CA Act: see para **[5]**, above. Secondly, there are statements from no less than six former members of this Court, as well as the current President, in three separate cases, to the effect that those grounds for setting aside the verdict of a jury are alien to this jurisdiction: see *Robinson (Egbert) v R*, Criminal Appeal No 14 of 1980 (judgment delivered on 4 November 1980), fifteenth to sixteenth paragraphs, *per* Blair Kerr P and Inniss and Telford Georges JJA; *Lauriano (Wilfred) v R*, Criminal Appeal No 15 of 1994 (judgment delivered on 11 November 1999), ninth paragraph, *per* George P; and *Gentle (Louie) v R*, Criminal Appeal No 26 of 2008 (judgment delivered on 27 March 2009), para 10, *per* Carey JA (speaking for the panel, whose other members were Mottley P and Sosa JA, as he then was). The point here is that if Mr La Caer could not have gained entry, as it were, through the wide door opened by the Criminal Appeal Act 1968, the appellant can hardly be expected to fare any better given the comparatively narrow entrance door opened to him under the CA Act. And shut out Mr Le Caer most certainly ended up; for, as Lord Widgery CJ, reaching conclusion, put it at page 730:

> '… the simple fact that there is no shorthand note is not itself a ground for saying that the conviction is unsafe or unsatisfactory.'

It bears noting here that the learned judge was at pains to express gratitude to counsel for their cooperation with the court, in, if this Court may say so, the highest traditions of the Bar. Having previously stated in the most matter-of-fact manner, and without referring to any enabling rule of court, that the Court of Appeal – Criminal Division had invited assistance from counsel and the trial judge in the form of their notes and recollections, he said, at pp 731-732:

> 'In this case the Court is much indebted to counsel and the learned judge for the assistance which it has received in trying to reconstruct what actually happened at the trial in the way of the directions actually given to the jury.'

[74] Which brings the Court to the second part of Mr Arthurs' quotation from Ms Seetahal's work, where she cites *Williams* as an example of a case in which a court

expressed concern over the 'absence of transcripts'. *Williams* is, indeed, a case in which such concern was voiced by the court. But, more importantly for present purposes, it is also another case, apart from *Le Caer* in which an English appellate court saw fit to turn to counsel for assistance with their trial notes given that very absence. And, once again, the court was not concerned to refer to any rule of court under which it might justify the adoption of such a course. The reason for that absence of concern, this Court would suggest, is that no one in either of the two cases in question was in any doubt that the court had ample power, by virtue of its inherent jurisdiction, to enlist the assistance of trial judge and trial counsel, and to use any notes so secured, at the hearing of the appeal. Sir Jack's article in Current Legal Problems would have been published in 1971, ie just before the 1972 decision in *Le Caer*, but, over and above that, it was based on cases decided over the years before 1971. It was not revealing principles never before heard of in the courts: merely gathering them together in one piece. And the passage quoted by counsel from Ms Seetahal's book, far from supporting the frankly dangerous view that, where there is no note of the summing up or no notes of evidence, an appeal must be allowed and the conviction quashed, indicates, through the reference to *Williams*, that one way of overcoming the difficulty is by relying on the notes of trial counsel. The rest is pure common sense: if only one counsel's notes are produced to the appellate court, then the court must make do with that. Any other approach would put a premium on non-cooperation.

[75] Turning to the second plank, with great respect to Mr Arthurs, his citation of the six cases already referred to at para **[47]**, above is of negligible assistance to the Court in circumstances where he is arguing before an appellate court originally established by a statute modelled on the Criminal Appeal Act 1907, and whose rules of court are based on the Criminal Appeal Rules 1908, but he utterly fails to show that the cases in question, on which he so heavily relies, concern courts similar to this appellate court in those two fundamental respects. In the particular circumstances of this case, this Court is prepared to echo the following wise words of Griffith J, when placed by counsel in a similar position, in the court below in *Moya v A-G and Anor*, Appeal No 3 of 2015 (judgment delivered on 29 November 2014), para 24:

'… the court will naturally prefer to take guidance from authorities closer to home.'

And this Court does not take the words 'closer to home' in a strictly geographical sense.

[76] It is left briefly to consider the third plank of Mr Arthurs' argument on the *de facto* preliminary objection here under discussion, ie the quotation from the headnote to the report of the Jamaican Court of Appeal's 1966 decision in *Parker*. It must be noted that the supposed entitlement of an appellant of which the court was there speaking was subject to a key qualification contained in the phrase 'if the court required it'. The court was saying that an appellant is entitled to have his appeal considered on the basis of the notes of evidence if the court required such notes. That is a far cry, indeed, from saying that, as counsel submitted, if there is no transcript of such notes of evidence and no note of the summing up, the appeal must perforce be allowed and the conviction quashed. The Board's approach in *Roberts*, some 37 years later, of hearing an appeal notwithstanding the absence of any note of the summing-up, powerfully demonstrates just how far-reaching this qualification is. To put it colloquially, *Parker* was speaking of a very big 'if'.

