IN THE COURT OF APPEAL OF BELIZE, A. D. 2018

CRIMINAL APPEAL NO 12 OF 2016

**GARETH HEMMANS** Appellant

v

**THE QUEEN** Respondent

BEFORE

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| The Hon Mr Justice Sir Manuel Sosa | President |
| The Hon Madam Justice Minnet Hafiz Bertram | Justice of Appeal |
| The Hon Mr Justice Lennox Campbell | Justice of Appeal |

A Sylvester for the appellant.
J Chan along with P Staine-Ferguson, Crown Counsel for the respondent.

15 June 2018 and 1 February 2019.

**HAFIZ-BERTRAM JA**

**Introduction**

**[1]** The appellant was tried before Lucas J, sitting alone, on an indictment charging him with one count of attempted murder, contrary to section 18 read along with sections 117 and 107 of the Criminal Code, Chapter 101 of the Substantive Laws of Belize. On 18 October 2016, he was convicted for attempted murder and sentenced on 27 October 2016 to 8 (eight) years imprisonment.

**[2]** The appellant appealed his conviction by notice dated 20 October 2016, without any grounds. On 26 October 2017, counsel for the appellant filed the notice of grounds of appeal which was later amended. The appeal was heard on 15 June 2018 and judgment was reserved.

**The Case for the Crown**

**[3]** The Prosecution in an indictment dated 4 September 2013, alleged that the appellant attempted to kill Miguel Zaiden on 1 May 2012, in Belize City. The appellant and Zaiden had an argument and the appellant punched Zaiden in the face. Thereafter, the appellant left and returned with a machete and chopped Zaiden several times. The prosecution brought four witnesses to prove its case, namely, Miguel Zaiden, Clifford Williams, Alfonso Cano and Dr. John Waight.

The evidence of Miguel Zaiden

**[4]** As shown by the evidence and the judgment of the trial judge, Mr. Zaiden was not a favourable witness. When his memory was refreshed in accordance with section 76(1) of the Evidence Act, he agreed that he gave the written statements dated 11 and 16 May 2012, which he gave to the police. Despite being a difficult witness, the learned trial judge did not qualify him as an adverse witness when applications were made by the Crown. The judge ruled that the application was premature since the witness had not displayed any animosity towards the Crown. In the view of the judge, the appellant was an unfavourable witness but that did not qualify him as a hostile witness.

**[5]** Mr. Zaiden deposed that on 1 May 2012, he was socializing at a friend's house on Madam Lizarraga Street, Fabers Road, Belize City. He was drinking alcohol with Tricia, Nicky and Cuz. During that socializing he got into a dispute with someone he knew as Junior "at the time". Later in his testimony he stated that he could not recall the dispute because he was drinking from 7.00 am that day. A portion of his testimony which was reproduced by the learned trial judge shows the following:

> "I do not rightfully remember because I was drinking; but I know that **I got chopped on my elbow and shoulder**. After I got chopped I walked away and the police came shortly on Madam Lizarraga Street. I was taken to the hospital. I thought it was someone I knew who chopped me, but being under oath, [sic] I did not see the person. I cannot say directly. I thought it was someone I knew because presently I was, as I said, in an argument. I was on the ground that is why I thought that it was the person I had the argument with."

**[6]** Later in the appellant's testimony, he stated that the Junior with whom he had the argument was not in the court. He said, "*The Junior I am talking about is not in this Court; but I found out, that is when I was in the hospital, that the place where I was chopped was in the neighbourhood to the person name Gareth."*

**[7]** Mr. Zaiden agreed, after refreshing his memory, that in his statement dated 11 May 2012, he said that "*Gareth approached me with a machete. It is in the statement that I said Gareth began chopping me with a machete*." In his oral testimony he continued by saying, "*But I cannot recall it because I was drunk."*

**[8]** In relation to Mr. Zaiden's second statement dated 16 May 2012, in which he stated that the person was serious in chopping him up, when questioned about that, he stated, "*I do recall saying that because I have chopped wounds; but I do not recall the person's face."* He further testified that he stated it was Gareth in his written statement because it was told to him by a third party that it was Gareth.

**[9]** Mr. Zaiden testified that, "*When I was receiving the chops to my body I just defended myself by raising my arm to avoid not being hit on my head*."

