**THE REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE HIGH COURT OF JUSTICE**

**Criminal Division**

**CRS 046/2009**

**THE STATE**

**v**

**1) AKEEL MITCHELL**

**&**

**2) RICHARD CHATOO**

**FOR**

**MURDER**

**Before The Honourable Justice Lisa Ramsumair-Hinds**

**Date of Delivery: 21 June 2021**

**Appearances:**

Mrs Sabrina Dougdeen-Jaglal, Ms Anju Bhola and Mrs Sophia Sandy-Smith for the State

Mr Mario Merritt and Mr Randall Raphael, instructed by Ms Kirby Joseph for Accused No. 1

Mr Evans Welch and Mr Kelston Pope instructed by Ms Gabriel Hernandez for Accused No. 2

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**RULING ON NO CASE SUBMISSION**

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**INTRODUCTION**

1. On 16th June 2021, Mr Merritt made an oral no case submission on behalf of Accused No. 1 (Mr Akeel Mitchell). Mr Merritt contends that there is no case to call upon this Accused to answer as it relates to the Indictment between the State and him. The State filed written submissions in response on 18th June 2021.

2. Essentially, Mr Merritt has invited the Court to consider that the case mounted by the State, through an attempt to forge a catena of circumstantial evidence, cannot amount to proof of guilt and at most, amounts to speculation. In any event, he posits that Mr Akeel Mitchell was doli incapax.

3. On 21st June 2021, I gave an oral ruling where I overruled the said no case submission, with a promise that I would later put same in writing. I do so now.

**APPLICABLE LEGAL PRINCIPLES**

4. There was a point in time when English criminal jurisprudence ordained that a case must be sent to the jury so long as there was some evidence in support of it, tenuity thereof notwithstanding. This position changed as it came to be realised that this was manifestly unfair and that evidence, rather more substantial than a mere scintilla, ought to be required before a case should be sent to the jury for its determination.

5. The test that applies today was expounded in **R v Galbraith**[1] and it is now well settled in our jurisdiction in **Sangit Chaitlal v The State**[2].

6. As it relates to the formulation of the test at the stage of a no-case submission in

[1] [1981] 2 All ER 1060

[2] [1985] 39 WIR 295

circumstantial cases, Counsel for both sides have referred me to several authorities and I am directed by the formulation and guidance in **DPP v Varlack**[3], **R v Jabber**[4] and **Taibo (Ellis) v R**[5].

7. As it relates to the formulation of the test in cases where there is no jury, I am guided by several authorities and, of those, I have selected three of greater note: **Chief Constable of Northern Ireland v LO**[6], **R v Courtney (William)**[7] and **R v Connor (Christine)**[8].

8. I have crystallised eight relevant principles from those authorities, which have guided my considerations in this ruling on the no-case submission.

    (1) There is no case to answer only if the evidence is not capable of supporting a conviction;
    (2) In a circumstantial case, that implies that even if all the evidence for the Prosecution were accepted and all inferences most favourable to the Prosecution which are reasonably open were drawn, a reasonable mind could not reach a conclusion of guilt beyond reasonable doubt, or to put it another way, a reasonable mind could not exclude all hypotheses consistent with innocence as being unreasonable;
    (3) The correct test is whether a reasonable tribunal of fact properly directed would be entitled to draw an adverse inference;
    (4) If there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation and conjecture;

[3] [2008] UKPC 56
[4] [2006] EWCA Crim 2694
[5] [1996] 48 WIR 74
[6] [2006] NICA 3
[7] [2007] NICA 6
[8] [2021] NICA 2

(5) Even where the case against the Accused is thin, if there is evidence upon which a tribunal of fact is open to accept as truthful or reliable upon which it could be satisfied of guilt without irrationality, then the Judge is not only entitled but is required to allow the case to proceed;

(6) The proper approach of a Judge or a Magistrate sitting without a jury does not involve a different test from that in **Galbraith**, but the exercise the Judge must engage in is suitably adjusted to reflect that she is the tribunal of fact;

(7) In a Judge Alone Trial on a no-case submission, the question to be asked is not "Do I have reasonable doubt?" Rather, it is whether I am convinced that there are no circumstances in which I can properly convict, and

(8) Even in Judge Alone Trials, the close of the Prosecution's case does not mark the appropriate point for the weighing up of evidence and inferences to determine which deducement is the more or most reasonable.

**ANALYSIS**

9. Mr Merritt has invited the Court to consider that there is no evidence of a joint enterprise that connects Akeel Mitchell to the death of Sean Luke. He submits that the State must prove not just the murder, but must also identify Mr Mitchell's principal or secondary role in that act of murder. In that regard, he repeatedly asked these three questions: *"What is the plan?"*, *"What is its scope?"* and *"What was Akeel Mitchell's role?"* In support, he relied heavily on the case of **R v Banfield and Banfield**[9].