[77] Accordingly, this Court answers the first part of the twofold question posed at para **[69]**, above in the affirmative. In other words, the Court's decision to authorise the use of prosecuting counsel's trial notes at the hearing, given the absence of that which has come customarily to be called a record of appeal, was correct in the sense of being supported, even if only indirectly, by the authorities. On the basis of those same authorities, the Court answers the second part of the twofold question in the negative. In other words, the Court holds that the absence of a record does not justify, *ipso facto*, the allowing of the appeal and the quashing of the conviction.

[78] The Court must next deal with the written argument of Mr Arthurs presented in the context of ground 2 and summarised at paras **[49]**-**[50]**, above. Having regard to the foregoing part of the present discussion, it is possible to do so in a few words. His

principal complaint over the fact that what he evidently expected to be 'notes of proceedings' turned out to be the notes of prosecuting counsel alone lacks validity in the light of the position already described in detail above: see paras **[56]**-**[62]**. In short, the Court, at a point during case management when the appellant was unrepresented, resolved to enlist the assistance of both trial counsel, but not before first satisfying itself that the appellant was consenting to Mr Arnold's release of his trial notes. It thereafter acted on that resolution but achieved only partial success. What followed next was an entirely proper exercise of the Court's powers under its inherent jurisdiction as a superior court to authorise the parties to use the only notes which, by diligent effort, it had succeeded in obtaining from trial counsel. The Court is, and must remain, perfectly entitled to use its inherent jurisdiction to frustrate any external attempt to hijack it and forcibly transform it into a dispenser of palm-tree justice.

[79] If, as is hoped, the remainder of Mr Arthurs' written argument underground 2, insofar as it relates to the so-called preliminary objection, is fairly and accurately summarised at para **[50]**, above, the gist thereof was that, whilst it may be the case that the CA Rules do not contemplate the settlement of a record of appeal, as such, when it comes to criminal, as opposed to civil, appeals, there is no escaping the reality that they (the CA Rules) require the preparation of 'copies of proceedings' in criminal appeals. As already indicated at para **[50]** above, Mr Arthurs submitted that rule 7 provides for the only way of securing a copy of proceedings where there is no record of the summing up and, moreover, that such copy of the proceedings is required under the rule to take the form of a statement from the trial judge. Whilst refraining from expressly stating that it is an appellant who is enabled by rule 7 to secure a copy of proceedings, counsel omitted from his quotation of rule 7(1) a total of 13 words which together make it crystal clear that it is the Registrar of this Court, and not an appellant, who is so enabled. Paras 30-32 of his **Skeleton Arguments** thus end up creating the misleading impression that it is an appellant who is supposed to secure all the material mentioned in rule 7(1).

[80] The glaring weakness of this unnecessarily vague and suggestive interpretation was foreshadowed by para **[51]**, above. It is an entirely confused and confusing

interpretation. The only point that, in strictness, needs to be made with respect to it is that rule 7(1) clearly places a duty on the Registrar of the court below to forward to the Registrar of this Court four copies of the proceedings in the court below. The rule is not speaking of an appellant at all, let alone granting him/her a right to anything. That is really an end of the matter. But three further points may be made to show the extent of counsel's confusion. First, those copies of proceedings must be so forwarded regardless of the existence or otherwise of a 'record' of the summing up of the trial judge. They are not forwarded, as Mr Arthurs contended, because of the absence of a record of the summing up. Secondly, the Registrar of the court below is also required to forward to this Court's Registrar four copies of the record of the summing up, if such a record has been made. Thirdly, if no such record has been made, the Registrar of the court below must forward to the Registrar of this Court 'a statement giving to the best of such judge's recollection the substance of the summing up'. Contrary to the submission of Mr Arthurs, that statement is a thing completely separate and apart from the copy of proceedings. The rule goes on to mention other items to be forwarded to the Registrar of this Court which need not be specified for present purposes since Mr Arthurs made no mention of them.

[81] The Court would make the following further point. As already pointed out at para **[6]**, above, where its wording was reproduced, section 28(1) of the CA Act imposes a duty on one person only, viz the appellant in a criminal appeal. That duty is to file grounds of appeal within a prescribed period of time after receipt of the record. In its wisdom, the legislature refrained from imposing a corresponding duty on the Registrar to deliver such a record to the appellant. This is entirely consistent with the position as to shorthand notes in England under the Criminal Appeal Act 1907. In this regard, the headnote to the report of *Elliott* must be borne in mind. As observed at para **[72**], above, the point there noted is that the provisions of the Criminal Appeal Act *vis-à-vis* shorthand notes were merely directory.

[82] The Court is, accordingly, entirely unable to accept the written argument of Mr Arthurs presented in purported support of the 'preliminary objection' in the context of ground 2 and summarised at paras **[49]**-**[50]**, above.

[83] It follows that the Court rejects the virtual preliminary objection of the appellant to the hearing of the appeal. There can be no automatic allowing of the appeal and quashing of the conviction at this stage. And, going back to the closing sentence of para **[5]**, above, the Court expresses the clear view that this 'preliminary objection' does not fall under any of the three categories of case provided for by section 30(1) of the CA Act. Accordingly, the Court now proceeds to deal with the appeal proper taking into account the contemporaneous trial notes of Mr Ramirez ('**the Notes**').