<u>The evidence of Special Constable Clifford Williams</u>

**[10]** The evidence of Special Constable Williams (SC Williams) was that on 1 May 2012, about 7:50 pm, he was at the Fabers Road precinct working when he received a call from the Police Central Room. He then visited Madam Liz Crescent on Fabers Road. He saw a male person with what appeared to be chop wounds to both arms and shoulders. He said that the person told him his name as one 'Miguel Zaiden'. Mr. Zaiden

was thereafter taken to the Karl Heusner Memorial Hospital (KHMH) and SC Williams was in the trauma room with him. He testified that he received some information from Mr. Zaiden in that room.

**[11]** SC Williams further testified that: (page 47 and 48 of record)

> "Acting on the information received from Mr. Zaiden, I visited No. 7576 Madam Liz Crescent. Arriving on the said location I saw one person sitting down on the verandah. I asked him if he knows Gareth Hemmans. He told me, "yes, it's me." I explained to him about a report made against him. The report was a chopping incident that took place a little earlier on the same day. I told him that he was involved in the incident and that I would escort him to the Queen Street Police Station pending charges.
>
> I cautioned him, "*you do not have to say anything unless you wish to do so, but whatever you say will be taken down in writing and given in evidence."*
>
> I also informed him of his rights and escorted him to the police vehicle. I informed him to know the reason for his detention; that he had the right to communicate with a solicitor or a member of his family in private.
>
> **I asked him of the instrument used in the incident.** …. He looked around and asked his mother that was on the verandah to get a machete that was at the back door. The machete was handed over to me by the mother. I took it and carried it to the Queen Street Police Station along with the accused person. The machete is a small black machete about two feet in length. I handed the machete to detective Constable Cano at the time along with the person detained Mr. Gareth Hemmans."

**[12]** SC Williams thereafter identified the appellant, Gareth Hemmans in the dock. In cross-examination, he was told by counsel that he did not state in his report whether he asked the appellant if he was the one who inflicted the injuries on Mr. Zaiden. To that question, he replied, "*Yes, it is between line 13 and 14*." When asked by counsel at the time, "*Where is it specifically between lines 13 and 14 that he answered you that he is the*

*person who inflicted the injuries on Miguel Zaiden*?", and the answer by the witness, SC Williams was, "*It is not recorded in the statement that I asked if he inflicted the injury on Miguel Zaiden and he answered yes*."

The evidence of Alfonso Cano

**[13]** Corporal Alfonso Cano testified that in May 2012, he was attached to the Criminal Investigation Branch, Queen Street Police Station. On 1 May 2012, he visited the KHMH trauma room where he observed that a male person was being attended with chop wounds to both arms. He identified himself as Miguel Zaiden. He was later taken to the operation theatre. He testified that Mr. Zaiden was issued a pair of medico forms by Woman Corporal in his presence. He further testified that on 2 May 2012, he visited KHMH and recorded a statement from Mr. Zaiden. Thereafter, he returned to CIB where SC Williams had detained Gareth Williams who was handed over to him along with the machete. Corporal Cano stated he informed the appellant of a report that was made against him. He then cautioned him and informed him of his constitutional rights.

**[14]** Corporal Cano testified that on 3 May 2012, he released the appellant from police custody because of a statement he recorded from Mr. Zaiden who requested no further action. He further testified that on 11 May 2012, Mr. Zaiden visited the CIB Office and gave a further statement about the chopping incident that occurred on 1 May 2012. As a result, on 16 May 2012, he formally swore to an information and complaint, obtained a warrant in the first instance and formally charged the appellant with attempted murder. He identified the appellant in the dock.

The evidence of Dr. John Waight

**[15]** Dr. John Waight is a registered medical practitioner. He was treated as an expert in general medicine and medical surgeon. He testified that he supervised the management of the injury to the left elbow of Miguel Zaiden in the Accident and Emergency Department of the KHMH and he prepared a report which he submitted to the police. The injuries recorded in the report are:

"In regard to the elbow, there was a deep, sharp edged .. approximately 10 centimetre in length over the posterior aspect of the elbow with a fracture of the olecranon which is the most proximal of upper which went completely through the olecraron (the bone) and there was also a fracture of the lower end of the humerus. ….

The bone of the upper arm both fractures and the fractures of both bones extended into the joint or extended into the part of the bone that forms the joint.