10. As it relates to the joint enterprise point raised by Mr Merritt and the State's response in this regard, I have considered the following authorities, all of which were raised

[9] [2013] EWCA Crim 1394

and discussed by State Counsel:

(1) **Banfield and Banfield**;

(2) **R v Strudwick and Merry**[10];

(3) **R v Lane v Lane**[11];

(4) **R v Lewis and Marshall-Gunn**[12]**;**

(5) **R v Lawson v Thompson**[13];

(6) **Gianetto**[14], and

(7) **R v Jogee and R v Ruddock**[15].

11. The State, in its response, clarified certain things, including the basis upon which it is advanced that criminal liability attaches to Mr Akeel Mitchell. Therefore, whereas earlier in the submission Mr Merritt suggested that this might involve joint principals, Mrs Dougdeen-Jaglal made it very clear that, while the State's case is indeed premised on joint enterprise, it is not one of joint principals. It should be noted that I find no fault in the State for only now noting with clarity, in responding to this no-case submission, the particular basis of the criminal liability. There is absolutely no difficulty with that and there are several cases on the point.

12. State Counsel submitted that the scope of the plan was to sexually assault and kill Sean Luke. As it relates to the deadly assault, the State says that one of the two Accused committed that act whilst being encouraged and/or assisted by the other Accused. I have directed myself by the guidance in **Lewis and Marshall-Gunn** which pointedly addresses the challenge facing prosecutions in general when the Prosecution is unable to prove which of two Accused was the actual principal and

[10] [1994] 99 Cr. App. R. 326
[11] [1986] 82 Cr. App. R 5
[12] [2017] EWCA Crim 1734
[13] [1994] Lexis Citation 4214
[14] [1997] 1 Cr App R 1
[15] [2016] 87 WIR 439

which was the actual accessory. In this regard, I am invited by the State to find that there is prima facie evidence to support the State's contention that this case is within the fourth of the five scenarios outlined in **Lewis and Marshall-Gunn**.

13. The State argued further, that following the guidance in **Jogee and Ruddock,** as well as or perhaps principally, **Giannetto**, in those circumstances, it is unnecessary to identify whether Akeel Mitchell was a principal or accessory. This does not mean to say that they do not have to prove or provide enough evidence from which to infer the requisite intent (**Jogee and Ruddock**). They submit that on the totality of their case, there is enough to infer that one Accused committed the deadly assault with the cane stalk whilst being assisted and/or encouraged by the other, and in these circumstances, it is unnecessary to identify which was the principal and which the accessory.

14. Alternatively, or perhaps additionally because facts can give rise to more than one theory of liability, the State averred that murder felony may arise as the basis of criminal liability. In this regard, Mrs Dougdeen-Jaglal suggested that the liability for the murder can be inferred from the very same circumstantial evidence as proof of an act/s in furtherance of sexual assault (the act/s which resulted in death) and likewise, it matters little whether Mr Mitchell is the one who committed the act/s in furtherance of the sexual assault or it was his co-Accused. Additionally, they posit that in either case the circumstantial evidence which they have presented is sufficient at this stage to lead to the relevant inferences based on the totality of the evidence and its cumulative effect.

15. I have listed and outlined aspects of the circumstantial evidence (albeit differently from State Counsel's invitation), in an effort to show incrementally and cumulatively what potential effect it could have on my assessment at this stage. This listing is meant to be inclusive, but not exhaustive, and certainly, what I raise here does not limit the aspects of evidence that can be raised at any later stage, if necessary.

(1) Last seen evidence provided prima facie by several witnesses. I need not detail it here;

(2) Evidence placing the Accused, Akeel Mitchell, inside the cane field having entered together with Accused No. 2 and with the deceased, Sean Luke;

(3) Prima facie evidence of sounds, which could be termed 'distress', from within the cane shortly after their entry;

(4) Prima facie evidence of the Accused, Akeel Mitchell, returning to the group or exiting from the cane together with Accused No. 2 shortly after they had gone in and shortly after the sounds were heard, but without Sean Luke;

(5) Evidence of underwear purportedly belonging to Sean Luke being discovered 100 feet from the location where the nude corpse was later discovered;

(6) Expert evidence of Akeel Mitchell's DNA from a sperm cell fraction on that underwear;

(7) Expert opinion evidence of the cause of death in what can be described as a bizarre and brutal manner which required a degree of force;

(8) Expert evidence about the discovery of spermatozoa in the anus of the deceased; and

(9) Prima facie evidence of post-offence conduct, that is two-fold. It includes, if it is accepted, conflicting reports by this Accused to Sean Luke's mother and a false account given by both Accused of some unknown man taking Sean Luke into the cane. (Of course, that falsity will only be established if the State's witnesses are to be believed.)

