IN THE SENIOR COURTS OF BELIZE

CENTRAL SESSION-BELIZE DISTRICT

IN THE HIGH COURT OF JUSTICE

INFERIOR APPEAL (CRIMINAL) NO.: IC20190021

BETWEEN

DWAYNE EVELYN

Appellant

and

JEROME MIDDLETON, DC 1507

Respondent

Before: The Honourable Mr. Justice Nigel Pilgrim

Appearances:

Mr. Leeroy Banner for the Appellant.

Ms. Alifa Elrington, Senior Crown Counsel, Head of the Prosecution Branch, for the Respondent.

2024: July 18th
October 11th

JUDGMENT

INFERIOR APPEAL-POST-CONVICTION DELAY- RIGHT TO TRIAL WITHIN A REASONABLE TIME- CONSTITUTION OF BELIZE- GANG MEMBERSHIP- CRIME CONTROL AND CRIMINAL JUSTICE ACT

History

[1] **PILGRIM J**.: Dwayne Evelyn, ("the appellant") pleaded guilty before the Learned Magistrate ("TLM") in the Belize Judicial District on 9th August 2019 to the charge of being the member of a gang, contrary to section 3(1)(a) of the **Crime Control and Criminal Justice Act**[1] ("CCCJA"). He was convicted and sentenced to a fine of three thousand five hundred dollars ($3,500.00) or in default three (3) years imprisonment by TLM and ordered to pay five dollars ($5.00) as costs of the court. The appellant filed his notice of appeal on 29th August 2019, well within the 21-day limit to lodge his appeal pursuant to **Order LXXIII Inferior Courts (Appeals)**[2] ("the Rules").

[2] The law requires that within 1 month[3] of that notice being filed, TLM is to prepare a statement of her reasons[4]. In this matter, there has been no statement of reasons provided by TLM. TLM however forwarded a formal record of appeal to the General Registry of the then Supreme Court on 9th October 2019. This matter was docketed to this Court in October 2023.

The Grounds of Appeal

[3] The appellant has challenged the safety of his conviction on three grounds.

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[1] Chapter 102 of the Substantive Laws of Belize, Revised Edition 2020.

[2] Rule 2(1)(b) made under the **Supreme Court of Judicature Act** Chapter 91 of the Substantive Laws of Belize, Revised Edition 2020 ("SCOJA"): *"2.-(1) The party desiring to appeal shall…(b) within twenty-one days after the pronouncing of the decision, lodge with the clerk a written notice of appeal in Form 1, and serve a copy thereof upon the opposite party.*
(2) Where the appellant is in prison, the keeper shall, on being requested so to do, render all reasonable assistance in the preparation of the notice and shall cause it to be lodged and a copy thereof to be served as above, if the appellant supplies him with the necessary fees and expenses."

[3] Rule 5(2) of the Rules: *"The statement **shall be lodged with the clerk, within one month of compliance by the applicant with Rules 2 and 3 of this order**, and **the clerk shall within fourteen days of the receipt thereof, prepare a copy of the proceedings including the reasons for the decision**, and when the copy is ready he **shall notify the appellant in writing** and, **on payment of the proper fees, deliver the copy to him."** (emphasis added)*

[4] Rule 5(1) of the Rules: " ***On compliance by the appellant with the requirements of Rules 2 and 3 of this order the magistrate shall draw up a formal conviction or order and a statement of his reasons for the decision appealed against**." (emphasis added)* Rule 2 deals with the giving of notice to appeal and Rule 3 deals with the payment of security of due prosecution of an appeal which is not required in criminal matters.

[4] Firstly, the appellant complains that his constitutional right to a trial within a reasonable time has been breached by the post-conviction delay in the listing and hearing of this appeal between 2019 to 2023. He submits in that regard that the Court should, in its discretion, quash the conviction of the appellant.

[5] The respondent replies that there is some justification for the delay by the State in hearing the appeal because of the COVID-19 pandemic and natural disasters. They also submit that the appellant failed to assert his rights to expedite the hearing of his appeal. They also submit in the alternative, that quashing the conviction is not an appropriate remedy on the facts of this case.

[6] Secondly, the appellant complains that the guilty plea is not supported by the evidence. In that regard, the contention is that even on the facts accepted by the appellant, they are not sufficient to make out a prima facie case of gang membership under the CCCJA.

[7] The respondent submits that his admission on the facts of the instant case was sufficient to establish his membership of a gang.

[8] The appellant finally contends that the acceptance of his guilty plea was procedurally unfair as he was legally unrepresented and was given insufficient assistance. The appellant complains further that TLM ought to have better informed herself on the sentence by ordering pre-sentence reports.

[9] The respondent submits that the appellant was, in the round, afforded sufficient assistance and a fair trial.

