IN THE SENIOR COURTS OF BELIZE

CENTRAL SESSION-BELIZE DISTRICT

IN THE HIGH COURT OF JUSTICE

INFERIOR APPEAL (CRIMINAL) NO.: IC20190032

BETWEEN

ELECK MCKOY

Appellant

and

KISHANA MCFIELD, P.C. 1498

Respondent

Appearances:

Mr. Hubert Elrington S.C., with him Mr. Norman Rodriguez for the Appellant.

Ms. Romey Wade, Crown Counsel, for the Respondent.

2023: October 11th
2024: February 26th
April 11th
May 9th

JUDGMENT

INFERIOR APPEAL- DEFAULT IN PROSECUTION OF APPEAL- HEARSAY- EXPERT OPINION- EXERCISE OF DISCRETION TO ADJOURN- DUTY TO ASSIST UNREPRESENTED DEFENDANT

[1] **PILGRIM J**.: Eleck Mckoy ("the appellant") was convicted on 29th October 2019 on a charge of burglary, contrary to section 148(1)(b) of the **Criminal Code**[1] ("the Code") before the Learned Magistrate ("TLM") sitting in the Belize Judicial District and sentenced to 8 years imprisonment. He has appealed his conviction to this Court, pursuant to section 107 of the **Supreme Court of Judicature Act** ("the SCOJA"). The Appellant had also appealed the sentence. The Appellant at hearing of the appeal sought leave to withdraw the appeal against sentence which was granted.

Preliminary issue: The late filing of grounds of appeal

[2] The first issue which the Court must deal with is if it should hear this appeal at all due to the failure of the appellant to meet the statutory deadline set for the filing of grounds of appeal in this matter.

[3] The Court had ordered the appellant, in a written ruling[2], to file his grounds of appeal 14 days from that date. The appellant did not file within time. The appellant's counsel, Mr. Rodriguez, submitted that this non-compliance was occasioned by illness and challenges at his office.

[4] The operative statutory direction comes from the **Order LXXIII Inferior Courts (Appeals) Rules** ("the Rules") made pursuant to SCOJA. This is because this is an appeal from 2019 and the later **Supreme Court (Inferior Courts Appeals) Rules 2021** expressly limits its application to appeals after its introduction[3].

[5] The Rules provide, where relevant, as follows:

> *"5(3) The appellant shall, within fourteen days after receipt of the notice, draw up a notice of the grounds of appeal in Form 3, and lodge it with the clerk and serve a copy thereof on the opposite party.*
> *…*
> *9(1) If anyone entitled to appeal is unavoidably prevented from so doing in the manner or within the time hereinbefore specified, he may apply to the Court for special leave to appeal.*

[1] Chapter 101 of the Substantive Laws of Belize. Revised Edition 2020.
[2] Dated 21st April 2023.
[3] Rule 19(2) *"…every appeal commenced before the entry into force of these Rules shall be continued and dealt with in all respects as if these Rules had not come into force."*

(2) On an application for such leave , the court may, if satisfied that the applicant was entitled to appeal and that he was unavoidably prevented from so doing as aforesaid, grant leave to appeal on any terms and conditions it thinks just…

…

10(1)If the appellant makes default in the due prosecution of his appeal…he shall be deemed to have abandoned the appeal…"

[6] The Court interprets the Rules, as it must, by reading them as a whole[4]. Rule 9, which is the only rule speaking explicitly to extension of time, speaks to the extension of time for appealing, that is filing the notice of appeal. It does not speak to the late filing of grounds of appeal. The Court, looking at the Rules as a whole, finds that the drafters intended the supervision of timelines after the filing of the notice of appeal to be done by way of the power granted by Rule 10 to treat "default" in prosecuting an appeal as to have been deemed to have abandoned it.

[7] The term default has not been defined in the Rules, but the Court is assisted by the Alberta Supreme Court decision of **Costello v Calgary**[5], per McLaurin J:

"'Default is in the legal sense at any rate synonymous with negligence, and is best defined by the synonym failure…."Default" in common parlance assuredly calls to mind negative conduct, a failure in any given situation to take care, or to do an act required by law…"

[8] The Court is of the view that whether there has been "default" is a fact sensitive determination to be considered against background of the principle that there must be finality to litigation[6] . The Court is prepared to accept that illness of counsel is a valid basis to avoid a finding of "default" in the due prosecution of this appeal. The Court will proceed to hear the substantive appeal.

The substantive grounds of appeal

i. The evidence

[9] The appellant was charged that he and others on 15th November 2016 at Belize City entered as a trespasser the premises of Mr. David Coye ("Mr. Coye") located at 4 1/2 miles George Price Highway,

[4] See **Smith v Selby** (2017) 91 WIR 70 (CCJ) at para 12.
[5] [1943] 2 WWR 327 at p 331.
[6] **R v Rambarran** 88 WIR 111 (CCJ) at para 44.