In regard to the other injuries, which I recorded on the following day, there was a deep trans .. clean edged, approximately 5 centimetres in length over the middle of the left forearm, that is, the part of the upper limb between the elbow and the wrist and there were superficial linear wounds over the upper part of both the right upper arm and the left upper arm. …I would classify the elbow injury to the left elbow as **grievous harm**. … The other injuries I would classify as wounding."

**[16]** Dr. Waight was questioned as to the reason he classified the injury to the left elbow as grievous harm and responded by saying that it was a serious injury which involved the fracture of two bones and if left untreated would lead to permanent and serious impairment of the function of that limb. In relation to force used, Dr. Waight testified that in his opinion, the injury to the left elbow was consistent with having been inflicted by a "*heavy sharp object wielded with considerable force. The other injuries were compatible with having been inflicted by a sharp edged object wielded with less force.*"

**No case submission**

**[17]** Counsel for the appellant at the time submitted that the Crown had not established a *prima facie* case as to who inflicted the unlawful harm upon Zaiden and as such the other element of intention also failed. He submitted that the complainant, Miguel Zaiden could not ascertain who injured him. Further, the evidence of Corporal Cano and SC Williams did not disclose any *prima facie* evidence which established that Gareth Williams

was the person who inflicted the injuries on Mr. Zaiden. Counsel submitted that based on the principles of **R v Galbraith** [1981] 2 All ER 1060, 73 Cr App Rep 124, the evidence adduced by the Crown was tenuous and no jury properly directed would be able to convict on it.

**[18]** In response, the Crown submitted that they were relying on circumstantial evidence to prove the case. The Crown relying on the authority of this Court, **The Queen v Melonie Coye and Others,** Criminal Appeal No. 16 of 2010, contended that as long as there are inferences that can be drawn which points to the guilt of the accused, the matter should be left to the jury. Counsel referred the trial judge to the evidence of Mr. Zaiden who said that on 1 May 2012, he got into an argument with a person he knows as Junior which occurred on Madam Liz Street. Further, SC Williams testified that on 1 May 2012, he spoke to Mr. Zaiden at the hospital and as a result he visited No. 7577 Madam Liz Crescent in the Fabers Road Area. At the residence he informed the accused of a chopping report made against him and thereafter cautioned him and advised him of his constitutional rights. Further, the appellant asked his mother to get a machete from behind a door and she handed it over to SC Williams. Counsel submitted that from this evidence, inferences could be drawn that it was the appellant who inflicted the injuries on Mr. Zaiden.

**[19]** In relation to intention to kill, counsel submitted that there was evidence from Mr. Zaiden and Dr. Waight which proved this element, that is, location of injuries as the complainant was trying to ward of the blows, force used to inflict the injuries, classification of injuries and the machete used to inflict the injuries.

**Ruling on no case submission**

**[20]** The learned trial judge ruled that the appellant had a case to answer. The reasons given were:

> "The evidence adduced by the Crown is that virtual complainant Miguel Zaiden was seriously injured to his forearm on 1 May 2012. He told the court that he was injured in the area of the body because he was trying to ward off the blows

or cuts which were aimed towards his neck and face. Mr. Zaiden deposed that he was unable to recognize his assailant because he was drunk influenced by alcohol.

Special Constable Clifford Williams deposed that on 1 May 2012 about 7.00 pm he received a call from Police Control Room. He visited Madam Liz Crescent, Fabers Road, Belize City. There he saw Miguel Zaiden suffering from injuries to both arms and shoulders. He placed Miguel Zaiden in the police motor vehicle and travelled en route to Karl Huesner Memorial Hospital. On the way an ambulance came whereby Miguel Zaiden was transported into the ambulance. SC Williams went to the K.H.M.H. Trauma Room.

Special Constable Williams received information from Miguel Zaiden and he went to a premises at No. 7576 Madam Liz Crescent. Upon SC Williams arrival at that address he saw a man sitting on the verandah. Special Constable asked him if he knew Gareth Hemmans. He replied, "Yes, it's me." Williams told him of his involvement in an incident earlier that day and that he escort him to Queen Street Police Station pending investigation.

Special Constable Williams having cautioned Mr. Gareth Hemmans and told him of his constitutional rights, he asked him of the instrument used in the incident. Gareth Hemmans asked his mother to fetch the machete which was at the back door. She did so and handed the machete to SC Williams.

