REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CRIMINAL DIVISON

Scarborough

CR T023/2015

THE STATE

Prosecution

V

SHELDON WILLIAMS

Prisoner

FOR MANSLAUGHTER

Before the Honourable Madam Justice Ramsumair-Hinds

Date of delivery: Monday July 29 2019

APPEARANCES:

Mrs Stacy Laloo-Chung and Ms Forrester for the State

Mrs Deborah Moore-Miggins, instructed by Ms Roberts for the Prisoner

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JUDGEMENT

INTRODUCTION

1. Mr Williams is before me in a Judge Alone Trial (JAT) on a charge of Manslaughter. His trial commenced on Wednesday July 1 2019 and I promised to give a written verdict today, Monday July 29 2019, fourteen days after I heard the last witness.

2. I have taken the liberty in this written ruling to explain the reasons for the procedure adopted in this JAT. I thank Counsel for both sides, Mrs Moore-Miggins, Ms Roberts and Mrs Laloo-Chong, as well as my pertinacious Judicial Research Counsel Ms Koya Ryan, for their contributions. It is not expected that future written decisions will repeat the explanations as to procedure, but rather that I will go more quickly to the task of considering the issue between the State and the Prisoner at the Bar, reaching conclusions on that essential issue and giving reasons for same. I apologize for the extent of explanation provided for the procedural considerations, but I believe that this was required as JATs are yet quite nascent.

THE LATE ELECTION FOR JAT

3. The opportunity to elect a JAT is now a statutory right of any person who faces an Indictment. JATs are not new to several other Commonwealth jurisdictions. Indeed, they are not new to the region. In 2013, Justice Charles Quin, Q.C. of the Grand Court of the Cayman Islands presented a paper on the topic 'Recent Developments in Criminal Practice and Procedure: Non-Jury Trials in the High Court and Witness Anonymity Orders'[1] which outlined the introduction of and nuances between JATs in several jurisdictions.

[1] Organisation of Eastern Caribbean States (OECS), 10th Regional Law Fair, 13 – 15 September 2013, British Virgin Islands.

4. Unlike the case in most other jurisdictions where non-jury trials are common, in Trinidad and Tobago, ***it is the Accused alone*** who can initiate this mode of trial. This is far from the mandatory situation in Belize's section 65A[2] or Jamaica's Gun Court[3]. Nor is this choice of mode subject to the decision of the DPP, as in Northern Ireland. Comparatively as well, I note that in the UK[4] and under Belize's section 65B (2)[5], although subject to the Court's discretion, the DPP can initiate consideration of a non-jury trial. In several of the jurisdictions, the Judge has wide discretion in the determination of the mode. These include those listed above where the DPP can apply. In the Turks and Caicos Islands[6], the decision to proceed without a jury can be ***entirely at the Judge's behest***. The Accused person can ***apply*** to the Judge for a non-jury trial in Belize and the Turks and Caicos Islands, but it is not a right. One can find comparative similarity with the local statutory provision in the Cayman Islands, where the Accused likewise is the one who has the right to elect this mode of trial. The relevant section reads:

> *If an accused person is of the opinion that due to the nature of the case or the surrounding circumstances, a fair trial with the jury may not be possible, he may, at least 21 days before the date of the trial or the date of the arraignment, whichever is earlier, elect to be tried by a judge alone; and such election shall be made by notice in writing addressed to the clerk.*[7]

5. Certainly, just as in Trinidad and Tobago, a timeline is prescribed for the

[2] Indictable Procedure (Amendment) Act 2011 (BZ).
[3] Except in cases of capital offences, where jury trial is necessary.
[4] The Criminal Justice Act 2003, section 43 (UK).
[5] n.2.
[6] Trial Without Jury Ordinance 2010 (TC).
[7] Section 129 of the Criminal Procedure Code (2011 Revision) (KY).

advance notification of this election. The Cayman legislation further provides for 'late' notifications under section 129 (2), which reads:

> *Notwithstanding subsection (1) a judge may permit an accused person to make an oral or written election at any time before a jury is empanelled, where such accused person has proven that, because of exigent circumstances, it was not possible for him to make an election within that time limit as specified in subsection (1).*

6. There is no similar provision in our legislation that gives the judge the discretion to approve a late election. In deciding whether to grant Mr Williams' very 'late' request to elect a JAT, I considered three primary factors.

   i. Firstly, I note that throughout the progression from Bill to law, Parliament made it abundantly clear that this amendment intended to give Accused persons a right.

   ii. Secondly, I note that even in the Cayman context where proof of exigent circumstances to mitigate the lateness is required, that is construed very widely in fairness to the Accused so as not to deprive one of their right to elect. According to Quin J:

> *Although the Criminal Procedure Code states that the defendant should give 21 days notice, what frequently occurs is that the defendant comes into court, he has a studious review of the jury panel, you see him enter into deep discussion with his attorney and an application is then made for a judge alone trial. What happens in the Cayman Islands is, I am sure very likely to happen in all smaller islands and smaller communities,*

the defendant sees one or more people on the jury panel who he did not expect to see and who he did not want to see. The court is faced with a late application, but I have always found to be fair to the defendant is the overriding consideration and consequently I have never refused an application for a judge alone trial.[8]

iii. Thirdly, an important consideration as well was that Mr Williams' Indictment was preferred some time ago and this right recently given to him, only five months ago.

7. Certainly, I can well appreciate the reason for a 60 day minimum period to avoid "embarrassment to the administration of justice".[9] I raise a few examples to explain what seems obvious. If an Accused elects a JAT and then on her trial date, she changes her mind and wishes to be tried by a jury of her peers, there is an incredible inconvenience to the proper administration of justice, in that, there is no readily available pool of jurors. Good trial management and trial certainty would have provided her with that window in time for her right to a fair trial, and according to the mode that she had earlier elected. To adjourn in order to secure the attendance of a pool would result in unacceptable delay and lost trial time. It certainly could erode confidence in proper administration, as she would have secured that window for herself to the disadvantage of all those waiting their turn for a fair trial.