Introduction (continued)

[84] Continuing then from para **[1]**, above, the appellant was tried together with one Oliver Rodríguez ('Rodríguez'), who was unrepresented, before González J ('the judge') and a jury on a three-count indictment charging them with robbing and kidnapping Mr Leon Castillo and with the commission of a third crime in Belmopan on 26 August 2006. The trial proper commenced on 13 June and ended on 29 June with the conviction of the appellant alone on the counts of robbery and kidnapping. On 30 June 2011, the judge imposed on the appellant the sentence already referred to above, in respect of which, as already noted, there is no argued application for leave to appeal.

[85] The third crime charged was taking a motor vehicle without having the consent of the owner or other lawful authority. The fate of this third charge, alas, was that it evaporated, so to speak, when, on a submission by Mr Arnold that there was no case for the appellant to answer in respect thereof, the judge ruled that, indeed, not only the appellant but also his co-accused had no case to answer. It appears from **the Notes** that the basis for counsel's submission to the judge was that the owner of the vehicle, Mr Castillo's mother, was not called to testify to the effect that she had not given the

accused permission to take her vehicle. The stark flimsiness of that basis will appear when the Crown evidence is described later in this judgment.

[86] It ought further to be noted, in passing, that Rodríguez ended up the beneficiary of directed acquittals in respect of both remaining counts.

[87] As already indicated above, in the notice of appeal signed by the appellant and filed on 5 July 2011, the appellant represented to the Court, through the Registrar, that Mr Sampson, an even more experienced Senior Counsel of the Belize Bar than Mr Arnold, was then acting for him and that his grounds of appeal would be submitted at a later date. He further represented therein that he did not desire the Court of Appeal to assign him legal aid.

[88] Following the lengthy delay which has already been described and explained above, the present appeal was heard, as also previously noted, on 20 June 2019, when this Court saw fit to take the unusual step of granting bail pending the delivery of judgment.

The Crown evidence

[89] On Saturday 26 August 2006, Mr Castillo, then only 20 years old, using an ATM, withdrew the modest sum of $50.00 from his bank account at the Market Square, Belmopan Branch of CIBC First Caribbean Bank and walked unsuspectingly towards his mother's parked motor vehicle and into a living nightmare. Two men, neither of them masked, emerged from behind the vehicle, an Isuzu Rodeo, and approached him menacingly. The shorter and clearer-complexioned of the two men was pointing a shotgun at him. He shall be hereinafter referred to mainly as "the gunman". The other man, who shall be hereinafter referred to mainly as "the taller man", demanded that he hand over the vehicle key. The gunman relieved him of his wallet containing the money he had just withdrawn from the ATM and ordered him into the vehicle. The gunman himself entered the vehicle, which the taller man then drove away. The gunman kept pointing the shotgun at Mr Castillo inside the vehicle. Presently, one of the two

assailants ordered Mr Castillo to pull his T-shirt over his head and to make his way as best he could to the rear of the moving vehicle. Mr Castillo was able to see through the thin fabric of his T-shirt even after obeying this order. The taller man drove the vehicle to a parking lot elsewhere in Belmopan where a third man, hereinafter to be referred to as "the third man", entered it.

[90] The taller man then drove along the Hummingbird Highway in the direction of Dangriga. After some 15-20 minutes, he turned left into a dirt road. Mr Castllo was then taken out of the vehicle and ordered to kneel down. At this point, the third man uttered words which may well indicate what he understood to be his role in the unfolding criminal enterprise. He cryptically told Mr Castillo that he was going to teach him a lesson. Fortunately for Mr Castillo, the taller man thereupon intervened, telling the third man that, since they had Mr Castillo's vehicle, they should only tie him up. At this, Mr Castillo was helped back onto his feet and made to walk some twelve feet into the bushes. His hands were then stretched around a tree and bound together. One of the three assailants then ominously told him that they would be back; and the vehicle was reversed towards the Hummingbird Highway.

[91] After some 5-10 minutes, Mr Castillo was able to release himself from the tree and seek assistance further up the dirt road. Such assistance was rendered by an elderly man who gave him safe custody back to the Hummingbird Highway, where another good Samaritan, driving an 18-wheeler truck, picked him up and took him to the Belmopan Police Station. Mr Castillo there made a report to the police.

[92] It appears from **the Notes**, that the main pillar of the prosecution case can only have been the evidence of Steven Serano, a Crown witness curiously and consistently (if not conveniently) ignored throughout the submissions to this Court, written and oral, of Mr Arthurs. It was Mr Serano's testimony that he was a bank teller who had known Mr Castillo and the appellant, the latter of whom he pointed out at trial, from the childhood days of both of them. He was also used to seeing Mr Castillo driving the vehicle in question – ever since he first received it, as he put it. The appellant, he further testified,

had borrowed his beach cruiser bicycle on 26 August 2006, ie the very day of the robbery and kidnapping. Crucially, Mr Serano gave evidence indicating that, when the appellant returned the bicycle to him at about 4.00 pm that same day, he, the appellant, was driving the vehicle which he, Mr Serano, was used to seeing Mr Castillo driving. **The Notes** reveal that during the course of cross-examination, presumably by Mr Arnold since he seems not to have mentioned Rodríguez in his evidence-in-chief, Mr Serano admitted that he could not "officially" (whatever that may have meant) recall the date when the vehicle was taken to his house and, furthermore, that he was not sure if his testimony was "relevant" (whatever that, too, may have meant). He is also recorded as having said, under cross-examination, "I did not know of a bike in the trunk". That was clearly a point entirely for the jury, who would have heard him say under examination-in-chief that the bicycle was brought back to him in the trunk of the vehicle.

