IN THE COURT OF APPEAL OF BELIZE AD 2017

CRIMINAL APPEAL NO 4 OF 2012

AKEEM THURTON	Appellant
v	
THE QUEEN	Respondent

BEFORE

The Hon Mr. Justice Dennis Morrison	Justice of Appeal
The Hon Mr. Justice Samuel Awich	Justice of Appeal
The Hon Mr. Justice Christopher Blackman	Justice of Appeal

Appearances:
N. Anderson and Bryan Neal for the appellant.
C.B. Vidal SC, DPP and S. Maharaj, Crown Counsel, for the respondent.

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20 March 2015 and 16 June 2017.

AWICH JA

[1] The appellant, Akeem Thurton, was tried in the Supreme Court of Belize from 27 February to 15 March, 2012, by the Learned Chief Justice Kenneth Benjamin, on an indictment for attempt to murder, contrary to s. 18 read with ss. 107 and 117 of the Criminal Code, Chapter 101 of Laws of Belize. The learned Chief Justice sat alone without a jury. In Belize trial on indictment had been before a judge and jury until Act

No. 5 of 2011 amended the Indictable Procedure Act, Cap. 96, by introducing s. 65 A which directed that, trial on indictment for certain offences, including attempt to murder, shall be, “before a judge sitting alone without a jury”.

[2] Mr. Thurton was not represented by an attorney at the trial. On 15 March, 2012 he was convicted on the single count of attempt to murder, and on 30 March, 2012 he was sentenced to 15 years imprisonment, commencing on that date. He had been on bail until that date. The bail had been granted on 29 October, 2010 following his arrest and detention on 6 June, 2010. So, he had been on remand in custody for 3 months and 23 days.

[3] On 3 April, 2012 the appellant appealed against the conviction and sentence. He simply filed a notice of appeal without specifying any ground of appeal. Subsequently, two years nine months after, in January 2015, the appellant obtained attorneys who formulated 20 grounds of appeal. They styled the grounds, “Supplemental grounds”. The attorneys properly applied for and obtained leave to file and argue the grounds.

[4] The prosecution case which the Chief Justice accepted is short. On 31 May, 2010 about 7.20 pm. Mr. Rodwell Williams, an attorney, together with a bodyguard Mr. Garbutt, exited his office on Albert Street, Belize City, and were proceeding to a parking lot where Mr. Williams’ car was parked, when two men on bicycles rode casually past. The men suddenly stopped, alighted their bicycles, turned round and faced Williams and Garbutt. One of the men threw down his bicycle, rushed and grabbed and grappled with Garbutt. The other man held his bicycle by the handle bar by one hand, drew a hand gun with the other hand and pointed it at Williams. He was about 12 feet away from Williams who stood still. The man raised his arm and gun to shoulder level and said: “Why don’t you give the man what he came for?” Williams replied that, they had no firearm. The man levelled the gun and shot Williams in the left side of the belly. Williams dropped to the ground. The man turned round the bicycle, got on it and rode away. In a moment people gathered at the scene.

[5] A police officer who was on patrol arrived and rendered help. Williams was conscious. He was rushed to the hospital. Because death was imminent doctors commenced surgery immediately without administering anesthesia. They carried out 5 operations, one after another, and were able to stop bleeding. Williams arrived at the hospital conscious, and was in and out of a coma during the early part of the surgery. Doctors assessed his chance of surviving at 10%. He was transferred by Air Ambulance to Jackson Memorial Hospital in Miami, Florida, USA where he underwent further treatment. He remained an inpatient until 1 September, 2010 and thereafter as an outpatient until 20 November, 2010.

[6] On 6 June, 2010 the appellant was arrested and charged with, among other offences, attempt to murder, under s. 18 read with ss. 107 and 117 of the Criminal Code. On 28 September, 2010 Williams identified Akeem Thurton, the appellant, at a police identification parade, as the person who shot him on 31 May, 2010. On 29th October, 2010 the appellant and one, Ricky Valencio, were released on bail. On 22 February, 2012 Valencio was reportedly killed. At the trial the appellant suggested that, it was Valencio who shot Williams.

[7] The particulars of the offence of attempt to murder for which Thurton was tried and convicted were these: "Akeem Thurton and another, on 31 day of May, 2010 in Belize City, in Belize District in the Central District of the Supreme Court, attempted to murder Rodwell Williams, SC."