Ground 1: There Is an Unreasonable Delay in the Appellant's Matter

The Legal Framework

Unreasonable Delay and the Constitution

[10] The Belizean **Constitution** provides as follows:

"6(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." (emphasis added)

[11] This right was considered by the apex court, the Caribbean Court of Justice ("the CCJ") with a similar constitutional provision from Barbados, in the case of **AG v Gibson**[5], per Saunders and Wit JCCJ, as they then were:

"[48] The public have a profound interest in criminal trials being heard within a reasonable time. Delay creates and increases the backlog of cases clogging and tarnishing the image of the criminal justice system. Further, the more time it takes to bring a case to trial the more difficult it may be to convict a guilty person. For a variety of reasons witnesses may become unavailable or their memories may fade, sometimes seriously weakening the case of the prosecution which carries the burden of proof…Defendants released on bail for lengthy periods have an opportunity to commit other crimes if they are so disposed. The longer an accused is free awaiting trial, the more tempting becomes the opportunity to skip bail and avoid being tried. On the other hand, keeping remanded persons in custody for excessive periods increases prison populations and aggravates the evils associated with overcrowded jails. Moreover, there is a financial cost to the public in maintaining a person on remand.

[49] Even more telling than the societal interests at stake are the consequences to an accused of a breach of the reasonable time guarantee. This is evident in the case of a defendant who is not guilty. That person is deprived of an early opportunity to have his name cleared and is confronted with the stigma, loss of privacy, anxiety and stress that accompany exposure to criminal proceedings. But a defendant facing conviction and punishment may also suffer, albeit to a lesser extent, as he is obliged to undergo the additional trauma of protracted delay with all the implications it may have for his health and family life…By deliberately elevating to the status of a constitutional imperative the right to a trial within a reasonable time, a right which already existed at common law, the framers of the

[5] [2010] 5 LRC 486.

Constitution ascribed a significance to this right that too often is under-appreciated, if not misunderstood."

[12] The CCJ considered this right in the Belizean context in the decision of **R v Henry**[6]. There the CCJ considered the position of the constitutional right to trial within a reasonable time in the appellate process, per Anderson JCCJ:

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

…

*[41] …****not all infringements of the constitutional right to a fair trial within a reasonable time must necessarily result in the allowing of the appeal and the quashing of the conviction. Indeed, this remedy is, as we have said, 'exceptional'; the emphasis is on fashioning a remedy, 'that is effective given the unique features of the particular case'. Remedies for breach may be a declaration, an award of damages, stay of prosecution, quashing of conviction, or a combination of these or some other or others. Everything depends upon the circumstances****." (emphasis added)*

[13] The CCJ also further considered unreasonable appellate delay and the remedies for a breach in the Belizean case of **Solomon Marin Jr. v R**[7], per Barrow JCCJ:

"[104] ***The grant of a remedy for breach of the right to a fair hearing within a reasonable time is very much a matter of discretion.*** *This is established in the language of s 20(2) of the Belize Constitution, which provides that the Supreme Court, among other things, may make such declarations and orders "as it may consider appropriate" for the purpose of*

[6] [2018] 5 LRC 546.
[7] [2021] CCJ 6 (AJ) BZ.

enforcing or securing the enforcement of any of the fundamental rights provisions of the Constitution. ***There is no right to any particular remedy****.*

…

[110] ***The element of discretion as to what is the appropriate remedy for a breach of the right to a fair trial within a reasonable time that was discussed in Gibson requires courts to consider the matter on a case-by-case basis, taking account of all the circumstances of the case****…*

[111] The discussion in Gibson provides a helpful indication of relevant circumstances to consider in deciding what is an appropriate remedy. Thus, an accused person may have contributed substantially to delay and there may have been other factors contributing to delay including lack of legal representation or access to critical resources, such as a highly specialised expert. ***Wider considerations may also be included in the circumstances a court must consider, such as the nature of the crime and the impact on the society's sense of justice, when deciding on what is appropriate****.*

[112] ***It is clear, therefore, that it is not the normal course that a convicted person whose constitutional right to a fair hearing has been breached will have their sentence reduced or suspended. When that happens, it is done on a principled basis of vindicating the right that has been breached. It is done to uphold the rule of law; to mark the value of the constitutional right; to meaningfully affirm that the administration of the legal and judicial system is as much subject to the law as everyone else. It is done for the good of the community and in the public interest****."*
(emphasis added)

Analysis

[14] The Court must consider as a first step whether there has been an unreasonable delay in the hearing of this appeal.

[15] The record of the appeal in this matter was generated by the Magistracy less than two months after the notice of appeal and forwarded to the then Supreme Court. There was then the gap between October 2019 and October 2023 when the matter was first docketed to a judge in the, now, High

Court of the Senior Courts. The appellant does not complain about the time after the appeal was docketed, indeed he would have contributed to it by missing filing dates ordered by the Court.