Belize City and stole one black in colour 20 inch LG brand flat screen television valued $400.00 (four hundred dollars), one black in colour Apple brand iPod valued at $500.00 (five hundred dollars), one beige in colour vault valued at $1,500.00 (one thousand five hundred dollars) containing land documents, insurance documents and some blank cheques, one black in colour 40 inch Panasonic brand flat screen television valued at $1,300.00 (one thousand three hundred dollars), a collection of DVDs valued at $98.00 (ninety eight dollars), and one black in colour iPod Nano valued at $300.00 (three hundred dollars) all the property of Mr. Coye.

[10] The offence of burglary is defined in the Code as follows, where relevant:

> *"148.-(1) A person is guilty of burglary if–*
>
> *…*
>
> *(b) having entered any building or part of a building as a trespasser he steals or attempts to steal anything in the building or that part of it or inflicts or attempts to inflict on any person therein any grievous bodily harm."*

[11] The case against the appellant is that on 15th November 2016 Mr. Coye received information sometime after 9 a.m. and called the police. He went to his home at 4 ½ Miles, George Price Highway and found his employee, Mr. Trevor Maheia ("Mr. Maheia"), tied up with damage to windows and doors. He observed his burglar bars cut and pried open and the windows open. He observed that several televisions and items mentioned in the aforementioned charge were missing. Mr. Maheia testified that around 8:00am, he was at Mr. Coye's residence and when he proceeded to go to the back of the yard to check on the dogs, he was approached by three dark male persons. One of the male persons held him at gun point and dragged him towards the back door area by the gas tank. He was made to lie face down. He stated that their faces were tied with shirts so he could not have seen their faces. They then covered him with canvas. Mr. Maheia stated that he heard noises when the burglar bar windows were wrenched open to facilitate entry into the house. He stated that he was on the ground for about forty-five minutes to an hour.

[12] He stated that he heard one of the men shouted for a television and the men were dragging something on the back door veranda. Mr. Maheia stated that they asked him about a key, he told them that is for the van.

[13] When they left, Mr. Maheia stated that he shouted for his neighbour for assistance. Mr. Coye testified that, after he came home, whilst looking outside from his backdoor upstairs, he observed that his white Chevrolet van ("the van") was missing. The van had markings "Coye Funeral Home". He later saw that van following a phone call at the Lake Independence Area in company with police that evening. Mr. Coye left his home secured and gave no one permission to take the items taken nor his vehicle.

[14] Mr. Brian Lopez, a scenes of crime technician, ("CST Lopez") would have processed the van for fingerprints, several of which he found. Assistant Superintendent of Police Osman Mortis ("ASP Mortis") would have compared a latent fingerprint from the van obtained from CST Lopez and with that of the appellant and opined that they were a match. The appellant was later arrested and charged with burglary.

[15] TLM founded her decision based on the circumstantial evidence of the fingerprint being found in the van so soon after it was stolen.

[16] The appellant challenges his conviction on the following grounds reformatted, as the Court understands them, to reflect the appropriate statutorily exclusive[7] grounds:

i. Inadmissible evidence was wrongly admitted and there was not sufficient evidence to sustain the decision[8]: This ground substantially covers the first two grounds pleaded by the appellant so it would be considered together. The evidence which is contended was wrongly admitted was evidence of the respondent who testified, "On 2 December 2016 I received information that the prints Brian Lopez took from the scene had a match with Eleck Mckoy". It is submitted that that evidence was hearsay and crucial to conviction. A sub-ground here is that ASP Mortis and Mr. Lopez were not properly deemed experts and, essentially that their evidence of opinion is inadmissible. There was also the

[7] Section 111 SCOJA.
[8] Section 111(g) SCOJA.

contention, "In particular, there was no chain of custody evidence between the lifting of the fingerprints from inside the van by the scenes of crime expert, Brian Lopez, and the placing of the lifted prints on the card and the later receipt of these cards by Assistant Inspector Mortise (sic)."

ii. The decision was based on a wrong principle: TLM wrongly exercised her discretion by failing to grant an adjournment in the circumstances of this case.

[17] The respondent's reply to these submissions were as follows:

i. The evidence of the respondent was not wrongly admitted as it was not led for its truth but to explain her actions. The respondent also contends that there was sufficient evidence for TLM to deem ASP Mortis and Mr. Lopez as experts and their evidence was properly admitted. The respondent also contends that the issue of chain of custody of the fingerprint was properly addressed on the evidence.

ii. TLM did not wrongly exercise her discretion by refusing an adjournment in this matter having regard to the history of the case and the principles in the **Criminal Procedure Rules 2016** ("CPR").