[8] At the scene during the incident on 31 May, 2010 there were street lights, but the scene of crime police officer had to use a flash light to gather small items of evidence. There was no one or anything between the shooter and Williams. The shooter wore a cap, but the peak was turned to the side, and his face was not covered. The incident took 2 minutes.

The grounds of appeal.

[9] The 20 grounds of appeal are the following:

“1. The enactment of the amendments to the Indictable Proceedings Act and the Juries Act failed to comply with the provisions of the Constitution and constitutional conventions and are unconstitutional, null and void.

2. The learned trial judge erred in applying the amendments set out in paragraph/ground 1 to the Appellant’s trial as the application was retrospective and contrary to law as it applied to alleged acts done by the Appellant before the enactment of the legislation/amendments and his trial is therefore a nullity and his conviction should be quashed.

3. The appellant was denied constitutional right to a fair hearing, within a reasonable time before an independent and impartial tribunal as his trial was before a judge alone and not a jury of his peers.

4. The learned trial judge erred when he failed to advise the Appellant of the importance of obtaining legal representation for his trial and failed to adjourn the trial to enable representation to be obtained.

5. The Appellant was denied his constitutional right to a fair trial as he was unrepresented, was offered no legal representation and was treated unequally under the law.

6. The learned trial judge failed to adequately inform the Appellant of his right to call witnesses in his defence and failed to take appropriate steps to enable any such defence witnesses to be called.

7. The leaned trial judge failed to offer proper assistance to the Appellant during his trial as he was unrepresented and the learned trial judge failed to provide sufficient explanations and information as to Appellant’s rights, as there is a duty on a trial judge to advise and assist a self-represented accused.

8. The learned trial judge erred in allowing the Prosecution to treat witnesses **CATHERINE MICHAEL** and **KYLON ARNOLD** as hostile and to cross-examine them on their statements to the police.
9. The learned trial judge erred in not taking judicial notice of the publicity surrounding the case; the publication of the Appellant's photograph on the front page of several newspapers between his arrest in early June 2010 and the holding of the identification parade on September 28, 2010 and the probability of the witness R. Williams, having seen the photographs.
10. The learned trial judge erred in allowing evidence of the identification parade on September 28th, 2010 to be adduced in view of the wide spread publication of the appellant's photograph in June, July, August and September 2010.
11. The learned trial judge erred in accepting the evidence that a proper identification parade was conducted as the Form allegedly signed by the Appellant was not tendered and Mrs. Thurton who was presented was not called to give evidence.
12. The learned trial judge erred in failing to consider 'joint enterprise' as the Appellant's purported caution statement could be interpreted to read that he was saying he was not the shooter but was present at the time of the shooting.
13. The learned trial judge erred as he failed to give and apply an adequate Turnbull direction with respect to the evidence of identification of the Appellant.
14. The learned trial judge erred in holding a voir dire concerning the admissibility of the Appellant's alleged statement to the police, as he was both the judge of the law and facts.
15. The learned trial judge erred in admitting the cautioned statement of the Appellant as the prosecution had failed to prove, beyond reasonable doubt, that it was voluntarily given, in view of the

evidence of the Appellant and his witness that he was beaten before the statement was given.

16. The learned trial judge erred in admitting into evidence a typed copy of the alleged cautioned statement of the Appellant instead of the original handwritten copy, signed by the Appellant.
17. The learned trial judge's directions on attempted murder contained misdirections and non-directions, were inadequate and inaccurate and therefore the conviction cannot stand.
18. The learned trial judge erred in finding that the prosecution had proved beyond a reasonable doubt an intention by the Appellant to kill merely because the injury was serious and erred in failing to find that the only intent may have been shooting.
19. The learned trial judge failed to state and consider in his judgment, the proper good character direction both in support of the Appellant's credibility and in support of a submission that he did not have a propensity to commit crimes.
20. The sentence was excessive in the circumstances, particularly as to the age of the Appellant, the fact that he had no previous convictions, his good character and the involvement in the offence of another, older person."

The Constitutional Grounds:

(a) (i). Act No. 5 of 2011, that abolished trial by jury on indictment for attempt to murder.

[10] The first ground of appeal was that: "the amendments to the Indictable Procedure Act and the Juries Act failed to comply with the provisions of the Constitution and constitutional conventions, and are unconstitutional, null and void." The submission of learned counsel Ms. Anderson for the appellant, was that, the amendments removing trial by jury were together a contravention of the constitutional fundamental right of, "protection of the law," in s. 6 (2) of the Constitution.