16. Mrs Dougdeen-Jaglal suggests that, on the twining together of all of those various aspects of the circumstantial evidence (again, it is not exhaustive), at this stage, there is sufficient evidence, in its totality and with its cumulative effect, to justify an inference of guilt by me, acting rationally and reasonably upon proper self-directions,

both on circumstantial evidence and as it relates to joint enterprise. In a circumstantial case, it is important to consider all of the components of the notional chain in their totality.

17. I remind myself and this is somewhat repetitive, that the central question at this stage is whether on one possible view of the facts there is sufficient evidence upon which, as a tribunal of fact, I can properly conclude that Mr Akeel Mitchell was guilty beyond reasonable doubt of having perpetrated the deadly assault on Sean Luke.

18. To frame the issue in that type of focused way serves to draw attention to the modest hurdle which the Prosecution has to overcome at this stage. That having been said, and having outlined a list of some strands of the circumstantial evidence presented by the State, taking into consideration its totality and cumulative effect, I agree with the State that there is sufficient evidence at this stage.

**DOLI INCAPAX**

19. That is another hurdle which the State must clear, as an element of the offence, as it relates to Mr Mitchell. Mr Merritt contends that Mr Mitchell was doli incapax. To begin my analysis of this issue, I quote from **Harper J** in **R (A Child) v Whitty[16]:**

> *"No civilised society", says Professor Colin Howard in his book entitled Criminal Law, 4th ed. (1982), p343, "regards children as accountable for their actions to the same extent as adults ... The wisdom of protecting young children against the full rigour of the law is beyond argument. The difficulty lies in determining when and under what circumstances should it be removed."*

20. Within our society, if more parents should hear and understand the rule, they might

[16] [1993] 66 A. Crim. R. 462, Supreme Court of Victoria

give less 'licks'. The doli incapax rule provides that a child who is under the age of seven years may not, under any circumstances, be charged with committing any crime.

21. There is a further presumption under the rule which operates in favour of a child between the age of 7 and 14. Such a child, that is one aged 7 to 14, is presumed to be incapable of committing a crime; however, unlike the case of a child under seven, the latter presumption is not conclusive. It can be rebutted by the Prosecution producing evidence which shows that such child at the time when they did the act, in respect of which the charge was brought, had sufficient understanding to know that the act was seriously wrong.

22. Trinidad and Tobago has inherited this common law position[17]. The classic authority on the point is the House of Lords' decision **in C v DPP[18]** and Counsel for both sides have referred extensively to this case.

23. I have distilled the central principles which governed my thoughts on the matter in this way:

    (1) Doli incapax is not a defence. It is an element of the Prosecution's case and must be rebutted. If the Prosecution fails to call evidence to rebut the presumption, there will be no case to answer. It follows, then, that if at the close of the Prosecution's case, as with the other elements, if there is sufficient evidence to satisfy a tribunal of fact, the trial must proceed. **Lord Lowry** in ***C v DPP*** put it this way: *"It is quite clear as the law stands, the Crown must, as part of the Crown's case, show that a child defendant*

[17] Save for sexual offences, where the age of criminal responsibility is 12 (Section 26: Sexual Offences Act, Chap. 11:28)

[18] [1996] AC 1

*is doli incapax before the child can have a case to meet."*[19]

(2) In order to rebut the presumption, the Prosecution must prove that the child, in doing the act which, of course, itself must be proved, they knew that it was a wrong act as distinct from an act of mere naughtiness or childish mischief. In **J.M. (A Minor) v Runeckles**[20], the test is defined as requiring proof that the child knew the act was seriously wrong and not merely something that would invite parental disapproval. It is not enough to think, *"Mammy will beat me."*

(3) The criminal standard of proof applies. The evidence relied upon by the Prosecution must be strong and clear beyond all doubt or contradiction. According to the learned authors of ***Blackstone*** or from **Rex v Gorrie**[21], it must be *"very clear and complete evidence"*. ***Lord Lowry*** in **C v DPP** put it this way: *"The presumption itself is not and never has been completely logical. It provides a benevolent safeguard which evidence can remove. Very little evidence is needed but it must be adduced as part of the Prosecution's case or else there will be no case to answer."*[22] In this regard, the evidence to prove the child's guilty knowledge *"must not be the mere proof of doing the act charged, however horrifying or obviously wrong that act may be.*[23]*"*

(4) Guilty knowledge cannot be presumed from the mere commission of the act. (Again, I feel the need to say that we need to explain some of these principles in parenting generally.) I note the clarification on this point from the Court in **A v DPP**[24], *"The act does not speak for itself but that does not prevent consideration for this purpose of the circumstances in which the act was committed. Consideration of conduct closely associated*

[19] Ibid, at 37E
[20] [1984] 79 Cr. App. R. 255
[21] [1918] 83 J.P. 136
[22] Note 18, at 33G
[23] Ibid, at 38F
[24] [1997] 1 Cr. App. R 27

*with the act is permitted for the purpose of deciding whether guilty knowledge is proved"*[25]*.* The nature of the offence charged may be a relevant factor in all of the circumstances.