[18] The Court also raised the issue, of its own motion, of whether there was a specific illegality that substantially affected the merits of the case. The particulars of the Court's concern were whether TLM provided appropriate assistance to the appellant in the context of this case, which rested heavily on expert evidence, namely, a fingerprint comparison. The appellant contended that TLM failed in that duty. The respondent contended that sufficient assistance was given, placing heavy reliance on the Court of Appeal decision of **Alex Guzman v R**[9].

ANALYSIS

GROUND 1: The reception of inadmissible evidence: The evidence of the respondent, ASP Mortis and CST Lopez.

[9] Criminal Appeal No. 10 of 2015.

[19] In terms of addressing the evidence of the respondent it may be helpful to set out a definition of hearsay as set out in the locus classicus Privy Council decision of **Subramaniam v R**[10], per Lord Radcliffe:

> *"Evidence of a statement made to a witness* ***by a person who is not himself called as a witness*** *may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made.* ***The fact that the statement was made, quite apart from its truth, is frequently relevant in considering the mental state and conduct thereafter of the witness or of some other person in whose presence the statement was made****." (emphasis added)*

[20] The English House of Lords decision of **R v Blastland**[11] is also instructive, per Lord Bridge of Harwich:

> *"****It is, of course, elementary that statements made to a witness by a third party are not excluded by the hearsay rule when they are put in evidence solely to prove the state of mind either of the maker of the statement or of the person to whom it was made. What a person said or heard said may well be the best and most direct evidence of that person's state of mind. This principle can only apply, however, when the state of mind evidenced by the statement is either itself directly in issue at the trial or of direct and immediate relevance to an issue which arises at the trial****." (emphasis added)*

[21] It is immediately observed that considering *Subramaniam* the assertions the respondent testified to had as their source the evidence of ASP Mortis and CST Lopez, who both testified at trial and were available for cross-examination by the appellant. They were not assertions, "by a person who is not himself called as a witness." The non-availability of the maker of the assertion for confrontation lies at the heart of the hearsay rule and the makers of those assertions were in court and available. The

[10] [1956] 1 WLR 965 at 970.
[11] [1986] AC 41.

Court notes the opinion of the English House of Lords in the case of **R v Sharp**[12], as to the basis of the hearsay rule, per Lord Havers:

> *"The rule is so firmly entrenched that the reasons for its adoption are of little more than historical interest but I suspect that* ***the principal reason that led the judges to adopt it many years ago was the fear that juries might give undue weight to evidence the truth of which could not be tested by cross-examination, and possibly also the risk of an account becoming distorted as it was passed from one person to another****." (emphasis added)*

[22] Further the evidence of the respondent is clearly led in the context of clarifying the basis of the detention of the appellant. The evidence, following *Blastland*, goes to establishing the state of the mind of the respondent where it is a relevant issue at trial, namely why did she arrest the appellant.

[23] The Court finds that this evidence consequently does not offend the hearsay rule.

[24] The Court also finds that there was no error in the admission of the evidence of ASP Mortis nor that of CST Lopez. The law has been since 1894 in the English case of **R v Silverlock**[13] that no formal qualifications were required for the giving of expert evidence and that it can be gained by study, experience or both, per Lord Russell of Killowen, C.J.:

> *"It is true that the witness who is called upon to give evidence founded on a comparison of handwritings must be peritus; he must be skilled in doing so;* ***but we cannot say that he must have become peritus in the way of his business or in any definite way****.* ***The question is, is he peritus? Is he skilled? Has he an adequate knowledge? Looking at the matter practically, if a witness is not skilled the judge will tell the jury to disregard his evidence.*** ***There is no decision which requires that the evidence of a man who is skilled in comparing handwriting, and who has formed a reliable opinion from past experience, should be excluded because his experience has not been gained in the way of his business.*** *It is, however, really unnecessary to consider this point; for it seems*

[12] [1988] 1 WLR 7 at p 11.
[13] [1894] 2 Q.B. 766 at p. 771.

from the statement in the present case that the witness was not only peritus, but was peritus in the way of his business. ***When once it is determined that the evidence is admissible, the rest is merely a question of its value or weight, and this is entirely a question for the jury, who will attach more or less weight to it according as they believe the witness to be peritus****." (emphasis added)*

[25] This and later authority led the editors of the **Blackstone's Criminal Practice 2024** to opine:

"F11.5
The expert's competence or skill may stem from formal study or training, experience, or both."