8. I have considered the converse as well. If the earlier choice had been reflected in acceptance of the current default mode of trial, that is by judge

[8] Quin J (n. 1) 7.
[9] Senate Debate 2017.03.14, 39 per Attorney-General Hon. F. Al-Rawi.

and jury, and then on the morning of trial, with an available pool of jurors, the Accused suddenly elects a JAT, there is no immediate wastage of trial time. Indeed, the pool is simply discharged (most of whom usually are quite expressive in their relief not to be selected). There is potentially a loss of trial time. JATs are likely to be shorter, there being no real need for Opening Addresses (Judge already has the Deposition), for a Voir Dire in some circumstances, for pauses to address legal objections in the absence of the lay-persons, or even for oral Closing Addresses. Proper calendaring of matters is based on the conservative but fair estimates of trial duration determined at case management. The sudden change to a JAT might result in an earlier end to the trial. That potential inconvenience of 'vacant' time, to my mind, can be easily and happily addressed by prudent use of the Criminal Procedure Rules, as similarly ready trials can be brought forward and heard earlier.

9. The idea that, "with the duty to give reasons in writing, then he cannot sit on a trial while he is preparing his reasons, and trial time is lost"[10] puzzles me as it fails to appreciate the full remit and ethic of efficient judges, who are quite capable of professional time management. Anomalies do exist and remain just that. Indeed, while this matter was being heard, Mrs Moore-Miggins had challenges with other previously scheduled trial fixtures in the Civil Division. In the two-day window granted out of professional courtesy to Counsel and to fellow Judges, I heard and determined another trial, incidentally one with a jury. Further, within the window for consideration of this written decision, I heard yet another trial, likewise with a jury. With respect, proper use of the Criminal Procedure Rules and good case management, which demands co-operation from the

[10] Senate Debate 2017.03.21, 31 per Sen. Sturge.

Bar, addresses these and other similar concerns. What remains is essentially an issue of the judge's acumen.

10. With those three considerations, I determined that Mr Williams' right to elect his preferred mode of trial was significant, especially as his was not a new Indictment and this was not a 'change of mind'. As a pool of jurors was already present, as all the witnesses for the Prosecution were ready, and as the Court and its team were situate in Tobago (all of which involve costs), it would have resulted in a greater inconvenience to good trial management if I were to resolve that right in favour of an adjournment for 60 days. I also believe that, in the circumstances as a whole, it would have been a greater offence to Parliament's intent to categorically ignore the Accused's election, late though it was, and proceed to empanel a jury of nine.

11. I was satisfied that the procedural safeguards prescribed by Parliament had been met. Mr Williams had been served with the Notice in accordance with **section 6 (7)** of the **Criminal Procedure Act**. He had the full opportunity to get advice from Counsel. Indeed this was the attorney who represented him since the charge was laid and through the committal proceedings, and there could be no suggestion that Counsel was inexperienced. The requisite Notice of the election had been filed. Finally, there was no issue of other persons accused on the Indictment.

THE VOIR DIRE

12. At the end of the voir dire, I ruled that an edited version of the Interview notes dated August 4 2008 was admissible.

13. This voir dire involved hearing evidence from nine witnesses for the Prosecution and from the Accused himself. Though the evidence was

received for the sole purpose of determining the issue of admissibility, it was anticipated that certainly in the event the impugned document was admitted, and potentially where it was not, that many, if not all the witnesses for the Prosecution would have to give evidence yet again on the merits in the main trial. Indeed, in the absence of Formal Admissions, which are highly improbable when dealing with impugned material, especially where the Court rules in favour of admissibility, the Prosecution witnesses must return to satisfy the fact-finders as to truth and reliability.

14. In a JAT, as there are no lay-persons to secrete this process from, this repetition seems to be, in my respectful view, an absurdity[11]. Indeed, there is case law that supports the view that in a JAT, a voir dire may not itself be necessary.[12]

15. In the circumstances of the instant case, it was my view that a voir dire was necessary. My reasons include, but are not restricted to, the fact that this was the first time a voir dire was to be conducted in our Criminal Assizes by a judge sitting in the capacity of both the tribunal of fact and law. Another factor that I considered was the relative importance of the impugned evidence to the State's case. Conceivably, I can rationalize that the greater the relative importance of the impugned evidence to the State's case as a whole, the more utility there is in establishing a line of demarcation. In such a situation, in the event the State is unsuccessful in meeting its burden at the voir dire, the State may very well have to assess whether or not to continue the prosecution. A third factor was that this challenge was in respect of inculpatory evidence. In all the circumstances,

[11] ***R v Gauthier*** [1977] 1 SCR 441 (SC, CA).

[12] ***Thurton v R*** [2017] 91 WIR 141, [41] per Awich JA (BZ, CA). See also ***R v Craigie et al*** (1986) 23 JLR 172, 183 (CA, JA), "… as the Resident Magistrate was judge of the law and tribunal of fact, a preliminary test of admissibility by way of a voir dire was impractical and unnecessary", dealing with the admissibility of tape recordings in a drug matter, where no voir dire was held.

I felt that the holding of a voir dire would be more efficient than not.

INCORPORATION OF THE EVIDENCE ON VOIR DIRE

16. Even before conducting the voir dire, and guided by the reasoning of the Supreme Court in the Canadian case **R v Gauthier**,[13] I invited both sides to consider whether this might be an appropriate case for the voir dire evidence to be later incorporated into the main trial so as to avoid needless repetition, and they agreed to consider same. The reasoning is plain. [14]In the ordinary course of a trial by judge with a jury, issues of admissibility - particularly of confessions/admissions - are determined by the judge in the absence of the jury. Ordinarily, a judge in such a trial is not required to determine issues of fact as those remain within the province of the jury. However, it is accepted that there is an overlap between the fact finding functions of judge and jury, where the judge must be satisfied that an incriminating statement was made voluntarily before she is able to decide that such a statement is admissible. Ordinarily then, the judge decides the issue of admissibility first, by hearing the evidence in the absence of the jury, and if she rules in favour of admissibility, the jury will normally hear the same evidence. This repetition of practically exactly the same evidence for the fact-finders is not to decide admissibility a second time but this time rather as a criterion of weight and value, if any, of the statement to the issue of guilt of the Accused.