[93] The evidence of Mr Serano assumed, within the framework of the Crown case, the paramount importance to which reference has been made in the immediately preceding paragraph as a result of the quality of the sole (and joint) identification parade held by the police to test the evidence of visual identification given by Mr Castillo, who had not previously known either the appellant or Rodríguez. The Judge ruled that the latter had no case to answer after concluding that insofar as it related to him the identification parade was 'not fairly and properly conducted'. To that parade the Court will briefly return later in the present judgment: see para **[132]**.

[94] Without, for the moment, entering into the question whether there was proof to the required standard of the identity of Mr Castillo's assailants, the undisputed and indisputable evidence of the circumstances and manner in which Mr Castillo was deprived of his valuables and relieved of the possession of the vehicle can have left no one reasonably (as opposed to wildly fancifully) doubting that such assailants had taken the vehicle from Mr Castillo without the consent of his mother, its undisputed owner. Based as it was on the absence of evidence of the grant by her, as owner, of permission for the taking, the ruling on the submission of no case, was, thus, with the greatest respect, palpably absurd.

The grounds of appeal proper and the submissions in respect thereof

Ground 1 - Reasonable time guarantee

[95] The appellant relied on four grounds of appeal proper, the first of which was said to be as follows:

> 'The appellant has been denied the right to a fair trial in a reasonable time – by reason of delay in having his appeal heard – the appeal being part of the trial process.'

In the view of the Court, the last eight words of this formulation are not, strictly speaking, part of the first ground. They amount, rather, to the statement of a legal proposition whose acceptance is universal at this stage in the development of the law. As such, they belong more in the appellant's legal argument than in the wording of his first ground.

[96] Mr Arthurs' submissions in respect of this ground were grouped under two sub-headings, the first of which was ***Delay and the Right to a Fair Trial within a Reasonable Time***.

[97] The first of these two groups of submissions was centred around section 6(2) of the Belize Constitution, which provides as follows:

> '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 …'

Counsel pointed to the fact that at the time the appeal was heard the unexpired residue of each ten-year term was only two years in length. The appellant, contended counsel, had not been afforded the effective right of appeal without undue delay.

[98] Mr Arthurs argued that unreasonable delay, by itself and without more, causes prejudice to an accused person and militates against the proper operation of the presumption of innocence, citing as authority for this proposition a Zimbabwean case, *S v Taenda* [2000] (2) ZLR 394H. The principles to be applied in determining whether a particular delay was unreasonable were, he said, those, including conduct of the accused and his assertion or failure to assert his right to a speedy trial, which were enumerated in that same case. Despite this heavy reliance on *Taenda*, counsel stopped short of providing the Court with a copy of the report thereof, contenting himself with directing attention to passages therefrom quoted in the judgment of a judge of the High Court of Zimbabwe, sitting in chambers, in *Masuko v Attorney General* [2003] ZWBHC 97.

[99] Mr Arthurs' second group of submissions was put forward under the sub-heading of ***Incomplete Record of Trial***. Counsel began by reminding this Court of its critical remarks in respect of the record of appeal in *Gabourel (Dennis) v R*, Criminal Appeal No 4 of 2015 (judgment delivered on 24 March 2017). Going on from there to the frank and inevitable acknowledgment that, in *Gabourel*, the Court (Sir Manuel Sosa P, Hafiz Bertram JA and Blackman JA) arrived at the conclusion that, even if there were, in the summation, some error on the part of the trial judge, a reasonable jury properly directed would inevitably have convicted Mr Gabourel, counsel contended that such a conclusion was not open to the Court in the present appeal for the reason that 'there are several problematic issues for the Court and specifically to (*sic*) the presiding judge at first instance'.

[100] Seeking to develop on this theme, counsel invited this Court to find that absence of a transcript of the judge's summing-up necessarily resulted in prejudice to the appellant given the track record of the judge who had, in his words, 'a continuing string of difficulty with issues of identification directions'. He said, somewhat paradoxically, that, out of 'restrained modesty and respect', reference would be made to only two cases illustrative of the string of difficulty in question. These two cases, viz *Pop (Aurelio) v R*, Privy Council Appeal (No 31 of 2002) and *Pipersburg (Leslie) and Anor v R*, Privy

Council Appeal No 96 of 2006 both involved the allowing of appeals from convictions following trials before the judge, sitting with a jury. Both had to do with erroneous directions on evidence of visual identification given by the judge to the jury; but the directions which ought properly to have been given were different in each case. And counsel did not, and could not, go so far as to suggest that these decisions show the judge committing one and the same error on successive occasions.