[11] Ms. Anderson argued that, trial by jury was a historical right and should be read into s. 6 of the Constitution as part of the right to a fair trial (a fair hearing), itself part of the right to equal protection of the law, guaranteed by that section; and further argued that, legitimate expectation to the right to trial by jury had accrued to the public, there ought to have been wide public consultation before trial by jury was abolished for the offences mentioned.

[12] We reject the first submission for the reason that, the Constitution of Belize does not include or imply trial by jury as a constitutional fundamental right. ***Section 6*** provides broadly for the right to equal protection of the law, and states several important features of a fair hearing, which is the cornerstone of the right to equal protection of the law. Trial by jury is not mentioned or implied. The phrase, "a fair trial," is commonly used in place of "a fair hearing" the phrase used in s. 6. The section states as follows:

> **6.-(1) All persons are equal before the law and are entitled without any discrimination to the equal protection of the law.**
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> **(2) 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 by an independent and impartial court established by law.**
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> **(3) Every person who is charged with a criminal offence -**
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> **(a) shall be presumed to be innocent until he is proved or has pleaded guilty;**
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> **(b) shall be informed as soon as reasonably practicable, in a language that he understands, of the nature and particulars of the offence charged;**

(c) shall be given adequate time and facilities for the preparation of his defence;

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

(e) shall be afforded facilities to examine in person or by his legal representative the witnesses called by the prosecution before the court, and to obtain the attendance and carry out the examination of witnesses to testify on his behalf before the court on the same conditions as those applying to witnesses called by the prosecution; and

(f) shall be permitted to have without payment the assistance of an interpreter if he cannot understand the language used at the trial,

and except with his own consent the trial shall not take place in his absence unless he so conducts himself as to render the continuance of the proceedings in his presence impracticable and the court has ordered him to be removed and the trial to proceed in his absence:

Provided that the trial may take place in his absence in any case in which it is so provided by a law under which he is entitled to adequate notice of the charge and the date, time and place of the trial and to a reasonable opportunity of appearing before the court.

(4) A person shall not be held to be guilty of a criminal offence on account of any act or omission that did not, at the time it took place, constitute such an offence, and no penalty shall be imposed for any

criminal offence that is severer in degree or description than the maximum penalty that might have been imposed for that offence at the time when it was committed.

(5) A person who shows that he has been tried by a competent court for a criminal offence and either convicted or acquitted shall not again be tried for that offence or for any other criminal offence of which he could have been convicted at the trial for that offence, save upon the order of a superior court in the course of appeal or review proceedings relating to the conviction or acquittal.

(6) A person who is tried for a criminal offence shall not be compelled to give evidence at the trial.

[13] We have already stated that s. 6 does not mention trial by jury, we shall note here that, in contrast, **s. 20 of the Constitution of the Bahamas 1973**, does. The people of the Bahamas in 1973 considered that, the historical right to trial by jury was so fundamental to them, and so they included it in their constitutional fundamental rights. The people of Belize did not consider so. They did not include the historical right to trial by jury in their constitutional fundamental rights in their Constitution in 1981.

[14] In further contrast to the Constitution of the Bahamas, the Constitution of Gibraltar (a common law country) did not include trial by jury in the constitutional fundamental rights of the people of Gibraltar. In an appeal from Gibraltar to the Privy Council, ***Pilar Aida Rojas v Brain Berllaque [2003] UKPC 76,*** the Privy Council stated at paragraph 11 that:

> *"Trial by jury is not a constitutional right in Gibraltar. But that difference is immaterial for present purposes. The Constitutional guarantee of a fair trial in Gibraltar applies to whatever form of trial is adopted in a particular case.*

If the form is jury trial, the method by which the jury is selected must be a method which will accord citizens a fair trial."

[15] So, the *sine qua non* of the constitutional fundamental right to protection of the law and in particular, "fair hearing", is fairness, not trial by jury. For instance, there is no guarantee that, a trial (a hearing) by jury will be fair where in a judicial district the population of the people who qualify for jury service is too small, or where intimidation is rife, or where there is strong party politics divide. Trial by jury could not have been fair trial in apartheid South Africa.

(a) (ii) Legitimate expectation to the right to jury trial.