Doctor John Waight described the injuries he observed on Miguel Zaiden on examining him. He classified the injury to the left elbow as serious and was inflicted by heavy, sharp object with considerable force.

I have considered the two well-known principles emanated in **R v Galbraith 73 Cr. App. R** also found in Archbold 2012 at paragraph 4-364. The second limb is applicable in this case. There is evidence which establishes a *prima facie* case against the accused. I therefore rule that the accused has a case to answer."

**Sworn testimony of the accused/appellant**

**[21]** The appellant was told of his three rights by the trial judge and he chose to testify. The evidence pertinent to the appeal was that the appellant lives at 7576 Madam Liz Crescent, Fabers Road, Belize City. On 1 May 2012, he was going to a "Chiney back of Fabers Road name Fire." On the way there he met a girl whose name is Nikki Westby a.k.a. Sweety. The appellant said he met her in a yard socializing with her two sisters and a male person about 100 yards away from his home. The property belonged to a Wilfred Murillo. The appellant testified that the male person was drunk and acting disorderly. He said he was in the yard talking to Ms. Westby for about five minutes. Then the male person went to Ms. Westby and asked her "if I'm her man and why she is talking to me so long for." Thereafter, the male person and Ms. Westby got into an argument. The appellant said that he left because he "don't want no part of that."

**[22]** The appellant testified that he continued to the Chiney shop which was about 300 yards from where he was talking to Ms. Westby. He said that when he reached the shop it was crowded and he was there about 20 to 25 minutes. On his way back home, he was told by someone that "*they just chop up the male person that was socializing with Sweety and her two sisters in the yard. So I continue on and went home*."

**[23]** He further testified that he was in his living room watching television when he heard a vehicle stop in front of his parents' home. He went outside and saw that it was a police mobile. He was then asked by a policeman "if Gareth Hemmans live here?" and he told him, "yes, I am Gareth Hemmans." The policeman was SC Williams and he was told that he was needed for questioning of a chopping incident. He said he asked SC Williams, "which chopping incident?" as he was never involved in a chopping incident. He was then searched and put in the police mobile. He said three blocks from his home SC Williams stopped the mobile. The appellant said the following:

> "**He asked me if I have a machete and I told him yes, my parents did**. So I asked him why he want a machete from me and I was not in no machete incident. So I told him that my parents have a machete that they used to do yard cleaning with. So he tell me he have to take me back for the machete. So

I ask him why and he respond, he have to check to see if that was the machete that inflicted the chop wounds. So I corporate [sic] with him and he took me back to my family home.

My mother was on the verandah, so I told my mother to get the machete from inside the house and she wanted to know why the Officer want the machete because she knew that I was not in the incident. ….. The Officer told her that he need the machete to check it to see if any blood stain or sample was on the machete. If it was the machete that was in the incident."

**[24]** The appellant further testified that the machete was given to SC Williams. He was then taken to the Queen Street Police Station and handed over along with the machete to CIB and he was detained from Monday to Thursday and thereafter released. On 12 May 2012, he was informed by Mr. Cano who went to his residence that the victim made another statement and was pressing charges again. Mr. Cano informed him that he would be charged for attempted murder. Thereafter, he was taken before the Magistrate and was sent to Hattieville Prison.

**[25]** In cross-examination, the appellant testified that he was in a fling with Ms. Westby but it was not a relationship. He explained that when he wanted sex he would go to her. He denied that Mr. Zaiden took away his fling from him. He also denied that he attacked Mr. Zaiden with a machete because he saw him socializing with Ms. Westby. He further denied that he had an argument with Mr. Zaiden.

**[26]** In further cross-examination he was asked if SC Williams asked him "about the instrument used in the incident?" The appellant responded by saying that, "*I don't agree with that part he didn't ask me for the machete. He asked me if I had a machete and I told him, yes."* He accepted that he asked his mother to get the machete as he was doing some yard cleaning that day and knew exactly where he left the machete.

**Grounds of appeal**

**[27]** The grounds of appeal as amended are:

(1) The decision was erroneous in point of law as the trial judge in determining whether to believe the evidence of SC Williams did not consider the evidence of the appellant, particularly, the testimony relating to the reason he handed over "a machete" to SC Williams;

(2) The decision was erroneous in point of law as the trial judge failed to consider whether the *mens rea* of the offence of attempted murder had been made out on all the evidence;

(3) The decision was erroneous in point of law as the trial judge failed to give himself a good character direction in respect of the appellant since he had given sworn testimony.