[26] The Court also finds helpful the decision submitted by the respondent of the Privy Council in the case of the **State v Brad Boyce**[14] where the trial judge had ruled that a pathologist, Dr. Hughvon des Vignes was not qualified as an expert for the purpose of giving an opinion on the cause of death and that his evidence was inadmissible. Their Lordships agreed with the Court of Appeal that, per Lord Hoffman:

"[25]...the judge's exclusion of the evidence of Dr des Vignes was erroneous in point of law. ***He had concentrated entirely on whether the doctor had a paper qualification and ignored the possibility that he might, by reason of his knowledge and experience be able to assist the jury in determining the cause of death****.* ***It was true that his experience was still relatively limited but the jury had seen him give evidence both in chief and in cross examination and would no doubt take both his qualifications and experiences into account in estimating the weight of his evidence****." (emphasis added)*

[27] The respondent has correctly pointed out that both witnesses have over 15 years of practical experience in their prescribed fields. ASP Mortis had explained how he came to his opinion in conjunction with providing demonstrative evidence in OM1 and 2. There was no basis on the

[14] (2006) 68 WIR 437.

evidence for TLM to reject the evidence of either witness as experts. In any event the deeming of a witness as an expert is a finding of fact by TLM. The Court notes that it is only open to it to disturb TLM's findings of facts if they were plainly wrong, on the authority of the decision of the Court of Appeal in **Nevis Betancourt v R**[15], which spoke about factual findings of judges but would apply equally to magistrates, per Foster JA:

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

[15] Criminal Appeal No. 6 of 2019.

[28] In considering the issue of chain of custody the decision of the Eastern Caribbean Supreme Court in **R v Hodge**[16] is instructive, considered in the context of DNA evidence, per Baptiste JA:

> *"[12] The underlying purpose of testimony relating to the chain of custody is to prove that the evidence which is sought to be tendered has not been altered, compromised, contaminated, substituted or otherwise tampered with, thus ensuring its integrity from collection to its production in court. The law tries to ensure the integrity of the evidence by requiring proof of the chain of custody by the party seeking to adduce the evidence.* ***Proof of continuity is not a legal requirement and gaps in continuity are not fatal to the Crown's case unless they raise a reasonable doubt about the exhibit's integrity. There is no specific requirement, neither is it necessary, that every person who may have possession during the chain of transfer be called to give evidence of the handling of the sample while it was in their possession****. It is a question of fact for the jury whether or not there is reason to doubt the accuracy of DNA results because of the possibility that security or continuity of samples was not maintained." (emphasis added)*
>
> .

[29] *Hodge* was accepted in Belize in a very similar context involving fingerprint evidence in **Brian Clark et al v R**[17]**.**

[30] ASP Mortis testified of having received latent fingerprints on 1st December 2016 from Scenes of Crime officer Darlene Gabourel. He noted that the prints were labelled as lifted on 15th November 2016 by CST Lopez. He identified the latent print that was a match and stated how he was able do so. It was entered into evidence as OM2. CST Lopez was shown OM2 and identified it as the same print he collected from the van and placed on the fingerprint card. He explained to the court how he was able to make such identification, noting among other things his signature and the date of collection "15.11.16". TLM would have been justified in taking no issue with the chain of custody of the print and the subsequent analysis by ASP Mortis, there being no legal requirement for Ms. Gabourel to testify. There is no basis for this Court to interfere with the findings of fact of TLM.

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[16] (2010) 77 WIR 247.
[17] Criminal Appeal Nos. 9 and 10 of 2017 at paras 33-42.

[31] The Court finds no merit in this ground of appeal.

GROUND 2: The exercise of the discretion to adjourn.

[32] The Court has found instructive the decision of the Court of Appeal in **R v Jacinto Roches et al**[18] on the issue of the exercise of the discretion to grant an adjournment, per Awich JA:

> *"[29]* ***A decision to grant or refuse an application for adjournment is a discretionary decision, an appellate court should not interfere with it unless the discretion was not exercised judicially. Exercising the discretion judicially means that the trial judge must hear the applicant for adjournment, and hear the other party, and decide whether it is reasonable or not to grant the adjournment, based on the particular circumstances of the case****...*
>
> *[30] The usual important factors to consider in deciding an application for adjournment have been enumerated … Some of them are: the* ***importance of the case and the likely adverse consequence to the case of refusing adjournment; the risk of prejudice to the party making the application in the conduct of its case, if adjournment is refused; the risk of prejudice to the other party, if adjournment is granted; the extent to which the applicant for adjournment had been responsible for creating the difficulty which has led to the application for adjournment; and the interest of court in the efficient despatch of court business****. The list is not exhaustive, much depends on the circumstances of the case and the facts about which the adjournment is sought." (emphasis added)*

[33] The Court has found having regard to the circumstances of this case the exercise of the discretion by TLM cannot be said to be plainly wrong so this Court will not interfere. The matter was set for trial on the date that it proceeded. TLM considered that it was a 3-year-old matter. TLM considered the