17. In a JAT, the judge decides both law and facts. Rigid demarcation and ring-fencing on issues of admissibility may not always be required[15]. In ***Akeem Thurton v The Queen***[16], the Chief Justice of Belize presided over that

[13] ***Gauthier***, 448, 452, 452, per Pigeon J.
[14] For cohesion, I repeat part of the ruling delivered on the voir dire on July 8th 2019
[15] See ***The State v Muchindu*** 2000(2) SACR 313 (W) (SC, SA).
[16] Cr. App. No. 4 of 2012, CA of Belize

jurisdiction's first JAT. The Accused had been unrepresented. The Prosecution relied in part on a statement given by the Accused to the police. The learned trial judge conducted a voir dire and admitted same. The Accused was later convicted and sentenced, having been found guilty on the charge of attempted murder. He was assisted by Counsel at the appellate level and one ground of appeal (out of twenty) stated:

> *The learned trial judge erred in holding a voir dire concerning the admissibility of the Appellant's alleged statement to the police, as he was both the judge of the law and facts.*

Awich JA delivered the decision on behalf of the panel[17] on appeal and stated:

> *There is no rule that, in a trial by a judge without a jury the judge should not hold a voir dire. It is a matter for the discretion of the judge. It has not been shown to us that, the Chief Justice exercised his discretion wrongly, or that the exercise of the discretion resulted in an unsafe conviction. Given that the judge is both judge of law and fact, there may well be less value in holding a voir dire in a judge alone trial*.[18]

18. An edited version of the Interview Notes was determined to be admissible for later consideration on the merits of this case. I then invited the parties to consider afresh the fact that the evidence of the witnesses for the Prosecution would have to be presented to me in my capacity as fact-finder. Indeed, the point of absurdity of repetition could not have been

[17] Panel: Dennis Morrison JA, Cristopher Blackwell JA and Awich JA.
[18] ***Akeem Thurton***, above, at p 18, para 41.

more emphatic than at that very juncture. There was no jury of laymen to re-invite into the Courtroom. The fact-finder had been present all along. I pause to note that, as part of the Case Management process, a document had been filed by the State on November 13 2018, tabling separately the witnesses required for the voir dire and those required for viva voce evidence before the jury. The columns next to the names listed firstly, the estimated time for the evidence in chief and next, the time for the cross-examination. I note particularly that the estimated times at both those stages for the voir dire evidence and the cross-examination is precisely the same. For example, it was estimated that ASP Nurse would be expected to testify for an hour and forty-five minutes in the voir dire and, certainly if there was a jury and the Interview Notes were admitted, he would need to testify again. The estimate for his evidence in the main trial was exactly the same. This expectation of an almost mirror duplication was the situation for all nine witnesses for the State. Though only an edited portion of the Notes were admitted, this evidence would still have to be placed before the fact-finder if the relevant portion was to form part of the deliberations regarding the issue between the State and Mr Williams on the Indictment.

19. Unsurprisingly, both sides saw the utility of incorporation regarding the evidence of six of those witnesses. Their evidence during the voir dire was still necessary for the fact-finder's consideration in assessing weight, and with no need from the parties to add OR TAKE AWAY anything from that evidence, recalling them seemed utterly absurd. Therefore, with the easy concurrence of both State and Defence, the evidence of Officers Kirk, Nelson-Henry, George, Forbes, Williams and Taylor was incorporated into the evidence in the main trial. As there was no separate jury of laymen to

hear it for the first time, there was absolutely no need for it to be literally read. It was incorporated into the evidence and was taken to be read.[19]

20. Regarding three of the State's witnesses in the voir dire, the situation was slightly different. The evidence of the Complainant in particular at the voir dire stage had been restricted to matters relevant to the issue of admissibility. The State therefore wished to continue, as it were, his evidence in chief. In respect of the Complainant, Officer Nurse and the Justice of the Peace, Mrs Moore-Miggins required the opportunity to conduct further cross-examination. However, as with the six who were first incorporated, the voir dire evidence of these three witnesses was also necessary for consideration by the fact-finder. Once again, in an effort to avoid needless repetition, but to allow for the full completion of their evidence on the merits, the evidence already given on the voir dire was first incorporated and taken to be read into the evidence, and they then returned to the witness box. They did so in turn, two to be further cross-examined and one, first to continue his evidence in chief,[20] then after to be further cross-examined.

21. I accept that the procedure that I adopted appears novel. As with anything 'new' in the practice of criminal law, some may become alarmed. I again pause to acknowledge that JATs are new, if only to this jurisdiction.

22. My respectful view is that in time, with careful and scrupulous comparative analysis of the common law by both our first instance and the appellate Benches in respect of the conduct of JATs, with the circumspection expected of both the State and Defence regarding their specific remit, and with an earnest desire to positively develop our criminal jurisprudence in

[19] See ***Gauthier***, above. See also ***R v Drury and Hazard*** 2000 MBCA 100 (CA, CA).
[20] ***The State v Pai*** [1987] LRC (Crim) 256 (NA, PG).

light of our own systemic reality, we are well able to give effect to that statutory provision, without compromising trial integrity. Certainly, this is a work in progress.

OTHER PROCEDURAL ADJUSTMENTS

23. The reception of evidence was complete on Monday July 15 2019. By virtue of the new **section 42B (1)** of the **Criminal Procedure Act**, I was time-bound to deliver a verdict before the expiration of 14 days, "when the case on both sides is closed."

24. As I noted before, Parliament has left the process of modification and adjustment to the Courts. The issue of the precise point when time begins to run remains open to interpretation. I do not pronounce on that now. However, it must at some point be recognized that in a jury trial, even after the last witness testifies, there are Closing Addresses to the fact-finders, and more significantly, there is an Ensor Hearing. Though it seems logical to me that the time should begin to run after I have heard all that the parties wish me to consider, I chose to apply caution in my interpretation and not tarry, as there was concern expressed during the legislative process and this particular provision was later included. I promised my verdict in writing exactly 14 days from the day the last witness testified.

25. The record will reflect that I invited the parties at first to make written submissions, which contemplated that they would include some law. However, I later reconsidered that position as it had the potential to invite overly lengthy and unnecessary legal submissions from Counsel. I instead directed that we hold an Ensor in the usual manner regarding their invitations on how I ought to direct myself. I did give them an opportunity to make use of their statutory right to "sum up the evidence" in writing. Mrs Moore-Miggins elected to sum up in writing by 3pm on Friday July 19

2019. The State was given the opportunity to reply by 3pm on Monday July 22, July 2019. (I am of the view that the only logical way to calculate time as the deadline under **section 42B (1)** is from this point.)