[16] The Court takes judicial notice of the fact that there was a global pandemic in 2020, and a state of emergency was declared in Belize on 1st April 2020. The start of the pandemic was almost six months after that file had been received without the matter being listed. The Court observes that this was not a voluminous record and an appeal, not after trial where evidence needed to be transcribed, but a guilty plea. It is difficult to comprehend, and there is no accounting from the State for why this matter was not docketed to a judge within 6 months of its receipt. Also, the **COVID-19 Directions (May 2020) Practice Direction** issued by the Supreme Court did not suspend the hearing of inferior appeals, which generally require no leading of evidence and is perfectly suited for virtual hearings. The generalized pleading of Hurricane Lisa in 2022, which the Court takes judicial notice of, also does not impress as a reasonable justification for the delay in this case. There is no particularized evidence from the State as to how that fact affected the listing of this matter. The judicial system, like every arm of the State, is accountable to the people it serves. If an appellant files an appeal, all the actors along the judicial chain are mandated to act with the dispatch required by the Constitution.

[17] The Court also notes that the only device the appellant could utilize to mandate the hearing of his appeal in the case where the Magistracy had already sent a record of appeal was separate litigation to mandate the Supreme Court's Registry to carry out its statutory function. It seems odious to hold against the appellant the fact that he did not further expense himself to "complain" about the delay as the respondent argues in their submission.

[18] The Court finds it hard not to draw the conclusion that this matter was not left to languish until it was reactivated in October 2023.

[19] The Court finds in the circumstances of this case that there was a breach of the appellant's right to a trial within a reasonable time.

[20] However, as both *Henry* and *Marin* hold, that is not the end of the matter. There is no right to a particular remedy and as Anderson JCCJ noted in the former case, the quashing of the conviction and sentence is an exceptional remedy. This Court has available sufficient material to judge the

safety of the conviction. The charge of gang membership is a serious and prevalent one, and the Court is mandated to consider the nature of the offence. The Court has to have an eye to the public interest in ensuring that serious wrongdoing does not go unpunished, if the conviction is a safe one. In that regard, though the Court considered the agony and anguish that the appellant would have gone through awaiting the hearing of this appeal, even though he was not incarcerated, the public interest requires the refusal of the nuclear remedy of quashing the conviction and sentence on the ground of delay.

[21] The Court dismisses this ground of appeal.

Ground 2: The Appellant's Guilty Plea is Not Supported by the Evidence

The Legal Framework

The Effect of a Guilty Plea

[22] The Court considers it may be helpful to recall the legal effect of a guilty plea.

[23] The Court is assisted by a decision of the Trinidadian Court of Appeal of **Richard Noel v Marlon Rawlins P.C. #16750**[8], per Soo Hon JA, as she then was:

> *"20. The same basic principles govern guilty pleas at summary trial as govern such pleas at trial on indictment. The law is helpfully summarised in Blackstones' Criminal Practice 2016 at Parts D12 and D22 as follows:*
>
> ***'If the accused pleads guilty, the prosecution are released from their obligation to prove the case. There is no need to empanel a jury, and the accused stands convicted simply by virtue of the word that has come from his own mouth**…'*
>
> *…*

[8] Mag. App. No. 63 of 2015.

21. ***Once an unequivocal plea of guilt is entered, the presumption of innocence ceases to apply and the defendant can be sentenced on the basis that he has been proved guilty****…" (emphasis added)*

[24] This principle is demonstrated by section 44(2) of the **Summary Jurisdiction (Procedure) Act**[9]:

"If the defendant says that he is guilty and shows no cause, or no sufficient cause, why an order should not be made against him, the court shall make such order against him as the justice of the case requires."

[25] The offence of gang membership for which the appellant was convicted requires consideration of several provisions of the CCCJA:

"3(1) A person who–
(a) is a gang member; …commits an offence by virtue of being such a member…and is liable on summary conviction to imprisonment for a term not exceeding ten years…
…
2…"gang" means an ***organization, association, combination or other arrangement*** *consisting of* ***three or more persons*** *whether* ***formally or informally organized****, that* ***commits****, or* ***has as one of its objects or purposes*** *the* ***commission or facilitating the commission of, a serious offence****;*
…
"gang member" means a person (including a gang leader) who ***belongs to a gang****, or a person who knowingly acts in the capacity of an agent for or an accessory to, or voluntarily associates himself with any gang-related activity, whether in a preparatory, executory or concealment phase of any such activity, or a person who knowingly performs, aids, or abets any such activity;*
…
"serious offence" means an offence specified in the Schedule."

[9] Chapter 99 of the Substantive Laws of Belize, Revised Edition 2020.

[26] The Schedule to the CCCJA lists 28 offences including drug trafficking, firearm possession and gang offences.