**Ground on reason the appellant handed over the machete**

**[28]** Mr. Sylvester contended that the trial judge at page 117 of the record stated *"[t]he evidence that I found weighed against [the Appellant] is that of S.C. Williams' interaction with him."* However, the judge in arriving at his determination did not consider the evidence of the appellant. He submitted that although the judge said at page 117 of the record that "he has considered the whole of the evidence" there is nothing in the record to indicate that this is so. Counsel submitted that the trial judge gave reasons for believing SC Williams but there is nothing in the record to show consideration of the appellant's testimony relating to the reason he handed over "a machete" to him.

**[29]** Counsel submitted that the evidence of both the appellant and SC Williams has to be reviewed. He referred the Court to SC Williams's evidence at page 47 of the record and the appellant's sworn evidence at line 15, page 80 to 81 of the record. He contended that the evidence of the appellant proved that he accepted that he handed over a machete but gave an explanation as the reason for doing so, which was in stark contrast to the evidence of SC Williams.

**[30]** Mr. Sylvester further contended that the trial judge did not juxtapose Williams' evidence with that of the appellant and then determining why he believed Williams' as opposed to the appellant. Counsel submitted that the judge erred in approaching the

matter in this way. Further, that there was not a balanced consideration of the appellant's evidence. He relied on the case of **Glenford Bermudez v The Queen**, Criminal Appeal No. 19 of 2011, at paragraph 23, where this Court said that "*in order for a trial to be worthy of that name*" the case for the defence needed "*adequately to be put before the jury in the summing-up."* Counsel submitted that in the instant matter the trial judge said, "I do not believe the alibi of the accused." As such, he contended that no adequate consideration of the case of the appellant was done. He submitted that this was a material omission which constituted a miscarriage of justice.

**[31]** Mr. Chan for the Crown, in reply submitted that the trial judge considered the evidence of the appellant and in particular the reason he handed over a machete to SC Williams. He referred the Court to page 116 and 117 of the record and submitted that the trial judge sitting alone did in fact consider the evidence of the appellant but did not believe it.

*Discussion*

**[32]** The judgment of the trial judge shows his consideration of the evidence in relation to the reason why the appellant handed over the machete to SC Williams and the inferences he drew from the circumstantial evidence that was before him.

**[33]** At page 48, line 9, of the record, SC Williams testified that, **"I asked him of the instrument used in the incident."** At this point, counsel at the time for the accused, objected to the line of questioning by the Crown because he submitted they were attempting to introduce evidence of an equipment which was not given to the defence as part of the disclosure. Further, the Crown could not produce the machete as an exhibit and the evidence was therefore hearsay. Counsel submitted to the judge that this portion of the evidence be withheld from the court since the probative value would be scandalous and adverse to the interest of justice for the appellant.

**[34]** The Crown responded to that objection by saying that the question asked by the witness to the accused is a question of fact for the judge to consider as a tribunal of fact. Further, that the evidence was not hearsay since it came from the appellant after he was

cautioned by SC Williams. Counsel at the time for the appellant, in reply, contended that the evidence would be prejudicial since the machete cannot be produced.

**[35]** The trial judge (page 50 of record) ruled that, *"I need to hear the evidence before I **may** determine whether it is hearsay or not hearsay the prejudicial effect outweighing the probative value.*" The judge then instructed the Crown to proceed with the testimony of SC Williams. He heard the further evidence of the said witness, but made no determination that it was hearsay evidence or that the prejudicial effect outweighed the probative value. Also, counsel at the time, made no further objection in relation to the evidence of SC Williams. The experienced trial judge obviously did not find it necessary to make a ruling. He did use the word "*may*".

**[36]** The further evidence heard by the judge after SC Williams enquired about the instrument used in the incident, would be repeated for present purposes (see para 11) SC Williams said:

> "He looked around and asked his mother that was on the verandah to get a machete that was at the back door. The machete was handed over to me by the mother. I took it and carried it the Queen Street Police Station along with the accused person. The machete is a small black machete about two feet in length. I handed the machete to detective Constable Cano at the time along with the person detained Mr. Gareth Hemmans."