[101] The remaining arguments advanced under the sub-heading of **Incomplete Record of Trial** were directed at supporting the virtual preliminary objection and have already been summarised, considered and rejected above.

[102] Replying to Mr Arthurs, Mr Chan, for the Crown, contended that the primary issue for this Court in dealing with ground 1 was whether the conviction of the appellant was a sound one. In his submission, it was. A secondary issue therefore arose: whether the delay complained of had caused prejudice to the appellant's appeal. In his submission, it had not. Accordingly, he contended, the quashing of the conviction was out of the question. He cited in support of this argument the decision of their Lordships' Board in *Tapper (Melanie) v Director of Public Prosecutions* [2012] UKPC 26. But he also relied on the subsequent judgment of the Caribbean Court of Justice ("the CCJ") in *The Queen v Henry (Gilbert)* [2018] CCJ 21 (AJ), in which that court, whilst holding that Mr Henry's constitutional right to a fair trial within a reasonable time had been infringed, refused to quash his conviction, citing as "a most pertinent circumstance" the compelling Crown evidence against him. Pointing to the Crown's adduction in this case of the evidence of Mr Serano, which, he implied, was strong, Mr Chan suggested that this Court ought similarly to refrain from quashing the appellant's conviction. And counsel highlighted, and commended to this Court, another reason for judgment given by the CCJ in *Henry*, viz that Mr Henry had never made a claim for constitutional redress in the court below. Mr Chan reminded this Court that this same additional reason for judgment in *Henry* was adopted in its own subsequent decision in *Daley (Lionel) v R*, Criminal Appeal No 8 of 2012 (judgment delivered on 2 November 2018), an appeal in which Mr

Arthurs had appeared and advanced a ground of appeal identical to ground 1 in the instant case.

[103] Mr Chan did not at any stage seek to rebut the contention that the appellant's constitutional right to a fair trial within a reasonable time had been violated.

Ground 2 – Absence of transcript

[104] The appellant's ground 2 read as follows:

> 'The absence of any transcript or copy of proceedings whatsoever, in a case where 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 and causing (*sic*) his conviction to be unsafe producing a prejudice to the appellant.'

[105] Mr Arthurs grouped his related submissions in writing under two separate sub-headings. The Court has already summarised, considered and rejected those submissions which were grouped under the first of these sub-heading, viz **NO COPY OF PROCEEDINGS**. They were deployed by Mr Arthurs in his dual effort to (a) prevent by way of his virtual preliminary objection the hearing of the present appeal and (b) at the same time obtain an order allowing the appeal and quashing the conviction.

[106] The remainder of Mr Arthurs' written submissions were grouped under the sub-heading **Prejudice by prevention to properly prosecute appeal in grounds of appeal**. Mr Arthurs was evidently unable to keep himself from raising in this different context, matters more apposite to the context of the virtual preliminary objection. I refer here to matters connected with section 28 of the CA Act. Those matters have already been considered and disposed of above. The rest of Mr Arthurs' submissions under this sub-heading are underpinned by his basic contention that 'there is still no copy of the

record recognizable by the Court of Appeal in the Act': **Skeleton Arguments**, para 39. The utter irrelevance of this contention, in the light of the steps properly taken by this Court in the exercise of its inherent jurisdiction, has already been fully exposed above in the course of this Court's complete rejection of the virtual preliminary objection.

[107] In his generally well-focused reply, Mr Chan reminded the Court that the general legal principle is that there must be a serious possibility that there was an error in the missing portion of a transcript or that an omission from the transcript deprived the appellant of a ground of appeal. He went on to point out that –

> 'The appellant has not … advanced any basis for a conclusion that in this case there is such a serious possibility. The arguments focus, in the main, that there is no definitively identifiable summation at all and further that "there are several problematic issues for the court and specifically to the presiding judge at first instance".'

Counsel made it clear that he was relying on the decision of their Lordships' Board in *Roberts*. And he contended that Mr Arthurs had not sought to lay any foundation for his suggestion that the judge had misdirected the jury in the course of his summing up.

Ground 3 – Remission/Parole

[108] Ground 3 was worded as follows:

> 'Owing to the delay in the trial and the deprivation of his right to a fair trial within a reasonable time. The appellant has not been afforded the right and application of the principles of remission.'

The complaint here was that 'the failure to hear his appeal due to the lost transcript and summing up has deprived and prejudiced the appellant from being admitted to parole'. (It must be pointed out at once that the appellant's conclusion that there was a loss of an existing transcript and summing up is an unwarranted assumption.) Counsel argued that the appellant was not considered for parole because of an 'unofficial practice' at the

prison in Hattieville whereby inmates awaiting the prosecution of their appeal are neither processed, nor encouraged to apply, for parole. Counsel saw fit to throw in on top of this, presumably for good measure, that the appellant was routinely denied both remission and parole by the authorities. He closed with an allusion to the prison records, which, he contended, show that the appellant's earliest possible release date would have been 28 February 2018 and that he became eligible for parole in 2016.

[109] The reply of Mr Chan to these submissions was threefold. First, he contended that there was no evidential basis for Mr Arthurs' submissions. Secondly, he said that Rule 42 of the Prison Rules contained no provision preventing it from applying to the case of an inmate whose appeal was outstanding. Thirdly he submitted that the success or otherwise of the appellant in obtaining benefits in terms of remission and parole ought not to be factors in the determination of his appeal from conviction.