[18] Criminal Appeal No 23 of 2013.

convenience of the witnesses who had attended as the matter was set for trial as she was enjoined to do by Rule 1.4(iii) of the CPR. TLM had given the appellant an opportunity to be heard and he offered no good reason for the absence of his attorney nor the absence of his disclosure, to which he is entitled to only 1 free copy[19]. Disclosure had been made to the defendant since 2017 and the matter had first been set for trial in December 2017 before the trial date in 2019. The Court is not going to take evidence from the bar table that it must have been that his copy of disclosure was with his attorney, as that certainly does not appear to have been indicated on the record. The conduct of the appellant by not having his counsel present and not having, nor applying for a replacement copy of his disclosure in advance of trial, when his matter has been set for trial is not to be encouraged. The CPR bears repeating:

> *"3.2 …adjournments shall be granted only if the Court is satisfied that:*
> *(i) There is good cause for an adjournment; and*
> *(ii) An adjournment is necessary in meeting the interests of justice.*
> *…*
> *3.4 Applications for an adjournment should be rigorously scrutinized with, in particular, the following factors to be taken into consideration:*
> *(i) Summary justice should be speedy justice;*
> *(ii) Delays are scandalous;*
> *(iii) The more serious the charge, the more the public interest demands that a trial take place;*
> *(iv) The age of the virtual complainant and any other significant witnesses;*
> *(v) Whether or not the refusal of an adjournment would compromise the Defendant's ability to fully present his defence; and*
> *(vi) The history of adjournments, at whose request any previous adjournments have been made and the reasons provided.*
> *…*
> *The overriding objective of these Rules is the just and expeditious disposal of cases. This cannot be achieved by the Court readily granting adjournments without good cause being shown.*
> *…*

[19] Rule 5.8 of the CPR.

This Part applies equally to cases in which a Defendant's attorney has failed to attend. In line with Rule 4.6(vii), an attorney is obliged to notify the Court immediately should they become aware of a conflicting fixture. A defendant is not entitled to repeated adjournments to secure the right to legal representation;"

[34] TLM would have certainly considered the consequences of the refusal of the adjournment, and she equipped him with a copy of the disclosure and allowed him to cross-examine the witnesses for the prosecution. The Court also finds instructive the decision of the Court of Appeal in **Marvin Cruz Reyes v R**[20] which was helpfully provided by the respondent. That appellant advanced the ground that the learned Trial Judge erred when he failed to advise him of the importance of obtaining legal representation for his trial and failed to adjourn the trial to enable representation to be obtained, per Ducille JA:

"[17] It cannot be overlooked that the particulars of the charge concerned the 26th day of August, 2007 and the trial commenced on the 6th day of November, 2013. By a simple calculation this was in excess of five years from the time of his arrest, the Appellant would have become acquainted with his right to have counsel of his choice. It is shocking that a ground of this nature would now be advanced by counsel for the Appellant. We see no merit in this ground given these circumstances."

[35] The Court would also rely on the decision of the Court of Appeal in **Thurton v R**[21], where there were similar issues, per Awich JA:

"[26] Regarding the right of the appellant to be permitted to defend himself in person or at his expense, by a legal practitioner of his choice, the Chief Justice adjourned the trial on 1 February 2012 to 2 February 2012 and then to 27 February 2012. It became clear that the appellant and his mother were unable to raise money to retain an attorney. ***He had been charged one year and six months earlier and was on bail. He had ample time. In the circumstances, the Chief Justice was entitled to exercise his discretion to proceed***

[20] Criminal Appeal No. 13 of 2019.
[21] (2017) 91 WIR 141.

with the trial even when the appellant did not have an attorney to represent him. The appellant had adequate time for the preparation of his defence and had been permitted to defend himself in person or at his own expense by a practitioner of his choice. The discretion by the Chief Justice could only be faulted if it could be shown that it was exercised unreasonably*."(emphasis added)*

[36] The appellant here had more time than the one in *Thurton*.

[37] This ground of appeal is without merit.

ISSUE: Did the Court assist the appellant appropriately in the conduct of his trial.

[38] The burden on a judicial officer to assist an unrepresented defendant was considered by the apex court, the Caribbean Court of Justice ("the CCJ") in the Barbadian case of **Bynoe v The State**[22]. In that case the CCJ held that the statement of law by the Barbadian Court of Appeal was "erudite" and "without error[23]". The Barbadian Court of Appeal held on this issue, which this Court submits would be the same for magistrates as it is for judges, per Reifer JA:

"[55] … the burden on a trial judge where an accused is unrepresented is extremely heavy. We have therefore attempted a non-exhaustive list of the duties of a trial judge in such circumstances which we hope will be of assistance and guidance to trial judges.