[27] Comparable legislation has been considered in Jamaica. Sykes CJ would have comprehensively considered legislation on criminal organizations, of which gangs are a subset, which bear a strong resemblance to the gang provisions in the CCCJA in **R v Carlington Godfrey et al**[10]. The Jamaican **Criminal Justice (Suppression of Criminal Organisations) Act** provides at section 2, where relevant:

> *"…any gang, group, alliance, network, combination or other arrangement among three or more persons (whether formally or informally affiliated or organized or whether or not operating through one or more bodies corporate or other associations) –(a) that has as one of its purposes the commission of one or more serious offences;"*

[28] Sykes CJ opined on the interpretation of those provisions:

> *"[14] From this definition a number of points emerge.* ***First, there is no need for any formality as in articles of association or any written documentation to be in existence before it can be said that a criminal organization exists****.* ***Second, the language used is quite wide and encompasses even what may be called loose arrangements provided that the other requirements are met****.* ***The statute does not require any permanence in the arrangement and neither does the arrangement need be long term****.* ***An arrangement among three or more persons for the commission of one and only one serious offence is sufficient****.* ***Third, the minimum number of persons required for a criminal organization to exist is three****.* ***Fourth, the Crown only needs to prove that one of the purposes of the three or more is to commit at least one serious offence. Fifth, there is no need for the Crown to prove that the commission of a serious offence is the dominant purpose. There is no main purpose or dominant criterion*** *as in the Canadian legislation that provided the inspiration for the Jamaican statute. All that needs to be established is that the commission of at least one serious offence is a purpose of the*

[10] [2020] JMSC Crim 04.

*arrangement…**Seventh, in respect of paragraph (a) there is no need for any serious offence to have been committed in order to establish the existence of a criminal organization**. **Once the Crown proves the arrangement involving a minimum of three persons and that one of or even the sole purpose of the arrangement is the commission of at least one serious offence then a criminal organization exists within the meaning of the statute.***

[15] A criminal organization may have legitimate and lawful purposes.

…

[16] This point is important. It is not unknown for criminals to use charitable acts to ingratiate themselves in communities but these charitable acts cannot deflect of a finding that a criminal organization exits if one of the purposes among the charitable ones is the commission of at least one serious offence. There is no Robin Hood defence if serious criminal activity is involved.

*[17] …**Before anyone can be convicted of being a part of or a member of a criminal organization under this statute, the person must have knowledge of the matters specified in (a)…of the definition**. It is important to keep in mind **that wilful blindness is sufficient for establishing the mental element of being a part of or a member of a criminal organization**.*

*[18] **Organization is an ordinary English word. It suggests some degree of structure. It remains to be examined how structured must the group be before it can be described as an organisation**.*

…

*[44] **This court accepts that there has to be some degree of organisation but having regard to the definition of criminal organization the evidential threshold necessary to meet the standard of organization is not very high**. What is definitely excluded is the spontaneous formation of a group that may arise in a spur-of-the-moment bar fight. Friends may have gone out to have a night of entertainment and relaxation with no criminality in mind. A fight erupts and the friends rally to assistance of one of their number. This would not qualify as a criminal organization.*

…

[57] ***There is no limit to the type of legally admissible evidence that may be adduced to prove the existence of a criminal organization****. Many of the offences in the CJSOCOA contain the words 'criminal organization.'* ***It means that an essential legal ingredient of many offences under this law requires proof that a criminal organization exists****.* ***One way of proving that such an organization exists is to adduce evidence of things done or said or things both said and done that are offences even though they are not charged in the indictment****. This opens the possibility of prejudicial evidence which may lead to an impermissible chain of reasoning, stigmatised in Makin v Attorney General for New South Wales [1894] A.C. 57 which itself may culminate in a conviction based on who the defendant is rather than whether the evidence has established that he committed the offence with which he has been charged.* ***The way to manage this risk is to determine whether the evidence adduced is greater in probative value than the risk of the impermissible chain of reasoning****." (emphasis added)*

[29] This Court is of the view that the approach taken in the interpretation of the Jamaican legislation in *Godfrey* should be applied in a similar fashion to the CCCJA in Belize.

[30] Consequently, in the Court's view, the elements of the offence of gang membership on a plain English reading of the relevant sections are as follows:

i. Proof of 3 or more members,
ii. Some form of organization, whether formal or informal,
iii. The arrangement has as, at least, one of its aims being the commission of scheduled offences **or** has committed scheduled offences,
iv. The defendant knows, which includes willful blindness, that the organization has as one of its aims, or has committed, scheduled offences, and
v. The defendant belongs to that organization.

[31] The first step in establishing gang membership, as can be seen by a disaggregation of the elements, is the existence of a gang, as was noted in the Canadian Supreme Court decision of **R v Abdullahi**[11].

[11] 2023 SCC 19 at para 12. Canada has legislation dealing with criminal organisations, which includes gangs, like Jamaica, though with greater requirements than either the Jamaican or Belizean legislation.