[16] Assuming that legitimate expectation to a jury trial had accrued, it might have been a wise thing to consult the general public when it was proposed to abolish jury trial. It is always a wise action to consult the general public when it is proposed to change, by legislation, a right which has accrued over a long time. However, it must be remembered that, generally public consultation is not a constitutional procedural requirement for enacting a law – compare ***The Prime Minister of Belize and the Attorney General v Alberto Vellos and Others [2010] UKPC 7.*** Consultation must clearly be provided for in the Constitution or other legislation, if it is to be a procedural requirement in enacting a law.

(b) The question of retrospectivity of Act No. 5 of 2011.

[17] Ms. Anderson also argued that, Act No. 5 of 2011 was retrospectively applied in the trial of the appellant. The incident for which the appellant was indicted and tried occurred on 31 May, 2010, Act No. 5 of 2011 was passed on 5 July, 2011 so, the Act which introduced trial by a judge without jury was applied to the trial of the appellant retrospectively. She argued that, this was contrary to the principle of the rule of law, and to article 15 (1) of the International Covenant on Civil and Political Rights, 1983; the error must render the trial a nullity.

[18] Article 15(1) of the Covenant provides:

> "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed."

[19] The Covenant was acceded to by Belize on 10 June, 1996. Even assuming that the provisions of the Covenant became part of the Domestic Law of Belize, the provisions of Article 15(1) would not be applicable to the facts of this case, notwithstanding, because the rule in s. 6(4) of the Constitution and in the common law, and in Article 15(1) of the Covenant, against retrospective legislation does not apply to legislation regarding procedural law. Act No. 5 of 2011 did not introduce a new offence or a new form of the offence of attempt to murder, or introduce a new and more severe penalty for the offence of attempt to murder. The offence of attempt to murder and the penalty for it existed in the same form as on 31 May, 2010 when Williams was shot. So, s. 6 (4) of the Constitution which prohibits charging and finding a person guilty for an act which had not been an offence at the time of the act, and prohibits punishing the person more severely, would not apply.

[20] Act No. 5 of 2011 simply changed the procedure of trial for the offence of attempt to murder. The change came after the shooting of Williams on 31 May, 2010. So, one could describe it as retrospective. But there is no general law or presumption of law that, a legislation changing a law of procedure shall not apply retrospectively. It is a matter of the date given in the legislation for the commencement of the new procedure law. An accused has no vested right to any particular procedure, but the procedure applied must be a fair one.

[21] In ***Hilroy Humphreys v The Attorney General of Antigua and Barbuda [2008] UKPC***, the Privy Council rejected the submission that, when the preliminary inquiries procedure was abolished in Antigua and Barbuda and the court did not apply preliminary inquiries procedure to the pending case of the appellant, he was

retrospectively deprived of the procedural protection to which he had been entitled at the time he was charged. In their opinion delivered by Lord Hoffman, their Lordships stated:

> *"The law deals with retrospectivity at two levels. First, a court will generally not construe legislation as intended to operate retrospectively if doing so would have an unfair result. The leading authority on this doctrine is the speech of Lord Mustill in L'Office Cherifien des Phosphates v Yamashita Shinnihon Steamship Co. Ltd [1994] 1 AC 486 at pp. 523-529. From the authorities examined by Lord Mustill, it would appear that the presumption will rarely, if ever, apply to changes in court procedure. Prospective litigants (or defendants in criminal proceedings) do not have a vested right to any particular procedure, and there will general be nothing unfair in applying whatever procedure is in force when the case comes to court. It is however, unnecessary to examine the scope of the doctrine because on any view it is a principle of construction which must yield to the express language of the statute. In this case the language of the statue could hardly be clearer."*

[22] There is no doubt that the date of commencement, 1 August 2011, of Act No. 5 of 2011 was stated in the Act, there cannot be any presumption about it. The Act was applicable when the trial of the appellant commenced on 27 February, 2012 because the rule about retrospectivity does not apply to procedural law. Act No. 5 of 2011 applied to the trial. For these reasons we reject the complaint that Act No. 5 of 2011 was applied to the trial of the appellant erroneously and contrary to the Constitution.

(c) Is there a special constitutional right of unrepresented accused?