[56] The well-established principle is that where persons on trial are not represented, they should have the maximum assistance possible from the court ...The trial judge performs his duties by informing the accused of his rights in relation to the conduct of the trial and by giving him such information as is necessary to enable him to have a fair trial. This is a wide and general directive to which we attempt to give particularity below. These (non-exhaustive) duties are as follows:

(a) To protect the interests of an unrepresented accused and to give him such assistance as is necessary for the proper conduct of his defence…;

[22] (2023) 101 WIR 78.
[23] Para 6.

(b) To ensure that the accused understands the nature of the charge and the general effect of the plea before accepting a guilty plea…;

(c) To ensure that the unrepresented accused has the necessary time to prepare their defence, including time to study the depositions…;

(d) To make a note of any applications for adjournments and the manner in which they are disposed of…;

(e) To ensure that confession statements made by the accused were made voluntarily... However, an appellant's lack of legal representation cannot serve to render unfair the admission into evidence of a statement properly obtained from him…

(f) To assist the accused in entering evidence before the court…;

(g) In circumstances where an application for discharge might succeed, such as where prejudicial information is put before a jury, the judge is under a duty to inform the accused …;

(h) To give proper directions to the jury on summing up the trial, particularly as it relates to (but not limited to)

(1) Identification evidence in accordance with…R v Turnbull [1976] 3 All ER 549…;

(2) Putting the defence of the unrepresented accused;

(i) Not to make negative comments concerning the accused's defence or express disbelief in the evidence of an accused or witness…Nonetheless, the judge is entitled to express a view on the facts and express it in strong terms, provided it is made clear to the jury that it decides the issues of fact…The overall watch words are even-handedness, balance, impartiality, all of which encompass the standard of fairness;

(j) Not to receive prejudicial information about an unrepresented accused in his absence and behind closed doors as this may give rise to a possibility of substantial injustice…"

[39] This advice was largely echoed by the Court of Appeal in *Thurton*, per Awich JA:

"[32] The objective of criminal case proceedings is to reach a verdict by a fair trial. That is the requirement in s 6 of the Constitution. It is the duty of the trial judge to achieve that objective, whether the accused is represented by counsel or not. ***Where the accused is unrepresented, the duty of the trial judge is more demanding; it imposes on him***

responsibilities to: assist the accused by informing him of his relevant rights, explaining the relevant procedures, assisting the accused in putting questions to witnesses, especially in cross-examination, and generally putting forward the defence that the unrepresented accused wishes the court to consider. *But the judge must do that 'without either descending into the arena on behalf of the defence [the accused] or, generally speaking, putting any sort of positive case on behalf of the defence, this is a difficult tight-rope for the trial judge to walk'*

…

[33] This court (Mottley P, Sosa and Carey JJA) adopted that principle in Ochoa v R (Criminal Appeal Case No 1 of 2007, 13 March 2008, unreported). The court, in its judgment prepared by Carey JA, explained the duty of a trial judge and its limit in these words:

*'6. …**There is no question that the judge's clear duty is to give such assistance to unrepresented defendant as is appropriate in the circumstances**. That, we apprehend, does not mean that the judge must bend over backwards, or to use the words of Lord Bingham CJ [in R v Brown (Milton) [1998] 2 Cr App Rep 364], "give the defendant his head to ask whatever questions, at whatever length, he wishes".*

…

*8. The duty of a trial judge where an accused person is unrepresented is to assist him to ensure that the jury understand the defence being put forward. He is not to act as defence counsel. **Clearly he will assist the accused to put questions in cross-examination, having ascertained the point or the issue the accused wishes to address, within the bounds of relevance. This duty to assist an unrepresented accused includes assistance in putting forward his defence in intelligible terms** …'" (emphasis added)*

[40] The respondent has also helpfully referred to the Court of Appeal decision of *Guzman*, per Awich JA:

*"[53] The law as stated in Jose Ochoa v The Queen is that: "the duty of a trial judge where an accused is unrepresented is to assist him to ensure that the jury understands the defence being put forward." **This does not mean that, the judge has to come up with the defence***

in the first place; that is for the accused, if he chooses to do. *The judge, "is not to act as defence counsel"…*

*[54] Regarding the submission that, at the end of each examination in chief the judge did not assist by putting questions to the witnesses in cross examination, our decision is that****, the judge had no duty to originate questions in cross-examination, it is for the accused, if he chooses, to put forward the original question, which the judge may assist him with in putting it in a way that conveys his defence****…*