That evidence may come from interception of communications between members, as done in *Abdullahi,* which may provide evidence of interaction between members and their involvement in, or planning of, scheduled offences. This evidence is admissible pursuant to section 20(1) of the **Interception of Communications Act**[12]. The Court notes that the CCJ Academy for Law's **Needham's Point Declaration on Criminal Justice Reform: Achieving a Modern Criminal Justice System**, at recommendation 6[13], specifically mentions intercepts and other digital evidence as the better evidence as compared to witness testimony whose credibility or reliability may be in doubt. This is consistent with what the CCJ has said in its judgments[14]. The evidence to establish the existence of a gang may come from ex-gang members or undercover operatives as suggested by the Trinidad and Tobago Court of Appeal decision of **AG v Kevin Stuart**[15]. The existence of a gang may also be established by appropriately qualified experts, so qualified by either experience or training including police officers, as was noted in the Bermudan Privy Council decision of **Myers et al v R**[16]. Lord Hughes noted that:

> *"[57]…Evidence of the practices, mores and associations of gangs, whether general or particular… has been received in several jurisdictions and there can in principle be no objection to it being given by a police officer, providing that the ordinary threshold requirements for expertise are established, and providing that the ordinary rules as to the giving of expert evidence are observed*[17]*."*

[32] Section 3(3) of the CCCJA also lists particular facts which may assist the Court in determining whether a gang exists, or a person is a member of a gang. Section 3(4) lists evidence which is not necessary to establish the presence of a gang, but those listed factors, if present, could be utilized to demonstrate its existence.

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[12] Chapter 229 of the Substantive Laws of Belize, Revised Edition 2020. This legislation came into force on 29th November 2023 pursuant to **Statutory Instrument No. 137 of 2023**.

[13] *"We the participants at this Conference themed, "Criminal Justice Reform in the Caribbean: Achieving a Modern Criminal Justice System", endorse the following experiences, best practices, and recommendations:…6 That laws be enacted to provide for greater use of forensic, scientific, digital, and expert witness evidence, including the use of modern evidence gathering techniques such as interception of communications, digital recording of confessions and interviews, and DNA testing. This is preferable to prosecutions based solely on admissions and confessions."*

[14] **Sealy v R** [2016] CCJ 1 at para 109.

[15] Civil Appeal No. P162 of 2015 at para 17.

[16] [2016] 2 LRC 383 at paras 57-61.

[17] See para 59 of *Myers*.

[33] Financial investigations and appropriate use of the unexplained wealth application procedure for suspected gang members living above their means under the **Civil Asset Recovery and Unexplained Wealth Act 2023**[18] may reveal in the listing of their assets connections and patterns which may assist in establishing the existence of a gang. It may also assist in the prosecution of members of gangs for other offences like money laundering if the evidence establishes that they were dealing with large sums of money or property with no legitimate source, utilizing section 3(2)(b)[19] of the **Money Laundering and Terrorism (Prevention) Act**[20], such as happened in the St. Vincentian case of **Gellizeau v The State**[21].

Analysis

[34] In the instant case the appellant had the charge read to him and he pleaded guilty. TLM asked him if he understood what he was pleading guilty to and he said yes. There was however no explanation to him of the elements of the offence by TLM and it must be noted that the appellant was unrepresented. The facts were read to him which he accepted. The facts which he accepted included the following elements:

i. Detective Rollington Fuller conducted an investigation. Based on that evidence and evidence from interviews and sources he concluded that there was a group called the "Throw the Park clique" ("TTPC") which was a branch of a "George Street Gang" ("GSG"). Surveillance observed insignia of both of those groups in graffiti about Belize City. Through those interviews and sources geographical zones for those groups were identified.
ii. TTPC had approximately 10 members based on information from informants.
iii. That those two groups had rivalry with other groups.

[18] Section 59. This Act came into force on 3rd August 2023 pursuant to **Statutory Instrument No. 85 of 2023**. See also **Supt. Wendell Lucas v David Neeranjan et al** Civil Appeal No. P.231 of 2020, a decision of the Court of Appeal of Trinidad and Tobago.
[19] "*For the purpose of proving a money laundering offence under sub-section (1) it is sufficient to prove that… (b) the circumstances in which the property was handled were such as to give rise to an irresistible inference that the property could only be derived from unlawful conduct."*
[20] Chapter 104 of the Substantive Laws of Belize, Revised Edition 2020.
[21] 91 WIR 301.

iv. That a substantial amount of drugs and illicit firearms were found in areas under the "control" of those groups.

v. In an interview the appellant accepted that he had been a member of GSG for about 10 years.

vi. The appellant had been charged for several offences in the past.

[35] The restatement of the agreed facts reveals a yawning chasm in relation to the elements of gang membership, to wit, the existence of the gang. There is no evidence that either grouping, GSG or TTPC, plan or have committed scheduled offences. The evidence that drugs or guns have been found in those groupings' "territories" does not mean that they or any members of those groupings are involved. It would have been different if in the agreed facts it was stated that Detective Fuller, assuming his training and experience qualified him to be treated as an expert, had said that he had interviewed several current or ex-members of the GSG and based on that he concluded that GSG was involved in possession of illicit firearms or drug trafficking, both scheduled offences.