Ground 4 – Misdirection on identification

[110] This ground was set out as follows:

> 'That the learned trial judge misdirected the jury and/or did not make proper directions to identification.'

Mr Arthurs, in arguing this ground, placed much reliance on a considerable portion of his written submissions previously set out in the context of ground 1 under the sub-heading of **Incomplete Record of Trial.** (He specifically incorporated paras 9-22 of his **Skeleton Arguments** into his written submissions in respect of ground 4.) The reader is reminded that those paragraphs have already been summarised, considered and rejected in dealing with the virtual preliminary objection above. But Mr Arthurs further contended that, even if **the Notes** can properly be looked at, 'there is no proper direction or not at all on identification'. Moreover, he said, if certain evidence was rejected by the judge, as **the Notes** indicate, no evidence of identification would have been left before the jury.

[111] Responding to Mr Arthurs, Mr Chan highlighted the fact that it can hardly be surprising to find some directions missing from notes which are incomplete. He referred to the judgment of this Court in *Daley's* case where a similar submission was rejected. And he pointed to the fact that there was nothing before this Court from the appellant's trial counsel to support this claim of a misdirection on identification.

Discussion

Ground 1 – Reasonable time guarantee

[112] The language of section 6(2) creates a major conceptual difficulty for this Court. The words 'fair hearing within a reasonable time' strongly suggest that a hearing within a reasonable time is not part and parcel of a fair hearing. If it were, there would, in the view of the Court, be no need for the inclusion of the words 'within a reasonable time' in the subsection. Put slightly differently, if it were inherent to a fair hear hearing that it should take place within a reasonable time, it would be tautologous to spell out that the fair hearing is to take place within a reasonable time. Merely to state in the subsection that the case shall be afforded a fair hearing would be quite sufficient. But the Court is aware of the decision of the House of Lords in *Attorney General's Reference (No 2 of 2001)* [2003] UKHL 68, which concerned article 6(1) of the European Convention on Human Rights in which is found a provision virtually identical to that contained in section 6(2) of the Belize Constitution. In that decision, the House of Lords gave expression to a contrary view which is of strong persuasive authority. The decision was followed by the Board in *Boolell (Prakash) v The State* [2006] UKPC 46, an appeal from the Court of Appeal of Mauritius, in which section 10(1) of the Constitution of Mauritius, containing the very same expression 'fair hearing within a reasonable time', was considered.

[113] In *Boolell*, the Board, having referred to the unsatisfactory state of the case law prior to the decision in *Attorney General's Reference (No 2 of 2001)*, said the following, at para 22:

> ‘The point on which any difference between these cases turns is whether there is a breach of section 10(1) only if there is a sufficient element of prejudice or unfairness, or whether there is a breach if unreasonable delay without more has been established, notwithstanding that the trial itself may be regarded as having been fair.’

The Board proceeded to consider several of the decided cases and, having done so, came to *Attorney General’s Reference (No 2 of 2001*). It said, at para 30:

> ‘Lord Bingham of Cornhill, who gave the leading opinion for the majority, set out as two of the fundamental first principles applying to article 6(1), that (a) the core right guaranteed by the article is to a fair trial (para 10) and (b) the article creates rights which though related are separate and distinct (para (12). It does not follow that the consequences of the breach of each of these rights is necessarily the same.’

[114] This Court, in the final analysis, accepts this statement of the legal position as correct, notwithstanding the conceptual difficulty referred to above.

[115] As regards the actual argument of Mr Arthurs, to the effect that there was a breach of section 6(2), there can be no doubt that, despite Mr Chan’s decision not to seek to rebut it, there are significant weaknesses therein. To begin with, the Court, as already adumbrated is not overly impressed by the presentation of an argument which is based on passages from a judgment which counsel, for whatever reason, refrains from providing in its entirety. Apart from that, the passages from *Taenda* relied upon by Mr Arthurs are quoted by a judge sitting in chambers, rather than in open court. But even more seriously, the invocation of the presumption of innocence in the present case is entirely misconceived. The appellant was tried and convicted. It is elementary law that the presumption of innocence provided for under section 6(3) of the Belize Constitution is no longer available to him. Moreover, even the passages said to be found in the judgment in *Taenda* refer to the conduct of the accused and his assertion or failure to

assert his right to a speedy trial as important factors in cases of the present kind. In the instant case, no light whatever is shed by the appellant on what, if any, steps in respect of such assertion were ever taken by him in conjunction with Mr Sampson, who, according to the notice of appeal signed by the former, was his legal representative as early as 5 July 2011. Nor does the Court know for how long Mr Sampson remained in that relationship with the appellant and, thus, in a position to assert the latter's right to a speedy appeal hearing. As shown by the account of some of the pertinent case management, based on the NOTP and rendered above, had the court not adopted a course completely outside the normal channels and thus charitably brought to an end the appellant's continuing ineffectual and unrealistic quest for affordable legal presentation, there is no telling when his appeal would have been heard.