[55] ***Regarding the submission that, the judge did not elicit from the accused, in the absence of the jury, what his defence would be, we would like to observe that, it is a fine line between merely assisting the accused in order to ensure a fair trial, and acting as a defence counsel. A judge is an umpire, he must be careful not to descend onto the arena. How far a judge can assist an accused depends on the particular circumstances in the proceedings. In this case, the accused did not intimate at all, what his defence might be****.* ***The judge would be crossing the line by initiating a defence for the accused. The trial judge in this case did not err****.*

[56] We also concluded that, given that the accused preferred to remain silent about any defence, the trial judge, if he initiated questions and possible defence, would have been exerting undue pressure to get the accused to abandon his right to silence. That would be improper. The judge did not err in not pointing out to the accused that the evidence for the prosecution remain uncontradicted*." (emphasis added)*

[41] In this case the key evidence against the appellant was the expert opinion evidence of the fingerprint analysis done by ASP Mortis. The Court observes that when an application was made to have CST Lopez give expert testimony as to crime scene processing there is a note on the record of appeal that the appellant was asked if there was any objection to him being deemed an expert to which he indicated no[24]. There is no note of a similar procedure being done in relation to the evidence of ASP Mortis[25]. There was no record of an opportunity being given to the appellant to make any submission on whether ASP Mortis was qualified to give crucial opinion evidence of the fingerprint comparison.

[24] P 6 of the notes of evidence.
[25] P 3 of the notes of evidence.

[42] The Court notes the provisions of section 44(5) of the **Summary Jurisdiction (Procedure) Act**[26] ("SJPA"):

> "*The magistrate shall in every case take notes in writing of the evidence, or of so much thereof as is material, in a book to be kept for that purpose, and the book shall be signed by the magistrate at the conclusion of each day's proceeding, Provided that, if the magistrate is from any cause unable to take the notes, they may be taken by the clerk under his direction."*

[43] This identical provision existed in Trinidadian legislation and it was considered by that Court of Appeal in **Abiram v Ramjohn**[27] where they held that if in the course of evidence material facts occurred, if they were not recorded the appellate court reviewing the record would not assume that those things happened in light of the statutory duty on the magistrate to make note of material evidence, per Wooding CJ:

> *"The matter had been referred back because of statements which were made the last time the matter came before this court in order to ascertain from the magistrate precisely what took place. He sent us a report in which he states that quite a lot of evidence was given on oath before he made his committal orders. But he also states that none of that evidence appears to have been taken down by the clerk whose duty it was to record it.*
>
> *…*
>
> ***The failure to do this in our view precludes this court from assuming that evidence was given in the proper way before the magistrate himself.*** *And although nothing that we say must be taken to imply any suggestion on our part that the magistrate has sought in any way to misrepresent the facts to us,* ***we consider that it would be an extremely dangerous precedent if we neglected to bear in mind the provisions of the Ordinance to which I have referred and if we proceeded on the footing that evidence was given in fact although none was recorded. In view of the statutory provisions, we must***

[26] Chapter 99 of the Substantive Laws of Belize, Revised Edition 2020.
[27] (1964) 7 WIR 208 at ps 209-210.

***proceed in this case on the footing that no evidence was given before the magistrate which was considered at all material**." (emphasis added)*

[44] Identical Guyanese legislation was considered by their Court of Appeal in the case of **Canterbury v Joseph Police Constable**[28], per Crane JA, as he then was:

> *"Magistrates are statutorily enjoined to take notes of evidence in all cases before them, for it is only by the taking of proper notes of the evidence can the cause of justice be served on a review of their decisions in the court of appeal.*
>
> *…*
>
> *It is important to observe that a magistrate must take evidence in every case, that is to say, whether the case is fought out or not.* ***Evidence means evidence which is sworn or unsworn, and includes facts narrated by the prosecutor and the statement of a defendant on a plea of guilty.***
>
> *…*
>
> ***There can be no short cut to the laborious task of the recording of evidence in any case. A proper note in writing must always be taken if the injustice which is patent on the record of these proceedings is to be avoided in the future**." (emphasis added)*

[45] The Court notes the heavy burden on a judicial officer when conducting a trial with an unrepresented defendant. The magistrate need not make a defence for him, nor originate his defence or cross-examination as noted in *Guzman*. However, the magistrate has a duty to hear both sides on the qualification of a witness to give expert evidence and more importantly invite any objection to those qualifications. It cannot be assumed that the appellant knew he had the power to object. It also cannot be assumed that he was given the opportunity to object in the absence of TLM making the appropriate endorsements on the record pursuant to her statutory duty under the SJPA. Again, it is no part of the magistrate's duty to record every iota of detail in a court hearing and the SJPA does not require that but she is under a duty to record what is material. This was a highly material event from a highly material witness, and TLM was under the added duty to assist. This issue would have

[28] (1964) 6 WIR 205 at p 206.

affected the outcome of the proceedings. In that regard, the Court finds that there is merit in this ground of appeal.