[36] Such evidence, appropriately justified by the expert's research, would be admissible in the Court's view. The opinion of the Privy Council in *Myers* on expert evidence and hearsay, in which a police gang expert testified is instructive, per Lord Hughes:

> *"[62] Insofar as Sergeant Rollin gave evidence as an expert, the question arises how far such a witness is affected by the rules of evidence as to hearsay.*
>
> *[63]* ***It is well established that an expert is entitled, in giving his evidence, to draw upon the general body of knowledge and understanding in which he is expert, notwithstanding that some (or even all) of the material may have been assembled by other students of the subject****… In a case very close to the present ones, the Court of Criminal Appeal for South Australia adopted the same approach in R v Cluse [2014] SASCFC 97, 120 SASR 268 in holding that a police officer in a similar position to Sergeant Rollin was* ***entitled in giving evidence of gang culture, characteristics and rivalry to draw upon information gathered from a number of sources****…*
>
> *[64] It does not, however, follow that because the witness is an expert he is immune from all inhibition on hearsay. He is not… in Cluse, the court drew the line at evidence from the officer*

of particular incidents of violence between the two gangs; that was held to require first hand evidence, or (so at least it was said) evidence from an officer who had himself investigated the incident. Thus all these cases show that there is a limit to the extent to which an expert may advance hearsay material.

[65] ***In some cases the dividing line is between opinion evidence, which may be informed by hearsay information (admissible)*** *and specific evidence of observable fact, which has to be proved in a manner which satisfies the ordinary rules of evidence.*

…

[68]…As part of the duty of an expert witness to the court, a police officer tendering the kind of evidence called in these cases must make full disclosure of the nature of his material. His duty involves at least the following.

(a) He must set out his qualifications to give expert evidence, by training and experience.

(b) He must state not only his conclusions but also how he has arrived at them; if they are based on his own observations or contacts with particular persons, he must say so; if they are based on information provided by other officers he must show how it is collected and exchanged and, if recorded, how; if they are based on informers, he must at least acknowledge that such is one source, although of course he need not name them.

(d) In relation to primary conclusions in relation to the defendant or other key persons, he must go beyond a mere general statement that he has sources of kinds A, B and C, but must say whence the particular information he is advancing has come; an example would be observations of a defendant in the company of others known to be members of a gang." (emphasis added)

[37] In the context of a criminal charge where the presumption of innocence applies and there is a burden of proof on the prosecution, a court cannot take judicial notice that there is a George Street Gang in Belize City **and** that it is involved in crime, in particular, scheduled offences. It is an element of the offence that must be established by evidence, which may include expert evidence, beyond reasonable doubt. It involves careful research and investigation of the grouping and their connections to scheduled offences. This is why Bereaux JA in *Stuart* would have observed, considering Trinidadian legislation which was similar in terms to the CCCJA:

"[17]…It is readily apparent from these provisions that proving gang membership in a court of law is no slam dunk. It requires a careful compilation of the evidence showing how the gang is organised, how the gang activity is perpetrated through gang members and their respective roles in such activity. Evidence at trial must be carefully led to show the nexus between the gang, the members and the activity. In a case where the gang-related activity relates to narcotics, evidence of actual sales of the narcotics is required to prove the gang-related activity. Mere surveillance without more may not suffice. It is not enough to simply observe the accused making "interactions" with other persons. The evidence must be that narcotics were sold by the accused to someone."

[38] TLM should not have accepted the guilty plea of the appellant because the agreed facts did not establish all the elements of gang membership, to wit, that the grouping to which he admitted he belonged, the GSG and the TTPC, planned or committed scheduled offences. TLM was obliged by Rule 8.8(i) of the **Criminal Procedure Rules 2016** ("CPR") to, "Before accepting a plea of guilty to any or all of the charges the Magistrate must satisfy themselves…that the Defendant committed the alleged offence(s)."

[39] The Court finds that there is merit in this ground of appeal. As there is, in the Court's view, insufficient evidence to sustain the conviction this ground alone requires the conviction and sentence to be quashed.

Ground 3: The Appellant Did Not Receive a Fair Trial

The Legal Framework

[40] The appellant complains about the paucity of information provided by TLM as to his rights before the taking of his guilty plea. In that regard it may be helpful to recount the requirements of the CPR, as is relevant, on arraignment and the taking of a guilty plea:

"8.1 (d) the charges shall be read to the Defendant by the Magistrate and the fact sheet, summarizing the evidence, shall be read aloud by the prosecutor;

*(e) **the Defendant shall be given an explanation of his or her rights**, **including**, where appropriate, the right to:*

…

(ii) legal representation…;

…

8.8 (i) Before accepting a plea of guilty to any or all of the charges the Magistrate must satisfy themselves, either by questioning the Defendant personally or by calling upon counsel to lead the questioning, that the Defendant committed the alleged offence(s), that the plea is entered voluntarily and that it is made with an appropriate understanding of the consequences."