**[37]** The evidence heard by the trial judge from the appellant on this issue, repeated for present purposes, (see paragraph 23) was that:

> **"He asked me if I have a machete and I told him yes, my parents did**. So I asked him why he want a machete from me and I was not in no machete incident. So I told him that my parents have a machete that they used to do yard cleaning with. So he tell me he have to take me back for the machete. So I ask him why and he respond, he have to check to see if that was the machete that inflicted the chop wounds. So I corporate (sic) with him and he took me back to my family home.

My mother was on the verandah, so I told my mother to get machete from inside the house and she wanted to know why the Officer want the machete because she knew that I was not in the incident. ….. The Officer told her that he need the machete to check it to see if any blood stain or sample was on the machete. If it was the machete that was in the incident."

**[38]** The foregoing is the version of both sides on the machete issue. It was for the trial judge, as the tribunal of fact, to decide which of those two versions to believe. The trial judge considered the evidence of both SC Williams and the appellant as shown in his judgment. At page 116 of the record, beginning from line 8, the trial judge considered the issue of the machete. The judge said:

"I now make reference to the machete. As pointed out earlier, S.C. Williams took possession of a machete that the accused had asked his mother to hand to him (Williams). However, no machete was tendered into evidence. Mr. Selgado learned defence counsel criticized the prosecution for not exhibiting the machete in court. He further censured the prosecution for not seeking to obtain and produce DNA evidence and fingerprint evidence from the machete.

The absence of a machete as an exhibit in court was not explained by the prosecution. Indeed there was no evidence of any sample of blood taken from the machete to provide, if any, DNA evidence. It is a similar situation in terms of fingerprint evidence. There was no evidence of dusting of the machete with a view to obtain latent fingerprints. <u>It is my considered view, however, that in light of the evidence of S.C. Williams of the accused's mother handing him the machete on the request of the accused which was made after S.C. Williams informed the accused, inter alia, that a report was made of a chopping incident and was asked "for the instrument used in the incident", the reaction of the accused to the accusation is, inferentially, an admission that the machete he handed to S.C. Williams is the one he used to cause harm upon Miguel Zaiden.</u>

I do not believe the alibi of the accused. Circumstantially, he is the person who injured Mr. Zaiden. I observed his demeanour when he was testifying. He too like Mr. Zaiden qualified his answers in cross-examination. Invariably, his answers were not straightforward. The evidence that I found weighed against him is that of S.C. Williams interaction with him.

After having considered the whole of the evidence – both of the Prosecution and of the Defence – I am sure that the accused is guilty of the crime of attempt [sic] murder." (emphasis added)

**[39]** It can be seen from the above that the trial judge did not find the appellant to be a truthful witness. On the other hand, the judge found the evidence of SC Williams believable. The judge considered the circumstantial evidence that was before him and in the opinion of the Court, drew a reasonable inference that it was the appellant who chopped the Mr. Zaiden.

**[40]** The evidence of SC Williams which the trial judge found weighed against the appellant was: (a) "I asked him of the instrument used in the incident;" and (b) He looked around and asked his mother who was on the verandah to get a machete that was at the back door which was handed over to SC Williams by the mother of the appellant. The judge clearly did not believe the appellant's version that he was asked if he has a machete.

**[41]** In the opinion of the Court, the trial judge considered the evidence of the appellant and in particular the reason he handed over the machete to SC Williams. Therefore, the appellant cannot succeed on this ground.

**Failure to consider *mens rea* of the offence of attempted murder**

**[42]** Mr. Sylvester contended that the trial judge failed to consider whether the *mens rea* of the offence of attempted murder had been made out on all the evidence. He submitted that it is trite law that proof of both elements of an offence is necessary to ground a conviction. He relied on the authors of Archbold, 2001 Ed. at para 17-1, citing Stephen J. in *R v Tolon* (1889) Q.D. 168, where it is stated that, "…*If the mental element of any*

*conduct alleged to be a crime is proved to have been absent in any given case, the crime so defined is not committed;…"*