[23] Much was argued by Ms. Anderson about grounds Nos. 4, 5, 6 and 7. Briefly, they were that, the trial of the appellant was an unfair trial and was unconstitutional because: the appellant was unrepresented by counsel at the trial; the Chief Justice

failed to advise the appellant of the importance of obtaining counsel, and failed to adjourned the trial for that purpose, or to offer an attorney to represent the appellant, the appellant was treated unequally under the law. Further that, during the trial the Chief Justice, "failed to adequately inform the appellant of his right to call witnesses in his defence and failed to take steps to enable the appellant to call the witnesses"; and the Chief Justice, "failed to offer proper assistance during the trial, to the unrepresented appellant, he did not provide sufficient explanations and information regarding the rights of the appellant in the course of the trial."

[24] The learned Director of Public Prosecutions Ms. Vidal SC, for the Crown, countered that, the right of an accused to representation by a legal practitioner was not an absolute right, he has a right to be afforded time to obtain a practitioner of his own choice, at his own expense. The appellant was afforded time, she submitted.

[25] Most of the factual basis of the complaints in the grounds of appeal were incorrect. It is incorrect to state that the Chief Justice did not inform the appellant that, he had the right to call witnesses, and did not assist in getting them to court. He did; first at the *voir dire* moment, and then at the close of the prosecution case – see the record of proceedings at pages 168, 177, 244 and 245. When the Chief Justice asked the appellant whether the appellant wished to call witnesses, the appellant responded by calling his mother as a witness. The Chief Justice asked if the appellant had more witnesses. He said, he did not.

[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 1 year and 6 months earlier and was on bail. He had ample time. In the circumstances, the Chief Justice was entitled to exercise his discretion to proceed 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. The appellant has not shown any unreasonableness - compare to ***R v Joseph Walker [1496] 15 WIR 355.***

[27] In Belize the constitutional right regarding representation of an accused by counsel in court is limited to being permitted, that is, afforded opportunity to obtain, at his own expense, a legal practitioner of his own choice. "There is no constitutional right to be provided with a legal practitioner at the expense of the State, even when an accused is faced with a serious charge such as in this case. It is clearly desirable in deserving instances that a trial judge make a request for the State to assist an accused with the costs of obtaining counsel. But failure of the State to assist financially cannot be regarded as a denial of a constitutional right, and form the basis of nullifying a trial. Judges do make the request for legal representation of an impecunious accused well aware that, they have no constitutional basis to commit the State to such financial expense.

[28] Responsibility for the finance of the Sate rests with the Executive. Currently, judges are limited to assigning counsel only where an impecunious accused is charged with a capital offence – see ***s. 194 of the Indictable Procedure Act, Cap. 96***. The submission that, it is a constitutional fundamental right of an accused charged with a serious crime, to be provided with a legal representative at the expense of the State has failed before in the Privy Council in, ***Richard Hinds v The Attorney General and Another Privy Council Appeal No, 28 of 2000***, an appeal from the Court of Appeal of Barbados. In their opinion at page 11, speaking about s. 18 (2) (d) of the Constitution of Barbados which is similar to s.6 (3) (d) of the Constitution of Belize, their Lordships stated this:

> *"Section 18 (2) (d) protects the rights of a criminal defendant to defend himself before the Court either in person or by a legal representative whom he has chosen. But this right is to be interpreted in the light of s. 18*

(12): such a defendant has no entitlement to be professionally represented at the expense of the public."

The duty of the judge to assist unrepresented accused.

[29] Again much argument was made by Ms. Anderson about what she perceived as, failure by the Chief Justice to advise and inform the accused of his rights, and about the applicable law and rules of procedure. On the other hand, much argument was made by Ms. Vidal SC, about the Chief Justice having carried out correctly his duty to assist and inform the appellant.

[30] We shall begin by making an observation that, even a professional practitioner may, in hindsight realize that, in the course of a trial he omitted to advance some points. It is unrealistic to pick on every omission by a trial judge without regard to its effect on the fairness of the entire trial, or whether the trial has otherwise resulted in a conviction which is unsafe. Our concern will be to identify omissions to assist and any shortcoming in the assistance rendered by the Chief Justice, and to see whether they resulted in a trial which was not fair, or in a conviction which was otherwise unsafe.

[31] We are an appellate court, our hearing is in the nature of a review. Our consideration should start with examining whether the Chief Justice understood correctly the principle regarding the duty of a trial judge in a trial where an accused is not represented by counsel, and proceed to examining whether if he understood the principle, the Chief Justice applied it correctly in the course of the trial.