[41] The Court observes that the framers of the CPR used the word "including" in listing the rights a defendant should be advised of, which means that what follows is not an exhaustive list and may in appropriate cases require expansion.

[42] The process of accepting a guilty plea at common law mirrors this process as outlined by the Trinidadian Court of Appeal in *Noel*, per Soo Hon JA:

"23…we consider the following guidelines as capturing the minimum procedural requirements to be adopted by Magistrates when considering whether to accept a guilty plea from an unrepresented defendant:

i. The charges should be read to the defendant and the elements of the offence should be explained to him in terms which are sufficiently simple for him to understand;

ii. Having explained the charges, the Magistrate should enquire of the defendant whether he understands the charges; If he does not understand or is unsure, further explanation may be warranted;

iii. The defendant should be given an opportunity to retain and instruct legal counsel;

iv. The defendant should be informed that he may seek an adjournment for the preparation of his defence;

v. The defendant should be specifically cautioned of the consequences of his plea and the risk of a custodial or severe sentence;

24. Where these steps are adopted the Court of Appeal can have confidence in the safety of the plea and the conviction recorded since the burden will then lie on the defendant to adduce what would have to be compelling evidence to establish that his plea was entered in ignorance."

[43] In *Noel* that Court also reinforced the importance of making an appropriate record of the guilty plea process and the explanation of rights for appellate scrutiny, again per Soo Hon JA:

"25…The fact that the procedure leading to the acceptance of a plea of guilty is captured so briefly causes us some concern.

26. Our first concern arises from the fact that the record does not indicate that the appellant was asked whether he understood the charges against him. It simply states that the charges were read to him and thereafter he pleaded guilty. In our view this is not enough. The standard of fairness in criminal proceedings requires that a defendant understand the substance of the allegation against him so that he may make a proper answer to the charge. If he does not understand the nature of the charge against him then he cannot realistically enter a plea that will be truly indicative of guilt. The Magistrate's reasons do not contradict the bare entry in the record, they repeat that the charge was read and the accused was cautioned, after this the prosecution elected summary trial and the accused pleaded guilty.

27. After the plea was entered, the Magistrate explained that she asked the appellant if he understood that by pleading guilty he was admitting the offence as charged. While this is commendable, it still falls short of her responsibility. Firstly, the explanation does not speak to the elements of the offence, nor to the consequences attached. In the context of a charge which carries a lengthy term of imprisonment, there is no discussion at all of the possible results. Furthermore, we cannot conduct a fair evaluation of whether the accused really understood the charge against him since the only material before us is the Magistrate's written reasons stating that he simply responded "Yes".

28. We acknowledge that it is the duty of the Magistrate to accept an unequivocal plea of guilty. However, the process of eliciting that plea must at the very least test the integrity of the defendant's statements. The benefits of a system that allows defendants who are prepared to willingly admit guilt to have their cases quickly disposed of are obvious.

However, it is imperative that justice is never sacrificed for expediency. It is the paramount duty of the criminal justice system to put procedural steps in place in order to ensure that the innocent are acquitted and that convictions are safe. If a conviction is recorded, the Court must be sure of the defendant's guilt and this means accepting a plea when the defendant is in fact guilty and wants to enter such a plea. While we are concerned with the swift dissemination of justice the court must ensure that this justice is never such a hustled affair that it results in the deprivation of fairness in the process. On the face of it, the record does not show that sufficient procedural steps were taken to ensure fairness to the appellant before the plea was taken, or that the plea was based on a clear acknowledgement of guilt.

29. Our second concern is that neither the record nor the Magistrate's reasons state that the appellant was advised of his right to seek legal advice before entering a plea. At no point was he advised of his right to seek an adjournment to do so. In the case of unrepresented litigants, especially in criminal trials where the liberty of the defendant is at stake, the right to retain and instruct counsel is indispensable and it is the duty of the court to ensure that the defendant has an opportunity to do so. This is borne out in the fact that as soon as counsel had the opportunity to take instructions, the application for a change of plea was made.

30. Had the appellant been provided with legal advice or at least advised of his right to seek advice, it would enhance the strength of his plea. The advantage of allowing the defendant to seek legal advice before the plea is taken is that any plea he enters thereafter is less likely to be overturned at a later stage since it will be presumed to have been made voluntarily, after careful consideration and explanation of the case against him and the legal consequences and possible sentence that flow from such a plea. Even if he rejects the advice or the opportunity to obtain counsel, the Magistrate is protected since procedurally, steps would have been taken to aid him in presenting any defence he may have. This would also relieve the Magistrate of the unenvious task of trying to balance his duty to assist the unrepresented defendant without descending into the arena. In our view, the procedure adopted in this case fell short of ensuring fairness to the accused. We therefore find merit on this ground."