GENERAL DIRECTIONS

26. I remind myself that the law does not require me, as a judge sitting alone, to detail every single relevant legal proposition, nor to review every fact and argument on either side[21], notwithstanding **sections 42B (2) and (3)**.

27. The purpose of my written reasons here is to provide a safeguard to Mr Williams that he has had a fair trial.

28. Indeed, this ruling is the first time in our jurisdiction that a finding of guilt in the Assizes is explained by the fact-finder.

29. I adopt the observations of Wit JCCJ approximately two weeks ago in ***Dioncicio Salazar v The Queen***:

> *An area of concern of jury trials has always been the fact that juries, lay juries for that matter, are not required to provide reasons for their decision, be it a conviction or an acquittal. The safeguards that must be put in place to avoid arbitrariness and to enable the accused to understand the reasons for his conviction (or for the prosecution to understand the reasons for an acquittal) are then to be found in rather strict rules for the admission of evidence and on the requirement for the presiding judge to provide the jurors with clear, precise, sometimes even detailed directions on the legal issues and on the (rules of) evidence. It is to be assumed that jurors*

[21] ***R v Thompson*** [1977] NI 74 (CA, NI).

usually understand and follow these directions and will do their level best to reach a fair decision, thus satisfying the relevant constitutional requirements.[22]

30. With respect, in the absence of any empirical evidence (as in the USA, for example), there is something illogical in this assumption that jurors **will** fairly apply even the most pristine directions. That the 'safety' of a conviction rests on a dissection of directions, at times to the point of semantics, seems to be an exercise/game of chance.

31. I remind myself that I need not decide every single disputed fact, only those that I find to be necessary in determining the issue on the Indictment. By way of example, I am untroubled by the dispute as to the precise number of 'call me' requests made by the Accused to Ms Francois. I believe that he made more than one.

32. I am acutely aware that the burden of proof is on the Prosecution and that the standard of proof is that I must be satisfied so that I am sure.

33. I am equally aware that it is entirely up to me as fact-finder to determine what evidence I choose to accept as having worth and what weight it deserves. I can accept or reject any part of the evidence which I received. As it relates to individual witnesses, I can accept or reject their evidence, in part or whole.

34. I remind myself that I must not substitute my lay-person's views for those of the experts, who possess particular technical and scientific qualifications. Nevertheless, I am free to accept or reject, in part or whole, even expert opinion evidence.

[22] [2019] CCJ 15 (AJ), [26].

35. I remind myself that when there are inferences of equal weight, the one most favourable to the Accused must take precedence.

36. Regarding the evidence received by Formal Admission, I well know that it can be treated in the same manner as evidence received viva voce, and that ultimately it is up to me to decide what weight, if any at all, to attach to any evidence. I also well know how to treat documentary evidence.

37. I am certainly aware that although they were agreed to by both sides, the Depositions which were tendered by Formal Admissions have a certain limitation, as I did not have the benefit of seeing these witnesses.

38. The statement of the deceased witness, as amended, is to be treated with particular caution. Unlike the witnesses who gave viva voce evidence, and even unlike those whose Depositions from the committal proceedings were read into evidence in the main trial, Mr Bikharry's evidence, as contained in his statement, is not under oath and has not been tested by cross-examination. As I consider his evidence, I must use caution as to its relative worth.

39. As it relates to the manner in which my reasons are here expressed, I again adopt the learning of Wit JCCJ:

> *As a general rule, the judge will consider the prosecution's evidence first. If that evidence seems strong enough to carry a conviction, the judge will consider the evidence of the defence. The judge will then look at the totality of the evidence to reach a final decision. It is there where the intercommunication and overlapping take place. It is after this polymorphic process that the judge needs to arrange his*

or her judgment in a logical order which will not always be able to reflect the complicated thinking process as such.[23]

40. I acknowledge that I am both the judge of law and fact. That necessarily brings its own dynamics to the trial process. I have meticulously guarded my thoughts as it relates to the respective hats that I wear. By way of example, when I determined whether Dr McDonald-Burris was an expert witness, that decision was made purely in my capacity as judge of the law. The question as to what weight should attach to her evidence, if any, is answered in my capacity as judge of the facts. The entire trial process is replete with opportunities to dissect which hat I wear at the material time. With respect, judges are required to navigate this path routinely and to carefully avoid trespass on the remit of the fact-finder. I emphasize that it is only at this point in the trial process that I judge facts, as it relates to the ultimate issue on the Indictment.

41. There is one count on the Indictment, that is Manslaughter. Mr Sheldon Williams is alleged to have unlawfully killed Jahmal Omari Grant on Friday August 1 2008.

42. I remind myself that the burden of proof is on the State to prove to the requisite standard the following:

a) That the killing of Jahmal Omari Grant must be the result of an unlawful act by Mr Williams;
b) That the unlawful act must be one which all sober and reasonable people would inevitably realize would subject Jahmal to, at least, the risk of some harm resulting therefrom, albeit not serious harm;

[23] See [35].

I note that it is immaterial whether Mr Williams knew that the act was unlawful and dangerous and whether or not he intended harm. The *mens rea* is that appropriate to the unlawful act in question. I note as well that harm means physical harm.

43. Before going any further, I note that the unlawful act being attributed to Mr Williams in causing Jahmal's death is an assault, that he dealt the 5 year old child more than one physical blow and that when he did so, he intended to cause some physical harm, however little. He need not have intended the tragic consequences which followed. It is obvious to my mind that if a grown man inflicts a blow, worse yet more than one, to the frame of a 5 year old child, any sober and reasonable person would inevitably realize that there is the risk of some harm. This is not even a case where I need ask if the Accused knew that assaulting a child was unlawful or dangerous. In any event, that is immaterial. It is equally unnecessary for the Prosecution to prove that the Accused recognized the risk. The ultimate question is whether I believe beyond reasonable doubt that Mr Williams did in fact assault the child as the State advances, and that the death was the result of the assault.