[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, it is a difficult tight-rope for the judge to walk,"* said Rose LJ in, ***De Oliveira [1997] Crim. L.R. 600***, in the Court of Appeal (England and Wales).

[33] This Court (Mottley, P, Sosa and Carey JJA) adopted that principle in ***Jose Ochoa v The Queen, Criminal Appeal Case No. 1 of 2007***. The Court, in its judgment prepared by Cary JA explained at paragraph 6 and 8 the duty of a trial judge, and its limit in these words:

> *"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, 'give the defendant his head, to ask whatever questions, at whatever length, he wishes'.*
>
> *…*
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> *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…"*

[34] Our overall conclusion in this appeal case is that, the Chief Justice demonstrated that, he understood the principle governing the duty of a trial judge in a trial of an underrepresented accused. While this does not appear fully in his judgment, it is borne out by the utterances and interjections by the Chief Justice in the course of the trial.

[35] Regarding the application of the principle, it is significant that, the Chief Justice in the first paragraph of his judgment reminded himself that the appellant, "was not legally represented at the trial." In our view, the instances that counsel for the appellant pointed to as instances of no or inadequate assistance were, in fact, incomplete texts. In any case, when one reads the entire record of the proceedings one concludes that, the Chief Justice assisted the appellant adequately.

[36] Some of the instances where the Chief Justice demonstrated his duty to the unrepresented appellant are these. On page 177 of the record of proceedings he tells the appellant: "This is all about you. Now, overnight you sit down and think about what you want to ask these two witnesses because I am only the referee. I will help you as far as I can but I can't lead the case for you. I don't know what you may know, understand? So, please prepare yourself come tomorrow. If you have to write down your questions, whatever, I will try to help you the best I can, but I can't come on your side. You understand that?" He also assisted and guided the appellant on pages: 144, 145, 148, 154, 168, 170, 177, 185, 243, 244, 247, 369, 370 and others.

The rest of the grounds of appeal.

[37] In our view, the rest of the grounds of appeal were raised more in hope than in expectation that they would succeed. At times what were stated in the judgment of the Chief Justice and in the record of proceedings had not been thoroughly checked. It led to citing mistaken factual basis of complaints in some grounds of appeal.

[38] The ground that, the trial judge failed to apply an adequate Turnbull direction in regard to evidence of identification was based on a mistaken belief that, the trial judge did not mention that, even an honest witness could be mistaken. When it was ascertained that the judge mentioned it, the ground was withdrawn. In any case, there is no reason to fault the consideration that the Chief Justice gave to the danger of relying on evidence of eye identification over the short moment; and the fact that the identification parade was held 4 months after the shooting.

[39] The ground that, the trial judge failed to consider joint enterprise, based on the statement of the appellant that, he was present, but was not the shooter, fails. The prosecution evidence and case was that, the appellant, not the other man, shot Williams. The judge accepted the testimony of Williams; the judge was entitled to accept the testimony. He explained his decision on the item of fact. An appellate court cannot lightly interfere.

[40] Although it would have been a good thing for the trial judge to enquire of the response of the appellant to the applications by the prosecution to have the judge deem the two witnesses hostile witnesses, no prejudice was occasioned. There was simply no basis for the judge to refuse the applications. The witnesses had materially contradicted their earlier statements.

[41] There is no rule that, in a trial by a judge without jury the judge should not hold a *voir dire*. It is a matter for the discretion of the judge. It has not been shown to us that, the Chief Justice exercised his discretion wrongly, or that the exercise of the discretion resulted in an unsafe conviction. Given that the judge is both judge of law and fact, there may well be less value in holding a *voir dire* in a judge alone trial.

[42] There is no merit in the complaint that the typed copy, other than the handwritten copy of the cautioned statement made by the appellant was taken as the exhibit. The statement was recorded by a police officer, not handwritten by the appellant himself; it was read to him and he signed it.

[43] We reject the complaint that, identification parade should not have been held because there had been much publicity about the case, and photographs of the suspect, the appellant, had been published in newspapers. It is a, "damned if you do and damned if you don't", argument. Unless the suspect is well known to the intended identifier, it is always a good practice to hold an identification parade. The possibility always exists that the identifier may fail to identify the suspect, with enormous advantage to the suspect.