**[43]** Counsel submitted that the learned trial judge although he had correctly set out the four elements of the offence, failed to direct himself on the specific intent to kill. Mr. Sylvester relied on the case of **Glenford Bermudez v The Queen, Criminal Appeal No. 19 of 2011**, paragraphs 9-19, where this Court stated the importance of a trial judge giving clear directions as it relates to proof of an intention to kill. Further, counsel submitted that there is nothing on the record to show that the trial judge considered *sections 6 and 9 of the Criminal Code*, which sets out the statutory matters which should be taken into account in relation to proof of intention to kill. Mr. Sylvester referred the Court to the sole consideration on the issue where the judge said at page 102 of the record that the intention to kill was inferred from the evidence of Mr. Zaiden when he said that, '*When I was receiving the chops to my body I just defended myself by raising my arm to avoid not being hit on my head'."*

**[44]** Counsel contended that the judge was not considering all of the evidence in the case and would not have been applying section 9 of the Criminal Code. Counsel also relied on paragraphs 17 and 18 of the **Bermudez** case which discussed intention to kill. For these reasons, he submitted that the judge erred and this constituted a miscarriage of justice and as such the conviction should be quashed.

**[45]** Mr. Chan in his response to this ground submitted that the decision of the judge was not erroneous in point of law since the learned judge stated the elements of attempted murder and that it had to be proven beyond a reasonable doubt. He referred the Court to the evidence of Mr. Zaiden at page 102 of the record where he testified as to the chop wounds he received and the judge adverting his mind to that evidence. Also, Mr. Zaiden's evidence at page 113 of the record which was referred to by the trial judge.

**[46]** Counsel contended that the judge sitting alone as judge and jury came to the conclusion that the accused had intention to kill which he inferred from the manner in which Mr. Zaiden was injured. That is, the accused had a machete and he was aiming chops to the head of Mr. Zaiden. Mr. Chan conceded that the directions on how the judge

was to infer intention could have been elaborated more but, even if he had done so, the inference on intent to kill would have been the same.

*Discussion*

**[47]** The instant matter was a judge alone trial and as such he (the judge) would not be expected to give detailed directions to himself as he would to a jury. In the **Bermudez** judgment relied upon by Mr. Sylvester, this Court discussed the directions as to the *mens rea* of murder and that was a trial with a jury. The Court would not expect the trial judge in the instant case, to give the same detailed directions to himself. This however, does not abdicate the judge, in giving his reasons for judgment to state why he found that there was a specific intent to kill by the appellant. As pointed out by both sides in their argument, the trial judge at page 109 of the record had set out the elements of the offence of attempted murder which the prosecution was required to prove. He correctly stated that:

> "In this particular case the Crown is required to prove the following elements:
>
> (i) The injuries to Miguel Zaiden were intentionally inflicted;
> (ii) The injuries were inflicted unlawfully;
> (iii) The accused is the person who intentionally and unlawfully inflicted the injuries upon Miguel Zaiden; and
> (iv) At the time the accused intentionally and unlawfully inflicted the injuries upon Miguel Zaiden his specific intention was to kill him."

**[48]** *Section 107* of the *Criminal Code* provides that, *"Every person who attempts to commit murder shall be liable to imprisonment for life.*" Murder is defined by *section 117* of the *Criminal Code*, as, "*Every person who intentionally causes the death of another person by any unlawful harm is guilty of murder, unless his crime is reduced to manslaughter by reason of such extreme provocation, or other matter of partial excuse as in the next following sections mentioned*." In the instant matter, all the elements of murder had to be proven with the exception of death, since the charge was attempted murder.

**[49]** The bone of contention under this ground was that the trial judge omitted to direct himself in relation to the fourth element of the offence, that is, the specific intention to kill. The judgment of the trial judge shows that there was not much effort put into this element (as acknowledged by the prosecution). The judgment at pages 102 and page 113 of the record showed the extent the learned judge dealt with this issue. He stated the following:

> Page 102
>
> "The evidence from Mr. Zaiden revealed that he was injured by someone on his elbow. **Pertaining to the intention of the person to kill him** is inferred from his testimony thus:
>
> **'When I was receiving the chops to my body I just defended myself by raising my arm to avoid not being hit on my head'**." (emphasis added)
>
> Page 113
>
> "I need to address the evidence of Mr. Miguel Zaiden. As I said he was an unfavourable witness, but he was not a hostile witness. He did not identify the accused in Court. He said that although he stated in his written statement that the person who injured him was Gareth that information was told to him. **However, he described the manner in which he was injured.** He deposed to in this way:
>
> > Q. Having refreshed your memory is it true that the person who chopped you was swinging a machete towards your head trying to chop you on your head and neck?"
> > A. "Yes, it is true that I got chopped on my upper shoulder and my arms, elbow hence the reason I cannot see who chopped me."
> > He added: "When I was receiving the chops to my body I just defended myself by raising my arm to avoid **not being hit on my head**."