44. In assessing whether the Prosecution has satisfied me that Mr Williams unlawfully killed Jahmal, I am aware that I must have regard to all of the evidence tendered in the main trial. I must not speculate, but I am free to draw conclusions on the evidence before me. I direct myself that I must scrupulously avoid all biases and prejudices. I must note on the record that I took care to excise from my mind the daily news reports this month, literally since this trial began regarding tragedies involving young children. Had this been a jury trial, I wonder if one could assume that even a robust direction to lay jurors would have sufficed.

45. I remind myself that Mr Williams has an absolute right to silence. I draw no adverse inference against him from the fact that he chose not to give evidence in the main trial. In this regard, I note here that I was careful to disabuse my mind of the inadmissible portions of the Interview Notes and Mr Bikharry's statement.

46. I remind myself that this right extends to his decision whether to call witnesses or not.

47. Though he did not give evidence in the main trial, he did invite me to incorporate his evidence in the voir dire. I direct myself that his evidence on the voir dire is relevant only to the issue of what weight to attach to the admitted portion of the Interview Notes.[24] He chose not to testify in the main trial. That is his choice. However, the exercise of that choice deprives me of having his evidence, tested by cross-examination for trial worthiness. I do not make any adverse finding in this regard, but I remain mindful of the dynamics involved.

THE CASE FOR THE PROSECUTION

48. Yurima Francois was in a cohabitational relationship with the Accused. She had a son from a prior relationship, the Deceased 5 year old Jahmal Omari Grant born on June 23 2003 who was treated by the Accused as a son. On the morning of August 1 2008, both the Accused and Ms Francois awoke and began their day. Mr Williams readied young Jahmal and took the child along to work with him. Jahmal told his mother that they were leaving. It was to be the last time she heard her son's voice.

49. Ms Francois herself left for work later. While at work, she checked her

[24] See [70] – [73]; [115]-[116] below.

phone and observed several 'call me' requests from Mr Williams. She called him and asked, perhaps impatiently, what he wanted. He asked why she was talking to him like that and hung up. Ms Francois returned to her work duties.

50. There came another 'call me' request while she was working. This time when she called, Mr Williams told her that she should leave work, that he was 'frighten' and that Jahmal was not well and "he not moving", or words to that effect. She left. On her way home, she received a call and Mr Williams told her to go directly to the Hospital.

51. Upon her arrival there, she saw the Accused who ushered her inside and she saw her son naked and laying on a bed, with doctors attending to him. The Accused fell to his knees and gave her an account of what happened. He told her that when he came home, he sent Jahmal to bathe. Jahmal fell down in the bathroom and he hit his head. She believed that he told her that the child was vomiting.

52. This would not be the first account given by the Accused. Actually, some time earlier, the landlord Mr Albert Bikharry who lived upstairs of the home shared by Ms Francois and Mr Williams, heard when Mr Williams came home. He heard sounds as if a gas tank was being moved and then some shouting. Approximately twenty minutes later, Mr Williams came upstairs, raising an alarm about Jahmal. Some 5-6 hours would have elapsed since the child had bid his mother good-bye. He told Mr Bikharry that he had been cleaning the bathroom and that Jahmal fell from the bed. He told Mr Bikharry that the child asked for water and after drinking same, Jahmal was vomiting. Mr Bikharry accompanied Mr Williams downstairs and saw the naked child laying motionless on the bed. He attempted to administer first aid. He saw no vomit. They went back upstairs and he

allowed Mr Williams to use his phone to call an ambulance. Mr Williams grew impatient on the phone and hung up.

53. The ambulance came a short while after and Jahmal was rushed to hospital, where he was pronounced dead.

54. Ms Francois' brother, Bernard Ferguson saw the Accused running away from the Hospital at about 2pm and when he enquired, the Accused told him, "Jahmal now die. He fell in the bathroom and lash he head."

55. Mr Ferguson took Mr Williams back up to the Hospital and stayed with him and Ms Francois. He later gave them a lift back to the home they were leasing from Mr Bikharry. Ms Francois did not go in.

56. The next morning, the Complainant Officer Campbell, met Ms Francois and Mr Williams at the Hospital Mortuary. Mr Williams, who was at that time not a suspect, spoke to Officer Campbell and gave him an account. Ms Francois and Mr Williams then both identified the body of young Jahmal to the Hospital Pathologist Dr Hubert Daisley.

57. Dr Daisley commenced a post mortem examination on the body of the child. He first did an X-ray and then approximately 20 minutes later made the post mortem incision. He immediately drew Officer Campbell's attention to the abdominal cavity, where the Officer observed what looked like blood. Dr Daisley immediately aborted his examination and ordered that forensic post mortem examination be conducted.

58. The Officer noted what Mr Williams had told him and also what transpired with Dr Daisley in the Station Diary.

59. The next day, Mr Williams was taken to the Police Station. He was still not then a suspect. Officer Campbell read over the note he had made in the Station Diary about what Mr Williams had told him on August 2 at the Mortuary. Mr Williams told him that the note did not capture everything he had said and volunteered to give a more detailed account in a statement. Indeed, he said that he was 100% willing and ready.

60. That statement was recorded by Officer Campbell and it was not under any Caution, as he was still not yet a suspect. The statement of August 3 2008 as it relates to what happened to Jahmal, was an amplification of the account told to Ms Francois and her brother. He maintained that he sent Jahmal to bathe and heard a noise like something fell. He asked Jahmal what happened and Jahmal told him he fell. He went a little further and said that Jahmal told him he hit his head and showed him where. Mr Williams signed that statement.

61. Upon completion, Officer Campbell told Mr Williams that the X-ray ordered by Dr Daisley revealed no visible injuries and that Dr Daisley observed blood in Jahmal's stomach and stopped his examination. He told Mr Williams that Dr Daisley ordered a forensic examination. Further, he told the Accused that because the child had been with him on August 1 up until he was pronounced dead, that he was now a suspect and would be kept in custody, while he continued enquiries into the child's death. He cautioned the Accused.

62. Around 8pm that night, Officer Campbell spoke with the landlord Mr Bikharry and recorded a statement from him. Mr Bikharry died before his evidence could be received in the committal proceedings.