[116] As regards Mr Arthurs' second group of submissions, this Court does not consider that the critical remarks made in *Gabourel* go far enough appreciably to assist the appellant's cause. As for his suggestion that in the present case, unlike in *Gabourel*, 'there are several problematic issues', the Court need only say that at the end of counsel's discursive submissions these issues had yet to be invested with any real substance. The feeble attempt to portray the judge as one prone to repeat errors in directing on identification is illustrative. The Court has earlier described as paradoxical counsel's claim that he would cite only two cases to show the judge's propensity to repeat his errors in identification cases out of 'restrained modesty and respect'. The Court would have thought that respect for the judge would have dictated the citation of more than two cases purportedly demonstrative of such a propensity. The notion that criticism on a flimsy basis is a sign of respect is simply irrational. More importantly, as already pointed out above, the cases of *Pop* and *Pipersburgh* cited by Mr Arthurs, apart from having to do with trials dating as far back as 2000 and 2004 respectively, signally fail to show the judge committing one and the same error on successive occasions.

[117] When all is said and done, however, Mr Chan has effectively conceded that there was in this case a breach of section 6(2) of the Belize Constitution and, in spite of the weaknesses in Mr Arthurs' argument already identified above, the Court is prepared to proceed, *arguendo*, on the basis that it is sufficiently sound.

[118] As noted above, Mr Chan at this point raises the question of prejudice as a prerequisite for the quashing of the pertinent convictions. In *Attorney General's Reference (No2 of of 2001)*, as will be recalled, the House observed that the breach of different rights conferred by provisions virtually identical to those of section 6(2) will not necessarily attract the same consequences: para **[113]**, above.

[119] The Court is in substantial agreement with the submissions of Mr Chan as summarised at para **[102]**, above.

[120] There is unquestionably vital instruction for present purposes in both decisions to which he directed this Court's attention. In *Tapper*, it was Lord Carnwath, writing in 2012 for the Judicial Committee, who, at para 28, said, referring to, amongst other cases, *Darmalingum v The State* [2000] 1 WLR 2303:

> '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 *Attorney General's Reference* case, [2004] 2 AC 72 and as summarised in *Boolell*, represents 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 the 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.'

[121] Some six years later in *Henry*, a truly unfortunate case from this jurisdiction in which the Court of Appeal gave two contradictory judgments in one and the same appeal, the Caribbean Court of Justice said, at paras [37]-[41]:

> '[37] … We unhesitatingly accept that there were significant irregularities both during and following the trial of Mr Henry mostly resulting from poor administrative practices of the judicial system. Almost everything that could have gone wrong went wrong … There was no complete clarity on what took place at trial because, critically, the transcript was incomplete and silent on significant aspects. There is no indication of whether Mr Henry had been advised of his rights on the conclusion of the case for the prosecution. There was no record of the judge's summing up, particularly of his treatment of the issue of self defence. There was no clear information on whether the jury's verdict was unanimous or by majority. 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 delay constitutes an infringement of the constitutional right to a fair trial within a reasonable time.
>
> **[38]** Bearing these irregularities in mind, the Court of Appeal pronounced: "23. In any event and in light of all the above, we conclude that the provisions of section 6(2) of the Constitution have been violated in this case, the delay and other irregularities amounting to a denial of a fair hearing within a reasonable time. Had it not been the fact that we have just declared the trial a nullity, we would be constrained to allow the appeal and set aside the conviction."
>
> **[39]** Insofar as the court held or opined that a breach of section 6(2) must ineluctably result in the allowing of the appeal and setting aside of the conviction, we must disagree. This Court has addressed the issue of remedies for breach of the constitutional right to a fair trial within a reasonable time …'

[122] The Caribbean Court of Justice went on to refer to, and quote from, its decisions in *Gibson v Attorney General* [2010] 3CCJ (AJ) and *Bridgelall v Hariprashad* [2017] 8 CCJ (AJ) before stating the following, at para [41]:

> '[41] It follows from these pronouncements that not all infringements of the constitutional right to a fair trial within a reasonable period 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". 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.'

The Caribbean Court of Justice reinstated the conviction of Mr Henry before the trial court.

[123] In the instant case, there was clearly extreme delay between conviction and appeal though there is nothing to show the taking of any steps on the part of the appellant and his counsel to assert the former's right to an early hearing of the appeal. But such delay, according to *Tapper*, does not justify the quashing of a conviction which is otherwise sound. The quashing of a conviction, an exceptional remedy according to *Henry*, should only be considered where the delay might cause substantial injustice. This Court considers that, as in *Henry*, a very relevant circumstance in the present case is the strength of the evidence stacked up against the appellant. Quite contrary to the submissions of Mr Arthurs, the evidence of identification against the appellant struck home with hurricane force, so to speak. Put in more familiar terms, it was nothing short of overwhelming. It came, of course, from Mr Serano. The Court finds it impossible to conclude that the conviction was other than sound.

Ground 2 – Absence of transcript

[124] The Court has already adumbrated at paras **[104]**-[**106]**, above what it sees as inherent fatal defects in the argument of Mr Arthurs under this ground.