**[50]** It can be seen from the above that the trial judge inferred intention to kill from the evidence of Mr. Zaiden that he raised his arm to avoid being chopped in the head with a

machete. The question to be asked is whether that was sufficient to prove beyond a reasonable doubt that there was a specific intent to kill. That is, the appellant had the intention to commit the full offence, being murder.

**[51]** Section 6 of the Criminal Code provides for the standard test of intention, that is, whether the person, (the appellant in this case) intended to produce the result, that is, to kill Mr. Zaiden when he chopped him with the machete.

**[52]** Section 9 of the Criminal Code sets out the approach to be adopted in relation to proof of intention to kill. Section 9 of the Criminal Code provides that:

> "9. A court or jury, in determining whether a person has committed an offence-
>
> (a) shall not be bound in law to infer that any question specified in the first column of the Table below is to be answered in the affirmative by reason only of the existence of the factor specified in the second column as appropriate to that question, but
>
> (b) shall treat that factor as relevant to that question, and decide the question by reference to all the evidence, drawing such inferences from the evidence as appear proper in the circumstances.

**[53]** The relevant question and factor in this case as shown in the table being whether the person charged with the offence intended to produce a particular result by his conduct (question) by the "*fact that the result was a natural and probable result of such conduct."* (appropriate factor).

**[54]** Mr. Sylvester contended that there is nothing on the record to show that the trial judge considered sections 6 and 9 of the Criminal Code, which sets out the statutory matters which should be taken into account in relation to proof of intention to kill. In the view of the Court, the judge was not required to set out sections 6 and 9 in his judgment

or use the formula as set out therein, provided that he makes it clear that the appellant intended to kill Mr. Zaiden. The question to be asked is whether the trial judge arrived at the conclusion of intent to kill by looking at all the facts and circumstances which were disclosed in the evidence. In the view of the Court, this is not borne out in the reasons for judgment given.

**[55]** The trial judge was expected to show in his reasons that the prosecution had proved to him beyond a reasonable doubt that the appellant had the intent to kill (murder) Mr. Zaiden. This Court is not satisfied that the offence of attempted murder had been proven beyond a reasonable doubt. In the view of the Court, the learned trial judge should have considered all the injuries suffered by Mr. Zaiden, none of which was life threatening. Mr. Zaiden who was intoxicated at the time, was on the ground, unarmed when he received the injuries with the machete.

**[56]** Mr. Zaiden received several injuries one of which was described by Dr. Waight as 'grievous harm' and the other injuries as 'wounding'. The injury to Mr. Zaiden's left elbow was classified as grievous harm by Dr. Waight because two bones were fractured and if left untreated would have led to permanent and serious impairment of the function of the limb. Dr. Waight testified that considerable force was used in relation to this injury.

**[57]** In relation to the other injuries, Dr. Waight testified that the middle of the left forearm (between the elbow and wrist) had a wound 5 centimetres in length. Further, there were superficial wounds over the upper part of both the right upper arm and the left upper arm. Dr. Waight described these injuries as wounding and that the injuries were 'wielded with less force.'

**[58]** The trial judge has not shown in his reasoning that he considered all the injuries received by Mr. Zaiden and the classification of those injuries. In the opinion of the Court, the consideration of all the injuries would have been capable of revealing whether the appellant had the intent to kill Mr. Zaiden. The appellant must have acted with the intent to commit murder to be found guilty of attempted murder. For those reasons, it is our opinion, that the ground on *mens rea* must succeed.

**Good character direction ground**

**[59]** Mr. Sylvester contended that the trial judge failed to give himself a good character direction in respect of the appellant since he had given sworn evidence. Having decided the previous ground in favour of the appellant, the Court does not find it necessary to make a determination on this ground.

**Disposition**

**[60]** The appeal is allowed. The conviction on the offence of attempted murder is quashed. The sentence is set aside. The Court enters a verdict and judgment of acquittal.

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SIR MANUEL SOSA P

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HAFIZ BERTRAM JA

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CAMPBELL JA