63. The next day, August 4 2008, Officer Campbell accompanied the child's

body to the Forensic Science Centre in Trinidad. There, Ms Francois and her brother identified Jahmal's body to a second Pathologist, Dr McDonald-Burris. She conducted a post mortem examination in the Officer's presence and gave to him a Certificate of her findings and two vials for further testing. During this examination, she made contemporaneous notes and later produced a Post Mortem Report. The Post Mortem Certificate and Report were both tendered. So too was the Certificate of Analysis. Dr McDonald-Burris also gave evidence and testified that in her opinion, Jahmal's body sustained more than one blunt impact which caused severe contusions internally. She also testified that she did not believe that the injuries she observed could have been sustained in a fall. Under cross-examination, she left that consideration in the scientific realm of possibility.

64. Officer Campbell returned to Tobago. On August 5 2008, Inspector Nurse interviewed the Accused. He told the Accused that the post mortem examination indicated that "Jahmal may have received a blow to the abdomen which might not be consistent with a fall." He was cautioned and immediately said, "Ah hit him, it happen already and ah sorry, ah didn't mean to hurt and damage anybody."

65. Both the statement given by the Accused on August 3 and the Notes of the Interview conducted by Inspector Nurse on August 4 were authenticated by JP Winfield Carrington on August 5 in the presence of the officers and several relatives of the Accused.

66. After conversations with the DPP, Officer Campbell charged Mr Williams for Manslaughter on August 6 2008 and administered a Rule 3 Caution. The Accused remained silent.

THE CASE FOR THE DEFENCE

67. Mr Williams did not give evidence in the main trial. He exercised his right to stay silent and I made no adverse findings against him for that election.

68. He did advance a defence in a number of ways. His case was put to the Prosecution witnesses. I remind myself that what is put is not evidence, but rather it is the response that may have evidential worth. The Statement of August 3 2008 was admitted without challenge and is his version of the events for my consideration. Finally, he requested that, in assessing what weight to attach to the admitted portion of the Notes, that is the Admission, that I take into consideration the evidence that he gave during the voir dire.

69. I reminded myself that Mr Williams is entitled to the benefit of both limbs of a good character direction. Although I allowed the State to elicit evidence that suggested that he may have previously hit the child, that evidence attracted no weight whatsoever. The plain fact is that there was no evidence upon which I could decide whether that was in fact true. I simply ignored it. I directed myself that although good character is not a defence, it could prove beneficial in two ways to the case for the Defence. I directed myself that his good character was a positive feature in whether I believed what he had invited me to consider, and secondly that it may make it less likely that he could have committed this offence for which he was charged.

70. The incorporation of the voir dire evidence into the main trial raises a particularly significant implication. The law in our jurisdiction allowed Mr Williams the right to give evidence for the consideration of the fact-finder in determining the ultimate issue of guilt on the Indictment. If he chose to exercise this right, he opened himself to possible, almost certain, cross-

examination by the Prosecutor. Unlike the cross-examination in the voir-dire, the Prosecutor would have been unfettered in questioning the Accused about his guilt regarding the death of Jahmal Omari Grant. Unlike in some jurisdictions, like Jamaica, Mr Williams does not have the right to make an unsworn statement from the dock, which may be considered by the fact-finder, though its weight may be affected as those words are unsworn and untested. In our jurisdiction, the only alternative to the election to give evidence, is to exercise the right to remain silent. Certainly, no adverse inference can be drawn from the exercise of this right.

71. However, I am mindful that it could be interpreted that Mr Williams has perhaps been given another option when allowed to invite the Court to incorporate the voir dire evidence into the main trial. This most certainly would be a disadvantage to the Prosecution, if in doing so, the Court were to consider that evidence as going to the question of guilt. While I agree that the choice to have a JAT is the Accused's, and while I also agree that the fairness of the trial to the Accused is a paramount consideration, I hold plainly that trial fairness necessarily involves fairness to both sides.

72. I must acknowledge the limited scope of the Prosecutor's ability to test the credibility of the Accused if that challenge is confined to the voir dire. As the Accused has escaped what may very well have been substantial cross-examination on the essential and ultimate issue in this case and, as the evidence which he gave went only to the issue being considered on the voir dire, its incorporation into the main trial must be confined to the fact-finder's task in relation to the challenged Interview Notes.[25]

73. That being noted, I also considered the Accused's evidence in the voir dire

[25] ***Drury and Hazard***. ***Gauthier*** distinguished on this point.

in relation to the questions whether he actually made the admission in the Interview, whether I believe it to be true and whether it is reliable.

74. Mr Williams does not dispute much of the Prosecution's case as to context. He accepts that Jahmal was with him that morning, essentially up until his death. He denies that the child's death was due to any unlawful act by him.

75. He says that he was a father to Jahmal and would often care for him.

76. That fateful morning, he took Jahmal to work with him. The child began vomiting, but he thought it was not serious. He returned home around 11am and began some household chores.

77. After cleaning the bathroom, he sent Jahmal to bathe. He was at the time in the kitchen, when he heard a noise like something falling. He called out to Jahmal, asking what made the noise. He said that the child told him that he fell and hit his head. He asked the child where and the child showed him his forehead where Mr Williams observed a swelling. Jahmal vomited several times after that.

78. Jahmal asked to lie down and he left him on the bed to contact the mother. When she spoke to him, he did not like her manner in answering. He questioned why she answered him like that and told her not to bother and then, he pelted down the phone.

79. When he returned to the room he realized that Jahmal was not moving. He went upstairs to the landlord in an effort to call an ambulance. He had no money on his phone at the time. While speaking on the phone to get the ambulance to come, he found that he was being asked too many questions and to repeat information. He began to curse and eventually slammed down the phone.

80. Mr Bikharry came downstairs and checked Jahmal. The child was not moving.

81. The ambulance arrived a short while later and rushed them to hospital. Jahmal was later pronounced dead.

82. Jahmal's biological father arrived with company and there were some heated exchanges at the hospital.

83. He co-operated with the police in the early part of their investigations by telling them everything that happened with Jahmal.