Analysis

[44] The Court firstly wishes to indicate that it sympathizes with TLM who would routinely face long lists, in difficult conditions, with the onerous burden of having a majority of unrepresented litigants. In this case TLM repeatedly tried to dissuade the appellant from entering a guilty plea as a matter of convenience, at one point refusing the plea out of her seeming innate sense of justice. It was in fact the appellant who was insisting that he wanted to plead guilty and was seemingly adamant about that position.

[45] However, many of the critical procedural safeguards required by the CPR and common law do not form part of the record of appeal. There is no record of the appellant, who was unrepresented, being informed of his right to legal representation. There is no record that the charge was explained to the appellant which should form part of the Rule 8.8(i) process where the TLM confirms that the appellant is in fact guilty. There is no explicit canvassing of the issue whether the plea was entered voluntarily or that it is made with an appropriate understanding of the consequences before being accepted.

[46] The safeguards that ought to accompany the acceptance of a guilty plea, which involves waiving the important constitutional right of the presumption of innocence, were not engaged in this case from what appears on the record. The Court cannot be certain that the guilty plea by the appellant was properly informed. This Court strongly endorses the guidance given in *Noel* for magistrates. In this regard there is merit in this ground. This would also justify the quashing of this conviction and sentence.

[47] The Court having found the conviction unsafe, the appellant's complaints on sentence are now academic. The Court would only wish to indicate two things on that issue.

[48] Firstly, the guidance on the general sentencing process by Belize's highest court, the CCJ, in **Teerath Persaud v R**[22] and **Linton Pompey v DPP**[23] ought to be followed by magistrates.

[49] Secondly, in terms of sentencing gang offences magistrates must have regard to the intent of the National Assembly by the creation of a significant 10-year maximum sentence as well as the severe

[22] 93 WIR 132 para 46.
[23] [2020] CCJ 7 (AJ) GY.

challenge to the national security of Belize these criminal groupings pose. The British Columbia Court of Appeal in the case of **R v Mastop**[24] considered sentencing in the context of the Canadian criminal organization/gang legislation and opined, per Stromberg-Stein J.A.:

> *"43 The parliamentary intent behind the criminal organization offences…is to take seriously the harm and danger of coordinated criminal activity.*
>
> *…*
>
> *46 The overall objective of the criminal organization legislation is to protect society from the wide-ranging effects, violent and otherwise, of criminals who work together as a group, as well as to prevent and deter organized criminal activities. Offenders who regularly commit crimes together are a greater menace to society than an individual offender working alone."*

[50] Also in another Canadian decision, **R v Manasseri**[25], the Ontario Court of Justice made the point that criminal organization/gang offences ought ordinarily to attract custodial sentences, per Fraser J:

> *"63 In R. c. Venneri, [2012] S.C.J. No. 33 (S.C.C.), the Supreme Court of Canada stated at para. 36:*
>
> *'Working collectively rather than alone carries with it advantages to criminals who form or join organized groups of like-minded felons. Organized criminal entities thrive and expand their reach by developing specializations and dividing labour accordingly; fostering trust and loyalty within the organization; sharing customers, financial resources, and insider knowledge; and, in some circumstances, developing a reputation for violence. A group that operates with even a minimal degree of organization over a period of time is bound to capitalize on these advantages and acquire a level of sophistication and expertise that poses an enhanced threat to the surrounding community.'*
>
> *64* ***Thus, criminal organization offences due to their more sophisticated structure and their incentive to circumvent the law tend to attract penitentiary type sentences. When sentencing offenders for these types of offences courts have repeatedly stated that denunciation and deterrence are the primary sentencing objectives****." (emphasis added)*

[24] 2013 BCCA 494.
[25] 2014 ONCJ 683.

[51] This Court is of the view that the reasoning of the decisions in *Mastop* and *Manasseri* should apply in Belize. The Court takes judicial notice that two states of emergency were declared in this country in 2024 because of rising crime that had at its root gang related violence. Any sentence imposed for gang offences must reflect the reality of their societal impact.

DISPOSITION

[52] It is declared that the right of the appellant under section 6(2) of the Belize Constitution to a fair hearing within a reasonable time was breached by the excessive delay in the hearing of his appeal to the High Court. The Court would not, however, quash the conviction on the ground of delay.

[53] The appeal is allowed, and the conviction and sentence are quashed on the basis of grounds 2 and 3. No retrial is ordered, owing to the unreasonable delay in the appellant's trial.

[54] Any monies paid by the appellant flowing from the learned Magistrate's orders are to be returned to him.

[55] The Court orders each party to bear their own costs.

[56] A copy of this judgment is to be sent to the Honourable Chief Magistrate.

Nigel C. Pilgrim
High Court Judge
Criminal Division
Central District
Dated 11th October 2024