[44] The Privy Council made the recommendation to carry out an identification parade notwithstanding wide publicity, in ***Pipersburg and Robateau v The Queen [2008] UKPC 11***, an appeal case from this Court. It is the perfect answer to the complaint in this ground of appeal. At paragraph 6 of the opinion of their Lordships delivered by Lord Rodger of Earlsferry, their Lordships stated:

> *"In the Court of Appeal the Director of Public Prosecutions accepted that the witness had not known the appellants' names. Moreover, the police did not hold an identification parade for either of the appellants. This was on the advice of the Crown Counsel then acting – apparently on the basis that an identification parade would have been inappropriate because the appellants' pictures had been published in the press and so there was a risk that witnesses would identify the appellants from the pictures. However well–intentioned that advice may have been, the decision not to hold an identity parade meant that the first time the three witnesses were asked if they could identify the men involved in the raid was more than eighteen months after the incident, when they were in the witness box and the appellants were sitting in the dock. In their Lordships' view, in a serious case such as the present, where the identification of the perpetrators is plainly going to be a critical issue at any trial, the balance of advantage will almost always lie with holding an identification parade."*

[45] Further, in our view, the Chief Justice had the discretion to accept the evidence about the identification parade, although the identification parade form was not signed by the appellant. The witnesses seemed credible enough for the judge to accept their testimonies about the identification parade.

[46] The ground of appeal that: the judge failed to state and consider in his judgment the proper good character direction in support of the appellant's credibility and propensity, has a short answer to it. At paragraphs 68, 69 and 70, the Chief Justice stated that, the appellant raised his good character and that, the court had to consider it in regard to credibility and any likelihood that he could commit such a crime. The Chief

Justice then quoted the rhetorical statements about good character and then did consider it, “in respect to the totality of the evidence”. We reject this ground of appeal.

[47] The complaint in ground No. 17 that: the learned trial judge’s directions on attempted murder contained misdirections and non-directions, and were inaccurate, is utterly baseless. The Chief Justice set out accurately the elements of the offence of attempt to murder at paragraphs 6, 7, 8 and 9 of his judgment. He cited and analysed s. 107 of the Criminal Code for the meaning of the offence of attempt to commit a crime. He recognized that, his consideration of the offence of attempt to murder must include consideration of the elements of murder itself, excluding death resulting. He accurately summed up his understanding of the offence of attempt to murder at paragraph 7 in the words: “In sum, the accused must have acted with the intent to commit murder and he must have gone beyond mere preparation.” The Chief Justice relied on the judgement of this Court in, ***Peter Augustine v The Queen, Criminal Case Appeal No. 8 of 2001***.

[48] The complaint in ground No. 18 is equally baseless. It was that: the trial judge erred in holding that the prosecution proved beyond reasonable doubt, an intention to kill merely because the injury was serious, and not that the only intent may have been shooting. We have concluded that, there were in addition, other strong items of evidence proving intent to kill, The shooter whom the Chief Justice found was the appellant, deliberately took with him a gun, a lethal weapon, with the intention to shoot the lawyer, Mr. Williams. He stood close, about 12 feet to the lawyer. He deliberately levelled his gun aiming at Williams, and shot in the trunk. The grave injuries were naturally expected. On those items of evidence, the Chief Justice was entitled to conclude that, the appellant intended to kill Williams, and that, without the quick reaction of those who took Williams to the hospital, and the medical treatment, Williams would have died.

Sentence

[49] Despite the young age of the appellant and his good character, this was a planned grave crime. The two young men planned murder casually and carried out their action in a cold and cruel way. In the circumstances of the crime, 15 years imprisonment is not anywhere near excessive even for the young appellant. In any case, an appellate Court shall not vary a long sentence of imprisonment by reducing or adding to it by a mere one or two years. It was argued that, the judge started with the average sentence of 15 years imprisonment and erroneously ended with 15 years. Whereas the average of sentences that have been imposed in the past for a particular kind of offence is a good and just guide, a judge should not lose sight completely of the maximum penalty intended by legislation for the crime. Where the facts of the particular offence are grave, the average sentence should be departed from.

[50] Our Conclusion is that, the appeal against conviction and sentence is dismissed; the conviction and sentence are affirmed, except that the sentence of 15 years imprisonment shall be computed to include the 3 months and 23 days that the appellant was in custody on remand.

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MORRISON JA

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AWICH JA

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BLACKMAN JA