84. He identified Jahmal's body to Dr Daisley on August 2 2008.

85. The next day, the police read to him what they wrote in the Station Diary about his report to them. As it was not the full account, he accepted Inspector Nurse's invitation to give a detailed version in a written statement. He did so. (Though I distinctly recall Mr Williams stating in his evidence in the voir dire that what he said in that Statement of August 3 is the truth about what happened to Jahmal, I did not consider that as going to the merits. To do so would give him an unfair advantage in avoiding cross-examination in the main trial, as he elected to remain silent. Again, I did not hold his silence against him.)

86. He was kept in custody from that point and told that Jahmal's death was being investigated.

87. He was not given proper meals as he was vegetarian, though he did not tell the officers that he did not eat meat. He was never told of his rights. He was removed in the 'fore-day-morning', that is the dead of night, to a station which was far from Scarborough. He was not allowed sleeping

accommodation and had no rest. He had no bath and no change of clothing.

88. The next day, Inspector Nurse said he was going to interview him. There was no caution and he was not told of his rights. He was essentially told what to say. He was never advised that he could make any corrections or additions to the Notes. He signed because he was told to sign.

89. He told the JP on 5th August 2008 that they told him what to say in the Interview Notes, but nevertheless signed after the JP's certificate because the JP told him to do so. His family members signed as well because the JP told them to.

90. Mr Williams called a witness, in the person of Dr Hughvon Des Vignes. His witness gave an expert opinion that the conclusions made by Dr McDonald-Burris were not fair. Dr Des Vignes further testified that it was possible that the injuries noted in the Post Mortem Report could have been caused by a fall with more than one impact or more than one fall.

ANALYSIS AND FINDINGS

91. At first blush, this case seems rather complicated. To the contrary, it is simple.

92. There is no dispute that Jahmal was in the sole care of the Accused up to the time of his death. He was perfectly fine when his mother saw him earlier that morning. Some 5-6 hours later, the child was dead.

93. The State says that there is both circumstantial and direct evidence to confirm that it is the Accused who caused Jahmal's death by an unlawful act, that is, multiple blows to his body.

94. Have they proved that to me so that I am satisfied beyond reasonable doubt? The Defence contends that reasonable doubt must arise.

95. They first say that there is no direct evidence, in that I am urged to find that the manner in which the Interview was conducted makes the admission unreliable and I ought to attach no weight to it. The State urges me to accept that he made the admission, to find that it was true and reliable.

96. The Defence next says that their expert witness has given a different opinion on the reliability of the State's forensic expert and more significantly, that their expert has testified that it is indeed possible that cause of death was not the result of an unlawful act by Mr Williams.

97. I will address the expert testimony first. Mrs Moore-Miggins made a rather late objection to the expertise of Dr McDonald-Burris. The simple fact is that the objection, if there was a real one, should have come at the point that the Prosecutor attempted to tender the Post Mortem Certificate and Post Mortem Report. It is the very expertise which founds the Court's ability to receive those documents in evidence. The point was further explored by Mrs Moore-Miggins in her cross-examination of Dr McDonald-Burris and the evidence in chief of Dr Des Vignes. I am aware of the provisions of the **Medical Board Act of Trinidad and Tobago**, **Chap 29:50.** By **Act No 31 of 2007**, Parliament mandated that the Medical Board establish and keep a Specialist Register. The new **section 22 (3)** created a criminal offence for practising as a specialist without being so registered. **Section 22 (4)** allowed a one year grace period for persons already practising special services to be registered. However, I note as well that though that amendment received assent on 28th September 2007, it was not until 12th December 2014, that there were **Regulations** to allow for

conformity with the amendment. I further take judicial notice of the Medical Board's Specialist Register Notice which took effect on 31st October 2017, which among other things prescribes several 'Pathways' to registration. One such Pathway is called the Direct Route which remains open to persons already registered on the Higher Qualification Listing until 31st December 2019. I am satisfied by the explanation provided by Dr McDonald-Burris that this Specialist Register is still a work in progress. I find that though his evidence may have been elicited to give another impression, Dr Des Vignes essentially confirmed that it is a work in progress. This challenge amounted to nil. The fact remains though that this is not a requirement under the **Evidence Act** regarding Government Experts, at least not yet. I might be overstepping, but for the integrity of future testimony, Dr McDonald-Burris might wish to make use of the Direct Route soon.

98. I need not detail the particulars of Dr McDonald-Burris' observations and findings. However, I state clearly that I found her evidence about how she began her examination, how she conducts an enquiry into cause of death in general and her explanations about her observations in this particular case were vividly clear. She was able to give succinct explanations to all challenges posed to her. I was able to clearly see with my mind's eye the external injuries when peeled away to reveal the "undersurface" and the internal findings. I had no difficulty accepting her professional opinion as to cause of death. I accept that Dr McDonald-Burris observed multiple points of impact on the child's body that could not be explained as being caused by a fall. She was able to clearly explain to me that based on her observation of the injuries to the liver and the location of the lobes of the liver, that there was one impact to the right lobe and surrounding parts, and another separate impact to the left lobe, which also involved the

stomach (located more centrally to left). I accept that there was another point of impact which contused the lung, which was signalled externally by a well-defined bruise on the lower right front of the chest. I accept that there was another injury to the head and another to the neck. Though those latter two were not attributed to the cause of death, they still inform my findings about what transpired between Mr Williams and the 5 year old child. I note here, in the manner described by Wit J noted in paragraph 36 above as 'intercommunication and overlapping', that the child's mother gave no evidence about any signs of harm, ailment or injury when he said good-bye that morning. He was absolutely fine mere hours prior.

99. As to the degree of force used, I accept the expert's evidence as to what she would base a finding of 'mild' or 'severe' on, in explaining her opinion in this case. I accept her opinion that moderate force can cause death. I accept that the force used on this child was sufficient to be transmitted to deep muscles, as evidenced by the observations to those located posteriorly and to the mesentry. Those in particular support to my satisfaction the improbability that this was a fall.

100. As to the issue of the quantity of blood and its source, I accept the findings and the explanation of Dr McDonald-Burris. I note in this regard that Dr Des Vignes primary challenge was that the statement of conclusion on the cause of death was not worded to his satisfaction. I find that I am easily able to assess the relative worth of Dr Des Vignes' evidence in this part of his cross-examination:

> Q: And sir, would you also agree with me that there may be small tears or ruptures, which are not visible to the naked eye, that may ooze or seep from those contusions?
>
> A: So then the bleeding is not due to the contusions, it is due to the tear.