[125] It remains only to add that the Court substantially accepts the contentions of Mr Chan made in reply to Mr Arthurs. There is no specificity in any of the complaints sought to be launched by Mr Arthurs. His case is in fact a study in clutching at straws. The Court agrees with Mr Chan that the guiding principle is to be found in the decision of the Privy Council in *Roberts*. Nothing in the judgment in that case opens a door to speculation run riot as to possible misdirection by the trial judge concerned. It is simply inconceivable that the Board failed in that case fully to appreciate the difficult position in which any intending appellant will be placed by the absence of a record of the summing up or, as in Le Caer**,** the virtual absence of notes of evidence. That full appreciation notwithstanding, the Board unambiguously stated, at para 7 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.'

That essential 'something to suggest that it [ie the summing up] contained a misdirection' is missing in the present case. As already noted above, in *Roberts* the necessary 'something' was made up of 'the indication from counsel at the trial that there might have been a misdirection on identification and, more particularly, to the prevalence of such misdirection at the relevant time': see para 9 of the judgment. In the instant case, the Court has not been directed to anything concrete which could be held to constitute this essential or necessary 'something'.

Ground 3 – Remission/Parole

[126] The mere statement of this ground gives rise to another conceptual difficulty, this one insuperable. The Court is unable to see, as a matter of pure principle, how such a ground could possibly give rise to the allowing of an appeal under section 30(1) of the

CA Act, set out at para **[5]**, above. Even if the allegations as to supposed occurrences at the prison in Hattieville were to be established, how would that show that the verdict at trial was 'unreasonable or cannot be supported having regard to the evidence', or that the judgment of the court before which the appellant was convicted involved 'a wrong decision of any question of law', or that there was at trial 'a miscarriage of justice'? In the opinion of this Court, it would show none of these things.

[127] But, beyond that, as Mr Chan contends, at the forefront of his three-pronged response, there is simply no evidential basis for the allegations in question. As mentioned at para **[39]**, above, the appellant purported to file an affidavit in this appeal; but this he did without having an application of any kind before the Court with which to connect it. And he did not at any time seek leave from the Court to rely on the contents of such affidavit other than in support of an application. Moreover, this filing was done when he already had the benefit and guidance of legal representation from Mr Arthurs and so could not plead his own layman's ignorance.

[128] Then there is Mr Chan's powerful second point about Rule 46 of the Prison Rules. There is no provision in that rule which would support or justify the alleged 'unofficial practice', which according to the appellant, was followed by prison authorities to his detriment. If anything here should have been challenged in court, it was that supposed unofficial practice. That, and not the delay in the hearing of his appeal, appears to have placed him in a position of disadvantage, if what he alleges in fact occurred.

[129] The third prong of Mr Chan's argument in reply, as to the irrelevance for present purposes of the success or otherwise of his efforts to obtain benefits in terms of remission and parole, resonates with the remarks already made by the Court at para **[125]**, above. There is rock-solid cogency in it.

[130] Accordingly, the Court concludes that ground 3 is utterly lacking in merit.

Ground 4 – Misdirection on identification

[131] As the Court has clearly stated at para **[110]**, above, much of the argument advanced for the appellant in the effort to establish this ground has been summarised, considered and rejected earlier in the present judgment. Two remaining remnants were identified in that paragraph. As to the first, that **the Notes** disclose no direction on identification, let alone a proper one, Mr Chan's retort is, in the view of this Court, axiomatically the correct short answer. No one has made the ridiculous suggestion that **the Notes** captured every word spoken by all the participants at trial. If a complaint along those lines were to be treated as valid in the present case, how much more valid would it fall to be treated in the context of a case such as *Roberts*, where there was no record at all of a summing up and thus even more scope for wild speculation? Far from suggesting that the absence of a summing up or notes of evidence allows counsel to descend to the level of complaints based on figments of the imagination, the Board enunciated by reference to *Elliott* and *Le Caer* that, as already hinted at para **[70]**, above, a relatively high threshold applies in cases of this type.

[132] Coming to the second of these remnants, the Court can find no substance in it. The suggestion that **the Notes** show the judge rejecting all the evidence of identification is unfounded. They clearly show, of course, that the judge, quite correctly, had no use for the evidence of the identification parade insofar as it related to Rodríguez, to which reference has already been made in passing at para **[93]**, above. Regrettably, the relevant ruling, dealt with at p 34 of **the Notes**, contains sweeping language capable of being interpreted to mean that he was rejecting all the evidence of the identification parade, not just the portions of it relating to Rodríguez. But there is no indication whatever in **the Notes** that the judge rejected the overwhelming evidence from Mr Serano squarely implicating the appellant in the commission of the crimes of which he ended up being convicted, rightly in the view of this Court.

Disposition

[133] For all of the reasons given above, the Court dismisses the appeal of the appellant and affirms his convictions and sentences. It is the further order of the Court that the appellant present himself to the Police at the Dangriga Police Station by 10 am on 3 November 2020 for transportation to the prison at Hattieville. Needless to say, his sentences shall continue to run on the day he so presents himself or is otherwise taken into custody by the Police.

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SIR MANUEL SOSA P

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HAFIZ BERTRAM JA

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DUCILLE JA