(5) I note further the reasoning of the Court of Appeal of Queensland in **R v Jay Michael Folling**[26]. *"Evidence of surrounding circumstances including conduct closely associated with the act constituting the offence may be considered for the purpose of proving the relevant capacity in relation to that offence … Such conduct may include asserting a false alibi, rendering a victim incapable of identifying the accused or preventing a victim from summoning assistance during the commission of an offence. Although, evidence of the Accused's age alone cannot rebut the presumption…, inferences capable of rebutting the presumption can be drawn from the Accused's age when considered together with evidence of the Accused's education or of the surrounding circumstances of the offence, or with the observation of the Accused's speech and demeanour".*

(6) Further to the point regarding the value, if any, which attaches to the age of the Accused in rebutting the presumption, it was noted in **B v R**[27], *"it is to be observed that, the lower the child is in the scale between eight and fourteen, the stronger the evidence necessary to rebut the presumption, because in the case of an eight year old it is conclusively presumed he is incapable of committing a crime."*[28] Also, ***Lord Lowry*** noted in **C v DPP,** *"the cases seem to show, logically enough, that the older the defendant is and the more obviously wrong the act, the easier it will generally be to prove guilty knowledge"*[29].

[25] Ibid, at 34

[26] Supreme Court of Queensland - Court of Appeal (Unreported) 26/3/98, at 6

[27] [1960] 44 Cr App R 1

[28] Ibid, at 3

[29] See Note 18, at 39A

24. With respect to this matter, and regarding Mr Mitchell in particular, I accept that the onus is on the Prosecution to rebut the presumption of doli incapax, and I note that the test at this stage is whether there is sufficient evidence for Mr Mitchell to be called upon make his defence.

25. In **The Republic v TR**[30], although it was in respect of a Magistrates' Court, the Supreme Court of Nauru dealt clearly with the wrong test being applied and in that case, the decision of the Magistrate was challenged. The Magistrate had incorrectly applied a test of, "beyond reasonable doubt", at the stage of a no-case submission on the doli incapax presumption[31].

26. At paragraphs 90 to 107 of the State's submissions, Mrs Dougdeen-Jaglal outlined the evidence relied upon by the State to rebut the presumption of doli incapax. I need not list them all. From those paragraphs, I am satisfied that it is very open to me, as factfinder, properly self-directed on doli incapax, as I have detailed, to draw those inferences as invited, some, even if not all, and on that basis, I might find that the State has successfully rebutted the presumption to the requisite standard.

27. The age of the Accused at the material time, puts him close to his 14th birthday and therefore higher on the scale, and together with the gravity of the acts done to the body of six-year-old Sean Luke, the approach in **L v DPP**[32] is open to me.

28. Certainly, the State suggested that the presumption can be 'negated' on that basis alone. However, there is more that is available in relation to the circumstantial

[30] Criminal Appeal No. 1 of 2020

[31] Ibid, para 20, *Khan J* concluded:

*"At the close of the case for the prosecution the magistrate made a correct finding that the prosecution had not adduced sufficient evidence to rebut the presumption of doli incapax (however he applied the incorrect test) which is also an element of the offence, as discussed above and the respondent was correctly acquitted of the charge. I uphold the finding of acquittal."*

[32] [1996] 2 Cr. App. R. 501

evidence here. There are inferences reasonably open to me regarding the surrounding circumstances, if I accept certain aspects of the State's case, that might provide proof of, for example, premeditation. In respect of the account/s provided by Avinash Baboolal and/or Avis Pradeep, that might provide some proof of rendering the six-year-old incapable of receiving assistance, for example, as it relates to the location where the crime took place. That evidence might provide something in the nature of proof of concealment as part of a criminal enterprise. Also, in that regard, there is the 100 feet between the discovery of the recovered clothing and the corpse itself.

29. Regarding the mental acuity of the Accused, there are also inferences reasonably open to me from the statement to the police. State Counsel has mentioned some portions of the statement, and I find that there are others as well.

30. It is not my task, at this stage, to choose between the inferences, which are reasonably open to me, and it is not to say that other inferences could not be drawn from the evidence. Inferences that could perhaps suggest innocence. It is a question of what the test is at this stage and I repeat, it is not for me to determine which deducement is the more or most reasonable.

31. In that regard, I find that the State has satisfied me. There is sufficient evidence to prove that Akeel Mitchell was doli capax.

**DISPOSITION**

32. The no case submission is overruled. I call upon the Accused to answer the charge.

Lisa Ramsumair-Hinds

Puisne Judge