[46] The Court would go further to indicate that though it is bound by *Guzman*[29], as it is a decision of the Court of Appeal, it wonders whether in the case of an unrepresented defendant it would be "crossing the line" for the magistrate to ask him what his defence is as part of the robust case management process envisioned by the CPR and the duty to identify early on what are the issues in the trial[30] and the duty of the judicial officer to assist him in presenting his defence in "intelligible terms"[31]. It begs the question how is the judicial officer to assist the defendant with putting forward his defence if he does not know what it is by asking him. In that regard the English Queen's Bench decision of **Malcolm v DPP**[32] is instructive. There that court considered the duty to identify issues under their procedural rules which are similar to the CPR, in the context of the defence case, per Stanley Burnton J:

> *"[31]…**Criminal trials are no longer to be treated as a game, in which each move is final and any omission by the prosecution leads to its failure. It is the duty of the defence to make its defence and the issues it raises clear to the prosecution and to the court at an early stage. That duty is implicit in r 3.3 of the Criminal Procedure Rules 2005, SI 2005/384, which requires the parties actively to assist the exercise by the court of its case management powers, the exercise of which requires early identification of the real issues**.*
>
> *…*
>
> *[34] I refer also to para 154 of Ch 10 of the Report of the Criminal Courts Review (October 2001), which was cited with approval by the Court of Appeal in R v Gleeson [2003] EWCA Crim 3357 at [36], [2004] 1 Cr App Rep 406 at [36]:*
>
> *'**it is understandable why as a matter of tactics a defendant might prefer to keep his case close to his chest. But that is not a valid reason for preventing a full and fair***

[29] Para 55.
[30] Rule 4.1(i): *"The Court shall actively manage cases in pursuit of delivering justice and ensuring that the delivery of justice is fair, timely and efficient, including by: (i) the early identification of the issues;"*
[31] *Thurton* at para. 33.
[32] [2007] 3 All ER 578.

hearing on the issues canvassed at the trial. A criminal trial is not a game under which a guilty defendant should be provided with a sporting chance. It is a search for truth in accordance with the twin principles that the prosecution must prove its case and that a defendant is not obliged to inculpate himself, the object being to convict the guilty and acquit the innocent. Requiring a defendant to indicate in advance what he disputes about the prosecution case offends neither of those principles*.'"(emphasis added)*

[47] The Court submits that the position in *Malcolm* is applicable in Belize, even though our Rule 4.1(i) omits the use of the word "real" in front of issues. The spirit and the intendment of the CPR is for the just trial of matters and justice is for both sides as the CCJ held in **Bennett v R**[33]. In that regard this Court wonders if it is not part of the duty of a judicial officer in the case of an unrepresented defendant in case management to enquire from a defendant what his defence is so that they can assist him in putting it.

[48] In this case which was after the coming into force of the CPR, with due deference to magistrates who have long lists and challenging working conditions, there is little on the record to identify assistance given by TLM to the appellant other than what would be observed in a trial with an attorney. There is no record of any assistance in framing questions, or putting his case to the prosecution witnesses. There was no discussion of what, if any, defence the appellant had nor how to put it.

[49] The Court finds in all these circumstances that the appellant did not get the effective assistance the law required he be given in terms of being given an opportunity to object to the propriety of deeming ASP Mortis an expert. Consequently, the Court would quash the conviction and sentence.

Disposition

[50] The Court has found merit in the last issue outlined above which in its view makes the conviction of the appellant unsafe and unsatisfactory. The appeal is allowed, and the conviction and sentence are

[33] (2019) 94 WIR 126 at para 4.

quashed. The Court has considered the principles governing the discretion to order a retrial set out in the Jamaican Privy Council case of **R v Reid**[34] and is of the view that the interests of justice require a retrial owing to the following factors:

i. This is a serious and prevalent charge; and
ii. The case against the appellant is strong.

[51] The Court notes that this is a 2016 allegation and is mindful of its constitutional obligation to protect the appellant's right to trial within a reasonable time. The Court however in doing the constitutional weighing process which needs to be done as noted by the CCJ in **Solomon Marin Jr. v R**[35] finds that the public interest demands that this case be re-tried. The Court will however order that the retrial and sentencing, if convicted, of this appellant be completed within 2 years of the date of this judgment or the prosecution is to be permanently stayed.

[52] The Court also orders that the matter be remitted for trial before a different magistrate.

[53] The Court orders each party to bear its own costs.

Nigel C. Pilgrim
High Court Judge
Criminal Division
Central District
Dated 9th May 2024

[34] (1978) 27 WIR 254 at paras 104-112.
[35] [2021] CCJ 6 (AJ) BZ.