101. Again, I will not detail all the challenges put to Dr McDonald-Burris in cross-examination. They did not affect her credibility, nor the reliability of her certain findings. On the State's case, I was satisfied beyond reasonable doubt that the child died as a result of injuries associated with multiple traumatic blunt force.

102. As to the challenge mounted by the Defence expert, I was not convinced that it was equally weighted. Mrs Moore-Miggins has suggested that the evidence of Dr Des Vignes is sufficient to give rise to reasonable doubt that the child died as a result of the unlawful act of the Accused. This she suggests would arise based on his opinion that the finding of Dr McDonald-Burris was not fair, which I reject wholly, and on his opinion that the injuries could possibly have been sustained in a fall/falls, which I find could not amount to anything more than a fanciful possibility. I do not accept those views as leading to an inference of any meaningful weight, which is different from the State's case.

103. I remind myself that the value of an expert's opinion is necessarily related to the facts upon which it is based. If the expert has been misinformed, or has taken irrelevant facts into consideration, or has failed to consider relevant ones, the opinion is likely to be valueless.[26] Dr Des Vignes' evidence was properly received, even though he did not himself observe Jahmal's body[27]. However, he did not have the benefit of the Referral Letter from Dr Daisley nor Dr McDonald-Burris' manuscript/contemporaneous notes and her diagrams. His evidence was based on the Post Mortem Report only. He stated categorically that he was engaged only to look at the Report. With respect, he did not assist me in any meaningful way, as I would expect of an expert. This is most evident

[26] Archbold (2018), [10-51].
[27] ***Kerron Briggs and The State*** Cr App No T-013 of 2014.

when he criticizes the use of the word 'severe' to describe the liver contusions, and would prefer to use measurements for greater scientific worth but yet refused to acknowledge the forensic implications. I would think that an expert who wishes to assist the Court would seek to ascertain from other readily available sources the extent of the injury if in doubt. His references to 'big words' and pedantic explanations did not amount to reasonable doubt.

104. His evidence amounts to speculation, as evident from this extract:

> Q: Do you think that it is possible in these circumstances, a child aspirates and falls down, and these injuries you see here are consistent with that occurrence?
>
> A: It is possible, but there is no evidence of confirming it based on the report.

105. I had very little difficulty in rejecting the evidence of Dr Des Vignes, with the consequent effect that after considering his evidence, and returning to the Prosecution's case, I still remained absolutely satisfied that Jahmal died as a result of multiple traumatic blunt force.

106. That by itself is not enough to convict. I must be sure that those injuries were caused by the Accused's unlawful act.

107. On the State's case, I am satisfied on the whole of the evidence, that there is only one inescapable inference to be drawn from the following facts, which I accept unreservedly:

- The Accused was the only person in whose care the child was left;
- There is no suggestion that the child was ill or injured when he parted company with his mother mere hours earlier;

- The Accused was not even-tempered, as evidenced from his first communication with the child's mother, and from his conduct (unchallenged) witnessed by Mr Bikharry;
- The injuries were not caused by one point of impact/blow;
- There was no vomit (I accept this as perhaps the only other aspect of Mr Bikharry's evidence to which I can attach weight. I did not attach weight to the fact that he said he was told that the child fell off the bed.)

108. Finally, regarding the issue of the admission, these are my findings. Though I was terribly unimpressed with Officer Nelson-Henry and attached precious little to her evidence, I found that I was not similarly affected by the other witnesses for the Prosecution. Certainly, there were some contradictions, but they related primarily to the details of who arrived first at the station and what was said before and during the authentication process on 5th August 2008.

109. I found the general manner in which Officers Kirk and Campbell and the 90 odd year old JP gave their evidence to be very convincing. In general, I believe that they were fair to Mr Williams.

110. I believe that the officers fed and accommodated the Accused as they said they did. Whether he ate the meals every time they were provided, did not trouble me. I find rather that the suggestion that a vegetarian who expects to be asked if he has any dietary restrictions, rather than declaring them, particularly after the first meal contained meat, and in the absence of such enquiry suffers in silence and consequent hunger, to be a stretch of the imagination. I do not believe that Mr Williams was improperly fed.

111. I believe that he was allowed visitors and that his mother brought him a change of clothing. I also believe that he was allowed a bath.

112. I accept Officer Nurse's evidence that Mr Williams was taken to the particular station, because they were investigating a death and persons involved in such investigations are usually accommodated at their most 'comfortable' station. I certainly accept that the room in which he was kept had a mattress.

113. I did find that Officer Nurse was overreaching in his confidence in the witness box, but not so that I disbelieved him. I accept that there is only one common-sense way to interpret the pronoun 'him', and it is exactly as Officer Nurse testified.

114. I am convinced that the manner in which Mr Williams was treated was fair.

115. I believe that he stuck with a particular story about the fall and a complaint from the child that he hit his head because of the visible swelling. I believe that when Officer Nurse told him that after the X-ray was done on Jahmal's body, there was no visible head injury and that after the forensic post mortem, there were indications that "Jahmal may have received a blow to the abdomen which might not be consistent with a fall", and that he intended to further interview him and record what he had to say, after being cautioned, Mr Williams made an admission. I believe that he did in fact say, "Ah hit him, it happen already and ah sorry, ah didn't mean to hurt and damage anybody." I believe that when he used the pronoun 'him', Mr Williams was referring to Jahmal. I am sure of these findings.

116. The issue of whether it is true and reliable is an involved one. In the task

of fact-finding, there were areas of overlap here and I applied the relevant principles of law, most of which have already been outlined, as and when they arose in my mind. I find that the absence of a propensity to violent conduct and the credibility of the accused are wholly outweighed by the nature and coherence of the State's case. I believe that when confronted by Officer Nurse, Mr Williams admitted his unlawful act and that he had not intended the tragic consequences. He confessed. I am sure of it. Not only do I believe his admission to be true, but also reliable.

VERDICT

117. Having outlined my reasoning, I state my finding that Mr Sheldon Williams is guilty of unlawfully killing Jahmal Omari Grant on August 1 2008.